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RECORDS AND REPORTING

April 3, 2000

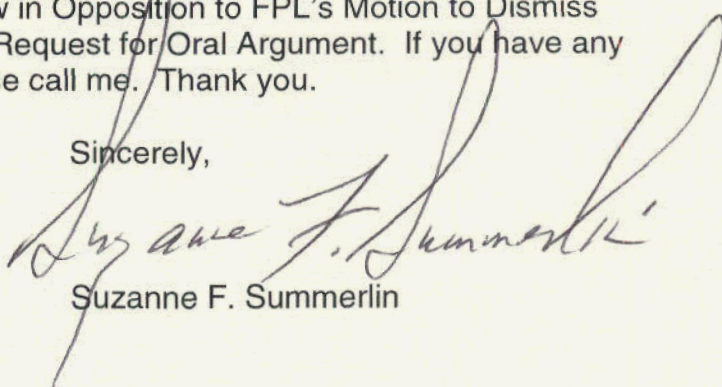
Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
4075 Esplanade Way, Room 110  
Tallahassee, Florida 32399-0850

RE: Docket No. 000288-EU, In re: Petition for Determination of Need for an Electrical Power Plant in Lake County by Panda Leesburg Power Partners, L.P.

Dear Ms. Bayo:

Enclosed for filing on behalf of Panda Leesburg Power Partners, L.P. in Docket No. 000288 are the original and fifteen copies of Panda Leesburg's Response and Memorandum of Law in Opposition to FPL's Motion to Dismiss the Petition and Panda Leesburg's Request for Oral Argument. If you have any questions regarding this filing, please call me. Thank you.

Sincerely,

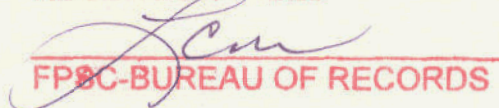


Suzanne F. Summerlin

SFS/wd  
Enclosures (32)

- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 3 \_\_\_\_\_
- MAS \_\_\_\_\_
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- WAW \_\_\_\_\_
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DOCUMENT NUMBER-DATE  
04071 APR-38  
FPSC-RECORDS/REPORTING

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition for Determination )  
of Need for an Electrical Power Plant in ) DOCKET NO. 000288-EU  
Lake County by Panda Leesburg )  
Power Partners, L.P. )  
\_\_\_\_\_ )

**PETITIONER'S REQUEST FOR ORAL ARGUMENT**  
**ON ITS RESPONSE AND MEMORANDUM OF LAW**  
**IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S**  
**MOTION TO DISMISS THE PETITION**

Panda Leesburg Power Partners, L.P. ("Panda Leesburg"), pursuant to Florida Public Service Commission Rule 25-22.058, F.A.C., by and through its undersigned attorney, hereby respectfully requests that it be granted oral argument on its Response and Memorandum of Law in Opposition to Florida Power & Light Company's Motion to Dismiss the Petition filed in the above-styled docket and, in support thereof, states as follows:

1. This petition for determination of need by Panda Leesburg as an Exempt Wholesale Generator ("EWG") is one of only four such filings to be made with the Commission at this point in time. Petitions for determinations of need by EWGs represent new territory for the Commission. This case presents many of the same significant and novel legal and policy issues that have been presented by the two proceedings for need determinations for EWGs that have preceded it (by Duke New Smyrna and Okeechobee Generating Company). However, this case also has its own unique facts. Each of these initial EWG filings will shape

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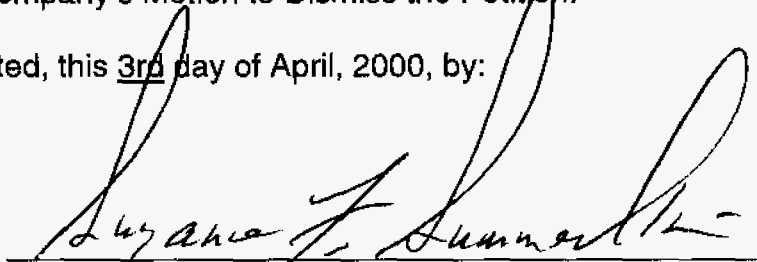
the development of the decisional law and policy that will govern all future EWG need determinations. For all of these reasons, Panda Leesburg submits that the Commission will benefit from discussion of the issues raised in Florida Power & Light Company's Motion to Dismiss the Petition and Panda Leesburg's Response and Memorandum of Law in Opposition to FPL's Motion to Dismiss the Petition.

2. Panda Leesburg Power Partners, L.P., has incurred a great deal of expense and time in the preparation of its Petition for Determination of Need. As the Commission's decision on FPL's Motion to Dismiss could be dispositive of the Petition, it is an extremely serious determination for Panda Leesburg.

3. Granting oral argument will permit the Commission to thoroughly evaluate and completely understand the parties' positions.

WHEREFORE, Panda Leesburg Power Partners, L.P., requests that it be granted oral argument on its Response and Memorandum of Law in Opposition to Florida Power & Light Company's Motion to Dismiss the Petition.

Respectfully submitted, this 3rd day of April, 2000, by:



Suzanne F. Summerlin, Esq.  
Florida Bar No. 398586  
Suzanne Brownless, Esq.  
Florida Bar No. 309591

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Attorneys for PANDA LEESBURG POWER  
PARTNERS, L.P.

**CERTIFICATE OF SERVICE**

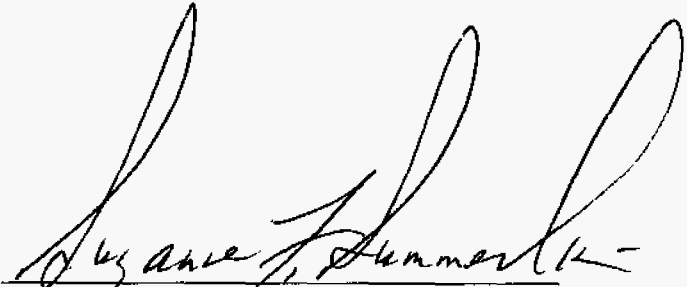
I HEREBY CERTIFY that a true and correct copy of this Panda Leesburg Power Partners, L.P.'s Request for Oral Argument on its Response and Memorandum of Law in Opposition to Florida Power & Light Company's Motion to Dismiss the Petition in Docket No. 000289-EU was served by Hand Delivery(\*) or mailed this 3<sup>rd</sup> day of April, 2000, to the following:

Marlene Stern, Esq.\*  
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Florida Public Service Commission  
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Tallahassee, Florida 32399-0850

Lee Colson, Staff Analyst\*  
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Panda Leesburg Power Partners, L.P.  
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Suzanne F. Summerlin, Esq.

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition for Determination )  
of Need for an Electrical Power Plant in ) DOCKET NO. 000288-EU  
Lake County by Panda Leesburg )  
Power Partners, L.P. )  
\_\_\_\_\_ )

**PETITIONER'S RESPONSE AND MEMORANDUM OF LAW  
IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S  
MOTION TO DISMISS THE PETITION**

Panda Leesburg Power Partners, L.P. ("Panda Leesburg"), hereinafter the "Petitioner", pursuant to Florida Public Service Commission, hereinafter "Commission", Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respectfully submits this response and memorandum of law in opposition to Florida Power & Light Company's Motion to Dismiss the Petition ("FPL's Motion to Dismiss").<sup>1</sup> Contrary to FPL's Motion to Dismiss, Panda Leesburg *is* a proper applicant for the Commission's determination of need under the plain language of the Florida Electrical Power Plant Siting Act (Sections 403.501-.518, F.S.) (the "Siting Act"). Panda Leesburg's Petition *has* demonstrated a need for the Panda Leesburg Project based on the criteria of section 403.519, F.S. Panda Leesburg *has* complied with the mandatory pleading requirements for need determination

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<sup>1</sup> On or about March 27, 2000, FPL also filed a Petition to Intervene. Petitioner is filing a response in opposition to the requested intervention concurrently with the filing of this memorandum of law. Thus, the issue of FPL's standing to intervene is pending. If the Commission denies FPL's intervention, FPL's Motion to Dismiss will be moot.

petitions pursuant to Rule 25-22.081, F.A.C. Panda Leesburg *is not* required by Rule 25-22.071, F.S., to file a Ten-Year Site Plan prior to filing its need determination petition. Finally, Panda Leesburg *is not* required to comply with the competitive bidding requirements of Rule 25-22.082, F.A.C., prior to seeking a need determination.

The legal standard to be employed by the Commission when considering a motion to dismiss is whether a petition alleges sufficient facts to state a cause of action upon which relief may be granted. In this consideration, the Commission must assume that all allegations in a petition are true and all reasonable inferences must be made in favor of the petitioner. See Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); Abruzzo v. Haller, 603 So.2d 1338, 1240 (Fla. 1st DCA 1992).

Practically every word of FPL's Motion to Dismiss has been considered and rejected in two proceedings before the Commission, one need determination currently on appeal and one need determination currently ongoing. **See** Docket No. 981042-EU, In Re: Joint Petition for Determination of Need for an Electric 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., 99 FPSC 3:401, 434-35 (hereinafter ***Duke New Smyrna***) and Docket No. 991462-EU, In Re: Petition for Determination of Need for an Electrical Power Plant in Okeechobee County by Okeechobee Generating Company, L.L.C., 99 FPSC 12:219-242 (hereinafter ***OGC***). The Commission's decision *in Duke New*

**Smyrna** is currently on appeal at the Florida Supreme Court and the **OGC** proceeding is currently ongoing.

As the following discussion demonstrates, Panda Leesburg's Petition clearly states sufficient facts to state a cause of action upon which relief may be granted. If FPL's Motion to Dismiss is not mooted by the proper denial of its Petition to Intervene in this proceeding, the Commission should deny the Motion to Dismiss as legally infirm.

**I. PANDA LEESBURG IS A PROPER APPLICANT UNDER SECTION 403.519, F.S.**

A. As it unsuccessfully argued in **Duke New Smyrna** and **OGC** regarding the petitioners in those proceedings, FPL asserts that Panda Leesburg is not a proper "applicant" pursuant to Section 403.519, F.S., and the Siting Act and, therefore, Panda Leesburg's Petition should be dismissed. In **Duke New Smyrna** and **OGC**, the Commission rejected FPL's arguments that a merchant plant developer could not be a proper "applicant" pursuant to Section 403.519, F.S. To be a proper applicant under the Siting Act and Section 403.519, F.S., the petitioner must be an "electric utility" within the meaning of Section 403.503(13), F.S. Panda Leesburg has alleged sufficient facts to establish that it is an "electric utility" under Section 403.503(13), F.S.

In Paragraph Number 3 of its Petition, Panda Leesburg alleges that it is a public utility under the Federal Power Act, 16 U.S.C.S. Section 824(b)(1)(1994).

Panda Leesburg goes on to state in Paragraph Number 3:

Panda Leesburg will build, own, and operate the Project and will market the Project's capacity, approximately 1,000 MW, and associated energy to other utilities under negotiated arrangements



entered into pursuant to Panda Leesburg's rate schedule as approved by the Federal Energy Regulatory Commission ("FERC").

All wholesale power transactions between utilities that are interconnected, either directly or indirectly, to transmission facilities that transmit power across state lines are transactions in interstate commerce subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission. See Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1971), wherein the U.S. Supreme Court upheld the Federal Power Commission's jurisdiction over the transmission of power, at wholesale, by Florida Power & Light Company's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce. See also 16 U.S.C.S. Section 824(e)&(b)(1)(1994). Panda Leesburg also alleges in Paragraph Number 3 that it filed for approval of its FERC market-based rates on March 3, 2000.

In Paragraph Number 4 of its Petition, Panda Leesburg alleges:

Panda Leesburg qualifies as an exempt wholesale generator ("EWG") under the Public Utility Holding Company Act of 1935. 15 U.S.C.S. Sections 79z-5a (1994 & Supp. 1997). Panda Leesburg filed its application for EWG status with the FERC on January 28, 2000. As an EWG, Panda Leesburg will be prohibited by the Public Utility Holding Company Act of 1935 from making retail sales of electricity from the Project.

Panda Leesburg has subsequently received its certification as an EWG as indicated in the attached FERC order, 90 FERC 62,166, issued on March 7, 2000. (See Attachment A hereto.) This FERC certification indicates that Panda Leesburg is authorized to engage in the business of generating and selling electricity. By the above allegations in its Petition, Panda Leesburg has established that it is a public utility pursuant to the Federal Power Act and an

EWG pursuant to the Public Utility Holding Company Act of 1935. As a public utility and an EWG, Panda Leesburg is regulated by the FERC. In addition to being a regulated electric company, Panda Leesburg will be engaged in the generation and transmission of electric energy, which fall within the definitional activities of Section 403.503(13), F.S., for an “electric utility.”

Thus Panda Leesburg has sufficiently pled facts that establish it is an “electric utility” pursuant to the Federal Power Act, as well as both “regulated” and an “electric company” and, therefore, within the statutory definition of “applicant” set out in Section 403.503(13), F.S. No more than this is required as a matter of pleading.

FPL argues that Panda Leesburg is required to have alleged that it had its EWG certification *prior* to filing a petition for determination of need at the Commission. This argument is tantamount to declaring that a company acting as an “electric utility” in the State of Florida would not be subject to Commission regulation simply because it had not received a certificate from the Commission. This hyper-technical argument demonstrates yet again FPL’s determined effort to conjure up artificial barriers to entry into the State of Florida for merchant plants.

Accordingly, FPL’s arguments that Panda Leesburg is not a proper “applicant” under Section 403.519, F.S., fail and FPL’s Motion to Dismiss must be denied.

**II. PANDA LEESBURG’S PETITION DEMONSTRATES A NEED FOR THE PROJECT PURSUANT TO SECTION 403.519, F.S.**

FPL asserts that Panda Leesburg’s “. . . Petition fails to identify and plead the need of any purchasing utility for the generation capacity of the plant.”

FPL's argument is essentially that Panda Leesburg must allege a utility-specific need for the generation capacity of the Panda Leesburg Project. To demonstrate such utility-specific need, FPL argues that Panda Leesburg must allege that it has firm contracts with existing retail-serving utilities for the generation it will produce and identify those firm contracts prior to filing a petition for determination of need at the Commission.

The Commission has considered and rejected this identical argument previously raised by FPL in both the *Duke New Smyrna* and *OGC* proceedings. FPL's argument, distilled to its essence, is that merchant plants must not be permitted to exist in the State of Florida. As FPL knows well, the very nature of merchant power plants requires that they not have firm contracts for their capacity. If merchant power plants are required to have firm contracts for their capacity prior to filing for a determination of need, there will be no merchant plants in Florida. This is the goal of FPL and FPL will not take no for an answer as is indicated by its ongoing appeal of the Commission's *Duke New Smyrna* decision at the Florida Supreme Court.

Panda Leesburg's Petition alleges in Paragraphs Numbers 15 through 22 that there is a statewide need for the generation capacity of this proposed merchant plant. Panda Leesburg's Petition alleges that the very presence and availability of this merchant plant will increase the reliability of the Florida Grid and that this additional wholesale generation will suppress the prices of electricity to the benefit of all Florida ratepayers.

FPL's argument that Panda Leesburg does not allege that it has firm contracts with specific retail-serving utilities and, therefore, does not demonstrate a need for the proposed project, fails. Therefore, FPL's Motion to Dismiss on this basis must be denied as it has been in the above-cited previous decisions of the Commission.

**III. PANDA LEESBURG HAS COMPLIED WITH THE MANDATORY PLEADING REQUIREMENTS IN RULE 25-22.081, F.A.C.**

Panda Leesburg's Petition substantially complies with all of the pleading requirements in Rule 25-22.081, F.A.C. FPL's Motion to Dismiss sets out the following provisions of Rule 25-22.081, F.A.C. (shown below with the emphasis FPL supplied on specific sections):

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 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.

FPL argues that Panda Leesburg's Petition fails to include the specific items identified by emphasis above in Rule 25-22.081, F.A.C. This is simply not correct.

FPL seems to argue that Panda Leesburg's Petition must include utility-specific information showing that the proposed project is the most cost-effective alternative specifically for FPL. Rule 25-22.081, F.A.C., cannot reasonably be construed in such a restrictive fashion. No applicant could have the type of information for other utilities that FPL contends this Rule should be interpreted to require.

Of course, from FPL's standpoint, the most cost-effective alternative would be to keep out Panda Leesburg and any other merchant plant that will have the effect of reducing FPL's prices or reducing FPL's opportunity in the future to build its own natural gas combined-cycle plants.

Panda Leesburg's Petition includes in Paragraphs Numbers 13, 14, and 15 through 32 an adequate description of the utilities primarily affected and a sufficient description of their "load and electrical characteristics, generating capability and interconnections" to enable the Commission to assess whether the proposed power plant will further "the need for electric system reliability and integrity" and "the need for adequate electricity at a reasonable cost," and whether the proposed plant is the "most cost-effective alternative available," and whether conservation programs "might mitigate the need for the proposed plant." Panda Leesburg's Exhibits attached to its Petition also include supporting documentation to the information contained in the above-cited paragraphs.

Panda Leesburg's Petition describes two analyses performed by R. W. Beck and Altos Management Partners that are the basis for the Petition's allegations of statewide need. Panda Leesburg's Petition includes a description of the load forecast for Peninsular Florida by R. W. Beck and Altos Management and a summary of the statewide need for additional generating capacity developed by these experts. This information fulfills the requirements of Rule 25-22.081(3), F.A.C. The Petition includes a description of various conditions and contingencies in which the additional generation of this proposed merchant plant will be needed by Peninsular Florida.

FPL asserts that if the analyses of R. W. Beck and Altos Management are not provided with the Petition upon filing, the Petition is "fatally insufficient". This is not true. The Rule requires that "detailed analysis and supporting documentation" be provided. The Petition does provide detailed analysis and the

exhibits provide supporting documentation. Neither Panda Leesburg nor any other applicant should be required under this Rule to provide all of its testimony and supporting documentation with its initial filing. Panda Leesburg will submit these analyses with the testimony of its expert witnesses. There will be no need for discovery requests for the Commission to receive these analyses. If Panda Leesburg does not make its case in the hearing in this proceeding, presenting adequate evidence to support its position that there is a statewide need for the project, Panda Leesburg will not be awarded its determination of need. Therefore, there is every reason for Panda Leesburg to provide its analyses and documentation to the Commission. This is yet another spurious and groundless argument by FPL.

FPL asserts that Panda Leesburg's Petition is defective because it does not discuss viable nongenerating alternatives as required by Rule 25-22.081(5), F.A.C. As a merchant plant, Panda Leesburg will not be serving retail customers. It is impossible for Panda Leesburg to exercise conservation measures to avoid the need for additional generation in the State of Florida. Further, Panda Leesburg is relying on the diligent efforts of retail-serving utilities, like FPL, to implement all cost-effective conservation measures possible. Therefore, there is no meaningful discussion that Panda Leesburg can provide on this issue. This was true in the case of both the *Duke New Smyrna* and *OGC* Petitions also. The Commission specifically rejected this argument by FPL in those proceedings. FPL is fully aware of the ludicrousness of expecting Panda Leesburg to fulfill this requirement in light of its merchant plant status, but FPL is

stretching to find some basis on which to have the Commission dismiss Panda Leesburg's Petition.

FPL argued in both the *Duke New Smyrna* and *OGC* proceedings that the Petitions had technical pleading deficiencies. The Commission determined that the applicants had substantially complied with the requirements of Rule 25-22.081, F.A.C., and rejected FPL's Motions to Dismiss on these grounds. FPL's arguments that Panda Leesburg has not complied with the pleading requirements in Rule 25-22.081, F.A.C., are groundless and FPL's Motion to Dismiss must be denied.

#### **IV. PANDA LEESBURG IS NOT REQUIRED TO FILE A TEN-YEAR SITE PLAN PRIOR TO FILING A PETITION FOR NEED DETERMINATION**

FPL asserts that Panda Leesburg's petition is deficient because it fails to allege that Panda Leesburg filed a Ten-Year Site Plan in April of 1999 in accordance with Rule 25-22.071, F.A.C. FPL is again incorrect. Panda Leesburg is not required to allege compliance with Rule 25-22.071, F.A.C., by stating that it has filed a Ten-Year Site Plan nor, indeed, is Panda Leesburg required to have filed a Ten-Year Site Plan prior to seeking a need determination from the Commission. Rule 25-22.081, F.A.C., which governs the contents of petitions for determinations of need, does not contain any requirement that the applicant have filed a Ten-Year Site Plan, allege that it has done so, or explain why it has not done so.

Rule 25-22.071(1), F.A.C., requires the filing of a Ten-Year Site Plan in two instances: where the electric utility has "existing generating capacity of 250 MW or greater" and where an electric utility "elects to construct an additional



generating facility exceeding 75 MW gross generating capacity . . . in the year the decision to construct is made or at least three years prior to application for site certification."

In regard to the first basis for requiring Panda Leesburg to comply with Rule 25-22.071, F.A.C., Panda Leesburg does not have installed capacity in excess of 250 MW in the State of Florida. Therefore, the first basis for requiring Panda Leesburg to comply with Rule 25-22.071, F.A.C., does not apply to Panda Leesburg.

In regard to the second basis for compelling compliance with the Ten-Year Site Plan requirement in Rule 25-22.071, F.A.C., Panda Leesburg has not, as of this date, made a firm commitment to construct the Panda Leesburg Project. Such a decision cannot be made, by a financially prudent business entity, until the basic permitting process required by the state in which such a power plant will be sited has been completed successfully. In other words, Panda Leesburg cannot rationally or prudently make a final decision to construct the Panda Leesburg Project until it receives an order from the Commission granting its Petition for a determination of need. Therefore, the second basis on which to compel compliance with Rule 25-22.071, F.A.C., does not apply to Panda Leesburg.

It makes no sense to require that Panda Leesburg file a document entitled Ten-Year Site Plan when such a document would have contained the identical information contained in Panda Leesburg's Petition and the information that will be presented within this proceeding. In effect, Panda Leesburg's filing of its

petition for need determination with the Commission constitutes its Ten-Year Site Plan. All information available will be provided in the context of this proceeding, making any additional Ten-Year Site Plan filing superfluous. Rule 25-22.071, F.A.C., was written with the intent to require investor-owned utilities and other retail-serving utilities that have been in existence for many years to identify potential sites for proposed additional generating units three years in advance to permit effective planning for all utilities in the State of Florida. To the extent that Rule 25-22.071, F.A.C., is intended to provide the Commission and other utilities with full information regarding proposed generating units, Panda Leesburg is substantially complying with that intent by filing its petition for determination of need and its participation in this proceeding.

The Commission considered and rejected this identical argument raised by FPL in both the *Duke New Smyrna* and *OGC* proceedings, stating in the *OGC* decision:

**We find that Rule 25-22.071, F.A.C., does not require OGC to file a ten year site plan prior to filing its need determination petition.** Subsection (1)(b) of the rule provides:

Any electric utility . . . that elects to construct an additional generating facility exceeding 75 MW gross generating capacity shall prepare a ten-year site plan, [to be submitted] 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.

OGC points out that it had not made its decision to construct the project as of the April 1 filing date specified in subsection (1)(a) of the rule. Accordingly, OGC was not required to file a ten-year site plan pursuant to the rule prior to filing its need determination petition. **Further, OGC is not required by any Commission rule to allege in its petition that it has satisfied the requirements of**

**Rule 25-22.071, F.A.C.** We note that OGC will be required, pursuant to the rule, to file a ten-year site plan on April 1, 2000, which OGC has stated it intends to do.

[Emphasis supplied.]

99 FPSC 12:219, 228. As the above-emphasized language points out, there is no Commission rule that requires Panda Leesburg to allege compliance with Rule 25-22.071, F.A.C., in its Petition for a need determination.

FPL asserts that Exhibit Site-D, a time schedule for the Panda Leesburg Project, indicates that Panda Leesburg made its decision to construct the Project in 1999. FPL has misinterpreted this time schedule. This schedule merely reflects Panda Leesburg's internal decision to pursue the permitting process for this proposed power plant. Once Panda Leesburg receives a determination of need from the Commission, it will comply with the requirements of Rule 25-22.071, F.A.C.

Accordingly, FPL's Motion to Dismiss based on its argument that Panda Leesburg has not complied with Rule 25-22.071, F.A.C., must be denied.

**V. PANDA LEESBURG IS NOT REQUIRED TO COMPLY WITH THE COMPETITIVE-BIDDING PROVISIONS OF RULE 25-22.082, F.A.C.**

FPL asserts that Panda Leesburg's petition is defective because Panda Leesburg does not allege compliance with Rule 25-22.082, F.A.C., Selection of Generating Capacity, by conducting a request for proposals. Panda Leesburg asserts, in good faith, that Rule 25-22.082, F.A.C., should not be construed as applying to merchant utilities such as Panda Leesburg, whose proposed power plant will not be included in any retail-serving utility's rate base and thereby subject to mandatory recovery from captive retail customers.

The fundamental purpose of this Rule is to protect captive electric ratepayers from paying too much for power supply resources from their monopoly retail-serving utilities. The history of the Rule and the Commission decisions interpreting the Rule bear out that this is the intention of the Rule. As Panda Leesburg is proposing a merchant plant utility that will have no statutory obligation to serve retail customers and no corresponding right to recover its investment costs from captive ratepayers, Rule 25-22.082, F.A.C., is clearly not intended to apply to Panda Leesburg or other merchant plant utilities.

The Commission addressed this same argument raised by FPL in the ***Duke New Smyrna*** and ***OGC*** proceedings. As the Commission stated in ***Duke New Smyrna***:

The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility in Florida should prudently seek out the most-cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another generation supply alternative for existing retail utilities. Florida ratepayers will not be at risk for the costs of the facility, unless it is proven to be the lower cost alternative at the time a contract is entered.

99 FPSC 3:434-35. Panda Leesburg will contribute to the fundamental purpose of Rule 25-22.082, F.A.C., by providing an additional, cost-effective option to retail-serving utilities in Florida.

In ***OGC***, the Commission cited the above-quoted language from ***Duke New Smyrna*** and went on to say:

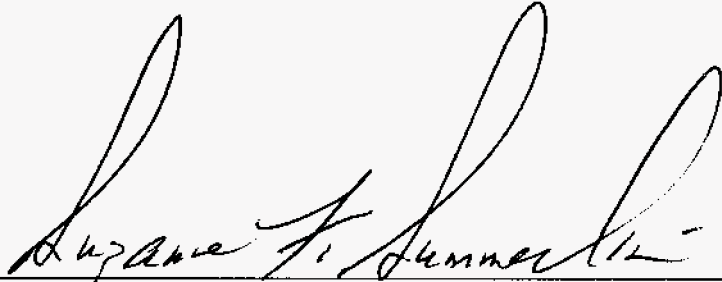
OGC's position is supported by our *Duke New Smyrna* decision, which implies that the requirements of the bidding rule are not applicable to merchant wholesale utilities. Further, we find instructive the maxim of statutory construction which provides that the law should not be interpreted in a manner that creates an absurd result. Requiring OGC to comply with Rule 25-22.082, Florida Administrative code, would clearly lead to an absurd result.

Just as in *Duke New Smyrna* and *OGC*, requiring Panda Leesburg to comply with Rule 25-22.082, F.A.C., as a precondition to obtaining a determination of need creates an absurd result. FPL's Motion to Dismiss on the basis that Panda Leesburg has failed to comply with Rule 25-22.082, F.A.C., must be denied.

### **CONCLUSION**

Panda Leesburg Power Partners, L.P., has substantially complied with all applicable pleading and other requirements necessary to bring its Petition for determination of need for the Panda Leesburg Power Project before the Commission. FPL's arguments in its Motion to Dismiss have been considered and rejected in two prior decisions by the Commission and are completely baseless, if not frivolous and dilatory. Therefore, FPL's Motion to Dismiss must be denied.

Respectfully submitted, this 3rd day of April, 2000.

A handwritten signature in black ink, appearing to read "Suzanne F. Summerlin". The signature is written in a cursive style with large, sweeping loops.

---

Suzanne F. Summerlin, Esq.  
Florida Bar No. 398586  
Suzanne Brownless, Esq.  
Florida Bar No. 309591

1311- B Paul Russell Road  
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(850) 656-2288

Attorneys for PANDA LEESBURG POWER  
PARTNERS, L.P.

**CERTIFICATE OF SERVICE**

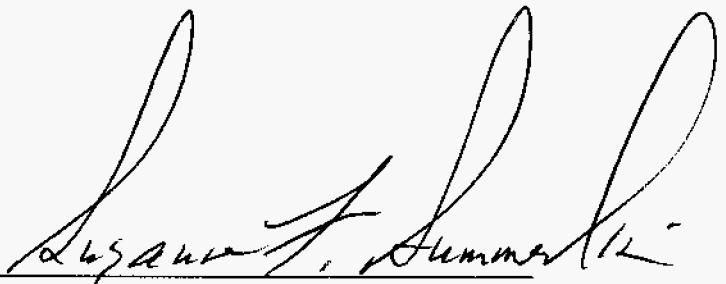
I HEREBY CERTIFY that a true and correct copy of this Panda Leesburg Power Partners, L.P.'s Response and Memorandum of Law in Opposition to Florida Power & Light Company's Motion to Dismiss the Petition in Docket No. 000289-EU was served by Hand Delivery(\*) or mailed this 3<sup>rd</sup> day of April, 2000, to the following:

Marlene Stern, Esq.\*  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard, Room 370  
Tallahassee, Florida 32399-0850

Lee Colson, Staff Analyst\*  
Division of Electric and Gas  
Florida Public Service Commission  
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\_\_\_\_\_  
Suzanne F. Summerlin, Esq.

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

March 7, 2000

Mr. William M. Lamb  
Assistant General Counsel  
Panda Energy International, Inc.  
4100 Spring Valley Road, Ste. 1001  
Dallas, Texas 75244

Re: Docket No. EG00-87-000

Dear Mr. Lamb:

On January 28, 2000, you filed an application for determination of exempt wholesale generator status on behalf of Panda Leesburg Power Partners, L.P., pursuant to section 32 of the Public Utility Holding Company Act of 1935 (PUHCA). Notice of the application was published in the Federal Register, 65 Fed. Reg. 6,596 (2000), with interventions or comments due on or before February 24, 2000. None was filed.

Authority to act on this matter is delegated to the General Counsel. 18 C.F.R. 375.309(g). The General Counsel has further delegated that authority to the Assistant General Counsel for Electric Rates and Corporate Regulation. Based on the information set forth in the application, I find that Panda Leesburg Power Partners, L.P. is an exempt wholesale generator as defined in section 32 of PUHCA.

A copy of this letter will be sent to the Securities and Exchange Commission.

Sincerely,



Michael A. Bardee  
Acting Assistant General Counsel  
Electric Rates and Corporate Regulation

ATTACHMENT A