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ORIGINAL

April 5, 2000

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Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
4075 Esplanade Way, Room 110  
Tallahassee, Florida 32399-0850

RE: Docket No. 000289-EU, In re: Petition for Determination of Need for  
an Electrical Power Plant in St. Lucie County by Panda Midway  
Power Partners, L.P.

Dear Ms. Bayo:

Enclosed for filing on behalf of Panda Midway Power Partners, L.P. in  
Docket No. 000289 are the original and fifteen copies of Panda Midway's  
Response and Memorandum of Law in Opposition to FPC's Motion to Dismiss  
the Petition and Panda Midway's Request for Oral Argument. If you have any  
questions regarding this filing, please call me. Thank you.

Sincerely,

*Suzanne F. Summerlin*  
Suzanne F. Summerlin

SFS/wd  
Enclosures (32)

AFA  
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*Response*  
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04183 APR-58  
FPSC-RECORDS/REPORTING

*Request*  
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04184 APR-58  
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re: Petition for Determination )  
of Need for an Electrical Power Plant in ) DOCKET NO. 000289-EU  
St. Lucie County by Panda Midway )  
Power Partners, L.P. )  
\_\_\_\_\_ )

**PETITIONER’S RESPONSE AND MEMORANDUM OF LAW  
IN OPPOSITION TO FLORIDA POWER CORPORATION’S  
MOTION TO DISMISS THE PETITION**

Panda Midway Power Partners, L.P. (“Panda Midway”), hereinafter the “Petitioner”, pursuant to Florida Public Service Commission, hereinafter “Commission”, Rule 28-106.204, Florida Administrative Code (“F.A.C.”), hereby respectfully submits this Response and Memorandum of Law in Opposition to Florida Power Corporation’s Motion to Dismiss the Petition (“FPC’s Motion to Dismiss”).<sup>1</sup> The arguments raised in FPC’s Motion to Dismiss have been previously raised by FPC in two proceedings before the Commission. In one need determination currently on appeal and another need determination currently ongoing, the Commission has considered and rejected FPC’s arguments. **See** Docket No. 981042-EU, In Re: Joint Petition for Determination of Need for an Electric Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company,

<sup>1</sup> On or about March 27, 2000, FPC also filed a Petition to Intervene. Petitioner is filing a response in opposition to the requested intervention concurrently with the filing of this memorandum of law. Thus, the issue of FPC’s standing to intervene is pending. If the Commission denies FPC’s intervention, FPC’s Motion to Dismiss will be moot.

DOCUMENT NUMBER-DATE

04183 APR-58

FPSC-RECORDS/REPORTING

Ltd., L.L.P., 99 FPSC 3:401, 434-35 (hereinafter ***Duke New Smyrna***) and Docket No. 991462-EU, In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C., 99 FPSC 12:219-242 (hereinafter ***OGC***). The Commission's decision ***in Duke New Smyrna*** is currently on appeal at the Florida Supreme Court and the ***OGC*** proceeding is currently ongoing.

### **SUMMARY**

Contrary to FPC's Motion to Dismiss, Panda Midway ***is*** a proper applicant for the Commission's determination of need under the plain language of Section 403.519, Florida Statutes ("F.S.") and the Florida Electrical Power Plant Siting Act (Sections 403.501-.518, F.S.) (the "Siting Act".) Panda Midway's Petition ***did*** cite facts that establish it is an "electric utility" under Chapter 366, F.S., and thus, subject to the Commission's Grid Bill. Panda Midway ***has*** complied with the mandatory pleading requirements for need determination petitions pursuant to Rule 25-22.081, F.A.C. Panda Midway ***is not*** required by Rule 25-22.071, F.S., to file a Ten-Year Site Plan prior to filing its need determination petition. Finally, Panda Midway ***is not*** required to comply with the competitive bidding requirements of Rule 25-22.082, F.A.C., prior to seeking a need determination.

The legal standard to be employed by the Commission when considering a motion to dismiss is whether a petition alleges sufficient facts to state a cause of action upon which relief may be granted. In this consideration, the Commission must assume that all allegations in a petition are true and all reasonable inferences must be made in favor of the petitioner. See Varnes v.

Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); Abruzzo v. Haller, 603 So.2d 1338, 1240 (Fla. 1st DCA 1992).

As the following discussion demonstrates, Panda Midway's Petition clearly states sufficient facts to state a cause of action upon which relief may be granted. If FPC's Motion to Dismiss is not mooted by the proper denial of its Petition to Intervene in this proceeding, the Commission should deny the Motion to Dismiss as legally infirm.

**I. PANDA MIDWAY IS A PROPER APPLICANT UNDER SECTION 403.519, F.S.**

A. FPC asserts in Paragraphs 1 through 6 of its Motion to Dismiss that Panda Midway is not a proper "applicant" pursuant to Section 403.519, F.S., and the Siting Act and, therefore, Panda Midway's Petition should be dismissed. In *Duke New Smyrna* and *OGC*, the Commission rejected FPC's arguments that the petitioners in those proceedings, merchant plant developers like Panda Midway, could not be proper "applicants" pursuant to Section 403.519, F.S. To be a proper applicant under the Siting Act and Section 403.519, F.S., the petitioner must be an "electric utility" within the meaning of Section 403.503(13), F.S. Panda Midway has alleged sufficient facts to establish that it is an "electric utility" under Section 403.503(13), F.S.

In Paragraph Number 3 of its Petition, Panda Midway alleges that it is a public utility under the Federal Power Act, 16 U.S.C.S. Section 824(b)(1)(1994).

Panda Midway goes on to state in Paragraph Number 3:

Panda Midway will build, own, and operate the Project and will market the Project's capacity, approximately 1,000 MW, and associated energy to other utilities under negotiated arrangements

entered into pursuant to Panda Midway's rate schedule as approved by the Federal Energy Regulatory Commission ("FERC").

All wholesale power transactions between utilities that are interconnected, either directly or indirectly, to transmission facilities that transmit power across state lines are transactions in interstate commerce subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission. See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1971), wherein the U.S. Supreme Court upheld the Federal Power Commission's jurisdiction over the transmission of power, at wholesale, by Florida Power Corporation's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce. See also 16 U.S.C.S. Section 824(e)&(b)(1)(1994). Panda Midway also alleges in Paragraph Number 3 that it filed for approval of its FERC market-based rates on March 3, 2000. This approval is to be issued by FERC in the immediate future.

In Paragraph Number 4 of its Petition, Panda Midway alleges:

Panda Midway qualifies as an exempt wholesale generator ("EWG") under the Public Utility Holding Company Act of 1935. 15 U.S.C.S. Sections 79z-5a (1994 & Supp. 1997). Panda Midway filed its application for EWG status with the FERC on January 28, 2000. As an EWG, Panda Midway will be prohibited by the Public Utility Holding Company Act of 1935 from making retail sales of electricity from the Project.

Panda Midway has subsequently received its certification as an EWG as indicated in the attached FERC order, 90 FERC 62,166, issued on March 7, 2000. (See Attachment A hereto.) This FERC certification indicates that Panda Midway is authorized to engage in the business of generating and selling electricity. By the above allegations in its Petition, Panda Midway has established that it is a public utility pursuant to the Federal Power Act and an

EWG pursuant to the Public Utility Holding Company Act of 1935. As a public utility and an EWG, Panda Midway is regulated by FERC. In addition to being a regulated electric company, Panda Midway will be engaged in the generation and transmission of electric energy, which fall within the definitional activities of Section 403.503(13), F.S., for an “electric utility.” Thus, as a company that sells wholesale electric power subject to the regulatory jurisdiction of FERC, Panda Midway fits within the plain meaning of the term “regulated electric company” under any reasonable construction of that term. For this reason, Panda Midway is a proper applicant under Sections 403.503(13) and 403.519, F.S.

FPC has asserted in its Motion to Dismiss that Panda Midway is not state-regulated under Section 366.02(2), F.S. This is completely inaccurate. Panda Midway is a “regulated electric company” because it is an “electric utility” subject to the Commission’s regulatory authority and jurisdiction under the express language of Chapter 366, F.S. Section 366.02(2), F.S., defines “electric utility” to mean

any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Panda Midway is investor-owned, in that it is wholly-owned by Panda Energy International, Inc., an investor-owned Texas corporation. When the Project comes on line, Panda Midway will own, maintain, and operate an electric generation system within Florida. Thus, by a “plain meaning” construction of the

statutory language, Panda Midway is an “electric utility” pursuant to Section 366.02(2), F.S.

As an electric utility under Chapter 366, F.S., Panda Midway is subject to the Commission’s Grid Bill authority, which is found at Sections 366.04(2) & (5) and 366.05(7) & (8), F.S. These provisions give the Commission

jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida . . . .

Section 366.04(5), F.S. Panda Midway is also subject to the Commission’s jurisdiction under Section 366.055, F.S., which gives the Commission authority over the “[e]nergy reserves of all utilities in the Florida energy grid . . . . to ensure that grid reliability and integrity are maintained.”

FPC has asserted in its Motion to Dismiss that Panda Midway did not allege that it is an “electric utility” under Section 366.02(2), F.S., and for this reason, Panda Midway’s Petition should be dismissed. This argument fails. Panda Midway alleged in its Petition all of the facts necessary to establish that it is an “electric utility” under Section 366.02(2), F.S., and that it is subject to the Commission’s jurisdiction as such.

The Commission considered and rejected these arguments in the *Duke New Smyrna*. The Commission stated in *Duke New Smyrna*:

Duke is an “electric utility” pursuant to Chapter 366, and is, therefore, subject to our Grid Bill authority.

99 FPSC 3:417. The Commission also stated in *Duke New Smyrna*:

The Project will be generating electricity thus meeting the functional requirements [of Section 366.02(2), F.S.].

99 FPSC 3:417.

Thus Panda Midway has sufficiently pled facts that establish it is an “electric utility” pursuant to the Federal Power Act, an “electric utility” pursuant to Section 366.02(2), F.S., as well as both “regulated” and an “electric company” and, therefore, within the statutory definition of “applicant” set out in Section 403.503(13), F.S. No more than this is required as a matter of pleading.

FPC argues that Panda Midway is required to have alleged that it had its EWG certification *prior* to filing a petition for determination of need at the Commission. This argument is tantamount to declaring that a company acting as an “electric utility” in the State of Florida would not be subject to Commission regulation simply because it had not received a certificate from the Commission. This hyper-technical argument demonstrates yet again FPC’s determined effort to conjure up artificial barriers to entry into the State of Florida for merchant plants.

Accordingly, FPC’s arguments that Panda Midway is not a proper “applicant” under Section 403.519, F.S., fail and FPC’s Motion to Dismiss must be denied.

## **II. PANDA MIDWAY HAS COMPLIED WITH THE MANDATORY PLEADING REQUIREMENTS IN RULE 25-22.081, F.A.C.**

In Paragraphs 7 through 13 of its Motion to Dismiss, FPC contends that Panda Midway’s Petition failed to comply with the mandatory pleading requirements in Rule 25-22.081, F.A.C. This is simply not correct. Panda



Midway's Petition substantially complies with all of the pleading requirements in Rule 25-22.081, F.A.C.

FPC begins its arguments with the assertion that "Panda Midway's Petition failed to contain or attached the required detailed analysis prescribed by Rule 25-22.081(3), F.A.C."

Panda Midway's Petition contained in Paragraphs Numbers 15 through 22 its analysis that there is a statewide need for the generation capacity of this proposed merchant plant. Panda Midway's Petition alleges that the very presence and availability of this merchant plant will increase the reliability of the Florida Grid and that this additional wholesale generation will suppress the prices of electricity to the benefit of all Florida ratepayers.

Panda Midway's Petition includes in Paragraphs Numbers 13, 14, and 15 through 32 an adequate description of the utilities primarily affected and a sufficient description of their "load and electrical characteristics, generating capability and interconnections" to enable the Commission to assess whether the proposed power plant will further "the need for electric system reliability and integrity" and "the need for adequate electricity at a reasonable cost," and whether the proposed plant is the "most cost-effective alternative available," and whether conservation programs "might mitigate the need for the proposed plant." Panda Midway's Exhibits attached to its Petition also include supporting documentation to the information contained in the above-cited paragraphs.

Panda Midway's Petition describes two analyses performed by R. W. Beck and Altos Management Partners that are the basis for the Petition's allegations of

statewide need. Panda Midway's Petition includes a description of the load forecast for Peninsular Florida by R. W. Beck and Altos Management and a summary of the statewide need for additional generating capacity developed by these experts. This information fulfills the requirements of Rule 25-22.081(3), F.A.C. The Petition includes a description of various conditions and contingencies in which the additional generation of this proposed merchant plant will be needed by Peninsular Florida.

FPC asserts that if the analyses of R. W. Beck and Altos Management are not provided with the Petition upon filing, the Petition is "fatally insufficient". This is not true. The Rule requires that "detailed analysis and supporting documentation" be provided. The Petition does provide detailed analysis and the exhibits provide supporting documentation. Neither Panda Midway nor any other applicant should be required under this Rule to provide all of its testimony and supporting documentation with its initial filing. Panda Midway will submit these analyses with the testimony of its expert witnesses. There will be no need for discovery requests for the Commission to receive these analyses. If Panda Midway does not make its case in the hearing in this proceeding, presenting adequate evidence to support its position that there is a statewide need for the Project, Panda Midway will not be awarded its determination of need. Therefore, there is every reason for Panda Midway to provide its analyses and documentation to the Commission. This is yet another spurious and groundless argument by FPC.

FPC argued in both the *Duke New Smyrna* and *OGC* proceedings that the Petitions had technical pleading deficiencies. The Commission determined that the applicants had substantially complied with the requirements of Rule 25-22.081, F.A.C., and rejected FPC's Motions to Dismiss on these grounds. FPC's arguments that Panda Midway has not complied with the pleading requirements in Rule 25-22.081, F.A.C., are groundless and FPC's Motion to Dismiss must be denied.

**III. PANDA MIDWAY IS NOT REQUIRED TO FILE A TEN-YEAR SITE PLAN PRIOR TO FILING A PETITION FOR NEED DETERMINATION**

In Paragraphs 14 and 15 of its Motion to Dismiss, FPC asserts that Panda Midway's petition is deficient because it fails to allege that Panda Midway filed a Ten-Year Site Plan in April of 1999 in accordance with Rule 25-22.071, F.A.C. FPC is again incorrect. Panda Midway is not required to allege compliance with Rule 25-22.071, F.A.C., by stating that it has filed a Ten-Year Site Plan nor, indeed, is Panda Midway required to have filed a Ten-Year Site Plan prior to seeking a need determination from the Commission. Rule 25-22.081, F.A.C., which governs the contents of petitions for determinations of need, does not contain any requirement that the applicant have filed a Ten-Year Site Plan, allege that it has done so, or explain why it has not done so.

Rule 25-22.071(1), F.A.C., requires the filing of a Ten-Year Site Plan in two instances: where the electric utility has "existing generating capacity of 250 MW or greater" and where an electric utility "elects to construct an additional generating facility exceeding 75 MW gross generating capacity . . . in the year

the decision to construct is made or at least three years prior to application for site certification.”

In regard to the first basis for requiring Panda Midway to comply with Rule 25-22.071, F.A.C., Panda Midway does not have installed capacity in excess of 250 MW in the State of Florida. Therefore, the first basis for requiring Panda Midway to comply with Rule 25-22.071, F.A.C., does not apply to Panda Midway.

In regard to the second basis for compelling compliance with the Ten-Year Site Plan requirement in Rule 25-22.071, F.A.C., Panda Midway has not, as of this date, made a firm commitment to construct the Panda Midway Project. Such a decision cannot be made, by a financially prudent business entity, until the basic permitting process required by the state in which such a power plant will be sited has been completed successfully. In other words, Panda Midway cannot rationally or prudently make a final decision to construct the Panda Midway Project until it receives an order from the Commission granting its Petition for a determination of need. Therefore, the second basis on which to compel compliance with Rule 25-22.071, F.A.C., does not apply to Panda Midway.

It makes no sense to require that Panda Midway file a document entitled Ten-Year Site Plan when such a document would have contained the identical information contained in Panda Midway’s Petition and the information that will be presented within this proceeding. In effect, Panda Midway’s filing of its petition for need determination with the Commission constitutes its Ten-Year Site Plan. All information available will be provided in the context of this proceeding, making any additional Ten-Year Site Plan filing superfluous. Rule 25-22.071, F.A.C.,

was written with the intent to require investor-owned utilities and other retail-serving utilities that have been in existence for many years to identify potential sites for proposed additional generating units three years in advance to permit effective planning for all utilities in the State of Florida. To the extent that Rule 25-22.071, F.A.C., is intended to provide the Commission and other utilities with full information regarding proposed generating units, Panda Midway is substantially complying with that intent by filing its petition for determination of need and its participation in this proceeding.

The Commission considered and rejected this identical argument raised by FPC in both the *Duke New Smyrna* and *OGC* proceedings, stating in the *OGC* decision:

**We find that Rule 25-22.071, F.A.C., does not require OGC to file a ten-year site plan prior to filing its need determination petition.** Subsection (1)(b) of the rule provides:

Any electric utility . . . that elects to construct an additional generating facility exceeding 75 MW gross generating capacity shall prepare a ten-year site plan, [to be submitted] in the year the decision to construct is made or at least three years prior to application for site certification, and every year thereafter until the facility becomes fully operational.

OGC points out that it had not made its decision to construct the project as of the April 1 filing date specified in subsection (1)(a) of the rule. Accordingly, OGC was not required to file a ten-year site plan pursuant to the rule prior to filing its need determination petition. **Further, OGC is not required by any Commission rule to allege in its petition that it has satisfied the requirements of Rule 25-22.071, F.A.C.** We note that OGC will be required, pursuant to the rule, to file a ten-year site plan on April 1, 2000, which OGC has stated it intends to do.

[Emphasis supplied.]

99 FPSC 12:219, 228. As the above-emphasized language points out, there is no Commission rule that requires Panda Midway to allege compliance with Rule 25-22.071, F.A.C., in its Petition for a need determination.

FPC asserts that the "Detailed Project Schedule," apparently Exhibit Site-D, a time schedule for the Panda Midway Project, indicates that Panda Midway made its decision to construct the Project in 1999. FPC has misinterpreted this time schedule. This schedule merely reflects Panda Midway's internal decision to pursue the permitting process for this proposed power plant. Once Panda Midway receives a determination of need from the Commission, it will fully comply with the requirements of Rule 25-22.071, F.A.C.

Accordingly, FPC's Motion to Dismiss based on its argument that Panda Midway has not complied with Rule 25-22.071, F.A.C., must be denied.

**IV. PANDA MIDWAY IS NOT REQUIRED TO COMPLY WITH THE COMPETITIVE-BIDDING PROVISIONS OF RULE 25-22.082, F.A.C.**

In paragraphs 12, 16, and 17 of its Motion to Dismiss, FPC asserts that Panda Midway's petition is defective because Panda Midway does not allege compliance with Rule 25-22.082, F.A.C. FPC states that Panda Midway was required to ". . . elicit alternative supply-side proposals" and describe those proposals in its Petition. Panda Midway submits that Rule 25-22.082, F.A.C., should not be construed as applying to merchant utilities such as Panda Midway, whose proposed power plant will not be included in any retail-serving utility's rate base and thereby subject to mandatory recovery from captive retail customers.

The fundamental purpose of this Rule is to protect captive electric ratepayers from paying too much for power supply resources from their

monopoly retail-serving utilities. The history of the Rule and the Commission decisions interpreting the Rule bear out that this is the intention of the Rule. As Panda Midway is proposing a merchant plant utility that will have no statutory obligation to serve retail customers and no corresponding right to recover its investment costs from captive ratepayers, Rule 25-22.082, F.A.C., is clearly not intended to apply to Panda Midway or other merchant plant utilities.

The Commission addressed this same argument raised by FPC in the ***Duke New Smyrna*** and ***OGC*** proceedings. As the Commission stated in ***Duke New Smyrna***:

The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility in Florida should prudently seek out the most-cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another generation supply alternative for existing retail utilities. Florida ratepayers will not be at risk for the costs of the facility, unless it is proven to be the lower cost alternative at the time a contract is entered.

99 FPSC 3:434-35. Panda Midway will contribute to the fundamental purpose of Rule 25-22.082, F.A.C., by providing an additional, cost-effective option to retail-serving utilities in Florida.

In ***OGC***, the Commission cited the above-quoted language from ***Duke New Smyrna*** and went on to say:

OGC's position is supported by our Duke New\_Smyrna decision, which implies that the requirements of the bidding rule are not applicable to merchant wholesale utilities. Further, we find

instructive the maxim of statutory construction which provides that the law should not be interpreted in a manner that creates an absurd result. Requiring OGC to comply with Rule 25-22.082, Florida Administrative code, would clearly lead to an absurd result.


Just as in *Duke New Smyrna* and *OGC*, requiring Panda Midway to comply with Rule 25-22.082, F.A.C., as a precondition to obtaining a determination of need creates an absurd result. FPC's Motion to Dismiss on the basis that Panda Midway has failed to comply with Rule 25-22.082, F.A.C., must be denied.

### **CONCLUSION**

Panda Midway Power Partners, L.P., has substantially complied with all applicable pleading and other requirements necessary to bring its Petition for Determination of Need for the Panda Midway Power Project before the Commission. FPC's arguments in its Motion to Dismiss have been considered and rejected in two prior decisions by the Commission. Therefore, FPC's Motion to Dismiss must be denied.



Respectfully submitted, this 5th day of April, 2000.

A handwritten signature in black ink, appearing to read "Suzanne F. Summerlin". The signature is written in a cursive style with large, sweeping loops.

Suzanne F. Summerlin, Esq.  
Florida Bar No. 398586  
Suzanne Brownless, Esq.  
Florida Bar No. 309591

1311- B Paul Russell Road  
Suite 201  
Tallahassee, Florida 32301  
(850) 656-2288

Attorneys for PANDA MIDWAY POWER PARTNERS,  
L.P.

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that a true and correct copy of this Panda Midway Power Partners, L.P.'s Response and Memorandum of Law in Opposition to Florida Power Corporation's Motion to Dismiss the Petition in Docket No. 000289-EU was served by Hand Delivery(\*) or mailed this 5<sup>th</sup> day of April, 2000, to the following:

Donna Clemons, Esq.\*  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard, Room 370  
Tallahassee, Florida 32399-0850

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2540 Shumard Oak Boulevard  
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Suzanne F. Summerlin, Esq.

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

March 7, 2000

Mr. William M. Lamb  
Assistant General Counsel  
Panda Energy International, Inc.  
4100 Spring Valley Road, Ste. 1001  
Dallas, Texas 75244

Re: Docket No. EG00-88-000

Dear Mr. Lamb:

On January 28, 2000, you filed an application for determination of exempt wholesale generator status on behalf of Panda Midway Power Partners, L.P., pursuant to section 32 of the Public Utility Holding Company Act of 1935 (PUHCA). Notice of the application was published in the Federal Register, 65 Fed. Reg. 6,597 (2000), with interventions or comments due on or before February 24, 2000. None was filed.

Authority to act on this matter is delegated to the General Counsel. 18 C.F.R. 375.309(g). The General Counsel has further delegated that authority to the Assistant General Counsel for Electric Rates and Corporate Regulation. Based on the information set forth in the application, I find that Panda Midway Power Partners, L.P. is an exempt wholesale generator as defined in section 32 of PUHCA.

A copy of this letter will be sent to the Securities and Exchange Commission.

Sincerely,



Michael A. Bardee  
Acting Assistant General Counsel  
Electric Rates and Corporate Regulation

ATTACHMENT A