



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

DOCUMENT NUMBER-DATE

03640 MAR 22 0

FPSC-RECORDS/REPORTING

**DATE:** MARCH 22, 2001

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF LEGAL SERVICES (ISAAC, ELIAS) *AND RVE 1/27*  
 DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HARLOW, BOHRMANN, BREMAN, HAFF) *AS WITH TB TB PL*  
 DIVISION OF ECONOMIC REGULATION (LESTER, STALLCUP) *1/27/01*  
 DIVISION OF COMPETITIVE SERVICES (MAKIN) *AM*

**RE:** DOCKET NO. 001748-EC - PETITION FOR DETERMINATION OF NEED FOR THE OSPREY ENERGY CENTER IN POLK COUNTY BY SEMINOLE ELECTRIC COOPERATIVE AND CALPINE CONSTRUCTION FINANCE COMPANY, L.P.

**AGENDA:** 04/03/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\001748A.RCM

### CASE BACKGROUND

Pursuant to Section 403.519, Florida Statutes, and Rule 25-22.081, Florida Administrative Code, Calpine Construction Finance Company, Inc. (Calpine) and Seminole Electric Cooperative, Inc. (Seminole) filed a Joint Petition for Determination of Need for the Osprey Energy Center, to be located in Polk County, Florida, on December 4, 2000. An Amended Petition was filed on January 8, 2001. The Amended Exhibits included a redacted version of the Power Purchase Agreement (PPA) between Calpine and Seminole (Document 00277-01). On February 21, 2001, the Commission issued Order No. PSC-01-0421-FOF-EC, granting the need petition.

On January 8, 2001, Seminole filed a Request for Confidential Treatment and Motion for Permanent Protective Order with respect to

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the information that Seminole and Calpine had redacted from the PPA. By Order No. PSC-01-0366-CFO-EC, issued February 12, 2001, the Prehearing Officer granted in part and denied in part the request and motion. On February 22, 2001, Calpine filed a Motion for Reconsideration of part of Order No. PSC-01-0366-CFO-EC. Calpine seeks reconsideration of those portions of the order which relate to the definition and structure of performance criteria under the PPA and information that relates to the pricing terms of the PPA. This recommendation addresses the Motion for Reconsideration. The Commission has jurisdiction under Section 366.093(3), Florida Statutes.

### DISCUSSION OF ISSUES

**ISSUE 1:** Should Calpine's Motion for Reconsideration be granted?

**RECOMMENDATION:** No, Calpine has not identified any issue of fact or law that was overlooked or not considered by the Prehearing Officer in rendering the Order.

**STAFF ANALYSIS:** Calpine argues in its Motion for Reconsideration that the information in question is held as confidential, proprietary business information by Calpine and that its public disclosure would harm Calpine's competitive interests. Calpine seeks reconsideration of the information redacted from the following portions of the PPA: (a) the information at page 9, lines 18-22, page 23, lines 28-35, page 24, lines 1-2 (all of which Calpine alleges is related information); and (b) the information at page 19, lines 30-31.

Calpine asserts that the information contained in page 9, lines 18-22, page 23, lines 28-35, and page 24, lines 1-2, relates to the definition and structure of performance criteria under the PPA. Calpine alleges that these provisions are not standard in negotiations relating to PPAs in other states. Calpine maintains that if disclosed, this information may be used by potential purchasing utilities in other states as a negotiating position in future negotiations with Calpine.

As evidence to support Calpine's position, an affidavit of Joseph Regnery was submitted along with Calpine's Motion. Therein, Mr. Regnery states the following is true with respect to the information on page 9, lines 18-22, page 23, lines 28-35, and page 24, lines 1-2: the information was specifically negotiated between

the parties; Calpine treats the information as confidential, proprietary business information; Calpine negotiates PPAs in Florida and in other states that have different performance criteria than that identified in the redacted information identified by the page and line numbers above; the specific performance criterion employed by the Seminole-Calpine PPA is not standard in PPAs negotiated by Calpine with other utilities; and the disclosure of such information would be injurious to Calpine's competitive interests by disclosing it to others.

Calpine alleges that the information contained in page 19, lines 30-31, relates and refers directly to the pricing terms contained in the PPA. Calpine asserts that disclosure of this information could be used against Calpine or Seminole by other entities negotiating with them. Calpine argues that the information referred to by the text on page 19, lines 30-31, was granted confidential protection by the Confidentiality Order. See Order No. PSC-01-0366-CFO-EC, page 2. Calpine believes that allowing the information on page 19, lines 30-31 to be disclosed would render the redaction of the material located on page 16, line 7 through page 17, line 17, meaningless. Calpine also describes these two findings as inconsistent.

The applicable standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law that was overlooked or not considered by the decision maker in rendering its order. Diamond Cab Co. v. King, 146 So. 2d (Fla. 1962). The mere fact that a party disagrees with the order is not a valid basis for reconsideration. Id. Further, reweighing of the evidence is not a sufficient basis for reconsideration. State v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958).

The Prehearing Officer did not agree that the information contained on page 9, lines 18-22, page 23, lines 28-35 and page 24, lines 1-2, warrants confidential protection. The Prehearing Officer found these terms to be commonly used in power purchase agreements and tariffs. See Order No. PSC-01-0366-CFO-EC at 4. Although Calpine alleges that the provisions in the text on page 9, lines 18-22, are not standard in other jurisdictions, staff does not believe the information is proprietary, confidential business information as contemplated by Section 366.093, Florida Statutes. The information on page 9, lines 18-22, lists several commonly used performance criterion. The Prehearing Officer ordered that Section 7.1 of the PPA, which contains the definitions to these performance criterion and the manner in which the criterion are used, should be held confidential. The lines in question on page 9 merely infer that these terms are used in Section 7.1 of the PPA,

without providing any additional information on the definitions or the manner in which the terms are employed. The Prehearing Officer stated that "[t]he definitions are general in nature and the information is not specific enough to affect competitive interests." Id. at 4. Furthermore, Order No. PSC-01-0366-CFO-EC states that Calpine "has not demonstrated how disclosure of this information would cause harm to the Parties." Id. at 4.

The information on page 23, lines 28-35, and page 24, lines 1-2, contains definitions of additional performance criteria used in the PPA. However, the Prehearing Officer found these performance criteria and the definitions provided are also commonly used, and therefore the information contained in this text is not specific enough in nature to impact competitive interests.

Lastly, the Prehearing Officer did not agree that the information contained on page 19, lines 30-31 should be protected under Section 366.093, Florida Statutes. The Prehearing Officer stated that "[t]his item is not specific enough in nature to impact competitive interests. Petitioner has not demonstrated how disclosure of this information would cause harm to the Parties." Id. at 4. These lines contain general information regarding pricing and as stated by Calpine, reference another section of the PPA which was granted confidentiality. The section which was granted confidential treatment contains specific pricing structure information, the disclosure of which could impair future negotiations. The information in question on page 19, while related to the information which was granted confidentiality, is general in nature. Further, staff disagrees with Calpine that the Prehearing Officer's order is internally inconsistent with regard to the confidentiality of these two sections.

Staff believes Calpine has not met the standard for reconsideration. Calpine has not shown that Order No. PSC-01-0366-CFO-EC overlooked some fact or point of law that would produce a different result. Calpine has essentially reargued the points raised in its original request for confidentiality. The only new argument being that certain provisions used in the Seminole-Calpine PPA are not standard in other states, which staff does not believe raises to the standard of reconsideration. The only information given to support Calpine's motion is conclusory, and the allegations that certain terms are not standard in power purchase agreements in other states. In addition, staff does not believe sufficient harm has been demonstrated by Calpine, rather, Calpine's allegations of harm are conclusory. Staff does not believe that this is sufficient to meet the reconsideration standard. Therefore

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staff recommends that the Commission deny Calpine's Motion for Reconsideration.

**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** The docket should be closed after the time for filing an appeal has run.

**STAFF ANALYSIS:** The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.