



William P. Cox
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420
(561) 304-5662
(561) 691-7135 (Facsimile)

August 21, 2017

-VIA ELECTRONIC FILING-

Ms. Carlotta Stauffer, Commission Clerk
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 20170122-EI - Florida Power & Light Company's Petition to Request Exemption under Rule 25-22.082(18), F.A.C, from Issuing a Request for Proposals for the Modernization of the Lauderdale Plant

Dear Ms. Stauffer:

Please find enclosed for filing a copy of Florida Power & Light Company's ("FPL") response to Sierra Club's Petition to Intervene and Protest.

Thank you for your assistance. Please contact me should you or your staff have any questions regarding this filing.

Sincerely,

s/ William P. Cox

William P. Cox
Senior Attorney
Florida Bar No. 0093531

WPC/msw
Enclosures

cc: Takira Thompson, Traci Matthews, Phillip Ellis, Division of Engineering
Charles Murphy, Office of the General Counsel

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company’s
Petition to Request Exemption under Rule 25-
22.082(18), F.A.C., from Issuing a Request
for Proposals for the Modernization of the
Lauderdale Plant

Docket No: 20170122-EI

Date: August 21, 2017

**FLORIDA POWER & LIGHT COMPANY’S RESPONSE TO
SIERRA CLUB’S PETITION TO INTERVENE AND PROTEST**

Pursuant to Rules 28-106.201 and 28-106.204, Florida Administrative Code (“F.A.C.”), Florida Power & Light Company (“FPL” or the “Company”), responds to the protest and petition to intervene filed by the Sierra Club (“Sierra Club Protest”) of Proposed Agency Action Order No. PSC-2017-0287-PAA-EI (“PAA Order”), issued by the Florida Public Service Commission (“FPSC” or the “Commission”) on July 24, 2017, which approved FPL’s request for exemption from a provision in Rule 25-22.082, F.A.C., the “Bid Rule,” which rule provision otherwise would direct the issuance of a Request for Proposals (“RFP”) in connection with FPL’s proposed modernization of its existing Lauderdale power plant (to be renamed the Dania Beach Clean Energy Center) (the “Project” or “Dania Beach Project”), prior to FPL filing a petition for determination of need for the Project with the Commission.

FPL requests that the Commission hold this docket in abeyance and consolidate this docket for purposes of hearing with the future need determination docket for the Project once FPL files such need determination petition with the Commission.

I. Background

1. Pursuant to Rule 25-22.082(18), F.A.C., on May 22, 2017, FPL filed a petition with the Commission requesting that FPL be exempted from the RFP requirement in the Bid Rule for FPL’s modernization of the Lauderdale plant. Subsection 18 of the Bid Rule itself

provides that the Commission may exempt a utility from any of the requirements of this rule based upon a finding by the Commission that (1) the proposal will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, *or* (2) will increase the reliable supply of electricity to the utility's general body of ratepayers, *or* (3) otherwise will serve the public welfare.

2. On June 2, 2017, Commission Staff propounded several data requests on FPL focused on the basis and underlying analyses supporting FPL's requested Bid Rule exemption. FPL provided responses to those data requests, adding further support for the requested exemption, on June 16 and July 7, 2017.

3. On July 13, 2017, after considering FPL's petition, oral comments from the Office of the Public Counsel ("OPC"), and written comments from Sierra Club, the Commission unanimously voted to approve FPL's petition. On July 24, 2017, the Commission issued the PAA Order granting FPL's request. The Commission determined that the Dania Beach Project meets all three requirements for exemption under Section 18 of the Bid Rule by reusing the existing Lauderdale plant site and related facilities for a newer, larger, and more efficient unit, specifically noting in the PAA Order, in direct response to the OPC and Sierra Club comments, that "[g]ranted the exemption does not relieve the Company of any requirements during a future PPSA [Power Plant Siting Act] need determination process, including a demonstration that the project is the most cost-effective source of power or whether conservation or renewable generation can mitigate the need for the modernization of the Lauderdale plant." PAA Order at

4. On August 14, 2017, Sierra Club filed a protest of the PAA Order and its petition to intervene in the above referenced docket.

II. Legal Argument

A. Sierra Club has the ability to obtain current market price information and is not restricted by the proposed Bid Rule exemption

4. Sierra Club has protested the PAA Order on the basis that granting the Bid Rule exemption would preclude the Commission and the Sierra Club and its membership from obtaining current market price information for generation alternatives. The reality is that neither Sierra Club nor its members are restricted from obtaining current market information in any way, shape, or form. The granting of the Bid Rule exemption in no way precludes Sierra Club (or its members) from obtaining any relevant market information that they may wish to bring forward in a future FPL need determination proceeding. Sierra Club admits as much in its comments, where it states that an RFP is not the only means to obtain current market price information to achieve the lowest costs for FPL and its customers for this Project. *See* Sierra Club Comments at 3 (filed July 11, 2017) (“While an RFP is certainly not the only way to obtain such information, ...”).

5. By granting the requested Bid Rule exemption, the Commission has determined that an RFP is not required; this determination in no way relieves FPL of its burden to satisfy the requirements of Section 403.519, Fla. Stat., in the subsequent need determination for the Project. These requirements include “a demonstration that the project is the most cost-effective source of power or whether conservation or renewable generation can mitigate the need for the modernization of the Lauderdale plant.” PAA Order at 4. The effect of the PAA Order is to allow FPL to move forward in the regulatory approval process for the proposed Project without issuance of an RFP because the Project is likely to result in a lower cost supply of electricity, to achieve a more reliable supply of electricity, and to provide public welfare benefits. The Commission’s proposed action does not prevent Sierra Club or any party from presenting

evidence and arguing in the Commission's subsequent need determination proceeding that more cost effective alternatives exist or that other renewable generation or conservation alternatives should be considered.

B. The requested Bid Rule exemption is not a waiver or variance under Section 120.542, Fla. Stat. because the Bid Rule expressly provides for the exemption

6. Sierra Club attempts to construe the requested exemption from the RFP requirement in the Bid Rule as a waiver or variance that must satisfy the legal standard for a variance or waiver of an agency rule under Section 120.542, Fla. Stat. Sierra Club's contention has no merit. The Commission has consistently applied the specific criteria in Section 18 of the Bid Rule to provide exemptions from the requirements of the rule when justified by a petitioning public utility. The Commission has consistently applied the rule in this manner since Section 18 of the Bid Rule in its current form was enacted by the Commission in 2003. *See, e.g., In Re: Petition for Determination of Need for Expansion of Crystal River 3 Nuclear Power Plant, for Exemption from Bid Rule 25-22.082, F.A.C., and for Cost Recovery Through Fuel Clause, by Progress Energy Florida, Inc., Docket No. 20060642-EI, Order No. PSC-2007-0119-FOF-EI (F.P.S.C. Feb. 8, 2007) ("Progress Energy Crystal River 3 Need Determination Order"); In re: Petition to Determine Need for West County Energy Center Unit 3 electrical power plant, by Florida Power & Light Company, In re: Petition for determination of need for conversion of Riviera Plant in Palm Beach County, by Florida Power & Light Company, In re: Petition for determination of need for conversion of Cape Canaveral Plant in Brevard County, by Florida Power & Light Company, Docket Nos. 20080203-EI, 20080245-EI, and 20080246-EI, Order No. PSC-2008-0591-FOF-EI (F.P.S.C. Sept. 12, 2008) ("FPL West County 3, Riviera Beach, and Cape Canaveral Need Determination Order"); In re: Petition for exemption under Rule 25-22.082(18), F.A.C., from issuing request for proposals (RFPs) for modernization of the Port*

Everglades Plant, by Florida Power & Light Company, Docket No. 20110228-EI, Order No. PSC-2011-0360-PAA-EI (F.P.S.C, Aug. 26, 2011).

7. The exemption provided in the Bid Rule is not a “variance” or “waiver” as defined in Chapter 120, Fla. Stat. Section 120.52(21), Fla. Stat., defines “variance” as “a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule,” and Section 120.52(22), Fla. Stat., defines “waiver” as “a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.”

8. Under Section 18 of the Bid Rule, the Commission has enacted specific criteria that, if satisfied by a petitioning public utility, relieve the utility from compliance with the rule or a specific part of the rule, such as the requirement to issue an RFP. This is not a case where FPL has sought a modification of the Bid Rule (variance). Nor is it a case where FPL has asked that the Bid Rule not be applied at all (waiver). Instead, consistent with precedent, the Commission has applied a specific provision in the Bid Rule (Section 18) that provides it with flexibility to exempt or provide an exception for a petitioning utility from any of the requirements of the rule, based on criteria specified in the rule itself. *See Redner vs. City of Tampa*, 827 So.2d 1056 (Fla 2nd DCA 2002) (finding an “exception” in a local zoning ordinance is not a “variance” or “waiver” under Section 120.542, Fla. Stat., because it is granted by legislative process under express provision of the enactment itself that contains a proper standard or rule of guidance). Accordingly, Sierra Club’s argument that the requested exemption fails to meet the variance or waiver standard in Section 120.542, Fla. Stat., is inapposite and should be rejected.

C. The Commission should hold this docket in abeyance and consolidate this docket with the future need determination proceeding for the Dania Beach Project

9. FPL requests that the Commission hold this proceeding in abeyance and take no further action at this time. This abeyance should continue until FPL files its need determination for the Dania Beach Project, at which time the Commission should consolidate the need determination docket for the Project with this docket for purposes of hearing. The Commission would then address the Bid Rule exemption request as a separate issue along with the other issues addressed in the need determination proceeding. Such treatment is consistent with prior Commission proceedings in which the Commission considered the electric utility's Bid Rule exemption request as a part of the utility's need determination petition. See *supra*, e.g., *Progress Energy Crystal River 3 Need Determination Order*; *FPL West County 3, Rivera Beach, and Cape Canaveral Need Determination Order*.

10. Such a consolidation of the two dockets for purposes of hearing will promote efficient use of the Commission's and the parties' resources by only conducting one hearing instead of two, and Sierra Club and all parties will receive due process on issues raised in both the protest of FPL's Bid Rule exemption request and the future need determination filing for the Project.

WHEREFORE, for the foregoing reasons, Florida Power & Light Company respectfully requests that the Commission hold this docket in abeyance and consolidate this docket with the future FPL need determination docket for the Project.

DATED this 21nd day of August, 2017.

Respectfully submitted,

William P. Cox
Senior Attorney
Kevin I. C. Donaldson
Senior Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5662
Facsimile: (561) 691-7135
Email: will.p.cox@fpl.com
Email: kevin.donaldson@fpl.com

By: *s/ William P. Cox* _____

William P. Cox
Florida Bar No. 0093531

CERTIFICATE OF SERVICE
Docket No. 20170122-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 21st day of August, 2017 to the following:

Charles Murphy, Esq.
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
cmurphy@psc.state.fl.us

Charles Rehwinkel, Esq.
Patricia Christensen, Esq.
J.R. Kelly, Esq.
Office of Public Counsel
The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399
rehwinkel.charles@leg.state.fl.us
christensen.patty@leg.state.fl.us
kelly.jr@leg.state.fl.us

Julie Kaplan, Esq.
Diana Csank, Esq.
Sierra Club
50 F St. NW, 8th Floor
Washington, DC 20001
julie.kaplan@sierraclub.org
diana.csank@sierraclub.org

By: s/ William P. Cox
William P. Cox
Florida Bar No. 0093531