STEEL HECTOR & DAVIS

REGISTERED LIMITED LIABILITY PARTNERSHIP

Steel Hector & Davis LLP
215 South Monroe, Suite 601
Tallahassee, Florida 32301-1804
850.222.2300
850.222.8410 Fax
www.steelhector.com

ORIGINAL

Matthew M. Childs, P.A.

October 2, 2000

Blanca S. Bayó, Director
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

By Hand Delivery

In Re: Petition for Determination of Need for Electric Power Plant in Polk County by Calpine Construction Finance Company, L.P. Docket No. 000442-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company are the original and fifteen (15) copies of Florida Power & Light's Response Calpine's Motion for Revised Procedural Schedule.

If you or your Staff have any questions regarding this transmittal, please contact me.

Very truly yours,

Matthew M. Childs, P.A.

MMC:rw
Enclosure
TAL_1998/35466-1

APP
CAF
CMP
COM
CTR
ECR
LEG
OPC
PAI
RGO
SEC
SER
OTH

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination of Need for Electric Power Plant in Polk County by Calpine Construction Finance Company, L.P.	))))	**Docket No. 000442-EI** **Filed:October 2, 2000**

RESPONSE OF FLORIDA POWER & LIGHT COMPANY TO CALPINE'S MOTION FOR REVISED PROCEDURAL SCHEDULE

Florida Power & Light Company, pursuant to Rule 25-106.204, Florida Administrative Code, replies as follows to Calpine Construction Finance Company, L.P.'s September 26, 2000, Motion For Revised Procedural Schedule:

1. FPL opposes the expedited discovery schedule proposed by Calpine for three reasons. First, as FPL requested Tuesday in its emergency motion, this matter should be held in abeyance, other than for consideration of motions to dismiss, until Calpine secures the contract and co-applicant that Calpine concedes is necessary for it to obtain a determination of need. Second, if the matter is not held in abeyance, then the procedural schedule should be modified to require Calpine to file all its direct testimony before FPL is required to respond with testimony. Third, the expedited discovery proposed by Calpine will not cure the denial of due process faced by the interveners, and Calpine should not be afforded expedited discovery during the unreasonably limited time the interveners have to prepare their cases.

2. It is Calpine's conduct in this case that even necessitates the consideration of expedited discovery.

a. It was Calpine that filed a petition not containing information required by Rule 25-22.081, F.A.C.;[1] filing an insufficient petition necessitates discovery to fill in the gaps that should have been addressed in the petition.

b. Then, knowing full well that opposition to intervention would delay a ruling on intervention and that without intervention FPL and FPC would not be parties and could not conduct discovery, Calpine opposed FPL's and FPC's intervention for over two months. Only at the last minute did Calpine withdraw its opposition to intervention, conceding in the process that its current petition is based in part on FPL's and FPC's need.[2]

c. Calpine's own proposal, for an aggressively scheduled a hearing date but also providing a procedure for Calpine to make a supplemental filing of information that should have been in their petition, has further exacerbated the need for expedited

---

[1] Calpine's petition did not identify the purchasing utility, even though Calpine acknowledges that the purchasing utility is a "primarily affected utility" within the meaning of Rule 25-22.081, F.A.C. *See, Calpine Construction Finance Company's Response And Memorandum Of Law In Opposition To Florida Power & Light Company's Motion To Dismiss The Petition* (July 17, 2000) (At pages 38 and 39 Calpine acknowledges that the purchasing utility will be a "primarily affected utility" within the meaning of Rule 25-22.081, F.A.C., and argues that FPL will not be.) Calpine did not identify any utility-specific conditions and factors that justified the unit as required by Rule 25-22.081, F.A.C., even though Calpine now acknowledges that it must have a contract with a purchasing utility and a co-applicant to proceed. Calpine's petition only contains peninsular Florida analyses which the Supreme Court has held (1) render the need criteria "virtually meaningless" and (2) will not support a determination of need. *See, Nassau Power Corp. v. Beard*, 601 So.2d 1175, 1178, n. 9 (Fla. 1992); *Tampa Electric Co. v. Garcia,* 25 Fla. L. Weekly S294 (Fla. April 20, 2000).

[2] At oral argument where Calpine withdrew its opposition to intervention, Calpine's counsel conceded that its petition was based upon FPL's and FPC's need: "Simply because their need in the planning horizon is part of what we based our petition on doesn't make them an indispensable party...."

discovery by placing the interveners in a position that makes their trial preparation essentially impossible.[3]

Make no mistake, it is Calpine that has created the apparent need for expedited discovery.

3. Calpine is not seeking expedited discovery as an accommodation to FPL and FPC. It is seeking expedited discovery solely in the hopes of preserving its hearing dates and the manifestly unfair procedural schedule it has managed to secure through its improper petition and *ex parte* conduct.

4. Calpine is not, as it suggests, "sensitive to" FPL's and FPC's testimony filing date of October 16th. If it were, it would have served FPL with Calpine's prefiled testimony. If it were, it would have withdrawn its opposition to FPL's and FPC's intervention well before September 19th and begun attempting to schedule discovery and address the confidentiality concerns it raises in its direct testimony. If it were, it would not be seeking the opportunity for Calpine to begin asking FPL and FPC expedited discovery in the limited and totally inadequate time FPL and FPC have between now and October 16th to conduct discovery and prepare testimony. If it were, it would not be suggesting that discovery on a complex computer model and information that Calpine's expert claims is confidential could be conducted in three weeks when it literally took months in the recent Okeechobee case.

---

[3] Faced with a Staff recommendation that properly suggested that Calpine's need case be held in abeyance, Calpine, fully aware that FPL and FPC had petitioned to intervene, sent an *ex parte* letter, in which it suggested a late November hearing and offered to make supplemental filings by early November. Calpine was fully aware that a supplemental filing of core evidence in early November and a hearing in late November would deny FPL and FPC a meaningful opportunity to prepare for trial.

5. The heart of Calpine's direct case is evidence purporting to show that there is a peninsular Florida need for the Calpine unit and that the Calpine unit is cost-effective for peninsular Florida. Of course, such a peninsular Florida case cannot be the basis to obtain a determination of need.[4] To secure a determination of need, a utility-specific assessment of need and cost-effectiveness is required.[5] In fact, without such a utility specific need, a need determination petition should be dismissed.[6] It was precisely because the parties and the Commission recognized that this was the appropriate disposition of wholesale need cases for plants without a contract that the Commission held the other wholesale plant need cases in abeyance.

6. Calpine would like nothing better than to put FPL and FPC to the task of conducting discovery on this testimony and evidence and for Calpine to then, if it is possible, change the entire complexion of the case by submitting the required utility-specific analyses under a schedule that allows FPL and FPC only a week to conduct discovery and file responsive testimony. Regardless whether Calpine eventually negotiates a contract with a purchasing utility and makes a supplemental submittal, FPL's discovery of Calpine's peninsular Florida direct case will be wasted. If Calpine

---

[4] *Tampa Electric Co. v. Garcia*, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), *op. revised* September 28, 2000.

[5] *In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities*, 89 FPSC 12:294, 319 (Order No. 22341); *In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Florida's Electric Utilities*, 91 FPSC 6:368 (Order No. 24672), *affirmed Nassau Power Corporation v. Beard*, 601 So. 2d 1175, 1178 (Fla. 1992).

[6] *In re: petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility)*, 92 FPSC 10:643, 645 (Order No. PSC-92-1210-FOF-EQ) (*Ark and Nassau*), *affirmed Nassau Power Corporation v. Deason*, 641 So. 2d 396 (Fla. 1994).

files a supplemental contract and utility-specific analysis, then the peninsular Florida analysis and the discovery conducted will be irrelevant and wasted, for it cannot support an affirmative determination of need and the case will turn on Calpine's utility-specific analyses. If Calpine does not secure a contract, a distinct possibility since every utility with a need has a plan in place to meet their need that does not include Calpine, then this case cannot proceed, as even Calpine admits, and the discovery would have been wasted. There is nothing "ironic," as Calpine's counsel has suggested, about FPL's and FPC's counsel opposing Calpine's expedited discovery when it appears to be offered only to waste FPL's and FPC's resources.

7. If Calpine were truly sensitive to FPL's and FPC's need to conduct written discovery before filing testimony, they would have proposed an expedited discovery arrangement and amended procedural schedule that would actually afford FPL and FPC an opportunity to conduct discovery and file testimony responsive to the testimony Calpine hopes to file in early November. Instead, the hearing schedule affords FPL and FPC a mere week after Calpine files its core evidence to not only conduct discovery, but also file responsive testimony. Under Calpine's proposed expedited discovery schedule, neither FPL nor FPC will have the opportunity to secure any written discovery responses regarding this essential evidence before they have to file their testimony. FPL and FPC have been given only a week to file responsive testimony. A two week discovery response period under that circumstance is hardly an accommodation to FPL and FPC.

8. The only fair remedy (other than dismissal) to the predicament created by Calpine (FPL and FPC having less than thirty days to conduct discovery before having to file testimony addressing testimony which Calpine has conceded Calpine will have to supplement) is to hold this case in abeyance to see if Calpine even secures the contract and co-applicant Calpine acknowledges

it needs. By holding the case in abeyance, the Commission can (1) learn whether Calpine ever secures its contract and co-applicant, (2) avoid the Commission and the parties expending resources that may be totally wasted if the necessary contract is not secured, (3) avoid unnecessary and rushed discovery on peninsular Florida analyses that cannot support an affirmative determination of need, and (4) establish a procedural schedule that allows Calpine to proceed on the required utility-specific analyses and affords interested parties a reasonable opportunity to review Calpine's utility-specific analyses.

9. The only benefits afforded by the expedited schedule are the benefits to Calpine of possibly allowing it to keep its manifestly unfair hearing schedule. The Commission is not well served by limiting the interveners to a week (or even three weeks) to conduct discovery and file responsive testimony. Remember what almost happened in the Okeechobee need case. If there had not been adequate time for discovery and responsive testimony (far more than three weeks), that case would have proceeded to trial without the Commission ever knowing that the underlying analysis was fundamentally flawed.

10. If the Prehearing Officer is going to consider a schedule change, then the schedule change that should be undertaken, if the entire matter is not held in abeyance, is relieving FPL of having to file any testimony on October 16th and allowing it a reasonable time after Calpine files its utility-specific analyses in November to analyze the testimony, conduct appropriate discovery with the assistance of experts, and then prepare and file responsive expert testimony. If Calpine ever files such evidence, discovery and testimony may not be necessary. FPL may be satisfied that it does not need to participate in this case to protect its interest. If the interveners withdraw, the case might then be processed very quickly. However, if FPL does not withdraw and instead exercises its due process

rights necessary to protect its interests, then FPL will need time to review the utility-specific analyses, conduct discovery and file responsive testimony.

11. If FPL ultimately faces having to proceed on this fundamentally unfair hearing schedule, then expedited discovery by the interveners will be required, but it will not provide them due process. In any event, there would be no basis for Calpine to conduct expedited discovery itself. Expedited Calpine discovery during the unreasonably limited time the interveners have been given to prepare testimony would only frustrate the interveners' ability to complete their own expedited discovery. While FPL is not opposed in principle to expedited discovery, FPL respectfully submits there are far better ways to proceed (as outlined above) than Calpine's expedited discovery schedule.

WHEREFORE, FPL respectfully submits that Calpine Motion For Revised procedural Schedule should be denied and FPL's motion to hold this matter in abeyance should be granted.

Respectfully submitted,

Steel Hector & Davis LLP
Suite 601
215 South Monroe Street
Tallahassee, Florida 32301

Attorneys for Florida Power &
Light Company

By: _____
Matthew M. Childs, P.A.
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Response of Florida Power & Light Company To Calpine's Motion For revised Procedural Schedule in Docket No. 000442-EI was served by Hand Delivery (*) or mailed this 2nd day of October, 2000 to the following:

Blanca S. Bayó, Director *
Records and Reporting
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

Robert Elias, Esquire. *
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Carlton Law Firm *
Robert Pass/Gary L. Sasso
215 South Monroe Street, Suite 500
Tallahassee, FL 32302-0190

Florida Power Corporation
Mr. James A. McGee, Esquire
P. O. Box 14042
St. Petersburg, FL 33733-4042

Alycia Lyons Goody, Esq.
Regional Counsel
Calpine Eastern Corporation
The Pilot House, 2nd Floor, Lewis Wharf
Boston, Massachusetts 02110

Tim Eves
Director, Business Development
Two Urban Centre
4890 West Kennedy Blvd., Suite 600
Tampa, FL 33609

Robert Scheffel Wright, Esq. *
John T. LaVia, III, Esq.
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, FL 32301

By: _____
Matthew M. Childs, P.A.