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April 24, 2002

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VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020262 and 020263

Dear Ms. Bayo:

On behalf of Reliant Energy Power Generation, Inc., enclosed for filing and distribution are the original and 15 copies of the following:

- Reliant Energy Power Generation, Inc.'s Response to Florida Power & Light Company's Emergency Motion to Hold Proceedings in Abeyance

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

Sincerely,

Joseph A. McGlothlin

JAM/mls
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power and 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 and 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

RELIANT ENERGY GENERATION, INC.'S RESOPNSE TO FLORIDA POWER & LIGHT COMPANY'S EMERGENCY MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Reliant Energy Power Generation, Inc. ("Reliant Energy"), pursuant to the Prehearing Officer's direction for expedited response, files its Response to Florida Power & Light Company's (FPL) Motion to Hold Proceedings in Abeyance

INTRODUCTION

1. In August 2001, FPL issued a Request For Proposals in which it solicited some 1750 MW of proposed capacity additions. Reliant Energy submitted proposals in response to the RFP.

2. In January 2002, FPL rejected all of the bids it had received. FPL announced its intent to construct 1900 MW of capacity, in the form of units other than those it had specified in the RFP as its "next planned generating units."

3. On March 29, 2002 Reliant Energy filed a complaint against FPL, in which Reliant Energy alleged that FPL had violated Rule 25-22.082, F.A.C. (the "bid rule") in several particulars. Specifically, Reliant Energy alleged that FPL had altered the unit upon which bidders had based their proposals, in violation of the rule, and had failed to provide a meaningful

estimate of its construction costs, also in violation of the rule. Reliant also alleged that onerous and commercially infeasible terms and conditions with which FPL filled the RFP, such as a requirement to keep bids open for 390 days; a completion security clause requiring $50,000 per MW (100% of which would be payable to FPL if the IPP were a day late); a provision enabling FPL to terminate the contract upon a change in the law governing merchant plants; and a clause enabling FPL to terminate the contract upon disallowance by the Commission of contract payments of any amount, had the cumulative effect of thwarting competition, in violation and in defiance of the rule.

4. On March 22, 2001, FPL filed the petitions to determine the need for Manatee 3 and Martin 8 that initiated these dockets. Manatee 3 and Martin 8 are not the units that were the basis for the August 2002 RFP.

5. On April 11, 2002, Calpine Energy Services, L.P. ("Calpine") and Reliant Energy filed their Joint Motion for Summary Final Order. In the Joint Motion, Calpine and Reliant Energy assert that, with respect both to Manatee 3 and Martin 8, FPL failed to satisfy the fundamental condition precedent of the rule, which requires an IOU to conduct an RFP on its "next planned generating unit" before filing a petition to determine the need for that unit. The Joint Motion seeks dismissal of both petitions, based on the absence of any dispute of material fact and the clear meaning of the rule. Oral argument on the Joint Motion is scheduled for May 3, 2002; the Commission currently is scheduled to vote on the Joint Motion on May 21, 2002.

6. By its Emergency Motion to Hold Proceeding in Abeyance, dated April 22, 2002, FPL proposes to address the many subjects that have been identified and challenged as infirmities and deficiencies in its original RFP by preparing and issuing a new RFP. In the Emergency Motion, FPL asks that the time frames of the rule governing the processing of

determination of need proceedings be "suspended" until FPL reissues its new RFP, evaluates responses to the new RFP and either makes a selection from the new competitive proposals or chooses its own self-build option a second time. In the event FPL selects its self-build option again, at that time FPL proposes that the proceedings be "reinstated" and that parties proceed as though they are at Day 31 of the 90 day prehearing process prescribed in the Commission's "determination of need" rule.

FPL's Emergency Motion contains numerous self-serving characterizations and conclusions with which Reliant Energy strenuously disagrees. However, other than to stress that Reliant's silence on these matters does not imply acquiescence, and to affirm and readopt the positions stated and arguments in its separate Complaint and in the pending Joint Motion for Summary Final Order, Reliant Energy does not intend to dwell on those differences in this pleading. *In concept*, Reliant Energy agrees with the proposition in FPL's Emergency Motion that the RFP that FPL conducted prior to filing the petitions should be revised to specify the correct "next planned generating units" and to eliminate the terms identified in FPL's motion, and that FPL should conduct a solicitation for new bids responsive to the revised RFP. In this pleading, Reliant Energy will focus on how this objective may be accomplished in a manner that preserves the parties' ability to prepare their cases *and* that passes legal muster.

Parties' Rights. Any procedure designed to reformulate the RFP and solicit new bids must preserve the rights of the parties to raise any objections they may have to the revised RFP after they have received it. In addition, the procedure must afford parties an adequate opportunity to prepare for hearing. With respect to this point, FPL's proposal (in the event it ultimately declares its intent to pursue its self-build options a second time) to renew prehearing activities on "Day 31" of the 90-day schedule is patently unreasonable and prejudicial. In the

event the proceeding is "revived," it will be because FPL will have received *new bids*, conducted *a new evaluation*, and prepared *new testimony*. It would be unrealistic and unfair to expect Reliant Energy and other parties to be given all of this new information, which will largely supplant the data upon which FPL has relied to this point, and -- as FPL's motion would require--to conduct associated discovery and file testimony in *three weeks*. Accordingly, Reliant opposes the idea of "suspending" or "tolling" the schedule. Any revised schedule must accommodate the legitimate case preparation needs of Intervenors. FPL's suggestion does not; it should be summarily rejected.[1]

In addition to the need for time frames adequate to enable Intervenors to prepare their cases, any revised procedure must preserve the right of Reliant Energy (and other parties) to raise any objections to the revised RFP that may be warranted after FPL issues it. While FPL appears to be poised now to eliminate many of the controversial terms in its first RFP, in its motion FPL clings to a flawed view of its unilateral "prerogative" that helped create the current dispute. Specifically, FPL claims the ability to "refine" (read "lower") its self-build costs after receiving proposals based on the costs identified in the RFP. Ignoring the unfairness of such a process, FPL argues this will encourage bidders to "make their best proposals."[2]

It is past time for the utility recognizing that competition is a two-way street: *FPL* should submit *its* best offer, too. If there was ever any validity to the notion that the purpose of an RFP was simply to sound out the market so that the utility issuing the IOU could change its initial

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[1] Based on conversations with Staff Counsel, it appears that, as a practical matter, the limited availability of hearing dates would render the 'suspension" proposal infeasible in any event.

[2] FPL seems to hold to the view that bidders' efforts are for the convenience of FPL. The Commission should send to FPL and other IOUs the strong message that they are competing, too, and that *they* must put forth *their* best proposals. Reliant submits this means (i) the utility presents its lowest offer and (ii) it then bound by that offer. It also means that the bids of the IOU and respondents should be scored by a neutral Commission-approved third party evaluator. And that all cost components applied to the decision making process be accounted for in a detailed, transparent manner.

proposal to the extent necessary to "win," that view is outdated and does not serve the interests of ratepayers. The initiatives to establish mandatory access to transmission and create EWGs, market-based rates, and RTOs were not designed simply to create expensive "strawmen" with which to benchmark the utility's price, but to foster vigorous competition that will serve customers' interests. The plain words of Rule 25-22.082 support this view. If the Commission instead sends the message that it believes the developers' only role in the "bid rule" process is to provide a reference point against which to compare the utility's costs, any ambition the Commission has to develop a meaningfully competitive wholesale market in Florida will be doomed to failure.

One more example of a potential dispute is FPL's intent to retain a form of "regulatory out" clause in the terms and conditions of the RFP. While some variation of the "regulatory out" clause may have been warranted during the era of QF contracts, that rationale no longer justifies placing all regulatory risk on the wholesale provider. Unlike QFs, an EWG does not impose a contractual obligation on a purchasing utility. Accordingly, Reliant Energy reserves the right to review and possibly protest any clause that seeks to place an unwarranted degree of regulatory risk on the wholesale entity.

For these and similar reasons, any modification of the procedure to be followed must preserve Reliant Energy's right and opportunity to review the new RFP and, if warranted, present its objections to the RFP to the Commission.

Procedural Requirements. Rule 25-22.082, F.A.C., requires the Commission to conduct an evidentiary hearing within 90 days of the filing of the petition to determine need and to make its decision within 135 days of the filing of the petition. It is clear from FPL's Emergency Motion that FPL has determined that a new RFP should be issued and that the existing hearing

schedule therefore should be obviated. It appears to Reliant Energy that the pending hearing requirement can be altered or obviated in any one of three ways: (i) a waiver of the requirement of the rule; (i) dismissal of the petitions; or (iii) a voluntary withdrawal of the petitions (options (ii) and (iii) to be followed by the filing of one or more new petitions after the completion of the renewed RFP and selection process). *To be clear,* Reliant Energy strongly agrees that the present schedule should be modified, meaning that one of these measures should be implemented.

In this regard, it is important to bear in mind the pending Joint Motion for Summary Final Order which, if granted, would be fully dispositive of both petitions. Further, if the Joint Motion is granted the disposition, in the form of a dismissal of the petitions, would occur prior to the scheduled hearing. (Again, the premise of the Joint Motion is that FPL failed to specify Martin 8 and Manatee 3 as its "next planned generating units" as required by the bid rule -- a failure that FPL would be rectified with the procedure outlined in FPL's Emergency Motion.) With the dismissal of the petitions on the grounds stated in the Joint Motion, FPL would pursue the new RFP described in its motion; Reliant Energy would have the right and opportunity to submit new bids and, if warranted, file a complaint related to objectionable features of the new RFP; the best capacity proposals could be selected; and FPL would file new petitions. Accordingly, there is pending a procedural vehicle that would accomplish everything that FPL proposes in its motion, without the prejudicial effect of the unrealistic case preparation time that FPL hopes to impose on Intervenors through the "suspension feature" of its Emergency Motion. A decision on the motion that currently is scheduled for May 21, 2002.

That being said, Reliant Energy is not opposed to accomplishing the new RFP/and the associated relief from the 90-day rule by way of the other avenues that are available. With

respect to the waiver, however, it appears to Reliant Energy that (leaving aside the other problem of the inadequacy of the case preparation time that FPL's motion would afford) acting *only* on FPL's present motion would build into the proceeding a legal infirmity that would jeopardize the ability of the Commission to sustain its ultimate decision.

In its Emergency Motion to Hold Proceedings in Abeyance, FPL requests the Commission to hold this proceeding in "abeyance" and that the "procedural schedule be immediately tolled."[3] However, this purposeful choice of words cannot change the fact that FPL really wants the Commission to waive and alter the time frames contained in Rule 25-22.080(2). Illustrating this point is easy. Absent action by the Commission, the hearing is scheduled to begin within the 90-day period specified in the rule. If the Commission takes the action that FPL proposes, the hearing will not begin within 90 days.

Section 120.542, Florida Statutes, addresses the requirements for rule waivers. The substantive standards, which an agency must apply to a waiver request, are set out in the statute explicitly:

> 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 the application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technical, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.[4]

Further, the entity seeking a waiver must file a petition with the agency, with a copy to the Joint Administrative Procedures Committee, which delineates:

- The rule from which a waiver is sought;

[3] FPL Motion at 1.

- The type of action requested;
- The specific acts which would justify a waiver;
- The reason the waiver would serve the purposes of the underlying statute.[5]

For emergency requests, information must be provided concerning the facts that make the situation an emergency as well as facts to show the petitioner will suffer an immediate adverse effect unless the waiver is granted more quickly than provided in the normal time frames.[6] This agency must provide notice of the request for waiver to the Department of State, which must publish notice in the first available issue of the Florida Administrative Weekly.[7] For a non-emergency waiver request, the agency must act on the request within 90 days of receipt of the request. For an emergency waiver request, the agency must act within 30 days of receipt of the request.[8] In its Emergency Motion FPL cites no authority to support the view that these requirements can be avoided by styling the action as a "suspension of the schedule."

Reliant Energy does not raise this point to be obstructionist. If the failure to address the requirements of the APA that govern a waiver constituted a harmless technical departure that would not jeopardize the rest of the proceeding, Reliant Energy would not raise the issue. However, evidence indicates that the judiciary does not take the requirement lightly. In *Panda Energy International v. Jacobs*, 27 FLW S 154 (Fl. 2002), Panda appealed, among other matters, the Commission's denial of its request for a continuance of the final determination of need hearing. The Court found that the Commission had not abused its discretion in denying Panda's request. It further stated that:

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[4] §120.542(2), Florida Statutes.
[5] §120.542(5), Florida Statutes. Rule 28-104.002, Florida Administrative Code, provides in more detail the information that must be contained in the petition.
[6] Rule 28-104.004, Florida Administrative Code.
[7] §120.542(6), Florida Statutes.
[8] Rule 28-104.005, Florida Administrative Code.

> in order to obtain a continuance Panda had to procure a waiver form the PSC's rule implementing the statutory deadlines for need proceedings. See § 120.542(2), (5), Fla. Stat. (2000); Florida Administrative Code. R. 28-104.002.

FPL is well aware that to alter the time frames in rule 25-22.080 requires a waiver from the Commission. FPL sought such a waiver in *In re: Petition for determination of need for an electrical power plant in Okeechobee County by Okeechobee Generating Company, L.L.C.*[9] In that case, Florida Power Corporation (FPC) filed an emergency petition for waiver of the Commission's scheduling requirements set out in rule 25-22.080(2). *FPL joined in that petition.*

In its order in the *Okeechobee* case, the Commission set out in detail the statutory requirements for both emergency and non-emergency rule waivers, as well as the time frames for processing such requests. It then substantively analyzed whether FPC and FPL had met the statutory and rule criteria. After its lengthy analysis, the Commission granted the requested waiver, concluding that:

> [W]e find FPC has demonstrated that application of the scheduling requirements in Rule 25-22.080(2), Florida Administrative Code, would create a substantial hardship to FPC. Further, we find that granting a waiver of the rule's scheduling requirements would not frustrate the purpose of the statute underlying that rule. Therefore, FPC has satisfied the requirements of Section 120.542(2), Florida Statutes, for a waiver of the rule's scheduling requirements.[10]

Again, to be clear, Reliant Energy does not oppose a waiver of or variance from the time frames established by rule as a means to accomplish the objective of a revised RFP and new bidding process, subject to the caveats discussed earlier. In fact, Reliant Energy believes grounds exist presently that would support a waiver request on the part of Intervenors who, more than 30 days after the filing of FPL's petition, continue to be frustrated with respect to such basic case preparation requirements as access to the computer model that FPL used in part of its evaluation process and ongoing, unresolved issues related to claims of confidentiality. Reliant

[9] Docket No. 991462-EU, Order No. PSC-99-2438-PAA-EU.

urges that, if the waiver route is pursued, it should be done in conformity with the requirements of the Administrative Procedures Act and the Uniform Rules. In addition, if a waiver is pursued Intervenors should be provided relief from the current schedule that contemplates the filing of Intervenor testimony on May 15, 2002. Reliant also believes it is fair to ask whether, given FPL's declared intent to issue a new RFP and given the time frames and procedural requirements involved with the waiver process, this avenue is superior to another that is available to FPL.

Withdrawal. In its motion FPL touts the "abeyance" approach as having advantages over the filing of a complete new petition. Implicitly, it is on this basis that FPL attempts to justify filing the Emergency Motion instead of simply withdrawing its petitions and rendering the 90-day issue moot. However, upon examination it is clear that the sole practical difference between the approach of FPL's motion, on the one hand, and the termination of one petition and the filing of a new one after the RFP has been concluded, on the other, is the prejudicial impact on Intervenors of the possibility of starting a new case on "Day 31." For the reasons stated earlier, Reliant Energy submits that, even if the Prehearing Officer were to entertain the Emergency Motion in its present form, fundamental fairness would require that the schedule proposed in FPL's pleading be modified to enlarge the time that parties would have to analyze and respond to a new evaluation, new testimony, and new exhibits. In its Emergency Motion, FPL claims that it seeks to minimize time requirements associated with a new RFP so that the impact on the ultimate in-service date is minimized. In view of the time that would be required to obtain a legally sustainable waiver, and the facial unreasonableness of the proposal to require Intervenors to receive new testimony on "Day 31," the mechanism of an immediate, voluntary withdrawal clearly would accomplish FPL's stated objective more quickly than the request for a waiver.

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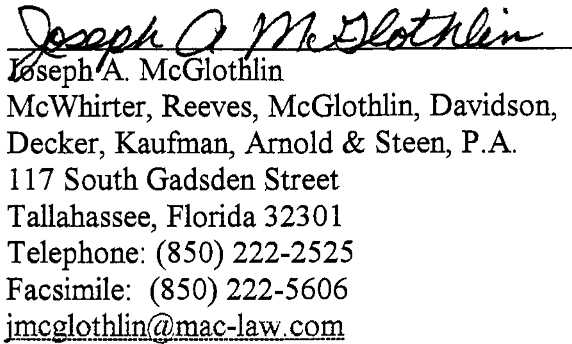
[10] Order No. PSC-99-2438-PAA-EU at 30.

CONCLUSION

Reliant Energy has asserted -- and, in its Emergency Motion, FPL has recognized-- the need to issue a new RFP and receive new bids. Reliant Energy and Calpine have filed a Joint Motion for Summary Final Order that, if granted, would be dispositive of both petitions and would result in a new RFP being issued without the complication of a running "statutory clock." However, unless the Joint Motion for Summary Final Order is expedited the Commission is not scheduled to rule on it until May 21, 2001.

As an alternative means of accomplishing a new RFP process, Reliant Energy does not oppose a waiver of the 90 day rule, if accompanied by a supervised new bidding process, the opportunity to raise any objections to the new RFP, and adequate time within which to prepare its case in the event FPL declares itself the winner again. FPL's Emergency Motion to Hold Proceedings In Abeyance is in reality a request for a waiver of Rule 25-22.082, F.A.C., that by its proposed terms would not provide Intervenors with an adequate opportunity to prepare for hearing. Moreover, it does not comply with the statutory requirements that govern waivers. If a waiver is pursued, Reliant Energy believes it is in the Commission's interest as well as the parties' to recognize that, to avoid possible challenges later, the waiver would require compliance with Section 120.543, F.S. When the time requirements associated with obtaining a waiver are factored into the equation, and the proposed time frame from 'start-up" to the hearing is adjusted to take into account parties' due process rights, FPL's claim that hanging onto the current dockets instead of terminating them and beginning anew would result in the shortest route to a decision doesn't hold up.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Reliant Energy Power Generation, Inc.'s Response to Florida Power & Light Company's Emergency Motion to Hold Proceedings in Abeyance was on this 24th day of April 2002, served via (*) Hand delivery and U.S. Mail to the following:

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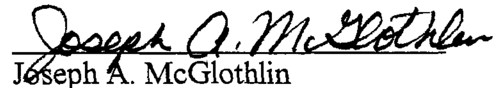

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