

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to Determine Need)
for an Electrical Power Plant)
in Manatee County by Florida)
Power & Light Company)

DOCKET NO. 020268-EL
FILED: APRIL 11 2008

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COMMISSION CLERK

PETITION TO INTERVENE OF CALPINE ENERGY SERVICES, L.P.

Calpine Energy Services, L.P. ("Calpine"), pursuant to Commission Rule 25-22.039, Florida Administrative Code ("F.A.C."), Rule 28-106.201, F.A.C., Rule 28-106.205, F.A.C., and Chapter 120, Florida Statutes,¹ hereby files its petition to intervene in the above-styled docket.

In summary, Calpine is entitled to intervene in this proceeding pursuant to Commission Rule 25-22.082(8), F.A.C.,² for the following reasons. First, Calpine was one of numerous wholesale power sellers who responded, as "participants" within the meaning of Rule 25-22.082(1)(c), F.A.C., to a request for proposals ("RFP") issued by Florida Power & Light Company ("FPL"). Second, FPL has now rejected all of the proposals, including several proposals and additional offers for negotiations submitted by Calpine. Third, FPL has instead

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- GCL 1
- OPC 1
- MMS _____
- SEC 1
- OTH None

¹ All citations herein to the Florida Statutes are to the 2001 edition thereof.

² The Commission's substantive rule applicable to many of the issues identified herein is Rule 25-22.082, F.A.C., Selection of Generating Capacity, which is referred to for convenience herein as the "Bid Rule."

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selected two power plant projects to be self-built by FPL to meet FPL's need for power identified in its RFP. Finally, one of the power plants that FPL has thus self-selected is the Manatee 3 power plant ("Manatee 3") that is the subject of this need determination proceeding.³

The gravamen of this proceeding is the Commission's determination of how the needs of FPL's captive electric customers will best be served by a power plant, or by a combination of power plants. The plant or plants to be built to meet the needs of FPL's customers must be: consistent with the specific criteria set forth in Section 403.519, Florida Statutes; consistent with the Commission's specific authority and "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and

³The Manatee 3 plant is proposed to be a "4-on-1" combined cycle unit, consisting of four combustion turbine generators, four heat recovery steam generators, and one steam turbine generator. Neither the Manatee 3 unit, nor any other unit to be built at FPL's Manatee plant site, nor any "4-on-1" combined cycle unit, was identified in FPL's RFP. The other power plant that FPL has self-selected to meet its identified need for power is a similar "4-on-1" combined cycle power plant to be built at FPL's Martin power plant site, which FPL has identified as "Martin 8." Calpine is contemporaneously filing a separate Petition to Intervene in the need determination proceeding for the Martin 8 unit, PSC Docket No. 020262-EI, In Re: Petition for Determination of Need for an Electrical Power Plant in Martin County by Florida Power & Light Company. As explained more fully in its separate Petition to Intervene, the Martin 8 unit is not the same as the Martin units identified in FPL's RFP.

distribution facilities," Fla. Stat. § 366.04(5); and consistent with the public interest.

As explained more fully herein, FPL has violated both the letter and the purpose of the Commission's Bid Rule, most obviously by filing its need determination petition for the proposed Manatee 3 unit where it had failed to identify the Manatee 3 unit or even to identify any unit planned or contemplated for its Manatee site, and where it had similarly, and utterly, failed to provide the "detailed technical description of [FPL's] next planned generating unit or units," as required by the Bid Rule, with respect to its proposed Manatee 3 unit in the above-mentioned RFP. Contrary to the purpose and intent of the Bid Rule, contrary to the interests of FPL's captive electric customers, and contrary to the public interest, FPL also refused to engage in any negotiations toward power purchase agreements with any participants in its RFP process and willfully and knowingly disregarded the opportunity, offered by Calpine, for FPL to obtain firm wholesale power supply products and contracts that Calpine would have specifically tailored to FPL's needs, and that would have provided better pricing and additional flexibility for the benefit of FPL and FPL's customers.

Pursuant to its general statutory mandate to regulate in the public interest, and pursuant to its specific statutory powers and duties, the Commission has extensive authority to ensure that only the power plant or plants that will best satisfy the

specific criteria enumerated in Section 403.519, Florida Statutes, that will best serve the needs of FPL's customers, and that will best serve the public interest, will be constructed and operated. The Commission has available to it a range of statutory powers to address the situation that FPL has created. The Commission's jurisdiction and specific authority would enable it to do one or more of the following:

- a. enter an order determining that FPL facially violated the Commission's Bid Rule by failing to identify and provide the required "detailed technical description" of the proposed Manatee 3 plant in its RFP;
- b. dismiss FPL's petition for determination of need for the proposed Manatee 3 plant accordingly;
- c. deny FPL's petition on the same grounds;
- d. order FPL to issue a new RFP with the proposed Manatee 3 plant correctly identified and specified;
- e. order a new RFP process to be supervised by the Commission ab initio, including: (i) advance PSC approval of the criteria, the weights to be assigned to those criteria, and the scoring system by which the criteria are to be applied to the proposals submitted in response to the RFP; (ii) PSC-supervised review, with the assistance of an impartial and independent third-party evaluator if deemed necessary by the Commission, of the proposals submitted in response to the RFP; and (iii) PSC determination of the "winners" of the RFP process, who would comprise the "short list" of respondents, as contemplated by the Bid Rule and by FPL's RFP document itself, with whom FPL would then negotiate toward power purchase agreements ("PPAs"); and
- f. conduct, on its own motion pursuant to Section 403.519, Florida Statutes, a proceeding to determine which power plants will best meet the needs of FPL's customers, and best serve the public interest of all Floridians, consistent with the criteria in Section 403.519, Florida Statutes, and with the Commission's general and specific jurisdiction, powers, and duties set forth in Chapter 366.

At the outset, Calpine acknowledges that this Petition to

Intervene contains more detail than is usual in intervention petitions. In view of the fact that need determination proceedings are generally processed on a fast track, with a hearing approximately 90 days after the petition is filed, Calpine believes that it is important to include as much detail as possible under the circumstances in order to identify issues for the Commission, FPL, and other parties.

PROCEDURAL BACKGROUND

1. FPL is a public utility as defined in Section 366.02(1), Florida Statutes, and thereby subject to the Commission's plenary regulatory jurisdiction pursuant to various provisions of Chapter 366, Florida Statutes, including, without limitation, Sections 366.03, 366.04(1)-(2)&(4)-(6), 366.041, 366.05, 366.06, 366.07, and 403.519, Florida Statutes. FPL is specifically subject to the Commission's Bid Rule. FPL's name and address is as follows:

Florida Power & Light Company
9250 West Flagler Street
Miami, Florida 33174.

2. Calpine is a wholesale power supplier that operates in the Peninsular Florida wholesale power market and in other wholesale power markets in the United States. As a participant in the Florida wholesale power market, Calpine understands that it is subject to certain aspects of the Commission's jurisdiction relating to the planning, development, and maintenance of a coordinated power supply grid in Florida. Calpine's name,

address, and telephone number are:

Calpine Energy Services, L.P.
2701 North Rocky Point Drive, Suite 1200
Tampa, Florida 33607
(813) 637-7300.

3. All pleadings, notices, orders, correspondence, and other communications filed or had in this docket should be served on the following:

Robert Scheffel Wright
Diane K. Kiesling
John T. LaVia, III
Landers & Parsons, P.A.
310 West College Avenue (ZIP 32301)
Post Office Box 271
Tallahassee, Florida 32302
Telephone (850) 681-0311
Telecopier (850) 224-5595

and

Joseph A. Regnery
Senior Counsel
2701 North Rocky Point Drive, Suite 1200
Tampa, Florida 33607
Telephone (813) 637-7300
Telecopier (813) 637-7399,

with a courtesy copy to:

Timothy R. Eves
Director, Business Development
Calpine Eastern Corporation
2701 North Rocky Point Drive, Suite 1200
Tampa, Florida 33607
Telephone (813) 637-7300
Telecopier (813) 637-7399.

4. The name and address of the agency affected by this complaint are:

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

5. At this point in these proceedings, there is no

proposed agency action to which Calpine is responding. However, consistent with the intent of Rule 28-106.201(2)(c), F.A.C., Calpine states that it learned of FPL's petition for determination of need that initiated this docket by advice of its counsel who found that FPL had filed the subject petition by reviewing the docket listing on the Commission's Internet web site on March 25, 2002.

STATUTES AND RULES THAT ENTITLE CALPINE TO RELIEF

6. Calpine is entitled to intervene in this proceeding by Rules 25-22.039, 25-22.082(8), 28-106.201, and 28-106.205, F.A.C., and by Chapter 120, Florida Statutes, because Calpine was a valid participant in FPL's RFP process and because the Commission's decision herein will determine Calpine's substantial interests. The statutes and rules that provide the Commission with the authority to grant the substantive relief identified herein include the following: Sections 403.519, 366.04(5), and 366.07, Florida Statutes; and Rule 25-22.082, F.A.C. This proceeding is exactly the type of proceeding intended to protect the interests of wholesale power suppliers, like Calpine, who believe that their proposals in response to a public utility's -- here, FPL's -- RFP have not been fairly evaluated and who believe that the utility's RFP process was defective.

7. Section 403.519, Florida Statutes, establishes the Commission as the exclusive forum for determining need for electrical power plants that are subject to the Florida

Electrical Power Plant Siting Act, Sections 403.501-.518, Florida Statutes (the "Siting Act"). In making its determination of need, the Commission is required to take into account the need for system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The Commission "shall also expressly consider . . . other matters within its jurisdiction which it deems relevant." Section 403.519, Florida Statutes. The relief requested by Calpine herein goes directly to ensuring that only the power plants that will meet the needs of FPL's customers most cost-effectively, most reliably, and most advantageously with respect to other factors (such as financial, economic, and operating risks), and that will best serve the public interest in Florida, are in fact the plants that are permitted, built, and operated.

8. Section 366.04(5), Florida Statutes, vests the Commission with "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Fla. Stat. § 366.04(5). The relief requested by Calpine herein will ensure that the planning and development of power plants in Florida is conducted in the best, most responsible, and most fully informed way, and that the best plants to meet an identified need -- here, the identified need of

FPL's customers -- are in fact the plants that are permitted, built, and operated. The relief requested by Calpine will also ensure that the most economic and cost-effective power plant options, taking all relevant factors into account, are in fact the plants that are built and operated to meet an identified need for power in Florida. Similarly, the relief requested by Calpine herein will also ensure that the power plants that best serve the public interest are the plants that are built and operated to meet Florida's needs for electricity.

FACTUAL BACKGROUND - CALPINE'S SUBSTANTIAL INTERESTS

9. As stated above, Calpine is a wholesale power supplier that sells electric capacity and energy, and other electric service products, at wholesale in Peninsular Florida and in other wholesale power markets in the United States. Calpine works closely with its affiliate, Calpine Construction Finance Company, L.P. ("CCFC"), to market power from CCFC's power plants. CCFC's primary business is the construction and operation of electrical power plants to supply power at wholesale to load-serving utilities such as FPL. CCFC is an electric utility under Section 366.02(2), Florida Statutes, a public utility under the Federal Power Act, and an Exempt Wholesale Generator pursuant to the Public Utility Holding Company Act of 1935. 15 U.S.C.S. § 79z-5a (1994 & Supp. 1997). As an electric utility under Section 366.02(2), Florida Statutes, CCFC is subject to the Commission's jurisdiction over the planning, development, and maintenance of

Florida's bulk power supply grid. Affiliates of CCFC presently operate one power plant in Florida, the Auburndale Power Plant, a cogeneration power plant having 150 megawatts ("MW") of net nominal generating capacity located in Polk County, Florida.

10. CCFC is also in the process of constructing two other power plants: (a) the Auburndale Peaker Energy Center, a 120 MW (nominal) simple cycle combustion turbine power plant located within the site of the existing Auburndale Power Plant, with a projected in-service date of June 2002; and (b) the Osprey Energy Center, a 529 MW (nominal) gas-fired combined cycle power plant located in Auburndale, Florida, on a site adjacent to the Auburndale Power Plant, with a projected in-service date of October 2003. Calpine has or will have the rights to market firm capacity and energy from the Auburndale Peaker Energy Center and any uncommitted capacity and energy that is available from the Osprey Energy Center after Calpine satisfies its contractual obligations to supply wholesale power from the Osprey Project to Seminole Electric Cooperative, Inc.

11. CCFC is also actively developing two other power plants in Florida: (a) the Blue Heron Energy Center, a 1,080 MW (ultimate net nominal capacity) gas-fired combined cycle plant located in Indian River County, which is the subject of a pending site certification application (In Re: Calpine Construction Finance Company, L.P., Blue Heron Energy Center, Site Certification Application No. PA00-42, DOAH Case No. 00-4564EPP); and (b) the Sandpiper Energy Center, a 540 MW (net nominal) gas-

fired combined cycle power plant to be located in Lee County, Florida, with a planned in-service date of the fourth quarter of 2005. Calpine will have the rights to market firm electric capacity and energy, and potentially other wholesale electric service products, from both the Blue Heron Energy Center and the Sandpiper Energy Center.

12. On September 28, 2001, Calpine submitted a proposal in response to FPL's RFP. Calpine's proposal conformed in all material respects to the scheduling and informational requirements of FPL's RFP. Accordingly, Calpine was and is a "participant" in FPL's RFP process within the meaning of the Commission's Bid Rule. Rule 25-22.082(1)(c), F.A.C. Calpine paid the requisite application fee and also paid FPL a significant additional sum to evaluate additional combinations of power supply alternatives that were available to FPL pursuant to Calpine's offer. In its response to FPL's RFP, as well as in subsequent correspondence and communications with FPL, Calpine indicated that it was prepared to negotiate toward a definitive power purchase agreement (or agreements) with FPL, using its response as a starting point for those negotiations.

13. In summary, Calpine offered to supply to FPL, at pricing terms and non-price terms favorable to FPL, up to all 1,750 MW of FPL's need (winter capacity rating) as identified in FPL's RFP at a guaranteed equivalent availability of 100 percent, subject only to certain limited off-seasonal-peak maintenance outages that Calpine would coordinate with FPL. The firm

capacity and energy offered by Calpine would be supplied from the Calpine Florida System, which is CCFC's and its affiliates' system of power plants in Florida, including the existing Auburndale Power Plant, the Auburndale Peaker Project and Osprey Energy Center that are presently under construction, and the Blue Heron Energy Center and Sandpiper Energy Center, which are presently under development. CCFC is also developing additional power plant projects in Florida that would be available, as part of Calpine's Florida System, to supply firm power to FPL to meet FPL's needs as those needs have been identified since the original RFP was issued last August. As discussed below, in view of the fact that FPL has now identified different needs than were identified in its RFP, Calpine is willing to tender -- and Calpine believes that the Commission should allow Calpine and the other bidders who were prejudiced by FPL's inaccurate identification of its next planned generating units in the August 13, 2001 RFP to tender -- a binding offer to supply firm electric capacity and energy from these additional plants as part of Calpine's Florida System.

14. Calpine's ability to carry out its fundamental business purposes, i.e., generally, to market wholesale electric service products based on the electric generating plants owned and operated by its affiliates, and specifically, to deliver firm capacity and energy to serve FPL's identified needs, will be substantially foreclosed if FPL's self-selection of its own projects to meet those needs were to be approved by the

Commission in this proceeding and the companion proceeding for FPL's proposed, self-selected Martin 8 plant. Moreover, Calpine's ability to have its proposal to FPL fairly considered by FPL in FPL's RFP process has been effectively denied by the substantial and material defects, described below, in FPL's RFP process. Accordingly, Calpine's substantial interests in a fair selection process, as provided for by the Commission's Bid Rule, have been violated and impaired, and these interests warrant rectification by the Commission, most importantly to protect the interests of FPL's captive electric customers who will be adversely affected by FPL's self-selection decision, as well as to protect Calpine's substantial interests.

**FACTUAL BACKGROUND - FPL'S REQUEST FOR PROPOSALS
AND PETITION FOR DETERMINATION OF NEED**

15. On August 13, 2001, FPL issued its RFP by which it solicited power supply proposals to meet needs for additional firm electric capacity and energy in 2005 and 2006. FPL's RFP identified the following as FPL's "next planned generating units" that it would plan to build if better alternatives were not made available via the RFP process:

- a. For 2005:
 - Conversion of 2 combustion turbines ("CTs") at FPL's existing Martin site into 1 combined cycle ("CC") unit which adds 249 MW (summer rating);
 - Conversion of 2 CTs at FPL's existing Ft. Myers site into 1 CC unit which adds 249 MW (summer rating);
 - Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating); and
 - Construction of a new CC unit at FPL's

existing Midway site which adds 547 MW (summer rating).

- b. For 2006: - Construction of a new CC unit at FPL's existing Martin site which adds 547 MW (summer rating).

16. FPL did not identify the proposed Manatee 3 unit, or any other unit to be built at its Manatee site, or any "4-on-1" combined cycle unit proposed for any site, in its RFP. In its petition, FPL identified the estimated costs for the Manatee 3 unit at \$566 million (in year-2005 dollars).

17. FPL's RFP contained several provisions that imposed differential and prejudicial requirements on respondents that are more onerous than those that would be applied to FPL and its self-build options. Perhaps the most significant of these is the "change-in-law contractual out" clause, which FPL required of respondents and which would allow FPL to terminate PPAs with successful respondents in the event of a change in Florida Statutes that would allow merchant power plants to be permitted under the Power Plant Siting Act. This provision has significant "optionality" value to FPL and to FPL's customers. However, this is a value that is not available to FPL's captive customers with FPL's self-build options, but FPL refused to give any credit for this value in evaluating responses to its RFP. FPL also imposed biased and onerous completion guaranty provisions, "regulatory-out" provisions, and long-term binding price restrictions on bidders that are significantly different from the treatment that would be afforded FPL for these items. These provisions are more

beneficial and valuable to FPL's customers than the corresponding treatment of FPL's self-build options, but FPL would not and did not give credit for these values in evaluating Calpine's and other respondents' proposals.

18. Moreover, FPL's evaluation process failed to take account of the significant risk-avoidance benefits and values available to FPL's customers via PPAs with Calpine or other respondents. Perhaps most significantly, FPL's evaluation failed to address the facts that, with PPAs with Calpine or other respondents, FPL's captive customers would not be exposed to the risks of construction cost overruns, unexpected maintenance and repair costs, and long-term market risks to which the customers would and, if FPL is allowed to proceed with its self-selected, self-build options like Manatee 3 and Martin 8, will be exposed.

19. Calpine submitted its response to FPL's RFP on September 28, 2001. Calpine's response offered extensive flexibility to FPL, including (a) an offer to supply up to all of the capacity and energy that FPL indicated in its RFP that it needed beginning in 2005 and 2006, (b) an offer for a range of contract terms from three years to ten years, consistent with the terms requested in FPL's RFP, and (c) an offer to supply power at a 100 percent guaranteed equivalent availability factor. FPL proposed to charge, and did charge, Calpine \$10,000 to obtain the RFP and for consideration of two specific megawatt-and-term proposals. In response to Calpine's offer of additional, specifically tailored supply options, FPL told Calpine that

Calpine would have to pay an additional \$9,000 for each pair of megawatt-and-term options that Calpine wanted FPL to consider. While Calpine believed at the time, and continues to believe, that this requirement was unreasonable and contrary to the best interests of FPL's customers, Calpine agreed to pay an additional \$27,000 for FPL to evaluate a total of eight megawatt-and-term proposals.

20. Calpine's proposals, which were submitted in response to FPL's RFP, were binding offers that FPL could have accepted on an "as is" basis. During the pendency of the RFP process, Mr. Mark Daley, Director of Marketing for Calpine, advised Mr. Steven R. Sim, FPL's manager in charge of the RFP process, that Calpine was prepared to negotiate with FPL on all terms and conditions of a PPA between FPL and Calpine, and that more favorable pricing could be made available to FPL as well as additional flexibility in terms of supply, and that other, more favorable terms and conditions could be tailored to meet FPL's specific needs. In reply, Mr. Sim advised Mr. Daley that such considerations would be taken up in negotiations with respondents who were selected to a "short list" for negotiations.

21. On or about January 15, 2002, FPL announced that it had selected a combination of "self-built" power plants, i.e., power plants to be built and operated by FPL, as the "winners" of FPL's RFP process. FPL made this announcement by a press release and by an e-mail message and letter to Calpine (see Exhibit A to this Petition) and, Calpine believes, to all other participants in its

RFP process. FPL's self-selected power supply options included the following:

- a. The conversion of two existing combustion turbines at FPL's Martin site into a 4 CT-based combined cycle unit to add approximately 800 MW of additional generating capacity; and
- b. Adding a new 4 CT-based combined cycle unit at FPL's existing Manatee site to add approximately 1,100 MW of additional generating capacity.

From this communication, it was not clear what configuration was contemplated for FPL's Manatee and Martin units.

22. When reminded by Calpine, on January 16, 2002, of FPL's representations that FPL would consider further negotiations on price in negotiations with those on a short list, FPL simply replied that its decision was "final."

23. FPL filed its need determination petition for the Manatee 3 plant on March 22, 2002.

**DISCUSSION - WHY THE COMMISSION MUST ACT TO
PROTECT THE PUBLIC INTEREST**

24. FPL has self-selected a unit for construction at its Manatee site that was never identified, and accordingly never described, in FPL's RFP.

25. In short, FPL has petitioned the Commission for a determination of need for a unit that it never identified in its RFP. This is a "moving target" of exactly the type that the Bid Rule was designed to prevent by requiring the utility to provide a "detailed technical description" of its next planned generating units. This is a clear, facial violation of the Commission's Bid

Rule that the Commission must rectify. This violation prejudiced Calpine and all other respondents to the RFP, and this violation systemically and unavoidably resulted in a defective evaluation of proposals: FPL cannot conduct a meaningful analysis of its options when it has utterly failed to identify Manatee 3 as one of its "next planned generating units" (and when it has, at best, mis-identified and mis-specified Martin 8), and when it has unilaterally refused to negotiate with any respondents to its RFP. Moreover, without being held to the terms of its RFP, a utility is free to change its evaluation parameters to ensure that it always wins and thus always forecloses its competitors from fair consideration. At a minimum, to protect FPL's customers and to ensure the integrity of the Commission's Bid Rule, the Commission must allow Calpine and the other respondents to submit new proposals aimed at FPL's "moved target."

26. Moreover, FPL's decision to evaluate the proposals submitted by Calpine and the other respondents to FPL's RFP against a generation expansion plan that included the Manatee 3 plant, an 1,100 MW unit that was not identified in the RFP, as well as the Martin 8 unit that was not identified in the RFP, virtually assures that Calpine's bid (and the bids submitted by other respondents) cannot have been fairly evaluated. All elements of a generation expansion plan affect each other interactively, and accordingly, the inclusion of the unannounced and unidentified Manatee 3 and Martin 8 units in the evaluation process unavoidably tainted the results of FPL's purported

evaluation.

27. FPL's failure to consider the flexibility options offered by Calpine also violated the fundamental purpose of the Bid Rule, which is to ensure that captive ratepayers get the best available deal for new power supply requirements.

28. FPL's refusal to negotiate with **any** respondent or respondents to its RFP also ensures, systematically, that FPL cannot have known all the options that were available to it through such negotiations and thus that FPL cannot know, or represent to the Commission, that it has adequately evaluated all available alternatives in its Bid Rule-required quest to find the most cost-effective alternative to meet its customers' needs.

29. FPL's requirement that respondents pay \$9,000 for each two additional evaluations was contrary to the public interest by chilling independent power producers ("IPPs") from seeking additional analyses. Consistent with the purpose of the Bid Rule, it was incumbent on FPL to undertake the additional analyses in the best interests of its customers and in the interests of fairness to the IPPs who responded to FPL's RFP.

30. FPL's willful refusal to make good on its representations to Calpine that it would consider additional pricing and non-price terms in negotiations with those on a short list of respondents not only violated Calpine's rights to have its proposals considered on a fair, non-discriminatory basis, but also adversely affected the interests of FPL's ratepayers and the Commission in having appropriate assurance that FPL obtained the

best available alternative for additional power. The process contemplated by the Bid Rule involves the selection by the public utility of "finalists," from the pool of participants, with whom the public utility will "conduct subsequent contract negotiations." Rule 25-22.082(1)(d), F.A.C.

31. While FPL reserved its right to reject all bids, its own RFP document clearly contemplated an extensive period for negotiations with short-listed bidders: the schedule set forth at page 12 of FPL's RFP projected that a "Short List Announcement" would occur in November 2001, to be followed by an "Award Announcement" in March 2002. FPL indicated to Calpine that it would follow this process, and then reneged. This violation is particularly significant because, by virtue of ignoring Calpine's offer and the opportunity made available to FPL thereby, FPL cannot have validly concluded that it had selected the most cost-effective option for its captive customers.

32. On information and belief, Calpine asserts that FPL did not conduct a fair evaluation of proposals against its self-built options based on power sales terms of different lengths or on other factors. For example, FPL's RFP required respondents to submit contracts of at least three but not more than ten years; if FPL subsequently evaluated Calpine's proposal, and the proposals of other respondents, on the basis of 3-10 year contracts, but then also evaluated its self-build options on the basis of the life of the plants, such action would constitute bias and an unfair, discriminatory-by-design selection process.

The fact that FPL has acknowledged that the best proposal involved a 25-year power purchase arrangement appears to indicate that FPL gave extra weight to longer-term proposals, which its RFP effectively discouraged. See FPL's RFP, Appendix E to the Need Study, at 4; FPL's Petition at 14.

DISPUTED ISSUES OF MATERIAL FACT

33. Calpine believes that the following material issues of fact are likely to be in dispute in this proceeding:

- a. whether FPL failed to adequately consider the flexibility benefits offered by Calpine's response to the RFP, especially Calpine's offer to serve all of FPL's identified need on a 100 percent guaranteed equivalent availability basis;
- b. whether FPL improperly ignored Calpine's offer to negotiate better pricing and non-price terms if Calpine were selected to a short list for specific contract negotiations;
- c. whether FPL improperly failed to follow the intent of the PSC's Bid Rule and FPL's own RFP by refusing to identify any IPPs' proposals for negotiations, and by refusing to negotiate with any IPPs toward power purchase agreements;
- d. whether FPL adequately evaluated the power purchase opportunities available to it from the proposals submitted by the IPPs, including Calpine;
- e. whether FPL's evaluation process accurately and appropriately evaluated all proposals with respect to all reasonable and appropriate evaluation factors or variables;
- f. whether FPL's evaluation of its own self-selected Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP accurately identified and accounted for the various financial and economic risks that would, and that would not, be imposed on FPL's customers with respect to each alternative;
- g. whether FPL's evaluation of its own self-selected Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP accurately identified and accounted for the various financial and economic risks that would be

imposed on the State as a whole with respect to each alternative;

- h. whether FPL's evaluation of its own self-selected Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP accurately identified and accounted for all risk-related impacts on the public interest;
- i. whether FPL's evaluation of its own self-selected Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP accurately identified and accounted for the differences in operational flexibility and efficiencies available from its Manatee 3 unit as compared to the proposals submitted by Calpine and the other respondents to FPL's RFP;
- j. whether FPL has demonstrated that adequate gas transportation and gas supply are available to meet the needs of the Manatee 3 unit;
- k. whether FPL's estimate of \$566 million as the incremental installed cost of the Manatee 3 unit is accurate, particularly in light of FPL's construction cost experiences at other units;
- l. whether FPL's estimate of \$566 million as the incremental installed cost of the Manatee 3 unit provides for an apples-to-apples comparison with respect to the proposals submitted by respondents to FPL's RFP;
- m. whether FPL improperly refused to honor its prior representations to Calpine that it would consider the possibility of better pricing and non-price terms and conditions when the short list was selected;
- n. whether it was appropriate for FPL and its "independent evaluator" to supplement their economic analyses of FPL's available power supply options, including its self-built Martin 8 and Manatee 3 power plants and the proposals submitted by Calpine and the other respondents to FPL's RFP, by adding certain cost items (including, without limitation, generator startup costs, transmission integration costs, and equity penalty costs) onto the costs of the respondents' proposals;
- o. whether FPL selected the most reliable combination of power supply options to meet its identified need for additional power supply resources;
- p. whether FPL's self-selected Manatee 3 unit is needed, taking into account the need of FPL's customers for system

reliability and integrity;

- q. whether FPL's self-selected Manatee 3 unit is needed, taking into account the need of Peninsular Florida for system reliability and integrity;
- r. whether FPL's self-selected Manatee 3 unit is needed, taking into account the need of FPL's customers for adequate electricity at a reasonable cost;
- s. whether FPL's self-selected Manatee 3 unit is needed, taking into account the need of Peninsular Florida for adequate electricity at a reasonable cost;
- t. whether FPL's practices with respect to its self-selection of its proposed Manatee 3 unit (i) are likely to result in fair, just, and reasonable rates to FPL's customers, and (ii) have produced a decision by FPL in this case that is likely to result in fair, just, and reasonable rates to FPL's customers;
- u. whether the proposed Manatee 3 unit is the most cost-effective alternative available to meet the needs of FPL's customers that it is proposed to serve;
- v. whether FPL selected the most cost-effective combination of power supply options to meet its identified need;
- w. whether the Manatee 3 unit provides significant non-price advantages over any or all of Calpine's proposals, or over any or all of the other proposals submitted by the other respondents to FPL's RFP;
- x. whether FPL designed its RFP to improperly favor FPL's self-built plant options in the evaluation process; and
- y. whether FPL committed other acts or omissions in its review of responses to its RFP that constitute violations of the Bid Rule.

34. Because this is a new proceeding, and because Calpine has not yet had any opportunity to conduct discovery with respect to the matters raised herein, Calpine also reserves its rights to raise such additional issues as may be identified through the discovery process in this case.

ULTIMATE FACTS ALLEGED

35. Calpine alleges the following ultimate facts that entitle Calpine to relief as prayed herein:

- a. Calpine was a valid participant in FPL's RFP process;
- b. Calpine submitted a responsive proposal to FPL in conformance with the schedule and procedural requirements of FPL's RFP;
- c. Calpine offered to supply all of FPL's needed electric capacity and energy with extensive flexibility running in favor of FPL and at a guaranteed equivalent availability factor ("EAF") of 100 percent;
- d. Taking all appropriate factors into account, Calpine offered superior power supply alternatives to the proposed Manatee 3 plant;
- e. FPL did not identify the proposed Manatee 3 plant, or any other unit planned or contemplated for construction at FPL's Manatee site, or any other "4-on-1" combined cycle unit, in its RFP;
- f. FPL did not provide in its RFP the "detailed technical description" of its proposed Manatee 3 unit required by the Bid Rule;
- g. FPL violated the Bid Rule by failing to identify and provide the requisite "detailed technical description" of its self-selected, proposed Manatee 3 unit in its RFP;
- h. FPL violated the Commission's Bid Rule and acted contrary to the best interests of its captive customers and also contrary to the public interest by, at a minimum, evaluating proposals submitted in response to its RFP against a generation expansion plan that included the Manatee 3 unit, a large (1,100 MW) power plant, and the Martin 8, a similarly large (800 MW) power plant, that were not identified in the RFP;
- i. FPL also violated the Bid Rule and acted contrary to the best interests of FPL's captive customers and also contrary to the public interest by failing to adequately consider the flexibility and economic benefits available to FPL and its captive customers via Calpine's offer to supply all of FPL's identified need for power on a 100 percent guaranteed equivalent availability basis;

- j. FPL also violated the Bid Rule and acted contrary to the best interests of its captive customers and also contrary to the public interest by willfully ignoring its representations to Calpine that it would consider the possibility of better pricing and non-price terms if Calpine were selected to a short list;
- k. FPL failed to evaluate all reasonably available alternatives in its RFP process, including specifically: (i) FPL's failure to evaluate the flexibility benefits offered by Calpine, (ii) FPL's failure to account adequately for Calpine's offer of 100 percent equivalent availability, and (iii) FPL's willful ignorance of -- as well as breach of its own representations regarding -- additional potential price and non-price benefits that could have been realized through negotiations with Calpine as a "short-listed" respondent.
- l. FPL violated the intent of the Bid Rule, as well as the specific provisions of its own RFP, and further acted contrary to the best interests of its captive customers and contrary to the public interest, by not selecting a "short list" of RFP respondents, including Calpine, for negotiations toward power purchase agreements;
- m. In light of the alternative power purchase options available to FPL, including the offer made to FPL by Calpine, the proposed Manatee 3 plant is not needed, taking into account FPL's need for system reliability and integrity.
- n. In light of the alternative power purchase options available to FPL, including the offer made to FPL by Calpine, the proposed Manatee 3 plant is not needed, taking into account Peninsular Florida's need for system reliability and integrity.
- o. In light of the alternative power purchase options available to FPL, including the offer made to FPL by Calpine, the proposed Manatee 3 plant is not needed, taking into account FPL's need for adequate electricity at a reasonable cost.
- p. In light of the alternative power purchase options available to FPL, including the offer made to FPL by Calpine, the proposed Manatee 3 plant is not needed, taking into account Peninsular Florida's need for adequate electricity at a reasonable cost.
- q. In light of the alternative power purchase options available to FPL, including the offer made to FPL by Calpine, the proposed Manatee 3 plant is not the most cost-effective alternative to meet the need for additional electric capacity and energy identified by FPL in this proceeding.

- r. In light of the alternative power purchase options available to FPL, including the offer made to FPL by Calpine, the proposed Manatee 3 plant is not the most cost-effective alternative for supplying needed electric capacity and energy in Peninsular Florida.
- s. Given FPL's failure to identify the proposed Manatee 3 plant in its RFP, FPL unavoidably prejudiced Calpine's and all other IPPs' ability to submit responsive bids.
- t. Given an adequate opportunity to prepare a bid based on what FPL has now revealed to be the characteristics of the proposed Manatee 3 plant, Calpine can and will present a proposal, including an offer binding on Calpine for a reasonable period of time, that will be superior to FPL's self-selected Manatee 3 plant in terms of the price and non-price advantages that Calpine's proposal will provide to FPL's customers;
- u. FPL failed to adequately consider the flexibility benefits offered by Calpine's response to the RFP, especially Calpine's offer to serve all of FPL's identified need on a 100 percent guaranteed equivalent availability basis;
- v. FPL willfully ignored Calpine's offer to negotiate better pricing and non-price terms if Calpine were selected to a short list for specific contract negotiations;
- w. FPL improperly failed to follow the intent of the PSC's Bid Rule and FPL's own RFP by refusing to identify any IPPs' proposals for negotiations, and by refusing to negotiate with any IPPs toward power purchase agreements;
- x. FPL did not adequately evaluate the power purchase opportunities available to it from the proposals submitted by the IPPs, including Calpine;
- y. FPL's evaluation process did not accurately and appropriately evaluate all proposals submitted in response to its RFP with respect to all reasonable and appropriate evaluation factors or variables;
- z. FPL's evaluation of its own self-selected proposed Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP did not accurately identify and account for the various financial and economic risks that would, and that would not, be imposed on FPL's customers with respect to each alternative;
- aa. FPL's evaluation of its own self-selected proposed Manatee 3 unit and of proposals submitted by Calpine and the other

respondents to FPL's RFP did not accurately identify and account for the various financial and economic risks that would be imposed on the State as a whole with respect to each alternative;

- ab. FPL's evaluation of its own self-selected proposed Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP did not accurately identify and account for all risk-related impacts on the public interest in Florida;
- ac. FPL's evaluation of its own self-selected proposed Manatee 3 unit and of proposals submitted by Calpine and the other respondents to FPL's RFP did not accurately identify and account for the differences in operational flexibility and efficiencies available from its proposed Manatee 3 unit as compared to the proposals submitted by Calpine and the other respondents to FPL's RFP;
- ad. FPL has not demonstrated that adequate gas transportation and gas supply are available to meet the needs of the proposed Manatee 3 plant;
- ae. FPL's estimate of \$566 million as the incremental installed cost of the proposed Manatee 3 unit is not accurate, particularly in light of FPL's recent construction cost experiences at its repowering projects;
- af. FPL's estimate of \$566 million as the incremental installed cost of the proposed Manatee 3 unit does not provide for, and is not consistent with, a fair, appropriate, apples-to-apples comparison with respect to the proposals submitted by Calpine and the other respondents to FPL's RFP;
- ag. FPL improperly refused to honor its prior representations to Calpine that it would consider the possibility of better pricing and non-price terms and conditions, when the short list was selected;
- ah. It was not appropriate for FPL and its "independent evaluator" to supplement their economic analyses of FPL's available power supply options, including its self-built proposed Martin 8 and Manatee 3 power plants and the proposals submitted by Calpine and the other respondents to FPL's RFP, by adding certain cost items (including, without limitation, generator startup costs, transmission integration costs, and equity penalty costs) onto the costs of the respondents' proposals;
- ai. FPL did not select the most reliable combination of power

supply options to meet its identified need for additional power supply resources;

- aj. FPL's self-selected proposed Manatee 3 unit is not needed, taking into account the need of FPL's customers for system reliability and integrity;
- ak. FPL's self-selected proposed Manatee 3 unit is not needed, taking into account the need of Peninsular Florida for adequate electricity at a reasonable cost;
- al. FPL's practices with respect to its self-selection of its proposed Manatee 3 unit (i) are not likely to result in fair, just, and reasonable rates to FPL's customers, and (ii) have not produced a decision by FPL in this case that is likely to result in fair, just, and reasonable rates to FPL's customers;
- am. the proposed Manatee 3 unit is not the most cost-effective alternative available to meet the needs of FPL's customers that it is proposed to serve;
- an. FPL has not selected the most cost-effective combination of power supply options to meet its identified need;
- ao. the proposed Manatee 3 unit does not provide significant non-price advantages over any or all of Calpine's proposals, or over any or all of the other proposals submitted by the other respondents to FPL's RFP;
- ap. FPL designed its RFP to improperly favor FPL's self-built plant options in the evaluation process;
- aq. to the extent that FPL assigned negative weighting and evaluation scores to Calpine's or any other respondent's bid based on credit considerations, such negative evaluation was inappropriate, and FPL failed to adequately serve the best interests of its captive customers by refusing to even negotiate with Calpine or other wholesale power suppliers who responded to FPL's RFP; and
- ar. FPL committed other acts or omissions in its review of responses to its RFP that constitute violations of the letter and intent the Bid Rule.

RELIEF REQUESTED

36. Calpine's allegations above are sufficient to establish Calpine's right to intervene in this proceeding pursuant to

Commission Rule 25-22.039 and 25-22.082(8), F.A.C., and pursuant to Chapter 120, Florida Statutes. Accordingly, Calpine prays that the Commission will enter its order **GRANTING** Calpine's Petition to Intervene.

37. Additionally, by this Petition to Intervene, Calpine seeks timely relief that both protects Calpine's substantial interests and serves the best interests of FPL's captive customers and the public interest of Florida generally. Here, this means that the Commission must act to ensure that the power plants that best meet the needs of FPL's captive customers, that best meet the needs of Peninsular Florida, that best satisfy the criteria enumerated in Section 403.519, Florida Statutes, and that best serve the public interest, are in fact the power plants that are built and operated.

38. Pursuant to its general statutory mandate to regulate in the public interest, and pursuant to its specific statutory powers and duties, the Commission has extensive specific authority to achieve these purposes and to address the situation that FPL has created. The Commission's jurisdiction and specific authority enable it to do one or more of the following:

- a. enter its order determining that FPL violated the Bid Rule by failing to identify and provide the required "detailed technical description" of the proposed Manatee 3 plant in its RFP;
- b. dismiss FPL's petition for determination of need for the proposed Manatee 3 unit because FPL clearly and facially violated the Commission's Bid Rule by completely failing to identify the proposed Manatee 3 plant in its Request for Proposals ("RFP");

- c. deny FPL's petition on the same grounds;
- d. order FPL to issue a new RFP with the proposed Manatee 3 unit correctly identified and specified;
- e. order a new RFP with respect to FPL's identified need, to be supervised by the Commission ab initio, including (i) advance PSC approval of the criteria, the weights to be assigned to those criteria, and the scoring system by which the criteria are to be applied to the proposals submitted in response to the RFP; (ii) PSC-supervised review of the proposals submitted in response to the RFP; and (iii) PSC determination of the "winners" of the RFP process, who would then comprise the "short list" of respondents, as contemplated by the Bid Rule and by FPL's RFP document itself, with whom FPL would then negotiate toward power purchase agreements ("PPAs"); and
- f. conduct, on its own motion, a proceeding to determine the need for the power plants that will best meet FPL's needs, and best serve the public interest of all Floridians, consistent with the criteria in Section 403.519, Florida Statutes, and with the Commission's general and specific jurisdiction, powers, and duties set forth in Chapter 366.

39. Calpine respectfully petitions the Commission to select the combination of relief that will best serve the interests of FPL's captive customers and best serve the public interest of Florida. Calpine strongly believes that the only ways that the Commission can ensure that the best choices are made are either (a) to take control of the RFP process from start to finish or (b) to conduct its own need determination proceeding. The only way that the Commission can ensure that the "best" plants -- i.e., "best" considering all relevant factors, including cost-effectiveness, all relevant interests of FPL's customers, and the public interest -- are built is, pursuant to its specific authority under Section 403.519, Florida Statutes, to grant affirmative determinations of need to the plants that the

Commission determines will best serve these needs and interests. (While Calpine does not specifically ask the Commission to take the following step, Calpine would advise the Commission that it believes that the only way that the Commission can ensure that FPL's customers get the benefit of the power supply options that the Commission determines will best meet the needs of FPL's customers and of Florida as a whole, is to order FPL, by exercising the Commission's authority under Section 366.07, Florida Statutes, to execute PPAs with the IPPs who offer the best power supply contracts and proposals for the Commission's and FPL's consideration.)

40. In view of the fact that FPL has petitioned for a determination of need for a completely new, previously unidentified Manatee unit, as well as for a Martin unit that is new and different from the Martin units that were identified in FPL's RFP, and in order to ensure that the best proposals are identified in the best interests of FPL's customers and in the public interest, any new RFP (whether or not supervised by the Commission) or any Commission-initiated need determination process must include the opportunity for all interested participants to submit new proposals that address FPL's newly-identified "next planned generating units."

CONCLUSION

WHEREFORE, for the reasons set forth above, Calpine Energy Services, L.P., respectfully asks the Commission:

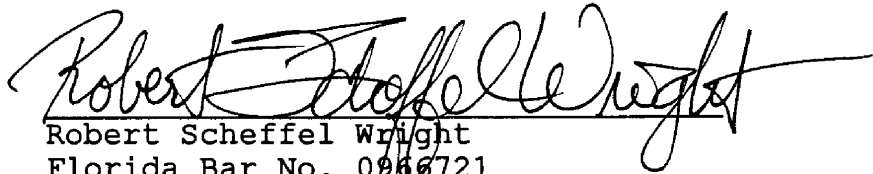
1. to issue its order GRANTING Calpine's Petition to Intervene in this proceeding;
2. to declare FPL's need determination petition for the proposed Manatee 3 unit to be in violation of the Commission's Bid rule;
3. to dismiss FPL's need determination petition for the proposed Manatee 3 unit;
4. either
 - a. to commence and establish by order appropriate proceedings in which the Commission will supervise a new RFP process, open to all willing participants, wherein all such participants will have the opportunity to submit new bids or proposals directed at the proposed Manatee 3 unit and the proposed Martin 8 unit that FPL has now identified as the units that it would otherwise build absent better options offered by Calpine or other wholesale power suppliers,

or

- b. to commence, on its own motion pursuant to its specific authority under Section 403.519, Florida Statutes, a proceeding to determine which power plant or plants, from all available alternatives, including FPL's proposed self-build options and proposals from all interested IPPs, will best meet the needs of FPL's customers for additional capacity and energy that FPL has proposed to meet from its proposed Manatee 3 project (and its proposed Martin 8 project). Any such proceeding should include the opportunity for all participants to submit new bids or proposals directed at the proposed Manatee 3 unit and the proposed Martin 8 unit that FPL has now identified as the units that it would otherwise build absent better options offered by Calpine or other wholesale power suppliers; and

5. to order such other relief as the Commission deems appropriate.

Respectfully submitted this 11th day of April, 2002.



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Attorneys for Calpine Energy
Services, L.P.

EXHIBIT A

E-MAIL CORRESPONDENCE BETWEEN
MARK DALEY AND STEVE R. SIM

Subject: FW: FPL's RFP decision
Date: Wed, 16 Jan 2002 15:02:52 -0800
From: Mark Daley <MDaley@calpine.com>

Here's their reply.

-----Original Message-----

From: Steve_R_Sim@fpl.com [mailto:Steve_R_Sim@fpl.com]
Sent: Wednesday, January 16, 2002 2:45 PM
To: Mark Daley
Subject: RE: FPL's RFP decision

Mark,

FPL's decision is final.

We thank Calpine for its interest in offering to meet FPL's 2005 & 2006 capacity needs and, once again, I'd like to personally thank you for assisting us in understanding Calpine's numerous proposals as we worked through the analyses.

Steve

"Mark Daley"
<Steve_R_Sim@fpl.com>
<MDaley@calpine.com>
To: "'Steve_R_Sim@fpl.com'"
cc:
Subject: RE: FPL's RFP decision
01/16/02
02:08 PM

Steve,
A few weeks ago, we spoke about Calpine's proposal. I expressed concern about limiting your analysis of our proposal to a few discreet points, chosen by and paid for by Calpine. With the lower MW amounts being evaluated, there was a chance of a lower MW award than Calpine could support with a system offering, and Calpine would have to back away from its system concept to a plant specific concept, at a lower price to FPL. This concept was addressed in the executive summary of our proposal. You said that others had asked about lowering their price and your response was that you

FW: FPL's RFP decision

would allow that only after shortlisting proposals. How can you be sure that your self-build is the best economic option without going through this process? Please reconsider your approach to allow further discussion.

Mark

-----Original Message-----

From: Steve_R_Sim@fpl.com [mailto:Steve_R_Sim@fpl.com]
Sent: Tuesday, January 15, 2002 5:19 AM
To: mdaley@calpine.com
Subject: FPL's RFP decision

----- Forwarded by Steve R Sim/RAP/FPL on 01/15/02 08:18 AM -----

Steve R Sim

To:

01/14/02

cc:

02:42 PM

bcc:

Subject: FPL's RFP decision

FPL has completed its analyses of the options offered in response to the recent Capacity RFP for meeting FPL's 2005 and 2006 capacity needs. FPL has decided to meet those needs with two FPL construction options. Those construction options are the conversion of two existing combustion turbines (CT's) at FPL's Martin site into a 4 CT-based combined cycle unit and the construction of a new 4 CT-based combined cycle unit at FPL's Manatee site. The total incremental capacity added by these two projects will be approximately 1,900 MW.

A certified letter confirming this information has been sent to you.

FPL thanks you for your interest in addressing our capacity needs through your proposal submittal to our RFP. In addition, I'd like to personally thank you for your assistance and patience in working with us as we analyzed all of the proposals.

Steve

(Embedded image moved to file: pic29855.pcx)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*), or Federal Express on this 11th day of April 2002, to the following:

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