ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for determination of need for Hines Unit 2 by Florida Power Corporation.	))))	DOCKET NO. 001064-EI

PANDA ENERGY INTERNATIONAL, INC.'S
RESPONSE IN OPPOSITION TO FPC'S
MOTION FOR RECONSIDERATION OF THE PREHEARING
OFFICER'S ORDER GRANTING PANDA'S PETITION TO INTERVENE

Panda Energy International, Inc. (PEII, Panda), by and through its undersigned counsel, files its Response In Opposition to Florida Power Corporation's (FPC) Motion For Reconsideration of the Prehearing Officer's Order Granting Panda's Petition to Intervene (Reconsideration Motion) and in support thereof states as follows:

Legal Standard

1. FPC argues in its Reconsideration Motion that the legal standard to be applied when reviewing the procedural orders of a Prehearing Officer is that of a *de novo* review by the full Commission panel, rather than the appellate review which has been traditionally used by the Commission in such circumstances. [Reconsideration Motion at 2-3]. PEII disagrees and urges that the Commission follow its own precedent in this area.

2. Under Florida case and statutory law agencies are allowed to delegate authority within their own organizations in order to achieve administrative efficiencies. Rule 28-101.001, Florida Administrative Code, requires that such delegations be specifically set forth in a Statement of Agency Organization and Operation. The Commission has done so and has determined that the Commission Chairman shall have the right to assign panels to conduct hearings on matters pending before the Commission and to delegate to

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prehearing officers the power to resolve all pretrial motions at their discretion. [Florida Public Service Commission Statement of Agency Organization and Operation, ¶ 6 at page 12 (1999)].

3. As noted by FPC, the Commission has always used an "appellate" standard when a panel reviews a pretrial order issued by a Prehearing Officer pursuant to Rule 25-22.0376(1), Florida Administrative Code. [Reconsideration Motion at 3]. This standard was clearly stated in In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc., et al. (Southern States), 96 FPSC 3:398, 399 (1996) thus:

> [T]he purpose of a petition for rehearing is merely to bring to the attention of the trial court or the administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance, and is not intended as a procedure for rearguing the whole case because the losing party disagrees with the judgment.

4. While PEII believes that the Commission could have adopted a *de novo* review standard for Prehearing Officer's orders, it has not done so. More importantly it is not now required to do so. The Commission's determination that a Prehearing Officer's pretrial procedural orders should be granted great deference is the Commission's to make, not FPC's. The proper standard to apply is that of the Southern States case.

Argument

5. FPC has not raised new facts or new legal issues in its Reconsideration Motion, and as such applying the Southern States

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standard, the motion should be denied.

6. The gist of FPC's argument against the right of PEII to intervene in this need determination proceeding is that the 1,000 MW power plants from which PEII would supply FPC with 250-500 MW of capacity are merchant power plants which cannot be permitted under the Florida Supreme Court's recent decision in Tampa Electric Co. v. Garcia (Tampa Electric), 25 Fla.L. Weekly S294 (Fla. April 20, 2000), *revised* 25 Fla.L. Weekly S730 (Fla. Sept. 28, 2000). [Reconsideration Motion at 4-5].

7. Specifically, it is FPC's contention that the Tampa Electric decision requires that there must be a retail utility which has a "specific, committed need for all of the electric power to be generated by the proposed plant" for the plant to be permittable as an IPP under the Florida Power Plant Siting Act. [Reconsideration Motion at 5]. Since in FPC's opinion PEII's plants cannot be permitted, FPC argues that it can reject these bids, and Panda's substantial interest in this proceeding, as a matter of law. [Reconsideration Motion at 4].

8. Even if one accepts FPC's interpretation of the Tampa Electric case as true on this point, it is a matter of public record that FPC is not the only retail electric utility which will need additional electric capacity in the 2003-2004 timeframe. The most recent Florida Reliability Coordinating Council (FRCC) Ten Year Site Plan identifies approximately 11,000 MW of additional capacity needed within Florida from 2000-2010.

9. PEII is diligently working to sell the balance of the

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capacity associated with each of these plants to other retail load serving entities in Florida. PEII would note that even FPC is not arguing that the Supreme Court has said that the entire capacity of an IPP must be committed to just one Florida retail utility. Given the Commission's decision at its October 17th agenda in the Calpine Need Determination docket[1], in which FPC's motion to dismiss was denied based on Calpine's representation that it *would secure* a contract with a Florida retail utility/utilities for the output of its proposed power plant, it is disingenuous for FPC to use this argument to disqualify PEII as an intervenor in this case. While the details of PEII's bid cannot change, *other facts* can change which affect the ability of PEII to construct these power plants.

10. There is, even under FPC's own interpretation of the Tampa Electric case, a very viable and legal means by which PEII can construct the power plants it has bid.[2] FPC's argument should be rejected by the Commission as spurious.

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[1] In re: Petition for determination of need for the Osprey Energy Center by Calpine Construction Finance Company, L.P., Docket No. 000442-EI.

[2] Additionally, PEII would note that a portion of these proposed plants, as outlined in PEII's bid proposal, will be used as backup for the MWs committed to FPC. PEII in this instance is using the "extra" MW at its proposed power plants to provide a "reserve margin" for its facility. PEII would also note that Mr. Crisp testified at his deposition that there is 400 MW, or 75%, of the capacity associated with the Hines Unit 2 plant which is in "excess" of that needed to meet the 2003-2004 20% reserve margin needs of FPC, the major reason given by FPC in support of this need petition. If FPC, as it has stipulated, is "fully committed" to meeting its identified retail load demand from the Hines Unit 2 plant, PEII is "fully committed" to meet its bid capacity as well.

11. PEII rejects FPC's assertion that it has no substantial interest in this proceeding other than the merits of its own bid. [Reconsideration Motion at 4-5]. A possible outcome of cross examination of FPC's witnesses at hearing may lead to the complete rejection of the Hines Unit 2 RFP process and an order requiring that this capacity be rebid. PEII, as a bona fide bidder in FPC's RFP, also has a substantial interest in the integrity of FPC's bidding process, and this is the proceeding in which challenges to the RFP process itself are to be made.[3]

12. PEII has both a right under Rule 25-22.082, Florida Administrative Code, (Bidding Rule) and a substantial interest in the integrity of the entire generation selection process used by FPC at issue in this proceeding which satisfies the Agrico Chemical[4] two-prong test for standing to intervene.

13. Finally, PEII states that its bid is the most cost-effective alternative available to serve the 530 MW of demand need identified by FPC in this proceeding. PEII also states that the RFP process engaged in by FPC regarding the capacity at issue in this proceeding was an elaborate and expensive sham intended to placate the FPSC and "comply" with Order PSC-99-0232-FOF-EI requiring that FPC bid this capacity.

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[3] PEII also notes that it paid a *nonrefundable* $10,000 fee to FPC to process and evaluate its bid. Regardless of the ultimate disposition of its own bid, PEII has the right to assure itself that this money was legitimately solicited.

[4] Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981).

14. In sum, FPC has not raised any issue or fact which was not argued to, and rejected by, the Prehearing Officer in its initial pleading objecting to the order granting PEII intervention as a full party in this proceeding. FPC's rehearing request does not meet the Southern States standard and should be denied.

WHEREFORE, PEII requests that this Commission deny FPC's Motion for Reconsideration of the Prehearing Officer's Order Granting Panda's Petition to Intervene.

Respectfully submitted this 25th day of October, 2000 by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by U.S. Mail to all parties listed below and also by (*)Hand Delivery and/or (**) Facsimile as indicated on this 25th day of October, 2000:

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