

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company.

DOCKET NO. 020262-EI

In re: Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company.

DOCKET NO. 020263-EI  
ORDER NO. PSC-02-0992-PCO-EI  
ISSUED: July 23, 2002

ORDER CONSOLIDATING NEED DETERMINATION PROCEEDINGS, APPROVING  
PROPOSAL FOR HANDLING CONFIDENTIAL BID INFORMATION  
AND ESTABLISHING PROCEDURE

Pursuant to Section 403.519, Florida Statutes, and Rule 25-22.081, Florida Administrative Code, Florida Power & Light Company (FPL) has petitioned the Commission to determine the need for two proposed electrical power plants, one in Martin County and one in Manatee County. FPL has asked that the dockets be consolidated for hearing purposes, to achieve administrative efficiency in light of the short procedural time-frames in need determination cases. Also, several intervenors, including Calpine Energy Services, L.P., (Calpine) have filed a Joint Motion for Order Governing the Handling of Confidential Bid Information,<sup>1</sup> information they believe they will need to effectively test the evidentiary bases of FPL's need determination petitions.

Jurisdiction over this matter is vested in the Commission through Section 403.519, Florida Statutes. The dockets are currently scheduled for an administrative hearing October 2-4, 2002. This Order is issued pursuant to the authority granted by

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<sup>1</sup> The joint motion was filed on May 16, 2002, by Calpine Energy Services, L.P., Reliant Energy Power Generation, Inc., and Mirant Corporation. Reliant and Mirant have since voluntarily withdrawn from these dockets, but Calpine remains a full party to the proceedings and asserts that approval of the Joint Motion is still necessary for it to prepare its case.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the proceedings. The Order will address the motion to consolidate, the motion for order governing the handling of confidential bid information, and the hearing procedures to be followed in the case, including general procedures for handling other confidential information.

#### Consolidation

FPL asserts in its motion that consolidation of these need determination proceedings is appropriate, because the two cases involve the same factual and legal issues, are supported by common studies and testimony, and will promote the efficient handling of the dockets.

Rule 28-106.108, Florida Administrative Code, provides that an agency may consolidate proceedings before it when those proceedings involve similar issues of fact or law, when consolidation would promote a just, speedy, and inexpensive resolution, and when consolidation would not unduly prejudice the rights of any party. Those conditions are met in these need determination dockets. FPL's Motion to Consolidate Need Determination Proceedings is granted.

#### Handling Confidential Bid Information

In selecting projects to meet its electric capacity needs in 2005 and 2006, FPL issued a Request for Proposals (RFP) from alternative capacity providers in August, 2001, and a Supplemental Request for Proposals in April, 2002. FPL evaluated the proposals it received as part of its selection process to assist it in choosing the most cost-effective projects to meet its capacity needs. The responses FPL received contained suppliers' confidential business information, including price, cost and contractual information. FPL evaluated the RFP responses, and its own self-build proposals that also contained confidential information, by use of a computer evaluation model called EGEAS. The EGEAS evaluation results provide the basis from which FPL made its decision to propose to build its own

generating capacity at its Martin and Manatee sites. FPL used other criteria in its decision, but the EGEAS evaluations were essential to FPL's cost-effectiveness analyses.

FPL and some of the RFP participants who have intervened in the case recognize the importance of the EGEAS evaluations to an understanding of FPL's need determination petitions. FPL has successfully negotiated with EPRI, the owner of the software, to provide limited licenses to the intervenors to use the EGEAS software in the case, so that the intervenors can test FPL's use of it in its decision to build its Martin and Manatee units.

Without access to the underlying bidding information, however, the intervenors will be unable to recreate the EGEAS model evaluations and adequately test FPL's cost-effectiveness analyses. Thus, the intervenors and FPL crafted a non-disclosure agreement under which FPL would provide the confidential bidding information to designated representatives of the intervenors, for use in testing its EGEAS evaluations in these need determination proceedings only.

This process was approved in Order No. PSC-02-0611-PCO-EI, issued May 3, 2002, but it was only approved for the confidential information submitted by the participants in FPL's first RFP process who had intervened in the need determination dockets. Order No. PSC-02-0611-PCO-EI protected the confidential information of non-party bidders from disclosure, because at the time the Order was issued FPL had just issued a supplemental RFP in the case. The parties had agreed that the non-party information relating to the first RFP was no longer particularly relevant to the proceedings, or necessary for the adequate preparation of their cases. The Order specifically stated, however, that if FPL amended its need determination petitions after the conclusion of its supplemental RFP, it was very likely that all bidders' confidential information submitted in response to the supplemental RFP would be subject to disclosure in discovery in these dockets.

We have reached the point in these proceedings where the intervenors have need for the confidential bidding information contained in all the responses to FPL's supplemental RFP. Without that information, the intervenors will be unable to

duplicate the EGEAS evaluations and test the validity of FPL's cost-effectiveness analyses. Balancing the harm of limited disclosure of the confidential information for the purpose of discovery in these dockets against the parties' need for the information, it appears that the parties' need outweighs the harm. All participants to FPL's supplemental RFP were forewarned of this event -- by FPL in its supplemental RFP, and by this Commission in Order No. PSC-02-0611-PCO-EI, and there is no other reasonable means to test FPL's EGEAS evaluations without the information in question.

For these reasons, as requested in the May 16, 2002, Joint Motion for Order Governing the Handling of Confidential Bid Information, the Confidentiality Agreement approved by Order No. PSC-02-0611-PCO will govern the handling of all confidential bid information used in FPL's evaluation of proposals submitted in response to FPL's April 26, 2002, supplemental RFP.

#### Establishing Procedures

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and all administrative rules applicable to this Commission.

#### Discovery

When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes. All parties shall respond to discovery requests within 20 days of service of the discovery request.

The hearing in this docket is set for October 2-4, 2002. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by September 18, 2002. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification. The discovery requests will

be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Pursuant to Rule 28-106.206, Florida Administrative Code, unless subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 150; requests for production of documents, including all subparts, shall be limited to 150; and requests for admissions, including all subparts, shall be limited to 50.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 366.093, Florida Statutes.

#### Diskette Filings

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

#### Prefiled Testimony and Exhibits

Each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an

opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of Records and Reporting, by the close of business, which is 5:00 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

#### Prehearing Statement

All parties in this docket shall file a prehearing statement. Staff will also file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 5:00 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

- (a) The name of all known witnesses that may be called by the party, and the subject matter of their testimony;
- (b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;
- (c) a statement of basic position in the proceeding;

- (d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (e) a statement of each question of law the party considers at issue and the party's position on each such issue;
- (f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;
- (g) a statement of issues that have been stipulated to by the parties;
- (h) a statement of all pending motions or other matters the party seeks action upon;
- (i) a statement identifying the parties' pending requests or claims for confidentiality; and
- (j) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held at 9:30 a.m., Wednesday, September 23, 2002, in Room 152 of the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

Prehearing Procedure: Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was

unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

#### Document Identification

To facilitate the management of documents in this docket, exhibits will be numbered at the Prehearing Conference. Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL  
J. Doe Exhibit No. \_\_\_\_\_  
Cost Studies for Minutes of Use by Time of Day



Controlling Dates

The following dates have been established to govern the key activities of this case.

- |  |                    |
|--|--------------------|
| 1) Preliminary list of issues                    | July 23, 2002      |
| 2) Petitioners' direct testimony and exhibits    | July 16, 2002      |
| 3) Intervenors' direct testimony and exhibits    | August 20, 2002    |
| 4) Staff's direct testimony and exhibits, if any | September 3, 2002  |
| 5) Rebuttal testimony and exhibits               | September 11, 2002 |
| 6) Prehearing Statements                         | September 11, 2002 |
| 7) Prehearing Conference                         | September 23, 2002 |
| 8) Hearing                                       | October 2-4, 2002  |
| 9) Briefs  | October 14, 2002   |

Use of Confidential Information At Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party

the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

Post-Hearing Procedure

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

Based upon the foregoing, it is

ORDER NO. PSC-02-0992-PCO-EI  
DOCKET NOS. 020262-EI and 020263-EI  
PAGE 11

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that the Motion to Consolidate Need Determination Proceedings is granted. Docket Nos. 020262-EI and 020263-EI shall be consolidated for hearing purposes. It is further

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that the May 16, 2002, Joint Motion for Order Governing the Handling of Confidential Bid Information is granted. Discovery of the confidential bid information provided to FPL in response to its Supplemental Request for Proposals shall be handled as outlined in the Confidentiality Agreement approved in Order No. PSC-02-0611-PCO. It is further

ORDERED that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 23rd day of July, 2002.



J. TERRY DEASON  
Commissioner and Prehearing Officer

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice

ORDER NO. PSC-02-0992-PCO-EI  
DOCKET NOS. 020262-EI and 020263-EI  
PAGE 12

should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.