

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

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 20, 2002

COMMISSION
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RESPONSE TO FPL'S MOTION TO STRIKE
PART OF CPV CANA'S RESPONSE AND
PETITION FOR WAIVER OF RULE 25-22.080, F.A.C.

CPV Cana, Ltd., through its undersigned counsel and pursuant to Sections 120.569 and 120.57(1) and 120.542, Florida Statutes (F.S), Rule 28-106.204, Florida Administrative Code (F.A.C.), and Rule Chapter 28-104, F.A.C., hereby files this Response to Florida Power & Light Company's Motion to Strike Part of CPV Cana's Response to Florida Power & Light Company's Emergency Motion for Abeyance and Petition for Waiver of Rule 25-22.080, F.A.C. and in support, states the following:

1. Florida Power & Light Company's (FPL's) Motion to Strike part of CPV Cana's Response and Petition for Waiver is misplaced. FPL characterizes CPV Cana's Request for Relief as part of its Response. This is not correct. CPV Cana's Response was directed exclusively to the point that FPL had requested an unauthorized and improper form of relief (an Emergency Motion to Hold Proceedings in Abeyance) from the timeframes set forth in the Bid Rule, Rule 25-22.082, F.A.C., and that instead, the appropriate relief mechanism was a waiver of those timeframes. CPV Cana's Request for Relief was set forth as part of its Petition, and sought, in conjunction with an extension of

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the timeframes in Rule 25-22.082, much-needed Commission oversight of FPL's re-bidding of the Martin facility capacity addition and bidding (for the first time) of FPL's Manatee facility capacity addition, to ensure FPL complies with the Bid Rule requirements and procedures. Requests for relief are properly made in a Petition -- not exclusively in the form of a Motion, as FPL claims. Rule 28-104.002(2)(f), F.A.C.; Rule 28-106.201(2)(g), F.A.C. CPV Cana's relief was properly requested as part of its Petition and therefore should not be stricken.

2. Further, FPL's quarrel with CPV Cana's requested relief, which is part of its Petition for Waiver, should be registered in the form of comments on the Petition, not via a Motion to Strike portions of the Petition. Section 120.542(6), F.S., and Rule 28-104.003, F.A.C., expressly grant interested persons the opportunity to submit comments on a Petition for Waiver, and FPL should pursue this statutorily authorized avenue for voicing its disagreement with the relief CPV Cana requests in its Petition, rather than moving to strike part of the Petition -- particularly since the relief CPV Cana requests is within the Commission's statutory authority to grant, and therefore is not "immaterial, redundant, impertinent, or scandalous."¹

3. The claims in Paragraphs 2 and 3 of FPL's Motion to Strike (portions of which are grounded in FPL's mischaracterization of CPV Cana's request for relief as part of CPV Cana's Response) also are misplaced. At core, these paragraphs appear to question the Commission's authority to grant the relief CPV Cana seeks in the Petition's request for relief. CPV Cana posits that the Commission does possess such authority, and

¹ Under Rule 1.140 of the Florida Rules of Civil Procedure, the standard for striking a pleading is that it is "immaterial, irrelevant, impertinent, or scandalous." The burden is on the moving party to demonstrate that the material requested to be stricken meets this standard. FPL has not alleged or demonstrated that the relief requested in CPV Cana's Petition meets this standard.

that the circumstances in this case are precisely those under which the Commission should exercise that authority. In its request for relief, CPV Cana has requested the Commission to oversee the Bid Rule process for the Manatee and Martin facilities to ensure that FPL (this time) complies with the Bid Rule. In seeking this relief, CPV Cana is requesting that the Commission take specific actions, tailored to the current situation, in order to enforce the provisions of Chapter 366, F.S. -- which the Commission clearly and indisputably is authorized to do.² Furthermore, Section 403.519, F.S., directs the Commission to determine, as part of a need determination proceeding, whether a utility's proposed capacity addition is the most cost effective alternative available. This statute -- which is implemented by the Bid Rule -- empowers the Commission to act as necessary to fulfill its statutory mandate, including actively overseeing the Bid Rule process.

Accordingly, the Commission's actions in this regard would not be inconsistent with the Bid Rule, as FPL argues.³ As discussed in its Petition for Waiver and its Comments on FPL's Emergency Petition for Waiver, CPV Cana submits that Commission oversight of FPL's bidding process is both prudent and necessary in light of FPL's violations of the

² See, e.g., §366.04(1), F.S. (granting the Commission authority to regulate and supervise each public utility with respect to rates and service); §366.04(2)(b), F.S. (stating the Commission's power over electric utilities for the purpose of prescribing fair rates); §366.04(2)(f), F.S. (stating the Commission's power to "prescribe and require the periodic filing of reports and other data as may be readily available and as necessary to exercise its jurisdiction hereunder")(emphasis added); §366.05, F.S. (empowering the Commission to prescribe fair and reasonable rates and charges). See also, People's Gas System, Inc. v. Mason, 182 So. 2d 429 (Fla. 1964)(in denying certiorari and request for rehearing, Florida Supreme Court expressly noted the broad powers granted by the Legislature to the Commission by Sections 366.04, 366.05, 366.06, and 366.07, F.S., to regulate utilities).

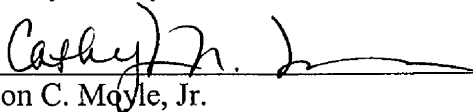
³ FPL's assertion that CPV Cana's requested relief "is nothing less than a wholesale amendment of the Bid Rule" also is misplaced. As discussed, the Commission possesses the statutory authority to interpret and implement the Bid Rule, and accordingly is authorized to grant the requested relief in the form of conditions on the grant of the requested waiver. Nor do the rulemaking provisions in Chapter 120, F.S., impose the rigid procedural restrictions on the Commission's ability to interpret and implement the Bid Rule that FPL argues. As The Environmental Trust v. Dept. of Env't'l Protection, 714 So. 2d 493 (Fla. 1st DCA 1998) instructs, agency interpretation and implementation of an existing rule with respect to a particular set of facts is not itself a rule. The court observed: "[i]f that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue."

Bid Rule during the August 2001 RFP process, and given FPL's apparent view that the Bid Rule imposes merely "technical, procedural" matters that must be perfunctorily addressed en route to selection of the self-build option (see Florida Power & Light Company's Emergency Motion to Hold Proceedings in Abeyance, Docket Nos. 020262-EI and 020263-EI, April 29, 2002, p. 2).

4. In sum, FPL's Motion to Strike part of CPV Cana's Petition for Waiver should not be granted because: (1) CPV Cana requests relief that is authorized by Chapter 366, F.S., and Section 403.519, F.S.; (2) because the statutorily established avenue for FPL to take issue with CPV Cana's Petition is via the submittal of comments on the Petition, as provided by Section 120.542, F.S., and Rule Chapter 28-104, F.A.C., rather than filing a Motion to Strike; and (3) because under any circumstances, FPL has neither adequately alleged nor demonstrated that CPV Cana's requested relief should be stricken under the pertinent standard in Florida Rule of Civil Procedure 1.140 for granting such motions.

WHEREFORE, CPV Cana respectfully requests the Commission to deny FPL's Motion to Strike.

Respectfully submitted this 20th day of May, 2002.



Jon C. Moyle, Jr.
Florida Bar No. 727016
Cathy M. Sellers
Florida Bar No. 0784958
Moyle Flanigan Katz Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
Telephone (850) 681-3828
Telefax (850) 681-8788

Attorneys for CPV Cana, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing CPV Cana, Ltd.'s Response to Motion to Strike Part of CPV Cana's Response to Florida Power & Light's Emergency Motion for Abeyance and Petition for Waiver has been furnished by U.S. Mail on this **20th day of May, 2002**, to those listed below without an asterisk, and by hand delivery to those marked with an asterisk:

Martha Carter Brown, Esquire*
Larry Harris, Esquire*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Jack Shreve, Esquire
Office of the Public Counsel
c/o Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, FL 32399-1400

Charles A. Guyton, Esquire*
Steel Hector & Davis, LLP
215 South Monroe St., Suite 601
Tallahassee, FL 32301

John T. Butler, Esquire
Steel Hector & Davis
200 South Biscayne Blvd., Suite 4000
Miami, FL 33131-2398

Bonnie Davis, Esquire *
Mr. William G. Walker, III
Florida Power & Light Company
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301-1859

R. Wade Litchfield, Esquire
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 22408-0420

Joseph A. McGlothlin, Esquire
McWhirter, Reeves, McGlothlin, et al.
117 South Gadsden Street
Tallahassee, FL 32303

Mr. Michael G. Briggs
Reliant Energy, Inc.
801 Pennsylvania Avenue, Suite 620
Washington, DC 20004

Suzanne Brownl ess, Esquire
Suzanne Brownless, P.A.
1311-B Paul Russell Road, Suite 201
Tallahassee, FL 32301

Ms. Beth Bradley
Director of Market Affairs
Mirant Corporation
1155 Perimeter Center West
Atlanta, GA 30338

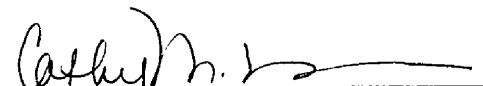
Robert Scheffel Wright, Esquire
Diane K. Kiesling, Esquire
John T. LaVia, III, Esquire
Landers & Parsons
310 West College Avenue
Tallahassee, FL 32301

Scott A. Goorland, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-2400

D. Bruce May, Esquire
Karen Walker, Esquire
Holland & Knight, LLP
Post Office Drawer 810
Tallahassee, FL 32302

Timothy R. Eves/Joseph A. Regnery
Calpine Eastern Corporation
2701 N. Rocky Point Dr., Suite 1200
Tampa, FL 33607

R. L. Wolfinger
South Pond Energy Park, LLC
c/o Constellation Power Source
111 Market Place, Suite 500
Baltimore, MD 21202-7110


Cathy M. Sellers