505

KATZ, KUTTER, HAIGLER, ALDERMAN, MARKS, BRYANT & YON

PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS AT LAW

SILVIA MORELL ALDERMAN
DONNA E. BLANTON
ALAN HARRISON BRENTS
DANIEL C. BROWN
BILL L. BRYANT, JR.
RICHARD E. COATES
J. RILEY DAVIS
JOSÉ A. DIEZ-ARGUELLES
MARTIN R. DIX
KENNETH W. DONNELLY
PAUL R. EZATOFF
WILLIAM M. FURLOW
MITCHELL B. HAIGLER
DAVID P. HEALY
EDWARD S. JAFFRY
MARK E. KAPLAN
ALLAN J. KATZ
EDWARD L. KUTTER
RICHARD P. LEE
JOHN C. LOVETT
CHRISTOPHER B. LUNNY
JOHN R. MARKS, III

POST OFFICE BOX 1877 32302-1877
HIGHPOINT CENTER
106 EAST COLLEGE AVENUE, 12TH FLOOR
TALLAHASSEE, FLORIDA 32301
TELEPHONE (904) 224-9634
TELECOPIER (904) 222-0103
TELECOPIER (904) 224-0781

TRAVIS L. MILLER
BRIAN M. NUGENT
BRUCE D. PLATT
ARTHUR L. STERN, III
GARY P. TIMIN
J. LARRY WILLIAMS
DAVID A. YON
PAUL A. ZEIGLER

OF COUNSEL:
PATRICK F. MARONEY
CRAIG A. MEYER

GOVERNMENTAL CONSULTANTS:
MONICA A. LASSETER*
PAT GRIFFITH O'CONNELL*
E. CLINT SMAWLEY*
GERALD C. WESTER*
(*NOT AN ATTORNEY)

EXECUTIVE DIRECTOR:
J. ANDREW KELLER, III, C.P.A.

July 31, 1995

BY MESSENGER

Blanca Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumarg Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW or a Solid Waste Facility Between Panda-Kathleen, L.P. and Florida Power Corporation
Docket No. [redacted]

Dear Ms. Bayo:

Enclosed are the original and fifteen (15) copies of Panda-Kathleen, L.P.'s Memorandum in Support of Petition for Formal Evidentiary Proceeding and Full Commission Hearing in the above matter. Also enclosed is a diskette containing the document formatted in WordPerfect 5.1.

Please call if you have questions or require additional information.

Very truly yours,

Gary P. Timin

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

GPT:cas
Enclosures

cc(w/enc.): David G. Mayer
John R. Marks, III
Martha Carter-Brown (by messenger)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Standard Offer Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility Less Than 75 MW or a Solid Waste Facility between Panda - Kathleen, L.P. and Florida Power Corporation	)	Docket No. 950110-EI Submitted for Filing: July 31, 1995

MEMORANDUM IN SUPPORT OF PETITION FOR FORMAL EVIDENTIARY PROCEEDING AND FULL COMMISSION HEARING

Panda-Kathleen, L.P. ("Panda") respectfully submits this Memorandum to supplement and support its Petition for Formal Evidentiary Proceeding and Full Commission Hearing, filed on June 29, 1995 (the "Hearing Petition"). Panda understands that a staff recommendation that the Petition should be granted is scheduled for action at the August 1, 1995 agenda conference.

For readers' convenience, a table of contents in outline form, an introduction, and a statement of the basic legal issues presented by the Hearing Petition precede the main text of this Memorandum. The concluding section of the Memorandum summarizes the relief that Panda is seeking in this proceeding. These materials provide a capsule overview of the issues to be addressed in this proceeding and of Panda's principal contentions respecting them that are advanced in this Memorandum.

MEMORANDUM IN SUPPORT OF PETITION FOR FORMAL EVIDENTIARY PROCEEDING AND FULL COMMISSION HEARING

TABLE OF CONTENTS

I. INTRODUCTION.

This Memorandum summarizes material facts and legal principles that entitle Panda to the relief it is seeking in this docket: a Florida Public Service Commission (the "Commission") order interpreting and confirming, consistently with federal law, specific rights of Panda under its Standard Offer Contract (the "Contract") with Florida Power Corporation ("FPC"). Such action by the Commission is now necessary because, more than three years after requesting and obtaining the Commission's approval to enter into the Contract, and fully aware that Panda was continuing to perform its duties at substantial effort, expense, and risk, FPC challenged Panda's essential rights under the Contract by filing a Petition for Declaratory Statement with the Commission on January 25, 1995 (the "FPC Petition"). Panda believes that FPC is seeking to force Panda to abandon the Contract as part of FPC's larger business strategy to reduce or avoid its previous commitments to cogenerators. Panda has found it necessary to sue FPC in federal district court in Tampa, alleging violations of federal and Florida antitrust laws, to obtain relief and remedies beyond those available from the Commission.

Initially opened to consider the FPC Petition, this docket was later broadened by Commission orders (a) granting Panda's motion to intervene and (b) denying in part FPC's motion to strike Panda's Motion for Declaratory Statement and Other Relief. In substance, each party is seeking a Commission order directly contrary to that requested by the other. The order that FPC requests would negate the Contract by having the Commission declare it "void" or by rendering Panda's performance wholly impracticable in light of engineering and commercial realities. By contrast, Panda seeks an order confirming its contractual rights and FPC's duties to perform and adjusting the Contract milestone dates in order to restore Panda to the position that it occupied before January 25, 1995. In short, FPC invoked the Commission's jurisdiction

to stop performance of the Contract, leaving Panda in need of a Commission order confirming Panda's original rights and extending the Contract milestone dates so that the parties will resume performing without penalty.

The growing number of conflicting factual and legal contentions in the parties' filings convinced Panda that comprehensive resolution of the issues requires a formal evidentiary proceeding under § 120.57(1), Florida Statutes. Having discussed the matter with counsel for the Commission and FPC, and being advised by FPC that it would not oppose the request, Panda filed its Hearing Petition. This Memorandum identifies various facts that are material to the ultimate legal issues presented by that Petition. To the extent that FPC stipulates to such facts, the evidentiary proceeding will be narrowed and expedited. This Memorandum also corrects the serious mischaracterizations of the Contract and the course of events contained in FPC's May 8, 1995, Answer in Opposition to Panda-Kathleen, L.P.'s Motion for Declaratory Statement and Other Relief ("Answer"), to which Panda has not had an earlier opportunity to respond.

As the pre-hearing procedures appropriate to a formal evidentiary proceeding have not begun, and because further information may be obtained through discovery, Panda reserves its rights to present additional factual and legal contentions later in this proceeding. This Memorandum aims to assist the Commission in understanding the parties' dispute, the material facts, and the legal principles and other considerations bearing on its proper resolution. Panda respectfully submits that those principles and considerations entitle it to the relief it seeks in this proceeding. Conversely, the Commission should not permit FPC to evade its duties by petitioning for a declaratory statement that would alter crucial terms of the Contract. That petition has already rendered Panda's performance impossible as a practical commercial matter.

Much less should the Commission grant FPC's petition, a step that would negate and reverse the Commission's prior orders.

II. STATEMENT OF ISSUES PRESENTED.

The Hearing Petition, as amplified by this Memorandum, presents the following three basic legal issues.

1. Where a long-term standard offer contract between an electric utility and a cogenerator that will operate a qualifying facility (a) is in a form prepared by the utility and is part of the utility's approved tariff, (b) was accepted by the utility to the exclusion of competing offers pursuant to a Commission order affirmatively requested by the utility, (c) obligates the cogenerator to deliver, and the utility to purchase, 74.9 MW of committed capacity at the point of delivery, and (d) does not specify the equipment or configuration of the plant, does the contract prohibit the cogenerator from designing and constructing a facility capable of producing in excess of 75 MW of nominal output at the plant, with the aim of assuring that it can deliver 74.9 MW of committed capacity at the point of delivery throughout the contract term under widely varying conditions and in compliance with engineering and environmental requirements?

2. Where a cogenerator entering into a standard offer contract using the utility's prescribed and approved form properly fills in several terms intentionally left blank for offerors to complete, one of which unambiguously provides as completed that the contract term continues for thirty years' delivery of capacity and energy following the in-service date, the utility has described the contract both in internal documents and to the Commission as having a thirty year term, and the Commission has expressly authorized the utility to accept this contract and reject all competing offers, may the utility several years later obtain a ruling by the Commission that the contract either (i) terminates after twenty years or (ii) continues for thirty years but obligates the utility to pay for only twenty years of committed capacity?

3. Where a utility that entered into a standard offer contract in 1991 interrupts the cogenerator's performance of the contract by initiating a proceeding before the Commission in 1995, at a time when, as the utility knew, the cogenerator was at a crucial stage of obtaining financing, preparing to commence construction, and completing vital contract negotiations, should the Commission extend the contract milestone dates for a commercially reasonable period following the conclusion of the proceeding (and any appeal therefrom) to restore the cogenerator to the position that it occupied before such interruption?

Panda respectfully submits that the first and second questions must be answered negatively and the third positively. Panda also believes that the Commission should assess how

the manner in which it considers these questions, and the relief it might grant, comport with applicable federal law.

III. THE CONTRACT AND COMMISSION RULES ALLOW PANDA TO CONSTRUCT A FACILITY WITH NOMINAL OUTPUT EXCEEDING 75 MW, AND FPC HAS KNOWN FROM THE OUTSET THAT PANDA NEEDED AND PLANNED TO DO SO.

FPC's first strategy for changing the Contract to Panda's detriment is to urge the Commission to impose a new and extraneous term arbitrarily limiting the size of Panda's cogeneration facility. Specifically, FPC asks the Commission to rule that Panda may not construct a facility with nominal output of more than 75 MW at the plant. Such a ruling would make delivering 74.9 MW of capacity or energy at the point of delivery physically impossible. The technical legal and engineering issues that FPC's request raises can not disguise its goal of extinguishing the Contract. This is revealed by FPC's requests that the Commission either declare the Contract no longer "available" to Panda (FPC Petition, p. 1; Answer, p. 1) or "nullify" the Contract as "void ab initio" (Answer, pp. 12, 15). In fact, the Contract commits facility selection and design to Panda's engineering and business judgment, and FPC has known since October, 1991, that Panda intended, and would need, to build a facility exceeding 75 MW of nominal capacity to meet its long-term contractual obligations reliably. Moreover, the capacity of Panda's facility and the energy that it will make available to FPC will benefit the ratepayers.

A. THE CONTRACT OBLIGATES PANDA TO DELIVER 74.9 MW OF COMMITTED CAPACITY AND ENERGY WITHOUT RESTRICTING THE PLANT'S NOMINAL OUTPUT.

Despite FPC's contentions, neither the Contract nor Commission rules specify or limit the nominal MW output of the facility, as measured at the plant under standard or other conditions. To the contrary, the Contract focuses uniformly on "Committed Capacity," and Panda's fundamental obligations are so expressed. Section 7.1 states Panda's most important duty in precisely those terms:

> The Committed Capacity shall be 74,900 KW, unless modified in accordance with this Article VII. The Committed Capacity shall be made available at the Point of Delivery from the Contract In-Service Date through the remaining Term of this Agreement.

"Committed Capacity" is defined as "the KW capacity, as defined in Article VI hereof, which the QF has agreed to make available on a firm basis at the Point of Delivery" (§ 1.9). Article VI in turn obligates Panda to "commit, sell and arrange for delivery of the Committed Capacity to the Company . . . at the Point of Delivery" (§ 6.1) and provides that the "Committed Capacity and electric energy made available at the Point of Delivery . . . shall be net of any electric energy used on the QF's side of the Point of Ownership" (§ 6.2).[1] Even Article II, on which FPC places greatest weight (see Part III.F. below), explicitly states that the Contract was available to a "Facility having a Committed Capacity which is less thatn 75,000 KW" (§2.1.2).

Thus, the fundamental business purpose of the Contract is to assure FPC that Panda will make available and deliver, throughout the term of the Agreement, firm capacity of 74.9 MW at the Point of Delivery, that is, where energy enters FPC's system (§ 1.31). For indisputable

[1] The phrase "net of ... energy used on the QF's side" plainly implies that the plant's output may exceed its Committed Capacity.

engineering reasons, this can be accomplished only with a facility capable of generating more than 75 MW nominal output at the plant. The controlling Contract provisions are uniformly phrased and intended to obligate Panda to furnish Committed Capacity. By contrast, the Contract is utterly silent on the technical specifications of Panda's facility, including its nominal output at the plant. In short, unambiguous and controlling Contract language uses the numerical KW limit not to stipulate or constrain plant size but rather to quantify Panda's obligation to deliver firm or Committed Capacity at the Point of Delivery. These Contract provisions cannot be dismissed as meaningless, for they benefit FPC's system and its rate payers (see Part III.G below).

B. FPC OBTAINED COMMISSION APPROVAL TO CONTRACT WITH PANDA KNOWING THAT PANDA PLANNED TO BUILD A FACILITY IN EXCESS OF 75 MW NOMINAL OUTPUT.

FPC would have the Commission believe that FPC first learned in mid-1994, to its complete surprise, that Panda intends to build a facility with nominal output greater than 75 MW at the plant. See Answer, pp. 6-21, esp. ¶¶ 11 & 19. Although the Contract does not require FPC to accept or pay for Committed Capacity above 74.9 MW, FPC asks the Commission to "nullify" the Contract because Panda supposedly "abruptly, significantly, and unilaterally changed its proposed configuration" (¶ 19). FPC's protest rings hollow, as the Contract does not specify a proposed "configuration", nowhere prohibits Panda from changing its design, and does not require FPC's approval of Panda's decisions. Had FPC desired such terms, it could have included them when applying for Commission approval of its Standard Offer Contract form. Further, FPC's experience and expertise in power generation and delivery belie any claim that it could have ever believed that Panda could deliver 74.9 MW of Committed Capacity from a facility generating less than 75 MW of nominal plant output.

The evidence will show that, in fact: (a) FPC knew that Panda and other bidders for the Standard Offer Contract proposed from the beginning to construct facilities with nominal output exceeding 75 MW; (b) FPC neither favored Panda's bid nor rejected competing proposals because of nominal plant output, as distinct from Committed Capacity; (c) FPC was aware of and never objected to Panda's original plant design, using three combustion turbines (in combined cycle) with nominal output at the plant of approximately 87-100 MW; (d) FPC obtained the Commission's approval to enter into the Contract with this knowledge; and (e) FPC expressed concern about nominal plant output in mid-1994, after Panda notified FPC that Panda had selected a combustion turbine with larger nominal output in order to meet more stringent environmental, engineering, and performance criteria in a reliable and economical manner.

For example, FPC acknowledges (Answer ¶ 14) that in 1991, in response to FPC's questionnaire distributed to prospective cogenerators, Panda stated that it then expected to install three General Electric LM 2500 combustion turbines in combined cycle. FPC fails to mention, however, that this configuration is rated for a nominal plant output under new, clean conditions of 95.2 MW, and instead asserts in self-serving manner that it "could reasonably be expected to have a net generating capacity of approximately 74.9 MW" (id.).[2] From information in FPC's internal evaluation of the seven competing proposals, Panda believes that at least four could produce nominal output at the plant in excess of 75 MW. Indeed, FPC's "Evaluation of Standard Offer Proposals" dated November, 1991, rated bids on their "capacity committed to

[2] FPC provocatively alleges that Panda materially misrepresented its original configuration (Answer ¶23), yet even a close reading of the Answer reveals, as the evidence will show, that Panda simply redesigned the facility later for good reason. Panda's description of the configuration expected in 1991 accurately expressed its intentions at that time. See Part III.D below. If FPC does not expressly retract its allegations of misrepresentations by Panda, Panda will request a specific finding by the Commission that the communications in question were not misrepresentations when made.

in the contract," not on the basis of net output. All the proposals contemplated facilities whose nominal output at the plant exceeded their respective committed capacity.

FPC sought and obtained Commission approval to refuse all seven offers except the Panda Contract without making an issue of nominal plant output, and the Commission's order (PSC-92-1202-FOF-EQ) does not even mention it. If FPC had a genuine concern about nominal plant output or believed that Panda's proposal did not comply with Contract requirements, it either should not have affirmatively requested Commission approval of the Contract, or should have petitioned for approval to reject Panda's Contract. It did neither. FPC's actions in obtaining Commission approval and allowing Panda to proceed with Contract performance for several years without complaining until mid-1994 that the nominal output of Panda's reconfigured facility would exceed 75 MW raises an estoppel against FPC's request to void the Contract now on this basis.[3] That FPC originally accepted Panda's proposal for a facility exceeding 75 MW of nominal output and began voicing supposed reservations years later shows that FPC's real desire is to avoid purchasing cogenerated capacity and energy. These crucial facts also negate FPC's claim that it was misled by other non-contractual documents (Answer ¶¶ 15-18), which should be understood to refer to committed capacity.

FPC places strongest emphasis on its having expressly declined to consent to Panda's decision to purchase and install a different equipment configuration than initially planned (Answer ¶¶ 19-22). FPC's description of these events omits crucial facts. First, the Contract

---

[3] See, e.g., *Dokken v. Minnesota-Ohio Oil Corp.*, 232 So. 2d 200, 202-03 (Fla. 2d DCA 1970), *cert. den.*, 240 So. 2d. 638 (Fla. 1970)(jury conclusions that plaintiff's conduct in a sale of securities was "inconsistent with such acts, conduct and knowledge in bringing this suit" and that defendants detrimentally relied on such conduct would estop plaintiff from asserting that sale was invalid); *Nachwalter v. Christie*, 611 F.Supp. 655, 664 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986)("Under Florida law, a failure to object results in an estoppel if the person was under an affirmative duty to speak.").

neither requires Panda to obtain FPC's consent to the selection of a turbine generator set nor entitles FPC to withhold consent or to veto Panda's decision. Second, FPC stresses that it "repeatedly urged" Panda to obtain Commission approval of the changed configuration (id. ¶ 22). FPC conveniently omits to mention that FPC declined to assist Panda in this effort and that Panda, with FPC's knowledge, ultimately obtained written advice from senior Commission staff that no approval was necessary. After informing FPC in writing that Panda would seek guidance from the Commission, Panda officers met in August, 1994, with Joseph Jenkins, Director of the Electric and Gas Division, and others to discuss the new plant configuration and output. By letter of August 23, 1994, Panda's counsel confirmed Panda's explanation that "under optimal conditions these units can produce in the 115 MW range" and staff's advice that installing these units "is consistent with Panda's standard offer contract and is not a contract change that would require [Commission] approval." Mr. Jenkins replied by letter of August 24, 1994, stating:

> I foresee no reason why this is any type of contract change that should come before the Commission for approval. I discussed this briefly with Florida Power's Bob Dolan and he concurred.

See Exhibit 7 to Panda's March 14, 1995 Motion (emphasis supplied). Thus, FPC knew that Panda had obtained a favorable interpretation from Commission staff -- just as FPC protests that it had "repeatedly urged" -- and Panda was reliably informed that FPC concurred with staff's conclusion. Contrary to FPC's suggestion, the new configuration did not require formal Commission approval.[4]

---

[4] Presumably FPC is not serious in suggesting that Panda should have disbelieved the Director of the Electric and Gas Division and sought formal Commission approval despite his advice to the contrary. No other sense can be made of the January 25, 1995 Petition, which complains that Panda did not seek Commission approval even after the August 24, 1994 letter.

C. THE COMMISSION'S RULES DO NOT LIMIT PANDA'S FACILITY TO 75 MW OF NOMINAL OUTPUT AT THE PLANT.

FPC argues that Commission rule 25-17.0832 prohibits a public utility from entering into, or the Commission from approving, a standard offer contract with a cogenerator that will operate a facility with greater than 75 MW nominal output at the plant. FPC evidently would have the Commission believe that FPC had not solicited and obtained the Commission's order authorizing FPC to enter into the Panda Contract, knowing that as initially planned the facility would carry a rating at the plant well above 75 MW. There is no need to indulge such pretence. As in the Contract, the references to 75 MW in the rule should be interpreted in view of the facts and circumstances of this proceeding as having set an upper limit on Committed Capacity, not plant size or nominal output.

Only subsections (3)(a) and (3)(c) of rule 25-17.0832 refer to a 75 MW threshold. The former uses the phrase "qualifying facilities less than 75 megawatts;" the latter refers to "a qualifying facility under 75 megawatts." Nothing in this rule, other related rules, or statutes that they implement (most importantly § 366.051, F.S.) states or implies that these phrases are intended to refer to nominal plant output. Engineering realities and Commission practice require that standard offer contracts be available for up to 75 MW of Committed Capacity. Were the rule construed to permit no more than 75 MW of capacity at the plant, it would be impermissibly vague for not specifying the conditions under which capacity would be measured. This interpretation would also preclude standard offer contracts for a committed capacity approaching 75 MW, as the feasible upper limit depends on site conditions and other variables.

FPC can not dispute that it is difficult if not impossible to configure a facility to deliver precisely 75 MW and that the output of a turbine combustion generator varies significantly over

time and under differing conditions. Important variables include the fuel being used, condenser cooling water temperature, ambient air temperature and humidity, and the age, condition, and maintenance of equipment. Consequently, to describe a facility as having a single numerical generating capacity without identifying all relevant conditions is not meaningful. The Commission's rule should not be interpreted as fixing an arbitrary upper limit of 75 MW of nominal capacity at the plant as if these variables did not exist or should be ignored. To the contrary, the Commission encourages sound engineering and environmental practices and economic power production. The Commission has approved situations in which a cogenerator that has entered into a standard offer contract negotiates separate agreements to deliver additional energy and firm capacity from the same facility, together exceeding 75 MW.[5]

FPC also misconstrues the July, 1992, order regarding Polk Power Partners, No. PSC-92-0683-DS-EQ, as flatly prohibiting Panda from operating a facility with nominal output above 75 MW to fulfill its contractual duty to deliver 74.9 MW of committed capacity and energy. Panda and FPC entered into the Contract in October and November, 1991, well before issuance of that order, which, even were it pertinent, should not be applied retroactively. Moreover, FPC's position disregards the factual situation that the Commission addressed in the 1992 order. That docket involved an attempt to "stack" two other contracts on top of a standard offer contract, together committing 123 MW of capacity under three agreements to two utilities. Had the Commission approved this arrangement, two utilities would have been committed to purchase the entire 123 MW of capacity. The Commission did not want to establish a precedent at that time for letting qualifying facilities "stack" numerous negotiated and standard offer contracts to

---

[5] See, e.g., Docket No. 931190-EQ, Order No. PSC-94-0197-DS-EQ (Feb. 16, 1994). (Polk Power Partners); Docket No. 940819-EQ, Order No. PSC-94-1306-FOF-EQ (Oct. 24, 1994) (Auburndale Power Partners).

be serviced from a single plant. Panda simply desires sufficient flexibility in plant design and generator selection to assure that it can, as promised, deliver 74.9 MW of Committed Capacity and energy in compliance with environmental requirements and under varying conditions throughout the term of the Contract. Further, the Commission has more recently allowed "stacking" in some circumstances. Id.

D. PANDA HAS SOUND AND COMPELLING ENGINEERING AND ENVIRONMENTAL COMPLIANCE REASONS FOR ITS SELECTION OF COMBUSTION TURBINE GENERATORS AND PLANT CONFIGURATION.

Panda's March 14, 1994, Motion for Declaratory Statement and Other Relief presents in detail the considerations that led Panda to alter its initial selection of generators and plant configuration. See Motion, pp. 18-22, and accompanying Affidavit of J. Brian Dietz, P.E. Without repeating that explanation here, Panda emphasizes that: (a) environmental emission compliance standards have become significantly more stringent since Panda's initial planning; (b) a facility that could reliably deliver 74.9 MW of Committed Capacity and energy at the point of delivery throughout the Contract term and under varying conditions must have nominal output substantially above 75 MW at the plant; (c) Panda undertook a rigorous comparative analysis of available generators before concluding that it should alter the configuration initially planned; and (d) Panda reasonably concluded from its analysis that, of the available generators, only the GE Frame 7EA or ABB11N1 combustion turbines would assure Panda that it could perform its Contract obligations to deliver Committed Capacity and energy under all weather conditions, with projected degradation, parasitic loads, and losses, and in compliance with environmental requirements.

E. FPC'S OTHER CONTRACTUAL ARGUMENTS ARE IRRELEVANT OR UNPERSUASIVE.

FPC appears reluctant to recognize the basic physical fact, well known to both FPC and the Commission, that an electric power plant must utilize generators and a design configuration with a nominal output at the plant substantially higher than the committed or firm capacity and energy agreed to be delivered into another system over a lengthy period. This presumably explains FPC's efforts to scour its contract form for provisions that might accommodate Panda's undeniable need to construct and operate a facility that can generate power in excess of Committed Capacity. The meager fruits of this exertion demonstrate how ill-conceived it is.

FPC identifies only two specific provisions for this purpose, but neither bears on the relation of plant size to Committed Capacity. The first is § 7.2, from which FPC extracts the misleadingly incomplete phrase that Panda may "decrease the initial Committed Capacity by no more than ten percent" (Answer ¶ 25). In fact, that section provides more fully that, during the first year following the In-Service Date, but not thereafter, Panda may "on one occasion only, increase or decrease the initial Committed Capacity by no more than ten percent" by written notice to FPC. A one-time option for a cogenerator, exercisable only during the first year of operations, to increase or decrease its committed capacity by up to 10% is plainly intended to adjust for modest differences between design and operational characteristics of the plant. It is not intended to create for the cogenerator's benefit a practical "operating buffer," to use FPC's phrase, throughout a multi-decade agreement for parasitic loads, transformer loss, heat rate degradation, and the like. Further, Panda has never indicated an intention to invoke this option, and, as Mr. Dietz's affidavit explains, decreasing Panda's Committed Capacity by 10% at the beginning of the delivery period is demonstrably inadequate in view of the necessary

excess of nominal output at the plant over Committed Capacity at the Point of Delivery under changing conditions. FPC also fails to mention the payment penalty that exercising this option would entail.

FPC next tries to twist Schedule 2 to Appendix C to carry similar effect (Answer ¶ 26). That Schedule specifies certain characteristics of the stipulated avoided unit, which then are used in calculating avoided costs. One characteristic is that the avoided unit would have had a minimum on-peak capacity factor of 90%. Contrary to FPC's contention, this 90% factor is not intended or adequate to meet all engineering and technological constraints of power production. Rather, the variance permitted by this specification is intended to allow for forced and planned outages resulting from such events as mechanical failure and periodic equipment maintenance, not to entitle the cogenerator to deliver, at its convenience, less Committed Capacity than the Contract specifies. Similarly, FPC's attempt to downplay the testing procedures and frequency may confuse the issue but do not alter Panda's unqualified obligation under the Contract to demonstrate, upon FPC's demand, that it can deliver its full Committed Capacity under adverse conditions, such as in hot summer weather and shortly before a major equipment overhaul.

F. THE COMMISSION SHOULD NOT REVISIT THE QUESTION WHETHER THE CONTRACT WAS ORIGINALLY "AVAILABLE" TO PANDA.

Nearly four years after selecting and executing Panda's Contract and soliciting the Commission's approval to refuse all competing offers, and almost three years after obtaining that approval, FPC now asks the Commission to rule that the Contract is no longer "available" to Panda. This request violates the language of the Contract and invites the Commission to decide

again a matter that was fully presented to, and decided by, the Commission in 1992. It should be rejected for both reasons.[6]

The Contract confers no right on FPC to refuse to perform its duties or to disavow or terminate the Contract, years after its inception, on the grounds that it has somehow become no longer "available" to Panda. The concept and terminology of "availability" is used only in Article II of the Contract. The purpose of Article II was to establish grounds on which FPC might have refused Panda's offer and declined to enter into the Contract. It provides that the Contract's "availability . . . is subject to" three conditions: (1) the capacity limitations of the avoided unit specified in Appendix C, Schedule 1, namely 80 MW; (2) the facility's being a solid waste facility or having committed capacity (not output) less than 75 MW; and (3) the facility's being located south of FPC's central Florida substation, unless other conditions not pertinent here were met. Thus, Article II's function was to specify conditions precedent that FPC might have invoked in 1991 to refuse a standard offer contract, especially because FPC was obligated to accept all such offers from qualifying facilities unless it obtained the Commission's approval to refuse them.

FPC's contention in 1995 that the Contract was not available to Panda in 1991 is both untimely and contrary to the purpose of Article II. FPC's request that the Commission now declare the Contract no longer "available" to Panda, almost four years after its execution, would unilaterally alter and effectively terminate the Contract, thus establishing a precedent allowing the utility to halt a transaction at any stage by contending that it might not have agreed to it years before.

---

[6] Permitting FPC to relitigate this question now, in a manner that could strip Panda of its established rights under the Contract, would also violate Panda's rights under federal law. See Part VI below.

FPC had ample opportunity to satisfy itself in 1991, and in fact concluded, that the Contract was available to Panda. In seeking and obtaining the Commission's 1992 order authorizing FPC to enter into the Panda Contract to the exclusion of all other offers, FPC held out publicly that the Contract was available to Panda. The equipment then and now planned for use are no different in being capable of producing output exceeding 75 MW at the plant. FPC should not now be heard to question, years after the appropriate juncture, its earlier determination or its representation to the Commission. The settled legal principles of the finality of unappealed administrative orders, res judicata, and equitable estoppel all bar FPC from seeking at this late stage to retract the position that it took before the Commission in obtaining the 1992 order and from asking the Commission now in effect to re-examine and reverse that order.[7]

G. PANDA'S ABILITY TO DELIVER FIRM CAPACITY OF 74.9 MW AND ENERGY OF AT LEAST THAT AMOUNT WILL BENEFIT FPC'S RATEPAYERS.

Important public policies that the Commission is charged with implementing also weigh strongly in favor of Panda's plans to operate a facility with nominal output exceeding 74.9 MW at the plant. As shown above, Panda's choice of equipment configuration assures both parties that the facility will reliably deliver the full Committed Capacity throughout the lengthy term of the Contract, under all weather conditions, net of parasitic loads and line losses, and at all

---

[7] *Peoples Gas System v. Mason*, 187 So. 2d 335 (Fla. 1966); *United Contractors, Inc. v. United Constr. Corp.*, 187 So. 2d 695, 701 (Fla. 2d DCA 1966)("[W]here a person has, with knowledge of the facts, acted or conducted himself in a particular manner . . . he cannot afterward assume a position inconsistent with such act or conduct to the prejudice of another who has acted in reliance on such conduct."); *Brown v. Department of Professional Regulation, Bd. of Psychological Examiners*, 602 So. 2d 1337, 1341 (Fla. 1st DCA 1992) ("The doctrine of collateral estoppel bars a party from litigating in a second action issues that were adjudicated in a prior litigation . . . [and] is applicable to administrative orders and decisions.")

stages of the plant's maintenance cycle. The combustion turbine generator chosen was selected because, of those commercially available, it is the most optimal plant enabling Panda to meet both its contractual obligations and more stringent environmental requirements.[8] FPC and its ratepayers will not be required to pay anything more for the facility's capacity in excess of 74.9 MW. Consequently, FPC's system and its ratepayers will have the benefit of up to approximately 40 MW of capacity without additional cost. The availability of this capacity enhances long-term system reliability, and any purchases by FPC of energy in excess of 74.9 MW will be at as-available energy rates only, free from fixed capacity costs. FPC's ratepayers will receive the dual benefits of more reliable service and lower total energy prices. The Commission should encourage this result.

Thus, FPC's contention that Panda "wants to force [FPC] to take, and pay for, all of the power produced by this much larger facility" (Answer ¶ 27) is grossly misleading. As FPC is no doubt well aware, Commission rule 17-25.0825 obligates FPC to purchase energy from Panda at as-available rates, as a matter of law.[9] Under Sections 6.1 and 7.1 of the Contract, FPC's obligation to accept and pay for Committed Capacity is strictly limited to 74.9 MW, regardless of the amount of energy generated or purchased. Section 6.1 and Article VIII obligate FPC to accept, purchase, and pay for the electric energy that Panda delivers at the Point of Delivery. Under Article VIII and rule 17-25.0825, FPC is obligated to pay for energy

---

[8] Chief among these was the reduction from 25 parts per million to 15 parts per million of nitrogen oxides emissions as the best available control technology.

[9] Rule 17-25.0825 implements FERC regulations obligating utilities to purchase all energy delivered by QF's. See 18 CFR §§292.303(a) & 292.304(d).

delivered from plant capacity greater than 74.9 MW at as-available prices in accordance with its approved tariff.

IV. THE CONTRACT OBLIGATES PANDA TO FURNISH, AND FPC TO PAY FOR, FIRM CAPACITY FOR THIRTY YEARS.

The Contract that Panda and FPC executed four years ago embodies an agreement for Panda to deliver, and FPC to pay for, firm capacity over a period of 30 years. Panda and FPC reached this agreement by a process of offer and acceptance of FPC's standard offer contract in which (a) Panda offered to provide firm capacity for a 30-year period and (b) FPC accepted Panda's offer and assumed the corresponding obligation to compensate Panda for 30 years' provision of firm capacity.

In its Answer, FPC spares no effort to evade these unavoidable facts. FPC first endeavors to deny them ("there is no documentation for this agreement," Answer ¶ 41), then attempts to obscure them ("FPC did not evaluate the filled-in-the-blank 'term' of Panda's Standard Offer Contract as a pricing issue," Answer ¶ 37),[10] and, finally, tries to wipe them out entirely ("FPC ... *could not* agree to make capacity payments for 30 years," Answer ¶ 38 [title]). FPC even makes the ludicrous suggestion that it thought Panda was perfectly willing to provide ten years of valuable capacity to FPC for free (Answer ¶ 37). Despite these efforts, FPC must face the facts that it accepted the benefit of Panda's offer to provide 30 years of firm capacity and must compensate Panda for that capacity in accordance with the Contract under the value of deferral method.

[10] This suggests that FPC believes it was free to ignore the very contract provisions that its approved form invited offerors to complete.

A. PANDA OFFERED, AND FPC ACCEPTED, A CONTRACT REQUIRING THE DELIVERY OF, AND PAYMENT FOR, FIRM CAPACITY FOR 30 YEARS.

In paragraphs 38 through 42 of its Answer, FPC claims that it never agreed to make 30 years of capacity payments to Panda. In support, FPC lamely asserts that this is so because Mr. Killian made a mistake, because the agreement was not documented, and because Panda at some point asked for documentation (Answer ¶¶ 39-41). Panda will demonstrate that the plain language of the Panda Contract designates a 30-year term for Panda to provide, and FPC to pay for, firm capacity and thus suffices by itself to rebut FPC's dubious factual claims.

One need only *read* the Standard Offer Contract, a document that FPC drafted unilaterally, to see that it openly invited Panda to designate the contract Term as well as the duration of its obligation to make deliver, and for FPC to pay for, Committed Capacity. Turning to the technical language of the Contract, the word "Term" is defined in section 1.37 as "the duration of this Agreement as specified in Article IV hereof." Section 4.1, in turn, states that the Term shall *begin* on the Execution Date[11] "and shall *expire* at 24:00 hours on the last day of (month, year), ..." The parenthetical containing the words "month, year" plainly serves to leave open and thus invite the cogenerator to define and delineate the Contract's Term. Panda responded to this invitation. Panda filled in this blank in Section 4.1 with a date thirty

[11] The Contract defines "Term" as the period running from the Execution Date to the expiration date. The Term of the Contract, then, is slightly over 33 years (November 25, 1991 to March 31, 2025). The last 30 years of the Term, from the In-Service Date to the expiration date, is the period during which the qualifying facility is in operation. For simplicity and to avoid confusion, in this memorandum Panda refers to the Contract as having a 30-year term.

years after the Contract In-Service Date and executed the completed Contract on October 4, 1991.[12]

In so doing, Panda made an offer to make available the Committed Capacity during this 30-year period. This obligation is embodied in ¶ 7.1 of the Contract, which states that "[t]he Committed Capacity shall be made available at the point of Delivery from the Contract In-Service Date through the remaining Term of this Agreement." In taking this obligation upon itself, Panda bargained for a corresponding obligation on the part of FPC to pay for this capacity. That obligation is set forth in ¶ 8.5, which states that "[t]he QF will be eligible for a capacity payment in any month that the Total Capacity Factor exceeds the Minimum Total Capacity Factor." FPC accepted Panda's offer fifty-two days later, on November 25, 1991, by having its officer affix his signature to the contract document that had been filled in and executed by Panda.

In its Answer, FPC tries to trivialize the fact that, at FPC's invitation, Panda completed a blank term in the Contract (Answer ¶¶ 30, 37), and even goes so far as to suggest (¶ 37) that the filled-in space does not constitute a contract term. Both the Commission and FPC are well aware that the procedure Panda utilized is entirely in accord with the quintessential "off-the-shelf" nature of standard offer contracts. The Commission explicitly recognized in its 1994 *Auburndale* decision that:

> As the name implies, a standard offer contract is just that, an "off-the-shelf" offering that has certain blank terms to be filled in when a particular QF executes the contract. Those terms include the name of the QF, the location of the facility, the size of the facility,

---

[12] Panda and FPC entered into a letter agreement dated April 29, 1993, which extended the in-service date to January 1, 1997. This was confirmed in the April 12, 1995 Clarification Agreement. This has the effect of extending the expiration date as well, to preserve the 30-year period for delivery of capacity and energy.

> *the term of the contract*, the committed capacity, the in-service date, and the capacity payment option. *Once the blanks are filled in and the standard offer is signed, those terms are not subject to negotiation or modification unless the contracts specifically provide for the modification.*[13]

Contrary to FPC's argument, the Commission plainly intended that the filled-in expiration date would be a binding contractual provision. Once FPC accepted Panda's offer and entered into the Contract, it became bound by the entire agreement, including the stipulated Term. FPC's attempt to imply otherwise is simply wrong and reveals its real desire to terminate the Contract.

B. EVIDENCE EXTRINSIC TO THE CONTRACT ALSO SHOWS THAT BOTH PANDA AND FPC INTENDED TO REACH AN AGREEMENT REQUIRING DELIVERY OF, AND PAYMENT FOR, FIRM CAPACITY FOR 30 YEARS.

Panda will demonstrate in this proceeding that both Panda and FPC *intended to* enter into an agreement requiring the provision of firm capacity and the compensation for that capacity for a period of thirty years. As FPC should be prepared to stipulate: (a) during its bid evaluation procedure, FPC consistently described the Panda proposal and one other project proposal as having 30-year terms, but described the other five projects as proposing 20-year terms; (b) in its presentation of the Panda Contract and the other projects to the Commission in Docket No. 91-1142-EQ, FPC described the Panda Contract as having a 30-year term; and (c) in its presentation to the Commission FPC made absolutely no objection or comment concerning the 30-year term. The only reasonable and consistent explanation for this course of conduct is that, at the time of contracting, FPC understood two things: that its agreement with Panda was for

---

[13]*In re: Joint Petition for Approval of Standard Offer Contracts of Florida Power Corporation and Auburndale Power Partners, L.P.*, Docket No. 940819-EQ, Order No. PSC-94-1306-FOF-EQ, 94 FPSC 10:375, page 3, issued October 24, 1994 [emph. supplied].

a thirty-year term, *and* that the agreement contemplated that FPC would compensate Panda for its provision of firm capacity over a period of 30 years.

FPC's newly-hatched theory -- that it "did not evaluate the filled-in-the-blank term of [the Panda Contract] as a pricing issue," and instead thought that "Florida Power would pay only the 'as-available' energy rate in years 21-30" (Answer ¶ 37) -- is not only implausible on its face, but is also forcefully belied by FPC's own actions and communications. FPC is far too experienced and knowledgeable in the electric utility business to have seriously expected to receive ten years of 74.9 MW of capacity for free from any power producer. The evidence will show, to the contrary, that in its evaluation documents (a) FPC never mentioned that it expected to receive free capacity for ten years from the two 30-year projects, and (b) FPC never assigned any significance to this alleged phenomenon, either positively as representing a bargain for its ratepayers, or negatively because the offer would be non-financeable as "too good to be true." Were the Commission to adopt FPC's fanciful theory that the Contract Term does not govern the length of Committed Capacity payments (see ¶ 37), a utility could demand delivery of energy indefinitely, while continuing to defer its avoided unit but without paying the cogenerator for the fixed costs of generating the energy.

In summary, if FPC genuinely believed that the Panda Contract had a 20-year term and required only 20 years of capacity payments, FPC would not have acted as it did. Rather, it would have described the Panda Contract as having a 20-year term in its evaluation documents, in presenting the Panda Contract to the Commission, and in seeking approval to refuse all other offers. If, on the other hand, FPC genuinely believed that the Term was for 30 years, but that capacity payments would cease after year "20", then FPC would have addressed this noteworthy arrangement in the evaluation process and brought it to the Commission's attention as an

exceptional benefit to the utility and its ratepayers. That FPC adopted *neither* of these approaches confirms that its recent construction of the Panda Contract strays far afield from both parties' original understanding and intent. Throughout its course of dealings with Panda since 1991, FPC never seriously suggested that FPC believed it would make no capacity payments for years 21 to 30. This remarkable contention was first advanced, to Panda's alarm, in FPC's January 25, 1995 Petition.

C. THE CONTRACT DOES NOT OBLIGATE PANDA TO PROVIDE CAPACITY AT NO COST TO FPC FOR TEN YEARS.

FPC argues that the avoided cost capacity payment schedules appended to the Panda Contract (Appendix C, Schedules 2 and 3) dictate that the utility's obligation to make capacity payments terminates at the end of 20 years (Answer ¶ 29). FPC further asserts, for the first time since it signed the Contract in 1991, that the Commission's rules preclude capacity payments after 20 years (Answer ¶¶ 31-33). These contentions, which would have the effect of involuntarily conscripting Panda into providing ten years of valuable firm capacity for free, are flatly wrong.

As noted above, the Contract itself at section 1.37 states unambiguously that the Term is "the duration of this Agreement *as specified in Article IV hereof*" (emph. supplied). Nowhere does the Contract state that the Term is to be defined by reference to any of the Appendices or Schedules. Furthermore, Schedules 2 and 3 bear all of the hallmarks of illustrative charts, not definitive payment timetables negating Panda's right to receive capacity payments beyond the year "2016." It is also difficult to conceive of any purpose for the "NOTE" that appears at the bottom of pages 1 through 4 of Schedule 3 other than to indicate that the "formulas set forth in FPSC Rule 25-17.0832(5)" should and must be employed in order

to conform the payment schedules to the Contract Term.[14] While FPC's Answer claims that the utility intended the calculations shown on Schedule 3 to be exhaustive rather than illustrative, FPC can not point to anything on these charts or in the Contract itself to confirm this self-serving point of view (Answer ¶ 33). Absent such evidence, one wonders how FPC's privately-held viewpoint would ever have become known to Panda, as indeed it did not until early 1995, after FPC decided to try to avoid the Contract.

Moreover, nowhere in its Answer does FPC cite any authority for the proposition that the aforementioned schedules override the remaining provisions of the Contract. This is a hurdle that FPC simply can not scale. Assuming without conceding that there is an ambiguity in the Contract, under Florida law ambiguities are construed against the drafter of the instrument, which in this case is FPC. Furthermore, where written-in and pre-printed provisions conflict, Florida law holds that the written-in terms ordinarily prevail.[15] FPC's entire argument founders against these very basic rules of contract interpretation.

D. THE COMMISSION APPROVED THE CONTRACT IN A FINAL AND NONAPPEALABLE ORDER AND IN SO DOING IMPLICITLY WAIVED THE APPLICATION OF RULE 25-17.0832(3)(e)6.

FPC's claim that the 30-year capacity payment obligation violates Commission rule 25-17.0832(3)(e)6 fails for another reason as well. Even assuming the rule has the effect FPC

---

[14] Panda will prove, if FPC does not stipulate, that the value of deferral methodology set forth in FPSC Rule 25-17.0832(5) can be applied to calculate the appropriate capacity payments for the entire Contract Term, and that this is the only manner of preserving the parties' original bargain, and its benefits for both, throughout the 30-year Term. This issue is addressed in Part IV.F. of this Memorandum.

[15] *See Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432, 434 (Fla. 1980)(interpretation of ambiguities and written-in provisions); *MacIntyre v. Green's Pool Serv., Inc.*, 347 So. 2d 1081 (Fla. 3d DCA 1977)(written-in provisions prevail).

suggests, the rule's application to Panda was waived when the Contract was approved without modification in Order No. PSC-92-1202-FOF-EQ.

As stated above, FPC submitted the Contract to the Commission in Docket No. 91-1142-EQ together with a number of documents describing the Contract as having a term of 30 years. Nowhere in those materials did FPC make any objection or comment regarding that term. FPC did not propose a reduction of the stipulated Term from 30 to 20 years, either to Panda or the Commission. Rather, FPC unequivocally praised the Panda Contract as having the "highest likelihood of success" and being "in the best interest of its ratepayers." *Post-Hearing Brief of Florida Power Corporation*, at 9. With these materials before it, the Commission approved the Panda Contract without modification. Order No. PSC-92-1202-FOF-EQ.

Commission Rule 25-17.0832(e)6 relating to the maximum term of standard offer contracts was also in effect at this time. Despite the existence of this Rule, FPC supported and the Commission approved a contract containing a Term of 30 years, which obligates Panda to provide capacity for 30 years, and which obligates FPC to pay for that capacity for 30 years. This suggests that the Commission either decided that Rule 25-17.0832(e)6 had no application to the facts and circumstances before it, or implicitly waived the application of this rule under its general authority to grant deviations for cause under rule 25-6.002.[16]

No party sought rehearing or reconsideration of the Commission's order or took a judicial appeal. The time for seeking any such relief has long since passed. FPC may not now question

---

[16] The cited rule, FAC 25-6.002, is designed to furnish the Commission with a desirable degree of flexibility in administering its regulations, and deciding their application in individual case proceedings.

that order, especially by asserting a position contrary to the position that it took in seeking the order.

Once having approved the Contract in an order that has become final and nonappealable, the Commission is precluded under Florida law from revisiting that approval, absent "extraordinary circumstances," by the doctrine of administrative finality.[17] This doctrine reflects the Florida Supreme Court's recognition that:

> there must be a terminal point in every proceeding, both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein.[18]

Indeed, for the Commission to modify its order approving the Contract, it must make a

> specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order [approving the Contract].[19]

FPC has proffered absolutely no evidence to show that the Commission's approval of the Contract was the result of the type of egregious error present in the cited cases or other "extraordinary circumstances" that would justify the Commission's withdrawal or modification of its 1992 order approving the Contract. The only "extraordinary circumstance" involved here is FPC's overweening desire to abolish Panda's 30-year Contract, which it presented to the

---

[17] *Richter v. Florida Power Corp.*, 366 So. 2d 798, 800 2nd DCA Fla. Dist. Ct. App. *See also Austin Tupler Trucking v. Hawkins*, 377 So. 2d 679 (Fla. 1979); *Peoples Gas Sys.*, 187 So. 2d at 335.

[18] *Austin Tupler*, 377 So. 2d. at 681. *See also Richter*, 366 So. 2d at 799-800.

[19] *Peoples Gas*, 187 So. 2d at 339. *See Reedy Creek Utilities Co. v. Florida Publ. Serv. Comm'n.*, 418 So. 2d 249, 253 (Fla. 1982) (modification permitted where computational error in rate determination lead to higher rates to public); *Richter*, 366 So. 2d at 801 (modification permitted where approved rates contained charges "identifiably resulting from unreasonable computation or exclusions.")

Commission in Docket No. 911142-EQ, and replace it unilaterally with a new 20-year version more to FPC's liking and benefit but to which Panda never agreed. Given that the Commission approved the Contract without modification in 1992, it is well settled under Florida law that the Commission may not grant FPC the relief it now seeks, years after that docket was closed. Indeed, in its order approving FPC's standard offer contract, the Commission stated that "at some point the Commission loses the power to change its decisions and must live with them."[20]

E. FPC IS BARRED FROM CLAIMING THAT ITS PAYMENT OBLIGATIONS UNDER THE CONTRACT TERMINATE AFTER 20 YEARS.

1. FPC Long Ago Waived its Right to Claim that the Panda Contract Violates the Contract or the Commission's Rules.

The Commission's rules are crystal clear in laying down the procedural avenues open to a utility that has received a signed standard offer contract from a qualifying facility. Rule 25-17.0832(3)(d) states that

> [w]ithin 60 days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal.

If FPC genuinely thought that Panda's manner of filling in the blank in section 4.2 was in violation of the Standard Offer Contract or the Commission's rules, then FPC should not have "accepted and signed the contract" and certainly should not have submitted the Contract for Commission approval. Rather, FPC should have elected the other option provided to it under the Commission rules, by filing a petition to reject the Contract within the requisite 60 days.[21]

---

[20] *In Re: Planning Hearings on Load Forecasts, etc.* Docket No. 910004-EU, Order No. 24989, Page 71, issued August 29, 1991, 91 FPSC 8:560.

[21] This was precisely the course taken by the utility in the Polsky Energy Corporation case, which involved a contention that the cogenerator improperly sought to make material changes to the utility's approved standard offer contract. *In re Petition Not to Accept Standard Offer*

Florida law has long recognized the concept of waiver, which the courts of this state define as the intentional relinquishment of a known right.[22] The elements of waiver are fully satisfied here. FPC obviously knew of the existence of Commission Rule 25-17.0832(3)(d) because it invoked this very rule in seeking to reject all contracts other than the Panda Contract. Similarly, the fact that Panda filled in a 30-year expiration date and sought to specify 30 years of capacity payments was, then as now, well-known to FPC. FPC nonetheless decided to request approval for, rather than petition to reject, the Panda Contract. Having elected this course, FPC is barred from making these claims in the present proceeding.

2. FPC is Equitably Estopped from Claiming that the Contract Must Be Interpreted So As to Annul FPC's Obligation to Make Capacity Payments During the Last Ten Years of the Contract Term.

Without conceding any of the foregoing arguments, Panda contends that FPC is equitably estopped from now claiming that the Contract must be interpreted so as to annul FPC's obligation to make capacity payments during the last ten years of the Contract Term. The elemental unfairness of FPC's behavior -- consisting of four uninterrupted months during 1991 and early 1992 of leading Panda down the garden path of a 30-year contract, followed by four years of acquiescence -- demands that FPC be equitably estopped from suddenly reversing its position in its January, 1995, Petition.

Contract of Polsky Energy Corporation, by Tampa Electric Company; Docket No. 940193-EQ; Order No. PSC-94-0488-FOF-EQ; 94 FPSC 4:364, issued April 25, 1994. Panda's circumstances are readily distinguishable from those at issue in Polsky. Panda merely filled in the blank space for the contract term, as it was required to do. Polsky, by contrast, changed the primary performance standard (monthly availability) in several places, to make it less rigorous, and deleted the provisions providing for completion and performance security and liquidated damages.

[22] *See, e.g., Richards v. Dodge*, 150 So. 2d 477, 481 (Fla. App. 1963); *Thomas N. Carlton Estate, Inc. v. Keller*, 52 So. 2d 131 (Fla. App. 1951).

Equitable estoppel is firmly established in Florida law.[23] Its essential elements are: (1) an assertion or conduct by a person, with knowledge of the facts; (2) reliance on this assertion or conduct by another; and (3) prejudice or detriment to the party who acted in reliance. The person who made the assertions is then estopped from maintaining a position inconsistent with his earlier position or conduct.[24] All these elements are present here.

Part III.B. of this Memorandum presents a long list of actions and communications by FPC in which FPC described the Contract as having a 30-year term. All of these communications were directly or indirectly conveyed to Panda. In fact, as Panda will demonstrate in this proceeding, a meeting took place on January 9, 1992 at which officials of FPC told representatives of Panda (a) that Panda was entitled to receive capacity payments for 30 years; (b) that the tables in Appendix C to the Contract needed to be corrected to show the payment due for the last 10 years; and (c) that the tables should be extended to escalate capacity payments over the last 10 years in the same manner as the first 20, i.e., at the rate of 5.1 percent a year. FPC first contended that the Contract was limited to 20 years in its filings in this proceeding.

Panda reasonably relied to its detriment on these communications. For example, Panda posted its $749,000 security deposit shortly after the January, 1992 meeting, in reliance on the assurances FPC gave at that meeting. Panda had no reason to believe that the foregoing communications were incorrect, or to suspect that FPC privately harbored a conflicting and

---

[23] E.g., *New York Life Ins. Co. v. Oates*, 166 So. 269 (Fla. 1930); *Yorke v. Noble*, 466 So. 2d 349, 315 (Fla. 4th DCA 1985), *dec. appv'd*, 490 So. 2d 29 (Fla. 1986) ("The doctrine of equitable estoppel is deeply ingrained in our jurisprudence, and should not be abrogated except by specific legislative mandate.")

[24] *United Contractors, Inc., supra* n.7, 187 So. 2d at 701-02.

peculiar notion that the Contract was limited to 20 years of capacity payments. On the other hand, it was perfectly reasonable for Panda to believe and act upon the representations of the utility that not only drafted the standard offer contract, but which also had obtained the Commission's approval to use the standard offer contract form in soliciting qualifying facility capacity.[25]

Because Panda relied upon FPC's communications, it is now threatened with losing its project investment and financing, to the detriment of the thousands of work-hours and millions of dollars it invested in the Kathleen project. This predicament is not of Panda's own making, as FPC has arrogantly stated, but it is a direct and proximate result of Panda's assumption that FPC's communications were reliable and intended to induce reliance. If for no other reasons, considerations of fairness and equity demand that FPC be estopped from asserting that its capacity payment obligation in the Contract runs for only 20 years.

F. THE CONTRACT SPECIFIES A REASONABLE AND APPROVED METHODOLOGY FOR CALCULATING CAPACITY PAYMENTS FOR ITS ENTIRE TERM.

Under the terms of the Contract, Panda can be properly compensated for deferring 30 years of FPC capacity by using the value of deferral methodology specified in Commission rule 25-17.0832(5). One need only take the capacity payments appearing in Appendix C, Schedule 3 and escalate the capital cost and fixed operations and maintenance expenses at 5.1% annually, and then apply the year by year deferral for ten years. FPC wants to pretend that the above method would result in a windfall to Panda. This is sheer nonsense and is certainly no

[25] *See In Re: Planning Hearings on Load Forecasts, etc.*, Docket No. 910004-EU, Order No. 24989, issued August 29, 1991, 91 FPSC 8:560.

justification for leaving Panda completely uncompensated for 10 full years of firm capacity, which is the result FPC seeks.

Contrary to FPC's hyperbolic position, the referenced tables readily can be expanded to apply to a cogeneration contract of any duration, whether the qualifying facility in question displaces utility capacity for 10, 20, or, as in Panda's case, 30 years. Pursuant to the April 29, 1993 letter agreement, Panda's capacity payments are to be computed under the "value of deferral" method. This method, which is defined and delineated in sections 25-17.0832(3)(g)1. and 25-17.0832(5) of the Commission's rules, is based on the concept that the owner of a qualifying facility is entitled to a capacity payment based on the avoided capital carrying costs of the displaced utility facility, adjusted for inflation, during each year of the qualifying facility's contract term. The method assumes that the avoided unit would continue in service for a period of "L" years, and that its capital carrying costs would grow every year in accordance with an assumed rate of inflation.

Because the Kathleen project will produce capacity for 30 years, 10 years beyond the economic life of FPC's avoided unit, some procedure must be adopted to compensate Panda for providing the additional ten years of capacity. The only accurate method for doing so is to assume that, at the end of "L" years the avoided unit is replaced with an identical new unit at a cost equal to the original cost of the first unit, escalated for the period L at the assumed inflation rate. Consistent with this assumption, the 5.1% growth rate appearing in Schedule 2 should be applied to escalate the illustrative capacity payments shown on Appendix C, Schedule 3 for an additional ten years, as if the Kathleen project were displacing one and one-half avoided units. This is precisely what the value of deferral method and the Panda Contract require. This

is the only method that will compensate Panda for the last 10 years of Committed Capacity as the same effective rate as the first 20 years.

FPC mounts a two-pronged attack on this Commission approved method.[26] First, FPC incorrectly argues that the method creates a "patent windfall," using some illusory accounting scare tactics in the process. However, Panda certainly is entitled to roughly 50% more than the illustrative Schedule 2 capacity payments because it will build, as FPC well knew, a facility with a 30-year life, thus deferring utility capacity investment for 10 additional years, or 150% of the anticipated plant life of the avoided unit. Further, FPC's argument that the annual depreciation-related revenue requirement differences between a 20-year and 30-year avoided unit would create huge disparities in the annual capital carrying cost recoveries as between two such units is simply false. To begin with, FPC has no basis whatsoever for its self-serving assumption, which is contrary to common sense, that an investment in a 30-year avoided unit would cost about the same as one with a 20-year life. Panda will demonstrate, in any event, that even assuming there is some difference in depreciation expense, the resulting disparity in the annual value of deferral would be vanishingly small.

FPC's second claim, that at the end of 20 years it would have been free to choose among improved technologies, is mere speculation. In any event, "newer, more advanced technologies" are at least as likely to entail higher, not lower, capital costs, as are new environmental requirements. Moreover, the rate of inflation, as well as interest rates, moves up or down, and the composite effect of all of these variables on the value of deferring capacity in any particular

---

[26] The Commission approved the value of deferral method in Docket No. 891-049-EU, Order No. 23623 (Oct. 16, 1990) (In re: Proposed Revisions to Rules). The parties' April, 1995, Clarification Agreement confirms that capacity payments will be based on this method (¶ 3).

year is unknown. Although the cost of a replacement unit in the twenty-first year can not be precisely forecast, it certainly is far above zero -- which is the amount that FPC proposes to pay Panda for Committed Capacity during years 21 through 30.

In sum, notwithstanding FPC's arguments to the contrary, this procedure adheres strictly to the Commission's rules, the value of deferral method, and the Contract. It would not generate a "windfall" to Panda. Rather, it would fairly compensate Panda for providing the Committed Capacity for 30 years, and it would do so without creating any need to modify, or deviate in any manner from, the four corners of the Contract.

V. THE COMMISSION SHOULD EXTEND THE CONTRACT MILESTONE DATES TO RESTORE PANDA TO ITS POSITION BEFORE JANUARY 25, 1995, AND ORDER FPC TO HONOR THE CONTRACT AS EXTENDED.

Despite the obstacles to performance that FPC has created, Panda has not wavered from its original goal of proceeding to construct and operate the facility as proposed and to deliver firm capacity and energy to FPC reliably throughout the full thirty-year delivery period. Confirming Panda's Contract rights and requiring FPC to honor the Contract, to allow Panda to proceed with performance free of further interference and delay, and to accept and pay for committed capacity and delivered energy for thirty years is the only affirmative relief that Panda seeks from the Commission. Although it will not compensate Panda for the inconvenience, substantial expense, and delay caused by FPC, Panda in this proceeding asks only that the Commission restore Panda to its position before January 25, 1995, when the FPC Petition brought the transaction to a sudden and complete stop at a crucial juncture.

As a practical matter, because the Contract specifies milestone dates with which Panda must comply for construction of the facility and the commencement of its operations, these dates must be extended after this proceeding (and any appeal) is completed. In short, Panda simply

asks that it be given commercially reasonable periods of time to order and purchase plant equipment, obtain financing, complete its negotiations for supply and other contracts, construct the facility, and bring it on-line, all before the thirty-year delivery and payment period begins, just as the Contract originally provided. Without such relief, once Panda persuades the Commission on the merits of the Contract interpretation issues discussed above, Panda would be exonerated in theory but faced for practical purposes with a Contract containing dates by then long past and schedules with which it could no longer possibly comply. For similar reasons, the Commission should rule that the price for Committed Capacity is to be calculated based on the calendar year during which such capacity is first delivered, so that Panda receives its agreed benefit provided in the Contract of inflation adjustments in the deferral formula, and that FPC may not seize Panda's $749,000 security deposit.

A. FPC FILED ITS PETITION KNOWING THAT PANDA WAS ON THE VERGE OF COMPLETING CRUCIAL STEPS TO FINANCE AND CONSTRUCT THE FACILITY AND THAT THE PETITION WOULD FORCE PANDA TO POSTPONE THESE STEPS INDEFINITELY.

Whether or not deliberately, FPC's Petition may have created the impression that it was filed simply because the parties had come to express differing views of the proper interpretation of certain Contract terms and FPC now desired to obtain some helpful clarification from the Commission. FPC's Answer goes so far as to allege explicitly (¶ 3) that Panda's Motion seeking a declaratory statement to the opposite effect reflects a "predicament" that "results from Panda's own failure to move its proposed project forward, coupled with its own decision less than a year ago" to alter the plant's configuration. These suggestions give a one-sided and distorted picture of the facts. Absent a stipulation by FPC, Panda is prepared to show (a) that it had been performing its Contract duties in a timely and satisfactory manner; (b) that FPC had

not asserted any breach of the Contract; (c) that the only extension of the pre-construction schedule had been agreed upon and memorialized in early 1993; and (d) that FPC was aware when it filed its Petition on January 25, 1995 that (i) Panda was then about to complete a number of crucial and time-sensitive steps toward completing financing and commencing construction, and (ii) FPC's Petition would jeopardize the entire future of the project and force Panda to postpone these steps until it obtains Commission orders or other legal relief requiring FPC to proceed with the Contract on a new schedule. The delay in this transaction has been deliberately caused by FPC and has predictably inflicted significant costs and risks on Panda.

FPC is thoroughly familiar with any cogenerator's need to enter into numerous complex, long-term agreements to proceed with construction and operation of an electric generating facility that also serves an independent commercial or industrial purpose, in Panda's case producing high-quality distilled water from condensate. FPC is also well aware of the long lead times and the commitments of substantial managerial and financial resources that are required to identify and negotiate with appropriate contracting parties, to develop definitive agreements, and to implement those agreements. For example, FPC has known that, like cogeneration facilities generally, the Panda facility would be project-financed, that is, that Panda as developer would need to borrow funds on a non-recourse basis through a construction loan and a long-term or permanent loan, and that Panda was proceeding toward closing its financing in preparation for commencing construction in or about March, 1995. Since the Contract's inception, Panda has regularly informed FPC of steps that it was taking and had completed in obtaining permits, negotiating contracts, ordering equipment, and the like through quarterly reports and many other communications.

Through these communications, FPC was aware that, during the second half of 1994 and continuing into 1995, Panda was, among other steps: (a) nearing closing an advantageous multi-million dollar bank loan necessary to finance construction of the facility; (b) placing its order for the chosen combustion turbine generator and other vital equipment, which are in limited supply and will be committed by the manufacturer only on long delivery schedules; (c) completing negotiations for supply of natural gas fuel for the plant for the 30 year period with Associated Natural Gas Company of Houston, Texas; and (d) completing negotiations with the City of Lakeland to provide to Lakeland economic benefits of the facility and to obtain from Lakeland necessary gas transportation capacity (as part of the greater capacity that Lakeland has under contract with Florida Gas Transportation Company), as well as certain credit enhancements to support Panda's purchase of gas supplies. As FPC had ample reason to expect, FPC's filing of its Petition on January 25, 1995, made it commercially impossible for Panda to proceed with these contracts and transactions, all of which had to be suspended indefinitely.

The delay caused by FPC has also placed in jeopardy Panda's $749,000 deposit under the Contract. FPC has informed Panda that FPC will consider returning the deposit if Panda does not prevail in this proceeding. Panda is challenging these and other actions of FPC, which have disrupted Panda's advantageous business relationships with third parties, in the federal court litigation.[27] For the present purposes of this proceeding, Panda notes only that FPC's course of conduct both reveals its true motive for the January 25, 1995, Petition and demonstrates why the milestone dates in the Contract need to be extended for commercially

[27] For example, Panda's federal complaint alleges that FPC persuaded the City of Lakeland to break off negotiations with Panda and instead contract to sell the same transportation capacity to FPC.

adequate periods once the Commission directs FPC to proceed with the Contract on the terms explained above.

B. THE COMMISSION'S AUTHORITY TO REGULATE ELECTRIC UTILITIES AND TO REQUIRE THEIR COMPLIANCE WITH LAW, ORDERS, AND APPROVED TARIFFS AND AGREEMENTS JUSTIFIES EXTENDING THE CONTRACT MILESTONE DATES.

Panda respectfully submits that, once the Commission concludes that the Contract allows Panda to construct a facility with nominal output in excess of 75 MW at the plant and requires FPC to accept and pay for Committed Capacity and energy for thirty years, extending the milestone dates will be not only an appropriate remedy but also the minimum of effective relief that the Commission can require on Panda's behalf. Under Florida contract law, a party to a contract has a duty not to delay, hinder, or obstruct another party's performance and is liable for violating this duty even in the absence of an express provision in the agreement to this effect.[28] As FPC's actions, including filing the Petition, have prevented Panda from continuing to perform in a timely manner, and Panda desires to continue and complete the full Contract Term, FPC should be ordered to accept and honor extended milestone dates. Otherwise Panda will be left with a hollow victory, while FPC will have "lost" on the merits but nevertheless succeeded in scuttling the Contract by delay and obstruction. Florida law does not permit a contracting party to escape its own obligations or avail itself of a limitation on liability by willful delay.[29]

---

[28] E.g., *Champagne-Webber, Inc. v. City of Ft. Lauderdale*, 519 So. 2d 696, 697-98 (Fla. 4th DCA 1988); *Gulf American Land Corp. v. Wain*, 166 So. 2d 763, 764 (Fla. 3d DCA 1964).

[29] See *Metropolitan Dade County v. Worsham Bros. Co., Inc.*, 563 So. 2d 1107, 1108 & n.2 (Fla. 3dDCA 1990); *Southern Gulf Util., Inc. v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458, 459 (Fla. 2d DCA 1970).

Further, to discharge effectively its statutory duties to regulate public electric utilities, and in exercise of its plenary jurisdiction over such utilities, the Commission should use its ample authority over FPC to craft a meaningful remedy that will preserve the Contract and restore Panda to its position before January 25, 1995. The Commission's express statutory jurisdiction and powers respecting public utilities could hardly be more expansive.[30] Under both PURPA and Florida law, the Commission is specifically charged with enforcing the obligation of electric utilities to purchase electric energy offered for sale by cogenerators in accordance with guidelines and rates that the Commission sets or approves, in furtherance of public policy favoring cogeneration. The Commission's responsibility is codified in §366.051, Florida Statutes (1993), which provides in part:

> The electric utility in whose service area a cogenerator ... is located shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator .... The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators ... and may set rates at which a public utility must purchase power or energy from a cogenerator .... In fixing [such] rates ..., the commission shall authorize a rate equal to the purchasing utility's full avoided costs.

Moreover, Florida courts have recognized the Commission's inherent authority to examine contracts between regulated utilities and other parties and require that they conform to the public interest, most particularly the interests of ratepayers.[31]

---

[30] *See generally*, Sections 366.04, 366.041, and 366.05, Florida Statutes (1993).

[31] *Florida Power & Light Co. v. Beard*, 626 So. 2d 660 (Fla. 1993) (Commission acted appropriately in requiring deletion of "regulatory out" clause from standard offer contract); *Florida Power Corp. v. Public Serv. Comm'*, 487 So. 2d 1061, 1063 (Fla. 1986) (improper to order rate refund where the contract "is not unreasonable and does not adversely affect ratepayers"); *H. Miller & Sons, Inc. v. Hawkins*, 373 So. 2d 913 (Fla. 1979).

Extension by a state utility commission of milestone dates under a cogeneration standard offer contract has been judicially approved as appropriate to protect the cogenerator from delays due to litigation. Case law emphasizes that extending milestone dates for a commercially reasonable period after the conclusion of litigation between a utility and a cogenerator both adequately protects the utility, which can still require that the adjusted dates be met, and fulfills the state commission's responsibility not to permit a utility to frustrate through regulatory litigation public policies favoring cogeneration.[32] Further, FPC's contract is part of its approved tariff, and its acceptance of the Panda Contract to the exclusion of others was specifically approved by Commission order. The Commission should require FPC to adhere strictly to these legally binding obligations. The only practical means of doing so is by confirming Panda's contractual rights, extending the milestone dates appropriately and directing FPC to honor the Contract.

C. THE PURCHASE PRICE FOR COMMITTED CAPACITY SHOULD BE COMPUTED ACCORDING TO THE CALENDAR YEAR DURING WHICH DELIVERY BEGINS; PANDA'S SECURITY DEPOSIT SHOULD BE PROTECTED.

The schedule in the Contract for payments for Committed Capacity is expressed in terms of both calendar years and contract years. The first contract year's payment amount is that applicable to 1997 because it was computed on the assumption that deliveries would commence in 1997 (Appendix C, Schedule 3). As a result of the interruption in performance caused by FPC, that date is no longer possible, due to the lead times in planning, financing, ordering, and

---

[32] *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Comm.*, 579 A.2d 1337, 1348-50 (Pa. Cmwlth. 1990) *aff'd*, 634 A. 2d 207 (Pa. 1993). *cert. denied*, 115 S.Ct. 311 (1994); *West Penn Power Co. v. Pennsylvania Public Utility Comm.*, 615 A.2d 951, 959-961 (Pa. Cmwlth. 1992), *app. denied, 655 A.2d 520 (Pa. 1993), cert denied*, 115 S.Ct. 311 (1994).

construction outlined above. Capacity payments for later years are increased by 5.1% annually, to account for the estimated escalation rate in plant costs, that is, inflation (Appendix C, Schedule 2). To protect Panda from the effects of these cost increases, which it will incur because of the delay caused by FPC, capacity rates for the first of the 30 years of deliveries should be set by using the rates specified for the calendar year during which delivery begins, not the rate specified for 1997. Otherwise, Panda would have to absorb at its own expense significant cost increases for which it would have been entitled to receive compensation, had operations commenced on the schedule jointly contemplated.

Also, FPC should be ordered not to seize or claim Panda's $749,000 security deposit, in whole or in part, during the pendency of this proceeding, to continue to hold the deposit in accordance with the Contract if Panda prevails and the parties move forward with performance, and to return the deposit in its entirety promptly in the event the Commission rules in favor of FPC.

VI. THE CONDUCT OF, AND THE RELIEF GRANTED IN, THIS PROCEEDING SHOULD BE CONSISTENT WITH APPLICABLE FEDERAL LAW.

Panda respectfully urges that, in conducting this proceeding and determining the relief that should be granted, the Commission must give due weight both to Florida law and public policy considerations and to applicable federal law and policy. Panda also believes that there are important respects in which federal law may have a preemptive effect. As the Commission has acknowledged, the Public Utility Regulatory Policies Act of 1978 ("PURPA") establishes a cooperative regulatory scheme. Specifically, section 210(f) of PURPA provides that each state regulatory authority must implement the FERC's rules for each electric utility for which it has rate making authority. Thus, despite the fact that wholesale electricity rates are the exclusive

province of the FERC, PURPA carved out a limited exception to this rule by requiring the states to implement one portion of the federal regulations under PURPA.[33]

For example, section 210(c) of PURPA requires the FERC to implement regulations exempting qualifying facilities from "state laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities."[34] Under the FERC rule implementing this statutory provision, the "state law and regulation" exemption is a "broad exemption" which is intended to immunize qualifying facilities from utility-type state regulation.[35] Similarly, after a state regulatory commission has approved a power purchase contract between a qualifying facility and a utility on the grounds that the rates were consistent with avoided cost, federal law precludes the state commission from reconsidering its approval or denying the passing on of those rates to the utility's consumers, based on changed circumstances.[36]

Panda acknowledges the staff's contention that the Commission enjoys broader continuing authority over standard offer contracts than negotiated contracts because the former were implemented under a valid Florida regulatory program. Panda respectfully submits that, while this Commission has ample authority to promulgate rules pertaining to standard offer contracts,

---

[33] *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295 (1953), *Fed. Energy Regulatory Comm'n v. Miss.*, 456 U.S. 742, 759-61 (1982).

[34] 16 U.S.C. § 824a-3(e)(1).

[35] 18 C.F.R. §§ 292.602(c) (1994); *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, Order No. 679, 45 Fed. Reg. 12214 (Feb. 5. 1980); Freehold Cogeneration Associates, L.P. v. Board of Regulatory Comm'rs of the State of New Jersey*, 44 F.3d 1178, 1185 (3d Cir. 1995).

[36] *Freehold Cogeneration Assoc., L.P.*, 44 F.3d at 1194; *Smith Cogeneration Management, Inc. v. Corp. Comm.*, 863 P.2d 1227 (Okla. 1993).

the implementation of such rules should yield to federal law to the extent of any conflict between them. Panda believes that the federal PURPA preemption caselaw has not recognized state regulatory commission treatment of standard offer contracts as posing a different set of considerations or as warranting a different result.[37] Panda reserves its right to address this issue further at a later juncture in this proceeding.

VII. CONCLUSION.

Panda remains committed to performing its Contract with FPC for its full thirty-year term. FPC's January 25, 1995 Petition interrupted Panda's performance at a particularly important stage by seeking a declaratory statement that would have violated and altered Panda's rights under the Contract. For the reasons discussed in this Memorandum, Panda requests that the Commission enter an order that will restore Panda to its position prior to January 25, 1995. More specifically, the Commission should:

1. Confirm Panda's right under the Contract to construct and operate a facility capable of generating more than 75 MW of nominal output at the plant, in accordance with either of Panda's currently planned configurations;
2. Confirm Panda's rights to deliver and receive payment for, and FPC's duties to accept and pay Panda for, 74.9 MW of Committed Capacity for the full thirty-year Term following the In-Service Date, at rates calculated in accordance with the deferral of value method specified in Rule 25-17.0832(5);

---

[37] See, e.g., *Indep. Energy Producers Ass'n v. Cal. Publ Utils. Comm'n*, 36 F.3d 848 (9th Cir. 1994); *Southern California Edison Company, et al., Order on Petitions for Enforcement Action Pursuant to Section 210(h) of PURPA*, 70 FERC ¶ 61,215, *recons. granted in part and denied in part*, 71 FERC ¶ 61,269 (1995).

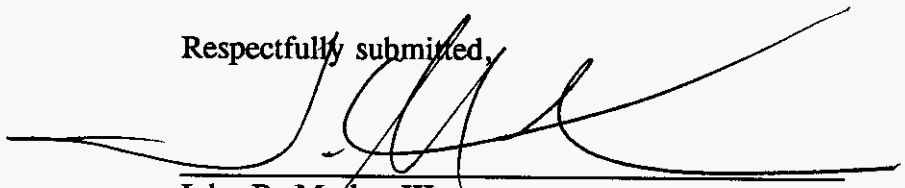
3. Order that the Contract milestone dates (including the "Contract In-Service Date" and "Construction Commencement Date") be extended for a commercially reasonable period following entry of the final non-appealable order in this proceeding (and any appeal therefrom), to allow Panda an adequate schedule to continue with Contract performance;

4. Order that payments for Committed Capacity be calculated using the rates specified for the calendar year in which actual deliveries begin, escalated thereafter at the stipulated rates; and

5. Order that Panda's security deposit be preserved intact by FPC during the pendency of this proceeding (and any appeal) and ultimately disposed of in accordance with Part V.C. above.

Because FPC has made numerous factual allegations that Panda believes are incorrect, including allegations of improper conduct and misrepresentations by Panda, Panda has found it necessary to petition for a formal evidentiary proceeding. Panda is prepared to demonstrate the actual course of events bearing on this matter. Panda believes that this proceeding can be narrowed and expedited if FPC will stipulate to the facts and resolve many of the issues identified in this Memorandum.

Respectfully submitted,



John R. Marks, III
Florida Bar No. 143026
Gary P. Timin
Florida Bar No. 439071
Paul R. Ezatoff
Florida Bar No. 300985
Katz, Kutter, Haigler, Alderman,
Marks, Bryant & Yon, P.A.
106 East College Avenue
Tallahassee, FL 32301
904/224-9634
ATTORNEYS FOR PANDA

Of Counsel:

Kenneth G. Hurwitz, Esq.
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, N.W., Suite 1000
Washington, DC 20005

-and-

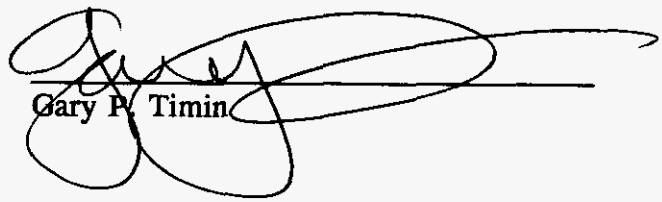
Barrett G. Johnson, Esq.
Johnson and Associates, P.A.
315 South Calhoun Street, Suite 350
Tallahassee, FL 32301

-and-

John B. O'Sullivan, Esq.
Chadbourne & Parke
1101 Vermont Avenue, N.W. - 10th Floor
Washington, DC 20005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Petition for Formal Evidentiary Proceeding and Full Commission Hearing has been served by Federal Express, to James A. McGee, Florida Power Corporation, 3201 Thirty-fourth Street South, St.Petersburg, Florida 33711, this 31st day of July, 1995.



Gary P. Timin