

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: April 7, 2015

TO: Office of Commission Clerk (Stauffer)

FROM: Division of Engineering (Graves, Vickery) *REH PV*
Office of the General Counsel (Murphy) *CM AT*

RE: Docket No. 150100-EI – DeSoto County Generating Company, LLC’s objections to Florida Power & Light Company’s 2015 request for proposals.

AGENDA: 04/16/15 – Regular Agenda – Oral Argument Requested- Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: Rule 25-22.082(12), Florida Administrative Code requires action by April 27, 2015

SPECIAL INSTRUCTIONS: None

Case Background

On March 26, 2015, pursuant to Chapters 120 and 366, Florida Statutes, (F.S.) and Rule 25-22.082, Florida Administrative Code (F.A.C.), DeSoto County Generating Company, LLC (DeSoto) filed its Objections (Objections) to Florida Power & Light Company’s (FPL or Company) March 16, 2015 Request for Proposals to meet Generation Capacity Needs beginning in 2019 (RFP).¹

¹ Although DeSoto also field a Request for Oral Argument, no decision is needed with respect to that filing because Rule 25-22.082(12), F.A.C., provides that the Commission is to make its decision in this matter “based on the written submission and oral argument by the Objector and the public utility.”

On March 31, 2015, pursuant to Section 350.0611, F.S., the Citizens of the State of Florida filed a Notice of Intervention. On that same day, FPL filed its Response to the Objections (Response).

This case represents just the second time that the objection process set forth in Rule 25-22.082(12), F.A.C., has been employed.² Pursuant to the rule, the Commission must determine, within 30 days of objections to an RFP being filed, whether the objections as stated would demonstrate that a violation of Rule 25-22.082, F.A.C., (Bid Rule) has occurred. The rule requires that the Commission's decision be based only on the written submission and oral argument of the objector and the public utility, without discovery or an evidentiary hearing. Given the expedited and informal nature of this process, the Commission's findings concerning the objections are necessarily informal preliminary findings of an advisory nature. This recommendation addresses DeSoto's Objections and FPL's Response and is based on the written submissions of Desoto and FPL.

The Commission has jurisdiction over this matter pursuant to Section 403.519, F.S., and the provisions of Chapter 366, F.S., including Sections 366.04, 366.041, 366.05, 366.051, 366.06, and 366.07.

² The objection process was previously used in Docket No. 030884-EU. In that instance, no order was issued and the docket was closed administratively. There was no motion or vote of the Commission; nonetheless, based upon the discussion of the Commissioners, the Commission did answer the question before it regarding whether objections to FPL's RFP reflected a violation of Rule 25-22.082, F.A.C.

Discussion of Issues

Issue 1: Do DeSoto's objections to FPL's Request for Proposals indicate a violation of any portion of Rule 25-22.082, Florida Administrative Code?

Recommendation: No. Desoto's objections to FPL's Request for Proposals do not indicate any terms which are unfair, unduly discriminatory, onerous, or commercially infeasible pursuant to Rule 25-22.082(5), F.A.C. (Graves, Vickery, Murphy)

Staff Analysis: Desoto asserts that it is a customer of FPL and the owner and operator of the DeSoto Generating Facility, which is a natural gas fired electrical power plant and a potential participant in FPL's RFP process. Desoto claims that its substantial interests are directly affected by the terms and conditions of the RFP which are unfair, unduly discriminatory, unreasonable, and contrary to the public interest and the best interests of FPL's retail customers. As a customer, DeSoto asserts that it has a substantial interest in having FPL make the best, most cost-effective decision regarding additional generation. Desoto also asserts that its substantial interests are of sufficient immediacy to entitle it to initiate this proceeding and that it will suffer a sufficient immediate injury in fact that is of the type that this proceeding is designed to protect.

DeSoto's objections are governed by Rule 25-22.082(12), F.A.C., which provides:

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

To support its case, Desoto relies on Rule 25-22.082(5), F.A.C., which, in part, provides that "[n]o term of the RFP shall be unfair, unduly discriminatory, onerous, or commercially infeasible" and sets forth a list of minimum requirements for an RFP. DeSoto also relies upon Rule 25-22.082(10), F.A.C., which provides that "[t]he public utility shall allow participants to formulate creative responses to the RFP, such as responses which employ innovative or inventive technologies or processes. The public utility shall evaluate all proposals."

DeSoto asserts that it is entitled to relief pursuant to the following: Section 366.04(5), F.S. (requiring the Commission to avoid uneconomic duplication of generating facilities); Section 403.519, F.S. (requiring the Commission to determine whether the utility's proposed generating resource represents the most cost effective alternative available to meet the needs of the utility and its customers); and, Rules 25-22.082(5) (requiring that an RFP be fair); 25-22.082 (10) (requiring that an RFP allow creative responses); and 25-22.082(12) (providing a potential participant with an opportunity to seek a Commission determination regarding the terms of an RFP). Desoto asks that the Commission take jurisdiction over its Objections, conduct oral argument, direct FPL to modify its RFP processes to fairly address DeSoto's Objections, and

take other relief the Commission “deems appropriate to protect the interests of DeSoto and all potential participants in the RFP and to protect the public interest.”

FPL asserts that the DeSoto Objections contain many unsupported assertions and the objections request more relief than is provided for in the objection process. FPL urges the Commission to recognize that it is not making a decision that determines parties’ substantial interests pursuant to Sections 120.569, 120.57(1), or 120.57(2), F.S. FPL argues that the Commission is simply offering guidance on the compliance of terms of the RFP with the Bid Rule and is not authorized under the Bid Rule to grant any other relief. FPL asserts that the only issue for resolution is whether the RFP violates the Bid Rule which was designed to protect the Utility’s customers and is not intended “to protect or promote the competitive interests of those who wish to sell power or generating facilities to a public utility.” FPL argues that the objections raised by DeSoto are a distortion of the intent of the Bid Rule which is found at Rule 25-22.082(1), F.A.C., and provides the following:

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 Section 403.519, F.S. 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.

FPL notes that there are currently 40 registrants to the RFP. FPL asserts that DeSoto is asking the Commission to interpret the RFP to protect DeSoto’s interests rather than the interests of FPL’s customers. FPL concludes that DeSoto’s Objections lack any merit, that there is no basis, factual or legal, to provide any of the relief requested by DeSoto. According to FPL, the RFP complies with the Commission’s Bid Rule and goes beyond the requirements of the Bid Rule to the benefit of potential proposers. FPL asserts that the Commission should reject all of DeSoto’s Objections.

After consideration of DeSoto’s written Objections and FPL’s Response, staff does not believe that a violation of Rule 25-22.082, F.A.C., has been identified. A summary of DeSoto’s specific objections and FPL’s responses are discussed below.

Prohibition of Proposals to Sell to FPL Existing or New Turnkey Generating Facilities

FPL has required as a Minimum Requirement of its RFP that “FPL will not consider or evaluate proposals to sell a generating unit to FPL....” DeSoto describes its existing generating facility as a 310 megawatt (MW) (summer net) simple cycle combustion turbine plant capable of operating on both natural gas and No. 2 fuel oil that began commercial operation in June 2002. DeSoto argues that by excluding proposals to sell existing facilities, FPL violates Rule 25-22.082(5), F.A.C., in that the terms of the RFP are unfair, discriminatory, and onerous. DeSoto characterizes these conditions as restricting DeSoto from being a participant in the RFP.

In its Response to the Objections, FPL states it is restricting the terms of its RFP to not consider existing generation facilities because the operating characteristics such as heat rate, age of the units, maintenance cycles, repairs and replacement parts are outside of its control. Not to

do so, would require a significant exercise in due diligence to determine the suitability of the existing facilities to meet the requirements of FPL's fleet operations. Additionally, independent power producers such as DeSoto do not operate under the same requirements as a regulated utility in terms of reliability and efficiency. FPL asserts that the DeSoto facility has not operated recently due to inefficiency and high cost and is a standby generator resource for the Florida Reliability Coordinating Council and Florida's bulk electric grid.

Staff believes FPL defined its terms within the RFP to remove from consideration generation facilities that would be incapable of meeting efficiency and operational requirements for baseload type operations. Staff would note that the DeSoto facility is a simple-cycle combustion turbine and that FPL's next planned generating unit contained in its RFP is a combined-cycle generating unit. It would not be in the best interests of FPL's customers to require it to purchase an existing facility that would be incapable of meeting the operational and efficiency performance of FPL's generation plan. Lastly, DeSoto is not restricted in any way from proposing to sell FPL capacity and energy under a purchased power agreement (PPA). Therefore, this objection does not appear to be a violation of Rule 25-22.082(5), F.A.C.

Refusal to Consider Other Additions to FPL's Generation Expansion Plan

DeSoto argues FPL violates Rule 25-22.082(10), F.A.C., that directs a public utility to allow participants to formulate creative responses to the RFP that employ innovative or inventive technologies or processes. DeSoto alleges that FPL intends to retire certain gas turbine units (GTs) and to replace that capacity with new combustion turbines (CTs) at its Lauderdale and Ft. Myers sites. Because the DeSoto Facility is located electrically in the same transmission area as the Ft. Myers units, DeSoto asserts that it would be more cost effective for FPL to purchase the DeSoto Facility instead of adding CTs at the Ft. Myers site.

FPL argues that the Ft. Myers units are not at issue in the RFP. The RFP represents FPL's next planned generation unit and is not part of its planned replacement of GTs prior to 2016. The requested relief to direct FPL to "consider alternatives" to its planned replacement of GTs in Ft. Myers is not relief that can be granted under the Bid Rule.

Staff agrees with FPL that the Ft. Myers CT replacements are not part of FPL's current RFP. The replacement of CTs at various sites does not require prior approval or a need determination by the Commission. Therefore, this objection does not appear to be a violation of Rule 25-22.082(10), F.A.C. However, when FPL seeks cost recovery of these units, FPL will have the burden of justifying that the replacements were the most cost-effective solution. A prudent utility should explore all available options, including purchasing existing generation facilities, prior to constructing new generation.

Completion and Performance Security Requirements

Desoto argues that the Commission should direct FPL to reduce the required Performance Security for existing facilities when the owner/operator can demonstrate a proven record of satisfactory performance. Simply stated, the RFP requires all proposers to post a "Performance Security" of \$200,000 per MW, or \$200 per kW, of capacity and DeSoto argues that it is too

high a bar for existing generators and should be reduced to the level FPL's own Standard Offer Contract that only requires a Performance Security of \$30,000 per MW or \$30 per kW.

In its Response, FPL states that the Completion Security level required in this RFP (\$185-200 per kW) compares reasonably with the Completion Security requirement in FPL's last two RFPs. The Completion Security required in FPL's most recent RFP was \$211-289 per kW. The Completion Security in FPL's second most recent RFP was \$319 per kW. Neither of these amounts was protested. In 2003, FPL had another RFP which was protested. In that case, the amount of the Completion Security was \$188 per kW in 2002 dollars. The Commission concluded that the level of Completion Security (12 years ago) was not inconsistent with the Bid Rule. (See Docket No. 030884-EU).

FPL contends that the security requirements in the RFP are designed to protect FPL's customers; the reduced security requirements in the standard offer contract provide less protection to FPL's customers, but are designed to encourage the development of renewable energy resources, a specific resource for which the Legislature has encouraged development. (See Section 366.91, F.S.). FPL further asserts that the standard offer contract security provision is not designed to provide a sufficient security guarantee to ensure that adequate resources are placed in service (as an alternative to FPL's 2019 next planned generating unit) to meet FPL's load requirements for significant long-term capacity needs. FPL concludes that the two entirely different objectives lead, not surprisingly, to different security requirements.

Staff concurs with FPL's position that comparing the Security requirements contained in the Company's RFP with those contained in the Company's standard offer contract is not appropriate. However, staff believes the security requirements cited by FPL are not appropriate for addressing DeSoto's Objection. Specifically, DeSoto objected to the Performance Security requirements for existing facilities. The prior security requirements cited by FPL are Completion Security requirements for new construction projects. Staff reviewed FPL's last three RFPs and the Performance Security requirements for existing facilities in those RFPs was \$144.5 per kW, \$160 per kW, and \$95 per kW.

Staff recognizes that performance security requirements are designed to insure that a utility can adequately replace capacity and energy in the event that a purchased power plant defaults on its capacity and energy delivery obligations. In such an event, FPL would need to consider the purchase of replacement power or the construction of substitute generation facilities. Given that the impact of a default event is dependent of several variables, it is difficult to prescribe a precise monetary amount that a utility should require in order to adequately protect its customers.

Although the performance security requirements for existing facilities contained in FPL's current RFP is higher than past requirements, staff does not believe that DeSoto has provided an adequate argument to require a change at this time. Therefore, staff believes that FPL's Completion and Security requirements do not appear to be a violation of Rule 25-22.082(5), F.A.C.

Financial Viability Requirements

FPL's RFP would require each Proposer, or a Guarantor, to have a senior unsecured debt rating of no less than BBB- from Standard & Poor's or Baa3 from Moody's Investors Service with a "stable" outlook, and also to satisfy the Completion and Performance Security requirements discussed above. DeSoto argues that applying such a requirement in addition to any Performance Security requirement is unnecessary and can only operate to restrict competitive proposals. Applying it to an entity such as DeSoto, which has operated the DeSoto Facility successfully, responsibly, and reliably in Florida for more than a decade, and which has previously sold capacity and energy to FPL under contracts for which the Commission approved cost recovery, is facially unreasonable and contrary to the best interests of FPL's customers. DeSoto asserts that this requirement could have the effect of foreclosing completely viable proposals from even being considered and therefore, violates Rule 25-22.082(5), F.A.C. because it is anti-competitive and thus, unfair.

In its Response, FPL acknowledges that it is insisting that all bidders or their guarantors have an investment grade senior unsecured debt rating to protect FPL customers. Inviting entities with non-investment grade, or junk bond, status to bid and potentially operate a power plant is, at best, an unreasonable proposition and, at worst, a very poor bet with potentially serious detrimental consequences for Florida and its electric consumers. Considering its objections as a whole, FPL contends that DeSoto's intent is to have the Commission strip away all the protective measures of the RFP to the point that an independent power producer is trusted to timely and properly complete construction and/or operation of a major power plant. In effect, DeSoto would have FPL and its customers rely almost wholly on "step-in" rights in the event of bankruptcy or non-performance, including when the proposer simply makes an economic decision to abandon the project. FPL has employed minimum financial viability requirements in its RFPs in 2007, 2005, and 2003. In the two most recent RFPs, the minimum financial viability criteria were not protested. In FPL's 2003 capacity RFP, FPL's minimum financial viability requirements were protested, and the Commission found no violation of the Bid Rule in that case (See Docket No. 030844-EU).

Staff recognizes that financial viability requirements are designed to minimize the financial risk that major generation projects are completed on time for the benefit of utility customers. The requirements contained in FPL's current RFP are consistent with past successful and uncontested solicitations. Lowering or removing these requirements would transfer the risk to FPL's customers. Therefore, this objection does not appear to be a violation of Rule 25-22.082(5), F.A.C.

Original Equipment Manufacturer (OEM) Parts for Critical Components

FPL's RFP would require that proposers of PPAs could only use OEM parts for certain GT components. DeSoto asserts that this requirement is unfair, and thus, violates Rule 25-22.082(5), F.A.C., because it would impose unnecessary costs on potential participants. It is also inconsistent with the fundamental purposes of the Bid Rule itself because it is at least potentially counter-productive, when applied to PPA proposals from existing generating facilities, because the PPA itself would contain defined criteria for the actual performance of the unit or units from

which the PPA was being served. Additionally, DeSoto argues that some other parts suppliers' have proven better than OEM equipment.

In its Response, FPL asserts that the use of non-OEM parts for critical hot gas path components is not in the best interests of FPL's customers. The use of non-OEM parts for critical hot gas components presents real risks (both reliability and availability risks) to FPL's customers. It is because of this risk that FPL requires the use of OEM parts for critical hot gas path components for its own units. In considering this minimum requirement, it is important to remember that under the Bid Rule proposals are compared to FPL's next planned generating unit, which will be held to the same exacting standard if it should be found to be FPL's best and most cost-effective option. Contrary to DeSoto's claim that the OEM requirement is unfair by requiring all – including FPL's self-build option – to use OEM parts, FPL is in fact establishing greater fairness among bids (a level playing field), and promoting reliability for the benefit of FPL's customers. No bidder is disadvantaged in this regard relative to another. In other words, by requiring every bidder to use and properly maintain OEM parts, FPL has removed the OEM parts cost issue and the OEM parts reliability issue, as points of contention, and FPL has established a fair, level playing field for all parties to compete.

Staff believes the requirement to utilize OEM parts insures that reliability will not be adversely affected and that all equipment warranties will remain in force. Since FPL is also held to this standard for its self-build option, this objection does not appear to be a violation of Rule 25-22.082(5), F.A.C.

Conclusion

Desoto's objections to FPL's Request for Proposals do not indicate any terms which are unfair, unduly discriminatory, onerous, or commercially infeasible pursuant to Rule 25-22.082(5), F.A.C.

Issue 2: Should this docket be closed?

Recommendation: Yes. The docket to address objections to FPL's RFP on a preliminary basis pursuant to Rule 25-22.082, F.A.C., should be closed. (Murphy)

Staff Analysis: This docket should be closed, other issues related to this subject may be raised by the appropriate parties to the future need determination proceeding.