IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. **88,280**

PANDA-KATHLEEN, L.P.

Appellant)

v.

FLORIDA POWER CORPORATION and
THE FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

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REPLY 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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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.

The arguments of both the Commission and Florida Power fail to persuade that the Commission may, at the unilateral request of a utility, act to revoke, or modify or interpret the terms of a Qualifying Facility contract ***previously approved by*** the Commission. There is no case support for this exercise of subject matter jurisdiction by the Commission, which is not available to it as part of its limited PURPA[1] implementation authority.[2]

The Commission has no power to employ its "standard offer contract" regulations to resolve what is nothing more than a contract dispute between the utility and the QF. The answer briefs of the Commission and Florida Power flatly admit that the Commission's decision was an attempted exercise of regulatory authority four years after it exercised its implementing authority to approve the Panda-Florida Power contract.[3] They further flatly admit that what Florida Power asked the Commission to do, and what it did, was rule that, (1) as to the net generation capacity issue, Panda's proposed performance of its contract was either in violation of the contract, or if it was not, then that the contract should be taken away

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[1] Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 823a, *et seq.*

[2] Both Florida Power and the Commission seize on Panda's timing in raising this issue of subject matter jurisdiction, but the law plainly provides that this issue may be raised at any time in the proceeding, even on appeal when not previously raised in the forum below. ***Cunningham v. Standard Guar.*** *Ins.* ***Co., 630*** **So.** 2d 179 (Fla. 1994); ***City of Miami v. Cosgrove,*** 516 So. 2d 1125 (Fla. 3d DCA 1987). Panda raised the issue of preemption only four months after counter-petitioning before the Commission and before any substantive rulings had been made by the Commission. (R. 429). It is equally wrong for Florida Power to maintain that Panda accepted the Commission's subject matter jurisdiction because it did not dispute its authority to curtail power purchases. (FPC **A.B.** at 25). FERC has specifically authorized certain continuing state regulatory jurisdiction over QF operations. "For example, the PURPA regulations provide for varying degrees of continuing jurisdiction over operational circumstances curtailments (§292.304(f)). . ." ***Re Niagara*** *Mohawk* ***Corp.***, 1996 WL 508763 at ***3 (N.Y.P.S.C.** Aug. 30, 1996). Consequently, it is absurd for Florida Power to urge that curtailment authority specifically delegated by FERC to state commissions is the equivalent of the Commission's exercise of unauthorized utility-type regulation. There is no basis for estoppel to be applied against Panda respecting its challenge to the Commission's subject matter jurisdiction.

[3] Commission **A.B.** at 6-7; Florida Power A.B. at **22-23.**

from Panda, and (2) as to the payment term, the unambiguous thirty year Committed Capacity payment should be reduced to twenty years to comply with the Commission's rules. The sole rationale offered to support this exercise of authority is the so-called distinction between the Commission's standard offer rules and its negotiated contract rules. In reply, Panda will explain why the creation of a "standard offer" provision for some QFs cannot be applied to abrogate or modify a Commission-approved contract.

Both the Commission and Florida Power misconceive that a state implementation regulation under PURPA must expressly conflict with a FERC regulation for state commission action to be preempted.[4] The obvious rejoinder to this assertion is that the application of a state regulation may certainly be preempted, as well. ***3M Health Care, Ltd., v. Grant,*** 908 F.2d 918 (11th Cir. 1990) (Florida Drug and Cosmetic Act was preempted by federal law to extent that it was applied to warehousing of pharmaceuticals transshipped through Florida to foreign countries); ***KVUE, Znc., v. Austin Broadcasting Corp.***, 709 F.2d 922 (5th Cir. 1983); (state law preempted only to the extent that it contradicted federal administrative position); ***New York State Comm'n on Cable Television v. FCC,*** 669 F.2d 58 (2d Cir. 1982) (accord).[5] A state regulation need not be facially in conflict with a federal obligation for the Supremacy Clause to preempt a state's regulatory application. Thus, it is not necessary, as suggested by Florida Power, for Panda to demonstrate that the Commission's adoption of a standard offer contract rule is itself preempted by PURPA. The standard offer classification created by state rule is preempted, however, when utilized as a sword to modify, abrogate or reinterpret contracts previously approved by the Commission. That behavior cannot qualify as an

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[4] Commission A.B. at 10; Florida Power **A.B.** at **26.**

[5] ***FERC v. Mississippi,*** **456 U.S. 742** (1982), does not, of course, say otherwise. There, the court upheld the constitutionality of PURPA as an exercise of Congressional power under the Commerce Clause and against Tenth Amendment attack. The fundamental constitutional conclusion of the court was that in a circumstance where Congress could preempt all state conduct over the subject matter, it could condition a partial withdrawal of that preemption with a requirement that federal rights be enforced through state action. 456 U.S. at 763. Of course, the statute still says what it says: state commissions may regulate to implement PURPA, no more.

implementing action by a state commission.

Panda proved below, and Florida Power makes no attempt to deny that its unilateral effort to avoid the clear language of its contractual obligation to Panda was the result of its concluding that its contracts with Panda and other QFs were no longer profitable as a result of changed conditions. Florida Power's raw business concern was prompted by its anticipation that it would suffer "stranded investment", meaning that its contract with Panda would not be competitive and hence would not be profitable.[6]

This naked business reason for Florida Power's action to set aside or rewrite the Panda contract -- some four years after it was executed -- has been faced by courts and commissions in other jurisdictions, which unanimously have rejected it as the basis for the unprecedented action taken by the Commission in undoing the previously approved terms of this otherwise binding contract. There was no critical ***regulatory,*** or public interest at stake here in voiding this QF contract previously heralded as being in the public interest.[7]

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[6] A relevant recent decision has explained the term and the problem that arises for utilities:

> If this move [by FERC] to competition is fully implemented, traditional . . . utilities may be impacted if they have 'stranded investment' because it is non-competitive or if there is need for less capacity because of less demand. Stranded investment represents that portion of capacity which has capital costs and operating costs so great that the power is produced at a cost that will not be competitive in the coming competitive marketplace and has the potential to be written off.
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> These concerns are at the core of the disputes concerning PURPA contracts taking place before courts and regulatory bodies throughout this country. [citation omitted]. Because these contracts are 'take or pay' at 'avoided cost' [footnote omitted], there is a concern that QF contracts may be another form of stranded investment. The fear is either QFs will supply energy that the utility no longer needs because customers have walked away with their demand and are purchasing from independent power producers or that the avoided costs paid for QF power is at a cost higher than the cost of power that may become available in the potential competitive marketplace.

West Penn Power Co., v. Pennsylvania Public Utility Comm., 659 A.2d 1055, 1059 (Pa. Commw. 1995); ***See also Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Commissioners,*** 44 F.3d 1178 (3d Cir. 1995).

[7] Florida Power made meager effort below even to contend that Panda's proposed 115 MW facility would cause any harm to consumers. Florida Power knew that in low load periods it could curtail Panda all the way down to its *74.9* MW Committed Capacity. (T. 154-59). Even this prognostication of low load needs was forecast by Florida Power to end in five to seven years. (T. 156). Moreover, Florida Power's chief witness Dolan merely speculated that there could be any harm whatsoever to rate payers from Florida Power's having to purchase energy above Committed Capacity from Panda at "as-available" rates. He suggested that

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Critically, the economics-dictated impulse for Florida Power's seeking to set aside the Panda contract confirms that this case is on all fours with ***Freehold*** and cases following which have rejected state commission intervention to revoke or alter QF contracts after they have been approved. Post-approval intervention is not an exercise of "implementing" regulatory authority. Rather, that conduct is forbidden "utility-type regulation" preempted by PURPA. ***Freehold; West Penn***. State utility commissions traditionally did not possess power to regulate wholesale power contracts such as this. That realm belonged exclusively to FERC under the Federal Power Act, 16 U.S.C. § 791a, *et seq*. **PURPA** "created a narrow exception to the general rule" by authorizing state commissions "to implement PURPA by initially setting avoided cost rates" for QFs. ***American Bituminous Power Partners, L.P., v. Monongahela Power Co.,*** 168 P.U.R. 4th 344 (W.Va. **P.S.C.** 1996). Unremarkably, given this narrow exception to preemption, the implementing acts of authorizing and approving contracts constitute the precise boundaries of regulatory subject matter jurisdiction.

Freehold, of course, is the most thorough decision on the subject. It held that PURPA bars reconsideration by the regulator of the prior approval of an agreement by a utility to purchase energy from a certified QF, because that reconsideration was inherently "utility-type regulation" which PURPA expressly preempts. 44 F.3d at 1191-92.[8] Florida Power and the Commission try to distinguish ***Freehold*** and similar decisions by asserting that negotiated and

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Panda's 40 MW additional power "could cause" added cycling costs at some plants, but admitted that these possible costs were not passed along to consumers anyway. (T. 430-32). Moreover, Mr. Dolan's testimony was directed to effects on existing capacity, not avoiding the cost of future utility construction, which underlies the entire "avoided cost" concept. The mere fact that Florida Power may have made a business error in contracting for capacity it does not now forecast that it will need, is not a legal basis for invalidating the QF contract.

[8] "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.

standard contracts are different and that the standard offer contract procedure was promulgated under PURPA's implementing authority, so that the relief sought by Florida Power was not contract reformation, but merely rule enforcement.[9] These arguments are hollow.

Both standard and negotiated contracts must be approved by the Commission before they become binding. In either case, the Commission exercises its implementation authority when it approves the contract. The rationale put forward to support the distinction between standard offer and negotiated contract -- namely that the Commission has either greater or complete control over standard offer contracts[10] is a self-serving after-the-fact theory belied by the fact that the Commission approved a contract form that allowed Panda to fill in the most critical terms of any contract -- price and term. These terms were agreed to by Florida Power when they selected Panda as the winning bidder and were the basis on which it petitioned the Commission for approval, just as Florida Power would have had to do in the negotiated contract setting. This record reflected that Florida Power used the same forms for its standard and negotiated contracts and that it required QF's pursuing negotiated contracts to use the forms, otherwise there was no opportunity to negotiate a contract with Florida Power. (T. **82-86).**

Just because a contract was let by standard offer cannot condone the voiding of that contract. Forbidden "utility-type regulation" that has the effect of reforming or invalidating a contract is just that, regardless of whether it is exercised under a regulation that can be used as a source of implementing authority.

In this regard, *West Penn* is an important clarifying decision for several reasons deserving amplification. It involved a utility's appeal from a state commission's dismissal of its complaint seeking rescission of prior approval orders. The relationship between the utility and QF was negotiated, but the contractual product of that negotiation was "made conditional on the promulgation of a rule or the issuance of an order by the [state commission] approving

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[9] Florida Power **A.B.** at 35-36.
[10] (Commission **A.B.** at 23); (Florida Power **A.B.** at 35).

the legality of the agreements and specifically determining that the purchase of power would not result in excess capacity." 659 A.2d at 1060. Plainly, the case involved features both of a negotiated and standard offer arrangement as Florida would comprehend it, but under Pennsylvania law the contract of the parties would have had no existence absent approval by the state commission." That, of course, is precisely the credential on which Florida Power and the Commission rely here for continued authority to define the megawatt and duration terms of the QF contract that was previously approved as to those material terms in 1992. Nevertheless, *West Penn* rejected the view that continuing regulation was within the jurisdiction of the state's regulator.

That decision further debunks the preemption analysis urged by Florida Power in contending that the absence of conflict with a FERC rule ends the preemption argument in favor of state authority to intervene. Florida Power cites to FERC's decision in the *West Penn* controversy to support this argument,[12] spinning the theory that FERC's refusing to entertain the utility's petition that it not be required to purchase energy from the QF means that state action of any kind cannot be preempted.[13] Despite FERC's abstention,[14] however, the state court in ***West Penn*** still concluded that the state commission had accurately reasoned that it was preempted from reconsidering the terms of the contract previously approved." 659 A.2d at

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[11] Florida Power has expressly acknowledged and the Commission has implicitly acknowledged in its brief (and expressly in previous orders) that were this a contract that was the product of the negotiated contract route, then the Commission would not have possessed subject matter jurisdiction to consider Florida Power's request for declaratory relief. Ironically, the Commission's decision shows that Panda was in a worse competitive position by virtue of the standard offer process, because had it negotiated a contract then Florida Power could not have applied to the Commission to alter or revoke it even if the Commission made a "mistake" as it now suggests in approving it. As matters turned out, Panda had less leverage than the negotiated process would have allowed it.

[12] ***West Penn Power Co.***, 71 FERC ¶ 61, 153 (1995).

[13] Florida Power **A.B.** at **37.**

[14] FERC also made clear that it would not adjudicate the utility's petition because it had been litigated in the state courts.

[15] Other FERC decisions cited by Florida Power also fail to enlighten on the question of whether the state commission is preempted from reconsidering a previously approved QF contract. For example, in *Massachusetts Institute* ***of Technology,*** 74 FERC ¶ 61,221, 1996 FERC Lexis 280 (1996), FERC did not invoke its "discretionary enforcement authority" under

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1066. **FERC's** refusing to intervene does not mean that the state commission has jurisdiction to entangle itself in utility-type regulation that is otherwise preempted, as Florida Power's contrary arguments seek to imply.[16] The court confn-med that the state regulator "was not free to reconsider its prior orders approving [the contracts] or the rates under those agreements because such action is preempted by federal law." ***West Penn, 659*** A.2d at 106566. The track record from other states evinces overall an understanding that PURPA's state implementation authority is constricted in a manner that cannot possibly permit a state commission to undo an approved contract.[17]

Once Florida Power executed and the Commission approved the QF contract, that approved contract, whether arrived at by the negotiated or standard offer path, was still in substance a legally binding obligation between the contracting parties made so by the Commission's implementation authority.[18] By shying away from Panda's position that this

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PURPA to consider the university's contention that the state commission had erred in approving a utility's customer transition charge in the formula used to calculate energy payments. The case did not involve state commission reconsideration of the terms of an already approved QF contract.

[16] Florida Power A.B. at 36-37.

[17] The Supreme Court of Idaho recently distinguished ***Freehold*** on precisely this difference in the factual circumstance before it, where a contract had not yet been executed or approved, thereby reinforcing the bright line difference between implementing PURPA and being preempted by PURPA. ***See also American Bituminous Power Partners, L. P., v. Monongahela Power*** Co., 168 P.U.R. 4th 344 (W.Va. P.S.C. 1996) (preemption precludes reconsidering previously approved contract); ***Re Atlantic City Electric*** Co. 169 P.U.R. 4th 38 (N.J. B.P.U. 1996) (same).

[18] Florida Power's weak rejoinder to this conclusion is a footnoted discussion of a recent New York commission decision in which the latter held (consistent with a decision from the Ninth Circuit Court of Appeals) that a utility could institute a monitoring program to determine QF compliance with PURPA. ***Re Niagara Mohawk Corp.,*** 1996 WL 508763 (N.Y.P.S.C. Aug. 30, 1996). (See Florida Power's A.B. at 39, n. 11, using the alternate Lexis citation which apparently has a different style for this decision.) The decision does not remotely bear on the question framed here -- revisiting an approved contract in a manner that could abrogate the agreement. It simply deemed within state authority the power to approve a monitoring program as part of FERC-granted continuing state jurisdiction over certain "operational circumstances", that was consistent with a utility's authority to petition FERC for QF decertification. Simply put, mere monitoring by a utility for the purpose of gathering compliance information with which it might thereafter petition FERC for relief, did not fall outside the state commission's abidance of it own "contract non-interference principles. " Establishing a state monitoring system consistent with FERC authority to decertify a QF on
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proceeding was brought to annul the executed contract, yet acknowledging that it does not matter whether that is the practical result, the Commission and Florida Power are soft-peddling a radical departure from the constraints on state power under PURPA. They have not one precedent to support their conclusion that a state's *implementing* authority can be applied to abrogate contracts that have been approved in compliance with those very same implementation rules. Florida Power's petition for declaratory statement and its answer in opposition to Panda's responsive declaratory petition below were less shy about this. They urged, respectively, that the "Panda Standard Offer Contract is not available to Panda . . . if it configures its facility to have a capacity of 75 MW or more" (R. 5), and that Panda's contract be declared "void ab initio" (R. 342; underscore in original)."

Florida Power was plainly *seeking contract* ***interpretation***, despite its repeated rhetoric to the effect that it was merely seeking "rule enforcement". Florida Power's brief reflects that it and Panda had disagreements as to the very meaning and construction of contract terms, including the size term and duration of Committed Capacity payments.[20] This is a dispute concerning the interpretation of a contract, in which the parties disagree respecting that interpretation. For its part, the Commission flatly did modify the contract when it addressed the price term. It there recognized that Committed Capacity payments were set for 30 years by the contract's plain terms, but that it would be "unfair to . . . commit Panda to compliance

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proper submission of evidence by a utility is hardly the equivalent of invalidating, altering or nullifying a **QF's** ongoing and previously approved contract.

[19] While more muted in their language before the Court, which now adopts the mollifying tone that it is merely seeking rule enforcement, the Florida Power brief acknowledges that the Commission's decision essentially dismisses as legally immaterial any concern that by directing Panda to construct a facility of 75 or less MW, the Commission has terminated Panda's ability to comply with the terms of the standard offer contract. (Florida Power A.B. at 45; Commission A.B. 27-28.). Additionally, Panda's opponents make much of the fact that Panda sought to extend the milestone dates for construction of the facility, but they distort that request. The milestone extension request was made so that if and when the Commission ruled in favor of Panda it would have the opportunity to build the facility. Otherwise, the mere passage of time and Florida Power's litigiousness would make any favorable ruling a dead letter for Panda. Inconsistent relief was never sought by Panda.

[20] Florida Power A.B. at 18-20.

with its contractual performance requirements for 30 years", in light of the fact that it had determined that Florida Power's cost recovery was limited by rule to 20 years, hence its payment obligation under the contract would be modified from 30 to 20 years, as well. (R. 1637). It is difficult to imagine what was being done here if not contract modification, and simply because the Commission could be said to have interpreted its Rule in conjunction with the contract, did not make this process any less one of contract interpretation. That role, of course, is filled by courts everyday, and PURPA assigns courts, not the state utility regulator, the task of adjudicating these contract disputes. [21]

Freehold and the cases following its reasoning have made the only analytically sound determination, that upon execution or approval commission jurisdiction ceases. That line is the only one that makes sense, as the entire intent of PURPA is to provide opportunity and stability to the QF. In this case, the Commission's order has profoundly ***destabilized the*** relationship of QF to utility because now an approved Standard Offer contract stands subject to revision or annulment by further Commission order. [22] The Commission's willingness to subject this contract to subsequent review, reinterpretation, or invalidation runs counter to the

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[21] See Panda's I.B. at 34. That assignment of contract interpretation to the courts is obviously a good idea. Panda emphasized in its initial brief that the Commission ruled "irrelevant" virtually all the facts that would normally go into interpreting a contract that was deemed to be ambiguous and then simply modified the terms of the contract to fit its preconceived view of its rules on facility size and duration of Committed Capacity payments.

[22] The weakness in the Commission's and Florida Power's argument is that it must be taken to the logical extreme -- as they do -- that a standard offer contract is the regulatory equivalent of a tariff. That cannot be right, for that would mean by force of definition alone, that certain QFs may be regulated just as if they were utilities, because of a status established under the implementation authority of the Commission. It is simply not plausible that the standard offer category and the status it brings is a ***sub silentio*** manner of reintroducing "utility-type" regulation where it has been expressly proscribed. That construction of PURPA would be one clearly contradicting its plain language and importing a definition of "implementing authority" that would surely not harmonize ***in pari materia*** with the ban on "utility-type regulation" of QFs. ***McGhee v. Volusia*** County, 679 So. 2d 729 (Fla. 1996). Moreover, in the proceeding validating Panda's contract, the Commission divorced itself from the view that QFs are really subject to traditional tariff analysis. In granting Florida Power's petition to reject all but Panda's standard offer, the Commission stated: "We believe that standard offer contracts are published as tariffs as a matter of administrative convenience and are not subject to the same type scrutiny as a utility's offers to provide service." ***In re: Petition for Authority for Florida Power to Refuse all Standard Offer Contracts,*** Order No. PSC-92-1202 (Oct. 22 1992).

intent of PURPA and to that of the state-established standard offer contract.

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.

Florida Power's contention that Panda engaged in the standard offer process at its own peril, and the Commission's disdainful and insulting assertion that Panda is playing a game of "spot the mistake","[23] each serve to underscore the rather ivory-tower approach to advocacy that this utility and the Commission take when encountering resistance to an *ultra vires* exercise of power, but rarely enunciate quite so expressly. The bid process -- including Florida Power's proposal to the Commission to obtain energy from Panda as a QF based on Commission rule -- had everything to do with Committed Capacity and nothing to do with total or net generating capacity. The Commission-crafted standard offer contract form and its procedures were not interested in the latter. The contract signed by Panda and Florida Power and approved by the Commission addressed Committed Capacity ***with particularity,*** authorizing up to 75 MW of Committed Capacity, with no attendant limitation on the amount of total or net generating capacity.[24] The contract expressly stated that it was for a duration of 30 years and that Panda was to provide Committed Capacity for that duration. If redefining "Committed Capacity" to mean "net generating capacity" isn't a retroactive contract alteration, then this Court would be hard-pressed to name something that is.[25]

From the very outset of the contracting process, Panda proposed to Florida Power that it intended to build a facility that could produce at least 87-95 MW of net generating power.

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[23] Florida Power A.B. at 45; Commission's A.B. at 15.

[24] Panda's witnesses who discussed the necessity of constructing a 115 MW plant to meet Committed Capacity, given environmental and equipment technology constraints, always were addressing the *net* generating capacity available to serve that Committed Capacity. (T. 308-313). Therefore, Florida Power's picking at Panda's briefs use of the word "total" before "generating capacity" is just nit-picking.

[25] Three of the designs proposed by Panda's competitors for the standard offer contract had net generating capacities in excess of 75 MW. (T. 558). None were rejected on that basis.

(T. 13, 254). Florida Power, not Panda, took that contract proposal to the Commission on November 26, 1991, before ***Polk Power***[26] was decided. (See ***Petition for Authority*** at 1). Thereafter, in May 1992, Panda met with Florida Power to advise that it was planning to comply with the Committed Capacity covenant of the contract by constructing a 110 MW facility.[27] (T. 294-96). Florida Power did not amend its proposal before the Commission, which was pending when ***Polk Power*** was decided on July 21, 1992, nor reject Panda's plans. Three months later, on October 22, 1992, the Commission granted ***Florida Power's petition*** to approve its contract with Panda. [28] Given this chronology, it is fundamentally unfair that the Commission would audaciously accuse Panda of "willful blindness" and of "trying to make a game of 'spot the mistake' out of this process.. . . "[29] Panda could adorn the Commission and

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[26] ***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).

[27] The history of Panda's continued discussions with Florida Power regarding the planned energy output of the facility, and its detailed testimony concerning the environmental and technological reasons for the facility's size, make Florida Power's reliance on anecdotal comments of its Mr. Dolan pale by comparison regarding the ratio between Committed and net capacity that other QFs had met. Mr. Dolan's name-dropping style of testimony concerning other plants provided no details regarding whether these supposed "cornparables" had to meet the new emission standards facing Panda, as one example of their lack of probity. Moreover, Mr. Dolan's contention that Panda had the elective option to produce only 67.4 MW Committed Capacity was not accompanied by any explanation as to whether that would have allowed any change in facility design, again showing a dearth of Florida Power proof that Panda did not need to construct a facility that was capable of producing up to 115 MW.

[28] Panda amended its QF certification statement to FERC to advise that its facility would have a net electrical output of 115 MW, in August 1994, well before Florida Power even filed its petition for declaratory relief. (R. 348-49). Panda did not mislead FERC or anyone else as to its intentions to build a 115 MW plant, despite Florida Power's commentary otherwise. (A.B. at 5-6).

[29] Commission's A.B. at 24, 27. Moreover, much ado is made by Florida Power of a proposal made by a Panda marketing representative to the City of Lakeland to sell power from the proposed facility. Panda's senior vice-president carefully explained that this offer was not authorized (T. 273), and Panda's director of engineering explained that he was excluded from discussions after a first meeting at which he'd explained that the power was not available from the facility given the Committed Capacity needed for Florida Power. (T. 362). Slightly less than one month's time was all it took for the City to reject the marketing proposal, even before Panda could implement the executive decision to withdraw that proposal. (T. 368, 274). Insinuations to the contrary by Panda's opponents notwithstanding, Florida Power was aware by May 1992 of the 110 MW size proposed by Panda (T. 280, 294), and this one month episode with the City had no impact on Florida Power's obtaining approval of the Panda contract in 1992, or its subsequent business judgment in 1994 that the Panda facility not be built. (T. 129).

Florida Power with the same epithets, for each fail to explain in any logical manner how it is that they can feign compliance with the supposedly rigid net capacity interpretation of *Polk Power,* yet see no error in Florida Power's petitioning for approval of a 95 MW net power facility and obtaining that approval ***after*** *Polk Power* was decided, nor for saying even now that if Panda's design was only a little in excess of 75 MW, that would comply with the rules. As for the Commission, its retroactive interpretation scuttling this contract -- after approving it -- still leaves QFs unknowing of by what amount of net capacity they may exceed the Rule, without retroactively having their contracts extinguished.

The Commission made precisely possible exactly what Florida Power and Panda committed to, by virtue of the Commission's own contract procedure for implementing its standard offer regulations. The Commission has now deemed that standard-offer-compliant contract which it had once approved a virtual nullity in this case because the Commission, in its view, did not "spot a mistake" that apparently it now thinks it should have caught sooner. The Commission's briefing admission of a unilateral mistake, of course, serves as no foundation for revisiting this contract under principles of contract law, particularly when Panda has so plainly incurred a change in position in reliance on its Commission-approved contract with Florida Power. *Newman v. Metropolitan Dade County,* 576 So. 2d 1352 (Fla. 3d DCA 1991) (mutual mistake necessary to reform contract).

Nor is there anything persuasive in the notion that the contract expressly incorporated the Commission's regulations The contract purported to incorporate all the Commission's rules -- including those for negotiated contracts. Such wholesale incorporation at best for Panda's opponents created some ambiguity in the contract -- ambiguity to be resolved by principles of contract interpretation. Rule 25-17.0832(3)(a) was anything but precise on the point at issue. It *ambiguously* provides that a standard offer contract is available for obtaining "energy from small qualifying facilities less than 75 megawatts. . . ." It obviously could be read, *and was read* when this contract was executed, 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 (irrespective of the facility's net generating capacity). The Commission's argument that the decision in ***Polk Power*** was actually the rule before the Commission approved the contract,[30] serves to underscore, not detract from the fact that the parties and the Commission did not deem that precedent controlling in a contrary interpretation of the net capacity requirements for compliance with the standard offer contract.

Further demonstration of the Commission's lack of logic came in its alteration of the payment term from 30 to 20 years. After deciding that its rule required the economic plant life of the avoided unit to be 20 years (although its rule speaks of "anticipated plant life", not "economic life"), and despite the utterly plain language of the contract setting the payment term for 30 years, the Commission rejected Panda's expert's reconciliation of this contrived ambiguity, even while conceding that the expert's use of the Commission's own value of deferral methodology was "technically correct". (R. 1636). The Commission fell back upon a purported policy consideration to the effect that the use of this formula -- that would have readily dispatched any ambiguity between the contract and the rule -- would "inappropriately tie FPC to a planning decision . . . 20 years ahead of time." (R. 1636).

This analysis frankly just shows that the Commission was taking sides against Panda. The calculation of "avoided cost" is inherently founded on assumptions made from a present-day snapshot that estimates what the future cost of energy will be, in order to set a fair rate that a utility will pay to avoid future development of its own energy sources. Panda's expert explained that the 30 year life of this facility would avoid the cost of the unit for all of those 30 years and that there was a methodology already established which demonstrated there was nothing at all improper with the contract's plainly setting the term of payments at 30 years.

For the Commission to conclude that Florida Power was being unfairly tied to a planning decision for years 21-30 of this contract was simply to place its favorable imprimatur on Florida Power's determination that it wanted out of this contract because it had made a bad

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[30] Commission A.B. at 26-27

business deal. This sort of rogue reasoning displays a bias by the regulator in assenting to the needs of its traditional regulated utility that serves to underscore the importance of the bright line drawn by PURPA in protecting QFs from traditional regulation.

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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