

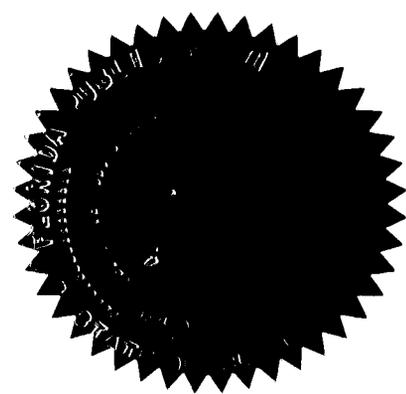
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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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
COMMISSIONER J. TERRY DEASON
COMMISSIONER JULIA L. JOHNSON
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA

DATE: Monday, September 25, 1995

TIME: Commenced at 2:00 p.m.
Concluded at 3:05 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 **JAMES MCGEE**, Carlton, Fields, Ward Emmanuel, Smith
3 & Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida
4 33731, Telephone No. (813) 223-7000, appearing on behalf of
5 **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** and **MICHAEL HAFF**, FPSC Division
14 of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee,
15 Florida 32399-0870, Telephone No. (904) 413-6187, appearing on
16 behalf of the **Commission Staff.**

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P R O C E E D I N G S

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

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3 **CHAIRMAN CLARK:** Call the oral argument to order.

4 **MS. BROWN:** By order --

5 **CHAIRMAN CLARK:** Hang on a minute. Are we on?

6 Okay. Thank you. Go ahead.

7 **MS. BROWN:** By order of PSC 951147-PCO-EI issued
8 September 15, 1995, this time and place was set for an oral
9 argument on Panda-Kathleen L.P.'s motion to stay or abate
10 proceedings and motion to dismiss. The oral argument will
11 address those motions.

12 **CHAIRMAN CLARK:** We'll take appearances.

13 **MR. BESING:** Chairman, for Panda-Kathleen, Ray
14 Besing, Kenneth Sukhia, David Moye and Eric Haug.

15 **CHAIRMAN CLARK:** Would you repeat those names,
16 please?

17 **MR. BESING:** Yes. Ray Besing, B-E-S-I-N-G; Kenneth
18 Sukhia, S-U-K-H-I-A; David Moye, M-O-Y-E; and Eric Haug,
19 H-A-U-G.

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

21 **MR. SUKHIA:** Commissioner, I have filed a
22 sponsorship for Mr. Besing who is here from Texas for the
23 Commission. There's no objections, as far as I understand,
24 from Staff.

25 **CHAIRMAN CLARK:** No objections to Mr. Besing

1 appearing on behalf of Panda-Kathleen?

2 MR. HAFF: None.

3 CHAIRMAN CLARK: Thank you.

4 MR. MCGEE: My name is James McGee, Post Office Box
5 14042, St. Petersburg 33733, on behalf of Florida Power
6 Corporation.

7 MS. BROWN: Martha Carter Brown representing the
8 Florida Public Service Commission Staff.

9 CHAIRMAN CLARK: Thank you. Any preliminary matters
10 I need to take up?

11 MR. BESING: If you please, Ms. Chairman, I would
12 like to divide our 20 minutes, if we might; 18 minutes for the
13 opening, and 2 minutes for rebuttal. Of the 18, I would like
14 to take 15 on the motion to dismiss. And Mr. Sukhia, 3
15 minutes on the motion to stay or abate.

16 I would also appreciate the Commission's permission
17 to use the chart by moving around to it. We had put it there
18 to avoid blocking views of either the Staff or other counsel.

19 CHAIRMAN CLARK: Are there any objections to
20 pursuing that way on oral argument? That's acceptable,
21 Mr. Besing.

22 CHAIRMAN CLARK: Ms. Brown?

23 MS. BROWN: I'm not aware of any other preliminary
24 matters.

25 CHAIRMAN CLARK: Okay. Thank you very much.

1 Mr. McGee, any preliminary matters?

2 MR. MCGEE: No.

3 CHAIRMAN CLARK: Mr. Besing, you may begin.

4 MR. BESING: Thank you. We are talking about
5 subject matter jurisdiction, which I'm sure you all know
6 cannot be waived, cannot be consented to, cannot be agreed to,
7 and may be raised at any time. I must say to you, I tried a
8 case one time and the jury was out and about to come back and
9 the Court, himself, suddenly realized that we had the wrong
10 amount of dollars being pled for the size of the court and,
11 therefore, he had no jurisdiction; and we had to wipe the
12 whole thing out. So we are talking about something that is
13 critical and threshold in every proceeding.

14 I submit to you that Florida Power Corporation
15 decided last year in March that the contracts which this
16 Commission approved in 1991 were no longer to its liking.
17 They worked internally during late '93 and early '94 on a plan
18 and published on March the 18th, 1994 their cogeneration
19 strategy.

20 Now, if you look at the chronology of what's
21 happened here in the cogeneration contract field, as you know,
22 there have been contracts since the 1980's. This Commission
23 in 1990 had a rulemaking proceeding and amended some of its
24 rules pertaining to cogeneration and cogeneration contracts
25 effective October the 25th, 1990. Subsequently, in 1991, in

1 Docket 910004, there was an extensive evidentiary hearing
2 conducted by the Commission with respect to a proposed new
3 contract and new rates by Florida Power and the other electric
4 power utilities in the state of Florida. That formulated an
5 order of this Commission on August 29, 1991, at which time
6 this Commission approved the standard offer contract that
7 Florida Power Corporation presented to the Commission and
8 approved the rates for the amount to be charged for
9 electricity under the avoided cost standard of the federal
10 law.

11 Then I submit to you, therefore, that that contract
12 was approved after extensive testimony, and analysis by the
13 Commission, testimony by Florida Power personnel and analysis
14 by the Commission. That was the first approval of the
15 contract.

16 Then as you see, the Step 3 here, Florida Power
17 Corporation and Panda-Kathleen entered into that contract
18 signed in October and then in November of 1991, later that
19 year, and signed, I think, November the 20-something by one of
20 the officers of Florida Power.

21 That contract and several other standard offer
22 contracts which were received by Florida Power were then
23 presented in a separate docket proceeding, in Docket
24 No. 911142 to the Commission for the Commission's approval of
25 those specific contracts. And by this Commission's order on

1 October the 22nd, 1992, in the Order 922202, this Commission
2 approved the Panda contract and rejected all the other
3 contracts that had been submitted to Florida Power.

4 I submit to you that's the second time the
5 Commission approved not only the generic standard form of
6 contract, but then approved the specific contract signed by
7 the parties. And after that, the parties started performing
8 the contract.

9 And Panda has several million dollars signed up in
10 the contract and was ready this spring to go ahead with this
11 branching, which has already been arranged with the Bank of
12 Tokyo for long-term financing and Merrill Lynch for the
13 short-term construction financing.

14 The one thing that the federal law and this
15 Commission's law, I believe, has been trying to establish is
16 that once one of those contracts has been executed and
17 approved by a state commission, it is critical that the
18 qualified facility, the small cogenerator, have certainty that
19 he's going to be able to finance over that 30-year term of
20 that contract, that there's not going to be disruptions that
21 are going to chase off the financing. And that's what
22 exactly -- what happened here when Florida Power filed its
23 second petition for declaratory statement.

24 And if you take a look at the timing here, I'll
25 leave you to your own conclusions. But having been before a

1 number of commissions and courts, I think I know what happens
2 on a day-to-day basis in terms of conversation and
3 information, particularly with what the utilities are able to
4 afford with people on the ground at commission offices in
5 learning what's going on and providing valuable information.

6 I don't criticize that at all. But the truth of the
7 matter is, is that after these contracts were being performed
8 for two years with Panda and Florida Power, then something
9 happened. Orlando Cogen and a number of other cogens in
10 Florida started having problems with Florida Power. If you'll
11 take a look at Tab 10 of the appendix that was submitted to
12 you by Florida Power, is a copy of this Commission's May the
13 2nd, 1995 order. Now, it's not so much for what the order
14 itself says. It deals with cogen contracts and the
15 Commission's decision on which changes, when you change, some
16 contracts have to be approved again, et cetera.

17 If you take a look at the second page, there's a
18 listing of the existing contracts in Florida, cogen contracts,
19 starting with Seminole Fertilizer Corporation. Now, this is
20 information that I have, and it's incomplete. But our
21 information so far is that Seminole on Page 2; Orlando Cogen
22 Limited on Page 3; Panda-Kathleen and Pasco Cogen Limited on
23 Page 3; on Page 5, Royster Phosphate, Mulberry Energy Company,
24 CFR BIO-GEN (Orange), Dade County, and on the next page, 6,
25 General Peat and EcoPeat, a total of 10 cogeneration contracts

1 have been forced to the bargaining table by this policy that
2 was adopted by Florida Power in March of 1994.

3 In other words in approximately a year and-a-half,
4 10 of these cogenerators have been told, "Your contract's
5 breached, and we're going to cancel these contracts; or you
6 are going to come lower the prices; or you are going to come
7 negotiate with us for curtailment or other major changes in
8 the contracts." Those that resisted had to file suit,
9 including Orlando, Pasco, one of the others, and Panda.

10 At the present time, there are two state courses:
11 one for breach of the contract, one for violation of Florida
12 antitrust laws, and two federal court suits both for violation
13 of the federal antitrust laws against Florida Power
14 Corporation because of this heavy handed conduct on the part
15 of Florida Power.

16 And what Florida Power has done, of course, is force
17 these people in the courthouse to get relief because they are
18 in midflight, they are getting ready to start the financing or
19 maybe finish their financing and started construction; or in
20 Orlando's case, they'd already finished the plant. And then
21 they are told, "We are not going to buy your power; or you are
22 going to have to curtail your production time; or you are
23 going to have to change your prices. You know we'll terminate
24 your contract."

25 Now, the first time that Florida Power decided that

1 it didn't want to be in the courthouse, it filed on April the
2 7th, 1994. One month after it adopted this strategy, it filed
3 with the Commission a petition for declaratory statement. And
4 at that time, it asked this Commission to, in effect, ratify
5 its conduct, interpret the contract the way it wanted it
6 interpreted, thereby providing Florida Power with a defense in
7 the courthouse.

8 I'm not dealing with the antitrust laws if the
9 contract, in effect, is void or if it's terminated. And I've
10 got -- and I'm going to be very candid with you -- I've got
11 the holy water of this Commission sprinkled on that defense,
12 and then I can go tell the federal judge or the state judge,
13 "Well, the Florida Public Service Commission has agreed with
14 me. That provides me with a defense."

15 **CHAIRMAN CLARK:** What is the defense? The state
16 action immunity?

17 **MR. BESING:** That's right. Sure.

18 **CHAIRMAN CLARK:** What is the defense?

19 **MR. BESING:** Sure. The state action immunity or the
20 marriage itself, as in this case here with Panda, the contract
21 doesn't exist. It's void.

22 We don't care how many meetings and dollars Panda
23 has spent; how many three years of time Panda's spent; we
24 don't care what their damages are. You don't have a contract
25 that tries the relationship; therefore, you can't complain

1 that there's anything that we did wrong.

2 Now, on January the 6th, 1995, this year, this
3 Commission heard oral argument like we are hearing today on
4 the motion to dismiss of Orlando Cogen on the same ground that
5 I've raised with you here; that Panda -- that the Commission
6 does not have jurisdiction to go back and revisit to
7 reinterpret or construe contracts when the Commission has
8 already approved those contracts. The critical point is the
9 time frame.

10 I do not think there is any legitimate distinction
11 in the federal law or Florida law between standard offer
12 contracts and negotiated contracts. I have stated that in
13 brief. You may or may not accept that. But even if there are
14 such differences, even if I give you that argument, even if I
15 give the counsel for Florida Power that argument, that's not
16 the issue. The issue is what happens after the Commission has
17 fully reviewed in evidentiary hearings and approved the
18 contract, whether it's a red one or a blue one or a green one,
19 whether it's standard or negotiated or otherwise. And that's
20 the point here. It's right here. Right here is when the
21 Commission's interest in those contracts stop.

22 **COMMISSIONER GARCIA:** Are you saying that this
23 Commission's responsibilities to the ratepayers of this state
24 end right there? You are saying that the Commission's
25 responsibilities to the ratepayers of this state end right

1 there?

2 **MR. BESING:** No, sir. But the responsibility of the
3 ratepayers is not an issue in a wholesale power contract,
4 whether -- because, as you know, the shoe may be on the other
5 foot next time. If a change in condition and circumstances in
6 prices has occurred out in the marketplace, it's just as
7 likely to hurt the little cogen as it is the public utility.
8 And the federal law and the case authorities and the
9 authorities in Florida have made it very clear.

10 We are talking about not regulating wholesale power
11 authorized under federal law. And we're saying that if you
12 step in after a contract has been reviewed and approved, you
13 are doing exactly what Florida Power knew would happen here,
14 that Merrill Lynch and the Bank of Tokyo backed off. They
15 said, "Huh-uh; we're not going to touch this with a 10-foot
16 pole."

17 "If they are going to file this type of a petition
18 questioning the validity of this contract, we ain't going to
19 lend a dime on it until you get that cleared up."

20 And that's exactly what Florida Power wanted to
21 happen. And that's exactly what did happen. Panda is dead in
22 the water.

23 Panda has not been able to complete its financing.
24 Panda has not been able to start its construction. And one of
25 the two milestones on that contract must be met in January 1,

1 of this coming year, 1996, where they must start the
2 construction.

3 **CHAIRMAN CLARK:** Mr. Besing, you have another
4 minute.

5 **MR. BESING:** Thank you. And if you take a look at
6 the timing effort in the oral argument on January the 6th,
7 1995, in midJanuary the Staff withdrew its memorandum to the
8 Commission. At the time they were opposing the motion to
9 dismiss; and they substituted on January the 26th, a new
10 memorandum which, I think, correctly stated that the motion to
11 dismiss should be granted so that the Commission does not have
12 jurisdiction to revisit these contracts.

13 It's very interesting that -- and I submit to you
14 that Florida Power knew that was coming out. And on January
15 the 25th, one day before the memorandum, the Staff gave out --
16 Florida Power filed its second shock, its second petition for
17 declaratory statement. This time against Panda.

18 **CHAIRMAN CLARK:** Mr. Besing, that's your 15 minutes.

19 **MR. BESING:** Thank you.

20 **CHAIRMAN CLARK:** Mr. Sukhia, unless you can speak as
21 loud as Mr. Besing, you are going to have to be at a
22 microphone so our reporter can hear us.

23 I'm sorry, I shouldn't have let you get away with
24 that, but --

25 **MR. SUKHIA:** Okay. I'll speak up.

1 **CHAIRMAN CLARK:** Go ahead.

2 **MR. SUKHIA:** May it please the Commission, my name
3 is Ken Sukhia. I'm with the Fowler White law firm in
4 Tallahassee. We're passing out to the Commission --

5 **COMMISSIONER KIESLING:** Mr. Sukhia, could you sit
6 down, because you definitely do not speak as loud as
7 Mr. Besing.

8 **CHAIRMAN CLARK:** And your light has to be off
9 because that means it's not muted.

10 **COMMISSIONER KIESLING:** Right.

11 **MR. SUKHIA:** We are passing out to the Commission
12 documents that I would ask you to direct your attention to
13 during my brief comments.

14 The issue regarding the stay is one which has been
15 well settled in the Florida Supreme Court. The first document
16 that you would have before you is the United Telephone versus
17 PSC case. And you'll see there's a blue tab on that case,
18 which highlights the language of the opinion, stating that the
19 Court cannot apply such a presumption that is a presumption in
20 favor of the regularity of this Commission's orders to support
21 the exercise of jurisdiction where none has been granted. And
22 the operative language is this: If there is a reasonable
23 doubt, a reasonable doubt, as to the lawful existence of a
24 particular power that is being exercised, the further exercise
25 of that power should be arrested.

1 Now, the opinion doesn't say that when all is said
2 and done we might go in and make modification, but it says the
3 further exercise of that power when there's a reasonable doubt
4 should be arrested. This is consistent with longstanding
5 opinions from both the First District Court of Appeal and also
6 the Florida Supreme Court, which it recognized that the
7 extraordinary remedies of immediate petition from orders
8 rendered when jurisdiction has been challenged is an
9 appropriate immediate interlocutory remedy.

10 Now, one of those cases is Department of General
11 Services versus Willis, that's the second case you have before
12 you. If you'll look to the footnote, Footnote 10 on Page 590
13 of that case, Professor Davis there cites three key factors
14 which should influence a judicial decision whether to
15 intervene in an action on the part of the Commission. And one
16 of those key three factors is the degree of apparent clarity
17 or doubt about administrative jurisdiction.

18 Now, my first argument to the Commission
19 respectfully would be that there is a reasonable doubt as to
20 this Commission's jurisdiction. And in those cases, the
21 Supreme Court has held that the further exercise of that
22 jurisdiction should be arrested. Now, there's a strange
23 argument afoot here which you may yet hear. And that is,
24 "Well if you stay this proceeding, you are going to intervene
25 in the proceeding in Federal District Court."

1 Now, if you stop and think about that or interfere
2 with it and if you stop and give thought to that, that really
3 makes no sense. As if to say, "Well, if this proceeding
4 weren't going on, it would somehow interfere with some other
5 proceeding." That's not more true of this proceeding than it
6 would be of any other proceeding that has absolutely nothing
7 to do with this one.

8 CHAIRMAN CLARK: Mr. Sukhia, you have about 30
9 seconds.

10 MR. SUKHIA: Okay. In any event, even if that were
11 true -- well, it isn't true. And I think if you look at the
12 letters, you'll find that we have appealed and we are
13 appealing the decision below of the magistrate to the district
14 court there.

15 It's also been argued that it's been going on for
16 some time and this, too, is irrelevant if you'll look at the
17 Stel-Den case, which we've cited in our brief. It says very
18 clearly that it makes no difference when jurisdiction is
19 raised; it can be raised at anytime. In fact, it's axiomatic
20 that it can.

21 And, finally, I would ask you to consider that those
22 cases which indicate that the court may -- or that the
23 Commission may exercise jurisdiction when there is a colorable
24 claim only relate to those cases where there is a colorable
25 claim to exclusive jurisdiction, which clearly there isn't

1 here. For instance, the case of Bryson or the case of
2 Charlotte County, those cases say when there is a colorable
3 claim to exclusive jurisdiction; yes, the Commission may be
4 permitted to proceed. But clearly that isn't true here where
5 there's an independent and ongoing case in another forum.

6 And finally, I would say that the stay surely should
7 be granted until such time that this Commission may render its
8 opinion. And, of course, at that time, in the event it's
9 necessary that an appeal be taken, we would ask at that time
10 as well that the stay be continued during the pendency of that
11 appeal. Thank you.

12 **CHAIRMAN CLARK:** Thank you, Mr. Sukhia.

13 **MR. MCGEE:** Good afternoon, Madam Chairman.

14 **CHAIRMAN CLARK:** Hang on. I need to restart my
15 watch.

16 **MR. MCGEE:** Okay.

17 **CHAIRMAN CLARK:** Go ahead.

18 **MR. MCGEE:** Because of time considerations, I'll
19 only highlight several of the key points in our response to
20 Panda's motion to dismiss. Am I coming through okay? I'll
21 try and speak up.

22 **CHAIRMAN CLARK:** Closer.

23 **MR. MCGEE:** I would urge you, though, to read that
24 response because it refutes every basis for dismissal that's
25 alleged in Panda's motion.

1 By way of background, on January 25th of this year,
2 Florida Power filed a petition for declaratory statement in
3 which we ask you to interpret your cogeneration rules in a
4 standard offer tariff filed pursuant to those rules. Shortly
5 after that, Panda filed its own motion for a declaratory
6 statement affirmatively seeking an interpretation of the same
7 rules in the same standard offer contract, as well as
8 requesting that the standard offer contract be modified by
9 extending its milestone dates.

10 Subsequently, in June Panda filed what it referred
11 to as a petition for formal evidentiary proceeding in which
12 Panda expressly asserted that you have jurisdiction to grant
13 the relief it requested. You granted Panda's petition, and
14 this matter has been set for hearing on February 19th of next
15 year.

16 Now, some eight months after the proceeding began,
17 in an incredible about face, Panda claims that you lack the
18 jurisdiction that it earlier claimed you had. And even more
19 astounding, Panda claims that your jurisdiction is so
20 obviously lacking that Florida Power's request to invoke that
21 jurisdiction was a sham.

22 Now, questions relating to the extent of the
23 Commission's jurisdiction over the relationship between
24 utilities and qualifying facilities are not new to you. In
25 January of this year, you heard arguments by Florida Power and

1 a number of QFs in two related cases regarding your
2 jurisdiction to interpret negotiated contracts. And in making
3 your decision on the jurisdictional issue that's before you
4 now, you really only need to determine whether your earlier
5 decisions are still good law. If it is, Panda's motion to
6 dismiss fails. And I say that because even though you rule
7 that the Commission does not have jurisdiction over negotiated
8 contracts, you did so in a way that carefully and thoroughly
9 distinguished the situation with respect to standard offer
10 contracts.

11 In your two earlier decisions, both of which were
12 issued on February 15th of this year, you began by recognizing
13 that your cogen rules provide two distinct ways for a utility
14 to purchase capacity and energy from a QF, either by means of
15 an individually negotiated contract or a standard offer
16 contract. And you emphasized that these two types of
17 contracts are treated very differently under your rules.

18 And you also recognized that unlike negotiated
19 contracts in which the parties are free to negotiate terms to
20 their mutual satisfaction, subject to your approval only for
21 purposed of cost recovery, standard offer contracts are state
22 controlled contracts that provide the means by which QFs can
23 require utilities to purchase their output without the need to
24 negotiate for a contract. You went on to describe how your
25 rules require utilities to publish standard offer contracts in

1 their tariffs, which the Commission must approve and which
2 have to conform to extensive guidelines that are set forth in
3 your rules.

4 In recognition of the significance that you ascribed
5 to these distinctions between negotiated contracts and
6 standard offer contracts, you found that, and I quote, "The
7 Commission controls the provisions of standard offer
8 contracts," end of quote, in reaching your conclusion that you
9 do not exercise similar control over negotiated contracts.
10 And, in fact, your decision refers to numerous occasions where
11 the Commission construed the provisions of standard offer
12 contracts in the past.

13 The legal effect of Commission control over the
14 standard offer contract is to make them "Orders of the
15 Commission binding as such upon the parties," which is the
16 language that was used in the line of Supreme Court cases
17 cited in our response, to the effect that -- to the same
18 effect as similar control over territorial agreements.

19 The case of PSC versus Fuller is particularly
20 significant here since the Supreme Court in that case
21 determined that the Commission had jurisdiction to resolve the
22 controversy over the provisions of a territorial agreement
23 approved by the Commission precisely because, and I quote,
24 "the agreement had no existence apart from the PSC order
25 approving it," end of quote. And just as in the Fuller case,

1 a standard offer contract has no existence apart from the PSC
2 order approving it.

3 Unlike the freely negotiated contract that the
4 Commission declined to review in its February 15th decisions,
5 standard offer contracts exist only because the Commission
6 defines their terms; mandates that utilities file them for
7 Commission approval; and ones approved, requires utilities to
8 abide by their terms with any cogenerator that accepts them.
9 And from this it follows that the Commission has the authority
10 to say what this state controlled contract means, to interpret
11 its own rules with respect to those contracts and, in
12 particular, to resolve disputes over the obligations that are
13 imposed thereunder.

14 Another important distinction between your
15 February 15th decisions in the case that's now before you is
16 that those decisions expressly found that Florida Power was
17 not asking the Commission to interpret its cogeneration rules.
18 If an interpretation of your rules had been involved, as is
19 the case here, the jurisdictional outcome would have been
20 different as the Commission had ruled in the Conserve case
21 that's cited in our response.

22 In that case, which involved a negotiated contract
23 between Tampa Electric and Conserve, Inc., a qualifying
24 facility, even though the Commission found that the court had
25 jurisdiction to construe the terms of the negotiated contract

1 in question and award any money damages, it ruled, and I
2 quote, "The Commission certainly has jurisdiction to construe
3 its own rules at the request of the utility to which those
4 rules apply," end of quote.

5 In fact, the Commission has expressly considered the
6 application of the same rule involved here to a QF that sought
7 to serve several standard offer contracts from a single
8 facility with a capacity of greater than 75 megawatts. In the
9 case of Polk Power Partners, which is cited in our response,
10 the Commission ruled that the 75 megawatt limitation in Rule
11 25-17.0832 applied to the net generating capacity of a
12 qualifying facility, not the standard offer contract's
13 committed capacity as the QF had urged. To rule otherwise,
14 the Commission found would be contrary to the clear intent of
15 the rules to preserve participation in standard offer
16 contracts to small QFs.

17 I'd like to turn for a moment to the question of
18 federal preemption.

19 **COMMISSIONER GARCIA:** Hasn't this Commission in the
20 past allowed standard offer contracts to be united with other
21 standard offer contracts which produce a larger production of
22 power from one facility?

23 **MR. MCGEE:** I think there have been some
24 modifications to standard offer contracts --

25 **COMMISSIONER GARCIA:** -- which ended up in being

1 larger producers. Right?

2 MR. MCGEE: And I think there might even have been
3 one of those in the modifications that were referred to in Tab
4 10 of our appendix.

5 But the Polk Power Partners case was one that dealt
6 with a practice that's referred to as stacking, where a
7 qualifying facility of greater than 75 megawatts attempts to
8 serve several standard offer contracts where each one is less
9 so that the facility, itself, involved can be considerably
10 larger than what the rule contemplates. And the Commission
11 found that it would frustrate its policy of reserving a
12 portion of the market for QF power to small generators because
13 a facility of any size could be used to serve a number of
14 small standard offer contracts. And I think that was the gist
15 of that decision.

16 On the preemption question, contrary to Panda's
17 contention, your jurisdiction to implement and enforce your
18 cogen rules have not been preempted by either PURPA or the
19 FERC implementing that statute. As our response to Panda's
20 motion to dismiss makes clear, both congress and FERC
21 envisioned a cooperative regulatory environment in which the
22 federal government would prescribe broad guidelines to
23 encourage QF development with the individual states retaining
24 responsibility to implement and enforce those guidelines. The
25 states were intended to be full participants in the process.

1 And to that end, state regulators were given broad discretion
2 to fashion specific procedures to be followed by local parties
3 under the umbrella program formulated by FERC.

4 Any possible doubt as to the ongoing jurisdiction
5 of state regulators and courts to interpret, construe, and
6 implement state PURPA rules and to resolve controversies
7 between utilities and QFs on a case-by-case basis was
8 affirmatively laid to rest in the U.S. Supreme Court case of
9 FERC versus Mississippi at 456 U.S. 742. Contrary to the
10 reading that Panda tries to give that landmark case, the
11 Supreme Court noted that PURPA does not globally preempt state
12 involvement in the ongoing PURPA enforcement scheme. Instead,
13 the Court noted that congress had only preempted conflicting
14 state commission actions.

15 Examples of this kind of conflicting action would be
16 where state commissions tried to impose their own QF
17 qualifying criteria or an attempt to impose QF purchase rates
18 that are higher than PURPA's full avoided cost ceiling.

19 As to other matters arising out of PURPA, the
20 Mississippi Court specifically acknowledged the authority of
21 state regulators to adjudicate disputes arising under the
22 statute, a role that the court called "the very activity
23 customarily engaged in by the state public service
24 commission."

25 **COMMISSIONER KIESLING:** Could I ask you a question

1 on that case, Mr. McGee?

2 MR. MCGEE: Yes.

3 COMMISSIONER KIESLING: Wasn't the Mississippi case
4 having to do with regulation of retail sales as opposed to
5 wholesale? I believe your quote at Page 8 of your memorandum
6 quotes that case as saying that while noting that congress
7 could have opted to, quote, "pre-empt the States completely in
8 the regulation of retail sales by electricity and gas
9 utilities and in the regulation of transactions between such
10 utilities and cogenerators," I took that to mean that we were
11 talking about retail sales between utilities and cogenerators.
12 And I thought that this was a different situation.

13 MR. MCGEE: No. In that case my understanding is
14 that the state of Mississippi questioned whether congress
15 acting through PURPA could require states to be the arm for
16 implementing their requirements under that federal statute.
17 That was challenged. Congress' authority to do that was
18 challenged by the state. And the court instead found that the
19 state was a proper vehicle for implementing that, and the
20 federal preemption precluded the states from challenging, in a
21 successful fashion, that requirement from PURPA.

22 Then the case got into the question of how that
23 implementation would work. And the court found that the
24 states not only were involved in an implementation role, but
25 an ongoing enforcement role. And the only thing that the

1 states were precluded from doing was to apply their
2 implementation of the PURPA standards in a way that was
3 inconsistent with the federal mandate.

4 **COMMISSIONER KIESLING:** Sorry, I took up a minute or
5 two of your time.

6 **CHAIRMAN CLARK:** It's an interesting case. It's not
7 only from what it says about the law, but what it says about
8 the personnel in the court.

9 **MR. MCGEE:** As to other matters besides those that
10 conflict with the federal mandate that may arise under PURPA,
11 the Mississippi Court found that those actions were the kind
12 that were customarily engaged in by state public service
13 commissions. And they also said that state regulators have
14 the discretion to, and I quote, "satisfy PURPA Section 210's
15 requirements simply by opening their doors to claimants."

16 Under Panda's restrictive view of this Commission's
17 jurisdiction, the Commission could not, to use the words of
18 the Supreme Court, open its doors to the claimants who are
19 seeking an interpretive ruling in this case. Panda strains to
20 reach its conclusion on this point only by citing inapplicable
21 precedent where state regulators attempted to do such things
22 as rewrite QF contracts, recalculate avoided cost rates, set
23 QF rates above full avoided cost or second guess FERC's QF
24 certifications. Each of the cases erroneously cited by
25 Panda's support for its position are fully addressed in our

1 response to Panda's motion to dismiss.

2 In our response we've also cited cases from
3 California, New York, Minnesota, Pennsylvania, and Idaho as
4 examples of cases where other states have, in fact,
5 interpreted QF contracts contrary to Panda's inferences.

6 In summary, Commissioners, Panda is asking you today
7 to depart from well settled federal and state law and to
8 unreasonably narrow your own jurisdiction. You have the
9 authority and, in fact, the mandate, both under federal and
10 state law to implement, review and enforce your PURPA rules
11 and to give effect to existing PURPA contracts. You've
12 exercised this authority in the past in the case of standard
13 offer contracts, and we ask you to do the same in this case.

14 I thank you for your attention. If you have any
15 questions, I'll be happy to try and respond to them.

16 **CHAIRMAN CLARK:** Let me ask you a question. Does
17 the rule on standard offer set the maximum facility size?
18 Does it say standard offers are available to facilities of
19 under 75 megawatts?

20 **MR. MCGEE:** Even the contract is captioned in
21 agreement for the purchase of power from a qualifying facility
22 of less than 75 megawatts.

23 **CHAIRMAN CLARK:** I'm talking about the rule. Is
24 that what the rule says?

25 **MR. MCGEE:** Yes. That is the language in the rule.

1 **CHAIRMAN CLARK:** What does the rule say about the
2 term of the capacity payments? Does it leave it to the tariff
3 filed, or does it say 20 years?

4 **MR. MCGEE:** The rule itself limits the maximum
5 duration for capacity payments to the life of the avoided
6 unit. And in the contract, the life of the avoided unit was
7 specified as 20 years.

8 **CHAIRMAN CLARK:** Okay. Apparently there's some
9 adjusting of time of the essence milestones?

10 **MR. MCGEE:** The contract specifies milestones for
11 both commencing instruction and the in-service date of the
12 plant. And those dates have been modified voluntarily once.
13 Panda now seeks to have those dates modified again. For an
14 unspecified period of time, it claims to put it back into the
15 position it would have been in had Florida Power not
16 instituted its proceeding.

17 **CHAIRMAN CLARK:** Okay. Well, refresh my memory. We
18 have the rules on the standard offer contract, and each
19 utility is required to file a tariff that states the terms for
20 their particular standard offer contract which, I guess,
21 includes what the avoided unit is.

22 **MR. MCGEE:** Yeah. It includes the avoided units, as
23 well as a number of other provisions that your rules require
24 be contained in the standard offer contract.

25 **CHAIRMAN CLARK:** Okay. And when someone comes in to

1 take advantage of that, they are limited to the terms and
2 conditions of that tariff.

3 **MR. MCGEE:** Right. It would be somewhat equivalent
4 to someone coming in and taking service under a particular
5 rate schedule.

6 **CHAIRMAN CLARK:** Okay. Other questions,
7 Commissioners?

8 **MR. MCGEE:** The issue as to the stay, if I may go on
9 here?

10 **CHAIRMAN CLARK:** You do have time.

11 **MR. MCGEE:** It strikes me as somewhat ironic -- I
12 remember Mr. Besing mentioned the concern for the timing of
13 this proceeding and that his lenders had indicated that they
14 wouldn't lend him a dime until the PSC case was cleared up.
15 And since this case has begun, every action that Panda has
16 taken has delayed this proceeding even further.

17 I think the concern I know that we have and I think
18 it's one that the Commission shares is that we preserve the
19 hearing that's set for February 19th. The Commission knows
20 better than anyone that your hearing calendar is extremely
21 tight and having that date fall by the wayside would create
22 severe problems. This is a hearing that Panda itself has
23 requested, and it seems to me that coming in to you now, eight
24 months after this proceeding has begun, and asking you to
25 delay further action --

1 **CHAIRMAN CLARK:** Let me just make sure, Mr. McGee,
2 you agree that jurisdiction can be raised at any time, don't
3 you?

4 **MR. MCGEE:** Yes. Well, if I can make that
5 distinction. I agree that subject matter jurisdiction can be
6 raised at any time --

7 **CHAIRMAN CLARK:** Subject, okay.

8 **MR. MCGEE:** -- if there is a claim over -- and Panda
9 has made a claim -- about jurisdiction over the person. And
10 that claim has been waived by their participation in this
11 proceeding so far.

12 **CHAIRMAN CLARK:** Okay.

13 **MR. MCGEE:** Now, of course, they can raise the
14 jurisdiction issue at any time, but whether they make a
15 credible case for that is something that, of course, is up for
16 the Commission to decide.

17 And we think that it's important that this
18 proceeding continue. All we are talking about in the way of
19 any activity that might take place between now and the time
20 that you will resolve the jurisdictional issue would be the
21 opportunity for discovery, which is essential for Florida
22 Power to be able to prepare its direct testimony which is due
23 on November 13th. And in the period of time that it's likely
24 to take to resolve this, we think it would be appropriate to
25 go forward with this proceeding in the same way that the

1 federal case is going forward right now.

2 Mr. Besing has indicated that there may be -- might
3 be an appeal of the order by the magistrate in the federal
4 district case requiring discovery to go forward. There is
5 none that has been put before the Commission or the court at
6 this time. And as long as there is a mandate from the
7 district court to go forward with discovery, we think it's
8 appropriate that discovery also go forward in this case.
9 That's all.

10 CHAIRMAN CLARK: Okay. Thank you. Mr. Besing, you
11 have three minutes.

12 MR. BESING: Commissioner Garcia, you raised a
13 question in my opening statement. I wanted to refer if you
14 would, perhaps later, to Page 19 of our brief, the
15 discussions, the Third Circuit's opinion in the Freehold case.
16 And it is there that the New Jersey Boards or PUC was at
17 issue, and the court held that the state boards'
18 implementation of FERC Section 210(a) type regulation ended
19 when the board approved the contract with the QC. And that's
20 the point. It's not a matter of what might happen to the rate
21 payers per se. It's a matter of the state authority to
22 implement federal law. And the federal law implementation is
23 at an end by the state commission when that contract has been
24 reviewed and approved by the Commission.

25 Now, with respect to Mr. McGee's continual reference

1 to the affirmative relief sought by Panda, Panda had, I think,
2 a duty and the right to defend itself at the opening -- at the
3 beginning of this proceeding. It couldn't very well sit back
4 and do nothing. As soon as we had enough presuit
5 investigation this spring, we filed the suit in the federal
6 court in June of this year. I think that it's clear, and as
7 the court says in the Stel-Den Case of America -- and this is
8 a Florida case -- "it is axiomatic that subject matter
9 jurisdiction is indispensable to a courts' power to adjudicate
10 rights between the parties. Additionally, it well settled
11 that lack of subject matter jurisdiction can be raised as a
12 defense at any time, including after entry of a final judgment
13 or for the first time on appeal." And that case is cited in
14 brief for you.

15 I think that Mr. McGee's comments, the bulk of them,
16 therefore beg the question. Whether or not we go forward with
17 the February 19th hearing or the filing of prefiled testimony
18 or the taking of depositions, all begs the threshold question
19 of jurisdiction in the first place. And I respectfully submit
20 to the Commission that it should stop where it is, look at the
21 jurisdictional question, decide it. If it is appealed, it's
22 appealed; but nevertheless let that issue come to rest before
23 going on. And, frankly, if we are correct -- and we certainly
24 believe we are given the case authority as we've cited you, it
25 would be an enormous waste of the Commission's resources and

1 people to continue in the schedule that has previously been
2 ordered looking at a February hearing date when virtually all
3 that would be for naught.

4 And I suggest to you very strongly that it makes no
5 sense for parites to waste money going to Dallas taking
6 depositions and coming to Tampa and taking depositions as
7 expensive as they are until we get the documents. And we're
8 going to argue that in the next motion.

9 **CHAIRMAN CLARK:** Mr. Besing, you are over three
10 minutes now.

11 **MR. BESING:** I didn't hear you.

12 **CHAIRMAN CLARK:** You are over three minutes.

13 **MR. BESING:** Thank you very much.

14 **CHAIRMAN CLARK:** Commissioners, are there any
15 questions?

16 **COMMISSIONER DEASON:** Yes, I have a question for
17 Mr. Besing.

18 **MR. MCGEE:** Yes.

19 **COMMISSIONER DEASON:** I know that you do not agree
20 that there is a difference. For the sake of your argument,
21 you do not agree that there is a difference between a standard
22 offer and negotiated contracts. But you stated, even for the
23 sake of argument at this point, even agreeing with it, there
24 is a difference. You indicated that that makes no difference
25 in the question that is before us at this time.

1 **MR. BESING:** That's correct.

2 **COMMISSIONER DEASON:** Could you explain that further
3 to me?

4 **MR. BESING:** Yes. And as I indicated in responding
5 to Commissioner Garcia, the point here is that regardless of
6 the nature of the QF contract, obviously its purpose is for
7 wholesale power sale by a QF to an electric utility that was
8 created by federal law and is to be implemented by state
9 commissions. Now, once the contract itself has been
10 established -- in this case, this Commission both reviewed and
11 established the negotiated contracts as well as the standard
12 offer contracts. Standard offer contracts are not the sole
13 creatures of this Commission. Both of them were reviewed;
14 both of them were presented to this Commission; and both of
15 them were approved by this Commission.

16 Note the whole argument in the Cogen Case of Orlando
17 that its contract was approved by this Commission in 1991,
18 just a few weeks -- in fact, on August the 29th, 1991, or just
19 prior to that; and then the standard offer contract was
20 approved. So there's no distinction between the way the
21 Commission treats these contracts. The contracts both
22 accomplish the same purpose. They are creatures of federal
23 law not state law. They are implemented by state law and
24 state regulation. But once those contracts have been reviewed
25 and approved, as in this case and in the case of Orlando and

1 the other negotiated contracts, the Commission's job is at an
2 end. And what's happening here is, is that Florida Power is
3 trying to come back and say, "Oh, no. You have some kind of
4 ongoing jurisdiction."

5 And I want to say this to you, Commissioner --

6 **COMMISSIONER DEASON:** Let me interrupt you for just
7 a moment. You see no difference between a contract that is
8 negotiated or a contract as is the standard offer contract, a
9 contract which is required by this Commission to be issued by
10 the utility. You see no difference there?

11 **MR. BESING:** They require both -- both of them are
12 required by this Commission. And both of them are required by
13 federal law, both types.

14 **COMMISSIONER DEASON:** How is it that the negotiated
15 contract is required by this Commission?

16 **MR. BESING:** Pardon?

17 **COMMISSIONER DEASON:** How is it that the negotiated
18 contract is required by this Commission.

19 **MR. BESING:** Your rules expressly provide the terms
20 and contents and provisions of a contract that is supposedly
21 negotiated.

22 **COMMISSIONER DEASON:** Does that rule require that
23 the utility enter into a negotiated contract --

24 **MR. BESING:** No.

25 **COMMISSIONER DEASON:** -- under those terms and

1 conditions?

2 **MR. BESING:** No. But there's a broader power under
3 which the utility is under compulsion and that is, is to buy
4 electric power on a wholesale basis from QFs, whether they
5 come in under a negotiated contract or under a standard offer
6 contract.

7 Apparently the distinction in the rule here, the
8 Commission's rules here, is the size of the QF. And there is
9 no basis for that distinction in federal or state law.

10 **COMMISSIONER DEASON:** Thank you.

11 **CHAIRMAN CLARK:** Let me ask you a question.

12 **MR. BESING:** Yes.

13 **CHAIRMAN CLARK:** Do you understand our rules to
14 limit the standard offer to facilities that are 75 megawatt
15 and under? Is that what our rules provide?

16 **MR. BESING:** I don't think so. I think it says it's
17 either 80 or 75, but I don't think that's relevant here.

18 **CHAIRMAN CLARK:** Well, let me ask my question.

19 **MR. BESING:** Yeah, go ahead.

20 **CHAIRMAN CLARK:** If it's relevant to what I'm trying
21 to understand. So the rule provides that it's available to
22 facilities that are either under 75 or 80 megawatts, whatever
23 the rule provides; and it also limits the terms of the payment
24 to the life of the avoided unit if what Mr. McGee says is
25 correct.

1 Now, how do we enforce those rules if we can't look
2 at a contract where one of the parties wants to have a larger
3 facility and wants to extend the payment schedule? What do we
4 do to enforce that rule?

5 **MR. BESING:** Well, I don't think that the rules are
6 at issue in the case that's now before the Commission. What's
7 at issue is Florida Power Corporation's own claim that it
8 wants the contract to be construed. I don't think that this
9 is a rule interpretation petition.

10 **CHAIRMAN CLARK:** Well, it says, "Petition for
11 Declaratory Statement regarding eligibility for standard offer
12 contract and payment thereunder." As I understand it, this is
13 a standard offer contract. And as I understand what we are
14 trying to resolve, does this facility still come under -- is
15 it still eligible under the standard offer contract under the
16 terms required under our rules?

17 **MR. BESING:** In the -- excuse me. I'm sorry.

18 **CHAIRMAN CLARK:** And what I think is being asked of
19 us is: Does this comply with our rules?

20 **MR. BESING:** No.

21 **CHAIRMAN CLARK:** And certainly we have the authority
22 to make that distinction.

23 **MR. BESING:** That's not what you are being asked to
24 do. What you are being asked to do is construe what is
25 alleged to be a breach of the contract by Panda. And that's

1 exactly what happened in the Orlando case. You were not
2 presented in the Orlando case with what appeared to be a
3 contract construction case. It was alleged to be a rule
4 interpretation. And this Commission said, "Oh, no, it's not a
5 rule interpretation case." The Staff said, "Oh, no, it's not
6 a rule interpretation case." It is a dispute over the
7 interpretation of the contract terms itself and what the
8 parties may do under it.

9 **CHAIRMAN CLARK:** Okay. Let me ask you this. If we
10 want to limit standard offer to a certain sized facility and
11 we want to limit the term, how long you have to make payments
12 under your standard offer contract --

13 **MR. BESING:** Right.

14 **CHAIRMAN CLARK:** -- how do we do that and enforce
15 that?

16 **MR. BESING:** I don't think that you have any
17 authority under the federal law to make that limitation.

18 **CHAIRMAN CLARK:** Okay.

19 **MR. BESING:** And that's the point here.

20 **CHAIRMAN CLARK:** Okay.

21 **MR. BESING:** That's why this Commission is
22 preempted.

23 **CHAIRMAN CLARK:** Then why should we have a standard
24 offer?

25 **MR. BESING:** I don't think you should, and I don't

1 think that makes any difference because in the California case
2 that we cite, the Ninth Circuit was faced with standard offer
3 contracts and came right back and said, "The Commission is
4 still trying to make a change in the contract."

5 That case makes it as clear as any case that it
6 doesn't matter whether it is a standard offer contract or
7 whether it is a negotiated contract. That is largely a
8 creature of state commissions, but you cannot by creating
9 those two creatures, those two animals, somehow change the
10 laws that apply.

11 You can't start regulating a QF because one QF has a
12 blue contract, and one's got a red one. You've already
13 decided you are not going to regulate, and you are not going
14 to interfere with the contract with Orlando Cogen. But you
15 are saying that the same contract that does the same thing has
16 the same purpose, under the same federal law, under the same
17 Florida statute, under the same enabling statute in Florida,
18 is somehow -- because it's called a standard offer contract,
19 we've got jurisdiction to take it apart, rewrite it, or
20 construe it, or do what we want to with it.

21 **CHAIRMAN CLARK:** But we don't have the jurisdiction
22 to make sure it adheres to the rule that specifies the terms
23 that will be in the standard offer.

24 **MR. BESING:** Chairman Clark, you're assuming that
25 rule is valid in the first instance.

1 **CHAIRMAN CLARK:** Okay.

2 **MR. BESING:** And there is no basis under federal law
3 for that distinction in the rule.

4 **CHAIRMAN CLARK:** Okay. All right. So your concern
5 is not only with this contract, but we probably shouldn't have
6 the standard offer rule?

7 **MR. BESING:** That's right. And, also, prospective
8 versus retroactive. For example, you had a change in your
9 rules and you did -- and I think very properly -- exercise
10 your jurisdiction to in effect say to the electric utilities:
11 Come in with some contracts that will be rewritten to reflect
12 those rules. You certainly could do that again.

13 If, for example, let's say FERC made some changes in
14 cost recoveries and suggested that the state commissions
15 correspondingly get involved in doing that, you could amend
16 your rules, have a rulemaking proceeding, and on all new
17 contracts you could say, "Let's have new contracts that
18 reflect our changes in our substantive rules."

19 But here you've got contracts that are under rules
20 that you just changed. You changed them in '90. You approved
21 the contracts in '91. Now in '95, Florida Power is asking you
22 to come back in and say, "Oh, wait a minute. You can continue
23 tinkering with these contracts even if it does destroy the
24 very purpose" --

25 **CHAIRMAN CLARK:** Let me interrupt you. Do you agree

1 then the logical extension of what you are arguing is that we
2 shouldn't have rules that limit the size of the facility that
3 can use the standard offer or limit the term under which
4 payments can be made, because once we approve that, it's
5 unenforcible.

6 **MR. BESING:** Well, I don't have that burden, but I
7 can say to you that I think a very exhaustive analysis of the
8 federal statutes and regulations, as well as the case
9 authorities, suggest that there's absolutely no basis, not a
10 sentence, not a phrase anywhere in that law that makes any
11 distinction between a standard versus a negotiated.

12 **CHAIRMAN CLARK:** Okay.

13 **MR. BESING:** That doesn't mean that you might not
14 have those distinctions if you wish, but you've got to treat
15 the people that are contracting under them the same. And you
16 can't say to Orlando on the one hand, "We're not going to
17 regulate you. We are going to let you go ahead and start your
18 power plant. We are going to let you go ahead and operate it.
19 We're not going to screw up your financing. But over here
20 because you fellows have got a different kind of contract that
21 we created and approved, we are going to let Florida Power do
22 what it's done to you." Now, that's not right, and that's not
23 fair.

24 **CHAIRMAN CLARK:** Okay.

25 **COMMISSIONER DEASON:** Well, let me ask a question.

1 You're using terminology, "tinkering with contracts,"
2 "regulating QFs". I'm having a problem with that terminology
3 described and what I understand to be a request to interpret a
4 contract which is prescribed by this Commission within our
5 rules. And according to the Conserve case, this Commission
6 has the authority to interpret our own rules.

7 **MR. BESING:** And, Mr. Deason, what happened in
8 Conserve? You had contracts already out there and then you
9 changed your rules. Clearly -- or amended your rules. You
10 clearly had some concert as to whether or not -- and the
11 question was whether or not those new amended rules applied
12 retroactively to those previous contracts. That was the issue
13 in Conserve.

14 And the decision was properly made, no, it doesn't.
15 Those contracts are already in force. We cannot retroactively
16 apply amended rules to contracts. And the converse applies
17 once you've adopted your rules, once you've approved the
18 contract, you can't come back three years later when the
19 parties are in midflight in performance of the contract and
20 say, "Well, surprise, Panda, we're just going to let your
21 lending and your financing wander off, and we've going to let
22 the time milestones pass you by because a petition that we've
23 already rejected once here, in February of this year, has been
24 filed by the second time by Florida Power for the deliberate
25 purpose of trying to stop that financing."

1 **COMMISSIONER DEASON:** Thank you.

2 **MR. MCGEE:** May I respond to that, Commissioners?

3 **COMMISSIONER KIESLING:** I'm sorry, I didn't hear
4 you?

5 **CHAIRMAN CLARK:** I think it's appropriate that you
6 can respond to the question that was asked.

7 **MR. MCGEE:** The contention that Florida Power is
8 trying to do something to this contract is just plainly not
9 the case. Florida Power has simply asked the Commission to
10 interpret its own QF rules, especially with respect to the
11 20-year term and the 75 megawatt limitation, to see what that
12 means and how it applies to the contract.

13 Now, we've entered into a contract with Panda. They
14 expect us to live up to it; we expect them to live up to the
15 contract, too. They're the ones who, at the time this
16 contract was before the Commission, had certified that that
17 unit had a capacity, a net capacity of 74.9 megawatts. It
18 was their action afterwards that changed it and raised the
19 capacity to 115. If that had been 115 --

20 **COMMISSIONER GARCIA:** How does that capacity affect
21 your interests in that contract?

22 **MR. MCGEE:** That contract and according to the
23 Commission policy that I've described in the Polk Power
24 Partners' case, the contract and the Commission rules say that
25 standard offer contracts are limited to facilities that have a

1 net capacity of less than 75 megawatts.

2 If we had know at the time that that contract was
3 before the Commission that they planned to build a facility
4 that, in fact, was 115 megawatts -- in the first place the
5 contract wouldn't have been accepted. But in the second
6 place, that clearly would have been something that this
7 Commission could have considered in whether to approve the
8 contract or not.

9 To come back now and say that because they elected
10 to change the size of that contract after it was entered --
11 and somehow you can't look at that even though it's clearly a
12 question that you could have considered in the --

13 **COMMISSIONER GARCIA:** They are not changing the size
14 of the contract or your obligation under the contract?

15 **MR. MCGEE:** Excuse me, they are changing the size of
16 the facility which raises --

17 **COMMISSIONER GARCIA:** But it doesn't change your
18 obligations to them under that contract?

19 **MR. MCGEE:** Well, the question is whether they are
20 still eligible for that contract, because the contract itself
21 says that it is -- and the Commission rules more importantly,
22 say that that contract is only available to facilities that
23 are less than 75 megawatts.

24 And if they couldn't have taken service under a
25 standard offer contract with the size of the facility at 115

1 and that could have been considered by the Commission at the
2 time that approval was granted, certainly you wouldn't want to
3 establish a policy that says someone can come in and make all
4 the representations necessary to satisfy your rules, and as
5 soon as approval is received, go back and reconfigure the unit
6 in any way that they deem fit. That would clearly frustrate
7 your jurisdiction in the first instance. It would frustrate
8 the policy of your rules to reserve some capacity for small
9 QFs.

10 **CHAIRMAN CLARK:** And let me be clear. Was your
11 petition to seek guidance from us as to whether or not the
12 payments you would make under this contract would continue to
13 be eligible for cost recovery given the changes in the
14 facility? And is that why you came to the Commission?

15 **MR. MCGEE:** We came to the Commission because we
16 were concerned having learned of Panda's change in the size of
17 the unit that that facility would no longer qualify for the
18 standard offer contract. And that in turn would put in to
19 question whether or not the costs were recoverable.

20 **CHAIRMAN CLARK:** And what we do, we approve your
21 signing of the standard offer contract. And once we approve
22 that, it's eligible for cost recovery. Is that right?

23 **MR. MCGEE:** This one was approved under somewhat
24 unusual conditions because there were several QFs who wanted
25 that capacity. And, in fact, we supported the petition --

1 filed a petition to have that capacity awarded to Panda
2 contrary to the claims of some other ones.

3 **CHAIRMAN CLARK:** I see. So you were trying to
4 determine which entity you had to contract with.

5 **MR. MCGEE:** Right.

6 **CHAIRMAN CLARK:** Because to contract with all of
7 them, you would have exceeded the needed capacity.

8 **MR. MCGEE:** That's correct. Normally, a standard
9 offer contract wouldn't have to be specifically individually
10 approved by the Commission.

11 **CHAIRMAN CLARK:** Yeah. Because if it's a standard
12 offer, those terms and conditions have already been approved
13 for a recovery.

14 **MR. MCGEE:** Right. And the standard offer contract
15 is an additional alternative that's made available to
16 facilitate the development of cogeneration. Small QFs can
17 negotiate for a contract; they don't have to take a standard
18 offer.

19 Panda elected to do so. It provides them with one
20 other alternative that wouldn't be available otherwise. This
21 is not an attempt to limit the size of a facility. Any sized
22 facility can come in, seek to negotiate. If they have
23 difficulties, they can exercise the provisions of your rules
24 and come to you; but all this does is provide one additional
25 opportunity to save the need to negotiate if you happen to be

1 a small QF because the Commission has a policy of wanting to
2 encourage the small operations and save them some nitch in the
3 market.

4 **CHAIRMAN CLARK:** Thank you. Commissioners, any
5 further questions?

6 **MR. BESING:** Can I respond briefly on that matter?

7 **CHAIRMAN CLARK:** I'll give you a minute.

8 **MR. BESING:** Thank you. There's a big difference
9 between committed capacity, which is what the contract talks
10 about, and rated capacity. Now, I'm not going to get into the
11 merits of the facts on this case as Mr. McGee has, except to
12 say that the contract itself is sought to be construed as to
13 whether or not 75 or 115 is committed versus rated capacity.
14 The term, it is defined in the definition section, is
15 committed capacity. And there is no suggestion by Panda or
16 anyone else that the Florida Power Commission is going to pay
17 a dime more than committed capacity.

18 **CHAIRMAN CLARK:** Thank you.

19 **MR. BESING:** Thank you for your time. I appreciate
20 it.

21 **CHAIRMAN CLARK:** Commissioners, I think that
22 concludes the oral argument on the motion to dismiss and
23 motion to stay. I think I have to have oral argument of
24 motion for protective order.

25 **MS. BROWN:** Chairman Clark, if I could just for the

1 parties' convenience let everyone know we are planning, if we
2 possibly can, to file a recommendation on the oral argument
3 and the motions to dismiss by the 12th of October for the
4 Commission's consideration at its 24th of October agenda
5 conference pending receiving the transcripts and having a
6 couple of weeks, anyway, to consider.

7 **COMMISSIONER DEASON:** Let me ask a question. I
8 thought the 24th agenda was basically for emergency items
9 only. Is this an emergency?

10 **MS. BROWN:** Well, no. It's not an emergency except
11 the remainder of the schedule for the hearing provide that
12 direct testimony from both Panda and Florida Power Corporation
13 would be due the 13th of November. We probably could push
14 that back a little bit. We were trying to --

15 **COMMISSIONER DEASON:** Well, I mean, obviously,
16 that's for the Chairman to decide. I just thought I'd bring
17 up the point that the 24th agenda --

18 **MS. BROWN:** Thank you. I had forgotten that.

19 **COMMISSIONER DEASON:** -- is supposed to be minimum.

20 **CHAIRMAN CLARK:** Yes, that's correct. And I think
21 what we were concerned about and why we had the oral argument
22 when we did was we wanted to endeavor to preserve our ability
23 to use those hearing dates. But I think the point is well
24 taken in terms of we are going to have our hands full on those
25 dates with the telephone matters --

1 **MR. BESING:** Which is why we asked you to --

2 **CHAIRMAN CLARK:** -- just a minute.

3 **MR. BESING:** I'm sorry.

4 **CHAIRMAN CLARK:** -- with the telephone matters. And
5 Martha and I will see what we can do because this may require
6 a good deal of discussion at agenda, as did the last one. So
7 we'll work on that, keeping in mind the need for that to be an
8 emergency agenda.

9 **MR. BESING:** The inquiry by Commissioner Deason
10 simply highlights, I think, our request that you go ahead now
11 and rule on the motion to stay for obvious reasons, because of
12 this time problem and your hearing on the 24th, the
13 transcript. The fact that we are having an appeal to the U.S.
14 District Court on discovery matters, it looks to me like we
15 are asking you to do that today.

16 **CHAIRMAN CLARK:** I'm not here to rule on the motion
17 to stay today. I don't know if anyone else is. We will await
18 the recommendation and discuss it in our agenda.

19 **MR. BESING:** I didn't hear you. I'm sorry. You
20 will wait --

21 **CHAIRMAN CLARK:** We will wait for the recommendation
22 from Staff. One thing you may not know is we have to do
23 everything in a public forum. And if we were to decide on a
24 motion, we would have to conduct our deliberations here, which
25 may take another hour or two hours. And we wouldn't have the

1 benefit of our Staff's recommendation on that.

2 And I think, me, personally, this is a subject of
3 great interest because it does significantly affect the rates
4 to utilities. And I have a concern with the rates to
5 utilities, but I also have a concern that the cogeneration
6 industry continue to be a viable industry. So there are very
7 difficult issues to resolve, and I would like to have a
8 recommendation from my Staff.

9 Thank you, Commissioners.

10 I would like to make one other request. I would
11 like a copy of the Mississippi case. And the site I got was
12 456-US742, in case other Commissioners would like to see that
13 case. I think that was the case challenging PURPA in its
14 delegation of authority to the states, wasn't it?

15 **MS. BROWN:** Yes. Chairman Clark, hold on just a
16 minute. I think you may have it already.

17 **Mr. McGee,** isn't that in your --

18 **MR. MCGEE:** Yep.

19 **CHAIRMAN CLARK:** Is it in here?

20 **MS. BROWN:** Yes. It's in the big blue book, isn't
21 it? No? If it's not, I'll get it for you.

22 **CHAIRMAN CLARK:** Thank you. Give me a second to
23 shuffle my papers. Why don't we take a 10-minute break and
24 that will give you --

25 **MR. BESING:** That would be helpful. Thank you.

(Thereupon, the hearing concluded at 3:05 p.m.)

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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 Florida Public Service
7 Commission at the time and place herein stated; it is further

8 CERTIFIED that I stenographically reported the said
9 proceedings; that the same has been transcribed under my
10 direct supervision; and that this transcript, consisting of 51
11 pages, constitutes a true transcription of my notes of said
12 proceedings.

DATED this 3rd day of October, 1995.

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

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