

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Determination of Need for Electrical Power Plant in Lake County by Panda Midway Power Partners. L.P.

DOCKET NO. 000289-EU

RECORDS AND REPORTING

00 MAY -3 PM 3:49

RECEIVED-FPSC

PANDA MIDWAY POWER PARTNERS, L.P.'S RESPONSE IN OPPOSITION TO FLORIDA POWER CORPORATION'S SUGGESTION OF LACK OF JURISDICTION, SUPPLEMENT TO MOTION TO DISMISS AND MOTION FOR IMMEDIATE STAY PENDING DISMISSAL

Petitioner, Panda Midway Power Partners, L.P.'s (Panda Midway), pursuant to Rule 28-106.204(1), Florida Administrative Code, files this response in opposition to Florida Power Corporation's (FPC) Suggestion of Lack of Jurisdiction and Motion For Immediate Stay, and states as follows:

1. On April 26, 2000, FPC filed the Florida Supreme Court decision Tampa Electric Co., Florida Power Corp. and Florida Power & Light Co. v. Joe 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., LL (Duke), Supreme Court Case Numbers SC95444-95446, with the Commission and cited it for the proposition that the Commission is "without jurisdiction or power to entertain, hear, or grant" the petition for need determination in this docket. [FPC Motion at 2-4]. Based upon this case, FPC has urged the Commission to grant FPC intervention so that FPC can request dismissal of this petition or, in the alternative, impose an "immediate stay" of all procedural filing dates set by the existing CASR and Procedural Order No. PSC-00-0685-PCO-EU, issued on April 12, 2000. [FPC Motion at 4-5].

AFA
APP
GAP
CMW
CTR
EAQ
LEG
MAS
OPG
RRR
SEC
MAW
H

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
05526 MAY-3 8

Effect of Duke Decision

2. In response to FPC's contention that the Duke decision is dispositive of the status of Panda Midway and its ability to use the Florida Electrical Power Plant Siting Act (Siting Act), Panda Midway would note that the decision of the Supreme Court does not become final until May 5, 2000.¹ For this reason alone, it would be inappropriate for the Commission to grant FPC its request to dismiss on the basis of that decision.

Intervention

3. Although a bit unclear, it appears to be FPC's position that by virtue of the Duke decision, it should be granted intervenor status in this case. [FPC Motion at 4-5]. This is simply wrong. Even if the Duke decision were final, which it is not, it cannot be read as addressing the question of intervention by FPC in this, or any other, need determination docket. Although the participation of FPC in the Duke need determination docket was originally contested by Duke New Smyrna Beach, that issue was not the subject of the appeal to the Supreme Court. The standard for intervention remains that of substantial interest as outlined in Panda Midway's previously filed Objection to FPC's Petition For Leave to Intervene. Intervention still should not be granted.

4. Nothing has been changed by the issuance of the Duke decision with regard to the status of FPC in this docket. FPC is not a party and has no standing to request that the Commission do

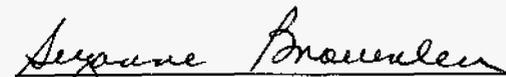
¹ Rule 9.330(a), Florida Rules of Appellate Procedure.

anything. Likewise, FPC cannot be adversely affected by the failure of the Commission to grant a dismissal or stay the filing dates or any other dates set forth in the Procedural Order. As a nonparty to the suit, FPC does not have a right to file anything or to participate at all. FPC cannot be harmed in this case. It is not a party.

5. Because FPC is not a party, its Motion should be stricken and disregarded by the Commission. Panda Midway is confident that the Commission will act appropriately with regard to the Duke decision when it becomes final. Until that time, Panda Midway will follow the filing requirements of the Procedural Order.

WHEREFORE, Panda Midway Power Partners, L.P., requests that this Commission Strike Florida Power Corporation's Notice of Supplemental Authority, Suggestion of Lack of Jurisdiction, Supplement to Motion to Dismiss, and Motion for Immediate Stay Pending Dismissal, or in the alternative, deny same.

Respectfully submitted this 3d day of May, 2000 by:


Suzanne Brownless, Esq.
Fla. Bar No. 309591
Suzanne Summerlin, Esq.
Fla. Bar No. 398586

1311-B Paul Russell Road
Suite 201
Tallahassee, Florida 32301
Phone: (850) 877-5200
FAX: (850) 878-0090

ATTORNEYS FOR Panda Midway
POWER PARTNERS, L.P.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for determination)
of need for electric power plant)
in Lake County by Panda Midway)
Power Partners, L.P.)
_____)

DOCKET NO. 000289-EU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Panda Midway Power Partners, L.P.'s Response to Florida Power Corporation's Notice of Supplemental Authority, Suggestion of Lack of Jurisdiction, Supplement to Motion to Dismiss, and Motion for Immediate Stay Pending Dismissal has been provided by U.S. Mail or (*) Hand Delivery to the following on May 3, 2000:

Gary L. Sasso, Esq.
Jill H. Bowman, Esq.
Carlton, Fields Law Firm
P.O. Box 2861
St. Petersburg, FL 33731

Panda Midway Power
Partners, L.P.
Steve Crain, P.E.
4100 Spring Valley
Suite 1001
Dallas, Texas 75244

*Donna Clemons, Esq.
Legal Division
Florida Public Service Comm.
2540 Shumard Oak Blvd.
Room 370
Tallahassee, Florida 32399-0850

*Lee Colson
Division of Electric & Gas
Florida Public Service Comm.
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Robert W. Pass, Esq.
Carlton Fields Law Firm
P.O. Drawer 190
Tallahassee, FL 32302-0190

James A. McGee, Esq.
Senior Counsel
Florida Power Corp.
P.O. Box 14042
St. Petersburg, FL 33733-4042



Suzanne Brownless, Esq.

c: 3122