

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

JANUARY 25, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BROWN) *MCB RVE*
DIVISION OF ELECTRIC AND GAS (HAFF, BALLINGER) *TJS MSH RLT*

RE: DOCKET NO. 950110-EI - STANDARD OFFER CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY BETWEEN PANDA-KATHLEEN, L.P. AND FLORIDA POWER CORPORATION.

AGENDA: FEBRUARY 6, 1996 - REGULAR AGENDA - DECISION PRIOR TO HEARING - MOTION FOR STAY PENDING APPEAL OF ORDER DENYING MOTION TO DISMISS

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950110D.BCM
PARTIES DID NOT REQUEST ORAL ARGUMENT - PARTICIPATION SHOULD BE LIMITED TO ANSWERING QUESTIONS

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. Panda then filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing on the issues raised by the declaratory statement petitions. The Commission granted Panda's Petition in Order No. PSC-95-0998-FOF-EI, issued August 16, 1995, and set the case for hearing. The hearing is currently scheduled for February 19, 1996.

On September 12, 1995, Panda filed a Motion to Dismiss and a Motion to Stay or Abate Proceedings. Panda claimed that the

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On September 12, 1995, Panda filed a Motion to Dismiss and a Motion to Stay or Abate Proceedings. Panda claimed that the Commission could not consider the issues raised, because the Commission lacked jurisdiction over Panda, and it lacked jurisdiction over the subject matter of the case, the approved standard offer between Panda and FPC. The Commission denied Panda's motions in Order No. PSC-95-1590-FOF-EI.

On January 11, 1996, Panda filed a Petition for Writ of Certiorari to the Florida Supreme Court, in which it argued that the Commission lacked subject matter jurisdiction to adjudicate the issues in the case. Panda asked the Supreme Court to reverse the Commission's order denying Panda's motion to dismiss and direct the Commission to dismiss the proceeding. As of this writing, the Supreme Court has not made a preliminary determination that it will consider the merits of Panda's petition.

On January 12, 1996, Panda filed with the Commission a Motion To Stay Proceedings Pending Appellate Review. Florida Power Corporation responded in opposition to the motion on January 19, 1996. This is staff's recommendation to deny the Motion to Stay.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission deny Panda's Motion to Stay Proceedings Pending Appellate Review?

RECOMMENDATION: Yes. Based on the application of Rule 25-22.061(2), Florida Administrative Code, the Motion for Stay should be denied.

STAFF ANALYSIS: Rule 25-22.061(2), Florida Administrative Code, provides that the Commission may exercise its discretion to grant a stay of an order pending judicial review. The rule states that the Commission may, among other things, consider three factors in determining whether to grant the stay:

- (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.

Staff recommends that Panda's motion to stay should be denied because it does not satisfy the criteria established in the rule.

A. Whether the petitioner is likely to prevail on appeal

Panda's only suggestion that it is likely to succeed on its petition for certiorari is that if the Supreme Court makes a preliminary determination that it will consider the petition "that will be a strong signal that the appeal has some likelihood of success".

FPC responds that Panda has not demonstrated that its petition for certiorari is likely to succeed before the Supreme Court. FPC argues that a preliminary determination by the Court to consider Panda's petition would only indicate that the Court wished to hear from the other parties to the case. It would not indicate that Panda was likely to succeed. FPC claims that interlocutory judicial review of the Commission's order denying a motion to dismiss for lack of subject matter jurisdiction is improper. According to FPC, the plain language of Rule 9.100, Florida Rules of Appellate Procedure, upon which Panda relies for its certiorari petition, shows that Panda is not likely to succeed before the

Court¹, because Panda has an adequate remedy on appeal of the Commission's final action. FPC argues that any final judicial determination of the Commission's jurisdiction should be based on a complete evidentiary record established through proper procedures, not on the partial evidence and evidence not in the record that Panda submitted to the Court in its petition.

FPC also questions the nature of Panda's petition to the Court, claiming that the petition is really a request for a writ of prohibition to the Commission to refrain from further exercise of subject matter jurisdiction over Panda's and FPC's standard offer cogeneration contract. FPC explains that the Supreme Court does not have the constitutional authority to issue a writ of prohibition against an administrative agency. "Panda cannot avoid that constitutional prescription by the mere tactic of calling its petition something else, when that is in fact the relief it seeks." Response, p. 5.

The substantive claim of Panda's certiorari petition to the Supreme Court is that the Commission lacks subject matter jurisdiction over its standard offer contract with FPC. It is staff's opinion that Panda's claim is incorrect and based on a mischaracterization of the nature of the proceeding before the Commission. The claim has not been addressed by the Court before, however, and it is difficult to measure Panda's likelihood of success on the merits of the claim. Reasonable minds can differ on the issue.

From a procedural perspective, however, it is staff's opinion that Panda is not likely to succeed with its petition for certiorari at this point in the proceedings. It is doubtful that the Court would grant the petition and issue an extraordinary writ ordering the Commission to dismiss the case, because Panda has a perfectly adequate opportunity to raise the issue of subject matter jurisdiction in a regular appeal, when the Commission has decided the issues.

¹ Rule 9.100(f), Florida Rules of Appellate Procedure, 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 not 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.

To make even a preliminary showing that it is entitled to such extraordinary relief, Panda must first demonstrate "a departure from the essential requirements of law that will cause material injury for which there is not adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy". A denial of a motion to dismiss for lack of subject matter jurisdiction is not considered a material injury, because there is an adequate remedy by appeal of final administrative action. See Fiocchi v. Trainello, 566 So.2d 904 (Fla. 4th DCA 1990) See also, Tucker v. Resha, 610 So.2d 460, 463 (Fla. 1st DCA 1992); reversed on other grounds, 648 So2d 1187 (Fla. 1994), where the Court commented: "We adhere to the maxim that common-law certiorari is not to be used to sidestep the rule of law narrowly restricting those non-final orders subject to review."

The Supreme Court specifically addressed the appropriate means to challenge the Commission's exercise of subject matter jurisdiction in Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1256 (Fla. 1990). In that case a condominium management company secured an injunction from the circuit court preventing the Commission from exercising jurisdiction over a complaint against the company for resale of electricity to a condominium owner. The Supreme Court granted the Commission's petition for a writ of prohibition against the circuit court. The Court stated that "If [the management company] wishes to contest the PSC's jurisdiction, the proper vehicle would be by direct appeal to this Court after the PSC has acted."

For the reasons explained above, and on the authorities cited above, staff recommends that Panda's motion to stay does not satisfy the first criteria for a stay under Rule 25-22.061(2), Florida Administrative Code.

B. Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted

Panda claims that a stay of further proceedings in this case is appropriate to avoid unnecessary Commission activities and expense to the parties while the petition for certiorari is pending. Panda says a stay is necessary in order to avoid wasted effort if the Supreme Court quashes or modifies the scope of the Commission's proceeding. Since its petition raises some issues of federal preemption and a claim of infringement of federal rights, Panda argues that if a stay is not entered and Panda's appeal is successful, Panda will have been prejudiced by having to spend money and time to conduct a case where federal law provided an exemption.

FPC argues that Panda has failed to establish any of the criteria for a stay that are enumerated in Rule 25-22.061(2), Florida Administrative Code, including a showing that Panda will be harmed if a stay is not granted. FPC argues that expenditure of time and money to participate in the case is not sufficient harm to merit a stay.

Staff agrees that the expenditure of time and money to participate in a judicial or administrative proceeding does not constitute sufficient harm to stay the course of the proceeding. It is also not sufficient harm to merit the issuance of a writ of certiorari. As the First District Court of Appeal stated in Continental Equities, Inc. v. Jacksonville Transportation Authority, 558 So.2d 154 (Fla. 1st DCA, 1990):

It is axiomatic that a petitioner seeking relief from an appellate court by 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. . . . 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)

Staff recommends that Panda's motion to stay does not satisfy the second criteria for a stay under Rule 25-22.061(2), Florida Administrative Code.

C. Whether the delay will cause substantial harm or be contrary to the public interest

Panda suggests that the Commission could condition the stay on whether or not the Supreme Court decides to entertain Panda's certiorari petition. If the Court declines jurisdiction Panda suggests that the Commission could lift its stay, and thus the issuance of the stay would not cause undue delay.

FPC responds that a stay for any period of time would require rescheduling of the February 19, 1996 hearing date. Because of the Commission's crowded calendar, it is likely that the hearing would be delayed for several months. FPC states that if the Commission stays its proceedings, the delay will be substantial in a case that is already a year old. FPC claims that its planning process will

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be adversely affected, and Panda itself will be unable to proceed with the development of its project.

Staff agrees that further delay in a case that is already a year old will be harmful to both parties to the proceeding. As the Prehearing Officer said in her order denying Panda's motion for continuance, Order No. PSC-95-1563-PCO-EI issued December 15, 1995, "[d]elay is unwarranted and will adversely affect both the viability of Panda's project and FPC's generation planning." The in-service date of Panda's project and the avoided unit identified in the standard offer contract is 1997. Staff recommends that Panda's motion to stay does not satisfy the third criteria for a stay under Rule 25-22.061(2), Florida Administrative Code.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of the substantive issues in the case.

STAFF ANALYSIS: This docket should remain until the hearing is held and the Commission resolves the substantive issues in the case.