

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: OCTOBER 2000

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**CALPINE CONSTRUCTION FINANCE COMPANY'S RESPONSE AND MEMORANDUM
OF LAW IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S
EMERGENCY MOTION FOR ABEYANCE**

Calpine Construction Finance Company, L.P., ("Calpine"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby files this response and memorandum of law in opposition to Florida Power & Light Company's ("FPL") motion to hold Calpine's petition for determination of need for the Osprey Energy Center (the "Petition") in abeyance ("FPL's Motion"). In summary, FPL's arguments are essentially a meritless challenge to the Commission's actions in establishing the schedule for this proceeding, which schedule Calpine is following. Intervenors take each case as they find it, and FPL is not required to participate in this proceeding at all. Thus, any expenditures that FPL makes are solely within its discretion. Granting the relief requested would be contrary to the public interest, because it would delay the construction of the Osprey Project and deprive Florida of the substantial benefits of the Project for the duration of any delay.

FPL has completely failed to plead or establish any conditions constituting an "emergency." Finally, much of FPL's argument is based on blatant misrepresentations of Calpine's positions.

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Accordingly, in the public interest, and in the best interests of Florida retail electric customers, the Commission should deny FPL's motion and allow this proceeding to continue pursuant to the Order Establishing Procedure.

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 529 megawatts ("MW") of net generating capacity. Under the present schedule, the Project is expected to commence commercial operation in the second quarter of 2003, in time to serve Florida's needs during the summer of that year. 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. Petition at 12-13.

2. The Petition alleged that Calpine is committed to providing the electrical output 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. Petition at 4. To that end, as alleged in the Petition, Calpine has actively pursued discussions with Florida

retail-serving utilities, and those discussions have now led to active negotiations toward such contracts, and Calpine fully expects to file evidence (e.g., contracts, letters of intent, or similar documentary evidence) of the requisite utility-specific commitments in accordance with the schedule set forth in the Order Establishing Procedure, i.e., by November 1, 2000.¹ See Petition at 4-5.

3. The Commission has, in its Order Establishing Procedure, effectively given Calpine until the first of November to "put up or shut up" by furnishing evidence that the Osprey Project's output is appropriately committed to Florida retail-serving and load-serving utilities. Calpine is, as of this filing, actively in negotiations with such Florida utilities, and Calpine and its negotiating partners are on track to furnish the requisite evidence in accordance with the schedule in the Order Establishing Procedure, i.e., by November 1, 2000.

4. In the Petition, and again in its response to FPL's motion to dismiss, Calpine explained to the Commission why Calpine filed its Petition and accompanying Exhibits before it had final

¹ Calpine is endeavoring to comply with the schedule established by the Order Establishing Procedure. Calpine does not in any way, however, waive or recede from its position that the Commission has the legal authority to grant the requested determination of need for the Osprey Project on a conditional basis, as identified as a contingent possibility in Calpine's Petition (Petition at 5) and as discussed in Calpine's Response and Memorandum of Law in Opposition to FPL's Motion to Dismiss, which response and memorandum were filed on July 17, 2000.

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.

5. The Commission issued its Order Establishing Procedure for this docket on September 11, 2000. That Order provides, among other things, for intervenors to file on October 16, 2000, their direct testimony addressing Calpine's testimony filed on August 18 and 21, 2000; for the Commission Staff to file its corresponding testimony on October 23; and for Calpine to file any testimony rebutting Staff and intervenor testimony on October 30. The Order

Establishing Procedure also requires Calpine to file any supplemental testimony on November 1, 2000; Calpine understands that this testimony is to address the status of contractual commitments of the Osprey Project's output to Florida retail-serving utilities. The intervenors are then required to file any responsive testimony addressing Calpine's November 1 testimony on November 8, the Staff correspondingly on November 15, and Calpine's corresponding rebuttal on November 22. The hearings are scheduled for November 29 and 30 and December 1, 2000.

6. Calpine filed a motion for revised procedural schedule on September 26, 2000. In that motion, which remains pending, Calpine has asked the Commission for expedited discovery, largely to permit FPL and Florida Power Corporation ("FPC") to conduct expedited discovery so as to accommodate the filing of their testimony and exhibits that are due on October 16. Both FPL and FPC have opposed the relief requested by Calpine; at least FPC is apparently taking the position that the only subject upon which they wish to conduct discovery is the contract or contracts between Calpine and other Florida utilities. See Attachment A, letter from G.L. Sasso to R.S. Wright, September 27, 2000.

7. As more fully explained in Calpine's accompanying Memorandum of Law, the schedule established by the Commission for this proceeding is appropriate and consistent with due process principles. Contrary to FPL's baseless assertions, FPL does not "have" to participate in this proceeding at all, let alone spend

any time, money, or effort doing so: as an intervenor, FPL takes the case as it finds it, and all expenditures made by FPL are in its sole discretion. No emergency exists, and FPL has relied heavily on misrepresentations of Calpine's position regarding what is required for this case to proceed. In the public interest, specifically to secure the Osprey Project's benefits for Florida in the most timely way, the Commission should deny FPL's Motion to delay this proceeding and allow the case to proceed in accordance with the Order Establishing Procedure.

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 hold the Osprey Project need determination proceeding in abeyance and allow this case to proceed in accordance with the Order Establishing Procedure.

MEMORANDUM OF LAW

The case schedule established by the Commission is appropriate and consistent with due process requirements and applicable Commission precedent, and accordingly that schedule should not be modified. Granting the relief requested by FPL -- which is effectively an indefinite delay in the permitting process and subsequent commercial operation of the Osprey Project -- is contrary to the public interest and should be denied. As an intervenor, FPL takes the case as it finds it. Moreover, contrary to its baseless assertions, FPL does not have to participate in this process at all, let alone "expend the hundreds of thousands of dollars required to prepare for trial under the currently unreasonable schedule" FPL's Motion at 2. Moreover, FPL is not required in any way to participate in this or any other proceeding to oppose a power plant that will, by the express terms of Calpine's Petition, not be built unless it is contractually committed to meeting the needs of Florida retail-serving utilities and their retail customers. FPL has failed completely to allege any conditions constituting an emergency, because no such emergency exists. FPL has also relied heavily on blatant misrepresentations of Calpine's positions. Accordingly, FPL's motion for abeyance should be denied.

I. THE CASE SCHEDULE SET FORTH IN THE COMMISSION'S ORDER ESTABLISHING PROCEDURE IS APPROPRIATE AND SHOULD NOT BE MODIFIED AS SUGGESTED BY FPL.

The schedule established by the Order Establishing Procedure is appropriate, reasonable, and consistent with due process requirements, as well as with applicable Commission precedent. Correspondingly, FPL's attacks on the Commission's Order are inappropriate. The main body of Calpine's testimony and exhibits in support of its case in chief was filed on August 18 and 21, 2000. This testimony addressed Calpine, as the primary applicant for the Commission's determination of need; technical aspects of the Project itself, including engineering features, water supply, transmission arrangements, fuel supply, and environmental permitting considerations; and the economic impacts of the Osprey Project's operations on the Peninsular Florida power supply system. FPL has until October 16, i.e., nearly two months after Calpine's initial filing, to respond to that body of testimony and exhibits. Pursuant to the Commission's Order, Calpine has until November 1 to file any supplemental testimony, which Calpine understands to be primarily for the purpose of addressing the status of contractual commitments of the Project's output to Florida retail-serving or load-serving utilities, and FPL has until November 8 to file its responsive testimony to Calpine's November 1 testimony.

No prejudice and no due process impairment will result from the schedule established by the Commission's Order. Even if it can

show a legitimate interest in the contracts sufficient to justify its continued participation, FPL will have four full weeks from Calpine's filing until the hearing.

In a similar case involving FPL, the Commission processed, on an expedited basis, FPL's petition to include the cost of Scherer Unit No. 4 in FPL's rate base. In fact, that case was processed through the entire hearing, and the final order was issued, on the basis of a non-final, non-binding letter of intent. See In Re: Petition of Florida Power & Light Company for Inclusion of the Scherer Unit No. 4 Purchase in Rate Base, Including an Acquisition Adjustment, 91 FPSC 2:602, 603 ("Scherer 4"). The Commission may find the status of FPL's contract in that case to be particularly interesting in the present context. That status was described in the Commission's order as follows.

When the Petition was filed, FPL was in the process of negotiating the purchase, and thus, there was no final contract with Georgia Power Corporation (GPC) and the Southern Companies (Southern). Contract negotiations continued during and after the hearing. There was, however, a non-binding letter of intent entered into by GPC, Southern, and FPL which provided an estimated purchase price. The letter of intent was relied upon by FPL throughout the proceedings in this docket.

Scherer 4, 91 FPSC 2:602 at 603. FPL also filed a "supplement to the Letter of Intent" that was the subject of the hearing on the very day that the hearing began. Scherer 4, Exhibit 2 at 1 (cover letter accompanying the filing of the document). This document, designated Exhibit 2 in the record of the Scherer 4 proceeding, was

an approximately 3-page, single-spaced supplement to the non-binding letter of intent upon which FPL relied throughout the proceeding; according to the dates on the documents comprising Exhibit 2, the supplement had been executed the day before the hearing. Clearly, there was no opportunity for meaningful discovery on this apparently significant document, yet FPL and the Commission went forward with the hearing and the final order in that case.

Faced with what it perceived as an unnecessarily compressed time schedule and with the fact that the letter of intent relied upon by FPL was non-binding and did not provide concrete information, the Public Counsel moved for a postponement of the hearing and rescheduling of the CASR dates on November 9, 1990, approximately one month before the hearing scheduled to begin on December 11. Scherer 4, FPSC Document No. 10091 (November 9, 1990); see also Scherer 4, Transcript of Oral Argument at 4 (November 26, 1990). Oral argument on that motion was held on November 26, 1990, approximately two weeks before the hearings, and the Public Counsel's requested postponement and rescheduling were denied. In Re: Petition of Florida Power & Light Company for Inclusion of the Scherer Unit No. 4 Purchase in Rate Base, Including an Acquisition Adjustment, 90 FPSC 12:30 (Order Denying Motion to Postpone Hearing and Reschedule CASR Dates, December 4, 1990).

Similarly, there is no good reason for the Commission to

postpone its scheduled actions in the Osprey Project need determination case, and FPL's Motion should be denied. If the procedural schedule is sufficient for the Commission and the Commission Staff to evaluate Calpine's case, then it is sufficient for an intervenor with dubious interests in the outcome of this proceeding.²

With regard to FPL's due process claims, there can be no prejudice to FPL because there can be no adverse impact on FPL by the Commission granting the relief requested by Calpine. As Calpine has pled its case, and in the current procedural posture of the proceeding, there are several outcomes, of which two are truly relevant: i.e., the outcome where the Osprey Project is built and the outcome where the Osprey Project is not built. If the Project is not built, i.e., if Calpine somehow fails to sustain its burden of proof in the need determination or site certification proceedings, there can be no impact on FPL. If the Project is built pursuant to contractual commitments to Florida retail-serving utilities, then it may be built sooner, e.g., under the schedule established by the Commission's Order Establishing Procedure, or

² A direct implication of FPL's Motion is that FPL believes it is better suited than the Commission to evaluate Calpine's case and Calpine's contracts with Florida retail-serving or load-serving utilities. The Commission should not be misled. FPL is not a public interest group attempting to protect the best interests of Florida's citizens and electric customers; rather, FPL is attempting to protect the economic interests of its shareholders by thwarting the entry of additional wholesale power supply resources into the Peninsular Florida market.

later, e.g., if FPL's Motion to delay this proceeding were granted. Either way, however, there is no effect on FPL (unless, of course, FPL is the contracting utility, in which case it is fair to presume that there would likewise be no adverse impact on FPL). From this simple analysis, it is obvious that FPL's Motion is simply a continuation of its campaign to thwart and delay competition in the Peninsular Florida wholesale power market using every available procedural gambit available to it.

Moreover, if FPL means what it has said, at least implicitly -- that if Calpine has contracts with Florida retail-serving or load-serving entities, then it will not object to the Project -- then it has no rational purpose in participating in this case in any event, because, as Calpine has framed its Petition, the Osprey Project will never be built until and unless such contracts are in place. Again, Calpine believes that FPL's real purpose is to continue its campaign of attempting to thwart any form of competition in the wholesale market in Florida in an effort to protect the economic advantages associated with its incumbent position and effective monopolistic power in that market.

II. THE COMMISSION SHOULD PROCEED IN ACCORDANCE WITH THE ORDER ESTABLISHING PROCEDURE BECAUSE THE SCHEDULE SET FORTH THEREIN ADVANCES 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.

As Calpine alleged in its Petition, Calpine has diligently pursued discussions toward contractual arrangements that will commit the Osprey Project's output to Florida retail-serving utilities, and those discussions have evolved into active, specific negotiations for the full output of the Project. Calpine fully expects to file evidence that the Project's output is thus committed to cost-effectively meeting specific Florida retail-serving utilities' needs by November 1, 2000, in accordance with the Order Establishing Procedure.

Delay in the need determination process will delay the in-service date of the Project.³ Such a delay, which would be occasioned by granting FPL's motion to delay the case, would 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

³ Calpine explained with specificity the impacts of delays in the need determination process on the in-service date of the Project in its response to FPL's motion to dismiss filed on July 17, 2000. See Calpine's Response and Memorandum of Law at 19-22.

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; delaying the Project's in-service date will deprive the State of those benefits as well.

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 were granted. In the final analysis, these benefits are the reasons that the Commission must deny FPL's Motion.

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 pursuant to

the Order Establishing Procedure. This course offers the ability to reap for the State and her electric customers, in the most timely way, 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 ("FEECA"), which includes Section 403.519,⁴ 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.

**III. AS AN INTERVENOR, FPL TAKES THE CASE AS
IT FINDS IT.**

FPL is an intervenor in this docket. See Order Granting Petition for Intervention (PSC-00-1687-PCO-EI). Concerning intervention, Commission Rule 25-22.039, F.A.C., provides:

⁴ 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 to the Siting Act, but rather that that status is governed by the definitions contained within the Siting Act itself.

Persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petitions for leave to intervene must be filed at least five (5) days before the final hearing, must conform with Commission Rule 26-22.036(7)(a), and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

(Emphasis supplied.) This concept that intervenors to a proceeding "take the case as they find it" is not unique to Commission Rule 25-22.039, F.A.C. Rather, Rule 25-22.039, F.A.C., directly reflects the well-established legal principle that intervention shall be in subordination to and in recognition of the main proceeding. See Fla. R. Civ. P. 1.230; see also Union Central Life Insurance Co. v. Carlisle, 593 So.2d 505 (Fla. 1992).

FPL's Motion does abuse to the concept that an intervenor must "take the case as it finds it." The procedural aspects of this need determination proceeding have been clearly delineated in the Commission's Order Establishing Procedure--this is the case that FPL finds. Rather than working within those time frames, FPL is now attempting to, in effect, hijack this case by demanding an unspecified delay of the proceeding. The delay FPL seeks is precisely the type of disruption of the ongoing proceeding that an intervenor should not be allowed to cause. See Humana Health Plans

v. Durant, 650 So.2d 203, 204 (Fla. 4th DCA 1995) (stating that it was within the trial court's discretion to deny intervention so as not to delay the trial); Hartford Fire Ins. Co. v. School Board of Dade Co., 661 So.2d 111, 112 (4th DCA 1995) (granting intervention where such intervention would not delay or disrupt the proceeding). The Commission should reject FPL's last-ditch efforts to delay this proceeding unnecessarily in an effort to maintain its monopolistic position in the wholesale market in Florida and, accordingly, the Commission should deny FPL's Motion.

**IV. FPL HAS FAILED TO ALLEGE CONDITIONS
ESTABLISHING THAT AN EMERGENCY EXISTS.**

FPL has styled its Motion as an "emergency" request for relief, but FPL has not pled what the alleged emergency is. Apparently, FPL's alleged "emergency" is that it does not want to follow the procedural schedule set forth in the Order Establishing Procedure because it gives FPL only four full weeks from the date upon which Calpine is expected to file supplemental testimony to conduct discovery, respond to that testimony, and otherwise prepare for hearing. This simply does not rise to the level of an emergency.

As previously noted, FPL is an intervenor in this docket and, as such, takes the case as it finds it. See Rule 25-22.039, F.A.C. This means that FPL takes the procedural schedule as it finds it; FPL's intervenor status does not give it the right or the ability to demand that the schedule be modified. As noted above, the

schedule is sufficient for the Commission Staff to evaluate Calpine's contractual arrangements; if this situation does not pose an emergency for the Commission Staff, it does not pose an emergency for FPL. Perhaps more importantly, the procedural schedule gives FPL ample time to conduct discovery and prepare its case.

In sum, FPL has not adequately pled the existence of an emergency because no emergency exists. The Commission should reject FPL's Motion.

**V. FPL HAS MISREPRESENTED THE FACTS
THROUGHOUT ITS MOTION.**

FPL has misrepresented numerous facts throughout its motion. These misrepresentations fall into three major areas: alleged ex parte communications, the statements of counsel for Calpine during the hearing on intervention, and the terms of the Order Establishing Procedure.

FPL wrongly asserts that Calpine has had ex parte communications with the Commission through an allegedly ex parte letter and that Calpine has orchestrated ex parte letters from non-parties. FPL's characterization is mistaken and misplaced. These proceedings are governed by Chapter 120. Section 120.66, Florida Statutes, defines ex parte communications to be a communication relative to the merits, or a threat, or a offer of reward to the agency head or the presiding officer by a party to the proceeding or any person who has a substantial interest in the proposed agency

action. Section 120.66 goes on to expressly exclude from that definition a communication with advisory staff members who do not testify on behalf of the agency in the proceeding. See also Fla. Stat. § 350.042 (prohibiting ex parte communications with Commissioners but specifically exempting Commission Staff).

In this case, apparently FPL believes that a letter to the General Counsel from Calpine was an improper ex parte communication and that letters from utilities interested in securing contracts for the output of the Osprey Project were somehow "orchestrated" by Calpine in violation on the prohibition against ex parte communications. Clearly FPL misapprehends the nature of those letters. There have been no ex parte communications with any Commissioners or with the presiding officer in this case by or on behalf of Calpine. There have been no discussions of the merits with any Commissioner or the presiding officer. Finally, there have been no communications that constitute ex parte communications by or on behalf of Calpine. Any letter from or on behalf of Calpine has been unrelated to the merits or has been to an advisory staff member who will not be a witness in the proceeding. FPL knows this, but seeks to mischaracterize the letters so as to place Calpine in a negative light. The Commission should not countenance such misrepresentation and mischaracterization.

FPL next misrepresents the terms of the Order Establishing Procedure. FPL states in footnote 1 of its Motion that the Order Establishing Procedure "acknowledges that Calpine's petition and

direct case do not contain the elements necessary to proceed." A simple reading of that Order reveals the deceptive nature of this allegation. Clearly the Order Establishing Procedure makes no acknowledgment or other statement regarding the soundness of Calpine's case.

Perhaps the most egregious misrepresentations by FPL come in the repeated distortion of Calpine counsel's words at the oral argument before the Prehearing Officer on September 19, 2000. No less than eight times in its relatively short Motion, FPL states that Calpine, through counsel, admitted or acknowledged or conceded that it must have a co-applicant and contracts to proceed with this need determination proceeding. However, FPL conspicuously omits key words from counsel's two statements related to this subject. Calpine's counsel stated "we have made it very clear, both in our application and we will make it very clear here today, that we are in agreement, we cannot proceed with construction until we have a co-applicant and contracts, according to the application we filed." Transcript of September 19, 2000, Motion Hearing at 21, lines 5-10. Later, Calpine's counsel stated "We have made it very clear that we understand that under the current state of the law we must have contracts before we can proceed to the construction or any further with this project." Transcript of September 19, 2000, Motion Hearing at 22, lines 8-12. These are the only two statements on this subject in the entire transcript of that oral argument. FPL's misrepresentation of these statements can be nothing less than

intentional since FPL directly quoted one of those statements in its Motion. There has been no concession by Calpine on this point. Calpine has always believed that it is entitled to an affirmative determination of need subject to the condition that it cannot and will not begin construction until it has contractual arrangements that satisfy the commitment requirements of Tampa Electric v. Garcia. The burden would be on Calpine to submit adequate information for the Commission to perform the required Section 403.519 analysis prior to construction. Calpine has not wavered from its conviction that its Petition is proper and adequate to proceed through the need determination and the site certification proceedings with an affirmative, albeit conditional, need determination. The blatant misrepresentations by FPL alone justify denial of FPL's disingenuous motion.

FPL has also at least partially misrepresented the Staff's recommendation, subsequently withdrawn, that the Osprey need determination case be held in abeyance. FPL attempts to characterize the Staff's recommendation as being to avoid the unnecessary expenditure of time and effort on the case. FPL, however, omits the fact that the Staff's rationale for holding the case in abeyance was that the Florida Supreme Court had not yet ruled on the appeal pending in the Duke New Smyrna need determination case. The Staff's recommendation stated in its entirety as follows: "The Petition for need determination in Docket No. 000442-EI should be held in abeyance until a final decision has

been issued by the Florida Supreme Court in Tampa Electric v. Garcia." FPSC Docket No. 000442-EI, Staff Recommendation dated August 3, 2000 (FPSC Document No. 09405-00, withdrawn August 29, 2000).⁵

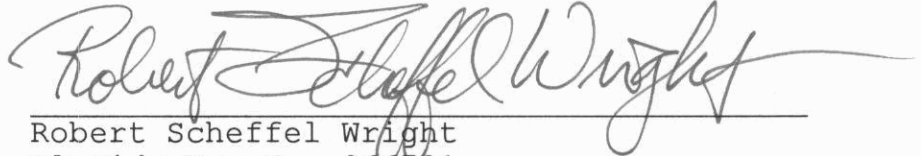
Now that the Court has ruled, denying the Commission's and other parties' motions for rehearing filed in that case, nothing has changed with respect to the instant need determination proceeding for the Osprey Project. Calpine's Petition is still entirely valid within even the narrow scope of the Court's now-final opinion in Tampa Electric v. Garcia, because Calpine has alleged that the Project will only be built if and when Calpine has demonstrated the utility-specific commitment required by that decision. While it was hypothetically possible that the Court could have modified its initial opinion in such a way as to make clear that Calpine could not apply for a determination of need as it has done, the Court did not do so. Accordingly, Calpine's Petition remains valid in accord with Commission precedent regarding the Commission's authority to impose conditions on need determinations.

⁵ In discussion text, the Staff went on to say that "[g]iven the Court's initial opinion, it appears that allowing the events in Docket No. 000442-EI to continue as originally scheduled could result in the unnecessary expenditure of the parties' and the Commission's time and resources. Therefore, staff recommends that the Commission hold this need determination docket in abeyance pending a final decision by the Florida Supreme Court in Tampa Electric v. Garcia." Id.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should DENY FPL's motion to hold the need determination proceeding for the Osprey Energy Center in abeyance.

Respectfully submitted this 3rd day of October, 2000.



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Tallahassee, FL 32301

VIA FACSIMILE

Re: Osprey Energy Center Need Determination Case, FPSC Docket No. 000442-EI

Dear Scheff:

Thank you for your letter of September 26, 2000. With all respect, your offer to provide expedited discovery has no substance. When I asked you about the status of Calpine's supposed contract negotiations when you called, you declined to provide that information, indicating that you were not at liberty to do so. That is the only discovery that matters. The testimony that Calpine has filed to date is essentially meaningless, having no connection to any contracts. We have little interest in asking you about it.

We may serve some limited discovery in the near future that relates to our legal position, without waiving our fundamental objection to the legality of this proceeding. When you feel at liberty to respond to requests about the status, nature, and particulars of any power purchase agreements, please advise us. At that point it may make sense to take depositions. But if you are either unable or unwilling to provide that information now, then it makes no sense to waste our time or yours taking depositions.

I would also like to state my objection to the notion that somehow our due process rights can be protected by Calpine's going through the motions of providing discovery when in fact the very subject of the proceeding--the power purchase agreements that Calpine is ostensibly negotiating--will be identified and filed on the eve of the hearing, if at all. That is consistent neither with controlling precedent, the Commission's rules, nor due process.

Sincerely,



Gary L. Sasso

cc: Charles Guyton
Robert Elias