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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Petition for Determination)
of Need for an Electrical Power)
Plant in Polk County by Calpine)
Construction Finance Company, L.P.)

DOCKET NO. 000442781
FILED: JULY 17, 2000
RECORDS AND REPORTING

CALPINE'S RESPONSE IN OPPOSITION TO FLORIDA POWER CORPORATION'S PETITION FOR LEAVE TO INTERVENE AND ACCOMPANYING MEMORANDUM OF LAW

Petitioner, Calpine Construction Finance Company, L.P., ("Calpine") pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this response in opposition to the petition for leave to intervene in this proceeding filed by Florida Power Corporation ("FPC") and accompanying Memorandum of Law, and in support thereof says:

1. On June 19, 2000, Calpine filed its Petition for Determination of Need for an Electrical Power Plant ("Calpine's Petition for Determination of Need"), pursuant to the Florida Electrical Power Plant Siting Act (Sections 403.501-.518, Florida Statutes), Section 403.519, Florida Statutes, and Rules 25-22.080-.081, F.A.C., seeking an affirmative determination of need for the Osprey Energy Center (the "Osprey Project"). The Osprey Project will be a natural gas-fired, combined cycle power plant with 527 megawatts of net generating capacity at average ambient site conditions.

2. As alleged in Calpine's Petition for Determination of Need, and contrary to the repeated mischaracterizations in FPC's Petition, Calpine is not developing the Osprey Project as a

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"merchant plant." Rather, consistent with the Florida Supreme Court's recent, though non-final, decision in Tampa Electric Co., v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), motions for rehearing pending, Calpine alleged in its Petition for Determination of Need that Calpine is committed to entering into contractual arrangements that will commit the output of the Osprey Project to Florida utilities to serve the needs of Florida retail electric customers.

3. On July 10, 2000, FPC filed its petition for leave to intervene ("FPC's Petition").¹ To establish standing to intervene, FPC must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing under Section 120.57, Florida Statutes, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997) (citing Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981)).

4. FPC's Petition, though lengthy, only alleges two ways that its substantial interests will purportedly be affected by this proceeding. FPC alleges that Calpine's Petition for

¹In accord with In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion County by Windstream Utilities Company, 97 FPSC 4:556, Calpine is responding to FPC's petition as a motion, and therefore is requesting denial thereof. If FPC is granted intervention, Calpine reserves its right to move to dismiss FPC at any time during these proceedings.

Determination of Need "implicates" FPC's substantial interests in the following respects:

a. FPC asserts that Calpine proposes to meet FPC's identified needs without following the rules for adding capacity additions and power purchase resources that FPC must follow. FPC claims that this threatens to "obliterate the regulatory framework" governing how FPC meets its needs and that as a "stakeholder" in the system, FPC must be allowed to participate in this proceeding. FPC's Petition at 5.

b. FPC also asserts that Calpine's Petition for Determination of Need "wreaks havoc with FPC's efforts to plan capacity additions to its own system." FPC's Petition at 5.

FPC also argues that Commission precedent establishes its right to participate in this proceeding.

5. As more fully explained in the attached Memorandum of Law, FPC's claims regarding adverse effects to its interests are nothing more than speculative, conclusory allegations that FPC has not explained, and which, indeed, FPC cannot explain in a way sufficient to establish standing in this proceeding. FPC has not demonstrated, and cannot demonstrate, standing to participate in this need determination proceeding in accordance with applicable principles of Florida law because FPC cannot demonstrate any adverse effect. The interests that FPC has alleged--effects on its ability to plan generation facilities and effects on the existing regulatory framework--are speculative, remote, and

outside the zone of interests to be protected in this proceeding to determine the need for the Osprey Project. Moreover, FPC's purported interests are based on the incorrect assumption that the Osprey Project will be a merchant plant. Lastly, existing precedent does not establish FPC's standing to participate in this proceeding.

Accordingly, under well-established standing doctrine as set forth in Agrico and its progeny, FPC's Petition must be denied.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Calpine Construction Finance Company, L.P., respectfully requests that the Commission DENY FPC's Petition for Leave to Intervene in this proceeding.

MEMORANDUM OF LAW

This is a proceeding for determination of need for the Osprey Project. The Osprey Project will be a natural gas-fired, combined cycle electrical power plant with 527 megawatts of net generating capacity to be constructed by Calpine in the City of Auburndale, Polk County, Florida. The purpose of this need determination proceeding is to determine whether the proposed Osprey Project is consistent with the needs of Florida electric customers for reliable electric power supplies at a reasonable cost and to assure that the Osprey Project is the most cost-

effective alternative available to provide needed power. See Floridians for Responsible Utility Growth v. Beard, 621 So.2d 410, 412 (Fla. 1993); In Re: Petition to Determine Need for Proposed Capital Expansion Project of the Dade County Resource Recovery Facility, an Existing Solid Waste Facility, by Metropolitan Dade County, FPSC Docket No. 930196-EQ, Order No. PSC-93-1715-FOF-EQ at 2 (Fla. Pub. Serv. Comm'n, Nov. 30, 1993). This proceeding also serves to evaluate the need for the Osprey Project against which the Governor and Cabinet, sitting as the Siting Board, must balance the environmental impact resulting from the Osprey Project's construction and operation in making the ultimate decision whether to grant or deny site certification for the Osprey Project.

FPC has petitioned to intervene in this proceeding.² To establish standing to intervene, FPC must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel, 691 So.2d at 477 (citing Agrico, 406 So.2d at 482).

Calpine requests that the Commission deny FPC's Petition

² Though styled a petition for leave to intervene, FPC devotes substantial portions of its purported statements of substantial interest to allegations concerning the merits of Calpine's Petition for Determination of Need which are not relevant to FPC's interests and therefore inappropriate to a petition to intervene. See, e.g., FPC's Petition at 3-4.

because it is clear on the face of FPC's Petition that FPC has not met, and cannot as a matter of law meet, its burden of establishing standing to participate in this proceeding.

SUMMARY OF APPLICABLE LAW

To establish standing to intervene, FPC must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel, 691 So.2d at 477 (citing Agrico, 406 So.2d at 482); see also Friends of Matanzas, Inc. v. Department of Environmental Protection, 729 So.2d 437, 439 (Fla. 5th DCA 1999) (to be entitled to participate in an administrative hearing a party must "allege and establish" that its substantial interests will be affected). These requirements are commonly known as the two prongs of the "Agrico test" for standing. The first prong of the Agrico test focuses on the degree of injury, and the second prong focuses on the nature of the injury. Ameristeel, 691 So.2d at 477 (citing Agrico, 406 So.2d at 482). The burden is on FPC to establish its standing to participate in this proceeding. See In Re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation for Acknowledgment or Approval of Merger whereby MCI Worldcom will acquire control of Sprint and its Florida Operating Subsidiaries, ASC Telecom, Inc. d/b/a Alternatel (IXC Certificate No. 4398), Sprint Communications

Company Limited Partnership (holder of PATS Certificate No. 559 and ALEC Certificate No. 4732) Sprint Communications Company Limited Partnership d/b/a Sprint (holder of ISC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365), 00 FPSC 3:16, 20 (hereinafter "Worldcom") (Order Denying Motion for Leave to Intervene) (citing Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1052 (Fla. 1st DCA 1979)).

To satisfy the first prong of the Agrico test, FPC must demonstrate that this proceeding will result in an injury to FPC which is immediate, not remote. The alleged injury cannot be based merely on speculation or conjecture. See Ameristeel, 691 So.2d at 478; Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So.2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1226 (Fla. 3d DCA 1990); Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987).

To satisfy the second prong of the Agrico test, FPC must demonstrate that its alleged injuries are of the type and nature against which this need determination proceeding is designed to protect. Friends of Matanzas, 729 So.2d at 439. Stated differently, FPC's alleged injuries must fall within the "zone of interest" to be protected by this need determination proceeding

and the statute and rules that establish the purpose and framework for this proceeding. See North Ridge General Hospital, Inc. v. NME Hospitals, Inc., 478 So.2d 1138, 1139 (Fla. 1st DCA 1985). Moreover, as a general rule, alleged economic injury alone is not sufficient to form the basis for standing unless the proceeding and underlying statutory framework are specifically designed to address competitive economic injury. Id.; see also In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FPSC 3:352, 355.

ARGUMENT

I. FPC'S ALLEGED SUBSTANTIAL INTERESTS ARE NOT SUFFICIENT TO ESTABLISH STANDING IN THIS PROCEEDING.

FPC's Petition is a rambling diatribe against the Osprey Project in which FPC provides little support for its standing to participate in this proceeding. Boiled down, FPC alleges essentially two factual bases in support of its requested intervention:

1. FPC asserts that Calpine is attempting to meet FPC's needs without adhering to existing Commission rules. FPC claims that this represents an attempt to destroy the existing regulatory framework, and that as a "stakeholder" in that regulatory framework, FPC must be allowed to intervene. FPC's Petition at 5. (This novel basis for standing will be referred to herein as "stakeholder standing.")

2. FPC also alleges that Calpine's Petition for

Determination of Need will adversely affect FPC's ability to plan generation additions to its own system. FPC's Petition at 5-6.

As set forth below, neither of FPC's allegations of impacts to its substantial interests is sufficient to establish FPC's standing to participate in this proceeding.

A. FPC Cannot Demonstrate Standing by Claiming it is a "Stakeholder" in the Existing Regulatory Framework.

In its Petition, FPC asserts that Calpine proposes to meet FPC's identified needs without complying with the existing regulatory framework. Based on this premise, FPC contends that as a current "stakeholder" in the system, FPC must be given standing to participate in the proceeding to protect the existing regulatory framework. FPC's Petition at 5. FPC's premise that Calpine's Petition seeks to meet FPC's identified need without complying with the existing regulatory framework is patently incorrect, and FPC's conclusion that it should thus be granted standing as a "stakeholder" is unequivocally contradicted by well-established case law.

As to FPC's erroneous premise, the Osprey Project is not a merchant plant. As alleged in Calpine's Petition for Determination of Need, the Osprey Project will not and cannot be constructed unless the output of the Project is under contract to be purchased by Florida electric utilities for ultimate use by those utilities' retail ratepayers. Calpine's Petition for

Determination of Need at 4-6. Thus, Calpine suggests a more appropriate way to describe the Osprey Project is as a "wholesale contract plant." As a wholesale contract plant, the only way that the Osprey Project will meet any of FPC's identified needs is if FPC voluntarily opts to enter into a contract with Calpine. Calpine readily stipulates that if FPC entered into such a contract, FPC would have standing to participate in this proceeding. (In fact, FPC would be a co-applicant for the Commission's affirmative determination of need.) But FPC has not opted to enter into a contract with Calpine and thus: FPC's needs will not be met by the Osprey Project, FPC's interests will not be determined by this proceeding, and this proceeding will have no adverse impact on FPC's planning processes.³ Moreover, if FPC were to voluntarily⁴ enter into a power purchase agreement with Calpine, FPC could hardly argue that the effects of the contract on the Project would be adverse to FPC.

As to FPC's claim that it has "stakeholder standing," it is telling that FPC cites absolutely no authority for its novel

³Calpine included information regarding the needs of seven specific Florida retail-serving utilities, including FPC, in the Exhibits to its Petition for Determination of Need to show the Commission (1) that there is great need (9,000 MW) for new generation resources to which the seven utilities have not yet specifically committed; and (2) that Calpine's expectations of being able to enter into contracts that satisfy the requirements of Tampa Electric Co. v. Garcia are well-grounded in fact.

⁴Indeed, FPC will only enter into a contract with Calpine voluntarily because Calpine has no legal ability to force FPC to buy its power.

theory. Calpine contends that FPC fails to cite any support for its theory of stakeholder standing, because no such authority exists. To the contrary, it is well-established that:

[T]he concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, by limiting the proceeding to actual disputes between persons whose rights and interests subject to protection by the statutes involved are immediately and substantially affected. Thus it has been stated, the "purpose of the law of standing is to protect against improper plaintiffs."

Florida Soc. of Ophthalmology v. State Bd. of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988) (citing 59 Am.Jur.2d, Parties § 30 (1987) (emphasis supplied). FPC is precisely the type of "improper" party that the standing doctrine was developed to prevent from participating in the adjudicatory process. FPC has not--and cannot--demonstrate that it will be adversely affected by the proceeding or that FPC's substantial interests will be determined by the Commission's decision herein. Rather, Calpine believes that FPC's interest is a purely economic interest in perpetuating its existing monopoly power in the Florida wholesale market. Do not be fooled by FPC's rhetoric--every moment that FPC delays the construction of the Osprey Project has the potential to pad FPC's and its shareholders' bottom lines. This purely economic interest does not provide a legitimate basis for FPC to participate in this proceeding and FPC's Petition should be denied.

B. FPC's Allegations Regarding the Effects of the Outcome of this Proceeding on its Planning Activities are Insufficient to Demonstrate Standing.

FPC alleges that if the Commission grants the requested determination of need for the Osprey Project, its ability to plan its system will be adversely affected, ostensibly because the Commission's action granting the requested determination of need would create uncertainty. FPC's Petition at 6. As an initial matter, FPC's allegation is based on the erroneous premise that the Osprey Project will be a merchant plant--it will not. The alleged effect on FPC's planning is speculative and remote, and therefore insufficient to establish standing under Agrico. See Ameristeel, 691 So.2d at 478. In addition, FPC has not explained how any effects on its planning processes might be adverse. Indeed, FPC's own planning documents submitted to the Commission reveal that FPC is perfectly capable of planning in the face of uncertainty. See FPC's Ten-Year Site Plan, 1998-2007 at 61-62. Lastly, Michael Rib, FPC's planning witness in the Duke New Smyrna need determination proceeding,⁵ conceded that FPC can and does plan for power plants such as the Osprey Project. Duke New

⁵In 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, (hereinafter "Duke New Smyrna") rev'd sub nom. Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), motions for rehearing pending.

Smryna, Testimony of Michael Rib, Vol. 10 at 1275-76. Finally, FPC cannot credibly claim to have been surprised by the Osprey Project: like other Florida utilities, Calpine has filed with the Commission its 2000 Ten-Year Site Plan in which it identified and provided the required planning information concerning the Project.

Planning inherently deals with uncertainty. Basically, it is the process by which an entity, in FPC's case an electric utility with retail and wholesale customers, makes decisions as to how to address future circumstances that cannot be known with precision. Power supply planning routinely addresses and incorporates considerations regarding the availability of electric capacity and energy from other power suppliers.

The availability of an additional resource that a utility may choose to--but does not have to--buy from simply cannot create an adverse effect. Either the utility will choose to buy from the supplier on mutually agreeable, beneficial terms, in which case there can be no adverse effect, or the utility will decline to purchase from the supplier (assuming rational behavior, this would occur when no mutually beneficial deal was possible) and proceed with its independent plans accordingly. Either way, there can be no adverse effect on the utility's planning processes.

FPC has previously confirmed to the Commission its ability

to plan in the face of perceived uncertainty.⁶ As recently as 1998, FPC's Ten-Year Site Plan addressed the issue of uncertainty as follows:

FPC's forecast of capacity and demand is based on serving expected growth in regulated retail load and commitments to existing wholesale customers. As deregulation occurs in the electric industry, customers with choice, such as the wholesale market, are switching to new generation suppliers. This creates an added dimension of uncertainty which a traditional utility is not accustomed to planning for. FPC realizes that the long-term obligation to serve the total wholesale market no longer exists. FPC's remaining wholesale market customers are expected to exercise their option of receiving power from alternative suppliers around the year 2002. To date, a significant amount of the wholesale load is being evaluated through competitive Requests For Proposals by wholesale customers in Florida. As a result, the company assumes that the wholesale business will be very competitive. FPC is not committing long-term generation resources to serve the wholesale market until a viable plan is in place. FPC believes that the long-term interests of both wholesale and retail customers are being served by this plan.

See Florida Power Corporation's Ten-Year Site Plan, 1998-2007 at 61-62 (FPC's 1997 Ten-Year Site Plan contains substantially identical language). In this statement, FPC identifies a source of uncertainty and then addresses that uncertainty in its

⁶To reiterate, because the Osprey Project will be a wholesale contract plant and not a merchant plant, there will be no uncertainty as to where the output of the plant will be sold. Quite simply, the output of the plant will be sold to the electric utilities that contract for such output.

planning process. FPC therefore cannot credibly claim that the availability of potential power supplies will "adversely affect" its planning processes.

Further evidence of FPC's ability to plan for uncommitted generating capacity can be found in testimony offered by FPC in Duke New Smyrna. In Duke New Smyrna, FPC's witness Michael Rib conceded during cross examination that FPC could include merchant plants in its planning process. Duke New Smyrna, Testimony of Michael Rib, Vol. 10 at 1275-76. Though the output of the Osprey Project will be committed to Florida utilities, Mr. Rib's testimony nonetheless demonstrates that there will be no adverse effects to FPC's planning process if a merchant plant with uncommitted capacity were constructed.

In sum, FPC's claim that it should be granted standing based on an impact on its ability to plan is a red herring--there simply is no adverse impact.

Finally, this is not a planning proceeding. FPC's and Calpine's generation plans are reviewed by the Commission in its review of utility ten-year site plans pursuant to Section 186.801, Florida Statutes, and Commission Rule 25-22.071, F.A.C. Thus, impacts to FPC's ability to plan are not of the type or nature against which this need determination is designed to protect. See North Ridge, 478 So.2d at 1139.

II. THE PRECEDENT RELIED ON BY FPC IN SUPPORT OF ITS STANDING IS NEITHER BINDING NOR PERSUASIVE.

FPC also asserts that it is entitled to intervene in this proceeding on the authority of the Commission's rulings in Duke New Smyrna and 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 (hereinafter "OGC"). For several reasons, FPC is wrong. First, the need determinations in Duke New Smyrna and OGC were for "merchant plants." As previously noted, the Osprey Project will not be a merchant plant--it will be a wholesale contract plant that will have its output contractually committed to Florida electric utilities before it is built. Thus, the Commission's rulings in Duke New Smyrna and OGC are readily distinguishable from this case.

Second, in neither Duke New Smyrna nor OGC did the full Commission have the opportunity to rule on the issue of whether an incumbent investor-owned utility that had not entered into a contract for any of the output of a merchant plant had standing to participate in that merchant plant's need determination proceeding. In Duke New Smyrna, the issue of FPC's standing was resolved by the Prehearing Officer and was never ruled on by the full Commission. 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., 98 FPSC 10:69 (Order Granting Petitions to Intervene issued by Prehearing Officer). In OGC, the applicant did not contest FPC's standing. Thus, neither case established precedent that is binding on the full Commission as to FPC's standing to participate in this case.


Third, and most importantly, standing is a jurisdictional matter that must be proved up in each and every case. FPC bears the burden of alleging facts sufficient to demonstrate that it meets the standing test set forth in Agrico and its progeny. See Worldcom, 00 FPSC 3:16 at 20 (petitioner has burden of establishing standing); Friends of Matanzas, 729 So.2d at 439 (to be entitled to a hearing a party must allege and establish that its substantial interests will be affected). FPC has failed to do so and, thus, FPC's Petition should be denied.

CONCLUSION

Calpine is respectfully requesting the Commission to determine the need for the Osprey Project on the basis of the benefits that will accrue to the Florida electric utilities that contract for the Project's output and on the basis that the wholesale generating capacity and energy to be provided by the Project will contribute significantly to the reliability and integrity of the Peninsular Florida bulk power supply system and to the need of electric customers in Peninsular Florida for

adequate electricity at a reasonable cost. None of FPC's legitimate, cognizable interests are being determined, nor subject to being adversely affected, by the Commission's action in this proceeding, and accordingly, FPC's Petition must be denied as a matter of law.

Respectfully submitted this 17th day of July, 2000.



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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 (*), facsimile transmission (**), or U.S. Mail, on this 17th day of July, 2000, to the following:

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