

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to determine need for Turkey Point Unit 5 Electrical Power Plant, by Florida Power & Light Company.

Docket No. 040206-EI Filed March 31, 2004.

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

Pursuant to Chapter 120, Florida Statutes ("F.S."), Sections 403.519 and 366.07, F.S., and Rules 25-22.039, 25-22.082, 28-106.201, and 28-106.205, Florida Administrative Code ("F.A.C."), Calpine Energy Services, L.P. ("Calpine"), through its undersigned counsel, files this Petition to Intervene in the above-styled proceeding and in support, states the following:

1. Petitioner, 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. The name, address, and telephone number of Calpine are:

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

2. The name, address, and telephone number of Calpine's attorneys in this matter are:

Jon C. Moyle, Jr.
Cathy M. Sellers
Moyle Flanigan Katz Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828

All filings, correspondence, and other documents and communications should be directed to Mr. Moyle and Ms. Sellers at this address and phone number.

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3. Florida Power & Light Company ("FPL") is an investor-owned electric utility subject to the Commission's jurisdiction pursuant to Chapter 366, F.S. and Section 403.519, F.S. FPL serves retail customers in a service area that encompasses much of southern Florida.

4. Calpine is an Exempt Wholesale Generator engaged in the business of providing bulk wholesale electric power to retail-serving utilities in Florida, such as FPL. Calpine and its corporate affiliates are involved in a number of power plant projects in Florida, including the following: the Auburndale Power Plant, a cogeneration power plant having 150 megawatts ("MW") of net nominal generating capacity located in Polk County, Florida; the Auburndale Peaker Energy Center, a 120 MW (nominal) simple cycle combustion turbine located in Polk County, Florida; the Osprey Energy Center, a 529 MW (nominal) gas-fired combined cycle power plant located in Auburndale, Florida; the Blue Heron Energy Center, a 1,080 MW combined cycle facility planned for Indian River County, Florida.

5. The affected agency is the Florida Public Service Commission ("Commission"), located at 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.

6. At this point in this proceeding, there is no proposed agency action. In compliance with Rule 28-106.201(2)(c), F.A.C., Calpine learned of FPL's filing of the Petition for Determination of Need for Turkey Point Unit 5 through review of the Commission's internet website, and, specifically, the documents filed as part of this docket.

**Calpine Has Standing to Intervene and Participate as a Party in this Proceeding**

7. Calpine has standing to intervene and participate as a party to this proceeding, on two grounds: as a party whose substantial interests will be affected by the Commission's need determination decision in this proceeding; and pursuant to provision of Rule 25-22.082, F.A.C.

8. The Electrical Power Plant Siting Act makes the Commission's Determination of Need issued pursuant to Section 403.519, F.S., a condition precedent to a utility being granted approval to modify its site to add proposed generating capacity at certified electric generating facilities. A key element of any Determination of Need proceeding is that the Commission consider whether a utility's proposed electric generating capacity or capacity addition is the most cost-effective alternative. This need determination requirement is implemented in part by the Commission's "Bid Rule," Rule 25-22.082, F.A.C. This rule requires a utility proposing the addition of generating capacity to solicit competitive proposals for supply-side alternatives to the proposed capacity through the Requests for Proposals (RFPs) process, and then to evaluate those proposed alternatives to select the most cost-effective alternative. The Bid Rule also states that the RFP's terms cannot be onerous, unduly burdensome, commercially infeasible or unfair.

9. On August 25, 2003, FPL issued a Request for Proposals ("RFP") in which it solicited competitive alternatives to the next planned generating unit in its generation expansion plan. In the RFP, FPL identified a total of 1,066 MW of incremental generating capacity, which it planned to build at its Turkey Point generating facility located in south Dade County unless it received more cost-effective proposals from wholesale providers, such as Calpine.

10. Calpine timely submitted a response to FPL's RFP. In its response, Calpine offered 252 MW that would be generated at the Blue Heron Energy Center, a combined cycle plant to be located in Indian River County.

11. On or about December 11, 2003, FPL informed Calpine that it was not selected to provide any of the capacity identified in its RFP. In a press release of January 21, 2004, FPL announced that it intends to build all the generating capacity identified in its RFP at the Turkey Point generating site.

12. On March 8, 2004, FPL filed its Petition for Determination of Need in this docket, in which it asks the Commission to determine, pursuant to Section 403.519, F.S., that there is a need for Turkey Point Unit 5, which will be a 1,144 MW (summer rating) and 1,181 MW (winter rating) power plant.

13. Calpine has standing to intervene as a party in this proceeding. Intervention into a Commission need determination proceeding is granted to entities whose substantial interests are subject to determination or will be affected through the proceeding. *See* Rule 25-22.039, F.A.C. As a respondent to FPL's RFP, and a participant in FPL's RFP process, Calpine's substantial interests will be affected by the Commission's decision in this proceeding. Calpine is in the business of providing wholesale power to retail-serving utilities on terms that are cost-effective to the retail serving utility's customers. Calpine submitted a proposal in response to FPL's RFP. Pursuant to Section 403.519, F.S., the Commission is to consider whether the proposal embodied in FPL's petition is the most cost-effective alternative. In this proceeding, FPL alleges that its self-build option is more cost-effective than the alternatives presented to FPL in response to its RFP. A finding by the Commission that FPL's self-build option is the most cost-effective solution to FPL's capacity needs would directly and negatively affect Calpine's substantial interests by denying Calpine the opportunity to sell the capacity it offered in response to FPL's RFP.

14. Additionally, Calpine's substantial interests are affected in that certain provisions of FPL's RFP were unduly burdensome, commercially infeasible, onerous or unfair in violation of Rule 25-22.082(5), of the Bid Rule. A trade association in which Calpine is a member initially challenged certain terms of FPL's RFP pursuant to the RFP objection process established in Rule 25-22.082(12), F.A.C. The PSC considered argument, though not evidence, and made a

preliminary ruling. As the Commission made clear in the RFP objection proceeding, the Commission's ruling was non-final and was not based on any evidence. Calpine maintains that certain terms of FPL's RFP were unfair, onerous, commercially infeasible or unduly burdensome, thus substantially affecting Calpine's ability to participate effectively in responding to FPL's RFP. In other words, Calpine was injured by FPL's failure to put forward an RFP that did not contain unfair, unduly burdensome, commercially infeasible or onerous terms. Accordingly, Calpine's substantial interests are affected. This proceeding presents Calpine with the opportunity to present evidence, through cross examination or otherwise, in support of its contention that key terms of FPL's RFP violated section 25-22.082(5), F.A.C., and other pertinent provisions of the Bid Rule.

15. Calpine has suffered an injury in fact of sufficient immediacy and directness to entitle it to participate as a party in this proceeding, and that substantial injury is of the nature and type that this proceeding is designed to protect. *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d. 478, 482 (Fla. 2d DCA 1981); Sections 120.569(1), 120.57(1), F.S.; Rule 25-22.039, F.A.C. (persons who have a substantial interest in the proceeding have standing to intervene and participate as parties to the Commission proceeding). Accordingly, Calpine should be granted permission to intervene and participate as a party to this need determination proceeding.

16. Calpine also has standing to participate as a party to this proceeding because, by virtue of having submitted a proposal in response to FPL's RFP, Calpine is a "participant" in accordance with Rule 25-22.082(1)(d), F.A.C. Rule 25-22.082(16), F.A.C., contemplates that developers of wholesale generation projects, such as Calpine, who respond and participate in the RFP of an investor-owned utility, will be permitted, as participants, to intervene in the need

determination proceeding associated with the RFP and participate as parties to protect their interests. Participation in this proceeding will protect Calpine's interests and will assist the Commission in ensuring that the most cost-effective option is secured for the benefit of FPL's ratepayers. For these reasons, Calpine is afforded standing by the Bid Rule to intervene and participate as a party to this proceeding. Section 120.52(12), F.S.; Section 120.569(1), F.S.; Rule 25-22.082, F.A.C.

17. This Commission has, on many occasions, granted intervention to independent power producers such as Calpine that have responded to RFPs issued by investor-owned utilities pursuant to the Bid Rule. *See, e.g.*, PSC Order No. 02-0538-PCO-EI issued on April 18, 2002, Granting Reliant Energy Power Generation's Petition to Intervene in Docket No. 020262; PSC Order No. 02-0550-PCO-EI issued April 23, 2003, Granting Calpine Energy Services, L.P.'s Petition to Intervene in Docket No. 020262; PSC Order No. 00-1959-PCO-EI issued October 24, 2000, Granting Intervention to Panda Energy International in re: Petition for Determination of Need for Hines 2 Power Plant by Florida Power Corporation.

#### **Disputed Issues of Material Fact**

18. The disputed issues of material fact that are anticipated to be addressed in this Determination of Need proceeding include, but are not limited to:

a. Whether FPL's RFP enables the Commission to fulfill its statutory responsibility to determine the most cost-effective generating unit under Section 403.519, F.S.

b. Whether FPL's RFP specifies inappropriate criteria to be applied in the comparison of generating alternatives.

c. Whether FPL's RFP contains terms that are unfair, onerous, commercially infeasible or unduly burdensome in violation of Rule 25-22.082(5) of the Bid Rule.

d. Whether FPL properly evaluated security risks of locating an additional 1,144 MW (summer rating) and 1,181 MW (winter rating) of electric generating capacity power supply at Turkey Point.

e. Whether FPL applied the criteria in its RFP fairly and correctly to its own self-build proposal as compared to proposals submitted, including the proposal submitted by Calpine.

f. Whether FPL prejudiced the comparison of alternatives, including Calpine's proposal, in favor of FPL's self-build option by imposing risks and costs on the respondents that were not similarly imposed on FPL's self-build option.

g. Whether FPL failed to include all the costs of its Turkey Point Unit 5 in its RFP.

h. Whether FPL prejudiced the comparison of alternatives, including Calpine's proposal, in favor of FPL's self-build option by failing to include all the costs attributable to its self-build option.

i. Whether FPL's proposal to construct, own, and operate 1,144 MW (summer rating) and 1,181 MW (winter rating) of additional capacity serve to cost-effectively manage the risks borne by ratepayers, relative to alternative resources that include more purchased power, including power purchased from Calpine.

g. Whether FPL failed to comply with the terms of its RFP, and, if so, what action should the Commission take.

h. Whether the costs FPL represents in its Petition and associated filings, except for additional costs prudently incurred due to extraordinary circumstance, will be the costs used for all subsequent regulatory purposes.

i. Absent a finding that the costs represented in its Petition and associated filings will be the costs used for all subsequent regulatory purposes, except for additional costs

prudently incurred due to extraordinary circumstance, whether the Commission has sufficient evidence to determine that FPL's self-build proposal represents the most cost-effective generating unit.

j. Whether FPL's method of grouping respondent proposals is appropriate.

k. Whether FPL's use of an equity penalty or adjustment is appropriate.

l. Whether FPL failed to prove that the proposed Turkey Point Unit 5 is the most cost-effective alternative for meeting FPL's capacity needs.

m. Whether FPL failed to prove its entitlement to an affirmative determination of need for Turkey Point Unit 5.

n. What actions the Commission should take, if FPL's Petition for Need is ultimately granted, to ensure that the costs set forth by FPL in its petition are realized.

o. Assuming Calpine's requested intervention is granted, it reserves the right to adopt any other issues raised by staff or any other parties to this proceeding, and to take discovery, present testimony and cross-examination on, and otherwise participate with respect to those issues.

#### **Statement of Ultimate Facts Alleged**

19. Ultimate facts alleged by Calpine include, but are not limited to:

a. FPL's RFP violated the Bid Rule, and that violation injured Calpine's substantial interests by depriving it of any opportunity to participate meaningfully in the RFP process for the Turkey Point Unit 5 facility generation capacity addition.

b. FPL has failed to provide sufficient evidence that the costs represented in its petition, except for additional costs prudently incurred due to extraordinary circumstance, will be



the costs used for subsequent regulatory purposes, thereby failing to prove that its Turkey Point Unit 5 facility is the most cost effective alternative.

c. FPL has not demonstrated or proven its entitlement to an affirmative Determination of Need for the Turkey Point Unit 5 facility.

**Statutes and Rules Entitling Calpine to Relief in this Proceeding and Explanation of How the Alleged Facts Relate to these Statutes and Rules**

21. The statutes and rules entitling Calpine to relief in this proceeding are:

a. Section 403.519, F.S.

b. Rule 25-22.082, F.A.C.

22. Calpine is entitled to relief pursuant to these statutes and rules because:

a. FPL's RFP for the Turkey Point Unit 5 proposed electrical generating capacity violated the Bid Rule, Rule 25-22.082, F.A.C. That violation injured Calpine's substantial interests by depriving it of any opportunity to meaningfully participate in the RFP process for the Turkey Point Unit 5 facility generation capacity addition.

b. FPL has failed to provide sufficient evidence that the costs represented in its Petition for Determination of Need will be the costs used for subsequent regulatory purposes, and, thus, has failed to prove that its Turkey Point Unit 5 facility is the most cost effective alternative as required by Section 403.519, F.S.

c. FPL has not demonstrated that there is a need for the proposed generating capacity, and, thus, has failed to prove its entitlement to an affirmative Determination of Need for the Turkey Point Unit 5 facility under Section 403.519, F.A.C.

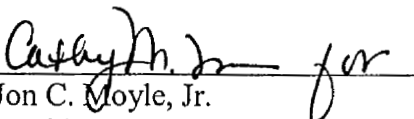
**Relief Requested**

WHEREFORE, Calpine respectfully requests the Commission to:

(1) Enter an Order granting permission to Calpine to intervene and participate as a full party to this proceeding; AND

(2) Declare FPL's need determination for the proposed Turkey Point Unit 5 to be in violation of the Commission's Bid Rule and dismiss FPL's Petition for Determination of Need filed in this proceeding.

Respectfully submitted this 31<sup>st</sup> day of March, 2004.



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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy was served by hand-delivery this 31<sup>st</sup> day of March, 2004, on Jennifer Brubaker, Esq., Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-9850; and Charles A. Guyton, Esq., Steel Hector & Davis, LLP, 215 South Monroe Street, Suite 601, Tallahassee, FL 32301, and by U.S. Mail to the following persons:

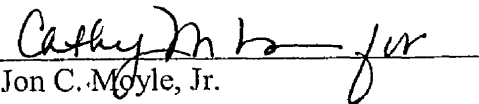
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