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**Florida Power**  
CORPORATION

**JAMES A. MCGEE**  
SENIOR COUNSEL

January 19, 1995

Ms. Blanca S. Bayó, Director  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

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Re: Docket No. 950110-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket are the original and fifteen copies of Florida Power Corporation's Response in Opposition to Panda's Motion to Stay the Proceedings Pending Appellate Review..

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.

Very truly yours,

*[Handwritten Signature]*  
for James A. McGee

JAM/jb  
Enclosures

cc: Parties of Record

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A Florida Progress Company

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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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.

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Docket No. 950110-EI

Submitted for filing:  
January 22, 1996

**FLORIDA POWER CORPORATION'S RESPONSE  
IN OPPOSITION TO PANDA'S MOTION TO STAY  
THE PROCEEDINGS PENDING APPELLATE REVIEW**

Panda's request for a stay should be denied, because Panda has failed to establish even one, much less all, of the elements set out in Rule 25-22.061(2) of the Florida Administrative Code (which governs requests for stays such as Panda's in this proceeding). The rule provides, in pertinent part, as follows:

(2) \* \* \* In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner is likely to prevail on appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

Panda has not satisfied any of these requirements for a stay.

**I. PANDA HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS  
OF ITS PETITION FOR EXTRAORDINARY RELIEF.**

The Commission carefully analyzed the issue of its jurisdiction in this matter and concluded such jurisdiction exists. The Florida Supreme Court has repeatedly held that Commission orders have a presumption that the Commission has the jurisdiction to enter such orders:

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Commission orders come to the Court "*clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.*" [Citations omitted]. An agency's interpretation of a statute it is charged with enforcing is entitled to great deference. . . .

Florida Interexchange Carriers Assoc. v. Beard etc., et al., 624 So. 2d 248, 250-51 (Fla. 1993); *accord* Florida Cable Television Assoc. v. Deason, 635 So. 2d 14, 15 (Fla. 1994) (emphasis added).<sup>1</sup>

Panda has not offered any new argument or reason in its motion to stay to suggest that the Commission's jurisdictional decision is supposedly wrong. Panda simply refers to its petition filed with the Florida Supreme Court, which does nothing more than repeat the arguments already considered and rejected by the Commission. In short, Panda has done nothing new to demonstrate in its motion for stay that it is likely to succeed on the merits of its petition and overcome the presumption of correctness afforded to the Commission's determination of jurisdiction.

The Supreme Court has not issued an order directing Florida Power to respond to Panda's petition, and it could exercise its discretion to deny the petition without requiring the Commission and Florida Power to respond.<sup>2</sup> Even if the Court issues an order requiring a response, however, that would only

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<sup>1</sup> Here, as in Florida Interexchange, the Commission's jurisdiction derives directly from statutes -- in particular, Section 366.051 ("The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer") of the Florida Statutes and the Rules promulgated by the Commission to implement Section 366.051 (*e.g.*, Rule 25-17.0832 F.A.C.).

<sup>2</sup> Rule 9.100 (e), (f) and (h) of the Florida Rules of Appellate Procedure (on which Panda relies) set out the applicable procedure, and make it clear that no response is required unless and until the Court enters an order requiring a response and setting a date for responding.

demonstrate that the Supreme Court wanted to hear from the other side of this dispute, not that Panda is likely to succeed. As the Rule states:

If the petition demonstrates a *preliminary basis* for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted.

Fla. R. App. P. Rule 9.100(f) (emphasis added).

Given the inaccuracies contained in Panda's petition,<sup>3</sup> and given the incompleteness of the record that Panda submitted with its petition,<sup>4</sup> it would certainly not be surprising if the Supreme Court concludes that it wants to hear from the respondents before ruling on Panda's petition. If that occurs, Florida Power, of course, will fully address Panda's arguments in its response. But even without getting into the merits of Panda's contentions, it is clear that Panda is not likely to prevail on its petition.

Apart from the presumption of correctness afforded the Commission's decision, the most obvious problem has to do with the nature of Panda's petition to the Supreme Court. While Panda styled it as a petition for a writ of certiorari,

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<sup>3</sup> For example, Panda's petition erroneously relies on matters and documents not yet in the record in this proceeding. See discussion of the documents at footnote 5 beginning at page 7 hereof. Panda's petition also contains fundamentally inaccurate descriptions of the record and of the relief that Florida Power is seeking. Thus, as this Commission explicitly recognized in its order on jurisdiction, Florida Power is not seeking to modify or terminate the contract -- it is simply seeking the Commission's determination whether the contract will still be available to Panda if it persists in its plan to build a facility greater than 75 MW, in violation of the Commission's rules and the Commission approved standard offer contract for "Qualifying Facilities Less than 75 MW." Panda also mischaracterizes Florida Power's recently filed federal lawsuit as a concession that the Commission has no special expertise. Florida Power has made no such "concession." To the contrary, it affirmatively pleaded that the Commission does have jurisdiction to resolve the issues raised in that particular count.

<sup>4</sup> Panda does not disclose the pendency of its counter petition for declaratory relief or its demand for an evidentiary hearing.

in substance it is clearly asking the Supreme Court to prohibit the Commission from conducting this proceeding:

Panda seeks this Court's intervention to *stop that [i.e. this Commission] proceeding. . . .*The Commission's *continued exercise of jurisdiction* over the Florida Power declaratory action is *beyond its subject matter jurisdiction . . .*

(Panda's petition at 1-2) (emphasis added).

Thus, no matter what it is styled, the inescapable fact is that Panda wants the Supreme Court to prohibit the Commission from exercising jurisdiction over this proceeding. In substance, if not form, Panda is asking the Supreme Court to enter a writ of prohibition against the Commission, a state agency. That the Court may not do.

In State v. Public Employees Relations Commission, 630 So. 2d 1093 (Fla. 1994), the Supreme Court acknowledged that it does not have jurisdiction to issue a writ of prohibition to a state agency. Specifically, the Court stated:

The writ of prohibition is an extraordinary writ that may be granted only when a lower court is without jurisdiction or attempts to act in excess of jurisdiction. \* \* \* [Citation omitted]. Article V, section 3(b)(7) of the Florida Constitution provides that the Supreme Court "may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction." *Because the plain language of this provision specifically limits the issuance of writs of prohibition to courts, we do not have jurisdiction to issue a writ of prohibition to a state agency like PERC.*

630 So. 2d at 1094 (emphasis added). That case involved an administrative proceeding filed before the Public Employees Relations Commission. There, as here, a party argued the agency was without jurisdiction. The Court, however, determined it did not have jurisdiction to issue such a writ of prohibition, because the Florida Constitution limits its right to issue writs of prohibition specifically to courts.

This holding is dispositive of Panda's petition to the Court "to stop" the Commission's proceeding here. Under this controlling precedent, the Supreme Court is without jurisdiction to prohibit a state agency, such as the Commission, from proceeding to exercise its jurisdiction, which is precisely what Panda seeks to have the Court do. Panda cannot avoid that constitutional proscription by the mere tactic of calling its petition something else, when that is in fact the relief it seeks. The Court obviously cannot do indirectly through a writ of certiorari, what it is constitutionally proscribed from doing directly.

There is another reason apparent on the face of Panda's petition why Panda is not likely to prevail. As demonstrated by the supporting material Panda filed with its petition, Panda obviously believes that the jurisdictional determination it is seeking from the Florida Supreme Court cannot be made without considering the evidence. Thus, even though no evidence has yet been taken in this proceeding and even though some of the materials submitted with Panda's petition are not even part of the record,<sup>5</sup> Panda proffered various evidentiary materials to the Florida Supreme Court with its petition.

The submittal of these selected documents compellingly demonstrates why any final determination of the Commission's jurisdiction on judicial review should be based on a complete evidentiary record established through proper procedures. For example, the affidavit statements of Brian Dietz are substantially disputed by

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<sup>5</sup> Panda did not file (i) a 1990 letter from Florida Power to Panda enclosing a copy of an unsigned proposed form of standard offer contract as it existed in 1990 (which of course predated the standard offer contract that is involved in this proceeding by almost one full year) (Exhibit 2 to Panda's petition), (ii) Florida Power's 1991 Evaluation of Standard Offer Proposals (Exhibit 5 to Panda's petition), (iii) an Affidavit of J. Brian Dietz, P.E. (Exhibit 9 to Panda's petition), or (iv) a recently filed complaint that Florida Power filed against Panda in federal court (Exhibit 11 to Panda's petition) in support of its motion to dismiss filed in September 1995, nor did it refer to them in the oral argument on that motion. Indeed, only one of those documents - the Dietz affidavit -- previously was made a part of the record in this proceeding.

Florida Power and are based, among other things, on an incorrect understanding of the Commission's rules and the standard offer contract incorporating those rules. Indeed, Florida Power is in the process of preparing its rebuttal testimony which is not to be filed on January 24, 1996, and will not be considered by the Commission until the February 19, 1996, evidentiary hearing.

Manifestly, the issue of the Commission's jurisdiction should not be determined on the basis of an incomplete, one-sided, and inaccurate record. Rather, it should be resolved on a full record establishing the circumstances leading to the pending petitions and to the need for the requested relief.

Indeed, the impropriety of interlocutory judicial review of the Commission's jurisdictional order is graphically demonstrated by Panda's continued mischaracterization of the nature of the relief that Florida Power seeks from the Commission. For example, Panda mistakenly asserts to the Court that Florida Power asked the Commission to rule that the term "Committed Capacity" "does not allow Panda to build a facility having the capability of generating in excess of 75 megawatts of electricity under any conditions." Panda petition at 8-9. The Commission, however, clearly recognized in its order that Florida Power has not asked for such a ruling: rather, "FPC requests that we determine whether the proposed size of the plant complies with Commission Rule 25-17.0832(3)(a), Florida Administrative Code." Likewise, Panda erroneously asserts that Florida Power is seeking to modify this contract. That is, of course, not the case at all - it is instead Panda itself that has sought to unilaterally modify this previously approved standard offer contract.

It is perfectly apparent from Panda's persistent effort to describe the nature of the relief differently from that actually sought by Florida Power that Panda

recognizes the nature of the relief ultimately announced on the merits may well have an impact on the question of jurisdiction. When the Court realizes this, as this Commission did, it seems far more probable that it will deny the petition and await the fully developed record specifying all of the facts.

In short, Panda has not presented a straight issue of law to the Court in its petition, but instead has affirmatively presented evidence that has not yet been presented to or been considered by this Commission. Florida Power has substantial evidence it will be submitting at the forthcoming evidentiary hearing in response, among other things, to the points Panda apparently is attempting to make with the materials outside of the record that it has submitted to the Court. It would appear likely that the Court will not wish to make a jurisdictional decision on the type of improper, and partially developed factual record Panda has submitted, and will prefer to await the complete record that will be made and the final order that will be issued specifying the exact nature of the relief the Commission will order.

Were the Florida Supreme Court to require a response to the petition, Florida Power would bring all of these points and many more to the Court's attention. At this juncture, however, setting aside the presumption that the Commission's jurisdiction decision is correct, these deficiencies -- which spring from the face of Panda's petition -- by themselves demonstrate that Panda has failed to demonstrate a likelihood of prevailing on its petition "to stop" this Commission from exercising its jurisdiction in this proceeding.



II. PANDA HAS FAILED TO DEMONSTRATE IT IS LIKELY TO SUFFER IRREPARABLE HARM PENDING THE APPEAL.

Panda's only argument on how it will be harmed is that *if it ultimately prevails on its jurisdictional challenge*, it will have had to have spent time and money in obtaining a resolution of this dispute. That is the same basic argument Panda served up with its first motion to stay the proceedings. But Panda offers no authority whatsoever to suggest that this is the type of harm that constitutes "irreparable harm." If in fact that were the case, then it would apply to every single case in which a party challenges the jurisdiction of a court or administrative body. The Commission identified the obvious consequence of such an argument, were it to be considered a valid basis for a stay:

The wheels of justice would grind quickly to a halt if parties could so easily delay a proceeding by that tactic.

Order No. PSC-95-1590-FOF-EI Docket No. 950110-EI at 10.

The fact of the matter is the mere expenditure of time, effort and money in resolving an issue that may later be reversed does not establish prejudice:

It is axiomatic that a petitioner seeking relief from an appellate court by the writ of common law certiorari must demonstrate two elements, that the lower tribunal's order constitutes a departure from the essential requirements of law and that it may cause material injury for which the remedy by appeal will be inadequate. [Citation omitted]. It is also *well-established, however, that potential waste of time and money which would be incurred if a trial court error is not corrected before trial is not that type of injury.* [Citations omitted].

Continental Equities, Inc. v. Jacksonville Transportation Authority, 558 So. 2d 154, 155 (Fla. 1st DCA 1990) (emphasis added); *accord* Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1100 (Fla. 1987) ("the authorities are clear that [inconvenience, considerable expense of time and money for all parties] is not sufficient to permit certiorari review").

Moreover, even if Panda ultimately prevailed in establishing the Commission lacks jurisdiction, Panda will in no way be prejudiced by the expenditure of time and effort involved in this proceeding. It can hardly be doubted that the issues raised in this proceeding will have to be resolved in some forum. Panda itself has filed a petition in this proceeding, which it has never withdrawn for "lack of jurisdiction," in which it seeks a resolution of the same issues, and even if (i) the parties go through the evidentiary hearing scheduled one month from now, (ii) Panda fails to obtain the declaratory statement it wants, and (iii) ultimately the Commission's decision is overturned on appeal on jurisdictional grounds, Panda will still have benefitted from the discovery it has obtained and its appellate remedy at that point will be more than adequate to protect it.

**III. THE RESULTING DELAY CAUSED BY A STAY WILL CAUSE SUBSTANTIAL HARM AND WILL BE CONTRARY TO THE PUBLIC INTEREST**

Panda argues that the issuance of a stay pending Supreme Court review will not cause undue delay. The Commission's prior findings in this proceeding, however, belie that argument. As the Commission noted when Panda sought a "90 day" continuance of the February 19, 1996 evidentiary hearing, the Commission's docket is sufficiently crowded that even if the Commission were to have taken that hearing off the calendar at that time and reset it right then, as Panda asked, the next available hearing date was at least nine (9) months away.

Because the Commission's hearing calendar is very crowded, rescheduling the hearing will likely cause a *substantial delay*. The delay will be more extensive than Panda's 90 days, and would more than likely be *at least nine months*.

12/15/93 Order No. PSC-95-1563-PCO-EI, Docket No. 950110-EI at 3 (rehearing by full Commission denied 1/3/96).

If a stay is issued, there is no telling how long it will take the Supreme Court to resolve Panda's petition. Panda certainly has done nothing to ask the Supreme Court for any form of expedited review, so it is not without precedent that it could be months or years before a decision is rendered. The parties will then have to wait many more months for a hearing. Thus, the overall delay caused by a stay could easily exceed a full year from now. This proceeding has already been pending for a year, which would mean that the issues raised by Florida Power on January 25, 1995, may not be resolved until sometime well into 1997 or even later than that.

The Commission itself has already recognized the harm that will befall all parties if a resolution of those issues is delayed more than it already has been. As the Commission's Prehearing Officer found:

*Delay is unwarranted and will adversely affect both the viability of Panda's project and FPC's generation planning.*

12/15/93 Order No. PSC-95-1563-PCO-EI, Docket No. 950110-EI at 3 (rehearing by full Commission denied 1/3/96) (emphasis added).

Nothing has occurred since then that in any way diminishes that finding. It goes without stating that Florida Power's generation planning has a direct impact on Florida Power's customers and ratepayers. Since delay adversely affects Florida Power's generation planning, therefore, it necessarily will adversely affect Florida Power's customers and ratepayers and thus will be contrary to the public interest. Panda has not even offered an argument to suggest the Commission's finding in this regard is mistaken.

Ironically, Panda is the one that says it cannot get started with construction until the issues in this proceeding are resolved, because one of the issues to be

resolved is whether the standard offer is available to Panda if it constructs a 115 MW facility as it is planning. If the stay is granted, however, it is likely that issue will not be finally resolved until 1997 -- the year when the avoided unit subject to the Panda standard offer would have been placed in-service. It will then be another substantial period before Panda could obtain financing and begin construction, much less complete it. Thus, if a stay is granted, the very real possibility exists that construction would not even begin on Panda's alternative to the 1997 avoided unit, until some time in 1998 or 1999. It would seem that is contrary to the very regulatory scheme that Panda sought to benefit from when it first submitted its standard offer to Florida Power.

#### IV. CONCLUSION

It is time to resolve the substantive issues that precipitated this dispute in the first place. These issues have been on the table for a very long time. Panda actively participated in them and itself sought affirmative relief. Panda waited until 8 months into the proceeding to first challenge jurisdiction, but even then did not withdraw its own petition or abandon its request for an evidentiary hearing. The end is now in sight with the February 19, 1996 evidentiary hearing rapidly approaching. Panda's request for a stay, coming when the proceeding is 90% complete, should be denied.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL  
FLORIDA POWER CORPORATION

By 

for James A. McGee  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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Docket No. 950110-EI

Submitted for filing:  
January 19, 1996

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Response in Opposition to Panda's Motion to Stay the Proceedings Pending Appellate Review has been furnished to Ronald C. LaFace, Esq., and Lorence Jon Bielby, Esq., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 101 East College Ave., Tallahassee, Florida 32301 and Martha Carter Brown, Division of Legal Services, Florida Public Service Commission, 2450 Shumard Oak Blvd., Tallahassee, Florida 32399-0892, this 19th day of January, 1996

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