

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
FILE COPY

In Re: Petition for Declaratory Statement
Regarding Eligibility for Standard
Offer Contract and Payment
Thereunder by Florida Power
Corporation

Docket No. 950110-EI

**FLORIDA POWER CORPORATION'S NOTICE OF FILING SUPPLEMENTAL
MATERIAL IN OPPOSITION TO PANDA'S MOTION FOR PROTECTIVE ORDER**

TO: Persons listed on attached Certificate of Service

PLEASE TAKE NOTICE THAT Florida Power Corporation hereby files with the Florida Public Service Commission a copy of FLORIDA POWER'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS ("FPC's Response to Motion to Compel"), the original of which has been filed with the Clerk of the United States District Court for the Middle District of Florida, Tampa Division, in the case entitled *Panda-Kathleen, L.P., v. Florida Power Corporation*, pending therein as Case No 95-922-CIV-T-24C (the "Federal Case"). PLEASE NOTE that one of the documents attached to FPC's Response to Motion to Compel is an Affidavit of Michele Webb which has attached to it several exhibits, including Exhibits D, I and J. Those Exhibits have been removed from the copy of FPC's Response to Motion to Compel being filed herewith with the Commission because those documents have been stamped "Confidential" by Florida Power Corporation and were produced in the Federal Case subject to that certain AGREED ORDER FOR THE HANDLING OF CONFIDENTIAL INFORMATION dated August 3, 1995, entered by Magistrate Jenkins in the Federal Case. No comparable protective order has yet been entered herein. Upon the entry of

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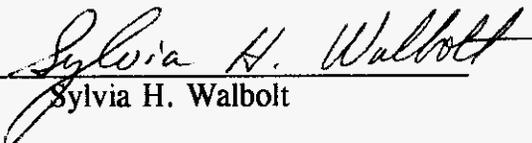
a comparable order, Florida Power will provide the Commission with the sealed copies of these exhibits.

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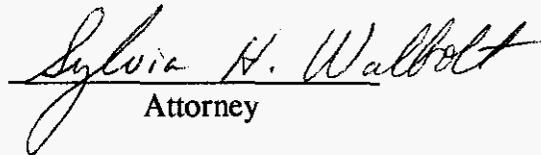
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement
regarding eligibility for Standard Offer
contract and payment thereunder by
Florida Power Corporation

Docket No. 950110-EI

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by to Hand Delivery to Ken Sukhia, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., 101 N. Monroe Street, Suite 1090, Tallahassee, Florida 32301, to Ray G. Besing, Esquire, The Law Offices of Ray G. Besing, P.C., 1100 St. Paul Place, 750 N. St. Paul, Dallas, Texas 75201, and to Robert Vandiver, Esquire and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, this 25th day of September, 1995.



Attorney

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN, L.P., a Delaware
Limited Partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

vs.

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

Case No. 95-922-CIV-T-24C

**FLORIDA POWER'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Even though Florida Power's counsel have repeatedly represented to Panda's counsel, both orally and in writing, that Florida Power has produced all of its documents responsive to PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS ("Document Request"),¹ on September 13, 1995, Panda filed PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS along with PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER. Both motions had but one goal -- to delay Florida Power's depositions of Panda's employees.

¹ The only documents not produced to date are documents that Florida Power timely objected to, and documents that are privileged or work product. In addition, the copying is being completed now of 5 recently discovered boxes of documents being produced.

Unfortunately, Panda now has achieved that goal, albeit in the breach, by openly violating this Court's August 28 and September 15 Orders.²

In several respects, Panda's Motion to Compel is even more extraordinary than Panda's violation of the Court's deposition Orders. Most motions to compel contain some form of evidentiary support -- be it an affidavit, a deposition excerpt, or some other form of proof that documents have been withheld -- to show that documents actually exist and are in the possession of, but have not been produced by, the respondent. Panda, however, offered no such evidentiary support at all. Most motions to compel also follow Local Rule 3.04(a) and quote in the motion both the text of the particular portion of a document request at issue, and the response. Panda did not quote from its Document Request (although it is attached), and Panda failed to quote from Florida Power's written response -- in fact, Panda did not even bother mentioning it had been timely filed, much less attach it as an exhibit to the Motion to Compel.

The most extraordinary aspect of Panda's Motion to Compel, however, is its disregard for the truth. Florida Power submits with this response the attached declaration of Steven C. Dupré ("Dupré Aff.") and affidavit of Michele Webb ("Webb Aff."). Those affidavits, along with the affidavit of Steven C. Dupré filed with Florida Power's response to Panda's Motion for

² In those Orders, the Court directed Panda to produce its witnesses for depositions first on September 5, 1995 and then on September 25, 1995. Most recently, however, Panda's counsel advised Florida Power's counsel on September 19, 1995, not to come to Texas to start depositions on September 25, because, among other things, Panda intended to "appeal" the September 15, 1995, Order to the District Court under Rule 72. Dupré Aff. ¶9. Panda, however, does not have any order postponing the depositions scheduled for the week of September 25 -- Panda simply refused to show up. Dupré Aff. ¶9-10 and Exs. 2 and 3 thereto.

Protective Order, constitute the only *evidentiary* statements in this record concerning Florida Power's document production. Those affidavits demonstrate that Florida Power not only produced all of its documents, but did so in record time. More importantly, Florida Power's affidavits show that Panda's "accusations" in the Motion to Compel and the "outline" of "deficiencies" attached to it, are simply false.

I. FLORIDA POWER'S DOCUMENT PRODUCTION EFFORTS

On July 25, 1995, *before* Panda delivered any document request, Florida Power made its entire Panda file available to Panda for inspection. Webb Aff. ¶3. At Panda's request, those files, and several other files, were copied the next day and shipped to Panda's counsel's office. Webb Aff. ¶3. On August 3, 1995, Panda served its Document Request. Four days later, Panda insisted it be permitted to send a team of employees to Florida Power's offices to begin inspecting Florida Power's documents no later than August 14, 1995. Dupré Aff. ¶5. After a few days, however, Panda elected not to inspect documents at Florida Power's offices, and instead, on August 11, 1995, asked that Florida Power just have its documents photocopied and delivered to Panda in Texas. Florida Power immediately that arduous task. Webb Aff. ¶5. The copy service Florida Power used began shipped the first twenty-six (26) boxes of copies on August 16, 1995, and an additional eighteen (18) boxes on August 23, 1995. Eight (8) more boxes were delivered between August 26, 1995 and September 18, 1995. Webb Aff. ¶6.

At the outset of the production, Florida Power had been unable to track down documents that Panda had asked for on two subjects -- *e.g.*, documents associated with two dockets before the Florida Public Service Commission. Through persistent research, however, Florida Power

finally located those documents around the beginning of September, 1995. Thus, on September 5, 1995, when Panda raised the issue about where those documents were, Florida Power's counsel informed Panda's counsel that the documents had just been located and would be produced shortly. The two boxes of documents associated with Florida Public Service Commission Docket No. 911142 have now been reviewed for privileged material, and shipped. Webb Aff. ¶6. Five more boxes of documents associated with the Florida Public Service Commission docket 910004 still are in the process of being reviewed and photocopied, and shortly will be shipped. Webb Aff. ¶7. Ironically, these lately discovered and produced documents are largely part of the public record, for the most part could have been obtained directly from the public records, and are being produced for Panda's convenience.

The document count produced, copied and shipped is now up to approximately *148,000 pages*, in *57 boxes of files*. Except for the possibility of as yet undiscovered inadvertent omissions from production, an inevitable occurrence in such a quick, large scale production, all of Florida Power's responsive documents have been produced, and but for the documents that are being reviewed and copied right now, all have been copied and shipped.

When Panda first asserted that documents had not been produced by Florida Power, the undersigned counsel promptly and thoroughly investigated those accusations. Florida Power's counsel ascertained that every one of the issues raised by Panda involved a misunderstanding or misperception of the facts by Panda (or involved the documents Florida Power had just recently located). He explained to Panda's counsel that it was not apparent that any currently existing document had not been produced and asked Panda to supply Florida Power with the basis of any

belief that he was mistaken in that regard. Dupré Aff. ¶¶7-8. Panda did not supply Florida Power with any such evidence -- instead, it filed its Motion to Compel and asked for a 2 hour evidentiary hearing.

II. PANDA'S UNSUBSTANTIATED ALLEGATIONS ARE DEMONSTRABLY FALSE

A. PANDA'S 20 PAGE SPREADSHEET

Panda asserts in its Motion to Compel various "concerns," "objections" and "beliefs" that Florida Power has failed to produce documents. Its only "support" for these assertions, however, is an *unsworn*, 20-page "spreadsheet." Panda characterizes that anonymously prepared spreadsheet as follows:

a partial and preliminary listing of specific omissions from, and deficiencies in, FPC's production of documents thus far, *graphically illustrating FPC's failures or refusals to produce large categories of relevant documents*

Panda's Motion to Compel at ¶4 (emphasis added). In truth, that spreadsheet "graphically illustrate[s]" only one thing -- that Panda's Motion to Compel is patently frivolous. The accusations in that "spreadsheet," are demonstrably false.

Florida Power has not had time to research every single line item on Panda's "spreadsheet" -- it should not have to do so, however, because it is Panda's burden to prove, *and not just merely allege*, that documents have not been produced. Florida Power has researched enough of it to know that Panda's speculative assertions are all misplaced. For example, many of the documents that Panda claims are missing not only were produced, but were right before Panda's eyes. Webb Aff. ¶9. In some instances, Florida Power simply does not have the types of documents that Panda apparently expected to find -- such as notes of every

participant in every meeting that ever occurred -- and there is nothing in the "spreadsheet" or the record before this Court to suggest that such documents actually exist but were deliberately withheld by Florida Power, as Panda charged. Webb Aff. ¶9. Finally, in other instances, the documents Panda claims were not produced were produced -- the documents just are not located in the files that Panda expected them to be in; they are located in other files. Webb Aff. ¶¶9, 10.

One of the most graphic illustrations of the inaccuracy of Panda's accusations is the assertion both in the "spreadsheet" and in the text of the Motion to Compel that Florida Power has not produced a specific file relating to Panda's very project. Spreadsheet page 1, line 9 ("DNP [*i.e.* did not produce] - Panda File"); Panda's Motion to Compel ¶4.b ("FPC did not produce a specific file relating to Panda-Kathleen or Panda Energy Corporation"). Florida Power's "Panda" files were the very first files Florida Power produced in this case! Webb Aff. ¶3; Dupré Aff. ¶4. Indeed, it produced those files even before Panda had served Florida Power with a document request -- they were shown to Panda's counsel on July 25, 1995.

Not only did Florida Power produce those files, but on September 5, 1995, when Panda's counsel asked Florida Power's counsel for the second time where they were, Florida Power for the third time re-verified this fact. Two days, later, in the letter that Panda attached to its Motion to Compel as Exhibit 3, Florida Power's counsel not only confirmed -- *for the fourth time* -- that Florida Power's Panda files had been produced with the very first boxes of

documents, but went further and identified the documents by Bates number.³ With that specific an identification, Panda could go independently corroborate Florida Power's representation by looking at the exact papers in question:

As I told you during our September 5, 1995, meeting (and on August 30 or 31, 1995, when Tom and I talked on the telephone), *all of the files FPC kept on the Panda project were among the first three boxes of documents produced to you on July 25, 1995.* Although I do not believe I have any obligation to do so, on this one subject, *I will identify the specific Bates numbers of the subject files. They are (i) all documents with a "PEC" prefix as part of the Bates number, and (ii) the following series of Bates numbers:*

118135-79 118378-490 143292-303
118160-377 118491-95 143304-412

Dupré Aff. ¶7 and Ex. 1 to that affidavit (emphasis and footnote added).

Florida Power's counsel can represent that, after receiving the "spreadsheet" from Panda's counsel on September 5, 1995, and before Panda filed its Motion to Compel, they investigated the matter further. Florida Power's counsel personally spot checked the items on the spreadsheet and reviewed each of the categories in the draft motion to compel given to him on September 5, 1995. Dupré Aff. ¶7. Since the receipt of Panda's "spreadsheet," Florida Power also has been researching each and every line item on it. That time consuming research has been concluded for the first four full pages of the "spreadsheet." Webb Aff. ¶9. Florida Power's counsel can represent that each and every matter complained about on those first four pages involves either (i) documents that in fact have been produced, but Panda either has not

³ The phrase "Bates numbered" refers to the unique document control numbers affixed to each document, generally in the lower right hand corner, before they were produced.

recognized them or has ignored them, (ii) documents that simply do not exist, as near as Florida Power can tell, or (iii) documents that have been redacted for privilege reasons, as specified in a privilege log delivered to Panda on September 13, 1995.⁴ Dupré Aff. ¶8; Webb Aff. ¶¶9, 10.

Florida Power has selected five samples from Panda's spreadsheet as illustrations of the different ways that Panda's allegations are inaccurate. In that regard, Florida Power has attached copies of the produced documents mentioned in the spreadsheet to the affidavit of Michele Webb. These documents demonstrate the total falsity of Panda's claims.

First example. The seventh (7th) line on page one (1) of Panda's spreadsheet reads as follows:

Request #	Date	Bates # 1st Page	Final Page	Description
3		120253 & 118136		Paper on Cargill move by Panda- <i>WHERE ARE MEETING NOTES AND FINAL RECOMMENDATIONS</i> . This report just sets out pros and cons (Fall 1993) No records of telephone conversations with Panda or Cargill on this subject.

Panda Spreadsheet at 1 (emphasis added). Here, Panda complains primarily about the absence of any meeting notes and final recommendations on a paper involving Cargill, identifying the document that was Bates numbered 120253 as the lone document allegedly produced by Florida Power on this isolated subject.

⁴ Certain of the "spreadsheet" line items do not even assert that Florida Power failed to produce documents. Those items are more like observations made by someone about particular documents that were produced. For example, on page 1, line 16, Panda identifies to Bates number pages and says "Pages 1 and 2 Not from Fort Mead RFP prior to Bates stamp pages AT5327-AT5331." Florida Power cannot determine what Panda means by this, much less what it seeks to compel Florida Power to do.

This accusation simply ignored the produced nine (9) pages of documents that *literally surrounded* the document bearing Bates number 120253. Florida Power has attached as Exhibit D to the affidavit of Michele Webb the surrounding documents *that were produced to Panda*, bearing Bates numbers 120251-60.⁵ The first page (120251) is a letter on the subject. The second page (120252) is a memo containing what might be described as information or a recommendation on the subject. The third page (120253) is the one document Panda chose to highlight in its schedule, containing the pros and cons referred to in Panda's spreadsheet. The very next page (120254) is a set of handwritten notes concerning this very subject. The next two pages (120255-56) are two more letters on the subject. The next two pages (120257-58) are an agreement on the subject. The next page (120259) is another letter, and the last page (120260) is a memo to the file. Webb Aff. ¶10.a and Ex. D.

In light of the proximity (within the documents produced) of all of these other papers to the document Panda complains about (120253), Panda's query, "*where are meeting notes and final recommendations,*" is incomprehensible.

Second example. The fifteenth (15th) line on page one (1) of Panda's spreadsheet reads as follows:

Request #	Date	Bates # 1st Page	Final Page	Description
5	2/7/92	450221		Letter transmitting 3 contracts and proforma runs - Proforma runs are accounted for but did we receive copies of the Pasco, Lake and Orlando Cogen contracts?

⁵ Various of the exhibits to Mrs. Webb's affidavit are stamped confidential and thus are filed under seal pursuant to this Court's Agreed Order For the Handling of Confidential Information dated August 3, 1995.

Panda Spreadsheet at 1 (emphasis added). The fact that Panda, in its Motion to Compel, would ask a question like this, "*Did we receive copies of the Pasco, Lake and Orlando Cogen contracts,*" demonstrates that the Motion to Compel is premature. Setting aside the impropriety of using a motion to compel to engage in this type of rumination, however, the answer to Panda's question is yes, Panda did receive such contracts. The three contracts identified in the question were produced at Bates numbers 101459-548, 100922-1011 and 103450-629, and copies of the first and last pages of these *lengthy* documents are attached to Mrs. Webb's affidavit as Exhibits E, F and G. Webb Aff. ¶10.b.

Third example. The seventeenth (17th) line on page one (1) of Panda's spreadsheet reads as follows:

Request #	Date	Bates # 1st Page	Final Page	Description
5	4/1/92	AT5310		All requirements, rates & schedules <i>not included as attachment.</i>

Panda Spreadsheet at 1 (emphasis added). In short, Panda is representing to the Court that the document bearing Bates number AT5310 identified "requirements, rates & schedules [that were] not included" in the document production.

That representation is false. The document with Bates number AT5310 is a single sheet that says, among other things, "Attached is a draft of Florida Power's ALL REQUIREMENTS RESALE SERVICE RATE SCHEDULE RS-2." Incredibly, the page *immediately preceding* that sheet of paper in the document production is the very attachment in question Panda represents was not produced. Florida Power has attached both pages as Exhibit H to Mrs.

Webb's affidavit. See Webb Aff. ¶10.c. Panda either "neglected" to look at the immediately preceding page, or chose to make it falsely appear as though Florida Power had not produced a document that had actually been produced. Neither explanation, however, should be considered excusable, given that Panda chose to precipitously file a Motion to Compel.

Fourth example. The last line of page one (1) of Panda's spreadsheet reads as follows:

Request #	Date	Bates # 1st Page	Final Page	Description
5	1/6/93	140368		Handwritten memo from MB Foley to PCH (Phil) requesting Phil's advise on proposed standard for requiring cogenerators us use double circuit interconnections with FPC. <i>Memo refers to an attachment that is not attached.</i>

Panda Spreadsheet at 1 (emphasis added). Panda apparently does not like the fact that the attachment described in that document was not with that document when it was filed in Florida Power's files. Florida Power has examined the original file that contained this handwritten note referring to an attachment. Panda did not receive an attached attachment, because Panda received Florida Power's files in the manner in which they are usually kept, and no attachment is actually attached to the original in the file. Webb Aff. ¶10.d.

Thus, the issue of what happened to that attachment between when the author wrote the note, and when that note was put into a file, will have to await the deposition process -- if that issue has any materiality in the first place. The failure to keep attachments attached to original documents when the original documents are ultimately placed into a business file, however, is a common, every day occurrence, particularly where human beings, with all of their foibles, are

keeping the files. Why Panda complains about this after being told that it received Florida Power's files in the manner in which they were actually kept, is unfathomable.

Fifth example. This example may represents the most egregious type of Panda's misrepresentations, because it applies to many of the line items in the Panda spreadsheet that Florida Power has managed to run down so far. Specifically, the fourth (4th) line on page 3 of Panda's schedule reads as follows:

Request #	Date	Bates # 1st Page	Final Page	Description
5		124780		FPC responses to Florida Cities data request No. 1 (undated) - <i>Refers to an attached schedule of capacity payments showing breakdown of each QF by month - SCHEDULE IS NOT ATTACHED.</i>

Panda Spreadsheet at 3 (emphasis added). Panda refers to Bates number 124780 and alleges that Florida Power did not produce what Panda describes in its own words as an "attached schedule of capacity payments showing breakdown of each QF by month"

Not only is that statement false, but it is so obviously false when one just glances at the documents in the sequence in which they were produced as to call into question Panda's good faith in allowing its lawyers to sign the Motion to Compel. Literally, the *very next Bates numbered pages produced in sequence in Florida Power's document production* were Bates numbers 124781-83. A copy of the document Panda alleges had no attachment, *along with the attachment that was in fact produced*, is attached as Exhibit J to Mrs. Webb's affidavit. Panda either falsely made this allegation, or recklessly ignored the following information on the face

of the produced documents that should have alerted Panda to the fact that the next three pages indeed were the very three pages it was alleging were not attached:

- ▶ The page Panda admits having seen (Bates No. 124780) has an identifying description that says it is "*Page 1 of 4*" of "Florida Power Corporation Responses to Florida Cities Data Request # 1 Docket No. ER 93-299-000 Question # 1-75" "Witness: Preparer: Robert D. Dolan"; the next three pages in the production (Bates Nos. 124781-83) contain the *exact same identification information* and say, in sequence that they are "*Page 2 of 4*", "*Page 3 of 4*" and "*Page 4 of 4*."
- ▶ The text of the page Panda admits having seen (Bates No. 124780) refers to a schedule of capacity payments showing the "breakdown of each QF by month;" the next three pages in the document production (Bates Nos. 124781-83) have the months of the year 1993 spread across the top in columns, and the names of cogenerators (*i.e.* QFs) spread across the left side by name.
- ▶ Finally, the text of the page Panda admits having seen (Bates No. 124780) refers to a "forecasted increase in capacity payments of \$12,072,000." The number \$12,072 appears in the lower right space on the very next page -- suggesting that that the spreadsheet numbers are in thousands (*i.e.* 000s).

* * * *

Florida Power could go on and on, undoubtedly taking each line item on the 20 page spreadsheet to task like this, but it should not have to. Panda did not offer one bit of evidence to support its burden of demonstrating that Florida Power has "large amounts" of documents that it did not produce. The above examples are not just isolated examples -- similar findings have been identified for most, if not every one of, the line items on the spreadsheet that Florida Power had time to check. Webb Aff. ¶10. Given just how glaring these examples are, however, it appears that Panda has gone well beyond the bounds of propriety when it directed its lawyers to sign and file the Motion to Compel. Considered in a light most favorable to Panda, that spreadsheet represents some kind of stream of consciousness speculation by various

unidentified Panda employees concerning what they needed to look for as they continued their review of Florida Power's documents or identifying depositions questions they wanted Panda's lawyers to pose. But to have premised a motion as serious as a Motion to Compel, accusing Florida Power of not producing whole categories of documents based on that spreadsheet, is, to say the least, extremely improper.

B. PANDA'S 13 "CATEGORIES" OF SUPPOSEDLY NOT PRODUCED DOCUMENTS

Panda adds insult to injury when, in bootstrap fashion, it asserts in the text of its Motion to Compel that the specific "deficiencies" identified on its "spreadsheet" demonstrate that Florida Power has not produced 13 "large categories of relevant documents." Panda's Motion to Compel ¶4. On September 7, 1995, after investigating these categories, Florida Power's counsel explained in a letter to Panda's counsel, paragraph by paragraph, that Panda was plainly mistaken in asserting these 13 categories of documents had not been produced. Dupré Aff. ¶7 and Ex. 1 to affidavit; Exhibit 3 to Motion to Compel. Florida Power incorporates that letter herein by this reference as an additional response to paragraphs 4.a through 4.m of Panda's Motion to Compel. Beyond the details of that letter, however, two aspects of that letter illustrate, perhaps best of all, just how devoid of merit Panda's Motion to Compel is.

First, after taking the time to investigate and explain in detail each issue raised, Florida Power's counsel urged Panda's counsel to continue the dialogue on this discovery point, *if* Panda *still* felt that something was amiss:

These explanations surely ought to satisfy Panda at this stage. If during deposition or other discovery it becomes apparent that some *currently existing document* was not produced, we will be more than happy to take the issue up with you at that time.

Right now, however, that is not apparent to us. *If you have some basis to make such a suggestion at this time, please contact us with it and we will confer with you concerning it -- if it should have been produced, it will be; if it is objectionable or was intentionally withheld without explanation, we will address those issues when you raise them. Right now, however, a motion to compel would be premature and without basis. If you feel otherwise, we would urge you to confer with us in good faith to try to work out any dispute we may have on that point. As far as we are concerned, however, you have not made any effort under local rule 3.01(g) to do so.*

(Emphasis added). After sending this letter, however, Florida Power heard nothing further from Panda on this subject -- not a telephone call, not a meeting and not even a letter suggesting Florida Power had overlooked anything -- until it received the Motion to Compel on September 13, 1995. Dupré Aff. ¶8.

Second, as noted earlier, one of the thirteen categories set out in paragraph 4 of Panda's Motion to Compel demonstrates that Panda did not even take into account the very specific information Florida Power's counsel provided in its September 7, 1995 letter. Specifically, in paragraph 4.b of Panda's Motion to Compel, Panda boldly alleges that Florida Power did not produce any file relating to Panda's specific project. Yet in the September 7, 1995, answer to that question (provided *six days prior to Panda's filing* of the Motion to Compel), Florida Power pinpointed, by document number, exactly which documents constituted its Panda files. See quotation from that letter at page 7 of this response. Panda nevertheless persists in making the unsubstantiated claim in its Motion to Compel that Florida Power has not produced its Panda file. It does this, even though Florida Power's counsel asked Panda's counsel to confer further with Florida Power's counsel if, after checking out the documents identified by numbers, it still felt the Panda file had not been produced. Panda never conferred further with Florida Power,

before filing its totally unsubstantiated accusation that Florida Power had not produced its Panda file.

III. APPLICABLE CASE LAW WARRANTS DENIAL OF THE MOTION TO COMPEL WITHOUT A HEARING

It is axiomatic that a party cannot be compelled to produce documents it does not have. Fed.R.Civ.P. Rule 34(a)(1) ("Any party may serve on any other party a request (1) to produce . . . documents . . . which are in the possession, custody or control of the party upon whom the request is served"). The burden of showing that a party is in control of the requested documents that have not been produced falls upon the party bringing the motion to compel. Technical Concepts v. Continental Manufacturing Co., 1994 WL 262119 at 2 (N.D. Ill. June 10, 1994) ("By neglecting to present any evidence showing that Continental has control over the requested documents, Technical has failed to carry its burden to support the motion to compel") (copy attached); Sparks Tune-Up Centers, Inc., v. Panchevre, 1991 WL 101667 at 2 (N.D. Ill. June 4, 1991) (plaintiff failed to carry burden of showing defendants possessed unproduced documents, because "plaintiff offers no facts to support" its theory that defendant "controlled" certain third parties); Butler v. Portland General Electric Company, 1990 WL 15680 at 1-2 (D. Or. Feb. 9, 1990) (Court accepted representations made by defendant that it had searched and found no additional documents as basis to deny motion to compel).

Panda has not come close to meeting its burden of showing that Florida Power has possession, custody or control over documents that were requested and not produced — Panda, indeed, has offered no evidentiary support for its allegations. Given the unrebutted affidavits

that Florida Power has submitted, nothing further should be necessary. The Motion to Compel is devoid merit and should be denied.

IV. PANDA'S REPRESENTATION THAT FLORIDA POWER IS SATISFIED WITH PANDA'S PRODUCTION OF ITS DOCUMENTS ALSO IS FALSE

Florida Power must direct the Court's attention to one other material misrepresentation in Panda's Motion to Compel. Panda gratuitously remarks that "FPC apparently found Panda's document production satisfactory; it has not complained about Panda's document production in any respect." Panda's Motion to Compel ¶2. That representation, like so much else in the Motion to Compel, is false, and Panda knows it is false.

Panda's draft motion to compel, which Panda shared with Florida Power on September 5, 1995, contained the identical statement. Florida Power explained the inaccuracy of that statement, in no uncertain terms, in Florida Power's September 7 letter. Specifically, Florida Power's counsel stated:

Having said all of this, I must strenuously take issue with another aspect of your draft motion to compel. Specifically, *you incorrectly state that "FPC apparently found Panda's document production satisfactory; it has not complained about Panda's document production in any respect."* I cannot imagine why you would say this, in light of the several material issues we have raised. Ignoring those issues, however, will not make them go away. For example, my August 28, 1995, letter raises the following issues:

- ▶ I identified a page full of bates numbers that FPC had identified as of that date as missing from the documents produced by Panda and asked that they either be produced or that an explanation for withholding them be given. *To date, you have not responded to this deficiency in Panda's production.* I have enclosed an updated list. Please produce them or explain why they will not be produced.
- ▶ I also identified *four missing boxes of documents* for which we have apparently been billed for the copying. *To date, you have not responded to this deficiency in Panda's production.*

- ▶ Panda has not yet served us with its written response confirming that all of the requested documents have been produced. To date, all you have done on this is take a position I believe is inappropriate -- namely that no response is yet due in light of the timing of the case management conference. We take issue with that, as I told Tom on the telephone when he argued the point with me on August 30, 1995, because the parties agreed to expedite the document production process here.
- ▶ Panda has stamped thousands of pages as "specially restricted" that do not constitute the types of documents that can be specially restricted. I asked you to immediately review Panda's use of that designation and provide us with a list of documents Panda actually believes fit the limited definition of specially restricted documents. *To date, you have not responded to this deficiency in Panda's production.*

In addition, Ray mentioned at our meeting on September 5, 1995, that Panda withheld certain documents (he did not specify which) on privilege grounds that are not subject to any privilege and thus must be produced. To date, however, we have not seen those documents. Also at our meeting on September 5, 1995, I pointed out that Panda did not produce a single document related to its claim to have suffered \$325,000,000 in damages. Ray confirmed that no such documents exist, although FPC considers that fact startling.

The fact that FPC has not prepared a "spreadsheet" pointing out other questions on a document by document basis that arise from the information contained in the documents that were produced does not mean that FPC has no other concerns about Panda's production of documents. Rather, FPC in all likelihood will raise those types of concerns at the appropriate time -- namely when we have a witness in front of us who can answer specific questions of that nature.

(Dupré Aff. ¶7 and Ex. 1 [emphasis added]).

Since September 7, 1995, Panda still has not provided any of the discovery, information, or responses, that Florida Power has been "complaining" about, in some instances, for a month or more. Florida Power has not yet felt it appropriate to bring these issues before the Court on a motion to compel, because Florida Power remains hopeful that Panda will get around to providing these very specifically identified documents and explanations soon -- *i.e.* when Panda

finally quits trying to evade being deposed. If Panda chooses to ignore Florida Power further on these points, however, Florida Power will have no choice but to move to compel. One thing should be clear, however -- Florida Power has "complaints" about Panda's document production, Panda knows it, and its contrary representation to the Court in its Motion to Compel is false.

V. PANDA SHOULD BE ORDERED TO PAY FLORIDA POWER'S FEES ASSOCIATED WITH THE MOTION TO COMPEL

Rule 37 of the Federal Rules of Civil Procedure allows a party to move to compel. Rule 37 also provides as follows:

If the motion is denied, the court may enter any order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P Rule 37(a)(4)(B) (emphasis added). If the Court denies Panda's Motion For Protective Order, Florida Power submits that Rule 37 mandates that Panda be required to pay Florida Power's considerable expenses incurred in investigating and responding to the Motion to Compel, including fees under these circumstances. Panda has completely failed to substantiate its bare allegations of discovery abuse.

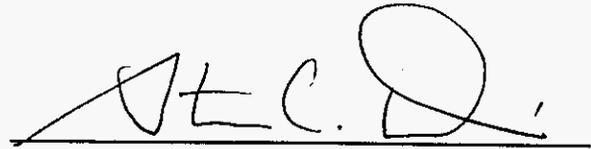
* * * * *

In summary, Florida Power submits that Panda's Motion to Compel should be denied, without hearing, because (i) its allegations that documents have not been produce represent sheer speculation by unidentified Panda employees -- no evidence, in any form, is proffered to substantiate its allegations; and (ii) the evidentiary record that Florida Power has made, both

Panda-Kathleen, L.P. v. Florida Power Corporation
Case No. 95-922-CIV-T-24C
Florida Power's Response to Panda's Motion to Compel

prior to filing this response and with this filing, is uncontroverted and demonstrates Florida Power has produced its responsive documents -- indeed, many of the very documents Panda's claims are missing in fact are and have been in Panda's possession for some time.

James P. Fama FB No. 0797812
Deputy General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733



Sylvia H. Walbolt, FB No. 033604
Donald R. Smith, FB No. 607959
Steven C. Dupré FB No. 0471860
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Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
One Harbour Place
Post Office Box 3239
Tampa, FL 33601
(813) 223-7000
Attorneys for Defendant, Florida Power
Corporation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by Hand Delivery to Thomas T. Steele, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. (813-229-8313), Post Office Box 1438, Tampa, Florida 33601, and by U.S. Mail to Ray G. Besing, Esquire, The Law Offices of Ray G. Besing, P.C. (214-220-1202), 1100 St. Paul Place, 750 N. St. Paul, Dallas, Texas 75201, and to Robert Vandiver, Esquire and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission (904-413-6250), 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, this 25th day of September, 1995.



Attorney

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN, L.P., a Delaware
Limited Partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

vs.

Case No. 95-922-CIV-T-24C

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

DECLARATION OF STEVEN C. DUPRÉ

I, Steven C. Dupré, verify, state and certify, under penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I am over 18 years old, have personal knowledge of the facts stated in this affidavit, and, if sworn as a witness, can testify competently to the facts stated in this affidavit.
2. I am one of the lawyers of record for Florida Power Corporation in this case. I am a shareholder of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. I have been licensed to practice law in Illinois since 1977 and in Florida since 1985.
3. I have been directly involved in the production of documents by Florida Power in this case.
4. On July 25, 1995, I personally delivered to Panda's counsel in our Tampa office three boxes of documents that had been given to me by Michele Webb, a paralegal

employed by Florida Power. As I understand it, those boxes included Florida Power's Panda files.

5. On August 3, 1995, I received a copy of Panda's first request for production of documents. It sought 64 categories of documents. Four days later, I received a letter from Panda's counsel insisting that a team of Panda employees be permitted to begin inspecting the documents responsive to the request. I passed that request on to Mrs. Webb. I understand that on August 10, 1995, Panda's paralegal involved in the document production was contacted and invited Panda's team to begin its inspection at its convenience.

6. On September 5, 1995, I attended a meeting with Tom Steele, Ray Besing and Ralph Killian, of Panda, along with Don Schmidt of my firm. During that meeting, Mr. Steele provided me with a draft motion to compel, and Mr. Besing provided me with a 20 page spreadsheet of problems that Panda had with Florida Power's document production. Mr. Killian showed me the documents identified by Bates number in the text of the draft motion to compel. Messrs. Steele and Besing asked me to investigate these problems and report back to them, which I stated I would do.

7. On September 6, 1996, I spent several hours meeting with Mrs. Webb and others in the Florida Power organization to investigate the allegations about an incomplete document production contained in the draft motion to compel and spreadsheet. Among other things, I investigated how documents had been gathered within the organization, who had gathered them, and how they had been organized when they were produced. I also personally spot checked several of the specific points raised in the spreadsheet and asked the paralegals involved in the process about the other matters reflected on the spreadsheet. I satisfied myself,

among other things, that nothing Panda had asked for had been held back by Florida Power, other than documents objected to in the response to Panda's document request that I caused to be served on September 5, 1995. Either the documents alleged to be missing were not missing but were located in the files produced, or they did not exist. With regard to concerns about redacted documents reflected on the spreadsheet, I ascertained that privileged documents or portions of privileged documents were redacted and that a document by document privilege log showing the basis of each redaction was almost complete. Thus, the following day, September 7, 1995, I wrote a letter to Messrs. Besing and Steele, a copy of which is attached as Exhibit 1, providing Florida Power's specific response to each point raised in their draft motion to compel. On September 13, 1995, I had the privilege log delivered to Mr. Steele's office.

8. After I sent my September 7, 1995 letter, and after I sent the privilege log, I did not hear another word from Messrs. Steele or Besing on the subject of the documents, until I received Panda's Motion to Compel. The spreadsheet attached to the Motion to Compel appears to be the same spreadsheet given to me on September 5, 1995. Likewise, the allegations in paragraph 4 of the Motion to Compel, appear to be identical to the allegations contained in the draft motion to compel that I was given on September 5, 1995.

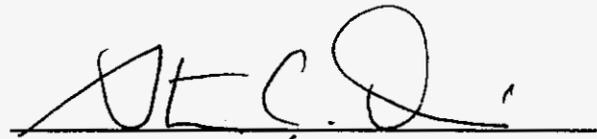
9. On September 19, 1995, I spoke to Panda's counsel, Ray Besing to inquire about rescheduling the three Panda witnesses whose depositions had been scheduled for September 18 - 20, 1995, that had to be cancelled to comply with the Court's order dated September 15, 1995. He informed me at that time that no Panda witnesses would be produced on September 25, 1995, and that he intended to appeal the September 15, 1995, Order under

Rule 72 of the Federal Rules of Civil Procedure. I confirmed our conversation with a letter, a copy of which is attached as Exhibit 2.

10. I had not received objections to the Court's September 15, 1995 Order as of Saturday, September 23, 1995. On September 23, 1995, I spoke to Tom Steele about this., Mr. Steele informed me that (i) I should not go to Texas for the depositions, and (ii) Panda's deadline for filing objections was not until Spetember 29, 1995. Mr. Steele also said, however, that he intended to try to file Panda's objections sooner. I confirmed this with a letter dated September 23, 1995, a copy of which is attached as Exhibit 3.

I declare, verify, state and certify, under penalty of perjury, that the foregoing statements are true and correct.

Executed on: September 24, 1995


STEVEN C. DUPRÉ

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by Facsimile and U.S. Mail to Thomas T. Steele, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601, and by Facsimile and U.S. Mail to Ray G. Besing, Esquire, The Law Offices of Ray G. Besing, P.C., 1100 St. Paul Place, 750 N. St. Paul, Dallas, Texas 75201, and to Robert Vandiver, Esquire and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, this ~~25~~ day of September, 1995.



Attorney

F

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P. A.
ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3239 TAMPA, FLORIDA 33601 18131 223-7000 FAX 18131 229-4133	FIRSTSTATE TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 14071 849-0300 FAX 14071 648-9099	HARBOURVIEW BUILDING P.O. BOX 12426 PENSACOLA, FLORIDA 32582 19041 434-0142 FAX 19041 434-5366	FIRST FLORIDA BANK BUILDING P.O. DRAWER 190 TALLAHASSEE, FLORIDA 32302 19041 224-1585 FAX 19041 222-0398	ESPERANTE P.O. BOX 150 WEST PALM BEACH, FLORIDA 33402 14071 859-7070 FAX 14071 859-7368	BARNETT TOWER P.O. BOX 2861 ST. PETERSBURG, FLORIDA 33731 18131 821-7000 FAX 18131 822-3788
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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg

September 7, 1995
By FAX and Mail

CONFIRMATION COPY
OF FAX TRANSMITTAL

Ray G. Besing
The Law Offices of Ray Besing, P.C.
1100 St. Paul Place
750 N. St. Paul
Dallas, TX 75201

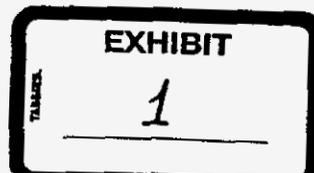
Thomas T. Steele
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
Suite 1700
501 E. Kennedy Blvd.
Tampa, FL 33601

Re: Panda-Kathleen, L.P., etc. v. Florida Power Corporation, U.S.D.C.
Middle District Case No. 95-992-Civ-T-24(C) - Panda's Questions
About FPC's Document Production

Dear Ray and Tom:

On September 5, 1995, during the case management conference at Tom's office, you asked us to review various specific questions about FPC's document production. You raised these questions in the form of a *draft* motion to compel and in a *draft* 20 page spreadsheet that is identified as an exhibit to that draft motion. If you had first conferred with us about those items (as required by the rules), I am certain you would agree that a motion to compel raising those issues would be without basis and, in any event, entirely premature. Presumably after you review this letter you will concur.

Panda's concerns appear to derive primarily from a fundamental misperception of (i) how Florida Power's files are kept in the ordinary course and what it keeps in its files, and (ii) how FPC produced its files. FPC neither failed nor refused to produce large categories of relevant documents. FPC simply did not organize its production to correspond to the 64 artificial categories of documents identified in Panda's document request. Rather, FPC produced the files in the manner in which FPC ordinarily keeps them, which of course is perfectly permissible under the rules.



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Ray G. Besing
Thomas T. Steele
September 7, 1995
Page 2

What you describe as "omissions" and "deficiencies" in the *production*, are not omissions or deficiencies in the production at all. At worst, they might constitute characteristics of FPC's internal file keeping habits and system. Just because Panda thinks certain documents *should* exist, however, does not mean they do exist. The fact is that many documents that Panda had apparently hoped would exist do not.

The draft motion to compel. To understand more fully what I mean, I have taken the liberty below of going through each of the 13 subparagraphs of paragraph 4 of your draft motion to compel and describing why Panda is off base with its concerns. Specifically:

- a. *Panda meeting and telephone notes.* FPC has produced what documents it has on this subject. FPC also has recently found seven (7) additional pages of notes (of Dave Gammon) which are being processed and will be in your hands shortly. If you cannot track down other people's notes of specific meetings or notes in the files that were produced, in all likelihood that means either that no such notes exist or that in reviewing the documents, Panda's 7 document reviewers overlooked documents that fit this description. In all events, however, FPC has held nothing back.
- b. *FPC's Panda files.* As I told you during our September 5, 1995, meeting (and on August 30 or 31, 1995, when Tom and I talked on the telephone), all of the files FPC kept on the Panda project were among the first three boxes of documents produced to you on July 25, 1995. Although I do not believe I have any obligation to do so, on this one subject I will identify the specific bates numbers of the subject files. They are (i) all documents with a "PEC" prefix as part of the bates number, and (ii) the following series of bates numbers:

118135-79 118378-490 143292-303
118180-377 118491-95 143304-412

Panda has received copies of all files kept by FPC relating to the Panda project.

- c. *Documents concerning FPC's "confidence" in the Panda project.* If FPC has any documents on this subject, you have received them. No matter how hard Panda wishes there would be more such documents, wishing it will not make it happen. If you cannot find documents which you think fit this category, it is either because they do not exist (and thus FPC does not have them), or they are part of one of the files produced over the last four weeks and Panda just has not yet recognized the documents for what they are. Either way, that does not render FPC's production deficient.

- d. *Gas strategy documents and "management action" plans or milestones, correspondence or other documents relating to the City of Lakeland.* FPC has produced all of its files concerning its involvement with the City of Lakeland. FPC has produced or is in the process of producing other documents concerning its efforts to obtain excess capacity on the Florida Gas Transmission pipeline. FPC does not intend to produce the fairly substantial volume of documents involving the old Sunshine Pipeline, unless you can show us how those documents are reasonably calculated to lead to the discovery of admissible evidence. As near as we can tell, those documents have nothing whatever to do with even the broad sweep of Panda's antitrust allegations, much less the Panda project in particular. We have thus objected to the production of such documents. If Panda wants that objection to be heard by the Court it is welcome to do so. We would ask, however, that Panda comply with the requirement to confer with us on this particular point *if* Panda feels it has some colorable basis or reason to see this large volume of material.
- e. *Cogeneration Review and Cogeneration Strategy Related Documents.* FPC cannot figure out what Panda means with its reference to a "coherent collection" of FPC comments. FPC, however, has produced everything it has concerning these documents, so presumably anything that would fit that description has been produced. If it is not all in one place in the production, that is because it is not all in one place in FPC's files.
- f. *Senior management related documents.* If documents constituting responses Panda might have expected to see from "senior management" on various issues are not among the documents produced, it is because such documents do not exist or Panda has not yet recognized them for what they are.
- g. *Task force, strategy team, management, executive or board of director meeting summaries.* If documents fitting this description were not produced, it is because such documents do not exist. For example, no minutes of the FPC board of directors or executive committee relate to Panda, and very few minutes of such meetings even relate to any of the other cogenerators. Those that exist have been or are in the process of being produced, even though they have no relationship to Panda. *See* Document Nos. 375000-03.
- h. *Organized pricing data and explanations.* Even though this information has virtually no bearing on Panda, FPC did produce documents fitting this description, most of which have the bates number prefix of "ML." Whether Panda considers such documents to be "organized," the documents were produced in the manner in which FPC ordinarily keeps them.

Ray G. Besing
Thomas T. Steele
September 7, 1995
Page 4

- i. *Back-up information or documents re the 1991 standard offer contract bids.* Whether Panda likes it or not, FPC has produced everything it has on this now very old subject. That Panda hoped FPC would have more documentation is immaterial; FPC cannot create documents that do not exist just to suit Panda's desire.
- j. *The redacted documents.* As I have explained on at least two prior occasions now, privileged or work-product documents were redacted. The specifics of this will be reflected in the attorney-client privilege log that we are preparing. FPC's log will be ready to be exchanged with you on Tuesday. We trust yours will be ready as well. I suggest, therefore, that you not concern yourself about the redacted documents until you have had a chance to examine the log.
- k. *"PEC" documents.* The PEC prefix (which is an acronym standing for "Panda Energy Corporation" chosen by an FPC paralegal purely for purposes of convenience) was put on those Panda related documents produced in response to Panda's request but that had not previously been requested from or produced by FPC in other litigation. Most of the Panda related documents had been produced before, so that is why there are not many PEC prefixed documents. Plainly, Panda's "guess" at the meaning of that prefix was off the mark -- something Panda could have learned by simply having you ask me about that prefix, rather than going to the trouble of trying to turn it into something nefarious that should be the subject of a motion to compel.
- l. *Incomplete or no attachments, where a document refers to attachments.* Just because a document may once have had an attachment appended to it does not mean that when it was placed in FPC's files, the attachment was still there. Panda received the files in the manner in which they were ordinarily kept by FPC. Sometimes that may mean that the attachments were filed in the same file in a different location, or in different files altogether. For that matter, attachments that once existed could well have been discarded long ago. If documents that were produced refer to attachments about which Panda is curious, the proper way to find out what happened to them or why they are not where Panda might have put them if Panda were the keeper of the subject files, is to make inquiry of appropriate witnesses, and not to accuse FPC of not producing its files.
- m. *PSC docket 910004.* Literally within the last week, FPC located about 6 boxes of documents that should more than satisfy Panda in this regard. Those documents are being integrated into the system and processed for copying, so Panda will receive them shortly. Most of these documents, however, are already

Ray G. Besing
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September 7, 1995
Page 5

a matter of public record, so Panda surely could have obtained them by going directly to the Commission, if it feels it needed them sooner.

The spreadsheet. The specific points that you raise in the 20 page spreadsheet generally fall into one or more of the above categories. In fact, I believe Panda's concerns as expressed in the spreadsheet (where we can decipher the sometimes cryptic notes you warned us about) fall into three main groups. *First*, redactions from documents constitute work-product or privileged communications. The specific document-by-document explanation will be forthcoming on Tuesday (assuming you are prepared to swap your privilege log at the same time). *Second*, some documents Panda *thinks* were not produced in fact have been or are still in the process of being produced (for example, numerous documents concerning the 1994 cogeneration review and strategy documents and various papers related to McGuire and Niekum's Lakeland efforts). *Third*, the remainder of the documents are documents that Panda *thinks* should have existed in a particular location in a particular file, but in reality either do not exist or were not filed by FPC in the particular file. In short, not one of the issues raised in Panda's spreadsheet or draft motion to compel actually involves a matter in dispute -- every one of the issues involves a misunderstanding or misperception of the facts by Panda.

These explanations surely ought to satisfy Panda at this stage. If during deposition or other discovery it becomes apparent that some *currently existing document* was not produced, we will be more than happy to take the issue up with you at that time. Right now, however, that is not apparent to us. If you have some basis to make such a suggestion at this time, please contact us with it and we will confer with you concerning it -- if it should have been produced, it will be; if it is objectionable or was intentionally withheld without explanation, we will address those issues when you raise them. Right now, however, a motion to compel would be premature and without basis. If you feel otherwise, we would urge you to confer with us in good faith to try to work out any dispute we may have on that point. As far as we are concerned, however, you have not made any effort under local rule 3.01(g) to do so.

Having said all of this, I must strenuously take issue with another aspect of your draft motion to compel. Specifically, you incorrectly state that "FPC apparently found Panda's document production satisfactory; it has not complained about Panda's document production in any respect." I cannot imagine why you would say this, in light of the several material issues we have raised. Ignoring those issues, however, will not make them go away. For example, my August 28, 1995, letter raises the following issues:

- ▶ I identified a page full of bates numbers that FPC had identified as of that date as missing from the documents produced by Panda and asked that they either be produced or that an explanation for withholding them be given. *To date, you have not responded to this deficiency in Panda's production.* I have enclosed an updated list. Please produce them or explain why they will not be produced.

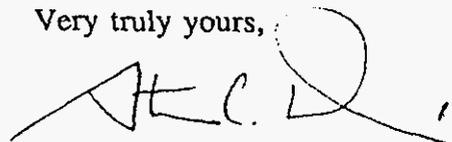
Ray G. Besing
Thomas T. Steele
September 7, 1995
Page 6

- ▶ I also identified *four missing boxes of documents* for which we have apparently been billed for the copying. *To date, you have not responded to this deficiency in Panda's production.*
- ▶ Panda has not yet served us with its written response confirming that all of the requested documents have been produced. To date, all you have done on this is take a position I believe is inappropriate -- namely that no response is yet due in light of the timing of the case management conference. We take issue with that, as I told Tom on the telephone when he argued the point with me on August 30, 1995, because the parties agreed to expedite the document production process here.
- ▶ Panda has stamped thousands of pages as "specially restricted" that do not constitute the types of documents that can be specially restricted. I asked you to immediately review Panda's use of that designation and provide us with a list of documents Panda actually believes fit the limited definition of specially restricted documents. *To date, you have not responded to this deficiency in Panda's production.*

In addition, Ray mentioned at our meeting on September 5, 1995, that Panda withheld certain documents (he did not specify which) on privilege grounds that are not subject to any privilege and thus must be produced. To date, however, we have not seen those documents. Also at our meeting on September 5, 1995, I pointed out that Panda did not produce a single document related to its claim to have suffered \$325,000,000 in damages. Ray confirmed that no such documents exist, although FPC considers that fact startling.

The fact that FPC has not prepared a "spreadsheet" pointing out other questions on a document by document basis that arise from the information contained in the documents that were produced does not mean that FPC has no other concerns about Panda's production of documents. Rather, FPC in all likelihood will raise those types of concerns at the appropriate time -- namely when we have a witness in front of us who can answer specific questions of that nature.

Very truly yours,



Steven C. Dupré

Enclosure

cc: Richard C. Bellak, Esq. w/ enclosure
James P. Fama, Esq. w/o enclosure
Sylvia H. Walbolt, Esq. w/o enclosure
Donald R. Schmidt, Esq. w/o enclosure

1160

Missing Bates Numbers / Panda-Kathleen v. FPC - Case No. 95-992-Civ-T-24(C)

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 PK054333
 PK054335
 PK054337
 PK054711
 PK054891 - PK054931
 PK056771
 PK057504
 PK056883
 PK057504
 PK057621 - PK057626
 PK058333 - PK058337
 PK059316 - PK059325
 PK059395 - PK059397
 PK070271 - PK070330
 PK070696 - PK070697
 PK071710 - PK071712

PK071733 - PK071734
 PK071751 - PK071781
 PK071837 - PK071839
 PK071946 - PK071960
 PK072090 - PK072059
 PK072109 - PK072116
 PK072892
 PK072919
 PK073032 - PK073034
 PK073136
 PK073266 - PK073276
 PK073279 - PK073284
 PK073287 - PK073289
 PK073457 - PK073468
 PK073471
 PK073476 - PK073481
 PK073517
 PK074006
 PK074017 - PK074026
 PK074422
 PK074433
 PK074592 - PK074597
 PK074741
 PK075367
 PK075463
 PK076436 - PK076443
 PK080262 - PK080267
 PK080355 - PK080363
 PK080375 - PK080377
 PK080448 - PK080451
 PK080454 - PK080461
 PK080470 - PK080473
 PK080556
 PK080560
 PK080563 - PK080567
 PK080859 - PK080860
 PK082025 - PK082048
 New as of 9/1/95

F

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P. A.

ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3239 TAMPA, FLORIDA 33601 (813) 223-7000 FAX (813) 229-4133	FIRSTSTATE TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 (407) 849-0300 FAX (407) 848-9099	HARBOURVIEW BUILDING P.O. BOX 12426 PENSACOLA, FLORIDA 32582 (904) 434-0142 FAX (904) 434-5366	FIRST FLORIDA BANK BUILDING P.O. DRAWER 190 TALLAHASSEE, FLORIDA 32302 (904) 224-1585 FAX (904) 222-0398	ESPERANTE P.O. BOX 150 WEST PALM BEACH, FLORIDA 33402 (407) 659-7070 FAX (407) 659-7368	BARNETT TOWER P.O. BOX 2861 ST. PETERSBURG, FLORIDA 33731 (813) 821-7000 FAX (813) 822-3768
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FILE NO. 00309-78147

PLEASE REPLY TO : St. Petersburg

September 20, 1995
By FAX and Mail

Ray G. Besing
The Law Offices of Ray Besing, P.C.
1100 St. Paul Place
750 N. St. Paul
Dallas, TX 75201

CONFIRMATION COPY
OF FAX TRANSMITTAL

Thomas T. Steele
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
Suite 1700
501 E. Kennedy Blvd.
Tampa, FL 33601

Re: Panda-Kathleen, L.P., etc. v. Florida Power Corporation, U.S.D.C.
Middle District Case No. 95-992-Civ-T-24(C) -- Deposition Schedule

Dear Ray and Tom:

The purpose of this letter is merely to confirm what I was told on the telephone by Ray last night. Please understand, however, that we continue to believe the positions being taken by Panda are contumacious.

Specifically, last night, after I had faxed my September 19, 1995, letter to you, Ray returned my telephone call. Ray told me that on Saturday, September 16, 1995, he had instructed Tom to "appeal" the Magistrate's Order dated September 15, 1995, pursuant to Rule 72 of the Federal Rules of Civil Procedure. I presume the reason I have yet to receive anything of this nature, is that until Tom returned my telephone call this morning and I related to him Ray's remarks, Tom did not realize he had been so instructed.

Ray told me I should not bother to come to Texas for the depositions scheduled for the week of September 25, 1995. Notwithstanding the Magistrate's August 28 and September 15 Orders, Ray told me that no Panda witnesses, including those on the schedule for September 25, 26, 27 and 28, will present themselves for depositions even if I were to show up, because (i) of the forthcoming "appeal," (ii) several of them are in China and are not even due back until mid-week, and (iii) Ray is unavailable Monday (because of an argument before the FPSC) and



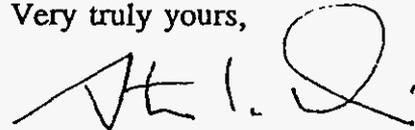
1162

Ray G. Besing
Thomas T. Steele
September 20, 1995
Page 2

most of the day Tuesday (because of some injunction hearing on a personal matter involving Ray).

If I have inaccurately described my conversation on these points in any way, please let me know immediately.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. C. Dupré". The signature is stylized with a large, circular flourish at the end.

Steven C. Dupré

cc: James P. Fama, Esq.
Sylvia H. Walbolt, Esq.
Donald R. Schmidt, Esq.

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P. A.

ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3239 TAMPA, FLORIDA 33601 (813) 223-7000 FAX (813) 229-4133	FIRSTSTATE TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 (407) 849-0300 FAX (407) 648-9099	HARBOURVIEW BUILDING P.O. BOX 12426 PENSACOLA, FLORIDA 32582 (904) 434-0142 FAX (904) 434-5366	FIRST FLORIDA BANK BUILDING P.O. DRAWER 190 TALLAHASSEE, FLORIDA 32302 (904) 224-1585 FAX (904) 222-0398	ESPERANTE P.O. BOX 150 WEST PALM BEACH, FLORIDA 33402 (407) 659-7070 FAX (407) 659-7368	BARNETT TOWER P.O. BOX 2861 ST. PETERSBURG, FLORIDA 33731 (813) 821-7000 FAX (813) 822-3768
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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg

September 23, 1995

By FAX to 229-8313 and Mail (9/25)

Thomas T. Steele
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
501 E. Kennedy Blvd.
Tampa, FL 33601

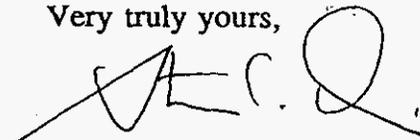
Re: Panda-Kathleen, L.P., etc. v. Florida Power Corporation, U.S.D.C.
Middle District Case No. 95-992-Civ-T-24(C)

Dear Tom:

This confirms that when we spoke today, you told me, among other things, that I should not plan to travel to Texas tomorrow for depositions scheduled during the week of September 25, 1995, because you would be filing objections to Magistrate Jenkins' September 15, 1995, Order. You told me you felt Panda's deadline for objecting was Friday, September 29, 1995, although you said you would try to file sooner than that. Please fax a copy of those objections to my office as soon as they are completed so that Florida Power can respond quickly.

Please understand that Florida Power continues to consider Panda's refusal to allow its witnesses to be deposed to be contumacious. You and Mr. Besing have made it clear, however, that Florida Power would be engaging in a futile act if it were to incur the expense of sending one of its lawyers to Texas for the depositions next week.

Very truly yours,



Steven C. Dupré

cc: Ray Besing, Esq.
James Fama, Esq.
Sylvia H. Walbolt, Esq.
Donald R. Schmidt, Esq.



THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN, L.P., a Delaware
Limited Partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

vs.

Case No. 95-922-CIV-T-24C

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

AFFIDAVIT OF MICHELE WEBB

I, Michele Webb, being duly sworn under oath, depose and state as follows:

1. I am over 18 years old, have personal knowledge of the facts stated in this affidavit, and, if sworn as a witness, can testify competently to the facts stated in this affidavit.
2. I am employed by Florida Power as a paralegal. I work in Florida Power's legal department under the supervision of James Fama, Deputy General Counsel. One of my jobs on this case has been to gather, maintain and produce Florida Power's documents responsive to the document request served by Panda on August 3, 1995.
3. On or about July 25, 1995, I provided Steven C. Dupré, with three boxes of documents that contained, among other things, Florida Power's Panda files so he could

produce them for inspection to Panda's counsel. The next day, I caused those three boxes of documents to be copied and delivered to the offices of Panda's counsel in Tampa.

4. On or about August 3, 1995, I received a copy of Panda's document request for the first time. I determined that many of the documents that Panda was requesting had previously been gathered and produced in other litigation and were located in a secure facility. I also began gathering other documents that were requested by Panda that had not previously been produced in other litigation. On or about August 7, 1995, I learned that Panda wanted to send a document inspection team to Florida Power to begin examining the documents responsive to the August 3 document request, no later than August 14, 1995. By August 10, 1995, some 128,000 pages of documents responsive to Panda's request were available and I was prepared to allow Panda's inspection team to begin its inspection.

5. On August 11, 1995, however, Randall Love, one of Florida Power's attorneys, informed me that Panda no longer planned to send its inspection team in. Instead, Panda asked that Florida Power simply copy the documents wholesale and ship them to Panda in Texas. That same day, the first 26 boxes of responsive documents were delivered to Florida Legal Copies (a professional copy service) for the purpose of complying with the document request. I then began overseeing the process of having the copy service copy and ship those documents.

6. The first set of copies went out via Federal Express to Texas on August 16, 1995. This production consisted of twenty-six (26) boxes as evidenced by Exhibit A. Additionally, on August 23, 1995, eighteen (18) boxes were delivered to Panda via Federal

Express as evidenced by Exhibit B. Between August 26, 1995 and September 18, 1995, eight (8) additional boxes were shipped via Federal Express to Panda as evidenced by Composite Exhibit C.

7. Currently, some five boxes of documents associated with the Florida Public Service Commission Docket No. 910004 are in the process of being reviewed and copied. Within the next few days, after the remaining five boxes have been copied and delivered, I believe that Florida Power will have produced all documents responsive to Panda's request, other than privileged or work product documents and documents that Florida Power's counsel objected to. Obviously, given the size of the Florida Power organization and the speed with which we produced the documents, the possibility exists that there may be some inadvertent omissions, but I currently am not aware of any. If I discover any, they will be produced promptly.

8. On September 6, 1995, I was given a copy of a draft motion to compel and a 20 page spreadsheet apparently prepared by Panda, in which Panda claims Florida Power has not produced a large volume of material. I have now spent approximately seven (7) hours researching these accusations and they are not true.

9. So far, I have investigated every single line item contained on the first four pages of Panda's spreadsheet. Many of the documents Panda claims were not produced actually were produced right next to the documents that apparently triggered Panda to claim the documents had not been produced. In other instances, the documents that Panda claims were not produced (such as meeting notes by every participant in various meetings) are documents that

do not exist within Florida Power's files. I have no reason to believe that such documents ever existed. In still other instances, documents that Panda might have expected to find in one file actually were contained in different Florida Power files, but they were produced in those other files. Finally, in other instances, I cannot even make sense out of the comments on the spreadsheet -- these types of comments do not allege that documents are missing; they are just too cryptic for me to follow.

10. I have selected five samples of the types of problems Panda has raised in the spreadsheet, and I have attached the documents that demonstrate that in fact Florida Power has produced the documents Panda says are missing. Specifically:

a. Attached as Exhibit D are documents bearing Bates numbers 120251-60. Those pages of documents were produced. Document number 120253 about which Panda complains in the 7th line of page 1 of its spreadsheet was produced right in the middle of those pages.

b. Attached as Exhibits E, F and G are the first and last pages of documents Bates numbered 101459-101548, 100922-101011 and 103540-103629. These are the contracts referred to in the document bearing Bates number 450221 described in the 15th line on page 1 of the spreadsheet. All three (3) documents were produced in their entirety.

c. Attached as Exhibit H are pages of documents that were produced bearing Bates numbers AT5309-10. Page A5309 is the page Panda claims was not

produced on the 17th line of page 1 of the spreadsheet. Not only was that document produced, but it was right next to the one Panda reviewed, document AT5310.

d. Attached as Exhibit I is document number 140368. In the 19th line of page 1 of the spreadsheet, Panda complains the document refers to an attachment that is not attached. I searched the original Florida Power file and ascertained that the document in question was produced exactly as it is. Whatever was attached to that note at some point in the past was not attached to it when it was put in the file that was produced.

e. Attached as Exhibit J are pages of documents bearing Bates numbers 124780-83. On the 4th line of page 3 of Panda's spreadsheet, Panda complains that the Schedule referred to in the document bearing Bates number 124780 was not attached. Unless there was some kind of copying problem between when I produced the documents and when Panda received them, that statement is not true. In fact, the three immediately following pages were attached and were produced.

These examples are not just isolated incidents. These types of explanations or similar explanations apply to each one of the items set out in the first four pages that I have researched so far.

Further, affiant sayeth not.



MICHELE WEBB

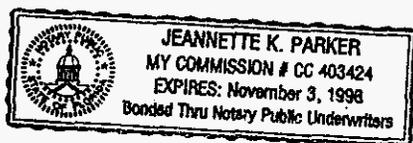
Panda-Kathleen, L.P. v. Florida Power Corporation
Case No. 95-922-CIV-T-24C
Affidavit of Michele Webb

STATE OF FLORIDA

|
| ss
|

COUNTY OF PINELLAS

The foregoing instrument was acknowledged before me on this 22nd day of September, 1995 by MICHELE WEBB. She is personally known to me and did take an oath.



Jeannette K. Parker
Signature

Jeannette K. Parker
Name of Acknowledger Typed, Printed or Stamped
Title or Rank NOTARY PUBLIC
Serial Number CC 403424

Panda-Kathleen, L.P. v. Florida Power Corporation
Case No. 95-922-CIV-T-24C
Affidavit of Michele Webb

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by Facsimile and U.S. Mail to Thomas T. Steele, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. (229-8313), Post Office Box 1438, Tampa, Florida 33601, and by Facsimile and U.S. Mail to Ray G. Besing, Esquire, The Law Offices of Ray G. Besing, P.C. (214-220-1202), 1100 St. Paul Place, 750 N. St. Paul, Dallas, Texas 75201, and to Robert Vandiver, Esquire and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission (904-413-6250), 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, this 25th day of September, 1995.



Attorney

1172

FEDERAL EXPRESS MULTIPLE PACKAGE SHIPMENT LABELS

SHIPMENT DATE	8/16/95
MASTER LABEL NUMBER	124478290
DESCRIPTION	
OF	6201310001
DESCRIPTION	
OF	6201310017
DESCRIPTION	
OF	6201310026
DESCRIPTION	
OF	6201310035
SHIPMENT DATE	8/16/95
MASTER LABEL NUMBER	124478290
DESCRIPTION	
OF	6201300995
DESCRIPTION	
OF	6201300996
DESCRIPTION	
OF	6201300997
DESCRIPTION	
OF	6201300998
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FEDERAL EXPRESS MULTIPLE PACKAGE SHIPMENT LABELS

USE THIS AIRBILL FOR SHIPMENTS WITHIN THE CONTINENTAL U.S.A., ALASKA AND HAWAII. USE THE INTERNATIONAL AIR WAYBILL FOR SHIPMENTS TO PUERTO RICO AND ALL NON U.S. LOCATIONS. QUESTIONS? CALL 800-238-5355 TOLL FREE.

AIRBILL PACKAGE TRACKING NUMBER 1244778290

1244778290

Ref. # MCF A502 Del. 10:06 8/17 M. Gates



SENDER'S FEDERAL EXPRESS ACCOUNT NUMBER: _____ Date: 8/16/95

From (Your Name) Please Print: _____ Your Phone Number (Very Important): 813 273-9177 To (Recipient's Name) Please Print: William J. Nordlund Recipient's Phone Number (Very Important): 416 180-7158

Company: FLORIDA LEGAL COPIES Department/Floor No.: _____ Company: PANDA-KATHLEEN INC Department/Floor No.: _____

Street Address: 101 E. KENNEDY BLVD # 3425 Exact Street Address (We Cannot Deliver to P.O. Boxes or P.O. Zip Codes): 4100 Spring Valley Rd # 1001

City: TAMPA State: FL ZIP Required: 33602 City: Dallas State: TX ZIP Required: 75244

YOUR INTERNAL BILLING REFERENCE INFORMATION (optional) (First 24 characters will appear on invoice): 1036-8947-3

IF HOLD AT FEDEX LOCATION, Print FEDEX Address Here: _____

PAYMENT: Bill Sender, Bill Recipient's FedEx Acct. No., Bill 3rd Party FedEx Acct. No., Bill Credit Card

5 Cash, Check Acct./Credit Card No.: _____ Exp. Date: _____

4 SERVICES (Check only one box):

11 <input checked="" type="checkbox"/> OTHER PACKAGING	51 <input type="checkbox"/> OTHER PACKAGING
12 <input type="checkbox"/> FEDEX LETTER*	52 <input type="checkbox"/> FEDEX PAK*
13 <input type="checkbox"/> FEDEX BOX	53 <input type="checkbox"/> FEDEX DDX
14 <input type="checkbox"/> FEDEX TUBE	54 <input type="checkbox"/> FEDEX TUBE
30 <input type="checkbox"/> ECONOMY*	46 <input type="checkbox"/> GOVT LETTER
	41 <input type="checkbox"/> GOVT PACKAGE

5 DELIVERY AND SPECIAL HANDLING (Check services required):

1 HOLD AT FEDEX LOCATION WEEKDAY (If in Section 1)

2 DELIVER WEEKDAY

31 HOLD AT FEDEX LOCATION SATURDAY (If in Section 1)

3 DELIVER SATURDAY (Extra charge) (Not available to all locations)

9 SATURDAY PICK-UP (Extra charge)

Special Handling:

4 DANGEROUS GOODS (Extra charge)

6 DRY ICE (Dangerous Goods Shipper's Declaration not required)

12 HOLIDAY DELIVERY (If offered) (Extra charge)

6 SERVICE CONDITIONS, DECLARED VALUE AND LIMIT OF LIABILITY

Use of this airbill constitutes your agreement to the service conditions in our current Service Guide, available upon request. See back of sender's copy of this airbill for information. Service conditions may vary for Government Overnight Service. See U.S. Government Service Guide for details.

We will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, and document your actual loss for a timely claim. Limitations found in the current Federal Express Service Guide apply. Your right to recover from Federal Express for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the declared value specified to the left. Recovery cannot exceed actual documented loss. The maximum Declared Value for FedEx Letter and FedEx Pak packages is \$500.

In the event of undelivered, Federal Express will at your request and with some limitations refund all transportation charges paid. See Service Guide for further information.

Sender authorizes Federal Express to deliver this shipment without obtaining a delivery signature and shall indemnify and hold harmless Federal Express from any claims resulting therefrom.

70 OVERNIGHT FREIGHT** (Carrier's reservation required) (Delivery commitment may be later in some areas.)

80 TWO-DAY FREIGHT** (Declared Value Limit \$500. Call for delivery schedule.)

758

1995 08/15/95

PRINTED IN U.S.A.

SENDER'S COPY DROP OFF YOUR PACKAGE AND SAVE

EXHIBIT A



USE THIS AIRBILL FOR SHIPMENTS WITHIN THE CONTINENTAL U.S.A., ALASKA AND HAWAII.
USE THE INTERNATIONAL AIR WAYBILL FOR SHIPMENTS TO PUERTO RICO AND ALL NON U.S. LOCATIONS.
QUESTIONS? CALL 800-238-5355 TOLL FREE.

AIRBILL PACKAGE TRACKING NUMBER 1217855914

1217855914

Ref. # MCFE 426
Date 9:23 8/18
M6ades

SENDER'S COPY

SENDER'S FEDERAL EXPRESS ACCOUNT NUMBER: [Blank] Date: 6-16-95

From (Your Name) Please Print: FLORENCE LOGAN P. PILES
Company: 101 E. Kennedy Blvd Ste 3125
Street Address: Tampa, FL
City: Tampa, FL State: FL ZIP Required: 33602

Your Phone Number (Very Important): 813 273 1111
Department/Floor No.: [Blank]

To (Recipient's Name) Please Print: WILLIAM C. NORDLUND
Company: KATHA - KATHLEEN L.P.
Exact Street Address (We Cannot Deliver to P.O. Boxes or P.O. Zip Codes): 4100 Spring Valley Rd #1001
City: Dallas TX State: TX ZIP Required: 75244

Recipient's Phone Number (Very Important): 817 80-7151
Department/Floor No.: [Blank]

YOUR INTERNAL BILLING REFERENCE INFORMATION (optional) (First 24 characters will appear on invoice): 1036-8944-3

IF HOLD AT FEDEX LOCATION, Print FEDEX Address Here: [Blank]

PAYMENT: Bill Sender Bill Recipient's FedEx Acct. No. Bill Third Party FedEx Acct. No. Bill Credit Card

City: [Blank] State: [Blank] ZIP Required: [Blank]

SENDER'S COPY
DROP OFF YOUR PACKAGE AND SAVE

4 SERVICES (Check only one box)

11 <input checked="" type="checkbox"/> OTHER PACKAGING	51 <input type="checkbox"/> OTHER PACKAGING
16 <input checked="" type="checkbox"/> FEDEX PAK*	56 <input type="checkbox"/> FEDEX PAK*
12 <input type="checkbox"/> FEDEX PAK*	52 <input type="checkbox"/> FEDEX PAK*
13 <input type="checkbox"/> FEDEX BOX	53 <input type="checkbox"/> FEDEX BOX
14 <input type="checkbox"/> FEDEX TUBE	54 <input type="checkbox"/> FEDEX TUBE

5 DELIVERY AND SPECIAL HANDLING (Check services required)

Weekly Service

1 HOLD AT FEDEX LOCATION WEEKDAY (FB in Section H)

2 DELIVER WEEKDAY

Saturday Service

31 HOLD AT FEDEX LOCATION SATURDAY (FB in Section H)

3 DELIVER SATURDAY (Extra charge)

9 SATURDAY PICK-UP (Extra charge)

Special Handlings

4 HAZARDOUS GOODS (See Section H)

6 DRY ICE (Dangerous Goods Shipper's Declaration not required)

70 OVERNIGHT FREIGHT** (Confirmed reservation required)

80 TWO-DAY FREIGHT** (Confirmed reservation required)

12 HOLIDAY DELIVERY (if offered) (Extra charge)

70 OVERNIGHT FREIGHT** (Confirmed reservation required)

80 TWO-DAY FREIGHT** (Confirmed reservation required)

12 HOLIDAY DELIVERY (if offered) (Extra charge)

Service Conditions, Declared Value and Limit of Liability

Use of this airbill constitutes your agreement to the service conditions in our current Service Guide, available upon request. See back of sender's copy of this airbill for information. Service conditions may vary for Government Overnight Service. See U.S. Government Service Guide for details.

We will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, and document your actual loss for a timely claim. Limitations found in the current Federal Express Service Guide apply. Your right to recover from Federal Express for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the declared value specified to the left. Recovery cannot exceed actual transportation loss. The maximum Declared Value for FedEx Letter and FedEx Pak packages is \$500.

In the event of delayed delivery, Federal Express will at your request send you some limitations (refund of transportation charges paid). See Service Guide for further information.

Sender authorizes Federal Express to deliver this shipment without obtaining a delivery signature and shall indemnify and hold harmless Federal Express from any claims resulting therefrom.

Release Signature: [Blank]



USE THIS AIRBILL FOR SHIPMENTS WITHIN THE CONTINENTAL U.S.A., ALASKA AND HAWAII.
USE THE INTERNATIONAL AIR WAYBILL FOR SHIPMENTS TO PUERTO RICO AND ALL NON U.S. LOCATIONS.
QUESTIONS? CALL 800-238-5355 TOLL FREE.

AIRBILL
PACKAGE
TRACKING NUMBER

4895834720

4895834720

SENDER'S COPY

SENDER'S FEDERAL EXPRESS ACCOUNT NUMBER		Date	
		8/28/95	
From (Your Name) Please Print		Your Phone Number (Very Important)	To (Recipient's Name) Please Print
FLORIDA Legal Copies		(813) 273-9117	William C. Nordlund
Company		Department/Floor No.	Recipient's Phone Number (Very Important)
Panda-Kathleen L.P.			(214) 980-7159
Street Address		Exact Street Address (We Cannot Deliver to P.O. Boxes or P.O. Zip Codes.)	
101 S Kennedy Blvd Ste 3425		1100 Spring Valley Rd #1001	
City		State	ZIP Required
Tampa FL		TX	75244
YOUR INTERNAL BILLING REFERENCE INFORMATION (optional) (First 24 characters will appear on invoice.)			
1036-8944-3			
IF HOLD FOR PICK-UP, Print FEDEX Address Here			
Street Address			
City			State
			ZIP Required
PAYMENT			
<input type="checkbox"/> Bill Sender <input checked="" type="checkbox"/> Bill Recipient's FedEx Acct. No. <input type="checkbox"/> 3rd Party FedEx Acct. No. <input type="checkbox"/> Bill Credit Card <input type="checkbox"/> Cash/Check Acct./Check Card No.			
SERVICES (Check only one box)		DELIVERY AND SPECIAL HANDLING (Check services required)	PACKAGES
Priority Overnight (Delivery by next business morning) <input checked="" type="checkbox"/> YOUR PACKAGING <input type="checkbox"/> FEDEX LETTER <input type="checkbox"/> FEDEX PAK <input type="checkbox"/> FEDEX BOX <input type="checkbox"/> FEDEX TUBE Economy Two-Day (Delivery by second business day) <input type="checkbox"/> ECONOMY Government Overnight (Restricted for authorized users only) <input type="checkbox"/> GOVT LETTER <input type="checkbox"/> GOVT PACKAGE Freight Service (For packages over 150 lbs.) <input type="checkbox"/> OVERNIGHT FREIGHT <input type="checkbox"/> TWO-DAY FREIGHT	<input type="checkbox"/> HOLD FOR PICK-UP (Fill in Box H) <input type="checkbox"/> DELIVER WEEKDAY <input type="checkbox"/> DELIVER SATURDAY (Extra charge) (Not available in all locations) <input type="checkbox"/> DANGEROUS GOODS (Extra charge) <input type="checkbox"/> DRY ICE <input type="checkbox"/> OTHER SPECIAL SERVICE <input type="checkbox"/> SATURDAY PICK-UP (if extra charge) <input type="checkbox"/> HOLIDAY DELIVERY (if extra charge)	Total Total Total DIM SHIPMENT (Chargeable Weight) lbs. x W x H International Air <input type="checkbox"/> 11 kg (24 lbs) <input type="checkbox"/> 11 kg (24 lbs)	SERVICE CONDITIONS, DECLARED VALUE AND LIMIT OF LIABILITY Use of this airbill constitutes your agreement to the service conditions in our current Service Guide, available upon request. See back of sender's copy of this airbill for information. Service conditions may vary for Government Overnight Service. See U.S. Government Service Guide for details. We will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, and document your actual loss for a timely claim. Limitations found in the current Federal Express Service Guide apply. Your right to recover from Federal Express for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the declared value specified to the left. Recovery cannot exceed actual documented loss. The maximum Declared Value for FedEx Letter and FedEx Pak packages is \$500.00. In the event of untimely delivery, Federal Express will at your request and with some limitations refund all transportation charges paid. See Service Guide for further information. Sender authorizes Federal Express to deliver this shipment without obtaining a delivery signature and shall indemnify and hold harmless Federal Express from any claims resulting therefrom. Signature:
Federal Express Use		REVISION DATE 2/92 PART #137205 GBFE FORMAT #126	
Basic Charges		126	
Declared Value Charge		19.15	
Other 1			
Other 2			
Total Charges			

EXHIBIT B

F. Power Job 9570

PROTECT YOUR COPY AND SAVE

FedEx USA Airbill

Tracking Number 7198161261

MC# 262

Sender's Copy

1 From (please print)

Date 8/30/95 Sender's FedEx Account Number

Sender's Name

Phone (813) 273-9177

Company FLORIDA LEGAL COPIES

Dept./Floor 3425
Suite/Room

Address 101 E. KENNEDY

City TAMPA State FL Zip 33602

2 Your Internal Billing Reference Information
(Optional) (First 24 characters will appear on invoice) 1036-8947-3

3 To (please print)

Recipient's Name William C. NORDLUND Phone (214) 980-7159

Company PAUDA-KATHLEEN LP Dept./Floor # 1001
Suite/Room

Address 4100 SPRING VALLEY Road.

City DALLAS State TX Zip 75244

For "HOLD" Service check here
 Weekday Saturday
(Not available at all locations)

For Saturday Delivery check here
 (Extra Charge, Not available at all locations)

Service Conditions, Declared Value, and Limit of Liability - By using this Airbill, you agree to the service conditions in our current Service Guide or U.S. Government Service Guide. Both are available on request. See back of Sender's Copy of this airbill for information and additional terms. We will not be responsible for any claim in excess of \$100 per package whether the result of loss, damage, or delay, non-delivery, misdelivery or misinformation, unless you declare a higher value, pay an additional charge, and document your actual loss in a timely manner. Your

right to recover from us for any loss includes intrinsic value of the package, loss of sales, interest, profit, attorney's fees, costs, and other forms of damage, whether direct, incidental, consequential, or special, and is limited to the greater of \$100 or the declared value but cannot exceed actual documented loss. The minimum declared value for any FedEx Letter and FedEx Pak is \$500. Federal Express may, upon your request, and with some limitations, refund all transportation charges paid. See the FedEx Service Guide for further details.

Questions? 463 3339
Call 1-800-Go-FedEx

The World On Time

4 Service*

FedEx Priority Overnight (Next business morning) FedEx Standard Overnight (Next business afternoon) FedEx 2Day (Second business day)
 FedEx Govt. Overnight (Authorized user only)
 FedEx Overnight Freight FedEx 2Day Freight
(For packages over 150 pounds. Call for delivery schedule.)

*Delivery commitment may be later in some areas.

5 Packaging

FedEx Letter* FedEx Pak* FedEx Box FedEx Tube Other Packaging
*Declared value limit \$500

6 Special Handling

Does this shipment contain dangerous goods? No Yes (As per attached Shipper's Declaration) Yes (Shipper's Declaration not required)
 Dry Ice (Dry Ice, UN 1845 III, kg 304 CA Cargo Aircraft Only
(Dangerous Goods Shipper's Declaration not required)

7 Payment

Bill to: Sender (Account no. in section 1 will be billed) Recipient (Enter FedEx account no. or Credit Card no. below) Third Party Credit Card Cash/Check

FedEx Account No. 1036-8947-3

Credit Card No.	Exp. Date	Total Packages	Total Weight	Total Declared Value*	Total Charges*
				\$.00	\$

*When declaring a value higher than \$100 per package, you pay an additional charge. See SERVICE CONDITIONS, DECLARED VALUE AND LIMIT OF LIABILITY section for further information.

8 Release Signature

Your signature authorizes Federal Express to deliver this shipment without obtaining a signature and agrees to indemnify and hold harmless Federal Express from any resulting claims.

194

Rev. Date 5/95 - PART 7146143
©1994-95 FedEx - PRINTED IN U.S.A.

EXHIBIT C

FedEx USA Airbill

Tracking Number **7003858551**

Sender's Copy

1 50 43727160 5229M

1 From (please print)
Date 8-31-95 Sender's FedEx Account Number 1791-3471-3

Sender's Name _____ Phone (813) 273-9177

Company FLORIDA LEGAL COPIES Dept./Floor Suite/Room _____

Address 101 EAST KENNEDY STE 3425

City TAMPA State FL Zip 33602

2 Your Internal Billing Reference Information (Optional) (Fax 24 characters will appear on invoice) 1036-8947-3

3 To (please print)
Recipient's Name William C. Nordlund Phone (214) 980-7159

Company Panda - Kathleen LP Dept./Floor Suite/Room 1001

Address (If "HOLD" at FedEx location, send FedEx address here) 4100 Spring Valley Road

City Dallas State TX Zip 75244

For "HOLD" Service check here
 Weekday Saturday (Not available at all locations)

For Saturday Delivery check here
 Extra Charge Not available in all locations

Service Conditions, Declared Value, and Limit of Liability. By using this Airbill, you agree to the terms and conditions of our standard "Terms of Service" (TOS). For restricted "Special Services", there are additional restrictions. See the back of this Airbill for details. We will not be responsible for any loss or damage to your property if you do not declare a higher value, pay an additional charge, and document your actual loss in a timely manner. Your

right to receive items on the way back to the sender; value of the packages; level of risk; insurance; and attorney's fees, costs, and other losses of damage, including those to be shared, except as provided, or agreed, and is limited to the greater of \$500 or the declared value for a parcel or the actual value for a parcel. The appropriate declared value for any item is listed in Part 3, Section 2 of this Airbill. I agree, from now on, to report, and with some limitations, report all transportation charges paid. See the FedEx Service Guide for further details.

4 Service*
 FedEx Priority Overnight (Next business day)
 FedEx Standard Overnight (Next business afternoon)
 FedEx 2Day (Second business day)
 FedEx Overnight Freight (Unauthorized short haul)
 FedEx 2Day Freight (For packages over 150 pounds. Call for delivery schedule.)

*Delivery commitment may be later in some areas.

6 Packaging
 FedEx Mailbox* FedEx Pak* FedEx Box FedEx Tube Other Packaging (The actual value must apply)

8 Special Handling
Does this shipment contain dangerous goods? No Yes (See per package "Special Handling" label)
 Fragile High Value CA Charge Air Mail Only

7 Payment
Bill to: Sender (Account in my name) Recipient Third Party Credit Card Cash/Check (If not bill to recipient, no credit card label required)

FedEx Account No. 1036-8947-3

Credit Card No. _____ Exp. Date _____
Total Packages 2 Total Weight 50 Total Declared Value \$ _____ Total Charges \$ _____

*When the billing value is higher than \$100 per package, you pay an additional charge. See SI 8V1C1 CONDITIONS, DE CLARED VALUE AND LIMIT OF LIABILITY sections for further information.

8 Release Signature

Your signature authorizes Federal Express to deliver this shipment without obtaining a signature and agrees to indemnify and hold harmless Federal Express from any resulting claims.

194

Questions?
Call 1-800-Go-FedEx

The World On Time

FedEx USA Airbill

Tracking Number **7003858573**

MPFA495
3

Sender's Copy
50 43727160 5229M

1 From (please print) _____
Date 9/11/95 Sender's FedEx Account Number 1791-3471-3

Sender's Name Rich Loveday Phone (813) 273-9177

Company FLORIDA LEGAL COPIES Dept./Floor Suite/Room _____

Address 101 EAST KENNEDY STE 3425

City TAMPA State FL Zip 33602

2 Your Internal Billing Reference Information (Optional) (First 24 characters will appear on invoice) Job 10018

3 To (please print) _____
Recipient's Name William C. Nordlund Phone 214 980-7159

Company Panda-Kathleen LP Dept./Floor Suite/Room #1001

Address (No "HOLD" at FedEx location. Who is not deliver to P.D. by FedEx. Do not use code 416.)
4100 Spring Valley Road

City Dallas State TX Zip 75244

For "HOLD" Service check here
 Weekday Saturday (Not available at all locations)

For Saturday Delivery check here
 (Extra Charge, Not available to all locations)

4 Service*
 FedEx Priority Overnight (Next business morning) FedEx Standard Overnight (Next business afternoon) FedEx 2Day (Second business day)
 FedEx Govt. Overnight (Authorized user only)
 FedEx Overnight Freight FedEx 2Day Freight (For packages over 150 pounds. Call for delivery schedule.)

*Delivery commitment may be later in some areas

5 Packaging
 FedEx Letter* FedEx Pak* FedEx Box FedEx Tube Other Packaging (Declare value limit \$500)

6 Special Handling
Does this shipment contain dangerous goods? No Yes (No per attached Shipper's Declaration) Yes (Shipper's Declaration not required)
 Dry Ice (Dry Ice, 5, UN 1845 IN _____ kg, 504 (Dangerous Goods Shipper's Declaration not required)) Cargo Aircraft Only

7 Payment
Bill to: Sender (Account no. in section 1 will be billed) Recipient (Enter FedEx account no. or Credit Card no. below) Third Party Credit Card Cash/Check

FedEx Account No. 1036-8947-3

Credit Card No. _____ Exp. Date _____

Total Packages	Total Weight	Total Declared Value	Total Charges
<u>3</u>	<u>90</u>	<u>\$.00</u>	<u>\$</u>

*When declaring a value higher than \$100 per package, you pay an additional charge. See SERVICE CONDITIONS, DECLARED VALUE AND LIMIT OF LIABILITY section for further information.

8 Release Signature

Your signature authorizes Federal Express to deliver this shipment without obtaining a signature and agrees to indemnify and hold harmless Federal Express from any resulting claims.

194

Service Conditions, Declared Value, and Limit of Liability - By using this Airbill, you agree to the service conditions in our current Service Guide or U.S. Government Service Guide. Both are available on request. See back of Sender's Copy of this airbill for information and additional terms. We will not be responsible for any claim in excess of \$100 per package whether the result of loss, damage, or delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, and document your actual loss in a timely manner. Your

right to recover from us for any loss includes intrinsic value of the package, loss of sales, interest, profit, attorney's fees, costs, and other forms of damage, whether direct, incidental, consequential, or special, and is limited to the greater of \$100 or the declared value but cannot exceed actual documented loss. The maximum declared value for any FedEx Letter and FedEx Pak is \$500. Federal Express may, upon your request, and with some limitations, refund all transportation charges paid. See the FedEx Service Guide for further details.

Questions? 403-3339
Call 1-800-Go-FedEx

The World On Time

FedEx USA Airbill

Tracking Number 7003858606

Sender's Copy

6 50 43727160 5229M

From (please print) Date 4-18-95 Sender's FedEx Account Number 1791-3471-3

Sender's Name Phone (813) 223-9617

Company FLORIDA LEGAL COPIES Dept./Floor Suite/Room

Address 101 EAST KENNEDY STE 3425

City TAMPA State FL Zip 33602

Your Internal Billing Reference Information 193-1584

To (please print) Requester's Name Linda-Kathleen (LP) Phone (214) 950-7159

Company Bill C. Nordlund Dept./Floor Suite/Room 1001

Address 4100 Spring Valley Road

City Dallas State TX Zip 75244

For "HOLD" Service check here [] Weekday [] Saturday

For Saturday Delivery check here [] (if this charge not available at all locations)

Service Conditions, Declared Value, and Limit of Liability - By using this Airbill, you agree to the...

right to recover from us for any loss includes intrinsic value of the package, loss of sales, interest, profit, attorney's fees, costs, and other items of damage, whether direct, incidental, consequential, or special...

4 Service FedEx Priority Overnight (Next business morning) [] FedEx Standard Overnight (Next business afternoon) [] FedEx 2Day (Second business day) [] FedEx Govt. Overnight (Authorized users only) [] FedEx 1 Day Overnight Freight [] FedEx 2 Day Freight

5 Packaging FedEx Envelope [] FedEx Tube [] FedEx Box [] FedEx Mailer [] Other Packaging (The actual value must be \$100)

6 Special Handling Does this shipment contain dangerous goods? [] No [] Yes (Do not attach to this form) [] Yes (Attach to the bottom of this form) [] Fragile [] High Value [] Signature Required [] Signature Required (Not for address and temperature) [] Dry Ice [] Hazardous Materials (Shippers & Users must follow regulations) [] Cargo Aircraft Only

7 Payment Bill To: [] Sender (Bill must be on our form & will be billed) [] Recipient [] Third Party [] Credit Card [] Cash/Check (If not a bill & amount on a Credit Card on below)

8 Release Signature Credit Card No. Exp. Date Total Packages 2 Boxes Total Weight 50 Total Declared Value \$ 00 Total Charges \$

8 Release Signature Your signature authorizes Federal Express to deliver this shipment without obtaining a signature and agrees to indemnify and hold harmless Federal Express from any resulting claims.

Questions? Call 1-800-Go-FedEx

The World On Time

194

Rev. Date 5/95 • PART #148182 ©1994-95 FedEx • PRINTED IN U.S.A.

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN, L.P., a Delaware
Limited Partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

vs.

Case No. 95-922-CIV-T-24C

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

EXHIBIT D
TO AFFIDAVIT OF MICHELE WEBB

The document contained in this sealed envelope was been stamped "Confidential" by Florida Power before it was produced. Since the Affidavit of Michele Webb, which refers to this document, is being filed with the Court, this document is being filed under seal pursuant to paragraph 11 of this Court's August 3, 1995, AGREED ORDER FOR THE HANDLING OF CONFIDENTIAL INFORMATION.

James P. Fama FB No. 0797812
Deputy General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733



Sylvia H. Walbolt, FB No. 033604
Donald R. Smith, FB No. 607959
Steven C. Dupré FB No. 0471860
Randall J. Love FB No. 0000380
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
One Harbour Place
Post Office Box 3239
Tampa, FL 33601
(813) 223-7000
Attorneys for Florida Power Corporation

Interconnected

NEGOTIATED CONTRACT FOR THE
PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

between

PASCO COGEN LIMITED

and

FLORIDA POWER CORPORATION



101459 1180

(3) Any solid waste facility which has an existing firm energy and capacity contract in effect before October 1, 1988, shall have a one-time option to renegotiate that contract to incorporate any or all of the provisions of subsection (2) and (4) into their contract. This renegotiation shall be based on the unit that the contract was designed to avoid but applying the most recent Commission-approved cost estimates of Rule 25-17.0832(5)(a), Florida Administrative Code, for the same unit type and in-service year to determine the utility's value of avoided capacity over the remaining term of the contract.

(4) Because section 377.709(4), Fla. Stat., requires the local government to refund early capacity payments should a solid waste facility be abandoned, closed down or rendered illegal, a utility may not require risk-related guarantees as required in Rule 25-17.0832, paragraph (2)(c), (2)(d), (3)(e)8, and (3)(f)1. However, at its option, a solid waste facility may provide such risk related guarantee.

(5) Nothing in this rule shall preclude a solid waste facility from electing advance capacity payments authorized pursuant to section 377.709(3)(b), F.S., which advanced capacity payments shall be in lieu of firm capacity payments otherwise authorized pursuant to this rule and Rule 25-17.0832, F.A.C. The provisions of subsection (4) are applicable to solid waste facilities electing advanced capacity payments.

Specific Authority: 350.127(2), 377.709(5), F.S.

Law Implemented: 366.051, 366.055(3), 377.709, F.S.

History: New 8/8/85, formerly 25-17.91, Amended 4/26/89, 10/25/90.

Interconnected

**NEGOTIATED CONTRACT FOR THE
PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY**

between

LAKE COGEN LIMITED

and

FLORIDA POWER CORPORATION



100922
1182

(3) Any solid waste facility which has an existing firm energy and capacity contract in effect before October 1, 1988, shall have a one-time option to renegotiate that contract to incorporate any or all of the provisions of subsection (2) and (4) into their contract. This renegotiation shall be based on the unit that the contract was designed to avoid but applying the most recent Commission-approved cost estimates of Rule 25-17.0832(5)(a), Florida Administrative Code, for the same unit type and in-service year to determine the utility's value of avoided capacity over the remaining term of the contract.

(4) Because section 377.709(4), Fla. Stat., requires the local government to refund early capacity payments should a solid waste facility be abandoned, closed down or rendered illegal, a utility may not require risk-related guarantees as required in Rule 25-17.0832, paragraph (2)(c), (2)(d), (3)(e)8, and (3)(f)1. However, at its option, a solid waste facility may provide such risk related guarantee.

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Specific Authority: 350.127(2), 377.709(5), F.S.

Law Implemented: 366.051, 366.055(3), 377.709, F.S.

History: New 8/8/85, formerly 25-17.91, Amended 4/26/89, 10/25/90.

Interconnected

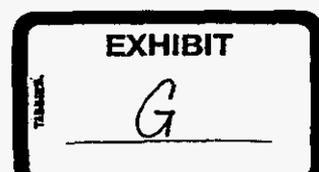
NEGOTIATED CONTRACT FOR THE
PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

between

ORLANDO COGEN LIMITED, L.P.

and

FLORIDA POWER CORPORATION



103540

1184

(3) Any solid waste facility which has an existing firm energy and capacity contract in effect before October 1, 1988, shall have a one-time option to renegotiate that contract to incorporate any or all of the provisions of subsection (2) and (4) into their contract. This renegotiation shall be based on the unit that the contract was designed to avoid but applying the most recent Commission-approved cost estimates of Rule 25-17.0832(5)(a), Florida Administrative Code, for the same unit type and in-service year to determine the utility's value of avoided capacity over the remaining term of the contract.

(4) Because section 377.709(4), Fla. Stat., requires the local government to refund early capacity payments should a solid waste facility be abandoned, closed down or rendered illegal, a utility may not require risk-related guarantees as required in Rule 25-17.0832, paragraph (2)(c), (2)(d), (3)(e)8, and (3)(f)1. However, at its option, a solid waste facility may provide such risk related guarantee.

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Specific Authority: 350.127(2), 377.709(5), F.S.

Law Implemented: 366.051, 366.055(3), 377.709, F.S.

History: New 8/8/85, formerly 25-17.91, Amended 4/26/89, 10/25/90.

H:WR078C91

FLORIDA POWER CORPORATION
 RATE DEPARTMENT
 PRESENT RATES
 REVENUE ANALYSIS: JANUARY 1991 - DECEMBER 1991

SYSTEM PAGE: 14
 DATE: 11/17/92
 REPORT PAGE: 14

CUSTOMER: CITY OF FORT MEADE - FERC RATE SCHEDULE RS-2 ACCOUNT #: 51 2093 99901
 DELIVERY POINT: CITY OF FORT MEADE
 RTCD 34 - 69KV

LINE NO	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	SUBTOTAL
(1) ENERGY - BLOCK ONE (KWH)	2,966,400	2,675,200	2,585,600	2,739,660	3,338,580	3,114,720	17,420,160
(2) ENERGY - BLOCK TWO (KWH)	0	0	0	293,940	21,420	277,280	592,640
(3) TOTAL ENERGY CONS. (KWH)	2,966,400	2,675,200	2,585,600	3,033,600	3,360,000	3,392,000	18,012,800
(4) ACTUAL DEMAND (KW)	7,123	8,362	6,823	7,411	7,094	7,663	44,476
(5) BILLING DEMAND (KW)	7,243	8,678	7,003	6,523	7,949	7,416	44,812
(6) CUSTOMER CHARGE (\$)	372	372	372	372	372	372	2,232
(7) DEMAND CHARGE (\$)	50,556	60,572	48,881	45,531	55,484	51,764	312,788
(8) ENERGY CHARGE - 1ST BLOCK	97,268	87,720	84,782	89,833	109,472	102,132	571,207
(9) ENERGY CHARGE - 2ND BLOCK	0	0	0	8,242	601	7,775	16,618
(10) TOTAL - BASE CHARGES (\$)	148,196	148,664	134,035	143,978	165,929	162,043	902,845
(11) MONTHLY CREDIT (\$)	(1,081)	(1,183)	(1,010)	(1,000)	(1,197)	(1,132)	(6,603)
(12) FUEL ADJUST. CHARGES (\$)	(15,218)	(15,249)	(13,911)	(8,251)	(6,754)	(14,382)	(73,765)
(13) TOTAL - ALL CHARGES (\$)	131,897	132,232	119,114	134,727	157,978	146,529	822,477
	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
(14) ENERGY - BLOCK ONE (KWH)	3,261,720	3,399,060	3,402,840	2,883,200	2,739,660	3,040,000	36,146,640
(15) ENERGY - BLOCK TWO (KWH)	408,680	277,740	597,160	0	41,140	0	1,917,360
(16) TOTAL ENERGY CONS. (KWH)	3,670,400	3,676,800	4,000,000	2,883,200	2,780,800	3,040,000	38,064,000
(17) ACTUAL DEMAND (KW)	7,277	7,500	6,631	6,379	7,267	7,171	86,701
(18) BILLING DEMAND (KW)	7,766	8,093	8,102	7,738	6,523	7,469	90,503
(19) CUSTOMER CHARGE (\$)	372	372	372	372	372	372	4,464
(20) DEMAND CHARGE (\$)	54,207	56,489	56,552	54,011	45,531	52,134	631,712
(21) ENERGY CHARGE - 1ST BLOCK	106,952	111,455	111,579	94,540	89,833	99,682	1,185,248
(22) ENERGY CHARGE - 2ND BLOCK	11,459	7,788	16,744	0	1,154	0	53,763
(23) TOTAL - BASE CHARGES (\$)	172,990	176,104	185,247	148,923	136,890	152,188	1,875,187
(24) MONTHLY CREDIT (\$)	(1,193)	(1,234)	(1,254)	(1,118)	(985)	(1,112)	(13,498)
(25) FUEL ADJUST. CHARGES (\$)	(16,590)	(7,905)	(12,040)	(7,179)	(2,113)	(9,150)	(128,742)
(26) TOTAL - ALL CHARGES (\$)	155,207	166,965	171,953	140,626	133,792	141,926	1,732,947

1186

ATT:309

EXHIBIT
H

Subject: All Requirements Resale Service for the City of Fort Meade

Attached is a draft of Florida Power's ALL REQUIREMENTS RESALE SERVICE RATE SCHEDULE RS-2. This serves as an sample contract between Florida Power and the City of Fort Meade. A Resale Service contract between Florida Power and Fort Meade would expand Section II, Applicability (2) on First Revised Sheet No. 2, to allow the City of Fort Meade to take delivery of its St. Lucie entitlement.

Beginning on First Revised Sheet No. 30 is Florida Power Corporation TRANSMISSION SERVICE RESALE RATE SCHEDULE T-1. This rate schedule would need to be executed between the City of Fort Meade and Florida Power prior to the City of Fort Meade taking delivery of its St. Lucie entitlement or resale electric service from another utility using Florida Power's transmission facilities.

The length of contract and the notice of termination will be amended subject to final negotiations.

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN, L.P., a Delaware
Limited Partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

vs.

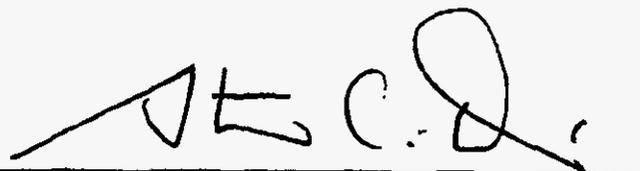
Case No. 95-922-CIV-T-24C

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

EXHIBIT I
TO AFFIDAVIT OF MICHELE WEBB

The document contained in this sealed envelope was been stamped "Confidential" by Florida Power before it was produced. Since the Affidavit of Michele Webb, which refers to this document, is being filed with the Court, this document is being filed under seal pursuant to paragraph 11 of this Court's August 3, 1995, AGREED ORDER FOR THE HANDLING OF CONFIDENTIAL INFORMATION.



James P. Fama FB No. 0797812
Deputy General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733

Sylvia H. Walbolt, FB No. 033604
Donald R. Smith, FB No. 607959
Steven C. Dupré FB No. 0471860
Randall J. Love FB No. 0000380
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
One Harbour Place
Post Office Box 3239
Tampa, FL 33601
(813) 223-7000
Attorneys for Florida Power Corporation

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN, L.P., a Delaware
Limited Partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

vs.

Case No. 95-922-CIV-T-24C

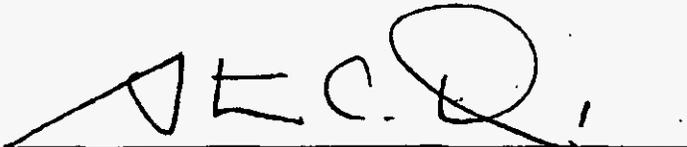
FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

EXHIBIT J
TO AFFIDAVIT OF MICHELE WEBB

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James P. Fama FB No. 0797812
Deputy General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733



Sylvia H. Walbolt, FB No. 033604
Donald R. Smith, FB No. 607959
Steven C. Dupré FB No. 0471860
Randall J. Love FB No. 0000380
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
One Harbour Place
Post Office Box 3239
Tampa, FL 33601
(813) 223-7000
Attorneys for Florida Power Corporation

Burden case

TECHNICAL CONCEPTS, L.P., Plaintiff,
v.
CONTINENTAL MANUFACTURING
COMPANY, Defendant.

No. 92 C 7476.

United States District Court, N.D.Illinois,
Eastern Division.

June 10, 1994.

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

*1 Plaintiff Technical Concepts, L.P., ("Technical") brought this patent infringement suit against defendant Continental Manufacturing Company ("Continental"). This matter is currently before the court on Technical's Motion to Compel the Production of Documents Located in Hong Kong. For the reasons stated below, the motion is denied.

Background

On November 13, 1992, Technical, an Illinois limited partnership, filed suit against Continental, a Missouri corporation, alleging infringement of U.S. Patent No. 4,830,791 under 35 U.S.C. § 281 and 28 U.S.C. § 1338(c). The disputed patent covers an air freshener device.

In Technical's first and second set of Requests for the Production of Documents and Things, Technical sought documents concerning the conception, design, development, testing, and manufacture of air freshener devices made or sold by defendant Continental. (Pl.'s Motion to Compel Documents Located in Hong Kong ("Motion"), Ex. A, Request Nos. 1-3, 5, 14, 20-21, 25, 47 and 62).

In response to several letters, and following further discussions pursuant to Local Rule 12(k), Continental stated that it had already produced responsive documents in its possession, but would not be able to produce additional documents because they were in the

possession of third parties I.J. Langleb, Ltd. ("Langleb") and Kader Industries, Co., Ltd. ("Kader"), located in Hong Kong. (Technical's Statement Pursuant to Local Rule 12(k)). Continental maintains that these documents are not within its possession or control as required by Federal Rule of Civil Procedure 34(a).

On February 11, 1994, Technical brought this motion to compel.

Discussion

Under Federal Rule of Civil Procedure ("Rule") 37(a), a party may, upon reasonable notice, apply for an order compelling discovery. Further, Rule 34 provides that "[a]ny party may serve on any other party a request (1) to produce ... any designated documents ... which are in the possession, custody or control of the party upon whom the request is served...." Fed.R.Civ.P. 34(a)(1). As in all matters pertaining to discovery, the court exercises broad discretion in determining whether to compel discovery. See generally 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil §§ 2176, 2285 (1970).

A Rule 34 motion for the production of documents is entitled to broad and liberal treatment. In *Re Folding Carton Antitrust Litigation*, 76 F.R.D. 420, 423 (N.D.Ill.1977). Although Rule 34 has been broadly construed in order to facilitate discovery, its broad interpretation does not mean that every document is discoverable without a showing of possession or control. *Estate of Young v. Holmes*, 134 F.R.D. 291, 293 (D.Nev.1991). Rather, the party bringing the motion must have a legal right to obtain the documents on demand. *Id.* See also *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir.1984), *M.L.C., Inc. v. North American Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y.1986). The existence of this legal right of control depends upon the relationship between the parties, usually arising from statute, affiliation or employment. *Estate of Young*, 134 F.R.D. at 294. The burden of showing that a party is in control of requested documents falls upon the

party which brings the motion to compel. Sparks Tune-Up Ctrs., Inc. v. Panchevre, No. 90 C 4369, 1991 WL 101667, at *2, 1991 U.S. Dist. LEXIS 7441, at *5 (N.D.Ill. June 3, 1991).

*2 In the instant case, Technical asserts that the documents in dispute are under the control of Continental within the meaning of Rule 34. In particular, Technical insists that Continental's ability to retrieve items that are presently beyond the jurisdiction of the court is sufficient basis for compelling defendant to produce these documents. Also, Technical argues that Langleb and Kader "although located in Hong Kong and not established as being directly related to the defendant, are nevertheless closely associated with, and have acted as agents of, the defendant, at least with regards [sic] to the development and manufacture of air-freshener devices at issue in this lawsuit." (Motion at 4-5). Thus, plaintiff concludes that there is an ongoing contractual and agency relationship "through which the defendant could readily obtain the documents sought by plaintiff's request." (Id. at 5). Technical offers no evidence in the record demonstrating this claimed agency relationship or ability to retrieve documents.

In contrast, Continental claims that Langleb, Kader, and Continental are all separate and distinct entities, and are not related or affiliated in any way. Defendant states that the products which are the subject of this lawsuit are wholly manufactured by Kader, and that Langleb arranges Continental's purchase of the products from Kader. According to Continental, Kader is a vendor and Langleb is a broker. Continental claims this relationship is insufficient to enable it to direct either Kader or Langleb to release documents in their control. In support, Continental attaches the affidavit of Mike Boland, President of Continental.

While it is clear that a business relationship does exist between Kader, Langleb and Continental, it is not at all clear that defendant has a legal right to the third party documents upon demand. By neglecting to present any evidence showing that

Continental has control over the requested documents, Technical has failed to carry its burden to support the motion to compel. Moreover, the court rejects Technical's argument that recent authority favors a broader construction of "control" in lieu of the legal right requirement in situations where the opposing party has not attempted to obtain the requested documents. The cases cited by Technical do not support such a broad construction of control; they require at least some indication of legal control over the documents before ordering that they be compelled. For instance, in *Scott v. Arex, Inc.*, 124 F.R.D. 39, 41 (D.Conn.1989), the defendant was found to have control over the payroll records for the defendant corporation which he owned. In reaching that conclusion, the court made clear that a party cannot avoid production by merely saying that certain documents are not in its possession. However, the *Scott* court emphasized that "[a] party controls documents that it has the right, authority, or ability to obtain upon demand." *Id.* In that case, it was clear that the defendant was an owner and officer of the corporation and had a legal right to obtain the corporation's documents on demand.

*3 Similarly, in *M.L.C.*, the court found that the defendant had control over documents which were produced in an untimely fashion, suppressed, or destroyed. 109 F.R.D. at 136. There, the court noted that its conclusion that defendant had control was supported, in part, by the fact that the defendant was able to obtain the documents for its own purposes at a later time. *Id.* at 138. Thus, the court reasoned that although the ability to obtain documents on demand does not necessarily mean that a legal right to do so exists, it is at least indicative of such control. Likewise, in *In re Folding Carton*, the court ordered the defendant to attempt to obtain requested documents from its former employees since the former employees were still receiving compensation from the defendant. 76 F.R.D. at 423. In that case, the court concluded that the ability to withhold payment was an indicia of control. *Id.*

No such relationship or indication of control

has been established in the instant case. Indeed, Continental has denied the existence of any such employment or superior-subordinate relationship or affiliation between itself and Langleb and Kader. (Boland Aff. ¶¶ 3-5). Moreover, Technical has failed to carry its burden of showing control, and there are no indicia of control apparent from the record. Consequently, the court denies Technical's motion to compel.

Costs

When a motion to compel discovery is denied, Rule 37(a) requires the court to order the moving party to pay to the non-movant the reasonable expenses incurred in opposing the motion, including attorney's fees, "unless the court finds that the making of the motion was substantially justified...." After consideration of the facts and the briefs, and in light of the alleged importance of the requested documents, the court finds that fees are not warranted because the motion was substantially justified. Therefore, no costs are awarded.

Conclusion

For the foregoing reasons, plaintiff's motion to compel production of documents located in Hong Kong is denied.

END OF DOCUMENT

SPARKS TUNE-UP CENTERS, INC.,
Plaintiff,

v.

**Samuel L. PANCHEVRE and Maricela
Panchevre, Defendants.**

No. 90 C 4369.

United States District Court, N.D. Illinois,
E.D.

June 4, 1991.

MEMORANDUM OPINION AND ORDER

ANN C. WILLIAMS, District Judge.

*1 On July 31, 1990, Sparks Tune-Up Centers, Inc. ("Sparks") filed suit against Samuel L. Panchevre and Maricela Panchevre, alleging that defendants were holding themselves out as franchisees of Sparks and using the Sparks trademark without being a Sparks licensee. On August 2, 1990, Sparks filed a motion for a temporary restraining order ("TRO"), requesting the court to enjoin defendants and their agents from continuing to use the Sparks trademark. The court granted plaintiff's motion and enjoined defendants and their agents from displaying the Sparks trademark, service mark and name in any manner. On August 8, 1990, plaintiff filed a petition for a rule to show cause why defendants should not be found in contempt for violating the TRO. Plaintiff alleged that on August 6, 1990, defendants were still utilizing the Sparks name in conducting their business.

The court referred the petition for a rule to show cause to Magistrate Judge Rosemond for a hearing. The Magistrate Judge entered an order stating that "the Rule to Show Cause ... will be resolved by the return of all materials bearing Sparks' name ... Defendants shall return manuals, invoices, service orders and any other material bearing plaintiff's trade name or logo directly to plaintiff in Downers Grove, Illinois." Magistrate Judge Rosemond's Order dated August 21, 1990. Defendant maintains that he returned whatever Sparks material he had at his Texas

residence before September 19, 1990.

On October 24, 1990, plaintiff filed a second petition for a rule to show cause. This petition stated that defendants failed to return certain Sparks manuals and that defendants did not return any invoices, service orders or other materials bearing Sparks' trade name or logo. Plaintiff alleged that failure to return these items violated Magistrate Judge Rosemond's order of August 21, 1990. On October 24, 1990, plaintiff also filed a motion to compel the production of documents. The motion to compel sought various financial documents which plaintiff had originally requested in late August, 1990.

On October 29, 1990, Magistrate Judge Rosemond granted plaintiff's motion to compel and ordered the outstanding documents to be produced by November 19, 1990. See Magistrate Judge Rosemond's Minute Order dated October 29, 1990. The Magistrate Judge stated that if defendants failed to produce the documents by November 19, they would be fined \$100.00 per day for every day thereafter that the documents were not produced. The Magistrate Judge also awarded plaintiff's their attorneys' fees for having to bring the motion to compel.

Regarding the Rule to Show Cause, the Magistrate Judge granted the motion, granted plaintiff its attorneys' fees for having to bring the motion, and set a hearing date of November 29, 1990 to determine if defendants should be held in contempt. Id. On that date the Magistrate Judge also heard oral argument on defendants' motion for reconsideration of the Magistrate Judge's October 29 ruling granting plaintiff's motion to compel. In their motion for reconsideration, defendants stated that the Magistrate erred in granting the motion to compel because they had produced all documents in their possession, custody or control.

*2 On November 29, 1990, the Magistrate Judge entered an order in which he ruled on both the reconsideration motion and the contempt motion. The Magistrate Judge denied defendants' motion for reconsideration

of the granting of the motion to compel. The Magistrate Judge also held defendants in contempt for failing to return the manuals, invoices, etc., bearing the Sparks name, and fined defendants \$100.00 per day until they returned the materials, or \$100.00 per day for one year, whichever is shorter. The Magistrate Judge held that defendants had not shown that they were not in "constructive possession and control" of the documents which were the subject of the motion to compel and the rule to show cause. Finally, the Magistrate Judge approved plaintiff's fee petition for both the motion to compel and the rule to show cause, over defendants' objections, and ordered defendants to pay plaintiff \$1,395.00 in fees. Defendants filed objections to all of the Magistrate Judge's rulings and the court will now address those objections.

Motion to Compel

Rule 34 of the Federal Rules of Civil Procedure provides that "[a]ny party may serve on any other party a request (1) to produce ... any designated documents ... which are in the possession, custody or control of the party upon whom the request is served ..." As noted above, plaintiff served a document production request upon defendants in late August, 1990, and as of October, 1990, defendants still had not produced the following items: (1) credit applications submitted to banks from which defendants sought financing; (2) written documents reflecting all sales which took place at defendants' Indianapolis stores; (3) written documents reflecting deposits made from sales at the Indianapolis stores; (4) profit and loss statements from defendants' automotive centers; and (5) sales tax returns from the automotive centers. Defendants contend that the Magistrate Judge erred in granting plaintiff's motion to compel these items because defendants did not have possession or control of the items at the time the document production request was made.

In support of their contention that Mr. Panchevre did not have possession or control of the documents at issue, defendants point to

the deposition of Mr. Panchevre. During the deposition, plaintiff's attorney questioned Mr. Panchevre about document request numbers 9, 10 and 11 (numbered as items 2, 3 and 4 above). In regard to these three requests, defendant stated that he did not possess the items at issue and that he believed his former business associates, Mr. Fred Hobbs and Mr. Wayne Rogers, had the documents. See Deposition of Mr. Panchevre at 23-25. Mr. Panchevre further testified that he had contacted Mr. Hobbs and that Mr. Hobbs had agreed to send Mr. Panchevre the relevant documents. *Id.* However, defendants point to no deposition testimony in which Mr. Panchevre denied having possession of the documents referred to in request numbers 7 and 12 (numbered as items 1 and 5 above).

*3 "A party cannot be required to permit inspection of documents or things that he does not have and does not control." Wright & Miller, *Federal Practice & Procedure: Civil*, § 2210 (1970). Furthermore, the party which brings the motion to compel has the burden of establishing that the non-movant has control of the requested documents. See *Norman v. Young*, 422 F.2d 470, 473 (10th Cir.1970). The court agrees with defendants that as to document production requests numbers 9, 10 and 11, plaintiff has not carried its burden of showing that defendants possess or control the relevant documents. Mr. Panchevre swore under oath that he did not possess or control the documents. Plaintiff does not dispute that defendants do not have the requested documents, but plaintiff maintains that defendants have control over the nonparties who possess the documents. However, plaintiff offers no facts to support this theory. Furthermore, plaintiff cites no cases in which a former business relationship, in and of itself, was sufficient to show control over a person for purposes of Rule 34. In sum, the court finds that plaintiff failed to show defendants possessed or controlled the documents listed in request numbers 9, 10 and 11 and therefore, the court reverses the Magistrate Judge's granting of the motion to compel regarding those documents.

However, defendants have not shown that

they did not possess the credit applications or the tax returns sought in request numbers 7 and 12. Moreover, defendants offer no reason for their failure to produce these items in a timely fashion. Thus, the court affirms the Magistrate Judge's granting of the motion to compel as to request numbers 7 and 12. The court also affirms the Magistrate Judge's granting of plaintiff's fees for having to bring the motion to compel. See Fed.R.Civ.P. 37(d) (court shall require party who fails to respond to request for inspection to pay the reasonable expenses, including attorneys' fees, caused by the failure to respond). [FN1]

Contempt Proceedings

As noted above, on August 21, 1990, Magistrate Judge Rosemond ordered defendants to return "manuals, invoices, service orders, and any other material bearing plaintiff's trade name or logo directly to plaintiff ..." After defendants failed to return certain manuals and failed to return the invoices, service orders, etc., plaintiff filed a rule to show cause why defendants should not be held in contempt. Again, defendants claimed that the missing manuals, invoices, etc. were at the Indianapolis store and that Mr. Hobbs and Mr. Rogers were not cooperating in returning the materials. See Deposition of Samuel Panchevre at 127-129, 205-06. Magistrate Judge Rosemond held that because defendants were alerted by pre-litigation letters that plaintiff wanted certain materials returned and because defendants voluntarily changed their position by selling the business, they should be deemed to be in "constructive possession" of the materials. The Magistrate Judge therefore held defendants in contempt for not producing the requested materials. See Magistrate Judge Rosemond's Minute Order dated November 29, 1990.

*4 Although the court does not condone defendants' actions in abandoning materials which defendants knew would be requested once litigation ensued, the court does not believe that holding defendants in contempt of the Magistrate Judge's August 21 order is an appropriate sanction. "[O]ne who is charged

with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to perform or comply." *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir.1974). Mr. Panchevre stated that he cannot comply with the court's order in full and plaintiff again has not produced evidence to the contrary.

Plaintiff argues that defendants could have filed a third-party action against the non-parties or subpoenaed the documents from the non-parties, and the fact that defendants did not undertake these actions shows that they violated the Magistrate Judge's August 21 order. However, the Magistrate Judge's August 21 order did not require such measures. The order directed defendants to return manuals, invoices, etc. bearing plaintiff's trade name or logo. It did not say that if defendants were unable to procure all the manuals and other materials from non-parties, that defendants were also required to institute separate litigation against the uncooperative non-parties. Mr. Panchevre complied with the order in that he returned the materials he had and he attempted to get the other materials from the non-parties. The fact that he was unsuccessful in procuring all the materials from the non-parties does not mean that he failed to comply with the Magistrate Judge's order. Thus, the court reverses the Magistrate Judge's rulings finding defendants in contempt and imposing the cost of plaintiff's attorneys' fees for the contempt proceedings.

Attorneys' Fees

Plaintiff submitted and the Magistrate Judge approved a fee petition of \$1,395.00 for the attorneys' fees incurred in bringing both the motion to compel and the petition for a rule to show cause. This court has affirmed the Magistrate Judge's award of fees for the motion to compel, but reversed the Magistrate Judge's award of fees for the rule to show cause. Based on plaintiff's attorney's itemization of fees, the court calculates that plaintiff incurred \$630.00 in legal fees in connection with the motion to compel. Thus, the court orders defendants to pay plaintiff

\$630.00 in legal fees in connection with the motion to compel. Thus, the court orders defendants to pay plaintiff \$630.00 in attorneys' fees.

Conclusion

For the aforementioned reasons, the court affirms Magistrate Judge Rosemond's granting of plaintiff's motion to compel document production request numbers 7 and 12 and reverses the granting of the motion to compel document production request numbers 9, 10 and 11. The court affirms Magistrate Judge Rosemond's granting of the fees plaintiff incurred in bringing the motion to compel. Finally, the court reverses Magistrate Judge Rosemond's finding that defendants should be held in contempt of court for non-compliance with the Magistrate Judge's August 21 order. The court also reverses the granting of attorneys' fees plaintiff incurred in bringing the rule to show cause.

FN1. The court will address the amount of fees awarded in a separate section.

END OF DOCUMENT

Glenn BUTLER and Farley Flynn,
Plaintiffs,
v.
PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation,
Defendant.

CIV. No. 88-455-FR.

United States District Court, D. Oregon.

Feb. 9, 1990.

Timothy J. Vanagas, Jennings, Vanagas &
Lowe, Gresham, Or., for plaintiffs.

Jonathan T. Harnish, Corbett Gordon,
Bullard, Korshoj, Smith & Jernstedt, P.C.,
Mary Ellen Hoffman, Portland General
Electric Company, Portland, Or., for
defendant.

OPINION

FRYE, District Judge:

*1 The matter before the court is the motion
(# 82) of plaintiffs, Glenn Butler and Farley
Flynn, to compel discovery and for sanctions
against defendant, Portland General Electric
Company (PGE). This is an action for age
discrimination by two former employees of
PGE.

ANALYSIS AND RULING

Butler and Flynn move to compel responses
to various discovery requests from PGE. The
court will address the requests in the order
presented by the parties.

1. Butler and Flynn move to compel further
production in response to Request No. 9 in
their third request for production. Request
No. 9 asks for the minutes and reports of the
Position Evaluation Committee for 1985-86.
PGE objects that the request is overbroad, but
offers to produce the documents which contain
information involving the jobs for which
Butler and Flynn applied.

Butler and Flynn argue that they need
information regarding all jobs evaluated by
the Position Evaluation Committee in order to
determine if the committee had a practice of
finding every job it analyzed to be "new."
PGE responds that the RIF committee, and
not the Position Evaluation Committee, is the
body which decides whether a position is to be
treated as a new job. PGE represents that
Butler and Flynn have obtained copies of all
relevant minutes and other documents of the
RIF committee.

As it appears that the minutes and reports of
the Position Evaluation Committee do not
contain further relevant information, Butler
and Flynn's motion is denied as to Request
No. 9.

2. Butler and Flynn move to compel further
production in response to Request No. 26 in
their third request for production. PGE
responded that although the request is vague,
it would produce the tests. Butler and Flynn
contend that they have not received the tests
as promised by PGE. PGE states that the
responsive documents were produced to Butler
and Flynn on October 3, 1989. PGE offers to
arrange for Butler and Flynn to be provided
again with the documents if they cannot locate
them.

The court finds that the issue regarding
Request No. 26 is moot.

3. Butler and Flynn move to compel further
production in response to Request No. 3 in
their fourth request for production. Request
No. 3 asks for annual records indicating the
names and positions held by employees in
Division Operations whose wages or salaries
were included in Codes 911, 912, 913 and 916
of the 1982-1986 PGE FERC Form 1 filings.
PGE objects that the request is overbroad and
irrelevant, but agrees to produce any
responsive documents relating to the CFS
departments which have not already been
produced. PGE further states that it has
searched for such documents and found no
additional documents.

Butler and Flynn contend that the deposition testimony of Dave Carboneau, an employee of PGE, indicates that additional records exist. PGE submits the affidavits of Corbett Gordon and Vickie Coonts, which state that Coonts made the inquiry suggested by Carboneau and found that no further documents are available and that it will be necessary to create a new computer program in order to produce further information responsive to Request No. 3.

*2 Under Fed.R.Civ.P. 34(a), a party is required to produce only documents which are in its "possession, custody or control." A document is not in the possession, custody or control of a party if it does not exist, and production cannot be required of a document which is not yet in existence. Wright and Miller, *Federal Practice and Procedure: Civil* § 2210, p. 625.

The court accepts the representation of PGE that the requested information has not been compiled into the form of a document or a computer program. As the law does not require a party to prepare or create a document in response to a discovery request, the motion to compel is denied as to Request No. 3.

4. Butler and Flynn move to compel further production in response to Request No. 13 in their fifth request for production. Request No. 13 asks for minutes, records and reports of the Executive Position Review Committee between 1984 and 1988. PGE objects that the request is overbroad in scope, but offers to produce any responsive documentation "which pertains to the Executive Position Review Committee, within the CFS department of the Sales, Community Relations, and Service and Design Consultant aspects of the MCO department." PGE states that it has made a search for such documentation and learned that none exists.

Butler and Flynn argue that PGE's limitation on the scope of Request No. 13 is unacceptable because the practice of age discrimination was widespread at PGE and involved many work areas. PGE responds

that since there are no responsive documents, Request No. 13, regardless of scope, is moot.

The court accepts the representation of PGE that it has made a diligent search for responsive documents and that none have been located. The motion to compel is denied as to Request No. 13.

5. Butler and Flynn move to compel further production in response to Request No. 14 in their fifth request for production. Request No. 14 asks for:

Any and all documents of any nature or description, including but not limited to calendars, photographs, journals, diaries, memoranda, correspondence, testimony notes, rough notes, telephone messages and data responses which relate in any way to the Oregon Public Utility Commission staff requests to PGE for information regarding PGE Reduction in Force Program, Categories A, B, D, and D Advertising activities and charges, Marketing/Sales activity, conservation, promotional activities and concessions regarding PGE rate making cases between 1976 through 1986, and PGE's responses thereto.

Defendant's Responses to Plaintiffs' Fifth Request for Production, p. 8. PGE objects to the request as vague and burdensome, but offers to produce the boxes of documents which include the responsive documents and to permit Butler and Flynn to search for the responsive documents at a mutually convenient time.

Butler and Flynn contend that PGE should be required to identify the responsive documents in the approximately twenty-five boxes of documents made available for review by PGE. PGE argues that under Rule 34, it is proper to produce documents as they are kept in the usual course of business. PGE contends that since the parties are in an equal position to sort through the material, PGE should not be required to structure and organize the documents for Butler and Flynn.

*3 Under Rule 34(b), it is proper to produce

documents as they are kept in the usual course of business. There is no indication that PGE has purposefully produced the documents in an inconvenient form. Rather, Request No. 14 is so wide-ranging and vague that Butler and Flynn are better situated than PGE to sort through the documents and determine which are responsive. The court accepts PGE's representation that the documents continue to be made available for inspection by Butler and Flynn. The motion to compel is denied as to Request No. 14.

6. Butler and Flynn move to compel further production in response to Request No. 18 in their fifth request for production. Request No. 18 asks for copies of PGE's separation letter (agreement) for each Division Operations employee RIFFED by PGE between 1983 and 1986. PGE objects that the request is overbroad, but offers to produce such letters for all employees RIFFED from the CFS department in 1986.

Butler and Flynn contend that discovery should not be limited to the CFS department where they worked because employees in other work areas have testified to their belief that age discrimination occurred in other areas. PGE contends that separation letters are essentially form letters which would not provide any relevant information. PGE argues that the testimony of employees from other departments as to their subjective belief regarding discrimination is not relevant to the claims brought by Butler and Flynn.

Butler and Flynn have not stated what information they expect to gain from the separation letters, or how evidence regarding the subjective beliefs of employees in other departments would be relevant to this action. As the separation letters appear to be duplicative of other discovery materials, and of marginal relevance at best, the court denies the motion to compel as to Request No. 18.

7. Butler and Flynn move to compel production under Request No. 20 in their fifth request for production, which requests: "Report and supporting OAR 860-21-605 materials, submitted to the PUC, as required

by all for 1976 through 1986." PGE responded that the request is vague and incomprehensible due to the inclusion of the words "by all."

Butler and Flynn contend that PGE seized on the mistaken inclusion of extra words in the request as an excuse to object to the request. PGE responds that it cannot be expected to know whether Butler and Flynn mistakenly included extra words or whether further words were omitted from the request.

The court agrees that a party is not required to guess as to the meaning of a word or phrase mistakenly included in a discovery request. However, this matter could have been resolved by an informal conference between counsel before this motion was filed. The court has insufficient information before it regarding the nature of the documents sought by Request No. 20. Therefore, the motion to compel is denied as to Request No. 20.

8. Butler and Flynn move for an award of their reasonable expenses, including attorney fees, incurred in bringing this motion. As Butler and Flynn have not prevailed in this motion, such an award is not appropriate.

CONCLUSION

*4 The motion of Butler and Flynn to compel discovery and for sanctions (#82) is denied.

ORDER

IT IS HEREBY ORDERED that plaintiffs' motion to compel discovery and for sanctions (#82) is DENIED.

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