

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination	)	
of Need for an Electrical Power	)	DOCKET NO. 000289-EU
Plant in Lake County by	)	
Panda Midway Power Partners, L.P.	)	Submitted for filing:
_____	)	March 27, 2000

**FLORIDA POWER CORPORATION'S  
MOTION TO DISMISS THE PETITION**

Pursuant to Rule 28-106.204, Fla. Admin. Code, Florida Power Corporation ("FPC") files this motion to dismiss the Petition for a Determination of Need for an Electric Power Plant filed with the Florida Public Service Commission (the "Commission") on March 6, 2000 by Panda Midway Power Partners, L.P. ("Panda Midway"). As grounds for its motion, FPC states as follows:

1. Panda Midway's Petition for a Determination of Need for a 1000 MW "merchant plant" should be dismissed for each of the following reasons:

- Panda Midway is not a proper "applicant" under Section 403.519, Fla. Stats. or the Florida Electrical Power Plant Siting Act ("the Siting Act") §§ 403.501-.518, Fla. Stats.;
- Panda Midway admittedly is not an EWG as to the proposed power plant for which it seeks a determination of need, and does not allege that it is an "electric utility" under Florida Statutes Chapter 366, subject to the Grid Bill and Ten Year Site Plan ("TYSP") regulatory authority of the Commission;
- Panda Midway failed to comply with the pleading requirements of Rule 25-22.081, Florida Administrative Code;
- Panda Midway failed to comply with Rule 25-22.071, Florida Administrative Code; and

- Panda Midway failed to comply with Rule 25-22.082, Florida Administrative Code.

2. As explained more fully below, these defects in Panda Midway's qualifications as a proper "applicant," its failure to comply with Rule 25-22.081's pleading requirements, and its failure to comply with the legal prerequisites to the filing of a Petition for Determination of Need are fatal and require the immediate dismissal of Panda Midway's Petition by the Commission.

3. Panda Midway is not a proper "applicant" under Florida Statute Section 403.519, or the Siting Act. Under controlling Supreme Court precedent, only entities like FPC that are obligated to serve retail load or independent power producers that are contractually dedicated to serving the needs of such entities have standing as an "applicant" to seek a determination of need under Section 403.519, Fla. Stats. E.g., Nassau Power Corporation v. Deason, 641 So. 2d 396 (Fla. 1994). Although the Commission ruled otherwise in Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Order No. PSC 99-0535-FOF-EM (Mar. 22, 1999) ("Duke"), the Commission exceeded its statutory authority in reaching that result.

4. Even under the Commission's decision in Duke, Panda Midway is not a proper "applicant" for a determination of need. To the contrary, Panda Midway admits at Page 4 of its Petition that it has not yet obtained FERC approval as an exempt wholesale generator ("EWG").

5. Further, Panda Midway fails to allege that it is an "electric utility" under Florida Statutes Chapter 366, subject to the Grid Bill and TYSP regulatory authority of the Commission.

6. For all these reasons, Panda Midway fails to qualify as a proper “applicant” for a determination of need, and its Petition should be dismissed.

7. Panda Midway has also failed to comply with the pleading requirements of Commission Rule, 25-22.081, Florida Administrative Code, applicable to need petitions.

8. Importantly, Panda Midway’s Petition does not contain or attach the required detailed analysis prescribed by Rule 25-22.081(3). This Rule provides in pertinent part as follows:

If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

Panda Midway’s Petition seeks a determination on “some basis in addition to or in lieu of capacity needs.” Panda Midway admits that it cannot meet the need for future capacity that the FRCC has identified in its load and resource plan unless “other utilities contract for the Project’s output.” (Petition, ¶ 17). Further, Panda Midway asserts – without any supporting analysis or documentation – that its Project “can be expected to suppress wholesale power prices in Florida below what they would otherwise be.” (Petition, ¶ 25). Thus, it is plain on the face of the Petition that Panda Midway is seeking approval for its Project on “some basis in addition to or in lieu of capacity needs” (emphasis added) as Rule 25-22.081(3) provides. Therefore, Panda Midway must comply with the requirements of the Rule. It has not.

9. Panda Midway’s Petition neither contains nor attaches anything remotely resembling the required detailed analysis and supporting documentation concerning the alleged costs and benefits of the Project. Panda Midway’s Petition merely refers to two analyses that have been performed by retained consultants: one by R.W. Beck and the other by Altos Management Partners. Neither analysis is discussed in detail and only the summary conclusions

of R.W. Beck's minimally described modeling even accompanies the Petition. Thus, Panda Midway's Petition is deficient on its face.

10. This is not an insignificant failure. Panda Midway's disregard for this specific pleading requirement makes it impossible for the Commission Staff and intervenors to evaluate the Petition's need allegations, especially under the accelerated schedule that has been established for the hearing in this docket. The importance of this omission has been illustrated dramatically by recent events in a similar pending docket involving Okeechobee Generating Company, L.L.C. ("OGC"). (Docket No. 991462-EU). Like Panda Midway, OGC based its Petition on a professed economic need for its proposed merchant plant; asserted that its Project would provide cost-effective power to the FRCC region and would provide economic benefits to the region; and based its Petition on the work of Altos Management Partners. Although OGC provided substantially more materials with its Petition than Panda Midway, OGC nonetheless failed to include any detailed analyses and documentation concerning the work of Altos Management Partners. After months of discovery and the expenditure of considerable resources by all parties and the Commission, the intervenors were finally able to obtain much (but not all) of the supporting analyses and documentation and learned that the supporting work was fatally flawed. Because this information had not been timely disclosed, OGC was forced to seek an emergency continuance of the hearing, at great cost and expense to all parties and the Commission. This debacle illustrates the crucial importance of the requirement that supporting analyses and documentation be provided with the petition.

11. Florida's electric customers rely on the Commission to make informed, critical decisions about the need for and cost-effectiveness of future generation resources in the State. The Commission should not permit such significant pleading failures to hamper its ability to

fulfill its obligations to these customers. Panda Midway's facially inadequate Petition should be dismissed.

12. Panda Midway's Petition also fails to comply with the pleading requirements of Rule 25-22.081(4). This subsection states that the need petitions of all investor-owned utilities must include "a detailed description of the selection process used and detailed description of the generating unit alternatives proposed by each finalist, if any, selected to participate in subsequent contract negotiations pursuant to Rule 25-22.082, Florida Administrative Code," (the "Bid Rule"). If Panda Midway is a "utility" at all (which FPC rejects) then it must be an investor-owned utility, according to its own allegations. (Petition, ¶ 5). Thus, Panda Midway must comply with the Bid Rule, and describe in its Petition how it has done so, which it has not.

13. Finally, Panda Midway has failed to comply with the legal prerequisites to filing a Petition for Determination of Need under the Commission's Rules, and accordingly its Petition is legally infirm and should be dismissed.

14. To begin, Panda Midway failed to file a 1999 Ten Year Site Plan. Commission Rule 25-22.071, Florida Administrative Code, at subsection (1)(b) specifically requires any electric utility planning to construct a generating facility greater than 75 MW to prepare and submit a TYSP "in the year the decision to construct is made or at least three years prior to application for site certification . . .," making such filing a legal prerequisite to a need determination proceeding.

15. As evidenced by the "Detailed Project Schedule" attached to Panda Midway's Petition, Panda Midway decided in 1999 to construct its proposed Project. If Panda Midway is not an "electric utility," then it has no standing to file its Petition for a determination of need. If it is an "electric utility" (which FPC rejects) then it was required to file a TYSP in a timely

manner. (Panda Midway should not be permitted to evade this requirement through the artifice of allowing the filing date to expire before announcing its plans to develop the Project.)

Moreover, although Panda Midway has not yet filed its application for site certification, it is apparent that Panda Midway intends to do so within three years, given its planned in-service date of May 2003. Accordingly, Panda Midway was required to file a TYSP before now, and its failure to do so is fatal to its Petition.

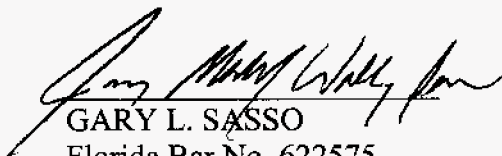
16. Moreover, Panda Midway's Petition should be dismissed due to its failure to comply with the Commission's Bid Rule, a prerequisite to the filing of a need petition by any investor-owned utility as demonstrated above. The fact that the Panda Midway's Project will not be "rate-based" is simply irrelevant to the question whether Panda Midway is the most cost-effective provider of additional supply-side capacity in Florida.

17. Panda Midway alleges in its Petition (at ¶¶ 26-28) that Florida's retail load-serving utilities will buy 99% to 100% of the Project's output and pass the cost of those purchases through to their electric customers. Accordingly, Panda Midway proposes to impose the cost of its Project ultimately upon Florida ratepayers. That being the case, Panda Midway must demonstrate that its Project will be more cost-effective than alternatives that may be provided by Florida load-serving utilities or other entities. Panda Midway is in no position to do so if it has not complied with the Bid Rule to elicit alternative supply-side proposals. Because Panda Midway has not complied with this prerequisite, its Petition should be dismissed.

18. For all of the foregoing reasons, Panda Midway's Petition for Determination of Need should be dismissed.

WHEREFORE, FPC requests that the Commission enter an Order dismissing Panda Midway's Petition for Determination of Need for an Electrical Power Plant in St. Lucie County by Panda Midway Power Partners, L.P., and closing the docket in this matter.

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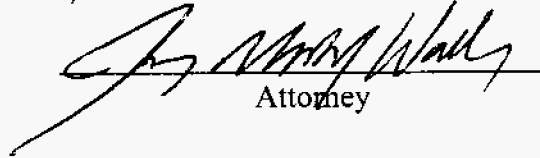
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CERTIFICATE OF SERVICE

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

  
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