



Public Service Commission

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DATE: APRIL 19, 2001

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

FROM: DIVISION OF LEGAL SERVICES (ISAAC, STERN, C. KEATING) *RNF mks WCK RVE*
DIVISION OF SAFETY AND ELECTRIC RELIABILITY (COLSON, BALLINGER, BREMAN, FUTRELL, HAFF) *WMM*
DIVISION OF COMPETITIVE SERVICES (MAKIN) *WMS JCB JOT*
DIVISION OF ECONOMIC REGULATION (LESTER)

RE: 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. 000612-EU - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN ST. LUCIE COUNTY BY DUKE ENERGY ST. LUCIE, L.L.C.

DOCKET NO. 991462-EI - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN OKEECHOBEE COUNTY BY OKEECHOBEE GENERATING COMPANY, L.L.C.

AGENDA: 05/01/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000289-3.RCM

CASE BACKGROUND

On September 24, 1999, Okeechobee Generating Company, L.L.C. (OGC), filed a Petition for Determination of Need for an Electrical

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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.

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-EU, and the petition filed by Panda Midway was assigned Docket No. 000289-EU. By Order No. PSC-00-0685-PCO-EU, issued April 12, 2000, these dockets were consolidated.

On May 22, 2000, Duke Energy St. Lucie, L.L.C., (Duke) filed a Petition for Determination of Need for an Electrical Power Plant. Duke proposed a 608 MW natural gas-fired, combined cycle merchant plant, an associated natural gas lateral pipeline, and transmission facilities to connect the plant to the Florida grid. These facilities are proposed to be located in St. Lucie County. The anticipated in-service date for the proposed plant is June 1, 2003. Duke's petition was assigned Docket No. 000612-EU.

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., 767 So.2d 428 (Fla. 2000) (revised) (reh'g denied) (cert. denied). 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. Docket Nos. 991462-EI, 000288-EU, and 000289-EU 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.

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On December 12, 2000, the Commission issued Order No. PSC-00-2382-PCO-EU holding all four dockets in abeyance pending the expiration of the appellate time period to the United States Supreme Court in the Tampa Electric case. The City of New Smyrna Beach Utilities Commission timely sought United States Supreme Court review of the Tampa Electric case, however the United States Supreme Court denied certiorari on March 5, 2001.

On March 20, 2001, Panda Leesburg, Panda Midway, and Duke filed a Joint Motion to Continue Abatement. The parties allege that in light of current legislative initiatives, Docket Nos. 000288-EU, 000289-EU, and 000612-EU should continue to be held in abeyance until the conclusion of the 2001 Regular Session of the Florida Legislature. No response to the motion was filed. In addition to discussing the motion and the appropriate treatment of the three dockets addressed in the motion, this recommendation addresses the appropriate treatment of Docket No. 991462-EU. The Commission has jurisdiction under Section 403.519, Florida Statutes.

ISSUE 1: Should the Commission grant Panda Leesburg, Panda Midway, and Duke's Joint Motion to Continue Abatement in Docket Nos. 000288-EU, 000289-EU, 000612-EU?

RECOMMENDATION: Yes. The motion for continued abatement should be granted. In the event that no new legislation is passed which gives merchant plants applicant status under Section 403.519, Florida Statutes, staff recommends that the Commission allow these dockets to be administratively closed. (ISAAC, C.KEATING, STERN)

STAFF ANALYSIS: In Order No. PSC-00-2382-PCO-EU, issued on December 12, 2000, the Commission allowed the above-referenced dockets to be held in abeyance. The rationale behind this order was to allow the last appellate opportunity to expire before closing the dockets. The United States Supreme Court denied certiorari on March 5, 2001.

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Panda Leesburg, Panda Midway, and Duke allege in their motion that Docket Nos. 000288-EU, 000289-EU, and 000612-EU should continue to be held in abeyance until the end of the 2001 legislative session "because of the possibility of legislative action that could affect the viability of the petitions in these dockets." Motion at p. 3. In the motion, the parties allege a possibility that legislation will be passed this session that addresses the issue of need determinations and the ability of exempt wholesale generators (EWGs), such as Panda and Duke, to either qualify as applicants in need determinations or be exempt from this requirement. The legislative session is scheduled to end on May 4, 2001. The parties allege that no harm will be caused by continuing the abatement of these dockets, yet serious harm may occur if the Commission fails to continue abatement. The parties contend that valuable time will be lost if they are forced to refile their petitions and start the siting "clock" all over should the legislature keep the need determination process and allow EWGs to be applicants.

Staff recommends that the motion for continued abatement should be granted. Typically, speculation as to whether the Legislature will act on issues is not a sufficient reason to hold dockets in abeyance. As established in Tampa Electric v. Garcia, the Commission does not have current statutory authority to grant the ultimate relief sought and did not have such authority when these petitions were filed. However, the Regular Session ends three days after the scheduled Agenda Conference for this item. Because of this minor delay and because there have been legislative developments which may impact merchant plants' ability to apply for a need determination, staff recommends that the Commission grant the Motion for Continued Abatement. In the event that no new legislation is passed during the Regular Session which gives merchant plants applicant status under Section 403.519, Florida Statutes, staff recommends that the Commission allow these dockets to be administratively closed.

Staff notes that the passage of time involved from the filing of each of these petitions to the conclusion of the 2001 legislative session has likely rendered some of the information in these petitions stale. This recommendation does not change the fact that these petitioners may have to amend their petitions if and when the law changes in Florida to allow a wholesale merchant power plant to come forward in a need determination proceeding.

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ISSUE 2: Should Docket No. 991462-EI be held in abeyance until the end of the 2001 Regular Legislative Session?

RECOMMENDATION: Yes. The Commission should hold Docket No. 991462-EI in abeyance until the end of the 2001 Regular Legislative Session. In addition, staff recommends that this docket should be closed administratively in the event that no new legislation is passed which gives merchant plants applicant status under Section 403.519, Florida Statutes. (ISAAC, C.KEATING, STERN)

STAFF ANALYSIS: Although a motion was not filed on behalf of OGC, the issues involved are similar to those involved in the dockets discussed in Issue 1. Docket No. 991462-EI was also placed in abeyance by the Commission on December 12, 2000. Based on the prior similar treatment of these dockets, staff recommends that Docket No. 991462-EI also be held in abeyance until the end of the 2001 Regular Session. Furthermore, staff recommends that this docket should be closed administratively in the event that no new legislation is passed during the Regular Session which gives merchant plants applicant status under Section 403.519, Florida Statutes.

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ISSUE 3: Should these dockets be closed?

RECOMMENDATION: No. These dockets should remain open pending the outcome of the 2001 Regular Legislative Session. (ISAAC, C.KEATING, STERN)

STAFF ANALYSIS: These dockets should remain open pending the outcome of the 2001 Regular Legislative Session. If no legislative action is taken to allow EWGs access to the need determination process, these dockets should be administratively closed.