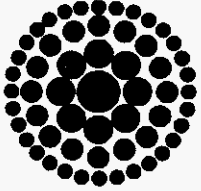


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p



Florida Power
CORPORATION

ORIGINAL FILE COPY

JAMES A. MCGEE
SENIOR COUNSEL

December 11, 1995

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

RECEIVED
GENERAL
SERVICE DIVISION
1995 DEC 11 AM 10:46
MAILROOM

Re: Docket No. 950110-EI

Dear Ms. Bayó:

ACK Enclosed for filing in the subject docket are fifteen copies of Florida Power Corporation's Response in Opposition to Panda's Motion to Continue.

AFA _____
APP _____
CIS _____ Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.
CMI _____
CPL _____

Haff
1
5

Very truly yours,

James A. McGee

Jam/jb
 Enclosure
cc: Parties of Records
W B _____
OTH _____

RECEIVED
FPSC

DOCUMENT NUMBER-DATE

12413 DEC 11 82

3201 Thirty-fourth Street South • Post Office Box 14042 • St. Petersburg, Florida 33733-4042 • (813) 866-5786 • Fax: (813) 866-4931

GENERAL OFFICE
A Florida Progress Company

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding eligibility for Standard Offer contract and payment thereunder by Florida Power Corporation.

ORIGINAL
FILE COPY

Docket No. 950110-EI

Submitted for filing:
December 8, 1995

**RESPONSE OF FLORIDA POWER CORPORATION
IN OPPOSITION TO PANDA-KATHLEEN'S MOTION TO CONTINUE**

Florida Power Corporation ("Florida Power" or "the Company") hereby responds in opposition to the Motion To Continue filed in this docket by Panda-Kathleen ("Panda") and states as follows:

Introduction

1. Florida Power urges the Commission to deny Panda's request to postpone all pending dates in this proceeding, including the February 19 hearing date, by at least 90 days. Panda should not be allowed to benefit from its past pattern of obstruction and delay in the conduct of discovery. Moreover, the uncertainty with respect to when and if the Panda cogeneration project will be available to Florida Power and to the grid needs to be resolved at the earliest possible time in order for Florida Power to properly plan its system. It should be noted that construction on this project was supposed to begin no later than January 1, 1996, with an in-service date on or before January 1, 1997.

DOCUMENT NUMBER-DATE

12413 DEC 11 1995

Background

2. Florida Power initiated this proceeding on January 25, 1995 by requesting a declaratory statement to resolve a dispute that had developed between Florida Power and Panda concerning the meaning and legal effect of the standard offer contract previously approved by the Commission. In light of that dispute and Panda's refusal to itself seek a declaratory statement concerning the matters in dispute, Florida Power's petition represented the most expeditious way to resolve the dispute so that the parties could get on with the business of performing their obligations under the contract.

3. On the one hand, Panda has claimed the pendency of Florida Power's petition in this proceeding has detrimentally delayed its project. On the other hand, Panda is the party whose actions have consistently been designed to prolong this proceeding and delay its resolution. First, Panda not only requested that the docket be converted into a more time consuming formal evidentiary proceeding with a full Commission hearing, but waited over five months to do so.¹ This request came one day after the denial of Panda's request in federal district court for a Temporary Restraining Order which would have enjoined Florida Power from proceeding further before the Commission in this docket.² The Commission granted Panda's request for a full evidentiary proceeding and set February 19, 1996 for the final hearing. On September 12, 1995 Panda filed a Motion to Stay or Abate Proceedings in conjunction with its Motion to Dismiss. On September

¹ Petition of Panda-Kathleen for Formal Evidentiary Proceeding and Full Commission Hearing, filed June 29, 1995.

² Panda-Kathleen vs. Florida Power Corporation, Case No. 95-992-Civ-T-24(C), U.S. District Court for the Middle District of Florida, Tampa Division, filed June 26, 1995.

13, 1995 Panda filed a Motion for Protective Order seeking to prevent Florida Power from taking the depositions of certain Panda employees. Panda now asks the Commission to delay this proceeding so that its new counsel can review the case material and conduct discovery.

Discussion

4. Panda's statement that "no exchange of discovery has occurred in this Public Service Commission matter . . ." is clearly wrong and misleading. PANDA MOTION TO CONTINUE, ¶4 at 2. Panda knows full well that *extensive discovery* already has occurred for use in both this proceeding and the parallel federal lawsuit Panda filed against Florida Power on June 26, 1995. One of the very first (and most sensible) agreements reached by counsel for Panda and Florida Power in this proceeding and the federal lawsuit was that the discovery conducted in the federal lawsuit would be interchangeable and usable in this proceeding, and vice versa. Ray Besing, who filed the federal lawsuit for Panda and remains one of Panda's lawyers "of record" in this proceeding, confirmed this agreement in writing. See 7/26/95 Letter from Ray Besing to Steven C. Dupré at ¶1, a copy of which is attached as Exhibit A.

5. That the quantity of discovery is extensive can be seen merely by reciting what has occurred so far:

- ▶ To date, Florida Power produced 148,000 pages of documents, although Florida Power believes that only a small percentage of those pages have any bearing on the narrow issues involved in this proceeding.
- ▶ To date, Panda appears to have produced more than 60,000 pages of documents to Florida Power.
- ▶ Florida Power deposed two (2) former Panda employees in early October, 1995.

- ▶ Panda has answered 8 interrogatories propounded by Florida Power.

6. There are only two reasons more depositions have not been completed prior to now, both of which represent additional grounds why Panda's belated request for a continuance should be denied. First, although the federal court ordered Panda twice to comply with Florida Power's schedule of depositions of Panda's existing employees, Panda contumaciously refused.³ But for Panda's refusal to be deposed, Florida Power would have taken 10 depositions by now, not two depositions.

7. Second, Panda elected to refrain from conducting its own deposition discovery. Panda should not be permitted to benefit through a delay that was occasioned by Panda's voluntary selection of available procedural tactics. As noted above, on September 13, 1995 Panda filed a Motion for Protective Order asking the Commission to stop all depositions being conducted by Florida Power in this proceeding. Panda's ostensible basis for that motion was that Florida Power should produce even more pages of documents before deposition discovery started. Panda relied heavily, if not exclusively, on a pending motion to compel production of documents Panda had filed in the federal case. Panda argued to the Commission it would be wasteful for it to have to start its depositions without all of Florida Power's documents.

³ By an order dated August 28, 1995, in the federal case, Panda was ordered to proceed with Florida Power's scheduled depositions beginning the week of September 5, 1995. A copy of that order is attached as Exhibit B. Panda refused to comply. A copy of the letter so refusing is attached as Exhibit C. By a second order dated September 15, 1995, Panda again was told to produce certain previously noticed employees. A copy is attached as Exhibit D. Panda again refused. See attached Exhibit E. Panda even tried a last minute *third* attempt to block Florida Power's depositions of two former Panda employees, but that attempt failed. See October 6, 1995, order of the federal district court in Texas, attached as Exhibit F.

8. These arguments, however, proved to be a house of cards that fell apart shortly after the Commission's September 25, 1995 hearing on Panda's motion for protective order. On October 2, 1995 the federal court *denied* Panda's motion to compel. A copy of the order denying that motion is attached as Exhibit G. Panda's ostensible basis for trying to obtain a postponement of the depositions in the first place was found to be without merit.

9. As it happens, the parties have been forced, through Panda's delaying tactics, to compress the period in which to conduct their remaining discovery in this proceeding. Panda finally appeared to be cooperating, by ostensibly agreeing to deposition dates during the weeks of December 11, 1995, December 18, 1995 and December 27, 1995. Panda has asked to begin Florida Power depositions in a "dual track" mode beginning December 18, 1995. In the interest of not losing the February 19, 1996, evidentiary hearing date, Florida Power agreed to begin making its employees available as requested (subject to scheduling problems associated with Panda's last minute request). In short, Panda's self-imposed failure to start its own deposition discovery should not interfere with Panda's ability to prepare for the *one-day* evidentiary hearing it asked for six months ago, because even now, Panda can conduct the discovery it needs within the remaining time frame.

10. Remarkably, on December 8, 1995, as this response was being finalized, Panda, without any forewarning, dismissed its federal lawsuit against Florida Power.⁴ In the same breath, Panda has used the dismissal as an excuse

⁴ Panda has made very clear, it intends to refile that federal lawsuit in an "appropriate forum" when it is ready to "pursue the matter aggressively," but for now, the federal lawsuit has been dismissed.

to not make its witnesses available for depositions that were to begin on Monday, December 11, 1995, three days from now. Ironically, in announcing this extraordinary tactical maneuver, Panda's counsel made it very clear that:

We are prepared to discuss with you a deposition schedule in the PSC proceeding limited to the issues raised in the PSC proceeding and the witnesses relevant to those issues that would contemplate both sides taking all of their depositions between January 2 and February 12, *which is more than adequate time* given the limited issues to be present here.

12/8/95 Letter from David Ross to Steven C. Dupré at 2, a copy of which is attached as Exhibit H (emphasis added). Thus, by Panda's own acknowledgement, a continuance to allow for discovery is unnecessary.

11. Panda states that "a delay of the evidentiary hearing set in this proceeding for ninety (90) days will not prejudice Florida Power." PANDA MOTION TO CONTINUE, ¶ 7 at 4. Panda is wrong. Florida Power's planning process is being impaired by the uncertainty surrounding the availability of the Panda project's generation capacity, and that impairment will be exacerbated by further delay.

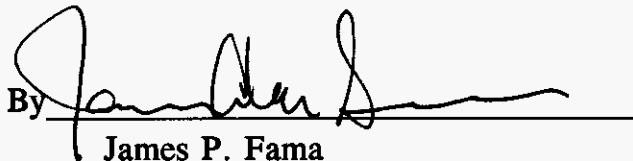
12. The key milestone dates in the Panda standard offer contract, which Florida Power has already agreed to extend once before, provide for construction commencement by January 1, 1996 and commercial operation by January 1, 1997, the in-service date of the avoided unit. Florida Power's current generation expansion plan reflects the addition of Panda's capacity in 1997, although it is becoming increasingly apparent that the plan will have to be modified as this date becomes less and less feasible. Florida Power has a real and pressing need to know when and, more importantly, if Panda's capacity will be available so that

alternative arrangements can be developed and incorporated into its generating planning process.

13. Panda seeks to minimize the effect of its request by characterizing it as a "brief delay." In reality, as the Commission and Staff know better than most, the need to reschedule a date on the Commission's crowded hearing calendar raises the likelihood of a substantial delay. Even under the current schedule, this case will be over 15 months old at conclusion. Further delay is unwarranted and will adversely affect both the viability of Panda's project and Florida Power's generation planning and the ability to make necessary business decisions for the future.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By 

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

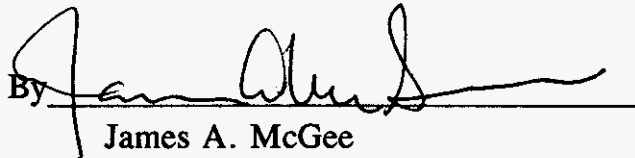
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Response in Opposition to Panda-Kathleen L.P.'s Motion to Continue has been furnished to Barrett G. Johnson, Esquire, Johnson & Associates, P.A., P.O. Box 1308, Tallahassee, FL 32302; Raymond C. Besing, Esq., 1100 St. Paul Place, 750 North St. Paul, Dallas, Texas; Eric S. Haug, Esq., Fowler, White, Gillen, Boggs, Villareal & Banker, Post Office Box 11240, Tallahassee, Florida 32302; Ronald C. LaFace, Esq., and Lorence Jon Bielby, Esq., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 101 East College Ave., Tallahassee, Florida 32301; Martha Carter Brown, Division of Legal Services, Florida Public Service Commission, 2450 Shumard Oak Blvd., Tallahassee, Florida 32399-0892, this 11th day of December, 1995.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By 

James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5786
Facsimile: (813) 866-4931

THE LAW OFFICES OF

RAY G. BESINGA Professional Corporation
ATTORNEYS & COUNSELORS1100 ST. PAUL PLACE
750 N. ST. PAUL
DALLAS, TEXAS 75201(214) 220-9090
FAX (214) 220-1202

July 26, 1995

Via facsimile - (813) 223-7000

Donald R. Schmidt, Esq.

Steven D. Dupre, Esq.

Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.

One Harbour Place

Tampa, Florida 33601

CONFIDENTIALRE: *Panda-Kathleen, L.P., Plaintiff v. Florida Power Corporation, Defendant;*
Case No. 95-992-Civ-T-24C.

Gentlemen:

Thank you for your hospitality and professional courtesies yesterday during our discussion regarding discovery prior to the hearing on Plaintiff's Motion for Preliminary Injunction. The latter confirms our agreements:

1. We have agreed that all discovery, written and oral, may be used by either party in the lawsuit and the FPSC proceeding.
2. Plaintiff has agreed to produce its non-privileged documents responsive to Defendants' July 24 First Request for Production of Documents by Friday, July 28, and to furnish you with a Privilege Log soon thereafter.
3. Defendant has agreed to produce its non-privileged documents responsive to Plaintiff's July 26 First Request for Production of Documents by Friday, July 28, and to furnish you with a Privilege Log soon thereafter.
4. Regarding the Agreed Order For the Handling of Confidential Information, I have expressed to you a serious reluctance to agree that "Qualified Person" should include either party's employees as " . . . necessary to their role in this action or the FPSC proceeding . . ." because of what our pre-suit investigation revealed as extremely predatory conduct by Florida Power Corporation and the danger that Panda's highly confidential information will be used by Florida Power Corporation to further injure Panda.

You have assured me that Florida Power Corporation will act in good faith and on that assurance I have approved the unusual provisions in the Order.

EXHIBIT A

1225

July 26, 1995

Page 2

5. Later today, Tom Steele and I will place a conference call to you in an effort to work out an equitable and convenient deposition schedule. As we discovered, that may be either simultaneous discovery on an agreed sequence of witnesses or alternating depositions on an agreed sequence of witnesses. The suggestion that Panda witnesses be deposed first and FPC witnesses be deposed later is not acceptable.
6. I have advised you that Mr. Steele will play an active role in representing Panda but that agreements between counsel are subject to my approval and, ultimately, the approval of William Nordlund, Panda's General Counsel; and you have advised us that both of you will be the principal active counsel for FPC but that agreements between counsel are subject to the approval of FPC's Assistant General Counsel James Farna.

In this connection and in order to avoid possible misunderstandings, regulatory counsel for Panda in the FPSC proceeding do not have authority to speak for Panda in this lawsuit or in the FPSC on matters which may affect or relate to this lawsuit.
7. As you requested, this is to advise you that I have no personal knowledge of the facts in the case and the verification of the Complaint is based upon my personal knowledge of the factual and legal investigation conducted by me and under my direction prior to the filing of the Complaint but subsequent to my engagement in the matter on May 12, 1995.

We will call you in a few hours.

Very truly yours,

THE LAW OFFICES OF RAY G. BESING, P.C.

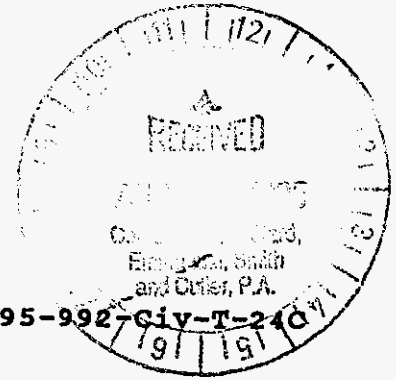
By: 

Ray G. Besing

RGB:cb

cc: Thomas Steele, Esq. (via facsimile)
William C. Nordlund, Esq. (via facsimile)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



PANDA-KATHLEEN L.P.,

Plaintiff,

vs.

Case No: 95-992-Civ-T-240

FLORIDA POWER CORP.,

Defendant.

O R D E R

THIS CAUSE comes on for consideration of the following motion and defendant's response (Dkt.30):

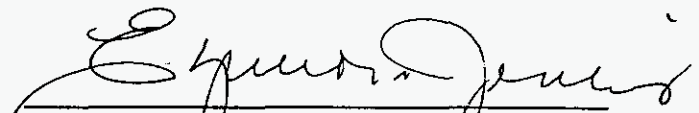
Motion: Plaintiff's Motion to Extend Time for Filing Response and to Reschedule Preliminary Injunction Hearing and Expedited Discovery Schedule (Dkt.23).

Filing Date: August 17, 1995.

Disposition: GRANTED IN PART and DENIED IN PART. Plaintiff shall file a response to the Florida Public Service Commission's Amended Motion to Intervene on or before August 31, 1995. However, the Commission shall supplement its amended motion to intervene by filing "a pleading setting forth the claim or defense for which intervention is sought" in compliance with Rule 24(c), Fed. R. Civ. P., within twenty (20) days from the date of this order. Moreover, the evidentiary hearing shall be continued until after a ruling on the Commission's motion to intervene. However, plaintiff has not shown good cause for the further extension of initiating depositions. This court recalls that at the prior status

conference in this case, the parties agreed that the proposed intervenor PSC could attend the depositions scheduled in this case. Therefore, the expedited discovery shall proceed as agreed upon and depositions shall begin the week of September 5, 1995. The parties shall confer and file a schedule of depositions for the expedited discovery within five (5) days.

DONE and ORDERED at Tampa, Florida this 28th day of August, 1995.


ELIZABETH A. JENKINS
United States Magistrate Judge



FOWLER, WHITE, GILLEN, BOGGS, VILLAREAL AND BANKER, P. A.

ATTORNEYS AT LAW

TAMPA — ST. PETERSBURG — CLEARWATER

FT. MYERS — TALLAHASSEE

CARLE - FOWHITE
TELE 52776

501 EAST KENNEDY BLVD
POST OFFICE BOX 1438
TAMPA FLORIDA 33601

TELECOPIER
(813) 225-8313

(813) 228-7411

September 1, 1995

VIA TELECOPY (813) 822-3768
AND UNITED STATES MAIL

Steven C. Dupré, Atty.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Barnett Tower, Suite 2300
200 Central Ave.
St. Petersburg, FL 33701

Re: Panda-Kathleen, L.P. v. Florida Power Corp.
United States District Court, Middle District
of Florida, Tampa Division
Case No. 95-992-Civ-T-24C
Our File No. 195-1584

Dear Steve:

This letter follows up our telephone discussion today in which I advised you that Panda cannot agree to begin depositions as FPC requests:

1. FPC's "willingness" to postpone depositions of Panda personnel and other witnesses only until Monday, September 18, 1995, is not agreeable. Panda cannot participate in any depositions until FPC has produced all documents responsive to Panda's request for production. Panda will not accept that FPC "must" start depositions no later than September 18, 1995. If FPC persists in that posture, Panda will file, and obtain a hearing on, a motion for protective order on such depositions and a motion to compel on FPC's unproduced documents.

EXHIBIT C

1289

Steven C. Dupré, Atty.
September 1, 1995
Page 2.

2. Panda's view is that, absent agreement of the parties, Local Rule 3.05 expressly precludes commencement of any discovery until after the case management conference and, if there are disagreements as to the discovery plan, Local Rule 3.05 precludes discovery until those disagreements are resolved.

3. FPC first appeared in the case on July 5, 1995, so the case management conference must be conducted on or before next Tuesday, September 5, 1995, and the Case Management Report must be filed on or before Tuesday, September 19, 1995.

4. Mr. Besing and I, along with one or more representatives of Panda, are prepared to meet with you, other counsel for FPC, and one or more representatives of FPC, late Tuesday afternoon, September 5, 1995, at 4:00 p.m., to discuss the matters specified in the Case Management Report form.

5. At the case management conference, we will present you with an initial draft list of the known deficiencies in FPC's document production that Panda's personnel have identified thus far and will request that those deficiencies be promptly remedied to avoid Panda having to file a motion to compel production.

6. At the case management conference, we also intend to address the issue of deposition scheduling. As stated in Paragraph 1, above, no depositions can be conducted until (i) the court has conducted a preliminary pretrial conference and has entered the "Case Management and Scheduling Order" and (ii) FPC has remedied the specified deficiencies in its document production (or the court has ruled on Panda's motion to compel), the remaining FPC documents have been produced, and we have had a reasonable opportunity to examine those documents.

7. At the case management conference, we further intend to address the issue of the extent and mechanics of the participation of counsel for the Florida Public Service Commission ("the FPSC") in the depositions. Plainly, if the court denies the FPSC's intervention motion, then that issue will be moot (see Paragraph 9, below). But if the court grants the intervention motion, we foresee a number of questions about the conduct of those

1230

Steven C. Dupré, Atty.
September 1, 1995
Page 3.

depositions that will have to be resolved before the depositions begin.

8. On Panda's motion for preliminary injunctive relief, both parties are entitled to conduct document, and some deposition, discovery on the injunction issues. To ensure that FPC is not unfairly prejudiced by any delay in beginning deposition discovery, we will stipulate that the injunction hearing not be conducted until on or after November 13, 1995. However, the injunction hearing must be conducted in ample time for the district court to enter its order prior to January 1, 1996. This stipulation will be neither a "withdrawal" nor a "suspension" of Panda's pending motion for preliminary injunction.

9. We do not accept FPC's arguments about discovery in the FPSC proceeding.

10. To ensure that FPC has adequate time to prepare for preliminary injunction hearing, we will agree to the following described schedule:

a. Case Management Conference: Held Tuesday, September 5, 1995.

b. "Case Management Report": Filed on or before Friday, September 8, 1995.

c. Objections to "Case Management Report": Filed on or before Friday, September 15, 1995.

d. Court hearing: On (i) the Case Management Report and (ii) if necessary, Panda's motion to compel and motion for protective order - date unknown.

e. Depositions: Dual-track depositions in Dallas, Texas, and St. Petersburg, Florida, during the weeks of October 9 and 23, 1995, assuming that FPC's document production is complete by the end of September, 1995.

1231

Steven C. Dupré, Atty.
September 1, 1995
Page 4.

If this schedule is acceptable to FPC, we will prepare a proposed order. Or, if it needs refinement, we will be prepared to discuss it at next Tuesday afternoon's meeting.

Very truly yours,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.

By: Tom
Thomas T. Steele

TTS:reb
cc: R. Besing, Atty.
W. Nordlund, Atty.

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

95 SEP 15 PM 5:43

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

PANDA-KATHLEEN L.P.,

Plaintiff,

vs.

Case No: 95-992-Civ-T-24C

FLORIDA POWER CORP.,

Defendant.

O R D E R

THIS CAUSE comes on for consideration of Plaintiff Panda's Motion for Entry of Protective Order (Dkt.39) and defendant's response filed on September 14, 1995.

Although plaintiff's motion was filed on September 13, 1995, this court did not have the opportunity to consider the motion and response until the late afternoon of September 15, 1995.

Plaintiff seeks to stay all depositions until defendant has produced all documents requested by plaintiff and the court has resolved disputes raised in the case management report. Plaintiff indicates that lead counsel, Mr. Besing, is unavailable for depositions the week of September 18, 1995, due to his Continuing Legal Education seminars and depositions scheduled in another case.

Defendant states that it attempted to schedule all depositions, pursuant to this court's prior order, with plaintiff's counsel but received no cooperation. Defendant also states that all pertinent, non-privileged documents have

EXHIBIT D

been provided. As for the scope of the depositions, defendant correctly states that it needs to address the merits of plaintiff's allegations in determining the Rule 65 requirement of likelihood of success.

Plaintiff has made several efforts to delay discovery and a hearing on the motion for preliminary injunction which it has filed. Further delays will not be countenanced. There appears to be no good reason why the conflicts in Mr. Besing's schedule could not have been resolved by the parties or brought to the court's attention sooner. As the parties know, the filing of a motion does not stay discovery. This court recognizes that expenses may have already been incurred by defendant in anticipation of the depositions set for the week of September 18, 1995. An award of such expenses may be appropriate.

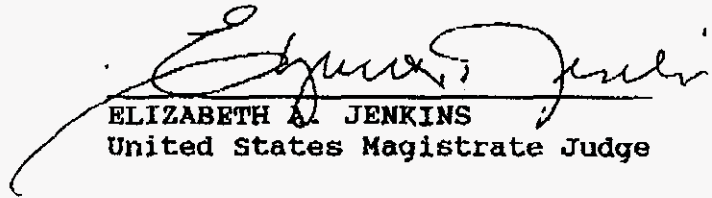
This court reluctantly concludes that the depositions scheduled for the week of September 18, 1995, must be rescheduled due to plaintiff's counsel's conflict. However, plaintiff has failed to demonstrate good cause for the remaining relief requested.

Upon consideration, it is ORDERED that:

(1) Plaintiff Panda's Motion for Entry of Protective Order (Dkt.39) is GRANTED to the extent that the depositions scheduled for the week of September 18, 1995 shall be rescheduled and the motion is otherwise DENIED.

(2) Plaintiff shall file a response to defendant's request for attorney's fees and expenses incurred in making this motion within ten (10) days.

DONE and ORDERED at Tampa, Florida this 15th day of September, 1995.


ELIZABETH A. JENKINS
United States Magistrate Judge

THE LAW OFFICES OF
RAY G. BESING
A Professional Corporation
ATTORNEYS & COUNSELORS

1100 ST. PAUL PLACE
750 N. ST. PAUL
DALLAS, TEXAS 75201

(214) 220-9090
FAX (214) 220-1202

Ray G. Besing
Timothy R. George

September 20, 1995

Via facsimile - (813) 223-7000

Steven D. Dupre, Esq.
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
One Harbour Place
Tampa, Florida 33601

CONFIDENTIAL

RE: *Panda-Kathleen, L.P., Plaintiff v. Florida Power Corporation, Defendant;*
Case No. 95-992-Civ-T-24C.

Dear Steve:

This acknowledges our telephone conversation late yesterday afternoon, September 19, and my review of your letter of that date, which was delivered to my home Tuesday night. As I stated to you, Panda is not willing to voluntarily produce any of its employees for depositions until the U.S. District Court has considered Panda's objections on appeal from the Magistrate's Order of Friday, September 15, pursuant to Rule 72(a). Since I am out of the office for almost a week, I have asked Tom Steele to prepare those objections and appeal and file it timely under the Rule. Therefore, unless and until the U.S. District Court rules on those objections and appeal, Panda will not be prepared to produce any witnesses for deposition in Dallas during the week commencing Monday, September 25 or any other time prior to a ruling by that Court.

In the meantime, Panda has pending its Motion for Protective Order filed with the Florida Public Service Commission. As Mr. McGee knows, I advised the Commission's staff attorney, Mrs. Brown, that Panda was not prepared to permit the commencement of any depositions of Panda employees until both the Commission and the U.S. District Court have ruled on the respective Motions for Protective Order. This is because parties previously have agreed - and the Commission and the Court are aware of that agreement - that discovery in both matters would be usable in both matters. Obviously, we are not going to engage in any deposition in one case when a Motion for Protective Order is still pending in the other case, thereby risking taking the depositions twice. I am surprised that you are so shocked by that revelation. The mathematics is not difficult to understand.

With respect to your currently looking at the week of October 9, such as October 10, 11, 12 or 13, for taking depositions, that week is out, in any event. I have committed to the many attorneys in the *Panda v. Heard* case that depositions will be taken in that case

EXHIBIT E

1236

September 20, 1995

Page 2

throughout the week of October 9. On another note, please be advised that Mr. Darol Lindloff is still in China and will be there for some time to come; further, Mr. Ralph Killian left for China and will be there for some time; Mr. Tom Bagby is almost constantly in Mexico for Panda and expects to be there the bulk of the time over the next several weeks. I have not control over the fact that Panda is a very small company with less than 35 total employees who are working on a multiplicity of projects in the United States and in at least five foreign countries. I trust that, notwithstanding the massive size and redundancy of employee positions at Florida Power Corporation, your client will make an effort to understand the realities.

Regarding the extremely deficient production of documents by your client, Florida Power Corporation, your letter of September 7 and other facile efforts to excuse or justify a rather massive refusal by Florida Power Corporation to produce highly relevant objects I rejected. I and knowledgeable Panda personnel have spent hundreds of hours inspecting the documents FPC has produced; and those documents do not include a substantial amount of documents known to exist and, indeed, documents which FPC has produced to other plaintiffs in pending, similar lawsuits. I do not intend to continue entertaining your protestations of innocence. We are prepared to put on our evidence regarding these matters in a hearing before the Magistrate and, if necessary, the U.S. District Court; and you are certainly have the right to put on rebuttal evidence. In the meantime, please spare me your self-serving telephone calls and letters. They are not necessary, constructive or professional.

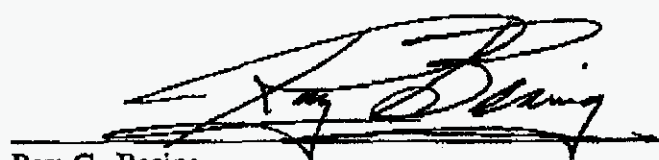
Finally, I have requested that you verify through Tom Steele (in my absence, in Miami) your statement to me yesterday afternoon that FPC has sent additional documents, subsequent to the box of documents received by Panda on Friday, September 1, some 20 days ago. Please advise Mr. Steele of the number of boxes and the Bates range so that he can communicate with Panda in Dallas to determine if Panda received those documents.

Thank you for your attention to these matters.

Very truly yours,

THE LAW OFFICES OF RAY G. BESING, P.C.

By:


Ray G. Besing

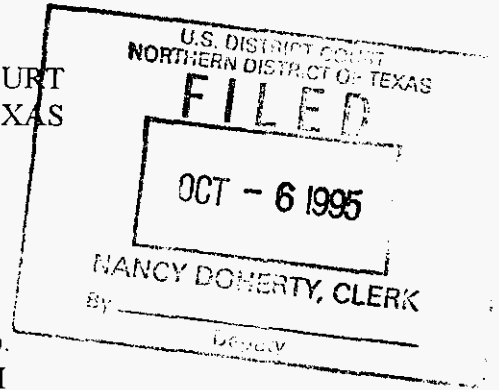
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September 20, 1995
Page 3

cc: Tom Steele, Esq. (via facsimile)
Ralph Killian (via facsimile)

DICTATED BUT NOT READ BY MR. BESING

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



PANDA-KATHLEEN, L.P., a
Delaware limited partnership, acting
by and through Panda-Kathleen
Corporation, its general partner, a
Delaware corporation,

Plaintiff,

v.

FLORIDA POWER CORPORATION,

Defendant.

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Civil Action No.
3:95-MC-120-H

(Civil Action No. 95-992-Civ-T-24(C)
Middle District of Florida)

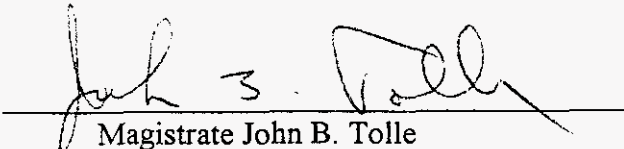
ORDER

On the 4th day of October, 1995, this cause came on to be heard on Plaintiff Panda's Motion for Protective Order (the "Motion For Protective Order") which was filed around 3:40 p.m. on October 4, 1995 in the above-referenced case. Movant's counsel of record in this case asked to be heard by the undersigned on an oral motion to stay these depositions that were the subject of the Motion For Protective Order until the hearing of that motion. The Court declined to consider the motion for stay, but instead chose to hear the Motion For Protective Order. Harold A. Rose of Bracewell & Patterson, L.L.P. appeared by telephone on behalf of Florida Power Corporation. The Court, after considering the Motion For Protective Order and the exhibits thereto, is of the opinion and finds that the Motion For Protective Order should be DENIED, with the understanding that

Plaintiff will have the opportunity to retake the depositions of these deponents at some subsequent date, at Plaintiff's discretion.

IT IS ACCORDINGLY ORDERED, that the oral depositions of Donald Kinney and Edward Gwynn as noticed by the Defendant Florida Power Corporation in Exhibit C attached to the Plaintiff's Motion for Protective Order may proceed as noticed.

October 5, 1997.


Magistrate John B. Tolle

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PANDA-KATHLEEN L.P.,

Plaintiff,

vs.

Case No: 95-992-Civ-T-24C

FLORIDA POWER CORP.,

Defendant.

O R D E R

THIS CAUSE comes on for consideration of Florida Public Service Commission's Motion to Intervene (Dkt.15), Florida Public Service Commission's Amended Motion to Intervene (Dkt.16), Defendant's Emergency Motion to Prohibit Panda From Retaining Former FPC Employees as Paid Experts (Dkt.22), Defendant's Amended Motion to Intervene (Dkt.28), Defendant's Motion for Leave to File Supplemental Authority (Dkt.34), Plaintiff's Motion for Enlargement of Time to Respond to Defendant's Emergency Motion (Dkt.37), Plaintiff's Motion to Compel Production of Documents (Dkt.40).

Plaintiff seeks an order compelling defendant to produce requested documents allegedly not produced. Plaintiff requests a two-hour evidentiary hearing on this issue. Defendant responds that it has produced all requested, non-privileged or protected, documents and is in the process of copying recently discovered documents. Defendant supports its position with affidavits of Steven Dupre and Michele Webb, a

paralegal with Florida Power, and responses to plaintiff's "spreadsheet."

Plaintiff has not established the need for an evidentiary hearing, that relevant documents have not been produced or that defendant has not adequately responded to plaintiff's request for production. Therefore, plaintiff's motion to compel is denied.

Defendant requests fees associated with responding to the motion to compel pursuant to Rule 37(a)(4)(B), Fed. R. Civ. P. Because of the extensive number of documents at issue and plaintiff's apparent confusion over defendant's production, this court declines to award expenses and fees at this time, but may reconsider this issue should future circumstances warrant such relief.

The other motions are addressed below.

Upon consideration, it is **ORDERED that:**

(1) Plaintiff's Motion to Compel Production of Documents (Dkt.40) is DENIED.

(2) Florida Public Service Commission's Motion to Intervene (Dkt.15) and Florida Public Service Commission's Amended Motion to Intervene (Dkt.16) are DENIED AS MOOT. The Commission has filed a Second Amended Motion to Intervene.

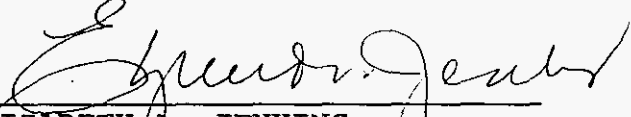
(3) Defendant's Emergency Motion to Prohibit Panda From Retaining Former FPC Employees as Paid Experts (Dkt.22) and Defendant's Amended Motion to Intervene (Dkt.28) are DEFERRED pending oral argument. A hearing shall be held on

these motions on October 23, 1995 at 10:00 a.m. in Room 207,
United States Courthouse.

(4) Defendant's Motion for Leave to File
Supplemental Authority (Dkt.34) is GRANTED.

(5) Plaintiff's Motion for Enlargement of Time to
Respond to Defendant's Emergency Motion (Dkt.37) is GRANTED.
Plaintiff's responses are deemed timely filed.

DONE and ORDERED at Tampa, Florida this 2nd day of
October, 1995.



ELIZABETH A. JENKINS
United States Magistrate Judge

GREENBERG
ATTORNEYS AT LAW
TRAUIG

David L. Ross
(305) 579-0523

December 8, 1995

BY TELECOPY

Steven C. Dupre, Esq.
Carlton Fields Ward Emmanuel Smith & Cutler, P.A.
Barnett Tower
P. O. Box 2861
St. Petersburg, Florida 33731

Re: Panda Kathleen v. Florida Power Corp., Case No. 95-992-CIV-T-24C.

Dear Steven:

This is to advise you that this morning we have filed on behalf of Panda Kathleen, L. P. the enclosed voluntary dismissal without prejudice of the above stated action, pursuant to Federal Rules of Civil Procedure 41(a)(1). As a result of that dismissal, the depositions which you have noticed in your Fourth Amended Notice of Taking Deposition served late Wednesday will not take place. You should understand that Panda has every intention in the near future of refiling an action against Florida Power in an appropriate forum raising similar, but, not identical, claims to those asserted in this action. You should not, for one minute, believe that we have taken this step for lack of confidence in Panda's position. As a matter of fact, my ongoing education on the facts and documents in this case convinces me more than ever that Panda has strong and meritorious claims. We simply prefer to proceed with those claims when we are ready to do so aggressively.

Although the issue is moot, I would further note that your Fourth Amended Notice of Deposition was completely at odds with our previous discussions about discovery schedules. At our meeting on November 20, it was Sylvia that proposed that any immediate discovery that you wished to press would be limited to contract issues raised by the Florida Public Service Commission proceeding. Both in our discussions of November 20, as well as in my November 22 and subsequent letters, I agreed that initial discovery would be so limited and further made clear my position that there was no need to take that discovery in December, if events before the PSC extended deadlines there. The Fourth Amended Notice of Deposition, which you served upon us, purported to demand 30(b)(6) depositions of Panda on all issues raised in the now-dismissed Middle District action and further purported to be taken pursuant to a non-existent agreement as to who would submit

GREENBERG TRAUIG HOFFMAN LIPOFF ROSEN & QUENTEL, P.A.
1221 BRICKELL AVENUE MIAMI, FLORIDA 33131 305-579-0500 FAX 305-579-0717
MIAMI FORT LAUDERDALE WEST PALM BEACH TALLAHASSEE
NEW YORK WASHINGTON, D.C.

EXHIBIT H

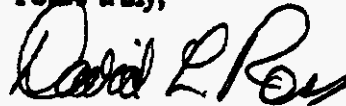
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Steven C. Dupre, Esq.
December 8, 1995
Page 2

affidavits on behalf of Panda in support of a withdrawn motion for preliminary injunction. That notice flatly violated the understandings we had and, therefore, violated Rule 3.02 of the Local Rules of the Middle District. I hope, and presume, that this is a result of carelessness in preparation of the notice rather than anything intentional. In any event, given our voluntary dismissal of the lawsuit, those issues are now moot.

As you know, we will challenge the decision of the PSC to deny Panda's motion to dismiss. In that connection, we will be seeking a stay of the proceeding pending appeal. As you are also aware, in the staff recommendation to the Commission to deny our motion to dismiss, it was recognized that a motion to stay may appropriately be made when that decision is appealed. Furthermore, our pending motion for continuance has not been ruled upon. Even in advance of any rulings on a forthcoming motion to stay or our motion for continuance, the Commission, as I am sure you are aware, has nevertheless now extended the discovery deadline to February 12, 1996 and has provided that the parties shall file their direct testimony on January 5 and rebuttal testimony on January 24. There is, therefore, no need in the PSC proceeding to take depositions on an expedited schedule before the parties even identify their witnesses by direct testimony and before a determination is made as to whether the hearing is going forward. So that there is no misunderstanding, in light of our dismissal of the federal case, the fact that there is no outstanding Notice of Deposition in the PSC proceeding, and the fact that we have not agreed to produce witnesses while our continuance motion there is unresolved pending FPC's response, we will not produce our witnesses in Dallas next week for deposition. We are prepared to discuss with you a deposition schedule in the PSC proceeding limited to the issues raised in the PSC proceeding and the witnesses relevant to those issues that would contemplate both sides taking all of their depositions between January 2 and February 12, which is more than adequate time given the limited issues to be presented there.

Yours truly,



DAVID L. ROSS

DLR/hv

cc: Richard Bellak, Esq.

GREENBERG TRAURIG