

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Petition for Determination )  
of Need for an Electrical Power )  
Plant in Polk County by Calpine )  
Construction Finance Company, L.P. )

DOCKET NO. 0004426 EIDS AND  
REPORTING  
FILED: JULY 17, 2000

CALPINE'S RESPONSE IN OPPOSITION TO FLORIDA POWER & LIGHT  
COMPANY'S PETITION FOR LEAVE TO INTERVENE AND  
ACCOMPANYING MEMORANDUM OF LAW

Petitioner, Calpine Construction Finance Company, L.P., ("Calpine") pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this response in opposition to the petition for leave to intervene in this proceeding filed by Florida Power & Light Company ("FPL's Petition") and accompanying Memorandum of Law, and in support thereof says:

1. On June 19, 2000, Calpine filed its Petition for Determination of Need for an Electrical Power Plant ("Calpine's Petition for Determination of Need"), pursuant to the Florida Electrical Power Plant Siting Act (Sections 403.501-.518, Florida Statutes), Section 403.519, Florida Statutes, and Rules 25-22.080-.081, F.A.C., seeking an affirmative determination of need for the Osprey Energy Center (the "Osprey Project" or "Project").

APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM 5 The Osprey Project will be a natural gas-fired, combined cycle  
CTR \_\_\_\_\_  
EGR \_\_\_\_\_  
LEG 2 power plant with 527 megawatts of net generating capacity at  
OPC \_\_\_\_\_  
PAI \_\_\_\_\_  
RGO \_\_\_\_\_  
SEC \_\_\_\_\_  
OTH \_\_\_\_\_  
average ambient site conditions.

2. As alleged in Calpine's Petition for Determination of Need, and contrary to the repeated mischaracterizations in FPL's

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Petition,<sup>1</sup> Calpine is not developing the Osprey Project as a "merchant plant." Rather, consistent with the Florida Supreme Court's recent, though non-final, decision in Tampa Electric Co., v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), motions for rehearing pending, Calpine alleged in its Petition for Determination of Need that Calpine is committed to entering into contractual arrangements that will commit the output of the Osprey Project to Florida utilities to serve the needs of Florida retail electric customers. Calpine's Petition at 4, 5, 28.

3. On July 10, 2000, FPL filed its petition for leave to intervene.<sup>2</sup> To establish standing to intervene, FPL must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing under Section 120.57, Florida Statutes, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So.2d 473 (Fla. 1997) (citing Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981)).

4. FPL's Petition is extremely lengthy and represents a

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<sup>1</sup>See e.g., FPL's Petition at 2, 3, 11, 14 (describing the Osprey Project as a "merchant plant").

<sup>2</sup>In accord with In Re: Application for Amendment of Certificate No. 427-W to Add Territory in Marion County by Windstream Utilities Company, 97 FPSC 4:556, Calpine is responding to FPL's petition as a motion, and therefore is requesting denial thereof. If FPL is granted intervention, Calpine reserves its right to move to dismiss FPL at any time during these proceedings.

shotgun approach in which FPL alleges numerous purported adverse impacts to its substantial interests. However, FPL's various claims of how its substantial interests will be affected by this proceeding can be condensed to the following:

a. Based on an erroneous premise that the Osprey Project will be a merchant plant, FPL asserts that Calpine is proposing to meet some portion of FPL's system reliability needs and thus, as an assumed--by FPL--outlet for the Osprey Project's output, FPL has an interest in this proceeding. FPL's Petition at 7, 9-10. In a similar vein, FPL also asserts that because the Osprey Project is proposing to meet FPL's needs, FPL has the right to participate in this proceeding to determine whether the costs of the Osprey Project will be the most effective alternative for FPL. FPL's Petition at 11-12.

b. FPL alleges that the Osprey Project will adversely impact FPL's transmission and generation planning functions, thereby making it more difficult for FPL to meet its obligations to serve retail customers and raising the potential for uneconomic duplication of facilities. FPL's Petition at 8-9.

c. FPL asserts that the Osprey Project may displace off-system opportunity (wholesale) sales currently being made by FPL. FPL's Petition at 10-11.

In addition, FPL claims that precedent and the Commission's rules grant FPL the right to participate in this proceeding.

5. As more fully explained in the attached Memorandum of Law, FPL's claims regarding adverse effects to its interests are nothing more than speculative, conclusory allegations that FPL has not explained, and which, indeed, FPL cannot explain in a way sufficient to establish standing in this proceeding. FPL has not demonstrated, and cannot demonstrate, standing to participate in this need determination proceeding in accordance with applicable principles of Florida law because FPL cannot demonstrate any adverse effect. The interests that FPL has alleged--effects on FPL caused by the Osprey Project meeting FPL's system reliability needs, effects on FPL's ability to plan transmission and generation facilities without uneconomic duplication, and effects on FPL caused by the displacement of wholesale sales currently being made by FPL--are speculative, remote, and outside the zone of interests to be protected in this proceeding to determine the need for the Osprey Project. Moreover, FPL's purported interests are based on the incorrect assumption that the Osprey Project will be a merchant plant. Lastly, neither existing precedent nor the Commission's rules establish FPL's "right" to participate in this proceeding.

Accordingly, under well-established standing doctrine as set forth in Agrico and its progeny, FPL's Petition must be denied.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Calpine Construction Finance Company, L.P., respectfully requests that the Commission DENY FPL's Petition for Leave to Intervene in this proceeding.

MEMORANDUM OF LAW

This is a proceeding for determination of need for the Osprey Project. The Osprey Project will be a natural gas-fired, combined cycle electrical power plant with 527 megawatts of net generating capacity to be constructed by Calpine in the City of Auburndale, Polk County, Florida. The purpose of this need determination proceeding is to determine whether the proposed Osprey Project is consistent with the needs of Florida electric customers for reliable electric power supplies at a reasonable cost and to assure that the Osprey Project is the most cost-effective alternative available to provide needed power. See Floridians for Responsible Utility Growth v. Beard, 621 So.2d 410, 412 (Fla. 1993); In Re: Petition to Determine Need for Proposed Capital Expansion Project of the Dade County Resource Recovery Facility, an Existing Solid Waste Facility, by Metropolitan Dade County, FPSC Docket No. 930196-EQ, Order No. PSC-93-1715-FOF-EQ at 2 (Fla. Pub. Serv. Comm'n, Nov. 30, 1993). This proceeding also serves to evaluate the need for the Osprey Project against which the Governor and Cabinet, sitting as the

Siting Board, must balance the environmental impact resulting from the Osprey Project's construction and operation in making the ultimate decision whether to grant or deny site certification for the Osprey Project.

FPL has petitioned to intervene in this proceeding.<sup>3</sup> To establish standing to intervene, FPL must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel, 691 So.2d at 477 (citing Agrico, 406 So.2d at 482).

Calpine requests that the Commission deny FPL's Petition because it is clear on the face of FPL's Petition that FPL has not met, and cannot as a matter of law meet, its burden of establishing standing to participate in this proceeding. See Friends of Matanzas, Inc. v. Department of Environmental Protection, 729 So.2d 437, 438 (Fla. 5th DCA 1999) (denying a party the opportunity to participate in an administrative hearing because of the party's failure to allege adequate grounds for standing).

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<sup>3</sup>Though styled a petition for leave to intervene, FPL devotes substantial portions of its Petition to allegations concerning the merits of Calpine's Petition for Determination of Need which are not relevant to FPL's interests and therefore inappropriate to a petition to intervene. See, e.g., FPL's Petition at 2-6.

### SUMMARY OF APPLICABLE LAW

To establish standing to intervene, FPL must demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that its injury is of the type or nature against which this proceeding is designed to protect. Ameristeel, 691 So.2d at 477 (citing Agrico, 406 So.2d at 482); see also Friends of Matanzas, 729 So.2d at 439 (to be entitled to participate in an administrative hearing a party must "allege and establish" that its substantial interests will be affected). These requirements are commonly known as the two prongs of the "Agrico test" for standing. The first prong of the Agrico test focuses on the degree of injury, and the second prong focuses on the nature of the injury. Ameristeel, 691 So.2d at 477 (citing Agrico, 406 So.2d at 482). The burden is on FPL to establish its standing to participate in this proceeding. See In Re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation for Acknowledgment or Approval of Merger whereby MCI Worldcom will acquire control of Sprint and its Florida Operating Subsidiaries, ASC Telecom, Inc. d/b/a Alternatel (IXC Certificate No. 4398), Sprint Communications Company Limited Partnership (holder of PATS Certificate No. 5359 and ALEC Certificate No. 4732), Sprint Communications Company Limited Partnership d/b/a Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate

No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365), 00 FPSC 3:16 (hereinafter "Worldcom") (Order Denying Motion for Leave to Intervene) (citing Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1052 (Fla. 1st DCA 1979)).

To satisfy the first prong of the Agrico test, FPL must demonstrate that this proceeding will result in an injury to FPL which is immediate, not remote. The alleged injury cannot be based merely on speculation or conjecture. See Ameristeel, 691 So.2d at 478; Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So.2d 1236, 1237 (Fla. 4th DCA 1995); International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1226 (Fla. 3d DCA 1990); Village Park Mobile Home Ass'n v. Department of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987).

To satisfy the second prong of the Agrico test, FPL must demonstrate that its alleged injuries are of the type and nature against which this need determination proceeding is designed to protect. Friends of Matanzas, 729 So.2d at 439. Stated differently, FPL's alleged injuries must fall within the "zone of interest" to be protected by this need determination proceeding and the statute and rules that establish the purpose and framework for this proceeding. See North Ridge General Hospital, Inc. v. NME Hospitals, Inc., 478 So.2d 1138, 1139 (Fla. 1st DCA 1985). Moreover, as a general rule, alleged competitive economic



injury alone is not sufficient to form the basis for standing unless the proceeding and underlying statutory framework are specifically designed to address competitive economic injury. Id.; see also In Re: Peoples Gas System, Inc. Petition for Approval of Load Profile Enhancement Rider, 95 FPSC 3:352, 355.

#### ARGUMENT

##### I. FPL'S ALLEGED SUBSTANTIAL INTERESTS ARE NOT SUFFICIENT TO ESTABLISH STANDING IN THIS PROCEEDING.

FPL's Petition is a diatribe against the Osprey Project in which FPL makes it clear that it would prefer that the Project were not completed. Ignoring the rhetoric, FPL's factual allegations of how its substantial interests purportedly will be affected by this proceeding can be summarized as follows:

1. FPL asserts that it will be affected by the Osprey Project because the Project will be a merchant plant the output of which Calpine is proposing to use to meet a portion of FPL's needs. See FPL's Petition at 11, 13. FPL also asserts that it should be allowed to participate in this proceeding to determine whether the Osprey Project will be cost-effective to FPL. FPL's Petition at 7, 9-10.

2. FPL alleges that the Osprey Project will adversely affect FPL's ability to plan transmission and generation additions to its own system, thus creating the potential for uneconomic duplication. FPL's Petition at 11-12.

3. FPL also claims that it will be adversely affected

because the Osprey Project may displace off-system opportunity (wholesale) sales currently being made by FPL. FPL's Petition at 10-11.

As set forth below, FPL's allegations of impacts to its substantial interests are not sufficient to establish FPL's standing to participate in this proceeding.

**A. The Osprey Project is Not a Merchant Plant and FPL's Allegations that Calpine is Proposing to Meet FPL's Needs are Unfounded and Insufficient to Establish Standing.**

For the record, Calpine is not developing the Osprey Project as a merchant plant. Thus, contrary to FPL's repeated mischaracterizations,<sup>4</sup> Calpine is not proposing to meet FPL's system reliability needs or any other of FPL's needs. As alleged in Calpine's Petition for Determination of Need, the Osprey Project will not and cannot be constructed unless the output of the Project is under contract to be purchased by Florida electric utilities for ultimate use by those utilities' retail ratepayers. Calpine's Petition for Determination of Need at 4-6. Thus, Calpine suggests a more appropriate way to describe the Osprey Project is as a "wholesale contract plant." As a wholesale contract plant, the only way that the Osprey Project will meet any of FPL's needs is if FPL voluntarily opts to enter into a contract with Calpine. Calpine readily

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<sup>4</sup>See e.g., FPL's Petition at 2, 3, 11, 14 (describing the Osprey Project as a "merchant plant").

stipulates that if FPL entered into such a contract, FPL would have standing to participate in this proceeding. (In fact, FPL would be a co-applicant for the Commission's affirmative determination of need.) But FPL has not opted to enter into a contract with Calpine, and thus, FPL's needs will not be met by the Osprey Project and FPL's interests will not be determined by this proceeding.<sup>5</sup> Moreover, if FPL were to voluntarily<sup>6</sup> enter into a power purchase agreement with Calpine, FPL could hardly argue that the effects of the contract on the Project would be adverse to FPL.

Accordingly, FPL's claim that it should be allowed to participate in this proceeding because Calpine is proposing to meet FPL's need is wholly misplaced.

Similarly misplaced is FPL's claim that it has the right to participate in this proceeding to determine whether the Osprey Project will be the most cost-effective alternative to FPL.<sup>7</sup> FPL

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<sup>5</sup>Calpine included information regarding the needs of seven specific Florida retail-serving utilities, including FPL, in the Exhibits to its Petition for Determination of Need to show the Commission: (1) that there is great need (9,000 MW) for new generation resources to which the seven utilities have not yet specifically committed; and (2) that Calpine's expectations of being able to enter into contracts that satisfy the requirements of Tampa Electric Co. v. Garcia are well-grounded in fact.

<sup>6</sup>Indeed, FPL will only enter into a contract with Calpine voluntarily because Calpine has no legal ability to force FPL to buy its power.

<sup>7</sup>As further evidence of the shotgun approach taken by FPL in its Petition, FPL claims that uncertainty created by what FPL perceives as vagueness in Calpine's Petition for Determination of

has no standing to intervene in a need determination proceeding to challenge the cost-effectiveness of a project from which it will not purchase power. To allow FPL to intervene in a need determination proceeding for a wholesale contract plant when FPL is not one of the contracting utilities would invite a free-for-all in all future need determination proceedings and would turn the law of standing on its head.

The only grounds that would give FPL standing to question the cost-effectiveness of the Osprey Project would be FPL entering into a power purchase agreement to buy power from the Project. As noted above, Calpine readily agrees that if FPL enters into such a contract with Calpine, FPL would have standing to participate in the hearing to address whether its purchase from the Osprey Project will be cost effective.<sup>8</sup> FPL has not done so; accordingly, FPL should not be allowed to meddle in this proceeding.

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Need concerning the Project's costs is itself an impact to FPL justifying FPL's participation in this proceeding. FPL's Petition at 10, n.4. FPL's claim demonstrates a fundamental misapprehension of the law of standing in Florida. Any perceived vagueness or lack of detail in Calpine's Petition for Determination of Need is not an injury in fact that would establish standing under the Agrico test. Rather, FPL's remedy for addressing vagueness in a pleading is to move for a more definite statement. FPL did not do so and its time for filing such a motion has passed. See Fla. R. Civ. Proc. 1.140.

<sup>8</sup>It is reasonable to assume that FPL would not enter into such a contract unless the contract was cost-effective.

**B. FPL's Allegations Regarding the Effects of the Outcome of this Proceeding on its Planning Activities are Insufficient to Demonstrate Standing.**

FPL alleges that if the Commission grants the requested determination of need for the Osprey Project, its ability to plan for both transmission and generation additions to its system will be adversely impacted, ostensibly because the Commission's action granting the requested determination of need would create uncertainty. FPL's Petition at 8-10. FPL's speculative and conclusory allegations concerning impacts to its planning functions are insufficient to establish standing in this case.

**1. The Osprey Project Will Not Affect FPL's Generation Planning and Will Not Result in the Uneconomic Duplication of Generating Assets.**

As an initial matter, FPL's allegation is based on the erroneous premise that the Osprey Project will be a merchant plant--it will not. However, even if the Osprey Project were a merchant plant, the alleged effect on FPL's generation planning is speculative and remote, and therefore insufficient to establish standing under Agrico. See Ameristeel, 691 So.2d at 478. In addition, FPL has not explained how any effects on its planning processes might be adverse. Indeed, contrary to the hyperbole contained in FPL's Petition claiming that the Project will cast FPL's planning efforts into an "abyss of uncertainty," (see FPL's Petition at 10) FPL's own planning documents previously filed with the Commission reveal that FPL is perfectly

capable of planning in the face of uncertainty and of relying--in its own planning processes--on unknown, unspecified, unidentified power supply resources to meet its projected power supply needs.

See FPL's Ten-Year Power Plant Site Plan, 1997-2006 at 65.

Finally, FPL cannot credibly claim to have been surprised by Calpine's decision to go forward with the Osprey Project: like other Florida utilities, Calpine has filed with the Commission its 2000 Ten-Year Site Plan in which it identified and provided the required planning information concerning the Project.

Planning inherently deals with uncertainty. Basically, it is the process by which an entity, in FPL's case an electric utility with retail and wholesale customers, makes decisions as to how to address future circumstances that cannot be known with precision. Power supply planning routinely addresses and incorporates considerations regarding the availability of electric capacity and energy from other power suppliers. See, e.g., FPL's Ten-Year Power Plant Site Plan, 1999-2008 at 13, 16, 137, 145.

The availability of an additional resource that a utility may choose to--but does not have to--buy from simply cannot create an adverse effect.<sup>9</sup> Either the utility will choose to buy

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<sup>9</sup>The planning utility probably should, and probably would, take account of the potential availability of power from an additional power plant in evaluating its overall reliability in an "assisted" basis. For example, FPL probably should, and probably does, consider the potential availability of power from Tampa Electric Company, Florida Power Corporation, the Southern

from the supplier on mutually agreeable, beneficial terms, in which case there can be no adverse effect, or the utility will decline to purchase from the supplier (assuming rational behavior, this would occur when no mutually beneficial deal was possible) and proceed with its independent plans accordingly. Either way, there can be no adverse effect on the utility's planning processes.

FPL has previously demonstrated to the Commission its ability to incorporate potential future power purchases, even from unspecified, unidentified suppliers, into its planning processes.<sup>10</sup> FPL therefore cannot credibly claim that the availability of potential power supplies will "adversely affect" its planning processes. As recently as 1997, FPL's Ten-Year Power Plant Site Plan relied on future unspecified "firm capacity purchases" as part of its planned generation resources. See FPL's Ten-Year Power Plant Site Plan, 1997-2006 at 65 (April,

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Company, and other utilities and power marketers in its planning processes. The potential availability of power from the Osprey Project (e.g., if one of the utilities that contracted to buy the Project's power from Calpine turned out to have power to sell to FPL) would fall into the same category. However, the presence of a potential additional power supply resource cannot create an adverse effect on FPL or any other utility or its planning processes.

<sup>10</sup>To reiterate, because the Osprey Project will be a wholesale contract plant and not a merchant plant, there will be no uncertainty as to where the output of the plant will be sold. Quite simply, the output of the plant will be sold to the electric utilities that contract for such output before the Project is constructed.

1997) (reflecting FPL's plans to acquire needed incremental capacity from unspecified firm capacity purchases in 1997, 2002, and 2003). FPL explained its reliance on these unspecified firm capacity purchases in its responses to the Commission Staff's requests for supplemental information regarding FPL's 1997 Ten-Year Power Plant Site Plan. In its response to Item No. 5 of the Staff's supplemental request, FPL stated that "All of the resource plans analyzed began with short-term firm capacity purchases from one or more unspecified parties in 2002 and in 2003." In its response to Item No. 13 of the Staff's supplemental request, FPL stated that the "currently projected additional firm power purchases shown in FPL's resource plan are a 113 MW firm purchase from an unspecified party starting in 2002 and an additional 244 MW firm purchase from an unspecified party starting in 2003. The supplying parties may not be electric utilities." If FPL can plan to serve its needs with "firm capacity purchases" from unspecified, unidentified entities, which may not even be electric utilities, it can surely deal, without adverse effect, with the possibility of buying from a known wholesale utility in those same planning processes.

Moreover, in its 1999 Ten-Year Power Plant Site Plan, FPL submitted to the Commission a document prepared by the Florida Reliability Coordinating Council ("FRCC") entitled Principles and Guides for Planning Reliable Bulk Electric Systems (hereinafter "FRCC Planning Principles") that makes clear that FPL is capable



of planning for projects such as the Osprey Project. The FRCC Planning Principles clearly state that:

Non-utility generator facilities should be planned and integrated with the bulk electric systems in accordance with all applicable planning principles, criteria, and guides.

FPL's 1999 Ten-Year Power Plant Site Plan, at 145 (response to Commission Staff's Discussion Item No. 8).

In sum, FPL's claim that it should be granted standing based on an impact to its ability to plan for generation additions is a red herring--there simply is no adverse impact to FPL's generation planning function.

It is also noteworthy that this is not a planning proceeding. FPL's and Calpine's generation plans are reviewed by the Commission in its review of utility ten-year site plans pursuant to Section 186.801, Florida Statutes, and Commission Rule 25-22.071, F.A.C. Thus, impacts to FPL's ability to plan are not of the type or nature against which this need determination is designed to protect. See North Ridge, 478 So.2d at 1139.

FPL also makes several vague references to the licensing of the Osprey Project leading to uneconomic duplication of facilities. FPL's Petition at 9, 10. FPL's claims concerning uneconomic duplication are too speculative to establish standing to participate in this proceeding. See Ameristeel, 691 So.2d at 478.

Moreover, FPL's allegations concerning the potential

uneconomic duplication of facilities is based on a misunderstanding of the concept of uneconomic duplication. Fundamentally, the concept of uneconomic duplication relates to situations in which the entities involved (whose facilities would possibly be duplicative) intend to recover all of their respective capital and operating costs through regulated rates from captive ratepayers. In this case, however, Calpine is taking all of the financial risk of the Project. Customers will pay for capacity and energy supplied by the Osprey Project only if, and only to the extent that, their retail-serving utilities determine that contract purchases from the Osprey Project represent a cost-effective choice. Such purchases will be, by definition, economic. There cannot be "uneconomic duplication" in this situation, because customers will not pay for capacity that is not used to serve them.

Interpreting the statute, as FPL apparently would have the Commission interpret it, to mean uneconomic to another utility would yet again invite a free-for-all in any future need determination proceeding. If FPL's theory were given credence, at a minimum, any generating utility would have standing to intervene in any need determination proceeding for a power plant to be built in, or projected to provide power to, Florida, on the ground that the proposed plant would or could displace some sales that the putative intervenor might otherwise make. This is not contemplated by the statute, which does not purport to protect

the competitive economic interests of other utilities. The only fair reading of the statute is that it is designed to protect against uneconomic duplication of resources from the perspective of captive electric ratepayers, and perhaps from the perspective of the public generally, but not from the perspective of individual utilities.

The Project will not be uneconomic to such captive electric customers. If their retail-serving utilities enter into contracts with Calpine to buy power from the Project for resale to those customers, it will be because such purchases represent a prudent, cost-effective alternative; if the retail-serving utilities do not buy the power, there can be no adverse, uneconomic effect on the ratepayers. It may be uneconomic to Calpine, because Calpine is taking the business risk that it will be able to sell capacity and energy from the Osprey Project at less than the cost of energy from existing facilities, and at less than the cost of energy and capacity from new, not-yet-constructed power plants, and still make a profit.

**2. FPL's Allegation Regarding the Effects of this Proceeding on its Transmission Planning Function is Insufficient to Demonstrate Standing.**

FPL alleges that the Osprey Project will adversely affect FPL's transmission planning by causing greater use of FPL's transmission system than FPL has planned and in ways that FPL cannot predict. FPL's Petition at 8. These alleged effects on

transmission planning are speculative, conclusory, and unexplained. See Ameristeel, 691 So.2d at 477. Moreover, they are outside the zone of interests to be protected in this need determination proceeding for the Osprey Project. This proceeding is not designed to and will not determine any transmission issues.<sup>11</sup> See Agrico, 406 So.2d at 482. FPL's proper venue for redress of any impacts on its transmission system is through proper proceedings before the Federal Energy Regulatory Commission ("FERC") pursuant to FPL's FERC-approved transmission tariff and the FERC's rules.<sup>12</sup>

Moreover, as a threshold matter, Calpine does not propose to interconnect to FPL's transmission system. Rather, the Osprey Project will be electrically interconnected to the Peninsular Florida grid at Tampa Electric Co.'s Recker Substation. Calpine's Petition for Determination of Need at 17-18. Accordingly, FPL has no factual basis to claim an adverse impact to its transmission system. If the Commission were to allow FPL to intervene in this need determination proceeding based on FPL's speculative claim that the Osprey Project might result in greater use of FPL's transmission system without fair compensation or other amelioration of any potential adverse impacts, then any

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<sup>11</sup>As noted in Calpine's Petition for Determination of Need, Calpine's allegations concerning transmission matters were made solely for informational purposes.

<sup>12</sup>This applies whether Calpine is or is not interconnected to FPL's transmission system.

utility with transmission facilities in Florida would have standing to intervene in all future need determination proceedings based on the theory that there could be increased usage of their facilities. This, of course, would result in an absurd situation and would completely rewrite the Commission's well-established principles of standing.

As to any hypothetical impacts on FPL's existing transmission system, FPL will know in plenty of time what the status and progress of the Osprey Project are. Neither Calpine nor utilities purchasing the Project's output can simply show up at FPL's office one day and demand firm transmission service the next. Generally speaking, Calpine or a purchasing utility would have to submit a formal request for transmission service to FPL (and to any other utility whose transmission facilities Calpine wishes to use) pursuant to FPL's open access tariff. FPL is then entitled to conduct a transmission study to determine what, if any, impacts providing the requested service will have on its system, and may, subject to FERC approval, require Calpine not only to pay FPL's tariffed transmission rates but also to make extra contributions or payments to cover incremental costs incurred by FPL as a direct result of providing the transmission service requested by Calpine. The relevant point here, of course, is that FPL's interests are subject to protection in the proper proceedings before the FERC, not in this need determination proceeding. Accordingly, FPL's allegations

concerning impacts to its ability to plan are beyond the zone of interest of this proceeding. See Friends of Matanzas, 729 So.2d 439 (the alleged injury must be of the type or nature the proceeding is designed to protect).

**C. FPL's Allegation Regarding Effects on its Ability to Make Off-System Opportunity (Wholesale) Sales is not Cognizable in this Proceeding and is Insufficient to Establish Standing.**

FPL alleges that Calpine will directly compete with FPL for off-system opportunity (wholesale) sales and may in fact displace some of FPL's off-system opportunity sales.<sup>13</sup> FPL's Petition at 10-11. FPL's claim of lost off-system opportunity sales is speculative and dependent on many future factors and events, including future fuel prices, future load characteristics, the future of FPL's generation fleet, and the degree to which the revenues from such sales might exceed the costs incurred to make them. Accordingly, they are insufficient to establish standing. See International Jai-Alai, 561 So.2d at 1226 (future economic

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<sup>13</sup>FPL also claims that the displacement of FPL's off-system opportunity sales will adversely affect FPL's ratepayers. While this alleged injury is also too speculative to serve as a basis for FPL's standing to participate in this proceeding, it is noteworthy that FPL has filed testimony asking the Commission to expand the range of off-system sales for which FPL's shareholders will receive part of the gains. See In Re: Review of the Appropriate Application of Incentives to Wholesale Power Sales by Investor-owned Electric Utilities, (PSC Docket No. 991779-EI) (testimony of Korel M. Dubin and Joseph P. Stepenovitch on behalf of FPL). Thus, whatever benefits FPL's ratepayers may realize from off-system sales are subject to a significant reduction by FPL's own actions.

injury too remote to establish standing).

**II. THE PRECEDENT RELIED ON BY FPL IN SUPPORT OF ITS STANDING IS NEITHER BINDING NOR PERSUASIVE.**

FPL asserts that it is entitled to intervene in this proceeding on the authority of the Commission's rulings in In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 99 FPSC 3:401 (hereinafter "Duke New Smyrna") rev'd sub nom. Tampa Electric Co. v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), motions for rehearing pending, and In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, LLC, FPSC Docket No. 991462-EU (hereinafter "OGC"). For several reasons, FPL is wrong. First, the need determinations in Duke New Smyrna and OGC were for "merchant plants." As previously noted, the Osprey Project will not be a merchant plant--it will be a wholesale contract plant that will have its output contractually committed to Florida electric utilities before it is built. Thus, the Commission's rulings in Duke New Smyrna and OGC are readily distinguishable from this case.

Second, in neither Duke New Smyrna nor OGC did the full Commission have the opportunity to rule on the issue of whether an incumbent investor-owned utility that had not entered into a contract for any of the output of a merchant plant had standing

to participate in that merchant plant's need determination proceeding. In Duke New Smyrna, the issue of FPL's standing was resolved by the Prehearing Officer and was never ruled on by the full Commission. In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., 98 FPSC 10:69 (Order Granting Petitions to Intervene issued by Prehearing Officer). In OGC, the applicant did not contest FPL's standing. Thus, neither case established precedent that is binding on the full Commission as to FPL's standing to participate in this case.

Third, and most importantly, standing is a jurisdictional matter that must be proved up in each and every case. FPL bears the burden of alleging facts sufficient to demonstrate that it meets the standing test set forth in Agrico. See Worldcom, 00 FPSC at 3:206 (burden is on petitioner to establish standing); Friends of Matanzas, 729 So.2d at 439 (to be entitled to a hearing a party must allege and establish that its substantial interests will be affected). FPL has failed to do so and, thus, FPL's Petition should be denied.

FPL also argues that Tampa Electric Co. v. Garcia "recognizes" FPL's right to participate in this proceeding. FPL's argument amounts to pure sophistry. Nothing in Tampa Electric Co. v. Garcia addresses whether FPL can allege sufficient interest to establish standing in this separate



proceeding to determine the need for a wholesale contract plant.

**III. FPL'S ALLEGATION THAT IT IS A PRIMARILY  
AFFECTED UTILITY IS UNFOUNDED AND INSUFFICIENT TO  
ESTABLISH STANDING.**

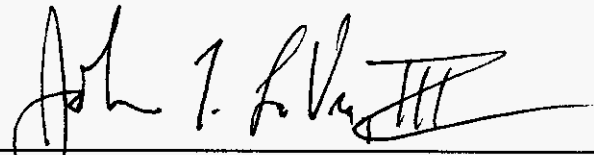
FPL also alleges that as a utility in Peninsular Florida with need, it is one of the "utilities primarily affected" by the proposed Project and the Commission's action herein, and that it should have been described in the Petition initiating this docket. FPL is wrong, because it is not a primarily affected utility as expressly contemplated by Rules 25-22.080 and 25-22.081, F.A.C. The utilities primarily affected by the Project are Calpine and the Florida electric utilities that enter into contracts to purchase power from the Osprey Project. Whether FPL will ever be affected at all depends solely on whether FPL chooses to buy power from the Osprey Project. Thus, FPL will not be affected except by its own choice to buy power from the Osprey Project. Since FPL has not made that choice, it cannot now claim to be a primarily affected utility entitled to participate in this proceeding.

**CONCLUSION**

From the blizzard of paper (totaling nearly 80 pages) filed by FPL in response to Calpine's Petition for Determination of Need, it is clear that FPL has a keen interest in this proceeding. However, FPL has not--and cannot--demonstrate that it will be adversely affected by the proceeding or that FPL's

substantial interests will be determined by the Commission's decisions herein. Calpine believes that FPL's interest in participating in this docket is a purely economic interest in perpetuating its existing monopoly power in the Florida wholesale market. Do not be fooled by FPL's rhetoric--every moment that FPL delays the construction of the Osprey Project has the potential to add to FPL's and its shareholders' bottom lines. This purely economic interest does not provide a legitimate basis for FPL to participate in this proceeding and Calpine respectfully requests that FPL's Petition be denied.

Respectfully submitted this 17th day of July, 2000.



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Robert Scheffel Wright  
Florida Bar No. 966721  
John T. LaVia, III  
Florida Bar No. 853666  
Diane K. Kiesling  
Florida Bar No. 233285  
LANDERS & PARSONS, P.A.  
310 West College Avenue (32301)  
Post Office Box 271  
Tallahassee, Florida 32302  
Telephone: (850) 681-0311  
Telecopier: (850) 224-5595

Attorneys for Calpine Construction  
Finance Company, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery (\*), facsimile transmission (\*\*), or U.S. Mail, on this 17th day of July, 2000, to the following:

Robert V. Elias, Esq.\*  
Division of Legal Services  
Florida Public Service Comm.  
2540 Shumard Oak Boulevard  
Gunter Building  
Tallahassee, FL 32399-0850

Debra Swim, Esq.  
LEAF  
1114 Thomasville Road  
Suite E  
Tallahassee, FL 32303

Matthew M. Childs, Esq.\*  
Charles A. Guyton, Esq.  
Steel Hector & Davis, LLP  
215 South Monroe Street  
Suite 601  
Tallahassee, FL 32301  
(Florida Power & Light Co.)

William G. Walker, III  
Vice President  
Regulatory Affairs  
Florida Power & Light Company  
9250 West Flagler Street  
Miami, FL 33174  
(Florida Power & Light Co.)

Gary L. Sasso, Esq.  
Jill H. Bowman, Esq.  
Carlton Fields  
P.O. Box 2861  
St. Petersburg, FL 33731  
(Florida Power Corporation)

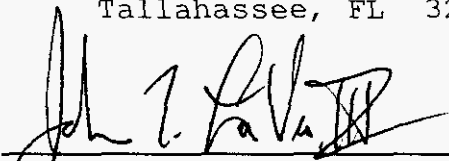
James A. McGee, Esq.  
Senior Counsel  
Florida Power Corporation  
P.O. Box 14042  
St. Petersburg, FL 33733  
(Florida Power Corporation)

Robert W. Pass, Esq.\*  
Carlton Fields  
215 S. Monroe Street  
Suite 500  
Tallahassee, FL 32301  
(Florida Power Corporation)

Scott A. Goorland, Esq.  
Department of Environmental  
Protection  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, FL 32399-2400

Mr. Paul Darst  
Dept. of Community Affairs  
Division of Local Resource  
Planning  
2740 Centerview Drive  
Tallahassee, FL 32399-2100

Jon Moyle, Esq.  
Moyle, Flanigan, Katz, Kolins,  
Raymond & Sheehan, P.A.  
118 N. Gadsden St.  
Tallahassee, FL 32301

  
\_\_\_\_\_  
Attorney