

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Objections to Florida Power & Light Company's Request for Proposals filed August 25, 2003, by Florida Partnership for Affordable Competitive Energy (PACE) and some individual member companies.

Filed: September 16, 2003.

COMMISSION  
CLERK

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

Pursuant to Rule 28-106.204, Florida Administrative Code, Florida Partnership for Affordable Competitive Energy ("PACE") and some of its individual members, who on September 4, 2003, collectively filed Objections to Florida Power & Light Company's ("FPL") Request for Proposals dated August 25, 2003, hereby file this *Response to FPL's Motion to Exclude PACE from Bid Rule Process*. In support, PACE states the following:

**Introduction**

The Florida Public Service Commission's Bid Rule, codified at 25-22.082, F.A.C., establishes the minimum substantive and procedural requirements to which investor-owned utilities must adhere in issuing Requests for Proposals (RFPs) to solicit supply-side alternative proposals to an IOU's self-build option. The Bid Rule's principal objective is to enable the Commission to determine the most cost-effective electric generation capacity source. Integral to this determination is that the various Bid Rule processes be transparent and non-exclusive, so that persons who have substantial interests at stake are allowed to meaningfully participate and present information and evidence

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challenging the cost-effectiveness of an IOU's self-build option and presenting alternative generation capacity sources.

Rule 25-22.082(12), F.A.C., creating the RFP Objections process, was added to the Bid Rule earlier this year specifically to make the RFP process more "open" by providing potential participants to the RFP process the opportunity to address the Commission concerning unfair, onerous, unduly discriminatory, or commercially infeasible provisions in an IOU's RFP. By providing this "up-front" opportunity to address flaws in an RFP **before** initiation of a formal need determination proceeding, time-consuming and costly extraordinary measures -- which this Commission previously has been forced to undertake as a result of flawed RFPs -- may be avoided.

FPL's Motion is its latest attempt to foreclose participation by competing electric energy producers in the Commission's Bid Rule processes. For the reasons discussed herein, the Commission should reject FPL's effort to "close" the Bid Rule processes from participation by persons and entities who have a substantial interest at stake. The Commission should accept the Objections filed by PACE and some of its members and address the issues, as urged in the Objections.

I. **Under any procedural scenario, PACE and its members have standing pursuant to Commission Bid Rule precedent to file objections to FPL's RFP.**

PACE and its members have standing to participate in the Objections process established in Rule 25-22.082(12), F.A.C., whether or not this process is governed by the processes applicable to administrative adjudicatory proceedings under Chapter 120, Florida Statutes ("F.S."). FPL argues that in any event PACE is not entitled to file

objections under Rule 25-22.082(12) because PACE, as a trade association comprised of independent power producers, is not **itself** an electric capacity generator, so it cannot be a potential “participant,” as that term is defined in the Bid Rule. This argument completely disregards the fact that this Commission previously has determined, in the context of need proceedings conducted under the Bid Rule, that PACE is a “participant” for purposes of the Bid Rule. As such, the Commission’s previously issued Orders addressing PACE’s standing are completely relevant -- indeed, dispositive -- to the matter of allowing PACE to file objections on behalf of its member companies under the newly-adopted Objections provision in Rule 25-22.082(12), F.A.C.

Rule 25-22.082(12) provides in pertinent part: “[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...” Rule 25-22.082(12), F.A.C. (emphasis added). The key standing requirement for an entity to file an objection is that it potentially be a “participant” as that term is defined in the Bid Rule.

“Participant” is defined in the amended Bid Rule as “**a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a public utility’s RFP.**” Rule 25-22.082(2)(d), F.A.C. (emphasis added). The second sentence of Rule 25-22.082(2)(d) states that “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. (emphasis added). The definition

of “participant” is identical to that codified in the Bid Rule prior to the 2003 amendment,<sup>1</sup> and the revised second sentence of the subsection provides a more expansive list of inclusive (not exclusive) examples of “participants” than was previously set forth in Rule 25-22.082(2)(d). The key point is, the Commission’s previous interpretations of the term “participant” – the definition of which remains unchanged under the 2003 Bid Rule amendments -- are directly and critically relevant to the Commission’s determination regarding PACE’s status as a participant in this RFP Objections proceeding.

The Bid Rule’s provision governing standing to participate in need determination proceedings, is currently codified at Rule 25-22.082(16), F.A.C.<sup>2</sup> This rule states: “[t]he 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. Rule 25-22.082(16), F.A.C. (emphasis added). In two prior need determination proceedings, involving the Florida Power Corporation’s Hines Unit 3<sup>3</sup> and

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<sup>1</sup> The version of the Bid Rule that was in effect immediately prior to the 2003 amendments contained the following definition of “participant”:

a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a utility’s RFP. A participant may include utility and non-utility generators as well as providers of turnkey offerings and other utility supply side alternatives.”

The first sentence of this definition is exactly the same as the first sentence in the current definition of “participant.” The second sentence has been revised to expressly make the group of entities that may be considered “participants” under the Bid Rule inclusive, and not limited to, examples identified in the definition.

<sup>2</sup> The Bid Rule’s need determination standing provision, Rule 25-22.082(16), was previously codified at Rule 25-22.082(8), F.A.C., but was renumbered as a result of the 2003 amendments to the Bid Rule. Critically, the language in current Rule 25-22.082(16), F.A.C., **was not amended in any manner** when it was renumbered from subsection (8) to subsection (16) of the Bid Rule, and **remains exactly the same** as it was codified in the prior version of the Bid Rule, which was in effect when the Commission issued its Orders finding that under the need determination standing provision PACE had standing to participate to represent the substantial interests of its members. As such, the Commission’s Orders interpreting former Rule 25-22.082(8) for purposes of intervention to participate as a party in need determination proceedings continue to apply to the interpretation and application of Rule 25-22.082(16), F.A.C.

<sup>3</sup> *In re: Petition to determine need for Hines Unit 3 in Polk County, Florida, by Florida Power Corporation*, Docket No. 020953-EI, Prehearing Order, Order No. PSC-02-1650-PHO-EI (Nov. 25, 2002), at 13, granting PACE’s Amended Petition to Intervene; *In re: Petition to determine need for an electrical*

the FPL Martin and Manatee electric generation facilities, the Commission interpreted this rule provision to determine that PACE had standing to participate as a party to represent the substantial interests of its members, most of whom were participants by virtue of submitting responses to the investor-owned utilities' RFPs -- even though PACE itself did not submit a response to the RFPs. These Orders are directly controlling precedent regarding the Commission's interpretation of the term "participant" under the Bid Rule, and they instruct that PACE be permitted to participate in this proceeding on behalf of its member companies.<sup>4</sup> FPL, on the other hand, cites no Commission or other applicable precedent to support its position that PACE and its members should be precluded from participating in the Objections process.

In a similar vein, FPL argues that the language of new Rule 25-22.082(12) by referring **only** to "participants," necessarily excludes persons whose substantial interests are affected from participating in the RFP Objections process. However, the Commission's previous need determination Orders, finding that PACE had standing in the FPL and FPC need determination proceedings to represent the interests of its members, completely undercuts this position. The need determination standing provision in Rule 25-22.082(16)<sup>5</sup> -- like the Objections provision in Rule 25-22.082(12) --

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*power plant in Martin County by Florida Power & Light Company, Docket No. 020262-EI and In re: Petition to determine need for an electrical power plant in Manatee County by Florida Power & Light Company, Docket No. 020263-EI, Order Granting Petition to Intervene (Sept. 4, 2002).*

<sup>4</sup> FPL characterizes these Commission Orders as "irrelevant" to the issue of whether PACE is a participant in the Bid Rule objections process. PACE notes that FPL has cited **no** legal support whatsoever for its untenable position, the upshot of which is that this Commission should interpret the term "participant" -- which only has one definition in the Bid Rule -- to mean two different things, depending on which subsection of the Bid Rule is at issue. Not only is FPL's position unsupportable and absurd from a legal perspective, but it also potentially would cause significant confusion in future Bid Rule proceedings. The Commission has strong legal precedent to support a determination that PACE be permitted to participate in the objections proceeding.

<sup>5</sup> Previously codified at Rule 25-22.082(8), F.A.C.

expressly refers only to “participant.” Yet, as discussed above, the Commission previously has interpreted this Bid Rule<sup>6</sup> standing provision to include PACE, on behalf of the substantial interests of its members. Again, these Orders are directly relevant and controlling with respect to the Commission’s interpretation of the term “participant” under the Bid Rule. These Orders militate that PACE is a participant for purposes of the participating in the Objections process under the Bid Rule -- just as PACE was determined a participant by the Commission for purposes of representing its members’ substantial interests in need determination proceedings. *See, Gadsden State Bank v. Lewis*, 348 So. 2d 343 (Fla. 1st DCA 1977)( bank that filed a protest to agency approval of charter for competing bank was a “party” pursuant to agency rule because it had filed a protest alleging its substantial interests were affected by issuance of the charter.).

The situation in this Objection proceeding is essentially the same as that in the FPL and FPC need determination proceedings: PACE seeks to participate in the proceeding to represent the substantial interests of its members, all of whom have standing as potential participants to RFP’s RFP. In FPL’s *Response in Opposition to PACE’s Amended Petition to Intervene* filed in the Martin and Manatee need determination proceedings, Docket Nos. 020262-EI and 020263-EI, FPL itself concedes that PACE’s standing derives from the standing of its members to participate in proceedings. *FPL Response in Opposition*, at 3. FPL’s concession in this regard undercuts its position that PACE lacks standing to represent the substantial interests of its

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<sup>6</sup> As previously explained, when the Commission interpreted the term “participant” in the context of standing in the FPL and FPC need determination proceedings, the need determination standing provision was then codified at Rule 25-22.082(8), F.A.C. Due to the 2003 Bid Rule amendments, Rule 25-22.082(8) was renumbered as Rule 25-22.082(16), but otherwise remains completely unchanged, so that the need determination standing provision in the amended Bid Rule is identical to that in the previous version of the Bid Rule.

members in this proceeding -- particularly when it is unquestionable that PACE's members, as independent power producers in the business of developing wholesale electric generation capacity in Florida, have standing as potential participants to object to the RFP at issue in this proceeding. Just as this Commission previously has determined, in the FPL and FPC need determination proceedings, that PACE has standing to participate to represent the interests of its members, the Commission should also determine that PACE has standing as a participant under the Bid Rule to represent the substantial interests of its members in this proceeding.

**II. PACE has associational standing under Chapter 120, F.S., to represent the interests of its members in the RFP Objection process.**

Setting aside for the moment FPL's argument that the Administrative Procedure Act does not apply to the RFP Objections process established in Rule 25-22.082(12), and assuming that Chapter 120 applies to this proceeding, it is unquestionable that PACE has asserted facts sufficient to demonstrate its standing under Chapter 120 to represent the interests of its individual member companies, all of whom are potential generation suppliers in the RFP process.

First, as previously discussed, PACE has standing by provision of the Bid Rule. As extensively addressed in the preceding section of this *Response*, PACE has standing as a "participant" by virtue of prior Commission Orders interpreting the term "participant" in the Bid Rule to include PACE in its representative capacity on behalf of the substantial interests of its members. Further, in the Objections submitted by PACE and some of its members, PACE states that it seeks to represent the interests of its

members, and explains that its members are IPPs, all of whom are potential bidders to FPL's RFP, and all of whom thus have standing under Rule 25-22.082(12) to participate in the RFP Objection process. *Response*, at. 3. As such, PACE has standing, derived from the standing of its members, to represent the interests of these members in this proceeding.<sup>7</sup>

Further, in the Objections, PACE alleges facts sufficient to show that it meets the "substantial interests" associational standing test announced in *Florida Home Builders v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982).<sup>8</sup> PACE states that it seeks to represent the substantial interests of its members in this proceeding. PACE specifically identifies numerous provisions in FPL's RFP that it alleges are unfair, unduly discriminatory, or commercially infeasible, as prohibited under Rule 25-22.082(5), F.A.C.<sup>9</sup> PACE then proceeds to explain, in substantial factual detail **why** these provisions are unfair, unduly discriminatory, onerous, or commercially infeasible, and **how** these provisions, if left as they are in the RFP, will cause immediate substantial injury to PACE's members, by rendering the RFP so weighted in favor of FPL's self-build option that it will be extremely difficult for PACE's members to formulate

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<sup>7</sup> Section 120.52(12), F.S., defines the term "party" to include "any other person who, as a matter of constitutional right, provision of statute, or **provision of rule**, or whose substantial interests will be affected by the proposed agency action, and who makes an appearance as a party." Section 120.52(12), F.S. (emphasis added).

<sup>8</sup> The Florida Supreme Court in *Florida Home Builders* set forth the three-prong test for associational standing in Florida. Specifically, the association must allege facts sufficient to show: (1) a substantial number, although not necessarily a majority, of its members are substantially affected; (2) the subject matter must be within the association's general scope of interest and activity; and (3) the relief requested must be of a type appropriate for an association to receive on behalf of its members. This standard was extended to administrative adjudicatory proceedings under Section 120.57 in *Farmworker Rights Org. v. Department of Health and Rehab. Svcs.*, 417 So. 2d 753 (Fla. 1<sup>st</sup> DCA 1982).

<sup>9</sup> This is the standard enunciated in Rule 25-22.082(5): "[n]o term of the RFP shall be unfair, unduly discriminatory, onerous, or commercially infeasible." Presumably, RFP provisions that fail this standard -- that is, are determined by the Commission to be unfair, unduly discriminatory, onerous, or commercially infeasible, must be deleted or revised to render them able to pass muster under this standard.



responses that have any chance of winning the RFP process. These specifically described injuries are a real and immediate result of **the RFP process itself**, not the need determination hearing process under Rule 25-22.080, F.A.C. As such, FPL's charge that "PACE cannot begin to show an immediate injury in fact for any of its members" is factually baseless and legally incorrect. *FPL Motion to Exclude*, at 7-8. PACE's members are substantially injured by being subjected to the unfair, onerous, unduly discriminatory, and commercially infeasible terms and conditions of FPL's RFP -- with which they must comply if they wish to have any chance whatsoever of being chosen to provide generation capacity under the RFP.

FPL also appears to argue that PACE's members cannot be injured because the Commission has not rendered any decision that causes an injury to PACE's members. *Motion to Exclude*, at 8. This argument completely ignores that the Commission routinely grants entities intervention into need determination proceedings, which are **not** initiated by any action or proposed action on the part of the **Commission**, but, instead, are initiated by the filing of a Petition for need determination for a proposed electric power plant. As such, FPL's argument that there can be no injury to PACE's members because there has been no "agency action" by the Commission, is pointless and incorrect.

FPL further argues that because PACE and its members have not specifically identified the members with whom PACE joins in submitting the Objections, PACE merely asserts "generic"<sup>10</sup> concerns of its members, which are insufficient to meet the

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<sup>10</sup> Webster's Ninth New Collegiate dictionary defines the term "generic" as "general." As a matter of fact, the Objections submitted by PACE and its members **specifically** identify which RFP provisions violate the RFP standard in Rule 25-22.082(5), discuss in great detail the **specific reasons why** PACE and its members believe the provisions violate this standard, and discuss in **specific detail how** the provisions injure PACE's members in the RFP process. FPL's blithe description of PACE's members' concerns as "general" obviously mischaracterizes the specific, detailed nature of the Objections.

injury-in-fact standing requirement. As alleged “support” for this argument – which even a cursory reading of the Objections reveals has no basis – FPL cites the *Order Denying Intervention without Prejudice*, Order No. PSC-02-1536-PCO-EI, issued in Docket No. 020953-EI (November 8, 2002), FPC’s Hines Unit 3 need determination proceeding. In this Order, the Prehearing Officer initially determined that PACE did not have standing to intervene into FPC’s need determination for the Hines Unit 3 facility, but granted PACE leave to amend its Petition to adequately allege standing. In fact, that is precisely what PACE did in its Amended Petition, and the Prehearing Officer determined that PACE’s allegations were legally and factually sufficient to afford PACE standing to intervene in the need determination proceeding. This decision is memorialized in the *Prehearing Order*, which, in part, grants PACE’s Amended Petition to Intervene. Order No. PSC-02-1650-PHO-EI (November 25, 2002). FPC subsequently moved for reconsideration of the standing ruling, but the full Commission denied the Motion, specifically on the ground that “[t]he record is clear that the Prehearing Officer **had the facts and law before him**, and made the determination that PACE has made factual allegations sufficient to confer standing to intervene in this docket **as required by *Agrico and Florida Home Builders***.” *Order Denying Motion for Reconsideration*, Order No. PSC-02-1754-FOF-EI (December 12, 2002), Docket No. 020953-EI, at 3 (emphasis added). This quote in the Commission’s Order -- particularly the highlighted clause -- makes abundantly clear that the Prehearing Officer correctly considered the facts and applicable law in rendering his decision to allow PACE to intervene, and for FPL to suggest otherwise, as it does on pages 9 and 10 of its *Motion to Exclude*, is simply wrong. FPL may not agree with or like the result of the *Order Denying Motion for*

*Reconsideration*, but that does not render the Commission's decision any less correct or legally binding with respect to PACE's standing rights to participate in need determination proceedings. FPL's discussion of the Commission's decision regarding PACE's standing in the Hines Unit 3 need determination proceeding is inaccurate and should be disregarded in resolving the issues in this proceeding.<sup>11</sup>

Furthermore, FPL's position that not identifying PACE's members in the Objections somehow renders PACE's members' alleged injuries of insufficient immediacy to support a determination of standing is not supported by law or fact. FPL cites no legal support for this proposition, and has chosen to ignore established case law holding that associations are not required to divulge the identities of their members on whose behalf they are participating in a lawsuit to have standing to represent the interests of their members. *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958); *National Rifle Ass'n of America v. City of South Miami*, 774 So. 2d 815 (Fla. 3d DCA 2000)(holding that under the doctrine of associational privacy, the NRA should not have been required to divulge the names of its members in order to have standing to represent those members in a lawsuit). FPL's arguments in this regard are misplaced and should be rejected.

With respect to the other requirements of the *Florida Home Builders* associational standing test, PACE has adequately alleged facts demonstrating it meets these

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<sup>11</sup> FPL argues that in an evidentiary hearing, PACE would be constrained from arguing in favor of any particular bid over any other bid because PACE represents members "working together," and thus could not meet the *Agrico* requirement of showing injury to any one member of sufficient immediacy. This position completely disregards that, **in fact**, the Commission previously **has** determined, in two previous need determination evidentiary hearings, that PACE **does** have standing to intervene and represent the interests of its members. FPL's argument that PACE, by virtue of representing the collective interests of its members, could not ever demonstrate injury of sufficient immediacy, obviously is incorrect and should be rejected as a misplaced attempt to eviscerate the principle of associational standing as applied to Bid Rule proceedings.

requirements, too. PACE alleges facts showing that it represents its members' interest in this proceeding in being eligible to provide, and providing, alternative electric generation capacity in Florida. Clearly, PACE's scope of interest and activity is addressed within the subject of this proceeding, which is to provide an opportunity for electric generation capacity suppliers to compete to be able to provide capacity solicited through FPL's RFP. The RFP must establish a fair process in order for PACE's members to be able to fairly compete to provide the solicited generation capacity. As such, it cannot seriously be disputed that PACE's scope of interest and activity is not within the scope of this RFP proceeding. Finally, as already extensively discussed herein, PACE has alleged factual information in the Objections sufficient to show that it is an appropriate entity to receive relief on behalf of its members. PACE and its members seek to have the Commission require FPL to revise or delete certain unfair, onerous, unduly discriminatory, and commercially infeasible provisions in its RFP. Under these circumstances, it cannot be seriously disputed that PACE has shown that it is an appropriate entity to receive relief on behalf of its members.

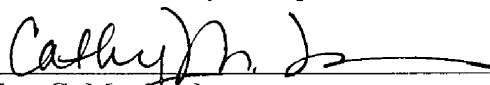
For these reasons -- should the Commission determine that the Objections process is governed by the adjudicatory provisions in Chapter, 120, F.S. -- PACE has alleged facts sufficient to show that it has associational standing under *Florida Home Builders* to participate in this Objections proceeding.

For these reasons, the Commission's decision with respect to the Objections to FPL's RFP arguably is subject to Chapter 120, F.S. If the Commission so determines, then PACE and its members have standing to participate in the administrative adjudicatory proceeding for the reasons previously discussed herein.

### Conclusion

Based on Commission precedent with respect to PACE's standing to participate in Bid Rule proceedings, and case law interpreting and applying the administrative associational standing test, and consistent with the intent of Rule 25-22.082(12), F.A.C., to create a more "open," proactive process for address potentially unfair, onerous, unduly discriminatory, or commercially infeasible RFP provisions prior to initiation of a formal need determination proceeding, the Commission should reject FPL's effort to exclude participation in this Bid Rule process by persons and entities, and their representatives, whose substantial interests are at stake. Accordingly, PACE and its members respectfully request the Commission to deny *FPL's Motion to Exclude PACE from Bid Rule Objection Process*.

Respectfully submitted this 16th day of September, 2003.



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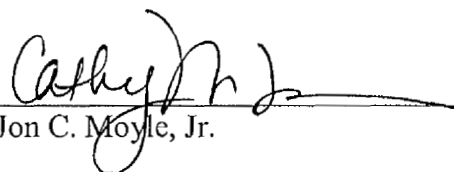
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served by hand delivery and by electronic mail to Charles A. Guyton, Esq., Steel Hector & Davis, LLP, 215 South Monroe St., Suite 600, Tallahassee, FL 32301, and to Cochran Keating, Esq., and Martha Carter Brown, Esq., this 16<sup>th</sup> day of September, 2003.

  
Jon C. Moyle, Jr.