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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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COMMISSION
CLERK

In Re: Petition for Determination)
of Need for an Electrical Power)
Plant in Martin County by Florida)
Power & Light Company)
_____)

DOCKET NO. 020262-EI

In Re: Petition for Determination)
of Need for an Electrical Power)
Plant in Manatee County by Florida)
Power & Light Company)
_____)

DOCKET NO. 020263-EI

FILED: APRIL 24, 2002

RESPONSE OF CALPINE ENERGY SERVICES, L.P. TO FPL'S
EMERGENCY MOTION TO HOLD PROCEEDINGS IN ABEYANCE

Calpine Energy Services, L.P. ("Calpine"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and Chapter 120, Florida Statutes,¹ hereby submits this response, on an expedited basis, to Florida Power & Light Company's ("FPL") emergency motion to hold its pending need determination proceedings in the above-styled dockets in abeyance ("FPL's Motion") filed herein on April 22, 2002. In summary, while Calpine believes that there are significant legal flaws with FPL's motion, Calpine does

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not object to (and is willing, pursuant to appropriate legal authority, to stipulate to) the schedule for these proceedings being modified in order to accommodate the issuance of a new (or supplemental) request for proposals ("RFP") and the processing of responses thereto, so long as Calpine's and the other independent
1 to
each file

¹ All references to the Florida Statutes herein are to the 2001 edition thereof

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power producers' ("IPPs") ability to participate in the subsequent proceedings is not impaired. However, Calpine also objects to certain aspects of FPL's proposal, to which it responds briefly herein to the limited extent practicable in the limited time available. Calpine remains strongly interested in timely, rational, and appropriate proceedings that produce decisions, by the Commission, that result in the best, most reliable, most cost-effective, and most advantageous power plants being built and operated to meet the needs of FPL's customers and the needs of Florida.

A. Calpine Does Not Oppose "Abatement" Of The Scheduling Requirements Specified In Rule 25-22.080, F.A.C. However, FPL's Motion Is Effectively A Petition For Waiver Or Variance Of Rule 25-22.080, F.A.C., Which Requires Compliance With Section 120.542, Florida Statutes.

As a threshold issue, while Calpine does not oppose, and in fact supports, the immediate "abatement" of the timeframes specified in Rule 25-22.080(2), F.A.C., there are some procedural concerns regarding the appropriate mechanism to achieve the intended results.

FPL's Motion variously requests that the procedural schedule for these proceedings be "immediately tolled," "suspended" (as opposed to "fully suspended" as used elsewhere in FPL's Motion), or "held in abeyance" while FPL pursues a new RFP process. The procedural schedule is driven by the timeframes in Rule 25-22.080(2), F.A.C., from which FPL has not sought a variance or waiver. The applicable provisions of Rule 25-22.080(2) are in bold

and state as follows:

(2) Within 7 days following receipt of a petition, . . . the Commission shall set a date for hearing, which shall be within 90 days of receipt of the petition or of issuance of its order. Following the hearing, each party may make submittals to the Commission on a time schedule to be determined in accordance with the requirements of each proceeding, but terminating no later than 120 days from the receipt of the petition. The matter will be placed before the Commission on an agenda which will permit a decision no later than 135 days from the date of receiving the petition

Rule 25-22.080 implements Section 403.519, Florida Statutes, which relates to the Commission's responsibility, within the parameters of the Florida Electrical Power Plant Siting Act, to determine the need for an electrical power plant.²

While Calpine agrees that the procedural schedule can be altered and even abated to a limited extent, Calpine suggests that the appropriate and sole legally sufficient method for deviating from the 90-day clock is by way of a petition or emergency petition, pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, F.A.C., for a temporary variance from or waiver of

² Sections 403.501-403.518, Florida Statutes, constitute the Florida Electrical Power Plant Siting Act (the "Act"). Section 403.519, Florida Statutes, makes the Commission the exclusive forum for determining the need for a new power plant that is subject to the Act. Section 403.507(2)(a)2, Florida Statutes, requires the Commission to file its report related to its determination of need as part of the site certification proceedings within 150 days after distribution of the complete site certification application. This 150 day requirement can be waived by the Administrative Law Judge for good cause shown, but would need to be the subject of a separate request to alter the timeframes pursuant to Section 403.5095, Florida Statutes.

Rule 25-22.080(2), F.A.C.³ Regardless whether denominated "tolling," "suspension," or "abatement," Calpine respectfully suggests that a variance from or waiver from the rule-required 90-day clock can only be obtained through compliance with the requirements of Section 120.542, Florida Statutes, because the requested change in the procedural schedule prescribed by Rule 25-22.080(2), F.A.C., is, necessarily, an alteration of or deviation from the express terms of the Rule. The Florida Supreme Court recognized this very requirement in Panda Energy International v. Jacobs, 27 Fla. L. Weekly S154, S155 (February 21, 2002), when it concluded that the Commission did not abuse its discretion by denying Panda's motion for continuance, in part, because "in order to obtain a continuance, Panda had to procure a waiver from the PSC's rule implementing the statutory deadlines for need proceedings. See § 120.542(2), (5), Fla. Stat. (2000); Fla. Admin. Code R. 28-104.002."

Section 120.542, Florida Statutes, provides in pertinent part:

120.542 Variances and waivers.--

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. . . . Agencies are

³ There are at least two other ways to obtain appropriate relief from the 90-day clock. First, FPL could simply voluntarily dismiss its need petitions. Second, the Commission could grant the pending Joint Motion for Summary Final Order filed by Calpine and Reliant Energy Power Generation, Inc., on April 11, 2002.

authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. . . . This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

* * *

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. . . . The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

The Uniform Rules contain an entire chapter regarding Variances and Waivers of Rules. See Chapter 28-104, F.A.C. Express provisions of the rules allow for an Emergency Petition for a Temporary Variance or Waiver. The rule contains technical

pleading requirements, specific notice requirements, and procedural requirements. Rule 28-104.002(2)(i), F.A.C., requires a statement of whether the variance or waiver sought is permanent or temporary. If the variance is temporary, the petition must include the dates indicating the duration of the requested variance.

In the present case, FPL has sought a temporary "suspension" of the rule until a date certain. Calpine does not support that date certain, but does agree that the hearing scheduled for June 19-21, 2002, should be abated or continued. The only vehicle by which any party can address concerns with the duration of the abatement is an appropriately filed petition pursuant to Section 120.542(2), Florida Statutes.

Calpine urges that the hearing scheduled for June 19-21, 2002, be immediately continued, but that a decision on the "reinstitution" or "resumption" of the 90-day clock pursuant to Rule 25-22.080(2), F.A.C., be made in response to a proper petition for a variance or waiver filed in compliance with Section 120.542, Florida Statutes, and Chapter 28-104, F.A.C.

Calpine is not raising this issue to challenge the requested alteration of schedule (subject to the understanding that a hearing on a July 16 filing would be held in early October) or to obstruct the orderly processing of these cases in any way. The purpose of Calpine's suggestion is to protect the procedural integrity of the proceedings and to eliminate possible challenges to the final agency action that comes out of the underlying need determination

proceedings by addressing this potentially serious procedural issue while there is still time to do so.

From conversations between Calpine's counsel and FPL's counsel, Calpine understands the following, upon which Calpine's position not objecting to the scheduling relief requested by FPL is conditioned:

- a. That FPL will not be required to respond to discovery propounded after April 19, but FPL will respond to non-objectionable discovery propounded on or before April 19 in accord with a 30-day response clock;
 - b. That any disputes over objections to such pre-April 20 discovery will be resolved by the Prehearing Officer, or the Commission, as appropriate and required, in the normal course of business (i.e., such disputes will not be tolled, suspended, or held in abeyance); and
 - c. That FPL will provide to each party to the case the EGEAS model, the Sedway model sponsored by FPL's witness Alan S. Taylor, and the confidential information associated with these models, including input data thereto, as soon as each such party executes an appropriate sublicensing agreement for the EGEAS model and as soon as the motion for protective order filed on April 22, 2002, by AES Coral is disposed of.
- B. Any Modifications To The Procedural Schedule For These Proceedings Should Not Prejudice Calpine's Or Any Other Party's Ability To Seek Relief That The Commission Has The Statutory Authority To Grant.

With regard to the modifications to the schedule contemplated by FPL's Motion, Calpine does not object so long as such modifications do not adversely affect Calpine's ability to prepare and prosecute its case, whatever that case may turn out to be. At this time, Calpine understands FPL's request to be that, if it selects FPL self-build units to meet its needs following the new RFP process, it will file materials (e.g., amended petitions and

amended testimony and exhibits) on July 16, 2002; Calpine also understands that the Commission Staff have identified hearing dates in early October. If this is the case, i.e., filing on July 16 for hearings in early October, Calpine has no objection to such a schedule. (Calpine would object to FPL's proposed schedule, however, by which a hearing would be held beginning on or about September 13 following a new filing on July 16, because that schedule would not allow sufficient time for discovery and intervenor testimony if FPL again selects its own proposals as the "winners" of FPL's RFP process. At a minimum, FPL will be required to conduct and submit testimony on a new evaluation process, and 23 days is not sufficient to address such new material. Since FPL has effectively acknowledged that a need determination hearing for a successful bidder can be held in December and still meet FPL's needs, it follows that FPL can have a need hearing for an FPL self-build option in December and likewise meet its needs, at least as well as the hypothetical IPP could.) As noted above, Calpine is willing to stipulate to a variance or waiver of the time requirements of Rule 25-22.080, F.A.C., to allow these cases to proceed in accord with such a schedule.

Calpine remains committed to seeking, and to participating in, processes that will produce a timely decision by the Commission that will lead to the selection of the best, most efficient, most reliable, most cost-effective, and most advantageous power supply options available to meet the needs of FPL's customers and of the

State as a whole. Calpine believes that the Commission has the requisite statutory authority to undertake proceedings, such as a Commission-supervised RFP process or a Commission-initiated need determination proceeding as identified in Calpine's petitions to intervene, that will produce this result. Any relief granted with regard to FPL's Motion should be without prejudice to Calpine's, or any other party's, ability to seek such relief, or any other relief that the Commission is authorized to grant.

Calpine also continues to believe that a selection process in which FPL is permitted to change its cost values and other components of its evaluations, after seeing the proposals submitted by Calpine and other respondents to FPL's RFP, is not such a process. See FPL's Motion at Paragraphs 5.a and 11. Such a process is contrary to the public interest and likely to result in a situation similar to that in which the Commission and the parties to these proceedings currently find themselves, but three or four months down the road. Worse, such a process may result in the Commission being faced with a Hobson's choice: if FPL were to select FPL self-build units to meet its needs, but IPPs were then able to prove that FPL's choices were not the best or most cost-effective alternatives, the Commission could be left with the ability to only decide either (a) to grant FPL's need determination petitions, even though FPL's proposed projects may not be the best or most cost-effective alternatives, or (b) to deny FPL's petitions, which might put FPL at risk of not meeting its reserve

margin goals.⁴

C. Calpine Disagrees With FPL's Characterization Of Several Matters In FPL's Motion.

Although not directly material to the procedural issues posed by FPL's Motion, Calpine strongly disagrees with several of FPL's assertions in its Motion, and is compelled to respond briefly to several of FPL's allegations here. The Commission should not interpret Calpine's silence with respect to any matters not addressed below as agreement or acquiescence therein; rather, the Commission should understand that Calpine is attempting to be as brief as possible in the current context.

First, FPL has not fully complied with the Commission's Bid Rule. In fact, FPL has ignored and violated the Bid Rule in the

⁴ This concern is not without precedent. See, e.g., In Re: Petition of Florida Power and Light Company to Determine Need for Electrical Power Plant - Martin Expansion Project, Docket No. 890974-EI, Order No. 23080, at 11 (Fla. Pub. Serv. Comm'n, June 15, 1990):

Of concern also is the testimony of Broward's Witness Henderson that FPL made negotiations so difficult that Broward was forced to accept the current standard offer in order to sell the capacity from its solid waste facilities. And, even after tendering the standard offer, Broward had to petition the Commission to enforce FPL's acceptance of that standard offer. [T. 608] The conclusion which we draw from this record is that FPL has placed itself in the position of having to build capacity which it may have been able to avoid had it more aggressively pursued QF capacity on its system.

See also In Re: Petition of Florida Power and Light Company to Determine Need for Electrical Power Plant - Lauderdale Repowering, Docket No. 890973-EI, Order No. 23079 at 12 (Fla. Pub. Serv. Comm'n, June 15, 1990), where the Commission made essentially the identical statement.

most fundamental way, by failing to comply with the Rule's plain-language requirement to identify its "next planned generating units" in its August 13, 2001 RFP.

FPL's suggestion that the supplemental RFP will give bidders "yet another opportunity" to offer cost-effective power supplies to FPL is a gross mis-characterization of FPL's processes. The bidders never had a first opportunity because FPL, at a minimum, mis-specified its initial RFP, failed to identify its "next planned generating units," and imposed unreasonable and onerous conditions on bidders.

Calpine objects to the notion that FPL has any right whatsoever to change its cost estimates after issuing its next RFP. FPL's construction of the Bid Rule violates the plain meaning of the Bid Rule's requirements that costs be published in the RFP. FPL's construction is also contrary to public policy because it is anti-competitive and directly detrimental to the development and maintenance of a healthy wholesale power market to serve the needs of Floridians, and it violates the fundamental purposes of the Bid Rule. The current situation was brought on by FPL's pursuing a "moving target" strategy -- all FPL is doing now is "telegraphing" its intent to do exactly the same thing, though perhaps not quite so egregiously and perhaps not to quite the same exaggerated degree, the next time around.

Calpine also rejects FPL's assertion that Calpine's proposals were not cost-effective to FPL and its customers.

Calpine also believes that FPL's proposal to charge bidders \$10,000 per proposal evaluated is exorbitant, well outside the range of industry standards, unfair, and contrary to the public interest and the best interests of FPL's customers.

D. Calpine Respectfully Reserves Its Rights To Object To The New RFP.

Calpine wants to make clear that, in not opposing the procedural scheduling relief requested by FPL (subject to the alternate October hearing dates indicated by the Commission Staff), it is not waiving any potential objections that it may have to the new RFP.

Calpine is first concerned that the new, or supplemental, RFP will not solve a fundamental problem that Calpine identified with the first RFP: that FPL is attempting to force Calpine and the other bidders to guess what FPL really wants, while FPL will continue to refuse -- as it did during the first RFP process -- to give any meaningful information regarding its needs and wants. Similarly, there is no indication that the new RFP will address or resolve another fundamental problem, the absence of evaluation criteria and the weights assigned thereto in FPL's evaluation processes. These concerns may (or may not) be resolved by the new RFP, but this cannot be known until Calpine and the other parties have the opportunity to see the content of the new RFP.

Calpine is also concerned that other specific provisions of the new RFP may be onerous, unreasonable, or otherwise inappropriate, and reserves its rights to object thereto. For

example, at this time, Calpine cannot know whether the anticipated new completion security provision, fair-sounding though it may be in concept, is reasonable and commercially feasible until Calpine and the other respondents have an opportunity to review it.

CONCLUSION

Calpine fully agrees with FPL that the purpose of these proceedings is to ensure that the Commission approves the best power plant projects and the best deals for FPL's customers and for the State as a whole. This is all that Calpine has ever sought. The crucial difference is that FPL wants to control and manipulate the process by changing its cost estimates during its evaluation, by manipulating other elements of its evaluation processes, by playing "hide the ball" with respondents so that they cannot submit truly responsive proposals, and by other improper tactics, in order to ensure that FPL wins its RFP processes and controls as much of the Florida wholesale power market as possible. Calpine, on the other hand, wants the Commission, as the impartial protector of the public interest, to make these decisions on the merits.

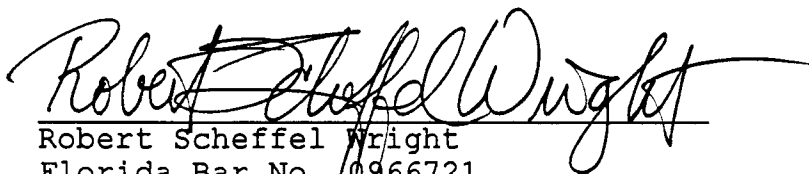
WHEREFORE, Calpine Energy Services, L.P., responds to FPL's Emergency Motion To Hold Proceedings In Abeyance by stating that:

1. Calpine respectfully suggests that FPL's Motion is not the appropriate procedural vehicle for seeking all of the relief requested, specifically the requested variance from or waiver of the 90-day clock prescribed by Rule 25-22.080(2); rather, the appropriate means of obtaining that relief is by an emergency petition for waiver or variance pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, F.A.C.;
2. Calpine does not object to the scheduling relief requested in FPL's Motion, subject to the understandings regarding

discovery and the furnishing of confidential information set forth above, and subject to such procedural relief not prejudicing Calpine's, or any other party's, ability to seek relief in these proceedings that the Commission has the authority to grant;

3. Calpine objects to certain assertions made by FPL in its Motion, objects to certain provisions of FPL's anticipated new RFP as stated above (including specifically, without limitation, FPL's claimed ability to change its costs after the fact), and reserves its rights to raise further objections to FPL's anticipated new RFP after receiving and reviewing it (Calpine further commits to raise any such objections as soon as practicable); and
4. Calpine supports entry of an order modifying the schedule for these proceedings accordingly.

Respectfully submitted this 24th day of April, 2002.



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (*), or U.S. Mail, on this 24th day of April 2002, to the following:

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