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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Proposed Revisions to)
Rule 25-22.082, F.A.C., Selection)
of Generating Capacity)
_____)

DOCKET NO. 020398-EL
FILED: JUNE 28, 2002

COMMISSION
CLERK

COMMENTS OF CALPINE EASTERN CORPORATION

Calpine Eastern Corporation ("Calpine") hereby submits these comments regarding the Commission Staff's proposal to amend the Commission's Rule 25-22.082, Florida Administrative Code ("F.A.C."), Selection of Generating Capacity, commonly referred to as the "Bid Rule." In summary, Calpine applauds the Staff and the Commission for initiating this docket to amend the Bid Rule, commends the general direction of the Staff's proposed modifications (as reflected in the draft attached to the May 29, 2002 Notice of Proposed Rule Development and Commission Workshop, hereinafter the "Staff's May 29 Proposal"), and supports continuing these proceedings with a formal hearing. Moreover, for the reasons previously set forth in the comments filed by the Florida Partnership for Affordable Competitive Energy ("PACE") on March 15, 2002, Calpine strongly believes that the Commission has the authority to adopt rules implementing all of the Staff's and all of PACE's and Calpine's recommendations. However, as with the "strawman" proposal advanced by Staff in the undocketed workshop held on February 7, 2002, Calpine believes that the Staff's May 29 Proposal is not adequate to ensure that the best, most cost-effective power supply options are chosen to meet the needs of the captive electric customers of Florida's investor-owned utilities ("IOUs") or to promote the realization of the lowest cost power supply for Florida electric customers, which would be available through a robust, competitive wholesale power supply market.

Accordingly, Calpine supports the comments filed contemporaneously by PACE, and Calpine also suggests an anonymous electronic auction model wherein all viable bidders, including retail-serving IOUs, will bid, anonymously, to supply power at the lowest cost pursuant to a power purchase agreement ("PPA") proposed by the utility, subject to Commission review and approval. These models can reasonably and realistically be expected to produce the most cost-effective power supplies for Florida electric customers.

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THE PROPOSAL TO EXPAND THE SCOPE OF THE BID RULE IS A SOUND STEP
TOWARD PROTECTING FLORIDA ELECTRIC CUSTOMERS

One of the most important changes proposed by the Staff is the expansion of the Bid Rule's scope to include all capacity additions of 150 MW or more. This is a sound, positive step that will prevent abuses by Florida IOUs that have used loopholes in the Florida Electrical Power Plant Siting Act to construct costly capacity additions which impose long-term cost responsibility and risks on the IOUs' captive customers, chiefly through repowering existing units, without any a priori review by the Commission.

ADDITIONAL IMPROVEMENTS ARE NEEDED

Additional improvements in the processes by which new power supply resources are selected and contracted are needed to achieve the best, most cost-effective results for Florida electric customers. The existing Bid Rule has been used to a conclusion three times by Florida IOUs, and each process to date has yielded the same result -- the IOU selecting its own self-build option as the winner over all other proposals. During the same time that the Bid Rule has been in effect, other Florida utilities, including Seminole Electric Cooperative, the Florida Municipal Power Agency, the Kissimmee Utility Authority, and the Orlando Utilities Commission, have conducted RFP processes that have resulted in PPAs between those utilities and independent power producers ("IPPs").

While an RFP-type process can work effectively, if the rules are set properly and administered fairly, the present system does not embody such a system, and unfortunately, the Staff's May 29 Proposal to amend the Bid Rule will not work effectively, and will probably not produce efficient results. Perhaps the most significant weakness of the current system and the Staff's May 29 Proposal is that it will not require the IOUs to submit, at any point in the process, a proposal that will bind the IOUs to their bids. This means that the utility's ratepayers will not be assured of getting the benefit of the bargain that the IOU has purported to offer in order to "win" its RFP process.

GUIDING PRINCIPLES

The Commission should be guided, as closely as possible, by the following principles in amending Rule 25-22.082, F.A.C.

1. The power supply procurement processes required by the Rule should be designed to obtain the best, most cost-effective, most reliable, and least risky power supplies possible for

Florida electric customers.

2. The power supply procurement processes required by the Rule should be designed to maximize the efficiency and cost-effectiveness of Florida's power supply system.
3. The power supply procurement processes should be credible and politically acceptable.
4. The processes should be fair to all parties, including the retail-serving IOUs subject to the Rule, those utilities' customers, and all potential power suppliers who may bid in the procurement processes.

MODEL I: AN IMPROVED RFP PROCESS

Calpine agrees with and supports the comments submitted by PACE at the February 7, 2002 undocketed workshop and also PACE's comments submitted contemporaneously with Calpine's comments on June 28, 2002. Calpine agrees with PACE that a properly designed and administered RFP process can work effectively to meet the needs of Florida electric customers for reliable, least-cost power supplies. Calpine suggests that, if the Commission determines that continuing some form of the existing RFP process is the preferred alternative, the following characteristics should be incorporated into the RFP process.

1. The Commission should approve a utility's RFP, including the criteria and weights to be applied, and should afford a clear point of entry for bidders to challenge an RFP at the beginning of any RFP process.
2. Utility self-build decisions have historically ignored the lost opportunity costs to consumers related to such irreversible long-term investments. In any situation where a utility commits ratepayers to pay for the capital costs and return of investment over the life of the asset (or stranded costs should the asset be prematurely retired), that decision forecloses ratepayers from the opportunity to buy at lower power prices when market conditions change in subsequent years. Over a 30-year mortgage period for the book life of a power plant, it is very likely that such opportunities will arise. Recognizing and evaluating the option value available under flexible terms (e.g., a shorter term of commitment) of competing power supply alternatives from IPPs is critical to assuring ratepayers the lowest long-term cost. As an example, if a utility self-build plant and a PPA with an IPP yielded the same net present value of costs over a 30-year term, but the PPA included a termination option in year 10, the PPA

would be a more valuable alternative. The value of that flexibility lies in the fact that consumers would have the benefit of buying from the market to the degree the market was lower than the original contract price. Under the utility self-build scenario, however, consumers would remain on the hook until all capital costs were amortized.

3. The scope of costs and related cost assumptions must not be biased to favor either IOUs or IPPs. Specifically, cost assumptions regarding interconnection upgrades and associated costs, interconnection status, and the cost of using existing utility rate-based assets must be treated in a fair and neutral manner. With respect to existing assets, this means that the cost-effectiveness evaluation must not simply treat existing assets as zero-cost assets, but rather that the evaluation must factor in the opportunity cost to the utility's customers of potentially selling the assets to other generators.

4. The Commission should employ, or require the IOU to employ, a truly independent entity to evaluate all available power supply proposals, including the utility's self-build options and IPPs' proposals.

5. In any RFP process, the Rule should require IOUs to submit binding, sealed bids for their self-build options. The IOU would be allowed to submit a sealed bid at a price less than its published avoided cost.

6. If the IOU submits the winning bid, it must be bound by the pricing and other relevant terms and conditions that the utility represents to the Commission as the best and most cost-effective power supply alternative available to meet the needs of its customers.

**MODEL II: ANONYMOUS ELECTRONIC AUCTION BASED ON A
UTILITY-DEVELOPED AND COMMISSION-APPROVED PPA**

Calpine suggests that an anonymous electronic auction, in which participants bid to supply power pursuant to a utility-developed and Commission-approved PPA, may be best suited to satisfy the guiding principles articulated above. As conceived by Calpine, the auction would have at least the following features.

1. The process would be initiated by a utility's submittal to the Commission of a proposed form PPA that would specify all non-price terms and conditions for the anticipated power purchase by the utility. Generally, the performance terms and conditions specified in the PPA should be identical or neutral as between a utility-

built option and an IPP's proposal. Pricing terms (at least capacity payments) would be left blank. A particular PPA could, for example, be structured so that all bidders simply bid a capacity payment stream for the duration of the PPA, or a PPA could be structured so that bidders would bid a capacity payment stream and a heat rate that would be used to determine energy payments under the PPA (and that would be used to estimate energy costs for purposes of valuing bids in the auction).

2. The filing of the proposed PPA would trigger a proceeding before the Commission. The purpose of the proceeding would be to determine the most cost-effective means of meeting the need identified in the PPA, and, if necessary, to determine the need for a new power plant (or plants) to serve the identified need. In determining the term or duration of the PPA, or in determining any termination option provisions to be included in a PPA, or both, the Commission should take into account the option value referenced above. The hearing would encompass Commission review and approval of the form of the PPA, including a clear point of entry for the Public Counsel, any potential bidder, or any other authorized intervenor to challenge any provision of the PPA that it believes to be unduly onerous, biased, anticompetitive, or otherwise contrary to the best interests of the utility's customers. The hearing would also address the qualifications of potential bidders.

3. Once a PPA was approved by the Commission, a qualified auctioneer or auction administrator would conduct the auction. The Commission could decide on the qualifications of such administrator entities. The administrator could be engaged by the Commission or by the utility whose PPA is at issue. Participants would be charged the actual costs of administering the auction.

4. The auction must be an anonymous or "blind" electronic auction, with the administrator responsible for ensuring the anonymity of all bidders. The "reserve price" would be set at the utility's stated "avoided cost" for the unit it would otherwise build absent a better offer in the auction; in practical terms, this means that the bidding in the auction would start at the reserve price.

5. The winner of the auction would be eligible to sign a PPA in the form approved by the Commission at the prices bid. The Commission would approve such PPA for cost recovery, and would not revisit its approval unless certain extraordinary grounds -- perjury, deceit, fraud, intentional withholding of key information, mistake of fact, or collusion -- existed to warrant doing so. (This standard is analogous to the grounds for vacating a judgment under the Florida Rules of Civil Procedure.)

6. If applicable, the Commission's order approving the PPA (or the utility's self-build option) would also grant an affirmative determination of need from the Commission for any power plant subject to the Florida Electrical Power Plant Siting Act.

7. Any auction could be canceled by the Commission, with the process reverting to a conventional need determination hearing, if the PSC determines, as a matter of fact based on competent substantial evidence, that there is likely to be insufficient competitiveness in the auction to ensure the lowest-cost result for customers.

Discussion

Generically, auctions have many favorable characteristics, and they appear to be particularly applicable to achieving favorable results -- i.e., the most cost-effective power supplies -- for Florida's electric customers. The following is a brief summary of the favorable characteristics of an auction model in this context.

1. Properly designed auctions are most likely to get the lowest prices for customers.
2. Anonymity of bidders will reduce bias in the auction process.
3. A large number of bidders, which appears likely here, will enhance the overall competitiveness of the bids, thereby resulting in the most cost-effective PPA for customers.
4. Auctions can be designed and structured to encourage maximum participation.
5. Auctions are truly objective. This characteristic solves the "beauty contest" problem, and eliminates the need for lengthy administrative hearings as to whose proposal really was or is the best, as to how the proposals should have been evaluated, as to whether "penalties" were properly applied to IPPs' proposals and "premiums" were properly assigned to the IOU's self-build proposal, and so on.
6. An auction based on a utility-developed and Commission-approved PPA eliminates litigation over evaluation criteria and weights assigned thereto that might have to be decided in a challenge either to an RFP or to the results of an RFP process.
7. An auction based on a utility-developed PPA, subject to Commission review and approval, respects the IOUs' role in

developing a contract with non-price terms and conditions that best suit their particular needs and circumstances while providing an objective process for PSC review of any provisions that may be biased, unduly onerous, anticompetitive, discouraging to entry, or otherwise contrary to the best interests of Florida electric customers.

8. An auction with the winner signing a Commission-approved PPA with the utility (a) gives the utility's ratepayers the benefit of the bargain achieved by the auction and certainty of power supply costs pursuant to the PPA, (b) gives the utility the certainty of being able to recover payments made to the seller (or itself, if it is the winner), and (c) gives the winner-seller the certainty of its payment stream(s) as set forth in the PPA pursuant to its bid.
9. An auction system eliminates the utility's need to engage in extensive evaluations and modeling of a potential multitude of proposals from IPPs. All bidders are bidding on the same PPA developed by the utility.
10. An auction system is truly fair to all participants -- each and every participant has an equal opportunity to bid a price low enough to win.
11. An auction system is politically acceptable because it will get the lowest prices for customers, and because it is fair and objective.
12. An auction system is far more efficient administratively than an RFP process, particularly an RFP process like that currently used.

**COMMISSION AUTHORITY TO PROMULGATE AMENDMENTS
TO THE BID RULE**

The general issue of the Commission's statutory authority to amend Rule 25-22.082, F.A.C., as proposed or to adopt a new rule related to the procurement of capacity additions was extensively briefed in PACE's Post-Workshop Memorandum filed on March 15, 2002, and PACE's Post-Workshop Memorandum is adopted and incorporated by reference herein. In summary, the 1999 amendments to Chapter 120, the Administrative Procedures Act (APA), require, in addition to a grant of rulemaking authority, a specific law to be implemented. Under those new provisions, an "agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." Section 120.52(8) and Section 120.536(1), Florida Statutes (2001).

Section 120.58(8) and Section 120.536(1), Florida Statutes, specifically require:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

The rule provisions proposed by PACE in its comments and by Calpine herein, as well as the amendments to Rule 25-22.082, F.A.C., reflected in the Staff's May 29 Proposal, are firmly rooted in both general and specific powers of the Commission and general and specific rulemaking authority given to the Commission. Among other statutes, Sections 366.05(1), 366.04(5), 366.06(2), and 366.07, Florida Statutes, provide specific authority for the Commission to adopt either PACE's proposal or Calpine's auction model in its Rule. Section 366.05(1), Florida Statutes, contains the requisite general grant of rulemaking authority for the Commission to adopt rules implementing and enforcing the above-referenced specific statutes. In pertinent part, Section 366.05(1) provides as follows:

(1) In the exercise of such jurisdiction, the commission shall have power . . . to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter.

Sections 366.04(5), 366.06(2), and 366.07, Florida Statutes, grant the Commission the specific powers and duties relevant to Calpine's auction proposal. Section 366.04(5), Florida Statutes, provides:

The commission shall further have 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.

Section 366.06(2), Florida Statutes, provides:

Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

Section 366.07, Florida Statutes, provides:

Rates; adjustment.--Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

These sections specifically and unequivocally empower the Commission to govern and to fix practices of investor-owned electric utilities that are related to or affect rates. With Section 366.05(1), Florida Statutes, these provisions grant to the Commission exactly the combination of general and specific

authority that the amended APA requires to support rulemaking to adopt Calpine's proposal contained herein (as well as PACE's proposal and the proposed amendments published by the Commission).¹ The use of the word "practices" in these cited statutes should be interpreted by the Commission to include the practices related to capacity additions, because the process by which such additions are selected is directly tied to the level of rates to be paid by the captive retail customers of the IOUs. If the most cost-effective capacity addition is not pursued, the rates will be unnecessarily high.

Pursuant to Section 366.07, Florida Statutes, the Commission has the specific authority to fix and determine the practices and contracts of IOUs relating to rates. The Commission likewise has the general authority, pursuant to 366.05(1), Florida Statutes, to adopt rules implementing this specific authority. It cannot reasonably be disputed that an IOU's procurement of significant additional capacity falls within the term "practice." It also cannot reasonably be disputed that if the utility's procurement practices do not ensure that the very best deal for the utility's customers, its rates will be adversely affected and unnecessarily high. If the Commission, after hearing, determines that the best procurement practice and procedure to be followed by all IOUs in Florida is that proposed by Calpine or that proposed by PACE, then the Commission clearly has the requisite authority to impose such requirements by rule.

Additionally, the Commission has the necessary statutory authority to establish prerequisites to a utility placing a capacity addition in rate base or before a utility enters into PPAs. The Commission also has the needed specific statutory authority to promulgate rules requiring satisfaction of those prerequisites. Section 366.07, Florida Statutes, gives the Commission the authority to fix and determine a utility's practices and contracts affecting rates. Requiring advance approval of major investments in capacity, either through building facilities or through entering into long-term PPAs, is obviously a practice that

¹ Existing case law concerning rulemaking under the amended APA clearly supports Calpine's position. See Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000); Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001); Osheyack v. Garcia, 2001 Fla. LEXIS 1573 (Fla. 2001); and Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 243 (Fla. 1st DCA 2002). For further discussion of these cases, please see PACE's Post-Workshop Memorandum, which is incorporated herein by reference.

affects rates. Further, Section 366.04(5), Florida Statutes, gives the Commission "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida," both for the assurance of adequate and reliable sources of energy and for the avoidance of further uneconomic duplication of generation. Such specific authority to ensure that an inefficient, non-cost-effective power plant is not built must, of necessity, extend to authority to establish the practices and procedures to avoid such a scenario.

Further, public policy, combined with the Commission's broad mandate to regulate public utilities in the public interest as an exercise of the police power, Section 366.01, Florida Statutes, strongly supports the Commission's authority to impose these types of prerequisites. The Commission is charged to protect the public interest, not merely to ensure that the rate impacts of electric utility's decisions are consistent with the public interest. The public interest mandates that new, major capacity additions are the most cost-effective and best for the state of Florida as a whole. Therefore, pursuant to Sections 366.04(5) and 366.07, Florida Statutes, the Commission has the necessary authority to ensure that the right resource decisions are made.

It can and must be concluded that the Commission has the authority, both general and specific, to promulgate rules related to capacity additions and that includes adoption of an auction proposal.

ANTITRUST DISCLAIMER

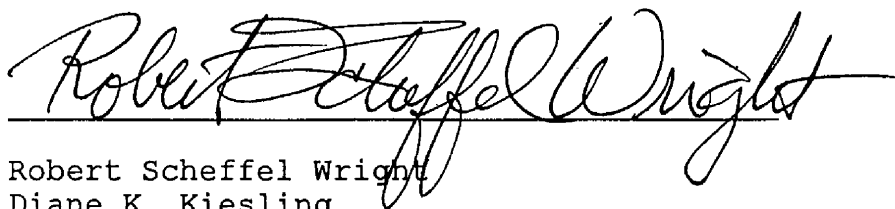
The Commission should include a statement, either within the body of the Rule or in the order adopting the Rule, to the effect that the Commission does not regard this Rule as establishing a program of continuing supervision of the behavior of any parties, including the IOUs subject to the Rule, as regards their participation in any auction pursuant to this Rule, and accordingly, the Commission does not intend that its actions under this Rule should be construed as conferring state action antitrust immunity on any participant in any auction hereunder with respect to such participant's activities in the auction.

CONCLUSION

Calpine appreciates the opportunity to present these summary comments at this time, and Calpine looks forward to participating in the rule development workshop and further proceedings in this docket. Calpine will also furnish specific analyses and recommendations on the subjects with regard to which the Staff are

seeking the Commission's direction, including the Commission's options regarding RFP outcomes and cost recovery, as well as other comments, in due course.

Respectfully submitted this 28th day of June, 2002.

A handwritten signature in cursive script, reading "Robert Scheffel Wright", written over a horizontal line.

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery (*), and U.S. Mail to the following parties on this 28th day of June, 2002.

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