

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: JANUARY 4, 2001

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

FROM: DIVISION OF LEGAL SERVICES (ISAAC, ELIAS) *ENS*
DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HARLOW, BOHRMANN, BREMAN, HAFF) *Tb WTM*
DIVISION OF ECONOMIC REGULATION (LESTER, STALLCUP) *FL*
DIVISION OF COMPETITIVE SERVICES (MAKIN) *TDJ*

RE: DOCKET NO. 001748-EC - PETITION FOR DETERMINATION OF NEED FOR THE OSPREY ENERGY CENTER IN POLK COUNTY BY SEMINOLE ELECTRIC COOPERATIVE AND CALPINE CONSTRUCTION FINANCE COMPANY, L.P.

AGENDA: 01/16/01 - REGULAR AGENDA - PROPOSED AGENCY ACTION (ISSUE 2 ONLY) - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: 03/08/01 - PETITION DEEMED APPROVED IF NOT GRANTED OR DENIED WITHIN 90 DAYS OF RECEIPT

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\001748.RCM

CASE BACKGROUND

On December 4, 2000, Seminole Electric Cooperative, Inc. (Seminole) and Calpine Construction Finance Company, L.P. (Calpine), filed a Joint Petition for Determination of Need for an Electrical Power Plant. Seminole and Calpine propose to construct a 529 megawatt (MW) natural gas-fired, combined cycle generating plant in Polk County, Florida, expected to commence commercial operation in the second quarter of 2003. On December 7, 2000, 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 (the Bidding Rule). Rule 25-22.082, Florida Administrative Code, Selection of Generation Capacity,

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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. Seminole is in agreement with Calpine's petition concerning Rule 25-22.082(2), Florida Administrative Code. Notice of the waiver request was published in the Florida Administrative Weekly (FAW) on December 29, 2000. No parties have filed responses to this petition. An administrative hearing on Seminole and Calpine's joint petition for need is set for February 12 and 13, 2001.

This recommendation addresses Calpine's petition concerning Rule 25-22.082(2), Florida Administrative Code. The Commission has jurisdiction over this matter under Sections 120.542 and 403.519, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Calpine Construction Finance Company L.P.'s (Calpine's) request for a determination that Rule 25-22.082(2), Florida Administrative Code (the Bidding Rule), does not apply to Calpine or the Osprey Energy Center?

RECOMMENDATION: Yes. The Commission should grant Calpine's petition for a Determination that Rule 25-22.082(2), Florida Administrative Code, Does Not Apply to Calpine or the Osprey Energy Center. The Bidding Rule is not applicable to Seminole Electric Cooperative, Inc., which is contracting to purchase the output of the Project. (ISAAC)

STAFF ANALYSIS:

I. Calpine's Arguments

Calpine alleges that it is developing the Osprey Energy Center as a wholesale contract power plant. Calpine further alleges that it has committed the Project's output, via the Memorandum of Understanding (MOU), to Seminole to serve the needs of Seminole's member cooperative utility.

Calpine states two reasons that the proposed Project is not subject to the Bidding Rule. First, Calpine states that it is a wholesale-only utility, therefore, the Project will not be a rate-based power plant where captive electric customers could be required to pay for the Project's costs through regulated rates. Secondly, Calpine contends that the Project's output is committed to Seminole pursuant to the MOU, and Seminole, an electric cooperative, is not subject to the Bidding Rule.

A. Wholesale-Only Utility

Calpine maintains that the Bidding Rule was not intended to apply to a competitive wholesale utility like Calpine. Calpine states that Calpine nor the Project has a statutory obligation to directly serve retail customers nor any corresponding ability to bind such captive customers to pay for the Project's costs. Instead, Calpine argues that retail-serving utilities will only pay for the capacity and energy purchased from Calpine, and they will only buy power when the purchase represents the most cost-effective alternative available to serve an identified need. According to Calpine, the Project promotes the fundamental purpose of the Bidding Rule by making an additional, cost-effective power supply option available to retail-serving utilities.

B. Electric Cooperatives

Calpine alleges that the Bidding Rule does not apply to it 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. Calpine states that by its express terms, the Bidding Rule is inapplicable to Seminole, since the Rule applies only to investor-owned utilities that propose power plants subject to Section 403.519, Florida Statutes.

II. Rule Background and Analysis

The Bidding Rule requires IOUs to "evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals (RFP)." Rule 25-22.082, Florida Administrative Code. In staff's recommendation for the Bidding Rule, staff recommended that each electric utility, including municipal and cooperative electric utilities, subject to the provisions of the Power Plant Siting Act should be required to use bidding as a means of determining and selecting the most cost-effective generating alternative. However, by Order No. PSC-93-1846-FOF-EU, issued December 29, 1993, municipal and cooperative

electric utilities were not required to comply with the Bidding Rule requirements of Rule 25-22.082(2), Florida Administrative Code.

Since the Bidding Rule was adopted, the Commission has never required cooperative or municipal utilities to comply with its requirements. See, for example, Order No. PSC-97-0659-FOF-EM, issued June 9, 1997, Order No. PSC-98-1301-FOF-EM, issued October 7, 1998, and Order No. PSC-99-0931-FOF-EM, issued May 10, 1999. Calpine has alleged that Seminole has contracted to purchase the facility's output. Therefore, staff recommends that the Commission grant Calpine's petition for a determination that the Bidding Rule does not apply to Calpine or the Osprey Project.

It is important to note that in this analysis, staff does not reach the question of whether Calpine, as a wholesale contract plant, is exempt from the Bidding Rule. Staff's recommendation is based on the allegation that Seminole is a cooperative utility which has contracted to purchase the output of the facility. This application should be processed to consider Seminole's need, rather than Calpine's need for the proposed electrical power plant. In considering this need determination, the Commission should take into account Seminole's need for electric reliability and integrity, Seminole's need for adequate electricity at a reasonable cost, the conservation measures taken by or reasonably available to Seminole, and whether the proposed plant is the most cost-effective alternative for Seminole. Therefore, staff does not believe it is necessary to reach the question of whether Calpine is subject to the Bidding Rule.

ISSUE 2: Should the Commission grant Calpine's alternative request for a waiver of Rule 25-22.082(2), Florida Administrative Code?

RECOMMENDATION: If the Commission approves staff's recommendation in Issue 1, this issue is moot. As discussed in Issue 1, given that Calpine and Seminole are joint applicants for the petition, staff believes the Bidding Rule is not applicable, given Seminole's status as a cooperative utility. However, if the Commission denies staff's recommendation for Issue 1, staff does not believe Calpine has met the standards for approval of the rule waiver request. (ISAAC)

STAFF ANALYSIS:

I. Petition for Rule Waiver

As discussed in Issue 1, given that Calpine and Seminole are joint applicants for the petition, staff believes the Bidding Rule is not applicable, given Seminole's status as a cooperative utility. However, if the Commission denies staff's recommendation for Issue 1, staff does not believe Calpine has met the standards for approval of the rule waiver request.

A. Standard for Approval

Section 120.542, Florida Statutes (1999), mandates threshold proofs and notice provisions for variances and waivers from agency rules. Subsection (2) of the statute states:

Variances and 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 the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when 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.

Thus, under the statute, a person requesting a variance or waiver must affirmatively demonstrate that the purpose of the underlying

statute has been met. In addition, the petitioner must demonstrate that it will either suffer "substantial hardship" or that "principles of fairness" will be violated. If the allegations relate to fairness, an additional proof of uniqueness to the petitioner is required by the statute.

Rule 25-22.082, Florida Administrative Code, Selection of Generation Capacity, was adopted by the Commission in 1994 in lieu of a more restrictive Commission scored bidding process. Rule 25-22.082, Florida Administrative Code, implements Sections 366.051 and 403.519, Florida Statutes. The purpose of the Rule is to afford investor-owned electric utilities the opportunity 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, and statutorily time-constrained, need determination. Municipal electric utilities and rural electric cooperatives are not covered by the rule. Further, investor-owned utilities may be excused from the requirements of the rule if they demonstrate that the waiver would likely result in a lower-cost supply of electricity, increase the reliable supply of electricity, or is otherwise in the public interest.

B. Calpine's Petition for Waiver

Calpine has requested a permanent waiver of Rule 25-22.082(2), Florida Administrative Code, should the Commission determine that the Rule is applicable to the Osprey Energy Center in Issue 1. In addressing the public interest aspects of its request for rule waiver, Calpine has alleged that 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. Calpine asserts that the application of the rule in this instance creates a substantial hardship for Calpine, Seminole, Seminole's Member utility systems, and those systems' member-consumers. Calpine further argues that the purpose of the underlying statute will be achieved if Calpine's petition is granted.

1. Purpose of the Underlying Statute

In its petition for waiver, Calpine identifies the underlying statute implemented by the rule as Section 403.519, Florida Statutes. According to Calpine, Rule 25-22.082(2), Florida Administrative Code, promotes the Commission's consideration, pursuant to Section 403.519, Florida Statutes, of whether a proposed plant to be built and included in a retail-serving investor-owned utility's rate-base is the most cost-effective

alternative. Calpine alleges that the purpose of 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.

See In re: Proposed Amendment to Rule 25-22.081, F.A.C., Contents of Petition; and Proposed New Rule 25-22.082, F.A.C., Selection of Generation Capacity, Docket No. 921288-EU, Staff Recommendation at 3,9,10 (November 22, 1993). Calpine states that Commission orders applying and interpreting the Rule support this proposition. In re: Petition by Florida Power Corporation for Waiver of Rule 25-22.082, F.A.C., Selection of Generating Capacity, 99 FPSC 2:92, 96.

Calpine maintains that in this 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. Furthermore, Seminole has engaged in its own RFP process, in order to ensure that its agreement to purchase the Project's output represents the most cost-effective alternative to meet the needs of its retail customers. Calpine states that Seminole has evaluated and determined that Osprey Project represents the best alternative for meeting the needs of Seminole, its Member systems, and those systems' member-consumers. This evaluation will be presented at the need determination hearing in this docket. In addition, Calpine maintains that the Joint Petition for Determination of Need demonstrates that the Osprey Energy Project will increase the reliable and cost-effective supply of electricity to retail-serving utilities that purchase the Project's output.

The underlying purpose of Section 403.519, Florida Statutes, is to ensure that need exists for a power plant. The Commission is mandated to take into account electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. Staff believes that Calpine has adequately demonstrated that the purposes of the underlying statute will be achieved by granting the requested waiver.

2. Substantial Hardship

Calpine states that it has completed the necessary environmental evaluations and has filed the Site Certification Application for the Project, and the sufficiency review of that application is near completion. In addition, Calpine states that it and Seminole have entered into the MOU and the parties anticipate executing the definitive PPA by December 19, 2000. Calpine contends that if it 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. Furthermore, such delay would cause substantial hardship to Seminole, its Member utility systems, and those systems' member-consumers by delaying the benefits of the Project to Seminole and those served by Seminole. Calpine alleges that the substantial reliability and cost-savings benefits of the Project would likely be lost to Seminole and those served by Seminole for the summer of 2003 and perhaps the winter of 2003-2004 as well.

An allegation of substantial hardship requires an affirmative demonstration by the petitioner of economic, technological, or legal hardship. By Order No. PSC-99-1091-PAA-EI, issued May 28, 1999, the Commission denied Gulf Power's (Gulf's) petition for a rule waiver. In that case, Gulf requested a waiver of the standard offer requirements set forth in Rule 25-17.0832(4), Florida Administrative Code. However, the Commission stated that a delay in construction did not amount to a substantial hardship. The Commission pointed out that Gulf was aware of the Commission's rules and of its own planning processes. The Commission stated that the hardship was self-inflicted, and therefore, did not constitute substantial hardship under the waiver standard.

Based on this precedent, staff does not believe Calpine has satisfied the criteria set forth in Section 120.542(2), Florida Statutes, for a waiver of Rule 25-22.082(2), Florida Administrative Code. Therefore, staff recommends the Commission deny Calpine's waiver request.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, this docket is scheduled for hearing. Staff is recommending that Issue 2 is moot if staff's recommendation for Issue 1 is approved. However, if the Commission votes on Issue 2, the proposed agency action will become final upon issuance of a consummating order if no person whose substantial interests are affected files a timely protest.

STAFF ANALYSIS: No, this docket is scheduled for hearing. Staff is recommending that Issue 2 is moot if staff's recommendation for Issue 1 is approved. However, if the Commission votes on Issue 2, the proposed agency action will become final upon issuance of a consummating order if no person whose substantial interests are affected files a timely protest.