

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
Submitted for filing:
July 10, 2000

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FLORIDA POWER CORPORATION'S SUGGESTION
OF LACK OF JURISDICTION AND MOTION TO DISMISS

Intervenor, Florida Power Corporation ("FPC") respectfully suggests that the Commission lacks jurisdiction to proceed with the Petition of Calpine Construction Finance Company, L.P. ("Calpine" or "Petitioner") for a determination of need. Under the Florida Supreme Court's decision in Tampa Electric Co. v. Joe Garcia, et al., Supreme Court Case No. SC95444-95446 (April 20, 2000) ("Duke"), Calpine has no proper standing to file a need petition, and the Commission has no statutory authority to entertain such a petition.¹ Therefore, Calpine's Petition should be dismissed immediately, and this docket should be closed forthwith. In further support of this motion, FPC states as follows:

1. In its recent decision in Duke, the Florida Supreme Court made abundantly clear that wholesale power plants — like Calpine's proposed plant (the "Project") — that are not yet contractually committed to meeting the identified needs of Florida retail load-serving utilities are not proper applicants for a need determination under Section 403.519, Fla. Stats. The Court

¹ Although the Public Service Commission and Duke New Smyrna have moved for rehearing in this case, the Florida Supreme Court's decision in Duke simply reiterates the Florida Supreme Court's controlling interpretation of the Siting Act as set forth in the Nassau cases and mandates the immediate dismissal of Calpine's decidedly illegal need petition. Nassau Power Corp. v Beard, 601 So. 2d 1175 (Fla. 1992) ("Nassau I") and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) ("Nassau II") (collectively, the "Nassau cases"). Indeed, Calpine previously avoided abatement of this docket by claiming that its need application when filed would meet the requirements of Duke, distinguishing the Project from its merchant brethren. Calpine's petition utterly fails in this regard, and its Petition should meet the same fate as the other now decidedly illegal merchant plant applications.

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expressly held that “the granting of the determination of need” on the basis of such an application “exceeds the PSC’s present authority.” Duke at 18.

2. Relying upon its prior decisions in the Nassau cases, the Supreme Court held that only retail utilities, like FPC, or independent power producers (“IPPs”) that are already fully committed by contract to meeting the identified needs of a retail utility or utilities are proper applicants for need determinations:

A determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant.

Duke at 13.²

3. In its Petition, Calpine frankly acknowledges that its Project was conceived initially as a merchant plant. That being the case, Calpine has not obtained and does not allege that it has obtained power purchase agreements dedicating the proposed plant to meeting the needs of Florida load-serving utilities. In place of final power purchase agreements, Calpine offers only vague conjecture that it is “pursuing” discussions, that may “lead” to serious “negotiations” about prospective contracts with yet-unidentified retail utilities. (Need Petition Intro. p. 4). Thus, on the face of the Petition it is clear that Calpine is no differently situated from any other merchant developer in the State: Calpine has no ability whatsoever to plead and prove that it will in fact meet identified, utility-specific needs.

4. Calpine may not rely on unspecified assurances that it will serve an unspecified “need” of Florida’s retail utilities in the future, either by entering into contracts with unidentified utilities on unidentified terms (or by operating as a merchant, if the law changes). (Need Petition ¶¶19-29). In Duke, the Florida Supreme Court specifically addressed this situation, stating:

The projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need pursuant to § 403.519, Florida Statutes.

Duke at 17.

5. Attempting to circumvent the clear holding of the Supreme Court's decision in the Duke case, Calpine insists that the Commission should allow Calpine to proceed with its need case, despite the fact that Calpine cannot make a legally sufficient showing of need at the present time, based on sheer speculation that Calpine may be able to make such a showing at the time of the hearing. Calpine's suggestion is procedurally bizarre and legally inappropriate. A petitioner for relief must be able to allege a legally sufficient basis for relief at the time that it files its petition, or else its petition should be dismissed. See e.g., Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County, 492 So.2d 686, 688 (Fla. 3rd DCA, 1986) (where less than all the requisite elements of a cause of action exist when the complaint is filed, the claim should be dismissed without leave to amend); and Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607, 610 (Fla. 4th DCA, 1975) (a cause of action must exist and be complete before the action can be commenced). Calpine should not be given a competitive advantage over other independent power projects in the form of a legally improper, procedural priority for its project. No more than any other would-be power plant developer, Calpine should be made to file a case, if at all, only when and if it has a legally sufficient case to file, and not a moment sooner.

6. Anticipating that it will not in fact be able to adduce sufficient power purchase agreements at the time of a final hearing in this matter, Calpine makes the extraordinary request that the Commission nonetheless grant a determination of need — based on no legally sufficient basis whatsoever — conditioned on Calpine's ability to adduce sufficient power purchase

² All emphasis in quoted material is added.

agreements prior to constructing the plant. This proposal would make a mockery of the need determination process, converting it into a hollow exercise, deferring any substantive consideration of need to post-determination proceedings. Calpine's proposal does violence to Section 403.519, the Power Plant Siting Act, this Commission's long-standing approach to need hearings, and controlling Florida Supreme Court precedent (Duke and the Nassau cases), all of which provide for a searching, careful application of the statutory need criteria at the time of the need hearing, not after the petition has been granted.

7. Calpine's reliance on In Re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 92 FPSC 3:19, 21; In Re: Petition of Florida Power & Light Company to Determine Need for Electrical Power Plant – Martin Expansion Project, 90 FPSC 6:268; and In Re: Petition of Seminole Electric Cooperative, Inc., TECO Power Services Corporation and Tampa Electric Company for a Determination of Need for Proposed Electric Power Plant, 89 FPSC 12:262 is misplaced. These decisions do not provide precedent for deferring the identification and proof of material contract terms until after the need hearing is completed. In each of these cases, the petitioning party demonstrated a utility-specific need and adduced the particular terms on which that need would be served at the time of the need hearing. In each case, the Commission conditioned its determination of need on the ability of the applicant to fulfill specific contract terms pleaded, identified, and proved at the hearing. Here, by contrast, Calpine cannot even allege that it has entered into power purchase agreements, let alone identify and prove the terms of such agreements. That being the case, Calpine is in no position to make a showing at the hearing that its proposed plant is in fact needed to serve a specific utility's identified need, that its plant will be the most cost-effective alternative for serving that need, that the retail utility was

unable to mitigate that need through appropriate conservation measures, and to subject other circumstances of the particular contract and decision by any contracting utility to full Commission scrutiny before the determination of need is granted.

8. Furthermore, Calpine does not even propose to enter into contracts that would ultimately satisfy controlling law. At best, Calpine proposes to enter into ill-defined three- to five-year power purchase agreements, which would leave more than 80 percent of the expected life-time capacity of the proposed plant uncommitted. (Need Petition Ex. 69). The Supreme Court in Duke specifically rejected nominal compliance with the need standard:

Moreover, we agree with appellants that the fact of Duke's joining with New Smyrna in this arrangement for a thirty-megawatt commitment does not transform the application into one that complies with the Siting Act and FEECA.

Duke at 17. Under Duke a proper applicant must have fully committed its plant to Florida load-serving utilities. Id. Calpine cannot just say it "will commit" its plant to Florida retail utilities to some limited extent. The plant as a whole must be contractually dedicated to meeting the needs of Florida retail utilities.

9. Finally, it is revealing that Calpine seeks to be excused from complying with the Bid Rule. The fact is, Calpine has no load to serve, has no need for supply-side resources to serve such load, is in no position to identify any utility-specific need that its Project will meet, and is in no position to demonstrate that its Project would be the most cost-effective means of meeting that need. In effect, Calpine is seeking an exemption from not just the Bid Rule, but from the entire need process. *But the Supreme Court made unmistakably plain in Duke and in the Nassau cases that the Commission has no authority to give Calpine what it wants.*

Wherefore, FPC respectfully requests that the Commission enter an Order dismissing Calpine's need petition and closing this docket.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S SUGGESTION OF LACK JURISDICTION AND MOTION TO DISMISS has been furnished by Fax to Robert Scheffel Wright as counsel for Calpine Construction Finance Company, L.P. and via U.S. Mail to all other parties of record this 10th day of July, 2000.



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