

1:05  
4/4

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

ORIGINAL  
FILE COPY

---

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: April 3, 1995

**PANDA-KATHLEEN L.P.'S RESPONSE TO  
FLORIDA POWER CORPORATION'S  
MOTION TO STRIKE PANDA-KATHLEEN L.P.'S  
MOTION FOR DECLARATORY STATEMENT**

COMES NOW, Panda-Kathleen, L.P. ("Panda"), by and through its undersigned attorneys, and respectfully moves this Commission to deny Florida Power Corporation's ("Florida Power") Motion to Strike dated March 24, 1995 (and to deny for the same reasons Florida Power's March 21, 1995 motion to deny Panda's Motion To Supplement Petition for Declaratory Statement), and as grounds therefor states:

1. Florida Power appears to ask this Commission to strike Panda's entire response to Florida Power's Petition for Declaratory Statement. Florida Power offers no basis for the Commission to strike any of Panda's pleading except for Panda's request that the Commission order Florida Power to show cause why Florida Power should not complete, execute, and deliver the Clarification Letter (as defined in Panda's March 9 motion). In fact, other than the Clarification Letter matter, every issue in Panda's pleading is either a direct response to Florida Power's Petition for Declaratory Statement (the design of Panda's facility, the 30-year term of the contract, and the appropriate rate applicable after 2016) or addressed to a matter that arises only because of that Petition (the extension of the milestone dates and the calendar year basis for capacity payments). As described more fully in paragraph 6 below, Panda is willing to treat the Clarification Letter issue as moot based on Florida Power's representations to this Commission in paragraph 6 of its Answer in Opposition to Panda-Kathleen, L.P.'s Motion to Supplement the Petition for Declaratory Statement.

DOCUMENT NUMBER-DATE

03387 APR-3 1995

FPSC-RECORDS/REPORTING

393

2. Florida Power quotes from the Commission's rule governing declaratory statements (Florida Power's Motion to Strike, p. 2) to the effect that a declaratory statement addresses only how a statutory provision, rule or order applies to "petitioner in his or her particular circumstances only." Rule 25-22.021 (emphasis added by Florida Power). Of course, a declaration by the Commission as to whether Florida Power is bound by the Standard Offer Contract between Florida Power and Panda is just as much a declaration of Panda's rights under the same agreement. Therefore, Panda is legally an indispensable party. Florida Power's desire for an empty-chair debate is not a legal basis for the Commission to strike Panda's Motion or silence an indispensable party for Florida Power's gain at Panda's--and the rate payer's--expense. This argument by Florida Power is also moot, because this Commission has already determined that Panda is a party and has issued its Order granting Panda's intervention.

3. Florida Power's January 25, 1995 Petition for Declaratory Statement sought a Commission determination that Panda's plant design made Panda ineligible for its Standard Offer Contract. In its March 14, 1995 pleading, Panda showed that given the laws of physics, generators capable of producing 74.9 MW measured at the Point of Delivery under worst-case conditions over the entire term of the Standard Offer Contract must necessarily produce more than 74.9 MW measured at the generator at all times, and substantially more than 74.9 MW under optimal conditions and that these physical facts are consistent with Commission rules. Further, Panda showed that its choice of equipment and configuration was the smallest that could reliably and efficiently produce 74.9 MW at the Point of Delivery and meet environmental requirements at all times over the life of the contract. These points are directly responsive to Florida Power's Petition.

4. Similarly, Florida Power asks the Commission to declare that the Florida Power-Panda Standard Offer Contract has only a 20-year term. In support of this request, Florida Power relies on the illustrative table of rates by calendar year in Schedule 3 to Appendix C to the Standard Offer Contract, which shows capacity and energy payments for only 20 years. Florida Power further argues that the rates would have to be recalculated if the contract had a 30-year

term to spread 20 years' value over 30 years. Again, the Commission can make no determination of Florida Power's rights on this matter that does not simultaneously determine Panda's rights. In fact, since the contract on its face has a 30-year term, it is Florida Power that is asking the Commission to reform the contract. Panda's pleading was directly responsive to Florida Power's Petition, pointing out that the contract had always been described by Florida Power (to, among others, this Commission) as a 30-year contract; and that under the formula in the Commission's rules referenced in Schedule 3 to Appendix C to the Standard Offer Contract the value of deferral of Florida Power's avoided unit was calculated in exactly the same manner for the last 10 years of the agreement as for the first 20 years (so that the payments under the Normal Payment Option would continue to escalate at 5.1% over the last 10 years). Again, Florida Power offers no basis for the Commission to strike this portion of Panda's pleading.

5. Florida Power commenced this proceeding by filing its Petition for Declaratory Statement on January 25, 1995. As was entirely foreseeable, this filing, made without prior consultation with or notification to Panda, halted Panda's financing of the facility and forced Panda to cancel the order for major equipment to be used in the Plant. This action has seriously jeopardized Panda's ability to meet both the "Construction Commencement Date" and "Contract In-Service Date" milestones. The Commission staff advised Panda (and told Panda that Florida Power concurred) by letter dated August 24, 1994 from Joe Jenkins that the size and configuration of Panda's design did not raise an issue and that the Commission did not have to address the question. Panda relied on the letter in good faith, as it was entitled to do. Further, Florida Power told Panda that the table in Schedule 3 had to be extended for the full 30-year term reflecting a 5.1% annual escalation over that full term. Panda thus believes that Florida Power's filing was unnecessary and the consequences foreseeable by Florida Power. It is elementary that if one party forces non-compliance on the other party, it can not profit by its actions. Where delay is causing problems, it is only reasonable to resolve those problems as quickly as possible and it is appropriate to deal with the consequences of Florida Power's Petition in the proceeding initiated by that Petition. Thus, Panda addressed the milestone extension. Similarly, it is

necessary to deal with how to apply the rate table in Schedule 3 to an in-service date later than January 1, 1997 only because of Florida Power's eleventh-hour petition and the delays it caused. Since Florida Power has raised questions to which Panda thought the answers were obvious, Panda appropriately seeks to have the Commission determine that, since the capacity payments are set out by calendar year in Schedule 3 to Appendix C, the rates would apply only for capacity sold in the appropriate calendar year of operation.

6. The single portion of Panda's motion that Florida Power substantively addressed in its Motion to Strike, the matters raised in the Clarification Letter, appears to have been largely resolved by further discussion between the parties subsequent both to Panda's filings in this docket and to Florida Power's Motion to Strike. Hence, the points raised as to the Clarification Letter by Florida Power are largely moot, provided that Florida Power executes the letter in the form recently negotiated by the parties and does not unreasonably delay or refuse to act on similar matters that may be raised by third parties during the remainder of the financing. The Clarification Letter by Panda's terms does no more than confirm for Panda's lenders in a routine way how certain provisions in the Standard Offer Contract work or what they mean. (As this pleading was being prepared for filing, however, Florida Power advised Panda that it has retained outside counsel on this matter and that outside counsel would change the draft Clarification Letter into an agreement with new modification, even though the Clarification Letter had been within a few word choices of execution.) Panda still hopes to resolve this matter, and will keep the Commission apprised of progress or lack thereof. Panda will accept Florida Power's pledge that "Florida Power will continue to attempt to reach accommodation with Panda" (Answer in Opposition p. 6) and hereby withdraws its "Clarification Letter" from this proceeding, based on Florida Power's representations to Panda and to this Commission. Panda does ask the Commission to revisit the issue if necessary.

7. As stated in Panda's motion, extension of the milestone dates and payment of the rates on a calendar year basis do not keep Panda entirely whole. Thus, Panda continues to seek the quickest possible resolution of the issues raised and the problems caused by Florida Power's

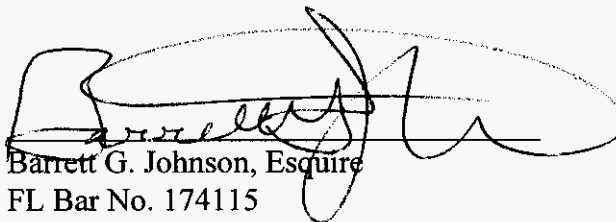
Petition. Rather than filing a Motion to Strike and seeking an extension for its answer to Panda's response on the issues raised by its Petition, thus worsening the schedule delays, Florida Power might simply have addressed the issues.

8. As stated, Panda has been concerned with critical time paths throughout. For that reason, Panda responded to Florida Power's pleadings in this docket and respectfully asked this Commission to dispose of the matters before it herein on the pleadings filed by both parties, supplemented by oral argument. Simply put, it is obvious that the declaratory statement proceeding Florida Power started necessarily cannot determine Florida Power's position without also determining Panda's, and as now joined, this proceeding is the quickest and most appropriate way to determine the issues. The fact is that Panda has asked only for that relief necessary to resolve the matters raised by Florida Power or consequent thereof. For Florida Power to assert that it can invoke this Commission's authority to convene a proceeding to determine another party's vital interests and exclude that party from any ability to be present or to present its case flies in the face of what Justice Harlan called "fundamental principles of Anglo-American Law."

CONCLUSION

Panda respectfully requests that the Commission deny Florida Power's Motion to Strike in its entirety, grant Panda's motion and enter its order granting the relief requested in Panda's pleadings in this docket.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barrett G. Johnson", is written over a horizontal line. The signature is stylized and somewhat cursive.

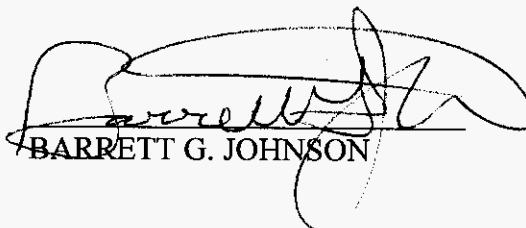
Barrett G. Johnson, Esquire  
FL Bar No. 174115  
Johnson and Associates, P.A., Suite 350  
315 South Calhoun Street  
Tallahassee, Florida 32301  
Telephone: (904) 222-2693

and

John B. O'Sullivan, Esquire  
Chadbourne & Parke  
Tenth Floor  
1101 Vermont Avenue, N.W.  
Washington, D.C. 20005  
Telephone: (202) 289-3000  
**ATTORNEYS FOR PANDA**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail to James A. McGee, Florida Power Corporation, P. O. Box 14042, St. Petersburg, FL 33733-4042 this 3<sup>rd</sup> day of April, 1995.

  
BARRETT G. JOHNSON