

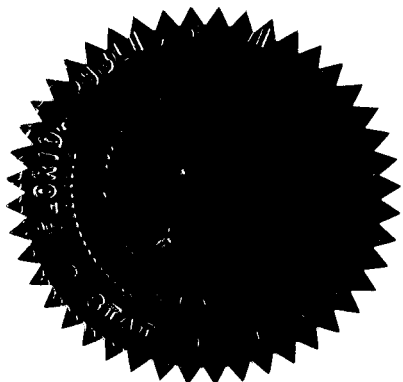
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

Standard Offer Contract for the
Purchase of Firm Capacity and
Energy From a Qualifying
Facility Between Panda-Kathleen
L.P. and Florida Power
Corporation.

Docket No. 950110-EI



PROCEEDINGS: ORAL ARGUMENT

BEFORE: CHAIRMAN SUSAN F. CLARK

DATE: Monday, September 25, 1995

TIME: Commenced at 3:25 p.m.
Concluded at 4:08 p.m.

PLACE: Betty Easley Conference Center
4075 Esplanade Way
Room 148
Tallahassee, Florida

REPORTED BY: ROWENA NASH HACKNEY
Official Commission Reporter

1 APPEARANCES:

2 **SYLVIA WALBOLT**, Carlton, Fields, Ward Emmanuel,
3 Smith & Cutler, P.A., Post Office Box 2861, St. Petersburg,
4 Florida 33731, Telephone No. (813) 223-7000, appearing on
5 behalf of **Florida Power Corporation**.

6 **ERIC HAUG**, **KENNETH SUKHIA** and **DAVID MOYE**, Fowler,
7 White Law Firm, 101 North Monroe Street, Suite 1090,
8 Tallahassee, Florida 32301, appearing on behalf of
9 **Panda-Kathleen**.

10 **RAY G. BESING**, 1100 St. Paul Place, 750 North St.
11 Paul, Dallas, Texas 75201, Telephone No. (214) 220-9090,
12 appearing on behalf **Panda-Kathleen**.

13 **MARTHA CARTER BROWN**, FPSC Division of Legal
14 Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida
15 32399-0870, Telephone No. (904) 413-6187, appearing on behalf
16 of the **Commission Staff**.

17

18

19

20

21

22

23

24

25

I N D E X

MISCELLANEOUS

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

ITEM

PAGE NO.

CERTIFICATE OF REPORTER

34

P R O C E E D I N G S

(Hearing convened at 2:00 p.m.)

1
2
3 MS. BROWN: Ms. Brown, there is a separate notice
4 for this argument, is there not?

5 MS. BROWN: Yes, there is, Commissioner.

6 CHAIRMAN CLARK: Would you please read that notice?

7 MS. BROWN: By notice issued September 15, 1995,
8 this time and place was set for an oral argument on Panda's
9 motion for protective order in Docket No. 950110-EI. The
10 purpose of the oral argument is to review the motion.

11 CHAIRMAN CLARK: We'll take appearances.

12 MR. BESING: Ms. Chairman, the parties met, their
13 counsel met, in Tampa in the federal case on July the 25th.

14 CHAIRMAN CLARK: I'm taking appearances now.

15 MR. BESING: Oh, I'm sorry. I thought you said
16 Panda.

17 CHAIRMAN CLARK: No. I think this is a separate
18 notice -- proceeding, so we need to take appearances.

19 MR. BESING: I apologize. I'm not used to that.

20 CHAIRMAN CLARK: Go ahead.

21 MR. BESING: I'm sorry. Ray Besing, and the same
22 gentlemen that were here last time: Kenneth Sukhia, David
23 Moyer and Eric Haug for Panda-Kathleen.

24 CHAIRMAN CLARK: Thank you.

25 MS. WALBOLT: Sylvia Walbolt for Florida Power Corp.

1 **MS. BROWN:** Martha Carter Brown representing the
2 Florida Public Service Commission Staff.

3 **CHAIRMAN CLARK:** Thank you. Mr. Besing, it's your
4 motion. Go ahead.

5 **MR. BESING:** Thank you. As I said, the attorneys
6 met for Panda and Florida Power, met in Tampa at Florida
7 Power's Counsel's office on July the 25th. We did agree that
8 documents would be produced on an expedited basis by both
9 parties simultaneously and that we would try to agree on dates
10 for depositions. Although we did not agree on the
11 depositions, we did agree on the number of depositions, namely
12 ten to each side.

13 We could not agree to the timing of the depositions
14 because, for example, even though counsel for Florida Power
15 had known that Mr. Steele, our co-counsel in Tampa, and I were
16 both scheduled long ago for vacations in August, they insisted
17 upon taking depositions of the Panda people starting August
18 the 18th, when neither one of us would be, in fact, in the
19 United States at the time.

20 We said, well, we'll get back to you and see if we
21 can work out times. However, in the meantime, documents were
22 produced by Panda, a little over 120,000 copies; and to this
23 day, Florida Power has not complained or objected to any of
24 the document production. As far as I know, they are satisfied
25 with it. We met on September the 5th. They made no complaint

1 about it.

2 **CHAIRMAN CLARK:** Let me ask you to clarify
3 something.

4 **MR. BESING:** Sure.

5 **CHAIRMAN CLARK:** You are talking about documents
6 produced in this proceeding before the Commission?

7 **MR. BESING:** No. I'm talking about documents
8 produced in the federal lawsuit.

9 **CHAIRMAN CLARK:** Why are we talking about that?

10 **MR. BESING:** Pardon?

11 **CHAIRMAN CLARK:** Why are we talking about that?

12 **MR. BESING:** Because the parties also agreed that
13 the discovery in this proceeding and that proceeding, insofar
14 as there was discovery in this proceeding and that proceeding,
15 would be useable in either proceeding --

16 **CHAIRMAN CLARK:** Okay.

17 **MR. BESING:** -- in order to avoid duplication and
18 expense and so forth.

19 Now, I know the Chairman is aware of the basic
20 premise that we all learn somewhere about the first year of
21 law school and, that is, you don't take expensive oral
22 depositions without the documents in advance. I know of no
23 trial attorneys or regulatory attorneys or anyone else who
24 does that. And it was clearly understood that the documents
25 had to be produced first. And because of the volume that was

1 involved over a five- or six-year period, starting back in
2 1990, certainly both sides had to have a reasonable time to
3 read, analyze and organize those documents so that they could
4 be used in an efficient way with the deposition witnesses.

5 As I stated, Panda produced its documents very early
6 on, and there has been no complaint. However, we started
7 receiving what I would politely try to call laundered cannon
8 fodder, documents from Florida Power that had no meaning, no
9 relevance, no materiality; largely meaningless materials. So
10 when we started receiving some 50-some-odd boxes by the 1st of
11 September -- this occurred during August -- the Panda people
12 who were familiar with this case and had worked on the
13 Kathleen project since 1990, started going through all of
14 those voluminous documents. And at my request they prepared,
15 so that we could then sit down and meet with the Florida Power
16 counsel in early September and say, "Here's what's not been
17 produced."

18 I've asked counsel and co-counsel to provide the
19 Chairman with a copy of what we attached to our Motion to
20 Compel. It was filed in September the 13th in Plaintiff's
21 motion to compel production of documents. And you'll see it's
22 a spreadsheet of some 20-some-odd pages.

23 I'm certainly not going to go through all of it and
24 bore everybody to death, but let me just make some
25 explanations here. "DNP" means "did not produce." You'll see

1 DNP on particular items. The key on the far left column, 11,
2 22, 33, et cetera, is the request number; Request No. 4 or
3 Request No. 24, et cetera. The date of the document is then
4 shown. The Bate stamped number that was assigned to that
5 document is then shown. And then the problem with the
6 document or the absence of the document is shown in the column
7 under "Description."

8 Even on the first page, you'll notice in the first
9 item that the complaint of the Florida Power Commission
10 against Orlando Cogen was marked "privileged and confidential
11 attorney work product," a public document.

12 First item, down the page under the first No. 4, the
13 "Rocha Memo Competitive Assessment using Cost/Price Model
14 Forecasts Cost Data of competitors strategic planning will
15 use." Did not produce. "Cost/price model. Attached." Not
16 produced. The memo from Mr. Bombino to the cost/price team
17 regarding the December 1, '93 deliverable from this team to
18 Mr. Keesler, did not produce the documents relating to the
19 memo, any final reports, response from Keesler, et cetera.

20 Mr. Dolan, a frequent appearer before this
21 Commission --

22 **CHAIRMAN CLARK:** Mr. Besing, just so I'm clear, we
23 are here on a motion for protective order for discovery from
24 you, right? Not a motion to compel discovery.

25 **MR. BESING:** We're on a motion for protective order

1 with respect to oral depositions being sought on a motion on
2 notice that's been filed by Florida Power to take the Panda's
3 witnesses' depositions starting today.

4 **CHAIRMAN CLARK:** Okay. So you need to tie up --

5 **MR. BESING:** And the point is, is that we can't go
6 forward with the depositions until we get the documents, and
7 we have not gotten the documents. And this is some proof to
8 you, page after page of thousands of documents, that Florida
9 Power did not produce.

10 **CHAIRMAN CLARK:** You need documents from Florida
11 Power in order for them to prepare for their depositions?

12 **MR. BESING:** And for us to take theirs, because they
13 are going to be done simultaneously. That is, I'm going to be
14 taking Florida Power's witnesses in Tampa which counsel for
15 Florida Power are going to be taking depositions of Panda
16 witnesses in Dallas.

17 **CHAIRMAN CLARK:** All right. And these are all the
18 documents in the federal court, that you've asked for in the
19 federal court?

20 **MR. BESING:** These are documents that were not
21 produced based on this request for production of documents way
22 back in August.

23 **CHAIRMAN CLARK:** Right. Filed in this case?

24 **MR. BESING:** I don't know. It's filed in the
25 federal court case.

1 **CHAIRMAN CLARK:** Okay. Go ahead.

2 **MR. BESING:** All right. Now, the problem here is
3 that you'll find every variety of
4 here's-how-we-hide-documents, namely, whole volumes of
5 documents that are redacted. The entire page and every page
6 of a 20- or 30-page document is redacted. It is redacted so
7 thoroughly, Ms. Chairman, that you cannot determine what the
8 document is. You don't know whether it's a letter or a
9 memorandum or a brief or what.

10 You have documents which simply were not produced.
11 And you say, well, people asking for documents in lawsuits
12 always complain about that. Well, we have a little bit of
13 advantage here. There are three other lawsuits that are far,
14 far along compared to this one in the discovery stage, such as
15 the Orlando case and the Pasco case. We know what has been
16 produced by Florida Power in those cases, and the stuff
17 they've produced in those cases is not being produced in the
18 Panda case; volumes of documents, most of which relate back
19 to what was going on in the preparation of the cogen strategy
20 in late 1993 and early 1994. And you can see those dates.
21 You can see where they had meetings. You can see where they
22 had minutes but no reports, no minutes, no notes, no nothing
23 were ever produced.

24 **CHAIRMAN CLARK:** Have you filed a motion to compel
25 in federal court?

1 **MR. BESING:** Yes, it's pending. And we've asked for
2 an oral argument in the presentation of evidence in that case.

3 **CHAIRMAN CLARK:** Okay.

4 **MR. BESING:** That's pending in the federal court.
5 We've filed this on the 13th of September and have asked for a
6 evidentiary hearing from the U.S. Magistrate. The magistrate
7 has not yet set that motion to compel. And I think that's the
8 real gist of this.

9 When the magistrate sets the hearing, hopefully
10 soon, we'll be able to put on witnesses that will be able to
11 show the magistrate in glowing color, the kinds of documents
12 that Florida Power has refused to produce; they've not
13 complied with their discovery of obligations. And after that
14 has been heard, hopefully, Florida Power will be required to
15 produce the documents. And we can then have a time to analyze
16 them and start that bilateral depositions of the Florida Power
17 witnesses as well as the Panda witnesses. And those are the
18 depositions which, if this case is still pending,
19 representatives of this Commission would be attending.

20 I might add, as far as I know, there has been no
21 production of more documents to the Staff of this Commission
22 than have been produced to Panda. And the Staff of this
23 Commission is going to be pretty ill prepared to do any work
24 effectively in discovery without the documents.

25 I find it very interesting, in conclusion, that I

1 received today Florida Power's response in opposition to our
2 motion to compel filed in the federal court. And let's take
3 an example. I believe you had it; it was filed out here as
4 well. On Page 6 of that very lengthy response -- I won't
5 waste your time with a lot of it. The comment could be made
6 repeatedly. We have asked in spreadsheet Page 1 at Line 9 for
7 the Panda file. The records of Florida Power are set up so
8 that each cogenerator has its own file of all the materials
9 that Florida Power generates that deal with that particular
10 cogenerator, Orlando, whoever. There is no Panda file. We've
11 asked for the Panda file repeatedly. We had a meeting on
12 September the 5th with counsel from Florida Power. We said,
13 "Where is it?" They made a note of it.

14 But here on Page 6 they say, quote, "Spreadsheet
15 Page 1, Line 9, did not produce Panda file. Panda's motion to
16 compel, Paragraph 4B." And then they say, "Florida Power's
17 Panda files were the very first files Florida Power produced
18 in this case," exclamation point, Webb affidavit. That's a
19 false statement. There isn't any way to be nice about it;
20 it's a false statement.

21 I was there on July the 25th. I looked at three
22 small boxes of documents. And what they were, were documents
23 which had been produced and were part of public record before
24 this Commission involving Panda-Kathleen. There were none of
25 the internal files of Florida Power Corporation on Panda.

1 That statement is false. And whoever Webb is, has just made a
2 false statement as has Mr. Dupre.

3 **CHAIRMAN CLARK:** Mr. Besing?

4 **MR. BESING:** The next statement. Not only did
5 Florida Power produce those files, but on September the 5th,
6 1995, when Panda's counsel asked Florida Power's counsel for
7 the second time where they were, Florida Power for the third
8 time reverified this fact. That's not true.

9 **CHAIRMAN CLARK:** Mr. Besing, what you're arguing to
10 me sounds like what you should be arguing in the federal court
11 in your motion to compel.

12 **MR. BESING:** But in the meantime --

13 **CHAIRMAN CLARK:** Let me finish. As I understand
14 what you are saying to me, you want me to stay any discovery
15 in this docket because there are going to be similar discovery
16 conducted, and you've agreed with opposing counsel to try and
17 conduct that in cooperation with this docket to save on
18 discovery.

19 **MR. BESING:** Correct. That's right.

20 **CHAIRMAN CLARK:** And am I correct that you are
21 saying because you haven't gotten the documents in the other
22 case --

23 **MR. BESING:** Which would apply here.

24 **CHAIRMAN CLARK:** -- which would apply here -- in the
25 interest of facilitating that cooperation, I should stay the

1 discovery.

2 **MR. BESING:** I'm asking you to grant a protective
3 order on the notice that was filed in this Commission by
4 Florida Power Corporation to start the depositions of the
5 Panda witnesses without the documents that we have asked for.
6 And those depositions are supposed to start today, the 25th.

7 **CHAIRMAN CLARK:** All right. But it's based on the
8 interest of coordinating --

9 **MR. BESING:** Coordinating the two dockets --

10 **CHAIRMAN CLARK:** Right.

11 **MR. BESING:** -- and being able to avoid having to go
12 back and retake those depositions after the documents are
13 produced by Florida Panda -- Florida Power pursuant to federal
14 court order at a later time. It seems to me an enormous waste
15 of the Staff's time, my time, Panda's peoples' time, Florida
16 Power peoples' time, Florida Power's lawyers, to start
17 depositions under a notice filed in this Commission to take
18 depositions when the documents haven't been produced. It
19 makes a mockery of the whole coordination and timesaving and
20 cost-saving effort that the parties, including the Staff, have
21 tried to work out together.

22 **CHAIRMAN CLARK:** Okay.

23 **MR. BESING:** That's it.

24 **MS. WALBOLT:** May I respond, Your Honor?

25 **MS. BROWN:** Chairman Clark, may I --

1 **CHAIRMAN CLARK:** Ms. Walbolt, you will have your
2 opportunity. I am going to listen to Mr. Besing for his
3 allotted time, and then you can respond.

4 **MS. BROWN:** Chairman Clark, I don't think we set an
5 allotted time, and perhaps we need to.

6 **CHAIRMAN CLARK:** Well, I'm allotting him 20 minutes.

7 **MR. BESING:** Well, I don't know how much time I have
8 left, but I think --

9 **CHAIRMAN CLARK:** You have about five minutes.

10 **MR. BESING:** I think the point is pretty clear if
11 you -- and I'd be glad to leave with you if you are going to
12 take this under consideration, as I gather would be the case,
13 plaintiff's first request for production of documents, Florida
14 Power's response to those requests, which led to this
15 spreadsheet --

16 **CHAIRMAN CLARK:** Right. But this has all been filed
17 in the federal court.

18 **MR. BESING:** That's right.

19 **CHAIRMAN CLARK:** Okay. Thank you.

20 **MR. BESING:** However, what came out of this case
21 that started all of this and caused us to file this motion for
22 protective order is because the notice was filed in this
23 Commission -- a notice was filed in this Commission -- by
24 Florida Power to start the depositions now, not when they've
25 produced their documents.

1 **CHAIRMAN CLARK:** Well, I appreciate the notion of
2 trying to coordinate discovery; and to the extent they are
3 related, I think that is a good idea.

4 **MR. BESING:** Yeah.

5 **CHAIRMAN CLARK:** But if the Commission determines it
6 has jurisdiction, we have a time schedule we've got to meet;
7 and I've got to consider that in terms of allowing the
8 production of documents and discovery to go forward.

9 **MR. BESING:** I would still hope that -- and this was
10 made in the motion to stay -- that it would make no sense to
11 go forward. I don't see -- and I please hope this is not
12 disrespectfully stated. I was told at a meeting here a couple
13 of weeks ago that we have to go forward because the Commission
14 has ordered this time schedule to click along.

15 **CHAIRMAN CLARK:** Right.

16 **MR. BESING:** That begs the entire question of
17 jurisdiction.

18 **CHAIRMAN CLARK:** I understand.

19 **MR. BESING:** And if there's no jurisdiction and the
20 Commission decided otherwise and says, "Yes, we do have
21 jurisdiction" -- let's assume you rule that way on
22 October 24th, God forbid -- assume you do.

23 **CHAIRMAN CLARK:** Quite frankly, that's what concerns
24 me most, if that week --

25 **MR. BESING:** And then at that point we are going to

1 ask under the Florida Statutes -- we are going to ask you to
2 stay all proceedings in this Commission pending the appeal to
3 the Florida Supreme Court, and the Supreme Court has made that
4 quite clear that the Commission should do so.

5 So any way you cut it, depositions without
6 documents, depositions while stay motions are pending,
7 depositions while jurisdictional threshold issues are pending,
8 don't make any sense to anyone.

9 **CHAIRMAN CLARK:** I understand that.

10 **MR. BESING:** Thank you.

11 **CHAIRMAN CLARK:** Thank you.

12 **MS. WALBOLT:** If I might be heard?

13 **MR. BESING:** If I might reserve the balance of my
14 time?

15 **CHAIRMAN CLARK:** Ms. Walbolt -- Mrs. Walbolt,
16 excuse me.

17 **MS. WALBOLT:** It is, of course, Panda's burden to
18 show why Florida Power should not be allowed to proceed with
19 discovery in order to prepare for a hearing that it asked for
20 and it received from this Commission and I submit, Madam
21 Chairman, it has not done so. And I would like to address
22 some of the just plain misstatements that have been made here
23 today.

24 First of all, Mr. Besing said to you, Madam
25 Chairman, that there was no agreement on depositions in the

1 federal case, that it was something in agreement to produce
2 documents, and that is just not true. There was an agreement
3 that the parties would proceed. We were at the time looking
4 to have an expedited hearing on Panda's motion for preliminary
5 injunction. And the parties had agreed that they would move
6 forward on an expedited basis with depositions.

7 And you don't have to take my word for that
8 agreement. It is recited in the order of the magistrate judge
9 directing Panda to produce its witnesses, all four employees,
10 secondly for deposition.

11 Secondly, the depositions are not going to move
12 forward simultaneously. There was an agreement at the time
13 that the parties were aiming toward a September 5 hearing date
14 on preliminary injunction, that to the extent necessary, we
15 would go forward on a double track. In other words, we'd be
16 taking depositions simultaneously because there simply were
17 not enough business days between the date we were meeting to
18 set the deposition schedule and the date of the hearing that
19 had been set. And so we agreed we would move forward on a
20 dual track. There is nothing --

21 **CHAIRMAN CLARK:** Let me be clear. On a dual track
22 for both proceedings?

23 **MS. WALBOLT:** Yes, yes. Yes.

24 **CHAIRMAN CLARK:** Okay.

25 **MS. WALBOLT:** Because we had an agreement that, you

1 know, obviously it would be fruitless to repeat the same
2 depositions in both of the proceedings, so we were going to
3 move forward. But there is no order of the court requiring
4 that that be done. And it will not be done, I am confident.

5 Secondly, Mr. Besing said that Florida Power has
6 made no complaints about Panda's production. That's kind of
7 irrelevant, but just for purposes of the record, it's also not
8 true. We have been trying to work those problems out. If we
9 can't, we will file a motion order to compel.

10 Madam Chairman, Mr. Besing's claims of massive
11 concealment of documents by Florida Power are just simply
12 false. We have submitted a response today. It shows point by
13 point for at least the first page of this so-called
14 spreadsheet that the documents were produced. In some
15 instances, they were the immediately preceding document to
16 the document whereon the spreadsheet it says, "was not
17 produced."

18 We produced three boxes of Panda files. We have
19 affidavits of one of my partners. We have an affidavit of the
20 Florida Power paralegal, all saying those are all of the Panda
21 files that were responsive. Mr. Besing has accused these two
22 people of perjury with nothing to support that statement,
23 other than his speculation that there must be some other
24 documents. And I find it personally very offensive.

25 It is true documents were redacted. What Mr. Besing

1 neglects to tell you, Madam Chairman, is that we produced a
2 privileged log, which is the way this is always done. And in
3 that privileged log provided the information so that he
4 believes we improperly claimed a privilege for
5 attorney/client, for instance, documents, then he can go to
6 court and move to compel such a document. But I will
7 represent to the Commissioner, and I will say that when these
8 claims began to be bandied about of this massive concealment
9 of documents, I personally did become involved in it and
10 satisfied myself that there has been no such concealment of
11 documents.

12 We've produced something like 57 boxes of documents
13 in an extraordinarily short time. If documents haven't been
14 produced, it's because they don't exist. No matter how much
15 Panda would like us to keep documents in the way they'd think
16 it ought to be, we don't always make memoranda of every single
17 meeting or every single phone call or not every single person
18 in the meeting makes a memorandum of the meeting or an
19 objection has been interposed. And I think the ludicrousness,
20 if I could say that -- I guess that's not a word -- of this
21 claim that we've massively concealed documents is pointed out
22 by the very argument that Mr. Besing made.

23 We have two other lawsuits in which we have produced
24 massive amounts of documents. Mr. Besing is cooperating with
25 counsel in those cases. He has obtained documents from them.

1 It would be passing silly for us to conceal documents that we
2 have already produced that have been the subject of a year's
3 worth of depositions.

4 There has been no concealment. And Madam Chairman,
5 the Federal Magistrate had no difficulty at all in denying
6 Panda's motion for protective order where they made exactly
7 this same argument that you have heard today. And, in fact,
8 the Magistrate's order, which is included in the materials we
9 submitted, said in the strongest of language that the
10 depositions were to proceed.

11 Well, Mr. Besing and his counsel, Panda, have now
12 for the second time -- this is the second order, Madam
13 Chairman, this is the second order directing Panda to proceed
14 with depositions. The first one directed that the depositions
15 begin in early September.

16 **MR. BESING:** That is false.

17 **CHAIRMAN CLARK:** Let me interrupt you just a minute.
18 Even if I granted a protective order for this proceeding,
19 wouldn't those depositions go ahead because that's what the
20 federal court has said to do?

21 **MS. WALBOLT:** That was the very next thing I was
22 going to say, Madam Chairman. Exactly. The deposition
23 schedule that we filed in this case was obviously a duplicate
24 of what we filed in the federal court. It was for the same
25 days because we are trying to avoid inefficiencies. We are

1 trying to move forward.

2 The statement was made this morning, during the
3 argument this morning, that an appeal had been filed from the
4 Magistrate's order. I checked at noon. We did not have
5 any --

6 **MR. BESING:** There was no statement made,
7 Ms. Walbolt. You know better than that.

8 **CHAIRMAN CLARK:** Mr. Besing, I'm going to let --

9 **MR. BESING:** I think I've got a right to object when
10 false statements are made in the middle of the argument.

11 **CHAIRMAN CLARK:** Mr. Besing, I did not let
12 Ms. Walbolt respond to the statements you made at the time. I
13 said it would wait until her opportunity. You will get the
14 same opportunity on rebuttal.

15 Go ahead.

16 **MS. WALBOLT:** Thank you, Madam Chairman. I was
17 simply going to say that we checked at noon, and at that time
18 were told by the Tampa partner of Fowler White, who has
19 responsibility of the federal case, that he had not filed the
20 notice of appeal and could not provide us one.

21 I think it's important to understand that in the
22 federal court there must be an actual order. There must be a
23 protective order. You don't simply file a motion. You don't
24 simply file an appeal and have that act as an automatic stay.
25 You must get an order staying the depositions. That has not

1 been done.

2 There have been two orders; the first of which was
3 never appealed. The second of which we're told will be
4 appealed. There have been two orders of the Federal
5 Magistrate saying, "You will go ahead." And the second order
6 said in the strongest language that no further delay would be
7 consonance. Nevertheless, that order has been violated, just
8 as the original one was as well.

9 We believe, Madam Chairman, that this motion should
10 be denied. We think, at a minimum, the Commission should
11 allow any depositions that the federal court does allow to be
12 taken and require Panda to attend, that those depositions
13 should be used in this proceeding. We would particularly ask
14 the Commission not to enter some type of indefinite protective
15 order such as Panda has sought.

16 There's been mention of a stay pending appeal and
17 that there should be no discovery pending an appeal. I'm
18 frank to say I'll have to go back and look at my rules, but I
19 think the only party who would have a right to appeal would be
20 Florida Power if this Commission were to dismiss the
21 proceeding, and at that point if that were to occur, it would
22 be a moot point.

23 If the Commission does not dismiss the proceeding,
24 that is an interlocutory order, I believe. It is my view it
25 is an interlocutory order. It is not a final order that will

1 be subject to appeal. And so at a minimum, we would ask,
2 number one, that it not be any indefinite protective order.
3 That, number two, it be made clear that this Commission is not
4 suggesting to the federal court that it should not allow
5 depositions to go forward, that any depositions that are taken
6 in the federal court be used in this proceeding. And,
7 finally, that if some delay is to be granted, we implore you
8 not to let the hearing date slip, even if we have to compress
9 some of the other time requirements, and that Panda should not
10 be allowed to come back in at a later date and ask that that
11 hearing be postponed because of lack of time to complete
12 discovery or to meet the other deadlines.

13 It obviously was very difficult for this Commission
14 to get that February 19 hearing date on its calendar in the
15 first place. Florida Power is most anxious to keep that date
16 on the Commission's calendar. It has a very real need, and
17 that's why it's a time-of-the-essence contract.

18 Florida Power has a very real need to know for
19 planning purpose whether this project is going to move
20 forward. And, if so, in what configuration and how much
21 energy Florida Power is going to be required to purchase and
22 what payments for any additional energy that the facility may
23 or may not be allowed to produce. And we would urge the
24 Commission not to allow Panda to delay the Commission's
25 determination of those issues. Thank you very much.

1 **CHAIRMAN CLARK:** Thank you, Ms. Walbolt.

2 Mr. Besing?

3 **MR. BESING:** Ms. Chairman, Florida Power's alleged
4 planning purposes do not hold a candle to Florida Power
5 concerted attempt to wipe out a cogenerator, which is what
6 this lawsuit in Tampa is all about. And I think the argument
7 is spurious to say the least.

8 Ms. Walbolt's rather outrageous statement about
9 facts that don't exist and claiming things that occurred that
10 did not occur is probably the best proof I know of of why we
11 need to have an evidentiary hearing. And let's have some
12 people under oath get up in front of the magistrate and try to
13 tell some of those same stories.

14 Let me give you a couple of examples. If you look
15 at the order of August the 28th of the magistrate, the
16 magistrate did not order depositions to start. The magistrate
17 ordered that the parties attempt to agree on the time for
18 depositions. That's all. It was not appealed because there
19 was no agreement. There was no need for an appeal.

20 Now, that's the August 28th order. It has not been
21 violated by Panda or anybody else.

22 **CHAIRMAN CLARK:** Mr. Besing, that's for something
23 you ought to take up in the federal courts.

24 **MR. BESING:** Pardon?

25 **CHAIRMAN CLARK:** I really want to understand what I

1 should do with the protective order.

2 MR. BESING: Well, it seems to me, Ms. Chairman,
3 that the federal court has got to decide the motion to compel
4 that is pending -- been filed on the 13th of September, should
5 be set for hearing shortly, will be an evidentiary hearing --
6 we've asked for it to be so that we can put on evidence like
7 these spreadsheets with live witnesses and show what documents
8 have not been produced by Florida Power.

9 Likewise, we are appealing -- and I believe you have
10 before you from the previous hearing, the two letters: One
11 dated September the 23rd, that you should still have up there
12 where Mr. Dupre, the counsel for Florida Power, is advised by
13 Tom Steele, in the second paragraph, quote, "Panda will serve
14 and file its objections to Magistrate Judge Jenkins' order of
15 September 15 along with a supporting memorandum no later than
16 Friday, September 29." That's under the local rules and the
17 timing of those local rules.

18 We are filing an appeal. We have an acknowledgement
19 letter which you also have dated September the 23rd to
20 Mr. Steele from Mr. Dupre where he says, "I won't be going to
21 Texas to take depositions," quote, "because you would be
22 filing objections to Magistrate Jenkins September 15th order.
23 You told me you felt Panda's deadline for objecting was
24 Friday, September 29, 1995," which is this Friday.

25 So much for this business about, "I checked at noon

1 and there was no appeal." They know very well it's going to
2 be filed on Friday.

3 Now, with respect to the second order of the
4 magistrate of September the 15th, the magistrate simply said
5 we are granting Panda's request for protective order for the
6 week of the 18th, which is when these people were noticed, but
7 denying it four weeks subsequent to that. That's what we are
8 appealing to the U.S. District Judge who has this case. The
9 Magistrate's order is appealable.

10 While we are at that, about appealability,
11 Ms. Walbolt's --

12 **CHAIRMAN CLARK:** And it's appealable to the judge?

13 **MR. BESING:** To the United States District Judge,
14 right. The magistrate makes an initial decision or
15 recommendation and then the United States District Judge can
16 overrule that, modify it or otherwise. And it's very
17 frequently done in federal practice.

18 Now, Ms. Walbolt suggests that the only person who
19 could appeal this Commission's decision on jurisdiction would
20 be Florida Power. And the reason for that, she says, is that
21 Panda would be appealing an interlocutory order. And let me
22 just cite this to you. The appellate courts have long
23 recognized the need to permit the immediate review of an
24 agency's attempts to act in excess of its jurisdiction. See
25 City of Tallahassee versus Mann, 411 So2d 162, by the Florida

1 Supreme Court in 1981. As the court noted and stated in
2 Department of General Services versus Willis, 344 So2d 580 at
3 590, there are three factors which should influence the
4 judicial decision whether to intervene by extraordinary rep or
5 defer to the administrative remedy, and it goes on to discuss
6 those.

7 **CHAIRMAN CLARK:** Mr. Besing, let me ask you a
8 question.

9 **MR. BESING:** Sure.

10 **CHAIRMAN CLARK:** Do I even have to reach that?

11 **MR. BESING:** I don't think you do because we have a
12 clear right of appeal. The issue here, it seems to me, is to
13 stay activity by the Commission where there is a legitimate --
14 and as we quoted to the court from this decision in United
15 Telephone, which I know this Commission is very familiar with,
16 decided by the Florida Supreme Court in 1986.

17 And the court there said, quote, "If there is a
18 reasonable doubt as to the lawful existence of a particular
19 power, 'in this case jurisdiction,' that is being exercised,
20 the further exercise of the power should be arrested or
21 stayed."

22 **CHAIRMAN CLARK:** Does that predate or is it after
23 the P.W. Ventures case, do you know?

24 **MR. BESING:** It's the -- the date of the decision in
25 496 So2d is 1986.

1 **CHAIRMAN CLARK:** Okay.

2 **MR. BESING:** Now, with respect to the argument that
3 they have problems with Panda documents, that's not correct.
4 I've never met Ms. Walbolt in my life before this afternoon,
5 and she's never complained and doesn't know anything about
6 that complaint. She wasn't present at the meeting of counsel
7 on the 25th of July. She was not present at the appearance
8 before the Staff on September the 5th. She didn't meet on
9 September the 5th in Tampa. She has no personal knowledge
10 whatever. And if the time comes when she wants to make these
11 kinds of outrageous statements, well, then, we'll put her
12 under oath and see how she does under oath.

13 I resent the kind of suggestions and statements
14 being made here today and ask that you please honor the
15 agreement of the Staff, Florida Power, and Panda that we have
16 tandem coordinated discovery, that documents come before oral
17 depositions, and that when the documents are produced as they
18 should be after a hearing by the court on the motion to compel
19 now pending and filed by Panda, then and only then should the
20 depositions go forward. Otherwise the Staff, Panda, and
21 Florida Power are going to be wasting an enormous amount of
22 money and people.

23 **CHAIRMAN CLARK:** Thank you. Mr. Besing, let me ask
24 you one question. One of the things that Florida Power
25 Corporation has requested is that alternatively that Florida

1 Power Corporation be allowed to use the deposition it takes in
2 the federal court case in this proceeding. Do you have any
3 objection to that?

4 MR. BESING: I didn't hear you. I can't hear.

5 CHAIRMAN CLARK: One of the things that FPC has
6 asked for in their prayer for relief regarding their
7 memorandum in opposition to the motion for protective order --

8 MR. BESING: Yes.

9 CHAIRMAN CLARK: -- is that alternatively Florida
10 Power Corporation be allowed to use the deposition it takes in
11 the federal court case in this proceeding to the extent
12 relevant. Do you have any objection to that?

13 MR. BESING: That's what our agreement is, if I'm
14 understanding you correctly --

15 CHAIRMAN CLARK: Okay.

16 MR. BESING: -- is that the depositions are usable
17 in both proceedings.

18 CHAIRMAN CLARK: Do you want to look at it and tell
19 me if you have any objections to that?

20 MR. BESING: What page is it on? I may have a copy
21 of it. What page is that?

22 CHAIRMAN CLARK: It's Page 5 of their memorandum in
23 opposition to motion for protective order.

24 MR. BESING: All right. Let me look at it. This
25 was given to me on the way out. I have not read it. I'm

1 sorry.

2 **CHAIRMAN CLARK:** Okay. If you just look at
3 Paragraph A, that will be helpful.

4 **MR. BESING:** Denying Panda's motion for protective
5 order with a hearing --

6 **CHAIRMAN CLARK:** Yes. And then the alternative.

7 **MR. BESING:** "Or alternatively allowing FPC to use
8 the deposition it takes in the federal court case in this
9 proceeding to the extent relevant."

10 Well, I don't think that they need that from you
11 because there is an agreement that if this case goes
12 forward --

13 **CHAIRMAN CLARK:** Okay.

14 **MR. BESING:** If this Commission has jurisdiction,
15 then clearly the depositions are usable in either case.

16 **CHAIRMAN CLARK:** So I don't need to order that --

17 **MR. BESING:** No.

18 **CHAIRMAN CLARK:** That's something you've already
19 agreed to?

20 **MR. BESING:** No. That's been clearly understood and
21 agreed to from the outset by all three sets. We are
22 resisting. I want you to be sure you've got the total
23 picture. We are vigorously resisting the Commissions
24 intervention in the federal antitrust case in Tampa.

25 **CHAIRMAN CLARK:** I understand.

1 **MR. BESING:** And all that. But whether that is for
2 or against the Staff or the Commission -- and if the
3 Commission determines that it's got jurisdiction and the
4 Florida Supreme Court agrees, then there is absolutely no
5 reason for you to order, again, what has already been agreed
6 to by the parties. And I stipulate here that we'll use all
7 the discovery interchangeably.

8 **CHAIRMAN CLARK:** All right.

9 **MR. BESING:** If it's relevant on any issue here,
10 then you can use that witness rather than having to recall him
11 for deposition in this proceeding.

12 **CHAIRMAN CLARK:** Okay.

13 **MR. BESING:** And vice versa. If there's stuff in
14 the deposition that relates partly to issues here and partly
15 to issues in the antitrust case, it'd be used in the antitrust
16 case as well by any party.

17 **CHAIRMAN CLARK:** I don't think I have any more
18 questions. Can you hear? You can't hear too well with the --
19 I promise you we're getting longer microphones, and we're just
20 waiting for the --

21 **MR. BESING:** When I lean away, for some reason, I
22 just noticed that when you asked me, I couldn't hear any of
23 the question.

24 **CHAIRMAN CLARK:** I apologize. And it's just a
25 matter of we're in a new building, and we're trying to work

1 STATE OF FLORIDA)
2 COUNTY OF LEON)

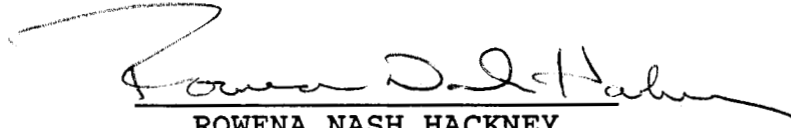
CERTIFICATE OF REPORTER

3 I, ROWENA NASH HACKNEY, Official Commission
4 Reporter,

5 DO HEREBY CERTIFY that the Oral Argument in Docket
6 No. 950110-EI was heard by the Prehearing Officer at the time
and place herein stated; it is further

7 CERTIFIED that I stenographically reported the said
8 proceedings; that the same has been transcribed under my
9 direct supervision; and that this transcript, consisting of 33
10 pages, constitutes a true transcription of my notes of said
11 proceedings.

12 DATED this 27th day of September, 1995.

13 
14 ROWENA NASH HACKNEY
15 Official Commission Reporter
16 (904) 413-6736

17
18
19
20
21
22
23
24
25