BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: 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 ORDER NO. PSC-95-1590-FOF-EI ISSUED: December 27, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS AND MOTION TO STAY OR ABATE PROCEEDINGS

BY THE COMMISSION:

CASE BACKGROUND

On January 25, 1995, Florida Power Corporation (FPC) filed a petition with the Commission for a declaratory statement regarding certain aspects of its Standard Offer cogeneration contract with Panda-Kathleen, L.P./Panda Energy Company (Panda). Panda intervened in the proceeding and filed its own declaratory statement petition on the issues FPC had raised. Panda also raised an additional issue regarding postponement of the significant milestone dates of the standard offer pending the Commission's resolution of the declaratory statement proceedings. FPC moved to strike Panda's petition, which we denied on the common issues both parties had raised in their petitions, but granted on the milestone date issue. See Order PSC-95-0692-FOF-EI, issued June 12, 1995.

On June 29, 1995, after a status conference with Commission staff, at which Panda expressed its concern that material factual issues were in dispute in the case, Panda filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing on the issues raised by the declaratory statement petitions. Panda contended that disputed issues of material fact affected all issues, and should properly be resolved before the full Commission in a formal administrative proceeding. Panda asserted that the standard offer is established by tariff and approved by the Commission, and to the extent permitted by applicable law the

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Commission has jurisdiction to make determinations respecting the contract and to grant the appropriate relief requested. We granted Panda's Petition in Order No. PSC-95-0998-FOF-EI, issued August 16, 1995.

Three days before Panda filed its petition for an evidentiary proceeding, Panda had filed a complaint in Federal antitrust court against FPC for violations of the antitrust laws. Panda requested a temporary and permanent injunction against FPC, prohibiting it from participating in this proceeding before the Commission. Panda alleged that the proceeding was a sham, because FPC knew that the Commission did not have jurisdiction to consider the issues regarding the standard offer contract. The Commission filed a Petition to Intervene in the federal case to inform the court of the nature and extent of its jurisdiction over standard offer contracts between public utilities and cogenerators. To protect the integrity of its regulatory process, and to protect its ability to fulfill its responsibility to implement and enforce PURPA (The Public Utility Regulatory Policy Act) in the State of Florida, the Commission also contested the allegation that its proceeding is a sham. Panda has since voluntarily dismissed its antitrust complaint against FPC.

On September 12, 1995, Panda filed a Motion to Dismiss and a Motion to Stay or Abate Proceedings in this case. Panda alleged that the Commission cannot consider the issues FPC has raised, because the Commission lacks jurisdiction over Panda, and it lacks jurisdiction over the subject matter of the case, the approved standard offer contract between Panda and FPC. As it did in its antitrust complaint, Panda alleged that this proceeding is a sham. FPC filed a Response in Opposition to Panda's motions on September 19, 1995. We heard oral argument on the motions September 25, 1995, and we decided at our December 5, 1995 Agenda Conference that the Motion to Dismiss and the Motion to Stay or Abate Proceedings should be denied. This Order memorializes that decision.

DECISION

Motion to Dismiss

The subject matter of this case is a "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less than 75 MW or a Solid Waste Facility". The form of the standard offer, incorporated in FPC's filed tariff, was approved by the Commission in Order No. 24989, issued August 29, 1991. The specific standard offer at issue here was

executed by Panda and FPC on November 25, 1991. It was specifically approved by the Commission in Order No. PSC-92-1202-FOF-EQ, issued October 22, 1992.

The standard offer states that the agreement is made "consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date". The agreement provides that Panda will provide 74.9 MW (megawatts) of committed firm energy and capacity at rates based on FPC's avoided unit, a combustion turbine with a 1997 in-service date and a 20 year useful life. The term provision of the standard offer shows a term of thirty years, beginning in 1995 and ending in 2025. Firm capacity payments to be made to Panda, however, only last for 20 years, a period that corresponds to the life of the 1997 avoided unit.

FPC's Petition in this case alleges that in the summer of 1994, Panda informed FPC that it intended to build a cogeneration facility capable of producing 115 Mws of capacity to fulfil its 74.9 MW standard offer. Panda also raised questions about the 30-year term of the standard offer and the 20-year period of firm energy and capacity payments incorporated in Appendix C of the Standard Offer. FPC requests that we determine whether the proposed size of the plant complies with Commission Rule 25-17.0832(3)(a), Florida Administrative Code.[1] FPC also requests that we determine whether Rule 25-17.083(3)(e)(6) requires FPC to make firm energy and capacity payments to Panda under the standard offer for 20 years or for 30 years.[2] In addition, Panda requests

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[1] Rule 25-17.0832(3)(a) states;

(3) Standard Offer Contracts
(a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091.

[2] Rule 25-17.0832(3)(e) provides, in pertinent part that;

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

> 6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be

that we extend the milestone dates of the standard offer to reflect the regulatory delays caused by this proceeding.

Panda asserts in its Motion to Dismiss that we do not have jurisdiction to hear this case because we have no jurisdiction over Panda itself, and because we are preempted by Federal law from "'revisiting' the previously-approved contract". Panda claims that we cannot resolve any contract dispute between utilities and cogenerators. Referring to the our recent orders deferring to the courts to interpret negotiated cogeneration contract provisions and resolve negotiated cogeneration contract disputes, Panda claims that there is no valid difference between our authority over negotiated contracts and our authority over standard offer tariff contracts. Panda states that our rule limiting the availability of standard offer contracts to small cogenerators under 75 MW has no basis in federal law. Panda claims that this proceeding will subject it to "utility-type regulation" from which it is exempt under PURPA and FERC's (Federal Energy Regulatory Commission) regulations implementing PURPA.

FPC responds that whether or not we have jurisdiction over a cogenerator, we clearly have jurisdiction over a public utility itself and the standard offer cogeneration contracts that we require the utility to execute. FPC also states that Panda has voluntarily submitted to our jurisdiction and affirmatively requested relief on the same issues FPC has raised. FPC contends that Panda's arguments and supporting case law are not relevant to the issues FPC has raised and the relief FPC has requested. FPC asserts that we clearly have jurisdiction to interpret our own standard offer rules as they apply to this agreement. FPC points out that Panda does not mention the numerous cases in which we have exercised our jurisdiction to interpret standard offers and the rules that govern them.[3] FPC argues that neither PURPA, nor FERC's

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> delivered, at a minimum, for a period of ten years, commencing with the in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit. . . .

[3] See, for example, In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power

rules implementing PURPA, preempt the Commission's authority to answer the questions raised in this case. According to FPC, PURPA and FERC's guidelines establish a cooperative regulatory scheme in which the federal government has prescribed broad guidelines to encourage the development of cogeneration, and the states retain continuing responsibility to implement and enforce those guidelines. As long as the state regulatory agency acts in ways that are compatible with the FERC guidelines, it is carrying out its intended role under PURPA.

Jurisdiction over Panda

Panda's argument that the Commission should dismiss this case because it does not have jurisdiction over Panda is groundless for two reasons. First, we have extensive regulatory authority over FPC, the public utility required to purchase cogenerated power under the state-created and state-controlled standard offer contract. Second, Panda has voluntarily submitted itself to our jurisdiction by taking substantive action in the case and requesting affirmative relief from us. A claim of lack of jurisdiction over the subject matter of a case (in rem jurisdiction) may be raised at any time, even for the first time on appeal; but a claim of lack of jurisdiction over the person (in personam jurisdiction) must be affirmatively asserted before the party takes any substantive action in the case or the claim will be deemed waived. Miller v. Marriner, 403 So.2d 472 (Fla. 5th DCA 1981); Alsup v. Your Graphics are Showing, Inc., 551 So. 2d 222 (Fla. 2d DCA 1988); Hubbard v. Cazares, 413 So.2d 1192 (Fla. 2d DCA 1981). Panda's own Petition for Declaratory Statement and its Petition for Formal Evidentiary Proceeding preclude it from arguing lack of jurisdiction over Panda now.

Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991, Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

Jurisdiction over the Subject Matter

Panda's motion to dismiss generally raises a broad array of state and federal issues concerning the relationship between public electric utilities and cogenerators and the shared jurisdiction of state and federal regulators over that relationship. Panda's broad, general arguments, however, never really address the issues in this case, the facts in this case, or the specific relief that FPC has requested.

We note that in 1978, Congress enacted PURPA to develop ways to lessen the country's dependence on foreign oil and natural gas and to encourage the use of waste energy. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (Qfs). Section 210(b) directs FERC to set rates for the purchase of power from Qfs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against Qfs, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(e) directs FERC to adopt rules exempting Qfs from state and federal regulation of electric utility rates and financial organization, except those regulations established to implement and enforce PURPA's mandate. Section 210(e)(3) specifically states that qualifying facilities will not be exempt from regulations implementing PURPA. Section 210(f) directs state regulatory authorities to implement PURPA and FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, "the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source". 18 C.F.R. s. 292.101(b)(6). In subpart C of its regulations FERC directs the states and their utility commissions to implement, on a continuing basis, FERC's regulations. Subpart F reflects PURPA's intent to exempt qualifying facilities from traditional state utility regulation, with the exception of state regulation implementing PURPA. 18 C.F.R. s. 292(c) states:

> (c) Exemption from certain State law and regulation.

> (1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2) of this section) from State law or regulation respecting:
> (i) The rates of electric utilities; and
> (ii) The financial and organizational regulation of electric utilities.
> (2) A qualifying facility may not be exempted from State laws and regulation implementing Subpart C.

In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities must purchase electricity offered for sale by Qfs, "in accordance with applicable law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from Qfs, and it permits the Commission to set rates at which a public utility must purchase that power or energy.

Our implementation of PURPA, FERC's regulations, and Section 366.051, Florida Statutes is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity: by means of a standard offer contract; or an individually negotiated power purchase contract. See Rules 25-17.082(1) and 25-17.0832, Florida Administrative Code.

The Commission's rules require utilities to publish a standard offer contract in their tariffs which the Commission must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, insurance, the term of the contract, and the length of the capacity payment stream. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832(3)(d), Florida Administrative Code.

The same is not true for negotiated contracts, and the distinction is significant. Rule 25-17.082(2), Florida Administrative Code, encourages utilities and Qfs to negotiate contracts, and provides the criteria we will consider when we determine whether a contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations",

imposes an obligation to negotiate cogeneration contracts in good faith, and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. Utilities are not required to execute a negotiated contract, and they are not required to include the vast array of specific provisions that the standard offer rules contain. As we observed in Order No. PSC-95-0210-FOF-EQ, issued February 15, 1995, negotiated contracts are not subject to such extensive direction and control under the rules.

> While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts. We have interpreted the provisions of standard offer contracts on several occasions, but we have not interpreted the provisions of negotiated contracts.

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There is a valid regulatory purpose behind the different treatment of negotiated contracts and standard offers in our cogeneration rules, and it is entirely consistent with federal regulation. State-controlled standard offers that a utility is required to execute encourage the development of cogeneration by relieving smaller qualifying facilities from the burden of negotiating with utilities that have greater resources and superior bargaining power. Conversely, because a utility is not free to negotiate the terms and conditions of a standard offer, it is entitled to rely upon the stability and certainty of the standardized terms established and enforced by the Commission's rules, just as the cogenerator is.

In this case FPC has asked us to apply and enforce the cogeneration rules we developed to implement PURPA. As we stated in Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserve Cogeneration Agreement, Docket No. 840438-EI, Order No. 14207, issued March 31, 1985: "[T]he Commission certainly has jurisdiction to construe its own Rules at the request of a regulated utility to which those rules apply." If we did not have that authority there would be no reason to have implemented the rules. Contrary to Panda's claims, it does not appear to us that FPC is asking us to "revisit" and modify or terminate Panda's standard offer. Rather, FPC is asking us to apply our rules, in

effect at the time the standard offer was executed and approved, to the terms of the contract we approved. In fact, it appears to us that Panda is the party suggesting that the standard offer be modified.

The relief FPC has requested here does not conflict with federal regulations or subject Panda to "utility-type" state rate regulation. It seeks an answer to two questions: 1) Under the provisions of Rule 25-17.0832(3)(a), Florida Administrative Code, as applied to the standard offer at issue, is Panda permitted to build a cogeneration facility larger than 75 MW; 2) Under the provisions of Rule 25-17.0832(3)(e)(6), Florida Administrative Code, as applied to the standard offer at issue, is Florida Power obligated to make firm capacity and energy payments to Panda for more than 20 years. Certainly we have the authority to answer those questions.

To prevail on its motion to dismiss Panda must demonstrate that the facts alleged in FPC's petition, when viewed in the light most favorable to FPC, fail to set forth any claim that the Commission can resolve. We find that the motion has not met this test. We deny the Motion to Dismiss.

Motion to Stay or Abate Proceedings

Panda's Motion to Stay or Abate Proceedings, in its entirety, consists of the following paragraph;

> When the jurisdiction of a court or agency is put at issue - which can be done by the parties or the court or agency at any time- then the court or agency should not take any further actions until reply briefs are filed and a proper determination of jurisdiction is made. All decisions and actions of a court or agency without jurisdiction are void and may be ignored. See Stel-Den of America, Inc. v. Roof Structures, Inc., 438 So.2d 882 (Fla. App. 1983)

The authority cited above supports the position that a claim of lack of subject matter jurisdiction can be raised for the first time on appeal or at any other time. The authority does not support the position that a court or agency must refrain from taking any action every time a litigant raises a subject matter

jurisdiction argument. The wheels of justice would grind quickly to a halt if parties could so easily delay a proceeding by that tactic. Nor does the Stel-Den case state that decisions of a court or agency without jurisdiction may be summarily ignored.

Rule 25-22.061(2), Florida Administrative Code, provides that a decision to grant a stay rests within the sound discretion of the Commission. Usually a stay is requested under this rule after judicial review of the Commission's final or non-final order has been requested. Without commenting on the merits of such a motion now, we believe that this motion is premature and would be better filed if Panda seeks judicial review of our decision to deny its motion to dismiss. Therefore, we deny the motion to stay or abate proceedings without prejudice to file another motion to stay, pending judicial review of our decision.

It is therefore

ORDERED by the Florida Public Service Commission that the Motion to Dismiss and the Motion to Stay or Abate proceedings filed by Panda-Kathleen, L.P. are denied. It is further

ORDERED that this docket shall remain open until the substantive issues of the case are resolved.

By ORDER of the Florida Public Service Commission, this 27th day of December, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: ______________________
Chief, Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.