

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

ORIGINAL

FLORIDA POWER CORPORATION'S PETITION FOR LEAVE TO INTERVENE

RECORDS AND REPORTING

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I. Introduction

Pursuant to Rule 25-22.039, F. A. C., Florida Power Corporation ("FPC" or Intervenor) petitions the Commission for leave to intervene as a full and indispensable party respondent in this proceeding. In this docket, Calpine Construction Finance Company, L.P., ("Calpine" or "Petitioner") is seeking both an illegal determination of need and a connected declaratory statement that Rule 25-22.082, F. A. C. (the "Bid Rule") does not apply to Calpine or that its application should be waived. FPC seeks leave to intervene to stop this illegal proceeding at its inception. As grounds for this request, FPC states the following:

II. Intervenor Information

1. The name and address of the affected agency are:

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

2. The name and address of the Intervenor are:

Florida Power Corporation P.O. Box 14042 One Progress Plaza, Suite 1500 St. Petersburg, FL 33733

3. All pleadings, motions, orders, and other documents directed to the Intervenor are

to be served on:

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FPSC BUREAU OF RECORDS

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III. Substantial Interests

4. The Florida Supreme Court in Tampa Electric Co. v. Joe Garcia, et al., Supreme Court Case No. SC95444-95446 (April 20, 2000)¹ (hereafter “Duke”), made abundantly clear that wholesale power plants—like Calpine’s proposed plant (the “Project”)—not yet contractually committed to Florida retail load serving utilities are not proper applicants for a need determination under Section 403.519, Fla. Stats., and that “the granting of the determination of need” on the basis of such an application “exceeds the PSC’s present authority.” Duke at 18. Reaffirming its prior decisions in the Nassau² cases, the 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 such retail 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 13.³

5. In this case, Calpine makes plain on the face of its Petition that it has no contracts whatsoever with load-serving Florida utilities. In place of final power purchase agreements, Calpine offers only vague conjecture that Calpine is “pursuing” discussions, that may “lead” to serious “negotiations” about prospective contracts with yet-unidentified retail utilities. (Need Petition Intro, p. 4) In Duke, the Florida Supreme Court very specifically addressed this situation, stating:

¹ Both the Public Service Commission and Duke New Smyrna have moved for rehearing in the case. Nonetheless, 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.

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.

6. If Calpine had complied with the law and entered into power purchase agreements with retail utilities before filing its Petition, two things could have occurred. First, Calpine would have been in a position to specify in its petition that, by virtue of such agreements, particular, load-serving utilities would be primarily affected by its petition, as required by the Commission's rules. Rule 25-22.081(1), F.A.C. Second, those particular Florida retail utilities would be necessary co-applicants with Calpine in the need proceeding and would, under prevailing law, be deemed indispensable parties to this proceeding. (Nassau Order No. PSC-92-1210-FOF-EQ). Of course, Calpine has not alleged that it has entered into power purchase agreements with particular Florida utilities, and thus it is not in a position to obtain sponsorship from any such utility for its need petition.

7. Instead, Calpine has suggested that it may in the future enter into contracts with any one of a number of Peninsular Florida retail utilities, including FPC. Thus, Calpine has alleged that, if approved, the Project may be counted towards meeting the needs identified by Peninsular Florida utilities, including FPC, in their respective Ten-Year Site Plans. (Need Petition ¶ 20; Need Petition Exhibits, Table 13). In the same connection, Calpine has alleged that its proposed plant would be more efficient than 35,000 MW of gas-fired and oil-fired plants existing in Florida, including several of FPC's operating and proposed plants. (Need Petition ¶ 20; Need Petition Exhibits Table 14.A, 14.B).

² Nassau Power Corp. v Beard, 601 So. 2d 1175 (Fla. 1992) and Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) (collectively, the Nassau cases).

³ All emphasis in quoted material is added.

8. For the reasons we have given, and will develop more fully in FPC's motion to dismiss, Calpine's petition is legally insufficient on its face. But as far as it goes, the Petition plainly implicates FPC's substantial interests in a number of respects.

9. First, to the extent that Calpine proposes to meet any need at all, it proposes at least in part to meet FPC's identified needs. Yet, Florida law specifies rules that FPC must follow and is currently following to add capacity additions or power purchase resources to its own system. To the say the least, Calpine's Petition amounts to a frontal assault on the rules that FPC must obey and is attempting to obey, and FPC has every right and substantial interest to participate in a proceeding that threatens—once again—to obliterate the regulatory framework that governs how and when FPC may meet the needs of its customers for new power resources. By its Petition, Calpine seeks to have this Commission conduct a meaningless hearing, where no material facts will be known or developed concerning the particular needs of utilities—including FPC—to whom Calpine hopes to market power or the terms or cost-effectiveness of those conjectural sales. This amounts to a blatant circumvention of the existing need process as it exists today. If the rules that have applied heretofore to need determinations could be so drastically changed, plainly the current stakeholders in the system, including FPC, must be given standing to participate in the proceeding where the change will be considered.

10. By the same token, Calpine's Petition wreaks havoc with FPC's efforts to plan capacity additions for its own system. The Petition raises such fundamental questions such as whether FPC would have any obligation to issue a Request for Proposals or to file its own need Petition before adding significant power resources to its own system if this Commission may conditionally approve power plants based on the developer's stated intention to enter into contracts with FPC and other utilities in the future. FPC has every legitimate interest in

participating in the resolution of issues such as these, which are so fundamental to FPC's planning process.

11. To the extent that Calpine seeks to operate as a merchant plant, FPC is entitled to intervene on the authority of this Commission's rulings in the Duke case and in In re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, LLC, FPSC Docket No. 991462-EU ("OGC"), and it is plain on the face of the Petition that Calpine seeks authority—no matter what the outcome of the petitions for rehearing in the Duke case—to operate in whole or in substantial part as a merchant plant. Indeed, Calpine has stated its intent either to operate exclusively as a merchant plant, or, at most—even if the Supreme Court refuses to reconsider its decision—to pursue three- to five-year contracts, leaving over 80 percent of the 25-year capacity of the plant uncommitted. Of course, this flies in the face of the Supreme Court's decisions in the Duke and Nassau cases.

12. Putting this aside, however, and considering for the moment just FPC's standing to intervene, FPC's substantial interests would be implicated by any Commission decision granting a determination of need to Calpine in these circumstances, just as in the Duke and OGC cases. The Supreme Court in the Duke case unmistakably reaffirmed that retail utilities like FPC play a unique role under the current statutory scheme. Need proceedings exist to determine whether new power plants are needed to enable load-serving utilities to discharge their statutory obligation to serve the citizens of the State of Florida. Where, as here, a merchant plant developer announces its intent to sell power on a merchant basis to FPC and other retail utilities, those utilities plainly have standing to contest whether this is the most appropriate means to meet their needs.

13. Further, merchant plant sales are not in fact the most cost-effective way to meet the needs of load-serving utilities, including FPC. FPC can and will show, if necessary, that incumbent-built plants provide, in the long run, a more cost-effective means of supplying power to Florida ratepayers, including FPC's customers.

IV. FPC's Standing

14. In order to establish standing to intervene in any proceeding, it is settled that a petitioner must show that (1) it will suffer injury in fact of sufficient immediacy to warrant a hearing, and (2) that the injury is of the type or nature that the proceeding is designed to protect. E.g., Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), review denied, 415 So. 2d 1359 (Fla. 1982). In applying the Agrico test, the Commission "must not lose sight of the reason for requiring a party to have standing in order to participate in a judicial or administrative proceeding": "[T]o ensure that a party has a substantial interest in the outcome" so that "he will adequately represent the interest he asserts" in a proceeding in which that interest is not "totally unrelated to the issues which are to be resolved in the administrative proceeding." Gregory v. Indian River County, 610 So. 2d 547, 554 (Fla. 1st DCA 1992).

15. FPC's standing to intervene in this proceeding could not be clearer. FPC should be given party status to protect the substantial interests we have discussed above. Indeed, under controlling authority, only retail utilities like FPC (or IPPs under contract with them) have standing to initiate and participate in a need proceeding. As the Supreme Court held in the Nassau cases and reaffirmed in Duke, a need proceeding exists for the very purpose of determining the needs of particular load-serving utilities, like FPC. The fact is, Calpine lacks standing to go forward with this case; not FPC.

16. The Commission has routinely allowed entities to intervene in need determination proceedings precisely because the substantial interests of those entities will be affected by the proceedings. See, e.g., In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Ltd. Partnership, 1992 Fla. PUC LEXIS 1631; 92 FPSC 11: 363; Dkt. No. 920520-EQ; Order No. PSC-92-1355-FOF-EQ (Nov. 23, 1992) (recognizing there is a limited need by utilities for additional capacity and energy and that "it is incumbent upon competing alternatives to come forward at a need determination" proceeding); In re: Petition to Determine Need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, 1997 Fla. PUC LEXIS 679; 97 FPSC 6: 115; Dkt. No. 961512-EM; Order No. PSC-97-0659-FOF-EM (June 9, 1997) (granting the Legal Environmental Assistance Foundation, Enpower, Inc., and LS Power LLC leave to intervene in need determination proceeding); In re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for Determination of Need for Electric Power Plant to be Located in Okeechobee County, FL, 1993 Fla. PUC LEXIS 124; Dkt. No. 920807-GP; Order No. PSC-93-0141-PCO-GP (Jan. 27, 1993) (granting FP&L's petition to intervene in need determination proceeding); In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Ltd., 1992 Fla. PUC LEXIS 1146; 92 FPSC 8:376; Dkt. No. 920520-EQ; Order No. PSC-92-0830-PCO-EQ (Aug. 18, 1992) (granting Nassau Power Corporation's petition to intervene in need determination proceeding); In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 1992 Fla. PUC LEXIS 568; 92 FPSC 3: 19; Dkt. No. 910883-EI; Order No. PSC-92-0002-FOF-EI (March 2, 1992) (granting Floridians for Responsible Utility Growth leave to intervene in need

determination proceeding); In re: Petition of Florida Power Corporation for Determination of Need for Proposed Electrical Power and Related Facilities, 1991 Fla. PUC LEXIS 1863; 91 FPSC 10:290 (Oct. 15, 1991) (granting Florida Industrial Cogeneration Association, Floridians for Responsible Utility Growth and Panda Energy Corporation leave to intervene in need determination proceeding).

17. The Commission granted FPC and other retail utilities leave to intervene as parties in the Duke case and in the now abated case brought by OGC. The result should not be different here.

V. Disputed Issues of Material Fact

18. Calpine's Petition is deficient as a matter of law. Accordingly, Calpine's Petition should be dismissed summarily and this docket closed. The Florida Supreme Court's decision in Duke clearly prohibits the Commission's consideration of Calpine's requests (conditional or otherwise) and the Commission should simply dismiss them out of hand.

19. Assuming, however, that the Commission would have proper occasion to consider and determine factual issues, the Petition would present numerous disputed issues of material fact. These include, but are not limited to:

- a. Whether the terms of sale for power sold from the Project would be disadvantageous to ultimate consumers in this State, in relation to regulated sales by utilities like FPC.
- b. Whether the Project will absorb or divert natural gas from other power producers in the State, who are fully committed to serving customers in the State on a long-term basis.
- c. Whether the Project will adversely affect FPC's transmission system or the reliability of the Florida grid.

- d. Whether FPC and other Peninsular Florida utilities can rely to any extent on uncommitted capacity (such as the proposed capacity of this project) to satisfy their obligation to provide reliable electric service to retail customers in the State.
- e. Whether and when Florida utilities and the Commission would have any assurance of when, whether, and on what terms Calpine would sell power.
- f. Whether Calpine has properly estimated the availability of the Project's uncommitted capacity to ultimate consumers in the State.
- g. Whether the Petition complies with the Commission's rules.
- h. Whether the proposed Project would satisfy the statutory criteria of need.
- i. Whether the proposed Project would reliably meet the need of any particular retail utility in Peninsular Florida for firm capacity to meet its statutory obligation to serve.
- j. Whether the proposed Project would constitute the most cost effective means for any particular retail utility or any collection of utilities reliably to meet their need for firm power resources.
- n. Whether the Petitioner has complied with the requirements of Rule 25-22.082, or obtained an appropriate waiver prior to the filing of its need petition.

I. Ultimate Facts Alleged

20. This proceeding will affect FPC's substantial interests in the respects identified in paragraphs 1-19 above, which are incorporated by reference herein.

21. The Commission is without jurisdiction to grant Calpine's request for a determination of need and its connected request for a declaratory statement that the Bid Rule does not apply to Calpine or for a waiver of the Bid Rule.

22. The proposed Project would not satisfy the applicable statutory standards of need as set forth in Duke.

23. The proposed Project would not meet any identified retail utility's need for firm resources to meet its obligation to serve.

24. The proposed Project would not provide the most cost-effective means for any retail utility to meet in a reliable manner its obligation to serve.

25. Calpine has not satisfied and cannot satisfy the requirements of the Florida Energy Efficiency Conservation Act ("FEECA"), including those set forth in Section 403.519 of that law, that a petitioner for a determination of need first demonstrate that it has taken reasonable measures to avoid the construction of new generating facilities and has otherwise engaged in appropriate conservation measures.

26. Calpine is incapable of having a "need" for generating capacity within the meaning of Section 403.519 since Calpine has no obligation to serve. Petitioner's only need is a need for profits.

27. The proposed Project would not contribute to the reserve margins of any particular retail utility in Florida or of the retail utilities in Peninsular Florida.

28. The proposed Project would necessarily create environmental impacts in Florida without a countervailing demonstration of true "need," as that term is used in Section 403.519 and authoritatively construed by the Florida Supreme Court.

29. Calpine has no contractual commitments whatsoever with any retail utility in Florida and thus utterly fails to satisfy the requirements established by the Florida Supreme Court as a precondition of standing for any IPP under Section 403.519 and the Florida Electric Power Plant Siting Act.

30. Calpine's plans to sell its output in Florida are speculative and unenforceable.

31. The Commission would not have regulatory jurisdiction over Calpine. If Calpine should choose to resist the Commission's attempt to exercise jurisdiction over it, the Commission would be powerless to stop it.

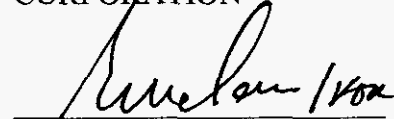
32. Calpine has failed to comply with the requirements of Rule 25-22.082, F.A.C., a precondition for filing an application for a determination of need for an investor-owned electric utility.

WHEREFORE, FPC respectfully petitions for leave to intervene and participate as a full and indispensable party respondent to this proceeding.

Dated this 10th day of July 2000.

Respectfully submitted,

FLORIDA POWER
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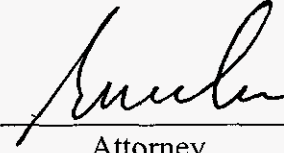
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S PETITION FOR LEAVE TO INTERVENE 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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