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FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

NOVEMBER 22, 1993

TO :DIRECTOR OF RECORDS AND REPORTING

FROM :DIVISION OF APPEALS (RULE)
DIVISION OF LEGAL SERVICES (PALECKI)
DIVISION OF ELECTRIC AND GAS (BALLINGER, FLOYD, TRAPP)
DIVISION OF RESEARCH AND REGULATORY REVIEW (HOPPE, HEWITT)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (MAUREY)

RE :DOCKET NO. 921288-EU, 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.
AGENDA:DECEMBER 6, 1993 - CONTROVERSIAL AGENDA - PARTIES MAY NOT PARTICIPATE

PANEL:FULL COMMISSION

CRITICAL DATES:NONE

SPECIAL INSTRUCTIONS: I:\PSC\APP\WP\921288.RCM

CASE BACKGROUND

In 1992 the Commission considered the joint petition to determine need filed by Cypress Energy Partners, L.P. and Florida Power & Light Company (FPL). During the proceedings, the Commissioners expressed frustration that the limited selection process used by FPL to select Cypress did not facilitate the Commission's statutory responsibility to determine the most cost-effective generating unit under Section 403.519, Florida Statutes. The Commissioners were particularly concerned about the need for a fair selection process with closure, and therefore directed staff to develop a rule instructing utilities in the procedures by which they select between competing providers of capacity and energy.

On October 5, 1992, Congress passed legislation known as the National Energy Policy Act of 1992 (Act). This broad based legislation covered numerous areas of the electric and gas industries. The Act requires the Commission, as the government agency responsible for regulating the electric industry in this state, to determine whether it is appropriate to implement the standards outlined in Section 712 of the Act.

In response to this federal requirement, the Commission opened Docket No. 930331-EU. However, because the issues raised in Section 712 are closely related to the subject matter of this rule making proceeding, the Commission decided at the April 20, 1993 Agenda Conference to consider the Section 712 provisions in connection with this docket. (See Order No. PSC-93-0710-FOF-EU issued May 10, 1993.)

Staff first developed a rule that required electric utilities to solicit bids for additional generating capacity. The focus of this first draft was to address all non-price attributes of the utility's need for additional generation in a model contract thereby leaving price as the sole remaining factor upon which competitive bids would be taken. The first draft rule did not represent a staff consensus on the best selection procedure, and staff believed that further investigation was necessary before recommending a proposed rule. The first draft rule was presented to the Commission for discussion purposes at the January 19, 1993 agenda conference. The Commission directed staff to hold a workshop, which was held on February 24, 1993. The workshop was attended by representatives from Florida Power Corporation, Florida Power & Light Company, Gulf Power Company and Tampa Electric Company, as well as municipal and cooperative utilities, numerous nonutility generators, and others. Participants were invited to file post-workshop comments.

After the workshop, staff redrafted the rule. The second draft simply required each utility to adopt a fair selection process with closure. In order to initiate a rule hearing, the Commission voted to propose this rule on August 3, 1993. Thereafter, a hearing was held on September 29, 30, and October 1, 1993. Participants included representatives from the University of Florida, Florida Power Corporation, Florida Power and Light, Kissimmee Utility Authority, Competitive Energy Producers Association (CEPA), Falcon Seaboard Corp., Florida Municipal Power Agency, Florida Municipal Electric Association, Seminole Electric Cooperative, Gulf Power Co., SONAT, Tampa Electric Co., Enron Power Corp., LEAF, City of Tallahassee Electric Dept., and Ark Energy.

At the hearing, staff presented an alternate draft of the rule that would require utilities to solicit proposals for generation alternatives prior to filing for a determination of need. Post-hearing comments were filed by Enron Power Corp., Joe Cresse, LEAF, Florida Power and Light, Florida Municipal Power Agency, Florida Municipal Electric Association, Florida Solar Energy Industries Association, Ark Energy, Ormat, Falcon Seaboard Corp., Gulf Power Co., Tampa Electric Co., Destec Energy Inc., and CEPA.

RULE SUMMARY AND INTENT

Before a rule governing the generation selection process can be formulated, one must first address the central issue of what role competition should play in the acquisition of new generating resources in Florida. Under the current regulatory scheme, as defined by statute, Florida's electric utilities are charged with an obligation to serve customers. Section 366.03, Florida Statutes, states in part: "Each public utility shall furnish to each person applying therefore reasonably sufficient, adequate, and efficient service upon terms as required by the commission". In order to meet this obligation to serve, each electric utility must forecast the future demand and energy requirements of its customers, taking into consideration conservation, and then plan for the construction or purchase of additional generating capacity to meet those requirements at the lowest practicable cost to the ratepayers.

Given the existing regulatory framework, staff believes that competition, and more specifically competitive bidding, should be used as a tool to assist electric utilities in fulfilling their statutory obligation to serve at the lowest cost. Generation planning is a normal business function of electric utilities. That function is reviewed by the Commission but would not normally be pre-empted by the Commission. It is the utility's job to provide adequate, reliable, safe, and economical electrical service to the public and it is the Commission's job to review the decisions made by the utility.

With the advent of federal legislation permitting non-utility generators to enter the bulk power supply market, utilities now have more alternatives to select from in order to meet their obligation to provide electrical service to the public. It is believed that competition among generation providers will generally benefit the public because it will result in lower prices and higher quality. Unbridled competition, however, is not likely to accomplish these goals. Neither will government control and pre-emption of the competitive selection process.

With these thoughts in mind, staff has proposed a rule which we believe strikes a balance between encouraging the cost savings which may be available through competition while recognizing the utility's obligation to serve and ensuing responsibility to plan, develop and manage its resources. Ultimately, however, it is the utility which must decide whether to build or purchase additional generating capacity and the Commission which must review these decisions to ensure that the public interest is served.

Basically, staff's proposed rule requires electric utilities to engage in a competitive bidding process unless they demonstrate that such is not in the best interest of their ratepayers. (Staff uses the term "bidding" to indicate the process described in the rule, which may not be the same way parties used that term at the hearing.) While the rule could stop at this simple statement of policy, staff believes that further direction is needed to ensure that a fair selection process with closure is employed by each electric utility.

Specifically, staff's proposed rule:

1. Requires all electric utilities (IOUs, coops and munis) to issue a Request For Proposals (RFP) prior to filing a petition for determination of need unless to do so is not in the best interest of the utilities' ratepayers.

2. Requires each utility RFP to identify the MW size, timing, and price and non-price attributes of the generating unit which the utility plans to build absent a more economical or reliable alternative.

3. Requires the utility to provide timely notice of its issuance of an RFP in major newspapers and publications with statewide and national circulation.

4. Requires the utility to evaluate proposals (which may include non-utility generators, utility generators, turnkey offerings, and other generating supply alternatives) from which a manageable group of potentially viable and cost-effective finalists would be selected.

5. Requires the utility to negotiate in good faith with any finalists to the solicitation process to achieve the most economical and reliable alternative to its next planned generating unit.

5. Limits the ability of non-participants to the RFP process to challenge the outcome of the selection process at a need determination proceeding. The selection process may be challenged at any time either on the Commission's own motion or by a justified complaint by a substantially affected party.

6. Provides for a case-by-case waiver from issuing an RFP based on a Commission finding that such a waiver is in the best interests of the utility's ratepayers.

ISSUE SUMMARY

ISSUE 1: Should the Commission adopt a rule that would require bidding or adopt a rule that would allow bidding?

RECOMMENDATION: The Commission should adopt a rule which requires bidding unless the utility can demonstrate on a case-by-case basis that bidding is not in the best interest of its ratepayers.

ISSUE 2: If bidding is required, should such a process be required for every capacity addition or for only those capacity additions which are subject to a determination of need pursuant to the Power Plant Siting Act?

RECOMMENDATION: Since the Power Plant Siting Act (PPSA) requires the Commission to predetermine the need for certain major power plant additions, this rule should only apply to those power plant additions subject to the PPSA. While staff would encourage the use of competitive bidding as a prudent means for all utilities to select other generation resources, the prudence of power plants built for IOUs not subject to a need determination under the PPSA should continue to be reviewed at the time they are placed in rate base.

ISSUE 3: Should the Commission adopt a rule that requires a preapproval of need and the evaluation criteria employed in the RFP process, commonly referred to as bifurcation?

RECOMMENDATION: No. A bifurcated process increases risk to the utility's ratepayers with no measurable increase in benefits. Such a process would also place the Commission in the position of making utility management decisions. The Commission should continue its role as a regulatory agency and initiate appropriate action should a complaint arise or upon its own motion.

ISSUE 4: If the Commission adopts a rule that requires bidding, should the Commission establish a scoring system to determine the "winner(s)"?

RECOMMENDATION: No. Each utility should be required to include as part of its RFP a detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price

and non-price attributes.

ISSUE 5: If the Commission adopts a rule that requires bidding, should the Commission be required to select a "winner"?

RECOMMENDATION: No. Because electric utilities have a statutory obligation to serve and an ensuing responsibility to plan, develop, and manage its resources, the utility should decide whether to construct its next planned generating unit or to select a generating alternative resulting from the bidding process. The Commission should continue to exercise its role as a regulatory agency under the Power Plant Siting Act and approve or deny a specific proposal at the need determination proceeding.

ALTERNATE RECOMMENDATION: Legal and Appeals staff agree with technical staff that the utility, not the Commission, should administer the bidding process. However, Legal and Appeals staff believe that the utility should be required to select a "winner" from the RFP participants, rather than entering into contract negotiations with finalists.

ISSUE 6: Should the Commission adopt a rule that would require generating capacity set asides in the bidding process for high efficiency cogeneration, solid waste facilities, and renewable technologies?

RECOMMENDATION: No, not at this time. A more appropriate forum to address this issue would be for the Commission to open a new rulemaking docket to repeal or amend Chapter 25-17, Part III, Utilities' Obligations With Regard To Cogenerators And Small Power Producers, Florida Administrative Code.

ISSUE 7: Should the Commission adopt a rule that would require an electric utility to solicit both supply and demand side alternatives to its proposed plant?

RECOMMENDATION: No. Any rule adopted by the Commission should focus on generation alternatives only. Whether to adopt demand-side bidding is a policy issue more appropriately addressed after the Commission sets conservation goals. Demand side bidding may be a means by which the utility can reach its goals.

ISSUE 8: If the Commission adopts a rule that requires bidding, should such a process be required for municipal and cooperative utilities as well as investor owned utilities?

RECOMMENDATION: Yes. Each electric utility subject to the provisions of the Power Plant Siting Act should be required to use bidding as a means of determining the most cost-effective generating alternative.

ISSUE 9: Should the Commission adopt Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity, as proposed?

RECOMMENDATION: No. Instead, the Commission should adopt a version of the staff's alternate rule, which was discussed at the hearing. The alternate rule should be changed by clarifying the definition of "participant"; adding the definition of "finalist"; adding notice requirements; and removing the preference for high efficiency cogenerators, solid waste facilities and renewable technologies. This proposed rule is contained in Attachment A.

ISSUE 10: Should the Commission adopt the amendments to Rule 25-22.081(4), Florida Administrative Code, as proposed?

RECOMMENDATION: No. The Commission should adopt a version that would slightly modify the amendments to rule 25-22.081(4) to more clearly incorporate proposed rule 25-22.082. This proposed rule is contained in Attachment B.

ISSUE 11: How, if at all, should the Commission implement the standards outlined in Section 712 of the National Energy Policy Act of 1992?

RECOMMENDATION: The Commission should adopt a slightly modified version of proposed rule 25-22.081(7) that would indicate that the rule only applies to investor-owned utilities. This proposed rule is contained in Attachment B.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission adopt a rule that would require

bidding or adopt a rule that would allow bidding?

RECOMMENDATION: The Commission should adopt a rule which requires bidding unless the utility can demonstrate on a case-by-case basis that bidding is not in the best interest of its ratepayers.

STAFF ANALYSIS: This is the basic threshold issue before the Commission which centers around the fact that the utility has the obligation to serve at the lowest cost. Section 403.519, Florida Statutes, commonly called the Power Plant Site Act (PPSA), requires that the Commission consider "whether the proposed plant is the most cost-effective alternative available" in the context of a need determination proceeding. Currently, there are several types of non-utility generation that are alternatives to the utility building its own generation. Bidding is a tool that can help the utility explore these alternatives and to satisfy its obligation to serve with the most cost-effective alternative.

Staff also recognizes that there may be circumstances where bidding may not be in the best interest of the utility's ratepayers (e.g. TECO's project that received partial Federal funding) To maintain this flexibility, any rule adopted should allow the utility to request a waiver from the rule if it can be shown that to do so would be in the best interest of the utility's ratepayers. Ultimately, the utility should be held accountable for its decisions and should continue to carry the responsibility and risk associated with the obligation to serve.

However, if the Commission decides to go forward with the originally proposed rule which simply requires utilities to adopt a fair selection process with closure, staff would recommend some clarifying language to indicate that it would only apply before filing for a need determination. This is consistent with the staff's belief that the purpose of any formalized selection process is to satisfy the utility's burden of evaluating alternatives to its proposed plant at a need determination proceeding.

ISSUE 2: If bidding is required, should such a process be required for every capacity addition or for only those capacity additions which are subject to a determination of need pursuant to the Power Plant Siting Act?

RECOMMENDATION: Since the Power Plant Siting Act (PPSA) requires the Commission to predetermine the need for certain major power plant

additions, this rule should only apply to those power plant additions subject to the PPSA. While staff would encourage the use of competitive bidding as a prudent means for all utilities to select other generation resources, the prudence of power plants built for IOUs and purchased power agreements not subject to a need determination under the PPSA should continue to be reviewed at the time they are placed in rate base or their cost is recovered.

STAFF ANALYSIS: Staff would recommend that any proposed bidding rule focus on projects that must conform with the PPSA rather than adopting a generic rule for all capacity additions pending the experience with the proposed rule. The logistics of bidding may tend to limit the opportunities to purchase power from other utilities due to the short lead time within which such power typically becomes available. For example, the current unit power sales and economy sales from the Southern Company to FPC and FPL became available with little or no advance notice. FPC and FPL acted quickly in order to secure the purchases.

Because of the specific review criteria contained in the PPSA, the utility must demonstrate that the proposed plant is the most cost-effective alternative. Bidding is a means by which this burden can be satisfied. Generation projects and purchased power agreements that are not required to go through the PPSA will continue to be reviewed on a case-by-case basis. The utility will be held responsible for obtaining the least cost alternative for its ratepayers.

There was general consensus among the participants to the hearing that a bidding process is a rather expensive process.(TR 560) Requiring bidding for smaller capacity additions that would not normally incur the expense and time of the power plant site act may add unnecessary costs to the project. Whether to bid or not is a decision each utility must make on a project by project basis. Power plants that do not go through the power plant site act receive no prior approval but, for IOUs, must sustain the review of the Commission when cost recovery is requested. This is a risk not taken lightly by most utilities. Requiring bidding for only PPSA projects also follows the logic behind the threshold size limit in the current power plant site act. That threshold was established for administrative efficiency. The same logic should be true for any bidding process.

ISSUE 3: Should the Commission adopt a rule that requires a preapproval of need and the evaluation criteria employed in the RFP process, commonly referred to as bifurcation?

RECOMMENDATION: No. A bifurcated process increases risk to the utility's ratepayers with no measurable increase in benefits. Such a process would also place the Commission in the position of making utility management decisions. The Commission should continue its role as a regulatory agency and initiate appropriate action should a complaint arise or upon its own motion.

STAFF ANALYSIS: This issue is one of the clear dividing lines between the staff and other participants to the rule hearing. Both utility and non-utility generators seem to favor a bifurcated proceeding in order to "provide a clear point of entry" and a "level playing field". As proposed by CEPA, the Commission would approve a MW need and an RFP package before any bids would be solicited. The RFP would contain a "well crafted contract" and incorporate a scoring mechanism that would enable an "independent third party" to evaluate all proposals.

Staff believes that a Commission decision is not needed to provide a clear point of entry. In a competitive market, a clear point of entry is obtained by providing timely notice of an RFP to a sufficient number of participants. Staff's proposed rule would accomplish this by requiring widespread notice of the RFP. In fact, staff's proposed rule has many points of entry. From the time the utility's RFP is published up until a petition for need determination is filed, any substantially affected party can file a justifiable complaint or the Commission can act on its own motion to question any aspect of the selection process.

If a level playing field is a goal, it must be level for the ratepayer as well. Staff would also recommend that the Commission should focus on adopting a rule that would result in the best deal for the ratepayers. This goes hand in hand with the staff's belief that as long as the utility has the obligation to serve, it should retain the responsibility to make the decisions it deems necessary to meet that obligation and justify those decisions to the Commission. Staff's proposed rule would accomplish this by having the utility solicit proposals, negotiate the best deal for its ratepayers, and justify that decision before the Commission at the need determination proceeding.

While a bifurcated proceeding may benefit the stockholders of the utility and non-utility generators, staff can see no benefit for the ratepayers since they would be subjected to the risk associated with paying for a decision that was made before it was necessary. For a bifurcated proceeding to be meaningful, the MW amount, type of

plant, and location should all be identified. All bids could then be evaluated against the utility's planned unit addition to see if a better deal for the ratepayers was available. From our experience with the annual planning hearings, this would result in a 9 to 11 month proceeding before the first bid could be solicited. Adding this extra time would increase the risk that the ultimate decision to build a particular plant may not be based on the most current planning data. This would result in locking into a potentially less than optimal generation mix.

CEPA makes the argument that bifurcation results in the Commission making the same decisions, just at the beginning of the process rather than at the end. Staff disagrees with this characterization because, as with most decisions, timing is critical. Because of the dynamic nature of the planning process, a decision made 9 to 11 months before the first bid is solicited places the ratepayer at risk of paying for a decision before it was necessary. Preapproval of the utility's evaluation criteria and need for power well before the utility would commit to the proposed project would increase the risk that the ultimate decision to build a particular plant may not be the most cost-effective alternative for its ratepayers and would place the Commission in the position of making utility management decisions.

CEPA also recognizes the subjective concerns of the utility but states that these concerns could be taken care of in a "well crafted contract". Mr. Dolan on behalf of FPC put it best when he stated that "a well crafted contract is in the eyes of the beholder" (TR 757) In other words, what the utility may consider reasonable, the non-utility generator may not. Staff does not object to a sample contract as a starting point for negotiations but does not wish to overly constrain the utilities acquisition process. Staff's proposed rule would require solicitations for the purpose of selecting a manageable number of viable and cost-effective proposals from which the utility can attempt to finalize a purchased power contract. To have a utility put forth a "well crafted" contract to be accepted without modification would expand the Commission's current standard offer contract to all takers, not just qualifying facilities and may not result in the lowest cost to the utility's ratepayers.

Another argument proffered by CEPA supporting bifurcation is the notion that a predetermined need would draw more participants to the RFP process and thereby induce more competition and presumably a better price for the ratepayer. Participation in prior utility initiated bid processes has been substantial and staff is not convinced that an additional few participants will necessarily result in better prices

for the ratepayers. Any solicitation should focus on quality, not quantity. This has occurred naturally in the non-utility market. When PURPA was first enacted, there were several developers, small and large, and entrepreneurs. Most current independent power producers and other developers are large companies or subsidiaries of either utilities or manufacturers of generating equipment. These companies are well aware of the power needs of utilities and usually have a long history in the electric generation business. Based on the above, staff does not believe that there are any additional benefits for the utilities' ratepayers to be gained as a result of a bifurcated proceeding.

ISSUE 4: If the Commission adopts a rule that requires bidding, should the Commission establish a scoring system to determine the "winner(s)"?

RECOMMENDATION: No. Each utility should be required to include as part of its RFP a detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price and non-price attributes.

STAFF ANALYSIS: Most commentors agreed that a strict scoring procedure would be difficult at best. In addition, it is well known that any strict scoring system can be crafted to reach a desired outcome. What this means is that if a strict scoring procedure is adopted, competing providers will be litigating the criteria and weighting factors to favor their project, without regard for the utility's needs and without the Commission knowing what the proposed project may be. Staff would suggest that a more rational approach would be for the utility to identify its needs and that developers respond to those needs. This goes back to a common thread in the entire bidding issue which is that as long as the utility has the obligation to serve, it should retain the responsibility to make the decisions it deems necessary to meet that obligation and justify those decisions to the Commission after the fact.

Another factor to consider if a strict scoring process is adopted is who will evaluate the proposals? However, with any evaluation there must be some subjectivity involved. If the Commission is the evaluator, this clearly places the Commission in the role of utility management. If a sealed bid approach is used and the utility evaluates the proposals, like TECO has proposed, this seems to invite litigation. Staff does not believe that a truly independent third party, other than the Commission, could be agreed upon to evaluate the proposals.

Also, staff's proposed rule would allow any substantially affected party to file a justifiable complaint or the Commission can act on its own motion to question any aspect of the selection process. This type of process would neither eliminate nor encourage litigation but would place the Commission in the role as an independent third party evaluator if the need arises. The Commission is currently required to act as a third party evaluator pursuant to the PPSA.

One purpose of a strict scoring process is to focus on price as the determining factor. Therefore, a strict scoring process and a sealed bid approach go hand in hand. The disclosure of the utility's projected cost was the topic of much debate at the hearing. Much of the utility opposition to publishing its cost was based on the belief that the utility would be bound by that cost and that the non-utility generators would congregate their proposals around that cost which would virtually eliminate any savings to the ratepayers. The intent of the staff proposed rule is not to hold the utility to its initial bid price but rather continue to review the prudence of additional expenditures over the life of the plant. This was discussed repeatedly at the hearing. (TR 22, 30-34, 57-81, 90-93) Staff would prefer that the utility publish its projected costs over a sealed bid approach based on the discussions contained in Issues 1 and 3. The staff proposed rule would require the utility to publish its cost estimates which would allow the Commission to fully analyze conservation programs, provide some basic information to potential providers, allow for the continuation of standard offer contracts, and act as a sanity check when the utility files a need determination either on its own or jointly with a non-utility generator. The level of detail that was in the staff alternate rule at the time of the hearing is what may require some modification. Staff recognizes that some of the parameters required may not apply to all utilities (e.g. no AFUDC for municipalities) and that publishing the utility's estimated costs may cause potential providers to congregate their proposals around that cost. However, competing providers will still compete with each other to make it to the negotiating table. Also, if a utility only publishes the technical criteria of its avoided unit, any reputable power supplier can figure out the utility's cost with a fair degree of accuracy (TR 552). If no utility cost data is published, then the cost data used to evaluate conservation should be sealed as well. Otherwise the Commission could not fairly evaluate conservation programs without supplying privileged information to potential generation suppliers. Also, without the utility publishing its avoided cost, the Commission could never approve another standard offer contract. If the Commission does not require a strict scoring procedure, then staff recommends that there is no additional benefit to the utility's ratepayers by withholding the utility's estimated

costs.

ISSUE 5: If the Commission adopts a rule that requires bidding, should the Commission be required to select a "winner"?

RECOMMENDATION: No. Because electric utilities have a statutory obligation to serve and an ensuing responsibility to plan, develop, and manage its resources, the utility should decide whether to construct its next planned generating unit or to select a generating alternative resulting from the bidding process. The Commission should continue to exercise its role as a regulatory agency under the Power Plant Siting Act and approve or deny a specific proposal at the need determination proceeding.

ALTERNATE RECOMMENDATION: Legal and Appeals staff agree with technical staff that the utility, not the Commission, should administer the bidding process. However, Legal and Appeals staff believe that the utility should be required to select a "winner" from the RFP participants, rather than entering into contract negotiations with finalists.

STAFF ANALYSIS: The result of requiring the Commission to select a "winner" is to take a so called competitive process and place it into a political and highly litigated process. Staff finds it odd that the non-utility generators, with the exception of Enron, seem to favor the Commission selecting a "winner" yet they espouse the virtues of competition and deregulation of the generation industry. What this means to staff is that apparently the non-utility generators believe they can convince the Commission, or possibly the Governor and Cabinet, that their project is the best rather than convincing the utility at the negotiating table. In the end, the ratepayers should be better off if the non-utility and utility generators sit at the negotiating table rather than lobbying and litigating in the political arenas. This is consistent with past Commission policy regarding qualifying facilities where the Commission has expressed a preference for negotiated contracts and requires the investor owned utilities to negotiate in good faith.

Another twist on this issue would be for the utility to bring forward two or three alternatives which were approximately equal in price and reliability but differed in fuel type. These competing alternatives could then proceed through the power plant site act and ultimately the Governor and Cabinet would have a variety of choices

before them. It is staff's belief that this type of process would stifle true competition and would not provide closure. True competition would again be shifted from the negotiating table to the political arena. Staff also believes that such a process would not be practical because it would require several projects to proceed through the permitting process at great expense and may limit the number of potential providers. At the hearing, commentors for the municipalities and non-utility generators stated that putting together a proposal was, by itself, an expensive proposal. To require a process where several competing participants would proceed through the PPSA at the same time would favor the developers who have large amounts of available capital and are politically well-connected. This does not represent a level playing field within the non-utility generation industry and would not result in the least cost alternative for the ratepayer.

Staff supports the basic economic theory that competition should result in lower prices for the end user. The staff proposed rule creates a framework from which competition for generation supply can evolve. By requiring the utility to issue an RFP and enter into subsequent negotiations, the Commission is making the policy statement that it wants the utilities to consider a wide variety of generation alternatives in order to get the best deal for their ratepayers. As stated earlier, the utility should maintain the responsibility to select the most viable, reliable, and cost-effective alternative for its ratepayers.

ALTERNATE STAFF ANALYSIS: Legal and Appeals staff agree with technical staff that the utility, not the Commission, should administer the bidding process. However, Legal and Appeals staff recommend that the utility should be required to select a "winner" from the RFP participants, rather than entering into contract negotiations with finalists.

The Commission's current rules require utilities to negotiate in good faith with cogenerators. The new rule will do nothing more than require the additional step of an RFP, which will limit the number of parties with whom a utility must negotiate. The negotiation phase has produced problems in the past, which is one of the reasons the Commission decided to pursue a new rule. The recommended rule will only lead to the same problems. There are many ways that a reluctant utility can "kill" a proposal through the negotiating process, or even change the project from the one described in the RFP.

The rule should require an RFP that is sufficiently detailed to

allow the utility to select the most cost-effective project and enter into a contract. Whether the RFP includes the type of "well-crafted contract" discussed at the hearing should be within the utility's discretion, however, the RFP should include enough detail to cover the major contingencies of the deal so that the utility is not required to negotiate, and only minor details remain to be ironed out.

ISSUE 6: Should the Commission adopt a rule that would require generating capacity set asides in the bidding process for high efficiency cogeneration, solid waste facilities, and renewable technologies?

RECOMMENDATION: No, not at this time. A more appropriate forum to address this issue would be for the Commission to open a new rulemaking docket to repeal or amend Chapter 25-17, Part III, Utilities' Obligations With Regard To Cogenerators And Small Power Producers, Florida Administrative Code.

STAFF ANALYSIS: The initial thought behind allowing a preference for high efficiency cogenerators, renewable, and solid waste facilities was to make it easier for them to get to the negotiating table, not to give a price preference over other technologies. By definition most, if not all, of these three types of facilities are qualifying facilities. Therefore, staff would recommend that a more appropriate forum to address the issue of set asides for these facilities would be during a rulemaking docket to repeal or amend Chapter 25-17, Florida Administrative Code. If some type of preference is given to these facilities pursuant to a bidding rule, there may be a conflict with the Commission's existing rules for utilities to negotiate with qualifying facilities in good faith, as directed in Rule 25-17.0834, Florida Administrative Code.

LEAF has recommended that any bidding rule contain a set aside of 5% of capacity needs to be met through solar energy sources. LEAF also requests a "modest price preference" be given over other energy sources. Apparently, LEAF has misconstrued the staff's intent of the preference recommended for renewable technologies that was discussed at the hearing. If a particular type of technology requires a subsidization to further the development of that technology, there are other means to obtain that subsidy. The Commission is responsible for approving only demand and supply side alternatives that are cost-effective to the utility's general body of ratepayers. In its post hearing comments, the Florida Solar Energy Industries Association states that the 5% set aside for solar technologies would cost an

average of $2.1/watt and that coal fired generation would cost $1.2/watt.

ISSUE 7: Should the Commission adopt a rule that would require an electric utility to solicit both supply and demand side alternatives to its proposed plant?

RECOMMENDATION: No. This rule should focus on generation alternatives only. Whether to adopt demand-side bidding is a policy issue more appropriately addressed after the Commission sets conservation goals. Demand side bidding may be a means by which the utility can reach its goals.

STAFF ANALYSIS: The Commission is establishing new policy with the proposal of a bidding rule. As such, the Commission should proceed cautiously until it becomes more familiar with the process. The inclusion of demand side alternatives in a competitive bidding process would add another layer of complexity. Staff believes that the appropriate place to address the Commission's policy on levels of demand side alternatives is the current conservation goals dockets. Once these goals are approved, the corresponding amounts of conservation will become part of the utilities plans. Demand side bidding may be a means by which the utility can reach its goals. Therefore, staff would recommend that the Commission adopt a rule that only addresses supply side alternatives at this time.

ISSUE 8: If the Commission adopts a rule that requires bidding, should such a process be required for municipal and cooperative utilities as well as investor owned utilities?

RECOMMENDATION: Yes. Each electric utility subject to the provisions of the Power Plant Siting Act should be required to use bidding as a means of determining and selecting the most cost-effective generating alternative.

STAFF ANALYSIS: It is staff's opinion that the purpose of a bidding process is to satisfy the utility's burden of demonstrating that the proposed facility is the most cost effective alternative available under Section 403.519, Florida Statutes. The municipal utilities have suggested that they be exempt from any bidding requirements because they are financed differently than investor owned utilities and non-utility generators and therefore can build capacity cheaper than either entity. Staff recommends that as long as Section 403.519,

Florida Statutes, requires the Commission to consider whether the proposed plant is the most cost-effective alternative, then the municipal and cooperative utilities should be required to use bidding as a tool to satisfy that burden of proof. Also, as discussed in Issue 2, the cost of a bidding procedure may add unnecessary costs to a small project but are a small percentage of the cost of permitting a plant through the power plant site act. If this is true, then the municipal and cooperative utilities should not be unduly harmed and the alleged financing advantage can be fleshed out.

ISSUE 9: Should the Commission adopt Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity, as proposed?

RECOMMENDATION: No. Instead, the Commission should adopt a version of the staff's alternate rule, which was discussed at the hearing. The alternate rule should be changed by clarifying the definition of "participant"; adding the definition of "finalist"; adding notice requirements; and remove the preference for high efficiency cogenerators, solid waste facilities and renewable technologies. This proposed rule is contained in Attachment A.

STAFF ANALYSIS: Staff has recommended four modifications plus some minor word changes to the staff alternate rule that was presented at the hearing. These modifications are in response to comments by other parties to the hearing and to clarify staff's intent of the rule.

In its comments, FPL suggested language that would clarify who a participant would be in a bidding process. Staff believes that this clarification is useful and should eliminate any question as to who the bidding process is intended to involve.

To clarify the staff's intent of the RFP process to be used as a tool to allow utilities to evaluate viable alternatives, the definition of a finalist is necessary. A finalist is someone who submitted a proposal and was selected by the utility to attempt to finalize a contract through negotiations. Becoming a finalist does not guarantee a purchased power contract.

In the discussion between Commissioner Clark and the CEPA witness Mr. Huddleston, a concern was raised about public notice of the location of potential power plants. (TR 513-525) Based on this, staff would recommend that a more rational system of noticing requirements would be to have the developer who submits a proposal also publicly notice its submission in the area of its proposed project. Later, when the

utility selects its finalists, the utility would publish notices in all the affected areas. Public notice would again be published pursuant to the power plant site act when a final project is selected. This noticing process would timely notify the public and should bring to light local opposition which may question the viability of a proposed project.

The initial thought behind allowing a preference for high efficiency cogenerators, renewable, and solid waste facilities was to make it easier for them to get to the negotiating table, not to give a price preference over other technologies. As discussed in Issue 6, staff recommends that any preferences be discussed in the context of the existing qualifying facility rules. By definition most, if not all, of these three types of facilities are already qualifying facilities. Staff would argue that in either situation, these types of facilities should not be paid more than the utility's avoided cost.

ISSUE 10: Should the Commission adopt the amendments to Rule 25-22.081(4), Florida Administrative Code, as proposed?

RECOMMENDATION: No. The Commission should adopt a version that would slightly modify the amendments to rule 25-22.081(4) to more clearly incorporate proposed rule 25-22.082. This proposed rule is contained in Attachment B.

STAFF ANALYSIS: The proposed amendments to Rule 25-22.081(4) were originally included to describe the utility's selection process. This language is still applicable in order to describe how the utility complied with proposed rule 25-22.082. Staff recommends that the Commission adopt a version of Rule 25-22.081(4) that more clearly references the selection process described in proposed Rule 25-22.082. The recommended language requires the utility to provide a detailed description of the finalists selected to participate in subsequent contract negotiations as part of its petition for determination of need.

ISSUE 11: How, if at all, should the Commission implement the standards outlined in Section 712 of the National Energy Policy Act of 1992?

RECOMMENDATION: The Commission should adopt a slightly modified version of proposed rule 25-22.081(7) that would indicate that the

rule only applies to investor-owned utilities. This proposed rule is contained in Attachment B.

STAFF ANALYSIS: Section 712 of the Act requires that:

To the extent that a State regulatory authority requires or allows electric utilities for which it has ratemaking authority to consider the purchase of long-term wholesale power supplies as a means of meeting electric demand, such authority shall perform a general evaluation of:

(i) the potential for increases or decreases in the costs of capital for such utilities and any resulting increases or decreases in retail rates paid by electric consumers, that may result from purchases of long-term wholesale power supplies in lieu of the construction of new generation facilities by such utilities;

(ii) whether the use by Exempt Wholesale Generators (EWGs) of capital structures which employ proportionally greater amounts of debt than the capital structures of such utilities threatens reliability or provides an unfair advantage for EWGs over such utilities;

(iii) whether to implement procedures for the advance approval or disapproval of the purchase of a particular long-term wholesale power supply; and

(iv) whether to require as a condition for the approval of the purchase of power that there be reasonable assurances of fuel supply adequacy.

There was a great deal of discussion during the hearing regarding the Section 712 provisions. On the one hand, witnesses appearing on behalf of the investor-owned utilities provided prefiled comments or testified that purchases of long-term wholesale power could increase the purchasing utility's cost of capital and threaten its system reliability. On the other hand, witnesses representing various non-utility generators provided prefiled comments or testified that purchased power could lower the purchasing utility's cost of capital and does not threaten the reliability of its system. Between these two extremes, both FPC witness Miller (TR 671, 678) and TECO witness Hadaway (TR 781, 787) acknowledged that there are risks with either

the build or buy option and suggested the Commission look at the costs associated with each option on a case-by-case basis. Staff believes the testimony of witnesses Miller and Hadaway, as well as the contradicting testimony presented by many of the witnesses who addressed the Section 712 provisions, supports its recommendation that the Section 712 issues should be addressed on a case-by-case basis.

The Commission already evaluates the Section 712 provisions whenever they are raised as issues each time it considers a need determination filing. By adopting Rule 25-22.081(7), the Commission would codify its existing practice in response to the requirements of the Act. However, during the hearing it was argued that under a strict interpretation of the Act, the Section 712 provisions only apply to investor-owned utilities since these utilities are the only ones over which the Commission has ratemaking authority. Therefore, staff has recommended that proposed rule 25-22.081(7) be modified to only apply to investor-owned utilities.

Staff believes that the Commission should continue to evaluate the various issues set forth in Section 712 of the Act each time it makes a determination of need. Therefore, staff recommends that need determination petitions include the following information whenever the generation addition is the result of a purchased power agreement between an investor-owned utility and a non-utility generator: a discussion of the potential for increases or decreases in the purchasing utility's cost of capital, the effect of the seller's financing arrangements on the purchasing utility's system reliability, any competitive advantage to the seller resulting from the seller's financing arrangements and the adequacy of the seller's fuel supply.

ATTACHMENTS:

Attachment A: Rule 25-22.082, Selection of Generating Capacity
Attachment B: Rule 24-22.081, Contents of Petition

25-22.082 Selection of Generating Capacity

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

(a) Next Planned Generating Unit: the next generating unit addition planned for construction by an investor-owned, municipal or cooperative utility that will require certification pursuant to Section 403.519, Florida Statutes.

(b) Request for Proposals (R.F.P.): a document in which a utility publishes the price and non-price attributes of its next planned generating unit in order to solicit and screen, for subsequent contract negotiations, competitive proposals for supply-side alternatives to the utility's next planned generating unit.

(c) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a utility's R.F.P. A participant may include utility and non-utility generators as well as providers of turnkey offerings and other utility supply side alternatives.

(d) Finalist: one or more participants selected by the utility with whom to conduct subsequent contract negotiations.

(2) Prior to filing a petition for determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, an electric utility shall evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (R.F.P.).

(3) Each utility shall provide timely notification of its issuance of an R.F.P. 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 R.F.P. package may be requested;

(b) a general description of the utility's next planned generating unit, including its planned in-service date, MW size, location, fuel type and technology; and

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

(4) Each utility's R.F.P. shall include, at a minimum:

(a) a detailed technical description of the utility's next planned generating unit or units on which the R.F.P. is based, as well as the financial assumptions and parameters associated with it, including, at a minimum, the following information:

1. a description of the utility's next planned generating unit(s) and its proposed location(s);

2. the MW size;

3. the estimated in-service date;

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ATTACHMENT A

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 planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;

11. a description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;

12. a discussion of the actions necessary to comply with environmental requirements; and

13. a summary of all major assumptions used in developing the above estimates;

(b) a schedule of critical dates for solicitation, evaluation, screening of proposals and subsequent contract negotiations;

(c) 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;

8. pricing structure; and

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

(5) As part of its RFP the utility shall require each participant to publish a notice in a newspaper of general circulation in each county in which the

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participant's proposed generating facility would be located. 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 utility that solicited proposals, and a general description of the proposed power plant and its location.

(6) Within 30 days after the utility has selected finalists, if any, from the participants who responded to the R.F.P. the utility shall publish notice in a newspaper of general circulation in each county in which a finalist has proposed to build an electrical power plant. The notice shall include the name and address of each finalist, the name and address of the utility, and a general description of each proposed power plant, including its location, size, fuel type, and associated facilities.

(7) Each electric utility shall file a copy of its R.F.P. with the Commission.

~~(4) After a utility identifies a need for additional generating capacity it shall select a provider of the generating capacity by employing a fair selection procedure. The selection process implemented shall contain, at a minimum, provisions which are sufficient to:~~

~~(a) provide a clear point of entry for nonutility generators within two years before the required construction start date of the generation addition, to allow for contract negotiations and plant certification, by notifying the nonutility generators on the mailing list kept pursuant to subsection (3) below of the need and procedures to follow to participate in the selection process;~~

~~(b) allow nonutility generators to participate in the selection process on a nondiscriminatory basis;~~

~~(c) ensure that projects proposed by nonutility generators are capable of providing reliable electric service over the life of the project; and~~

~~(d) ensure timely completion of any generating capacity addition in order to meet the demands of the utility's customers.~~

~~(2) Bidding is encouraged as a selection method. However, utilities may use any selection method that complies with the provisions of this rule.~~

~~(3) Each utility shall maintain a mailing list of nonutility generators that contact the utility regarding power sales.~~ (5) Within one year from the ~~commencement of the selection process, the electric utility shall furnish the Commission with either a signed purchased power agreement or an explanation as to why no purchased power agreement was found to be beneficial to the utility's general body of ratepayers.~~

(5) ~~(5)~~ The Commission shall not allow potential suppliers of capacity who were not participants ~~nonutility generators that did not participate in the selection process~~ to contest the outcome of the selection process in a power plant need determination ~~siting~~ proceeding.

(6) ~~(6)~~ The Commission may waive any ~~the~~ procedural requirements of this rule upon a showing that the waiver is in the public interest ~~it will facilitate the selection~~

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ATTACHMENT A

~~process without impairing its fairness.~~

Specific Authority: 120.53(1)(c), 350.127(2), 366.05(1), 366.051, F.S.

Law Implemented: 403.519, 366.051, F.S.

History: New _____.

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ATTACHMENT A

25-22.051 Contents of Petition. Petitions submitted to commence a proceeding to determine the need for a proposed electrical power plant or responses to the Commission's order commencing such a proceeding shall comply with the other requirements of Chapter 25-22, Florida Administrative Code ~~F.A.C. Chapter 25-2, F.A.C.~~ as to form and style except that a utility may, at its option, submit its petition in the same format and style as its application for site certification pursuant to Sections 403.501 through 403.517, Florida Statutes ~~F.S.~~ so long as the informational requirements of this rule and Chapter 25-22, Florida Administrative Code ~~F.A.C. Chapter 25-2, F.A.C.~~ are satisfied. The petition, to allow the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine whether the proposed plant is the most cost effective alternative available, shall contain the following information.

(1) A general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections.

(2) A general description of the proposed electrical power plant, including the size, number of units, fuel type and supply modes, the approximate costs, and projected in-service date or dates.

(3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant including the general time within which the generating units will be needed. Documentation shall include historical and forecasted summer and winter peaks, number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions. Load forecasts shall identify the model or models on which they were based and shall include sufficient detail to permit analysis of the model or models. If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

(4) A summary discussion of the major available generating alternatives which were examined and evaluated pursuant to Rule 25-22.052, Florida Administrative Code, including a complete description of the selection process used ~~pursuant to 25-22.052~~ in arriving at the decision to pursue the proposed generating unit. The discussion shall include a detailed ~~general~~ description of the generating unit alternatives proposed by each finalist, if any, that was selected to participate in subsequent contract negotiations pursuant to Rule 25-22.052, Florida Administrative Code, including purchases where appropriate, and an evaluation of each alternative in terms of economics, reliability, long-term flexibility and usefulness and any other relevant factors. Those major generating technologies generally available and potentially appropriate for the timing of the proposed plan and other conditions specific to it shall be discussed.

(5) A discussion of viable nongenerating alternatives including an evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively

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ATTACHMENT B

and the effects on the timing and size of the proposed plant.

(6) An evaluation of the adverse consequences which will result if the proposed electrical power plant is not added in the approximate size sought or in the approximate time sought.

(7) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a nonutility generator, the petition shall include a discussion of the potential for increases or decreases in the ~~purchasing~~ utility's cost of capital, the effect of the seller's financing arrangements on the ~~purchasing~~ utility's system reliability, any competitive advantage the financing arrangements may give the seller ~~to the seller resulting from the seller's financing arrangements~~ and the seller's fuel supply adequacy ~~of the seller's fuel supply~~.

Specific Authority: 120.53(1)(c), 350.127(2), 366.05(1), F.S.

Law Implemented: 403.519, F.S.

History: New 12/2/80, Transferred 12/21/81, formerly 25-22.81, Amended _____

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ATTACHMENT B