11 12 w

Florida Power
CORPORATION

ORIGINAL
FILE COPY

JAMES A. MCGEE
SENIOR COUNSEL

September 18, 1995

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 950110-EI

Dear Ms. Bayó:

ACK ✓
AFA
APP
CAF
CMU
CTR
EAG Hall
LEG 1
LIN 5
OPC
RCH
SEC 1
WAS
OTH

Enclosed for filing in the subject docket are fifteen copies of Florida Power Corporation's Memorandum in Opposition to Motion to Dismiss.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee for MW

James A. McGee

Jam/jb
Enclosure
cc: Parties of Records

Memorandum 09226-95
Appendix 09227-95

GENERAL OFFICE
3201 Thirty-fourth Street South • Post Office Box 14042 • St. Petersburg, Florida 33733-4042 • (813) 866-5786 • Fax: (813) 866-4931
A Florida Progress Company

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding eligibility for Standard Offer contract and payment thereunder by Florida Power Corporation.	**Docket No. 950110-EI** **Submitted for filing: September 19, 1995**

FLORIDA POWER CORPORATION'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Petitioner, Florida Power Corporation ("FPC"), submits this memorandum in opposition to the motion to dismiss filed by Panda Kathleen, L.P. ("Panda").

I. Background Facts

FPC instituted this proceeding on January 25, 1995, by filing a Petition for Declaratory Statement, attached hereto as Appendix 1[1], seeking a determination of its rights and obligations under the "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW or a Solid Waste Facility" entered into between Panda and FPC on November 25, 1991 (the "Panda Standard Offer Contract" or the "Contract"). *See*, Appendix 1, Exhibit 1. That Contract was entered into pursuant to the Rules of the Florida Public Service Commission 25-17.080 through 25-17.091, Florida Administrative Code (F.A.C.), which are expressly incorporated into and made a part of the Contract. As required by the terms of the Contract,

[1] Copies of various materials referred to herein are included in the appendix filed with this response.

the PSC approved it by Order No. PSC-92-1202 FOF-EQ, Docket No. 911142-EQ, dated October 22, 1992. Appendix 2.

When Panda subsequently sought to build a 115 MW facility rather than a 75 MW facility, FPC advised Panda that it did not believe this could be done under the Standard Offer Contract without PSC approval, and it urged Panda to seek a ruling from the PSC in this regard. *See* Appendix 1, Exhibit 4. Although it was FPC's understanding that Panda intended to obtain such a ruling, Panda did not do so and instead merely raised this issue informally with the Commission Staff. *See* Appendix 1, Exhibit 5. Accordingly, FPC filed its Petition for Declaratory Statement on this issue as well as another issue that had arisen with respect to FPC's obligations under this PSC-approved Contract.

First, FPC requested a declaration that Panda will not comply with the "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW"[2] if it builds a 115 MW facility rather than a 75 MW facility. FPC sought this declaration in light, among other things, of Rule 25-17.0832, F.A.C., which expressly limits the use of this Standard Offer Contract to small qualifying facilities less than 75 MW.

Second, FPC requested a declaration that its capacity payment obligations will terminate after 20 years in accordance with the terms of the Contract and the specific schedule of payments provided therein, instead of 30 years as urged by Panda. In this regard, FPC pointed to Rule 25-17.0832(3)(e)(6), F.A.C., which is incorporated in the Contract and provides that "[a]t a

---

[2] All emphasis in this memorandum is supplied unless otherwise noted.

maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit." The Contract expressly defines the life of the avoided unit as 20 years, and it contains a 20-year capacity payment schedule. *See* Appendix 1, Exhibit 1, Appendix C, Schedule 2.

In February, 1995, Panda petitioned the PSC for leave to intervene in this proceeding. In so doing, Panda made no claim that the PSC lacked jurisdiction over FPC's petition. The PSC granted Panda's request to intervene on March 6, 1995, in Order No. PSC-95-0306-PCO-EI.

Shortly thereafter, in March 1995, Panda filed its own "Motion for Declaratory Statement and Other Relief" requesting the PSC to enter a declaratory statement in the negative of the declaratory statement requested by FPC. In effect, Panda asked the PSC to declare that Panda's proposed 115 MW facility is in compliance with the Contract, and that FPC is obligated to extend the contractual schedule of capacity payments for an additional 10 years. Panda also requested the PSC to modify the Contract to extend the specified milestone dates. In making that motion, Panda made no assertion that the PSC lacked jurisdiction to render the relief sought therein.

Subsequently, in June 1995, Panda filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing (Petition for Evidentiary Hearing), requesting the PSC to hold a formal evidentiary hearing on the pending petitions. Panda expressly acknowledged that the PSC has jurisdiction over the matter, declaring that "[t]o the extent permitted by applicable law, the Commission has jurisdiction to make determinations respecting the [Panda Standard Offer] Contract and to grant appropriate relief, consistent with that

requested in earlier filings in this docket." (Petition for Evidentiary Hearing, ¶ 7, pp. 4-5). Moreover, Panda asserted that, "[u]nder its Rules 25-22.022, 25-22.025 and 25-22.035, the Commission has the right, and in these circumstances an obligation, to convene and conduct a formal evidentiary proceeding under section 120.57(1), Florida Statutes." (Petition for Evidentiary Hearing, ¶ 7, p. 4). Pursuant to Panda's petition, the PSC scheduled a hearing on these issues for February 19, 1996.

Now, some eight months after FPC's petition was filed and long after Panda itself sought to invoke the PSC's jurisdiction, Panda filed its (1) Motion to Stay or Abate Proceedings, (2) Motion to Dismiss and (3) Supporting Memorandum (Panda Motion to Stay, to Dismiss and Memorandum) asserting for the first time that the PSC lacks jurisdiction over Panda or the claims asserted in the parties' petitions in this docket. Specifically, Panda claims that the relief sought from the PSC in FPC's petition is preempted by the Public Utility Regulatory Policies Act of 1978 ("PURPA") § 210(e) and the Federal Energy Regulatory Commission ("FERC ") regulations. Moreover, without benefit of any authority, Panda asserts that the "distinction between a 'negotiated' and a 'standard offer'" has "nothing to do with jurisdiction." (Motion to Stay, to Dismiss, and Memorandum, pp. 25-26).

In urging that the Commission lacks jurisdiction to interpret and enforce its rules governing this Standard Offer Contract or to interpret and enforce the Contract approved pursuant to those rules, Panda ignores its voluntary submission to this Commission's jurisdiction, as well as its own affirmative request for relief from the Commission on the exact same issues raised in FPC's petition. Panda also ignores the long line of orders where this

Commission has exercised jurisdiction to interpret Standard Offer Contracts and the PSC's rules governing them. Instead, Panda relies on cases from other jurisdictions where, unlike this case, the utility petitioned the state commission to modify or terminate an existing contract. FPC has requested no such relief here, and those authorities are simply not relevant to this proceeding.[3]

In point of fact, it is clear that the Commission has jurisdiction to declare, as requested by both FPC and Panda, whether, under Commission Rule 25-17.0832 and the Standard Offer Contract, Panda is entitled to build a 115 MW facility. The PSC also has jurisdiction to determine whether, under the Contract and Rule 25-17.0832(3)(e)(6), F.A.C., FPC's scheduled capacity payment obligations terminate after 20 years, which is the Commission-ordered life of the avoided unit. This jurisdiction is not preempted by federal law, and it has been provided in no uncertain terms in the PSC's enabling legislation. Indeed, the matters raised in this proceeding go to the very heart of the PSC's jurisdiction under PURPA and the related Florida statute -- the interpretation and application of the PSC's own PURPA rules and orders, including its order approving the Panda Standard Offer Contract itself.

Neither PURPA nor FERC rules implementing that statute operate to exclusively occupy and thereby preempt the area of utility-qualifying facility (QF) relationships. Instead, both the United States Congress and the FERC envisioned a cooperative regulatory environment in which the federal government would prescribe broad

---

[3] Panda's assertion that the PSC lacks jurisdiction to regulate Panda (Motion to Stay, to Dismiss, and Memorandum, pp. 6-7) is a classic red herring: the PSC does have jurisdiction over the Panda Standard Offer Contract, and it likewise has jurisdiction to construe, apply and enforce its own rules as well as any utility tariffs thereunder.

guidelines to encourage QF development, while the individual states would retain responsibility to implement and enforce those guidelines. The states were intended to be full participants in this process. To that end, state regulators were given broad discretion to fashion specific procedures to be followed by local parties under the umbrella program formulated by the FERC. In short, PURPA contemplated a continuing responsibility of each state regulatory authority, and so long as the agency acts in ways which are compatible with the FERC guidelines, it is carrying out its legitimate and intended role in the PURPA implementation scheme.

A. PURPA Contemplated An Ongoing State Enforcement Role.

Congress enacted PURPA in an effort to encourage the development of non-traditional energy sources, and Sections 201 and 210 were specifically designed to remove certain impediments to such efforts. *See FERC Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. No. 38 at 12211 (Feb. 25, 1980) ("Order No. 69"). Appendix 3. For example, QFs faced the prospect of being regulated under state laws as an electric utility. Section 210(e)(1) dealt with this concern by permitting the FERC, in its discretion, to issue rules exempting QFs from utility-type regulation under state law. 16 U.S.C. § 824a-3(e)(1). Notably, however, Section 210(e)(3) explicitly prohibited any exemption from state laws or

regulations issued for purposes of implementing the PURPA program itself.[4] 16 U.S.C. § 824a-3(e)(3)(A).

In Section 210 Congress relied upon the states as well as the federal government to implement its legislative objectives. FERC was instructed to enact regulations that would encourage QF development. 16 U.S.C. § 824a-3(a). It did so in Order No. 69, *supra*, and other similar orders. *See* 18 C.F.R. Part 292. State regulatory agencies were directed to take appropriate steps to implement the FERC's rules. 16 U.S.C. § 824a-3(f)(1). This Commission did so in Rules 25-17.080 through 25-17.091, F.A.C., which also implement Florida legislation that promotes the goals of PURPA. § 366.051, Fla. Stat. (1993).

FERC emphasized, when it first enacted PURPA rules, that the states would retain an active role. This jurisdiction applies not only to the initial implementation action taken by state regulators but also to their actions on a continuing basis in construing, applying and enforcing their PURPA rules. As FERC observed in Order No. 69 at 12231, the states' procedures: "it can also consist of review and enforcement of the application by a State regulatory authority or nonregulated electric utility, on a case-by-case basis, of its regulations or of any other provision it may have adopted to implement the Commission's rules under section 210." FERC likewise has authority to entertain PURPA enforcement claims (16 U.S.C. § 824a-3(h)), but such authority is concurrent, not exclusive or preemptive.

---

[4] This is, of course, consistent with the underlying rationale for the exemptions -- that QFs would be reticent about entering the power sales business if such sales would subject them to existing laws pertaining to cost-based regulation or similar utility-type oversight. At the same time, QFs must be expected to live by the terms of the very PURPA rules which afford them these generous regulatory exemptions.

B. Supreme Court Precedent Confirms That This Commission's Enforcement Jurisdiction Has Not Energy Services Been Federally Preempted.

Any possible doubt as to the ongoing jurisdiction of state regulators and courts to interpret, construe and implement state PURPA rules and to resolve controversies thereunder between utilities and QFs on a case-by-case basis was affirmatively laid to rest by the United States Supreme Court in *FERC v. Mississippi*, 456 U.S. 742 (1982). While noting that Congress could have opted to "pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators," the Court emphasized that PURPA "does nothing more than pre-empt conflicting state enactments in the traditional way." *Id.* at 759. The Court also acknowledged that state regulators have broad discretion to determine how best to apply the general FERC guidelines. In particular, the Court noted that under FERC's PURPA rules:

> a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.

Id. at 751. Summing up the PURPA role of state regulators, the Court added that:

> In essence, then, the statute and the implementing regulations simply require the [State] authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the [State] Public Service Commission.

Id. at 760.

The *Mississippi* Court referred by analogy to *Testa v. Katt*, 330 U.S. 386 (1947), in which a federal price control statute gave jurisdiction over claims to both state and federal courts. The state courts were deemed competent to adjudicate those claims even though they were called upon to enforce federally-mandated standards

which had become the prevailing policy in every state. 456 U.S. at 760. According to the Court, "[t]he Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210's requirements simply by opening its doors to claimants." *Id.* Consistent with the Court's holding in *Mississippi*, this Commission is being asked to do no more than to "open its doors to claimants" who seek an interpretation of the Commission's rules and the PSC-approved Standard Offer Contract which incorporates those rules.

C. The FERC's Articulated Enforcement Policy Defers Matters Arising Under State PURPA Rules To The States.

Consideration by this Commission of the petitions for declaratory relief in the instant docket is completely consistent with FERC's characterization of the proper state role under PURPA. In 1983, FERC issued a policy statement in which it delineated the appropriate procedures for enforcing the requirements of PURPA Section 210. *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policy Act of 1978*, 23 FERC ¶ 61,304 (1983) (the "Policy Statement") Appendix 4. That Policy Statement expressed an overtly non-preemptive view with respect to virtually all PURPA enforcement issues, and it repeatedly encouraged parties to initiate enforcement proceedings in state rather than federal regulatory and judicial fora.

Thus, although FERC expressed some willingness (albeit as a matter of concurrent jurisdiction with the states) to entertain challenges to the programs set up by states to implement PURPA, it adopted a "hands off" policy as to all ongoing enforcement issues that might arise after the initial implementation phase. FERC described the mechanism under Section 210(g)(2) as a scheme under which the state

courts would be the primary enforcement authorities when a person challenges the application of state commission PURPA rules. Once the initial PURPA rules have been put into effect, "the State judicial forums are available to ensure that electric utilities and qualifying facilities are dealing in good faith and in a manner consistent with locally-established regulation." *Id.* at 61,646.

FERC has cited its Policy Statement more than a dozen times, including as recently as September 1995 in *North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power Light Co.*, ____ FERC ¶ ____ (Sept. ____, 1995). A draft copy of this order which was approved at the September 13, 1995 Commission Agenda is attached as Appendix 5. Given its continued adherence to the jurisdictional principles articulated in that Policy Statement, the FERC's recent decision in *Southern California Edison Co. San Diego Gas & Electric* Co., 71 FERC ¶ 61,269 (1995), Appendix 6, is not surprising and, in fact, cannot be read (in the manner Panda erroneously suggests) as a disclaimer of state commission authority to resolve enforcement claims such as those before the PSC.

In the *Southern California Edison* case, FERC invalidated certain state commission orders which had required California utilities to purchase energy from QFs at rates in excess of their full avoided costs. FERC determined that the state commission's general process for determining avoided costs was defective because it failed to consider all potential sources of alternative capacity supplies and therefore had the potential to overstate the utilities' true avoided costs. Because the resulting pricing would exceed the federally mandated ceiling on QF purchase rates, FERC concluded that the state commission's basic PURPA implementation process was invalid.

The point is, the issue in *Southern California Edison* was the state commission's generic program for implementing PURPA, which is a matter over which FERC specifically retained an oversight role in the *Policy Statement*. That case did not involve a state agency's interpretation, application, and enforcement of the state's established rules to an individual utility-QF controversy, as is the case here.

D. This Commission has Jurisdiction to Interpret and Enforce Its PURPA Rules.

In accordance with PURPA and FERC's rules thereunder, the Florida Legislature directed that electric utilities "shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator . . . ." § 366.051, Fla. Stat. (1993). The Legislature further provided that "[t]he [PSC] shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators . . . and may set rates at which a public utility must purchase power or energy from a cogenerator . . . . " *Id.* Section 366.051 thus confers upon the PSC the authority to establish the terms upon which a utility may be required to purchase power from a cogenerator.

Consistent with this statutory authority, the PSC adopted relevant portions of FERC's PURPA rules and promulgated Rules 25-17.080 through 25-17.091, F.A.C., entitled "Utilities' Obligations with Regard to Cogenerators and Small Power Producers." These rules provide "two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract, or an individually negotiated power purchase contract."[5] *In re: Petition for determination that implementation of*

---

[5] Panda had the option, then, whether to simply accept a Standard Offer Contract or, instead, pursue a separately negotiated contract. Likewise, Panda opted (continued...)

contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, of the Florida Administrative Code, by Florida Power Corporation, Docket No. 940771-EQ, Order No. PSC-95-0210-FOF-EQ, February 15, 1995 ("Order No. 95-0210") at 9. Appendix 7. *Accord In re: Petition for resolution of a cogeneration contract dispute with Orlando Cogen Limited, L.P., by Florida Power Corporation*, Docket No. 940357-EQ, Order No. PSC-95-0209-FOF-EQ, dated February 15, 1995 ("Order No. 95-0209"). Appendix 8.

These two types of contracts are, according to the Commission, treated "very differently" under the rules.[6] *Id.* at 9. Standard Offer Contracts are "state-controlled" contracts that provide the means by which qualifying facilities can sell energy to utilities without the need to negotiate a contract. *Id.* The Commission's rules "require utilities to publish a standard offer contract in their tariffs which [the PSC] must approve," and which must conform to the extensive guidelines regarding determination of avoided units, interconnection, and insurance, among others. Order No. 95-0210 at 9; *see also Florida Power & Light Co. v. Beard*, 626 So. 2d 660, 661 (Fla. 1993); Rule 25-17.082(1), (2), 25-17.0832(3), F.A.C.

---

[5](...continued)
to size its facility at 74.9 MW net in order to satisfy the subscription limit for the Standard Offer Contract. Having exercised those options, it is Panda -- not FPC or the PSC -- which determined the manner in which the PSC would subsequently address disputes regarding the Contract.

[6] Thus, although Panda attacks the Commission's "staff" for "attach[ing] some significance" to the distinction between these two types of contracts, it is the Commission itself that has drawn this distinction in prior orders that Panda simply ignores. The differences between Standard Offer Contracts and negotiated contracts were specifically discussed in the 1992 Implementation Proceeding, Docket No. 910603-EQ.

Given their legal status as filed tariffs and the fact that they are "state-controlled" contracts, it is clear that the PSC has jurisdiction to construe and enforce Standard Offer Contracts. Indeed, in Docket No. 940771-EQ before the PSC, the cogenerators contesting jurisdiction specifically distinguished standard offer contracts from negotiated contracts on this very ground, asserting that "standard offer contracts are embodied in utility tariffs over which the [PSC] is given specific jurisdiction in § 366.051, Florida Statutes." *See* Orlando Cogen Limited's Motion to Dismiss FPC's Amended Petition, Docket No. 940771-EQ, p. 21, n.9. Appendix 9. The Commission itself similarly agreed that this was, in fact, a critical distinction, emphasizing that "[w]hile the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts." Order No. 95-0209, p. 11.

In fact, the legal effect of PSC control over the provisions of Standard Offer Contracts is to make them "order[s] of the Commission, binding as such upon the parties." *See City Gas Co. v. Peoples Gas System, Inc.*, 182 So. 2d 429, 436 (Fla. 1965); *PSC v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989); *City of Homestead v. Beard*, 600 So. 2d 450, 452 (Fla. 1992); *H. Miller & Sons, Inc. v. Hawkins*, 373 So. 2d 913, 914-15 (Fla. 1979). *PSC v. Fuller* is of particular significance here since the Florida Supreme Court determined there that the Commission had jurisdiction to resolve a controversy over the provisions in a territorial agreement approved by the Commission precisely because "the agreement ha[d] no existence apart from the PSC order approving it. . . ." *Id.* at 1212.

Just as in *Fuller*, a Standard Offer Contract has no existence apart from the PSC order approving it. Unlike the freely negotiated contract that the Commission declined to review in Order No. 95-0209, Standard Offer Contracts exist only

because the PSC defines their terms, mandates that utilities must file them for PSC approval and, once approved, requires utilities to abide by their terms with any cogenerator that accepts them. Concomitantly, then, the PSC has the authority to say what this "state-controlled" Contract means, to interpret its own rules and orders with respect to this Contract, to resolve disputes over the obligations imposed thereunder, and to determine whether it should be modified in the manner demanded by Panda.[7]

Indeed, the PSC has construed provisions of Standard Offer Contracts on numerous occasions. Order No. 95-0210, Appendix 7, n. 2. In each of these cases, the PSC was called upon to interpret, and did interpret, a term in a Standard Offer Contract between a cogenerator and a utility. *See, e.g., In re: CFR Bio-Gen's petition for declaratory statement regarding the methodology to be used in its standard offer cogeneration contracts with Florida Power Corporation*, Order No. 24338, issued April 9, 1991, Docket No. 900877-EQ (interpreting calculation of firm capacity payments under "Option B" of standard offer contract); *In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract and request for determination of substantial interest*, Order No. 24729,

---

[7] The Commission has expressly held that, as to both Standard Offer Contracts and negotiated contracts, any "material" modifications must be approved by the PSC. *In Re: Petition for approval to the extent required, of certain actions relating to approved cogeneration contracts by Florida Power Corporation*, Docket No. 940797-EQ, Order No. PSC-95-0540-FOF-EQ, dated May 2, 1995 (Order No. 95-0540). Appendix 10. The Commission necessarily has jurisdiction to determine whether a change is material and requires PSC approval. Here, of course, Panda has demanded that FPC agree to a number of changes in the contract, including a 53% increase in the net generating capacity of the proposed facility. Letter dated July 27, 1994, from Ted Hollon of Panda to David Gammon of FPC, Appendix 11. Panda also wants the Contract modified to postpone various milestone requirements. Regardless of the merits of Panda's demands, it is clear that any such changes must first be approved by this Commission.

issued July 1, 1991, Docket No. 900383-EQ; *In re: Petition of Timber Energy Resources, Inc. for declaratory statement regarding upward modification of committed capacity amount by cogenerators*, Order No. 21585, issued July 19, 1989, Docket No. 890453-EQ (interpreting committed capacity provisions in standard offer contract); and *In re: Petition for declaratory statement by Wheelabrator North Broward, Inc.*, Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

Moreover, the PSC has specifically exercised this jurisdiction to interpret its own rules, which are expressly incorporated in the Panda Standard Offer Contract. The Commission has declared, in words directly applicable here, that it "certainly has jurisdiction to construe its own [r]ules at the request of a regulated utility to which the rules apply." *In re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement*, Order No. 14207, Docket No. 840438-EI, issued March 21, 1985. Appendix 12. Indeed, under analogous circumstances, the Commission has expressly considered the application of Rule 25-17.0832 to a QF which sought to "stack" Standard Offer Contracts in order to construct a facility with a total net generating capacity in excess of 75 MW. *In re: Petition of Polk Power Partners for a Declaratory Statement Regarding Eligibility for Standard Offer Contracts*, Order No. PSC-92-0683-DS-EQ, Docket No. 920556-EQ, issued July 21, 1992. Appendix 13.

Panda ignores these directly controlling authorities. Instead, it relies entirely on out-of-state authorities dealing with claims for relief entirely different from that sought by FPC in its petition for a declaratory statement. As we now show, the authorities cited by Panda do not address, much less control, the issue presented by the narrow claim for relief requested by FPC in this proceeding.

E. The Relevant Case Law Supports a Finding of Commission Jurisdiction -- Not Preemption.

As an initial matter, Panda's reliance on 16 U.S.C. § 824a-3(e)(1995) in support of its lack of jurisdiction argument is misplaced. Insofar as this subsection authorizes FERC to exempt qualifying facilities from "State laws and regulations," it "does nothing more than pre-empt conflicting state enactments in the traditional way." *FERC v. Mississippi*, 456 U.S. at 759 (1982).

Here, there are no "conflicting state enactments" to be preempted. Rather, the Florida Commission adopted rules consistent with FERC's PURPA rules and with section 366.051 of the Florida Statutes, which provides PSC jurisdiction over Standard Offer Contracts and which was expressly adopted pursuant to the provisions of PURPA. Moreover, as explained above and utterly ignored by Panda, the regulatory exemptions available to QFs are simply inapplicable, by the express terms of PURPA, to any of the Commission's rules issued to implement and enforce the PURPA program itself. 16 U.S.C. § 824a-3(e)(3)(1995). Those are, of course, the very rules for which FPC is seeking an interpretation and enforcement in this docket.

Panda also claims support from cases addressing claims which bear no resemblance at all to the controversy before this Commission. This is simply a proceeding in which the Commission is being asked to construe various provisions of its own PURPA rules and interpretative orders as embodied in a filed and approved Standard Offer Contract which was promulgated as a utility tariff pursuant to those established rules and Section 366.051 of the Florida Statutes. This is not a case in which FPC is asking the Commission to issue new rules, modify a negotiated contract, or subject a QF to utility-type regulation of any kind. (Quite to the contrary, it is only Panda which is seeking to modify the PSC-approved Standard

Offer Contract by increasing the maximum facility size and extending the term for capacity payments and adjusting the "time of the essence" milestones). Given the nature of the limited relief FPC is seeking in its petition, each of the cases cited by Panda is inapposite.

For example, Panda places great reliance on the Third Circuit's recent decision in *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1995). That decision resulted from a Board-initiated review of the current cost-effectiveness of all outstanding power purchase contracts in New Jersey and an order directing Jersey Central to modify or buy-out a previously-approved contract with Freehold. The Third Circuit held that reopening the contract to revise a previously-approved avoided cost rate would impermissibly subject the QF to utility-type rate regulation. The *Freehold* decision simply has no relevance to the instant case. Indeed, when correctly read, it supports a finding of Commission jurisdiction here.

First, *Freehold* involved a negotiated contract, not a Standard Offer Contract. As this Commission has previously ruled, these two types of contracts are treated "very differently" under Florida's PURPA rules. *Order No. 95-0210* at 9; *see also* Order No. 95-0209. This Commission has not attempted to control the provisions of negotiated contracts, but it plainly does control the terms of Standard Offer Contracts, such as the Panda Contract. *See* Order No. 95-0209, p. 5.

Second, *Freehold* involved an entirely different claim for relief than the Commission is being asked to grant in this proceeding. Unlike *Freehold*, this is not a case in which the Commission or the utility is seeking to modify a previously-

approved contract to reduce an established capacity or energy rate.[8] Rather, Florida Power has simply asked to interpret certain essential provisions of the rules/tariff/standard offer contract and determine what the parties' existing rights and obligations are under that contract. This imposes no form of "utility-type regulation" on Panda, but rather merely enforces the Commission's PURPA rules which Panda has taken advantage of and from which it is clearly not exempt after having done so.

Significantly, the *Freehold* court specifically emphasized that "[t]his case does not involve a state regulation promulgated pursuant to section 210(f), which governs the sale and purchase of electricity between utilities and QFs, nor was it brought by a person against a QF to enforce such a regulation." *Id.* at 1184, n. 4; at 1185, 1191-92. In contrast, FPC's petition for declaratory relief most definitely is an action "against a QF to enforce" a "state regulation promulgated pursuant to section 210(f)" -- *i.e.*, the 75 MW size limit in the Commission's regulation and in the Standard Offer Contract, and the required linkage of capacity payments to the expected plant life of a specific avoidable unit. *See* Rule 17.0832, F.A.C.

The point is, as the *Freehold* court recognized and as we have shown above, the federal exemption from utility-type regulation does not apply to "any State law or regulation in effect in a State pursuant to subsection (f) [of PURPA Section 210]."

---

[8] Because the Board in *Freehold* was attempting to affirmatively alter, rather than merely interpret, the terms of the parties' contract, the Third Circuit did "not believe that Freehold's claims [could] correctly be characterized as a dispute under the [contract]." 44 F.3d at 1190, n. 10. Here, in contrast, the interpretational dispute between Florida Power and Panda can be clearly "characterized as a dispute under the [contract]." And, to the extent that Panda seeks to modify this contract, the Commission has previously held that its approval must first be obtained for any such modification.

16 U.S.C. § 824a-3(e)(3)(A). FERC confirmed this limitation in Order No. 69 at 12233:

> Several commenters noted that this section might be interpreted as exempting qualifying facilities from state laws or regulations implementing the Commission's rules, under section 210(f) of PURPA. In order to clarify that qualifying facilities are not to be exempt from these rules, the Commission has added subparagraph (c)(2) prohibiting any exemptions from State laws and regulations promulgated pursuant to Subpart C of these rules.

This Commission's rules at issue here are regulations which implement Section 210(f), and hence Panda's claim to be exempt from these regulations is utterly without merit. In the words of the *Freehold* court, *"QFs simply are not exempt from state laws and regulations enacted pursuant to section 210(f) and, with it, section 210(a)."* 44 F.2d at 1192.

As can be readily seen, then, *Freehold* in fact supports FPC's position, and it certainly lends no credence at all to Panda's motion to dismiss FPC's petition in this proceeding. FERC's recent order in *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) ,Appendix 14, illustrates this well.

In that case, a utility asked FERC to issue a declaratory order that a state regulatory commission lacked authority to modify a previously negotiated and approved QF power purchase contract by extending certain contract milestone dates, particularly without a corresponding reduction in price to reflect the utility's current avoided costs. The QF, citing *Freehold*, argued that neither the state commission nor the FERC could revisit the negotiated contract rates because this would be a prohibited exercise of "utility-type regulation" of the QF.

FERC implicitly rejected this contention, holding that the state commission had authority to resolve QF contract disputes. FERC noted that such "modifications to the Purchase Agreement involve fact-based determinations and PURPA enforcement issues that we consistently have regarded as the province of the States." *Id.* at 61,494. (footnote omitted). FERC also emphasized that:

> It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts.

Id. at 61,495 (footnotes omitted). Under FERC's reading of *Freehold*, then, the Florida Commission is not preempted from interpreting the provisions of its own regulations or of the Panda Standard Offer Contract issued in accordance with those regulations.

Panda's reliance on the Ninth Circuit's decision in *Independent Energy Producers Ass'n. Inc. v. California Public Utilities Comm'n*, 36 F.3d 848 (9th Cir. 1994) is equally misplaced. That case involved a program developed by the California Public Utilities Commission and certain utilities under which the utilities were authorized to monitor compliance of QFs with federal operating and efficiency standards. If a utility determined that a QF did not meet the FERC's operating and efficiency standards (and hence was not a QF), it was authorized to suspend payment of the rates specified in the contract and to substitute a lower, "alternative" rate. The Ninth Circuit struck that program down, holding that PURPA evinced Congress' intent that FERC exercise exclusive authority over "QF status determinations." *Id.* at 853.

Here, of course, neither of the issues on which FPC is seeking a declaratory statement involve a "QF status determination." Likewise, FPC is not seeking to suspend payment of the rates specified in the contract or to substitute a lower, "alternative" rate for Panda's failure to meet federal standards. Instead, as can be seen from the face of its petition, FPC is doing nothing more than seeking declarations relating to the interpretation and application of the Commission's own rules and the Panda Standard Offer Contract which the Commission previously reviewed and approved. These are matters over which FERC has never purported to exercise exclusive jurisdiction.

The Ninth Circuit drew this very distinction unambiguously in *Independent Energy*. The court observed that "the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities. . . . The state's authority to implement section 210 is admittedly broad. . . ." In contrast, it held that "nothing in the language of this section [210] indicates that such authority includes the authority to make QF status determinations." *Id.* at 856. Properly read, *Independent Energy*, like *Freehold*, directly refutes Panda's contention that this Commission lacks jurisdiction over its PURPA rules and orders.

Moreover, because the petition filed by FPC before this Commission is not seeking to establish QF rates or to reopen or modify a previously approved contract or the avoided cost rate level established thereunder, other cases cited by Panda are equally inapposite: *Afton Energy, Inc. v. Idaho Power Co.*, 693 P.2d 427 (Idaho 1984) (discussing standard of review under which the state commission can modify a QF rate included in an involuntary PURPA contract); *Smith Cogeneration Management, Inc. v. Corporation Comm'n and Public Service Co. of Oklahoma*, 863 P.2d 1227 (Okla. 1993) (addressing commission rule mandating ongoing state

commission authority to modify QF contract rates); *PUC v. Gulf States Utilities Co.*, 809 S.W. 2d 201 (Tex. 1991) (addressing the state commission's ability to limit pass-through of negotiated rates greater than full avoided cost to the utility's ratepayers); *Kansas City Power & Light Co. v. Corporation Comm'n of Kansas*, 676 P.2d 764 (Kan. 1984) (proscribing state-authorized QF rates higher than the federally-mandated full avoided cost standard); *Bates Fabric Inc. v. Public Utilities Comm'n,* 447 A.2d 1211 (Me. 1982) (finding PURPA inapplicable to proposed price modifications in a pre-PURPA contract); *Barasch v. Pennsylvania Public Utility Comm'n,* 546 A.2d 1296, *reargument denied*, 550 A.2d 257 (1988) (addressing due process notice requirements for utility customers before utility can enter into a QF contract).

It should also be noted that one case relied upon by Panda -- *Consolidated Edison Company of New York, Inc. v. Public Service Comm'n of New York*, 98 App. Div. 2d 377, 471 N.Y.S. 2d 684 (1983) -- is not only inapplicable because it dealt with the validity of a statewide avoided cost rate, it is no longer good law even on that issue because its finding of federal preemption was reversed by a higher New York court. 63 N.Y.2d 424, 472 N.E. 2d 981 (1984), appeal dismissed, 470 U.S. 1075 (1985).

Finally, and contrary to the erroneous impression which Panda seeks to establish, there have been numerous instances in which state regulatory commissions have interpreted QF contracts, particularly when policy questions were at issue or when the scope of the agency's initial contract approval was called into question. For example, in *American Cogen Technology, Inc. v. Pacific Gas and Electric Co.*, 1989 Cal. PUC LEXIS 813 (Nov. 22, 1989), Appendix 15, the California Commission approved a settlement of a dispute that arose after the utility purchaser refused to extend certain contract deadlines despite the QF's claim that the contract's

force majeure provisions required the extension. In deciding whether to approve the settlement, the California Commission construed the force majeure clause and concluded that it was unclear how courts would have interpreted that provision and what the litigation outcome would have been. The California Commission explained that it has "become involved in some contractual disputes when the issues were closely related to our proper authority as the agency charged with the regulation of investor-owned electric utilities."

The Minnesota Commission likewise interpreted a QF contract and found that it locked in a price but not a commercial operation date. *In the Matter of the Petition of Rosemont Cogeneration Joint Venture, et al. for an order Resolving a Dispute with Northern States Power Co.*, 1989 Minn. PUC LEXIS 107 (May 11, 1989). Appendix 16. That Commission also addressed the purchasing utility's waiver of contract rights by failing to terminate the contract when it became clear that commercial operation would be delayed.

The New York Public Service Commission has taken a similar approach. In *Fulton Cogeneration Associates v. Niagara Mohawk Power Corp.*, 1995 U.S. Dist. LEXIS 7249 (March 28, 1995), Appendix 17, the United States District Court for the Northern District of New York granted summary judgment to a QF on the grounds that the utility purchaser had breached the parties' energy output contract when it attempted to pay the contract price only for the first 47 megawatts produced by the facility and a market price for the remaining output of the facility. The district court interpreted the contract's reference to the facility's 47 megawatt capacity as an estimate and found that the project had not produced an amount of energy unreasonably disproportionate to the contract estimate. However, it also noted that the New York Commission requires a new contract when an increase in QF capacity

results from a design change and the magnitude of the increase constitutes a material alteration not contemplated in the Commission's approval of the original contract.

One of the cases cited by the *Fulton* court, *Indeck-Yerkes Energy Services, Inc. v. Public Service Commission of New York*, 164 A.D.2d 618, 564 N.Y.S. 2d 841 (3d Dep't 1991), was an affirmance of the New York Commission's decision that the utility purchaser was not required to purchase excess QF output at a contractually-negotiated rate where the additional output was the result of a facility design change and increased the originally committed generating capacity by 9%. In reversing a lower court decision based on contract law, the appellate court explained that:

> [t]he issue in this proceeding is not one of pure interpretation of the language of the agreement between the petitioner and [the utility purchaser] by application of common-law principles of contracts. Rather it is whether there is a rational basis to the PSC's determination of the scope of its prior approval of the parties' agreement, particularly the price structure contained therein, as not covering other than insignificant deviations from the contract's stated initial output.

Thus, Panda errs when it cites *Erie Energy Associates*, 1992 N.Y. PUC LEXIS 52 (March 4, 1992), Appendix 18, for the proposition that state commissions (and New York in particular) do not interpret QF contracts. In the *Erie* case, the New York Commission simply declined to entertain a controversy over a developer's failure to meet contract milestones on the grounds that the dispute could be resolved according to commercial law principles through negotiation, arbitration, or the courts. Here, however, as in the *Indeck-Yerkes* decision, there are sound policy reasons for the PSC to interpret the Panda Standard Offer Contract and determine whether it should be modified in its essential terms as Panda has demanded.

Contrary to the conclusion which Panda draws from *Barasch v. Pennsylvania Public Utility Commission*, 546 A.2d 1296, *reargument denied*, 550 A.2d 257 (1988) the Pennsylvania Commission also interprets and has even modified QF contracts. *Armco Advanced Materials Corporation v. Pennsylvania Public Utility Commission*, 1995 Pa. Commw. LEXIS 344 (July 20, 1995), Appendix 19, is the latest in a series of cases brought by a Pennsylvania utility and two of its industrial customers challenging the Pennsylvania Commission's order recalculating the price to be paid by the utility for QF power. In one of the earlier cases, 135 Pa. Commw. 15, 579 A.2d 1337 (1990), *aff'd per curium*, 535 Pa. 108, 634 A.2d 207 (1993), *cert. denied sub. nom. West Penn Power Co. v. Pennsylvania Public Utility Commission*, 115 S.Ct. 311 (1994), the court upheld the Pennsylvania Commission's extension of contract milestone dates on the grounds that:

> [a] utility's submission of a contract with a QF to the PUC for approval is legally equivalent to a petition by a QF to the PUC to compel the utility to enter into that contract. In our view, such a petition necessarily invokes the full power and duty of the PUC to examine all of the contract's terms and conditions to ensure that they are in compliance with the FERC regulations implementing PURPA. . . . Where a utility privately negotiates and executes a contract with a QF, the parties may agree to virtually anything, and the terms of their agreement are legal and enforceable. However, when the utility chooses not to accept the risk that the rates it has negotiated will be proper and recoverable, but conditions its obligations on preapproval by the PUC, then the utility subjects the entire agreement to the scrutiny of the PUC and incurs the risk that the PUC may modify other provisions of the contract if it concludes that they are not in accordance with PURPA and the FERC regulations.

579 A.2d at 1348-49. The July 1995 *Armco* decision cited above continued to permit the Pennsylvania Commission to amend the contract milestone dates, although it barred the Commission from imposing contract changes that would result in a rate greater than the utility's full avoided cost.

Panda similarly misconstrues the law in Idaho. It asserts (Motion to Stay, to Dismiss, and Memorandum, pp. 10-11) that in *Afton Energy, Inc. v. Idaho Power Co.*, 729 P.2d 400 (Id. 1986), the Idaho Supreme Court upheld a decision of the Idaho Commission holding that a district court is the proper forum to interpret contracts. Panda also states (Motion to Stay, to Dismiss, and Memorandum, pp. 21-24) that the Idaho Supreme Court held in *Afton Energy, Inc. v. Idaho Power Co.*, 693 P.2d 427 (Id. 1984) that a state commission only has authority to resolve disputes arising out of QF contracts under federal law.

However, Panda has inexcusably chosen to cite only two in the series of Idaho cases involving the Afton/Idaho Power contract dispute. The most recent of those decisions reveals that the Idaho Commission did, in fact, interpret that contract. *See Afton Energy, Inc. v. Idaho Power Co.*, 834 P.2d 850, 854 (Id. 1992). Furthermore, although the Idaho Supreme Court did not give the Idaho Commission's interpretation preclusive effect on the grounds that it was advisory, the court resolved the parties' contract dispute under Idaho contract law, not under federal law as Panda suggests.

The long and short of these cases is that PURPA does not preempt all state review and interpretation of QF contracts. State regulatory commissions, as well as state courts, can legitimately entertain requests to interpret and apply local rules and orders as they apply to QF contracts, so long as this oversight does not conflict with overriding federal authority (*e.g.*, QF certification or the full avoided cost rate ceiling). Hence, the case law fully supports the conclusion that the PSC has jurisdiction to address FPC's petition in this docket.

III. Conclusion.

For all the foregoing reasons, the Commission should accordingly deny Panda's motion to dismiss.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

James P. Fama
Deputy General Counsel
Florida Bar No. 0797812
James A. McGee
Senior Counsel
Florida Bar No. 0150483
Jeffery A. Froeschle
Florida Bar No. 0395935
Post Office Box 14042
St. Petersburg, Florida 33731

and

Alan C. Sundberg
Florida Bar No. 079381
Sylvia H. Walbolt
Florida Bar No. 033604
Donald R. Schmidt
Florida Bar No. 607959
Steven C. Durpré
Florida Bar No. 471860
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.

One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, FL 33701
Attorneys for Petitioner, Florida Power Corporation

By _____
for James A. McGee

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding eligibility for Standard Offer contract and payment thereunder by Florida Power Corporation.	**Docket No. 950110-EI** **Submitted for filing: September 19, 1995**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Memorandum in Opposition to Motion to Dismiss has been furnished via Federal Express and/or U.S. Mail to John R. Marks, III, Esquire, of Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon, P.A., 106 East College Avenue, Suite 1200, Tallahassee, FL 32301, Robert Vandiver, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, Martha Carter Brown, Esquire, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, Ken Sukhia, Esquire, Fowler, White, Gillen, Boggs Villareal and Banker, P.A., 101 North Monroe Street, Suite 1090, Tallahassee, FL 32301 and Ray Besing, Esquire, 1100 St. Paul Place, 750 North St. Paul, Dallas, Texas 75201, this 18th day of September, 1995.

Respectfully submitted,

Attorney