

FLORIDA PUBLIC SERVICE COMMISSION
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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JAYE, ELIAS) *RUE TTB*
DIVISION OF ELECTRIC AND GAS (HAFF) *RLT JDJ*
msw

RE: DOCKET NO. 950110-EI - STANDARD OFFER CONTRACT FOR THE
PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING
FACILITY BETWEEN PANDA-KATHLEEN, L.P. AND FLORIDA POWER
CORPORATION

AGENDA: 04/07/98 - REGULAR AGENDA - POST HEARING DECISION -
PARTIES MAY NOT PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\950110.RCM

CASE BACKGROUND

On November 25, 1991, Panda-Kathleen, L.P. (Panda), executed a Standard Offer Contract with Florida Power Corporation (FPC). The contract was designed to avoid a unit with an in-service date of January 1, 1997. The contract was approved by Order No. PSC-92-1202-FOF-EQ, issued October 22, 1992, in Docket No. 911142-EQ.

By Order No. PSC-96-0671-FOF-EI issued May 20, 1996, in this docket, the Commission resolved several issues concerning provisions of the contract. The Commission determined that the contract was limited to 20 years (the life of the avoided unit) and the facility was limited in size to less than 75 megawatts. The Commission found that the performance dates in the contract should be extended by 18 months to account for the length of time required to resolve the dispute.

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Panda appealed the Final Order to the Florida Supreme Court. The Florida Supreme Court affirmed the Commission's Order in an Opinion issued September 18, 1997. Panda's Motion for Rehearing was denied on November 13, 1997.

On January 7, 1998, Panda filed a Motion for Extension of Contract Performance Dates. In its Motion, Panda requested a 12 month extension of the construction commencement date and an additional 18 month extension of the in-service date.

On February 9, 1998, FPC filed its Response of Florida Power Corporation in Opposition to Panda's Motion for Extension of Contract Performance Dates.

Panda responded to FPC's Memorandum in Opposition on February 25, 1998, in its Reply to Florida Power Corporation's Memorandum in Opposition. Commission rules do not contemplate a responsive filing such as this.

FPC filed supplemental materials with the Commission on February 25, 1998, consisting of: a copy of Panda's Petition for Writ of Certiorari, which Panda filed with the United States Supreme Court on February 11, 1998; and, a letter dated February 23, 1998, from FPC to Panda stating that FPC declared Panda in default of its Standard Offer Contract for the Purchase of Firm Capacity and Energy.

This recommendation addresses Panda's Motion for Extension of Contract Performance Dates.

DISCUSSION OF ISSUES

ISSUE 1: Should Panda's Motion for Extension of Contract Performance Dates be granted?

STAFF RECOMMENDATION: No. Panda's Motion for Extension of Contract Performance Dates should not be granted.

STAFF ANALYSIS: Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI granted Panda an 18 month extension of contract performance deadlines because of the lengthy hearing process initiated by FPC's filing for a declaratory statement.

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PANDA'S POSITION:

Panda argues in its Motion that it is entitled to an extension of contract dates because of the following:

1. [T]he Commission extended the construction commencement and in-service dates contained in the contract for eighteen months [in Order No.96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI] because the proceedings before the Commission had halted Panda's efforts to secure equipment and financing for the period between the time Florida Power filed the administrative proceeding and the date on which the final order became effective. [p.1]
2. Panda's appeal of Order No. 96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI, to the Florida Supreme Court was:

another step in the regulatory proceedings *commenced by Florida Power Corporation* in which Panda was exercising its appellate right mandated by the constitution to have the Supreme Court review the final order of this Commission The bona fide dispute between the parties was not resolved until conclusion of the proceedings in the Supreme Court. [emphasis in the original] [p.1]

3. Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling. The situation, however, with which Panda was faced during the proceedings before this Commission--an inability to secure financing and equipment and meet performance dates under the contract--continued to exist until the Supreme Court finally determined the controversy on November 13, 1997. [pp. 1-2]
4. Panda seeks an extension of the construction commencement and in-service dates for an additional 12 and 18 months, respectively because:

These periods of time are necessary to obtain permitting, financing and equipment as well as to complete construction of the power plant, none of which could have been accomplished during the entire period of time which has elapsed between filing of Florida Power's declaratory

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proceeding until final disposition of the parties' dispute by the Supreme Court. [p. 2]

FPC'S POSITION:

In its February 9, 1998, Response to Panda's Motion, FPC argued that the extension should be denied on several grounds including:

1. Granting Panda's Motion amounts to a unilateral modification of the contract which is unsupported by consideration or the assent of the other affected party. [p. 2]

2. The "Commission does not have the power to reform the parties' Contract over FPC's objection. See, e.g., United Telephone Co. Of Florida v. Public Service Comm'n, 496 So. 2d 116(Fla. 1986)." [p.2]

3. Even if FPC assented to the modification, which it does not, Rule 25-17.0836(5),(6), Florida Administrative Code, requires the Commission to determine if the requested modification benefits the general body of FPC's ratepayers after evaluating the modification against the existing Contract. In this case, FPC argues that the ratepayers will be harmed by increased payments to Panda over the abbreviated life of the avoided unit. [p. 2]

4. If Panda's motion were granted, FPC would be required to break the law by paying Panda more money than the cost of the avoided unit. FPC asserts that the unit to be avoided was to be in-service January 1, 1997, and Panda could not have the unit constructed until late 1999. FPC argues that this would force it to either: make payments for longer than the 20 year lifespan of the avoided unit; or, compress 20 years worth of payments into the remaining 16 years of the avoided unit's lifespan. FPC maintains that either scenario would be violative of Rule 25-17.0832(4)(b), Florida Administrative Code. FPC asserts that it:

cannot be required to make capacity payments to Panda at rates different from the yearly capacity payment rates set forth in the Contract because the capacity payment rates under the Contract cannot be increased without exceeding the unit's avoided costs. [p. 14]

5. FPC asserts that it will have had to wait for firm capacity from Panda's plant for at least four years after the date originally contracted, i.e., January 1, 1997. The Force Majeure

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clause in the contract, however, only allows for a maximum of 180 days, or six months, delay in the provision of firm capacity to FPC from the in-service date of January 1, 1997. [p. 5]

STAFF ANALYSIS:

Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI granted Panda an 18 month extension of contract performance deadlines because of the lengthy hearing process initiated by FPC's filing for a declaratory statement. FPC petitioned for a declaratory statement because neither party to the contract could agree to the unit's size or the terms by which capacity payments would be made by FPC to Panda. The Commission granted the extension in order to keep both parties to the contract in the same position that they occupied before the commencement of the petition. The capacity payments were adjusted to reflect the revised in-service date.

Panda chose to appeal the Commission's Final Order to the Florida Supreme Court. Panda did not file a Motion for Stay until July 1, 1997, the date Panda was to begin construction of its unit. This Motion was rendered moot by the issuance of the Court's opinion. In contract law, the general rule is that, in the absence of provisions in the contract itself, a party thereto is not excused from performing it according to its terms, where performance is possible and lawful. See, e.g., *Corpus Juris Secundum* 17A §459.

Based upon the law of contracts, it appears that Panda had a duty under the contract at issue to perform as the contract stood after the issuance of Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI. Despite Panda's pursuit of its appeal to the Florida Supreme Court, it had a duty to begin performing on the contract even though it disagreed with the findings contained in the order. The appellant assumes the risk of losing on appeal and therefore assumes the risk of breach should it stop performance while litigating. Staff recommends that Panda should not now receive a stay or extension of the milestone dates for building a cogeneration facility contemplated to avoid a 1997 unit while it pursues its U.S. Supreme Court appeal. The original extension was granted to keep the parties in the same position that they occupied when FPC began proceedings for a declaratory statement.

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Staff agrees with FPC that Panda's Motion is effectively a request for a unilateral modification of contract terms. According to contract law, a unilateral modification of a contract is unlawful. Contracts must be modified with the consent of both parties and the exchange of additional consideration, which has not happened in this case. See, e.g. Wilson v. Odom, 215 So. 2d, 37, 39 (Fla. 1st DCA 1968), United Contractors, Inc. V. United Constr. Corp., 187 So. 2d 695, 702 (Fla. 2d DCA 1966). The Commission is likewise unable to order modifications to contracts that it has approved. See, e.g., United Telephone Co. of Florida v. Public Service Comm'n., 496 So. 2d 116 (Fla. 1986).

Panda has argued at every phase of this proceeding that the Commission's jurisdiction is limited by PURPA. Panda asserted on September 12, 1995, in its Motion to Dismiss and Motion to Stay or Abate Proceedings in this docket, that 16 U.S.C. §824a-3 (PURPA) preempts the Commission's jurisdiction over cogeneration contracts after the Commission approves such contracts. The Commission denied this Motion in Order No. PSC-95-1590-FOF-EI.

In its Petition for a Writ of Certiorari to the United States Supreme Court, Panda argues:

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. [p. 5]

Thus, Panda's Petition for a Writ of Certiorari argues that the Commission has no jurisdiction over Panda's cogeneration contract with FPC. At the same time, Panda is petitioning the Commission for an extension of the milestone dates under the contract.

Staff believes that Panda's Motion should be denied because Panda has shown no basis in either a statute or a rule for granting an extension. Staff has not found any authority which would entitle Panda to an extension. Panda relies upon the extension granted it in Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in this docket, as precedent for obtaining additional extensions. The extension granted in that order, as discussed above, was to insure

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that neither Panda nor FPC was harmed or benefitted by the time it took to process FPC's petition for declaratory statement. In this instance, the delay was caused solely by Panda as it pursued its appeals.

For these reasons, staff recommends that Panda's Motion for Extension of Contract Performance Dates should be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: If no party files a Motion for Reconsideration or Notice of Appeal of the Commission's final order, no further action will be required. Therefore, this docket should be closed.