ORIGINAL

Florida Power
CORPORATION

JAMES A. McGEE
SENIOR COUNSEL

February 6, 1998

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 Response of Florida Power Corporation in Opposition to Panda's Motion for Extension of Contract Performance Dates.

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

ACK ✓
AFA
APP
CAF
CMU
CTR
EAG
LEG 2
LIN 5
OPC
RCH
SEC 1
WAS
OTH

JAM/kp
Enclosures
cc: Parties of Record

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

MAIL ROOM
98 FEB -9 AM 11:00

DOCUMENT NUMBER-DATE
02034 FEB-9 98
FPSC-RECORDS/REPORTING

GENERAL OFFICE
3201 Thirty-fourth Street South • Post Office Box 14042 • St. Petersburg, Florida 33733-4042 • (813) 866-5184 • Fax: (813) 866-4931
A Florida Progress Company

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding eligibility for Standard Offer contract and payment thereunder by Florida Power Corporation.	Docket No. 950110-EI Submitted for filing: February 9, 1998

RESPONSE OF FLORIDA POWER CORPORATION IN OPPOSITION TO PANDA'S MOTION FOR EXTENSION OF CONTRACT PERFORMANCE DATES

Florida Power Corporation ("FPC"), pursuant to Rule 25-22.037, F.A.C., and Order No. PSC-98-0120-PCO-EI, hereby responds in opposition to the Motion for Extension of Contract Performance Dates filed by Panda-Kathleen, L.P. ("Panda") on January 6, 1998, and states as follows:

INTRODUCTION

In January, 1998, Panda made its fourth request to extend the construction commencement and commercial operation dates under its 1991 Standard Offer Contract (the "Contract"), with FPC. Panda asserts that the situation which it faced during the Commission's proceedings -- "an inability to secure financing and equipment" -- "continued to exist until the Supreme Court finally determined the controversy on November 13, 1997." Motion, pp. 1-2. Panda now asks for an additional twelve (12) months to commence construction "from the date of the new PSC order" and an additional eighteen (18) months to complete construction.[1/] (Id.).

[1/] All emphasis is supplied unless otherwise noted.

Simply put, Panda does not intend to start building its cogeneration facility until the middle of 1999, at the earliest. Therefore, commercial operation will be postponed until some time after the year 2000. Panda, as a result, calls upon FPC to wait until at least 2001 for the firm capacity and energy that Panda originally promised to deliver to FPC in April, 1995. Contract, Art. IV, § 4.2. FPC cannot and does not agree to a new extension of the contractual milestone dates that would further delay Panda's performance of its contractual obligations and thereby deprive FPC of the full benefit of its bargain under the Contract, which was for the delivery of power beginning in 1995. [2/]

Although nominally styled a simple Motion for Extension of Contract Performance Dates, Panda's Motion instead constitutes a unilateral attempt to modify the Contract, for its benefit without any concomitant benefit to FPC. The Commission does not have the power to reform the parties' Contract over FPC's objection. See, e.g., United Telephone Co. of Florida v. Public Service Comm'n, 496 So. 2d 116 (Fla. 1986). Accordingly, the Commission must deny the requested relief.

Even if FPC consented to the proposed modification -- which it does not -- the Commission would be obligated to disapprove any modification that does not comply with the Commission's Rule regarding modifications to existing contracts. Under that Rule, a requested modification must be shown to benefit the "general body of ratepayers" after an evaluation of the modification "against the existing Contract." Rule 25-17.0836(5),(6). FPC's ratepayers will not be benefitted by the proposed modification, thus, the rule is not satisfied.

[2/] It bears emphasis that neither party has performed under the Contract. Therefore, if the Motion is denied -- as FPC urges -- the parties' positions remain unchanged and both parties can be excused from performance of the Contract.

In any case, the Commission could and should not approve any modification to the timing of and amount of capacity payments to Panda, as Panda has urged in the past. This is so because FPC cannot pay -- and the Commission cannot award -- Panda firm capacity payments in excess of FPC's avoided unit cost without violating the Public Utilities Regulatory Policy Act ("PURPA"), Section 366.051, Fla. Stat., and this Commission's own rules implementing PURPA.

Accordingly, Panda's request for a modification of the Contract should be denied. At a minimum, any further extension of Panda's milestone obligations under the Contract should not result in a windfall to Panda and a penalty to FPC of capacity payments greater than the cost of the avoided unit. The Contract payments for firm capacity and energy must in all events remain the same as FPC agreed to pay and be limited to the life of the avoided unit.

ARGUMENT

I. Because FPC has not -- and cannot -- receive the full benefit of its bargain under the Contract, FPC must oppose further delays in Panda's performance.

At Panda's request, FPC agreed in 1993 to an amendment (later approved by the Commission), extending the Contract performance dates to January 1, 1996 for construction commencement and January 1, 1997 for commercial operation. However, Panda failed to meet those extended dates because Panda disputed the permissible capacity of the facility and duration of the capacity payments under the Contract -- disputes that were resolved in FPC's favor by this Commission and the Florida Supreme Court. Order No. PSC-96-0671-FOF-EI; Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 323 (Fla. 1997).

FPC sought declaratory relief from the Commission on those disputes only because Panda, who had raised the disputes in the first place, refused to seek a

resolution of them by the Commission. Any delay resulting from the Commission proceeding was, as this Commission recognized, certainly "contributed to" by Panda. Order No. PSC-96-0671-FOF-EI. Nevertheless, the Commission again extended the Contract performance dates in its May 1996 Order clarifying the Contract, giving Panda until July 1, 1997 to start construction and July 1, 1998 to begin operation of the facility.

Panda waited until July 1, 1997 -- the day Panda was supposed to start construction -- to seek another amendment of those dates from the Commission.[3/] Panda is no longer content with the extension of time Panda asked for in its third and still pending request for an extension of the Contract performance dates. Panda wants a "new" and different Order, one which would further delay its performance under the Contract.

But, the fact is, when Panda failed to commence construction on July 1, 1997, without obtaining another extension of time, Panda breached the Contract. FPC, as a result, has the right to declare Panda in default and terminate the Contract. Contract, Art. IV, § 4.2; Art. XV, §§ 15.1 and 15.2. FPC continues to have that right under the Contract since Panda remains in breach of its Contract obligations.

Given the pendency of Panda's request for relief from the Commission, FPC has not exercised its right to terminate the Contract for Panda's breach. However, FPC submits it cannot be called upon to hold in abeyance any further its contractual

---

[3/] Panda first sought an "emergency" stay of the Contract performance dates from the Florida Supreme Court five days before it was supposed to begin construction. The Court denied Panda's request without prejudice to Panda's seeking relief from the Commission. Thereafter, Panda purportedly sought a "stay" from the Commission pending its appeal. In fact, Panda actually asked the Commission to affirmatively amend its Order, so that the 18-month extension of the Contract performance dates requested by Panda would run from the date of the Commission's Order, not the existing Contract performance dates. Of course, the Commission's Order provided an extension of the milestone dates from the existing Contract dates.

rights, and Panda, in turn, should not be given delay rights it did not bargain for under the Contract. In the absence of any agreement between FPC and Panda regarding amended Contract dates, Panda has sought the extraordinary relief of unilateral amendments of the Contract performance dates from this Commission, rather than rely on the provisions of its Contract that deal with delays in its performance.

Panda has not declared a force majeure event under the Contract, as Panda had the right to do. If construction commencement or completion were delayed by an event that was beyond Panda's control and was neither reasonably foreseeable nor caused by Panda's negligence, Panda was entitled to declare a force majeure, excusing its performance for the duration of the event up to a maximum of sixty (60) days. Contract, Art. IV, § 4.2; Art. I, § 1.18. If there were additional force majeure events, the "maximum extension" of construction commencement and/or commercial in-service "in no event [was to] exceed a total of one hundred and eighty (180) days, irrespective of the nature or number of Force Majeure Events declared by" Panda. Contract, Art. IV, § 4.2.

As can be seen, the parties expressly contemplated unforeseen delays in meeting the construction milestones under the Contract, and they agreed that FPC was not obligated to perform its obligations under the Contract if 180 days passed after the occurrence of the event that delayed construction commencement or completion without the contractual milestones being met. In that event, FPC had the right to terminate the Contract, without regard to the fault of either party.

Under any scenario, the delays in commencement of construction that Panda has obtained have far exceeded what was contemplated by the parties. At this late date, FPC cannot possibly receive what it bargained for under its Contract and, for

that reason alone, FPC (and its ratepayers) would be prejudiced by any further delays in Panda's performance under the Contract.

As the Contract and Commission's Order of approval make clear, FPC bargained for firm capacity and energy to replace an avoided combustion turbine unit in its Contract with Panda -- a unit that was scheduled to commence operation on January 1, 1997 and complete operation in 2016. Contract, App. C. If Panda's Motion is granted, however, Panda will not provide FPC with firm capacity and energy for at least the first four years that the avoided unit would have operated. But FPC and Panda had agreed -- and this Commission had approved -- a maximum delay of only six months in the delivery of firm capacity and energy to FPC under the Contract due to force majeure events.

FPC and its ratepayers would accordingly be prejudiced by any new extension of the Contract milestone dates, because they could not then receive the full benefit of their rights under the Contract. Panda is attempting to force this modification on FPC without providing FPC any additional consideration and without FPC's assent. See Wilson v. Odom, 215 So. 2d 37, 39 (Fla. 1st DCA 1968) (reversing denial of specific performance of option to purchase land where refusal to proceed without modification violated the "fundamental principle of law that modification of a contract must be supported by consideration" and "cannot be made by one party without the assent of the other party"); United Contractors, Inc. v. United Constr. Corp., 187 So. 2d 695, 702 (Fla. 2d DCA 1966) (Court refused to permit modification to contract between seller and buyer by seller and seller's lender that "constituted a complete impairment of [buyer's] property right" in the equipment purchased under the Contract because "one party to a contract cannot alter its terms without the assent of the other" party).

The Commission may not properly order such relief. It is well settled that the Commission derives its power solely from the legislature. United Telephone Co., 496 So. 2d at 118. While Section 366.051, Fla. Stat., grants the Commission the authority to establish guidelines for the purchase of power by public utilities from cogenerators it does not give the Commission the power to alter the contractual relationship between the utility and a cogenerator once they enter into a contract for the purchase of power under the Commission's guidelines. The Commission, accordingly, cannot interfere with the Contract by granting Panda a modification of the Contract performance dates over FPC's objection. United Telephone Co., 496 So. 2d at 118 (where legislature "was silent on the Commission's power (or lack thereof) to modify contracts between telephone companies" there was no basis for the Commission's action, quashing orders which interfered with companies' contractual relationship).

II. Panda's proposed modification of the Contract performance dates does not satisfy the requirements of the Commission's own Rule and, if granted, would impose an obligation on FPC that, as a matter of law, FPC cannot satisfy.

Even if the Commission were inclined to grant Panda's request to modify the Contract performance dates, Panda should not in that event get a better deal in price than was bargained for by the parties. Panda should not be made better off -- and FPC and its ratepayers worse off -- because of Panda's delays in commencing and completing construction of its facility. In particular, FPC and its ratepayers should not be required to make higher payments for a term longer than the life of the avoided unit.

Rather, at the very least, any new extension of the milestone dates must be consistent with the other terms and conditions of the Contract. The Commission's

own Rule with respect to the modification of existing contracts requires that result. Likewise, the law requires the Commission and the parties to abide by the avoided cost principles under the Commission's Rules, which were expressly made a part of the Contract. FPC should be obligated to pay only for the remaining plant life of the avoided unit that it would receive, at the rates set forth in the Contract.

A. Under Rule 25-17.0836 the Commission must approve, consistent with the evaluation required by the Rule, any modification that changes the timing of capacity payments or the amount of capacity payments.

Rule 25-17.0836 governs modifications to existing contracts. It provides that Commission approval is required for any modification that affects the overall efficiency, cost-effectiveness, or nature of the project.[4/] Examples are changes to "the timing of capacity payments or amount of capacity payments." Rule 25-17.0836.

Even if the milestone dates are again changed by the Commission, it should not modify the Contract to alter the timing and amount of capacity payments. In particular, no modification should be made to the Contract either (i) to increase the year-by-year capacity payments in the Contract or (ii) to extend the Contract beyond the life of the avoided unit, i.e. 2016, by adding yearly capacity payments to the existing Contract schedules. For example, the Commission should not compress the existing 20-year capacity payment stream in the Contract schedules into the remaining sixteen years of the avoided unit's anticipated plant life.

In either case, Panda would be paid more for its firm capacity than was agreed to under the Contract and more than avoided cost. The Commission cannot grant

---

[4/] Under the Rule, Commission approval is required for a modification "[i]n order for a utility to recover its costs." Rule 25-17.0836(2), F.A.C. The costs of the Contract are recoverable from FPC's ratepayers. Order No. 24989. Hence, a modification of this Contract is covered by Rule 25-17.0836(2), F.A.C.

Panda that relief without violating its own Rule with respect to the modification of existing contracts and, further, without requiring FPC to violate PURPA and the law implementing PURPA in Florida by paying more than the cost of the avoided unit.

This Commission recently made that exact point: "[I]n evaluating contract modifications, 'avoided cost' becomes the existing contract," and, as a result, "modifications which result in costs above the existing contract are not appropriate for approval." Order No. PSC-97-1437-FOF-EQ, pp. 8, 14.[5/] See also Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey, 44 F. 3d 1178, 1194 (3d Cir. 1994) (once commission approved a cogeneration contract on the grounds that the rates were consistent with avoided cost, it could not reconsider those rates). For an extension of the Contract performance dates to remain consistent with that law, then, the firm capacity payments under the Contract must remain unaffected by the extension.

1. The Florida Supreme Court in its decision affirming the Commission's Order clarifying the Contract made clear that the utility may in no event pay more than the avoided cost under the Contract.

PURPA, Section 366.051, Fla. Stat., and the Commission's Rules with respect to cogeneration -- most recently construed by the Florida Supreme Court in Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997) -- make clear that payments to Panda under the Contract are limited to the cost of the avoided unit as represented by the "rates, terms and other conditions" for that unit under the Contract. Rule 25-17.0832(4)(b).

[5/] In re: Petition for expedited approval of settlement agreement with Lake Cogen, Ltd., by Florida Power Corp., Docket No. 961477-EQ, Order No. PSC-97-1437-FOF-EQ, November 14, 1997.

In Panda, the Florida Supreme Court affirmed the Commission's Order clarifying the Contract with respect to the issues Panda raised on appeal. One of those issues involved Panda's claim that it was entitled to capacity payments over thirty years because Panda had typed in a termination date of thirty, rather than twenty, years from the in-service date. This Commission held that Rule 25-17.0832(4)(e)6 "clearly states that the economic plant life controls the term of capacity payments." Order No. PSC-96-0671-FOF-EQ. The Commission found that the "economic plant life of FPC's avoided unit is 20 years." (Id.). The Commission concluded that the duration of capacity payments under the Contract was accordingly twenty, not thirty, years.

The Florida Supreme Court concurred with the Commission's view, holding that the Commission's "decision conformed to the intent of PURPA and the Commission's Rules." Further, the Court emphasized "that if the Commission had not resolved the conflict created by the Commission's approval of a contract term conflicting with the Commission's rule as to avoided cost," i.e., Rule 25-17.0832(4)(e)6, "then the Contract would have violated PURPA and Section 366.051, Florida Statutes." Panda, 701 So. 2d at 328.

For the same reason, the Commission cannot approve of a change in the rates or the term of the firm capacity payments under the Contract. One of the very Rules before the Court in Panda would be violated if that were done. Rule 25-17.0832(4)(e)6 conclusively sets the period in which Panda must provide and FPC must pay for firm capacity at the anticipated plant life of the avoided unit. Rule 25-17.0832(4)(b) further establishes that the rates under the Contract are the avoided unit's rates set under Rule 25-17.0832(4)(g)1 on a year-by-year basis.

As such, the rates and term of the capacity payments are fixed. Any alteration of them by the Commission's amendment of the Contract is, as the Florida Supreme Court recognized in Panda, an alteration of, or deviation from, avoided cost, in violation of the law. See also Order No. PSC-97-1437-FOF-EQ.

2. It is impossible for FPC to pay more than avoided cost under the law; therefore, FPC, under Florida law, is discharged from its obligation to perform.

If a further extension of Panda's Contract performance dates were accompanied by a requirement that FPC make payments that depart from the rates and terms for payment under the Contract, FPC would find it impossible to perform under the Contract without violating the law. Under Florida law, impossibility of performance occurs "where the purposes, for which the contract was made, have, on one side become impossible to perform." Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc., 174 So. 2d 614, 617 (Fla. 2d DCA 1965).

When performance is impracticable without violating the law, the contract's purpose is impossible to perform. See Moon v. Wilson, 130 So 25 (Fla. 1930) ("[i]f one contracts absolutely and unqualifiedly to do something possible to be done, he must make his promise good unless his performance will be rendered actually impossible by an Act of God, the law, or the other party"). See also Restatement of Contracts (Second), §§ 261, 264. In that event, a party will not be required to break the law and risk the consequences; rather, that party will be discharged from further performance of the obligation. Id. See also Crown Ice, 174 So. 2d at 616-17 (Senter Farms was excused from its obligation to purchase all the ice it needed for its packing operations from Crown Ice because it was impossible for Crown Ice to supply the quality and quantity of ice bargained for under the contract). FPC,

therefore, would be discharged from performance of contractual obligations that are in violation of the law.

B. When evaluated against the existing Contract, any modification to the Contract affecting the timing and amount of capacity payments does not benefit the ratepayers.

Rule 25-17.0836 requires the Commission to evaluate the proposed modification against "the existing contract."[6/] The purpose is to demonstrate "any benefits to the general body of ratepayers" as a result of the modification. Rule 25-17.0836(5),(6). See also Order No. PSC-97-1437-FOF-EQ. Manifestly, any requirement of payments at rates and for periods of time other than payments at the rates and over the remaining period of time in the Contract result in no benefit to FPC's general body of ratepayers.

1. Any extension of the Contract performance dates that has the effect of extending capacity payments beyond the life of the avoided unit is inconsistent with the Contract and the Commission's Rules.

Under the Contract, FPC is required to pay Panda only for the firm capacity and energy that Panda actually delivers to FPC. Contract, Art. VI. Panda does not get to select when it will deliver firm capacity and energy to FPC and when it will not, thereby controlling when it is paid for that firm capacity and energy. Rather, Rule 25-17.0832(4)(e)6 establishes the beginning and end date for such payments. Rule 25-17.0832(4)(e)6; Contract, Art. I, §§ 1.1, 1.5 (making a part of the Contract Rules 25-17.080 through 25-17.091).

[6/] The Rule also requires the Commission to evaluate the proposed modification against "the current value of the purchasing utility's avoided cost." Rule 25-17.0836(6), F.A.C. However, because any modification to the Contract performance dates that yields capacity payments different from the capacity payments under the Contract will not "benefit the general body of ratepayers," an evaluation based on FPC's current avoided cost does not need to be undertaken by the Commission.

The firm capacity and energy payments "commenc[e] with the anticipated in-service date of the avoided unit" and are "equal to the anticipated plant life of the avoided unit." (Id.). The anticipated in-service date for the avoided unit under the Contract is January 1, 1997 and the anticipated plant life is twenty years. Contract, App. C. See also Panda-Kathleen, 701 So. 2d at 328. Therefore, the firm capacity and energy payments under the Contract commence on January 1, 1997 and end in the year 2016, the end of the life of the avoided unit.

It follows that the Contract performance dates cannot be extended in a manner that results in Panda receiving firm capacity and energy payments beyond the year 2016 for an avoided unit that does not exist at that time. Thus, if the capacity payments are extended beyond the year 2016, such that the rates are escalated after 2016 as if the unit had a longer plant life, the firm capacity payments would no longer equal the avoided cost of the avoided unit under the Contract.

Significantly, Panda's expert essentially urged this very scenario in the 1996 hearing and the Commission rejected it. Panda's expert asserted that FPC's avoided unit was merely the first in a stream of avoided units, and therefore the value of deferral methodology did not limit the capacity payments under the Contract. The Commission dismissed this argument because it assumed the existence of subsequent avoided units "of the same type" and "with the same cost" and, hence, "inappropriately" tied FPC to "a planning decision" for a second avoided unit ahead of time. Order No. PSC-96-0671-FOF-EI.

The point is, FPC, not Panda, has the responsibility to serve its ratepayers and, accordingly, FPC must have the ability to plan how it intends to meet that responsibility when additional generation is needed by its ratepayers. Had FPC planned to construct a unit similar to the unit avoided by the Contract in 1997, and

been delayed significantly beyond that year for reasons beyond FPC's control, FPC might have planned differently to meet its ratepayers' needs. For example, it might not have built the unit at all. Panda, which has no obligation to serve, certainly cannot force upon FPC and its ratepayers a similar, but still different, avoided unit through an extension of the capacity payments to a different or later period of time. Again, FPC would be inappropriately bound to a planning decision for a second unit before FPC planned another avoided unit.

2. Any extension of the Contract performance dates that has the effect of altering the capacity payment rate in each remaining year under the Contract would be inconsistent with the Contract and, accordingly, the Commission's Rules.

FPC cannot be required to make capacity payments to Panda at rates different from the yearly capacity payment rates set forth in the Contract because the capacity payment rates under the Contract cannot be increased without exceeding the unit's avoided cost. If, for example, Panda were allowed, as a result of an extension of the Contract performance dates, to receive the 20-year capacity payment stream in the remaining sixteen years under the Contract, the compression of the 20-year capacity payment stream into a shorter period of time would necessarily increase the year-to-year capacity payment rates and, hence, increase the capacity payments under the Contract. But the "rates" of payment are also "equal to" the avoided cost of avoiding construction of the 1997 combustion turbine unit. Rule 25-17.0832(4)(b). Indeed, the capacity payments must "equal" the "value of a year-to-year deferral of the avoided unit." Rule 25-17.0832(4)(g)1. Consequently, any modification of the Contract that compressed the capacity payment stream under the Contract into a shorter period of time, with the resulting increase in the year-to-year capacity rates, would necessarily exceed avoided cost.

Likewise, if the capacity payments were extended beyond 2016, the capacity payment rates, as a result of the "annual escalation of plant cost" of 5.1% in Appendix C to the Contract, would be higher than the year-by-year value of deferral during the 20-year life of the avoided unit. The economic plant life of the avoided unit -- which, under the Commission's rules, controls the term of the capacity payments -- would end in 2016. There is no avoided unit after December 2016 on which to base the required year-by-year value of deferral of avoided costs to determine capacity payments. Rule 25-17.0832(4)(g). To require capacity payments after 2016 would, therefore, violate the avoided unit cost concept and result in an impermissible windfall to Panda.

Indeed, if that were the case, the longer commercial operation is delayed, the better off Panda will be. The capacity payment rates, if they were extended under the Contract beyond the anticipated plant life of the avoided unit, would increase each year by the annual escalation of plant cost of 5.1%. In 2017, one year after the avoided unit under the Contract ceases operation, the capacity payment rate would be 5.1% higher than the last year of the avoided unit's operation. In 2018, the payment rate would be 5.1% higher than the rate in 2017 and so on. If Panda were able to push the capacity payments beyond the avoided unit's plant life, Panda would receive progressively higher capacity payments, even though the avoided unit no longer exists. That result should not be countenanced by the Commission.[7/]

[7/] Notably, the projected escalation rate of 5.1% under the Contract also exceeds the current inflation rate for plant costs. The windfall to Panda becomes manifest when the required comparison is made between the existing capacity payment stream under the Contract and a capacity payment stream using the current inflation rate for plant costs: the latter capacity payment stream is much lower than the avoided cost for the 1997 combustion turbine under the Contract, to the detriment of FPC's ratepayers. That detriment to FPC's ratepayers would be exacerbated if the capacity payments were extended beyond twenty years, or there was an increase in the capacity (continued...)

It is important to note that Panda may not now rely on the Commission's statement in its earlier Order that Panda is entitled to a 20-year capacity payment stream with a net present value of approximately $71 million in 1996. To begin with, that statement was conditioned on Panda's meeting the extended Contract performance dates and commencing construction by July 1, 1997 -- which Panda did not do. Instead, Panda now seeks new, affirmative relief from the Commission, and the Commission should condition any grant of such relief upon terms that will not benefit Panda, to the detriment of FPC and its ratepayers, and upon terms that are consistent with PURPA and the Commission's rules under PURPA. Panda-Kathleen, 701 So. 2d at 328; Order No. PSC-97-1437-FOF-EQ.

Moreover, the Commission could not have intended by that statement a result at variance with the Contract and the requirements of PURPA. Indeed, the Commission clearly intended the revised capacity payment stream to be consistent with the avoided cost stream in the Contract, reasoning that "[t]his net present value equals that of the payment stream contained in Appendix C, Schedule 3 of the" Contract. But, in actual fact, the net present value calculation does not equal the payment stream under the Contract. Instead, it exceeds the capacity payments contained in Appendix C to the Contract. As a result, if the annual escalation of plant cost rate from the net present value calculation is used instead of the Contract rate, Panda receives yet another windfall, to the tune of an overpayment above the capacity cost of the avoided unit of approximately $300,000 per year. Panda thereby benefits greatly by its delay in performance.

---

[7]/(...continued)
payment rate in each remaining year under the Contract, and Panda, as a result, received higher capacity payments than agreed to under the Contract. The Commission should not approve a Contract modification creating that adverse result for the ratepayers.

Manifestly, the Commission did not -- and could not -- intend that FPC should pay more than the avoided cost represented by the Contract payments. To prevent such a result from occurring with respect to Panda's new request for affirmative relief, the Commission has the authority and the obligation to see that any new relief granted Panda does not violate the avoided cost principles laid out in the Commission's rules and orders and confirmed by the Florida Supreme Court in its Panda decision. Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 337 (Fla. 1966) (recognizing the Commission's inherent power to reconsider orders still under its control as a result of any change in circumstance or any demonstrated public need or interest); Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So. 2d 249, 253 (Fla. 1982) (holding that the Commission has the inherent power to amend its orders to protect the customer).

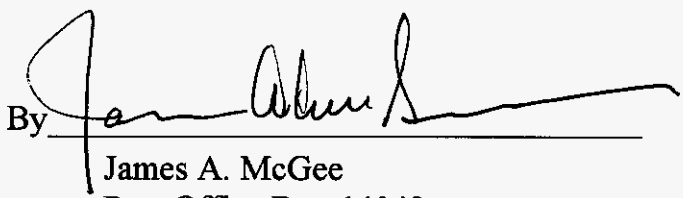
In granting the last extension of time for Panda to commence and complete construction of its facility, the Commission concluded that "neither party should be helped or harmed" because of the delays occasioned at that time by the need to resolve the disputes under the Contract. Order No. PSC-96-0671-FOF-EI. If granted, Panda's current Motion would certainly "help" Panda and "harm" FPC by denying FPC the full benefit of its bargain and other rights under a Contract that exceeds FPC's current avoided cost. Order No. PSC-97-1437-FOF-EQ, pp. 8, 14 (ruling that "in evaluating contract modifications, `avoided cost' becomes the existing contract," and "modifications which result in costs above the existing contract are not appropriate for approval"); Freehold Cogeneration Associates, 44 F. 3d at 1193 (accepting cogenerator's argument that revisiting the rates under its Contract to change them as a result of changed circumstances deprived the cogenerator of the benefits of the bargain under the contract and PURPA).

CONCLUSION

Panda's Motion for Extension of Contract Performance Dates -- requesting another modification to Panda's Contract with FPC -- should be denied for the reasons provided above. Alternatively, and at a minimum, any further modification to the Contract extending those dates should not result in a windfall to Panda and a penalty to FPC of firm capacity payments greater than the cost of the avoided unit. Rather, the contract payments for firm capacity and energy must in all events remain the same as FPC agreed to pay at the rates for, and for the life of, the avoided unit under the Contract.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By 

James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Response in Opposition to Panda's Motion for Extension of Contract Performance Dates has been furnished to David L. Ross, Esq., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami Florida 33131 and Richard Bellak, Esq., Associate General Counsel, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0892, by express delivery this 6th day of February, 1998.

Attorney