

ORIGINAL  
FILE COPY

**REBUTTAL TESTIMONY OF  
EDWARD R. GWYNN**

1 **Q. Please state your name and business address.**

2 **A. My name is Edward R. Gwynn. My business address is 14643 Dallas**  
3 **Parkway, Suite 500, Dallas, Texas 75240.**

4

5 **Q. By whom are you employed and in what capacity?**

6 **A. I am employed by HEARD Energy Corporation ("HEARD") and I am**  
7 **currently the Sr. Vice President and General Counsel of HEARD. I am not**  
8 **employed by, nor do I have any relationship with Florida Power, other than**  
9 **that they have subpoenaed me and agreed to pay my expenses incurred in**  
10 **connection with my attendance at a hearing in Tallahassee on this matter on**  
11 **February 19, 1996.**

12

13 **Q. Prior to joining HEARD, by whom were you employed and in what**  
14 **capacity?**

15 **A. I was employed by Panda Energy Corporation ("Panda Energy") as its general**  
16 **counsel. I occupied this position in late 1991, all of 1992 and part of 1993**  
17 **before I left Panda Energy. My responsibilities in this position included**  
18 **normal general counsel responsibilities such as negotiating contracts, writing**  
19 **contracts and handling normal corporate legal matters. Prior to actually**  
20 **becoming an employee of Panda Energy, I represented Panda Energy as its**  
21 **general counsel. I also was on the board of directors of Panda Energy for**

1 some period of time. In total, I was involved either as an outside lawyer,  
2 board member or in-house general counsel for Panda Energy for about 10  
3 years.

4  
5 **Q. Do you have any continuing involvement with Panda?**

6 A. Yes. Various members of my family currently own 200,000 shares of stock  
7 of Panda. Panda also is suing a large group of companies and people,  
8 including, among others, HEARD and me.

9  
10 **Q. During 1991 and 1992, what was the relationship between Panda Energy  
11 and Panda-Kathleen Corporation, the general partner of Panda-Kathleen,  
12 L.P.?**

13 A. Panda-Kathleen Corporation was a subsidiary of Panda Energy ("Panda," as  
14 used herein, refers to Panda Energy, Panda-Kathleen Corporation or Panda  
15 Kathleen, L.P., depending upon the context in which I use the word  
16 "Panda").

17  
18 **Q. Do you hold any professional certifications or licenses?**

19 A. Yes. I am licensed to practice law in several states, including Texas.

20  
21 **Q. Have you previously given testimony concerning issues that exist between  
22 Panda and Florida Power?**

23 A. Yes. On October 6, 1995, pursuant to a subpoena issued in the case of  
24 *Panda-Kathleen, L.P. v. Florida Power Corporation*, pending in the United  
25 States District Court for the Middle District of Florida as Case No. 95-992-

1 Civ-T-24C, I appeared in Dallas, Texas, for a deposition conducted initially  
2 by Florida Power's lawyer. At that time, I gave deposition testimony that  
3 lasted most of the day. During that deposition, I was cross-examined by the  
4 lawyer for Panda.

5  
6 **Q. What is the purpose of your testimony?**

7 **A. Florida Power has subpoenaed me to provide testimony of my recollection of**  
8 **several events in which I was personally involved while employed by Panda**  
9 **and about which I previously testified in my October 6, 1995 deposition. In**  
10 **that regard, I have reviewed portions of the "pre-filed" testimony of Ralph**  
11 **Killian, Brian Dietz and Darol Lindloff that I understand has been submitted**  
12 **for filing in this proceeding.**

13  
14 **Q. On what do you base the testimony contained herein?**

15 **A. My testimony herein is based on my personal knowledge of the facts.**  
16

17 **THE DURATION OF THE CAPACITY PAYMENTS**  
18

19 **Q. Did you read the portion of Ralph Killian's pre-filed testimony (at page**  
20 **20, lines 14-21 and page 21 lines 1-12) in which he said that Florida**  
21 **Power agreed that (1) Panda would receive capacity payments for the**  
22 **entire 30-year term of the contract, and (2) Florida Power's payments**  
23 **would escalate over the contract term not shown in the tables in Schedule**  
24 **3 to Appendix C at a rate of 5.1% per year?**

25 **A. Yes.**

1 **Q. Did you have occasion to attend the January 9, 1992 meeting at Florida**  
2 **Power Corporation's offices in St. Petersburg, Florida at which Mr.**  
3 **Killian says that agreement was reached?**

4 A. Yes.

5  
6 **Q. In what capacity did you attend that meeting?**

7 A. I attended the January 9, 1992 meeting as Panda's principal contract  
8 negotiator.

9  
10 **Q. Was an agreement made at that meeting such as that described by Mr.**  
11 **Killian at page 20, lines 14-21 and page 21 lines 1-12 of his "pre-filed"**  
12 **testimony?**

13 A. No. I and several other Panda employees, including Mr. Killian visited  
14 Florida Power's offices to discuss various questions and concerns that both  
15 parties had about the standard offer contract that Panda had submitted to  
16 Florida Power in October 1991 and that Florida Power had accepted in  
17 November (sometimes referred to as the "Standard Offer Contract"). We met  
18 with Allen Honey and others from Florida Power. I took contemporaneous  
19 notes during that meeting of various matters that were discussed between  
20 Florida Power and Panda. A copy of those notes is submitted with my  
21 testimony (although I did not write the words "makes you want to puke" on  
22 that exhibit -- I do not know who wrote those words). (Exhibit No. \_\_\_\_  
23 (ERG-1)).

24

1 During the meeting, a Florida Power representative raised the subject of the  
2 duration of the capacity payments and the term of the contract. I believe it  
3 was Mr. Honey who said that the "term [of the standard offer contract] should  
4 be 20 years," or words to that effect. I recorded those words in my notes.  
5 (Exhibit No. \_\_\_\_ (ERG-1)).  
6

7 **Q. How did Panda's representatives respond to that statement?**

8 A. We did not agree with the statement. I made a note to myself to check the  
9 standard offer contract to analyze the issue of what, if any obligation, Florida  
10 Power had to make capacity payments beyond 20 years. During that meeting,  
11 however, no resolution of that issue was agreed to by Panda and Florida  
12 Power. We, on behalf of Panda, were not about to make any agreement on  
13 any one portion of the issues discussed until they all were resolved.  
14

15 **Q. During the January 9, 1992 meeting, did Florida Power make any**  
16 **definitive promise or agreement that the way this issue would be handled**  
17 **would be to either (1) pay Panda capacity payments for 30 years, (2)**  
18 **escalate the amount of capacity payments for the period following the**  
19 **year 2016 at a rate of 5.1%, (3) compute the payments using the formula**  
20 **contained in the PSC regulations, or (4) compute those payments using a**  
21 **different avoided unit?**

22 A. No. As I stated earlier, no definitive agreement or promise was made  
23 between the parties on this subject.  
24

1 **Q. Prior to when you left Panda in early 1993, did Panda and Florida Power**  
2 **ever come to a definitive agreement on how to handle the issue concerning**  
3 **the duration of capacity payments and the term of the contract that had**  
4 **been raised at the January 9, 1992, meeting with Florida Power?**

5 **A. Not to my knowledge. No one inside of Panda Energy ever reported to me**  
6 **during that period that they had reached any such agreement with Florida**  
7 **Power, and I never saw any letter or other writing that stated any such**  
8 **agreement had been reached.**

9  
10 **THE SIZE OF THE FACILITY**

11  
12 **Q. Did you read the portions of the testimony of Messrs. Dietz, Killian and**  
13 **Lindloff concerning the size of the facility that Panda wants to build?**

14 **A. Yes, I did.**

15  
16 **Q. While you were employed by Panda, were you ever involved in**  
17 **discussions inside Panda concerning the size of the facility that would be**  
18 **built to satisfy Panda's obligations under its standard offer contract with**  
19 **Florida Power?**

20 **A. Yes, on at least two separate occasions. The first time was in October 1991,**  
21 **when I filed with the Federal Energy Regulatory Commission, Panda's**  
22 **AMENDED AND RESTATED NOTICE OF SELF CERTIFICATION AS A QUALIFYING FACILITY.**  
23 **A copy of that filing is submitted with my testimony. (Exhibit No. \_\_\_\_**  
24 **(ERG-2)). In that filing, on behalf of Panda, I certified that "The Facility**

1 will have an estimated net maximum capacity at design conditions of 74.9  
2 MW."

3  
4 The second time I was involved in discussions about the facility size was  
5 about a year later, in or around October 1992. Specifically, I had been asked  
6 by the then president of Panda Energy, Hans van Kuilenburg, what size plant  
7 could be built. He asked me to research the standard offer contract and what  
8 I knew of the law of the situation and to advise Panda on what the contract  
9 provided. I recall attending a meeting at Panda's offices on or about October  
10 10, 1992, at which I gave my advice concerning the standard offer contract,  
11 and the facility size permitted under that contract.

12  
13 **Q. Who was present at the October 10, 1992, meeting?**

14 **A.** This meeting involved only Panda employees. As I recall it, Ralph Killian,  
15 Darol Lindloff, Don Kinney and Brian Dietz of Panda were all present.

16  
17 **Q. Please describe, as best you can recall it, what you said during the**  
18 **October 10, 1992, meeting on the subject of facility size permitted under**  
19 **the Standard Offer Contract?**

20 **A.** One of the topics of discussion was the ability to require Florida Power to  
21 purchase energy at the "as-available" price generated by a plant with a  
22 capacity or facility size designed above 75 megawatts. By capacity, or  
23 facility size, I am referring to the capability of the facility to produce energy.  
24 I am not referring to the contractual term "committed capacity" as used in the  
25 Standard Offer Contract, which means the specific 74.9 MW of energy

1 produced by the facility that Panda was committed to provide to Florida  
2 Power and Florida Power was committed to purchase under the circumstances  
3 described therein. I was asked what capacity or size facility I felt the contract  
4 provisions would allow.

5  
6 I expressed reservations about Florida Power's obligation to buy such energy  
7 from a plant designed with a capacity to produce more than 75 megawatts. I  
8 said to the Panda employees assembled for this meeting that (i) the Standard  
9 Offer Contract provided for a committed capacity of 74.9 megawatts, (ii)  
10 there was no mechanism to increase this presently in the contract, and (iii)  
11 Florida Power Corporation may or may not be required to accept (at as-  
12 available prices) energy generated by a capacity in excess of 75 megawatts.

13  
14 I voiced the opinion internally that perhaps the Standard Offer Contract could  
15 be modified or interpreted to permit, within a range, relatively slight capacity  
16 (i.e., facility size) deviations that become apparent when the plant is tested.

17 A plant normally will not test exactly at the capacity specified in the contract.

18 I also voiced the opinion that this was a relatively slight range applicable only  
19 to a plant designed to achieve a 74.9 megawatt capacity at the worst ambient  
20 conditions, not to one designed to achieve a capacity greater than 74.9  
21 megawatts.

22  
23 **Q. Do you recall the size of the facility under consideration by Panda during**  
24 **the October 10, 1992, meeting?**



1 A. I do not recall the exact size, but I do recall it was in excess of 100  
2 megawatts.

3

4 **Q. Did you state during the meeting whether you thought a facility of that**  
5 **size fit within what you earlier described as the slight deviation range that**  
6 **would be permitted?**

7 A. I stated in effect that I did not believe 100 MW was within the range of what  
8 I earlier described as "slight deviations."

9

10 **Q. Did you state during the meeting whether or not you felt that a facility of**  
11 **that size would be permissible under the standard offer contract?**

12 A. I was asked what size the plant could be, and I explained to the Panda people  
13 that in my opinion the standard offer contract as written would permit at most  
14 deviations that could be attributed to the differences that would occur in the  
15 final construction of the plant versus the targeted or intended capacity. I  
16 stated that in my opinion the contract, as written, would not permit  
17 deviations beyond 10%.

18

19 **Q. During the October 10, 1992, meeting did anyone with Panda say**  
20 **anything to the effect that it was technically infeasible to construct a**  
21 **facility that would enable Panda to fulfill the terms of its standard offer**  
22 **contract with Florida Power unless the size of that facility exceeded 100**  
23 **MW?**

24 A. No, to the contrary, several of the turbines that were discussed at that meeting  
25 involved facility sizes that closely approximated 75 MW.

1 Q. Does this conclude your testimony?

2 A. Yes.

**FPSC DOCKET NO. 950110-EI**  
**EXHIBIT NO. \_\_\_\_\_ (ERG-1)**  
**CONSISTING OF TWO PAGES**

ERG



FPC MEETING

1-9-92

REV. S.O. GOWEN

1

• FOR POSSIBLE  
K REVIEW

- ALSO FLA QWL TO DO BUS.  
14.1.1

PAGE 1

ERG MAKE SURE PAUL R. KATHLEW, L.P. PARTIALLY  
IS PROPERLY FORMED, ETC. (GMAKES YOU WANT TO PURCH)

1.10

POINT OF DELIVERY AND METER AT SUBSTATION. 69KV - 230KV.  
(WILSON - NOT LATHEAUS WEST)

• DIRECTION OF INTERCONNECTION FOR THE CITY

4.1

• TERM SHOULD BE 20 YRS. CK CAP. PAY OBL. BEFORE  
20 YRS.

7.5

DOES ONE EVENT LIMIT APPLY TO 24 MO  
PERIOD OR WHOLE TERM

9.2 +

• ZARLY PAYMENT OPTION - WE CAN CHANGE THIS. IT  
ISNT CLEAR IF WE NEED TO AMEND  
DDO OF IF IT CAN WAIT  
FOR FINANCING

3.2

• WHAT ABOUT CURE WORKING IF OF STATUS LOST

10.3

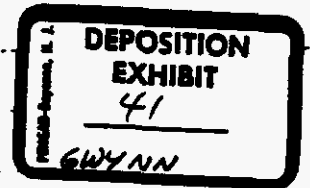
NO WAY TO QUANTIFY. A PHANTOM FPC UNIT  
WILL BE USED TO CALCULATE DEBIT OR CREDIT.

APPENDIX C

3500 kWh: [8960X42]

+ CAN RUN WHENEVER WE WANT

• HR Q AN OPEN K QUESTION



STUDY ON PEAK CAPACITY FACTOR +  
TOTAL " "

IE: OBLIG TO BUY UP TO ETC

3.2 WHAT HAPPENS IF QF STATUS LOST.

11.3 WHAT IS ENERGY COST DATA REFERENCED  
IN 11.3 - ?

WHAT IS COST OF PROVIDING SUCH DATA ?

15.1.3 IS TRANS. SERV. AGREEMENT REQUIRED. 2

SCH. MAINTENANCE

**FPSC DOCKET NO. 950110-EI  
EXHIBIT NO. \_\_\_\_\_(ERG-2)  
CONSISTING OF THREE PAGES**

October 7, 1991

Secretary  
Federal Energy Regulatory Commission  
825 North Capital Street  
Washington, D.C. 20426

RE: Panda Energy Corporation  
Amended and Restated Notice of  
Self-Certification As a  
Qualifying Facility  
74.9 MW Natural Gas Fired Facility  
Lakeland, Florida

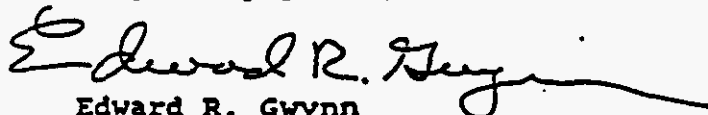
Dear Sir/Madam:

Enclosed herewith you will find four (4) copies of subject notice. This notice will amend and restate a previous Self-Certification, No. 91-62 which was filed by Panda Energy Corporation and listed the estimated net maximum design capacity at 150 MW and steam generation at 50,000 lbs. per hour.

We would appreciate receiving a copy of this notice from you reflecting the assigned QF number.

If there are any questions or problems, please contact me immediately at the number listed below.

Very truly yours,



Edward R. Gwynn  
General Counsel

Enclosures

4100 Spring Valley, Suite 1001 Dallas, Texas 75244  
214/980-7159 FAX 214/980-6815

P-K000687

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Panda-Kathleen  
Limited Partnership

Docket No. QF \_\_\_\_\_

Amended and Restated  
Notice of Self-Certification As a  
Qualifying Cogeneration Facility

Pursuant to Section 292.207 of the regulations of the Federal Energy Regulatory Commission (the "Commission"), Panda-Kathleen Limited Partnership ("Panda") hereby files an amended and restated notice of self-certification as a qualifying cogeneration facility.

Location of the Facility And  
Identification of the Applicant

The cogeneration facility (the "Facility") will be located at the plant site of Erly Juice, Inc., 4100 Frontage Road South, Lakeland, Florida 33802-2004.

The owner of the Facility will be Panda-Kathleen Limited Partnership, a partnership formed under the laws of the State of Delaware.

The address of Panda-Kathleen Limited Partnership is:

Panda-Kathleen Limited Partnership  
4100 Spring Valley Road  
Suite 1001  
Dallas, Texas 75244

Description of the Facility

The Facility is a combined cycle cogeneration facility, incorporating three (3) gas fired combustion turbine generators, three (3) waste heat recovery steam generators and one (1) extraction induction steam turbine generator.

The Facility will have an estimated net maximum capacity at design conditions of 74.9 MW. The electrical output of the Facility will be sold to Florida Power Corporation ("FPC") with an interconnect directly into the FPC transmission system. The Facility will generate approximately 15,000 lbs. per hour of steam which will be sold to Erly Juice, Inc. for use in the processing of citrus juices.

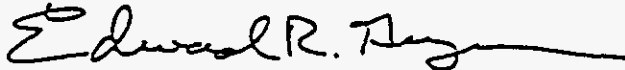


Primary Energy Source

The Facility will be fueled by Natural Gas and is expected to commence operation in 1997 or before.

Panda-Kathleen Limited Partnership has submitted this notice of self-certification as a qualifying cogeneration facility to be executed by its general partner's corporate official and general counsel on this 7th day of October 1991.

Respectfully submitted,  
Panda-Kathleen Corporation, for  
Panda-Kathleen Limited Partnership



Edward R. Gwynn  
General Counsel