ORIGINAL

Florida Power
CORPORATION

JAMES A. McGEE
SENIOR COUNSEL

February 24, 1998

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

Re: Docket No. 950110-EQ

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of the following supplemental information regarding Florida Power Corporation's Response in Opposition to Panda-Kathleen, L.P.'s Motion for Extension of Contract Performance Dates, which is scheduled for consideration by the Commission at its March 10, 1998 Agenda Conference.

ACK ____
AFA ____
APP ____
CAF ____
CMU ____
CTR ____
EAG ____
LEG 2
LIN 5
OPC ____
RCH ____
SEC 1
WAS ____
OTH ____

1. Petition for Writ of Certiorari filed with the United States Supreme Court by Panda-Kathleen, L.P., on February 11, 1998, in which Panda-Kathleen, L.P. states on page 3 that "the Commission issued an order ruling that Florida Power's contract with Panda was invalid."

2. Letter from Florida Power Corporation to Panda-Kathleen, L.P., dated February 23, 1998, declaring Panda-Kathleen, L.P., in default of its Standard Offer Contract for the Purchase of Firm Capacity and Energy for failure to satisfy the extended construction commencement performance date established by the Commission, and terminating the Standard Offer Contract effective upon the Commission's denial of Panda-Kathleen, L.P.'s request for further extension of the contract performance dates.

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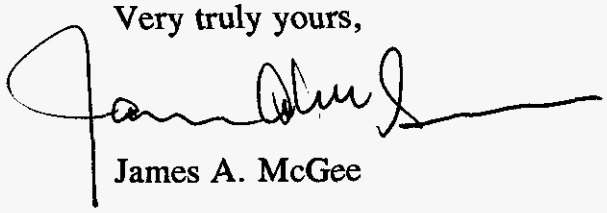
A Florida Progress Company

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Thank you for your assistance in this matter.

Very truly yours,



James A. McGee

JAM/kp
Enclosure

cc: Parties of record

h:\jam\950110\mileston.sup

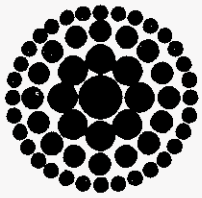
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Standard Offer Contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P. and Florida Power Corporation.	Docket No. 950110-EI Submitted for filing: February 25, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Supplemental Information has been furnished to David L. Ross, Esq., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami Florida 33131 and Richard Bellak, Esq., Associate General Counsel, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0892, by express delivery this 24th day of February, 1998.

Attorney



Florida Power
CORPORATION

February 24, 1998

Mr. Kyle Woodruff
Project Manager
Panda-Kathleen, L.P.
4100 Spring Valley, Suite 1001
Dallas, TX 75244

Dear Mr. Woodruff:

This is to advise you that Florida Power Corporation is declaring Panda-Kathleen, L.P. in default under the Standard Offer Contract for the Purchase of Firm Capacity and Energy.

As you are aware, Panda-Kathleen, L.P. contracted with Florida Power in 1991 to begin providing electricity to Florida Power's ratepayers in 1995. Service under the contract is now well overdue. Although Panda-Kathleen, L.P. obtained from the Commission an extension of the date to commence construction of the facility until July 1, 1997, that date, too, has now come and gone.

Florida Power has anticipated for some time a definitive end to litigation over the contract and the commencement of service under it, but it appears that no end to the dispute is in sight. In this connection, Panda-Kathleen, L.P. has filed another motion with the Public Service Commission asking the Commission effectively to relieve the company of its obligation to provide timely service, and, most recently, Panda-Kathleen, L.P. has petitioned the United States Supreme Court to review the decision of the Florida Supreme Court in Florida Power's favor.

Based on these recent actions, we are left to conclude that not only is Panda-Kathleen, L.P. late in commencing service under the contract, but Florida Power has no assurance whatsoever that Panda-Kathleen, L.P. is now ready, willing, or able to perform its obligations under the Contract.

In a final effort to provide every reasonable accommodation to Panda-Kathleen, L.P., Florida Power is willing to await the outcome of the Commission's decision on Panda-Kathleen, L.P.'s request for a further extension of the contract performance dates before exercising its right to terminate the contract for Panda-Kathleen, L.P.'s default. Nonetheless, Florida Power now considers and hereby declares Panda-Kathleen, L.P. to be in default under the contract. Accordingly, if the motion for extension of those dates is denied by the Commission -- as Florida Power believes it should be -- please be advised that Panda-Kathleen, L.P.'s contract with Florida Power will be terminated pursuant to Article XV, Sections 15.1 and 15.2 of that contract, effective upon the date of the Commission's vote on the requested extension (irrespective of any further efforts by Panda-Kathleen, L.P. to seek reconsideration of the order, to appeal it, or otherwise to continue to litigate its dispute with Florida Power).

Sincerely,

R. James Rocha for DWG

David W. Gammon
Manager, Purchased Power Resources

DWG/kp

No. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

v.

FLORIDA POWER CORPORATION and
FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

Arthur J. England, Jr., Esq.*
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Counsel for Panda-Kathleen, L.P.

QUESTION PRESENTED

Acting pursuant to, and in furtherance of the congressional objective expressed in the Public Utilities Regulatory Policies Act of 1978 ("PURPA") of encouraging the cogeneration of electric power by small power producers denominated as "qualified facilities," the Florida Public Service Commission (Commission) approved a cogeneration contract between Panda-Kathleen, L.P. (Panda) and Florida Power Corporation (Florida Power). Two years later Florida Power sought to have the Commission rewrite, and effectively invalidate the contract, despite the preemptive effect of PURPA and the Act's express intent that small power generating facilities such as Panda are to be exempt from state regulatory intercession. The Commission acceded to Florida Power's request, and the Florida Supreme Court upheld the Commission in a decision holding that the state's regulatory power was not preempted by the Congress. The court's decision is in irreconcilable conflict with the decisional law announced by every federal and state court to have addressed the preemptive effect of PURPA's exemption of cogeneration and small power production facilities from state utility-type regulation. The question presented is:

Does the Public Utility Regulatory Policies Act of 1978 preempt state regulatory jurisdiction over contract disputes arising from agency-approved contracts for the purchase of power by public utilities from cogenerators and small power producers?

LIST PURSUANT TO RULE 29.6

The parent companies of Panda-Kathleen, L.P. are: Panda Energy International, Inc. (parent corporation); Panda Global Holdings, Inc. (wholly owned subsidiary of Panda Energy International, Inc.); Panda Energy Corporation (wholly-owned subsidiary of Panda Energy International, Inc.); and Panda-Kathleen Corporation (wholly-owned subsidiary of Panda Energy Corporation). Panda-Kathleen Corporation is the general partner of Panda-Kathleen, L.P., the petitioner in this cause.

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

Federal Statutes

Florida Statutes

TABLE OF CITATIONS
(Continued)

Page

Administrative Regulations

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner Panda-Kathleen, L.P., respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Florida in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-12a) is reported at 701 So. 2d 322 (Fla. 1997). The orders of the Florida Public Service Commission (App., *infra*, 13a-76a) are reported at 92 FPSC 10:557 (1992), 95 FPSC 12:365 (1995), and 96 FPSC 5:379 (1996).

JURISDICTION

The Supreme Court of Florida issued its decision on September 18, 1997 (App., *infra*, 1a-12a), and denied rehearing on November 13, 1997. (App., *infra*, 77a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 823a, *et. seq.*

18 C.F.R. §§ 292.303, 292.304, 292.602

§ 366.051, Florida Statutes (1991)

Rule 25-17.0832, Florida Administrative Code (1995)

Pursuant to Supreme Court Rule 14(1)(f), the text of the foregoing statutes and regulations is set out in the appendix to this petition. (App., *infra,* 78a-97a).

STATEMENT

A. The Florida Power Corporation/Panda-Kathleen Contract

The petitioner before the Court is Panda-Kathleen, L.P. The respondents are Florida Power Corporation and the Florida Public Service Commission.

On November 25, 1991, Panda and Florida Power entered into a "standard-offer contract," pursuant to which Panda was to provide and Florida Power was to purchase 74.9 megawatts (MW) of cogenerated electricity. (App., *infra*, 1a-2a). The Commission approved Florida Power's petition to accept Panda's contract, and to allow Florida Power to reject several other contract offers, upon a finding that Florida Power "acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed . . . to be the best available." (App., *infra*, 16a).

Two years after securing Commission approval of the Panda contract, Florida Power filed a petition for a declaratory statement under the Florida Administrative Procedures Act, requesting that the Commission rewrite, and effectively invalidate the Panda contract, as being in conflict with certain requirements of Commission Rule 25-17.0832 of the Florida Administrative Code. (App., *infra*, 1a-3a, 90-94a).[1] After being granted leave to intervene, Panda filed a motion to dismiss contending that the Public Utilities Regulatory Policies Act of 1978 preempted the

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[1] The grounds for rescission asserted by Florida Power were that Panda proposed to construct a cogeneration facility with a total "capacity" of 115 MW, which Florida Power alleged would exceed the 75 MW limit on the amount of power to be "supplied" under cogeneration contracts authorized in Rule 25-17.0832(3)(a); and that the 30-year term expressed in the contract exceeds the "economic plant life" limitation of the Rule (App., *infra*, 2a-3a). The Rules on which Florida Power relied for relief were incorporated into the Panda contract and attached as appendices to the contract, though, at the time of the Commission's earlier approval.

Commission's jurisdiction to hear Florida Power's challenge to the contract, and that Florida Power was required to bring an action in an appropriate court if it wished to avoid its obligations under the agreement. (App., *infra,* 4a, 104a-136a).

The Commission denied Panda's motion to dismiss, ruling that Florida Power's requested relief "does not conflict with federal regulations or subject Panda to 'utility-type' state rate regulations," and that the Commission had jurisdiction to address Florida Power's challenge to the contract. (App., *infra*, 4a, 22a-34a). Following evidentiary hearings, the Commission issued an order ruling that Florida Power's contract with Panda was invalid. (App. 4a-5a, 13a-21a).

B. The Florida Supreme Court's Decision

On direct appeal to the Florida Supreme Court, Panda again contended that the PURPA preempted the Commission's jurisdiction to re-analyze and re-define terms in the Panda/Florida Power contract. (App., *infra,* 5a). Rejecting Panda's claim, the court held that PURPA "contemplates and authorizes the Commission's exercise of jurisdiction to resolve controversies such as this one." (App., *infra,* 7a). The court stated that statutes enacted by the Florida Legislature to implement PURPA vested the Commission with the authority to approve so-called "standard offer" contracts, and to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers." (App., *infra,* 8a), quoting § 366.051, Fla. Stat. (1991). The court held that "it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations." (App., *infra*, 8a-9a). The court found that "[b]oth of the federal and state legislative enactments . . . clearly contemplate that the Commission shall bear the responsibility of resolving such disputes." (App., *infra,* 9a).

The court acknowledged the decision in *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir.), ___ U.S. ___, 116 S. Ct. 68 (1995), in which the Third Circuit struck down state regulatory action that conflicted with PURPA's exemption of qualifying facilities from state regulatory jurisdiction (App., *infra*, 9a-10a), but declined to follow the rationale of *Freehold*:

> We recognize, as did the court in *Freehold*, that utility-type rate regulation is clearly preempted. However, the Florida Commission in its order ruling upon Panda's standard-offer contract, did not engage in utility-type rate regulation. This case involves the construction of conflicting provisions that were included in the contract from . . . its inception, not a modification in the terms of the contract so as to adjust rates paid by consumers.

(App., *infra*, 10a).

REASON FOR GRANTING THE PETITION

The Public Utilities Regulatory Policies Act of 1978 was enacted to foster conservation of resources that are used to produce electricity, as part of an effort to lessen this country's dependence on foreign oil and to combat the energy crisis. A major component of PURPA is the provision for the development of cogeneration and small power production facilities, which the Congress believed would lead to a reduction in demand for traditional fuel resources. Recognizing, however, that traditional utilities would be reluctant to purchase power from nontraditional facilities and, further, that the financial burdens imposed by regulatory intervention would discourage the development of cogeneration and small power production facilities, Congress directed the Federal Energy Regulatory Commission (FERC) to promulgate rules that would exempt such facilities from state and federal regulatory control. In compliance with the congressional mandate, FERC implemented PURPA by promulgating regulations that

exempt cogeneration and small power production facilities from traditional state utility regulation.

By approving Florida Power's attempt to escape its contractual duties under a cogeneration agreement that had been expressly approved by the Commission under regulations adopted to implement both PURPA and FERC's rules, the Florida Supreme Court has transgressed upon the congressional mandate, and has announced a rule of law that irreconcilably conflicts with the decisional law announced by every federal and state court to have addressed the preemptive effect of PURPA. The Florida Supreme Court's rationale, if not disapproved by the Court, will all but undo the expressly-stated congressional intent to facilitate the development of alternative energy resources. Both the decisional disharmony and the importance of carrying out the intent of the Congress commend this matter to the Court's attention.

A. *PURPA's Exemption of Cogeneration and Small Power Production Facilities From State Utility-Type Regulation*

Section 210 of PURPA, codified as 16 U.S.C. § 824a-3, addresses the role of cogeneration and small power production facilities in PURPA's overall scheme for the conservation of fuel resources.[2] In *FERC v. Mississippi*, 456 U.S. 742 (1982), this Court set forth both the underlying congressional intent and the correlative provisions of PURPA:

> Section 210 . . . seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would

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[2] A "cogeneration facility" produces both electrical energy and steam (or some other form of useful energy, such as heat). 16 U.S.C. § 796(18)(A). A "small power production facility" produces no more than 80 MW and uses either waste or renewable resources to produce electric power. 16 U.S.C. § 796(17)(A).

> reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.
>
> In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities . . . .
>
> To solve the second problem perceived by Congress, § 210(e), 16 U.S.C. § 824a-3(e), directs FERC to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities.

456 U.S. at 750-51 (footnotes omitted). Section 210 directs FERC to promulgate regulations, pursuant to which a qualifying cogeneration or small power production facility (commonly referred to as a Qualified Facility or "QF") shall be "exempted in whole or part . . . from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production." 16 U.S.C. § 824a-3(e)(1).

In *FERC v. Mississippi,* the Court verified the preemptive authority of Section 210 by rejecting Mississippi's Tenth Amendment challenge:

> Insofar as § 210 authorizes FERC to exempt qualified power facilities from "State laws and regulations," it does nothing more than pre-empt conflicting state enactments in the traditional way. Clearly, Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators . . . . [T]he Federal Government may displace state regulation even though this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."

456 U.S. at 759 (citations omitted). Executing its responsibility under PURPA, FERC promulgated regulations to enable Section 210, including a provision that QFs are exempt "from State law or regulation respecting: i) [t]he rates of electric facilities; ii) [t]he financial and organizational regulation of electric utilities." 18 C.F.R. § 292.602(c); 18 C.F.R. § 292.101, *et. seq.*

In accordance with PURPA, the Florida Legislature directed the Commission to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers." § 366.051, Florida Statutes (1991). The Commission, in turn, promulgated an administrative rule that adopts two contracting methodologies to implement PURPA's design: (1) the "negotiated contract," in which a utility directly negotiates with a QF for the purchase of power; and (2) the "standard offer contract," which, once submitted by a QF must be accepted by the utility absent affirmative permission from the Commission to reject the contract. Rule 25-17.0832(2), (3), Fla. Admin. Code.

In conformity with the Commission's regulations, Panda submitted a standard offer contract to Florida Power, with all of its contractual term specified and the

Commission's rules incorporated by reference. In due course, the contract was submitted to the Commission with Florida Power's request that it be approved, and that other proposed standard offer QF contracts be rejected. (App., *infra,* 14a). The Commission granted Florida Power's petition, finding that Florida Power had "acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by [Florida Power] to be the best available." (App., *infra,* 16a).

Under 16 U.S.C. § 824a-3(b), state regulatory rules cannot provide for a QF rate "which exceeds the incremental cost to the electric utility of alternative electric energy," defined as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d) (referenced as the "avoided cost"). State regulatory agencies are thus required to promulgate rules to ensure that QF rates comply with these requirements. 16 U.S.C. § 824a-3(b). The Commission's action in approving Panda's standard offer contract, and the underlying Commission regulations that were followed in that process, were completely consistent with PURPA's mandate.

No one disputes that the Commission was acting well within its proper role under PURPA in reviewing and approving Panda's standard offer contract. When the Commission some two years later effectively *invalidated* the contract it had already approved, based on a conflict in the very terms it had previously seen and approved, however, it went far beyond its authority to *implement* QF contracts. It patently entered into the forbidden realm of utility-type regulation.

PURPA specifically provides that disputes arising from QF contracts are subject to *judicial* review, just as any contract dispute would ordinarily be resolved between private parties. 16 U.S.C. § 824a-3(g). Congress did not declare, and rationally could not have directed the creation of preemptive federal regulatory requirements, and at the same time contemplate intercession by state regulatory

bodies to revisit previously-approved contract terms so that power companies can escape the very contracts PURPA fostered.

B. *The Florida Supreme Court's Interpretation of PURPA to Allow a Regulatory Agency to Invalidate a QF Contract Conflicts With Other Federal and State Court Interpretations of PURPA*

The Florida Supreme Court's allowance of state regulatory interference with approved QF cogeneration contracts runs contrary to established precedent on PURPA's preemptive effect. The case law draws a bright-line distinction between the role of state agencies in approving QF contracts and post-contractual interference. The Commission's action against Panda, which effectively invalidated terms expressed in the Commission-approved QF contract between Panda and Florida Power, clearly falls on the preempted side of the distinguishing line.

An unbroken line of federal and state precedent has invalidated similar state regulatory efforts to interfere with approved QF contracts. These decisions largely have involved state efforts to modify QF rates set pursuant to PURPA's requirement that rates under a QF contract may not exceed the "incremental costs" of purchasing alternative electric energy, which FERC defined as "avoided costs," *i.e.*, costs for electric energy which, but for the purchase from the QF, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).[3]

In *Independent Energy Producers Association, Inc. v. California Public Utilities Commission,* 36 F.3d 848 (9th Cir. 1994), the court addressed the validity of a California regulatory provision that authorized utilities to suspend payments of contractual rates under approved cogeneration contracts and to substitute lower rates, upon a determination

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[3] In *American Paper Inst. v. American Elec. Power Service,* 461 U.S. 402, 412-18 (1983), the Court upheld FERC's requirement that QFs receive the full avoided cost rates.

that the QF had failed to meet federal operating and efficiency standards. 36 F.3d at 849-50. The Ninth Circuit recognized that, under PURPA, "the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated" by FERC. 37 F.3d at 856. Nonetheless, the court held that the California regulation "violates PURPA by substituting for any 'non-complying' QF and 'alternative' avoided cost rate." *Id.* at 854.

This holding was based on the fundamental proposition that the states do not have "the authority to alter the terms of standard offer contracts" when such rulings have the effect of *invalidating* a previously-approved QF contract. *Id.* at 858-59. Fully recognizing that utilities may, on occasion, be "lock[ed] . . . into paying rates that were calculated on incorrect assumptions about the future costs of fossil fuels," the court nonetheless held that the fact of lower than anticipated avoided costs "does not give the state and the [utility] the right *unilaterally* to modify the terms of the standard offer contract." *Id.* at 858 (emphasis added).

To like effect is the decision of the Supreme Court of Oklahoma in *Smith Cogeneration Management, Inc. v. Corporation Commission,* 863 P.2d 1227 (Okla. 1993). The regulation at issue in *Smith* required utilities and cogenerators "to include in each contract a notice provision that allows the Corporation Commission to change the terms and otherwise finalize experimental purchase tariffs of a power sales agreement throughout the duration of the contract." *Id.* at 1237 n.35. Challenging the rule, the cogenerator in *Smith* asserted that, "while states have broad authority to implement PURPA, any utility-type regulation over cogeneration contracts directly conflicts with the Act. *Id.* at 1237. The Oklahoma court agreed:

> Reconsideration of long-term contracts with established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to prevent reconsideration of such contracts. The

> legislative history behind PURPA confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by qualifying facilities to utilities. . . .
>
> * * *
>
> . . . Requiring QFs and electric utilities to include a notice provision allowing reconsideration of established avoided costs conflicts with PURPA and FERC regulations. Such a requirement makes it impossible to comply with PURPA and FERC regulations requiring established rate certainty for the duration of long term contracts for qualifying facilities that have incurred an obligation to deliver power. . . .

863 P.2d at 1240-41 (footnote omitted).

In *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of State of New Jersey*, 44 F.3d 1178 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 68 (1995), the Third Circuit applied the precepts set forth in *Independent Energy Producers* and *Smith* to invalidate a state regulatory agency's attempt to rescind a QF contract. Freehold, a QF, had negotiated a power purchase agreement with a New Jersey public utility which was approved by the state's Board of Regulatory Commissioners (the BRC). *Id.* at 1182-83. Approximately one year later, "in response to decreases in the cost of obtaining electrical power, the BRC directed public utilities to notify it of any power supply contracts which were no longer economically beneficial," so that the BRC could encourage "buy outs" and other remedial measures. *Id.* at 1183. Freehold resisted a buy out proposal, but the BRC directed the parties "to renegotiate" the contract or a buy out, failing which an evidentiary hearing would be conducted to consider alternative measures, in response to the utility's argument that the contract "was no longer an economically beneficial contract because the contractual avoided cost was significantly higher than the current avoided cost." *Id.*

The Third Circuit analyzed the state's power under Section 210(f) of PURPA "to implement the requirements of section 210(a) and the relevant regulations," and concluded that contract re-examination is prohibited in "utility-type" regulation:

> Here, on the other hand, the BRC's implementation of FERC's section 210(a)-type regulations *ended with the BRC's . . . approval* of the PPA [the contract]. The present attempt to either modify the PPA or revoke BRC approval is "utility-type" regulation — exactly the type of regulation from which Freehold is immune under section 210(e). . . .

Id. at 1191-92 (emphasis added). Thus, "once the BRC approved the power purchase agreement . . . on the ground that the rates were consistent with avoided cost, *any action or order by the BRC to reconsider its approval*" was preempted by PURPA. *Id.* at 1194 (emphasis added).

Freehold has been accepted as the controlling interpretation of PURPA preemption. *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Electric Corp.*, 908 F. Supp. 1180, 1189-90 (W.D.N.Y. 1995); *West Penn Power Company v. Pennsylvania Public Utility Commission,* 659 A.2d 1055, 1065-66 (Pa. Commw. 1995). No reported decision, prior to the Florida Supreme Court's decision in this case, appears to have authorized a state agency to modify a previously-approved QF contract — much less to

virtually rescind such a contract under PURPA.[4] The distinction drawn by the Florida Supreme Court between "utility-type regulation" and "the construction of conflicting provisions that were included in the contract from . . . its inception" (App., *infra*, 9a-10a), is simply not one that can be reconciled with PURPA or the extant law. A "construction" of contract terms which has the intended effect of excusing the utility's performance altogether, as here, is the heart and soul of agency oversight, and directly contrary to PURPA's consignment of contract disputes to the courts. As the Pennsylvania court held in *West Penn Power Company*:

> Section 210 of PURPA preempts the [state commission] from *reconsidering its prior approval* of the [contracts] between West Penn and the QFs *or* to change the rates established for the avoided costs at the time of the agreements. Unless or until PURPA is amended or repealed, reestablishing regulatory power over the area, it appears that the [state commission] *cannot reexamine contracts* for PURPA power. . . .

659 A.2d at 1066 (emphasis added).

C. *The Need For Resolution of the Conflicting Precedents*

PURPA was expressly intended to create a market for QFs to sell their energy to established utilities by requiring

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[4] In *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 917 P.2d 766 (1996), the court declined to reverse a regulatory order under *Freehold* because the order was an interim measure that preceded actual *approval* of the QF contract. 917 P.2d at 779. The court distinguished *Freehold* as involving an attempt "to reopen a power purchase agreement" after "[t]he executed agreement had previously been approved by the BRC," whereas in *Rosebud*, "no contractual agreement had been entered into, nor had the [state commission] previously approved avoided costs specific to [the proposed contract]" prior to entering the order sought to be quashed. *Id.*

utilities to purchase power from QFs "whether they want to or not." *Kamine/Besicorp Allegany,* 908 F. Supp. at 1189. Indeed, so overriding was the congressional desire to implement cogeneration and small power production contracts that FERC, in promulgating its regulations to enable PURPA, fully recognized and expressly acknowledged that although a utility might in a particular instance pay more than the actual avoided cost, such is an acceptable consequence of implementing PURPA's goals. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA,* 45 Fed. Reg. 12214, 12224 (1980). Not surprisingly, major utility companies have been reluctant "to be forced into this 'marriage.'" *Kamine/Besicorp Allegany,* 908 F. Supp. at 1189. That reluctance has undoubtedly engendered the recent spate of PURPA suits in which utilities, such as Florida Power here, have asked their regulators to alleviate economic consequences they did not fully appreciate and do not now desire.

As the court observed in *West Penn Power Company*, however, "PURPA had the unintended consequence of promoting competition in the electric industry in that non-utility, independent power producers are entering the market to supply electrical power both to utilities and to large customers." 659 A.2d at 1059. The Energy Policy Act of 1992, 16 U.S.C. §§ 824j, 824k, was enacted to confer upon FERC "certain powers to open the wholesale electrical market. 659 A.2d at 1059. Traditional monopolistic utilities are concerned that increased competition will leave them with "stranded investment," *i.e.,* "that portion of capacity which has capital costs and operating costs so great that the power is produced at a cost that will not be competitive in the coming competitive market place." *Id.* That concern is "at the core of the disputes concerning PURPA contracts taking place before courts and regulatory bodies throughout this country." *Id.* Utilities fear that "QFs will supply energy that the utility no longer needs because customers have walked away with their demand and are purchasing from independent power producers or that the avoided costs paid for QF power is at a cost higher than the cost of power that may become

available" to the customer in a more competitive market place. *Id.*

Congress, however, has neither amended nor repealed PURPA, and the courts have hewn closely to PURPA's intent by rejecting the efforts of utilities to chip away at its preemptive effects. The Florida Supreme Court's decision is the first break in the bulwark of protection erected by the courts around PURPA's core purposes and provisions. This opening, if exploited by traditional utilities — as it undoubtedly will be — will eventually become the means by which section 210 of PURPA will lose all vitality.

Federal preemption is at the very heart of the Supremacy Clause. *E.g., Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 368-69 (1986). Where express congressional preemptive intent has been ignored by a state court, as here, it is essential that the Court step in to vindicate the will of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

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