

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED-FPSC
NOV 16 AM 10:44
RECORDS AND REPORTING

DATE: NOVEMBER 16, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF SAFETY AND ELECTRIC RELIABILITY (HAFF, BREMAN, FUTRELL, COLSON, BALLINGER) *WOM WCK RKS RVE*
DIVISION OF LEGAL SERVICES (C. KEATING, STERN, ISAAC)
DIVISION OF ECONOMIC REGULATION (LESTER) *PL*
DIVISION OF COMPETITIVE SERVICES (MAKIN) *DM*

RE: DOCKET NO. 991462-EI - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN OKEECHOBEE COUNTY BY OKEECHOBEE GENERATING COMPANY, L.L.C.

DOCKET NO. 000288-EU - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN LAKE COUNTY BY PANDA LEESBURG POWER PARTNERS, L.P.

DOCKET NO. 000289-EU - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN ST. LUCIE COUNTY BY PANDA MIDWAY POWER PARTNERS, L.P.

DOCKET NO. 000612-EU - PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN ST. LUCIE COUNTY BY DUKE ENERGY ST. LUCIE, L.L.C.

AGENDA: ²⁸11/07/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\000289-1.RCM

CASE BACKGROUND

On September 24, 1999, Okeechobee Generating Company, L.L.C. (OGC), filed a Petition for Determination of Need for an Electrical

DOCUMENT NUMBER-DATE

14792 NOV 16 00

FPSC-RECORDS/REPORTING

DOCKET NOS. 991462-EI, 000288-EU, 000289-EU, 000612-EU
DATE: NOVEMBER 16, 2000

Power Plant. OGC proposed to construct a 550-megawatt (MW) natural gas-fired, combined cycle merchant power plant in Okeechobee County, Florida, to commence commercial operation in April, 2003. OGC's petition was assigned Docket No. 991462-EI.

On March 6, 2000, Panda Leesburg Power Partners, L.P. (Panda Leesburg) and Panda Midway Power Partners, L.P. (Panda Midway) filed petitions to determine the need for electrical power plants in Lake County and St. Lucie County, respectively. Panda Leesburg and Panda Midway both proposed to construct separate 1000-MW natural gas-fired, combined cycle merchant power plants to commence commercial operation by May, 2003. The petition filed by Panda Leesburg was assigned Docket No. 000288-EG, and the petition filed by Panda Midway was assigned Docket No. 000289-EG. By Order No. PSC-00-0685-PCO-EU, issued April 12, 2000, these dockets were consolidated.

On May 22, 2000, Duke Energy St. Lucie, L.L.C., (Duke) filed a Petition for Determination of Need for an Electrical Power Plant. Duke proposed a 608 MW natural gas-fired, combined cycle merchant plant, an associated natural gas lateral pipeline, and transmission facilities to connect the plant to the Florida grid. These facilities are to be located in St. Lucie County. The anticipated in-service date is June 1, 2003. Duke's petition was assigned Docket NO. 000612-EU.

On April 20, 2000, the Florida Supreme Court issued its decision in Tampa Electric Co.; Florida Power Corp.; and Florida Power & Light Co., v. 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., L.L.P., 25 Fla. Law W. S294 (Fla. April 20, 2000). Therein, the Court reversed the Commission's prior decision to grant a need determination "for an electric power company's proposal to build and operate a merchant plant in Volusia County." Id. at 3. The Court also indicated that "[a] determination of need is presently available only to an applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant." Id. at 13. Docket Nos. 991462-EI, 000288-EU, and 000289-EU were placed in abeyance by Order No. PSC-00-1063-PCO-EU, issued June 5, 2000, pending a final decision by the Florida Supreme Court. The Court denied motions for rehearing on September 28, 2000, in Tampa Electric v. Garcia, thereby finalizing its initial opinion.

Pursuant to Rule 28-106.204, Florida Administrative Code, the petitioning parties in all four of the merchant plant need

determination dockets have filed motions to abate the proceedings in each of the respective dockets until the conclusion of the 2002 Regular Session of the Florida Legislature. This recommendation addresses the appropriate treatment of the pending merchant plant need determination dockets.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the motions to abate the need determination proceedings in Docket Nos. 991462-EI, 000288-EU, 000289-EU, and 000612-EU?

RECOMMENDATION: No. The motions to abate should be denied. (ISAAC)

STAFF ANALYSIS: Each of the petitioning parties have filed separate motions to abate their respective need determination proceedings. The parties all state that on May 3, 2000, Governor Jeb Bush issued Executive Order No. 00-127, creating the Energy 2020 Study Commission to determine "what Florida's electric energy needs will be over the next 20 years and how to best supply those needs in an efficient, affordable, and reliable manner that will ensure adequate electric reserves." Executive Order at ¶4. One of the major topics of discussion by the Study Commission, according to the parties, is the wholesale electric market. The parties contend that the Study Commission's work plan indicates that the Study Commission plans to expedite its recommendation regarding wholesale market restructuring.

The parties maintain that if the Legislature acts to amend the Florida Statutes to allow need determination proceedings to include wholesale merchant power plant applicants, they would be required to refile their Petitions unless the dockets were held in abeyance. Therefore, the parties request the Commission to continue to hold the merchant plant dockets in abeyance until the conclusion of the 2002 Regular Session, or such time as the Florida Legislature addresses the issue of whether a need determination is available to a wholesale merchant power plant. No responses were timely filed.

DOCKET NOS. 991462-EI, 000288-EU, 000289-EU, 000612-EU
DATE: NOVEMBER 16, 2000

Staff recommends that the motions to abate should be denied. Mere speculation on how the future legislature will act on issues is not sufficient reason to hold dockets in abeyance. These petitioners can refile their petitions, if and when the law changes in Florida to allow a wholesale merchant power plant to come forward in a need determination proceeding. Indeed, the passage of time involved from the filing of each of these petitions to the conclusion of the 2002 legislative session would likely render much of the information in the petitions stale. As established in Tampa Electric v. Garcia, the Commission does not have current statutory authority to grant the ultimate relief sought. Therefore, the motions to abate should be denied in the above-referenced dockets.

DOCKET NOS. 991462-EI, 000288-EU, 000289-EU, 000612-EU
DATE: NOVEMBER 16, 2000

ISSUE 2: Should the Commission, on its own motion, dismiss the petitions for determination of need in Docket Nos. 991462-EI, 000288-EU, 000289-EU and 000612-EU?

RECOMMENDATION: Yes. The Commission should dismiss the petitions, on its own motion, in Docket Nos. 991462-EI, 000288-EU, 000289-EU and 000612-EU for failure to state a cause of action. (ISAAC)

STAFF ANALYSIS: The pleadings in a petition must state a cause of action. See Kislak v. Kreedian, 95 So.2d 510 (Fla. 1957). In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. See id., 95 So.2d 510. The substantive law upon which the Commission derives its authority to grant the relief requested by petitioners is Section 409.519, Florida Statutes, which gives the Commission authority to determine the need for electrical power plants subject to the Florida Electrical Power Plant Siting Act (Sections 403.501-403.518, Florida Statutes, "Siting Act"). The Florida Supreme Court, in Tampa Electric v. Garcia, recently clarified the statutory framework under which the Commission makes its decision in a need determination case.

Staff believes that the OGC need petition, the two Panda need petitions and the Duke need petition do not state a cause of action on which the Commission may grant relief. As stated above, the Court in Tampa Electric v. Garcia held that an applicant in a need determination case must demonstrate that the proposed plant's output is fully committed to Florida retail customers. See Tampa Electric v. Garcia, 25 Fla. L. Weekly S294 (Fla. April 20, 2000) (revised) (reh'g denied). The need determinations filed by OGC, Panda and Duke propose "merchant plants," which are not committed to retail customers. According to the Court, the current statutory scheme "...was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates." Id. at 24. And unlike Calpine Construction Finance Company, L.P., in Docket 000442-EI, the above-referenced petitioners did not allege that their proposed plants' output would be fully committed to retail-serving utilities.

For these reasons, staff recommends the Commission dismiss the four above-referenced need petitions, on its own motion.

DOCKET NOS. 991462-EI, 000288-EU, 000289-EU, 000612-EU
DATE: NOVEMBER 16, 2000

ISSUE 3: Should these dockets be closed?

RECOMMENDATION: Yes. (ISAAC)

STAFF ANALYSIS: These dockets should be closed after the time for appeal expires.