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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.)
_____)

RECORDS AND REPORTING
DOCKET NO. 000442-ET
FILED: July 17, 2000

**CALPINE'S RESPONSE IN OPPOSITION TO FLORIDA POWER CORPORATION'S
MOTION TO DISMISS CALPINE'S PETITION FOR DETERMINATION THAT
COMMISSION RULE 25-22.082(2) DOES NOT APPLY TO CALPINE OR
ALTERNATIVE REQUEST FOR WAIVER OF RULE 25-22.082(2), F.A.C.**

Petitioner, Calpine Construction Finance Company, L.P., (Calpine) pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), hereby respectfully submits this response in opposition to Florida Power Corporation's (FPC) Motion to Dismiss Calpine's Petition related to Rule 25-22.082(2), F.A.C.,¹ and in support thereof says:

1. Florida Power Corporation fails to cite any authority for it to insert itself into Calpine's Petition related to Rule 25-22.082(2), the Bid Rule. This is not a proceeding involving potential suppliers of capacity to Calpine pursuant to a request for proposals (RFP), nor is it a proceeding in which compliance with the Bid Rule is at issue. Instead, Calpine's Petition seeks a determination of the applicability of the Bid Rule to Calpine, or alternatively a waiver of the Bid Rule as to Calpine's Osprey Energy Center Project.

2. Instead of citing authority for it to insert itself into Calpine's Bid Rule Petition, FPC uses its motion to argue matters raised in its Motion to Dismiss the Petition for Need Determination, simply failing to recognize that as to the Bid Rule Petition, it is nothing more than

¹On June 19, 2000, Calpine filed its 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. Because the two alternative forms of relief sought are discussed independently, they will be referred to as to separate petitions.

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an officious intermeddler. FPC misapprehends the purpose of the Bid Rule so as to create a role for itself where none exists. The plain reading of Rule 25-22.082 suggests no basis for an entity to participate in the Commission's determination of the applicability of its rule to Calpine or in the Commission's alternative consideration of whether to grant a waiver pursuant to Section 120.542, Florida Statutes, and Rule 25-22.082(9).

3. It is within the exclusive authority of the Commission to decide whether to deny Calpine's request for a determination of non-applicability or to deny a waiver of the rule. The Bid Rule, by its express terms, does not contemplate interpretation or enforcement by any entity other than the Florida Public Service Commission.

4. The question of whether the Bid Rule applies to Calpine in its particular circumstances is not an appropriate means to obtain a policy statement of general applicability from the Commission. The impact of that determination is on Calpine alone. There are no circumstances under which the Commission's determination on this particular Petition as to Calpine could have any impact on FPC or its interests. Any argument to the contrary is disingenuous and misguided.

5. FPC lacks standing to insert itself into the Commission's consideration of Calpine's Petition for a determination that Rule 25-22.082(2), F.A.C., does not apply. It is even more obvious that FPC lacks standing to intervene into or to assert a position in the alternative rule waiver request.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Calpine Construction Finance Company, L.P., respectfully requests that the Commission DENY FPC's Motion to Dismiss Calpine's Petition for Determination that Commission Rule 25-22.082(2) Does Not Apply to Calpine, or in the Alternative Request for Waiver of Rule 25-22.082(2).

MEMORANDUM OF LAW

It is axiomatic that an entity must have some authority to insert itself into any proceeding, and this is particularly so when the proceeding is related to an agency's interpretation of its own rule's applicability to a unique set of facts. Here, Calpine is seeking, first, a determination that the Bid Rule does not apply to it under the unique circumstances of its Osprey Energy Center Project (the Osprey Project or the Project). Only if the Commission makes a contrary determination on the primary Petition does the alternative Petition for Waiver come into play.

The determination of whether the Bid Rule applies to the Osprey Project is exclusively between the Commission and Calpine, because it involves the Commission's interpretation of its own rule. FPC misapprehends the purpose of the Bid Rule when it states that the "very purpose of the Bid Rule is to ferret out competing power supply alternatives interested in meeting a load-serving utility's specified need." Correctly stated, the fundamental purpose of the Bid Rule is to protect captive ratepayers from uneconomic decisions by their monopoly retail-serving utilities, which have the ability to bind those ratepayers to pay the costs of the utilities' power plants and capacity acquisitions. Staff's recommendation in support of the Commission's adoption of the Bid Rule makes it clear that the purpose is to promote competitive selection of generation

capacity in order "to assist electric utilities in fulfilling their statutory obligation to serve at the lowest cost" and to facilitate the Commission's role in reviewing the utility's power supply procurement decisions to ensure that service is provided at the lowest cost to ratepayers. See Order No. PSC-93-1846-FOF-EU in Docket No. 921288-EU.

The focus of the Bid Rule is on investor-owned utilities with a statutory obligation to serve retail ratepayers and on protecting those captive retail ratepayers from paying for capacity additions that are not the least cost alternatives available. Calpine has alleged facts to show that it is a competitive wholesale utility with no obligation to serve retail customers and no captive retail ratepayers from whom cost recovery can be demanded. Those facts must be taken as true in considering a Motion to Dismiss such as FPC has filed. Calpine is simply seeking the Commission's determination that if Calpine has no statutory obligation to serve retail ratepayers and has no retail ratepayers from whom to demand cost recovery, then the Bid Rule does not apply. Clearly the Bid Rule was not intended to apply to projects for which a retail ratepayer can never be required to pay.

This focus of the Bid Rule is clarified in the Commission's Order in Duke New Smyrna.² There the Commission recognized that the "bidding rule" requires an investor-owned utility to evaluate all supply-side alternatives in order that a determination can be made that the proposed unit to be built by the retail-serving utility is the most cost-effective means of meeting the needs of

² 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; rev'd sub nom. Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294, motions for rehearing pending.

the retail utility.³ Florida ratepayers will not be at risk for the costs of the Osprey Project unless it is the least cost alternative at the time a contract is entered. If capacity from the Osprey Project is not the lowest cost alternative to the retail utility, the retail serving utility does not have to sign a contract or purchase any of the output. In such an event, the retail ratepayers would have no obligation to support any of the costs of the Calpine Project.

The Commission has the exclusive jurisdiction to interpret its Bid Rule and to decide whether the rule applies to Calpine. That decision is one which requires no input from others besides the Petitioner and the Commission and it is one that has no role for other entities. It is inconceivable what interest FPC could have in the matter that is an interest cognizable under the rule. Unless FPC enters into a contract to purchase any of the output of the Osprey Energy Center, it has no interest in how or whether the Bid Rule is applied to Calpine or whether Calpine is granted a waiver of the rule requirements.

The impact of the decision Calpine has asked the Commission to make is on Calpine alone. Calpine has not asked the Commission for any policy statement of general applicability. It has simply asked for a determination that, under the facts of this case, the Bid Rule does not apply to Calpine. Such a decision implicates no interests of FPC or any other retail-serving utility that has no contract to purchase the output. FPC has not identified any interest that would be affected by

³ The Commission reiterated this interpretation and application of the Bid Rule in ORDER NO. PSC-99-2438-PAA-EU, entered in In Re: Petition for determination of need for an electrical power plant in Okeechobee County by Okeechobee Generating Company, L.L.C., 99 FPSC 12:219 (Okeechobee). At pages 226 and 227, the Commission agreed that the fundamental "purpose of the rule is to protect captive ratepayers from uneconomic decisions by their monopoly retail-serving utilities, which have the ability to bind their ratepayers to pay the costs of power supply resources." That Order also makes clear that generation facilities, such as Osprey Energy Center, constitute a generation supply alternative for existing retail utilities. As such the Bid Rule does not apply to wholesale utilities.

the Commission's consideration of Calpine's Petition. FPC lacks standing to insert itself into the Commission's consideration of Calpine's Petition for a determination that Rule 25-22.082(2) does not apply to Calpine.

Not every entity having an interest in the outcome of a particular dispute has a right to participate as a party in the proceeding to resolve that dispute. Standing to intervene into an administrative process can only occur under the test established in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981), rev. denied, Freeport Sulphur Co v. Agrico Chemical Co., 415 So.2d 1359 (Fla. 1982); and rev. denied, Sulphur Terminals Co. v. Agrico Chemical Co., 415 So.2d 1361 (Fla. 1982). That two pronged test requires that, in order to attain standing, the intervenor must demonstrate that he has a substantial interest in the proceeding and will suffer injury in fact which is of sufficient immediacy to entitle him to participate and that his substantial injury is of the type or nature which the proceeding is designed to protect. The Agrico test has been adopted many times since then and has been further refined and explained in its progeny. See Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997); Fairbanks, Inc., v. Department of Transportation, 635 So.2d 58 (Fla. 1st DCA 1994); Friends of the Everglades, Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 595 So.2d 186 (Fla. 1st DCA 1992); Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988), rev. denied, 542 So.2d 1333 (Fla. 1989); North Ridge General Hospital v. NME Hospitals, Inc., 478 So.2d 1138 (Fla. 1st DCA 1985).

The Agrico test is instructive and has become deeply inculcated into the body of administrative law. However, the underlying reason for requiring a party to have standing in order to participate in a proceeding is also instructive here. That purpose is to ensure that a party

has a "sufficient interest in the outcome of the litigation" to assure that he has a personal stake in the outcome so he will adequately represent the interest he asserts. See General Development Corporation v. Kirk, 251 So.2d 284, 286 (Fla. 2nd DCA 1971).

[N]ot everyone having an interest in the outcome of a particular dispute over an agency's interpretation of the law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of government or the public, is entitled to participate as a party in an administrative proceeding to resolve that dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's efforts to govern, a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling. Therefore, the legislature must define and the courts must enforce certain limits on the public's right to participate in administrative proceedings. The concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, limiting the proceeding to actual disputes between persons whose rights and interests subject to protection by the statutes involved are immediately and substantially affected. Thus, it has been stated, the "purpose of the law of standing is to protect against improper plaintiffs."

Florida Society of Ophthalmology, 532 So.2d at 1284.

It is also well-settled that an entity has no right to enter a controversy simply because he believes "that one side or the other should prevail for the benefit of his city, county or state."

Charlotte County Development Commission v. Lord, 180 So.2d 198, 199 (Fla. 2nd DCA 1965).

Standing is the "requisite personal interest that must exist at the commencement of the litigation" so as to create a right to enter into that litigation. Montgomery v. Department of Health and Rehabilitative Services, 468 So.2d 1014, 1016 (Fla. 1st DCA 1985). The burden is on FPC to allege adequate grounds for its standing before it can be permitted to participate in this

proceeding. Friends of Matanzas v. Department of Environmental Protection, 729 So.2d 437, 438 (Fla. 5th DCA 1999).

An examination of FPC's Motion to Dismiss makes it glaringly clear that FPC has failed to allege adequate grounds for its standing to insert itself into this proceeding concerning Calpine's Petition regarding the Bid Rule. It has failed to allege any authority for its standing and has failed to establish that its substantial interests will be affected under the two-pronged Agrico test. As to the Petition for Determination that Commission Rule 25-22.082(2) Does Not Apply to Calpine, FPC has not alleged or established, as required by Agrico, that this proceeding will result in an injury to FPC that is immediate, not remote; an injury in fact, not one based on speculation or conjecture. Ameristeel, 691 So.2d at 477; Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So.2d 1236 (Fla. 4th DCA 1995); International Jai-Alai Players Association v. Florida Pari-Mutuel Commission, 561 So.2d 1224 (Fla. 3rd DCA 1990); and Village Park Mobile Home Association v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987). FPC has also failed to satisfy the second prong of Agrico because it has failed to allege that any injury it may suffer is of the type against which this proceeding is designed to protect.

FPC may argue that Calpine filed the Petition for Determination that Commission Rule 25-22.082(2) does not apply to Calpine as part of the need determination proceeding and FPC has standing in the Bid Rule proceeding by virtue of its standing in the need determination proceeding. In its response to FPC's Petition for Leave to Intervene, Calpine argues that FPC has no standing in the need determination proceeding and it is clear that if FPC lacks standing there, it could not have standing here. But, assuming for purposes of argument that FPC is granted

intervention into the need determination proceeding, it still has no standing to insert itself into this separate, albeit related, proceeding⁴. FPC will suffer no injury in fact from the Commission's action on the Petition for determination that Commission Rule 25-22.082(2) does not apply to Calpine.

While FPC has failed to identify any injury in fact that it will suffer if Calpine is allowed to proceed with its Petition for determination that the Bid Rule does not apply to Calpine, it has even more dismally failed to show how any injury it may suffer is one that is cognizable under the Bid Rule. The Bid Rule is not intended to protect the interests of every retail-serving utility in every matter related to capacity and generation. The Bid Rule is only concerned with the interests of the investor-owned electric utility that is proposing a generating unit and those participants who submit a proposal to supply generation capacity. The zone of interest of the Bid Rule is limited and FPC has asserted no injury that is within that limited zone of interest. FPC cannot participate in these proceedings on Calpine's Bid Rule Petition to assert its belief that Calpine should or should not be required to comply with the Bid Rule. FPC has no interest in this proceeding except to prevent or delay Calpine's construction of the Osprey Project so as to perpetuate FPC's monopolistic interests.

FPC cannot reasonably be arguing that any investor-owned electric utility should be able to insert itself into any other utility's activity under the Bid Rule unless the intervenor is either the entity seeking to construct the generating unit or is a participant in the RFP process. To allow

⁴ While the Need Determination Petition and the Petition related to Rule 25-22.082(2) are separate and distinct petitions, they were filed, perhaps incorrectly, in the same Docket Number for administrative convenience. Because they involve different time tracks and different issues, they should be considered as separate and distinct proceedings and they should be heard by the Commission in separate hearings.

otherwise would have every electric utility intervening into every other utility's capacity development proceedings. The absurdity of that result is obvious.

These arguments apply equally to FPC's standing to participate in the alternative proceeding on Calpine's Petition for a Waiver of the Bid Rule. In the alternative request for relief, Calpine is seeking a waiver of Rule 25-22.082(2) under the authority of Section 120.542, Florida Statutes, Rule 25.22.082(9), and Chapter 28-104, F.A.C. Section 120.542(2), Florida Statutes, identifies the standard to be applied in waiver requests. That standard is that the waiver shall be granted when **the person subject to the rule** demonstrates that the purpose of the underlying rule will be achieved by other means **by the person** and when application of the rule would create a substantial hardship. It is up to the person seeking the waiver to demonstrate that he will achieve the purposes of the underlying rule by other means and that he will suffer a substantial hardship without the waiver. There is no statutory basis for any other entity to be involved in the waiver request besides the person subject to the rule and the agency whose rule is at issue.

Both Section 120.542 and Chapter 28-104, the portion of the administrative code related to variances and waivers, specify only one form of participation in a rule waiver proceeding other than by the applicant or the agency. That form of participation is by the submission of written comments on the petition within 14 days after notice.⁵ It is expressly stated that the right to comment does not alone confer party status in any proceeding arising from a petition for waiver. Party status in any proceeding arising from a petition for waiver is only available to an entity

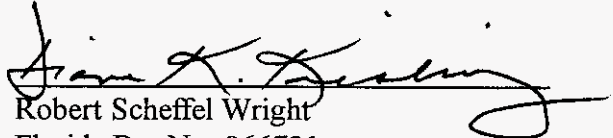
⁵FPC's motion to dismiss cannot be construed as "comments" because they would be untimely.

whose substantial interests will be affected in the proceeding. Since FPC has failed to allege any basis for its substantial interests in such a proceeding, FPC's Motion to Dismiss must be denied. FPC has no substantial interest and no standing to insert itself into the Petition for Waiver of Rule 25-22.082(2), F.A.C.

CONCLUSION

Despite Florida Power Corporation's liberal usage of adverbs to support its Motion to Dismiss, three things are clear: (1) FPC has no basis in law to insert itself into Calpine's Petition for Determination that Commission Rule 25-22.082(2) Does Not Apply to Calpine; (2) FPC has alleged no standing to insert itself into these proceedings; and (3) FPC has no substantial interest in the Petition for Waiver of Rule 25-22.082(2). For these reasons, as more particularly discussed above, Florida Power Corporation's Motion to Dismiss the Petitions related to Rule 25-22.082(2) should be DENIED.

Respectfully submitted this 17th day of July, 2000.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*), facsimile transmission (**), or U.S. Mail, on this 17th day of July, 2000, to the following:

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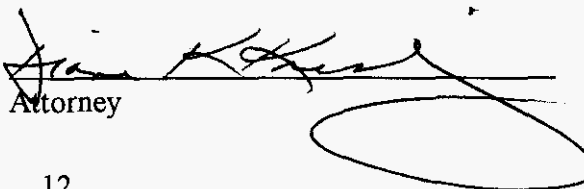
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