

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 991462-EU - Petition for
determination of need for an electrical power plant in
Okeechobee County by Okeechobee Generating Company,
L.L.C.

DOCKET NO. 000288-EU - Petition for
determination of need for an electrical power plant in
Lake County by Panda Leesburg Power Partners, L.P.

DOCKET NO. 000289-EU - Petition for
determination of need for an electrical power plant in
St. Lucie County by Panda Midway Power Partners, L.P.

DOCKET NO. 000442-EI - Petition for
determination of need for the Osprey Energy Center by
Calpine Construction Finance Company, L.P.

BEFORE: CHAIRMAN JOE GARCIA
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 9**

DATE: Tuesday, May 16, 2000

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS
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PARTICIPANTS:

SUZANNE BROWNLESS, Suzanne Brownless, P.A., on behalf of Panda Leesburg Power Partners, L.P., and Panda Midway Power Partners, L.P.

CHARLES A. GUYTON, Steel, Hector & Davis, on behalf of Florida Power & Light Company.

COCHRAN KEATING, Commission Staff.

ROBERT PASS, Carlton Fields, on behalf of Hillsborough District School Board.

ROBERT SCHEFFEL WRIGHT, Landers & Parsons, on behalf of Calpine Construction Finance Company, L.P.

STAFF RECOMMENDATION

Issue 1: Should the Commission hold Dockets 991462-EU, 000288-EU, 000289-EU, and 000442-EI in abeyance pending the Florida Supreme Court's final decision regarding Tampa Electric Co., et al. vs. Garcia, et al., Case Nos. SC95444, SC95445, SC95446 ("Duke-New Smyrna")?

Recommendation: Yes. The petitions for need determinations in Dockets Nos. 991462-EU, 000288-EU, 000289-EU, and 000442-EI should be held in abeyance until a final decision has been issued by the Florida Supreme Court in the "Duke-New Smyrna" case.

Issue 2: Should Dockets Nos. 991462-EU, 000288-EU, 000289-EU, and 000442-EI be closed?

Recommendation: No. These dockets should remain open until a final decision is reached by the Florida Supreme Court in the "Duke-New Smyrna" case.

1 CHAIRMAN GARCIA: We go all the way down to
2 Item 9.

3 MR. KEATING: Commissioners, Item 9 is
4 Staff's recommendation that the four pending
5 merchant plant need determination dockets be
6 held in abeyance pending the Florida Supreme
7 Court's disposition of all motions for rehearing
8 that have been filed in the appeal of our order
9 granting the determination of need for the Duke
10 New Smyrna power plant.

11 As you are aware, the Supreme Court
12 overturned the Commission's decision to grant a
13 determination of need for the Duke New Smyrna
14 plant. That decision does not become final
15 until all motions for rehearing have been
16 decided. However, given the Court's initial
17 opinion, it appears that going forward with the
18 currently pending need proceedings that are
19 scheduled could result in unnecessary
20 expenditure of time and resources by the parties
21 and the Commission.

22 Speaking only for Docket No. 991462, which
23 is the Okeechobee need determination, it's my
24 understanding that the parties have no objection
25 to Staff's recommendation. I believe that the

1 parties to the other dockets listed in Staff's
2 recommendation may wish to address the
3 Commission.

4 CHAIRMAN GARCIA: Okay.

5 MS. BROWNLESS: I'm here on behalf --
6 Suzanne Brownless, Suzanne Brownless, P.A. --

7 CHAIRMAN GARCIA: Suzanne, I'm not picking
8 you up.

9 MS. BROWNLESS: I'm sorry. Is that
10 better?

11 CHAIRMAN GARCIA: Yes.

12 MS. BROWNLESS: Excuse me. I forgot to
13 press the button.

14 Suzanne Brownless of Suzanne Brownless,
15 P.A., here on behalf of Panda Energy, and our
16 docket numbers are the 000288 and 289. We're
17 here to speak in opposition to the Staff's
18 recommendation and to tell you a little bit
19 about why we're in a little bit different
20 procedural posture than OGC or Calpine, the
21 other EWGs who have need determinations pending
22 before you.

23 To start with, although Florida Power &
24 Light and Power Corp. have requested
25 intervention in our dockets, they are not

1 parties to our docket at this time, so
2 proceeding ahead with our procedural -- the
3 procedural schedule that has been set out in our
4 docket would not adversely affect them and could
5 not adversely affect them. They have no rights
6 in this docket to file testimony or conduct
7 discovery or do anything else.

8 The second thing is that, unlike OGC, we
9 have filed our prefiled testimony as required by
10 our procedural order. We've done everything we
11 were supposed to do exactly when we were
12 supposed to do it. We are prepared to go
13 forward and can go forward.

14 The third thing is that the Staff of the
15 Public Service Commission would not be
16 prejudiced by going forward in our case. As a
17 former staff member myself, I understand that
18 the Staff has a lot of dockets and that you all
19 have a lot of dockets. But this case is like
20 any other that comes before you, and we do have
21 the right to have our application timely
22 processed by the Commission. My client, as has
23 these other EWGs, has expended significant
24 amounts of money, and I would vouchsafe more
25 money in this effort than either Florida Power &

1 Light or Florida Power Corporation has expended,
2 and we wish to go forward. We are willing to
3 bank on the excellent arguments raised by your
4 staff in your own petitions for rehearing, as
5 well as in four other petitions for rehearing
6 filed by others in that docket.

7 The last point that I would make is that it
8 would seem to me that if you stay the
9 proceedings in our docket, you send an
10 incorrect, bad message to the Florida Supreme
11 Court where you have your motions for rehearing
12 pending, and that is that you do not have the
13 conviction of your own previous decision, your
14 own previous policy and the statutory decision
15 that exempt wholesale generators are proper
16 applicants. And I believe that that would be
17 detrimental.

18 CHAIRMAN GARCIA: Well, Suzanne, no one
19 could argue that I've had conviction on this
20 issue. Some have thought I should be convicted
21 on this issue.

22 The question, though, is a question of
23 just expediency and work. And as a staff
24 member, as a former staff member, you realize --
25 I don't have any doubt that they're more than

1 happy to work on these cases, as they are with
2 all petitions that come before us. But I think
3 it's just a question of timeliness. Clearly,
4 holding yours in abeyance, not having to have
5 all this series of arguments -- because I know
6 you have expended, as many have expended their
7 precious resources--to come to our state and have
8 the Florida Supreme Court tell them to go
9 somewhere else.

10 Nonetheless, I think to have our staff,
11 your client, as well as the companies, because I
12 have no doubt that they will ask to intervene at
13 some point, and that will be -- I think the last
14 intervention argument lasted -- I counted I
15 think eight or nine hours, if I'm not mistaken,
16 when it was all told, or motions to dismiss, on
17 the last Duke one.

18 So it just strikes me that you're better
19 off and we're better off if we simply wait. Who
20 knows? I believe that Mr. Bellak's arguments
21 were, to paraphrase, manna from heaven, and
22 hopefully they will come to pass as you wish,
23 you're standing there before us, and we then
24 proceed with the case where we left off. But I
25 don't know if we really make any progress except

1 expending funds on what you and I know is still
2 pending. And clearly, the decision that came
3 out justifies us taking pause.

4 MS. BROWNLESS: And I guess the thing that
5 I would point out, I spent a lot of time
6 listening to the Supreme Court oral arguments,
7 which are on the web now, as an excellent
8 resource. And I think we should all be grateful
9 that our state has provided that facility for
10 us. As I listened to those oral arguments,
11 there was one point which was brought out both
12 in the Commission's motion for rehearing as well
13 as in Duke's, and I think also reiterated in
14 LEAF's motion for rehearing, which is the
15 Supreme Court erroneously believes that exempt
16 wholesale generators greater than 75 megawatts
17 will not be constructed in the State of Florida
18 unless they can use the Power Plant Siting Act,
19 so that their decision was actually a means of
20 controlling the construction of EWGs. We all
21 know that is completely erroneous, because we
22 have exempt wholesale generators in our state
23 greater than 75 megawatts on the drawing boards
24 and being permitted right now, being constructed
25 right now.

1 So I think, if I may be so bold, that --

2 CHAIRMAN GARCIA: I don't think being
3 constructed right now. Already operating in
4 Florida, and --

5 MS. BROWNLESS: Right.

6 CHAIRMAN GARCIA: -- have been for quite a
7 while.

8 MS. BROWNLESS: And have been for quite a
9 while. So clearly, their decision on the
10 applicant is not going to prohibit an exempt
11 wholesale generator from being constructed in
12 Florida.

13 And I think that unlike most petitions for
14 rehearing, a substantial number of which I've
15 written myself, in which one reargues the
16 merits, there really were fundamental factual
17 misunderstandings on the part of the justices in
18 this instance. And --

19 CHAIRMAN GARCIA: I'm glad you said it.

20 MS. BROWNLESS: Not for lack of
21 questioning, I might add. They did try to
22 pursue it on numerous occasions in the oral
23 argument.

24 CHAIRMAN GARCIA: By the way, I probably
25 watched it more times than you did.

1 MS. BROWNLESS: So I guess what I'm saying
2 is, I understand that this is a volatile issue.
3 I understand that this is a politically
4 sensitive and serious issue. And I would just
5 request that you continue on. Nobody will fault
6 you for going forward in this instance, because,
7 you know, to paraphrase the country-western
8 song, it ain't over till the fat lady sings.

9 Now, I certainly wouldn't urge you to go
10 forward if the Supreme Court order had become
11 final. That would be that. But that's not the
12 case here. And I think you have, if I may be so
13 bold, a responsibility to stand by what you have
14 perceived to be good for the State of Florida.

15 CHAIRMAN GARCIA: Let me just add this.
16 First of all, I don't think this Commission
17 votes based on political difficulties. I think
18 all the Commissioners voted on the merits of
19 this issue when Duke came up, and that's how
20 that case went forward. And I want to tell you
21 that I don't think how we vote this out has
22 anything to avoid that responsibility.

23 Perhaps I see it a different way. I think
24 the message that the Court should get is
25 precisely the message that is occurring right

1 here today. And I'm speaking now from a
2 personal point of view. You are someone who has
3 come into this state, spent dollars to be in
4 this state, relying on what, to at least three
5 of the members of this body, who are the expert
6 body on these issues and who has somewhere in
7 the neighborhood of 114 years of regulatory
8 history in this state, relied on in making that
9 decision, at least the three, the majority, and
10 the staff.

11 That being the case, if the Court decided
12 that way, then these are the consequences to
13 those decisions by the Court on the legal basis
14 that they made it, and we shouldn't pour more
15 money or resources, at least from the staff
16 point of view, on something that the Court has
17 decided in the way it has decided.

18 COMMISSIONER CLARK: Mr. Chairman, you
19 know, I agree with you on that point. It was my
20 point from the beginning of the motion to
21 dismiss that we need to quit arguing what the
22 law is. We need to argue what the law ought to
23 be, and the fact that I think we could better
24 spend our time saying we think merchant plants
25 are good, this is how we think we can fold them

1 into the framework here, what do we do about
2 conservation, how does that figure in, should
3 everybody have the opportunity to build a plant
4 without coming in to show their plant is the
5 most cost-effective if it's not going into the
6 rate base. I think our time is better spent
7 deciding what changes should be made rather than
8 who was right or wrong.

9 The Supreme Court has spoken at this time.
10 They may change their mind on reconsideration.
11 But in my view, it doesn't change the fact that
12 we need to do some re-examination of the
13 statute. Even if the Court says, yes, merchant
14 plants are appropriate, I think we still need
15 some changes.

16 CHAIRMAN GARCIA: No question about it,
17 although I believe that the Governor's putting
18 out the task force on energy policy I think
19 begins that process. And for us, again, in the
20 same spirit of what I think staff has proposed
21 here today, if we were to begin to study that --
22 I know that we've been made ex officio members;
23 at least I have for the next six months or so.
24 Barring something --

25 COMMISSIONER CLARK: But I think -- I guess

1 my question is, does that -- I think we should
2 be prepared as the Commission to say, you know,
3 here's what -- here's like the sum of what came
4 out of the Duke case. Here's some of the facts,
5 and we believe these things need to be covered
6 in terms of what needs to be changed.

7 CHAIRMAN GARCIA: I have to tell you, I
8 agree. I don't disagree with that. And I
9 believe, as Commissioner Jaber will probably
10 attest, that I, as well as she, have had
11 discussion with people in the Governor's office
12 to make sure that the process and what happened
13 here isn't forgotten, because we have an
14 extensive record that was well developed in this
15 case which I think should serve as some of the
16 information that the Energy Policy Commission
17 will look at.

18 I also believe that the filings by our
19 staff, Mr. Bellak, on this case before the
20 Supreme Court and the actual Duke order are
21 great testaments to the work that was done here
22 on some of those issues.

23 And I agree with you. I just don't end up
24 on the same legal analysis as you and the Court
25 did. But that is where we should be.

1 COMMISSIONER CLARK: I appreciate that, but
2 really, at this point, that's not the issue
3 anymore.

4 CHAIRMAN GARCIA: I agree. I agree. I
5 think I've said the same thing from a different
6 angle.

7 Thank you, Ms. Brownless. Did you -- sir,
8 you wanted to --

9 MR. PASS: Thank you, Mr. Chairman. My
10 name is Robert Pass. I'm here for Florida Power
11 Corporation.

12 I came here prepared to make a substantial
13 argument if necessary. I'm not sure whether it
14 is. Obviously, we agree with the staff
15 recommendation. The Court, six members of the
16 Court have spoken rather definitively. It's not
17 as if nothing has happened. It's not as if
18 they've said, "Here's a tentative view that we
19 hold. what do you think?" six members have
20 said definitely that the Commission under the
21 current statutory scheme lacks the power to be
22 processing an application like this one or like
23 Calpine.

24 CHAIRMAN GARCIA: Thank you. Schef?

25 MR. WRIGHT: Thank you, Mr. Chairman.

1 Robert Scheffel Wright, Landers & Parsons law
2 firm, appearing on behalf of Calpine
3 Construction Finance Company.

4 On or about March 20th, Calpine
5 Construction Finance Company filed a site
6 certification application with the Florida
7 Department of Environmental Protection for the
8 Osprey Energy Center. On March 31st, the
9 Department issued a letter determining that the
10 application was complete.

11 I understand from procedural conversations
12 with the staff that they have been waiting for
13 Calpine/Osprey to file our need determination
14 package before responding to the Department's
15 request for comments as to the sufficiency of
16 the site certification application. We were --
17 we, Calpine, were in fact pretty close to filing
18 the need determination petition and exhibits
19 when the events of April 20th occurred, and that
20 put us in the posture of re-evaluating our
21 position, trying to figure out how we could go
22 forward, and what alternative opportunities may
23 be available to us to go forward.

24 As I sit here today, I can aver to you that
25 we do expect and plan to file the need

1 determination petition for the Osprey project in
2 the near future, before the end of this month at
3 the latest. We are pursuing various options
4 that we believe would allow the need
5 determination proceeding to go forward within
6 the scope of the Court's Duke New Smyrna
7 opinion, notwithstanding the fact that we do not
8 agree that the Court's opinion was correct, and
9 we agree with Ms. Brownless, the Commission, and
10 the other parties who have moved for rehearing
11 that that opinion should be turned around.

12 As a practical matter, I think what you
13 have before you is a request from the Department
14 for comments on the sufficiency of our
15 application. We haven't filed a need
16 determination petition. We haven't filed
17 exhibits in accordance with your rules. We
18 think it would be premature for you to hold much
19 in abeyance, other than maybe responding to the
20 Department's request for sufficiency comments.

21 Our real concern is that we wouldn't want
22 an order that could be construed as foreclosing
23 our ability to file a petition, which in some
24 context an abeyance or an abatement might mean.
25 We don't want -- we really don't want there to

1 be any prejudgment of our petition. We believe
2 we're going to file a petition that will fall
3 within the scope of what --

4 CHAIRMAN GARCIA: And Staff is fine with
5 that.

6 Yes. All right. Mr. Guyton?

7 MR. WRIGHT: Thank you.

8 MR. GUYTON: Commissioners, I'll be brief.
9 I'm appearing on behalf of Florida Power & Light
10 Company.

11 We're in support of the staff
12 recommendation. I would suggest to you that I
13 think staff's response to Calpine was
14 appropriate. They ought to have the benefit of
15 filing a need determination before you assess
16 sufficiency, particularly given the lack of
17 detail that have been in the last couple of need
18 determinations.

19 CHAIRMAN GARCIA: Thank you, Mr. Guyton.

20 COMMISSIONER JACOBS: I have a brief
21 question. Ms. Brownless, I take it that you're
22 prepared -- if we were not to hold these in
23 abeyance, you would be prepared then to
24 entertain the motions to dismiss that would
25 inevitably follow?

1 MS. BROWNLESS: Sure.

2 COMMISSIONER JACOBS: Okay.

3 CHAIRMAN GARCIA: All right.

4 COMMISSIONER CLARK: I move Staff.

5 COMMISSIONER DEASON: Second.

6 CHAIRMAN GARCIA: Okay. Before I vote this
7 out, I just -- I guess for the record, I want to
8 be clear on this. I think this Chairman in
9 particular has run into a lot of criticism on
10 this issue, and I want to make it clear here and
11 on the record that what this Chairman did was
12 support what I believed was the majority
13 position of this Commission. And I think
14 fortunately we prevailed at the Legislature
15 under very intense opposition to change the law
16 to stop this. I think I was fortunate in that,
17 and we were fortunate in that.

18 And I think that a study commission is
19 prevailing on the issue. We're going to study
20 this issue. We're going to try to solve the
21 issue, and I think the Governor has stepped
22 forward to do that, and I hope -- I know we will
23 be an integral part of that, as I hope all the
24 players will who are here and participated in
25 the Duke docket, as well as the other dockets

1 here. And perhaps with a little bit of fortune,
2 at least from my point of view, the Court may
3 see this issue.

4 And that being the case, I want to make
5 this point also. Commissioner Clark is
6 absolutely right. If the Court does sustain the
7 initial Duke decision, I am one that under that
8 particular circumstance, we do have a changed
9 series of circumstances, and we may want to
10 address some specific determination of need
11 issues that should be corrected under existing
12 law.

13 That said, there's a motion and a second.
14 All those in favor signify by saying "aye."

15 COMMISSIONER CLARK: Aye.

16 COMMISSIONER JABER: Aye.

17 COMMISSIONER DEASON: Aye.

18 COMMISSIONER JACOBS: Aye.

19 CHAIRMAN GARCIA: Opposed?

20 Very good. Thank you.

21 (Conclusion of consideration of Item 9.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, MARY ALLEN NEEL; do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 19 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 25th day of May, 2000.


MARY ALLEN NEEL, RPR
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