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Charles A. Guyton  
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May 14, 2002

**-VIA HAND DELIVERY-**

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

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COMMISSION  
CLERK

**Re: Docket No. 020175-EI**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and seven (7) copies of FPL's Amended Motion to Dismiss Reliant's Complaint, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

*for*  
*CC Dalby*  
Charles A. Guyton

CAG:pgv

Enclosure

cc: All Parties of Record

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Reliant Energy Power )  
Generation, Inc. Against Florida Power & )  
Light Company )

Docket No. 020175-EI  
Filed: May 14, 2002

**FLORIDA POWER & LIGHT COMPANY'S  
AMENDED MOTION TO DISMISS RELIANT'S COMPLAINT**

Pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), Florida Power & Light Company ("FPL") hereby files its Amended Motion to Dismiss the Complaint of Reliant Energy Power Generation, Inc. Against Florida Power [&] Light Company ("Complaint") and moves to dismiss on the new ground that the allegations have been rendered moot and also on previously stated grounds that the Complaint fails to state a cause of action, was untimely filed, and requests unauthorized relief, as asserted in FPL's Motion to Dismiss. In support of this Amended Motion to Dismiss, FPL states:

**Reliant's Complaint Has Been Rendered Moot By Recent Commission Action  
Approving FPL's Issuance of a Supplemental Request for Proposals**

1. On February 28, 2002, Reliant Energy Power Generation, Inc. ("Reliant") filed a Complaint alleging that FPL violated Rule 25-22.082, Florida Administrative Code ("the Bid Rule") in a Request for Proposals ("RFP") that was issued on August 13, 2001 ("initial RFP") to solicit proposals for evaluation and determination by FPL of the most cost-effective electrical generating units for FPL's 2005 and 2006 capacity need.

2. This Commission assigned the Complaint Docket No. 020175-EI. On March 20, 2002, FPL responded to the Complaint with a Motion to Dismiss alleging that the Complaint failed to state a cause of action, was filed untimely, and requested relief that the Legislature has not authorized the Commission to grant.

3. On March 22, 2002, FPL petitioned for determinations of need for Martin Unit 8 and Manatee Unit 3, the two units that FPL determined from its evaluation of the initial RFP responses to be the most cost-effective, least risk options to meet FPL's 2005 and 2006 need. The Commission assigned Docket Nos. 020262-EI and 020263-EI to the Martin Unit 8 and Manatee Unit 3 proceedings. In those proceedings, many intervenors raised issues regarding FPL's compliance with the Bid Rule that are the same issues raised in the Reliant Complaint.

4. On April 22, 2002, FPL filed an Emergency Motion to Hold Proceedings in Abeyance in the FPL Need Determination dockets in order to allow FPL to issue a supplemental Request for Proposals ("Supplemental RFP"). The stated purposes of the Supplemental RFP are (1) to give the disappointed bidders another opportunity to provide alternatives that are more cost-effective than those identified by FPL; and (2) to refocus FPL's Need Determination on Section 403.519, Florida Statutes, which simply authorizes the Commission make a single determination as to whether the proposed units FPL presents to the Commission in its Petition for Need Determination are the most cost-effective for FPL's customers. FPL Need Determination, Emergency Motion at 4 (filed in Dockets 020262 and 020263). In its Emergency Motion, FPL stated its intent to change its Supplemental RFP to address the various Bid Rule compliance issues about which Reliant and the Need Determination intervenors had complained. This would allow the Commission and the parties to focus on the best unit for FPL's customers rather than Bid Rule compliance issues.

5. On April 23, 2002, the Commission voted to defer the decision as to whether to grant FPL's Motion to Dismiss Reliant's Complaint. PSC Document No. 04457. Oral argument on FPL's Motion to Dismiss had been scheduled for that day.

6. On April 26, 2002, the Commission granted FPL's Emergency Motion to Hold Proceedings in Abeyance and stated that "[a] supplemental RFP may address the parties' concerns with the initial RFP and that will facilitate the conduct of the rest of the case." Order No. PSC-02-0571-PCO-EI. That same day, April 26, FPL issued its Supplemental RFP. These two actions rendered moot the allegations in Reliant's Complaint as to the initial RFP and the process of selecting the most cost-effective option for FPL's Need Determination. Thus, the Complaint should be dismissed as moot based on the following grounds.

7. Counts 1 and 3 of the Complaint are moot in that the Supplemental RFP contains revised cost estimates for its Next Planned Generating Units and also describes the Martin 8 and Manatee 3 self-build options that FPL chose for its Need Determination after evaluating all responses to its RFP. Counts 1 and 3 allege that FPL in the initial RFP understated the costs of its "Next Planned Generating Units" and changed its "Next Planned Generating Units" after the RFP participants had submitted their proposals. Complaint, ¶¶ 15, 22, 25. It should be noted that Reliant and other bidders were fully on notice prior to responding to the initial RFP that FPL's cost and performance information as to "Next Planned Generating Units" were based upon "2000-vintage information" and that FPL planned to use "the most current planning data to evaluate proposals and its self-build and contract extension options." *See* Initial RFP at 7 (emphasis added).

8. In order to address the bidders' concerns, FPL in its Supplemental RFP described as its "Next Planned Generating Units" the proposed "conversion of 2 existing combustion turbines at FPL's existing Martin site, plus the addition of 2 more CT's, into 1 combined cycle (CC) unit which adds 789 incremental MW (Summer)" and "construction of a new four CT-based CC unit at FPL's existing Manatee site which adds 1,107 incremental

MW (Summer).” Supplemental RFP at 6. These units are the self-build options that FPL determined, after evaluating all proposals submitted in response to its initial RFP, to be the most cost-effective options to meet the needs of its customers. Thus, FPL’s supplemental RFP addressed Reliant’s concern, as referenced in the Commission’s order of April 26, and thereby rendered moot Reliant’s allegations in Counts 1 and 3 (paragraphs 15, 22, and 25) of the Complaint.

9. Reliant’s Complaint in Count 2 alleges that FPL placed “onerous and commercially infeasible terms in the RFP.” Complaint, ¶¶ 16 through 21. Although FPL denies that any of its initial RFP terms were onerous or commercially infeasible, FPL nevertheless has addressed these concerns in the Supplemental RFP by making the following changes: modifying the requirement that bids are to remain open from 390 to 120 days; modifying the Completion Security provision of the RFP, including a revision so that the entire Completion Security would not become due upon one day’s failure to achieve the anticipated completion date; eliminating the provision allowing FPL to cancel a contract if the legislature enacts changes to restructure the wholesale power market; and modifying the Regulatory Out provision governing cost recovery. As to the fee required in the initial RFP for each proposal, the Supplemental RFP provides that previous bidders are allowed one free proposal for each proposal previously submitted and new bidders and additional bids are charged a fee of \$10,000 each. Thus, FPL’s Supplemental RFP addresses Reliant’s concerns as to allegedly “onerous” or “commercially infeasible” terms and renders moot the allegations in paragraphs 16 through 21 of the Complaint.

10. In Count 4, Reliant’s Complaint alleges that FPL’s decision not to consider gas tolling arrangements “effectively undermined the intent of the rule.” Complaint at ¶ 23. FPL continues to maintain that the Bid Rule contains no requirement that FPL evaluate in its RFP

gas-tolling or other confiscatory arrangements. However, in order to address Reliant's concerns, FPL did not include in its Supplemental RFP a statement that FPL would not consider any gas-tolling arrangements and thus rendered moot the gas-tolling allegation in paragraph 23 of the Complaint.

11. In Count 5, Reliant's Complaint alleges that FPL breached the terms of its RFP by failing to negotiate with the respondents who submitted the best bids. Complaint at § 24. Although FPL continues to maintain that this allegation fails to state a cause of action in that it does not allege a rule violation, FPL has nevertheless addressed this concern in the Supplemental RFP by stating that once it has evaluated all proposals, FPL "will enter into initial negotiations with certain bidders." Supplemental RFP at 19. After an initial negotiating period, FPL will either continue negotiations with one or more of those Bidders, reject all bids and pursue self-build options or existing contract extensions, or pursue a combination of purchasing and building. Id. This provision renders moot Reliant's allegation as to negotiations at paragraph 24 of the Complaint.

12. In Count 6, Reliant reiterates its allegations in the five previous counts as the so-called "totality of the circumstances." As stated, all of these arguments have been rendered moot by FPL's the issuance of the Supplemental RFP and the Commission's approval of a proposed process in which the RFP evaluation of proposals will be repeated while the Need Determination is held in abeyance.

13. Therefore, FPL's issuance of its Supplemental RFP has removed any potential factual basis for the Reliant Complaint as to FPL's original RFP and evaluation of the proposals submitted in response to that RFP. A case is moot when it presents no actual controversy or when the issues have ceased to exist. Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992), citing

Black's Law Dictionary 1008 (6<sup>th</sup> Ed. 1990). A moot case generally will be dismissed. Id. Cases will be dismissed as moot when, due to a change in circumstances, an actual controversy no longer exists. Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 514 So. 2d 1114, 1115 (Fla. 1<sup>st</sup> DCA 1987) (appeal of an order granting a certificate of need was dismissed as moot where such certificate was no longer required for the operation of an artificial kidney center). Reliant's Complaint is entirely moot and should be dismissed on that basis.

#### **Aside From Being Moot, Reliant's Complaint Fails to State a Cause of Action**

14. FPL continues to assert that Reliant's allegations that FPL violated the intent of the Bid Rule do not state a cause of action. Reliant's Complaint repeatedly misstates the purpose or intent of the Bid Rule, Complaint at ¶¶ 7, 9, 14, 23 and 25, while also alleging that FPL violated the so-called intent of the rule. Even if Reliant's statements accurately characterized the rule's intent, Reliant would have failed to state a cause of action by alleging that FPL violated the rule's intent. FPL is obligated to comply with the express requirements of properly adopted rules promulgated within the Commission's authority. However, FPL has no obligation to divine and comply with unstated and unarticulated intent supposedly underlying the Bid Rule or any other rule. When the language of a statute or rule is clear and unambiguous, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning. T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Intent is determined primarily from the language of the statute or rule. State v. Cohen, 696 So. 2d 435 (Fla. 4<sup>th</sup> DCA 1997). Thus, a cause of action alleging a rule violation is limited to the express language of the rule, rather than Reliant's interpretation of the "intent" behind the rule.

15. In addressing FPL’s argument that an allegation that conduct violates the intent rather than the letter of a rule fails to state a cause of action, it is important to recognize that Reliant’s allegations that FPL violated the intent of the Bid Rule are conclusions of law, not allegations of fact. Unlike allegations of fact, which the Commission must accept as true when passing on a motion to dismiss, conclusions of law are not properly accepted as true or otherwise admitted. *See Ellison v. City of Ft. Lauderdale*, 175 So. 2d 198 (Fla. 1965). FPL’s Motion to Dismiss calls upon the Commission to address whether the legal conclusions advanced by Reliant, which allege that FPL violated the unarticulated intent of the Bid Rule, state a cause of action. In doing so, it is inappropriate to treat Reliant’s improper legal conclusions as if they were factual allegations and assume they are true. A legal conclusion that conduct violates the intent of the Bid Rule fails to state a cause of action upon which relief may be granted.

In the present case, Reliant plainly states in the first three lines of the Complaint that its cause of action is for violation of a rule:

Reliant . . . files its Complaint against Florida Power [&] Light Company for violation of Rule 25-22.082. Florida Administrative Code.

Despite this clear statement of Reliant’s sole basis for the complaint (violation of the rule, not its intent), Reliant proceeds to recite its own interpretations of the Commission’s intent in adopting the rule. Reliant cites to no supporting authority. Reliant baldly alleges in the heading that precedes paragraph 25 of the Complaint that FPL “subverted the intent” of the rule. However, nothing in Florida law requires FPL to comply with provisions that are unarticulated in the rule or ideas that the Commission rejected in adopting the rule.

16. The Commission should dismiss as failing to state a cause of action the four counts of Reliant’s Complaint alleging that FPL failed to comply with the “intent” rather than the letter of the Bid rule: Count 2 (terms of the RFP); Count 4 (terms of the RFP as to gas tolling);



Count 5, (alleged breach of terms of the RFP); and Count 6 (“totality of the circumstances”). Counts 2 and 4, regarding the terms of FPL’s RFP, paragraphs 16-21 and 23, fail to allege any violation of the Bid Rule. No provisions of the Bid Rule (or any other rule) require the inclusion or exclusion of specific terms in a utility’s RFP. Thus, inclusion of objected-to terms within an RFP cannot violate the rule and Reliant fails to state a cause of action. Reliant’s attempt to argue that FPL’s conduct violates some unstated intent of the rule does not cure this deficiency in the Complaint. In a similar but equally deficient approach, Reliant argues in Count 4, paragraph 24, that FPL’s conduct “breached the terms of its RFP.” Setting aside the inaccuracy of this assertion, it should simply be noted that FPL’s RFP is not a part of the Bid Rule and does not have the force and effect of a rule. (If it did, then the terms of the RFP that Reliant complains about in its earlier count would have the effect of a rule and could not be challenged.) Thus, even if FPL failed to follow the terms of its RFP, a factual allegation that FPL contests, such failure does not rise to a cause of action for a violation of the Bid Rule.

17. Thus, Counts 2, 4, 5 and 6 do not properly allege a violation of the Bid Rule. Rather, these counts allege either a violation of the unarticulated purpose and intent of the rule (a legal conclusion) or a violation of FPL’s RFP document, neither of which have the force and effect of the rule. These allegations fail to state a cause of action against FPL and should be dismissed.

#### **Reliant Failed to Timely File Its Now-Moot Complaint Alleging Bid Rule Violations**

18. A Complaint as to the contents of FPL’s initial RFP document could have been appropriately filed during the time period subsequent to FPL’s issuance of the initial RFP and prior to FPL’s evaluation of the proposals. FPL further amends its previous Motion to Dismiss Reliant’s Complaint by noting that counsel’s review of the Commission’s special agenda

conference concerning adoption and amendment of the Bid Rule (Docket No. 921288-EU) reveals that the Commission anticipated that a complaint as to the terms of an RFP should be filed prior to the ensuing determination of need proceeding.<sup>1</sup> Ultimately, the Commission adopted a wait-and-see approach regarding the timeliness of complaints. The instant case demonstrates why an untimely complaint should be dismissed. Reliant had months to file a complaint and chose not to. Reliant was given the opportunity to file exceptions to the initial RFP. It chose not to. In fact, Reliant submitted bids upon which FPL relied. Reliant's untimely complaint should be dismissed.

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<sup>1</sup> During the Commission special agenda conference in which the Commission adopted the Bid Rule (Docket 921288-EU), the following exchanges occurred between the Commission and Staff regarding the timing of a complaints as to an RFP:

MR. BALLINGER: If the RFP goes out and we don't have a problem with it, and we don't hear from anybody and they go out and the utility selects a winner, and, then, at the need determination proceeding somebody comes in and says "Wait a minute. That RFP was biased," you know, I think we would be obligated to hear their case at the need hearing. But I think from a realistic standard, they should have brought it up sooner if they wanted to have a chance at the process.

COMMISSIONER CLARK: But there's no specific language that tells them they can challenge the RFP.

MR. BALLINGER: It's the current complaint process we have now with any filing by a utility.

Attachment A at 34-35.

CHAIRMAN DEASON: Now, is there going to be an opportunity for someone to petition the Commission and say, "This RFP is all screwed up. It's biased and the result you are going to get is a nuclear plant?"

MR. BALLINGER: Yes.

CHAIRMAN DEASON: And we're going to say, "Yeah, you're right. This RFP is wrong, we're going to change it before any responses are filed to the RFP?"

MR. BALLINGER: Yes. And I think it would be prudent on a participant, if they felt it was that biased, to stop the process, basically, up front and not let it continue to bring it your attention or for Staff to bring it to your attention. That's totally biased. And air those issues out up front before we waste all that time of going through the solicitation process.

Attachment A at 79-80.

19. Reliant has been aware of the terms of FPL's RFP since August of 2001, when it received FPL's RFP document. Reliant chose to submit three RFP proposals in response to that RFP document rather than raising a complaint with the Commission at that time. (Apparently the terms became commercially infeasible only after it was announced that Reliant did not secure the RFP award.) Reliant also had available to it the means, stated within the RFP, to state exceptions to the terms of the RFP and declined to do so. FPL relied upon Reliant's proposals, including its failure to take exception to any of the terms of FPL's RFP, and analyzed two of Reliant's three proposals. As to Reliant's third proposal, which clearly violated the terms of FPL's RFP document, FPL returned Reliant's application fee and heard no complaint for more than five months. Given FPL's reliance upon Reliant's eligible proposals and Reliant's failure to state exceptions to the terms of FPL's RFP, Reliant should now be barred from now attacking the terms and conditions of FPL's RFP.

20. A complaint as to the terms of the RFP should be undertaken at the time of the alleged injury, not months later after the utility has relied upon the respondent's proposals. A timely contest or complaint regarding the RFP terms could have been heard without jeopardizing the entire power plant licensing process, but Reliant's attack six and half months after becoming aware of the terms of the RFP and five months after responding to the RFP without stating any exceptions is not meant to be curative. It is meant to penalize. Reliant's allegations regarding the terms of the RFP, now entirely moot, were untimely filed. This ground is asserted in addition to the grounds as to Reliant's failure to state a cause of action. Thus, even if it had not been rendered moot, the portion of Reliant's Complaint attempting to challenge the terms of the initial RFP, Counts 2 and 4, should be dismissed because it was untimely filed.

**Reliant's Now-Moot Complaint Requests Relief  
That Is Unauthorized and Inconsistent With the Bid Rule**

21. FPL's issuance of a supplemental RFP has rendered moot the relief that Reliant requested in its Complaint. However, even if these requests were not now moot, they could not be granted because the Commission is unauthorized to grant them under the Bid Rule or any other Commission rule or statute governing the Commission. In its request for relief, Reliant asks the Commission to effectively amend the Bid Rule in this proceeding to grant relief the Commission has chosen not to include in the rule and to attempt to enlarge its statutory authority by the Commission's own decree. The Commission is a creature of statute limited to those powers expressly conveyed by statute and such other powers as are reasonably implied. City of Cape Coral v. GAC Utilities, Inc. and the Public Service Comm'n, 281 So. 2d 493, 495-96 (Fla. 1973). Moreover, the Commission cannot promulgate rules without specific authority and cannot by rule enlarge its authority beyond that conveyed by the Legislature. Teleco Communications Co. v. Clark, 695 So. 2d 304, 308 (Fla. 1997).

22. Reliant asks the Commission to require FPL to issue a new RFP and to submit such RFP to the Commission for review of its terms and conditions in advance of its issuance. Reliant also asks the Commission to require FPL to retain a neutral, independent evaluator to score submissions. Finally, Reliant asks the Commission to require FPL to submit a binding self-build bid to the independent evaluator at the same time and manner as other bids. None of this relief is authorized under the Bid Rule. When the rule was adopted and amended, the Commission was asked to impose similar provisions of the nature Reliant now seeks, and the Commission declined. It chose instead to adopt the traditional regulatory model in which the utility, having the obligation to serve, retains the role of conducting the RFP and evaluation responses, and the Commission reviews the utility's conduct in the ensuing determination of

need.<sup>2</sup> Reliant effectively asks the Commission to amend its rule and extend its operation well beyond the scope of the current rule.

23. Reliant is also asking the Commission to act in a fashion that the Legislature has not authorized. The Bid Rule implements Section 403.519, Florida Statutes, which is not an authorizing statute for rule promulgation and, further, does not authorize the Commission to (a) require utilities to issue RFPs prior to seeking determinations of need; (b) authorize complaints regarding RFPs; (c) require utilities to reissue RFPs in response to complaints; (d) require utilities to submit their RFPs prior to the Commission for advance approval; (e) require utilities to retain an independent evaluator to score submissions; or (f) require utilities to submit bids in the same manner and same time as other RFP bidders.

24. The Bid Rule is intended only to implement the language in section 403.519, Florida Statutes, providing that, in a determination of need proceeding, “the commission shall take into account ... whether the proposed plant is the most cost-effective alternative available.” The Bid Rule simply provides detailed criteria for use of the Commission in carrying out that that statutory direction. The relief requested by Reliant goes well beyond the Bid Rule’s statutory authorization.

25. Reliant asks the Commission to usurp the role of utility management. However, Commission authority that invades the province of utility management is not reasonably inferred from Section 403.519, Florida Statutes. The statute does not address any required conduct of a

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<sup>2</sup> At the agenda conference in which the Commission adopted the Bid Rule (Docket 921288-EU), there was a lengthy exchange between the Commissioners and Staff regarding the purpose and application of the rule. During that discussion, it was recognized that utilities continued to have an obligation to serve and because of that obligation, certain managerial prerogatives were reserved to utilities. Attachment A at 58-59, 136-140, 146-147. These prerogatives included the understanding that the utility, not the Commission, conducts the RFP and selects the winning bidder, with the Commission reserving the right to pass judgment on the utility’s conclusion. Attachment A at 52 - 61.

utility prior to a determination of need. The Commission's sole authorized role is to determine whether an option is the most cost-effective option after a utility files a request for a Need Determination. The statutory language does not authorize a rule that dictates in excruciating detail a utility's process prior to presenting its case to the Commission.

26. Reliant also asks the Commission to conduct an evaluation of responses previously submitted to FPL, determine the appropriate price and non-price attributes for judging the proposals, employ an independent third party evaluator and determine which proposal is most cost-effective and then award a determination of need, even though there would not be a contract with any RFP proposer that might win. Once again, none of this is currently authorized in the Bid Rule. Reliant is asking the Commission to undertake a wholesale rule amendment and impose intrusive provisions and relief of the type the Commission has previously rejected in adopting and amending the Bid Rule. Having promulgated its rule, the Commission is bound to follow it and cannot undertake conduct and provide relief that is not provided in the rule.

24. None of the relief requested by Reliant is authorized or even contemplated by Section 403.519, Florida Statute, the statute that the Bid Rule is supposed to implement. The statute does not authorize a rule requiring a RFP; it does not authorize the Commission to evaluate the results of a RFP (particularly when the Commission's rule regarding RFPs envisions that the utility, not the Commission, will evaluate RFP proposals); it does not authorize the Commission to establish price and non-price attributes to be used in a RFP; it does not authorize the Commission to select an independent third-party evaluator to analyze bids. Finally, Reliant asks this Commission to award a determination of need without a contract, despite the fact that the Commission has held, in a case upheld by the Supreme Court of Florida, that it will not grant a determination of need to an applicant who does not have a contract with a utility serving retail

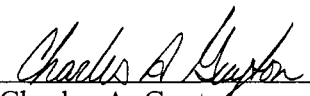
customers. In re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Generating Facility), 92 FPSC 10:693, *affirmed*, Nassau Power Corporation v. Deason, 641 So. 2d 397, 399 (Fla. 1994) (“Under the Commission’s interpretation, a non-utility generator will be able to obtain a need determination for a proposed project only after a power sales agreement has been entered into with a utility.”) Thus, the Complaint should be dismissed because Reliant’s requests for relief in its now-moot Complaint are unauthorized and invalid.

WHEREFORE, FPL requests that the Commission dismiss the Complaint of Reliant Energy Power Generation, Inc. Against Florida Power [&] Light Company.

Respectfully submitted,

R. Wade Litchfield, Esq.  
Florida Power & Light Company  
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Juno Beach, Florida 33408-0420  
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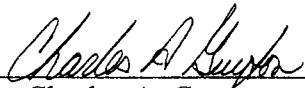
  
Charles A. Guyton

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Florida Power & Light Company's Motion to Dismiss Reliant's Complaint was served by hand delivery upon the following this 14<sup>th</sup> day of May, 2002:

Joseph A. McGlothlin  
McWhirter, Reeves, McGlothlin, Davidson  
Decker, Kaufman, Arnold & Steen, P.A.  
117 South Gadsden Street  
Tallahassee, Florida 32301

Martha Carter Brown  
Staff Attorney  
Florida Public Service Commission  
2450 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0870

By:   
Charles A. Guyton



# ATTACHMENT A

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :  
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Proposed Amendment of :  
Rule 25-22.081, F.A.C., : DOCKET NO. 921288-EU  
Contents of Petition; and :  
Proposed Adoption of Rule :  
25-22.082, F.A.C., :  
Selection of Generating :  
Capacity. :  
:

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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

DOCUMENT NUMBER-DATE  
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FPSC-RECORDS/REPORTING

1 own motion, or somebody else could come in and say,  
2 "The RFP is not appropriate to meet their need." They  
3 don't have to wait until -- I'm not sure that No. 7  
4 does that, makes it clear. If that is what your intent  
5 is. I'm not sure it should be.

6 I'm suggesting that -- I guess, when the need  
7 is brought to us that I think at that point it may be  
8 appropriate to allow a disgruntled bidder to come in  
9 and say, "It shouldn't have been bid in that way in  
10 the first instance." And is that the only point at  
11 which that should be done, or does it have to be  
12 initially when it comes out?

13 MR. BALLINGER: I think -- let me see if I  
14 understand your question. If the RFP goes out and we  
15 don't have a problem with it, and we don't hear from  
16 anybody and they go out and the utility selects a  
17 winner, and, then, at the need determination proceeding  
18 somebody comes in and says, "Wait a minute. That RFP  
19 was biased," you know, I think we would be obligated to  
20 hear their case at the need hearing. But I think from  
21 a realistic standard, they should have brought it up  
22 sooner if they wanted to have a chance in the process.

23 COMMISSIONER CLARK: But there's no specific  
24 language that tells them that they can challenge the  
25 RFP.

1 MR. BALLINGER: It's the current complaint  
2 process we have now with any filing by a utility.

3 COMMISSIONER CLARK: All right. What would  
4 be the basis of their complaint? What would they come  
5 in and say?

6 MR. BALLINGER: The utility is asking for  
7 something that's totally bias to them building it only  
8 because it's specified in a certain county, in a  
9 certain location, and all this. Then it would be up to  
10 the utility to respond why; that is what their needs  
11 are.

12 MS. RULE: Commissioner, if I may respond.  
13 We've been round and round on how to deal with the  
14 issue of the biased RFP. On the one hand, there is a  
15 good deal of feeling among the technical Staff that  
16 under no circumstances should the Commission agree to a  
17 bifurcated procedure. That is, the technical Staff  
18 believes very strongly that a preapproval of need is a  
19 mistake.

20 We're trying to figure out some way to deal  
21 with a problem of a biased RFP without having a  
22 preapproval of an RFP each and every time. If somebody  
23 has a complaint about a utility selection procedure,  
24 they are free to bring it to the Commission. We didn't  
25 feel it necessary to institutionalize that and,

1 for the utilities to beat the bushes to see what's out  
2 there of qualified generating providers; from that,  
3 develop something to screen down to a manageable number  
4 of finalists with which to negotiate the best price for  
5 the ratepayer. And it may be their other project ends  
6 up being the best one from an overall perspective.

7 COMMISSIONER LAUREDO: What do you consider a  
8 manageable number of finalists?

9 MR. BALLINGER: Maybe three or five?

10 COMMISSIONER LAUREDO: So why don't we say  
11 that?

12 MR. BALLINGER: Well, again, it goes to I  
13 think it's the utility's decision. They may go through  
14 and find only one, and even that one they may not be  
15 able to reach a negotiation with. I wouldn't want to  
16 specify a number in a rule to always have three or  
17 always have five.

18 COMMISSIONER CLARK: Do I understand Issue 4  
19 to be that we're not going to tell them that they have  
20 to select a winner and that's it?

21 MR. BALLINGER: When you say, "select a  
22 winner," do you mean select a winner out of the pool of  
23 respondents or can the winner also be the utility?

24 You have to remember, in Staff's view, the  
25 utility publishes its costs as part of the RFP, but it

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 (Simultaneous conversation.)

2 MR. TRAPP: Oh, definitely.

3 I would prefer the utility do the bulk of the  
4 work and have the hard burden of proof, and come up  
5 here and just let me ask some leading questions and get  
6 to the bottom line of the thing and then make a  
7 determination.

8 I agree with you the Commission is  
9 regulators; the buck stops here. You have to make a  
10 decision and that decision is going to carry over as a  
11 rate impact on customer bills. But, again, regulation  
12 versus management.

13 COMMISSIONER CLARK: That's right. And it's  
14 up to them to make that decision. They are charged  
15 with running the utility in the most efficient way, and  
16 our job is to review that and to make sure we agree  
17 with their conclusions or where we don't agree to  
18 require them to change it.

19 MR. TRAPP: True.

20 CHAIRMAN DEASON: I agree with that in most  
21 scenarios. But what we have here is if this is going  
22 to be a fair and open process where somebody who feels  
23 like they have not been treated fairly has a forum in  
24 which to express that concern and hopefully gain  
25 relief, the Commission is going to make the ultimate

1 decision anyway. I think it's going to be extremely  
2 rare where there is an RFP issued and the decision is  
3 made. And I don't care if the utility chooses itself  
4 or chooses another provider, a NUG. There's going to  
5 be another NUG out there who is not going to like that  
6 decision, and they're going to file a complaint with  
7 the Commission. And the Commission is going to have to  
8 look at that RFP; they're going to have to look at the  
9 scoring criteria; they're going to have to look at the  
10 subjective judgments that were made by someone who  
11 probably gets paid a lot of money to make those  
12 decisions, but ultimately the decision is going to be  
13 ours. Do you say, "Yes, it was fair, it was objective,  
14 the decision is a correct decision," or do you say,  
15 "No, it wasn't"?

16 MR. BALLINGER: I think you're right, and  
17 that decision is telling the utility whether or not  
18 they made the right decision or the wrong decision. I  
19 don't it should go further to say, "The right decision  
20 is this over here."

21 CHAIRMAN DEASON: Okay. That's a good --

22 MR. BALLINGER: That's a very fine line.

23 CHAIRMAN DEASON: All right. What happens  
24 then if we go through this long, drawn-out process,  
25 which is very complicated and expensive and

1 time-consuming and the end result is a complaint that's  
2 filed with the determination of the winner of the RFP,  
3 and the Commission makes the decision that:  
4 Complainant, you're correct, it was not done fairly and  
5 something was misscored or the subjective criteria were  
6 biased? So that just means we start all over again,  
7 and then that whole time that window of opportunity  
8 narrows and that we're just a year further down the  
9 road to where the capacity has to be on line or else  
10 the lights go out?

11 MR. BALLINGER: I would like to think that  
12 the threat of regulation is a pretty big threat to the  
13 utility that they will pursue the right job and the  
14 right plant. Because if that were to happen and we  
15 were to find, we have remedies for that situation.  
16 Whereas, on a nonutility, we don't; they're a  
17 nonregulated entity. So I think the threat of  
18 regulation over a utility is very strong for them to  
19 come forward with the best project.

20 CHAIRMAN DEASON: What is our remedy? Would  
21 you say, "Well, Utility, you really blew it. We're  
22 going to make you build it and you have to do it within  
23 two years. And so it's going to cost more because the  
24 available technologies are limited but we're only going  
25 to allow you recovery as if the other project was built

1 and you're just going to suffer"?

2 MR. BALLINGER: That's basically it. You go  
3 to the stockholders' pockets.

4 CHAIRMAN DEASON: And then the cost of  
5 capital increases for the utility and the customer is  
6 going to pay regardless? I mean --

7 MR. BALLINGER: That's possible. I agree.

8 MR. TRAPP: It's happened in other  
9 jurisdictions.

10 CHAIRMAN DEASON: There are no easy answers.

11 MR. TRAPP: No, sir.

12 MS. RULE: Well, Chairman Deason, in a sense  
13 this very question comes up whenever the utility makes  
14 a decision that the Commission must approve. The  
15 utility might not make the right decision. What are  
16 you going to do? You can either take away that  
17 decision-making capability and make that sort of  
18 decision yourself, or you can take whatever regulatory  
19 action is available to you to show that that is not a  
20 prudent decision and you cannot approve it for rate  
21 recovery.

22 This happens to be one specific type of  
23 question that's come before the Commission recently in  
24 a very public fashion, but it's involved in almost  
25 every decision that comes to you for approval.

1     itself.

2                     The other would be a challenge to the extent  
3     "Well, we agree with the criteria, but they scored it  
4     wrong." I mean, they didn't apply what they told us  
5     they were going to do, step one, two, three in making  
6     an evaluation of this criteria but they didn't. They  
7     skipped to two and that way it biased our proposal. I  
8     mean, I'm trying to talk in generalities here, but I  
9     think there is two. One is the RFP was not right, two  
10    is the RFP was not applied correctly.

11                    MR. BALLINGER: Correct.

12                    CHAIRMAN DEASON: When are those going to be  
13    determined? When are those going to be litigated?

14                    MR. BALLINGER: Hopefully, the first one --  
15    well, I don't want to say, "hopefully." Staff is not  
16    envisioning that one being litigated every time. The  
17    opportunity is there when the utility files its RFP.  
18    If a potential participant sees a problem or the  
19    Commission sees a problem on its own motion, we can  
20    initiate a proceeding to straighten the RFP out.

21                    The second part would be if it wasn't --

22                    CHAIRMAN DEASON: Now, is there going to be  
23    an opportunity for someone to petition the Commission  
24    and say, "This RFP is all screwed up. It's biased and  
25    the result you're going to get is a nuclear plant"?

1 MR. BALLINGER: Yes.

2 CHAIRMAN DEASON: And we're going to say,  
3 "Yeah, you're right. This RFP is wrong, we're going  
4 change it before any responses are filed to the RFP"?

5 MR. BALLINGER: Yes. And I think it would be  
6 prudent on a participant, if they feel it was that  
7 biased, to stop the process, basically, up front and  
8 not let it continue to bring it to your attention or  
9 for Staff to bring it to your attention. That's  
10 totally biased. And air those issue out up front  
11 before we waste all that time of going through the  
12 solicitation process.

13 COMMISSIONER LAUREDO: The word "methodology"  
14 used in that section is not the same, and it's not  
15 synonymous with scoring system?

16 MR. BALLINGER: No. We're not recommending --

17 COMMISSIONER LAUREDO: I'm saying it on the  
18 record so we don't have a problem, because words have a  
19 way of just evolving. To me, I mean, it's a big  
20 difference. That's what I was trying to illustrate in  
21 much less eloquent terms that their scoring system is a  
22 very rigid thing and methodology is a little bit more  
23 flexible. And your suggestion, including that  
24 language, is the flexible approach and not the scoring  
25 system rigidity that at least I interpreted?



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Proposed amendment of Rule 25-22.081, F.A.C.,  
Contents of Petition; and proposed adoption of Rule  
25-22.082, Selection of Generating Capacity.

DOCKET NO. 921288-EU

VOLUME II

Pages 120 - 174

BEFORE:	CHAIRMAN J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER LUIS J. LAUREDO COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING
PROCEEDING:	SPECIAL AGENDA CONFERENCE
DATE:	Tuesday, December 7, 1993
PLACE:	106 Fletcher Building Tallahassee, Florida
REPORTED BY:	JANE FAUROT Notary Public in and for the State of Florida at Large



ACCURATE STENOTYPE REPORTERS, INC.  
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1           into the crafting of the RFP so that those items are  
2           considered.

3           CHAIRMAN DEASON: I think, and I may be reading  
4           this rule entirely wrong, but I think that information  
5           is on what the company's plant would be. That if they  
6           were going to build, they would build this type plant,  
7           this size, this location, with this type technology,  
8           and fuel. And they are basically putting that out on  
9           the table and saying, "Look folks, this is what we  
10          think that we would end up doing, or something very  
11          similar to this." Now, that's just the information to  
12          the bidders, and the bidders can come in, and they were  
13          not obligated. They can come in with something  
14          entirely different, perhaps something that is so  
15          different and costs so much less that it makes the  
16          utility's plan look like they were foolish at one  
17          point. But they are not bound in any way by that.

18          COMMISSIONER KIESLING: Well, that's not what I  
19          see on Page 2 in Subsection 4(a), where it says each  
20          utility's RFP shall include at a minimum, and it goes  
21          through the technical description --

22          MS. RULE: Commissioner --

23          COMMISSIONER KIESLING: -- primary and secondary  
24          fuel types.

25          MS. RULE: It talks about a detailed technical

1 description of that utility's next planned generating  
2 unit.

3 COMMISSIONER KIESLING: Right. Well, doesn't that  
4 include whether it's going to be a combined turbine,  
5 or --

6 MS. RULE: That's what the utility would plan, not  
7 necessarily what anybody else would propose. It puts  
8 the parties, any participants on notice of what the  
9 utility intends to do unless somebody else comes up  
10 with something better. It does not restrict the depth  
11 and breadth of proposals that could be made in  
12 response.

13 MR. TRAPP: If I could, the philosophy, I think,  
14 is what is important behind this rule. And the  
15 philosophy is that the utility under Florida law has an  
16 obligation to serve its customers. And in order to do  
17 that it must plan and acquire resources. What this  
18 does, basically, it says, "Absent any alternatives in  
19 the competitive marketplace, utility, what is your best  
20 project in terms of reliability and cost to the  
21 consumer, and put that on the table, and we are going  
22 to use that as a comparative plant to gauge  
23 alternatives against." In order to determine if  
24 something is better, you have to compare it to  
25 something. So what we are comparing it to is what the

1 utility would otherwise build. They put that up front  
2 in the RFP, saying, "This is what we plan to do, unless  
3 you can show us something better." Then it's incumbent  
4 upon the bidders in responding to the RFP, to respond  
5 to the same types of information with regard to  
6 location, water, air, the basic things necessary for a  
7 power plant to operate, and then you compare all of  
8 those nonpriced parameters and all the priced  
9 parameters to the avoided unit to determine whether or  
10 not one of the bidders has a better project than what  
11 the utility would otherwise build. If they do, that's  
12 a winning bidder.

13 COMMISSIONER KIESLING: When you say you would  
14 compare, don't you mean the utility would compare?

15 MR. TRAPP: The utility would make a management  
16 decision and bring it before the Commission for the  
17 Commission's approval and judgment.

18 COMMISSIONER KIESLING: Well, all I can tell you  
19 is that having heard bid protests and been involved  
20 with bid cases for more than the last ten years, this  
21 is the most peculiar bid process I have ever seen in my  
22 life. There is no RFP. There is, "I'm going to build  
23 this, unless someone comes in and proves that I should,  
24 you know, use another proposal." That's not a bid  
25 process.

1           MR. TRAPP: And, again, the philosophy, it was  
2           discussed yesterday about this rule, that it is  
3           somewhat different, is that because of the utility's  
4           obligation to serve in Florida, and because they are a  
5           regulated entity, we are suggesting that this rule  
6           should be used, or bidding should be used as a tool by  
7           the utilities to fulfill their statutory obligations.  
8           And it probably does look different than other  
9           conventional bid packages.

10           MR. BALLINGER: It's not a conventional bid. It's  
11           a semantical term. We use bidding, and we explained  
12           this at the beginning, it's a request for proposals, is  
13           what it's making them do. And people can send in a  
14           variety of things trying to respond to that proposal.  
15           It's not a strict bid where you have specifications out  
16           there, meet these specifications, and the best price  
17           would win. We use that term bidding interchangeably.  
18           But the purpose of this is a tool for the utilities to  
19           go out there, beat the bushes with an RFP, saying, "If  
20           I build it, I'm going to build it here, this and such,  
21           look like this, and costs this much. Show me what you  
22           want to propose, and then we'll talk." So it's the  
23           mechanism to get them out into the market, solicit from  
24           IPPs proposals from which to make an informed decision.

25           COMMISSIONER KIESLING: Well, I have to differ

1 with you; that's not what an RFP is, either. And I  
2 think there is a big range of cases that define RFP and  
3 what one is. And whether you want to define yours  
4 differently or not, you know, that certainly is an area  
5 for confusion. If you are using the same term that is  
6 used in Florida Statutes for RFPs, then yours is not an  
7 RFP. An RFP, as it's generally used, and used in  
8 statute, is simply a description of what you would like  
9 to end up with, and a request that people make  
10 proposals to do that. It doesn't allow you to come in  
11 and bid for yourself, or to have a proposal of your own  
12 that is going to be the default winner.

13 MR. TRAPP: And it may be the difference lying in  
14 that it is a regulated entity as opposed to a  
15 government agency going out for a service.

16 COMMISSIONER CLARK: An entity that has the  
17 obligation to provide the end product to the customer  
18 at the lowest possible cost.

19 MR. BALLINGER: It may not be the best choice of  
20 words, that's why we put in a special definition for  
21 request for proposals, and we made our own definition,  
22 if you will. It may not be conforming with the  
23 statutes, but we had to use some buzz word to go  
24 through it and we have created the definition.

25 COMMISSIONER LAUREDO: Commissioner, I have some

1           COMMISSIONER KIESLING: Well, who decides the  
2 methodology to value the utilities?

3           MR. TRAPP: The utility has to make a management  
4 decision; and the Commission, as economic regulator,  
5 has to determine the validity of that decision.

6           COMMISSIONER KIESLING: Well, then I, again, would  
7 just say that is not an RFP, and that is certainly to  
8 me not a level playing field.

9           CHAIRMAN DEASON: And the reason for that is that  
10 the utility is the one making the decision? Or could  
11 you explain why that's the case in your opinion. Is it  
12 not fair because the utility is the entity making the  
13 decision, basically evaluating their own proposal  
14 against other proposals?

15           COMMISSIONER KIESLING: Absolutely. And because  
16 there is no opportunity for input into methodology,  
17 criteria, weighing of the criteria, how that  
18 methodology is going to be carried out, from anyone  
19 except the utility.

20           MR. BALLINGER: That gets us back to bifurcation,  
21 and the preapproval of these things. A strict scoring  
22 mechanism; is that attainable? I agree with you. I  
23 mean, it leaves the subjectivity to the utility. But,  
24 on the other hand, you have to weigh, can you make it  
25 so nonsubjective that it can be scored by someone other

1 than the utility, or by the Commission, or have a  
2 preapproval by the Commission. Staff's intent in this  
3 was to not really level the field between the IPP or  
4 non-utility generator and the utility, because I don't  
5 think it will ever be until we totally deregulate at  
6 least generation, because the utility has the  
7 obligation to serve. It may only stay slightly tilted.  
8 Our intent in the rule is to recognize that slight  
9 tilt, but to try to get a better deal for the  
10 ratepayer. To try to do something to force the  
11 regulated entity that we have some jurisdiction over to  
12 go out and get a better deal for the ratepayer. The  
13 IPPs will compete amongst themselves, they are going to  
14 give their best shot to get a price in to sign with the  
15 utility. The utility has the responsibility to  
16 evaluate those proposals now, and justify to the  
17 Commission why they chose A or chose themselves. And  
18 those three are really intertwined, and that's a long  
19 series of discussions.

20 COMMISSIONER CLARK: And it has to do with your  
21 basic philosophy.

22 MR. BALLINGER: Yes, ma'am.

23 COMMISSIONER CLARK: And one of the things the  
24 Governor said this morning sort of has a bearing on  
25 this case. The utilities have the responsibility of