

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

**in re: Florida Power & Light Company's  
2003 Capacity Request for Proposal**

) Docket No. 030884-EU  
)

) Filed: September 9, 2003

**FLORIDA POWER & LIGHT COMPANY'S MOTION  
TO EXCLUDE PACE FROM BID RULE OBJECTION PROCESS**

Florida Power & Light Company ("FPL"), pursuant to rules 28-106.204 and 25-22.082(12), Florida Administrative Code ("F.A.C."), moves to exclude the Partnership for Affordable Competitive Energy ("PACE"), from participation in the objection process for FPL's 2003 Capacity Request for Proposal ("RFP") because PACE does not meet the express requirements of Rule 25-22.082, F.A.C. ("the Bid Rule) for a potential RFP participant to file objections to a specific RFP and, further, PACE would be unable to demonstrate standing to intervene if the objection process were an administrative evidentiary proceeding. In support, FPL states:

**INTRODUCTION**

PACE has filed in the Public Service Commission ("the Commission") its Objections To Florida Power & Light Company's Request For Proposals ("PACE Objections"), in response to the RFP that FPL issued in accordance with the Bid Rule on August 25, 2003. PACE seeks to object to the RFP under Rule 25-22.082(12), F.A.C., based on its status as a "statewide trade association consisting of [independent power producers]" and the allegation that certain of its members are potential participants in the RFP process. PACE Objections at 3. PACE also states that it is joined in the objections by "some of its member companies," which PACE does not name and identifies only as "several independent power producers ("IPPs") that are in the business of developing wholesale electric generation capacity in Florida." PACE Objections at 1 n.1. PACE and its unnamed members should be excluded from the RFP objection process based

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on the express terms of Rule 25-22.082(12) or, alternatively, based on PACE's and the unnamed members' lack of standing to intervene.

In 1994, the Commission adopted the Bid Rule to instruct public utilities as to the procedures by which they select certain types of cost-effective projects to provide capacity and energy. Order No. PSC-92-1355-FOF-EQ. In 2003, the Commission amended the Bid Rule by adding a provision that "a potential participant may file with the commission objections [to an RFP]". Rule 22.082(12), F.A.C. During the agenda conference on the Bid Rule amendments, the Commission's General Counsel made the following observation as to the RFP objection process: "Section 12 is . . . a procedure by which the affected parties can have a pretty good idea what the Commission would do if they had to do it at the end of the [Need Determination] case, and I don't think it's anything more than that . . . . [T]his is advisory in nature essentially . . . . You're giving it a quick and dirty shot early in the case to let them know where you're likely to go. And that's all we're doing in Section 12." Transcript of Agenda Conference at 74-75 (Docket No. 020398-EQ, Jan. 3, 2003).

The language of this subsection of the rule and the Commission's intent as reflected in the above quotation from the Agenda Conference transcript indicate that the RFP objection process in Section 12 of the Bid Rule is apparently unrelated to the process set forth in Chapter 120, Florida Statutes, the Administrative Procedure Act ("the APA"), to resolve disputed issues of material fact. Therefore, PACE's argument that it was granted standing to intervene in recent Need Determination proceedings, *see* PACE Objections at 3 n.4, is irrelevant and simply does not apply to the issue of its participation in the RFP objection process.

Further, PACE is a trade organization that does not fall within the Bid Rule's express definition of a "participant" as "a potential generation supplier." *See* Rule 25-22.082(2)(d),

F.A.C. (emphasis added). PACE is not a generator, marketer or utility affiliate and thus is not similar to any of the examples provided in the rule to illustrate the term “potential generation supplier[s].” *Id.* Finally, even if PACE were a “participant” and even if the APA’s standing requirements did apply to the RFP objection process, PACE has not demonstrated that it would meet the requirements for organizational standing to intervene.

### ARGUMENT

#### **I. The APA’s Adjudicatory Requirements Are Not Relevant To The Bid Rule’s Objection Process.**

In 2003, the Commission added to the Bid Rule the following provision:

A potential participant may file with the Commission objections to the RFP limited to specific allegations of violations of this rule within 10 days of the issuance of the RFP. The public utility may file a written response within 5 days. Within 30 days of the objection, the Commission panel assigned shall determine whether the objection as stated would demonstrate that a rule violation has occurred, based on the written submission and oral argument by the objector and the public utility, without discovery or an evidentiary hearing. The RFP process will not be abated pending the resolution of such objection.

Rule 25-22.082(12), F.A.C. (emphasis added).

By plainly stating “without discovery or an evidentiary hearing,” this subsection of the Bid Rule expressly disallows an evidentiary, or fact-finding, proceeding of the type that is provided in the APA. An evidentiary hearing is clearly a central element of the adjudicative proceedings provided in sections 120.569 and 120.57, Florida Statutes. Such a hearing is not only absent from the RFP objection process; it is expressly banned.

In *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), later adopted by the Florida Supreme Court in *Ameristeel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997), the Court provided standing requirements for participation as a party in administrative hearings and held:

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 an 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 (emphasis added). However, in Rule 25-22.082(12), F.A.C., the Commission has clearly forestalled any possibility of a section 120.57 hearing or any other type of evidentiary hearing within the Bid Rule objection process. Therefore, the Commission has not incorporated into the context of the Bid Rule's objection process the sections of the APA and its implementing rules that govern proceedings to resolve disputed issues of material fact. Thus, the requirements for standing and other aspects of those proceedings cannot apply here.

Moreover, the APA and its implementing rules for administrative fact-finding proceedings do not mention "participants." Rather, the APA and its rules include provisions for petitioners, respondents and intervenors as "parties." Anyone, including an organization, seeking to intervene as a party to a section 120.569 or 120.57 proceeding must demonstrate "substantial interests of the intervenor." See Rule 28-106.205, F.A.C., implementing sections 120.569 and 120.57, Fla. Stat. See also *Florida Home Builders Ass'n v. Dep't of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) (setting forth principles for organizational standing).

By defining an RFP objector as a "participant," rather than an intervenor or party, the Commission has excluded the "substantial interest" test and instead has chosen to expressly define a "participant" within the Bid Rule. Therefore, PACE's assertion that it is entitled to object to the RFP may be considered only within the language of the Bid Rule itself.

## **II. PACE Is Not A Potential Participant In The 2003 RFP Issued By FPL.**

The Bid Rule defines "participant" as follows:

[A] potential **generation supplier** who submits a proposal in compliance with both the schedule and information 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), marketers, and affiliates of public utilities, as well as providers of turnkey offerings, distributed generation, and other utility supply side alternatives.

Rule 25-22.082(2)(d), F.A.C.

In its Objection, PACE defines itself as a statewide trade organization and states that it is a “potential participant.” PACE Objections at 2-3. However, PACE provides no basis for its conclusion that it is a “potential participant” other than the irrelevant statement that it was granted intervenor status in two recent Need Determination proceedings and the inaccurate statement that “the express provisions and intent of the revised Bid Rule [are] to encourage and accommodate participation by substantially interested entities in the RFP process.” PACE Objections at 4.

In fact, the amended Bid Rule clearly states that the objection process is open to “potential participants” and never refers to “substantially interested entities.” A “participant” is a “generation supplier.” Rule 25-22.082(2)(d), F.A.C. Within the category of “generation supplier,” the Bid Rule lists various types and does not limit the list to those types. The term “participant” is limited solely to generation suppliers, and PACE is, by its own definition, not a generation supplier. Therefore, allowing PACE to object would violate the express terms of the Bid Rule.

### **III. PACE Could Not Demonstrate Standing.**

Even if the RFP objection process were characterized as an administrative adjudicatory proceeding subject to APA requirements, PACE could not demonstrate standing to intervene or to object. The absurdity of such an endeavor is evidenced by the fact that PACE has not even tried to demonstrate associational standing under the APA requirements set forth in *Florida Home Builders Ass’n*. Rather, PACE has merely expressed its wish to file its objections to the RFP “to represent the interests of its members.” PACE Objections at 4.

**A. Legal Requirements For Associational Standing.**

In *Florida Home Builders Ass'n*, the Florida Supreme Court held that, to prove standing, 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); and, if so, that (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 can meet this test depends, in turn, on whether any of the association’s members can show standing under the two-prong test set forth in *Agrico* in which a potential intervenor must show an (1) “injury in fact . . . of sufficient immediacy” that is (2) “substantial” and “of a type or nature which the proceeding is designed to protect.” 406 So. 2d at 482. These standing principles are incorporated in the Commission’s Rule 25-22.039, F.A.C., which provides that a would-be intervenor in a Commission proceeding 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.

In its Objection, PACE has not asserted compliance with these requirements.

**B. PACE Could Not Demonstrate Standing.**

**1. PACE Could Not Show That It Is Entitled To Participate As A Matter Of Constitutional Or Statutory Right Or Pursuant To A Commission Rule.**

No constitutional or statutory right exists as a basis for PACE’s intervention. The sole potential avenue for meeting the first part of the standing test under Rule 25-22.039, F.A.C., would be a successful allegation that the Bid Rule confers upon PACE an express right to intervene. As stated above in section II, PACE could not be considered a potential participant

under the definition under any stretch of the definition provided in Rule 25-22.082(2)(d), F.A.C., which defines “participant” as a “generation supplier.” Therefore, PACE could not point to a Commission rule that entitled it to intervene.

**2. PACE Could Not Show That Its Substantial Interests Are Subject To Determination Or Will Be Affected Through The RFP Objection Process.**

Even if the RFP objection process were governed by the APA standing requirements for hearings pursuant to sections 120.569, 120.57(1) or 120.57(2), Florida Statutes, PACE could not demonstrate associational standing. PACE could not meet the initial threshold showing that a substantial number of its members are “substantially affected” by the proposed agency action. See *Florida Home Builders Ass’n*, 412 So. 2d at 353-54. Therefore, the Commission would not reach the remaining requirements that the subject matter fall within PACE’s general scope of interest and activity and that the relief requested is of the type appropriate for PACE to receive on behalf of its members. *Id.*

**3. PACE Could Not Demonstrate That The Commission Or FPL Has Acted Or Will Act To Disadvantage Even One Member Of The PACE Organization.**

An entity is “substantially affected” if it can show an immediate “injury in fact,” of the “type or nature which the proceeding is designed to protect” for any particular member or for a substantial number of its members. *Agrico*, 406 So. 2d at 482. At this stage of the RFP process, an RFP has been issued. No bidders have responded. No bid has been accepted or rejected. The Commission has taken no action. Therefore, PACE cannot begin to show an immediate injury in fact for any one of its members.

Any alleged defect in the RFP would present only a remote or speculative injury to any particular member of PACE as a potential bidder responding to the RFP. See *Village Park Mobile Home Ass’n, Inc. v. State, Dep’t of Business Regulation*, 506 So. 2d 426, 433 (Fla. 1<sup>st</sup>

DCA 1987) (stating that “abstract 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.”)

Even after bids have been accepted or rejected in response to an RFP, a party to an administrative bid protest must demonstrate that its project would have been selected for the contract but for the fact that another project was chosen. *Preston Carroll Co. v. Florida Keys Aqueduct Authority*, 400 So. 2d 524, 524 (Fla. 3d DCA 1981). This requirement goes to the immediacy of harm required to be shown by the *Agrico* test to preclude bidders who present only speculative or remote allegations of harm.

Here, PACE cannot point to any decision of the Commission or of FPL concerning a particular potential or existing project or bid that has caused an immediate or direct injury to the particular member submitting that bid. In fact, the objection process is aimed at the RFP itself, not at any action of the Commission or the RFP issuer as to particular bidders. Therefore, it would be impossible for PACE to show that even one, much less “a substantial number,” of its members has been substantially affected by any decision related to the RFP.

#### **4. PACE Has Merely Asserted Generic Concerns Of Its Members.**

PACE purports to represent some of its members who, as potential participants, are preparing to submit competing bids in response to FPL’s RFP. In its Objection, PACE states that all of its members “are working together to promote a competitive wholesale electricity marketplace in Florida to benefit all Floridians.” PACE Objections at 3. In fact, PACE does not name even one of its members in its Objection, and therefore does not even purport to represent the individual interest of any one of its members as a potential bidder. Further, in an evidentiary



hearing, PACE would be constrained from arguing in favor of any particular bid over any other bid because it represents members “working together,” and thus could not meet the *Agrico* requirement of showing injury to any one member of “sufficient immediacy.” *Agrico*, 406 So. 2d at 482.

PACE’s inability to meet the *Agrico* test even in an actual evidentiary hearing scenario was illustrated in 2002, when a Commission Prehearing Officer initially denied PACE’s petition to intervene<sup>1</sup> in a Determination of Need Proceeding that was conducted pursuant to section 120.569, Florida Statutes. In his Order, the Prehearing Officer stated:

I do not find PACE’s Petition adequately alleges an injury in fact that is of sufficient immediacy to entitle PACE to a Section 120.57, Florida Statutes, hearing, or alleges injury to the type of interests that this need determination proceeding is designed to protect, as required by *Agrico*. As PACE has not alleged that a substantial number of its members have suffered an immediate injury in fact which would entitle them to a hearing, PACE’s Petition for Intervention is denied without prejudice.<sup>2</sup>

PACE subsequently filed an Amended Petition to Intervene in which PACE named its members and stated that “five out of six submitted responses to FPC’s RFP but were not selected due to FPC’s flawed cost-effectiveness evaluation process. . . .”<sup>3</sup> The Prehearing Officer granted the Amended Petition and orally stated during a Prehearing Conference that he had granted the Amended Petition because PACE might “provide the Commission with a little bit more flushed out record.” Transcript at 3-4, Prehearing Conference, Nov. 20, 2002. In a subsequent written Order, the Prehearing Officer limited PACE’s participation to issues already

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<sup>1</sup> Petition to Intervene (Oct. 31, 2002), *In re: Petition to Determine Need for Hines Unit 3 in Polk County by Florida Power Corporation*, Docket No. 020953-EI.

<sup>2</sup> Order No. PSC-02-1536-PCO-EI (Nov. 8, 2002), *In re: Petition to Determine Need for Hines Unit 3 in Polk County by Florida Power Corporation*, Docket No. 020953-EI.

<sup>3</sup> Amended Petition to Intervene at 4 (Nov. 15, 2002), *In re: Petition to Determine Need for Hines Unit 3 in Polk County by Florida Power Corporation*, Docket No. 020953-EI.

delineated and precluded PACE from filing testimony or presenting witnesses.<sup>4</sup> In granting PACE's petition, the Prehearing Officer did not mention the *Agrico* test or the legal requirement that standing must be established prior to an entity's being allowed to intervene. *See St. Joe Paper Co. v. Dep't of Community Affairs*, 657 So. 2d 27, 28-29 (Fla. 1<sup>st</sup> DCA 1995) (holding that the Commission erred in allowing intervention of an association that lacked standing under established legal standards and that error was not harmless because the association's participation "was a material error in procedure which may have impaired the fairness of the proceeding").

Upon Motion for Reconsideration, the full Commission did not reach the merits of FPC's contention that PACE had failed to meet the *Agrico* test requiring a showing of immediate injury in fact.<sup>5</sup> Rather, the Commission deferred to the Prehearing Officer's order granting PACE's petition based on a conclusion that FPC had not applied the correct standard of review for a motion for reconsideration. *Id.* at 2-3. Again, there was no mention of the legal requirement that standing must be established.

Thus, the Commission has already recognized PACE's lack of standing and has limited PACE's participation in a Determination of Need proceeding. The Commission should follow its own precedent by again precluding PACE from inserting its generic arguments into a process that was not designed to accommodate general policy issues and objections. The Commission should not entertain PACE's remote and speculative assertions as to the generic interests of its members, especially at this early stage of the RFP process.

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<sup>4</sup> Order No. PSC-02-1650-PHO-EI (Nov. 25, 2002), *In re: Petition to Determine Need for Hines Unit 3 in Polk County by Florida Power Corporation*, Docket No. 020953-EI.

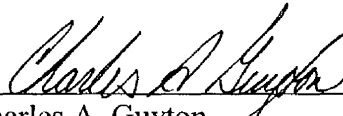
<sup>5</sup> Order No. PSC-02-1754-FOF-EI (Dec. 12, 2002), *In re: Petition to Determine Need for Hines Unit 3 in Polk County by Florida Power Corporation*, Docket No. 020953-EI.

**CONCLUSION**

For the foregoing reasons, the Commission should exclude PACE from the objection process for FPL's 2003 Capacity Request for Proposal.

Respectfully submitted,

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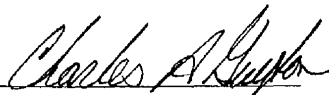
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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 9<sup>th</sup> day of September, 2003 a copy of the foregoing Florida Power & Light Company's Motion to Exclude PACE from Bid Rule Objection Process was served by either personal service (\*) or First Class United States Mail upon the following persons:

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