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 FILED: JULY 17, 2000

CALPINE CONSTRUCTION FINANCE COMPANY'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS THE PETITION

Calpine Construction Finance Company, L.P., ("Calpine"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby files this response in opposition to Florida Power & Light Company's ("FPL") motion to dismiss Calpine's petition for determination of need for the Osprey Energy Center (the "Petition"), and in opposition to FPL's Memorandum of Law Supporting Its Motion To Dismiss The Need Petition ("FPL's Memo"). In summary, FPL's arguments are generally inapposite to the facts of Calpine's Petition and mischaracterize Calpine's request for relief and the law upon which Calpine's Petition is based. Specifically, FPL's arguments based on Commission Order No. 22341 and its progeny are misplaced because those decisions all addressed the law of cogeneration and instances where entities, including cogenerators, were attempting to force utilities to buy those entities' electrical power output. Contrary to FPL's suggestion, the Osprey Project, as pled by Calpine in its Petition, is not a "merchant plant;" rather, as pled in the Petition, before the Project can be constructed, "Calpine and the utilities purchasing

the Osprey Project's output will demonstrate both the commitment of the Project's output to meeting those purchasing utilities' needs and the cost-effectiveness of the purchase arrangement" to the Commission. See Petition at 34. Accordingly, FPL's attempts to apply these earlier cases to the facts in this case are inapposite. FPL's arguments based on Tampa Electric Company v. Garcia[1] mischaracterize Calpine's positions and theories: Calpine has pled its request for the Commission's determination of need for the Osprey Energy Center squarely within the narrow scope articulated by the Florida Supreme Court in the Tampa Electric v. Garcia opinion. Moreover, the Tampa Electric v. Garcia opinion is, by its own terms, not final. The Commission should see FPL's blizzard of paper for what it is: an attempt to delay or derail, by means of a kitchen sink full of alleged procedural roadblocks, a beneficial project that Calpine has pled specifically within the utility-specific ambit of Tampa Electric v. Garcia.

Finally, the issue posed here is really one of timing.[2] Calpine has affirmatively alleged that it will demonstrate to the Commission that it has committed the Osprey Project's output to

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[1] Tampa Electric Company v. Garcia, 25 Fla. L Weekly S294 (Fla. April 20, 2000), motions for rehearing pending. (hereinafter "Tampa Electric v. Garcia")

[2] Issues of timing are uniquely within the Commission's sound discretion. Consistent with its broad mandates to promote and protect the public interest, the Commission should be particularly hesitant to delay a project that offers such significant benefits on the basis of such weak procedural arguments.

meeting the needs of specific Florida retail-serving utilities and that the terms of such commitments are cost-effective to those purchasing utilities. The question is whether Calpine should be allowed to proceed on its Petition as pled, or whether this proceeding should be delayed until Calpine has more evidence to present regarding how the Project will satisfy utility-specific needs. In the public interest, and in the best interests of Florida retail electric customers, the Commission should allow this proceeding to continue as prayed in Calpine's Petition.

INTRODUCTION AND BACKGROUND

1. On June 19, 2000, Calpine filed its Petition with the Florida Public Service Commission ("FPSC" or "Commission") for an affirmative determination of need for the Osprey Energy Center (the "Osprey Project" or the "Project"). The Osprey Project will be a natural gas-fired, combined cycle power plant with 527 megawatts ("MW") of net generating capacity. The Project is expected to commence commercial operation in the second quarter of 2003. In its Petition, Calpine alleged facts sufficient to establish that it is an electric utility under Chapter 366, Florida Statutes, a public utility under the Federal Power Act, and an electric utility and a regulated electric company under the Florida Electrical Power Plant Siting Act.

2. The Petition alleged that Calpine is committed to providing the electrical capacity and energy to be produced by the

Osprey Project to Peninsular Florida utilities that have responsibility for providing power to Florida customers who purchase electricity at retail rates. To that end, Calpine further alleged that it will commit the Osprey Project's output to such Peninsular Florida utilities, that Calpine is actively pursuing discussions, which Calpine believes will lead to active negotiations, toward entering into such contracts, and that Calpine expects to have satisfactory evidence (e.g., contracts, letters of intent, or similar documentary evidence) of utility-specific commitments to present to the Commission in advance of the scheduled hearings. See Petition at 4-6. In the event that Calpine does not have such evidence of contractual commitments of the Project's output by the time of the scheduled hearings, Calpine, consistent with ample Commission precedent, asked the Commission for an affirmative determination of need subject to the condition that, before construction of the Osprey Project could begin, Calpine would have to make the required demonstrations that the Project will cost-effectively meet the specific needs of Florida retail-serving utilities. Consistent with extensive Commission precedent, Calpine also alleged that the Project will contribute to the need of Peninsular Florida for system reliability and for adequate electricity at a reasonable cost, and that the Project will be cost-effective to Peninsular Florida.

3. As alleged in its Petition, Calpine initially planned to develop the Osprey Energy Center as a "merchant" plant, consistent

with the Commission's need determination order approving the Duke New Smyrna Beach Power Project.[3] Calpine's primary business purpose in developing the Osprey Energy Center has been, and continues to be, to provide clean, reliable, cost-effective wholesale power to Florida retail-serving utilities for the benefit of their ratepayers. Accordingly, in keeping with the Supreme Court's recent, though presently non-final, opinion in Tampa Electric v. Garcia, Calpine has alleged that it will commit to sell the output of the Project to Florida utilities that serve retail customers in Florida. In endeavoring to fulfill this commitment, Calpine is diligently pursuing discussions (which Calpine believes will lead to active negotiations) toward contractual arrangements committing the output of the Osprey Project to Florida retail-serving utilities to meet the needs of those utilities' Florida retail electric customers. Calpine is pursuing such discussions with the Florida Municipal Power Agency, Reedy Creek Improvement District, and other Florida utilities that provide service to retail customers.

4. To the extent that Calpine obtains contracts, or other

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[3] 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, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), motions for rehearing pending. 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.

satisfactory evidence (e.g., letters of intent to enter into contracts) of the Project's commitment to serve the needs of Florida retail-serving utilities, for the Osprey Project's output, Calpine will submit those documents to the Commission promptly, e.g., as supplemental exhibits to the Petition or as exhibits to Calpine's witnesses' testimonies. To the extent that Calpine does not obtain contracts or other demonstrable commitments (binding on Calpine) to provide the output of the Project to Florida utilities in time for adequate review in the hearing in this case, Calpine requested that the Commission grant its affirmative need determination subject to a specific condition, on the need determination and on the site certification for the Project, that before construction can commence, Calpine must demonstrate to the Commission that it has appropriate contractual arrangements confirming that the Project's output will be committed to meeting the needs of, and be cost-effective to, Florida retail-serving utilities for the benefit of those utilities' retail customers.[4] If, pursuant to applicable law, Calpine becomes able to develop the

[4] The Commission has imposed conditions on its determinations of need in several cases. See, e.g., 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; 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. These cases and their applicability to this need determination proceeding are discussed in detail below.

Project as a competitive wholesale (or "merchant") facility, in whole or in part, Calpine reserves its right to amend its Petition and the accompanying Exhibits accordingly.

5. In the Petition, Calpine further explained to the Commission why Calpine filed its Petition and the Exhibits before it had final power sales contracts in hand. Specifically, Calpine explained that it filed the Osprey Petition when it did

> in order to expedite the availability of the Project's benefits for Florida's retail-serving utilities and their customers. At substantial expense to itself, 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. This delay can be avoided by allowing the need determination process to move forward while the site certification process is moving forward in parallel. Calpine believes that it is likely that it will have contracts for the Osprey Project's output in place before the site certification hearing is held; if so, then effectively no time in the permitting and construction of the Project will have been lost, and Florida can begin enjoying the Project's benefits sooner.

Petition at 6; see also Petition at 40.

6. Calpine also alleged that it is not required to conduct, or to have conducted, a competitive selection process pursuant to

Rule 25-22.082, F.A.C. (the "Bidding Rule") for the Osprey Project, because the intent of the Bidding Rule is to protect captive ratepayers from imprudent expenditures by retail utilities. Calpine explained that this is consistent with the Commission's articulated vision for the role of competitive wholesale power plants in the context of the Bidding Rule, which is that such power plants will provide alternative power supply options for the retail-serving, investor-owned utilities to which the Bidding Rule is intended to apply.[5] Nonetheless, pursuant to Section 120.542, Florida Statutes, Calpine simultaneously submitted a petition for waiver of Rule 25-22.082, F.A.C., in conjunction with the filing of the Petition.

7. Calpine alleged that it is the utility primarily affected by the Project and that other utilities that enter into contractual arrangements to purchase the Project's output will also be primarily affected utilities within the meaning of the Commission's rules and orders. Calpine further alleged that Calpine and the utilities purchasing the Osprey Project's output will furnish appropriate descriptive information regarding those utilities at the same time that the contracts or other evidence of the Project's output commitment to serving those utilities' needs are submitted to the Commission. Petition at 11 and 11, n.5.

8. Calpine also made specific allegations regarding the

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[5] Duke New Smyrna, 99 FPSC 3:401, 434-35.

amount of firm capacity and energy that it anticipates producing and delivering for use by Florida retail-serving utilities to serve their retail electric customers. Petition at 11. Calpine made allegations explaining the beneficial energy conservation impacts of the Project, the overall cost-effectiveness of the Project, the beneficial environmental impacts of the Project, and the favorable strategic aspects of the Project. Petition at 32-33, 35, and 48, and Tables 15, 16.A & 16.B, 17, 18, and 19.A-19.C of the Exhibits.

9. As more fully explained in Calpine's accompanying Memorandum of Law, the Commission has the legal authority to grant the requested determination of need for the Osprey Project as prayed by Calpine, and the Commission should do so in the public interest. Each of FPL's arguments is flawed, misplaced, or based on mischaracterizations of Calpine's Petition or of applicable law, and accordingly, the Commission should deny FPL's motion.

RELIEF REQUESTED

WHEREFORE, based on the foregoing and for the reasons set forth in detail in the following Memorandum of Law, the Commission should DENY FPL's motion to dismiss Calpine's Petition.

MEMORANDUM OF LAW

The Commission has the legal authority to grant the requested determination of need for the Osprey Energy Center and should do so in the public interest. The Commission should deny FPL's motion to dismiss because each of FPL's arguments is flawed, misplaced, or based on mischaracterization or misrepresentation of Calpine's Petition. Calpine's Petition is fully consistent with existing law, i.e., the Commission's holding in Duke New Smyrna, and fully compliant with even the narrow requirements of Tampa Electric v. Garcia, which remains non-final by its own terms. Even if Tampa Electric v. Garcia were final, settled law, Calpine has pled specific facts sufficient to justify granting the relief requested. Taking all of Calpine's allegations as true, as the Commission must do in considering FPL's motion to dismiss, the issue of dismissal turns on two questions:

1. Does the Commission have the legal ability to do what Calpine has requested, i.e., to grant the Petition as requested by Calpine in the Petition?

2. Should the Commission grant the Petition subject to the condition specified therein if indeed Calpine does not adduce the requisite evidence of utility-specific commitment and cost-effectiveness by the scheduled October hearing?

Calpine submits that both questions must be answered in the affirmative, based on Commission precedent and based on the Commission's overriding, legislatively-ordained purpose to promote the public interest and the interests of Florida electric

customers. Accordingly, FPL's motion to dismiss should be denied.

ARGUMENT

The Commission should deny FPL's motion to dismiss and allow this need determination case to proceed because it is in the public interest, and in the best interests of Florida's electric customers, to do so. Specifically, allowing the need determination proceeding to go forward will enable the site certification process also to go forward, which will enable the Project to be constructed in time to meet the needs of Florida retail-serving utilities in the summer of 2003 and winter of 2003-2004. Granting FPL's motion to dismiss would certainly cost the State the availability of the Project for the summer of 2003 and likely for the winter of 2003-2004 as well.

Moreover, each of FPL's arguments is flawed, misplaced, or based on a mischaracterization of Calpine's Petition or applicable law, and accordingly, each of FPL's arguments should be rejected and its motion to dismiss denied.

Finally, the Commission should deny FPL's Petition because to grant it would violate the Commerce Clause of the United States Constitution and impermissibly conflict with the express purposes of the Congress in enacting the Energy Policy Act of 1992.

I. THE COMMISSION HAS THE AUTHORITY TO GRANT THE REQUESTED DETERMINATION OF NEED FOR THE OSPREY PROJECT AND SHOULD DO SO IN THE PUBLIC INTEREST.

Calpine has asked the Commission to grant its affirmative determination of need for the Osprey Energy Center on the basis that the Project's output will be committed to Florida retail-serving utilities for the benefit of their retail electric customers. Calpine has further explained why it filed its Petition when it did, i.e., before having final power sales contracts in hand: to enable the Project's permitting to proceed as scheduled so that it will be in service to meet the purchasing utilities' needs beginning in the summer of 2003.

There are several possible scenarios for the processing of this need determination case. In an optimistic scenario, the Commission's motion for rehearing in Tampa Electric v. Garcia would be granted and the Commission's Duke New Smyrna decision affirmed, which would relieve Calpine of having to comply with the requirements of the Court's opinion. In another scenario, Calpine would, before the hearings scheduled for October of this year, enter into contracts and other arrangements (e.g., letters of intent or memoranda of understanding) establishing that all or substantially all of the Project's output will be appropriately committed to meeting the needs of Florida retail-serving utilities. In this case, no condition at all might be required on the Commission's order issuing from the October hearings. Alternately,

the only condition might be that final contracts had to be submitted to the Commission to enable the Commission to confirm that the terms and conditions thereof conform to those set forth in the letters of intent or memoranda of understanding presented in the October hearings. The Commission imposed a similar condition in 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, where the Commission conditioned its determination of need on the subsequent FERC approval of contracts in the exact form in which they were presented to the Commission.[6] In another scenario, Calpine might have letters of intent or similar arrangements in place for only a modest portion of the Project's output before the hearing. In such a case, as stated in its Petition, Calpine recognizes that it would have to subsequently demonstrate to the Commission that the output of the Project was committed to Florida retail-serving utilities in compliance with the requirements of Tampa Electric v. Garcia (assuming that the Commission's motion for rehearing is denied), including a demonstration of cost-

[6] Considering the numerous possible scenarios, several of which allow the permitting of the Project, including the need determination proceeding, to proceed as presently scheduled, Calpine believes that dismissal at this time would be premature at best. The Court's Tampa Electric v. Garcia opinion is, by its own terms, not final, and even if it should become final, Calpine has the opportunity to develop sufficient evidence to satisfy all applicable requirements of that opinion in time to support the October hearings. Accordingly, FPL's motion should be denied.

effectiveness to the purchasing utilities (see Petition at 23, 25-26, 28, 39-40) in order to proceed with construction of the Project. Finally, in the extremely pessimistic scenario, Calpine might have no letters of intent or any other utility-specific evidence to present at the October hearings. Calpine recognizes that in this case as well, Calpine and the utilities that subsequently enter into power purchase agreements with Calpine for the Project's output would have to come to the Commission to demonstrate that those agreements complied with the Commission's statutes and rules (basically that the output covered by the agreements was needed by and cost-effective to the purchasing utilities) and with the requirements of Tampa Electric v. Garcia.

The Commission has the legal authority to grant the requested determination of need under any of these scenarios and should do so in furtherance of the public interest.

A. The Commission Has The Legal Authority To Grant The Requested Determination Of Need.

As alleged in its Petition, Calpine is diligently pursuing discussions toward contractual arrangements that will confirm that the Osprey Project's output is committed to Florida retail-serving utilities. Calpine is optimistic that it will be able to present satisfactory evidence that the Project's output is committed to cost-effectively meeting specific Florida retail-serving utilities' needs in time for this evidence to be adequately evaluated and tested at the hearings in this proceeding (which Calpine expects to

be held in October 2000). To the extent that Calpine does not have satisfactory evidence that the output of the Project is appropriately committed by those hearing dates, Calpine requests that the Commission grant an affirmative determination of need subject to the condition that, before construction of the Project may begin, Calpine must demonstrate to the Commission that the Project's output is committed to Florida retail-serving utilities and that the purchase and sales arrangements are cost-effective to the purchasing utilities.

The Commission has clearly explained its authority to impose conditions on affirmative determinations of need in In Re: Petition of Florida Power & Light Company to Determine Need for Electrical Power Plant - Martin Expansion Project, 90 FPSC 6:268 ("Martin 3&4"). In that case, the Commission stated the following:

> Pursuant to Section 403.519, Florida Statutes, the Commission has the inherent authority to place conditions on need determinations supported by the record developed in the proceeding. Such conditions are similar in effect to those placed on the applicants by the Department of Environmental Regulation (DER) or any of the other statutory parties to proceedings under the Power Plant Siting Act (Sections 403.501-.517, Florida Statutes). A violation of any of the conditions placed upon a need determination would result in appropriate action being taken by this agency.

Martin 3&4, 90 FPSC 6:282.

The Commission has imposed conditions on its determinations of need in several cases. For example, in the need determination

proceeding for Tampa Electric Company's ("TECO") Polk County coal gasification combined cycle power plant, the Commission conditioned its approval of the plant's construction on TECO's obtaining a specified $120 million grant from the U.S. Department of Energy. 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. This precedent is particularly significant and directly applicable here because it represents a condition on the Commission's affirmative determination of need that carried all the way through the site certification process and that had to be satisfied before construction of TECO's plant could begin. The Commission was explicit on this point, stating as follows: "We approve the plant's construction on the condition that TECO does receive the $120 million grant from the Department of Energy to help defray the costs of the Project." Id. at 21. The Commission further clarified its approval by stating that "[b]ecause of the importance of the DOE grant to the cost-effectiveness of the project, however, we must condition our approval on TECO's receipt of the $120 million grant with no requirement that TECO repay any part of the $120 million grant." Id. at 28.

This is exactly the type of affirmative determination of need, subject to a specified condition subsequent, that Calpine is seeking in this case (that is, in the event that Calpine does not have satisfactory evidence that the Project's output is committed

to Florida retail-serving utilities before the hearing in this docket). This precedent is also significant in that the condition imposed in the Commission's affirmative determination of need was the subsequent occurrence of a certain economic event before construction could begin.

The Commission also imposed several specific conditions on its order determining need for the Hardee Power Station, including the following: (a) that the terms and conditions of the wholesale contracts identified by Seminole, TECO, and TECO Power Services had to be approved by FERC as specified in those contracts, (b) that TECO had to construct a specified transmission line at a cost less than or equal to the cost shown in the record of the proceeding before the Commission, and (c) that TECO Power Services had to construct a natural gas lateral at a cost no greater than that shown in the record. 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, 272.

There is no legally meaningful difference between the conditions imposed in the above-cited cases and that which Calpine has asked the Commission to incorporate (if necessary) into its requested determination of need for the Osprey Project. Either a required fact is true when pled or not: TECO did not have the DOE grant in hand when it came to the Commission in its need determination case. TECO, TECO Power Services, and Seminole did

not have all required approvals for the contracts upon which the Commission conditioned the determination of need for the Hardee Power Station when they came to the Commission with their petition for determination of need. The Commission should not impose a different standard on Calpine: the Commission should allow Calpine to proceed as requested and should, accordingly, deny FPL's motion.

B. The Commission Should Grant The Requested Determination Of Need So That The Osprey Project's Output Can Be Made Available For The Benefit Of Florida Electric Customers As Soon As Possible.

As outlined above, any of several scenarios may unfold as this need determination case progresses. At one end of the spectrum, the hearings may be held in October as scheduled and an affirmative determination of need issued without any conditions whatever. At the other end, Calpine and utilities not identified as of the October hearings would have to subsequently come to the Commission to demonstrate that they in fact had entered power purchase contracts that committed the output of the Project in accord with Tampa Electric v. Garcia and that the terms and conditions of the contracts assured that the Project's output would meet the purchasing utilities' needs cost-effectively. In between are scenarios wherein there might be only a condition that Calpine and identified utilities subsequently demonstrate to the Commission that the terms and conditions set forth in final power purchase contracts conformed to those in the letters of intent or memoranda of understanding that were presented to the Commission in October.

In any of these scenarios, the Commission should allow the case to go forward as scheduled in order to promote the timely realization of the Project's benefits for the electric customers of Florida.

As shown in Figure 17 of the Exhibits to the Petition, Calpine presently expects to have the need determination hearing in October, the site certification hearing in March 2001, and the final hearing for the Osprey Project before the Siting Board in August 2001, resulting in the commencement of construction in time to bring the Project into commercial operation by June 2003, i.e., in time for the summer season of that year. If FPL's motion to dismiss were granted and Calpine were forced to wait until it had contracts in hand for the output of the Project before returning to the Commission with its need determination case for the Project, this schedule would be delayed. Assume for the sake of example that Calpine did not enter into all required contracts until March 2001. The schedule for the Project would then be postponed such that the need determination hearing would not be held until June 2001, the site certification hearing would not be held until November 2001 (or later), the final hearing before the Siting Board would not be held until April 2002 (or later), and the Project would not come into service until February 2004 (or later).

This delay, which would be occasioned by granting FPL's motion to dismiss at this stage, would thus cost the State and her citizens the substantial benefits of the Project -- potential power supply cost savings in the range of $120 million for each year of

delay, see Table 18 of the Exhibits; improvements in Peninsular Florida reserve margins, see Tables 7 and 8 of the Exhibits; substantial primary fuel savings benefits, see Table 15 of the Exhibits; and substantial reductions in emissions of sulfur dioxide and nitrogen oxides, see Table 17 of the Exhibits -- for the period of the delay. It is also likely that the Project would provide additional benefits in the new regime contemplated under a Florida Regional Transmission Organization, e.g., helping to alleviate price spikes for ancillary services.

The Commission may ask how the required events would occur if it grants Calpine's petition and one of the scenarios requires some subsequent Commission review and action concerning final power purchase contracts between Calpine and Florida retail-serving utilities. Naturally, this would depend on the nature of the condition, e.g., whether the only thing remaining to be done would be for the Commission to confirm that the terms and conditions of the final contracts conformed to those set forth in letters of intent reviewed in the October hearings, or whether Calpine and utilities that had not been identified as of the October hearings had to present information regarding those utilities' needs and how the Project and the contracts would meet those needs cost-effectively.

In the first case, Calpine believes that the required subsequent proceeding should be very brief and simple, for the sole purpose of confirming that the terms and conditions of the final

contracts matched those of the letters of intent. In the latter case, Calpine believes that a subsequent hearing could be held, probably within 60 days of filing the utility-specific information and the contracts, with the sole purpose being to evaluate how, and whether, the contracts in fact meet the specific utilities' needs cost-effectively. Following the timing example discussed above, the initial hearing would take place in October as anticipated, and an affirmative determination of need, subject to the requested condition, would issue following that hearing. Calpine and the subject utilities would (by hypothesis) have their contracts in place in March 2001. The subsequent hearing on those contracts would be held in May or June 2001. The site certification hearing would have been held in March 2001, as presently anticipated, and Calpine would then be in a position to proceed to the Siting Board -- with the condition on its affirmative determination of need satisfied -- as presently scheduled, in August 2001, and the Project could be constructed and brought into commercial service by June 2003.

In summary, the schedules may be outlined as follows.

	Calpine's Schedule	Motion to Dismiss Granted
Need Hearing	October 2000	June 2001
Need Order	December 2000	August 2001
Contracts/Supp. Info. Filed	March 2001	March 2001
Supplemental PSC Proceeding (if Necessary)	May-June 2001	N/A
Site Certification Hearing	March 2001	November 2001
Siting Board Action	August 2001	April 2002
Osprey In-Service	June 2003	February 2004

Allowing this need determination proceeding to go forward as prayed by Calpine offers the realistic opportunity to gain for the State and her citizens essentially a year's (the summer of 2003 and the winter of 2003-2004) worth of enhanced reliability, a year's worth of power supply cost savings, a year's worth of fuel savings, and a year's worth of environmental improvements that would be lost if FPL's motion to dismiss were granted. In the final analysis, these benefits are the reasons that the Commission must deny FPL's motion.

C. The Commission's Overriding Mandate To Promote The Public Interest Requires The Denial Of FPL's Motion.

Section 366.01, Florida Statutes, declares the Legislature's intent that Chapter 366 is to be liberally construed in the public interest. Calpine has demonstrated above, and in the specific

factual allegations in its Petition, that the public interest will be well served by denying FPL's motion and by allowing Calpine to proceed as requested. This course offers the ability to reap for the State and her electric customers significant power supply cost savings, significant primary fuel savings, significant reductions in emissions from electricity generation, and measurable improvements in power system reliability.

Similarly, Section 366.81, Florida Statutes, declares that the Florida Energy Efficiency and Conservation Act, which includes Section 403.519,[7] is "to be liberally construed in order to meet the complex problems of . . . increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use . . . and conserving expensive resources, particularly petroleum fuels." This specific legislative mandate should lead the Commission to deny FPL's motion and allow this need determination proceeding to go forward because of the significant fuel savings benefits that the Project will provide.

II. CALPINE IS A PROPER APPLICANT FOR THE REQUESTED DETERMINATION OF NEED.

FPL spends one-third of its motion to dismiss arguing that Calpine is not a proper applicant. FPL argues earlier Commission

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[7] Calpine believes that this mandate constitutes an "other matter[] within [the commission's] jurisdiction" which the Commission should deem relevant to its consideration of Calpine's Petition. Calpine does not agree that the definitions in FEECA govern its status as an electric utility or as an applicant with respect the Siting Act, but rather that that status is governed by the definitions contained within the Siting Act itself.

decisions, including Order No. 22341, the Commission's ARK and Nassau decision[8], and the Florida Supreme Court's Nassau v. Deason opinion as supporting its contention. More specifically, FPL argues that Calpine's status as a "public utility" under the Federal Power Act does not make Calpine a proper applicant, that Calpine is not an "electric utility" within the meaning of Section 366.02(2), Florida Statutes, that ARK and Nassau applies to Calpine, and that the condition sought on a contingent basis by Calpine does not make Calpine a proper applicant. FPL's arguments are misplaced and unfounded, and accordingly its motion should be dismissed. While most of FPL's arguments have previously been rejected by the Commission, in order to protect its position and to ensure that the Commission has complete briefing on these issues, Calpine will respond to each of FPL's arguments.

As a threshold matter, the Commission should observe that Calpine's Osprey Project is not, and will not be, a merchant plant as suggested by FPL. FPL's Memo at 24. Rather, as alleged in Calpine's Petition, the Project is a contract wholesale plant plainly within the scope of electrical power plants for which need determinations are permissible under the Tampa Electric v. Garcia opinion.

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[8] In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility, 92 FPSC 10:643 ("ARK and Nassau"), aff'd sub nom. Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994).

A. Calpine is a Proper Applicant Under Section 403.519, F.S. and Under All Applicable Case Law.

Section 403.519, F.S., provides in pertinent part:

> On request by an applicant or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act.

(Emphasis supplied.) Section 403.503,(4), F.S., defines an "applicant"[9] as:

> any electric utility which applies for certification pursuant to the provisions of this act.

(Emphasis supplied.) Section 403.503(13), F.S., in turn, defines an electric utility as:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

(Emphasis supplied.) Thus, a "regulated electric company" is a proper "applicant" specifically authorized under the Siting Act to seek a determination of need from the Commission. For the reasons set forth below, Calpine is a "regulated electric company."

As alleged in the Petition, Calpine is a "public utility"[10]

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[9] Section 403.522(4), F.S., (part of the Transmission Line Siting Act) contains an identical definition of the term "applicant."

[10] Section 366.02(1), F.S. provides that a "public utility" under Florida law "suppl[ies] electricity . . . to or for the public within" Florida. Because Calpine is authorized to sell

under the Federal Power Act, 16 U.S.C.S. § 824(b)(1)(1994). See Petition at 12. As a "public utility" selling power at wholesale in interstate commerce, Calpine is clearly subject to the regulatory jurisdiction of FERC, including, but not limited to, the FERC's jurisdiction over rates pursuant to the Federal Power Act. In fact, as stated in the Petition, the FERC has approved Calpine's Rate Schedule No. 1 for sale of the Project's entire capacity and associated energy to other utilities under negotiated arrangements. Petition at 13 (citing In Re: Calpine Construction Finance Company, L.P., 90 FERC ¶61,164 (February 23, 2000)). Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of the FERC, Calpine fits squarely within the plain meaning of the term "regulated electric company" under any reasonable construction of the term, and Calpine is a proper applicant under Sections 403.503(13) and 403.519, F.S. See Carson v. Miller, 370 So. 2d 10 (Fla. 1979) (words of common usage should be construed in their plain and ordinary sense.)

FPL argues that the Commission's ARK and Nassau decision and Nassau Power v. Deason require dismissal of Calpine's Petition. These cases are inapposite to the facts of Calpine's Petition for at least two critical reasons. First, these cases represent the law of cogeneration, see F.P.S.C. Staff Memorandum, Dkt. No. 971446-EU (Dec. 2, 1997) at 6, or perhaps more generally, the law

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electricity only at wholesale, i.e., to other utilities, it is not a "public utility" under Section 366.02(1), F.S.

of non-utility generators seeking to bind a retail-serving utility to a long-term power contract. See Nassau Power v. Deason, 641 So. 2d at 397-98 (stating that the issue in that case "is whether a non-utility cogenerator such as Nassau is a proper applicant for a determination of need") (emphasis supplied). In this case and in the earlier Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992), the putative applicants for a need determination were attempting to require FPL to purchase, and ultimately charge its ratepayers for, the electrical power to be produced by the proposed projects.[11] That is simply not the case here. These cases, including ARK and Nassau, Nassau Power v. Deason, and Nassau Power v. Beard are thus readily distinguishable. Further, Calpine has

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[11] In the underlying orders that led to the Nassau decisions, the Commission emphasized the limited scope of its rulings. Thus, in Order No. 22341, the Commission said,

> to the extent that a proposed electric power plant constructed as a QF is selling its capacity to an electric utility pursuant to a standard offer or negotiated contract, that capacity is meeting the needs of the purchasing utility.

In Re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, Docket No. 890004-EU, Order No. 22341, (Fla. Pub. Serv. Comm'n, Dec. 26, 1989). Also, in Order No. PSC-92-1210-EQ, which was reviewed by the Supreme Court in Nassau II, the Commission stressed: "It is our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need." In Re: Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 646, (emphasis supplied). By the Commission's own careful structure of the Order, the rationale does not apply to Calpine.

alleged that it is both an "electric utility" pursuant to Section 403.503(13), F.S., and a "public utility" under the Federal Power Act. Thus, attempting to shoehorn Calpine into the law of non-utility generators is patently absurd.[12]

Perhaps more significantly, Calpine has pled specifically that it will have contractual arrangements with Florida retail-serving utilities that demonstrate that the Project's output is committed to meeting those Florida utilities needs cost-effectively. This brings Calpine's Petition squarely within the scope of permissible need determinations under both Nassau Power v. Beard and Nassau Power v. Deason, even if those cases were applicable here, and squarely within the scope of permissible need determinations under Commission precedent granting affirmative determinations of need subject to conditions and under Tampa Electric v. Garcia, if that opinion becomes final.

B. Calpine Is An "Electric Utility" and Is Subject to the Commission's Grid Bill Authority Under Chapter 366.02, F.S.

FPL asserts that Calpine is not an "electric utility" under Section 366.02(2), Florida Statutes, FPL's Memo at 19, and therefore not an applicant as that term is defined within the Siting Act because it is not an electric utility under the Commission's organic regulatory statute, Chapter 366, F.S.

Contrary to FPL's assertions, Calpine is an "electric utility"

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[12] As discussed herein, Calpine is also an "electric utility" as defined in Section 366.02(2).

under Section 366.02(2), Florida Statutes, by the plain language of the statute. Section 366.02(2), F.S., defines "electric utility" to mean

> any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Calpine is investor-owned, in that it is owned by its partners. Second, when the Osprey Project becomes operational, Calpine will own, maintain, and operate an electric generation system within Florida.[13] Thus, by a straightforward, "plain language" reading of the statutory language, Calpine satisfies each prong of the definition of "electric utility." Calpine is also a "public utility" under the Federal Power Act, thereby making it also an "electric utility" under a reasonable generic application of that term.

FPL also asserts that even if Calpine were an electric utility under Chapter 366, Florida Statutes, Calpine would not be an applicant under Section 403.519 because "utility" for the purposes of the latter section is defined in Section 366.82(1), Florida Statutes. While FPL is correct that Section 366.82(1) defines utility for the purposes of Section 403.519, the word "utility" does not appear in Section 403.519. While it is hypothetically

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[13] Moreover, as stated in the Exhibits to Calpine's Petition, Calpine Corporation, an affiliate of Calpine, owns the Auburndale Power Plant located adjacent to the proposed site of the Osprey Project.

possible that an entity could be an electric utility under 366.02(2) but not under the Siting Act, this would present quite a Catch-22 for such entities and for the Commission. On the one hand, if the Commission has jurisdiction, these entities would be exposed to various forms of regulation by the Commission but simultaneously deprived of one of the rights that would appear to attach to their regulated status: the right to apply for a determination of need.

On the other hand, if such entities are not (as FPL asserts) electric utilities, then the Commission would have no jurisdiction over them at all. This cannot have been intended, for it would deprive the Commission of any authority over an entire class of power producers that may legally operate in Florida, including entities that operate non-steam and non-solar plants and entities that operate units that were originally built by retail-serving utilities and subsequently sold to such entities.

In the same vein, FPL's argument that Calpine and similar entities are not electric utilities because the Commission has not asserted jurisdiction over them is irrelevant. Jurisdiction either exists or it doesn't. Calpine believes that it is an electric utility and has complied with the requirements to the extent necessary, e.g., it filed its 2000 Ten-Year Site Plan. Calpine believes that attempting to evade such jurisdiction would be unlawful and contrary to the public interest, though FPL's theory directly implies that this was the Legislature's intent. FPL's

theory also implies that the Legislature intended that numerous power plants, e.g., non-steam and non-solar facilities of any size and power plants originally built by retail-serving utilities but subsequently sold to other entities, could exist totally outside the Commission's jurisdiction. This is almost absurd, and certainly contrary to the Legislature's specific mandates for the Commission to regulate in the public interest.

However, this is not relevant here because, as Calpine has pled in its Petition, the Osprey Project's output will be committed to Florida retail-serving utilities in full compliance with the requirements of Tampa Electric v. Garcia.

FPL also advances a specious argument based on the fact that Section 366.02(2) uses the present tense form of several verbs. FPL's Memo at 19 and 19, n. 30. In FPL's view, because Calpine does not yet own a generation facility, it is not an electric utility. This distinction is not important here and would, in fact, deprive the Commission of important planning jurisdiction over Calpine and similar entities that might develop power plants outside the Siting Act.

FPL also advances the specious argument that one power plant is not a system within the meaning of Section 366.02(2), Florida Statutes. This theory, too, would lead to absurd results. It would deprive the Commission of jurisdiction over various power plants and their owner-operators that can clearly exist under present law, e.g., non-steam power plants of any size and power

plants originally built by retail-serving utilities under the Siting Act but subsequently sold to wholesale suppliers like Calpine. Numerous such plants are presently in development in Florida, and at least three generating units at one station have been sold by their original owner (a retail-serving utility) to another entity like Calpine.

C. The Condition Sought By Calpine, On A Contingent Basis, Is Proper And Provides Sufficient Basis Upon Which The Commission May Grant The Requested Determination Of Need.

FPL argues that the condition sought by Calpine would not make Calpine a proper applicant. FPL is wrong. The condition sought by Calpine -- on a contingent basis, against the contingency that Calpine does not adduce sufficient evidence that the Project's output is committed to Florida retail-serving utilities at the anticipated October hearings -- will in fact bring Calpine squarely within the scope of the type of need determination applications that are permissible under even the narrow strictures of Tampa Electric v. Garcia. It will do so by establishing, as a prerequisite for construction of the Project, that the Project's output must be committed to Florida utilities that serve customers at retail rates.

The Commission should note well that the Court in Tampa Electric v. Garcia never said that Duke New Smyrna was not a proper applicant. Rather, the Court said only that a "determination of need is only available 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." Tampa Electric v. Garcia, 25 Fla. L. Weekly at S296. Calpine has averred to the Commission that it will make the required showings of commitment to serving specific utilities' needs. See Petition at 23, 25-26, 28, 34, and 40.

FPL's assertion (FPL's Memo at 25) that Calpine is arguing for a determination of need based on a "general commitment" of the Project's output is simply incorrect, as is FPL's assertion (Memo at 27) that "Calpine proposes not to make a utility specific showing of need but a general peninsular Florida showing of need." Calpine has made clear that it will make the required showings of commitment to serving specific utilities' needs.[14] Id. Likewise, FPL's assertion that Calpine's approach would "completely frustrate the meaningful determination of utility-specific need" either misunderstands or mischaracterizes Calpine's Petition. Calpine has made it abundantly clear that it will make the required showings of commitment to serving specific utilities' needs. Id.

Similarly, FPL's "after the fact" argument, FPL's Memo at 26, either fails to understand or mischaracterizes the relief that

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[14] Calpine included information regarding the needs of seven specific Florida retail-serving utilities, including FPL, in the Exhibits to its Petition 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 v. Garcia are well-grounded in fact.

Calpine has requested. No construction of the project will begin before the Commission has the opportunity to evaluate the utility-specific need of those Peninsular Florida utilities that Calpine enters into contracts with and the cost-effective of the proposed transactions to those Peninsular Florida utilities. See Petition at 23, 25-26, 28, 34, 40.

III. EVEN ASSUMING THAT THE CRITERIA OF SECTION 403.519 ARE UTILITY-SPECIFIC, CALPINE HAS ALLEGED SUFFICIENT FACTS TO JUSTIFY THE RELIEF REQUESTED.

FPL argues that Calpine's Petition fails to meet the utility-specific criteria requirements of Section 403.519. Calpine does not agree that the criteria of Section 403.519 are utility-specific: the word "utility" does not even appear in the subject section, and the Commission has itself distinguished the authority upon which FPL purports to rely as relating to cogeneration pricing. Even assuming that these criteria are utility-specific, Calpine has averred to the Commission that it, and the Peninsular Florida utilities with whom Calpine enters contracts, will demonstrate utility-specific need and utility-specific cost-effectiveness. See Petition at 23, 25-26, 28, and 34. Consistent with extensive Commission precedent, Calpine has also pled that the Project will meet, and is consistent with, the needs of Peninsular Florida for system reliability and integrity and for adequate electricity at a reasonable cost, and that the Project is also cost-effective to Peninsular Florida.

FPL's arguments based on Order No. 22341 and the Court's Nassau Power decisions are irrelevant to Calpine's theory of the case. Calpine will show that the Project's output will meet the needs of specific Florida utilities and that the arrangements will be cost-effective to those utilities. See Petition at 23, 25-26, 28, and 34. FPL's argument (FPL's Memo at 35) that Calpine's Petition disregards the utility-specific nature of the criteria in Section 403.519 is similarly misplaced. Indeed, it is FPL who has disregarded the numerous express statements in Calpine's Petition affirming Calpine's commitment to demonstrate to the Commission that the Project will satisfy specific utilities' needs.

IV. CALPINE HAS PLED SPECIFIC, DETAILED, AND QUANTIFIED COST-EFFECTIVENESS TO PENINSULAR FLORIDA AND HAS AVERRED TO THE COMMISSION THAT CALPINE AND THE UTILITIES THAT WILL PURCHASE THE OSPREY PROJECT'S OUTPUT WILL DEMONSTRATE COST-EFFECTIVENESS TO THOSE UTILITIES.

FPL asserts (Memo at 36) that Calpine "asks the Commission to presume cost-effectiveness." This assertion is plainly false. Calpine has pled specific, detailed, and quantified allegations of cost-effectiveness to Peninsular Florida based on analyses using the well-known power system economic model PROMOD IV®. These analyses demonstrate that the addition of the Osprey Project to the Peninsular Florida power supply system in addition to all other planned generating units will be dramatically cost-effective, producing savings of $803 million (net present value)over the first

ten years of the Project's operation. Table 18 of the Exhibits. Contrary to FPL's false assertion, at page 37 of its Memo, that "the only utility specific allegation that Calpine makes is that purchases by purchasing utilities, whoever they turn out to be, will be the most cost-effective alternative to the purchasing utility," Calpine has also made it abundantly clear that it, and the utilities that contract to purchase the Osprey Project's output, will demonstrate to the Commission that the arrangements under which they will buy the Project's power will be cost-effective to those purchasing utilities. See Petition at 23, 25-26, 28, and 34.

Contrary to FPL's baseless assertions, Calpine is not in any way asking the Commission to presume cost-effectiveness of the anticipated contracts to the purchasing utilities. Although the Commission could do so, based on its expertise and understanding of the industry, Calpine is asking the Commission only to allow Calpine to go forward through the permitting process subject to the condition that before construction of the Osprey Energy Center may commence, Calpine and the purchasing utilities must demonstrate that the contracts between those utilities and Calpine for the Project's output will satisfy those utilities' needs for reliability and adequate electricity at a reasonable cost, and demonstrate cost-effectiveness to those utilities. See Petition at 23, 25-26, 28, and 40.

V. CALPINE HAS SATISFIED ALL APPLICABLE PLEADING REQUIREMENTS OF SECTION 403.519, F.S., AND THE COMMISSION'S RULES.

Calpine's Petition fully complies with all applicable pleading requirements set forth in Rule 25-22.081, F.A.C. and is more than sufficient to allow:

> the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine the most cost effective alternative available....

See Rule 25-22.081, F.A.C. (repeating the necessary factors to be considered in a need determination proceeding set forth in Section 403.519, F.S.).

FPL argues that Calpine has (1) failed to describe the utility or utilities primarily affected by the Petition, (2) omitted the required statement of the specific factors indicating a need for the Project, (3) failed to address viable non-generating alternatives, and (4) failed to include the discussion of the cost of capital impacts required by Rule 25-22.081(7), F.A.C. Calpine responds to each of these allegations below.

A. The Petition Identifies the Primarily Affected Utility in Compliance with Rule 25-22.081(1), F.A.C. and Explains How Additional Information Regarding Other Primarily Affected Utilities Will Be Furnished To The Commission In Compliance With the Requirements of Tampa Electric v. Garcia.

FPL argues, Memo at 38, that the Petition contains no descriptions of the utility or utilities primarily affected by the Petition. Calpine has specifically complied with these

requirements with respect to Calpine itself and has explained exactly how it will comply with respect to the utilities with whom it contracts to sell the Project's output. (Calpine has already discussed the appropriateness of the requested affirmative determination of need subject to this condition.)

Rule 25-22.081(1), F.A.C., requires that a petition for determination of need include: "[a] general description of the utility or utilities primarily affected." In this case, Calpine is the only utility primarily affected at this time and the Petition includes all relevant allegations regarding Calpine. The Petition and supporting Exhibits specifically describe Calpine (see Petition at 11-14), Calpine's load and electrical characteristics (see Petition at 11-12 and Tables 9 and 10 of the Exhibits), Calpine's generating capability (see Petition at 14-15 and 18-19), and the Osprey Project's interconnections (see Petition at 17-18 and Exhibits, pages 30-38 and Figures 11 and 12).

Calpine has also alleged that it and the utilities that contract to purchase the Osprey Project's output will furnish all appropriate information regarding those utilities, their specific needs, and the cost-effectiveness of the purchase arrangements to those utilities "at the same time that the contracts or other evidence of the Project's output commitment to serving those utilities' needs are submitted to the Commission." Petition at 11, n.5.

FPL is not and cannot be a primarily affected utility or a

purchasing utility until it elects, voluntarily and at its sole discretion, to enter into a power purchase agreement with Calpine. If FPL had entered into such an agreement, Calpine would have identified it in the Petition. To date, FPL has not chosen to do so and thus is not primarily affected by either the Project or this proceeding.

B. The Petition Contains Extensive Descriptions of the Specific Factors Indicating That The Osprey Project Is Needed.

FPL argues that Calpine's Petition omits a statement of the specific conditions and other factors indicating a need for the Project. Memo at 41. Contrary to FPL's assertion, Calpine has presented, in the Petition and the accompanying Exhibits, extensive information regarding and descriptions of the factors that indicate that the Project is needed.

Calpine has presented evidence that Peninsular Florida needs more than 10,000 MW of capacity to maintain planned reserve margins, and that there is no commitment to specific resources to meet most -- 9,000 MW -- of that need. Exhibits, Table 13. Calpine has presented evidence that the Project will be more energy-efficient than virtually all of the generating resources projected to be in service in Peninsular Florida in 2003 and 2008. Exhibits, Tables 14.A and 14.B. Calpine has also presented evidence that the Project will be more cost-effective than the vast majority (more cost-effective than approximately 35,000 MW) of the generating resources projected to be available in Peninsular

Florida in 2008. Exhibits, Table 14.B. Calpine has also presented evidence of the primary fuel savings that the Project will provide, including savings by fuel type. Exhibits, Tables 15, 16.A, and 16.B. Calpine has also presented evidence that the Project's operation, modeled as part of an integrated Peninsular Florida supply system, will yield net present value savings of more than $800 million over the first ten years of the Project's operation. Exhibits, Table 18. (The Exhibits also include sensitivity analyses showing the comparable cost savings under higher fuel price, higher load growth, and lower load growth scenarios. Exhibits, Tables 19.A, 19.B, and 19.C.) Calpine has also presented evidence regarding the net environmental benefits -- reductions in sulfur dioxide and nitrogen oxides emissions -- that the Project can be expected to provide. Exhibits, Table 17.

Contrary to FPL's assertion at page 43 of its Memo, Calpine has indeed presented information regarding Peninsular Florida's net energy for load, number of customers, and load factors. Exhibits, Table 5. Calpine also identified the model used to make its projections. While Calpine did not provide the model, it did not do so because the model is proprietary. The Commission should note that FPL itself identified, but did not provide, three models, PROMOD, PROSCREEN, and TIGER in a one-and-one-half page summary in the appendices to its Petition to Determine Need for Electrical Power Plant 1993-1996 (Appendices), FPSC Document No. 07446, July 25, 1989. Calpine's load forecasts were taken from the FRCC 1999

Load & Resource Plan and extrapolated for years not covered by that document by Slater Consulting.

FPL again argues that Calpine has failed to present the required evidence for specific purchasing utilities. As explained in the Petition and elsewhere herein, Calpine has explained to the Commission that it will provide the required utility-specific information "at the same time that the contracts or other evidence of the Project's output commitment to serving those utilities' needs are submitted to the Commission." Petition at 11, n.5. Thus, FPL's argument is simply another attempt to argue against the requested determination of need subject to the condition requested -- if it turns out to be necessary -- in Calpine's Petition. Calpine has addressed this argument at length above.

C. Calpine's Petition Contains a Discussion of Viable Nongenerating Alternatives in Compliance with Rule 25-22.081(5), F.A.C.

FPL also argues, Memo at 44, that the Petition's discussion of non-generating alternatives is inadequate. Rule 25-22.081(5), F.A.C., provides that a need determination petition should include "[a] discussion of viable nongenerating alternatives . . ." The Petition contains a discussion of Calpine's nongenerating alternatives. See Petition at 21 (stating that as a federally regulated public utility, Calpine does not engage in end use conservation programs and is not required to have conservation goals pursuant to Section 366.82(2), F.S.). These allegations

concerning the nature of Calpine and its operations and concerning energy conservation constitute the discussion of nongenerating alternatives that meets the pleading requirement of Rule 25-22.081(5), F.A.C. Calpine and the utilities with whom it contracts to sell the Project's output will, naturally, demonstrate that those purchasing utilities have no viable, cost-effective non-generating alternatives to the proposed purchases.

D. Rule 25-22.081(7), F.A.C., is not Applicable to the Project.

Finally, FPL argues that the Petition does not discuss the cost of capital impacts required by Rule 25-22.081(7), F.A.C.. The subject Rule provides in pertinent part:

> If the generation addition is the result of a purchased power agreement between an investor-owned utility and a non-utility generator ...

(Emphasis supplied.) Quite simply, Rule 25-22.081(7), F.A.C., does not apply in this case because the Project is not, at least at this point in time, the result of a purchased power agreement between an investor-owned utility and a non-utility generator. Moreover, Calpine is not a "non-utility generator." Calpine is an "electric utility under both Sections 366.02(3) and 403.503(13), F.S., and a "public utility" under the Federal Power Act. Thus, on its face, Rule 25-22.081(7), F.A.C., is not applicable to this need determination proceeding. (For example, does this require FPL or any other investor-owned utility to provide a discussion of the impacts of its power purchase agreements with the Southern Company

or each other? Calpine does not believe so.) If an investor-owned utility enters a power purchase agreement with Calpine, then that utility and Calpine will address the impacts of the proposed purchase in compliance with the subject Rule when they furnish the information regarding how the purchase will meet the purchasing utility's specific needs and how it will be cost-effective to the purchasing utility.

VI. CALPINE HAS COMPLIED WITH THE COMMISSION'S EXPRESS PRONOUNCEMENTS REGARDING COMPETITIVE BIDDING REQUIREMENTS AND RULE 25-22.082, F.A.C.

FPL asserts that Calpine has not complied with the requirements of Rule 25-22.082, F.A.C., Selection of Generating Capacity (the "Bidding Rule"), Memo at 46, and that this would result in circumvention of the Bidding Rule, Memo at 47. FPL's assertions are misplaced and unsupported by the Bidding Rule itself. Calpine has properly asked the Commission for a determination, consistent with prior Commission pronouncements on this exact subject, that the Rule does not apply to Calpine and, in the alternative, for a waiver of the Rule.

This argument of FPL's is misplaced because it fails to comprehend the fundamental purpose of the Bidding Rule. The 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. In its Duke New Smyrna order, the

Commission clearly articulated its vision of how merchant plants would fit into the Bidding Rule framework. As the Commission stated 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 meetings 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.

99 FPSC 3:434-35. Nothing in Tampa Electric v. Garcia changes this analysis.

Calpine, though a wholesale contract plant and not a merchant plant, will fit into this framework in the same way because it cannot force retail-serving utilities or their ratepayers to buy the Project's power, except by their choice. The difference is merely one of timing: a pure merchant plant is first built and then enters into contracts of varying durations, ranging from one hour to several years. Calpine, as a wholesale contract plant, will enter into contracts with Florida retail-serving utilities before the Project is constructed. It would make no sense to require Calpine to jump through the procedural hoops of the Bidding Rule because Calpine 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.

Duke New Smyrna, 99 FPSC 3:437-38. The Commission should not reasonably apply the Rule in such a way as to impede Calpine's ability to do so.

Calpine's approach is not, as FPL asserts, an attempt to circumvent the Bidding Rule. Calpine's approach will not circumvent the Rule at all, because the Rule only applies when an investor-owned utility would otherwise build a power plant subject to the Siting Act. If an IOU were contemplating a purchase from the Osprey Project to avoid building a plant that would be subject to the Siting Act, then that IOU would have to conduct the competitive selection process required by the Rule. Calpine's approach simply allows any utility to negotiate for a purchase from the Project when the Bidding Rule's requirements do not apply,[15] or when they do.

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[15] It should be noted that FPL is presently in the process of "repowering" two of its power plants (Ft. Myers and Sanford) by adding a total of more than 1,500 MW of generating capacity for which FPL has never conducted an RFP process and does not intend to do so. FPL's decision not to bid out the capacity represented by these "repowering" projects would not appear to be consistent with the Rule's goal of protecting captive ratepayers.

Moreover, a 4-member Commission has expressly held that the alleged failure of a merchant plant developer to comply with the Bidding Rule or to plead that it is not required to do so does not warrant dismissal. In In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee generating Company, L.L.C., 99 FPSC 12:219, the Commission rejected FPL's argument that the Petitioner's application for a determination of need for a merchant plant should be dismissed because the Petitioner had not complied with the Bidding Rule and denied FPL's motion to dismiss accordingly.

FPL's argument that Calpine cannot proceed with its need determination because it did not obtain the waiver or declaration of non-applicability in advance of filing its Petition is simply another example of FPL's attempting to throw up procedural roadblocks to a power plant that threatens its monopoly position, and the Commission should reject this ploy just as it rejected FPL's similar attempts in the Okeechobee Generating case.

VII. CALPINE'S THEORY IS FULLY CONSISTENT WITH THE SITING ACT AS APPLIED BY THE COMMISSION AND BY THE COURT IN TAMPA ELECTRIC V. GARCIA.

FPL's argues that the Petition's theory is inconsistent with the Siting Act. FPL's argument is misplaced. Calpine's theory is completely consistent with the Siting Act, both under the Commission's interpretation in Duke New Smyrna and under the Court's interpretations in the Nassau cases and in Tampa Electric

v. Garcia. Calpine's theory is that it will demonstrate the utility-specific commitments and cost-effectiveness required by Tampa Electric v. Garcia before construction of the Project can begin. As explained above, this may occur at the October hearings, or it may occur at some later date, but it will occur. Surely, the Commission has the authority to exercise its discretion on this timing issue in the public interest.

Moreover, FPL's argument that to allow Calpine to proceed would give Calpine special status and raise serious equal protection concerns, FPL's Memo at 49, is also misplaced. As alleged in its Petition, Calpine and the utilities that purchase the Osprey Project's output will make the required utility-specific demonstrations to the Commission before construction can begin. This is not special status. If Calpine's being allowed to proceed here implies special status, then it is because Calpine has had the forethought to present to the Commission an innovative opportunity to get a needed power plant into service in Florida earlier than FPL would like; there is no legal impediment to another potential supplier presenting a similar petition to the Commission.

VIII. FPL's ARGUMENT THAT THE PROPOSED OSPREY ENERGY CENTER IS UNNECESSARY AND UNECONOMIC IS, AT MOST, A QUESTION OF FACT TO BE DECIDED AT HEARING.

FPL has asserted that the proposed Osprey Energy Center represents an unnecessary and uneconomic duplication of facilities.

This assertion at most presents a question of fact to be addressed at the hearings in this proceeding. Calpine has pled that the proposed Osprey Energy Center is both economic (cost-effective) and non-duplicative.

Whether the Osprey Project is unnecessary is at most a question of fact to be determined based on the record of the case. Moreover, it will depend on whether, and to what degree, the contracts that Calpine will (indeed must) enter into before construction of the Project can begin are contracts to provide capacity and energy that would have been supplied by a unit that the purchasing utility or utilities would otherwise have built. Surely FPL would not argue (and Calpine would vigorously oppose FPL's standing to argue) that if another Peninsular Florida with responsibility for providing power to retail customers elects to buy the Osprey Project's output instead of building its own unit or entering into another purchase, that such purchase was unnecessary. Even if the Project's output is to be sold to a Peninsular Florida retail-serving utility in addition to resources that that utility otherwise plans to add to its system, it does not at all follow that the Project is unnecessary or uneconomic. For example, the purchasing utility may well determine that, based on the pricing and availability terms and conditions specified in its contract with Calpine that the contract purchase from the Project is necessary to enhance the purchasing utility's reliability, e.g., to increase its reserve margin cost-effectively.

Moreover, Calpine's Petition establishes, as a matter of pleading "fact" that must be presumed true for purposes of considering a motion to dismiss the Petition, that the Project, if added into the Peninsular Florida power supply system, will provide power supply cost savings to Peninsular Florida utilities of more than $800 million (Net Present Value) over the first ten years of the Project's operation. This is prima facie pleading fact, which must be presumed true in the context of this motion to dismiss, that the Project will not be uneconomic. Again, this is at most a question of fact to be decided at the hearing.

IX. PROHIBITING CALPINE FROM APPLYING DIRECTLY FOR A DETERMINATION OF NEED WOULD VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution prohibits the Commission from interpreting Florida law to prevent Calpine from applying directly for a determination of need. Under the interpretation of Section 403.519, F.S., proposed by FPL, Calpine may construct and operate a merchant power plant in Florida only if it first contracts with an in-state utility, which (according to the opponents) is the only type of entity entitled to apply for a determination of need. According to this interpretation, it is impossible for any out-of-state entity to enter the wholesale market for electrical power in Florida without first obtaining the permission of a potential in-state competitor. This interpretation of Florida law would allow in-state utilities

effectively to bar out-of-state companies from competing with them in the Florida market simply by refusing to apply for a determination of need on behalf of the out-of-state corporation. Or, conversely, the in-state utility can demand economic benefits to which it would not otherwise be entitled in exchange for presenting the out-of-state company's determination of need application. Both of these alternatives constitute clear favoritism toward local corporations, and are therefore inconsistent with the basic Commerce Clause principle that no state may use its regulatory authority to isolate its own corporations from interstate competition.

The dormant (or "negative") Commerce Clause is a body of doctrine derived from the Constitution's express grant of congressional power to "regulate Commerce . . . among the several states." U.S. Const. Art. I, Sec. 8. This doctrine imposes a judicially enforceable limit on the extent to which a state may regulate commerce coming into or leaving that state (including transactions that take place in interstate commerce). The dormant Commerce Clause limit on state regulatory authority is drawn directly from the Constitution, and therefore applies even in the absence of any federal statute preempting a particular state regulation. "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, unless such regulation has been preempted or expressly authorized by Congress." Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen

Freeholders of Atlantic County, 48 F.3d 701, 710 (3rd Cir. 1995).

The dormant Commerce Clause creates a national economic marketplace in every commercial commodity, including electricity. See New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)(striking down as violation of dormant Commerce Clause a New Hampshire Public Utilities Commission order banning export of locally produced hydroelectric power).[16] The principle governing dormant Commerce Clause cases is simple and virtually absolute: "This 'negative' aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988). Any state statute or regulation that functions primarily to provide economic benefits to in-state corporations is therefore unconstitutional. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."

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[16]With rare exceptions, electric power transactions at wholesale are transactions in interstate commerce, subject to regulation by the Federal Energy Regulatory Commission. See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) (Federal Power Commission, the precursor of the FERC, held to have jurisdiction over the transmission of power, at wholesale, by utility over another utility's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce); see also 16 U.S.C.S. §§ 824(a) & (b)(1) (1994).

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949). In this case, Calpine does not challenge the Florida health, safety, and environmental laws applicable to power generation facilities, and Calpine intends to comply with these laws in every respect. But the interpretation of Section 403.519, F.S., that would prohibit Calpine from even applying for a determination of need without first contracting with an in-state utility is related to neither health, safety nor the environment; it is pure economic protectionism, and therefore is prohibited by the dormant Commerce Clause.

State laws can conflict with dormant Commerce Clause mandates in two ways: by discriminating against out-of-state commerce, and by unreasonably burdening interstate commerce. The exclusionary interpretation of Section 403.519, F.S., urged by FPL is unconstitutional under both categories of dormant Commerce Clause jurisprudence.

A. To Prohibit Calpine From Applying for a Determination of Need Unconstitutionally Would Discriminate Against Out of State Commerce.

Requiring Calpine to contract with an in-state utility before obtaining a determination of need would overtly discriminate against unaffiliated out-of-state companies seeking to enter the wholesale market for electrical energy in Florida. Overt discrimination of this sort against out-of-state competitors of in-state companies is virtually impossible to justify under the

Commerce Clause. "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under the exclusionary interpretation of Section 403.519, F.S., urged by FPL, out-of-state companies who refuse to enter into binding contracts with in-state utilities would be totally barred from obtaining a determination of need, and therefore totally barred from doing business in Florida as a wholesale producer of electrical power. This interpretation of Section 403.519, F.S., fits precisely the Supreme Court's description of a clear dormant Commerce Clause violation. "The clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." Philadelphia, 437 U.S. at 624.

The United States Supreme Court has held unconstitutional many examples of state regulations that have attempted to give local economic interests a competitive advantage by requiring anyone doing business in the state to channel part of their business to the local companies. See C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994)(striking down statute barring local waste recycler from shipping nonrecyclable waste to out-of-state processor); Oklahoma v. Wyoming, 502 U.S. 437 (1992)(striking down statute requiring utilities to buy designated percentage of local coal); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)(striking down statute requiring companies exporting timber

from Alaska to process timber at local processing plants); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)(striking down statute requiring shippers to package cantaloupes in Arizona before being shipped out of state); Toomer v. Witsell, 334 U.S. 385 (1948)(striking down statute requiring shrimp fishermen to unload, pack, and stamp shrimp in South Carolina before shipping them out of state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)(striking down statute requiring shrimp to be hulled in Louisiana before being shipped out of state).

Although these cases extend over seven decades, and involve many different industries, the underlying theme is consistent: neither a state nor one of its agencies may discriminate against interstate commerce, regardless of whether the discrimination takes the form of a direct ban on out-of-state competitors, a statutory requirement that out-of-state businesses join with in-state businesses before doing business within the state, or the selective application of otherwise legitimate certification requirements. This theme has been applied to cases analogous to the present one for many years. For example, denying Calpine applicant status or requiring Calpine to contract with a local utility to obtain a determination of need would be indistinguishable from an equally exclusionary certification requirement struck down over seventy years ago in Buck v. Kuykendall, 267 U.S. 307 (1925). In that case, the State of Washington required all common carriers using the state's highways over certain routes to obtain a certificate of

public convenience and necessity. Id. at 313. Although the applicant had received a similar certificate from Oregon, and asserted his willingness to comply with all applicable Washington state regulations concerning common carriers, Washington denied the certificate on the ground that the route was already being adequately served. Id. In an opinion by Justice Brandeis, the Supreme Court struck down the certification requirement. The Court noted that the purpose of the requirement "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." Id. at 315-16.

The Supreme Court has recently reaffirmed Buck as an example of unlawful state discrimination against interstate commerce. See Carbone, 511 U.S. at 394; see also Medigen of Kentucky, Inc. v. Public Service Comm'n of West Virginia, 985 F.2d 164, 167 (4th Cir. 1993)(striking down requirement that transporter of medical waste obtain a certificate of convenience and necessity, and noting that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose"). Moreover, excluding Calpine from the determination of need process, as urged by FPL, would interfere with interstate commerce even more directly than the certification requirement struck down in Buck, because in this

case Calpine would be prohibited from even applying for a determination of need unless it contracts with a local utility. Thus, Calpine would be entirely barred from the Florida market.

It is irrelevant for purposes of dormant Commerce Clause analysis that Calpine could eventually enter the Florida market after it contracted with an in-state utility to obtain a determination of need. Any discriminatory state action that is intended or that has the effect of protecting local interests is sufficient to trigger the application of the Commerce Clause, even if that action merely imposes extra costs on an out-of-state entity. "The volume of commerce affected [by an exclusionary state regulation] measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." Wyoming, 502 U.S. at 455. Thus, even a minor economic effect on the operation of Calpine's facility would constitute a violation of the dormant Commerce Clause if that effect tends to favor local economic interests. Such an effect is inevitable if Calpine is forced to contract with a local utility to apply for a determination of need on Calpine's behalf. The requirement that Calpine enter a contract that might not be economically advantageous for Calpine would itself constitute an impermissible impact on interstate commerce. At a minimum, local utilities are not likely to undertake the task of applying for a determination of need on behalf of Calpine without demanding some compensation in return. Thus, Calpine would

be forced to compensate the local utility for its assistance, and this compensation would necessarily raise the cost of providing cheap power to the wholesale market. Local utilities who could themselves apply for a determination of need would therefore obtain an economic advantage over out-of-state competitors such as Calpine in serving the market for wholesale electrical power. The United States Supreme Court has consistently held that the dormant Commerce Clause prohibits states from using their regulatory authority in this way to skew a particular economic market in favor of local interests.

The facially discriminatory nature of the proposed interpretation of Section 403.519, F.S., renders that interpretation constitutionally indefensible. As noted above, it is virtually impossible to justify discriminatory restrictions on interstate commerce. See Philadelphia, 437 U.S. at 624 (noting "a virtually per se rule of invalidity" for protectionist statutes). Such restrictions may not be justified under any circumstance if the state cannot demonstrate that its legitimate local interests could not be protected through a nondiscriminatory alternative regulatory scheme. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Carbone, 511 U.S. at 392. In this case, therefore, the only question is whether the legitimate

interests represented by the determination of need process can be adequately served if Calpine is permitted to apply directly to the Commission without first contracting with a local utility for the entire capacity of the Project.

The determination of need process serves three general legitimate state interests: ensuring electric system reliability and integrity; providing adequate electricity at a reasonable cost; and determining whether a proposed plant is the most cost effective available. See Fla. Stat. § 403.519. All three interests can easily be protected by a nondiscriminatory alternative: simply apply these parameters to the merits of Calpine's application. Since the three legitimate state interests justifying the determination of need process can be satisfied without requiring a local utility to apply for a determination of need on behalf of Calpine, the exclusionary interpretation of Section 403.519, F.S., cannot withstand the "rigorous scrutiny" the United States Supreme Court demands in its dormant Commerce Clause decisions.

Finally, the fact that Section 403.519, F.S., might hypothetically affect in-state wholesale utilities as well as out-of-state wholesale utilities such as Calpine does not cure the unconstitutional discrimination inherent in the proposed interpretation. The Supreme Court has held repeatedly that a discriminatory statute "is no less discriminatory because in-state or in-town [companies] are also covered by the prohibition." Carbone, 511 U.S. at 391; see also Fort Gratiot Sanitary Landfill,

Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992)(striking down Michigan landfill regulation, even though regulation disadvantaged some Michigan commerce as well as interstate commerce); Dean Milk Co. v. Madison, 340 U.S. 349 (1951)(striking down Madison, Wisconsin ordinance requiring local inspection of milk, even though ordinance affected milk imported from other parts of state, as well as milk from other states). It is also irrelevant that the regulation does not disadvantage some out-of-state companies, in the sense that some out-of-state companies may choose voluntarily to join with an in-state utility to seek a determination of need for a new merchant power plant. "[T]he mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." Division of Alcoholic Beverages and Tobacco, et al v. McKesson Corp., 524 So.2d 1000, 1007 (Fla. 1988)(holding that protectionist excise tax violated dormant Commerce Clause, but refusing to force state to refund unconstitutionally collected tax), rev'd in part, 496 U.S. 18 (1990)(requiring state to refund unconstitutionally collected tax).

In sum, it is impossible under longstanding dormant Commerce Clause precedents to justify the requirement that Calpine contract with a Florida utility before applying for a determination of need: The requirement overtly discriminates in favor of existing Florida utilities, it has no legitimate justification that cannot be

satisfied by nondiscriminatory means, and it cannot be justified on the ground that other Florida independent power producers might also be affected by the requirement. The only possible conclusion, therefore, is that the exclusionary interpretation of Section 403.519, F.S., constitutes unconstitutional discrimination in violation of the dormant Commerce Clause, and Calpine should be permitted to apply directly for a determination of need. The motions to dismiss should be denied.

B. Prohibiting Calpine From Applying for a Determination of Need Unconstitutionally Burdens Interstate Commerce.

Because the requirement that Calpine contract with a local utility before applying for a determination of need constitutes unconstitutional discrimination against interstate commerce, it is unnecessary to consider whether the requirement would unconstitutionally burden interstate commerce. See Carbone, 511 U.S. at 390 (holding that courts "need not resort to" burden category of dormant commerce clause analysis if statute is found to discriminate against interstate commerce). In this case, however, applying the burden category of dormant Commerce Clause analysis would produce the same result as the discrimination analysis: i.e., that the proposed interpretation of Section 403.519, F.S., is unconstitutional.

This second category of dormant Commerce Clause analysis limits the extent to which states can indirectly burden interstate commerce, even if there is no evidence of local favoritism or

discrimination against interstate commerce. The most frequently cited statement of the burden analysis is found in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986)("we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

In this case the proposed interpretation of Section 403.519, F.S., fails every aspect of the Pike burden test. Requiring Calpine to contract with a local utility before applying for a determination of need is not evenhanded, the requirement's effect on interstate commerce is not incidental, the burden on commerce outweighs the putative local benefits, and the legitimate local interests represented by the determination of need process can be protected through means that have a much lower impact on interstate activities.

The discussion in the previous section demonstrates why the proposed interpretation of Section 403.519, F.S., is not evenhanded

in its treatment of in-state and out-of-state participants in the market for wholesale electrical power. Under FPL's proposed interpretation, the only way an out-of-state company can enter the market for wholesale electrical power is by entering into a contract with a local utility to obtain the necessary determination of need. This imposes a major burden on commerce because it imposes additional costs on out-of-state applicants, and forces them to give up a measure of control over the regulatory decisions that dictate how and when a new generation facility will be built.

The discussion in the previous section also disposes of the argument that legitimate local interests support the requirement that Calpine enter into a contract with a local utility to obtain regulatory approval of its new facility. The only legitimate interests that can be asserted in favor of the determination of need process are: ensuring electric system reliability and integrity, providing adequate electricity at a reasonable cost, and determining whether a proposed plant is the most cost-effective available. See Fla. Stat. § 403.519. All three interests can be satisfied by dealing with Calpine directly instead of through a local intermediary. There is, of course, a possible fourth interest to justify prohibiting Calpine from applying for a determination of need directly, i.e., to protect local economic interests from out-of-state competition in the wholesale market for electricity. This interest constitutes pure economic protectionism, however, and is therefore inconsistent on its face

with the dormant Commerce Clause. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 43-44 (1980).

Under the dormant Commerce Clause, the scope of the Commission's legitimate authority with regard to wholesale electrical generation facilities is necessarily more limited than its authority with regard to new generation facilities being proposed by utilities subject to retail rate regulation by the Commission. Thus, a decision to permit Calpine to apply directly for a determination of need would not imply any constitutional limit to the Commission's existing authority to regulate local utilities. The Commission's greater authority with regard to local utilities is consistent with the dormant Commerce Clause because it is necessary to protect the ratepayers who will be forced to bear the cost and the risk of a local utility's power plants. These interests are not relevant to Calpine's application, however, because Calpine will assume the entire cost and risk of the facility itself.

Permitting Calpine to apply directly for a determination of need infringes on none of the state's legitimate regulatory interests. Conversely, requiring Calpine to contract with a local utility to apply for a determination of need would directly burden interstate commerce in a manner that favors local economic interests and disadvantages competitors from outside the state. The burden this requirement imposes on interstate commerce clearly exceeds the local benefits; therefore the exclusionary

interpretation of Section 403.519, F.S., advanced by FPL is unconstitutional under the burden category of dormant Commerce Clause jurisprudence.

X. FEDERAL LAW PREEMPTS THE STATE FROM REQUIRING CALPINE TO OBTAIN A CONTRACT WITH STATE REGULATED ELECTRIC COMPANIES IN ORDER TO BUILD THE OSPREY ENERGY CENTER.

FPC is wrong when it argues that prior decisions requiring certain applicants to have contracts with purchasing utilities are applicable here. Even if one assumes, for the sake of argument, that the cases sited by FPC apply, and assumes further that the Legislature had the authority to adopt such a limitation under the Commerce Clause, interpreting Florida law as limiting applicants for a need determination to electric utilities regulated by the State is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry. The Energy Policy Act of 1992, and FERC's Order 888, which require public utilities that own transmission facilities to provide access to those facilities to independent power generators on a non-discriminatory basis, preempt such a limiting construction of Section 403.519, F.S. The limiting construction would require that Calpine contract to sell power to an in-state utility before it can construct and operate the Project, which would undermine a fundamental objective of Title VII of the Energy Policy Act and Order 888, i.e., to prevent vertically integrated public utilities (utilities that own generation,

transmission, and distribution, and which thus have incentives to favor their own generation) from interfering with the development of a competitive wholesale power market.

The doctrine of federal preemption derives from the affirmative grant of powers to Congress and the Supremacy Clause of the United States Constitution. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Independent Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm., 36 F.3d 848, 853 (9th Cir. 1993). As long as Congress acts within its constitutional powers, its statutes take precedence over any state law that conflicts with them. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1,210 (1824). By the same reasoning, state laws must also yield to duly promulgated federal regulations with which they conflict. See Louisiana Pub. Serv. Comm. v. FCC, 476 U.S. 355, 369 (1986); Hillsborough County, Fla. v. Automated Med Labs, 471 U.S. 707, 713 (1985); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982). State law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pacific Gas & Electric Company v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 204 (1983) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1991)).

A. **Requiring Calpine to Contract With a State Regulated Utility In Order to Build Its Power Plant Conflicts with the Goal of the Energy Policy Act and Order 888 to Free the Wholesale Power Market from Undue Discrimination by Vertically Integrated Utilities.**

Federal preemption may be explicit, may result from a conflict between federal and state law, or may arise when the federal regulatory provisions evidence an intent by Congress to occupy the field within which the state regulates. Cipollone, 505 U.S. at 516. The interpretation of Section 403.519, F.S., advocated by FPC would result in a circumstance in which the requirements of state law would conflict with the goals and purposes of a federal statute or regulation. To run afoul of the Constitution, state law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." PG&E, 461 U.S. at 204 (quoting Hines, 312 U.S. at 67). Requiring a wholesale power merchant to contract with a utility regulated by the State of Florida as a prerequisite to being allowed to build a power plant intended to supply power to the interstate wholesale market directly and substantially undermines the purposes of Title VII of the Energy Policy Act. That purpose is to prevent vertically integrated, regulated utilities from discouraging federally regulated public utilities, such as Calpine, from building wholesale generating facilities. See Energy Policy Act of 1992, Pub. Law. 102-486, 106 Stat. 2776, 2905-21 (1992).

The Energy Policy Act was written against a background of FERC's difficulty in unbundling generation of electricity and creating a competitive market for wholesale power. When Congress enacted the Federal Power Act, electricity was provided almost exclusively by vertically integrated state regulated utilities which owned generation, transmission and distribution facilities. Order 888, 61 Fed. Reg. 21,539, 21,543 (1992). Utilities sold a bundled service -- delivered electric energy -- to retail and wholesale customers. Id. Recent changes in technology, and the experience of utilities with buying power from independent qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA), indicated that generation of electricity could be provided more economically by independent producers, operating in a competitive market, without forfeiting system reliability. Id. at 21,543-46. FERC, however, was limited in its ability to encourage development of independent wholesale generators by two major factors. First, FERC did not have clear authority to order vertically integrated utilities to transmit power for wholesale generators. Id. at 21,546. Thus, existing utilities could stymie the plans of wholesale public utilities by refusing to transmit power for them, which would isolate a generating facility and render it incapable of delivering its power. Second, the Public Utility Holding Company Act of 1935 (PUHCA) imposed severe restrictions on the ability of independent developers to own power

projects that were not qualifying facilities under PURPA, and prohibited utilities from owning such facilities outside of the geographic area in which they provide regulated service. Title VII of The Energy Policy Act was adopted to grant FERC authority to address both of these problems.

In amendments to Sections 211 & 212 of the Federal Power Act, Congress provided that FERC has the authority to order utilities to transmit power for other generators of electricity. See 16 U.S.C. §§ 824j, 824k (1998). The legislative history manifests that Congress's intent in so providing was to prevent utilities with monopoly power over power transmission from interfering with FERC's efforts to create a competitive market for wholesale power. The House Report on the Energy Policy Act stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

H.R. Rep. No. 102-474(I) at 139-40 (1992), reprinted *in* 1992 U.S.C.C.A.N. 1954, 1962-63.

FERC's Order 888 also evidences a central concern with the ability of utilities to interfere with the development of a competitive wholesale power market. In the introduction and summary on the very first page of the 197 page Order, FERC stated

that, in order for consumers to see the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly discriminate against others [i.e. competing generators].

The reading of Section 403.519, F.S., advocated by the FPC would give FPC the precise power that Congress and FERC carefully worked to eliminate. Under that reading, if Florida's retail utilities do not agree to sign contracts for purchases of power from wholesale utility generators like Calpine, these utilities retain the power to act as "gatekeepers" and prevent such wholesale utilities from building generating facilities at all. Transmission guaranteed by the Energy Policy Act is not worth anything if a wholesale utility cannot build a plant to generate power in the first place.

B. Requiring Calpine to Enter into a Contract with a State Regulated Utility Undermines the Energy Policy Act's Goal of Facilitating Provision of Wholesale Power by Experienced, Competitive Power Producers.

Requiring that wholesale power generators enter into a contract with a state-regulated utility before applying for a determination of need would also undermine the provisions of the Energy Policy Act that provide for wholesale public utilities, such as Calpine, to be exempted from the requirements of PUHCA. Prior to the Energy Policy Act, PUHCA greatly restricted the structure of, and limited utility investment in, wholesale generators like Calpine. PUHCA subjected any such producer that was affiliated

with a utility to onerous regulation by the Securities Exchange Commission. See generally 15 U.S.C. §§79a - 79z-6 (1998). The legislative history of the Energy Policy Act demonstrates that Congress was especially concerned that PUHCA would discourage experienced power producers from building generating facilities. See H.R. Rep. No. 102-474(I) at 139 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1962. Thus, in adopting section 711 of the Energy Policy Act, 15 U.S.C. §79z-5a (1998), Congress created a new entity relative to PUHCA, the exempt wholesale generator (EWG), specifically to allow companies like Calpine to use their expertise to develop and operate wholesale generating facilities. Construing Section 403.519, F.S., to allow existing utilities to veto the building of power plants by affiliates of out-of-state utilities would directly interfere with Congress' objective to allow experienced companies to build and operate wholesale generating facilities.

Congressional intent that states not be allowed to burden the building of EWG facilities dispositively preempts the states from imposing such burdens. See Cal. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (stating that the Court's role in preemption cases is to ascertain the intent of Congress). When Congress passed the Energy Policy Act, it fully recognized that the Act would affect the criteria that states historically considered in approving a state regulated utility's construction of power

generation facilities. The Act explicitly allows the states to retain jurisdiction to guard against environmental harm that building a plant might entail, and to determine siting issues raised by an application to build such a plant. At a minimum, harmonizing the Energy Policy Act with Section 403.519, F.S., requires the Commission to deny FPC's Motion to Dismiss and grant the Petitioners a hearing on the merits of the Project; this application or construction would allow the Commission to make its decision under its statutes, on the merits, while respecting the Congress's and the FERC's purpose of promoting wholesale competition.

C. Nassau II Does Not Contradict the Conclusion that Interpreting Section 403.519, F.S., to Require that Calpine Contract with a State Regulated Utility is Preempted by Federal Law.

Finally, the Florida Supreme Court's decision in Nassau II does not undercut the conclusion that requiring Calpine to enter into a contract for sale of power with a Florida electric utility would conflict with federal law.[17] In Nassau II, the court affirmed the Commission's interpretation that Section 403.519, F.S., required a PURPA qualifying facility (QF), that proposed to bind a specific utility contractually as a precondition of going forward with its project, to enter into such a contract with a utility

[17] Similarly, Calpine believes that the Florida Supreme Court's brief disposition, in its non-final Tampa Electric v. Garcia opinion, of Duke's and the New Smyrna Beach Utilities Commission's federal arguments is incorrect.

before filing a (joint) application for a need determination. Federal preemption was not addressed by the Commission or the court. See generally 641 So. 2d 396; 92 FPSC 10:646.

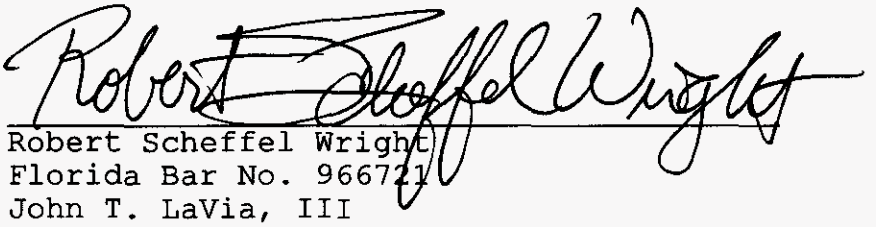
Even if it had been addressed, differences between the regulatory scheme established by PURPA and that established by the Energy Policy Act and Order 888 warrant different outcomes. PURPA requires state-regulated utilities to purchase power from QFs at avoided cost. 16 U.S.C. §824a-3 (1998). Thus, it envisions a sale of power to the utility and hence a contractual relationship between the QF and the utility. Unlike this case, in Nassau II, the QF attempted to require FPL to contract with it as a means of showing need. The Commission implicitly recognized this difference when it specifically limited the interpretation in the Nassau Order to proceedings in which non-utility generators seek determinations of need based on a specific utility's need. See 92 FPSC at 10:646-47. The Commission's interpretation of Section 403.519, F.S., with respect to QFs thus merely dictated that a contract between the QF and the purchasing utility must be in place prior to the determination of need for the QF's facility. If a contract requirement is imposed on wholesale power merchants for their plants to be considered for siting, the Commission would be creating an obligation that such merchants sell power to a particular utility in Florida, which is clearly inconsistent with the open, competitive wholesale market envisioned by Order 888.

To prohibit Calpine's plant from siting consideration because Calpine has not entered into a contract with a Florida utility would undermine the structure and purposes of the Energy Policy Act and Order 888, which are intended to prevent vertically integrated utilities from interfering with the creation of an open and competitive market for wholesale power. Allowing Calpine to gain consideration in a siting proceeding does not threaten any of the interests Congress left for states to protect when it allowed states to retain authority to impose environmental and siting requirements on wholesale generating facilities. Thus, to interpret Section 403.519, F.S., to require an applicant for a need determination to contract with an in-state utility would clearly conflict with the objectives of Congress and FERC and therefore is preempted.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should DENY FPL's motion to dismiss.

Respectfully submitted this 17th day of July, 2000.



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