

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition of Florida Power & Light Company for a determination of need for a power plant proposed to be located in Martin County.

DOCKET NO. 020262-EI

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RESPONSE OF MIRANT CORPORATION TO FPL'S EMERGENCY MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Mirant Corporation (Mirant) pursuant to Rules 28-106.204, Florida Administrative Code, file this Response to FPL's Emergency Motion to Hold Proceedings in Abeyance (FPL Motion) and in support thereof state as follows:

1. In FPL's Motion filed on April 22, 2002 FPL has proposed that it issue a new Request For Proposals (RFP) based upon the generating capacity which it actually selected as its own self-build options in these proceedings, Martin Unit 8 and Manatee Unit 3, i.e., "reopen the bidding process to allow bidders to submit supplemental proposals." [FPL Motion at ¶ 5] This "rebid" would be open to bidders who participated in the original bid of August, 2001 as well as new bidders. The bids would be due to FPL on May 24, 2002 and on July 16, 2002 FPL would advise the Commission (FPSC) if its own units had been again selected as the "winners". [FPL Motion at ¶ 6] If its own units were again selected, FPL would also revise its need filings and supplement its prefiled testimony and exhibits. [FPL Motion at ¶ 7] It is FPL's desire that in that event, these proceedings would be resumed at day 31 of the 135 day clock imposed by Rule 25-22.080, Florida Administrative Code.

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2. Mirant supports FPL's decision to rebid its capacity needs for 2005 and 2006, one of the actions that Mirant requested the Commission to require of FPL in its petition for intervention. However, Mirant is concerned about the procedural mechanism FPL has requested be instituted by the FPSC while the rebid takes place for several reasons.

3. First, the rebid is intended by FPL to cure the procedural problems identified by the Intervenor in these proceedings, i.e., failure to comply with the Bid Rule, Rule 25-22.082, Florida Administrative Code. This "cure" cannot be effective unless FPL relies solely upon the data it evaluates as a result of the rebid. That is, the "original" model runs which support FPL's selection of its own units must necessarily be given less weight than the model runs based on the second RFP /rebid. Thus, while the prefiled testimony to which Intervenor will have access upon the execution of the Confidentiality Agreement (which has been negotiated between the parties and will hopefully be approved by the prehearing officer) and sublicensing agreement are necessary for the evaluation of the case, Intervenor will not have access to the real data upon which FPL's decision was based until July 16, at the earliest. At which time an entirely new set of data will have to be reviewed and new interrogatories and production of documents requests will have to be initiated and responded or objected to. In short, for all practical purposes the case starts anew. The 90-day clock found in Rule 25-22-082, Florida Administrative Code, should also start anew.

4. Second, Mirant agrees with Calpine that FPL's Motion is a *de facto* request to waive the time lines of Rule 25-22.080, Florida Administrative Code and the substantive requirements of Rule 25-22.082, Florida Administrative Code. Mirant also agrees that the formalities of requesting a rule waiver pursuant to s. 120.542, Florida Statutes, have not been

complied with to date. Like Calpine, Mirant is concerned that a failure to properly comply with s. 120.542, Florida Statutes, rule waiver requirements will subject the results of these proceedings, whether FPL's units or that of a bidder, to legitimate appellate challenge on that basis.

5. Third, Mirant, as FPL, desires that the both the bidding and the need determination processes produce the most cost-effective alternative to supply FPL's identified capacity needs in 2005 and 2006. Mirant would note that FPL's own proposed schedule suggests that if a bidder's proposal is selected, the need determination for the winning bidder's proposal could be conducted in December of 2002 and still meet FPL's needs for capacity in a timely fashion. [FPL's Motion at ¶ 6] There is time to both rebid the capacity and to properly comply with the requirements of rule waiver set forth in s.120.542, Florida Statutes.

6. Given the procedural circumstances of these proceedings, there are three options open to the FPSC: 1) adopt FPL's proposal to "abate " the proceedings until July 16 as proposed; 2) modify FPL's proposal to "abate" by setting hearing 90 days after July 16 if FPL's units are selected and require compliance with the provisions of s.120.542, Florida Statutes, in the interim period; or 3) deny FPL's motion in tandem with granting the motion for summary final order currently pending in these dockets.

7. There is no question that from a purely procedural point of view, the denial of FPL's Motion coupled with dismissal of the need petitions by the full Commission is the most legally defensible action for the FPSC to take. FPL is free to rebid the Martin 8 and Manatee 3 Units with or without the FPSC's permission and whether or not these proceedings exist. The time frame set forth in FPL's Motion for another bidder's project, can apply equally as well to

FPL. Capacity needs will be met and ratepayers will not be harmed. Further, there should be no need to renegotiate the Confidentiality Agreement so laboriously secured or to jettison the sublicense agreement FPL worked so diligently to achieve. With these preliminary matters in place from the date of filing, the need process will work more efficiently from every participant's perspective - FPL's, intervenors' and non-intervenor bidder alike. Simply start over.

8. Pursuing an "abatement" no matter how short or long confuses and unnecessarily complicates the procedural issues regarding compliance with Rule 25-22.082, Florida Administrative Code, (Bidding Rule) raised by Intervenors and potential challenges to improper waiver of Rule 25-22.080, Florida Administrative Code, by non-intervenor bidders.


9. Finally, Mirant would note that even with the rebid, there is still one significant problem with FPL's proposal: it allows FPL to "refine its cost estimates". [FPL Motion at ¶ 5.a.) Whether or not this type of "refinement" was contemplated by the Commission when Rule 25-22.082, Florida Administrative Code, was originally adopted, is immaterial. Such "refinement" builds prejudice into the bidding process. It is unfair on its face. No matter what procedural mechanism is finally chosen by the Commission to process these dockets, Mirant reserves the right to contest this practice and any others used in the rebid of similar ilk.

WHEREFORE, Mirant Corporation states that:

- a. Mirant supports FPL's request to rebid its 2005 and 2006 capacity needs based on Martin Unit 8 and Manatee Unit 3 cost and operational parameters;
- b. Supports the entry of an order denying FPL's Motion if coupled with dismissal of FPL's need determination petitions, or alternatively;
- c. Supports the entry of an order granting FPL's Motion contingent upon: (i) FPL's

compliance with s.120.542, Florida Statutes, rule waiver requirements; (ii) rescheduling to allow 90 days between the submittal of the rebid data and hearing (assuming all discovery parameters stated in FPL's Motion) and (iii) retention of Mirant's right to raise objections to FPL's new RFP and the criteria used by FPL to evaluate same on any grounds.

Respectfully submitted this 24th day of April, 2002 by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by (*) Hand Delivery or United States Mail this 24th day of April, 2002 to the persons listed below:

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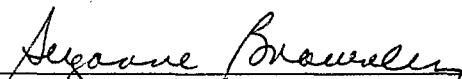
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