State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: SEPTEMBER 19, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (BALLINGER, HEWITT)
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (FUTRELL)
OFFICE OF THE GENERAL COUNSEL (BROWN)

RE: DOCKET NO. 020398-EI - PROPOSED REVISIONS TO RULE NUMBER 25-22.082, SELECTION OF GENERATING CAPACITY

AGENDA: 09/30/02 - SPECIAL AGENDA - POTENTIAL RULE PROPOSAL - INTERESTED PERSONS MAY PARTICIPATE

RULE STATUS: PROPOSAL SHOULD NOT BE DEFERRED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020398EI.RCM

FPSC-COMMISSION CLERK
FILED SEP 19 AM 9:52

CASE BACKGROUND

Prior to the construction of a power plant with a steam cycle greater than 75 MW, a utility must receive certification from the Governor and Cabinet pursuant to Sections 403.501-.518, Florida Statutes, also referred to as the Power Plant Siting Act (PPSA). Section 403.519, Florida Statutes, requires utilities to file a petition for Determination of Need with the Florida Public Service Commission (Commission). An affirmative determination of need is a prerequisite to certification pursuant to the PPSA. With the advent of federal legislation permitting non-utility generators to enter the bulk power supply market, utilities now have more alternatives to select from in order to meet their obligation to provide electrical service to the public.

In 1992 the Commission considered the Joint Petition to Determine Need filed by Cypress Energy Partners, L.P. and Florida Power & Light Company (FPL). During the proceedings, the

Commissioners expressed frustration that the limited selection process used by FPL to select Cypress did not facilitate the Commission's statutory responsibility under Section 403.519, Florida Statutes to determine whether the proposed plant was the most cost-effective generating alternative. The Commission ultimately denied the joint petition and directed staff to develop a rule instructing utilities in the procedures by which they select projects to provide capacity and energy. Rule 25-22.082, Florida Administrative Code (F.A.C.), was originally adopted by the Commission in January 1994, requiring investor-owned electric utilities to issue Requests for Proposals (RFPs) prior to filing a petition for Determination of Need. In adopting the rule, the Commission recognized that the RFP process is a tool to be used to measure the cost-effectiveness of a capacity selection.

Since it was adopted in 1994, Rule 25-22.082, F.A.C., has been utilized once by Gulf Power Company and once by Florida Power & Light Company. Florida Power Corporation has issued RFPs twice since the adoption of Rule 25-22.082, F.A.C.. During this same time frame, large amounts of generating capacity were planned and constructed without the requirement of certification under the PPSA, and thus without the benefit of comparative cost information obtained from an RFP process. In December 1999, Tampa Electric Company (TECO) petitioned for cost recovery of approximately $680 million to repower the Gannon Station, resulting in a net increase of capacity of approximately 380 MW. Since this was the first time a utility had sought cost recovery of a repowering project, in January of 2000 the staff recommended that TECO be required to issue an RFP prior to the repowering of its Gannon plants. The Commission denied staff's recommendation, but directed staff to also look at the idea of revising the current capacity selection rule to require RFPs for repowering projects.

In May of 2000, Governor Bush created the Florida Energy 2020 Study Commission (Study Commission). The Study Commission was charged with the responsibility of proposing an energy plan and strategy for Florida. Therefore, staff decided to put any proposed changes to Rule 25-22.082, F.A.C., on hold until the Study Commission's work was complete. On December 11, 2001, the Study Commission issued its Final Report. Neither the 2001 nor the 2002 Legislature took any action on the recommendations of the Study Commission. Therefore, staff's draft rule changes are based on existing statutory responsibilities and authority.

On February 7, 2002, the Commission held a workshop to discuss a staff prepared "strawman" version of suggested changes to Rule 25-22.082, F.A.C. The primary concern discussed by participants at the February 7, 2002, workshop regarding the "strawman" proposal was directed towards the Commission's statutory authority for proposing rule changes.

On March 15, 2002, post-workshop comments were filed collectively by the four large investor-owned electric utilities and by Florida PACE. Based upon the discussions at the workshop and the comments filed, the staff filed a recommendation on May 9, 2002, to schedule a rule development workshop. Pursuant to Order No. PSC-02-0273-PCO-EQ, Issued May 28, 2002, the Commission initiated the rule development process and scheduled a public workshop for July 19, 2002.

At the July 19, 2002 workshop, the IOUs presented a Stipulation in lieu of continuing with the rule development process. At the conclusion of the July 19, 2002 workshop, the Commission directed the staff to facilitate negotiations among the parties to see if a consensus Stipulation could be developed and file a recommendation to be considered at the September 3, 2002 Agenda Conference. Staff has been in weekly contact with the parties to obtain status reports of the negotiations and has attended a number of negotiation sessions. On July 26, 2002, Florida PACE filed its responses to the Stipulation offered at the July 19 workshop. On August 2, 2002, a proposed Stipulation was filed by the Florida PACE, the Florida Action Coalition Team (FACT) and the Florida Industrial Power Users Group (FIPUG). On August 15, 2002 Florida PACE, FACT, and FIPUG amended its proposed Stipulation. On August 19, 2002, the IOUs offered an amended Stipulation at a meeting with the parties. In a letter to Chairman Jaber dated August 20, 2002, Florida PACE requested an extension of time for negotiations until September 20, 2002. On August 21, 2002, the IOUs filed another amended Stipulation with the Commission staff. Chairman Jaber extended the filing schedule for the docket on August 22, 2002, and directed the parties to file, by September 6, 2002, either a mutually agreed upon stipulation, or a letter indicating no stipulation was reached. On September 6, 2002, PACE and the IOUs responded separately that no mutual stipulation was reached. The IOUs included in its correspondence a Stipulation dated August 20, 2002, and signed by representatives of each of the four companies. This document is identical to the amended Stipulation provided to Commission staff on August 21, 2002.

Since the Commission has held a rule development workshop to discuss the rule revision, the next step is to accept the proposed IOU Stipulation, go forward with a formal rule proposal, or close the docket.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission approve the proposed Stipulation offered by the Investor-Owned Electric Utilities dated August 20, 2002?

PRIMARY RECOMMENDATION: No, not in its current form. However, if the IOUs agree to expand the business practices listed in the proposed Stipulation to include application of the existing rule to capacity additions of 150 megawatts or greater, then the proposed Stipulation (Attachment A) would be consistent with the Commission's directive at the January 18, 2000 Agenda Conference.

ALTERNATE RECOMMENDATION: Yes. The Stipulation should be approved and the docket closed.

PRIMARY STAFF ANALYSIS: The IOU's proposed Stipulation would adopt a set of business practices in addition to the requirements of the existing rule, in exchange for closing the docket. The proposed Stipulation would:

(1) Require a meeting of interested persons to explain and review any proposed RFP before it is issued;

(2) Include a listing of the evaluation criteria to be used by the IOU in considering proposals, including a proviso that potential bidders retain creativity and discretion to respond to the RFP in ways not envisioned by the IOU;

(3) Invite Commission staff to observe milestone events of the RFP process; and,

(4) In instances of repowerings not covered by the existing Rule 25-22.082, F.A.C., the IOUs will each make an evaluation presentation at Internal Affairs to the Commissioners and

staff concerning the decision to undertake the repowering before the decision is implemented.

The current rule requires the IOU to provide a description of the price and non-price attributes, and the evaluation methodology to be used in each RFP. Staff can discuss and meet with utility personnel on any issue under current regulatory processes. While attendance at milestone meetings could help staff focus its discovery efforts, it would not necessarily make the RFP process more transparent. The current Ten-Year Site Plan process is one forum in which the Commission and the staff may question a utility's decision to repower a unit. The proposed business practice requiring a repowering presentation at Internal Affairs could improve the timing of information relayed to the Commission. However, a utility is currently free to request to make such a presentation at any time. Utilities are not currently required to hold a pre-RFP meeting with potential respondents. Therefore, the above listed business practices generally supplement the requirements of the existing rule and Commission authority. However, the August 20, 2002 proposed Stipulation does not address the Commission's direction to staff at the January 18, 2000, Agenda Conference to consider expansion of the existing rule to include repowering projects.

At the January 18, 2000 Agenda Conference, the Commission directed staff to look at the idea of revising the current capacity selection rule to require RFPs for repowering projects. As discussed in the background, major capacity additions have been added to the utilities' systems without the use of an RFP process. Therefore, the use of an RFP process to encompass repowerings and other major non-PPSA projects may improve the efficiency of the regulatory process. Staff suggests that the threshold be any capacity addition over 150 MW which should capture a significant level of capacity additions while not burdening the utility to issue RFPs for small capacity additions. Staff would recommend acceptance of the IOU Stipulation if it were to voluntarily apply the existing rule, as a business practice, to capacity additions of 150 MW or greater and close the instant docket.

As discussed in the case background, the original impetus for the suggested changes to Rule 25-22.082, F.A.C., came in January, 2000 when the Commission directed staff to look into applying the RFP rule to repowering projects. Since that time, a lot of change has occurred in the industry. Today, there may be few remaining plant sites that can economically accommodate a repowering to

natural gas. In addition, the three large investor-owned utilities have been adding generating capacity in order to satisfy a Commission approved Stipulation to maintain a minimum 20% reserve margin. The addition of new, efficient generating units may further reduce the economic benefits of retrofitting existing power plants. Therefore, if the proposed IOU Stipulation is rejected, but the Commission were to close the rulemaking docket on its own motion, the Commission would still review the prudence of management decisions and subsequent expenditures by investor-owned utilities in future need determination and cost-recovery proceedings. The Commission would continue to carry out its statutory responsibilities. IOUs would continue to issue RFPs for generating units subject to the PPSA pursuant to the existing rule. The utility would have the burden to justify its decision to construct non-PPSA units before recovering costs of such units, which could be as contentious as the Cypress proceeding discussed in the case background.

ALTERNATE STAFF ANALYSIS: Alternate staff notes a robust debate advanced by the parties at workshops and in comments as to whether the Commission has the requisite statutory authority to support the draft rule amendment of Rule 25-22.082, F.A.C., as that amendment is set forth in Issue 2. Alternate staff ventures no assessment as to Commission authority vis-à-vis the rule, but simply wishes to note for the benefit of the Commission that if the stipulation tendered by the IOU community allays the Commission's concerns regarding the RFP process under the existing rule, the Commission may legally accept the stipulation and terminate the rule amendment process without incurring any risk of litigation.

Moreover, alternate staff agrees with the primary recommendation that were the referenced rule amendments not proposed and subsequently adopted, staff would still be able to carry out its statutory responsibilities under the Power Plant Siting Act.

ISSUE 2: Should the Commission propose to amend Rule 25-22.082, Florida Administrative Code?

RECOMMENDATION: If the Commission wishes to expand the scope of the existing rule to encompass repowering projects and major capacity additions not covered by the existing rule, then the Commission should propose the revisions to Rule 25-22.082, F.A.C., Selection of Generating Capacity, contained in Attachment C.

STAFF ANALYSIS: In 1994, when the current rule was adopted, the Commission recognized that the RFP process is a tool to be used to measure the cost-effectiveness of a utility's proposed capacity selection. The information obtained through the RFP process improves the efficiency of the regulatory process by making information available on a more timely basis as opposed to utilizing a potentially contentious discovery process during the relatively short time frame of a need determination proceeding. The current rule only applies to projects requiring certification under the Power Plant Siting Act.

The suggested rule revisions are an effort to respond to the Commission's direction at the January 18, 2000, Agenda Conference to consider expansion of the RFP process to repowering projects and to improve the efficiency of the regulatory process. The suggested rule revisions would cause the rule to apply to "major capacity additions" not currently applicable under the rule, and ensure the IOU fairly considers all alternatives that could be cost-effective to ratepayers. Major capacity additions have been added without the benefit of an RFP process to measure the cost-effectiveness of the capacity addition. In recent need determination proceedings, issues regarding the value of the utility's existing site and common facilities, and the use of an equity penalty for purchase power agreements have been explored. The suggested rule revisions would require the utility to address these issues in the RFP process, rather than at a subsequent need determination or cost-recovery proceeding. Staff believes that addressing these issues in the RFP process would result in more efficient regulation to insure that a utility's choice of generation additions are in the best interest of its ratepayers.

Under current regulatory practice, the Commission will review the capacity selection made by the IOU at a need determination, rate case or cost-recovery proceeding. The utility will have to answer such questions as: "What other generation options did you explore?"; "Is the proposed generating unit the most cost-effective

alternative?"; "When did you make this decision?"; "Was this addition part of your plan contained in the Ten-Year Site Plan?" In essence, the suggested rule revisions affect the timing of gathering this type of information. The Commission will still use the same regulatory procedures it has used for decades, only the information would be gathered by the utility before the decision is made to construct a generating unit. The Commission would rely, in part, on this information when reviewing the public utility's decisions under current regulatory procedures. The IOU would still select the generating alternative, and justify that decision before the Commission.

Florida PACE's letter dated September 6, 2002 is contained in Attachment B. In that letter, Florida PACE states that it has not wavered from the three principles identified in its July 30, 2002 letter. The three principles are as follows:

(1) RFP terms, conditions, and evaluation criteria, including the weightings assigned to those criteria, should be vetted, and any disputes regarding the RFP or evaluation criteria should be resolved, at the outset of the process;

(2) all bidders, including the IOU, should submit binding bids at the same time and in the same manner; and

(3) the evaluation of the bids should be performed by the Commission or another neutral and independent third party.

PACE's September 6, 2002 letter also states that "PACE is not wedded to any particular language or formula". Therefore, it appears that Florida PACE is willing to go forward with the rulemaking process and present the above mentioned principles at a subsequent rule hearing.

Staff's suggested revisions to the rule, and how they compare to the existing rule, are discussed below.

Transfer of Rule to 25-6.0351, F.A.C.

The suggested rule revisions would make the rule applicable to generating additions not subject to the PPSA. Therefore, it may be appropriate to move the rule to those regulations relating to electric utility general management requirements. The current location is reserved for provisions relating to permitting proceedings.

Scope and Intent

This language has been added to make clear the Commission's intent that the rule provides the Commission information to evaluate, utilizing current regulatory procedures, a public utility's decision regarding the addition of generating capacity. This section also summarizes a public utility's statutory responsibility to provide an adequate, reliable, cost-effective supply of power to its customers, and clarifies that an RFP process is an appropriate tool by which the utility can meet its statutory obligations. (Section (1) of Attachment C)

Definitions

The term "Public Utility" has been added to make clear the rule is applicable to electric utilities subject to the Commission's ratemaking authority, as defined in Section 366.02(1), Florida Statutes. This was also done to bring consistency to the rule as the existing rule refers to "investor-owned utility" and "utility". (Section (2)(a) of Attachment C)

As discussed in the background, major capacity additions have been added to the utilities' systems without the use of an RFP process to measure the cost-effectiveness of the utility's capacity selection. In response to the Commission's direction at the January 18, 2000 Agenda Conference, the term "Major Capacity Addition" has been added to encompass repowerings and other major non-PPSA projects. Staff is suggesting that the threshold be 150 MW. Such a level should capture significant capacity additions, while not overwhelming the utility with having to issue an RFP for a small percentage change in overall generating capacity. A utility could still construct a relatively small capacity addition in order to maintain reliability without the lead time associated with an RFP process. (See section (2)(b) of Attachment C)

The term "Participant" has been modified to include Exempt Wholesale Generators (EWG), Qualifying Facilities (QFs), marketers, affiliates of public utilities, and providers of distributed generation. This was done to address changes in the electric generation industry. (Section (2)(d) of Attachment C)

Contents of an RFP

A provision requiring the disclosure of the costs of land and common facilities at the site of the proposed major capacity

addition has been added to the rule. This information would give the Commission additional data to evaluate the cost-effectiveness of the proposed major capacity addition. In addition, it also provides a measure of the reasonableness of the compensation the utility may require for the use of its facilities. (Section (5)(a)(10) of Attachment C)

A provision requiring historical and projected demand and energy data, similar to the information found in Ten-Year Site Plans, has been added to provide more complete information on the utility's need for capacity. (Section (5)(b) of Attachment C)

Unlike the existing rule which requires Commission approval following completion of the RFP process, the utility would include a date of submission for Commission approval where applicable. This is consistent with the suggested revisions that the RFP process would apply to certain non-PPSA projects which do not require approval by the Commission prior to construction. (Section (5)(c) of Attachment C)

Section (5)(f) was added to the existing rule in order to provide a clear benchmark by which a proposal will be evaluated. A utility should provide its weighting and ranking criteria in the RFP and should not vary from these criteria absent a showing of good cause. According to major financial rating agencies, purchase power agreements are debt-like in nature. The theory is that a utility would have to sell additional equity in order to maintain existing debt/equity ratios if a purchase power agreement were signed. As such, these rating agencies attempt to account for the financial impact of purchase power agreements when calculating a bond rating for the utility. Since adoption of the existing rule, some IOUs have added a cost to purchase power proposals commonly referred to as an equity penalty.

In past need determination proceedings, the equity penalty has not been a critical factor in determining whether an IOU's proposal was the most cost-effective alternative. The Commission has recognized the use of an equity penalty, but has not ruled that an equity penalty was appropriate on a generic basis. The suggested rule revisions would not allow the IOU to include an equity penalty which could screen potentially cost-effective proposals, absent a showing of good cause. As with the provision on requiring evaluation of proposals to be sited on utility property, the IOU still has the discretion to assign an equity penalty if it feels it

can justify such a decision before the Commission. (See Section (5)(f) of Attachment C)

A requirement to limit the application fee to $10,000 has been added. This limit is based on recent experience with RFP offerings and is intended to be low enough so as not to discourage participation. This section also recognizes that any application fee should be cost-based. (See Section (5)(g) of Attachment C)

Many times, the decision to construct a generating unit is based on factors in addition to meeting a utility's load growth. Such strategic issues such as fuel diversity, location, and operating characteristics must be considered. In order for the respondent to better understand the utility's need for power, and the operational characteristics of the system, the RFP should include information of system-specific conditions. (See Section (5)(h) of Attachment C)

Scope of utility evaluation

Section (6) states "The public utility shall allow participants to formulate creative responses to the RFP. The public utility shall evaluate all proposals." This is intended to require the utility to consider all proposals which may be cost-effective to ratepayers, such as proposals that would locate generation on utility-owned property or creative fuel procurement arrangements often referred to as "tolling agreements". (See Section (6) Attachment C)

Pre-bid meeting

This section was added based on experience in past RFPs and would require a meeting within two weeks of the issuance of the RFP. (See Section (8) Attachment C)

Due date for responses

This section was added based on experience in past RFPs and would require a minimum of sixty days between the issuance of the RFP and the due date for responses. (See Section (9) Attachment C)

Comments by RFP participants

This section was added to make explicit an existing procedural option available to potential RFP participants. A party may file

comments with the Commission regarding any aspect of the RFP. (See Section (10) Attachment C)

Utility evaluation of proposals

This section was added to explicitly require the public utility to fairly evaluate the proposals received against the utility's proposed major capacity addition. (See Section (11) Attachment C)

RFP complaint

This section was added to make explicit an existing procedural option available to potential RFP participants. The Commission, or a participant may challenge the results of the RFP through existing regulatory processes. A party may file a complaint with the Commission regarding any aspect of the RFP. (See Section (13) Attachment C)

Timing of Cost Recovery Review

This section was added to recognize existing regulatory processes by which the utility would petition for Commission review of the utility's capacity addition. The public utility would have the discretion to petition the Commission for cost recovery either through the capacity and fuel recovery clauses or through a base rate proceeding for non-PPSA capacity additions. A utility would still be required to petition for a determination of need if the facility is subject to the PPSA. As a general principal, the Commission may, on its own motion, review the results of an RFP process. This approach would allow the Commission to retain its current regulatory oversight and cost-recovery approval processes. (See Section (14) of Attachment C)

Exemptions from the RFP Process

Bilateral contracts, less than three years in duration, between a public utility and another provider would not require an RFP. A term of three years is more suitable for identifying short-term opportunities. Utilities would not be able to purchase from an affiliate unless the affiliate participated in an RFP process. The specific exemption is in addition to the general waiver provision contained in the existing rule. (See Sections (15) and (16) of Attachment C)

Summary

As discussed in the case background, the original impetus for the suggested changes to Rule 25-22.082, F.A.C., came in January, 2000 when the Commission directed staff to look into applying the RFP rule to repowering projects. The proposed rule revision is an attempt to follow this directive and increase the efficiency of the regulatory process to insure that a utility's choice of generation additions are in the best interest of its ratepayers. If no rule revision were proposed and the docket closed, the Commission would continue to carry out its statutory responsibilities in future need determination and cost-recovery proceedings. IOUs would continue to issue RFPs for generating units subject to the PPSA pursuant to the existing rule. Non-PPSA capacity additions would not require an RFP prior to the decision to pursue such an addition. The utility, however, would have the burden to justify its decision to the Commission in a future proceeding, which could be as contentious as the Cypress proceeding discussed in the case background.

Jurisdictional Analysis

Since the staff first submitted draft revisions to Rule 25-24.082, the investor-owned utilities have challenged the legal validity of each version of the revisions. They strongly contend that the revisions are an invalid exercise of delegated legislative authority, as described in the so-called "flush-left" paragraph found at the end of section 120.52(8) of Florida's Administrative Procedures Act. The same language is found in section 120.536(1), Florida Statutes. It states:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than

> implementing or interpreting the specific powers and duties conferred by the same statute.

The utilities contend that none of the statutes that the draft revisions propose to implement gives the Commission the specific power necessary to enact them. The utilities argue that:

> As is evident by the plain language of the statutes, none gives the Commission the specific power to require issuance of an RFP for capacity additions, to restrict a utility's discretion concerning how it makes capacity additions, to take any action it chooses concerning comments on a utility's RFP, or to take any action it chooses on the results of a utility's RFP. The draft amendments do all of these things. June 28, 2002, Comments of Investor-Owned Utilities, p.6.

The other participants in this rule development argue otherwise. They strongly contend that the draft revisions are well authorized by the Commission's enabling statutes, which grant the Commission broad authority to regulate an investor-owned electric utility's rates, operations and service, including the cost-effective acquisition of generating capacity, and to maintain an efficient and reliable energy grid. See, June 28, 2002, Comments of Calpine Eastern Corporation, p.p.s. 7-11.

The last paragraph of section 120.52(8)has been the subject of considerable litigation since it was adopted in 1999, and misunderstandings remain about the statute's requirements. The statute is difficult to apply to particular circumstances, and the cases acknowledge that the rulemaking standards must be applied on a case-by-case basis. Nonetheless, our analysis of the proposed rule amendments, the statutes they implement and the relevant case law leads us to believe that these revisions to Rule 25-24.082 properly implement and interpret several specific powers and duties fundamental to the Commission's regulatory role, and long found in the Commission's enabling statutes.

The cases pay particular attention to the scope of authority granted in each statute and the intent and language of the rule purporting to implement that statutory authority.[1] In Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 600(1st DCA 2000), the First District Court of Appeal first interpreted the 1999 amendment to the specific authority language in section 120.52(8). For purposes of our discussion here, the Court established two principles that other cases have followed in interpreting the statute. The Court stated that the language of the flush-left paragraph was clear on its face and needed no extrinsic aids to discern its meaning. The word "specific" meant just what it said.

> The ordinary meaning of the term 'specific' is 'limiting or limited; specifying or specified; precise, definite, [or] explicit.' See Webster's New World College Dictionary 1287 (3rd Ed.1996). 'Specific is used as an adjective in the 1999 version of section 120.52(8) to modify the phrase 'powers and duties.' In the context of the entire sentence, it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority." Save the Manatee at 599.

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[1]See, for example, Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 600(1st DCA 2000)(statute permitting grandfathering of existing developments under recent water quality standards limited grandfathering to those developments that did not have adverse environmental impacts. The water management district could not lawfully adopt a rule under section 120.52(8) that ignored the environmental limitation); State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So.2d 696 (Fla. 1st DCA 2001) *rehearing, clarification, rehearing en banc denied* 798 So.2d 847 (Fla. 1st DCA 2001), *rev. denied* 2002 Fla. Lexis 1619 (Fla. 2002) (Statute authorizing board of trustees to regulate submerged lands and docks and moorings expressly stated that the board's regulations must not interfere with commerce or the transitory operation of vessels through navigable waters); Florida Board of Medicine v. Florida Academy of Cosmetic Surgery,808 So. 2d. 243 (Fla. 1st DCA 2002)(authorizing statute clearly gave board "broad, unqualified, rulemaking authority" to establish standards of practice and care for office surgery.)

The Court also stated, however, that the term "specific" was not used in the statute as a synonym for "detailed."

> The new law gives the agencies authority to 'implement or interpret' specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term 'interpret' suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all of the details were contained in the statute itself.
>
> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Id. at 599.

To answer the question of whether a particular rule comports with the rulemaking standards of the Administrative Procedures Act, one must the review the scope and breadth of the statutory authority the rule purports to implement or interpret. The cases indicate that the statutes can provide a broad grant of authority, without delineating every possible exercise of that authority the agency may implement through rules.[2] Where the specific grant of authority is broad, the cases preserve the agency's discretion in its implementation.

The draft revisions list sections 350.127(2), 366.05(1), 366.06(2), 366.07 and 366.051, Florida Statutes, as authority to adopt the rule, and sections 403.519, 366.04(1),(2) and (5), 366.06(2), 366.07 and 366.051 as the laws implemented by the rule. These statutes are contained in Attachment D to this recommendation

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[2]See, for example, the Commission's case, Osheyack v. Garcia, 814 So.2d 440 (Fla. 2001)(written decision without published opinion affirming Commission's denial of petition for rulemaking.) In that case, the Florida Supreme Court held that the Commission's enabling statute, section 364.19, which provides that the Commission may make reasonable rules regarding contracts between telephone companies and their patrons, provided broad statutory authority under the 1999 rulemaking standards to support the Commission's rule permitting disconnection of local telephone service for failure to pay long distance bills.

for the Commission's convenience. They demonstrate that the Legislature has granted the Commission broad authority over Florida's investor-owned electric utilities to ensure that the rates they charge their customers for the provision of electric service are fair, just and reasonable, to ensure that the service they provide is reliable and efficient, and to ensure that the electric generating capacity necessary to provide the service -- a major component of the rates charged -- is reasonable and efficient and acquired in a cost-effective manner. The RFP process, which these draft rule revisions propose to apply to all major capacity additions, gives the Commission an effective tool and an objective standard by which to review and measure the cost-effectiveness of capacity additions. As subsection (1) of the draft rule revisions shows, the intent of the rule is to implement the Commission's existing statutory authority, not to engineer the development of competition in Florida's energy markets. The draft rule revisions identify several statutory provisions that grant the Commission ample and broad authority to support the rule, preserving to the Commission the discretion to implement its authority as it deems necessary.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: If the Commission does not close the docket on its own motion or accept the Stipulation by the IOUs, this docket should remain open. A hearing date should be established to provide all interested persons the opportunity to present evidence on the merits of the proposed rule.

STAFF ANALYSIS: In the event the Commission decides to propose amendments to Rule 25-22.082, F.A.C., this docket should remain open. Normally, if no affected party requests a hearing on a proposed rule, the rule would be filed for adoption. However, since this docket has been so controversial, staff would recommend that a hearing date be established to provide all interested persons the opportunity to present evidence on the merits of the proposed rule. At the conclusion of the hearing, the Commission can either adopt the proposed amendments with or without changes, request additional hearings, or close the docket on its own motion and maintain the existing rule.

Attachment A
Proposed IOU Stipulation

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Reply to: Tallahassee Office

September 6, 2002

The Honorable Lila A. Jaber
Chairman
Florida Public Service Commission
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Re: Docket No. 020398-EQ (possible revisions to rule 25-22.082, Florida Administrative Code, selection of generating capacity)

Dear Chairman Jaber:

Florida's four investor-owned utilities (IOUs) -- Florida Power & Light Company (FPL), Florida Power Corporation (FPC), Gulf Power Company (Gulf), and Tampa Electric Company (TECO) -- welcome this opportunity to provide an update on the IOUs' negotiations with representatives of independent power producers (IPPs) and similarly aligned parties concerning possible revisions to rule 25-22.082, relating to selection of generating capacity. The IOUs are aware of your request to receive by today's date either an agreed-upon stipulation or a letter indicating that no agreement was reached. Our understanding is that you requested information by today so that Staff can prepare a recommendation for your consideration at a Special Agenda on September 30, 2002.

Representatives of each of the IOUs have participated in two formal meetings and two formal conference calls with representatives of the IPPs. Additionally, individuals representing some of the IOUs have talked informally on many occasions with individuals affiliated with one or more IPPs in an effort to find common ground. The result of these many discussions is a new proposed Stipulation submitted by the IOUs to the IPPs on August 21, 2002.[1] A copy of the proposed Stipulation and its appendices is attached to this letter as Exhibit 1. The Stipulation is

[1] This Stipulation modifies and replaces the Stipulation signed by all four IOUs and presented to the Commission at its workshop on July 19, 2002.

designed to address the concerns raised by the IPPs about the application of current rule 25-22.082 and their desired changes to the process.

In our meetings and in letters to you dated July 26, 2002, and August 15, 2002, the IPPs identified three "principles" that they believe must be addressed in order to resolve this docket. The principles, in the words of the IPPs, are:

- The RFP criteria and factors that will be applied to measure competing proposals should be established at the outset of the proceeding;

- The application of the RFP criteria and the evaluation of the proposals must be placed in the hands of a neutral and independent entity;

- All potential providers should be placed on an equal footing when submitting their bids.

See Letter from Michael C. Green, executive director of Florida PACE, to Chairman Lila Jaber, August 15, 2002.

Various concerns were also expressed by the Commission and its Staff at the workshops in this docket. The IOUs have worked diligently to address each of these principles and the Commission concerns in the proposed Stipulation attached at Exhibit 1. First, the IOUs have identified and listed examples of criteria used to evaluate bids and have provided for a meeting among interested participants before the IOU issues a request for proposal (RFP). The "examples of criteria that could be specified" are listed at Appendix 1 to the Stipulation. These include threshold criteria, economic evaluation criteria, and non-price considerations. Providing these criteria to potential bidders and conducting a meeting before the RFP is issued will allow potential bidders to better understand what are likely to be the key provisions in an RFP. The IOUs believe providing this information is preferable to establishing specific weights for various criteria. Weighting is highly influenced by the circumstances surrounding the need for power, and the relative importance of a given criterion may change with time and circumstance. Furthermore, this approach is consistent with the Florida Supreme Court's decision in *Panda Energy Int'l v. Jacobs*, 813 So. 2d 46 (Fla. 2002), where the Court stated:

> With regard to the failure to assign specific weights to various factors, the undisputed testimony at the final hearing indicated that FPC did not assign weights to various factors in advance because FPC wanted to stimulate, rather than limit, creativity in the proposals in order to 'bring more value to [the] ratepayers.' The unchallenged testimony also explained that in order to allow bidders to give the utility their 'best shot' in their proposals, the utility had to

> retain discretion to exercise subjective judgment about all aspects of the proposals, once the utility had the benefit of evaluating the entire packages.

813 So. 2d at 55-56.

Second, to address the IPPs' concerns about independent evaluation, the IOUs' attached Stipulation provides for involvement of the Commission Staff at significant milestones in the process to observe the fairness of the process and the selection. Examples of these milestones are attached to the Stipulation as Appendix B. The Commission has recognized in the past that a provision for third-party evaluation of bids and selection of the project shifts the responsibility for capacity additions to an unregulated entity. This shift would be contrary to the statutory obligation of the IOUs to provide adequate and reliable service to their customers. Part of an IOU's statutory obligation to serve is to be responsible for and to justify its selection in the bidding process. Because the Staff will be monitoring that process, any concerns of the Staff undoubtedly will be promptly raised with the Commission in a need determination proceeding. The Stipulation's proposal for Staff involvement is designed to make the bidding process more transparent to all concerned.

Finally, the IOUs believe that the IPPs' focus on a "binding bid" by all parties as the means to place all bidders on equal footing is misplaced. In fact, none of the initial bids are "binding," even those of the IPPs. Under the current rule and in the course of recent RFPs, bidders have not been precluded from "sharpening their pencils" and improving their bids after their initial submissions. In fact, they have been encouraged to do so. This process facilitates the ultimate selection of the least-cost alternative. With Staff monitoring issuance of RFPs and subsequent milestones, transparency at all stages of the process should be enhanced. Moreover, if an IOU selects a self-build option, it will be held to its bid through a prudency review once cost recovery for the facility is sought. Should an IOU self-build project be completed for less than anticipated, customers receive the benefit of that cost savings. In the case of a purchased power agreement with an IPP, any cost savings benefit the IPP shareholders, not the customers.

Suggestions that IOUs "low ball" their self-build estimates and then request recovery of foreseeable cost overruns in a later cost recovery proceeding are unfounded, unsubstantiated by any evidence, and not supported by the historical record.[2] In the event that an IOU might

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[2] For example, between 1985 and 2003, FPL will have constructed or repowered seven combined cycle generating units resulting in an additional 3500 MW of capacity. In all cases the resulting $/kW are below estimates provided to the Commission. In fact, the combined savings are greater than $300 million. Customers have benefited directly from FPL's use of the self-

encounter unforeseeable circumstances increasing the cost of the project, it will be incumbent upon the IOU to explain and justify these circumstances to the Commission's satisfaction. Ultimately, IOUs remain fully accountable to the Commission, while IPPs are not. IPPs may bid on projects through specially created subsidiaries. Should an IPP face unanticipated cost overruns and seek to "walk away" from a contract or choose to construe its contract aggressively, the customers' only protection may be the uncertain outcome of litigation.

The IOUs believe it is important to remember that the IOUs and the IPPs are not identically situated in the bidding process; thus, issues relating to "equal footing" should be considered in the context of Florida's statutory scheme of utility regulation. The IOUs, not the IPPs, have the statutory obligation to serve Florida's customers. IPP projects, unlike IOU projects, are not subject to regulatory oversight.

The IOUs' proposed Stipulation is designed to address not only the concerns raised by the IPPs with the application of current rule 25-22.082, but also those expressed by the Commission and its Staff at the workshops in this docket. The IOUs believe the voluntary business practices outlined in the attached Stipulation increase transparency in the bidding process and increase assurance to everyone -- bidders, the Staff, and the public -- that the process is fair. The IOUs stand ready to adhere to the practices outlined in the proposed Stipulation as well as to current rule 25-22.082 if the Commission is prepared to recognize this Stipulation as an adequate basis to close this docket. Importantly, the IOUs view the Stipulation's voluntary business practices as supplemental to, and not in conflict with, the requirements of the current rule. Accordingly, the IOUs suggest that they can adopt these voluntary practices without any amendment to the existing rule.

A key advantage of the proposed Stipulation is that it can be implemented immediately. Rulemaking, on the other hand, could involve prolonged litigation concerning the Commission's statutory authority. By recognizing the IOUs' commitment in the Stipulation to adhere to certain voluntary business practices, the Commission can immediately achieve its goal of improving transparency and addressing fairness issues raised in the bidding process, while avoiding issues concerning legislative authority to revise rule 25-22.082.

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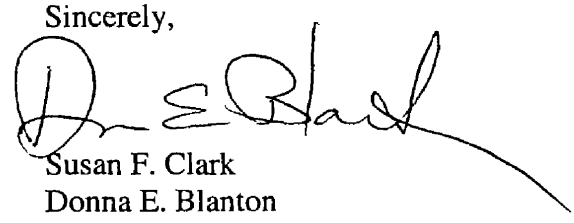
build option by this amount. In contrast, any cost savings from plants constructed by IPPs, through contracts with FPL, would have benefited IPP owners, not FPL customers.

For these reasons, the IOUs respectfully request that the Commission recognize the IOUs' proposal to adopt the attached Stipulation as a desirable and appropriate basis to close Docket No. 020398-EQ.

Sincerely,



Susan F. Clark
Donna E. Blanton

On Behalf of the IOUs

cc: The Honorable J. Terry Deason
The Honorable Braulio L. Baez
The Honorable Michael A. Palecki
The Honorable Rudolph "Rudy" Bradley
Ms. Diana Caldwell, Senate Regulated Industries Committee Staff Director
Mr. Patrick Imhof, House Utilities & Telecommunications Committee Staff Director
Mr. Harold McLean
Mr. James Beasley
Mr. Lee Willis
Mr. Jeffrey Stone
Mr. Russell Badders
Mr. Scheffel Wright
Mr. Gary Sasso
Mr. Richard Zambo
Mr. Gustavo Cepero
Ms. Michelle Hershel
Mr. John McWhirter
Mr. Joseph McGlothlin
Mr. Bill Walker
Mr. James McGee
Mr. Paul Lewis, Jr.
Ms. Susan Ritenour
Ms. Natalie Futch
Ms. Leslie Paugh

Mr. William Graham
Mr. John Orr
Mr. Michael Briggs
Ms. Angela Llewellyn
Mr. Richard Bellak
Ms. Martha Brown
Mr. William Keating
Mr. Thomas Ballinger
Mr. Craig Hewitt
Mr. Mark Futrell

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Proposed Revisions to Rule 25-22.082, F.A.C., Selection of Generating Capacity

DOCKET NO. 020398-EQ

STIPULATION

WHEREAS, the Florida Public Service Commission (the "Commission") initiated this docket to consider possible revisions to Rule 25-22.082, F.A.C. (the "Bid Rule"),

WHEREAS, to that end, the Staff of the Commission released draft amendments to the Bid Rule on May 9, 2002,

WHEREAS, various interested persons have submitted written comments concerning the draft comments or other possible revisions to the Bid Rule,

WHEREAS, Florida's four investor-owned utilities ("IOUs")—Gulf Power Company ("Gulf"), Tampa Electric Company ("TECO"), Florida Power Corporation ("FPC"), and Florida Power & Light Company ("FPL")—submitted consensus comments concerning the proposed revisions to the Bid Rule,

WHEREAS, various participants in this docket disagree about whether the Commission has the requisite statutory authority to promulgate the draft amendments or other revisions to the Bid Rule,

WHEREAS, Staff and the Commission have indicated at workshops on this subject that the intent of the proposed revisions is to increase the transparency of the process used by the IOUs in administering the Bid Rule and in undertaking repowerings and to provide the Commission and its Staff with information material to such decisions before they are implemented,

WHEREAS, the IOUs and various interested persons have met to discuss a possible

compromise that meets the concerns of the Commission and its Staff while avoiding needless, time-consuming, expensive, and often counter-productive legal disputes,

NOW, THEREFORE, the IOUs stipulate and agree as follows:

1. The IOUs will each adopt the following procedures as voluntary business practices for all projects governed by existing Rule 25-22.082, which practices are in addition to the requirements specified in such rule:

(a) In the event of an RFP covered by existing Rule 25-22.082, the IOUs will hold a meeting to explain and review the proposed RFP before it is issued.

(b) As part of the RFP, the IOU will provide a listing of the evaluation criteria the IOU intends to use to evaluate the proposals; provided, however, that potential bidders retain the creativity and discretion to respond to the RFP in ways not envisioned by the IOU. [See Appendix A].

(c) At the option of the Commission, the Commission Staff may attend milestone meetings conducted by the IOU as part of the IOU's process of evaluating and selecting capacity additions pursuant to RFPs issued under existing Rule 25-22.082, and to observe contract negotiations between the IOU and bidders that might take place as part of that process. [See Appendix B].

(d) Each IOU will designate a liaison knowledgeable about, and accountable within the IOU for, the RFP process, who will be responsible for working with Staff on such projects.

2. In the event of repowerings not covered by existing Rule 25-22.082, the IOUs will each adopt the business practice of making an evaluation presentation at Internal Affairs to Commissioners and Staff concerning the decision to undertake the repowering before the decision is implemented.

3. In each instance, the IOUs will retain the obligation and discretion to make the capacity-selection decisions under consideration, subject to review by the Commission in a need proceeding or cost recovery proceeding, as may be appropriate.

4. The IOUs enter into this Stipulation for the purpose of responding to the expressed concerns of the Commission and its Staff about increasing the transparency of their capacity-selection decisions, while avoiding legal disputes. Accordingly, this Stipulation is conditioned upon a decision by the Commission to close this docket.

5. In the event that the Commission accepts this Stipulation as a basis to close this docket, the IOUs understand and agree that the Commission does not waive its right and ability, pursuant to governing law, to initiate any proceeding or to take any action for which it has requisite jurisdiction and authority. The IOUs, through this Stipulation, do not waive any rights provided by the Administrative Procedure Act.

6. Notwithstanding the foregoing, this Stipulation will not apply to, or affect, RFPs or related capacity additions currently underway or repowering projects that have already been permitted.

AGREED this 20 day of August 2002.

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Attorneys for TECO

Appendix A

EXAMPLES OF CRITERIA THAT COULD BE SPECIFIED

I. THRESHOLD CRITERIA: The utility would identify the criteria to be eligible for economic screening (failure to comply disqualifies proposal from consideration); for example:

A. General Requirements

1. The proposal must

(a) Be received on time;

(b) Be accompanied by the submittal fee;

(c) Meet the in-service date specified in the RFP;

(d) Be accompanied by appropriate security requirements (e.g. completion security; performance security);

(e) Be verified by officer of entity submitting the proposal.

2. Through appropriate documentation, the financial viability of the bidder and of the project must be demonstrated.

B. Contractual Requirements

1. The proposal must specify:

(a) The minimum and maximum term or length of time for power purchase;

(b) The project size (mw);

(c) The type of capacity (firm, non-firm, seasonal);

(d) The technology used;

(e) For greenfield or unit proposals, the site location on a USGS map and documentation evidencing procurement of the site for term of the proposal.

2. Provide pricing schedules, which outline costs included and pricing indices used.

Appendix A

3. Specifically agree to Key Terms and Conditions in proposed contract or identify objectionable language and provide substitute language.

C. Operational and Feasibility Requirements

1. Provide information on the feasibility of project (capable of being licensed, built and operated by specified in-service date; experience with technology; and ability of technology to achieve operating targets).

2. Specify fuel and fuel source, including availability and transportation of fuel.

3. Provide information on the ability to operate the project in conformance with applicable voltage and frequency control requirements.

4. Provide information on the dispatchability and schedulability and willingness of bidder to coordinate maintenance scheduling.

5. Provide information on means of securing transmission necessary to deliver power to utility system.

II. ECONOMIC EVALUATION

The utility would identify the method to be used to evaluate proposals, for example:

1. The computer model or models to be used.

2. Method based on cumulative present value revenue requirements for evaluation period.

3. Incremental costs included to meet system needs for period of analysis including new units to meet reliability requirements including load growth.

4. Filler units, if necessary (if proposal does not cover entire period called for in RFP).

5. Steps to be followed in evaluation process (initial rankings; pairing with other proposals).

Appendix A

6. Other economic considerations to be evaluated, e.g. transmission integration costs, equity penalty, residual value of IOU–owned units and other separately identifiable incremental costs.

III. NON-PRICE CONSIDERATIONS

The utility would provide in the RFP a listing of non-price factors it will take into consideration in evaluating proposals. For example:

1. Experience/track record of the bidder;
2. Financial viability of bidder or project (relative to that of other Bidders and IOU);
3. Exceptions taken to RFP and PPA terms;
4. Proposed performance criteria;
5. Reasonableness of construction schedule milestones;
6. Operating and permitting limitations;
7. Deliverability of capacity and energy over transmission systems;
8. Effect of RTO/ISO operational considerations on project;
9. Economic dispatch capability;
10. Project licenseability;
11. Security of fuel supply;
12. Fuel diversity;
13. Fuel switching capability;
14. Water supply;
15. Facility location;
16. Dispatchability and maintenance considerations;
17. Commitment of guaranteed firm capacity;
18. Contract term flexibility;

Appendix A

19. Buy-out provisions;

20. Other value-added benefits, if any;

21. Remedies for failure to deliver or perform;

Appendix B

EXAMPLES OF RFP MILESTONE MEETINGS

(Specific milestones would be set out in RFP)

- Pre-RFP conference
- Bid opening
- Review the results of threshold screening
- Review the results of economic evaluation
- Review the results of non-price evaluation
- Identification of final list of projects
- Negotiations with final candidates
- Selection of project

Attachment B
Letter Dated 09/06/02 from Florida PACE

Florida Partnership for
Affordable Competitive Energy
www.keepupthepace.org

September 6, 2002

The Honorable Lila A. Jaber
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 020398-EQ

Dear Chairman Jaber:

By letter dated August 20, 2002, PACE, FACT and FIPUG requested a modification to the schedule in Docket No. 020398-EQ in order to enable the parties to continue to explore the possibility of finding a mutually acceptable resolution of the issues in the docket. In your reply of August 22, 2002, you directed the parties to either submit a stipulation by September 6, 2002 or notify the Commission on that date of their inability to reach an agreement. You indicated that the Commission Staff will prepare a recommendation in this docket for the Commissioners' consideration during a special agenda conference to be held on September 30, 2002.

On August 23 and again on August 28, 2002, at PACE's suggestion members of PACE, FACT and FIPUG conferred by telephone with representatives of the investor-owned utilities (IOUs) in additional attempts to find common ground. I regret to inform you that, after pursuing further the subjects that had been raised in earlier meetings and negotiations, the parties were unable to reach a mutually acceptable stipulation. Accordingly, PACE's view now is that the process that you described in your letter of August 22,2002 should move forward.

While the parties' efforts to date unfortunately have not resulted in a stipulation, PACE believes they have produced some worthwhile results that can be folded into the next steps. For instance, in response to comments made by the IOUs during the workshop of July 19, 2002, PACE modified its earlier rule proposal in two significant respects:

- First, PACE offered to remove from the existing rule the requirement that the IOU issuing the RFP reveal the estimate of its own construction costs in the RFP package. We agree that this change is needed to accomplish the objective of placing all bidders, including the IOU, on an equal footing. However, the modification renders moot the IOUs' prior assertion that, because the rule requires the IOU to "go first" in divulging cost information, it should therefore have the opportunity to change its bid after receiving responses to the RFP.

- Second, PACE also agreed to eliminate from its proposed rule language the requirement that an IOU permit a bidder to construct a generating plant on

property owned by the IOU. This modification was offered in direct response to objections raised by the IOUs.

To be clear, while PACE offered these modifications during the period in which the parties were negotiating, PACE's willingness to accept them as part of the rule that emerges from this docket is not dependent upon a stipulation of all parties. Instead, PACE regards the modifications as refinements and improvements to PACE's proposal that have resulted from the give and take of workshops and negotiations.

In suggesting and supporting these changes from PACE's original submission of February 7, 2002, PACE has not wavered from the three principles identified in the July 30, 2002 letter:

(1) RFP terms, conditions, and evaluation criteria, including the weightings assigned to those criteria, should be vetted, and any disputes regarding the RFP or evaluation criteria should be resolved, at the outset of the process;

(2) all bidders, including the IOU, should submit binding bids at the same time and in the same manner; and

(3) the evaluation of the bids should be performed by the Commission or another neutral and independent third party.

I reiterate that, while PACE will continue to advocate these principles, PACE is not wedded to any particular language or formula. PACE pledges to be flexible both in devising and in responding to proposed means by which these principles can be incorporated.

In short, the parties have tried diligently to find common ground. While they have been unable to resolve the issues in this docket to their mutual satisfaction, PACE believes progress has been made. PACE looks forward to participating in the next phase of the docket.

Yours truly,

Michael C. Green

cc: The Honorable J. Terry Deason
The Honorable Braulio L. Baez
The Honorable Michael A. Palecki
The Honorable Rudolph "Rudy" Bradley
Ms. Diana Caldwell, Senate Regulated Industries Committee Staff Director
Mr. Patrick Imhof, House Utilities & Telecommunications Committee Staff Director
Mr. Gary L. Sasso, Attorney for Florida Power Corp.
Ms. Susan Clark and Ms. Donna E. Blanton, Attorneys for Florida Power & Light
Mr. Jeffrey A. Stone, Attorney for Gulf Power
Mr. James D. Beasley, Attorney for TECO
Ms. Martha Brown

Attachment C
Suggested Rule Revisions

MEMORANDUM

August 20, 2002

TO: DIVISION OF APPEALS (BROWN)

FROM: DIVISION OF ECONOMIC REGULATION (HEWITT)

SUBJECT: STATEMENT OF ESTIMATED REGULATORY COSTS FOR PROPOSED AMENDMENT TO RULE 25-22.082, F.A.C., SELECTION OF GENERATING CAPACITY; DOCKET NO. 020398-EI

Rule 25-6.0345, F.A.C., Selection of Generating Capacity, contains the standards and minimum requirements for the selection process of new electric generating capacity over a minimum size.

The proposed amendments would expand the scope of the rule to include any major capacity addition of 150 megawatts or more and add a more explicit definition of "participant." Also, a public utility request for proposal (RFP) for adding capacity would have to contain additional information on costs of common facilities, all criteria for the new capacity, and a cap of $10,000 for an application fee. A participant may submit, and the public utility would have to evaluate, proposals to collocate the participant's proposed facility,

The Florida Administrative Procedures Act encourages an agency to prepare a Statement of Estimated Regulatory Costs (SERC). However, because of the expedited nature of this proposed rule making, there has been insufficient time to acquire the necessary data to prepare a full and adequate SERC. Therefore, a SERC will not be prepared for the proposed rule amendments at this time.

cc: Mary Andrews Bane
Tom Ballinger
Hurd Reeves

capmemo.wpd

25-~~22.082~~ 6.0351 Selection of Generating Capacity.(DRAFT 8/21/02)

(1) Scope and Intent. A Public Utility is required to provide reasonably sufficient, adequate, and efficient service to the public at fair and reasonable rates. The intent of this rule is to provide the Commission information to evaluate a public utility's decision regarding the addition of generating capacity. The use of a Request for Proposals (RFP) process is an appropriate means to ensure that a public utility meets its obligation to provide an adequate, reliable, and cost-efficient supply of capacity and energy. In order to assure an adequate and reliable source of energy, a public utility must plan and construct or purchase sufficient generating capacity. To assure fair and reasonable rates and to avoid the further uneconomic duplication of generation, transmission, and distribution facilities in Florida, a public utility must select the most economical and cost-effective mix of supply-side and demand-side resources to meet the demand and energy requirements of its end-use consumers. Each public utility, therefore, shall issue an RFP prior to the commencement of construction of a major capacity addition. Upon request of a Public Utility for cost recovery, the Commission will review the prudence of the Public Utility's decison under current regulatory procedures. Public utilities are encouraged to issue an RFP, using these rules as guidelines, prior to the construction or purchase of any other generating resource addition.

(2) ~~(1)~~ Definitions. For the purpose of this rule, the following

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terms shall have the following meaning:

(a) Public Utility: all electric utilities subject to the Florida Public Service Commission's ratemaking authority, as defined in Section 366.02(1), Florida Statutes.

(b~~a~~) Major Capacity Addition: any capacity addition which will require certification pursuant to Section 403.519, Florida Statutes, or any capacity addition of 150 MW or more which does not require certification pursuant to Section 403.519, Florida Statutes, including but not limited to the repowering of an existing generating facility. ~~Next Planned Generating Unit: the next generating unit addition planned for construction by an investor owned utility that will require certification pursuant to Section 403.519, Florida Statute.~~

(c~~b~~) Request for Proposals (RFP): a document in which a~~n~~ public ~~investor owned~~ utility publishes the price and non-price attributes of its next planned major capacity addition ~~generating unit~~ in order to solicit and screen, for potential subsequent contract negotiations, competitive proposals for supply-side alternatives to the public utility's next planned ~~generating unit~~ major capacity addition.

(d~~c~~) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a public utility's RFP. A participant may include, but is not limited to, utility and non-utility generators, Exempt Wholesale Generators (EWGs), Qualifying Facilities (QFs),

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marketers, and affiliates of public utilities, as well as providers of turnkey offerings, distributed generation, and other ~~utility~~ supply side alternatives.

(~~e~~d) Finalist: one or more participants selected by the public utility with whom to conduct subsequent contract negotiations.

~~(2) Prior to filing a petition for determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, each investor-owned electric utility shall evaluate supply side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP).~~

(3) Each public ~~investor owned~~ utility shall provide timely notification of its issuance of an RFP by publishing public notices in major newspapers, periodicals and trade publications to ensure statewide and national circulation. The public notice given shall include, at a minimum:

(a) the name and address of the contact person from whom an RFP package may be requested;

(b) a general description of the public utility's next planned ~~generating unit~~ major capacity addition, including its planned in-service date, MW size, location, fuel type and technology; and

(c) a schedule of critical dates for the solicitation, evaluation, screening of proposals and subsequent contract negotiations.

(~~4~~7) Each public ~~electric~~ utility shall file a copy of its RFP

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with the Commission upon issuance.

(5~~4~~) Each public utility's RFP shall include, at a minimum:

(a) a detailed technical description of the public utility's next planned major capacity addition ~~generating unit or units~~ on which the RFP is based, all costs that are associated with the major capacity addition, as well as the financial assumptions and parameters associated with it, including, at a minimum, the following information:

1. a description of the public utility's next planned major capacity addition ~~generating unit(s)~~ and its proposed location(s);

2. the MW size;

3. the estimated in-service date;

4. the primary and secondary fuel type;

5. an estimate of the total direct cost;

6. an estimate of the annual revenue requirements;

7. an estimate of the annual economic value of deferring construction;

8. an estimate of the fixed and variable operation and maintenance expense;

9. an estimate of the fuel cost;

10. the costs of common facilities at the site allocated to the major capacity addition, including, but not limited to land, improvements, transmission facilities, cooling water facilities, fuel transportation and handling

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facilities, and other infrastructure.

~~10~~1. an estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;

~~11~~2. a description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;

~~12~~3. a discussion of the actions necessary to comply with environmental requirements; and

~~13~~4. a summary of all major assumptions used in developing the above estimates;

(b) Detailed information regarding the public utility's ten year historical and ten year projected net energy for load, and summer and winter peak demand by class of customers;

(c~~b~~) a schedule of critical dates for solicitation, evaluation, screening of proposals, selection of finalists, ~~and~~ subsequent contract negotiations, and submission for Commission approval, if necessary;

(d~~c~~) a description of the price and non-price attributes to be addressed by each alternative generating proposal including, but not limited to:

1. technical and financial viability;

2. dispatchability;

3. deliverability (interconnection and transmission;

4. fuel supply;

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5. water supply;

6. environmental compliance;

7. performance criteria; and

8. pricing structure~~;~~. ~~and~~

(e~~d~~) a detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price and non-price attributes.

(f) All criteria, including all weighting and ranking factors that will be applied to select the finalists. Such criteria may include price and non-price considerations, but no criterion shall be employed that is not expressly identified in the RFP absent a showing of good cause. No adjustment to purchase power proposals due to the imputation of an increase to the public utility's cost of capital shall be made absent a showing of good cause;

(g) Any application fees that will be required of a participant. Any such fees or deposits shall be cost-based but shall not exceed $10,000 in the aggregate, with no more than $500 required to obtain the RFP;

(h) Any information regarding system-specific conditions which may include, but not be limited to, preferred locations proximate to load centers, transmission constraints, the need for voltage support in particular areas, and/or the public utility's need or desire for greater diversity of fuel sources.

(6) The public utility shall allow participants to formulate creative responses to the RFP. The public utility shall evaluate

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all proposals.

(~~7~~5). As part of its RFP, the public utility shall require each participant to publish a notice in a newspaper of general circulation in each county in which the participant~~'s~~ proposed~~s~~ to build an electrical power plant ~~generating facility would be located~~. The notice shall be at least one-quarter of a page and shall be published no later than 10 days after the date that proposals are due. The notice shall state that the participant has submitted a proposal to build an electrical power plant, and shall include the name and address of the participant submitting the proposal, the name and address of the public utility that solicited proposals, and a general description of the proposed power plant and its location.

(8) A pre-bid meeting shall be conducted by the public utility within two weeks after the issuance of the RFP. Each participant which obtains the RFP, the Office of Public Counsel, and the Commission staff shall be notified in a timely manner of the date, time, and location of the meeting.

(9) A minimum of 60 days shall be provided between the issuance of the RFP, and the due date for proposals in response to the RFP.

(10) Any potential participant in the RFP may file comments with the Commission regarding any aspect of the RFP prior to the due date for proposals specified in the RFP.

(11) The public utility shall evaluate the proposals received

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in response to the RFP in a fair comparison with the public utility's next planned major capacity addition identified in the RFP.

(12~~6~~) Within 30 days after the public utility has selected finalists, if any, from the participants who responded to the RFP, the public utility shall publish notice in a newspaper of general circulation in each county in which a finalist ~~has~~ proposed~~s~~ to build an electrical power plant. The notice shall include the name and address of each finalist, the name and address of the public utility, and a general description of each proposed electrical power plant, including its location, size, fuel type, and associated facilities.

(13) The Commission, upon its own motion, or a participant may challenge the results of an RFP. A participant may file a complaint with the Commission or intervene in a subsequent need determination or cost recovery proceeding. Any complaint will be processed by the Commission on an expedited basis.

(14) Upon conclusion of an RFP process, the public utility may petition the Commission for approval of the public utility's selection. If the Commission approves a purchase power agreement as a result of the RFP, the public utility shall be authorized to recover the prudently incurred costs of the agreement through the public utility's capacity, and fuel and purchased power cost recovery clauses absent evidence of fraud, mistake, or similar grounds sufficient to disturb the finality of the approval under

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governing law.

(15) Nothing in this rule shall prohibit a public utility from entering into short-term bilateral contracts, having a term of three years or less, for the purchase of capacity and energy. If the public utility chooses this option, it must justify the prudence of its decision prior to recovering the costs of the contract from its retail customers. A public utility, however, shall not enter into a bilateral contract for the purchase of capacity and energy with an affiliate outside of the RFP process.

~~8. The Commission shall not allow potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination proceeding.~~

~~9.~~ (16) The Commission may waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

Specific Authority 350.127(2), 366.05(1), 366.06(2), 366.07, 366.051 FS. Law Implemented 403.519, 366.04(1), 366.04(2), 366.04(5), 366.06(2), 366.07, 366.041, 366.051 FS.
History: Transferred from 25-22.082 and Amended

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Attachment D
Florida Statutes

The 2002 Florida Statutes

Title XXVII	Chapter 350	View Entire Chapter
RAILROADS AND OTHER REGULATED UTILITIES	FLORIDA PUBLIC SERVICE COMMISSION	

350.127 Penalties; rules; execution of contracts.--

(1) The commission may impose upon any regulated company that is found to have refused to comply with or willfully violated any lawful rule or order of the commission, or any statute administered by the commission, a penalty for each such offense of not more than $5,000, to be fixed, imposed, and collected by the commission, or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by the commission. Each day that such refusal or violation continues shall constitute a separate offense. Each penalty shall be a lien upon the real and personal property of the regulated company, enforceable by the commission as a statutory lien under chapter 85. The net proceeds from the enforcement of any such lien shall be deposited in the General Revenue Fund.

(2) The commission is authorized to adopt, by affirmative vote of a majority of the commission, rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

(3) The commission may designate one or more employees to execute contracts on behalf of the commission.

History.--ss. 3, 6, ch. 80-289; ss. 2, 3, ch. 81-318; s. 6, ch. 87-50; s. 71, ch. 98-200.

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366.05 Powers.--

(1) In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal, and clerical employees as it deems necessary to carry out the provisions of this chapter; and to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter.

(2) Every public utility, as defined in s. 366.02, which in addition to the production, transmission, delivery or furnishing of heat, light, or power also sells appliances or other merchandise shall keep separate and individual accounts for the sale and profit deriving from such sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any rate to be charged for service by any public utility.

(3) The commission shall provide for the examination and testing of all meters used for measuring any product or service of a public utility.

(4) Any consumer or user may have any such meter tested upon payment of the fees fixed by the commission.

(5) The commission shall establish reasonable fees to be paid for testing such meters on the request of the consumers or users, the fee to be paid by the consumer or user at the time of his or her request, but to be paid by the public utility and repaid to the consumer or user if the meter is found defective or incorrect to the disadvantage of the consumer or user, in excess of the degree or amount of tolerance customarily allowed for such meters, or as may be provided for in rules and regulations of the commission.

(6) The commission may purchase materials, apparatus, and standard measuring instruments for such examination and tests.

(7) The commission shall have the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids.

(8) If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance. The electric utilities involved in any action taken or orders issued pursuant to this subsection shall have full power and authority, notwithstanding any general or special laws to the contrary, to jointly plan, finance, build, operate, or lease generating and transmission facilities and shall be further authorized to exercise the powers granted to corporations in chapter 361. This subsection shall not supersede or control any provision of the Florida Electrical Power Plant Siting Act, ss. 403.501-403.518.

(9) The commission may require the filing of reports and other data by a public utility or its affiliated companies, including its parent company, regarding transactions, or allocations of common costs, among the utility and such affiliated companies. The commission may also require such reports or other data necessary to ensure that a utility's ratepayers do not subsidize nonutility activities.

(10) The Legislature finds that violations of commission orders or rules, in connection with the impairment of a public utility's operations or service, constitute irreparable harm for which there is no adequate remedy at law. The commission is authorized to seek relief in circuit court including temporary and permanent injunctions, restraining orders, or any other appropriate order. Such remedies shall be in addition to and supplementary to any other remedies available for enforcement of agency action under s. 120.69 or the provisions of this chapter. The commission shall establish procedures implementing this section by rule.

(11) The commission has the authority to assess a public utility for reasonable travel costs associated with reviewing the records of the public utility and its affiliates when such records are kept out of state. The public utility may bring the records back into the state for review.

History.--s. 5, ch. 26545, 1951; s. 2, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 53, ch. 78-95; ss. 5, 16, ch. 80-35; s. 1, ch. 81-131; s. 2, ch. 81-318; ss. 4, 20, 22, ch. 89-292; s. 51, ch. 90-331; s. 4, ch. 91-429; s. 3, ch. 93-35; s. 552, ch. 95-148; s. 72, ch. 98-200.

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366.06 Rates; procedure for fixing and changing.--

(1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

(2) Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

(3) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such public utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such public utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the public utility shall be refunded or disposed of by the public utility as the commission may direct; however, no such funds shall accrue to the benefit of the public utility. The commission shall take final commission action in the docket and enter its final order within 12 months of the commencement date for final agency action. As used in this subsection, the "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the utility has filed with the clerk the minimum filing requirements as established by rule of the commission. Within 30 days after receipt of the application, rate request, or other written document for which the commencement date for final agency action is to be established, the commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiencies to the applicant, specifically listing why said applicant has failed to meet the minimum filing requirements. Such statement of deficiencies shall be binding upon the commission to the extent that, once the deficiencies in the statement are satisfied, the commencement date for final agency action shall be promptly established as provided herein. Thereafter, within 15 days after the applicant indicates to the commission that it believes that it has met the minimum filing requirements, the commission or its designee shall either determine the commencement date for final agency action or specifically enumerate in writing why the requirements have not been met, in which case this procedure shall be repeated until the commencement date for final agency action is established. When the commission initiates a proceeding, the commencement date for final agency action shall be the date upon which the order initiating the proceeding is issued.

(4) A natural gas utility or a public electric utility whose annual sales to end-use customers amount to less than 500 gigawatt hours may specifically request the commission to process its petition for rate relief using the agency's proposed agency action procedure, as prescribed by commission rule. The commission shall enter its vote on the proposed agency action within 5 months of the commencement

date for final agency action. If the commission's proposed action is protested, the final decision must be rendered by the commission within 8 months of the date the protest is filed. At the expiration of 5 months following the commencement date for final agency action, if the commission has not taken action or if the commission's action is protested by a party other than the utility, the utility may place its requested rates into effect under bond, escrow, or corporate undertaking subject to refund, upon notice to the commission and upon filing the appropriate tariffs. The utility must keep accurate records of amounts received as provided by subsection (3).

History.--s. 6, ch. 26545, 1951; s. 4, ch. 74-195; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 7, 16, ch. 80-35; s. 2, ch. 81-318; ss. 8, 20, 22, ch. 89-292; s. 4, ch. 91-429; s. 5, ch. 93-35; s. 5, ch. 95-328.

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366.07 Rates; adjustment.--Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

History.--s. 7, ch. 26545, 1951; s. 24, ch. 57-1; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318; ss. 9, 20, 22, ch. 89-292; s. 4, ch. 91-429.

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Title XXVII — RAILROADS AND OTHER REGULATED UTILITIES
Chapter 366 — PUBLIC UTILITIES
View Entire Chapter

366.051 Cogeneration; small power production; commission jurisdiction.--Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer. The electric utility in whose service area a cogenerator or small power producer is located shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator or small power producer; or the cogenerator or small power producer may sell such electricity to any other electric utility in the state. The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs to the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source. The commission may use a statewide avoided unit when setting full avoided capacity costs. If the cogenerator or small power producer provides adequate security, based on its financial stability, and no costs in excess of full avoided costs are likely to be incurred by the electric utility over the term during which electricity is to be provided, the commission shall authorize the levelization of payments and the elimination of discounts due to risk factors in determining the rates. Public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location, if the commission finds that the provision of this service, and the charges, terms, and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. Notwithstanding any other provision of law, power generated by the customer and provided by the utility to the customers' facility at another location is subject to the gross receipts tax imposed under s. 203.01 and the use tax imposed under s. 212.06. Such taxes shall apply at the time the power is provided at such other location and shall be based upon the cost price of such power as provided in s. 212.06(1)(b).

History.--ss. 5, 22, ch. 89-292; s. 4, ch. 91-429.

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Title XXIX PUBLIC HEALTH | Chapter 403 ENVIRONMENTAL CONTROL | View Entire Chapter

403.519 Exclusive forum for determination of need.--On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The commission shall publish a notice of the proceeding in a newspaper of general circulation in each county in which the proposed electrical power plant will be located. The notice shall be at least one-quarter of a page and published at least 45 days prior to the scheduled date for the proceeding. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(2)(a)2. An order entered pursuant to this section constitutes final agency action.

History.--s. 5, ch. 80-65; s. 24, ch. 90-331.

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366.04 Jurisdiction of commission.--

(1) In addition to its existing functions, the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; assumption by it of liabilities or obligations as guarantor, endorser, or surety; and the issuance and sale of its securities, except a security which is a note or draft maturing not more than 1 year after the date of such issuance and sale and aggregating (together with all other then-outstanding notes and drafts of a maturity of 1 year or less on which such public utility is liable) not more than 5 percent of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of issue. The commission, upon application by a public utility, may authorize the utility to issue and sell securities of one or more offerings, or of one or more types, over a period of up to 12 months; or, if the securities are notes or drafts maturing not more than 1 year after the date of issuance and sale, the commission, upon such application, may authorize the utility to issue and sell such securities over a period of up to 24 months. The commission may take final action to grant an application by a public utility to issue and sell securities or to assume liabilities or obligations after having given notice in the Florida Administrative Weekly published at least 7 days in advance of final agency action. In taking final action on such application, the commission may deny authorization for the issuance or sale of a security or assumption of a liability or obligation if the security, liability, or obligation is for nonutility purposes; and shall deny authorization for the issuance or sale of a security or assumption of a liability or obligation if the financial viability of the public utility is adversely affected such that the public utility's ability to provide reasonable service at reasonable rates is jeopardized. Securities issued by a public utility or liabilities or obligations assumed by a public utility as guarantor, endorser, or surety pursuant to an order of the commission, which order is certified by the clerk of the commission and which order approves or authorizes the issuance and sale of such securities or the assumption of such liabilities or obligations, shall not be invalidated by a modification, repeal, or amendment to that order or by a supplemental order; however, the commission's approval of the issuance of securities or the assumption of liabilities or obligations shall constitute approval only as to the legality of the issue or assumption, and in no way shall it be considered commission approval of the rates, service, accounts, valuation, estimates, or determinations of cost or any other such matter. The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

(a) To prescribe uniform systems and classifications of accounts.

(b) To prescribe a rate structure for all electric utilities.

(c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.

(d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

(f) To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise its jurisdiction hereunder.

No provision of this chapter shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on July 1, 1974; however, existing territorial agreements shall not be altered or abridged hereby.

(3) In the exercise of its jurisdiction, the commission shall have the authority over natural gas utilities

for the following purposes:

(a) To approve territorial agreements between and among natural gas utilities. However, nothing in this chapter shall be construed to alter existing territorial agreements between the parties to such agreements.

(b) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among natural gas utilities. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

(c) For purposes of this subsection, "natural gas utility" means any utility which supplies natural gas or manufactured gas or liquefied gas with air admixture, or similar gaseous substance by pipeline, to or for the public and includes gas public utilities, gas districts, and natural gas utilities or municipalities or agencies thereof.

(4) Any customer shall be given an opportunity to present oral or written communications in commission proceedings to approve territorial agreements or resolve territorial disputes. If the commission proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it. Any substantially affected customer shall have the right to intervene in such proceedings.

(5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

(6) The commission shall further have exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities. In adopting safety standards, the commission shall:

(a) Adopt the 1984 edition of the National Electrical Safety Code (ANSI C2) as initial standards; and

(b) Adopt, after review, any new edition of the National Electrical Safety Code (ANSI C2).

The standards prescribed by the current 1984 edition of the National Electrical Safety Code (ANSI C2) shall constitute acceptable and adequate requirements for the protection of the safety of the public, and compliance with the minimum requirements of that code shall constitute good engineering practice by the utilities. The administrative authority referred to in the 1984 edition of the National Electrical Safety Code is the commission. However, nothing herein shall be construed as superseding, repealing, or amending the provisions of s. 403.523(1) and (10).

History.--s. 4, ch. 26545, 1951; s. 1, ch. 63-288; s. 1, ch. 63-279; s. 1, ch. 65-52; s. 1, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 3, 16, ch. 80-35; s. 2, ch. 81-318; s. 4, ch. 86-173; ss. 2, 20, 22, ch. 89-292; s. 50, ch. 90-331; s. 4, ch. 91-429; s. 13, ch. 95-146.