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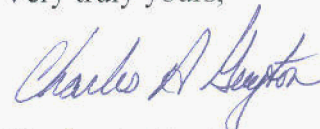
**In re: Petition for Determination of Need for an Electrical Power Plant in
St. Lucie County by Panda Midway Power Partners, L.P.
Docket No. 000289-EU**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") in Docket No. 000289-EU are the original and fifteen (15) copies of Florida Power & Light Company's Motion to Dismiss the Petition.

If you or your staff have any questions regarding this filing, please contact me.

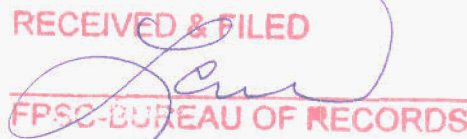
Very truly yours,



Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Determination)	
of Need for an Electrical Power Plant in)	Docket No. 000289-EU
St. Lucie County by Panda Midway)	Filed: March 27, 2000
Power Partners, L.P.)	

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS THE PETITION**

Florida Power & Light Company ("FPL") pursuant to Rule 28-106.204 of the Florida Administrative Code ("F.A.C."), hereby moves to dismiss the Petition for Determination of Need for an Electrical Power Plant in St. Lucie County, filed March 6, 2000 (hereinafter the "Petition"), by Panda Midway Power Partners, L.P. ("Panda"), and states:

I. INTRODUCTION

The Petition should be dismissed for the following reasons, each of which independently compels dismissal:

- (i) Panda is not a proper applicant under section 403.519, Florida Statutes;
- (ii) Panda's Petition fails to demonstrate a need for the project based on the criteria of section 403.519, Florida Statutes;
- (iii) Panda has failed to comply with the mandatory pleading requirements for need determination petitions established under Rule 25-22.081, F.A.C.;
- (iv) Panda has failed to submit a ten-year site plan prior to filing its need determination petition, as required by Rule 25-22.071, F.A.C.; and
- (v) Panda has failed to comply with the competitive-bidding requirements of Rule 25-22.082, F.A.C.

Panda is not an applicant or utility within the meaning of section 403.519, Florida Statutes, which governs need determination proceedings under the Florida Electrical Power Plant Siting Act, sections 403.501 - .508, Florida Statutes (the "Siting Act"). Panda has no obligation

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to serve and is not subject to regulation by the Commission. Moreover, because it has no customer base, Panda has no need for power of its own. Absent a contract with an electric utility for Panda's capacity, Panda has no standing to seek certification under prevailing Supreme Court case law.

Moreover, Panda's Petition is fatally deficient because it fails to demonstrate any need for the proposed facility by an electric utility. The Commission and Florida Supreme Court have previously construed the need determination criteria to be "utility specific." *In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities*, 89 FPSC 12:294, 319 (Order No. 22341); *Nassau Power Corporation v. Beard*, 601 So. 2d 1175, 1178 n. 9 (Fla. 1992). Yet, nowhere does the Petition demonstrate that the project's generating capacity is needed by any utility to meet customer demands. Instead the Petition merely attempts to show that there is a general market for its power, improperly equating this alleged economic viability with need under section 403.519. But the statute requires far more than a mere showing of economic viability: it requires that the project be needed "for electric system reliability and integrity," that it provide "adequate electricity at a reasonable cost," and that it be "the most cost-effective alternative available." Nowhere is a need based on these criteria demonstrated in the Petition.

Panda has also failed to meet the requirements of Rule 25-22.081, F.A.C., which governs the mandatory contents of need certification petitions. Panda's failure to provide the information required by Rule 25-22.081 makes it impossible for the interveners to properly evaluate Panda's proposed plant and impedes the Commission from carrying out its duty under section 403.519 to fully evaluate the plant based on "the need for electric system reliability and integrity, the need

for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available."

Finally, Panda has failed to comply with the requirement imposed by Rule 25-22.071 on every "electric utility" to file a ten year site-plan and with the bidding requirements applicable to all investor-owned "utilities" under Rule 25-22.082. Panda's failure to file comply with these rules underscores the fact that it is not – and does not truly consider itself to be – an electric utility. Indeed, Panda is trying to have it both ways, implicitly claiming that it is an electric utility by seeking a need determination, but failing to comply with the regulatory requirements that come with that designation. This is simply improper and Panda's Petition must be dismissed accordingly.

As discussed in greater detail below, Panda's Petition should be dismissed for each of the foregoing reasons.

II. PANDA LACKS STANDING TO FILE THE PETITION

A. Panda Is Not an "Applicant" under Section 403.519, Florida Statutes

Section 403.519, Florida Statutes provides that:

On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant or other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant

shall create a presumption of a public need and necessity and shall serve as the commission's report required by s. 403.507(1)(b).

§ 403.519, Fla. Stat. (emphasis added).

The term "applicant" is defined in section 403.503(4) as "any electric utility which applies for certification pursuant to the provisions of this act." (emphasis added.) "Electric utility" is, in turn, defined as "cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy."¹ § 403.503(13), Fla. Stat. (emphasis added). Further guidance on the meaning of the term "electric utility" is provided in the Florida Energy Efficiency and Conservation Act ("FEECA"), of which section 403.519 was originally enacted as a part.² FEECA defines the term "utility" for purposes of section 403.519 to mean "[a]ny person or entity of whatever form which provides electricity or natural gas at retail to the public." § 366.82(1), Fla. Stat. (emphasis added). Notably, this definition is found in the same section of the same session law in which section 403.519 was enacted and is expressly made applicable to section 403.519, indicating that

¹ The list of entities represents the universe of retail load-serving utilities that existed when section 403.503(13) was enacted in 1973.

² Section 403.519 was enacted, and remains, part of the Florida Energy Efficiency and Conservation Act, chapter 80-65, section 5, Laws of Florida, but was codified in chapter 403, Florida Statutes, with the Siting Act. See § 366.80, Fla. Stat. (noting that section 403.519 is part of FEECA).

the legislature envisioned that the applicant under section 403.519 would be a retail, load-serving utility with a duty to serve the public.³ See Ch. 80-65 Laws of Fla. § 5.

Panda does not set forth allegations demonstrating that it qualifies under this standard. Indeed, the Petition shows that Panda has no duty to serve and no contract with a utility that has a duty to serve, and will only sell power when it determines such activity to be in its economic best interests. Panda also fails to allege that it is an "electric utility" under Chapter 366, Florida Statutes, subject to the Grid Bill and ten-year site plan requirements of the Commission. Indeed, Panda claims that it will be an exempt wholesale generator ("EWG"), which is prohibited from serving retail load, and therefore cannot qualify as an "electric utility."

Moreover, even if the term "applicant" in section 403.519 were construed to include a "regulated electric company," as that term is used in section 403.503(13), Panda would not qualify. Panda has no licences or authorizations to generate or sell electricity in Florida. Nor does it claim to otherwise be regulated by the Commission. Indeed, because it has no retail customers, Panda would remain completely unregulated by this Commission even if certification was granted in this proceeding.⁴ Panda also has not been certified as an EWG, and is not

³ Given that the statute was enacted in 1980, the Legislature could not have meant anything else. Exempt wholesale generators, which Panda aspires to be, did not exist until created by federal legislation in 1992.

⁴ This fact alone negates any contention that Panda is an electric utility. Section 366.042(2), Florida Statutes requires the Commission to prescribe a rate structure for "all electric utilities." But as a merchant plant, Panda would escape such rate regulation and be allowed to sell at market prices. 15 U.S.C. § 79Z-5a. Such an anomalous result (i.e., that one can be an "electric utility" for purposes of getting a need certification but not for purpose of rate regulation) was clearly never intended by the Legislature.

regulated by the Federal Energy Regulatory Commission ("FERC").⁵ Thus, under any interpretation of the term, there is no basis for Panda to claim that it is a "regulated electric company."

More importantly, even if Panda does secure EWG status, its power sales will remain completely unregulated by the state of Florida, leaving Panda free to make opportunistic sales at such prices and on such terms as it desires. The allegation that Panda has applied for EWG status with FERC is therefore unavailing and does not make Panda a "regulated electric company" that is "authorized to engage in, the business of generating, transmitting, or distributing electric energy" under state law, much less an "applicant" under section 403.519. The Siting Act was created in 1973 and was intended to refer to the types of "regulated electric companies" existing at the time, all of which were state-regulated. It was not until 1992 that the federal government first authorized the creation of EWGs. Obviously, the intended construction of the term "regulated electric company" in a statute enacted in 1973 could not have included a class of generation company that would not exist until two decades in the future. Placed in historical context, the term "regulated electric company" can only refer to the companies regulated under Chapter 366, Florida Statutes. *See Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So. 2d 577, 581 (Fla. 1965) (reading into a statute a meaning that was not contemplated is improper).

Moreover, deferring to Panda's application for federal EWG status is inappropriate given the Supreme Court's prior interpretation of the purpose for need determinations in *Nassau Power*

⁵ Panda admits on page 4 of its Petition that it has not secured EWG status from FERC.

Corp. v. Deason, 641 So. 2d 396 (Fla. 1994). In that case the Supreme Court expressly noted that a need determination proceeding is tied to an electric utility's duty to serve its retail load, as it is the "need" caused by the utility's duty to serve that is at issue in the proceeding. Thus, need determinations cannot be sought by a company that has no obligation to make sales of power and therefore no "need" of its own. According to *Nassau Power v. Deason*, such power producers can apply for need certification only if they are contractually dedicated to serving the need of a retail, load-serving utility. Any interpretation of the statutes that allows a company to bootstrap itself into electric utility status through certification as an EWG -- which by definition does not serve retail load -- would run counter to Supreme Court precedent.

B. Supreme Court Case Law and Decisions of this Commission Confirm That, as a Non-Utility, Panda May Apply for Certification Only If it Has Contracted to Sell its Power to a Load-Serving Utility.

Both this Commission and the Florida Supreme Court have held that independent power producers may apply for a need determinations under section 403.519 only if they have a contract to sell the proposed plant's output to a load-serving utility. In *Petition of Nassau Power Corporation to Determine Need for an Electrical Power Plant*, 92 FSPC 10:643, the Commission held that an independent power producer that has no contract with a retail-serving utility does not qualify as an "applicant" under section 403.519. 92 FPSC 644-45. The Commission based this decision on a finding that the term "electric utility" in the definition of "applicant" refers to an entity with an obligation to serve retail load and an associated need for power to meet that obligation. Therefore, independent producers, having no obligation to serve and no need related to such an obligation, do not qualify under the existing statutory scheme:

Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators . . . have no such need since they are not qualified to serve customers.

92 FPSC 10: at 645.

The Commission also noted that the decision not to allow independent power producers to apply for certification was based on the plain language of the statute, and the Supreme Court's decision in *Nassau Power v. Beard*:

This scheme simply recognizes the utility's planning and evaluation process. It is the utility's need for power to serve its customers which must be evaluated in a need determination proceeding. *Nassau Power v. Beard*, [601 So. 2d 1175 (Fla. 1992)]. A non-utility generator has no such need because it is not required to serve customers. The utility, not the cogenerator or independent power producer, is the proper applicant.

92 FPSC 10: at 645.

Reviewing that order, The Florida Supreme Court agreed with the Commission that an applicant under section 403.519 must be an entity with a duty to serve retail load:

[A] need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators . . . have no similar need because they are not required to serve customers.

Nassau Power v. Deason, 641 So. 2d 396, 398 (Fla. 1994). The Court found that the Commission's interpretation of the term "applicant" to mean an electric utility with a duty to serve customers was consistent with both the Siting Act and the Supreme Court's earlier decision in *Nassau Power v. Beard*, 601 So. 2d 1175 (Fla. 1992).

Thus, the law is settled that an independent power producer can apply for a need determination "only after a power sales agreement has been entered into with a utility." *Id.* at

399. Panda's Petition (at 8-9) indicates only that Panda *might* seek to enter into such an agreement in the future. Nowhere is it alleged that any such contract exists, that any negotiations for a contract have been undertaken, or that Panda has even decided whether to pursue such a contract. Until Panda meets the requirement recognized in the *Nassau Power* decisions of entering into a power sales agreement, it has no standing to seek a need determination.

FPL recognizes that the Commission allowed a merchant plant to apply for a need determination 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., LLP*, Order No. PSC 99-0535-FOF-EM (March 22, 1999) (hereinafter "*Duke*"). However, the Commission exceeded its statutory authority and abrogated the legislative scheme in reaching that result. FPL and the other *Duke* interveners have appealed the Commission's Final Order to the Florida Supreme court, arguing, amongst other things that the Commission impermissibly departed from the *Nassau Power* decisions, that *Duke* was not a proper applicant under section 403.519, and that *Duke*'s petition failed to demonstrate a need for the project.⁶ FPL submits that *Duke* was incorrectly decided and cannot be reconciled with the Supreme Court's decisions in *Nassau Power v. Beard* and *Nassau Power v. Deason*, both of which make clear that an applicant under section 403.519 must be an electric utility with a duty to serve or an entity that has contracted to sell its power to such a

⁶ FPL is confident that the Florida Supreme Court will overturn the *Duke* Final Order. Such a result would, of course, also dictate dismissal of the Panda Petition for the reasons articulated above.

utility. Respectfully, it was not the Commission's place to disregard and supplant the legislative scheme in *Duke*, and that decision and its progeny should not be followed as precedent.⁷

III. THE PETITION FAILS TO DEMONSTRATE ANY NEED FOR THE PLANT AND INSTEAD IMPROPERLY ASKS THIS COMMISSION TO DEFER TO MARKET FORCES.

The Petition fails to identify and plead the need of any purchasing utility for the generation capacity of the plant. Panda makes no attempt to show such utility-specific need and instead merely argues that the project is "consistent with peninsular Florida's needs for generating capacity." Moreover, although Panda alleges that there is a general need of 8,000 MW statewide to meet reserve margins, it acknowledges that its project can "provide part of this needed capacity" only if "utilities contract for the project's output."⁸ Petition at 8-9. Unless and until such contracts are executed, Panda's contribution to the asserted state-wide need is only alleged to be "additional reliability protection [due to] its presence and availability." *Id.*

Distilled to its essence, Panda's entire case on need is that there is a general demand for additional generation, on a statewide basis, and sales of power from the project may alleviate some of this demand. This does not satisfy the requirement of demonstrating a utility-specific

⁷ Putting aside the fundamental errors of the Commission's *Duke* Final Order, it is clear that the instant case is distinguishable from *Duke*. In *Duke* the Commission reviewed a need determination application that was jointly filed by an electric utility, the Utilities Commission of the City of New Smyrna Beach, and Duke. If the Commission follows *Duke*, FPL submits that the decision should be limited to its facts; it should not be extended to allow an application by a merchant generator that has no ties whatsoever to an electric utility. Moreover, the instant case is also distinguishable because, unlike *Duke*, Panda is not an EWG. It has applied for such status, but no decision has been made by FERC. Even under the most aggressive reading of *Duke*, Panda would need the EWG certification before applying for need certification under section 403.519.

⁸ Panda has made no commitments to enter into any such contracts.

need for power, as the criteria of section 403.519 clearly envision. Panda cannot, for example, demonstrate that its power is needed for "electric system reliability and integrity" unless it discusses the system integrity of the utility(ies) to which it intends to sell power.⁹ Similarly, Panda cannot meaningfully address the "need for adequate electricity at a reasonable cost" or whether its project is the "most cost-effective available," without addressing the generation alternatives available to the specific utilities to which it intends to sell power.¹⁰ The Supreme Court has found on similar facts that the determination of cost effectiveness would be rendered "virtually meaningless" if examined on a statewide, rather than utility-specific, basis. *Nassau Power v. Beard*, 601 So. 2d at 1178, n. 9.

Without a firm commitment to sell the project's output to a utility or utilities, Panda's claim that it will meet the needs of peninsular Florida rests only on the vaguely defined impact of the project's "presence and availability." However, there is no commitment to serve imposed on Panda, nor is there any guarantee that it will not attempt to extract exorbitant prices during times

⁹ The Nassau Amelia Island need determination is a perfect example of why reliability benefits must be measured on a utility-specific basis. There, because of the project's impact on tie line capability, FPL would have received only 145 MW net, even though the project had nominal generation of 435 MW. *In re: Petition for Determination of Need for Electrical Power Plant (Amelia Island Cogeneration Facility) by Nassau Power Corp.*, 92 FPSC 2:814. And, because of its location the project would not have enhanced FPL's reliability as much as another alternative of equal capacity. *Id.*

¹⁰ If such an analysis was performed, the Panda project could never be the most cost-effective alternative available. As a merchant producer, Panda's economically rational behavior will be to sell power at or near the marginal cost of generation at any given time. However, if a utility was to build a plant similar to Panda's it would sell at cost-based rates. Thus, with Panda's project the lion's share of the savings (i.e., the extent to which power can be produced below marginal generation costs) will flow to the project owners. From the ratepayers' perspective this is necessarily far less cost effective than an equivalent utility-built plant, where the bulk of the savings will be passed on to retail electric customers.

of limited supply. By failing to identify a purchasing utility, failing to demonstrate the need of any utility for the project's power, and failing to explain how the project's power will be sold, Panda has failed to state a cause of action on the key issues in this proceeding.

Indeed, Panda's underlying theory -- that the market should determine whether a plant is needed -- represents nothing more than an invitation for this Commission to avoid its statutory duty of determining whether power plants are truly needed.¹¹ The very purpose of section 403.519 is to have a detailed evaluation of whether a plant is needed before it is built. It is simply insufficient to claim that the developer is taking all the financial risk and therefore if the plant turns out not to have been needed there is no harm done. A core principle underlying the section 403.519 need-determination provision is that power plants consume valuable natural resources and by their nature involve costs that are borne by public rather than the developer, such as environmental and natural resources impacts. In recognition of the reality that any plant will have such adverse consequences, the Siting Act and section 403.519 require that the need for the plant be proven before environmental and other impacts are even evaluated. The plain import of the statute is obvious: if a plant is not needed, it may not be built.

Panda and other would-be merchant power generators ask the Commission to completely ignore this legislative policy and defer to market forces. By advocating that any number of plants may be built so long as the developers are willing to take the risk that there will be a market for their power, Panda invites the wholesale proliferation of power plants (and their

¹¹ The Commission is expressly asked to disregard its statutory duty in Paragraphs 27 and 28 of the Petition, which ask the Commission to approve the certification "even if" the project is not the most cost-effective alternative, and "even if" it is not needed to maintain reliable electric service to Florida customers. Petition at 14-15.

associated environmental and natural resources impacts) as long as power developers determine that there is a market for additional generation. (Of course that identified market may not be in Florida, as there is nothing preventing an EWG from selling power in other states.) And, if a plant turn out not to have been needed, the state is left to deal with the incumbent environmental and natural resource costs. This theory runs counter to the legislative intent underlying the Siting Act. Indeed, it would completely abrogate the legislative policy decision that power plant development should be undertaken only when there is a demonstrated need for the facility.

IV. THE PETITION FAILS TO PROVIDE THE INFORMATION REQUIRED BY RULE 25-22.081

In Rule 25-22.081, F.A.C., the Commission has set forth the information that must be included with a petition to commence a need determination:

The petition, to allow the Commission to take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and the need to determine whether the proposed plant is the most cost effective alternative available, shall contain the following information:

(1) A general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections.

* * *

(3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant including the general time within which the generating units will be needed. Documentation shall include historical and forecasted summer and winter peaks, number of customers, net energy for load, and load factors with a discussion of the more critical operating conditions. Load forecasts shall identify the model or models on which they were based and shall include sufficient detail to permit analysis of the model or models. If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil blackout, then detailed analysis and supporting documentation of costs and benefits is required.

* * *

(5) A discussion of viable nongenerating alternatives including an evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively and the effects on the timing and size of the proposed plant.

* * *

(7) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a nonutility generator, the petition shall include a discussion of the potential for increases or decreases in the utility's cost of capital, the effect of the seller's financing arrangements on the utility's system reliability, any competitive advantage the financing arrangements may give the seller and the seller's fuel supply adequacy.

(emphasis added). As discussed below, Panda's Petition fails to meet many of the requirements of Rule 25-22.081, and should be dismissed accordingly.

A. There Is No Description of the Utility or Utilities Primarily Affected.

Rule 25-22.081(1) requires that a need determination petition include, "[a] general description of the utility or utilities primarily affected, including the load and electrical characteristics, generating capability, and interconnections." Utility-specific information is necessary for the Commission to address whether the proposed power plant furthers "the need for electric system reliability and integrity" and "the need for adequate electricity at a reasonable cost," whether the proposed plant is the "most cost-effective alternative available,"¹² and whether

¹² The need for utility specific cost-effectiveness information is clear from Panda's petition, which analyzes generation alternatives and states that the chosen technology is the most cost-effective "to Panda" (Petition at 16), but does not consider whether other alternatives would be more cost-effective to utilities and their customers.

conservation programs "might mitigate the need for the proposed plant." The Petition makes no attempt to provide this utility-specific information. The purchasing utility or utilities of the merchant plant generation are not identified; their specific load and electrical characteristics, their generating capability and their interconnections are not discussed. Consequently, the failure of to provide this mandatory information will completely frustrate the Commission's ability to apply the "utility and unit specific" need determination criteria.

Moreover, it is insufficient to substitute a discussion of the various factors mentioned in the rule from the perspective of "peninsular Florida." "Peninsular Florida" is nothing more than a planning convention, it is obviously not a utility.¹³ The rule in question and the statutory criteria the rule implements are utility specific,¹⁴ and are not satisfied by a general discussion of "peninsular Florida."¹⁵

B. The Petition Omits A Statement Of The Specific Conditions, Contingencies Or Other Factors Which Indicate A Need For The Proposed Electrical Power Plant.

¹³ "Peninsular Florida" is a planning construct representing the cumulative needs of 59 utilities in the geographic area called peninsular Florida. Not all nor even most of these utilities will be primarily affected by the proposed merchant capacity. The petitioners cannot reasonably maintain that their discussion of this planning construct satisfies the utility-specific requirements of the rule.

¹⁴ The need determination criteria are "utility and unit specific." *In re: Hearings on Load Forecasts, Generation Expansion Plans, and Cogeneration Prices for Peninsular Florida's Electric Utilities*, 89 FPSC 12:294, 319 (Order No. 22341); *Nassau Power Corporation v. Beard*, 601 So. 2d 1175, 1178 n. 9 (Fla. 1992).

¹⁵ Even if a discussion of "peninsular Florida" could satisfy the rule, the description provided in the Petition is far from complete. There is, for example, no description of "peninsular Florida's" electrical characteristics or its interconnections.

This information, required by Rule 25-22.081(3), is critical to the Commission's ability to make the utility-specific assessments associated with the mandatory, statutory need criteria regarding need for system reliability and integrity and need for adequate electricity at a reasonable cost. Failure to provide this essential information frustrates the Commission's ability to make its required assessment and constitutes grounds for dismissal.

No attempt is made to identify detailed information on the purchasing utility or utilities, because Panda does not know to whom it may sell its capacity and energy. Likewise, because Panda does not have a contract for the sale of the plant's output, it cannot identify the specific conditions, contingencies and factors which indicate a need for its plant. It also cannot document the purchasing utility's peak loads, net energy for load, or load factors and cannot provide a discussion of the more critical operating conditions. Accordingly, its Petition falls far short of the requirements of Rule 25-22.081(3).

Once again, any argument that a general discussion of the load forecast for "peninsular Florida" satisfies this requirement is unavailing. "Peninsular Florida" is not a legal entity with a need for a power plant. The obligation to meet the needs of the utilities within peninsular Florida rests solely with the utilities. It is the utilities that have the obligation to serve and the responsibility to plan. It is the individual utilities which will make the "build-or-buy" decisions necessary to meet needs. Therefore, the required information must be provided on a utility-specific basis.

And, even if a general discussion of the peninsular Florida's need for power could satisfy the requirements of Rule 25-22.081(3), the discussion in the Petition and its Exhibit falls well short of the rule's requirements, as there is no attempt to address "the specific conditions,

contingencies or other factors which indicate a need for the proposed power plant." There is, for example, no discussion of the factors underlying the load growth presumed in the Petition. Indeed, there is no discussion of the underlying demand-side facts at all. Instead the Petition provides mere conclusory statements indicating a general need for power, without delving into the facts underlying that position. This clearly falls far short of providing "the specific conditions, contingencies or other factors" that lead to the alleged need.

C. *The Petition Fails to Provide Detailed Analysis and Supporting Documentation of the Costs and Benefits of the Project*

Rule 25-28.081(3), F.A.C. requires an applicant to file "detailed analysis and supporting documentation of costs and benefits" whenever a determination of need is sought "on some basis in addition to or in lieu of capacity needs." Panda is basing its Petition primarily on an alleged economic need for power throughout peninsular Florida to meet reserve margins. This is clearly a basis other than the capacity needs of a utility. Indeed, as Panda has not identified the utility(ies) to which it will sell its power, the Petition cannot be based on any utility's capacity needs.

Thus, the "detailed analyses" requirements of Rule 25-22.081(3) clearly applies. But nowhere is any detailed analysis of the costs and benefits of the project provided in the Petition or Exhibits. The Petition refers in general terms to two analyses that apparently have been performed by R.W. Beck and Altos Management Partners, and provides a general summary of R.W. Beck's conclusions. However, neither analysis is provided. Panda's failure to provide this information makes it impossible for the Commission and parties to review the cost-effectiveness of the project and forces them to seek through discovery information which Panda had a duty to

provide in the first instance. As noted by Florida Power Corporation in its Motion to Dismiss the Petition, the results of such gamesmanship have recently become all too clear in the Okeechobee Generating Company Need Determination Docket (No. 991462-EU), where the applicant hid the details of its modeling for months through various discovery tactics, and when access was finally obtained, the interveners found that the modeling which allegedly documented cost-effectiveness did not even analyze the project. The Commission should not allow similar tactics to be used in this case; Panda's Petition is fatally insufficient without inclusion of the required analyses.

D. The Petition Fails to Address Nongenerating Alternatives.

Rule 25-22.081(5), F.A.C., requires "a discussion of the viable nongenerating alternatives including an evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively and the effects on the timing and size of the proposed unit." The Petition makes no attempt satisfy this pleading requirement. Instead Panda simply takes the position that because it is a merchant power producer, it "does not engage in end-use energy conservation," and should therefore be excused of any requirement to comply with Rule 25-22.081(5). Petition at 16. The only other information provided on this point is the allegation that the Panda unit is consistent with the goals of FEECA because conservation benefits will flow from the cost-effectiveness of the project and Panda's expectation that it will displace existing generation.

However, not a single nongenerating alternative is mentioned in the Petition as required by the Rule. Nor is there any "evaluation of the nature and extent of reductions in the growth rates of peak demand, KWH consumption and oil consumption resulting from the goals and

programs adopted pursuant to the Florida Energy Efficiency and Conservation Act." Because this information is omitted, the Commission cannot know from the Petition what conservation alternatives are available which might mitigate the alleged need for the proposed plant. And, without such information, the Commission cannot perform the assessment of the conservation criteria in Section 403.519, Florida Statutes.

V. THE PETITION DOES NOT ALLEGE COMPLIANCE WITH RULE 25-22.071

Rule 25-22.071(1)(b), F.A.C. provides that:

Any electric utility . . . that elects to construct an additional generating facility exceeding 75 MW gross generating capacity shall prepare a ten-year site plan, and submit 25 copies to the Public Service Commission's Division of Records and Reporting in the year the decision to construct is made or at least three years prior to application for site certification, and every year thereafter until the facility becomes fully operational.

The purpose of this requirement is to allow future power plant construction plans to be reviewed by the regulatory agencies, and facilitate comments on those plans being submitted to the Commission by the agencies. This duty is uniformly imposed on every "electric utility."

Panda has not filed a ten-year site plan, nor is any intent to file such a plan alleged in the Petition. Panda states that it made the decision to proceed with constructing its proposed Midway and Leesburg plants in 1999. Petition, Ex. Site-D. Therefore, if Panda was an electric utility, there would have been a mandatory requirement to submit a ten-year site plan during that year. Thus, even if Panda is an "electric utility" (which it is not), it should not be allowed to file its need determination petition due to its failure to comply with the ten-year site plan rule.

Panda's failure to file a ten-year site plan underscores the fact that it is not an electric utility and therefore not a proper applicant. It has failed to comply with the ten-year site plan

requirements applicable to all electric utilities. It has also failed to comply with the bidding requirements of Rule 25-22.082, which are applicable to all investor-owned utilities. Thus, Panda seeks to apply under a statute that allows need determinations only by electric utilities, but it has failed to acquiesce to the burdens and regulatory requirements applicable to such utilities. Panda cannot have it both ways -- it cannot be an "electric utility" when that status works to its benefit and yet disregard the obligations that are incumbent to that status.


VI. PANDA HAS FAILED TO COMPLY WITH THE BIDDING REQUIREMENTS OF RULE 25-22.082

In further disregard to its implicit assertion that it is an "electric utility" qualified to apply for certification under the Siting Act, Panda has made no attempt to comply with the bidding rules applicable to all investor-owned utility generation projects. It is undisputed that Panda is an investor-owned entity. Thus, if it was an electric utility, it would be required to "evaluate supply-side alternatives to its next planned generating unit by issuing a Request for Proposals," before "filing a petition for determination of need for an electrical power plant pursuant to section 403.519, Florida Statutes." Rule 25-22.082(2), F.A.C. Once again, FPL submits that Panda cannot have it both ways and claim to be an electric utility for purposes of seeking certification, but then disregard the prerequisites to such certification applicable to all investor-owned utilities. Whether because Panda is not an "electric utility" or because it has failed to comply with Rule 25-22.082, the result is the same: Panda's Petition must be dismissed.

WHEREFORE, FPL requests that the Commission enter an Order dismissing Panda's Petition for Determination of Need for an Electrical Power Plant in St. Lucie County, and closing this docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

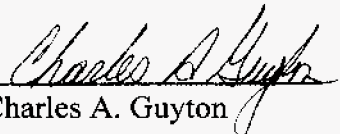
I HEREBY CERTIFY that a true and correct copy of this FPL's Motion to Dismiss the Petition in Docket No. 000289-EU was served by Hand Delivery (*) or mailed this 27th day of March, 2000 to the following:

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