

ORIGINAL

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.)

DOCKET NO. 000442-EI  
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RECORDS AND REPORTING

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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.

Calpine Construction Finance Company, L.P. ("Calpine"), pursuant to Section 120.542, Florida Statutes, and Commission Rule 25-22.082(9), Florida Administrative Code ("F.A.C."), hereby respectfully petitions the Commission for a determination that Rule 25-22.082(2), F.A.C., does not apply to Calpine or to its petition for determination of need for the Osprey Energy Center (the "Osprey Project" or the "Project"), or in the alternative, for a waiver of the application of Rule 25-22.082, F.A.C., Selection of Generating Capacity. In summary, Rule 25-22.082, F.A.C., should not be construed to apply to Calpine or to the Osprey Project because, by its inherent nature, Calpine cannot force any utility or any group of captive wholesale or retail customers to bear the Project's costs. Moreover, also by its inherent nature, the Project will reduce wholesale power supply

costs (and thus retail rates) and increase reliability in Peninsular Florida. If the Rule were determined to apply, then it should be waived because the Project serves the fundamental

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purpose of the underlying statute and rule, and because requiring Calpine to comply with the Rule would cause substantial hardship in the form of delay to Calpine, as well as delay of the Project's benefits to Florida electric customers.

In further support of this Petition, Calpine states as follows.

#### BACKGROUND

1. The name and address of the Petitioner is as follows:

Calpine Construction Finance Company, L.P.  
ATTN: Robert K. Alff  
Senior Vice President  
Calpine Eastern Corporation  
The Pilot House, 2<sup>nd</sup> Floor, Lewis Wharf  
Boston, Massachusetts 02110 .

2. All pleadings, motions, orders, and other documents directed to Petitioner are to be served on the following:

Robert Scheffel Wright  
John T. LaVia, III and  
Diane K. Kiesling  
Landers & Parsons, P.A.  
310 West College Avenue (ZIP 32301)  
Post Office Box 271  
Tallahassee, Florida 32302,

and

Alycia Lyons Goody, Esquire  
Regional Counsel  
Calpine Eastern Corporation  
The Pilot House, 2<sup>nd</sup> Floor, Lewis Wharf  
Boston, Massachusetts 02110

with courtesy copies to:

Tim Eves  
Director, Business Development  
Two Urban Centre  
4890 West Kennedy Blvd., Suite 600  
Tampa, Florida 33609.

3. The name and address of the agency affected by this

Petition is:

Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850.

4. Calpine is the developer of the Osprey Energy Center, which will be a natural gas-fired, combined cycle generating plant with 527 MW of net generating capacity at average ambient site conditions, excluding duct-firing and power augmentation. On March 16, 2000, Calpine filed its Site Certification Application for the Project with the Florida Department of Environmental Protection, and has filed its Petition for Determination of Need for the Project simultaneously with this Petition for Determination that Commission Rule 25-22.082 does not Apply to Calpine, or in the alternative, for waiver of Rule 25-22.082, F.A.C.

5. Calpine initially planned to develop the Osprey Energy Center as a competitive wholesale (or "merchant") plant, consistent with the Commission's need determination order approving the Duke New Smyrna Beach Power Project.<sup>1</sup> Calpine's primary business purpose in developing the Osprey Energy Center has been, and continues to be, to provide clean, reliable, cost-

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<sup>1</sup> 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, 2000 WL 422871 (Fla. 2000), motions for rehearing pending (hereinafter Tampa Electric Co. v. Garcia). 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.

effective wholesale power to Florida retail-serving utilities for the benefit of their ratepayers. In keeping with the Supreme Court's opinion in Tampa Electric Co. v. Garcia, Calpine will commit, pursuant to applicable law, the output of the Project to Florida utilities that serve retail customers in Florida. Calpine is diligently pursuing discussions toward contractual arrangements committing the output of the Osprey Project to retail-serving utilities that provide service to retail electric customers. If, pursuant to applicable law, Calpine becomes able to develop the Project as a competitive wholesale (or "merchant") facility, Calpine will amend its Petition and Exhibits accordingly. Such a change in the procedural stance of Calpine's Petition would not alter the conclusion that Rule 25-22.082 does not apply to the Project.

6. Calpine is an investor-owned electric utility within the meaning of Section 366.02(2) and a public utility under the Federal Power Act. Calpine is developing the Osprey Energy Center as a competitive wholesale power plant in a manner that is consistent with the Supreme Court's decision in Tampa Electric Co., et al. V. Garcia. Calpine initially planned to develop the Osprey Energy Center without prior contractual commitments, consistent with the Commission's need determination order in Duke New Smyrna. Subsequent to the Tampa Electric Co. V. Garcia decision, Calpine revised its plans and will commit the output of the Project, via contract, to Florida utilities that serve retail customers in Florida. See Calpine's Petition for Determination of

Need for the Project filed simultaneously with this Petition for Waiver of Rule 25-22.082, F.A.C. Hence, issues regarding Rule 25-22.082, F.A.C., and its applicability to Calpine may arise. First, Calpine seeks a determination by this Commission that it is not subject to Rule 25-22.082(2) because the Osprey Project will not be a rate-based power plant such that captive electric customers could be required to pay for the Project's costs through regulated rates and it will not be a QF such that any utility could be forced to purchase the Project's output. Therefore, Calpine is not an entity that the Commission intended to subject to the requirements of Rule 25-22.082. However, in the alternative, and for regulatory certainty, Calpine petitions for a waiver of Rule 25-22.082. The requested waiver is premised on the grounds that (a) the Osprey Project, by its very existence and inherent nature, promotes cost effective capacity procurement decisions by retail-serving utilities in Florida, (b) the Osprey Project will result in a lower cost supply of electricity to the retail-serving utilities in Florida, (c) the Osprey Project will increase the reliable supply of electricity to Florida retail-serving utilities' general body of ratepayers, (d) the Osprey Project will not be a rate-based power plant such that captive electric customers could be required to pay for the Project's costs through regulated rates, (e) the Osprey Project will not be a QF such that any utility could be forced to purchase the Project's output, and (f) it is in the public interest that the requirements of Rule 25-22.082(2) be waived as to this Project.

## PURPOSE OF UNDERLYING STATUTE

7. Rule 25-22.082, F.A.C., implements Section 403.519, Florida Statutes, which governs the Commission's determination of need proceedings for proposed electrical power plants. In particular, the rule promotes the Commission's consideration, pursuant to Section 403.519, of whether a proposed power plant is the most cost-effective alternative. The fundamental concept is that a competitive selection process will result in the lowest-cost viable alternative being selected. 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 those ratepayers to pay the costs of the utilities' power plants.

8. The Rule was adopted by Commission Order No. PSC-93-1846-FOF-EU, issued on December 29, 1993. Though the Order consists of little more than the boiler-plate notice of adoption language, the Staff's recommendation makes clear that the purpose of the Rule 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. Docket No. 921288-EU, Staff Recommendation at 3 (November 22, 1993); see also id. at 9, 10. This focus on utilities with a statutory obligation to serve retail ratepayers, and on protecting those captive retail

ratepayers, makes clear that the Rule was not intended to include competitive wholesale utilities, like Calpine and the Osprey Project here, which have no statutory obligation to serve retail customers and no captive retail ratepayers from whom they may demand cost recovery.

**RULE 25-22.082(2), F.A.C., IS NOT APPLICABLE TO COMPETITIVE WHOLESALE POWER PLANTS LIKE OSPREY ENERGY CENTER**

9. It is clear that the Rule was not intended to apply to a competitive wholesale utility like Calpine, and that it makes no sense to apply the Rule to the Osprey Project. Neither Calpine nor the Project has a statutory obligation to directly serve retail customers nor any corresponding legal ability to bind such captive customers to pay for any of the costs of the Project. Moreover, Calpine has no legal ability to bind any retail-serving utility to pay for any of the costs of the Project. Retail-serving utilities will only pay for the capacity and energy that they purchase from Calpine, and they will, reasonably assuming rational economic behavior, only buy power from the Project when that purchase represents the most cost-effective alternative available to serve an identified need. In other words, if a retail-serving utility has a lower-cost option than a potential purchase from the Project, then it should, consistent with its contractual obligations and its general duty to serve at the lowest cost, select the alternative.

10. This is exactly how the Commission envisioned a merchant plants operating in the context of the bidding rule. As the Commission noted in Duke New Smyrna:

The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another generation supply alternative for existing retail utilities. Florida ratepayers will not be at risk for the costs of the facility, unless it is proven to be the lowest cost alternative at the time a contract is entered.

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

11. This logic applies equally to a competitive wholesale power producer such as Calpine. No IOU (nor any municipal or cooperative utility) is required to contract with Calpine for the output of the Project. Florida ratepayers will not be at risk for the costs of the Project; they may, pursuant to contracts voluntarily entered into by their retail-serving utilities and subject to this Commission's prudence review of expenditures pursuant to such contracts, be required to pay for the costs of power actually produced by the Project and purchased by their retail-serving utilities.

12. It further makes no sense to require Calpine to jump through the procedural hoops of the Rule because Calpine and the



Osprey Project can only contribute to promoting the fundamental purpose of the Rule. In effect, Calpine is pursuing the certification for the Project for the purpose of providing cost-effective wholesale power to Florida retail-serving utilities through those utilities' various procurement processes. The Project can only contribute to the fundamental purpose of the Rule by making an additional, necessarily cost-effective power supply option available to retail-serving utilities. As the Commission stated in Duke New Smyrna:

The Duke New Smyrna project presents another alternative for existing utilities, without putting Florida ratepayers at risk for the costs of the facility as is done for the costs of rate based power plants.

\* \* \*

The evidence in the record shows this plant, because of its efficiencies, will be dispatched a great deal of the time. However, because of its merchant nature, it will only be dispatched when it is economical to do so. As a result, we believe that it will exert a downward pressure on electricity pricing in the wholesale power market in Florida. This, in turn, will flow through to retail IOU customers in retail through the fuel adjustment clause.

Duke New Smyrna, 99 FPSC 3:437-38. This same logic again applies to this Project in that IOUs (and other electric utilities) will only contract for this output if it is economic to do so and the nature of the contracts will be such that they need not take that output when it is not economic to do so. This arrangement can only exert downward pressure on electricity pricing in the wholesale power market in Florida. Such savings will flow through to retail

customers through fuel and purchased power cost recovery charges. The Commission should not reasonably apply the Rule in such a way as to impede Calpine's ability to provide these economic benefits to the retail-serving utilities and ultimately to the retail electric customers of Florida.

#### ALTERNATIVE PETITION FOR WAIVER

13. While Calpine firmly believes that Rule 25-22.082(2) does not apply to this Project, it alternatively petitions the Commission for a waiver of the Rule should the Commission determine that the Rule is applicable to this Project.

#### LEGAL BASIS FOR WAIVER

14. Section 120.542(1), Florida Statutes, authorizes each state agency to grant variances and waivers from the requirements in the agency's rules. Section 120.542(2), Florida Statutes, provides in pertinent part that

waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic . . . or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

Commission Rule 25-22.082(9), F.A.C. provides as follows:

The Commission may waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

**GRANTING THE REQUESTED WAIVER SATISFIES THE FUNDAMENTAL PURPOSE OF THE UNDERLYING STATUTE AND RULE**

15. As discussed above, 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 those ratepayers to pay the costs of the utilities' power plants. The Rule is intended 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. The Rule should not be construed or interpreted in a manner that is inconsistent with the underlying purposes of the Rule.

16. Commission orders applying and interpreting this Rule support the proposition that its intent is to protect captive ratepayers from being saddled with the costs of power supply resources that are not the most cost-effective alternatives available to their retail-serving utilities. For example, the Commission denied a request for waiver of the Rule by a retail-

serving investor-owned utility because the utility had not demonstrated that the lowest cost generation alternative would be selected by the utility, and that the requested waiver would thus be "contrary to the intent of the bidding rule . . . ." In Re: Petition by Florida Power Corporation for Waiver of Rule 25-22.-02, F.A.C., Selection of Generating Capacity, 99 FPSC 2:92, 96. The Commission went on to note that denying the waiver would assure that the utility's ratepayers benefit from the most economical resource addition. Id. at 98.

17. In the present case, granting of a waiver will promote the public interest in that retail-serving utilities' ratepayers will benefit from the most economic and cost-effective generation alternative. Calpine has no legal ability to bind any retail-serving utility to pay for any of the costs of the Project. Retail-serving utilities will only pay for the capacity and energy that they purchase from Calpine, and they will, reasonably assuming rational economic behavior, only buy power from the Project when that purchase represents the most cost-effective alternative available to serve an identified need. In other words, if a retail-serving utility has a lower-cost option available than a potential purchase from the Project, then it should, consistent with its contractual obligations and its general duty to serve at the lowest cost, select the alternative. The Project simply presents another generation supply alternative for existing retail utilities. Florida

ratepayers will not be at risk for the costs of the facility; at most, captive retail customers would be at risk for the costs of power purchased for their benefit by their retail-serving utilities, subject to the Commission's review of the prudence of such costs.

18. The waiver can only result in a lower cost of supply of electricity to the retail-serving utility's general body of ratepayers. This is so because (again, assuming economically rational behavior by the retail-serving utilities) only cost effective purchases will be made and only cost effective purchases can be passed through to retail ratepayers through the fuel adjustment clause. Not only will the Project result in a lower cost supply of electricity, it should result in the lowest cost supply of electricity to those retail-serving utilities that contract for the output.

19. Additionally, the Petition for Determination of Need amply demonstrates that the addition of this Project will increase the reliable supply of electricity to the retail-serving utilities that purchase output, and hence to their general body of rate payers.

20. Finally, it is abundantly clear that diversifying the available mix of available capacity in Florida, without burdening the retail ratepayers of any utility with the costs of a rate-based facility, is in the public interest. It would be disingenuous to argue otherwise since the costs

of this Project can never be included in any rates based on the costs associated with rate-based facilities.

21. Section 120.542(2), Florida Statutes, authorizes a waiver of a rule upon a demonstration that the purpose of the underlying statute will be achieved by other means and when application of a rule would create a substantial hardship or would violate principles of fairness. Calpine has amply demonstrated that the underlying purpose of the statute will be achieved because the essence of a competitive wholesale generator is one of cost effective provision of electricity. This Project, without doubt, will be a lower cost alternative source of supply that will be available to the retail ratepayers of the retail-serving utilities of Florida.

**REQUIRING CALPINE TO COMPLY WITH THE SUBJECT RULE  
WOULD RESULT IN SUBSTANTIAL HARDSHIP AS WELL AS  
LOST BENEFITS TO FLORIDA ELECTRIC CUSTOMERS**

22. Calpine is filing this Petition and the Exhibits at this time in order to expedite the availability of the Project's benefits for Florida's retail-serving utilities and their customers. 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. Moreover, Calpine would be forced to incur the expense of conducting the hypothetical selection process and would also be deprived of the business opportunities of having the Project operational before the summer of 2003. This delay can be avoided by allowing the need determination process to move forward while the site certification process is moving forward in parallel.

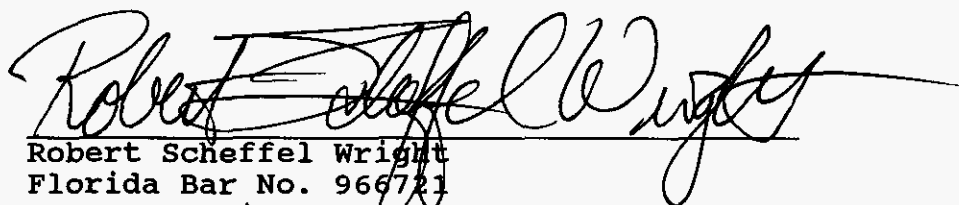
**RELIEF REQUESTED**

Calpine respectfully requests the Commission to enter an order confirming that Rule 25-22.082, F.A.C., does not apply to Calpine or to the Osprey Energy Center, or, in the alternative, for a waiver of the application of the subject rule to Calpine and the Osprey Project.

**CONCLUSION**

Calpine has amply demonstrated that Rule 25-22.082, F.A.C., was not intended to apply to competitive wholesale utilities like Calpine and competitive wholesale power plants like the Osprey Project, and accordingly, the Commission should grant the order requested herein. In the alternative, Calpine has also demonstrated that a waiver would serve the fundamental purpose of the underlying statute and rule, that it would impose substantial hardship on Calpine and cost the electric customers of Florida valuable time and opportunities of realizing the benefits of the Osprey Project, and that the waiver is in the public interest. Accordingly, the Commission should grant the relief requested herein.

Respectfully submitted this 19th day of June, 2000.



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