RICHARD A. ZAMBO, P.A.
ATTORNEYS AND COUNSELLORS

598 S.W. HIDDEN RIVER AVENUE
PALM CITY, FLORIDA 34990
(407) 220-9163

211 SOUTH GADSDEN STREET
TALLAHASSEE, FLORIDA 32301
(904) 222-9445

RICHARD A. ZAMBO
PAUL SEXTON
PLEASE REPLY TO:
PALM CITY

August 15, 1990

COGENERATION
ALTERNATIVE ENERGY
ENERGY REGULATORY LAW
PUBLIC UTILITY LAW
ADMINISTRATIVE LAW
APPELLATE LAW

FEDERAL EXPRESS

Mr. Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0870

900699-EQ

Re: Seminole Fertilizer Corporation Petition For Declaratory Statement

Dear Mr. Tribble,

Enclosed find the original and 10 copies of "Petition For Declaratory Statement" filed by and on behalf of Seminole Fertilizer Corporation. I have also enclosed an extra copy along with a self-addressed stamped envelope. Please date-stamp and return to me at the Palm City address.

If you should have any questions regarding this filing please do not hesitate to call.

Sincerely,

Richard A. Zambo
Attorney for
Seminole Fertilizer Corp.

RAZ/rb

Enclosure
cc: w/enclosures to:
Commissioner Michael Wilson, Chairman
Commissioner Jerry Gunter
Commissioner Tom Beard
Commissioner Betty Easley
Commissioner Frank Messersmith

Jim Dean
David Smith, Esquire
Susan Clark
Robert Trapp

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility	)	Docket No. _____
	)	Submitted for Filing:
	)	August 16, 1990

PETITION FOR DECLARATORY STATEMENT

Seminole Fertilizer Corporation ("Seminole" or "Petitioner"), pursuant to Section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code, by and through its undersigned attorneys, files its Petition for Declaratory Statement, requesting that this Commission issue an order declaring that the planned financing and ownership structure of the cogeneration facility for Seminole, as that financing and structure is described herein: (a) will not result in or be deemed to constitute an unlawful sale of electricity; (b) will not cause Seminole or the partnership/lessor that will own the cogeneration facility, or any of its individual partners to be deemed a public utility as that term is defined under Florida Law; and (c) will not cause Seminole or the partnership/lessor that will own the cogeneration facility, or any of its individual partners to otherwise be subject to regulation by the Commission. In support of its Petition Seminole says:

1. The name and address of the Petitioner are:

Seminole Fertilizer Corporation
Post Office Box 471
Bartow, Florida 33830
(813) 533-2171

2. All Pleadings, motions orders and other documents directed to Seminole are to be served on:

Richard A. Zambo, Esquire Richard A. Zambo, P.A. 598 Hidden River Avenue Palm City, Florida 34990 (407) 220-9163	Paul Sexton, Esquire Richard A. Zambo, P.A. 211 South Gadsden Street Tallahassee, Florida 32301 (904) 222-9445

THE ORDERS AND STATUTES INVOLVED

3. The orders and statutes on which a declaratory statement is sought include the following:

a) Those provisions of Section 366.02, Florida Statutes, defining "public utilities" subject to the jurisdiction of the Florida Public Service Commission:

> (1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state....

b) Those provisions of Order No. 17009, issued in Docket No. 860725-EU on December 22, 1986, finding that a lease financing of a cogeneration facility by Monsanto would not result in or be deemed to constitute an unlawful sale of electricity, would not cause the lessor to be deemed a public utility under Florida law, and would not subject Monsanto or its lessor to regulation by the Commission :

> This Commission has taken the position that a QF may not engage in a retail sale. In re: Amendment of Rules 25-17.80 through 25-17.89 relating to cogeneration, Order No. 12634, issued October 27, 1983, at

21; In re: Repeal of Rule 25-17.835 and Adoption of Rules 25-17.88, 15-17.882 (sic) and 25-17.883 - Wheeling of Cogenerated Energy; Retail Sales, Order No. 15053, Issued September 27, 1985, at 9-10.

(at pages 2 & 3)

* * *

Since it is clear from Monsanto's petition that it will not hold legal title to every piece of equipment constituting the proposed cogeneration facility, will a prohibited retail sale occur between the lessor of the QF and Monsanto? Based on the terms of Monsanto's proposed lease agreement, we conclude that no sale will occur. Monsanto is leasing equipment which produces electricity rather than buying electricity that the equipment generates.

(at page 3)

* * *

Were Monsanto to purchase its proposed cogeneration equipment, this Commission would have no jurisdiction over either the QF or Monsanto.

(at page 4)

* * *

. . . Monsanto has leased an asset, the qualifying facility equipment, that will allow it to generate its own thermal and electric energy. Monsanto is, therefore, serving itself and neither it nor its lessor would be subject to Commission jurisdiction under chapter 366, Florida Statutes.

(at page 5)

c) Those provisions of Order No. 18302-A, Issued in Docket No. 870446-EU on October 22, 1987, in which the Commission found that a planned sale of electricity by P.W.

Ventures, Inc. to an unrelated consumer (Pratt and Whitney) constituted a sale of electricity "to the public" under Section 366.02(1), F.S.:

> . . . The Commission's jurisdiction does not turn on the size of the territory or the number of customers but, more simply, on the supply of electricity to an unrelated entity. We hold that the statutory language "to the public" does not permit us to find that service to one, or a few, or some members of the public is nonjurisdictional, for one embarked on that course the statute does not tell us where to draw the line.

(at page 4) * * *

> . . . [W]e hold that the jurisdictional boundary is marked by the separateness of the supplier and the consumer of electricity, such that the supplier of electricity is serving a member of the public rather than itself, and not by the number of consumers involved. One indication of separateness is whether the risks of production associated with a cogeneration facility are assumed by the supplier rather than the consumer.

(at pages 6 & 7)

4. The Commission has over time identified points on a jurisdictional continuum. At one end, it is clear that a person may engage in self-service by owning a cogeneration facility (in which case the Commission's jurisdiction would not vest). At the other end, it is equally clear that a person who simply sells electricity to another unrelated person engages in a prohibited retail sale (in which case the Commissions jurisdiction would vest). In Monsanto, the Commission recognized that financing arrangements may place ownership of cogeneration facilities in someone other than

the person using the equipment to generate electricity for their own consumption. Most importantly, the Commission found that certain such arrangements are not jurisdictional. Although Seminole believes that the proposed financing and ownership structure will not result in a jurisdictional transaction, it seeks the Commission's confirmation of that fact.

THE FACTS PRESENTED

5. Seminole operates a phosphate fertilizer manufacturing complex and mine in Bartow, Polk County, Florida, within the service area of Tampa Electric Company (TECO). Seminole presently owns and operates at that site a nominal 35MW (37MW nameplate) qualifying cogeneration facility which produces electric and thermal energy from "waste heat" recovered in the fertilizer manufacturing process. Seminole is now involved in the process of substantially expanding the cogeneration capacity (the "expansion") at that site.

6. Seminole's current cogeneration capacity is some 10 to 15 MW less than it's electric power needs, and utilizes only about half of the waste heat generated by its fertilizer manufacturing operations. Seminole's expansion is planned to recover up to 90% of that available waste heat and generate approximately twice as much electric power as Seminole requires. The expansion will be implemented in two "phases". Phase One will entail the addition of a nominal 36MW (37MW

nameplate) steam turbine-generator using steam generated from recovered waste heat. Phase Two will entail the addition of a nominal 22MW (28MW nameplate) combustion gas turbine-generator supplying electricity, steam superheating and process steam; bringing Seminole's total cogeneration capacity to a nominal 93MW (102MW nameplate). (The combustion gas turbine will be fueled by natural gas, with propane, oil or other refined fuel as a back-up). The generating capacity will be used for two purposes; one, to serve the electric power needs of Seminole, and two, to fulfill the obligations of an electric power sales agreement(s) with one or more utility(ies).

7. Seminole has executed a letter of intent for Phase-One of the expansion and expects to execute a letter of intent for Phase-Two in the next 30 - 60 days. The steam turbine-generator and combustion gas turbine-generator will be installed under separate construction schedules and are expected to be completed in the late 1991-early 1992 time frame.

8. Seminole proposes to finance the expansion in a manner which will allow "off balance sheet" accounting treatment for financial purposes. In order to accomplish this objective, the cogeneration assets must be owned by an entity other than Seminole. With this basic requirement, and being aware of pertinent Commission policy, Seminole, after investigating a number of alternatives, has determined

that a "lease financing" (similar to the Monsanto arrangement) will best meet it's objectives. Unlike Monsanto, however, Seminole will "create" the lessor which will own the cogeneration facilities for lease to Seminole.

9. Seminole's proposed financing of the cogeneration expansion will place ownership of existing and planned cogeneration assets into a limited partnership which will lease a portion of the facilities to Seminole for its operation and use. The limited partnership is currently anticipated to be created by the following general sequence of events: First, Seminole will transfer existing cogeneration assets, tangible and intangible, into a wholly owned subsidiary ("Sub"). Second, Sub will organize a limited partnership ("partnership") into which it will transfer cogeneration assets in exchange for general and limited partnership interests. Third, Sub will sell partnership interests to one or more investors, retaining a general partnership interest for itself. (This sequence as well as other pertinent information is graphically depicted in Attachment A hereto).

10. Seminole will enter into at least two business arrangements with the partnership. One arrangement will be a lease of an undivided interest in the cogeneration facilities for purposes of generating Seminole's electric and thermal energy needs. (The concept of an undivided interest is nesessary because the sizing of the three generating units

is dictated by waste heat availability, steam requirements and other heat balance considerations and therefore do not in any combination equal Seminole's electric requirement of approximately 45 MW to 50 MW). The other arrangement will be an operating and maintenance (O&M) agreement under which Seminole will be obligated to operate and maintain the lessor's cogeneration facilities, for purposes of generating Seminole's energy needs and also for purposes of generating the required energy and capacity necessary under the partnership power sales agreement(s) with one or more utility(ies).

11. The lease agreement and O&M agreement have not yet been developed and will likely not be developed until after the Commission issues its order in this matter. However, petitioner represents that by virtue of provisions of a lease, an O&M agreement, or otherwise, the proposed lease financing will have the following characteristics:

a) Seminole, as operator of the facility, will be the applicant for the Qualifying Cogeneration Facility certification.

b) Seminole will be obligated to make fixed lease payments to the lessor throughout the term of the lease, including any extensions. Such payments represent a return of capital plus a return on investment to the partnership, and reflect the value of the transaction to Seminole and the requirements of the capital markets. (Though not finalized,

annual lease payments are expected to be in the range of 10% to 15% of the value of the assets used by Seminole).

c) The lease payments will be fixed throughout the life of the lease, subject to an annual escalator to be specified, and will not vary as a result of electrical generation or production rates. Electric power generated by Seminole with leased facilities for it's own consumption will be the property of Seminole .

d) Seminole will be obligated to make lease payments during outages of the cogeneration facility for either planned or unplanned events, except however, Seminole will be excused from such payments if: (a) the facility expansion is not completed; or, (b) the facility experiences an event of Force Majeure. (The partnership/lessor has "priority" on available generation from the facilities in order to meet its capacity sales obligation and the partnership/lessor will relieve Seminole of its obligation to make lease payments during periods of Force Majeure).

(e) Seminole will be physically responsible for the maintenance, repair, replacement and operation of the equipment. The cost responsibility has not yet been determined but will be reflected in the agreed upon annual lease amount, O&M agreement fees, and other arrangements among the parties.

(f) Seminole will furnish the waste heat for producing electric and thermal energy. The partnership/lessor will be responsible for the cost of the fuel for the combustion gas turbine-generator.

(g) The initial term of the lease is expected to be in the range of 10 to 15 years with a 5 year renewal. At the expiration of the lease Seminole will have the option to renew the lease for additional term(s) or purchase the facility. The length of additional terms as well as the purchase price will be dictated to a large degree by the Internal Revenue Code and financial accounting constraints.

(h) The risks assumed by Seminole are substantial and in many ways are similar to those associated with conventional debt financing. Had Seminole borrowed the funds to finance the expansion, Seminole would be obligated to repay the loan in periodic fixed payments regardless of electric production rates, and would operate, maintain and be responsible for the operation of the facility. Except for events of Force Majeure, Seminole remains at risk regarding the mechanical operation of the equipment.

12. Seminole believes that it's proposed lease financing arrangement does not result in a sale of electricity because:

(a) Seminole will be the owner of that portion of the electricity produced by the facility for consumption by Seminole and in no sense will the electricity be sold by the lessor to Seminole.

(b) Seminole will be the operator of the equipment and the lessor will have no control over the use of the facility other than as beneficiary of covenants requiring Seminole to maintain the equipment in good repair, to operate it in accordance with industry standards and to generate electric power for sale to one or more utility(ies).

(c) Lease payments will be fixed and will not vary with electrical generation by the Facility or with Seminole's production rates.

(d) Seminole, as operator of the facility, will be the applicant for the Qualifying Cogeneration Facility certification.

THE DECLARATORY STATEMENT SOUGHT

13. Seminole seeks an order by the Commission declaring that the planned financing and ownership structure of the cogeneration facility: (a) will not result in or be deemed to constitute an unlawful sale of electricity; (b) will not cause Seminole or the partnership/lessor that will own the cogeneration facility or any of its individual partners to be deemed a public utility as that term is defined under Florida Law; and, (c) will not cause Seminole or the partnership/lessor that will own the cogeneration facility or any of its individual partners to otherwise be subject to regulation by the Commission.

14. Seminole is seeking a determination that the proposed financing/ownership structure is a bona fide self-service arrangement and that, under the facts presented, there will be no "retail sale" of electricity that would subject any party to the regulatory jurisdiction of the Commission under Chapter 366, Florida Statutes. The key issue, of course, is whether the limited partnership or any of the partners would be "supplying electricity . . . to or for the public within this state" under Section 366.02(1). This language has been construed by the Commission on several occasions. Seminole believes, under the guidance of this Commission's decisions, that Seminole's proposal is a bona fide self-service arrangement, and that no party is "supplying electricity to or for the public". Rather, Seminole, through the use of leased equipment, will be generating electricity for its own consumption, an activity in which this Commission has declared no interest.

15. The Commission has entered a series of orders construing Section 366.02(1). Initially, the Commission determined that QFs were prohibited from making "retail sales", which it defined as the sale of electricity to an unrelated party. Over time, the Commission has identified a jurisdictional continuum which, at one end identifies a "prohibited retail sale" and at the other, identifies clearly permissible self-service by a QF. The prohibited situation occurs when the owner of generating facilities sells

electricity to one or more unrelated persons such as in the Timber Energy and P.W. Ventures cases).[1] The permissible situation occurs when a QF consumes the electricity generated at a facility it owns. The Monsanto case dealt with the issue of whether the consumer must actually own the generating facility it uses to produce electricity for its own consumption. The Commission held that Monsanto's proposed lease-financing of a facility did not involve a retail sale and that it constituted a bona fide self-service arrangement.[2]

16. While the specific facts of these cases are instructive, Commission policy regarding Chapter 366, rather than strict adherence to the literal fact patterns of previous cases, should dictate the analysis. In Monsanto, the Commission focused on who bore the risks of operation of the facility, rather than ownership of the facility. In that case, Monsanto, like Seminole in this case, would pay a fixed annual amount for the use of the facility, would operate the facility and would bear risks associated with operating the facility. In P.W. Ventures, the Commission again focused

[1] In re: Petition of Timber Energy Resources, Inc., Docket No. 861621-EU; In re: Petition of PW Ventures, Inc., for a declaratory statement in Palm Beach County, Order No. 18302-A, Docket No. 870446-EU.

[2] In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Order No. 17009, Docket No. 860725-EU.

on the risk of operation which risks, unlike Monsanto or Seminole's proposal were borne by the owner of the equipment rather than the consumer of the electric power. The risk of operation, however, should not be the sole focus of the analysis. The basic reason for the prohibition against retail sales was to prevent third parties from "cream skimming" and enticing high volume customers to forsake the utility as their primary supplier. This was a policy argument that the Supreme Court invoked in PW Ventures V. Nichols, 533 So.2d 281 (Fla. 1988) when it upheld the Commission's interpretation of Section 366.02(1):

> What PW Ventures proposes is to go into an area served by a utility and take one of its major customers. Under PW Venture's interpretation, other ventures could enter into similar contracts with other high use industrial complexes on a one-to-one basis and drastically change the regulatory scheme of this state. The effect of this practice would be that the revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers.

(at page 283)

17. Seminole's proposal does not in anyway involve a developer seeking to "skim" utility revenues. To the contrary, Seminole's proposal is a means of expanding its self-service capability via an off balance sheet financing that it alone can initiate. Because there are no electric sales revenues (other than those from sales to a utility(ies)) being diverted to an unregulated producer, no

developer can economically interject itself into and market this type of arrangement in Florida. This is a unique, customer-initiated and controlled transaction that simply expands Seminole's self-service capacity and more fully utilizes available waste heat.

18. The Supreme Court also embraced, albeit indirectly, the "risk" concepts used in the Commission's Monsanto and PW Ventures decisions. In rejecting as irrelevant the fact that a project becomes non-jurisdictional when it is owned by the customer, the Court stated:

> The expertise and investment needed to build a power plant, coupled with economics of scale would deter many individuals from producing power for themselves rather than simply purchasing it. The legislature determined that the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation.

(at page 284)

In other words, the legislature decided not to regulate self-service because the cost of entry would serve to "regulate" most self-service situations and thereby limit competition. In light of this language, the question is not "does the customer bear all of the risks of operation", but is: "is the potential for competition limited because the customer faces the cost of entry?"

19. When a developer designs, permits, finances, builds and operates a generating facility and the customer simply buys electricity, clearly the customer faces no barrier. The

developer simply chooses a high volume customer and hopes to profit from the spread between the electric utility rates and his electric power selling price. A developer could thus select a series of high volume customers across the state and become a formidable competitor. Under the Commission's view, the legislature sought to regulate this type of direct competition.

20. In this case, however, as in the Monsanto case, a customer is seeking a means of conserving energy and serving its electric needs by self-generation, and has structured a transaction designed to finance a cogeneration facility for its own use. In this case, Seminole presently: 1) has contracted and paid for engineering services to design the project; 2) is procuring necessary permits; and 3) has developed a financing mechanism for the project involving a subsidiary, a limited partnership and various specially structured relationships. In addition, Seminole will operate and maintain the facilities; and, will share in the risk of the project through the lease and O&M agreements with the partnership and through its ownership of the subsidiary. Each of these elements creates a substantial barrier for self-generation and is compatible with the Supreme Courts concept of natural regulation.

21. The facts of this case show that Seminole's proposed off-balance sheet structure financing is a bona fide self-service arrangement and that there will be no "retail

sale" of electricity that would subject any party to the regulatory jurisdiction of the Commission under Chapter 366, Florida Statutes. This is an arrangement initiated and structured by Seminole to expand it self-service capabilities and is uniquely tailored to Seminole's needs. No developer is involved, nor could one economically become involved. Seminole will bear substantial risks in the project as well as the cost of initiating this project. Clearly no party to this transaction is "supplying electricity to or for the public within this state" under Section 366.02(1).

22. Seminole believes that its proposal cannot result in a sale of electricity. Nevertheless, assuming arguendo that a "sale" would be deemed to take place, it would not be a sale "to or for the public". The fact that Seminole has initiated this structure and indirectly participates in the partnership through its subsidiary means that the sale is not to a member of the "public" but to a closely related entity with a direct economic interest in the design, construction and operation of the facility. The Commission's definition of a "retail sale" requires that the sale be to an "unrelated entity". This implies that a sale between "related entities" would not be a retail sale. (In considering this point, the Commission should remember that the policy objective of the

"retail sale" prohibition is to prevent cream skimming through a series of one-to-one transactions).

23. Seminole has expended significant time, effort and expense in exploring and evaluating financing opportunities. Seminole has recently received several preliminary proposals and contemplates a financial closing by November 15, 1990; such closing being contingent upon favorable action by the Commission in this matter. Accordingly, it is critical to Seminole's financing of this project that the order requested herein be issued by this Commission on an expedited basis.

WHEREFORE, Seminole respectfully requests that this Commission consider and resolve these matters as expeditiously as possible by entering an order declaring that the proposed financing and ownership structure, as that financing and structure is described herein (a) will not result in or be deemed to constitute an unlawful sale of electricity; (b) will not cause Seminole or the partnership/lessor that will own the cogeneration facility or any of its individual partners to be deemed a public utility as that term is defined under Florida law; and, will not cause Seminole or the partnership/lessor that will own the cogeneration facility or any of its individual partners to otherwise be subject to regulation by the Commission.

Dated, August 15, 1990

Respectfully Submitted,

PAUL SEXTON, ESQUIRE
Richard A. Zambo, P.A.
211 South Gadsden Street
Tallahassee, Florida 32301
(407) 222-9445

RICHARD A. ZAMBO
Richard A. Zambo, P.A.
598 Hidden River Avenue
Palm City, Florida 34990
(904) 220-9163

Attorneys for
Seminole Fertilizer Corp.

ATTACHMENT A