

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
ORDER NO. PSC-98-0596-FOF-EI
ISSUED: April 27, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING PANDA-KATHLEEN, L.P.'S MOTION FOR EXTENSION OF
CONTRACT PERFORMANCE DATES

BY THE COMMISSION:

On November 25, 1991, Panda-Kathleen, L.P. (Panda), executed
a Standard Offer Contract with Florida Power Corporation (FPC).
The contract was designed to avoid a unit with an in-service date
of January 1, 1997. The contract was approved by Order No. PSC-92-
1202-FOF-EQ, issued October 22, 1992, in Docket No. 911142-EQ.

By Order No. PSC-96-0671-FOF-EI issued May 20, 1996, in this
docket, we resolved several issues concerning provisions of the
contract. We determined that the contract was limited to 20 years
(the life of the avoided unit) and the facility was limited in size
to less than 75 megawatts. The Commission found that the
performance dates in the contract should be extended by 18 months
to account for the length of time required to resolve the dispute.

Panda appealed the Final Order to the Florida Supreme Court.
The Florida Supreme Court affirmed the Commission's Order in an
Opinion issued September 18, 1997. Panda's Motion for Rehearing
was denied on November 13, 1997.

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On January 7, 1998, Panda filed a Motion for Extension of Contract Performance Dates. In its Motion, Panda requested a 12 month extension of the construction commencement date and an additional 18 month extension of the in-service date. On February 9, 1998, FPC filed its Response of Florida Power Corporation in Opposition to Panda's Motion for Extension of Contract Performance Dates.

Panda responded to FPC's Memorandum in Opposition on February 25, 1998, in its Reply to Florida Power Corporation's Memorandum in Opposition. Commission rules do not contemplate a responsive filing such as this. We have not, therefore, considered the content in our deliberation.

FPC filed supplemental materials with the Commission on February 25, 1998, consisting of: a copy of Panda's Petition for Writ of Certiorari, which Panda filed with the United States Supreme Court on February 11, 1998; and, a letter dated February 23, 1998, from FPC to Panda stating that FPC declared Panda in default of its Standard Offer Contract for the Purchase of Firm Capacity and Energy.

Upon consideration, we find that Panda's Motion for Extension of Contract Performance Dates shall not be granted. Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI granted Panda an 18 month extension of contract performance deadlines because of the lengthy hearing process initiated by FPC's filing for a declaratory statement. FPC petitioned for a declaratory statement because neither party to the contract could agree to the unit's size or the terms by which capacity payments would be made by FPC to Panda. We granted the extension in order to keep both parties to the contract in the same position that they occupied before the commencement of the petition. The capacity payments were adjusted to reflect the revised in-service date.

Panda chose to appeal the Final Order to the Florida Supreme Court, which is its right to do. Panda did not file a Motion for Stay until July 1, 1997, the date it was to begin construction of its unit. This Motion was rendered moot by the issuance of the Court's opinion. In contract law, the general rule is that, in the absence of provisions in the contract itself, a party thereto is not excused from performing it according to its terms, where performance is possible and lawful. See, e.g., *Corpus Juris Secundum* 17A §459.

Based upon the law of contracts, it appears that Panda had a duty under the contract at issue to perform as the contract stood after the issuance of Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in Docket No. 950110-EI. Despite Panda's pursuit of its appeal to the Florida Supreme Court, it had a duty to begin performing on the contract even though it disagreed with the findings contained in the order. The appellant assumes the risk of losing on appeal, and therefore, assumes the risk of breach should it not perform while litigating.

We agree with FPC that Panda's Motion is effectively a request for a unilateral modification of contract terms. According to contract law, a unilateral modification of a contract is unlawful. Contracts must be modified with the consent of both parties and the exchange of additional consideration, which has not happened in this case. See, e.g. Wilson v. Odom, 215 So. 2d, 37, 39 (Fla. 1st DCA 1968), United Contractors, Inc. V. United Constr. Corp., 187 So. 2d 695, 702 (Fla. 2d DCA 1966). We are, likewise, unable to order unilateral modifications to contracts that we have approved unless the rates they contain are "unjust, unreasonable, unjustly discriminatory, [or] preferential" to ratepayers. United Telephone Co. of Florida v. Public Service Comm'n., 496 So. 2d 116 (Fla. 1986).

Panda has argued at every phase of this proceeding that the Commission's jurisdiction is limited by the Public Utilities Regulatory Policies Act (PURPA). For instance, Panda asserted on September 12, 1995, in its Motion to Dismiss and Motion to Stay or Abate Proceedings in this docket, that 16 U.S.C. §824a-3 (PURPA) preempts the Commission's jurisdiction over cogeneration contracts after the Commission approves such contracts. We denied this Motion in Order No. PSC-95-1590-FOF-EI.

We find that Panda's Motion should be denied because Panda has shown no basis in either statute or rule for granting an extension. Panda relies upon the extension granted it in Order No. PSC-96-0671-FOF-EI, issued May 20, 1996, in this docket, as precedent for obtaining additional extensions. The extension granted in that order, as discussed above, was to insure that neither Panda nor FPC was harmed or benefitted by the time it took to process FPC's petition for declaratory statement. In this instance, the delay was caused solely by Panda as it pursued its appeals.

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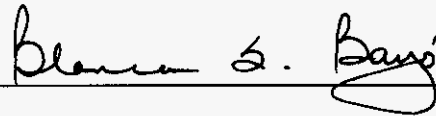
For these reasons, Panda's Motion for Extension of Contract Performance Dates is hereby denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Panda-Kathleen, L.P.'s Motion for Extension of Contract Performance Dates is denied for the reasons set forth in the body of this Order. It is further

ORDERED that this docket shall be closed if no party files a Motion for Reconsideration or Notice of Appeal of this Order.

By ORDER of the Florida Public Service Commission this 27th day of April, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

GAJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.