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September 14, 1995

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

Re: Docket No. 950110-EI

ACK ___ Dear Ms. Bayô:

___ Enclosed for filing in the above referenced docket is Panda's Request For Oral
___ Argument on its Motion to Stay or Abate Proceedings, Motion to Dismiss and Supporting
___ Memorandum which is being filed pursuant to Rule 25-22.037(2), F.A.C. The underlying
___ Motion has been attached to the filed copy without exhibits, however, we have not provided
___ 15 copies of the underlying Motion due to its length and also due to the fact that it was just
___ filed on September 12, 1995.

___

1 If you desire us to provide an additional 15 copies of the underlying Motion to this
5 request for oral argument, please let me know and we will supplement accordingly.

___

___

1 Sincerely,

___

___

Eric S. Haug

ESH:bg
Enclosures

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 25-22.058, F.A.C., Panda-Kathleen, L.P. ("Panda"), by and through it's undersigned counsel, hereby requests oral argument of its Motion to Stay or Abate Proceedings and Motion to Dismiss, with Supporting Memorandum, which was filed in this action September 12, 1995, and a copy of which is attached (without Exhibits).

Respectfully submitted,

THE LAW OFFICES OF
RAY G. BESING, P.C.
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By _____
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COUNSEL FOR PANDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile ~~hand delivery~~ to Donald R. Schmidt, Esq., Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A., One Harbour Place, 777 South Harbour Island Drive, Tampa, Florida 33602, attorney for Florida Power Corporation, and Robert Vandiver, Esq., and Martha Carter-Brown, Florida Public Service Commission, 2450 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, attorneys for the Public Service Commission, this 14th day of September, 1995.

Eric S. Haug, Esq.

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

(1) MOTION TO STAY OR ABATE PROCEEDINGS, (2) MOTION TO DISMISS AND (3) SUPPORTING MEMORANDUM

Pursuant to Rule 25-22.037(2)(a), F.A.C., Panda-Kathleen, L.P. ("Panda") files this (1) Motion to Stay, (2) Motion to Dismiss the Complaint filed by Florida Power Corporation ("FPC") in the above docket on January 25, 1995, and (3) Supporting Memorandum on the grounds that the Florida Public Service Commission ("the Commission") does not have jurisdiction (1) over Panda or (2) the claims asserted by FPC and that (3) all issues hearings, discovery and related scheduled proceedings in this Docket should be stayed or abated until a final decision on Panda's Motion to Dismiss (including any appeals) has been made.

I.

INTRODUCTION

A. In Docket No. 910004-EU, the Commission determined that FPC's avoided unit for a "standard offer contract"[1] was a 1997 combustion turbine. FPC prepared and filed with the Commission a proposed standard offer contract and a proposed tariff of rates to be paid by FPC to cogenerators such as Panda. The Commission approved the form,

[1]Although Panda does not accept the lawfulness of any valid distinction between a "negotiated" and a "standard offer" power purchase agreement or contract, these terms will be used for convenience because, apparently, the Commission's staff attaches some significance to the terms.

content, terms and conditions of FPC's standard offer contract and the FPC tariff of contract rates filed with the Commission, thereby establishing the rates for payment by FPC to the cogenerators, such as Panda, for the cogenerator's sale of wholesale electric power to FPC under that contract. Order No. 24989, issued August 29, 1991.

After the Commission's order, the Commission and FPC conducted a two-week "open season", between September 20 and October 4, 1991, soliciting cogenerators to consider and sign such contracts at these rates; the FPC received several signed contracts, including one from Panda. On November 19, 1991 FPC petitioned the Commission for authority to reject the first standard offer contract it had received and, subsequently, on November 26, 1991, FPC filed its petition with the Commission, in Docket No. 911142-EQ, for Commission authority to refuse all standard offer contracts except the one signed by Panda. The earlier petition for authority to reject and the subsequent petition for authority to refuse all contracts except the one signed by Panda were combined into a single docket, Docket No. 911142-EQ.

In its Order issued October 22, 1992 in that latter docket, this Commission ordered that FPC's petition for authority to reject all standard offer contracts except that signed by Panda be granted and that the docket be closed. True and correct copies of that Order is attached hereto and incorporated herein as Exhibit A.

A true and correct copy of the power purchase agreement, or contract, between FPC and Panda, executed by Panda on October 4, 1991 and executed by FPC on November 25, 1991 is attached hereto and incorporated herein as Exhibit B.

B. After the Commission's approval of the Panda contract, Panda and FPC commenced performing that contract, from the Fall of 1992 until recently, almost two and one-half years. However, unbeknownst to Panda, in early 1994 FPC completed an internal study of its cogeneration contracts and, adopted internally, a strategy[2] to rid itself of those contracts or to force the cogenerators into negotiating different terms of the contracts, more to FPC's liking. In the Fall of 1994, FPC concocted claims that Panda, now, is not "eligible" under the contract and that Panda is not entitled to receive capacity payments for the term of the contract, as approved by this Commission.

C. Then, on January 25, 1995, FPC filed a Petition for Declaratory Statement with this Commission, claiming that the contract being performed by Panda and FPC, and executed effective November 25, 1991 is " . . . not available to Panda-Kathleen, L.P. ("Panda") if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce 115 megawatts ("MW")." In addition, even if the contract is "available" to Panda, FPC seeks a further Commission decision that it has no obligation to make capacity or energy payments under the contract after December, 2016. A true and correct copy of the FPC Petition for Declaratory Statement, with exhibits, is attached hereto as Exhibit C.

Although these claimed "issues" of (1) availability of the contract to Panda and (2) term of capacity and energy payments were discussed and fully resolved between Panda and FPC early on, long before FPC filed its January 25, 1995 petition, it is evident that FPC is seeking the Commission's assistance in "revisiting" the previously-approved contract with the

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[2]Entitled "Cogeneration and Purchased Power Strategic Proposal"

intent that the Commission enter orders which, in effect, will render the contract terminated or economically unfeasible, thereby preventing Panda from concluding the financing, construction and operation of its QF near Lakeland, Florida - and putting Panda out of business.

D. The petition of FPC was and is a sham pleading, designed to institute this proceeding for the sole purpose of excluding Panda from the market in the sale and purchase of wholesale electric power in FPC's geographical service area. In addition, FPC, later in 1985 interfered with business and contractual relationships between Panda and third parties, in order to disable Panda from obtaining sufficient natural gas transport capacity to the construction site. The practical effect of FPC's deliberate actions, were designed to cause Panda's investors and lenders (the Bank of Tokyo and Merrill Lynch) to decline to close the financing of the QF earlier this year, and thereby prevent Panda from financing and constructing the facility near Lakeland.

E. Necessarily, Panda was required to protect itself at this Commission and to seek proper judicial relief in the court. On June 26, 1995 Panda filed its complaint in the District Court for the Middle District of Florida, Tampa Division, alleging antitrust violations and seeking necessary remedies, including injunctive relief and damages. That suit (Cause No. 95-992-Civ-T-24(c), *Panda-Kathleen, L.P. v. Florida Power Corporation*, hereinafter, for convenience, "the Federal case") is now pending and discovery by the parties has commenced. Upon the conclusion of a first round of document and deposition discovery by the parties, the court in the Federal case will conduct, later this year, a hearing on Panda's motion for preliminary injunction.

Further, to procedurally protect its position (even though this Commission lacks jurisdiction over FPC's petition and the proceeding instituted thereby), Panda filed in this Commission its petition to intervene on February 6, 1995 and its Motion for Declaratory Statement and Other Relief on March 14, 1995. The settled law is that no pleading of any party can confer jurisdiction on a court or agency which lacks that jurisdiction; a fatal defect which may be raised by the parties or the court or agency at any time.

F. On August 10 and 11, 1995 this Commission filed its initial and first amended motion to intervene in the Federal case, seeking to intervene as a party in the Federal case, claiming it wanted its "position" to be known to the court: that the Commission fully intended to claim it had jurisdiction to consider and potentially grant the relief sought in FPC's January 25 petition. The Commission assumed and has aggressively asserted that it has the jurisdiction to do so.

G. Because it was and is clear that the proper forum with jurisdiction to determine the anticompetitive conduct and other wrongful conduct of FPC and granting the relief sought by Panda is the court in the Federal case, Panda assumed that the Commission and its staff would acknowledge that the misconduct of FPC should be adjudicated in the Federal case. To that end, Panda's counsel recently requested of the Commission staff attorney to recommend to the Commission that this proceeding be stayed or abated so that the court in the Federal case could proceed to resolve all issues in dispute between Panda and FPC, given that court's jurisdiction, and the doctrine of comity. The staff attorney refused. FPC's counsel assigned to this proceeding refused.

The Commission also proceeded to file its second amended motion to intervene in the Federal case. Further, the Commission staff has stated the intention of the Commission to proceed with a September 14, 1995 hearing on designation of issues in this proceeding.

In the meantime, on September 6, 1995 FPC has served upon Panda's counsel FPC's Notice of the Taking of Oral Depositions of Panda employees and officers, commencing September 18, 1995. Not without coincidence, the FPC's counsel in this proceeding also served notice to depose the same Panda witnesses on the same dates.

In short, notwithstanding the applicable jurisdictional law which precludes the Commission from proceeding down the course the Commission has set for itself in this proceeding, the Commission apparently has no intention of acknowledging that jurisdictional law. Accordingly, these Motions to Stay or Abate and to Dismiss must now be presented to the Commission.

II. ARGUMENT

A. The Commission Does Not Have Jurisdiction Over Panda.

It is well established that the Commission is a legislative agency with only those powers explicitly conferred by statute or reasonably implied from the statutory powers which have been explicitly granted. *United Telephone Co. v. Public Service Commission*, 496 So. 2d 116, 118 (Fla. 1986). Any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. Id., 496 So. 2d at 118, quoting the Florida Supreme Court in *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So. 2d 577, 584 (Fla. 1965). Absent express authority, or authority necessarily implied,

the Commission is not concerned with allegations of fraud or breach of contract between and among contracting parties. *Deltona Corporation v. Mavo*, 342, So. 2d 510, 512 (Fla. 1977).

The statutory scheme applicable here is found in Chapter 366, F.S., and grants the Commission jurisdiction over "public utilities" and "electric utilities" as defined in Sections 366.02(1) and (2), F.S. Section 366.02(1), F.S., defines "public utility" as "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity . . . to or for the public within this state." Section 366.02(2), F.S., defines "electric utility" as "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."

Panda is not a public utility or an electric utility. Panda is a qualifying facility ("QF") pursuant to the provisions of the Public Utilities Regulatory Policies Act ("PURPA"), the Federal Rules implementing PURPA found in 18 C.F.R. 292.201, et. seq., and Commission Rule 25-17.080(1), (3), F.A.C. Panda sells electric capacity and energy at wholesale to FPC pursuant to the contract entered into in November, 1991. Panda does not engage in retail electricity sales of any type and, therefore, does not fall within the definition of either "public utility" or "electric utility" in Sections 366.02(1) and (2), F.S. The Commission does not have jurisdiction over Panda.

B. The Commission Does Not Have Jurisdiction Over the Claims Asserted in the FPC Petition.

1. Section 366.051, Florida Statutes, Does Not Grant the Commission Jurisdiction to Resolve Any Contract Dispute Between FPC and Panda.

The only authority which the Commission exercises over QFs such as Panda is purely derivative. The Commission oversees and regulates utilities such as FPC, who, in turn, contract with QFs such as Panda. Utilities petition the Commission for approval of their contracts[3] with QFs in order to recoup from ratepayers the money the utilities pay the QFs under these contracts.

In connection with that approval process, Section 366.051, F.S., authorized the Commission to do two things: (1) "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers" and, at the Commission's discretion, and (2) "set rates at which a public utility must purchase power or energy from a cogenerator or small power purchaser." At that point, the Commission's obligations - and authority - are finished.

Indeed, this Commission's staff recently recommended, in its January 26, 1995 memorandum to the Director, Division of Records and Reporting, that a Motion to Dismiss (in Docket No. 940357-EQ - Petition for Resolution of Cogeneration Contract Dispute with Orlando Cogen Limited, L.P., by Florida Power Company) be granted. A true and correct copy of the staff Memorandum to the Division of Legal Services is attached hereto and incorporated herein as Exhibit D. This Commission followed the staff's recommendation and ordered that the FPC petition involving that contract dispute be dismissed. See, the Commission's February 15, 1995 decision and order in the consolidated cases, Docket No.

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[3]In reality, FPC wrote the contract and the tariff and the Commission approves both, as here, in 1991. Further, the Commission approved the FPC-Panda contract in another order on October 22, 1992.

94-0771-EQ, a true and correct copy of which is attached hereto and incorporated herein as Exhibit E.

Both the Commission's staff and the Commission itself acknowledged that the Commission's jurisdiction and authority is dependent upon the enabling statute itself, here, Section 366.051 of the Florida Statutes. The Commission staff stated:

> "In compliance with PURPA, Section 366.051, F.S., provides that Florida's electric utilities must purchase electricity offered for sale by QFs, 'in accordance with applicable law.' The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs. . . .
>
> This rather lengthy discussion of the statues and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship of utilities and the qualifying facilities. . . . As Mr. Wenner from Auburndale pointed out in oral argument in a related docket, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction." (emphasis added).

The staff cited *Docket No. 840438-EI*, in re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserve Cogeneration Agreement, Order No. 14207, issued March 31, 1985, wherein the Commission refused to construe a paragraph of the cogeneration agreement, stating:

> "In response to Conserve's jurisdictional arguments, we agree that the civil courts have exclusive jurisdiction to construe the agreement and award damages if any are merited." Order 14207 at page 4. (emphasis added).

As stated by the Commission staff in its memorandum, Exhibit E:

> "The Commission said [in the Conserve Order] that it did have jurisdiction to interpret its cogeneration rules and to decide that its new rules did not apply to preexisting contracts, but it stated that matters of contractual interpretation were properly left to the civil courts."

The weight of authority from other states that have addresses similar issues supports this position. See, eg., *Afton Energy, Inc. v. Idaho Power Co.*, 729 P.2d 400 (Id. 1986); *Bates Fabrics, Inc. v. PUC*, 447 A.2d 1211 (ME. 1992); *Barasch v. Pennsylvania Public Utility Commission*, 546 A.2d 1296, *reargument denied*, 550 A.2d 257 (1988); *Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric and Gas Corporation Remains in Effect*, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); *Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey*, 1995 WL 4897 (3rd Cir. (N.J. 1995); *Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation*, Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the principle is same; under federal and state regulations of the relationship between utilities and cogenerators, state commissions should not resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In *Afton*, *supra.*, Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditions on the Idaho Supreme Court's determination whether the Idaho Commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the

agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that the lesser payment option would be in effect. The Commission, dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In *Erie Associates*, *supra.*, the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had canceled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

> Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
>
> We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such question do not involve our authority, under PURPA and PSL66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.
>
> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source of the authority to exercise jurisdiction over such issues.

The Commission staff also cites in the Memorandum, with approval, the decision of the Florida Supreme Court in *United Telephone Company*, supra. The Commission staff stated:

> "The Commission's authority derives from the statutes. *United Telephone Company* (citation) It cannot be conferred or inferred from the provisions of a contract. Nor does the Commission's responsibility to ensure the reliability of Florida's electric grid impose a responsibility to interpret the backup fuel provision of this contract. Even if the Commission determined that Orlando Cogen had not complied with the provisions of the contract, it could not order the cogenerator to perform. When the Commission approved this contract for cost recovery purposes, it determined that FPC's ratepayers would be protected in the event the cogenerator defaulted. Any further remedy for breach of the contract itself lies with the Court. . . . Staff recommends that the Motion to Dismiss should be granted. Florida Power Corporation's Petition fails to set forth any claim that the Commission can resolve. The Commission should defer to the Court to resolve this contract dispute. FPC's Petition should be dismissed." Memorandum at pages 9-10.

In sum, Section 366.051, F.S. does not give the Commission express or implied jurisdiction over the resolution of cogeneration contract disputes, as the Commission's staff has acknowledged. Strangely, in this case, the staff has taken an entirely contrary position.

2. Federal law preempts the Commission from exercising jurisdiction to revisit a previously-approved cogeneration contract.

It is undisputed that the Commission has approved the contract itself (and the rate tariff), in its order in Docket No. 910004-EU, Order No. 24989 issued August 29, 1991. It is undisputed, by the way, that the testimony offered by FPC witnesses (e.g., Robert D. Dolan) in that proceeding established that FPC wrote both the contract and the tariff applicable to Panda and FPC; presented the contract and the tariff to the Commission in the form of exhibits in that proceeding; and the contract and tariff, with minor modifications, were approved by the Commission in its final order in that proceeding.

In addition, the specific, signed contract for a 30-year term between Panda and FPC was especially approved by this Commission in its October 22, 1992 Order, (Exhibit A). Under settled case authority, this Commission cannot, some three years later (or at any subsequent time), revisit that contract for the purpose of construing, interpreting, modifying, canceling, voiding (or, for that matter, enforcing) the contract.

The point of departure is the provisions of PURPA § 210, 16 USC § 824a-3. The pertinent portion of that section, according to this Commission in its February 15, 1995 Order, Docket No. 940771-EQ, (Exhibit E):

> "contains several provisions designed to overcome [the] obstacles" [the resistance of monopoly electric utilities to purchasing power from other generation suppliers; the potential refusal of monopoly electric utilities to sell needed backup power to cogenerators; and subjecting cogenerators to extensive and expensive federal and state regulations]. § 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). § 210(b) directs FERC to set rates for the purchase of power from QFs.... FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost (defined under 18 C.F.R. § 292.101(b)(6)) FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of power purchase agreements, including price, as long as they are at or below a utility's avoided cost. (18 C.F.R. § 293.301) In compliance with PURPA, § 366.051, Florida Statutes, provides that Florida's electric utilities must purchase utility offered for sale by QFs, "in accordance with applicable law." The Statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The Statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs." (emphasis added).

Under the Supremacy Clause of the U.S. Constitution, applied to the field of cogeneration, such reconsideration by state commissions have the effect of conflicting with federal law in interfering with and discouraging cogeneration, by imposing burdensome utility-like regulation upon cogenerators, contrary to PURPA and FERC's regulations, in a field that is preempted by the federal law. Commission actions in a proceeding such as this one interfere with that federal policy and simply must yield.

In *Smith Cogeneration Management, Inc. v. The Corporation Commission of Oklahoma*, 863 P.2d, 1227 (Okla. 1993), the Oklahoma Commission had adopted a rule which allowed reconsideration by the Commission of avoided costs after the contract was agreed upon, thereby creating uncertainty for the cogenerator in its ability to obtain necessary financing to develop the facility. The Oklahoma Supreme Court held that the Commission rule was unlawful, being preempted by federal law and contrary to PURPA and the regulations of FERC. The Court pointed out that the preemption doctrine stems from the Supremacy Clause of the U.S. Constitution and invalidates any state law or regulation which contradicts or interferes with an act of Congress. The Court held that once the cogenerator had contractually obligated itself to deliver power to the public utility, the contract was approved and could not be revisited by the Commission at a later time. The Court relied upon *FERC v. Mississippi*, 456 US 742, 745 (1982), in which the U.S. Supreme Court held that the federal government may constitutionally order the States to implement the FERC's regulations through the State courts or agencies. As the Oklahoma Supreme Court stated:

> "Under this federal command, states have the authority to promulgate regulations mirroring the Federal regulations. In general, a State may enact its own laws or regulations as long as the federal authority has not preempted all state efforts to regulate in the area and as long as the state laws or regulations do not conflict with federal laws or regulations. *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

The Court held that the State Commission rule directly conflicts with PURPA and FERC regulations; it discourages cogeneration, and that is preempted by Federal law. The Court pointed out that if the entrepreneur can show an inability to finance without a firm contract, it is even more clear that any attempt by the Commission to revisit a cogeneration contract, even as a result of changed circumstances, deprives the cogenerator of the benefits of the commitment it made to furnish the power, and the State Commission rule is invalid.

The Court further held that a cogenerator is entitled to negotiate a long term purchase contract with established full avoided costs even if those costs are based on future estimates. The Court cited its 1993 opinion in *Wilson v. Harlow*, 860 P.2nd 793,799 (1993) in holding that cogeneration regulations might require results which are unfavorable to a utility's ratepayer. Just because conditions change and render a power sales agreement no longer attractive or feasible is not justification for revisiting or otherwise modifying the contract.

The Court also held that FERC regulations grant cogenerators the right to negotiate a long-term purchase contract, with the price of power to be purchased based on the avoided costs of the utility calculated at the time of delivery or at the time the obligation is incurred. Should a cogenerator choose the latter method of calculation, it has the right to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility.

The Court stated:

> "Reconsideration of long term contracts with established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to prevent reconsideration of such contracts. The legislative history behind PURPA confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by QFs to utilities." See also *Wilson v. Harlow*, 860 P.2d 793 (S.Ct. of Oklahoma, 1993).

In *FERC v. Mississippi*, the Supreme Court interpreted PURPA as imposing requirements on State regulatory authorities in excess of their duties under State law. The Court stated that, through PURPA, the Federal government intend to use State regulatory machinery to advance federal goals. The Court held constitutional the requirement of PURPA § 210 which "has the States enforce standards promulgated by FERC." Sd., 102 S. Ct. at 2137. The legislative history of the intention of the House and Senate conferees is consistent with the Court's opinion. See 1978 US Code Congr. and Adm. News 7659,7801.

The *Smith* decision of the Oklahoma Supreme Court was cited with approval in the *Freehold* decision this year by the Third Circuit, infra.

The thrust of these cases is that Federal law has preempted state PUC proceedings which seek to impose state utility regulation on QFs by construing previously approved PPAs or engaging in similar regulatory activity.

In *Independent Energy Producers Ass'n v. California PUC*, 36 F.3d 848 (9th Cir. 1994), the Court cited the Supreme Court's decision in *American Paper Inst. v. American Elec. Power*, 461 U.S. 402, 412-18, 103 S.Ct. 1921, 1927-31 (1983) as upholding FERC's requirement that QFs receive full avoided cost rates, the statutory maximum under PURPA §210.

The Ninth Circuit refers to four types of standard offer contracts adopted by the California PUC; however, lawfulness of the contracts was not an issue in the case in either the trial or appellate court.

It is clear that, whether a contract later proves to be undesirable to the utility or not, once the contract has been signed neither the utility nor the state PUC can change or modify the contract. That includes "standard offer" or fixed-price contracts, the precise subject before the Ninth Circuit Court. In Independent Energy, the PUC's "monitoring and enforcement program" over those "standard offer" contracts, authorizing utilities to monitor QF's compliance with federal operating and efficiency standards (and to reduce payments to QFs not found to be in compliance) was struck down, as preempted by federal law. Clearly the holding applies here, particularly since FPC is not even asking this Commission to ascertain anything about federal law.

The Court also relied upon 45 Fed.Reg. 12214, 12226 (1980), pointing out that FERC §292.304(e)(2)(iii) " . . . recognizes that the value of electric energy provided by the QF varies depending on the terms of its commitment to the utility, the length of time during which the QF has guaranteed that it will supply electric energy to the utility, . . . " Id. 36 F.3d at 856-57. Thus, the term of the contract and its provisions for payments are matters preempted by the FERC regulations; yet, FPC is attempting to ask this Commission to delve into the same subject.

As to an attempt to alter the terms of an existing contract, the Court held that the PUC did not have the authority to alter the contract:

> "However, the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed. 18 C.F.R. §292.304(d)(2)." Id, 36 F.3d at 858.

The Supreme Court of Texas also agrees. In *PUC v. Gulf States Utilities Company*, 809 S.W. 2d 201 (S.Ct. 1991), the Court held that PURPA does not grant the Texas PUC authority to alter the terms of a power purchase contract.

In the very recent Third Circuit case, *Freehold Cogeneration v. Board of Reg. Com'rs. of N.J.*, 44 F.3d 1178 (3rd Cir. 1995) [decided on January 9, 1995, prior to FPC's January 25 Petition filed in this Commission], the PPA was negotiated, signed and then approved by the New Jersey Board (PUC). However, the Board decided in 1993 to let utilities out of QF contracts no longer beneficial to the utilities, by buyouts and other measures to reduce power costs. In early 1994, the Board directed the QF and the utility to negotiate lower contract rates or a buyout and, if they did not do so, the Board would commence an evidentiary hearing to consider various courses of action including modifying or revocation of its approval of the PPA. The QF filed suit in the Federal court, seeking a declaratory judgment that PURPA preempted the Board's order and an injunction to stop the order. The District Court declined jurisdiction under PURPA §210(g) (only state courts or FERC ar to review state PUC orders) and the Johnson Act, 28 U.S.C. §1342 (which curtails federal court jurisdiction over state utility rates).

However, the Circuit Court reversed, holding:

1. The appeals to state courts or FERC under PURPA §210(g) are to review state PUC proceedings "designed to implement any requirement of rules promulgated by the FERC pursuant to 210(a)" but, here, the QF was claiming that the Board proceeding was inconsistent with and preempted by PURPA §210(e) and the FERC regulations which exempt QFS from state utility regulation (16 U.S.C. §824a-3(e)(1); 18 C.F.R. §292.602(c)). Id. at 1184-85 (*citing* Bristol Energy v. N.H. PUC, 13 F.3d 471 (1st Circ. 1994). The Court rejected the application of § 210(g).

2. The Johnson Act does not apply because the QF's claim is based on a federal statute, PURPA, and not solely on the Federal Constitution, *citing* Arkansas P&L Co. v. Missouri PUC, 829 F.2d 1444, 1449 (8th Cir. 1987).

3. The Federal court has jurisdiction over the preemption claim even though the parties were still in ongoing proceedings at the Board.

4. The state Board's implementation of FERC's §210(a)-type regulation ended when the Board approved the PPA. The attempt to either modify the PPA or revoke Board approval is "utility-type" regulation from which the QF is immune under PURPA §210(e). PURPA bars reconsideration of the prior approval of the PPA, the Court citing Independent, supra, and Smith Cogeneration, supra, "The Oklahoma court (in Smith) did not rest its preemption holding merely on the impact of the Commission rule on financing, but primarily on the obligation and rights of the parties under a negotiated and executed contract." Id. at 1193.

Here, FPC, too, is attempting to get the Commission to terminate or modify Panda's PPA because its rates are higher than rates that might be paid today. FPC decided in 1993 that it had contracted for too much QF power, which it claimed might result in a minimum load problem during certain periods. Rather than honor its QF contracts by reducing the amounts of its own power generation or by selling excess power to others at a reduced price, [as this Commission clearly stated should be done, in the January 1991 Order when FPC signed up over 642 MW for an identified need of 450 MW], recently has been attempting to cure its claimed minimum load problem by either coercing supply and price concessions from QFs (as in the Orlando Cogen case and several other QFs) or, as here, to entirely get out of the contract with Panda.

In FPC's cogeneration strategy documents of March, 1994, FPC concluded that its strategic interests will be served by taking whatever steps are necessary to rid itself of all of cogeneration contracts, including the Panda contract. In some cases, FPC has been able to intimidate cogenerators to renegotiate their contracts for lower capacity and energy payments by FPC, for curtailment or both. Four cogens who have resisted that intimidation, including Panda, have filed suit in the federal or state courts. The simple facts are that FPC made errors in calculating its cogeneration capacity needs in 1990 and 1991; FPC made errors in estimating the relative costs of coal and natural gas as fuels; and FPC decided it wanted to accelerate the construction and operation of its Fort Meade, Polk County units, without any competitive interference from Panda. In its "Cogen strategy" documents, FPC repeatedly made it clear that its fundamental purpose in adopting its strategy to rid itself of the cogen

contracts is to "improve its competitive position". Its subsidiary motive is to avoid making capacity and energy payments to the cogenerators as contracted.

That motive cannot be countenanced under PURPA and the FERC regulations. That is, FPC cannot attempt to obtain from this Commission an order which would relieve FPC of its PURPA and FERC obligations to buy and sell power to and from the QFs at the rates established in the contracts. Thus, in *Afton Energy, Inc. v. Idaho Power Company*, 693 P.2d 427 (Supreme Court of Idaho, 1984), the public utility attempted to challenge the authority of the Idaho PUC to order the utility to enter into a long-term (35 year) contract with the cogenerator. Idaho Power argued that the PUC should approve a contract which provided that the rates, terms and conditions in the contract are subject to the continuing jurisdiction of the Idaho PUC and, therefore, are subject to change, in revisions by order of the PUC. The basis of Idaho Power's claim was that the PUC had the (usual) statutory requirement under Idaho law to determine just, reasonable and sufficient rates, which rates of necessity must be subject to change as conditions change. The Idaho Supreme Court rejected that argument. The Court pointed out that PURPA section 210(b) (providing that the rules prescribed in subsection (a) shall insure that the utility's rates or purchase of energy from a QF should be just and reasonable "to the electric consumers of the electric utility and in the public interest") does <u>not</u> permit the State Commission to exercise pervasive regulation over the avoided cost rates paid to the cogenerator. "That is, the conferees of the House and Senate expressly stated that it was not their intention that that language in § 210(b) would subject cogenerators to State commission examination of the rates or terms; to do so would discourage cogeneration." The language proposed by Idaho Power, the Court said, would

result in utility-type regulation over the cogenerators, a result clearly rejected by Congress when it enacted PURPA.

Just as in the *Independent Energy* and *Freehold* cases, supra, the Court in *Afton Energy* pointed out that the FERC regulations do not contemplate utility-type regulation over rates paid to the cogenerator. The Court held that FERC regulations § 292.304(b),(5) and (d) make it clear that if the cogenerator chooses to exercise its option to receive avoided costs calculated at the time the obligation is incurred, that rate is to be maintained for the duration of the contract. Thus, the Court rejected Idaho Power's argument, stating:

> "It is clear that both the Congress and FERC, through it's implementing regulations, intended that (cogenerators) should not be subjected to the pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the Commission. In fact, one of Congress' main objectives in enacting PURPA was to encourage cogeneration and small power production by exempting (cogenerators) from pervasive state rate regulation. Congress was aware that such regulation presented a strong disincentive for cogenerators to engage in power production where the financial risks were great and the returns were not guaranteed to be recoverable."

The Idaho Supreme Court also made it clear that FERC Rule § 292.304(e)(iii) " . . . which provides that one of the factors in determining the avoided cost rates to be paid the (cogenerator) is "the terms of any contract or other legally enforceable obligation, including the duration of the obligation..." The Court went on to say that "the level of payments to the (cogenerator) varies depending on the length of the contract. Mathematically, the rate level is a function of the term of the contract. Thus, the Commission's rate-making authority is intricately related to its ability to define the term of the obligation. See Appendix A." Id., 693 P.2d at 431-432 and footnote 8. Also, see Appendix A, Idaho Power's rate

schedule for contracts from 2 years to 35 years in duration. [Obviously, the 20 year vs. 30 year dispute in the Panda case is derived from documents created by FPC, not from any authority or permission derived from PURPA or the FERC regulations. There is no term limitation in the federal law and FPC's claim is unsupportable under federal law - and common sense. The Idaho PUC had set out in its rules the terms of a standard form contract and, in justifying its refusal to sign that contract, Idaho Power asserted that the Commission had no jurisdiction to order Idaho Power to sign a contract which was not freely negotiated but rather was a standard form contract with terms dictated by the Commission.

The Commission also agreed that Idaho Power was, in fact, correct in its assertion that the Commission lacked jurisdiction to dictate contract terms between a utility and a cogenerator. The Idaho Commission stated: "The role of standard form contracts was to serve as a solid point of departure for negotiations. It has been our experience that sponsors of projects are greatly assisted in their initial planning efforts and their dealings with potential financial backers if the rates, terms and conditions governing future relations with the purchasing utility can be made available at the outset with at least some degree of assurance. It makes no sense to reinvent the wheel with each project. Nonetheless, the parties remain free to negotiate whatever terms make sense in light of the unique circumstances of each site's specific application."

In discussing this issue, the Idaho Supreme Court and the United States Supreme Court in the *FERC v. Mississippi* decision, supra, discussed FERC Rule 18 C.F.R. § 292.401(a)(198), which states that state commissions may implement PURPA § 210's requirement that a state commission implement rules for each electric utility, quoting that

FERC Rule as authorizing a state commission to implement the federal law by, among other things, "an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA]." In *FERC v. Mississippi*, the Supreme Court said:

> "In essence then, the [federal] statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. . . . [T]he Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210's requirement simply by opening its doors to claimants. That the Commission has administrative as well as judicial duties is of no significance. Any other conclusion would allow the States to disregard both the pre-imminent position held by federal law throughout the Nation . . . and the Congressional determination that the federal rights granted by PURPA can appropriately be enforced through State adjudicatory machinery . . . " Id., 102 S.Ct. at 2137-38.

However, the unequivocal significance of the opinions of the Supreme Court and the Idaho Court is that a state commission only has the authority to resolve disputes under the federal law. Here, FPC is not seeking a resolution of any dispute under federal law, but only asserts (frivolous) claims under a contract and a tariff FPC itself filed with and obtained previous approval by the this Commission or, at worst, under Florida Administrative Code Rule 25-17.0832(3). Both the Supreme Court and the Idaho Supreme Court confirmed the authority of a state commission to order a public utility to enter into a power purchase contract with a cogenerator, as a necessary part of that State Commission's duty to carry out the requirements of PURPA and the FERC regulations. However, the *Independent Energy*, *Freehold*, *Afton Energy* and *FERC v. Mississippi* decisions prohibit subsequent Commission hearings which may alter or terminate the PPA.

In *Kansas City Power & Light Co. v. The State Corporation Commission of Kansas*, 676 P.2d 764 (S.Ct. of Kansas, 1984) the Kansas Supreme Court reversed the Kansas Commission's setting of rates to be charged to the cogenerator on a basis other than avoided cost. The Court stated:

> "We find that federal law has preempted the field in the area of cogeneration, and that the KCC, a state regulatory authority, cannot require KCPL (the utility) to purchase electricity from cogenerators at a rate greater than the federally regulated rate based on avoided cost. The Congress of the United States established a national policy of developing alternate energy sources to combat the national energy crisis. The federal government has under its supervision activities in the energy field, including cogeneration, designed to benefit the nation as a whole. Where a state regulatory authority acts to the contrary, it must fail. The requirements of PURPA and the FERC regulations preclude or preempt state action not in compliance therewith unless a waiver is obtained. (referring to the waiver provision, which the Kansas Commission did not exercise, in FERC Rule § 292.403)."

Likewise, the Appellate Division of the Supreme Court of New York has held, without equivocation, that PURPA and the federal regulations have preempted the area of cogeneration and that New York PUC's rules and regulations cannot lawfully depart from the federal law. *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, et al.*, 98 App.Div.2d 377, 471 N.Y.S.2d 684 (1983).

3. The Commission's purported distinction between a "negotiated" and a "standard offer" contract is a distinction without a difference under the applicable law.

It is suggested by the Commission staff in its Memorandum, Exhibit D and in the Commission's February 15, 1995 Order, Exhibit E, that the Commission's rule, Section 25-17.0832, makes significant distinctions between "negotiated" contracts, on the one hand, and

"standard offer" contracts, on the other hand. Apparently, the argument is that, although the Commission has decided it does not have any authority to resolve contract disputes under negotiated contracts, between "big" QFs and a public utility, the Commission does have such authority over "standard offer" contracts between "small" QFs and a public utility. Whatever those distinctions may be, they have nothing to do with jurisdiction; both contracts have the same purpose under federal law and neither can be revisited later. That distinction has no authority under federal law, which controls. There is no case authority, or federal statutory law, which supports the jurisdictional claim of the Commission or its staff.

Further, the Commission's own rules, e.g., Section 25-17.0832(1) and (2), clearly require the Commission to do more work and exercise greater supervision over a negotiated contract than over a standard offer contract in Rule 25-17.0832(3). In its February 15 Order, Exhibit E, the Commission acknowledges that it must evaluate a negotiated contract to determine whether the contract is prudent for cost recovery purposes, i.e., ". . . to determine if its rates, terms and other conditions can be expected to contribute toward the deferral or avoidance of additional capacity construction by the utility . . ." Order at page 4. Again, in subsection (2) of that Rule, dealing with negotiated contracts, the Rules states "Negotiated contracts shall not be evaluated against an avoided unit in a standard offer contract, thus preserving the standard offer for small qualifying facilities as described in subsection (3)." Supposedly, the negotiated contract would be between "larger" private power companies which may want to negotiate special terms, conditions and even prices with the public utility; whereas the standard offer contract would be reserved for "small qualifying facilities" where most of the work of negotiating the terms, conditions and prices was already

done by the public utility in writing the contract and the associated rate tariff, a contract and tariff subsequently evaluated and approved by the Commission itself.

Clearly, whether the Commission played a great or lesser role in crafting one contract can have nothing to do with the Commission's lack of jurisdiction to revisit one of those contracts, already executed by the parties, partially performed by the parties and approved (twice) by the Commission.

Further, at page 6 of the February 15 Order (Exhibit E), the Commission stated:

> "This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the States in the regulation of the relationship between utilities and qualifying facilities. States and their utility Commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a State-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' rate payers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. ... While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts."

The Commission is quite correct in acknowledging its very limited authority to interfere in the relationship between utilities and QFs. The Commission, however, is clearly wrong when it asserts that it has the authority to "control the provisions of standard offer contracts", after they have been approved, whereas it lacks control over negotiated contracts after they have been approved. This is a distinction without a difference. Clearly, the Commission already has "approved" the standard offer contract, first, by allowing FPC's contract and tariff to be filed and become effective with all of its detailed terms and

provisions to be embodied in that contract; and, second, by entering an order granting FPC's petition to refuse all standard offer contracts except that one submitted by Panda, in its order of October 22, 1992. Obviously, Panda's contract was just as "approved" as any negotiated contract - indeed, it was approved twice. The Commission went to a great deal more trouble with, and analysis of, the terms of so-called "negotiated" contracts in approving approximately eight (8) contracts in its order of July 1, 1991 in Docket No. 910401-EQ, where the Commission reviewed and analyzed each of the principle terms of those contracts. Did the Commission do less on the standard offer contract, which it says it "controls"? Obviously not.

Further, the Commission cannot point to any valid post-approval distinction between "large" cogenerators or QFs and "small" cogenerators or QFs. Panda's standard offer contract provides for the construction of a facility which will contractually guarantee to produce 74.9 MW (committed capacity, not rated capacity) and, whether the plant necessary to do that is rated at 80 MW or at 150 MW is of no concern of the Commission. Further, in the Commission's July, 1991 Order, which approved a number of "negotiated" contracts, the "committed capacity" of those facilities ranged from a low of 28 MW to a high of 103.8 MW - and five of the eight facilities had "committed capacity" only between 28 MW and 72 MW. What is "small" and what is "large"?

It should be noted that in Florida Rule 25-17.080(1), the Commission adopted FERC Rules 292.101 through 292.207, which include Rule 292.205, the criteria for qualifying cogeneration facilities. The same Florida Rule, at subparagraph (3), restates or summarizes the FERC qualifying criteria for a cogenerator facility. Both the FERC Rule and the Florida

Rule incorporating the FERC Rules are in conflict with the "large" and "small" distinction between facilities under a negotiated contract and facilities under a standard offer contract, the "less than 75 MW definition of" small QFs in Florida Rule 25-17.0832(3), at 3(a) and 3(c). There also is a conflict between the Florida Rules' use of "committed capacity" in subparagraph (e)2 and the definitions in FERC Rule 292.202(g), (h), (i) and (j), dealing with "useful power output", "useful thermal energy output" and "total energy output".

The FPSC stated in the above opinion that FPC must purchase electricity offered for sale by Panda "in accordance with applicable law" (Florida Statutes § 366.051). "Applicable law" is the federal law and that implementing Florida law is not inconsistent with federal law.

There is nothing in PURPA or in the FERC regulations which make these size distinctions or allow them. Nothing in PURPA or the FERC regulations allow a state commission to control the size of a QF; the only "cap" is an 80 MW cap on the size of a qualifying small power production facility under 16 C.F.R. § 292.204(a). The criteria for qualifying cogeneration facilities, in contrast, at 16 C.F.R. § 292.205, deals only with efficiency standards; there is no size or capacity limitation on cogeneration facilities.

Even the Florida Code's Rule 25-17.0832(1) makes no distinction between firm capacity and energy produced and sold by a QF and purchased by a utility, as to the type of contract; that section of the Rule provides that such firm capacity and energy used and sold will be "...pursuant to a negotiated contract or a standard offer contract subject to certain contractual provisions as to the quantity, time and reliability of delivery." Further, provisions of that Rule require that, within one working day of the execution of a negotiated

contract or the receipt of a signed standard offer contract, the public utility has to notify the Commission's Director and, within 10 days after the execution or receipt of either type of contract, the public utility must file with the Commission certain reporting information, which is the same for both types of contracts. Subsection (c) of that Rule makes the distinction in size by stating that, in lieu of a separate and negotiated contract a QF under 75 MW may (not must) accept any utility's standard offer contract. The Rule goes on to state that QFs which are 75 MW or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2) of the Rule.

It is, therefore, clear that the Commission cannot impose size or similar limitations on the QFs; or assert jurisdiction to construe and interpret contracts, negotiated or standard offer, after they have been signed and approved.

Further, the claim stated in FPC's petition has nothing to do with an interpretation of the Commission's Rules. On page 1 of FPC's petition for declaratory statement, FPC makes it very clear that it is seeking a Commission declaration that the standard offer contract of Panda "is not available" to Panda "... if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce of 115 MW. In addition, if the standard offer contract is available to Panda, Florida Power seeks a further declaration that it has no obligation to make capacity or energy payments under the standard offer contract after December, 2016." (Exhibit C, January 25, 1995 Petition for Declaratory Statement, page 1). That petition clearly requests the Commission to interpret the contract and declare it either unavailable or economically unfeasible - goals which directly contradict and frustrate federal energy policy and law.

The rule that FPC claims needs interpretation is Florida Code Rule 25-17.0832(3)(a), which provides that, upon petition by a utility or pursuant to the Commission's action, each public utility shall submit for Commission approval a tariff and a standard offer contract for the purchase of firm capacity and energy . . ." That process already occurred, in August, 1991, before Panda entered into the contract with FPC. That rule has nothing to do with the approved contract subsequently executed by the parties in November, 1991; subsequently approved by the Commission in October, 1992; and subsequently performed by the parties for over two years.

There is no substance for FPC's petition; it is a sham. Moreover, even if it had any merit, it must be dismissed because the Commission lacks jurisdiction over one of the parties and over the subject matter, as a matter of law.

4. The Commission must address its lack of jurisdiction before any further steps can be taken in this proceeding; those activities must be stayed or abated.

Incredibly, having learned of Panda's intention to file this Motion to Dismiss, the staff proceeded to announce that it fully intended to see to it that a hearing on issues would proceed as scheduled this Thursday, September 14. FPC, also advised of the filing of this motion in a meeting of counsel in the federal case on September 5, proceed to serve notice of its intention to take oral depositions, starting next Monday, September 18.

When the jurisdiction of a court or agency is put at issue - which can be done by the parties or the court or agency at any time - then the court or agency should not take any further actions until reply briefs are filed, and a proper determination of jurisdiction is made. All decisions and actions of a court or agency without jurisdiction are void and may be

ignored. *See Stel-Den of American, Inc. v. Roof Structures, Inc.*, 438 So.2d 882 (Fla. App. 1983).

Panda's motion to stay or abate this proceeding should be promptly granted and, after briefing and hearing, Panda's motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via Federal Express to Donald R. Schmidt, Esq., Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A., One Harbour Place, 777 South Harbour Island Drive, Tampa, Florida 33602, attorney for Florida Power Corporation, and to Robert Vandiver, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, attorney for Public Service Commission, on this 12th day of September, 1995.

_____
Ken Sukhia, Esq.