IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 87,175

PANDA-KATHLEEN, L.P.

Appellant,

v.

FLORIDA POWER CORPORATION and
THE FLORIDA PUBLIC SERVICE COMMISSION,

Appellees,

INITIAL BRIEF ON THE MERITS OF PANDA-KATHLEEN, L.P.

ON APPEAL FROM A FINAL ORDER OF THE
FLORIDA PUBLIC SERVICE COMMISSION

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INTRODUCTION

This case involves an attempt by Florida Power Corporation (Florida Power) to escape its obligations under a standard offer contract to purchase electric power from Panda-Kathleen L.P. (Panda). Florida Power raised two spurious contractual issues in declaratory proceedings brought before the Florida Public Service Commission (Commission). These proceedings were used in an attempt to derail Panda's ability to perform under the contract. Florida Power's actions were motivated by an acknowledged desire that Panda not build **a** power plant because Florida Power determined, more than two years after signing the Panda contract, that the arrangement was no longer economically beneficial,

There are three issues to be addressed: **(1)** whether there was jurisdiction for the Commission to review the contract previously entered into by the parties; and **if** there was such jurisdiction; (2) whether the facility that Panda plans to build to meet its 74.9 megawatt Committed Capacity obligations under the Panda/Florida Power standard offer contract violates the contract; and (3) whether Panda is entitled to capacity payments for the full term of the contract.

STATEMENT OF THE CASE AND FACTS

This is an appeal **by** Panda from a final decision of the Commission relating to the service of a utility providing electricity. Art. V, §3(b)(2), Fla. Const., § 366.10; Fla. Stat (1995); and Fla. R. App. **P. 9.030** (a)(1)(A)(ii). The action was commenced at the Commission when Florida Power filed a request for a declaratory statement approximately four years after entering into a contract with Panda, seeking a determination that the plant designed by Panda pursuant to that contract violated the Commission's rules and the parties' contract, (R. 1-5). Florida Power contended that the facility designed by Panda should not be built and that Florida Power, despite the thirty year term **of** the contract, was obligated only to make "capacity" payments to Panda for twenty years, ***(Id.)***.

Panda moved to dismiss the proceeding, urging that the Commission's jurisdiction was preempted by federal law, meaning that it could not hear this long-after-the-fact challenge to the performance of the contract. (R, **449-475)**. Following denial **of** that motion (R. 1259-

1268), Panda pursued certiorari relief before the Court. That petition remained pending while the Commission proceeded to conduct an evidentiary hearing and ultimately entered its final order. (R. 1597).[1] In the alternative to dismissal, Panda sought a determination from the Commission that its plant design conformed to the contract and that the contract called for thirty years of capacity payments. (R. 154-183.) Panda additionally sought an extension of its construction commencement and in-service dates, based on the fact that Florida Power's institution of proceedings before the Commission had effectively halted Panda's efforts to secure equipment and financing. (R. 182-183).

In the final order now appealed, the Commission determined that Panda's proposed facility did not comply with provisions of its rules and that Florida Power was responsible for payments to Panda only for twenty years. (R. 1597-1629). The Commission did, however, extend the "milestone" dates for Panda's facility, and later corrected a scrivener's error in its final order that had resulted in a miscalculation of that extension. (R. 1668).

1. Background of Proceedings

A. The initial approval of the standard offer contract.

In 1978, Congress enacted comprehensive legislation, including the Public Utilities Regulatory Policies Act of 1978 **("PURPA")** to make the nation more energy independent. 16 **U.S.C.** §§ 823(a), ***et seq.*** (1995). This legislation encouraged cogenerators and small power producers (known as "qualifying facilities" or "QFs") to produce electricity and required utilities such as Florida Power to purchase the energy. In order to be a "qualifying facility" under PURPA and the Federal Power Act, 16 **U.S.C.** § 796(18)(B), a cogenerator must meet certain minimum size and output restrictions.[2] It is undisputed that Panda is a qualifying

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[1] The Court issued an order to show cause directing a response to the petition for a writ of certiorari from Florida Power. Panda, however, withdrew its petition in order to pursue the federal preemption issue jointly with other issues on final appeal.

[2] Title 16 U.S.C. § 796(18)(B) defines "qualifying cogeneration facility" for these purposes as one which

> (i) the [Federal Energy Regulatory Commission] determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use and fuel efficiency) as the Commission may, by rule, prescribe; and
>
> (ii) is owned by a person not primarily engaged in the generation or sale of

(continued . . .)

facility.[3] As more fully set forth below, a principal premise adopted by PURPA to encourage the generation of power by QFs is to exempt them from ongoing utility-type regulation by traditional state regulatory authorities, 16 U.S.C. § 824a-3(e)(1). States are provided a limited role under PURPA, to implement its purpose by authorizing contracts between utilities and Qualifying Facilities. 16 U.S.C. § 824a-3(f).

In early 1991, Florida Power sought to purchase power from QFs by both of the two alternate contracting methodologies established by Commission rule to implement PURPA's design. (T. 81-82); Fla. Admin. Code R. 25-17.0832(2), (3). Those two methodologies are classified as the "negotiated contract" and the "standard offer contract." (*Id.*). To that end, Florida Power submitted for Commission approval a standard offer contract form. (Ex. 5). By Commission rule, the standard offer contract signed and submitted by any qualifying facility must be accepted by the utility unless it affirmatively seeks permission of the Commission to reject the contract. The standard offer contract must offer to purchase electricity from cogenerators at full avoided cost. Fla. Admin. Code R. 25-17-0832(3)(b).

In addition to the use of standard offer contracts, the Commission's regulations authorize utilities to enter directly into negotiations with QFs for the purchase of power. Fla. Admin. Code R. 25-17.0832(2). Under the "negotiated contract" rule, the rate paid to the QF cannot be more, but may be less, than the full avoided cost. Any contract resulting from such negotiations must be reviewed and approved by the Commission. (*Id.*).

The 1991 standard offer contract utilized by Florida Power to send to Panda was substantially similar to the negotiated contracts that Florida Power executed in 1991 with numerous QFs in response to a Request for Proposal. (T. 82, 229-230; Ex. 23). Florida Power actually required any QF with which it "negotiated" an agreement to execute essentially the same

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(continued . . .)

electric power (other than electric power solely from cogeneration facilities or small power production facilities); . . . .

[3] Under PURPA, FERC has exclusive jurisdiction to determine whether a facility qualifies as a QF.

form contract (T.82-86). The procedural difference in the two circumstances is that a standard offer contract is first approved by the Commission before acceptance by a QF, and a negotiated contract is approved subsequent to execution by the parties. (T. 81-82). In the case of the standard offer contract, after the "blanks" are filled in and it is signed by the parties, it is submitted again to the Commission. (T. 91-92).

The standard offer contract form for which Florida Power sought and received approval from the Commission contained several blanks which had to be completed by prospective QFs, including the two contract terms which are now the subject of the dispute in this case: (1) the amount of power that the QF (in this case, Panda) would be obligated to provide to the utility as "Committed Capacity, " and (2) the duration of the QF's obligation to provide the Committed Capacity (and Florida Power's obligation to make payments) under the contract. (Ex. 30 at ¶¶ 4.1, 7.1). Incorporated into the standard offer contract are formulas for the computation of the payments to the QF, and illustrations for the use of those formulas. (Ex. 30 at ¶ 8.3; Ex. 30; Schedule C). The contract form submitted to Panda and other prospective QFs expressly limited them to choosing a Committed Capacity of less than 75 MW. ("The availability of this Agreement is subject to: . , . the Facility having a Committed Capacity which is less than 75,000 KW [equivalent to 75 MW]"; Ex. 30 at ¶ 2.1.2). (Wherever possible, the word "megawatts" will be abbreviated "MW".) The form, however, did not address the net maximum generating capacity of the facility.

In August 1991, the Commission reviewed and approved Florida Power's form of standard offer contract (as well as standard offer contracts submitted by other electric utilities). (Ex. 7). In rendering its approval of that form, the Commission specifically held that a "regulatory out" clause should not be included in the standard offer contract submitted by Florida Power. (Ex. 7 at pp. 70-71). This clause, which had previously been authorized by the Commission in QF/utility negotiated contracts, was the only one that would have allowed the Commission during the term of an existing contract to impose an alteration of the terms of the contract or the rates that the utility would have to pay based upon changed circumstances.

(*Id.*).

B. The open season and the execution of the contracts.

Following the Commission's approval of the standard offer contract form, Florida Power sent copies of the standard offer contract to interested QFs, and declared a two-week "open season" for any QF to execute and return the contract. (Ex. 7 at p. 1). By the close of that period, Florida Power had received ten executed standard offer contracts, including one from Panda. (Ex. 8). In executing the standard offer contract, Panda filled in the blanks with a "Committed Capacity" of 74,900 kilowatts (equal to 74.9 megawatts) and a contract term of **30** years. (Ex. 30 at ¶ 7.1; ¶ 4.1).

The contract provides for two methods of payment to Panda, First, Panda is paid a "capacity payment" for the amount of "Committed Capacity" that Panda offered to provide, in this case 74.9 MW. (Ex. 30 at ¶¶ 8.2-8.5). Committed Capacity refers to the amount of electricity that Panda is obligated to provide to Florida Power's transmission grid at all times, regardless of environmental conditions: "The Committed Capacity shall be made available at the Point of Delivery from the Contract In-Service Date through the remaining Term of this Agreement." (Ex. 30 at ¶ 7.1).

The contract provides that Florida Power, throughout the life of the contract, has the right to require Panda to demonstrate that it is, in fact, providing 74.9 MW "*or more*" at the delivery point defined therein. (Emphasis supplied; Ex. 30, ¶¶ 7.4, 1.8). The contract further provides that Panda must make the Committed Capacity available to Florida Power throughout the term of the contract, and Florida Power is obligated to pay for it. (Ex. 30, ¶ 6.1).

The "capacity payment" constitutes remuneration to Panda for the outlay of capital required to build and maintain a plant that is capable of producing the minimum of 74.9 MW whenever needed under any conditions over the life of the contract, whether or not Florida Power at any given moment needs to use that amount. (Ex. 30, ¶¶ 8.2-8.5). (The plant was not intended to operate 24 hours a day, 7 days a week, but rather to be available at 74.9 MW whenever needed. ***(Id.,*** ¶¶ 8.3, 8.4).) No capacity payment is made for any electricity

generated above 74.9 MW. (*Id.*, ¶ 6. 1). In addition to capacity payments, however, Panda is to be paid for *all* of the actual electrical energy that the Panda plant actually provides to Florida Power, under certain alternate rate schemes as set out in the contract, which generally reflected standard "as available", or "firm avoided energy rates" that Florida Power would have encountered in buying power from any source, (Ex. 30; ¶¶ 9.1-9.2).

C. **The selection of the Panda contract.**

The committed power supply that would have been provided by the ten executed contracts received by Florida Power at the close of the open season was well in excess of the amount that Florida Power was seeking. (T. 92, L. 14-18). As a result, Florida Power began a process of choosing which standard offer contract it wanted to utilize. Florida Power prepared a report rating the standard offer contracts it received, and filed that report with the Commission. (Ex. 8). Several of the competing bidders other than Panda submitted contracts with 30 year terms, and some bidders proposed plant designs in excess of 75 MW of net generating capacity, to be distinguished from the Committed Capacity that the contract expressly defined. (Ex. 8 at pp. 13, 15; T. 558).

The Florida Power report (which repeatedly recited that Panda had submitted a contract with a thirty year term, and Committed Capacity of 74.9 MW) ranked Panda's contract submission as the best in terms of feasibility and benefit to ratepayers. (Ex. 8; pp. 1, 2, 15, 19). Florida Power did not seek to disqualify any of the proposals on the grounds that generating capacity was in excess of 75 MW, or on the grounds that a term in excess of twenty years constituted a violation of Commission rules, (T.97-99). Florida Power knew that several of the facilities proposed in response to the standard offer contract were capable of generating in excess of 75 MW. (One proposal had an expressed net generating capacity of 85.442 MW). (T. 96- 97). None of those bids was rejected by Florida Power for exceeding 75 MW in capacity, nor did Florida Power raise this issue in seeking approval from the Commission to reject all contracts except Panda's (T. 98- 99). Florida Power's witness Robert Dolan recalled that one competing bidder was told to amend its proposed *Committed*

Capacity from in excess of 75 MW, and the bidder responded with a proposed 74.999 MW of Committed Capacity. (T. 95). Indeed, the "size" characteristic for evaluating the competing proposed projects was defined expressly as "[t]he capacity committed to in the contract, " (Ex. 8 at p. 11). There was no factor at all requested for the submitted proposals that addressed total generation of a facility. Instead, it was the proposed Committed Capacity that was related to the Commission's rule and to the subscription limit of 80 MW that was of interest to Florida Power for its power needs. (*Id.*; pp. 11 et seq.).

Florida Power petitioned the Commission for permission to reject all of the standard offer contracts it had received, ***except the one received from Panda, because of its superior ranking.*** (Ex. 8). The Commission approved Florida Power's petition to reject all standard offer contracts except Panda's, over the objection of at least one of the competing bidders. (Ex. 10). In that same order, the Commission formally approved Panda's contract with Florida Power which included terms calling for a 74.9 MW Committed Capacity and a 30 year contract period. ***(Id.).*** In approving the Panda contract, the Commission expressed the view that "Florida Power Corporation acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by FPC to be the best available. " (Ex. 10; p. 3).

II. The size of the facility.

From the outset of this transaction, Panda made clear that it proposed to build a facility that would generate in excess of 74.9 MW, (T. 283). The initial tentative Panda design, submitted with the contract, was for a facility that could generate 85 - 95 MW - under standard industry design environmental conditions known as "ISO," (59°F temperature and 60% humidity), (T. 106, 283, 556, 559). In 1992, after the contract was signed, Panda began the detailed process of planning, designing and seeking financing for its facility. Pursuant to its contractual obligation to keep Florida Power apprised of its engineering design (Ex. 30 at ¶ 3.5), Panda on several occasions informed Florida Power that it intended to construct a plant with a designed maximum capacity of 115 MW at IS0 conditions, in order to meet its 74.9

MW Committed Capacity obligations under the contract. (T. 294, 308, 392-94, 398).

J. Brian Dietz, director of engineering and operations for Panda, testified without equivocation that in order to provide to Florida Power a Committed Capacity of 74.9 MW, at all times, under all conditions, and to comply with Florida emission standards that changed after the contract had been signed, Panda would be required to construct a plant with a maximum total capacity well in excess of the 74.9 MW Committed Capacity. (T. 304-6). Dietz was personally responsible for Panda's engineering decisions in planning the plant, and it was his professional judgment that led Panda to conclude that a plant design that could meet its 74.9 MW Committed Capacity obligations under all conditions had to have a minimum design total net capacity of at least 100 MW. (T. 312). Numerous external factors, such as temperature and humidity, transmission line losses and facility aging severely effect the output of any plant. (T. 308- 313). Dietz explained that whenever there is an obligation to provide a minimum fixed amount of electricity (Committed Capacity of 74.9 MW) over a long period of time and range of weather conditions, a facility must be capable of generating more than the minimum. *(Id.).*

Panda, like any QF developer in the field, was further constrained by the parts commercially available for the plant, particularly turbine generators and their level of pollution emissions. (T. 3 13, 3 17-19). The only equipment configurations available to satisfy both contract requirements and emission standards would have a maximum output of 115 MW at IS0 conditions. (T. 322).

> It is not our intention to build a facility that sometimes makes 74.9 and other times doesn't make 74.9, because on the days that Florida Power Corp. needs the power, which is sometimes the hottest days of the year, they need to know that 74.9 megawatts is there. They've contracted with us for it. So therefore, we wanted to build a plant that would meet that commitment; and build the smallest one that we possibly could that would still make the 74.9 and still build a plant that would meet the Florida environmental requirements.

(T. 347). Thus, both a "safety factor" of design capacity in order to provide Committed Capacity under all conditions, and emissions constraints drove Panda's design.

Florida's emissions regulations were changed in 1992, and those changes severely

limited the emissions that could be generated by Panda's proposed plant. (T. 312). As the result of those changes, it was uncontradicted that Panda had fewer options in selecting equipment, because only a small number of the generating equipment units available could meet Florida's emission's requirements.[4] In fact, the plant configuration that Panda had originally submitted to Florida Power would not meet Florida's changed emissions requirements. (T. 3 18). Based on considerations of degradation of performance and emissions, Panda ultimately determined that only two turbine equipment models available at the time in the market would meet the emission and performance requirements of the project -- the ABB11N1 turbine (maximum capacity 115 MW) and the GE Frame 7 (maximum capacity 118 MW). (T. 318- 319). Of these two, only ABB would guarantee a delivery time, and Panda ultimately chose the ABB11N1. (T. 319-320).

Panda's design conclusions corresponded to Florida Power's own recommendations on size and emission efficiency to the effect that a plant with maximum capacity in excess of Committed Capacity had to be constructed to ensure compliance with contractually Committed Capacity. That is, until there was a drastic change based on Florida Power's rethinking of its previous business judgment to obtain cogenerated power, In September, 1992, Florida Power recommended to Panda an equipment configuration using two LM 6000 turbines, which resulted in a design capacity of 95 to 100 MW. (T. 392). Ultimately, Panda determined that this LM 6000 turbine configuration would not meet Florida emissions requirements. (T. 3 18). The plant design ultimately chosen by Panda used the smallest available turbine equipment which would assure generation of the Committed Capacity under all conditions, and also meet Florida's emissions requirements. (T . 3 19).

At trial, Florida Power did not put forth any credible counter-evidence that a plant with a maximum generating capacity of 74.9 MW would be feasible under the contract. No witness for Florida Power told the Commission what generators Panda could have selected to build a

[4] Since Florida Power required Panda to have a backup source of fuel for its plant, Panda was forced to design its plant with oil as an auxiliary fuel. The potential use of oil as a fuel eliminated Panda's ability to use certain kinds of emission-limiting equipment. (T. 313-314).

facility that would put out 74.9 MW at all times under all conditions and meet Florida's emissions requirements, other than what Panda selected. Florida Power's Dolan vaguely suggested that Panda's Dietz had not considered such items as inlet air conditioning, in assessing necessary design criteria. (T. 419). On rebuttal, this suggestion proved inaccurate when Dietz explicitly testified that he had considered this factor. (T. 556-557).

Dolan also offered vague anecdotal testimony that other qualifying facilities were controlling performance degradation, but no engineering analysis of any plant was specified that matched a Committed Capacity such as Panda's under the changed emissions requirements that Panda faced. (T. 162-163). A review of the list of Florida Power's other active cogeneration contracts (Ex. 2) revealed that many of the cogenerators serving Florida Power today also designed their plants with maximum net generating capacities higher than their total committed capacities. (T. 73). (The Auburndale facility, for example, provides 131 MW of Committed Capacity from a 150 MW plant (T. 69-72); Orange Cogen supplies 97 MW of Committed Capacity from a 104 to 106 MW plant). (Ex. 2). Florida Power also currently buys power from other cogenerators who produce well in excess of their Committed Capacity. For example, at times Florida Power buys up to 200 percent of the Committed Capacity generated by U. S Agricultural under the identical standard offer contract signed by Panda. (T. 64-66).

This historic overview of Florida Power's industry-wide practices harmonizes with the fact that prior to the summer of 1994, Florida Power *never* objected to Panda's plans for building a facility that could generate in excess of 74.9 MW. Indeed, it suggested just that very prudent industry technique for securing Committed Capacity and encouraged Panda to build a plant larger than 74.9 MW. (T. 392).

The summer of 1994 brought about the dramatic change in viewpoint alluded to earlier, however, when Florida Power for the first time objected to the construction of any plant larger than 74.9 MW and took the position that to construct a plant above that maximum capacity would violate the contract and Commission rules. (T. 238-241). A senior vice-president of

Panda testified to this remarkable change in attitude by Florida Power reflected in an internal, confidential document titled "Cogeneration Review" in which Florida Power essentially declared its intention to limit, if not undermine, cogeneration contracts whenever possible because they were not cost effective when compared to Florida Power facilities and posed a significant threat to Florida Power's competitive position. (T. 237-238). Florida Power's global strategy to decrease and/or eliminate the purchase of power from cogenerators in 1993 and 1994 rested on the findings of this critical corporate position paper:

> at the present time, the QF contracts are not cost effective when compared to FPC built natural gas fired combined cycle units.. . [Florida Power's] resources need to be assigned to properly evaluate and implement, if feasible, all of the options available to increase the cost-effectiveness of the QF contracts. These contracts pose a significant threat to [Florida Power's] competitive position.

(T. 237-238). At the time Florida Power adopted this view, it considered cogenerators to be competitors in the business of wholesaling electricity, to which it had lost some business. (T. 138). Based on its Review, Florida Power investigated the possibility of buying out certain contracts, including Panda's. Florida Power formed a "NUG" (non-utility generated) buyout committee to consider the situation in order to "make a return and improve operation of facilities." (T. 122; 124-125). By early 1994, Florida Power concluded from this review that not only had it overbooked Committed Capacity, but that purchasing power from QF's was no longer competitively or financially beneficial to it. (T.237-38).

Florida Power chose to implement its cogeneration strategy by "actively enforcing" its contracts and attempting to identify "breaches" by cogenerators, no matter how small, which would allow it to escape its obligations. (Ex. 14 , p. 10). It was this policy that led to a series of cases before the Commission, including this one, in which Florida Power attempted to have cogenerators who had executed contracts at about the same time as Panda declared in breach of their contracts. ***(See,*** for example, ***Re Florida Power Corp.,*** *infra.*).

Dolan, who was the manager of Florida Power's cogeneration contracts, acknowledged the business-driven rationale for this strategy. Florida Power deliberately overbooked Committed Capacity in 1991 between the negotiated contracts and the standard offer contracts

it was seeking at that time in expectation that some QF generating facilities would never come on line. (T. 123). Florida Power's business prediction proved to be incorrect, however, (T. 123-24, 138). Perhaps not surprisingly when business predictions turn into misjudgments with the passage of time, Florida Power ended up with more Committed Capacity than anticipated. (T. 123, 127 ,129) Panda's contract was specifically targeted by Florida Power as part of this strategy. (T. 127). Under these circumstances, Dolan admitted that by mid-1994, Florida Power ***did not want to see Panda's plant built.*** (T. 129).[5] Having made that determination, Florida Power ***then*** became insistent that the Commission must disapprove the proposed Panda plant because its net generating capacity exceeded 74.9 MW. (T. 238-241).

In 1992, Florida Power's representatives even went so far as to dissuade Panda from asking the Commission whether the sizing of Panda's plant was a problem. A Panda representative testified

> Bob Dolan told me that the size was not a problem to FPC, but that we should not talk with the Florida Public Service Commission on installing a 110 MW plant, and that we should be careful dealing with the Public Service Commission while ARK Energy was still challenging the FPC/Panda contract.

(T. 294-295). Florida Power did not cross-examine on this issue, and Dolan admitted that he did not want Panda to go to the Commission in 1992 because he did not want Panda to "muddy the waters" while the Commission was considering whether to allow Florida Power to select Panda's contract. (T. 115).

In response to Florida Power's belated objection, Panda met with Commission staff in August of 1994, and received a confirmation letter from Joseph Jenkins, the director of the Commission's Division of Electric and Gas, stating that Panda's proposed 115 MW facility did not violate the contract or require approval of the Commission. (T. 243-244). That letter also stated that Florida Power agreed with his view. (Ex. 19). Nevertheless, in January of 1995,

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[5] Florida Power's intentions are further clarified by other examples of its treatment of Panda. In late 1993 and early 1994, Panda was considering the relocation of its thermal host in order to accommodate additional steam use. Florida Power refused to agree to such a move, despite the lack of any effect whatsoever on Florida Power's interests. (T. 129-130). In an internal memorandum discussing that refusal, Florida Power noted that it did not wish to "throw Panda a lifeline". (T. 130; Ex. 13.)

Florida Power filed a Petition with the Commission seeking a declaration that Panda was in violation of its contract and the Commission's rules. (R. 1). As a result of that Petition, Panda's efforts to finance and begin construction of the project in a timely manner had to be halted. (T. 248).

III, The length of the contract.

Section 4.1 of the contract executed by Panda and Florida Power specifically identifies the duration of the agreement:

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

(Ex. 30 at ¶ 4.1). Dolan of Florida Power testified that from the outset the utility was aware that the contract submitted by Panda was for 30 years. (T. 100). Florida Power so described the contract in its petition to the Commission when it sought permission to reject all standard offer contracts but Panda's. (Ex. 8). The duration of the contract pertains directly to its payment terms. The two are linked expressly in the agreement, pursuant to which

> the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement. "

(Ex. 30 at ¶ 7.1; T. 171). As compensation for that provision of Committed Capacity,

> the Company [Florida Power] agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement.

(Ex. 30 at ¶ 6.1). After approval of the Panda contract by the Commission, Panda and Florida Power discussed the term of the contract on several occasions. Panda raised the issue because the illustrative schedule to the contract, Appendix C, only calculated "capacity payments" to Panda for twenty years, not the full thirty of the contract. (Ex.30; App. C; Schedule 3). The schedule did, however, expressly incorporate the formula for computing capacity payments set forth in the Commission's Rules.[6] (Id. App. C.)

[6] The Commission's standard offer rule expressly provides that a standard offer contract need only have an illustrative table of capacity payments for at least ten years attached as an exhibit, and does not require the standard offer contract to include a schedule of capacity payment terms for covering the full term of the contract, The rules provide a formula for (continued . . .)

Three years after execution of the contract, Florida Power for the first time raised that Rule 25-17.0832(3)(e)(6) limited its obligation to make capacity payments to Panda to the period of time equal to the "anticipated plant life of the avoided unit", which Florida Power equated to the "economic life" of the unit which was referred to under the contract as 20 years. (T. 51-52; Ex. 30; App. C; Schedules 2-3). Dolan testified that the difference between the 20-year capacity payment schedule and the 30-year term of the contract was not discussed with Panda when the contract was signed in 1991. (T. 168). He acknowledged that the contract was unclear on what would happen after the 20-year capacity payments term expired and "as-available" payments commenced. (T. 170).

Dolan also testified to his understanding that although Panda was obligated by contract to provide the capacity, it would not receive payment for supplying *Committed Capacity* (which includes payment for construction of the cogeneration facility) of 74.9MW for the last ten years of the contract term, but would receive payment only for electricity supplied on an "as available" basis by Panda. (T. 9; 101-103). Dolan admitted that although he personally had long held that view of the contract, perhaps even back to the time of execution, he had not communicated his view to Panda during the execution stage or the years immediately following. (T. 101-2). In fact, he testified that he believed the capacity Panda was obligated to provide for years 21 through 30 of the contract would be "free," (T. 91). Dolan never voiced this remarkable opinion to Panda or the Commission, even when Florida Power was seeking approval of the contract. (T. 101-103; 168-169). On cross-examination, he admitted that there was no clause in the contract which specifically stated that Florida Power was only responsible for paying for as-available energy charges for the last ten years of the contract. (T. 170-171). An expert witness for Panda testified that the only possible or fair reading of this contract was that capacity payments continued for years 21-30 and subsequently escalated annually at the same rate of 5.1% as contained in the illustrative schedule and the

(continued . . .)
computing the rest of the payments over the term of the contract. Fla. Admin. Code R. 25-17.0832(5).

Commission's Rules. (T. 512). Florida Power's notion of free capacity would constitute a blatant windfall, for under that construction of the contract Panda would still be providing thirty years worth of 74.9 MW Committed Capacity, which Florida Power could avoid duplicating, without paying for it. (T. 519-520).

Panda's expert also testified regarding the use of the value of deferral method set forth in the Commission's rules in interpreting the contract, explaining that the payment of thirty years of capacity payments was in fact mandated by the contract using that method and consistent with the Commission's rule. (T. 512-513). (That method is codified in Rule 25-0832(4) and Article VIII of the Contract and provides the basis for the calculation of capacity payments to be paid to cogenerators.) That method calculates the costs avoided by the utility, as required by PURPA, when the utility is able to defer the expense of building a new plant by purchasing firm capacity from a cogenerator. Panda's plant would permit Florida Power to avoid building 74.9 MW of capacity for a period of thirty years. Of course, the value of deferral method provides that Florida Power pay Panda for each of the thirty years in which Florida Power has avoided the cost of building a plant. (T. 515-519). As testified to by Panda's expert, the value of deferral method contained in the contract **and** in the Commission's rules provides that the capacity payments for year 20 of the contract should be escalated by 5.1 percent to derive year 21 payments, and that this procedure should be continued for each year up to year 30. (T. 535).

Panda's witnesses testified that Florida Power's representatives consistently acknowledged during the early years following execution of the contract, that capacity payments were due for the full thirty year terms of the contract and that the twenty year schedule in the appendix was an oversight that would be addressed. (T, 233-4; 394-5). At meetings with Florida Power, its representatives acknowledged that it was obligated to provide capacity payments to Panda for the last ten years of the contract with the only issue being what formula to use in light of the truncated schedule in Appendix "C." (*Id.*) No Florida Power witness contradicted Panda's testimony. Consistent with the timing of its change of heart on

the size of the Panda facility, Florida Power did not change its position on duration of capacity payments until after its early 1994 determination that it did not want Panda to build its plant. (T. 238-41).

Iv. **The decision of the Commission.**

The Commission found the evidence of the parties' understandings of the contract essentially irrelevant, instead ruling for Florida Power on both issues, the size limitations on the facility and the duration of the contract, by finding the contract which it had twice approved to now be in violation of its rules. The Commission's fmding was not based on the language of the parties' contract or their understanding, but on the conflict between 30 years and the 20-year term expressed in the Commission's rule and on the retroactive application of an interpretation of the Commission's 75 MW standard offer contract rule. (R. 1599). The Commission did rule for Panda on its request to extend the milestone dates under the contract for 18 months,

On the issue of facility capacity, the Commission stated the evidence showed that Panda could adequately serve its contract with a facility "much smaller than 115 MW"; "Panda does not need a 115 MW facility to serve its standard offer contract; " but that even if Panda needed to build such a larger facility to meet its Committed Capacity obligation, its standard offer rules did not allow it. (R. 1599). There was no record evidence, however, that supported the feasibility of a plant smaller than 115 MW under the output and emissions restrictions detailed by Panda's expert witness. The Commission did not conclude that Panda's design violated its contractual obligations, acknowledging that no term of the contract limited Panda's design to 75 MW of net generating capacity. (R. 1599). Instead, the Commission decided that any ambiguity surrounding the meaning of this contract was resolved by its decision in a case -- *Polk Power* -- issued after this contract was signed, which interpreted its rule respecting generating capacity limits for standard offer facilities by establishing a supposed bright-line rule that no standard offer contract would be authorized for a facility with total net capacity in excess of 75 MW. (R. 1599). Yet, the Commission's decision did not eliminate the original

ambiguity it had found, because it deemed that it would be reasonable, if not necessary, for any plant Panda designed to produce "slightly above" 75 MW, without further explication of how this conclusion was consistent with the contract, or the rule. (R. 1600).

With reference to the term of the capacity payments, the Commission acknowledged that the contract provided that the Committed Capacity of Panda shall be made available from the contract in-service date through the remaining term of the agreement (30 years). Nonetheless, because Commission rules limited capacity payments to the life of the avoided unit, Florida Power would only be required to make capacity payments for 20 years, and Panda would only be responsible for supplying firm capacity for 20 years, (R. 1602). The decision of the Commission found that the stated duration of the standard offer contract (30 years) and the cited rule "... are not consistent with respect to the term for firm capacity payments." (R. 1600).[7]

It is imperative for Panda that several of the Commission's non-findings on disputed facts be noted for the Court, as reflected in the Commission's response to Panda's Proposed Findings of Fact, (R. 1607).[8] Interestingly enough, certain findings are vital as well because of their inconsistency with the ultimate result.

The first group of findings can be classed as those which address the maximum generating capacity of the plant, an issue made critical by the Commission's determination that

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[7] As argued below, in sum the Commission rewrote the parties' contract to resolve the inconsistency of its plain terms with its post-contract, changed interpretation of its own rule.

[8] The argument section of Panda's brief will reflect back on these Commission responses for two reasons. First, to establish that what the Commission actually did was simply to conclude that its revised interpretation of its rule, coming after-the-fact of the approval of this contract, was inconsistent with this contract. The Commission simply applied its rule and ignored virtually all the evidence, except for selective approval of certain evidence largely provided by Florida Power. In short, the Commission regulated this transaction in a manner Panda will argue is prohibited by PURPA. Second, the treatment of Panda's proposed findings demonstrates that the Commission certainly did not utilize traditional contract interpretation methodologies. The plain language of the contract was not applied and, had the Commission found ambiguity in the contract's terms, it did not look to the parties' intent to clarify the ambiguity. By and large, the responses to Panda's proposed findings reflect the Commission's belief that the parties' discussions and course of dealings regarding their contract were *irrelevant* to the Commission's decision.

its rule intended this contract only to be for a facility of 75 MW total capacity rather than Committed Capacity. Proposed finding " 11" stated that Panda's original response explaining the nature of its planned facility was that it would generate ***in excess of 75 MW*** *of net* ***generating capacity.*** The Commission accepted this finding, "with the clarification that the plant configuration originally proposed by Panda would 'occasionally produce over 75' MW of net capacity." (R. 1609-1610).

In response to proposed finding "39, " the Commission agreed that other active cogenerators for Florida Power had designed their plants with maximum net generating capacities exceeding their committed capacities, including one plant with a 19 MW differential between committed and maximum capacities. (R. 1616). Finding "40" posed the fact that another cogenerator under a like standard offer contract was at times selling Florida Power 200 per cent of Committed Capacity. (T. 65). In rejecting this fact as both misleading and irrelevant, the Commission responded that the standard offer contract there signed was for 5.1 MW and that "FPC witness Dolan testified that [this cogenerator] would have subscribed for 10 MW if that amount had been available to subscribe to under [Florida Power's] standard offer contract." (R. 1617). Nonetheless, the fact remained that Florida Power was at times purchasing 10 MW from a plant with a standard offer contract Committed Capacity of 5.1 MW.

Another array of responses to proposed findings of fact submitted by Panda, reflected the Commission's opinion that the parties' understanding of the terms of the standard offer contract and their course of performance of the executed contract were "irrelevant to decide the factual matters at issue in this case. " (E.g., response to proposed finding 23; R. 1612-13).

The Commission found ***irrelevant*** that Florida Power did not reject any QF proposals on the basis that they included proposed plants of in excess of 74.9 MW for terms of thirty years. (*Id.*). The Commission found ***irrelevant*** that prior to the summer of 1994 Florida Power never objected to Panda's building a facility that could generate in excess of 74.9 MW. (#30; R. 1614). The Commission deemed ***irrelevant*** that its own division director confirmed

in writing that Panda's proposed facility did not violate the contract or require approval of the Commission. (#31; R. 1614-15). The Commission rejected as ***irrelevant*** Panda's opinion, conveyed through its chief design engineer, that the plant design was selected because it could meet Committed Capacity under all conditions. (#34; R. 1615). The Commission deemed ***irrelevant*** that Florida Power recommended the use of turbines having a capacity of 95-100 megawatts at standard operating conditions. (#36; R. 1616).

The Commission rejected as ***irrelevant*** that Florida Power offered no credible evidence that a plant with a maximum capacity of 74.9 megawatts would be feasible under this contract, or that there were generators available for purchase that would put out 74.9 MW at all times and under all conditions while meeting Florida's emissions requirements, other than those which Panda included in its reformulated design. (#38; R. 1616). This finding of irrelevance should be counterpoised with the Commission's concession that it may not have been technically feasible to build a plant with the requirements the Commission's rule was now interpreted by it to impose, (R, 1600). The Commission rejected as ***irrelevant*** that Panda had limited options in selecting equipment that could meet Florida's emission requirements. (#42; R. 1617). The Commission rejected as ***irrelevant*** that Florida Power's demands for the facility required Panda to design to use oil as a backup fuel and this eliminated the use of certain emissions limiting equipment. (#43; R. 1617). The Commission deemed ***irrelevant*** that Panda's original plant configuration would not have met state emissions requirements. (#44; R. 1618). The Commission found ***irrelevant*** that Panda's turbine choices came down to two choices, one of 115 and a second of 118 maximum MW, to meet contract requirements given emissions mandates and performance degradation factors. (#45; R. 1618). The Commission determined to be ***irrelevant*** that Panda and Florida Power each acted following execution of the standard offer contract as if the contract did ***not*** limit the net generation size of the facility. (#49; R. 1619).

The Commission rejected as ***irrelevant,*** on one ground, evidence that Florida Power encouraged Panda to design a plant with net generating capacity above 74.9 MW. (#53;

R. 1620). The Commission again rejected as ***irrelevant,*** on one ground, that Florida Power's strategy commencing in 1993 was to decrease or eliminate the purchase of power from cogenerators. (#54; R. 1620-21). Indeed, all of proposed findings 55 through 62, regarding Florida Power's intentions to avoid this contract and conduct in support of that strategy were deemed ***irrelevant.*** (R. 1621-23). Following issuance of the Commission's final order, this timely appeal ensued.

SUMMARY OF ARGUMENT

Panda's position before the Commission and in this appeal has three parts. First, Panda contends that under the express preemption provisions of PURPA there was no jurisdiction for the Commission to re-apply its rules in any manner to determine that the contract between Panda and Florida Power (in effect since 1992) was invalid, and that any issue of contract interpretation or performance thereunder must be left to the courts. Having approved the contract exactly as written, Panda contends that Florida Power could not ask the Commission to rewrite it, revoke its approval or interpret it. Any issue of contract interpretation had to be left to the courts. Second, even if the Commission had jurisdiction to hear this Petition, it nevertheless must conclude that the contract permitted Panda to build the facility it proposed and to receive capacity payments for the stated duration of the contract - 30 years. Finally, Florida Power waived its rights and was estopped to argue its position (and prevail) by virtue of its consistent conduct from 1991 to 1994 in proposing, entering into, and beginning performance of the contract that permitted the size facility Panda proposed and required payment for a period of 30 years.

The standard of review for questions of law is unrestrained, de *novo* review. ***Walsingham*** v. *Dockery*, 671 So. 2d 166 (Fla. 1st DCA 1996); ***Transportes Aereos Nacionales, S.A. v. DeBrenes***, 625 So. 2d 4 (Fla. 3d DCA 1993), ***rev. denied,*** 682 So. 2d 1025 (Fla. 1994). That standard of review should apply to the issue of preempted subject matter jurisdiction under PURPA. Additionally, the standard for reviewing the plain meaning of an unambigous contract is also ***de novo. CH2M Hill Southeast Corp. v. Pinellas County, 598 So.*** 2d 85 (Fla. 2d DCA), ***rev. denied,*** 613 So. 2d 7 (Fla. 1992); ***Dalton v. Dalton, 304 So.*** 2d 511

(Fla. 4th DCA 1974). The standard of review for factual determinations of the Commission is whether there is competent, substantial evidence to support the Commission order. A decision of the Commission shall not be affirmed where, as in this case, it is arbitrary or unsupported by the evidence and the error is shown by clear and satisfactory evidence. Gulf ***Power v. Florida Public Service Comm*** 'n, 453 So. 2d 799 (Fla. 1984); ***Citizens v. Public Service Comm'n,*** 435 So. 2d 784 (Fla.1983).

ARGUMENT

I. The Commission was preempted by federal law and therefore lacked subject matter jurisdiction over the contract dispute which Florida Power presented through its petition to declare Panda in noncompliance with the terms of the standard offer contract previously approved by the Commission.

A. Introduction.

The Florida Public Service Commission was preempted by the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 823a, ***et seq. (commonly*** referred to as "PURPA") from effecting by regulation or otherwise the relationship established between Panda, a "Qualifying Facility" (QF) and Florida Power, a public utility, after those entities had, with the Commission's blessing, executed a binding cogeneration contract.' PURPA is inflexible in this regard, with good reason.

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. Congress expressed its clear intent that the Federal Energy Regulatory Commission (FERC), rather than any state agency, shall have sole authority over regulatory-type matters once contracts are signed, and that contract disputes should be resolved in the courts. In prior proceedings, the Commission has recognized and declared that it lacked the authority to resolve contract disputes between an electric utility and a cogenerator once a contract was signed and approved, It has declined to so rule in this case,

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[9] PURPA signifies Congressional refinement of the policies originally articulated in the Federal Power Act, 16 U.S.C. §§ 791a, ***et seq.*** Under that law, FERC possessed exclusive authority to regulate wholesale power sales of energy in interstate commerce. The sale of power from Panda to Florida Power which then goes onto Florida Power's grid is such a sale.

PURPA is intended to control power generation costs and ensure long-term economic growth by reducing the nation's reliance on oil and gas and increasing the use of more abundant, domestically produced fuels. The law was necessary to overcome the reluctance of utilities historically functioning in a monopolistic climate, to deal with small competitors such as Qualifying Facilities. The policies underlying that Act -- intended to promote stability in the relationship between qualifying facilities and public utilities to assure national energy independence at fair and reasonable rates for consumers - would be sorely undermined were the Commission retroactively to void or modify the terms of a contract, or even serve as a forum for adjudication of a contract dispute. ***See Freehold Cogenemtion Assocs., L. P. v. Board of Regulatory Commissioners of the State of New Jersey, 44*** F.3d 1178, 1182 (3d Cir.), ***cert. denied,*** 116 S. Ct. 68 (1995).

In this case, the Commission has answered Florida Power's demand that it utilize regulatory powers intended ***only*** to ***implement*** the federal mandate to, instead, contradict it. The Commission followed federal law when it approved the standard offer contract between Panda and Florida Power. It subsequently disobeyed that law when it invalidated critical terms of that contract under state regulations that should be employed, if at all, prior to contract formation, but never as a tool of contract reformation. That regulatory action by the Commission should be preempted by PURPA and its implementing federal regulations

B. The preemptive effect of federal law expressly limits state regulators to implementing PURPA and its accompanying FERC regulations.

PURPA directs the Federal Energy Regulatory Commission (FERC) to pass rules and regulations requiring public utilities to buy electric energy from, and to sell electric energy to Qualifying Facilities. 16 U.S.C. § 824(a). To that end, Congress required FERC to promulgate rules exempting QFs from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities . . ., if the Commission determines such exemption is necessary to encourage cogeneration and small power production. " 16 U.S.C. § 824a-3(e).

FERC duly adopted regulations implementing this mandate," including the directive that QFs be exempt from traditional, state utility regulation, 18 C.F.R. at § 292.602(c). FERC carried out the preemption proscriptions of PURPA by promulgating regulations exempting QF's from various federal and state regulatory requirements, including "from State law or regulation respecting: i). the rates of electric utilities; and ii), the financial and organizational regulation of electric utilities. " 18 C.F.R. §292.602(c). Traditional state regulatory bodies, such as the Commission, are mandated by federal law to implement the rules passed by FERC to require utilities to purchase power from QF's. 16 U.S.C. §824a-3(f) ("State regulatory authority shall . . . implement such rule . . . . ")[11]

With this preemptive force of Congressional action embedded, FERC regulations now expressly govern transactions between QFs and public utilities, and, of course, the requirements established by FERC cannot be disestablished by state implementing rules. State ***implementation*** of utility purchase obligations is permitted, but there is a precise end point for state involvement because state regulation is expressly restricted to that which would implement this design. Congress did not direct the creation of preemptive federal regulatory requirements only to grant states implementation authority to undo what was done.

Primary among the governing guideposts of federal law is the specific requirement that utilities *must* purchase electricity generated by QFs at a rate not to exceed the utilities' full

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10 18 C.F.R. § 292.101 *et* seq.

11 A principal objective of the congressional attempt to encourage QFs was to reduce the financial burden of continuing state and federal regulation on such non-traditional facilities. ***FERC v. Mississippi,*** 456 U.S. 742 (1982). A major part of that objective was embodied in a specific declaration from Congress to avoid subjecting cogeneration facilities to traditional utility-type regulation:

> It is not the intention of the conferees that cogenerators and small power producers become subject . . . to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power. The conferees recognize that cogenerators and small power producers are different from electric utilities . . . .

H. R. Conf. Rep. ***No. 1750, 95th*** Cong. 2d ***Sess.*** (Oct 10, 1978), ***reprinted in*** 1978 U.S.C.C.A.N. (92 Stat.) 7831-32. The conferees recognized that utility-type regulation would act as "a significant disincentive" to businesses interested in cogeneration. ***Id.*** at 7832.

avoided cost. 16 U.S.C. §§ 824a-3(a); 824a-3(d); 18 C.F.R. §§ 292.303-304. The Commission is obligated to implement PURPA and FERC regulations that create procedures to require utilities such as Florida Power to buy electricity from QFs such as Panda at no more than full avoided cost.[12] ***FERC v. Mississippi,*** 456 U.S. 742 (1982). The Commission has the right and the obligation to approve the utility's calculation of full avoided cost. This involves initially reviewing and approving the utility's long-range generation needs, and the designation of the cost and type of generating facility that will be avoided by purchasing power from a QF instead. In doing so, the Commission determines that it is appropriate for the public utility to recover the costs of the contract from the ratepayers. Such involvement does not constitute preempted utility-type regulation of the QF. ***See Freehold, 44*** F.3d at 1192.

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 Panda's electricity at full avoided cost. The Commission's authority to ***implement*** this wholesale power transaction ended at that point.

C. Cases specifically addressing the preemptive effect of PTJRPA have uniformly determined that matters of contract interpretation are not within the subject matter jurisdiction of state regulatory bodies.

Once a state public service commission approves a QF contract to be in compliance with the requirements of PURPA and FERC rules as implemented by the state, its jurisdiction over that transaction ends, Any subsequent claims made by one party that the other is not performing are subject to judicial review - just as they would between any other private citizens. 16 U.S.C. § 824a-3(g) (1995). It is irrelevant whether the claim is cast as a breach of contract claim asserting that the states' implementing rules are part of the contract, or that the contract interpretation or that the state's rules should be applied to invalidate one party's performance under a previously approved contract - both of which arguments were asserted

[12] Full avoided cost is generally understood to mean the pricing of a unit of energy equal to the cost of deferring or avoiding the construction of additional generation capacity by the purchasing utility. It includes both the firm capacity and the energy that would be supplied by the avoided unit. Rule 25-17.0832(3)(b), Fla. Admin. Code (1995).

below by Florida Power. The cases that have interpreted PURPA and its preemptive effect on state involvement in QF/utility transactions have all come to the same conclusion in this regard .

The issue was directly addressed in ***Freehold,*** where a state public service commission, at the behest of a power company, opened a proceeding to order a QF to either renegotiate or be bought out of a contract previously entered into with the utility, on the grounds that the contract was no longer cost effective, The QF sought the intervention of the federal district court to enjoin the commission proceeding.

> The Third Circuit posed the question for adjudication (and answered it):
> We must determine only whether PURPA preempted the [state commission] order . . . directing the parties to renegotiate the purchase rate terms of the [contract] or, in the alternative, to negotiate an appropriate buyout of the [contract], failing which the [state commission] would and did commence proceedings now pending before it. We conclude that it does.

44 F.3d at 1190. Consistent with the Commission's behavior towards Panda, the state commission was seeking "to alter the terms of the [contract] after having fully approved it in a final . . . order. " 44 F.3d at 1190 n. 10. Similarly consonant with arguments accepted by the Commission, the New Jersey regulator urged that its authority under PURPA's state-implementation provision permitted it to retrofit the terms of the already approved QF-utility contract. The court disagreed that this intrusion could be categorized as an implementation procedure.

> The present attempt to either modify the [contract] or revoke [Commission] approval is 'utility type' regulation -- exactly the type of regulation from which [the QF] is immune under section 210(e).
>
> PURPA bars reconsideration of the prior approval of the [contract] at least absent some basis in the law of contracts for setting aside the [contract].
>
> [O]nce the [Commission] approved the power purchase agreement.. .any action or order by the [Commission] to reconsider its approval., .under purported state authority was preempted by federal law.

44 F.3d at 1194. The ***Freehold*** decision is consistent with every other decision addressing PURPA's preemptive strength. ***Smith Cogeneration Management, Inc. v. Corporation Comm'n***, ***863*** P.2d 1227 (Okla. 1993); ***Afton Energy, Inc. v. Idaho Power Co., 729*** P.2d 400 (Idaho 1986) (district court, not commission, was proper forum to interpret QF contract);

Bates Fabrics, Inc. v. Public Utilities Comm'n, 447 A.2d 1211 (Me. 1982); ***Barasch v. Pennsylvania Public Utility Comm'n, 546*** A.2d 1296, ***re-argument denied, 550*** A.2d 257 (Pa. Comm'n 1988), ***appeal denied, 567*** A.2d 655 (Pa. 1989); ***In re: Erie Associates,*** Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992).

Smith Cogeneration, for example, involved an effort by the Oklahoma Commission to require a contract clause in QF contracts reserving that Commission's jurisdiction to reconsider the terms of the contract. In rejecting that regulatory imposition, the Oklahoma Supreme Court held

> PURPA and FERC regulations seek to prevent reconsideration of such contracts. The legislative history behind PURPA confnms that Congress did not intend to impose traditional utility type rate-making concepts on sales by qualifying facilities to utilities.

863 P.2d at 1240-41. In ***Erie Associates, supra, the New*** York State Public Service Commission addressed a fact pattern strikingly similar to the present case. Erie, a public utility, pressed that state's commission to cancel a contract based on alleged noncompliance with its terms by the QF. In refusing to hear the petition, that commission held:

> Erie's petition will not be granted. Jurisdiction under [PURPA] is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
>
> We will not generally arbitrate disputes between utilities and [QFs] over the meaning of contract terms, because such questions do not involve our authority, under PURPA and [New York law] to order utilities to enter into contracts. Requests to arbitrate disputes over breach of contract issues are simply beyond our jurisdiction, in most cases.

Erie Associates, N.Y. PUC LEXIS 52 at p. 7. The Commission took jurisdiction of this dispute to do exactly what the New York Commission knew it could not do.

D. The Commission's decision is inconsistent with this line of decisions preempting state utility regulation over the terms of QF contracts.

Florida Power sought what amounts to a retroactive ruling that the Commission construe, interpret and for all practical purposes invalidate the contract between Panda and Florida Power previously approved by the Commission at Florida Power's request. Under the

Supremacy Clause of the United States Constitution,[13] the express preemptive effect of PURPA and its corollary regulations should have removed this contract dispute from the Commission's jurisdictional grasp. Under that binding federal statute, the Commission had no jurisdiction to construe, interpret, alter or revoke Panda's contract with Florida Power. The Commission's assertion of jurisdiction to do just that cannot coexist with countering federal law governing the respective rights of qualifying facilities and public utilities. The Commission's delimited jurisdiction under PURPA ended with its approval of the contract requiring Florida Power to buy Panda's energy at rates consistent with PURPA. The Commission's exercise of jurisdiction subjected Panda to continuing utility type regulation, expressly prohibited under PURPA.

The state's regulatory role in this arena is not defined in the first instance by state statutes and regulations, as made pointedly plain by the treasure of widespread case precedent on the preemptive purpose of federal law. [14] PURPA and its implementing regulations set the limits of the Commission's authority, and they define a narrow responsibility for state regulators, performed at the authorization stage. Congress expressed its clear intent that FERC, rather than any state agency, have sole authority over regulatory matters once contracts are signed, and that contract disputes be resolved in the courts. 16 U.S.C. § 824a-3(h); § 824a-3(g).

In this case, the Commission approved a contract the terms of which required Panda to provide and Florida Power to purchase a Committed Capacity of 74.9 megawatts for thirty years. Panda asserts that the plain language of the contract permitted it to exercise its

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[13] Art. VI, cl. 2, U.S. Const.

[14] Understandably, Florida Power sought before the Commission to downplay the pervasive authority from other jurisdictions, expressing the nativistic sentiment that the Commission knew well enough how to interpret its own regulations. Courts, of course, understand the usefulness of reviewing cases from other jurisdictions when analyzing issues of federal law applicable to those jurisdictions, as well. *Compare Estate of Frappier v. Wishnov*, 21 Fla. L. Weekly D1885 (Fla. 4th DCA 1966) (use of federal cases in construing ERISA); *Rubin v. Brutus Corp.*, 487 So. 2d 360 (Fla. 1st DCA), *rev. denied, 500 So.* 2d 543 (Fla. 1986).

engineering judgment to decide what size turbines it had to install to meet its Committed Capacity obligation, and that it was entitled to the capacity payment for this obligation for thirty years. Florida Power sought revocation, modification or interpretation of this approved contract on the grounds that it was inconsistent with the Commission's standard offer contract rules, employing a precedent of the Commission decided subsequent to the approval of the contract. While that subsequent Commission interpretation of its rules may have caused it not to have approved this contract at the time, its retrospective application to undo the approval constituted utility-type regulation barred by PURPA and federal implementing regulations. [15] Any action by the Commission to reconsider approval of the contract, whether cast as an attempt to apply its rules to revisit the initial approval, or to impose its interpretation on the contract, is preempted by federal law. See Freehold, 44 F.3d at 1194. The appropriate tribunal for contract disputes is the court, not the Commission.[16]

The Commission has in fact previously recognized in a comprehensive determination that it lacks the authority to resolve contract disputes between an electric utility and a cogenerator once a contract is signed and approved. ***Re Florida*** Power Corp., Docket No. 940857-EQ, Fla. PUC Lexis 220 (Feb. 15, 1995). The Commission held that the Florida enabling statute, section 366.051, "does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs," and, accordingly, that the Commission being a creature of limited statutory jurisdiction, should not consider the application for want of jurisdiction under PURPA,

In that petition, Florida Power sought an interpretation of the contract with a QF

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15 This decision, referenced in the Commission's order, arose on a very different petition with a very different purpose, utterly distinguishable from this setting. ***See In Re: Petition for Declaratory Statement Regarding Sale of Additional Capacity from a Qualifying Facility via a Standard Offer Contract, by Polk Power Partners, L. P., Ltd.,*** Order No. PSC-0683-DS-EQ (July 21, 1992). Panda will clarify in this brief the nonprecedential value of the ***Polk Power*** order.

16 PURPA does not create exclusive federal court jurisdiction for contract disputes, and these disputes may be adjudicated in state or federal court, depending on the nature of the dispute. ***Freehold, 44*** F.3d at 1184.

similar to Panda's that would result in the Commission's declaring a breach by the QF. Not surprisingly, Florida Power argued that its contract interpretation was based on ***Commission*** rules that the Commission, it urged, possessed jurisdiction to interpret. The Commission examined precedent, including ***Freehold*** and other decisions dispositive here as well, accurately identifying the constrained contours of its jurisdictional authority under PURPA. That extensive assessment ended with the Commission's conclusion that it could not, consistent with preemptive federal law, expand its role to "encompass continuing control over the fruits of the negotiation process once it has been successful and the [QF] contracts have been approved. " ***Id,*** at 8. (R. 935-36). The Court should hold the Commission to consistency in interpretation of its own jurisdictional limitations. The Commission here refused to follow its correct prior decision, apparently by reasoning that its authority is greater with respect to "standard offer" contracts than with "negotiated" contracts, such as that involved in its earlier decision when it determined that PURPA preempted Florida Power's effort to utilize Commission jurisdiction to regulate a QF agreement. For PURPA preemption purposes, that should be and is a distinction without a difference.

E. The Commission does not have jurisdictional authority to regulate standard offer contracts by retrospectively altering their terms or invalidating them.

In this matter, the Commission considered itself to possess full jurisdictional reign based on the difference between "negotiated" and "standard offer" contracts. There is every reason, however, to apply a like analysis to the standard offer contract between Panda and Florida Power, as in the negotiated contract setting. In neither case should PURPA's limited grant of implementation authority to state regulators be viewed as a license to reconsider approval of a cogeneration contract.

There is nothing in PURPA or in the FERC regulations which recognizes, or even mentions, a distinction between a negotiated contract or a standard offer contract. Both types of contracts between a QF and utility must be approved by the Commission, under PURPA. The only distinctions drawn by the Commission when it created these two alternate procedures

for QF contracts were (1) that standard offer contracts require "full avoided cost" rates for QF's (the upper limit under PURPA) while negotiated contracts can be for full avoided cost or less -- as permitted by PURPA; (2) that negotiated contracts are approved by the Commission after the rate is negotiated between the QF and the utility and the contract is signed while standard offer form contracts are first approved in advance; and (3) that standard offer contracts are limited to facilities less than 75 megawatts. PURPA and its accompanying FERC regulations make no mention of a megawatts size restriction on cogeneration facilities, such as Panda's.

None of these distinctions is in any way meaningful to the preemptive effect of PURPA. Simply put, a contract is a contract. In fact, Panda proved that the negotiated contracts entered into contemporaneously with the standard offer contract, including the very contract at issue in ***Re Florida Power Corp.,*** were in substance the virtually identical form. In either case, the contract was approved by the Commission and the execution of the contract created a legally binding obligation between the contracting parties. In both cases, PURPA provides that the Commission's jurisdiction was extinguished following approval of the contract.

Oddly, the Commission's rationale for the distinction between standard offer contracts and negotiated contracts proves Panda's point, In this proceeding, the Commission equated a standard offer contract to a tariff, which it asserted is within its continuing power to review and interpret. ***It is precisely that type of authority that PURPA preempts.*** Under PURPA, the Commission cannot treat a contract between a utility and a QF as "tariff-like" and therefore subject to traditional ongoing Commission regulation. The FERC rules rejecting this injection of state regulatory authority are as mightily preemptive as PURPA itself.

> Federal regulations have no less pre-emptive effect than federal statutes, Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.

Fidelity Fed. Savings &Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982). The Commission, of course, possesses only those powers explicitly conferred by statute or

reasonably implied from the statutory powers which have been explicitly granted. ***United States Tel. Co. of Florida v. Public Service Comm'n,*** 496 So. 2d 116, 118 (Fla. 1986). Reasonable doubt concerning the reach of its power should be resolved against extending it. ***Radio Tel. Communications, Inc. v. Southeastern Tel.,*** 170 So. 2d 577, 584 (Fla. 1964)). Part of these limitations adheres in the Commission's lack of traditional authority to void a previously approved contract, or to modify the terms of an executory contract. ***Deltona Corp*** v. ***Mayo***, 342 So. 2d 510, 512 (Fla. 1977). This traditional limitation has been carefully acknowledged by the Commission itself. ***Re Florida Power, supra***.

The Commission had only such jurisdiction as was granted by PURPA and Florida's implementing statute. § 366.09, Fla. Stat. (1995). The Commission could not have been granted the power to adjudicate or revisit this contract, because PURPA expressly prohibits the Commission from re-injecting itself in disputes between QFs and utilities over the terms of an approved, executed contract. ***Freehold*** and like decisions have all acknowledged this critical point. The Commission also previously acknowledged the limitations of its jurisdiction in relation to Qualifying Facilities by ordering elimination of the "regulatory out" clause in the standard offer contracts originally sought by Florida Power and by other public utilities. The Commission then understood its limited role.

> When we approve the standard offer contract, we make a commitment that we will allow cost recovery of payments made to small QFs. 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. [17]

This Court has previously recognized the validity of the Commission's position that these clauses destabilize the relationship of the QF and utility. ***Florida Power & Light Co., v. Beard,*** 626 So. 2d 660 (Fla. 1993). That problem is a salient part of what PURPA was designed to diffuse and altogether avoid. Unfortunately, the Commission's reassertion of jurisdiction over and reformation of Panda's contract four years after approving its terms is

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[17] ***In re: Planning Hearings on Load Forecasts Generation Expansion Plans, etc.,*** Order No. 24989 (Issued Aug. 8, 1991).

irreconcilable with that aim of stability and with federal law.

F. **Neither *Polk Power,* nor other decisions, establish that the Commission may retroactively dismantle a standard offer contract as an aspect of its regulatory jurisdiction.**

Despite the two prior approvals of this contract by the Commission, Florida Power asked and the Commission applied the post-contract, 1992 Commission decision in ***Polk Power*** to change the facility size term of the contract. The ***Polk Power*** decision addresses the interpretation of a portion of the Commission's standard offer contract rule that limits the availability of standard offer contracts to QF's building facilities of "less than 75 megawatts." The rule does not define whether the 75 megawatt cap refers to "Committed Capacity" or the maximum potential output of a plant under all conditions. See Rule 25-17.0832(3)(a), Fla. Admin. Code (1995). No written Commission interpretation of that rule existed when the Panda contract was approved.

Polk Power involved a dissimilar fact pattern in which a QF sought permission to sign three concurrent contracts (one standard offer and two negotiated contracts), with two different utilities, all to be served from a single 125 MW plant (which would have allowed it to receive ***Committed Capacity payments*** for the full output of its plant under all conditions.) In the differing context of that request, the Commission ruled that it intended the 75 MW cap in the standard offer contract rule to refer to total net generating output, not Committed Capacity. [18]

Permitting such "stacking" of standard offer contracts would have defeated the purpose of the standard offer rule -- to encourage small qualifying facilities, with limited ability to negotiate with utilities, to build cogeneration plants, Stacking would encourage large qualifying facilities to build large facilities and grab all the available standard offers. Limiting a facility to one

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[18] The Commission's final order in this case acknowledged that its "declaratory statement in Polk Power Partners was limited to the specific facts and circumstances of that case" (Slip op. at 3), but that the decision was nonetheless "informative" of its "intent . . . to preserve standard offer contracts for small qualifying facilities of 75 MWs or less." ***(Id.;*** the *petition* in ***Polk Power*** made clear that the petitioner there was seeking approval to service multiple standard offer contracts from a single facility, and thereby to *collect full capacity payments under each such contract for far more than 75 megawatts.)*

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.

Factually, of course, the case is entirely distinguishable. Panda does not seek to compel Florida Power to pay capacity payments for all power generated. Its contract specifically limits Florida Power's obligation to make capacity payments to the Committed Capacity maximum of 74.9 MW. Capacity payments reimburse a cogenerator for the capital costs of constructing a facility of a certain size. Thus, unlike the cogenerator in *Polk Power* who would have been encouraged to build a 125 MW plant because of complete capital costs recovery, Panda sought only to build a facility with the technology presently available to it that could not otherwise be built, as reflected in the unrebutted evidence before the Commission. The equities of the circumstance rest entirely with Panda and against application of the expressly limited holding in *Polk Power*.

Whatever the impact *Polk Power's* subsequent rule interpretation may have on the Commission's prospective power to limit QF contracts at the authorization stage, the Commission's willingness in this proceeding to subject this contract to subsequent review, reinterpretation, or invalidation is precisely the type of continuing utility regulation that PURPA preempts. Florida Power seeks direct Commission regulation over this transaction to now limit Panda to building a facility that cannot generate more than 75 MW under any circumstances (or as the Commission determined, to no more than "slightly above" 75 MW). This harsh retrospective invalidation is especially discordant with implementation authority, since PURPA itself has no size limitation on cogeneration QF's.[19]

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[19] Nothing in PURPA or in FERC regulations authorizes a state regulator to limit the availability of a certain type of contract to a QF based on size of the QF's facility or output (except for a provision which involves the setting of different rates of payment for tiny QF facilities under 100 kilowatts in design capacity not relevant here.) See 16 C.F.R. § 292 *et* seq. Whether the Commission even has the power to impose a cap on standard offer contracts in its Rules is questionable, but need not be decided here since the Commission ***approved*** the Florida Power/Panda contract as written.

If Florida Power believes that a proper interpretation of its contract with Panda limits Panda to a facility that cannot generate in excess of 75 MW, as opposed to limiting its "Committed Capacity" for which it receives capacity payments, then under PURPA, Florida Power had the opportunity to raise this contract interpretation issue before a judicial forum. ***Freehold; Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp. , 84*** F.3d 91 (2d Cir. 1996); ***Philadelphia Corp. v. Niagara Mohawk Power Corp.,*** 621 N.Y.S.2d 237 (App. Div. 1995). Resolution of the capacity issue involves nothing more than an application of common principles of contract construction, which courts perform every day. In ***Philadelphia Corp.,*** for example, a public utility sought court interpretation of the maximum amount of electricity it was bound to purchase from a Qualifying Facility under New York state's "output contracts" format. The court focused on commercial standards of fair dealing in concluding that quantities well in excess of estimated capacities need not be purchased. 621 N.Y. Supp. 2d at 239-240. Like common law principles should resolve the "interpretation" of the unambiguous 75 MW size issue or the likewise unambiguous 30-year term of the contract, assuming either of these provisions needed interpretation.

Counterpoised with these obviously sensible court solutions -- which under PURPA belong exclusively in the courthouse, not before the regulator-- are several startling aspects of the Commission's decision against Panda. One is that the ***Polk Power*** decision as the Commission applied it is an overly rigid response to a case that before a court would be properly decided consistent with common law standards. Here, one aspect of the Commission's decision asserts a literal application of ***Polk Power,*** then says without acknowledging any conflict, that Panda's plant could reasonably have generated something more than 75 MW and still have met the standard offer. So, although expressly crediting itself as a consistent application of the ***Polk Power*** cap on maximum generating capacity for standard offer contracts, the Commission's decision is obviously not at all consistent.

A second startling aspect of the decision is its conclusion that the evidence showed that Panda could have designed a plant much smaller than 115 MW and still have met the standard

offer contract -- without ever determining how much smaller. Apparently the Commission seeks support for this conclusion in the entirely undetailed anecdotal evidence presented by Florida Power that other cogeneration plants did not have as much differential between committed and net maximum capacities. While this itself is unjustified as a basis on which to evaluate the evidence, it is offensively so because the Commission's response to Panda's proposed facts was (a) to deem utterly ***irrelevant*** that Florida Power presented no credible evidence of alternative designs or equipment that could have been used to meet the contract and yet have less overall capacity; and, (b) to deem utterly ***irrelevant*** Panda's ***detailed*** testimony explaining the limited design and equipment available to meet Committed Capacity.

It is readily apparent that the Commission imposed its newly developed rule capping standard offers at Committed Capacity, while undermining any possible rationale for that inflexible cap, by conceding that it was not actually a rigid rule! It is just as ascertainable that the Commission could not possibly have determined -- consonant with any meaningful respect for due process -- that there was a way to build a plant with a smaller gap between committed and maximum capacities, since the Commission deemed irrelevant virtually all of the testimony that was relevant on that very point![20] The Commission's decision was possibly two things, either of which is entirely insupportable. It may have been a subsumed and utterly inadequate attempt to interpret the contract, a process within the jurisdiction of the courts, not the Commission. It clearly was a patent application of a reformulated interpretation of its rule on 75 megawatt capacity after the fact; in short, the Commission was regulating Panda.[21] Any doubt on this point is eliminated by the express language of the Commission's holding four years after approving this contract: "Therefore we hold that Panda's proposed qualifying

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[20] A court would certainly not be free selectively to reject evidence it disagreed with, cloaking disagreement with invalid assertions that the evidence was irrelevant when it was in fact both competent and intensely relevant to whether Panda's plant design did not put it in breach of the contract.

[21] Perhaps that form of regulation could best be charitably characterized as "incipient rulemaking", albeit so entirely devoid of notice that it would be an invalid exercise of regulatory authority, unwarranted in any event under PURPA. ***Compare City of Plant City v.*** Mayo, 337 So. 2d 966 (Fla. 1976).

facility does not comply with Rule 2517.0832, Florida Administrative Code."

Florida Power advanced decisions before the Commission to counter the potent line of precedents truncating Commission jurisdiction, highlighted by ***Freehold.*** These decisions, several of them state administrative orders, did not consider the preemptive force of PURPA. Great significance was placed by Florida Power on a New York intermediate appellate court decision, the significance of which was greatly overindulged in an effort to counter the no-regulatory-authority circumstance which the Commission should have acknowledged. ***Indeck-Yerkes Energy Sews., Inc., v. Public Service Comm 'n of State of New York, 564 N.Y*** .S.2d 841 (App. Div. 1991).

In that case, the QF itself placed in issue before New York's public service commission its authority under the contract to compel the public utility to purchase greater amounts of electricity than that anticipated as the output of the facility when it was designed. Under these limited circumstances, the court approved the commission's jurisdiction to determine the scope of its prior approval of the parties' agreement. It determined that the cogeneration contract did not provide within its scope a requirement for the public utility to purchase additional output above that contracted for. 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.

Contrariwise, Florida Power's position is, for all practical purposes, that the Commission's rule on standard offer contracts authorizes a retrospective re-determination of the approval of Panda's contract, not because Panda seeks to vary the amount of capacity committed to Florida Power and hence for which Florida Power is responsible to pay under the contract, or for any other reason that would be germane to Florida Power's obligations under the contract or to any effect on its rate payers. Florida Power seeks what amounts to a de-authorization of the contract because of a subsequently construed Commission ceiling on

megawatts for the facility. This draconian result was sought in the guise of determining the scope of the past approval by the Commission of the agreement, and is hardly consistent with *Indeck*.

The reality is that Florida Power seeks a remedy that is unsupported by the law it put before the Commission, for at least two reasons. First, none of the cases presented by Florida Power assessed the preemptive effect of PURPA on the extent to which the state regulator can effect a contract by determining the scope of its prior approval. Second, neither the *Indeck* decision of the New York court, nor any others presented by Florida Power, sought to void the contract at issue and that remedy was never urged by the public utility buying the cogenerated power .[22] Therefore, the cases are of no moment here.

Florida Power's and the Commission's analogy of the standard offer contract election to a tariff is license for the state rules to constitute continuing regulation of the QF. That regulation would extend to the ultimate disapproval of a contract based on a standard offer, even after its previous approval by the Commission. No commission has gone so far before under its PURPA implementation authority, nor should it. The standard offer process is purely a creature of state law. It cannot create regulatory power where none exists. Regardless of the label applied to the Commission's solution, it constituted regulation of Panda's rates, operation, and organization that should have been preempted.

The same arguments apply with as clear force to preempt the Commission's blatant reformation of the contract as to the term of capacity payments. Here, the Commission did not even pose that it was interpreting the contract. Its opinion appears to acknowledge that the contract term for *capacity payments* was what Panda says it was - thirty years - but that such a term is inconsistent with the rules. The Commission leaves no doubt that despite its prior

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[22] Recently, for example, the New York commission reviewed a contract under its *Indeck* jurisdiction, concluding that the petitioning utility and the Qualifying Facility should negotiate to resolve questions regarding capacity requirements under an approved contract. ***In Re Niagara Mohawk Power Corp.,*** 1996 WL 161415 (Case 95-E-1177, N.Y.P.S.C. March 26, 1996). The Commission understood its limited authority and did not even suggest invalidation of the contract.

approval of this contract -- twice -- it is simply now going to declare that it violates its current *sub silentio* interpretation of that rule, (that "economic plant life" as used by the contract, and "anticipated plant life," the language of the rule, *are the same)* and it will reform the contract to match the rule, by, out of fairness, limiting Panda's Committed Capacity obligation to twenty years. What could more clearly demonstrate that Panda has been subjected to ongoing regulation than providing a remedy that a court could never apply - ***reforming*** a contract to meet the Commission's rules in a way that the tribunal happens to deem fair to both parties.

The Commission is routinely the repository for statewide regulation of utilities and there is rarely a plausible challenge to its subject matter jurisdiction or discretionary authority over matters of rate regulation. PURPA altered this power insofar as QFs, by deeming them not to be utilities. The ability of a QF to rely on the security and stability of its contract rights is critical to the scheme of PURPA. The Commission has previously recognized this concern, but chose to circumvent it by recasting its authority where a previously authorized relationship grew out of a standard contract. PURPA precisely prohibits what has happened to Panda. Instead of proceeding with necessary financing and construction of its project, Panda found itself mired in prolonged litigation that threatened to eliminate the project and is now adrift in an appellate process to vindicate its right to the agreement struck with the Commission's four-year-old blessing.

To summarize, the proceedings before the Commission demonstrated that it applied its Rules, as interpreted after the execution of the Panda contract, to invalidate Panda's plant design on the basis of a size restriction on maximum capacity not expressed in the Rule and to reform the contract's capacity payment term to meet its interpretation of another rule. Obviously, that was a retrospective reinterpretation of its rules, for otherwise the Commission would not have approved the Panda contract in the first place. The Commission was not merely determining the scope of the standard offer contract it had authorized in 1992, as Florida Power urged to avoid PURPA preemption. The Commission was necessarily reinterpreting what the scope of that contract should have been based on a subsequent

reassessment of what it intended by its rules. By changing its mind, the Commission was applying an altered regulatory framework to the contract and, by that very process, it ***altered*** the terms of the contract in 1996; it did not define the scope of the contract that it had originally twice-blessed in 1992. Panda urges that this must be ***regulation,*** pure and simple, and hence prohibited by PURPA, regardless of the regulator's nomenclature for the contract in question, The Commission's assertion of subject matter jurisdiction to review a previously authorized contract, and to affect the parties' rights therein, directly subjected this QF and this contract to state utility regulation in violation of PURPA.

II. There is no competent, substantial evidence to support the decision of the commission finding the size of Panda's electrical generating plant to be in violation of the standard offer contract or limiting the payment to Panda for Committed Capacity to twenty years rather than the thirty years stated in the contract with Florida Power Corporation.

A. The size of Panda's facility was not limited by the contract.

Even if the Commission had jurisdiction to hear this dispute, its decision on the merits should be reversed. Any such jurisdiction would have to extend to a determination of the meaning of the contract entered into between the parties. The hallmark of any such exercise is a quest to find the intent of the parties to the contract. ***Emergency Assocs. of Tampa, P.A., v. Arnold,*** 664 So. 2d 1000 (Fla. 2d DCA 1995); *Gorman* v. Kelly, 658 So. 2d 1049 (Fla. 4th DCA 1995). Here, the Commission, at times selectively and at other times completely, ignored the evidence of the parties' contractual intent.

The plain language of the contract is the first critical index of the parties' intent. It contained no limitation on the size of Panda's plant and the actions of the parties in the three years preceding the petition to the Commission confirmed their mutual understanding of that fact. The Commission itself acknowledged that fact on page 3 of its Order. Rather, the contract specifically limits to 74.9 MW only the amount of Committed Capacity that Florida Power is obligated to purchase from Panda.

Florida Power has attempted to extrapolate a size limitation of 75 MW from the title of

the contract:[23] "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW. . . ." In view of the express terms of the contract which this title introduces, the only logical reading of the title is that it refers to the limitations on the Committed Capacity of the plant, which is recognized by express language of the contract as something *less than the* amount of electricity the facility may generate. Sections 1 .8 and 1.9 of the contract speak to ***Committed Capacity*** as the amount Panda has agreed to make available, at all times. Of special significance are sections 2.1 and 2.1.2 which make availability of the agreement subject to the facility having a ***Committed Capacity*** which is less than 75,000 KW (75 MW). Pursuant to Section 7.2 in no event shall the Committed Capacity exceed 75 MW.

Common sense dictates that there is no logical reason for sections 6.1, 6.2 and 6.3 of the contract to provide for sales of excess energy if the contract did not allow a facility which could generate capacity in excess of the Committed Capacity. Likewise, there would be no purpose to the test protocol set forth in the contract that required Panda to demonstrate it could produce 74.9 MW *or* more. Indeed, more than common sense supports this reading. If the Committed Capacity, in this case 75 MW, was also the authorized cap on generating capacity for standard offer contract generating plants, then these provisions of the contract would effectively be read out of the contract, Any court would have known the cardinal rule of contract interpretation that express terms of a contract cannot be ignored, and must be given their plain meaning. ***Bingemann v. Bingemann,*** 551 So. 2d 1228, 1231-32 (Fla. 1st DCA 1989), ***rev. denied 560 So.*** 2d 232 (Fla. 1990). The Commission ignored this basic tenet of contract law.[24] Panda's interpretation of the contract is based on express terms, while Florida Power's interpretation is based on a tenuous stretching of the document's title, while ignoring the express terms. The

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[23] Article XXVIII of the Contract provides that article and section headings in the contract are "for convenience only and shall not be construed as interpretations of text".

[24] Or, more likely, the Commission did not ignore this principle, it simply treated it as irrelevant because what it was doing was simply superseding the plain terms of the contract with its rule to comport with the Commission's changed opinion that its rule intended to restrict maximum output, not Committed Capacity. This was blatantly a regulatory action by the Commission -- in violation of PURPA -- not a mature exercise in contract construction.

contract plainly set a limitation on Committed Capacity, not on the maximum generating capacity of the facility.

B. **The rules do not limit the size of the facility.**

Florida Power maintained that the Commission's rules, ***in toto***, were incorporated by reference into the contract, meaning that the contract did contain a 75 MW net capacity limitation.[25] The Commission order apparently accepted this argument. Here too, the Commission ignored more hornbook contract law, this time another long-standing principle that express provisions of a contract control over the general:

> It is apodictic that, in determining the intention of the parties, individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general.

South Florida Beverage Corp., v. Figueredo, 409 So. 2d 490, 495 (Fla. 3d DCA 1981), ***rev. denied,*** 417 So, 2d 329 (Fla. 1982). That this "incorporation" of the rules was general is obvious, All the Commission's rules were attached to this form contract, including the rules governing negotiated contracts which the Commission and Florida Power went to great lengths to admonish had nothing at all to do with Panda's relationship to Florida Power. The specific unambiguous language placing a limitation only on Committed Capacity, and distinguishing that limitation from greater total output must control. Rules 25-17.0832(3)(a) and (c), cannot alter these rules of contract interpretation. Those rules obviously could be read, and were read at the time of the execution of this contract and for four years thereafter to provide that a standard offer contract is "available" for purchase from qualifying facilities where the Committed ***Capacity*** of energy is less than 75 MW. Three witnesses testified to their understanding that references in the rule mean a facility with 75 MW of Committed Capacity,

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[25] Those rules provide in pertinent part:

> (a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091,
>
> (c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts. . . ."

not a facility that can only produce a maximum of 75 MW. (T. 267; 341;407). Only Dolan of Florida Power opined that the rule refers to a 75 MW net capacity limitation, and both he and the Commission honored that rule in the breach by endorsing a "little bit pregnant" notion of ambiguous variance from the rule. Of course, Florida Power's actions at the time were inconsistent with Dolan's subsequent, business-wise opinion.

Indeed, the Commission's post-1992 interpretations of the rule support Panda's position, In three distinct cases, including the previously discussed decision in ***Polk Power,*** the Commission allowed a qualifying cogeneration facility to enter into a standard offer contract where the generating plant was larger (in net generating capacity) than the Committed Capacity of that standard offer contract. Order No. PSC-94-1306-FOF-EQ (10/24/94), ***In Re: Joint Petition for Approval of Standard Offer Contracts of Florida Power Corporation and Auburndale Power Partners, Limited Partnership,*** Order Approving Contract Modifications ***("Auburndale*** I"); Order No. PSC-95-1041-AS-EQ (8/21/95); ***In Re: Joint Petition for Expedited Approval of Settlement*** Agreement ***by Auburndale Power Partners, Limited Partnership and Florida Power Corporation,*** Notice of Proposed Agency Action Order Approving Settlement Agreement ***("Auburndale II"); Polk Power.*** In these cases, the Commission permitted facilities larger than 75 MW to utilize a standard offer contract, and accept capacity payments under the contract for no more than 75 MW, yet generate and sell more than 75 MW. The proper interpretation of these subsequent Commission interpretations of Rule 25-17.0832(3), including ***Polk Power,*** is simple -- no cogeneration facility may hold more than one standard offer contract.

Neither the contract, nor the Rule as most recently applied, provides any support for Florida Power's attempt to restrict Panda's plant size. The finding of the Commission to the contrary was error. Furthermore, there was no ambiguity in this contract so as to require an excursion beyond that document into parol evidence, nor should the Commission's rule have constituted a foundation for conjuring an ambiguity in the contract where none previously existed.

Had the Commission made that journey, however, it was then obligated to resolve the ambiguity created by its retrospective rule incorporation. Any uncertainty regarding the size of the plant permitted by the contract should ineluctably have endorsed Panda's interpretation when viewed in light of the evidence of the parties' course of performance. That barometer, of course, best illustrates their intent under the agreement. ***Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.,*** 302 So. 2d 404, 407 (Fla. 1974); *Oakwood Hills Co, v. Horacio* ***Toledo,*** Inc., 599 So. 2d 1374 (Fla. 3d DCA), rev. ***denied,*** 609 So. 2d 40 (Fla. 1992); ***Figueredo;*** *supra* .[26]

The evidence unabashedly reflected that both parties proceeded for two years on the understanding that Panda was not limited to a 75 MW plant, and Florida Power's tardy protestations to the contrary are clearly attributable to an internal corporate strategy to escape from cogeneration contracts. It is clear that until Florida Power decided that it did not want Panda to build its plant, size was not an issue. Had there been an ambiguity in this contract, the parties' course of performance dictated a finding in Panda's favor. The evidence at trial was overwhelming that in order to meet a 74.9 MW Committed Capacity at all times under all conditions it was necessary to construct a plant with a maximum capacity above 74.9 MW to account for performance degradations caused by climate, aging of the plant and other factors. Florida Power did not put forth any credible counter-evidence that a plant with a maximum generating capacity of 74.9 MW would be feasible under the contract and there was evidence that its own representatives recommended plant configurations that would exceed this maximum capacity. Moreover, emission standards with which Panda was compelled to comply restricted any efforts to narrow the difference between committed and maximum capacities. Florida Power's turnabout was guided by a business judgment that it had previously misjudged the necessity for cogenerated power and that its contracts were not commercially the best it could do.

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[26] In addition, an ambiguous term in a contract should be interpreted against the drafter (in this case, Florida Power and/or the Public Service Commission), ***Capital City Bank v.*** *Hilson*, 59 Fla. 215, 51 So. 853, 855 (Fla. 1910).

Before that turnabout the evidence was unassailable that Florida Power understood this plant would be built with a capacity exceeding 75 MW and made suggestions to assist and encourage in its design. Significantly, Florida Power made no effort at all to cross-examine Panda's witnesses who set forth these statements of Florida Power representatives that they knew the facility would not be limited to a total capacity of 75 MW. Nor was the slightest rebuttal testimony voiced to these corporate admissions. Failing to do so raised the inference of the truth of this testimony. ***State*** v. ***Michaels***, 454 So. 2d 560 (Fla. 1984); ***Maxfly Aviation, Inc. v. Gill,*** 605 So. 2d 1297 (Fla. 4th DCA 1992).[27]

Even the Commission acknowledged that the contract could not reasonably be read expressly to preclude any generation above 75 MW. Nonetheless, Florida Power's "a little bit pregnant" capacity argument was accepted by the Commission, which found that generation a little above 75 MW would be reasonable. No principled basis was offered as to ***how much*** over ***the line*** in generating capacity would be authorized under the re-made contract or the supposedly bright-line rule. Once the purported maximum threshold was crossed, the Commission's decision offers no legal explanation for how much more capacity is to be allowed. Astonishingly, the Commission has actually ***introduced a patent ambiguity into the contract where none previously existed,*** latent or otherwise. Without question, the Commission simply rewrote the contract to comply with its revised interpretation of its rule,

Courts are not permitted to rewrite contracts, of course. ***Shuster v. South Broward Hosp. Dist. Physicians' Professional Liab. Ins. Trust, 591 So.*** 2d ***174, 176*** (Fla. ***1992); Dune Z, Inc. v. Palms North Owners Ass'n, Inc.,*** 605 So. 2d 903 (Fla. 1st DCA 1992); ***Simpson v.*** Young, 369 So. 2d 376 (Fla. 1st DCA 1979); ***Hoffman v. Robinson,*** 213 So. 2d 267 (Fla. 3d

[27] Of course, Florida Power's strategy was effective before the Commission, which deemed all course of performance of the parties showing an understanding of the contract not to be limited to 75 MW total capacity to be ***irrelevant.*** Case law establishes without question that this evidence would have been relevant to determining what the contracting parties intended, were their agreement ambiguous. Again, the Commission's disinterest in meaningful evaluation of the parties' contractual intent reveals that it simply replaced the contract with its revised interpretation of its rule on standard offer capacity; it regulated where it should not have.

DCA 1968). Surely the Commission would have no such authority, outside its regulatory authority, which was expressly preempted here by PURPA.[28] What the Commission did not do was what a court must do -- analyze the extensive evidence of what the parties did, or said, to enlighten it in finding the parties *intent* in selecting the language they chose. Here, the Commission expressly declared that intent irrelevant. In short, Panda's evidence concerning the necessary size of Panda's facility stands unchallenged.

C. The duration of capacity payments under the contract was for 30 years and not limited by the Rules.

Florida Power sought a declaration from the Commission that despite the clear 30-year term of the contract, it was only obligated to pay capacity payments for 20 years. Once again, Florida Power's proposed interpretation conflicts with the plain language of the contract and the prior actions of the parties. That language and the purpose of the Rules prove that Panda should prevail on this issue, as well.

The only reasonable reading of the contract required 30 years of capacity payments and a concomitant obligation to provide those capacity payments for thirty years. There is no ambiguity in the contract. Once again, any obscure or latent ambiguity that can be manufactured was belied by the course of performance of Florida Power and its role in drafting the contract. Application of these hornbook tools of contract in interpretation simply clarifies the plain terms.

Florida Power argued that the schedules to the contract limited its obligation to pay capacity payments. Schedule B to the contract contained an actual calculation for the capacity payments owed to Panda under the relevant formula for the first twenty years of the contract. The schedule, however, also made direct reference to the fact that the calculation was made according to formulas adopted by the Commission that contained fixed escalation features. At

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[28] The Commission may retroactively impair the obligation of contract where there is no other means to protect the public but only as an aspect of its regulatory powers. The state must show an "overriding necessity . . . to exercise its police powers" in order to impair a contract. ***Park Benziger & Co., Inc., v. Southern Wine & Spirits, Inc.,*** 391 So. 2d 681 (Fla. 1980). Those regulatory powers were not available to the Commission here because of PURPA, In any event, "overriding necessity" to impair Panda's contract is nowhere to be found in this record where the Commission readily endorsed Panda's contract for four years.

worst, that schedule could create a contract ambiguity never raised by Florida Power until it adopted its decision to halt the Panda project. If the contract were ambiguous, however, the conduct of the parties again dictated that Panda should have prevailed.

The Commission's Rules on which Florida Power placed so much reliance required only that a standard offer contract contain an ***illustrative*** schedule of capacity payments for at least ten years. Fla. Admin. Code R. 25-17.0832(4). Thus, it was quite logical to conclude, as did both Panda ***and*** Florida Power (before its change of heart), that the attachment of only a 20-year payment schedule did not alter the contractual 30-year obligation.

In searching for contract ambiguity, Florida Power argued that because the schedule to the contract provided that the "economic plant life" of the avoided unit at issue was only twenty years, therefore it was obligated only to pay capacity payments for this economic plant life of the avoided unit. That argument missed the mark. A contract obligating Panda to supply Florida Power with firm capacity for thirty years allows Florida Power to avoid building alternative sources of capacity for that period. Florida Power is required under the contract (and PURPA) to pay for this avoided capacity, and Panda must be compensated for that firm capacity. PURPA's preemptive vitality is consistent with Panda's expert testimony and the only fair and logical reading of the contract: even in light of the defined plant life of twenty years for the "avoided unit" and the Commission's own formulas, capacity payments *had to continue* for the full thirty years of the contract escalated at the same rate provided for in *the illustrative* schedule. Indeed, Panda's expert demonstrated by utilizing the Commission's own rules on value of deferral methodology that a simple mathematical calculation would square the contract, schedule and the rule, leaving no ambiguity whatsoever.

Contrariwise, when Florida Power asserted that after twenty years it was obligated only to pay "as available" energy rates for the electricity generated and no capacity payment, it was urging a ludicrous construction of the contract that would constitute a blatant windfall for it. Had Florida Power seriously believed that Panda was truly offering ten years of "free" energy capacity under the contract, it would have trumpeted that fact from the highest rooftops when

seeking Commission approval to accept the Panda contract in 1992. Of course, it did no such thing. That absurd construction of the contract -- in essence voiding the material payment term -- cannot be reconciled with routine tenets of contract law interpretation. ***David v. Richman***, 568 So. 2d 922 (Fla. 1990).[29]

Florida Power argued as well that Rule 25-17.0832(3)(e)(6) prohibited it from paying capacity payments for 30 years because the standard offer contract defines the "economic life" of the avoided unit as 20 years. The rule states, **"[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. **"**

Of course, as a matter of contract interpretation, this incorporation of the general Rule language into the contract cannot overcome the specific contractual obligations to provide capacity for thirty years, and to pay for it. *Figueredo; supra.* Moreover, Panda's unrebutted expert testimony was that the Rule created no inconsistency with the contract terms. The rule speaks to "plant life" not "economic life" as mentioned in the contract. Even Florida Power's Dolan conceded that the normal expected physical plant life of a plant such as Panda's exceeded twenty years, The rule does not express whether it defines "economic life," as a reference to depreciation principles or simple physical life. The most reasonable interpretation of this rule in light of this contract, is that as long as a facility offers capacity energy over its life or the life of a successor facility, it is displacing the need for the utility to construct its own plant and thus avoiding a unit. As Panda's expert explained ". . . **[I]**t's displacing one and a half of that infinite stream of plants and continues to offer value out into the horizon. **"** (T. 523). Florida Power cannot logically dispute this analysis, most consistent with the contract's terms and the underlying purpose of PURPA.

[29] Once again, other Florida Power representatives admitted over the four year course that payments for capacity would be made in years 21-30. There was no contrary evidence to rebut these party admissions from the declarants, raising the ***Maxfly*** counter-inference against Florida Power once again.

D. Florida Power's conduct constituted a waiver and estoppel of its objections to Panda's plant size and to its assertion that the contract was limited to twenty years of capacity payments.

In addition to the rights of Panda emanating from the interpretation of the terms of the contract, even including the rules, the undisputed actions of Florida Power constituted a waiver and estoppel against their tardy objections to Panda's proposed plant. Florida Power encouraged Panda to design its plant larger than 75 MW and thereby waived or was estopped from any objection to that which it sought to accomplish.

Waiver is well understood to be the intentional relinquishment of a known right and may be express or implied. A party may waive any right to which it is legally entitled by actions or conduct warranting an inference that a known right has been relinquished. ***Thomas N. Carlton Estate*** v. Keller, 52 So. 2d 131 (Fla. 1951). "The doctrine of estoppel is a creature of equity and governed by equitable principles. It is applied against wrongdoers and not against the victims of wrong." ***Appalachian, Inc.*** v. Olson, 468 So. 2d 266, 269 (Fla. 2d DCA), ***rev. denied, 482 So.*** 2d 347 (Fla. 1985).

Florida Power knew that Panda had proposed a plant larger than 75 MW. Notwithstanding this knowledge, Florida Power requested that the Commission approve the contract. Florida Power's actions constituted an irrevocable waiver of its later construed objections to facility size. Florida Power's actions also constituted an estoppel against any objections to the capacity of Panda's plant, insofar as Florida Power made material representations to Panda and the Commission regarding its willingness to allow Panda to build a larger plant, and Panda relied on Florida Power's actions to its detriment.

Cutting through the rhetoric, Florida Power's argument as to duration of the contract was at its core that the Commission should not have approved a 30-year contract obligating both parties to the purchase and sale of Committed Capacity for thirty years, simply because of the rule limiting delivery of energy and capacity to a period of time equal to the anticipated life of the "avoided unit," which it contended was twenty years. Panda's response resonates with comparative simplicity: Florida Power expressly represented to the Commission that the Panda contract was for thirty years and the Commission did approve the 30-year payment

agreement at Florida Power's urging. After Florida Power requested Commission approval on this condition and the Commission approved the contract on that basis, surely Florida Power cannot revisit that approval to the detriment of Panda some four years later. See ***Keller, supra; Olson; supra.*** Pursuant to the plain language of the contract and the actions of the parties, Panda was entitled to capacity payments for the full term of the contract. General principles of waiver and estoppel again combine to prohibit Florida Power from seeking to nullify the very payment provision to which it agreed.

CONCLUSION

The decision of the Commission should be reversed and the Commission directed to dismiss this proceeding for lack of jurisdiction. In the alternative, the Commission should be ordered to enter a judgment for Panda on Florida Power's petition for declaratory relief and Panda's cross-petition,

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