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Florida
Power
CORPORATION

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March 29, 1996

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

Re: Docket No. 950110-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of Florida Power Corporation's Posthearing Statement.

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,

James A. McGee

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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 Submitted for filing: March 29, 1996

POSTHEARING STATEMENT OF FLORIDA POWER CORPORATION

Florida Power Corporation (FPC), pursuant to Rule 25-22.056, Florida Administrative Code, hereby submits its Posthearing Statement and represents as follows:

INTRODUCTION

The two principle issues raised in the declaratory statement requests of both Panda and Florida Power can be resolved by a straight forward application of the Commission's standard offer rules regarding the limitation on the size of qualifying facilities and the maximum period for delivery of firm capacity. This is so because standard offer contracts cannot be utilized in a manner contrary to the rules that govern those contracts. These rules expressly provide that the availability of a standard offer contract is limited to "small qualifying facilities less than 75 MW" and that the maximum period for delivery of firm capacity and energy under a standard offer contract is the life of avoided unit, which the Panda contract specifies as 20 years. These provisions, in and of themselves, are dispositive of Panda's revised proposal for a 115 MW facility and its claim for 30 years of capacity payments.

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Yet the testimony of the Panda witnesses addressing these two issues conspicuously avoids any reference whatsoever to the Commission's rules. Instead, they attempt to raise a variety of factual issues that have no bearing on the rules that govern standard offer contracts. Regarding the first issue, the Panda witnesses claim that a 115 MW facility is necessary to meet Panda's 74.9 MW Committed Capacity obligation under the contract. This is irrelevant; the Commission has already ruled that the 75 MW limitation applies to the net capacity of the facility, not the Committed Capacity of the contract. If Panda desires to build a facility larger than 75 MW, for whatever reason, it could have sought a negotiated contract as provided for in the Commission's rules. Regarding the second issue, Panda's witnesses claim that Florida Power representatives agreed that capacity payments were to be made for 30 years. Apart from being untrue, this too is irrelevant. Neither the representatives of Florida Power nor Panda have any authority to modify or waive the Commission's rules or the provisions of the standard offer contract.

The third principle issue in this case, regarding extension of the contract milestone dates, was raised by Panda and it has utterly failed to meet its burden of proof. Panda has not offered anything to demonstrate that it would have met the contract milestone dates, in particular, that it would have obtained financing, if Florida Power had not initiated this proceeding. In fact, Panda does not even claim that it could have obtained financing, only that "efforts were well under way" before Florida Power filed its petition. No evidence of any kind is offered to show whether those "efforts" had any chance of success. On the other hand, the testimony Florida Power witness Morrison provides substantial evidence that Panda's project was not financially viable.

STATEMENT OF ISSUES AND POSITIONS

ISSUE 1: Does Panda Energy's proposed qualifying facility comply with both Rule 25-17.0832, F.A.C. and the standard offer contract with Florida Power Corporation in light of its currently proposed size?

** FPC: No. Rule 25-17.0832(3)(a) and the Panda standard offer contract, which expressly incorporates the rule, unambiguously limit the availability of standard offer contracts to "small cogeneration facilities less than 75 MW." Panda's claim that the 75 MW limitation applies the contract's Committed Capacity is contrary to the rule's plain language and prior Commission decision.

Argument

A straight-forward reading of Rule 25-17.0832, F.A.C., makes it abundantly clear that Panda's proposed 115 MW facility is not in compliance with the limitation imposed by the rule on the size of a qualifying facility serving a standard offer contract. Subsection (3)(a) of the rule requires that "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 . . . ." Likewise, subsection (3)(c) of the rule provides: "In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts . . . may accept any utility's standard offer contract." Since Panda's proposed facility is more than 50% larger than 75 MW, it does not comply with the Commission's rules governing standard offer contracts, and hence the standard offer contract cannot be used by Panda to sell the facility's capacity and energy to Florida Power.

In contrast, Panda says nothing about the rule's 75 MW limitation; its direct and rebuttal conspicuously avoids even a reference to the rule, much less an attempt to reconcile its position with the rule's 75 MW limitation. On cross examination, Panda's witnesses offered only that the rule's reference to "qualifying facilities less than 75 MW" was somehow synonymous with a committed capacity less than 75 MW. Tr. 266-70, 341-42. On the other hand, one of Panda's witnesses testified that the term "qualifying facilities," as used in the rule, was also synonymous with "projects" and that the size of the Panda project was 115 MW. Tr. 268. Another Panda witness, after reading the reporting requirement in Rule 25-17.0832(1)(b)2 regarding "the amount of committed capacity specified in the contract, the size of the facility and the type of facility," agreed that committed capacity and the size of the facility are two separate and distinct terms in the rules. Tr. 344.

If there were any doubt that the clear language of the 75 MW limitation refers to the size of the facility and not to the amount of committed capacity, the Commission's decision in *Polk Power Partners*[1] eliminated it. In that case, Polk wanted to sell capacity from a qualifying facility with a capacity greater than 75 MW via a standard offer contract with a committed capacity of less than 75 MW. Though it acknowledged the 75 MW limitation in Rule 25-17.0832(3)(a), "Polk theorize[d] an ambiguity as to whether the 75 MW cap speaks to the <u>total net generating capacity</u>

of the QF, ... or the <u>committed capacity</u> which the qualifying facility has contractually committed to deliver on a firm basis to the purchasing utility."

[1] Order No. PSC-92-0683-DS-EQ, issued July 21, 1992 in Docket No. 920556-EQ. (Exhibit No. 1 (RDD-7).)

Order, p. 1 (emphasis in original). The Commission found that there was no "authentic ambiguity" when the matter was view in the context of standard offer rule, noting also the language in Rule 25-17.0832(2) aimed at "preserving the standard offer for small qualifying facilities as described in subsection (3)." The Commission went on to find that:

> All of the language in both rule sections relating the 75 MW cap to the goal of preserving the standard offer for small qualifying facilities would be rendered nugatory by the declaratory statement petitioned for by Polk. Order, p. 2 (emphasis in original).

The Commission concluded by stating that "the 75 MW cap referenced in Rule 25-17.0832(3)(a) refers to the total net generating capacity of the QF." Order, p. 2. The Commission's ruling in *Polk Power Partners* is directly applicable to, and dispositive of, this issue in the instant case.

While it is clear from the plain language of the rule and the Commission's *Polk Power Partners* decision that the 75 MW limitation applies to the size of the facility and that Panda's revised facility greatly exceeds that limitation, Panda, as noted above, has not offered any reconciliation of its position with the Commission's rules. Instead, Panda speaks only of its obligations under the standard offer contract, and even with this artificially narrow focus, conveniently ignores the fact that these rules are expressly made a part of the contract and are attached to it as an appendix. The essence of Panda's argument is that in order to satisfy it committed capacity obligations under the standard offer contract it needed to design a facility substantially larger than 75 MW. This argument is both misplaced and contradicted by Panda's own actions.

To begin with, whether or not Panda *needs* to build a facility larger than 75 MW is irrelevant to the question of whether the Commission's rule limits standard

offer contracts to facilities less than 75 MW. If Panda believed it needed to build a facility larger than 75 MW, the Commission's rules provide for negotiated contracts to accommodate such facilities. Conversely, if Panda wanted to utilize a standard offer contract and believed that it could not deliver a committed capacity of 74.9 MW from a facility that satisfies the rule's size limitation, Panda should have selected a lower committed capacity. In either event, the choice was Panda's and it should not now be allowed to have it both ways.

Moreover, it is apparent that Panda itself believed it could build a facility that would satisfy both its contractual capacity commitment and the rule's size limitation. In its Notice of Self-Certification filed with the Federal Energy Regulatory Commission on October 7, 1991 (Exhibit 1 (RDD-1)), Panda stated that "The Facility will have an estimated net maximum capacity at design conditions of 74.9 MW." Then, in April 1994, after Panda had enlarged its facility by 40 MW supposedly because the additional capacity was needed to satisfy its commitment to Florida Power, Panda submitted a proposal to the City of Lakeland offering to sell 35 MW of capacity and energy from the Kathleen facility for a period of 30 years. Exhibit 1 (RDD-13) and Exhibit 26. Panda's contention that this formal proposal, developed by an internal task force (*see,* Exhibits 25 and 27), and copied to three Panda officers, was unauthorized strains credibility. Despite the seriousness of this outstanding rouge proposal, Panda had taken no action to rescind it a month later when the City of Lakeland responded by rejecting the proposal as uneconomical. Tr. 273-74, 367-68; Exhibit 28. Panda's actions in attempting to sell its additional capacity strongly supports Florida Power's contention that Panda enlarged its facility to enhance the

economics of the project rather than to meet its capacity commitment under the standard offer contract. Tr. 417.

In addition, the standard offer contract itself provides several features that enable a QF to satisfy its capacity commitment without the need to substantially oversize the facility, contrary to Panda's contention that the facility must be sized to deliver the committed capacity under the worst conditions. The first is Section 7.2, which allows Panda to decrease its committed capacity by 10%, or down to approximately 67.4 MW, within the first year after the facility's in-service date. In fact, if Panda had originally selected a committed capacity of about 68.1 MW, it would have had the flexibility to adjust its committed capacity anywhere from 74.9 MW to 61.3 MW. Tr. 417-18.

Section 7.4 provides a significant measure of flexibility to Panda in satisfying its committed capacity obligations, thus obviating the need to oversize a facility in the manner proposed by Panda. This section allows Panda a full 60 days to demonstrate the ability to meet its committed capacity after notification by Florida Power. This gives Panda the opportunity to perform maintenance needed to restore or enhance the unit's efficiency and to avoid extreme weather conditions. Tr. 418. For example, Mr. Dietz claims the facility's size needs to be increased by 15% to 19% to allow for the possibility that Panda will have demonstrate its committed capacity at a time when the temperature is 102° F, which he says is the hottest day ever recorded in Lakeland. Tr. 309-10. Since Section 7.4 gives Panda 60 days demonstrate its committed capacity, it seems unlikely that a temperature of 102° will be sustained for two months. Tr. 419.

Section 7.5 allows Panda to reduce its committed capacity during a force majeure event for up to 24 months and to permanently reduce its committed

capacity within three months after a force majeure event. The flexibility provided by this section, in combination with that provided by Sections 7.2 and 7.4, eliminates the need for the kind of ultra-conservative design assumptions used by Panda in attempting to justify its oversized facility. Tr. 419.

In fact, except for a potential unrecoverable performance degradation of about 2% or 3% over the life of the facility, all of the factors identified by Mr. Dietz in calculating his overall degradation of 27% to 31% are unnecessary. The installation of inlet air chillers would enable Panda's facility to operate at design ambient conditions during extreme temperatures, thus eliminating entirely the need for Mr. Dietz's 15% to 19% ambient temperature adjustment. All but one of Florida Power's other combined cycle QFs utilize this performance enhancing equipment. The flexibility provided by the 60-day notice period in Section 7.4 of the contract effectively eliminates the need for Mr. Dietz's "maintenance-recoverable" and "operationally-recoverable" degradation adjustments. His adjustment for parasitic load (*i.e.*, the load required to operate the plant's auxiliary equipment) is unnecessary because this load is already subtracted in determining the facility's *net* generating capacity. Likewise, Mr. Dietz's adjustment for transmission losses can be eliminated by purchasing these losses from the wheeling utility, the City of Lakeland or interconnecting directly with Florida Power. Tr. 419-20.

Practical evidence that these theoretical degradation adjustments are unnecessary is found in the fact that none of Florida Power's other similarly situated QFs (combined cycle facilities with comparable committed capacity obligations) have designed their facilities with a "margin of error" even close to 53% level used by Panda. In fact, two of these facilities, Polk Power Partners

(Mulberry) and Orlando Cogen, both of which utilize equipment nearly identical to Panda's proposed configuration, each have a capacity commitment that is almost the same as the facility's net generating capacity. Tr. 420. When coupled with Panda's attempt to sell the capacity that it claims is necessary to serve the standard offer contract and the absence of similar oversizing by other comparable QFs, Panda's use of unrealistic design assumptions can be seen as an after-the-fact attempt to justify its oversized facility that was actually selected by Panda to enhance the economic viability of the project. Tr. 417.

Based on a series of questions to Mr. Dolan on cross examination (Tr. 67-73), it appears that Panda attaches some significance to the fact that several standard offer contracts are currently being served by facilities greater than 75 MW, by implication suggesting that the application of the 75 MW limitation to Panda's facility would be inconsistent or unfair. In fact, the opposite is true. All of the standard offer contracts referenced in Panda's cross-examination of Mr. Dolan and in the orders attached to its request for official recognition were entered into before 1990, when the Commission modified its standard offer rules by adopting the 75 MW limitation (Tr. 177-78). Prior to then, there was no restriction on the size of facilities serving standard offer contracts. Panda's standard offer contract, on the other hand, was entered into in 1991, after the Commission had established the goal of preserving the standard offer for small qualifying facilities and adopted the 75 MW limitation as a means to further that goal. It is clear, therefore, that the Commission's rules have been consistently applied to standard offer contracts, both to pre-1990 contracts when no size limitation existed and post-1990 contracts subject to the 75 MW limitation. Allowing Panda to circumvent this limitation would be unfair to the other QF

developers, such as Polk Power Partners, who have had to utilize negotiated contracts to sell the capacity of their larger facilities in order to comply with the revised rule.

One final point concerns the somewhat novel situation regarding the positions taken on this issue. For the reasons described above, Florida Power believes that the size of Panda's proposed facility is clearly contrary to the Commission's standard offer rules. Panda has not addressed the applicability of the Commission's rules to its facility at all. Staff's preliminary position states that the size of Panda's facility complies with the standard offer rules, but does not articulate any theory on which that preliminary conclusion is based. As a result, the record discloses no basis for an application of the Commission's standard offer rules that leads to a conclusion other than Florida Power's and, thus, none that Florida Power can respond to in this pleading. However, based on conversations with Staff counsel (disclosed to Panda) regarding this dilemma, Staff may be of the belief, preliminarily, that the rationale for the Commission's goal of preserving the standard offer for small qualifying facilities is no longer applicable in today's cogeneration market, that the Commission's *Polk Power Partners* decision was based on facts materially different than those presented here and should not be controlling, and that the Commission's standard offer rules should therefore be interpreted in a manner that would allow Panda's proposed facility.

While this may or may not accurately reflect Staff's view, Florida Power submits that the Commission's rules may not be interpreted in a manner inconsistent with their plain, unambiguous meaning. *Woodley v. Department of Health & Rehabilitative Services, 505 So. 2d 676 (Fla. 1st DCA 1987)* (when the agency's construction clearly contradicts the unambiguous language of the rule,

the construction is clearly erroneous and cannot stand); *Legal Environmental Assistance Foundation v. Board of County Commissioners, 642 So. 2d 1081 (Fla. 1994).* As described above, *Polk Power Partners* established that the 75 MW limitation unambiguously refers to the size of the facility, not to committed capacity. This true irrespective of whatever factual distinctions may exist between that case and the instant one. The rule cannot mean "facility" under one set of facts and mean "committed capacity" under another.

Polk Power Partners is significant in another respect that is also independent of factual distinctions. It identified the goal behind the adoption of the 75 MW limitation, *i.e.*, the preservation of the standard offer to small qualifying facilities. If Staff, or ultimately, the Commission believes that current policy considerations no longer support this goal, the proper course of action would be to initiate rulemaking to change the goal and the various rule provisions intended to implement the goal, for prospective application.

ISSUE 2: Does Rule 25-17.0832(3)(e)(6), F.A.C. and the standard offer contract require Florida Power Corporation to make firm capacity payments for the life of the avoided unit (20 years) or the term of the standard offer contract (30 years)?

** FPC: Rule 25-17.0832(3)(e)(6) and the Panda standard offer contract, which expressly incorporates the rule, limit the delivery of firm capacity under a standard offer contract to a maximum period of time equal to the life of the avoided unit, which the Panda standard offer contract specifies as 20 years.

Argument

Commission Rule 25-17.0832(3)(e)6, in conjunction with Schedule 2 to Appendix C of the Panda standard offer contract (Exhibit 1 (RDD-4)), dictates the period of time during which firm capacity and energy can be delivered under the contract. The rule specifies both the minimum and the maximum time periods for delivery of firm capacity and energy. After establishing that the minimum period for such delivery shall be 10 years, the rule goes on to state:

> 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. (emphasis added).

In Docket No. 910004-EU, the Commission approved a plant life for Florida Power's avoided unit of 20 years. Consistent with that approval, Schedule 2 of Appendix C to the Panda standard offer contract expressly provides that the economic plant life of the avoided unit is 20 years. In addition, the schedule of capacity payments contained in Schedule 3 of Appendix C to the contract is defined only through 2016, a 20-year period; there is no agreement as to the price to be paid for capacity that applies after the twentieth year. Therefore, under Rule 25-17.0832(3)(e)6 and under the standard offer contract entered into pursuant thereto, the maximum period of time for the delivery of firm capacity and energy under the Panda standard offer contract is 20 years and the payments to be made are those set forth in Schedule 2 and 3 of Appendix C.

On the other hand, Panda contends that it is entitled to capacity payments through "March, 2025," because (i) it filled that date in a blank for the contract's expiration date in the standard offer contract form, and (ii) because it alleges Florida Power agreed to do so after entering into the Panda contract. On that

basis, Panda takes the position that Florida Power is obligated to make capacity payments in some amount unspecified in the standard offer contract for a period in excess of 8 years after the year 2016.

As with the issue of facility size, Panda's position on the duration of capacity payments under the standard offer contract is fundamentally flawed because it fails to take into account the Commission's rules on this point. Specifically, none of the Panda witnesses even mention, much less attempt to reconcile their position with, the restriction in Rule 25-17.0832(3)(e)6 that limits the maximum period for the delivery of firm capacity and energy to the life of the avoided unit, which in the case of the Panda standard offer contract is 20 years. Rule 25-17.082(3)(e)6 controls the duration of capacity payments under a standard offer contract, and the parties to such a contract have no authority to alter those restrictions. Thus, the assertions of Panda in this regard, even if they were true, are simply not germane to the issue. For two reasons, Florida Power could not have agreed to make capacity payments to Panda beyond 20 years.

In the first place, Section 27.4 of the contract expressly provides that:

> The Parties' representatives designated above shall have full authority to act for their respective principals in all technical matters relating to the performance of this Agreement. However, they shall not have the authority to amend, modify, or waive any provision of this Agreement. (Emphasis added.)

In the second place, representatives of Panda and Florida Power clearly have no authority to modify or waive the application of the Commission's rules regarding maximum period for capacity payments, or the limitation on the size of a facility.

Moreover, Florida Power has not engaged in any conduct subsequent to acceptance of the standard offer proposal submitted by Panda that has modified or even been intended to modify the contract on this issue. Tr. 53, 423. Indeed,

several times between 1991 and now, Panda has suggested various proposed contract modifications on this subject, and Florida Power has never accepted any one of them, much less sought permission from the Commission to accept any one of Panda's proposals. Tr. 53.

ISSUE 3: If it is determined that Florida Power Corporation is required to make firm capacity payments to Panda Energy pursuant to the standard offer contract for 30 years, what are the price terms for that capacity?

** FPC: If Florida Power were required to make capacity payments for the full term of the standard offer contract, the value of deferral calculation should be redone, in accordance with the Commission's rules, using an economic life equal to the term of the capacity payments.

Argument

If the Commission were to determine that capacity payments to Panda should be made for the full term of the standard offer contract, it would be necessary rectify the discrepancy between the limitation on the duration of capacity payments in Rule 25-17.0832(3)(e)6 and the 20-year life of the avoided unit. The appropriate way to accomplish this would be to recalculate the value of deferring the avoided unit in accordance with the formula set forth in Rule 25-17.0832(5)(a), using a value for the economic life of the avoided unit (the variable "L") equal to the duration of the capacity payments. Tr. 173-75, 425. This recalculation is shown on sheet 1 of Exhibit 21.

In contrast, Panda would simply continue to escalate the level of capacity payments calculated for the original 20-year avoided unit over the remaining term

of contract. Panda argues that, under the value of deferral methodology, payments could be continued after the life of the original avoided unit to defer "an infinite series of capacity additions" (Tr. 513) and that it is consistent with this methodology for Panda's payments to extend for 30 years, thus deferring the original avoided unit and 10 years of the next avoided (Tr. 516-17). However, Panda's argument overlooks two important points.

First, whether or not 30 years of capacity payment for a 20-year avoided unit is consistent with value of deferral theory, it clearly is not consistent with the limitation on the duration capacity payments imposed by Rule 25-17.0832(3)(e)6. Second, the payments made for deferral of the second avoided unit would be based on the assumption that its cost characteristics are identical to the original avoided unit. Tr. 55, 532. In practical effect, this would force Florida Power to make planning decisions for the second avoided unit nearly 20 years before they would otherwise have been made, thus depriving Florida Power and its ratepayers of the opportunity to take advantage of technological advances and related cost reductions that occur in the interim. Tr. 55. Sheet 2 of Exhibit 21 illustrates that generation cost reductions experience over the short time since the Panda contract was entered into would save Florida Power's ratepayers over $11 million (present value) in payments beyond year 20 under the contract, compared to Panda's value of deferral approach. Tr. 176-77.

ISSUE 4: Should the Commission grant Panda Energy's request to extend the milestone dates in its standard offer contract?

** FPC: No. Panda failed to carry its burden of proving that Florida Power was the sole reason Panda failed to meet its milestones, while Florida

Power, citing Panda's own documents, presented uncontroverted testimony that Panda's failure to obtain financing and thereby meet its milestones was a direct result of Panda's own actions.

Argument

In its Motion for Declaratory Statement and Other Relief, Panda sought "relief from the deadlines or milestones in the Contract and other adjustments to the extent necessary to allow for, and keep Panda whole after, the delays caused by FPC's Petition." Panda's Motion for Declaratory Statement and Other Relief, p. 2, Submitted for Filing March 14, 1995. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. *Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981). See* also *Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977).* The proponent of the issue in an administrative proceeding is required to prove its case by a preponderance of the evidence. *American Insurance Association v. Department of Insurance, 518 So.2d 1342 (Fla. 1st DCA 1987).* Therefore, as to the milestone issue, Panda has the burden of establishing by a preponderance of the evidence the need for extending the standard offer contract milestone dates. To do so, Panda must demonstrate that it would have met its milestone dates but for the action of Florida Power in initiating this proceeding.

The sum total of Panda's evidence on this issue is found on pages 35-37 of Ralph Killian's testimony. Tr. 248-250. Mr. Killian testifies that Florida Power's actions had brought Panda's financing of the Panda Kathleen facility to a halt, Tr. 248; that ABB Power Generation had begun engineering and material procurement to meet the required delivery dates, Tr. 248; that efforts were well

under way to obtain financing and an equity partner for the project, Tr. 248; that, because there was no immediate financing available, Florida Power's actions forced Panda to cancel its order for combustion and steam turbine generators and Panda was also forced out of the queue for the manufacture of the turbines and other major components of its facility, Tr. 249; and, that Panda's ability to meet the construction start date and the in-service date were jeopardized "solely as a result of Florida Power's actions in attempting to disown the contract, Tr. 250. Mr. Killian attached no documents to support these statements, and there was no testimony by any other witness to support Mr. Killian's allegations.

Mr. Brian Morrison, an expert in financing the development of qualifying facilities, appeared on behalf of Florida Power. Relying on Panda's own documents, Mr. Morrison testified that Panda's failure to meet its milestone dates was not solely the result of Florida Power's actions but was rather the result of numerous factors present in the development and financing of Panda's project. Tr. 449-450. Mr. Morrison testified that lenders were aware before Florida Power filed its Petition for Declaratory Statement of the questions of whether Florida Power would be required to purchase power in excess of 74.9 MW under the standard offer contract and whether Florida Power would have to make capacity payments to Panda after 20 years under the contract. Tr. 449-450, 452-453, Exhibit 32 (BAM-5, 6, 23, 24, 25, and 27). He further testified that the concerns expressed by the prospective lenders would have been sufficient to interfere with financing for the project. Tr. 453. Mr. Morrison also testified that, contrary to Mr. Killian's unsupported testimony that efforts were well under way to obtain an equity partner for the project, in fact, just two days before Florida Power filed its Petition in this docket, Panda's equity partner dropped out

of the project. Tr. 457, 461, 485-490, Exhibit No. 32 (BAM-26). Finally, Mr. Morrison testified that there was substantial evidence that Panda would not be likely to obtain financing for its project. Tr. 455-459; Exhibit 32 (BAM-19, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36).

Florida Power asserts that Panda has failed to carry its burden of proving by a preponderance of the evidence that this Commission should unilaterally extend the milestone dates on the Florida Power-Panda standard offer contract. As can be seen, apart from the unsupported, uncorroborated testimony of Ralph Killian, there is no evidence in the record to support an extension of the milestone dates.

Moreover, considering the testimony of Mr. Morrison, the greater weight of evidence supports the conclusion that Panda would not have met its milestone dates, irrespective of the initiation of this proceeding, due to its own internal financial issues compounded by its own actions in respect to the project. It was Panda that chose to change its project from a facility that produced a net capacity of less than 75 MW to one that produced in excess of 115 MW. It was then Panda which, although confronted with the regulatory questions by its own lenders, chose not to seek an answer from the Commission. Then, even though the questions from the lenders persisted, chose to turn Florida Power's Petition for Declaratory Statement into an evidentiary proceeding and has attempted at every turn to stop or delay the resolution of the questions legitimately raised by Florida Power with respect to the contract. It is Panda's own actions and its inherent financial problems which are the sole cause for Panda to fail to meet its milestone dates. Panda should not now be rewarded with an extension of the contract milestones.

ISSUE 5: If the Commission grants Panda Energy's request to extend the contractual milestone dates, how long should these dates be extended?

** FPC: The contractual milestone dates should be extended by no more than one year. Financing and turbine manufacture can proceed simultaneously and can be done in one year. No change should be made to the one-year interval between the Construction Commencement date and the Commercial In-Service date.

Argument

The Panda standard offer contract set the Construction Commencement date for April 1, 1994, and the Commercial In-Service Status date for April 1, 1995. Exhibit No. 1 (RDD-4). On May 3, 1993, Panda and Florida Power amended the contract to provide that the Commercial In-Service Status date would be changed to January 1, 1997. The letter agreement further provided that Florida Power would allow a corresponding delay of the Construction Commencement date, thereby changing that date to January 1, 1996. Exhibit No. 23 (RK-15); Tr. 250. It is undisputed that Panda failed to meet the Construction Commencement Date of January 1, 1996.

Florida Power asserts that, if the Commission determines that the milestone dates should be extended, Panda should not be put in a better position than it was on January 25, 1995, the date Florida Power filed its Petition for Declaratory Statement (Petition). On that date, there were 340 days remaining until the Construction Commencement date of January 1, 1996. Panda had signed an Engineering Procurement and Construction (EPC) contract with Walsh Construction, whereby Walsh had done some preliminary engineering on the project and had identified the equipment and the slots in the factory. Tr. 552. Panda did not have financing arranged. Lenders were still conducting due diligence. Exhibit No. 32 (BAM-20, 21, 22, 23, 24, 25, 26, and 27); Tr. 473-74.

Furthermore, contrary to the assertions of Ralph Killian that efforts were well under way to obtain an equity partner for the project (Tr. 248), the unrefuted evidence shows that on January 23, 1995, two days *before* this proceeding was initiated, Panda lost its anticipated equity partner. Exhibit No. 32 (BAM-26); Tr. 451, 463, 485-90.

To put Panda in the position it was in on January 24, 1995, the Commission should set the Construction Commencement date one year from the date of the final order in this proceeding. By Panda's own testimony it will only take "12 months to get in line for the equipment and get it manufactured and delivered to the site." Tr. 550-51. Even if the manufacture of the turbines could not begin immediately, the contract does not require that the turbines be delivered to the site and installed in the facility on the Construction Commencement date. The Construction Commencement date is defined in the contract as "the date on which work on the concrete foundation for the turbine generator begins and substantial construction activity at the Facility site thereafter continues." Exhibit No. 1 (RDD-4). Therefore, the manufacture of the turbines does not have to be completed prior to the Construction Commencement date.

Turning to the financing, Panda testified that it would need 6 months to arrange financing. Mr. Morrison, who has developed and/or implemented financing for over 40 power projects, including 16 cogeneration projects (Tr. 447), testified that financing typically can be arranged in 90 to 120 days, 180 days at the outside. Tr. 503-04. However, Panda will not be starting from scratch. Panda has already tried numerous methods of financing, and dealt with numerous lenders. Tr. 455-57, 462-63, 495-97. Furthermore, while this docket has been proceeding, Panda has continued to search for equity financing. Tr. 499-500. Therefore, it is likely that, if Panda will be able to arrange financing at all, it will be able to do it in the 90 to 120-day range.

A one-year time schedule would require Panda to work on financing for the project simultaneously with work on manufacture of the turbines. However, Panda was doing this before Florida Power filed its Petition for Declaratory Statement commencing this proceeding. Tr. 553. Panda asserts that the periods for financing and for manufacture of the turbines should run consecutively, thereby allowing Panda 18 months (Tr. 548), six months for financing and 12 months for the manufacture of the turbines. Florida Power responds that with all of the previous work described above on financing and turbine manufacture, an 18-month period is unreasonably long. The Commission should allow no longer than 12 months from the date of the final order in this docket to the Construction Commencement date.

Besides the extension of the Construction Commencement date, Panda also testified at the hearing that it wanted 18 months from the Construction Commencement date for the facility to "go on line." Tr. 551-52. As written today, the contract provides that the facility shall achieve Commercial In-Service Status 12 months from the Construction Commencement date. Therefore, under Panda's request, the Commercial In-Service Status date would be extended by an additional six months, thereby allowing Panda 18 months to construct the facility.

This request illustrates the extent to which Panda is attempting to have the Commission modify the terms of the contract to Panda's benefit. Panda did not present any testimony as to why it would need six months more to construct the facility than the contract allowed. Furthermore, Panda did not even assert that the request for the additional six months to construct the facility was based on any matter related to the actions of Florida Power in this proceeding, or any other aspect of this proceeding. It was simply an unsupported attempt to obtain more time than it had previously agreed it would need to construct the facility. Florida Power asserts that there is no evidence

in the record to support any increase of the period from the Construction Commencement date to the Commercial In-Service Status date. Therefore, Panda's request should be denied and the Commission should set the Commercial In-Service Status date one year after the Construction Commencement date.

ISSUE 6: If Panda Energy's qualifying facility commences commercial operation after the contractual in-service date, how should the applicable capacity and energy rates be determined?

** FPC: The contractually specified capacity payments should be escalated for the period between the contract in-service date and the actual in-service date using the current inflation rate.

Argument

The failure of Panda to meet the contract in-service date would be a material breach of the contract which the Commission should not attempt to cure. However, if an adjustment were to be made, capacity payments specified in Schedule 3, Appendix C of the standard offer contract (Exhibit 1 (RDD-4)) should be escalated for the period between the contract in-service date and the actual in-service date using the *current* inflation rate. Tr. 173-74.

Respectfully submitted,

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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 Submitted for filing: March 29, 1996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Posthearing Statement has been furnished to David L. Ross, Esq., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131 and Martha Carter Brown, Division of Legal Services, Florida Public Service Commission, 2450 Shumard Oak Blvd., Tallahassee, Florida 32399-0892, by regular U.S. Mail this 29th day of March, 1996.

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