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May 24, 2002

Charles A. Guyton
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-VIA HAND DELIVERY-

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RECEIVED FPSC
02 MAY 24 PM 4:13
COMMISSION
CLERK

Re: Docket Nos. 020262-EI and 020263-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and seven (7) copies of Florida Power & Light Company's Comments Regarding CPV Cana, Ltd.'s Petition for Waiver of Rule 25-22.080, F.A.C., together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

Charles A. Guyton
Charles A. Guyton

CAG/gc
Enclosure
cc: All Parties of Record

TAL 1998/42570-1

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05588 MAY 24 2002

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition To Determine Need For) Docket No. 020262-EI
an Electrical Power Plant in Martin County)
by Florida Power & Light Company.)
_____)

In re: Petition To Determine Need For) Docket No. 020263-EI
an Electrical Power Plant in Manatee County)
by Florida Power & Light Company.)
_____) Dated: May 24, 2002

FLORIDA POWER & LIGHT COMPANY'S
COMMENTS REGARDING CPV CANA, LTD'S
PETITION FOR WAIVER OF RULE 25-22.080, F.A.C.

Florida Power & Light Company ("FPL"), pursuant to Rule 28-104.003, Florida Administrative Code ("F.A.C."), hereby comments upon 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. filed April 24, 2002.

Background

1. On April 22, 2002, FPL filed with the Commission an emergency motion seeking an abeyance of these proceeding so that FPL could conduct a Supplemental RFP. In response to FPL's motion, on April 24, 2002, CPV Cana filed a document entitled "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." ("CPV Cana's Petition"). In its document CPV Cana had two sections. The first was entitled "The Commission Should Waive the Timeframes for Conducting the Determination of Need Proceeding Rather Than Holding the Proceeding in Abeyance." In this section CPV both responded to FPL's emergency abeyance motion and requested a waiver of Rule 25-22.080, F.A.C., the Commission's rule regarding Electrical Power

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FPSC-COMMISSION CLERK

Plant Permitting Proceedings, specifically subsection (2) that addresses timeframes for the conduct of such proceedings. The second part of CPV Cana's document was entitled "The Commission Should Oversee the Conduct of and Evaluation of FPL's Supplemental RFP Process." In this section CPV Cana addressed FPL's emergency motion for abeyance and requested affirmative relief regarding Commission oversight of FPL's Supplemental RFP process pursuant to Rule 28-106.211, F.A.C. This section did not discuss waiver of Rule 25-22.080 or any other Commission rule. In its prayer for relief in this document, CPV Cana made three separate requests: (1) denial of the emergency motion for abeyance, (2) grant of CPV Cana's petition for waiver of the timeframes in Rule 25-22.080, F.A.C., and (3) issuance of an order stating the Commission would actively oversee FPL's Supplemental RFP, precluding FPL from certain conduct in evaluating the Supplemental RFP, and limiting FPL's cost recovery if it selected its own units in the Supplemental RFP.

2. CPV's filing is not the picture of clarity. It is styled as both a response to FPL's emergency motion and as a petition for rule waiver. Both those matters are addressed in the first section of the pleading. The second section requests affirmative relief related to neither responding to FPL's emergency motion for abeyance nor related to its request for a waiver of the timeframes set forth in Rule 25-22.080(2), F.A.C. Consequently, FPL filed a motion to strike this request for affirmative relief on May 10, 2002.

3. At the oral argument on May 22, 2002 on FPL's emergency motion for waiver of Rule 25-22.080(2) (FPL filed its emergency motion on April 29, 2002, several days after CPV Cana filed its rule waiver request regarding the same rule), CPV Cana's request for affirmative oversight relief was characterized by Staff as conditions CPV Cana sought for the issuance of the waiver of the time frames in Rule 25-22.080. During that oral argument counsel for CPV

Cana, at the request of the Commission, withdrew its request that the rule waiver be conditioned on the grant of this affirmative relief, but declined to withdraw CPV Cana's rule waiver petition.

4. On May 23, 2002, the Commission issued two orders relevant here. First, it issued Order No. PSC-02-0703-PCO-EI granting FPL's emergency waiver of rule 25-22.080(2). In it there was no mention of CPV Cana's petition for rule waiver or CPV's request for affirmative oversight relief in its rule waiver petition. Second, the Commission issued Order No. PSC-02-0704-PCO-EI in which FPL's motion to strike CPV Cana's request for affirmative oversight relief in its rule waiver petition was denied. It was denied because CPV Cana's counsel had withdrawn its request for relief at oral argument.

5. Thus, FPL faces a dilemma. CPV Cana has not withdrawn its rule waiver petition and the Commission has denied FPL's motion to strike the portion that FPL deems is improper. Thus, FPL finds itself responding to the merits of the CPV Cana petition even though it is now clearly moot. FPL's comments herein should not be construed as a reply to the portion of CPV Cana's petition that was a response to FPL's emergency motion for abeyance. That has clearly been resolved. FPL's emergency motion for abeyance has been granted. See, Order No. PSC-02-0571-PCO-EI. To the extent that CPV Cana's Petition was a response to FPL's emergency motion for abeyance, it has been considered and addressed in the Prehearing Officer's Interim Order On Procedure. FPL's comments are meant only to address CPV Cana's rule waiver petition and the improper affirmative relief requested that is not part of its rule waiver request.

**CPV Cana's Petition For Rule Waiver And Its Request For Oversight
Relief Should Be Denied**

6. CPV Cana's Petition for Waiver of Rule 25-22.080, F.A.C. is moot. CPV Cana's Petition sought a waiver of the time frames in Rule 25-22.080, F.A.C. Similarly, FPL filed two days after CPV an emergency petition for waiver of the time requirements in Rule 25-22.080(2),

F.A.C. The Commission has granted, as a result of FPL's motion, the same rule waiver that CPV Cana sought in its rule waiver petition. See, Order No. PSC-02-0703-PCO-EI (Order Granting Petition For Emergency Waiver Of Rule 25-22.080(2), Florida Administrative Code, May 23, 2002). Thus, there is no pending case or controversy as to the stated purpose of CPV Cana's Petition.

7. FPL acknowledges that in its rule waiver petition CPV Cana also sought additional affirmative oversight relief unrelated to either its response to FPL's emergency abeyance motion or CPV's request for waiver of the time limits of Rule 25-22.080. As was pointed out at oral argument on FPL's emergency motion for rule waiver (not only by FPL but also by Calpine), CPV's oversight relief was not germane to a rule waiver petition. Indeed, this request for oversight relief was improperly raised as part of a rule waiver petition seeking a waiver of the rule addressing the processing of need determination cases, Rule 25-22.080, F.A.C. It is totally unrelated to those timeframes set forth in the rule.

8. Requests for affirmative relief are properly raised by motion. Rule 28-106.204, F.A.C. states in pertinent part: "All requests for relief shall be by motion." CPV Cana's Petition is not a motion. It is labeled a response and a petition for rule waiver, and it provides just that - a response to a motion (a motion that has now been granted) and a petition to waive a time requirement in the Bid Rule. A response to a motion, in this case FPL's Emergency Motion for Abeyance, is not an appropriate vehicle for affirmative relief. A response properly addresses only whether the relief requested in an earlier motion should be granted or denied. Since CPV Cana's Response is not a motion, and all requests for relief must be made by motion, the portion of CPV Cana's Response which improperly attempts to request relief should be denied.

9. The portion of CPV Cana's Petition that requests a rule waiver is very specific as to the relief being sought: "the Commission should instead the eave [sic] [waive] the applicability of Rule 25-22.080 to this proceeding, with respect to the timeframes established in that rule." CPV Cana's Response at 1, 2. The affirmative request for oversight relief that CPV included in its petition is not part of CPV Cana's petition for a rule waiver. The rule CPV Cana sought a waiver for was Rule 25-22.080(2). F.A.C., the rule that provides the timeframe for conducting need determination proceedings. Its request for oversight relief does not relate to the timeframe for the need proceedings and is even under a separate heading in the CPV Cana Petition. Since the affirmative relief sought by CPV Cana is not part of its rule waiver petition and is not properly stated in a motion, it should be denied. It is not properly before the Commission.

10. The affirmative relief requested in CPV Cana's Petition should also be denied because the relief requested is inconsistent with the Commission's Bid Rule, Rule 25-22.082, F.A.C. CPV Cana seeks three actions, none of which are authorized by the Bid Rule and two of which are inconsistent with the history or application of the Bid Rule.

(a) CPV Cana asks the Prehearing Officer, pursuant to Rule 28-106.211, F.A.C., to enter an Order governing FPL's conduct of its Supplemental RFP by providing for active Commission oversight of the RFP process, evaluation and negotiation process. The requested relief is nothing less than a wholesale amendment of the Bid Rule. The Bid Rule does not authorize or envision such Commission action. In fact, the history of the adoption of the Bid Rule clearly shows that the Commission rejected a rule calling for such active Commission oversight. Instead, the Commission decided to adopt the traditional regulatory model in which the utility, having the obligation to serve, retains the role of conducting the RFP and evaluating

responses, and the Commission reviews the utility's conduct in the determination of need.¹ So, CPV Cana's requests for active Commission oversight is inconsistent with the Bid Rule and is effectively a request to have the Prehearing Officer unilaterally amend the Bid Rule. Moreover, this relief is unnecessary, as FPL has voluntarily offered to allow the Commission Staff to actively monitor FPL's conduct of its RFP and evaluation. See, Attachment B. This makes this aspect of requested relief moot as well.

(b) CPV Cana's Petition also asks the Prehearing Officer to issue an Order precluding FPL from materially changing its supplemental RFP document after submittal of bids. This would also be an effective amendment of the Bidding Rule, as it is not addressed in the existing rule. Moreover, it would not be in the best interest of FPL's customers to prevent FPL from making changes designed to work to the advantage of customers.

(c) CPV Cana's Petition also asks the Prehearing Officer to issue an Order precluding FPL from changing its cost data after Supplemental RFP proposals are submitted or if such costs are changed and FPL "wins," the Order would preclude FPL from recovering costs greater than those FPL includes in its cost estimates. Precluding FPL from changing its costs estimates is inconsistent with the history and prior application of the Bid Rule. When the Bid Rule was adopted, Commissioner Deason specifically noted the utility's cost estimates in the RFP were non-binding, (Attachment A at 91), and it was also observed that the utility is permitted to put a price on the table, solicit bids, and either select one or more bids for

¹ At the agenda conference in which the Commission adopted the Bid Rule, there was a lengthy exchange between the Commissioners and Staff regarding the purpose and application of the rule. During that discussion, it was recognized that utilities continued to have an obligation to serve and because of that obligation, certain managerial prerogatives were reserved to utilities. Attachment A at 58-59, 136-140, 146-147. These prerogatives included the understanding that the utility, not the Commission, conducts the RFP and selects the winning bidder, with the

negotiation or reject all bids without having to pick finalists and choose its own unit as the best alternative for customers, Attachment A at 68, 91-93, 136-140. Staff advising the Commission acknowledged the utility's "veto right" to reject all bids and conclude it could build cheaper (Attachment A at 92). Subsequently, in Docket No. 980783-EI, the Commission further interpreted the Bid Rule as allowing the utility to change its cost and meet or beat RFP proposals.² The express design of this interpretation of the Bid Rule was to benefit customers.

Commission reserving the right to pass judgment on the utility's conclusion, Attachment A at 52 - 61.

² At page 16 Commissioner Garcia asked Gulf's counsel: "Can't you beat that bid though? When they come in with the bid, if you think that the bid is too high and you can do better, can't you do better?"

Again at page 39 Commissioner Garcia had the following exchange with former Commissioner Cresse and Joe Jenkins:

"COMMISSIONER GARCIA: No, what I am saying is when this process is over, the utility looks at it. In other words, when our rule goes out there, all the - - you know. And your're right, we're asking the utility to pretty much show all its cards. When it shows its cards, and gets a series of bids, and it gets to pick the lowest bid, the utility still has the option, if I'm not mistaken, to beat that price, doesn't it?

MR. CRESSE: Sure, it does. I would assume it would have the option to beat that price. That's a clarification that I think need to be made.

COMMISSIONER GARCIA: Am I mistaken in that, Joe?

MR. JENKINS: I think that is correct."

Commissioners Deason and Johnson had the following exchange with Mr. Jenkins:

"COMMISSIONER DEASON: And if they are required to have their very best bottom-line price and be held to it when they present their RFP, then they are placed at a competitive disadvantage.

MR. JENKINS: I don't think they're held to their RFP price.

COMMISSIONER DEASON: Okay. Then what is the necessity of having any of this cost information provided up front?

MR. JENKINS: Just so we don't get high prices. The idea of revealing that information of Gulf Power or utilities showing their cards, showing their card is that they give some idea to the bidders of what they have to beat. Don't forget, Gulf Power will get to draw a second card; the bidders won't.

CHAIRMAN JOHNSON: What does that mean?

MR. JENKINS: That means that Gulf puts out its number in the RFP, the bidders respond, they know they have to beat that price. And when all of those prices come in

There was no mention of the utility's cost recovery being limited in perpetuity to such a cost estimate. Such an observation would be inconsistent with Commission conclusions that need determination proceedings do not properly address cost recovery. *In re: Petition for determination of need for Hines Unit 2 Power Plant by Florida Power Corporation*, 00 FPSC 10:269 (Order No. PSC-00-1933-PCO-EI).

As has been demonstrated, the affirmative oversight relief sought by CPV Cana should be denied because it is not authorized by the Bid Rule or it is inconsistent with the history and application of the Bid Rule.

through the passage of time, say, in about two or three months, then Gulf Power can come out with still another number. They're not held to that number.

Another representative exchange is the following dialogue among Commissioners Clark, and Garcia and Mr. Ballinger:

COMMISSIONER CLARK: Is that true, they do, in fact, get a second shot?

COMMISSIONER GARCIA: Yes.

MR. BALLINGER: Yes, ma'am, that was the whole intent. Since the utility does have the obligation to serve, they would be the ultimate surveyor, if you will, of the bids. They could even have a slightly higher priced bid and come in and convince you that their's is the best deal for other reasons.

COMMISSIONER CLARK: Or they could come in with a lower price.

MR. BALLINGER: Or they could come in with lower.

COMMISSIONER CLARK: Well, then, I think we have solved our problem.

Commissioner Jacobs also made statements that he understood that the utility would get a second bite of the apple, that it could submit an alternative different than what it published in its RFP document. See, page 68.

Ultimately, when the Commission voted to deny Gulf's requested waiver, it did so in large part based on its understanding that Gulf could come back after the fact and change its option to meet or beat the RFP proposals. See, remarks of Commissioners Garcia, Clark, Johnson at pages 77-82. Perhaps Commissioner Clark best summarized the exchange: "[T]hey [Gulf] will have an opportunity to put in yet another bid showing that they can meet the price. And in the end that will result, in my view, at least under the scenario we have been presented, with the least cost to customers." Transcript at page 78.

11. CPV Cana's improper request for affirmative oversight relief in its rule waiver petition should also be denied because it is substantive relief rather than the procedural relief the prehearing officer is authorized to grant by Rule 28-106.211, F.A.C. CPV bases its request for affirmative oversight relief upon Rule 28-106.211, F.A.C., a Uniform Rule of Procedure that authorizes the prehearing officer to issue procedural orders regarding the processing of a case.

That Rule provides in its entirety:

The presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the proceeding.

The relief requested by CPV Cana is not procedural relief associated with processing FPL's need cases. Those cases have been suspended and may never be reinitiated. The relief requested by CPV Cana is substantive relief regarding the supplemental RFP that FPL is undertaking. The relief is inconsistent with the Bid Rule, as discussed above. So, in the guise of requesting procedural relief, CPV Cana is actually asking the prehearing officer to give it the very substantive relief of unilaterally amending the Bid Rule. CPV's request for substantive relief should be denied because it is beyond the purview and scope of Rule 28-106.211, F.A.C.

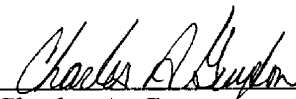
WHEREFORE, FPL respectfully suggests that CPV Cana's Petition should be denied. It is moot as to responding to FPL's emergency motion for abeyance and in requesting a waiver of Rule 25-22.080, F.A.C. The unrelated affirmative relief requested therein is not properly part of a rule waiver petition; it does not even address the rule supposedly being waived. It also is improper because (a) it was not requested by motion and is not a proper part of either CPV Cana's response to FPL's emergency motion or part of CPV Cana's petition to waive the time requirements of Rule 25-22.080, (b) it is inconsistent with and unauthorized by the Bid Rule, and

(c) it is not procedural relief within the purview of Rule 28-106.211, F.A.C. but is substantive relief of no less than a request of the prehearing officer to amend the Bid Rule.

Respectfully submitted,

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By: 
Charles A. Guyton
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Florida Power & Light Company's Comments Regarding CPV Cana, Ltd's Petition For Waiver Of Rule 25-22.080, F.A.C. has been served by hand delivery (*) or U.S. mail this 24th day of May, 2002 to the following:

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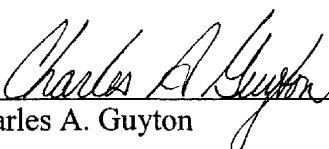
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By: 
Charles A. Guyton

ATTACHMENT A

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :
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:
Proposed Amendment of :
Rule 25-22.081, F.A.C., : DOCKET NO. 921288-EU
Contents of Petition; and :
Proposed Adoption of Rule :
25-22.082, F.A.C., :
Selection of Generating :
Capacity. :
:

FIRST DAY - VOLUME I

Pages 1 through 119

PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER LUIS J. LAUREDO
COMMISSIONER JULIA L. JOHNSON



DATE: Monday, December 6, 1993

TIME: Convened at 1:30 p.m.
Concluded at 3:50 p.m.

LOCATION: FPSC Hearing Room 106
Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32301

REPORTED BY: SYDNEY C. SILVA, CSR, RPR
PAMELA A. CANELL
Official Commission Reporters

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1 PARTICIPATING:

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3 MARY BANE, FPSC Deputy Executive
4 Director/Administration.5 MICHAEL PALECKI, FPSC Division of Legal
6 Services.

7 MARSHA RULE, FPSC Division of Appeals.

8 TOM BALLINGER and BOB TRAPP, FPSC Division of
9 Electric and Gas.

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1 for the utilities to beat the bushes to see what's out
2 there of qualified generating providers; from that,
3 develop something to screen down to a manageable number
4 of finalists with which to negotiate the best price for
5 the ratepayer. And it may be their other project ends
6 up being the best one from an overall perspective.

7 COMMISSIONER LAUREDO: What do you consider a
8 manageable number of finalists?

9 MR. BALLINGER: Maybe three or five?

10 COMMISSIONER LAUREDO: So why don't we say
11 that?

12 MR. BALLINGER: Well, again, it goes to I
13 think it's the utility's decision. They may go through
14 and find only one, and even that one they may not be
15 able to reach a negotiation with. I wouldn't want to
16 specify a number in a rule to always have three or
17 always have five.

18 COMMISSIONER CLARK: Do I understand Issue 4
19 to be that we're not going to tell them that they have
20 to select a winner and that's it?

21 MR. BALLINGER: When you say, "select a
22 winner," do you mean select a winner out of the pool of
23 respondents or can the winner also be the utility?

24 You have to remember, in Staff's view, the
25 utility publishes its costs as part of the RFP, but it

1 doesn't actually submit a bid, if you will, like the
2 others. It puts its price on the table but it's able
3 to reject all bids if it can prove to us that it was in
4 the best interest.

5 COMMISSIONER CLARK: What price do they put
6 on the table, what --

7 MR. BALLINGER: Basically, what we have in
8 the standard offer contracts.

9 COMMISSIONER CLARK: Okay.

10 MR. BALLINGER: Capital cost, O&M, fuel.

11 CHAIRMAN DEASON: That raises an interesting
12 question.

13 Why should the utility provide that cost
14 information up front? Why shouldn't the utility, if
15 it's going to participate in a bid, submit the bid and
16 if it has to be to a third party who takes the bids and
17 makes sure nobody tampers with the bids during the
18 process and then whoever is going to evaluate, whether
19 it's the utility, the Commission or another third
20 party, that that bid is opened and is reviewed and it's
21 scored some way, and the utility wins or loses.
22 Realizing there is going to have to be some subjective
23 review and analysis utilizing that, we're not
24 envisioning simply you just add up the scores and
25 whatever the highest scores win.

1 MR. BALLINGER: In this issue there's
2 several, and I spent a lot of time on the stand trying
3 to explain this.

4 If you go to a mechanism, let's say the
5 utility evaluates all sealed bids. And there is some
6 subjectivity in there, so the utility uses its
7 discretion and ends up selecting itself. Well, that
8 appears to invite litigation.

9 On the other hand, what is the whole purpose
10 of having a sealed bid? Is it to get the best price?
11 And if that is the reason, then you have to go that
12 step further: If the utility is bidding, are they
13 going to be held to that price over the life of that
14 contract? Are you going to forego, then, the
15 opportunity to make capital additions and prove to you
16 that they're prudent beyond the life of that contract,
17 realizing that they have the responsibility to keep the
18 lights on?

19 So it's a multitude of things you have to
20 consider. It's not just whether you score or not; it's
21 if you do this, you have to do B, C and D as well, at
22 least in my opinion.

23 If you have an independent third-party
24 evaluator, I don't think you can find one besides the
25 Commission. That's my own personal opinion. I don't

1 think you can find a consulting firm. There will
2 always be litigation over, "Well, they've done work
3 only for utilities," or, "They've only done work for
4 nonutilities," or whatever. The Commission, in my
5 mind, would be an independent evaluator.

6 Again, then you've gone back to one of the
7 reasons we didn't want bifurcation. We're not
8 recommending that the Commission make those decisions,
9 the utility make those decisions and we review them.
10 All right. That's it in a nutshell. And it's a very
11 convoluted --

12 COMMISSIONER LAUREDO: Speaking of convoluted --

13 COMMISSIONER JOHNSON: Tom, explain to me
14 once again the rationale why we don't want the
15 Commission to actually evaluate the bid? I mean, you
16 started by saying that we would be the only entity that
17 would be unbiased but we shouldn't be used because why?
18 Explain that.

19 MR. BALLINGER: Basically, it's a
20 philosophical difference. I don't believe the
21 Commission should be making the management decisions,
22 they should be reviewing them. Under the statutory,
23 the utility has the statutory obligation to serve. The
24 Commission has the authority, via the grid bill, if we
25 see something is wrong we can mandate the utility to

1 go, not to make those decisions on the front end.

2 CHAIRMAN DEASON: Tom, I agree with you
3 except that the statute under which we have to operate
4 puts, in my opinion, a very heavy burden on the
5 Commission. It says the Commission shall ensure it is
6 the most cost-effective unit in the need determination.
7 It doesn't say the Commission shall review to make sure
8 the unit proposed is reasonable or that the costs are
9 reasonable for ratepayers to pay, or anything like
10 that. It says, "It is the most cost-effective."
11 That's a pretty heavy burden.

12 MR. BALLINGER: Yes, I differ a little bit
13 because it does say consider whether it is the most
14 cost-effective. I don't know that you could interpret
15 it to say that it is the most cost-effective.

16 CHAIRMAN DEASON: There are a lot of parties
17 that come up here and say that it means the most
18 cost-effective unit.

19 MR. BALLINGER: I'm probably in the minority
20 on that one.

21 MR. TRAPP: And I guess the statute, as I
22 understand it, is a determination of need, though. And
23 I think the Commission, again, conventionally has
24 placed the burden of proof on the utility to
25 demonstrate.

1 It's coupled with your authority under 366,
2 in my mind, where the burden of proof is on the utility
3 to demonstrate what they're doing is prudent. And in
4 this case they have an extra burden; they have to
5 demonstrate that the power plant is the most
6 cost-effective.

7 Again, it goes back to the reason why we
8 think you should require bidding. Bidding is the best
9 way I know to demonstrate that burden of proof; and,
10 unfortunately, with it comes maybe some other issues
11 with regard to, "Well, did you do a prudent, proper
12 bidding instrument and procedure?" But all of that,
13 it seems to me, should be determined by the Commission
14 in a regulatory fashion in the need determination after
15 the utility has made a decision.

16 CHAIRMAN DEASON: But let me ask you this: If
17 we're going to allow parties the opportunity to
18 challenge a decision, isn't, in essence, the Commission
19 going to be the final determinator? So why don't we
20 just make the decision up front?

21 MR. TRAPP: Sure. Again, because I don't
22 think you pay me enough. (Laughter) CEOs get half a
23 million or whatever, and that kind of stuff; vice
24 presidents get, you know, a couple hundred grand, and I
25 don't get anywhere near that, so I would --

1 (Simultaneous conversation.)

2 MR. TRAPP: Oh, definitely.

3 I would prefer the utility do the bulk of the
4 work and have the hard burden of proof, and come up
5 here and just let me ask some leading questions and get
6 to the bottom line of the thing and then make a
7 determination.

8 I agree with you the Commission is
9 regulators; the buck stops here. You have to make a
10 decision and that decision is going to carry over as a
11 rate impact on customer bills. But, again, regulation
12 versus management.

13 COMMISSIONER CLARK: That's right. And it's
14 up to them to make that decision. They are charged
15 with running the utility in the most efficient way, and
16 our job is to review that and to make sure we agree
17 with their conclusions or where we don't agree to
18 require them to change it.

19 MR. TRAPP: True.

20 CHAIRMAN DEASON: I agree with that in most
21 scenarios. But what we have here is if this is going
22 to be a fair and open process where somebody who feels
23 like they have not been treated fairly has a forum in
24 which to express that concern and hopefully gain
25 relief, the Commission is going to make the ultimate

1 decision anyway. I think it's going to be extremely
2 rare where there is an RFP issued and the decision is
3 made. And I don't care if the utility chooses itself
4 or chooses another provider, a NUG. There's going to
5 be another NUG out there who is not going to like that
6 decision, and they're going to file a complaint with
7 the Commission. And the Commission is going to have to
8 look at that RFP; they're going to have to look at the
9 scoring criteria; they're going to have to look at the
10 subjective judgments that were made by someone who
11 probably gets paid a lot of money to make those
12 decisions, but ultimately the decision is going to be
13 ours. Do you say, "Yes, it was fair, it was objective,
14 the decision is a correct decision," or do you say,
15 "No, it wasn't"?

16 MR. BALLINGER: I think you're right, and
17 that decision is telling the utility whether or not
18 they made the right decision or the wrong decision. I
19 don't it should go further to say, "The right decision
20 is this over here."

21 CHAIRMAN DEASON: Okay. That's a good --

22 MR. BALLINGER: That's a very fine line.

23 CHAIRMAN DEASON: All right. What happens
24 then if we go through this long, drawn-out process,
25 which is very complicated and expensive and

1 time-consuming and the end result is a complaint that's
2 filed with the determination of the winner of the RFP,
3 and the Commission makes the decision that:
4 Complainant, you're correct, it was not done fairly and
5 something was misscored or the subjective criteria were
6 biased? So that just means we start all over again,
7 and then that whole time that window of opportunity
8 narrows and that we're just a year further down the
9 road to where the capacity has to be on line or else
10 the lights go out?

11 MR. BALLINGER: I would like to think that
12 the threat of regulation is a pretty big threat to the
13 utility that they will pursue the right job and the
14 right plant. Because if that were to happen and we
15 were to find, we have remedies for that situation.
16 Whereas, on a nonutility, we don't; they're a
17 nonregulated entity. So I think the threat of
18 regulation over a utility is very strong for them to
19 come forward with the best project.

20 CHAIRMAN DEASON: What is our remedy? Would
21 you say, "Well, Utility, you really blew it. We're
22 going to make you build it and you have to do it within
23 two years. And so it's going to cost more because the
24 available technologies are limited but we're only going
25 to allow you recovery as if the other project was built

1 and you're just going to suffer"?

2 MR. BALLINGER: That's basically it. You go
3 to the stockholders' pockets.

4 CHAIRMAN DEASON: And then the cost of
5 capital increases for the utility and the customer is
6 going to pay regardless? I mean --

7 MR. BALLINGER: That's possible. I agree.

8 MR. TRAPP: It's happened in other
9 jurisdictions.

10 CHAIRMAN DEASON: There are no easy answers.

11 MR. TRAPP: No, sir.

12 MS. RULE: Well, Chairman Deason, in a sense
13 this very question comes up whenever the utility makes
14 a decision that the Commission must approve. The
15 utility might not make the right decision. What are
16 you going to do? You can either take away that
17 decision-making capability and make that sort of
18 decision yourself, or you can take whatever regulatory
19 action is available to you to show that that is not a
20 prudent decision and you cannot approve it for rate
21 recovery.

22 This happens to be one specific type of
23 question that's come before the Commission recently in
24 a very public fashion, but it's involved in almost
25 every decision that comes to you for approval.

1 MR. BALLINGER: Yes.

2 COMMISSIONER LAUREDO: Okay. And your
3 recommendation is no. Okay.

4 Let me ask you, you talked about finalists
5 and I'm confused. Under this rule is the utility
6 required to pick finalists of which to pick a winner?

7 MR. BALLINGER: No.

8 COMMISSIONER LAUREDO: Huh?

9 MR. BALLINGER: No. I don't believe so,
10 because I think we have --

11 COMMISSIONER LAUREDO: Oh, I know it doesn't.
12 You look at (6), and it says, "If you pick finalists,
13 if any."

14 MR. BALLINGER: Right.

15 COMMISSIONER LAUREDO: So explain to me how --

16 MR. BALLINGER: If they feel that based on
17 their project nobody can meet their screening criteria,
18 then they can come to us and say, "We don't even have
19 viable projects that responded to us."

20 COMMISSIONER CLARK: They can choose
21 themselves.

22 COMMISSIONER LAUREDO: Well, that was my next
23 question.

24 MR. BALLINGER: Yes, they can choose
25 themselves, but I don't --

1 ahead and bid? And if he loses, makes that an issue
2 and have to counter an argument of not raising it early
3 enough, were there justifications of him not doing it,
4 And so I think we can sort of let that be for now and
5 see how it works.

6 CHAIRMAN DEASON: Let me ask a question. I
7 still have a little bit of difficulty with the rule as
8 proposed by Staff, which would require the Utility to
9 provide cost information on its proposal. Nonbinding.

10 And there's even a statement in your analysis
11 that says that most people who are experts in this
12 industry, when a utility says we need X megawatts in
13 this time frame and in this location, they pretty well
14 know what the utilities' costs are going to be anyway.
15 So why do we go through this exercise of having the
16 utility provide cost information?

17 MR. TRAPP: I think they do it anyway,
18 Commissioners, to define an avoided unit for
19 conservation purposes because we use the next unit in
20 plan for conservation cost-effectiveness calculations.

21 MR. BALLINGER: We also may use it for
22 standard offer contracts, which are still on the books
23 for small QFs, which may or may not continue. I don't
24 know, but current regulation, we have a standard offer.
25 So hiding avoided cost is nothing -- I don't see

1 anything to benefit unless you're going to hold a
2 utility to that cost over the length of plant and total
3 deregulate that plant.

4 MR. TRAPP: Remember that the utility has a
5 veto right, basically, in this rule at any point in
6 time. They can say, "No, we've decided that we're the
7 best and we can build cheaper and better than you can.
8 So we're closing down or stopping or not doing the RFP
9 process." We would like the information up front to
10 know what the utility thinks their cost is on what
11 their making that decision to go or stop the process on
12 so that we know from the front end on.

13 CHAIRMAN DEASON: But if this is going to be
14 a level playing field, isn't that a bias against the
15 utility?

16 MR. TRAPP: I don't think so because, again,
17 this is a regulated entity, which we're regulating, and
18 because we're regulating, they're publishing this cost
19 anyway in the other regulatory arenas that we have.
20 You would have to be a pretty naive competitor not to
21 be able to go dig up these costs, so why not just
22 publish them since they're being published anyway.

23 MR. BALLINGER: And the real competition is
24 between the other IPPs. They're going to be competing
25 amongst themselves to get in that lowest bid to get to

1 the negotiating table with the utility to show them
2 that it's a good cost.

3 CHAIRMAN DEASON: Well, are they going to be
4 competing with the utility with those people because
5 these costs are not binding in any way.

6 MR. BALLINGER: I understand. They're
7 competing with them, but they are also, in my opinion,
8 their main competition is each other.

9 COMMISSIONER CLARK: Well, also the utilities --

10 MR. BALLINGER: Because then those people are
11 on a level playing field with each other. They're all
12 nonregulated, they can structure their financing
13 virtually anyway they want, so they are the ones
14 competing. The utility has so many other different
15 constraints that, yes, they do compete with them but
16 there's so many other factors that may make a good
17 competition.

18 So I think the competition, as far as getting
19 a good price for the ratepayers, will still happen
20 because you have the nonutility industry competing
21 amongst itself. What you're doing is making the
22 nonregulated entities compete amongst themselves to be
23 providers of electricity for a regulated utility.

24 CHAIRMAN DEASON: Commissioners, what's your
25 pleasure on Issue 4?

1 into the crafting of the RFP so that those items are
2 considered.

3 CHAIRMAN DEASON: I think, and I may be reading
4 this rule entirely wrong, but I think that information
5 is on what the company's plant would be. That if they
6 were going to build, they would build this type plant,
7 this size, this location, with this type technology,
8 and fuel. And they are basically putting that out on
9 the table and saying, "Look folks, this is what we
10 think that we would end up doing, or something very
11 similar to this." Now, that's just the information to
12 the bidders, and the bidders can come in, and they were
13 not obligated. They can come in with something
14 entirely different, perhaps something that is so
15 different and costs so much less that it makes the
16 utility's plan look like they were foolish at one
17 point. But they are not bound in any way by that.

18 COMMISSIONER KIESLING: Well, that's not what I
19 see on Page 2 in Subsection 4(a), where it says each
20 utility's RFP shall include at a minimum, and it goes
21 through the technical description --

22 MS. RULE: Commissioner --

23 COMMISSIONER KIESLING: -- primary and secondary
24 fuel types.

25 MS. RULE: It talks about a detailed technical

1 description of that utility's next planned generating
2 unit.

3 COMMISSIONER KIESLING: Right. Well, doesn't that
4 include whether it's going to be a combined turbine,
5 or --

6 MS. RULE: That's what the utility would plan, not
7 necessarily what anybody else would propose. It puts
8 the parties, any participants on notice of what the
9 utility intends to do unless somebody else comes up
10 with something better. It does not restrict the depth
11 and breadth of proposals that could be made in
12 response.

13 MR. TRAPP: If I could, the philosophy, I think,
14 is what is important behind this rule. And the
15 philosophy is that the utility under Florida law has an
16 obligation to serve its customers. And in order to do
17 that it must plan and acquire resources. What this
18 does, basically, it says, "Absent any alternatives in
19 the competitive marketplace, utility, what is your best
20 project in terms of reliability and cost to the
21 consumer, and put that on the table, and we are going
22 to use that as a comparative plant to gauge
23 alternatives against." In order to determine if
24 something is better, you have to compare it to
25 something. So what we are comparing it to is what the

1 utility would otherwise build. They put that up front
2 in the RFP, saying, "This is what we plan to do, unless
3 you can show us something better." Then it's incumbent
4 upon the bidders in responding to the RFP, to respond
5 to the same types of information with regard to
6 location, water, air, the basic things necessary for a
7 power plant to operate, and then you compare all of
8 those nonpriced parameters and all the priced
9 parameters to the avoided unit to determine whether or
10 not one of the bidders has a better project than what
11 the utility would otherwise build. If they do, that's
12 a winning bidder.

13 COMMISSIONER KIESLING: When you say you would
14 compare, don't you mean the utility would compare?

15 MR. TRAPP: The utility would make a management
16 decision and bring it before the Commission for the
17 Commission's approval and judgment.

18 COMMISSIONER KIESLING: Well, all I can tell you
19 is that having heard bid protests and been involved
20 with bid cases for more than the last ten years, this
21 is the most peculiar bid process I have ever seen in my
22 life. There is no RFP. There is, "I'm going to build
23 this, unless someone comes in and proves that I should,
24 you know, use another proposal." That's not a bid
25 process.

1 MR. TRAPP: And, again, the philosophy, it was
2 discussed yesterday about this rule, that it is
3 somewhat different, is that because of the utility's
4 obligation to serve in Florida, and because they are a
5 regulated entity, we are suggesting that this rule
6 should be used, or bidding should be used as a tool by
7 the utilities to fulfill their statutory obligations.
8 And it probably does look different than other
9 conventional bid packages.

10 MR. BALLINGER: It's not a conventional bid. It's
11 a semantical term. We use bidding, and we explained
12 this at the beginning, it's a request for proposals, is
13 what it's making them do. And people can send in a
14 variety of things trying to respond to that proposal.
15 It's not a strict bid where you have specifications out
16 there, meet these specifications, and the best price
17 would win. We use that term bidding interchangeably.
18 But the purpose of this is a tool for the utilities to
19 go out there, beat the bushes with an RFP, saying, "If
20 I build it, I'm going to build it here, this and such,
21 look like this, and costs this much. Show me what you
22 want to propose, and then we'll talk." So it's the
23 mechanism to get them out into the market, solicit from
24 IPPs proposals from which to make an informed decision.

25 COMMISSIONER KIESLING: Well, I have to differ

1 with you; that's not what an RFP is, either. And I
2 think there is a big range of cases that define RFP and
3 what one is. And whether you want to define yours
4 differently or not, you know, that certainly is an area
5 for confusion. If you are using the same term that is
6 used in Florida Statutes for RFPs, then yours is not an
7 RFP. An RFP, as it's generally used, and used in
8 statute, is simply a description of what you would like
9 to end up with, and a request that people make
10 proposals to do that. It doesn't allow you to come in
11 and bid for yourself, or to have a proposal of your own
12 that is going to be the default winner.

13 MR. TRAPP: And it may be the difference lying in
14 that it is a regulated entity as opposed to a
15 government agency going out for a service.

16 COMMISSIONER CLARK: An entity that has the
17 obligation to provide the end product to the customer
18 at the lowest possible cost.

19 MR. BALLINGER: It may not be the best choice of
20 words, that's why we put in a special definition for
21 request for proposals, and we made our own definition,
22 if you will. It may not be conforming with the
23 statutes, but we had to use some buzz word to go
24 through it and we have created the definition.

25 COMMISSIONER LAUREDO: Commissioner, I have some

1 COMMISSIONER KIESLING: Well, who decides the
2 methodology to value the utilities?

3 MR. TRAPP: The utility has to make a management
4 decision; and the Commission, as economic regulator,
5 has to determine the validity of that decision.

6 COMMISSIONER KIESLING: Well, then I, again, would
7 just say that is not an RFP, and that is certainly to
8 me not a level playing field.

9 CHAIRMAN DEASON: And the reason for that is that
10 the utility is the one making the decision? Or could
11 you explain why that's the case in your opinion. Is it
12 not fair because the utility is the entity making the
13 decision, basically evaluating their own proposal
14 against other proposals?

15 COMMISSIONER KIESLING: Absolutely. And because
16 there is no opportunity for input into methodology,
17 criteria, weighing of the criteria, how that
18 methodology is going to be carried out, from anyone
19 except the utility.

20 MR. BALLINGER: That gets us back to bifurcation,
21 and the preapproval of these things. A strict scoring
22 mechanism; is that attainable? I agree with you. I
23 mean, it leaves the subjectivity to the utility. But,
24 on the other hand, you have to weigh, can you make it
25 so nonsubjective that it can be scored by someone other

1 than the utility, or by the Commission, or have a
2 preapproval by the Commission. Staff's intent in this
3 was to not really level the field between the IPP or
4 non-utility generator and the utility, because I don't
5 think it will ever be until we totally deregulate at
6 least generation, because the utility has the
7 obligation to serve. It may only stay slightly tilted.
8 Our intent in the rule is to recognize that slight
9 tilt, but to try to get a better deal for the
10 ratepayer. To try to do something to force the
11 regulated entity that we have some jurisdiction over to
12 go out and get a better deal for the ratepayer. The
13 IPPs will compete amongst themselves, they are going to
14 give their best shot to get a price in to sign with the
15 utility. The utility has the responsibility to
16 evaluate those proposals now, and justify to the
17 Commission why they chose A or chose themselves. And
18 those three are really intertwined, and that's a long
19 series of discussions.

20 COMMISSIONER CLARK: And it has to do with your
21 basic philosophy.

22 MR. BALLINGER: Yes, ma'am.

23 COMMISSIONER CLARK: And one of the things the
24 Governor said this morning sort of has a bearing on
25 this case. The utilities have the responsibility of

ATTACHMENT B



Florida Power & Light Company, P. O. Box 14000, Juno Beach, FL 33408-0020
Law Department

W. G. Walker, III
Vice President

May 8, 2002

***VIA FACSIMILE AND FEDERAL EXPRESS
OVERNIGHT DELIVERY***

Lila A. Jaber, Chairman
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: In re: Petition to determine need for an electrical power
plant in Martin County by Florida Power & Light Company
Docket No: 020262-EI

In re: Petition to determine need for an electrical power
plant in Manatee County by Florida Power & Light Company
Docket No. 020263-EI

Dear Chairman Jaber:

As you know, Florida Power & Light Company (FPL) released its supplemental RFP on April 26, 2002. The schedule calls for responsive bids to be submitted to FPL on or before May 24, 2002. Thereafter, FPL will open the bids and commence its evaluation. The evaluation is to be completed and a short list of competing bids announced by June 18, 2002.

FPL would like to offer to the Commission's staff the opportunity to observe the evaluation process as it occurs in Miami. Specifically, FPSC staff members are welcome to visit the offices of FPL's Resource Planning Department at any time throughout the evaluation period and to observe as much of the evaluation process as they feel is necessary. Of course, Staff will continue to have the opportunity to ask questions and educate itself regarding any aspect of the bids or the bid process after the evaluation phase, as occurred in the initial RFP. However, we believe that Staff's observation of the

Lila A. Jaber, Chairman
Florida Public Service Commission
May 8, 2002
Page 2

evaluation process in real time will provide Staff with a head start in its review of the supplemental bids and bid process.

It is our intent to provide Staff with the same degree of open access to the bids, the bid process, and the people who conduct the evaluation, as was made available to Staff subsequent to the initial RFP, subject to appropriate measures to ensure that the confidentiality of competitively sensitive bid data is maintained.

Staff members who wish to avail themselves of the opportunity to observe the bid evaluation process should contact Anne Grealy, Director of Regulatory Affairs, at (305) 552-4332.

Sincerely,



W.G. Walker, III
Vice President of Regulatory Affairs

WGW:ec

cc: Ms. Blanca S. Bayò, Director, Division of Records and Reporting
Florida Public Service Commission (By Facsimile and Regular U.S. Mail)
All parties of Record (By Facsimile and Regular U.S. Mail)