

implemented by the Commission's Rules. The Commission approves such contracts as to the calculation of the avoided cost rate, and the necessity of avoiding the designated avoided unit. (T. 79, C.1-25 (Dolan)).

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

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

8. The standard offer contract form for which Florida Power sought approval from the Commission contained several blanks which could be completed by prospective QF's, including the two contract terms which are the subject of this dispute: 1) the amount of power that the QF would be obligated to provide to the utility as "Committed Capacity," and 2) the duration of the QF's obligation to provide power (and Florida Power's obligation to make payments) under the contract. See Ex. 30 at ¶¶ 4.1, 7.1.

9. In August 1991, the Commission reviewed and approved Florida Power's form of standard offer contract and rate tariff (as well as standard offer contracts submitted by other electric utilities). (Ex.

7). In rendering its approval of that form, the Commission specifically held that a "regulatory out" clause should not be included in the standard offer contract submitted by Florida Power. See Ex. 7 at pp. 70-71. This clause, which had previously been authorized by the Commission in the negotiated QF/utility contracts, would have allowed the Commission to alter the terms of the contract or the rates that the utility would have to pay based upon changed circumstances.

The Open Season and the execution of the contracts

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

11. After receiving multiple standard offer contracts, Florida Power distributed a questionnaire to each interested QF, requesting information regarding the proposed facility that the QF would construct.

Panda's response to that questionnaire included a proposed tentative plant design that would generate in excess of 75 megawatts of net generating capacity. (T. 106, L. 5-9 (Dolan)); (T. 283, L. 11-19 (Killian)).

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

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

¶ 4.1.

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

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

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

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

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

19. In addition to capacity payments, Panda is to be paid for all of the actual electrical energy that the Panda plant provides to Florida Power, under certain alternate rate schemes. Ex. 30 at ¶¶ 9.1-9.2. No

capacity payment is to be made for energy in excess of 74.9 megawatts. See Ex. 30 at ¶¶ 8.2-8.5.

The Selection of the Panda Contract

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

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

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

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

98, L. 23 - 99, L. 4 (Dolan))

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

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

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

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

28. In 1993, the parties agreed to extend the milestone dates in their contract to require Panda to begin construction of its plant by January

1, 1996, and begin operation of the plant by January 1, 1997. (Ex. 11).

ISSUE 1

Background

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

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

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

The sizing of Panda's plant is mandated by technical considerations

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

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

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

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

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

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

38. Florida Power did not put forth any credible evidence that a plant with a maximum capacity of 74.9 megawatts would be feasible under the contract. No expert or witness for Florida Power told this Commission what generators Panda could select to build this facility that would put

out 74.9 megawatts at all times under all conditions and meet Florida's emissions requirements, other than what Mr. Dietz selected.

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

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

Panda was restricted in its choice of equipment by Florida's environmental requirements

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

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

43. Since Florida Power required Panda to have a backup source of fuel for its plant, Panda was forced to design its plant with oil as an auxiliary fuel. (T. 313, L. 7 - 314, L. 19 (Dietz)). The potential

use of oil as a fuel eliminated Panda's ability to use certain kinds of emissions-limiting equipment. Id.

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

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

The contract does not limit the size of the plant

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

47. The contract expressly limits the amount of Committed Capacity that may be contracted for, by providing that "[t]he availability of this Agreement is subject to...the Facility having a Committed Capacity which is less than 75,000 KW." Ex. 30 at ¶ 2.1.2. 48. Florida Power has stated that the 75 megawatt size cap that it seeks to impose pertains to net capacity of a plant under "normal conditions". (T. 159, L. 11-15 (Dolan)). However, in its 1992 Petition to approve the Panda contract, Florida Power used the word "size" to refer to the committed capacity of the project, not the capacity of the plant to be constructed. (T. 94, L. 6-9 (Dolan); (Ex. 10 at pp. 1, 15). In that

Petition, Florida Power repeatedly described the Panda project as 74.9 megawatts in size. Id.

Florida Power's actions support Panda's interpretation of the contract.

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

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

51. Florida Power was aware that Panda's initial proposal, which would utilize 3 LM2500 turbines, would have put out in excess of 75 megawatts. (T. 106, L. 5-9 (Dolan)); (T. 226, L. 8-10). That preliminary configuration proposal was not ultimately adopted by Panda because it could not meet the 74.9 megawatt Committed Capacity under all conditions, nor could it meet Florida emissions requirements. (T. 318, L. 6-13 (Dietz)).

52. Neither Florida Power nor the ratepayers would be damaged by Panda's proposed design. Panda has not argued that Florida Power would have to pay anything more than as-available prices for any output above 74.9 MW, and Florida Power would be able to curtail Panda from producing more than 74.9 megawatts in low-load conditions. (T. 155, L. 16-24 (Dolan)). The only harm asserted by Florida Power in this proceeding --

the theoretical potential to occasionally have to cycle off two existing plants more often -- was shown on cross examination to be admittedly de minimus "harm". (T. 430, L. 20 - 431, L. 13 (Dolan)).

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

54. In 1993 and 1994, Florida Power crafted a global strategy to decrease and/or eliminate the purchases of power from cogenerators. At that time, Florida Power considered cogenerators to be competitors with it in the business of wholesaling electricity, and had lost some business to them. (T. 138, L. 3-10 (Dolan)). That strategy was based on Florida Power's view that "at the present time, the QF contracts are not cost effective when compared to FPC built natural gas fired combined cycle units... [Florida Power's] resources need to be assigned to properly evaluate and implement, if feasible, all of the options available to increase the cost-effectiveness of the QF contracts." (T. 237 (Killian)). This statement, which was contained in Florida Power's Cogeneration Review, reflects a desire to escape cogeneration contracts.

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

56. At the time of the Cogeneration Review, Florida Power had overbooked committed capacity and had far more committed capacity than it initially anticipated. (T. 123, L. 14-24 (Dolan)). Florida Power had deliberately overbooked its cogeneration contracts in 1991 in

anticipation that some of those projects would not be built. Id. All the projects, however, did come to fruition. Id.

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

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

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

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

Florida Power attempted to prevent Panda from consulting the Commission on the sizing issue

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

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

the Commission was considering whether to allow Florida Power to select Panda's contract. (T. 115, L. 3-7 (Dolan)).

ISSUE 2

63. The contract explicitly defines the length of the parties' duties to perform:

The term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of March 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement.

Ex. 30 at ¶ 4.1.

64. In addition, the contract provides that "the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement". Ex. 30 at ¶ 7.1.; (T. 171, L. 10-13 (Dolan)). As compensation for the provision of that Committed Capacity, "the Company agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement. Ex. 30 at ¶

6.1. Based on these contractual obligations, the contract obligates Florida Power to make capacity payments for the entire period in which it provides firm committed capacity to Florida Power.

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

That draft standard offer contract was sent by Florida Power to Panda. (Ex. 4).

66. In his testimony, Robert Dolan of Florida Power asserted that it has always been his view that Florida Power was only obligated to make capacity payments for 20 years. Mr. Dolan testified that the capacity provided by Panda for years 21 through 30 of the contract would be

"free". (T. 91, L. 9-15; 101, L. 2 - 103, L. 22 (Dolan)). On cross-examination, Mr. Dolan admitted that he could not identify any clause in the contract which specifically states that Florida Power is only responsible for paying for as-available energy for the last ten years of the contract. (T. 170, L. 4 - 18 (Dolan)).

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

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

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

Capacity Payments for a thirty year term are consistent with the "value of deferral method" of calculation adopted by the Commission.

70. Roy Shanker, an expert witness sponsored by Panda, presented the only testimony regarding the use of the value of deferral method in interpreting the contract, and testified that the payment of thirty years of capacity payments was mandated by the contract using that

method. (T. 512, L. 5 - 513, L. 3 (Shanker)).

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

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

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

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

The actions of the parties reflect an understanding that Florida Power would make capacity payments to Panda for the full term of the contract.

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

the last ten years of the contract.

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

ISSUE 3

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

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

ISSUE 4

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

80. By filing its Petition, Florida Power interfered with Panda's

ability to perform under the contract. There is no dispute on this point. (T. 248, L. 1-11 (Killian)); (T. 449, L. 20 - 450, L. 9; 472, L. 16-21; 502, L. 9-20 (Morrison)).

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

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

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

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

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

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

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

ISSUE 5

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

ISSUE 6

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

90. Panda's expert, Roy Shanker, testified that the calculations contained in Exhibit 37 are obtained through a mechanical escalation of 5.1 percent for each year of the contract.

(T. 538, L. 3-19 (Shanker)).

Respectfully submitted,

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