4 00 pm

ORIGINAL FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

CASE NO. 950110-EI

In re: Petition for Declaratory Statement Regarding Eligibility for Standard Offer Contract and Payment Thereunder by Florida Power Corporation,	**PANDA'S MEMORANDUM IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Panda-Kathleen L.P. ("Panda") hereby submits its memorandum in support of proposed findings of fact and conclusions of law to the Florida Public Service Commission ("Commission") in the above-captioned docket.

I. INTRODUCTION

This case involves an attempt by Florida Power to escape its obligations under its contract with Panda. Florida Power has raised two spurious contractual issues to facilitate that escape. Florida Power's actions are motivated by an acknowledged desire that Panda not build its plant because Florida Power determined, two years after signing the Panda contract, that the arrangement was no longer economically beneficial. Florida Power's actions should not be condoned by the Commission, and Florida Power's petition should be answered in the negative, and Panda's in the affirmative.

There are three main issues which must be addressed in this case: (1) whether the facility that Panda plans to build to meet its 74.9 megawatt committed capacity obligations under the Panda/Florida Power standard offer contract violates the contract; (2) whether Panda is entitled to capacity payments for the full term of the contract[1]; and (3) whether the Commission

ACK
AFA
APP
CAF
CMU
CTR
EAG Haff
LEG 1
MAS 5
OPC
RCH
SEC 1
WAS
OTH

[1] At the prehearing conference in this case, Florida Power argued that the full term of the contract in this case is not 30 years, but is instead only 28 years, 3 months. See Prehearing Order at p. 6. However, that argument (with which Panda disagrees) was not pled by eitgher party in this case, and no

DOCUMENT NUMBER-DATE
03700 MAR 29 96
FPSC-RECORDS/REPORTING

should grant Panda an extension of the milestone dates contained in the contract to compensate for Florida Power's actions. Each of these issues should be resolved in Panda's favor.

Panda had previously moved to dismiss this proceeding for a lack of subject matter jurisdiction and/or federal preemption under PURPA. See Panda's Motion to Dismiss at pp. 6-25. That denial has been appealed to the Supreme Court of Florida. Although that motion has been denied by the Commission, Panda hereby reasserts and preserves its previous arguments in this regard.

II. BACKGROUND

1. **The initial approval of the standard offer contract**

In early 1991, Florida Power sought to purchase power from qualifying cogenerator facilities ("QF") by utilizing the standard offer methodology established by the Commission. To that end, Florida Power submitted for Commission approval a standard offer contract form. (Ex. 5). Under the Commission's regulations, a standard offer contract signed and submitted by a qualifying facility must be accepted by Florida Power unless Florida Power affirmatively seeks permission of the Commission to reject the contract. The standard offer contract must offer to purchase electricity from cogenerators at full avoided cost. Rule 25-17-0832(3)(b).

In addition to the use of standard offer contracts, the Commission's regulations authorize utilities to directly enter into negotiations with QFs for the purchase of power. Rule 25-17.0832(2). Those regulations require the utility to engage in negotiations with QFs, and to do so in good faith. Id. Under the "negotiated contract" rule, the rate paid to the QF cannot be more, but may be less than the full avoided cost. Any

---

evidence on that issue was introduced at the trial. Accordingly, that issue cannot be decided in this proceeding. Florida Power has preserved its position on that issue.

contract resulting from such negotiations must be reviewed and approved by the Commission. Id. In either the case of standard or negotiated contract, the Commission serves the same function - it approves the need to avoid a given generating unit and the methodology for calculating the avoided costs. (T. 79, L.1 - 25 (Dolan)). Thus, the only substantive difference between standard offer contracts and negotiated contracts is that the former are approved by the Commission prior to execution and the latter are approved by the Commission after execution. The 1991 standard offer contract in this case is substantially similar to the negotiated contracts that Florida Power executed in 1991 with numerous QFs in response to a Request for Proposal. (T. 82, L. 12-19 (Dolan)); (T. 229, L. 5 - T. 230, L. 11) (Killian); (Ex. 23).

The standard offer contract form for which Florida Power sought and received approval from the Commission contained several blanks which had to be completed by prospective QF's, including the two contract terms which are the subject of this dispute: 1) the amount of power that the QF would be obligated to provide to the utility as "Committed Capacity," and 2) the duration of the QF's obligation to provide the Committed Capacity (and Florida Power's obligation to make payments) under the contract. See Ex. 30 at ¶ 4.1, 7.1. Incorporated into the standard offer contract were formulas for the computation of the payments to the QF, and illustrations of the use of those formulas. See Ex. 30 at ¶ 8.3; Ex. 30 at Schedule C.

In August 1991, the Commission reviewed and approved Florida Power's form of standard offer contract (as well as standard offer contracts submitted by other electric utilities). (Ex. 7). In rendering its approval of that form, the Commission specifically held that a "regulatory out" clause should not be included in the standard offer contract submitted by Florida Power. See Ex. 7 at pp. 70-71. This clause, which had previously been authorized by the Commission in QF/utility negotiated contracts, would have

allowed the Commission during the term of an existing contract to impose an alteration of the terms of the contract or the rates that the utility would have to pay based upon changed circumstances. Id. The removal of the regulatory out clause eliminated the only portion of the contract which arguably allowed Florida Power to seek the Commission's post-approval involvement in the performance of the contract.

2. **The Open Season and the execution of the contracts**

Following the Commission's approval of the standard offer contract form, Florida Power sent copies of the standard offer contract to interested QF's, and declared a two-week "open season" for any QF to execute and return the contract. (Ex. 7 at p. 1). By the close of that period, Florida Power had received ten executed standard offer contracts, including one from Panda. (Ex. 8). In executing the standard offer contract, Panda filled in the blanks with a "Committed Capacity" of 74,900 kilowatts (equal to 74.9 megawatts), Ex. 30 at ¶ 7.1, and a contract term of 30 years. Ex. 30 at ¶ 4.1. At the time it submitted its completed standard offer contract, Panda also had to submit a completed questionnaire describing its tentative plans. Panda initially described a facility that would have been capable of generating 85 MW and 95 MW of electricity at ISO conditions (a standardized set of temperature, humidity and other conditions used as a bench-mark to compare facilities).

The contract provides for payment to Panda under two separate mechanisms. First, Panda is paid a "capacity payment" for the amount of "Committed Capacity" that Panda offered to provide, in this case 74.9 MW. Ex. 30 at ¶¶ 8.2-8.5. Committed Capacity is defined in the contract as the amount of electricity that Panda is obligated to provide to Florida Power's transmission grid at all times, under all environmental conditions. The contract provides that Florida Power, throughout the life of the contract, has

the right to require Panda to demonstrate at any time that it is, in fact, providing 74.9 MW "or more" at the delivery point defined therein. Ex. 30, ¶¶ 7.4, 1.8. The contract further provides that Panda must make the Committed Capacity available to Florida Power throughout the term of the contract, and Florida Power is obligated to pay for it. Ex. 30 at ¶ 6.1. As remuneration for the outlay of capital required to build and maintain a plant that has such capability, Panda is to receive a "capacity payment" as defined in ¶¶ 8.2-8.5 of the contract. Simply put, the capacity payment pays Panda for building and maintaining a plant that is capable of producing the minimum of 74.9 MW whenever needed under any conditions over the life of the contract.

In addition to capacity payments, Panda is to be paid for all of the actual electrical energy that the Panda plant provides to Florida Power, under certain alternate rate schemes. Ex. 30 at ¶¶ 9.1-9.2. No capacity payment is made for any electricity generated above 74.9 megawatts.

3. **The Selection of the Panda Contract**

The committed power supply that would have been provided by the ten executed contracts received by Florida Power at the close of the open season was well in excess of the amount that Florida Power was seeking. (T. 92, L. 14-18 (Dolan)). As a result, Florida Power began a process of choosing which standard offer contract (or contracts) it wanted to utilize. Florida Power prepared a report rating the standard offer contracts it received, and filed that report with the Commission. (Ex. 8). Several of the competing bidders in addition to Panda submitted contracts with 30 year terms and/or proposed plant designs in excess of 75 megawatts of net generating capacity. (Ex. 8 at pp. 13, 15); (T. 558, L. 1-14 (Dietz)); (T. 98-99 (Dolan)). The report (which repeatedly recited that Panda had submitted a contract with a thirty year term, and a Committed Capacity of 74.9 MW) ranked Panda's contract submission as the best in terms of feasibility and benefit to ratepayers. (Ex. 8 at pp.

1, 2, 15, 19). Florida Power did not seek to disqualify any of the proposals on the grounds that generating capacity was in excess of 75 MW or on the grounds that a term in excess of twenty years constituted a violation of Commission Rules. (T. 98, L. 23 - 99, L. 4 (Dolan)). Instead, based on that report, Florida Power petitioned the Commission for permission to reject all of the standard offer contracts it had received except the one received from Panda, because of its superior ranking. (Ex. 8).

In October of 1992, the Commission approved Florida Power's petition to reject all standard offer contracts, except Panda's, over the objection of at least one of the competing bidders. (Ex. 10). In that same order, the Commission formally approved Panda's contract with Florida Power (including the terms calling for a 74.9 MW Committed Capacity and a 30 year contract term). Id. Thus, the Panda/Florida Power contract was approved by the Commission **twice** -- once when the form was approved, and a second time when the Commission allowed Florida Power to select Panda's contract over the competing contracts.

In approving the Panda contract, the Commission stated "Florida Power Corporation acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by FPC to be the best available." (Ex. 10 at p. 3).

III. The Size of the facility

Issue I of the prehearing statement addresses the question of the size of the plant that Panda proposes to build under the contract. From the very beginning, Panda made clear that it proposed to build a facility to satisfy the standard offer contract that would generate in excess of 74.9 MW. The initial tentative Panda design, submitted with the contract, was for a facility that would exceed 75 MW and, could generate 85 - 95 MW at ISO conditions. (T. 106, L. 5-9 (Dolan)); (T. 283, L. 11-19 (Killian)). On

several occasions beginning in 1992, after the contract was signed, Panda informed Florida Power that it intended to construct a plant with a designed maximum capacity of 115 MW, at ISO conditions (i.e. 59 degrees), in order to meet its 74.9 megawatt Committed Capacity obligations under the contract. Panda's design was based upon the exercise of sound engineering judgment that in order to have 74.9 megawatts available at all times, under all conditions for the full term of the contract, and meet changing Florida emissions standards, a facility that would generate more than the Committed Capacity was necessary. (T. 304, L. 23 - 306, L. 17 (Dietz)). Prior to the summer of 1994, Florida Power not only never objected to the building of a facility that could generate in excess of 74.9 megawatts, it suggested it. (T. 392, L. 13-22 (Lindloff)). However, in the summer of 1994, Florida Power suddenly objected to the construction of any plant larger than 74.9 megawatts and took the position that to do so would violate the contract and this Commission's Rules. Florida Power then began insisting that the Commission must approve the plant.

In response to Florida Power's objection, Panda met with Commission staff in August of 1994, and received a confirmation letter from Joseph Jenkins, the director of the Commission's Division of Gas and Electric, stating that Panda's proposed 115 MW facility did not violate the contract or require approval of the Commission. (T. 243, L. 6 - 244, L. 5 (Killian)). This opinion did not dissuade Florida Power from continuing its dispute, and in January of 1995, Florida Power filed its Petition (without advance notice to Panda) in this case seeking a declaration from the Commission on this issue. As a result of that Petition, Panda's efforts to finance and begin construction of the project in a timely manner had to be halted.

Florida Power's Petition seeks a declaration that Panda's proposed plant violates the contract and/or the Commission's Rules. Panda's position

in this proceeding has three parts. First, Panda contends that under the case law cited in its motion to dismiss (which this Commission has previously rejected) Florida Power has no right to ask the Commission to reapply its rules in any manner that determines that the contract between Panda and Florida Power (in effect since 1992) is invalid, and that any issue of contract interpretation must be left to the courts. See Panda's Motion to Dismiss at pp. 6-25. Having approved this Contract exactly as written, Panda contends that Florida Power cannot ask this Commission to rewrite it, revoke its approval or interpret it. Second, in the alternative, even if the Commission has jurisdiction to hear this Petition, it nevertheless must conclude that the contract which this Commission approved permits Panda to build the facility it proposed and that such interpretation does not violate this Commission's Rules. Finally, even if this Commission felt such an interpretation would violate its rules, Florida Power has waived its rights and is estopped from so arguing by virtue of its consistent conduct from 1991 to 1994 in proposing, entering into, and beginning performance of a contract that permits the size facility that Panda proposes.

The contract contains no limitation as to the size of Panda's plant, and the actions of the parties in the three years preceding the Petition confirms their mutual understanding of the meaning of the contract. Accordingly, Florida Power's Petition for Declaratory relief on this issue should be answered in the negative.

A. **The sizing of Panda's plant is mandated by technical considerations**

The evidence at trial was unrebutted that, in order to meet a 74.9 megawatt committed capacity at all times under all conditions, it is necessary to construct a plant with a maximum capacity above 74.9 megawatts. (T. 304, L. 23 - 306, L. 17 (Dietz)). It is necessary to build additional capacity to

account for performance degradations caused by climate, aging of the plant, and other factors. Id. Brian Dietz, Panda's chief engineer, was personally responsible for Panda's engineering decisions in planning the Panda-Kathleen plant, and it was his professional opinion that led Panda to select a plant design that could meet its 74.9 megawatt committed capacity obligations under all conditions.

In considering the design of the plant, Mr. Dietz determined that a plant with a minimum design capacity of 100 megawatts (at ISO conditions) was necessary to meet Panda's committed capacity obligations under all conditions. (T. 312, L. 13-17 (Dietz)). Mr. Dietz's conclusion corresponds to Florida Power's own recommendations. On September 29, 1992, Alan Honey of Florida Power recommended to Darol Lindloff of Panda that Panda utilize an equipment configuration using two LM 6000 turbines, which result in a design capacity of 95 to 100 megawatts. (T. 392, L. 7-21 (Lindloff)). Ultimately, Panda determined that this LM 6000 turbine configuration would not meet Florida emissions requirements. (T. 318, L. 15-18 (Dietz)). The plant design ultimately chosen by Panda used the smallest available turbine equipment which would assure generation of the Committed Capacity under all conditions, and also meet Florida's emissions requirements. ((T. 319, L. 14 - 320, L. 4 (Dietz)).

Florida Power did not put forth any credible counter-evidence that a plant with a maximum generating capacity of 74.9 megawatts would be feasible under the contract. No expert or witness for Florida Power told this Commission what generators Panda could have selected to build this facility that would put out 74.9 megawatts at all times under all conditions and meet Florida's emissions requirements, other than what Mr. Dietz selected. At best, Florida Power's Mr. Dolan raised vague suggestions that Mr. Dietz hadn't considered such items as inlet air conditioning. (T. 419, L. 18-21 (Dolan)).

Upon rebuttal, of course, those suggestions proved to be untrue. (T. 556, L. 9 - 557, L. 19 (Dietz)). Mr. Dolan also offered vague anecdotal testimony that other QF's seemed to be able to control performance degradation, but gave no specific engineering analysis of any such plant (that matched a committed capacity such as Panda's under the emissions requirements that Panda faced) that explained how both requirements were met. (T. 162, L. 1 - 163, L. 25 (Dolan)). In short, Mr. Dietz' judgment stands unchallenged.

In fact, a review of the list of Florida Power's other active cogeneration contracts (Ex. 2) reveals that many of the cogenerators serving Florida Power today also designed their plants with maximum net generating capacities higher than their total committed capacities. See (T. 73, L. 4-11 (Dolan)(Auburndale provides 131 megawatts of committed capacity from a 150 megawatt plant)); (T. 69, L. 15 - 72, L. 7 (Dolan)(Orange Cogen supplies 97 megawatts of committed capacity from a 104 to 106 megawatt plant)); (Ex. 2). In addition, Florida Power currently buys power from other cogenerators who produce well in excess of their committed capacity. For example, at times Florida Power buys up to 200 percent of the committed capacity generated by U.S Agricultural under the identical standard offer contract signed by Panda. (T. 64, L. 1 - 66, L. 25 (Dolan)).

B. **Panda was restricted in its choice of equipment by Florida's environmental requirements.**

In addition to the necessity of a "safety factor" of design capacity in order to provide committed capacity under all conditions, Panda's design of its proposed plant was constrained by Florida's emissions requirements. It was the uncontradicted testimony of Brian Dietz that Florida's emissions regulations were changed in 1992, and those changes severely limited the emissions that could be generated by Panda's plant. (T. 312, L. 21 - 313, L. 5 (Dietz)). As the result of those changes, Panda was

limited in its options in selecting equipment, because only a small number of the generating equipment units available could meet Florida's emission's requirements.[2] In particular, the plant configuration that Panda had originally submitted to Florida Power would not meet Florida's changed emissions requirements. (T. 318, L. 6-13 (Dietz)).

Based on considerations of degradation of performance and emissions, Panda ultimately determined that only two turbine equipment models available at the time in the market would meet the emission and performance requirements of the project -- the ABB11N1 turbine (maximum capacity 115 megawatts) and the GE Frame 7 (maximum capacity 118 megawatts). (T. 318, L. 25 - 319, L. 8 (Dietz)). Of these two, only ABB would guarantee a delivery time, and Panda ultimately chose the ABB11N1. (T. 319, L. 25 - 320, L. 2 (Dietz)).

C. **The contract does not limit the size of the plant**

The contract between the parties contains no express limitation on the size of the plant to be constructed by Panda. Rather, the contract specifically limits only the amount of Committed Capacity that Florida Power is obligated to purchase from Panda to 74.9 megawatts. Ex. 30 at ¶ 7.1. This is the only size limitation contained in the contract. The contract expressly limits the amount of Committed Capacity that may be contracted for, and provides that "[t]he availability of this Agreement is subject to...the Facility having a Committed Capacity which is less than 75,000 KW."[3] Ex. 30 at

---

[2] Since Florida Power required Panda to have a backup source of fuel for its plant, Panda was forced to design its plant with oil as an auxiliary fuel. The potential use of oil as a fuel eliminated Panda's ability to use certain kinds of emission-limiting equipment. (T. 313, L. 7 - 314, L. 19 (Dietz)).

[3] Florida Power has stated that the 75 megawatt size cap that it seeks to impose pertains to net capacity of a plant under "normal conditions," whatever those are. (T. 159, L. 11-15

¶ 2.1.2.

Florida Power has been unable to identify any specific portion of the contract which would impose a size limit on Panda's plant. Instead, Florida Power has attempted to extrapolate such a size limitation from the title of the contract[4], which merely repeats language from Commission Rule 25-17.0832(3). Panda's interpretation of the contract is based on express terms, while Florida Power's interpretation is based on a tenuous stretching of the document's title, while ignoring the express terms. It is a black letter rule of contract interpretation that express terms of a contract cannot be ignored, and must be given their plain meaning. Bingemann v. Bingemann, 551 So.2d 1228, 1231-32 (Fla. 1st DCA 1989), rev. denied 560 So.2d 232 (Fla. 1990). Similarly, express terms of a contract cannot be ignored, and any contradictory terms in a contract must be read so as to reconcile their meanings. See Florida Power Corp. v. City of Tallahassee, 18 So.2d 671 (Fla. 1944). Commission Rule 25-0832(3) does not alter these rules of contract interpretation. That Rule merely says that a standard offer contract is "available" to a QF less than 75 MW. When read in the context of the express provisions of the contract limiting its availability to plants with 75 MW of Committed Capacity, not maximum generation, it is clear that the plain meaning of the contract, whether the Rule is considered to be part of it or not,

---

(Dolan)). However, the report attached to its 1992 Petition to approve the Panda contract, Florida Power used the word "size" to refer to the committed capacity of the project, not the capacity of the plant to be constructed. (T. 94, L. 6-9 (Dolan); (Ex. 10 at pp. 1, 15). In that Petition, Florida Power described the Panda project as 74.9 megawatts in size. (Ex. 10 at pp. 1, 15.)

[4] Article XXVIII of the Contract provides that article and section headings in the contract are "for convenience only and shall not be construed as interpretations of text".

allows Panda to build its proposed plant.[5]

It is undisputed that the contract, as so written, was approved by the Commission on **two separate occasions**, once in 1991 when the standard offer contract form was approved, and a second time when the Commission granted Florida Power's petition to accept the Panda contract and reject all other completed standard offer contracts completed by Panda. See (T. 78 L. 12-20 (Dolan)). At the time of the Commission's first approval of the contract in 1991, there was no Commission interpretation of Rule 25-0832(3) that suggested that the reference to a 75 megawatt limit referred to anything other than the committed capacity limitation expressly adopted in the contract. The second approval of the contract occurred **after** the Polk Power Partners I decision relied on by Florida Power (discussed below), and thus reflects that whatever impact that decision might have had on the approval process (which Panda contends is none), the contract as approved subsequently meets any requirements imposed by that case.

Panda believes that the legal effect of the Commission's approvals of the contract is clear. Once the Commission approved the contract and its specific language, PURPA's preemption provision bars any revisitation of the approval of that contract or reinterpretation of the terms of that contract.[6] See Panda's Motion to Dismiss at pp. 6-25 , and cases cited therein. As

---

[5] Given the engineering reality that one could not produce 74.9 MW of committed capacity at all times with a facility not capable of producing any more than exactly 74.9 MW ever, Florida Power's argument would nullify the express language of ¶ 2.1.2 of the contract. Instead of being available to a facility having a committed capacity of no more than 75.000 KW - the contract would only have been available to a facility of some unspecified lesser committed capacity.

[6] As discussed above, the Commission ordered in 1991 that utilities remove "regulatory-out" clauses from all new standard offer contracts. Those clauses would have potentially allowed a utility to ask the Commission to revisit a previously approved contract.

stated by Florida Power itself in seeking approval of the 1991 standard offer contract, "Commission approval of the standard offer should have the same legal effect as Commission approval of a negotiated contract." (T. 88, L. 18-20 (Dolan)). This Commission has ruled in a virtually identical situation that it does not have authority to reinterpret negotiated contracts once they are approved, In re Pasco Cogen Limited, Order Granting Motion To Dismiss, Docket No. 940771-EQ (2/15/95), and that rule should be equally applicable in this case.

Florida Power's entire argument on the size issue rests on the decision of the Commission in Polk Power Partners I, which was issued in the time period between the Commission's two approvals of the contract at issue. Panda contends that PURPA and the case law prohibits Florida Power from seeking a retroactive application of the Commission's Rules to declare a previously approved contract to be "no longer available" to Panda despite the express language of the contract. Panda contends that to revisit the prior approvals of the contract not only violates the letter and spirit of PURPA, but is simply unfair to Panda were that to be the result.

Nevertheless, Panda has not prevailed in this Commission as to its preemption argument, so it will demonstrate that Florida Power's reliance on Polk Power Partners I is misplaced. Subsequent interpretations of the Commission's Rule demonstrate that even if it were appropriate to require yet another determination that Panda's contract without a size limitation complies with the Rules, it in fact does. It is clear that the Commission's post-1992 interpretations of that rule **support** Panda's position. In at least three separate cases, the Commission has allowed a QF to service a standard offer contract from a plant which is larger (in net generating capacity) than the committed capacity of that standard offer contract. In Order No. PSC-94-1306-FOF-EQ (10/24/94), In Re: Joint Petition for Approval of Standard Offer

Contracts of Florida Power Corporation and Auburndale Power Partners, Limited Partnership, Order Approving Contract Modifications ("Auburndale I"); Order No. PSC-95-1041-AS-EQ (8/21/95), In Re: Joint Petition for Expedited Approval of Settlement Agreement by Auburndale Power Partners, Limited Partnership and Florida Power Corporation, Notice of Proposed Agency Action Order Approving Settlement Agreement ("Auburndale II"); and Order No. 94-0197-DS-EQ (2/16/94), In Re: Polk Power Partners L.P., Order Granting Petition For Declaratory Statement In The Negative, the Commission allowed facilities larger than 75 megawatts to utilize a standard offer contract, and accept capacity payments under such contract for no more than 75 megawatts, yet generate and sell more than 75 megawatts.[7] As noted above, U. S. Agricultural has the exact same standard offer contract as Panda, but a utilizes a facility with a considerably larger committed capacity safety factor, on a percentage basis, than Panda's proposal. (T. 63-64 (Dolan)).

The rule put forth in these subsequent Commission interpretations of Rule 25-17.0832(3) is simple -- no cogeneration facility may hold more than **one** standard offer contract.[8] Florida Power was a party to each of those cases, yet it has steadfastly clung to a 1992 Commission decision, In re: Polk

---

[7] At the February 19, 1996 hearing, the Commission took official notice of each of these prior Orders.

[8] Some of the cogeneration facilities which service Florida Power have up to **five** separate contracts for which they supply committed capacity. (T. 69, L. 21 - 70, L. 5; 72, L. 11 - 73, L. 25). The ability of these facilities -- Tiger Bay, Auburndale and Orange Cogen -- to service multiple contracts has been approved by the Commission on several occasions. See Order Approving Settlement Agreement (Auburndale), Docket No. 9505567-EQ, Order No. PSC-95-1041-AS-EQ (8/21/95); Order Regarding Certain Actions relating to Approving Cogeneration Contracts (Tiger Bay), Docket 940797-EQ, Order No. PSC-95-0540-FOF-EQ; Order Approving Contract Modifications (Auburndale), Docket No. 940819, Order No. PSC-94-1306-FOF-EQ.

Power Partners for a Declaratory Statement Regarding Eligibility for Standard Offer Contracts, Docket No. 920556-EQ, ("Polk Partners I"), as the sole basis for its position. However, the Commission's final order in the Polk Power Partners I decision is subject to misapplication because it does not describe the issue nor the facts with which the Commission was presented in that case. The Petition in Polk Power Partners I, dated May 28, 1992, (of which the Commission took official notice at the hearing in this case), makes clear that the petitioner there was seeking approval to service multiple standard offer contracts from a single facility, and thereby **collect full capacity payments under each such contract for far more than 75 megawatts.** Permitting such "stacking" of standard offer contracts would have defeated the purpose of the standard offer rule -- to encourage small QFs, with limited ability to negotiate with utilities, to build cogeneration plants. Stacking would encourage large QFs to build large facilities and grab all the available standard offers. Limiting a facility to one standard offer, however, encourages small QFs because the lack of capacity payments above 75 megawatts economically necessitates building facilities close to that size and that exceed that size only for technical requirements. Thus, the outcome of the 1992 Polk Power Partners I petition, denying the servicing of multiple standard offer contracts from a single facility, was consistent with the subsequent Commission decisions upon which Panda relies.

Neither the contract, nor the Rule as most recently applied, provides any support for Florida Power's attempt to restrict Panda's plant size, and Florida Power's petition on this issue should be answered in the negative.

D. **Established principles of contract interpretation support Panda's position on the size issue.**

Panda, of course, believes that there is no ambiguity in this

contract that would require this commission to go outside the contract to interpret it. However, even if the contract could be read to have any uncertainty or ambiguity regarding the size of the plant permitted by the contract, the actions of Florida Power support Panda's interpretation.[9] If a contract is ambiguous, then this Commission must seek the intent of the parties from extrinsic evidence, and the acts and course of performance by the parties to a contract is the best illustration of their intent and interpretation. Blackhawk Heating & Plumbing Co. v. Date Lease Fin. Corp., 302 So.2d 404, 407 (Fla. 1974); Oakwood Hills Co. v. Horacio Toledo, Inc., 599 So.2d 1374 (Fla. 3d DCA 1992). In addition, an ambiguous term in a contract should be interpreted against the drafter (in this case, Florida Power). Capital City Bank v. Hilson, 51 So. 853, 855 (Fla. 1910). These longstanding rules of contract construction weigh in favor of Panda, and any ambiguity must be resolved in Panda's favor.

---

[9] Florida Power's interpretation of this contract is premised on the argument that because the standard offer contract attached and "incorporated" the Commission's entire set of Rules relating to QF's, those Rules are thus part of the contract. That position is essentially meaningless. It is black letter law that when interpreting any contract, it must be interpreted in accordance with any governing law (including PURPA, which is presumably also "incorporated" into the contract) to the extent relevant. Gordon v. State, 608 So.2d 800, 802 (Fla. 1992). Attaching all Commission Rules to the contract adds nothing to the equation. Clearly large portions of the attached Rules (such as all those dealing with negotiated contracts) have no relevance at all to this contract, yet they purport to be incorporated. The fact is that despite Florida Power's efforts to cast this issue as something other than an exercise in contract interpretation (to try to avoid PURPA preemption), incorporating the Rules into the contract would do nothing more for Florida Power than to, at best, create some sort of ambiguity of some express Rule contradicting the contract. While we have demonstrated that is not the case, we show in this section that any ambiguity would have to be resolved in Panda's favor.

Both parties proceeded for two years on the understanding that Panda was not limited to a 75 megawatt plant, and Florida Power's tardy protestations to the contrary are purely attributable to an internal corporate strategy to escape from cogeneration contracts.

As reflected in the direct testimony of Joseph Brinson, and Darol Lindloff, Florida Power was advised on several occasions in 1992 that Panda intended to build a plant in excess of 75 megawatts, and perhaps as high as a maximum capacity of 110 megawatts to 115 megawatts. (T. 294, L.22 (Brinson); (T. 390, L. 22- 391, L. 2; (Lindloff)). Furthermore, Florida Power has conceded that it knew even Panda's initial proposal, which would utilize 3 LM2500 turbines, would have occasionally put out in excess of 75 megawatts (and in fact, would have generated 85-95 MW at ISO conditions). (T. 106 (Dolan));(T. 226, 283 (Killian)). That preliminary configuration proposal was not ultimately adopted by Panda because it could not meet the 74.9 megawatt Committed Capacity under all conditions, nor could it meet Florida emissions requirements. (T. 318 (Dietz)). Furthermore, Florida Power knew that several of the other proposed facilities submitted in response to Florida Power's standard offer contract were capable of generating in excess of 75 megawatts. (T. 558 (Dietz)); (T. 96-98 (Dolan)(Sparrow proposal had a net generating capacity of 85 megawatts)). None of those bids was rejected by Florida Power for exceeding 75 megawatts in capacity, nor did Florida Power raise this issue in seeking approval from the Commission to reject all contracts except Panda's. (T. 98-99 (Dolan)).

Florida Power did not object to Panda's plans, and indeed encouraged Panda to build a plant larger than 74.9 megawatts. (T. 392, L. 13-21 (Lindloff)). At one point, Florida Power's representative recommended to Panda that Panda construct a plant with an approximate maximum output of 95 to

100 megawatts. Id..[10] Significantly, Florida Power did not cross-examine Panda's witnesses on these statements, nor did it put forth any rebuttal testimony on these issues. It has thus admitted the truth of this testimony. See State v. Michaels, 454 So.2d 560 (Fla. 1984); Maxfly Aviation, Inc. v. Gill, 605 So.2d 1297 (Fla. 4th DCA 1992).

The records produced by Florida Power, and the testimony of Florida Power's own witnesses, make it very clear that the dispute over size in this case was not caused by Panda's actions, but instead arose from Florida Power's changed corporate strategy adopted in 1994.[11] In 1993 and 1994, Florida Power crafted a global strategy, arising from a "Cogeneration Review", to decrease and/or eliminate the purchases of power from cogenerators. That decision was based on Florida Power's view that

> at the present time, the QF contracts are not cost effective when compared to FPC built natural gas fired combined cycle units... [Florida Power's] resources need to be assigned to properly evaluate and implement, if feasible, all of the options available to increase the cost-effectiveness of the QF contracts.

(T. 237, L. 7-21; T. 238, L. 1-6 (Killian)); (Ex. 15). At the time Florida Power adopted this view, it considered cogenerators to be competitors in the

---

[10] This recommendation occurred 2 months **after** the Commission's decision in Polk Power Partners I.

[11] The existence of such external factors as the driving force behind Florida Power's objections is not surprising, because it is not clear what, if any, damage would be caused to Florida Power by Panda's proposed design. Florida Power would be able to curtail Panda from producing more than 74.9 megawatts in low-load conditions. (T. 155, L. 17-21 (Dolan)). The only harm asserted by Florida Power in this proceeding -- the theoretical potential to occasionally have to cycle off two existing plants more often -- was shown on cross examination to be admittedly short term de mimimus "harm". (T. 430, L. 20- 431, L. 21 (Dolan)).

business of wholesaling electricity, to whom it had lost some business. (T. 138, L. 3-10 (Dolan)).

Florida Power's Cogeneration Review reflects a clear desire to escape cogeneration contracts at all costs. To that end, Florida Power investigated the possibility of buying out certain contracts, including Panda's contract. Florida Power formed a "NUG" (non-utility generated) buyout committee. (T. 122, L. 7-15 (Dolan)). That desire was further based, in part, on the fact that Florida Power had deliberately overbooked committed capacity in its 1991 request for negotiation of contracts and had far more committed capacity than it initially anticipated when all of these facilities, to Florida Power's chagrin, came to be built. (T. 123, L. 14-24 (Dolan)).

Florida Power chose to implement its cogeneration strategy by "actively enforcing" its contracts and attempting to identify "breaches" by cogenerators, no matter how small, which would allow it to escape its obligations. (Ex. 14 at p. 10). It was this policy that led to the series of cases before this Commission regarding Florida Power's attempts to have cogenerators declared in breach of their contracts. See Pasco, infra.

The unrebutted evidence in this case shows that Florida Power did not challenge Panda's plant design until the summer of 1994, after the Cogeneration Review strategies were implemented. The timing of Florida Power's actions is not coincidental. Florida power's only witness in this proceeding flatly admitted that by mid-1994, Florida Power **did not want to see Panda's plant built.** (T. 129, L. 1-8 (Dolan)). Florida Power seized upon the previous non-issue of size as a strategy to insure that result. Florida Power sought to prevent Panda from proceeding, and created the plant size dispute to further that effort.[12]

---

[12] Florida Power's intentions are further clarified by other examples of its treatment of Panda. In late 1993 and early

In 1992, Florida Power's representatives, aware of the pending Polk Power Partners I proceeding upon which it would later seize, even went so far as to dissuade Panda from asking the Commission whether the sizing of Panda's plant was a problem. As testified to by Joseph Brinson, "Bob Dolan told me that the size was not a problem to FPC, but that we should not talk with the Florida Public Service Commission on installing a 110 MW plant, and that we should be careful dealing with the Public Service Commission while ARK Energy was still challenging the FPC/Panda contract". (T. 294, L. 25 - 295, L. 4 (Brinson)). Florida Power did not cross-examine Mr. Brinson on this issue, and Robert Dolan admitted that he did not want Panda to go to the Commission in 1992 because he did not want Panda to "muddy the waters" while the Commission was considering whether to allow Florida Power to select Panda's contract. (T. 115, L. 3-7 (Dolan)). It is clear that until Florida Power decided that it did not want Panda to build its plant, size was not an issue. Thus, under the authority cited above, even if the Commission felt there was any ambiguity in this contract, the parties' course of performance dictates a finding in Panda's favor.

In addition to the rights of Panda emanating from the interpretation of the terms of the contract, the undisputed actions of Florida Power also constitute a waiver and Estelle against their tardy objections to Panda's proposed plant. Florida Power encouraged Panda to design its plant larger than 75 megawatts, and has therefore waived and is estopped from any objection to Panda's plant size.

1994, Panda was considering the relocation of its thermal host in order to accommodate additional steam use. Florida Power refused to agree to such a move, despite the lack of any effect whatsoever on Florida Power's interests. (T. 129, L. 11- 130, L. 22 (Dolan)). In an internal memorandum discussing that refusal, Florida Power noted that it did not wish to **"throw Panda a lifeline"**. (T. 130, L. 21-22 (Dolan)); Ex. 13.

A waiver is the intentional relinquishment of a known right and may be express or implied. Thomas N. Carlton Estate v. Keller, 52 So.2d 131 (Fla.1951); Continental Real Estate Equities, Inc. v. Rich Man Poor Man, Inc., 458 So.2d 798 (Fla. 2d DCA 1984); Fireman's Fund Ins. Co. v. Vogel, 195 So.2d 20 (Fla. 2d DCA 1967). A party may waive any rights to which he or she is legally entitled, by actions or conduct warranting an inference that a known right has been relinquished. Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945); Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So.2d 294 (Fla. 3d DCA 1989); McNeal v. Marco Bay Assoc., 492 So.2d 778 (Fla. 2d DCA), rev. denied, 500 So.2d 544 (Fla.1986); Singer v. Singer, 442 So.2d 1020 (Fla. 3d DCA 1983). In this case, Florida Power knew Panda proposed a plant larger than 75 megawatts, and that the contract had no size limitation, yet requested that the Commission approve the contract on two occasions. Florida Power's actions were thus an irrevocable waiver of any objections it may have had.

Florida Power's actions also constitute an estoppel against any objections to Panda's plant, insofar as Florida Power made material representations to Panda and the Commission regarding its willingness to allow Panda to build a larger plant, and Panda relied on Florida Power's actions to its detriment.[13] See Appalachian, Inc. v. Olson, 468 So.2d 266, 269 (Fla. 2d

---

[13] Florida Power has argued that Panda's proposed plant is a breach, and that breach eliminates all obligations of Florida Power under the contract. However, it is a fundamental principle that equity prefers not to enforce the breach of contractual provisions which result in extreme forfeiture. American Fire and Casualty Company v. Collura, 163 So.2d 784 (Fla. 2d DCA), cert. denied, 171 So.2d 389 (Fla.1964). Equity abhors forfeiture, and a party entitled to a forfeiture may be estopped from asserting that right, if the result would be unconscionable. Dade County v. City of North Miami Beach, 69 So.2d 780 (Fla.1953); Rivers v. Amara, 40 So.2d 364 (Fla.1949); White v. Brousseau, 566 So.2d 832 (Fla. 5th DCA 1990). In this case, Florida Power's actions from 1991 through 1994 would be sufficient to allow Panda to proceed on the contract, purely on equity grounds, even if Florida Power's

DCA 1985)("The doctrine of estoppel is a creature of equity and governed by equitable principles. It is applied against wrongdoers and not against victims of wrong"); Greenhut Construction Co. v. Henry Knott, Inc., 247 so.2d 517 (Fla. 1st DCA 1971).

IV. The length of capacity payments under the contract

In its petition, Florida Power seeks a declaration from the Commission that, despite the clear 30 year term of the contract, Florida Power is only obligated to pay capacity payments for 20 years. Once again, Florida Power's proposed interpretation conflicts with the plain language of the contract and the prior actions of the parties. As with the size issue, Florida Power seeks to have this Commission reapply its Rules to alter the clear language of the contract despite two prior approvals. Once again, Panda asserts that PURPA prohibits Florida Power from seeking such relief. See Panda's Motion to Dismiss at pp. 6-25. Nevertheless, in the alternative, Panda contends that the language of the contract, the purposes of the Commission's Rules, and simple fairness dictate that Panda should prevail on this issue. Accordingly, Florida Power's petition should be answered in the negative on this issue.

A. **The terms of the contract require capacity payments for 30 years.**

Several provisions of the contract clearly and unambiguously define the length and nature of the parties' duties to perform:

> The term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of March 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement.

---

arguments were justified.

Ex. 30 at ¶ 4.1.

Pursuant to the contract, **"the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement"**. Ex. 30 at ¶ 7.1.; (T. 171, L. 10-13 (Dolan)). As compensation for the provision of Committed Capacity, **"the Company agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement.** Ex. 30 at ¶ 6.1. Based on these simple and clear obligations, Panda is obligated to provide the committed capacity to Florida Power for the full thirty years of the contract, and is entitled to capacity payments for the entire period in which it provides firm committed capacity to Florida Power. There is absolutely no ambiguity in the language this Commission twice approved.

Florida Power disputes Panda's entitlement to capacity payments after twenty years, based on (1) Commission Rule 25-17.0832(3)(e)(6); and (2) a schedule attached to the contract which only lists payments for 20 years. Neither of these arguments is applicable to this dispute.

First, as with the size issue, the prior approval of the contract by the Commission at Florida Power's request, on two separate occasions, should operate as a waiver and/or estoppel against Florida Power making arguments that the contract does not meet the Commission's Rules. See discussion infra. Florida Power's argument that, under Rule 25-17.0832(3)(e)(6), they are prohibited from paying for 30 years of capacity payments because the standard offer contract defines the "economic life" of the avoided unit fails for the same reason as Florida Power's arguments as to the size issue. What Florida Power is really arguing, without acknowledging it, is that the Commission should not have approved a thirty year contract obligating both parties to the **purchase** and **sale** of committed capacity for

thirty years because of that Rule. However, the Commission did approve this language twice at Florida Power's urging. Panda contends that PURPA prohibits Florida Power from now asking the Commission to remove its approval of such a contract. In the alternative, however, the principles of waiver and estoppel prohibit Florida Power from seeking that result. Florida Power expressly represented to the Commission that the Panda contract was for thirty years, and Florida Power requested Commission approval to enter into the contract. (T. 225, L. 1-5 (Killian);(Ex. 8 at p. 15). The Commission approved the contract on that basis, and Florida Power cannot seek to revisit that approval to the detriment of Panda some four years later. See Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945;) Appalachian, Inc. v. Olson, 468 So.2d 266, 269 (Fla. 2d DCA 1985)

In his testimony, Robert Dolan of Florida Power now asserts that it has really always been his view that Florida Power was obligated to make capacity payments for only 20 years.[14] (T. 91, L. 9-15; 101, L. 2 - 103, L. 22). In fact, Mr. Dolan testified that he believed that the capacity Panda was obligated to provide for years 21 through 30 of the contract would be **"free"**. (T. 91, L. 9-15 (Dolan). However, Mr. Dolan admitted that he never voiced this remarkable opinion to Panda or the Commission, even when Florida Power was seeking approval of the contract. (T. 101, L. 20 - 103, L. 2; 168, L. 17 - 169, L. 1 (Dolan)). Mr. Dolan's obviously recently created subjective opinion is not credible. If Florida Power felt that Panda was truly offering ten years of "free" capacity under the contract, then it would have trumpeted that fact from the highest rooftops when seeking Commission approval to accept the

[14] On cross-examination, Mr. Dolan admitted that there is no clause in the contract which specifically states that Florida Power is only responsible for paying for as-available energy for the last ten years of the contract. (T. 170, L. 4 - 171, L. 25 (Dolan)).

Panda contract in 1992. Florida Power is estopped from taking that position now.

Second, as with the size issue, the only reasonable reading of the contract requires 30 years of capacity payments. Once again Panda does not believe, based on the cited provisions, that there is any ambiguity in the contract. However, to the extent this Commission believes that there is an ambiguity, once again the course of performance of Florida Power and their role as draftsman of the contract dictate resolution of the ambiguity in Panda's favor.

Florida Power's argument that the schedules to the contract limit its obligations to pay capacity payments is specious. At worst, that schedule would create a contract ambiguity never raised by Florida Power until it adopted its decision to stop the Panda project if it could.[15] Appendix "C" to the contract, which only lists the capacity payments computed under Article VI of the contract and Rule 25-17.0832(4) for 20 years, nevertheless expressly refers to the contract's formula as the basis for computation. In fact, the Commission's Rules on which Florida Power places so much reliance only require that a standard offer contract contain an illustrative schedule of capacity payments for at least ten years. 25-17.0832(4). Thus, it was quite logical to conclude, as did both Panda **and** Florida Power (before its change of heart), that the attachment of only a twenty year payment schedule did not alter the contractual 30 year obligation.[16]

---

[15] Panda contends that there is no ambiguity because one must look to specific express provisions, rather than general provisions, when interpreting a contract. See Blackhawk Heating, infra. Here the contract says, in plain english, that Panda must provide Committed Capacity for thirty years and Florida Power must pay for it.

[16] As noted above, one prior draft of Florida Power's standard

B. **The actions of the parties reflect the understanding that Florida Power would make capacity payments to Panda for the full term of the contract.**

Panda presented testimony from several witnesses regarding discussions with Florida Power representatives in which the subject of capacity payments were discussed. In those discussions, Florida Power's representative stated that the capacity payments would be made for the last ten years of the contract.

Darol Lindloff and Ralph Killian each testified that they attended a meeting with Florida Power representatives in which Florida Power admitted that it was obligated to provide capacity payments to Panda for the last ten years of the contract with the only issue being what formula to use in light of the truncated schedule in Appendix "C." (T. 233, L. 14 - L. 234, L. 21 (Killian)); (T. 394, L. 20 - 395, L. 5 (Lindloff)). Florida Power did not present any testimony from any person who attended that meeting to rebut Panda's testimony, other than an obviously disgruntled former counsel of Panda's (who felt no ethical obligation to protect Panda's attorney-client privilege) and who merely said that he did not recall Florida Power and Panda reaching agreement on the issue of how to handle the last ten years. More significantly, Florida Power avoided calling as witnesses its own employees who made the statements in question to Mr. Killian and to Mr. Lindloff, and the Commission may therefore draw an inference against Florida Power on this issue. See State v. Michaels, 454 So.2d 560 (Fla. 1984); Maxfly Aviation, Inc. v. Gill, 605 So.2d 1297 (Fla. 4th DCA 1992).

Pursuant to the plain language of the contract and the actions of the parties, Panda is thus entitled to capacity payments for the full term of

---

offer contract submitted to the Commission listed capacity payments for 30 years, showing that it was merely a question of extrapolating the formula. (Ex. 5 at Schedule "C").

the contract.

C. **Capacity Payments for a thirty year term are consistent with the "value of deferral method" of calculation adopted by the Commission.**

Roy Shanker, an expert witness sponsored by Panda, presented testimony regarding the use of the value of deferral method set forth in the Commission's Rules in interpreting the contract, and testified that the payment of thirty years of capacity payments was in fact mandated by the contract using that method and consistent with the Commission's Rule. (T. 512, L. 5 - 513, L. 3 (Shanker).

The value of deferral method, codified in Rule 25-0832(4) and Article VIII of the Contract, provides the basis for the calculation of capacity payments to be paid to cogenerators. That method calculates the costs avoided by the utility, as required by PURPA, when the utility is able to defer the expense of building a new plant by purchasing firm capacity from a cogenerator. In this case, Florida Power was able to avoid building 74.9 megawatts of capacity for a period of thirty years. Therefore, the value of deferral method provides that Florida Power must pay Panda for each of the thirty years in which Florida Power has avoided the cost of building a plant.

As a contractual matter, Florida Power argues that because the schedule to the contract provides that the "plant life" of the avoided unit at issue is only twenty years, therefore Florida Power is only obligated to pay capacity payments for the "plant life" of the avoided unit. However, that argument misses the point. A contract obligating Panda to supply Florida Power with firm capacity for thirty years allows Florida Power to avoid building such capacity for that period. Florida Power is required under the contract (and PURPA) to pay for such avoided capacity, and Panda must be compensated for that firm capacity. Mr. Dolan's notion of free capacity would constitute a blatant windfall to Florida Power. (T. 519, L. 16 - 520, L. 9

(Shanker)).

D. **The calculation of capacity payments for years 21 through 30 of the contract.**

The calculation of payments for years 21 through 30 of the contract merely requires an application of the formulas contained in the contract, and in the Rules and requires no external fact finding. As testified by Roy Shanker, the value of deferral method contained in the contract **and** in the Commission's rules provides that the capacity payments for year 20 of the contract should be escalated by 5.1 percent to derive the year 21 payments, and that this procedure should be used for each year until year 30. (T. 535, L. 7-21 (Shanker)).

Florida Power has argued in its prehearing report that it believes that the Commission should revisit the payments to Panda under the contract to account for **current** conditions. Such a revisitation would be an express violation of PURPA, as set forth in Panda's Motion to Dismiss, at pp. 6-25, and would, in essence, be a reinstitution of the regulatory out clause that the Commission abolished in 1991.[17]

V. The milestone dates should be extended

The contract provides certain milestone dates for the inception and operation of Panda's plant. Pursuant to a previous agreement between the parties, those dates were extended to require construction to begin by January 1, 1996 and the plant to be in-service by January 1, 1997. (Ex. 11). Panda

[17] At trial, Florida Power argued that capacity payments at the contractually mandated rates would harm ratepayers. However, the fundamental purpose of the standard offer contract process was to allow Florida Power to avoid building a new plant - the "Bartow Peaker" - by purchasing power from a QF at the same costs as would be created by the Bartow Peaker. If the Panda contract had not been executed, Florida Power would have built the Bartow Peaker, and would be charging the same rates that Panda now seeks.

has requested a declaration from the Commission extending those milestone dates, because Panda's opportunity and ability to meet the milestone dates was destroyed by Florida Power's actions in filing its Petition.

A. **Panda should be given the opportunity to perform the contract**

By filing its Petition, Florida Power destroyed Panda's ability to perform under the contract. No lender would close a loan to a facility tied up in litigation and contract disputes such as this. There is no dispute on this point from either party's witnesses. (T. 248, L. 1-11 (Killian)); (T. 449, L. 20 - 450, L. 9; 472, L. 16-21; 502, L. 9-20 (Morrison)). Termination of financing efforts led to a shelving of Panda's project. (T. 249, L. 2-8 (Killian)). Since Panda should prevail on the merits of the contract disputes, it should, therefore, be given the opportunity to meet its obligations under the contract, and an extension of the milestone dates is appropriate.

Florida Power has attempted to avoid giving Panda an opportunity to fulfill the contract, by arguing that Panda has not "proven" that it would have met its milestone dates even without Florida Power's interference. This argument, which was not pled by Florida Power, is not an issue in this proceeding. The issues in this proceeding as pled by Florida Power are whether Panda can build a plant exceeding 75 MW and receive capacity payments for the full contract term. There is no dispute that Panda cannot close financing until those issues are resolved. Florida Power, until springing Mr. Morrison's rebuttal testimony[18], never asked for a declaration that the Panda

[18] Mr. Morrison's testimony, which questioned Panda's ability to obtain financing, contradicts his own experience in the industry. Mr. Morrison admits that, in his 15 years in the industry, he has never seen a situation where a cogenerator with a contract in hand could not obtain financing. (T. 470, L. 20 - 471, L. 13 (Morrison)).

contract should be terminated because it is inherently unfinanceable. Florida Power attempts to shift the Commission's focus, and blame the victim.[19] At the time of the filing of Florida Power's petition in January of 1995, Panda was under no obligation to "prove" to Florida Power its ability to give future performance, and Florida Power should not be allowed now speculate as to "what would have happened".

All Panda seeks is to be put back in the position it was in before Florida Power began this proceeding. Panda seeks a chance to fulfill its contract. If, as Florida Power believes[20], Panda cannot build its plant because it won't be able to close its financing, then Panda will suffer the risk. Florida Power stripped Panda of its opportunity in an attempt to avoid an unwanted plant, and that opportunity to obtain financing should be restored to Panda.

---

[19] Florida Power has argued that Panda has not proved that it could have financed the project. However, Florida Power's own expert concedes that the contractual disputes and the filing of the Petition prevented Panda from completing financing. (T. 452, L. 13 - 453, L. 20; 502, L. 9-20 ((Morrison)). In any event, the evidence at trial showed that Panda was well on its way to completing financing. Panda had an executed indication of interest from its primary lenders, the Bank of Tokyo and Bayerische Vereinsbank. (T. 468, L. 18-25 (Morrison)); (Ex. 33). Panda had prepared documentation to create a thermal host, and that host was approved by FERC. (T. 474, L. 9 - 475, L. 2 (Morrison)). Panda and its lenders were scheduled to close on financing, using medium term notes ("MTN") in March of 1995. (T. 493, L. 23 - 494, L. 1; 501, L. 18 - 502, L. 2 (Morrison)); (Ex. 36). Florida Power's filing of its Petition in January of 1995 toppled Panda's apple cart, and eliminated Panda's ability to meet its milestone dates.

[20] Even prior to the disputes at issue in this case, it was Florida Power's opinion that Florida Power's standard offer contract was structured in such a way as to make it impossible for a cogenerator to obtain financing. (T. 140, L. 16-23 (Dolan)), yet another clear indication that Florida Power has been playing games in an attempt to avoid the Panda contract.

B. **The extension of the milestone dates**

Ralph Killian testified that Florida Power's actions caused Panda to "los[e] its place in line" for the generating equipment it needs to build its plant. (T. 548, 15-18; 549, L. 24-25 (Killian)). In addition, Mr. Killian testified that Florida Power's actions caused Panda to lose its financing. (T. 549, L. 20-22 (Killian)). Based on these occurrences, Mr. Killian testified that Panda will need a period of eighteen months from the date of this Commission's order to finance and start construction of the plant, and will need an additional eighteen months to complete that construction. (T. 548, L. 18-23; 550, L. 13 - 551, L. 2; 551, L. 12-17 (Killian)).

Florida Power put forth no counter-evidence on the proper period for extension of the milestone dates, and Florida Power did not cross-examine Mr. Killian on his testimony in this regard. Therefore, the propriety of the amount of extension requested is unrebutted.

For the reasons set forth herein, the Commission should adopt the findings of fact and conclusions of law submitted herewith.

Respectfully submitted,

GREENBERG, TRAURIG, HOFFMAN, LIPOFF,
ROSEN & QUENTEL, P.A.
Attorneys for Panda Kathleen
Miami, Florida 33131

By: _____ "FOR"
DAVID L. ROSS