

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

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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 12, 2002

RESPONSE OF CPV GULF COAST, LTD. AND CPV CANA, LTD. TO FLORIDA POWER & LIGHT COMPANY'S MOTION IN LIMINE TO EXCLUDE TWO WITNESSES

CPV Gulfcoast, Ltd. and CPV Cana, Ltd. (hereafter "CPV"), pursuant to Section 120.569 and 120.57(1), Florida Statutes ("F.S."), and Rule 28-106.204, Florida Administrative Code ("F.A.C."), file this Response to Florida Power & Light Company's ("FPL") Motion in Limine to Exclude Two Witnesses, and in support, state the following:

1. As FPL acknowledges in its Motion in Limine, in its Responses to Interrogatories served to FPL on August 15, CPV notified FPL that it expects to call Mr. Mike Green and Mr. Michael Caldwell as fact witnesses at the October 4 hearing in this proceeding. In its Responses, CPV identified the subject matter about which each witness is expected to testify.

2. As attested in the Affidavit of Mike Green, attached as Exhibit 1, Mr. Green was a former employee of Duke Energy. After being approached about offering

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testimony, he indicated that he would need to check with his former employer about providing testimony. It was not until recently that he heard back from his former employer, at a point in time beyond the deadline for filing prefiled testimony. Moreover, Mr. Green attests that he is not within the control of CPV and will be testifying pursuant to subpoena. Given these circumstances, it is not reasonable to exclude Mr. Green's testimony on the grounds that prefiled testimony was not filed.

3. Mr. Michael Caldwell, the other witness whose testimony FPL seeks to exclude, also is not employed by CPV. In fact, he is a former employee of FPL with pertinent information on and direct knowledge of some of the issues being addressed at the October hearing in this proceeding. As with Mr. Green, due to CPV's lack of control over Mr. Caldwell's availability and schedule, CPV has obtained a subpoena to compel Mr. Caldwell's testimony at the hearing.

4. The Prehearing Officer's Scheduling states that "failure to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements *may* bar admission of such exhibits and testimony." Order No. PSC-02-0992-PCO-EI (Scheduling Order, July 23, 2002, emphasis added). Such language typically is included in scheduling orders precisely to provide the Commission flexibility to address situations like that present in this case, in which witnesses' presence and/or testimony were unable to have been obtained at the time prefiled testimony was due.

5. FPL argues that it needs Mr. Green's and Mr. Caldwell's prefiled testimony in order to adequately to rebut allegations that may be presented by these witnesses at hearing. However, FPL can readily determine these witnesses'

positions and the allegations they likely will advance at hearing by deposing them.¹ Given these circumstances, it is not unreasonable to allow deposition transcripts for these witnesses to function in the place of prefiled testimony. See *In re: Application for Amendment of Certificates in Lake County in JJ's Mobile Homes, Inc.*, PSC-95-0208-PCO-WS. Moreover, a letter authored by Mr. Caldwell that accuses FPL of failing to award a contract to an outside bidder because of a policy of thwarting competition has been prefiled in this case as an exhibit to the testimony of Doug Egan. FPL can hardly claim prejudice or surprise as to the subject matter about which Mr. Caldwell will testify, if called.

6. Contrary to FPL's assertions, CPV has not "chosen" to ignore the Prehearing Officer's² direction. As previously explained, circumstances beyond CPV's direction and control prevented CPV from obtaining testimony from Mr. Green and Mr. Caldwell for prefilings in this proceeding. The relief FPL requests in its Motion in Limine is unduly harsh and punitive given the circumstances. FPL can avoid the "unfair advantage" about which it complains by deposing CPV's witnesses, something it apparently intends to do.

7. Section 120.57(1)(b), F.S., which establishes the administrative procedures applicable to this proceeding expressly recognizes that all parties to a formal administrative proceeding "...*shall* have an opportunity to respond, present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal

¹ FPL states in footnote 1 of its Motion that deposition transcripts are unavailable because neither witness has been deposed by any party. CPV suggests that FPL is free to depose Mr. Green and Mr. Caldwell at a mutually acceptable time. In fact, FPL has filed a Notice of Deposition of Mr. Caldwell and has indicated its intent to depose Mr. Green.

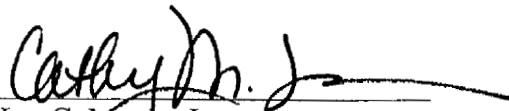
² The Scheduling Order was issued in this proceeding by the Prehearing Officer, not the Commission, as FPL appears to state in its Motion.

evidence” Section 120.57(1)(b), F.S. (emphasis added). FPL’s efforts to exclude CPV’s witnesses are contrary to this statutory provision establishing parties’ rights to participate in formal administrative hearings. Moreover, tellingly, FPL does not (and cannot) cite any Uniform Rules, Commission rules, or other authority *requiring* exclusion of witnesses for which prefiled testimony was not submitted. The Uniform Rules and Commission rules do not contain such provisions.

8. For the reasons discussed herein, excluding CPV’s witnesses’ testimony would be extremely and unduly prejudicial to CPV’s effective participation as a party in this proceeding. Moreover, excluding CPV’s witnesses’ testimony would be unduly harsh and punitive, given the circumstances that prevented CPV from adhering to the Scheduling Order’s prefiled testimony deadlines. Finally, neither FPL nor any other party will be inconvenienced, or treated unfairly or prejudicially by allowing such testimony, since each party has the opportunity to depose (and in fact, FPL apparently is deposing) CPV’s listed witnesses in advance of the hearing.

WHEREFORE, CPV Gulfcoast, Ltd. and CPV Cana, Ltd. respectfully request the Prehearing Officer to deny FPL’s Motion in Limine to exclude the testimony of CPV’s witnesses Green and Caldwell.

Respectfully submitted this 12th day of September, 2002.



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CERTIFICATE OF SERVICE

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 12th day of September, 2002:

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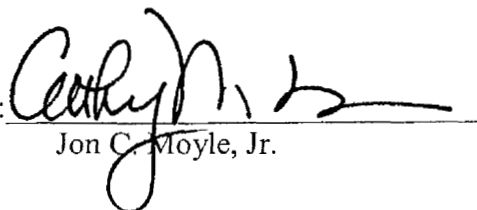
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By: 
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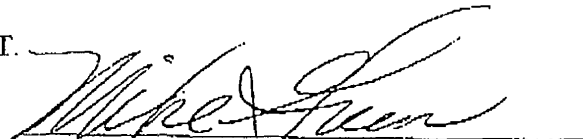
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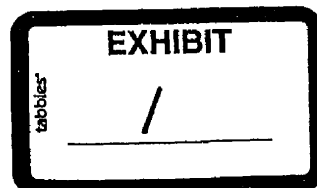
STATE OF FLORIDA
COUNTY OF SEMINOLE

BEFORE ME, this day personally appeared Mike Green, who being duly sworn, deposes and says that the following information is true and correct, and within his personal knowledge:

1. I understand that I have been listed as a witness by CVP Gulfcoast, Ltd. and CPV Cana in PSC Docket No. 020262 and 020263, Petitions for Need filed by Florida Power and Light Company.
2. I was approached by counsel for CPV Gulfcoast, Ltd. And CPV Cana, Ltd. on or about August 1, 2002 in which my testimony was sought for the above-referenced proceedings.
3. I indicated that I had certain obligations to my former employer, Duke Energy, and would have to check with them to see whether I might be able to provide testimony in this proceeding, something which I did.
4. It was only within the last week that I received a response to my inquiry from my former employer.
5. Given the above, and the fact that I am not under the control of CPV Cana, Ltd. or CPV Gulfcoast, Ltd., I did not file testimony in these proceedings as I understand is called for in the Prehearing Order.
6. I have recently been served a subpoena for trial in this proceeding and plan to testify pursuant to that subpoena if not released from its effect.

FURTHER AFFIANT SAYETH NAUGHT.


Mike Green



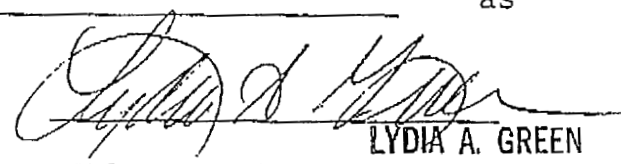
STATE OF FLORIDA

COUNTY OF SEMINOLE

Sworn to and subscribed before me by Mike Green
this 11th day of Sept., 2002.

he/she is personally known to me, OR
_____ has produced _____ as
identification.

(NOTARY STAMP)


LYDIA A. GREEN

NOTARY PUBLIC

Print _____ Name _____

