

State of Florida



Public Service Commission

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RECORDS AND REPORTING  
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DATE: AUGUST 3, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HARLOW)  
DIVISION OF LEGAL SERVICES (ELIAS, ISAAC) *MR RVE JJA*

RE: DOCKET NO. 000442-EI - PETITION FOR DETERMINATION OF NEED  
FOR THE OSPREY ENERGY CENTER BY CALPINE CONSTRUCTION  
FINANCE COMPANY, L.P.

AGENDA: 08/15/00 - REGULAR AGENDA - INTERESTED PERSONS MAY  
PARTICIPATE *JDT*

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\000442.RCM

CASE BACKGROUND

On June 19, 2000, Calpine Construction Finance Company, L.P., ("Calpine") filed a Petition for Determination of Need for an Electrical Power Plant. Calpine proposes to construct a 527 megawatt (MW) natural gas-fired, combined cycle power plant in Polk County, Florida, with an in-service date expected during the second quarter of 2003. An administrative hearing on Calpine's Petition is set for October 18-20, 2000.

Prior to filing a need petition with the Commission, Calpine filed its application with the Florida Department of Environmental Protection (DEP). On March 30, 2000, DEP filed a Notice of Receipt of Power Plant Siting Application and Request for Assignment of Administrative Law Judge regarding Calpine Construction Finance Company, L.P. Power Plant Siting. However, on May 22, 2000, DEP gave its Notice of Insufficiency regarding Calpine's application. Calpine filed a response on May 26, 2000, voicing its intent to

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submit additional information, within the 40-day time limit, in order to make the application sufficient.

In addition to filing its Petition for Determination of Need, Calpine also filed a Petition for Determination that Commission Rule 25-22.082(2), Florida Administrative Code does not Apply to Calpine, or in the Alternative, for Waiver of Commission Rule 25-22.082(2), Florida Administrative Code. Florida Power & Light Company (FPL) and Florida Power Corporation (FPC) have filed several petitions and motions concerning procedural aspects of this case, including motions to intervene and motions to dismiss.

Also, prior to the filing of Calpine's need determination petition, the Florida Supreme Court issued its decision in Tampa Electric Co.; Florida Power Corp.; and Florida Power & Light Co., v. Garcia, et al., as the Florida Public Service Commission; Utilities Commission, City of New Smyrna Beach; and Duke Energy New Smyrna Beach Power Co., Ltd., L.L.P., Case Nos. SC95444, SC95445, SC95446 (Order). Therein, the Court reversed the Commission's prior decision to grant a need determination "for an electric power company's proposal to build and operate a merchant plant in Volusia County." Order, p. 2. At page 13 of its Order, the Court indicated that "[a] determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant." This recommendation addresses the status of all pending matters in the Calpine need determination docket.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission hold Docket No. 000442-EI in abeyance pending the Florida Supreme Court's final decision regarding Tampa Electric Co., et al. v. Garcia, et al., Case Nos. SC95444, SC95445, SC95446?

**RECOMMENDATION:** Yes. The Petition for need determination in Docket No. 000442-EI should be held in abeyance until a final decision has been issued by the Florida Supreme Court in Tampa Electric v. Garcia. (ISAAC)

**STAFF ANALYSIS:** Staff believes it is appropriate to put Docket 000442-EI in abeyance until a final decision has been reached by

the Florida Supreme Court in the Tampa Electric case. The Supreme Court's Order will not become final until a decision is made on motions for rehearing.

In Tampa Electric v. Garcia, the Court held that Section 403.519, Florida Statutes, did not permit the granting of a determination of need where only 30 of the 514 megawatts of power to be produced by the proposed power plant were committed. The Court said that the Commission had exceeded in its statutory authority in granting the present determination of need. The Court concluded that "a need determination is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant." Tampa Electric v. Garcia at 13.

On June 5, 2000, following the issuance of the Florida Supreme Court's Order, the Commission issued an Order Holding Current Merchant Plant Petitions in Abeyance Pending Outcome of Florida Supreme Court's Decision in Duke-New Smyrna.

Staff notes that Calpine has attempted to distinguish its project from the Duke-New Smyrna project which was the subject of the Florida Supreme Court's opinion in Tampa Electric v. Garcia. Calpine admittedly does not presently have a contract to sell all of the output of the proposed facility with a retail serving utility. However, Calpine seeks a "conditional" need determination from the Commission, dependant upon the execution of a power purchase agreement. This is a somewhat novel argument.

The motions for rehearing of the Supreme Court's order have been pending for almost three months. Thus, it is reasonable to presume that a decision by the court may be rendered shortly. In the interest of judicial economy and administrative efficiency, staff believes it is appropriate to hold this matter in abeyance until after the Supreme Court has addressed the motions for rehearing.

Given the Court's initial opinion, it appears that allowing the events in Docket No. 000442-EI to continue as originally scheduled could result in the unnecessary expenditure of the parties' and the Commission's time and resources. Therefore, staff recommends that the Commission hold this need determination docket in abeyance pending a final decision by the Florida Supreme Court in Tampa Electric v. Garcia.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open until a final decision is reached by the Florida Supreme Court in Tampa Electric v. Garcia. (ISAAC)

**STAFF ANALYSIS:** The docket should remain open pending a final decision by the Florida Supreme Court in Tampa Electric v. Garcia.