

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Determination )  
of Need for an Electrical Power )  
Plant in Martin County by Florida )  
Power & Light Company )  
\_\_\_\_\_ )

DOCKET NO. 020262-

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COMMISSION  
CLERK

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In Re: Petition for Determination )  
of Need for an Electrical Power )  
Plant in Manatee County by Florida )  
Power & Light Company )  
\_\_\_\_\_ )

DOCKET NO. 020263-

FILED: APRIL 11, 2002

JOINT MOTION FOR SUMMARY FINAL ORDER OF CALPINE ENERGY SERVICES, L.P., AND RELIANT ENERGY POWER GENERATION, INC.

Calpine Energy Services, L.P. ("Calpine"), subject to its pending Petitions to Intervene in these proceedings, and Reliant Energy Power Generation, Inc. ("Reliant"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and Chapter 120, Florida Statutes,<sup>1</sup> hereby jointly file this Motion for Summary Final Order in the above-styled docket.

In summary, the Florida Public Service Commission should enter a Summary Final Order dismissing the Petitions for Determination of Need filed by Florida Power & Light Company

("FPL") in the above-styled proceedings based on FPL's failure

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ~~EGR~~ \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC \_\_\_\_\_
- MMS \_\_\_\_\_
- SEC \_\_\_\_\_
- OTH \_\_\_\_\_

<sup>1</sup> All citations herein to the Florida Statutes are to the 2001 edition thereof.

Done 4/15/02

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to comply with the requirements of Rule 25-22.082(8), F.A.C.<sup>2</sup> A Summary Final Order is appropriate in this instance because:

1. There are no disputed issues of material fact relative to FPL's failure to comply with the Bid Rule;
2. FPL's own pleadings and exhibits establish facts that demonstrate that FPL violated the plain meaning and the purpose of the Bid Rule by petitioning for determinations of need for electrical power plants that it did not identify, and for which it did not provide in its Request for Proposals ("RFP") the "detailed technical description" required by the Bid Rule; and
3. dismissal is required, and in the public interest, because compliance with the Bid Rule is, by the terms of the Bid Rule itself, a condition precedent to filing a need determination petition for a power plant subject to Section 403.519, Florida Statutes.

As explained more fully herein, FPL has violated both the letter and the purpose of the Commission's Bid Rule: (a) by filing its need determination petition for the proposed Martin 8 unit where it had failed to provide the "detailed technical description of [FPL's] next planned generating unit or units," required by the Bid Rule, with respect to its Martin 8 unit in the above-mentioned RFP; and (b) by filing its need determination petition for the proposed Manatee 3 unit where it had failed to identify the Manatee 3 unit, or any other unit to be built at FPL's Manatee site, and likewise failed to provide

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<sup>2</sup>The Commission's substantive rule applicable to the issues identified herein is Rule 25-22.082, F.A.C., Selection of Generating Capacity, which is referred to for convenience herein as the "Bid Rule."

any "detailed technical description" of any such unit, as required by the Bid Rule, in its RFP.

FPL's failures to comply with the requirements of the Bid Rule with respect to both units are clearly shown on the face of FPL's petitions and the other record showing.<sup>3</sup> There is no dispute of material fact with respect to the issues demonstrating FPL's failure to comply with the Bid Rule, and accordingly, Movants are entitled to a Summary Final Order determining that FPL did not comply with the Bid Rule as a matter of law. FPL's Petitions for Determination of Need for both the proposed Martin 8 unit and the proposed Manatee 3 unit must be dismissed as a matter of law.

#### PRELIMINARY STATEMENT

The gravamen of these proceedings is the Commission's determination of how the needs of FPL's captive electric customers will best be served by a power plant, or by a combination of power plants. The plant or plants to be built to meet the needs of FPL's customers must be consistent with the criteria set forth in Section 403.519, Florida Statutes. In order to further and facilitate its consideration of whether a

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<sup>3</sup> The record here includes FPL's Petitions for Determination of Need for both the Martin 8 and Manatee 3 units, the consolidated Need Study filed with these petitions, the Appendices to the Need Study, and the pre-filed testimony of FPL's witnesses Sim, Waters, Taylor, Brandt, and Yeager.

proposed power plant is the most cost-effective alternative available, and thereby to protect a public utility's captive customers against non-cost-effective decisions by the utility, the Commission adopted the Bid Rule, which provides, in pertinent part, as follows:

**25-22.082 Selection of Generating Capacity.**

(1) Definitions. For the purpose of this Rule, the following terms shall have the following meaning:

(a) **Next Planned Generating Unit: the next generating unit addition planned for construction by an investor-owned utility that will require certification pursuant to Section 403.519, Florida Statutes.**

(b) Request for Proposals (RFP): a document in which an investor-owned utility publishes the price and non-price attributes of **its next planned generating unit** in order to solicit and screen, for subsequent contract negotiations, competitive proposals for supply-side alternatives to the utility's next planned generating unit.

(c) Participant: a potential generation supplier who submits a proposal in compliance with both the schedule and informational requirements of a utility's RFP. A participant may include utility and non-utility generators as well as providers of turnkey offerings and other utility supply side alternatives.

(d) Finalist: one or more participants selected by the utility with whom to conduct subsequent contract negotiations.

(2) **Prior to filing a petition for determination of need for an electrical power plant pursuant to Section 403.519, Florida Statutes, each investor-owned electric utility shall evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP).**

\* \* \*

(4) Each utility's RFP shall include, at a minimum:

(a) a detailed technical description of the utility's next planned generating unit or units on which the RFP is based, as well as the financial assumptions and parameters associated with it, including at a minimum, the following information:

1. a description of the utility's next planned generating unit(s) and its proposed location(s);
2. the MW size;
3. the estimated in-service date;
4. the primary and secondary fuel type;
5. an estimate of the total direct cost;
6. an estimate of the annual revenue requirements;
7. an estimate of the annual economic value of deferring construction;
8. an estimate of the fixed and variable operation and maintenance expense;
9. an estimate of the fuel cost;
10. an estimate of the planned and forced outage rates, heat rate, minimum load and ramp rates, and other technical details;
11. a description and estimate of the costs required for associated facilities such as gas laterals and transmission interconnection;
12. a discussion of the actions necessary to comply with environmental requirements; and
13. a summary of all major assumptions used in developing the above estimates.

(Emphasis supplied)

As acknowledged by FPL, in its effort to satisfy the requirements of the Bid Rule as a condition precedent to the filing of its need determination petitions, FPL issued an RFP on August 13, 2001, soliciting power supply proposals to meet needs for additional firm electric capacity and energy in 2005 and 2006.

On September 28, 2001, Calpine and Reliant submitted proposals in response to FPL's RFP, and both Calpine and Reliant

are therefore "participants" in the RFP process within the meaning of the Bid Rule. FPL alleges that it evaluated all the proposals and that it then self-selected to build the proposed Martin 8 and Manatee 3 units at issue in these proceedings.

On March 22, 2002, FPL filed its need determination petitions for the proposed Martin 8 and Manatee 3 units.

As shown further in this Motion for Summary Final Order, by its clear violations of the plain, black-letter requirements and purpose of the Bid Rule, FPL failed to satisfy the conditions precedent to filing the Petitions for Determination of Need for both the Martin 8 and Manatee 3 units. There are no genuine disputed issues of fact in this regard because the facts set forth in the respective Petitions, the Need Study, and the pre-filed testimony of FPL's witnesses,<sup>4</sup> all taken as true for purposes of this Motion, show that FPL's Petitions for Determination of Need must be summarily dismissed as a matter of law.

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<sup>4</sup> Citations to the record will be by reference to the petitions by unit and page number (e.g., Martin Petition at 3), to the Need Study by page number (e.g., Need Study at 4), to the Appendices to the Need Study by Appendix and page number (e.g., App. E at E-5), and to the prefiled testimony by Witness name and page and line or exhibit number and page (e.g., Sim at 2 line 1).

STATEMENTS OF MATERIAL FACT AS TO WHICH  
THERE IS NO GENUINE ISSUE IN DISPUTE

1. On August 13, 2001, FPL issued its RFP by which it solicited power supply proposals to meet needs for additional firm electric capacity and energy in 2005 and 2006. (Appendix E) FPL's RFP identified the following as FPL's "next planned generating units" that it would plan to build if better alternatives were not made available via the RFP process:

- a. For 2005:
  - Conversion of 2 combustion turbines ("CTs") at FPL's existing Martin site into 1 combined cycle ("CC") unit which adds 249 MW (summer rating);
  - Conversion of 2 CTs at FPL's existing Ft. Myers site into 1 CC unit which adds 249 MW (summer rating);
  - Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating); and
  - Construction of a new CC unit at FPL's existing Midway site which adds 547 MW (summer rating).
  
- b. For 2006:
  - Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating).

(App. E at E-7-8 and E-54)

2. In its RFP, FPL specified the estimated costs for the first part of its Martin Project (the conversion of two existing CTs to a combined cycle unit) at \$108 million (in year-2000 dollars). (App. E at E-56) FPL identified the estimated costs for the additional 2005 combined cycle unit at the Martin site at \$225.3 million (in year-2000 dollars). (App. E at E-58)

3. The Martin 8 plant is proposed to be a "4-on-1" combined cycle unit, consisting of four combustion turbine generators, four heat recovery steam generators, and one steam turbine generator. This is not the same as the Martin units identified in FPL's RFP. (Martin Petition at 5, 6; Appendix E) The other power plant that FPL has self-selected to meet its identified need for power is a similar "4-on-1" combined cycle power plant to be built at FPL's Manatee power plant site, which FPL has identified as "Manatee 3." Neither the Manatee 3 unit, nor any other unit to be built at FPL's Manatee plant site, was identified in FPL's RFP. (Manatee Petition at 5, 6; Appendix E)

4. Calpine and Reliant submitted their responses to FPL's RFP on September 28, 2001. (Petitions at 11)

5. During the period from September 28, 2001, through at least November 2001, FPL proceeded to develop thirteen (13) more self-build options, including the two at issue in these proceedings. (Sim at 17 line 19-19 line 6)

6. On or about January 15, 2002, FPL announced that it had selected a combination of "self-built" power plants, i.e., power plants to be built and operated by FPL, as the "winners" of FPL's RFP process. (Sim at 61) FPL's self-selected power supply options included the following:



- a. The conversion of two existing combustion turbines at FPL's Martin site into a 4 CT-based combined cycle unit to add approximately 800 MW of additional generating capacity; and
- b. Adding a new 4 CT-based combined cycle unit at FPL's existing Manatee site to add approximately 1,100 MW of additional generating capacity.

(Petitions; Need Study at 2, 3, and throughout)

7. FPL filed its need determination petitions for the proposed Martin 8 unit and the proposed Manatee 3 unit on March 22, 2002. With those Petitions for Determination of Need, FPL also filed their Need Study with Appendices A-O and pre-filed testimony of Samuel S. Waters, Steven R. Sim, William L. Yeager, Alan S. Taylor, and C. Dennis Brandt, together with exhibits thereto.

8. FPL has self-selected a unit for construction at its Martin site that is substantively and materially different from the Martin additions that FPL identified in its RFP and that has itself not been the subject of any RFP. In its RFP, FPL identified the following as its proposed additional generating facilities at its Martin site:

- Conversion of 2 combustion turbines ("CTs") at FPL's existing Martin site into 1 combined cycle ("CC") unit which adds 249 MW (summer rating); and
- Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating).

(E-7, 8 and 54)

In the Martin petition initiating the Martin docket, however, FPL now proposes to build a "4-on-1" combined cycle unit with four combustion turbine generators configured with only one steam turbine generator. (Martin Petition at 1 and 5) In that petition, FPL states that the cost for the Martin 8 project (i.e., the additional costs to expand its two existing combustion turbine generators into the new "4-on-1" combined cycle unit that is now identified as Martin 8) would be \$473 million in 2005 dollars. (Martin Petition at 7) In addition to the fact that FPL has changed the unit described in the RFP to the unit now proposed in its need determination petition, FPL has also changed the costs of FPL's planned units for its Martin site. (Although FPL's RFP stated that the construction cost escalation rate would vary from year to year, applying FPL's estimate for general cost escalation, 2.5 percent per year, to the year-2000 base value in the RFP yields an estimate of \$377.1 million for 2005.) (See App. E at E-56-60)

9. FPL's values for availability and outage rates have also changed, and its need filing includes divergent values for the unit's heat rate. FPL's RFP, which is included as Appendix E to FPL's Need Study accompanying the need petitions for Martin 8 and Manatee 3, stated that the **two** combined cycle units identified as FPL's "next planned generating units" at its Martin site would each have a heat rate of 7,150 Btu per

kilowatt-hour at maximum capacity. (App. E at E-55, 57, 59)  
FPL's need determination petition for Martin 8 states that the newly identified unit would have an "average net-operating heat rate of 6,850 Btu/kWh (at 75° F)." Appendix D to FPL's Need Study, which is FPL's 2001 Ten-Year Site Plan, states that FPL's Martin combined cycle projects would each have an average net operating heat rate of 7,150 Btu/kWh.

10. FPL evaluated the proposals submitted by Calpine and the other respondents to FPL's RFP against a generation expansion plan that included the Martin 8 unit that was not identified or described in the RFP. FPL also evaluated the proposals submitted by Calpine and the other respondents to FPL's RFP against a generation expansion plan that included the Manatee 3 plant, an 1,100 MW unit that was not identified in the RFP. (Appendix E and Sim at 18, line 22-19, line 6) In fact, the Manatee option was not even identified by FPL internally until late November or early December 2001. (Sim at 18, lines 22-25)

**ARGUMENT AND MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR SUMMARY FINAL ORDER**

The three questions to be addressed in considering this Motion for Summary Final Order are:

1. Is compliance with Rule 25-22.082, F.A.C., a condition precedent to the filing of a Petition for Need Determination?
2. Based on the material facts about which there is no genuine disputed issue, did FPL comply with the letter and purpose of Rule 25-22.082, F.A.C.?
3. Should the Petition for Determination of Need be dismissed as a matter of law based on FPL's failure to comply with the requirements of Rule 25-22.082, F.A.C.?

Rule 28-106.204(4), F.A.C., provides:

Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. . . .

Section 120.57(1)(h), Florida Statutes, provides that in any proceeding in which final order authority exists, a summary final order shall be entered if it is determined "from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order."

Pursuant to this authority, this Commission has regularly considered and granted Motions for Summary Final Order where there has been no genuine issue of material fact. See, e.g., In Re: Application for Transfer of Certificate No. 281-S, Order No. PSC-00-0341-PCO-SU (FPSC February 18, 2000); ITC--DeltaCom Communications, Inc., v. BellSouth Telecommunications, Inc.,

Order No. PSC-00-15640-FOF-TP (FPSC August 24, 2000); In Re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osceola Farms, Co., Order No. PSC-00-22341-FOF-EI (FPSC December 6, 2000); and In Re: Complaint of Bayside Mobile Home Park, Order No. PSC-02-0247-FOF-WS (FPSC February 26, 2002).

The purpose of a summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts. National Airlines, Inc. v. Florida Equipment Company of Miami, 71 So. 2d 741 (Fla. 1954). The record is reviewed in the most favorable light toward the party against whom the summary final order is to be entered. Robinson v. City of Miami, 177 So. 2d 718 (Fla. 3<sup>rd</sup> DCA 1965). When the movant presents a showing that no material fact on a dispositive issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary final order is proper and should issue. There are two requisites for granting summary final order: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to entry of a final order as a matter of law on the undisputed facts. See Trawick's Florida Practice and Procedure, § 25-5 (2001). Both requisites raise questions

of law. Here, the first question is whether the record shows an absence of disputed material facts under the substantive law, meaning that the principles of the applicable substantive law must be determined and compared with the record showing of the facts. The second and final question is whether Calpine and Reliant are entitled to the relief sought as a matter of law. In these cases, the answer to both questions being an unequivocal and resounding "YES," a summary final order should issue.

The substantive law, Rule 25-22.082, F.A.C., clearly and unequivocally, mandates that **prior to filing a petition for determination of need**, each investor-owned electric utility **shall** evaluate alternatives to its next planned generating unit by issuing an RFP. Rule 25-22.082(2), F.A.C. The Next Planned Generating Unit is defined as the next generating unit addition **planned for construction** by an investor-owned utility that will require certification pursuant to Section 403.519, Florida Statutes. Rule 25-22.082(1)(a), F.A.C.

The next planned generation unit **must** be the subject of an RFP. The RFP **must** contain certain minimum information. Relevant to this case, FPL must have provided in its RFP a "detailed technical description of the utility's next planned generating unit or units on which the RFP is based, as well as the financial assumptions and parameters associated with it . . . . . ." That detailed technical description must include a

description of the utility's next planned generating unit and its proposed location, the MW size, the estimated total direct cost, the estimated annual revenue requirements, the estimated annual economic value of deferring construction, the estimated fixed and variable operation and maintenance expense, the estimated fuel cost, an estimate of outage rates, heat rate, and other technical details, a description and estimate of costs required for associated facilities, such as gas laterals and transmission interconnections, and a summary of all major assumptions used in developing these estimates.

Therefore, it is clear that conducting an RFP process that complies with all the requirements of Rule 25-22.082, F.A.C., is a condition precedent to the filing of a petition for determination of need by an investor-owned utility, such as FPL. It is well recognized that all valid conditions precedent to the institution of a particular action, whether prescribed by statute, fixed by agreement or implied by law, must be complied with prior to the institution of the action. 1 Fla. Jur. 2d Actions § 30. The requirement that an investor-owned electric utility comply with the Bid Rule prior to filing a Petition for Need determination is just such a condition precedent. See Trawick's Practice and Procedure, §1-5, Conditions precedent (2001). FPL's failure to comply with the express terms and the

intent of the Bid Rule constitutes a failure to satisfy a condition precedent to filing this action.

In this case, FPL's RFP identified the following as FPL's "next planned generating units" that it would plan to build if better alternatives were not made available via the RFP process:

- a. For 2005:
  - Conversion of 2 combustion turbines ("CTs") at FPL's existing Martin site into 1 combined cycle ("CC") unit which adds 249 MW (summer rating);
  - Conversion of 2 CTs at FPL's existing Ft. Myers site into 1 CC unit which adds 249 MW (summer rating);
  - Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating); and
  - Construction of a new CC unit at FPL's existing Midway site which adds 547 MW (summer rating).
  
- b. For 2006:
  - Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating).

The Martin 8 self-build option that FPL selected after the RFP process and that is the subject of the Petition for Determination of Need in Docket No. 020263-EI is not the next planned generating unit described in the RFP. FPL has self-selected a unit for construction at its Martin site that is substantively and materially different from the Martin additions that FPL identified in its RFP. In its Petitions initiating these dockets, however, FPL now proposes to build a "4-on-1" combined cycle unit with four combustion turbine generators and



four heat recovery steam generators, configured with only one steam turbine generator.

Moreover, in addition to Martin 8 being a different unit, in technical engineering terms, from the two Martin units identified in FPL's RFP, the technical information provided in the RFP is, not surprisingly, significantly different from that contained in the petition and exhibits. In its petition, FPL stated that the cost for the Martin 8 project (i.e., the additional costs to expand its two existing combustion turbine generators into the new "4-on-1" combined cycle unit that is now identified as Martin 8) would be \$473 million in 2005 dollars. In addition to the fact that FPL has changed the unit described in the RFP to the unit now proposed in its need determination petition, FPL has also dramatically changed the costs of FPL's planned units for its Martin site. (Although FPL's RFP stated that the construction cost escalation rate would vary from year to year, applying FPL's estimate for general cost escalation, 2.5 percent per year, to the year-2000 base value in the RFP yields an estimate of \$377.1 million for 2005.) FPL's values for availability and outage rates have also changed, and its need filing includes divergent values for the unit's heat rate. FPL's RFP, which is included as Appendix E to FPL's Need Study accompanying the need petitions for Martin 8 and Manatee 3, stated that the **two** combined cycle units identified as FPL's

"next planned generating units" at its Martin site would each have a heat rate of 7,150 Btu per kilowatt-hour at maximum capacity. (App. E at E-55, 57, 59) FPL's need determination petition for Martin 8 states that the newly identified unit would have an "average net-operating heat rate of 6,850 Btu/kWh (at 75° F)." Appendix D to FPL's Need Study, which is FPL's 2001 Ten-Year Site Plan, states that FPL's Martin combined cycle projects would each have an average net operating heat rate of 7,150 Btu/kWh.

The other unit that FPL has self-selected to meet its identified need for power is a similar "4-on-1" combined cycle power plant to be built at FPL's Manatee power plant site, which FPL has identified as "Manatee 3" in Docket No. 020263-EI. Neither the Manatee 3 unit, nor any other unit to be built at FPL's Manatee plant site, was identified in FPL's RFP. In fact, FPL's witness, Mr. Steven Sim, admits that FPL had not even identified the Manatee plant as a possible self-build option until approximately two (2) months after the responses to the RFP were filed by all the respondents.

It is thus clear that the units for which FPL has now filed its Petitions for Determination of Need were not identified in FPL's RFP. There is no dispute that these proposed units-- Martin 8 and Manatee 3--are FPL's "next planned generation

units," i.e., the next planned generating unit additions planned for construction by FPL that require an affirmative determination of need from the Commission pursuant to Section 403.519. Since the RFP demonstrably failed to include these units, FPL violated the Bid Rule.

In regard to the competitive selection of generating capacity pursuant to the Bid Rule, the plain meaning of the Rule must govern as a matter of law. See Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So. 2d 1055, 1057 (Fla. 1<sup>st</sup> DCA 1986). Rule 25-22.082(2), F.A.C., unequivocally requires that the investor-owned utility must evaluate supply-side alternatives to its next planned generating unit by issuing an RFP prior to filing a petition for determination of need for that unit. The next planned generating unit must be the one "planned for construction by an investor-owned utility that will require certification pursuant to Section 403.519, Florida Statutes." A detailed technical description of that next planned generating unit on which the RFP is based must be clearly provided in the RFP. This RFP by FPL did not include the detailed technical description of the Martin 8 unit that it now proposes to build. Even more significantly, this RFP by FPL did not even mention the Manatee 3 unit that it now proposes to build, apparently

because FPL itself has admitted that it did not even conceive of that option until two months after the close of the RFP. These requirements are not ambiguous and do not require further interpretation. Instead, they are clear and should be enforced.

FPL has violated both the letter and the purpose of the Commission's Bid Rule, most obviously by filing its need determination petition for Martin 8 and Manatee 3 where it had failed to provide the "detailed technical description of [FPL's] next planned generating unit or units," required by the Bid Rule in the above-mentioned RFP.

FPL has presented a "moving target" of exactly the type that the Bid Rule was designed to prevent by requiring the utility to provide a "detailed technical description" of its next planned generating units. FPL has blatantly and grossly circumvented the requirements of the Bid Rule. This violation prejudiced Calpine, Reliant, and all other respondents to the RFP, and this violation systemically and unavoidably resulted in a defective evaluation of proposals: FPL could not have conducted a meaningful analysis of its options when it had mis-identified and mis-specified its "next planned generating units." Any alternate interpretation of the Bid Rule would lead to an absurd result by allowing a utility to propose a decoy unit in its RFP and then to self-select a completely different unit in its capacity selection process. Such a sham RFP could

not be contemplated by the terms of the Bid Rule. Moreover, without being held to the terms of the RFP, a utility is free to change its evaluation parameters to ensure that it always wins and thus always forecloses its competitors from fair consideration. The Commission should not accept such an alternate interpretation of its Bid Rule, nor should it countenance such a clear, facial violation of the Commission's Bid Rule.

The Commission, Calpine, Reliant, and the other parties to these proceedings should not be forced to incur the expenses of preparing for hearing, including expensive modeling, discovery, and responses to discovery, as well as the expense of the hearing and post-hearing procedures when no dispositive issue of material fact exists related to FPL's compliance with the conditions precedent in the Bid Rule. This is exactly the type of situation that the Florida Supreme Court said is appropriate for a grant of summary disposition, i.e., one where the expense of trial is great and the absence of a genuine issue of material fact is clear. National Airlines, Inc. v. Florida Equipment Company of Miami, 71 So. 2d 741 (Fla. 1954).

These Petitions for Determination of Need should be dismissed by Summary Final Order expeditiously so that the issue of compliance with the Bid Rule is promptly disposed of prior to expenditure of more effort by all concerned. Prompt disposition

also furthers the goal of keeping the process moving and ensuring that needed capacity can be brought into service on a reasonable planning horizon. In other words, it will be better for FPL to start a new RFP process in compliance with the Bid Rule (or for the Commission to take action on its own motion to ensure that needed capacity is developed in a timely way) now, rather than waiting until these proceedings are concluded, which is presently scheduled for August of this year. Finally, the Commission should not countenance the blatant circumvention of the competitive capacity selection process prescribed by the Bid Rule by allowing these cases to proceed further. Now is the time to make FPL go back and do it right.

Movants have attempted to contact all parties and can represent that CPV supports the motion and Mirant takes no position at this time. FPL opposes the motion. Commission Staff takes no position.

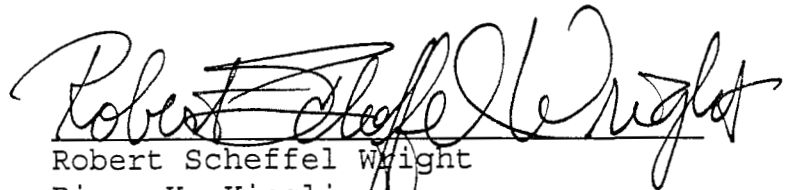
#### **SUMMARY OF ARGUMENT AND REQUEST FOR RELIEF**

Compliance with Rule 25-22.082, F.A.C., is a condition precedent to the filing of a Petition for Need Determination. Based on the material facts about which there is no genuine disputed issue, FPL did not comply with the requirements or purpose of Rule 25-22.082, F.A.C. The Motion for Summary Final Order should be granted and the subject Petitions for

Determination of Need should be dismissed as a matter of law based on FPL's failure to comply with the requirements of Rule 25-22.082, F.A.C.

WHEREFORE, Calpine Energy Services, L.P., and Reliant Energy Power Generation, Inc., pursuant to Rule 28-106.204, Florida Administrative Code, and Chapter 120, Florida Statutes, together with established Commission precedent, respectfully request that that Commission enter a summary final order dismissing the Petitions for Determination of Need for the proposed Martin 8 and Manatee 3 units filed by Florida Power & Light Company.

Respectfully submitted this 11<sup>th</sup> day of April, 2002.



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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 (\*), or Federal Express on this 11<sup>th</sup> day of April 2002, to the following:

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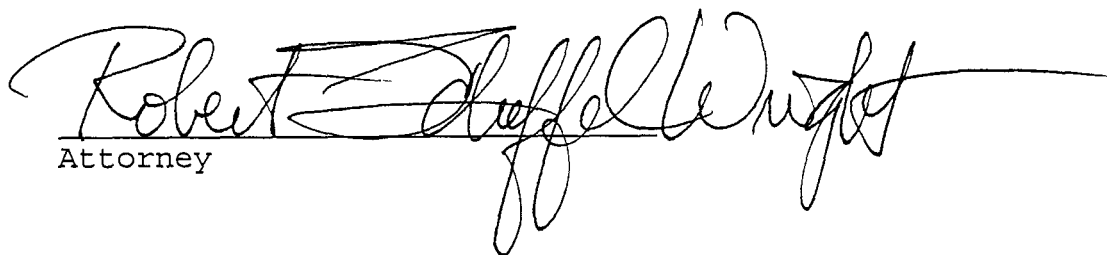
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