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November 15, 2002

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VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of Commission Clerk and
Administrative Services
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 020398-EI; Comments Of Florida Partnership For Affordable Competitive Energy

Dear Ms. Bayó:

Enclosed for filing please find one (1) original and fifteen (15) copies of the Comments Of Florida Partnership For Affordable Competitive Energy, submitted for filing in the above referenced docket. Please also find the enclosed diskette, containing an electronic version of the Comments in WordPerfect format. The Exhibits are provided in hard copy only.

Please acknowledge receipt of this document by time/date stamping the enclosed additional copy of the Petition, as indicated.

Very truly yours,

Leslie J. Paugh

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Enclosures: Comments Of Florida Partnership For Affordable Competitive Energy; original and fifteen copies
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COMMENTS
FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY

Docket 020398-EI
Proposed Revisions to Rule 25-22.082,
Selection of Generating Capacity

Filed November 15, 2002

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Revisions to Rule 25-22.082, Selection of Generating Capacity	)	Docket No. 020398-EI Filed: November 15, 2002

COMMENTS OF FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY

Comes now, the Florida Partnership for Affordable Competitive Energy ("PACE") and hereby files its Comments pursuant to section 120.54, Florida Statues (2002), Amended Notice of Rulemaking, Order No. PSC-02-1420A-NOR-EQ, issued October 17, 2002 and Order Establishing Procedures To Be Followed At Rulemaking Hearing, Order No. PSC-02-1514-PCO-EQ, issued November 4, 2002 ("Order Establishing Procedure").

I. Introduction

PACE is a non-profit organization of Independent Power Producers ("IPPs") consisting of the following companies: Mirant Americas Development, Inc., Constellation Power, Inc., Calpine Corporation, Competitive Power Ventures, Inc., PG&E National Energy Group, and Reliant Energy. PACE continues to support the Florida Public Service Commission's ("PSC" or "Commission") ongoing efforts to effectuate the objective of enhancing the selection of cost-effective generating capacity by Florida's public utilities through the rule development process. Meeting this objective will benefit all of the public utilities' customers.

In these Comments PACE provides four analyses: (1) a focused examination of its previous comments on legal and factual issues attendant to this rulemaking; (2) a detailed explanation of the proposed PACE rule for selection of generating capacity; (3) in the alternative, suggestions regarding proposed enhancements to the proposed rule; and (4) comments on additional matters for which clarification is sought by the PSC in the Order Establishing Procedure.

II. Prior Proceedings

Prior to publishing the proposed Rule, the PSC engaged in a lengthy and informative rule development and comment process, the product of which will assist in the evaluation in the instant proceeding. Rule development workshops were held on February 7, 2002 and July 19, 2002. A Special Agenda Conference to evaluate the staff recommendation was held on September 30, 2002. PACE filed two sets of comments during the prior proceedings: (1) Post-Workshop Memorandum of Florida PACE, attached hereto as Exhibit 1, was filed on March 15, 2002 in response to direction of the PSC at the February 7, 2002 rule development workshop; and (2) Pre-Workshop Comments of the Florida Partnership for Affordable Competitive Energy, attached hereto as Exhibit 2 filed on June 28, 2002 pursuant to Order Initiating Rule Development, Order No. PSC-02-0723-PCO-EQ, issued May 28, 2002. By this reference, PACE respectfully requests that these Exhibits be made a part of the record in this proceeding.

A. Post-Workshop Memorandum and Pre-Workshop Comments

In its Post-Workshop Memorandum and Pre-Workshop Comments, PACE fully analyzed and developed several core issues, each of which is briefly restated herein for emphasis and clarity.

1. PACE Proposal

In conjunction with the February 7th workshop, PACE submitted its proposal for amending Rule 25-22.082, Selection of Generating Capacity ("Bid Rule"). The PACE proposal ensures that all bidders' proposals are considered on an equal basis with sufficient transparency to enable full analysis by the PSC and that the most cost-effective generation is selected. In the main, the PACE proposal contained provisions requiring that all criteria, including weighting and ranking factors, be published and subject to review in advance of issuance of the request for proposals ("RFP"), that a neutral third party score proposals, and that investor owned utilities

("IOUs") submit binding bids at the same time as other responders to the RFP. The PACE proposal outlined an objective process based on fixed, rational criteria. First, the requirement of prior submission of criteria with weights and ranking factors protects against discrimination that may occur through the inclusion of commercially infeasible terms. Second, the requirement of a binding bid submitted by an IOU at the same time as all other proposals protects ratepayers against an IOU's gaming the process with unrealistically low bids that may later be abrogated by *ex poste facto* cost overruns. Third, the requirement of an independent evaluator protects against self dealing and inappropriate manipulation by the IOUs. Additional detail regarding the current PACE proposal is set forth in Section III of these Comments. As has been established in this proceeding, since its effective date, the current Bid Rule has been used five times by the IOUs and in each instance, the IOU self-selected over all other proposals. During that same period, other Florida utilities - municipals, cooperatives and the Florida Municipal Power Agency have all conducted RFP processes that have resulted in power purchase agreements with IPPs. Clearly the existing rule lacks the objectivity and transparency necessary for ascertaining the most cost-effective alternative for Florida ratepayers and requires the revisions proposed by PACE.

The foregoing represents a brief analysis of the prior PACE proposal for amendments to the Bid Rule. As a result of dialogue that emerged during the prior rule development and comment process as well as good faith negotiations with parties to these proceedings, PACE has modified several of its prior positions. Among other things, and without limitation, PACE has modified its positions by no longer advocating: (1) the requirement that the IOUs include cost projections in the RFP; (2) the requirement of explicit PSC prior approval of the RFP; (3) the requirement that IPPs be permitted to co-locate on IOUs' sites; and (4) the requirement that a neutral third party evaluate all proposals if the IOU is not proposing a self-build option. As such, PACE has attempted to streamline and expedite these proceedings while providing the ratepayers

of Florida the most cost-effective alternative possible for new generation additions. Notwithstanding these refinements, the PACE proposal has retained its three core principles: (1) weighting and scoring criteria and a point of entry to challenge the RFP, (2) an independent evaluator; and (3) binding bids. These principles must be achieved in order to effectuate selection of cost-effective generation additions.

2. Statutory Authority

It cannot seriously be questioned that the PSC possesses statutory authority to revise the Bid Rule in the manner proposed by PACE. The primary provision of the Administrative Procedure Act, Florida Statutes, Chapter 120, governing an agency's rulemaking authority states: "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required." Sections 120.52(8) and 120.536(1), Florida Statutes (2002). Chapters 366 and 403, Florida Statutes contain general and specific power of the Commission sufficient to satisfy the rulemaking standards. For instance, with respect to proposals that trigger the Florida Electrical Power Plant Siting Act, Florida Statutes sections 403.501-.518, section 403.519 specifically requires the Commission to consider whether a proposal is the most cost-effective alternative available, where it states:

> On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available . . .

The only meaningful way for the PSC to judge cost-effectiveness (as required by the statute) of a proposed project is to be assured that a detailed, fair, objective, binding comparison of all

available alternatives has been made. This type of process is at the core of PACE's proposal.

In addition to section 403.519, sections 366.05(1), 366.06(2) and 366.07 support adoption of the PACE proposal. Section 366.05(1), Florida Statutes provides the grant of *general* rulemaking authority that is *necessary* to support adoption of the rule. The section states:

> In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; . . . and to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter.

Sections 366.06(2) and 366.07, Florida Statutes *specifically* empower the Commission to govern practices of investor-owned electric utilities related to rates. Because the cost of new plant additions may be recovered through rates, the Commission's specific rulemaking authority cannot be seriously questioned. Section 366.06(2) states, in part:

> Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or *practices* of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law, . . . the commission shall order and hold a public hearing, . . .

(emphasis added)

Further, section 366.07, Florida Statutes states:

> Whenever the commission, after public hearing, . . . shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules regulations, measurements, *practices or contracts*, or any of them relating thereto, are unjust, . . . the commission shall determine and by

order fix the fair and reasonable rates . . . practices, contracts or service, to be imposed, observed, furnished or followed in the future.

(emphasis added)

Read together, these sections confer upon the Commission specific powers to be implemented by rules governing the practices that affect rates that customers pay. Among the practices that affect rates are the hundreds of millions of dollars of costs incurred when public utilities construct new power plants. Specifically, rates will be affected adversely if the utility's procurement practices involving a selection process fail to: (1) motivate potential sources to respond; (2) enable respondents to submit their best proposals; (3) identify, through an unbiased evaluation process, the most cost-effective alternative from customers' perspective; and (4) provide customers with the benefits of the best bargain. In sum, section 366.05(1) confers broad rulemaking authority on the Commission and sections 403.519, 366.07 and 366.06(2) confer specific powers on the Commission to determine cost-effectiveness and that rates and practices are just and reasonable.

3. Appropriateness of Requiring Binding Bids and PSC Authority to Require Binding Bids

It is not only appropriate, it is necessary for the protection of Florida's electricity consumers that the Commission require that the IOUs submit binding bids at the same time as all other proposers. The IOUs' objections to the requirement that they submit a binding bid is a matter of form over substance. When an IOU self-selects, it must prepare substantially more detailed information than is required by an RFP in preparation for its need determination. The submission of a binding bid, then, is only a question of timing and of binding the bidder. The argument by the IOUs that a binding bid is inappropriate because the companies need flexibility is specious and has been called into question by bidders as well as Commissioners.

Commissioner Baez: Fundamentally and philosophically, I think that holding the

IOUs, in the case of a self-build option, holding them to the number that they awarded themselves to bid with is philosophically – it makes logical sense. It makes sense to me. . . . But I could support some kind of binding nature it if does have some flexibility on the back end. It provides the IOUs an opportunity to make their case, albeit as I have said, on a somewhat higher – to a somewhat higher standard to address cost overruns or inevitabilities , reasonable as they may be.

Transcript of Special Agenda Conference, Monday September 30, 2002 ("Special Agenda Transcript"), pg. 222, lines 4-8, pg. 223, lines 9-14.

Chairman Jaber: Exactly. The way I look at this, the term binding, is we structure the rule correctly at the end of the day, binding means certainty. And the one thing all of this table has in common is that they want certainty. They want this Commission to take leadership and say, here is the way it is going [sic] be. This is going to be a better process. It is going to be open and transparent for the benefit of the ratepayer. And it means that if you outline the criteria at the front end, if you apply the factors to those criteria and you award the bids in the most fair way, it all takes care of itself. And you know what, and it may be at the end of this tortured process the IOUs still get to self-build. And I am okay with that. I am completely okay with that, because I have forced the companies to put the most efficient process up front for the benefit of the ratepayers.

Special Agenda Transcript, pgs. 230-31, lines 18-25 and 1-7.

Based on the foregoing, the arguments against requiring the IOUs to submit binding bids in the event of self-selection lack merit and should be rejected *in toto*. Binding bids are necessary to ensure that the captive customers of Florida's investor-owned utilities get the benefit of the bargain that those utilities represent to the Commission as being the most cost-effective

alternative available. The Commission, in exercising its authority over cost recovery for power purchase agreements, would surely hold an independent power producer to the specific requirements of its contract. So too should the IOUs be bound by their bids.

Clearly it is appropriate for the Commission to require binding bids. The PSC has ample, specific statutory authority with which to promulgate rules requiring binding bids as part of its evaluation of the cost-effectiveness of capacity procurement practices. With respect to the cost-effectiveness analysis, the Commission has no opportunity to determine whether the most cost-effective alternative has been selected if there are no comparisons to the selected option. In addition to the statutory authority attendant to the cost-effectiveness analysis, section 366.07, Florida Statutes, grants the PSC the specific statutory authority to fix and determine a public utility's practices and contracts affecting rates. An IOU's procurement of major power supply resources is clearly a "practice" that affects the utility's rates. If the utility does not get the most cost-effective alternative for its ratepayers, their rates are adversely affected for more that 30 years. The utility's procurement practices should ensure that the utility does, in fact, get the most cost-effective alternative and the Commission should correspondingly ensure that the customers get the benefit of that alternative. Submitting a binding bid in an evaluation process for needed power supplies is similarly a "practice" affecting the utility's rates. Binding bids ensure fairness and objectivity in the evaluation process.

B. Positions of IOUs' Affiliates in Other Jurisdictions

At least one independent power development affiliate of a Florida IOU has advocated in other jurisdictions similar positions to those advocated here by PACE. TECO Power Services ("TPS"), a direct affiliate of Tampa Electric Company, has advocated such positions in both Arizona and Louisiana. In Arizona, the Arizona Corporation Commission ("ACC") is currently engaged in proceedings to select the best power supply options for its two large IOUs, Arizona Public Service Company and Tucson Electric Power. These proceedings, commonly referred

to as the "Track B Process," are designed to allow the utilities to implement an RFP-type process or an auction process to select needed capacity. The RFP (or auction instrument) will be developed on the front end, subjected to workshop discussions, and then issued. The process will be overseen by an Independent Monitor hired by the ACC Staff and paid by the respective utility, mostly if not entirely out of bidders' fees, which are limited to $10,000 per bidder. While the utility will make the ultimate selection, the Independent Monitor will participate in all phases of the process and will file an independent written report with the ACC and the Staff immediately upon the conclusion of the process. Bids will be binding. A September 12, 2002, press release issued by TECO Energy, Inc., parent company of Tampa Electric Company, praised the Arizona Commission's initiatives, calling them "pro-competitive, responsible, and intelligent." The press release quoted Rick Ludwig, president of TECO Power Services, as follows:

> The ACC is clearly looking out for ratepayers. The unanimous ruling last week ensures that Arizonans will have the best of both worlds. Competitive power generation companies will compete to serve utilities, and customers will save because their electricity will come from the lowest-cost producer. The approach also ensures that Arizonans will get the environmental benefits of new, clean, state-of-the-art gas-fueled power plants.

Mr. Ludwig went on to say that "the ACC's decision . . . will ensure that Arizona ratepayers get the environmental and economic benefits and added reliability of newer, cleaner power generation brought to Arizona by independent power companies, who have invested billions of dollars in the state." A copy of TECO Energy's press release is attached to these comments as Exhibit 3.

Similarly, in an "op-ed" piece published in the Scottsdale Tribune on September 5, 2002, Richard Lehfeldt, Senior Vice President of External Affairs for TECO Energy, also praised the

Arizona Commission's actions:

> The strategy for wholesale competition being advanced by the ACC is both thoughtful and deliberate.
>
> It offers Arizonans the best of both worlds: The immediate consumer benefits of increased wholesale competition and the time to deliberate on how to proceed with retail competition in the future. Risks to the state's power reliability are minimized, and regulated utilities; like Arizona Public Service and Tucson Electric will continue to serve their customers.
>
> The difference is, now independent power companies will compete to serve as much as 50 percent of the utilities' energy requirements. The companies who come in with the lowest prices will sell the electricity. Lower prices benefit consumers. It really is that simple. . . .
>
> And customers in an energy market like Arizona, which follows an intelligent, well-structured plan that takes this into consideration, won't have to choose between reliability and affordability. They can have both.

A copy of Mr. Lehfeldt's article is attached to these Comments as Exhibit 4.

In recent proceedings in Louisiana, the Louisiana Public Service Commission (LPSC) adopted a rule that requires utilities subject to the LPSC's jurisdiction to employ a market-based mechanism to support the acquisition of new power supply resources. In Re: Development of Market-Based Mechanisms to Evaluate Proposals to Construct or Acquire Generating Capacity to Meet Native Load (Supplements the September 20, 1983 General Order), General Order, Docket No. R-26172 (Louisiana P.S.C., April 10, 2002) A copy of the LPSC's April 10, 2002 General Order is attached to these Comments as Exhibit 5. Among other things, the LPSC now requires a market-based mechanism which shall be an RFP or alternative market-based mechanism or procedure, limited exceptions (e.g., resource additions less than 35 MW,

repowerings less than 50 MW or 10 percent of the unit's existing capacity, and projects with incremental cost per kW less than $100), advance technical conferences regarding proposed RFPs, a description of the methods and criteria that the utility intends to use to evaluate responses, and permissive consideration of project and contract risk attributes.

In comments submitted to the Louisiana PSC, TECO Power Services supported independent third party oversight and evaluation of bids, as well as inclusion in the RFP of adequate information concerning the capacity need and relevant technical requirements, in order to "assure that merchant generation is not placed at a competitive disadvantage in the RFP process." A copy of TECO Power Services' Reply Comments, submitted to the LPSC on January 25, 2002, is attached hereto as Exhibit 6. In its Reply Comments, in commentary strikingly similar to the comments offered by PACE in this proceeding, TECO Power Services stated the following:

> TPS agrees that a need determination should proceed [sic; appears to mean "precede"] the RFP process and that an independent entity should oversee the RFP process, evaluate the bids and make a recommendation to the LPSC of the proposal that is in the best interest of Louisiana residents and businesses.
>
> * * *
>
> TPS agrees that the jurisdictional utility has the responsibility to prudently plan and supply the capacity needs of its customers. The existing process, however, leaves the Commission in an untenable position when trying to determine the best alternative in today's market. Under the existing procedure, the utility determines the alternatives it examines and the proposal it presents to the Commission as the best option. Thus, the alternatives from which the Commission must choose, should it reject the utility's selection, are automatically limited to what the utility has reviewed. While the Commission can reject all of

the alternatives the utility has reviewed, the regulator is still faced with meeting a capacity need on a timely basis and may not have time to order the utility to start over with a review of additional alternatives. . . . A fair RFP process with independent oversight ensures that the Commission reviews all potential alternatives and that the RFP is not written in such a way that might hinder the ability of bidders to put forth their best proposal or otherwise bias the outcome.

In a subsequent proceeding before the LPSC in which Entergy, an IOU operating in Louisiana, is conducting an RFP, TECO Power Services has weighed in with comments regarding Entergy's draft RFP and stated:

> As a potential bidder in the RFP process, TPS urges that the following additional information should be included in the Final RFP so that the procedure is meaningful and adequately explores the market's capabilities:
>
> Entergy should include in the Final RFP the procedures, criteria and scoring system that will be used to evaluate the responses to the RFP; and
>
> Entergy should identify in the Final RFP how transmission interconnection and optional upgrade costs will be considered in the evaluation process.
>
> Also, TPS urges that the Staff ensure that any Entergy affiliates, including Entergy operating companies, who seek to supply some or all of the additional resource needs in the Entergy service area from non-regulated generation sources, shall be required to participate in the RFP process and meet all of the same criteria required of other non-affiliated parties.

The letter from TPS to Mr. Matthew Loftus is attached hereto as Exhibit 7.

C. Case Law Support For Statutory Authority

Case law strongly supports the position that the Commission possesses the requisite

statutory authority to adopt PACE's proposed rule. Southwest Florida Water Management District v Save The Manatee Club, Inc., 773 So.2d 594 (Fla. 1st DCA 2000); Osheyack v Garcia, Case No. FC-96439, Supreme Court of Florida, 814 So.2d 440 (2001); Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Florida Appellate, 1st DCA, 2002). PACE cited and analyzed these cases in its Brief of March 15, 2002, which is attached to these comments and which PACE incorporates by reference. PACE will not duplicate here the extensive argument contained in the brief. However, PACE wishes to bring to the Commission's attention the fact that very recently the First District Court of Appeal decided another case which strongly reinforces the position which PACE has argued throughout this case. In the case of Frandsen v. Department of Environmental Protection, 2002 Fla. App. Lexis 13201; 27 Fla. L. Weekly D.2039 (2002) the court considered the validity of a rule under which the Florida Division of Recreation and Parks authorized a Park Manager to impose restrictions on the rights of park visitors to engage in free speech activities. The rule, entitled "Free Speech Activities," stated in part:

> Free Speech Activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. . . . Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. . . . The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

Frandsen, at pg. 1, n.1

Section 258.007(2), Florida Statutes provides the Division's general rulemaking authority. With respect to the specific law to be implemented, the Division cited section 258.004, Florida Statutes. That statute provides that the division's duties are to "supervise,

administer, regulate and control the operation of all public parks . . . and to preserve, manage, regulate, and protect all park and recreational areas held by the state." Despite the absence of any specific reference in the statutes to the division's authority to restrict "free speech activities" the court concluded: "The rule in question falls under this specific grant of authority and is otherwise a valid exercise of delegated legislative authority. See Section 120.52(8) Fla. Stat. (2001)" Frandsen, at pg 3.

Like the other cases upon which PACE relies, the Frandsen case emphatically refutes the contention by the investor-owned utilities that the Commission does not possess the requisite statutory authority to support the adoption of a meaningful capacity procurement rule. Relative to the Commission's Bid Rule proceedings, Frandsen strongly supports the Commission's authority to adopt PACE's proposed amendments. There is no doubt that the Commission has the requisite general grant of rulemaking authority under section 366.05(1), and there can similarly be no doubt that the Commission has the powers and duties: (a) to determine cost-effectiveness pursuant to section 403.519; (b) to exercise jurisdiction over the planning, development, and maintenance of a coordinated power supply grid in Florida pursuant to section 366.04(5); and (c) to prescribe a public utility's practices and contracts affecting rates pursuant to section 366.07. Each of these powers is significantly more specific than the Department of Environmental Protection's powers to supervise, regulate, and control the operation of state parks. Accordingly, the First DCA's Frandsen decision leaves no doubt that the Commission has the authority to adopt the amendments advocated by PACE in this proceeding.

III. PACE's Proposed Rule Language

In his prefiled testimony, PACE Executive Director Michael C. Green states that the proper objective of the rule governing the selection of generating capacity is to secure for ratepayers the most cost-effective source of generation available. He identifies the three principles that PACE believes are necessary to obtain that objective: (1) the communication of

all terms, conditions, scoring criteria, and weighting factors to potential RFP participants prior to the submission of bids, together with a procedural opportunity to challenge any unreasonable or infeasible terms before the Commission at the outset of the process; (2) the scoring of the responses to the RFP by an independent evaluator in any proceeding in which the sponsoring public utility intends to propose a self-build option or consider a transaction with an affiliate of that utility; and (3) a requirement that the IOU submit its bid at the same time as other responders and be held to the terms of its proposal to the same extent that a respondent to the RFP would be bound if its bid had been incorporated in a power purchase contract comporting with the terms of the RFP.

During the workshop of July 19, 2002 PACE distributed a draft rule which PACE continues to support. It is attached to these Comments as Exhibit 8. In these comments, PACE will describe the features of the attached draft rule.

A. Expanded Scope of Rule

The history of the existing bid rule demonstrates that it is difficult to foresee developments in the size and nature of power generation projects. PACE believes it would be a mistake to assume, for instance, that no more repowerings will occur in the future. Accordingly, the attached draft rule would require an IOU to issue an RFP prior to commencing the construction of a capacity addition of 75 megawatts ("MW") or more, regardless of technology and regardless of whether the addition would constitute new construction or a repowering of existing capacity.

B. Early Vetting of Terms and Criteria: Point of Entry

PACE believes the principle regarding the early identification and vetting of all terms and criteria can be accomplished by building into the rule an *opportunity* to file a complaint at an early point. Subsection (2) of the attached draft would require a public utility to file its RFP package prior to advertising its issuance. Upon receipt of the package, the Commission would

publish, in the Florida Administrative Weekly, the date by which any complaints by potential RFP participants relative to terms or scoring criteria must be filed with the Commission. The Commission would establish a date prior to the deadline for submitting responses to the RFP, which, according to Subsection (1), must be at least 75-days after the date of the first national advertisement. Subsection (2) also provides that the Commission may decide on its own motion to issue an order proposing to modify the RFP package. Importantly, upon the filing of the complaint or a vote to issue a proposed agency action order, pursuant to Subsection (2) of the draft rule the public utility must hold RFP activities in abeyance until the Commission has resolved issues relating to terms and conditions. PACE envisions and recommends that any proceedings regarding alleged flaws in an RFP be conducted on an expedited basis.

The effect of this portion of the draft rule, as compared to the situation with the existing rule, would be to impose a limitation on the time frame within which a potential respondent to the RFP may challenge any of the terms, conditions, and criteria contained in the utility's RFP package. PACE believes this approach to the rule will have the following substantive advantages for ensuring the integrity of the process: (1) the availability of a procedure for challenging terms and conditions will avoid situations in which developers are discouraged from submitting responses to an RFP; (2) if onerous and/or infeasible terms and conditions are removed at the outset, bidders will not be forced to artificially inflate their bids to protect themselves from unwarranted costs and risks; and (3) dissemination of the complete scoring criteria will educate bidders more completely as to the needs of the utility's system, thereby improving their ability to tailor and customize proposals to meet those specific needs.

This approach will also ensure relative efficiency and procedural integrity of the selection process. Providing a point of entry to raise substantive challenges on the front end of a selection process will ensure closure and certainty on the back end of the process. Under PACE's approach, the front-end point of entry will ensure that disputes regarding the RFP or other

selection process are resolved before that process is completed, such that aggrieved participants (and the Commission) will not have to wait until the need determination hearing to voice their complaints in a meaningful proceeding. This, in turn, will avoid a scenario where the utility could be required to start over after the entire selection process and need determination hearing had been completed. In its full implementation, with clear specification of criteria and weights and a front-end point of entry to challenge unreasonable, inappropriate, onerous, or commercially unreasonable aspects of an RFP, PACE's recommended process will ensure that the only issues to be raised in the need determination hearing (with respect to the selection process) will be issues relating to whether the proposals were accurately evaluated in full accordance with the Commission-approved selection process, including the accurate application and scoring of proposals pursuant to the Commission-approved criteria and weighting system embodied in the RFP or other selection process. In addition, the specification of criteria and weights at the front end of the process will enhance bidders' flexibility in responding to the RFP because responses will focus solely on the most cost effective manner in which to achieve the stated objectives of the RFP. The RFP criteria must ultimately be fixed in order for the evaluator to make an award. Specifying the criteria at the beginning will make the entire process much more efficient than at present.

C. Independent Evaluator

As Mr. Green describes in his prefiled testimony, an investor-owned utility that offers a self-build proposal and then judges that proposal against responses to the RFP creates a severe conflict of interest. To remove that conflict and the related opportunity for bias to affect the evaluation of alternatives, as well as to assure potential respondents that the contest involving the utility's self-build proposal will be a fair one, Subsection (3) of PACE's draft rule provides that, in any situation in which the public utility sponsoring the RFP proposes a self-build option, the IOU shall engage a neutral, independent entity to evaluate all proposals. This subsection

establishes a mechanism under which all respondents and the public utility shall submit sealed proposals meeting the requirements of the RFP simultaneously to the Commission or the Commission's designated representative by the deadline established in the RFP. Within the RFP package, the utility must identify the proposed independent evaluator, and describe its qualifications. The subsection further provides that the IOU will use application fees submitted by the bidders to compensate the independent, third party evaluator.

The evaluation process is delineated in Subsection (4) of PACE's draft rule. The rule calls for the selection process to occur in two stages. First, the independent evaluator (or public utility, if it has not proposed a self-build option) will apply the approved scoring criteria and weighting factors of the RFP package to all competing submissions and identify a short list of the highest ranked proposals or combinations of proposals. At that point, the public utility is to provide each participant on the short list information regarding the transmission integration costs associated with the respective proposals. The short list of participants will use this information to prepare and submit final sealed and binding bids. The independent evaluator or public utility will review the second, final bids, and, based upon the criteria of the RFP package, identify the most cost-effective proposal or combination of proposals. Pursuant to subsection 6, if a proposal other than the public utility's self-build option is chosen, the public utility and the winning participant shall prepare and execute a power purchase agreement ("PPA") that incorporates the RFP terms and the winning proposal. On the other hand, if the public utility is selected by the independent evaluator, the same subsection requires the public utility to reflect in future earnings surveillance reports and ratemaking proceedings, and recover from end use consumers, only the costs of its winning proposal to the same extent that pricing proposals of participants would have been binding on them in a power purchase contract.

D. Binding Bids

To protect ratepayers from the risk of excessive costs, and to ensure the integrity of the

Commission's decisions regarding power supply additions, e.g., need determinations and approval of PPAs for cost recovery purposes, the Commission must require that all participants submit binding bids to which they will be held if they are selected as the most cost-effective supply alternative. To allow after-the-fact changes can harm customers and will undermine the integrity of the Commission's decisions by failing to ensure that customers get the benefit of the bargain as represented to the Commission in winning Commission approval of the supply option. Similarly, to ensure the integrity of the selection process, which will encourage maximum participation by all potential suppliers to the benefit of customers, the Commission must require that all bidders, including the utility and any utility affiliate that offers or proposes to supply needed power, submit their bids or proposals at the same time and in the same manner.

It is critically important that bids be binding with respect to all components that affect and determine costs that will be imposed upon ratepayers. This includes not only the capital costs, e.g., the capital-cost-related revenue requirements for an IOU that wins a selection process or the capacity payments in a PPA if an IPP's proposal is selected, but also operating and maintenance ("O&M") costs, unit heat rates, and unit outage rates. Failure to include all of these components will result in an inaccurate evaluation of bids and will unnecessarily expose ratepayers to higher costs. To protect ratepayers and to ensure that those ratepayers get the benefit of the alternative that the Commission determines is in fact the best, most cost-effective alternative available to them, the winning bidder, be it the IOU or another wholesale supplier, must be held to the terms of its bid. For example, if the winning bid is determined on the basis of a projected actual operating heat rate of 6,900 Btu per kilowatt-hour ("kWh"), then cost recovery must be based on that heat rate. If, on the other hand, the winning bid is based on a 6,900 Btu/kWh heat rate but the unit subsequently operates at 7,000 or 7,200 Btu/kWh, the ratepayers will be deprived of the benefits that led to the selection of the winning proposal if the

Commission allows cost recovery based on the higher value.[1] By contrast, typically PPAs provide that the supplier will be paid on the basis of a contractually specified heat rate regardless of the supplier's actual operating experience. If the IOU self-builds, current practice would allow the IOU to recover on the basis of its unit's actual heat rate. If this is higher than the heat rate used in the utility's cost-effectiveness evaluations, upon which the Commission based its decision to approve the self-build option, such treatment will fail to ensure that the utility's captive customers get the benefit of the alternative represented to the Commission as being the best alternative available. This is especially critical if, as has been the case in recent IOU need determinations, the cost differential between the IOU's self-build option and the bids of other suppliers has been very small; allowing the utility to recover fuel costs based on a higher-than-projected heat rate can easily result in the utility's customers being worse off than they would be under a competing option that featured certainty of energy pricing.

The same principles hold true for O&M costs and for availability and outage rate performance. With a PPA, the O&M cost liability of the utility's customers will be determined in accordance with the fixed terms of the PPA. With an IOU's self-build option, if O&M costs are higher than projected, the Commission must similarly prohibit cost recovery for any amounts higher than those represented by the IOU as being the costs that are part of its most cost-effective selection; otherwise, the ratepayers will be exposed to paying unnecessarily high costs and may well be worse off than if the IOU had entered into a price-certain PPA with another wholesale

[1]As a real-world example, consider the following. In FPC's pending petition for determination of need for its proposed Hines 3 unit, FPC states (at paragraph 10) that Hines 3 has an expected average summer and winter full load heat rate of approximately 6,900 Btu per kWh. However, in its current 2002-2001 Ten-Year Site Plan, FPC represents that Hines 3 will have an average net operating heat rate of 7,306 Btu/kWh. This is a difference of almost 6 percent. Six percent of the annual fuel cost bill for such a unit is on the order of $3 million to $4 million. If the cost-effectiveness evaluations were based on the lower number but performance more closely matches the higher number, the Commission cannot be assured that the ratepayers get the benefit of the bargain represented by FPC unless it holds FPC to the performance characteristics that it represents in attempting to justify its self-selection of Hines 3 in the need case.

supplier. Similarly, with a PPA, if the IPP fails to meet contractually specified availability criteria, its capacity payments will typically be reduced by provisions of the PPA. Correspondingly, if the IOU fails to meet the availability criteria that it represents to the Commission are the actual performance criteria upon which its self-build unit is determined to be the most cost-effective alternative, the ratepayers will be exposed to paying more than they should have, and more than the PSC believed they would have to pay when it made its decision on cost-effectiveness. This is unacceptable if the Commission is to fulfill its overriding and overarching duty to protect ratepayers.

IV. Changes To Published Rule Amendments

In an earlier section of these Comments, PACE presented and described the draft rule that it proposes as a substitute for the rule amendments that were published by the Commission on October 25, 2002.

The Order Establishing Procedure also requested participants to address possible changes to the published amendments. PACE has prepared a markup to the language that was published in the Florida Administrative Weekly. PACE respectfully submits that adopting PACE's proposed draft would be the more efficient method of incorporating the principles that PACE advocates. However, in the event the Commission prefers to use the published language as its base document, PACE has identified the changes necessary to accomplish the same objectives utilizing that version of the rule as a starting point. A description of the suggested changes follows. The markup is appended hereto as Exhibit 9 of these Comments.

Changes to Subsection (1). "Scope and Intent." As explained earlier, PACE contends that, in instances in which the public utility sponsoring the RFP also proposes a self-build option, scoring should be placed in the hands of a neutral and independent evaluator. As written, the Commission's proposed language in Section 1 assumes the utility would perform all evaluations.

PACE's suggested language would remove that assumption.

Changes to Subsection (2). "Definitions." PACE has added the term "independent evaluator" to the list of defined terms. PACE has also introduced that term in the definition of finalist, consistent with the theme that in any RFP the evaluation will be performed by either the public utility or an independent evaluator, depending on circumstances. PACE has also broadened the scope of the RFP requirement by adding "major capacity addition" as a defined term and by applying the RFP requirement to major capacity additions in Subsection (3).

Changes to Subsection (3). Again, editing is needed to remove the implication that the electric utility shall perform all evaluations in all RFPs.

Changes to Subsection (4). Consistent with the broader scope recommended by PACE, the term "major capacity unit" has been substituted for "next planned generating unit."

Changes to Subsection (5). Consistent with its earlier commitment, PACE has deleted those information requirements would require the public utility to include estimates of the cost of its proposal within the RFP package. PACE has added a limit of $10,000 (aggregated) to the description of the application fees in subsection (g). In addition, PACE has added, to the list of information requirements, the identity and qualifications of the proposed independent evaluator (applicable only when the public utility intends to propose a self-build option or consider a transaction with an affiliate).

Changes to Subsection (8). In conjunction with other changes designed to create a "point of entry" for potential participants who wish to challenge RFP terms, in subsection (8) PACE has added a provision requiring the Commission to publish notice in the FAW when it receives the public utility's RFP package.

Changes to Subsection (9). This is another instance in which the original language contemplated that the public utility would evaluate all proposals. PACE has edited subsection

(9) to provide that an independent evaluator would be engaged to score all proposals if the public utility intends to offer a self-build option or consider a transaction with an affiliate.

Changes to Subsection (11). These proposed changes in language are designed to develop the "point of entry" and the mechanism for processing related complaints on an expedited basis. The changes create a limited opportunity for the filing of complaints related to RFP terms and conditions. They also provide that the Commission will expedite the hearing on a complaint, and that the utility shall hold RFP activities in abeyance pending the disposition of the complaint.

Changes to Subsection (12). To provide sufficient time for the notice/complaint mechanism, the deadline for responses to the RFP has been modified from 60 days to 75 days following the issuance of the RFP.

Changes to Subsection (13). These changes extend the theme that evaluations shall be performed by the public utility or an independent evaluator, "as applicable." As amended by PACE's language, the public utility proposing a self-build option would be required to submit a sealed bid to the independent evaluator at the same time and in the same manner as respondents to the RFP.

Changes to Subsection (14). This change in language is designed to implement the principle that the rule should deter the public utility from using unrealistic projections of cost and/or performance criteria to win the RFP. The change would limit the public utility's ability to recover any costs above those identified in the winning proposal the change would place the public utility on an equal footing with respondents to the RFP in that regard.

Changes to Subsection (15). The revised language would prohibit participants from attempting to raise, in a challenge to the outcome of the selection process, any issue related to the RFP terms and conditions unless the participant can demonstrate that it could not have

addressed the issue in a complaint filed at the time the Commission published notice of the RFP filing.

Changes to Subsection (16). Pace suggests that this subsection is unnecessary in light of statutory provisions governing rule waivers.

V. PSC Issues Analysis

A. Bid Protest and Dispute Resolution

The implementation of PACE's proposals will have the effect of streamlining proceedings on bid protests. Under PACE's proposal, all parties who submitted proposals–including, where applicable, the public utility that issued the RFP–would have the opportunity to challenge the independent evaluator's determination of the winning proposal or combination of proposals. However, because PACE's approach calls for the vetting of RFP terms and criteria at the outset of the RFP process, PACE's proposed rule would limit and simplify the scope of issues that could be raised after the winner of the RFP has been announced. Having established clear and definitive terms, criteria, and weighting factors at the outset, and having placed the role of applying those criteria in the hands of a neutral and objective entity, PACE's proposed rule would limit the scope of the review of the independent evaluator's selection to a claim that the evaluator applied the criteria and scoring factors incorrectly, unless the challenger could demonstrate that it was precluded from raising an issue relating to terms or criteria at the time the RFP was issued. Three significant observations flow from these points. First, this approach places the public utility and respondents on an absolute equal footing with regard to challenging the outcome of the RFP. Second, as the up-front process of establishing terms, criteria, and weighting factors becomes more complete and definitive, the role of the scoring entity involves less discretion, meaning the evaluation process becomes more precise. Third, a more comprehensive and detailed process for identifying terms, criteria, and scoring

factors, coupled with the participation of an objective and unbiased scorer, will at a minimum narrow remaining issues and may result in a less contentious post-scoring period.

B. Equity Penalty

The so-called "equity penalty" is an unwarranted and self-serving gambit on the part of Florida IOUs to create a significant bar to entry by handicapping all wholesale power options with a set of contrived and unwarranted theoretical costs. Whether in the rule under consideration or in the context of individual RFP evaluations, the Commission should reject efforts by the IOUs to impose an "equity penalty" on power purchase options.

While styled an "equity penalty," the handicap proposed by IOUs actually derives from the risk perceived by a bond rating agency that the Commission may not permit a regulated utility to recover contract payments made to wholesale providers from its customers. In other words, it is a component of "regulatory risk." In this regard, it is important to recognize that the Commission allows the utilities it regulates to recover contract payments on a current basis through the capacity cost recovery clause and the fuel and purchased power cost recovery clause. Further, over time the Commission has authorized returns on equity that are designed reasonably to compensate the utility for *all* business and investment risks. Finally, while the utilities translate this perceived risk of non-recovery into a claim for additional equity in their capital structure, the Commission has historically based its ratemaking activities on capital structures that include liberal amounts of equity. In short, the risk of nonrecovery that a utility faces is a function of its regulatory environment, and over time the Commission has done all that it reasonably can to signal rating agencies that it will act responsibly and reasonably toward the utilities it regulates. After all, as the Commission is aware, it and the rating agencies serve different constituencies, whose objectives are not aligned. The rating agency wants protection for bondholders from all risk. The Commission's job is to serve ratepayers' interests. Quite simply, the Commission must draw the line at some point so that ratepayers do not bear

unwarranted costs in order to provide outsized demands for "comfort" from rating agencies. Conspicuously, this is one such instance.

The IOUs' "equity penalty" is an exercise in distorted logic. The so-called "equity penalty" addresses *only* the perceived risk of non-payment. However, it is virtually axiomatic that a utility encounters risks whether it builds a unit or whether it instead contracts to purchase power. If the utility builds a power plant, it will face construction risk, operation risk, the risk of technological obsolescence, and the risk of not recovering its costs if and when the regulatory framework changes. All of these risks will be considered by a rating agency. *None* of these risks is taken into account by the IOUs' version of the "equity penalty." *Nor does the IOUs' " equity penalty" take into account the significant risks that a power purchase contract shifts away from the utility and its customers and onto the developers of the wholesale power generation project.* An evenhanded recognition of the benefits of purchased power would offset those characteristics of purchased power, including the possibility of nonrecovery, that (depending on the individual regulatory environment) may affect the utility's risk profile. Such an accounting occurs in the rating agencies' analyses, but not in the IOUs' proposed application of the "equity penalty."

The insistence of the IOUs on focusing on one aspect of the agencies' risk analyses, to the exclusion of attributes of power purchase contracts that actually would reduce IOUs' risk, constitutes blatant distortion on their part. For instance, a power purchase agreement shifts away from the utility, and onto the seller, many of the risks that the rating agency would otherwise assign to the utility's ownership and operation of the power plant. The power purchase agreement reduces the utility's construction risk (that is, risk of completion, risk of uncompensated cost overruns), and the utility's operation risk (risk of outages, risk of damaged equipment). By providing short-term flexibility, a power purchase contract can reduce the risk that a utility-owned power plant will become obsolete during the 30-40 years it is owned by the utility. It reduces the risk that could be occasioned by a decision of lawmakers or regulators to

alter the regulatory scheme.

In short, power purchase arrangements can be a source of cost-effective power *and* can also shield an IOU's customers from significant risks. Both of these advantages would be lost if the Commission were to allow the IOUs to implement their prejudicial "equity penalty" theory.

C. Utility Staffing of Bid Evaluation

Utility staffing of bid evaluation procedures was raised in the Order Establishing Procedure. Consistent with its recommendation that an independent evaluator be engaged to score all proposals, PACE respectfully recommends that utility staffing of the bid evaluation process is simply unacceptable because it is too fraught with inherent conflicts of interest. If one or more units of the utility seeking additional power supplies, e.g., the power plant development division and the central financial planning division, take the view that the IOU should build any needed capacity, either because "we're in the business of building and operating power plants" or because it will contribute beneficially to the utility's earnings, or both, or other reasons, there will be a direct and unavoidable conflict of interest with any unit and employees of the utility that are supposedly charged with making an impartial selection of new power supply resources. This conflict could be manifested in difficult management relations between the senior financial management and the senior management responsible for the evaluation process, or it could, in very practical terms, take the form of informal peer pressure imposed on the evaluators to make sure that the utility wins the selection process. Putting utility personnel in such a situation is untenable and inappropriate; the selection of needed resources, which must by law be the most cost-effective alternatives to serve Florida electric consumers, requires independent evaluation by an entity that has no conflict of interest, preferably by an entity hired by, and which answers directly to, the Commission. This does not mean that the Commission would pay the independent evaluator; PACE strongly believes that the bidders in the process should pay the costs for such independent evaluator services through their "bidders' fees" submitted in

conjunction with their bids.

D. Binding Bid Implementation Issues: Treatment of Cost Overruns and Sharing of Cost Savings Benefits

During the September 30 Special Agenda Conference, the Commissioners and participants discussed the issue of cost overruns in the event that the utility's self-build option is selected pursuant to a fair evaluation process. The Commissioners and parties also discussed the issue whether an IOU that builds and operates its self-build unit at less than its projected cost should be allowed to keep some of the savings thus realized for the account and benefit of its shareholders. Both of these issues relate directly to the requirement for all entities to submit comparable binding bids, and PACE provides its comments on these implementation issues here.

Treatment of Cost Overruns. The primary purpose of the requirement for binding bids is to protect ratepayers. The secondary purpose of the requirement for binding bids is to ensure that the Commission's decision to approve any IOU's or IPP's winning bid, based upon the information submitted by the applicant or applicants to the Commission to support that decision, is the decision that is effectuated when the selected project is constructed and operated. Specifically, the binding bid requirement will ensure that a utility's captive ratepayers get the benefit of the bargain that is determined to be the best, most cost-effective alternative available when the decision is made, and it will ensure that the full anticipated benefits of the decision made by the Commission to approve that alternative are made available to the utility's customers.

Fundamentally, ensuring that the ratepayers receive the benefits of the decision requires that the Commission stand by its judgment in all subsequent regulatory proceedings related to the selected option that affect customers' rates. Otherwise, a successful bidder could artificially lower its bid and then seek to undo the Commission's decision by seeking subsequent authorization to recover more than the costs that the Commission determined were the most cost-

effective alternative available to serve customers. This misleading bidding would harm ratepayers and would undermine the Commission's decisions.

In considering how to handle cost overruns, if at all, the Commission must answer the question "Would we, the Florida Public Service Commission, allow an IPP to recover additional payments from ratepayers (via increased payments under a PPA) if that IPP were to incur unforeseen and unforeseeable costs after the Commission approved the IPP's project and a PPA to provide power from that project for the benefit of ratepayers?" PACE anticipates that the Commission would, as it should, answer this question in the negative, and accordingly and correspondingly, the Commission must also simply say "No" to any *ex post facto* IOU requests for additional cost recovery. Otherwise, ratepayers are not protected, ratepayers do not get the benefit of the alternative that the applicant represented to the Commission as being the most cost effective alternative, and the integrity of the Commission's decisions will be undermined.

Sharing of Cost Savings Benefits From an IOU's Self-Build Option. The Commissioners also discussed the possibility of allowing an IOU to keep part of any cost savings benefits realized if the IOU's self-build option is selected and the IOU successfully constructs and operates its unit at lower costs than projected. Consistent with its fundamental beliefs that wholesale competition and appropriate incentives will produce better results for ratepayers, PACE conceptually has no objection to an IOU that wins a fair and unbiased contest (provided that the measure is total projected cost and total actual cost, including full and appropriate consideration of all cost-determining factors, including not only capital costs but also projected unit O&M costs, projected unit heat rate, and projected unit outage rate, as discussed in PACE's general discussion of binding bids above) receiving some appropriate portion of savings; beyond that, however, PACE regards this subject as one more appropriately considered in a retail ratemaking context.

In sum, it is clear from the foregoing that in order to ensure that Florida ratepayers pay

only for the most cost-effective generation additions, fundamental changes to the Bid Rule must be made. To assure a fair, transparent and predictable selection process, PACE's three core principles must be adopted: (1) that all weighting and scoring criteria be published in advance and subject to review; (2) that a neutral third party score proposals; and (3) that the IOUs submit binding bids at the same time as other responders to the RFP. The PACE proposal creates an objective process based on fixed, rational criteria which will assure that the most cost-effective generation additions are selected.

Respectfully submitted this 15th day of November, 2002.

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CERTIFICATE OF SERVICE
DOCKET NO. 020398

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*) and U.S. Mail to the following parties on this 15th day of November, 2002.

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Exhibit No. 1
Docket No. 020398-EI
PACE
Filed November 15, 2002

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March 15, 2002

VIA HAND DELIVERY

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Re: Post-Workshop Memorandum of Florida PACE

Dear Ms. Bayo:

On behalf of Florida PACE, I am enclosing for filing and distribution the original and 15 copies of the following:

- Post-Workshop Memorandum of Florida PACE

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Joe A. McGlothlin

Joseph A. McGlothlin

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Rule Development Workshop to Consider Amendments to Rule 25-22.082.F.A.C.

Filed: March 15, 2002

POST-WORKSHOP MEMORANDUM OF FLORIDA PACE

As directed by the Chairman at the conclusion of the February 7, 2002 workshop, Florida PACE submits its Memorandum addressing the subjects that were identified for further comments.

INTRODUCTION

In January 2002, the Commission Staff distributed a "Strawman" proposal which, if adopted, would amend Rule 25-22.082, Florida Administrative Code. The "Strawman" would expand the scope of the current rule to include capacity additions of 50 MW or more, thereby encompassing combustion turbines and repowering projects that investor-owned utilities can now pursue without first seeking and considering competitive alternatives. The "Strawman" would enlarge the list of information that the IOU would be required to provide in its Request For Proposals (RFP). It would require IOUs to allow respondents to develop capacity additions on sites owned by the IOUs. The "Strawman" would enable the Commission to deny the capacity addition that is the subject of an IOU's petition in a determination of need case and directly select the most cost effective alternative from the options before it.

The Commission held a rule development workshop on February 7, 2002. During the workshop, Florida PACE distributed a separate proposal to amend Rule 25-22.082, F.A.C. The PACE proposal incorporates the broader scope of the "Strawman." To the basic structure of the "Strawman", PACE added amendments to require IOUs to submit their RFPs to the Commission for approval prior to issuance; to engage a neutral party (the "independent evaluator") to evaluate

and score proposals in accordance with criteria approved by the Commission; and to submit their own self-build proposals to the independent evaluator in the form of a binding bid.

At the conclusion of the workshop, Chairman Jaber identified the following subjects to be addressed in a memorandum:

1. Comments on the PACE proposal.

2. Does the Commission have sufficient statutory authority to adopt the proposals to amend Rule 25-22.082 F.A.C.?

3. Is it feasible to require a utility to submit a sealed bid? Does the Commission have the authority to impose such a requirement?

4. Can the Commission impose "prerequisites" that a utility must meet before placing facilities in rate base and/or entering contracts?

5. With respect to PACE's proposal to identify RFP criteria prior to the issuance of an RFP, and the IOU's contention that they need to preserve flexibility of terms, is there a middle ground?

6. Have other jurisdictions fashioned bidding rules/regimes? If so, what are they?

7. What is the concept of "negotiated rulemaking" as it is treated in the Administrative Procedures Act? Does it have application here?

8. Has the Commission identified Rule 25-22.082, F.A.C. during its annual review of rules to determine those for which it no longer has authority? What is the import of those annual reviews?

I. THE PACE PROPOSAL

To provide a frame of reference for the post-workshop comments on the proposal that PACE distributed on February 7, 2002, PACE will provide here a short synopsis of the major

features of the proposal and a brief exposition of the rationale for PACE's approach.[1]

The PACE proposal incorporates the major thrust of Staff's "Strawman," which is to expand the scope of the rule. History has proven that IOUs will avoid the necessity of issuing an RFP by pursuing units that do not trigger the Siting Act, which presently defines the scope of the rule. The proposed broadening of the rule is a sorely needed improvement, and one which PACE endorses and incorporates in its proposal.

The major features that PACE added to the "Strawman" are (a) the requirement that an IOU present its RFP to the Commission for approval prior to issuance; (b) the requirement that scoring be placed in the hands of a neutral third party; and (c) the requirement that the IOU submit its self-build proposal to the neutral third party for evaluation in the form of a binding bid.

All of these elements proceed from a recognition that, in a proceeding to select capacity additions, the IOU is not an indifferent and objective arbiter. Instead, the IOU is a contestant. It has a significant stake in the outcome; under retail regulation, the return on investment in plant that an IOU receives in the form of retail rates is the principal source of shareholder profits from retail service. In any other competitive setting – ranging from the local rose show and contest to the Miss USA Pageant -- the notion of putting the role of scoring entrants on selecting the winner in the hands of one of the contestants would be rejected immediately as absurd on its face. An analysis of the IOU's incentives will demonstrate that the idea is misplaced also in the context of the competition between wholesale providers and retail-serving IOUs for the opportunity to provide the next capacity addition.

The proposal to require up-front approval of RFP parameters and criteria illustrates the

[1] For purposes of this summary, only the major features are described. The details of the PACE proposal are contained in the mark-up that was distributed during the February workshop.

point. The measure is needed to ensure that the IOU, which has a vested interest in the outcome of an RFP, does not use the absence of oversight at the outset of the process to discriminate against potential respondents or give its own proposal an undue advantage. This could be accomplished by the inclusion of commercially infeasible terms or terms that disadvantage wholesale providers in favor of the self-build option. To illustrate, assume a hypothetical "antique car" competition. Assume, absurdly, that one of the competitors is assigned the responsibility of establishing the scoring criteria and judging all entrants. The contestant has entered a 1905 vehicle -- the oldest in the competition by far -- but it is in poor condition. If the contestant is free to assign weight to the categories of age and condition as he sees fit, which is he likely to deem more deserving of greater emphasis?

Because incentives to discriminate are powerful and -- absent supervision and oversight -- opportunities for abuse abound, the Commission should review the RFP prior to issuance to assure that the terms are commercially feasible and non-discriminatory.

Similar considerations support the placing of the scoring of the responses in the hands of an independent evaluator. A neutral third party – one that has no stake in the outcome -- is needed to ensure that the criteria of the RFP, once reviewed by the Commission, are applied fairly and objectively.

The third of the three principal elements of PACE's proposal is the requirement that an IOU submit a bid to the neutral scorer, and agree to be bound by its bid. This measure is designed simply to place the IOU on an equal footing with respondents. Respondents are required to be prepared to commit contractually to the terms of their bids. To place the IOU on an equal footing is only fair; however, the real purpose of the measure is to protect ratepayers form shouldering undue costs. It is in the ratepayers' interest to design and conduct the RFP so

that the IOU cannot submit an artificially low cost long enough to secure the right to go forward, only to increase the cost and seek to recover those costs from ratepayers after the fact.

II. STATUTORY AUTHORITY

Introduction

During the workshop on February 7, 2002, the investor-owned utilities challenged the sufficiency of the Commission's statutory authority to embrace either Staff's "Strawman" proposal or PACE's proposed amendments to rule 25-22.082, Florida Administrative Code. In this section of the post-workshop brief, PACE will develop the history of the changes to the APA that affect the Commission's rulemaking authority, as that statute has been interpreted and applied by courts of law. PACE will demonstrate that the Commission has ample authority under its empowering statutes to adopt PACE's proposal.

Summary of Argument

Concerned with the ability of agencies to adopt rules reaching beyond any powers that it had delegated to them under a judicially created standard that required only that rules be "reasonably related" to the agencies' authorizing statutes, in 1996 the Florida Legislature amended the Administrative Procedures Act to codify a more restrictive standard for rulemaking. As amended in 1996, the APA authorized agencies to adopt rules that interpreted, implemented or made specific their "particular powers and duties." Notwithstanding this language, courts soon construed the revised APA to mean that an agency could promulgate a rule if it fell within a "class of powers and duties" granted to the agency by statute.

In response to this new judicial gloss on the 1996 language, in 1999 the Legislature amended the APA again. The 1999 amendments were designed specifically to supersede the case law that interpreted the 1996 revisions. The key provisions of the APA governing an

agency's rulemaking authority now read:

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

Sections 120.52(8) and 120.536(1), Florida Statutes (2001)

Understandably, the evolution of the statutory standard for rulemaking authority is of interest. However, from the Commission's perspective, as they relate to PACE's proposal the legislative amendments and the cases interpreting those amendments are academic. Resident in Chapter 366, Florida Statutes are general *and* specific powers of the Commission that *pass muster under any of the rulemaking standards established by the Legislature and the courts, before and after the 1996 and 1999 amendments.* The legislative changes do not affect the validity of the Commission's existing capacity procurement rule or impair the Commission's ability to adopt the PACE-proposed amendments to the existing rule.

Among other statutes, Sections 366.05(1), 366.06(02), and 366.07 support the adoption of the PACE proposal. Section 366.05, Florida Statutes, illustrates the type of "general" rulemaking authority that, under current law, is "necessary but not sufficient", in and of itself, to support the adoption of a rule. However, Sections 366.06(2) and 366.07, Florida Statutes, specifically empower the Commission to govern practices of investor-owned electric utilities that are related to, or affect rates. This is a specific power and duty that the Legislation has conferred on the Commission. In conjunction with the general rulemaking authority found in Section

366.05(1), Florida Statutes, these provisions delegate to the Commission precisely the combination of general and specific statutory powers that the amended APA requires to support rulemaking.

Based on oral presentations during the February 7, 2002 workshop, the IOUs may be expected to argue that Sections 366.07 and 366.06(2), Florida Statutes, are "not specific enough." If so, the Commission should reject the argument. During the legislative process that culminated in the language quoted above, legislators considered, but rejected, a proposal to require agencies to demonstrate a statute containing *detailed* powers and duties. They opted instead for the term "*specific*". Consistent with this clear indication of legislative intent, very recent judicial decisions -- involving the interpretation and application of the 1999 legislative amendments to the APA -- emphasize that the amended APA *does not require* an empowering statute to meet a certain prescribed degree or test of specificity. Further, in *Save the Manatee,*[2] the seminal case on the subject, and more recently in *Florida Board of Medicine,* the First District Court of Appeal recognized that a rule will always be more specific than the statute it implements.

The Florida Supreme Court agrees. Its 2001 *Osheyack* decision is a case involving the appeal of an order in which the Commission affirmed the validity of one of its telecommunications rules. On appeal the Florida Supreme Court gauged the sufficiency of Section 364.19, Florida Statutes to support the rule, which allows local exchange companies to disconnect the long distance service of customers who fail to pay their long distance bills. Section 364.19 says only that the Commission has authority to govern contracts between telephone companies and their customers. Absent in the statute is any reference to "long

[2] Full citations to cases are provided in the Argument section that follows.

distance," "termination of service," or "non-payment." The court rejected the argument that the statute was insufficient to meet the criteria of the revised APA, thereby confirming that Section 364.19 is a "specific law" within the meaning of Sections 120.53(8) and 120.536(2), Florida Statutes.

In *Save the Manatee, Florida Medical Association,* and *Osheyack,* (which is analogous to the instant situation in many respects), the courts have signaled agencies that--notwithstanding the 1999 amendments to the APA -- they should not be dissuaded from performing their explicit statutory functions by overreaching claims based on "insufficient" or "non-specific" statutory authority. Accordingly, the Commission can and should interpret the phrase "practices" to include the current IOU practices of selecting capacity additions without first soliciting competitive alternatives, and/or of conducting unfair, discriminatory, and self-serving proceedings that are not designed to identify the most cost-effective option from the ratepayers' perspective. To ensure that practices of investor-owned electric utilities in the area of the selection of capacity additions will impact rates paid by customers in a positive, cost-effective manner, the Commission should adopt PACE's proposed amendments to rule 25-22.082, Florida Administrative Code.

Argument

Until 1996, a rule was deemed to be a valid exercise of delegated legislative authority if it was reasonably related to the enabling statute and not arbitrary or capricious. *See General Tel. Co. of Fla. v. Florida Pub. Serv. Commission,* 446 So. 2d 1063 (Fla. 1984); *Department of Labor and Employment Sec., Div. Of Workers' Compensation v. Bradley,* 636 So. 2d. 802 (Fla.1st DCA 1994); *Florida Waterworks Ass'n v. Florida Pub. Serv Commission,* 473 So. 2d 237 (Fla. 1st DCA 1985); Marine Indus. Ass'n of Halies, South Florida v. Dept. of Envt'l Protection, 672

So. 2d 878, 882 (Fla. 4th DCA 1996); Staff of Fla. Senate Governmental Reform and Oversight Committee on CS/SBs 2290 and 2288, Final Staff Analysis 2 (Mar. 21, 1996)(hereafter "Final Staff Analysis"), citing *Dept. of Labor and Employment Security v. Bradley*, 636 So. 2d. 802 (Fla. 1st DCA 1994).

To legislatively "overrule" this body of case law, in 1996 the Florida Legislature amended the APA to restrict agencies' authority to adopt rules. Final Senate Staff Analysis, at 12; Sellers, L., The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform, 48 Fla. L. Rev. 93, 126 (1996). The change in the APA rulemaking standard was intended to foreclose the practice of promulgating rules "reasonably related" to an enabling statute, as well as prevent the promulgation of rules based solely on an agency's general grant of rulemaking authority. Specifically, the Legislature added the following provision to Sections 120.536 and 120.52(8), F.S.:

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

Section 120.536(1), F.S. (1996); 120.52(8), F.S. (1996).

The first sentence of this provision emphasized that for an agency to be authorized to adopt rules, the agency must have a general grant of rulemaking authority that must be exercised in conjunction with a specific provision of law that grants particular powers and duties that may be found anywhere in the enabling statute. Boyd, F. Scott, Legislative Checks on Rulemaking Under Florida's New APA, 24 Fla. St. U. L. Rev. 309 (Winter 1997). The second sentence

clarified that "particular," as opposed to "general," powers and duties could be implemented through rulemaking. The third sentence directed administrative law judges not to apply the "reasonably related" standard, and clarified that a rule should not be determined valid merely because it is not arbitrary and capricious and is reasonably related to the enabling statute's purpose. Again, this provision was included to reject earlier case law holding that agencies had legislative authority to adopt rules as long as the rules are reasonably related to the statute's purpose and are not arbitrary and capricious. This sentence further instructed administrative law judges that in the absence of particular statutory provisions, agencies could not engage in rulemaking to implement general statutory policy and statements of intent. The last sentence of the provision clarified that only specific powers and duties conferred on an agency could be implemented or interpreted through rulemaking. *Id.* at 338-339.

Very quickly, judicial decisions eroded the legislative intent underlying the 1996 amendments. The case of *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), involved an appeal from a final order of the Division of Administrative Hearings (DOAH) invalidating rules promulgated by the water management district. The rules added two new hydrological basins to the water management district and implemented more restrictive permitting and development requirements in those areas. The court concluded that the 1996 changes to the APA restricted rulemaking to only those rules which regulate "[a] matter directly within *the class of powers and duties* identified in the statute to be implemented." *Id.* at 80. (emphasis supplied). The court held that the rules establishing the two new hydrological basins were within the class of powers and duties created by Section 373.413, Florida Statutes, which specifically allowed the district to "delineate areas within the district wherein permits may be required." *Id.* at 81. According to the court,

> [t]he Legislature gave the District authority to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas, and the District did just that. By any name, the Tomoka River and Spruce Creek Hydrologic Basins are delineated geographic areas in which permits are required.

Id.

The court held that the other rules, which implemented more restrictive permitting and development requirements in the hydrological basins, were also valid exercises of delegated legislative authority. *Id.* The rules fell within the authority granted in section 373.413, which granted the District the authority to:

> require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part . . . [and] will not be harmful to the water resources of the district.

Id.

In holding the rules were valid, the court determined that the term "particular" in Section 120.52(8), F.S., restricted agency rulemaking authority to subjects "directly within the class of powers and duties identified in the enabling statute." It then reasoned that rules identifying geographic areas needing greater protection and imposing stringent environmental standards fell within the "class of powers and duties" delegated by the enabling statute.

In 1999, the Legislature revised the rulemaking standard that it adopted in 1996. The revisions to the APA reflected the Legislature's disapproval of the standard developed in *Consolidated-Tomoka Land Co.* The 1999 changes replaced the sentence,

> "An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute"

with

> "An agency may adopt only rules that implement or interpret the specific powers

and duties granted by the enabling statute."

Further, the sentence,

> "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute."

was replaced with

> "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute."

Commentators reviewing the legislative history of the 1999 amendments to Sections 120.536(1) and 120.52(8) noted that the purpose of the 1999 amendments was to reaffirm the intent of the 1996 legislation to limit agency discretion in rulemaking -- not to further narrow agency rulemaking authority beyond that intended via the 1996 amendments. Significantly, early versions of the amending bills contained the term "*detailed* powers and duties." That term ultimately was deleted due to concerns that it would *too sharply restrict agencies' ability to adopt rules*. Greenbaum, D. and Sellers, L., 1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing? 27 Fl. St. U. L. Rev. 499, 504 (1997). The substitution of the term "specific" in place of "detailed" clearly signals the Legislature's intent that the "details" -- i.e., the small and subordinate parts -- of an agency's powers and duties need not be set forth in the statute. As long as the statute confers specific powers and duties -- as opposed to general grants of rulemaking authority -- an agency may adopt rules to implement and interpret that statute. *Id.* at 508.

The First DCA considered the import of the 1999 amendments in *Southwest Florida Water Management District v. Save the Manatee,* Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). The District appealed a final order of DOAH which declared parts of a rule to be invalid.

The rule provided a "grandfather clause" that exempted certain kinds of developments approved before October 1, 1984, from the permitting requirements imposed on others. In its decision, the court first recognized the Legislature's repeal of the "class of powers and duties" test. Applying the new standard, the court invalidated the District's rule because the disputed sections of the rule did not implement or interpret any specific power or duty granted in the applicable enabling statute. *Id.* at 600.

Based on the facts of the case, the decision is no surprise -- and it does not affect the authority of the Commission to adopt the proposal that PACE presented on February 7, 2002. Section 373.414(9), Florida Statutes, the statute to which the District pointed, granted the District the authority to promulgate rules which establish exemptions to permitting requirements "if such exemptions . . . do not allow significant adverse impacts to occur individually or cumulatively." (Emphasis supplied.) The court observed that the exemptions provided by the rule were not based on the absence of a potential impact on the environment, but were based instead entirely on the date on which a development had been approved. "Because section 373.414(9) does not provide specific authority for an exemption based on prior approval, the exemptions are invalid." *Id.* In other words, in *Save the Manatee* the challenged rule violated an express limitation of the enabling statute on which the agency relied. As will be seen, that is not the case here.

Importantly, in *Save the Manatee,* the court recognized that the analysis of whether an enabling statute authorizes a rule is one which must be made on a case-by-case basis. *Id.* at 599. The court also addressed the Legislature's use in of the word "specific" in 1999 amendments to modify the phrase "powers and duties." *Id.* at 599. The court concluded that, for a rule to be a valid exercise of delegated legislative authority, the authority to adopt the rule "must be based on an explicit power or duty identified in the enabling statute." *Id.* Significantly, however, the

court said the term "specific" was not used in the 1999 statute as a synonym for the term "detailed." *Id.* As the court put it, "[a] rule that is used to implement or carry out a directive will necessarily contain more detailed language than that used in the directive itself." *Id.*

During the February 7 workshop, counsel for the IOUs cited the case of *State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.* 794 So. 2d 696 (Fla. 1st DCA 2001). The First DCA addressed a DOAH order invalidating a rule promulgated by the Board which prohibited "cruises to nowhere" from anchoring on sovereign submerged lands. In its notice of proposed rulemaking, the Board identified sections 253.03(7)(a) and 253.03(7)(b), Florida Statutes (1999)[3] as authority for the proposed rule.[4]

Again, the decision was consistent with the requirement that a rule implement a specific power, which, as will be shown, the PACE proposal would do. The *Day Cruise* court noted that although section 253.03(7)(b) does confer rulemaking authority with respect to submerged lands, the provision is limited to rules relating to physical changes or other effects on sovereign land. The Board's proposed rule would have prohibited the anchoring of boats sent by cruise ships to carry passengers who wished to gamble off shore. It did not govern the use of the sea bottom in a way that protected its physical integrity or fostered marine life. *Id.* Further, by purporting to

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[3] Section 253.03(7)(a) read: The Board of Trustees of the Internal Improvement Trust Fund is hereby authorized and directed to administer all state-owned lands and shall be responsible for the creation of an overall and comprehensive plan of development concerning the acquisition, management, and disposition of state-owned lands so as to ensure maximum benefit and use. The Board of Trustees of the Internal Improvement Trust Fund has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act.

Section 253.03(7)(b) read: With respect to administering, controlling, and managing sovereignty submerged lands, the Board of Trustees of the Internal Improvement Trust Fund also may adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other watercraft, which shall be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom; the establishment of anchorages; and the discharge of sewage, pumpout requirements, and facilities associated with anchorages. The regulations must not interfere with commerce or the transitory operation of vessels through navigable water, but shall control the use of sovereignty submerged lands as a place of business or residence.

[4] Also listed were sections 253.03, 253.04, 253.001, and 253.77, Florida Statutes (1999); as well as Article X, Section 11, Florida Constitution.

interfere with commerce, a matter prohibited by the law, the rule "transgressed" the very statute that the agency invoked as authority to adopt the measure.[5] The case does not help the IOUs' cause. It merely illustrates the dual principles, developed in *Save the Manatee*, *supra*, that (i) a determination of an agency's authority to adopt a rule is case - and fact - specific and (ii) (sensibly enough) a rule cannot violate an express limitation in the statute on which the rule relies.

In *Osheyack v. Garcia*, 2001 Fla. LEXIS 1573 (Fla. 2001), rehearing denied Order SC96439 (December 21, 2001), the Florida Supreme Court addressed an order of the Commission validating a rule that authorizes a telephone company to disconnect local telephone service for nonpayment of long distance charges. As authority for the rule, the Commission relied upon Section 364.19, Florida Statutes (1999). Section 364.19 states:

> The Commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.

Pursuant to this statute, the Commission promulgated rule 25-4.113, Florida Administrative Code, which provides, in pertinent part:

> (1) As applicable, the company may refuse or discontinue telephone service under the following conditions provided that, unless otherwise stated, the customer shall be given notice and allowed a reasonable time to comply with any rule or remedy any deficiency:
>
> - - - - -
>
> (f) For nonpayment of bills for telephone service, including the telecommunications access system surcharge referred to in Rule 25-4.160(3), provided that suspension or termination of service shall not be made without 5 working days' written notice to the customer, except in extreme cases. The written notice shall be separate and apart from the regular monthly bill for service. A company shall not, however, refuse or discontinue service for nonpayment of a dishonored check service charge imposed by the company, nor discontinue a customer's Lifeline local service

[5]The judges wrote concurring and dissenting opinions. The court certified the question before it to the Florida Supreme Court. One wonders if perhaps the decision to certify reflected the disarray of the court as much as it reflected the significance that it attached to the rule.

> if the charges, taxes, and fees applicable to dial tone, local usage, dual tone multifrequency dialing, emergency services such as "911," and relay service are paid. No company shall discontinue service to any customer for the initial nonpayment of the current bill on a day the company's business office is closed or on a day preceding a day the business office is closed.

Citing the holding of *Save the s, Id.*, that the authority to adopt and administrative rule must be based on an explicit power of duty identified in the enabling statute, the Florida Supreme Court agreed with the Commission's decision that the disconnect rule was "directly and specifically related to the authority granted the Commission over telecommunications contracts pursuant to Section 364.19." *Id.* at 4-5.

The recent case of *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery*, Case No. ID00-3897 (Fla. 1st DCA, 2002) makes the point that a "specific" statutory power need not exhibit a prescribed level of detail even more forcefully. At issue were the following two rules relating to the standards of care that govern surgery performed in a physician's office:

64B8-9.009(4)

> (b) Transfer Agreement Required. The physician must have a transfer agreement with a licensed hospital within reasonable proximity if the physician does not have staff privileges to perform the same procedure as that being performed in the out-patient setting at a licensed hospital within reasonable proximity.

64B8-9.009(6)(b)1.a.

> (b) Hospital Staff Privileges Required. The physician must have staff privileges to perform the same procedure as that being performed in the out-patient setting at a licensed hospital within reasonable proximity.

As support for its rules, the agency invoked Section 458.331(1)(v), Florida Statutes.

Section 458.331(1)(b) states the agency may:

> Establish by rule standards of practice and standards of care for particular practice settings, including, but not limited to, education and training, equipment and supplies, medications including

> anesthetics, assistance of an delegation to other personnel, transfer agreements, sterilization, records, performance of complex or multiple procedures, informed consent, and policy and procedure manuals.

In the case below, the Administrative Law Judge (ALJ) concluded that Section 458.331(a)(v) was not specific enough to sustain either rule. On appeal, the First DCA reversed the ALJ. The court stated:

> The ALJ concluded that this language did not provide rulemaking authority for the transfer agreement provision in rule 64B8-9.009(4)(b) essentially because the grant of authority in section 458.331(1)(v) was not specific enough. Section 458.331(1)(v) clearly grants the Board authority to require by rule that physicians performing level II office surgeries who do not have staff privileges to perform the same procedure at a licensed hospital within reasonable proximity have, instead, a transfer agreement with a licensed hospital within reasonable proximity. As *Save the s* makes clear, *whether the grant of authority is specific enough is beside the point* . . .
>
> . . . .
>
> The ALJ concluded that section 458.331(1)(v) did not provide rulemaking authority for this provision [64B8-9.009(6(b)1.a.)] for essentially the same reason that he concluded it did not provide authority for rule 64B8-9.009(4)(b)-because section 458.331(1)(v) is not specific enough. As previously indicated, the degree of specificity of the grant of authority is *irrelevant.*

Id. at 19-20 (emphasis provided).

The court's treatment of the rule that identified "staff privileges" as a qualifying standard is particularly instructive, as "staff privileges" are not mentioned in the empowering statute. The court said:

> Here, it is apparent that this portion of proposed rule 64B8-9.009(6)(b)1.a. is intended to make having staff privileges one of several optional methods by which a physician might establish his or her credentials to perform level III office surgery. Section 458.331(1)(v) clearly gives broad, unqualified, rulemaking authority to the Board to establish standards of care for particular "practice settings." It does not specify what those standards should be, or how they should be established, leaving such matters to the discretion of the Board. It seems to us relatively clear that level III office surgery is a "practice setting" and that the staff privilege provision constitutes a "standard[] of practice [or] standard [] of care."

Id. at 20.

Any fair application of the principles espoused in the *Save the s, Osheyack, and Florida Medical Association* cases to the statutes and rule language that were the subjects of the February 7, 2002 workshop leads to only one conclusion: It is within the Commission's statutory power to adopt PACE's proposed amendments to the "bid rule." Chapter 366, Florida Statutes grants the Commission its powers to regulate investor-owned electric utilities. The Chapter includes both general and specific provisions.

The general provision in Section 366.05(1), Florida Statutes, states:

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

(emphasis provided).

Without argument, this is the type of broad statement that, after the 1999 amendments to the APA, is "necessary" but "not sufficient" to support the adoption of a rule.

However, the powers of the Commission are not limited to the general statement contained in Section 366.05(1). For instance, Section 366.07, Florida Statutes, states:

> Whenever the commission, after public hearing either upon its own motion or 56upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, *practices* or contracts, or any of them, *relating thereto*, are unjust, unreasonable, insufficient, excessive, or unjustly

> discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, *practices*, contracts or service, to be imposed, observed, furnished or followed in the future.

(emphasis provided).

Further, Section 366.06(2), Florida Statutes, states:

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

(emphasis added).

Read together, these three subsections clearly empower the Commission -- upon determining that practices of a utility relating to or affecting rates are insufficient -- to adopt rules governing the practices to be followed in the future. This is a specific power that the Commission is authorized by the APA, as amended, to implement or interpret by rule. Sections 120.52(8) and 120.536(1), Florida Statutes (2001). Therefore, the Commission is free to interpret the phrase "practice" to include the practice of proceeding with a capacity addition without first conducting a comparative evaluation of alternatives. That practice relates to rates by causing them to be artificially and unnecessarily high. The Commission is similarly free to implement this specific power through a rule designed to establish the desirable practice. The fact that the word "bid" is absent from the statute is no more a hindrance than was the absence of "long distance," "non-payment" and "termination" in the *Osheyack* case or the term "staff

privileges" from Section 458.331(1)(b) in the 2002 *Florida Medical Association* case. The APA requires only that a power be specific. It does not mandate a degree of specificity. *Save the s, supra; Osheyack, supra; Florida Medical Association, supra.*

Conclusion Regarding Statutory Authority

While it is true that the Legislature has amended the APA to provide a more restrictive ability of an agency to adopt rules, the Commission has authority to adopt a rule designed to require the practices of the investor-owned utilities in the area of choosing capacity additions to affect customers' rates positively by ensuring that all alternatives are identified and that the process fairly selects the most cost-effective option. Section 366.05(1) confers broad rulemaking authority on the Commission; Sections 366.07 and 366.06(2) confer on the Commission powers that are "specific" within the meaning of the amended APA. As the courts, including the Florida Supreme Court, have made clear, no more is needed. The Commission can, and should, proceed to adopt PACE's proposed amendments to Rule 25-22.082, Florida Administrative Code.

III.A. IT IS ENTIRELY FEASIBLE TO REQUIRE IOUs TO SUBMIT SEALED BIDS IN AN RFP/EVALUATION PROCESS.

The Commission also asked the Workshop participants to address the feasibility of requiring IOUs to submit sealed bids to their own requests for proposals. This is at most a question of timing, because an IOU must, necessarily, prepare significant information regarding its self-build or utility-build option before issuing an RFP. Further, it must prepare even more detailed information regarding its self-build option, the costs thereof, revenue requirements impacts thereof, and so on, in any need determination. Ultimately, the requirement for a sealed bid in an RFP process is no different except as to the timing of preparing the information. The IOUs' affiliates, e.g., FPL Energy and TECO Power Services, are surely familiar with submitting sealed bids to utilities in other states where they develop merchant plants and sell wholesale

power. Moreover, at least Florida Power Corporation ("FPC"), through an affiliate, has participated in the submission of sealed bids to a Request for Proposals issued by FPC itself, where those sealed bids, along with other proposals, were evaluated with the assistance of a third-party evaluator engaged for that purpose by FPC.

III.B. THE PSC HAS AMPLE AUTHORITY TO REQUIRE IOUs TO SUBMIT SEALED BIDS IN POWER SUPPLY PROCUREMENT RFP/EVALUATION PROCESSES, AS WELL AS TO PROMULGATE RULES REQUIRING SAME.

The Commission also asked the Workshop participants to address the authority of the PSC to require an IOU to submit a "sealed bid" for its utility-build option in any evaluation process. PACE submits that the Commission has ample, specific statutory authority to require IOUs to submit such sealed bids and to promulgate rules requiring that practice as part of an evaluation process for power supply proposals.

Section 366.07, Florida Statutes, grants the PSC the specific statutory authority to fix and determine a public utility's practices and contracts affecting rates. This not only gives the PSC the direct statutory power to impose requirements regarding such practices on Florida's public utilities in and pursuant to appropriate proceedings; it also satisfies the "specific statutory authority" requirement needed to support a rule requiring such practices. An IOU's procurement of major power supply resources is clearly a "practice" that affects the utility's rates. If the utility does not get the best deal for its ratepayers, their rates are adversely affected. The utility's procurement practices are supposed to ensure that the utility does in fact get the best deal. Submitting a "sealed bid" in an evaluation process for needed power supplies is similarly a "practice" affecting the utility's rates. A "sealed bid" requirement ensures fairness and objectivity in the evaluation process. The Commission has the requisite authority to impose such requirements -- here, PACE's proposed amendments to the Bid Rule -- that would require public

utilities to submit a "sealed bid" in any power procurement RFP/evaluation process. The Commission has the express authority to promulgate such rules (to implement all provisions of Chapter 366) pursuant to Section 366.05(1), Florida Statutes.

IV. THE PSC HAS AMPLE STATUTORY AUTHORITY TO IMPOSE PREREQUISITES THAT MUST BE SATISFIED BEFORE PLACING FACILITIES, E.G., POWER PLANTS, IN RATE BASE OR BEFORE ENTERING CONTRACTS.

The Commission also asked the Workshop participants to address the question whether the Commission has the authority to impose prerequisites on an IOU before the IOU can place facilities in rate base or enter long-term contracts, e.g., power purchase agreements ("PPAs"). PACE submits that the Commission has ample, specific statutory authority to impose such requirements, and that the Commission also has ample, specific statutory authority to promulgate rules requiring the satisfaction of such prerequisites.

The Commission's authority to impose such prerequisites derives at least from Section 366.07, Florida Statutes. As noted elsewhere in PACE's comments, Section 366.07 gives the PSC the authority to fix and determine a public utility's practices and contracts affecting rates. Requiring such advance approval of major investments is obviously a practice that affects a utility's rates. In addition, Section 366.04(5), Florida Statutes, gives the Commission

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

This is specific authority to ensure that an inefficient, non-cost-effective power plant is not built. The only way that the Commission can protect against such a result is by imposing appropriate prerequisites on the construction and operation of such a plant. Once an inefficient or uneconomic plant is built, the Commission cannot avoid the adverse consequences to the public

interest.

Advance approval of major power plant investments has been granted by the Commission. In 1991, the Commission granted FPL's petition for advance approval or authorization to include FPL's purchase price for its share of the Scherer 4 power plant in rate base. In Re: Florida Power & Light Company, 1991 WL 501802 Fla. P.S.C., Docket No. 900796-EI, Order No. 24165, January 26, 1991). If the Commission has the statutory authority to grant such advance approval of costs to be included in rate base upon a utility's request, it has the authority to impose it as a prerequisite. The authority to impose prerequisites contemplated by this question is also analogous to the existing requirements, in Rule 25-17.0832(1)-(3), F.A.C., that an IOU must submit a negotiated cogeneration power purchase contract to the Commission within ten days following its execution, and that in reviewing such a PPA for approval, for cost recovery purposes, the Commission will consider several factors, mainly relating to a demonstration that the PPA is needed, cost-effective, and viable. In practice, this means that in Florida, longer-term cogeneration PPAs contain provisions that require PSC approval as a condition precedent to the effectiveness of the PPA. This is exactly the type of prerequisite to cost recovery that is at issue here.

Moreover, public policy, bolstered by the Commission's broad mandate to regulate public utilities in the public interest as an exercise of the police power, strongly supports the Commission's authority to impose such prerequisites. The Commission is charged to protect the public interest, not merely to ensure that the rate impacts of IOUs' decisions are consistent with actions taken in the public interest. In the context of new, major power plants, the public interest requires that the right plant be built at the right cost, not merely that a utility's rates be set as though the right plant were built at the right cost. If a relatively inefficient and non-cost effective

plant is built by an IOU, the State will lose the efficiency and economic benefits of the foregone more efficient, more cost-effective option forever. An ex post prudence review can only remedy such inefficiencies as they affect rates -- it cannot prevent the wrong decision. On the other hand, prerequisites imposed a priori can prevent wrong decisions. Pursuant to Sections 366.07 and 366.04(5), Florida Statutes, the Commission has, as it must have, the authority to ensure that the right resource decisions are made in the public interest.

V. THE INVESTOR-OWNED UTILITIES HAVE A FAIR DEGREE OF FLEXIBILITY IN DESIGNING THEIR REQUESTS FOR PROPOSALS, INCLUDING FLEXIBILITY IN ESTABLISHING EVALUATION CRITERIA AND THE WEIGHTS TO BE ASSIGNED TO SUCH CRITERIA. THIS FLEXIBILITY, HOWEVER, MUST END AT THE ISSUANCE OF THE RFP IN ORDER TO ENSURE THAT ALL RFP RESPONDENTS KNOW WHAT THEIR TARGET IS AND IN ORDER TO ENSURE A FAIR, PRINCIPLED, OBJECTIVE EVALUATION OF PROPOSALS.

With respect to the issue of RFP evaluation criteria and the weights assigned to such RFP criteria, the Commission asked the Workshop participants to consider whether there might be a "middle ground" between (a) PACE's position that the evaluation criteria, and the weights assigned thereto, must be specified in an RFP when issued, and (b) the IOUs' position that they require flexibility to add or subtract evaluation criteria, and to vary the weights assigned to criteria, during the course of an RFP evaluation process. PACE's answer is that there is no such middle ground.

PACE does not dispute that the IOUs properly have at least a fair degree of flexibility in designing their RFPs on the front end, i.e., before they are issued or submitted to the Commission for approval prior to issuance. At some point, however, that flexibility must end in favor of a defined, non-moving target and in favor of a fair, principled, objective evaluation of all proposals.

Ultimately, whichever entity is to evaluate RFP responses must decide on a set of criteria and weights to be applied uniformly to all responses. This requirement to identify criteria and determine the weights assigned thereto applies equally to an IOU, to an independent third-party evaluator (whether hired by the IOU or by the Commission), or to the Commission. Thus, the question of when the criteria and their weights become "final" is simply one of timing. PACE believes that, in order to ensure a principled evaluation of all proposals, and in order to fairly and adequately inform RFP respondents of what the IOU wants and of what is in the best interests of the IOU's ratepayers and of the State as a whole, the criteria and their weights must be established when the RFP is issued. Otherwise, the RFP would be based on a "moving target," which would make it impossible for the respondents to adequately address the IOUs' needs. In short, one cannot submit a responsive proposal if one doesn't know what is desired.

The IOUs, on the other hand, claim that they want to be able to modify, add to, and subtract from the evaluation criteria, and to vary the weights assigned to certain criteria, as the evaluation process progresses, in order to be "flexible" with respect to the responses. They assert that proposals may include certain features that are not adequately covered by the pre-established criteria. While theoretically possible, it seems unlikely that any such event has ever occurred in an IOU's RFP (in light of the fact that the IOUs have "won" every RFP process pursuant to the Bid Rule since the Rule's inception). Moreover, even if it were to occur, it would simply indicate that the criteria or weights were not adequately specified on the front end.

The Commission should look askance at the IOUs' position in light of the fact that, since the Bid Rule has been in effect, no IOU has been able to find anything in an IPP's response creative or flexible enough to warrant doing anything other than pursuing the utility-build option, which surely and clearly cannot be regarded as requiring any flexibility at all. PACE believes

that the IOUs' "flexibility" argument is no more than an artifice, contrived to enable them to continue winning every one of their RFPs. Requiring front-end identification and establishment of evaluation criteria and their weights will ensure objective, principled evaluations of all proposals but will prevent the IOUs from "adjusting" the criteria, or the weights, or both, to favor their proposals after receiving the responses to an RFP.

The Commission should remember, too, that the purpose of even the existing Bid Rule is to identify a "short list" of proposals for further negotiations. Surely an IOU's allegedly needed flexibility can be more than adequately addressed by selecting the two or three or four proposals that have the most promise based on the primary evaluation, assuming that some flexibility were really required, and then seeking that flexibility in contracts developed through the negotiation process rather than in the evaluation process.

VI. BIDDING REQUIREMENTS IN OTHER STATES

Numerous states have RFP/Bidding rules and procedures for competitive selection of capacity additions. A few states, such as Louisiana, are just beginning to look at truly competitive bidding processes. Of those states that have rules or procedures for RFPs for selection of capacity, a range of rules are seen. This list is not exhaustive; the regimes listed may be in flux based on the degree of deregulation in each state.

1. **Colorado**--The Colorado Public Utilities Commission has an Integrated Resource Plan rule that requires the use of RFPs for major capacity additions.[6] The Colorado rules have several significant provisions:

COPUC Rule 723-21-8--Defines the purpose and contents of RFPs to include apprising

[6] COPUC Rules 723-21-7 through 723-21-10.

potential bidders of the proposed criteria for the evaluation of bids and clearly specifying the required elements for all bids, such as price and non-price factors. The utility is prohibited from limiting the pool of bidders through unreasonable or excessively restrictive minimum criteria.

COPUC Rule 723-21-9--This rule defines the competitive resource acquisition process. Rule 723-21-9.1 requires the utility to acquire all supply-side resources and demand-side savings, including improvements to the utility's existing generation facilities, pursuant to these procedures. Rule 723-21-9.2 requires the utility to use the competitive acquisitions procedures to competitively acquire all supply-side resources and demand-side savings in which neither the utility, one of its affiliates nor one of its subsidiaries, are bidders, unless it adheres to special procedures for such self-dealing contained in Rule 723-21-9.5. Additionally, the criteria for evaluating the bid must be specified in the RFP. The final selection is made through the IRP process. Rule 723-21-9.5 allows the utility to submit a bid only if it nominates a third-party overseer to monitor the evaluation of bids and to report to the Commission in an independent and unbiased manner. If the utility and the overseer disagree about the resource acquisition to be provided by the utility, the overseer is to provide the Commission with alternatives. Finally, Rule 723-21-10 provides for Commission review and approval of the integrated resource plans that include the capacity acquisition at issue in the RFP. The Commission may approve, disapprove or suggest modifications to the IRP. The Commission shall specifically address the adequacy of the contents of the RFPs and may elect to approve an alternative to the utility's proposed IRP portfolio.

2. **Texas**--Texas has extensive guidelines and rules for selecting resources. The rules were originally enacted in 1996 and were modified in 1998.[7] The overall scheme is within the context of Integrated Resource Planning. Generating electric utilities are subject to the

requirements of the applicable rule. (Section 25.161(b)(1)). If the electric utility has selected resources through a solicitation, it may ask the commission to certify the contracts. (Section 25.161(c)(4)). The guidelines recognize that existing markets are not fully open and fully competitive; therefore a formal solicitation process with regulatory oversight is appropriate. (Section 25.161 (g)(1)-(3)). The utility shall conduct all-source bidding and its evaluation criteria shall consider lowest reasonable system cost, among other things. Section 25.163 relates to acquisition of resources outside the solicitation process under limited circumstances. The circumstances where resources can be acquired outside the solicitation process are limited. Section 25.168 formalizes the solicitation process and provides that a solicitation may be required as part of the IRP process, may be initiated by an electric utility, or may be ordered by the commission. (Section 25.168(a)). The electric utility is required to conduct solicitation for demand-side and supply-side resources. (Section 25-168(b). The RFP is to encourage broad participation and allows for bids from one or more of the utility's affiliates. (Section 25.168(d)). If an affiliate bids, the utility may not give preferential treatment or consideration to that affiliate's bid. Additionally, the utility may not share information including information about customers, electric service needs, loads, costs, prices, etc., unless it is shared equally with all bidders. (Section 25.168(g)). Perhaps most significant is that the utility is required to use and independent evaluator if an affiliate or the utility itself plans to bid. (Section 25.168(h)). The evaluation of the bids must be in accordance with the criteria specified in the RFP. (Section 25.168(i)). The utility may apply to the commission to self-build is the results of the solicitation do not meet the supply-side needs of the utility. (Section 25.168(k)). Final approval or certification of a contract that is reached after the solicitation process is sought from the commission pursuant to Section 25.169. Additionally, the commission must grant a certificate of

[7] 16 Texas Administrative Code Chapter 25, Sections 25.161 through 25.171.

convenience and necessity for all new generation facilities after consideration of a number of criteria and, if there has been a solicitation and all bids are rejected, the commission shall consider the reported costs of the resource alternatives at the time of certification and in any prudence proceeding. There is a rebuttable presumption that the rejected bids constitute a market-based assessment of the value of new generation units in the context of a proceeding to include the appropriate costs in rate base. (Section 25.171).

3. **Pennsylvania**--The Commonwealth of Pennsylvania has a mandatory competitive bidding provision that applies to purchases of capacity resources.[8] The key provisions of the rule are that a utility or its affiliates can submit offers in a competitive bidding program, but all bids must be evaluated fairly by an independent third-party evaluator. Abusive self-dealing is prohibited. In fact, communication of information between members of work groups within the soliciting utility is prohibited. The RFP shall include necessary information, including the evaluation criteria and major assumptions. An electric utility can file a petition for permission to construct its own generating plant outside of a competitive bidding program, but it is subject to commission approval after full hearing. The utility's self-build option must be the best least-cost option compared to the other options; must have the lowest rate impact; must have the best reliability standards; must offer the greatest improvement in the utility's financial standing; must offer the largest economies of scale and best optimum fuel mix; and must be in the public interest.

4. **Virginia**--The Virginia State Corporation Commission adopted rules pertaining to the use of bidding to purchase electricity from other suppliers.[9] The essential terms of the rules, which were adopted in 1990, require as follows:

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[8] 52 Pa. Code § 57.34(c).
[9] 20 VAC5-301-10 through 301-110.

20 VAC5-301-10--The purpose is to establish minimum requirements for any electric utility bidding program that is used to purchase electric capacity and energy. Electric utilities have the right to establish a bidding program or to secure capacity through other means. All responsibility for developing RFPs, evaluating proposals, and negotiating contracts lies with the utility.

20 VAC5-301-40--The RFP should contain accurate information which, at a minimum, addresses the size, type and timing of capacity; minimum thresholds; major assumptions to be used by the utility in bid evaluation; Preferred location of additional capacity; and specific information concerning the factors involved in determining price and non-price criteria used for selecting winning bids. Potential bidders should have a chance to meet with the utility to discuss the RFP and the utility's capacity needs.

20 VAC5-301-50--Evaluation of bids must be based on criteria identified in the RFP. Bids are to compete with other bids and with the utility's self-build option, including plant life extensions. The utility must be able to demonstrate that it has objectively evaluated its self-build option against the bids received.

20 VAC5-301-60--The utility must develop detailed cost estimated of its own build option and said cost estimates must be current and based on prices likely available. The estimates need not be disclosed to potential bidders, but if they are not identified in the RFP, they must be submitted to the Commission prior to receiving competitive bids.

20 VAC5-301-100--The Commission provides a forum to resolve disputes between a utility and a bidder that may arise as a result of the bidding process. If a utility elects not to implement a bidding process, the Commission will continue its traditional role of arbitrating price, terms and conditions of purchase power contracts if the parties reach an impasse.

Virginia's RFP process is voluntary, and lacks an enforcement mechanism.

5. **Georgia**--The Georgia Public Service Commission has an RFP and Integrated Resource Plan Rule found in Chapter 515-3-4 of the GPSC's General Rules. Essentially that rule requires electric utilities to issue RFPs for new supply-side resources. Specifically, the rule requires a utility to file a draft RFP with the PSC prior to formal distribution and to file a copy of the actual RFP that is issued. It also requires a utility that intends to pursue a self-build option to submit a detailed written proposal as a sealed bid with a copy to an independent accounting firm. Thirdly, the rule requires that the utility's self-build proposal contain the entire cost of the project. Finally, the rule requires the utility to make information on the results of the bid available to the GPSC. One point of interest regarding the Georgia rules are that Chapter 515-3-4.04(3) exempts "repowering" from the RFP process because they amount to "life extension or efficiency improvement of an existing generating plant **that does not require significant capital investment**." Clearly the definition did not contemplate development of new combined cycle units under the guise of "repowering."

6. **Washington**--The Washington Utilities and Transportation Commission also has extensive rules requiring a fair and reasonable competition to fulfill the utility's new resource needs. The material provisions of the Washington bidding rules are as follows:

Rule WAC 480-107-001--The rules are intended to provide a competition to fill a utility's new resource needs on a fair and reasonable basis, however the rules do not preclude electric utilities from constructing electric resources to satisfy their public service obligations.

Rule WAC 480-107-020--An electric utility may allow an affiliate to participate in a bidding process as a power supplier only under conditions set forth in WAC 480-107-160.

Rule WAC 480-107-060--The RFP must be approved by the commission and must

specify the resource block and long-term avoided costs and must explain the evaluation and ranking criteria.

Rule WAC 480-107-100--If there are material changes in the project proposal that ranked first, the utility must re-rank all project proposals.

Rule WAC 480-107-160--Utility subsidiaries may participate in an affiliated utility's bidding process subject to enhanced commission scrutiny designed to ensure that no unfair advantage is given to the bidding subsidiary. Disclosure by the utility to an affiliated subsidiary of the contents of the RFP or competing proposals is deemed to be an unfair advantage. If it is shown that any unfair advantage was given to a bidding subsidiary, rate recovery for the project may be denied in full or in part by the commission.

While the Washington rules appear to be voluntary and do not directly address self-build options, the threat of cost disallowance could help ensure a fair and reasonable process. Research has not revealed any specific cases that demonstrate how well this bidding process has worked.

7. **Wisconsin**--The State of Wisconsin has partially deregulated electric service. Both electric utilities and non-utility generators such as merchant plants can own generation facilities. If there is not enough power available for purchase, a utility is required to issue RFP through the WPSC's bidding process as a way to select among competing offers. The bidders, including the utility, are then evaluated. The utility needing the power recommends to the WPSC the bid it believes will provide the needed power at the least overall cost. The WPSC then decides

8. **Louisiana**--The Louisiana Public Service Commission is the midst of Docket No. R-26172 to formulate rules related to a competitive selection process for capacity additions. All

briefs have been filed and the staff has filed its recommendation. If action is taken prior to hearing in this docket, the position of the Louisiana PSC will be communicated to the Florida PSC in a timely manner.

9. **Michigan**--The Michigan Public Service Commission modified its capacity solicitation procedures in 2000. There is great flexibility for the utilities because the rules are general. An attempt in 1992 to strengthen the rules failed.[10] Whether to approve the utility's selection or choose one of the other alternatives.

10. **Alabama**--Alabama has an RFP process, but it has significant shortcomings that have allowed a Southern Company affiliate to "win" every major RFP solicitation that has been issued by Alabama Power Company (another Southern Company affiliate). One significant shortcoming of the Alabama procedure is that the utility can issue its RFP prior to developing its own self-build proposal, thereby allowing the utility to develop its self-build proposal after seeing all the competition. This can hardly be called a competitive selection process.

Conclusion Regarding Approaches In Other States

While there are clearly many different ways to approach competitive capacity additions, some conclusions can be reached and some support can be drawn from the examples discussed. First, the more successful bidding processes, i.e., those that lead to the lowest cost and highest quality capacity additions, are those that share some common themes. Those themes are ones related to fairness of the process, not only during the bidding stage, but also during the RFP drafting stage and the bid evaluation stage. One other essential element is regulatory commission willingness and mechanisms to enforce the requirements of the competitive selection process, even through exclusion of some or all expenditures from rate base if necessary.

[10] Case No. U-12148, In the Matter of Consumers Energy Company to rescind the Commission's June 12, 1992 Opinion and Order in Case NO. U-9586 and to approve an alternative capacity solicitation process.

The RFP must contain accurate and complete information related to the capacity needed, all factors related to price and non-price criteria, the required elements for all bids, long term avoided costs, the criteria for evaluating the bids, and all major assumptions. It is essential that the RFP cannot contain unreasonable or excessively restrictive minimum criteria so as to limit the pool of bidders. In fact, the RFP should expressly encourage broad participation in the bidding process.

Next, the bidding process itself must be fair. If the utility or an affiliate of the utility is permitted to bid, the utility must not give preferential treatment or unfair advantage to those bids. Further, the utility must be prohibited from sharing information with itself or any affiliate that it does not share equally with all bidders. The utility should be prohibited from disclosing information to an affiliate regarding the contents of the RFP or the competing proposals. Washington State enforces this prohibition by denying rate recovery, in full or in part, if any unfair advantage is shown.

One mechanism for preventing unfair advantage in evaluating a utility's self-build option or the proposal of an affiliate is to require a third-party overseer or independent evaluator any time the utility or an affiliate responds to the RFP. The processes used in Pennsylvania, Colorado, and Texas provide good examples of how this can be accomplished. Use of an independent evaluator that uses the express criteria in the RFP to evaluate and rank the bids will lead to selection of the least-cost, lowest rate impact, most reliable, and most economic capacity addition.

Finally, an integral element of the optimal bidding procedure is adequate oversight and enforcement by the commission, either through restrictions on inclusion in rate base, recovery of costs in rates, or denial of a certificate of convenience and necessity, or through final authority to

select the best alternative among all the bids submitted.

While the bidding procedures in Pennsylvania, Texas, Colorado and Washington seem to offer the best overall schemes for capacity additions, it is clear that some of the best elements of other plans can also provide a substantive basis for a comprehensive bidding rule that addresses the adequacy of the RFP, the fairness of the bidding process, the independence of the evaluation process, and the involvement of the commission.

VII. NEGOTIATED RULEMAKING

The Commission has requested the interested parties, in their written comments on the draft rule amendments, to address the negotiated rulemaking process. Following is a brief discussion of the process and an analysis of the feasibility of the use of that process in this proceeding.

Section 120.54(2)(d), F.S., authorizes agencies to use negotiated rulemaking in developing and adopting rules. This process involves the designation of a committee of representatives of interested persons for the purpose of developing a mutually acceptable rule proposal. In determining whether to use the negotiated rulemaking process, the agency should consider whether a balanced committee of interested persons who will work in good faith can be assembled. Additionally, the agency is supposed to consider whether the agency could use the group consensus work product as its basis for a proposed rule, and whether the agency is willing to support the work of the negotiating committee as it develops a proposal.

If the agency decides to employ the negotiated rulemaking process for developing a rule proposal, it must publish notice in the Florida Administrative Weekly of the representative groups that will be invited to participate in the process, and other persons may apply to participate. All meetings must be noticed and open to the public, and the negotiating committee

must be chaired by a neutral mediator or facilitator. Section 120.54(2)(d), F.S.; Sellers, L., The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform, 48 Fla. L. Rev. 93 (1996).

The negotiated rulemaking process was informally employed by agencies for years preceding the 1996 amendments to the APA formally authorizing the process. Id. at 108-109. Although the statute generally encourages the use of negotiated rulemaking in the development of complex or controversial rules as a means of generating a consensus work product, a key consideration is whether a committee of persons can be assembled who will work to achieve the objective of a mutually acceptable consensus product. Given the highly polarized positions of the parties in this proceeding, it is questionable whether a working committee could be assembled that would negotiate in earnest to develop a consensus work product. PACE believes an attempt to employ the negotiated rulemaking in this proceeding may ultimately result in substantial delay of amendment of the Bid Rule, with no consensus being reached at the end of a protracted negotiating process. For this reason, PACE submits that the use of negotiated rulemaking in this proceeding would most likely not be efficient or productive.

VIII. REVIEW OF EXISTING RULES IN LIGHT OF APA AMENDMENTS

In both the 1996 and the 1999 amendments to the APA, the Legislature required agencies to identify rules that lacked the requisite specific statutory authority under the new rulemaking standard enacted by each of the amendments. The agencies' listings of rules for which they lacked the requisite authority were presented to the Legislature for action to grant such authority. Where the Legislature declined to enact such authority, agencies were required to repeal the rules. Rules that were not identified by agencies as lacking statutory authority remain subject to challenge pursuant to the APA.

The Commission did not identify the existing Bid Rule as a rule for which it lacked

statutory authority. Although the statute, Section 120.536(2)(b), authorizes the Joint Administrative Procedures Committee or any substantially affected person to petition agencies to repeal any rules for which they believe there is inadequate statutory authority, neither the Committee nor any of the IOUs nor any other entity has petitioned the Commission to repeal the existing Bid Rule. The events outlined here do not mean that the Rule has achieved "safe haven" status; it merely means that the Commission and the Commission Staff reviewed the Bid Rule and determined to their satisfaction that the Commission has adequate statutory authority for the Rule, and that neither the Joint Administrative Procedures Committee nor any other entity has availed itself of its right to seek repeal of the Rule. The Commission should note that three of Florida's IOUs have issued RFPs in compliance with the Bid Rule since the 1999 amendments. While these events converge on the conclusion that the Rule is valid as it stands from a procedural standpoint there is no statutory prohibition against any substantially affected person, including an IOU, seeking repeal of the existing Bid Rule on the grounds that the Commission lacks the specific statutory power to implement the Rule's requirements. Any such challenge would have to confront the compelling evidence of statutory authority discussed earlier in this memorandum.

CONCLUSION

For the reasons discussed on February 7, 2002 and amplified herein, the Commission can and should proceed with rulemaking to amend rule 25-22.082.F.A.C. Florida PACE commends, for the Commission's consideration, the proposed amendments that it distributed during the workshop of February 7, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Workshop Memorandum of Florida PACE, was on this 15th day of March 2002, sent (*) Hand Delivery and U.S. Mail, postage prepaid to the following names and addresses:

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Exhibit No. 2
Docket No. 020398-EI
PACE
Filed November 15, 2002

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June 28, 2002

VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of Commission Clerk and
Administrative Services
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 020398-EI; Proposed revisions to Rule 25-22.082, Selection of Generating Capacity.

Dear Ms. Bayó:

Enclosed for filing please find one (1) original and fifteen (15) copies of the Pre-Workshop Comments of the Florida Partnership for Affordable Competitive Energy, submitted for filing in the above referenced docket. Please also find the enclosed diskette, containing an electronic version of the Filing in Word format.

Please acknowledge receipt of this document by time/date stamping the enclosed additional copy of the Filing, as indicated.

Very truly yours,

Leslie J. Paugh

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed revisions to Rule 25-22.082, Selection of Generating Capacity	Docket No. 020398-EI Filed June 28, 2002

PRE-WORKSHOP COMMENTS OF THE FLORIDA PARTNERSHIP FOR AFFORDABLE COMPETITIVE ENERGY

Comes now, the Florida Partnership for Affordable Competitive Energy ("PACE") and hereby files its Pre-Workshop Comments pursuant to Order Initiating Rule Development, Order No. PSC-02-0723-PCO-EQ, issued May 28, 2002, and Notice of Proposed Rule Development and Commission Workshop, issued May 29, 2002.

I. Introduction

PACE is a non-profit organization of Independent Power Producers ("IPPs") consisting of the following companies: Duke Energy North America, LLC, Mirant Americas Development, Inc., Constellation Power, Inc., Calpine Corporation, Competitive Power Ventures, Inc., PG&E National Energy Group and Reliant Energy. PACE supports the Commission's and staff's efforts to effectuate the objective of enhancing the cost-effective selection of additional generating capacity by Florida's electric utilities through the rule development process. Meeting this objective will benefit all Florida consumers.

II. Staff Proposal

Pursuant to the staff recommendation dated May 9, 2002, ("Recommendation") and the vote of the Commission during the May 21, 2002, Agenda Conference, Selection of Generating Capacity, Rule 25-22.082, Florida Administrative Code, ("Bid Rule") is

recommended to be revised in the following four primary ways. First, the scope of projects to which the request for proposals ("RFPs") process is to apply is recommended to be broadened to encompass repowerings and other projects not subject to the Florida Electrical Power Plant Siting Act[1] by requiring investor-owned utilities ("IOUs") to issue RFPs for major[2] capacity additions. Second, IOUs are to be required to evaluate proposals for non-utility generating facilities to be collocated on the IOU's site. Third, while cost recovery mechanisms remain unchanged, there is proposed to be an expedited complaint review process relative to complaints filed by participants regarding the RFP process. Fourth, it is proposed that bilateral contracts of three years or less in duration be exempt from the RFP process. In addition, the staff proposal appropriately enlarges the list of information that the IOU would be required to provide in its RFP.

PACE submits that the Recommendation does not go far enough toward achieving the goal of enhancing the cost-effective selection of additional generating capacity. To further effectuate achievement of that goal, PACE offers the following additional provisions to ensure that the ratepayers of Florida have the benefit of least-cost, reliable generation additions.

III. PACE Proposal

During the February 7, 2002, Commission workshop, PACE submitted a proposal for revisions to the generation selection process that ensures that the IPPs' proposals and the IOUs' self-build proposals are considered on an equal basis. PACE provided a concise comparison between the existing rule and the PACE proposal that is worthy of repeating and being made part of the record in this rule development proceeding.

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[1] FLA. STAT. §§ 403.501-403.518 (2001).
[2] 150 megawatts or greater.

A. The following summarizes the primary provisions of the present Bid Rule:

1. The IOU designs the RFP package.
2. The IOU provides a copy to the PSC when it issues the RFP. (No point of entry for objections is provided and no approval process is contemplated.)
3. The IOU receives proposals.
4. The IOU scores proposals.
5. The IOU announces a winner.
6. The IOU files a petition for determination of need. (Only RFP participants have standing to intervene.)

B. The following summarizes the primary provisions contained in the PACE proposal:

1. The IOU designs the proposed RFP package.
2. The IOU selects the proposed neutral third party to score proposals.
3. The IOU applies to the Commission for approval of the RFP package and approval of the neutral third party evaluator.
4. All potential bidders who have secured the package from the IOU have a specific time frame within which to object to the choice of third party evaluator, or to discriminatory or commercially infeasible RFP criteria. The Commission has the same opportunity to initiate a proceeding to eliminate biased or infeasible criteria on its own motion.
5. If there is no dispute, or after an expedited proceeding on objections, if any, the Commission approves the RFP package.

6. The IOU submits its own self-build proposal to the neutral third party evaluator at the same time as the other bidders.
7. The neutral third party applies the criteria previously approved by the Commission and ranks the proposals.
8. The IOU applies for approval of the proposal selected by the neutral third party evaluator. Where applicable, this request is incorporated in a petition to determine need. RFP participants can intervene, but can contest the selection only on the grounds that the neutral third party evaluator applied the Commission-approved scoring criteria incorrectly.
9. If selected, the IOU is bound by the terms of its bid.

The full text of the PACE proposal is contained in Attachment A, appended hereto.[3]

The fundamental purpose of the PACE proposal is to provide an objective process based on fixed, reasonable criteria. The central provisions of the PACE proposal are the impartial evaluator and the requirement that the IOU must respond to the RFP on an equal footing with other participants. These provisions will ensure that the ratepayers of Florida pay only for the most cost-effective, reliable generation resources while at the same time allowing the IOU to propose the specifications of the RFP as appropriate for its particular circumstances.

PACE accomplishes its objective through three important provisions. First, PACE has added a requirement that the IOU that proposes a major capacity addition present its RFP to the Commission for approval prior to its issuance. The preliminary approval requirement ensures that the IOU has sufficient flexibility to provide for its

[3] The bilateral contract provision has been revised from 5 to 3 years to comport with the current staff recommendation.

specific needs while at the same time providing Commission oversight to protect against discrimination. Discrimination against potential respondents may occur through the inclusion of commercially infeasible terms, terms that favor the self-build option, or terms that do not properly discount the self-build or long-term power purchase agreement options appropriately for their inherent foregoing of future supply or demand opportunities. Confronted with such terms, a potential provider must either choose not to participate, or reflect the added costs and/or unwarranted risks in its bid. Regardless of the choice, the IOU gains an unfair advantage, and the ratepayers are penalized in the form of a process that does not result in the greatest number of participants offering their lowest possible bids.

Currently, respondents have the ability to submit a complaint against an IOU that is related to excesses within the RFP. For example, Reliant Energy filed such a complaint against Florida Power & Light Company in Docket No. 020175-EI. PACE's proposal to require that a potential bidder raise certain issues at this point or not at all would codify that procedural opportunity, but it would also increase the efficiency of the process by: (1) delineating precisely the grounds that can form the basis for a complaint; (2) establishing the time frame within which it can be brought; (3) providing that the RFP process shall be halted until such complaints, if any, have been resolved; and (4) establishing, at the "front end" of the process, Commission-approved parameters and criteria.

Second, as previously stated, PACE strongly endorses a requirement that the bid evaluation be performed by a neutral third party. As the Bid Rule is currently written, the IOU, which has a monetary stake in the outcome of the bid process, evaluates and selects the winning bids under a cloak of secrecy. The IOUs can and do use this provision to

their advantage. It is well known that since its effective date, the Bid Rule has been used three times by IOUs and in each instance, the IOU selected a self-build option over all other proposals. During that same period, other Florida utilities, Seminole Electric Cooperative, the Kissimmee Utility Authority, the Orlando Utilities Commission and the Florida Municipal Power Agency have all conducted RFP processes that have resulted in vastly different outcomes - power purchase agreements with IPPs. This glaring inconsistency can be readily cured by requiring that all participants, including the IOU, be evaluated equally, fairly and objectively by a neutral third party.

Third, PACE added the requirement that the IOU submit its self-build proposal to the third party evaluator in the form of a binding bid at the same time as the other bidders. This requirement is critical to avoid after-the-fact cost increases and unnecessary delay and administrative litigation.[4] In addition, the binding bid requirement will avoid the chilling effect anti-competitive *ex post facto* bid revision has on potential participants. If potential participants believe that their competitive information will be used to their disadvantage by the IOU, participants may opt to submit only summary bid information or, more likely, refrain from bidding altogether thus reducing the field of competing participants to the detriment of ratepayers. The prohibition against a "winning" IOU from increasing the amount it seeks to recover from customers after winning the RFP is intended to prevent the IOU from gaming the system by "lowballing" its bid to obtain the award and increasing costs to ratepayers afterwards. Respondents must be prepared to live with their bids; it is only fair that the IOU be required to do likewise.

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[4] *See* In Re: Petition for Determination of Need for an Electrical Power Plant in Martin County by Florida Power & Light Company, Docket No. 020262-EI, and In Re: Petition for Determination of Need for an Electrical Power Plant in Manatee County by Florida Power & Light Company, Docket No. 020263-EI.

In sum, the PACE proposal is designed to establish a truly competitive process for identifying the most cost-effective generating resources for Florida's electric customers. The PACE proposal provides equal access for all potential participants to the generation selection process. The ratepayers of Florida can only gain from increased power supply options because only the most cost-effective, reliable provider from the field of competent suppliers will be selected under the PACE proposal. The IOUs argue, in the main, that the Bid Rule should not be revised because it is functioning as intended. PACE submits that the facts do not support this conclusion and encourages the Commission to adopt the PACE proposal. By this reference, PACE incorporates herein and reasserts all of the positions taken in its Post-Workshop Memorandum of Florida PACE, filed March 15, 2002, as directed by the Chairman of the Florida Public Service Commission at the conclusion of the February 7, 2002, workshop.

Respectfully submitted this 28th day of June, 2002.

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Attachment A

(1) Definitions. For the purpose of this rule, the following terms shall have the following meaning:

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

(b) "Capacity Addition" means any generating unit addition of 50 megawatts (MW) or more gross generating capacity, or modification to an existing generating unit resulting in a net addition of 50 MW or more gross generating capacity planned for construction by utility.

(c) Request for Proposals (RFP): a document in which a public utility publishes the price and non-price attributes of its next planned Capacity Addition or Additions in order to solicit and to enable an Independent Evaluator to screen, for subsequent contract negotiations, competitive proposals for supply-side alternatives to the public utility's next planned capacity addition.

(d) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a public utility's RFP. A participant may include, but is not limited to, utility and non-utility generators, Exempt Wholesale Generators (EWGs), Qualifying Facilities (QFs), marketers, and affiliates of public utilities, as well as providers of turnkey offerings, distributed generation, and other supply side alternatives.

(e) Independent Evaluator: A firm that is qualified, by virtue of its impartiality and its experience and expertise in the economics, technological, and commercial aspects of the power generation industry, to apply criteria and scoring factors that have been

approved by the Commission to the proposals submitted in response to the RFP of a public utility and the competing proposal, if any, of the public utility; score and rank all of the proposals; and identify the proposal or combination of proposals that constitutes the most cost effective of the public utility's generation supply options.

(2) A public utility shall conduct an RFP and complete an RFP proceeding prior to the commencement of construction of a Capacity Addition. Penalties for violation of this section shall include, without limitation:

(a) A rebuttable presumption, to be applied in all regulatory proceedings, including earnings surveillance reviews, general rate cases, and Fuel and Purchased Power Cost Recovery proceedings, that all capital, operating, maintenance, and other expenditures on or associated with the Capacity Addition were unreasonable and imprudent, and therefore subject to disallowance in part or in their entirety; and

(b) Fines of $5,000 per day from the date upon which construction of the Capacity Addition commenced through and including the last day of the useful life of the Capacity Addition.

(3) A public utility that conducts an RFP pursuant to this rule shall engage an Independent Evaluator to compare and score proposals submitted to the public utility in response to the RFP. The Commission shall establish and maintain a list of approved Independent Evaluators. Firms wishing to be added to the approved list shall submit their qualifications to the Commission for its consideration. The Commission shall review a request to ensure that the firm has demonstrated broad experience and professional expertise in the economic, technological and commercial aspects of the power generation industry. A public utility shall choose one of the Independent Evaluators from the approved list. A public utility shall not engage the same Independent Evaluator in

consecutive RFPs.

OR

(3) A public utility that conducts an RFP pursuant to this rule shall engage an Independent Evaluator to compare and score proposals submitted to the public utility in response to the RFP. The public utility shall demonstrate the qualifications of the proposed Independent Evaluator at the time it seeks approval of its proposed RFP package pursuant to subsection ____. A public utility shall not engage the same Independent Evaluator in consecutive RFPs.

(4) Each public utility that is required to issue an RFP pursuant to this rule shall first submit its proposed RFP to the Commission for approval.

(5) The proposed RFP shall include, at a minimum:

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

1. a description of the public utility's planned Capacity Addition or Additions and it's (their) proposed location(s);
2. the MW size;
3. the estimated in-service date;
4. the primary and secondary fuel type;
5. an estimate of the total direct cost;
6. an estimate of the annual revenue requirements;
7. an estimate of the annual economic value of deferring construction;
8. an estimate of the fixed and variable operation and maintenance expense;
9. an estimate of the fuel cost;
10. an estimate of the market value of land, improvements, or

infrastructure for the site on which the public utility proposes to build the Capacity Addition, if the site was acquired prior to the issuance of the RFP, or if improvements were made or infrastructure placed prior to the issuance of the RFP;

11. an estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;
12. a description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;
13. a discussion of the actions necessary to comply with environmental requirements; and
14. a summary of all major assumptions used in developing the above estimates.

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

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

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

1. technical and financial viability;
2. dispatchability;
3. deliverability (interconnection and transmission);
4. fuel supply;
5. water supply;
6. environmental compliance;

7. performance criteria; and

8. pricing structure;

(e) The name of the Independent Evaluator that the public utility proposes to engage to score proposals received in response to the RFP, together with information sufficient to demonstrate that no relationship exists between the public utility and the proposed Independent Evaluator that would create the appearance of bias, favoritism, or a conflict of interest.

(f) A detailed description of the methodology proposed by the public utility to be used by the Independent Evaluator to evaluate alternative generating proposals on the basis of price and non-price attributes.

(g) All criteria, including all weighting and ranking factors that will be applied to select the finalists. Such criteria may include price and non-price considerations, but no criterion shall be employed that is not expressly identified in the RFP. No adjustment to purchase power proposals due to the imputation of an increase to the public utility's cost of capital shall be made. The RFP shall be structured to allow a participant to propose to supply all or a portion of the capacity represented by the Capacity Addition or Additions, and for the Independent Evaluator to identify one or a combination of proposals as the most cost-effective means of meeting the specified need;

(h) Any application fees that will be required of a participant. Any such fees or deposits shall be cost-based but shall not exceed $10,000 in the aggregate, with no more than $500 required to obtain the RFP. The public utility shall apply the monies received from participants toward the fees and costs incurred for the services of the Independent Evaluator.

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

(j) A provision stating the public utility will allow participants to construct an electric generating facility on the public utility's property. Any fees to be paid by the participant to the public utility for constructing on the public utility's property shall be included as a benefit to the public utility's ratepayers in the cost-effectiveness analysis of the participant's proposal, and shall be credited to the public utility's capacity recovery clause.

(6) Each public utility shall provide timely notification of the filing of its proposed RFP with the Commission by publishing public notices in major newspapers, periodicals and trade publications to ensure statewide and national circulation. The public notice given shall include, at a minimum:

(a) the name and address of the contact person from whom an RFP package may be requested, at a cost not to exceed $500;

(b) a general description of the public utility's planned Capacity Addition or Additions, including its (their) planned in-service date(s), MW size, location(s), fuel type and technology; and

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

(7) Within 30 days of the filing of the proposed RFP or the publication of the notice required by subsection ___, whichever date is later, any potential participant who has obtained the proposed RFP may file a complaint with the Commission alleging that one or more provisions of the proposed RFP package, including, but not limited to, the selection of the Independent Evaluator, are discriminatory, anticompetitive, or commercially infeasible, or that the informational contents of the RFP package are insufficient to meet the requirements of this rule. Within the 30 day period, the

Commission may issue an order proposing to modify the RFP on its own motion. The complaint or order initiating the proceeding shall identify with specificity the provisions of the proposed RFP that are asserted to be discriminatory, anticompetitive, commercially infeasible, technically inappropriate, or insufficient. Any potential participant may intervene; however, the Commission will consider only the provisions of the proposed RFP that were specifically identified in the complaint(s) or order. If requested, the Commission shall conduct an expedited hearing on the issues so presented and shall render its decision and issue its order within 100 days of the date the complaint was filed or the order was issued. Any motion for reconsideration must be filed within 5 days of the issuance of the order. If no complaint is filed and no order initiating proceeding is issued within the 30 day time frame of this subsection, the proposed RFP shall be deemed to have been approved and the public utility shall issue its RFP in its original form. In the event a complaint is filed or an order is issued, the public utility shall not issue the RFP until the Commission has rendered its decision and the public utility has made any modifications needed to conform the proposed RFP to the Commission's final order.

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

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

(10) A minimum of 60 days shall be provided between the issuance of the RFP,

and the due date for proposals in response to the RFP. If the public utility proposes to construct and operate the Capacity Addition that is the subject of the RFP, it shall submit a detailed proposal conforming to the requirements of the RFP to the Independent Evaluator prior to the deadline for responses to the RFP. The issuing utility's proposal may not vary from the information regarding the utility's proposed Capacity Addition or Capacity Additions, as applicable, required by subsection (4) (a) above. Violation of this section shall result in automatic disqualification of the utility's proposal.

(11) The Independent Evaluator shall score the proposals submitted in response to the RFP, including the proposal of the public utility, if applicable, in accordance with the criteria and parameters of the approved RFP. The Independent Evaluator shall submit its evaluations to the public utility and to the Commission. The public utility shall announce the names of the participants or participants that were selected by the Independent Evaluator.

(12) Within 30 days after the Independent Evaluator has submitted its rankings, the public utility shall publish notice in a newspaper of general circulation in each county in which the participants named by the Independent Evaluator proposes to build an electrical power plant. The notice shall include the name and address of the participant, the name and address of the public utility, and a general description of the proposed electrical power plants, including location, size, fuel type, and associated facilities.

(13) At the conclusion of the RFP process, the public utility shall petition the Commission for confirmation that the Independent Evaluator's selection of either one or a combination of the proposals is the public utility's most cost-effective option. If the proposed Capacity Addition requires review under the Florida Electrical Power Plant Siting Act, the request shall be embodied in the associated petition for a determination of need. Any participant in the RFP may intervene and oppose the Independent Evaluator's selection, but only on the grounds that the criteria and ranking factors of the approved RFP were applied incorrectly. If the Commission determines that the approved criteria of the RFP were correctly applied, it shall confirm that the proposal selected by the Independent Evaluator is the most cost-effective option. If the Commission determines

that the approved criteria were applied incorrectly, it shall revise the scoring of the proposal selected by the Independent Evaluator and of the proposals of intervening participants. In the event the corrected evaluations result in a different winner, the Commission shall direct the public utility to negotiate a power purchase agreement with the different winner of the RFP. Where applicable, the Commission shall also deny the petition for a determination of need associated with the rejected proposal. If the Commission approves a power purchase agreement that results from the RFP, the Commission shall not preclude the public utility from seeking recovery of the costs of the agreement through the public utility's capacity, and fuel and purchased power cost recovery clauses absent evidence of fraud, mistake, or similar grounds sufficient to disturb the finality of the approval under governing law. If the Commission approves the public utility's self-build option as the most cost-effective alternative, the public utility shall thereafter not place in rate base any amount for capital expenditures associated with its Capacity Addition that exceeds the amount identified in the proposal that it submitted to the Independent Evaluator, nor shall the public utility be allowed cost recovery for any expenses associated with its Capacity Addition that exceed the corresponding amounts identified in the proposal that it submitted to the Independent Evaluator.

(14) Nothing in this rule shall prohibit a public utility from entering into one or more contracts for the purchase of capacity and energy with terms of three years or less through bilateral negotiations with one or more wholesale providers rather than through an RFP process. If the public utility chooses this option, it must obtain Commission approval to recover the costs of the contract from its retail customers prior to including such costs in the public utility's capacity and fuel cost recovery clauses. A public utility shall not enter into a bilateral contract for the purchase of capacity and energy with an affiliate outside of the RFP process.

Specific Authority 350.127(2), 366.05(1), 366.06(2), 366.07, 366.051 FS. Law Implemented 403.519, 366.04(1), 366.06(2), 366.07, 366.051 FS. History.

CERTIFICATE OF SERVICE
DOCKET NO. 020398

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery (*), and U.S. Mail to the following parties on this 28th day of June, 2002.

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Press Release Source: TECO Energy, Inc.

TECO Energy, Panda Energy Praise Arizona Commission for Responsible Restructuring Policy; Electric Customers to Reap Benefits of Wholesale Competition

Thursday September 12, 1:00 pm ET

PHOENIX, Sept. 12 /PRNewswire-FirstCall/ -- TECO Energy's (NYSE: TE - News) TECO Power Services subsidiary (TPS) and Panda Energy today praised the decision **issued yesterday by the Arizona Corporation Commission, calling the ACC's moves** toward wholesale electric power competition "pro-competitive, responsible and intelligent."

TPS President Rick Ludwig said, "The ACC is clearly looking out for ratepayers. The unanimous ruling last week ensures that Arizonans will have the best of both worlds. Competitive power generation companies will compete to serve utilities, and customers will save because their electricity will come from the lowest-cost producer. The approach also ensures that Arizonans will get the environmental benefits of new, clean, state-of-the-art gas-fueled power plants."

Under the decision released yesterday by the ACC, retail deregulation has been postponed for the near term, but more than 2,000 megawatts of generating capacity, enough to power two million homes, will go up for competitive wholesale bids in early 2003.

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"We agree with the ACC's decision to defer retail competition until wholesale competition is viably implemented in the state. This will ensure that Arizona ratepayers get the environmental and economic benefits and added reliability of newer, cleaner power generation brought to Arizona by independent power companies, who have invested billions of dollars in the state," said Ludwig.

TECO Energy is the parent company of TECO Power Services and, together with Panda Energy, a partner in a 2,000-megawatt generating facility under construction in Gila Bend, Arizona. The facility is expected to be commercially operational next year. The plant, which has created more than 1,000 construction jobs, is highly efficient and fueled with natural gas, making it among the cleanest in the state.

TECO Energy (NYSE: TE - News) is an S&P 500 company with regulated and unregulated operations, including Tampa Electric, Peoples Gas System, TECO Power Services, TECO Transport, TECO Coal, TECO Coalbed Methane and TECO Solutions. TECO Power Services currently has 5,600 megawatts of generation under construction.

Headquartered in Dallas, Texas, Panda Energy International, Inc. is a privately held, non-regulated electric generation company whose primary focus is the development, ownership and operation of state-of-the-art, environmentally clean, low-cost power plants. Panda has developed 9,000 megawatts that are either under construction or in commercial operation, with 9,000 megawatts of electric generating capacity currently in advanced development.

Source: TECO Energy, Inc.

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THURSDAY, SEPTEMBER 5, 2002

A Freedom Communications Newspaper ©2002

Richard Lehfeldt

ACC plan: Compete for electric business

Just a few years ago, if your lights were on and your bill was reasonable, electricity was something you took for granted. Since California's disastrous deregulation experiment, however, that's no longer the case. And while California remains the poster child of how NOT to restructure an electric market, Arizona remains a role model for how to succeed.

Thanks to the work of the Arizona Corporation Commission over the past year, Arizona has found a way to continue — even improve — electric reliability, while still lowering costs to consumers through competition. The strategy for wholesale competition being advanced by the ACC is both thoughtful and deliberate.

It offers Arizonans the best of both worlds. The immediate consumer benefits of increased wholesale competition and the time to deliberate on how to proceed with retail competition in the future. Risks to the state's power reliability are minimized, and regulated utilities like Arizona Public Service and Tucson Electric will continue to serve their customers.

The difference is, now independent power companies will compete to serve as much as 50 percent of the utilities' energy requirements. The companies who come in with the lowest prices will sell the electricity. Lower prices benefit consumers. It really is that simple.

If, under this competitive framework, none of the independent companies presents the lowest prices and it is most economical for the utility to produce its own electricity, customers still benefit. Currently, with nonutility companies building around 6,000 megawatts of capacity to serve Arizona, the stage is set for consumers to save money.

We fully support the philosophy that wholesale competition is a necessary precursor for retail competition, and that the state can safely delay its decision as to how to proceed on retail competition until a later date. A market simply must succeed at the wholesale level to successfully implement competition at the retail level at some future time.

And customers in an energy market like Arizona, which follows an intelligent, well-structured plan that takes this into consideration, won't have to choose between reliability and affordability. They can have both.

— Richard Lenfeldt is senior vice president of external affairs for TECO Energy Inc., parent company of TECO Power Services, joint venture partner with Panda Energy on a 2,000 megawatt generating facility under construction in Gila Bend

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

LOUISIANA PUBLIC SERVICE COMMISSION
EX PARTE

Docket No. R-26172 – Louisiana Public Service Commission, ex parte. In re: Development of Market-Based Mechanisms to Evaluate Proposals to Construct or Acquire Generating Capacity to Meeting Native Load. Supplements the September 20, 1983 General Order.

(Decided at the March 21, 2002 Business and Executive Session)

A. **Background:**

Given the growth over the past decade in power demands and the lack of utility power plant construction, Louisiana utilities currently have (or soon will have) a substantial need for new generating capacity resources. During the last three years, utilities have sought to fill most of that large capacity need through short-to-intermediate purchases.[1] Some of these capacity purchases have been at relatively high prices. The short-to-intermediate purchase strategy has been followed in part due to uncertainty regarding the introduction of retail access and the development of a wholesale market. These regulatory and market uncertainties argued strongly for avoiding long-term commitments.

The current regulatory framework for capacity additions is the Commission's General Order dated September 20, 1983. This Order requires that any public utility seeking to construct or convert an electric generating facility or enter into a purchase power contract (other than for economy energy or emergency power contract) must first obtain a certificate of public convenience and necessity (CPCN) from the Commission. The Order requires the filing of the supporting information, project schedules and costs, and for purchase power, the contracts themselves. Once the certificate is obtained, the utility is required to notify the Commission promptly of any changes in cost or schedule for the resource. The Order calls for a Commission decision, after public hearing, within 120 days of the application.

In recent years, Louisiana utilities have obtained power supplies pursuant to this General Order, as discussed in the comments of Cleco and Entergy. The certification requests have been granted after formal and informal review by Staff and subject to public hearings. Both utilities have made use of Requests for Proposals as part of the process of acquiring these supplies.

In December 2001, the Commission issued an order declining to proceed at this time with retail access, dispelling some of the uncertainty regarding the implementation of retail access in Louisiana. The need for additional capacity resources has been recognized, and Louisiana utilities presently are considering the relevant options, including acquiring long-term capacity resources in the form of either purchase power or "self build".

B. **Procedures:**

The Commission, at the December 5, 2001 B&E, directed Staff to open a Docket to consider the adoption of a market-test mechanism to demonstrate that applications for the construction and/or acquisition of additional regulated generation by investor-owned utilities is the least cost alternative and in the public interest. The matter was first published in the December 7, 2001 Official Bulletin. Interested parties were requested to submit Initial Comments on December 28, 2001 and Reply Comments on January 11, 2002. After the Initial Comments were submitted, Staff republished the docket in the January 4, 2001 Official Bulletin amending the procedural schedule to allow more time

[1] In addition to capacity purchases, utilities have obtained capacity at relatively low cost by uprating existing units and by returning to service capacity in extended reserve shutdown

for Reply Comments due to the volume of Initial Comments received. Staff included a prepared list of questions gleaned from the December 28, 2001 Comments and requested that the parties respond as part of their Reply filings by January 25, 2002.

All comments were placed on the LPSC website. Louisiana investor-owned utilities, merchant plant developers and industrial customer representatives submitted extensive comments. A total of 18 commenting parties participated, with the list of these parties attached to Staff's Report and Recommendation as Appendix A. Staff's Report and Initial Recommendation was filed on February 15, 2002, and comments on Staff's report were filed February 22, 2002.

Attached to Staff's Report and Recommendation, as Appendix B is an outline of Staff's proposed Rule. This Rule would require the use of a formal RFP process for the acquisition by Louisiana utilities of power supply resources, subject to certain exceptions and exemptions specified in the Rule.

Staff held a Technical Conference on Monday, March 11, 2002, where it went over the revised proposed Rule and gathered further information and comments from everyone who attended.

C. Core Issues Addressed in Comments:

The core issues in this rulemaking concern the market-based mechanism which should be employed and how should it be implemented. Our review of the comments finds near unanimous support for the use of a market-based mechanism for acquiring generation capacity resources using a Request for Proposal (RFP) approach. IPP and customer group commenters strongly urged a formal RFP requirement. Utility commenters noted that an RFP is a useful tool, which they have employed in the recent past for capacity acquisition, but at the same time they urged flexibility.

The main difference between the utility and non-utility commenters is how the process of administering a market-based mechanism should work, i.e., the regulatory oversight process. Utilities argued that it is fundamentally their responsibility to conduct planning and supply acquisition, and that a market-based mechanism can be employed by the utility within the structure of the Commission's 1983 General Order. Moreover, utility decisions on resource acquisition ultimately are subject to Commission prudence reviews. Non-utility commenters generally believe a different process is needed providing greater opportunity for third-party (before-the-fact) review, in some cases, detailed filing requirements, and the retaining of an independent entity to either conduct or oversee the RFP process. With respect to process, the comments raise the following issues:

1. **Who should administer the RFP?**

There was a broad range of recommendations on this issue. At one end of the spectrum, several parties suggested that the Commission retain an independent third-party to administer the RFP, evaluate bids and make recommendations on project selection to the Commission (e.g., Calpine, LMOGA, Williams). Entergy represents the other end of the spectrum, arguing the utility should conduct the RFP, bid evaluations and select projects/contracts, subject to Commission approval. Cleco takes an intermediate position describing its recent RFP experience, which involved close and active cooperation with the Staff.

2. **What type of proceeding should accompany the market-based mechanism?**

The initial comments identified several different models for regulatory review, some of which differ significantly from current practice. The LEUG proposed a highly structured process for reviewing utility planning data and the RFP. This would involve the utility filing its "need for power" analysis (load forecast, reliability standard) and an analysis of its self-supply options Once the need for capacity and supply proposal has been established, the utility initiates an RFP process (with on-going third-party

oversight). Based upon the evaluation of bids and the utility's supply proposal, the independent third party will make a recommendation to the Commission. This process would require extensive and detailed filing requirements.

Cleco proposed a more informal process which is compatible with the 1983 General Order. Under Cleco's approach, the utility would develop its supply proposal and conduct its RFP in concert with informal Staff review. Unlike the LEUG model, Cleco would not make a formal filing with the Commission until the RFP and contracting process is completed (presumably with Staff concurrence). This process was previously employed by Cleco in 1999/2000 and required slightly less than one year to complete (from the RFP issuance).

Entergy and SWEPCO did not describe a regulatory process in any detail, but they appear to favor retaining the existing process. For example, in 2000 and 2001 Entergy arranged supply acquisition entirely on its own (including conducting an RFP) and submitted its contracts or other resources to the Commission for its approval pursuant to the 1983 General Order.

3. **Should there be exceptions to the requirement to use a market-based mechanism?**

Many commenters suggested that not all utility resource additions should be subject to a mandatory RFP process. Some suggested that relatively minor modifications to generating units, which add only small amounts of capacity, could be exempt from this formal requirement, as well as short-term (non affiliate) purchase power contracts. Some commenters suggested the use of numerical thresholds to determine the standard for automatic exemptions.

4. **How should utility "self-build" proposals be treated in this process?**

Several parties expressed the view that Louisiana utilities should not build at all but instead should acquire its capacity needs entirely from the wholesale market. They cited in support of their position market power concerns and the importance of encouraging merchant plant development in Louisiana. Most commenters, however, recognized that utility projects may be appropriate if they pass a market test. As Sempra's witness states, the purpose of the RFP process is to "get the best deal for ratepayers in terms of cost, risks, reliability and environmental performance." It is possible that a utility self-build project--vetted through an RFP-- could be the "best deal for ratepayers." Utilities did not specifically advocate proceeding with their own self-build projects, but they indicated the need to retain the flexibility to select the most appropriate capacity additions for their customers, which could include a self-build plant. Utilities also noted the importance of third-party credit risk and fuel mix objectives as part of project selection criteria.

Some non-utility commenters support (or do not oppose) the option of utility self-build projects, but proposed certain restrictions or regulatory treatment for such projects. These commenters stated that if a utility proposes or identifies a self-bid project, detailed information about that project should be made available to market participants so they can bid against it. In the alternative, some commenters recommended that the utility (or its affiliate) must "bid" its project into the RFP process, as any other bidder. The LEUG did not advocate that the utility "bid" its project, but it did argue that if its project were to prevail in the RFP process, the utility must be held to its stated cost estimate for purposes of retail cost recovery. Moreover, such projects should not be eligible for retail stranded cost recovery if and when retail access is introduced.

D. Other Issues Raised in Comments and at the Technical Conference:

The parties raised a number of other issues which are related to proposals regarding market-based mechanisms but which are not addressed at this time (or addressed in only a limited fashion) in Staff's recommended rule. This includes market power mitigation, retail rate treatment for new utility capacity additions, access to utility-owned power plant sites and affiliate transactions. We anticipate that some of these

issues may be addressed as part of other LPSC dockets. In particular, the Commission's December 4, 2001 Order in Consolidated Docket Nos. U-21453, U-20925 (SC), U-22992 (SC) (Subdocket A) directs the formation of a collaborative to explore a number of issues including a pre-retail access Affiliate Rules and Standards of Conduct; the parameters for a market power investigation; and methods to encourage the construction of new generation to serve regulated load.

The issue of market power was extensively debated in both the initial and reply comments, and was briefly discussed at the Technical Conference. Certain IPP parties argued that utility construction (particularly that of Entergy) would serve to exacerbate an existing problem of market power in Louisiana, and therefore such construction should be either discouraged or foreclosed. Other parties merely argued that the effect on market power could be used as a non-price factor in evaluating a utility self-build project versus the RFP bids.

Staff's proposed rule does not dictate the specific methodology by which bids and utility self-build proposals are to be evaluated (other than the traditional standard of reliable service at lowest reasonable cost). Therefore, parties have the right to argue for consideration of market power issue in the future when confronted with specific utility proposals. It should be noted, however, that the utility self-build proposals subject to this rule are those, which would serve regulated Louisiana load, not the unregulated wholesale market. It would be impractical for Staff or the Commission to perform a market power evaluation of the bids. Moreover, if market power is present, it is probably related to transmission control and physical limitations, which are not the subject of this rulemaking. Transmission issues are being addressed in other dockets.

One of the most difficult issues raised in comments is the retail rate treatment of utility capacity projects in light of a "market test" requirement. As the LEUG and other comments point out, the utility has the ability to favor its own project over competitive offers by "low balling" the cost estimate. This prompted some parties to argue that the utility must "bid" its project into the RFP and limit cost recovery to its bid (or accept a cost cap). This suggestion would eliminate the perceived bias (as well as shielding customers from the risk of cost overruns), but it also effectively would deregulate all new generation, which is not the purpose of this docket. For example, LEUG suggested limiting cost recovery to the lesser of actual cost or the utility's cost estimate. This might encourage the utility to inflate its cost estimate, causing a low cost project to lose. Moreover, as some commenters (e.g., Dynegy) have noted, the utility on certain occasions may have significant cost advantages over IPPs due to its ability to repower existing units and/or utilize existing, developed sites. This cost advantage should flow through to ratepayers as part of cost-based rates, but it might not do so if the utility is required to "bid" its self-build projects. Similarly, the imposition of a cost cap for retail rate recovery might discourages utility projects, which should go forward. This issue can be addressed in another forum and is not affected by the Rule proposed by Staff.

Two of the commenters, Sempra and Dynegy, proposed that merchant plant developers be given access to utility power plant sites and facilities. They argue that these existing sites--with valuable infrastructure paid for by ratepayers--provide utilities with a large advantage over IPPs who must develop greenfield sites. Thus, access to these sites on a nondiscriminatory basis is needed to provide a competitive "level playing field". This access would have further public interest advantages by providing utilities with an additional revenue stream from leasing or selling spare capacity, along with the environmental advantages of avoiding greenfield construction Utilities strongly oppose this recommendation citing mostly legal arguments.

The recommendation set forth by Sempra and Dynegy has considerable conceptual merit. It is in the public interest for utilities to make the most effective and efficient use of the infrastructure paid for by ratepayers. Moreover, "brownfield" development may have important environmental and land use advantages over greenfield development. However, the comments do not provide sufficient information to determine whether such an arrangement is feasible or practical for Louisiana utilities -- particularly if the sharing of infrastructure and a power plant site is mandated rather than voluntary. For example, could the sharing of common facilities by competing entities lead to operational conflicts? Only one instance in which this arrangement has been

pursued was cited in comments. Staff is unable to address this recommendation at this time in its proposed Rule.

An additional concern raised in comments was the concern that the electric utility may improperly favor its non-regulated affiliates. This could occur either through the purchase of affiliate-owned assets or by providing preferential treatment to an affiliate bid in the RFP. Commission rules on affiliate transactions and code of conduct will be addressed in another forum. However, Staff agrees with comments that this is an important issue and it is addressed in a general way in Staff's proposed Rule. Staff further agrees with the point made by LEUG at the Technical Conference that contract negotiations between the utility and its unregulated affiliate requires careful Staff review and oversight.

E. Proposed Rule:

1. *Phase I - RFP Process*

The Rule proposes that the basic structure of the capacity acquisition process be similar to Cleco's informal "Staff collaborative" approach, coupled with certain aspects of the more formal regulatory review process proposed by the LEUG and LMOGA. Specifically, the process is one of technical review and consultation concerning the utility's proposal rather than litigation. When a utility seeks to acquire or build capacity resources, it will be required to make a formal informational filing with the Commission submitting its detailed planning information, including but not limited to: (1) its identified capacity need (and supporting analysis), (2) proposed or possible self-build capacity alternatives (including cost data), (3) a draft RFP for obtaining purchase power and/or testing its own self-build proposal, and (4) a proposed schedule for completing the RFP process. The utility will also be required to describe the process by which it would evaluate RFP responses. The need for power, planning date, and RFP information will be subject to review and comment by Staff and participating organizations, with the utility holding one or more technical conferences, as needed. The utility may request that planning data, including that associated with its self build proposal, be submitted subject to confidentiality protection.

After providing an opportunity for review, analysis and comment on the planning data and the draft RFP, the utility will proceed with the issuance of the RFP and review of the bids received. Staff and qualifying participants (those entitled to review the confidential bids) will have an opportunity to review the bids and the utility's evaluation analysis of those bids. Based upon the RFP results and its evaluation, the utility may choose to proceed with its self-build option or enter into contract negotiations with one or more bidders (or both). Staff (and qualified participants) will have the opportunity to provide input on the utility's bid evaluation and resource selection.

After completing this Phase I process (with Staff/participant input), the utility will then submit its capacity resource acquisition proposal to the Commission for certification approval in accordance with the 1983 General Order. The "Phase I" RFP process and results could serve as the justification required under the General Order. Assuming the utility's resource evaluation and selection is not in dispute, a Commission ruling on the application can easily be reached within the 120-day time frame. Out of an abundance of caution, Staff is proposing that in the event a dispute delays resolution, the Commission ("as needed") may modify the 120-day time limit.

In developing this recommended procedure, Staff has been guided by the objectives of providing close regulatory oversight of the utility's planning decisions while conducting that review efficiently and expeditiously. Hence, our intent in "Phase I" is to provide an opportunity for technical review and comment on the utility planning proposals and resource selection in a non-litigated setting. For example, Phase I contemplates discovery, the exchange of information and comments, technical conferences, etc , but no testimony or evidentiary hearings. It is expected that this process will lead to agreement and consensus on resource selection, but failing that, it will at least achieve a narrowing and defining of differences.

2. ***Phase II – Filing for Approval***

In "Phase II," the utility files for approval with the Commission pursuant to the 1983 General Order, for the projects/contracts selected in Phase I. If at that point, objections to the utility's proposal remain, they can be litigated in that docketed proceeding, with the Commission being the ultimate decision maker.

We believe that this process provides both the structure and use of the wholesale market sought by parties, such as LMOGA and LEUG, while at the same time preserving to the utilities their traditional responsibility for supply planning and acquisition. The capacity resources acquired, however, must pass a market test. There is explicit recognition in the Rule that the purpose of this process is to provide reliable service at the lowest reasonable cost, while allowing for the use of other public interest project selection criteria mentioned in the comments of the parties.

The proposed Rule rejects the concept suggested by several parties that an independent third-party entity be retained by the Commission either to conduct the RFP or evaluate results and submit a recommendation. This is not necessary and could be counterproductive. Active oversight is properly the function of the Commission Staff. Staff believes that a flexible contract negotiation process -- conducted by the utility (with Staff input) -- is both necessary and beneficial. A third-party evaluator could not conduct such negotiations.

Also included in the proposed Rule are exemptions and exceptions. For example, certain resource additions involve only small increments of capacity or relatively modest costs. Consequently, a formal RFP process would be inefficient or impractical. However, defining exemptions using qualitative descriptions (e.g., "unit modifications") is quite difficult and potentially ambiguous. Specifically, the intent is not to exempt from the market-based mechanism a major repowering project, but there is no accepted definition of "repowering" which would achieve that purpose. Therefore, Staff and some of the commenters believe the use of quantitative thresholds is preferable. For uprates, the proposed Rule provides an exemption for unit uprates of less then 50 mW (or 10 percent of a unit's existing capacity) or capacity investments of less than $100 per kW. This will exempt normal unit uprates (and many return to service projects) but will not exempt large repowering projects. Purchase power contracts one year in duration or less also are exempted. In addition, a utility may apply for an exemption to the competitive bidding requirement outside of the quantitative thresholds upon the appropriate public interest demonstration.

Finally, the Rule does not eliminate prudence reviews in subsequent rate and/or fuel proceedings with respect to the utility's obligation to prudently implement, construct and/or manage capacity projects or purchase power contracts, although the Phase I process is expected to reduce the need for such reviews. In the case of resources acquired subject to an exemption or exception, the utility retains the obligation to demonstrate prudence. If a utility capacity project or purchase power contract is approved under the Phase I process, the utility retains the obligation to prudently manage that resource (including construction cost control) during its entire life.

The proposed Rule serves to supplement the 1983 General Order rather than to replace it. It also modifies the General Order to provide greater flexibility with respect to the timing of a Commission ruling on a 1983 General Order application.

On motion of Commissioner Sittig, seconded by Commissioner Field, and unanimously adopted, the Commission voted to accept the Staff's Report and Recommendation, which included an attached Proposed Rule.

THEREFORE IT IS ORDERED:

1. Electric utilities subject to the Commission's jurisdiction shall employ a market-based mechanism to support the acquisition of generating capacity or purchase power contracts intended to serve LPSC-jurisdictional retail customers The results and analysis from employing this mechanism shall serve as part of the

"justification" required in paragraph (2) of the 1983 General Order. This requirement shall not apply to non-jurisdictional affiliates of a Louisiana utility except in cases where the affiliate enters into a purchase power contract on behalf of the Louisiana utility.

2. The following generating capacity investments or contracts do not require the formal use of a market-based mechanism:

   a. resources less than 35 MW;

   b. modifications to an existing unit which expand the unit's capacity either by less than 10 percent or by less than 50 MW;

   c. return to service of a unit in extended reserve shutdown if the total refurbishment costs (inclusive of new environmental controls and start up O&M) are less than $100 per kW;

   d. a project whose incremental installed cost for the increased capacity is less than $100 per kW;

   e. contracts for the purchase of economy energy or emergency power; or

   f. contracts of one year or less in duration, provided that the utility expects to receive power supply under the contract within one year of contract execution.

3. The market-based mechanism shall be a Request for Proposal (RFP) competitive solicitation process. The utility may propose an alternative market-based mechanism or procedure if it can demonstrate that circumstances indicate that a formal RFP would not be in the public interest.

4. Any capacity investment exempt from the market-based mechanism must be supported with the appropriate justification at the time the utility seeks Commission approval or rate recovery for that investment. For any such exempt capacity addition or purchase power contract, the utility retains the obligation to prudently implement, construct and/or manage the resource consistent with the objective to provide reliable service at lowest reasonable cost.

5. Any utility capacity project or purchase power contract approved subject to the market-based mechanism and the 1983 General Order remains subject to prudence review in subsequent rate and/or fuel clause audit proceedings with respect to the utility's obligation to prudently implement, construct and/or manage the capacity project or purchase power contract consistent with the objective of providing reliable service at lowest reasonable cost.

6. In order to implement the market-based mechanism for capacity investments or purchase power contracts, the utility is required to submit an informational filing with the Commission containing but not limited to the following items:

   a. A description of the utility's proposed capacity addition including timing, amount and type;

   b. In the case the electric utility's proposal is to construct generating capacity, a detailed estimate of the project cost, revenue requirement impacts and support for that cost estimate;

   c. Supporting information and documentation justifying the amount of capacity need and the proposed resources to be acquired;

   d Supporting information and documentation justifying the type of resources which the electric utility proposes or expects to construct and/or acquire; along with resource alternatives considered but rejected.

e. The utility's proposed schedule for conducting and completing its RFP process and resource acquisition process. This would include the anticipated schedule for undertaking and completing any proposed power plant construction. This proposed schedule for conducting the RFP shall include adequate time for Staff review and discovery.

f. A description of the methods and criteria that the utility intends to use to evaluate RFP bid responses;

g. A draft purchase power agreement or a description of key contract elements;

h. A draft RFP solicitation document; and

i. A draft or sample confidentiality agreement.

Utility planning data and its own power plant cost estimates may be submitted subject to appropriate confidentiality protections. Certain commercially sensitive information may be denied to potential bidders.

7. The electric utility shall hold one or more technical conferences with Staff and participating organizations to review the utility's filing and proposals. The electric utility may proceed with the RFP process after completion of a consultation process with Staff and participants.

8. The electric utility shall provide RFP bid results and its evaluation of those bids to Staff and participating organizations deemed eligible to review such material subject to appropriate confidentiality protections. The electric utility shall provide an opportunity for Staff and eligible participant consultation before selecting purchase power contracts offers and/or rejecting RFP bids in favor of its own capacity construction process.

9. The electric utility shall conduct its planning and RFP process with the objective being the provision of reliable electric service at lowest reasonable cost. The selection of projects or purchase power contracts also may consider public interest criteria such as: project or contract risk attributes; fuel diversity; and other factors deemed relevant.

10. If a utility's corporate affiliate submits a bid in the RFP process, the utility must ensure that the affiliate has no preferential access to information or has any unfair advantage over other potential bidders.

11. At the conclusion of the RFP process, including Staff and participant consultation, the proposed purchase power contract(s) and/or utility capacity construction project shall be submitted for Commission approval subject to the terms of the 1983 General Order

12. This rule modifies paragraph (5) of the 1983 General Order which requires a Commission order within 120 days of the filing of an application The Commission order shall be issued within 120 days of the completion of the RFP process and the electric utility submission of an application for approval of its purchase power contracts and/or self build projects. The electric utility may request the issuance of a Commission order within less than 120 days upon demonstration that expedited approval is needed. The Commission, as needed, may extend the 120-day time limit.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
April 10, 2002

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY"A.BLOSSMAN

/S/ DON OWEN
DISTRICT V
VICE CHAIRMAN DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ C.DALE SITTIG
DISTRICT IV
COMMISSIONER C. DALE SITTIG

SECRETARY
LAWRENCE C. ST. BLANC

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

APPENDIX A

LIST OF COMMENTING PARTIES

Merchant Plant Suppliers

(1) Electric Power Supply Association (EPSA)

(2) Calpine Corporation

(3) Williams Energy Marketing and Trading Company

(4) Tractebel North America

(5) Dynegy, Inc.

(6) Sempra Energy Resources

(7) PG&E National Energy Group

(8) TECO Power Services, Inc.

(9) Reliant Resources, Inc.

Utilities

(1) Entergy Gulf States, Inc./Entergy Louisiana, Inc.

(2) AEP/Southerwestern Electric Power Company (SWEPCO)

(3) Cleco Power LLC

Customer Groups/Other

(1) Mike Thibodeaux

(2) Louisiana Mid-Continent Oil and Gas Association

(3) Bayou Steel Corporation

(4) Louisiana Energy Users Group (LEUG)

(5) Occidental Chemical Corporation

(6) Motiva Enterprises, LLC

Exhibit No. 6
Docket No. 020398-EI
PACE
Filed November 15, 2002

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

LOUISIANA PUBLIC SERVICE COMMISSION
EX PARTE

DOCKET NO. R-26172

IN RE: DEVELOPMENT OF MARKET-BASED MECHANISMS TO EVALUATE PROPOSALS TO CONSTRUCT OR ACQUIRE GENERATING CAPACITY TO MEETING NATIVE LOAD

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LA. PUBLIC SERVICE COMMISSION

REPLY COMMENTS OF TECO POWER SERVICES, INC. ON MARKET-BASED MECHANISMS

TECO Power Services, Inc. ("TPS") appreciates the opportunity to provide comments on the important issues presented in this proceeding. The Louisiana Public Service Commission ("LPSC" or "Commission") should closely examine its procedures for reviewing and approving capacity needs and additions to ensure that those procedures allow Louisiana ratepayers to receive the benefits provided by the developing competitive wholesale market and the development and construction of merchant generation in and around Louisiana.

TPS is currently partnering with Texaco Power and Gasification Global Inc. ("Texaco") to develop a gasification generation project at the CITGO Petroleum Corporation ("CITGO") facility near Lake Charles, Louisiana. The generation project will produce power for sale into the wholesale market. TPS is interested in having a fair opportunity to provide power from that generation facility to Louisiana residents by means of wholesale sales to the appropriate utility. The adoption of a fair and nondiscriminatory request for proposal ("RFP") process with independent third party oversight will provide TPS with that opportunity.

TPS generally supports the comments filed in this proceeding by the Louisiana Mid-Continent Oil and Gas Association ("LMOGA"). TPS agrees that a need determination should proceed the RFP process and that an independent entity should oversee the RFP process, evaluate the bids and make a recommendation to the LPSC of the proposal that is in the best interest of Louisiana residents and businesses. TPS also supports the participation by third parties in the needs and RFP determination with appropriate confidentiality protections for competitively sensitive information. Such a process would not only provide short-term benefits to Louisiana by ensuring the best source of power supply, but would help to further the development of the competitive wholesale market in this state which would provide significant long term benefits.

Based on public statements made by Entergy, Inc., it appears that the regulated utility may be making a filing in the near future which would request authority to meet capacity needs in Louisiana with new or repowered regulated generation. In the event such a filing is made, the resolution of the needs and appropriate resource issues presented by such a filing should be made in accordance with the procedures developed in this docket, rather than under the existing General Order U-9-20-83.

Entergy takes the position that a LPSC-jurisdictional utility should retain the responsibility to plan its system and to determine which capacity alternatives are the most reasonable from both a cost and reliability perspective. TPS agrees that the jurisdictional utility has the responsibility to prudently plan and supply the capacity needs of its customers. The existing process, however, leaves the Commission in an untenable position when trying to determine the best alternative in today's market. Under the existing procedure, the utility determines the alternatives it examines and the proposal it presents to the Commission as the best option. Thus, the alternatives from which the

Commission must choose, should it reject the utility's selection, are automatically limited to what the utility has reviewed. While the Commission can reject all of the alternatives the utility has reviewed, the regulator is still faced with meeting a capacity need on a timely basis and may not have time to order the utility to start over with a review of additional alternatives. Further, the existing process may have been satisfactory prior to the development of a competitive wholesale market and the construction of merchant generation in the state and surrounding area. However, with all of the new alternatives, it no longer assures that the Commission will be informed of all of the opportunities for meeting capacity needs on a timely basis. A fair RFP process with independent oversight ensures that the Commission reviews all potential alternatives and that the RFP is not written in such a way that might hinder the ability of bidders to put forth their best proposal or otherwise bias the outcome. The end result is the same as it in under the existing procedure. The Commission makes the final decision on how the capacity need will be met and the utility has the obligation to prudently carry out that decision.

As mentioned by several parties, the process must assure that merchant generation is not placed at a competitive disadvantage in the RFP process. While requiring independent third party oversight will help address that concern, there are other safeguards that should be in place. First of all the RFP must provide adequate information to the prospective bidders of the nature of the capacity need, and the relevant technical requirements, so that each bidder can ensure that he has made his best offer. Obviously the utility will have ready access to such information and a fair process requires that the other bidders also have access to relevant information. Additionally, while utility input will be required in the development of the terms of the RFP, an independent third party

is required for final development to ensure that the bid requirements do not preclude acceptable capacity alternatives.

By developing such a procedure and enforcing it fairly the LPSC will ensure that Louisiana ratepayers will be served by a power supply that best serves the public interest. In addition, such a process will promote continued investment in this state by project developers and further economic development due to reliable and competitively priced power supply.

Respectfully submitted:

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ATTORNEYS FOR TECO POWER SERVICES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by U.S. mail, postage prepaid, on the official service list.

This 25th day of January 2002.

Exhibit No. 7
Docket No. 020398-EI
PACE
Filed November 15, 2002

J. RANDY YOUNG
PARTNER
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October 22, 2002

Mr. Matthew Loftus
Louisiana Public Service Commission
Post Office Box 91154
Baton Rouge, Louisiana 70821-9154

VIA ELECTRONIC AND U.S. MAIL

RE: Entergy Services, Inc.'s Fall 2002 Request for Proposals for Supply Side Resources

Dear Matthew:

TECO Power Services Corporation ("TPS") submits the following initial comments to the Louisiana Public Service Commission ("LPSC") as a follow-up to the Technical Conference held on October 15, 2002, regarding Entergy Services, Inc.'s ("Entergy") Draft Fall 2002 Request for Proposals for Supply Side Resources ("RFP").

TPS appreciates the LPSC Staff's involvement in the RFP process to help ensure that it is reasonable, fair and takes advantage of the competitive process to obtain the additional resources needed in the Entergy service area at the lowest reasonable cost for Louisiana ratepayers. As a potential bidder in the RFP process, TPS urges that the following additional information should be included in the Final RFP so that the procedure is meaningful and adequately explores the market's capabilities:

Entergy should include in the Final RFP the procedures, criteria and scoring system that will be used to evaluate the responses to the RFP; and

Entergy should identify in the Final RFP how transmission interconnection and optional upgrade costs will be considered in the evaluation process.

Also, TPS urges that the Staff ensure that any Entergy affiliates, including Entergy operating companies, who seek to supply some or all of the additional resource needs in the Entergy service area from non-regulated generation sources, shall be required to participate in the RFP process and meet all of the same criteria required of other non-affiliated parties. Further, to the extent that Entergy should decide at some point in the future to pursue any self-build or repowering options, including but not limited to the Michoud or Little Gypsy repowering proposals mentioned generally in the RFP filing, then Entergy should at that time be required to submit a detailed informational filing on the proposal and issue an RFP to test the specific proposal against the market as required by the LPSC's Market Based Mechanisms Order.

TPS appreciates the opportunity to submit the above comments and urges that they be incorporated in the RFP process. TPS understands that the LPSC Staff will accept additional comments after Entergy completes posting all of its answers to the written questions submitted by TPS and other interested parties in connection with the Technical Conference. TPS reserves its rights to file additional comments as it may consider appropriate after having a reasonable time to review and consider all of Entergy's answers.

Thank you for your assistance in this matter.

Very truly yours,

Katherine W. King
J. Randy Young

KWK:tjh
cc: LPSC Commissioners
Entergy Services, Inc., Ms. Julie Ell (by electronic mail)

Delete existing Rule 25-22.082 in it entirety, and replace with the following language:

25-6.0351 Selection of Generating Capacity

(1) Prior to commencing the construction of a capacity addition of 75 MW or more (of any technology, whether new construction or the repowering or expansion of existing capacity), a public utility as defined in Section 366.02(1), Florida Statutes shall first solicit competitive alternatives by issuing a Request For Proposals (RFP). The public utility shall publish notices of its RFP in major newspapers and trade publications nationwide. The deadline for submitting responses to the RFP shall be at least 75 days after the date of the first national advertisement.

(2) Prior to the date of the notice required by (1) above, the public utility shall file its RFP package with the Commission. By notice published in the Florida Administrative Weekly, the Commission shall establish the date by which any complaints by potential RFP participants relative to appropriateness of terms, scoring criteria, or any other aspects of the RFP package must be filed with the Commission. Within the same period the Commission may vote on its own motion to issue an order proposing to modify the RFP package. If a timely complaint is filed, or if such an order is protested, the Commission shall expedite the hearing on the matter. Upon the filing of a complaint or the decision to issue an order, the public utility shall hold RFP activities in abeyance until the related issues have been resolved.

(3) All respondents and, if it proposes a self-build option, the public utility, shall submit sealed proposals meeting the requirements of the RFP to the Commission

or its designated representative by the governing deadline. If the IOU or an affiliate/subsidiary of the IOU intends to submit a proposal, a neutral and independent entity shall evaluate all proposals. In the RFP the public utility shall provide the qualifications of another neutral entity it proposes to engage for the purpose; however, the Commission may elect to perform the evaluations in any RFP required by this rule. The application fees submitted by bidders will be used to compensate the third party evaluator.

(4) The neutral entity selected to evaluate the proposals (or the Commission or public utility, where applicable) shall apply the evaluation/scoring criteria of the RFP to the competing submissions and shall identify a short list of the highest ranked proposals or combinations of proposals for further consideration. The public utility shall provide to each participant on the short list its analysis of transmission integration costs necessary to integrate the participant's proposal into the public utility's system. Each participant on the short list, including the public utility, if applicable, shall thereafter submit a final sealed and binding bid for evaluation. Based on its review of the final bids, the independent evaluator (or the Commission or public utility, as applicable) shall identify the winner(s) of the RFP.

(5) An affected party may challenge, by complaint filed with the Commission or in a proceeding on a related petition to determine need, the selection made. However, the grounds for such a challenge shall be limited to an assertion that the RFP criteria were incorrectly applied, unless the party shows it could not have raised its issue in a complaint brought under (3) above.

(6) If a proposal other than the public utility's self-build option is chosen, the public utility and the winning RFP participant shall negotiate in good faith a power

purchase agreement that incorporates the terms of the RFP and the winning proposal. If its proposal is selected as the most cost-effective, the public utility's proposed costs shall be binding on it in future earnings surveillance reports and ratemaking proceedings to the same extent the pricing proposals of participants would be binding on them in a power purchase agreement.

(7) The public utility's RFP shall include, at a minimum, the following information:

(A) Where applicable, a technical description of the public utility's proposed capacity addition, to include size (in MW), technology, estimated in-service date, primary and secondary fuels, location, market value of property and infrastructure at the location, associated facilities (such as pipelines and transmission facilities) to be built, and projected capacity factor over a twenty year horizon.

(B) The public utility's ten-year historical and (current) ten year projected net energy for load, and summer and winter peak demand by class of customers.

(C) A schedule of milestone dates for receipt, evaluation, and selection of proposals.

(D) (If the IOU or an affiliate/subsidiary of the IOU intends to offer a proposal) the neutral and independent entity that the public utility proposes to engage to evaluate proposals, and its qualifications.

(E) A complete list and description of all price and non-price attributes to be addressed by each participant in its proposal.

(F) Any applications fees that will be required of a participant. Any such fees or deposits shall not exceed $10,000 in the aggregate, with no more than $500 required to obtain the RFP. Multiple application fees for variations

of power supply options shall not be required.

(G) All criteria, including all weighting and ranking factors and all price and non-price considerations that will be applied to evaluate proposals. No increase to the public utility's cost of capital shall be imputed.

(H) A detailed description of the assumptions and methodology that will be employed to evaluate all proposals, including the manner in which the costs of any existing infrastructure will be allocated to the public utility's proposed capacity addition.

25-22.082 Selection of Generating Capacity.

(1) Scope and Intent. A Public Utility is required to provide reasonably sufficient, adequate, and efficient service to the public at fair and reasonable rates. In order to assure an adequate and reliable source of energy, a public utility must plan and construct or purchase sufficient generating capacity. ~~To assure fair and reasonable rates and to avoid the further uneconomic duplication of generation, transmission, and distribution facilities in Florida, a public utility must select the most economical and cost-effective mix of supply-side and demand-side resources to meet the demand and energy requirements of its end-use consumers.~~ The intent of this rule is to ~~provide the Commission information to evaluate a public utility's decision regarding the addition of generating capacity pursuant to Chapter 403.519, Florida Statutes~~ ensure the selection of the most economical and cost-effective mix of supply-side and demand-side resources to meet the demand and energy requirements of its end-use customers. The use of a Request for Proposals (RFP) process is an appropriate means to ensure that a public utility's selection of a proposed generation addition is the most cost-effective alternative available.[1]

(2) Definitions. For the purpose of this rule, the following terms shall have the following meaning:

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

(b) ~~Next Planned Generating Unit: the next generating unit addition planned for construction by an investor-owned utility that will require certification pursuant to Section~~

[1] § IV Comments, pgs. 21-22.

~~403.519, Florida Statutes.~~ Major Capacity Addition: any electrical generating unit, regardles of age or technology, that exceeds 75MW of generating capacity.[2]

(c) Request for Proposals (RFP): a document in which a public utility publishes the price and non-price attributes of its next ~~planned generating unit~~ major capacity addition in order to solicit and screen, for potential subsequent contract negotiations, competitive proposals for supply-side alternatives to the public utility's next ~~planned generating unit~~ major capacity addition.[3]

(d) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a public utility's RFP. A participant may include, but is not limited to, utility and non-utility generators, Exempt Wholesale Generators (EWGs), Qualifying Facilities (QFs), marketers, and affiliates of public utilities, as well as providers of turnkey offerings, distributed generation, and other supply side alternatives.

(e) Finalist: one or more participants selected by the independent evaluator or the public utility, as applicable, with whom ~~to conduct subsequent contract negotiations~~ the public utility is to negotiate a power purchase agreement based on RFP terms and the winning proposal(s).[4]

(f) Independent evaluator: a neutral entity, unrelated to the public utility sponsoring the RFP, that is qualified to apply the criteria and weighting factors of the RFP to proposals (including the public utility's self-build proposal) and rank them with respect to relative cost-

[2] § IV Comments, pg. 22.

[3] § IV Comments, pg. 22.

[4] § IV Comments, pg. 22.

effectiveness.[5]

(3) ~~Prior to filing a petition for determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes,~~ Before commencing to construct a major capacity addition, each investor-owned electric utility shall issue ~~evaluate supply-side alternatives to its next planned generating unit by issuing~~ a Request for Proposals (RFP).[6]

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

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

(b) a general description of the public utility's ~~next planned generating unit~~ proposed major capacity addition, including its planned in-service date, MW size, location, fuel type and technology; and[7]

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

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

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

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[5] § IV Comments, pg. 22.

[6] § IV Comments, pg. 22.

[7] § IV Comments, pg. 22.

information:[8]

1. a description of the public utility's ~~next planned generating unit(s)~~ proposed major capacity addition and its proposed location(s);[9]
2. the MW size;
3. the estimated in-service date;
4. the primary and secondary fuel type;
5. ~~an estimate of the total direct cost;~~[10]
6. ~~an estimate of the annual revenue requirements;~~[11]
7. ~~an estimate of the annual economic value of deferring construction;~~[12]
8. ~~an estimate of the fixed and variable operation and maintenance expense;~~[13]
9. ~~9.~~ 5. an estimate of the fuel cost;
10. ~~10.~~ 6. an estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;[14]
11. ~~11.~~ 7. a description ~~and estimate of the costs~~ of required ~~for~~ associated facilities such as gas laterals and transmission interconnection;[15]
12. ~~12.~~ 8. a discussion of the actions necessary to comply with environmental requirements;

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[8] § IV Comments, pg. 22.

[9] § IV Comments, pg. 22.

[10] § IV Comments, pg. 22.

[11] § IV Comments, pg. 22.

[12] § IV Comments, pg. 22.

[13] § IV Comments, pg. 22.

[14] § IV Comments, pg. 22.

[15] § IV Comments, pg. 22.

and

~~13.~~ 9. a summary of all major assumptions used in developing the above estimates;[16]

(b) Detailed information regarding the public utility's ten year historical and ten year projected net energy for load;

(c) a schedule of critical dates for solicitation, evaluation, screening of proposals, selection of finalists, subsequent contract negotiations;

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

1. technical and financial viability;

2. dispatchability;

3. deliverability (interconnection and transmission);

4. fuel supply;

5. water supply;

6. environmental compliance;

7. performance criteria; and

8. pricing structure.

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

(f) All criteria, including all weighting and ranking factors that will be applied to select the finalists. Such criteria may include price and non-price considerations, but no criterion shall be employed that is not expressly identified in the RFP ~~absent a showing of good cause~~;[17]

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[16] § IV Comments, pg. 22.

[17] § IV Comments, pg. 22.

(g) Any application fees that will be required of a participant. Any such fees or deposits shall be cost-based, and shall not exceed $10,000 in the aggregate;[18]

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

(i) If the public utility intends to propose a self-build option or consider a transaction with an affiliate, the identity and qualifications of the proposed independent evaluator.[19]

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

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

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[18] § IV Comments, pg. 22.

[19] § IV Comments, pg. 22.

size, fuel type, and associated facilities.

(8) Each public utility shall file a copy of its RFP with the Commission upon issuance. The Commission shall publish notice of its receipt of the RFP in the Florida Administrative Weekly.[20]

(9) The public utility shall allow participants to formulate creative responses to the RFP. The public utility shall evaluate all proposals unless it intends to offer a self-build option or to consider a transaction with an affiliate. In those circumstances the public utility shall engage an independent evaluator to score all proposals.[21]

(10) The public utility shall conduct a meeting prior to the release of the RFP ~~with potential participants to discuss the requirements of the RFP~~. The public utility shall also conduct a meeting within two weeks after the issuance of the RFP and prior to the submission of any proposals. The Office of Public Counsel and the Commission staff shall be notified in a timely manner of the date, time, and location of such meetings.[22]

(11) A potential participant ~~who attended the public utility's post-issuance meeting~~ may file with the Commission a complaint raising specific objections to any terms of the RFP within ~~10~~ 14 days of the ~~post-issuance meeting~~ FAW notice required by paragraph (8) above.[23] Failure to file objections within ~~10~~ 14 days shall constitute a waiver of ~~those~~ objections. The Commission will ~~address any objections to the terms of the RFP~~ conduct a hearing on any such complaint and enter its ruling on an expedited basis.[24] If a complaint is filed timely, the public

[20] § IV Comments, pg. 22.

[21] § IV Comments, pgs. 22-23.

[22] § IV Comments, pgs. 22-23

[23] § IV Comments, pg. 23

[24] § IV Comments, pg. 23.

utility shall hold all RFP activities, including the submission of proposals, in abeyance pending its disposition.[25]

(12) A minimum of ~~60~~ 75 days shall be provided between the issuance of the RFP, and the due date for proposals in response to the RFP.[26]

(13) The public **utility** or independent evaluator, as applicable, [27]shall evaluate the proposals received in response to the RFP in a fair comparison with the public utility's next planned generating unit identified in the RFP.

(14) If the Commission approves a purchase power agreement as a result of the RFP, the public utility shall be authorized to recover the prudently incurred costs of the agreement through the public utility's capacity, and fuel and purchased power cost recovery clauses absent evidence of fraud, mistake, or similar grounds sufficient to disturb the finality of the approval under governing law. If the public ~~utility selects a self-build option, any costs in addition to those identified in the need determination proceeding shall not be recoverable unless the utility can demonstrate that such costs were prudently incurred and unforeseen and beyond its control.~~ utility's self-build option is selected, the public utility's recovery of costs will be limited to the costs associated with the projections of its proposals to the same extent the RFP terms would have limited respondents in a power purchase contract.[28]

(15) 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

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[25]§ IV Comments, pg. 23.

[26]§ IV Comments, pg. 23.

[27]§ IV Comments, pg. 23.

[28]§ IV Comments, pg. 23.

proceeding.

~~(16) The Commission may waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.~~[29]

Specific Authority: 350.127(2), 366.05(1), 366.06(2), 366.07, 366.051, F.S.

Law Implemented: 403.519, 366.04(1), 366.04(2), 366.04(5), 366.06(1), 366.06(2), 366.07, 366.041, 366.051, F.S.

History: New 01/20/94, Amended.

[29] § IV Comments, pg. 24.