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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

CASE NO. 950110-EI

In re: Petition for Declaratory Statement Regarding Eligibility for Standard Offer Contract and Payment Thereunder by Florida Power Corporation,

CONCLUSIONS OF LAW

Panda-Kathleen L.P. ("Panda") hereby submits its proposed conclusions of law to the Florida Public Service Commission ("Commission") in the above-captioned docket.

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

1. The contract between the parties contains no express limitation on the size of the plant to be constructed by Panda. Rather, the contract specifically limits only the amount of Committed Capacity that Florida Power is obligated to purchase from Panda to 74.9 megawatts. Ex. 30 at ¶ 7.1. This is the only size limitation contained in the contract. The contract expressly limits the amount of Committed Capacity that may be contracted for, and provides that "[t]he availability of this Agreement is subject to...the Facility having a Committed Capacity which is less than 75,000 KW." Ex. 30 at ¶ 2.1.2. Thus, the express terms of the contract permit Panda's proposed plant.

2. It is a black letter rule of contract interpretation that express terms of a contract cannot be ignored, and must be given their plain meaning. Bingemann v. Bingemann, 551 So.2d 1228, 1231-32 (Fla. 1st DCA 1989), rev. denied 560 So.2d 232 (Fla. 1990). Similarly, express terms of a contract cannot be ignored, and any contradictory terms in a contract must be read so as to reconcile

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their meanings. See Florida Power Corp. v. City of Tallahassee, 18 So.2d 671 (Fla. 1944). The plain meaning of the contract allows Panda to build construct its proposed plant.

3. PURPA and the case law prohibit Florida Power from seeking a retroactive application of the Commission's Rules to declare a previously approved contract to be "no longer available" to Panda despite the express language of the contract. See e.g., Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 44 F.2d 1178 (3d Cir), cert. denied 116 S.Ct. 68 (1995). The Commission has previously ruled in In re Pasco Cogen Limited, Order Granting Motion To Dismiss, Docket No. 940771-EQ (2/15/95) that it does not have jurisdiction to interpret or revisit negotiated contracts. In the present case, the standard offer contract at issue was substantially based on, and is substantially similar to, the negotiated contract. A revisitation of the prior approvals of the contract not only violates the letter and spirit of PURPA, but is simply unfair to Panda.

4. Even if it were necessary for the Commission to revisit the prior approval of the contract, our recent decision's support Panda's position. In at least three separate cases, the Commission has allowed a QF to service a standard offer contract from a plant which is larger (in net generating capacity) than the committed capacity of that standard offer contract. In Order No. PSC-94-1306-FOF-EQ (10/24/94), In Re: Joint Petition for Approval of Standard Offer Contracts of Florida Power Corporation and Auburndale Power Partners, Limited Partnership, Order Approving Contract Modifications ("Auburndale I"); Order No. PSC-95-1041-AS-EQ (8/21/95), In Re: Joint

Petition for Expedited Approval of Settlement Agreement by Auburndale Power Partners, Limited Partnership and Florida Power Corporation, Notice of Proposed Agency Action Order Approving Settlement Agreement ("Auburndale II"); and Order No. 94-0197-DS-EQ (2/16/94), In Re: Polk Power Partners L.P., Order Granting Petition For Declaratory Statement In The Negative, the Commission allowed facilities larger than 75 megawatts to utilize a standard offer contract, and accept capacity payments under such contract for no more than 75 megawatts, yet generate and sell more than 75 megawatts. The rule put forth in these Commission interpretations of Rule 25-17.0832(3) is simple -- no cogeneration facility may hold more than **one** standard offer contract.

5. The Commission's final order in the Polk Power Partners I is not controlling in this case, because it does not fully describe the issue with which the Commission was presented. The Petition in Polk Power Partners I, dated May 28, 1992, shows that the petitioner there was seeking approval to service multiple standard offer contracts from a single facility, and thereby collect full capacity payments under each such contract for far more than 75 megawatts. Permitting such "stacking" of standard offer contracts would have defeated the purpose of the standard offer rule -- to encourage small QFs, with limited ability to negotiate with utilities, to build cogeneration plants.

6. Even if the contract could be read to create any uncertainty or ambiguity regarding the size of the plant permitted by the contract, the course of performance supports Panda's interpretation. If a contract is ambiguous, the course of

performance by parties to a contract illustrates their intent and interpretation. Blackhawk Heating & Plumbing Co. v. Date Lease Fin. Corp., 302 So.2d 404, 407 (Fla. 1974); Oakwood Hills Co. v. Horacio Toledo, Inc., 599 So.2d 1374 (Fla. 3d DCA 1992). In addition, an ambiguous term in a contract should be interpreted against the drafter (in this case, Florida Power). Capital City Bank v. Hilson, 51 So. 853, 855 (Fla. 1910). These longstanding rules of contract construction weigh in favor of Panda, and any ambiguity must be resolved in Panda's favor. Both parties proceeded for two years on the understanding that Panda was not limited to a 75 megawatt plant, and Florida Power's tardy protestations to the contrary are attributable to an internal corporate strategy to find ways to escape from cogeneration contracts.

7. The actions of Florida Power also constitute a waiver and estoppel against their tardy objections to Panda's proposed plant. Florida Power both encouraged Panda and permitted Panda to proceed for two years to design its plant in a way that would generate in excess of 75 megawatts. Florida Power never voiced any objection to this Commission when it twice sought approval of this contract, whose plain meaning did not limit Panda to generating only 75 MW, and when it knew that Panda's initial plant design generated in excess of 75 MW at ISO conditions. Florida Power therefore has waived and is estopped from any objection to Panda's plant size.

8. A waiver is the intentional relinquishment of a known right and may be express or implied. Thomas N. Carlton Estate v. Keller, 52 So.2d 131 (Fla.1951); Continental Real Estate Equities, Inc. v. Rich Man Poor Man, Inc., 458 So.2d 798 (Fla. 2d DCA 1984);

Fireman's Fund Ins. Co. v. Vogel, 195 So.2d 20 (Fla. 2d DCA 1967). A party may waive any rights to which he or she is legally entitled, by actions or conduct warranting an inference that a known right has been relinquished. Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945); Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So.2d 294 (Fla. 3d DCA 1989); McNeal v. Marco Bay Assoc., 492 So.2d 778 (Fla. 2d DCA), rev. denied, 500 So.2d 544 (Fla.1986); Singer v. Singer, 442 So.2d 1020 (Fla. 3d DCA 1983). In this case, Florida Power did not avail itself of an opportunity to object to the size of Panda's facility when it requested that the Commission approve the contract on two occasions. Florida Power's actions were thus an irrevocable waiver of any objections it may have had.

9. Florida Power's actions also constitute an estoppel against any objections to Panda's plant, insofar as Florida Power made material representations to Panda and the Commission regarding its willingness to allow Panda to build a larger plant, and Panda relied on Florida Power's actions to its detriment. See Appalachian, Inc. v. Olson, 468 So.2d 266, 269 (Fla. 2d DCA 1985)("The doctrine of estoppel is a creature of equity and governed by equitable principles. It is applied against wrongdoers and not against victims of wrong"); Greenhut Construction Co. v. Henry Knott, Inc., 247 so.2d 517 (Fla. 1st DCA 1971).

Issue II - 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 or the term of the standard offer contract?

10. The contract clearly and unambiguously defines the length and nature of the parties' duties to perform:

> The term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of March 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement.

Ex. 30 at ¶ 4.1.

11. Pursuant to the contract,**"the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement"**. See Ex. 30 at ¶ 7.1.; (T. 171, L. 9-14 (Dolan)). As compensation for the provision of Committed Capacity, **"the Company agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement.** Ex. 30 at ¶ 6.1. Based on these simple and clear obligations, Panda is entitled to capacity payments for the entire period in which it provides firm committed capacity to Florida Power. The contract is not ambiguous in this regard.

12. The prior approval of the contract by the Commission at Florida Power's request, on two separate occasions, operates as a waiver and/or estoppel against Florida Power making arguments that the contract does not meet the Commission's Rules. Florida Power expressly represented to the Commission that the Panda contract was for thirty years, and Florida Power requested Commission approval to enter into the contract. (T. 225, L. 1-9 (Killian);(Ex. 8). The Commission approved the contract on that basis, and Florida Power cannot seek to revisit that approval to the detriment of Panda some

four years later. See Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945;) Appalachian, Inc. v. Olson, 468 So.2d 266, 269 (Fla. 2d DCA 1985). Florida Power is essentially arguing that the Commission should not have approved a thirty year contract obligating both parties to the **purchase** and **sale** of committed capacity for thirty years because of those Rules. The time to make such an argument, if ever, was when Florida Power petitioned this Commission for permission to reject all but Panda's standard offer contract. Since this Commission has already approved this contract twice, PURPA preemption prohibits Florida Power from now asking the Commission to remove its approval of such a contract.

13. Even if there is any ambiguity in this agreement as to the length of Florida Power's obligation to make capacity payments by virtue of the contract's reference to Rule 25-17.0832, that ambiguity must be resolved against Florida Power under the same principles of contract interpretation referred to above. Florida Power acknowledged its obligation to make thirty years of capacity payments to Panda prior to its 1994 change of position. It drafted the contract. Thus, the ambiguity, if any, must be resolved against Florida Power.

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, what are the price terms of that capacity.

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?

14. The calculation of payments for years 21 through 30 of the contract requires an application of the terms and formulas contained

in the contract. The value of deferral method contained in the contract and in the Commission's rules provides that the capacity payments for year 20 of the contract should be escalated by 5.1 percent to derive the year 21 payments, and that this procedure should be used for each year until year 30. All other payments shall be made at the rates provided for under the contract.

ISSUE 4 - Should the Commission grant Panda Energy's request to extend the milestone dates in the Contract?

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

15. The contract provides certain milestone dates for the inception and operation of Panda's plant. Since Panda's inability to complete its opportunity to meet the milestone dates is attributable to Florida Power, an extension of the dates is appropriate. Therefore, the dates are extended as follows -- (a) the commencement date is extended until 18 months after this Commission's final order in this docket; and (b) the in-service date is extended until 18 months after the commencement date.

Respectfully submitted,

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