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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need of Hines Unit 3 Power Plant	)	DOCKET NO. 020953-EI
	)	Submitted for filing: November 25, 2002

FLORIDA POWER CORPORATION'S MOTION FOR RECONSIDERATION OF THE PREHEARING OFFICER'S ORDER GRANTING PACE'S AMENDED PETITION TO INTERVENE

Pursuant to Rule 25-22.0376, F.A.C., Florida Power Corporation ("FPC") moves for reconsideration by the full panel of the Prehearing Officer's decision granting intervention to the Florida Partnership for Affordable Competitive Energy ("PACE"). PACE has not demonstrated that it satisfies the legal requirements for intervention. The Prehearing Officer nonetheless granted PACE's Amended Petition to Intervene so that PACE could help the Commission develop a fuller record in this proceeding. With all due respect, this is not the legal standard for intervention; it disregards the countervailing, legitimate interests of FPC (and potentially FPC's customers) in avoiding needless cost, disruption, and delay in this important project; it risks confusion of the issues; and it delegates to an entity that is admittedly seeking to further its own economic interest a role more appropriately shouldered by the Commission's own Staff.

Under controlling authorities, PACE has not demonstrated that it has standing to intervene in this case. No individual member of PACE who actually participated in FPC's RFP has stepped forward to assert, or alleged any basis to conclude, that its proposed project is superior to Hines 3. Further, PACE declines to do as a trade association what none of its members is willing to do individually—that is, contend that any particular project is superior to the project for which Florida Power is seeking an affirmative determination of need. Rather, PACE seeks only to raise general issues of fairness that the Commission will review immediately

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after the hearing in this case in the Bid Rule hearings or to raise non-existent "issues" that are outside the Commission's jurisdiction or that are based on obvious misconceptions or mischaracterizations of the actual record in this case, without any allegation or showing that any of these supposed "issues" would change the bottom-line conclusion that Hines 3 is at least $187 million less costly than any PACE member proposal.

Introduction

On November 20, 2002, at the Prehearing Conference, the Prehearing Officer orally granted PACE's Amended Petition to Intervene in this proceeding. PACE had previously filed an Initial Petition to Intervene, which the Prehearing Officer denied because PACE failed to allege "an injury in fact that is of sufficient immediacy to entitle PACE to a Section 120.57, Florida Statutes, hearing" and failed to allege "injury to the type of interests that this need determination proceeding is designed to protect." (Order Denying Intervention, dated November 8, 2002) ("Order"). The Prehearing Officer observed that intervention might be appropriate "[t]o the extent that an individual participant in FPC's Request for Proposals (RFP) process can allege that the process was not conducted in accordance with Rule 25-22.082 . . . or that FPC failed to take into account some facts or circumstances which resulted in prejudice to that participant."[1] (Order, p. 2).

In its Amended Petition to Intervene, PACE failed to allege that FPC actually departed from the requirements of the Bid Rule, or actually miscalculated the costs of Hines 3 versus the costs of any particular alternative proposal it considered, such that the outcome of FPC's evaluation would have, and should have, resulted in the selection of any PACE member's proposal. Instead, PACE merely raised more allegations concerning the general fairness of

[1] All emphasis has been added unless otherwise noted.

FPC's process. These allegations, however, did not correct the fundamental defect in PACE's Initial Petition to Intervene.

Despite PACE's failure to cure the defects that were the basis for the denial of its Initial Petition, the Prehearing Officer decided to grant the Amended Petition to Intervene because PACE might "provide the Commission with a little bit more flushed out record." (Transcript of November 20, 2002 Hearing, pp. 3-4). With all due respect to the Prehearing Officer, an entity that admittedly seeks to intervene to further its own economic interest but cannot establish that it satisfies the requisite standards for intervention should not be permitted to participate as a full "party" in a proceeding such as this, which affects the substantial interests and due process rights of FPC, on the ground that, for better or worse, the would-be intervenor might further develop the record. That is especially true where, as here, the would-be intervenor has sought leave to intervene on the basis of a stated intention to inject issues into the proceeding that are demonstrably without basis, built on a plain misunderstanding of facts already in the record, or have no proper place in this proceeding.

Standing is a legal threshold that a party must satisfy prior to being admitted in a case. If a party lacks standing, that party cannot intervene in the proceedings as a matter of law. PACE has failed to demonstrate its standing, and accordingly, as a matter of law, PACE's Amended Petition to Intervene must be denied.

Reconsideration

FPC seeks reconsideration of the Prehearing Officer's order granting PACE's Amended Petition for Intervention by the full panel assigned to the proceeding. FPC makes this motion under Rule 25-22.0376, F.A.C. – one of the Commission's two "reconsideration" rules. This Rule essentially permits an appeal from a non-final order issued solely by the Prehearing Officer to the full panel assigned to the proceeding. This is significant because the first decision maker

(i.e., the Prehearing Officer) is different from the second decision maker (i.e., the full panel), converting the motion for "reconsideration" into a motion for "consideration" in the first instance by the full panel.

FPC recognizes, however, that the Commission has in the past applied a more stringent standard of review on motions for reconsideration of a prehearing officer's decision. See, e.g. In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc., et al, 96 FPSC 3:398 (applying the reconsideration standard applicable under Rule 25-22.060 to the review of a prehearing officer's decision by the full panel under Rule 25-22.0376). The Commission has recited that standard as follows:

> The proper standard of review for a Motion for Reconsideration would be whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. (Citations omitted).

See In re Aloha Utilities, Inc., Order No., PSC-00-1628-FOF-WS, (September 12, 2000). Respectfully, we suggest that this more stringent standard should be limited only to true "reconsideration" by the same decision maker under the Commission's second rule – Rule 25-22.060 F.A.C. The reason for limiting reconsideration in those circumstances to situations where the decision maker overlooked something important during its first decision is precisely because the same decision maker has already considered and rejected the arguments made by the party seeking rehearing. Obviously, that rationale has no application to a situation, such as this, where the aggrieved party is presenting its arguments for the first time to the full panel. Such a motion is not properly seen as "reconsideration" at all, but a request that the full panel review the matter anew.

Because standing presents a pure question of law, even a reviewing court will not defer to the determination of a lower tribunal on an issue of standing. See Edgewater Beach Owners Association, Inc., 2002 WL 1932546 (Fla. 1st DCA Aug. 22, 2002) ("[d]etermining whether a

party has standing is a pure question of law to be reviewed de novo"); Turner v. Hillsborough County Aviation Authority, 739 So. 2d 175, 177 (Fla. 2d DCA 1999) (stating that issue of standing presents a pure question of law). Given that the panel is entrusted with the primary responsibility to resolve all issues in this case, it is not appropriate for the panel to apply a more stringent standard than a reviewing court when the panel is called upon to decide an important issue in the case.

In its decisions explaining and applying the more stringent standard for reconsideration, the Commission recurringly cites as the basis for this position cases that actually demonstrate our point, e.g., Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962) (discussing reconsideration from decisions of the full Commission); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981) (discussing reconsideration by a trial court of the court's prior decision). Each of the cases involves a situation where reconsideration is requested by the same decision maker(s) who thoroughly considered and resolved the issue in the first instance. Accordingly, they provide no support for imposing a "reconsideration" standard on matters taken up by the full Commission for the first time.

Regardless of the standard of review that will be applied by the panel in this case, the order granting PACE's Amended Petition to Intervene should be reconsidered because, in granting intervention, the Prehearing Officer overlooked binding precedent of the Florida Supreme Court establishing the legal prerequisites to administrative standing, namely, Florida Home Builders Ass'n v. Department of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982) and Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997), adopting Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

The transcript of the hearing reflects that the Prehearing Officer determined that PACE's intervention might provide some limited benefit to the proceedings. Transcript of November 20,

2002 Hearing, pp. 3-4. This determination, however, did not address the issue whether PACE satisfied its burden of showing that it had associational standing to intervene. The Prehearing Officer's ruling does not acknowledge that standing is a question of law that must be established prior to a party's being allowed to intervene. See St. Joe Paper Co. v. Dept. of Community Affairs, 657 So. 2d 27, 28-29 (Fla. 1st DCA 1995) (holding that Commission erred in allowing intervention of association that lacked standing under established legal standards and holding that error was not harmless because the association's participation "was a material error in procedure which thus may have impaired the fairness of the proceeding").

The Prehearing Officer indicated that he was granting intervention to "err" on the side of "caution," but this presumes that granting intervention has a lesser downside than denying intervention. That is far from true. Granting intervention where it is not warranted wreaks havoc with a case, exacerbates the risk of error in the determination of critical issues, imposes unwarranted cost and disruption on the utility, creates confusion of the issues, potentially delays or impedes the development of an important project, and needlessly consumes the resources of the Commission and the utility (and potentially its ratepayers).

In the Hines 2 case, for example, last-minute intervention by an IPP whose standing we challenged increased the complexity and cost of litigation and imposed significant disruption on the utility, and, even at the conclusion of the proceedings before the Commission, the intervenor filed a groundless appeal to the Florida Supreme Court and then attempted to use the pendency of that appeal to create confusion before the Siting Board, in an effort to sidetrack the much-needed project.

Further, erring on the side of "caution," is erring nonetheless. The determination of standing is simply one that cannot and should not be avoided. As we have discussed, a determination of standing to intervene is a pure legal question and is the threshold issue that must

be determined prior to the grant of a petition to intervene. If the legal prerequisites to standing are not applied in the interest of developing a fuller record in the case, where does the Commission draw the line? Any lawyer who wants to meddle, with or without a client, can arguably help the Commission develop a fuller record. But the Commission has a well-qualified Staff to serve this purpose. Allowing the intervention of persons who conceivably might have beneficial information or who might play a supposedly beneficial role would open the floodgates to intervention in need determination proceedings. See Fort Howard Co., 624 So. 2d at 785 (holding that allowing a non-bidder to challenge the bid process would open the floodgate of potential protestants to bid awards).

For these reasons, when third parties wish to intervene in the hearing of a true party, such as FPC, whose substantial interests are in fact on the line in the proceeding before the Commission, the Commission has an obligation to the true party to apply the principles of standing to determine whether the would-be intervenor should be given leave to participate in the case in ways that are potentially detrimental to the substantial interests of the actual party in the case.

Although the decision whether to allow a party to intervene is to some extent within the discretion of the Commission, the Commission's discretion is not unbounded; rather, the Commission is obliged in reaching its decision to follow established law. See generally Grimes v. Walton County, 591 So. 2d 1091, 1094 (Fla. 1st DCA 1992) ("a trial court's discretion [to grant a request to intervene] is not unbounded; rather, it is obliged, in reaching its decision, to follow established law"). In all events, the Commission must first determine that, as a matter of law, a party has standing to intervene prior to exercising its discretion as to whether the party will actually be allowed to intervene. See Edgewater Beach Owners Assoc., Inc., 2002 WL 1932546 ("[d]etermining whether a party has standing is a pure question of law"). As we now

show, PACE has utterly failed to demonstrate its standing to intervene in this case under controlling authorities.

ARGUMENT

I. Governing Principles

The Florida Supreme Court established the ground rules for associational standing in Florida Home Builders Ass'n v. Department of Labor and Employment Sec., 412 So. 2d 351 (Fla. 1982). There, the Court held that an association must demonstrate that (1) a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the proposed agency action (in that case, a rule), (2) the subject matter of the proceeding is within the association's general scope of interest and activity, and (3) the relief requested is of the type appropriate for the association to receive on behalf of its members. Id. at 353-54.

Whether an association is able to meet this test depends, in turn, on whether the association's members may establish standing under the two-prong test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), and later adopted by the Supreme Court in Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997):

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Agrico, 406 So. 2d at 482. These principles are incorporated in Rule 25-22.039 of the Florida Administrative Code, which provides that intervenors must:

> [D]emonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

It is clear on the face of the Amended Petition that PACE cannot meet these requirements.

II. PACE Cannot Meet the Standards for Intervention

A. PACE Seeks to Intervene to Protect Its Members' "Competitive" Interests

As a threshold matter, PACE has now abandoned any pretense of intervening to protect the interests of Florida Power's customers and now expressly seeks to intervene to protect the "competitive" interests of its members. (Amended Petition, p. 5, n. 2). PACE insists that the Bid Rule obviously includes the competitive interests of bidders within the zone of interests the Bid Rule is intended to protect. This argument is misconceived.

The Florida Supreme Court made clear in TECO v. Garcia, 767 So. 2d 428 (Fla. 2000), that neither Section 403.519, Florida Statutes, nor the Florida Electric Power Plant Siting Act empowers the Commission to promote or protect the competitive interests of independent power producers such as PACE's membership. Id. at 435 (holding that existing legislation does not authorize Commission to promote "competitive market in wholesale power"). Accordingly, the Bid Rule may not be properly read to protect PACE's "competitive" interests, or this would jeopardize the legality of the Bid Rule itself. Because PACE advances this ground as the fundamental premise for its Amended Petition, PACE's Amended Petition to Intervene should have been denied.

B. PACE Has Not Alleged that FPC Should Have Selected Any Particular Alternative Proposal

Even apart from PACE's failure to meet the most fundamental test of standing, i.e., asserting a substantial interest legitimately protected by this proceeding, none of the particular grounds that PACE seeks to assert in this proceeding provides any justification for granting PACE's Amended Petition.

All PACE has done is to attempt to identify certain supposed "issues" that it seeks to raise generically on behalf of all of its members. PACE has not cured the fundamental defect of

its initial petition, namely, PACE's "failure to argue that the actual RFP process was not conducted in accordance with the bid rule, to the actual detriment of any member, or that FPC's RFP process failed to take into account some fact which disadvantaged any member." (Order, p. 2). Unless and until PACE is able to demonstrate how FPC acted to disadvantage a particular member, so that that member stands to gain or lose as a direct result of this proceeding, no amount of discussion about supposed "issues" can establish PACE's own standing to raise them. Because PACE has not remedied this fundamental defect in its petition, its Amended Petition should have been denied.

Specifically, in its Amended Petition, PACE argues that it should be entitled to intervene in these proceedings based on four considerations: (1) PACE argues that the Southwest Florida Water Management District ("SWFMD") has asserted an objection relating to site certification conditions at the Hines Energy Complex and somehow this entitles PACE to intervene in this need proceeding, (2) FPC's projected heat rate in the Hines 3 Need Study differs from heat rate specified for Hines 3 in FPC's 2002 Ten-Year Site Plan, which PACE contends calls into question the cost figures for the Hines 3 power plant, (3) PACE asserts that FPC has indicated that it may be engaging in wholesale sales, calling into question whether this business strategy was a factor used in FPC's self-selection of the Hines 3 unit, and (4) PACE asserts that FPC may have assigned excessive cost to "filler" supply alternatives in comparing the self-build option with other alternatives.

PACE skates by the fundamental question why PACE should be given standing to assert any of these arguments in this proceeding. Just as important, none of these "issues" could affect the outcome of this proceeding.

In fact, what is conspicuously missing from PACE's Amended Petition is any allegation that, as a result of these "issues," FPC should have selected, but failed to select, any particular

alternative proposal as more cost-effective than Hines 3. No individual member of PACE who actually participated in FPC's RFP has stepped forward to assert, or alleged any basis to conclude, that its proposed project is superior to Hines 3. At most, PACE seeks to persuade the Commission that FPC's process suffered from a general lack of fairness, but PACE leaves the Commission without any reason whatsoever to conclude that FPC had a specific, concrete option that was more in fact cost-effective than Hines 3. PACE's participation in this proceeding would be purely theoretical. Neither PACE nor any of its members would stand to gain or lose in any concrete, legitimate way as a direct result of the Commission's final decision. To grant intervention in these circumstances would nullify the word and the intent of the Bid Rule and render meaningless the time-tested requirements for standing established in Agrico and Florida Homebuilder.

We now turn to each of the particular arguments PACE advances in support of its Amended Petition to Intervene.

(1) First, PACE contends that it somehow has a substantial interest in intervening in these proceedings to talk about SWFMD's preliminary objection to FPC's site certification modification concerning water usage at the Hines Energy Complex ("HEC"). To state this proposition is to expose its lack of merit. PACE has no proper business raising any issues in this proceeding that may be the subject of different proceedings before the Department of Environmental Protection. Further, apart from the fact that this subject may not be appropriately addressed in this need proceeding, merely to identify the fact that SWFMD has asserted this objection does not somehow confer standing on PACE to speak to the issue in any forum.

In fact, the seminal Agrico case held squarely that a would-be intervenor may not intervene in a Chapter 403 permitting proceeding to protect its competitive interests. On the face of the SWFMD objection on which PACE relies, it is clear that the objection was asserted before

DEP as part of a Chapter 403 permitting proceeding. What PACE is seeking to do here is far more indefensible than the would-be intervenor's attempt to gain standing in the Agrico litigation. Here, PACE is seeking to raise Chapter 403 permitting issue in a different proceeding. This amounts to an impermissible attempt to circumvent insurmountable standing obstacles in the DEP proceedings by asking this Commission to adjudicate an objection over which it has no jurisdiction.

Further, it is evident on the face of the objection that it is addressed solely to FPC's request for emergency allocations of groundwater from existing permitted sources to supplement water levels in the cooling pond solely for the operation of Hines Units 1 and 2. That request by Florida Power in no way affects the previously-approved groundwater supply for Hines 3 under the existing Conditions of Certification. Sufficient water to accommodate the addition of Hines 3 was approved in the original Site Certification.

Thus, SWFMD's written objection to emergency allocation for Hines Units 1 and 2 makes no reference to Hines 3. It does not state or even suggest that the existing permitted allocation of up to 5 MGD of groundwater for Hines 3 is inconsistent with the existing Conditions of Certification, as approved by the Siting Board. Accordingly, there is no real "issue" here to resolve in this proceeding.

(2) Next, PACE asserts that it seeks to argue that the heat rate FPC identified for Hines 3 in its 2002 Ten-Year Site Plan differs from the heat rate FPC identifies in its Need Study for Hines 3, putting into question the cost figures for Hines 3. PACE is mixing apples and oranges. The heat rate identified in the Ten-Year Site Plan is plainly identified in that document as the "Average Net Operating Heat Rate," whereas the heat rate reflected in the Need Study is identified as the "Full Load Heat Rate." No change has occurred, and there is no resulting impact on the cost evaluation of Hines 3. These numbers simply reflect definitionally different

heat rate values. So there is no "issue" here, either. In fact, this was confirmed in the deposition of Dan Roeder that PACE took upon its entry into this case. Thus, in its effort to develop a fuller "record" to date, PACE has succeeded only in establishing that the "issue" it seeks to litigate does not exist.

Moreover, PACE cannot point to any provision of the Bid Rule, or any principle of resource selection, that says that a utility may not use specifications and cost projections for its next-planned unit not included in its Ten-Year Site Plan projection. In suggesting that it seeks to intervene in order to make this assertion, even taking PACE's obvious misstatement as true, PACE has succeeded merely in demonstrating that it cannot allege in good faith that FPC departed from any actual requirement of the Bid Rule, to the specific detriment of any of PACE's members.

(3) Third, PACE asserts that it seeks leave to intervene to argue that FPC intends to make some wholesale system sales. PACE makes no showing whatsoever how this issue has any material bearing on which alternative project is the most cost-effective for Florida Power's customers. PACE does not allege, and cannot allege, that any of its member's particular proposals become cheaper, or that Hines 3 becomes more expensive, if FPC makes wholesale system sales.

Moreover, the whole premise of this supposed "issue"—PACE's assertion that Florida Power relied on unspecified wholesale need as a part of the total need supporting Hines 3—is simply false. The forecast used to determine Florida Power's need for Hines 3 included only native load and firm wholesale sales that Florida Power has already committed to make. So there is no "issue" here.

(4) Finally, PACE says it is entitled to participate to argue that FPC assigned excessive costs to "filler" supplies that favored the self-build alternative. This argument, too, is a red

herring. As a preliminary matter, PACE does not allege that this consideration or any other, for that matter, changes the bottom line. Specifically, PACE does not allege facts from which the Commission should conclude that the cost of its members' proposals were lower than the cost of Hines 3 and thus should have been chosen as a more cost-effective proposal than Hines 3.

The reason for this is obvious. As demonstrated by Exhibit 6 of Daniel Roeder's pre-filed testimony, all of the bids submitted during the RFP process were more expensive than Hines 3 without any regard to "filler" units. So there is no "issue" here.[2]

C. PACE Continues Merely to Assert Generic Concerns of Its Members

Fundamentally, PACE's Amended Petition suffers from the critical defect that PACE is not purporting to intervene in support of any of its member's particular proposals. As we discussed in our opposition to PACE's initial and amended Petitions to Intervene, a disappointed bidder is given standing to participate in a bid protest for the very purpose of advocating a particular proposal that the bidder can credibly allege should have been accepted instead of the bid actually chosen. Otherwise, the would-be intervenor could not demonstrate that it has a concrete interest in the outcome of the proceeding. As the Court held in Agrico, in order to demonstrate a substantial interest in the outcome of a proceeding, the prospective intervenor

[2] As we discussed in our opposition to PACE's initial and Amended Petition to Intervene, the Commission's prior order permitting PACE to intervene in the Florida Power & Light need proceeding does not control this case for a number of reasons. First, we provided to the Commission materials that the Commission did not have in evaluating PACE's petition to intervene in the FP&L proceeding, namely, PACE's articles of incorporation demonstrating that, contrary to PACE's assertions, PACE was not seeking leave to intervene to protect FPC's ratepayers. Rather, PACE's Articles stated that PACE exists "exclusively" to promote the commercial interests of its own IPP members. Second, PACE's intervention in the FP&L proceeding was merely cumulative of the intervention of member bidders. Third, the Commission did not consider the extent to which the issues PACE sought to raise in the FP&L proceedings might lead to a different outcome for the proposal of any particular PACE member bidder. Fourth, the Commission had not decided as of the time of PACE's intervention in the FP&L hearings whether the Commission was going to conduct hearings in the Bid Rule docket, affording PACE an opportunity to assert its general concerns there. At this time, however, the Commission has scheduled such hearings to commence on the heels of the final hearing in this case. Thus, PACE has a perfectly adequate forum to raise its general views that did not exist at the time intervention was granted in the FP&L proceedings. Finally, in its Amended Petition, PACE has specified grounds for intervention in this case that were not presented or considered in the FP&L case. As we discuss in text, each and every one of these grounds is defective.

must establish that it "will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing." Agrico, 406 So. 2d at 482 (all emphasis added unless noted).

In this case, however, none of PACE's members who actually submitted a bid seeks to intervene in support of its own proposal. Further, PACE declines to do as a trade association what none of its members is willing to do individually—that is, contend that any particular project is superior to the project for which Florida Power is seeking an affirmative determination of need. PACE cannot assert associational standing based on interests that no one is asserting—namely, the interests of disappointed bidders in demonstrating that their projects should have been selected by Florida Power in lieu of the Company's self-build alternative.

The courts have repeatedly recognized that, to gain intervention in a bid protest, a bidder must be prepared to demonstrate that its particular project would have been selected but for the option actually chosen. Only then will the bidder's interest be sufficiently immediate to meet the prerequisites for standing. For this reason, courts have held that only the second-lowest bidder to a public contract has standing to challenge a state agency's acceptance of another bid. See Preston Carroll Co. v. Florida Keys Aqueduct Authority, 400 So. 2d 524, 524 (Fla. 3d DCA 1981). In Preston Carroll Co., the Third District stated, "In order to contest the award of a public contract to an apparent low bidder, appellant was required to establish that it had a 'substantial interest' to be determined by the agency. A second lowest bid establishes that substantial interest." Id. at 524. The reasoning behind this rule is clear. In most cases, the company with the second-lowest bid is the only company that would have been granted the contract if the accepted bid had been rejected. Thus, that company is the only one that is immediately injured by the agency's decision.

As already discussed, the Agrico decision establishes that standing requires a showing of "immediate" injury in fact. The "immediacy" requirement is intended to preclude participation

based on stated concerns that are speculative or remote. See Village Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987) (stating, "[A]bstract injury is not enough. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical. A petitioner must allege that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct.").

In this case, PACE does not and cannot allege that Florida Power would have and should have selected any one of its members' bids in lieu of Florida Power's self-build option. Accordingly, PACE cannot assert standing based on the interests of any one of its members, let alone all of these competing bidders, and PACE's Amended Petition to Intervene should have been denied.

This result is compelled by the Commission's own rules and decisions. Rule 25-22.090(8) of the Florida Administrative Code provides: "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." The Commission has explained that the intent of this rule is to preclude intervention by prospective power suppliers who have some agenda other than advocating particular proposals actually presented and considered during the utility's RFP process. See In re: Petition by Florida Power Corp. for Waiver of Rule 25-22.082, FAC, selection of generating capacity, 1999 Fla. PUC LEXIS 227, 99 FPSC 2:92 (Feb. 9, 1999) ("FPC Bid Rule Waiver Decision") (the Bid Rule was intended "to preclude likely intervenors" who do not actually submit proposals during the RFP process). Thus, the Bid Rule was enacted in significant part to prevent intervention by those who do not intend to demonstrate they submitted a particular project during the RFP project that should have been but was not selected by the utility.

PACE's amendments to its Petition do not change the irrefutable fact that PACE stands before the Commission as a non-bidder that wishes to raise issues of general concern. Non-bidders do not have standing to challenge the results of a bid proceeding. Brasfield & Gorrie General Contractor, Inc. v. AJAX Construction Co. of Tallahassee, 627 So. 2d 1200, 1203 (Fla. 1st DCA 1994) ("a non-bidder, who is not and cannot potentially be a party to the contract with the public body, is not entitled to the relief of either an award of the contract, or a re-bid"); Fort Howard Co. v. Dep't. of Management Services, 624 So. 2d 783 (Fla. 1st DCA 1993) (holding that non-bidder supplier did not have standing to challenge bid results even though it was the supplier for the two vendors submitting the lowest bids).

In Westinghouse Electric Corp. v. Jacksonville Transportation Authority, 491 So.2d 1238 (Fla. 1st DCA 1986), the First District held that, absent extraordinary circumstances, a non-bidder does not have standing to file a bid protest. The court reasoned that non-bidders should not be allowed to learn the terms of other bids and then challenge the process in an attempt to force a re-bidding. Id. at 1241. Such "sandbagging" would erode the integrity of the public bidding process. Id. The exclusion of non-bidders also protects against the intervention of limitless parties in bid determinations. See Fort Howard Co., 624 So. 2d at 785 (holding that allowing a non-bidder to challenge the bid process would open the floodgate of potential protestants to bid awards). Accordingly, PACE's Amended Petition, like its initial Petition, should have been denied.

III. The Bid Rule Hearing Will Provide PACE With a More Appropriate Forum

A need determination proceeding is not a rulemaking or investigative proceeding conducted to determine policy. The proceeding is focused on whether a specific power plant is needed and whether the particular alternative selected by the utility-provider is the most cost-efficient means of meeting the utility's identified need.

PACE's petition reflects that PACE intends to challenge the fairness of FPC's process. This policy concern should be addressed in a rule-making proceeding. In fact, PACE has proposed changes to the solicitation requirements of rule 25-22.082, and is an active participant in proceedings to consider such changes. See Docket No. 020398-EQ ("Bid Rule Docket"). The Commission has now scheduled hearings in the Bid Rule Docket for the same week as the Hines 3 hearing. PACE will have every opportunity to present its views on the policy issues it has identified in that docket.

A need determination proceeding is not the forum for PACE to argue its rule and policy concerns. See generally AmeriSteel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (holding that potential economic loss was not the kind of interest designed to be protected by the Commission's proceedings to approve territorial agreements between utilities). Proceedings pursuant to section 403.519 have a limited purpose very different from general rulemaking. PACE's Amended Petition should have been denied for this reason, too.

Conclusion

For the foregoing reasons, FPC respectfully requests that the Commission reconsider the order of the Prehearing Officer granting PACE's Amended Petition to Intervene, apply the binding law on these issues, and deny PACE's Amended Petition to Intervene.

Respectfully submitted,

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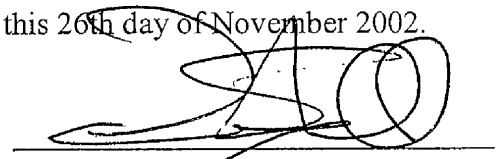
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been served by Facsimile and U.S. Mail to the parties with an asterisk by their name; and by U.S. Mail to the other interested parties of record as listed below on this 26th day of November 2002.



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