IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 88,280

PANDA-KATHLEEN, L.P.

Appellant,

v.

FLORIDA POWER CORPORATION and
THE FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

APPELLEE FLORIDA POWER CORPORATION'S ANSWER BRIEF ON THE MERITS

On Appeal From a Final Order Of The
Florida Public Service Commission

James A. McGee
Florida Bar No. 0150483
Jeffrey A. Froeschle
Florida Bar No. 0395935
Office of the General Counsel
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, Florida 33733
(813) 866-5786

and

Alan C. Sundberg
Florida Bar No. 079381
Sylvia H. Walbolt
Florida Bar No. 033603
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P. A.
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, Florida 33733
(813) 821-7000

Attorneys for Appellee
Florida Power Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

INTRODUCTION

The statement of the case and facts submitted by Panda-Kathleen, L.P. ("Panda") omits certain material facts, incorrectly states other material facts, and consistently sets forth the facts in the light most favorable to Panda rather than to Florida Power Corporation ("FPC"), the prevailing party. In addition, Panda incorrectly states the issues presented to and resolved by the Florida Public Service Commission ("PSC" or "Commission") in this proceeding. As the PSC expressly recognized, and contrary to Panda's repeated assertion, FPC did not ask the Commission to "'revisit'" and invalidate or modify the Contract.[1] [Order at 8, A. 8]. FPC simply asked the Commission to enforce its Rules authorizing the Standard Offer Contract at issue here and mandating its terms and conditions.

The first issue in that regard was whether Panda, after taking advantage of the PSC's Rules for a Standard Offer Contract for "a qualifying facility less than 75 MW," could subsequently and unilaterally decide to construct a facility of 115 MW -- 53% larger than the PSC's Rules specified for this Contract. The issue was not, as Panda states [Br. 4], the "amount of Dower that Panda would be obligated to provide to the utility as Committed Capacity." Rather, it was whether the 115 MW facility Panda

---

[1] The Commission's order denying Panda's motion to dismiss is included in the Appendix to this brief at Tab 8 and is referred to as the "Order." The Commission's Final Order below is included in the Appendix at Tab 9 and is referred to as the "Final Order." The transcript of the hearing is designated "T.___." Panda's initial brief is designated "Br. ___." All emphasis in this brief is supplied unless otherwise noted.

proposed to build would comply with Rule 25-17.0832 (3)(c) [A. 12], which limited this Standard Offer Contract to a "qualifying facility less than 75 MW . . . "

The second issue was whether FPC was obligated to make capacity payments in the manner specified by Rule 25-17.0832(3)(e)(6) [A. 123. That Rule required capacity payments under a Standard Offer Contract to be made for a "maximum" period of the life of the avoided unit, which the Contract specified as 20 years. Panda's Standard Offer Contract expressly incorporated this Rule, and a payment schedule was included in the Contract which specified the amount of the payments to be made during the 20-year life of this unit. Nevertheless, Panda contended that FPC was obligated to make capacity payments for an additional 10 years over and above the unit's life, at some unspecified price that is nowhere found in the PSC's Rules, the Contract, or the capacity payment schedule to the Contract.

When the issues presented to the PSC are correctly understood and the evidence is considered as a whole, it becomes clear that the Commission correctly rejected Panda's interpretation of the PSC's Rules authorizing and governing this Standard Offer Contract. As the Commission correctly found, Panda's proposed 115 MW facility was not a " qualifying facility less than 75 MW" as required under Rule 25-17.0832 (3)(c), and Panda's effort to obtain 30 years of capacity payments for an avoided unit having a life of only 20 years was simply not permissible under Rule 25-17.0832(3) (c)(6).

Furthermore, when the regulatory scheme established by 16 U.S.C. § § 823 (a), et seq. (1995), the Public Utility Regulatory Policies Act of 1978 ("PURPA") is considered as a whole, rather than in the snippets Panda cites in isolation, it becomes clear that the PSC correctly concluded that it had jurisdiction in this proceeding. Unlike the cases Panda relies on, this case does **not** involve an effort to terminate or modify a freely negotiated contract after its execution. Instead, it involves the enforcement of the PSC's Rules implementing PURPA. That is an area explicitly reserved to the states under PURPA, and the PSC was completely within that area of reserved authority when it proceeded to enforce its PURPA Rules, which were the basis for the PSC's approval of the Contract in the first instance.

STATEMENT OF THE CASE AND FACTS

1. The PURPA Regulatory Scheme.

PURPA requires utilities to purchase electricity from "qualifying facilities" ("QFs") which satisfy particular criteria, and it provides general standards regulating the price for such purchases. PURPA directed FERC to enact regulations requiring that every electric utility offer to purchase electricity made available to it from a QF. 16 U.S.C. § 824a-3(a)(1995). PURPA further directed each state regulatory authority to implement FERC's PURPA rules. 16 U.S.C. § 824a-3(f)(1)(1995).

In accordance with PURPA and FERC's rules thereunder, the Florida Legislature directed that electric utilities "shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator . . . ." § 366.051, Fla.

Stat. (1993). To ensure that this directive was carried out, the Legislature provided that "[t]he [PSC] shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators . . . ." Id.

Consistent with this state and federal statutory authority, the PSC adopted all of FERC's PTJRPA Rules and promulgated Rule 25-17.080 - 25-17.091 [A. 12], entitled "Utilities' Obligations with Regard to Cogenerators and Small Power Producers." These Rules provide "two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract, or an individually negotiated power purchase contract." Order No. PSC-95-0210-FOF-EQ, Docket No. 940771-EQ, February 15, 1995 [("Order No. 95-0210") at 9, A. 10 at D]; see also Order No. PSC-95-0209-FOF-EQ, Docket No. 940357-EQ (same) [A. 10 at C].

The Commission has emphasized that these two types of contracts are treated "very differently" under its Rules. [Order No. 95-0210 at 9, A. 10 at D]. Unlike negotiated contracts, Standard Offer Contracts are "state-controlled" contracts that utilities are required to enter into without negotiation over their terms and conditions. [Order at 5, 8; A.8]. Thus, the Commission's rules "require utilities to publish a standard offer contract in their tariffs" which must conform to the extensive guidelines set forth in the Commission's rules.[2/] [Order No. 95-

---

[2/] Because "utilities are given no choice" with respect to Standard Offer Contracts, the Commission determined there was no need for the "reg out" clause which is included in the negotiated contracts [Order at 8, A. 8], a decision this Court affirmed in Florida Power & Light Co. v. Beard, 626 So. 2d 660, 663 (Fla. 1993).

0210 at 9, A. 10 at D]. See Rules 25-17.082(1),(2) and 25-17.0832(3) [A. 12]. This provides a means by which "smaller qualifying facilities" can sell energy to utilities which have "superior bargaining power." [Order at 8, A. 8].

Hence, the difference between these two types of contracts is not, as Panda states [Br. 4], merely that one is approved by the PSC before the contract is executed and the other is approved afterwards. The Commission specifically focused on the substantive differences in these different types of contracts when it determined that it has jurisdiction to interpret and enforce its Rules controlling Standard Offer Contracts, although it does not, as a general matter, have jurisdiction to interpret negotiated contracts whose terms are not mandated by the Commission's Rules. See pages 16-17, 28-32, infra.

2. The Panda Standard Offer Contract.

Pursuant to the Commission's Order No. 24989, issued August 29, 1991 [A. 1], FPC filed a tariff for a "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW of a Solid Waste Facility." On November 25, 1991, Panda and FPC executed this Standard Offer Contract [A. 2], pursuant to PSC Rules 25-17.080 through 25-17.091 [A. 12], which were incorporated as a part of the Contract. Those Rules expressly provided that "a qualifying facility under 75 megawatts . . . may accept any utility's standard offer contract." Rule 25-17.0832(3)(c). On October 7, 1991, shortly before this Contract was executed, Panda certified to FERC that "[t]he Facility will have an estimated net maximum

capacity at design conditions of 74.9 MW."[3/] [Composite Ex. 1, RDD-1; T. 40].

Notwithstanding that certification by Panda to FERC, Panda asserts that it "made clear" to FPC "[f]rom the outset of this transaction [that] it proposed to build a facility that would generate in excess of 74.9 MW," and it points to the "initial tentative Panda design, submitted with the contract," for a facility that "could generate 85-95 MW . . . ." [Br. 73. However, as it does throughout its brief, Panda improperly equates a facility's gross generating capacity with its net generating capacity. [T. 160, 344]. Under the PSC's Rules, like the FERC's Rules, the facility's size is measured by its net generating capacity -- which Panda had certified to FERC would be less than 75 MW.

Thus, although "the equipment originally proposed by Panda would have a gross capacity of about 85 and 90 MW, the net generating capacity that the facility would actually have been capable of delivering to Florida Power would have been dependent on such additional factors as the amount of facility's parasitic load and especially the energy required by the facility's steam host." [T. 421]. Given Panda's express representations that it was proposing to construct a "75 MW gas-fired cogeneration facility" [Composite Ex. 1, RDD-3; T. 421], FPC "had no reason to believe" that Panda's net generating capacity would exceed 75 MW

[3/] Under FERC precedent, a QF's facility's size is measured by its "maximum net output," Turner Falls Limited Partnership, 53 FERC §61,075 (1990) [A. 11 at D], not its gross output.

to "any significant degree."[4] Id. That was especially the case since other QFs had "contractually committed to a capacity that is nearly identical to their facility's net generating capacity." Id,

Several years after its execution of this Standard Offer Contract for a "facility less than 75 MW, Panda decided to dramatically alter the size of the facility it proposed to build. Although Panda had certified to FERC that the facility would be less than 75 MW -- a size that qualified for the Standard Offer Contract under Rule 25-17.0832(3)(a) for "small qualifying facilities less than 75 MW" -- Panda proposed in the summer of 1994 to build a 115 MW facility -- 53 percent larger than it had certified to FERC.

In its brief, Panda states that it had informed FPC "on several occasions" [Br. 73 of its intent to build a 115 MW facility -- without ever saying when it supposedly did that -- and it asserts that FPC did not complain about this until the summer of 1994; Panda further argues that FPC raised the issue of the facility's size at that point in time because it had decided

---

[4] FPC has never disputed that Panda could build a facility that might, by its very nature, have insignificant deviations in net generating capacity over 75 MW. See Indeck-Yerkes Enersv Services, Inc. v. Public Service Com'n of State of N.Y., 564 N.Y.S. 2d 841, 843 (N.Y.A.D.3d 1991) (anticipated deviation in output "only referred to 'an inescapable imprecision with respect to the expected output of a planned facility' and not to an increase which is attributable, as here, to changes in the facility's operations 'to improve cycle efficiency and availability' . . . ."). However, as the Indeck Court held and as Panda's own former general counsel had earlier advised it (T. 196-97), a deviation greater than 10% would clearly be impermissible.

it did not want this project to go forward. [Br. 10-11]. The evidence established, however, that FPC first expressed its concerns about a 115 MW facility in the summer of 1994 because it was by letter dated June 23, 1994 that Panda notified FPC of this proposed enlargement of the facility. [Composite Ex. 1, RDD-8; T. 44-45]. Upon receiving this notice, FPC provided Panda with a copy of a recent decision of the commission confirming that, under its Rules, Standard Offer Contracts are only available to a facility smaller than 75 MW and that the facility size is determined by its net generating capacity, not the amount of capacity committed under the contract. [T. 143].

Panda disingeneously states that "[a] view of the list of Florida Power's other active cogeneration contracts" shows that other cogenerators have facilities greater than 75 MW. [Br. 10]. However, some of these "cogeneration contracts" were **not** Standard Offer Contracts, but rather negotiated contracts which were **not** subject to the PSC's Rules for Standard Offer Contracts. Moreover, all of the others were Standard Offer Contracts entered into before 1990, when the Commission modified its Standard Offer Rules by adopting the 75 MW facility size limitation. [T. 177-78]. Prior to 1990, there was no restriction on the size of facilities serving Standard Offer Contracts. Panda's Contract was entered into after the Commission had established the goal of preserving the Standard Offer Contract for small qualifying facilities and adopted the 75 MW limitation as a means to further that goal. The record is undisputed that Panda is the only QF

seeking to build a facility larger than 75 MW under a post-1990 Standard Offer Contract.

Although Panda contends that it needed to enlarge the facility to assure it would be able to satisfy its committed Capacity obligations to FPC, its contemporaneous actions show otherwise. In Panda's first notice to FPC of this proposed enlargement of the facility, Panda stated that "[t]hese machines are the most economical units that allow [Panda] to supply the committed capacity of 74.9 MW at all times." [Composite Ex. 1, RDD-8; T. 456]. Significantly, Panda's former general counsel testified that when he was asked by Panda whether the Contract permitted a unit exceeding 100 MW (which he advised Panda it did not), there was no suggestion that such a unit was required for Panda to perform the Contract. [T. 196-200]. Quite to the contrary, several units were being considered by Panda which "approximated 75 MW." Id.

Moreover, although Panda asserts that all of the additional capacity from this enlarged unit was required in order to perform its Contract with FPC, the evidence established that Panda did not intend to dedicate that capacity to FPC at all. Instead, Panda intended to sell this increased capacity to third parties. Thus, some two months before Panda advised FPC of its plan to enlarge the facility to 115 MW, it submitted a proposal to the City of Lakeland for the sale of 35 MW of capacity and energy

from this the facility.[5] [Ex. 26; T. 361]. Given Panda's effort to market to other utilities the additional capacity an enlarged facility would produce, it is apparent that this change in the size in the facility was to enhance the economics of the project, not to meet Panda's capacity commitment to FPC under the Contract. [T. 417].

In its brief, Panda repeatedly, but incorrectly, states that it is required to provide committed Capacity of 74.9 MW at "all times" and under "all conditions," and that FPC has the right "throughout the life of the contract" to require Panda to demonstrate that it is doing so. [See, e.g., Br. 53. In actual fact, Panda has an absolute contractual right to decrease its Committed Capacity by 10%, or down to 67.4 MW. (Contract ¶ 7.2, A. 2; T. 418]. Moreover, Panda only needed to operate at 90 percent of its Committed Capacity during FPC's on-peak hours to satisfy its performance obligations under the Contract, with no performance requirement during the remaining hours of the day. Panda is not required to produce 74.9 MW "at all times." [T. 1663.

Furthermore, FPC only has the right once a vear to require Panda to demonstrate full capacity, and Panda then has the right to pick any date within a 60 day period for the test. [Contract ¶ 7.4, A. 2; T. 418-419]. This gives Panda the opportunity to

---

[5] Panda contended below that this formal proposal -- which was developed by an internal task force (see Exhibits 25 and 27), and copied to three Panda officers [Ex. 26; T. 364] -- was not authorized. [T. 273, 362]. That contention was patently incredible. Indeed, Panda never withdrew this offer, which was rejected by the City a month later. [Ex. 28; T. 273-74, 367-68].

perform maintenance needed to restore or enhance the unit's efficiency and to avoid extreme weather conditions. [T. 418]. For example, Panda claimed that the facility's size needed to be increased to allow the possibility that it might have to demonstrate its Committed Capacity at a time when the temperature was 102º F, the hottest day ever recorded in Lakeland. [T. 309-___. But Section 7.4 of the Contract gives Panda 60 days demonstrate its Committed Capacity, and it is not likely that a temperature of 102º would be sustained for two solid months! [T. 419].

It is telling that none of FPC's other similarly situated QFs designed their facilities with a "margin of error" even close to 53% level used by Panda. In fact, two facilities 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. [T. 420]. When Panda's attempt to sell to others the additional capacity that it claimed was necessary to serve the Standard Offer Contract is coupled with the absence of any such oversizing by comparable QFs, it is plain that Panda's effort to enlarge this facility was nothing more than an after-the-fact attempt to enhance the economic viability of the project. [T. 417].

It must also be remembered that it was Panda itself which agreed by a Standard Offer Contract to provide Committed Capacity of 74.9 MW from a 74.9 MW facility. If Panda believed it needed to build a facility larger than 75 MW in order to make such a commitment, the Commission's Rules provided for negotiated

contracts to accommodate larger qualifying facilities. (Rule 25-17.0832(2), A. 12; T. 416]. Conversely, if Panda wanted to utilize the Standard Offer Contract for facilities less than 75 MW but believed that it could not deliver a Committed Capacity of 74.9 MW from a facility that would meet the Rule's size limitations, Panda could have selected a lower Committed Capacity. [T. 164]. Instead, it entered into a Standard Offer Contract for a "qualifying facility less than 75 MW," while undertaking at the same time to provide a Committed Capacity of 74.9 MW (which could be reduced to 67.4 MW at Panda's option) from a facility having a federally certified maximum net generating capacity of 74.9 MW.

3. The PSC Proceeding.

Upon learning of Panda's intention to build a 115 MW facility, FPC advised Panda that it did not believe this could be done under the Commission's Rules, absent PSC approval. [T. 44, 57]. Panda did not seek such approval from the Commission and instead simply raised the issue with members of the Commission's staff. [Composite Ex. 23, RK-30, 31; T. 243, 244]. A staff member later advised Panda, by letter dated August 24, 1994, that he "fore[saw] no reason why this is any type of contract change that should come before the Commission." (Composite Ex. 23, RK-30, 31; T. 243-244]. But, as the Commission observed in its Final Order, he did not "address whether the size of Panda's proposed facility would comply with Rule 25-17.0832, Florida Administrative Code, which is at issue here." [Final Order at 2, A. 9].

FPC was not copied on that letter. [T. 46]. Not knowing of the letter, FPC wrote Panda on September 8, 1994 that it would await the Commission's action on the facility size issue. [Composite Ex. 1, RDD-12; T. 46]. It was not until January, 1995 that Panda provided FPC with a copy of the letter and it became "apparent to Florida Power that Panda did not intend to seek any formal Commission ruling on this subject . . . ." [T. 46].

Since Panda was persisting in its change in plans without obtaining PSC approval, FPC filed its petition, dated January 25, 1995, seeking a declaration on two discrete issues. [R. 1-135; A. 3]. Although Panda opens its brief by characterizing those issues as "spurious" [Br. 1], Panda had itself raised those very issues with FPC, and it had sought FPC's consent to Panda's proposed modification of the Contract with respect to them. [Composite Ex. 1, RDD-9; T. 45]. In addition, one of these "spurious" issues had been independently raised with Panda by a prospective lender on the project. [Composite Ex. 32, BAM-6, Sheet 21 of 26; T. 452]. Manifestly, these were not "spurious" issues conjured up by FPC to derail this project, as Panda repeatedly urges in its brief,

The first issue raised in FPC's petition was whether Panda would comply with the "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW" if it built a 115 MW facility, as it now sought to do. FPC specifically sought this declaration in light of Rule 25-17.0832(3)(a), which was the basis upon which this Contract was authorized in the first instance and which was incorporated as a

term of the Contract. That Rule expressly limits the use of this Contract to "small qualifying facilities less than 75 MW." Thus, FPC did not simply rely on the "title" of the Contract, as Panda wrongly states [Br. 39-40]; it relied on the substantive requirements of the controlling PSC Rule that had been incorporated as an integral part of this Contract.

Secondly, FPC requested a declaration that, under Rule 25-17.0832(3)(e)(6), FPC's capacity payment obligations would terminate after 20 years, which is the life of the avoided unit specified in the Contract, instead of 30 years as urged by Panda. That Rule, which is also specifically incorporated into the Contract, provides that "[a]t 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."[6/] The Contract expressly defines the life of this avoided unit as 20 years, and it contains a 20-year capacity payment schedule. [See Contract Appendix C, Schedules 2 & 3, A. 2; T. 52].

In February, 1995, Panda petitioned the PSC for leave to intervene in the proceeding. [R. 136; A. 43. In so doing, Panda made no claim that the PSC lacked jurisdiction over FPC's Petition, nor did it move to dismiss that Petition at that time, as Panda incorrectly implies on page 1 of its brief. Id. The PSC granted Panda's request to intervene on March 6, 1995.

[6/] FPC does not dispute its obligation to purchase and pay for "as-available" energy for the entire 30 year term of the Contract.

[Order No. PSC 95-0306-PCO-EI, Docket No. 950110-EI].

Shortly thereafter, Panda filed its own "Motion for Declaratory Statement and Other Relief" [R. 154] and requested the PSC to declare that Panda's proposed 115 MW facility would comply with the Contract and that FPC would be obligated to make capacity payments for an additional 10 years over and above the life of the avoided unit. Panda also asked the PSC to modify the Contract to extend its specified milestone dates. [R. 154, 376, A. 5]. In making that motion, Panda made no assertion that the PSC lacked jurisdiction to render the relief sought therein. Id.

On June 29, 1995, following a status conference with Commission staff at which Panda expressed concern that material factual issues were in dispute, Panda filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing. [R. 376, A. 5]. Panda expressly acknowledged in that Petition that the PSC had jurisdiction over this matter, declaring that "[t]o the extent permitted by applicable law, the Commission has jurisdiction to make determinations ressectins the [Panda Standard Offer] Contract and to grant appropriate relief, consistent with that requested in earlier filinss in this docket." [Petition, ¶ 7, pp. 4-5, A. 5]. Moreover, Panda asserted that, "[u]nder its Rules 25-22.022, 25-22.025 and 25-22.035, the Commission has the right, and in these circumstances an oblisation, to convene and conduct a formal evidentiary proceeding under section 120.57(1), Florida Statues." [Petition, ¶ 7, p. 4, A. 5]. Pursuant to Panda's Petition, the PSC scheduled a hearing on these issues for February 19, 1996.

4. **Panda's** Belated Motion to Dismiss and the Order Denvins Dismissal.

On September 12, 1995, some eight months after **FPC's** Petition was filed and long after Panda had itself affirmatively invoked the **PSC's** jurisdiction to resolve this dispute, Panda filed a Motion to Stay or Abate Proceedings, Motion To Dismiss and Supporting Memorandum, asserting to the Commission for the first time that it lacked jurisdiction over the claims raised in **FPC's** petition.1 **[R.** 444, A. **6].** Specifically, Panda claimed that the relief sought from the PSC in **FPC's** petition -is preempted by Section **210(e)** of PURPA and **FERC's** Rules under PURPA. Following briefing by the parties and oral argument, the PSC denied Panda's motions by order dated December 27, 1995. [Order at 10, A. **8].**

The Commission first ruled that it has **"extensive** regulatory authority over FPC, the public utility required to purchase cogenerated power under the state-created and state-controlled standard offer **contract."** (Order at 5, A. **8].** Under the Rules the Commission adopted to implement PURPA, there are "significant " differences between standard offer contracts and negotiated contracts, and the latter are not subject to the same "extensive direction and control under the **[PSC's] rules"** as

---

1/ Panda incorrectly states that it sought its affirmative relief **"[i]n** the alternative to dismissal . . . ." **[Br. 2].** Quite to the contrary, Panda sought its affirmative relief long before it filed its motion to dismiss. Moreover, it never suggested that the PSC lacked jurisdiction over Panda's affirmative claims, including its request for the Commission to modifv the Contract's milestone dates, which claims were never withdrawn.

standard offers. (Order at 7, A. 8]. In the Commission's words, "utilities are not required to execute a negotiated contract, and they are not required to include the vast arrav of specific provisions that the standard offer rules contain." Id. The Commission went on to explain that:

> There is a valid reuulatorv purpose behind the different treatment of negotiated contracts and standard offers in our cogeneration rules, and it is entirelv consistent with federal resulation. State-controlled standard offers that a utility is required to execute encourage the development of cogeneration by relieving smaller qualifying facilities from the burden of negotiating with utilities that have greater resources and superior bargaining power. Conversely, because a utility is not free to negotiate the terms and conditions of a standard offer, it is entitled to relv upon the stabilitv and certainty of the standardized terms established and enforced by the Commission's rules, iust as the cosenerator is.

Id. at 8.

The Commission emphasized that FPC was simply asking the PSC to enforce its Rules which are a part of the Contract, not to "'revisit"' and terminate or modify the Contract., Id. It concluded that it has jurisdiction to "apply and enforce the cogeneration rules we developed to implement PURPA," id., and that "[t]he relief FPC has reuuested here does not conflict with federal regulations or subiect Panda to 'utility-type' state rate regulation." Id. at 9.

The Commission also ruled that "Panda has voluntarily submitted itself to our jurisdiction by taking substantive action in the case and requesting affirmative relief from us." Id. at 5. Noting that a claim of lack of jurisdiction over the person "must be affirmatively asserted before the party takes any substantive action in the case or the claim will be deemed

waived," the Commission determined that "Panda's own Petition for Declaratory Statement and its Petition for Formal Evidentiary Proceeding preclude it from arguing lack of jurisdiction over Panda now." Id.

5. The Evidentiary Hearing.

At the hearing, Panda contended that it had to construct a 115 MW unit in order to comply with emission standards enacted after this Contract was signed. [Br. 9]. However, Panda's own expert acknowledged that compliance with these standards would have been an issue only when the natural gas-fired facility operated on its planned backup fuel -- oil -- [T. 351], and that Panda could have selected another backup fuel -- such as propane -- that would have alleviated any compliance problems [T. 352]. Moreover, even using oil as a backup fuel, technology is admittedly available which would have allowed the original facility to satisfy those standards, and indeed, that technology is being used successfully by other Qfs. [T. 314].

Panda also argued that it was contractually obligated to provide FPC "a Committed capacity of 74.9 MW, at all times, under all conditions," and therefore needed to construct a plant with a maximum total capacity well in excess of the 74.9 MW Committed Capacity." [Br. 8]. That testimony was, however, directly contradicted by FPC's witness Robert Dolan, who explained that Panda is not required to provide 74.9 NW "at all times, under all conditions,@@ and that the Contract instead affords "a significant measure of flexibility to Panda in satisfying its committed capacity obligations," including the right to unilaterally

decrease its Committed Capacity by 10%. [T. 418-19]. In addition, Dolan refuted the design assumptions used by Panda in an effort to justify its 53% increase in the size of the facility, and he described the facilities of other QFs, each of which has a net generating capacity about equal to the contractual Committed Capacity, exactly as Panda originally planned and certified to FERC. [T. 419-20].

The parties also presented sharply conflicting testimony on the issue of FPC's capacity payment obligations. Panda states in its brief that it presented testimony that FPC had agreed in meetings after the Contract was executed that it was obligated to make capacity payments for the full 30-year term of the Contract, that the 20-year capacity payment schedule in the Contract "was an oversight that would be addressed," and that "the only issue" was what the amount of the payments would be for the last 10 years, given the absence of any agreement on that price in the Contract. [Br. 15]. However, contrary to Panda's statement that "[n]o Florida Power witness contradicted Panda's testimony," id., that testimony was contradicted by FPC's witness Dolan. [T. 51-55, 423-424]. It was also contradicted by Panda's own former general counsel, who had been present at the meetings and testified that no such agreement was ever made by FPC. [T. 192-94).

Panda also asserts that FPC did not refuse to make the additional capacity payments until 1994, some 3 years after it executed the Contract, and Panda attempts to ascribe FPC's refusal to its alleged determination at that time that it did not

want this plant to be built. [Br. 15-16]. Once again, however, Panda ignores the contradictory evidence, which establishes that FPC had expressed its "concerns" about Panda's demand for additional capacity payments as early as a January 9, 1992 "negotiating session," just a few months after the Contract's execution. [T. 199].

Panda cites at length from its expert witness' testimony opining as to the supposed requirement under the Contract for 30 years of capacity payments. [Br. 14-15]. But Panda completely ignores the witness' explicit acknowledgement [T. 513, 536] that his opinions did not take into consideration the PSC Rules, which are expressly incorporated as part of the standard Offer Contract. Those PSC Rules make it perfectly clear that capacity payments cannot be made after the 20 year life of the plant. [Composite Ex. 32, BAM-6, Sheet 21 of 26; T. 444). Panda also ignores the record evidence that, if FPC were required to make capacity payments for 30 years rather than the unit's 20 year life, it would be "forced to pay substantially more than the cost of the avoided unit that is the subject of the Panda Contract." [T. 543. That would not only be "contrary to the avoided cost pricing principles of PURPA," it also "would result in an unwarranted windfall to Panda." Id.

6. The Final Order.

The Commission entered its Final Order on May 20, 1996. [A. 9]. It weighed the conflicting evidence as the trier of fact and found that "the evidence shows that Panda could adequately serve its contract with a facility much smaller than 115 MW."

[Final Order at 2, A. 9]. It went on to find that "[t]he evidence also shows that Panda itself did not believe it needed additional capacity to serve its standard offer contract because it offered to sell an additional 35 MW of firm capacity from the facility to the City of Lakeland." Id. The PSC also construed its Rules in this regard and concluded that:

> [e]ven if Panda needed to build a larger facility, our rules do not allow it. Therefore, we hold that Panda's proposed qualifying facility does not comply with Rule 25-17.0832, Florida Administrative Code.

Id.

The PSC further ruled that, under Rule 25-17.0832 [A. 11], FPC must make capacity payments to Panda for the useful life of the avoided unit, which is 20 years. Id. If FPC were required to make such payments to Panda for 30 years:

> FPC's capacity payments would exceed the avoided cost of the unit identified in the standard offer. This is clearly in violation of both the Public Utility Resulatorv Policy Act (PURPA) and our rules for QFs, which were implemented to ensure that utilities pay no more than the avoided cost to purchase capacity and energy from qualifying facilities.

Id.

Finally, the Commission ruled that the milestone dates contained in the Standard Offer Contract would be extended, as Panda had requested, for 18 months. Id.

STANDARD OF REVIEW

> Commission orders come to the Court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." [Citations omitted]. An agency's interpretation of a statute it is charged with enforcing is entitled to great deference . . . ,

Florida Interexchange Carriers Ass'n. v. Beard, 624 So. 2d 248, 250-51 (Fla. 1993). This Court likewise pays great deference to an agency's interpretation of its own rules, and it "should not be overturned unless clearly erroneous." Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983).

This Court "will not reweigh or reevaluate the evidence presented to the commission, but will examine the record only to determine whether the order complained of meets the essential requirements of law and whether the agency had available to it competent substantial evidence to support its findings." McCaw Communications of Florida Inc., v. Clark, 1996 WL 543397 (Fla. September 26, 1996).

SUMMARY OF ARGUMENT

Panda's contention that the Commission lacked jurisdiction in this case is founded on Panda's incorrect assertion that FPC asked the Commission to "void" or "reform" this Contract. Based on that erroneous premise, Panda relies on cases where, unlike this case, a utility petitioned the state commission to modify its payment obligations under the contract or to terminate an existing contract. The Commission correctly determined that FPC did not request anv such relief in this proceeding. Rather, FPC simply sought to enforce the PSC's PURPA rules which are the basis for the PSC's approval of this Contract and are incorporated in it. That is plainly an action the PSC was permitted to take because PURPA expressly provides that QFs are not exemst from state OF rules adopted to implement PURPA.

Thus, contrary to the assertion Panda erroneously urges to this Court, neither PURPA nor the FERC rules implementing PURPA operate to exclusively occupy, and thereby preempt, the area of utility-QF relationships. PURPA, FERC's rules and orders thereunder, controlling Supreme Court precedent, and numerous decisions and orders from other states make that clear. Instead, Congress and FERC envisioned a cooperative regulatory environment in which the federal government would prescribe broad guidelines to encourage QF development, while the states would retain responsibility to implement and enforce those guidelines. So long as the state rules do not conflict with FERC's rules -- and Panda has made no assertion that the PSC's PURPA Rules conflict with FERC's rules -- the state is carrying out its legitimate and intended role in the PURPA implementation scheme. That is exactly what the PSC did here, when it enforced its PURPA Rules with respect to this Standard Offer Contract.

On their face, the PSC's PURPA Rules limit the availability of a Standard Offer Contract to a "qualifying facility less than 75 MW," and they likewise limit the utility's obligation to make capacity payments to the life of the avoided unit, which here was indisputably 20 years. The PSC construed those Rules in a manner that is fully consistent with their plain language and purpose, with prior precedent, and with the law under PURPA. Furthermore, the PSC methodically evaluated the evidence before it, and its factual findings are firmly grounded on competent substantial evidence. The Commission's decision that Panda must comply with the requirements of the PSC's Rules for Standard Offer Contracts

has not been shown by Panda to be "clearly erroneous," and it should be affirmed by this Court.

ARGUMENT

POINT ONE

THE PSC HAS JURISDICTION TO ENFORCE ITS PURPA RULES.

A. PURPA Provided For An Ongoing State Enforcement Role.

Congress enacted PURPA in an effort to encourage the development of non-traditional energy sources, and Sections 201 and 210 were specifically designed to remove certain impediments to such efforts. See FERC Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. No. 38 at 12211 (Feb. 25, 1980) ("Order No. 69") [A. 11, A]. For example, QFs faced the prospect of being regulated under state laws as an electric utility. Section 210(e)(1) dealt with this concern by permitting the FERC, in its discretion, to issue rules providing QFs with a limited exemption from certain state regulation. 16 U.S.C. § 824a-3(e)(1). Notably, however, Section 210(e)(3) explicitly prohibited any exemption of QFs from state laws or regulations issued for purposes of implementing PURPA. 16 U.S.C. § 824a-3(e)(3)(A).

In short, Congress did not provide for federal occupation of the field of QF contracts. PURPA were exempted QFs from some state regulatory burdens, but they were not exempted from all such regulation, and Congress specifically looked to both the states and the federal government to implement the objectives of

PURPA. FERC was instructed to enact regulations that would encourage QF development. 16 U.S.C. § 824a-3(a). In turn, state regulatory agencies were directed to take appropriate steps to implement PURPA and the FERC's rules. 16 U.S.C. § 824a-3(f)(1).

In enacting its PURPA rules, FERC exempted QFs only from state laws or regulations respecting "[t]he rates of electric utilities[] and . . . the financial and organizational regulation of electric utilities," 18 C.F.R. §292.602(c)(1), which is often described as the QF's exemption from "utility-type regulation." FERC's Rules expressly provided that this exemption did not apply to rules adopted by states to implement PURPA. 18 C.F.R. §292.602(c)(2). Instead, the states would retain an active role in construing and enforcing their PURPA rules, and state "oversight will be ongoing" in that regard. [Order No. 69 at 12231, A. 11 at A].

Thus, Panda's contention that the PSC's authority "ended" with its approval of this Contract [Br. 24] is plainly wrong.[8/] Although the PSC could not thereafter change the terms of that Contract or invalidate it through "utility-type regulation" -- which it was not asked to do here -- it does have jurisdiction to enforce the PSC's PURPA Rules pursuant to which the Contract was

---

[8/] In fact, Panda itself has previously acceded to the PSC's exercise of on-going jurisdiction over QF contracts, thereby recognizing that the PSC's authority does not "end" upon its approval of the contract. For example, Panda participated, without asserting any claim of lack of jurisdiction, in the PSC's proceeding approving procedures by which FPC can curtail purchases of power under existing QF contracts when required by operational constraints on FPC's system. [See Order No. PSC-95-1133-FOF-EQ, Docket 941101-EQ, A. 10 at E].

authorized in the first instance and which were expressly made a part of the Contract, That is all the PSC was asked to do here and, as its Final Order establishes, that is all it did do.

B. **Supreme** Court **Precedent** Confirms That The Commission's Enforcement Jurisdiction Over Its PURPA Rules Has Not Been **Federally Preempted.**

Any possible doubt as to the ongoing jurisdiction of state regulators to interpret their PURPA rules and to resolve controversies thereunder on a case-by-case basis was affirmatively laid to rest by the United States Supreme Court in FERC v. Mississippi, 456 U.S. 742 (1982). While noting that Congress could have opted to **"pre-empt** the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and **cogenerators,"** the Court emphasized that PURPA **"does** nothing more than pre-empt **conflicting** state enactments in the traditional **way."** Id. at 759. The Court also acknowledged that state regulators have broad discretion to determine how best to apply **FERC's** PURPA rules:

> a state commission **may** comply with the statutory **requirements** by issuing regulations, by resolvins **disputes** on a case-by-case basis, or bv takins anv other action reasonably designed to give effect to **FERC's** rules.

Id. at 751. Summing up the PURPA role of state regulators, the Court added that:

> In essence, then, the statute and the implementing regulations simply require the [State] authorities to adjudicate disputes arisins under the statute. Dispute resolution of this kind is the very type of activity **customarily** engaged in by the [State] Public Service Commission.

Id. **at 760.**

The **Mississippi** Court referred by analogy to **Testa v.** Katt, 330 U.S. 386 **(1947),** in which a federal price control statute gave jurisdiction over claims to both state and federal courts. The state courts were deemed competent to adjudicate those claims, even though they were called upon to enforce **federally-** mandated standards which had become the prevailing policy in every state. Mississippi at 760. According to the Court, **"[t]he** Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy § 210's requirements simply by opening its doors to claimants." Id. Consistent with the Court's holding in Mississippi, the PSC here simply opened **"its** doors to claimants" who sought an interpretation of the **PSC's** rules under PURPA and the mandated Standard Offer Contract which expressly incorporated those rules.

c. **FERC's** Articulated Enforcement Policy Defers Matters Arisins Under State PURPA Rules To The States.

Consistent with the Supreme Court's recognition in Mississippi that state regulatory bodies are to open their doors to adjudicate PURPA **claims,** FERC has long encouraged such bodies to take jurisdiction of such disputes. In 1983, FERC issued a policy statement in which it expressed an overtly non-preemptive view with respect to PURPA enforcement issues that might arise after the initial implementation of PURPA rules, and it specifically directed parties to initiate enforcement proceedings in **state fora,** rather than in federal regulatory and judicial **fora.** Policy Statement Regarding the Commission's Enforcement

Role Under Section 210 of the Public Utility Regulatory Policy Act of 1978, 23 FERC ¶ 61,304 (1983) (the "Policy Statement").

FERC has cited its Policy Statement more than a dozen times. See, e.g., North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Energy Services, Inc. and Arkansas Power & Light Co., 72 FERC ¶ 61,263 (Sept. 19, 1995). As recently as February, 1996, FERC adhered to that "policy of leaving the states to determine the specific parameters of individual QF contracts . . . ." Massachusetts Institute of Technology, 74 FERC ¶ 61,221, 61,750 n.11 (1996) [A. 11 at B]. The PSC's consideration of FPC's petition is completely consistent with FERC's characterization of the proper state role under PURPA.

D. The PSC Has Jurisdiction Under State Law To Interpret And Enforce Its PURPA Rules.

In accordance with PURPA and FERC's rules thereunder, the Florida Legislature directed that electric utilities "shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator . . . ." § 366.851, Fla. Stat. (1993). The Legislature further provided that "[t]he [PSC] shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators." Id. Consistent with this statutory directive, the PSC adopted relevant portions of FERC's PURPA rules, and it further promulgated Rules 25-17.080 through 25-17.091 [A. 12], providing "two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract, or an individually negotiated power purchase contract."

[Order No. 95-0210 at 8-9; A. 10 at D; Order No. PSC 95-0209-FOF-EQ, p. 258, A. 10 at C].

Panda elected to enter into a Standard Offer Contract, with the terms mandated by the PSC's PURPA's rules, rather than negotiate with FPC with respect to the terms of a purchase contract. These two types of contracts are, however, treated Very differently" under the PSC's rules [Order No. 95-0210 at 9, A. 10 at D], and Panda's contention that there is no difference between the PSC's jurisdiction over them was correctly rejected by the Commission.

As the Commission emphasized in denying Panda's motion to dismiss, Standard Offer Contracts are "state-controlled" contracts which must be filed in PSC-approved tariffs and must conform to the "extensive guidelines" set forth in the PSC's rules adopted pursuant to PURPA. [Order at 5, 8, A. 83. Those rules provide the means by which small QFs can sell energy to utilities without the need to negotiate a contract. Significantly, this Court expressly relied on the difference in these contracts when it affirmed the PSC's decision "to remove regulatory out clauses from standard offer contracts with small QFs" while allowing them in negotiated contracts. Florida Power & Lisht Co. v. Beard, 626 So. 2d 660, 663 (Fla. 1993).

Given their legal status as filed tariffs and the fact that they are "state-controlled" contracts, it is clear that the PSC has jurisdiction to construe and enforce them. The cogenerators contesting jurisdiction in Docket No. 940771-EQ specifically distinguished standard offer contracts from negotiated contracts

on this very ground, asserting that "standard offer contracts are embodied in utility tariffs over which the [PSC] is given specific jurisdiction in § 366.051, Florida Statutes." [See A. 737 at 13].

The Commission agreed that this was a critical distinction, observing that "[w]hile the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts." [Order No. 95-0209, p. 8, A. 10 at C].

As can be seen from its face, then, Panda's assertion that Order No. 95-0209 establishes that the Commission lacks jurisdiction in this proceeding [Br. 21, 28] is simply not true. That order only dealt with the PSC's jurisdiction to construe certain terms of a negotiated contract -- terms it did not mandate or purport to control. In so ruling, the PSC expressly distinguished that proceeding from one -- as here -- involving a Standard Offer Contract. As such, that order in no way supports Panda's claim here, but rather is completely consistent with the Commission's order denying Panda's motion to dismiss, as well as with its other orders asserting jurisdiction over state-controlled Standard Offer Contracts.

Indeed, this Court's own prior precedents make it clear that the legal effect of the control the PSC exercises over Standard Offer Contracts is to render them "order[s] of the Commission, binding as such upon the parties." See City Gas Co. v, Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965); Public Service Com'n v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989). Public

Service Com'n v. Fuller is of particular significance here since this Court determined there that the Commission had jurisdiction to resolve a controversy over the provisions in a territorial agreement approved by the Commission precisely because "the agreement hard1 no existence apart from the PSC order approving it . . . ." Id. at 1212.

Just as in Fuller, a Standard Offer Contract has no existence apart from the PSC order approving it. Unlike the negotiated contracts that the Commission declined to address in Order No. 95-0209, Standard Offer Contracts exist only because the PSC defines their terms, mandates that utilities must file them as tariffs for PSC approval and, once approved, requires utilities to abide by their terms with any QF that accepts them. As a result, the PSC has the authority to say what this "state-controlled" Contract means, and to enforce its own rules and orders authorizing it.

The Commission long ago declared, in words directly applicable here, that it "certainly has jurisdiction to construe its own [PURPA] [r]ules at the request of a regulated utility to which the rules apply." [PSC Order No. 14207, p. 9, Docket No. 840438-EI, issued March 21, 1985, A 10 at A]. Panda's own argument graphically illustrates that the Commission was squarely presented here with the need to construe and enforce its PURPA rules with respect to its prior approval of this Standard Offer Contract.

For example, Panda asserts that "the Commission approved a contract whose terms required Panda to provide and Florida Power

to purchase a Committed Capacity of 74.9 MW for thirty years." [Br. 27). But the Commission itself has declared that it did not approve a contract with those terms and that its PURPA rules, pursuant to which this Contract was approved, required FPC to purchase power from a "qualifying facility of less than 75 MW" and to make capacity payments for only the life of the avoided unit. Certainly, the Commission has jurisdiction to determine the correctness of Panda's construction of the Commission's order approving the Contract -- an order that was required for the Contract to be legally efficacious in the first place.

Panda also argues that nothing in PURPA "recognizes, or even mentions, a distinction between a negotiated contract or a standard offer contract." [Br. 29]. But nothing in PURPA or the FERC's rules prohibits a state regulatory agency from providing for these different types of contracts, and hence the PSC was fully authorized to adopt its Standard Offer Rules. Having voluntarily chosen the Standard Offer option, Panda cannot collaterally challenge those Rules at this late date.

In sum, and consistent with its prior orders, the Commission expressly ruled that it had jurisdiction to resolve the issues presented in this proceeding with respect to its Rules adopted pursuant to PURPA and § 366.051, Fla. Stat. (1993). "Commission orders come to the Court 'clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers' . . . ." Florida Interexchanae Carriers Assoc., 624 So.2d at 250-51. That presumption should be given full force and

effect with respect to the PSC's interpretation of Section 366.051, which it is charged with enforcing.

E. The Relevant Case Law Confirms the PSC's Jurisdiction To Enforce Its PURPA Rules.

It is clear that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." Cisollone v. Liqsett Grouw, Inc., 112 S.Ct. 2608, 2618 (1992). In interpreting such clauses, "the wresumption aqainst preemption mandates courts to read such a clause narrowly." Wright v. Dow Chemical. U.S.A., 845 F.Supp. 503, 508 (M.D. Tenn. 1993) (citing Ciwollone). Nevertheless, Panda contends that PURPA should be read broadly to exempt Panda from all PSC oversight once the Standard offer Contract was executed. Panda's argument is utterly without merit.

By the express terms of PURPA, the limited regulatory exemption available to QFs does not extend to rules issued by states to implement the PURPA scheme. 16 U.S.C. § 824a-3(e)(3)(1995). Florida's implementing rules are, of course, the very rules which the PSC acted to enforce here. Moreover, insofar as PURPA authorizes FERC to exempt qualifying facilities from "State laws and regulations, it does nothing more than pre-empt conflicting state enactments in the traditional way." Mississippi at 759. Here, there are no "conflicting state enactments" to be preempted. The PSC adopted rules consistent with FERC's PURPA rules and with § 366.051, Fla. Stat. (1993),

which provides PSC jurisdiction over Standard Offer Contracts that utilities such as FPC are mandated to execute with QFs.

In urging that the PSC lacked jurisdiction here, Panda relies on cases addressing claims for relief entirely different from that sought by FPC in its petition for a declaratory statement. As the Commission correctly recognized in denying Panda's motion to dismiss, and contrary to Panda's repeated assertion in its brief, FPC did not ask the Commission to modify, reform, invalidate or terminate this Contract.[9/] Instead, the Commission was simply asked to enforce its PURPA rules which were the basis for and were incorporated in this Contract. Given the nature of the limited relief which FPC sought and the PSC granted, each of the cases cited by Panda is plainly inapposite.

For example, Panda places great reliance on the Third Circuit's decision in Freehold Cogeneration Associates, L.P. v. Board of Regulatory Comm'rs of the State of New Jersey, 44 F.3d 1178 (3d Cir. 1995), cert. denied, 116 S. Ct. 681 (1995). That decision resulted from a Board-initiated review of the current cost-effectiveness of all outstanding power purchase contracts in New Jersey and an order directing the utility to modify or buy-out a previously-approved contract with QF. The Third Circuit held that requiring a QF to reopen the contract to revise a negotiated and previously-approved avoided cost rate would

---

[9/] Panda's reliance on the Commission's statement in Order No. 24989 [A. 1] that it would not "revisit [] our decision to allow cost recovery@@ [Br. 31] is accordingly misplaced. FPC did not ask the PSC to "revisit" its "decision to allow cost recovery" of FPC's payments to Panda, nor has the PSC done so.

impermissibly subject the QF to utility-type rate regulation. That narrow holding has no relevance to the instant case. In point of fact, the decision as a whole supports the Commission's finding of jurisdiction under the circumstances presented here.

First, Freehold involved a negotiated contract, not a Standard Offer Contract. As shown above, these two types of contracts are treated Very differently" under the PSC's PURPA rules and there is nothing in federal law prohibiting such a distinction. [PSC Order No. 95-0210 at 9, A. 10 at Dj. The Commission has **not** attempted to control the terms of negotiated contracts, but it **completely** controls the terms of Standard Offer Contracts. This Court's decision in Beard expressly recognized this distinction, noting that Standard Offer Contracts were authorized by the PSC to encourage small qualifying facilities. Panda's bald assertion that there is no difference between these types of contracts flies directly in the face of Beard.

Second, Freehold involved entirely different relief than the PSC granted here. Unlike Freehold, this is **not** a case in which the Commission or the utility was seeking to **modify** a previously-approved contract and thereby impose "utility-type regulation" on the QF.[10/] Rather, FPC simply asked the PSC to enforce its established PURPA rules, which Panda had taken advantage of, and

---

[10/] All of the other cases relied on by Panda, including Smith Cogeneration Management, Inc. v. corporation Comm'n and Public Service Co. of Oklahoma, 863 P.2d 1227 (Okla. 1993), likewise involved an effort to terminate or modify a previously approved contract through utility-type regulation. They do not in any way purport to address the states' jurisdiction to determine the very different enforcement issues presented here.

agreed to comply with, in executing this Standard Offer Contract,

Significantly, the Freehold court specifically emphasized that "[t]his case does not involve a state regulation promulgated pursuant to section 210(f), which governs the sale and purchase of electricity between utilities and QFs, nor was it brought by a person asainst a OF to enforce such a regulation." Id. at 1184, n. 4, at 1185, 1191-92. In contrast, FPC's petition is an effort to enforce a "state regulation promulgated pursuant to section 210(f)" -- i.e., the 75 MW size limit in the Commission's Rules and the Rules' required linkage of the period of time for capacity payments to the life of the avoided unit.

The point is, as the Freehold court recognized and as we have shown above, the federal exemption of QFs from utility-type regulation does not apply to State rules adopted to implement PURPA itself. FERC confirmed this limitation in Order No. 69 at 12233 [A. 11 at A]:

> Several commentators noted that this section might be interpreted as exempting qualifying facilities from state laws or regulations implementing the Commission's rules, under section 210(f) of PURPA. In order to clarify that qualifying facilities are not to be exempt from these rules, the Commission has added subparagraph (c)(2) prohibiting anv exemptions from State laws and regulations promulgated pursuant to Subpart C of these rules.

The PSC rules at issue here are indisputably regulations which implement Section 210(f), and Panda's claim to be exempt from those Rules is wholly without merit. In the words of the Freehold court, "QFs simply are not exempt from state laws and reaulatxons enacted pursuant to section 210(f) and, with it. section 210(a)." Freehold at 1192.

As can be readily seen, then, Freehold lends no credence at all to Panda's assertion that the PSC lacks jurisdiction to enforce its PURPA rules, and instead fully supports the PSC's determination here. FERC's subsequent order in West Penn Power Co., 71 FERC ¶ 61,153 (1995) A. 11 at E], illustrates this well.

In that case, FERC held that the state commission had authority to resolve a utility-QF dispute, noting that it involved "fact-based determinations and PURPA enforcement issues that we consistently have resarded as the province of the states ." Id. at 61,494. FERC emphasized that "[i]t is up to the States, not this Commission, to determine the specific parameters of individual QF sower purchase agreements," and it declared that "[t]his Commission does not intend to adjudicate the specific provisions of individual OF contracts." Id. at 61,495. FERC adhered to West Penn in its February 29, 1996 order in Massachusetts Institute of Technolosv, noting its "policy of leaving the states to determine the specific parameters of individual QF contracts , . . ." 74 FERC at 61,750 n.11 [A. 11 at B].

As these and the other authorities FPC relied on below establish, the PSC is not preempted from interpreting and enforcing its rules under PURPA, and' Panda's assertion that "every" decision has held that state commissions are preempted from interpreting and enforcing their PURPA rules when disputes arise under QF contracts [Br. 24-35] is flatly wrong, There have been numerous instances in which state regulatory commissions have interpreted QF contracts. [See A. at 22-26]. In

particular, the states' authority to resolve such disputes has been confirmed when policy questions were at issue or when the scope of the agency's initial contract approval was called into question.

For example, in Indeck-Yerkes, the New York Commission determined that the utility was not required to purchase excess QF output at the previously approved rate, where the additional output was the result of a subsequent facility design change by the QF. The Commission found that: (1) a 9% increase in output was a "material deviation from the estimate in the approved agreement," (2) "the use of the word 'approximately'" in connection with the estimate "only referred to 'an inescapable imprecision with respect to the expected output of a planned facility' and not to an increase which is attributable, as here, to changes in the facility's operations 'to improve cycle efficiency and availability'," and (3) the agreement did not provide for "the increased capacity . . . ." Id. at 843. Ruling that its approval of the agreement did not cover the increased capacity, the Commission required the parties to re-negotiate regarding that capacity.

The lower court reversed the Commission's ruling based on contract law -- just as Panda urges here -- and the court's interpretation of the contract as requiring the purchase of the entire output of the enlarged facility. The appellate court in turn reversed that decision, explaining that:

> The issue in this proceeding is not one of pure interpretation of the language of the agreement between the petitioner and [the utility purchaser] by application of

> common-law principles of contracts. Rather it is whether there is a rational basis to the PSC's determination of the scope of its prior approval of the parties' asreement, particularly the price structure contained therein, as not covering other than insignificant deviations from the contract's stated initial output. . ..[11]

Id. at 843.

So too here. FPC simply sought a Commission determination whether the Commission's PURPA Rules permitted Panda to build a facility in excess of 75 MW or permitted Panda to demand capacity payments for more than the period established by Commission Rule, and those are issues peculiarly within the Commission's jurisdiction, Panda's argument that these issues are better left to the courts because they would determine the parties' intent [Br. 45], makes this very point: this is not a contract necrotiated by the parties -- it is a contract whose terms were determined and indeed mandated by the Commission through its PURPA Rules. Who better, then, to determine what those Rules mean!

---

[11] Panda improperly cites Erie Enersv Associates, 1992 N.Y. PUC LEXIS 52 (March 4, 1992), for the proposition that state commissions -- and particularly the New York Commission -- cannot and do not interpret QF contracts. Any such notion was conclusively put to rest in Re Establish Program for Monitoring Qualifying Facility Status, 1996 N.Y PUC Lexis 484 (Aug. 30, 1996), where the New York Commission expressly concluded that "there is an 'ongoing' state regulatory oversight duty to take actions 'reasonably designed' to further PURPA objectives." Consistent with the PSC's Final Order here, the Commission declared that "[t]he Freehold decision IPPNY cites is irrelevant to these ongoing supervisory efforts, because that court's holding was limited to a finding that the PURPA regulations generally remove QF contracts from traditional state utility rate regulation, which otherwise would extend to modification of power purchase contract prices." Id,

The fact of the matter is, authority from other jurisdictions overwhelmingly confirms the Commission's jurisdiction to resolve questions regarding its PURPA Rules. Although Panda argues that there was no claim "to void the contract at issue" in those cases, once again, that is exactly the point: just as in those cases, there was no claim here "to void" this Contract. FPC simply sought to enforce this Contract in accordance with the Rules by which it was authorized and approved and which are explicitly incorporated as a part of the Contract itself.

As a final argument, Panda ludicrously attempts to convert FPC's citation of the Commission's decision in In Re: Petition of Polk Power Partners For A Declaratory Statement Resarding Elisibilitv For Standard Offer Contracts, PSC Order No. PSC-92-0683-DS-EQ, Docket No. 920556-EQ ("Polk Power Partners") [A. 10 at B] into an FPC effort to have the PSC retroactively impose new "utility type regulation" on Panda. It is quite true that the Polk Power Partners decision was rendered after Panda executed this Standard Offer Contract. But Panda's argument that FPC's reliance on that decision is therefore an attempt to subject Panda to retroactive regulation completely misconstrues the nature of FPC's argument.

The Polk Power Partners decision interpreted one of the PSC's Rules at issue in this case -- the Rule pertaining to facility size for QF seeking to take advantage of the Standard Offer Contracts authorized by the PSC. As such, it is persuasive authority on the meaning which that Rule has carried from the

time of its initial adowtion, including the Rule's meaning at the time Panda executed the Standard Offer Contract pursuant to the Rule. It is for this purpose only that FPC relies on the Polk Power Partners decision.

Panda apparently contends that the PSC's interpretations of its previously adowted rules, such as the interpretation provided in Polk Power Partners, amounts to changes to such rules. Such a view, however, ignores the distinction between interpretations of already existing authority and the adoption of such authority in the first instance. Indeed, under Panda's view, it should have itself refrained from citing Freehold to this Court, as that decision also interpreted the meaning of a statute and regulation only after the Contract here had been executed. Obviously, such a cramped view of the use and significance of precedent is not the law.

Simply put, FPC is not saying that Panda cannot build a 115 MW facility because a facility of that size is now precluded by the Commission's decision in Polk Power Partners. FPC is saying that the Commission's Rules have always prohibited such action, and Polk Power Partners is simply persuasive authority for FPC's reading (rather than Panda's reading) of the Rules which it previously agreed to be bound to in this Standard Offer Contract.

In sum, PURPA does not preempt all state oversight of QF contracts, as Panda urges -- it merely exempts QFs from certain, narrowly defined, utility-type regulation, which was not at issue here. State regulatory commissions can legitimately entertain requests to interpret and enforce state PURPA rules -- the only

issue here -- so long as those rules do not conflict with overriding federal authority. The Commission's conclusion that it had jurisdiction to enforce its PURPA Rules is completely consistent with PURPA and with the relevant case law, and it should be affirmed.[12/]

POINT TWO

THE PSC CORRECTLY INTERPRETED AND ENFORCED ITS PURPA RULES.

Under Florida law, an administrative agency's interpretation of its own rules is to be afforded "great deference" and should not be overturned unless "clearly erroneous." [See at pages 21-22, supra]. Here, the PSC's interpretation of its Rules implementing PURPA is in complete accord with the plain language of those Rules, and the PSC correctly found that Panda's attempt to build a 115 MW facility rather than a 74.9 MW facility, and to obtain capacity payments for 30 years rather than the 20 year life of the avoided unit, would violate those Rules.

A. Rule 25-17.0832(3)(a) limits the availability of Standard Offer Contracts to "small qualifying facilities less than 75 MW."

Rule 25-17.0832 makes it clear that Panda's proposed 115 MW facility is not in compliance with the maximum size limit for a QF opting to accept a Standard Offer Contract. Subsection (3)(a) requires that "each public utility shall submit for Commission

---

[12/] The PSC was also correct in ruling that Panda had waived any objection to jurisdiction. By filing its own petition for relief from the PSC, Panda submitted to the PSC's jurisdiction. [Order at 4, A. 8]. Panda never withdrew its petition, which squarely presented to the PSC the very issues presented by FPC's petition. Hence, these issues were properly before the Commission for this reason as well.

approval a tariff , . . and a standard offer contract . . . for the purchase of firm capacity and energy from small aualifving facilities less than 75 megawatts . . . ." Likewise, subsection (3)(c) provides: "In lieu of a separately negotiated contract, a aualifvins facility under 75 megawatts . . . may accept any utility's standard offer contract." Since Panda's proposed facility is 53% larger than the 75 MW ceiling, it does not comply with the Commission's Rules governing Standard Offer Contracts.

At the hearing below, Panda simply ignored the Rule's 75 MW limitation. Its direct and rebuttal testimony conspicuously avoided any reference to the Rule, much less any attempt to reconcile its position with the Rule's requirements. When questioned on cross examination, Panda's witnesses contended that the Rule's reference to "qualifying facilities less than 75 MW" should be read to mean "contracts specifying Committed Capacity less than 75 MW." [T. 266-70, 341-42]. However, Panda's witnesses' own reading of the Rules established that the Rule did not say that. For example, one of Panda's witnesses testified that the term "qualifying facilities" was synonymous with "projects" and that size of the Panda project was 115 MW. [T. 268]. Another Panda witness, after reading the requirement in Rule 25-17.0832(1)(b)(2) for reporting of both "the amount of committed capacity specified in the contract" and "the size of the facility,@@ agreed that these are separate and distinct terms in the Rules. [T. 344].

If there were any doubt that the 75 MW limitation refers to the size of the facility and not to the amount of Committed

Capacity specified in the Contract, the Commissions's decision in Polk Power Partners eliminated it. In that case, Polk wanted to sell committed capacity of less than 75 MW from a qualifying facility with a capacity greater than 75 MW under a standard offer contract. Though Polk acknowledged the Rule's 75 MW limitation, "Polk theorize[d] an ambiguity as to whether the 75 MW cap speaks to the total net generating capacity of the QF, . . . or the committed capacity which the qualifying facility has contractually committed to deliver on a firm basis to the purchasing utility." Polk Power Partners at p. 1 (emphasis in original).

The Commission found that there was no "authentic ambiguity" when the matter was viewed in the context of the Standard Offer Rule. Noting that the Rule was aimed at "preserving the standard offer for small qualifying facilities as described in subsection (3)," the Commission declared 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.

Id. 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 seneratins capacity of the QF." Id. at p. 3. The Commission's interpretation is dispositive of Panda's contention that the Rule refers to "the committed capacity" which the QF has agreed to deliver from the facility.

Notwithstanding the Rule's explicit limitation of Standard Offer Contracts to "qualifying facilities less than 75 MW," Panda

contends that it needed to build a 115 MW facility in order to perform its obligations under this Contract. As the Commission correctly found, Panda's argument is not only misplaced, it is belied by Panda's own actions.

To begin with, the Commission properly found that whether 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. Since the Rules on their face make such Contracts available only to "small qualifying facilities less than 75 MW," Panda could not take advantage of that Contract and at the same time build a large 115 MW facility. If it needed to build a facility of that size, it should have availed itself of the Commission's Rules for negotiated contracts for larger facilities. The choice was Panda's, and having elected to take advantage of the PSC's Rule for a facility less than 75 MW, it was obliged to comply with the facility size requirements of that Rule -- which it could have done by simply selecting in the first place to commit to capacity less than 75 MW, if it believed that a commitment of 74.9 MW was incompatible with a facility less than 75 MW.

Moreover, as the PSC further found, the evidence showed that Panda itself believed it could build a facility that would satisfy both the capacity commitment it had selected and the Rule's facility size limitation. Panda's proposal to sell the City of Lakeland 35 MW of the facility's enlarged capacity leaves no doubt of that! Even apart from that, there was substantial evidence establishing that Panda did not need to build a 115 MW

facility in order to satisfy its capacity commitment to FPC.[13] [See, e.g., T. 417-20]. Indeed, other Qfs have constructed facilities with a capacity commitment almost the same as the net generating capacity. [T. 420]. Panda could have done so as well.

Given the language and purpose of Rule 25-17.0832 [A. 12], the PSC's interpretation of that Rule -- an interpretation which must be given "great deference" by this Court -- must be affirmed. And, since the Commission's finding that a 115 MW facility would violate that Rule is based on competent substantial evidence, that finding must likewise be affirmed.

B. Rule 25-17.0832(3)(e)(6) limits the capacity payments under a Standard Offer Contract to a "maximum" period of time equal to the life of the avoided unit.

Rule 25-17.0832(3)(e)(6) dictates the period of time during which firm capacity and energy are to be delivered under the contract. 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.

It is undisputed that the Commission approved a plant life for this avoided unit of 20 years. Consistent with that approval, the Contract expressly provides that the life of the

---

[13] Panda also claims that it needed to build a 115 MW facility in order to comply with emission standards adopted after its execution of this Contract. [Br. 9]. However, its own expert evidence established that there was technology -- which many other QFs were using -- which would allow Panda to comply with those regulations with a 75 MW unit. [See page 18, supra].

avoided unit is 20 years. In addition, the schedule of capacity payments set forth in Appendix C to the Contract is defined for only a 20-year period.

The Commission was fully justified in concluding from the face of Rule 25-17.0832(3)(e)(6) that the "maximum" period of time for the payment of firm capacity and energy under the Panda Standard Offer Contract is 20 years and that the capacity payments to be made are those set forth in Appendix C. There is nothing in either the Rules or the Contract that requires FPC to make capacity payments beyond the 20 year useful life of the avoided unit, and Panda's assertion that the Contract "unambiguously" requires such payments for 30 years [Br. 45] is utterly without merit.[14/] Indeed, the indisputable absence of any requirement in the Contract for capacity payments after the 20th year was specifically raised by a prospective lender on this project. [Composite Ex. 32, BAM-6, Sheet 21 of 26; T. 4443.

Notwithstanding the absence of any express provision in the Contract or the Rules for such payments after the 20 year life of the avoided unit, Panda contends that it is entitled to capacity payments (in some amount unspecified in the Contract) through

---

[14/] Panda's reliance on its expert's testimony that the Contract required capacity payments for 30 years is also misplaced. In the first place, "[r]egardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions." Palm Beach County v. Town of Palm Beach, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983), aff'd and remanded on other grounds, 460 So. 2d 879 (Fla. 1984. In the second place, Panda's expert frankly acknowledged that he had not considered the PSC's Rules, and those Rules, which are an integral part of this Contract, established a "maximum" period of 20 years for capacity payments.

"March, 2025," because (i) it inserted that date in a blank for the Contract's expiration date in the standard Offer Contract form, and (ii) because it alleges that FPC orally agreed to do so after entering into the Contract. However, just as with the issue of facility size, Panda's position on the duration of capacity payments under the Standard Offer Contract ignores the Commissions's Rules on this precise point.

None of the Panda witnesses were able to reconcile their position with the Rule's restriction limits the "maximum" period for the delivery of firm capacity and energy to the life of the avoided unit. But that Rule controls the duration of capacity payments under a Standard Offer Contract, and the parties have no authority to alter the restrictions imposed by those Rules. In fact, as the Commission's Final Order makes clear, any purported after-the fact agreement by the parties that FPC would be obligated to make capacity payments for 30 years, rather than the 20-year life of the avoided unit, would have been in direct contravention of both Rule 25-17.0832 and PURPA itself because:

> FPC's capacity payments would exceed the avoided cost of the unit identified in the standard offer. This is clearly in violation of both the Public Utility Resulatorv Policy Act (PURPA) and our rules for QFs, which were implemented to ensure that utilities pay no more than the avoided cost to purchase capacity and energy from qualifying facilities.[15]

---

[15] As shown at page 19 supra, FPC did not make any subsequent agreement to pay for capacity after the 20 year life of the unit. [T. 53, 423]. Moreover, principles of waiver and estoppel obviously cannot be applied, as Panda urges, to require FPC to make payments which are contrary to state and federal law and the whole policy of PURPA itself. See Cameron County Wat r (continued:..)

[Final Order at 2, A. 9].

In short, the Commission's interpretation of Rule 25-17,0832(3)(e)(6) fully comports with both the language and the purpose of the Rule, and that interpretation should be affirmed by this Court. The Commission's further finding that Panda's effort to require FPC to make capacity payments for a decade longer than the life of this avoided unit would violate the Contract and the PSC's PURPA rules is fully supported by competent substantial evidence, and it should be affirmed as well.

CONCLUSION

Having taken advantage of the benefits of those Rules to obtain this Contract in the first instance and having expressly incorporated them as part of the Contract, Panda cannot now be heard to complain that the PSC has ordered it to comply with, their requirements as well. The Commission's Final Order should be affirmed by this Court.

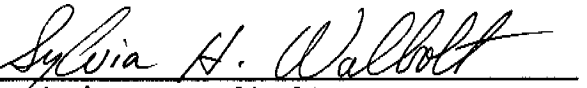
[15/](...continued)
Improvement Dist, No. 8 v. De La Verqne Engine Co., 93 F.2d 373, (5th Cir. 1937).

Respectfully submitted,

James A. McGee
Florida Bar No. 0150483
Jeffrey A. Froeschle
Florida Bar No. 0395935
Office of the General Counsel
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, Florida 33733
(813) 866-5786

and

Alan C. Sundberg
Florida Bar No. 079381
Sylvia H. Walbolt
Florida Bar No. 033603
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P. A.
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, Florida 33733
(813) 821-7000

By: 

Sylvia H. Walbolt
Florida Bar No. 033604

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief on the Merits and Appendices have been furnished by U. S. Mail to Arthur J. England, Jr., Esquire, David L. Ross, Esquire, Charles M. Auslander, Esquire, Joe N. Unger, Esquire Of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P. A., 1221 Brickell Avenue, Miami, Florida 33131 and Richard Bellak, Esquire, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0892, on this 4th day of November, 1996.

Sylvia H. Walbolt

Attorney