

State of Florida



Public Service Commission
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TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BROWN, HARRIS) *NCB DES*
DIVISION OF ECONOMIC REGULATION (HAFF) *Watt*

JB 73 JOJ 198

RE: DOCKET NO. 020262-EI - PETITION TO DETERMINE NEED FOR AN
ELECTRICAL POWER PLANT IN MARTIN COUNTY BY FLORIDA POWER
& LIGHT COMPANY.

DOCKET NO. 020263-EI - PETITION TO DETERMINE NEED FOR AN
ELECTRICAL POWER PLANT IN MANATEE COUNTY BY FLORIDA POWER
& LIGHT COMPANY.

AGENDA: 05/21/02 - REGULAR AGENDA - EMERGENCY RULE WAIVER -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: MAY 29, 2002 - EMERGENCY RULE WAIVER PETITION
DEEMED APPROVED IF NOT GRANTED OR DENIED WITHIN
30 DAYS OF RECEIPT

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020262.RCM

CASE BACKGROUND

In August of 2001, Florida Power and Light Company (FPL) issued a Request for Proposals (RFP) for additional generating capacity to fill its projected capacity needs in 2005 and 2006. FPL evaluated numerous proposals from 15 respondents to the RFP, along with several of its own proposals to supply the needed capacity. In February of 2002, FPL announced that it would not select any of the respondents to its RFP to build its capacity additions, but instead would seek certification of two new power plants it would build itself on its existing Martin and Manatee plant sites. FPL filed its Petitions for Certification of the

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plants with the Department of Environmental Protection in February of 2002, and filed its Petitions for Need Determinations on March 22, 2002.

Several bidders have intervened in the need determination dockets, including Reliant Energy Power Generation, Inc., Calpine Energy Services, L.P., CPV Cana, Ltd., Mirant Corporation, and South Pond Energy Park, LLC. All have criticized FPL's RFP process, and Reliant has filed a separate complaint in which it contends that FPL's RFP process failed to comply with Rule 25-22.082, Florida Administrative Code.

On April 22, 2002, in response to the interveners' complaints about the initial RFP, FPL filed an emergency motion to hold the need determination cases in abeyance, so that it could have additional time to issue a supplemental RFP that would address the complaints about the initial RFP process. On April 26, 2002, the Prehearing Officer granted FPL's motion in his Interim Order On Procedure, Order No. PSC-02-0571-PCO-EI. In his Order, the Prehearing officer anticipated that the need determination hearing would be held in October, and noted that FPL would be filing an Emergency Petition for Waiver of Rule 25-22.080(2), Florida Administrative Code, which sets a 90-day time limitation for a need determination hearing.¹

FPL filed its emergency petition on April 29, 2002. An FAW notice announcing receipt of FPL's rule waiver petition was published on Friday May 10, 2002. CPV Cana filed comments on FPL's emergency waiver petition on May 3, 2002. This recommendation addresses FPL's Emergency Rule Waiver Petition.

¹ On April 24, 2002, CPV Cana filed a Response to the Motion for Abeyance, which also contained a rule waiver petition, for the same rule. CPV Cana's petition was also noticed in the May 10, 2002, FAW, but is not included in this recommendation, because it was not filed as an emergency petition and the time for comments has not expired. It will be addressed in a subsequent recommendation, if necessary.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Power & Light Company's emergency petition for waiver of Rule 25-22.080(2), Florida Administrative Code?

RECOMMENDATION: Yes. Florida Power & Light Company's petition satisfies the statutory and rule criteria for an emergency rule waiver. (Harris, Brown)

STAFF ANALYSIS: Pursuant to the requirements of section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, FPL requests an emergency waiver of the Commission's scheduling requirements in Rule 25-22.080(2), Florida Administrative Code. Rule 25-22.080(2) provides that an administrative hearing on a petition for a determination of need for an electric power plant must be held within 90 days of the filing of the petition. A decision on the petition must be reached within 135 days of the filing of the petition.

In its petition, FPL explains that its decision to issue a supplemental RFP necessitates an adjustment to the procedural schedule in these need determination proceedings. The hearing for the dockets was scheduled to be held June 19-21, 2002, within 90 days of the date FPL filed the need determination petitions. FPL cannot conduct a new RFP, evaluate the proposals it receives, negotiate with prospective bidders, and file supplemental testimony and exhibits -- which the parties would need time to explore and address -- within the original time schedule of the case. Therefore, FPL requests an emergency waiver of the time limitations of Rule 25-22.080(2), so that the final hearing may be rescheduled to October 2-4, 2002.

FPL claims that its requested waiver and stay of the proceedings meets the criteria for a waiver found in section 120.542. That statute provides that the petitioner must show a substantial hardship or a violation of principles of fairness if the petitioner is required to comply with the rule in question, and the petitioner must also show that the purposes of the underlying statute will still be achieved. FPL states that its requested waiver will not undermine the purposes of the need determination statute, section 403.519, Florida Statutes. Section 403.519 provides that the Commission shall determine the need for a

proposed electrical power plant based upon the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. FPL asserts that the proposed waiver will actually serve to better effectuate the purposes of the statute by affording prospective providers of generating alternatives with an additional opportunity to propose cost-effective alternatives to FPL's Martin and Manatee capacity additions. FPL states that substantial hardship will occur if the 90-day time frame is not waived, because FPL will not be able to conduct its supplemental RFP to determine if a more cost-effective alternative exists to its proposed plants. The Commission will have less certainty that it is determining the need for additional capacity that is the most cost-effective alternative for FPL's ratepayers.

FPL asserts that this rule waiver must be granted on an emergency basis pursuant to Rule 28-104.004, Florida Administrative Code, because the June 19-20 hearing is fast approaching, and the usual 90-day processing time for a rule waiver is too slow to accommodate the supplemental RFP process. FPL states:

Given the need to proceed expeditiously with the supplemental RFP and to alleviate the parties from the requirements of continuing on-going litigation that may ultimately be rendered moot, the requested rule waiver should be entered as soon as possible. Any substantial delay will create undue hardship for all parties.

FPL states that it conferred with counsel for the interveners in these cases, and they have not objected to the waiver in light of the fact that FPL will file its supplemental testimony and exhibits on the results of the supplemental RFP by July 16 and the hearing will be scheduled for October 2-4.

CPV Cana, the only intervener that has filed a written response to the waiver petition, does not object to the waiver, but requests that the Commission take several extraordinary steps to ensure that FPL's supplemental RFP process complies with the Commission's "bidding" rule, Rule 25-22.082, Florida Administrative Code. CPV requests that the Commission grant FPL's emergency petition for a waiver subject to four conditions: 1) that the Commission actively oversee the RFP process, evaluation, and negotiations; 2) that the Commission preclude FPL from making

"material changes" to its supplemental RFP after proposals are submitted; 3) that the Commission preclude FPL from changing its cost data after it reviews the proposals submitted by respondents to the RFP; and (4) that the Commission impose limits on FPL's future recovery of the costs of the power plants it proposes to build itself.

Section 120.542(2), Florida Statutes, sets forth the criteria that must be satisfied by any regulated person seeking a variance or waiver from agency rules:

Variations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statutes will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

An emergency petition must also meet the requirements of Rule 28-104.002, and Rule 28-104.004(2), Florida Administrative Code, which provide that a petition for an emergency waiver must also specify:

- (a) The specific facts that make the situation an emergency; and
- (b) The specific facts to show that the petitioner will suffer an immediate adverse affect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

The Commission normally has 90 days to grant or deny a petition for rule waiver under the time frame established in section 120.542(8), Florida Statutes. This time is shortened to 30 days for emergency petitions for rule waiver. See Rule 28-104.05(1), Florida Administrative Code.

Emergency Treatment

Following the requirements of Section 403.519, Florida Statutes, and Rule 25-22.080, a hearing on the need determination petitions was set for June 19-21, 2002. Under the non-emergency rule waiver process, the Commission would not have to decide on FPL's Petition until July 25, 2002, more than a month after the need determination hearings are scheduled, in violation of the rule. For this reason, staff recommends that FPL has alleged sufficient facts to demonstrate that this Petition meets the requirements of 28-104.002, Florida Administrative Code, and should be allowed emergency treatment.

Substantial Hardship

Staff also recommends that FPL has alleged sufficient facts to demonstrate that both FPL and the interveners to the case will face substantial hardship if the rule waiver is not granted. Failure to grant the rule waiver will force the parties to continue expensive, complicated litigation over issues which a second RFP could potentially resolve, allowing the parties and the Commission to focus on the need determination itself. If the Commission grants the rule waiver and allows the second RFP process to go forward, several issues raised by the parties could be either clarified or resolved, and, in any event, the second RFP will likely lead to a more effective and clear need determination proceeding. Moreover, granting the request for waiver supports principles of fairness, in that it allows the second RFP process to take place, giving all parties additional opportunity to submit new or additional proposals which may be cost effective alternatives to FPL's self-build option.

Purpose of the Underlying Statute

The underlying purpose of Section 403.519, Florida Statutes, is to ensure the integrity and reliability of Florida's electrical power system in the most cost effective manner. FPL asserts that waiver of the Rule to allow for a second RFP process furthers these purposes, because it increases the opportunities of bidders to submit proposals for cost-effective alternatives to supply capacity and thus facilitates the choice of the most cost-effective alternative. Staff agrees that granting the rule waiver in order to allow a second RFP process does indeed serve the purposes of Section 403.519, Florida Statutes. The additional RFP process will

assist the Commission in its analysis of the cost-effectiveness of the project or projects that will ultimately be the subject of these need determination proceedings. The additional time will also allow the parties the opportunity to resolve some or all of the outstanding issues in the need determination proceedings, which may simplify the final hearing. Therefore, staff believes the rule waiver requested would have the direct effect of promoting the purposes of the underlying statute, Section 403.519, Florida Statutes.

Conclusion

Based upon the above analysis, FPL has demonstrated that the purposes of the underlying statute will be achieved by granting the rule waiver requested, and that failure to grant the waiver requested would work substantial hardship on the parties or violate principles of fairness. In addition, FPL has demonstrated specific facts that make this situation an emergency, and which show that FPL and the other parties will suffer an immediate adverse effect unless the waiver is granted. Therefore, staff recommends that the Commission grant FPL's Emergency Petition for Waiver of Rule 25-22.080, Florida Administrative Code.

Staff does not recommend that the Commission condition the granting of this waiver on the matters requested by CPV Cana. Whether or not the Commission could impose such conditions on a utility's RFP process under some circumstances, such an action is not necessary here. FPL has voluntarily decided to issue a supplemental RFP, in part in response to the interveners' criticisms of its initial RFP, and FPL has voluntarily invited staff to observe all aspects of its supplemental RFP process. There is nothing in that voluntary behavior to support the imposition of the kinds of restrictions CPV Cana requests. Further, those conditions exceed the scope of the Commission's existing bidding rule. For these reasons staff recommends that FPL's emergency petition for waiver should be granted without conditions.

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DATE: May 9, 2002

ISSUE 2: Should these dockets be closed?

RECOMMENDATION: No. These dockets should remain open.
(Brown, Harris)

STAFF ANALYSIS: These dockets should remain open to complete
the need determination proceedings.