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April 14, 1995

ORIGINAL
FILE COPY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0870

RE: Motion to Withdraw Clarification
Letter
Florida Power Corporation
Docket No. 950110-EI

Dear Ms. Bayo:

Enclosed for filing are the original and fifteen copies of Panda's Motion to Withdraw Clarification letter.

Sincerely,

Barrett G. Johnson

BGJ/bkd

ACK
AFA
APP Kelton
CAF
CMU
CTR
EAG Ballinger
LEG
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition For Declaratory Statement Regarding Eligibility For Standard Offer Contract And Payment Thereunder By Florida Power Corporation	Docket No. 950110-EI

MOTION TO WITHDRAW
CLARIFICATION LETTER

COMES NOW, Panda Kathleen, LP and Panda Energy Company (collectively "Panda"), by and through its undersigned attorneys, and respectfully moves this Commission to withdraw the Clarification Letter placed before this Commission in this docket by Panda's Motion, and as grounds therefor states:

1. Panda and Florida Power Corporation have each executed a Clarification Letter, a copy of which is attached, so that the issue is now moot.

WHEREFORE, Panda respectfully requests that this Commission not further consider the Clarification Letter in this proceeding because the issues addressed therein have been resolved by the parties.

RESPECTFULLY submitted this 14th day of April, 1995.

BARRETT G. JOHNSON, ESQ.
Florida Bar No. 174115
Johnson & Associates, P.A.
P. O. Box 1308
Tallahassee, Florida 32302
(904) 222-2693
Fax: (904) 222-2702

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail to James A. McGee, Florida Power Corpoaration, P. O. Box 14042, St. Petersburg, FL 33733-4042 this 14th day of April, 1995.

BARRETT G. JOHNSON

FLORIDA PUBLIC SERVICE COMMISSION
Fletcher Building, 101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

April 20, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (HELTON) Matt DS PLT
DIVISION OF ELECTRIC & GAS (BALLINGER, HAFF) RJ TM MMH

RE: DOCKET NO. 950110-EI - FLORIDA POWER CORPORATION - PETITION FOR DECLARATORY STATEMENT REGARDING ELIGIBILITY FOR STANDARD OFFER CONTRACT AND PAYMENT THEREUNDER BY FLORIDA POWER CORPORATION

AGENDA: 5/2/95 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\APP\WP\950110.RCM

CASE BACKGROUND

On January 25, 1995, Florida Power Corporation (FPC) filed a petition for declaratory statement concerning the application of Rule 25-17.032(3)(a), Florida Administrative Code, to its standard offer contract with Panda-Kathleen L.P. (Panda). FPC seeks a declaration on two issues: (1) whether the 74.9 MW standard offer contract is available to Panda if the cogenerator constructs a facility with the capacity to produce 115 MW, and (2) whether the capacity payment contract term for the FPC-Panda standard offer contract is 20 or 30 years.

Panda filed a petition to intervene on February 6, 1995, which was granted by Order No. PSC-95-306-PCO-EI, on March 6, 1995. On March 10, 1995, Panda filed a Motion to Supplement Petition for Declaratory Statement, to which FPC responded on March 21, 1995. On April 14, 1995, Panda filed a withdrawal of the issues raised in its Motion to Supplement making this motion moot.

On March 15, 1995, Panda also filed a Motion for Declaratory Statement and Other Relief. By this motion, Panda seeks competing

declarations on the same two issues raised by FPC. On March 24, 1995, FPC filed a Motion to Strike Panda's motion, to which Panda responded on April 3, 1995. The purpose of this recommendation is to address the Panda Motion for Declaratory Statement to determine whether it should be stricken.

DISCUSSION OF ISSUES

ISSUE 1: Should Florida Power Corporation's Motion to Strike Panda-Kathleen L.P.'s Motion for Declaratory Statement and Other Relief be granted?

RECOMMENDATION: FPC's motion should be granted in part and denied in part. Panda's issues dealing with the clarification letter and extending milestone dates should be stricken. However, Panda's competing request for declaratory statement should not be stricken; it should be resolved in the same docket as FPC's Petition for Declaratory Statement since they both concern the same issues. If the Commission accepts staff's recommendation, FPC should be required to file a response to Panda's motion within 7 days of the Commission's vote on this matter.

STAFF ANALYSIS: FPC seeks a declaration that the FPC-Panda standard offer contract is not available to Panda "if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce 115 megawatts." (FPC Petition for Declaratory Statement at p. 1) If the Commission declares the standard offer contract to be available to Panda, FPC also "seeks a further declaration that it has no obligation to make capacity or energy payments under the Standard Offer Contract after the . . ." year 2016. (FPC Petition for Declaratory Statement at p. 1)

In its Motion for Declaratory Statement and Other Relief, Panda seeks competing declarations. That is, Panda's facility design is consistent with the FPC-Panda standard offer contract, and the standard offer contract has a 30-year term for which the formula to be used in the escalation of capacity payments applies to every year of the contract, not just the first 20 years. (Panda Motion for Declaratory Statement at p. 1) Panda also requests that the Commission toll the time for Panda to meet certain contract milestone dates so that Panda would be put in the same position as if FPC had never filed its Petition for Declaratory Statement. (Panda's Motion for Declaratory Statement at pp. 6, 26, and 29) In addition, Panda requests that the Commission order FPC to show cause why FPC should not be required to complete, execute, and

deliver the lender's clarification letter. (Panda's Motion for Declaratory Statement at pp. 7, 28, and 30)

Pursuant to Rule 25-22.020(1), Florida Administrative Code, "[a]ny person may seek a declaratory statement as to the applicability of a specific statutory provision or of any rule or order of the Commission . . .." The Commission's rules also provide that "[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner in his or her particular circumstances only." Rule 25-22.021, Florida Administrative Code. In most circumstances, a declaratory statement affects the substantial interests of the petitioner only. In this case, however, FPC has asked the Commission to apply Rule 25-17.032 to a standard offer contract between FPC and Panda. The declaratory statement sought by FPC affects Panda's substantial interests as well as FPC's. For this reason, Panda's petition to intervene in this proceeding was granted.

FPC filed a Motion to Strike Panda's Motion for Declaratory Statement arguing that declaratory statements "apply to the petitioner in his or her particular circumstances only." (FPC's Motion to Strike at p. 2, quoting Rule 25-22.021, Florida Administrative Code)(emphasis deleted) No rule, however, prohibits Panda from filing its own petition for declaratory statement. In the past, when there have been competing petitions for declaratory statement before the Commission at the same time, the Commission has resolved them in the same docket. In re: Petition for Declaratory Statement of Lack of Jurisdiction of Florida Public Service Commission, or, Alternatively, Request for Formal Hearing Concerning Conduct of General Development Utilities, Inc., By Charlotte County, 94 F.P.S.C. 4:209 (1994) (the Commission entered an order denying Charlotte County's petition for declaratory statement and granting General Development Utilities, Inc.'s petition for declaratory statement concerning Commission jurisdiction). In the Charlotte County-GDU case, the Commission found that "[s]ince both petitions address the same issues, efficiency would be attained by consolidating them." Id. at 4:210. Efficiency would be gained here, as well, by resolving both petitions for declaratory statement in the same docket.

Staff agrees with FPC, however, that the issue raised by Panda concerning extending the milestone dates is inappropriate for a declaratory statement proceeding. (FPC Motion to Strike at p. 2) The portions of Panda's motion for declaratory statement dealing with tolling time or extending milestone dates should be stricken.

Any issues relating to the clarification letter became moot by Panda's April 14, 1995, withdrawal of those issues. Therefore, those parts of Panda's Motion for Declaratory Statement dealing with the clarification letter should also be stricken.

Staff recommends that Panda's motion for declaratory statement be answered in this docket; however, Panda's issues concerning the clarification letter and milestone dates should be stricken. In FPC's Motion to Strike, FPC requested a 7 day extension to respond to Panda's Motion for Declaratory Statement. If the Commission accepts staff's recommendation, FPC should be required to file a response to Panda's motion for declaratory statement within 7 days of the Commission's vote on this matter.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No.

STAFF ANALYSIS: This docket should remain open until FPC's petition for declaratory statement is answered, and if it is not stricken, Panda's motion for declaratory statement is answered.