BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Standard offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P. and Florida Power Corporation.	DOCKET NO. 950110-EI ORDER NO. PSC-96-0671-FOF-EI ISSUED: May 20, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

FINAL ORDER
CLARIFYING STANDARD OFFER CONTRACT

BY THE COMMISSION:

CASE BACKGROUND

On January 25, 1995, Florida Power Corporation (FPC) filed a petition with the Commission for a declaratory statement regarding certain aspects of its Standard Offer cogeneration contract with Panda-Kathleen, L.P. / Panda Energy Company (Panda). Panda intervened in the proceeding and filed its own petition for a declaratory statement on the issues raised by FPC. Panda raised an additional issue regarding postponement of significant milestone dates of the standard offer contract pending resolution of the declaratory statement proceedings. Panda then filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing on the issues raised by the declaratory statement petitions. We granted this Petition in Order No. PSC-95-0998-FOF-EI, issued August 16, 1995, and set the case for hearing, which was held on February 19, 1996.

The parties filed post-hearing statements and briefs on March 29, 1996. Panda also filed 90 proposed findings of fact. We include our ruling on each proposed finding in Attachment A to this Order. Our decision on the issues addressed at the hearing is set forth below.

DECISION

The parties presented three main issues for our consideration: 1) Whether Panda's proposed 115 MW (megawatt) qualifying facility complies with Rule 25-17.0832, Florida Administrative Code and the standard offer contract with Florida Power Corporation; 2) Whether Rule 25-17.0832 (3)(e)(6), Florida Administrative Code and the standard offer contract require Florida Power Corporation to make firm capacity payments for the life of the avoided unit (20 years) or the term of the standard offer contract (30 years); 3) Whether, and for how long, the Commission should grant Panda's request to extend the milestone dates in its standard offer contract.

1) The size of the proposed facility

FPC asserts that Rule 25-17.0832(3)(a), Florida Administrative Code, and the Panda standard offer contract that expressly incorporates the rule, limit the availability of standard offer contracts to "small cogeneration facilities less than 75 MW." FPC claims that the 75 MW limitation in the rule applies to the net capacity of the facility to be built. FPC disputes Panda's argument that the 75 MW limit applies to the contract's Committed Capacity, not to the ultimate size of the generating unit. FPC argues that Panda's position is contrary to the rule's plain language and prior Commission decisions.

Panda claims that its proposed 115 MW plant is in compliance with the standard offer contract, as supported by the language of the contract and the parties' actions. Panda argues that compliance with Rule 25-17.0832(3)(a), Florida Administrative Code, is not relevant to our decision on this issue; but nevertheless, the proposed facility does comply with the rule.

Rule 25-17.0832, contains our rules governing standard offer contracts. The rule was specifically amended in October, 1990, to ensure that standard offer contracts were reserved for small qualifying facilities. Subsection (3)(a) states, in part, that:

> . . . each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities **less than 75 megawatts**. . . (emphasis added)

Subsection (3)(c) of the rule states:

> In lieu of a separately negotiated contract, a qualifying facility **under 75 megawatts** or a solid waste facility, as

> defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to Subsection (2). (emphasis added)

We determined in Docket No. 920556-EQ, In Re: Petition for Declaratory Statement Regarding Sale of Additional Capacity From a Qualifying Facility via a Standard Offer Contract, by Polk Power Partners, L.P., LTD., Order No. PSC-92-0683-DS-EQ, that the 75 MW threshold described in Rule 25-17.0832(3)(a) applies to the "total net capacity" of a qualifying facility, rather than the "committed capacity" sold by a qualifying facility pursuant to a standard offer contract. Net capacity is defined as generator output available for sale after subtracting internal load and interconnection losses. Although our declaratory statement in Polk Power Partners was limited to the specific facts and circumstances of that case, that decision is informative with respect to our intent in Rule 25-17.0832, Florida Administrative Code, to preserve standard offer contracts for small qualifying facilities of 75 MWs or less.

Citing climate conditions, performance degradations, and revised emission standards in Florida, Panda witness Killian asserted that a unit with a net capacity of 115 MW was needed to ensure Panda's compliance with the 74.9 MW firm capacity contract. Mr. Killian also argued that the Commission's rules refer to committed capacity rather than facility size. Mr Killian stated that the "standard offer contract does not limit the size of the facility." We believe this testimony conflicts with the straightforward language of Rule 25-17.0832, Florida Administrative Code. If any ambiguity surrounding the intent of the rule to reserve standard offer contracts for small qualifying facilities existed, that ambiguity was eliminated when we issued the declaratory statement in Polk Power Partners. While there is no specific language in the standard offer contract that limits the size of the facility to 75 MWs or less, the standard offer that Panda and FPC executed expressly incorporates our rules in Appendix E.

Panda witness Dietz also testified that Panda must build a 115 MW plant to fulfill its obligations under the 74.9 MW standard offer contract. Mr Deitz asserted that Panda was required to make 74.9 MW of capacity available under all conditions and at all times. We disagree. The standard offer contract does not require that Panda supply 74.9 MW at all times. The contract specifies an on-peak capacity factor of 90% and an overall capacity factor of 42%. FPC witness Dolan testified that Panda's standard offer

contract could be served by a facility with a net rated capacity of 75 MW. He mentioned other qualifying facilities that have capacity contracts with FPC, such as Tiger Bay, Orlando Cogen, and Mission Energy, that consistently provide capacity at their net rated output.

We believe it is reasonable to assume that, on occasion, Panda's proposed facility may generate slightly above 75 MW. Generating units are typically manufactured in block sizes, and it may not even be feasible to install a generating facility with a net capacity of exactly 74.9 MW, without occasionally exceeding 75 MW. Nevertheless, the evidence shows that Panda could adequately serve its contract with a facility much smaller than 115 MW. The evidence also shows that Panda itself did not believe it needed additional capacity to serve its standard offer contract, because it offered to sell an additional 35 MW of firm capacity from the facility to the City of Lakeland.

Panda relies on an August 24, 1994, letter from the Director of the Commission's Division of Electric and Gas to Panda's former counsel, Mr. Barrett Johnson, to support its position that it could build a 115 MW plant to serve a 74.9MW standard offer. In his letter, Mr. Jenkins stated, in part, that:

> Based on the representations, I foresee no reason why this is any type of contract change that should come before the Commission for approval.

That letter did not, however, address whether the size of Panda's proposed facility would comply with Rule 25-17.0832, Florida Administrative Code, which is at issue here.

In light of the evidence in the record, we find that Panda does not need a 115 MW facility to serve its standard offer contract. Even if Panda needed to build a larger facility, our rules do not allow it. Therefore, we hold that Panda's proposed qualifying facility does not comply with Rule 25-17.0832, Florida Administrative Code.

2) The term of capacity payments

FPC argues that Rule 25-17.0832 (3)(e)(6), Florida Administrative Code, and the Panda standard offer contract, limit the delivery of firm capacity under a standard offer contract to a maximum period that is equal to the life of the avoided unit. The Panda standard offer contract defines that period as 20 years. Panda argues that it is entitled to firm capacity payments for the full term of the contract, as supported by the language of the

contract and the parties' actions. Panda asserts that, although it believes compliance with the rule is not relevant to this case, payments made according to the full contract term of 30 years would, nevertheless, be in compliance with Rule 25-17.0832.

The standard offer contract and Rule 25-17.0832(3)(e)(6), Florida Administrative Code, are not consistent with respect to the term for firm capacity payments. The standard offer contract has a contract termination date of March, 2025, 30 years from the early in-service date originally requested by Panda. The Capacity Commitment section of the contract states:

> 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.

Rule 25-17.0832(3)(e)(6), Florida Administrative Code, establishes the period of time during which firm capacity and energy can be delivered under a standard offer contract. The rule states, in pertinent part, that:

> At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit. . .

As we mentioned above, our rules governing cogeneration contracts are included in Appendix E to the standard offer. Appendix C, Schedule 2 to the standard offer contains the operating and economic parameters pertaining to FPC's avoided unit, a 1997 combustion turbine. This schedule clearly shows that the economic plant life of FPC's avoided unit is 20 years.

Since the contract term is 30 years, but the economic life of the avoided unit is 20 years, FPC witness Dolan testified that the contract only requires FPC to purchase as-available energy starting in year 21. While we agree that Mr. Dolan's assumption is logical, we need to point out that his assertion is not supported by specific language to that effect in the standard offer contract.

Panda witness Shanker testified that FPC's avoided unit is essentially the first in a stream of avoided units, and, therefore, the value of deferral methodology does not limit the term of capacity payments. Mr. Shanker assumes that subsequent avoided units will be the same type as FPC's original one, with similar costs. Although Mr. Shanker is technically correct according to the value of deferral methodology, his assumption would inappropriately tie FPC to a planning decision for a second avoided unit 20 years ahead of time. Rule 25-17.0832 (3)(e)(6), Florida

Administrative Code, was adopted to avoid just this situation. The rule clearly states that the economic plant life controls the term of capacity payments. If we were to determine that FPC must make firm capacity payments to Panda for 30 years in the manner suggested by Mr. Shanker, FPC's capacity payments would exceed the avoided costs of the unit identified in the standard offer. This is clearly in violation of both the Public Utility Regulatory Policy Act (PURPA) and our rules for QFs, which were implemented to ensure that utilities pay no more than the avoided cost to purchase capacity and energy from qualifying facilities.

Panda also alleges that discussions were held with FPC, and a verbal agreement was reached, to extend the term of firm capacity payments to 30 years. Panda and FPC disagree on the content of those discussions. Whether such an agreement was reached is, however, immaterial to the determination of the payment period. Rule 25-17.0832, Florida Administrative Code, cannot be violated by extending the firm capacity payment term. "Implied in every contract is the fact that it is to be interpreted and enforced in accordance with the law." de Slatopolsky v. Balmoral Condominium Association, 427 So.2d 781 (Fla. 3d DCA) 1983. Since our rules have the force and effect of law (See Hulmes v. Division of Retirement, Department of Administration, 418 So.2d 269 (Fla. 1st DCA) 1982), any ambiguity in Panda's standard offer contract must be resolved in conformance with the rules that govern it. Therefore, we hold that FPC will only be responsible for firm capacity payments to Panda, and eligible for cost recovery of those payments, for 20 years, in compliance with Rule 25-17.0832, Florida Administrative Code.

Principles of fairness deter us from requiring FPC to make 30 years of capacity payments under the contract, while allowing only 20 years of cost recovery under the rule. It would be equally unfair to require FPC to make only 20 years of capacity payments, but commit Panda to compliance with its contractual performance requirements for 30 years. Therefore, FPC shall only be required to make capacity payments for 20 years, in accordance with our rules, and Panda will only be responsible for supplying firm capacity for 20 years. The total capacity payment stream must have a net present value of approximately $71 million in 1996. This net present value equals that of the payment stream contained in Appendix C, Schedule 3 of the standard offer contract. This approach is the best way to resolve the inconsistency between the contract language and the rule.

Milestone Dates

FPC argues that the milestone dates in the standard offer contract should not be extended. FPC asserts that Panda failed to carry its burden of proof that FPC was the sole reason Panda failed to meet its milestones. FPC argues that it has already presented uncontroverted testimony that Panda's failure to obtain financing and thereby meet its milestones was a direct result of Panda's own actions. Panda argues that the milestone dates should be extended because FPC's actions in initiating this proceeding effectively precluded Panda from further development of its project.

FPC initiated this proceeding to resolve disagreement over fundamental aspects of its standard offer contract with Panda; the term of firm capacity payments and the unit size of the qualifying facility. FPC filed its petition on January 25, 1995, nearly fifteen months ago. While it is true that Panda has contributed to the delay in resolving the issues in this case, FPC witness Morrison testified that uncertainty among lending institutions contributed to delays in acquiring financing for Panda's project. Potential financiers questioned whether FPC would be required to purchase capacity in excess of 74.9 MW, and whether FPC would have to make firm capacity payments for more than 20 years. Mr. Morrison admitted that lenders would want the uncertainty in this docket resolved prior to closing on any financing arrangements. Thus, Panda had to delay proceeding with project financing pending our decision in this docket. No party should be penalized because of the time required to resolve this case. The milestone dates in Panda's standard offer contract shall, therefore, be extended.

Panda argues that it needs 36 months to finance, order equipment, and build the facility. FPC states that milestone dates should be extended by no more than one year, since FPC filed its declaratory statement petition in this docket approximately one year prior to the start date for facility construction.

Panda witness Killian testified that Panda would need a total of at least 18 months to gain financing and order equipment, and an additional 18 months to construct the unit. Mr. Killian admitted under cross-examination, however, that Panda's time line was not "set in stone", and could be shortened. FPC witness Morrison disagreed with Mr. Killian's time line to arrange financing for the project. Mr. Morrison stated that Panda should be able to acquire financing "anywhere from 90 to 120 days, with 180 days at the outside."

We believe that a party should neither be helped nor harmed because of the time requirements of the regulatory process. We hold, therefore, that it is appropriate to extend the contractual milestone dates by a period equal to the time necessary for deciding the matters in this docket. An extension of 18 months represents the approximate amount of time that has transpired from the filing date of FPC's petition for a declaratory statement until the effective date of our order in this docket. Thus, we will extend the milestone dates for Panda's standard offer contract to January 1, 1997, for construction commencement, and July 1, 1998, for the in-service date.

Capacity and Energy Payments

As previously discussed, Panda should receive a 20-year capacity payment stream. That payment must have a net present value of approximately $71 million in 1996. This net present value equals that of the payment stream contained in Appendix C, Schedule 3 of the standard offer contract. Since all energy payments must be made according to Rule 25-17.0832(4), Florida Administrative Code, we direct FPC to file a new capacity payment stream for administrative approval within 30 days of the date this Order is issued.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Panda Energy Company's proposed qualifying facility must have a net generating capacity of 75 MWs or less in order to comply with Rule 25-17.0832(3)(a), Florida Administrative Code. It is further

ORDERED that Florida Power Corporation must make firm capacity payments to Panda Energy Company under the standard offer contract for the life of the avoided unit, which is 20 years. It is further

ORDERED that the payment stream must have a net present value equal to the capacity payment stream set forth in "Appendix C" to the standard offer contract between Florida Power Corporation and Panda Energy Company. It is further

ORDERED that the milestone dates contained in the standard offer contract shall be extended for a period of 18 months. It is further

ORDERED that Florida Power Corporation must file a new capacity payment schedule for administrative approval within 30 days of the issuance of this Order. It is further

ORDERED that specific rulings on Panda's proposed findings of fact are included at Attachment A to this Order and incorporated herein. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 20th day of May, 1996.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

ATTACHMENT A

PROPOSED FINDINGS OF FACT -- PANDA-KATHLEEN, L.P.

Pursuant to Rule 25-22.056(2), Florida Administrative Code, Proposed Findings of Fact shall be succinct, shall clearly cite to the record, and shall not contain mixed questions of law and fact. We have reviewed Panda Energy Company's Proposed Findings of Fact and rule on them as follows:

1. In early 1991, Florida Power sought to purchase power from cogenerators by utilizing the standard offer methodology established by the Commission. To that end, Florida Power submitted for Commission approval a standard offer contract form. (Ex. 5).

   RULING: Accept.

2. A standard offer contract sets, in advance, the rates and terms for which the utility will purchase electricity from a QF. Under the Commission's Rule, that rate must represent the "full avoided cost"; in other words, the utility must offer to pay a rate equivalent to the full amount of money saved by the utility by not having to build its own new generating facility. Rule 25-17-0832(3).

   RULING: Reject as an argument rather than a finding of fact. The statement is an incorrect argument of full avoided cost.

3. In addition to the use of standard offer contracts, the Commission's regulations authorize utilities to directly enter into negotiations with Qfs for the purchase of power. Rule 25-17.0832(2). Those regulations require the utility to engage in negotiations with Qfs, and to do so in good faith. Id.

   RULING: Accept.

4. Under the "negotiated contract" rule, the rate paid to the QF can be no more than the full avoided cost, but may be less. Any contract resulting from such negotiations must be reviewed and approved by the Commission. Id.

   RULING: Accept with the clarification that we review and approve negotiated contracts solely for cost recovery purposes.

5. When approving a standard offer contract or a negotiated contract with a QF, the Commission approves the contract as being in compliance with the Public Utilities Regulatory Practices Act ("PURPA"), as implemented by the Commission's Rules. The Commission approves such contracts as to the calculation of the avoided cost rate, and the necessity of avoiding the designated avoided unit. (T. 79, C.1-25 (Dolan).

RULING: Accept the first sentence of the proposed finding. Reject the second sentence as unclear and unsupported by the record citation.

6. The only substantive difference between standard offer contracts and negotiated contracts is that the former are approved by the Commission prior to execution and the latter are approved by the Commission after execution.

RULING: Reject as an argument rather than a finding of fact and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

7. The 1991 standard offer contract in this case is substantially similar to the negotiated contracts that Florida Power executed with numerous Qfs in 1991. (T. 82, L. 12-19 (Dolan)); (T. 229, L. 5 - T. 230, L. 11) (Killian); (Ex. 23). When entering into negotiated contracts in 1991 with a series of Qfs, Florida Power required the Qfs to use a standard form of contract. (T. 76, L. 19-23 (Dolan)). Florida Power based its standard offer contract form on the negotiated contract form it had been using. (T. 81, L. 19 - 82, L. 7 (Dolan)); (Ex. 23, RK-4); (T. 230, L. 6-11 (Killian)).

RULING: Reject the first sentence of the proposed finding as unsupported by the greater weight of the evidence and unsupported by the record citation. Reject the second and third sentences as irrelevant to decide the factual matters at issue in this case. Issues in this case pertain to the standard offer contract, not the negotiated contract.

8. The standard offer contract form for which Florida Power sought approval from the Commission contained several blanks which could be completed by prospective QF's, including the two contract terms which are the subject of this dispute: 1) the amount of power that the QF would be obligated to provide

to the utility as "Committed Capacity," and 2) the duration of the QF's obligation to provide power (and Florida Power's obligation to make payments) under the contract. See Ex. 30 at ¶¶ 4.1, 7.1.

RULING: Reject as unsupported by the evidence. The second contract term referred to above does not relate to FPC's obligation to make payments but, rather, the termination date of the contract.

9. In August 1991, the Commission reviewed and approved Florida Power's form of standard offer contract and rate tariff (as well as standard offer contracts submitted by other electric utilities). (Ex. 7). In rendering its approval of that form, the Commission specifically held that a "regulatory out" clause should not be included in the standard offer contract submitted by Florida Power. See Ex. 7 at pp. 70-71. This clause, which had previously been authorized by the Commission in the negotiated QF/utility contracts, would have allowed the Commission to alter the terms of the contract or the rates that the utility would have to pay based upon changed circumstances.

RULING: Accept the first and second sentences of the proposed finding. Reject the third sentence because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

10. Following the Commission's approval of the standard offer contract form, Florida Power sent copies of the standard offer contract to interested QF's, and declared a two-week "open season" for any QF to execute and return the contract. (Ex. 7 at p.1). By the close of that period, Florida Power had received ten executed standard offer contracts, including one from Panda. (Ex. 8).

RULING: Accept.

11. After receiving multiple standard offer contracts, Florida Power distributed a questionnaire to each interested QF, requesting information regarding the proposed facility that the QF would construct. Panda's response to that questionnaire included a proposed tentative plant design that would generate in excess of 75 megawatts of net generating

capacity. (T. 106, L. 5-9 (Dolan)); (T. 283, L. 11-19 (Killian)).

RULING: Accept the first sentence of the proposed finding. Accept the second sentence with the clarification that the plant configuration originally proposed by Panda would "occasionally produce over 75" MW of net capacity (Tr. 106, line 7).

12. Under the Commission's regulations, a standard offer contract signed and submitted by a qualifying facility must be accepted by Florida Power unless Florida Power affirmatively seeks permission of the Commission to reject the contract. Rule 25-17-0832(3)(b).

RULING: Accept.

13. In executing the standard offer contract, Panda filled in the blanks with a "Committed Capacity" of 74,900 kilowatts (equal to 74.9 megawatts), Ex. 30 at ¶ 7.1, and a contract term of 30 years. Ex. 30 at ¶ 4.1.

RULING: Accept with the clarification that Panda did <u>not</u> fill in a blank containing a contract term of 30 years; rather, Panda filled in a blank which contained the termination date of the contract. The date which Panda provided was 30 years after the early in-service date originally agreed to by Panda and FPC.

14. The contract with Panda provides that "the term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of March 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement." Ex. 30 at ¶ 4.1.

RULING: Accept.

15. Pursuant to the contract with Panda,"the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement". Ex. 30 at 7.1.; (T. 171, L. 9-14 (Dolan)).

RULING: Accept with the clarification that this transcript cite does not contain this statement as originating from FPC

Witness Dolan. He simply agreed that this statement is contained in the contract.

16. The Panda contract provides that Florida Power "agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement. Ex. 30 at ¶ 6.1.

RULING: Accept.

17. The Panda contract provides that Florida Power, throughout the life of the contract, has the right to require Panda to demonstrate at any time that it is, in fact, providing 74.9 MW "or more" at the delivery point defined therein. Ex. 30, ¶¶ 7.4, 1.8.

RULING: Reject as misleading and unsupported by the weight of the evidence. The cited exhibit states that demonstration of the facility's commercial in-service status shall be required "not more than once in any 12 month period", and such demonstration "avoids, if practical, previously notified periods of planned outages..."

18. The Panda contract provides for payment to Panda under two separate mechanisms. First, Panda is paid a "capacity payment" for the amount of "Committed Capacity" that Panda offered to provide, in this case 74.9 MW. Ex. 30 at ¶¶ 8.2-8.5. Committed Capacity is defined in the contract as the amount of electricity that Panda is obligated to provide to Florida Power's transmission grid at all times, under all environmental conditions. Id.

RULING: Accept the first sentence of the proposed finding. Accept the second sentence with the clarification that Panda not only "offered", but committed by contract to provide 74.9 MW. Reject the third sentence as unsupported by the greater weight of the evidence. The contract does not require Panda to provide committed capacity "at all times, under all environmental conditions". Rather, the contract specifies an on-peak capacity factor of 90% and an overall capacity factor of 42% (Exhibit 30, Appendix C, Schedule 2).

19. In addition to capacity payments, Panda is to be paid for all of the actual electrical energy that the Panda plant provides

to Florida Power, under certain alternate rate schemes. Ex. 30 at ¶¶ 9.1-9.2. No capacity payment is to be made for energy in excess of 74.9 megawatts.See Ex. 30 at ¶¶ 8.2-8.5.

RULING: Reject as unclear. It is not clear what is meant by "certain alternate rate schemes."

20. The committed power supply that would have been provided by the ten executed contracts received by Florida Power at the close of the open season was well in excess of the amount that Florida Power was seeking. (T. 92, L. 14-18 (Dolan)). As a result, Florida Power began a process of choosing which standard offer contract (or contracts) it wanted to utilize.

RULING: Accept.

21. Florida Power prepared a report rating the standard offer contracts it received, and filed that report with the Commission. (Ex. 8). The report specifically described the Panda contract proposal as having a thirty year term, and a Committed Capacity of 74.9 MW. (Ex. 8 at pp. 1, 2, 15, 19)

RULING: Accept.

22. Florida Power ranked Panda's contract submission as the best in terms of feasibility and benefit to ratepayers. Id. Based on that report, Florida Power petitioned the Commission for permission to reject all of the standard offer contracts it had received except the one received from Panda. Id..

RULING: Accept.

23. During the open season, several standard offer proposals were submitted to Florida Power by Qfs which also contained contract terms of thirty years and/or facilities with net generating capacities larger than 74.9 megawatts. (Ex. 8 at pp. 13, 15); (T. 558, L. 1-14 (Dietz)); (T. 98-99 (Dolan)). For example, Sparrow submitted a proposal with 85 megawatts of net generating capacity, and Noah and Destec submitted proposals for a thirty year term. Id.. Florida Power did not reject any of the QF proposals on that basis, nor did it suggest to the Commission that any of those proposals would violate the Commission's Rules. (T. 98, L. 23 - 99, L. 4 (Dolan))

RULING: Accept the first sentence of the proposed finding. Reject the second sentence because the transcript cites do not support this statement. Reject the third sentence as irrelevant to decide the factual matters at issue in this case.

24. In the 1991 standard offer open season, Florida Power received a contract from Sparrow in which Sparrow had selected a committed capacity of 75 megawatts. (T. 95, L. 5-14 (Dolan)). In order to comply with the standard offer, Florida Power altered the committed capacity of the Sparrow contract to 74.999 megawatts. (Ex. 8 at pp. 1, 3) Based on the position that Florida Power has now taken, Sparrow would have to fulfil that committed capacity obligation using a facility smaller than 75 megawatts.

RULING: Reject because this statement is unsupported by the greater weight of the evidence.

25. In due course the Commission approved Florida Power's petition to reject all standard offer contracts, except Panda's, over the objection of one of the competing bidders. (Ex. 10). In that same order, the Commission formally approved Panda's contract with Florida Power, including the terms calling for a 74.9 MW Committed Capacity and a 30 year contract term. Id. Thus, the Panda/Florida Power contract was approved by the Commission twice -- once when the form was approved, and a second time when the Commission allowed Florida Power to select the contract completed by Panda over the competing contracts.

RULING: Reject as misleading and unsupported by the weight of the evidence. We approved a blank contract form one time. We approved Panda's standard offer contract with FPC only one time.

26. In approving the Panda contract, the Commission held that "Florida Power Corporation acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by FPC to be the best available." (Ex. 10 at p. 3).

RULING: Accept.

27. Florida Power had signed the Panda contract prior to submitting it to the Commission. (T. 105, L. 3 (Dolan)). After the Commission approved Panda's contract, it therefore became a binding agreement between the parties.

RULING: Accept the first sentence of the proposed finding. Reject the second sentence as a Conclusion of Law rather than a Finding of Fact.

28. In 1993, the parties agreed to extend the milestone dates in their contract to require Panda to begin construction of its plant by January 1, 1996, and begin operation of the plant by January 1, 1997. (Ex. 11).

RULING: Accept.

29. Panda had to design a plant with a net generating capacity in excess of 74.9 megawatts to insure that it would be able to meet its 74.9 megawatt committed capacity obligation under all conditions. (T. 304, L. 23 - 306, L. 17 (Dietz)).

RULING: Reject as an argument rather than a finding of fact.

30. Prior to the summer of 1994, Florida Power never objected to the building of a facility that could generate in excess of 74.9 megawatts. (T. 392, L. 13-22 (Lindloff)); (T. 294, L. 8 - 295, L. 5 (Brinson)). However, in the summer of 1994, Florida Power objected to the construction by Panda of any plant larger than 74.9 megawatts. (T. 235, L. 20 - 236, L. 19 (Killian)). Florida Power then began insisting that Panda seek the approval of the Commission on the size issue. Id.

RULING: Reject as an argument and irrelevant to decide the factual matters at issue in this case.

31. In response to Florida Power's objection, Panda met with Commission staff in August of 1994, and received a confirmation letter from Joseph Jenkins, the director of the Commission's Division of Gas and Electric, stating that Panda's proposed facility did not violate the contract or require approval of the Commission. (T. 243, L. 6 - 244, L. 5 (Killian)). This opinion did not dissuade Florida Power from continuing its dispute, and in January of 1995, Florida Power filed its from Petition (without advance notice to

Panda) in this case seeking a declaration the Commission on this issue.

RULING: Reject as irrelevant to decide the factual matters at issue in this case and as unsupported by the greater weight of the evidence.

32. In order to meet a 74.9 megawatt committed capacity at all times under all conditions, it is necessary to construct a plant with a maximum capacity above 74.9 megawatts. (T. 304, L. 23 - 306, L. 17 (Dietz)).

RULING: Reject as unclear. It is unclear whether the reference to "maximum" capacity is the net capacity of the facility or the gross rating of the generator.

33. It is necessary to build additional capacity to account for performance degradations caused by climate, aging of the plant, and other factors. Id.

RULING: Reject as unclear and as unsupported by the weight of the evidence.

34. Brian Dietz, Panda's chief engineer, was personally responsible for Panda's engineering decisions in planning the Panda-Kathleen plant, and it was his professional opinion that led Panda to select a plant design that could meet its 74.9 megawatt committed capacity obligations under all conditions. Id..

RULING: Reject as irrelevant to decide the factual matters at issue in this case. It is not relevant whose professional opinion Panda relied on.

35. In considering the design of the plant, Mr.. Dietz determined that a plant with a minimum design capacity of 100 megawatts (at ISO conditions) was necessary to meet Panda's committed capacity obligations under all conditions. (T. 312, L. 10-17 (Dietz)).

RULING: Reject as opinion and as unsupported by the weight of the evidence.

36. Mr.. Dietz's conclusion corresponds to Florida Power's own recommendations. On September 29, 1992, Alan Honey of Florida Power recommended to Darol Lindloff of Panda that Panda utilize an equipment configuration using two LM 6000 turbines, which result in a design capacity of 95 to 100 megawatts at ISO conditions. (T. 392, L. 7-21 (Lindloff)). Ultimately, Panda determined that this LM 6000 turbine configuration would not meet Florida emissions requirements. (T. 318, L. 15-18 (Dietz)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

37. The plant design ultimately chosen by Panda used the smallest available turbine equipment which would assure generation of the Committed Capacity under all conditions, and also meet Florida's emissions requirements. (T. 319, L. 14 - 320, L. 4 (Dietz)).

RULING: Reject as unsupported by the weight of the evidence.

38. Florida Power did not put forth any credible evidence that a plant with a maximum capacity of 74.9 megawatts would be feasible under the contract. No expert or witness for Florida Power told this Commission what generators Panda could select to build this facility that would put out 74.9 megawatts at all times under all conditions and meet Florida's emissions requirements, other than what Mr.. Dietz selected.

RULING: Reject as irrelevant to decide the factual matters at issue in this case, as an argument rather than a finding of fact, and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

39. In Florida Power's other active cogeneration contracts (Ex. 2), many of the cogenerators serving Florida Power also designed their plants with maximum net generating capacities higher than their committed capacities. See (T. 73, L. 4-11 (Dolan)(Auburndale provides 131 megawatts of committed capacity from a 150 megawatt plant)); (T. 69, L. 15 - 72, L. 7 (Dolan)(Orange Cogen supplies 97 megawatts of committed capacity from a 104 to 106 megawatt plant).

RULING: Accept.

40. Florida Power currently buys power from other cogenerators who produce in excess of their committed capacity. For example, at times Florida Power buys up to 200 percent of the committed capacity generated by U.S Agricultural. (T. 64, L. 1 - 66, L. 25 (Dolan)). U.S. Agricultural entered into the same standard offer contract form as Panda. (T. 65, L. 18-25 (Dolan).

RULING: Reject as misleading and as irrelevant to decide the factual matters at issue in this case. U.S. Agricultural signed a 5.1 MW standard offer contract with FPC. FPC Witness Dolan testified that U.S. Agricultural would have subscribed for 10 MW if that amount had been available to subscribe to under FPC's standard offer contract.

41. Panda's design of its proposed plant was constrained by Florida's emissions requirements. It was the uncontradicted testimony of Brian Dietz that Florida's emission regulations were changed in 1992, and those changes severely limited the emissions that could be generated by Panda's plant. (T. 312, L. 21 - 313, L. 5 (Dietz)).

RULING: Reject the first proposed finding as unclear and as irrelevant to decide the factual matters at issue in this case. It is not indicated in what way Panda's proposed plant design was "constrained". Reject the second statement as an argument rather than a finding of fact.

42. As the result of those changes, Panda was limited in its options in selecting equipment, because only a small number of the generating equipment units available in the market could meet Florida's emission's requirements. (T. 317, L. 1 - T. 319, L. 8 (Dietz)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

43. Since Florida Power required Panda to have a backup source of fuel for its plant, Panda was forced to design its plant with oil as an auxiliary fuel. (T. 313, L. 7 - 314, L. 19 (Dietz)). The potential use of oil as a fuel eliminated Panda's ability to use certain kinds of emissions-limiting equipment. Id.

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

44. The plant configuration that Panda had originally submitted to Florida Power would not meet Florida's emissions requirements. (T. T. 318, L. 6-13 (Dietz)).

RULING: Reject as unclear and as irrelevant to decide the factual matters at issue in this case. It is not indicated the time frame during which Panda's plant configuration would not meet emission requirements.

45. Based on its considerations of degradation of performance and emissions, Panda ultimately determined that only two kinds of turbine equipment would meet the requirements of the Project -- the ABB11N1 turbine (maximum capacity 115 megawatts) and the GE Frame 7 (maximum capacity 118 megawatts). (T. 318, L. 25 - 319, L. 8 (Dietz). Of these two, only ABB would guarantee a delivery time, and Panda ultimately chose the ABB11N1. Id.

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

46. The contract between the parties contains no express limitation on the net generation size of the plant to be constructed by Panda. Rather, the contract specifically limits only the amount of Committed Capacity that Florida Power is obligated to purchase from Panda to 74.9 megawatts. Ex. 30 at ¶ 7.1.

RULING: Reject as unsupported by the greater weight of the evidence. Appendix E to the standard offer contract contains Rule 25-17.0832, Florida Administrative Code, which limits the net output of facilities accepting the standard offer contract.

47. The contract expressly limits the amount of Committed Capacity that may be contracted for, by providing that "[t]he availability of this Agreement is subject to...the Facility having a Committed Capacity which is less than 75,000 KW." Ex. 30 at ¶ 2.1.2.

RULING: Accept.

48. Florida Power has stated that the 75 megawatt size cap that it seeks to impose pertains to net capacity of a plant under "normal conditions". (T. 159, L. 11-15 (Dolan)). However, in

its 1992 Petition to approve the Panda contract, Florida Power used the word "size" to refer to the committed capacity of the project, not the capacity of the plant to be constructed. (T. 94, L. 6-9 (Dolan); (Ex. 10 at pp. 1, 15). In that Petition, Florida Power repeatedly described the Panda project as 74.9 megawatts in size. Id.

RULING: Reject an argument rather than a finding of fact and as irrelevant to decide the factual matters at issue in this case.

49. The actions of both parties, after the contract was entered into, support Panda on the fact that the contract does not limit the net generation size of Panda's facility. Both parties proceeded on the understanding that Panda was not limited to a 75 megawatt plant.

RULING: Reject as irrelevant to decide the factual matters at issue in this case and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

50. Florida Power was advised on several occasions, beginning in 1992, that Panda was considering building a plant with a maximum capacity of 110 megawatts to 115 megawatts. (T. 294, L.22 (Brinson); (T. 390, L. 22 - 391, L. 2; (Lindloff)). Florida Power did not object to Panda's plans, and indeed encouraged Panda to build a plant larger than 74.9 megawatts. (T. 392, L. 13-21 (Lindloff)). In fact, Florida Power's representative recommended to Panda that Panda construct a plant with an approximate maximum output of 95 to 100 megawatts. Id.

RULING: Reject the first sentence of the proposed finding as irrelevant to decide the factual matters at issue in this case. Reject the second sentence as unsupported by the greater weight of the evidence. The record indicates that FPC first informed Panda of the Polk Power Partners decision, then suggested that Panda seek a declaratory statement from us regarding the proposed facility's size. Reject the third sentence as an argument rather than a finding of fact.

51. Florida Power was aware that Panda's initial proposal, which would utilize 3 LM2500 turbines, would have put out in excess of 75 megawatts. (T. 106, L. 5-9 (Dolan)); (T. 226, L. 8-10).

That preliminary configuration proposal was not ultimately adopted by Panda because it could not meet the 74.9 megawatt Committed Capacity under all conditions, nor could it meet Florida emissions requirements. (T. 318, L. 6-13 (Dietz)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case and as unsupported by the weight of the evidence. The above-referenced transcript cite states that three LM2500 turbines would **occasionally** produce more than 75 MW.

52. Neither Florida Power nor the ratepayers would be damaged by Panda's proposed design. Panda has not argued that Florida Power would have to pay anything more than as-available prices for any output above 74.9 MW, and Florida Power would be able to curtail Panda from producing more than 74.9 megawatts in low-load conditions. (T. 155, L. 16-24 (Dolan)). The only harm asserted by Florida Power in this proceeding -- the theoretical potential to occasionally have to cycle off two existing plants more often -- was shown on cross examination to be admittedly de minimus "harm". (T. 430, L. 20 - 431, L. 13 (Dolan)).

RULING: Reject as unclear and as an argument rather than a finding of fact. It is unclear what is meant by the term "damaged", and FPC witness Dolan did not testify that cycling off two units would result in de minimus harm.

53. Florida Power encouraged Panda to design a plant with a net generating capacity larger than 74.9 megawatts, and Florida Power has attempted to create contract disputes in an attempt to escape from its contract with Panda.

RULING: Reject as an argument rather than a finding of fact, as irrelevant to decide the factual matters at issue in this case, and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

54. In 1993 and 1994, Florida Power crafted a global strategy to decrease and/or eliminate the purchases of power from cogenerators. At that time, Florida Power considered cogenerators to be competitors with it in the business of wholesaling electricity, and had lost some business to them. (T. 138, L. 3-10 (Dolan)). That strategy was based on

Florida Power's view that "at the present time, the QF contracts are not cost effective when compared to FPC built natural gas fired combined cycle units... [Florida Power's] resources need to be assigned to properly evaluate and implement, if feasible, all of the options available to increase the cost-effectiveness of the QF contracts." (T. 237 (Killian)). This statement, which was contained in Florida Power's Cogeneration Review, reflects a desire to escape cogeneration contracts.

RULING: Reject as an argument rather than a finding of fact and as irrelevant to decide the factual matters at issue in this case.

55. Florida Power investigated the possibility of buying out certain contracts, including Panda's contract. To that end, Florida Power formed a "NUG" (non-utility generated) buyout committee. (T. 122, L. 7-15 (Dolan)). Florida Power considered buying out any contract on which plant construction had not yet begun. (Ex. 15)

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

56. At the time of the Cogeneration Review, Florida Power had overbooked committed capacity and had far more committed capacity than it initially anticipated. (T. 123, L. 14-24 (Dolan)). Florida Power had deliberately overbooked its cogeneration contracts in 1991 in anticipation that some of those projects would not be built. Id. All the projects, however, did come to fruition. Id.

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

57. Florida Power implemented its cogeneration strategy by "actively enforcing" its contracts and attempting to identify "breaches" by cogenerators, no matter how small, which would allow it to escape its obligations. (Ex. 14 at p. 10).

RULING: Reject as irrelevant to decide the factual matters at issue in this case and as an argument rather than a finding of fact.

58. Florida Power has admitted that it concluded in 1994 that did not, and does not, want Panda to build its plant. (T. 129, L. 1-8 (Dolan)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

59. Florida Power's intentions are further clarified by other examples of its treatment of Panda. In late 1993 and early 1994, Panda was considering the relocation of its thermal host in order to accommodate additional steam use. Florida Power refused to agree to such a move, despite the lack of any effect whatsoever on Florida Power's interests. (T. 129, L. 11- 130, L. 22 (Dolan).

RULING: Reject as an argument rather than a finding of fact and as irrelevant to decide the factual matters at issue in this case.

60. In an internal memorandum discussing the refusal to allow a change of site, Florida Power noted that it did not wish to "throw Panda a lifeline". (T. 130, L. 21-22 (Dolan)); (Ex. 13).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

61. Florida Power's representatives dissuaded Panda from seeking a determination from the Commission regarding the sizing of Panda's plant.

RULING: Reject as irrelevant to decide the factual matters at issue in this case, as unsupported by the greater weight of the evidence, and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

62. Panda's representative, Joseph Brinson, was told by Florida Power's representative, Robert Dolan, that "size was not a problem to FPC, but that we should not talk with the Florida Public Service Commission on installing a 110 MW plant, and that we should be careful dealing with the Public Service Commission while ARK Energy was still challenging the FPC/Panda contract". (T. 294, L. 25 - 295, L. 4 (Brinson)).

Robert Dolan admitted that he did not want Panda to go to the Commission because he did not want Panda to "muddy the waters" while the Commission was considering whether to allow Florida Power to select Panda's contract. (T. 115, L. 3-7 (Dolan)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

63. The contract explicitly defines the length of the parties' duties to perform: The term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of March 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement. Ex. 30 at ¶ 4.1.

RULING: Accept.

64. In addition, the contract provides that "the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement". Ex. 30 at ¶ 7.1.; (T. 171, L. 10-13 (Dolan)). As compensation for the provision of that Committed Capacity, "the Company agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement. Ex. 30 at ¶ 6.1. Based on these contractual obligations, the contract obligates Florida Power to make capacity payments for the entire period in which it provides firm committed capacity to Florida Power.

RULING: Accept the first and second sentences of the proposed finding. Reject the third sentence as a Conclusion of Law rather than a Finding of Fact.

65. In 1990, Florida Power submitted a draft of its standard offer contract to the Commission for approval. (T. 87, L. 2-8 (Dolan))(Ex. 5). That contract had a schedule which listed capacity payments for thirty years, but defined an avoided unit of only twenty years. (Ex. 5). That draft standard offer contract was sent by Florida Power to Panda. (Ex. 4).

RULING: Reject as irrelevant to decide the factual matters at issue in this case. Regardless of what was stated on a draft contract, it is not the contract that was approved by us and signed by Panda.

66. In his testimony, Robert Dolan of Florida Power asserted that it has always been his view that Florida Power was only obligated to make capacity payments for 20 years. Mr.. Dolan testified that the capacity provided by Panda for years 21 through 30 of the contract would be "free". (T. 91, L. 9-15; 101, L. 2 - 103, L. 22 (Dolan)). On cross-examination, Mr.. Dolan admitted that he could not identify any clause in the contract which specifically states that Florida Power is only responsible for paying for as-available energy for the last ten years of the contract. (T. 170, L. 4 - 18 (Dolan)).

RULING: Accept with the clarification that Mr.. Dolan stated that "we had researched the contract to make this determination."

67. Mr.. Dolan never voiced his opinion to Panda or the Commission regarding the length of capacity payments, even when Florida Power was seeking approval of the contract. (T. 101, L. 20 - 103, L. 2; 168, L. 17 - 169, L. 1 (Dolan)). If the contract did indeed provide for 10 years of free capacity, that free capacity would have been of benefit to the ratepayers, and Florida Power would have cited that interpretation when seeking approval of the Panda contract.

RULING: Reject as irrelevant to decide the factual matters at issue in this case and because transcript cite does not support the second statement.

68. The schedules attached to the contract do not limit Florida Power's capacity payments to 20 years. Appendix "C" to the contract, states on its face payments should be made in accordance with Rule 25-17.0832(4), as referenced in Paragraph 8.2 of the Contract. (Ex. 30 at Appendix "C").

RULING: Reject the first sentence of the proposed finding as an argument rather than a finding of fact. Accept the second sentence.

69. Rule 25-17.0832(4) requires only that an illustrative schedule of payments be attached to a standard offer that goes out at least ten years. It is not necessary that such a schedule be attached covering the full term of the contract. Appendix "C" to the Panda contract is such an illustrative schedule.

RULING: Accept with the clarification that it is Rule 25-17.0832(3)(e)3. that contains this requirement, not Rule 25-17.0832(4).

70. Roy Shanker, an expert witness sponsored by Panda, presented the only testimony regarding the use of the value of deferral method in interpreting the contract, and testified that the payment of thirty years of capacity payments was mandated by the contract using that method. (T. 512, L. 5 - 513, L. 3 (Shanker)).

RULING: Reject as unsupported by the evidence. Panda witness Shanker did not state that 30 years of capacity payments was **mandated**, only that 30 years of capacity payments was not inconsistent with value of deferral theory.

71. The value of deferral method, codified in Rule 25-17.0832 and Article VIII of the Contract, provides the basis for the calculation of capacity payments to be paid to cogenerators. Id. That method calculates the costs avoided by the utility when the utility is able to defer the expense of building a new plant by purchasing firm capacity from a cogenerator.

RULING: Accept the first sentence of the proposed finding. Reject the second sentence as unclear.

72. In this case, Florida Power will be able to avoid building 115 megawatts of capacity for a period of thirty years. Therefore, the value of deferral method provides that Florida Power must pay Panda for each of the thirty years in which Florida Power has avoided the cost of building a plant. Id.

RULING: Reject as an argument rather than a finding of fact.

73. Florida Power has argued that the contract provides that the "plant life" of the avoided unit at issue is only twenty years, and therefore Florida Power is only obligated to pay capacity payments for the "plant life" of the avoided unit. However, the contract obligates Panda to supply Florida Power firm capacity for thirty years, not twenty. Thus, Florida Power is avoiding having to build that much capacity for thirty years, and Panda must be compensated for that.

RULING: Reject as an argument rather than a finding of fact and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

74. If Panda is not paid for providing capacity for the last ten years of the contract, a windfall to Florida Power would result. (T. 519, L. 16 - 520, L. 9 (Shanker)).

RULING: Reject as an argument rather than a finding of fact.

75. Panda presented testimony from several witnesses regarding discussions with Florida Power representatives in which the subject of capacity payments were discussed. In those discussions, Florida Power's representative conceded that the capacity payments needed to be made for the last ten years of the contract.

RULING: Reject as irrelevant to decide the factual matters at issue in this case, as an argument rather than a finding of fact, and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

76. Darol Lindloff and Ralph Killian attended a meeting with Florida Power representatives in which Florida Power admitted that it needed to do something to provide capacity payments to Panda for the last ten years of the contract. (T. 233, L. 14 - L. 234, L. 21 (Killian)); (T. 394, L. 20 - 395, L. 5 (Lindloff)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

77. The calculation of payments for years 21 through 30 of the contract requires an application of the formulas contained in the contract, and requires no external fact finding. As testified by Roy Shanker, the value of deferral method contained in the contract and in the Commission's rules provides that the capacity payments for year 20 of the contract may be escalated by 5.1 percent to derive the year 21 payments, and that this procedure should be used for each year until year 30. (T. 535, L. 7-21 (Shanker)).

RULING: Reject as an argument rather than a finding of fact.

78. Appendix "C" of the Contract provides the amount of firm capacity payments for years 1 through 20 of the Contract, and firm capacity payments to Panda for years 21 through 30 of the Contract should be computed by escalating the payments due Panda at year 20 at a rate of 5.1% per year. (T. 538, L. 3-19 (Shanker)). A copy of those calculations was introduced in evidence as Exhibit 37.

RULING: Reject as an argument rather than a finding of fact.

79. The contract provides certain milestone dates for the inception and completion of the construction of Panda's plant. Pursuant to a previous agreement between the parties, those dates were extended to require construction to begin by January 1, 1996 and be completed by January 1, 1997. (Ex. 11).

RULING: Accept.

80. By filing its Petition, Florida Power interfered with Panda's ability to perform under the contract. There is no dispute on this point. (T. 248, L. 1-11 (Killian)); (T. 449, L. 20 - 450, L. 9; 472, L. 16-21; 502, L. 9-20 (Morrison)).

RULING: Reject as an argument rather than a finding of fact.

81. By the time of the Petition, Panda had undertaken substantial progress toward compliance with the contract. (T. 248, L. 1-11 (Killian)).

RULING: Reject as the transcript cite does not support this statement.

82. Panda had an executed indication of interest from its primary lenders, the Bank of Tokyo and Bayerische Vereinsbank. (T. 468, L. 18-25 (Morrison)); (Ex. 33).

RULING: Accept.

83. Panda had prepared documentation to create a thermal host, and that host was approved by FERC. (T. 474, L. 9 - 475, L. 2 (Morrison)).

RULING: Accept.

84. Panda and its lenders were scheduled to close on financing, using medium term notes ("MTN") in March of 1995. (T. 493, L. 23 - 494, L. 1; 501, L. 18 - 502, L. 2 (Morrison)); (Ex. 36, p.2).

RULING: Accept.

85. Prior to the disputes at issue in this case, it was Florida Power's opinion that Florida Power's standard offer contract was structured in such a way as to make it impossible for a cogenerator to obtain financing. (T. 140, L. 16-23 (Dolan)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case and as unsupported by the greater weight of the evidence. FPC witness Dolan said that it may difficult, even impossible, for a cogenerator to finance a contract based on combustion turbine unit payments "using nonrecourse, high leverage financing." (Tr. 140, lines 22-23).

86. Since Panda's inability to meet the milestone dates is attributable to Florida Power's actions, an extension of the milestone dates is appropriate.

RULING: Reject as an argument rather than a finding of fact and because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

87. This Commission makes no finding as to whether Panda would have been able to complete its financing. The Commission does not find Florida Power's arguments on this issue relevant at this time, given the issues raised. Panda is merely asking for the opportunity to complete its financing and construct its plant, and is entitled to that opportunity.

RULING: Reject as an argument rather than a finding of fact and because there is no transcript or exhibit cite for this

statement, as required by Rule 25-22.056(2), Florida Administrative Code.

88. Ralph Killian testified that Florida Power's actions caused Panda to lose its place in line for the generating equipment it needs to build its plant. (T. 548, 15-18; 549, L. 24-25 (Killian))). In addition, Mr. Killian testified that Florida Power's actions caused Panda to lose its financing. Id. Based on these occurrences, Panda will need a period of eighteen months from the date of this Commission's order to start construction of the plant, and will need an additional eighteen months to complete that construction. (T. 548, L. 18-23; 550, L. 13 - 551, L. 2; 551, L. 12-17 (Killian)).

RULING: Reject as an argument rather than a finding of fact.

89. The payments to Panda for committed capacity and energy are specifically provided on the contract, and may be obtained directly from the contract. The payments to Panda under the contract for a particular year have been computed in Exhibit 37.

RULING: Reject as not supported by the greater weight of the evidence.

90. Panda's expert, Roy Shanker, testified that the calculations contained in Exhibit 37 are obtained through a mechanical escalation of 5.1 percent for each year of the contract. (T. 538, L. 3-19 (Shanker)).

RULING: Accept.