

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination of Need for Proposed Electrical Power Plant in Manatee County by Florida Power & Light Company.

Docket No. 020263-EI Filed June 7, 2002.

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CPV GULF COAST LTD.'S REQUEST FOR LEAVE TO AMEND PETITION TO INTERVENE AND AMENDED PETITION TO INTERVENE INTO NEED DETERMINATION PROCEEDING

Pursuant to Sections 120.569 and 120.57(1), Florida Statutes ("F.S."), Sections 403.519 and 366.07, F.S., and Rules 25-22.039, 25-22.082, 28-106.201, 28-106.204, and 28-106.205, Florida Administrative Code ("F.A.C."), CPV Gulfcoast, Ltd., through its undersigned counsel, files this Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene into Need Determination Proceeding, and in support, states the following:

- 1. The name, address, and telephone number of CPV Gulfcoast, Ltd. are:

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- 2. The names, address, and telephone number of CPV Gulfcoast's attorneys in this matter are:

Jon C. Moyle, Jr. Cathy M. Sellers Moyle Flanigan Katz Raymond & Sheehan, P.A. 118 North Gadsden Street Tallahassee, FL 32301 (850)681-3828

AUS ___ CAF ___ All filings, correspondence, and other documents and communications in this matter should be CMP ___ COM 5 CTR ___ directed to Mr. Moyle and Ms. Sellers at this address and telephone number. ECR ___ GCL ___ OPC I MMS ___ SEC I OTH Henry

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3. Florida Power & Light Company (“FPL”) is an investor-owned electric utility subject to the Florida Public Service Commission’s jurisdiction. FPL provides retail electric service to customers in a service area that encompasses much of southern Florida, including Manatee County.

4. CPV Gulfcoast, Ltd. is an Exempt Wholesale Generator engaged in the business of providing bulk wholesale electric power to retail-serving utilities in Florida, such as FPL. CPV Gulfcoast is in the process of developing an approximately 250 megawatt (“MW”) combined cycle natural gas-fired electric power generating facility, with potential to expand, in Manatee County, Florida. CPV Gulfcoast’s 250 MW facility is projected to be fully operational by 2004.

5. The affected agency in this proceeding is the Florida Public Service Commission (“Commission”), 2450 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.

I. Request for Leave to Amend Petition to Intervene

6. Pursuant to Sections 120.569 and 120.57, F.S. and Rule 28-106.204, F.A.C., CPV Gulfcoast moves the Commission to grant CPV Gulfcoast leave to amend its Petition to Intervene filed in this proceeding on April 23, 2002. By way of background and in support of this motion, CPV Gulfcoast states the following:

7. In August 2001, FPL distributed a Request for Proposals (RFP) and solicited bids to construct approximately 1750 MW of new generating capacity, which, according to FPL’s RFP, would be constructed at its Martin, Ft. Meyers, and Midway electric generating facilities. The RFP did not identify the Manatee facility as a site for the addition of new generating capacity.

8. In January 2002, FPL rejected all of the bids and announced that it would itself construct approximately 1900 MW of new generating capacity, approximately 1100 MW of which would be constructed at the Manatee facility, even though RFP's failed to identify the Manatee facility for new capacity addition.

9. On March 22, 2002, FPL filed a Petition for Determination of Need for an Electrical Power Plant, seeking a determination of need for approximately 1100 MW at its Manatee facility.

10. On April 23, 2002, CPV Gulfcoast filed a Petition to Intervene, seeking to intervene into the need determination proceeding for FPL's Manatee facility. In connection with the Petition to Intervene, on April 26, 2002, CPV Gulfcoast also filed a Petition for Waiver of Rule 25-22.082(2), F.A.C., requesting the Commission to waive the Bid Rule's requirement that it have been a bidder in FPL's August 2001 RFP process in order to intervene and participate as a party in FPL's need determination proceeding. In its petitions, CPV Gulfcoast explained that it had not submitted a response to FPL's August 2001 RFP because the RFP had not identified the Manatee facility as a site for capacity addition. CPV Gulfcoast further stated that it would have submitted a response had the RFP accurately represented that FPL intended to construct capacity at the Manatee facility. CPV Gulfcoast argued that to deny CPV Gulfcoast's Petition to Intervene because it was not a bidder in the RFP process would reward FPL's violation of the Bid Rule and would unfairly deprive CPV Gulfcoast of the opportunity to participate in the need determination, through no fault of its own. CPV Gulfcoast's Petition to Intervene and Petition for Waiver of Rule 25-22.082(8), F.A.C., currently are pending.

11. On April 22, 2002, in response to strenuous objections by parties to the August 2001 bid process regarding FPL's numerous violations of the Bid Rule, FPL moved to abate its

need determination proceeding, pending its conduct of a Supplemental RFP process. The Commission granted FPL's motion for abeyance and subsequently granted FPL an emergency waiver of the timeframes established in Rule 25-22.080(2), F.A.C., to enable FPL to conduct the Supplemental RFP.

12. On April 26, 2002, FPL released its Supplemental RFP to prospective bidders. The deadline for submitting responses was May 24, 2002. The Supplemental RFP identified its Manatee facility as a site at which capacity would be added. CPV Gulfcoast timely submitted a response to the Supplemental RFP.

13. Rule 25-22.082(1)(c), F.A.C., defines "participant" as "a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a utility's RFP." Per this definition, CPV Gulfcoast is now a "participant" within the meaning of the Bid Rule by virtue of having submitted a bid in response to FPL's Supplemental RFP. As such, CPV Gulfcoast is now entitled under the Bid Rule to participate as a party in FPL's need determination proceeding, which is being supplemented by additional generation capacity alternatives garnered through the Supplemental RFP process.¹

14. At the time CPV Gulfcoast filed its Petition to Intervene, FPL had not yet issued its Supplemental RFP, and, because of the failure of the August 2001 RFP to identify the Manatee facility as a site at which generation capacity would be expanded, CPV Gulfcoast had not submitted a proposal in response to the August 2001 RFP. Thus, CPV Gulfcoast's Petition to Intervene was based on facts and circumstances that have since changed or been rendered moot

¹ For this reason, CPV Gulfcoast no longer needs to obtain a waiver of Rule 25-22.082(8), F.A.C., in order to participate in FPL's need determination proceeding. In a separate filing concurrent with this Request for Leave to Amend and Amended Petition to Intervene, CPV Gulfcoast is withdrawing its Petition for Waiver of Rule 25-22.082(8), F.A.C.

by FPL's issuance of its Supplemental RFP and CPV Gulfcoast's submittal of a proposal in response to the Supplemental RFP.

15. For these reasons, CPV Gulfcoast requests the Commission to grant leave to amend its Petition to Intervene that was filed on April 23, 2002. Provided leave to amend is granted, CPV Gulfcoast's Amended Petition to Intervene is set forth below.

II. Amended Petition to Intervene of CPV Gulfcoast, Ltd.

16. Pursuant to Sections 403.519, 120.569, and 120.57(1), F.S., and Rules 25-22.082, 28-106.201, and 28-106.205, F.A.C., CPV Gulfcoast requests the Commission to grant it permission to intervene in and participate as a full party to this proceeding. In support of this Petition, CPV Gulfcoast states the following:

A. CPV Gulfcoast Has Standing to Intervene and Participate as a Party to this Proceeding

17. CPV Gulfcoast has standing to intervene and participate as a party to this proceeding because its substantial interests will be affected by this proceeding. To demonstrate its substantial interests will be affected by this proceeding, CPV Gulfcoast must allege and demonstrate that as a result of this proceeding: (1) it will suffer, or in is imminent danger of suffering, an injury in fact of sufficient immediacy to entitle it to participate in this proceeding, and (2) that its alleged injury falls within the zone of interest this proceeding is designed to protect. Agrico Chem. Co. v. Dept. of Env't'l Regulation, 406 So. 2d. 478 (Fla. 2d DCA 1981).

18. As discussed above, pursuant to Section 403.519, F.S., and Rule 22-25.082, F.A.C. (the "Bid Rule"), FPL issued an RFP in August 2001 and a Supplemental RFP in April 2002. In its Supplemental RFP, FPL has solicited generation capacity alternatives for

approximately 1900 MW of additional generation capacity, approximately 1100 MW of which is to be added at FPL's Manatee facility.

19. CPV Gulfcoast timely submitted a response to the Supplemental RFP that proposes to meet a portion of FPL's generation capacity needs set forth in the Supplemental RFP, and therefore is a "participant" as that term is defined in Rule 25-22.082(1)(c), F.A.C.

20. As a participant in FPL's Supplemental RFP proposing to provide a portion of the projected 1,900 MW of generation capacity needed, CPV Gulfcoast's substantial interests will be affected by this need determination proceeding. Pursuant to Section 403.519, F.S., this need determination proceeding will in part address whether FPL's capacity addition option chosen through the RFP process is the most cost-effective capacity alternative available. CPV Gulfcoast has a substantial interest in being selected as an alternative generation capacity supplier, and this interest will be immediately and directly affected by this need determination proceeding.²

Village Park Mobile Home Owner's Association v. Dept. of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Dept. of Env't'l Regulation, 406 So. 2d. 478 (Fla. 2d DCA 1981).

2 In FPL's Response to the Florida Action Coalition Team's ("FACT") Petition to Intervene, FPL opposed FACT's petition in part on the ground that the need determination is "suspended." CPV Gulfcoast anticipates, notwithstanding FPL's unequivocal statement in its response to CPV Gulfcoast's initial Petition to Intervene that if CPV Gulfcoast were to submit a bid in the Supplemental RFP process, "FPL has no objection to CPV Gulfcoast being granted intervenor status in this docket," (Florida Power & Light Company's Response to Petition to Intervene of CPV Gulfcoast, Ltd., p. 2), that FPL nonetheless will similarly attempt to argue that CPV Gulfcoast's Amended Petition to Intervene should not be granted because the need determination is "suspended." CPV Gulfcoast submits that FPL's view of the effect of the "suspension" granted by the Prehearing Officer is broader than that actually granted in the Interim Order on Procedure (Order No. PSC-02-0571-PCO-EI). In that Order, the Prehearing Officer correctly characterized FPL's request in its Emergency Motion for Abeyance as asking that the procedural schedule established pursuant to the timeframes in Rule 25-22.080 be suspended. In granting the motion, the Prehearing Officer did exactly as FPL requested – he suspended the procedural schedule applicable to the proceedings and granted FPL's request concerning outstanding discovery. However, he did not, as FPL has argued, make the proceeding temporarily "go away." This is apparent by his statement in the Order that "[i]n the interim, all other outstanding motions and procedural issues that arise will be addressed in due course, but expeditiously." Order, p. 2 (emphasis added). On these grounds and due to the fact that CPV Gulfcoast clearly has standing as a person whose substantial interests will be affected and through being made a party by rule, its request to intervene and participate as a party to this proceeding should be granted expeditiously.

21. Further, CPV Gulfcoast's substantial interests clearly fall within the zone of interest of this proceeding. A key purpose of this need determination proceeding is to ensure that the most cost-effective alternative is selected for the proposed capacity addition to the Manatee facility. To that end, the Bid Rule requires investor-owned utilities, prior to filing determination of need petitions, to solicit, obtain, and consider competitive proposals for supply-side alternatives to the utility's next planned generating capacity additions. Rule 25-22.082(1)(b), F.A.C. As a potential electric generation capacity supplier responding to FPL's Supplemental RFP, CPV Gulfcoast's interest is to provide the most cost-effective alternative for the additional generation capacity at the Manatee facility. Rule 25-22.081(4), F.A.C., requires utilities, as part of their determination of need petitions, to address the major available generating alternatives that were examined and evaluated in arriving at the decision to pursue the proposed generating unit. Pursuant to this provision, CPV Gulfcoast's interest as a respondent to FPL's Supplemental RFP will be addressed in this determination of need proceeding. Accordingly, CPV Gulfcoast's interest clearly falls within the scope and zone of interest of this proceeding, entitling it to intervene and participate as a party.

22. Moreover, CPV Gulfcoast has standing by virtue of the Bid Rule to intervene and participate in this proceeding. As discussed above, as a respondent to FPL's Supplemental RFP, CPV Gulfcoast is a "participant" under Rule 25-22.082(1)(c), F.A.C., which contemplates that participants in utilities' RFPs are entitled to intervene and participate as parties in the "determination of need" proceedings associated with the RFP process. Also, Rule 25-22.082(8) implicitly provides that participants in the RFP process are to be able to contest the outcome of the RFP selection process in a need determination. Accordingly, CPV Gulfcoast is made a party

to this proceeding by Bid Rule provisions. Section 120.52(12)(b), F.S.; Sections 120.569(1), 120.57(1), F.S.; Rule 25-22.082(1)(c), F.A.C.; Rule 25-22.082(8), F.A.C.

23. Also as previously discussed (in footnote 2 herein), in FPL's Response to CPV Gulfcoast's previously-submitted Petition to Intervene, FPL opposed CPV Gulfcoast's intervention because CPV Gulfcoast had not been a bidder in the August 2001 RFP process. However, FPL recognized that CPV Gulfcoast would have an opportunity to submit a bid in the Supplemental RFP process, and stated: **"If CPVG submits such a bid, then FPL will have no objection to CPVG's being granted intervenor status in this docket."** Florida Power & Light Company's Response to Petition to Intervene of CPV Gulfcoast, Ltd., filed April 30, 2002, p. 2 (emphasis supplied). It should be noted that FPL's statement regarding its lack of objection to CPV Gulfcoast's intervention if it were a bidder was unequivocal.

24. In sum, CPV Gulfcoast has standing, both as a person whose substantial interests will be affected by this proceeding, and through provisions of the Commission's Bid Rule, to intervene and participate as a party to this proceeding.

B. Disputed Issues of Material Fact

25. The disputed issues of material fact that are anticipated to be addressed in this proceeding include, but are not limited to:

- a. Has FPL specified appropriate criteria to be applied in its selection of power supply generation alternatives?
- b. Has FPL applied the appropriate criteria fairly and accurately in making its decision concerning provision of the additional generation capacity at the Manatee facility?
- c. If FPL selects either of its self-build options, did it include all costs attributable to its self-build options in making its selection?

d. If FPL selects either of its self-build options, does its proposal to construct, own, and operate the additional capacity cost-effectively manage the risks borne by ratepayers, relative to alternative resources that include more purchased power, including power purchased from CPV Gulfcoast?

e. Did FPL comply with the terms of its Supplemental RFP?

f. What action should the Commission take to ensure that FPL contracts with the providers of the most cost-effective options available to FPL's ratepayers?

g. Assuming CPV Gulfcoast's intervention is granted, CPV Gulfcoast reserves the right to adopt any other issues identified by any other parties to this proceeding, and effect discovery, present testimony and cross-examination, and otherwise participate in this need determination proceeding with respect to those issues.

C. Statement of Ultimate Facts Alleged

26. Ultimate facts alleged by CPV Gulfcoast include, but are not limited to:

a. When incorporated into a power purchase contract, CPV Gulfcoast's proposal would reduce the risk profile of FPL's portfolio of generation resources, thereby providing a benefit to FPL ratepayers. This benefit should be recognized in the evaluation of the alternatives submitted for FPL's proposed additional Manatee generation capacity. Any attempt by FPL to penalize CPV Gulfcoast's proposal in the scoring of alternatives, by ascribing to CPV Gulfcoast a negative impact on FPL's cost of capital, is unwarranted and prejudicial to CPV Gulfcoast, and, ultimately, to FPL's ratepayers.

b. The proposals that CPV Gulfcoast submitted to FPL in response to its Supplemental RFP constitute the most cost-effective means of a providing a portion of the

projected additional capacity need at the Manatee facility, to ensure reliability and adequate electricity at reasonable cost to FPL's retail ratepayers.

D. Statutes and Rules Entitling CPV Gulfcoast to Relief

27. The following statutes and rules entitle CPV Gulfcoast to intervene and participate as a party to this proceeding, and to the relief requested below:


- a. Sections 120.569 and 120.57(1), F. S.
- b. Section 403.519, F.S.
- c. Section 366.07, F.S.
- d. Rule 25-22.082, F.A.C.
- e. Rules 28-106.201, 28-106.204, and 28-106.205, F.A.C.

WHEREFORE, CPV Gulfcoast, Ltd. respectfully requests the Commission to:

- (1) Grant CPV Gulfcoast permission to intervene and participate as a full party to this proceeding;
- (2) Enter an Order precluding FPL from making material changes to its Supplemental RFP after the submittal of bids, so that bidders will not again be frustrated and unfairly precluded from meaningfully responding to the RFP by virtue of FPL's creation of a "moving target," as was the case with FPL's August 2001 RFP;
- (3) Enter an Order that precludes FPL from changing cost data after it reviews the proposals submitted by the bidders in response to its Supplemental RFP, or, alternatively, if FPL is permitted to change its cost data, that precludes FPL from recovering any amounts greater than those represented by its self-build option, should FPL again declare itself the winner of the RFP process; and

(4) Take any and all other actions necessary to ensure that ratepayers' best interests are served.

Respectfully submitted this 7th day of June, 2002.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of CPV Gulcoast, Ltd.'s Request for Leave to Amend Petition to Intervene and Amended Petition to Intervene into Need Determination Proceeding has been furnished by U.S. Mail on this 7th day of June, 2002 to those listed below without an asterisk, and by hand delivery to those marked with an asterisk:

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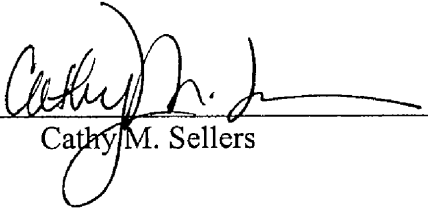
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