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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 000442-11  
FILED: OCTOBER 30, 2008  
RECORDS AND REPORTING

AMENDED PETITION FOR DETERMINATION THAT COMMISSION RULE 25-22.082(2), F.A.C., DOES NOT APPLY TO CALPINE OR TO THE OSPREY ENERGY CENTER, OR IN THE ALTERNATIVE, FOR WAIVER OF COMMISSION RULE 25-22.082(2), F.A.C.

Calpine Construction Finance Company, L.P. ("Calpine"), pursuant to Section 120.542, Florida Statutes, and Commission Rule 25-22.082(9), Florida Administrative Code ("F.A.C."), hereby respectfully petitions the Commission for a determination that Rule 25-22.082(2), F.A.C., does not apply to Calpine or to Calpine's pending petition for determination of need for the Osprey Energy Center (the "Osprey Project" or the "Project"), or in the alternative, for a permanent waiver of the application of Rule 25-22.082, F.A.C., Selection of Generating Capacity (the "Bidding Rule" or "Rule"). In summary, Rule 25-22.082, F.A.C., should not be construed to apply to Calpine or the Osprey Project because the Project will meet the needs of Seminole Electric Cooperative, Inc. ("Seminole"), which is a cooperative utility system that is expressly exempt from the requirements of the

APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP 1  
COM 3  
CTR \_\_\_\_\_  
EGR 2  
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SEC 4  
SER 1  
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Bidding Rule.<sup>1</sup>  
  
<sup>1</sup> Seminole and Calpine Energy Services, L.P., an affiliate of Calpine, have executed a Memorandum of Understanding (the "MOU")

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Moreover, requiring Calpine to conduct a competitive selection process would add an unintended and unnecessary regulatory requirement on the power procurement process in Florida, in that it would effectively require every participant or "bidder" in any utility's procurement process to conduct its own competitive selection process in addition to the purchasing utility's process. This result cannot have been intended by the Commission. Moreover, the Bidding Rule was never intended to apply to wholesale-only utilities that participate in competitive selection processes conducted by retail-serving and load-serving utilities. The fundamental purpose of the Rule -- to protect captive electric consumers from uneconomic decisions by investor-owned utilities -- is served by allowing Calpine and other similar wholesale-only utilities to participate in the load-serving utilities' selection processes, whereby those utilities select the most cost-effective power supply alternative to meet their needs; the purpose of the Rule would not be served by imposing an additional layer of pre-bid regulatory process on the bidders themselves. Additionally, due to Calpine's inherent nature as a non-QF, wholesale-only utility, Calpine cannot force any other utility or any group of captive wholesale or retail

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for the sale of the Osprey Project's output to Seminole. This MOU was filed with the Commission on October 17, 2000, under cover of a Request for Specified Confidential Treatment by which Calpine has sought protection of confidential, proprietary business information contained in the MOU.

customers to bear the Project's costs. Moreover, also by its inherent nature, the Project will reduce wholesale power supply costs (and thus retail rates) and increase reliability in Peninsular Florida. Finally, if the Rule were determined to apply to Calpine or the Osprey Project, then it should be waived because the Project serves the fundamental purpose of the underlying statute and of the Bidding Rule, and because requiring Calpine to comply with the Rule would cause substantial hardship in the form of delay to Calpine, as well as delay of the Project's benefits to Seminole, Seminole's member cooperative utilities, and those utilities' member-consumers.

In further support of this Petition, Calpine and Seminole state as follows.

#### PROCEDURAL BACKGROUND

1. The name and address of the Petitioner is as follows:

Calpine Construction Finance Company, L.P.  
ATTN: Robert K. Alff  
Senior Vice President  
Calpine Eastern Corporation  
The Pilot House, 2<sup>nd</sup> Floor, Lewis Wharf  
Boston, Massachusetts 02110 .

2. All pleadings, motions, orders, and other documents directed to Calpine are to be served on the following:

Robert Scheffel Wright  
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Diane K. Kiesling  
Landers & Parsons, P.A.  
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Alycia Lyons Goody, Esquire  
Regional Counsel  
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with courtesy copies to:

Timothy R. Eves  
Director, Business Development  
Two Urban Centre  
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3. The name and address of the agency affected by this  
Petition is:

Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850.

4. Calpine is the developer of the Osprey Energy Center,  
which will be a natural gas-fired, combined cycle generating  
plant with 529 MW of net generating capacity at average ambient  
site conditions, excluding duct-firing and power augmentation.  
On March 16, 2000, Calpine filed its Site Certification  
Application for the Project with the Florida Department of  
Environmental Protection, and filed its Petition for  
Determination of Need for the Project on June 19, 2000. At the  
same time, Calpine also filed a petition for determination that  
the Bidding Rule does not apply to Calpine and alternative motion  
for waiver. This Amended Petition replaces the June 19 pleading.

5. Calpine is developing the Osprey Energy Center as a competitive wholesale power plant. Calpine has committed the output of the Project, via the MOU, to Seminole to serve the needs of Seminole's member cooperative utility systems and those systems' member-consumers in Florida. Hence, issues regarding Rule 25-22.082, F.A.C., and its applicability to Calpine or to the Osprey project may arise. First, Calpine seeks a determination by this Commission that neither Calpine nor the Osprey Project is subject to the Bidding Rule because the Osprey Project's output is committed to Seminole pursuant to the MOU, and because Seminole is not subject to the Bidding Rule. Second, Calpine seeks a determination that neither Calpine nor the Osprey Project is subject to the Rule because Calpine is a wholesale-only utility and because the Project will therefore not be a rate-based power plant such that captive electric customers could be required to pay for the Project's costs through regulated rates. Therefore, Calpine is not an entity that the Commission intended to subject to the requirements of the Rule. In addition, it would be redundant and unintended to require Calpine or any other participant in a load-serving utility's competitive selection process to conduct its own competitive selection process, either before or after submitting its bid to the load-serving utility. This result is clearly unintended, yet it would

be directly implied by requiring Calpine to conduct (or to have conducted) its own competitive bid in this case.

6. In the alternative, and for regulatory certainty, Calpine petitions the Commission for a waiver of the Bidding Rule. The requested waiver is premised on the grounds that (a) the Osprey Project's output is committed to Seminole, that the Project is meeting Seminole's needs, and that Seminole is not subject to the Rule; (b) the Osprey Project, by its existence and inherent nature, will promote the fundamental purpose of the Rule, i.e., to protect captive electric ratepayers by promoting cost-effective capacity procurement decisions by retail-serving utilities in Florida, (c) the Osprey Project will result in a lower cost supply of electricity to Seminole, a retail-serving utility in Florida, (d) the Osprey Project will increase the reliable supply of electricity to Florida retail-serving utilities' general body of ratepayers, (e) the Osprey Project will not be a rate-based power plant such that captive electric customers could be required to pay for the Project's costs through regulated rates, (f) the Osprey Project will not be a QF such that any utility could be forced to purchase the Project's output, (g) it is in the public interest that the requirements of Rule 25-22.082(2) be waived as to this Project, and (h) requiring Calpine to conduct its own competitive selection process, either before or after submitting its proposal to Seminole, would be

unnecessary to protect Seminole or those whom it serves, redundant to Seminole's evaluation processes, and unintended.

PURPOSE OF UNDERLYING STATUTE

7. Rule 25-22.082, F.A.C., implements Section 403.519, Florida Statutes, which governs the Commission's determination of need proceedings for proposed electrical power plants. In particular, the rule promotes the Commission's consideration, pursuant to Section 403.519, of whether a proposed power plant to be built and included in a retail-serving investor-owned utility's rate base is the most cost-effective alternative. The fundamental concept is that a competitive selection process will result in the lowest-cost viable alternative being selected in the best interests of the ratepayers. The fundamental purpose of the Rule is to protect captive utility ratepayers from uneconomic decisions by their monopoly retail-serving utilities, which have the ability to bind those ratepayers to pay the costs of the utilities' power plants.

8. The Rule was adopted by Commission Order No. PSC-93-1846-FOF-EU, issued on December 29, 1993. Though the Order consists of little more than the boilerplate notice of adoption language, the Staff's recommendation makes clear that the purpose of the Rule is to promote competitive selection of generation capacity in order "to assist electric utilities in fulfilling their statutory obligation to serve at the lowest cost" and to

facilitate the Commission's role in reviewing the utility's power supply procurement decisions to ensure that service is provided at the lowest cost to ratepayers. Docket No. 921288-EU, Staff Recommendation at 3 (November 22, 1993); see also id. at 9, 10. This focus on utilities with a statutory obligation to directly serve retail ratepayers, and on protecting those captive retail ratepayers, makes clear that the Rule was not intended to include competitive wholesale utilities, like Calpine and the Osprey Project here, which have no statutory obligation to serve retail customers and no captive retail ratepayers from whom they may demand cost recovery.

I. THE BIDDING RULE DOES NOT APPLY TO CALPINE OR THE OSPREY PROJECT BECAUSE SEMINOLE, A COOPERATIVE UTILITY EXEMPT FROM THE RULE, IS PURCHASING THE PROJECT'S OUTPUT TO MEET THE NEEDS OF SEMINOLE AND ITS MEMBER COOPERATIVE UTILITY SYSTEMS.

9. By its express terms, the Bidding Rule does not apply to Seminole Electric Cooperative, Inc. Specifically, the Rule applies only to investor-owned utilities that propose power plants subject to Section 403.519, Florida Statutes. See Rule 25-22.082(1)(a)&(b), (2), and (3), F.A.C. Given this specific provision of the Rule, it follows necessarily that the Rule does not apply to power plants either proposed by or selected by municipal and cooperative utility systems, like Seminole, to meet their needs. Moreover, imposing this requirement on Calpine and



the Osprey Project here would effectively require any and all participants in any utility's selection process to conduct their own competitive procurement processes before or after submitting their bids to the potential purchasing utility; this cannot be reasonably read into the Bidding Rule, and it surely cannot have been intended by the Commission in adopting the Rule, because it would impose additional, unnecessary regulatory requirements and cause delay in the permitting and construction of needed power plants.

II. RULE 25-22.082(2), F.A.C., IS NOT  
APPLICABLE TO COMPETITIVE WHOLESALE  
POWER PLANTS LIKE THE OSPREY ENERGY  
CENTER.

10. It is clear that the Rule was not intended to apply to a competitive wholesale utility like Calpine, and that it makes no sense to apply the Rule to the Osprey Project. Neither Calpine nor the Project has a statutory obligation to directly serve retail customers nor any corresponding legal ability to bind such captive customers to pay for any of the costs of the Project. Moreover, Calpine has no legal ability to bind any retail-serving utility to pay for any of the costs of the Project. Retail-serving utilities will only pay for the capacity and energy that they purchase from Calpine, and they will only buy power from the Project when that purchase represents the most cost-effective alternative available to serve an identified need.

In other words, if a retail-serving utility has a lower-cost option than a potential purchase from the Project, then it should, consistent with its contractual obligations and its general duty to serve at the lowest cost, select the alternative.

11. This is exactly how the Commission envisioned a competitive wholesale plant operating in the context of the bidding rule. As the Commission has aptly noted:

The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another generation supply alternative for existing retail utilities. Florida ratepayers will not be at risk for the costs of the facility, unless it is proven to be the lowest cost alternative at the time a contract is entered.

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, 434-35 ("Duke New Smyrna"), reversed on other grounds sub nom. Tampa Electric Company v. Garcia, 25 Fla. L. Weekly S294 (Fla. 2000).

12. This logic applies equally to a competitive wholesale power producer's projects such as Calpine's Osprey Energy Center. No investor-owned public utility ("IOU") (nor any municipal or cooperative utility) is required to contract with Calpine for the output of the Project. Florida ratepayers will not be at risk for the costs of the Project; they may, pursuant to contracts

voluntarily entered into by their retail-serving utilities and subject to this Commission's prudence review of expenditures pursuant to such contracts, be required to pay for the costs of power actually produced by the Project and purchased by their retail-serving utilities.

13. It further makes no sense to require Calpine (or any other competitive wholesale power supplier) to jump through the procedural hoops of the Rule because Calpine and the Osprey Project can only contribute to promoting the fundamental purpose of the Rule. In effect, Calpine is pursuing certification of the Project for the purpose of providing cost-effective wholesale power to Florida retail-serving utilities through those utilities' procurement processes. The Project can only contribute to the fundamental purpose of the Rule by making an additional, necessarily cost-effective power supply option available to retail-serving utilities. As the Commission stated in Duke New Smyrna:

The Duke New Smyrna project presents another alternative for existing utilities, without putting Florida ratepayers at risk for the costs of the facility as is done for the costs of rate based power plants.

\* \* \*

The evidence in the record shows this plant, because of its efficiencies, will be dispatched a great deal of the time. However, because of its merchant nature, it will only be dispatched when it is economical to do so. As a result, we believe that it will exert a downward pressure on electricity pricing in the wholesale power market in

Florida. This, in turn, will flow through to retail IOU customers in retail through the fuel adjustment clause.

Duke New Smyrna, 99 FPSC 3:437-38. This same logic again applies to this Project in that IOUs (and other electric utilities) will only contract for this output if it is economic to do so and the nature of the contracts will likely be such that the purchasing utilities need not take that output when it is not economic to do so. This arrangement can only exert downward pressure on electricity pricing in the wholesale power market in Florida. Such savings will flow through to retail customers through fuel and purchased power cost recovery charges. The Commission should not apply the Rule in such a way as to impede Calpine's ability to provide these economic benefits to the retail-serving utilities and ultimately to the retail electric customers of Florida.

#### ALTERNATIVE PETITION FOR WAIVER

14. While Calpine firmly believes that Rule 25-22.082(2) does not apply either to Calpine or to the Osprey Project, Calpine alternatively petitions the Commission for a permanent waiver of the Rule should the Commission determine that the Rule is applicable to the Osprey Project.

#### LEGAL BASIS FOR WAIVER

15. Section 120.542(1), Florida Statutes, authorizes each state agency to grant variances and waivers from the requirements

in the agency's rules. Section 120.542(2), Florida Statutes, provides in pertinent part that

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

16. Commission Rule 25-22.082(9), F.A.C. provides as follows:

The Commission may waive this rule or any part thereof upon a showing that the waiver would likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

**I. GRANTING THE REQUESTED WAIVER SATISFIES THE FUNDAMENTAL PURPOSE OF THE UNDERLYING STATUTE AND RULE.**

17. As discussed above, the fundamental purpose of the Rule is to protect captive ratepayers from uneconomic decisions by their monopoly retail-serving utilities, which have the ability to bind those ratepayers to pay the costs of the utilities' power plants. The Rule is intended to promote competitive selection of generation capacity in order "to assist electric utilities in fulfilling their statutory obligation to serve at the lowest

cost" and to facilitate the Commission's role in reviewing the utility's power supply procurement decisions to ensure that service is provided at the lowest cost to ratepayers. The Rule should not be construed or interpreted in a manner that is inconsistent with the underlying purposes of the Rule.

18. Commission orders applying and interpreting this Rule support the proposition that its intent is to protect captive ratepayers from being saddled with the costs of power supply resources that are not the most cost-effective alternatives available to their retail-serving utilities. For example, the Commission denied a request for waiver of the Rule by a retail-serving investor-owned utility because the utility had not demonstrated that the lowest cost generation alternative would be selected by the utility, and that the requested waiver would thus be "contrary to the intent of the bidding rule . . . ." In Re: Petition by Florida Power Corporation for Waiver of Rule 25-22.-02, F.A.C., Selection of Generating Capacity, 99 FPSC 2:92, 96.

19. In the present case, granting a waiver will promote the public interest in that Seminole's member cooperative systems and those systems' member-consumers will benefit from the most economic and cost-effective generation alternative, in the most timely way. Seminole has evaluated the purchase of the Osprey Project's output pursuant to the MOU and the PPA to be negotiated pursuant to the MOU, and Seminole has thus determined that the

PPA represents the best alternative for meeting the needs of Seminole, its member systems, and those systems' member-consumers. Because Seminole has conducted an appropriate evaluation of alternatives, which will be presented to the Commission in the need determination hearing for the Osprey Project, requiring Calpine to conduct a separate competitive selection process would be redundant and unnecessary. Indeed, imposing this requirement on Calpine in this case would imply that the Commission would require any competitive supplier to have conducted its own bid, either before or after submitting its proposal into a potential purchasing utility's competitive procurement process; adding such a requirement would unnecessarily complicate and delay utility procurement processes to the detriment of those utilities, to the detriment of those whom they serve, and to the detriment of the public interest. Moreover, in the present situation, imposing this requirement would delay the permitting and construction of the Osprey Project to the detriment of Seminole, its member systems, and those systems' member-consumers, and to the detriment of the public interest.

20. Additionally, the Petition for Determination of Need amply demonstrates that the addition of this Project will increase the reliable and cost-effective supply of electricity to the retail-serving utilities that purchase the Project's output,

now known to be Seminole and its member cooperatives, and hence to those systems' member-consumers.

21. Finally, it is abundantly clear that diversifying the available mix of available capacity in Florida, without burdening the retail ratepayers of any utility with the costs of a rate-based facility, is in the public interest. It would be disingenuous to argue otherwise since the costs of this Project can never be included in any utility's rate base.

22. Section 120.542(2), Florida Statutes, authorizes a waiver of a rule upon a demonstration that the purpose of the underlying statute will be achieved by other means and when application of a rule would create a substantial hardship or would violate principles of fairness. Calpine has amply demonstrated that the underlying purpose of the statute will be achieved because the essence of a competitive wholesale generator is one of cost-effective provision of electricity. This Project, without doubt, will be a lower cost alternative source of supply that will be available to Seminole, its member systems, and those systems' member-consumers. Additionally, Seminole has engaged in its own RFP process, albeit not one mandated by the Bidding Rule, in order to ensure that its agreement to purchase the output of the Project represents the most cost-effective alternative to meet the needs of its retail customers. Hence, the underlying purpose of the Rule has been achieved.



II. REQUIRING CALPINE TO COMPLY WITH THE  
SUBJECT RULE WOULD RESULT IN SUBSTANTIAL  
HARDSHIP AS WELL AS LOST BENEFITS TO  
FLORIDA ELECTRIC CONSUMERS.

23. Calpine filed the initial Petition and Exhibits initiating this need determination proceeding in order to expedite the availability of the Project's benefits for Florida's retail-serving utilities and their customers. Calpine and Seminole are presently preparing the appropriate pleadings to add Seminole as a co-applicant for the Commission's determination of need for the Project. Calpine has already completed the necessary environmental evaluations for the Project and has filed the Site Certification Application for the Osprey Project, and the sufficiency review of that application is nearly complete. Calpine and Seminole have entered into a binding agreement for the purchase of the output of the Project. If Calpine were forced to wait any longer to move forward with the Project, such delay would inflict substantial hardship on Calpine by unnecessarily increasing the cost of permitting the Project and by delaying the timely construction and operation of the Project. Moreover, such delay would inflict substantial hardship on Seminole, its member utility systems, and those systems' member-consumers by delaying the benefits of the Project to Seminole and those whom Seminole serves: the substantial reliability and cost-savings benefits of the Project would likely be lost to Seminole

and those whom Seminole serves for the summer of 2003 and perhaps for the winter of 2003-2004 as well. This delay and these hardships can be avoided by allowing the need determination process to move forward while the site certification process is moving forward in parallel, without contorting the purpose of Rule 25-22.082 to make it apply in this instance.

#### RELIEF REQUESTED

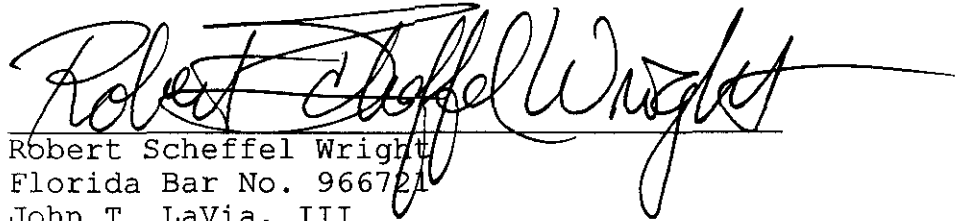
Calpine respectfully requests the Commission to enter an order confirming that Rule 25-22.082, F.A.C., does not apply to Calpine or the Osprey Energy Center, or, in the alternative, for a waiver of the application of the subject rule to Calpine and the Osprey Project.

#### CONCLUSION

The Bidding Rule does not apply to Seminole Electric Cooperative, the primary purchaser of the Osprey Project's output pursuant to the MOU and PPA, and accordingly, the Rule does not apply to either Calpine or the Osprey Project, which have been chosen by Seminole to meet its needs. Moreover, Calpine has amply demonstrated that Rule 25-22.082, F.A.C., was not intended to apply to competitive wholesale utilities like Calpine or to competitive wholesale power plants like the Osprey Project, and accordingly, the Commission should grant the order requested

herein. In the alternative, Calpine has also demonstrated that a waiver would serve the fundamental purpose of the underlying statute and rule, that it would impose substantial hardship on Calpine, Seminole, Seminole's member cooperative utility systems, and those systems' member-consumers, and that the requested waiver is in the public interest. Accordingly, the Commission should grant the relief requested herein.

Respectfully submitted this 30<sup>th</sup> day of October, 2000.

A large, stylized handwritten signature in black ink, which appears to read "Robert Scheffel Wright". The signature is written over a horizontal line.

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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 30th day of October, 2000, to the following:

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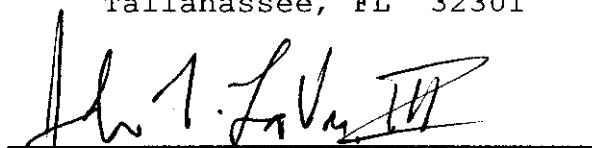
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