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March 24, 2000

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: In re: Petition for Determination of Need for an Electrical Power Plant in Lake  
County by Panda Leesburg Power Partners, L.P.  
Docket No. 000288-EU

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and 15 copies of each of the following:

- 1. Florida Power Corporation's Petition for Leave to Intervene; and 03764-00
- 2. Florida Power Corporation's Motion to Dismiss the Petition. 03765-00

We request you acknowledge receipt and filing of the above by stamping the additional copy of this letter and returning it to me in the self-addressed, stamped envelope provided.

If you or your Staff have any questions regarding this filing, please contact me at (727) 821-7000.

Very truly yours,

*Gary L. Sasso*  
Gary L. Sasso ja

Enclosure

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RECEIVED & FILED  
*[Signature]*  
FPSC BUREAU OF RECORDS

*June 3/29/00*

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.

TAMPA ORLANDO PENSACOLA TALLAHASSEE WEST PALM BEACH ST. PETERSBURG MIAMI

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination	)	
of Need for an Electrical Power	)	DOCKET NO. 000288-EU
Plant in Lake County by Panda	)	
Leesburg Power Partners, L.P.	)	Submitted for filing:
	)	March 27, 2000
_____	)	

**FLORIDA POWER CORPORATION'S  
PETITION FOR LEAVE TO INTERVENE**

**I. Introduction**

Pursuant to Fla. Admin. Code Rule 25-22.039, Florida Power Corporation ("FPC") petitions the Commission for leave to intervene as a full party respondent in this proceeding. As grounds for this request, FPC states the following:

**II. Intervenor Information**

1. The name and address of the affected agency are:

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

2. The name and address of the petitioner are:

Florida Power Corporation  
 P.O. Box 14042  
 One Progress Plaza, Suite 1500  
 St. Petersburg, FL 33733

3. All pleadings, motions, orders, and other documents directed to the petitioner are

to be served on:

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### **III. Substantial Interests**

4. The question whether the Commission has statutory authority to grant a need determination for a "merchant plant" is currently pending before the Florida Supreme Court in the case involving Duke Energy New Smyrna Beach Power Company's petition for a

determination of need. The Court may not render a decision on this important question prior to the final hearing date in this docket.

5. If FPC prevails in the pending appeal, the Petition for Determination of Need filed by Panda Leesburg Power Partners, L.P. (“Panda Leesburg”) must be rejected, and Panda Leesburg will not be permitted to obtain a determination of need for its proposed plant (the “Project”) unless it is able to demonstrate at the outset that the plant will in fact be needed by a retail utility, such as FPC, as evidenced by a final power purchase agreement. In the current proceeding, however, Panda proposes to serve “Florida’s need” for electric power supply, without demonstrating any statutory or contractual commitment to do so. (Petition p. 2).

6. Under controlling Florida Supreme Court authority, an independent power producer like Panda Leesburg would have to enter into a contract with a utility like FPC in order to prove that some retail utility actually has a need for additional capacity. Granting Panda Leesburg’s Petition would fundamentally alter the role of public utilities under the existing regulatory scheme and would thus impair FPC’s substantial legal interests as a regulated retail utility. To summarize the law on this matter, this Commission does not have authority under existing law to approve Panda Leesburg’s request for a determination of need. Panda Leesburg is not a regulated retail load-serving utility, it has not recited a “utility and unit specific” need, and it cannot identify any entity that will “ultimately consume the power” that it proposes to offer. Nassau Power Corp. v. Beard, 601 So. 2d 1175, 1178 n.9 (Fla. 1992); Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994). Absent these prerequisites a need determination would be both inappropriate and illegal.

7. Panda Leesburg, however, presumes that the law has been changed and that the Commission may approve its petition based on the Duke precedent. FPC plainly has a stake in

the regulatory regime that exists apart from this Commission's decision in the Duke case, and the Florida Supreme Court may well sustain FPC's position on appeal in that case. Because the Court's decision will not likely be issued prior to the hearing in this docket, FPC should be given leave to preserve its position in the event the Court rules in FPC's favor on appeal. Otherwise, the stakeholders in this controversy would be confronted with the absurd situation that the Commission might grant a determination of need that is contrary to law, and leave no one with standing to challenge that decision.

8. Further, the Petition and Exhibits make clear that Panda Leesburg proposes to build the Project to meet FPC's power resource needs. Panda Leesburg alleges that FPC (together with Florida Power & Light and TECO) have recently agreed to achieve a planned twenty percent reserve margin by the summer of 2004 and that the Project will contribute to meeting the needs of Peninsular Florida utilities, including, by obvious inference, FPC. (Need Exh., p. 1). In fact, Petitioner alleges that its primary market will consist of Peninsular Florida utilities. (Id., p. 6). As the second largest investor-owned utility in the State, FPC serves approximately twenty percent of the load in Peninsular Florida. Despite its professed interest in meeting FPC's needs, Panda Leesburg proposes to operate as a "merchant" plant. (Petition, ¶ 21). And the fact is, FPC does not need, and cannot rely upon, a "merchant" plant to meet its power resource needs.

9. Panda Leesburg further alleges that its project will affirmatively displace production by various existing facilities in Peninsular Florida, including older steam generating units fired by heavy fuel oil and natural gas, combined cycle resources fired by natural gas, and peaking resources fired by natural gas and fuel oil. (Id., p. 9). FPC owns and operates such units and will continue to do so. Panda Leesburg proposes to affect directly FPC's operation and

dispatch of these generating units.

10. In its Petition and Exhibits, Panda Leesburg characterizes proposed, future capacity additions by FPC and other Florida utilities that are in the “early planning stages” (where neither construction nor air quality permits have been approved, or no petition for determination of need has been submitted “prior to the Project’s power plant siting application”) as “Uncommitted” resources. (Petition, p. 9 n. 3). In a State where capacity additions are legally limited to those that are “needed,” it is apparent that Panda Leesburg proposes to beat out FPC’s proposed capacity additions that are currently in the “early planning stages,” thus jeopardizing FPC’s ability to add committed power resources to its own system. This will, in turn, compromise FPC’s ability to provide reliable service to its customers.

11. Alternatively, taking into account the fact that individual utilities like FPC are unable to count toward their reserve margins power plants that are not under contract, Panda Leesburg proposes to build redundant capacity in Florida, leading to the uneconomic duplication of resources.

12. While characterizing retail-utility proposed units as “Uncommitted” resources, Panda Leesburg does not hesitate to treat its own proposed plant as a “Committed” resource that may be counted appropriately toward satisfying reserve margins in the FRCC region. (Petition, pp. 9-10 & Exh. F, Table 6). In fact, Panda Leesburg argues for approval of its Project based on the Project’s asserted contributions towards FRCC reserve margins. (Petition, ¶ 18). This runs directly counter to long-standing Commission policy. The Commission has confirmed time and time again that retail utilities and the FRCC may count only firm power resources toward reserve margins. See e.g., Order No. PSC-93-1715-FOF-EQ; Order No. PSC-96-1076-FOF-EU; FPSC Rule 25-6.035(2). If the Commission were to accept Panda Leesburg’s position, the obligations

of the FRCC (and its member utilities, including FPC) under long-standing Commission policy would change, and FPC's long-term planning will be detrimentally affected. This, too, necessitates that FPC be afforded leave to intervene.

13. What is more, Panda Leesburg's proposed merchant plant will create economic distortions in the FRCC region, to the detriment of FPC and its ratepayers. Over the life of the Project, Panda Leesburg will exact more from FPC's ratepayers than FPC would be permitted or able to exact under cost-of-service regulation. Therefore, even if the Commission were inclined to agree that a need existed for a plant like the proposed Project, the Proposed Project would not provide the most cost-effective alternative to meeting the needs of FPC's ratepayers. To the contrary, development of the Project will have an adverse impact on FPC's ratepayers.

14. Finally, the Petition also alleges that the Project will interconnect with FPC's transmission system. (E.g., Petition, p. 2). Based on FPC's preliminary review of the Project, it appears that the Project may have an adverse impact on FPC's transmission system, compromising the reliability of the grid. In addition, at this time it appears that FPC may not be able to complete necessary upgrades in time for the Project to meet its planned in-service date.

#### **IV. FPC's Standing**

15. In order to establish standing to intervene in any proceeding, it is settled that a petitioner must show that (1) it will suffer injury in fact of sufficient immediacy to warrant a hearing, and (2) that the injury is of the type or nature that the proceeding is designed to protect. E.g., Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), review denied, 415 So. 2d 1359 (Fla. 1982). In applying the Agrico test, the Commission "must not lose sight of the reason for requiring a party to have standing in order to participate in a judicial or administrative proceeding": "[T]o ensure that a party has a

to participate in a judicial or administrative proceeding”: “[T]o ensure that a party has a substantial interest in the outcome” so that “he will adequately represent the interest he asserts” in a proceeding in which that interest is not “totally unrelated to the issues which are to be resolved in the administrative proceeding.” Gregory v. Indian River County, 610 So. 2d 547, 554 (Fla. 1<sup>st</sup> DCA 1992).

16. As noted above, until the Florida Supreme Court resolves the question presently pending before it in the Duke appeal, this Commission’s authority under existing law to approve Panda Leesberg’s request for a need determination remains subject to question. FPC should be permitted to participate in any proceeding that involves this open question and substantially impacts the future of generation resources in this State. Otherwise, the Commission might render a ruling that proves to be contrary to law, and no stakeholder in the current regulatory framework would have standing to challenge the illegal decision.

17. FPC must be given leave to intervene for other reasons as well. As we have explained, Panda Leesberg proposes to meet the needs of “Peninsular Florida,” specifically by selling power to retail utilities, including FPC. FPC serves twenty percent of the retail load of Peninsular Florida. Thus, Panda Leesberg is seeking, quite plainly, to meet FPC’s need. It follows, that FPC is an indispensable party in this proceeding.

18. In addition, Panda Leesberg proposes to displace the operation of FPC’s existing generating units; displace the development of FPC’s proposed generating units (still in the “early planning” stages); create an uneconomic duplication of FPC-owned or planned resources; and supplant current policy and utility planning requirements concerning the application of uncommitted capacity toward FRCC reserve margins. Furthermore, the Project would have a detrimental impact on FPC’s ratepayers over the life of the proposed generating unit. These



403.501-.518, Fla. Stats. and the need provision of the Florida Electric Energy Conservation Act (“FEECA”), § 403.519, Fla. Stats., and FPC plainly has standing to raise them. If FPC does not, no one else will.

19. Finally, the Project may adversely impact FPC’s transmission system, compromising the reliability of the grid. This consideration, too, falls squarely within the ambit of concerns addressed by Section 403.519 and the PPSA. Indeed, the Commission stated in its decision in Duke that it might deny a petition for a determination of need based on the fact that “a proposed plant could adversely effect the reliability of the Florida grid,” such as where “the plant, by its proposed location within the Florida grid, . . . degrades the transmission system within Florida.” In re: Joint Petition for a determination of need for an electrical power plant in Volusia County, Docket No. 981042-IM; Order No. PSC-99-0535-FOF-EM (March 22, 1999), at 45.

20. The Commission has routinely allowed entities to intervene in need determination proceedings precisely because the substantial interests of those entities will be affected by the proceedings. See, e.g., In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Company and Cypress Energy Partners, Ltd. Partnership, 1992 Fla. PUC LEXIS 1631; 92 FPSC 11: 363; Dkt. No. 920520-EQ; Order No. PSC-92-1355-FOF-EQ (Nov. 23, 1992) (recognizing there is a limited need by utilities for additional capacity and energy and that “it is incumbent upon competing alternatives to come forward at a need determination” proceeding); In re: Petition to Determine Need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, 1997 Fla. PUC LEXIS 679; 97 FPSC 6: 115; Dkt. No. 961512-EM; Order No. PSC-97-0659-FOF-EM (June 9, 1997) (granting the Legal Environmental Assistance Foundation, Enpower, Inc., and LS

(June 9, 1997) (granting the Legal Environmental Assistance Foundation, Enpower, Inc., and LS Power LLC leave to intervene in need determination proceeding); In re: Petition of Ark Energy, Inc. and CSW Development-I, Inc. for Determination of Need for Electric Power Plant to be Located in Okeechobee County, FL, 1993 Fla. PUC LEXIS 124; Dkt. No. 920807-GP; Order No. PSC-93-0141-PCO-GP (Jan. 27, 1993) (granting FP&L's petition to intervene in need determination proceeding); In re: Joint Petition to Determine Need for Electric Power Plant to be Located in Okeechobee County by Florida Power & Light Co. and Cypress Energy Partners, Ltd., 1992 Fla. PUC LEXIS 1146; 92 FPSC 8:376; Dkt. No. 920520-EQ; Order No. PSC-92-0830-PCO-EQ (Aug. 18, 1992) (granting Nassau Power Corporation's petition to intervene in need determination proceeding); In re: Petition for Determination of Need for a Proposed Electrical Power Plant and Related Facilities in Polk County by Tampa Electric Company, 1992 Fla. PUC LEXIS 568; 92 FPSC 3: 19; Dkt. No. 910883-EI; Order No. PSC-92-0002-FOF-EI (March 2, 1992) (granting Floridians for Responsible Utility Growth leave to intervene in need determination proceeding); In re: Petition of Florida Power Corporation for Determination of Need for Proposed Electrical Power and Related Facilities, 1991 Fla. PUC LEXIS 1863; 91 FPSC 10:290 (Oct. 15, 1991) (granting Florida Industrial Cogeneration Association, Floridians for Responsible Utility Growth and Panda Energy Corporation leave to intervene in need determination proceeding).

21. Indeed, the Commission granted FPC and other retail utilities leave to intervene as parties in the Duke case and in the pending case brought by Okeechobee Generating Company, L.L.C. (Docket No. 991462-EU). The result should be no different here.

**V. Disputed Issues of Material Fact**

22. FPC submits that Panda Leesburg's Petition is deficient as a matter of law and that it can and should be dismissed summarily. Assuming, however, that the Commission would have proper occasion to consider and determine factual issues, the petition presents numerous disputed issues of material fact. These include, but are not limited to:

- a. Whether and to what extent the power produced by Panda Leesburg's proposed "merchant plant" would be sold in Florida or outside the State.
- b. Whether and to what extent retail utilities in the State would have any assurance of how, when, where, and on what terms Panda Leesburg will market power in this State.
- c. Whether the terms of sale for power sold from the Project would be disadvantageous to ultimate consumers in this State, in relation to regulated sales by utilities like FPC.
- d. Whether the Project has a sufficient contract in place for a firm supply of gas.
- e. Whether the Project will absorb or divert natural gas from other power producers in the State, who are committed to serving customers in the State on a long-term basis.
- f. Whether the Project will adversely affect FPC's transmission system or the reliability of the Florida grid.
- g. Whether the Project will be able to meet its projected in-service date given that the appropriate Federal agencies have not approved the construction of a second major trans-Florida gas pipeline.
- h. Whether it is appropriate to consider only supply-side resources to the exclusion of demand-side resources when examining the adequacy of reserve margins planned for individual utilities and/or Peninsular Florida.
- i. Whether Peninsular Florida is in need of more installed capacity than is currently planned by Peninsular Florida retail utilities that are committed to serving retail customers within the State.
- j. Whether FPC and other Peninsular Florida utilities can rely to any extent on uncommitted capacity (such as the proposed capacity of this project) to satisfy their obligation to provide reliable electric service to retail customers in the State.

- k. Whether or not the Project would be able to meet its projected in-service date given the anticipated difficulties in securing necessary transmission upgrades.
- l. Whether the Project's in-service date coincides with any need in the State for generation in addition to that which is already planned by Peninsular Florida's retail-load-serving utilities.
- m. Whether Panda Leesburg has properly estimated the availability of the Project's uncommitted capacity to ultimate consumers in the State.
- n. Whether the Petition complies with the Commission's rules.
- o. Whether the proposed Project would satisfy the statutory criteria of need.
- p. Whether the proposed Project would reliably meet the need of any particular retail utility in Peninsular Florida for firm capacity to meet its statutory obligation to serve.
- q. Whether the proposed Project would constitute the most cost effective means for any particular retail utility or any collection of utilities reliably to meet their need for firm power resources.

**I. Ultimate Facts Alleged**

23. This proceeding will affect FPC's substantial interests in the respects identified in paragraphs 1-21 above, which are incorporated by reference herein.

24. The proposed Project would not satisfy the applicable statutory standards of need.

25. The proposed Project would not meet any identified retail utility's need for firm resources to meet its obligation to serve.

26. The proposed Project would not provide the most cost-effective means for any retail utility to meet in a reliable manner its obligation to serve.

27. Panda Leesburg has not satisfied and cannot satisfy the requirements of the Florida Energy Efficiency Conservation Act ("FEECA"), including those set forth in Section 403.519 of that law, that a petitioner for a determination of need first demonstrate that it has

taken reasonable measures to avoid the construction of new generating facilities and has otherwise engaged in appropriate conservation measures.

28. Panda Leesburg is incapable of having a “need” for generating capacity within the meaning of Section 403.519 since Panda Leesburg has no obligation to serve. Panda Leesburg’s only need is a need for profits.

29. The proposed Project would not contribute to the reserve margins of any particular retail utility in Florida or of the retail utilities in Peninsular Florida.

30. The proposed Project would necessarily create environmental impacts in Florida without a countervailing demonstration of true “need,” as that term is used in Section 403.519 and authoritatively construed by the Florida Supreme Court.

31. Panda Leesburg has no contractual commitments whatsoever with any retail utility in Florida and thus utterly fails to satisfy the requirements established by the Florida Supreme Court as a precondition of standing for any IPP under Section 403.519 and the Florida Electric Power Plant Siting Act.

32. Panda Leesburg’s plans to sell its output in Florida are speculative and unenforceable.

33. Panda Leesburg is not an “electric utility” or “utility” as that term is used in the applicable Florida statutes.

34. The Commission would not have regulatory jurisdiction over Panda Leesburg. If Panda Leesburg should choose to resist the Commission’s attempt to exercise jurisdiction over it, the Commission would be powerless to stop it.

WHEREFORE, FPC respectfully petitions for leave to intervene and participate as a full party respondent to this proceeding.

Dated this 24<sup>th</sup> day of March 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FLORIDA POWER CORPORATION'S PETITION TO INTERVENE has been furnished by U.S. Mail to the following parties of record this 24<sup>th</sup> day of March, 2000.

  
Attorney

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