

ORIGINAL

August 15, 2002

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**VIA HAND DELIVERY**

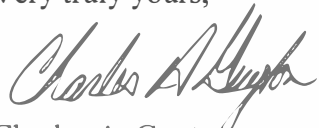
Blanca S. Bayó, Director  
Division of the Commission Clerk &  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and seven (7) copies of FPL's Response to Calpine Energy Services' Amended Issues of Material Fact and Ultimate Facts, 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

CAG:gc  
Enclosure  
Copy to: Counsel for All Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Florida Power & Light )  
Company for a determination of need for )  
a power plant proposed to be located )  
in Martin County )  
\_\_\_\_\_ )  
Docket No. 020262-EI

In re: Petition of Florida Power & Light )  
Company for a determination of need for )  
a power plant proposed to be located )  
in Manatee County )  
\_\_\_\_\_ )  
Docket No. 020263-EI  
August 15, 2002

**FPL's Response to Calpine Energy Services'  
Amended Issues of Material Fact and Ultimate Facts**

Florida Power & Light Company ("FPL") hereby responds to the Amended Issues of Material Fact and Ultimate Facts of Calpine Energy Services, L.P., in Response to Amended Petitions for Determination of Need (the "Issue Statement"), and states:

On August 8, 2002, Calpine Energy Services, L.P. ("Calpine") filed its Issue Statement. Previously on April 11, 2002, Calpine petitioned to intervene in these proceedings. FPL did not object to Calpine intervening, and Calpine was granted party status on April 23, 2002. The Issue Statement is therefore not a petition to intervene, nor does it purport to amend Calpine's previously filed April 11, 2002, Petition to Intervene.

The Issue Statement is in fact nothing more than (i) an attempt to improperly raise various factual claims separate and apart from any testimony Calpine may file and (ii) a procedurally and substantively improper request for sweeping and unprecedented relief, without so much as a thread of legal or factual justification.

The Issue Statement contains dozens of unsupported factual allegations and skewed statements of the issues. The Commission's issue identification process -- and not Calpine's improper amorphous papers -- controls what is tried. Moreover, FPL obviously disputes Calpine's allegations and submits that the evidence, and not Calpine's attempt to poison the well, should be the determining factor in the Commission's findings.

More fundamentally, the evidence will show that Martin Unit 8 and Manatee Unit 3 are needed to maintain electric system reliability and integrity, will provide adequate power at reasonable cost, and are the most cost-effective option available to meet the needs of FPL's customers. See § 403.519, Fla. Stat. To the extent Calpine's Issue Statement seeks to expand the proceedings beyond this statutory mandate it is improper.

The evidence will also show that the risks inherent in any agreement with Calpine were unacceptable based on its parent's below investment-grade credit rating and weak financial position and its parent's related announcement in January 2002 that it had placed all units not under construction on "standby." Presumably, this would include the units Calpine proposed to FPL in its Supplemental RFP proposals. The significant risk of default, and the impacts on FPL's reliability that would stem from such a default, justified FPL not selecting Calpine for negotiations. Calpine's claims regarding the bid evaluation do nothing to overcome its fundamental financial problems.

Additionally, the Issue Statement's requests for relief (pp. 15-16) are wholly unjustified, both procedurally and substantively, and for the reasons that follow should be denied:

**A. The requests for relief are procedurally improper.**

To the extent the Issue Statement requests relief, it is procedurally improper and may not be acted upon. The Issue Statement is not a pleading contemplated in the uniform rules, nor is it a proper basis to seek affirmative relief. Rules 28-106.201.203 and .205 recognize only a petition, answer and petition to intervene as pleadings, and Rule 28-106.204(1) further indicates that "[a]ll requests for relief shall be by motion."

The Issue Statement does not purport to be either a petition or a motion. Nor is it an amendment to Calpine's already-granted Petition to Intervene. Yet it seeks sweeping relief, not the least of which is to have the Commission initiate a parallel or substitute need determination proceeding based on little more than Calpine's baseless claims regarding the bidding process. Putting aside for the moment the lack of any substantive basis for these requests, at the very least Calpine would need to request relief by motion rather than merely suggesting an unprecedented course of action in an anomalous filing.

Moreover, to the extent it asks the Commission to open a new need determination proceeding (presumably for Calpine's projects), the request falls far short of what is required.<sup>1</sup> The Commission has enacted detailed regulations governing what must be submitted to initiate a need determination proceeding. As set forth in Rule 25-

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<sup>1</sup> It is also, as will be discussed, contrary to the restrictions on entities such as Calpine seeking determinations of need for uncommitted capacity, as reaffirmed by the Supreme Court of Florida in *Tampa Electric Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000).

22.081, the required submittals include: (i) a statement of the particulars demonstrating the need for the plant, (ii) a discussion of generating alternatives considered and why they were not chosen and, (iii) when the petition involves a purchase power agreement between a utility and non-utility, a discussion of the effect on the utility's cost of capital and reliability.

Clearly, Calpine does not provide -- nor even attempt to provide -- this information in its Issue Statement. Yet Calpine just as clearly is seeking to initiate a need determination proceeding by its filing. But, the creative and cynical suggestion that the Commission should open such a proceeding, "on its own motion" (with its "own motion" coming at Calpine's request) is not a basis to circumvent the requirements of the Commission's rules regarding initiation of need determination proceedings.

**B. The request for a separate need determination proceeding would fundamentally restructure the bid evaluation process.**

Calpine's request for a parallel need determination proceeding would also have the Commission completely reconfigure the bidding process set forth in Rule 25-22.082, Fla. Admin. Code. There are no other applications before the Commission, nor has any independent developer submitted the information required by Rule 25-22.081 in support of a proposed project. All the Commission would have to support a parallel "*sua sponte*" need proceeding would be the bid information evaluated by FPL. Thus, what Calpine is really asking is that the Commission take the RFP bids, open a parallel docket, and use that docket as a basis to (i) conduct its own evaluation, (ii) select a unit and (iii) certify it as needed, all presumably without FPL even contracting for the power.

Calpine would thus apparently have the Commission essentially take the bid evaluation away from the utility and substitute a commission-run evaluation in a

separate, parallel need determination proceeding. Yet the applicable Commission rule clearly contemplates that the utility, not the Commission, must undertake the evaluation. See Rule 25-22.082(2), Fla. Admin Code (“each investor- owned electric utility shall evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP)”). It is FPL that is designated to evaluate the RFP responses, which it did while monitored by the Commission staff. There is no justification for the Commission going back and starting anew in a separate proceeding initiated at Calpine’s request.

**C. The request that the Commission open a new need determination would violate *Tampa Electric Co. v. Garcia*.**

Additionally, the parallel need determination proceeding that Calpine requests would violate the restrictions recognized by the Supreme Court of Florida in *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000). In that case the Supreme Court recognized that a nonutility such as Calpine cannot seek or obtain need certification for a power plant, unless the unit is fully committed by contract to serving the needs of a particular retail utility or utilities: “A determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has a specific committed need for all of the electrical power. . . .” *Id.* at 434. Calpine would apparently have the Commission, at Calpine’s direct request, attempt to circumvent these restrictions by asking the Commission to act on its behalf and open a need determination for Calpine (and others), so that Calpine could claim the proceeding opened at its request was on the Commission’s own motion.

What Calpine is apparently seeking through its request for a new need determination proceeding is a bare determination of need for one of the bidders’

projects. Nowhere does Calpine ask that FPL contract for that power. The only reason to open a **new** need determination proceeding would be to review and certify the need of one or more plants, completely divorced from any contracting with FPL. Of course, without such a contract with FPL or another utility, any determination of need would run afoul of the restrictions recognized by the Supreme Court of Florida in *Tampa Electric Co. v. Garcia*.

**D. There is no basis to deny both units.**

Finally, Calpine cannot justify its request that the Commission deny **both** FPL units. The two units are needed by FPL for reliability purposes, to meet 1722 MW of documented need. Failure to secure this full amount will place FPL's 2005 and 2006 reserve margins in jeopardy.

Notwithstanding its stated desire to derail both projects, Calpine has not proposed to provide to FPL sufficient capacity to meet all of FPL's 2005 and 2006 need. Thus, even if Calpine's proposals had been selected and contracted despite its fundamentally weak and risky financial position, at least one of the FPL units would still have been built.<sup>2</sup> Thus, no challenge by Calpine could possibly be a basis for denying both units.<sup>3</sup>

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<sup>2</sup> At least one and perhaps both FPL units would have to be built in addition to a Calpine proposal. Calpine had multiple proposals. Of those, only its modest proposal for a 250 MW sale in 2005 was competitive. If FPL made such a purchase in 2005, it would still need its Manatee 3 unit in 2005 to meet its reserve margin criterion and the Martin 8 unit in 2006 to meet that year's reserve margin. If the larger, less competitive Calpine proposal for 611 MW had been contracted in addition to the 250 MW proposal, FPL would still have to add one of its units to meet its capacity needs in both 2005 and 2006.

<sup>3</sup> Moreover, there is no reasonable claim that there is an all-IPP portfolio that would be cost effective. The best such portfolio is over \$400 million more expensive than the portfolio of Martin Unit 8 and Manatee Unit 3.

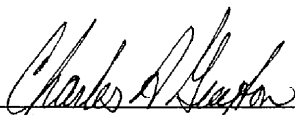
Indeed, were Calpine to have its way, FPL's customers would be left with a shortfall of their requirements, even if FPL contracted with Calpine as Calpine proposed. The only possible reason Calpine can have for asking that need determinations for both units be denied is to create a capacity shortfall so that it may benefit from its other existing units in Florida, which have uncommitted merchant capacity. Seeking improper relief that places the reliability of the FPL system and the State of Florida at jeopardy should be seen for what it: a self-serving, less than responsible attempt to serve its economic interests at the expense of FPL customers and Florida's citizens.

WHEREFORE, the Commission should (1) refuse to consider Calpine's statement of issues to the extent inconsistent with those identified through the formal issue identification process, (2) to the extent Calpine's issues are included in the formal issue identification process, require strict proof of the factual allegations in the Issue Statement, and (3) refuse to grant the relief requested by Calpine.

Respectfully submitted,

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By:   
Charles A. Guyton  
Gabriel E. Nieto



**CERTIFICATE OF SERVICE**  
**Docket Nos. 020262-EI and 020263-EI**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by hand delivery (\*) or by e-mail (\*\*) and United States Mail this 15<sup>th</sup> day of August 2002, to the following:

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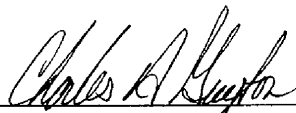
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