CASE No. 88,280

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

EVENING SESSION

VOLUME 2

PAGES 180 through 377

PROCEEDINGS:	**HEARING**
BEFORE:	CHAIRMAN SUSAN F. CLARK COMMISSIONER J. TERRY DEASON COMMISSIONER JULIA L. JOHNSON COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
DATE:	Monday, February 19, 1996
TIME:	Commenced at 9:35 a.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	LISA GIROD JONES, RPR, RMR

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JAMES A. McGEE, Attorney at Law, and JEFFERY A. FROESCHLE, Attorney at Law, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042; appearing on behalf of Florida Power Corporation.

DAVID L. ROSS, Attorney at Law, LAWRENCE D. SILVERMAN, Attorney at Law, and LORENE JON BIELBY, Attorney at Law, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131; appearing on behalf of Panda-Kathleen, L.P.

MARTHA CARTER BROWN, Staff Counsel, and LORNA WAGNER, Staff Counsel, Florida Public Service Commission, 2540 Shumard Oaks Boulevard, Tallahassee, Florida 32399-0850; appearing on behalf of the Commission Staff.

I N D E X - VOLUME 2

WITNESSES

EXHIBITS

NUMBER	IDENTIFIED	ADMITTED
22 - (Gwynn) ERG-1 & ERG-2	188	209
23 - (Killian) RK-1 - RK-15	213	289
24 - (Brinson) JCB-1 & JCB-2	291	297
25 - (Dietz) Depo Exhibit No. 57	359	376
26 - (Dietz) Depo Exhibit No. 77	361	376
27 - (Dietz) Depo Exhibit No. 78	365	376
28 - (Dietz) Depo Exhibit No. 60	367	376
29 - (Dietz) 10-20-94 Order Granting Application For Certification of a Qualifying Cogen Facility	375	376

PROCEEDINGS

(Transcript continued in sequence from Volume 1.)

CHAIRMAN CLARK: All right, we're going to take Mr. Gwynn now?

MR. FROESCHLE: Madam Chairman, my name is Jeff Froeschle on behalf of Florida Power. I would like to call Ed Gwynn.

MR. ROSS: May I have about a one-minute recess?

CHAIRMAN CLARK: Go ahead.

(Pause)

CHAIRMAN CLARK: Mr. Ross, are you ready?

MR. ROSS: I'm ready.

MR. FROESCHLE: Thank you, Madam Chairman.

EDWARD R. GWYNN

was called as a witness on behalf of Florida Power Corporation, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FROESCHLE:

Q Mr. Gwynn, would you please state your name and business address?

A My name is Edward R. Gwynn. My business address is in Dallas, Texas. It's on North Central

Expressway in Dallas, Texas, HEARD Energy Corporation. It's Suite 500, and I -- my street address I can check. I have it here. I'll have to get it for you out of my wallet later.

CHAIRMAN CLARK: I'm sorry, I didn't hear what you said.

WITNESS GWYNN: My address, my specific address, I'm looking for it, and --

CHAIRMAN CLARK: We have it as 14643, Dallas Parkway, Suite 500, Dallas, Texas; is that it?

WITNESS GWYNN: That is correct, Suite 500.

BY MR. FROESCHLE:

Q Do you have before you a document entitled Rebuttal Testimony of Edward R. Gwynn?

A I do.

Q Would you please describe how that testimony was prepared?

A The testimony was prepared from previous deposition testimony that I gave in a deposition under subpoena for the Middle District Court of Florida in Case No. 95-992-Civ-T-24C, on October 6th of 1995, I believe.

Q Have you reviewed that testimony?

A I have.

Q Do you have any additions or corrections you

would like to make to that testimony?

A I have none.

Q If you were asked the same questions today that were asked in this testimony, would you answer them the same way?

A I would.

MR. FROESCHLE: Madam Chairman, we would ask that Mr. Gwynn's testimony be inserted into the record as though read.

CHAIRMAN CLARK: The rebuttal testimony of Mr. Edward R. Gwynn will be inserted in the record as though read.

MR. ROSS: Madam Chairman, I must, just for the record, state an objection to Mr. Gwynn's testimony, to this extent: A portion of Mr. Gwynn's testimony covers privileged information as our former general counsel. And so that the record is clear that we are not waiving any objections to that, I think it is necessary on our client's behalf to object to that testimony coming into this record since it is privileged communications, and that is the entire portion of his testimony where he describes a legal opinion which he says he gave to our client at a particular meeting on October the 10th, 1992.

CHAIRMAN CLARK: Mr. Ross, you need to tell me

the lines that you object to.

MR. ROSS: It would be starting on Page 7, Line 4, and running through the bottom of Page 9, Line 25.

CHAIRMAN CLARK: And what is your objection?

MR. ROSS: That he has testified to privileged communications, and therefore it should not be admitted into evidence in this proceeding.

CHAIRMAN CLARK: As I understand it, this is testimony that was taken from a deposition. Did you make an objection to that -- his testifying at that time?

MR. ROSS: I was not counsel at the time, but I have to state for the record that counsel at that time did not make an objection at the deposition.

CHAIRMAN CLARK: Well, I think the privilege has been waived, Mr. Ross.

MR. ROSS: I understand what Your Honor is saying, but so that the record is clear for future proceedings, I wish to say that we continue to maintain the objection.

CHAIRMAN CLARK: All right. I'm going to allow the prefiled rebuttal testimony to be entered in the record as though read with that objection noted.

MR. FROESCHLE: Mr. Gwynn has attached to his

testimony Exhibit Nos. ERG-1 and ERG-2. We ask that they be marked as Composite Exhibit 22.

CHAIRMAN CLARK: They'll be marked as Exhibit 22.

(Exhibit No. 22 marked for identification.)

Docket No. 950110-EI

REBUTTAL TESTIMONY OF EDWARD R. GWYNN

Q. Please state your name and business address.

A. My name is Edward R. Gwynn. My business address is 14643 Dallas Parkway, Suite 500, Dallas, Texas 75240.

Q. By whom are you employed and in what capacity?

A. I am employed by HEARD Energy Corporation ("HEARD") and I am currently the Sr. Vice President and General Counsel of HEARD. I am not employed by, nor do I have any relationship with Florida Power, other than that they have subpoenaed me and agreed to pay my expenses incurred in connection with my attendance at a hearing in Tallahassee on this matter on February 19, 1996.

Q. Prior to joining HEARD, by whom were you employed and in what capacity?

A. I was employed by Panda Energy Corporation ("Panda Energy") as its general counsel. I occupied this position in late 1991, all of 1992 and part of 1993 before I left Panda Energy. My responsibilities in this position included normal general counsel responsibilities such as negotiating contracts, writing contracts and handling normal corporate legal matters. Prior to actually becoming an employee of Panda Energy, I represented Panda Energy as its general counsel. I also was on the board of directors of Panda Energy for

some period of time. In total, I was involved either as an outside lawyer, board member or in-house general counsel for Panda Energy for about 10 years.

Q. Do you have any continuing involvement with Panda?

A. Yes. Various members of my family currently own 200,000 shares of stock of Panda. Panda also is suing a large group of companies and people, including, among others, HEARD and me.

Q. During 1991 and 1992, what was the relationship between Panda Energy and Panda-Kathleen Corporation, the general partner of Panda-Kathleen, L.P.?

A. Panda-Kathleen Corporation was a subsidiary of Panda Energy ("Panda," as used herein, refers to Panda Energy, Panda-Kathleen Corporation or Panda Kathleen, L.P., depending upon the context in which I use the word "Panda").

Q. Do you hold any professional certifications or licenses?

A. Yes. I am licensed to practice law in several states, including Texas.

Q. Have you previously given testimony concerning issues that exist between Panda and Florida Power?

A. Yes. On October 6, 1995, pursuant to a subpoena issued in the case of *Panda-Kathleen, L.P. v. Florida Power Corporation*, pending in the United States District Court for the Middle District of Florida as Case No. 95-992-

Civ-T-24C, I appeared in Dallas, Texas, for a deposition conducted initially by Florida Power's lawyer. At that time, I gave deposition testimony that lasted most of the day. During that deposition, I was cross-examined by the lawyer for Panda.

Q. What is the purpose of your testimony?

A. Florida Power has subpoenaed me to provide testimony of my recollection of several events in which I was personally involved while employed by Panda and about which I previously testified in my October 6, 1995 deposition. In that regard, I have reviewed portions of the "pre-filed" testimony of Ralph Killian, Brian Dietz and Darol Lindloff that I understand has been submitted for filing in this proceeding.

Q. On what do you base the testimony contained herein?

A. My testimony herein is based on my personal knowledge of the facts.

THE DURATION OF THE CAPACITY PAYMENTS

Q. Did you read the portion of Ralph Killian's pre-filed testimony (at page 20, lines 14-21 and page 21 lines 1-12) in which he said that Florida Power agreed that (1) Panda would receive capacity payments for the entire 30-year term of the contract, and (2) Florida Power's payments would escalate over the contract term not shown in the tables in Schedule 3 to Appendix C at a rate of 5.1% per year?

A. Yes.

Q. Did you have occasion to attend the January 9, 1992 meeting at Florida Power Corporation's offices in St. Petersburg, Florida at which Mr. Killian says that agreement was reached?

A. Yes.

Q. In what capacity did you attend that meeting?

A. I attended the January 9, 1992 meeting as Panda's principal contract negotiator.

Q. Was an agreement made at that meeting such as that described by Mr. Killian at page 20, lines 14-21 and page 21 lines 1-12 of his "pre-filed" testimony?

A. No. I and several other Panda employees, including Mr. Killian visited Florida Power's offices to discuss various questions and concerns that both parties had about the standard offer contract that Panda had submitted to Florida Power in October 1991 and that Florida Power had accepted in November (sometimes referred to as the "Standard Offer Contract"). We met with Allen Honey and others from Florida Power. I took contemporaneous notes during that meeting of various matters that were discussed between Florida Power and Panda. A copy of those notes is submitted with my testimony (although I did not write the words "makes you want to puke" on that exhibit -- I do not know who wrote those words). (Exhibit No. 22 (ERG-1)).

During the meeting, a Florida Power representative raised the subject of the duration of the capacity payments and the term of the contract. I believe it was Mr. Honey who said that the "term [of the standard offer contract] should be 20 years," or words to that effect. I recorded those words in my notes. (Exhibit No. ___ (ERG-1)).

Q. How did Panda's representatives respond to that statement?

A. We did not agree with the statement. I made a note to myself to check the standard offer contract to analyze the issue of what, if any obligation, Florida Power had to make capacity payments beyond 20 years. During that meeting, however, no resolution of that issue was agreed to by Panda and Florida Power. We, on behalf of Panda, were not about to make any agreement on any one portion of the issues discussed until they all were resolved.

Q. During the January 9, 1992 meeting, did Florida Power make any definitive promise or agreement that the way this issue would be handled would be to either (1) pay Panda capacity payments for 30 years, (2) escalate the amount of capacity payments for the period following the year 2016 at a rate of 5.1%, (3) compute the payments using the formula contained in the PSC regulations, or (4) compute those payments using a different avoided unit?

A. No. As I stated earlier, no definitive agreement or promise was made between the parties on this subject.

Q. Prior to when you left Panda in early 1993, did Panda and Florida Power ever come to a definitive agreement on how to handle the issue concerning the duration of capacity payments and the term of the contract that had been raised at the January 9, 1992, meeting with Florida Power?

A. Not to my knowledge. No one inside of Panda Energy ever reported to me during that period that they had reached any such agreement with Florida Power, and I never saw any letter or other writing that stated any such agreement had been reached.

THE SIZE OF THE FACILITY

Q. Did you read the portions of the testimony of Messrs. Dietz, Killian and Lindloff concerning the size of the facility that Panda wants to build?

A. Yes, I did.

Q. While you were employed by Panda, were you ever involved in discussions inside Panda concerning the size of the facility that would be built to satisfy Panda's obligations under its standard offer contract with Florida Power?

A. Yes, on at least two separate occasions. The first time was in October 1991, when I filed with the Federal Energy Regulatory Commission, Panda's AMENDED AND RESTATED NOTICE OF SELF CERTIFICATION AS A QUALIFYING FACILITY. A copy of that filing is submitted with my testimony. (Exhibit No. 22 (ERG-2)). In that filing, on behalf of Panda, I certified that "The Facility

will have an estimated net maximum capacity at design conditions of 74.9 MW."

The second time I was involved in discussions about the facility size was about a year later, in or around October 1992. Specifically, I had been asked by the then president of Panda Energy, Hans van Kuilenburg, what size plant could be built. He asked me to research the standard offer contract and what I knew of the law of the situation and to advise Panda on what the contract provided. I recall attending a meeting at Panda's offices on or about October 10, 1992, at which I gave my advice concerning the standard offer contract, and the facility size permitted under that contract.

Q. Who was present at the October 10, 1992, meeting?

A. This meeting involved only Panda employees. As I recall it, Ralph Killian, Darol Lindloff, Don Kinney and Brian Dietz of Panda were all present.

Q. Please describe, as best you can recall it, what you said during the October 10, 1992, meeting on the subject of facility size permitted under the Standard Offer Contract?

A. One of the topics of discussion was the ability to require Florida Power to purchase energy at the "as-available" price generated by a plant with a capacity or facility size designed above 75 megawatts. By capacity, or facility size, I am referring to the capability of the facility to produce energy. I am not referring to the contractual term "committed capacity" as used in the Standard Offer Contract, which means the specific 74.9 MW of energy

produced by the facility that Panda was committed to provide to Florida Power and Florida Power was committed to purchase under the circumstances described therein. I was asked what capacity or size facility I felt the contract provisions would allow.

I expressed reservations about Florida Power's obligation to buy such energy from a plant designed with a capacity to produce more than 75 megawatts. I said to the Panda employees assembled for this meeting that (i) the Standard Offer Contract provided for a committed capacity of 74.9 megawatts, (ii) there was no mechanism to increase this presently in the contract, and (iii) Florida Power Corporation may or may not be required to accept (at as-available prices) energy generated by a capacity in excess of 75 megawatts.

I voiced the opinion internally that perhaps the Standard Offer Contract could be modified or interpreted to permit, within a range, relatively slight capacity (i.e., facility size) deviations that become apparent when the plant is tested. A plant normally will not test exactly at the capacity specified in the contract. I also voiced the opinion that this was a relatively slight range applicable only to a plant designed to achieve a 74.9 megawatt capacity at the worst ambient conditions, not to one designed to achieve a capacity greater than 74.9 megawatts.

Q. Do you recall the size of the facility under consideration by Panda during the October 10, 1992, meeting?

A. I do not recall the exact size, but I do recall it was in excess of 100 megawatts.

Q. Did you state during the meeting whether you thought a facility of that size fit within what you earlier described as the slight deviation range that would be permitted?

A. I stated in effect that I did not believe 100 MW was within the range of what I earlier described as "slight deviations."

Q. Did you state during the meeting whether or not you felt that a facility of that size would be permissible under the standard offer contract?

A. I was asked what size the plant could be, and I explained to the Panda people that in my opinion the standard offer contract as written would permit at most deviations that could be attributed to the differences that would occur in the final construction of the plant versus the targeted or intended capacity. I stated that in my opinion the contract, as written, would not permit deviations beyond 10%.

Q. During the October 10, 1992, meeting did anyone with Panda say anything to the effect that it was technically infeasible to construct a facility that would enable Panda to fulfill the terms of its standard offer contract with Florida Power unless the size of that facility exceeded 100 MW?

A. No, to the contrary, several of the turbines that were discussed at that meeting involved facility sizes that closely approximated 75 MW.

Q. Does this conclude your testimony?

A. Yes.

BY MR. FROESCHLE:

Q Mr. Gwynn, would you please give us a summary of your testimony?

A Yes. A standard offer contract with a 30-year term was submitted by Panda to Florida Power Corporation in or about October 1991. Florida Power Corporation signed and returned the standard offer contract to Panda without modification during November 1991. The first negotiation or review session was held at Florida Power Corporation offices on or about January 9th, 1992. I attended the January 9th negotiation sessions as Panda's principal contract negotiator. Mr. Killian and other Panda personnel also attended the January 9th session, as did Allen Honey and certain other Florida Power Corporation representatives.

We were aware at Panda, before the January 9th, 1992 negotiation, of Florida Power Corporation's concerns regarding the 30-year term.

These concerns, and other concerns of both parties regarding the standard offer contract, were discussed at the January 9th, 1992 negotiation session. No resolution of the term issue was arrived at on January 9th at that session. Panda did not agree to shorten the term to 20 years and Florida Power Corporation made no commitments either with regard to

the 30-year term or with regard to the amount of the capacity payments. These matters were discussed, but no agreements were reached. In fact, this was decided before we went to the negotiation, that we had to find out what all the issues were before any concessions were made either way.

And so resolution of these matters was arrived at either at the January 9th, 1992 meeting or at anytime prior to my resignation from Panda during February 1993. My prefiled testimony also treats advice that I gave to Panda personnel on or about October 10th, 1992. At that time the issue of concerns of both parties with regard to the term of the contract still had not been resolved, and there was the issue of a size of the plant that still was unresolved and to what as-available energy might be at that point, if the plant was built larger than the 75 megawatts. Various configurations had been considered. I don't recall the exact figures, but from somewhere near the 75 megawatts to something well over 100 megawatts.

During that meeting, attended by Panda employees, I believe it was Mr. Dietz, Mr. Killian -- let's see who else. Mr. Dietz, Mr. Killian, Mr. Lindloff, and Donald Kinney. I was asked a number of questions, which I had been asked to research before

that, to research both the standard offer contract and the law as I understood it. And my advice was that the standard offer contract provided for a committed capacity of less than 75 megawatts, hence the 74.9 megawatt bid; number two, that there was no mechanism in the contract to increase the 74.9 percent megawatt capacity; and lastly, that Florida Power Corporation may or may not be required to accept as-available energy generated by a capacity in excess of 74.9 percent. I had no question but what energy associated with 74.9 percent megawatts was -- fit within the definition of as-available energy. I did not know whether or not energy associated with any capacity in excess of 74.9 percent megawatts would be treated as as-available energy under Florida regulations. That concludes my summary.

MR. FROESCHLE: I would tender Mr. Gwynn for cross-examination at this time.

CHAIRMAN CLARK: Mr. Ross?

MR. ROSS: Your Honor, just for the record, I would move to strike that last portion of his summary where he talked about an opinion as to the as-available energy over 74.9 megawatts. I don't see that in his direct prefiled testimony at all. I don't see anything about such an opinion in his direct prefiled testimony.

CHAIRMAN CLARK: It's Mr. Froeschle, isn't it? Can you respond to that, please?

MR. FROESCHLE: I believe on Page 8 of his testimony he states, "I also voice the opinion that this was a relatively slight change, applicable only to a plant designed to achieve a 74.9 megawatt capacity and not one designed to achieve a capacity greater than 74.9 megawatts." I believe he's touched on the issue and that his summary is possibly different words but of the same character.

MR. ROSS: I'm sorry. I'm sorry, I see the sentence now that he's referring to.

CHAIRMAN CLARK: All right, so you withdraw the objection. Thank you. Mr. Ross.

CROSS-EXAMINATION

BY MR. ROSS:

Q Mr. Gwynn, I have just a couple of questions for you. You're a defendant in a lawsuit as we sit here today, brought against you and many other people by Panda Energy Corporation; are you not, sir?

A That's correct. It's mentioned in my prefiled testimony.

Q And you are being sued by Panda Energy for having stolen corporate opportunities of Panda Energy Corp. while you were employed by Panda Energy; isn't

that the basis of the claim?

A I don't think that's the way it's styled. That may be your interpretation.

Q That is basically the basis of the claim; is it not, sir?

A There are a lot more aspects to it than that.

Q That's certainly one of them?

A No, not as stolen.

Q That you usurped corporate opportunities?

A That's the term used.

Q You like that term better?

A I don't like either term.

Q So you are being sued for having usurped corporate opportunities of Panda Energy Corp. while you were employed by Panda Energy Corp.; is that correct?

A I'm being sued, along with Billbank Tweed, Enterge Corporation, Morgan Stanley and others, Allstate.

Q You said in your summary of your testimony a moment ago that you told the folks at Panda that you didn't know whether or not Florida Power Corporation would be required to accept at as-available energy prices the capacity generated in excess of 75 megawatts by this proposed facility. Did I understand you correctly?

A Yes, the portion of the energy associated with the excess over 74.9, that is correct.

Q You remember that you were deposed in the federal court proceeding; you mentioned that in your summary?

A Yes, on October 6 of last year.

Q And do you recall at Page 137 of that deposition, you were asked the following question and gave the following answer, beginning at Line 10: "What opinion did you render as to the as-available energy issue?"

And your answer was: "That the Florida Power Corporation would be required to purchase as-available energy."

A That is correct, and that would be my testimony now. The question was not -- the question addressed -- they were clearly required to develop -- the question was, what was as-available energy. Florida Power Corporation was required to purchase as-available energy, and my response there did not address what as-available energy was.

Q Wouldn't that be the energy over and above the 74.9 megawatts?

A Not necessarily. It could be any energy produced that was not purchased. The as-available

energy, as I understand it, would be whatever energy Florida Power had not purchased, and it could be under the 74.9 percent megawatts as well.

Q Well, you understood that under this standard offer contract, Florida Power was required to purchase the first 74.9 megawatts of committed capacity; I think you said that, correct?

A Of capacity, not energy.

Q And they also had -- well they had to pay a capacity payment for that, correct?

A For capacity, but energy is a separate issue.

Q They also paid an energy payment for that; didn't they?

A That was not my understanding.

Q That was not your understanding of the contract?

A No, it was not.

Q Have you gone back and looked at the contract?

A I haven't had occasion to go back and look at it. I don't think the contract required the purchase of energy of that amount. The as-available energy, the question is, what was the definition of as-available energy in the plan.

Q Okay, but just so that I understand, it was your opinion that Florida Power had to buy all of the

energy, correct?

A No, that's not correct.

Q At as-available rates?

A No, you're mischaracterizing it. My opinion was that if they purchased as-available energy, they would have to buy some portion of it, at least the energy associated with 74.9 megawatts, not necessarily the energy associated with the capacity over that.

Q Is it correct, sir, that -- you recall that the in-service and construction commencement dates were extended, right, in this contract?

A Yes. I don't recall when I -- when that happened, but yes, I do know that it has happened.

Q You recall that it was as early as October 1992 that it was actually a desire on Florida Power's part to delay the in-service dates of this?

A I do recall that. It was Florida Power Corporation's desire.

MR. ROSS: Thank you. I have no further questions.

CHAIRMAN CLARK: Thank you, Mr. Ross. Staff?

MS. BROWN: Staff has no questions.

CHAIRMAN CLARK: Redirect?

Excuse me. Commissioners, do you have any questions?

(No response.)

CHAIRMAN CLARK: Redirect.

REDIRECT EXAMINATION

BY MR. FROESCHLE:

Q Mr. Gwynn, you were asked some questions about the litigation you're engaged in with Panda. Could you describe for us briefly what that litigation is?

A I'm not sure you could describe it briefly. I think the legal fees have exceeded two and a quarter million dollars for everybody concerned. I don't know that I can give it. Panda basically is claiming that projects that we developed in our new company in Indonesia were projects that they had developed and that we had taken from them. Not the case at all. They're different locations. Panda submitted bids in June of 1991 for certain Indonesian projects, unsolicited bids that had a self-destruct date of September 1991. They didn't visit again, with the exception of one visit to Jakarta, Indonesia, and did not follow up. They did not follow up sales efforts after we left. We have two projects in entirely different locations, and those are the ones that they claim we took, I guess under the presumption since they tried to do business in 1991 in Indonesia, that we were precluded forever from doing so, along with Morgan Stanley and Allstate and a lot of the

world.

CHAIRMAN CLARK: Morgan Stanley and who else?

WITNESS GWYNN: They've sued Allstate Life Insurance, Allstate Insurance, Morgan Stanley, Investment Bankers, Billbank Tweed, Enterge and 20 some defendants. They also then added our Indonesian partners, whom we didn't even meet until a year and a half after we left Panda. They were just excluded under a special appearance this past week.

BY MR. FROESCHLE:

Q Mr. Gwynn, do you own any stock in Panda?

A My family and I own 200,000 shares, a substantial block.

Q Are you an employee of Florida Power in any respect?

A No, I am not.

MR. FROESHLE: I have no other questions.

CHAIRMAN CLARK: Thank you. Thank you, Mr. Gwynn. You're excused.

CHAIRMAN CLARK: I suppose you move the admission of Exhibit 22?

MR. FROESCHLE: Yes, Madam Chairman, I would move for the admission of Exhibit No. 22.

CHAIRMAN CLARK: Without objection, Exhibit 22 is admitted.

(Exhibit No. 22 received into evidence.)

CHAIRMAN CLARK: Thank you, Mr. Gwynn.

(Witness Gwynn excused.)

* * *

CHAIRMAN CLARK: Mr. Killian.

RALPH KILLIAN

was called as a witness on behalf of Panda-Kathleen, L.P., and having been duly sworn, testified as follows:

CHAIRMAN CLARK: Mr. Ross, go ahead.

DIRECT EXAMINATION

BY MR. ROSS:

Q Would you state your name and address for the record, please?

A My name is Ralph Killian. I work at 4100 Spring Valley in Dallas, Texas.

Q And your present position is what?

A Senior vice president of Panda Energy.

Q Mr. Killian, do you have before you a document that constitutes the prefiled direct testimony that you have filed in this case?

A Yes, I do.

Q And just so that the record is clear, do you also have a short excerpt from the prefiled testimony in this case that's bound in a separate red cover?

A Yes, I do.

Q Commissioners, as I understand, the separately bound volume was the small portion of his testimony for which a claim of confidentiality was made, but I now understand, if I'm correct, that the claim to confidentiality has been withdrawn, so that therefore his entire direct testimony can go in without issue.

MR. McGEE: Yes, Madam Chairman. Florida Power never had made a claim for that portion of the testimony, but Panda, out of consideration for our claim of consideration regarding the underlying document, had redacted that portion of his testimony. Since it doesn't refer to the small part of the exhibit that is confidential, we have no concern about his testimony.

CHAIRMAN CLARK: I'm sorry, Mr. McGee, I didn't understand what you just said. You need to speak louder. Go ahead.

MR. McGEE: Florida Power had a claim for confidentiality of a small portion of Mr. Killian's exhibit.

CHAIRMAN CLARK: Which exhibit?

MR. McGEE: RK-5, and it was four lines on Page 5. Because of that claim that Florida Power had with respect to the document, when Panda prepared Mr. Killian's testimony, all reference to that overall exhibit, RK-5, was redacted. The content of that

testimony never addressed the small portion of the exhibit that was confidential, and we have never asserted a claim of confidentiality with respect to the testimony.

CHAIRMAN CLARK: Okay. So the entire testimony, prefiled direct testimony of Mr. Ralph Killian, can be inserted in the record as though read without any portions of it being treated at confidential?

MR. McGEE: Yes, ma'am.

CHAIRMAN CLARK: Now, I guess I need some more direction from you all as to the prefiled testimony. I noted -- I assumed when I was reading the testimony that where you didn't complete -- for instance, on Page 3 where you ended at Line 11, that the rest of it was confidential. I guess -- apparently that's an error.

MR. ROSS: That's just a page break. That's just the way it came out. When we started doing this with the redacting and we had to get it filed, some things didn't come out right, but no, there's nothing missing there.

CHAIRMAN CLARK: Let me just be clear. In your red copy, what we should -- we should substitute the pages in the red copy for the pages you have in the prefiled testimony?

MR. ROSS: That is correct. That's the only additions. That's correct.

CHAIRMAN CLARK: Just so the record is -- are there any other additions or corrections to this testimony? Have you gotten that far?

MR. ROSS: I haven't asked that question yet.

CHAIRMAN CLARK: Go ahead.

BY MR. ROSS:

Q Mr. Killian, are there any additions or corrections to your prefiled testimony that you wish to make?

A No, there are not.

Q And if you were asked the same questions here today, would you give the same answers today?

A Yes, I would.

MR. ROSS: We would then tender into the record as though read the prefiled testimony of Ralph Killian.

CHAIRMAN CLARK: All right, the prefiled direct testimony of Mr. Ralph Killian will be inserted in the record as though read, and let the record reflect that the separately provided pages of pages 5, 24 and 25, will be -- in the red folder, will be substituted for what is currently 5, 24 and 25.

MR. ROSS: That is correct.

CHAIRMAN CLARK: Go ahead, Mr. Ross.

MR. ROSS: Let me just deal with the exhibits.

BY MR. ROSS:

Q Mr. Killian, attached to your prefiled testimony you have a set of exhibits that are marked there as RK-1 through RK-15, correct?

A That is correct.

Q And those are the exhibits that are referred to in your direct testimony?

A That's correct.

Q I would tender in as composite exhibit then No. 23, the exhibits to Mr. Killian's direct testimony.

CHAIRMAN CLARK: Okay, RK-1 through --

MR. ROSS: 15.

CHAIRMAN CLARK: -- RK-15 will be marked as Composite Exhibit 23.

(Exhibit No. 23 marked for identification.)

CHAIRMAN CLARK: Go ahead.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

TESTIMONY OF **RALPH KILLIAN**

ON BEHALF OF PANDA-KATHLEEN, L.P.

DOCKET NO. 950110-EI

I. INTRODUCTION AND QUALIFICATION

Q. Please state your name, profession, and business address.

A. My name is Ralph Killian. I am the Senior Vice President of Panda Energy International, Inc. Panda Energy International, Inc. is engaged in the development and operation of cogeneration facilities. Panda-Kathleen, L.P. ("Panda") is engaged in the development of a qualified cogeneration facility in Lakeland, Florida pursuant to a contract between Panda and Florida Power Corporation ("Florida Power"). My business address is 4100 Spring Valley, Dallas, Texas 75244.

Q. State briefly your educational and professional background.

A. I earned a B.S. degree in chemical engineering from the University of Florida in 1969. From 1969 to 1988, I held various engineering staff and management positions at AMOCO Production Company. From 1988 to 1989, I was Senior Vice president of Texas Eastern Gas Pipeline Company, where I was responsible for all marketing, supply and transportation for the Texas Eastern interstate natural gas pipeline serving the northeast United States.

Q. On whose behalf are you appearing in this proceeding?

A. I am appearing on behalf of Panda-Kathleen, L.P.

Q. Please describe your duties with Panda Energy International, Inc.

A. I am the Senior Vice President of Panda Energy International, Inc.. I am responsible for business development, sales, project development, fuel

procurement and management, and certain other functions. I had, and continue to have, overall responsibility for the Panda-Kathleen, L.P. project, among other matters. I have been with Panda Energy International, Inc. and its predecessor, Panda Energy Corporation, since 1989.

Q. Have you ever testified before the Florida Public Service Commission?

A. No, I have not.

II. PURPOSE OF TESTIMONY

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to state the facts underlying Panda's contract with Florida Power Corporation, obligating Panda to furnish wholesale electric power for 30 years at a net 74.9 MW or greater of capacity, under all operating conditions, and obligating Florida Power to purchase that power at rates as calculable in the contract. My testimony will also state the facts of Panda's discussions with Florida Power Corporation from 1991-1995 relating to these contractual issues.

Q. Are you sponsoring an exhibit in this case?

A. Yes. It consists of seventeen documents.

Document No. 1 is a Standard Offer Contract Questionnaire Panda received from Florida Power in September 1991.

Document No. 2 is Panda's response to that questionnaire, which it delivered to Florida Power in October 1991.

Document No. 3 is Florida Power's "Evaluation Of Standard Offer Proposals," dated November 1991.

Document No. 4 is a Florida Power document entitled "Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility," which was provided to Panda in February 1991.

Document No. 5 is an internal Florida Power study, entitled " Cogeneration Review; an Assessment of Florida Power's Qualifying Facility (CoGeneration) Purchases," dated December, 1991.

Document No. 6 is Panda's Quarterly Progress Report to Florida Power, dated June 20, 1994.

Document No. 7 is a June 23, 1994 letter from Ted Hollon to David Gammon.

Document No. 8 is a July 27, 1994 letter from Ted Hollon to David Gammon.

Document No. 9 is an August 3, 1994 letter from David Gammon to Ted Hollon.

Document No. 10 is an August 8, 1994 letter from Ralph T. Killian to David Gammon.

Document No. 11 is an August 10, 1994 letter from Kyle Woodruff to Robert D. Dolan.

Document No. 12 is an August 23, 1994 letter from Barrett G. Johnson to Joseph D. Jenkins of the Florida Public Service Commission.

Document No. 13 is an August 24, 1994 letter from Joseph Jenkins of the Florida Public Service Commission to Barrett Johnson.

Document No. 14 is Robert D. Dolan, "Financial Incentives For Power Purchases: A Utility's View," presented at the Gulf Coast Cogeneration Association, 1992 Spring Meeting, held April 21, 1992.

Document No. 15 is an April 29, 1993 letter from Robert Dolan to Mark Bentley, extending the milestone dates under the contract.

III. THE CONTRACT BETWEEN PANDA AND FLORIDA POWER CORPORATION

Q. Please describe the process by which Panda responded to Florida Power Corporation's Standard Offer Contract Questionnaire in October 1991.

A. In September 1991, Panda received a Standard Offer Contract Questionnaire from Florida Power (attached hereto as "Exhibit 1"). Among the questions posed in that questionnaire was the committed capacity of a Panda facility. When Panda responded to that questionnaire in October 1991 (attached hereto as

"Exhibit 2"), it offered to provide Florida Power with 74.9 MW of committed capacity for a thirty-year term.

Q. Was Panda successful in its bid for the Florida Power Contract?

A. Yes. After reviewing Panda's response and the responses of six other bidders, Florida Power chose to contract with Panda. On November 19, 1991 and on November 26, 1991, Florida Power petitioned the Public Service Commission for authority to refuse standard offer contracts from cogenerators other than Panda.

On October 22, 1992, the Commission granted the petition, finding 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. We find that this action is consistent with the language of Rule 25-17.0832(3)(d), F.A.C." Order Granting Petition For Authority For Florida Power Corporation To Refuse All

Standard Offer Contracts Except That Submitted By Panda Kathleen, L.P. ("Order") at 3.

Q. What obligations did the Panda-Florida Power contract impose on the parties with respect to the capacity of a facility?

A. The contract discussed capacity in several paragraphs. Among these references were the following:

(a) Paragraph 1.9 defined committed capacity as the "KW capacity, as defined in Article VI hereof, which the QF has agreed to make available on a firm basis at the Point of Delivery.

(b) Paragraph 2.1 limited the availability of the Agreement to the available capacity limitations described in Schedule 1 of Appendix C and being either a solid.waste facility or a facility having a Committed Capacity of less than 75,000 KW.

(c) In Paragraph 6.1, Panda committed to sell and arrange for the delivery of the Committed Capacity to Florida Power Corporation. Further in that Article, Florida Power contracted to purchase the Committed Capacity made available to it at the Point of Delivery. In addition, in the last sentence of that Article, Panda agreed to sell and deliver or arrange for delivery of the electric energy to the company and Florida Power Corporation agreed to purchase such electric energy as is made available for sale and received by it at the Point of Delivery.

(d) Paragraph 6.2 states that the Committed Capacity and electrical energy made available to Florida Power shall be net of any electrical energy on Panda's side of the Point of Ownership.

(e) Schedule 4 of Appendix C refers to a multiplier for the On-Peak Capacity Factor ("OPCF") which must be greater than or equal to the Committed

OPCF, clearly recognizing that on-peak capacity would be greater than the Committed Capacity.

(f) Energy sales in excess of the committed capacity as referred to in Paragraphs 6.1, 6.2 and 6.3 are clearly contemplated by Schedule 5 of Appendix C, which describes an optional payment plan for such excess energy sales. Appendix C encouraged Panda to participate in this payment plan by providing such excess energy for sale to Florida Power. While Panda did not elect this payment program, the fact remains that the availability of such a program would serve no purpose absent the availability of energy production in excess of the committed capacity, and Florida Power's obligation to purchase that excess energy.

Q. **How did the Panda-Florida Power contract bind the parties to an express contract length?**

A. Article 4.1 shows the term of the Agreement beginning on the execution date (November 25, 1991) and

terminating on the last day of March 2025. Florida Power acknowledged this in its November 1991 "Evaluation Of Standard Offer Proposals," (attached hereto as "Exhibit 3"), repeatedly describing the contract term as 30 years. This document was submitted to the Commission by Florida Power in its petition for authority to refuse standard offer contracts from cogenerators other than Panda, and was admitted as Exhibit 1 in that proceeding.

Q. Did Panda understand the term "committed capacity" to be synonymous with the net size of the plant?

A. At no time did Panda ever understand committed capacity to be synonymous with net size. The contract does not state a net size limitation, and moreover, Florida Power never indicated to Panda that it understood that the term "committed capacity" represented a 74.9 MW absolute size limitation. At all times, as described below, Florida Power Corporation's representatives were in accord with the irrefutable engineering realities

that to produce 74.9 MW of committed capacity, under all conditions, a facility must have a net capacity greater than 74.9 MW. From the very beginning of the contracting process, in responding to a questionnaire that Florida Power sent to Panda inviting submission of a contract proposal, Panda indicated that its equipment choice at that time was three Stewart & Stevenson/GE LM 2500 turbine generator sets. Such equipment, with a heat generator and steam turbine-generator would be capable of producing at least 87-95 MW at 59° F.

Q. You referred to irrefutable engineering realities relevant to the capacity of a generator. What do you mean by that?

A. There are a variety of factors that affect the actual output of a generator. A generator's actual output varies, depending on (a) the frame size, (b) age, ~~(c)~~ maintenance, (d) ambient air temperature, (e) humidity, (f) elevation above sea level, (g) BTU rating of the fuel from time to time, (h) condenser cooling water temperature, and many other factors. It ignores these realities to speak of a generating unit as having a specific capacity without defining all the variable conditions. It also follows that the capacity of a generating unit will vary with changes in these variables. As a practical matter, to comply with its contractual commitment to produce the committed capacity for thirty years during summer conditions or other challenging environmental conditions while complying with Florida's strict emissions regulations, Panda had to be acutely sensitive to each of these

variables during the process of selecting an appropriate equipment configuration.

IV. "STANDARD OFFER" CONTRACTS AND "NEGOTIATED" CONTRACTS

Q. What experience did Panda have with the contractual provisions in Florida Power's "negotiated" contracts?

A. In January and February 1991, Panda participated in the process by which Florida Power selected a "negotiated contract" for the purchase of firm capacity and energy from a qualifying facility. See "Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility (attached hereto as "Exhibit 4"). This process contained no true negotiation, rather consisting of Florida Power providing qualifying facilities ("QF") with proposed contracts and then soliciting suggestions from those QF's. Florida Power then reviewed the suggestions and decided which suggestions it would accept. Those accepted suggestions, and any other new provisions that Florida Power decided to incorporate, were incorporated into all contracts, standardizing the "negotiated contract."

In those discussions, Panda was told by Florida Power that there would be no negotiation of contract terms, and "negotiated contracts" containing changes when returned by QF's to Florida Power would be disfavored.

I have since learned that the "negotiated contract" and the standard offer contract were developed by Florida Power from a "model contract." Hence, it is unsurprising that there are so many striking similarities in the provisions of those contracts, especially those provisions relevant to this dispute.

V. PANDA'S DILIGENT ATTEMPTS TO MEET THE IN-SERVICE DATE

Q. What did Panda personnel do to meet the in-service date set forth in the contract?

A. After the execution of the contract, Panda personnel began to solicit bids to construct the facility. Initially, we had planned to construct a plant using a gas turbine with an average output of between 75 and 95

MW. However, after examining the available turbines and analyzing projected Panda Kathleen operations with respect to the temperatures, humidity and elevation common to Polk County and considering typical equipment degradation patterns and state environmental mandates, and the other factors discussed above on pages 10 and 11, it became clear that it would be impossible for Panda to ensure that it could produce the committed capacity of 74.9 MW for each day of the thirty year contractual term without a net generating capacity of at least 100 MW. Therefore, we decided to consider a turbine with power output of 100 MW to ensure that we could always meet the contractually agreed committed capacity and avoid defaulting on our contractual obligations to Florida Power.

In this process, a change in the environmental regulations promulgated by the Florida Department of Environmental Protection ("FDEP") played a critical role. In 1992, by the time that this Commission had granted Florida Power's petition to refuse all standard

offer contracts other than Panda's, the FDEP had lowered its acceptable limit on a gas combustion turbine's nitrogen oxide emissions from 25 parts per million ("PPM") to 15 PPM. As a result, certain configurations Panda had previously considered would no longer meet the standards set by the FDEP's regulations.

Q. What discussions did Panda have with Florida Power after Florida Power and Panda executed their contract, to ensure that Panda would meet the contractual milestones?

A. Beginning in January 1992, Panda representatives and Florida Power representatives had numerous face-to-face discussions and telephone conferences to implement the contract and prepare for the in-service date.

On January 9, 1992, I attended a meeting with Florida Power to discuss our agreement and several areas that needed clarification. Allen Honey, whom I believe was

Florida Power Corporation's Senior Cogeneration Engineer at that time, led the Florida Power team in attendance. At that meeting, Florida Power told us that while it would pay Panda for our energy output in excess of 74.9 MW, the contract limited their obligation to pay for capacity in excess of 74.9 MW. This comported with our understanding of our agreement as well as with the engineering reality discussed above, namely that a facility capable of producing 74.9 MW of output at all times during a thirty year contract will, much of the time, be capable of generating more than 74.9 MW.

In addition, at that January meeting, we discussed the fact that while the parties had agreed to a 30 year contract term and the contractual terms themselves reflected this, Schedule 3 to Appendix C to the contract only showed 20 years of payments. Florida Power acknowledged that this was an inadvertent error that needed to be corrected. Florida Power agreed that (1) Panda would receive capacity payments for the

entire 30-year term of the contract, and (2) Florida Power's payments would escalate over the contract term not shown in the tables in Schedule 3 to Appendix C at a rate of 5.1% per year.

Florida Power stated that Schedule 3 was an illustrative table only and not a modification of the 30 year term. They explained that contract payments for years 21-30 of the contract had been omitted from Schedule 3 simply because the applicable regulations required illustration of only ten years or more of payments.

Q. Was this consistent with Florida Power's previous evaluation of the value of Panda's proposal to the ratepayers and to Florida Power?

A. Yes. When it had decided to contract with Panda in October 1991, Florida Power had used a calculus of factors to rate the proposals. In the evaluation

containing that calculus, which it submitted to this Commission in November 1991, Florida Power had rated Panda's proposal as clearly the best offer for the rate-payers and for avoiding expensive replacement power. In its calculus, size, which Florida Power defined as "the committed capacity," was weighted as comprising 10% of the ranking. On the other hand, feasibility was weighted at 40% and reliability at 30%. Location and developer qualifications were weighted equally with size. In its October 22, 1992 Order granting Florida Power's petition for authority to refuse all standard offer contracts except that submitted by Panda, this Commission held that "the criteria used to evaluate the various proposals were valid, reasonable and fairly applied." Order at 5.

Q. **Did Florida Power's behavior remain consistent with its November 1991 evaluation of Panda's proposal?**

A. No. In the later half of 1994, Florida Power rather suddenly began taking the approach that it was

unwilling to state in writing that Panda's equipment configuration was permissible under our contract. Up until the middle of 1994, Florida Power had consistently agreed with Panda representatives that a plant with a net generating capacity under certain conditions in excess of 74.9 MW was a technical necessity, and had suggested not raising the issue with the Florida Public Service Commission so as to not interrupt the challenge by ARK Energy to Florida Power's having chosen our contract. However, in the second half of 1994, Florida Power abruptly refused to sign any documents or clarification letters for lenders confirming our equipment choice.

Until this time, Florida Power had treated Panda as offering the most feasible and reliable option for its customers and shareholders. After its sudden change, whereas facility size was previously not an issue, it suddenly emerged as the 100% criterion. In revising its evaluation process, Florida Power acted in a manner

inconsistent with its previous representations and its November 1991 ranking process.

Q. Do you know of any reason for this remarkable change in attitude by Florida Power?

A. In an internal, confidential December 1993 document entitled "Cogeneration Review," Florida Power essentially declared its intention to limit, if not undermine, QF contracts whenever possible. See "Cogeneration Review," dated December 1993 (attached hereto as "Exhibit 5"). In that document, in discussing the QF contracts it had already bound itself to for nearly 1,100 MW of capacity, Florida Power declared 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. These contracts pose a significant threat

to FPC's competitive position." See Cogeneration Review at 4, 5. There, Florida Power cited several miscalculations it had made on issues such as the capacity dropout rate and the cost-effectiveness of its avoided cost projection. At no time did it refer to any problem due to Panda or any other QF.

Q. What did Panda do to try to resolve this dispute?

A. Florida Power demonstrated its revised attitude following Panda's June 3, 1994 application to the Florida Department of Environmental Protection ("FDEP") for an Air Permit for Construction of the facility with a nominal output of 115 MW. In that application, Panda had submitted two configurations: one based on the General Electric ("GE") 7EA Combustion turbine and the other based on the ABB Power Generation ABB 11N1.

Representatives of Panda and Florida Power met on June 22, 1994 to discuss the excess energy which could be produced by either of those configurations. At that

meeting, Panda informed Florida Power of this submittal and equipment configurations in Panda's Quarterly Progress Report dated June 20, 1994. See Panda's Quarterly Progress Report to Florida Power, dated June 20, 1994. (attached hereto as "Exhibit 6").

Following discussions, the parties agreed that Panda would compose a clarification letter for both parties' signatures confirming the equipment configuration and the sale of excess energy produced by the facility to Florida Power.

On June 23, 1994, Panda sent a clarification letter to Florida Power for its signature memorializing the parties' June 22, 1994 discussions. See June 23, 1994 letter from Ted Hollon to David Gammon (attached hereto as "Exhibit 7"). Yet, Florida Power refused to sign this letter. On July 27, 1994, Panda sent a revised clarification letter to Florida Power for its signature stating, among other things, that the two

configurations submitted to the FDEP were being permitted in order to meet the committed capacity requirements of the contract as well as the current environmental requirements in the State of Florida. See July 27, 1994 letter from Ted Hollon to David Gammon (attached hereto as "Exhibit 8"). The revised letter further stated that although under certain site operating conditions the facility's output would be 115 MW, Florida Power would not be obligated to make any capacity payments above the 74.9 MW of committed capacity. Finally, the letter stated that Panda had no objection to Florida Power submitting this letter to this Commission if Florida Power deemed it necessary.

On August 3, 1994, Panda received a reply from Florida Power refusing to sign the revised letter. See August 3, 1994 letter from David Gammon to Ted Hollon (attached hereto as "Exhibit 9"). In its reply, Florida Power stated that it did not agree that the construction of a 115 MW facility was consistent with

the contract. However, Florida Power ignored the issue of presenting any dispute to this Commission.

In response, Panda initiated telephone conversations with Florida Power to resolve these new differences. These conversations seemed to have proved successful. As a result, on August 8, 1994, Panda submitted a third letter to Florida Power for its signature under the impression that this second revised clarification letter would be acceptable to Florida Power. See August 8, 1994 letter from Ralph T. Killian to Robert Dolan (attached hereto as "Exhibit 10"). This letter reiterated that the facility size was 115 MW and added that Panda would submit the executed letter to the Commission to determine if Commission approval is required. Nothing in that letter prevented Florida Power from intervening or from taking any position in any such action at the Commission. Florida Power refused to sign this clarification letter as well. In a subsequent telephone conversation, Florida Power

simply told Panda that it saw no advantage in Florida Power signing the letter.

On August 10, 1994, Panda sent a letter to Mr. Dolan re-emphasizing Panda's understanding that the equipment it had selected was appropriate under the Contract. See August 10, 1994 letter from Kyle Woodruff to Robert D. Dolan (attached hereto as "Exhibit 11"). Panda also informed Mr. Dolan that it intended to consult with the Commission to determine if this issue required Commission approval.

Q. Did Panda discuss Florida Power's apparent concerns about the equipment configuration with any representative of the Florida Public Service Commission?

A. Yes. On August 15, 1994, Panda representatives met with Joseph Jenkins, Director of the FPSC's Division of Electric and Gas, as well as Robert Trapp and Thomas Ballenger of the FPSC. In that meeting, Panda's representatives set forth the two specific equipment configurations it was considering, and the fact that, "under optimal conditions these units can produce in the 115 MW range." In response, Mr. Jenkins and his colleagues agreed with Panda that Panda's generation of net generating capacity of 115 MW was "consistent with Panda's standard offer contract and is not a contract change that would require Florida Public Service Commission approval." See August 24, 1994 letter from Barrett Johnson to Joseph Jenkins of the Florida Public Service Commission (attached hereto as "Exhibit 12").

Moreover, Mr. Jenkins stated that he had discussed this issue with Bob Dolan of Florida Power Corporation and Mr. Dolan concurred with Mr. Jenkins that this was a contractual matter between Panda and Florida Power that did not require PSC adjudication. See August 23, 1994 letter from Joseph Jenkins of the Florida Public Service Commission to Barrett Johnson (attached hereto as "Exhibit 13"). Based upon the express assurances of Mr. Jenkins, Panda moved forward with performing under the contract, continued with permitting the above equipment configurations, and felt it had satisfied the issue of facility size, despite Florida Power's lack of cooperation or initiative.

At no time during this process or at any other time prior to filing the instant action did Florida Power give any indication that it intended to reintroduce this matter before the Commission. Panda only received notice of Florida Power's true intent after Florida Power had filed its Petition for Declaratory Statement with this Commission on January 25, 1995.

VI. CALCULATION OF PAYMENTS FOR YEARS 21 THROUGH 30 OF THE CONTRACT

Q. How are capacity payments to be made to Panda for years 21 through 30 of the contract?

A. Payments for years 21 through 30 are to be made by applying the value deferral method. Payment through that method is consistent with the FPSC's regulations.

VII. BENEFIT OF THE CONTRACT TO FLORIDA CITIZENS

Q. How would Florida Power's rate payers benefit from a Panda facility that provided energy in excess of the committed capacity?

A. For the energy that Panda produces in excess of the committed capacity, Florida Power would be able to purchase that energy from Panda at a low rate. Under the contract, Florida Power is entitled to do so as it would pay Panda solely for the energy cost, without any obligation to pay for the capacity based on the per-KW cost of Florida Power's avoided simple-cycle combustion turbine for 74.9 MW of capacity. As contemplated by the contract, this would provide Florida Power with free capacity. With the production of 115 MW of energy, Florida Power would receive 40.1 MW of free capacity. This would enhance the reliability and profitability of Florida Power's service.

Moreover, as Robert Dolan, Florida Power's Manager of Cogeneration Contracts and Administration, told the

members of a cogeneration association six months after Florida Power executed its contract with Panda and six months before this Commission approved the contract, "The expected future need for capacity is great, therefore it is virtually certain that this [contracted] capacity will be needed. Florida's population keeps expanding even during recessionary periods, planned reserve margins are low, and there is significant reliance on demand-side management. These factors assure that there will be a market for this capacity FPC has under contract." See Robert D. Dolan, "Financial Incentives For Power Purchases: A Utility's View," presented at the Gulf Coast Cogeneration Association, 1992 Spring Meeting Held April 21, 1992 (attached hereto as "Exhibit 14").

VIII. WHAT IMPACT DID FLORIDA POWER'S ACTIONS HAVE ON PANDA

Q. What effect has Florida Power's refusal to honor its contract had on Panda?

A. Florida Power's actions in attempting to dishonor its contractual obligation and seeking to rewrite the Panda-Florida Power contract to impose new obligations on Panda have had the absolutely predictable result of bringing Panda's financing of the Panda Kathleen facility to a halt. As no lender will offer financing to a party for a project of this magnitude when the other party is doing everything in its power to avoid its contractual obligations, Panda's commitment has been placed on hold pending resolution of these disputed issues.

By December 16, 1994, ABB Power Generation ("ABB") had begun engineering and material procurement to meet the required delivery dates. By January 11, 1995, Panda had obtained all construction permits and efforts were well under way to obtain financing and an equity partner for the project. Panda updated Florida Power on or about January 1, 1995, about this significant progress as required by the Contract.

Today, as there is no immediate financing available, Florida Power's actions have forced Panda to cancel its order for combustion and steam turbine generators with its supplier ABB and Panda has lost its place in the ABB production schedule. In addition, Panda has been forced out of the queue for the manufacture of other major components of its facility.

The forced delay in Panda's development of the project will be greater than the elapsed time lost from Florida Power's attempts to disown its contract. In other words, a day-for-day extension will not restore Panda to the position it occupied on the day prior to Florida Power's petition. Major pieces of generating equipment with long lead times are built by their manufacturer only when there is a firm equipment order in place and, if there is not a timely notice to proceed to the manufacturer, it normally means lengthy delays because the offering company will have to "go back to the end of the line" and the lead time varies greatly depending

upon the volume of orders received by the manufacturer at any given time.

Each of these activities is part of a critical time path to commercial operation and to meeting the milestones set forth in the Panda-Florida Power contract, as amended by the April 29, 1993 letter from Robert Dolan to Mark Bentley (attached hereto as "Exhibit 15"). Panda's ability to meet the construction start date of January 1, 1996 and the in-service date of January 1, 1997 has been jeopardized solely as a result of Florida Power's actions in attempting to disown the contract.

Further, any delay beyond the expected date for commercial operations costs Panda money in real terms even if the milestone dates are extended, because Panda will not receive capacity payments or revenues from the sale of energy when they were expected pursuant to the Contract.

Moreover, Panda has already spent substantial sums to perform under the contract, including, but not limited to: purchasing land for the project site; contracting for environmental studies and permitting on the project site; surveying of the project site; paying Florida Power the $750,000 security deposit, and paying fees to contractors, consultants, lenders, and attorneys. From 1991 to 1995, Panda expended these funds to ensure that it would meet a supplier's production schedule, comply with all Florida permitting requirements and meet the commercial in-service date.

In sum, Panda will be unable to discover the ultimate effect of Florida Power's actions at least until a final adjudication of this contractual dispute has been obtained.

Q. Does Panda remain ready, willing and able to build this facility and commit 74.9 MW of capacity for 30 years as called for in the contract?

A. Yes.

Q. What is it you want this commission to do?

A. Deny Florida Power's petition. Panda has asked this Commission to rule that it does not have jurisdiction to now go back and reinterpret a contract that it has approved on two separate occasions or, alternatively, to now rule that the Panda-Florida Power contract is void. Panda believes that issues of interpretation of this contract should be resolved by the courts. Of course, so long as this commission believes it has jurisdiction, Panda asks for a ruling denying Florida Power's petition and holding that (1) the equipment configuration Panda has chosen does not violate the contract, (2) Florida Power is obligated to pay for the committed capacity at the rate set forth in Appendix C

as escalated at the same rate for the final 10 years, and (3) extending the contractual milestone schedule to provide Panda with sufficient time to meet a revised construction start date and a revised in-service date. Anything less will destroy this cogeneration project in violation of the principles of PURPA, to the detriment of Florida's citizens.

Q. Does this conclude your testimony?

A. Yes, it does.

BY MR. ROSS:

Q Mr. Killian, would you please give us a summary of your direct testimony?

A Thank you. My prefiled direct testimony relates -- I relate to the facts underlying Panda's contract with Florida Power Corporation and my knowledge of involvement of Panda's communications with Florida Power Corporation concerning some of the issues covered in this proceeding. The standard offer contract provides for a term of 30 years. This standard offer contract requires that Panda supply at least 74.9 megawatts of committed capacity to Florida Power Corporation under all conditions. Standard offer contract does not limit the size of the facility. In fact, the initial facility design at the time the standard offer contract was entered into was for a net output of between 87 and 95 megawatts under normal conditions. There were no objections raised by Florida Power Corporation to our size or term until the second half of 1994.

Because of climate conditions, performance degradations and revised emission standards in the state of Florida, Panda was required to design a facility of 115 megawatts of net generating capacity.

I was personally at a meeting in early 1992

where Florida Power Corporation representatives acknowledged that our facility would produce in excess of 74.9 megawatts and that Florida Power Corporation would accept and pay for such excess energy. Further, Florida Power Corporation acknowledged in this meeting the discrepancy between the 30-year term of the contract and the 20-year capacity payment schedule, and they acknowledged that that was an oversight and would need to be corrected.

They also acknowledged in that meeting that Panda would receive capacity payments for 30 years. In 1994 and 1995, I was involved in several attempts to obtain clarification from Florida Power Corporation regarding the meaning of certain terms of the contract. However, during that time Florida Power Corporation adopted a policy to avoid its contracts with cogenerators and began creating disputes and issues in an attempt to prevent Panda from building its plant.

During the summer of '94, Panda worked with Florida Power Corporation to obtain a clarification, but Florida Power Corporation would not sign the clarification letter.

And in a final blow, Florida Power Corporation filed this proceeding with the Commission. Florida Power Corporation's actions brought Panda's efforts to

finance and build this plant to a halt. No one would lend money with Florida Power Corporation challenging the validity of this contract. Prior to Florida Power Corporation's action, Panda was well on the way towards obtaining financing for the project and construction of the plant. In order for Panda to get back where it was before the filing of Florida Power Corp.'s actions, Panda would need a milestone extension to put it back in the place it was prior to Florida Power Corp.'s filing in this proceeding with the Commission. That's my summary.

MR. ROSS: Thank you, Mr. Killian. We tender Mr. Killian for cross-examination.

CHAIRMAN CLARK: Mr. McGee.

CROSS-EXAMINATION

BY MR. McGEE:

Q Mr. Killian, you referred in your summary to a meeting between Panda representatives and Florida Power representatives in early 1992. Would that be the same meeting that Mr. Gwynn just testified to on January 9th?

A Yes, it would.

Q Would you agree then that even with respect to the representatives of Panda itself, that there was a lack of agreement as to just what exactly was concurred to by Florida Power at that meeting?

COMMISSIONER KIESLING: Could you speak into the mike?

MS. BROWN: I can't hear either.

COMMISSIONER KIESLING: When you turn your head that way, the mike is behind you. Sound waves don't move that way.

WITNESS KILLIAN: I'm sorry, could you repeat the question?

BY MR. McGEE:

Q Would you agree then that even amongst Panda representatives in attendance at that meeting, that there was a lack of agreement as to what Florida Power had committed?

A I will agree that I disagree with Mr. Gwynn on several of the issues.

Q But do you recognize that Mr. Gwynn was at the meeting?

A Mr. Gwynn was at the meeting on January 9th, 1992, that's correct.

Q Mr. Killian, would I be correct in generalizing about your testimony, that it's intended to support the position that Panda's proposed 115 megawatt capacity and Panda's receipt of capacity payments for 30 years is consistent with the Panda/Florida Power standard offer contract?

A That is correct.

CHAIRMAN CLARK: Mr. McGee, maybe you should move to the next chair over. I'm having difficulty hearing you, and I think the court reporter is too. So if you'd move to the other microphone maybe and turn it on and leave them both on, maybe that will help.

MR. McGEE: Stereo?

CHAIRMAN CLARK: You need to get close to the microphone. These are not like the ones in the other building, and it's important that you get right up to the microphone.

BY MR. McGEE:

Q I think you agree that you're contending that your position is consistent with the standard offer contract. What I would like to know is, is it your position that the size of Panda's facility and the duration of capacity payments don't need to be consistent with the Commission's rules that govern standard offer contracts?

A I have not -- I'm not an expert in Commission rules. I would say that our contract and our understanding of the 30-year issue is consistent with the contract.

Q Your understanding of the 30-year issue is consistent with the contract?

A Contract.

Q Is it consistent with the rules?

A To my understanding, there is a -- in the schedule that shows the capacity payments, there is a footnote in there that indicates that the table is for illustrative purposes, and that table, that the capacity payments are calculated in accordance with Commission rules. So I guess maybe the answer to your question is that the 30-year term and the calculation of those payments would be consistent -- since it did so indicate in the footnotes, would be consistent with Commission rules.

CHAIRMAN CLARK: Mr. Killian --

WITNESS KILLIAN: But then, once again, I'm not an expert in the Commission rules.

CHAIRMAN CLARK: Let me ask you a question. Do you know if the Commission rule calls for the contract to -- calls for the capacity payments to be made over the same term as the avoided unit would have been in service?

WITNESS KILLIAN: I know -- I've read the Commission rules and I see the -- I see the language you're referring to that talks about the life of the facility. That is correct. I see that.

CHAIRMAN CLARK: That's being avoided?

WITNESS KILLIAN: I didn't see that qualification. I saw that the life of the facility was mentioned in the Commission rules.

CHAIRMAN CLARK: What does life of the facility mean then?

WITNESS KILLIAN: It would be how long a facility would be in existence.

CHAIRMAN CLARK: Is it your facility or the facility being avoided?

WITNESS KILLIAN: I would view that it would -- in the case of the term of the contract, it would be the life -- related to the life of our facility.

CHAIRMAN CLARK: Let me ask it a different way. Is this a project that's being done under PURPA? Was this a project being done under PURPA?

WITNESS KILLIAN: Yes, ma'am.

CHAIRMAN CLARK: What does PURPA call for in terms of the costs to be paid? Is it connected to the cost of the avoided unit?

WITNESS KILLIAN: It's connected to the avoided cost of the project.

CHAIRMAN CLARK: Isn't the theory of PURPA is that the ratepayers will be no worse off -- that whether they get energy from your project or one built by FPC,

the cost to them is going to be the same?

WITNESS KILLIAN: It's my understanding.

CHAIRMAN CLARK: Okay. If that's the case, doesn't it make sense to make the capacity payments equivalent to the unit avoided?

WITNESS KILLIAN: Not necessarily.

CHAIRMAN CLARK: Why not? Why don't you wind up paying more if you have capacity costs beyond the avoided unit?

WITNESS KILLIAN: Yes, ma'am. It's my understanding that in the value of deferral method, what you're doing is you're looking at year-by-year deferral of a project, and each year that you defer putting that project into service, you're avoiding a certain cost. And if you defer putting that unit in service for 30 years, you are in fact avoiding a cost for 30 years.

CHAIRMAN CLARK: But it's the avoided unit that has the life of 30 years in the example you've given then?

WITNESS KILLIAN: No, ma'am, you're avoiding putting that unit in service for a period of 30 years, and as I understand it that's what's being avoided is putting that unit in for the term of the contract.

CHAIRMAN CLARK: So you're making a distinction between the life of the unit that would have

been put in and the number of years it can be avoided?

WITNESS KILLIAN: Yes.

CHAIRMAN CLARK: Okay. Go ahead, Mr. McGee.

BY MR. McGEE:

Q Just to pursue that. Under that viewpoint then, once you had a contract that committed some capacity to avoid a unit, even if the unit that's avoided has a life of, say, 20 years, in this case you could keep deferring it forever and in theory it would still be appropriate?

A In my understanding that's correct.

Q And that would be true irrespective of the changes in technology and in cost and all the other circumstances that surround the operation and the planning for these kind of units?

A Well, it would be true consistent with the contract, with the contract term, that's correct.

Q Do you have a copy of the contract with you? In looking through your exhibits I don't think that you did, but I noticed that it was an exhibit to Mr. Lindloff's testimony. Do you have his there?

COMMISSIONER KIESLING: While you're looking, you're creeping down the table. Thank you. I have an extra one if you need it.

WITNESS KILLIAN: I have the negotiated

contract.

MR. ROSS: I don't think he has it.

WITNESS KILLIAN: I don't have it.

BY MR. McGEE:

Q Now that you have that there, I notice that in your testimony you state that, on Page 12, Line 15, that the contract does not state a net size limitation, and that was why I asked you to review the contract.

Would you -- have you verified that that is an accurate quote from your testimony?

A That's correct.

Q Would you look at -- it's designated Sheet 2 of 88 of Mr. Lindloff's exhibit. It's the title page of the contract.

A Yes, I see that.

Q Would you read the title at the top of the page, the one that begins standard offer contract?

A Standard offer contract for the purchase of firm capacity and energy from a qualifying facility less than 75 megawatts, or a solid waste facility.

Q Does the phrase "a qualifying facility less than 75 megawatts" suggest to you consistency with the qualifying facility of 115 megawatts?

A I don't understand your question.

Q Well, if the contract refers to it being for a

facility less than 75 megawatts, and you've indicated that your facility is consistent with the contract, I want to know if that phrase in the title suggests an inconsistency.

A The phrase in the title suggests nothing to me, but I'll refer you to Article 2 of the contract, under availability, the second 2.1.2, where it elaborates a little bit on the title, I guess you would call it. It says, "The facility being a solid waste facility pursuant to FPSC Rule 25-17.091, or the facility having a committed capacity which is less than 75,000 kilowatts." So what it refers to me is that -- what it means on the title that I just read, it refers to the committed capacity of the contract, not the net generating output of the facility.

Q Would you agree with me, Mr. Killian, that we have two different terms that we're using here. We have some discussion that's taken place in the hearing that has to do with the size of the facility itself, the hardware, and then we have a discussion about the size or the amount of committed capacity in the contract. Now, when the title of the contract refers to a facility, does that suggest to you the physical plant?

A I didn't hear the last point. You faded off again.

Q I'm sorry. Does the reference to a qualifying facility less than 75 megawatts suggest to you that in that instance we're talking about the physical plant, the hardware?

A No, that doesn't suggest that to me.

Q It doesn't. Would you look at Section -- it's on Sheet 6 of 88 of Mr. Lindloff's exhibit. It's Section 1.1 under definitions, and in particular, Section 1.1.5. Would you agree with me, Mr. Killian, that the Commission's rules governing standard offer contracts are incorporated into and made a part of the standard offer contract?

A Yes.

Q And, in fact, those rules are physically attached to the contract; aren't they?

A Yes.

Q And they're in Appendix E?

A That's correct.

Q Would you turn back into Appendix E of the contract where the rules are listed? I would like to -- it's on Page 72 of 88.

A Okay.

Q I would like to ask you to -- I would like to ask you to look at Section 25-17.083, which is the rule titled Firm Capacity and Energy Contracts, and look at

Section 3-A, which is at, actually, the bottom of the next page where the rule begins, there's a reference to a 17-44 for a page number at the bottom. Do you see the section I'm talking about, Section 3-A?

A Yes.

Q Would you read the language in that short section?

A "Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs in a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts, or from solid waste facilities as defined in Rule 25-17.091."

Q Now, does the reference in that subsection to small qualifying facilities less than 75 megawatts suggest to you that it's -- that a 115 megawatt unit would be consistent with this aspect of the standard offer contract?

A What it suggests to me is that the committed capacity cannot be greater than 74.9 megawatts.

Q But this language doesn't say committed capacity, does it?

A But that's what that suggests to me. That's what you asked.

Q Would you turn the page, sir, and look at rule -- at Subsection C? It's towards the top of the next page, and I would ask you if you would read the first sentence for me, please.

A "In lieu of a separately negotiated contract" -- is this the one?

Q Yes.

A -- "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."

Q And then would you read the following sentence?

A "Qualifying facilities which are 75 megawatts or greater may negotiate contracts for purchase of capacity and energy pursuant to Subsection 2."

Q Thank you. Again, this language -- does this language suggest to you compatibility of a 115 megawatt unit with the -- with these terms that have been incorporated into the standard offer contract?

A Well, this language here, once again, suggests to me that the -- that for projects of greater than 75 megawatts or greater, you would go to a -- 75 -- greater of committed capacity, you would go to a negotiated contract. That's what that suggests to me.

Q You would read then projects and facility as being synonymous terms?

A That's correct.

Q What is the size of the Panda project?

A The nominal capacity is around 115 megawatts.

Q So under this language then, applying that rule, you would go to a negotiated contract?

A No, I said committed capacity. A project with a committed capacity of 74.9 megawatts would then go to -- or a facility for 75 -- 74.9 megawatts, would go to a negotiated contract.

Q Not meaning to quibble with you, but I thought you just agreed that you viewed the project and the facility as being synonymous terms.

A They are.

Q And if this says that a facility of greater than 75 megawatts should use a negotiated contract, not a standard offer contract --

A I said a committed capacity of 74.9 megawatts. See, what -- the first section referred to a committed capacity of 75 megawatts or less. This refers to a committed capacity of 75 megawatts or greater.

Q So then you're, in effect, saying that facility, project and committed capacity are all synonymous terms?

A No, I'm not. I'm only saying that committed capacity is the measure that's stated here in this particular provision.

Q Well, the verb that -- the word that's actually used is the word "facility"; is that correct?

A Qualifying facilities -- it's actually plural. QF is a word of art. Qualifying facility is a word of art. That describes the fact that it is a PURPA-based contract. It's not trying to categorize anything else other than that. It's trying to define what kind of facility. It's a qualifying facility.

Q And the use of the word "facility," then, is comparable to committed capacity under your understanding?

A No.

CHAIRMAN CLARK: But it is for purposes of the rule, as I understand your testimony.

WITNESS KILLIAN: I guess maybe I don't understand the question. I don't understand his question.

BY MR. McGEE:

Q Well, you've indicated that this rule, which is part of the contract, both in subsection A and subsection C, limits a standard offer contract to a small qualifying facility less than 75 megawatts, and

I'm attempting to find out whether under your interpretation of the contract, you think that this rule is consistent with the facility that you're planning, which is 115 megawatts?

A Yes, and my answer is that I read this to mean that as long as the facility's committed capacity is consistent with this rule, being that in our case it's 74. -- committed capacity is 74.9 megawatts, that the rule doesn't put a specific limit on the size of the facility being built.

Q And you say that, even though the rule doesn't speak to committed capacity at all; is that correct?

A That's correct.

Q While we're in this section of the rules, I wonder if you would look at the bottom of that page, Section E, Paragraph 6, the last sentence reads, "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, commencing with the anticipated in-service date of the avoided unit."

Mr. Killian, do you know if the contract specifies the in-service date of the avoided unit?

A Yes.

Q And what is that?

A 1997.

Q And do you know if the contract specifies the life of the avoided unit?

A When you say life, could you be more specific?

Q The life of the avoided unit. You want me to characterize that differently?

A Yes, sir.

Q How long it will remain in operation, how long it's expected to remain in operation.

A How long -- you're asking me does the contract specify how long the facility will remain in operation?

Q Yes.

A In that particular case, no, the contract doesn't specify that life.

Q Would you turn to Sheet 53 of 88 in the standard offer contract? This is Appendix C, Schedule 2.

A Yes.

Q All right. Under the second category, Investment Data, would you read the last line?

A "Economic plant life equal 20 years."

Q Okay, and then earlier you indicated that the contract specifies the in-service date of the avoided unit; did you not?

A That's correct.

Q Is that stated up on the first line under the category General?

A Yes, it is.

Q Okay. Doesn't say in-service, though, does it?

A It says, "year of avoided unit."

Q So you read those two terms as being synonymous?

A Yes, because that's when the capacity payments would start, would be in 1997.

Q But you don't see that economic plant life refers to the life of the avoided unit?

A No, I don't.

Q If you would turn back to Page 12 of your testimony. At the bottom of Page 12, beginning on Line 19 and into the top of the next page, you refer to "irrefutable engineering realities" that you claim make it necessary for a facility to have a net capacity substantially greater than 74.9 megawatts in order to produce a capacity of 74.9 megawatts; do you see that?

A Yes, I do.

Q Isn't it true, Mr. Killian, that Panda's own self-certification filed with the FERC stated that the Panda facility would have a net capacity of precisely 74.9 megawatts?

A Yes, it did.

Q And isn't it also true that after Panda redesigned its facility to increase its net capacity to 115 megawatts, supposedly to accommodate the additional capacity necessary to reliably deliver 74.9 megawatts, that Panda offered to sell 35 megawatts of firm capacity to the -- to Lakeland Utilities?

A There was an offer put out by a representative of Panda, yes, although he was not authorized to do that.

Q Did you receive a copy of that letter?

A Yes, I did.

Q Did you take any action to see that that unauthorized activity was rescinded?

A Yes. You use the term "rescinded." I took action to check on whether or not -- the validity of that action, that effort could have been undertaken.

Q Lakeland responded to your proposal; didn't they?

A That's correct.

Q So it appears that they weren't aware that the offer was rescinded?

A We did not officially rescind the offer to Lakeland.

Q I see. If you would turn to Page 13 --

CHAIRMAN CLARK: Mr. Killian, let me follow up on that. So the offer was made by somebody who was not authorized to do so, and when you found out, you, nonetheless, let the offer stay out there for Lakeland to take advantage of it?

WITNESS KILLIAN: No. We had internal discussions and a decision was made to withdraw the offer, but the answer came back before the withdrawal could take place.

CHAIRMAN CLARK: All right. I'm confused. Did you withdraw the offer or --

WITNESS KILLIAN: No, they had already said they were not interested by the time we made the decision to withdraw the offer.

CHAIRMAN CLARK: Was there any documentation that you had made the decision to withdraw the offer?

WITNESS KILLIAN: I don't recall.

BY MR. McGEE:

Q Lakeland Utilities' response to your offer was approximately a month later; was it not?

A A month after the --

Q After the offer was -- after the proposal was submitted to them?

A I don't recall when it was.

Q Mr. Killian, on Page 30 of your testimony in

your answer you describe a meeting between Panda and members of the Public Service Commission Staff. Do you know whether Florida Power or any representatives of Florida Power were invited to that meeting?

A Not to my knowledge.

Q Do you know whether they were even informed that the meeting was to take place?

A Beforehand?

Q Yes.

A I do not know whether they were or were not informed.

Q In any event, Florida Power representatives weren't present at that meeting, were they?

A That is correct.

Q Was the subject of the proposed 115 megawatt facility's compatibility with the Commission's 75 megawatt rule discussed at that meeting?

A To the best of my knowledge it was.

Q Can you indicate to me how that knowledge was acquired?

A Through discussion with the people that attended that meeting.

Q Would you turn to your Exhibit RK-12?

A Okay.

Q Now that's a letter from Barrett Johnson, an

attorney representing Panda, to Mr. Jenkins of the Florida Public Service Commission Staff; is that correct?

A That is correct.

Q And the purpose of that letter is to -- and the content of that letter summarizes the discussion at the meeting that was held on August 15th?

A That is correct.

Q And do you see anywhere in that even the mention of the word "rule"?

A No, I do not.

Q In fact, isn't it true that the letters from Mr. Johnson to Mr. Jenkins and the response from Mr. Jenkins to Mr. Johnson indicate that the discussion was really in the context of whether or not Panda's new configuration constituted a contract modification that would require Commission approval and not whether it was consistent with the Commission rules? (Pause)

I should indicate that that responsive letter from Mr. Jenkins is the following exhibit, RK-13.

A I do see those exact words in here where it does refer to the last sentence of Mr. Johnson's letter -- or the second to the last sentence states that, "We also discussed the fact that the operation of Panda-Kathleen in the manner described in this letter

and the attached letter to Florida Power Corporation is consistent with Panda's standard offer contract and is not a contract change that would require Florida Public Service Commission approval." Yes, that's stated in the letter.

Q All right. And then in Mr. Jenkins' response, he states -- this is in RK-13, "Based on the representations," meaning at the -- in the Panda letter, "I foresee no reason why this is any type of contract change that should come before the Commission for approval."

A Yes, that's in there. However, I do know that the rule was discussed in that meeting.

Q And is that documented anywhere?

A I can't answer that. I do know the rule was discussed.

Q You were not at that meeting though, were you?

A No. I do know from the reports from the people who did attend the meeting that the rule was discussed.

Q After that meeting was over and this exchange of correspondence took place, do you know if Panda did anything to make Florida Power aware of the results of that meeting?

A In Mr. Jenkins' letter he references a phone

call to Mr. Dolan where he says, "I discussed this briefly with Florida Power's Bob Dolan and he concurred."

Q Well, my question was whether you -- whether Panda had done anything to communicate or advise Florida Power in any way of the results of this meeting.

A I don't recall specifically on that one.

Q And the reference in Mr. Jenkins' letter that you just referred to discussing with the Florida Power's Bob Dolan, that would suggest that that conversation with Mr. Dolan took place before this letter was written?

A That's correct.

Q So that didn't cause you to believe that Florida Power had received copies of Mr. Jenkins' letter, did it?

A Not necessarily, no. It just indicated to us that Mr. Jenkins had had a conversation with Mr. Dolan concerning this matter and he had no problem.

Q Do you have any basis for disagreeing with Mr. Dolan's testimony that the first time Florida Power became aware of either the meeting or the correspondence that followed the meeting was in early January 1995?

A I don't understand that. If Mr. Jenkins talked to Mr. Dolan, you would have thought he would

have known about it when he talked to Mr. Jenkins. You would have thought Mr. Dolan would have recognized that the reason he was getting the phone call from Mr. Jenkins was because Panda did have that meeting. So I can't understand why it would have been four or five months later before he recognized the meeting took place.

Q Well, do you have any basis for disagreeing with his testimony that he didn't receive copies of the correspondence until that time?

A Oh, no, not of the correspondence. I can't disagree with that.

Q Would you turn to Page 33 of your testimony, please?

A I'm sorry, what page?

Q Page 33. I was struck by your testimony on Line 16, which says, "With the production of 115 megawatts of energy, Florida Power would receive 40.1 megawatts of free capacity."

Is it your testimony that Florida Power would avoid an additional 40 megawatts of capacity?

A Well, are you -- you say avoid. My testimony is that they would not have to pay for any capacity that was delivered above 74.9 megawatts; that the contract only required a committed capacity of 74.9 megawatts.

And to the extent that we delivered them energy in excess of that, they would not have to make capacity payments for the amounts above 74.9 megawatts.

Q Well, but you would be delivering energy, but you're claiming that the capacity would be free. Would Florida Power be receiving any capacity?

A They would -- of course. They would be receiving free energy which would not require them to pay for capacity for that extra amount of megawatts they were receiving.

Q Did you mean to say just now free energy? The energy would be at as-available --

A No, I'm sorry. I stand corrected. It would not be free energy. The capacity would be free.

CHAIRMAN CLARK: Let me ask a question on that. And I had a question in your direct testimony when you indicated that Florida Power Corporation would receive 40.1 megawatts of free capacity. But you have no obligation to deliver that capacity to them, do you? You don't suffer any penalties if you do not in fact deliver that capacity?

WITNESS KILLIAN: We view that when we build the plant that we're going to deliver all the energy to Florida Power Corp., and unlike the misadventure with the City of Lakeland, that we're not going to go out and

sell that extra capacity to another party. And consequently, that capacity is reserved to go to Florida Power Corp., and we're not -- neither does the contract require that they pay for it or are we asking that they pay for that extra capacity. So to that extent they end up with about 40 megawatts of free capacity.

CHAIRMAN CLARK: Are you obligated to deliver that capacity under the contract?

WITNESS KILLIAN: No, ma'am.

BY MR. McGEE:

Q In that same vein then, from Florida Power's standpoint, it can't count on having that capacity; can it?

A No.

Q So if Florida Power has a capacity need -- say Florida Power identifies a capacity need for 100 megawatts, it can't subtract 40 megawatts from that and only add an additional 60; can it?

A Well, to the extent that Panda is delivering it to Florida Power Corp. and the facility is producing it, you know, it's there.

Q Do you understand that planners make long-term decisions; that it wouldn't be a day-to-day view?

A That's correct.

Q Well, if the planners at Florida Power can't

view that 40 megawatts, that additional 40 megawatts that you have at your facility, as avoiding a capacity need on Florida Power's part, then Florida Power would have to build that capacity; wouldn't it?

A But what this becomes is capacity that's there, that's available to Florida Power Corp., and they don't have to pay into any capacity for this, and the benefit will accrue to the ratepayers.

Q But if Florida Power has already had to add an additional 40 megawatts on its own because it can't count on yours, it's not free, is it?

A Knowing the fact that it is available here, I don't see why you would waste the money to go out and add an extra 40 megawatts.

Q Isn't the whole basis for why this additional 40 megawatts is needed is because it's necessary to provide 74.9 megawatts and that you're going to experience degradation and these other phenomena that make it necessary, that additional 40, to be able to serve the 75 megawatts?

A This was the size of plant that was required in order to meet the needs of this contract. It was the smallest plant that we could size to meet the 74.9 megawatts of committed capacity at all times.

Q So if you need that additional capacity to

meet the 75 megawatt committed capacity, how can Florida Power count on it to avoid building 40 megawatts of its own capacity?

A Well, to the extent the plant can produce it, it's available to Florida Power Corp.

MR. McGEE: Those are all the questions I have.

CHAIRMAN CLARK: Staff?

MS. BROWN: Staff has no questions.

CHAIRMAN CLARK: Commissioners?

Mr. Killian, I do have a couple questions. I want to be clear on what you were originally proposing to build to meet the 74.9 megawatts. And as I understand it, it was combustion turbines of 25 each, three of them?

WITNESS KILLIAN: Yes, ma'am. There were three LM 2500s, which their nominal capacity is 25 megawatts each, and under normal conditions, they would put out between 87 and 95 megawatts.

CHAIRMAN CLARK: Okay, and I'm not sure I understood why you deviated from that proposal and why those three units could reliably produce the committed capacity and yet the other two you chose could not.

WITNESS KILLIAN: One of the witnesses will get into that in probably detail later, but in a

nutshell, we went back and looked at -- did a more exhaustive study of what the requirements were for the project and saw that we could not expect to get 74.9 megawatts at all times and under all climate conditions, and so therefore it dictated that we get a different type of unit than the LM 2500s.

Additionally, in this time frame, the emissions standards for Florida changed from 25 parts per million NOX down to 15 parts per million NOX. And these particular units would not have achieved that NOX level. So that would eliminate the aero-derivative machines.

CHAIRMAN CLARK: So but for the change in the environmental concerns, you could have used those 25 megawatt units and had that --

WITNESS KILLIAN: No, ma'am. No, ma'am, we could not. That was another factor that eliminated aero-derivative machines, but we had made the decision to not use the LM 2500s prior to the change in regulations because of the change in climate conditions and the degradation conditions we expected over the life of the contract. We didn't feel comfortable that these machines would be able to provide the 74.9 megawatts throughout the term of the contract.

CHAIRMAN CLARK: How soon after you made the

proposal to use that did you decide that they were no longer viable?

WITNESS KILLIAN: I'm not sure of the exact time frame. You certainly -- please ask one of the other witnesses that may have been involved in that.

CHAIRMAN CLARK: I'm still having difficulty understanding the 30-year versus 20-year. And I keep relating it back to the notion that under PURPA, and setting the avoided cost, that whoever generates the electricity, the cost should be the same to the ratepayers. And correct me if I've misunderstood it, it seems to me that the capacity payments that are set out for your contract under the standard offer use an economic life of the avoided unit of 20 years.

WITNESS KILLIAN: Yes.

CHAIRMAN CLARK: And you're saying that your contract is for 30 years, but as I understand it, the payments you're asking for are the same as those based on a 20-year unit, and to me, that means the avoided costs they have to pay under the contract, as you want it interpreted, will be more.

WITNESS KILLIAN: But that's not what the value of deferral method does. The value of deferral method defers putting a unit in service on a year-by-year basis. In fact, your rules even allow for

a ten-year, a minimum ten years for a contract. And that's certainly -- I mean, under the same philosophy, that certainly wouldn't be fair. But also, you could put a different economic life in ten years.

CHAIRMAN CLARK: Why wouldn't it be fair? My concern here is --

WITNESS KILLIAN: It might be fair if a person had a facility and then he had another use for it beyond the ten-year period. But the point I'm trying to make is the rule that establishes how you determine the capacity payments is not necessarily related to the particular facility that goes in. It's related to the deferring of an avoided unit each year, and that's the way it's calculated.

CHAIRMAN CLARK: You're saying the payment being made to the cogenerator is not related to the cost of the avoided unit?

WITNESS KILLIAN: That's what I'm saying, yes.

CHAIRMAN CLARK: Then how can we be sure that the ratepayers are not harmed by the price -- that they pay the same price they would have paid if the utility built the unit as opposed to the qualifying facility being built?

WITNESS KILLIAN: I can't answer that

question.

CHAIRMAN CLARK: Okay.

WITNESS KILLIAN: But I will say that the value of deferral method is pretty clear on how it's calculated, and it would appear to me that, you know, if a contract were approved for 30 years, it would be very consistent to calculate it consistent with the calculation method spelled out in the rule.

CHAIRMAN CLARK: Let me see if we can agree on one thing, that certainly the ratepayer should have to pay no more under that contract than they would have paid had the utility built the unit that's being avoided?

WITNESS KILLIAN: And under the philosophy avoidance of building the unit, such as the value of deferral method calls for, if Florida Power Corp. --

CHAIRMAN CLARK: You're putting qualifications on it that I didn't put on it.

WITNESS KILLIAN: Yes, ma'am.

CHAIRMAN CLARK: Under the philosophy of PURPA, isn't PURPA designed so that the ratepayers pay no more for that electricity, whether it is generated by Florida Power Corporation or by a qualifying facility? Is that the philosophy of PURPA?

WITNESS KILLIAN: I would prefer the lawyers

to try to interpret the PURPA rules rather than me.

CHAIRMAN CLARK: Fair enough.

MR. ROSS: I think, Commissioner Clark, actually we have Mr. Shanker who will be testifying on just that, and I think you could ask those questions of Mr. Shanker.

CHAIRMAN CLARK: I will. Any other questions? Redirect?

REDIRECT EXAMINATION

BY MR. ROSS:

Q I just wanted to ask you one question, Mr. Killian. Is it correct that you understand the words "economic plant life" to mean something different than the expected operational life of the facility?

A That is correct.

Q And when you saw the terms "economic plant life" in this facility, you didn't think that meant the operational life, correct?

A No, I felt they were different.

Q And isn't it correct you believe the operational life of the 1997 combustion turbine unit, which is the avoided unit here, is in fact longer than 20 years?

A That is correct.

MR. ROSS: Thank you. That's all I have.

CHAIRMAN CLARK: Thank you, Mr. Killian.

(Witness Killian excused.)

* * *

CHAIRMAN CLARK: Exhibits? Do you move the admission of Exhibit 23?

MR. ROSS: Yes, I do.

CHAIRMAN CLARK: It will be admitted in the record without objection.

(Exhibit No. 23 received into evidence.)

MR. ROSS: I'm sorry, I thought I already had. If it is all right with the Commissioners, just because of a flight schedule, if we could take Mr. Brinson next, rather than whoever is next in the list. He's one of our direct witnesses. He has an earlier plane to catch.

MR. McGEE: We have no objection.

CHAIRMAN CLARK: No objection?

MR. McGEE: No objection.

CHAIRMAN CLARK: Okay. Commissioners? We're going to take a break until quarter of, and we will start with Mr. Brinson.

(Recess from 3:35 p.m. until 3:55 p.m.)

CHAIRMAN CLARK: Go ahead and reconvene the hearing. Mr. Brinson?

Go ahead, Mr. Ross.

JOSEPH C. BRINSON

was called as a witness on behalf of Panda-Kathleen, L.P., and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSS:

Q Could you please state your name and your work address for the record?

A First, is the mike working? I can't see from the lights.

Q It's on.

A My name is Joseph C. Brinson and presently I am the site manager for Panda-Brandywine's L.P. cogeneration facility, and my business address is 16400 Mattawoman Drive, Brandywine, Maryland 20613.

Q Mr. Brinson, do you have before you a document which is a copy of the prefiled direct testimony that you have presented in this proceeding?

A Yes, sir.

Q Do you have any additions or corrections to make to that testimony?

A No, sir.

Q And is that testimony true and accurate, and if asked the same questions today, would you give the same answers?

A Yes, sir.

MR. ROSS: I move that Mr. Brinson's direct testimony be entered into the record as though read.

CHAIRMAN CLARK: Mr. Brinson's prefiled direct testimony will be inserted in the record as though read.

BY MR. ROSS:

Q Thank you. And you also, Mr. Brinson, have two exhibits to your direct testimony which constitute Exhibits JCB-1 and JCB-2?

A Yes, sir, I do.

Q And those are the exhibits that are referred to in your direct testimony?

A Yes, sir.

MR. ROSS: I would offer as Composite Exhibit No. 24 the exhibits to Mr. Brinson's testimony which are JCB-1 and JCB-2.

CHAIRMAN CLARK: JCB-1 and 2 attached to Mr. Brinson's direct testimony will be marked as Composite Exhibit 24.

(Exhibit No. 24 marked for identification.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

TESTIMONY OF JOSEPH BRINSON

ON BEHALF OF PANDA-KATHLEEN, L.P.

DOCKET NO. 950110-EI

Q. Please state your name, profession, and business address.

A. My name is Joseph Brinson. I am the Site Manager of Panda-Brandywine, L.P.'s cogeneration facility, which is being developed by Panda Energy International, Inc. Panda Energy International, Inc., is engaged in the development and operation of cogeneration facilities. Prior to taking my present position at Panda-Brandywine, L.P., I worked on the planning of the cogeneration plant to be constructed by Panda-Kathleen, L.P. Panda-Kathleen, L.P. is engaged in the development of a qualified cogeneration facility in Lakeland, Florida pursuant to a contract between Panda-Kathleen, L.P. and Florida Power Corporation. My business address is 16400 Mattawoman Drive, Brandywine, Maryland 20613.

Q. State briefly your educational and professional background.

A. I graduated from North Georgia College with a B.S. in Business Administration. I joined Panda in 1985. In 1989, I became the project manager during construction of the Panda-Rosemary L.P. plant in Roanoake Rapids, North

Carolina. I became the Plant Manager of that facility in 1990, and remained there until assuming my current position.

Q. On whose behalf are you appearing in this proceeding?

A. I am appearing on behalf of Panda-Kathleen, L.P.

Q. Please describe your duties with Panda Energy Corporation.

A. I am the Site Manager of Panda-Brandywine, L.P., and I am responsible for the construction of that plant. I have held that position since March of 1992.

Q. What position did you hold prior to becoming plant manager at Panda-Brandywine?

A. I was Project Manager at Panda Energy Corporation, and I was involved in the planning of the Panda-Kathleen facility during part of 1992.

Q. Did you have any meetings or discussions with FPC as part of your job duties?

A. Yes. I had several meetings with FPC employees in Florida while working on the planning of the Panda-Kathleen project.

Q. Did you ever have any discussions with FPC employees regarding the planned size of the Panda-Kathleen plant?

A. I had discussions with FPC regarding plant size on at least two separate occasions. During the week of April 15, 1992, Don Kinney and I met with Bob Dolan, Alan Keith and David Gammon of FPC to discuss planning issues for the Panda-Kathleen project. We discussed whether FPC would purchase the energy produced in excess of 74.9 MW by the plant. FPC stated that they would purchase additional energy above 74.9 MW committed capacity if Panda wanted to provide it from the Panda-Kathleen Plant. Notes of that meeting are attached as Exhibit "A".

Q. Any other discussions with FPC on the plant size issue?

A. On May 1, 1992, I again met with Bob Dolan, Alan Keith and David Gammon to discuss various issues, including a proposal to build a 110 MW facility to meet Panda-Kathleen's 74.9 MW committed capacity obligation. Bob Dolan told me that the 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. A report of that meeting is attached as Exhibit "B".

Q. Did you have any other contact with FPC on this issue?

A. No. Late in 1992, I was reassigned to work solely on the Brandywine project...

Q. Does this conclude your testimony?

A. Yes.

BY MR. ROSS:

Q Mr. Brinson, would you give us a brief summary of your testimony, please?

A Yes, sir. My prefiled direct testimony describes two conversations that I had with Florida Power representatives regarding the size of the Panda-Kathleen facility. And at the time of these conversations I was a project manager for Panda for the Panda-Kathleen project.

In April of '92, I met with Mr. Bob Dolan and Mr. David Gammon, Florida Power Corp. -- at Florida Power, and which they stated that Florida Power would purchase additional energy above the 74.9 megawatt committed capacity if Panda would like to provide it.

And then again in May of '92, I had another meeting with Florida Power representatives, Mr. Dolan and Mr. Gammon, in which we discussed Panda's proposal to build a 110-megawatt plant to meet the committed capacity requirement for the Panda-Kathleen facility.

And Mr. Dolan again said that the size would not be a problem with Florida Power, but that we should not talk with the Florida Public Service Commission at that time because the Ark Energy challenge to the standard offer and contract was still pending.

Q And are the exhibits that are attached, those

are your notes of those two conversations?

A Yes, sir, the notes that are -- the exhibits are my notes from those two meetings.

MR. ROSS: Thank you. I tender Mr. Brinson for cross-examination.

MR. FROESCHLE: We have no questions for this witness.

CHAIRMAN CLARK: Staff.

MS. BROWN: Staff has no questions.

CHAIRMAN CLARK: Commissioners? You got off the hook.

WITNESS BRINSON: Now I can make that airplane.

CHAIRMAN CLARK: Thank you, Mr. Brinson.

Do we need to move the exhibit? Exhibit 24 will be admitted in the record without objection and you can be excused, Mr. Brinson.

(Exhibit No. 24 received into evidence.)

WITNESS BRINSON: Thank you, ma'am.

(Witness Brinson excused.)

* * *

MR. ROSS: Mr. Dietz will be next.

CHAIRMAN CLARK: Yes.

J. BRIAN DIETZ

was called as a witness on behalf of Panda-Kathleen,

L.P., and having been duly sworn, testified as follows:

MR. ROSS: Should we wait -- do you wish us to wait or should we go ahead?

CHAIRMAN CLARK: No, he'll come up here when -- we'll go through the formalities and he'll be ready by that time.

DIRECT EXAMINATION

BY MR. ROSS:

Q Would you please state your name and business address for the record, please?

CHAIRMAN CLARK: The light has to be off for your mike to be on.

WITNESS DIETZ: My name is J. Brian Dietz. My business address is 4100 Spring Valley Road, Suite 1001, Dallas, Texas 75244.

BY MR. ROSS:

Q Mr. Dietz, do you have before you a document which is a copy of the prefiled direct testimony that you have filed in this case?

A Yes, I do.

Q And is that testimony true and accurate today?

A Yes, it is.

Q Do you have any additions or changes to that testimony that you wish to make at this time?

A No, I do not.

Q And if asked the same questions today, would you give the same responses?

A Yes, I would.

Q I move that the prefiled testimony of Mr. Dietz be accepted into the record as though read.

CHAIRMAN CLARK: The prefiled direct testimony of Mr. J. Brian Dietz will be inserted in the record as though read.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TESTIMONY OF **J. BRIAN DIETZ**
ON BEHALF OF PANDA-KATHLEEN, L.P.
DOCKET NO. 950110-EI

I. INTRODUCTION AND QUALIFICATION

Q. Please state your name, profession, and business address.

A. My name is J. Brian Dietz. I am the Director of Engineering and Operations of Panda Energy International, Inc. Panda Energy International, Inc. is engaged in the development and operation of cogeneration facilities. Panda-Kathleen, L.P. is engaged in the development, ownership and operation of independent power facilities and a qualified cogeneration facility in Lakeland, Florida pursuant to a contract between Panda-Kathleen, L.P. and Florida Power Corporation. My business address is 4100 Spring Valley, Dallas, Texas 75244.

Q. State briefly your educational and professional background.

A. I earned a Bachelor of Science degree in mechanical engineering from the University of Maryland in 1960 and a Master of Science degree in mechanical engineering from Rensselaer Polytechnic Institute in 1966.

From 1960-61, I was employed by Vitro Laboratories of Silver Spring, Maryland. From 1961-66, I was employed by

United Technologies as a Senior Engineer, leaving in 1966 to join Vought Corporation of Dallas, Texas as a Senior Engineering Specialist. I left Vought in 1977 to become the Director of Engineering and Development for Lone Star Energy Company of Dallas, Texas.

In 1983, I left Lone Star to become the Manager of Business Development for CSW Energy, Inc. of Dallas. In that position, I directed project development activities for cogeneration, small power production and energy management activities for CSW, a then newly-formed subsidiary of Central and Southwest Corporation, a public utility holding company. At CSW, I led a business development team that obtained four letters of intent to develop more than 300 MW of cogeneration projects.

In 1985, I left CSW to become the Director of Project Development for Ford, Bacon & Davis of Monroe, Louisiana. While employed in this position from 1985-87, I marketed and developed cogeneration projects for this engineering and construction firm specializing in pulp and paper projects.

In 1987, I returned to Lone Star Energy as a Vice-President, serving as executive manager for Lone Star, directing engineering, operations and profit-loss

performance for five large thermal energy plants representing a $170 million investment.

In 1989, I left Lone Star to become an independent consultant specializing in the development, analysis and operations and maintenance of industrial energy and cogeneration projects. During that time, in addition to my work for other clients, I reviewed the operational readiness of the operations contractor, and performed owners representative overview activities for the commissioning, start-up and testing of a 165 MW combined cycle cogeneration facility for Panda Energy Corporation, the predecessor to Panda Energy International, Inc..

I joined Panda Energy Corporation in September 1992 as its Director of Engineering and Operations.

I am a registered professional engineer in the state of Texas and have held numerous offices in the American Society of Mechanical Engineers.

Q. On whose behalf are you appearing in this proceeding?

A. I am appearing on behalf of Panda-Kathleen, L.P.

Q. Please describe your duties with Panda Energy International, Inc.

A. As Panda's chief engineer, I have the responsibility for the direction of the design, analyses, selection and specification of all major equipment and systems for the Panda-Kathleen project and the 230 MW Panda Brandywine project. These responsibilities also include, and have included, participation in the negotiation of the turnkey engineering/procurement/construction contracts for these cogeneration plants.

As Panda's chief of plant operations, I have total management responsibility for the operation and maintenance of Panda's existing 175 MW cogeneration facility in North Carolina. The plant consists of one GE Frame 7 and one GE Frame 6 gas turbine in a combined cycle configuration. My responsibilities also include corporate management and the administration of the power purchase contract and thermal sales contract, and responsibility for the financial performance (profit and loss) of the plant.

Q. Have you ever testified before the Florida Public Service Commission?

A. No, I have not.

II. PURPOSE OF TESTIMONY

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to state the facts underlying Panda's attempts to comply with its contractual obligation to ensure that it will be able to supply Florida Power Corporation with wholesale electric power for 30 years at a net 74.9 MW or greater of capacity, under all operating conditions. My testimony will also state the facts regarding the engineering and permitting necessities that Panda attempted to comply with throughout the configuration selection process.

III. CONTRACTUAL CONSIDERATIONS IN CONFIGURATION SELECTION

Q. What considerations went into the choice of configuration for the Panda facility?

A. Panda must select a plant configuration which meets the performance and interconnection requirements set forth in the contract executed by Panda and Florida Power Corporation ("FPC"). These include requirements for the Facility to:

1. Make available to FPC the Committed Capacity of 74.9 MW, at all times, at the Point of Delivery from the Contract In-Service Date throughout the entire term of the power agreement (30 years);

2. Demonstrate, each year, the Commercial In-Service Status of the Facility within 60 days of when FPC demands that demonstration;

3. Maintain an hourly kW output, as metered at the Point of Delivery, equal to or greater than the Committed Capacity for a consecutive twenty-four hour period or during the on-peak hours for two consecutive days;

4. Be in compliance with all applicable permits;

5. Be a Qualifying Facility ("QF") delivering steam during all hours of plant operation (as opposed to the avoided or deferred unit which is a combustion turbine operating as a peaking unit in a simple cycle configuration);

6. Be capable of delivering the Committed Capacity using back-up fuel; and

7. Operate at 74.9 MWH per hour or more for 90% of the on-peak hours and 42% of the total hours in each year of the Contract term to approximate the availability and capacity factor of the utility's avoided unit as required by the Contract.

There are no constraints in the power agreement on the technology, equipment or plant configuration that may be utilized.

Q. Did Panda consider size restrictions in its contract with Florida Power in selecting a configuration for the Panda facility?

A. There are no provisions in the power purchase agreement that restrict the electrical generating capability of the plant. In fact, the contract requires Panda to deliver 74.9 MW of Committed Capacity at the Point of Delivery at all times under all weather conditions and states of maintenance.

IV. ENGINEERING CONSIDERATIONS IN CONFIGURATION SELECTION

Q. Why would Panda need to select a configuration for the facility that would have an ultimate capability exceeding 74.9 MW at the generator?

A. Given the realities of electrical generation, the contract required Panda to construct a facility with an ultimate capability exceeding 74.9 MW at the generator because:

1. The Committed Capacity is determined after parasitic electrical usage (the electricity needed to run auxiliary equipment and systems in the plant that are necessary to generate electricity) is subtracted;

2. The Committed Capacity is determined at, and must be delivered to, the Point of Delivery, after line and transformation losses have occurred;

3. The Committed Capacity must be delivered under all weather conditions and without regard to degradation occurring as a result of normal wear and tear;

4. The Committed Capacity must be deliverable using the back-up fuel; and

5. The Contract requires demonstrating this capability on 60 days notice throughout the term of the Contract, and prudence requires assuming that such notice will take place under worst case conditions.

To satisfy all of these requirements requires the construction of a plant with a maximum total capability greater than the 74.9 MW Committed Capacity.

Q. What design issues went into this configuration selection process?

A. To meet its obligations under its contract with Florida Power, Panda proposed to construct a combustion turbine in a combined cycle configuration for this Facility. Under this configuration, the waste heat from the combustion turbine is captured to make steam, which in turn is used to generate more electricity with great efficiency. The steam is extracted for process uses which is what makes it a cogeneration facility. This is the only viable QF configuration that could be built whereby the capacity and energy payment streams under the Contract will match up with the project's fixed and variable costs and that also will ensure that the facility is in full compliance with the Public Utilities Regulatory Policies Act ("PURPA"). Combined cycle technology has a number of characteristics that require

the application of a unit with a maximum total capability greater than the Committed Capacity of 74.9 MW.

Q. Was ambient temperature degradation an issue in configuration selection?

A. Yes. The output of a combined cycle plant varies significantly with changes in ambient temperature and relative humidity. The Contract does not set the ambient conditions for the plant design nor does it set any upper limit for temperature under which the 74.9 MW Committed Capacity performance requirements must be met. Since a combined cycle facility is subject to substantial performance degradation under conditions of high ambient temperature, the plant had to be sized to meet the Committed Capacity under the maximum expected ambient temperature. Florida Power had expressly requested facility performance numbers for temperatures as high as 110° F and temperatures of 100° F are commonly experienced in Lakeland in at least three different calendar months of the year. The maximum recorded temperature is 102° F. During the 30-year term of the Contract, a 102° F temperature must be anticipated.

At a temperature of 102° F, the performance of a combined cycle plant degrades from approximately 15% to 19% of rated capacity (depending on the exact equipment

selected) compared with the performance of the unit at 59° F at sea level. Plant rated performance is typically quoted at 59° F at sea level.

Q. What other performance degradation issues were considered in the configuration selection process?

A. A combined cycle facility also is subject to substantial, performance degradation, both non-recoverable and maintenance-recoverable, due to operational wear and tear on the plant. Maintenance-recoverable degradation is experienced between the major overhauls of the combustion turbine, steam turbine, and other plant auxiliary equipment. Published figures by major turbine suppliers show that non-recoverable and maintenance-recoverable degradation can be up to 6%.

In addition, a combined cycle facility experiences operationally-recoverable degradation. This degradation includes that due to combustion turbine compressor and air cleaner fouling. This can amount to 2% of rated capacity. This degradation can be recovered by thorough, off-line "washing" of the compressor and/or cleaning of the air filter. This "washing" can be accomplished when the combustion turbine is off-line.

Q. How must the design capability account for parasitic loads?

A. The facility will consume approximately 2% of its total output for internal purposes, including operating pumps, fans, controls, and other auxiliary equipment. The design must account for these parasitic loads.

Q. How did Panda account for projected transformation and transmission line losses?

A. These losses have been estimated at 1/2% to 1-1/2% and will continue over the thirty year period of the agreement.

Q. Based on the analysis you've just described, what did Panda consider to be the total effects of degradation, parasitic loads and transformation and line losses?

A. For the combined cycle facility to meet the Committed Capacity of 74.9 MW at the Point of Delivery at all times during the 30-year term of the power purchase agreement, the plant must be designed to include the cumulative effects of temperature degradation, nonrecoverable degradation, recoverable degradation, and transformation and line losses to the Point of Delivery. These degradations in output do not include reduced plant

output or degradation due to random auxiliary equipment failure over the 30 year term of the power agreement. These random equipment failures include such things as loss of a cooling tower fan, heat recovery steam generator tube failures, malfunctioning of combustion or steam turbine controls, valve failures, etc. Prudent engineering practice would include an extra margin of several percent above design rated plant output of the plant. Panda considered 2% to be a conservative margin. In the aggregate, all of these factors, conservatively, can total 27% to 31% of the Facility's initial generation capability rated under standard conditions. As a result the plant must be designed conservatively with a minimum rated output of 100 MW at 59° F net of parasitic loads. This is the minimum size that the Facility must be capable of producing to be able to meet its contractual commitments for the entire 30-year term of the Contract.

IV. ENVIRONMENTAL CONSIDERATIONS IN CONFIGURATION SELECTION

Q. How did environmental regulations play a part in the configuration selection process?

A. When Panda signed the contract with Florida Power, the State of Florida limited nitrogen oxide ("NO_x") emissions to the atmosphere from a generating facility to 25 parts per million ("PPM") at 15% excess oxygen. However, when

Panda began the facility permitting process in late 1992, the State of Florida had limited those emissions to the atmosphere to 15 PPM at 15% excess oxygen. This regulatory change had a significant effect on the technology selection and configuration selection process.

Uncontrolled, most combustion turbine models emit well over 150 PPM NO_x at 15% excess oxygen. There are currently two methods to achieve compliance with NO_x emission standards for a combined cycle plant: (i) through the use of dry low NO_x combustors ("DLN") in the combustion turbine; or (ii) through the injection of water or steam in the combustion turbine combustors in conjunction with injection of ammonia and catalytic reduction in Selective Catalytic Reduction equipment ("SCR") located in the heat recovery steam generator.

Q. Would the use of Selective Catalytic Reduction equipment ("SCR") enable Panda to comply with these Florida environmental regulations?

A. No. While both the DLN and, to some extent, SCR technologies are sufficiently developed to be accepted by the engineering, regulatory, and financial communities, the SCR technology has particular problems associated with it that would make it difficult, if not impossible,

to meet the 15 PPM requirement over the 30 year contract term.

Application of SCR to combustion turbines has been primarily limited to natural gas fueled units. In California, the state with the most significant experience with SCR, only 11 of 41 permitted SCR facilities have been permitted to fire oil as a backup fuel, as is required for the facility. This is due to the fact that the SCR catalyst promotes the oxidation of flue gas SO_2 to SO_3, which in turn reacts with un-reacted ammonia to form compounds that foul equipment downstream, including the SCR catalyst, rendering it ineffective. Only one of these facilities has ever been fired on oil (resulting in catalyst failure) and it no longer operates with liquid fuels. This factor alone virtually disqualifies SCR technology, and any turbines that cannot meet environmental standards without it, for use by Panda-Kathleen.

In addition, there are certain inherent safety and environmental risks associated with the use of SCR technology. The safety risks include leaks in an urban environment during the transportation, storage, and handling of the ammonia required for the SCR. Ammonia is designated as an "Extraordinarily Hazardous Substance" under Federal Superfund Regulations. The environmental

risks include malfunctioning of the SCR and its control system, ammonia slip (i.e., the mismatch between the ammonia injected and the ammonia needed for NO_x reduction during operation), and the disposal at the end of its useful life of spent SCR catalyst, which contains substantial amounts of heavy metals and metal oxides that are classified as hazardous (e.g., titanium, vanadium, platinum, and rhodium). These safety and environmental risks translate into financial risks for operator, owner, and lenders. In addition, a facility using SCR technology will have a higher capital cost and substantially higher operating and maintenance costs than one using DLN technology.

In addition to the advantages of DLN over SCR technology for safety, environmental protection, and cost, DLN technology also offers operability advantages. These include smoothness and reliability during combustor mode changes, gas turbine load changes, and system transients. In addition, unlike SCR equipment, the DLN system operation is transparent to the plant operator.

The use of SCR technology is not preferred by either engineers or regulators in several areas of the country for the aforementioned reasons. Many consider the use of SCR to control NO_x emissions as "extraordinary means" or "heroic technology." The Panda-Kathleen project

considered using SCR technology only as a last resort in the event that plant configurations using DLN could not be employed.

V. FINANCING CONSIDERATIONS IN CONFIGURATION SELECTION

Q. How did all of the factors you've described affect plant financeability?

A. Potential lending and equity participants in the Panda-Kathleen project will look not only at its financial strength but also at the plant design and selection of equipment. To be financeable, the plant must incorporate previously applied technology that has been thoroughly proven in other applications and must incorporate that equipment to produce a plant with high reliability over the term of the power contract. The only viable plant option that would meet all these requirements and could be built and operated as a QF with the capacity and energy payment streams provided under the Contract is a combined cycle facility.

VI. EQUIPMENT SELECTION TO COMPLY WITH THE PANDA-FPC CONTRACT

Q. What brands of equipment and models did Panda consider in the configuration selection process?

A. Based on the Contract performance requirements and design issues, Panda performed a detailed evaluation of six combustion turbine alternatives for the combined cycle plant. Several other configurations were evaluated on a preliminary basis. The number of alternative combustion turbines is limited by equipment availability since, unlike conventional steam plants that custom-tailor the steam turbine performance, combustion turbines come only in standard sizes predetermined by the manufacturers. The six configurations evaluated cover a wide range of performance. These were the ABB 8C, Siemens V64.3, GE LM2500, GE LM6000, GE Frame 7EA, and the ABB 11N1 combustion turbines.

The ABB 8C combined cycle facility was unable to produce the necessary minimum rated output of 100 MW at 59° F net of parasitic loads (to overcome expected degradation and line losses) without extensive supplemental firing of the heat recovery steam generator (HRSG) and the use of SCR technology for NOx control to 15 PPM. Supplemental firing of the HRSG is not the most efficient use of fuel for the QF concept. The disadvantages of SCR technology have already been discussed. This configuration was rejected for these reasons.

Similarly, the Siemens V64.3 combined cycle facility also was unable to produce the necessary minimum rated output

of 100 MW at 59° F net of parasitic loads without supplemental firing of the HRSG. Further, NO_x emissions cannot be controlled to 15 PPM without the use of SCR. For these reasons, this configuration was rejected.

As with facilities using the ABB 8C or Siemens V64.3 units, a combined cycle facility using three combined GE aero derivative LM2500 combustion turbines was unable to produce the necessary minimum rated output of 100 MW at 59° F net of parasitic loads without supplemental firing of the HRSG. NO_x emissions cannot be controlled to 15 PPM without the use of SCR. For these reasons, this configuration was rejected.

The GE LM6000 aero derivative combined cycle facility using two combustion turbines was determined to produce 109 MW net of parasitic loads at 59° F. This is 9 MW more than the necessary minimum rated output. However, the use of SCRs to control the NO_x emissions to 15 PPM is required. In addition, the capital and O&M costs for this configuration were greater than the costs associated with more acceptable configurations. This configuration was rejected for these reasons.

When new, the GE Frame 7EA combined cycle facility was rated to produce 118 MW net of parasitic loads at 59° F. Control of NO_x emissions to less than 15 PPM can be

obtained using DLN technology. Thus, this unit was deemed to be acceptable.

When new, the ABB11N1 combined cycle facility was rated to produce 116 MW net of parasitic loads at 59° F. Control of NO_x emissions to 15 PPM can be obtained using DLN technology. Therefore this unit also was deemed to be acceptable.

VII. PLANT CONFIGURATIONS SELECTED

Q. What brands of equipment and models did Panda ultimately select based on this analysis?

A. Based on the foregoing analysis, Panda determined that the GE Frame 7EA and ABB11N1 combustion turbines are the only reasonable plant configurations that could reliably provide the Committed Capacity of 74.9 MW at the Point of Delivery at all times over the 30-term of the Contract under all weather conditions with the expected degradation, parasitic loads, and losses. These configurations are the lowest capacity units that meet these criteria. The analysis indicated that both were equally capable from a technical and economic standpoint. Both combustion turbine manufacturers were willing to guarantee DLN technology to meet 15 PPM. While Panda submitted both configurations for permitting, ultimately only ABB was able to guarantee timely delivery of its

combustion and steam turbines in accordance with the schedule set forth in Panda's EPC contract to assure the plant would achieve Commercial In-Service Status in accordance with the power purchase contract.

Q. Does this conclude your testimony?

A. Yes, it does.

MR. ROSS: And there are no exhibits attached to Mr. Dietz's prefiled testimony, therefore we tender Mr. Dietz for cross-examination.

CHAIRMAN CLARK: All right, let me make sure. He can give a summary if you --

MR. ROSS: I'm sorry. It's getting late in the day. Please give a summary of your testimony, Mr. Dietz.

WITNESS DIETZ: My direct prefiled testimony describes in detail the analysis that Panda performed that ultimately led to the decision to use the ABB 11N1 combustion turbine in a combined cycle configuration for the Panda-Kathleen project.

During the time of these analysis, I was director of engineering and operations for Panda Energy and had responsibility for conducting the analysis and the evaluations of the various combustion turbine equipment that Panda could use to satisfy the committed capacity requirements of the standard offer contract.

In performing my engineering analysis, I considered the impact of the Florida climate and other sources of performance degradation on the output of the plant and came to the conclusion that as a matter of prudent engineering practice, that Panda should construct a facility of 100 megawatts net electrical

output in order to meet its contractual commitments to provide 74.9 megawatts of committed capacity to Florida Power under all conditions for the term of the contract that we have with Florida Power.

I also analyzed whether the available units and equipment configurations would meet the state of Florida air emissions requirements. These requirements changed substantially from the time we signed the contract until the time that we selected the equipment configuration, primarily with the NOX emissions from the equipment going from 25 parts per million down to 15 parts per million.

I determined after these analyses that there was only two equipment configurations available, the ABB 11N1 and the GE Frame 7EA that were capable of meeting the 74.9 megawatts of committed capacity under all conditions during the life of the contract, and also to meet the Florida environmental emissions requirements.

The ABB 11N1 has an output of about 115 megawatts net, and the Frame 7EA has a few more megawatts available, about 117.

We ultimately selected the ABB 11N1 combustion turbine because of the manufacturer's guarantees that they could meet the schedule that was required in order to build the facility in time to meet the scheduled

on-line dates.

That concludes a brief summary of my testimony.

MR. ROSS: Thank you. We now tender Mr. Dietz for cross-examination.

CHAIRMAN CLARK: Mr. Froeschle?

MR. FROESCHLE: Thank you.

CROSS-EXAMINATION

BY MR. FROESCHLE:

Q Mr. Dietz, how many engineers are employed by Panda?

A Currently Panda has about five engineers.

Q In 1991, how many engineers did Panda have?

A Panda did not have any engineers.

Q When did they first hire an engineer?

A August of 1992.

Q Who was that person?

A That was me.

Q Have you since been involved in the hiring of other engineers?

A Yes, I have.

Q And you now have four engineers that work for you?

A We have four engineers with the company. Some work for me and some work for other people.

Q Is Darol Lindloff one of those persons?

A Mr. Lindloff is the vice-president of technical services. He does not report to me. I'm director of engineering and operations.

Q But is he an engineer?

A No, he is not.

Q Is he a turbine expert?

A I think over the years that he has gained substantial familiarization of combustion turbine characteristics and understands the application of combustion turbines.

Q Does he select turbines?

A He has selected turbines.

Q On what occasions?

A He selected the combustion turbines that were initially proposed for the Panda-Kathleen project.

Q Mr. Lindloff did?

A Yes, he did.

Q And at what point in time was that?

A I'm not exactly sure. At the time that the proposal was submitted to Florida Power Corp. would have to be the time. I was not with the company at that time.

Q So that predated your employment by Panda?

A That's correct. I didn't join Panda until

August of 1992.

Q Do you know if Mr. Lindloff was involved in the determination of the turbines that would be used in the initial configuration of the project?

A That is my understanding.

Q That he was?

A Yes.

Q Does Mr. Lindloff work in the area of environmental regulations?

A No, he does not.

Q Is he knowledgeable in matters of aircraft derivative machinery?

A I think that question would be better answered by Mr. Lindloff.

Q Do you have any knowledge of it at all?

A I have knowledge of it, yes, but he would be the best one to provide you that answer.

Q Well, I was just asking what you know of his knowledge.

A I think he's knowledgeable in aircraft derivative.

Q I would like to turn your attention to the standard offer contract which Panda entered into with Florida Power. Do you have a copy of that before you?

A No, I do not. Is it in this book? I have it

before me now.

Q I would like to direct your attention to paragraph 7.1. Do you have that before you?

A Yes, I do.

Q What does paragraph 7.1 refer to?

A Refers to the committed capacity.

Q Would you agree that there is a blank left there for the amount of the committed capacity?

A There is no blank in this contract that I have in front of me.

Q Would you agree that the standard offer contract was initially blank and that there was a number filled into that space?

A I cannot answer that. I do not know for certain. I never saw a blank or an unfilled in standard offer contract.

Q Do you have any knowledge of where the number 74,900 came from?

A My understanding is that Panda provided that number.

Q Do you know who in Panda was the person who determined that number?

A I do not.

Q You would agree, however, that that number wasn't assigned to Panda by Florida Power or any other

party?

A I don't understand the question. Do I understand -- would you repeat the question, please?

Q I'm just asking you if you would agree that that number was not chosen by another person, another entity?

A I have no knowledge.

Q You have no knowledge. Do you know if at the time that that number was selected, whether there was a design in existence?

A I do not.

Q Do you know if there was any kind of configuration that had been preliminarily or in any other way drawn up?

A I do not.

Q Are you familiar with the amended and restated notice of self certification as a qualifying cogeneration facility which has been admitted into evidence previously at this proceeding?

A What is the question, please? I don't understand the question.

Q What I'm asking you is, are you familiar with the amended and restated notice of self-certification as a qualifying cogeneration facility, which has already been admitted into evidence at this proceeding as Robert

Dolan's Composite Exhibit No. 1?

A If I could look at it, I could probably answer the question.

(Pause)

A This looks like an application for self-certification.

Q Excuse me?

A This looks like the application for self-certification.

Q If I might --

A It in itself is not the approved -- an approved FERC document.

CHAIRMAN CLARK: While they're looking for that, let me ask you a question. When I read your testimony, you spent a good deal of time talking about the mitigation, the NOX mitigation approaches, and one of them was, let's see, the one that used ammonia.

WITNESS DIETZ: Selective Catalytic Reduction.

CHAIRMAN CLARK: And you explained the difficulties with that. And then you conclude by saying that had an impact on the financeability of it. Did it have an impact on the size of the facility you could build? I took that to be what your testimony was intending to accomplish is to explain why you needed to build 115 megawatts to meet the 74.9, and I did not see

how the discussion of the SCR technology impacted the size of it.

WITNESS DIETZ: The SCR technology in itself -- basically the conclusion in my testimony was that SCR technology is not viable.

CHAIRMAN CLARK: Right.

WITNESS DIETZ: And the reason for that is that the facilities that have operated using SCR technology in California, only 11 of the 40 some odd facilities at the time I did that evaluation were permitted to use oil, which we were going to use as a backup fuel. Only one facility ever tried to burn oil and it so fouled up their SCRs, that it basically completely ruined them, and they basically had to throw them out and they've never burned oil again.

CHAIRMAN CLARK: I guess I wanted to make sure I didn't miss anything, that you weren't saying that that had an impact on the size unit.

WITNESS DIETZ: No, no, that in itself did not. The SCR technology -- basically when the SCR technology was not viable, that meant we had to go with the dry low NOX technology, of which just the ABB 11N1 and the Frame 70A had the dry low NOX technology at the time that we selected the configuration.

CHAIRMAN CLARK: So that's how it relates to

the configuration; you could not use the other technology. All right. That wasn't clear to me, I'm sorry.

Mr. Froeschle, go ahead. Have you found the document you wanted to ask him about?

MR. FROESCHLE: Yes. If I might interrupt that line of questions and ask a follow-up question.

BY MR. FROESCHLE:

Q Regarding the technology, the SCR versus the dry low NOX technology, was it a matter that you could not use SCR technology, or was it a matter of choice?

A We didn't believe SCR technology was viable. Because the oil, firing on oil, which is a backup fuel for this facility, fouled the SCRs.

Q So it's your testimony that you could not build a facility using the SCR technology?

A Well, you could always build one, but it isn't going to work.

Q So you could build a facility that way?

A But it isn't going to work. So why would you build a facility that isn't going to work?

Q Why wouldn't it work?

A Because the SCRs would be fouled, and you would basically have to go in and replace the SCRs.

CHAIRMAN CLARK: As I understood it, the SCRs

would be fouled because your backup fuel was No. 2 oil.

WITNESS DIETZ: Right, that is correct. The sulfur in the backup fuel will foul -- in reaction with ammonia, will end up fouling the catalyst. And the catalyst itself has many heavy metals in it, including platinum, vanadium, rhodium, and these are considered not a desirable product that you need to dispose of. It's considered a hazardous product. And if you -- every time you burn oil, if you have to go in and replace millions of dollars of these catalysts, then it's just truly not viable.

CHAIRMAN CLARK: Okay, Mr. Froeschle, go ahead.

BY MR. FROESCHLE:

Q Is it the case that the SCR technology would not work because you were using oil as a backup fuel; is that correct?

A It was sulfur in the backup fuel, that's correct.

Q Isn't it true that you could have used another backup fuel?

A There isn't another backup fuel that's reliably available in the area.

Q On what do you base that statement?

A Basically, the other backup fuels that you

have, there is not the distribution system to distribute the quantity of fuel that would be required in the event that your facility got curtailed from using natural gas and you had to go to the backup fuel.

Q So you're saying that the other fuels would not -- there would be an insufficient supply?

A That's correct.

Q So it isn't the technology, it's the backup fuel supply that makes it impossible?

A Well, it all works together, hand in glove.

CHAIRMAN CLARK: Mr. Dietz, would you clarify for me what the other backup fuel would have been?

WITNESS DIETZ: You could potentially use propane as a backup fuel.

CHAIRMAN CLARK: Can't you store propane like you would store oil? I mean, I know it's not the same technology, but can't you store propane on site?

WITNESS DIETZ: Yes. There's not a problem with the storing of the propane. It's the quantities of propane that would be required in the event that you needed a large quantity of it immediately.

CHAIRMAN CLARK: Go ahead, Mr. Froeschle.

BY MR. FROESCHLE:

Q But isn't it true that Panda chose, as a backup fuel, oil?

A That is correct. And Panda reviewed that with Florida Power Corp. prior to my coming on to the project.

Q But isn't it also true that it's Panda's responsibility to design and build the facility?

A And we've taken that responsibility to heart, and we have.

Q But it was your choice on the design, wasn't it?

A That is correct.

Q Now I asked you to place in front of you, before that digression, the amended and restated notice of self-certification as a qualifying cogeneration facility. Do you still have that?

A I have an application for it. It was here a minute ago. I do not have a FERC-certified copy of it.

MR. FROESCHLE: Madam Chairman, I want to check to see whether he has the correct document in front of him, because what I have that I am referring to is an amended and restated notice of self-certification, as opposed to an application. I just want to make sure he's got the right document.

CHAIRMAN CLARK: That's fine.

WITNESS DIETZ: It's the filing, but it's not the -- it's a filing, but I don't see any FERC stamp or

acceptance on it.

BY MR. FROESCHLE:

Q That's correct, it is a filing. And who was it made by?

A It was made by Ed Gwynn.

Q On behalf of Panda; isn't that correct?

A Yes.

Q And in that document, doesn't it state that the facility will have an estimated net maximum capacity, at design conditions, of 74.9 megawatts?

A In the letter it says estimated net maximum design capacity of 150 megawatts and a steam generation of 50,000 pounds an hour on the letter.

Q I am referring to the amended notice at the bottom of the page.

A You mean the -- not on the letter page?

Q Page 2 of 3 of Exhibit RDD-1.

A Okay, the letter says 150 megawatts and steam generation of 50,000 pounds an hour. That covers sheet 2 of 3.

Q Let me try to clarify and see if I can get this clear enough for you.

MR. ROSS: Madam Chairman, may I interpose an objection?

CHAIRMAN CLARK: You can't all talk at once.

The court reporter can only get one of you. Just hang on a minute, Mr. Dietz.

MR. ROSS: Let me interpose an objection. I'm sorry.

CHAIRMAN CLARK: Mr. Froeschle, what were you going to say?

MR. FROESCHLE: What I would like to do is just ask a couple questions. I believe I understand where his confusion on this issue might be.

CHAIRMAN CLARK: Ask your question and then we'll give Mr. Ross an opportunity to object if he chooses to.

MR. FROESCHLE: Thank you very much.

BY MR. FROESCHLE:

Q I'm looking now at Sheet 1 of 3 of Exhibit RDD-1. Are you there?

A Yes.

Q And that's a letter dated October 7th, 1991, isn't it?

A That's correct.

Q And in that letter, doesn't it state that this notice will amend and restate a previous -- a previous self-certification, No. 91-62, which was filed by Panda Energy Corporation, and listed the estimated net maximum design capacity at 150 megawatts and steam generation at

50,000 pounds per hour; is that correct?

A That's correct.

Q So would you agree now that this amended and restated notice, which is attached to that letter, is in fact a restatement of the quantities that were being certified to FERC?

MR. ROSS: While he's looking, let me state my objection at this point. Maybe we can move things along. I'm not sure what any of this has to do with his direct testimony. He hasn't testified about these FERC applications. There hasn't even been established that before just now he's even seen these things before. I thought cross-examination was limited to the scope of his direct.

MR. FROESCHLE: Madam Chairman, Mr. Dietz has testified as to the size of the facility, and this is an aspect of that issue. The certification that we have here states that they will build a facility 74.9 megawatts net.

CHAIRMAN CLARK: Mr. Ross, I think he can explore previous decisions on what to use as a way of testing the validity of his testimony now.

Why don't you ask your question, that last question again, and Mr. Dietz, if you will answer.

MR. FROESCHLE: I would ask that it be read

back.

(Record read.)

WITNESS DIETZ: The answer to that is yes. As of October 7th, 1991. That is correct.

BY MR. FROESCHLE:

Q What do the terms "net maximum capacity at design conditions of 74.9 megawatts" mean to you?

A I think they're self-explanatory with the exception of design conditions. I don't know what the design conditions are, since they're not in the letter.

Q Well, I'm asking what meaning you give to the words "net maximum capacity at design conditions".

A In connection with this case, I would say the design conditions would have to be at least 102 degrees Fahrenheit with an appropriate relative humidity to go along with that, and that would say that we would have to have a maximum capacity at 74.9 megawatts.

Q So you would agree that the net maximum capacity of the facility that was certified to FERC in this document was 74.9 megawatts?

A That's correct.

Q And you would agree with me that Panda was responsible for the design of the facility; would you not?

A That's correct.

Q Therefore, wouldn't you agree that Panda, in its certification to FERC and in this capacity statement in the contract, was intending to design a facility that would be no larger than 74.9 megawatts?

A It appears that way in October of 1991.

Q Now, on Page 7, Lines 11 to 13 of your testimony, I would ask you first to go to that point in your testimony. Are you there?

A Yes, I am.

Q In that portion of your testimony, you were asked the question: "Did Panda consider size restrictions in its contract with Florida Power in selecting a configuration for the Panda facility?"

You answer that, "There are no provisions in the power purchase agreement that restrict the electrical generating capability of the plant." Would you agree with that?

A Yes, I did. I so submitted in my direct filed testimony.

Q Are you familiar with the title to the standard offer contract?

A Yes, I am.

Q Could you please read it for the record?

A Before the Florida Public Service Commission, Testimony of Darol -- whoops. I can't find the first

page of the contract here.

Standard Offer Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility Less Than 75 Megawatts or a Solid Waste Facility.

Q What do the words in that title "Qualifying Facility Less Than 75 Megawatts" mean to you?

A Since that was the only place that it was used within the contract, and everywhere else it talked about 75 megawatts of committed capacity, and my understanding is that the titles have no relevance in accordance to one of the sections in the contract, that the 75 megawatts was for committed capacity.

Q I would like to explore that with you then. I would like you to turn to -- I believe it's Sheet No. 9.505 in the upper right-hand corner. It looks to be after the table of contents. It looks to be the first page of the contract itself. Are you at that page?

A Yes, I am.

Q Would you agree that on this first page that the same words that were used in the title of the contract are repeated here?

A Yes.

Q Now, I would like you to go down the page a little bit to right below witnesseth, and I would like for you to read for us that paragraph that begins,

"Whereas."

A "Whereas, the QF desires to sell and the Company desires to purchase electricity to be generated by the facility and made available for the sale to the Company, consistent with the FPSC Rules 25-17.080 through 25-17.091, in effect as of the execution date" -- you want me to continue?

Q Would you agree then that the contract has referenced the Florida Public Service Commission rules?

A I agree that it apparently has referenced them, yes.

Q And that they -- this contract, in fact, is intended to be consistent with those rules. Wouldn't you agree with that?

A Even though I'm not a lawyer, to understand complete legal terminology, that appears to be the case.

Q Okay. Have you read those rules?

A I've read them several years ago.

Q Have you read them since that time?

A I have not.

Q I would like to refer you to, attached to the standard offer contract, the rules, and I would like to ask that you turn to first the Rule 25-17.0832. Are you there?

A No.

Q It's attached to the back of the contract. If you have the version which is the attachment to Darol Lindloff's testimony, it would be Sheet 72 of 88.

A And what is the paragraph number?

Q It would be paragraph 3, subparagraph -- just one moment -- (a). If you could please read subparagraph (3)(a) for the record.

A And that's on Page 72?

Q No, we've moved to Page 73. It would be towards the bottom of the page.

A (3)(a), "Upon petition by a utility, or pursuant to a Commission action, 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, or from solid waste facilities as defined in Rule 25-17.091."

Q Now, again, what do those terms "small qualifying facilities less than 75 megawatts" mean to you?

A The term here of "small qualifying facilities of less than 75 megawatts," used in conjunction earlier with the firm capacity, mean to me the 74.9 megawatts of committed capacity that Panda has contracted for.

Q Do you see anywhere in this rule the words

"committed" or "capacity" or "contract"? One at a time, if you please.

A It says, "Purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts." And to me that means the committed capacity of 74.9 that is referenced in the contract. And in particular --

Q Is the term "contract" in the rule?

A -- in particular in Article 2.1.2.

Q Are you referring me to a --

A "The facility" -- I'm sorry. 2.1.2, "The facility having a committed capacity which is less than 75,000 kW." The two in conjunction, I read that then to mean committed capacity.

Q So what you're saying is that committed capacity --

A And firm capacity and energy from a small qualifying facility less than 75 megawatts.

Q Those terms are synonymous?

A Yes.

Q I would ask that you now look at Page 72 of 88. And it's the same rule and it's Paragraph (1)(b), and I would like for you to read (1)(b) through subparagraph 2, for the record, please.

A Starting with, "In ten working days"?

Q Yes.

A (1)(b)?

Q Yes, please. (Pause)

CHAIRMAN CLARK: Mr. Dietz, I think he wants you to read it out loud.

WITNESS DIETZ: Okay. I think you would have to read it in conjunction with the lead-in paragraph which is -- which starts out "Firm capacity and energy are" --

CHAIRMAN CLARK: Mr. Dietz. Mr. Dietz. Would you please read what he asked you to read? Your attorney can ask you to read the other part on redirect.

WITNESS DIETZ: Thank you.

CHAIRMAN CLARK: Or you can further qualify your answer.

WITNESS DIETZ: Okay, (b)(2)?

MR. FROESCHLE: I would like you to start with (b) and read down through (2).

WITNESS DIETZ: "Within ten working days of the execution of a negotiated contract for the purchase of firm capacity and energy, or within ten working days of receipt of a signed standard offer contract, the purchasing utility shall file with the Commission a copy of the signed contract and a summary of its terms and conditions. At a minimum, such summary will report:

"No. 2, the amount of the committed capacity specified in the contract, the size of the facility and the type of facility, its location and its interconnection and transmission requirements."

BY MR. FROESCHLE:

Q Would you agree with me that committed capacity and the size of the facility are distinctly two separate items in this rule?

A That appears that way.

Q Thank you. Going back to Page 7 of your testimony, you stated that there were no provisions in the power purchase agreement that restrict the electrical generating capability of the plant?

A That is my interpretation of the contract.

Q In your opinion, do you believe Panda could build a 1000 megawatt facility under this standard offer contract?

A That's a highly speculative question, but, yes, I believe, in speculation, that one could deduce that.

COMMISSIONER GARCIA: Could you repeat the question? I'm sorry, missed the question.

BY MR. FROESCHLE:

Q Mr. Dietz, in your opinion, could Panda build a 1000 megawatt facility under this standard offer

contract?

A Speculatively, I believe that Panda could build a 1000 megawatt facility. However, Panda has no intentions of building one larger than is necessary to meet the requirements of our contract and has so demonstrated, as demonstrated in my testimony, by selecting the smallest unit that's available that can meet the capacity under all times and conditions, and to meet the environmental regulations of the state of Florida.

Q Why, if it was true that you could build a 1000 megawatt facility under this contract, did you size it to the smallest possible facility?

A Because I believe that was in the spirit of the standard offer contract.

Q So the spirit of the standard offer contract is that you could have built any size, but Florida Power didn't really want you to build one bigger than 75 megawatts?

A I can't answer to what Florida Power Corp. wanted. I've never talked to them on this issue.

Q But didn't you just state that you believed that that was the spirit of the contract?

MR. ROSS: Objection. That's exact opposite of what he just stated. I would object to that

question, the form of the question.

COMMISSIONER GARCIA: Everybody's mumbling. What did you --

MR. ROSS: I'm sorry. I objected to the argumentative question. He just restated the witness's testimony just exactly opposite of what he just said, and then he said, "Isn't that what you just said?"

CHAIRMAN CLARK: Hang on a minute. Can you please read back what the witness said?

MR. ROSS: Or he said, the spirit of the contract.

(Record read.)

CHAIRMAN CLARK: Would you ask your question again, Mr. Froeschle?

MR. FROESCHLE: Could I ask that she read that one also, the next question?

CHAIRMAN CLARK: Could you read that one also?

(Record read.)

CHAIRMAN CLARK: I don't think it's entirely clear what the answer to the question was. Let me see if I can ask Mr. Froeschle to ask his question again.

As I understood your answer, though, Mr. Dietz, it was that you believed the spirit of the standard offer contract is that the facility be less than 75 megawatts.

WITNESS DIETZ: I believe my answer was that we wanted to make it as close to 74.9 megawatts as we possibly could and meet our contractual commitment to provide firm capacity over the term of the contract.

It is not our intention to build a facility that sometimes makes 74.9 and other times doesn't make 74.9, because on the days that Florida Power Corp. needs the power, which is sometimes the hottest days of the year, they need to know that that 74.9 megawatts is there. They've contracted with us for it. So therefore, we wanted to build a plant that would meet that commitment and build the smallest one that we possibly could that would still make that 74.9 and still build a plant that would meet the Florida environmental requirements.

COMMISSIONER GARCIA: So your testimony is that your plant size is the only plant size that could meet that demand? In other words that was the smallest possible that you could come in with to meet the demand that you had contracted?

WITNESS DIETZ: That's correct. And that's basically the basis for my prefiled testimony.

COMMISSIONER GARCIA: Just want to get it on.

WITNESS DIETZ: I appreciate the help.

BY MR. FROESCHLE:

Q Let me see if I can clarify that question with your agreement. Would you agree that that's the smallest you could build the facility under the self-imposed limitations of using the particular backup fuel which you chose to use, of not using inlet air cooling and of having to perform to the contract requirements upon the order of Florida Power at any given moment? Would that be a statement you could agree with?

A No, I could not fully agree with that statement. If you could break it down into complements, I'll tell you which parts I agree with and which parts I don't.

Q Do you know which ones, without my repeating them, that you would disagree with?

A I think it would be best if we could do it one by one.

CHAIRMAN CLARK: Even if he could do it, I don't think we'd understand it.

BY MR. FROESCHLE:

Q You have stated that 115 megawatts is the smallest facility which you could design and still supply 74.9 megawatts of capacity on every single minute of every day of every year of the contract for the life of this contract; is that correct?

A That's correct.

Q All right. Now, you also -- you've also agreed previously that Panda chose 74.9 megawatts of capacity, right?

A That's correct.

Q All right, so we are working --

A Of committed capacity.

Q Okay.

A That's correct.

Q So we're working with certain self-imposed issues here. In other words, Panda has chosen the committed capacity which it wishes to supply. Now, isn't it also true you could have designed a facility that used inlet air cooling?

A And we did.

Q So you could have done that. Was the 115 megawatt facility, was that allowing for inlet air cooling?

A 115, yes, it was, we have evaporative coolers on the inlet of the combustion coolers.

Q So that would be -- 115 megawatt facility would have that designed into it?

A That's correct.

Q What about the dry low NOX versus the SCR technology for environmental limitations?

A That's designed in also.

Q That's designed in also.

Did you use inlet air cooling for the original configurations of 74.9 megawatts?

A I don't know what was used for the original 74.9 megawatts.

Q Did you ever see that design or that configuration?

A No, I did not.

Q And are you stating now that you have never analyzed that particular --

A Yes, I've analyzed it later.

Q Can you tell me now whether that would incorporate inlet air cooling?

A Yes. All the configurations that are in my prefiled testimony -- and it starts over on Page -- basically on Page 19 and 20, that review all the configurations that we looked at. I'm sorry, it starts over on Page 18 -- 18, 19 and 20. All of them used evaporative coolers for chilling the inlet air.

Q Isn't it true, though, that in your testimony you stated that you would have to increase the size of the facility by 15 to 19 percent because of the temperature variations?

A That's correct.

Q And wouldn't that problem be alleviated by

inlet air cooling?

A Are you talking about the use of chillers or inlet air cooling? We employ inlet air cooling, and the 15 to 19 percent degradation due to temperatures includes evaporative coolers. So you have that in addition to the evaporative coolers.

Q Let me ask you this question. Did your design incorporate chillers?

A No, we did not.

Q And could you have designed a facility that would have?

A Yes, we could have.

Q So you have made a choice there, a self-limiting choice, of choosing not to use chillers; is that correct?

A It would not have made an effect on the outcome of the configuration selected.

Q On what do you base that statement?

A On the environmental requirements.

Q Now, I believe that you've stated that the environmental requirements were tied into the backup fuel used; is that correct?

A That's correct.

Q And I believe you've also testified that you chose a particular backup fuel here, which was oil as

opposed to propane; is that correct?

A We chose the most readily available backup fuel that we could, knowing that a reliable supply of fuel is what's necessary under the contract. The most readily available backup fuel is oil.

Q But, again, you have chosen to use a particular fuel. We're not talking about an impossibility, are we? You could have chosen another fuel.

A Well, the reliability of a large quantity of propane as a backup fuel is certainly suspect, and the distribution system in the Lakeland area is certainly suspect.

Q But again, you could have chosen another backup fuel; couldn't you?

A Yes.

Q Thank you. And if you had chosen another backup fuel, the self-limitation you've imposed on your design parameters would have been alleviated; wouldn't it?

A It would have been alleviated to the extent it would have alleviated some technical requirements. However, it would have violated the contract in having a reliable supply of fuel at all times, which is part of the contract.

Q So are you stating that your real reason why you had to design the facility was because of the backup fuel problem, not the environmental limitations?

A No, it was the environmental limitations due to the fact that we needed a reliable backup -- reliable supply of backup fuel.

Q Now, one other limitation that you have seemingly imposed on your design parameters here is your reference to nonmaintenance and maintenance recoverable degradations of the turbines; is that correct?

A That is correct.

Q And I believe that you have stated that the reason that those would have to be included in the additional capacity you would have to design into the facility is because Florida Power at any given moment of any given day, any given year, could go in and require you to show that the facility was producing 74.9 megawatts; is that correct?

A That's correct.

Q Could you cite me to the paragraph in the contract where that states that?

A Panda signed a contract to provide 74.9 megawatts of committed capacity. Panda has -- and believes that Florida Power needs to have that power available at all times and under all conditions over the

life of the contract, and not under some sort of specified test condition or excuse of performance under other conditions. Florida Power Corp. needs to know that that capacity is available. I cannot specify a particular place in the contract that says that it has to be under all times and all conditions. It says that it -- we must provide 74.9 megawatts of committed capacity. It doesn't say 74.9 megawatts of committed capacity on sunny days or cloudy days, or you're excused if the weather gets too cold or too hot. It's 74.9 megawatts of committed capacity.

Q I believe that that response was nonresponsive to the question. I would now ask you to cite me where in the contract it states --

A I believe I answered that I couldn't cite the particular thing in the contract.

Q You cannot. Let me ask you to read, at this time, paragraph 7.2 of the standard offer contract.

A "For the period ending one year immediately after the contract in-service date, the QF may, on one occasion only, increase or decrease the initial committed capacity by no more than 10 percent of the committed capacity specified in Section 7.1 hereof, upon written notice to the Company, before such change is to be effective, provided, however, that in no event shall

the committed capacity exceed 75,000 kilowatts, unless the QF is a solid waste facility."

Q I apologize for having cited you to the wrong paragraph, but I would like to ask you a question regarding that particular paragraph. Would you agree that that paragraph allowed -- would allow Panda to reduce the committed capacity which it selected when it submitted this offer to Florida Power?

A Yes, it would, on a selective basis.

Q And that selective basis being that it could be done only one time in a year?

A That's -- only in the first year.

Q And that it would be by no more than ten percent; would you agree with that?

A That's correct.

Q Have you ever calculated what that would mean in terms of the committed capacity that Panda could have lowered the committed capacity of the contract to?

A I did not specifically calculate it, but it's roughly 7.5 megawatts, roughly.

Q So that would be a smaller capacity size of --

A That's correct.

Q -- 7.5 megawatts?

A That's correct.

Q So Panda could have reduced its committed

capacity under the contract and then had -- have some leeway between the committed capacity in the contract and the size of the facility; isn't that correct?

A That's correct.

Q Is it your testimony that there is no facility whatsoever that could be designed if you -- If you removed the self-restrictions on your design that you've placed there, regarding fuel size, regarding the chillers, regarding some of these other aspects of it, are you -- is it your testimony that there is no facility that could have been designed that would have been less than 75 megawatts that would have provided the committed capacity under this clause of this contract?

A Well, that's -- as long as we're speculating, I assume that we probably could find one.

Q So you could design such a facility; you would agree?

A We're just playing highly speculative games here, yes.

Q I'm asking you in your professional engineer's opinion, as a designer of these facilities, whether you believe that you could design such a facility.

A I can't answer that here without going back and looking at all the information that we have available.

Q I would now like to have you read paragraph 7.4 from the contract.

A "The Company shall have the right to require that the QF, not more than once in any 12-month period, redemonstrate the commercial in-service status of the facility within 60 days of the demand, provided, however, that such demand shall be coordinated with the QF so that the 60-day period for the redemonstration period avoids, if practical, previously notified periods of planned outages and reduction in capacity pursuant to Article 5."

Q In your opinion, does that clause allow Florida Power to designate the time that -- the specific date, or time of day, or day of the week, or anything else, when Panda would have to meet these requirements?

A It doesn't designate the time and doesn't designate the Florida Power as being able to select the time, but it doesn't prohibit it from doing so.

Q Would you agree that this provision allows the Company to redemonstrate its commercial in-service status within 60 days of the demand for that recertification -- or redemonstration, excuse me.

A I'm sorry, could you repeat the question, please?

Q Would you agree that under this paragraph,

7.4, that Panda would have 60 days to redemonstrate the commercial in-service status of the facility?

A I believe that's what the paragraph says.

Q Therefore, Florida -- I withdraw that question.

Now, at some point in time after the initial self-certification of the facility at 74.9 megawatts, was there -- apparently there was a redesign or a reconfiguration of the facility; is that correct?

A Yes.

Q And at that point in time you determined that the 75 megawatt facility was no longer viable; is that correct?

A Panda was looking at other configurations at about the time that I came on board. And my activities when I came on board were to evaluate other types of configurations.

Q Is it your testimony that Panda would have to build a 115 megawatt facility in order to supply 74.9 megawatts of capacity; is that correct?

A That is my testimony.

Q That is your testimony.

MR. FROESCHLE: At this time I would like to show you what was marked as Deposition Exhibit No. 57.

Madam Chairman, I believe this would be

Exhibit No. 26.

CHAIRMAN CLARK: I have 25. The last exhibit was JCB-1 and 2.

MR. FROESCHLE: So this is Exhibit 25?

CHAIRMAN CLARK: That's what I have, because there were no exhibits to Mr. Dietz' testimony.

MR. FROESCHLE: We had miscounted that.

CHAIRMAN CLARK: This is a deposition exhibit and it was taken at whose deposition?

MR. FROESCHLE: This was taken at the deposition of Mr. Dietz.

CHAIRMAN CLARK: And what was the date?

MR. FROESCHLE: If I might have a moment.

(Pause)

MR. FROESCHLE: Madam Chairman, the date of the deposition was January 9th, 1996.

CHAIRMAN CLARK: All right, we'll mark as Exhibit 25 Deposition Exhibit No. 57 from Mr. Dietz' January -- 25th?

MR. FROESCHLE: January 9th.

CHAIRMAN CLARK: -- January 9th deposition.

(Exhibit No. 25 marked for identification.)

CHAIRMAN CLARK: Go ahead with your questions.

MR. FROESCHLE: Thank you.

BY MR. FROESCHLE:

Q Do you have before you now what's been marked as Exhibit 25?

A Yes, I do.

Q Do you recognize that document?

A Yes, I do.

Q And what does that document provide for?

A It's an invitation to come to a meeting to be conducted by Taylor Cheek to discuss a strategy meeting for 35 megawatts of sale from the Panda-Kathleen to the City of Lakeland.

Q Is this from the same facility for which you have been talking about would have to be sized at 115 megawatts to provide 74.9 megawatts to Florida Power?

A It appears that way, yes.

MR. FROESCHLE: If I might have a moment, Your Honor -- Madam Chairman, excuse me.

Madam Chairman, I would like to use a document that has already been provided to the Commission under rebuttal testimony, but it has not been yet admitted at this proceeding. So I would request guidance as to whether you would like to refer to it in the testimony exhibits or if you would like me to separately offer it.

CHAIRMAN CLARK: Why don't we separately identify it? Do you have copies of it?

MR. FROESCHLE: Yes, I do.

CHAIRMAN CLARK: We'll go ahead and do that.

MR. FROESCHLE: It is Deposition Exhibit 77.

CHAIRMAN CLARK: It's Deposition Exhibit No. 77 from Mr. Dietz's January 9th, 1996 deposition?

MR. FROESCHLE: Yes. I would ask that this exhibit be marked Exhibit 26.

CHAIRMAN CLARK: It will be marked as Exhibit 26.

(Exhibit No. 26 marked for identification.)

BY MR. FROESCHLE:

Q Mr. Dietz, do you have this Exhibit 26 in front of you now?

A Yes, I do.

Q What is this? Do you recognize it?

A This appears to be a proposal from Taylor Cheek of Panda Energy to the City of Lakeland for 35 megawatts of electric capacity and energy.

Q Would you agree that the 35 megawatt brainstorming session ultimately led to an offer to Lakeland to sell power? Would you agree with that statement?

A I would say that could have contributed to it.

Q And would you also agree, then, that that was

from the same facility which you believe had to be sized at 115 megawatts to provide 74.9 megawatts to Florida Power under the standard offer contract?

A That is correct. At that meeting that was referred to in the first memo, I went to it and basically said it couldn't be done, and basically I was excluded from all activities regarding this proposal after that.

Q I appreciate that qualification, although I wasn't asking for that. But that's fine. I would like to ask you at this time, since that proposal was made, how Panda was intending to supply that 35 megawatts of firm capacity.

A I have no clue. It couldn't be done from our facility, because obviously we needed at least 100 megawatts in order to satisfy -- as it was in my testimony -- in order to satisfy the 74.9 megawatts of committed capacity for Florida Power Corp. under the standard offer contract. So I had no idea how these people were going to do it. I believe that earlier today that Mr. Killian testified that this was an unauthorized proposal that went out and that the proposal was in the process of being recalled when the city had rejected it.

Q I would like to refer you, then, to that offer

where there is -- at the bottom of this April 4th, 1994 offer made, a CC to Ralph Killian, and I would ask you to tell me what his position was with Panda at the time that this offer was made.

A I believe he was senior vice president.

Q And Mr. Darol Lindloff?

A Vice president.

Q And Mr. Todd Carter?

A He was president of Pan-Oak, which is an expiration and gathering -- expiration company for fuel.

Q Now at the time that this offer was made, did you remain the head engineer in charge of this project?

A At the time this offer was made it was made independent of me.

Q I was asking you, however, if you remained the head engineer in charge of the project.

A I was -- yes.

Q So in other words, as the head engineer who is designing this facility, you were completely at odds with these persons who you've identified as to how much capacity that plant would be able to supply; is that correct?

A I was at odds with Taylor Cheek on how much capacity could be supplied from the facility.

Q Now these people -- excuse me, I didn't mean

to interrupt.

A I don't believe that Darol Lindloff was involved at that time in anything to do with either this proposal or the project, either one. He was typically put on there as a matter of courtesy. He was pretty actively involved in developing some projects in China at that time.

Ralph Killian, in -- of course you questioned him earlier regarding his activities at this time, so I can't answer for what his knowledge was on it.

Q But you were at odds with this proposal?

A That is correct.

Q And these persons were copied with this proposal; is that correct?

A That is correct.

Q And that was dated April 4th, 1994; is that correct?

A The proposal is dated April 4th, 1994.

Q I would like to show you now deposition Exhibit No. 60 from that same deposition.

CHAIRMAN CLARK: We'll identify as Exhibit 27, Deposition --

MR. FROESCHLE: Madam Chairman, if I might apologize, I've gotten one exhibit ahead of myself, and if we could just hold on to this one, I would like to

offer another one in advance of that one. So if we could set that to the side.

CHAIRMAN CLARK: Okay.

MR. FROESCHLE: At this time I would like to show the witness Deposition Exhibit 78 from that same deposition.

CHAIRMAN CLARK: Exhibit 78 from Mr. Dietz' January 9th, 1996 deposition will be marked as Exhibit 27.

(Exhibit No. 27 marked for identification.)

BY MR. FROESCHLE:

Q Mr. Dietz, do you have Exhibit 27 before you?

A Yes.

Q What is the date on that document?

A April 5th, 1994.

Q '94? Is that correct?

A Yes.

Q Would you agree that that's the day after the offer was made to the City of Lakeland?

A That's correct.

Q Would you read down there the second -- well, it looks like a bullet point, and it states Project Description?

A Yes.

Q And by that is the name Brian?

A That's correct.

Q Do you know who that is referring to?

A That is referring to me.

Q And that project description, under the first subpoint there, has the word 75 megawatts versus 110 megawatts; is that correct?

A That's correct.

Q And could you tell me what the purpose of that agenda item was?

A Yes. This was an agenda item for the Panda-Kathleen prebid conference with the engineer, procure constructors, that was held in Lakeland on the 5th of April. The team that we had down there included Ted Hollon, who was our vice president of construction, included myself, and it included Kyle Woodruff, who had joined the Company within just a few days prior to that, who was to be the project manager for the Panda-Kathleen project, taking over, basically, from Ted, who was acting in that position prior to that.

The prebid meeting was to acquaint the bidders with the site at Lakeland and to introduce them to the project. Under the project description, the 75 megawatts versus the 110 megawatts was to explain basically to them the fact that we had a 74.9 megawatt committed capacity and that we needed to build a larger-

sized facility in order to meet that committed capacity and to explain the reasoning behind that.

Mr. Hollon, who wrote this document -- and it was primarily for our internal use at the meeting, to make sure that we didn't forget anything on the agenda -- mistakenly put 110 megawatts as opposed to the 115 megawatts. The remaining part of the agenda discusses items that were of interest to the potential bidders for the project.

Q Would you agree that 75 plus 35 equals 110?

A Yes, I do.

Q Thank you. I now would like to refer to the other document which we just distributed, Deposition Exhibit 60 from that same deposition.

CHAIRMAN CLARK: Deposition Exhibit 60 from Mr. Dietz' January 9th, 1996 deposition will be marked as Exhibit 28.

(Exhibit No. 28 marked for identification.)

BY MR. FROESCHLE:

Q Do you have that Exhibit 28 before you now?

A Yes, I do.

Q Do you know what that is?

A This appears to be the letter of rejection from the City of Lakeland to our proposal of April 4th.

Q When is it dated?

A May 2nd.

Q So approximately one month passed from the time that the renegade offer was made until this letter of rejection came from Lakeland; is that correct?

A It appears to be that way.

Q Do you have any evidence -- or excuse me, let me withdraw that question.

Did Panda ever convey to the City of Lakeland that the offer made was either incorrect or improper or anything else of that nature?

A I don't know. I wasn't involved -- I was not involved in the offer process. I was not included in any of the meetings after the first meeting.

Q Have you ever seen any documents that would so raise that point with the City of Lakeland?

A No.

Q Would you agree that it was the City of Lakeland, not Panda, that chose not to conclude this offer made by Panda?

A I can't answer that question. I have -- don't have enough knowledge to know that.

Q Would you like to take the time to read this document?

A Not particularly. I believe Mr. Killian discussed that in much more detail in his testimony

earlier.

MR. FROESCHLE: I have no other questions at this time.

CHAIRMAN CLARK: Thank you. Staff?

CROSS-EXAMINATION

BY MS. WAGNER:

Q Mr. Dietz, we only have a few questions for you, and basically it's regarding the size of the facility and how you determine that size. First, I would like to ask you, are there -- do power plants come in discrete sizes?

A Yes, they do. Combined cycle facilities, which use combustion turbines and heat recovery steam generators and steam turbines, come in discrete sizes, unlike other power plants where a particular size is selected and they just automatically design the steam turbine specifically for a particular size. Combustion turbines, because of their technology, come in a size. The only modifications you can get to that, basically, are due to the burner technology, whether you have dry low NOX technology or whether you use regular technology, but that's only just a megawatt or two difference on a turbine that might be about 75 megawatts. So they come in discrete building block sizes.

Q So you could not build one, let's say, that's like 86 megawatts or anything like that?

A You would basically have to go out and look at what's available. And, for instance, GE happens to make an 80 megawatt turbine. The GE Frame 7EA is an example, and that's one of the ones that we considered. But they, at least at the time we did this, did not have a, quote, "86 megawatt," or you couldn't buy an 87.5 megawatt. The next size of turbine they might make would be up substantially larger than that.

Q Would you agree that there's nothing really wrong with the philosophy of maximizing your profits?

A Well, I don't believe there is anything wrong with it, within the constraints of the contract. We've got to meet the requirements of the contract. And, you know, I was a little bit disturbed when I heard earlier that on the 20-year versus 30-year that Panda might breach the contract or default under the contract during the last ten years. That disturbed me very much, because Panda does not do that. Panda wants to live up to the obligations that it has signed up for.

Q When you determined the size of the facility did you look at it -- when you came up with the 115 megawatts, did you look at it in regards to economic feasibility?

A That was done independently of me. My purpose with being with the company was to look at things from a technological standpoint. The information that I had was passed on to the finance department, and of course they are continually looking at how they can make money. But in this case the finance department didn't select the technology. We, in the technical department, selected the technology.

Q So Mr. Killian can answer that question as to whether not -- Mr. Lindloff can answer that question as to whether or not the 115 megawatt is more economically feasible than, let's, say the 75?

A Well, you can ask him. I don't know how familiar he is with that.

Q When you determined the size of the plant, did you attempt to build the plant or create it so that it was the largest plant that could be supported by the capacity payments that were generated from the standard offer contract?

A Well, of course we are limited on the capacity payments to the 74.9 megawatts of committed capacity. Everything above that we don't get paid for. So, you know, what we want to do is build as inexpensive a plant as we possibly can to meet that -- in any event, whether it's to meet our contract requirements, as cheaply as we

possibly can. We don't want to spend $100 million or $200 million on a 75 megawatt plant when that's just not the going rate.

Q But if you got a deal on a 300 megawatt plant that cost -- excuse me for one second. I'm sorry. Okay, so if you got a deal on the 300 megawatt plant that had the same cost and basically was the same deal as the 115 megawatt plant, would you find it more feasible at that point to go with the 300 megawatt plant?

A That's an interesting question. I would sure question the people that had a 300 megawatt plant, of what sort of quality they had. Obviously would we potentially like to go with the cheapest plant we could and get the biggest bang for the dollar.

However, having said that, we are also interested in the quality of the facility.

COMMISSIONER GARCIA: What if it was a good quality, top quality, a very good -- you got a good deal?

WITNESS DIETZ: Well, I would certainly like to consider it.

COMMISSIONER GARCIA: Wouldn't that violate the spirit, though, that you spoke about earlier about the contract?

WITNESS DIETZ: I think it would. We selected the smallest plant that we could that met the spirit of the contract, or we felt like that was the case. You know, we're playing hypothetical games here.

COMMISSIONER GARCIA: Right. I realize that.

WITNESS DIETZ: And I think we might want to consider that type of facility to -- for another type of contract, where we could get capacity payments for -- larger capacity payments, certainly.

MS. WAGNER: Thank you, Mr. Dietz. That's all that we have for you.

CHAIRMAN CLARK: Questions, Commissioners?

WITNESS DIETZ: That was a very challenging question.

CHAIRMAN CLARK: Redirect?

MR. ROSS: Two questions on redirect.

REDIRECT EXAMINATION

BY MR. ROSS:

Q Mr. Dietz, you were asked a lot of questions about this Lakeland situation. Just so it's clear, you told Mr. Cheek from the beginning that it wouldn't work, technically, to make that offer to Lakeland, didn't you, sir?

A That is correct.

Q And you believe it would not have been

possible to make such a contract with Lakeland, correct?

A That is correct.

Q You were asked earlier a number of questions about the original FERC application that was done before you were there. Do you recall that?

A That's correct, and I was -- kind of stumbled around it because I had not seen that application previously.

Q The FERC application was amended, however, after you were with Panda; was it not?

A That is correct.

Q And there was actually an order from FERC granting your amended application for certification as a qualifying facility, correct?

A That is correct. I didn't see that order from FERC on the application that I was asked to testify about earlier.

MR. ROSS: Let me just have it identified at this point. This is an exhibit that is attached to one of the rebuttal witness's testimony we haven't gotten to yet, but consistent with our position here, let's go ahead and identify it now, which would be No. 29.

BY MR. ROSS:

Q Can you identify this exhibit as the order the order granting the amended FERC application?

A Yes, that is correct.

CHAIRMAN CLARK: Mr. Ross, do you want this identified as Exhibit 29?

MR. ROSS: Yes, I would.

CHAIRMAN CLARK: Exhibit 29 is the Order Granting Application for Certification as a Qualifying Cogeneration Facility dated -- or excuse me, issued October 20th, 1994.

(Exhibit No. 29 marked for identification.)

MR. ROSS: And I would offer that as an exhibit on redirect. It is, as I said, also later identified in one of the rebuttal witnesses, matter of fact one of Florida Power's rebuttal witnesses.

CHAIRMAN CLARK: Anymore questions, Mr. Ross?

MR. ROSS: I believe that is it for Mr. Dietz.

CHAIRMAN CLARK: Okay, exhibits. Mr. Froeschle, do you have any exhibits you want to move into the record?

MR. FROESCHLE: Yes, ma'am. Yes, Exhibits 25 through 28, I would request that they be moved into evidence.

CHAIRMAN CLARK: Exhibits 25 through 28 will be entered into the record without objection.

Mr. Ross, you move Exhibit 29?

MR. ROSS: Right.

CHAIRMAN CLARK: It will be entered in the record without objection:

(Exhibit Nos. 25, 26, 27, 28 and 29 received into evidence.)

(Witness Dietz excused.)

* * *

CHAIRMAN CLARK: We need to take stock of how long we're going to be this evening. The next witness is Mr. Lindloff.

Mr. McGee, can you estimate how much time for cross-examination you have?

MR. FROESCHLE: If I might have one minute.

CHAIRMAN CLARK: Staff, how long do you have for Mr. Lindloff?

MS. BROWN: We have no questions, at least so far.

CHAIRMAN CLARK: Mr. Ross, what about Mr. Morrison and Mr. Dolan, how much -- when they appear on rebuttal, how much time do you need for cross-examination?

MR. ROSS: On Mr. Dolan's rebuttal I would estimate no more than ten, 15 minutes maximum.

CHAIRMAN CLARK: And Mr. Morrison?

MR. ROSS: Probably no more than 30 minutes.

CHAIRMAN CLARK: Back to you, Mr. Froeschle. Can you estimate your cross-examination of Mr. Lindloff?

MR. FROESCHLE: I would estimate between five and ten minutes, probably closer to five.

CHAIRMAN CLARK: How about rebuttal witnesses, Killian, Dietz and Shanker, total cross-examination on those witnesses?

MS. BROWN: Chairman Clark, Staff has very little.

CHAIRMAN CLARK: I'm going to give you 15 minutes for all three.

MR. McGEE: Madam Chairman, on all three I would estimate 15 minutes.

CHAIRMAN CLARK: Okay. All right.

MR. McGEE: Maybe 20.

CHAIRMAN CLARK: We're going to adjourn -- we're going to reconvene in ten minutes. We'll take a short break.

(Recess at 5:28 p.m. until 5:40 p.m.)

(Transcript continued in sequence in Volume 3.)