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September 26, 2000

Blanca S. Bayó, Director
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Florida Public Service Commission
4075 Esplanade Way, Room 110
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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 Emergency Motion to Hold this Matter in Abeyance.

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

Very truly yours,

Charles A. Guyton

Charles A. Guyton

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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: September 26, 2000**

FLORIDA POWER & LIGHT COMPANY'S EMERGENCY MOTION TO HOLD THIS MATTER IN ABEYANCE

Florida Power & Light Company, pursuant to Rule 28-108.204 and 28-108.211, Florida Administrative Code, moves the Prehearing Officer to immediately hold this matter in abeyance or expeditiously convene the panel hearing this matter to consider holding it in abeyance. In support of this motion FPL states:

1. From its inception, Calpine's need determination proceeding has proceeded in an inappropriate fashion.[1] Calpine's proceeding was not held in abeyance although every other wholesale plant need determination case was held in abeyance because it appeared that allowing

[1] Staff, not Calpine, initiated this proceeding. Then, after the issuance of *Tampa Electric Co. v. Garcia*, the Staff recommended that this case and every other pending wholesale plant need case be held in abeyance pending rehearing on *Tampa Electric Co. v. Garcia*. The Commission approved the Staff's recommendation of abeyance for every case except Calpine's. Once Calpine's deficient petition was filed, Staff filed another recommendation to hold this case in abeyance, but after Calpine sent an *ex parte* letter and orchestrated *ex parte* letters from other non-parties, the Staff recommendation was withdrawn, even though the rationale for its recommendation was still true. Then, an Order Establishing Procedure was issued that essentially acknowledges that Calpine's petition and direct case do not contain the elements necessary to proceed by giving Calpine the extraordinary opportunity to present supplemental testimony regarding utility specific need and cost-effectiveness less than a month before hearing. The order appears to have overlooked the dilemma it creates for the interveners' trial preparation, for it affords the interveners a mere week to conduct discovery on and present a response to this necessary, core proof, yet gives Calpine two weeks to rebut what the interveners may file.

those dockets to proceed "as originally scheduled could result in the unnecessary expenditure of the parties' and the Commission's time and resources." Order No. PSC-00-1063-PCO-EU (June 5, 2000). Of course, that is precisely the circumstance faced in this case as well, and it justifies abeyance. In addition, in light of Calpine's recent acknowledgments in oral argument that it must have both a contract and a co-applicant to proceed, the further processing of this charmed case cannot be justified. Calpine has neither the contract nor the co-applicant that even Calpine now acknowledges it must have to obtain a determination of need. It may never have them. Processing this case without these essential, required elements is both unfair to the interveners and a waste of time and resources to the Commission and the interveners. In the absence of Calpine having secured the contract and co-applicant it concedes is necessary, FPL should not have to expend the hundreds of thousands of dollars required to prepare for trial under the currently unreasonable schedule or any other schedule. This matter should be held in abeyance, other than the consideration of whether the case should be dismissed, until Calpine secures, if it ever does, the contract and co-applicant it acknowledges it needs.

2. At oral argument on intervention, Calpine conceded that it could not proceed and secure an affirmative determination of need without a contract or co-applicant. In making Calpine's "withdrawal" of opposition to FPL's and FPC's intervention, counsel for Calpine stated that Calpine anticipated proceeding with a co-applicant: "It's our hope that the investor-owned utilities will make good on their public statements to the effect that they will no longer oppose this or any project when the project is committed via a contract with a retail serving applicant -- co-applicant." Calpine's counsel went on to acknowledge that to proceed Calpine had to have a co-applicant and a contract:

> Simply because their need in the planning horizon is part of what we based our petition on doesn't make them an indispensable party, particular when we have made it very clear, both in our application and **we will make it clear here today, that we are in agreement, we cannot proceed with the construction until we have a co-applicant and contracts**, according to the application we filed. At the point we have contracts, we will know who the co-applicant is, we will know who the indispensable party is, and that entity or entities will come in and be co-applicants.

3. Calpine does not have such a contract or co-applicant and has provided no firm date by which it expects this to change. Calpine's concession that it cannot secure a determination of need without a contract and co-applicant, coupled with Calpine's lack of such a contract and co-applicant make it clear that Calpine's case should not proceed. Calpine's concessions means that as of today, September 25, 2000, more than three months after Calpine filed its petition and more than two months after FPL filed its motion to dismiss, Calpine cannot even allege the presence of the facts necessary to entitle it to relief.

4. FPL has filed a motion to dismiss arguing, among a number of other arguments, that the absence of a contract and a co-applicant means that Calpine is not a proper applicant and its petition is infirm. Unfortunately, although motions to dismiss have been pending over two months, rulings on those motions do not appear to be imminent.

5. While they await the Commission's rulings on their motions to dismiss, the interveners find themselves in a position of having to prepare for trial in a case that should not (and, indeed, may not) be heard, on a petition that flouts applicable rules regarding the petition and the necessary allegations supporting the relief requested[2], on a schedule that does not afford adequate

[2] Rule 25-22.081, F.A.C. requires, among other things, identification of the primarily affected utility (in this case, the purchasing utility) and the particular circumstances that justify the project (in this case the utility-specific allegations that the petition completely omits).

time for discovery and responsive testimony, on testimony of a purported peninsular Florida need, which, even if proven, could not support an affirmative determination of need[3], and under a schedule that contemplates supplemental filings on the eve of hearing, thereby depriving the interveners due process. FPL faces the unnecessary and unwarranted expenditure of hundreds of thousands of dollars to prepare for a case which, by any objective measure, should be dismissed. Regardless of whether this case is dismissed, given Calpine's admission that it does not have either the necessary contract or co-applicant, this case should be held in abeyance, other than consideration of dismissal, until Calpine secures the contract(s) and co-applicant(s) necessary to proceed.

6. As the Commission has previously determined, processing a need determination case for an entity such as Calpine is reasonable only **after** it has signed a contract; allowing it to proceed without a contract and a co-applicant would result in an unjustifiable waste of resources:

> Since our 1990 Martin order (Order No. 23080, issued June 15, 1990) the policy of the Commission has been that a contracting utility is an indispensable party to a need determination proceeding. As an indispensable party, the utility will be treated as a joint applicant with the utility with which it has contracted. This will satisfy the statutory requirement that an applicant be an "electric utility" while allowing generating entities with a contract to bring that contract before the commission. Thus, a non-utility generator such as Ark or Nassau will be able to obtain a need determination for its project **after it has signed a contract** (power sales agreement) with a utility.
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> * * *

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[3] In *Nassau Power v. Beard*, 601 So. 2d 1175, 1178, N. 9 (Fla. 1992), the Supreme Court noted that the cost-effectiveness criterion of Section 403.519 "would be rendered virtually meaningless if the PSC were required to calculate need on a statewide basis...." In *Tampa Electric Co. v. Garcia*, 25 Fla. L. Weekly S294 (April 20, 2000), the Court clearly found that a determination of need could not be premised upon a peninsular Florida analysis: "the projected need of unspecified utilities throughout peninsular Florida is not among the authorized criteria for determining whether to grant a determination of need pursuant to Section 403.519, Florida Statutes."

> If we accepted Nassau and Ark as statutory applicants, any entity capable of building a power plant could file a petition for a determination of need at any time for whatever plant they wanted to build. We are statutorily required to promptly conduct a hearing and issue an order for each such petition. **We would end up devoting inordinate time and resources to need cases. Wasting time in need determination proceedings for projects that may never reach fruition is not an efficient use of the administrative process.** (Emphasis added.)

In re: petition of Nassau Power Corporation to determine need for electrical power plant, 92 FPSC 10:643 (October 26, 1992) (*Ark and Nassau*).

7. Here we are two months before the scheduled hearing with only peninsular Florida testimony and analyses that will not support an affirmative determination of need. The information necessary to support a determination of need, the identification of the primarily affected utility (the purchasing utility), the need of the purchasing utility for the proposed unit for reliability and adequate electricity at a reasonable cost, why the proposed plant is the purchasing utility's most cost-effective alternative, and a demonstration that there are not conservation measures available to the purchasing utility that would mitigate the need for the proposed plant, has not been pled and will not be filed, if at all, until November 1, 2000, less than a month before the scheduled hearing. Thus, FPL cannot even begin discovery as to the critical facts, which by Calpine's own admission, do not even exist yet. Discovery regarding Calpine's peninsular Florida analyses would be wasted effort, for the analyses cannot support an affirmative determination of need. Therefore, no time or resources should be spent by either the Commission or the interveners regarding this insufficient evidence. FPL cannot conduct discovery regarding the contract and the purchasing utility, for they do not yet exist. FPL cannot provide consultants with the utility-specific analyses that are required for a determination of need, because neither they nor the underlying utility and contract have been identified. FPL cannot begin testimony preparation for the same reasons. Attempting to prepare for

trial under these circumstances is not just unreasonable; it is impossible. This case needs to be held in abeyance until the necessary contract(s) and co-applicant(s) are secured, if they are at all.

8. The Commission Staff had it right in the Staff recommendation that was unfortunately withdrawn after Calpine's *ex parte* letter: allowing events in Docket No. 000442-EI to continue as scheduled will result in the unnecessary expenditure of the parties' and the Commission's time and resources. The Commission also had it right in the *Ark and Nassau* case. Allowing non-utility generators to proceed in need cases without a utility co-applicant and without a contract would result in the Commission and the parties "devoting inordinate time and resources to need cases. Wasting time in need determination proceedings for projects that may never reach fruition is not an efficient use of the administrative process."

9. To assure the efficient use of the administrative process, the Commission should dismiss Calpine's legally infirm need petition. Until it does so, or until Calpine secures the contracts and co-applicants necessary for it to obtain a need determination, the Commission should hold this case in abeyance. This is a case that may well never come to fruition, and until there are contracts in place that indicate Calpine can proceed, the only resources justified in this case are resources expended to determine whether it should be dismissed. Regardless of whether this case comes to fruition, FPL reserves its right to seek attorneys fees and costs for the filing of a petition so infirm and clearly at odds with established precedent that it is properly characterized as frivolous.

10. Holding this matter in abeyance is an action that can and should be undertaken promptly by the Prehearing Officer. It is Calpine's conduct of filing a need petition before securing a necessary contract and co-applicant that has created the prospect of the Commission and interveners wasting significant resources. The Prehearing Officer, under Rule 28-106.211, Florida

Administrative Code, has authority to issue orders necessary for the just, speedy and inexpensive determination of all aspects of the case. Therefore, FPL requests that the Prehearing Officer immediately issue an order holding all aspects of this case, other than consideration of dismissal, in abeyance until Calpine secures the contract(s) and co-applicant(s) necessary to proceed. In the alternative, if the Prehearing Officer feels the need to involve the remainder of the panel in this decision, FPL requests that the Prehearing Officer act to get this matter expeditiously before the panel, even if a special agenda is necessary.

12. Counsel for Calpine and Florida Power Corporation were contacted regarding this motion. Calpine does not agree with the relief requested herein; FPC agrees with the relief requested herein.

WHEREFORE, FPL respectfully moves that either the Prehearing Officer or the panel assigned to this case promptly issue an order holding all aspects of this case, other than consideration of dismissal, in abeyance until Calpine secures the contract(s) and co-applicants necessary for it to proceed.

Respectfully submitted,

Steel Hector & Davis LLP
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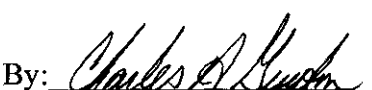
Attorneys for Florida Power &
Light Company

By: 
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this FPL's Emergency Motion to Hold This Matter in Abeyance in Docket No. 000442-EI was served by Hand Delivery (*) or mailed this 26th day of September 2000 to the following:

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