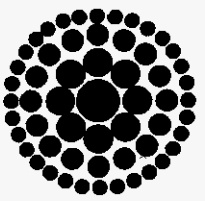


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Florida Power
CORPORATION

RECEIVED
FLORIDA PUBLIC SERVICE COMMISSION
JAMES A. MCGEE
SENIOR COUNSEL
1995 SEP 19 10 01 AM
MAIL ROOM

September 18, 1995

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

Re: Docket No. 950110-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket are fifteen copies of Florida Power Corporation's Memorandum in Opposition to Motion for Protective Order.

ACK Please acknowledge your receipt of the above filing on the enclosed copy
AFA _____ of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette
APP _____ containing the above-referenced document in WordPerfect format. Thank you for
CAF _____ your assistance in this matter.

CMU _____
CTR _____
EAG Huff
LEG _____
LIN 5
OPC _____
RCH _____
SEC 1
WAS _____
OTH _____

Jam/jb
Enclosure
cc: Parties of Records

Very truly yours,

James A. McGee
James A. McGee

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RECORDS

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

GENERAL OFFICE

Panda refers in the motion for protective order filed in this proceeding). FPC responded the next day with its Response in Opposition to Panda's Motion for Entry of Protective Order attached as Exhibit 2. On Friday September 15, 1995, the federal court swiftly dispensed with Panda's motion for protection and ordered, for a second time, that the depositions proceed. A copy of the federal court's second order is attached as Exhibit 3. The only leeway that the federal court gave Panda in its second order is that the depositions have now been ordered to begin on September 25, 1995, not September 18.

FPC, thus, quickly demonstrated to the federal court its entitlement to proceed with depositions in the federal court over Panda's protective order "objections." FPC also is entitled to deposition discovery from Panda's witnesses in this proceeding.³ FPC needs to start those depositions now, so it can properly prepare its pre-filed testimony for the evidentiary hearing Panda asked for. November 13, 1995, is only 56 days away, leaving very little time for FPC to conduct these depositions in sufficient time to have the benefit of them in preparing the initial pre-filed testimony.

Panda is using the same ploy here that it tried to get by with last week in the federal court to stop the depositions -- it has filed a motion for protective order asserting that FPC has failed to produce documents requested by Panda in the federal lawsuit. What makes its motion for protective order in this proceeding particularly extraordinary, however, is that in federal court, Panda did not exhibit the same reckless abandon it has employed here. Most likely out of fear of Rule

³ On July 25, 1995, Panda's new lawyer in this case, Ray Besing, agreed that depositions in both the federal case and this proceeding could be used in both proceedings.

11 sanctions, Panda has not alleged in the federal court, as it has here, that FPC is "massively resisting" Panda's document request, or that FPC was "forced to produce" documents in other pending QF related lawsuits that it is not producing in Panda's case, or that FPC has "concealed [documents] from production." In federal court, Panda merely describes the so-called problems it claims to have encountered with FPC's document production, as "omissions from, or deficiencies in, FPC's production."

Panda's accusation that FPC has engaged in a massive document cover up could not be further from the truth. Notably, Panda failed to disclose to the Commission in its motion for protective order that:

- To date, FPC already has produced to Panda at least 55 boxes of files, containing 140,000 documents.
- FPC made the first 128,000 pages of those documents available for Panda's inspection a mere seven (7) days after Panda served its document request.
- Through an arduous and expensive effort on FPC's part, FPC has now managed to have copied and shipped to Panda in Texas all of those documents.
- FPC is still in the process of copying two boxes of documents related to the FPSC Docket No. 941142-EQ, and five boxes of documents related to the FPSC Docket 910004-EU, which FPC recently located in its records retention facility and which FPC reported to Panda's counsel.
- Two (2) days after Panda gave FPC a 20-page spreadsheet of alleged deficiencies in FPC's expedited, massive production of documents in the federal court, FPC provided Panda with a detailed written response addressing each so-called problem by category and invited a further dialog with Panda if, after reviewing that response, Panda still felt it had any basis for complaining about FPC's production of documents.

- Panda never followed up with FPC after receiving its explanation of what Panda had clearly mis-perceived as problems with FPC's production of documents.

The sheer volume and speed of FPC's production of documents in the federal court belie Panda's hysterical accusations of resistance and concealment. In fact, FPC has produced to Panda all of the documents it produced in the other QF related lawsuits, and it has also produced all documents responsive to Panda's request, except to the extent an objection has been interposed or copying is still in process. As shown by FPC's response to Panda's federal court protective order motion (Exhibit 2), and the affidavit and correspondence attached to that response, the assertions contained in Panda's motion for protective order in this proceeding are utterly devoid of merit. Simply stated, Panda's allegations of FPC's massive resistance and concealment of documents are false.

Furthermore, Panda's unwarranted attacks upon FPC's document production efforts in the federal case provide no basis -- legal, practical or otherwise -- for Panda to refuse to provide deposition testimony in this proceeding. While the contract issues presented here are also raised in the federal case, the antitrust and tort claims raised in the federal case are not at issue here. Most of the documents Panda requested be produced in the federal case relate solely to those antitrust and tort claims and have nothing to do with the contract issues involved in this proceeding. Thus, if there were even a hint of truth to the incendiary accusations contained in Panda's motion for protective order -- and there is no truth to them -- the resolution of those issues by the federal court should not forestall FPC from pursuing its right to question Panda's witnesses in this proceeding, particularly since the upcoming evidentiary hearing was ordered by the Commission at Panda's request.

Finally, since the depositions are moving forward in the federal case, it would be inefficient not to allow them to go forward in this case. Indeed, it would be contrary to Panda's commitment in the federal case that all discovery, written and oral, may be used by either party in the lawsuit and the FPSC proceeding.

WHEREFORE, FPC respectfully requests that the Commission enter an order:

A. Denying Panda's motion for protective order without a hearing and cancelling the hearing set before a hearing officer on September 25, 1995, or alternatively allowing FPC to use the depositions it takes in the federal court case in this proceeding, to the extent relevant;

B. Directing Panda to forthwith produce its employees for the scheduled depositions;

C. Awarding FPC its fees associated with responding to Panda's motion for protective order, pursuant to Rule 25-22.034, F.A.C. and Rules 1.280(c) and 1.380(a)(4), Fla. R. Civ. P.; and

D. Granting such further relief as is appropriate under the circumstances.

Respectfully submitted,

**OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION**

James P. Fama
Deputy General Counsel
Florida Bar No. 0797812
James A. McGee
Senior Counsel
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Corporate Counsel
Florida Bar No. 0395935
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and

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Florida Bar No. 033604
Donald R. Schmidt
Florida Bar No. 607959
Steven C. Durpré
Florida Bar No. 471860

**CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.**
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, FL 33701
Attorneys for Petitioner, Florida
Power Corporation

By 
for James A. McGee

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION


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

Docket No. 950110-EI

Submitted for filing:
September 19, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Memorandum in Opposition to Motion for Protective Order has been furnished via Federal Express and/or U.S. Mail to John R. Marks, III, Esquire, of Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon, P.A., 106 East College Avenue, Suite 1200, Tallahassee, FL 32301, Robert Vandiver, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, Martha Carter Brown, Esquire, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, Ken Sukhia, Esquire, Fowler, White, Gillen, Boggs Villareal and Banker, P.A., 101 North Monroe Street, Suite 1090, Tallahassee, FL 32301 and Ray Besing, Esquire, 1100 St. Paul Place, 750 North St. Paul, Dallas, Texas 75201, this 18th day of September, 1995.



Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN L.P.,

Plaintiff,

vs.

Case No: 95-992-Civ-T-24C

FLORIDA POWER CORP.,

Defendant.

O R D E R

THIS CAUSE comes on for consideration of the following motion and defendant's response (Dkt.30):

Motion: Plaintiff's Motion to Extend Time for Filing Response and to Reschedule Preliminary Injunction Hearing and Expedited Discovery Schedule (Dkt.23).

Filing Date: August 17, 1995.

Disposition: GRANTED IN PART and DENIED IN PART. Plaintiff shall file a response to the Florida Public Service Commission's Amended Motion to Intervene on or before August 31, 1995. However, the Commission shall supplement its amended motion to intervene by filing "a pleading setting forth the claim or defense for which intervention is sought" in compliance with Rule 24(c), Fed. R. Civ. P., within twenty (20) days from the date of this order. Moreover, the evidentiary hearing shall be continued until after a ruling on the Commission's motion to intervene. However, plaintiff has not shown good cause for the further extension of initiating depositions. This court recalls that at the prior status

EXHIBIT 1

1083

conference in this case, the parties agreed that the proposed intervenor PSC could attend the depositions scheduled in this case. Therefore, the expedited discovery shall proceed as agreed upon and depositions shall begin the week of September 5, 1995. The parties shall confer and file a schedule of depositions for the expedited discovery within five (5) days.

DONE and ORDERED at Tampa, Florida this 28th day of August, 1995.


ELIZABETH A. JENKINS
United States Magistrate Judge

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THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

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

Plaintiff,

vs.

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

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

**FLORIDA POWER CORPORATION'S RESPONSE IN OPPOSITION TO
PANDA'S MOTION FOR ENTRY OF PROTECTIVE ORDER**

Despite electing to come into this Court with a claim of damages for \$325,000,000 (which it seeks to have trebled) and seeking preliminary injunctive relief, despite having agreed to expedited depositions both in a discovery conference and in open court, and despite this Court's explicit order that Florida Power could proceed with depositions the week of September 5, 1995, Panda has refused to produce its witnesses for deposition until some indefinite time in the future, when Panda concludes *it* is ready to depose FPC's employees. Panda, however, should be ordered -- again -- to produce its witnesses for deposition immediately. It can then take its depositions at whatever time it believes it is prepared to do so.

Florida Power needs to begin these depositions now so it can begin to defend itself against the serious charges levelled by Panda. Panda has already had the benefit (through Florida Power's document production) of many deposition transcripts of Florida Power's

employees in other "cogeneration" lawsuits against Florida Power. Moreover, Panda has apparently persuaded counsel in those other cases to question Florida Power's employees about matters related to this lawsuit, as well as to produce documents to Panda from those cases. Florida Power needs to begin its depositions just to begin to even the playing field.

PLAINTIFF PANDA'S MOTION FOR ENTRY OF PROTECTIVE ORDER represents Panda's latest effort to stop Florida Power from taking depositions. In its zeal to evade its obligation to produce its employees for deposition, however, Panda has violated (i) this Court's August 28, 1995 mandate that the depositions proceed, (ii) the Federal Rules of Civil Procedure, and (iii) applicable case law. Florida Power respectfully asks this Court to *expeditiously and summarily deny* Panda's protective order motion and direct Panda to produce its witnesses as noticed *beginning Monday, September 18, 1995.*

I. THE AUGUST 28, 1995 ORDER.

On August 28, 1995, this Court ordered the parties to confer on scheduling, to file a deposition schedule "within 5 days," and to begin expedited depositions during the week of September 5, 1995. This Court's August 28 Order unambiguously mandates that:

Therefore, the expedited discovery shall proceed as agreed upon and depositions shall begin the week of September 5, 1995. The parties shall confer and file a schedule of depositions for the expedited discovery within five (5) days.

(Emphasis added). Panda did *not* ask the Court to reconsider that order. Nevertheless, Panda refused to agree upon or file a deposition schedule with dates certain for depositions.

Florida Power tried to get Panda to comply with this order for three straight days after it received the order. See attached Affidavit of Steven C. Dupré ("Dupré Aff.") ¶¶3-5. Panda simply refused to agree upon or file a schedule with dates certain for depositions. Instead, on

Friday, September 1, 1995, Panda's local counsel reported that Panda would not offer Florida Power *any* specific deposition dates, much less confer about specific dates to begin during the week of September 5, 1995, as the Court had ordered. Panda's counsel told Florida Power's counsel that instead of filing the mandated agreed upon deposition schedule on September 5, 1995, Panda would file a motion for protective order on that date to seek, once again, to stop the depositions.

As a result, on September 5, 1995, Florida Power had no alternative but to simply file its own schedule of those depositions it wished to take in accordance with this Court's August 28 Order. Those duly noticed depositions are supposed to begin in four days, on Monday, September 18, 1995. In contrast, Panda did nothing. It neither agreed to a schedule for future depositions, nor filed its promised motion for protective order. Panda instead waited until late in the afternoon on September 13, 1995, a mere three business days away from the start of the depositions, to file such a motion. Panda's delay thus gives Florida Power virtually no time to respond fully if it hopes to hold onto the September 18, 1995 deposition date, and it gives the Court even less time to consider and rule on the motion.

Panda was ordered to confer with Florida Power about specific deposition dates, but it refused. Panda was ordered to begin depositions during the week of September 5, 1995, but it refused. Panda even refused Florida Power's compromise start date of beginning depositions during the week of September 18, 1995 -- a *two week delay solely to accommodate Panda*. In short, Panda has openly and contumaciously disobeyed this Court's discovery order, and its current motion to further delay discovery should be denied.

II. PANDA'S PROTECTIVE ORDER MOTION VIOLATES RULE 26

Panda's purported excuse for its latest attempt to evade its obligation to produce its employees for deposition in accordance with this Court's order is a contention that Florida Power has not fully produced its documents in response to Panda's request for documents served on August 3, 1995. Never mind that Florida Power made more than 128,000 documents available for Panda's inspection *seven days* after receiving Panda's request. Never mind that all of those documents have now been photocopied and shipped to Texas, at Panda's request. Panda would have this Court believe -- without even a hint of evidentiary support -- that Florida Power has deliberately withheld documents from Panda. In support of that claim, Panda has now filed (albeit inappropriately and prematurely) a separate motion to compel still further production of documents.

Florida Power will separately respond to Panda's motion to compel and will detail in that response the inaccuracy of Panda's allegations concerning Florida Power's document production. For present purposes, however, the undersigned counsel represent, as officers of the Court, that they have carefully investigated Panda's assertion that Florida Power's production was incomplete, and they believe that, to the contrary, all of Florida Power's documents have in fact been produced (other than those expressly objected to in Florida Power's timely served response to Panda's document request).¹

¹ This is not to say, of course, that given the short time frame within which Florida Power made its massive production, there may turn out to have been some inadvertent omissions from the production. That is inevitably the case with any large scale production of this nature. Florida Power's counsel repeatedly has advised Panda's counsel that they will investigate any claim of omission raised by Panda in that regard, and they have faithfully and promptly done so. To date, *all* of Panda's claims conveyed to counsel have either proven incorrect or have been promptly rectified. Dupré Aff. ¶6.

Furthermore, *even if everything Panda complains about in its motion to compel were true* -- and it most certainly is not -- the Federal Rules of Civil Procedure do not permit Panda to bar Florida Power from conducting its deposition discovery while Panda tries to obtain still more documents from Florida Power. To the contrary, Rule 26(d) provides as follows:

. . . methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Fed.R.Civ.P. 26(d) (emphasis added); *see, Meisch v. Fifth Transoceanic Shipping Company Limited*, 1994 WL 582960 (S.D.N.Y. 1994) (ordering discovery and awarding sanctions because "this dispute developed due to plaintiff counsel's unjustified insistence on receipt of certain discovery materials before he would allow the plaintiff to be deposed"), a copy of which is attached.

Nevertheless, Panda is trying to force its unilaterally chosen sequence of discovery on Florida Power by delaying Florida Power's deposition discovery while Panda conducts additional document discovery. Moreover, while Panda is refusing to provide deposition discovery to Florida Power, Panda is obtaining document discovery from other parties and obtaining deposition discovery from Florida Power through questions those other parties are asking of Florida Power witnesses in on-going depositions in those cases about the Panda issues in this case. Dupré Aff. ¶8. Florida Power, of course, does not object to this in this case -- Florida Power merely wants to be permitted to take the depositions that Panda initially agreed could be taken and that this Court ordered Florida Power be allowed to take beginning the week of September 5, 1995, so that it can prepare to defend itself against Panda's claims.

Panda, however, says Florida Power should not be permitted to pursue *its* discovery until *Panda* has satisfied itself that it has every possible document in its possession *and* has had time to review and analyze them. That is precisely what Rule 26 does not permit, absent a prior order of Court. Panda has no such order here; quite the contrary, the only Court order in this case mandates that Panda allow Florida Power to proceed with discovery. Thus, by refusing to produce its witnesses — witnesses who swore to the affidavits Panda relied on to support its complaint and its motion for preliminary injunction and who obviously do not need Florida Power's documents in order to testify about the matters set forth in those affidavits — Panda is violating Rule 26 as well as this Court's Order.

III. CONTROLLING CASE LAW PROHIBITS PANDA'S DISCOVERY TACTICS

Applicable case law, and indeed the manual entitled **DISCOVERY PRACTICE IN THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ("Discovery Practice Manual")**, establish that:

the mere filing of a motion for a protective order does not, absent an order of the court granting the motion, excuse the moving party from complying with the discovery requested or scheduled.

Discovery Practice §VI.B (emphasis added); accord Hepperle v. Johnston, 590 F.2d 609; 613 (5th Cir. 1979) ("The court's inaction on appellant's motion [for protective order to stop a deposition] did not relieve him of a duty to appear for his deposition."); see also Williams v. American Telephone and Telegraph Co., 134 F.R.D. 302, 303 (M.D. Fla. 1991) ("The filing of a motion for a protective order does not excuse the movant from complying with the discovery requested.").

Nevertheless, on September 11, 1995, Panda's Texas counsel wrote Florida Power's counsel and asserted, in strident terms, that Panda would *not* appear for depositions on September 18, 1995, absent a court order (in addition to this Court's August 28 Order) to do so. Dupré Aff. ¶7. Panda's Texas counsel essentially took the position that merely by filing a motion for protective order, he could effectively achieve what the motion itself sought -- a delay in the depositions.

Florida Power's counsel quickly responded, citing the above cited authority. Dupré Aff. ¶7. Panda's only reply was the filing yesterday of its protective order motion. Notably, Panda ignores the cited cases in its motion -- Panda literally offers no legal support for its position that it need not now attend the depositions. After receiving that motion, Florida Power confirmed with Panda's local counsel that Panda indeed would not appear for the scheduled depositions, absent an order denying its latest protective order motion. Dupré Aff. ¶9.

IV. PANDA HAS SHOWN NO GOOD CAUSE FOR THIS SECOND POSTPONEMENT REQUEST

Panda's motion offers four ostensible reasons why the Court should allow Panda to delay (indefinitely) the scheduled depositions. First, Panda says that until it gets even more documents from Florida Power, it "cannot prepare its witnesses" (Plaintiff's Motion For Entry of Protective Order ¶4.a). Panda certainly did not hold off filing a \$1,000,000,000 lawsuit against Florida Power until it had all of Florida Power's documents, nor did it hesitate in rushing into court seeking first a temporary restraining order (which was denied) and now a preliminary injunction on the basis of sworn affidavits of the very employees Florida Power is seeking to depose. Panda has now had more than a month to review Florida Power's documents and

"prepare" its witnesses in light of them — it should not need more time, even if reviewing Florida Power's documents were something it was entitled to do before being deposed.

Panda presumably had some basis upon which to file its serious allegations in its complaint and motion for injunctive relief, and Florida Power is entitled to discover that basis. Panda obviously did not rely on Florida Power's documents to file this suit. Florida Power should be entitled to discover what basis (if any) Panda has for its claims, particularly since Panda's motion for preliminary injunction remains pending and has *not been withdrawn* or suspended, as Panda suggested at one point it intended to do in an effort to forestall deposition discovery by Florida Power.

Second, Panda does not want Florida Power to start its depositions until Panda is ready itself to start deposing Florida Power's witnesses, and Panda is not yet ready to start doing that. Panda points to an agreement made on July 25, 1995, to conduct "dual track" depositions. But that agreement was precisely to allow *expedited* depositions, which Panda has precluded.² Having done so, Panda cannot now assert a right to delay Florida Power's depositions until it is ready to proceed itself.

Third, Panda asserts that Panda's Texas counsel, Ray Besing, must attend of "Continuing Legal Education seminars, required of all Texas attorneys" on September 18 - 20, 1995, when

² That agreement also was made in order to prepare for the preliminary injunction hearing that was then scheduled for September 5, 1995, and the practical problem that there were not enough business days between July 25, 1995, and September 5, 1995, given counsel's vacation plans, to conduct 20 different depositions on different business days. This is no longer the case, and there is no necessity now for "dual track" depositions since the injunction hearing has been postponed at Panda's request.

the first three depositions are scheduled.³ Florida Power has sought to accommodate Panda's counsel's schedule. Indeed, on September 1, 1995, Florida Power's counsel learned about Mr. Besing's court ordered September 21, 22 and 23 depositions in another case and attempted to accommodate that previously scheduled engagement by *not scheduling* depositions in this case for the same days. However, Florida Power cannot forever postpone depositions due to Mr. Besing's busy schedule. If his schedule is once again to be accommodated at Florida Power's expense, it should involve a delay of no more than one week.

Fourth, Panda complains that Florida Power intends, when it takes depositions of Panda personnel, to make inquiry about matters that deal with the merits of its lawsuit, as if the merits have nothing to do with its pending motion for preliminary injunction. Panda's Motion for Protective Order ¶8 n.2. As part of its injunction motion, however, Panda must demonstrate a likelihood of success on the merits and Florida Power must be able to defend against Panda's contentions in that regard. Thus, discovery directed to the merits is highly pertinent to the injunction issue. Moreover, given the passage of time that has elapsed since Panda filed that motion and the fact that no hearing is currently scheduled, it would be inequitable to preclude Florida Power from proceeding with merits discovery.

* * * *

Panda's protective order motion is a thinly veiled stalling tactic, as is their request for a 30 minute "evidentiary" hearing on this motion. Panda has made no showing why an

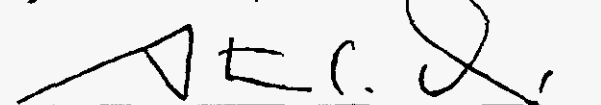
³ Neither of Florida Power's lawyers have any recollection that this reason was why Panda did not want to proceed with depositions on these dates. In any event, Florida Power remains prepared to accommodate counsel's schedules to a reasonable extent but, to date, Mr. Besing's schedule has been such that he has not time for *any* depositions in this case. Cooperation must be a two-way street.

evidentiary hearing should be required to resolve this basic discovery dispute, and no evidentiary hearing is necessary. Such a hearing would only serve Panda's design for more delay. Panda is the plaintiff in this case, and under Rule 11, it is supposed to have had a basis for filing its complaint in the first place. Florida Power needs and is entitled to the scheduled deposition discovery, in order to defend itself against Panda's claim for \$1 billion in damages and for a preliminary injunction.

WHEREFORE, Florida Power respectfully requests that the Court enter an order:

- A. Denying Plaintiff's Motion for Entry of Protective Order;
- B. Directing Panda to appear for the depositions in accordance with the previously filed schedule (or alternatively pushing the schedule back no more than one week), and ordering appropriate sanctions if Panda continues to refuse to obey;
- C. Awarding Florida Power its attorneys fees and costs associated with addressing Panda's motion for protective order pursuant to Rules 26(c) and 37(a)(4); and
- D. Granting it such further relief as is just and equitable under the circumstances.


Sylvia H. Walbolt, FB No. 033604


Donald R. Schmidt, FB No. 607959
Steven C. Dupré, FB No. 471860
Carlton, Fields, Ward, Emmanuel, Smith &
St. Petersburg, FL 33731
One Harbour Place
Tampa, FL 33601
(813) 223-7000
Attorneys for Defendant, Florida Power
Corporation

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by Facsimile and U.S. Mail to Thomas T. Steele, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601, and by Facsimile and U.S. Mail to Ray G. Besing, Esquire, The Law Offices of Ray G. Besing, P.C., 1100 St. Paul Place, 750 N. St. Paul, Dallas, Texas 75201, and to Robert Vandiver, Esquire and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, this 14th day of September, 1995.



Attorney

Not Reported in F.Supp.
(Cite as: 1994 WL 582960 (S.D.N.Y.))

Page 1

Inez MEISCH, Plaintiff,
v.
FIFTH TRANSOCEANIC SHIPPING
COMPANY LIMITED, Celebrity Cruises,
Inc. in
personam, and the Amerikanis, her
engines, boilers, tackle, etc. in rem,
Defendants.

No. 94 Civ. 0683 (DAB).

United States District Court,
S.D. New York.

Oct. 21, 1994.

MEMORANDUM OPINION and ORDER

BATTS, District Judge.

*1 Plaintiff has moved this court pursuant to Rules 26(d), 30, 33, 34, and 37 of the Federal Rules of Civil Procedure to compel discovery and for costs. Defendants opposed plaintiff's motion and made their own request for an order requiring plaintiff to be deposed in New York by a date certain and requiring plaintiff to produce medical releases prior to that deposition. Plaintiff's motion is granted in part and denied in part; defendants' motion is granted.

While under the Federal Rules a discovery priority is not established based upon which party notices a deposition or serves interrogatories first, Rule 26(d) authorizes the court to order the sequence of discovery upon motion. Specifically, the advisory notes to Rule 26(d) state: "The court may upon motion and by order grant priority in a particular case." Fed.R.Civ.P. 26(d) advisory committee's notes (emphasis added). An order regarding the sequence of discovery is at the discretion of the trial judge. *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir.1992) ("A trial court enjoys wide discretion in its handling of pre-trial discovery...."); *General Houses v. Marloch Manufacturing Corp.*, 239 F.2d 510, 514 (2d Cir.1956) ("The order of examination is at the discretion of the trial judge....").

To the extent that discovery is sought to be compelled, the motion is granted and dates for production are set forth below. Because I find that this dispute developed due to plaintiff counsel's unjustified insistence on receipt of certain discovery materials before he would allow the plaintiff to be deposed, plaintiff's motion for costs and to have discovery compelled from defendants, prior to the plaintiff's deposition, is denied.

Defendant's application that plaintiff be deposed by a date certain is granted, with a date set forth below, and its application to compel production of medical releases prior to the deposition is likewise granted.

Based on the foregoing, it is **HEREBY ORDERED** that

- (1) The plaintiff shall provide medical releases to the defendant on or before November 1, 1994;
- (2) The plaintiff shall submit to deposition by defendant in New York City on or before January 31, 1995; and,
- (3) The defendant shall respond to all currently outstanding discovery requests within two weeks of completion of plaintiff's deposition.

SO ORDERED.

END OF DOCUMENT

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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

Plaintiff,

vs.

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

FLORIDA POWER CORPORATION, a
Florida Corporation,

Defendant.

AFFIDAVIT OF STEVEN C. DUPRÉ

I, Steven C. Dupré, being duly sworn under oath, depose and state as follows:

1. I am over 18 years old, have personal knowledge of the facts stated in this affidavit, and, if sworn as a witness, can testify competently to the facts stated in this affidavit.

2. I am one of the lawyers of record for Florida Power Corporation in this case. I am a shareholder of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. I have been licensed to practice law in Illinois since 1977 and in Florida since 1985.

3. I received a copy of this Court's August 28, 1995, Order on August 29, 1995. The next morning (around 10:19 a.m.), I faxed and mailed a letter to Ray G. Besing, one of Panda's lawyers of record, on a host of topics. Among other things, I suggested:

that we have a conference telephone call this afternoon involving you, Tom Steele, Don Schmidt and me, say around 3:00 p.m. our time. If a different time today or tomorrow would be more convenient please call my office and set up an alternative time that will enable us to meet the Court's requirement to file our

Panda-Kathleen, L.P. v. Florida Power Corporation
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Affidavit of Steven C. Dupré

schedule of depositions by the end of the week so we can begin first thing next week.

I received no telephone call from either Mr. Besing or Mr. Steele on August 30, 1995, nor did I receive any message that they had tried to reach me.

4. The next day, while I was away from the office, I spoke to Tom Steele on the telephone. He told me that if Florida Power did not agree, Panda would file a motion to suspend the preliminary injunction hearing, and postpone the depositions until sometime in October, assuming that Panda was then subjectively satisfied that all of Florida Power's documents had been produced to Panda. I assured him that all of Florida Power's documents had been produced to Panda. I also asked him to at least check with his client and Mr. Besing about a tentative schedule that could be in place if Panda's motion to postpone were denied. He said he would check and get back to me, and I said I would confer with Florida Power and call him later regarding his request that Florida Power agree to Panda's motion. After conferring with Florida Power, I telephoned him at 2:15 p.m. and that we were willing to compromise and start depositions the week of September 18, 1995, as a compromise. Mr. Steele told me he thought that proposed compromise would be acceptable, but he would need to check with his clients. See 9/1/95 letter from Steven C. Dupré to Thomas T. Steele, a copy of which is attached as Exhibit A.

5. On September 1, 1995, Mr. Steele telephoned me and reported that Panda was not willing to agree to any specific deposition schedule at this time. See 9/1/95 Letter (# 2) from Steven C. Dupré to Mr. Steele, a copy of which is attached as Exhibit B. Mr. Steele

Panda-Kathleen, L.P. v. Florida Power Corporation
Case No. 95-922-CIV-T-24C
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stated that he would instead file a motion for protective order on the day the Court had ordered the deposition schedule be filed (September 5, 1995).

6. On September 5, 1995, I participated in a case management conference with Don Schmidt from my office, and with Tom Steele, Ray Besing and Ralph Killian, of Panda. During that meeting, Mr. Killian provided me with a 20 page spreadsheet of purported deficiencies Panda believed existed with Florida Power's document production along with a draft motion to compel that his counsel had provided to me, and he reviewed a few of those matters with me. The next day, I visited Florida Power's office to review these problems with Florida Power's in-house paralegal, Mrs. Michele Webb, handling the document production for Florida Power. We reviewed *every* concern raised by Panda. On September 7, 1995, I sent a detailed letter to Messrs. Besing and Steele going over the claims they raised in their draft motion to compel point by point. A copy of that letter is attached as Exhibit C. I determined that no documents had been withheld from Panda, and that the matters Panda perceived as "deficiencies" in the production were nothing more than a product of the time lag in copying and shipping that volume of paper, or "deficiencies" in the manner in which Florida Power keeps its files. For example, in some instances of so-called "missing documents," Florida Power had the documents, but they were produced either in files other than the ones that Panda had anticipated they would find them. In other instances, the documents Panda anticipated might exist do not exist. Another example of a claimed "deficiency" was the lack of meeting notes from every one of the meeting participants in meetings extending back some four years. I specifically confirmed, consistent with my obligations as an officer of the Court, that Florida Power was not

Panda-Kathleen, L.P. v. Florida Power Corporation
Case No. 95-922-CIV-T-24C
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withholding documents. To the best of my knowledge and belief Florida Power has produced all documents responsive to Panda's request for production of documents, other than those objected to or withheld on privilege and work-product grounds. I made it clear in that letter and in various conversations that I have had with Mr. Steele since this lawsuit started that I would expeditiously investigate any specific document production problem they perceive exists and I will promptly respond. I have lived up to that promise and I will continue to do so.

7. By September 8, 1995, I had not yet received Panda's promised motion for protective order. Thus, I wrote Messrs. Steele and Besing advising them that Florida Power intended to proceed with depositions on September 18, 1995, pursuant to the August 28, 1995, Order entered in this case. A copy of that letter is attached as Exhibit D. On September 11, 1995, Mr. Besing responded to my September 8, 1995, letter by telling me in no uncertain terms that Panda would not appear for depositions beginning the week of September 18, 1995, "*or any other date*" A copy of his response is attached as Exhibit E. I responded on September 12, 1995, citing applicable case law for why the position he was taking was improper, and asking him to reconsider his position. A copy of my letter is attached as Exhibit F.

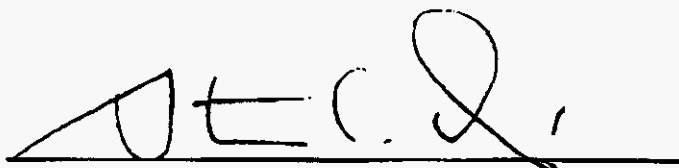
8. I have learned from fellow shareholders of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. who are handling other lawsuits filed by cogeneration companies such as Panda against Florida Power, that (i) Panda is obtaining documents from Florida Power's opponents in those cases, and (ii) one lawyer in those other cases asked one of Florida Power's employees in a recent deposition a series of questions concerning the issues

Panda-Kathleen, L.P. v. Florida Power Corporation
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Affidavit of Steven C. Dupré

raised by Panda in this case. Messrs. Steele and Besing confirmed this fact to me on September 5, 1995, during the case management conference.

9. Yesterday afternoon, I spoke to Tom Steele, who affirmed that I could represent to the Court that Panda would not appear for depositions on September 18, 1995, even if I flew to Texas and appeared at the appointed hour and time.

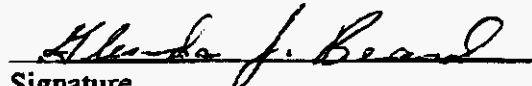
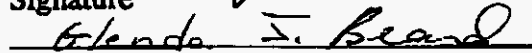
Further, affiant sayeth not.

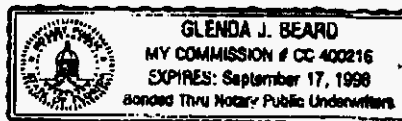

STEVEN C. DUPRÉ

STATE OF FLORIDA
COUNTY OF PINELLAS

ss

The foregoing instrument was acknowledged before me on this 14th day of September, 1995 by STEVEN C. DUPRÉ. He is personally known to me and did take an oath.

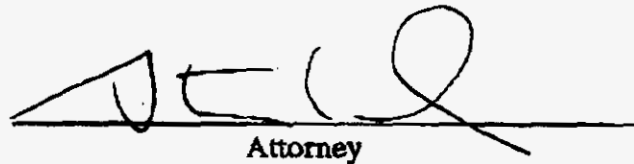

Signature

Name of Acknowledger Typed, Printed or Stamped
Title or Rank _____
Serial Number _____



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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by Facsimile and U.S. Mail to Thomas T. Steele, Esquire, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Post Office Box 1438, Tampa, Florida 33601, and by Facsimile and U.S. Mail to Ray G. Besing, Esquire, The Law Offices of Ray G. Besing, P.C., 1100 St. Paul Place, 750 N. St. Paul, Dallas, Texas 75201, and to Robert Vandiver, Esquire and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, this 14th day of September, 1995.



Attorney

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

ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3239 TAMPA, FLORIDA 33601 (813) 223-7000 FAX (813) 228-4133	FIRST STATE TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 (407) 849-0300 FAX (407) 648-9099	HARBOURVIEW BUILDING P.O. BOX 12420 PENSACOLA, FLORIDA 32582 (904) 434-0142 FAX (904) 434-9388	FIRST FLORIDA BANK BUILDING P.O. DRAWER 190 TALLAHASSEE, FLORIDA 32302 (904) 224-1585 FAX (904) 222-0398	ESPIONANTE P.O. BOX 150 WEST PALM BEACH, FLORIDA 33407 (407) 689-7070 FAX (407) 689-7368	BARNETT TOWER P.O. BOX 2861 ST. PETERSBURG, FLORIDA 33731 (813) 821-7000 FAX (813) 822-3768
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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg

September 1, 1995

By **FAX**

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

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

Dear Tom:

As I mentioned yesterday when we spoke on the telephone, pursuant to Magistrate Jenkins' order dated August 29, 1995, Panda and FPC have an obligation to confer and file a deposition schedule with the Court no later than Tuesday, September 5, 1995. Even if Panda withdraws its pending motion for preliminary injunction (or suspends it, as you suggested was Panda's intention), however, FPC still must begin its depositions of Panda right away. In response to your request yesterday for a further delay in beginning our depositions (this time until October), I indicated that FPC must start no later than September 18, 1995. At 2:15 p.m. yesterday, you indicated (i) you thought that sounded acceptable, (ii) you would call your client to determine its response to my suggestion, and (iii) you would get right back to me. By 5:25 pm when you called me back, unfortunately, I had already left the office.

Assuming Panda is willing to confer about the schedule as we discussed yesterday, enclosed is the list of Panda employees and former employees we would like to depose in this first go around (in the form of a draft Amended Notice of Deposition) with a proposed schedule of deposition dates to begin no later than September 18, 1995. Please confer with your client to determine whether any of these dates need to be juggled to accommodate schedule conflicts. Obviously, if we wait until September 18, 1995, to begin our depositions, we will have less flexibility in that regard than we would if we started earlier as the Court ordered, so I would appreciate it if you would do what you can to get Panda to accept this schedule.

Exhibit A

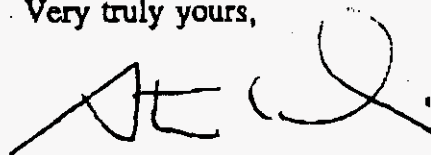
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Thomas T. Steele
September 1, 1995
Page 2

Please note that with respect to the deposition of the Bank of Tokyo, Ltd., I have not named an individual, even though Ray Besing mentioned the name Kirk Edelman when we met on July 25, 1995. We will be serving Bank of Tokyo with a subpoena that contains a Rule 30(b)(6) request that Bank of Tokyo formally designate the person who can give testimony on, among other subjects, the terms and conditions of all binding loan commitments and loan agreements between Bank of Tokyo and Panda. If Mr. Edelman is so designated, that of course is fine with us, but if he cannot give the bank's official testimony on that subject, we will require the bank to provide a witness who can. We also will be asking that bank to produce its own documents, and we will serve a subpoena duces tecum for that purpose. Naturally, if the bank is willing to send its documents and corporate representatives to Texas or Florida for those depositions, we will accommodate. Until we hear such a commitment from that bank, however, we will be planning to go to New York for that deposition.

My goal is to be able to file with the Court on Tuesday a schedule of depositions that has Panda's agreement. You were not in yet when I called this morning, and I will be out from about 9:10 a.m. until 11:00 a.m. Please let me hear from you today. If I am not here and you can leave a message with my secretary, please do so.

Very truly yours,



Steven C. Dupré

cc: James P. Fama, Esq. (w/ enclosure)
Sylvia H. Walbolt, Esq. (w/ enclosure)
Donald R. Schmidt, Esq. (w/ enclosure)
Ray G. Besing, Esq. (w/ enclosure)

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

ATTORNEYS AT LAW

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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg.

September 1, 1995
By FAX (Letter # 2)

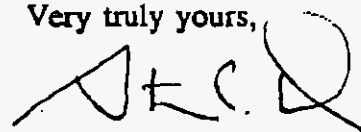
Thomas T. Steele
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
501 E. Kennedy Blvd.
Tampa, FL 33601

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

Dear Tom:

I am disappointed that you were unable to prevail upon Panda to agree to comply with Magistrate Jenkins' order dated August 29, 1995. FPC considers Panda's refusal to cooperate in this regard to be an intentional violation of that order.

Very truly yours,



Steven C. Dupré

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

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

ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3239 TAMPA, FLORIDA 33601 (813) 223-7000 FAX (813) 229-4133	FIRST STATE TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 (407) 849-0300 FAX (407) 849-9099	HARBORVIEW BUILDING P.O. BOX 12426 PENSACOLA, FLORIDA 32502 (904) 434-0142 FAX (904) 434-5388	FIRST FLORIDA BANK BUILDING P.O. DRAWER 180 TALLAHASSEE, FLORIDA 32308 (904) 824-1583 FAX (904) 222-0398	ESPERANTE P.O. BOX 150 WEST PALM BEACH, FLORIDA 33416 (407) 659-7070 FAX (407) 659-7388	DWIGHT TOWER P.O. BOX 2861 ST. PETERSBURG, FLORIDA 33731 (813) 821-7000 FAX (813) 822-3768
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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg

September 7, 1995
By FAX and Mail

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

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

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

Dear Ray and Tom:

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

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

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

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

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

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

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

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

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

Ray G. Besing
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Page 3

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

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

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

Ray G. Besing
Thomas T. Steele
September 7, 1995
Page 5

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

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

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

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

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

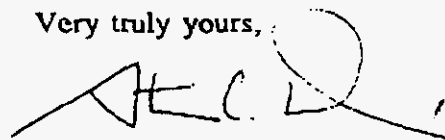
Ray G. Besing
Thomas T. Steele
September 7, 1995
Page 6

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

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

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

Very truly yours,



Steven C. Dupré

Enclosure

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

1111

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New as of 9/1/95

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

ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3239 TAMPA, FLORIDA 33601 (813) 223-7000 FAX (813) 229-4133	PRISTAL TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 (407) 648-0300 FAX (407) 648-9069	HAINBOURNE BUILDING P.O. BOX 12426 TENSACOLA, FLORIDA 32517 (904) 434-0142 FAX (904) 434-5286	FIRST FLORIDA BANK BUILDING P.O. DRAWER 180 TALLAHASSEE, FLORIDA 32302 (904) 224-1665 FAX (904) 222-0308	ESPERANTO P.O. BOX 180 WEST PALM BEACH, FLORIDA 33402 (407) 659-7070 FAX (407) 659-7388	BARNETT TOWER P.O. BOX 2881 ST. PETERSBURG, FLORIDA 33731 (813) 821-7000 FAX (813) 822-3788
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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg

September 8, 1995

By FAX and Mail

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

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

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

Dear Ray and Tom:

I received your revised draft of a case management report yesterday afternoon. I was unable to complete proposed revisions to it before day's end yesterday, and I will be out all day today. I did notice, however, that for some reason you included various statements suggesting you still expect Florida Power Corporation to modify its current schedule of depositions.

I am certain I made clear prior to, and again on, September 5, 1995, that Florida Power intends to proceed with the depositions as scheduled in the schedule we filed with the Court pursuant to its August 28, 1995, order. Since it may not be until Monday, September 11, 1995, that I can provide a full response to your draft case management report (which will reflect our disagreement with your suggestions), I wanted to make sure you at least understood this much today - we will proceed with the depositions beginning the week of September 18, 1995.

Very truly yours,



Steven C. Dupré

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

Exhibit D

1113

THE LAW OFFICES OF

RAY G. BESINGA Professional Corporation
ATTORNEYS & COUNSELORS1100 ST. PAUL PLACE
750 N. ST. PAUL
DALLAS, TEXAS 75201(214) 220-9090
FAX (214) 220-1202

September 11, 1995

Via facsimile - (813) 223-7000Steven D. Dupre, Esq.
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
One Harbour Place
Tampa, Florida 33601CONFIDENTIALRE: *Panda-Kathleen, L.P., Plaintiff v. Florida Power Corporation, Defendant;*
Case No. 95-992-Civ-T-24C.

Dear Steve:

I received your incredibly arrogant and insulting letter dated September 8. I thought we had cleared the air at the Case Management Report meeting on Tuesday, September 5 that you would stop writing overbearing and presumptuous letters to me and Tom Steele.

We discussed at some length in that meeting that Panda would not agree to Florida Power Corporation pursuing its desired schedule of depositions and that a motion for protective order would be filed to prevent those depositions from commencing until Florida Power Corporation performs its earlier obligations to produce the relevant documents designated in the Plaintiff's Request for Production of Documents.

It is, therefore, disingenuous for you to make the statement that ". . . for some reason you included various statements suggesting you still expect Florida Power Corporation to modify its current schedule of depositions."

Further, it is outrageous for you to unilaterally declare that ". . . we will proceed with the depositions beginning the week of September 18, 1995." No, you will not. You and I will abide by the Court's decision on that subject. In the meantime, no Panda employee will present himself for an oral deposition on September 18 or any other date until your client stops breaching its discovery obligations by producing the documents it has concealed and refused to produce.

Further, you were advised on Tuesday, September 5 that several of the persons for whom you served notices are in China or are on their way to China in a very large and critical project. Had Florida Power Corporation produced its documents fully and timely as it is committed to do, those persons' depositions could have been taken prior to the commencement of their commitments to the China project.

Exhibit E

1114

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P.3/3

I strongly recommend that you stop sending dictatorial letters. You are not running this lawsuit - the Court is - and if you proceed further with this kind of unprofessional and irresponsible conduct and statements, I am going to bring the matter to the attention of the court.

Very truly yours,

THE LAW OFFICES OF RAY G. BESING, P.C.

By:



~~Ray G. Besing~~

RGB:cb

cc: Tom Steele, Esq.

Fields

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

ATTORNEYS AT LAW

ONE HARBOUR PLACE P.O. BOX 3233 TAMPA, FLORIDA 33601 (813) 223-7000 FAX (813) 223-4133	FIRST STATE TOWER P.O. BOX 1171 ORLANDO, FLORIDA 32802 14071 848-0300 FAX (407) 848-9099	HARBORVIEW BUILDING P.O. BOX 12428 PENSACOLA, FLORIDA 32502 19041 434-0142 FAX (904) 434-5386	FIRST FLORIDA BANK BUILDING P.O. DRAWER 180 TALLAHASSEE, FLORIDA 32302 19041 224-1385 FAX (904) 222-0386	ESPERANTE P.O. BOX 150 WEST PALM BEACH, FLORIDA 33402 14071 868-7070 FAX (407) 868-7368	BAINETT TOWER P.O. BOX 2661 ST. PETERSBURG, FLORIDA 33731 (813) 821-7000 FAX (813) 822-3768
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FILE NO. 00309-78147

PLEASE REPLY TO: St. Petersburg

September 12, 1995
By FAX and Mail

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

Re: Panda-Kathleen, L.P., etc. v. Florida Power Corporation, U.S.D.C. Middle District Case No. 95-992-Civ-T-24(C) -- Your Two (2) Letters To Me Dated September 11, 1995

Dear Ray:

This letter responds, in reverse order, to the two letters you faxed to me yesterday, September 11, 1995. I would have replied sooner, but you faxed the letters to our Tampa office, while I am actually located in the St. Petersburg office.

Your September 11, 1995 Letter Concerning Depositions

In setting the depositions that are to begin September 18, Florida Power did abide by the Court decision concerning depositions -- namely the Order dated August 28, 1995. I am aware of no other applicable order. Pursuant to that order, we filed our deposition schedule on September 5, 1995. We unilaterally selected that schedule only after Panda *refused to comply* with the portion ordering all parties to confer about deposition dates starting the week of September 5, 1995, and only after Panda rejected our offer to voluntarily schedule depositions starting the week of September 18, 1995 to accommodate your desire for more time (rather than scheduling them to begin the week of September 5 as specified in the Order).

When Tom Steele reported to me Panda's refusal to agree to any dates prior to October, he told me Panda would file a motion for protective order on September 5, 1995, in an effort to stop those depositions. To my knowledge, however, to date, no such motion has yet been filed, much less ruled upon. Thus, the Court's August 28, 1995, Order remains the controlling decision.

Before Panda decides to not appear at the depositions scheduled to begin Monday in this case (and, for that matter, in the PSC proceedings), I urge you to review Section VI B (at page

Ray G. Besing
September 12, 1995
Page 2

32) of a publication entitled *DISCOVERY PRACTICE IN THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA*. For your convenience, a copy of the pertinent excerpt is enclosed. You will see that the mere filing of a motion for protective order does not excuse the moving party from complying with the discovery, absent an order granting the motion. I also urge you to review the case law that stands for the same proposition. *E.g.*, *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979) ("The court's inaction on appellant's motion [for protective order to stop a deposition] did not relieve him of a duty to appear for his deposition."); *see also*, *Williams v. American Telephone and Telegraph Co.*, 134 F.R.D. 302, 303 (M.D. Fla. 1991) ("The filing of a motion for a protective order does not excuse the movant from complying with the discovery requested."). Finally, I would urge you to review Rule 26 of the Federal Rules of Civil Procedure, which does not say that Panda gets to prevent its people from being deposed until after it has satisfied itself that it has received all of the documents it asked for in the way of documents from FPC, other than those that are the subject of FPC's written objections.

If Panda actually intends to file a motion for protective order, please fax a copy of it to my office at (813) 822-3761 as soon as it is filed. I will do everything I can to respond to it fast enough so that the Court can consider and rule on it before the end of the day Friday, September 15, 1995, but my ability to do so diminishes with each passing day. This would have been much easier had Panda filed such a motion when it said it was going to (*i.e.* a week ago). Now that we are bumping up against September 18, it becomes doubly important for you to get the motion filed right away in order that we can try to respond expeditiously enough to have the Court rule on or before Friday. Unless I receive *either* a court order entered in this case and an equivalent ruling entered in the PSC proceedings on or before Friday, September 15, 1995, barring the depositions *or* a written stipulation by you stating that (i) Panda's witnesses will not appear as scheduled, and (ii) I should not incur the expense of travelling to Dallas on Sunday to begin those depositions on Monday because even if I do, Panda will not appear, I will appear at the scheduled location (*i.e.* Panda's offices) Monday morning as scheduled to begin Mr. Killian's deposition.

With respect to your assertion that some of Panda's personnel will be out of the country when I have scheduled their depositions, I do recall you mentioning in passing at our September 5 meeting that some of Panda's people are scheduled to be in China. You did not tell me who or when, and you certainly did not offer to rearrange the proposed schedule to switch depositions around. Nevertheless, if you will confer with me to juggle the schedule, I will do everything I can to accommodate witnesses who are out of the country. That, of course, requires you to do something you have yet to do -- namely to confer with me and proffer specific dates for specific people.

Your September 11, 1995 Letter Concerning Ralph Killian

You are mistaken on every point raised in this letter.

Ray G. Besing
September 12, 1995
Page 3

First, with regard to whether I identified to you earlier last week the same information that Michele Webb gave Mr. Killian about the boxes in which the inadvertently produced privileged documents are located, I would urge you to reread my letter to you and Tom Steele dated September 6, 1995, faxed to your office at about 10:18 a.m. our time. If you do, you will see that I *wrote* you and Mr. Steele the day *after* our conference on September 5, 1995, and gave you the exact same information that Mrs. Webb gave Mr. Killian. Perhaps you did not communicate that information to Mr. Killian before he called Mrs. Webb, but I certainly gave it to you.

Second, on September 5, 1995, you *invited me* to directly contact Mr. Killian on one limited subject, and one subject only. Specifically, you said I could contact him to seek clarification of what you described to me as sometimes "cryptic" notes included in the 20 page spreadsheet you provided me on September 5, 1995. At that time, I told you that if anyone were to make that type of contact from our side, it would probably be Michele Webb. Contrary to your suggestion, I did not invite Mr. Killian to contact Mrs. Webb on any subject, nor did I agree he could do so. The subject of Mr. Killian initiating direct contact with Mrs. Webb simply never came up on September 5, 1995.

Third, as I agreed to do, I have in fact looked into whether FPC has a "box index" of which documents were in which boxes (which is the only inquiry on indexes you raised in our September 5, 1995, meeting). I have ascertained that FPC *does not have* such an index. Thus, I obviously cannot provide one to you. The *only* document index that FPC does have is classic work product, which was prepared using information constituting the review notes and analysis of Carlton Fields attorneys in both this case and other litigation. That document index, therefore, is not subject to production because it is clearly work-product.

Fourth, FPC did timely comply with Rule 34(b) by serving you with its written response and by producing documents "as they are kept in the usual course of business [by Florida Power]" If you have some basis for your suggestion to the contrary, please provide it to me. I think it is telling, however, that no one in the other cases (which have been pending far longer than this case) in which these documents have been produced in this manner has accused Florida Power of making an incomplete production.

* * * *

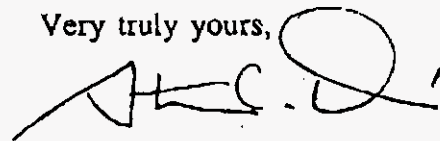
Notwithstanding the strident tone of your letters and the inappropriate and false personal attack levelled at me, the fact remains that Florida Power has produced to Panda all of the documents Panda asked for in the manner in which they are usually kept. It did this in record time to accommodate Panda's ostensible desire for expedited discovery. We of course recognize the possibility of problems occurring in a document production of this magnitude and speed, so we remain willing to work with you to clear up any specific problems you can identify. To date, certainly, any specifics you have raised concerning the document production have been expeditiously addressed.

Ray G. Besing
September 12, 1995
Page 4

Frankly, we would appreciate it if you would begin providing us with the same expeditious response to the comparable issues we have been raising for quite some time now. Just so you have them collected in one place, we are still awaiting from Panda the following:

- ▶ Either copies of the many missing documents which we have identified to you by bates number that were not been produced by Panda, or alternatively, an explanation why those documents were withheld.
- ▶ Copies of the documents in Panda's boxes 27-30, for which we have been billed by the copy center, but which we have not received yet, or an explanation why they were not produced.
- ▶ The documents you mentioned on September 5, 1995, that Panda incorrectly thought were privileged but which you have now determined are not privileged.
- ▶ Answers to both FPC's first and second sets of interrogatories. (Tom Steele has twice now told me by telephone he would be mailing them to me within 24 hours of our telephone call, but I have not received them.)
- ▶ Panda's written response confirming it has produced all of its documents in response to Florida Power's first request for production of documents.
- ▶ A description of the information and data Panda alleges in its pleadings and papers FPC has refused to provide Panda (we have been asking for this since early July!).
- ▶ Panda's privilege log, which you stated would be given to us today (if you will call us to coordinate, we will be in position late this afternoon to provide you with FPC's privilege log).

Very truly yours,



Steven C. Dupré

Enclosure

cc: Thomas T. Steele, Esq. (w/ enclosure)
Richard C. Bellak, Esq. (w/ enclosure)
James P. Lama, Esq. (w/ enclosure)
Sylvia H. Walbolt, Esq. (w/ enclosure)
Donald R. Schmidt, Esq. (w/o enclosure)

Ray G. Besing
September 12, 1995
Page 5

bcc: Randall J. Love, Esq. (w/ enclosure)

DISCOVERY PRACTICE
IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA



VI. MOTIONS TO COMPEL OR FOR A PROTECTIVE ORDER

A. Reference to Local Rule 3.04. The procedures and guidelines governing the filing of motions to compel or for protective order are set forth in Local Rule 3.04, Middle District of Florida, a copy of which is reproduced in Appendix "A" to this Handbook for the convenience of Counsel.

B. Effect of Filing a Motion for a Protective Order. In addition to the procedures and guidelines governing the filing of motions for a protective order, counsel should be aware that the mere filing of a motion for a protective order does not, absent an order of the Court granting the motion, excuse the moving party from complying with the discovery requested or scheduled.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

95 SEP 15 PM 5:43

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

PANDA-KATHLEEN L.P.,
Plaintiff,

vs.

Case No: 95-992-Civ-T-24C

FLORIDA POWER CORP.,
Defendant.

ORDER

THIS CAUSE comes on for consideration of Plaintiff Panda's Motion for Entry of Protective Order (Dkt.39) and defendant's response filed on September 14, 1995.

Although plaintiff's motion was filed on September 13, 1995, this court did not have the opportunity to consider the motion and response until the late afternoon of September 15, 1995.

Plaintiff seeks to stay all depositions until defendant has produced all documents requested by plaintiff and the court has resolved disputes raised in the case management report. Plaintiff indicates that lead counsel, Mr. Besing, is unavailable for depositions the week of September 18, 1995, due to his Continuing Legal Education seminars and depositions scheduled in another case.

Defendant states that it attempted to schedule all depositions, pursuant to this court's prior order, with plaintiff's counsel but received no cooperation. Defendant also states that all pertinent, non-privileged documents have

EXHIBIT 3

been provided. As for the scope of the depositions, defendant correctly states that it needs to address the merits of plaintiff's allegations in determining the Rule 65 requirement of likelihood of success.

Plaintiff has made several efforts to delay discovery and a hearing on the motion for preliminary injunction which it has filed. Further delays will not be countenanced. There appears to be no good reason why the conflicts in Mr. Besing's schedule could not have been resolved by the parties or brought to the court's attention sooner. As the parties know, the filing of a motion does not stay discovery. This court recognizes that expenses may have already been incurred by defendant in anticipation of the depositions set for the week of September 18, 1995. An award of such expenses may be appropriate.


This court reluctantly concludes that the depositions scheduled for the week of September 18, 1995, must be rescheduled due to plaintiff's counsel's conflict. However, plaintiff has failed to demonstrate good cause for the remaining relief requested.

Upon consideration, it is ORDERED that:

(1) Plaintiff Pande's Motion for Entry of Protective Order (Dkt.39) is GRANTED to the extent that the depositions scheduled for the week of September 18, 1995 shall be rescheduled and the motion is otherwise DENIED.

(2) Plaintiff shall file a response to defendant's request for attorney's fees and expenses incurred in making this motion within ten (10) days.

DONE and ORDERED at Tampa, Florida this 15th day of September, 1995.


ELIZABETH A. JENKINS
United States Magistrate Judge