

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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COMMISSION
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In re: Petition of Florida Power & Light Company
for a determination of need for a power plant
proposed to be located in Manatee County.

Docket No. 020263-EI
Filed May 3, 2002

COMMENTS OF CPV CANA, LTD. AND CPV GULF COAST, LTD.
ON FLORIDA POWER & LIGHT COMPANY'S
EMERGENCY PETITION FOR WAIVER OF RULE 25-22.080(2)

CPV Cana, Ltd. and CPV Gulfcoast, Ltd., through their undersigned counsel and pursuant to Section 120.542, Florida Statutes ("F.S.") and Rule 28-104.003, Florida Administrative Code ("F.A.C."), hereby file the following comments to Florida Power & Light Company's ("FPL") Emergency Petition for Waiver of Rule 25-22.080(2):

1. CPV Cana, Ltd., is an Exempt Wholesale Generator ("EWG") engaged in the business of providing bulk wholesale electric power to retail-serving utilities in Florida, such as FPL. CPV Cana is in the process of developing a 250 MW combined cycle gas-fired electric power generating facility in St. Lucie County, FL. CPV Cana petitioned for, and has been granted, intervention to participate as a party to these need determination proceedings. Order No. PSC-02-556-EI; Order No. PSC-02-556-EI (April 24, 2002).

2. CPV Gulfcoast, Ltd. also is an EWG engaged in the business of providing bulk wholesale electric power to retail-serving utilities in Florida, and is in the process of developing a 250 MW combined cycle gas-fired electric power generating facility in

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FPSC-COMMISSION CLERK

Manatee County, FL. CPV Gulfcoast has filed a Petition to Intervene, seeking to participate as a party to the Manatee need determination proceeding. CPV Gulfcoast also has filed a Petition for Waiver of Rule 25-22.082(8), F.A.C., requesting the Commission to waive the rule requirement that in order to be a party to a need determination proceeding, an electric power provider must have been a “participant” in the utility’s Request for Proposals (“RFP”) process. As explained in detail in its Petition for Waiver of Rule 25-22.082(8), CPV Gulfcoast did not participate in FPL’s RFP because the RFP failed to provide notice of, or solicit proposals for, the expansion of its Manatee County electric generating plant. CPV Gulfcoast is awaiting the Prehearing Officer’s determination of its party status in this proceeding.

3. For the reasons discussed in paragraphs 1 and 2 above, CPV Cana and CPV Gulfcoast are “interested persons” entitled under Section 120.542, F.S., and Rule 28-104.003, F.A.C., to submit comments on FPL’s Emergency Petition for Waiver of Rule 25-22.080(2), F.A.C., in this proceeding.

4. By way of background, FPL filed an Emergency Motion to Hold Proceedings in Abeyance in these need determination proceedings, seeking to have the timeframes in Rule 25-22.080(2) “abated” to give it time to reissue its RFP to correct the extensive deficiencies that have been raised by the parties in these need determination proceedings and in Docket No. 020175-EI, In re: Complaint of Reliant Energy Power Generation, Inc. Against Florida Power & Light Company. In response to FPL’s Emergency Motion to Hold Proceedings in Abeyance, CPV Cana filed a Response and Petition for Waiver of Rule 25-22.080, F.A.C.,¹ noting that a waiver of the rule, rather

¹ CPV Cana’s Response and Petition for Waiver was filed on April 24, 2002, and currently is pending before the Commission.

than “abeyance,” is the statutorily authorized vehicle for obtaining relief from the need determination timeframes in Rule 25-22.080(2), F.A.C. In its Response and Petition, CPV Cana requests the Commission to grant relief that, in addition to granting CPV Cana’s requested waiver, also seeks the Commission’s establishment of a process that would involve active Commission oversight of FPL’s RFP and the evaluation and negotiation processes; seeks to preclude FPL from making material changes to its new RFP after the submittal of bids so that prospective bidders may respond with the certainty that material changes will not occur after the bids are submitted and being evaluated; and seeks to preclude FPL from changing its cost data after it reviews the proposals submitted by other bidders, and, in part, seeks to preclude FPL from recovering any sums greater than those represented by its self-build options if FPL again declares itself the winner of the RFP process.

5. On April 29, 2002, FPL filed an Emergency Petition for Waiver of Rule 25-22.080(2). In its Petition, FPL requests only that the timeframes in Rule 25-22.080(2) be waived to enable the final need determination hearing be held on October 2-4, so that FPL can issue another RFP and evaluate the proposals submitted under the new RFP for the facilities for which it seeks need determinations in these proceedings. It does not request or agree to the range of relief that CPV Cana requested in its Response and Petition for Waiver of Rule 25-22.080, F.A.C

6. CPV Cana and CPV Gulfcoast submit that it is necessary and appropriate, under the circumstances in this case, for the Commission to condition the grant of FPL’s emergency waiver on the inclusion of the oversight processes requested by CPV Cana in its Response and Petition for Waiver of Rule 25-22.080. This position is grounded in the

fact that FPL's previous RFP failed to identify the Manatee facility and contained other inaccurate and misleading information, as more completely characterized in CPV Gulfcoast's Petition for Waiver of Rule 25-22.082(8), F.A.C., CPV Cana's and CPV Gulfcoast's Petitions to Intervene in this proceeding, Reliant's Complaint against FPL in Docket No. Docket No. 020175-EI , and CPV Cana's Petition to Intervene in the Reliant Complaint case. Given FPL's track record in its previous RFP proceeding and, more recently, its characterization of the numerous concerns about the August 2001 RFP raised by the parties in this proceeding as "technical, procedural aspects of the bidding process" (Florida Power & Light Company's Emergency Motion to Hold Proceedings in Abeyance, Docket Nos. 020262-EI and 020263-EI, April 29, 2002, p. 2), CPV Cana and CPV Gulfcoast are concerned whether FPL will conduct an RFP process and evaluation process that complies with the letter of Rule 25-22.082, F.A.C., and that is fair, impartial, and aimed at identifying the most cost-effective alternatives for the new generation capacity FPL seeks to add to its facilities. To protect the integrity of the new RFP proceeding and the evaluation thereof, CPV Cana and CPV Gulfcoast believe active Commission oversight of, and involvement in, the process are essential.

7. Indeed, the Commissioners themselves previously have recognized the importance of a prudent, proper RFP bidding instrument and procedure and, under certain circumstances, the appropriateness of Commission oversight and active participation in that process. In Docket No. 921288-EI, which involved the adoption of the Bid Rule governing the content and conduct of RFPs (transcript excerpts attached as Exhibit A), Chairman Deason noted that the Commission is charged with the ultimate burden in power plant need determinations to ensure that the generation source selected is "the

most cost-effective unit in the need determination.” (T., p. 56, lines 6-10). As part of the discussion in that proceeding, Chairman Deason noted that given the nature of the RFP process (see T., p. 146, lines 9-14) and the Commission’s final responsibility for determining the most cost-effective alternative, it may be appropriate for the Commission itself to assume the role of independent third-party evaluator of RFP proposals. (T., p. 53, lines 13-21; T., p. 54, lines 23-25; T., p. 57, lines 17-20). CPV Cana and Gulfcoast submit that the circumstances in this case militate Commission involvement in this RFP issuance, evaluation, and negotiation processes.

8. For the reasons set forth herein and more fully discussed in CPV Cana’s Response and Petition for Waiver of Rule 25-080, F.A.C. (as well as in CPV Gulfcoast’s Petition for Waiver of Rule 25-22.082(8), F.A.C., CPV Cana’s and CPV Gulfcoast’s Petitions to Intervene in this proceeding, and CPV Cana’s Petition to Intervene in the Reliant Complaint case, Docket No. 020175-EI), CPV Cana and CPV Gulfcoast respectfully request the Commission, if it grants FPL’s Emergency Petition for Waiver of Rule 25-22.080(2), to do so conditioned on the following: (1) the Commission will actively oversee the RFP process, evaluation and negotiation processes; (2) the Commission will preclude FPL from making material changes to its “supplemental RFP” document after the submittal of bids, so that prospective bidders may respond with the certainty that material changes will not occur after the bids are submitted and being evaluated; (3) the Commission will preclude FPL from changing its cost data after it reviews the proposals submitted by other bidders; and (4) the Commission will preclude FPL from recovering any sums greater than those represented by its self-build options should FPL again declare itself the winner of the RFP process. CPV Cana and CPV

Gulfcoast believe that these conditions are necessary to ensure that the RFP bidding, evaluation, and negotiation processes are conducted in a fair and impartial manner that will result in selection of the most cost-effective capacity provision alternative, as required by Section 403.519, F.S.

9. The Commission is authorized under Chapter 366, F.S., and by Rule 28-106.211, to issue “any order necessary to effectuate discovery, prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case....” Rule 28-106.211, F.A.C. (emphasis supplied). Thus, the Commission possesses the authority to provide the relief sought by CPV Cana in its Response and Petition for Waiver of Rule 25-22.080, F.A.C., and accordingly can condition the grant of a waiver to FPL as CPV Cana and CPV Gulfcoast have requested herein.

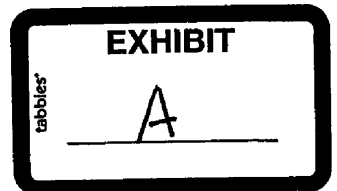


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cc: All Parties of Record

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION



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In the Matter of
Proposed Amendment of
Rule 25-22.081, F.A.C.,
Contents of Petition; and
Proposed Adoption of Rule
25-22.082, F.A.C.,
Selection of Generating
Capacity.

DOCKET NO. 921288-EU

FIRST DAY - VOLUME I

Pages 1 through 119

PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER LUIS J. LAUREDO
COMMISSIONER JULIA L. JOHNSON



DATE: Monday, December 6, 1993

TIME: Convened at 1:30 p.m.
Concluded at 3:50 p.m.

LOCATION: FPSC Hearing Room 106
Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32301

REPORTED BY: SYDNEY C. SILVA, CSR, RPR
PAMELA A. CANELL
Official Commission Reporters

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1 doesn't actually submit a bid, if you will, like the
2 others. It puts its price on the table but it's able
3 to reject all bids if it can prove to us that it was in
4 the best interest.

5 COMMISSIONER CLARK: What price do they put
6 on the table, what --

7 MR. BALLINGER: Basically, what we have in
8 the standard offer contracts.

9 COMMISSIONER CLARK: Okay.

10 MR. BALLINGER: Capital cost, O&M, fuel.

11 CHAIRMAN DEASON: That raises an interesting
12 question.

13 Why should the utility provide that cost
14 information up front? Why shouldn't the utility, if
15 it's going to participate in a bid, submit the bid and
16 if it has to be to a third party who takes the bids and
17 makes sure nobody tampers with the bids during the
18 process and then whoever is going to evaluate, whether
19 it's the utility, the Commission or another third
20 party, that that bid is opened and is reviewed and it's
21 scored some way, and the utility wins or loses.

22 Realizing there is going to have to be some subjective
23 review and analysis utilizing that, we're not
24 envisioning simply you just add up the scores and
25 whatever the highest scores win.

1 MR. BALLINGER: In this issue there's
2 several, and I spent a lot of time on the stand trying
3 to explain this.

4 If you go to a mechanism, let's say the
5 utility evaluates all sealed bids. And there is some
6 subjectivity in there, so the utility uses its
7 discretion and ends up selecting itself. Well, that
8 appears to invite litigation.

9 On the other hand, what is the whole purpose
10 of having a sealed bid? Is it to get the best price?
11 And if that is the reason, then you have to go that
12 step further: If the utility is bidding, are they
13 going to be held to that price over the life of that
14 contract? Are you going to forego, then, the
15 opportunity to make capital additions and prove to you
16 that they're prudent beyond the life of that contract,
17 realizing that they have the responsibility to keep the
18 lights on?

19 So it's a multitude of things you have to
20 consider. It's not just whether you score or not; it's
21 if you do this, you have to do B, C and D as well, at
22 least in my opinion.

23 If you have an independent third-party
24 evaluator, I don't think you can find one besides the
25 Commission. That's my own personal opinion. I don't

1 think you can find a consulting firm. There will
2 always be litigation over, "Well, they've done work
3 only for utilities," or, "They've only done work for
4 nonutilities," or whatever. The Commission, in my
5 mind, would be an independent evaluator.

6 Again, then you've gone back to one of the
7 reasons we didn't want bifurcation. We're not
8 recommending that the Commission make those decisions,
9 the utility make those decisions and we review them.
10 All right. That's it in a nutshell. And it's a very
11 convoluted --

12 COMMISSIONER LAUREDO: Speaking of convoluted --

13 COMMISSIONER JOHNSON: Tom, explain to me
14 once again the rationale why we don't want the
15 Commission to actually evaluate the bid? I mean, you
16 started by saying that we would be the only entity that
17 would be unbiased but we shouldn't be used because why?
18 Explain that.

19 MR. BALLINGER: Basically, it's a
20 philosophical difference. I don't believe the
21 Commission should be making the management decisions,
22 they should be reviewing them. Under the statutory,
23 the utility has the statutory obligation to serve. The
24 Commission has the authority, via the grid bill, if we
25 see something is wrong we can mandate the utility to

1 go, not to make those decisions on the front end.

2 CHAIRMAN DEASON: Tom, I agree with you
3 except that the statute under which we have to operate
4 puts, in my opinion, a very heavy burden on the
5 Commission. It says the Commission shall ensure it is
6 the most cost-effective unit in the need determination.
7 It doesn't say the Commission shall review to make sure
8 the unit proposed is reasonable or that the costs are
9 reasonable for ratepayers to pay, or anything like
10 that. It says, "It is the most cost-effective."
11 That's a pretty heavy burden.

12 MR. BALLINGER: Yes, I differ a little bit
13 because it does say consider whether it is the most
14 cost-effective. I don't know that you could interpret
15 it to say that it is the most cost-effective.

16 CHAIRMAN DEASON: There are a lot of parties
17 that come up here and say that it means the most
18 cost-effective unit.

19 MR. BALLINGER: I'm probably in the minority
20 on that one.

21 MR. TRAPP: And I guess the statute, as I
22 understand it, is a determination of need, though. And
23 I think the Commission, again, conventionally has
24 placed the burden of proof on the utility to
25 demonstrate.

1 It's coupled with your authority under 366,
2 in my mind, where the burden of proof is on the utility
3 to demonstrate what they're doing is prudent. And in
4 this case they have an extra burden; they have to
5 demonstrate that the power plant is the most
6 cost-effective.

7 Again, it goes back to the reason why we
8 think you should require bidding. Bidding is the best
9 way I know to demonstrate that burden of proof; and,
10 unfortunately, with it comes maybe some other issues
11 with regard to, "Well, did you do a prudent, proper
12 bidding instrument and procedure?" But all of that,
13 it seems to me, should be determined by the Commission
14 in a regulatory fashion in the need determination after
15 the utility has made a decision.

16 CHAIRMAN DEASON: But let me ask you this: If
17 we're going to allow parties the opportunity to
18 challenge a decision, isn't, in essence, the Commission
19 going to be the final determinator? So why don't we
20 just make the decision up front?

21 MR. TRAPP: Sure. Again, because I don't
22 think you pay me enough. (Laughter) CEOs get half a
23 million or whatever, and that kind of stuff; vice
24 presidents get, you know, a couple hundred grand, and I
25 don't get anywhere near that, so I would --

1 would not suffer, the duty to serve would be -- somehow
2 they would inherent that mantle and lower costs, then I
3 would just say fine. But I don't know that. Nor do
4 you, nor do they. And so our quest is how do we move a
5 little bit towards their position, which I think this
6 rule does, without dismantling this system that has
7 worked so fine. That's the way I look at it, very
8 simplistic, Commissioner, with 100 reservations that I
9 have.

10 COMMISSIONER JOHNSON: As I look at this rule, and
11 I understand, Commissioner Kiesling, your concern,
12 because I had the same first reaction that, "Well, this
13 doesn't level the playing field. This isn't a fair
14 bidding process." And it's not. But, admittedly it's
15 not. Admittedly, that was not the goal. Admittedly,
16 after discussing the issues with Staff, and their
17 expression that the investor-owned utilities have the
18 obligation to serve, they are the ones that are
19 regulated by us, and, therefore, the circumstances
20 dictate that the field isn't level. And in looking at
21 that, and understanding that we do need to take this
22 first step, I think this is a good start. I share the
23 concern of Commissioner Deason that, well, the way we
24 have this process laid out, we are just pretending. We
25 are saying, "Well, we will give the utility the first