



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** OCTOBER 10, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAKO)

**FROM:** DIVISION OF LEGAL SERVICES (ELIAS, ISAAC) *RNR RVE*  
 DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HARLOW, BOHRMANN, BREMAN) *STB WBM*  
 DIVISION OF ECONOMIC REGULATION (LESTER, STALLCUP) *JOJ RNT*  
 DIVISION OF COMPETITIVE SERVICES (MAKIN) *WBM*

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

**AGENDA:** 10/17/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\SER\WP\000442-1.RCM

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### 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, expected to commence commercial operation in the second quarter of 2003. Calpine also filed a Petition for Determination that Commission Rule 25-22.082(2), Florida Administrative Code, Does Not Apply, or in the Alternative, for Waiver of Commission Rule 25-22.082(2), Florida Administrative Code. An administrative hearing on Calpine's petition for need is set for November 29, 30, and December 1, 2000.

After oral argument before the Prehearing Officer, Florida Power & Light Company (FPL) and Florida Power Corporation (FPC)

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were granted leave to intervene in this docket, by Order No. PSC-00-1687-PCO-EI, issued September 21, 2000. FPL and FPC filed Motions to Dismiss Calpine's Petition for Determination of Need. FPC filed a Motion to Dismiss Calpine's Petition for a Determination that Rule 25-22.082(2) does not Apply to Calpine or Alternative Request for Rule Waiver of 25-22.082(2) and FPL filed an Emergency Motion to Hold this Matter in Abeyance. This recommendation addresses the Petition regarding the applicability of Rule 25-22.082(2), Florida Administrative Code, filed by Calpine, the Motions to Dismiss filed by FPL and FPC, Calpine's Request for Oral Argument and FPL's Emergency Motion to Hold this Matter in Abeyance. Calpine has made a commitment to file information regarding the contracts for the Project's output by November 1, 2000. But for this commitment, the analysis might be different.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Calpine's Request for Oral Argument?

**RECOMMENDATION:** Yes. The Commission should grant Calpine's request for oral argument.

**STAFF ANALYSIS:** Pursuant to Rule 25-22.058, Florida Administrative Code, a request for oral argument must state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. The request must also be contained on a separate document and must accompany the pleading upon which the argument is requested. See Rule 25-22.058, Florida Administrative Code. Calpine filed a Request for Oral Argument on July 17, 2000, regarding the Motions to Dismiss filed by Florida Power & Light Company (FPL) and Florida Power Corporation (FPC), as well as, FPC's Motion to Dismiss Calpine's bidding rule inapplicability/bidding rule waiver petition.

As grounds for its request, Calpine states that oral argument would assist the Commission in fully comprehending and making a

fully informed decision on the issues involved in this case. Calpine asserts that the issues posed with respect to FPL's and FPC's motions to dismiss are complex because they relate to the first petition for determination of need to come before the Commission since the issuance of the Supreme Court's Tampa Electric v. Garcia decision.

Staff recommends that the Commission grant Calpine's request for oral argument, allowing each side 10 minutes. The parties present differing interpretations of the Tampa Electric v. Garcia opinion, and, thus, underscore the usefulness of oral argument. With respect to reconsideration of non-final orders, oral argument may be granted at the discretion of the Commission. See Rule 25-22.0376(5), Florida Administrative Code. On this type of non-final order, the parties are allowed to participate at the Agenda Conference. Participation at the Agenda Conference is the most expeditious way to proceed in this docket.

**ISSUE 2:** Should the Commission grant FPL's Emergency Motion to Hold this Matter in Abeyance?

**RECOMMENDATION:** No. FPL's Motion should be denied.

**STAFF ANALYSIS:**

I. Background

On September 26, 2000, Florida Power & Light (FPL), filed an Emergency Motion requesting the Prehearing Officer to immediately hold this matter in abeyance or expeditiously convene a panel hearing this matter to consider holding it in abeyance. By letter dated October 5, 2000, FPC joined in the motion. The Prehearing Officer directed staff to file a recommendation on this and other pending motions for consideration by the panel at the October 17, 2000 Agenda.

FPL states that it and other intervenors find themselves in a position of preparing for trial in a case that should not be heard. FPL alleges that it faces the unnecessary and unwarranted

expenditure of hundreds of thousands of dollars to prepare for this case. FPL states that regardless of whether the Commission dismisses this case, it should be held in abeyance until Calpine secures the contract(s) and co-applicant(s) necessary to proceed. FPL supports its argument with a previous Commission Order where the Commission stated, "[w]asting time in need determination proceedings for projects that may never reach fruition is not an efficient use of the administrative process." In re: Petition of Nassau Power Corporation to determine need for electrical power plant, 92 FPSC 10:643 (Order No. PSC-92-1210-FOF-EQ) (Ark and Nassau).

FPL states that it cannot begin discovery as to the critical facts based on the current schedule. FPL argues that discovery regarding the existing data which are based on analyses of peninsular Florida would be a wasted effort since, according to FPL, it is insufficient evidence to support an affirmative determination of need. FPL maintains that the Commission should dismiss Calpine's Need Petition, or in the alternative, FPL argues that the Commission should hold the case in abeyance until the necessary requirements are fulfilled by Calpine.

Calpine believes that the Commission should deny FPL's motion for three main reasons. First, Calpine asserts that intervenors take each case as they find it, and FPL is not required to participate in this proceeding at all. Calpine states that any expenditures FPL makes are within its own discretion. Second, Calpine believes that granting the relief requested would be contrary to the public interest. And third, FPL has failed to plead "emergency" conditions.

Calpine maintains that the case schedule set forth in the Commission's Order Establishing Procedure is appropriate and should not be modified as suggested by FPL. Calpine analogizes this case to one involving FPL that the Commission processed on an expedited basis. See In re: Petition of Florida Power & Light Company for Inclusion of the Scherer Unit No. 4 Purchase in Rate Base, Including an Acquisition Adjustment, 91 FPSC 2:602, 603 (Scherer 4). In that case, according to Calpine, FPL petitioned to include the cost of Scherer Unit No. 4 in FPL's rate base. Calpine states that the case was processed on the basis of a non-final, non-binding letter of intent. See id. In addition, Calpine states that FPL filed supplemental information the day before the Scherer 4 hearing, allowing no opportunity for meaningful discovery. Calpine notes that based on the compressed schedule, Public Counsel moved for postponement of the hearing and rescheduling of CASR dates. Calpine states that the Commission denied Public Counsel's

request. See In re: Petition of Florida Power & Light Company for Inclusion of the Scherer Unit No. 4 Purchase in Rate Base, Including an Acquisition Adjustment, 90 FPSC 12:30. Calpine alleges that FPL is not prejudiced because there can be no adverse impact on FPL by the Commission granting the relief requested by Calpine.

Calpine maintains that as an intervenor, FPL takes the case as it finds it. See Rule 25-22.039, Florida Administrative Code. Calpine asserts that the delay FPL seeks is the type of disruption of an ongoing proceeding that an intervenor should not be allowed to cause. See Humana Health Plans v. Durant, 650 So.2d 203,204 (Fla. 4th DCA 1995); Hartford Fire Ins. Co. v. School Bd. of Dade Co., 661 So.2d 111,112 (Fla. 4th DCA 1995).

Calpine also maintains that the Commission should proceed in accordance with the Order Establishing Procedure because the schedule set forth therein advances the public interest. Calpine reasserts that it filed its Petition before having final power sales contracts in hand to enable the permitting process to proceed and to allow the Project to come in-service in the summer of 2003. Calpine maintains that delaying the need determination process will delay the in-service date, costing the State and its citizens the benefits of the Project. Calpine asserts that the Commission's mandate to promote the public interest requires the denial of FPL's Motion. See Section 366.01, Florida Statutes. In addition, Calpine cites Section 366.81, Florida Statutes, as support for the Commission to deny FPL's Motion and to allow this proceeding to go forward because of the significant fuel saving benefits that the Project will provide.

Lastly, Calpine maintains that FPL has failed to allege conditions establishing that an emergency exists. Calpine states that although FPL styles its Motion as an "emergency," it has not pled what the alleged emergency is. Calpine believes that if the Commission staff finds the schedule sufficient for evaluation, there should not be a problem for FPL, as an intervenor.

## II. Analysis

Under Rule 25-22.039, Florida Administrative Code, parties granted intervenor status "take the case as they find it." FPL and FPC were granted intervenor status on September 21, 2000. The Order Establishing Procedure, Order No. PSC-00-1615-PCO-EI, was issued on September 11, 2000. In that Order, the Prehearing Officer established the dates for the key activities in the case. The Order was issued under the authority of Rule 28-106.211,

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Florida Administrative Code, which allows the presiding officer in a case to issue orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

Staff believes that the principle stated in Rule 25-22.039, Florida Administrative Code--"[i]ntervenors take the case as they find it"--should control the decision of this emergency motion. See In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, Order No. 25224, Docket No. 910883-EI, October 16, 1999, as amended October 23, 1991. This Rule, along with the decision in the Scherer case, regarding a similar matter, support staff's position to deny FPL's Emergency Motion to Hold this Matter in Abeyance.

The Prehearing Officer has issued a procedural schedule which intervenors should follow. Just as FPL was allowed in Scherer, staff believes Calpine should be permitted to proceed. Staff is mindful of the Florida Supreme Court's Order in Tampa Electric v. Garcia. It will be incumbent on Calpine to demonstrate by record evidence that its proposal is consistent with the Court's decision. Staff believes that it and the intervenors have had sufficient time to review the initial petition and testimony. Likewise, staff believes the month long period intervenors will have to review Calpine's supplemental information will be sufficient as well.

Staff agrees with Calpine, in that no due process issues exist for the intervenors since intervenors were on notice of the schedule since it was issued. Moreover, Calpine has filed extensive testimony and exhibits with project-specific information. In addition, Calpine has agreed to provide expedited discovery to the intervenors. Need determinations are routinely processed in relatively compressed time frames. See Rule 25-22.080, Florida Administrative Code. For the foregoing reasons, staff recommends that the Commission deny FPL's Motion.

**ISSUE 3:** Should the Commission grant Calpine's petition for a determination that Rule 25-22.082(2), Florida Administrative Code, does not apply to Calpine, or grant Calpine's alternative request for waiver of Rule 25-22.082(2), Florida Administrative Code?

**RECOMMENDATION:** The Commission should grant Calpine's petition for a Determination that Rule 25-22.082(2), Florida Administrative Code, does not apply to Calpine.

**STAFF ANALYSIS:**

I. Background

Rule 25-22.082, Florida Administrative Code, *Selection of Generation Capacity* (the Bidding Rule), requires investor-owned electric utilities (IOUs) to solicit bids for supply-side alternatives prior to filing a petition for a determination of need for new generation under Section 403.519, Florida Statutes. The bidding rule requires IOUs to explore, through the RFP process, cost-effective supply-side alternatives which may be available in the competitive wholesale marketplace prior to filing a formal, statutorily time-constrained, need determination. Municipal electric utilities and rural electric cooperatives are not covered by the rule.

A. Calpine's Petition

On June 19, 2000, Calpine 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 (the bidding rule). Calpine requested for determination that the bidding rule does not apply to it pursuant to Section 120.542, Florida Statutes, and Rule 25-22.082(9), Florida Administrative Code. Calpine asserts that the bidding rule is inapplicable because Calpine cannot force any utility or any group of captive wholesale or retail customers to bear the Project's costs. In the alternative, if the bidding rule were determined to apply to Calpine, Calpine then asks for a waiver of Rule 25-22.082(2), Florida Administrative Code. Calpine asserts that a waiver should be granted because: (1) the Project serves the fundamental purpose of Section 403.519, Florida Statutes and Rule 25-22.082, Florida Administrative Code; and (2) requiring Calpine to comply with the bidding rule would cause a substantial hardship in the form of delay to Calpine, as well as a delay of the Project's benefits to Florida's electric customers.

B. FPC's Motion to Dismiss Calpine's Petition

FPC requests that the Commission dismiss Calpine's petition. FPC alleges that the fact that Calpine has not entered into power purchase agreements with Florida retail utilities leads to the conclusion that Calpine does not need nor is it entitled to a determination that the Bidding Rule is inapplicable or should be waived.

FPC questions the need for a need determination at all if the Commission may presume that power purchase contracts are cost-effective. FPC states that the purpose of the Bidding Rule is to ferret out competing power supply alternatives interested in meeting a retail load-serving utility's specified need.

C. Calpine's Response

Calpine submitted a response in opposition to FPC's Motion to Dismiss Calpine's petition concerning Rule 25-22.082(2), Florida Administrative Code. First, Calpine maintains that FPC failed to cite any authority to insert itself into Calpine's Petition related to the Bidding Rule. According to Calpine, FPC misapprehended the purpose of the Bidding Rule so as to create a role for itself where none exists.

Calpine asserts that it is within the Commission's exclusive jurisdiction to decide whether to deny Calpine's request for a determination of non-applicability or to deny a waiver of the rule. Calpine argues that FPC lacks standing to insert itself into the Commission's consideration of the Bidding Rule's applicability to Calpine or Calpine's request of waiver of this Rule.

II. Analysis

Staff believes that Calpine is not covered by the bidding rule. Consistent with the underlying purposes of Section 403.519, Florida Statutes, staff believes there are two main reasons to grant Calpine's petition to forego the requirements of Rule 25-22.082, Florida Administrative Code. First, staff believes that the bidding rule was not meant to apply to wholesale utilities, such as Calpine, since these utilities do not have a captive rate-base. Staff notes that this is a question of first impression. Assuming rational economic behavior, retail-serving utilities will only buy power from Calpine's Project when that purchase represents the most cost-effective option at the time the decision is made. This is consistent with the Statute's cost-effectiveness requirement. Secondly, staff believes that each retail utility



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that Calpine contracts with will have to go through the RFP bidding process, unless it falls under the municipal utility or rural electric cooperative exemption. Therefore, staff recommends that the Commission grant Calpine's Petition for a Determination that Rule 25-22.082(2) Does Not Apply to Calpine. In the event that a utility subject to the rule contracts with Calpine, the issue of that utility's compliance with the rule will be an issue. If the Commission disagrees with staff's recommendation on this issue, staff will bring its recommendation to the next agenda regarding Calpine's alternate request for rule waiver.

**ISSUE 4:** Should the Commission grant Florida Power & Light Company's (FPL's) motion to dismiss Calpine's Petition for Determination of Need for an Electrical Power Plant?

**RECOMMENDATION:** No. Calpine's petition for need determination states a cause of action upon which relief can be granted because it alleges all of the required elements. At the time Calpine files its information concerning contractual commitments, it shall file all the information required by Rule 25-22.081, Florida Administrative Code.

**STAFF ANALYSIS:**

I. Background

A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. Kislak v. Kriedian, 95 So.2d 510 (Fla. 1957). But, taking all the well-pleaded allegations of the petition as true, where a cause of action has been adequately alleged, a motion to dismiss should be denied. Fletcher v. Williams, 153 So.2d 759, 764 (Fla. 1st DCA 1963).

By motion filed July 10, 2000, FPL argues that Calpine's need determination should be dismissed for failing to comply with statutory and rule requirements for a need determination petition and for asserting a theory inconsistent with the Siting Act in its petition. Specifically, FPL alleges that the following reasons are grounds for dismissing Calpine's Petition:

- Calpine is not a proper applicant for a Section 403.519, Florida Statutes, need determination.

- The petition fails to allege or demonstrate a utility specific need for the project based on criteria set out in Section 403.519, Florida Statutes.
- Calpine improperly asks the Commission to presume that certain statutory criteria will be met.
- The petition fails to meet the minimum pleading requirements of Rule 25-22.081, Florida Administrative Code.
- Calpine failed to follow the competitive bidding requirements of Rule 25-22.082, Florida Administrative Code, and proposes to enter into contracts with Florida retail utilities in circumvention of Rule 25-22.082, Florida Administrative Code.
- Calpine advances a theory in its Petition which is inconsistent with the underlying theory of the Siting Act
- The petition shows, on its face, that Calpine's proposed plant would constitute an unnecessary and uneconomic duplication of facilities.

Calpine responded to these allegations and also added two of its own arguments. First, Calpine argues that prohibiting it from applying directly for a determination of need would violate the Dormant Commerce Clause of the United States Constitution. Secondly, Calpine asserts that federal law preempts Florida from requiring Calpine to obtain a contract with state regulated electric companies in order to build the proposed project (Osprey Energy Center).

In this case, Calpine's Petition pleads all applicable criteria of Section 403.519, Florida Statutes, as defined in Tampa Electric v. Garcia, and pleads all applicable requirements of Rule 25-22.081, Florida Administrative Code. In sum, taking all the well-pleaded allegations of Calpine's petition as true, a cause of action has been adequately alleged to justify denial of FPL's motion to dismiss. Thus, staff believes FPL's specific arguments, as discussed below, fail to demonstrate that Calpine's petition does not state a cause of action upon which relief can be granted.

## II. Analysis

### A. Sufficiency of facts alleged to establish Calpine's status as a proper applicant for a Section 403.519, Florida Statutes, need determination

FPL discusses two need determination cases decided by the Commission in 1992, Ark Energy, Inc. (Docket No. 920761-EQ) and Nassau Power Corporation (Docket No. 920769-EQ). FPL contends the present Petition is similar to these two cases. The Commission dismissed both of these petitions finding Nassau and Ark not to be

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proper applicants for a need determination under Section 403.519, Florida Statutes. In re: Petition of Nassau Power Corporation to determine need for electrical power plant (Okeechobee County Cogeneration Facility), 92 FPSC 10:643, 644 (Order No. PSC-92-1210-FOF-EQ) (Ark/Nassau).

FPL comments on several points made by the Commission in its Order. First, the Commission noted that Ark and Nassau did not qualify as applicants since they did not fit under the definition of "electric utility." It was explained in the order that each of the entities listed in the statutory definition of "electric utility" had an obligation to serve and an associated need. Non-utility generators, such as Ark and Nassau, do not have such a need since they are not obligated to serve customers. Secondly, it was noted that the Commission also stated that its Ark/Nassau decision was an extension of its prior decisions interpreting the Siting Act. In these decisions, the Commission found that a contracting utility was an indispensable party in a need determination proceeding for parties not fitting the definition of applicant or electric utility in the Siting Act.

FPL alleges that the Ark/Nassau decision is dispositive of this case. First, it contends that, as in Ark/Nassau, Calpine does not have a contract to sell the output of its unit to an electric utility. Also, as in Ark/Nassau, Calpine does not have an obligation to serve customers and has no need of its own. FPL also states that as in Ark/Nassau, Calpine is not a proper "applicant" or an "electric utility" within the meaning of the Siting Act. FPL then states that, as in Ark/Nassau, the Commission would waste its time and resources to proceed with the Calpine Petition or any other petitions from a non-utility generator without a contract with a utility for the output of its facility. Lastly, FPL states that as in Ark/Nassau, it is the utility's need for power which is properly evaluated in a need determination. A non-utility generator may obtain a need determination after signing a contract with a utility for the output of its facility.

In addition to the similarities identified above, FPL notes that this decision was upheld on appeal by the Florida Supreme Court. Nassau Power Corporation v. Deason, 641 So.2d 396 (Fla. 1994). The Court found that the Commission's construction of "applicant" was consistent with the plain meaning of the Siting Act and the Court's prior decision in Nassau Power Corporation v. Beard, 601 So.2d 1175 (Fla. 1992). Furthermore, FPL cites a more recent Supreme Court decision affirming the Nassau cases' analysis of the Siting Act. See Tampa Electric Company v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000), (reh'g denied).

FPL asserts that the circumstances in the Nassau cases and in the Tampa Electric Co. v. Garcia decision are not sufficiently distinguishable from Calpine's circumstances to warrant an abandonment of "the proper construction of the Siting Act." FPL alleges that "public utility" status under the Federal Power Act does not make Calpine a proper applicant under the Siting Act. FPL notes that this argument was rejected in all three prior decisions discussed above. FPL also asserts that Calpine is not an "electric utility" under Section 366.02(2), Florida Statutes, as alleged in the petition, because Calpine does not own, maintain or operate an electric generating, transmission or distribution system. FPL also contends that Calpine's construction of the term "electric utility" is inconsistent with past Commission practice. Furthermore, FPL alleges that the status of "electric utility" under Chapter 366, Florida Statutes, does not convey "applicant" status under the Siting Act. According to FPL, Duke New Smyrna and the Commission made this same argument in Tampa Electric Co. v. Garcia and the Florida Supreme Court rejected it.

In its memorandum, FPL dismisses two possible arguments Calpine could make in the future. First, FPL states that any attempt by Calpine to argue that the Ark/Nassau decision is inapplicable because of the observation that it is to be narrowly construed would be misleading. Second, FPL maintains that the Florida Supreme Court's holding in Nassau v. Deason is not dicta, and it controls the Commission's review of the Petition. To further support this position, FPL reminds the Commission that Nassau v. Deason was cited as precedent in Tampa Electric v. Garcia. FPL questions whether the Court would have relied on it as precedent if it were dicta.

FPL also sees flaws in Calpine's request for the Commission to place a condition on its Petition. Calpine requested for the Commission to condition the need determination on Calpine's ability to demonstrate that the project's output is committed to Florida utilities with the responsibility of serving retail utilities. FPL argues that Calpine never explains in its Petition how the condition would qualify it to be a proper applicant. FPL continues to argue that this request does not distinguish Calpine from Duke New Smyrna or many other merchant plant applicants. FPL maintains that this perspective is inconsistent with the Nassau decisions. FPL points to two sentences in the Tampa Electric case which may lead Calpine to assert this condition, however neither sentence read in conjunction with the rest of the opinion could afford such a conclusion. FPL contends that Calpine may have read a part of Tampa Electric as allowing it to proceed with a need determination as long as it promises to, after the fact, show that has contracts

with specific utilities committing its capacity. However, FPL argues this ignores that the Court stated that it reached its conclusion "based upon our Nassau analysis of the Siting Act." 25 Fla. L. Weekly S296. FPL argues that when Tampa Electric is read in conjunction with the Nassau cases, it is clear that a contractual commitment by a non-utility generator to specific utilities is required.

FPL also states that Calpine may believe that capacity can be fully committed by act of the Commission. However, according to FPL, the Legislature, not the Commission, as stated in previous Court decisions, must act. FPL maintains that Calpine's construction of this language if entertained would frustrate the meaningful determination of utility specific need. Based on the foregoing reasons, FPL requests the Petition to be dismissed.

Calpine asserts in its defense to FPL's allegation that it is not a proper applicant for a need determination proceeding, that its Project is not, and will not be, a merchant plant as suggested by FPL. Calpine maintains that it is a proper applicant under Section 403.519, Florida Statutes, and all applicable case law. Calpine asserts that a "regulated electric utility" is a proper "applicant" authorized under the Siting Act to seek a need determination. Calpine further states that it fits under the definition of "regulated electric utility" since it is a public utility subject to FERC regulation.

Calpine argues that the Commission's Ark/Nassau decision and Nassau Power v. Deason are not applicable to reviewing its Petition for two reasons. First, Calpine states that these cases represent the law of co-generation, a separate subject. And secondly, Calpine has specifically pled that it will have contractual arrangements with Florida retail-serving utilities and will demonstrate that the Project's output is committed to meeting those Florida utilities' needs cost-effectively.

Contrary to FPL's assertions, Calpine argues that it is an "electric utility" and subject to Commission Grid Bill Authority under Chapter 366.02, Florida Statutes. FPL argues that even if Calpine were an "electric utility" for purposes of Chapter 366, Florida Statutes, it would not be an "applicant" for purposes of Section 403.519, Florida Statutes, because "utility" for purposes of this section is defined in Section 366.82(1), Florida Statutes. Calpine concedes that FPL is correct in that "utility" is defined in Section 366.82(1), Florida Statutes, for purposes of Section 403.519, Florida Statutes, however, Calpine states that "utility" does not appear in Section 403.519, Florida Statutes. Calpine

admits that it is possible that an entity could be an "electric utility" under Section 366.02(2), Florida Statutes, and not under the Siting Act, but this cannot have been what the Legislature intended, according to Calpine. If it were what the Legislature intended, Calpine asserts there would be a "Catch-22": if the Commission had jurisdiction then entities would be exposed to various Commission regulation without being able to apply for a need determination, and if entities were not "electric utilities" under the statute then the Commission would have no jurisdiction at all over an entire class of power producers that may legally operate in Florida.

FPL argues that Calpine is not an "electric utility" since it does not yet own a generation facility. In addition, FPL argues that one power plant is not a system within the meaning of Section 366.02(2), Florida Statutes. Calpine contends that these are unimportant distinctions that could lead to absurd results.

In response to FPL's argument against the condition sought by Calpine, Calpine maintains that the condition, on a contingent basis, is proper and provides sufficient basis upon which the Commission may grant the requested determination of need. Calpine states that Tampa Electric v. Garcia never said that Duke/New Smyrna was not a proper applicant, rather, the Court stated that an applicant needs to demonstrate that a retail-serving utility (or utilities) has specific committed need for all of the electric power to be generated at the proposed plant. Calpine reiterates that it will make the required showings of commitment to serving specific utilities' needs.

As stated above, when disposing of a motion to dismiss, the tribunal must consider only the petition, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Based on this standard, staff believes Calpine's Petition alleges sufficient facts to support its statement that it is a proper applicant under Section 403.519, Florida Statutes. Staff believes that Calpine meets its pleading requirement as a "regulated electric utility". This qualifies Calpine as a proper applicant for a need determination. Staff further agrees with Calpine that this is consistent with Tampa Electric v. Garcia, which states 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." See Tampa Electric v. Garcia, 25 Fla. L. Weekly S294 at 13-14. Staff believes that this holding allows Calpine to apply for a need

determination, just that Calpine's output has to be committed to retail-serving utilities before a need determination is granted. Accepting the well-pleaded facts of Calpine's Petition as true, staff recommends that the Commission denies FPL's motion to dismiss on this ground.

B. Sufficiency of facts alleged to support utility specific need for the project based on criteria set out in Section 403.519, Florida Statutes

FPL asserts that the need determination criteria in Section 403.519, Florida Statutes, are utility specific. FPL argues that Calpine has not identified the utility into which it will sell or produce a contract with, under which costs and the impact on need can be determined.

FPL also states that the Commission has held the criteria of Section 403.519, Florida Statutes, to be utility specific. According to FPL, in Order No. 22341, the Commission established the following three principles: (1) the need determination criteria of Section 403.519, Florida Statutes, are utility specific; (2) "need" for the purposes of the Siting Act is the need for the purchasing electric utility; and (3) the Commission does not presume need or cost-effectiveness, instead, this is evaluated from the purchasing utility's perspective. In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 318-20 (FPSC 1989).

In addition to the Commission's interpretation, FPL states that the Supreme Court has also held that the criteria of Section 403.519, Florida Statutes, are utility specific. The Commission's interpretation of the Siting Act in Order Nos. 22341 and 24672 was appealed to the Florida Supreme Court. The Commission's interpretation was affirmed. FPL presents further support by quoting the Supreme Court in the Tampa Electric case: "[t]he projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need pursuant to section 403.519, Florida Statutes." 25 Fla. L. Weekly at S297.

FPL argues that the Commission's and the Supreme Court's prior determinations that the criteria of Section 403.519, Florida Statutes, are utility specific cannot be distinguished in this case. FPL alleges that Calpine's Petition disregards the utility specific nature of the criteria set out in Section 403.519, Florida Statutes. FPL maintains that the Commission could not make a need



determination without knowing the information set out in the criteria of Section 403.519, Florida Statutes. FPL requests the Petition to be dismissed since it does not allow the Commission to determine whether the utility specific need determination is met.

Although Calpine does not agree that the criteria of Section 403.519, Florida Statutes, are utility-specific, Calpine has stated that it will demonstrate utility-specific need and utility-specific cost-effectiveness. Calpine believes that FPL's arguments based on Order No. 22341 and the Court's Nassau Power decisions are irrelevant to Calpine's theory of the case. Calpine further asserts that FPL's argument that Calpine's Petition disregards the utility-specific criteria is misplaced. In fact, Calpine alleges that it is FPL who has disregarded numerous express statements in the Petition that will satisfy the utility-specific criteria.

Staff agrees with Calpine, in that the Nassau Power decisions differ with the current case. The difference is in the facts alleged by Calpine. The law regarding Section 403.519, Florida Statutes, stated in the Nassau Power decisions and reaffirmed in Tampa Electric still applies to Calpine. However, staff believes this case differs from Tampa Electric procedurally since Calpine has pled that it will have contracts for its Project's output. For this reason, staff believes that Calpine's petition is sufficient and should not be dismissed.

C. Sufficiency of the facts alleged to establish Calpine's Project as the most cost-effective alternative under Section 403.519, Florida Statutes

FPL cites to Order No. 22341, where the Commission stated that it was overruling previous decisions that presumed cost-effectiveness. In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294, 319 (Order 22341). Instead, according to FPL, capacity was to be evaluated from the purchasing utility's perspective. FPL states that the Court agreed with the Commission's new policy, stating that to continue with its prior practice of assuming cost-effectiveness would be an abrogation of the Commission's statutory responsibilities under the Siting Act. See Nassau Power Corp. v. Beard, 601 So.2d 1175.

FPL asserts that Calpine's Petition asks the Commission to presume that Calpine's output will be the most cost-effective alternative to any purchasing utility or they would not make the purchase. FPL contends that this goes against Order No. 22341, which was affirmed by Nassau Power Corp. v. Beard. FPL asserts

that the Commission cannot presume what Calpine asks it to presume. FPL maintains that Calpine needs to show a comparative analysis illustrating that a specific utility's or utilities' purchases are the most cost-effective alternative. FPL alleges that the failure to provide this information in Calpine's Petition constitutes failure to state a cause of action and is grounds for dismissal.

Calpine denies FPL's assertion that Calpine asked the Commission to presume cost-effectiveness. Calpine counters this claim by pointing out that it has pled specific, detailed, and quantified allegations of cost-effectiveness based on analyses using the power system economic model PROMOD IV. Calpine asserts that it has asked the Commission to allow it to go forward with the permitting process subject to the condition that before construction may commence on the Project, Calpine and the purchasing utilities must demonstrate that the contracts will satisfy those utilities' needs and cost-effectiveness. Calpine has assured staff that it will demonstrate its Project's commitment by the November 1, 2000, filing deadline set out in the Order Establishing Procedure.

Under the standard of review for a motion to dismiss, stated above, staff believes that Calpine's petition alleges sufficient allegations concerning cost-effectiveness to survive a motion to dismiss. Staff believes the data illustrating the average cost reduction in both the Petition and the Exhibits are sufficient. Therefore, staff recommends denial of FPL's motion to dismiss on this ground.

D. Whether the Petition complied with Rule 25-22.081, Florida Administrative Code.

Rule 25-22.081, Florida Administrative Code, also governs need determination proceedings. The Rule provides in pertinent part:

Petitions submitted to commence a proceeding to determine the need for a proposed electrical power plant...shall contain the following information:

- (1) A general description of the utility or utilities primarily affected...
- (2) A general description of the proposed electrical power plant...
- (3) A statement of the specific conditions, contingencies or other factors which indicate a

need for the proposed electrical power plant...If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

- (4) A summary discussion of the major available generating alternatives...
- (5) A discussion of viable nongenerating alternatives...
- (6) An evaluation of the adverse consequences which will result if the proposed electrical power plant is not added...
- (7) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a nonutility generator, the petition shall include a discussion of the potential for increases or decreases in the utility's cost of capital...

FPL believes that Calpine's Petition has failed to meet the prescribed mandatory pleading requirements for a petition to commence a need determination under Rule 25-22.081, Florida Administrative Code. FPL alleges that the Petition fails to meet the subsections (1), (3), (4), and (7) of Rule 25-22.081, Florida Administrative Code. FPL asserts that the failure the Petition to satisfy the mandatory requirements of Rule 25-22.081, Florida Administrative Code is grounds for dismissal.

Calpine contests FPL's argument that the Petition contains no descriptions of the utility or utilities primarily affected by the Petition. Calpine states that it is the only utility primarily affected at this time and the Petition includes all relevant allegations regarding Calpine. Calpine also restates that it and the utilities that contract to purchase its output will furnish all applicable information at the same time the contracts or other evidence of the Project's output commitment are submitted to the Commission. Calpine adds that FPL has not contracted with Calpine, thus is not primarily affected by either the Project or this proceeding.

Calpine takes issue with FPL's allegation that Calpine's petition omits a statement of the specific conditions and other factors indicating a need for the Project. Calpine maintains that it has presented, within its Petition and Exhibits, extensive information regarding and description of the factors that indicated that the Project is needed. Calpine also asserts that it has presented information regarding Peninsular Florida's net energy for load, number of customers, and load factors. Calpine alleges that FPL, itself, identified, but did not provide three models in a one-and-one-half page summary in the appendices to its Petition to Determine Need for Electrical Power Plant 1993-1996 (Appendices), FPSC Document No. 07446, July 25, 1989.

Calpine maintains, contrary to FPL's Motion, that its Petition contains a discussion of viable nongenerating alternatives in compliance with Rule 25-22.081(5), Florida Administrative Code. Furthermore, Calpine disagrees with FPL's statement that Rule 25-22.081(7), Florida Administrative Code, is applicable to the Project. Calpine asserts that since it is not a "non-utility generator," it is not required to discuss the cost of capital impacts required by the Rule.

As stated previously, Calpine has made assurances to staff that it will provide information regarding contracts with Florida retail utilities for its Project's output by November 1, 2000. At this time, Calpine will meet the requirements of Rule 25-22.081, Florida Administrative Code and cure the present defect. Second, Calpine's Petition alleged sufficient facts to demonstrate that a need exists for new capacity in Florida. Third, Calpine makes sufficient pleadings regarding the viable nongenerating alternatives--Calpine discusses which viable nongenerating alternatives were examined and finds there are no existing viable nongenerating alternatives to the Osprey Energy Center.

Lastly, FPL's argument that the Petition must be dismissed because it fails to discuss the economic impacts required by subsection (7) of the Rule is misplaced. By its terms, subsection (7) applies only to investor-owned utilities which propose to contract with non-utility generators. The Project is not the result of a purchased power agreement of this type and thus the rule does not apply. If Calpine contracts with an investor-owned utility, as it committed to do, subsection (7) will be satisfied.

E. Whether the Petition complied with Rule 25-22.082, Florida Administrative Code.

According to FPL, under Rule 25-22.082(2), Florida Administrative Code, before filing a need determination petition for an electrical power plant pursuant to Section 403.519, Florida Statutes, an electric utility is required to "evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals." FPL states that although Calpine alleges it is an "electric utility," a fact that FPL disputes, Calpine does not fulfill the requirement under Rule 25-22.082, Florida Administrative Code. FPL asserts that whether it is because Calpine is not an "electric utility" or because Calpine has failed to comply with Rule 25-22.082, Florida Administrative Code, Calpine's Petition must be dismissed.

FPL states that Calpine filed a petition seeking a Determination that Rule 25-22.082(2), Florida Administrative Code, is Not Applicable to it, or, in the Alternative, a Waiver of Rule 25-22.082(2), Florida Administrative Code. FPL believes that Calpine should have filed and resolved this matter before pursuing a determination of need. FPL believes that neither the Commission nor the intervenors should have to wait for this petition to be addressed. Instead, FPL believes Calpine's Petition should be dismissed.

Calpine believes FPL's assertions regarding Calpine's alleged noncompliance with the "Bidding Rule" to be misplaced and unsupported. Calpine asserts that it has gone through the correct procedure for a determination regarding this Rule. Calpine alleges that FPL's assertion is misplaced because the purpose of the Rule is to protect captive ratepayers. Calpine states that it is a wholesale contract plant which cannot force retail-serving utilities or their ratepayers to buy the Project's power. Calpine explains that it is not attempting to circumvent the Bidding Rule, the requirements of the Bidding Rule just do not apply in this situation. Moreover, Calpine states that the Commission has previously held that the alleged failure of a merchant plant developer to comply with the Bidding Rule or to plead that it is not required to do so does not warrant dismissal. In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C., 99 FPSC 12:219.

Staff has recommended in Issue 3 of this recommendation that Rule 25-22.082(2), Florida Administrative Code, does not apply to Calpine. Therefore, staff believes that the motion to dismiss on

this ground is moot and should be denied. Staff notes that the Okeechobee case, cited by Calpine, does not apply to this case, since the Okeechobee need determination was a pure merchant case.

F. Whether the Petition is consistent with the purpose of the Siting Act.

According to FPL, the Siting Act directs a power plant's environmental impact to be weighed against a utility's specific need for a power plant. FPL states that the theory of the Siting Act is, "if you don't need it, then you don't build it." FPL asserts that the Petition's theory is inconsistent with the Siting Act since Calpine has no obligation to serve and has no present contracts to sell its output to utilities. FPL argues that if the Petition were granted, the intent of the Legislature would be overlooked. FPL asserts that the Commission is the gatekeeper under the Siting Act. FPL wants Calpine to have to follow the law and first secure contracts for its output before proceeding with a need determination. FPL states that the Petition should be dismissed as being inconsistent with the Siting Act.

Calpine asserts that FPL's argument is misplaced. Calpine maintains that its theory is that it will demonstrate the utility-specific commitments and cost-effectiveness required by Tampa Electric v. Garcia before the construction of the Project can begin. Calpine believes the Commission has the authority to exercise discretion on this timing issue in the public interest. Calpine disagrees with FPL that this allows Calpine to hold a "special status." Calpine, instead, sees this as an innovative opportunity to get a needed power plant into service in Florida earlier than FPL would like.

Staff agrees with Calpine, in that the motion to dismiss should be denied on this argument. Calpine has stated that it will demonstrate the utility-specific commitments and cost-effectiveness required by Tampa Electric v. Garcia by November 1, 2000, which is before the need determination hearing. Staff believes this is consistent with the Siting Act, which as interpreted by the Court in Tampa Electric v. Garcia, requires utility-specific need prior to the granting of a need determination. Therefore, staff recommends that the Commission deny FPL's motion to dismiss on this ground.

G. Whether the Project will result in unnecessary and uneconomic duplication of facilities.

According to FPL, the Commission retains jurisdiction over the planning, development and maintenance of the electric grid to assure adequate and reliable source of energy for Florida and to avoid the uneconomic duplication of facilities. Section 366.04(5), Florida Statutes. FPL argues that if the Commission were to allow this need determination to proceed it would be allowing the uneconomic duplication of services. FPL points to Tables 7 and 8 in the Petition Exhibit which show that reserve margin criteria will be met without the Calpine plant being built. FPL concludes from this information that there is no need for the proposed plant since utilities with their obligation to serve have already planned to meet their needs. FPL alleges that to allow Calpine to proceed would necessarily result in uneconomic duplication of facilities. FPL, therefore, states that the Petition should be dismissed.

The disagreement on whether the Project is both economic/non-economic and non-duplicative/duplicative is a question of fact, according to Calpine. Calpine asserts that its Petition establishes, as a matter of pleading "fact" that must be presumed true for purposes of considering this Motion, that the Project if added to Florida's power system, will provide a cost savings of more than \$800 million over the first ten years of the Project's operation.

Staff agrees with Calpine, in that its well-pleaded allegations, taken as true, satisfy the standard to survive a motion to dismiss. It is incumbent upon Calpine, as the petitioner to prove these allegations with record evidence at hearing.

H. Whether prohibiting Calpine from applying directly for a determination of need would violate the dormant Commerce Clause of the United States Constitution

According to Calpine, the Commerce Clause of the United States Constitution prohibits the Commission from interpreting Florida law to prevent Calpine from applying directly for a need determination. However, the Supreme Court in Tampa Electric v. Garcia dismissed this argument, stating that power-plant siting and need determinations are areas that Congress has expressly left to the states. See Tampa Electric v. Garcia, 25 Fla. L. Weekly S294 at 18. Therefore, we recommend that the Commission reject Calpine's Commerce Clause argument.

I. Whether Federal law preempts the state from requiring Calpine to obtain a contract with state regulatory electric companies in order to build the Osprey Energy Center.

Calpine asserts that interpreting Florida law as limiting applicants for a need determination is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry. However, the Supreme Court in Tampa Electric v. Garcia dismissed this argument, stating that power-plant siting and need determinations are areas that Congress has expressly left to the states. See Tampa Electric v. Garcia, 25 Fla. L. Weekly S294 at 18. Therefore, we recommend that the Commission reject Calpine's federal preemption argument.



**ISSUE 5:** Should the Commission grant Florida Power Corporation's motion to dismiss Calpine Construction Finance Company L.P.'s petition for determination of need for an electrical power plant?

**RECOMMENDATION:** No. Calpine's petition states a cause of action upon which relief can be granted because it alleges all of the required elements.

**STAFF ANALYSIS:**

I. Background

A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. Kislak v. Kriedian, 95 So.2d 510 (Fla. 1957).

On July 10, 2000, Florida Power Corporation (FPC) filed a Suggestion of Lack of Jurisdiction and Motion to Dismiss in the Calpine Need Determination docket. Specifically, FPC alleges the following:

- Florida Public Service Commission lacks the authority to grant the requested determination of need for the Osprey Project
- Allowing Calpine to proceed as requested gives Calpine an undue competitive advantage
- Calpine's potential three-to-five year duration of contracts for the Project's output is insufficient to satisfy the requirements of Tampa Electric v. Garcia
- Calpine has not demonstrated that its Project is the most cost-effective means of meeting Florida's power need since it has petitioned to bypass the bid rule and has no load to serve

Calpine requests the Commission deny FPC's motion to dismiss Calpine's Petition. Calpine asserts that the issue of dismissal turns on two questions:

1. Does the Commission have the legal ability to grant the Petition as requested by Calpine in the Petition?
2. Should the Commission grant the Petition subject to the condition specified therein if indeed Calpine does not present the requisite evidence of utility-specific commitment and cost-effectiveness by the scheduled October hearing?

Calpine submits that both of these questions should be answered in the affirmative, based on existing applicable precedent and law.

Calpine believes that the Commission should deny FPC's motion because (1) it is in the public interest to proceed with the need determination and it is in the best interest of Florida's electric customers to do so; (2) each of FPC's arguments is flawed, misplaced, or based on mischaracterizations or misrepresentations of Calpine's Petition; and (3) to grant the motion would violate the Commerce Clause of the United States Constitution and impermissibly conflict with the express purposes of the Energy Policy Act of 1992.

## II. Analysis

Staff has summarized the parties' positions and staff's recommendation on FPC's motion in detail below:

### A. Whether the Commission lacks jurisdiction to proceed with the Calpine Petition for a determination of need.

FPC suggests that the Commission lacks jurisdiction to proceed with the Calpine Petition for a determination of need. FPC contends that under Tampa Electric Co. v. Garcia, et al., Supreme Court Case No. SC95444-95446 (April 20, 2000) ("Duke"), Calpine has no proper standing to file a need determination and the Commission has no statutory authority to entertain such a petition. Therefore, according to FPC, Calpine's Petition should be dismissed and Docket 000442-EI should be closed.

FPC makes several arguments in support of its motion. First, in Duke, the Florida Supreme Court held that wholesale power plants which have not secured contractual commitments to serve the identified needs of Florida retail load-serving utilities are not proper applicants under Section 403.519, Florida Statutes. FPC

concludes that to grant a need determination for a company which is not contractually committed exceeds the Public Service Commission's authority. FPC also states that in previous decisions the Florida Supreme Court found that only retail utilities, or independent power producers (IPPs) that are already fully committed contractually to meeting the identified needs of retail utilities are proper applicants for need determinations.

Calpine states that FPC's arguments that Calpine's Petition is premature and its request is "legally improper and procedurally bizarre" are misplaced because Calpine's request is compliant with Commission precedent and the utility-specific requirements announced in Tampa Electric v. Garcia. Calpine reiterates that it filed its Petition prior to securing contracts for its output to enable the Project to proceed on schedule. Calpine further asserts that the Commission does have legal authority to grant the requested need determination and should do so in the public interest.

Calpine maintains that the Commission has explained its authority to impose conditions on affirmative determinations of need in In re: Petition of Florida Power & Light Company to Determine Need for Electrical Power Plant - Martin Expansion Project, 90 FPSC 6:268 (Commission did not impose any conditions in this case.). Calpine cites several instances where the Commission has incorporated conditions into requested determinations of need. See In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 92 FPSC 3:19, 21 (Commission approved the plant's construction on the condition that TECO received a grant from the Department of Energy to help defray the costs of the Project.); see also, In re: Petition of Seminole Electric Cooperative, Inc., TECO Power Services Corporation and Tampa Electric Company for a Determination of Need for Proposed Electric Power Plant, 89 FPSC 12:262, 272 (Commission granted need determination with the condition that the terms of the contracts were approved by FERC, as specified in the contracts; that TECO had to construct a transmission line at a cost less than or equal to the cost shown during the proceeding; and that TECO had to construct a natural gas lateral at a cost no greater than shown in the record.). Calpine argues that the Commission should not impose a different standard on Calpine; instead, the Commission should allow Calpine to proceed and deny FPC's motion.

Calpine believes that the Commission should grant its need determination request so that the Project's output can be made available for the benefit of Florida electric customers. Calpine

argues that if FPC's motion to dismiss is granted, the delay would cost the State the substantial benefits of the Project--potential power cost savings in the range of \$120 million for each year of delay, according to Calpine Exhibits. Calpine also believes its Project would provide benefits in the new regime contemplated under a Florida Regional Transmission Organization, in that it could help alleviate price spikes for ancillary services.

Calpine presents a comparative schedule of upcoming events for its current schedule and one reflecting the pending motion to dismiss. The schedule would be thrown off approximately one year, according to Calpine, if the motion to dismiss were granted. Calpine believes that the benefits that would be lost in this year are reason for the Commission to deny FPC's motion.

Calpine asserts that the Commission's overriding mandate to promote the public interest requires the denial of FPC's motion. Calpine notes that Section 366.01, Florida Statutes, declares Chapter 366 to be liberally construed in the public interest. In addition, Calpine notes that Section 366.81, Florida Statutes, declares that the Florida Energy Efficiency and Conservation Act, which includes Section 403.519, Florida Statutes, is to be liberally construed to meet efficiency, cost-effectiveness and conservation concerns. Calpine states that this language should lead the Commission to deny FPC's motion and go forward with the need determination based on significant fuel saving benefits that the Project will provide.

Staff disagrees with FPC that the Commission lacks jurisdiction to entertain Calpine's Petition under the Supreme Court's interpretation of the current law. Staff believes that Calpine's pleading is consistent with Tampa Electric v. Garcia since it has pled that it will contractually commit its Project's output. Staff interprets Tampa Electric v. Garcia to require a petitioner for a need determination to secure contractual commitments to serve Florida retail load-serving utilities. Staff recommends, under the standard for a motion to dismiss, that the motion to dismiss is denied on this ground. Calpine has pled that it will secure the necessary contractual commitments. Calpine assures staff that these commitments will be in hand by November 1, 2000. Taking these well-pleaded allegations as true, the motion to dismiss should be denied.

B. Whether Allowing Calpine to Proceed as Requested Would Give Calpine an Undue Competitive Advantage.

FPC alleges that Calpine is not differently situated from any other merchant developer in Florida. FPC reiterates the Duke decision, which stated that "[t]he projected need of unspecified utilities throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need pursuant to Section 403.519, Florida Statutes." (Duke at 17). Instead, FPC states that a petitioner must be able to allege a sufficient basis for relief at the time that it files its petition, or else the petition should be dismissed. See e.g., Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County, 492 So.2d 686, 688 (Fla. 3rd DCA, 1986), and Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607, 610 (Fla. 4th DCA, 1975). FPC contends that Calpine should not be given special permission or granted its extraordinary request to file a case until it has a legally sufficient case to file.

FPC believes that Calpine's reliance on previous Commission decisions is misplaced. FPC states that the cases referred to in Calpine's Petition refer to petitioners which demonstrated a utility-specific need at the time of the hearing. Further, FPC distinguishes Calpine from these situations since Calpine cannot allege that it has entered into a purchase agreement.

Calpine asserts that FPC's argument is misplaced. Calpine does not believe that allowing Calpine to proceed with its request would give it a competitive advantage over independent power projects. Calpine asserts there is no legal impediment to other potential suppliers presenting a similar petition to the Commission, therefore, Calpine would not receive an unfair advantage.

Staff believes that Calpine has alleged a sufficient basis for relief in its Petition for it to survive a motion to dismiss on this basis.

C. Whether the Potential Three-to-Five-Year Duration of Contracts for the Project's Output is Insufficient to Satisfy the Requirements of Tampa Electric v. Garcia.

FPC alleges that Calpine does not propose to enter into contracts that would satisfy controlling legal requirements. Instead, FPC states that Calpine proposes to enter into three-five year contracts, leaving approximately 80% of the plant's life-time capacity uncommitted, thereby violating Tampa Electric v. Garcia, according to FPC, which specifically rejected nominal compliance with the need standard.

In response to FPC's allegation that Calpine proposes to enter into "ill-defined three-to-five-year power purchase agreements, which would leave more than 80 percent of the expected life-time capacity of the proposed plant uncommitted," Calpine makes three points. First, Calpine states that these types of contracts seem to be desirable to FPC and also to FPL. Calpine cites a recent Commission proceeding where FPC requested and obtained a waiver of Rule 25-17.0832(4)(e)(7)(m), Florida Administrative Code, allowing it to limit the standard cogeneration contract to five years, instead of the rule required ten years. In Re: Petition of Florida Power Corporation for Approval of Standard Offer Contract Based on a 2003 Combined Cycle Avoided Unit and Accompanying Rate Schedule, Schedule CG-2, Pursuant to Section 366.051, F.S., and Rules 25-22.036(4) and 25-17.0832(4), F.A.C., 00 FPSC 3:206. In addition, Calpine wants the Commission to take note that FPC requested and obtained identical relief from the Commission in the form of a variance from the requirements of the same Rule. In Re: Petition by Florida Power & Light Company for Approval of a Standard Offer Contract and Revised COG-2 Tariff, 99 FPSC 9:23, 31.

Next, Calpine states that it is discussing options for appropriate renewal terms with potential retail-serving utility purchasers. And lastly, Calpine asserts that the question as to what "fully committed to use by Florida customers who purchase electrical power at retail rates" (Tampa Electric v. Garcia, 25 Fla. L. Weekly at S297) means is ultimately a question for the Commission.

Tampa Electric v. Garcia did not set a threshold for what it meant be "fully committed," therefore, staff believes it is up to the Commission at hearing to decide whether Calpine's contracts meet the controlling legal standard.

- D. Whether Calpine has demonstrated that the Project is the most cost-effective means of meeting Florida's power need, as required by Section 403.519, Florida Statutes.

Finally, FPC states that by petitioning to by-pass the bid rule and since Calpine currently has no load to serve, Calpine is in no position to demonstrate that its Project is the most cost-effective means of meeting Florida's power need. Based on the foregoing reasons, FPC has requested the Commission to enter an Order dismissing Calpine's need Petition and to close the docket.

Staff disagrees with FPC and believes Calpine has sufficiently pled cost-effectiveness in its Petition. Therefore, staff

recommends that the Commission deny FPC's motion to dismiss on this ground.

- E. Whether prohibiting Calpine from applying directly for a determination of need would violate the dormant Commerce Clause of the United States Constitution, and whether federal law preempts the state from requiring Calpine to obtain a contract with state regulated electric companies in order to build the Osprey Energy Center.

Calpine asserts that the Commerce Clause of the United States Constitution prohibits the Commission from interpreting Florida law to prevent Calpine from applying directly for a need determination. In addition, Calpine maintains that interpreting Florida law as limiting applicants for a need determination in this way is inconsistent with the goals and policies of federal law, specifically the Energy Policy Act of 1992.

However, the Supreme Court in Tampa Electric v. Garcia dismissed this argument, stating that power-plant siting and need determinations are areas that Congress has expressly left to the states. See Tampa Electric v. Garcia, 25 Fla. L. Weekly S294 at 18. Therefore, staff recommends that the Commission rejects Calpine's Commerce Clause argument.

**ISSUE 6:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open for the hearing.

**STAFF ANALYSIS:** This docket should remain open for the hearing.