

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power & Light Company  
for a determination of need for a power plant  
proposed to be located in Martin County.

Docket No. 020262-EI

In re: Petition of Florida Power & Light Company  
for a determination of need for a power plant  
proposed to be located in Manatee County.

Docket No. 020263-EI  
Filed April 24, 2002

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COMMISSION  
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RESPONSE TO FLORIDA POWER  
& LIGHT COMPANY'S EMERGENCY MOTION FOR ABEYANCE  
AND PETITION FOR WAIVER OF RULE 25-22.080, F.A.C.

CPV Cana, Ltd., through its undersigned counsel and pursuant to Section  
120.542, Florida Statutes (F.S), Rule Chapter 28-104, Florida Administrative Code (F.A.C.), and  
Rule 28-106.204, F.A.C., hereby files this Response to Florida Power & Light Company's (FPL)  
Emergency Motion for Abeyance and Petition for Waiver of Rule 25-22.080, F.A.C., and in

support, states the following:

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The Commission Should Waive the Timeframes for Conducting the Determination  
of Need Proceeding Rather than Holding the Proceeding in Abeyance

1. In order to correct numerous, likely-fatal deficiencies in its August 2001 Request  
for Proposals (RFP) solicitation and evaluation process, FPL has asked the Commission to "hold  
in abeyance" this need determination proceeding while it conducts what it terms a "supplemental  
RFP process." In making this request, FPL attempts to skirt the Commission's rules governing  
the power plant determination of need proceedings. For the following reasons, FPL's request to  
hold this proceeding abeyance should be denied, and the Commission should instead the eave the  
applicability of Rule 25-22.080 to this proceeding, with respect to the timeframes established in

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that rule.

- a. Rule 25-22.080(2), F.A.C., provides in pertinent part:

Within 7 days following receipt of a petition, ... the Commission shall set a date for hearing, which shall be within 90 days of receipt of the petition.... Following the hearing, each party may make submittals to the Commission on a time schedule to be determined in accordance with the requirements of each proceedings [sic], but terminating no later than 120 days from receipt of the petition. The matter will be placed before the Commission on an agenda which will permit a decision no later than 135 days from the date of receiving the petition ....

Rule 25-22.080(2), F.A.C. (emphasis added).

b. The timeframes in Rule 25-22.080(2) are not advisory guidelines that may be “abated” upon request. They are mandatory timeframes that must be followed once a utility has filed a petition for a determination of need proceeding to construct a power plant. In this case, FPL filed its petitions for the Martin and Manatee power plant additions on March 22, 2002. When FPL filed its petitions, it was fully aware of -- and indeed, was responsible for -- the numerous substantive and procedural deficiencies in its August 2001 RFP process, including the failure of the RFP to even mention the FPL Manatee power plant as a site at which additional capacity would be proposed. Notwithstanding, FPL sought to move forward with the need determination process. Now that its failure to follow the Bid Rule’s prescribed procedures have been brought to the Commission’s attention by numerous intervenors in this proceeding, FPL, faced with the prospect of having its petitions dismissed, seeks to have the Commission grant additional time so it can “correct” what it terms strictly “technical, procedural aspects” of the bidding process.

c. Nothing in Section 403.519, F.S., Rule 25-22.080, F.A.C., or in any other Commission rules governing the determination of need process, authorizes the Commission to “hold in abeyance” the proceeding or “abate” any of the timeframes and deadlines codified in

Rule 25-22.080(2). Tellingly, FPL does not cite any statutory, case law, or rule authority to support the “abeyance” relief it now seeks in order to salvage its need determination proceedings.

d. Rather than granting unauthorized relief in the form of “abeyance” from the determination of need timeframes and deadlines codified in Commission rules, the Commission should instead waive the timeframes pursuant to Section 120.542, F.S., and Rule Chapter 28-104, F.A.C. Indeed, the Legislature created the waiver process in Section 120.542, F.S., specifically for the purpose of addressing situations such as the one facing FPL and the intervenors in this proceeding, in which unfair and unintended results may result from strict adherence to the rule’s terms. Section 120.542(2), F.S., provides that waiver shall be granted when the person subject to an administrative rule demonstrates that: (1) the application of the rule would create a substantial hardship or violate principles of fairness; and (2) the underlying purpose of the statute would be achieved by other means. Section 120.542, F.S.; Rule Chapter 28-104, F.A.C. These conditions exist in this case.

e. As FPL described in detail its Emergency Motion to Hold Proceedings in Abeyance, strict application of the timeframes in Rule 25-22.080 works a substantial hardship on all parties to this proceeding. Accordingly, CPV Cana does not dispute FPL’s contention that the timeframes in Rule 25-22.080 should be modified to enable FPL to conduct its proposed “supplemental RFP” process. However, the appropriate legal process for modifying these rule timeframes is through the statutorily created waiver process -- not through an unauthorized “abeyance” of the proceedings.

f. Further, CPV Cana takes serious issue with the fairness and reasonableness of the substitute schedule FPL proposes in its Emergency Motion to Hold Proceeding in Abeyance.

CPV Cana submits that the substitute schedule that FPL proposes as a “remedy” to what amounts to a self-created hardship, is unfair to and works a substantial hardship on CPV Cana and the other intervenors in this proceeding. In its Motion, FPL notes that there were 61 days left on its need determination time clock when it filed its “emergency” motion on April 22, 2002.<sup>1</sup> It is not expected that a ruling will be entered until, at the earliest, Friday, April 26, 2002. This would leave 56 days in the proceeding under the timeframe imposed by Rule 25-22.080(2) in which to completely prepare for a need determination hearing. Given that FPL proposes to conduct a what is tantamount to a new RFP process for the proposed Manatee capacity addition, and proposes to substantially revise its RFP for the Martin facility, this “new” need determination case that FPL is likely to present at the end of its “supplemental RFP process” will be substantially and materially different from the case FPL has filed and presented to date. For example, it is anticipated that the “new” need determination case likely would yield and rely on completely new data, and would involve the solicitation of new proposals and the submittal of new and substantially different bids than those submitted in response to the August 2001 RFP. Further, the “new” need determination proceeding would require the performance of new computer modeling and analysis, not to mention the introduction of numerous substantial issues inherent in the proposal of new power plant capacity at a new location, with attendant issues related to transmission, gas supply, and other matters, as detailed in Rule 25-22.081, F.A.C.

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<sup>1</sup> CPV Cana notes that even though FPL has styled its pleading as an “Emergency” Motion to Hold Proceedings in Abeyance, it has failed to allege with specificity facts explaining why there exists an immediate danger to the public health, safety, or welfare that requires the Commission’s entry of an emergency order in this proceeding. Section 120.569(2)(n), F.S. Case law makes clear that conclusory predictions of harm that are unsupported by specific factual allegations are not sufficient to support claims of an emergency. Commercial Consultants Corp. v. Dept. of Business Regulation, 363 So. 2d 1162 (Fla. 1<sup>st</sup> DCA 1978). An “emergency” may exist as far as FPL is concerned, but as discussed above, that “emergency” was self-created largely as a result of FPL’s failure to follow the Bid Rule process in Rule 25-22.082.

g. Moreover, FPL appears in its Motion to have a 30-day discovery response period apply to the proceeding, notwithstanding the unrealistically compressed timeframe it proposes for the conduct of the process. A mere 56 days in which to conduct meaningful discovery and adequately prepare for hearing in this proceeding on what will be essentially a new proposal for capacity addition at the Manatee and Martin facilities is woefully insufficient and unfair, and thus imposes a substantial hardship on CPV Cana and other parties in this proceeding. This is particularly true, given that it presently appears that the only computer upon which computer modeling runs can be performed without questions as to the accuracy of the results arising, is FPL's mainframe computer located in Miami – for which access must be coordinated, scheduled, and paid.

h. In sum, under the circumstances of this proceeding as described herein and in FPL's Motion, the need determination timeframes in Rule 25-22.080 do indeed work a substantial hardship on the parties to this proceeding, and, accordingly, those timeframes should be waived pursuant to Section 120.542, F.S., and a more realistic schedule established for conducting the "supplemental RFP" process and subsequent need determination process. However, as previously noted, the schedule FPL proposes in which to conduct the "supplemental RFP" process and need determination proceeding is both unrealistic and unfair. Accordingly, while CPV concurs that relief needs to be granted with respect to the existing timeframes in this proceeding under Rule 25-22.080, F.A.C., it opposes the substitute timeframes FPL proposes in its Motion, and requests the Commission to establish an alternative schedule.

i. In addition to the fact that strict application of the rule works a substantial hardship on CPV Cana in this proceeding, the underlying purpose of Section 403.519, F.S., will be accomplished by altering the proceeding timeframes to provide a more fair and realistic

schedule than that presently imposed by Rule 25-22.080, or suggested by FPL in its Motion. Granting CPV Cana's Petition for Waiver from the timeframes in Rule 25-22.080 would enable FPL to conduct its "supplemental RFP" process to obtain meaningful, responsive alternative proposals from bidders for its proposed capacity additions. This would advance the purpose of Section 403.519, F.S., that a determination of need proceeding be directed at determining the most cost-effective alternative for the proposed capacity. Neither the timeframes dictated by Rule 25-22.080 nor the substitute schedule proposed by FPL would further this purpose under the circumstances in this proceeding. To this end, CPV Cana requests that the Commission set a more realistic schedule in order to foster productive, fair RFP and determination of need processes.

j. The waiver of the timeframes in Rule 25-22.080 requested in this Petition would constitute a permanent waiver.

k. There is Commission precedent for granting waiver of Rule 25-22.080 under circumstances in which meeting the rule's timeframes would work a hardship on the parties involved in the process. In In re: Petition for determination of need for an electrical power plant in Okeechobee County by Okeechobee Generating Company, LLC, Docket No. 991462-EU, Order No. PSC 99-2438-PAA-EU (Dec. 13, 1999), FPL, along with Florida Power Corporation, sought and received a waiver of Rule 25-22.080, in part on the ground they needed more time to prepare for and meaningfully participate in the proceeding. Florida Power & Light Company's Motion to Join Florida Power Corporation's Emergency Petition for Waiver of Rule 25-22.080 and Request for Stay, Docket No. 991462-EU (Oct. 21, 1999). In this proceeding, FPL alleges and CPV concurs, that circumstances exist that create a substantial hardship on the parties, such that the timeframes should be modified to provide for a more meaningful and fair RFP and need

determination process. CPV Cana submits that this should be accomplished through a legislatively authorized vehicle – the grant of a waiver – rather than through an unauthorized relief mechanism in form of “abeyance.”

The Commission Should Oversee the Conduct of  
and Evaluation of FPL’s Supplemental RFP Process

2. In its Emergency Motion to Hold Proceedings in Abeyance, FPL characterizes the numerous concerns raised by the intervenors, including CPV Cana, about FPL’s August 2001 RFP as “technical, procedural aspects of the bidding process” that are “not the intended focus of section 403.519, F.S.....” This characterization minimizes FPL’s failure to follow the Bid Rule in its August 2001 RFP process. In short, FPL appears to view the Bid Rule process as a necessary procedural hurdle to be overcome before FPL can pursue its self-build option for the Manatee and Martin power plants. CPV Cana is concerned that FPL’s “supplemental RFP process” will consist of an effort to comply with the procedural requirements of the Bid Rule, but that FPL’s evaluation of the proposals will yield the same result – FPL’s determination that its self-build option is the most cost-effective. To help avoid this outcome, CPV Cana respectfully requests that the Commission staff actively supervise the “supplemental RFP process,” including the evaluation and negotiation of the bids received by FPL in response to the RFP. Providing Commission oversight will provide bidders with confidence that an impartial evaluation will take place. Creating a sense of certainty that the goal line will remain fixed will encourage more bidders, enhance competition, and ensure that the ratepayers receive most cost-effective generating units. Finally, FPL should not be allowed to change its cost figures during the evaluation process so as to undercut the other bidders after FPL reviews the competing bids. (If FPL is permitted to alter its numbers after it reviews the numbers submitted by everyone else, it

should not be allowed to recover any costs beyond the figures it represents in its “winning” bid, should it again choose its self-build options.) In managing a docketed case, the prehearing officer has broad power to fashion appropriate relief. Rule 28-106.211, F.A.C. Fashioning such relief to ensuring that the “supplemental” RFP solicitation, evaluation and negotiation process is fair and transparent is within the power and duties of duties of the prehearing officer.

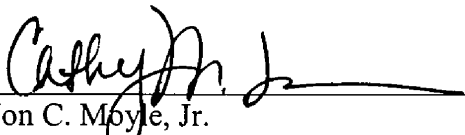
### Relief Requested

3. For the reasons discussed herein, CPV Cana respectfully requests the Commission to grant the following relief in this proceeding:

- a. Deny FPL’s Emergency Motion for Abeyance of Proceedings;
- b. Grant CPV Cana’s Petition for Waiver as set forth herein;
- c. Issue an Order that establishes procedure with respect to the conduct of the supplemental RFP process by FPL, and provides for active Commission oversight of the RFP process, evaluation and negotiation processes;
- d. Issue an Order that precludes FPL from making material changes to its “supplemental RFP” document after the submittal of bids, so that prospective bidders may respond with the certainty that material changes will not occur after the bids are submitted and being evaluated; and
- e. Issue an Order that precludes FPL from changing its cost data after it reviews the proposals submitted by other bidders, or alternatively, if FPL is permitted to change its cost data, order that it be precluded from recovering any sums greater than those represented by its self-build options, should FPL again declare itself the winner of the RFP process.



Respectfully submitted this 24<sup>th</sup> day of April, 2002.

A handwritten signature in dark ink, appearing to read "Jon C. Moyle, Jr.", written over a horizontal line.

Jon C. Moyle, Jr.

Florida Bar No. 727016

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Attorneys for CPV Cana, Ltd.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of CPV Cana, Ltd.'s Response to Florida Power & Light Company's Emergency Motion for Abeyance and Petition for Waiver of Rule 25-22.080, F.A.C. has been furnished by hand delivery this 24<sup>th</sup> day of April, 2002 (except for Reliant Energy which has been sent by facsimile and U.S. Mail this date), to the following:

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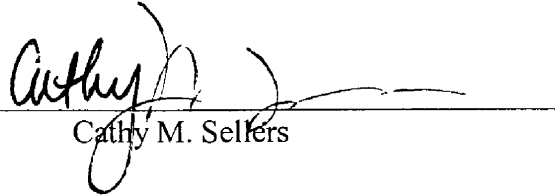
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