BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Petition for Declaratory Statement Regarding Eligibility for Standard Offer Contract and Payment Thereunder by Florida Power Corporation

Docket No. 950110-EI

(1) MOTION TO STAY OR ABATE PROCEEDINGS, (2) MOTION TO DISMISS AND (3) SUPPORTING MEMORANDUM

Pursuant to Rule 25-22.037(2)(a), F.A.C., Panda-Kathleen, L.P. ("Panda") files this (1) Motion to Stay, (2) Motion to Dismiss the Complaint filed by Florida Power Corporation ("FPC") in the above docket on January 25, 1995, and (3) Supporting Memorandum on the grounds that the Florida Public Service Commission ("the Commission") does not have jurisdiction (1) over Panda or (2) the claims asserted by FPC and that (3) all issues hearings, discovery and related scheduled proceedings in this Docket should be stayed or abated until a final decision on Panda's Motion to Dismiss (including any appeals) has been made.

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I.

INTRODUCTION

A. In Docket No. 910004-EU, the Commission determined that FPC's avoided unit for a "standard offer contract"[1] was a 1997 combustion turbine. FPC prepared and filed with the Commission a proposed standard offer contract and a proposed tariff of rates to be paid by FPC to cogenerators such as Panda. The Commission approved the form,

[1]Although Panda does not accept the lawfulness of any valid distinction between a "negotiated" and a "standard offer" power purchase agreement or contract, these terms will be used for convenience because, apparently, the Commission's staff attaches some significance to the terms.

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content, terms and conditions of FPC's standard offer contract and the FPC tariff of contract rates filed with the Commission, thereby establishing the rates for payment by FPC to the cogenerators, such as Panda, for the cogenerator's sale of wholesale electric power to FPC under that contract. Order No. 24989, issued August 29, 1991.

After the Commission's order, the Commission and FPC conducted a two-week "open season", between September 20 and October 4, 1991, soliciting cogenerators to consider and sign such contracts at these rates; the FPC received several signed contracts, including one from Panda. On November 19, 1991 FPC petitioned the Commission for authority to reject the first standard offer contract it had received and, subsequently, on November 26, 1991, FPC filed its petition with the Commission, in Docket No. 911142-EQ, for Commission authority to refuse all standard offer contracts except the one signed by Panda. The earlier petition for authority to reject and the subsequent petition for authority to refuse all contracts except the one signed by Panda were combined into a single docket, Docket No. 911142-EQ.

In its Order issued October 22, 1992 in that latter docket, this Commission ordered that FPC's petition for authority to reject all standard offer contracts except that signed by Panda be granted and that the docket be closed. True and correct copies of that Order is attached hereto and incorporated herein as Exhibit A.

A true and correct copy of the power purchase agreement, or contract, between FPC and Panda, executed by Panda on October 4, 1991 and executed by FPC on November 25, 1991 is attached hereto and incorporated herein as Exhibit B.

B. After the Commission's approval of the Panda contract, Panda and FPC commenced performing that contract, from the Fall of 1992 until recently, almost two and one-half years. However, unbeknownst to Panda, in early 1994 FPC completed an internal study of its cogeneration contracts and, adopted internally, a strategy[2] to rid itself of those contracts or to force the cogenerators into negotiating different terms of the contracts, more to FPC's liking. In the Fall of 1994, FPC concocted claims that Panda, now, is not "eligible" under the contract and that Panda is not entitled to receive capacity payments for the term of the contract, as approved by this Commission.

C. Then, on January 25, 1995, FPC filed a Petition for Declaratory Statement with this Commission, claiming that the contract being performed by Panda and FPC, and executed effective November 25, 1991 is " . . . not available to Panda-Kathleen, L.P. ("Panda") if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce 115 megawatts ("MW")." In addition, even if the contract is "available" to Panda, FPC seeks a further Commission decision that it has no obligation to make capacity or energy payments under the contract after December, 2016. A true and correct copy of the FPC Petition for Declaratory Statement, with exhibits, is attached hereto as Exhibit C.

Although these claimed "issues" of (1) availability of the contract to Panda and (2) term of capacity and energy payments were discussed and fully resolved between Panda and FPC early on, long before FPC filed its January 25, 1995 petition, it is evident that FPC is seeking the Commission's assistance in "revisiting" the previously-approved contract with the

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[2]Entitled "Cogeneration and Purchased Power Strategic Proposal"

intent that the Commission enter orders which, in effect, will render the contract terminated or economically unfeasible, thereby preventing Panda from concluding the financing, construction and operation of its QF near Lakeland, Florida - and putting Panda out of business.

D. The petition of FPC was and is a sham pleading, designed to institute this proceeding for the sole purpose of excluding Panda from the market in the sale and purchase of wholesale electric power in FPC's geographical service area. In addition, FPC, later in 1985 interfered with business and contractual relationships between Panda and third parties, in order to disable Panda from obtaining sufficient natural gas transport capacity to the construction site. The practical effect of FPC's deliberate actions, were designed to cause Panda's investors and lenders (the Bank of Tokyo and Merrill Lynch) to decline to close the financing of the QF earlier this year, and thereby prevent Panda from financing and constructing the facility near Lakeland.

E. Necessarily, Panda was required to protect itself at this Commission and to seek proper judicial relief in the court. On June 26, 1995 Panda filed its complaint in the District Court for the Middle District of Florida, Tampa Division, alleging antitrust violations and seeking necessary remedies, including injunctive relief and damages. That suit (Cause No. 95-992-Civ-T-24(c), *Panda-Kathleen, L.P. v. Florida Power Corporation*, hereinafter, for convenience, "the Federal case") is now pending and discovery by the parties has commenced. Upon the conclusion of a first round of document and deposition discovery by the parties, the court in the Federal case will conduct, later this year, a hearing on Panda's motion for preliminary injunction.

Further, to procedurally protect its position (even though this Commission lacks jurisdiction over FPC's petition and the proceeding instituted thereby), Panda filed in this Commission its petition to intervene on February 6, 1995 and its Motion for Declaratory Statement and Other Relief on March 14, 1995. The settled law is that no pleading of any party can confer jurisdiction on a court or agency which lacks that jurisdiction; a fatal defect which may be raised by the parties or the court or agency at any time.

F. On August 10 and 11, 1995 this Commission filed its initial and first amended motion to intervene in the Federal case, seeking to intervene as a party in the Federal case, claiming it wanted its "position" to be known to the court: that the Commission fully intended to claim it had jurisdiction to consider and potentially grant the relief sought in FPC's January 25 petition. The Commission assumed and has aggressively asserted that it has the jurisdiction to do so.

G. Because it was and is clear that the proper forum with jurisdiction to determine the anticompetitive conduct and other wrongful conduct of FPC and granting the relief sought by Panda is the court in the Federal case, Panda assumed that the Commission and its staff would acknowledge that the misconduct of FPC should be adjudicated in the Federal case. To that end, Panda's counsel recently requested of the Commission staff attorney to recommend to the Commission that this proceeding be stayed or abated so that the court in the Federal case could proceed to resolve all issues in dispute between Panda and FPC, given that court's jurisdiction, and the doctrine of comity. The staff attorney refused. FPC's counsel assigned to this proceeding refused.

The Commission also proceeded to file its second amended motion to intervene in the Federal case. Further, the Commission staff has stated the intention of the Commission to proceed with a September 14, 1995 hearing on designation of issues in this proceeding.

In the meantime, on September 6, 1995 FPC has served upon Panda's counsel FPC's Notice of the Taking of Oral Depositions of Panda employees and officers, commencing September 18, 1995. Not without coincidence, the FPC's counsel in this proceeding also served notice to depose the same Panda witnesses on the same dates.

In short, notwithstanding the applicable jurisdictional law which precludes the Commission from proceeding down the course the Commission has set for itself in this proceeding, the Commission apparently has no intention of acknowledging that jurisdictional law. Accordingly, these Motions to Stay or Abate and to Dismiss must now be presented to the Commission.

II. ARGUMENT

A. The Commission Does Not Have Jurisdiction Over Panda.

It is well established that the Commission is a legislative agency with only those powers explicitly conferred by statute or reasonably implied from the statutory powers which have been explicitly granted. *United Telephone Co. v. Public Service Commission*, 496 So. 2d 116, 118 (Fla. 1986). Any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. Id., 496 So. 2d at 118, quoting the Florida Supreme Court in *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So. 2d 577, 584 (Fla. 1965). Absent express authority, or authority necessarily implied,

the Commission is not concerned with allegations of fraud or breach of contract between and among contracting parties. *Deltona Corporation v. Mavo*, 342, So. 2d 510, 512 (Fla. 1977).

The statutory scheme applicable here is found in Chapter 366, F.S., and grants the Commission jurisdiction over "public utilities" and "electric utilities" as defined in Sections 366.02(1) and (2), F.S. Section 366.02(1), F.S., defines "public utility" as "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity . . . to or for the public within this state." Section 366.02(2), F.S., defines "electric utility" as "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."

Panda is not a public utility or an electric utility. Panda is a qualifying facility ("QF") pursuant to the provisions of the Public Utilities Regulatory Policies Act ("PURPA"), the Federal Rules implementing PURPA found in 18 C.F.R. 292.201, et. seq., and Commission Rule 25-17.080(1), (3), F.A.C. Panda sells electric capacity and energy at wholesale to FPC pursuant to the contract entered into in November, 1991. Panda does not engage in retail electricity sales of any type and, therefore, does not fall within the definition of either "public utility" or "electric utility" in Sections 366.02(1) and (2), F.S. The Commission does not have jurisdiction over Panda.

B. The Commission Does Not Have Jurisdiction Over the Claims Asserted in the FPC Petition.

1. Section 366.051, Florida Statutes, Does Not Grant the Commission Jurisdiction to Resolve Any Contract Dispute Between FPC and Panda.

The only authority which the Commission exercises over QFs such as Panda is purely derivative. The Commission oversees and regulates utilities such as FPC, who, in turn, contract with QFs such as Panda. Utilities petition the Commission for approval of their contracts[3] with QFs in order to recoup from ratepayers the money the utilities pay the QFs under these contracts.

In connection with that approval process, Section 366.051, F.S., authorized the Commission to do two things: (1) "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers" and, at the Commission's discretion, and (2) "set rates at which a public utility must purchase power or energy from a cogenerator or small power purchaser." At that point, the Commission's obligations - and authority - are finished.

Indeed, this Commission's staff recently recommended, in its January 26, 1995 memorandum to the Director, Division of Records and Reporting, that a Motion to Dismiss (in Docket No. 940357-EQ - Petition for Resolution of Cogeneration Contract Dispute with Orlando Cogen Limited, L.P., by Florida Power Company) be granted. A true and correct copy of the staff Memorandum to the Division of Legal Services is attached hereto and incorporated herein as Exhibit D. This Commission followed the staff's recommendation and ordered that the FPC petition involving that contract dispute be dismissed. See, the Commission's February 15, 1995 decision and order in the consolidated cases, Docket No.

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[3]In reality, FPC wrote the contract and the tariff and the Commission approves both, as here, in 1991. Further, the Commission approved the FPC-Panda contract in another order on October 22, 1992.

94-0771-EQ, a true and correct copy of which is attached hereto and incorporated herein as Exhibit E.

Both the Commission's staff and the Commission itself acknowledged that the Commission's jurisdiction and authority is dependent upon the enabling statute itself, here, Section 366.051 of the Florida Statutes. The Commission staff stated:

> "In compliance with PURPA, Section 366.051, F.S., provides that Florida's electric utilities must purchase electricity offered for sale by QFs, 'in accordance with applicable law.' The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs. . . .
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> This rather lengthy discussion of the statues and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship of utilities and the qualifying facilities. . . . As Mr. Wenner from Auburndale pointed out in oral argument in a related docket, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction." (emphasis added).

The staff cited *Docket No. 840438-EI*, in re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserve Cogeneration Agreement, Order No. 14207, issued March 31, 1985, wherein the Commission refused to construe a paragraph of the cogeneration agreement, stating:

> "In response to Conserve's jurisdictional arguments, we agree that the civil courts have exclusive jurisdiction to construe the agreement and award damages if any are merited." Order 14207 at page 4. (emphasis added).

As stated by the Commission staff in its memorandum, Exhibit E:

> "The Commission said [in the Conserve Order] that it did have jurisdiction to interpret its cogeneration rules and to decide that its new rules did not apply to preexisting contracts, but it stated that matters of contractual interpretation were properly left to the civil courts."

The weight of authority from other states that have addresses similar issues supports this position. See, eg., *Afton Energy, Inc. v. Idaho Power Co.*, 729 P.2d 400 (Id. 1986); *Bates Fabrics, Inc. v. PUC*, 447 A.2d 1211 (ME. 1992); *Barasch v. Pennsylvania Public Utility Commission*, 546 A.2d 1296, *reargument denied*, 550 A.2d 257 (1988); *Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric and Gas Corporation Remains in Effect*, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); *Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey*, 1995 WL 4897 (3rd Cir. (N.J. 1995); *Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation*, Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the principle is same; under federal and state regulations of the relationship between utilities and cogenerators, state commissions should not resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In *Afton, supra.*, Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditions on the Idaho Supreme Court's determination whether the Idaho Commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the

agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that the lesser payment option would be in effect. The Commission, dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In *Erie Associates*, *supra.*, the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had canceled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

> Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
>
> We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such question do not involve our authority, under PURPA and PSL66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.
>
> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source of the authority to exercise jurisdiction over such issues.

The Commission staff also cites in the Memorandum, with approval, the decision of the Florida Supreme Court in *United Telephone Company*, supra. The Commission staff stated:

> "The Commission's authority derives from the statutes. *United Telephone Company* (citation) It cannot be conferred or inferred from the provisions of a contract. Nor does the Commission's responsibility to ensure the reliability of Florida's electric grid impose a responsibility to interpret the backup fuel provision of this contract. Even if the Commission determined that Orlando Cogen had not complied with the provisions of the contract, it could not order the cogenerator to perform. When the Commission approved this contract for cost recovery purposes, it determined that FPC's ratepayers would be protected in the event the cogenerator defaulted. Any further remedy for breach of the contract itself lies with the Court. . . . Staff recommends that the Motion to Dismiss should be granted. Florida Power Corporation's Petition fails to set forth any claim that the Commission can resolve. The Commission should defer to the Court to resolve this contract dispute. FPC's Petition should be dismissed." Memorandum at pages 9-10.

In sum, Section 366.051, F.S. does not give the Commission express or implied jurisdiction over the resolution of cogeneration contract disputes, as the Commission's staff has acknowledged. Strangely, in this case, the staff has taken an entirely contrary position.

2. Federal law preempts the Commission from exercising jurisdiction to revisit a previously-approved cogeneration contract.

It is undisputed that the Commission has approved the contract itself (and the rate tariff), in its order in Docket No. 910004-EU, Order No. 24989 issued August 29, 1991. It is undisputed, by the way, that the testimony offered by FPC witnesses (e.g., Robert D. Dolan) in that proceeding established that FPC wrote both the contract and the tariff applicable to Panda and FPC; presented the contract and the tariff to the Commission in the form of exhibits in that proceeding; and the contract and tariff, with minor modifications, were approved by the Commission in its final order in that proceeding.

In addition, the specific, signed contract for a 30-year term between Panda and FPC was especially approved by this Commission in its October 22, 1992 Order, (Exhibit A). Under settled case authority, this Commission cannot, some three years later (or at any subsequent time), revisit that contract for the purpose of construing, interpreting, modifying, canceling, voiding (or, for that matter, enforcing) the contract.

The point of departure is the provisions of PURPA § 210, 16 USC § 824a-3. The pertinent portion of that section, according to this Commission in its February 15, 1995 Order, Docket No. 940771-EQ, (Exhibit E):

> "contains several provisions designed to overcome [the] obstacles" [the resistance of monopoly electric utilities to purchasing power from other generation suppliers; the potential refusal of monopoly electric utilities to sell needed backup power to cogenerators; and subjecting cogenerators to extensive and expensive federal and state regulations]. § 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). § 210(b) directs FERC to set rates for the purchase of power from QFs.... FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost (defined under 18 C.F.R. § 292.101(b)(6)) FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of power purchase agreements, including price, as long as they are at or below a utility's avoided cost. (18 C.F.R. § 293.301) In compliance with PURPA, § 366.051, Florida Statutes, provides that Florida's electric utilities must purchase utility offered for sale by QFs, "in accordance with applicable law." The Statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The Statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs." (emphasis added).

Under the Supremacy Clause of the U.S. Constitution, applied to the field of cogeneration, such reconsideration by state commissions have the effect of conflicting with federal law in interfering with and discouraging cogeneration, by imposing burdensome utility-like regulation upon cogenerators, contrary to PURPA and FERC's regulations, in a field that is preempted by the federal law. Commission actions in a proceeding such as this one interfere with that federal policy and simply must yield.

In *Smith Cogeneration Management, Inc. v. The Corporation Commission of Oklahoma*, 863 P.2d, 1227 (Okla. 1993), the Oklahoma Commission had adopted a rule which allowed reconsideration by the Commission of avoided costs after the contract was agreed upon, thereby creating uncertainty for the cogenerator in its ability to obtain necessary financing to develop the facility. The Oklahoma Supreme Court held that the Commission rule was unlawful, being preempted by federal law and contrary to PURPA and the regulations of FERC. The Court pointed out that the preemption doctrine stems from the Supremacy Clause of the U.S. Constitution and invalidates any state law or regulation which contradicts or interferes with an act of Congress. The Court held that once the cogenerator had contractually obligated itself to deliver power to the public utility, the contract was approved and could not be revisited by the Commission at a later time. The Court relied upon *FERC v. Mississippi*, 456 US 742, 745 (1982), in which the U.S. Supreme Court held that the federal government may constitutionally order the States to implement the FERC's regulations through the State courts or agencies. As the Oklahoma Supreme Court stated:

> "Under this federal command, states have the authority to promulgate regulations mirroring the Federal regulations. In general, a State may enact its own laws or regulations as long as the federal authority has not preempted all state efforts to regulate in the area and as long as the state laws or regulations do not conflict with federal laws or regulations. *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

The Court held that the State Commission rule directly conflicts with PURPA and FERC regulations; it discourages cogeneration, and that is preempted by Federal law. The Court pointed out that if the entrepreneur can show an inability to finance without a firm contract, it is even more clear that any attempt by the Commission to revisit a cogeneration contract, even as a result of changed circumstances, deprives the cogenerator of the benefits of the commitment it made to furnish the power, and the State Commission rule is invalid.

The Court further held that a cogenerator is entitled to negotiate a long term purchase contract with established full avoided costs even if those costs are based on future estimates. The Court cited its 1993 opinion in *Wilson v. Harlow*, 860 P.2nd 793,799 (1993) in holding that cogeneration regulations might require results which are unfavorable to a utility's ratepayer. Just because conditions change and render a power sales agreement no longer attractive or feasible is not justification for revisiting or otherwise modifying the contract.

The Court also held that FERC regulations grant cogenerators the right to negotiate a long-term purchase contract, with the price of power to be purchased based on the avoided costs of the utility calculated at the time of delivery or at the time the obligation is incurred. Should a cogenerator choose the latter method of calculation, it has the right to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility.

The Court stated:

> "Reconsideration of long term contracts with established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to prevent reconsideration of such contracts. The legislative history behind PURPA confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by QFs to utilities." See also *Wilson v. Harlow*, 860 P.2d 793 (S.Ct. of Oklahoma, 1993).

In *FERC v. Mississippi*, the Supreme Court interpreted PURPA as imposing requirements on State regulatory authorities in excess of their duties under State law. The Court stated that, through PURPA, the Federal government intend to use State regulatory machinery to advance federal goals. The Court held constitutional the requirement of PURPA § 210 which "has the States enforce standards promulgated by FERC." Sd., 102 S. Ct. at 2137. The legislative history of the intention of the House and Senate conferees is consistent with the Court's opinion. See 1978 US Code Congr. and Adm. News 7659,7801.

The *Smith* decision of the Oklahoma Supreme Court was cited with approval in the *Freehold* decision this year by the Third Circuit, infra.

The thrust of these cases is that Federal law has preempted state PUC proceedings which seek to impose state utility regulation on QFs by construing previously approved PPAs or engaging in similar regulatory activity.

In *Independent Energy Producers Ass'n v. California PUC*, 36 F.3d 848 (9th Cir. 1994), the Court cited the Supreme Court's decision in *American Paper Inst. v. American Elec. Power*, 461 U.S. 402, 412-18, 103 S.Ct. 1921, 1927-31 (1983) as upholding FERC's requirement that QFs receive full avoided cost rates, the statutory maximum under PURPA §210.

The Ninth Circuit refers to four types of standard offer contracts adopted by the California PUC; however, lawfulness of the contracts was not an issue in the case in either the trial or appellate court.

It is clear that, whether a contract later proves to be undesirable to the utility or not, once the contract has been signed neither the utility nor the state PUC can change or modify the contract. That includes "standard offer" or fixed-price contracts, the precise subject before the Ninth Circuit Court. In Independent Energy, the PUC's "monitoring and enforcement program" over those "standard offer" contracts, authorizing utilities to monitor QF's compliance with federal operating and efficiency standards (and to reduce payments to QFs not found to be in compliance) was struck down, as preempted by federal law. Clearly the holding applies here, particularly since FPC is not even asking this Commission to ascertain anything about federal law.

The Court also relied upon 45 Fed.Reg. 12214, 12226 (1980), pointing out that FERC §292.304(e)(2)(iii) " . . . recognizes that the value of electric energy provided by the QF varies depending on the terms of its commitment to the utility, the length of time during which the QF has guaranteed that it will supply electric energy to the utility, . . . " Id. 36 F.3d at 856-57. Thus, the term of the contract and its provisions for payments are matters preempted by the FERC regulations; yet, FPC is attempting to ask this Commission to delve into the same subject.

As to an attempt to alter the terms of an existing contract, the Court held that the PUC did not have the authority to alter the contract:

> "However, the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed. 18 C.F.R. §292.304(d)(2)." Id, 36 F.3d at 858.

The Supreme Court of Texas also agrees. In *PUC v. Gulf States Utilities Company*, 809 S.W. 2d 201 (S.Ct. 1991), the Court held that PURPA does not grant the Texas PUC authority to alter the terms of a power purchase contract.

In the very recent Third Circuit case, *Freehold Cogeneration v. Board of Reg. Com'rs. of N.J.*, 44 F.3d 1178 (3rd Cir. 1995) [decided on January 9, 1995, prior to FPC's January 25 Petition filed in this Commission], the PPA was negotiated, signed and then approved by the New Jersey Board (PUC). However, the Board decided in 1993 to let utilities out of QF contracts no longer beneficial to the utilities, by buyouts and other measures to reduce power costs. In early 1994, the Board directed the QF and the utility to negotiate lower contract rates or a buyout and, if they did not do so, the Board would commence an evidentiary hearing to consider various courses of action including modifying or revocation of its approval of the PPA. The QF filed suit in the Federal court, seeking a declaratory judgment that PURPA preempted the Board's order and an injunction to stop the order. The District Court declined jurisdiction under PURPA §210(g) (only state courts or FERC ar to review state PUC orders) and the Johnson Act, 28 U.S.C. §1342 (which curtails federal court jurisdiction over state utility rates).

However, the Circuit Court reversed, holding:

1. The appeals to state courts or FERC under PURPA §210(g) are to review state PUC proceedings "designed to implement any requirement of rules promulgated by the FERC pursuant to 210(a)" but, here, the QF was claiming that the Board proceeding was inconsistent with and preempted by PURPA §210(e) and the FERC regulations which exempt QFS from state utility regulation (16 U.S.C. §824a-3(e)(1); 18 C.F.R. §292.602(c)). Id. at 1184-85 (*citing* Bristol Energy v. N.H. PUC, 13 F.3d 471 (1st Circ. 1994). The Court rejected the application of § 210(g).

2. The Johnson Act does not apply because the QF's claim is based on a federal statute, PURPA, and not solely on the Federal Constitution, *citing* Arkansas P&L Co. v. Missouri PUC, 829 F.2d 1444, 1449 (8th Cir. 1987).

3. The Federal court has jurisdiction over the preemption claim even though the parties were still in ongoing proceedings at the Board.

4. The state Board's implementation of FERC's §210(a)-type regulation ended when the Board approved the PPA. The attempt to either modify the PPA or revoke Board approval is "utility-type" regulation from which the QF is immune under PURPA §210(e). PURPA bars reconsideration of the prior approval of the PPA, the Court citing Independent, supra, and Smith Cogeneration, supra, "The Oklahoma court (in Smith) did not rest its preemption holding merely on the impact of the Commission rule on financing, but primarily on the obligation and rights of the parties under a negotiated and executed contract." Id. at 1193.

Here, FPC, too, is attempting to get the Commission to terminate or modify Panda's PPA because its rates are higher than rates that might be paid today. FPC decided in 1993 that it had contracted for too much QF power, which it claimed might result in a minimum load problem during certain periods. Rather than honor its QF contracts by reducing the amounts of its own power generation or by selling excess power to others at a reduced price, [as this Commission clearly stated should be done, in the January 1991 Order when FPC signed up over 642 MW for an identified need of 450 MW], recently has been attempting to cure its claimed minimum load problem by either coercing supply and price concessions from QFs (as in the Orlando Cogen case and several other QFs) or, as here, to entirely get out of the contract with Panda.

In FPC's cogeneration strategy documents of March, 1994, FPC concluded that its strategic interests will be served by taking whatever steps are necessary to rid itself of all of cogeneration contracts, including the Panda contract. In some cases, FPC has been able to intimidate cogenerators to renegotiate their contracts for lower capacity and energy payments by FPC, for curtailment or both. Four cogens who have resisted that intimidation, including Panda, have filed suit in the federal or state courts. The simple facts are that FPC made errors in calculating its cogeneration capacity needs in 1990 and 1991; FPC made errors in estimating the relative costs of coal and natural gas as fuels; and FPC decided it wanted to accelerate the construction and operation of its Fort Meade, Polk County units, without any competitive interference from Panda. In its "Cogen strategy" documents, FPC repeatedly made it clear that its fundamental purpose in adopting its strategy to rid itself of the cogen

contracts is to "improve its competitive position". Its subsidiary motive is to avoid making capacity and energy payments to the cogenerators as contracted.

That motive cannot be countenanced under PURPA and the FERC regulations. That is, FPC cannot attempt to obtain from this Commission an order which would relieve FPC of its PURPA and FERC obligations to buy and sell power to and from the QFs at the rates established in the contracts. Thus, in *Afton Energy, Inc. v. Idaho Power Company*, 693 P.2d 427 (Supreme Court of Idaho, 1984), the public utility attempted to challenge the authority of the Idaho PUC to order the utility to enter into a long-term (35 year) contract with the cogenerator. Idaho Power argued that the PUC should approve a contract which provided that the rates, terms and conditions in the contract are subject to the continuing jurisdiction of the Idaho PUC and, therefore, are subject to change, in revisions by order of the PUC. The basis of Idaho Power's claim was that the PUC had the (usual) statutory requirement under Idaho law to determine just, reasonable and sufficient rates, which rates of necessity must be subject to change as conditions change. The Idaho Supreme Court rejected that argument. The Court pointed out that PURPA section 210(b) (providing that the rules prescribed in subsection (a) shall insure that the utility's rates or purchase of energy from a QF should be just and reasonable "to the electric consumers of the electric utility and in the public interest") does <u>not</u> permit the State Commission to exercise pervasive regulation over the avoided cost rates paid to the cogenerator. "That is, the conferees of the House and Senate expressly stated that it was not their intention that that language in § 210(b) would subject cogenerators to State commission examination of the rates or terms; to do so would discourage cogeneration." The language proposed by Idaho Power, the Court said, would

result in utility-type regulation over the cogenerators, a result clearly rejected by Congress when it enacted PURPA.

Just as in the *Independent Energy* and *Freehold* cases, supra, the Court in *Afton Energy* pointed out that the FERC regulations do not contemplate utility-type regulation over rates paid to the cogenerator. The Court held that FERC regulations § 292.304(b),(5) and (d) make it clear that if the cogenerator chooses to exercise its option to receive avoided costs calculated at the time the obligation is incurred, that rate is to be maintained for the duration of the contract. Thus, the Court rejected Idaho Power's argument, stating:

> "It is clear that both the Congress and FERC, through it's implementing regulations, intended that (cogenerators) should not be subjected to the pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the Commission. In fact, one of Congress' main objectives in enacting PURPA was to encourage cogeneration and small power production by exempting (cogenerators) from pervasive state rate regulation. Congress was aware that such regulation presented a strong disincentive for cogenerators to engage in power production where the financial risks were great and the returns were not guaranteed to be recoverable."

The Idaho Supreme Court also made it clear that FERC Rule § 292.304(e)(iii) " . . . which provides that one of the factors in determining the avoided cost rates to be paid the (cogenerator) is "the terms of any contract or other legally enforceable obligation, including the duration of the obligation..." The Court went on to say that "the level of payments to the (cogenerator) varies depending on the length of the contract. Mathematically, the rate level is a function of the term of the contract. Thus, the Commission's rate-making authority is intricately related to its ability to define the term of the obligation. See Appendix A." Id., 693 P.2d at 431-432 and footnote 8. Also, see Appendix A, Idaho Power's rate

schedule for contracts from 2 years to 35 years in duration. [Obviously, the 20 year vs. 30 year dispute in the Panda case is derived from documents created by FPC, not from any authority or permission derived from PURPA or the FERC regulations. There is no term limitation in the federal law and FPC's claim is unsupportable under federal law - and common sense. The Idaho PUC had set out in its rules the terms of a standard form contract and, in justifying its refusal to sign that contract, Idaho Power asserted that the Commission had no jurisdiction to order Idaho Power to sign a contract which was not freely negotiated but rather was a standard form contract with terms dictated by the Commission.

The Commission also agreed that Idaho Power was, in fact, correct in its assertion that the Commission lacked jurisdiction to dictate contract terms between a utility and a cogenerator. The Idaho Commission stated: "The role of standard form contracts was to serve as a solid point of departure for negotiations. It has been our experience that sponsors of projects are greatly assisted in their initial planning efforts and their dealings with potential financial backers if the rates, terms and conditions governing future relations with the purchasing utility can be made available at the outset with at least some degree of assurance. It makes no sense to reinvent the wheel with each project. Nonetheless, the parties remain free to negotiate whatever terms make sense in light of the unique circumstances of each site's specific application."

In discussing this issue, the Idaho Supreme Court and the United States Supreme Court in the *FERC v. Mississippi* decision, supra, discussed FERC Rule 18 C.F.R. § 292.401(a)(198), which states that state commissions may implement PURPA § 210's requirement that a state commission implement rules for each electric utility, quoting that

FERC Rule as authorizing a state commission to implement the federal law by, among other things, "an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA]." In *FERC v. Mississippi*, the Supreme Court said:

> "In essence then, the [federal] statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. . . . [T]he Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210's requirement simply by opening its doors to claimants. That the Commission has administrative as well as judicial duties is of no significance. Any other conclusion would allow the States to disregard both the pre-imminent position held by federal law throughout the Nation . . . and the Congressional determination that the federal rights granted by PURPA can appropriately be enforced through State adjudicatory machinery . . . " Id., 102 S.Ct. at 2137-38.

However, the unequivocal significance of the opinions of the Supreme Court and the Idaho Court is that a state commission only has the authority to resolve disputes under the federal law. Here, FPC is not seeking a resolution of any dispute under federal law, but only asserts (frivolous) claims under a contract and a tariff FPC itself filed with and obtained previous approval by the this Commission or, at worst, under Florida Administrative Code Rule 25-17.0832(3). Both the Supreme Court and the Idaho Supreme Court confirmed the authority of a state commission to order a public utility to enter into a power purchase contract with a cogenerator, as a necessary part of that State Commission's duty to carry out the requirements of PURPA and the FERC regulations. However, the *Independent Energy*, *Freehold*, *Afton Energy* and *FERC v. Mississippi* decisions prohibit subsequent Commission hearings which may alter or terminate the PPA.

In *Kansas City Power & Light Co. v. The State Corporation Commission of Kansas*, 676 P.2d 764 (S.Ct. of Kansas, 1984) the Kansas Supreme Court reversed the Kansas Commission's setting of rates to be charged to the cogenerator on a basis other than avoided cost. The Court stated:

> "We find that federal law has preempted the field in the area of cogeneration, and that the KCC, a state regulatory authority, cannot require KCPL (the utility) to purchase electricity from cogenerators at a rate greater than the federally regulated rate based on avoided cost. The Congress of the United States established a national policy of developing alternate energy sources to combat the national energy crisis. The federal government has under its supervision activities in the energy field, including cogeneration, designed to benefit the nation as a whole. Where a state regulatory authority acts to the contrary, it must fail. The requirements of PURPA and the FERC regulations preclude or preempt state action not in compliance therewith unless a waiver is obtained. (referring to the waiver provision, which the Kansas Commission did not exercise, in FERC Rule § 292.403)."

Likewise, the Appellate Division of the Supreme Court of New York has held, without equivocation, that PURPA and the federal regulations have preempted the area of cogeneration and that New York PUC's rules and regulations cannot lawfully depart from the federal law. *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, et al.*, 98 App.Div.2d 377, 471 N.Y.S.2d 684 (1983).

3. The Commission's purported distinction between a "negotiated" and a "standard offer" contract is a distinction without a difference under the applicable law.

It is suggested by the Commission staff in its Memorandum, Exhibit D and in the Commission's February 15, 1995 Order, Exhibit E, that the Commission's rule, Section 25-17.0832, makes significant distinctions between "negotiated" contracts, on the one hand, and

"standard offer" contracts, on the other hand. Apparently, the argument is that, although the Commission has decided it does not have any authority to resolve contract disputes under negotiated contracts, between "big" QFs and a public utility, the Commission does have such authority over "standard offer" contracts between "small" QFs and a public utility. Whatever those distinctions may be, they have nothing to do with jurisdiction; both contracts have the same purpose under federal law and neither can be revisited later. That distinction has no authority under federal law, which controls. There is no case authority, or federal statutory law, which supports the jurisdictional claim of the Commission or its staff.

Further, the Commission's own rules, e.g., Section 25-17.0832(1) and (2), clearly require the Commission to do more work and exercise greater supervision over a negotiated contract than over a standard offer contract in Rule 25-17.0832(3). In its February 15 Order, Exhibit E, the Commission acknowledges that it must evaluate a negotiated contract to determine whether the contract is prudent for cost recovery purposes, i.e., ". . . to determine if its rates, terms and other conditions can be expected to contribute toward the deferral or avoidance of additional capacity construction by the utility . . ." Order at page 4. Again, in subsection (2) of that Rule, dealing with negotiated contracts, the Rules states "Negotiated contracts shall not be evaluated against an avoided unit in a standard offer contract, thus preserving the standard offer for small qualifying facilities as described in subsection (3)." Supposedly, the negotiated contract would be between "larger" private power companies which may want to negotiate special terms, conditions and even prices with the public utility; whereas the standard offer contract would be reserved for "small qualifying facilities" where most of the work of negotiating the terms, conditions and prices was already

done by the public utility in writing the contract and the associated rate tariff, a contract and tariff subsequently evaluated and approved by the Commission itself.

Clearly, whether the Commission played a great or lesser role in crafting one contract can have nothing to do with the Commission's lack of jurisdiction to revisit one of those contracts, already executed by the parties, partially performed by the parties and approved (twice) by the Commission.

Further, at page 6 of the February 15 Order (Exhibit E), the Commission stated:

> "This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the States in the regulation of the relationship between utilities and qualifying facilities. States and their utility Commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a State-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' rate payers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. ... While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts."

The Commission is quite correct in acknowledging its very limited authority to interfere in the relationship between utilities and QFs. The Commission, however, is clearly wrong when it asserts that it has the authority to "control the provisions of standard offer contracts", after they have been approved, whereas it lacks control over negotiated contracts after they have been approved. This is a distinction without a difference. Clearly, the Commission already has "approved" the standard offer contract, first, by allowing FPC's contract and tariff to be filed and become effective with all of its detailed terms and

provisions to be embodied in that contract; and, second, by entering an order granting FPC's petition to refuse all standard offer contracts except that one submitted by Panda, in its order of October 22, 1992. Obviously, Panda's contract was just as "approved" as any negotiated contract - indeed, it was approved twice. The Commission went to a great deal more trouble with, and analysis of, the terms of so-called "negotiated" contracts in approving approximately eight (8) contracts in its order of July 1, 1991 in Docket No. 910401-EQ, where the Commission reviewed and analyzed each of the principle terms of those contracts. Did the Commission do less on the standard offer contract, which it says it "controls"? Obviously not.

Further, the Commission cannot point to any valid post-approval distinction between "large" cogenerators or QFs and "small" cogenerators or QFs. Panda's standard offer contract provides for the construction of a facility which will contractually guarantee to produce 74.9 MW (committed capacity, not rated capacity) and, whether the plant necessary to do that is rated at 80 MW or at 150 MW is of no concern of the Commission. Further, in the Commission's July, 1991 Order, which approved a number of "negotiated" contracts, the "committed capacity" of those facilities ranged from a low of 28 MW to a high of 103.8 MW - and five of the eight facilities had "committed capacity" only between 28 MW and 72 MW. What is "small" and what is "large"?

It should be noted that in Florida Rule 25-17.080(1), the Commission adopted FERC Rules 292.101 through 292.207, which include Rule 292.205, the criteria for qualifying cogeneration facilities. The same Florida Rule, at subparagraph (3), restates or summarizes the FERC qualifying criteria for a cogenerator facility. Both the FERC Rule and the Florida

Rule incorporating the FERC Rules are in conflict with the "large" and "small" distinction between facilities under a negotiated contract and facilities under a standard offer contract, the "less than 75 MW definition of" small QFs in Florida Rule 25-17.0832(3), at 3(a) and 3(c). There also is a conflict between the Florida Rules' use of "committed capacity" in subparagraph (e)2 and the definitions in FERC Rule 292.202(g), (h), (i) and (j), dealing with "useful power output", "useful thermal energy output" and "total energy output".

The FPSC stated in the above opinion that FPC must purchase electricity offered for sale by Panda "in accordance with applicable law" (Florida Statutes § 366.051). "Applicable law" is the federal law and that implementing Florida law is not inconsistent with federal law.

There is nothing in PURPA or in the FERC regulations which make these size distinctions or allow them. Nothing in PURPA or the FERC regulations allow a state commission to control the size of a QF; the only "cap" is an 80 MW cap on the size of a qualifying small power production facility under 16 C.F.R. § 292.204(a). The criteria for qualifying cogeneration facilities, in contrast, at 16 C.F.R. § 292.205, deals only with efficiency standards; there is no size or capacity limitation on cogeneration facilities.

Even the Florida Code's Rule 25-17.0832(1) makes no distinction between firm capacity and energy produced and sold by a QF and purchased by a utility, as to the type of contract; that section of the Rule provides that such firm capacity and energy used and sold will be "...pursuant to a negotiated contract or a standard offer contract subject to certain contractual provisions as to the quantity, time and reliability of delivery." Further, provisions of that Rule require that, within one working day of the execution of a negotiated

contract or the receipt of a signed standard offer contract, the public utility has to notify the Commission's Director and, within 10 days after the execution or receipt of either type of contract, the public utility must file with the Commission certain reporting information, which is the same for both types of contracts. Subsection (c) of that Rule makes the distinction in size by stating that, in lieu of a separate and negotiated contract a QF under 75 MW may (not must) accept any utility's standard offer contract. The Rule goes on to state that QFs which are 75 MW or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2) of the Rule.

It is, therefore, clear that the Commission cannot impose size or similar limitations on the QFs; or assert jurisdiction to construe and interpret contracts, negotiated or standard offer, after they have been signed and approved.

Further, the claim stated in FPC's petition has nothing to do with an interpretation of the Commission's Rules. On page 1 of FPC's petition for declaratory statement, FPC makes it very clear that it is seeking a Commission declaration that the standard offer contract of Panda "is not available" to Panda "... if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce of 115 MW. In addition, if the standard offer contract is available to Panda, Florida Power seeks a further declaration that it has no obligation to make capacity or energy payments under the standard offer contract after December, 2016." (Exhibit C, January 25, 1995 Petition for Declaratory Statement, page 1). That petition clearly requests the Commission to interpret the contract and declare it either unavailable or economically unfeasible - goals which directly contradict and frustrate federal energy policy and law.

The rule that FPC claims needs interpretation is Florida Code Rule 25-17.0832(3)(a), which provides that, upon petition by a utility or pursuant to the Commission's action, each public utility shall submit for Commission approval a tariff and a standard offer contract for the purchase of firm capacity and energy . . ." That process already occurred, in August, 1991, before Panda entered into the contract with FPC. That rule has nothing to do with the approved contract subsequently executed by the parties in November, 1991; subsequently approved by the Commission in October, 1992; and subsequently performed by the parties for over two years.

There is no substance for FPC's petition; it is a sham. Moreover, even if it had any merit, it must be dismissed because the Commission lacks jurisdiction over one of the parties and over the subject matter, as a matter of law.

4. The Commission must address its lack of jurisdiction before any further steps can be taken in this proceeding; those activities must be stayed or abated.

Incredibly, having learned of Panda's intention to file this Motion to Dismiss, the staff proceeded to announce that it fully intended to see to it that a hearing on issues would proceed as scheduled this Thursday, September 14. FPC, also advised of the filing of this motion in a meeting of counsel in the federal case on September 5, proceed to serve notice of its intention to take oral depositions, starting next Monday, September 18.

When the jurisdiction of a court or agency is put at issue - which can be done by the parties or the court or agency at any time - then the court or agency should not take any further actions until reply briefs are filed, and a proper determination of jurisdiction is made. All decisions and actions of a court or agency without jurisdiction are void and may be

ignored. *See Stel-Den of American, Inc. v. Roof Structures, Inc.*, 438 So.2d 882 (Fla. App. 1983).

Panda's motion to stay or abate this proceeding should be promptly granted and, after briefing and hearing, Panda's motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via Federal Express to Donald R. Schmidt, Esq., Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A., One Harbour Place, 777 South Harbour Island Drive, Tampa, Florida 33602, attorney for Florida Power Corporation, and to Robert Vandiver, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, attorney for Public Service Commission, on this 12th day of September, 1995.

Ken Sukhia

Ken Sukhia, Esq.

Exhibit A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Authority for Florida Power Corporation to Refuse all Standard Offer Contracts Except that submitted by Panda Kathleen, L.P.	DOCKET NO. 911142-EQ ORDER NO. PSC-92-1202-FOF-EQ ISSUED: 10/22/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER GRANTING PETITION FOR AUTHORITY FOR FLORIDA POWER CORPORATION TO REFUSE ALL STANDARD OFFER CONTRACTS EXCEPT THAT SUBMITTED BY PANDA KATHLEEN, L.P.

BY THE COMMISSION:

CASE BACKGROUND

In Docket No. 910004-EU, the Commission determined that FPC's avoided unit for its standard offer contract was a 1997 combustion turbine. The standard offer subscription limit was set at 80 MW, with an effective date of September 20, 1991.

FPC conducted a two week "open season" from September 20, 1991, to October 4, 1991, during which potential providers were to submit standard offer contracts for evaluation. FPC received nine contracts during its "open season" and one contract after the "open season" concluded. On November 19, 1991, FPC petitioned the Commission for authority to reject the first standard offer contract it had received on September 20, 1991, from Noah IV GP, Incorporated (Noah IV). Subsequently, on November 26, 1991, FPC filed a petition with the Commission for authority to refuse all standard offer contracts except the one submitted by Panda Kathleen L.P. This petition also included rejection of Noah IV's contract. The two petitions have been combined into this single docket, Docket No. 911142-EQ.

On December 13, 1991, Noah IV and Ark Energy, Incorporated (Ark), jointly filed an Answer and Cross-Petition to FPC's petition. In the petition, Noah IV and Ark requested the Commission to reject FPC's petition and either (1) order FPC to execute the standard offer contract submitted by Noah IV to FPC or (2) set the matter for hearing. Subsequently, counsel for Noah IV and Ark agreed to permit the petition by FPC to be treated as a Proposed Agency Action. At the February 18, 1992, agenda

conference, the Commission voted unanimously to approve the staff recommendation to approve FPC's petition, but to keep the standard offer open until the remaining 5.1 MW are subscribed.

Noah IV and Ark timely filed a protest to the Notice of Proposed Agency Action. A hearing was held on the matter on June 29, 1992. All parties submitted post hearing filings. In addition to its forty two page brief, ARK/NOAH IV submitted forty proposed Findings of Fact. Recommendations for rulings on each specific Finding of Fact are included in this Order as Attachment I. ARK/NOAH IV also submitted 11 proposed Conclusions of Law. We believe these conclusions are redundant in the context of a case heard by the agency head with an explicitly defined Issue List, Post Hearing briefs and a Final Order to be prepared after considering staff recommendations on the enumerated legal, policy and factual issues. This agency is under no legal duty to address each proposed conclusion in this setting. Therefore, we make no rulings on the 11 proposed Conclusions of Law submitted by ARK/NOAH IV.

We find that Commission rules do not require a "first-in-time, first-in-line" prioritization of standard offer contracts submitted to a utility. Rule 25-17.0832(d)3 does allow other methods of prioritizing contracts.

The pertinent portion of rule reads:

> "Within sixty days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions **may** be based on:
>
> 1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
> 2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer." (emphasis added)

We believe that had the commission intended these two criteria to be exclusive, the words "**may only**" or "**shall only**" would appear in the place of the word "**may**". In reviewing the legislative history of the rule, we are unpersuaded that the Commission intended that these two explicit criteria were intended to be

exclusive. The record is devoid of evidence suggesting the commission considered the possibility of an immediate over-subscription of a standard offer contract or of simultaneous delivery to the utility or of a "first day queue" as experienced by Florida Power and Light Company and referenced in testimony in this proceeding. Moreover, the deletion of one proposed explicit basis for petitioning the Commission (a change in the utilities generation expansion plan) from the proposed rule should not be construed to eliminate every possible reasonable method of evaluating standard offer contracts. In the instant case, 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.

We find that Florida Power Corporation did not violate its tariff by either petitioning for the Commission's authority to reject NOAH IV's standard offer contract on the basis of a comparative evaluation or by executing the standard offer contract delivered to FPC by Panda Kathleen on October 4, 1991.

Rule 25-17.0832 is incorporated by reference in FPC's standard offer tariff. The subject of "evaluation criteria" is not explicitly spoken to in the tariff. Any violation of the tariff is predicated on a violation of Rule 25-17.0832, F.A.C. Since we have determined that FPC's actions were consistent with the requirements of Rule 25-17.0832, F.A.C., no violation of FPC's tariff occurred.

Additionally, as recognized by Ark witness James Freeman, standard offer contracts are a unique type of tariff. Rather than selling products or services for an established price/rate, the standard offer tariff defines the terms of a utility purchase of products or services. We believe that standard offer contracts are published as tariffs as a matter of administrative convenience and are not subject to the same type scrutiny as a utility's offers to provide service. Therefore, we find that FPC did not violate its tariff by either petitioning for the Commission's authority to reject NOAH IV's standard offer contract on the basis of a comparative evaluation or by executing the standard offer contract delivered to FPC by Panda Kathleen on October 4, 1991.

We find that ARK/NOAH IV did not waive its right to object to Florida Power's evaluation process by failing to notify Staff, other respondents to the standard offer or Florida Power of Ark/Noah's position that a first-in-time acceptance was required. Prior to the Petition to Reject Standard Offer Contracts filed by FPC, ARK/NOAH IV had no clear point of entry to a Section 120.57, Florida Statutes proceeding to exercise its rights. ARK/NOAH IV were under no duty to protest FPC's chosen procedure until they

were afforded a point of entry by the Commission to do so.

Rule 25-17.0832, F.A.C., does not purport to give individual parties the right to object to the evaluation method utilized by a utility in evaluating standard offer contracts. Thus, ARK/NOAH could not waive a right that it never had in the first place. ARK/NOAH were under no duty to protest FPC's chosen procedure until they were afforded a point of entry to a proceeding pursuant to Section 120.57, Florida Statutes. In protesting the Notice of Proposed Agency Action entered in this docket ARK did what the law required.

We find that as of November 19, 1991, ARK/NOAH IV's Lake County Cogeneration Project was technically viable with respect to fuel transportation capability.

On June 20, 1991, a $10,000 reservation deposit was made to reserve pipeline capacity for the Ark/Noah project and other Ark projects on Florida Gas Transmission's Phase III expansion. Evidently, this fact was not communicated to FPC when Ark/Noah filed its standard offer acceptance or when asked for additional information by FPC. In addition, another pipeline is projected to be constructed in Florida that could provide gas transportation for the project. Since the Ark/Noah project will have dual fuel capability, it could use another fuel as a "bridge" measure between its in-service date and the availability of additional pipeline capacity. Therefore, we find that the Ark/Noah project appears to be technically viable with respect to fuel transportation capability.

We find that sufficient information was not provided to FPC to determine the technical viability of the proposed thermal host for ARK/NOAH IV's Lake County Cogeneration Project.

Ark/Noah's witness Malenius argues, in part, that viability with respect to the thermal host is assured based on the following: (1) there is sufficient lead time for a competent QF developer to construct such a project; (2) Ark Energy's financial strength and established experience; and (3) Ark is presently developing a similar facility (the Mulberry Facility). However, these facts, which are very general in nature, do not establish the viability of the thermal host for the specific project proposed by Ark/Noah in this proceeding.

On October 11, 1991, FPC sent a questionnaire to seven entities who had submitted standard offer contracts during the open season. This questionnaire, among other things, asked the proposer to describe the level of commitment from the steam user, including whether it is an existing, ongoing enterprise and whether the steam user has an ownership interest in the project. The questionnaire

also asked for copies of commitments by the steam user on behalf of the project. In response to this specific request, Ark referred to Attachment "H" of its September 21 [sic], 1991, standard offer submittal to FPC. Attachment "H" of Ark's standard offer submittal has not been offered into evidence in this proceeding, but FPC assigned a score of minus 1 (Poor) to the category entitled "Host" in its comparative evaluation of the project.

In a letter to Thomas Wetherington of FPC, dated November 5, 1991, William Siderewicz of Ark Energy briefly discusses the possibility of marketing its CO2 product to a wholesaler, who, in turn, will distribute the CO2 product to end users. Item 3 of that letter states, in part, "A copy of Carbonic Industries, 1990 annual report and recent communication regarding our working relationship is attached." We make the following three observations with regard to this information:

(1) the 1990 annual report of Carbonic Industries does not provide specific technical information to assess the viability of any specific thermal host;

(2) the one-page brief letter from David Fike of Carbonic Industries to William Siderewicz of Ark Energy provides almost no information on the purported "working relationship" between the two entities;

(3) the information provided does not constitute any kind of commitment to purchase the CO2 output.

Therefore, we find that sufficient information was not provided to FPC to establish technical viability of the proposed thermal host.

We find that as of November 19, 1991, ARK/NOAH IV's Lake County Cogeneration project did not have the highest likelihood of success relative to the other proposals received by Florida Power Corporation.

Although ARK/NOAH's witnesses testified that FPC's comparative evaluation system was unfair, no alternate weighting and ranking system was introduced into the record showing that the NOAH IV project would have the highest likelihood of success. The fairness and/or reasonableness of FPC's comparative evaluation procedure is not one of the issues that have been raised in this proceeding. However, we believe that the criteria used to evaluate the various proposals were valid, reasonable and fairly applied. Exhibit 1 contains the ranking criteria, ranking methodology, and the results of FPC's evaluation.

Based on our decisions in the above issues, the remainder of the issues raised in this proceeding are rendered moot.

In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's Petition for authority to reject all standard offer contracts except that submitted by Panda Kathleen, L.P. is GRANTED. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 22nd day of October, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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

ATTACHMENT I
SPECIFIC RULINGS ON ARK/NOAH'S PROPOSED FINDINGS OF FACT

1. Nothing in the Commission's standard offer rule addresses the comparative evaluation/open season procedure followed by Florida Power Corporation ("Florida Power") in this proceeding. [Rule 25-17.-832, F.A.C. (1991)]

RULING: Rejected as a Conclusion of Law and not a Finding of Fact.

2. Nothing in the pre-adoption history of the standard offer rule supports the use of a comparative evaluation/open season procedure for executing standard offer contracts. [ARK/NOAH Exhibit 3; Tr. 313 line 25- Tr. 317 line 3, esp. p. 316, lines 15-16]

RULING: Rejected as a Conclusion of Law and not a Finding of Fact.

3. At hearing, Florida Power introduced no evidence that the pre-adoption history of the standard offer rule supports use of a comparative evaluation/open season approach. (Tr. 12, line 11 - Tr. 142, line 2; Tr. 554, line 13 - Tr. 593, line 11].

RULING: Rejected as unnecessary to decide the factual matters at issue in this case.

4. At the September 18, 1990 agenda conference, the Commission voted to adopt Rule 25-17.0832. At that conference, prior to their vote, Commission members were advised by staff that the rule was structured so that standard offer contracts would be handled on a "first in line" basis. [ARK/NOAH Exhibit 3, Doc. 9, at 49-50]

RULING: Accepted and incorporated with the clarification that the exchange was between Chairman Wilson and Ms. Harvey; and was not sworn testimony in any proceeding.

5. Prior to adoption of the rule, members of the Commission considered establishing three criteria for rejecting a standard offer contract, then reduced the criteria to the two now contained in Rule 25-17.0832(3). [ARK/NOAH Exhibit 3, Doc. 5, pp. 93-103].

RULING: Accepted and incorporated with the clarification that the criteria are not exclusive.

6. The conversation with Jennifer Harvey described by Florida Power at hearing was informal, not noticed, and entirely off the record. [Tr. 66, line 17 - Tr. 67, line 8].

RULING: Rejected as unnecessary to decide the matters at issue in the proceeding.

7. ARK/NOAH were the first to accept Florida Power's standard offer to purchase firm capacity and energy from a QF. [Tr. 21, lines 18-19; FPC Exhibit 1, pp. 19,30]

RULING: Accepted and incorporated.

8. ARK/NOAH were the only QF to accept Florida Power's standard offer tariff on September 20, 1991, and no other QF accepted until September 26, 1991. [Tr. 21, lines 18-19; FPC Exhibit 1, pp. 19,30]

RULING: Accepted and incorporated, with the clarification that ARK/NOAH were the first to file documents responsive to the tariff.

9. At hearing Florida Power introduced no evidence to demonstrate that the ARK/NOAH project was not viable. [Tr. 12, line 11 - Tr. 142, line 2; Tr. 554, line 13 - Tr. 593, line 11].

RULING: Rejected as unsupported by the evidence, FPC expressed concerns about the viability of the steam host which could affect the viability of the project. However, the evidence neither proves nor disproves the viability of the project.

10. At hearing Florida Power's witness conceded that had the ARK/NOAH project been the only project under consideration, he did not know whether he would have petitioned to reject. [Tr. 26, line 10 - Tr. 27, line 2]

RULING: Rejected. At one point in his testimony he did not know. On redirect he indicated that FPC would have petitioned to reject the contract.

11. At hearing, Florida Power's witness admitted that Florida Power "would have had a difficult time" in proving that ARK/NOAH could not bring their project on line in five years. [Tr. 31, lines 15-24]

RULING: Accepted and incorporated.

12. Florida Power's witness admitted that it is possible to build a facility such as ARK/NOAH's Lake County cogeneration facility. [Tr. 30, lines 17-18].

RULING: Accepted and incorporated.

13. Under Florida Power's comparative evaluation analysis, ARK/NOAH were rated "very good" as a developer [Tr. 137, lines 24-25].

RULING: Accepted and incorporated.

14. The ARK/NOAH project was rated as "good" or "very good" on 7 of 8 viability-related criteria. [Tr. 138, line 6 - Tr. 139, line 12; FPC Exhibit 1, p. 19]

RULING: Accepted and incorporated.

15. The ARK/NOAH project was ranked fourth overall under Florida Power's comparative evaluation. [Tr. 26, lines 7-8; FPC Exhibit 1, p. 19].

RULING: Accepted and incorporated.

16. As of November 19, 1991, the ARK/NOAH Lake County Cogeneration project was a viable project. [Tr. 540, line 1 - Tr. 541, line 10; Tr. 184, line 11 - Tr. 186, line 9].

RULING: Rejected as unsupported by the greater weight of the evidence. FPC had concerns about the security of the steam host. [Tr. 556-557; page 22, FPC Exhibit 1]. The viability of the steam host could affect the viability of the project.

17. ARK Energy, through Polk Power Partners, L.P., is also developing the Mulberry Cogeneration Facility, a cogeneration facility in Polk County, Florida, that is nearly identical to the Lake County Cogeneration Facility being developed by ARK/NOAH. [Tr. 535, lines 3-14].

RULING: Rejected as irrelevant.

18. The Mulberry Cogeneration Facility is approximately on schedule. [Tr. 535, lines 15-16; Tr. 538, line 18 - Tr. 539, line 4].

RULING: Rejected as irrelevant.

19. Florida Power's standard offer tariff, Sheets Nos. 9.500 through 9.900, was required to be filed on September 6, 1991. [PSC Order No. 24989, p. 70, 73].

RULING: Accepted and incorporated.

20. Florida Power's standard offer tariff did not mention a comparative evaluation/open season process. [Tr. 34, line 5 - Tr. 35, line 3]

RULING: Accepted with the modification that FPC's standard offer tariff does not mention any evaluation method.

21. Florida Power's standard offer tariff was approved on September 12, 1991, and became effective on September 20, 1991. [Tr. 33, lines 4-6; FPC Exhibit 1, Section X, Memo from R.D. Dolan to File: See Tr. 72, lines 9-12]

RULING: Accepted and incorporated.

22. Florida Power's comparative evaluation/open season process was never reviewed or approved by the Commission. [Tr. 34, line 5 - Tr. 35, line 3]

RULING: Accepted with the clarification that prior approval of the comparative evaluation/open season was not required under the rule and by our decision in this matter is explicitly approved.

23. ARK/NOAH accepted the standard offer tariff at 7:35 a.m. on September 20, 1991 by hand-delivery of a completed standard offer contract to Florida Power in St. Petersburg, Florida. [Tr. 464, lines 10-13].

RULING: Accepted and incorporated.

24. Once ARK/NOAH accepted Florida Power's standard offer contract on September 20, only 10 MW remained to be subscribed, under the Commission's rule and the terms of Florida Power's tariff. [FPC Exhibit 1, Standard Offer Contract Tariff, Original Reissue Sheets Nos. 9.511 and 9.710]

RULING: Rejected as a Conclusion of Law, however we accepted as

fact that NOAH/ARK offered to provide 70 MW of the 80 MW subscription limit.

25. ARK/NOAH contacted Florida Power prior to the standard offer contract's effective date, and inquired where to file the contract and how early the office would open on September 20. [Tr. 463, line 18 - Tr. 464, line 3; Tr. 502, line 25 - Tr. 503, line 9].

RULING: Accepted and incorporated.

26. As of November 19, 1991, ample capacity remained in FGT's Phase III pipeline expansion to serve ARK/NOAH's fuel requirements. [Tr. 437, 541, line 19 - Tr. 542, line 8]

RULING: Accepted and incorporated.

27. On June 20, 1991 the appropriate reservation deposit was made on behalf of ARK to reserve Phase III capacity for the ARK/NOAH project and other ARK projects in Florida. [Tr. 441, lines 11-12]

RULING: Accepted and incorporated.

28. ARK/NOAH have numerous options available to it for fuel supply in 1997. [Tr. 188, lines 2-11; Tr. 437, line 14 - Tr. 438, line 2; Tr. 542, line 14 - Tr. 543, line 1].

RULING: Rejected to the extent that numerous is too indefinite.

29. ARK/NOAH's cogeneration facility will have dual fuel capability, so if necessary, ARK/NOAH will use an alternative fuel as a bridge measure. [Tr. 188, lines 6-11; Tr. 437, line 20 - Tr. 438, line 22; Tr. 542, line 20 - Tr. 543, line 1].

RULING: Accepted and incorporated.

30. Florida Power rated ARK/NOAH's Lake County project "good" with respect to fuel transportation. [FPC Exhibit 1, p. 19,25].

RULING: Accepted and incorporated.

31. Liquid carbon dioxide plants are widely recognized as viable thermal hosts for qualifying cogeneration facilities. [Tr.

535, line 19 - 536, line 3].

RULING: Accepted and incorporated without the word "widely."

32. Florida Power itself has sought and obtained approval of a negotiated contract for a cogeneration facility with a carbon dioxide plant as its thermal host. [Tr. 189, line 21 - Tr. 194, line 2].

RULING: Accepted and incorporated.

33. The Florida Power plant referred to in the above Proposed Finding of Fact is scheduled to be built in less than half the time available to ARK/NOAH for the Lake County project. [Tr. 192, line 16 - Tr. 193, line 13; Tr. 543, line 17 - Tr. 544, line 10]

RULING: Accepted and incorporated.

34. Florida Power produced no evidence that the plant referred to in Proposed Finding 32 will be unable to come on line because of lack of a CO2 thermal host. [Tr. 97, line 18 - Tr. 98, line 11].

RULING: Rejected as irrelevant.

35. The sum total of Florida Power's allegation that ARK/NOAH's project is not viable is Florida Power's subjective rating of the project as "poor" with respect to thermal host, because of the absence of a letter of intent to construct the CO2 plant, and undocumented "doubts" concerning ARK/NOAH's ability to access the CO2 market. [FPC Exhibit 1, p. 22; Tr. 97, lines 7-18].

RULING: Rejected as argument rather than a finding of fact.

36. ARK/NOAH have a ready market for the carbon dioxide produced at its Lake County Facility, and has already granted a "right of first refusal" to a CO2 marketer. [Tr. 546, line 14-24]

RULING: Rejected as unsupported by the evidence of record.

37. Florida Power never formally advised potential QF's of its comparative evaluation/open season. [Tr. 119, line 6 - Tr. 123, line 14]

RULING: Rejected. The term "formally" is not adequately defined.

38. Florida Power's evaluation and scoring criteria never made a part of the record of Docket No. 910004-EU.

RULING: Rejected as irrelevant, based on our determination that the open season was proper under the rule.

39. ARK/NOAH had no communication with Panda Kathleen prior to filing its acceptance of the standard offer contract. [Tr. 152, line 18 - Tr. 153, line 20]

RULING: Accepted and incorporated.

40. Panda made its decision when to file based on the representations of Florida Power and allegedly others, but not on any representations or communication by ARK/NOAH. [Tr. 152, line 18 - Tr. 153, line 20]

RULING: Accepted and incorporated.

Exhibit B

Docket L.

Standard Offer
For Purchase Of Firm Capacity and Energy
From A Qualifying Facility Less Than 75 MW Or A Solid Waste Facility

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ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE: September 20, 1991

STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY LESS THAN 75 MW OR A SOLID WASTE FACILITY

between

PANDA-KATHLEEN L.P.

and

FLORIDA POWER CORPORATION

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

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SHEET

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY LESS THAN 75 MW OR A SOLID WASTE FACILITY

This Agreement ("Agreement") is made and entered by and between Panda-Kathleen, L.P., a Delaware Limited Partnership, having its principal place of business at 4100 Spring Valley #1001 Dallas, TX 75244 (hereinafter referred to as the "QF"), and Florida Power Corporation, a private utility corporation organized under the laws of the State of Florida, having its principal place of business at St. Petersburg, Florida (hereinafter referred to as the "Company"). The QF and the Company may be hereinafter referred to individually as a "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, the QF desires to sell, and the Company desires to purchase, electricity to be generated by the Facility and made available for sale to the Company, consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date; and

WHEREAS, the QF will engage in interconnected operation of the QF's generating facility with the Company system (hereinafter referred as the "Transmission Service Utility") which is directly interconnected at one or more points with the Company.

NOW, THEREFORE, for mutual consideration, the Parties covenant and agree as follows:

ARTICLE I: DEFINITIONS

As used in this Agreement and in the Appendices hereto, the following capitalized terms shall have the following meanings:

1.1 Appendices means the schedules, exhibits and attachments which are appended hereto and are hereby incorporated by reference and made a part of this Agreement.

1.1.1 Appendix A sets forth the Company's Interconnection Scheduling and Cost Procedures.

1.1.2 Appendix B sets forth the Company's Parallel Operating Procedures.

1.1.3 Appendix C sets forth the Company's Standard Offer Rates for Purchase of Firm Capacity and Energy from a Qualifying Facility less than 75 MW or a Solid Waste Facility.

1.1.4 Appendix D sets forth the Company's Transmission Service Standards.

1.1.5 Appendix E sets forth FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date.

1.2 Avoided Unit Fuel Reference Plant means that Company unit(s) whose delivered price of fuel shall be used as a proxy for the fuel associated with the avoided unit is defined in Appendix C.

1.3 Avoided Unit Heat Rate means the average annual heat rate associated with the unit in million BTU per KWH as it is defined in Appendix C.

1.4 Avoided Unit Variable O & M means the variable operation and maintenance expense associated with the unit type selected in section 8.2.1 hereof in dollars per KWH as it is defined in Appendix C.

1.5 BTU means British thermal unit.

1.6 Capacity Account means that account which complies with the procedure in section 8.6 hereof.

1.7 Capacity Payment Adjustment means the value calculated pursuant to Appendix C.

Environmental Tests (Air)

1.8 Commercial In-Service Status means (i) that the Facility is in compliance with all applicable Facility permits; (ii) that the Facility has maintained an hourly KW output, as metered at the Point of Delivery, equal to or greater than the Committed Capacity for a consecutive twenty-four (24) hour period or during the On-Peak Hours specified in Appendix C of two consecutive days; and (iii) that such twenty-four (24) hour period is reasonably reflective of the Facility's day to day operations.

1.9 Committed Capacity means 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.

At Substation where KW enter FPC System

1.10 Company's Interconnection Facilities means all equipment which is constructed, owned, operated, and maintained by the Company located on the Company's side of the Point of Delivery, including without limitation, equipment for connection, switching, transmission, distribution, protective relaying and safety provisions which, in the Company's reasonable judgment, is required to be installed for the delivery and measurement of electric energy into the Company's system on behalf of the QF, including all metering and telemetering equipment installed for the measurement of such energy regardless of its location in relation to the Point of Delivery.

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1.11 Contract In-Service Date means the date, as specified in Article IV hereof, by which the QF has agreed to achieve Commercial In-Service Status.

1.12 Construction Commencement Date means the date on which work on the concrete foundation for the turbine generator begins and substantial construction activity at the Facility site thereafter continues.

1.13 Control Area means a utility system capable of regulating its generation in order to maintain its interchange schedule with other utility systems and contribute its frequency bias obligation to the interconnection.

1.14 Execution Date means the date on which the Company executes this Agreement.

1.15 Facility means all equipment, as described in this Agreement, used to produce electric energy and, for a cogeneration facility, used to produce useful thermal energy through the sequential use of energy and all equipment required for parallel operation with the interconnected utility.

1.16 FERC means the Federal Energy Regulatory Commission and any successor.

1.17 Florida-Southern Interface means the points of interconnection between the electric Control Areas of (1) Florida Power & Light Company, Florida Power Corporation, Jacksonville Electric Authority, and the City of Tallahassee and (2) Southern Company.

1.18 Force Majeure Event means an event or occurrence that is not reasonably foreseeable by a Party, is beyond its reasonable control, and is not caused by its negligence or lack of due diligence, including, but not limited to, natural disasters, fire, lightning, wind, perils of the sea, flood, explosions, acts of God or the public enemy, strikes, lockouts, vandalism,

blockages, insurrections, riots, war, sabotage, action of a court or public authority, or accidents to or failure of equipment or machinery, including, if applicable, equipment of the Transmission Service Utility.

1.19 FPSC means the Florida Public Service Commission and any successor.

1.20 Import Capability means the capability to import power at the Florida-Southern Interface, giving consideration to the various limitations imposed upon those facilities by the electric systems to which they are directly or indirectly connected.

1.21 Interconnection Costs means the actual costs incurred by the Company for the Company's Interconnection Facilities, including, without limitation, the cost of equipment, engineering, communication and administrative activities.

1.22 Interconnection Costs Offset means the estimated costs included in the Interconnection Costs that the Company would have incurred if it were not purchasing Committed Capacity and electric energy but instead itself generated or purchased from other sources an equivalent amount of Committed Capacity and electric energy and provided normal service to the Facility as if it were a non-generating customer.

1.23 KW means one (1) kilowatt of electric capacity.

1.24 KWH means one (1) kilowatthour of electric energy.

1.25 Minimum On-Peak Capacity Factor means that value which is associated with the unit as it is defined in Appendix C.

1.26 Minimum Total Capacity Factor means that value which is associated with the unit as it is defined in Appendix C.

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1.27 On-Peak Hours means those daily time periods specified in Appendix C.

1.28 On-Peak Capacity Factor means the ratio calculated pursuant to section 8.3 hereof.

1.29 Operational Event of Default means an event or circumstance defined as such in Article XV hereof.

1.30 Performance Adjustment means the value calculated pursuant to Appendix C.

1.31 Point of Delivery means the point(s) where electric energy delivered to the Company pursuant to this Agreement enters the Company's system.

1.32 Point of Metering means the point(s) where electric energy made available for delivery to the Company, subject to adjustment for losses, is measured.

1.33 Point of Ownership means the interconnection point(s) between the Facility interconnected utility.

1.34 Pre-Operational Event of Default means an event or circumstance defined as such in Article XV hereof.

1.35 Security Guaranty means the deposits or other assurances as specified in section 13.1 hereof.

1.36 Qualifying [Small Power Production or Cogeneration] Facility means a facility that meets the requirements defined in FPSC Rule 25-17.080.

1.37 Term means the duration of this Agreement as specified in Article IV hereof.

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1.38 Total Capacity Factor means the ratio calculated pursuant to section 8.4 hereof.

1.39 Transmission Service Agreement means that agreement between the QF and the Transmission Service Utility which meets the requirements of Appendix D.

ARTICLE II: AVAILABILITY

2.1 The availability of this Agreement is subject to:

2.1.1 The available capacity limitations described in Schedule 1 of Appendix C; and

2.1.2 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 KW; and

2.1.3 The provisions of section 2.2.

2.2 This Agreement is available to a QF with a Facility which shall be located south of the latitude of the Company's Central Florida Substation. For a QF with a Facility located north of the latitude of the Company's Central Florida Substation, this Agreement is available provided that (i) by the Contract In-Service Date the Company can make available an amount of Import Capability equal to the diminution of Import Capability caused by the Facility during the Term of the Agreement; and (ii) the QF shall reimburse the Company for such costs incurred by the Company to make available such Import Capability. Such reimbursement shall not be considered as a reduction in the payments made by the Company to the QF for capacity and energy purchased under this Agreement.

ARTICLE III: FACILITY

3.1 The Facility shall be located in Section 20, Township 28 South, Range 23 E. The Facility shall meet all other specifications identified in the Appendices hereto in all material respects and no change in the designated location of the Facility shall be made by the QF. The Facility shall be designed and constructed by the QF or its agents at the QF's sole expense.

3.2 Throughout the Term of this Agreement, the Facility shall be a Qualifying [redacted] Facility.

3.3 Except for Force Majeure Events declared by the Facility's fuel supplier(s) or fuel transporter(s) which comply with the definition of Force Majeure Events as specified in this Agreement and occur after the Contract In-Service Date, the Facility's ability to deliver its Committed Capacity shall not be encumbered by interruptions in its fuel supply.

3.4 The QF shall either (i) arrange for and maintain standby electrical service under a firm tariff; or (ii) maintain the ability to restart and/or continue operations during interruptions of electric service; or (iii) maintain multiple independent sources of generation.

3.5 From the Execution Date through the Contract In-Service Date, the QF shall provide the Company with progress reports on the first day of January, April, July and October which describe the current status of Facility development in such detail as the Company may reasonably require.

ARTICLE IV: TERM AND MILESTONES

4.1 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 month, year], unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions

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of this Agreement. Upon termination or expiration of this Agreement, the Parties shall be relieved of their obligations under this Agreement except for the obligation to pay each other all monies under this Agreement, which obligation shall survive termination or expiration.

4.2 The Parties agree that time is of the essence and that: (i) the QF shall execute the Transmission Service Agreement, if applicable, which shall be approved or accepted for filing by the FERC on or before the first day of [month, year]: N/A (ii) the Construction Commencement Date shall occur on or before the first day of [month, year]: 4/1/94 1/1/96 and (iii) the Facility shall achieve Commercial In-Service Status on or before the first day of [month, year]: ~~4/1/95~~ 1/1/97, which date shall constitute the Contract In-Service Date. These three dates shall not be modified except as follows: upon written request by the QF not more than sixty (60) days after the declaration of a Force Majeure Event by the QF, which event contributes proximately and materially to a delay in the QF's schedule, these three dates each may be extended on a day-for-day basis for each day of delay so caused by the Force Majeure Event; provided, however, that the QF shall specifically identify: (i) each date for which extension is being requested; and (ii) the expected duration of the Force Majeure Event; and provided further, that the maximum extension of any of these three dates shall in no event exceed a total of one hundred and eighty (180) days, irrespective of the nature or number of Force Majeure Events declared by the QF. If the Contract In-Service Date is extended then the Term of the Agreement may be extended for the same number of days.

ARTICLE V: QF OPERATING RESPONSIBILITIES

5.1 During the Term of this Agreement, the QF shall:

5.1.1 Have the sole responsibility to, and shall at its sole expense, operate and maintain the Facility in accordance with all requirements set forth in this Agreement.

5.1.2 Provide the Company prior to October 1 of each calendar year the estimated amounts of electricity to be generated by the Facility and delivered to the Company for each month of the following calendar year, including the time, duration and magnitude of any planned outages or reductions in capacity.

5.1.3 Promptly notify the Company of any changes to the yearly generation and maintenance schedules.

5.1.4 Provide the Company by telephone or facsimile prior to 9:00 A.M. of each day an estimate of the hourly amounts of electric energy to be delivered at the Point of Delivery for the next succeeding day.

5.1.5 Coordinate scheduled outages and maintenance of the Facility with the Company. The QF agrees to recognize and accommodate the Company's system demands and obligations by exercising reasonable efforts to schedule outages and maintenance during such times as are designated by the Company.

5.1.6 Comply with reasonable requirements of the Company regarding day-to-day or hour-by-hour communications with the Company or with the Transmission Service Utility relative to the performance of this Agreement.

5.2 The estimates and schedules provided by the QF under this Article V shall be prepared in good faith, based on conditions known or anticipated at the time such estimates and schedules are made, and shall not be binding upon either Party; provided, however, that the QF shall in no event be relieved of its obligation to deliver Committed Capacity under the terms and conditions of this Agreement.

ARTICLE VI: PURCHASE AND SALE OF CAPACITY AND ENERGY

6.1 Commencing on the Contract In-Service Date, the QF shall commit, sell and arrange for delivery of the Committed Capacity to the Company and the Company agrees to purchase, accept and pay for the Committed Capacity made available to the Company at the Point of Delivery in accordance with the terms and conditions of this Agreement. The QF also shall sell and deliver or arrange for the delivery of the electric energy to the Company and the Company agrees to purchase, accept, and pay for such electric energy as is made available for sale to and received by the Company at the Point of Delivery.

6.2 The Committed Capacity and electric energy made available at the Point of Delivery to the Company shall be ~~xx~~ net of any electric energy used on the QF's side of the Point of Ownership or ( ) simultaneous with any purchases from the interconnected utility. This selection in billing methodology shall not be changed.

6.3 If the Company is unable to receive part or all of the Committed Capacity which the QF has made available for sale to the Company at the Point of Delivery by reason of (i) a Force Majeure Event; or (ii) pursuant to FPSC Rule 25-17.086, notice and procedural requirements of Article XX or FPSC Rule 25-17.086 shall apply and the Company will nevertheless be obligated to make capacity payments which the QF would be otherwise qualified to receive, and to pay for energy actually received, if any. The Company shall not be obligated to pay for energy which the QF would have delivered but for such occurrences and QF shall be entitled to sell or otherwise dispose of such energy in any lawful manner; provided, however, such entitlement to sell shall not be construed to require the Company to transmit such energy to another entity.

6.4 The QF shall not commence initial deliveries of energy to the Point of Delivery without the prior written consent of the Company, which consent shall not be unreasonably withheld. The QF shall provide the Company not less than thirty (30) days written notice before any testing to establish the

Facility's Commercial In-Service Status. Representatives of the Company shall have the right to be present during any such testing.

ARTICLE VII: CAPACITY COMMITMENT

7.1 The Committed Capacity shall be 74,900 KW, unless modified in accordance with this Article VII. The Committed Capacity shall be made available at the Point of Delivery from the Contract In-Service Date through the remaining Term of this Agreement.

7.2 For the period ending one (1) 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 ten percent (10%) 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 KW unless the QF is a solid waste facility.

7.3 A redesignated Committed Capacity pursuant to this Article VII shall be stated to the nearest whole KW and shall be effective only on the commencement of a full billing period.

7.4 The Company shall have the right to require that the QF, not more than once in any twelve (12) month period, re-demonstrate the Commercial In-Service Status of the Facility within sixty (60) days of the demand; provided, however, that such demand shall be coordinated with the QF so that the sixty (60) day period for re-demonstration period avoids, if practical, previously notified periods of planned outages and reduction in capacity pursuant to Article V.

7.5 During a Force Majeure Event declared by the QF, the QF may temporarily redesignate the Committed Capacity for up to twenty-four (24) consecutive months; provided, however, that no more than one such temporary redesignation may be made within any twenty-four (24) month period unless otherwise agreed by the Company in writing. Within three (3) months after such Force Majeure Event is cured, the QF may, on one occasion, without penalty,

designate a new Committed Capacity to apply for the remaining Term. Any temporary or final redesignation of the Committed Capacity pursuant to this section 7.5 must, in the Company's judgment, be directly attributable to the Force Majeure Event and of a magnitude commensurate with the scope of the Force Majeure Event.

ARTICLE VIII: CAPACITY PAYMENTS

8.1 Capacity payments shall not commence before the Contract In-Service Date and until the QF has achieved Commercial In-Service Status.

8.2 Capacity payments shall be based upon the following selections as described in Appendix C.

8.2.1 Payment options:

(X) Value of deferral payments
(X) Early payments
(X) Levelized payments
( ) Early levelized payments

8.2.2 If an early payment option is selected pursuant to section 8.2.1, then early payments shall not commence more than three (3) years prior to the Contract In-Service Date for the unit. For the selected early payment option, the early payments shall commence 2 ( ) years prior to the Contract In-Service Date. (As provided in columns 5, 6, and 7 of page 2, Schedule 3, Appendix C.)

8.3 At the end of each billing month, beginning with the first full month following the Contract In-Service Date, the Company will calculate the rolling average On-Peak Capacity Factor for the most recent twelve (12) month period, including such month, or for the actual number of full months since the Contract In-Service Date if less than twelve (12) months, based on the On-Peak Hours defined in Appendix C. The On-Peak Capacity Factor shall be calculated

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as the electric energy actually received by the Company at the Point of Delivery during the On-Peak Hours of the applicable period divided by the product of the Committed Capacity and the number of On-Peak Hours during the applicable period. In calculating the On-Peak Capacity Factor, the Company shall exclude hours and electric energy delivered by the QF during periods in which: (i) the Company does not or cannot perform its obligations to receive all the electric energy which the QF has made available at the Point of Delivery; or (ii) the QF's payments for electric energy are being calculated pursuant to section 9.1.1 hereof.

8.4 At the end of each billing month, beginning with the first ful month following the Contract In-Service Date, the Company will calculate th rolling average Total Capacity Factor for the most recent twelve (12) mont period, including such month, or for the actual number of full months since th Contract In-Service Date if less than twelve (12) months. The Total Capacit Factor shall be calculated as the electric energy actually received by th Company during the hours of the applicable period divided by the product of the Committed Capacity and the number of hours during the applicable period. In calculating the Total Capacity Factor, the Company shall exclude hours and electric energy delivered by the QF during periods in which: (i) the Company does not or cannot perform its obligations to receive all electric energy which the QF has made available at the Point of Delivery; or (ii) the QF's payments for electric energy are being calculated pursuant to section 9.1.1 hereof.

8.5 The QF will be eligible for a capacity payment in any month that the Total Capacity Factor exceeds the Minimum Total Capacity Factor. The monthly capacity payment shall be equal to the product of (i) the applicable capacity payment rate; (ii) the Committed Capacity; (iii) the Capacity Payment Adjustment; and (iv) the ratio of the total number of hours in the billing period less the number of hours during which the QF is being paid for energy pursuant to section 9.1.1 to the total number of hours in the billing period.

8.6 The Parties recognize that early or early levelized capacity payments are in the nature of "early payment" for a future capacity benefit to

the Company when such payments exceed value of deferral capacity payments. To ensure that the Company will receive a capacity benefit for such difference in capacity payments which have been made, or alternatively, that the QF will repay the amount of such difference in payments received to the extent the capacity benefit has not been conferred, the following provisions will apply:

8.6.1 When the QF is first entitled to a capacity payment, the Company shall establish a Capacity Account. Each month the Capacity Account shall be credited in the amount of the Company's capacity payments made to the QF pursuant to the early or levelized payment options and shall be debited in the amount which the Company would have paid for capacity in the month pursuant to the value of deferral payment option.

8.6.2 The monthly balance in the Capacity Account shall accrue interest at the annual rate of 9.96%, or 0.7944% per month.

8.6.3 The QF shall owe the Company and be liable for the credit balance in the Capacity Account. The Company agrees to notify QF monthly as to the current Capacity Account balance. Prior to receipt of accelerated capacity payments the QF shall in the form of: (i) an unconditional and irrevocable direct pay letter of credit; (ii) surety bond; (iii) other form of acceptable security; or (iv) other promise to repay such amount, (for governmental solid waste), in compliance with rule 25-17.091 F.A.C.; provided that the entity issuing such promise, the form of the promise, and the means of securing payment shall be acceptable to the Company in its sole discretion.

8.6.4 The QF's obligation to pay the credit balance in the Capacity Account shall survive termination or expiration of this Agreement.

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ARTICLE IX: ENERGY PAYMENTS

9.1 For that electric energy received by the Company at the Point of Delivery each month, the Company will pay the QF an amount computed as follows:

9.1.1 Prior to the Contract In-Service Date and for the duration of an Event of Default or a Force Majeure Event declared by the QF prior to a permitted redesignation of the Committed Capacity by the QF, the QF will receive electric energy payments based on the Company's actual avoided energy costs as calculated hourly in accordance with FPSC Rule 25-17.0825; provided, however, that the calculation shall be based on such rule as it may be amended from time to time.

9.1.2 Except as otherwise provided in section 9.1.1 hereof, for each billing month beginning with the first full month following the Contract In-Service Date, the QF will receive electric energy payments calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Reference Plant and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O & M for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the Company's actual avoided energy cost calculated in accordance with section 9.1.1.

9.1.3 Energy payments shall be equal to the sum, over all hours of the month, of the product of each hour's energy cost as determined pursuant to section 9.1.1 hereof or section 9.1.2 hereof, whichever is applicable, and the energy received by the Company at the Point of Delivery, plus the Performance

(as such rule may be amended from

Adjustment, if applicable. The QF ( ) elects (X) does not elect the Performance Adjustment in Appendix C.

9.2 Energy payments pursuant to sections 9.1.1 and 9.1.2 hereof shall be subject to the delivery voltage adjustment value applicable to the Facility and approved from time to time by the FPSC pursuant to Appendix C.

ARTICLE X: CREDITS & CHARGES TO THE QF

10.1 The Company shall bill and the QF shall pay or receive all charges applicable under this Agreement.

10.2 To the extent not otherwise included in the charges under section 10.1 hereof, the Company shall bill and the QF shall pay or receive a monthly charge or credit equal to any taxes, assessments or other impositions for which the Company may be liable or relieved of as a result of its installation of facilities in connection with this Agreement, its purchases of Committed Capacity and electric energy from the QF or any other activity undertaken pursuant to this Agreement. Such debit or credit shall not include any amounts; (i) for which the Company would have been liable or relieved of had it generated or purchased from other sources an equivalent amount of Committed Capacity and electric energy based on normal value of deferral payments; or (ii) which are recovered or later paid by the Company.

10.3 The QF will receive a debit or a credit equal to the difference between the way the system would have operated utilizing the avoided unit and the way the system actually operated with the QF. The value of the emission credits or debits received by the QF will be the value at the time that the credits or debits were incurred by the Company. In order to be eligible for a credit for sulfur dioxide emission reductions the energy provided by the QF must be of equal value in reducing system-wide sulfur dioxide emissions as the energy that would have been provided by the avoided unit.

Heading to be cut per PSC

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ARTICLE XI: METERING

11.1 All electric energy delivered to the Company shall be capable of being measured hourly at the Point of Metering. All electric energy delivered to the Company shall be adjusted for losses from the Point of Metering to the Point of Delivery. Any additional required metering equipment to measure electric energy and the telemetering equipment necessary to transmit such measurements to a location specified by the Company shall be installed, calibrated and maintained by the Company or the Transmission Service Utility, if applicable, and all related costs shall be charged to the QF, pursuant to Appendix A, as part of the Company's Interconnection Facilities.

11.2 All meter testing and related billing corrections, for electricity sold and purchased by the Company, shall conform to the metering and billing guidelines contained in FPSC Rules 25-6.052 through 25-6.060 and FPSC Rule 25-6.103, as they may be amended from time to time, notwithstanding that such guidelines apply to the utility as the seller of electricity.

11.3 The QF shall have the right to install, at its own expense, metering equipment capable of measuring energy on an hourly basis at the Point of Metering. At the request of the QF, the Company shall provide the QF hourly energy cost data from the Company's systems; provided that the QF agrees to reimburse the Company for its cost to provide such data.

ARTICLE XII: PAYMENT PROCEDURE

12.1 Bills shall be issued and payments shall be made monthly to the QF and by the QF in accordance with the following procedures:

12.1.1 The capacity payment, if any, calculated for a given month pursuant to Article VIII hereof shall be added to the electric energy payment, if any, calculated for such month

pursuant to Article IX hereof. The resulting amount, if any, shall be tendered, with cost tabulations showing the basis for payment, by the Company to the QF as a single payment. Such payments to the QF shall be due and payable twenty (20) business days following the date the meters are read.

12.1.2 When any amount is owing from the QF, the Company shall issue a monthly bill to the QF with cost tabulations showing the basis for the charges. All amounts owing to the Company from the QF shall be due and payable twenty (20) business days after the date of the Company's billing statement. Amounts owing to the Company for retail electric service shall be payable in accordance with the provisions of the applicable rate schedule.

12.1.3 At the option of the QF, the Company will provide a net payment or net bill, whichever is applicable, that consolidates amounts owing to the QF with amounts owing to the Company.

12.1.4 Except for charges for retail electric service, any amount due and payable from either Party to the other pursuant to this Agreement that is not received by the due date shall accrue interest from the due date at the rate specified in section 13.2 hereof.

ARTICLE XIII: SECURITY GUARANTIES

13.1 Within sixty (60) days after the Execution Date of this Agreement, the QF shall post a Security Guaranty with the Company equal to $10.00 per KW of Committed Capacity to ensure completion of the Facility in a timely fashion as contemplated by this Agreement. This Agreement shall terminate if the Security Guaranty is not tendered on or before the applicable due date specified herein. The QF shall either: (i) pay the Company a cash deposit in

an amount equal to the Security Guaranty; or (ii) provide the Company an unconditional and irrevocable direct pay letter of credit or (iii) surety bond; or (iv) other promise to pay such amount, (for governmental solid waste facility), in compliance with rule 25-17.091 F.A.C. upon failure of the QF to perform its obligations under this Agreement; provided that the entity issuing such promise, the form of the promise, and the means of securing payment all shall be acceptable to the Company in its sole discretion.

13.2 A Security Guaranty paid to the Company shall accrue interest at a rate equal to the thirty (30) day highest grade commercial paper rate as published in the Wall Street Journal on the first business day of each month. Such interest shall be compounded monthly.

13.3 If the Facility achieves Commercial In-Service Status on or before the Contract In-Service Date, the Company shall refund to the QF any cash Security Guaranty paid to the Company and accrued interest within thirty (30) days thereafter or shall cancel any other form of Security Guaranty which the Company has accepted in lieu of a cash deposit. If this Agreement is terminated pursuant to section 15.2, the QF shall immediately forfeit and the Company, in lieu of any other remedies, shall retain the monies associated with any Security Guaranty made by the QF pursuant to section 13.1 and the interest, if applicable, pursuant to section 13.2.

ARTICLE XIV: REPRESENTATIONS, WARRANTIES AND COVENANTS

14.1 The QF makes the following additional representations, warranties and covenants as the basis for the benefits and obligations contained in this Agreement:

14.1.1 The QF represents and warrants that it is a corporation, partnership or other business entity duly organized, validly existing and in good standing under the laws

of the State/Commonwealth of Delaware and is qualified to do business under the laws of the State of Florida.

14.1.2 The QF represents, covenants and warrants that, to the best of the QF's knowledge, throughout the Term of this Agreement the QF will be in compliance with, or will have acted in good faith and used its best efforts to be in compliance with, all laws, judicial and administrative orders, rules and regulations, with respect to the ownership and operation of the Facility, including but not limited to applicable certificates, licenses, permits and governmental approvals; environmental impact analyses, and, if applicable, the mitigation of environmental impacts.

14.1.3 The QF represents and warrants that it is not prohibited by any law or contract from entering into this Agreement and discharging and performing all covenants and obligations on its part to be performed pursuant to this Agreement.

14.1.4 The QF represents and warrants that there is no pending or threatened action or proceeding affecting the QF before any court, governmental agency or arbitrator that could reasonably be expected to affect materially and adversely the ability of the QF to perform its obligations hereunder, or which purports to affect the legality, validity or enforceability of this Agreement.

14.2 All representations and warranties made by the QF in or under this Agreement shall survive the execution and delivery of this Agreement and any action taken pursuant hereto.

ARTICLE XV: EVENTS OF DEFAULT; REMEDIES

15.1 PRE-OPERATIONAL EVENTS OF DEFAULT

Any one or more of the following events occurring before the Contract In-Service Date for any reason, except events caused by the Company, shall constitute a Pre-Operational Event of Default and shall give the Company the right, without limitation, to exercise the remedies specified under section 15.2 hereof:

15.1.1 The QF, without a prior assignment permitted pursuant to Article XXII hereof, becomes insolvent, becomes subject to bankruptcy or receivership proceedings, or dissolves as a legal business entity.

15.1.2 Any representation or warranty furnished by the QF to the Company is false or misleading in any material respect when made and the QF fails to conform to said representation or warranty within sixty (60) days after a demand by the Company to do so.

15.1.3 The QF has not entered into the Transmission Service Agreement, if applicable, which has been approved or accepted for filing by the FERC on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV.

15.1.4 The Construction Commencement Date has not occurred on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV.

15.1.5 The QF fails to diligently pursue construction of the Facility after the Construction Commencement Date.

15.1.6 The Facility fails to achieve Commercial In-Service Status on or before the Contract In-Service Date.

15.1.7 The QF fails to comply with any other material terms and conditions of this Agreement and fails to conform to said term and condition within sixty (60) days after a demand by the Company to do so.

15.2 REMEDIES FOR PRE-OPERATIONAL EVENTS OF DEFAULT

For any Pre-Operational Event of Default specified under section 15.1 hereof, the Company may terminate this Agreement and retain the Security Guaranty pursuant to section 13.3.

15.3 OPERATIONAL EVENTS OF DEFAULT

Any one or more of the following events except events caused by Force Majeure Events unless otherwise stated, occurring on or after the Contract In-Service Date shall constitute an Operational Event of Default by the QF and shall give the Company the right, without limitation, to exercise the remedies under section 15.4 hereof:

15.3.1 The QF fails upon request by the Company pursuant to section 7.4 hereof to re-demonstrate the Facility's Commercial In-Service Status to the satisfaction of the Company.

15.3.2 The QF fails for any reason, including Force Majeure Events, to qualify for capacity payments under Article VIII hereof for any consecutive twenty-four (24) month period.

15.3.3 The QF fails to perform or comply with any other material terms and conditions of this Agreement and fails to

conform to said term and condition within sixty (60) days after a demand by the Company to do so.

15.3.4 The QF, without a prior assignment permitted pursuant to Article XXII hereof, becomes insolvent, becomes subject to bankruptcy or receivership proceedings, or dissolves as a legal business entity.

15.4 REMEDIES FOR OPERATIONAL EVENTS OF DEFAULT

For any Operational Event of Default specified under section 15.3 hereof, the Company may, without an election of remedies to the exclusion of other remedies, take any of the following actions:

15.4.1 Allow the QF a reasonable opportunity to cure the Operational Event of Default and suspend its capacity payment obligations upon written notice whereupon the QF shall be entitled only to energy payments calculated pursuant to section 9.1.1 hereof. Thereafter, if the Operational Event of Default is cured: (i) capacity payments shall resume and subsequent energy payments shall be paid pursuant to section 9.1.2 hereof; and (ii) the On-Peak Capacity Factor and the Total Capacity Factor shall be calculated on the assumption that the first full month after the Operational Event of Default is cured is the first month that the performance criteria are imposed.

15.4.2 Terminate this Agreement.

15.4.3 Exercise all remedies available at law or in equity.

ARTICLE XVI: PERMITS

The QF hereby agrees to seek to obtain, at its sole expense, any and all governmental permits, certificates, or other authorization the QF is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement. The Company hereby agrees, at the QF's expense, to seek to obtain any and all governmental permits, certificates, or other authorization the Company is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement.

ARTICLE XVII: INDEMNIFICATION

The QF agrees to indemnify and save harmless the Company and its employees, officers, and directors against any and all liability, loss, damage, costs or expense which the Company, its employees, officers and directors may hereafter incur, suffer or be required to pay by reason of negligence on the part of the QF in performing its obligations pursuant to this Agreement or the QF's failure to abide by the provisions of this Agreement. The Company agrees to indemnify and save harmless the QF and its employees, officers, and directors against any and all liability, loss, damage, cost or expense which the QF, its employees, officers, and directors may hereafter incur, suffer, or be required to pay by reason of negligence on the part of the Company in performing its obligations pursuant to this Agreement or the Company's failure to abide by the provisions of this Agreement. The QF agrees to include the Company as an additional insured in any liability insurance policy or policies the QF obtains to protect the QF's interests with respect to the QF's indemnity and hold harmless assurance to the Company contained in Article XVII.

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ARTICLE XVIII: EXCLUSION OF INCIDENTAL, CONSEQUENTIAL, AND INDIRECT DAMAGES

Neither Party shall be liable to the other for incidental, consequential or indirect damages, including, but not limited to, the cost of replacement capacity and energy, whether arising in contract, tort, or otherwise.

ARTICLE XIX: INSURANCE

The provisions of this Article does not apply to a QF whose Facility is not directly interconnected with the Company's system.

19.1 In addition to other insurance carried by the QF in accordance with the Agreement, the QF shall deliver to the Company, at least fifteen (15) days prior to the commencement of any work on the Company's Interconnection Facilities, a certificate of insurance certifying the QF's coverage under a liability insurance policy issued by a reputable insurance company authorized to do business in the State of Florida naming the QF as a named insured and the Company as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering liabilities arising out of the interconnection with the Facility, or caused by the operation of the Facility or by the QF's failure to maintain the Facility in satisfactory and safe operating condition.

19.2 The insurance policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than $1,000,000 for each occurrence which can be exceeded by the QF. The required insurance policy shall be endorsed with a provision requiring the insurance company to notify the Company at least thirty (30) days prior the effective date of any cancellation or material change in the policy.

19.3 The QF shall pay all premiums and other charges due on said insurance policy and shall keep said policy in force during the entire period of interconnection with the Company.

ARTICLE XX: FORCE MAJEURE

20.1 If either Party because of Force Majeure Event is rendered wholly or partly unable to perform its obligations under this Agreement, other than the obligation of that Party to make payments of money, that Party shall, except as otherwise provided in this Agreement, be excused from whatever performance is affected by the Force Majeure Event to the extent so affected, provided that:

20.1.1 The non-performing Party, as soon as possible after it becomes aware of its inability to perform, shall declare a Force Majeure Event and give the other Party written notice of the particulars of the occurrence(s), including without limitation, the nature, cause, and date and time of commencement of the occurrence(s), the anticipated scope and duration of any delay, and any date(s) that may be affected thereby.

20.1.2 The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.

20.1.3 Obligations of either Party which arose before the occurrence causing the suspension of performance are not excused as a result of the occurrence.

20.1.4 The non-performing Party uses its best efforts to remedy its inability to perform with all reasonable dispatch;

provided, however, that nothing contained herein shall require the settlement of any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the affected Party, are contrary to its interests. It is understood and agreed that the settlement of strikes, walkouts, lockouts or other labor disputes shall be entirely within the discretion of the affected Party.

20.1.5 When the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall so notify the other Party in writing.

20.2 Unless and until the QF temporarily redesignates the Committed Capacity pursuant to section 7.5 hereof, no capacity payment obligation pursuant to Article VII hereof shall accrue during any period of a declared Force Majeure Event pursuant to section 20.1.1 through 20.1.5. During any such period, the Company will pay for such energy as may be received and accepted pursuant to section 9.1.1 hereof.

20.3 If the QF temporarily or permanently redesignates the Committed Capacity pursuant to section 7.5 hereof, then capacity payment obligations shall thereafter resume at the applicable redesignated level and the Company will resume energy payments pursuant to section 9.1.2 hereof.

ARTICLE XXI: FACILITY RESPONSIBILITY AND ACCESS

21.1 Representatives of the Company shall at all reasonable times have access to the Facility and to property owned or controlled by the QF for the purpose of inspecting, testing, and obtaining other technical information deemed necessary by the Company in connection with this Agreement. Any inspections or testing by the Company shall not relieve the QF of its obligation to maintain the Facility.

21.2 In no event shall any Company statement, representation, or lack thereof, either express or implied, relieve the QF of its exclusive responsibility for the Facility and its exclusive obligations, if applicable, with the Transmission Service Utility. Any Company inspection of property or equipment owned or controlled by the QF or the Transmission Service Utility, or any Company review of or consent to the QF's or the Transmission Service Utility's plans, shall not be construed as endorsing the design, fitness or operation of the Facility or the Transmission Service Utility's equipment nor as a warranty or guarantee.

21.3 The QF shall reactivate the Facility and shall arrange for the Transmission Service Utility's delivery of electric energy to the Point of Delivery at its own expense if either the Facility or the equipment of the Transmission Service Utility is rendered inoperable due to actions of the QF or its agents, or a Force Majeure Event. The Company shall reactivate the Company's Interconnection Facilities at its own expense if the same are rendered inoperable due to actions of the Company or its agents, or a Force Majeure Event.

ARTICLE XXII: SUCCESSORS AND ASSIGNS

Neither Party shall have the right to assign its obligations, benefits, and duties without the consent of the other Party, which shall not be unreasonably withheld or delayed.

ARTICLE XXIII: DISCLAIMER

In executing this Agreement, the Company does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with the QF or any assignee of this Agreement, nor does it create any third party beneficiary rights. Nothing contained in this Agreement shall be construed to create an association, trust, partnership, or joint venture between the Parties. No payment by the

Company to the QF for energy or capacity shall be construed as payment by the Company for the acquisition of any ownership or property interest in the Facility.

ARTICLE XXIV: WAIVERS

The failure of either Party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a general waiver of any such provision or the relinquishment of any such right, but the same shall continue and remain in full force and effect, except with respect to the particular instance or instances.

ARTICLE XXV: COMPLETE AGREEMENT

The terms and provisions contained in this Agreement constitute the entire agreement between the Parties and shall supersede all previous communications, representations, or agreements, either verbal or written, between the Parties with respect to the Facility and this Agreement.

ARTICLE XXVI: COUNTERPARTS

This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

ARTICLE XXVII: COMMUNICATIONS

27.1 Any non-emergency or operational notice, request, consent, payment or other communication made pursuant to this Agreement to be given by one Party to the other Party shall be in writing, either personally delivered or mailed to the representative of said other Party designated in this section,

and shall be deemed to be given when received. Notices and other communications by the Company to the QF shall be addressed to:

Panda-Kathleen L.P.
4100 Spring Valley
Suite 1001
Dallas, TX 75244

Notices to the Company shall be addressed to:

Florida Power Corporation
P. O. Box 14042
St. Petersburg, FL 33733

27.2 Communications made for emergency or operational reasons may be made to the following persons and shall thereafter be confirmed promptly in writing.

To The Company: System Dispatcher on Duty
Title: System Dispatcher
Telephone: (813)866-5888
Telecopier: (813)384-7865

To The QF: Name Hans R. van Kuilenburg
Title: President
Telephone: (214) 980-7159
Telecopier: (214) 980-6815

27.3 Either Party may change its representatives in sections 28.1 or 28.2 by prior written notice to the other Party.

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27.4 The Parties' representatives designated above shall have full authority to act for their respective principals in all technical matters relating to the performance of this Agreement. However, they shall not have the authority to amend, modify, or waive any provision of this Agreement.

ARTICLE XXVIII: SECTION HEADINGS FOR CONVENIENCE

Article or section headings appearing in this Agreement are inserted for convenience only and shall not be construed as interpretations of text.

ARTICLE XXIX: GOVERNING LAW

The interpretation and performance of this Agreement and each of its provisions shall be governed by the laws of the State of Florida.

IN WITNESS WHEREOF, the QF and the Company have caused this Agreement to be executed by their duly authorized representatives on the day and year first above written.

The Qualifying Facility:
Panda-Kathleen L.P.

By: PANDA-KATHLEEN CORPORATION

Title: Robert W. Carter
Robert Carter, Chairman

Date: 10-4-91

ATTEST:

The Company:

By:

Title: PETER DAGOSTINO
VICE-PRESIDENT

Date: 11-25-91

ATTEST:

FLORIDA POWER CORP.
LEGAL DEPT.
APPROVED
Date 11/25/91
By

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

APPENDIX A

INTERCONNECTION SCHEDULING AND COST RESPONSIBILITY

1.0 Purpose.

This appendix provides the procedures for the scheduling of construction for the Company's Interconnection Facilities as well as the cost responsibility of the QF for the payment of Interconnection Costs. This appendix applies to all QF's, whether or not their Facility will be directly interconnected with the Company's system. All requirements contained herein shall apply in addition to and not in lieu of the provisions of the Agreement.

2.0 Submission of Plans and Development of Interconnection Schedules and Cost Estimates.

2.1 No later than sixty (60) days after the Execution Date, the QF shall specify the date it desires the Company's Interconnection Facilities to be available for receipt of the electric energy and shall provide a preliminary written description of the Facility and, if applicable, the QF's anticipated arrangements with the Transmission Service Utility, including without limitation, a one-line diagram, anticipated Facility site data and any additional facilities anticipated to be needed by the Transmission Service Utility. Based upon the information provided, the Company shall develop preliminary written Interconnection Costs and scheduling estimates for the Company's Interconnection Facilities within sixty (60) days after the information is provided. The schedule developed hereunder will indicate when the QF's final electrical plans must be submitted to the Company pursuant to section 2.2 hereof.

2.2 The QF shall submit the Facility's final electrical plans and all revisions to the information previously submitted under section 2.1 hereof to the Company no later than the date specified under section 2.1 hereof, unless such date is modified in the Company's reasonable discretion. Based upon the information provided and within sixty (60) days after the information is provided, the Company shall update its written Interconnection Costs and schedule estimates, provide the estimated time period required for construction of the Company's Interconnection Facilities, and specify the date by which the Company must receive notice from the QF to initiate construction, which date shall, to the extent practical, be consistent with the QF's schedule for delivery of energy into the Company's system. The final electrical plans shall include the following information, unless all or a portion of such information is waived by the Company in its discretion:

a. Physical layout drawings, including dimensions;
b. All associated equipment specifications and characteristics including technical parameters, ratings, basic impulse levels, electrical main one-line diagrams, schematic diagrams, system protections, frequency, voltage, current and interconnection distance;
c. Functional and logic diagrams, control and meter diagrams, conductor sizes and length, and any other relevant data which might be necessary to understand the Facility's proposed system and to be able to make a coordinated system;
d. Power requirements in watts and vars;
e. Expected radio-noise, harmonic generation and telephone interference factor;
f. Synchronizing methods; and
g. Facility operating/instruction manuals.
h. If applicable, a detailed description of the facilities to be utilized by the Transmission Service Utility to deliver energy to the Point of Delivery.

2.3 Any subsequent change in the final electrical plans shall be submitted to the Company and it is understood and agreed that any such changes may affect the Company's schedules and Interconnection Costs as previously estimated.

2.4 The QF shall pay the actual costs incurred by the Company to develop all estimates pursuant to section 2.1 and 2.2 hereof and to evaluate any changes proposed by the QF under section 2.3 hereof, as such costs are billed pursuant to Article XII of the Agreement. At the Company's option, advance payment for these cost estimates may be required, in which event the Company will issue an adjusted bill reflecting actual costs following completion of the cost estimates.

2.5 The Parties agree that any cost or scheduling estimates provided by the Company hereunder shall be prepared in good faith but shall not be binding. The Company may modify such schedules as necessary to accommodate contingencies that affect the Company's ability to initiate or complete the Company's Interconnection Facilities and actual costs will be used as the basis for all final charges hereunder.

3.0 Payment Obligations for Interconnection Costs.

3.1 The Company shall have no obligation to initiate construction of the Company's Interconnection Facilities prior to a written notice from the QF agreeing to the Company's interconnection design requirements and notifying the Company to initiate its activities to construct the Company's Interconnection Facilities; provided, however, that such notice shall be received not later than the date specified by the Company under section 2.2 hereof. The QF shall be liable for and agrees to pay all Interconnection Costs incurred by the Company on or after the specified date for initiation of construction.

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3.2 The QF agrees to pay all of the Company's actual Interconnection Costs as such costs are incurred and billed in accordance with Article XII of the Agreement. Such amounts shall be billed pursuant to section 3.2.1 if the QF elects the payment option permitted by FPSC Rule 25-17.087(4). Otherwise the QF shall be billed pursuant to section 3.2.2.

3.2.1 Upon a showing of credit worthiness, the QF shall have the option of making monthly installment payments for Interconnection Costs over a period no longer than thirty six (36) months. The period selected is 36 months. Principal payments will be based on the estimated Interconnection Costs less the Interconnection Costs Offset, divided by the repayment period in months to determine the monthly principal payment. Payments will be invoiced in the first month following first incurrence of Interconnection Costs by the Company. Invoices to the QF will include principal payments plus interest on the unpaid balance, if any, calculated at a rate equal to the thirty (30) day highest grade commercial paper rate as published in the Wall Street Journal on the first business day of each month. The final payment or payments will be adjusted to cause the sum of principal payments to equal the actual Interconnection Costs.

3.2.2 When Interconnection Costs are incurred by the Company, such costs will be billed to the QF to the extent that they exceed the Interconnection Costs Offset.

3.3 If the QF notifies the Company in writing to interrupt or cease interconnection work at any time and for any reason, the QF shall nonetheless be obligated to pay the Company for all costs incurred in connection with the Company's Interconnection Facilities through the date of such notification and for all additional costs for which the Company is responsible pursuant to binding contracts with third parties.

4.0 Payment Obligations for Operation, Maintenance and Repair of the Company's Interconnection Facilities

The QF also agrees to pay monthly through the Term of the Agreement for all costs associated with the operation, maintenance and repair of the Company's Interconnection Facilities, based on a percentage of the total Interconnection Costs net of the Interconnection Costs Offset, as set forth in Appendix C.

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APPENDIX B

PARALLEL OPERATING PROCEDURES

1.0 Purpose

This appendix provides general operating, testing, and inspection procedures intended to promote the safe parallel operation of the Facility with the Company's system. All requirements contained herein shall apply in addition to and not in lieu of the provisions of the Agreement.

2.0 Schematic Diagram

Exhibit B-1, attached hereto and made a part hereof, is a schematic diagram showing the major circuit components connecting the Facility and the Company's [substation] and showing the Point of Delivery and the Point of Metering and/or Point of Ownership, if different. All switch number designations initially left blank on Exhibit B-1 will be inserted by the Company on or before the date on which the Facility first operates in parallel with the Company's system.

3.0 Operating Standards

3.1 The QF and the Company will independently provide for the safe operation of their respective facilities, including periods during which the other Party's facilities are unexpectedly energized or de-energized.

3.2 The QF shall reduce, curtail, or interrupt electrical generation or take other appropriate action for so long as it is reasonably necessary, which in the judgment of the QF or the Company may be necessary to

operate and maintain a part of either Party's system, to address, if applicable, an emergency on either Party's system.

3.3 As provided in the Agreement, the QF shall not operate the Facility's electric generation equipment in parallel with the Company's system without prior written consent of the Company. Such consent shall not be given until the QF has satisfied all criteria under the Agreement and has:

(i) submitted to and received consent from the Company of its as-built electrical specifications;

(ii) demonstrated to the Company's satisfaction that the Facility is in compliance with the insurance requirements of the Agreement; and

(iii) demonstrated to the Company's satisfaction that the Facility is in compliance with all regulations, rules, orders, or decisions of any governmental or regulatory authority having jurisdiction over the Facility's generating equipment or the operation of such equipment.

3.4 After any approved Facility modifications are completed, the QF shall not resume parallel operation with the Company's system until the QF has demonstrated that it is in compliance with all the requirements of section 4.2 hereof.

3.5 The QF shall be responsible for coordination and synchronization of the Facility's equipment with the Company's electrical system, and assumes all responsibility for damage that may occur from improper coordination or synchronization of the generator with the utility's system.

3.6 The Company shall have the right to open and lock, with a Company padlock, manual disconnect switch numbers(s)_____ and isolate the Facility's generation system without prior notice to the QF. To the extend

practicable, however, prior notice shall be given. Any of the following conditions shall be cause for disconnection:

1. Company system emergencies and/or maintenance repair and construction requirements;
2. hazardous conditions existing on the Facility's generating or protective equipment as determined by the Company;
3. adverse effects of the Facility's generation to the Company's other electric consumers and/or system as determined by the Company;
4. failure of the QF to maintain any required insurance; or
5. failure of the QF to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the Facility's electric generating equipment or the operation of such equipment.

3.7 The Facility's electric generation equipment shall not be operated in parallel with the Company's system when auxiliary power is being provided from a source other than the Facility's electric generation equipment.

3.8 Neither Party shall operate switching devices owned by the other Party, except that the Company may open the manual disconnect switch(s) number(s)_____ owned by the QF pursuant to section 3.6 hereof.

3.9 Should one Party desire to change the operating position of a switching device owned by the other Party, the following procedures shall be followed:

(i) The Party requesting the switching change shall orally agree with an authorized representative of the other Party regarding which switch or switches are to be operated, the requested position of each switching device, and when each switch is to be operated.

(ii) The Party performing the requested switching shall notify the requesting Party when the requested switching change has been completed.

(iii) Neither Party shall rely solely on the other party's switching device to provide electrical isolation necessary for personnel safety. Each Party will perform work on its side of the Point of Ownership as if its facilities are energized or test for voltage and install grounds prior to beginning work.

(iv) Each Party shall be responsible for returning its facilities to approved operating conditions, including removal of grounds, prior to the Company authorizing the restoration of parallel operation.

(v) The Company shall install one or more red tags similar to the red tag shown in Exhibit B-2 attached hereto and made a part hereof, on all open switches. Only Company personnel on the Company's switching and tagging list shall remove and/or close any switch bearing a Company red tag under any circumstances.

3.10 Should any essential protective equipment fail or be removed from service for maintenance or construction requirements, the Facility's electric generation equipment shall be disconnected from the Company's system. To accomplish this disconnection, the QF shall either (i) open the generator breaker number(s) _____; or (ii) open the manual disconnect switch number(s) _____.

3.10.1 If the QF elects option (i), the breaker assembly shall be opened and drawn out by QF personnel. As promptly as practicable, Company personnel shall install a Company padlock and a red tag on the breaker enclosure door.

3.10.2 If the QF elects option (ii), the switch shall be opened by QF personnel or by Company personnel and, as promptly as practicable, Company personnel will install a Company padlock and a red tag.

4.0 Inspection and Testing

4.1 The inspection and testing of all electrical relays governing the operation of the generator's circuit breaker shall be performed in accordance with manufacturer's recommendations, but in no case less than once every 12 months. This inspection and testing shall include, but not be limited to, the following:

(i) electrical checks on all relays and verification of settings electrically;

(ii) cleaning of all contacts;

(iii) complete testing of tripping mechanisms for correct operating sequence and proper time intervals; and

(iv) visual inspection of the general condition of the relays.

4.2 In the event that any essential relay or protective equipment is found to be inoperative or in need of repair, the QF shall notify the Company of the problem and cease parallel operation of the generator until repairs or replacements have been made. The QF shall be responsible for maintaining records of all inspections and repairs and shall make said records available to the Company upon request.

4.3 The Company shall have the right to operate and test any of the Facility's protective equipment to assure accuracy and proper operation. This testing shall not relieve the QF of the responsibility to assure proper operation of its equipment and to perform routine maintenance and testing.

5.0 Notification

5.1 Communications made for emergency or operational reasons may be made to the following persons and shall thereafter be confirmed promptly in writing:

To The Company: System Dispatcher on Duty
Title: System Dispatcher
Telephone: (813)866-5888
Telecopier: (813)384-7865

To The QF: Name Panda-Kathleen L.P.
Title: Robert Carter Chairman
Telephone: (214)980-7159
Telecopier: (2140)980-6815

5.2 Each Party shall provide as much notification as practicable to the other Party regarding planned outages of equipment that may affect the other Party's operation.

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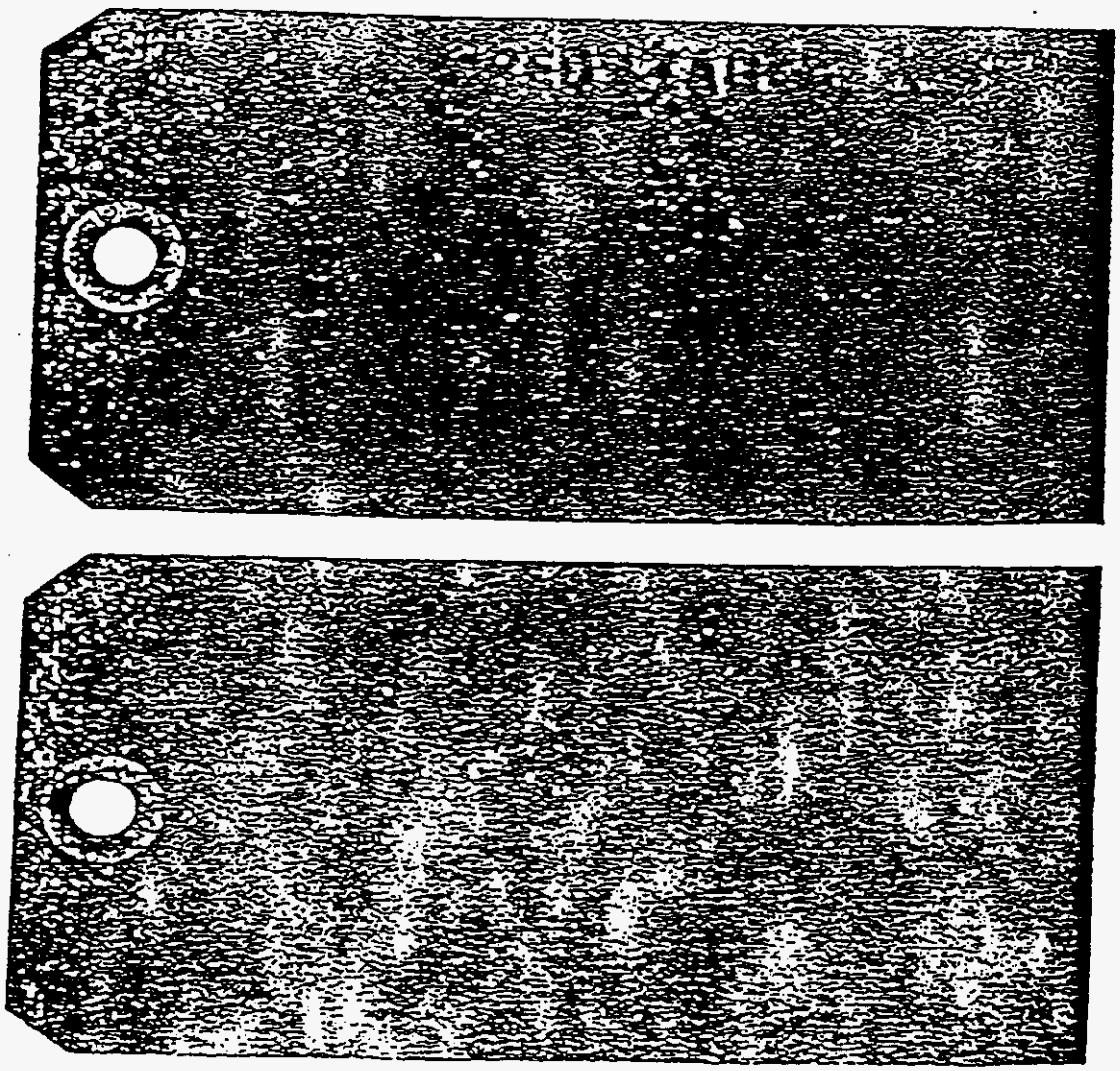
EFFECTIVE: September 20, 1991

EXHIBIT B-1

Exhibit B-1 will be unique for each Facility and must be complete prior to parallel operation with the Company.

EXHIBIT B-2

A switch or switch point (i.e., elbow, open jumpers, etc.) with a red tag attached is open and shall not be closed under any circumstances. After a switch has been red tagged, that switch cannot be closed until the red tag is removed. Red tags can only be removed when authorized by a specific written order.



ISSUED BY: S. F. Nixon, Jr., Director Rate Department
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APPENDIX C
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SCHEDULE 1
SUMMARY OF STANDARD OFFER AVAILABILITY

DESIGNATED AVOIDED UNIT	AVAILABLE CAPACITY MW	PAYMENT OPTION STARTING			
		NORMAL	EARLY	LEVELIZED	EARLY LEVELIZED
1997 Combustion Turbine	80	1997	1994-1996	1997	1994-1996

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SCHEDULE 2
GENERAL INFORMATION FOR 1997 COMBUSTION TURBINE UNIT

GENERAL
YEAR OF AVOIDED UNIT = 1997
AVOIDED UNIT REFERENCE PLANT = BARTOW CT UNITS

INVESTMENT DATA
TOTAL COST, DIRECT + AFUDC, IN 1/91 $'s = $398.88/KW
ANNUAL ESCALATION RATE OF PLANT COSTS = 5.10%
ECONOMIC PLANT LIFE = 20 YEARS

OPERATING DATA
AVOIDED UNIT FIXED O&M COSTS IN 1/91 $'s = $6.18/KW/YR
AVOIDED UNIT VARIABLE O&M COSTS IN 1/91 $'s = $1.83/KWH
ANNUAL ESCALATION RATE OF O&M COSTS = 5.10%
MINIMUM ON-PEAK CAPACITY FACTOR = 90.0%
MINIMUM TOTAL CAPACITY FACTOR = 42.0%
SYSTEM VARIABLE O&M COSTS IN 1/91 $'s = $0.673/KWH
AVOIDED UNIT HEAT RATE = 11,610 BTU/KWH
TYPE OF FUEL = DISTILLATE

ON-PEAK HOURS
(1) FOR THE CALENDAR MONTHS OF NOVEMBER THROUGH MARCH,
ALL DAYS: 6:00 A.M. TO 12:00 NOON, AND
5:00 P.M. TO 10:00 P.M.
(2) FOR THE CALENDAR MONTHS OF APRIL THROUGH OCTOBER,
ALL DAYS: 11:00 A.M. TO 10:00 P.M.

FINANCIAL DATA
K FACTOR (MID YEAR) = 1.5259
UTILITY DISCOUNT RATE = 9.96%

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SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)
	CAPACITY PAYMENT - $/KW/MONTH		
CONTRACT YEAR	NORMAL PAYMENT OPTION		
	O&M	CAPITAL	TOTAL
1997	0.71	5.08	5.79
1998	0.75	5.33	6.08
1999	0.79	5.60	6.39
2000	0.83	5.89	6.72
2001	0.87	6.19	7.06
2002	0.91	6.51	7.42
2003	0.96	6.84	7.80
2004	1.01	7.19	8.20
2005	1.06	7.56	8.62
2006	1.11	7.95	9.06
2007	1.17	8.35	9.52
2008	1.23	8.78	10.01
2009	1.29	9.23	10.52
2010	1.36	9.69	11.05
2011	1.43	10.19	11.62
2012	1.50	10.71	12.21
2013	1.58	11.25	12.83
2014	1.66	11.83	13.49
2015	1.74	12.43	14.17
2016	1.83	13.07	14.90

NOTE:Above payments calculated in accordance with formulas set forth in FPSC Rule 25-17.0832(5). Payment shall be adjusted by multiplying factor for On-Peak Capacity Factor determined in Schedule 8.

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EFFECTIVE DATE: September 20, 1991

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SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)

CAPACITY PAYMENT - $/KW/MONTH

CONTRACT YEAR	EARLY PAYMENT OPTION STARTING 1/96 O&M	STARTING 1/96 CAPITAL	STARTING 1/96 TOTAL	STARTING 1/95 O&M	STARTING 1/95 CAPITAL	STARTING 1/95 TOTAL	STARTING 1/94 O&M	STARTING 1/94 CAPITAL	STARTING 1/94 TOTAL
1994	-	-	-	-	-	-	0.49	3.52	4.01
1995	-	-	-	0.56	3.96	4.52	0.52	3.69	4.21
1996	0.63	4.48	5.11	0.58	4.17	4.75	0.54	3.89	4.43
1997	0.66	4.71	5.37	0.61	4.39	5.00	0.57	4.08	4.65
1998	0.69	4.96	5.65	0.65	4.60	5.25	0.60	4.29	4.89
1999	0.73	5.20	5.93	0.68	4.84	5.52	0.63	4.51	5.14
2000	0.77	5.47	6.24	0.71	5.09	5.80	0.66	4.74	5.40
2001	0.81	5.74	6.55	0.75	5.34	6.09	0.70	4.98	5.68
2002	0.85	6.04	6.89	0.79	5.62	6.41	0.73	5.24	5.97
2003	0.89	6.35	7.24	0.83	5.90	6.73	0.77	5.50	6.27
2004	0.94	6.67	7.61	0.87	6.21	7.08	0.81	5.78	6.59
2005	0.98	7.02	8.00	0.91	6.53	7.44	0.85	6.08	6.93
2006	1.03	7.38	8.41	0.96	6.86	7.82	0.90	6.38	7.28
2007	1.09	7.74	8.83	1.01	7.20	8.21	0.94	6.71	7.65
2008	1.14	8.14	9.28	1.06	7.57	8.63	0.99	7.05	8.04
2009	1.20	8.56	9.76	1.12	7.95	9.07	1.04	7.41	8.45
2010	1.26	9.00	10.26	1.17	8.37	9.54	1.09	7.79	8.88
2011	1.33	9.45	10.78	1.23	8.79	10.02	1.15	8.19	9.34
2012	1.39	9.94	11.33	1.30	9.23	10.53	1.21	8.60	9.81
2013	1.46	10.45	11.91	1.36	9.71	11.07	1.27	9.04	10.31
2014	1.54	10.97	12.51	1.43	10.21	11.64	1.33	9.51	10.84
2015	1.62	11.53	13.15	1.50	10.73	12.23	1.40	9.99	11.39
2016	1.70	12.12	13.82	1.58	11.27	12.85	1.47	10.50	11.97

NOTE: Above payments calculated in accordance with formulas set forth in FPSC Rule 25-17.0832(5). Payment shall be adjusted by multiplying factor for On-Peak Capacity Factor determined in Schedule 7.

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SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)
	CAPACITY PAYMENT - $/KW/MONTH		
CONTRACT YEAR	LEVELIZED PAYMENT OPTION O&M	CAPITAL	TOTAL
1997	0.71	7.28	7.99
1998	0.75	7.28	8.03
1999	0.79	7.28	8.07
2000	0.83	7.28	8.11
2001	0.87	7.28	8.15
2002	0.91	7.28	8.19
2003	0.96	7.28	8.24
2004	1.01	7.28	8.29
2005	1.06	7.28	8.34
2006	1.11	7.28	8.39
2007	1.17	7.28	8.45
2008	1.23	7.28	8.51
2009	1.29	7.28	8.57
2010	1.36	7.28	8.64
2011	1.43	7.28	8.71
2012	1.50	7.28	8.78
2013	1.58	7.28	8.86
2014	1.66	7.28	8.94
2015	1.74	7.28	9.02
2016	1.83	7.28	9.11

NOTE: Above payments calculated in accordance with formulas set forth in FPSC Rule 25-17.0832(5). Payment shall be adjusted by multiplying factor for On-Peak Capacity Factor determined in Schedule 7.

ISSUED BY: S. F. Nixon, Jr., Director Rate Department

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RATES

SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
	CAPACITY PAYMENT - $/KW/MONTH								
	EARLY LEVELIZED PAYMENT OPTION - $/KW/MONTH								
CONTRACT	STARTING 1/96			STARTING 1/95			STARTING 1/96		
YEAR	O&M	CAPITAL	TOTAL	O&M	CAPITAL	TOTAL	O&M	CAPITAL	TOTAL
1994	-	-	-	-	-	-	0.49	5.25	5.74
1995	-	-	-	0.56	5.84	6.40	0.52	5.25	5.77
1996	0.63	6.52	7.15	0.58	5.84	6.42	0.54	5.25	5.79
1997	0.66	6.52	7.18	0.61	5.84	6.45	0.57	5.25	5.82
1998	0.69	6.52	7.21	0.65	5.84	6.49	0.60	5.25	5.85
1999	0.73	6.52	7.25	0.68	5.84	6.52	0.63	5.25	5.88
2000	0.77	6.52	7.29	0.71	5.84	6.55	0.66	5.25	5.91
2001	0.81	6.52	7.33	0.75	5.84	6.59	0.70	5.25	5.95
2002	0.85	6.52	7.37	0.79	5.84	6.63	0.73	5.25	5.98
2003	0.89	6.52	7.41	0.83	5.84	6.67	0.77	5.25	6.02
2004	0.94	6.52	7.46	0.87	5.84	6.71	0.81	5.25	6.06
2005	0.98	6.52	7.50	0.91	5.84	6.75	0.85	5.25	6.10
2006	1.03	6.52	7.55	0.96	5.84	6.80	0.90	5.25	6.15
2007	1.09	6.52	7.61	1.01	5.84	6.85	0.94	5.25	6.19
2008	1.14	6.52	7.66	1.06	5.84	6.90	0.99	5.25	6.24
2009	1.20	6.52	7.72	1.12	5.84	6.96	1.04	5.25	6.29
2010	1.26	6.52	7.78	1.17	5.84	7.01	1.09	5.25	6.34
2011	1.33	6.52	7.85	1.23	5.84	7.07	1.15	5.25	6.40
2012	1.39	6.52	7.91	1.30	5.84	7.14	1.21	5.25	6.46
2013	1.46	6.52	7.98	1.36	5.84	7.20	1.27	5.25	6.52
2014	1.54	6.52	8.06	1.43	5.84	7.27	1.33	5.25	6.58
2015	1.62	6.52	8.14	1.50	5.84	7.34	1.40	5.25	6.65
2016	1.70	6.52	8.22	1.58	5.84	7.42	1.47	5.25	6.72

NOTE: Above payments calculated in accordance with formulas set forth in FPSC Rule 25-17.0832(5). Payment shall be adjusted by multiplying factor for On-Peak Capacity Factor determined in Schedule 7.

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SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)
	ENERGY PAYMENT - $/MWH		
CONTRACT YEAR	(ESTIMATED) FUEL	O&M	TOTAL
1997	52.63	1.03	53.66
1998	55.82	1.08	56.90
1999	53.70	1.13	54.83
2000	58.78	1.19	59.97
2001	56.42	1.25	57.67
2002	62.36	1.32	63.68
2003	66.46	1.38	67.84
2004	72.25	1.45	73.70
2005	79.70	1.53	81.23
2006	83.76	1.61	85.39
2007	88.04	1.69	89.73
2008	92.53	1.77	94.30
2009	97.25	1.86	99.11
2010	102.20	1.96	104.16
2011	107.42	2.06	109.48
2012	112.90	2.16	115.06
2013	118.65	2.27	120.92
2014	124.70	2.39	127.09
2015	131.06	2.51	133.57
2016	137.75	2.64	140.39

NOTE: Information provided above is estimated. Actual payment shall be determined in accordance with FPSC Rule 25-17.0832(4).

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SCHEDULE 4
Capacity Payment Adjustment for On-Peak Capacity Factor

O.P.C.F.	CAPACITY PAYMENT ADJUSTMENT MULTIPLYING FACTOR
Greater than or Equal to the Committed O.P.C.F.	1.0
From 50.0% to the Committed O.P.C.F.	$1.5 \left[\frac{\text{O.P.C.F.}}{\text{Committed O.P.C.F.}} \right]$
Below 50.0%	0

NOTE: O.P.C.F. = On-Peak Capacity Factor

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SCHEDULE S
Optional Performance Adjustment

If a Qualifying facility elects the Performance Adjustment provision of Article IX in the Standard Offer Contract, the following formula shall be calculated each month after the Contract In-Service Date for all hours in the month:

74.9 max = 90 As-Available

$$\sum_{\text{for } I = \text{first hour}}^{\text{last hour}} PERADJ_I = [KWH_I - (CC \times 1.0 \text{ hr.} \times (CF/100))] \times (EP1_I - EP2_I)$$

Where:

$PERADJ_I$ = the Performance Adjustment for hour I.

KWH_I = the hourly energy delivered to the Company by the QF during hour I.

CC = the QF's Committed Capacity in KW.

CF = If the QF's On-Peak Capacity Factor (%) is 50.0% or greater, then CF equals the lesser of (a) the avoided unit Minimum On-Peak Capacity Factor (%) or (b) the QF's On-Peak Capacity Factor (%); if the QF's On-Peak Capacity Factor is less than 50.0%, then CF equals zero.

EP1 = the energy payment in $/KWH for hour I as determined in the Standard Offer Contract for purchase of As-Available Energy.

EP2 = the energy payment in $/KWH for hour I as determined in the Standard Offer Contract for purchase of Firm Capacity and Energy.

Note:

The Performance Adjustment shall not apply to any hour in which the following condition occurs:

(a) the QF's Energy Payment is determined on the basis of the Standard Offer Contract for purchase of As-Available Energy;

(b) the Company cannot perform its obligation to receive all energy which the QF has made available for sale at the Point of Delivery;

(c) the Energy Payment as determined in the Standard Offer Contract for purchase of Firm Capacity and Energy exceeds the Energy Payment as determined in the Standard Offer Contract for purchase of As-Available Energy.

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SCHEDULE 6

Charges to Qualifying Facility

Customer Charges:

The Qualifying Facility shall be billed monthly for the costs of meter reading, billing, and other appropriate administrative costs. The charge shall be set equal to the stated Customer Charge of the Company's applicable rate schedule for service to the Qualifying Facility load as a non-generating customer of the Company.

Operation, Maintenance, and Repair Charges:

The Qualifying Facility shall be billed monthly for the costs associated with the operation, maintenance, and repair of the interconnection. These include (a) the Company's inspections of the interconnection and (b) maintenance of any equipment beyond that which would be required to provide normal electric service to the Qualifying Facility if no sales to the Company were involved.

The Qualifying Facility shall pay a monthly charge equal to 0.50% of the Interconnection Costs less the Interconnection Costs Offset. This monthly rate shall be adjusted periodically.

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SCHEDULE 7
Delivery Voltage Adjustment Page 1 of 1

The QF's energy payment will be multiplied by a Delivery Voltage Adjustment whose value will depend upon (i) the delivery voltage at the Point of Delivery and (ii) the methodology approved by the FPSC to determine the adjustment for standard offer contracts pursuant to the rule in Appendix E.

The Company's actual hourly avoided energy costs shall be adjusted according to the delivery voltage by the following multipliers as may be filed from time to time with the FPSC:

Qualifying Facility Delivery Voltage	Adjustment Factor
69 KV or greater	1.036
4 KV, 12 KV, 25 KV	1.047
600 Volts or lower	1.070

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FERC when the Transmission Service Agreement or amendments thereto is tendered for filing.

2.3 To ensure the continuous availability to the Company of the Committed Capacity during the Term of the Agreement, the Transmission Service Agreement shall contain provisions satisfying the following minimum criteria:

(i) the Transmission Service Utility's transmission commitment shall be for the full amount of the Committed Capacity plus any losses assessed by the Transmission Service Utility from the Point of Metering to the Point of Delivery;

(ii) the duration of the Transmission Service Utility's transmission commitment shall be for a term at least as long as the Term of the Agreement with termination provisions that are acceptable to the Company;

(iii) the Transmission Service Utility's transmission commitment shall not be interruptible or curtailable to a greater extent than the Transmission Service Utility's transmission service to its own firm requirements customers;

(iv) The QF and the Transmission Service Utility shall not be permitted to amend the Transmission Service Agreement in a manner that adversely affects the Company's rights without the Company's prior written consent;

(v) the Company shall be provided with prompt notification of any default under the Transmission Service Agreement;

(vi) the QF and/or the Transmission Service Utility shall expressly indemnify and hold the Company harmless for any and all liability or cost responsibility in connection with the

Transmission Service Agreement and the activities undertaken thereunder, including, without limitation, any facility costs, service charges, or third party impact claims;

(vii) the Company shall be entitled to reasonable access at all times to property and equipment owned or controlled by either the QF or the Transmission Service Utility and at reasonable times to records and schedules maintained by either the QF or the Transmission Service Utility, in order to carry out the purposes of the Agreement in a safe, reliable and economical manner;

(viii) unless otherwise agreed by the Company, the Point of Delivery into the Company's system shall be defined as all points of interconnection at transmission voltages between the Company and the Transmission Service Utility pursuant to any tariffs or interchange agreements on file with the FERC and in effect from time to time;

(ix) the electric energy made available from the Facility for transmission to the Company shall be telemetered to the Company and shall be reduced for all losses assessed by the Transmission Service Agreement from the Point of Metering to the Point of Delivery; the electric energy as so adjusted shall be considered the electric energy delivered to the Company for billing purposes and shall be considered as if within the Company's Control Area, provided that the Transmission Service Utility can deliver and the Company accept the electric energy as so adjusted;

(x) As an alternative to section 2.3(ix) hereof, electric energy from the Facility shall be scheduled for delivery to the Point of Delivery by the Transmission Service Utility and such

electric energy as is scheduled shall be considered as electric energy delivered to the Company for billing purposes.

(xi) The Transmission Service Utility and the Company shall coordinate with one another concerning any inability to deliver or receive the electric energy as adjusted pursuant to section 8.3 (ix) hereof. Whenever the Transmission Service Utility is unable to deliver or the Company does not accept such energy, such energy shall no longer be considered within the Company's Control Area if energy is delivered pursuant to section 2.3(ix) hereof; and

(xii) a contact person for the Transmission Service Utility shall be designated for day-to-day communications between the Transmission Service Utility and the Parties.

APPENDIX D

TRANSMISSION SERVICE STANDARDS

1.0 Purpose.

This appendix provides minimum standards required by the Company in the Transmission Service Agreement and applies to QF's whose Facility is not directly interconnected with the Company and who are selling firm capacity and energy to the Company.

2.0 Standards for QF's Selling Firm Capacity and Energy.

2.1 The QF shall ensure that, throughout the Term of the Agreement, the Transmission Service Utility or its lawful successors but no other party shall deliver the Committed Capacity and electric energy to the Company on behalf of the QF.

2.2 A proposed Transmission Service Agreement and any amendments thereto shall be submitted to the Company for its review and consent no less than sixty (60) days before said Transmission Service Agreement or amendment is proposed to be tendered for filing with the FERC. Such consent shall not be unreasonably withheld. No review, recommendations or consent by the Company shall be deemed an approval of any safety or other arrangements between the QF and the Transmission Service Utility nor shall it relieve the QF and the Transmission Service Utility of their responsibility with respect to the adequate engineering, design, construction and operation of any facilities other than the Company's Interconnection Facilities and for any injury to property or persons associated with any failure to perform in a proper and safe manner for any reason. Nothing contained herein shall prevent the Company from exercising any rights that it otherwise would have to participate as a full party before the

Appendix E

PART III

UTILITIES' OBLIGATIONS WITH REGARD TO COGENERATORS AND SMALL POWER PRODUCERS

25-17.080 Definitions and Qualifying Criteria.

(1) For the purpose of these rules the Commission adopts the Federal Energy Regulatory Commission Rules 292.101 through 292.207, effective March 20, 1980, regarding definitions and criteria that a small power producer or cogenerator must meet to achieve the status of a qualifying facility. Small power producers and cogenerators which fail to meet the FERC criteria for achieving qualifying facility status but otherwise meet the objectives of economically reducing Florida's dependence on oil and the economic deferral of utility power plant expenditures may petition the Commission to be granted qualifying facility status for the purpose of receiving energy and capacity payments pursuant to these rules.

(2) In general, under the FERC regulations, a small power producer is a qualifying facility if:

(a) the small power producer does not exceed 80 MW; and

(b) the primary (at least 50%) energy source of the small power producer is biomass, waste, or another renewable resource; and

(c) the small power production facility is not owned by a person primarily engaged in the generation or sale of electricity. This criterion is met if less than 50% of the equity interest in the facility is owned by a utility, utility holding company, or a subsidiary of them.

(3) In general, under the FERC regulations, a cogenerator is a qualifying facility if:

(a) the useful thermal energy output of a topping cycle cogeneration facility is not less than 5% of the facility's total energy output per year; and

(b) the useful power output plus half of the useful thermal energy output of a topping cycle cogeneration facility built after March 13, 1980, with any energy input of natural gas or oil is greater than 42.5% or 45% if the useful thermal energy output is less than 15% of the total energy output of the facility; and

(c) the useful power output of a bottoming cycle cogeneration facility built after March 13, 1980, with any energy input as supplementary firing of natural gas or oil is not less than 45% of the natural gas or oil input on an annual basis; and

3. upon completion and approval by the utility of any alterations to the interconnection reasonably required to effect the change in billing and upon payment by the qualifying facility for such alterations.

(c) Should a qualifying facility elect to make simultaneous purchases and sales, purchases of electric service by the qualifying facility from the interconnecting utility shall be billed at the retail rate schedule under which the qualifying facility load would receive service as a non-generating customer of the utility; sales of electricity delivered by the qualifying facility to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832.

(d) Should a qualifying facility elect a net billing arrangement, the hourly net energy and capacity sales delivered to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832; purchases from the interconnecting utility shall be billed pursuant to the utility's applicable standby service or supplemental service rate schedules.

(4)(a) Payments for energy and capacity sold by a qualifying facility shall be rendered monthly by the purchasing utility and as promptly as possible, normally by the twentieth business day following the day the meter is read. The kilowatt-hours sold by the qualifying facility, the applicable avoided energy rate at which payments were made, and the rate and amount of the applicable capacity payment shall accompany the payment by the utility to the qualifying facility.

(b) Where simultaneous purchases and sales are made by a qualifying facility, avoided energy and capacity payments to the qualifying facility may, at the option of the qualifying facility, be shown as a credit to the qualifying facility's bill; the kilowatt-hours produced by the qualifying facility, the avoided energy rate at which payments were made, and the rate and amount of the capacity payment shall accompany the bill to the qualifying facility. A credit shall not exceed the amount of the qualifying facility's bill from the utility and the excess, if any, shall be paid directly to the qualifying facility in accordance with this rule.

(5) A utility may require a security deposit from each interconnected qualifying facility in accordance with Rule 25-6.097 for the qualifying facility's purchase of power from the utility. Each utility's tariff shall contain specific criteria for determining the applicability and amount of a deposit from a interconnected qualifying facility consistent with projected net cash flow on monthly basis.

(6) Each utility shall keep separate accounts for sales to qualifyin facilities and purchases from qualifying facilities.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 5/13/81, Amended 9/4/83, formerly 25-17.82, Amended 10/25/90.

25-17.0825 As-Available Energy.

(1) As-available energy is energy produced and sold by a qualifying facility on an hour-by-hour basis for which contractual commitments as to the quantity, time, or reliability of delivery are not required. Each utility shall purchase as-available energy from any qualifying facility. As-available energy shall be sold by a qualifying facility and purchased by a utility pursuant to the terms and conditions of a published tariff or a separately negotiated contract.

As-available energy sold by a qualifying facility shall be purchased by the utility at a rate, in cents per kilowatt-hour, not to exceed the utility's avoided energy cost. Because of the lack of assurances as to the quantity, time, or reliability of delivery of as-available energy, no capacity payments shall be made to a qualifying facility for the delivery of as-available energy.

(a) Tariff Rates: Each utility shall publish a tariff for the purchase of as-available energy from qualifying facilities. Each utility's published tariff shall state that the rate of payment for as-available energy is the utility's

avoided energy cost as defined in subsection (2) of this rule, less the additional costs directly attributable to the purchase of such energy from a qualifying facility. The additional costs directly associated with the purchase of as-available energy from qualifying facilities shall be specifically identified in the utility's tariff.

(b) Contract Rates: Each utility may enter into a separately negotiated contract for the purchase of as-available energy from a qualifying facility. All contracts for the purchase of as-available energy between a qualifying facility and a utility shall be filed with the Commission within 10 working days of their signing. Those qualifying facilities wishing to negotiate a contract for the sale of firm capacity and energy with terms different from those in a utility's standard offer contract may do so pursuant to Rule 25-17.0832(2). Where parties cannot agree on the terms and conditions of a negotiated contract, either party may apply to the Commission for relief pursuant to Rule 25-17.0834.

(2)(a) Avoided energy costs associated with as-available energy are defined as the utility's actual avoided energy cost before the sale of interchange energy. Avoided energy costs associated with as-available energy shall be all costs the utility avoided due to the purchase of as-available energy, including the utility's incremental fuel, identifiable variable operating and maintenance expense, and identifiable variable utility power purchases. Demonstrable utility administrative costs required to calculate avoided energy costs may be deducted from avoided energy payments. Avoided line losses reflecting the voltage at which generation by the qualifying facility is received by the utility shall also be included in the determination of avoided energy costs. Each utility shall calculate its avoided energy cost associated with as-available energy—deterministically, on an hour-by-hour basis, after accounting for interchange sales which have taken place, using the utility's actual avoided energy cost for the hour, as affected by the output of the qualifying facilities connected to the utility's system. A megawatt block size at least equal to the most recent available estimate of the combined average hourly generation of all qualifying facilities making energy sales based on the utility's as-available energy rate to the utility shall be used to calculate the utility's hourly avoided energy costs associated with as-available energy. For the purpose of this subsection, interchange sales are inter-utility sales which are provided at the option of the selling utility exclusive of central pool dispatch transactions.

(b) Each utility's tariff shall include a description of the methodology to be used in the calculation of avoided energy cost implementing subsection (2) of this Rule. Each utility's implementation methodology shall specify the method by which the utility's incremental fuel and operating and maintenance costs and line losses are determined.

(3)(a) For qualifying facilities with hourly recording meters, monthly payments for as-available energy shall be made and shall be calculated based on the product of: (1) the utility's actual avoided energy rate for each hour during the month; and (2) the quantity of energy sold by the qualifying facility during that hour.

(b) For qualifying facilities with dual kilowatt-hour register time-of-day meters, monthly payments for as-available energy shall be calculated based on the average of the utility's actual hourly avoided energy rate for the on-peak and off-peak periods during the month.

(c) For qualifying facilities with standard kilowatt-hour meters, monthly payments for as-available energy shall be calculated based on the average of the utility's actual hourly avoided energy rate for the off-peak periods during the month.

(4) Each utility shall file with the Commission by the twentieth business day of the following month, a monthly report of their actual hourly avoided energy costs, the average of their actual hourly avoided energy costs for the on-peak and

off-peak periods during the month, and the average of their actual hourly avoided energy costs for the month with the Commission. A copy shall be furnished to any individual who requests such information.

(5) Upon request by a qualifying facility or any interested person, each utility shall provide within 30 days its most current projections of its generation mix, fuel price by type of fuel, and at least a five year projection of fuel forecasts to estimate future as-available energy prices as well as any other information reasonably required by the qualifying facility to project future avoided cost prices including, but not limited to, a 24 hour advance forecast of hour-by-hour avoided energy costs. The utility may charge an appropriate fee, not to exceed the actual cost of production and copying, for providing such information.

(6) Utility payments for as-available energy made to qualifying facilities pursuant to the utility's tariff shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power. Utility payments for as-available energy made to qualifying facilities pursuant to a separately negotiated contract shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power costs if the payments are not reasonably projected to result in higher cost electric service to the utility's general body of ratepayers or adversely affect the adequacy or reliability of electric service to all customers.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.083 Firm Energy and Capacity.
Specific Authority: 366.04(1), 366.05(1), 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 9/4/83, formerly 25-17.83, Repealed 10/25/90.

25-17.0831 Contracts.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.831, Repealed 10/25/90.

25-17.0832 Firm Capacity and Energy Contracts.

(1) Firm capacity and energy are capacity and energy produced and sold by a qualifying facility and purchased by a utility pursuant to a negotiated contract or a standard offer contract subject to certain contractual provisions as to the quantity, time and reliability of delivery.

(a) Within one working day of the execution of a negotiated contract or the receipt of a signed standard offer contract, the utility shall notify the Director of the Division of Electric and Gas and provide the amount of committed capacity and the avoided unit, if any, to which the contract should be applied.

(b) Within 10 working days of the execution of a negotiated contract for the purchase of firm capacity and energy or within 10 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 a summary shall report:

1. the name of the utility and the owner and/or operator of the qualifying facility, who are signatories of the contract;
2. the amount of committed capacity specified in the contract, the size of the facility, the type of the facility its location, and its interconnection and transmission requirements;
3. the amount of annual and on-peak and off-peak energy expected to be delivered to the utility;
4. the type of unit being avoided, its size and its in-service year;
5. the in-service date of the qualifying facility; and

6. the date by which the delivery of firm capacity and energy is expected to commence.

(c) Prior to the anticipated in-service date of the avoided unit specified in the contract, a qualifying facility which has negotiated a firm capacity and energy contract or has accepted a utility's standard offer contract may sell as-available energy to any utility pursuant to Rule 25-17.0825.

(2) Negotiated Contracts. Utilities and qualifying facilities are encouraged to negotiate contracts for the purchase of firm capacity and energy. Such contracts will be considered prudent for cost recovery purposes if it is demonstrated that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract. Negotiated contracts shall not be evaluated against an avoided unit in a standard offer contract, thus preserving the standard offer for small qualifying facilities as described in subsection (3). In reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery, the Commission shall consider factors relating to the contract that would impact the utility's general body of retail and wholesale customers including:

(a) whether additional firm capacity and energy is needed by the purchasing utility and by Florida utilities from a statewide perspective; and

(b) whether the cumulative present worth of firm capacity and energy payments made to the qualifying facility over the term of the contract are projected to be no greater than:

1. the cumulative present worth of the value of a year-by-year deferral of the construction and operation of generation or parts thereof by the purchasing utility over the term of the contract; calculated in accordance with subsection (4) and paragraph (5)(a) of this rule, providing that the contract is designed to contribute towards the deferral or avoidance of such capacity; or
2. the cummulative present worth of other capacity and energy related costs that the contract is designed to avoid such as fuel, operation and maintenance expenses or alternative purchases of capacity, providing that the contract is designed to avoid such costs; and

(c) to the extent that annual firm capacity and energy payments made to the qualifying facility in any year exceed that year's annual value of deferring the construction and operation of generation by the purchasing utility or other capacity and energy related costs, whether the contract contains provisions to ensure repayment of such payments exceeding that year's value of deferring that capacity in the event that the qualifying facility fails to deliver firm capacity and energy pursuant to the terms and conditions of the contract; provided, however, that provisions to ensure repayment may be based on forecasted data; and

(d) considering the technical reliability, viability and financial stability of the qualifying facility, whether the contract contains provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract.

(3) Standard Offer Contracts.

(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.

(b) The rates, terms, and other conditions contained in each utility's standard offer contract or contracts shall be based on the need for and equal to the avoided cost of deferring or avoiding the construction of additional generation

capacity or parts thereof by the purchasing utility. Rates for payment of capacity sold by a qualifying facility shall be specified in the contract for the duration of the contract. In reviewing a utility's standard offer contract or contracts, the Commission shall consider the criteria specified in paragraphs (2)(a) through (2)(d) of this rule, as well as any other information relating to the determination of the utility's full avoided costs.

(c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts or a solid waste facility as defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2). Should a utility fail to negotiate in good faith, any qualifying facility may apply to the Commission for relief pursuant to Rule 25-17.0834, F.A.C.

(d) Within 60 days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions may be based on:

1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer.

A standard offer contract which has been accepted by a qualifying facility shall apply towards the subscription limit of the unit designated in the contract effective the date the utility receives the accepted contract. If the contract is not accepted by the utility, its effect shall be removed from the subscription limit effective the date of the Commission order granting the utility's petition.

(e) Minimum Specifications. Each standard offer contract shall, at minimum, specify:

1. the avoided unit or units on which the contract is based;
2. the total amount of committed capacity, in megawatts, needed to fully subscribe the avoided unit specified in the contract;
3. the payment options available to the qualifying facility including all financial and economic assumptions necessary to calculate the firm capacity payments available under each payment option and an illustrative calculation of firm capacity payments for a minimum ten year term contract commencing with the in-service date of the avoided unit for each payment option;
4. the date on which the standard contract offer expires. This date shall be at least four years before the anticipated in-service date of the avoided unit or units unless the avoided unit could be constructed in less than four years, or when the subscription limit has been reached;
5. the date by which firm capacity and energy deliveries from the qualifying facility to the utility shall commence. This date shall be no later than the anticipated in-service date of the avoided unit specified in the contract;
6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. 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;

7. the minimum performance standards for the delivery of firm capacity and energy by the qualifying facility during the utility's daily seasonal peak and off-peak periods. These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract;

8. provisions to ensure repayment of payments to the extent that annual firm capacity and energy payments made to the qualifying facility in any year exceed that year's annual value of deferring the avoided unit specified in the contract in the event that the qualifying facility fails to perform pursuant to the terms and conditions of the contract. Such provisions may be in the form of a surety bond or equivalent assurance of repayment of payments exceeding the year-by-year value of deferring the avoided unit specified in the contract.

(f) The Commission may approve contracts that specify:

1. provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract which may be in the form of an up-front payment, surety bond, or equivalent assurance of payment. Such payment or surety shall be refunded upon completion of the facility and demonstration that the facility can deliver the amount of capacity and energy specified in the contract; and

2. a listing of the parameters, including any impact on electric power transfer capability, associated with the qualifying facility as compared to the avoided unit necessary for the calculation of the avoided cost.

(g) Firm Capacity Payment Options. Each standard offer contract shall also contain, at a minimum, the following options for the payment of firm capacity delivered by the qualifying facility:

1. Value of deferral capacity payments. Value of deferral capacity payments shall commence on the anticipated in-service date of the avoided unit. Capacity payments under this option shall consist of monthly payments escalating annually of the avoided capital and fixed operation and maintenance expense associated with the avoided unit and shall be equal to the value of a year-by-year deferral of the avoided unit, calculated in accordance with paragraph (5)(a) of this rule.

Does not now apply to Panda-Kath

2. Early capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. Early capacity payments shall consist of monthly payments escalating annually of the avoided capital and fixed operation and maintenance expense associated with the avoided unit, calculated in conformance with paragraph (5)(b) of the rule. At the option of the qualifying facility, early capacity payments may commence at any time after the specified early capacity payment date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule.

3. Levelized capacity payments. Levelized capacity payments shall commence on the anticipated in-service date of the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance portion of capacity payments shall be equal to the value of the year-by-year deferral of fixed operation and maintenance expense associated with the avoided unit calculated in conformance with paragraph (5)(a) of this rule. Where levelized capacity payments are elected, the cumulative present value of the levelized capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule, value of deferral capacity payments.

4. Early levelized capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early levelized capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance expense shall be calculated in conformance with paragraph (5)(b) of this rule. At the option of the qualifying facility, early levelized capacity payments shall commence at any time after the specified early capacity date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early levelized capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule.

(4) Avoided Energy Payments.

(a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825.

(b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility. During the periods that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825(2)(a).

(c) The energy cost of the avoided unit specified in the contract shall be defined as the cost of fuel, in cents per kilowatt-hour, which would have been burned at the avoided unit plus variable operation and maintenance expense plus avoided line losses. The cost of fuel shall be calculated as the average market

price of fuel, in cents per million Btu, associated with the avoided unit multiplied by the average heat rate associated with the avoided unit. The variable operating and maintenance expense shall be estimated based on the unit fuel type and technology of the avoided unit.

(5) Calculation of standard offer contract firm capacity payment options.

(a) Calculation of year-by-year value of deferral. The year-by-year value of deferral of an avoided unit shall be the difference in revenue requirements associated with deferring the avoided unit one year and shall be calculated as follows:

$$VAC_m = \frac{1}{12}\left[XI_n \left[\frac{1 - \frac{(1+ip)}{(1+r)}^{L}}{1 - \frac{(1+ip)}{(1+r)}} \right] + O_n \right]$$

Where, for a one year deferral:

VAC_m = utility's monthly value of avoided capacity, in dollars per kilowatt per month, for each month of year n;

K = present value of carrying charges for one dollar of investment over L years with carrying charges computed using average annual rate base and assumed to be paid at the middle of each year and present value to the middle of the first year;

I_n = total direct and indirect cost, in mid-year dollars per kilowatt including AFUDC but excluding CWIP, of the avoided unit with an in-service date of year n, including all identifiable and quantifiable costs relating to the construction of the avoided unit that would have been paid had the avoided unit been constructed;

O_n = total fixed operation and maintenance expense for the year n, in mid-year dollars per kilowatt per year, of the avoided unit;

i_p = annual escalation rate associated with the plant cost of the avoided unit(s);

i_o = annual escalation rate associated with the operation and maintenance expense of the avoided unit(s);

r = annual discount rate, defined as the utility's incremental after tax cost of capital;

L = expected life of the avoided unit; and

n = year for which the avoided unit is deferred starting with its original anticipated in-service date and ending with the termination of the contract for the purchase of firm energy and capacity.

(b) Calculation of early capacity payments. Monthly early capacity payments shall be calculated as follows:

$$A_m = A_c \frac{(1+ip)^{(m-1)}}{12} + A_o \frac{(1+io)^{(m-1)}}{12} \quad \text{for m=1 to t}$$

Where: A_m = monthly early capacity payments to be made to the qualifying facility for each month of the contract year n, in dollars per kilowatt per month;

i_p = annual escalation rate associated with the plant cost of the avoided unit;

i_o = annual escalation note associated with the operation and maintenance expense of the avoided unit(s);

m = year for which early capacity payments to a qualifying facility are made, starting in year one and ending in the year t;

t = the term, in years, of the contract for the purchase of firm capacity;

$$\lambda_C = F \left[\frac{(1 + ip)}{1 - (1 + r)^{t}} \cdot \frac{(1 + ip)^{t}}{1 - (1 + r)^{t}} \right]$$

Where: F = the cumulative present value in the year that the contractual payments will begin, of the avoided capital cost component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit(s); and

r = annual discount rate, defined as the utility's incremental after tax cost of capital; and

$$\lambda_O = G \left[\frac{(1 + io)}{1 - (1 + r)^{t}} \cdot \frac{(1 + io)^{t}}{1 - (1 + r)^{t}} \right]$$

Where: G = The cumulative present value in the year that the contractual payments will begin, of the avoided fixed operation and maintenance expense component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit.

(c) Levelized and early levelized capacity payments. Monthly levelized and early levelized capacity payments shall be calculated as follows:

$$P_L = F \times \frac{r}{12} \cdot \frac{}{1-(1+r)^{-t}} + O$$

Where: P_L = the monthly levelized capacity payment, starting on or prior to the in-service date of the avoided unit;

F = the cumulative present value, in the year that the contractual payments will begin, of the avoided capital cost component of the capacity payments which would have been made had the capacity payments not been levelized;

r = the annual discount rate, defined as the utility's incremental after tax cost of capital; and

t = the term, in years, of the contract for the purchase of firm capacity.

O = the monthly fixed operation and maintenance component of the capacity payments, calculated in accordance with paragraph (5)(a) for levelized capacity payments or with paragraph (5)(b) for early levelized capacity payments.

(6) Sale of Excess Firm Energy and Capacity. To the extent that firm energy and capacity purchased from a qualifying facility pursuant to a standard offer contract or an individually negotiated contract is not needed by the purchasing utility, these rules shall be construed to encourage the

purchasing utility to sell all or part of the energy and capacity to the utility in need of energy and capacity at a mutually agreed upon price which is cost effective to the ratepayers.

(7) Upon request by a qualifying facility or any interested person, each utility shall provide within 30 days its most current projections of its future generation mix including type and timing of anticipated generation additions, and at least a 20-year projection of fuel forecasts, as well as any other information reasonably required by the qualifying facility to project future avoided cost prices. The utility may charge an appropriate fee, not to exceed the actual cost of production and copying, for providing such information.

(8)(a) Firm energy and capacity payments made to a qualifying facility pursuant to a separately negotiated contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs if the contract is found to be prudent in accordance with subsection (2) of this rule.

(b) Upon acceptance of the contract by both parties, firm energy and capacity payments made to a qualifying facility pursuant to a standard offer contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs.

(c) Firm energy and capacity payments made pursuant to a standard offer contract signed by the qualifying facility, for which the utility has petitioned the Commission to reject, is recoverable through the Commission's periodic review of fuel and purchased power costs if the Commission requires the utility to accept the contract because it satisfies subsection (3) of this rule.

Specific Authority: 350.127, 366.04(1), 366.051, 366.05(8), F.S.
Law Implemented: 366.051, 403.503, F.S.
History: New 10/25/90.

25-17.0833 Planning Hearings.

(1) Upon petition or on its own motion, the Commission shall periodically review optimal generation and transmission plans from a statewide and individual utility perspective. In connection with these proceedings, the Commission shall consider the need for capacity from both a statewide and individual utility perspective, the adequacy of the transmission grid, and other strategic planning concerns affecting the Florida electric grid.

(2) Upon petition, or on its own motion, the Commission, as needed, shall review individual utility generation and expansion plans at any time.

Specific Authority: 366.05(8), 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.0834 Settlement of Disputes in Contract Negotiations.

(1) Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in 366.051, Florida Statutes, should the Commission find that the utility failed to negotiate in good faith.

(2) To the extent possible, the Commission will dispose of an application for relief within 90 days of the filing of a petition by either a utility or a qualifying facility.

(3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility as approved by section 350.127, Florida Statutes.
Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.0835 Wheeling.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), 366.055(3), F.S.
History: New 9/4/83, repealed 10/4/85, formerly 25-17.835.

25-17.084 The Utility's Obligation to Sell.
Upon compliance with Rule 25-17.087, each utility shall sell energy to qualifying facilities at rates which are just, reasonable, and non-discriminatory.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.84.

25-17.085 Reserved.

25-17.086 Periods During Which Purchases are not Required.
Where purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082 to purchase electricity from a qualifying facility. The utility shall notify the qualifying facility(ies) prior to the instance giving rise to those conditions, if practicable. If prior notice is not practicable, the utility shall notify the qualifying facility(ies) as soon as practicable after the fact. In either event the utility shall notify the Commission, and the Commission staff shall, upon request of the affected qualifying facility(ies), investigate the utility's claim. Nothing in this section shall operate to relieve the utility of its general obligation to purchase pursuant to Rule 25-17.082.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, Amended 9/4/83, formerly 25-17.86.

25-17.087 Interconnection and Standards.
(1) Each utility shall interconnect with any qualifying facility which:
(a) is in its service area;
(b) requests interconnection;
(c) agrees to meet system standards specified in this rule; (d) agrees to pay the cost of interconnection; and
(e) signs an interconnection agreement.
(2) Nothing in this rule shall be construed to preclude a utility from evaluating each request for interconnection on its own merits and modifying the general standards specified in this rule to reflect the result of such an evaluation.
(3) Where a utility refuses to interconnect with a qualifying facility or attempts to impose unreasonable standards pursuant to subsection (2) of this rule, the qualifying facility may petition the Commission for relief. The utility shall have the burden of demonstrating to the Commission why

interconnection with the qualifying facility should not be required or that the standards the utility seeks to impose on the qualifying facility pursuant to subsection (2) are reasonable.

(4) Upon a showing of credit worthiness, the qualifying facility shall have the option of making monthly installment payments over a period no longer than 36 months toward the full cost of interconnection. However, where the qualifying facility exercises that option the utility shall charge interest on the amount owing. The utility shall charge such interest at the 30-day commercial paper rate. In any event, no utility may bear the cost of interconnection.

(5) Application for Interconnection. A qualifying facility shall not operate electric generating equipment in parallel with the utility's electric system without the prior written consent of the utility. Formal application for interconnection shall be made by the qualifying facility prior to the installation of any generation related equipment. This application shall be accompanied by the following:

(a) Physical layout drawings, including dimensions;

(b) All associated equipment specifications and characteristics including technical parameters, ratings, basic impulse levels, electrical main one-line diagrams, schematic diagrams, system protections, frequency, voltage, current and interconnection distance;

(c) Functional and logic diagrams, control and meter diagrams, conductor sizes and length, and any other relevant data which might be necessary to understand the proposed system and to be able to make a coordinated system;

(d) Power requirements in watts and vars;

(e) Expected radio-noise, harmonic generation and telephone interference factor;

(f) Synchronizing methods; and

(g) Operating/instruction manuals.

Any subsequent change in the system must also be submitted for review and written approval prior to actual modification. The above mentioned review, recommendations and approval by the utility do not relieve the qualifying facility from complete responsibility for the adequate engineering design, construction and operation of the qualifying facility equipment and for any liability for injuries to property or persons associated with any failure to perform in a proper and safe manner for any reason.

(6) Personnel Safety. Adequate protection and safe operational procedures must be developed and followed by the joint system. These operating procedures must be approved by both the utility and the qualifying facility. The qualifying facility shall be required to furnish, install, operate and maintain in good order and repair, and be solely responsible for, without cost to the utility, all facilities required for the safe operation of the generation system in parallel with the utility's system.

The qualifying facility shall permit the utility's employees to enter upon its property at any reasonable time for the purpose of inspection and/or testing the qualifying facility's equipment, facilities, or apparatus. Such inspections shall not relieve the qualifying facility from its obligation to maintain its equipment in safe and satisfactory operating condition.

The utility's approval of isolating devices used by the qualifying facility will be required to ensure that these will comply with the utility's switching and tagging procedure for safe working clearances.

(a) Disconnect Switch. A manual disconnect switch, of the visible load break type, to provide a separation point between the qualifying facility's generation system and the utility's system, shall be required. The utility will specify the location of the disconnect switch. The switch shall be mounted separate from the meter socket and shall be readily accessible to

the utility and be capable of being locked in the open position with a utility padlock. The utility may reserve the right to open the switch (i.e. isolating the qualifying facility's generation system) without prior notice to the qualifying facility. To the extent practicable, however, prior notice shall be given.

Any of the following conditions shall be cause for disconnection:

1. Utility system emergencies and/or maintenance requirements;
2. Hazardous conditions existing on the qualifying facility's generating or protective equipment as determined by the utility;
3. Adverse effects of the qualifying facility's generation to the utility's other electric consumers and/or system as determined by the utility;
4. Failure of the qualifying facility to maintain any required insurance; or
5. Failure of the qualifying facility to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the qualifying facility's electric generating equipment or the operation of such equipment.

(b) Responsibility and Liability. The utility and the qualifying facility shall each be responsible for its own facilities. The utility and the qualifying facility shall each be responsible for ensuring adequate safeguards for other utility customers, utility and qualifying facility personnel and equipment, and for the protection of its own generating system. The utility and the qualifying facility shall each indemnify and save the other harmless from any and all claims, demands, costs, or expense for loss, damage, or injury to persons or property of the other caused by, arising out of, or resulting from:

1. Any act or omission by a party or that party's contractors, agents, servants and employees in connection with the installation or operation of that party's generation system or the operation thereof in connection with the other party's system;
2. Any defect in, failure of, or fault related to a party's generation system;
3. The negligence of a party or negligence of that party's contractors, agents servants and employees; or
4. Any other event or act that is the result of, or proximately caused by, a party.

For the purposes of this subsection, the term party shall mean either utility or qualifying facility, as the case may be.

(c) Insurance. The qualifying facility shall deliver to the utility, at least fifteen days prior to the start of any interconnection work, a certificate of insurance certifying the qualifying facility's coverage under a liability insurance policy issued by a reputable insurance company authorized to do business in the State of Florida naming the qualifying facility as named insured, and the utility as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering the liabilities accepted under this agreement arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.

The policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than $300,000 for each occurrence; more insurance may be required as deemed necessary by

the utility. In addition, the above required policy shall be endorsed with a provision whereby the insurance company will notify the utility thirty days prior to the effective date of cancellation or material change in the policy.

The qualifying facility shall pay all premiums and other charges due on said policy and keep said policy in force during the entire period of interconnection with the utility.

(7) Protection and Operation. It will be the responsibility of the qualifying facility to provide all devices necessary to protect the qualifying facility's equipment from damage by the abnormal conditions and operations which occur on the utility system that result in interruptions and restorations of service by the utility's equipment and personnel. The qualifying facility shall protect its generator and associated equipment from overvoltage, undervoltage, overload, short circuits (including ground fault condition), open circuits, phase unbalance and reversal, over or under frequency condition, and other injurious electrical conditions that may arise on the utility's system and any reclose attempt by the utility.

The utility may reserve the right to perform such tests as it deems necessary to ensure safe and efficient protection and operation of the qualifying facility's equipment.

(a) Loss of Source: The qualifying facility shall provide, or the utility will provide at the qualifying facility's expense, approved protective equipment necessary to immediately, completely, and automatically disconnect the qualifying facility's generation from the utility's system in the event of a fault on the qualifying facility's system, a fault of the utility's system, or loss of source on the utility's system. Disconnection must be completed within the time specified by the utility in its standard operating procedure for its electric system for loss of a source on the utility's system.

This automatic disconnecting device may be of the manual or automatic reclose type and shall not be capable of reclosing until after service is restored by the utility. The type and size of the device shall be approved by the utility depending upon the installation. Adequate test data or technical proof that the device meets the above criteria must be supplied by the qualifying facility to the utility. The utility shall approve a device that will perform the above functions at minimal capital and operating costs to the qualifying facility.

(b) Coordination and Synchronization. The qualifying facility shall be responsible for coordination and synchronization of the qualifying facility's equipment with the utility's electrical system, and assumes all responsibility for damage that may occur from improper coordination or synchronization of the generator with the utility's system.

(c) Electrical Characteristics. Single phase generator interconnections with the utility are permitted at power levels up to 20 KW. For power levels exceeding 20 KW, a three phase balanced interconnection will normally be required. For the purpose of calculating connected generation, 1 horsepower equals 1 kilowatt. The qualifying facility shall interconnect with the utility at the voltage of the available distribution or the transmission line of the utility for the locality of the interconnection, and shall utilize one of the standard connections (single phase, three phase, wye, delta) as approved by the utility.

The utility may reserve the right to require a separate transformation and/or service for a qualifying facility's generation system, at the qualifying facility's expense. The qualifying facility shall bond all neutrals of the qualifying facility's system to the utility's neutral, and shall install a separate driven ground with a resistance value which shall be determined by the utility and bond this ground to the qualifying facility's system neutral.

(d) Exceptions. A qualifying facility's generator having a capacity rating that can:

1. produce power in excess of 1/2 of the minimum utility customer requirements of the interconnected distribution or transmission circuit; or
2. produce power flows approaching or exceeding the thermal capacity of the connected utility distribution or transmission lines or transformers; or
3. adversely affect the operation of the utility or other utility customer's voltage, frequency or overcurrent control and protection devices; or
4. adversely affect the quality of service to other utility customers; or
5. interconnect at voltage levels greater than distribution voltages,

will require more complex interconnection facilities as deemed necessary by the utility.

(8) Quality of Service. The qualifying facility's generated electricity shall meet the following minimum guidelines:

(a) Frequency. The governor control on the prime mover shall be capable of maintaining the generator output frequency within limits for loads from no-load up to rated output. The limits for frequency shall be 60 hertz (cycles per second), plus or minus an instantaneous variation of less than 1%.

(b) Voltage. The regulator control shall be capable of maintaining the generator output voltage within limits for loads from no-load up to rated output. The limits for voltage shall be the nominal operating voltage level, plus or minus 5%.

(c) Harmonics. The output sine wave distortion shall be deemed acceptable when it does not have a higher content (root mean square) of harmonics than the utility's normal harmonic content at the interconnection point.

(d) Power Factor. The qualifying facility's generation system shall be designed, operated and controlled to provide reactive power requirements from 0.85 lagging to 0.85 leading power factor. Induction generators shall have static capacitors that provide at least 85% of the magnetizing current requirements of the induction generator field. (Capacitors shall not be so large as to permit self-excitation of the qualifying facility's generator field).

(e) DC Generators. Direct current generators may be operated in parallel with the utility's system through a synchronous inverter. The inverter must meet all criteria in these rules.

(9) Metering. The actual metering equipment required, its voltage rating, number of phases, size, current transformers, potential transformers, number of inputs and associated memory is dependent on the type, size and location of the electric service provided. In situations where power may flow both in and out of the qualifying facility's system, power flowing into the qualifying facility's system will be measured separately from power flowing out of the qualifying facility's system.

The utility will provide, at no additional cost to the qualifying facility, the metering equipment necessary to measure capacity and energy deliveries to the qualifying facility. The utility will provide, at the qualifying facility's expense, the necessary additional metering equipment to measure energy deliveries by the qualifying facility to the utility.

(10) Cost Responsibility. The qualifying facility is required to bear all costs associated with the change-out, upgrading or addition of protective devices, transformers, lines, services, meters, switches, and associated equipment and devices beyond that which would be required to

provide normal service to the qualifying facility if the qualifying facility were a non-generating customer. These costs shall be paid by the qualifying facility to the utility for all material and labor that is required. Prior to any work being done by the utility, the utility shall supply the qualifying facility with a written cost estimate of all its required materials and labor and an estimate of the date by which construction of the interconnection will be completed. This estimate shall be provided to the qualifying facility within 60 days after the qualifying facility supplies the utility with its final electrical plans. The utility shall also provide project timing and feasibility information to the qualifying facility.

(11) Each utility shall submit to the Commission, a standard agreement for interconnection by qualifying facilities as part of their standard offer contract or contracts required by Rule 25-17.0832(3).

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 9/4/83, formerly 25-17.87, Amended 10/25/90.

25-17.088 Transmission Service for Qualifying Facilities.
Specific Authority: 350.127(2), 366.051, F.S.
Law Implemented: 366.051, 366.04(3), 366.055(3), F.S.
History: New 10/4/85, formerly 25-17.88, Amended 2/3/87, Repealed 10/25/90.

25-17.0882 Transmission Service Not Required for Self-Service.
Specific Authority: 350.127(2), 366.05(1), F.S.
Law Implemented: 366.05(9), 366.04(3), 366.055(3), F.S.
History: New 10/4/85, formerly 25-17.882, Repealed 10/25/90.

25-17.0883 Conditions Requiring Transmission Service for Self-service.

Public utilities are required to provide transmission and distribution services to enable a retail customer to transmit electrical power generated at one location to the customer's facilities at another location when the provision of such service and its associated charges, terms, and other conditions are not reasonably projected to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. The determination of whether transmission service for self service is likely to result in higher cost electric service may be made using cost effectiveness methodology employed by the Commission in evaluating conservation programs of the utility, adjusted as appropriate to reflect the qualifying facility's contribution to the utility for standby service and wheeling charges, other utility program costs, the fact that qualifying facility self-service performance can be precisely metered and monitored, and taking into consideration the unique load characteristics of the qualifying facility compared to other conservation programs.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.089 Transmission Service for Qualifying Facilities.

(1) Upon request by a qualifying facility, each electric utility in Florida shall provide, subject to the provisions of subsection (3) of this rule, transmission service to wheel as-available energy or firm energy and capacity produced by a Qualifying Facility from the Qualifying Facility to another electric utility.

(2) The rates, terms, and conditions for transmission services as described in subsection (1) and in Rule 25-17.0883 which are provided by an investor-owned utility shall be those approved by the Federal Energy Regulatory Commission.

(3) An electric utility may deny, curtail, or discontinue transmission service to a Qualifying Facility on a non- discriminatory basis if the provision of such service would adversely affect the safety, adequacy, reliability, or cost of providing electric service to the utility's general body of retail and wholesale customers.
Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, 366.055(3), F.S.
History: New 10/25/90.

25-17.090 Reserved.

25-17.091 Governmental Solid Waste Energy and Capacity.
(1) Definitions and Applicability:
(a) "Solid Waste Facility" means a facility owned or operated by, or on behalf of, local government, the purpose of which is to dispose of solid waste, as that term is defined in section 403.703(13), Fla. Stat. (1988), and to generate electricity.
(b) A facility is owned by or operated on behalf of a local government if the power purchase agreement is between the local government and the electric utility.
(c) A solid waste facility shall include a facility which is not owned or operated by a local government but is operated on its behalf. When the power purchase agreement is between a non-governmental entity and an electric utility, the facility is operated by a private entity on behalf of a local government if:
1. One or more local governments have entered into a long-term agreement with the private entity for the disposal of solid waste for which the local governments are responsible and that agreement has a term at least as long as the term of the contract for the purchase of energy and capacity from the facility; and
2. The Commission determines there is no undue risk imposed on the electric ratepayers of the purchasing utility, based on:
a. The local government's acceptance of responsibility for the private entity's performance of the power purchase contract, or
b. Such other factors as the Commission deems appropriate, including, without limitation, the issuance of bonds by the local government to finance all, or a substantial portion, of the costs of the facility; the reliability of the solid waste technology; and the financial capability of the private owner and operator.
3. The requirements of subparagraph 2 shall be satisfied if a local government described in subparagraph 1 enters into an agreement with the purchasing utility providing that in the event of a default by the private entity under the power purchase contract, the local government shall perform the private entity's obligations, or cause them to be performed, for the remaining term of the contract, and shall not seek to renegotiate the power purchase contract.
(d) This rule shall apply to all contracts for the purchase of energy or capacity from solid waste facilities entered into, or renegotiated as provided in subsection (3), after October 1, 1988.
(2) Except as provided in subsections (3) and (4) of this rule, the provisions of Rules 25-17.080 - 25-17.089, Florida Administrative Code, are applicable to contracts for the purchase of energy and capacity from a solid waste facility.

(3) Any solid waste facility which has an existing firm energy and capacity contract in effect before October 1, 1988, shall have a one-time option to renegotiate that contract to incorporate any or all of the provisions of subsection (2) and (4) into their contract. This renegotiation shall be based on the unit that the contract was designed to avoid but applying the most recent Commission-approved cost estimates of Rule 25-17.0832(5)(a), Florida Administrative Code, for the same unit type and in-service year to determine the utility's value of avoided capacity over the remaining term of the contract.

(4) Because section 377.709(4), Fla. Stat., requires the local government to refund early capacity payments should a solid waste facility be abandoned, closed down or rendered illegal, a utility may not require risk-related guarantees as required in Rule 25-17.0832, paragraph (2)(c), (2)(d), (3)(e)8, and (3)(f)1. However, at its option, a solid waste facility may provide such risk related guarantee.

(5) Nothing in this rule shall preclude a solid waste facility from electing advance capacity payments authorized pursuant to section 377.709(3)(b), F.S., which advanced capacity payments shall be in lieu of firm capacity payments otherwise authorized pursuant to this rule and Rule 25-17.0832, F.A.C. The provisions of subsection (4) are applicable to solid waste facilities electing advanced capacity payments.

Specific Authority: 350.127(2), 377.709(5), F.S.
Law Implemented: 366.051, 366.055(3), 377.709, F.S.
History: New 8/8/85, formerly 25-17.91, Amended 4/26/89, 10/25/90.

Florida Power
CORPORATION

April 29, 1993

Mr. Mark E. Bentley
Attorney
Panda-Kathleen, L.P.
4100 Spring Valley, Suite 1001
Dallas, Texas 75244

MAY - 3 1993

RE: Standard Offer Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility Less Than 75 MW or a Solid Waste Facility Between Panda-Kathleen L.P. and Florida Power Corporation

Dear Mark:

This letter concerns our earlier meetings and your letters dated January 26, 1993 and March 23, 1993. In consideration of Florida Power Corporation's (FPC) waiver of the early in-service date to January 1, 1997, Panda-Kathleen, LP waives early payments and thereby elects normal payments pursuant to Schedule 3, Page 1. In addition, FPC will allow a corresponding delay of the construction commencement date.

If the foregoing accurately reflects your understanding of our agreement with respect to the subject matter set out above, please so indicate by signing in the space provided below, and returning a signed counterpart hereof to me.

Very truly yours,

Florida Power Corporation

By: Robert D. Dolan
Robert D. Dolan

FLORIDA POWER CORP.
LEGAL DEPT.
APPROVED
Date 4/29/93
By: JPF

ACCEPTED AND AGREED TO THIS 3 DAY OF May, 1993.

Panda-Kathleen, L.P.

By: Robert W. Carter
Robert W. Carter

cc: M. B. Foley, Jr.
J. P. Fania
A. J. Honey
D. W. Gammon

RDD #4 Bentley.ltr

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EXHIBIT C

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. _____ Submitted for filing: January 25, 1995

PETITION FOR DECLARATORY STATEMENT

Florida Power Corporation ("Florida Power" or "the Company") hereby submits this Petition for Declaratory Statement pursuant to Section 120.565, F.S., and Rule 25-22.020, F.A.C. Florida Power seeks a declaration that the Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less than 75 MW or a Solid Waste Facility between Panda-Kathleen L.P. and Florida Power Corporation dated November 25, 1991 (the "Standard Offer Contract") is not available to Panda-Kathleen L.P. ("Panda") if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce 115 megawatts ("MW"). In addition, if the Standard Offer Contract is available to Panda, Florida Power seeks a further declaration that it has no obligation to make capacity or energy payments under the Standard Offer Contract after the December, 2016.

INTRODUCTION

1. The name of the Petitioner and its business address is:

Florida Power Corporation
3201 - 34th Street South
Post Office Box 14042
St. Petersburg, FL 33733-4042

2. All notices, pleadings and correspondence should be directed to:

James P. Fama
James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

DISCUSSION

A. Availability of the Standard Offer Contract.

3. On November 25, 1991, Panda and Florida Power entered into the Panda Standard Offer Contract (Exhibit 1) pursuant to Rule 25-17.032(3)(a) and (c), Florida Administrative Code. That rule provides for standard offer contracts involving "small qualifying facilities less than 75 megawatts. . . ." The Panda Standard Offer Contract is expressly titled "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW or a Solid Waste Facility."

4. The Commission has expressly considered the application of Rule 25-17.032 to projects which have a total net generating capacity in excess of 75 MW, and ruled that such projects do not qualify to take advantage of standard offer contracts. Order No. PSC-92-0683-DS-EQ, dated July 21, 1992. (Exhibit 2). In so ruling, the Commission entered an Order Granting Declaratory Statement In The Negative on a request by Polk Power Partners to take advantage of a standard order contract for a facility that had a net generating capacity in excess of the 75 MW cap. See also, Order No. PSC-94-1306-FOF-EQ, dated October 24, 1994 ("the Commission's current Rule 25-17.0832(3)(a) . . . limits the availability of Standard Offer Contracts to Qualified Cogeneration Facilities (QF) under 75 MW.") (Exhibit 3).

5. Despite the 75 MW cap identified both in Rule 25-17.032(3)(a) and in the Panda Standard Offer Contract, Panda proposes to install either a GE Frame 7 EA or an ABB 11 N1 combustion turbine in a combined cycle configuration for its cogeneration project. This configuration would produce 115 MW or more, in violation of the 75 MW cap imposed by Rule 25-17.0832 and the Panda Standard Offer Contract itself.

6. FPC has repeatedly expressed its belief to Panda that this Standard Offer Contract is not available with respect to Panda's proposed facility. (See, e.g., Exhibit 4). FPC further advised Panda that it should obtain a ruling from this Commission on this issue and that FPC would comply with the Commission's ruling thereon. It was FPC's understanding that Panda intended to obtain such a ruling from the FPSC.

7. However, Panda has not sought a decision from the Commission regarding the availability of, and its rights under, the Panda Standard Offer Contract in light of the project's 115 MW size. Rather, Panda has simply discussed the matter on an informal basis with FPSC staff. Its discussions are described in the letter from Barrett G. Johnson to Joseph D. Jenkins dated August 23, 1994. (Exhibit 5). Mr. Jenkins responded by letter of August 24, 1994, to Barrett G. Johnson, (Exhibit 6), and Panda has asserted that this letter constitutes approval of their proposed action.

8. FPC believes that the Commission's express rulings in Order Nos. PSC-92-0683-DS-EQ and 94-1306-FOF-EQ, as well as the express terms of both Rule 25-17.0832 and the Panda Standard Offer Contract, clearly prohibit the availability of the Standard Offer Contract to a facility producing more than 75 MW. However, since Panda has not sought a ruling from the Commission as to

the availability of the Standard Offer Contract for this proposed facility, Florida Power accordingly requests the Commission to declare the applicability of its rules and orders governing standard offer contracts to Panda's proposed 115 MW cogeneration facility.

B. Determination of the Panda Standard Offer Contract's Payment Terms.

9. Under the terms of the Panda Standard Offer Contract, Florida Power's capacity payment obligations terminate at the end of 20 years, which will be December 2016. Among other things, Appendix C, Schedule 2 of the Contract states that the economic life of the avoided unit is 20 years, and the capacity payments were calculated on that explicit basis. (Exhibit 7). Had the contract been for a term of 30 years, the monthly capacity payments would have been correspondingly reduced. Moreover, it is for this reason that all payment schedules in the Appendices are defined only through the year 2016, a twenty year period.

10. Despite these contractual provisions and limiting terms, Panda attempted to modify the term of its Standard Offer Contract by writing in an expiration date of March, 2025. On that basis, Panda now takes the position that FPC is obligated to make capacity payments in some unspecified amount under the Panda Standard Offer Contract for an additional ten years after the year 2016. See letter dated August 10, 1994 from Kyle Woodruff, Project Manager of Panda to Robert D. Dolan, P.E., Manager, Cogeneration Contracts of Florida Power. (Exhibit 8). Panda may also take the position that Florida Power is obligated by contract to purchase as available energy after the year 2016.

11. This attempt by Panda to modify the Standard Offer Contract is improper and conflicts with the terms of the contract that was presented to it by Florida Power and which explicitly contemplated a contract term and contract payments not to exceed 20 years. As the Commission ruled in Order No. PSC-94-0488-FOF-EQ: "Like any unilateral contract, no changes can be made to a Standard Offer Contract without the consent of the utility. Any changes to the Standard Offer Contract would necessitate negotiation which would negate the use of the Standard Offer Contract." (Exhibit 9). In so ruling, the Commission granted the petition of Tampa Electric Company not to accept the standard offer contract of Polsky Energy Corporation because Polsky had made changes to that contract.

NEED FOR DECLARATORY STATEMENT

12. Florida Power has a real and immediate need for the requested declaratory statement as it relates to its own particular circumstances only. The Commission's declaratory statement as to the correct application of Rule 25-17.0832, F.A.C., and its orders establishing the availability of Standard Offer Contracts and the ability of Panda to change the terms of this Standard Offer Contract will ensure that Florida Power and its customers will only pay for capacity and energy from facilities properly configured to take advantage of this Standard Offer Contract, and that FPC and its customers will, in addition, have no contractual obligation to pay for capacity and energy purchased from Panda other than as expressly provided for in that Standard Offer Contract. A timely resolution of these essential questions will enable Florida Power to plan its needs and its financial obligations to this QF in an orderly manner.

WHEREFORE, Florida Power Corporation requests that the Commission enter an order declaring that the Panda Standard Offer Contract is not available to Panda-Kathleen L.P. if it configures its facility to have a capacity of 75 MW or more; and, if the Standard Offer Contract is nevertheless available to Panda, to declare that Florida Power has no obligation under the Contract to make any energy or capacity payments to Panda after December 2016.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By _____

James P. Fama
James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

h:\jam\panda-ds.pet

Standard Offer
For Purchase Of Firm Capacity and Energy
From A Qualifying Facility Less Than 75 MW Or A Solid Waste Facility

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ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE: September 20, 1991

EXHIBIT
-1-

STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY LESS THAN 75 MW OR A SOLID WASTE FACILITY

between

PANDA-KATHLEEN L.P.

and

FLORIDA POWER CORPORATION

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

SHEET

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY LESS THAN 75 MW OR A SOLID WASTE FACILITY

This Agreement ("Agreement") is made and entered by and between Panda-Kathleen, L.P., a Delaware Limited Partnership, having its principal place of business at 4100 Spring Valley #1001 Dallas, TX 75244 (hereinafter referred to as the "QF"), and Florida Power Corporation, a private utility corporation organized under the laws of the State of Florida, having its principal place of business at St. Petersburg, Florida (hereinafter referred to as the "Company"). The QF and the Company may be hereinafter referred to individually as a "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, the QF desires to sell, and the Company desires to purchase, electricity to be generated by the Facility and made available for sale to the Company, consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date; and

WHEREAS, the QF will engage in interconnected operation of the QF's generating facility with the Company system (hereinafter referred as the "Transmission Service Utility") which is directly interconnected at one or more points with the Company.

NOW, THEREFORE, for mutual consideration, the Parties covenant and agree as follows:

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1.4 Avoided Unit Variable O & M means the variable operation and maintenance expense associated with the unit type selected in section 8.2.1 hereof in dollars per KWH as it is defined in Appendix C.

1.5 BTU means British thermal unit.

1.6 Capacity Account means that account which complies with the procedure in section 8.6 hereof.

1.7 Capacity Payment Adjustment means the value calculated pursuant to Appendix C.

1.8 Commercial In-Service Status means (i) that the Facility is in compliance with all applicable Facility permits; (ii) that the Facility has maintained an hourly KW output, as metered at the Point of Delivery, equal to or greater than the Committed Capacity for a consecutive twenty-four (24) hour period or during the On-Peak Hours specified in Appendix C of two consecutive days; and (iii) that such twenty-four (24) hour period is reasonably reflective of the Facility's day to day operations.

1.9 Committed Capacity means 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.

1.10 Company's Interconnection Facilities means all equipment which is constructed, owned, operated, and maintained by the Company located on the Company's side of the Point of Delivery, including without limitation, equipment for connection, switching, transmission, distribution, protective relaying and safety provisions which, in the Company's reasonable judgment, is required to be installed for the delivery and measurement of electric energy into the Company's system on behalf of the QF, including all metering and telemetering equipment installed for the measurement of such energy regardless of its location in relation to the Point of Delivery.

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blockages, insurrections, riots, war, sabotage, action of a court or public authority, or accidents to or failure of equipment or machinery, including, if applicable, equipment of the Transmission Service Utility.

1.19 FPSC means the Florida Public Service Commission and any successor.

1.20 Import Capability means the capability to import power at the Florida-Southern Interface, giving consideration to the various limitations imposed upon those facilities by the electric systems to which they are directly or indirectly connected.

1.21 Interconnection Costs means the actual costs incurred by the Company for the Company's Interconnection Facilities, including, without limitation, the cost of equipment, engineering, communication and administrative activities.

1.22 Interconnection Costs Offset means the estimated costs included in the Interconnection Costs that the Company would have incurred if it were not purchasing Committed Capacity and electric energy but instead itself generated or purchased from other sources an equivalent amount of Committed Capacity and electric energy and provided normal service to the Facility as if it were a non-generating customer.

1.23 KW means one (1) kilowatt of electric capacity.

1.24 KWH means one (1) kilowatthour of electric energy.

1.25 Minimum On-Peak Capacity Factor means that value which is associated with the unit as it is defined in Appendix C.

1.26 Minimum Total Capacity Factor means that value which is associated with the unit as it is defined in Appendix C.

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1.38 Total Capacity Factor means the ratio calculated pursuant to section 8.4 hereof.

1.39 Transmission Service Agreement means that agreement between the QF and the Transmission Service Utility which meets the requirements of Appendix D.

ARTICLE II: AVAILABILITY

2.1 The availability of this Agreement is subject to:

2.1.1 The available capacity limitations described in Schedule 1 of Appendix C; and

2.1.2 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 KW; and

2.1.3 The provisions of section 2.2.

2.2 This Agreement is available to a QF with a Facility which shall be located south of the latitude of the Company's Central Florida Substation. For a QF with a Facility located north of the latitude of the Company's Central Florida Substation, this Agreement is available provided that (i) by the Contract In-Service Date the Company can make available an amount of Import Capability equal to the diminution of Import Capability caused by the Facility during the Term of the Agreement; and (ii) the QF shall reimburse the Company for such costs incurred by the Company to make available such Import Capability. Such reimbursement shall not be considered as a reduction in the payments made by the Company to the QF for capacity and energy purchased under this Agreement.

of this Agreement. Upon termination or expiration of this Agreement, the Parties shall be relieved of their obligations under this Agreement except for the obligation to pay each other all monies under this Agreement, which obligation shall survive termination or expiration.

4.2 The Parties agree that time is of the essence and that: (i) the QF shall execute the Transmission Service Agreement, if applicable, which shall be approved or accepted for filing by the FERC on or before the first day of [month, year]: N/A (ii) the Construction Commencement Date shall occur on or before the first day of [month, year]: 4/1/94 and (iii) the Facility shall achieve Commercial In-Service Status on or before the first day of [month, year]: 4/1/95, which date shall constitute the Contract In-Service Date. These three dates shall not be modified except as follows: upon written request by the QF not more than sixty (60) days after the declaration of a Force Majeure Event by the QF, which event contributes proximately and materially to a delay in the QF's schedule, these three dates each may be extended on a day-for-day basis for each day of delay so caused by the Force Majeure Event; provided, however, that the QF shall specifically identify: (i) each date for which extension is being requested; and (ii) the expected duration of the Force Majeure Event; and provided further, that the maximum extension of any of these three dates shall in no event exceed a total of one hundred and eighty (180) days, irrespective of the nature or number of Force Majeure Events declared by the QF. If the Contract In-Service Date is extended then the Term of the Agreement may be extended for the same number of days.

ARTICLE V: QF OPERATING RESPONSIBILITIES

5.1 During the Term of this Agreement, the QF shall:

5.1.1 Have the sole responsibility to, and shall at its sole expense, operate and maintain the Facility in accordance with all requirements set forth in this Agreement.

ARTICLE VI: PURCHASE AND SALE OF CAPACITY AND ENERGY

6.1 Commencing on the Contract In-Service Date, the QF shall commit, sell and arrange for delivery of the Committed Capacity to the Company and the Company agrees to purchase, accept and pay for the Committed Capacity made available to the Company at the Point of Delivery in accordance with the terms and conditions of this Agreement. The QF also shall sell and deliver or arrange for the delivery of the electric energy to the Company and the Company agrees to purchase, accept, and pay for such electric energy as is made available for sale to and received by the Company at the Point of Delivery.

6.2 The Committed Capacity and electric energy made available at the Point of Delivery to the Company shall be ~~(xx)~~ net of any electric energy used on the QF's side of the Point of Ownership or ( ) simultaneous with any purchases from the interconnected utility. This selection in billing methodology shall not be changed.

6.3 If the Company is unable to receive part or all of the Committed Capacity which the QF has made available for sale to the Company at the Point of Delivery by reason of (i) a Force Majeure Event; or (ii) pursuant to FPSC Rule 25-17.086, notice and procedural requirements of Article XX or FPSC Rule 25-17.086 shall apply and the Company will nevertheless be obligated to make capacity payments which the QF would be otherwise qualified to receive, and to pay for energy actually received, if any. The Company shall not be obligated to pay for energy which the QF would have delivered but for such occurrences and QF shall be entitled to sell or otherwise dispose of such energy in any lawful manner; provided, however, such entitlement to sell shall not be construed to require the Company to transmit such energy to another entity.

6.4 The QF shall not commence initial deliveries of energy to the Point of Delivery without the prior written consent of the Company, which consent shall not be unreasonably withheld. The QF shall provide the Company not less than thirty (30) days written notice before any testing to establish the

designate a new Committed Capacity to apply for the remaining Term. Any temporary or final redesignation of the Committed Capacity pursuant to this section 7.5 must, in the Company's judgment, be directly attributable to the Force Majeure Event and of a magnitude commensurate with the scope of the Force Majeure Event.

ARTICLE VIII: CAPACITY PAYMENTS

8.1 Capacity payments shall not commence before the Contract In-Service Date and until the QF has achieved Commercial In-Service Status.

8.2 Capacity payments shall be based upon the following selections as described in Appendix C.

8.2.1 Payment options:

( ) Value of deferral payments
(X) Early payments
( ) Levelized payments
( ) Early levelized payments

8.2.2 If an early payment option is selected pursuant to section 8.2.1, then early payments shall not commence more than three (3) years prior to the Contract In-Service Date for the unit. For the selected early payment option, the early payments shall commence __2__ ( ) years prior to the Contract In-Service Date. (As provided in columns 5, 6, and 7 of page 2, Schedule 3, Appendix C.)

8.3 At the end of each billing month, beginning with the first full month following the Contract In-Service Date, the Company will calculate the rolling average On-Peak Capacity Factor for the most recent twelve (12) month period, including such month, or for the actual number of full months since the Contract In-Service Date if less than twelve (12) months, based on the On-Peak Hours defined in Appendix C. The On-Peak Capacity Factor shall be calculated

the Company when such payments exceed value of deferral capacity payments. To ensure that the Company will receive a capacity benefit for such difference in capacity payments which have been made, or alternatively, that the QF will repay the amount of such difference in payments received to the extent the capacity benefit has not been conferred, the following provisions will apply:

8.6.1 When the QF is first entitled to a capacity payment, the Company shall establish a Capacity Account. Each month the Capacity Account shall be credited in the amount of the Company's capacity payments made to the QF pursuant to the early or levelized payment options and shall be debited in the amount which the Company would have paid for capacity in the month pursuant to the value of deferral payment option.

8.6.2 The monthly balance in the Capacity Account shall accrue interest at the annual rate of 9.96%, or 0.7944% per month.

8.6.3 The QF shall owe the Company and be liable for the credit balance in the Capacity Account. The Company agrees to notify QF monthly as to the current Capacity Account balance. Prior to receipt of accelerated capacity payments the QF shall in the form of: (i) an unconditional and irrevocable direct pay letter of credit; (ii) surety bond; (iii) other form of acceptable security; or (iv) other promise to repay such amount, (for governmental solid waste), in compliance with rule 25-17.091 F.A.C.; provided that the entity issuing such promise, the form of the promise, and the means of securing payment shall be acceptable to the Company in its sole discretion.

8.6.4 The QF's obligation to pay the credit balance in the Capacity Account shall survive termination or expiration of this Agreement.

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Adjustment, if applicable. The QF ( ) elects (X) does not elect the Performance Adjustment in Appendix C.

9.2 Energy payments pursuant to sections 9.1.1 and 9.1.2 hereof shall be subject to the delivery voltage adjustment value applicable to the Facility and approved from time to time by the FPSC pursuant to Appendix C.

ARTICLE X: CREDITS & CHARGES TO THE QF

10.1 The Company shall bill and the QF shall pay or receive all charges applicable under this Agreement.

10.2 To the extent not otherwise included in the charges under section 10.1 hereof, the Company shall bill and the QF shall pay or receive a monthly charge or credit equal to any taxes, assessments or other impositions for which the Company may be liable or relieved of as a result of its installation of facilities in connection with this Agreement, its purchases of Committed Capacity and electric energy from the QF or any other activity undertaken pursuant to this Agreement. Such debit or credit shall not include any amounts; (i) for which the Company would have been liable or relieved of had it generated or purchased from other sources an equivalent amount of Committed Capacity and electric energy based on normal value of deferral payments; or (ii) which are recovered or later paid by the Company.

10.3 The QF will receive a debit or a credit equal to the difference between the way the system would have operated utilizing the avoided unit and the way the system actually operated with the QF. The value of the emission credits or debits received by the QF will be the value at the time that the credits or debits were incurred by the Company. In order to be eligible for a credit for sulfur dioxide emission reductions the energy provided by the QF must be of equal value in reducing system-wide sulfur dioxide emissions as the energy that would have been provided by the avoided unit.

pursuant to Article IX hereof. The resulting amount, if any, shall be tendered, with cost tabulations showing the basis for payment, by the Company to the QF as a single payment. Such payments to the QF shall be due and payable twenty (20) business days following the date the meters are read.

12.1.2 When any amount is owing from the QF, the Company shall issue a monthly bill to the QF with cost tabulations showing the basis for the charges. All amounts owing to the Company from the QF shall be due and payable twenty (20) business days after the date of the Company's billing statement. Amounts owing to the Company for retail electric service shall be payable in accordance with the provisions of the applicable rate schedule.

12.1.3 At the option of the QF, the Company will provide a net payment or net bill, whichever is applicable, that consolidates amounts owing to the QF with amounts owing to the Company.

12.1.4 Except for charges for retail electric service, any amount due and payable from either Party to the other pursuant to this Agreement that is not received by the due date shall accrue interest from the due date at the rate specified in section 13.2 hereof.

ARTICLE XIII: SECURITY GUARANTIES

13.1 Within sixty (60) days after the Execution Date of this Agreement, the QF shall post a Security Guaranty with the Company equal to $10.00 per KW of Committed Capacity to ensure completion of the Facility in a timely fashion as contemplated by this Agreement. This Agreement shall terminate if the Security Guaranty is not tendered on or before the applicable due date specified herein. The QF shall either: (i) pay the Company a cash deposit in

of the State/Commonwealth of Delaware and is qualified to do business under the laws of the State of Florida.

14.1.2 The QF represents, covenants and warrants that, to the best of the QF's knowledge, throughout the Term of this Agreement the QF will be in compliance with, or will have acted in good faith and used its best efforts to be in compliance with, all laws, judicial and administrative orders, rules and regulations, with respect to the ownership and operation of the Facility, including but not limited to applicable certificates, licenses, permits and governmental approvals; environmental impact analyses, and, if applicable, the mitigation of environmental impacts.

14.1.3 The QF represents and warrants that it is not prohibited by any law or contract from entering into this Agreement and discharging and performing all covenants and obligations on its part to be performed pursuant to this Agreement.

14.1.4 The QF represents and warrants that there is no pending or threatened action or proceeding affecting the QF before any court, governmental agency or arbitrator that could reasonably be expected to affect materially and adversely the ability of the QF to perform its obligations hereunder, or which purports to affect the legality, validity or enforceability of this Agreement.

14.2 All representations and warranties made by the QF in or under this Agreement shall survive the execution and delivery of this Agreement and any action taken pursuant hereto.

15.1.6 The Facility fails to achieve Commercial In-Service Status on or before the Contract In-Service Date.

15.1.7 The QF fails to comply with any other material terms and conditions of this Agreement and fails to conform to said term and condition within sixty (60) days after a demand by the Company to do so.

15.2 REMEDIES FOR PRE-OPERATIONAL EVENTS OF DEFAULT

For any Pre-Operational Event of Default specified under section 15.1 hereof, the Company may terminate this Agreement and retain the Security Guaranty pursuant to section 13.3.

15.3 OPERATIONAL EVENTS OF DEFAULT

Any one or more of the following events except events caused by Force Majeure Events unless otherwise stated, occurring on or after the Contract In-Service Date shall constitute an Operational Event of Default by the QF and shall give the Company the right, without limitation, to exercise the remedies under section 15.4 hereof:

15.3.1 The QF fails upon request by the Company pursuant to section 7.4 hereof to re-demonstrate the Facility's Commercial In-Service Status to the satisfaction of the Company.

15.3.2 The QF fails for any reason, including Force Majeure Events, to qualify for capacity payments under Article VIII hereof for any consecutive twenty-four (24) month period.

15.3.3 The QF fails to perform or comply with any other material terms and conditions of this Agreement and fails to

ARTICLE XVI: PERMITS

The QF hereby agrees to seek to obtain, at its sole expense, any and all governmental permits, certificates, or other authorization the QF is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement. The Company hereby agrees, at the QF's expense, to seek to obtain any and all governmental permits, certificates, or other authorization the Company is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement.

ARTICLE XVII: INDEMNIFICATION

The QF agrees to indemnify and save harmless the Company and its employees, officers, and directors against any and all liability, loss, damage, costs or expense which the Company, its employees, officers and directors may hereafter incur, suffer or be required to pay by reason of negligence on the part of the QF in performing its obligations pursuant to this Agreement or the QF's failure to abide by the provisions of this Agreement. The Company agrees to indemnify and save harmless the QF and its employees, officers, and directors against any and all liability, loss, damage, cost or expense which the QF, its employees, officers, and directors may hereafter incur, suffer, or be required to pay by reason of negligence on the part of the Company in performing its obligations pursuant to this Agreement or the Company's failure to abide by the provisions of this Agreement. The QF agrees to include the Company as an additional insured in any liability insurance policy or policies the QF obtains to protect the QF's interests with respect to the QF's indemnity and hold harmless assurance to the Company contained in Article XVII.

19.3 The QF shall pay all premiums and other charges due on said insurance policy and shall keep said policy in force during the entire period of interconnection with the Company.

ARTICLE XX: FORCE MAJEURE

20.1 If either Party because of Force Majeure Event is rendered wholly or partly unable to perform its obligations under this Agreement, other than the obligation of that Party to make payments of money, that Party shall, except as otherwise provided in this Agreement, be excused from whatever performance is affected by the Force Majeure Event to the extent so affected, provided that:

20.1.1 The non-performing Party, as soon as possible after it becomes aware of its inability to perform, shall declare a Force Majeure Event and give the other Party written notice of the particulars of the occurrence(s), including without limitation, the nature, cause, and date and time of commencement of the occurrence(s), the anticipated scope and duration of any delay, and any date(s) that may be affected thereby.

20.1.2 The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.

20.1.3 Obligations of either Party which arose before the occurrence causing the suspension of performance are not excused as a result of the occurrence.

20.1.4 The non-performing Party uses its best efforts to remedy its inability to perform with all reasonable dispatch;

21.2 In no event shall any Company statement, representation, or lack thereof, either express or implied, relieve the QF of its exclusive responsibility for the Facility and its exclusive obligations, if applicable, with the Transmission Service Utility. Any Company inspection of property or equipment owned or controlled by the QF or the Transmission Service Utility, or any Company review of or consent to the QF's or the Transmission Service Utility's plans, shall not be construed as endorsing the design, fitness or operation of the Facility or the Transmission Service Utility's equipment nor as a warranty or guarantee.

21.3 The QF shall reactivate the Facility and shall arrange for the Transmission Service Utility's delivery of electric energy to the Point of Delivery at its own expense if either the Facility or the equipment of the Transmission Service Utility is rendered inoperable due to actions of the QF or its agents, or a Force Majeure Event. The Company shall reactivate the Company's Interconnection Facilities at its own expense if the same are rendered inoperable due to actions of the Company or its agents, or a Force Majeure Event.

ARTICLE XXII: SUCCESSORS AND ASSIGNS

Neither Party shall have the right to assign its obligations, benefits, and duties without the consent of the other Party, which shall not be unreasonably withheld or delayed.

ARTICLE XXIII: DISCLAIMER

In executing this Agreement, the Company does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with the QF or any assignee of this Agreement, nor does it create any third party beneficiary rights. Nothing contained in this Agreement shall be construed to create an association, trust, partnership, or joint venture between the Parties. No payment by the

and shall be deemed to be given when received. Notices and other communications by the Company to the QF shall be addressed to:

Panda-Kathleen L.P.
4100 Spring Valley
Suite 1001
Dallas, TX 75244

Notices to the Company shall be addressed to:

Florida Power Corporation
P. O. Box 14042
St. Petersburg, FL 33733

27.2 Communications made for emergency or operational reasons may be made to the following persons and shall thereafter be confirmed promptly in writing.

To The Company: System Dispatcher on Duty
Title: System Dispatcher
Telephone: (813)866-5888
Telecopier: (813)384-7865

To The QF: Name Hans R. van Kuilenburg
Title: President
Telephone: (214) 980-7159
Telecopier: (214) 980-6815

27.3 Either Party may change its representatives in sections 28.1 or 28.2 by prior written notice to the other Party.

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
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IN WITNESS WHEREOF, the QF and the Company have caused this Agreement to be executed by their duly authorized representatives on the day and year first above written.

The Qualifying Facility:
Panda-Kathleen L.P.

By: PANDA-KATHLEEN CORPORATION

Title: Robert W. Carter
Robert Carter, Chairman

Date: 10-4-91

ATTEST:
Jessie Broerman

The Company:

By:

Title: PETER DAGOSTINO
VICE-PRESIDENT

Date: 11-25-91

ATTEST:
Robert Fiala

FLORIDA POWER CORP.
LEGAL DEPT.
APPROVED
Date 11/25/91
By

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

2.2 The QF shall submit the Facility's final electrical plans and all revisions to the information previously submitted under section 2.1 hereof to the Company no later than the date specified under section 2.1 hereof, unless such date is modified in the Company's reasonable discretion. Based upon the information provided and within sixty (60) days after the information is provided, the Company shall update its written Interconnection Costs and schedule estimates, provide the estimated time period required for construction of the Company's Interconnection Facilities, and specify the date by which the Company must receive notice from the QF to initiate construction, which date shall, to the extent practical, be consistent with the QF's schedule for delivery of energy into the Company's system. The final electrical plans shall include the following information, unless all or a portion of such information is waived by the Company in its discretion:

a. Physical layout drawings, including dimensions;
b. All associated equipment specifications and characteristics including technical parameters, ratings, basic impulse levels, electrical main one-line diagrams, schematic diagrams, system protections, frequency, voltage, current and interconnection distance;
c. Functional and logic diagrams, control and meter diagrams, conductor sizes and length, and any other relevant data which might be necessary to understand the Facility's proposed system and to be able to make a coordinated system;
d. Power requirements in watts and vars;
e. Expected radio-noise, harmonic generation and telephone interference factor;
f. Synchronizing methods; and
g. Facility operating/instruction manuals.
h. If applicable, a detailed description of the facilities to be utilized by the Transmission Service Utility to deliver energy to the Point of Delivery.

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3.2 The QF agrees to pay all of the Company's actual Interconnection Costs as such costs are incurred and billed in accordance with Article XII of the Agreement. Such amounts shall be billed pursuant to section 3.2.1 if the QF elects the payment option permitted by FPSC Rule 25-17.087(4). Otherwise the QF shall be billed pursuant to section 3.2.2.

3.2.1 Upon a showing of credit worthiness, the QF shall have the option of making monthly installment payments for Interconnection Costs over a period no longer than thirty six (36) months. The period selected is 36 months. Principal payments will be based on the estimated Interconnection Costs less the Interconnection Costs Offset, divided by the repayment period in months to determine the monthly principal payment. Payments will be invoiced in the first month following first incurrence of Interconnection Costs by the Company. Invoices to the QF will include principal payments plus interest on the unpaid balance, if any, calculated at a rate equal to the thirty (30) day highest grade commercial paper rate as published in the Wall Street Journal on the first business day of each month. The final payment or payments will be adjusted to cause the sum of principal payments to equal the actual Interconnection Costs.

3.2.2 When Interconnection Costs are incurred by the Company, such costs will be billed to the QF to the extent that they exceed the Interconnection Costs Offset.

ISSUE BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

APPENDIX B

PARALLEL OPERATING PROCEDURES

1.0 Purpose

This appendix provides general operating, testing, and inspection procedures intended to promote the safe parallel operation of the Facility with the Company's system. All requirements contained herein shall apply in addition to and not in lieu of the provisions of the Agreement.

2.0 Schematic Diagram

Exhibit B-1, attached hereto and made a part hereof, is a schematic diagram showing the major circuit components connecting the Facility and the Company's [substation] and showing the Point of Delivery and the Point of Metering and/or Point of Ownership, if different. All switch number designations initially left blank on Exhibit B-1 will be inserted by the Company on or before the date on which the Facility first operates in parallel with the Company's system.

3.0 Operating Standards

3.1 The QF and the Company will independently provide for the safe operation of their respective facilities, including periods during which the other Party's facilities are unexpectedly energized or de-energized.

3.2 The QF shall reduce, curtail, or interrupt electrical generation or take other appropriate action for so long as it is reasonably necessary, which in the judgment of the QF or the Company may be necessary to

practicable, however, prior notice shall be given. Any of the following conditions shall be cause for disconnection:

1. Company system emergencies and/or maintenance repair and construction requirements;
2. hazardous conditions existing on the Facility's generating or protective equipment as determined by the Company;
3. adverse effects of the Facility's generation to the Company's other electric consumers and/or system as determined by the Company;
4. failure of the QF to maintain any required insurance; or
5. failure of the QF to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the Facility's electric generating equipment or the operation of such equipment.

3.7 The Facility's electric generation equipment shall not be operated in parallel with the Company's system when auxiliary power is being provided from a source other than the Facility's electric generation equipment.

3.8 Neither Party shall operate switching devices owned by the other Party, except that the Company may open the manual disconnect switch(s) number(s)_____ owned by the QF pursuant to section 3.6 hereof.

3.9 Should one Party desire to change the operating position of a switching device owned by the other Party, the following procedures shall be followed:

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EFFECTIVE: September 20, 1991

3.10.1 If the QF elects option (i), the breaker assembly shall be opened and drawn out by QF personnel. As promptly as practicable, Company personnel shall install a Company padlock and a red tag on the breaker enclosure door.

3.10.2 If the QF elects option (ii), the switch shall be opened by QF personnel or by Company personnel and, as promptly as practicable, Company personnel will install a Company padlock and a red tag.

4.0 Inspection and Testing

4.1 The inspection and testing of all electrical relays governing the operation of the generator's circuit breaker shall be performed in accordance with manufacturer's recommendations, but in no case less than once every 12 months. This inspection and testing shall include, but not be limited to, the following:

(i) electrical checks on all relays and verification of settings electrically;

(ii) cleaning of all contacts;

(iii) complete testing of tripping mechanisms for correct operating sequence and proper time intervals; and

(iv) visual inspection of the general condition of the relays.

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

EXHIBIT B-1

Exhibit B-1 will be unique for each Facility and must be complete prior to parallel operation with the Company.

ISSUED BY: S. F. Nixon, Jr., Director Rate Department
EFFECTIVE: September 20, 1991

APPENDIX C
RATES

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ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE: September 20, 1991

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RATES

SCHEDULE 2
GENERAL INFORMATION FOR 1997 COMBUSTION TURBINE UNIT

GENERAL
YEAR OF AVOIDED UNIT = 1997
AVOIDED UNIT REFERENCE PLANT = BARTOW CT UNITS

INVESTMENT DATA
TOTAL COST, DIRECT + AFUDC, IN 1/91 $'s = $398.88/KW
ANNUAL ESCALATION RATE OF PLANT COSTS = 5.10%
ECONOMIC PLANT LIFE = 20 YEARS

OPERATING DATA
AVOIDED UNIT FIXED O&M COSTS IN 1/91 $'s = $6.18/KW/YR
AVOIDED UNIT VARIABLE O&M COSTS IN 1/91 $'s = $1.83/MWH
ANNUAL ESCALATION RATE OF O&M COSTS = 5.10%
MINIMUM ON-PEAK CAPACITY FACTOR = 90.0%
MINIMUM TOTAL CAPACITY FACTOR = 42.0%
SYSTEM VARIABLE O&M COSTS IN 1/91 $'s = $0.673/MWH
AVOIDED UNIT HEAT RATE = 11,610 BTU/KWH
TYPE OF FUEL = DISTILLATE

ON-PEAK HOURS
(1) FOR THE CALENDAR MONTHS OF NOVEMBER THROUGH MARCH,
ALL DAYS: 6:00 A.M. TO 12:00 NOON, AND
5:00 P.M. TO 10:00 P.M.
(2) FOR THE CALENDAR MONTHS OF APRIL THROUGH OCTOBER,
ALL DAYS: 11:00 A.M. TO 10:00 P.M.

FINANCIAL DATA
K FACTOR (MID YEAR) = 1.5259
UTILITY DISCOUNT RATE = 9.96%

ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE DATE: September 20, 1991

APPENDIX C
RATES

SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)

CAPACITY PAYMENT - $/KW/MONTH

CONTRACT YEAR	EARLY PAYMENT OPTION STARTING 1/96 O&M	STARTING 1/96 CAPITAL	STARTING 1/96 TOTAL	STARTING 1/95 O&M	STARTING 1/95 CAPITAL	STARTING 1/95 TOTAL	STARTING 1/94 O&M	STARTING 1/94 CAPITAL	STARTING 1/94 TOTAL
1994	-	-	-	-	-	-	0.49	3.52	4.01
1995	-	-	-	0.56	3.96	4.52	0.52	3.69	4.21
1996	0.63	4.48	5.11	0.58	4.17	4.75	0.54	3.89	4.43
1997	0.66	4.71	5.37	0.61	4.39	5.00	0.57	4.08	4.65
1998	0.69	4.96	5.65	0.65	4.60	5.25	0.60	4.29	4.89
1999	0.73	5.20	5.93	0.68	4.84	5.52	0.63	4.51	5.14
2000	0.77	5.47	6.24	0.71	5.09	5.80	0.66	4.74	5.40
2001	0.81	5.74	6.55	0.75	5.34	6.09	0.70	4.98	5.68
2002	0.85	6.04	6.89	0.79	5.62	6.41	0.73	5.24	5.97
2003	0.89	6.35	7.24	0.83	5.90	6.73	0.77	5.50	6.27
2004	0.94	6.67	7.61	0.87	6.21	7.08	0.81	5.78	6.59
2005	0.98	7.02	8.00	0.91	6.53	7.44	0.85	6.08	6.93
2006	1.03	7.38	8.41	0.96	6.86	7.82	0.90	6.38	7.28
2007	1.09	7.74	8.83	1.01	7.20	8.21	0.94	6.71	7.65
2008	1.14	8.14	9.28	1.06	7.57	8.63	0.99	7.05	8.04
2009	1.20	8.56	9.76	1.12	7.95	9.07	1.04	7.41	8.45
2010	1.26	9.00	10.26	1.17	8.37	9.54	1.09	7.79	8.88
2011	1.33	9.45	10.78	1.23	8.79	10.02	1.15	8.19	9.34
2012	1.39	9.94	11.33	1.30	9.23	10.53	1.21	8.60	9.81
2013	1.46	10.45	11.91	1.36	9.71	11.07	1.27	9.04	10.31
2014	1.54	10.97	12.51	1.43	10.21	11.64	1.33	9.51	10.84
2015	1.62	11.53	13.15	1.50	10.73	12.23	1.40	9.99	11.39
2016	1.70	12.12	13.82	1.58	11.27	12.85	1.47	10.50	11.97

NOTE: Above payments calculated in accordance with formulas set forth in FPSC Rule 25-17.0832(5). Payment shall be adjusted by multiplying factor for On-Peak Capacity Factor determined in Schedule 7.

ISSUED BY: S. F. Nixon Jr., Director Rate Department

EFFECTIVE DATE: September 20, 1991

APPENDIX C
RATES

SCHEDULE 3
Payments for Avoided 1997 Combustion Turbine Unit

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
	CAPACITY PAYMENT - $/KW/MONTH								
	EARLY LEVELIZED PAYMENT OPTION - $/KW/MONTH								
CONTRACT	STARTING 1/96			STARTING 1/95			STARTING 1/94		
YEAR	O&M	CAPITAL	TOTAL	O&M	CAPITAL	TOTAL	O&M	CAPITAL	TOTAL
1994	-	-	-	-	-	-	0.49	5.25	5.74
1995	-	-	-	0.56	5.84	6.40	0.52	5.25	5.77
1996	0.63	6.52	7.15	0.58	5.84	6.42	0.54	5.25	5.79
1997	0.66	6.52	7.18	0.61	5.84	6.45	0.57	5.25	5.82
1998	0.69	6.52	7.21	0.65	5.84	6.49	0.60	5.25	5.85
1999	0.73	6.52	7.25	0.68	5.84	6.52	0.63	5.25	5.88
2000	0.77	6.52	7.29	0.71	5.84	6.55	0.66	5.25	5.91
2001	0.81	6.52	7.33	0.75	5.84	6.59	0.70	5.25	5.95
2002	0.85	6.52	7.37	0.79	5.84	6.63	0.73	5.25	5.98
2003	0.89	6.52	7.41	0.83	5.84	6.67	0.77	5.25	6.02
2004	0.94	6.52	7.46	0.87	5.84	6.71	0.81	5.25	6.06
2005	0.98	6.52	7.50	0.91	5.84	6.75	0.85	5.25	6.10
2006	1.03	6.52	7.55	0.96	5.84	6.80	0.90	5.25	6.15
2007	1.09	6.52	7.61	1.01	5.84	6.85	0.94	5.25	6.19
2008	1.14	6.52	7.66	1.06	5.84	6.90	0.99	5.25	6.24
2009	1.20	6.52	7.72	1.12	5.84	6.96	1.04	5.25	6.29
2010	1.26	6.52	7.78	1.17	5.84	7.01	1.09	5.25	6.34
2011	1.33	6.52	7.85	1.23	5.84	7.07	1.15	5.25	6.40
2012	1.39	6.52	7.91	1.30	5.84	7.14	1.21	5.25	6.46
2013	1.46	6.52	7.98	1.36	5.84	7.20	1.27	5.25	6.52
2014	1.54	6.52	8.06	1.43	5.84	7.27	1.33	5.25	6.58
2015	1.62	6.52	8.14	1.50	5.84	7.34	1.40	5.25	6.65
2016	1.70	6.52	8.22	1.58	5.84	7.42	1.47	5.25	6.72

NOTE: Above payments calculated in accordance with formulas set forth in FPSC Rule 25-17.0832(5). Payment shall be adjusted by multiplying factor for On-Peak Capacity Factor determined in Schedule 7.

ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE DATE: September 20, 1991

APPENDIX C
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SCHEDULE 4
Capacity Payment Adjustment for On-Peak Capacity Factor

O.P.C.F.	CAPACITY PAYMENT ADJUSTMENT MULTIPLYING FACTOR
Greater than or Equal to the Committed O.P.C.F.	1.0
From 50.0% to the Committed O.P.C.F.	$\left[\frac{\text{O.P.C.F.}}{\text{Committed O.P.C.F.}}\right]^{1.5}$
Below 50.0%	0

NOTE: O.P.C.F. = On-Peak Capacity Factor

ISSUED BY: S. F. Nixon, Jr., Rate Department

EFFECTIVE: September 20, 1991

APPENDIX C
RATES

SCHEDULE 6

Charges to Qualifying Facility

Customer Charges:

The Qualifying Facility shall be billed monthly for the costs of meter reading, billing, and other appropriate administrative costs. The charge shall be set equal to the stated Customer Charge of the Company's applicable rate schedule for service to the Qualifying Facility load as a non-generating customer of the Company.

Operation, Maintenance, and Repair Charges:

The Qualifying Facility shall be billed monthly for the costs associated with the operation, maintenance, and repair of the interconnection. These include (a) the Company's inspections of the interconnection and (b) maintenance of any equipment beyond that which would be required to provide normal electric service to the Qualifying Facility if no sales to the Company were involved.

The Qualifying Facility shall pay a monthly charge equal to 0.50% of the Interconnection Costs less the Interconnection Costs Offset. This monthly rate shall be adjusted periodically.

ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE DATE: September 20, 1991

APPENDIX D

TRANSMISSION SERVICE STANDARDS

1.0 Purpose.

This appendix provides minimum standards required by the Company in the Transmission Service Agreement and applies to QF's whose Facility is not directly interconnected with the Company and who are selling firm capacity and energy to the Company.

2.0 Standards for QF's Selling Firm Capacity and Energy.

2.1 The QF shall ensure that, throughout the Term of the Agreement, the Transmission Service Utility or its lawful successors but no other party shall deliver the Committed Capacity and electric energy to the Company on behalf of the QF.

2.2 A proposed Transmission Service Agreement and any amendments thereto shall be submitted to the Company for its review and consent no less than sixty (60) days before said Transmission Service Agreement or amendment is proposed to be tendered for filing with the FERC. Such consent shall not be unreasonably withheld. No review, recommendations or consent by the Company shall be deemed an approval of any safety or other arrangements between the QF and the Transmission Service Utility nor shall it relieve the QF and the Transmission Service Utility of their responsibility with respect to the adequate engineering, design, construction and operation of any facilities other than the Company's Interconnection Facilities and for any injury to property or persons associated with any failure to perform in a proper and safe manner for any reason. Nothing contained herein shall prevent the Company from exercising any rights that it otherwise would have to participate as a full party before the

Transmission Service Agreement and the activities undertaken thereunder, including, without limitation, any facility costs, service charges, or third party impact claims;

(vii) the Company shall be entitled to reasonable access at all times to property and equipment owned or controlled by either the QF or the Transmission Service Utility and at reasonable times to records and schedules maintained by either the QF or the Transmission Service Utility, in order to carry out the purposes of the Agreement in a safe, reliable and economical manner;

(viii) unless otherwise agreed by the Company, the Point of Delivery into the Company's system shall be defined as all points of interconnection at transmission voltages between the Company and the Transmission Service Utility pursuant to any tariffs or interchange agreements on file with the FERC and in effect from time to time;

(ix) the electric energy made available from the Facility for transmission to the Company shall be telemetered to the Company and shall be reduced for all losses assessed by the Transmission Service Agreement from the Point of Metering to the Point of Delivery; the electric energy as so adjusted shall be considered the electric energy delivered to the Company for billing purposes and shall be considered as if within the Company's Control Area, provided that the Transmission Service Utility can deliver and the Company accept the electric energy as so adjusted;

(x) As an alternative to section 2.3(ix) hereof, electric energy from the Facility shall be scheduled for delivery to the Point of Delivery by the Transmission Service Utility and such

PART III

UTILITIES' OBLIGATIONS WITH REGARD TO COGENERATORS AND SMALL POWER PRODUCERS

25-17.080 Definitions and Qualifying Criteria.

(1) For the purpose of these rules the Commission adopts the Federal Energy Regulatory Commission Rules 292.101 through 292.207, effective March 20, 1980, regarding definitions and criteria that a small power producer or cogenerator must meet to achieve the status of a qualifying facility. Small power producers and cogenerators which fail to meet the FERC criteria for achieving qualifying facility status but otherwise meet the objectives of economically reducing Florida's dependence on oil and the economic deferral of utility power plant expenditures may petition the Commission to be granted qualifying facility status for the purpose of receiving energy and capacity payments pursuant to these rules.

(2) In general, under the FERC regulations, a small power producer is a qualifying facility if:

(a) the small power producer does not exceed 80 MW; and

(b) the primary (at least 50%) energy source of the small power producer is biomass, waste, or another renewable resource; and

(c) the small power production facility is not owned by a person primarily engaged in the generation or sale of electricity. This criterion is met if less than 50% of the equity interest in the facility is owned by a utility, utility holding company, or a subsidiary of them.

(3) In general, under the FERC regulations, a cogenerator is a qualifying facility if:

(a) the useful thermal energy output of a topping cycle cogeneration facility is not less than 5% of the facility's total energy output per year; and

(b) the useful power output plus half of the useful thermal energy output of a topping cycle cogeneration facility built after March 13, 1980, with any energy input of natural gas or oil is greater than 42.5% or 45% if the useful thermal energy output is less than 15% of the total energy output of the facility; and

(c) the useful power output of a bottoming cycle cogeneration facility built after March 13, 1980, with any energy input as supplementary firing of natural gas or oil is not less than 45% of the natural gas or oil input on an annual basis; and

3. upon completion and approval by the utility of any alterations to the interconnection reasonably required to effect the change in billing and upon payment by the qualifying facility for such alterations.

(c) Should a qualifying facility elect to make simultaneous purchases and sales, purchases of electric service by the qualifying facility from the interconnecting utility shall be billed at the retail rate schedule under which the qualifying facility load would receive service as a non-generating customer of the utility; sales of electricity delivered by the qualifying facility to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832.

(d) Should a qualifying facility elect a net billing arrangement, the hourly net energy and capacity sales delivered to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832; purchases from the interconnecting utility shall be billed pursuant to the utility's applicable standby service or supplemental service rate schedules.

(4)(a) Payments for energy and capacity sold by a qualifying facility shall be rendered monthly by the purchasing utility and as promptly as possible, normally by the twentieth business day following the day the meter is read. The kilowatt-hours sold by the qualifying facility, the applicable avoided energy rate at which payments were made, and the rate and amount of the applicable capacity payment shall accompany the payment by the utility to the qualifying facility.

(b) Where simultaneous purchases and sales are made by a qualifying facility, avoided energy and capacity payments to the qualifying facility may, at the option of the qualifying facility, be shown as a credit to the qualifying facility's bill; the kilowatt-hours produced by the qualifying facility, the avoided energy rate at which payments were made, and the rate and amount of the capacity payment shall accompany the bill to the qualifying facility. A credit shall not exceed the amount of the qualifying facility's bill from the utility and the excess, if any, shall be paid directly to the qualifying facility in accordance with this rule.

(5) A utility may require a security deposit from each interconnected qualifying facility in accordance with Rule 25-6.097 for the qualifying facility's purchase of power from the utility. Each utility's tariff shall contain specific criteria for determining the applicability and amount of a deposit from an interconnected qualifying facility consistent with projected net cash flow on a monthly basis.

(6) Each utility shall keep separate accounts for sales to qualifying facilities and purchases from qualifying facilities.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 5/13/81, Amended 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.0825 As-Available Energy.

(1) As-available energy is energy produced and sold by a qualifying facility on an hour-by-hour basis for which contractual commitments as to the quantity, time, or reliability of delivery are not required. Each utility shall purchase as-available energy from any qualifying facility. As-available energy shall be sold by a qualifying facility and purchased by a utility pursuant to the terms and conditions of a published tariff or a separately negotiated contract.

As-available energy sold by a qualifying facility shall be purchased by the utility at a rate, in cents per kilowatt-hour, not to exceed the utility's avoided energy cost. Because of the lack of assurances as to the quantity, time, or reliability of delivery of as-available energy, no capacity payments shall be made to a qualifying facility for the delivery of as-available energy.

(a) Tariff Rates: Each utility shall publish a tariff for the purchase of as-available energy from qualifying facilities. Each utility's published tariff shall state that the rate of payment for as-available energy is the utility's

off-peak periods during the month, and the average of their actual hourly avoided energy costs for the month with the Commission. A copy shall be furnished to any individual who requests such information.

(5) Upon request by a qualifying facility or any interested person, each utility shall provide within 30 days its most current projections of its generation mix, fuel price by type of fuel, and at least a five year projection of fuel forecasts to estimate future as-available energy prices as well as any other information reasonably required by the qualifying facility to project future avoided cost prices including, but not limited to, a 24 hour advance forecast of hour-by-hour avoided energy costs. The utility may charge an appropriate fee, not to exceed the actual cost of production and copying, for providing such information.

(6) Utility payments for as-available energy made to qualifying facilities pursuant to the utility's tariff shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power. Utility payments for as-available energy made to qualifying facilities pursuant to a separately negotiated contract shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power costs if the payments are not reasonably projected to result in higher cost electric service to the utility's general body of ratepayers or adversely affect the adequacy or reliability of electric service to all customers.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.083 Firm Energy and Capacity.
Specific Authority: 366.04(1), 366.05(1), 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 9/4/83, formerly 25-17.83, Repealed 10/25/90.

25-17.0831 Contracts.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.831, Repealed 10/25/90.

25-17.0832 Firm Capacity and Energy Contracts.

(1) Firm capacity and energy are capacity and energy produced and sold by a qualifying facility and purchased by a utility pursuant to a negotiated contract or a standard offer contract subject to certain contractual provisions as to the quantity, time and reliability of delivery.

(a) Within one working day of the execution of a negotiated contract or the receipt of a signed standard offer contract, the utility shall notify the Director of the Division of Electric and Gas and provide the amount of committed capacity and the avoided unit, if any, to which the contract should be applied.

(b) Within 10 working days of the execution of a negotiated contract for the purchase of firm capacity and energy or within 10 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 a summary shall report:

1. the name of the utility and the owner and/or operator of the qualifying facility, who are signatories of the contract;
2. the amount of committed capacity specified in the contract, the size of the facility, the type of the facility its location, and its interconnection and transmission requirements;
3. the amount of annual and on-peak and off-peak energy expected to be delivered to the utility;
4. the type of unit being avoided, its size and its in-service year;
5. the in-service date of the qualifying facility; and

capacity or parts thereof by the purchasing utility. Rates for payment of capacity sold by a qualifying facility shall be specified in the contract for the duration of the contract. In reviewing a utility's standard offer contract or contracts, the Commission shall consider the criteria specified in paragraphs (2)(a) through (2)(d) of this rule, as well as any other information relating to the determination of the utility's full avoided costs.

(c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts or a solid waste facility as defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2). Should a utility fail to negotiate in good faith, any qualifying facility may apply to the Commission for relief pursuant to Rule 25-17.0834, F.A.C.

(d) Within 60 days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions may be based on:

1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer.

A standard offer contract which has been accepted by a qualifying facility shall apply towards the subscription limit of the unit designated in the contract effective the date the utility receives the accepted contract. If the contract is not accepted by the utility, its effect shall be removed from the subscription limit effective the date of the Commission order granting the utility's petition.

(e) Minimum Specifications. Each standard offer contract shall, at minimum, specify:

1. the avoided unit or units on which the contract is based;
2. the total amount of committed capacity, in megawatts, needed to fully subscribe the avoided unit specified in the contract;
3. the payment options available to the qualifying facility including all financial and economic assumptions necessary to calculate the firm capacity payments available under each payment option and an illustrative calculation of firm capacity payments for a minimum ten year term contract commencing with the in-service date of the avoided unit for each payment option;
4. the date on which the standard contract offer expires. This date shall be at least four years before the anticipated in-service date of the avoided unit or units unless the avoided unit could be constructed in less than four years, or when the subscription limit has been reached;
5. the date by which firm capacity and energy deliveries from the qualifying facility to the utility shall commence. This date shall be no later than the anticipated in-service date of the avoided unit specified in the contract;
6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. 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;

3. Levelized capacity payments. Levelized capacity payments shall commence on the anticipated in-service date of the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance portion of capacity payments shall be equal to the value of the year-by-year deferral of fixed operation and maintenance expense associated with the avoided unit calculated in conformance with paragraph (5)(a) of this rule. Where levelized capacity payments are elected, the cumulative present value of the levelized capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule, value of deferral capacity payments.
4. Early levelized capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early levelized capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance expense shall be calculated in conformance with paragraph (5)(b) of this rule. At the option of the qualifying facility, early levelized capacity payments shall commence at any time after the specified early capacity date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early levelized capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule.

(4) Avoided Energy Payments.

(a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825.

(b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility. During the periods that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825(2)(a).

(c) The energy cost of the avoided unit specified in the contract shall be defined as the cost of fuel, in cents per kilowatt-hour, which would have been burned at the avoided unit plus variable operation and maintenance expense plus avoided line losses. The cost of fuel shall be calculated as the average market

t = the term, in years, of the contract for the purchase of firm capacity;

$$A_C = F \left[\frac{(1 + ip)}{1 - \frac{(1 + ip)^t}{(1 + r)^t}} \right]$$

Where: F = the cumulative present value in the year that the contractual payments will begin, of the avoided capital cost component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit(s); and

r = annual discount rate, defined as the utility's incremental after tax cost of capital; and

$$A_O = G \left[\frac{(1 + io)}{1 - \frac{(1 + io)^t}{(1 + r)^t}} \right]$$

Where: G = The cumulative present value in the year that the contractual payments will begin, of the avoided fixed operation and maintenance expense component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit.

(c) Levelized and early levelized capacity payments. Monthly levelized and early levelized capacity payments shall be calculated as follows:

$$P_L = F \times \frac{r}{12\left[1-(1+r)^{-t}\right]} + O$$

Where: P_L = the monthly levelized capacity payment, starting on or prior to the in-service date of the avoided unit;

F = the cumulative present value, in the year that the contractual payments will begin, of the avoided capital cost component of the capacity payments which would have been made had the capacity payments not been levelized;

r = the annual discount rate, defined as the utility's incremental after tax cost of capital; and

t = the term, in years, of the contract for the purchase of firm capacity.

O = the monthly fixed operation and maintenance component of the capacity payments, calculated in accordance with paragraph (5)(a) for levelized capacity payments or with paragraph (5)(b) for early levelized capacity payments.

(6) Sale of Excess Firm Energy and Capacity. To the extent that firm energy and capacity purchased from a qualifying facility pursuant to a standard offer contract or an individually negotiated contract is not needed by the purchasing utility, these rules shall be construed to encourage the

(3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility as approved by section 350.127, Florida Statutes.
Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.0835 Wheeling.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), 366.055(3), F.S.
History: New 9/4/83, repealed 10/4/85, formerly 25-17.835.

25-17.084 The Utility's Obligation to Sell.
Upon compliance with Rule 25-17.087, each utility shall sell energy to qualirying facilities at rates which are just, reasonable, and non-discriminatory.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.84.

25-17.085 Reserved.

25-17.086 Periods During Which Purchases are not Required.
Where purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082 to purchase electricity from a qualifying facility. The utility shall notify the qualifying facility(ies) prior to the instance giving rise to those conditions, if practicable. If prior notice is not practicable, the utility shall notify the qualifying facility(ies) as soon as practicable after the fact. In either event the utility shall notify the Commission, and the Commission staff shall, upon request of the affected qualifying facility(ies), investigate the utility's claim. Nothing in this section shall operate to relieve the utility of its general obligation to purchase pursuant to Rule 25-17.082.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, Amended 9/4/83, formerly 25-17.86.

25-17.087 Interconnection and Standards.
(1) Each utility shall interconnect with any qualifying facility which:
(a) is in its service area;
(b) requests interconnection;
(c) agrees to meet system standards specified in this rule; (d) agrees to pay the cost of interconnection; and
(e) signs an interconnection agreement.
(2) Nothing in this rule shall be construed to preclude a utility from evaluating each request for interconnection on its own merits and modifying the general standards specified in this rule to reflect the result of such an evaluation.
(3) Where a utility refuses to interconnect with a qualifying facility or attempts to impose unreasonable standards pursuant to subsection (2) of this rule, the qualifying facility may petition the Commission for relief. The utility shall have the burden of demonstrating to the Commission why

the utility and be capable of being locked in the open position with a utility padlock. The utility may reserve the right to open the switch (i.e. isolating the qualifying facility's generation system) without prior notice to the qualifying facility. To the extent practicable, however, prior notice shall be given.

Any of the following conditions shall be cause for disconnection:

1. Utility system emergencies and/or maintenance requirements;
2. Hazardous conditions existing on the qualifying facility's generating or protective equipment as determined by the utility;
3. Adverse effects of the qualifying facility's generation to the utility's other electric consumers and/or system as determined by the utility;
4. Failure of the qualifying facility to maintain any required insurance; or
5. Failure of the qualifying facility to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the qualifying facility's electric generating equipment or the operation of such equipment.

(b) Responsibility and Liability. The utility and the qualifying facility shall each be responsible for its own facilities. The utility and the qualifying facility shall each be responsible for ensuring adequate safeguards for other utility customers, utility and qualifying facility personnel and equipment, and for the protection of its own generating system. The utility and the qualifying facility shall each indemnify and save the other harmless from any and all claims, demands, costs, or expense for loss, damage, or injury to persons or property of the other caused by, arising out of, or resulting from:

1. Any act or omission by a party or that party's contractors, agents, servants and employees in connection with the installation or operation of that party's generation system or the operation thereof in connection with the other party's system;
2. Any defect in, failure of, or fault related to a party's generation system;
3. The negligence of a party or negligence of that party's contractors, agents servants and employees; or
4. Any other event or act that is the result of, or proximately caused by, a party.

For the purposes of this subsection, the term party shall mean either utility or qualifying facility, as the case may be.

(c) Insurance. The qualifying facility shall deliver to the utility, at least fifteen days prior to the start of any interconnection work, a certificate of insurance certifying the qualifying facility's coverage under a liability insurance policy issued by a reputable insurance company authorized to do business in the State of Florida naming the qualifying facility as named insured, and the utility as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering the liabilities accepted under this agreement arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.

The policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than $300,000 for each occurrence; more insurance may be required as deemed necessary by

(d) Exceptions. A qualifying facility's generator having a capacity rating that can:

1. produce power in excess of 1/2 of the minimum utility customer requirements of the interconnected distribution or transmission circuit; or
2. produce power flows approaching or exceeding the thermal capacity of the connected utility distribution or transmission lines or transformers; or
3. adversely affect the operation of the utility or other utility customer's voltage, frequency or overcurrent control and protection devices; or
4. adversely affect the quality of service to other utility customers; or
5. interconnect at voltage levels greater than distribution voltages,

will require more complex interconnection facilities as deemed necessary by the utility.

(8) Quality of Service. The qualifying facility's generated electricity shall meet the following minimum guidelines:

(a) Frequency. The governor control on the prime mover shall be capable of maintaining the generator output frequency within limits for loads from no-load up to rated output. The limits for frequency shall be 60 hertz (cycles per second), plus or minus an instantaneous variation of less than 1%.

(b) Voltage. The regulator control shall be capable of maintaining the generator output voltage within limits for loads from no-load up to rated output. The limits for voltage shall be the nominal operating voltage level, plus or minus 5%.

(c) Harmonics. The output sine wave distortion shall be deemed acceptable when it does not have a higher content (root mean square) of harmonics than the utility's normal harmonic content at the interconnection point.

(d) Power Factor. The qualifying facility's generation system shall be designed, operated and controlled to provide reactive power requirements from 0.85 lagging to 0.85 leading power factor. Induction generators shall have static capacitors that provide at least 85% of the magnetizing current requirements of the induction generator field. (Capacitors shall not be so large as to permit self-excitation of the qualifying facility's generator field).

(e) DC Generators. Direct current generators may be operated in parallel with the utility's system through a synchronous invertor. The inverter must meet all criteria in these rules.

(9) Metering. The actual metering equipment required, its voltage rating, number of phases, size, current transformers, potential transformers, number of inputs and associated memory is dependent on the type, size and location of the electric service provided. In situations where power may flow both in and out of the qualifying facility's system, power flowing into the qualifying facility's system will be measured separately from power flowing out of the qualifying facility's system.

The utility will provide, at no additional cost to the qualifying facility, the metering equipment necessary to measure capacity and energy deliveries to the qualifying facility. The utility will provide, at the qualifying facility's expense, the necessary additional metering equipment to measure energy deliveries by the qualifying facility to the utility.

(10) Cost Responsibility. The qualifying facility is required to bear all costs associated with the change-out, upgrading or addition of protective devices, transformers, lines, services, meters, switches, and associated equipment and devices beyond that which would be required to

(3) An electric utility may deny, curtail, or discontinue transmission service to a Qualifying Facility on a non- discriminatory basis if the provision of such service would adversely affect the safety, adequacy, reliability, or cost of providing electric service to the utility's general body of retail and wholesale customers.
Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, 366.055(3), F.S.
History: New 10/25/90.

25-17.090 Reserved.

25-17.091 Governmental Solid Waste Energy and Capacity.
(1) Definitions and Applicability:
(a) "Solid Waste Facility" means a facility owned or operated by, or on behalf of, local government, the purpose of which is to dispose of solid waste, as that term is defined in section 403.703(13), Fla. Stat. (1988), and to generate electricity.
(b) A facility is owned by or operated on behalf of a local government if the power purchase agreement is between the local government and the electric utility.
(c) A solid waste facility shall include a facility which is not owned or operated by a local government but is operated on its behalf. When the power purchase agreement is between a non-governmental entity and an electric utility, the facility is operated by a private entity on behalf of a local government if:

1. One or more local governments have entered into a long-term agreement with the private entity for the disposal of solid waste for which the local governments are responsible and that agreement has a term at least as long as the term of the contract for the purchase of energy and capacity from the facility; and
2. The Commission determines there is no undue risk imposed on the electric ratepayers of the purchasing utility, based on:
   a. The local government's acceptance of responsibility for the private entity's performance of the power purchase contract, or
   b. Such other factors as the Commission deems appropriate, including, without limitation, the issuance of bonds by the local government to finance all, or a substantial portion, of the costs of the facility; the reliability of the solid waste technology; and the financial capability of the private owner and operator.
3. The requirements of subparagraph 2 shall be satisfied if a local government described in subparagraph 1 enters into an agreement with the purchasing utility providing that in the event of a default by the private entity under the power purchase contract, the local government shall perform the private entity's obligations, or cause them to be performed, for the remaining term of the contract, and shall not seek to renegotiate the power purchase contract.

(d) This rule shall apply to all contracts for the purchase of energy or capacity from solid waste facilities entered into, or renegotiated as provided in subsection (3), after October 1, 1988.
(2) Except as provided in subsections (3) and (4) of this rule, the provisions of Rules 25-17.080 - 25-17.089, Florida Administrative Code, are applicable to contracts for the purchase of energy and capacity from a solid waste facility.

(3) Any solid waste facility which has an existing firm energy and capacity contract in effect before October 1, 1988, shall have a one-time option to renegotiate that contract to incorporate any or all of the provisions of subsection (2) and (4) into their contract. This renegotiation shall be based on the unit that the contract was designed to avoid but applying the most recent Commission-approved cost estimates of Rule 25-17.0832(5)(a), Florida Administrative Code, for the same unit type and in-service year to determine the utility's value of avoided capacity over the remaining term of the contract.

(4) Because section 377.709(4), Fla. Stat., requires the local government to refund early capacity payments should a solid waste facility be abandoned, closed down or rendered illegal, a utility may not require risk-related guarantees as required in Rule 25-17.0832, paragraph (2)(c), (2)(d), (3)(e)8, and (3)(f)1. However, at its option, a solid waste facility may provide such risk related guarantee.

(5) Nothing in this rule shall preclude a solid waste facility from electing advance capacity payments authorized pursuant to section 377.709(3)(b), F.S., which advanced capacity payments shall be in lieu of firm capacity payments otherwise authorized pursuant to this rule and Rule 25-17.0832, F.A.C. The provisions of subsection (4) are applicable to solid waste facilities electing advanced capacity payments.

Specific Authority: 350.127(2), 377.709(5), F.S.
Law Implemented: 366.051, 366.055(3), 377.709, F.S.
History: New 8/8/85, formerly 25-17.91, Amended 4/26/89, 10/25/90.

2ND CASE of Level 1 printed in FULL format.

In Re: Petition of Polk Power Partners for a Declaratory Statement Regarding Eligibility for **Standard Offer** Contracts

DOCKET NO. 920556-EQ; ORDER NO. PSC-92-0683-DS-EQ

Florida Public Service Commission

1992 Fla. PUC LEXIS 1076; 92 FPSC 7:388

July 21, 1992

PANEL:
[*1]

The following Commissioners participated in the disposition of this matter: THOMAS M. BEARD, Chairman; BETTY EASLEY; J. TERRY DEASON; SUSAN F. CLARK; LUIS J. LAUREDO

OPINION:
ORDER GRANTING DECLARATORY STATEMENT IN THE NEGATIVE

BY THE COMMISSION:

BACKGROUND

By petition filed May 28, 1992, Polk Power Partners, L.P. ("Polk") has asked for a declaratory statement that Polk Power Partners may sell additional capacity from a qualifying cogeneration facility via a **standard offer** contract, where the project's total net generating capacity exceeds 75 megawatts (MW) and where the contemplated **standard offer** contract provides for committed capacity of less than 75 MW.

Though acknowledging that Rule 25-17.0832(3)(a), F.A.C. provides for **standard offer** contracts involving "small qualifying facilities less than 75 megawatts. ", Polk theorizes an ambiguity as to whether the 75 megawatt cap speaks to the total net generating capacity n1 of the QF, as defined at 18 C.F.R. 292.202 (g) (1990) of the FERC rules implementing PURPA, or the committed capacity which the qualifying facility has contractually committed to deliver on a firm basis to the purchasing utility. It is the latter definition [*2] alone which would be consistent with the declaratory statement petitioned for by Polk.

n1 Total net generating capacity, or "Useful power output" of a cogeneration facility means the electric or mechanical energy made available for use exclusive of any such energy used in the power production process.

DISCUSSION

We grant Polk Power Partners' Petition for Declaratory Statement, albeit in the negative.

The mere allegation at p. 8 of the Petition that

A QF with a total net generating capacity of 95 MW that sells only 70 MW to a purchasing utility is frequently referred to as a 70 MW QF

is hardly sufficient to create authentic ambiguity in this matter in view of the context in which the operable **standard offer** rule appears. Not only Rule 25-7.0832(3)(a), previously cited, but also Rule 25-17.0832(2) states that

Negotiated contracts shall not be evaluated against an avoided unit in a **standard offer** contract, thus preserving the **standard offer** for small qualifying facilities as described in subsection (3) [e.s.]

All of the language in both rule sections relating the 75 MW cap to the goal of preserving the **standard offer** for small qualifying facilities would [*3] be rendered nugatory by the declaratory statement petitioned for by Polk.

If "committed" capacity, rather than total net generating capacity were the measure by which to calculate the 75 MW cap, QF's of any size could participate in **standard offer** contracts, contrary to the clear intent of the rules to preserve such participation for small QF's. It is a fundamental principle of statutory construction that statutes are not to be construed in such a manner as to render them meaningless, and that principle should govern the interpretation of rules as well.

Accordingly, we decline Polk's Petition to issue the statement requested. We state instead that the 75 MW cap referenced in Rule 25-17.0832(3)(a) refers to the total net generating capacity of the QF.

In view of the above, it is

ORDERED by the Florida Public Service Commission that Polk Power Partner's Petition for Declaratory Statement is granted in the negative. It is further

ORDERED that this docket is closed.

By Order of the Florida Public Service Commission this 21st day of July, 1992.

1ST CASE of Level 1 printed in FULL format.

In Re: Joint Petition for Approval of Standard Offer Contracts of FLORIDA POWER CORPORATION and AUBURNDALE POWER PARTNERS, LIMITED PARTNERSHIP

DOCKET NO. 940819-EQ; ORDER NO. PSC-94-1306-FOF-EQ

Florida Public Service Commission

94 FPSC 10:375

October 24, 1994

PANEL:
[*1]

The following Commissioners participated in the disposition of this matter: J. TERRY DEASON, Chairman, SUSAN F. CLARK, JOE GARCIA, JULIA L. JOHNSON, DIANE K. KIESLING

OPINION:
NOTICE OF PROPOSED AGENCY ACTION ORDER APPROVING CONTRACT MODIFICATIONS

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

By Order No. 21947, issued September 27, 1989, we approved a standard offer contract between Florida Power Corporation (FPC) and the Sun Bank of Tampa Bay (Sun Bank) for 8.5 MW of capacity generated by a wood waste burning cogeneration unit in Jefferson County. In Order No. 21948, a companion order issued that same date, we approved a standard offer contract between FPC and Sun Bank for 7.969 MW of capacity generated by a similar unit in Madison County.

Both standard offer contracts contained provisions that permitted assignment of the contracts with FPC's prior written approval, and in fact Sun Bank had [*2] already assigned both standard offer contracts to LFC Corporation (LFC) on April 14, 1989. Both standard offer contracts also contemplated a one-time adjustment of committed capacity; and on December 18, 1992, LFC increased the committed capacity for the Madison facility from 7.969 MW to 8.5 MW. The combined committed capacity of the facilities is now 17 MW. The facilities have been operational since 1990.

The standard offer contracts were assigned again by LFC to Auburndale Power Partners, Limited Partnership (Auburndale) in a "Consent and Agreement" (Consent), executed by LFC, FPC and Auburndale on April 18, 1994. By the terms of the Consent, Auburndale would generate the firm capacity and energy committed by LFC's standard offer contracts from Auburndale's own existing 150 MW natural gas fired cogeneration facility in Polk County, not from LFC's existing wood waste burning cogeneration facilities in Madison and Jefferson Counties.

Auburndale already plans to sell 114 MW of firm capacity to FPC pursuant to a negotiated contract that we approved in Order No. 24634, Docket No. 910401-EQ, issued July 1, 1991. The Consent also provided that FPC could curtail energy purchases from [*3] Auburndale under certain circumstances. If the Consent is approved, LFC plans to discontinue operations at the Madison and Jefferson County facilities.

On August 5, 1994, Auburndale and FPC filed this Joint Petition for Expedited Approval of Contract Modifications. In the joint petition the parties have asked us to confirm that the standard offer contracts as modified continue to qualify for cost recovery and are not subject to the provisions of the Commission's current Rule 25-17.0832(3)(a), whichh limits the availability of Standard Offer Contracts to Qualified Cogeneration Facilities (QF) under 75 MW. The modifications in question include: LFC's assignment of the standard offer contracts to Auburndale; a change in location and facilities from LFC's plants in Madison and Jefferson counties to Auburndale's natural gas fired plant in Auburndale; and, curtailment provisions that permit FPC to reduce energy purchases from Auburndale during certain periods when FPC's load is reduced.

At our September 20, 1994 Agenda Conference we addressed four substantive issues raised by the joint petition:

1) Is LFC's assignment of its standard offer contracts with Florida Power Corporation [*4] to Auburndale Power Partners contemplated by the terms of those contracts?

2) Is the change in location from the existing LFC facilities in Madison and Jefferson counties to the Auburndale facility in Polk county, Florida contemplated pursuant to the original standard offer contracts?

3) Are the agreed upon "Off-Peak Curtailment Periods" as defined in the Consent and Agreement between Auburndale, FPC, and LFC contemplated pursuant to Sections 5(a) and 5(c) of LFC's original standard offer contract?

4) Should the joint petition for approval of contract modifications be approved?

Our decision on those issues is memorialized below.

The Assignment

The standard offer contracts in question specifically provide for assignment with the prior written approval of FPC. This requirement was met when LFC, Auburndale, and FPC entered into the Consent and Agreement. The Consent assigned the responsibility of generating the power and the rights and benefits of the standard offer contracts to Auburndale. By an amendment to the Consent, LFC has retained its original obligations to FPC. Upon consideration we find that this type of assignment was contemplated in the original standard [*5] offer contracts that were approved by the Commission in Order Nos. 21947 and 21948. Therefore, no further Commission approval is required.

The Change in Facilities and Location

While the terms of the standard offer contracts provided for assignment, the

terms of the contracts did not provide for a change in location and facilities from the existing woodburning facilities in Madison and Jefferson counties to the Auburndale natural gas facility in Polk county.

As the name implies, a standard offer contract is just that, an "off-the-shelf" offering that has certain blank terms to be filled in when a particular QF executes the contract. Those terms include the name of the QF, the effective date of the contract, the location of the facility, the size of the facility, the term of the contract, the committed capacity, the in-service date, and the capacity payment option. Once the blanks are filled in and the standard offer is signed, those terms are not subject to negotiation or modification unless the contracts specifically provide for the modification.

Auburndale and FPC suggest that the change in location is a minor modification, because the location was originally left blank [*6] in the standard offer contract. The location provision of a standard offer contract is left blank because the utility does not know the location or type of a facility when it publishes its standard offer contract tariff. The fact that this information was not specified by the utility before the standard offer was executed does not mean that the information is insignificant and can be changed at will. It means that at the outset the cogenerator has the flexibility and the responsibility to provide the location information so that the purchasing utility can, from that point on, manage its purchased power contracts and plan its system accordingly. The changes in location and facilities significantly modify the project that was the subject of the original standard offers. We must evaluate the current effect of those changes on the ratepayers.

FPC indicated that the current LFC standard offer contracts are more expensive than FPC's current avoided costs by approximately $ 20 million. FPC's analysis of the benefits of the proposed changes shows a net present value benefit of approximately $ 12 million compared to the original standard offers. Auburndale and FPC state in [*7] their joint petition that the "new location will reduce line loss incurred in the transmission of power to the load center, provide greater reliability as the transmission distance will be significantly shortened, and increase FPC's opportunity for purchase of bargain and emergency power from the non-peninsular Florida System." At the Agenda Conference, FPC indicated that the majority of the $ 12 million benefit was the result of replacing expensive as-available energy with less expensive firm energy. We believe that in this instance there are significant benefits to be gained by FPC's ratepayers, and accordingly we approve the modification.

Curtailment

Section 4(d) of the Consent and Agreement defines "Off-Peak Curtailment Periods" as the off-peak hours, 12:00 a.m. to 6:00 a.m, for certain months of the year. These are the "[t]imes the Company shall be deemed unable to accept energy and capacity deliveries". This section relieves FPC of the obligation to purchase excess as-available energy which may not be economical.

Section 5 of LFC's standard offer contract reads as follows:

During the term of this agreement, QF agrees to:

(a) Provide The Company prior to October 1 of [*8] each calendar year an estimate of the amount of electricity generated by the Facility and delivered to

The Company for each month of the following calendar year, including the time, duration and magnitude of any planned outages or reductions in capacity;

(b) Promptly update the yearly generation schedule and maintenance schedule as and when any changes may be determined necessary;

(c) Coordinate its scheduled Facility outages with The Company;

(d) Comply with reasonable requirements of The Company regarding day-to-day or hour-by-hour communications between the parties relative to the performance of this Agreement; and

(e) Adjust reactive power flow in the interconnection so as to remain within the range of 85% leading to 85% lagging power factor.

Section 5 of the standard offer requires that the QF and the utility coordinate planned outages of the QF so the utility can manage its system. Typically, planned outages are for maintenance purposes for the QF. They are not to relieve minimum load problems of the utility. The "Off-Peak Curtailment Periods" provision in the Consent are intended to relieve minimum load problems that FPC contends exist, to avoid economic penalties [*9] associated with the continuing purchase of as-available energy during off-peak hours. The "Off-Peak Curtailment Periods" provision is a modification to the terms of the original standard offer contract that is not provided for in the contract.

Having said that, we do believe the parties have adequately demonstrated that the new curtailment provisions will provide FPC the opportunity to avoid the continuing purchase of as-available energy during off-peak hours, and thus, like the change in location and facilities, will provide benefits to FPC's ratepayers. We therefore approve the curtailment provisions. We view the question of whether current Rule 25-17.0832(3)(a), Florida Administrative Code applies to these contracts as modified to be moot.

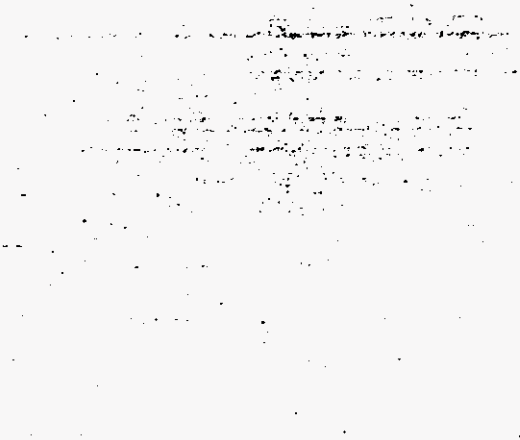
It is, therefore,

ORDERED by the Florida Public Service Commission that the Joint Petition for Expedited Approval of Contract Modifications of Florida Power Corporation and Auburndale Power Partners, Limited Partnership is approved for purposes of cost recovery. It is further

ORDERED that this Order shall become final and this docket shall be closed unless an appropriate petition for formal proceedings is received by the Division of Records [*10] and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.

By ORDER of the Florida Public Service Commission, this 24th day of October, 1994.

Chairman Deason and Commissioner Clark concur in the Commission's decision that the proposed modifications to the standard offer contracts are beneficial to FPC and its ratepayers and should be approved. They do not believe that it is necessary to decide whether the modifications were contemplated in the original contracts.



Florida Power
CORPORATION

September 8, 1994

Mr. Kyle Woodruff
Project Manager
Panda-Kathleen L. P.
4100 Spring Valley, Suite 1001
Dallas, Texas 75244

Re: Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW or a Solid Waste Facility between Panda-Kathleen, L. P. and Florida Power Corporation

Dear Kyle:

This is in response to your letter of August 10, 1994.

First, your letter indicates that Panda will be consulting with the PSC regarding its planned configuration which will produce 115 MW. As you know, Florida Power Corporation (FPC) has expressed concerns about that configuration's ability to comply with the 75 MW limitations imposed on standard offer contracts and, therefore, is pleased to see that Panda intends to consult with the Florida Public Service Commission (FPSC).

With respect to what will happen after the FPSC responds to your project proposal, Florida Power will not speculate at this time on how FPSC actions may or may not affect the rights and obligations under our contract with Panda. We will be happy to address this matter after FPSC actions.

Sincerely,

Robert D. Dolan
Manager, Cogeneration Contracts and Administration

RDD/mag

cc: M. B. Foley Jr.
J. P. Fama

EXHIBIT
-4-

JOHNSON AND ASSOCIATES
ATTORNEYS AND COUNSELORS

BARRETT G. JOHNSON

KARA TOLLETT OAKLEY

315 SOUTH CALHOUN ST., SUITE 350
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(904) 222-2633

MAILING ADDRESS:
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TALLAHASSEE, FLORIDA
32302
FAX (904) 222-2702

August 23, 1994

Joseph D. Jenkins
Director, Electric & Gas Division
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399

Dear Joe:

The purpose of this letter is to confirm the discussion on August 15, 1994 between you, Bob Trapp and Tom Ballenger of your staff and Bill Nordlund, Brian Dietz and myself regarding the Panda Kathleen cogeneration plant and Panda's standard offer contract with Florida Power Corporation.

As we discussed, Panda's contractual obligation is to be able to produce 74.9 MW under all site conditions for the life of the unit. Panda recently informed FPC by letter of the equipment configurations which will enable Panda to meet its contractual obligation while complying with its various environmental requirements. A copy is attached for your information. We also discussed the fact that under certain site conditions the ABB 11 N 1 and GE Frame 7EA will produce more than 74.9 MW. Since Panda Kathleen's contractual requirement is to be able to produce 74.9 MW under worst case conditions, such as right before a major overhaul and during a heat wave, it is necessarily true that the unit be capable of more than 74.9 MW under best case conditions. As we discussed, under optimal conditions these units can produce in the 115 MW range. Of course, this energy is quite a bargain for the rate payers since it carries no capacity costs to FPC under the Standard Offer Contract.

We also discussed the fact that the operation of Panda-Kathleen in the manner described in this letter and the attached letter to FPC is consistent with Panda's standard offer contract and is not a contract change that would require Florida Public Service Commission approval. Please advise immediately if this is incorrect or if you have any questions.

Sincerely,

Barrett G. Johnson

EXHIBIT
-5-

State of Florida

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

DIVISION OF ELECTRIC & GAS
JOSEPH D. JENKINS
DIRECTOR
(904) 488-8501

Public Service Commission

August 24, 1994

Mr. Barrett G. Johnson
Johnson and Associates
315 South Calhoun Street
Suite 350
Tallahassee, Florida 32301

Dear Mr. Johnson:

This is to confirm receipt of your letter dated August 23, 1994 concerning Panda Kathleen's plans to begin satisfying its contractual obligation with Florida Power Corporation by installing the units described in your letter. Based on the representations, I foresee no reason why this is any type of contract change that should come before the Commission for approval. I discussed this briefly with Florida Power's Bob Dolan and he concurred.

Sincerely,

Joseph D. Jenkins
Director
Division of Electric and Gas

JDJ/ms

EXHIBIT
-6-

APPENDIX C
RATES

SCHEDULE 2
GENERAL INFORMATION FOR 1997 COMBUSTION TURBINE UNIT

GENERAL
YEAR OF AVOIDED UNIT = 1997
AVOIDED UNIT REFERENCE PLANT = BARTOW CT UNITS

INVESTMENT DATA
TOTAL COST, DIRECT + AFUDC, IN 1/91 $'s = $398.88/KW
ANNUAL ESCALATION RATE OF PLANT COSTS = 5.10%
ECONOMIC PLANT LIFE = 20 YEARS

OPERATING DATA
AVOIDED UNIT FIXED O&M COSTS IN 1/91 $'s = $6.18/KW/YR
AVOIDED UNIT VARIABLE O&M COSTS IN 1/91 $'s = $1.83/MWH
ANNUAL ESCALATION RATE OF O&M COSTS = 5.10%
MINIMUM ON-PEAK CAPACITY FACTOR = 90.0%
MINIMUM TOTAL CAPACITY FACTOR = 42.0%
SYSTEM VARIABLE O&M COSTS IN 1/91 $'s = $0.673/MWH
AVOIDED UNIT HEAT RATE = 11,610 BTU/KWH
TYPE OF FUEL = DISTILLATE

ON-PEAK HOURS
(1) FOR THE CALENDAR MONTHS OF NOVEMBER THROUGH MARCH,
ALL DAYS: 6:00 A.M. TO 12:00 NOON, AND
5:00 P.M. TO 10:00 P.M.
(2) FOR THE CALENDAR MONTHS OF APRIL THROUGH OCTOBER,
ALL DAYS: 11:00 A.M. TO 10:00 P.M.

FINANCIAL DATA
K FACTOR (MID YEAR) = 1.5259
UTILITY DISCOUNT RATE = 9.96%

ISSUED BY: S. F. Nixon, Jr., Director Rate Department

EFFECTIVE DATE: September 20, 1991

EXHIBIT
-7-

PANDA-KATHLEEN L.P.
A Panda Company

August 10, 1994

Mr. Robert D. Dolan, P. E.
Manager, Cogeneration Contracts
Florida Power Corporation
3201 34th Street South
St. Petersburg, FL 33711

RE: Standard Offer Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Less Than 75 MW Or A Solid Waste Facility Between Panda-Kathleen L. P. and Florida Power Corporation

Dear Mr. Dolan:

The purpose of this letter is to advise Florida Power Corporation (FPC) of Panda's intention to install either a GE Frame 7EA or an ABB 11 N1 combustion turbine in a combined cycle configuration for the Lakeland cogeneration Qualifying Facility since they are the only gas turbines commercially available which can produce at least 74.9 MW each day over the life of the 30 year contract term, taking into account equipment degradation, site weather conditions, steam host needs, and environmental requirements. Panda plans to discuss equipment configuration with the Florida Public Service Commission (FPSC) to determine whether or not FPSC approval is required.

Assuming that the FPSC determines that its approval for such equipment configuration is not required, then it is Panda's understanding that the following shall apply:

1. In the event that any energy is produced in excess of 74.9 MW, FPC will pay Panda for energy produced above 74.9 MW at FPC's as-available energy price.

2. FPC will purchase the energy produced above 74.9 MW, if any, at all times when available except when system operating conditions will not permit such; i.e. at minimum load conditions as reasonably defined by FPC.

Sincerely,

Kyle Woodruff

Kyle Woodruff
Project Manager

4100 Spring Valley, Suite 1001 • Dallas, Texas • 75244 • 214/980-7159 • Fax 980-6815

EXHIBIT
-8-

139430

Exhibit D

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

JANUARY 26, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BROWN/JOHNSON)
DIVISION OF ELECTRIC AND GAS (FUTRELL)

RE: DOCKET NO. 940357-EQ - PETITION FOR RESOLUTION OF A COGENERATION CONTRACT DISPUTE WITH ORLANDO COGEN LIMITED, L.P., BY FLORIDA POWER COMPANY

AGENDA: 02/07/95 - REGULAR AGENDA
DECISION ON MOTION TO DISMISS - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\940357.RCM
PARTIES HAVE ALREADY PARTICIPATED IN ORAL ARGUMENT ON THIS MOTION. PARTICIPATION AT THIS AGENDA SHOULD BE LIMITED TO ANSWERING QUESTIONS.

CASE BACKGROUND

On April 7, 1994, Florida Power Corporation filed its petition seeking resolution of a cogeneration contract dispute with Orlando Cogen Limited, L.P. (OCL). The dispute involves the Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility (contract) executed by FPC and OCL on March 31, 1991. By Order No. 24734, issued July 1, 1991, the Commission approved the contract for cost recovery.

Pursuant to Section 3.3 of the contract, the ability of OCL, the cogenerator, to deliver its committed capacity "shall not be encumbered by interruptions in its fuel supply." FPC alleges that section 3.3 requires that OCL maintain a back-up fuel supply and that OCL has not complied with this requirement. OCL denies that back-up fuel is required and has filed a lawsuit against FPC in District Court for the Middle District of Florida for breach of contract and antitrust violations. OCL's complaint was filed in federal court prior to the filing of the petition by FPC in this docket.

DOCKET NO. 940357-EQ
JANUARY 26, 1995

On August 15, 1994, a Commission panel heard oral argument on OCL's motion to dismiss for lack of jurisdiction. Staff then filed its recommendation for consideration at the September 6, 1994, agenda conference. At the agenda conference, the item was deferred and the panel recommended that the full Commission hear oral argument on OCL's motion. Further, the panel recommended that this docket be coordinated with other pending dockets wherein motions to dismiss for lack of jurisdiction were filed by other cogenerators based on similar grounds as those raised in OCL's motion. Accordingly, oral argument was held on January 5, 1995, on the motions to dismiss filed in this docket, Docket 940771-EQ and Docket 940797-EQ. The positions of the parties are as follows:

OCL:

A. The Commission does not have jurisdiction over cogenerators.

B. Federal law delegates limited authority to the states to encourage cogeneration and to approve such contracts for cost recovery.

C. The Commission's order approving a cogeneration contract for cost recovery does not confer jurisdiction for the Commission to interpret the contract after it has been approved.

D. The Commission does not have express or statutorily implied jurisdiction to interpret contracts.

E. FPC's allegations of fraud constitute an improper attempt to invoke the exception to the Administrative Finality Rule.

F. The doctrine of comity requires that the Commission defer to the federal court.

FPC:

A. The PSC has broad statutory authority to regulate the terms and conditions of QF contracts and it exercised that authority in this area.

B. Having been approved by the PSC, a cogeneration contract becomes an order of the PSC, subject to its continuing jurisdiction.

C. The regulatory-out provision of these contracts recognizes the Commission's continuing jurisdiction.

D. Pursuant to the Commission's statutory authority to protect

ratepayers, the Commission has implied authority to interpret cogeneration contracts.

E. The PSC has continuing authority to clarify the meaning of its order, even after the order has been entered.

F. The doctrine of comity does not require the Commission to defer to the federal court.

This is Staff's recommendation on the motion to dismiss. This recommendation supersedes the staff recommendation that was filed on August 25, 1994.

DOCKET NO. 940357-EQ
JANUARY 26, 1995

DISCUSSION OF ISSUES

ISSUE 1: Should The Commission grant Orlando Cogen Limited's Motion to Dismiss Florida Power Corporation's petition.?

RECOMMENDATION: Yes. The motion should be granted. The petition should be dismissed.

STAFF ANALYSIS: In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), to develop ways to lessen the country's dependence on foreign oil and natural gas. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. In developing PURPA, Congress identified three major obstacles that hindered the development of a strong cogeneration market: 1) Monopoly electric utilities resisted purchasing power from other generation suppliers instead of building their own generating units; 2) Monopoly electric utilities could refuse to sell needed backup power to cogenerators; and, 3) cogenerators and small power producers could be subject to extensive, expensive federal and state regulation as electric utilities. PURPA contains several provisions designed to overcome these obstacles. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against QF's, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(e) directs FERC to adopt rules exempting QFs from most state and federal utility regulation, and section 210(f) directs state regulatory authorities to implement FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, " the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. s. 292.101(b)(6). FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of purchased power agreements, including price, as long as they are at or below a utilities' avoided cost. 18 C.F.R. s 292.301.

In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities must purchase electricity offered for sale by QFs, "in accordance with applicable

law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QF's.

The Commission's implementation of Section 366.051 is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract or an individually negotiated power purchase contract. See Rules 25-17.082(1) and 25-17.0832. The two types of contracts are treated very differently in the rules. The rules require utilities to publish a standard offer contract in its tariffs that must be approved by the Commission and conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, and insurance. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832(3)(d).

In contrast, the rules are much more limited in their treatment of negotiated contracts. Rule 25-17.082(2) simply encourages utilities and qualifying facilities to negotiate contracts, and provides the criteria the Commission will consider when it determines whether the contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations", imposes an obligation to negotiate cogeneration contracts in good faith, and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. The rule makes no provision for resolution of a dispute once the contract has been executed and approved by the Commission for cost recovery.

While the Commission uses certain of its standard offer contract rules as guidelines in determining the cost-effectiveness of negotiated contracts for cost recovery purposes, it has refused to require any standard provisions to be included in negotiated contracts. In Docket No. 910603-EQ, the Commission specifically addressed the issue of standard provisions for negotiated contracts. Interestingly enough, while the cogenerators in this docket urge that the Commission does not have jurisdiction over the

terms and provisions of negotiated contracts, in Docket 910603-EQ the cogenerators urged the Commission to proscribe certain standard provisions in negotiated contracts and prohibit other provisions, like regulatory out clauses, from inclusion in negotiated contracts. In Order No.25668, issued February 3, 1992, the Commission said:

> We will not prescribe standard provisions in negotiated contracts, because negotiated contracts are just that --negotiated contracts. Standardized provisions are not necessary in negotiated contracts, and they can impair the negotiating process.
>
> Rule 25-17.0834, Florida Administrative Code, provides a remedy to QFs when a utility does not negotiate in good faith. If a utility insists on an unreasonable requirement, QFs are free to petition the Commission for relief. . . .
>
> Standardized terms in negotiated contracts could impair negotiating flexibility to the detriment of the utility and the QF. As Witness Dolan stated, "[e]ven if guidelines and standards at a given time did reflect the parties' perceptions, guidelines and standards cannot be modified easily or quickly in response to changes in conditions that bear on the risks and benefits of the transaction". Standard terms that suit the needs of some parties will not suit the needs of other QFs wishing to negotiate contracts. Even in this docket, the QFs do not agree as to which terms should be standardized. . . . It is clear from the differing opinions that negotiated contracts should not contain standard provisions.

Order No. 25668, p. 7

This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship of utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation

process once it has been successful and the contracts have been approved. As Mr. Wenner for Auburndale pointed out in oral argument in a related docket, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction.

The Commission has adhered to the purpose and intent of the federal law in the development and implementation of its own cogeneration rules, and has developed a regulatory scheme that is very different for standard offer contracts and negotiated contracts. The Commission controls the provisions of standard offer contracts, but it has refused to exercise control over the provisions of negotiated contracts. The Commission has interpreted the provisions of standard offer contracts on several occasions.[1] The only time the Commission was asked to interpret a provision of a negotiated contract, however, it refused to do so. In Docket No. 840438-EI, In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, Order No. 14207, issued March 31, 1985, the Commission refused to construe a paragraph of the agreement that concerned renegotiation of contract terms. The Commission said:

> In response to Conserv's jurisdictional arguments, we agree that the civil courts have exclusive jurisdiction to construe the agreement and award damages if any are merited.

Order 14207, p.4.

The Commission went on to say that it did have jurisdiction to interpret its cogeneration rules and to decide that its new rules did not apply to preexisting contracts, but it stated that matters of contractual interpretation were properly left to the civil courts. We do not think that the Conserv decision is controlling

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[1] In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991, Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

in this case. It was issued as a declaratory statement, limited to the facts and circumstances of the case, and of somewhat limited precedential value, and it was issued before section 366.031, Florida Statutes was enacted. It does lend support, however, to the proposition that the Commission has limited its involvement in negotiated contracts to the contract formation process and cost recovery review. It has provided no forum for contract dispute resolution after a negotiated contract has been executed and approved for cost recovery.

The weight of authority from other states that have addressed similar issues supports this position. See, eg. Afton Energy, Inc v. Idaho Power Co., 729 P.2d 400 (Id. 1986); Bates Fabrics, Inc. v. PUC, 447 A.2d 1211 (ME. 1992); Barasch v. Pennsylvania Public Utility Commission, 546 A.2d 1296, reargument denied, 550 A.2d 257 (1988); Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric & Gas Corporation Remains in Effect, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 1995 WL 4897 (3rd Cir. (N.J. 1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation, Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the principal appears the same; under federal and state regulation of the relationship between utilities and cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In Afton, supra., Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditioned on the Idaho Supreme Court's determination whether the Idaho Commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that the lesser payment option would be in effect. The Commission, dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In Erie Associates, supra., the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had cancelled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

> Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
>
> We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such questions do not involve our authority, under PURPA and FSL@66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.
>
> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source for the authority to exercise jurisdiction over such issues.

Staff disagrees with FPC's proposition that when the Commission issues its order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that the Commission has continuing jurisdiction to interpret. Indeed the Supreme Court has determined that territorial agreements merge into the Commission's orders approving them, but territorial agreements are not valid commercial purchased power contracts. They are otherwise unlawful, anticompetitive agreements that have no validity under the law until the Commission approves them. Furthermore, territorial agreements involve the provision of retail electric service over which the Commission has exclusive and preemptive authority. As explained above, the Commission does not enjoy such authority over QF's or their negotiated power purchase contracts.

The Commission does have some continuing regulatory supervisory authority over power purchases made pursuant to negotiated contracts (see staff's recommendation in Docket No. 940797-EQ). That power has been clearly recognized by the parties through the regulatory out provisions of these contracts. We disagree however, with FPC's contention that the regulatory out provisions of negotiated contracts somehow confer continuing authority to resolve contract disputes. The Commission's authority derives from the statutes. United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986). It cannot be conferred or inferred from the provisions of a contract. Nor does the Commission's responsibility to ensure the reliability of Florida's electric grid impose a responsibility to interpret the backup fuel provision of this contract. Even if the Commission

determined that Orlando Cogen had not complied with the provisions of the contract, it could not order the cogenerator to perform. When the Commission approved this contract for cost recovery purposes, it determined that FPC's ratepayers would be protected in the event the cogenerator defaulted. Any further remedy for breach of the contract itself lies with the court. We note however, that Courts may refer contract interpretation disputes to the Commission in order to maintain uniformity and to bring the Commission's specialized expertise to bear upon the technical issues involved.

Staff recommends that the motion to dismiss should be granted. Florida Power Corporation's petition fails to set forth any claim that the Commission can resolve. The Commission should defer to the court to resolve this contract dispute. FPC's petition should be dismissed.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed.

Exhibit E

FOR YOUR INFORMATION
FROM CHARLES W. PITTMAN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for determination that implementation of contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, F.A.C., by Florida Power Corporation.	DOCKET NO. 940771-EQ ORDER NO. PSC-95-0210-FOF-EQ ISSUED: February 15, 1995

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING MOTIONS TO DISMISS

BACKGROUND

In 1991 and 1992, Florida Power Corporation (FPC) entered into eleven negotiated cogeneration contracts with various cogenerators. Those contracts provide approximately 735 megawatts (MW) out of approximately 1,045 MWs of cogenerated capacity that FPC will have on its system by the end of 1995. The negotiated contracts in question are between FPC and the following cogenerators: Seminole Fertilizer, Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, Ridge Generating Station, Dade County, Polk Power Partners-Mulberry, Polk Power Partners-Royster, EcoPeat Avon Park, and CFR Biogen.

The contracts all contain the following provision, section 9.1.2:

> Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based on the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided

> Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

This provision establishes the method to determine when cogenerators are entitled to receive firm energy payments or as-available energy payments under the contract. The Commission reviewed the 11 negotiated contracts and found them to be cost-effective for FPC's ratepayers under the criteria established in Rules 25-17.082 and 25-17.0832(2), Florida Administrative Code. [1] The information the Commission received at that time was based on simplified assumptions to arrive at the estimated energy payments.

Recently, FPC states, it reviewed the operational status of the avoided unit described in section 9.1.2 of the contracts during minimum load conditions. FPC determined that the avoided unit would be scheduled off during certain minimum load hours of the day. On July 18, 1994, FPC notified the parties to the contracts that it would begin implementing section 9.1.2, effective August 1, 1994. Prior to that time FPC had paid cogenerators firm energy prices at all hours.

Three days later, on July 21, 1994, FPC filed a petition seeking our declaratory statement that section 9.1.2 of its negotiated cogeneration contracts is consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. Rules 25-17.0832(4)(a) and (b) provide:

> (4) Avoided energy payments.
> (a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825(2)(a).

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[1] See Order No. 24099, issued February 12, 1991 in Docket No. 900917-EQ; Order No. 24734, issued July 1, 1991 in Docket No. 910401-EQ; Order No. 24923, issued August 19, 1991 in Docket No. 910549-EQ; and Order No. PSC-92-0129-FOF-EQ, issued March 31, 1992 in Docket No. 900383-EQ.

> (b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825 (2)(a).

Several cogenerators petitioned for leave to intervene and questioned whether the declaratory statement was the appropriate procedure to resolve the issue. In addition, in September 1994, OCL, Pasco, Lake, Metro-Dade County, and Auburndale filed motions to dismiss on the grounds that we do not have jurisdiction to consider FPC's petition. Also, subsequent to the filing of FPC's petition, Pasco Cogen and Lake Cogen initiated lawsuits in the state courts for breach of contract and declaratory judgment.

On November 1, 1994, FPC amended its petition and asked the Commission to determine whether its implementation of section 9.1.2 is lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. FPC also requested a formal evidentiary proceeding. Thereafter the cogenerators filed additional motions to dismiss the amended petition.

On January 5, 1995, we heard oral argument on the motions to dismiss filed in this docket and the motions to dismiss filed in two other dockets involving cogeneration contracts. We have fully considered the merits of the motions to dismiss, and we find that they should be granted. Our reasons for this decision are set out below.

DECISION

In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), to develop ways to lessen the country's dependence on foreign oil and natural gas. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. In developing PURPA, Congress identified three major obstacles that hindered the development of a strong cogeneration market. First, monopoly electric utilities resisted purchasing power from other generation suppliers instead of building their own generating units. Second, monopoly electric utilities could refuse to sell needed backup

power to cogenerators. Third, cogenerators and small power producers could be subject to extensive, expensive federal and state regulation as electric utilities.

PURPA contains several provisions designed to overcome these obstacles. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against QF's, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(e) directs FERC to adopt rules exempting QFs from most state and federal utility regulation, and section 210(f) directs state regulatory authorities to implement FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, " the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. s. 292.101(b)(6). FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of purchased power agreements, including price, as long as they are at or below a utilities' avoided cost. 18 C.F.R. s. 292.301.

In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities must purchase electricity offered for sale by QFs, "in accordance with applicable law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs.

The Commission's implementation of Section 366.051 is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract, or an individually negotiated power purchase contract. See Rules 25-17.082(1) and 25-17.0832. The two types of contracts are treated very differently in our rules. The rules require utilities to

publish a standard offer contract in their tariffs which we must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, and insurance. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832(3)(d), Florida Administrative Code.

In contrast, our rules are more limited in their treatment of negotiated contracts. Rule 25-17.082(2), Florida Administrative Code, simply encourages utilities and QFs to negotiate contracts, and provides the criteria the Commission will consider when it determines whether the contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations", imposes an obligation to negotiate cogeneration contracts in good faith, and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. The rule makes no provision for resolution of a dispute once the contract has been executed and approved for cost recovery.

We use certain standard offer contract rules as guidelines in determining the cost-effectiveness of negotiated contracts for cost recovery purposes, but we have not required any standard provisions to be included in negotiated contracts. In Docket No. 910603-EQ, we specifically addressed the issue of standard provisions for negotiated contracts. In that docket the cogenerators urged us to prescribe certain standard provisions in negotiated contracts and prohibit other provisions, like regulatory out clauses. In Order No.25668, issued February 3, 1992, we said:

> We will not prescribe standard provisions in negotiated contracts, because negotiated contracts are just that --<u>negotiated</u> contracts. Standardized provisions are not necessary in negotiated contracts, and they can impair the negotiating process.
>
> Rule 25-17.0834, Florida Administrative Code, provides a remedy to QFs when a utility does not negotiate in good faith. If a utility insists on an unreasonable requirement, QFs are free to petition the Commission for relief. . . .

> Standardized terms in negotiated contracts could impair negotiating flexibility to the detriment of the utility and the QF. As Witness Dolan stated, "[e]ven if guidelines and standards at a given time did reflect the parties' perceptions, guidelines and standards cannot be modified easily or quickly in response to changes in conditions that bear on the risks and benefits of the transaction". Standard terms that suit the needs of some parties will not suit the needs of other QFs wishing to negotiate contracts. Even in this docket, the QFs do not agree as to which terms should be standardized. . . . It is clear from the differing opinions that negotiated contracts should not contain standard provisions.

Order No. 25668, p. 7

This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. As Auburndale's attorney pointed out in oral argument, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction.

While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts. We have interpreted the provisions of standard offer contracts on several occasions,[2] but we have not

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[2] In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991,

interpreted the provisions of negotiated contracts. See Docket No. 840438-EI, In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, Order No. 14207, issued March 31, 1985, where we refused to construe a paragraph of the agreement that concerned renegotiation of contract terms. There we said that while we could interpret our cogeneration rules and decide that the new rules did not apply to preexisting contracts, matters of contractual interpretation were properly left to the civil courts. Our Conserv decision, while not controlling here, does lend support to the proposition that we have limited our involvement in negotiated contracts to the contract formation process and cost recovery review.

The weight of authority from other states that have addressed similar issues supports this position. See, eg. Afton Energy, Inc v. Idaho Power Co., 729 P.2d 400 (Id. 1986); Bates Fabrics, Inc. v. PUC, 447 A.2d 1211 (ME. 1992); Barasch v. Pennsylvania Public Utility Commission, 546 A.2d 1296, reargument denied, 550 A.2d 257 (1988); Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric & Gas Corporation Remains in Effect, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 1995 WL 4897 (3rd Cir. (N.J. 1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation, Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the general consensus appears to be that under federal and state regulation of the relationship between utilities and cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In Afton, supra., Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditioned on the Idaho Supreme Court's determination whether the Idaho commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that

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Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

the lesser payment option would be in effect. The Commission dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In Erie Associates, supra., the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had cancelled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

> Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
>
> We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such questions do not involve our authority, under PURPA and PSL@66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.
>
> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source for the authority to exercise jurisdiction over such issues.

FPC has asked us to determine if its implementation of the pricing provision is lawful and consistent with Commission Rule 25-17.0832(4), Florida Administrative Code. We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to decide that its interpretation of the contract's pricing provision is correct. We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. Furthermore, we agree with the cogenerators that the pricing methodology outlined in Rule 25-17.0832(4), Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts. We have clearly said that we would not require any standard provisions, pricing or otherwise, for negotiated

contracts. Therefore, whether FPC's implementation of the pricing provision is consistent with the rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. In this case, we will defer to the courts to resolve that dispute. We note however, that courts have the discretion to refer matters to us for consideration to maintain uniformity and to bring the Commission's specialized expertise to bear upon the issues at hand.

We disagree with FPC's proposition that when the Commission issues an order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that we have continuing jurisdiction to interpret. It is true that the Supreme Court has determined that territorial agreements merge into Commission orders approving them, but territorial agreements are not valid commercial purchased power contracts. They are otherwise unlawful, anticompetitive agreements that have no validity under the law until we approve them. Furthermore, territorial agreements involve the provision of retail electric service over which we have exclusive and preemptive authority. As explained above, we do not enjoy such authority over QFs or their negotiated power purchase contracts.

Under certain circumstances we will exercise continuing regulatory supervision over power purchases made pursuant to negotiated contracts. We have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake;[3] but if it is determined that any of those facts existed when we approved a contract for cost recovery, we will review our initial decision. That power has been clearly recognized by the parties through the "regulatory out" provisions of those contracts. We do not think, however, that the regulatory out provisions of negotiated contracts somehow confer continuing responsibility or authority to resolve contract interpretation disputes. Our authority derives from the statutes. United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986). It cannot be conferred or inferred from the provisions of a contract.

For these reasons we find that the motions to dismiss should be granted. FPC's petition fails to set forth any claim that the Commission should resolve. We defer to the courts to answer the question of contract interpretation raised in this case. Thus, FPC's petition is dismissed.

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[3] See Docket No. 910603-EQ, In Re: Implementation of Rules 25-17.080 through 25-17.091, Florida Administrative Code, Order No. 25668, issued February 3, 1992.

It is therefore

ORDERED by the Florida Public Service Commission that the Motions to Dismiss filed by Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, and Metro Dade County/Montenay are granted. Florida Power Corporation's Petition is dismissed. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 15th day of February, 1995.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-488-8371.

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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

1ST CASE of Level 1 printed in FULL format.

In Re: Petition not to Accept Standard Offer Contract of Polsky Energy Corporation, by Tampa Electric Company

DOCKET NO. 940193-EQ; ORDER NO. PSC-94-0488-FOF-EQ

Florida Public Service Commission

94 FPSC 4:364

April 25, 1994

PANEL:
[*1]

The following Commissioners participated in the disposition of this matter: J. TERRY DEASON, Chairman; SUSAN F. CLARK, JULIA L. JOHNSON, DIANE K. KIESLING

OPINION:
NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING PETITION NOT TO ACCEPT STANDARD OFFER CONTRACT SUBMITTED BY POLSKY ENERGY CORPORATION TO TAMPA ELECTRIC COMPANY

BY THE COMMISSION:

Notice is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

Pursuant to Rules 25-17.0832 (3) (c)&(d), Florida Administrative Code, Tampa Electric Company (TECO) has petitioned the Commission to allow TECO to not accept the Standard Offer Contracts presented to TECO by Polsky Energy Corporation (PEC) on January 28, 1994. On December 20, 1993 TECO filed with the Commission a Petition to Close Standard Offer Contract which was assigned Docket Number 931218-EQ. On January 26, 1994 TECO filed a petition for Approval of Standard Offer Contract for Cogenerators and Small Power Producers which was assigned Docket [*2] Number 940094-EQ. The "replacement" standard offer contract delays the in-service date of TECO's next avoided unit by two years. Commission consideration of these two petitions is pending.

TECO, in its Petition to not accept the Standard Offer Contract, alleged that the PEC proposal should really be considered a request for a negotiated contract. PEC made changes to the Standard Offer Contract as follows: At paragraph 2.0 (page 8.346) they changed the minimum Monthly Availability Factor (MAF) from 90% to 80%; at paragraph 2.4 (page 8.347) they changed the MAF from 90% to 80%; at paragraph 3.0 (page 8.348) they changed the MAF from 90% to 80%; at paragraphs 4.2.4.1 COMPLETION SECURITY, 4.2.4.2 PERFORMANCE SECURITY, and 4.2.4.3 LIQUIDATED DAMAGES (pages 8.400, 8.410 and 8.411) they crossed out the entire paragraphs.

In accord with Rule 25-17.0832(3)(c), Florida Administrative Code, a Standard Offer Contract is to be used in lieu of an negotiated contract. Like

EXHIBIT
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any unilateral contract, no changes can be made to a Standard Offer Contract without the consent of the utility. Any changes to the Standard Offer Contract would necessitate negotiation which would negate the [*3] use of the Standard Offer Contract.

Therefore we find that Tampa Electric Company's (TECO) petition to not accept the Standard Offer Contract by Polsky Energy Corporation (PEC) should be granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's (TECO) petition to not accept the Standard Offer Contract by Polsky Energy Corporation (PEC) shall be granted. It is further

ORDERED that if there is no protest to this proposed agency action within the time frame set forth below, this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 25th day of April, 1994.