

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida)
Power Corporation for Waiver)
of Rule 25-22.082, F.A.C.,)
Selection of Generating Capacity)

Docket No. 981360-EI

Filed: December 21, 1998

PETITION FOR LEAVE TO INTERVENE

Edison Mission Energy ("Edison Mission"), by and through undersigned counsel, and pursuant to Rules 25-22.026, 25-22.036 and 25-22.039, Florida Administrative Code, requests leave to intervene in this proceeding wherein the Florida Public Service Commission (the "Commission") is scheduled to address Florida Power Corporation's ("FPC"'s) petition for waiver of Rule 25-22.082, Florida Administrative Code (the "Bidding Rule"). For the reasons set forth herein, Edison Mission respectfully requests that the Commission deny FPC's Petition and direct FPC to issue a Request for Proposals ("RFP") pursuant to the Bidding Rule. In support of its petition, Edison Mission states:

Intervenor Information

1. Edison Mission is a California corporation which owns subsidiaries doing business in Florida. Edison Mission's headquarters and principal executive offices are located in Irvine, California. Edison Mission's full name and address are:

Edison Mission Energy
18101 Von Karman Avenue, Suite 1700
Irvine, California 92612-1046

2. Copies of pleadings, notices and other documents in this proceeding directed to Edison Mission should be served on:

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and

Kenneth Niemann
Director of Business Management
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Statement of Ultimate Facts

3. Edison Mission, through its subsidiaries, is engaged in the business of developing, acquiring, owning and operating electric power generation facilities worldwide. Edison Mission is a wholly owned subsidiary of The Mission Group, which is a wholly owned, non-utility subsidiary of Edison International. Edison International is also the parent holding company of Southern California Edison Company, one of the largest electric utilities in the United States. Edison Mission, through its subsidiaries, has experience in all phases of project development and ownership, including engineering and construction, permitting, financing, asset management and operations. Edison Mission, through its subsidiaries, currently owns interests in 52 projects totalling 9,985 megawatts ("MW") of generating capacity, of which 7,363 are in

operation, and 2,622 are under construction. Of these projects, Edison Mission, through its subsidiaries, owns interests in 26 domestic operating projects in eight states, which have a total generating capacity of 3,679 MW, of which Edison Mission's net ownership share is 1,640 MW. In addition, Edison Mission will soon complete the acquisition of the 1,884 MW Homer City Generating Station in western Pennsylvania, one of the largest coal-fired generating plants in the mid-Atlantic states. Moreover, Edison Mission, through its wholly owned subsidiaries, maintains a fifty percent ownership interest in Auburndale Power Partners, Limited Partnership ("Auburndale"), a 150 MW natural gas-fired cogeneration facility located in Polk County, Florida. Auburndale sells output at wholesale to FPC under long term power purchase agreements, and to other electric utilities and energy marketers. Edison Mission, through wholly owned subsidiaries or affiliates, is interested in exploring opportunities to construct, or obtain an interest in, additional electric generating facilities in Florida.

4. On October 20, 1998, FPC filed a Petition with the Commission requesting that the Commission waive the Bidding Rule as it may apply to FPC's filing a petition with the Commission to determine need for a proposed 500 MW electrical power plant to be located at FPC's Hines Energy Complex in Polk County, Florida (the "Facility").

5. The Commission adopted the Bidding Rule in December of 1993.¹ See In Re: Proposed Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Proposed New Rule 25-22.082, F.A.C., Selection of Generating Capacity, 93 F.P.S.C. 12:556,

¹ The Bidding Rule became effective on January 10, 1994. See Fla. Admin. Code R. 25-22.082.

Docket No. 921288-EU, Order No. PSC-93-1846-FOF-EU (Dec. 29, 1993) (notice of adoption of rule and rule amendments). The purpose of the Bidding Rule is "to ensure that the process used by investor-owned electric utilities to evaluate and select proposed power projects facilitates the Commission's statutory responsibility to determine the most cost-effective generating unit under Section 403.519, Florida Statutes."² In Re: Proposed Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Proposed New Rule 25-22.082, F.A.C., Selection of Generating Capacity, 93 F.P.S.C. 8:267, 269, Docket No. 921288-EU, Order No. PSC-93-1184-NOR-EU (Aug. 12, 1993) (notice of rulemaking). Another stated purpose of the Bidding Rule is to "require electric utilities to employ a selection process that provides a clear point of entry for nonutility generators and imposes specific procedural and substantive requirements on utilities to ensure that utilities fairly examine all generation alternatives." Id. Accordingly, the Bidding Rule requires each investor-owned electric utility to fairly evaluate supply-side alternatives by issuing a RFP prior to filing a petition for a determination of need for an electrical power plant with the Commission. See Fla. Admin. Code R. 25-22.082(2).

6. In 1996, the Florida Legislature substantially revised Chapter 120, Florida Statutes -- Florida's Administrative Procedure Act. As part of those revisions, the Legislature enacted Section 120.542, Florida Statutes, governing waivers of agency rules. Section 120.542 recognizes that waiver of an agency's rule may be appropriate in limited circumstances where strict application of the rule could lead to "unreasonable,

² Section 403.519 requires the Commission to determine the need for a proposed new electrical generating facility.

unfair and unintended results" § 120.542(1), Fla. Stat. (1997). Subsection (2) of Section 120.542 provides that:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship", means demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purpose of this section, "principles of fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects others similarly situated persons who are subject to the rule.

§ 120.542(2), Fla. Stat. (1997) (emphasis added).

7. Section 120.542 authorizes agencies to waive their rules only when consistent with the threshold standards set forth in subsection (2) of Section 120.542. See § 120.542(1), Fla. Stat. (1997) ("Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section."). These threshold standards apply to a request for waiver of the Commission's Bidding Rule.³ See In re: Petition by Gulf Power Company for waiver of portions of Rule 25-22.082(4)(a), F.A.C., Selection of Generating Capacity, 98 F.P.S.C. 9:51, Docket No. 980783-EI, Order No. PSC-98-1202-FOF-EI (Sept. 9, 1998) (denying petition for waiver of the Bidding Rule where Gulf

³ Although subsection (9) of the Bidding Rule states that the Commission may waive the Bidding Rule "upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body or ratepayers, or is otherwise in the public interest[.]" these criteria must be interpreted by the Commission in light of the threshold waiver requirements in Section 120.542. See § 120.542(1), Fla. Stat. (1997) (agency only has authority to waive rule when consistent with threshold standards in Section 120.542).

Power Company did not meet the threshold standards for waiver in Section 120.542). As described below, FPC cannot meet the threshold standards for waiver of the Bidding Rule.

Basic Position

8. FPC has not, and cannot, demonstrate that the purpose of the statute underlying the Bidding Rule will be achieved by granting the relief requested in FPC's Petition for waiver of the Bidding Rule. The statutory authority for the Bidding Rule is Section 403.519, Florida Statutes. FPC's Petition states that the purpose of Section 403.519 is "to ensure that a utility's customers receive the benefit of the most cost-effective generation supply alternative in satisfying the utility's need for capacity." (Petition at ¶ 17). FPC has suggested that the requested waiver of the Bidding Rule will achieve the purpose of Section 403.519 as a result of FPC's commitment not to initiate base rate recovery of the capital and non-fuel O&M costs associated with the Facility over a five year period. FPC, however, has failed to recognize that Section 403.519 imposes a statutory duty on the Commission to make specific findings regarding whether a proposed new electrical generating facility is the most cost-effective alternative available for supplying electricity. See Nassau Power Corp. v. Deason, 641 So. 2d 396, 397 (Fla. 1994) (quoting Nassau Power Corp. v. Beard, 601 So. 2d 1175, 1176-77 (Fla. 1992)). As noted above, the Bidding Rule was enacted to ensure that the Commission has information in a need determination proceeding necessary to fulfill its statutory responsibility under Section 403.519 by requiring a utility to fairly examine all generation alternatives. Thus, the Commission cannot possibly make

specific findings regarding whether the proposed Facility is the most cost-effective alternative available for supplying electricity without knowing what alternatives to construction of the new Facility exist. Moreover, it is disingenuous for FPC to represent that its construction of the proposed Facility is the most cost-effective power supply alternative without engaging in a competitive solicitation that identifies all other available alternatives.

9. Further, Section 403.519 does not authorize the Commission to make a need determination based solely on the immediate costs to a utility's ratepayers or the costs to a utility's ratepayers over a limited period of time. Instead, a determination that construction of a new facility is the most cost-effective alternative contemplates that the Commission will evaluate all costs of the proposed facility that will be imposed at one time or another on the utility's ratepayers. Although, FPC has stated that it will not seek to recover the capital and non-fuel O&M costs of the Facility through its base rates for a five year period, it may be assumed that these costs will be borne by FPC's future ratepayers upon expiration of the self-imposed five year "rate freeze" period. Furthermore, there is no guarantee that the costs to FPC's ratepayers of the proposed Facility will be less than the costs of purchased power at the end of the five year "rate freeze."

10. FPC's proposal to implement a self-imposed five year "rate freeze" operates to undermine the purpose of the Bidding Rule, which is to ensure a fair process for utilities to evaluate power supply alternatives. FPC proposes to temporarily absorb the capital and non-fuel O&M costs of its own construction of the proposed Facility.

However, FPC makes no corresponding commitment to absorb any such costs associated with purchased power. Thus, under that one-sided analysis, there can be no fair comparison of the costs of FPC's Facility and the costs of purchased power alternatives. Any meaningful comparison between FPC's proposed Facility and capacity that will be acquired through the RFP process must require FPC to absorb the winning bidder's capital and non-fuel O&M costs for the same five year period.

11. Competition in electric markets, particularly in the wholesale generation area, has arrived in Florida. In order to ensure that Florida ratepayers fully receive the benefits of this new competition, it is important that the Commission protect against an incumbent utility's abusive use of its market power. An integrated utility, like FPC, possesses significant market power within its franchised service territory. Allowing an incumbent electric utility to build additional generation in Florida without any real regard to other supply side alternatives will only exacerbate market power concerns and make it considerably more difficult to foster effective competition. Edison Mission does not propose or suggest that FPC should be prohibited from constructing additional generations, so long as FPC's proposed Facility proves to be the most economical alternative. However, Edison Mission respectfully submits that the Commission must insist on FPC conducting a fair and objective RFP process in order to fully protect the interests of Florida's ratepayers and mitigate the risk of FPC abusing its market power position.

12. Not only has FPC failed to demonstrate that the purpose of Section 403.519 will be achieved if FPC's Petition is granted, but FPC also has not, and cannot,

demonstrate that application of the Bidding Rule would create a substantial hardship for FPC or would violate principles of fairness.⁴ This portion of the threshold test for waiver is necessary to satisfy the requirements of Section 120.542.

13. FPC claims that requiring FPC to comply with the Bidding Rule would result in a substantial hardship because: (a) FPC would be required to devote time and resources to the bidding process, with "no reasonable expectation that the result could be as beneficial as can be achieved by the requested waiver[;]" (b) FPC's customers would lose the benefit of the self-imposed five year "rate freeze;" and (c) soliciting competitive proposals would delay the availability of new capacity and impair the reliability of FPC's system during the delay. As previously noted a "substantial hardship" under Section 120.542 is a "demonstrated economic, technological, legal or other type of hardship." None of the above claims demonstrate any hardship on FPC and certainly do not demonstrate a substantial hardship.

14. If a utility were able to obtain a waiver of the Bidding Rule simply by asserting that it has no reasonable expectation that a result more beneficial than construction could be achieved through a competitive solicitation, the Bidding Rule would be rendered meaningless. There is no way that FPC can evaluate whether a more beneficial result could be achieved through competitive solicitation without knowing what alternatives exist to construction of the proposed Facility. Such alternatives can only be fully explored through the RFP process. Moreover, FPC's

⁴ FPC's Petition only asserts that application of the Bidding Rule would result in a substantial hardship and not that application of the Bidding Rule would violate principles of fairness. (See Petition at ¶ 19).

assertion that it has no reasonable expectation that a more beneficial result could be reached through the Bidding Rule is based on FPC's self-imposed five year "rate freeze." As noted above, a comparison of power supply alternatives that takes into account the five year "rate freeze" only as applied to the FPC Facility (and not to purchased power) is a patently unfair comparison.

15. FPC also cannot claim that compliance with the Bidding Rule will significantly delay the availability of new capacity and impair the reliability of FPC's system. It will take the Commission approximately three months to address FPC's Petition for waiver. In that time, FPC could have conducted a competitive solicitation pursuant to the Bidding Rule. FPC is not concerned that compliance with the Bidding Rule will result in delay. FPC is concerned that its compliance with the Bidding Rule may indicate that there is a more cost-effective alternative than construction of the proposed Facility.

16. For the reasons described above, FPC cannot satisfy the threshold requirements in Section 120.542 for obtaining waiver of the Bidding Rule. Thus, FPC's Petition for waiver must be denied.

Substantial Interest Affected

17. Edison Mission has standing to intervene as a party in this proceeding. Intervention in a Commission proceeding is granted to those entities whose substantial interests are subject to determination or will be affected through the proceeding. See Fla. Admin. Code R. 25-22.039. As an affiliate of a current and potential supplier of

purchased power, Edison Mission has a direct and substantial interest in FPC adhering to the Bidding Rule which is the focus of this proceeding.

18. Edison Mission, through its affiliates and subsidiaries, owns interests in non-utility generators and, as such, is entitled as a matter of law to participate in a RFP process conducted pursuant to the Bidding Rule. See Fla. Admin. Code R. 25-22.082(c) ("A participant may include utility and non-utility generators as well as providers of turnkey offerings and other utility supply side alternatives."). As described above, the Bidding Rule is intended to provide non-utility generators, such as Edison Mission, with a clear point of entry in a utility's, and subsequently, the Commission's, evaluation and determination of the least-cost supply alternative for supplying electricity. The Bidding Rule prohibits the Commission from allowing "potential suppliers of capacity who were not participants to contest the outcome of the selection process in a power plant need determination proceeding." See Fla. Admin. Code R. 25-22.082(8). Thus, waiver of the Bidding Rule would effectively deprive Edison Mission of a clear point of entry to which it is lawfully entitled.

19. Furthermore, Edison Mission's formal participation in this proceeding is necessary in order for the Commission to evaluate whether the ratepayers are best served by FPC's proposal to waive the Bidding Rule. As described above, Section 403.519 obligates the Commission to make specific findings regarding whether the proposed construction of a new electrical generating facility is the least-cost supply alternative. The Commission cannot fulfill this obligation based on generic representations by FPC that its construction of the proposed Facility will be less costly

to its ratepayers than purchased power when the Commission has no basis upon which to determine the potential purchased power supply alternatives that are available. Additionally, participation by non-utility generators, such as Edison Mission, in this proceeding is essential to ensure that there is a fair basis for cost comparisons. As previously noted, there can be no fair comparison concerning the cost of power supply alternatives so long as the comparison takes into account FPC's unilateral self-imposed five year "rate freeze," unless FPC is required to extend the "rate freeze" to include purchased power suppliers. Only potential third party suppliers can adequately and fairly apprise the Commission as to whether there are more cost-effective supply-side alternatives than the proposed construction of the Facility by FPC.

20. Granting Edison Mission leave to intervene in this proceeding is also consistent with prior Commission orders concerning similar issues of standing. In a need determination proceeding currently pending before the Commission, the Commission has granted petitions to intervene by a potential alternative supplier of power and by a union of electrical workers. See In re: Joint petition for determination of need for an electrical power plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Docket No. 981042-EM, Order No. PSC-98-1510-PCO-EM (Nov. 13, 1998) (granting U.S. Generating Company's petition to intervene). If these parties' substantial interests will be affected in a need determination proceeding, Edison Mission's substantial interests will certainly be affected in this proceeding in which FPC seeks waiver of the Bidding Rule.

Disputed Issues of Material Fact

21. The disputed issues of material fact of which Edison Mission has knowledge at this time include, without limitation, the following:

a. Whether FPC has demonstrated that the purpose of Section 403.519 will be achieved if FPC's Petition for waiver of the Bidding Rule is granted;

b. Whether the Commission can fulfill its statutory obligation to make specific findings in a need determination proceeding that the construction of the proposed Facility is the most cost-effective alternative for supplying electricity without being aware of, and analyzing, what other alternatives exist;

c. Whether the costs of FPC's proposed Facility can be fairly compared to the cost of purchased power in light of FPC's proposed self-imposed five year "rate freeze;" and

d. Whether FPC has demonstrated that application of the Bidding Rule would create a substantial hardship on FPC.

WHEREFORE, Edison Mission respectfully requests that the Commission:

- (a) Grant Edison Mission intervenor status in this proceeding;
- (b) Deny FPC's Petition for waiver of the Bidding Rule; and

(c) Grant such other relief as the Commission deems appropriate.

Respectfully submitted,


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CERTIFICATE OF SERVICE

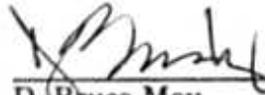
I HEREBY CERTIFY that a copy of the foregoing Petition for Leave to Intervene was furnished by U.S. mail to James A. McGee, Esq., Florida Power Corporation, P.O. Box 14042, St. Petersburg, FL 33733-4042 and by hand delivery to Robert Elias, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Room 370, Tallahassee, Florida 32399-0850 this 21th day of December, 1998.


D. Bruce May

TAL-143164.4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Leave to Intervene was furnished by U.S. mail to James A. McGee, Esq., Florida Power Corporation, P.O. Box 14042, St. Petersburg, FL 33733-4042 and by hand delivery to Robert Elias, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Room 370, Tallahassee, Florida 32399-0850 this 21st day of December, 1998.



D. Bruce May

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