

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No.: 020262-EI

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

Docket No.: 020263-EI Filed: September 4, 2002

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RESPONSE OF CPV CANA, LTD. TO FPL'S MOTION TO REMOVE INTERVENOR CPV CANA AS A PARTY AND DISMISS AS MOOT CPV CANA'S ALLEGATIONS

CPV Cana, Ltd., pursuant to Section 403.519, Florida Statutes (F.S.) and Rule 28-106.204, Florida Administrative Code (F.A.C.), files this Response to FPL's Motion to remove CPV Cana as a party to this proceeding and to dismiss its allegations as moot. For the reasons discussed herein, the Florida Public Service Commission ("Commission") should deny FPL's Motion.

1. Pursuant to Order No. PSC-02-0556-PCO-EI ("Order"), CPV Cana was granted permission by the Commission to intervene and participate as a party to this proceeding. CPV Cana was granted party status because it demonstrated its substantial interests would be affected in FPL's need determination proceeding for the proposed Martin County electric generation facility. Order, pp. 1-2. CPV Cana's substantial interests will be affected in this proceeding as set forth in its Petition to Intervene, filed in this proceeding on April 12, 2002 (attached hereto as Exhibit 1) and those interests, as

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detailed below, have not substantially changed since CPV Cana intervened and was granted party status.

2. CPV Cana filed a proposal in response to FPL's initial Request for Proposals (RFP) in August 2001. CPV Cana's proposal was rejected by FPL, and CPV Cana subsequently intervened in FPL's need determination proceeding pursuant to Rule 25-22.082, F.A.C. In its Petition to Intervene, among other things, CPV Cana raised numerous issues concerning the fairness and integrity of FPL's RFP process -- including whether FPL failed to include all costs attributable to its self-build option, and whether FPL fairly and accurately applied appropriate criteria in considering proposed alternative power supply generation alternatives and in selecting the self-build option. As discussed herein, these issues remain viable in this need determination proceeding, and CPV Cana, as a bidder in response to FPL's original RFP, is substantially interested in the determination of these issues.

3. The issues that CPV Cana and others raised concerning the fairness, accuracy, and integrity of FPL's RFP process prompted FPL to request permission from the Commission to abate its need determination proceeding and to conduct what it called a "supplemental RFP," for the purpose of correcting numerous, likely-fatal deficiencies in its August 2001 RFP.<sup>1</sup> Presumably, FPL sought to conduct this "supplemental" RFP in order to avoid having to withdraw its petitions for need determination, which would have lengthened the need determination process. The Commission granted FPL's request, and FPL conducted its "supplemental" RFP process in late April. CPV Gulfcoast, an

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<sup>1</sup> An egregious, but not sole, example of FPL's failure to follow the basic provisions of Rule 25-22.082, F.A.C., was FPL's election to meet a portion of its projected generation capacity need through self-building additional generation capacity at its Manatee facility, which was not even mentioned in the August 2001 RFP as a facility at which FPL contemplated expanding its generation capacity.

affiliate of CPV Cana, submitted a bid to provide a portion of the supply generation capacity at the Manatee facility, and CPV Cana did not resubmit its bid package as part of the supplemental RFP process.

4. FPL argues that CPV Cana no longer has substantial interests at issue in this process because it did not resubmit its bid in response to FPL's *supplemental* RFP. Apparently, FPL's considers its supplemental RFP to have *completely superseded and supplanted* its original RFP process. CPV Cana posits that the Commission should not view FPL's supplemental RFP as having this effect, but instead should treat FPL's supplemental RFP as precisely what it is – a supplement to FPL's original RFP process, which continues to survive and the fairness and integrity of which are at issue in this need determination proceeding.<sup>2</sup>

5. The term “supplement” is defined by Webster's New Ninth Collegiate Dictionary as “something that *completes or makes an addition*”; “a part *added to or issued as a continuation of...*” (emphasis added). FPL self-styled its April 2002 RFP as “supplemental,” but now argues that its August 2001 RFP process -- which served as the basis for its need determination petitions that initiated this ongoing proceeding -- and the issues raised by that RFP, are moot. CPV Cana submits that FPL cannot, and should not, have it both ways: either its April 2002 RFP truly was “supplemental” -- in which case the RFP *added to or continued* the August 2001 RFP process -- or its April 2002 RFP was not a “supplemental” RFP but instead was an *entirely new* RFP – in which case FPL should have been required to withdraw (and, indeed, should now be required to withdraw) its need determination petitions and refile them *after* it conducted the April

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<sup>2</sup> Indeed, portions of the prefiled testimony in this case discuss both the initial RFP and the supplemental RFP, and make clear that the two RFPs are distinct and that the initial RFP remains extant and relevant in this proceeding.

2002 RFP. FPL obtained permission to conduct, and conducted, a *supplemental* RFP. In doing so, FPL *supplemented* its August 2001 RFP capacity provision determinations with its April 2002 supplemental RFP capacity supply. Thus, the Commission should treat FPL's *supplemental* RFP as precisely that – an RFP that *adds to*, rather than supersedes or supplants, the determinations made by FPL in its August 2001 RFP process, and that FPL relied on in filing its need determination petitions in this proceeding.

6. In addition, treating FPL's supplemental RFP as having superseded and rendered moot its August 2001 RFP for purposes of this proceeding would reward FPL's failure in the first place to follow the Bid Rule and Rule 25-22.080, and would be unfair to other parties to this proceeding, like CPV Cana. But for these parties' vigilance in calling the Commission's attention to FPL's numerous and substantial violations of the Bid Rule, such violations may have gone unaddressed until much later in the proceeding and may well have resulted in FPL being forced to withdraw its need determination petitions and refile them. Granting FPL's request to remove parties that previously have been granted intervenor status in this proceeding would, in essence, allow FPL to flout the Bid Rule, *then* seek and obtain (with the acquiescence of CPV Cana and other parties in this proceeding) relief in the form of Commission permission to conduct a *supplemental* RFP (which, parenthetically, is not expressly authorized by the Commission's rules), *then* characterize its *supplemental* RFP as having superseded its original RFP (even though it was not required to initiate a new proceeding) in order to effectuate the removal of parties who previously were granted permission to participate, in part to challenge whether FPL's self-driven, self-controlled RFP constituted a fair, accurate, and unbiased means of determining the most cost-effective power supply

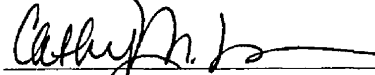
generation alternative. The Commission should not ratify or facilitate FPL's conduct or course of action in this regard.

7. To that point, in its Petition to Intervene and throughout this proceeding, CPV Cana, as a bidder, has raised issues concerning the basic fairness, accuracy, and integrity of the *entire* RFP process which is the basis for this need determination proceeding. These issues are germane and, indeed, integral, to the core purpose for this need determination proceeding – whether FPL's self-selected self-build option is the most cost-effective alternative available for meeting the projected generation capacity needs. For these reasons and for the reasons set forth in CPV Cana's Petition to Intervene, CPV Cana's substantial interests are, and continue to be, affected by this proceeding, and CPV Cana is entitled to remain and participate in this proceeding as a party. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

8. Moreover, the Commission's Order granting party status to CPV Cana is the law of the case in this proceeding. As discussed herein, the facts establishing that CPV Cana's substantial interests are affected in this proceeding have not changed. See Estate of Paulk v. Lindamood, 529 So. 2d 1150 (Fla. 1<sup>st</sup> DCA 1988) (whenever issues are established between the same parties in the same case, that resolution continues to be the law of the case so long as the facts upon which the decision was predicated continue to be the facts of the case). FPL's own failures to conduct its August 2001 RFP properly and in accordance with the Commission's rules does not alter the Commission's previous decision regarding CPV Cana's party status or the facts underlying that decision.

9. For these reasons, CPV Cana respectfully requests this Commission to deny FPL's Motion to have CPV Cana removed as a party from this proceeding and to have its allegations declared moot.

Respectfully submitted this 4<sup>th</sup> day of September, 2002.



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail to those listed below without an asterisk, and by e-mail and hand delivery to those marked with an asterisk on this 4<sup>th</sup> day of September, 2002:

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By: \_\_\_\_\_

  
Jon C. Moyle, Jr.

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 April 12, 2002.

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PETITION TO INTERVENE OF CPV CANA, LTD.

Pursuant to Chapter 120, Florida Statutes, Sections 403.519 and 366.07, Florida Statutes ("F.S."), and Rules 25-22.039, 25-22.082, 28-106.201, and 28-106.205, Florida Administrative Code (F.A.C.), CPV Cana, Ltd., ("CPV Cana"), through its undersigned counsel, files this Petition to Intervene and in support, states the following:

1. The name, address, and telephone number of CPV Cana, Ltd., are:  
CPV Cana, Ltd.  
35 Braintree Hill Office Park  
Suite 107  
Braintree, MA 01284  
(781) 848-0253
2. The name, address, and telephone number of CPV Cana's attorneys in this case 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

All filings, correspondence, and other documents and communications should be directed to Mr. Moyle and Ms. Sellers at this address and phone number.

3. Florida Power & Light Company ("FPL") is an investor-owned electric utility subject to the Commission's jurisdiction. FPL serves retail customers in a service area that encompasses much of southern Florida and Florida's east coast.

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4. CPV Cana, 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 Cana is in the process of developing an approximately 250 MW combined cycle natural gas-fired electric power generating facility in St. Lucie County, Florida, with future expansion projected to 500 MW. CPV Cana's 250 MW facility is projected to be fully operational by 2004.

5. The affected agency is the Florida Public Service Commission ("Commission"), 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.

CPV Cana's Substantial Interests Are Affected by this Proceeding

6. To have standing to intervene and participate as a party in this proceeding, CPV Cana must demonstrate that its substantial interests will be affected by this proceeding. To do so, CPV Cana must allege and show that as a result of this proceeding: (1) it will suffer, or is in eminent 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 Chemical Co. v. Department of Environmental Regulation, 406 So. 2d. 478 (Fla. 2d DCA 1981). As discussed herein, CPV Cana's substantial interests will be affected by this proceeding, so it is entitled to intervene and participate as a party.

a. Pursuant to Section 403.519, F.S., and Rule 22-25.082, F.A.C. (the "Bid Rule"), in August 2001, FPL issued a Request for Proposals ("RFP"), in which it solicited competitive alternatives for to the next planned generating units in its generation expansion plan. The RFP solicited generation alternatives for 1,750 MW of additional generation capacity to be added at FPL's Martin, Ft. Meyers, and Midway sites. In its RFP, FPL stated that its cost to construct the capacity identified in the RFP would be

approximately \$429 per installed KW on average. The in-service date for this additional capacity was projected as 2005 – 2006.

b. CPV Cana obtained a copy of the RFP, attended the bidders' conference, and timely submitted a response to the RFP that proposed to meet approximately 245 MW of FPL's generation capacity needs identified and set forth in the RFP.

c. In January 2002, FPL informed CPV Cana that rather than accepting its proposal, FPL would itself construct 1,900 MW of additional generating capacity. This is more than the amount of capacity for which proposals were solicited, and also involves the addition of capacity at FPL's Manatee facility, which was not covered in the RFP. As previously noted, FPL's RFP stated that its cost to construct the additional capacity in the RFP would be approximately \$429 per installed KW on average. However, after rejecting all responses to the RFP, including CPV Cana's, FPL subsequently estimated that its self-build option would average approximately \$579 per installed KW. This represents a thirty-five percent (35%) increase in the projected cost of the additional capacity, and this cost potentially is subject to further increase over time. CPV Cana's response to the RFP would have provided a more cost-effective alternative than the cost of FPL plans to self-build the additional capacity.

d. On March 22, 2002, FPL filed a Petition for Determination of Need for an Electrical Power Plant, seeking an affirmative determination of need for the additional generation capacity at FPL's Manatee electrical generating facility, in connection with its expressed intent to construct additional combined cycle generating capacity at that facility.

e. As a participant in FPL's RFP process for providing a portion of the projected 1,750 MW generation capacity need, CPV Cana's substantial interests will be affected by this determination of need proceeding. Pursuant to Section 403.519, F.S., this proceeding will address the issue of whether FPL's proposed self-build option for the capacity addition is the most cost-effective alternative available. FPL's position is that its self-build option for the Manatee capacity is more cost-effective than the alternatives submitted by the respondents, including CPV Cana, to its RFP. However, CPV Cana's proposal was designed to compete with FPL's self-build option and with proposals submitted by other entities responding to the RFP.<sup>1</sup> To that end, CPV Cana's substantial interest in being selected as an alternative generation capacity supplier would be immediately and directly injured by a Commission determination that FPL's self-build option is the most cost-effective alternative for the generation capacity addition to the Manatee plant. Village Park Mobile Home Association v. Department of Business Regulation, 506 So. 2d. 426, 433 (Fla. 1<sup>st</sup> DCA 1987).

f. Further, CPV Cana's asserted interests fall within the zone of interest of this proceeding. A key purpose of this determination of need proceeding is to ensure selection of the most cost-effective capacity addition alternatives for FPL's proposed additions to its 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

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<sup>1</sup> CPV Cana has filed a Petition to Intervene in Docket No. 020175-EI, In re: Complaint of Reliant Energy Power Generation, Inc. Against Florida Power & Light Company, which was filed to address FPL's failure to comply with the Commission's Bid Rule, Rule 25-22.082, F.A.C. Without concurring with FPL's position on CPV Cana's standing in the complaint proceeding, CPV Cana notes that in FPL's response to CPV Cana's Petition to Intervene, FPL concedes that the issues raised by CPV Cana would be cognizable in the need determination proceeding addressing the capacity for which CPV Cana submitted a proposal in response to FPL's RFP. That need determination is being addressed in this proceeding.

capacity additions. Rule 25-22.082(1)(b), F.A.C. As a potential electric generation capacity supplier responding to FPL's RFP, CPV Cana'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 Cana's interest as a respondent to FPL's RFP will be addressed in this determination of need proceeding. Accordingly, CPV Cana's interest clearly falls within the scope and zone of interest of this proceeding, thus entitling CPV Cana to intervene and participate as a party.

g. Moreover, CPV Cana has standing by rule to intervene and participate in this proceeding. As a respondent to FPL's RFP, CPV Cana is a "participant" as that term is defined in the Bid Rule, Section 25-22.082(1)(c), F.A.C. The Bid Rule contemplates that participants in utilities' RFPs are entitled to intervene and participate as parties in the "determination of need" proceedings associated with the RFPs. In fact, the Bid Rule expressly excludes potential generation capacity suppliers who were not "participants" from participating in the determination of need process, the clear implication being that potential suppliers who are participants in the Bid Rule process are entitled to participate in the determination of need proceeding. Accordingly, CPV Cana is made a party to this proceeding by provision of rule. Section 120.52(12)(b), F.S., Section 120.569(1), F.S.

In sum, CPV Cana has standing, both as a person whose substantial interests will be affected and by Commission rule, intervene and participate as a full party to this proceeding.

Disputed Issues of Material Fact

7. The disputed issues of material fact that are anticipated to be addressed in this determination of need proceeding include, but are not limited to:
- a. In its RFP, did FPL specify inappropriate or incorrect criteria to be applied in its consideration of power supply generation alternatives?
  - b. Did FPL apply the appropriate criteria fairly and accurately in making its decision concerning provision of the additional generation capacity at the Manatee facility?
  - c. Did FPL fail to include all costs attributable to its self-build option in preparing its RFP?
  - d. Did FPL's failure to include all costs attributable to its self-build option in preparing its RFP prejudice the comparison of alternatives, including CPV Cana's proposal, in favor of FPL's self-build option?
  - e. Does FPL's proposal to construct, own, and operate 1900 MW of additional capacity serve to cost-effectively manage the risks borne by ratepayers, relative to alternative resources that include more purchased power, including power purchased from CPV Cana?
  - f. Did FPL fail to comply with the terms of its RFP, and if so, what action should the PSC take?
  - g. 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?
  - h. Assuming CPV Cana's requested intervention is granted, CPV Cana reserves the right to adopt any other issues raised by any other parties to this proceeding,

and to take discovery, present testimony and cross-examination on, and otherwise participate with respect to those issues.

Statement of Ultimate Facts Alleged

8. Ultimate facts alleged by CPV Cana include, but are not limited to:

a. FPL applied inappropriate criteria, thus prejudicing CPV Cana's proposal for the Manatee facility generation capacity.

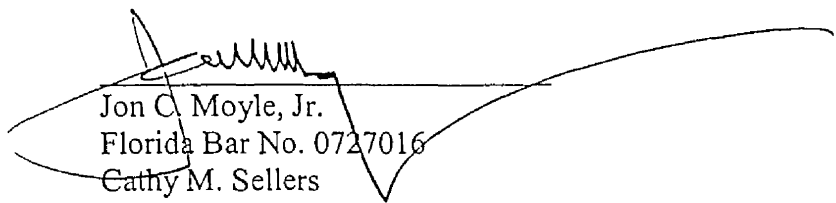
b. FPL did not comply with the terms of its RFP in the Bid Rule process under Rule 25-22.082, F.A.C.

c. FPL has not demonstrated or proven its entitlement to an affirmative determination of need for the Manatee facility.

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

e. The proposals that CPV Cana submitted to FPL in its RFP constitute the most cost-effective means of 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.

WHEREFORE, CPV Cana, Ltd. requests the Commission to (1) enter an Order granting permission to CPV Cana to intervene and participate as a full party to this proceeding; (2) dismiss or deny FPL's petition for a determination of need for its Manatee facility; (3) require FPL to issue a revised RFP pursuant to directives designed to ensure reasonable criteria and a fair evaluation; and (4) take any and all other actions necessary to ensure that ratepayers' best interests are served.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition to Intervene of CPV Cana, Ltd. has been furnished by U.S. Mail on this 12<sup>th</sup> day of April, 2002, to those listed below without an asterisk, and by hand delivery to those marked with an asterisk:

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