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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination)
of Need for an Electrical Power)
Plant in Polk County by Calpine)
Construction Finance)
Company, L.P.)

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RECORDS AND REPORTING

**CALPINE CONSTRUCTION FINANCE COMPANY'S RESPONSE AND MEMORANDUM
OF LAW IN OPPOSITION TO FLORIDA POWER CORPORATION'S
SUGGESTION OF LACK OF JURISDICTION AND
MOTION TO DISMISS THE PETITION**

Calpine Construction Finance Company, L.P., ("Calpine"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby files this response in opposition to Florida Power Corporation's ("FPC") suggestion of lack of jurisdiction and motion to dismiss ("FPC's Motion") Calpine's petition for determination of need for the Osprey Energy Center (the "Petition"). In summary, FPC's arguments are generally inapposite to the facts of Calpine's Petition and mischaracterize Calpine's request for relief and the law upon which Calpine's Petition is based. Contrary to FPC's suggestion, the Osprey Energy Center (the "Osprey Project" or the "Project"), as pled by Calpine in its Petition, is not a "merchant plant;" rather, as

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FPSC-RECORDS/REPORTING

Petition at 34. FPC's arguments based on Tampa Electric Company v. Garcia¹ mischaracterize Calpine's positions and theories: Calpine has pled its request for the Commission's determination of need for the Osprey Energy Center squarely within the narrow scope articulated by the Florida Supreme Court in the Tampa Electric v. Garcia opinion. Moreover, the Tampa Electric v. Garcia opinion is, by its own terms, not final. The Commission should see FPC's attack for what it is: an attempt to delay or derail, by means of alleged procedural roadblocks, a beneficial project that Calpine has pled specifically within the utility-specific ambit of Tampa Electric v. Garcia.

Finally, the issue posed here is really one of timing.² Calpine has affirmatively alleged that it will demonstrate to the Commission that it has committed the Osprey Project's output to meeting the needs of specific Florida retail-serving utilities and that the terms of such commitments are cost-effective to those purchasing utilities. The question is whether Calpine should be allowed to proceed on its Petition as pled, or whether this proceeding should be delayed until Calpine has more evidence

¹ Tampa Electric Company v. Garcia, 25 Fla. L Weekly S294 (Fla. April 20, 2000), motions for rehearing pending. (hereinafter "Tampa Electric v. Garcia")

² Issues of timing are uniquely within the Commission's sound discretion. Consistent with its broad mandates to promote and protect the public interest, the Commission should be particularly hesitant to delay a project that offers such significant benefits on the basis of such weak procedural arguments.

to present regarding how the Project will satisfy utility-specific needs. In the public interest, and in the best interests of Florida retail electric customers, the Commission should allow this proceeding to continue as prayed in Calpine's Petition.

INTRODUCTION AND BACKGROUND

1. On June 19, 2000, Calpine filed its Petition with the Florida Public Service Commission ("FPSC" or "Commission") for an affirmative determination of need for the Osprey Energy Center (the "Osprey Project" or the "Project"). The Osprey Project will be a natural gas-fired, combined cycle power plant with 527 megawatts ("MW") of net generating capacity. The Project is expected to commence commercial operation in the second quarter of 2003. In its Petition, Calpine alleged facts sufficient to establish that it is an electric utility under Chapter 366, Florida Statutes, a public utility under the Federal Power Act, and an electric utility and a regulated electric company under the Florida Electrical Power Plant Siting Act.

2. The Petition alleged that Calpine is committed to providing the electrical capacity and energy to be produced by the Osprey Project to Peninsular Florida utilities that have responsibility for providing power to Florida customers who purchase electricity at retail rates. To that end, Calpine further alleged that it will commit the Osprey Project's output

to such Peninsular Florida utilities, that Calpine is actively pursuing discussions, which Calpine believes will lead to active negotiations, toward entering into such contracts, and that Calpine expects to have satisfactory evidence (e.g., contracts, letters of intent, or similar documentary evidence) of utility-specific commitments to present to the Commission in advance of the scheduled hearing. See Petition at 4-6. In the event that Calpine does not have such evidence of contractual commitments of the Project's output by the time of the scheduled hearings, Calpine, consistent with ample Commission precedent, asked the Commission for an affirmative determination of need subject to the condition that, before construction of the Osprey Project could begin, Calpine would have to make the required demonstrations that the Project will cost-effectively meet the specific needs of Florida retail-serving utilities. Consistent with extensive Commission precedent, Calpine also alleged that the Project will contribute to the need of Peninsular Florida for system reliability and for adequate electricity at a reasonable cost, and that the Project will be cost-effective to Peninsular Florida.

3. As alleged in its Petition, Calpine initially planned to develop the Osprey Project as a "merchant" plant, consistent with the Commission's need determination order approving the Duke

New Smyrna Beach Power Project.³ Calpine's primary business purpose in developing the Osprey Project has been, and continues to be, to provide clean, reliable, cost-effective wholesale power to Florida retail-serving utilities for the benefit of their ratepayers. Accordingly, in keeping with the Supreme Court's recent, though presently non-final, opinion in Tampa Electric v. Garcia, Calpine has alleged that it will commit to sell the output of the Project to Florida utilities that serve retail customers in Florida. In endeavoring to fulfill this commitment, Calpine is diligently pursuing discussions (which Calpine believes will lead to active negotiations) toward contractual arrangements committing the output of the Osprey Project to Florida retail-serving utilities to meet the needs of those utilities' Florida retail electric customers. Calpine is pursuing such discussions with the Florida Municipal Power Agency, Reedy Creek Improvement District, and other Florida utilities that provide service to retail customers.

4. To the extent that Calpine obtains contracts, or other satisfactory evidence (e.g., letters of intent to enter into

³ In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401, ("Duke New Smyrna") rev'd sub nom. Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), motions for rehearing pending. In Duke New Smyrna, the Commission defined a "merchant" power plant as a plant with no rate base and no captive retail customers. Duke New Smyrna, 99 FPSC at 3:407.

contracts) of the Project's commitment to serve the needs of Florida retail-serving utilities, for the Osprey Project's output, Calpine will submit those documents to the Commission promptly, e.g., as supplemental exhibits to the Petition or as exhibits to Calpine's witnesses' testimonies. To the extent that Calpine does not obtain contracts or other demonstrable commitments (binding on Calpine) to provide the output of the Project to Florida utilities in time for adequate review in the hearing in this case, Calpine requested in its Petition that the Commission grant the requested need determination subject to a specific condition, on the need determination and on the site certification for the Project, that before construction can commence, Calpine must demonstrate to the Commission that it has appropriate contractual arrangements confirming that the Project's output will be committed to meeting the needs of, and be cost-effective to, Florida retail-serving utilities for the benefit of those utilities' retail customers.⁴ If, pursuant to

⁴The Commission has imposed conditions on its determinations of need in several cases. See, e.g., In Re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 92 FPSC 3:19, 21; In Re: Petition of Florida Power & Light Company to Determine Need for Electrical Power Plant - Martin Expansion Project, 90 FPSC 6:268; In Re: Petition of Seminole Electric Cooperative, Inc., TECO Power Services Corporation and Tampa Electric Company for a Determination of Need for Proposed Electric Power Plant, 89 FPSC 12:262. These cases and their applicability to this need determination proceeding are discussed in detail below.

applicable law, Calpine becomes able to develop the Project as a competitive wholesale (or "merchant") facility, in whole or in part, Calpine has reserved its right to amend its Petition and the accompanying Exhibits accordingly.

5. In the Petition, Calpine further explained to the Commission why Calpine filed its Petition and the Exhibits before it had final power sales contracts in hand. Specifically, Calpine explained that it filed the Osprey Petition when it did

in order to expedite the availability of the Project's benefits for Florida's retail-serving utilities and their customers. At substantial expense to itself, Calpine has already completed the necessary environmental evaluations for the Project and has filed the Site Certification Application for the Osprey Project, and the sufficiency review of that application is complete for the most part. Calpine is actively pursuing discussions toward negotiations for power sales contracts. If Calpine were forced to wait until it had contracts in place before even filing this Petition, which could be a period of months, the benefits of the Project to Florida electric utilities and their customers could be lost for the summer of 2003 and the winter of 2003-2004. This delay can be avoided by allowing the need determination process to move forward while the site certification process is moving forward in parallel. Calpine believes that it is likely that it will have contracts for the Osprey Project's output in place before the site certification hearing is held; if so, then effectively no time in the permitting and construction of the Project will have been lost, and Florida can begin enjoying the Project's benefits sooner.

Petition at 6; see also Petition at 40.

6. Calpine also alleged that it is not required to conduct, or to have conducted, a competitive selection process pursuant to Rule 25-22.082, F.A.C. (the "Bidding Rule") for the Osprey Project, because the intent of the Bidding Rule is to protect captive ratepayers from imprudent expenditures by retail utilities. Calpine explained that this is consistent with the Commission's articulated vision for the role of competitive wholesale power plants in the context of the Bidding Rule, which is that such power plants will provide alternative power supply options for the retail-serving, investor-owned utilities to which the Bidding Rule is intended to apply.⁵ Nonetheless, pursuant to Section 120.542, Florida Statutes, Calpine simultaneously submitted a petition for waiver of Rule 25-22.082, F.A.C., in conjunction with the filing of the Petition.⁶

7. Calpine alleged that it is the utility primarily affected by the Project and that other utilities that enter into contractual arrangements to purchase the Project's output will also be primarily affected utilities within the meaning of the Commission's rules and orders. Calpine further alleged that

⁵ Duke New Smyrna, 99 FPSC 3:401, 434-35.

⁶ The exact style of this pleading is Petition for Determination That Commission Rule 25-22.082(2), F.A.C., Does Not Apply to Calpine, Or In The Alternative, For Waiver of Commission Rule 25-22.082(2), F.A.C. Although this petition was filed in the already open need determination case for the Osprey Project, it is a separate, albeit related, petition.

Calpine and the utilities purchasing the Osprey Project's output will furnish appropriate descriptive information regarding those utilities at the same time that the contracts or other evidence of the Project's output commitment to serving those utilities' needs are submitted to the Commission. Petition at 11 and 11, n.5.

8. Calpine also made specific allegations regarding the amount of firm capacity and energy that it anticipates producing and delivering for use by Florida retail-serving utilities to serve their retail electric customers. Petition at 11. Calpine made allegations explaining the beneficial energy conservation impacts of the Project, the overall cost-effectiveness of the Project, the beneficial environmental impacts of the Project, and the favorable strategic aspects of the Project. Petition at 32-33, 35, and 48, and Tables 15, 16.A & 16.B, 17, 18, and 19.A-19.C of the Exhibits.

9. As more fully explained in Calpine's accompanying Memorandum of Law, the Commission has the legal authority to grant the requested determination of need for the Osprey Project as prayed by Calpine, and the Commission should do so in the public interest. Each of FPC's arguments is flawed, misplaced, or based on mischaracterizations of Calpine's Petition or of applicable law, and accordingly, the Commission should deny FPC's

motion.⁷

RELIEF REQUESTED

WHEREFORE, based on the foregoing and for the reasons set forth in detail in the following Memorandum of Law, the Commission should DENY FPC's motion to dismiss Calpine's Petition.

MEMORANDUM OF LAW

The Commission has the legal authority to grant the requested determination of need for the Osprey Energy Center and should do so in the public interest. The Commission should deny FPC's motion to dismiss because each of FPC's arguments is flawed, misplaced, or based on mischaracterization or misrepresentation of Calpine's Petition. Calpine's Petition is fully consistent with existing law, i.e., the Commission's holding in Duke New Smyrna, and fully compliant with even the narrow requirements of Tampa Electric v. Garcia, which remains non-final by its own terms. Even if Tampa Electric v. Garcia were final, settled law, Calpine has pled specific facts sufficient to justify granting the relief requested. Taking all of Calpine's allegations as true, as the Commission must do in

⁷This assumes, for purposes of this pleading only, that FPC's petition to intervene is granted. If it is not granted, then its motion to dismiss must be rejected because FPC would have no party status to participate in this proceeding.

considering FPC's motion to dismiss, the issue of dismissal turns on two questions:

1. Does the Commission have the legal ability to do what Calpine has requested, i.e., to grant the Petition as requested by Calpine in the Petition?
2. Should the Commission grant the Petition subject to the condition specified therein if indeed Calpine does not adduce the requisite evidence of utility-specific commitment and cost-effectiveness by the scheduled October hearing?

Calpine submits that both questions must be answered in the affirmative, based on Commission precedent and based on the Commission's overriding, legislatively-ordained purpose to promote the public interest and the interests of Florida electric customers. Accordingly, FPC's motion to dismiss should be denied.

ARGUMENT

The Commission should deny FPC's motion to dismiss and allow this need determination case to proceed because it is in the public interest, and in the best interests of Florida's electric customers, to do so. Specifically, allowing the need determination proceeding to go forward will enable the site certification process also to go forward, which will enable the Project to be constructed in time to meet the needs of Florida retail-serving utilities in the summer of 2003 and winter of 2003-2004. Granting FPC's motion to dismiss would certainly cost the State the availability of the Project for the summer of 2003

and likely for the winter of 2003-2004 as well.

FPC argues that Calpine cannot proceed because the Project's output is "not yet contractually committed" to Florida retail-serving utilities. FPC's Motion at 1. FPC also falsely accuses Calpine of planning to enter into "contracts with unidentified utilities on unidentified terms," FPC's Motion at 2, and of attempting to circumvent the Florida Supreme Court's non-final holding in Tampa Electric v. Garcia. Id. at 3. FPC also argues that Calpine should not be given a competitive advantage over other developers of "independent power projects." Id. Finally, FPC also argues that the potential three-to-five year contracts referenced in the Petition would not satisfy controlling law.

Each of FPC's arguments is flawed, misplaced, or based on a mischaracterization of Calpine's Petition or applicable law, and accordingly, each of FPC's arguments should be rejected and its motion to dismiss denied.

Moreover, the Commission should deny FPC's Petition because to grant it would violate the Commerce Clause of the United States Constitution and impermissibly conflict with the express purposes of the Congress in enacting the Energy Policy Act of 1992.

**I. THE COMMISSION HAS THE AUTHORITY TO
GRANT THE REQUESTED DETERMINATION OF
NEED FOR THE OSPREY PROJECT AND SHOULD
DO SO IN THE PUBLIC INTEREST.**

FPC argues that Calpine's Petition is premature and that

Calpine's requested relief is "legally improper and procedurally bizarre." FPC's Memo at 3. As explained below, FPC's arguments are misplaced because Calpine's request is fully compliant with Commission precedent and with the utility-specific requirements of Tampa Electric v. Garcia, if indeed that opinion of the Court becomes final. The Commission has the legal authority to grant the requested relief and should do so in the public interest.

Calpine has asked the Commission to grant its affirmative determination of need for the Osprey Energy Center on the basis that the Project's output will be committed to Florida retail-serving utilities for the benefit of the their retail electric customers. Calpine has further explained why it filed its Petition when it did, i.e., before having final power sales contracts in hand: to enable the Project's permitting to proceed as scheduled so that it will be in service to meet the purchasing utilities' needs beginning in the summer of 2003.

There are several possible scenarios for the processing of this need determination case. In an optimistic scenario, the Commission's motion for rehearing in Tampa Electric v. Garcia would be granted and the Commission's Duke New Smyrna decision affirmed, which would relieve Calpine of having to comply with the requirements of the Court's opinion. In another scenario, Calpine would, before the hearings scheduled for October of this year, enter into contracts and other arrangements (e.g., letters

of intent or memoranda of understanding) establishing that all or substantially all of the Project's output will be appropriately committed to meeting the needs of Florida retail-serving utilities. In this case, no condition at all might be required on the Commission's order issuing from the October hearings. Alternately, the only condition might be that final contracts had to be submitted to the Commission to enable the Commission to confirm that the terms and conditions thereof conform to those set forth in the letters of intent or memoranda of understanding presented in the October hearings. The Commission imposed a similar condition in In Re: Petition of Seminole Electric Cooperative, Inc., TECO Power Services Corporation and Tampa Electric Company for a Determination of Need for Proposed Electric Power Plant, 89 FPSC 12:262, where the Commission conditioned its determination of need on the subsequent FERC approval of contracts in the exact form in which they were presented to the Commission.⁸ In another scenario, Calpine might have letters of intent or similar arrangements in place for only a modest portion of the Project's output before the hearing. In

⁸Considering the numerous possible scenarios, several of which allow the permitting of the Project, including the need determination proceeding, to proceed as presently scheduled, Calpine believes that dismissal at this time would be premature at best. The Court's Tampa Electric v. Garcia opinion is, by its own terms, not final, and even if it should become final, Calpine has the opportunity to develop sufficient evidence to satisfy all applicable requirements of that opinion in time to support the October hearings. Accordingly, FPC's motion should be denied.

such a case, as stated in its Petition, Calpine recognizes that it would have to subsequently demonstrate to the Commission that the output of the Project was committed to Florida retail-serving utilities in compliance with the requirements of Tampa Electric v. Garcia (assuming that the Commission's motion for rehearing is denied), including a demonstration of cost-effectiveness to the purchasing utilities (see Petition at 23, 25-26, 28, 39-40) in order to proceed with construction of the Project. Finally, in the "worst-case" scenario from Calpine's perspective, Calpine might have no letters of intent or any other utility-specific evidence to present at the October hearings. Calpine recognizes that in this case as well, Calpine and the utilities that subsequently enter into power purchase agreements with Calpine for the Project's output would have to come to the Commission to demonstrate that those agreements complied with the Commission's statutes and rules (basically that the output covered by the agreements was needed by and cost-effective to the purchasing utilities) and with the requirements of Tampa Electric v. Garcia.

The Commission has the legal authority to grant the requested determination of need under any of these scenarios and should do so in the public interest.

A. The Commission Has The Legal Authority To Grant The Requested Determination Of Need.

As alleged in its Petition, Calpine is diligently pursuing discussions toward contractual arrangements that will confirm

that the Osprey Project's output is committed to Florida retail-serving utilities. Calpine is optimistic that it will be able to present satisfactory evidence that the Project's output is committed to cost-effectively meeting specific Florida retail-serving utilities' needs in time for this evidence to be adequately evaluated and tested at the hearings in this proceeding (which Calpine expects to be held in October 2000). To the extent that Calpine does not have satisfactory evidence that the output of the Project is appropriately committed by those hearing dates, Calpine requests that the Commission grant an affirmative determination of need subject to the condition that, before construction of the Project may begin, Calpine must demonstrate to the Commission that the Project's output is committed to Florida retail-serving utilities and that the purchase and sales arrangements are cost-effective to the purchasing utilities.

The Commission has clearly explained its authority to impose conditions on affirmative determinations of need in In Re: Petition of Florida Power & Light Company to Determine Need for Electrical Power Plant - Martin Expansion Project, 90 FPSC 6:268 ("Martin 3&4"). In that case, the Commission stated the following:

Pursuant to Section 403.519, Florida Statutes, the Commission has the inherent authority to place conditions on need determinations supported by the record

developed in the proceeding. Such conditions are similar in effect to those placed on the applicants by the Department of Environmental Regulation (DER) or any of the other statutory parties to proceedings under the Power Plant Siting Act (Sections 403.501-.517, Florida Statutes). A violation of any of the conditions placed upon a need determination would result in appropriate action being taken by this agency.

Martin 3&4, 90 FPSC 6:282.

The Commission has imposed conditions on its determinations of need in several cases. For example, in the need determination proceeding for Tampa Electric Company's ("TECO") Polk County coal gasification combined cycle power plant, the Commission conditioned its approval of the plant's construction on TECO's obtaining a specified \$120 million grant from the U.S. Department of Energy. In Re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 92 FPSC 3:19, 21. This precedent is particularly significant and directly applicable here because it represents a condition on the Commission's affirmative determination of need that carried all the way through the site certification process and that had to be satisfied before construction of TECO's plant could begin. The Commission was explicit on this point, stating as follows: "We approve the plant's construction on the condition that TECO does receive the \$120 million grant from the Department of Energy to help defray the costs of the Project." Id. at 21. The Commission

further clarified its approval by stating that "[b]ecause of the importance of the DOE grant to the cost-effectiveness of the project, however, we must condition our approval on TECO's receipt of the \$120 million grant with no requirement that TECO repay any part of the \$120 million grant." Id. at 28.

This is exactly the type of affirmative determination of need, subject to a specified condition subsequent, that Calpine is seeking in this case (that is, in the event that Calpine does not have satisfactory evidence that the Project's output is committed to Florida retail-serving utilities before the hearing in this docket). This precedent is also significant in that the condition imposed in the Commission's affirmative determination of need was the subsequent occurrence of a certain economic event before construction could begin.

The Commission also imposed several specific conditions on its order determining need for the Hardee Power Station, including the following: (a) that the terms and conditions of the wholesale contracts identified by Seminole, Tampa Electric Company, and TECO Power Services had to be approved by FERC as specified in those contracts, (b) that TECO had to construct a specified transmission line at a cost less than or equal to the cost shown in the record of the proceeding before the Commission, and (c) that TECO Power Services had to construct a natural gas lateral at a cost no greater than that shown in the record. In

Re: Petition of Seminole Electric Cooperative, Inc., TECO Power Services Corporation and Tampa Electric Company for a Determination of Need for Proposed Electric Power Plant, 89 FPSC 12:262, 272.

There is no legally meaningful difference between the conditions imposed in the above-cited cases and that which Calpine has asked the Commission to incorporate (if necessary) into its requested determination of need for the Osprey Project. Either a required fact is true when pled or not: TECO did not have the DOE grant in hand when it came to the Commission in its need determination case. TECO, TECO Power Services, and Seminole did not have all required approvals for the contracts upon which the Commission conditioned the determination of need for the Hardee Power Station when they came to the Commission with their petition for determination of need. The Commission should not impose a different standard on Calpine: the Commission should allow Calpine to proceed as requested and should, accordingly, deny FPC's motion.

B. The Commission Should Grant The Requested Determination Of Need So That The Osprey Project's Output Can Be Made Available For The Benefit Of Florida Electric Customers As Soon As Possible.

As outlined above, any of several scenarios may unfold as this need determination case progresses. At one end of the spectrum, the hearings may be held in October as scheduled and an affirmative determination of need issued without any conditions

whatever. At the other end, Calpine and utilities not identified as of the October hearings would have to subsequently come to the Commission to demonstrate that they in fact had entered power purchase contracts that committed the output of the Project in accord with Tampa Electric v. Garcia and that the terms and conditions of the contracts assured that the Project's output would meet the purchasing utilities' needs cost-effectively. In between are scenarios wherein there might be only a condition that Calpine and identified utilities subsequently demonstrate to the Commission that the terms and conditions set forth in final power purchase contracts conformed to those in the letters of intent or memoranda of understanding that were presented to the Commission in October. In any of these scenarios, the Commission should allow the case to go forward as scheduled in order to promote the timely realization of the Project's benefits for the electric customers of Florida.

As shown in Figure 17 of the Exhibits to the Petition, Calpine presently expects to have the need determination hearing in October, the site certification hearing in March 2001, and the final hearing for the Osprey Project before the Siting Board in August 2001, resulting in the commencement of construction in time to bring the Project into commercial operation by June 2003, i.e., in time for the summer season of that year. If FPC's motion to dismiss were granted and Calpine were forced to wait

until it had contracts in hand for the output of the Project before returning to the Commission with its need determination case for the Project, this schedule would be delayed. Assume for the sake of example that Calpine did not enter into all required contracts until March 2001. The schedule for the Project would then be postponed such that the need determination hearing would not be held until June 2001, the site certification hearing would not be held until November 2001 (or later), the final hearing before the Siting Board would not be held until April 2002 (or later), and the Project would not come into service until February 2004 (or later).

This delay, which would be occasioned by granting FPC's motion to dismiss at this stage, would thus cost the State and her citizens the substantial benefits of the Project -- potential power supply cost savings in the range of \$120 million for each year of delay, see Table 18 of the Exhibits; improvements in Peninsular Florida reserve margins, see Tables 7 and 8 of the Exhibits; substantial primary fuel savings benefits, see Table 15 of the Exhibits; and substantial reductions in emissions of sulfur dioxide and nitrogen oxides, see Table 17 of the Exhibits -- for the period of the delay. It is also likely that the Project would provide additional benefits in the new regime contemplated under a Florida Regional Transmission Organization, e.g., helping to alleviate price spikes for ancillary services.

The Commission may ask how the required events would occur if it grants Calpine's Petition and one of the scenarios requires some subsequent Commission review and action concerning final power purchase contracts between Calpine and Florida retail-serving utilities. Naturally, this would depend on the nature of the condition, e.g., whether the only thing remaining to be done would be for the Commission to confirm that the terms and conditions of the final contracts conformed to those set forth in letters of intent reviewed in the October hearings, or whether Calpine and utilities that had not been identified as of the October hearings had to present information regarding those utilities' needs and how the Project and the contracts would meet those needs cost-effectively.

In the first case, Calpine believes that the required subsequent proceeding should be very brief and simple, for the sole purpose of confirming that the terms and conditions of the final contracts matched those of the letters of intent. In the latter case, Calpine believes that a subsequent hearing could be held, probably within 60 days of filing the utility-specific information and the contracts, with the sole purpose being to evaluate how, and whether, the contracts in fact meet the specific utilities' needs cost-effectively. Following the timing example discussed above, the initial hearing would take place in October as anticipated, and an affirmative determination of need,

subject to the requested condition, would issue following that hearing. Calpine and the subject utilities would (by hypothesis) have their contracts in place in March 2001. The subsequent hearing on those contracts would be held in May or June 2001. The site certification hearing would have been held in March 2001, as presently anticipated, and Calpine would then be in a position to proceed to the Siting Board -- with the condition on its affirmative determination of need satisfied -- as presently scheduled, in August 2001, and the Project could be constructed and brought into commercial service by June 2003.

In summary, the schedules may be outlined as follows.

	<u>Calpine's Schedule</u>	<u>Motion to Dismiss Granted</u>
Need Hearing	October 2000	June 2001
Need Order	December 2000	August 2001
Contracts/Supp. Info. Filed	March 2001	March 2001
Supplemental PSC Proceeding	May-June 2001	N/A
Site Certification Hearing	March 2001	November 2001
Siting Board Action	August 2001	April 2002
Osprey In-Service	June 2003	February 2004

Allowing this need determination proceeding to go forward as prayed by Calpine offers the realistic opportunity to gain for the State and her citizens essentially a year's (the summer of 2003 and the winter of 2003-2004) worth of enhanced reliability,

a year's worth of power supply cost savings, a year's worth of fuel savings, and a year's worth of environmental improvements that would be lost if FPC's motion to dismiss were granted. In the final analysis, these benefits are the reasons that the Commission must deny FPC's motion.

C. The Commission's Overriding Mandate To Promote The Public Interest Requires The Denial Of FPC's Motion.

Section 366.01, Florida Statutes, declares the Legislature's intent that Chapter 366 is to be liberally construed in the public interest. Calpine has demonstrated above, and in the specific factual allegations in its Petition, that the public interest will be well served by denying FPC's motion and by allowing Calpine to proceed as requested. This course offers the ability to reap for the State and her electric customers significant power supply cost savings, significant primary fuel savings, significant reductions in emissions from electricity generation, and measurable improvements in power system reliability.

Similarly, Section 366.81, Florida Statutes, declares that the Florida Energy Efficiency and Conservation Act, which includes Section 403.519,⁹ is "to be liberally construed in order

⁹ Calpine believes that this mandate constitutes an "other matter[] within [the commission's] jurisdiction" which the Commission should deem relevant to its consideration of Calpine's Petition. Calpine does not agree that the definitions in FEECA govern its status as an electric utility or as an applicant with respect the Siting Act, but rather that that status is governed by

to meet the complex problems of . . . increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use . . . and conserving expensive resources, particularly petroleum fuels." This specific legislative mandate should lead the Commission to deny FPC's motion and allow this need determination proceeding to go forward because of the significant fuel savings benefits that the Project will provide.

II. FPC'S ARGUMENT THAT ALLOWING CALPINE TO PROCEED AS REQUESTED WOULD GIVE CALPINE AN UNDUE COMPETITIVE ADVANTAGE IS MISPLACED.

FPC argues that allowing Calpine to proceed as requested in its Petition would give Calpine "a competitive advantage over other independent power projects in the form of a legally improper, procedural priority for its project."¹⁰ FPC's Memo at 3. This argument is misplaced. As alleged in its Petition, Calpine and the utilities that purchase the Osprey Project's output will make the required utility-specific demonstrations to the Commission before construction can begin. As demonstrated in

the definitions contained within the Siting Act itself.

¹⁰ This argument confirms Calpine's position that FPC should not be allowed to intervene in this proceeding. Here, FPC is apparently attempting to take upon itself the role of protector of the interests of other potential wholesale power suppliers, the very "independent power producers" that FPC has worked so hard to exclude from participation in the Florida wholesale market. FPC does not have standing to participate in this proceeding at all, and it surely lacks standing to assert the interests of these other suppliers.

the above discussion of the Commission's authority to grant determinations of need subject to conditions, this is neither legally improper nor "procedurally bizarre." Id. If Calpine's being allowed to proceed here in fact gives Calpine a competitive advantage, then that advantage will have been gained because Calpine, unlike any other developer to date, has had the forethought to present to the Commission an innovative opportunity, fully in compliance with the utility-specific strictures of the non-final Tampa Electric v. Garcia opinion, to get a needed power plant into service in Florida in a timely manner (albeit earlier than FPC would like). There is no legal impediment to another potential supplier presenting a similar petition to the Commission, and accordingly, Calpine would receive no undue advantage if, in fact, it were to obtain any advantage at all.

III. FPC'S ARGUMENT THAT THE POTENTIAL THREE-TO-FIVE-YEAR DURATION OF CONTRACTS FOR THE PROJECT'S OUTPUT IS INSUFFICIENT TO SATISFY THE REQUIREMENTS OF TAMPA ELECTRIC V. GARCIA IS MISPLACED, INCONSISTENT WITH FPC'S OWN POSITIONS CONCERNING OTHER POWER PURCHASE CONTRACTS, AND AT MOST A QUESTION OF FACT FOR THE COMMISSION.

FPC argues that Calpine proposes to enter into "ill-defined three-to-five-year power purchase agreements, which would leave more than 80 percent of the expected life-time capacity of the proposed plant uncommitted." FPC's Motion at 5 (emphasis in

original omitted). In response, Calpine makes three points.

First, five-year power purchase contracts appear to be desirable to FPC, and to FPL as well, for economic and strategic reasons. In a recent proceeding before the Commission, FPC requested and obtained from the Commission a waiver of Rule 25-17.0832(4)(e(7))m F.A.C., enabling it to limit the term of standard offer cogeneration contracts to five years, instead of the Rule-required ten years. FPC made this request to "protect[] its ratepayers from the uncertainties of long-term contracts." In Re: Petition of Florida Power Corporation for Approval of Standard Offer Contract Based on a 2003 Combined Cycle Avoided Unit and Accompanying Rate Schedule, Schedule C)G-2, Pursuant to Section 366.051, F.S., and Rules 25-22.036(4) and 25-17.0832(4), F.A.C., 00 FPSC 3:206, 207. It is inconsistent for FPC to argue that a five-year minimum term for one class of power sales contracts is desirable because it will protect FPC's ratepayers while attempting to simultaneously argue that an identical minimum contract term is impermissible.

The Commission should also note that FPL requested and obtained identical relief from the Commission in the form of a variance from the requirements of the same Rule. In Re: Petition by Florida Power & Light Company for Approval of a Standard Offer Contract and Revised COG-2 Tariff, 99 FPSC 9:23, 31. Analogous to FPC's arguments that the requested waiver (or variance, in

FPL's case) would protect FPC's ratepayers, FPL argued "that a ten year contract term will create an unreasonable risk and burden for its customers." Id. at 99 FPSC 9:31.

Second, Calpine would aver to the Commission that as part of its ongoing discussions with potential retail-serving utility purchasers of the Project's output, it is discussing and plans to discuss and negotiate for appropriate renewal terms that will continue to confirm Calpine's commitment "to sell the output of the Project to Florida utilities that serve retail customers in Florida" and to "demonstrate the need for the Osprey Energy Center to meet the specific needs of utilities that are responsible for retail customers in Florida." Petition at 4, 22.

Third, ultimately, there may be a question as to what "fully committed to use by Florida customers who purchase electrical power at retail rates" means. See Tampa Electric v. Garcia, 25 Fla. L. Weekly at S297. However, this is at most a question of fact for the Commission.

IV. PROHIBITING CALPINE FROM APPLYING DIRECTLY FOR A DETERMINATION OF NEED WOULD VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, AND FEDERAL LAW PREEMPTS THE STATE FROM REQUIRING CALPINE TO OBTAIN A CONTRACT WITH STATE REGULATED ELECTRIC COMPANIES IN ORDER TO BUILD THE OSPREY ENERGY CENTER.

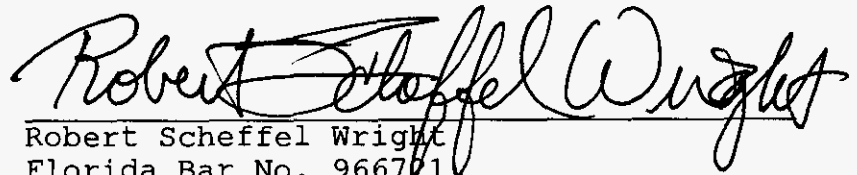
As explained in detail in Calpine's memorandum of law in opposition to Florida Power & Light Company's motion to dismiss Calpine's Petition, filed simultaneously herewith, the Commerce

Clause of the United States Constitution prohibits the Commission from interpreting Florida law to prevent Calpine from applying directly for a determination of need. Moreover, interpreting Florida law as limiting applicants for a need determination to electric utilities regulated by the State is inconsistent with the goals and policies of federal law, specifically the Energy Policy Act of 1992, intended to promote competition in the United States electric utility industry. To conserve paper and effort, Calpine adopts the arguments on these points made in its memo opposing FPL's motion to dismiss and incorporates the same by reference herein.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should DENY FPC's motion to dismiss and REJECT FPC's suggestion of lack of jurisdiction.

Respectfully submitted this 17th day of July, 2000.



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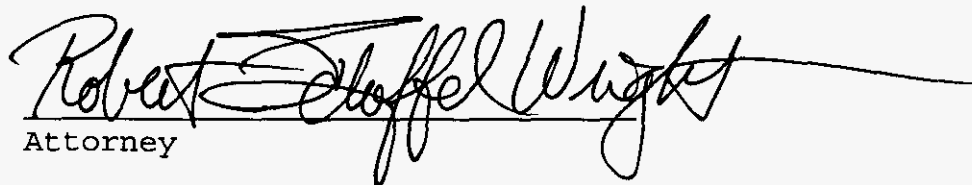
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