IN THE SUPREME COURT OF FLORIDA

PANDA-KATHLEEN, L.P.

Appellant,

vs.

FLORIDA POWER CORPORATION and, THE FLORIDA PUBLIC SERVICE COMMISSION,

**Appellees.**

CASE NO. 88,280

# ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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## SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, Florida Public Service Commission is referred to as the Commission or FPSC. Appellee Florida Power Corporation is referred to as FPC or Florida Power. Appellant Panda-Kathleen L.P. is referred to as Panda.

References to the transcript of the February 19, 1996 hearing in this case are designated as Tr. ____. References to the record are designated as R ____.

### Acronyms

FERC = Federal Energy Regulatory Commission

MW = Megawatts

QF = Qualifying Facility

PURPA = Public Utilities Regulatory Policies Act

## STATEMENT OF THE CASE AND FACTS

This case concerns a standard offer contract, the form of which was approved by appellee Florida Public Service Commission (Commission) August 29, 1991. (TR 4). Pursuant to Commission Rule 25-17.0832(3)(a), such standard offers are limited to, as here pertinent,

> the purchase of firm capacity and energy from small qualifying facilities [QF's] less than 75 megawatts . . . .[1]

Further, pursuant to Rule 25-17.0832(3)(e)(6),

> the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility [is] [a]t a maximum . . ., equal to the anticipated plant life of the avoided unit,[2] commencing with the anticipated in-service date of the avoided unit;

On November 25, 1991, Panda-Kathleen, L.P. (Panda) and Florida Power Corporation (FPC) entered into the Panda Standard Offer Contract (Contract) at issue. (TR. 6). That Contract, entitled "Standard Offer For Purchase Of Firm Capacity And Energy From A Qualifying Facility Less Than 75 MW Or A Solid Waste

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[1] The limitation of the availability of standard offers to small QF's of less than 75 megawatts is the result of a rule amendment dated 10/25/90. Prior to that time, facilities larger than 75MW participated in standard offer contracts. (R. 177-8).

[2] Pursuant to Section 366.051, Florida Statutes, and as consistent with the Public Utilities Regulatory Policy Act, 16 U.S.C §823(a), et seq. (1995) (PURPA), qualifying facilities (QF's) such as Panda can sell capacity and energy to utilities at, but not exceeding, "avoided cost". In effect, the "avoided unit" referred to in Rule 25-17.0832(3)(e)(6) is the plant that the utility can avoid constructing by purchasing power from QF's. By limiting payments to QF's to avoided costs, the state and federal law protects ratepayers from having to pay more for QF-generated power than they would have paid for power from utility-constructed plant.

Facility", incorporated the above-cited rules. (R. 6-137; R. 6; R. 9; R. 107-9). In addition, Schedule 2 to Appendix C of the Contract identified the economic plant life of the avoided unit as equal to 20 years. (R. 89). The Commission approved the contract on October 22, 1992. Order No. PSC-92-1202-FOF-EQ.

On January 25, 1995, FPC filed a petition for declaratory statement alleging that, notwithstanding the above-cited rules, Panda was proposing to construct a cogeneration facility of 115 MW and, by reason of having filled in a contract expiration date of 2025, was asserting the right to capacity payments for a period of time exceeding the 20 year economic plant life of the avoided unit by an additional ten years. (R. 2-3). The petition sought an order declaring that

> the Panda Standard Offer Contract is not available to Panda-Kathleen L.P. if it configures its facility to have a capacity of 75MW or more; and, if the Standard Offer Contract is nevertheless available to Panda, to declare that Florida Power has no obligation under the Contract to make any [firm] energy or capacity payments to Panda after [the 20-year life of the avoided unit ending] December 2016.

(R. 5)

On February 6, 1995, Panda sought to intervene in the declaratory statement proceeding. The Commission granted intervention on March 6, 1995. Order No. PSC-95-0306-PCO-EI.

On March 14, 1995, Panda filed a Motion for Declaratory Statement and Other Relief seeking an order declaring Panda's proposed 115MW facility to be consistent with Rule 25-17.0832(3)(a) and other Commission rules and declaring that the

Contract which the Commission approved provided for a 30-year time period of payments for capacity and energy.[3] (R. 169-299). On May 8, 1995, FPC filed an Answer In Opposition. (R. 327). On June 29, 1995, Panda filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing. (R. 381-436).

During the course of the responsive pleadings, both Panda and FPC acknowledged the Commission's jurisdictional ability to adjudicate these matters related to the Contract. As stated by Panda specifically,

> Under its Rules 25-22.022, 25-22.025 and 25-22.035, the Commission has the right, and in these circumstances an obligation, to convene and conduct a formal ~~evidentiary proceeding~~ under section 120.57(1), Florida Statutes. [e.s.]

(R. 383). By Order No. PSC-95-0998-FOF-EI, dated August 16, 1996, Panda's petition for a formal evidentiary proceeding to consider the issues raised in the cross-petitions for declaratory statement was granted. (R. 437-9).

On September 12, 1995, Panda filed a Motion To Dismiss and a Motion To Stay Or Abate Proceedings, articulating the theory that the Commission's jurisdiction was preempted.

In its December 27, 1995, Order denying the motions, the Commission held that it had jurisdiction to "apply and enforce the cogeneration rules we developed to implement PURPA", Order No. PSC-95-1590-FOF-EI at 8, and that "the relief F.P.C. has requested here [enforcement of Standard Offer rules that were

[3] The motion also sought an extension of milestone dates for the project.

incorporated in the Contract] **does** not conflict with federal regulations or subject Panda to 'utility-type' state rate regulation". Id. at 9. The Commission also found 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", because a claim of lack of jurisdiction over the person "must be affirmatively asserted before the party takes substantive action in the case or the claim will **be** deemed waived". Id. At 5. R. **1192-1202.**

The hearing in the matter was subsequently set for February **19, 1996.** (R. **441).** After the hearing, in Order No. PSC-96-0671-FOF-EI (Order), **the** Commission issued its opinion that Panda's proposed 115MW facility would not comply with Rule 25-17.0832, Florida Administrative Code, and that Rule 25-17.0832(3)(e)(6) **limited** the duration of capacity payments to the avoided unit's plant life of 20 years. The Commission used the payment stream in Appendix C, Schedule 3 of the Standard Offer Contract **to** set a net present value of approximately $71 million in **1996** for the total capacity payment stream and also granted extended milestone dates. Order, **p.** 4, **6.** Panda **filed** its Notice of Appeal of that Order, June **18, 1996.**

## STANDARD OF REVIEW

Whether the Commission's order meets the essential requirements of law and whether the Commission had available to it competent substantial evidence to support its findings.

## SUMMARY OF ARGUMENT

The Commission had jurisdiction to resolve the dispute presented by Florida Power's and Panda's cross-petitions for declaratory statements concerning the Commission's PURPA implementation rules. FERC v. Mississippi. In FERC, the U.S. Supreme Court held that such rules are not preempted. Only state rules which conflict with PURPA are preempted.

PURPA itself prohibits preemption of the rules at issue here, which implement PURPA by encouraging small QFs less than 75MW though the availability of standard offer contracts, and by limiting the duration of payments to QFs for firm energy and capacity to the life of the avoided unit. 16 U.S.C. §824 a-3(e)(3)(A).

The challenged Commission Order enforced PURPA. It declared that Panda's proposed 115MW facility and claim of 30 years of firm capacity payments would violate Rules 25-17.0832(3)(a) and 25-17.0832(3)(e)(6), respectively. The Court in Freehold v. Board, the case mainly relied upon by Panda, made it clear that there was no preemption of such disputes involving state commission implementation of PURPA under Section 210(f). The facts at issue in Freehold were different, involving an attempt by the state commission to adjust rates in view of changing conditions.

In contrast to the facts of Freehold, this case concerned the specific parameters of a QF power purchase agreement, subject

matter that is up to the states to determine, not the Federal Energy Regulatory Commission (FERC). West Penn.

The cases cited in Commission Order 0210 do not support Panda's absolute preemption theory. Even though the state oversight of nesotiated contracts between utilities and QFs is largely performed at the authorization stage, fraud, mistake or misrepresentation are exceptions which would require review of the authorization decision.

Commission control over standard offer contracts is necessarily greater than over negotiated contracts. The Commission's standard offer rules, which are incorporated as terms of the standard offer contract, must be complied with so that utilities are not forced into agreements which violate the Commission's PURPA implementation policies, PURPA, or both.

Panda's argument that this case involving those rules must be adjudicated by the courts is baseless, given this Court's holding that deference by the courts is due the Commission's administrative construction of its own rules. Pan American World Airways v. Florida Public Service Commission.

As noted in the Polk Power order, the context of the facility size limitation rule provided notice that standard offer contracts are limited to small QFs less than 75MW of useful power output (total net generating capacity). The Polk Power order itself resolved any remaining ambiguity. This Court recognized the Commission's authority to establish and enforce such guidelines. Fla. Power & Light v. Nichols.

Panda's search for the intent of the parties through contract interpretation is inapposite where the parties clearly stated their intent to agree to the sale and purchase of electricity consistent with the Commission's standard offer rules. The binding effect of those rules cannot be unilaterally nullified by Panda's preemption theories, unsupported analogies to collective bargaining agreements, or assertions of waiver and estoppel based on allegations concerning FPC's conduct. Panda's own cited authority recognizes that the intent of the parties will not be followed when contrary to law. Oakwood Hills v. Horacio Toledo. Sec. 366.095, Florida Statutes.

Panda's "value of deferral" method cannot be substituted for the Commission's rule limiting the duration of capacity payments to the life of the avoided unit. The value of deferral method is also unapprovable for exceeding avoided cost and undesirable for "locking in" the utility to current technology over potentially uncontrolled time periods.

Panda's participation in the standard offer contract is conditioned on its compliance with the rules concerning facility size and capacity payment duration and the Commission did not err in ***so*** **holding.**

## ARGUMENT

### I. THE COMMISSION HAD JURISDICTION TO ISSUE A DECLARATORY STATEMENT CONCERNING WHAT IT HAD APPROVED IN THE PANDA STANDARD OFFER CONTRACT.

#### A. The Commission's assertion of jurisdiction over the issues in this case is consistent with PURPA and the U.S. Supreme Court's holding in FERC v. Mississippi.

The appealed-from Commission final order, PSC-96-0671-FOF-EI (Order), considered three issues: 1) whether the facility approved by the Commission in the contract approval process was to be a small QF of less than 75MW, as stated in Rule 25-17.0832(3) (a), F.A.C., or, as argued by Panda, a facility of indeterminately large size capable of delivering, inter alia, 74.9MW of committed capacity;[4] 2) whether the time period of payments for capacity **was** to be limited to the 20-year life of the avoided unit, as required by Rule 25-17.0832(3)(e)(6), F.A.C., or as contended by Panda, capable of being extended indefinitely merely by Panda's filling some longer time period into the blank for contract duration; 3) whether Panda's milestone performance dates under the contract should be lengthened beyond those originally approved.

Though Panda has brought 50 pages of labyrinthine argument to the task of proving that the Commission's jurisdiction over contract disputes between utilities and QF's is preempted once the contract has been approved, Panda has not challenged on appeal the Commission's jurisdiction to resolve Issue 3, i.e.,

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[4] Capacity for which payments are due by terms of the contract other than Rule 25-17.0832(3)(a).

the post-approval contract dispute over the milestone dates. Moreover, Panda has offered no explanation as to how, in view of its theory of preemption, the Commission could have exercised jurisdiction to adjudicate that post-approval contract dispute. The explanation is simple. There is no basis for the preemption theory when applied to PURPA implementation activities, including those post-dating contract approval. Panda's reliance on the Commission's jurisdiction to resolve the dispute over milestone dates estops Panda to claim any such theory.[5]

Even if Panda were not estopped to assert its preemption theory by its own continuing reliance on the Commission's jurisdiction, the holdings of the U.S. Supreme Court and Federal Energy Regulatory Commission (FERC) plainly foreclose that theory. As stated by the Court in FERC v. Mississippi, 456 U.S. 742, 751 (1982),

> a state commission may comply with the statutory requirements [of PURPA] by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules. [e.s.].

In this case, the Commission issued regulations, the two rule subsections within Rule 25-17.0832 discussed above, and resolved the instant dispute about them on a case-by-case basis, as specifically contemplated by the Court in FERC, supra,. Such PURPA implementation activities, contrary to Panda's theory, are

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[5] Panda's position in this regard is result-oriented, rather than logical, since as noted at p. 3, supra, Panda itself had previously argued in support of the Commission's right and obligation to exercise jurisdiction over all of these issues.

not preempted even if they occur after contract approval. Indeed, as stated by the Court, though Congress could have preempted the states in this area had it wished to do so,

> [PURPA] does nothing more than pre-empt conflicting state enactments in the traditional way.

456 U.S. at 759. Panda has shown no conflict between Rule 25-17.0832(3)(a), which encourages small QF's less than 75MW through the availability of standard offers, and PURPA. Though such specific encouragement of small QF's less than 75MW is not required by PURPA, the rule is not a conflicting state enactment such as would be preempted. FERC, supra. Panda has also shown no conflict between Rule 25-17.032(3)(e)(6), which constrains capacity payments to QF's to no more than avoided costs, and PURPA. This limitation is obligatory under PURPA, an obligation embodied in state law as well. §366.051, Florida Statutes (1995). The Commission's enforcement of it is not only not preempted, it is required, as acknowledged by Panda itself. Initial brief, p. 23-24.

Since the rules at issue implement PURPA and do not conflict with it, PURPA explicitly prohibits QF's from any exemption from those rules. 16 U.S.C. §824 a-3(e)(3)(A). Thus, the Commission's declaratory statement proceeding enforcing the less than 75MW facility size limitation and 20-year duration of capacity payments is well within the area of non-preempted state activity set out in FERC v. Mississippi and PURPA itself. In other words, the generally applicable law is one of non-

preemption where PURPA implementation is concerned, exactly the opposite of **Panda's** theory. The post-approval resolution of the milestone dates issue aside, all the Commission did in its challenged order was to adjudicate cross-petitions by FPC and Panda itself as to their conflicting claims of what was approved by the Commission in its consideration of the Panda Standard Offer Contract at the time it was approved. As the Court stated in **FERC, supra,**

> "the [state] 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".

456 **U.S. at 760.** Panda's theory is facially and fatally inconsistent with the Court's holding in FERC v. Mississippi, and with PURPA itself.

B. **The preemption case mainly relied upon by Panda does not support Panda's theory in this case.**

There are two areas in which the rules of the Federal Energy **Regulatory** Commission implementing PURPA do exempt QF's from state regulation: regulations concerning "[t]he rates of electric utilities [] and . . . the financial and organizational regulation of electric utilities". 18 C.F.R. §292.602(c)(1). **However,** neither the limitation of standard offers to small QF's less than 75MW nor the limitation of capacity payments to the life of the avoided unit so **as** to enforce PURPA's mandatory avoided cost constraint in the formation of the contract trenches **on** these two preempted areas. In effect, the Commission has the option of enforcing its less than 75MW facility size rule for

standard offers because the regulation is not inconsistent with PURPA; it has the obligation to enforce its rule limiting contract duration to the life of the avoided unit because PURPA's avoided cost constraint is mandatory. No case, statute or argument forwarded by Panda demonstrates anything to the contrary. Instead, Panda attempts to ignore the specific holdings of the U.S. Supreme Court in FERC, supra, and the provisions of PURPA itself cited above so as to arbitrarily limit the Commission's jurisdiction over contract disputes to the moment of contract approval even when PURPA implementation is at issue:

> The Commission exercised its PURPA authority when it approved Florida Power's standard offer contract, first as a form, and then specifically as completed by Panda, to purchase electricity at full avoided cost. The Commission's authority to implement this wholesale power transaction ended at this point. [e.s.].

Initial brief at 24.

Besides the fact that this is inconsistent with what the U.S. Supreme Court specifically stated in FERC, Panda's theory would, in this case, disenable the Commission to carry out either its rule limiting standard offers to small QF's less than 75MW or its obligation under PURPA to limit capacity payments to avoided costs. At the time the contract was approved, the Commission had no notice that Panda was planning to build a 115MW facility rather than one that strictly complied with the rule language; i.e., a small QF less than 75 MW. Under Panda's theory, Panda could have built a QF of any size so long as its committed

capacity was less than 75MW. [Tr. 344-51 Panda deems that 'small enough' to meet the Commission's policy goals. See, Initial Brief, p. 32-3, However, this Court has recognized that

> the PSC is authorized to establish guidelines relating to the purchase by utilities of QF produced power.

Fla. Power & Light Co. v. Nichols, 516 So. 2d 260, 261-62 (Fla. 1987). See, §366.051, F.S. The theory that such guidelines can be evaded if the QF simply hides its real intent until after the contract is approved is a direct attack on the authority recognized by this Court in Fla. Power & Light."

Similarly, at the time the contract was approved, the Commission had no direct notice of Panda's theory that despite the 20-year plant life of the avoided unit listed in Schedule 2 to Appendix C to the Contract, Panda could receive 30 years of capacity payments merely by filling in the blank with "2025" as the termination date. Panda had notice of Rule 25-17.0832(3) (e) (6) limiting the term of capacity payments to the life of the avoided unit and was expected to have filled in the contract blanks so as to comply with it.[7] Once again, under Panda's theory, the Commission's ability to meet its obligations

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[6] The result is the same if the QF simply "misconceives" the rule, such as equating a small QF of less than 75MW to a 115MW facility or avoided cost payments based on an avoided unit with a 20-year life to 30 years of payments pursuant to a formula. See, 8120.565; Rule 25-22.020, F.A.C., which provide opportunities to avoid such misconceptions.

[7] Panda's brief ignores the Commission's realistic basis for that expectation of compliance. See, Section 366.095, Florida Statutes, providing for penalties of as much as $5,000 per day for refusal to comply with, or willful violation of, Commission rules.

under PURPA to limit payments to avoided cost can be evaded as long as the Commission is unaware of the evasion at the time of approval. To the contrary, as the Commission reads the relevant statute, §366.051, F.S., the standard offer contract, as interpreted by Panda, exceeded full avoided cost by exceeding the life of the avoided unit contrary to Rule 25-17.0832(3)(e)(6), and could not have been approved except by mistake or inadvertence. As noted by this Court in P.W. Ventures v. Nichols, 532 So. 2d 281, 283 (Fla. 1988),

> . . . the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight . . . . The courts will not depart from such a construction unless it is clearly unauthorized or erroneous . . . .

In this instance, not only the Florida Legislature, but Congress through rules promulgated by the FERC, has charged the Commission with enforcement of the avoided cost limitation. The Commission's Order carries out that responsibility in the manner contemplated by the U.S. Supreme Court in FERC v. Mississippi. Panda has no authority for its theory that all of this can be replaced by a game of "spot the mistake", in which the Commission took its one and only turn and lost.

Indeed, the authority relied on by Panda is easily distinguishable. Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 44 F. 3rd 1178 (3rd Cir. 1995) (Freehold), Panda's principal case, concerned a power purchase agreement between a cogenerator and a

Utility.' However, the facts stated as early as pages 2-3 of Freehold are sufficient to distinguish that case from the issues in this appeal. Therein, the opinion notes,

> On March 26, 1992, . . . Freehold and JCP&L entered into a power purchase agreement ("the PPA") , to commence on the date of BRC [Board of Regulatory Commissioners] approval and to continue thereafter for a period of twenty years. The BRC approved the PPA by order dated July 8, 1992. Under the terms of the PPA, JCP&L is to pay Freehold 100% of JCP&L's 1989 avoided cost for the purchase of electric power. [e.s.]

44 F. 3rd at 2.

Unlike the instant case, the contract and its approval were not controversial in Freehold. Instead, Freehold concerned "changed circumstances" in the form of a subsequent decline in JCP&L's avoided costs and the efforts of the BRC to induce the cogenerator to renegotiate a new agreement reflecting that reduction so as to save money for ratepayers. The BRC was found to be preempted by section 210(e) of PURPA from subjecting the cogenerator to that kind of utility type regulation; i.e., adjusting the rate of payments to the cogenerator based on conditions that had changed subsequent to the approved agreement. Nowhere in Freehold, however, was there any issue or controversy concerning the PURPA status of the original PPA. Indeed, the Freehold opinion states as fact that, under the PPA as approved by the Board,

> JCP&L is to pay Freehold 100% of JCP&L's 1989 avoided cost for the purchase of electric power.

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[8] The agreement was "negotiated" rather than "standard offer", a distinction discussed later in this brief.

Therefore, as a matter of fact and law, the BRC successfully carried out its obligation under PURPA to constrain those payments to not exceed 100% of JCP&L's avoided cost at the time of approval of the agreement and the BRC had nothing further to do with respect to that issue. The BRC did not contest that.

The case on appeal is different. FPC, in its petition for declaratory statement, and Panda in its cross-petition, brought two different possibilities to the Commission's attention. One possibility was that the Commission had assertedly approved an agreement wherein, as interpreted by Panda, capacity payments exceeding FPC's avoided cost would be made to Panda because the term of firm capacity payments, contrary to Rule 25-17.0832(3)(e)(6), would exceed the 20-year life of the avoided unit by 10 years. The other possibility was that the Commission had approved an agreement wherein, as interpreted by FPC, capacity payments would equal FPC's avoided cost because the term of capacity payments would not exceed the 20-year life of the avoided unit. The Commission's order verified that the latter was all that the Commission was authorized to approve under PURPA or its rules implementing PURPA. While the Commission acknowledged that Panda had written in a longer contract term than the 20-year life of the avoided unit,

> Rule 25-17.0832, Florida Administrative Code, cannot be violated by extending the firm capacity payment term.

Order, p. 6.

Clearly, this controversy involved the PURPA status of the contract at its formation. Section 210(f). This was a matter concerning the Commission's PURPA implementing rules, a matter not at issue in Freehold. Under section 210(a) of PURPA, the Commission was not preempted from resolving this dispute in accord with the previously cited opinion in FERC v. Mississippi. Indeed, that is consistent with the analysis in Freehold itself:

> Here, . . . the BRC's implementation of FERC's 210(a)-type regulations ended with BRC's July 28, 1992 approval of the PPA.

In this case, the proceeding below made the Commission aware that its implementation of FERC's 210(a)-type regulations was still at issue.

While nothing in Freehold involved any question about what the BRC approved as of the approval date, in this case, the controversy exclusively concerned the issue of what the Commission had actually approved on October 22, 1992. Because the facts of this case and Freehold are distinct from one another, it is not surprising that the preemption analysis yields different results. Panda's main case therefore supports the Commission's Order, not Panda's theory. The same analysis would apply to the controversy about Rule 25-17.0832(3)(a) concerning the under 75MW limitation on facility size eligibility for standard offers, since that is also a Commission rule which implements PURPA in Florida.

As stated in the Contract itself:

> the OF desires to sell, and the Company desires to purchase electricity to be generated by the

> Facility and made available for sale to the Company, consistent with FPSC Rules 25-17,080 through 25-17.091 in effect as of the execution date; [e.s.]

R. 9. What the Commission clarified it had approved is, as stated above, what both Panda and FPC agreed that they wished to do -- enter into an agreement for the sale and purchase of electricity consistent with FPSC Rules 25-17.080 through 25-17.091.

Moreover, as noted by the FERC itself, in West Penn Power Company, 71 F.E.R.C. P 61,153, 1995 FERC Lexis 856 (May 8, 1995),

> Our [PURPA] regulations expressly permit rates in long-term QF contracts to be based on avoided costs as of the time a legally enforceable obligation is incurred. It is up to the States, not [FERC] . . . to determine the specific parameters of OF power purchase agreements, [] including the date at which a legally enforceable obligation is incurred under State Law.

FERC Lexis 856 at p. 43.

On October 22, 1992, the Commission approved a contract containing the specific parameters of Rules 25-17.0832(3) (a) and 25-17.0832(3)(e)(6). No authority cited by Panda preempts the Commission's ability to determine and enforce those PURPA-implementing parameters. They relate not to changed circumstances resulting in new post-approval proposals, as was the case in Freehold, but to the specific parameters of this QF power purchase agreement as of the time the obligation was incurred. These matters were explicitly not preempted by the FERC, but were up to the states to determine. West Penn, sunra. That being so, there is no authority that precluded the

Commission from issuing a declaratory statement as to precisely what specific parameters it had determined, when petitioned by both parties to do so. Section 120.565, Florida Statutes. Rule **25-22.020,** F.A.C. FERC v. Mississippi, supra.

On p. 36 of the Initial Brief, Panda explains the holding in Indeck-Yerkes Energy Servs., Inc. v. Public Service Commission of State of New York, 564 N.Y.S. So. 2d 841 (App. Dev. 1991) (wherein the N.Y. Commission determined the scope of its prior approval of a cogeneration contract) as follows:

> This issue of salable capacity under the contract was affirmatively put **at** issue by the QF, without regard to whether any preemptive forces were at play. Having petitioned the Commission's analysis of the nature of the contract terms, choosing that forum without reference to preemption, the QF was logically bound by the reasoning of the Commission.

Of course, precisely the same is true of Panda with respect to its March 14, 1995 Motion for Declaratory Statement (R. 169-299) and June 29, 1995 Petition For Full Evidentiary Proceeding and Full Commission Hearing (R. 381-436). Not only has Panda failed to demonstrate any support for its preemption argument, but its own analysis of Indeck-Yerkes estops Panda to **assert** such argument.

C. **Panda's preemption theory is unsupported by cases collected in Order** PSC-95-0210-FOF-EQ.

On p. 21 of the Initial Brief, Panda states:

> The federal scheme creating qualifying facilities such **as** cogenerators and requiring utilities to purchase their electricity mandates a limited role for state regulatory agencies, largely performed at the authorization stage. [e.s.]

While there are numerous cases in support of that premise, Panda's problem is that it does not nearly equate to the hard and fast theory Panda espouses that all post-authorization contract dispute resolution activities by state regulatory agencies are preempted, merely for being post-authorization activities. As Panda's brief unfolds, the qualifying adverb "largely" is abandoned in an attempt to finesse this "problem". See, e.g., Initial Brief, p. 27.

Interestingly, the cases Panda relies on are found cited in the Commission's own order, PSC-95-0210-FOF-EQ (Order 0210), and as the Commission made clear, they do not espouse Panda's theory of absolute preemption The Commission's conclusion based on reviewing them is that

> . . . the general consensus appears to be that under federal and state regulation of the relationship between utilities and cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery. [e.s.]

R. 936-7.

Panda's theory of absolute preemption is not supported by the cases cited in Commission Order 0210, which, as the Commission observed, bespeak nothing more than a general consensus that post-approval contract disputes involving negotiated contracts should be left, as a general matter, to the courts. Worse, for Panda, even this general and non-absolute prescription has specific exceptions:

> Under certain circumstances we will exercise continuing regulatory supervision over power purchases made pursuant to negotiated contracts. We have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake; [] but if it is determined that any of those facts existed when we approved a contract for cost recovery, we will review our initial decision. [e.s.]

R. 938.

Thus, even were this a case involving a negotiated contract, which it is not, and even though the Commission concurs that its supervision of such negotiated contracts "largely" takes place at the authorization stage, there is still no support for Panda's absolute preemption theory. If the Commission were mistaken as to its cost recovery determination, or based its approval on a misrepresentation, it is not foreclosed from correcting that mistake or disallowing that misrepresentation by any of the cases cited in Order 0210. They do not collectively support Panda's theory of hard and fast preemption of all post-authorization activity by the Commission. They merely establish that state commission PURPA oversight in the context of negotiated contracts "generally" or "largely" occurs at the time of approval, not absolutely or exclusively then. They reflect the circumstance that, in many instances, post-approval regulatory activities are not PURPA implementing, while in some -- such as this case -- they are.

The Panda Standard Offer is not a negotiated contract, however, and Panda's theory of absolute preemption is even less

relevant to that, As explained in Order 0210, the Commission's PURPA implementation rules

> require utilities to publish a standard offer contract in their tariffs which we must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection and insurance. Utilities must purchase firm energy and capacity and available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. [e.s.]

R. 935. The reason that the Commission's control over standard offer contracts is greater than in the instance of negotiated contracts is clear. The utility is required to publish the standard offer contract and required to purchase energy pursuant to its terms. Unless the standard offer contract terms as applied comply with the Commission's rules governing standard offers as the Commission interprets them, the utility could be forced into an agreement which violated the Commission's policies in implementing PURPA, PURPA itself, or both. As previously noted, PURPA specifically prohibits preemption of the application of such state commission PURPA enforcement rules. 16 U.S.C. §824 a-3(e)(3)(A). The United States Supreme Court noted, in La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369-70, (1986) that

> The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. . . .

The answer, based on PURPA itself, West Penn, FERC v. Mississippi, Freehold and Commission Order 0210, is flatly no as to enforcement by the Commission of its PURPA implementing rules.

**D. The Commission's elimination of regulatory out clauses in standard offer contracts supports the Commission's position, not Panda's.**

On p. 31 of the Initial Brief, Panda cites Commission Order No. 24989 eliminating regulatory out clauses in standard offer contracts as a demonstration of the Commission's "limited role":

> When we approve the standard offer contract, we make a commitment that we allow cost recovery of payments made to small QF's. Because we have made such a commitment, there is no need for a regulatory out provision in the standard offer We have no intention of revisiting our decision to allow cost recovery.

Panda fails to note the exception in that Order, at p. 71-2 thereof, paralleling that of Order 0210, for fraud, misrepresentation or mistake, in which case the order would permit the review otherwise eschewed. Again, Panda is trying to make a **game** of "spot the mistake" out of this process, but lacks any authority for that attempt.

Moreover, Panda **misses** the essence of why the Commission could forego the regulatory out clause in standard offer contracts, but not in negotiated contracts. In standard offer contracts, as opposed to negotiated contracts where the parties negotiate the terms, the Commission can -- and does -- rely on its ability to enforce its own rules, which are themselves incorporated as the terms of the standard offer contract. §366.095, Florida Statutes; see, n. 7, supra. That is the very

reason the regulatory out clause is not needed in standard offers.

Finally, this fact leads to yet another argument inimical to Panda's theory that this case must be adjudicated by a court rather than the Commission. As stated by this Court in Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983),

> We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous . . . . The same deference has been accorded to rules which have been in effect over an extended period and to the meaning assigned to them by officials charged with their administration.[9]

By the time this matter was presented by both parties to the Commission in 1995, both rules at issue had been in effect over an extended period. The issue presented was the Commission's administrative construction of two of its own rules. For Panda to claim, bereft of any on-point authority, and on page after page of its brief, that this matter must be initially adjudicated in the courts, when this Court has determined that deference by the courts is due the Commission's interpretation of its own rules, is anomalous and nonsensical, as well as unsupported.

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[9] Panda mischaracterizes this principle as "nativistic", Initial Brief, p. 27, n. 14, and misses the point that the Commission serves as FERC's agent in implementing PURPA in Florida.

### E. Polk Power is yet another case relied upon by Panda which supports the Commission's position, not Panda's.

When stripped of its verbiage, Panda's unsupported preemption theory and claim that the Commission "retroactively dismantled" the standard offer contract are nothing more than an attempt to fob off on the Commission responsibility for Panda's own cavalier attitude toward the Commission's rules. Polk Power, petitioner for a declaratory statement, asked that the less than 75MW limitation in Rule 25-17.0832(3) (a) be declared applicable to the "committed capacity"" of the facility rather than its total net generating capacity.[11] The Commission, however, defined the less than 75MW limitation to refer to "total net generating capacity."

To Panda, the Polk Power analysis represents a Commission interpretation of Rule 25-17.0832(3)(a) arrived at after the Panda standard offer contract was executed ("post contract") which the Commission seeks to apply "retroactively" to that contract.

Panda's argument is totally wrong. First, as a technical matter, the Commission approved the Panda Standard Offer Contract on October 22, 1992. That approval post-dated the July 21, 1992

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[10] Committed capacity is capacity which is contractually committed by the QF to be delivered on a firm basis to the utility.

[11] Total net generating capacity (useful power output) of a cogeneration facility is the electrical or mechanical energy made available for use exclusive of any such energy used in the power production process.

Polk Power opinion. That opinion was, therefore, "pre-contract approval". Order No, PSC-92-0683-DS-EQ.

Second, a reading of the Polk Power order negates the claim by Panda that the rule itself gives no guidance on what the less than 75MW limitation referred to.

For example, the Commission questioned whether the petitioner in Polk Power had even identified "authentic ambiguity" in view of "the context in which the operable standard offer rule appears." The Commission then cited a number of rules identifying the goal of "preserving the standard offer for small qualifying facilities" as the reason for the limitation, a goal that would have been "rendered nugatory" by the interpretation Polk Power sought. As noted by the Commission,

> If "committed" capacity, rather than total net generating capacity were the measure by which to calculate the 75MW cap, QF's of any size could participate in standard offer contracts, contrary to the clear intent of the rules to preserve such participation for small QF's. It is a fundamental principle of statutory construction that statutes are not to be construed in such a manner as to render them meaningless, and that principle should govern the interpretation of rules as well.

R. 1006

For Panda to maintain, throughout the pendency of this controversy, that neither the rules themselves nor the Commission's interpretation of them in its pre-contract approval, July 1992 Polk Power order gave even a hint to Panda of how the Commission interpreted Rule 25-17.0832(3) (a) on the date of contract approval, is simply willful blindness. Panda cannot

turn its own imprudence into the Commission's problem by such theory-spinning.

Panda claims that its "committed capacity" theory is distinguishable from Polk Power's petition involving multiple standard offers:

> Limiting a facility to one standard offer contract, however, encourages small QFs because the lack of capacity payments above 75 megawatts economically necessitates building facilities close to that size or that exceed that size only to comply with capacity and environmental requirements.

Initial brief, p. 32-33.

As this case demonstrates, that is not accurate. [Tr. 344-5] Panda apparently believed it would have sufficient additional capacity to propose to sell 35MW of capacity and energy to the City of Lakeland from its proposed facility notwithstanding Panda's environmental and capacity obligations under the standard offer agreement, Ex. 1 (RDD-13) and Ex. 26. That aside, it is not for Panda to restructure either the Commission's rules or policies. The facilities sought to be encouraged by the Commission are facilities which produce less than 75MW of useful power output and are, therefore, smaller than the alternatives presented by either Polk Power's or Panda's hypotheses. This Court has found the Commission authorized to establish and enforce such guidelines. Fla. Power & Light Co. v. Nichols, supra; §366.051, F.S. As established herein, nothing in PURPA precludes them or exempts Panda from the obligation to comply with those guidelines.

In the Commission's view, the non-Florida cases cited by Panda fall into one of two categories. Either they actually support the Commission's position rather than Panda's or they describe state commission activity which, though perhaps well-intentioned, is not PURPA implementing and therefore is distinguishable from the declaratory proceeding below.[12] The result is that Panda has not demonstrated anything the Commission did to have been preempted, based on the authority cited.

While state regulation may be preempted by federal law "to the extent that it actually conflicts with federal law", Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982), Panda has identified no such conflict. Actual conflict will occur where compliance with both state and federal statutes is a physical impossibility, Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), or where state regulation stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Hillsboroush County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 714 (1985), quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The Commission's Rule requiring that the standard offer not exceed avoided cost by matching the contract duration of capacity payments to the life of the avoided unit does not conflict with

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[12] Of those cases cited at p. 25-6 of the Initial Brief, Smith Cogeneration exemplifies activity unrelated to PURPA implementation, while Afton, Bates and Erie are in accord with the Commission's general view of negotiated contracts described in Section I.C. of this brief. In Barasch, the reviewing court remanded to the Pennsylvania Commission for reconsideration of the issues in that case.

federal PURPA requirements, it implements them. The Commission's rule limiting standard offer contracts to QFs less than 75 MW, where QFs 75MW and larger are free to enter into negotiated contracts with utilities, does not conflict with federal PURPA requirements, and is not preempted by them. FERC v. Mississippi, supra. Panda has therefore been unable to overcome the statutory presumption that the Commission's Order has been made within the Commission's jurisdiction and powers, is reasonable and just and such **as** ought to have been made. General Telephone Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1959).

## II. THE COMMISSION'S ORDER IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

### A. The size of Panda's facility is limited by the contract, which incorporates the Commission's rules.

Panda argues that neither the "contract" nor the "rules" limited the size of the facility Panda proposed to construct, as if the rules and the contract were two different things. However, as the Commission noted at the outset of this brief, the Contract incorporated the standard offer rules. (R. 6-137; R. 6; R. 9; R. 107-9). The Standard Offer rules are terms of the contract to the same extent **as** the other terms.

As indicated by the Polk Power order, the Commission believed that the context in which Rule 25-17.0832(3) (a) appeared, which included numerous references to the encouragement of small QFs, gave clear notice that the under 75MW limit referred to the facility's total net generation capacity rather

than the firm capacity committed to a purchaser by one of the contract arrangements, among others. Moreover, the Polk Power order affirming that principle was issued some three months prior to the date of approval of the Contract at issue here. Though Polk Power was limited to the facts presented therein, those facts are sufficiently close to the facility size issue raised by Panda to alert a prudent party to this Contract as to what was being approved regarding facility size. Moreover, even Panda's witness agreed that facility size and committed capacity are distinct since Rule 25-17.0832(1) (b) (2) requires reporting both. [Tr. 3441 Thus, Panda's argument does not more successfully merge the issue of facility size with committed capacity than it separates the standard offer rules from the contract incorporating them.

Moreover, Panda's claim that express terms of the contract are ignored by the Commission's interpretation, such as those requiring Panda to demonstrate it could produce 74.9 MW or more and those providing for sales of energy in excess of committed capacity, neglects the circumstance that this is a standard offer. Those contract terms only become "academic" if the QF elects, as did Panda, to supply the maximum committed capacity that a facility with a useful net output of less than 75MW could supply. The standard offer, however, was drafted to allow for the fact that QFs could and would contract to supply less than the maximum possible committed capacity and thus could have "excess" energy to sell and could, in fact, be asked to

demonstrate their contracted for committed capacity or more. In this instance, the terms are not 'ignored' merely because Panda's "excess" energy is equal to zero and the amount "more" than 74.9MW committed capacity that Panda can be asked to demonstrate is also zero.

Citing South Florida Beverage Corp. v. Figueredo, 409 So. 2d 329 (Fla. 1982), Panda asserts that the Commission's standard offer rules are "general provisions" over which the "specific" provisions of "the contract" control. This reasoning is meritless and merely another ploy to attempt to dodge the effect of the Commission's standard offer rules.

First, as noted previously, the standard offer rules are not separate from "the contract", they constitute many of the terms of the contract. Moreover, nothing in §366.095, Florida Statutes suggests that the Commission must forbear from enforcement of those rules merely because a party to a standard offer contract incorporating those rules views them as "not controlling".

Figueredo is not on point and is certainly not authority which could foreclose that enforcement. That case held that conflicts between alternative methods of calculating overtime pay under the Fair Labor Standards Act were to be resolved by applying a regular rate of pay based on what hours and methods of pay were adopted in actual fact by the employer and employee, unaffected by any designation of a contrary "regular rate" in the wage contracts. [citing Walling v. Younserman-Reynolds Hardware Co., 325 U.S. 419 (1945).

However, Panda can cite no analogous holding to the effect that the Commission's standard offer rules are like "regular rates" provisions in a collective bargaining agreement, i.e., pronouncements over against which the parties' contrary intent is controlling. Instead, the Commission's standard offer rules, promulgated to implement PURPA in Florida by the expert agency entrusted with that responsibility by the FERC, are Commission-determined specific parameters of the QF power purchase agreement in question. West Penn, supra. As such, they are neither controlled over by a contrary intent manifested by a party or parties to the standard offer, nor subject to court interpretations which conflict with that of the Commission, unless that interpretation is clearly erroneous. Pan American, supra.

Panda also argues that the Commission's interpretation is not consistent with three orders involving Auburndale Power Partners, L.P. However, those orders involved, not the size of a facility intended to provide power under a standard offer, but the assignment of standard offer contracts to preexisting plants. They represent the Commission's policy decision that its goal of encouraging small QFs less than 75MW would be unaffected by allowing the assisnment of those standard offers to pre-existing facilities.

The remainder of Panda's points do not alter the conclusion that Rule 25-17.0832(3) (a) was properly found to limit Panda's proposed facility to less than 75MW. Though Panda asserts that

contract ambiguities should be resolved against the drafter, the Commission noted that even theoretical ambiguity as to this issue had been resolved in Polk Power. Nor can ambiguity be found in the circumstance that a less than 75MW facility could be reasonably expected to generate slightly more than 75MW. This is inherent in the definition of "total net generating capacity" as the electrical or mechanical energy made available for use exclusive of any such energy used in the power production process. Polk Power, supra. (Tr. 159-161; 178).

The Commission also properly rejected Panda's claim that changes in emission standards, performance degradations and climate conditions justified its position that its proposed 115 MW facility complied with the facility size rule. There was competent, substantial evidence that there are other qualifying facilities that consistently provide capacity at their net rated output. [Tr. 162-7] The Commission, relied on, inter alia, this evidence in support of its conclusion that Panda did not need a 115MW facility to serve its standard offer contract and the Commission did not err in doing so. As this Court stated in Polk County v. Florida Public Service Commission, 460 So. 2d 380 (Fla. 1984),

> . . . we 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.

The Commission also noted that

> [e]ven if Panda needed to build a larger facility, our rules do not allow it.

Order, p. 4. In other words, Panda remains responsible for the design of its facility and cannot make the Commission responsible for its choices so as to excuse its failure to comply with Commission rules. As stated by FERC in West Penn,

> . . . whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions [than avoided costs1 of the QF's contract with the purchasing utility is a matter for the States to determine. [e.s.]

1995 FERC LEXIS 856, p. 43. There is no authority that a QF such as Panda can unilaterally modify those terms and conditions.

While Panda claims that its lengthy, but inapposite, dissertation on contract interpretation is in search of finding the parties' intent, Panda ignored the clear statement of the parties' intent in the Contract itself:

> . . . the QF desires to sell, and the Company desires to purchase electricity to be generated by the Facility and made available for sale to the Company, consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the execution date; [e.s.]

(R. 9) Panda's witness, Mr. Dietz, acknowledged that this Contract was intended to be consistent with the Commission's rules. [Tr. 3401 Contrary to Panda's claim that the Commission ignored the parties' intent or declared it irrelevant, the Commission's Order is fully in accord with that intent as stated in the Contract itself and acknowledged by Mr. Dietz. It is Panda's argument in favor of unilateral nullification of the

effect of those rules that is inconsistent with the parties' clearly stated intent, as well as contrary to law.

**B. The Commission did not err in finding that the duration of capacity payments to Panda was limited to 20 years.**

Panda's argument on this issue continues to rest on the assumption that the Commission's rules can be ignored. Indeed, it is only at the end of the three-page discussion of this issue, that Panda finally mentions Rule 25-17.0832(3)(e)(6) at all.

In the Commission's view, the rule is dispositive, not merely an interesting sidelight. The rule states,

> " [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". [e.s.]

Given that the standard offer contract identifies the plant life of the avoided unit as 20 **years** (R. 89), direct application of the rule limits the **term** of capacity payments to 20 years, regardless of the contract termination date filled in by Panda. Panda has not demonstrated anything to the contrary, and its "contract trumps the rules" approach again erroneously assumes that the contract is one thing and the rules another, even though the former incorporates the latter,

Instead of a direct approach, which effectuates the Commission's rules, **as** consistent with the parties' stated intent, Panda offers an alternative to the rule, very much in the manner Panda offered an alternative to the facility size rule. However, it is not for Panda to restructure either the Commission's rules or policies. Florida Power & Light, supra.

There are, moreover, at least two problems with Panda's assertion that "the only fair and logical reading of the contract" is that Panda was to supply firm capacity to Florida Power for thirty years. First, the Commission could not approve an arrangement involving 30 years of capacity payments to avoid a plant with a twenty-year life, other than by mistake or inadvertence, because the Commission cannot approve payments which exceed avoided cost. Section 366.051, Florida Statutes. West Penn, supra. FERC LEXIS, 856 at p. 43.

Second, the "value of deferral method" which Panda argues should apply, extending avoided cost payments beyond the life of the avoided unit -- in this case, by a decade -- would eliminate the opportunity at the end of the designated avoided unit life to assess the ability of future technology to meet the needs of the utility and its customers more efficiently. As Panda's witness testified,

> In the value of deferral methodology, it explicitly assumes that the entire infinite stream is identical [as to the characteristics of the plant being avoided].

[Tr. 5311

Thus, even if Panda could choose whether to adhere to the Commission's rule or Panda's "value of deferral method" alternative, which it cannot, that alternative has the fatal defects of being unapprovable for exceeding avoided cost and undesirable for "locking in" the utility to the costs of current technology for an "infinite stream" -- potentially uncontrolled lengths of time.

The Commission's rule, in contrast, is both more fair and logical than Panda's reading. More to the point, Panda's compliance with it is required and the Commission did not err is so holding. §366.095, Florida Statutes.

**C. Any arguable waiver and estoppel caused by Florida Power's conduct cannot operate to nullify the effect of the Commission's standard offer rules.**

In the concluding section of the Initial Brief, Panda argues that Florida Power knew that Panda proposed to build **a** larger plant than 75MW and requested the Commission to approve the Contract anyway. Panda further argues that Florida Power expressly represented to the Commission that the Contract **was** a thirty-year agreement and sought and received the Commission's approval thereof. Panda concludes that Florida Power therefore has waived - or is estopped by this course of conduct to assert -- that Panda's facility must, by rule, be less than 75MW total net generating capacity or that the duration of capacity payments is limited by rule to 20 years. Florida Power, for its part, contests the factual premises asserted by Panda.

The Commission views this factual debate, however, **as** fundamentally irrevelant. As a matter of law, the operations of the Standard Offer Contract must comply with the Commission's standard offer rules incorporated therein, any understandings of the parties to the contrary notwithstanding.[13] As established

[13] As stated in Oakwood Hills v, Horacio Toledo, 599 So. 2d 1374, 1376 (3rd DCA 1992), authority relied upon by Panda itself, "It is a recognized principle of law that the parties' own interpretation of their contract will be followed unless it is contrary to law". [e.s.]

previously, the Commission's enforcement of those rules cannot be argued away by preemption theories nor can the rules be ignored on the basis of such inapposite authority as ~~Figueredo.~~ Panda's theory of waiver and estoppel, its last excuse for ignoring those rules, is no more effective in achieving that result than the preemption and Figueredo constructs.

This case embodies a truism: Panda's participation in the Standard Offer Contract is conditioned on its compliance with the Commission's standard offer rules. The Commission's Order did not err in requiring Panda's compliance with Rules 25-17.0832(3) (a) and 25-17.0832(3)(e)(6), regardless of the alleged course of conduct of the parties. The Commission's interpretation of those rules has not been demonstrated to be clearly erroneous. That interpretation is therefore entitled to this Court's deference and the rules, as so interpreted, are binding on the parties. Indeed, the only relevant estoppel issue demonstrated in the facts of this case is the estoppel of Panda to contest the Commission's jurisdiction as to these issues, given its prior invocation of that jurisdiction, both through its own pleadings and continuing reliance on that jurisdiction for resolution of the dispute concerning milestone dates.

## CONCLUSION

Panda-Kathleen L.P. has not demonstrated the Commission's Order to be clearly erroneous or unsupported by competent substantial evidence. Nor has appellant demonstrated that the Order failed to comport with the essential requirements of law.

WHEREFORE, appellee Florida Public Service Commission respectfully requests that this Court affirm the Commission's Order,

Respectfully submitted,

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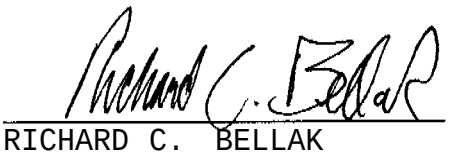

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Dated: November 4, 1996

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 4th day of November, 1996 to the following:

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