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RECORDS AND REPORTING

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

DATE: OCTOBER 26, 2000

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

FROM: DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HAFF, BREMAN, *MSA*, *JB*, *WEM*, *CSB*)
GOAD, FUTRELL, COLSON *PC* *MA*
DIVISION OF LEGAL SERVICES (C. KEATING, STERN, ISAAC) *HKS* *RNI* *WCK* *RVT*
DIVISION OF ECONOMIC REGULATION (LESTER) *PL* *JDJ*
DIVISION OF COMPETITIVE SERVICES (MAKIN) *JD*

RE: DOCKET NO. 991462-EI - 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.

AGENDA: 11/07/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\000289.RCM

CASE BACKGROUND

On September 24, 1999, Okeechobee Generating Company, L.L.C. (OGC), filed a Petition for Determination of Need for an Electrical Power Plant. OGC proposed to construct a 550-megawatt (MW) natural gas-fired, combined cycle merchant power plant in Okeechobee County, Florida, to commence commercial operation in April, 2003. OGC's petition was assigned Docket No. 991462-EI.

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13711 OCT 26 00

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On March 6, 2000, Panda Leesburg Power Partners, L.P. (Panda Leesburg) and Panda Midway Power Partners, L.P. (Panda Midway) filed petitions to determine the need for electrical power plants in Lake County and St. Lucie County, respectively. Panda Leesburg and Panda Midway both proposed to construct separate 1000-MW natural gas-fired, combined cycle merchant power plants to commence commercial operation by May, 2003. The petition filed by Panda Leesburg was assigned Docket No. 000288-EG, and the petition filed by Panda Midway was assigned Docket No. 000289-EG. By Order No. PSC-00-0685-PCO-EU, issued April 12, 2000, these dockets were consolidated.

On April 20, 2000, the Florida Supreme Court issued its decision in Tampa Electric Co.; Florida Power Corp.; and Florida Power & Light Co., v. Garcia, et al., as the Florida Public Service Commission; Utilities Commission, City of New Smyrna Beach; and Duke Energy New Smyrna Beach Power Co., Ltd., L.L.P., 25 Fla. Law W. S294 (Fla. April 20, 2000). Therein, the Court reversed the Commission's prior decision to grant a need determination "for an electric power company's proposal to build and operate a merchant plant in Volusia County." Id. at 3. The Court also indicated 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." Id. at 13. The above-mentioned merchant plant need determination dockets were placed in abeyance by Order No. PSC-00-1063-PCO-EU, issued June 5, 2000, pending a final decision by the Florida Supreme Court. The Court denied motions for rehearing on September 28, 2000, in Tampa Electric v. Garcia, thereby finalizing its initial opinion.

This recommendation addresses the status of the pending merchant plant need determination dockets.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission dismiss the Petitions for Determination of Need in Docket Nos. 991462-EI, 000288-EU, and 000289-EU?

RECOMMENDATION: Yes. The Commission should dismiss the petitions in Docket Nos. 991462-EI, 000288-EU, and 000289-EU for failure to state a cause of action. (ISAAC)

STAFF ANALYSIS: The pleadings in a petition must state a cause of action. See Kislak v. Kreedian, 95 So.2d 510 (Fla. 1957). 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. See id., 95 So.2d 510. The substantive law upon which the Commission derives its authority to grant the relief requested by petitioners is Section 409.519, Florida Statutes, which gives the Commission authority to determine the need for electrical power plants subject to the Florida Electrical Power Plant Siting Act (Sections 403.501-403.518, Florida Statutes, "Siting Act"). The Florida Supreme Court, in Tampa Electric v. Garcia, recently clarified the statutory guidelines under which the Commission makes its decision in a need determination case.

Staff believes that the OGC need petition and the two Panda need petitions do not state a cause of action on which the Commission may grant relief. As stated above, the Court in Tampa Electric v. Garcia held that an applicant in a need determination case must demonstrate that the proposed plant's output is fully committed to Florida retail customers. See Tampa Electric v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000) (revised) (reh'g denied). The petitions filed by OGC and Panda in Docket Nos. 991462-EI, 000288-EU, and 000289-EU, propose "merchant plants," which are not committed to retail customers. According to the Court, the current statutory scheme "...was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates." Id. at 24.

For these reasons, staff recommends the Commission dismiss the three above-referenced need petitions.

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ISSUE 2: Should these dockets be closed?

RECOMMENDATION: Yes. (ISAAC)

STAFF ANALYSIS: These dockets should be closed after the time for appeal expires.