FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

October 4, 1990

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF APPEALS (BELLAK, MILLER)
DIVISION OF ELECTRIC AND GAS (DEAN, HAFF)

RE : DOCKET NO.: ~~900669-EQ~~ 900699-EQ - PETITION FOR DECLARATORY STATEMENT BY SEMINOLE FERTILIZER CORPORATION

AGENDA : 10/16/90 - CONTROVERSIAL AGENDA - PARTIES MAY PARTICIPATE

PANEL : FULL COMMISSION

CRITICAL DATES: NONE

BACKGROUND

On August 16, 1990, Seminole Fertilizer Corporation ("Seminole"), pursuant to section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code, filed a Petition for a Declaratory Statement. Seminole requested an expedited review.

Two alternative recommendations are provided below. The salient points in each is summarized in the recommendation, but the detail is contained in the attached orders. The orders are parallel through page 5 and from that point forward, reach alternative conclusions.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission issue a declaratory statement?

RECOMMENDATION: Yes. The petition appears to meet the threshold standards for issuing a declaratory statement.

STAFF ANALYSIS: Section 120.565, Florida Statutes, provides that a declaratory statement sets out the agency's opinion as to the applicability of a specified statutory provision or of any rule or

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order of the agency as it applies to the petitioner in his particular set of circumstances. Petitioner has described a factual scenario pertaining to Seminole's financing and organizational circumstances and has asked the Commission to interpret the law as it applies to those facts. Thus, a declaratory statement is appropriate.

ISSUE 2: Should petitioner be allowed to participate at agenda?

RECOMMENDATION: Yes. Because this is a close question, the petitioner should be allowed to participate at agenda.

STAFF ANALYSIS: While not wishing to set a precedent, we request that petitioner be allowed to participate at agenda. The full discussion at agenda should help to elucidate the factual scenario presented by Seminole.

ISSUE 3: Should the Commission issue the attached Proposed Declaratory Statement, which answers Seminole's petition in the negative?

PRIMARY RECOMMENDATION: Yes. Denial is appropriate because the issue raised concerns this Commission's jurisdiction. Therefore, we are being asked for a legal determination which should be consistent with Florida and federal precedents. Those precedents allow for ordinary leases of cogeneration equipment and for sale-leaseback financing of such equipment. There is, however, no precedent for the proposal before us, where a lessee cogenerates power, a lessor non-cogenerator owns and sells some of that power to utilities, and the expense of power production is shared between the two.

STAFF ANALYSIS: The Court cases and prior orders relating to jurisdiction should not lightly be disregarded unless the Commission is ready to approve subsequent similar proposals with the following characteristics:

1. Though a lease of equipment with fixed payments independent of electricity production is claimed, the lease and O&M agreements will actually divide the ownership of the electricity produced

between the cogenerator and limited partnership. Though the cogenerator is said to own the electricity which it produces for its own use, priority of ownership goes to the limited partnership when less than the fully anticipated output of electricity occurs. Unlike Monsanto, therefore, production of power and control thereof is involved in the "lease" and O&M arrangements.

Moreover, the cogenerator supplies waste heat while the partnership in turn supplies fuel for the gas turbine and the energy source for each entity's power cannot be readily assigned. These complexities make the application of Monsanto's tests for "lease of equipment vs. "sale of electricity" too ambiguous when applied here to conclude that no sale of electricity will take place. In Monsanto, the lessee produced power for itself, supplied the fuel, took the risks, etc. The lessor did not own or sell power. It was, therefore, clearly a lease of equipment.

Monsanto is like the FERC sale-leaseback cases and clearly unlike Seminole's proposal, which creates a partnership which will own and sell electricity to utilities but has none of the characteristics of a QF, lacking possession of cogeneration equipment, waste heat from which to cogenerate or involvement in producing power (other than supplying fuel).

2. If a sale cannot be ruled out, the argument that the entities are so related that sales between them would not trigger our jurisdiction blurs the precedents in Metro-Dade and PW Ventures.

Metro-Dade defined self-service as requiring identical entities. Clearly, Seminole Sub L.P., which was designed to be a legally distinct entity, is not

> identical. It therefore fails the test of Metro-Dade as to self-service.
>
> Applying PW Ventures is more of a close question. If any related entity is outside of our jurisdiction because sales to completely unrelated entities is the test, the Seminole proposal may arguably meet the test. However, the PW Ventures court never examined the issue of partial relatedness.
>
> Thus, the conclusion that PW Ventures requires complete unrelatedness for our jurisdiction to attach can only be implied, whereas our requirement of complete identity to avoid our jurisdiction was actually held by us in Metro-Dade.

Beyond the legal issues described above, the most evident practical problem which will result from granting Seminole's petition is that we, in turn, must then require utilities to purchase at avoided cost-rates electricity owned and sold not by Seminole QF, but by Seminole Sub L.P., which, as stated previously, lacks the normal attributes of a QF, and is not stated in the petition to be a QF.

ALTERNATIVE RECOMMENDATION: As an alternative, the Commission could, as a matter of policy, grant the petition. (Order in Attachment C).

STAFF ANALYSIS: This would be a new direction for the Commission, but one that is not legally precluded. The issues in this case are so close that while legal precedent may lead to a denial, policy consideration might lead the FPSC to endorse the proposal.

The points which weigh in the favor of approving this statement are:

--Petitioner has represented that fixed lease payments are involved which do not vary based on energy output. This meets the test of Monsanto.

--The fact that Seminole's wholly owned subsidiary is the general partner of the limited partnership/lessor makes the two

entities so closely related that they could arguably overcome the analysis applied in PW Ventures.

--A new statutory directive has been enacted by the Legislature since the time of the earlier cases of PW Ventures and Metropolitan Dade. New language in the Federal Energy and Efficiency Act (FEECA) states: "Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load control systems be encouraged." Section 366.81, Florida Statutes.

--The Metropolitan Dade case, which precluded a proposed financing and structure, was dissimilar in two key ways: the issue involved self-service wheeling; and the case applied a standard which looked for "identical" entities. Now, the standard via PW Ventures appears to be a "related" versus "unrelated" test.

--Petitioner has represented that no cream skimming will occur and that this model cannot easily be duplicated by others. It is "unique" to petitioner's factual situation. If so, there should be no harm to the public interest.

--The creation by the Legislature in 1989 of section 366.051, Florida Statutes, on cogeneration, states: "Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer." This new language may provide a new basis for endorsing the scheme proposed by Seminole as long as it is not precluded by any other statutes.

--"Public utility" is defined in section 366.02 as every person etc. supplying

> electricity "to or for the public within this state." The interrelationship of Seminole and the limited partnership/lessor should not trigger the "to or for the public" test itself.

Thus, this Commission may not be bound to apply a "strict constructionist" analysis. A more broad-brush policy approach to encourage cogeneration could arguably be applied so long as no statutes are violated. If developments take place in this transaction which later trigger FPSC jurisdiction, this declaratory statement would not preclude the Commission's assertion of such jurisdiction at that time.

CBM:prl
Attachments
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ATTACHMENT A

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. 900699-EQ 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

07433 AUG 16 1990

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

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

018

21; <u>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</u>, 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 <u>arquendo</u> 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

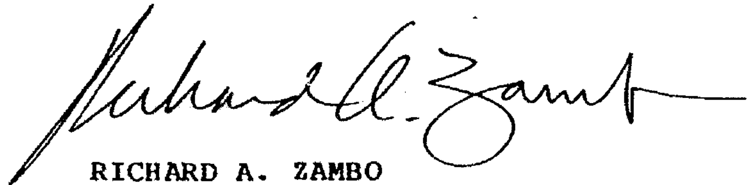
"retail sale" prohibition is to prevent cream skimming through a series of one-to-one transactions).

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,



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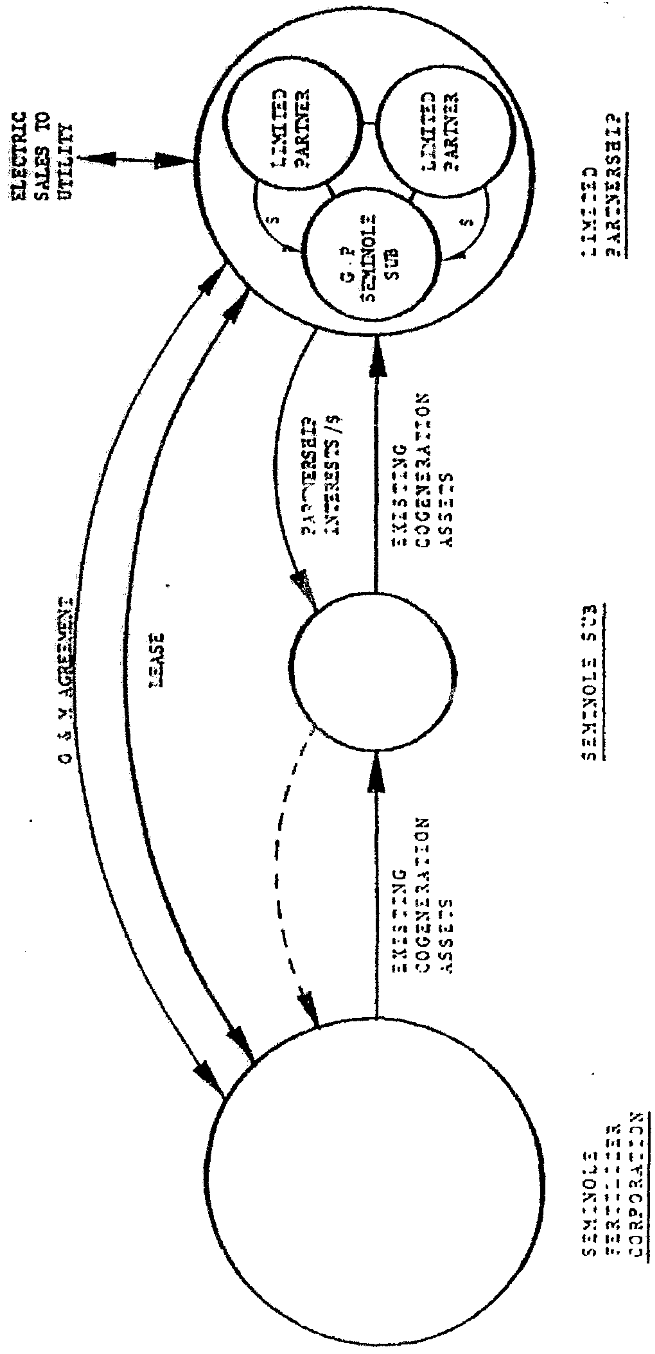
ATTACHMENT A



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. 900699-EQ ORDER NO. ISSUED:

The following Commissioners participated in the disposition of this matter:

MICHAEL WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
FRANK S. MESSERSMITH

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

By petition filed on August 16, 1990, Seminole Fertilizer Corporation (Seminole) sought a Declaratory Statement on the jurisdictional status of a proposed expansion of a cogeneration project. Specifically, the Petition requests an order declaring that its planned expanded cogeneration facility as financed and owned

a) will not a 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 be subject to regulation by the Commission.

Caveat

This Declaratory Statement is based solely upon information provided by Petitioner. Any alteration or modification of that information or failure to realize arrangements as described in the petition may substantially affect the conclusions reached in this Declaratory Statement as stated herein.

Background

Petitioner operates a phosphate fertilizer manufacturing complex and mine in Bartow, Polk County, Florida, within the service area of Tampa Electric Company (TECO). Cogeneration facilities owned and operated by Seminole now furnish approximately 10 to 15% less than Seminole's electric power needs while utilizing about 50% of the waste heat generated by Seminole's fertilizer manufacturing operations. Seminole proposes an expansion to its cogeneration facilities in order to utilize up to 90% of available waste heat while generating about twice as much electricity as Seminole requires. The excess electricity will be sold to one or more utilities.

Seminole proposes to finance the purchase of additional equipment, a nominal 36 MW (37 MW nameplate) steam turbine generator ("Phase 1") and nominal 22 MW (28 MW nameplate) combustion gas turbine ("Phase 2") by creating a limited partnership to own its cogeneration equipment and, in turn, lease it to Seminole, thus allowing for "off balance sheet" accounting treatment for financial purposes.

Seminole anticipates the following general sequence of events:

> <u>First</u>, Seminole will transfer existing cogeneration assets, tangible and intangible, into a wholly owned subsidiary ("Sub"). <u>Second</u>, Sub will organize a limited partnership ("partnership") into which it will transfer cogeneration assets in exchange for general and limited partnership interests. <u>Third</u>, Sub will sell partnership interests to one or more investors, retaining a general partnership interest for itself.

Seminole will enter into a lease arrangement with the partnership and an operating and maintenance (O&M) agreement under which Seminole will be obligated to operate and maintain the cogeneration facilities in order to meet Seminole's energy needs and to supply power under sales agreements with one or more utilities.

While the specific lease and O&M agreements have not yet been developed, Seminole represents that such documents will reflect the following characteristics of the proposed lease financing:

1) Seminole, as operator, will be the applicant for QF certification.

2) Seminole will be obligated to make fixed lease payments reflecting a return on capital plus investment to the partnership and reflecting the value of the transaction to Seminole and the requirements of capital markets; i.e., estimated at 10-15% of the value of the assets used by Seminole.

3) The lease payments will be fixed, subject to an annual escalator, and will not vary with the electricity produced.

4) Lease payments are due regardless of outages with two exceptions:

   a) failure to complete the expansion.

   b) force majeure.

5) Seminole is responsible for the maintenance, repair, replacement, and operation of the equipment.

6) Seminole provides waste heat; partnership/ lessor supplies fuel for the combustion turbine.

7) The initial lease term is expected to be 10-15 years with a 5-year renewal and an option to extend or purchase.

8) The risks to Seminole are analogous to debt financing; i.e., lease payments are due without regard to electricity production.

9) Seminole will lease an undivided interest in the cogeneration assets for the purpose of generating its electrical power requirements. Seminole will own the electric power thus generated, but only that amount required for its own use.

10) Under the O&M agreement, Seminole will be paid by the partnership to operate the

> cogeneration assets to generate electrical power in excess of its own requirements, which will be owned by the limited partnership/lessor and sold by it to one or more utilities. In the event less electricity is produced than required by Seminole and the partnership/lessor power sales, the latter will have "priority."

Discussion

Petitioner's suggested analysis asserts the applicability of our attached Order No. 17009, In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility.

Therein, we determined that Monsanto's lease financing of its cogeneration facility did not result in a retail sale of electricity, did not cause Monsanto's lessor to be deemed a public utility and did not subject either Monsanto or its lessor to regulation by this Commission.

The instant petition essentially asks whether that result would change under the facts as described in the petition. We consider those issues in the order presented.

Issue 1. Will the proposed expansion result in an unlawful retail sale of electricity?

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, 25-17.882, and 25-17.0883 - Wheeling of Cogeneration Energy; Retail Sales; Order No. 15053, issued September 27, 1985 at 9-10.

Under the facts presented in the Petition, Seminole will operate and maintain the cogeneration equipment and supply waste heat for its operation. The partnership/lessor will supply fuel for the gas turbine and will have priority as to the electricity produced, which it will own and sell to utilities to the extent of its power sales agreements. The remaining electricity will be owned and consumed by Seminole.

Neither the lease nor O&M (operating and maintenance) agreement have been drafted. However, since the electricity

produced must be divided between its respective owners, these agreements must address amounts of electricity produced, as distinguished from Monsanto, which only involved a lease of equipment. Moreover, at least a portion of the partnership's power will be generated from Seminole's waste heat, again as distinguished from Monsanto, where the user of electricity supplied the fuel:

> Throughout the lease term, Monsanto would be solely responsible for all costs and expenses associated with the maintenance, repair, replacement, and operation of the leased equipment, including the repair and replacement of major capital items, procurement of fuel for the facility, taxes, and insurance. Most importantly, just as in the lease of an automobile, the lease payments would be fixed throughout the term of the leased. These payments, based on a negotiated rate of return on the lessor's investment, would be independent of electric generation, production rates, or any other operational variables of the facility.

The problem is not that the Monsanto factors do not apply at all to Seminole's proposal, but that they apply so ambiguously. We cannot state, therefore, that the arrangements finally made will not result in a sale of electricity.

Petitioner argues that even if a sale does result, it is not a sale to an unrelated entity, as in P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). For the purposes relevant to this analysis, however, Seminole has distinct characteristics from Seminole sub L.P.

Seminole will lease cogeneration equipment, operate and maintain it, have possession of it, and produce waste heat from which energy can be cogenerated. Under federal law and our precedents, such as Monsanto, Seminole would be a QF. See, eg., Re Bridgeport Resco Company, L.P. Docket No. EL 88-15-000, 43 FERC Paragraph 62, 168.

In contrast, Seminole sub L.P., while the owner of the cogeneration equipment, will not operate or maintain the equipment, possess the equipment or supply any waste heat from which cogeneration can take place. Therefore, Seminole sub L.P. does not appear to be a QF and, pending a different determination of that issue by the FERC, the Commission will not require utilities to

purchase energy owned by Seminole sub L.P. at avoided cost rates, though this is what Petitioner contemplates. The two entities are sufficiently distinct that we cannot state as a matter of law that a sale of electricity from one to the other could not occur.

Petitioner states that we should not require all of the risk to be on the lessee, as in Monsanto, and that sufficient risk is on Seminole to distinguish the proposal from P.W. Ventures, supra. There, the Court noted that:

> The expertise and investment needed to build a power plant, coupled with economies of scale, would deter individuals from producing power for themselves rather than simply purchasing it. [e.s.] 533 So.2d at 284.

If Petitioner simply structured a limited partnership lease/financing arrangement to produce its own cogenerated power and excess for sale to utilities, it would be meeting the natural barrier to entry described with approval by the Court in P.W. Ventures, supra. Petitioner, however, would take the further step of producing cogenerated power, not only for itself to use and sell, but for Seminole sub L.P., which supplies fuel therefor, and has first priority as to any power generated. Therefore, the risks and rewards are shared between the cogenerator, Seminole, and the partnership, Seminole sub L.P., thus changing the mix between cogeneration and regulated public utilities approved by the Court in P.W. Ventures. We decline to endorse that change.

Issue 2. Will Seminole or the partnership/lessor be deemed a public utility under Florida law?

§366.02(1), F.S. defines "public utility" as, in pertinent part,

> every person, corporation, partnership, association or other legal entity and their lessees, trustees or receivers supplying electricity or gas (natural, manufacturered, or similar gaseous substances) to or for the public within this state; [e.s.]

Based on our analysis of Issue 1, the sale of electricity between the corporation (Seminole) and the partnership would meet the definition of public utility as to both entities.

Moreover, pending a contrary analysis by FERC, Seminole sub L.P. does not appear to meet the criteria for QF status. An

attempt by it to sell electricity would meet the definition of public utility cited above. A lessor which was found not to be a public utility pointedly did not sell electricity. Re: Bridgeport Resco Company, L.P., 43 FERC Paragraph 62, 168 (1988).

Issue 3. Would Seminole or the partnership/lessor be subject to regulation by the Commission?

Based on our analyses of Issues 1 and 2, supra, both Seminole and Seminole sub L.P. would be subject to this Commission's regulation because engaged in activities of public utilities.

Petitioner asserts that its proposal can be placed on a continuum between two extremes, with Monsanto on one end and such cases as P.W. Ventures on the other. If this proposal is closer to Monsanto than P.W., the argument goes, we should grant the petition.

Generally, no claim could be made that any lessor could claim QF status and sell electricity to a utility or that it was a related entity and sales to it of cogenerated energy would be outside the rule of P.W. Ventures.

Under the proposed facts, where the lessor's general partner is the wholly-owed subsidiary of a cogenerator, a much closer question is created as to relatedness of the two entities and the possibility that the partnership might have QF status.

The Court, in P.W. Ventures has drawn jurisdictional lines supported by its view of the relevant policy. The Commission has also articulated clear jurisdictional boundaries in such cases as Monsanto, cited earlier and In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission, Order No. 17510, issued May 5, 1987. In Metropolitan, the Commission found that the definition of self-service required identical entities.

The Petitioner's continuum argument is somewhat at odds with these cases. Jurisdiction is not stronger or weaker, but attaches fully or not at all. It may be that, as a matter of policy, FERC or the Court may conclude that the specific structure proposed by Petitioner lies outside our jurisdiction. Based on our own study of the relevant precedents and pending such determinations by others, we are unable to so find.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement by Seminole Fertilizer Corporation that its proposed financing of a cogeneration facility would not result in an unlawful sale of electricity, would not be deemed a public utility under Florida law, and would not subject Seminole or the partnership/lessor to regulation by this Commission, is answered in the negative for the reasons set forth in the body of this Order.

By ORDER of the Florida Public Service Commission this ______ day of ________________________, _________.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida

Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

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. 900699-EQ ORDER NO. ISSUED:

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman
THOMAS M. BEARD
GERALD L. GUNTER
BETTY EASLEY
FRANK S. MESSERSMITH

ORDER GRANTING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

By petition filed on August 16, 1990, Seminole Fertilizer Corporation (Seminole) sought a Declaratory Statement on the jurisdictional status of a proposed expansion of a cogeneration project. Specifically, the Petition requests an order declaring that its planned expanded cogeneration facility as financed and owned

a) will not a 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 be subject to regulation by the Commission.

Caveat

This Declaratory Statement is based solely upon information provided by Petitioner. Any alteration or modification of that information or failure to realize arrangements as described in the petition may substantially affect the conclusions reached in this Declaratory Statement as stated herein.

Background

Petitioner operates a phosphate fertilizer manufacturing complex and mine in Bartow, Polk County, Florida, within the service area of Tampa Electric Company (TECO). Cogeneration facilities owned and operated by Seminole now furnish approximately 10 to 15% less than Seminole's electric power needs while utilizing about 50% of the waste heat generated by Seminole's fertilizer manufacturing operations. Seminole proposes an expansion to its cogeneration facilities in order to utilize up to 90% of available waste heat while generating about twice as much electricity as Seminole requires. The excess electricity will be sold to one or more utilities.

Seminole proposes to finance the purchase of additional equipment, a nominal 36 MW (37 MW nameplate) steam turbine generator ("Phase 1") and nominal 22 MW (28 MW nameplate) combustion gas turbine ("Phase 2") by creating a limited partnership to own its cogeneration equipment and, in turn, lease it to Seminole, thus allowing for "off balance sheet" accounting treatment for financial purposes.

Seminole anticipates 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.

Seminole will enter into a lease arrangement with the partnership and an operating and maintenance (O&M) agreement under which Seminole will be obligated to operate and maintain the cogeneration facilities in order to meet Seminole's energy needs and to supply power under sales agreements with one or more utilities.

While the specific lease and O&M agreements have not yet been developed, Seminole represents that such documents will reflect the following characteristics of the proposed lease financing:

1) Seminole, as operator, will be the applicant for QF certification.

2) Seminole will be obligated to make fixed lease payments reflecting a return on capital plus investment to the partnership and reflecting the value of the transaction to Seminole and the requirements of capital markets; i.e., estimated at 10-15% of the value of the assets used by Seminole.

3) The lease payments will be fixed, subject to an annual escalator, and will not vary with the electricity produced.

4) Lease payments are due regardless of outages with two exceptions:

   a) failure to complete the expansion.

   b) force majeure.

5) Seminole is responsible for the maintenance, repair, replacement, and operation of the equipment.

6) Seminole provides waste heat; partnership/ lessor supplies fuel for the combustion turbine.

7) The initial lease term is expected to be 10-15 years with a 5-year renewal and an option to extend or purchase.

8) The risks to Seminole are analogous to debt financing; i.e., lease payments are due without regard to electricity production.

9) Seminole will lease an undivided interest in the cogeneration assets for the purpose of generating its electrical power requirements. Seminole will own

the electric power thus generated, but only that amount required for its own use.

10) Under the O&M agreement, Seminole will be paid by the partnership to operate the cogeneration assets to generate electrical power in excess of its own requirements, which will be owned by the limited partnership/lessor and sold by it to one or more utilities. In the event less electricity is produced than required by Seminole and the partnership/lessor power sales, the latter will have "priority."

Discussion

Petitioner's suggested analysis asserts the applicability of our attached Order No. 17009, In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility.

Therein, we determined that Monsanto's lease financing of its cogeneration facility did not result in a retail sale of electricity, did not cause Monsanto's lessor to be deemed a public utility and did not subject either Monsanto or its lessor to regulation by this Commission.

The instant petition essentially asks whether that result would change under the facts as described in the petition. We consider those issues in the order presented.

Issue 1. Will the proposed expansion result in an unlawful retail sale of electricity?

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, 25-17.882, and 25-17.0883 - Wheeling of Cogeneration Energy; Retail Sales; Order No. 15053, issued September 27, 1985 at 9-10.

Under the facts presented in the Petition, Seminole will operate and maintain the cogeneration equipment and supply waste heat for its operation. The partnership/lessor will supply fuel for the gas turbine and will have priority as to the electricity produced, which it will own and sell to utilities to the extent of

its power sales agreements. The remaining electricity will be owned and consumed by Seminole.

Neither the lease nor O&M (operating and maintenance) agreement have been drafted. However, since the electricity produced must be divided between its respective owners, these agreements must address amounts of electricity produced, as distinguished from Monsanto, which only involved a lease of equipment. Moreover, at least a portion of the partnership's power will be generated from Seminole's waste heat, again as distinguished from Monsanto, where the user of electricity supplied the fuel:

> Throughout the lease term, Monsanto would be solely responsible for all costs and expenses associated with the maintenance, repair, replacement, and operation of the leased equipment, including the repair and replacement of major capital items, procurement of fuel for the facility, taxes, and insurance. Most importantly, just as in the lease of an automobile, the lease payments would be fixed throughout the term of the leased. These payments, based on a negotiated rate of return on the lessor's investment, would be independent of electric generation, production rates, or any other operational variables of the facility.

The problem is not that the Monsanto factors do not apply at all to Seminole's proposal, but that they apply so ambiguously. We cannot state, therefore, that the arrangements finally made will not result in a sale of electricity.

Petitioner argues that even if a sale does result, it is not a sale to an unrelated entity, as in the PW Ventures, Inc.'s declaratory statement. In PW Ventures, the Commission's jurisdiction turned on the supply of electricity to an unrelated entity. "The jurisdictional boundary is marked by the separation of the supplier and the consumer of electricity such that the supplier is serving a member of the public rather than itself."

Here, Seminole is serving its own needs; but, in addition, it is serving the lessor who in turn provides electricity to utilities pursuant to power purchase agreements.

If the Commission deems Seminole and the lessor to be "related entities" due to Seminole's wholly owned subsidiary being the general partner of the lessor, there arguably would not be an

unlawful sale of electricity. Then, the transaction would also not cause the cogeneration facility to be deemed a public utility. Finally, none of the participants would become subject to PSC jurisdiction solely because of such a transaction, through the characterization of the lessor as a QF may seem problematical.

Petitioner states, in addition, that we should not require all of the risk to be on the lessee, as in Monsanto, and that sufficient risk is on Seminole to distinguish the proposal from PW Ventures, supra. There, the Court noted that:

> The expertise and investment needed to build a power plant, coupled with economies of scale, would deter individuals from producing power for themselves rather than simply purchasing it. [e.s.] 533 So.2d at 284.

If Petitioner simply structured a limited partnership lease/financing arrangement to produce its own cogenerated power and excess for sale to utilities, it would be meeting the natural barrier to entry described with approval by the Court in PW Ventures, supra. Petitioner, however, would take the further step of producing cogenerated power, not only for itself to use and sell, but for Seminole sub L.P., which supplies fuel therefor, and has first priority as to any power generated.

In Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self Service Transmission, Order No. 17510, issued May 5, 1987, ("Metro-Dade"), the FPSC dismissed an application for self-service wheeling pursuant to our cogeneration rules on the grounds that the provision of electricity to an end-user by a separate entity that bore all the risks, but in which the end-user had only a partial interest, was not self-generation. In that case, the order stated:

> [T]he County has title only to the building . . . that it is no longer in possession of, because it has leased it to another party. The generating equipment that will actually produce the electrical power is owned . . . by either Winthroup Financial Co. or Florida Energy Partners. In turn, neither of these parties has possession of the generating equipment because it has been leased to South Florida Cogeneration Associates. We find that the County does not "generate" the electrical power to be wheeled because it must first purchase the power from South Florida Cogeneration.

However, the issue in Metro-Dade was transmission and dealt specifically with an FPSC self-service transmission rule. The order was addressing whether the owner of the QF is identical to the customer whose facilities the power is to be transmitted to. In Metro-Dade, the FPSC concluded that "while the customer to receive the wheeled power is clearly the County, the electrical power to be wheeled is not generated by the County."

Petitioner claims its structuring to be bona-fide "self-service." Is the Metro-Dade test of "identical entities" the relevant test or merely the requirement that the entities be "related," as suggested in PW Ventures?

If, as Petitioner represents, (1) no cream-skimming would result from this transaction; (2) it encourages cogeneration; and (3) it is a unique model which cannot be used as a pattern for many developers to follow, it appears to be in the public interest. If it is in the public interest to encourage cogeneration, and if the State faces potential energy shortfalls, and if the law and court cases do not expressly preclude the transaction, the Commission may deem to find such a transaction outside the scope of our jurisdiction.

Postdating Metro-Dade is new statutory language mandating the encouragement of cogeneration through appropriate goals of the Commission. See, §366.82, F.S. Also, the new statute, on cogeneration, section 366.051, states that cogeneration is of benefit to the public when included as part of the total energy supply of the electric grid of the state or consumed by a cogenerator or small power producer. In light of this, the Commission finds that the lessee/QF (Seminole) and partnership/lessor (Seminole sub L.P.) are sufficiently "related" to surmount the PW Ventures jurisdictional boundary which precludes sales between "unrelated entities." It follows from that finding that the transaction at issue does not create a public utility which is subject to our jurisdiction.

Conclusion

The Monsanto case is not directly dispositive of the issues presented by the Petitioner. The two-way flow of dollars between the lessee and lessor require different tests than those provided in Monsanto.

A more difficult issue is presented than whether a true lease or sale results from the arrangements ultimately drafted. That issue is whether the separate entities created to achieve "off balance sheet financing" are sufficiently related to be considered one and the same for jurisdictional purposes and therefore beyond

our regulatory purview. Our conclusion is that no retail sale occurs where, as here, the general partner of the partnership/lessor is a wholly owned subsidiary of the lessee/QF. We leave to FERC the further determination of the equally close question of the QF status of the partnership/lessor.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement by Seminole Fertilizer Corporation that its proposed financing of a cogeneration facility would not result in an unlawful sale of electricity, would not be deemed a public utility under Florida law, and would not subject Seminole or the partnership/lessor to regulation by this Commission, is answered in the positive for the reasons set forth in the body of this Order.

By ORDER of the Florida Public Service Commission this ______ day of ____________________________, __________.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2),

Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Monsanto Company for a declaratory statement concerning the lease financing of a cogeneration facility.	DOCKET NO. 860725-EU ORDER NO. 17009 ISSUED: 12-22-86

The following Commissioners participated in the disposition of this matter:

JOHN R. MARKS, III, Chairman
GERALD L. GUNTER
JOHN T. HERNDON
KATIE NICHOLS
MICHAEL MCK. WILSON

DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On June 3, 1986, the Monsanto Company (Monsanto) filed a petition for declaratory statement asking that the Commission find that: (1) Monsanto's proposed lease-financing of its cogeneration facility would not result in an unlawful sale of electricity, (2) this arrangement would not cause Monsanto's lessor to be a public utility under Florida law, (3) the proposed lease-financing would not subject Monsanto or its lessor to regulation by this Commission, and (4) Gulf Power Company (Gulf) was required to supply supplemental, backup and maintenance ("standby") electric power at approved non-discriminatory tariff rates to Monsanto.

Both Metropolitan Dade County (Dade) and Gulf filed requests for intervention in this docket on June 26, 1986, and July 2, 1986, respectively. Gulf also requested a Section 120.57, Florida Statutes, evidentiary hearing should its intervention be granted. Upon finding that neither Dade nor Gulf had the "substantial interest" required for intervention under Chapter 120, Florida Statutes, and Rule 25-22.39, Florida Administrative Code, the Commission at its September 2, 1986 agenda conference denied their requests for intervention. The Commission did, however, give Gulf an opportunity to file a brief addressing the legal issues raised by Monsanto in its petition. Gulf filed its brief in a timely fashion on September 22, 1986. Monsanto filed its reply brief on September 26, 1986.

As outlined in its petition, Monsanto is proposing to increase its present electric generating capacity from approximately 10 to 15 megawatts to approximately 35 to 45 megawatts by the addition of a combustion turbine generator. The proposed combustion turbine generator would burn natural gas and/or oil and produce electricity and a high temperature exhaust stream which would be directed to a heat recovery steam generator to produce steam for existing back pressure turbine generators and for processing steam requirements. The combined production of electricity and steam would displace existing, less efficient natural gas boilers and thereby substantially lower the amount of natural gas and/or oil used at Monsanto's manufacturing complex.

The proposed cogeneration facility, then, would be an integrated system comprised of currently operational back-pressure turbines, a condensing turbine, and waste gas and natural gas boilers and the proposed combustion turbine generator, heat recovery steam generator and electric and steam interconnections.

DOCUMENT NUMBER-DATE
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Monsanto currently has qualifying facility (QF) status for its present cogeneration facility. Monsanto has not sought a reaffirmation of its QF status with the Federal Energy Regulatory Commission (FERC) since the final design of the proposed combined cogeneration facility will not be available until a lessor is secured. Monsanto has stated, however, that the combined cogeneration facility "will be designed and operated in accordance with the requirements necessary to maintain QF status under the Federal law."

Construction of the QF is expected to begin in January, 1987, with commercial operation to commence during 1988 pursuant to the terms of a "turn-key" contract between Monsanto and a yet-to-be selected manufacturer/lessor. The lessor will finance the facility and hold title to it for lease to Monsanto.

The essential terms of the proposed lease are as follows. The lease would be for a minimum term of not less than five years. At the end of the initial lease period, Monsanto would have three options: renew the lease; purchase the equipment at its fair market value; or pay for the dismantlement and removal of the equipment. Monsanto would provide the fuel for the facility to operate the equipment; would own and consume on-site all the steam and electric power produced by the equipment; be obligated to make fixed lease payments to the lessor; and would be the holder of the QF certification from FERC.

Monsanto's lease payments would be fixed throughout the term of the lease. These payments would be independent of electric generation, production rates or any operational variable and would include a negotiated rate of return on the lessor's investment comparable to the interest rate in traditional financing. Lease payments would continue to be due during either planned or unplanned outages of the facility. Throughout the term of the lease, Monsanto would be responsible for all costs and expenses associated with the maintenance, repair, replacement and operation of the leased equipment, including the repair or replacement of major capital items, taxes and insurance.

The lessor would hold legal title to the equipment, receive Investment Tax Credits (ITC) and depreciation benefits associated with it investment, and receive the fixed lease payments throughout the term of the lease. The fixed price renewal terms of the lease, should Monsanto decide to renew the lease at the end of its initial term, as other financial terms and conditions of the lease not delineated here, would be dictated by the applicable revenue rulings issued by the Internal Revenue Service to insure that the lessor received the facility's associated ITC's and depreciation benefits.

The lessor would have no control over the use of the facility other than as the beneficiary of covenants requiring Monsanto to maintain the equipment in good repair and operate it in accordance with industry standards.

DISCUSSION

Issue 1: Would Monsanto Company's (Monsanto) proposed lease financing of its cogeneration facility result in or be deemed to constitute a lawful sale of electricity?

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 15-17.89 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 and 25-17.883 - Wheeling of Cogenerated Energy; Retail Sales, Order No. 15053, issued September 27, 1985 at 9-10.

Retail sale was defined by this Commission in its withdrawn proposed Rule 25-17.883, Florida Administrative Code, as any transaction in which energy or capacity was supplied to an entity that did not have identical ownership to the QF. In re: Amendment of Rule 25-17.835 pertaining to the provision of utility transmission service to qualifying facilities at multiple locations, Order No. 14143, issued March 5, 1985 at 7.

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 upon 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.

This conclusion is supported by the terms of the lease. Throughout the lease term, Monsanto would be solely responsible for all costs and expenses associated with the maintenance, repair, replacement and operation of the leased equipment, including the repair or replacement of major capital items, procurement of fuel for the facility, taxes and insurance. Most importantly, just as in the lease of an automobile, the lease payments would be fixed throughout the term of the lease. These payments, based on a negotiated rate of return on the lessor's investment, would be independent of electric generation, production rates or any other operational variable of the facility. Thus, lease payments would continue to be due during either planned or unplanned outages of the facility.

All the risks of operation of the facility are retained by Monsanto. The only risks shifted to the lessor under the proposed arrangement are the risks associated with (1) tax law changes (ITC's and depreciation benefits are discontinued or so modified that this facility does not qualify for them); (2) the inability of the lessor to utilize the ITC's and depreciation benefits associated with its investment in the facility due to lack of taxable income; and (3) lack of residual value in the equipment after the expiration of the initial term.

These risks are exactly the same as those retained by the lessor of any piece of equipment. This is reflected by the charge to be paid by Monsanto, not a charge based on consumption, i.e., per kilowatt hour, but a fixed payment per month based on the fair market value of the facility. These fixed lease payments, coupled with Monsanto's sole responsibility to operate the equipment and thereby produce electricity, clearly support the analysis that Monsanto's lessor is providing the means of producing electricity, not selling electricity per se.

Gulf has argued that this situation is analogous to the "shared savings" scenario addressed in Section 255.258, Florida Statutes. Since the "shared savings" financing used by state agencies needed a statutory exception, then, Gulf asserts, Monsanto's proposed financing is the sale of electricity and needs a specific statutory exemption also.

This logic is faulty, however, since Monsanto's obligation to make payments based on the fair market value of the facility, not its energy production, also distinguishes this lease arrangement

from the "shared savings" arrangement addressed in Section 255.258, Florida Statutes.

Section 255.253, Florida Statutes, which provides definitions for terms used in Section 255.258, defines shared savings financing as follows:

> (5) "Shared savings financing" means the financing of energy conservation measures and maintenance services through a private firm which may own any purchased equipment for the duration of a contract, which shall not exceed 10 years unless so authorized by the division. Such contract shall specify that the private firm will be recompensed either out of a negotiated portion of the savings resulting from the conservation measures and maintenance services provided by the private firm or, in the case of a cogeneration project, through the payment of a rate for energy lower than would otherwise have been paid for the same energy from current sources. (Emphasis supplied)

Under this financing arrangement, the payment to the owner of the cogeneration facility is linked to the production of electricity and thermal energy and its consumption by the end user, the state agency. Should the cogeneration facility be inoperable, no payments would be required of the state agency to the owner of the facility.

Monsanto argues that but for title being retained by the lessor, the proposed lease is identical to a purchase by means of traditional debt financing. Again, the key element of this analogy is that the payments are fixed and based on the asset's fair market value plus a rate of return (interest), not on the amount of energy produced. Regardless of whether the facility produces energy, Monsanto is obligated to make its "mortgage" payments. We do not disagree with this characterization.

Either based on the lease analogy or on the debt financing analogy, no sale of electricity will take place between Monsanto and its lessor under the proposed agreement.

Issue 2: Would Monsanto's proposed lease financing of a cogeneration facility cause Monsanto's lessor to be deemed a public utility under Florida law?

As discussed above, we are of the opinion that no sale of electricity would take place between Monsanto and its lessor. Therefore, Monsanto's lessor would be supplying a means of producing electricity, not "supplying electricity . . . to or for the public within this state" pursuant to Section 366.02(1), Florida Statutes. Monsanto's lessor, then, does not fall within the statutory definition of Section 366.02(1), Florida Statutes, and is not a public utility under Florida law.

Issue 3: Would Monsanto's proposed lease financing of its cogeneration facility subject either Monsanto or its lessor to regulation by this Commission?

No. Were Monsanto to purchase its proposed cogeneration equipment, this Commission would have no jurisdiction over either the QF or Monsanto. A customer can clearly choose to serve himself and "so long as a customer serves himself without the involvement of

regulated utilities, the Commission has no interest in the matter." Order No. 12634 at 22.

As discussed above in Issues 1 and 2, 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.

Issue 4: Is Monsanto entitled to purchase supplemental, backup and maintenance ("standby") electric power at applicable non-discriminatory rates pursuant to approved tariffs?

We do not consider this issue to be an appropriate one for resolution in a declaratory statement. There is no question or doubt that pursuant to the controlling Federal Energy Regulation Commission Rules 18 CFR 292.305(b) and 292.303(b) implementing the Public Utilities Regulatory Policies Act (PURPA), and Rule 25-17.084, Florida Administrative Code, Gulf Power Company must provide "standby" electric power at applicable non-discriminatory tariff rates to Monsanto in its capacity as operator of the proposed qualifying facility.

For this reason, we make no decision with regards to this issue. Therefore, it is

ORDERED by the Florida Public Service Commission that Monsanto Company's proposed lease financing of its cogeneration facility does not result in nor is it deemed to constitute a lawful sale of electricity. It is further

ORDERED that Monsanto's proposed lease financing of a cogeneration facility does not cause Monsanto's lessor to be deemed a public utility under Florida law. It is further

ORDERED that Monsanto's proposed lease financing of its cogeneration facility will not subject either Monsanto or its lessor to regulation by this Commission. It is further

ORDERED that Monsanto's entitlement to purchase supplemental, backup and maintenance ("standby") electric power at non-discriminatory rates is not an appropriate question on which a declaratory statement should issue.

By ORDER of the Florida Public Service Commission, this 22nd day of DECEMBER, 1986.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

SB

by: Kay Flynn
Chief, Bureau of Records

ATTACHMENT E

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of METROPOLITAN DADE COUNTY for Expedited Consideration of Request for Provision of Self-Service Transmission.) DOCKET NO. 860786-EI

ORDER NO. 17510

ISSUED: 5-5-87

The following Commissioners participated in the disposition of this matter:

KATIE NICHOLS, Chairman
GERALD L. GUNTER
JOHN T. HERNDON
MICHAEL McK. WILSON

ORDER DENYING REQUEST FOR SELF-SERVICE WHEELING

BY THE COMMISSION:

Pursuant to Notice, the Florida Public Service Commission held public hearings in the above docket in Tallahassee, Florida, on December 9 and 10, 1986.

APPEARANCES: MATTHEW M. CHILDS, Esquire, Steel, Hector and Davis, Suite 200, 201 South Monroe Street, Tallahassee, Florida 32301
On behalf of Florida Power and Light Company

JOSEPH McGLOTHLIN, Esquire, Lawson, McWhirter, Grandoff and Reeves, Post Office Box 3350, Tampa, Florida 33601-3350
On behalf of Thermo Electron Corporation

JASON BROWN, Esquire and ADAM WENNER, Esquire, Suite 2810, Metro-Dade Center, 111 Northwest First Street, Miami, Florida 33128-1993
On behalf of Metropolitan Dade County

MICHAEL B. TWOMEY, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff

WILLIAM H. HARROLD, Esquire and HAROLD McLEAN, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0861
On behalf of the Commissioners

SUMMARY OF DECISION

In this case, Metropolitan Dade County (the County) petitioned this Commission requesting that we require Florida Power and Light Company (FPL) to utilize its transmission and distribution system to "wheel" power from a qualifying facility (QF) located in the County's Downtown Government Center to the County's facilities at the Jackson Memorial Hospital/Civic Center complex and other County locations. The County's petition was filed pursuant to Rule 25-17.0882, Florida Administrative Code (the Self-Service Wheeling Rule), which provides that we may, under certain circumstances, require a public utility to "provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location." Determining that the QF was jointly owned by the County and a limited partnership of other

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entities and, therefore, was not the same entity or customer as the County, which was to receive the electrical power, we found that the proposed transaction was not self-service wheeling (SSW) and declined to order FPL to provide the requested service.

PROCEDURAL BACKGROUND

On June 13, 1986 the County filed with this Commission a petition requesting that we issue an order requiring FPL to provide transmission services for certain of the power generated at the QF located at the County's Downtown Government Center to certain of the County's outlying facilities.

On July 7, 1986, FPL responded to the County's petition by filing a Motion to Dismiss and for More Definite Statement, which challenged, among other things, the County's allegation that the requested transmission service constitutes SSW pursuant to Rule 25-17.0882, Florida Administrative Code. FPL asked that the County's petition be dismissed or, in the alternative, that it be clarified so as to adequately apprise FPL of the exact nature and elements of the requested transmission service. On July 21, 1986, the County filed a Memorandum in opposition to FPL's motion.

Oral argument on FPL's motion was heard on September 9, 1986, at which time the County's petition was dismissed with leave to amend. The County filed a revised petition on September 12, 1986. A prehearing conference was held before Commissioner Nichols on September 22, 1986 and hearings were held on December 9 and 10, 1986, when we heard the testimony of seven witnesses. Thermo Electron Corporation was granted intervenor status at hearing. Having considered the evidence presented at hearing and the arguments of the parties expressed in their post-hearing briefs, we have determined, for the reasons that follow, that the County's petition must be denied.

BACKGROUND AND NATURE OF REQUESTED SERVICE

The source of power to be wheeled by the requested service is a 27-megawatt (MW) combustion turbine, which is located on county-owned land adjoining the County's Downtown Government Center. The Federal Energy Regulatory Commission (FERC) has ruled that the combustion turbine and its ancillary equipment is a qualifying cogeneration facility (QF). By utilizing heat rejected from the gas turbine, the QF is expected to produce 2800 tons of chilled water and 170 gpm of hot water in addition to its electric generation.

The ownership of the QF is rather involved. The County has legal title to the building in which the electrical generating equipment is located, the land on which the building is located, an absorbtion chiller plant, heat rejection coolers, a chilled water circulating system, electric and thermal distribution systems, a standby emergency diesel-generator and its fuel oil storage tank, natural gas installation, gas lines, a gas compressor room, an interconnection installation with FPL and electrical switchgear. The County does not have legal title to any of the equipment that will actually produce the power it seeks to have wheeled by FPL.

The actual electric generating equipment, consisting of gas turbines, steam turbines, heat recovery boiler and electric power generators was funded through the use of a lease/sale arrangement. Under this arrangement, the debt component of the financing was provided by the Bank of Boston, while the equity component was raised through a limited partnership formed by Winthrop Financial Corporation, called Florida Energy Partners. Florida Energy Partners, in turn, leases the financed equipment (generating equipment) to a joint venture of Thermo Electron and Rolls-Royce subsidiaries called South Florida Cogeneration Associates, which will operate the QF for the 16 years of the lease. This lease (the Facility lease), also provides that South Florida Cogeneration Associates has the option to purchase the generating equipment from Florida Energy Partners at the end of the lease term for its then fair market value, which is estimated to be $7.5 million. Thus, at this juncture, the County has title to the QF's building and the ancillary equipment, while Florida Energy Partners has title to the generating equipment. South Florida Cogeneration Associates does not have title to any of the QF's equipment, but has a leasehold interest in the generating equipment.

In order to have possession of the entire QF, South Florida Cogeneration Associates leases the building and the ancillary equipment from the County pursuant to an "Agreement and Lease of Space and Ancillary Systems," (the Space lease). As rent, South Florida Cogeneration Associates is obligated to pay the County one-half of the net-after-tax cash flow from operating the QF. A Purchase Option Agreement (Exhibit D to the Space lease) grants the County the option to purchase the generating equipment from South Florida Cogeneration Associates for payment of $1.00. As is more fully discussed later in this order, the County's exercise of its option requires South Florida Cogeneration Associates to exercise its option under the Facility lease to acquire the generating equipment from Florida Energy Partners. Furthermore, although the exercise price of the County's option is $1.00, the Purchase Option Agreement acknowledges that the consideration for the option is the County's performance of its obligations under the Space lease and the Energy Purchase Contract. This means that, under all the pertinent contracts, the County would pay for the generating equipment throughout the 16-year term of the lease and, at the end, Winthrop Financial Corporation and South Florida Cogeneration Associates having been made whole, the County would acquire legal title to the entire QF.

The County gains its entitlement to the output of the QF through the "Contract for the Purchase and Sale of Electrical and Thermal Energy" (Energy Contract) it had entered into with South Florida Cogeneration Associates. Pursuant to the Energy Contract, South Florida Cogeneration Associates agreed to operate the QF and sell to the County, and the County agreed to purchase "(i) all of the power from time to time produced by the Facility and (ii) Thermal Energy from time to time produced . . . ," subject to various conditions. The County is obligated to use the QF's power for "(i) all of the requirements of the County in the Downtown Government Center and (ii) all of the requirements for Power of each other building or facility owned or occupied by the County for which a transmission arrangement may be established. . . ."

In the event that the County is not able to use all of the power from the QF, the County has agreed to resell the excess power at the best obtainable price to "Other Energy

Purchasers." Alternatively, South Florida Cogeneration Associates may, subject to the County's approval, arrange for the sale of excess power to "Other Energy Purchasers."

For all power delivered to the County, the County pays to South Florida Cogeneration Associates its "Equivalent Power Costs," which is defined by the contract as "an amount equal to the most favorable cost of service which would have been charged by Florida Power and Light Company . . . for the same units of electrical power consumed at the same times of day during the same period."

On October 1, 1985, FPL and the County entered into an "Interconnection Agreement for Qualifying Facilities" (Interconnection Agreement), which provides that FPL will provide appropriate retail service for the [Downtown Government Center] at Interconnection Point."

The County anticipated that approximately 10 MW of electric power would be used in the Downtown Government Center. If transmission services were available from FPL, the Downtown Government Center would consume all of the chilled and hot water produced by the QF, except that 1 MW of electric power would be used to produce chilled water that would be sold to the State of Florida. Pursuant to its petition, the County requested that we require FPL to transmit the remaining 16 MW of electric power to the County's facilities at three additional locations. They were (1) Jackson Memorial Hospital and Civic Center, (2) the Dade County Water and Sewer Authority, and (3) Dade County Arterial Street Lighting. Dade County proposed to pay FPL a wheeling rate in the range of 5 to 7.5 mills/kwh.

The County stated that, if its request for SSW were denied, it would construct its own transmission line from the Downtown Government Center to the Jackson Memorial Hospital/Civic Center Complex, a distance of some two miles. Furthermore, the County stated that it would utilize electric energy from the QF to provide chilled water to others near the Downtown Government Center. The County argued that these sales of chilled water would displace the use of electric energy from FPL, which otherwise would have been used to operate electric chillers.

Although the County acknowledged that FPL's provision of SSW to the three desired locations would result in a net reduction in the utility's revenues, it argued that FPL would still be better off accepting the wheeling rates, as opposed to forcing the County to construct its own transmission line. The County maintained that the latter would result in FPL losing both retail sales revenues and the wheeling revenues. Using these "with SSW" and "without SSW" scenarios, the County concluded that the costs to FPL's other ratepayers would be lower if SSW were provided than if it were not.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue 1: Whether the transactions described by Dade County's Petition for the transmission of the electrical output (transmission service) of the cogeneration facility at the Downtown Government Center (facility) is self-service wheeling (SSW).

At the outset, we note that we are here to interpret the applicability of one of our administrative rules to the facts presented by this case and, accordingly, to determine whether the County is entitled to the service it has requested. It may be helpful to keep in mind that the requested service involves ordering an investor-owned electric utility to "hire out" its privately-owned transmission/distribution system to another party. This rule, Rule 25-17.0882, Florida Administrative Code, was promulgated in Docket No. 840399-EU, in which we considered and rejected the notion that any customer could demand access to a utility's transmission/distribution system if willing to pay the associated costs. Considering that there is no federal or Florida statutory right for a generating customer to serve either itself or others over a utility's transmission/distribution system, we limited our rule to those who desired to serve themselves, as opposed to those who would make sales to others. Having made that determination in Docket No. 840399-EU, it is not our intention to rehear it now.

By its revised petition the County requested that we order FPL to utilize its privately-owned transmission facilities to transport power from one location to another for the county's benefit. The County's petition was pursuant to Rule 25-17.0882, Florida Administrative Code, which provides as follows:

> Transmission Service Not Required for Self-Service. Public utilities are not required to provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location unless the customer or the utility demonstrates that the provision of this service and the charges, terms, and other conditions associated with the provision of this service are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers.

By its title, the rule addresses "self-service." Webster's New Collegiate Dictionary defines "self-service" as "the serving of oneself . . . ." "Oneself," in turn, is defined as "a person's self: one's own self . . . ." And, lastly Webster's defines "self" as "to, with, for, or toward oneself or itself." This dictionary contains close to four full pages of words modified by "self." Not surprisingly, their common theme is that they are things done "to, with, for, or toward oneself or itself." Our rule is consistent with the common usage of the term "self-service" and speaks to "transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location. . . ." Thus, the question becomes whether we intended the "customer" to be the same entity at both ends.

Self-service wheeling or SSW is clearly applicable where the owner of the QF is identical to the customer whose facilities the electrical power is to be transmitted to. Such was the case in Docket No. 861180-EU, In re: Petition of W.R.

<u>Grace and Co. for a declaratory statement</u>. There, as is reported in Order No. 17389, all parties agreed that Grace owned both the cogeneration facility at Ridgewood and the mining operations it sought to have power "wheeled" to at Hookers Prairie. However, notwithstanding the fact that SSW was applicable because the same customer was to be found at both ends of the desired service, the requested service was denied because we found that Grace had not demonstrated that provision of the SSW was not likely to result in higher cost electric service to Tampa Electric Company's general body of customers.

In the case at hand, it is clear from the evidence, and we find, that the requested service is not SSW and, therefore, that Rule 25-17.0882, Florida Administrative Code, is not applicable. This determination is based upon our finding that, while the customer to receive the "wheeled" power is clearly the County, it is just as clear that the electrical power to be wheeled is not "generated by" the County as required by our rule.

The County never disputed that it lacked legal title to the entire QF or, more specifically, that it lacked title to the electric "generating equipment." Rather, the County argues that we may look to the "business and economic realities to determine whether, for purposes of the rule, the customer should be considered the owner of both the facility and the remote loads to which power would be wheeled." In pursuing this theory, the County states that it has legal title to the "ancillary equipment" and "equitable title" to the remaining generating components. We reject the County's theory as being insufficient to establish it as the customer generating the power.

As is apparent from the background facts recited earlier in this order, the County has title only to the building, some heating and air conditioning and other ancillary equipment that it is no longer in possession of, because it has leased it to another party. The generating equipment that will actually produce the electrical power is owned, or title is held by, either Winthrop Financial Co., Inc. or Florida Energy Partners. In turn, neither of these parties has possession of the generating equipment because it has been leased to South Florida Cogeneration Associates. We find that the County does not "generate" the electrical power to be wheeled because it must first <u>purchase</u> the power from South Florida Cogeneration Associates pursuant to their contract. We conclude that this relationship and these facts do not qualify as SSW pursuant to Rule 25-17.0882, Florida Administrative Code.

We note that the County's equitable title argument rests on its option to acquire title to the generating equipment from South Florida Cogeneration Associates after the latter has exercised its option to acquire title of the same from Florida Energy Partners. Although not determinative of our rejection of the County's equitable title theory, we note that the up to \$2.5 million the County will have to expend to exercise its option is a far cry from the \$1 payment it cited in its petition as the cost of entirely owning the facility at the end of the lease term. We also note that the potential \$2.5 million payment by the County to acquire title could be questioned as being "nominal" in relation to the equipment's expected market value of \$7.5 million.

Issue 2: If the transmission service is SSW, what is the proper test for determining whether the provision of self-service wheeling is not likely to result in higher cost electric service to FPL's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers?

Inasmuch as we found that the requested service was not SSW, we consider this issue moot and decline to render a decision on it. However, see our discussion of the related issue in Order No. 17389, issued in the W.R. Grace & Co. docket.

Issue 3: What are the key elements of the wheeling arrangement the county is requesting?

As with Issue 2, we find that this issue is moot and decline to render a decision on it.

Issue 4: If Dade County owned pieces of equipment called the electrical generators and purchased steam or mechanical energy from the joint venture, and also maintained its current ownership interest in the facility, would Dade County be eligible for SSW?

This is a hypothetical issue, inasmuch as the County is not the owner of the electrical generating equipment. However, we consider that the ownership of merely another piece of the QF, without the ownership of the entire QF, would be insufficient to make the County the customer generating the electrical power. Accordingly, we find that even if the County owned the electrical generators and purchased steam or mechanical energy from South Florida Cogeneration Associates, it still would not qualify for SSW pursuant to Rule 25-17.0882, Florida Administrative Code.

Issue 5: If the Commission grants the County's request for transmission service, what relief should it order?

Having found the requested service to not be SSW, we find this issue to be moot and decline to render a decision on it.

Issue 6: What are the appropriate rates, terms and conditions for the provision of backup service to the loads to which power would be wheeled?

The appropriate rates, terms and conditions for the provision of backup service to the loads to which power would be wheeled has been adressed in Docket No. 850673-EU Generic Investigation of Issues Related to Standby Rates and answered in Order No. 17159 issued in that docket.

Issue 7: Would provision of the requested service constitute conjunctive billing?

Inasmuch as the provision of the requested service has been denied, this issue, too, is moot.

Issue 8: Whether the construction and operation of an electrical line to the Jackson Memorial Hospital/Civic Center Complex and piping for chilled water by Dade County is technically and economically feasible?

We have determined that no finding on this issue is necessary. However, see Order No. 17389 for a discussion of a related issue in the W.R. Grace case.

In view of the above, it is

ORDERED by the Florida Public Service Commission that Metropolitan Dade County's Revised Petition requesting that we find that the proposed transmission of power from the Cogeneration Facility to the specified Dade County facilities satisfies the standards in Rule 25-17.0882, Florida Administrative Code, is denied for the reasons stated in the body of this order. It is further

ORDERED that Metropolitan Dade County's request that we require Florida Power and Light Company to provide the requested transmission service is denied because the requested service does not qualify pursuant to Rule 25-17.0882, Florida Administrative Code.

By ORDER of the Florida Public Service Commission, this 5th day of MAY, 1987.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes (1985), to notify parties of any administrative hearing or judicial review of Commission orders that may be available, as well as the procedures and time limits that apply to such further proceedings. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

ATTACHMENT F

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of PW Ventures, Inc., for declaratory statement in Palm Beach County.	DOCKET NO. 870446-EU ORDER NO. 18302 ISSUED: 10-16-87

The following Commissioners participated in the disposition of this matter:

KATIE NICHOLS, Chairman
THOMAS M. BEARD
GERALD L. GUNTER
JOHN T. HERNDON
MICHAEL McK. WILSON

ORDER DENYING DECLARATORY STATEMENT

BY THE COMMISSION:

By petition filed on April 24, 1987, PW Ventures., Inc. (PW Ventures), sought a Declaratory Statement on the jurisdictional status of a proposed cogeneration project.

PW Ventures is a Florida corporation jointly owned by FPL Energy Services, Inc., (which is a wholly-owned subsidiary of FPL Group, Inc.) and Impell Corporation (which is a wholly-owned subsidiary of Combustion Engineering, Inc.). Each stockholder has a 50% interest in PW Ventures. These two stockholders have a letter of intent with Pratt and Whitney to develop a cogeneration facility at an industrial plant site in Palm Beach County, Florida. Pratt and Whitney is a division of United Technologies Corporation. Located at the Palm Beach site are the research and training operations of the Pratt and Whitney Government Products Division. Two other corporate divisions of United Technologies, Sikorsky Aircraft and United Technologies Airport Operations Group are also located at the site, as is a wholly-owned subsidiary of United Technologies, UT Optical Systems, Inc.. The Federal Aircraft Credit Union, an independent entity which serves the employees of the various companies just described, also has a branch office on the premises. In its entirety the site consists of several thousand acres all owned by United Technologies on which are located several buildings, a private airport, and remote facilities for the full-scale testing of aircraft engines. The site is under the day-to-day management of Pratt and Whitney. Electricity is presently provided to the site through two points of connection between Florida Power & Light Company and Pratt and Whitney.

PW Ventures proposes to construct, own, and operate the cogeneration project for Pratt and Whitney on land leased from it. The project will initially consist of three 6 MW gas engine-generators, fueled by a combination of 95% natural gas and 5% diesel fuel. The site is projected to have an average electric demand of approximately 17 MW in 1989 and a peak demand in excess of 20 MW. Therefore, the proposed cogeneration facility should satisfy most, but not all, of the demand for electrical energy at the site. Electrical and thermal energy produced by the cogeneration facility would be sold by PW Ventures to Pratt and Whitney under a long-term contract at rates to be negotiated. The contract would contain a take-or-pay provision that guarantees a minimum level of purchases by Pratt and Whitney. If the output of the cogeneration facility does not satisfy all of Pratt and Whitney's needs, Pratt and Whitney will purchase additional or supplemental power from Florida Power & Light Company. When

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the cogeneration facility has a planned or unplanned outage, Pratt and Whitney will purchase all of its power requirements from Florida Power & Light Company as back-up power.

Should the output of the cogeneration facility exceed the electrical requirements of Pratt and Whitney, PW Ventures would be free to sell the excess electricity to others. PW Ventures proposes to contractually bind itself to sell any excess power only to an electric utility as "as-available energy" under the Commission's cogeneration rules. The contract would prohibit PW Ventures from selling electricity to any party except Pratt and Whitney or an electric utility. The contract would also provide that electricity produced by PW Ventures would not be wheeled to any off-site location owned by Pratt and Whitney.

At the end of the contract term, Pratt and Whitney would have the option to purchase the cogeneration facility from PW Ventures at a market-based price. Pratt and Whitney will also have the option to purchase the cogeneration facility under certain conditions during the term of the contract. The duration of the proposed contract was not stated in the Petition for Declaratory Statement.

The Petition for Declaratory Statement explicitly states that PW Ventures is to exist solely to bring to life the cogeneration project with Pratt and Whitney, and will not have an interest in any other business or project.

On these proposed circumstances PW Ventures requests a declaration that the sale of electricity by PW Ventures to Pratt and Whitney will not render PW Ventures a public utility under Section 366.02(1), Florida Statutes, and, therefore, PW Ventures would not be subject to the Commission's jurisdiction. This we decline to give.

PW Ventures makes two arguments in support of its request. First, it contends that the statutory definition of a public utility includes a requirement that electricity be supplied to the public and, since it would be serving only Pratt and Whitney, it would not be serving the public and, therefore, would not be a public utility. Second, PW Ventures asserts that the proposed sale of electricity should be viewed as merely one aspect of a complex contractual relationship between the parties and that this broader relationship distinguishes it from the traditional utility-customer relationship and any need for the statutory protection afforded the latter. We find neither of these arguments persuasive.

The entire definition of a public utility as that term applies in the electric and gas industry is contained in Section 366.02(1), Florida Statutes:

> 366.02 Definitions.--As used in this chapter: (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; but the term "public utility" as used herein does not include either a cooperative now or hereafter organized and existing under the Rural Electrification Cooperative Law of the state; a municipality or any agency thereof;

> any natural gas pipeline transmission company making only sales of natural gas at wholesale and to direct industrial consumers; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, unless such person also supplies electricity or manufactured or natural gas.

Given this statutory definition and the transaction proposed by PW Ventures, the issue boils down to whether a contract for the sale of electricity to one end-user renders the producer-seller subject to jurisdiction as a public utility. The answer to this question depends on whether the supply of electricity to one end-user constitutes supplying "electricity to or for the public" since that is the definitional key in the statute.

PW Ventures contends that its proposed sale of electricity to Pratt and Whitney does not fall within the common meaning of service "to the public" or the meaning of that phrase when it is used as a legal term of art. Significantly, however, PW Ventures does not allege that Pratt and Whitney is not a member of the public; thus it is forced to argue that service to a member of "the public" does not constitute service "to the public" as that term is used in Section 366.02(1). This would mean that an entity could supply electricity to some, but not all, members of "the public" and thereby avoid the Commission's jurisdiction. Yet the statutory definition itself does not contain any numerical exemption from jurisdiction.

The same problem arises with PW Ventures' characterization of service "to the public" as a legal term of art. In the cases cited by PW Ventures, the courts, with one exception, were construing the common law definition of a public utility. To be considered a public utility at common law an entity had, among other attributes, to offer its services to all comers generally and indiscriminately. With this common law definition of a public utility, PW Ventures would end the debate. Apparently it could, by private contract, supply electricity to one (or more?) persons(s?), and, because the offer is not made to the general public, avoid regulation as a public utility.

However, the critical question is whether the Legislature intended to incorporate the common law definition of public utility into the statutory definition of public utility found in Section 366.02(1), Florida Statutes. Several factors suggest that this is not the case. Review of the definitional exemptions contained in Section 366.02(1) and the definition of a water and sewer utility in Section 367.021 and exemptions thereto in Section 367.022, Florida Statutes, undermine the contention that one can serve a select few without becoming a jurisdictional public utility.

The definitional phrase "to or for the public" in Section 366.02(1) applies to gas as well as electric utilities. Significantly, there is an express statutory exemption from regulation as a public utility for a "natural gas pipeline transmission company making only sales of natural gas at wholesale and to direct industrial consumers." This is precisely what PW Ventures wishes to do, yet there is not a statutory exemption for an entity "making only sales of electricity at wholesale and to direct industrial consumers."

In parallel with Section 366.02(1), Section 367.021, Florida Statutes, defines a water or sewer utility as every person "providing, or who proposes to provide, water or sewer service to the public for compensation." Section 367.022(6), Florida Statutes, expressly exempts from this definition "systems with the capacity or proposed capacity to serve 100 or fewer persons". There is not a parallel numerical exemption to the statutory definition of a public utility supplying electricity. Yet the statutory interpretation advocated by PW Ventures would require a line to be drawn somewhere between sales to some members of the public, as a presumably nonjurisdictional activity, and sales to the public generally and indiscriminately, an admittedly jurisdictional activity. Neither the Commission nor the courts can determine the locus of this line. No matter how the riddle is twisted, one seeking to escape the conclusion that service to a member of the public constitutes service "to the public" must suggest a number greater than one that triggers jurisdiction. And the argument twists back upon itself when one considers that service to a member of the public is service to all members of the public within the area occupied by that single member of the public. Even large public utilities, such as Florida Power & Light Company, do not hold themselves out as willing to serve all within the Commission's jurisdiction, but all within a specified territorial service area. Were it otherwise, customers, rather than the Commission, would settle territorial disputes. 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 once embarked on that course the statute does not tell us where to draw the line.

The Petition presented by PW Ventures invites the Commission to focus its attention solely on the proposed relationship between PW Ventures and Pratt and Whitney in resolving the jurisdictional question posed. Yet we cannot, and should not, blind ourselves to the fact that the real parties in interest in this case are ESI and Impell, the joint owners of PW Ventures. May ESI form multiple limited partnerships to serve other retail customers and continue to avoid regulation? In other words, may an entity serve several members of the public and escape jurisdiction by always providing service via a one-to-one contract? But if formation of some number of such partnerships does eventually lead to jurisdiction, at what point does this occur, and what is the status of partnerships formed before jurisdiction attaches? We reject the notion that ESI is, or may become, a public utility but may provide unregulated service through PW Ventures to Pratt and Whitney for this conflicts with Section 366.06, Florida Statutes, which clearly contemplates that all services by public utilities to retail customers will be provided by regulated tariffs: "A public utility shall not, directly or indirectly, charge or receive any rate not on file with the Commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the Commission...."

Furthermore, adoption of the position advocated by PW Ventures would transform an otherwise simple submetering transaction into a ticklish jurisdictional question. As it is at present, PW Ventures proposes that Pratt and Whitney be the customer of record for the entire site and divide the total bill it would pay to PW Ventures between the various divisions and subsidiaries according to their usage. Arguably in doing so Pratt and Whitney is simply serving itself. However, Pratt and Whitney also has, and would have, the same arrangement with the Credit Union. Either the permitted submetering of electricity by Pratt and Whitney to the Credit Union becomes the impermissible provision of electricity to residents of an industrial park as the Commission found In re: Petition of Timber Energy Resources, Inc. Docket No. 861621-EU, or, if Pratt and Whitney is simply a conduit, PW Ventures would be serving two members of the public, Pratt and Whitney and the Credit Union. Thus, the proposal PW Ventures has presented would require the Commission to approve either the retail sale of electricity by Pratt and Whitney to the Credit Union as nonjurisdictional or the retail sale of electricity by PW Ventures to two members of the public, Pratt and Whitney and the Credit Union, as nonjurisdictional. Even PW Ventures has not suggested that, if it is not submetering, but instead constitutes a sale, the relationship between Pratt and Whitney and the Credit Union would be anything other than a traditional utility-customer relationship. Thus the "limited transaction" PW Ventures asks us to approve as nonjurisdictional really involves sales of electricity to two unrelated members of the public. We decline to characterize such a transaction as nonjurisdictional.

PW Ventures asserts that Pratt and Whitney chose to proceed with its cogeneration project through the proposed contract outlined above but that it could have constructed the facility itself or entered into a pure financial lease. Had Pratt and Whitney embarked on this venture under its own auspices, no jurisdictional question would be presented, as jurisdiction attaches to the supply of electricity to another but not to oneself. The gist of PW Ventures' argument is that the Commission should not insist on jurisdiction when Pratt and Whitney choose to accomplish through a third party what it could have accomplished on its own. But there is a significant difference between assumption of the financial and production risks associated with a cogeneration project and simply purchasing electricity. Were this a forum in which we were empowered to ascertain what the law ought to be, we would have to carefully analyze whether this difference justifies a different jurisdictional result. However, our task in this docket is to ascertain what the law is, and we conclude that the supply of electricity to a member of the public confers Commission jurisdiction on the transaction, even if the entity supplied could have obtained it through its own efforts.

PW Ventures also asserts that the relationship it desires to establish with Pratt and Whitney is one that both parties had a hand in designing, that it involves "much more" than the sale of electricity, and that, because it is not akin to a traditional utility-customer relationship, Pratt and Whitney does not need the protection of the Commission's jurisdiction over the transaction. While we do not agree with these assertions, even if they were true, they would be a plea for legislative action rather than an answer to a jurisdictional question.

Our decision in this docket is consistent with a number of decisions we have made on related questions in recent years. The regulatory scheme the Commission implemented for cogeneration and small power production was premised on our belief that cogenerators were not permitted to engage in unregulated retail sales (See Docket No. 820406-EU, Order No. 12634). Then in In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, Docket No. 860275-EU, we held that no sale of electricity occurred, and, therefore, Commission jurisdiction did not attach when a cogenerator entered into a conventional lease financing arrangement for the construction of its cogeneration facility, where the cogenerator retained all of the risks of production associated with the facility.

In contrast, in In re: Petition of Metropolitan Dade County for Expedited for Self-Service Transmission, Docket No. 860786-EI, the Commission dismissed an application for self-service wheeling pursuant to our cogeneration rules on the ground that the provision of electricity to an end-user by a separate entity that bore all the risks of production, but in which the end-user had only a partial ownership interest, was not self-generation and, therefore, the threshold requirement of the rule in question was not met.

The issue was further pursued in In re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement, Docket No. 861621-EU. In that case a small power producer wanted to provide, without regulation as a public utility, electrical power to a group of unrelated entities, all of whom were located in a specific industrial park. We held that the proposed transaction would indeed bring the small power producer within our jurisdiction. The only difference between Timber Energy Resources and the present case is the greater degree of affiliation between the ultimate consumers of electricity in this case. Nonbinding language in Timber Energy Resources suggested that we might have reached a different conclusion there had fewer customers been involved. Upon further reflection, and faced for the first time with an actual case involving one, or at the most two, customers, we hold that the jurisdictional boundary is marked by the separateness of the supplier and the consumer of electricity such that the supplier 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 by the consumer. To suggest, as PW Ventures does, that a consumer's commitment to a take-or-pay clause for a yet-to-be-negotiated amount of electricity at a yet-to-be-negotiated price, shifts some risk back to the consumer, and thereby distinguishes the relationship from that of a traditional one, misstates the risk involved. A take-or-pay clause in any supply contract gives some assurance to the seller that the planned-for market will be there; it does not affect the risk that production equipment will perform as contemplated at the time the supply contract is made. It is this latter risk of production that we have evaluated in previous cases to determine whether the existence of separate entities has jurisdictional significance.

This line of cases illustrates the continuing pressure for change that has surfaced in the electric industry in recent years. But these cases, and the arguments advanced by PW Ventures in support of its Petition, also demonstrate that the

sort of change sought cannot be granted in administrative adjudication but must be guided by legislative wisdom.

Our decision in this docket should not be taken as casting doubt on our previous decision concerning the submetering of electricity. In In re: Sale of Electricity to be Resold, Docket No. 69319-EU, the Commission held that a landlord's submetering of electricity provided to his tenants was nonjurisdictional. However, the Commission also required all utilities to strictly enforce the prohibition-against-resale clause of their tariffs by disconnecting any utility customer who resold electricity to his tenants. The effect of the decisions was to allow landlords to submeter tenants' use of electricity and allocate the total bill according to each tenant's proportional consumption so long as the landlord collected no more than the total billed by the utility. This is precisely what Pratt and Whitney proposes to do with the electricity supplied to it by PW Ventures. Pratt and Whitney would in effect submeter it to companies located within the industrial park. But there is a difference between the submetering of electricity on a pass-through-the-cost basis and the production and sale of electricity. In the first instance, the entity is a mere conduit existing for convenience alone. In the second, a separate enterprise is engaged in the utility business. Commission approval of the former does not make the latter nonjurisdictional.

Nor should our decision in this docket be taken as a retreat from our policy of encouraging cogeneration. We affirm our policy of encouraging cogeneration and small power production that is cost-effective to the general body of ratepayers of this state. Again we note that the purpose of this Declaratory Statement is to ascertain what the law is, not what it ought to be. The latter must await a different day and another forum.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement by PW Ventures, Inc. that a sale of electricity by it to Pratt and Whitney would not render it subject to Commission jurisdiction under Section 366.02(1), Florida Statutes, is denied for the reasons set forth in the body of this Order.

By ORDER of the Florida Public Service Commission, this 16th day of OCTOBER, 1987.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

BED

by: Kay Flynn
Chief, Bureau of Records

[1, 2] Under Florida law, as Roe correctly notes, arbitration is a favored means of dispute resolution and courts indulge every reasonable presumption to uphold proceedings resulting in an award. *Beach Resorts Int'l, Inc. v. Clarmac Marine Constr. Co.*, 339 So.2d 689, 690 (Fla. 2d DCA 1976). This maxim, however, lends no support to Roe's position, for its application presupposes that the parties have agreed to binding arbitration. That is not the case here. The parties specifically declined to be bound by any award exceeding the specified limit. Moreover, rather than offending public policy, Florida law specifically authorizes the parties to agree as they have.

Section 682.02, Florida Statutes (1987), provides in pertinent part that an agreement to arbitrate

> shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; *provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.*

(Emphasis added.) Thus, this section gives the parties the prerogative of rejecting the application of the Florida Arbitration Code. That is precisely what occurred in this case as to any award exceeding $10,000. The parties simply agreed to binding arbitration as to any award up to $10,000 and to nonbinding arbitration as to any award exceeding that limit. We fail to discern any logical reason which would or should prohibit such an agreement. Nor do we find merit in Roe's assertions that any stipulation to exempt the statute's application must be accomplished by specifically tracking the language of the statute or that rejection of the Code must apply to the entire agreement or not at all.

Finally, we find no public policy which would be adversely affected by validating the challenged provision. Roe's characterization of that provision as an "escape clause" which Amica unilaterally can exercise unfairly represents the parties' agreement. The option of rejection is equally available to both parties. Just as Amica invoked the provision in this case, Roe could have requested a jury trial had he found an award only slightly over $10,000, unsatisfactory. Moreover, as Roe concedes, arbitration is a desirable option and should be encouraged. The district court aptly noted that the contract provision at issue at least resolves claims of less than $10,000 and provides an objective indication of the value of larger claims, making the settlement process easier. *Roe*, 515 So.2d at 1372.

For the foregoing reasons, we find that the arbitration provision at issue here complies both with the intent and requirements of section 682.02, Florida Statutes (1987), and offends no public policy. The opinion of the district court is approved, and *Berger v. Fireman's Fund Insurance Co.* is disapproved to the extent it conflicts.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

PW VENTURES, INC., Appellant,

v.

Katie NICHOLS, Chairman of Florida Public Service Commission, and Florida Public Service Commission, Appellees.

No. 71462.

Supreme Court of Florida.

Oct. 27, 1988.

The Public Service Commission determined that corporation fell within its regulatory jurisdiction under proposed transaction wherein corporation agreed to provide electric and thermal power for industrial complex. Corporation sought judicial review. The Supreme Court, Grimes, J., held

that corporation would be subject to regulation by the Commission under the proposed transaction.

Decision of the Commission approved.

McDonald, J., dissented and filed opinion.

1. Statutes ⇐219(1, 4)

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

2. Statutes ⇐195

Express mention of one thing in statute implies exclusion of another.

3. Electricity ⇐8.1(1)

Regulation of production and sale of electricity necessarily contemplates granting of monopolies in the public interest. West's F.S.A. § 366.01 et seq.

4. Electricity ⇐1

Phrase "to the public," as used in public utility statute, means "to any member of the public," rather than "to the general public"; therefore, sale of electricity to single industrial customer would make provider "public utility" subject to regulation by the Public Service Commission, even though provider planned to construct, own, and operate generating facility on land leased from customer. West's F.S.A. §§ 366.01 et seq., 366.02(1).

See publication Words and Phrases for other judicial constructions and definitions.

Richard D. Melson of Hopping, Boyd, Green & Sams, Tallahassee, for appellant.

Susan F. Clark, Gen. Counsel, Florida Public Service Com'n, Tallahassee, for appellees.

Richard A. Zambo and Paul Sexton of Richard A. Zambo, P.A., Brandon, for amici curiae, C.F. Industries, Inc., IMC Fertilizer, Inc., Monsanto Co. and W.R. Grace & Co.

GRIMES, Justice.

PW Ventures, Inc. (PW Ventures) appeals from an adverse ruling of the Florida Public Service Commission (PSC). We have jurisdiction. Art. V, § 3(b)(2), Fla. Const.

PW Ventures[1] signed a letter of intent with Pratt and Whitney (Pratt) to provide electric and thermal power at Pratt's industrial complex in Palm Beach County. PW Ventures proposes to construct, own, and operate a cogeneration[2] project on land leased from Pratt and to sell its output to Pratt under a long-term take or pay contract.[3] Before proceeding with construction of the facility that would provide the power, PW Ventures sought a declaratory statement from the PSC that it would not be a public utility subject to PSC regulation. After a hearing, the PSC ruled that PW Ventures proposed transaction with Pratt fell within its regulatory jurisdiction.

At issue here is whether the sale of electricity to a single customer[4] makes the provider a public utility. The decision hinges on the phrase "to the public," as it is used in section 366.02(1), Florida Statutes (1985). In pertinent part that subsection provides:

> "Public utility" means every person, corporation, partnership, association, or oth-

1. PW Ventures is a Florida corporation which was originally owned by FPL Energy Services, Inc. (a wholly owned subsidiary of FPL Group, Inc.) and Impell Corporation (a wholly owned subsidiary of Combustion Engineering, Inc.). After the entry of the PSC order, FPL Energy Services, Inc. transferred its 50% interest to Combustion Engineering, Inc.

2. Cogeneration involves the use of steam power to produce electricity, with some of the energy from the steam being recaptured for further use. The PSC seeks only to regulate the sale of electrical power.

3. The power would be used by Pratt and several affiliated corporate entities and by the Federal Aircraft Credit Union which is also located on the property.

4. While the PSC reminds us that the power generated by the project will actually be passed on to several entities, we prefer to address the issue in the context argued by PW Ventures.

er 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....

Distilled to their essence, the parties' views are as follows: PW Ventures says the phrase "to the public" means to the general public and was not meant to apply to a bargained-for transaction between two businesses. The PSC says the phrase means "to any member of the public." While the issue is not without doubt, we are inclined to the position of the PSC.

[1] At the outset, we note the well established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight. *Warnock v. Florida Hotel & Restaurant Comm'n,* 178 So.2d 917 (Fla. 3d DCA 1965), *appeal dismissed,* 188 So.2d 811 (Fla.1966). The courts will not depart from such a construction unless it is clearly unauthorized or erroneous. *Gay v. Canada Dry Bottling Co.,* 59 So.2d 788 (Fla.1952).

[2] Also, it is significant that the statute itself would permit the type of transaction proposed by PW Ventures and Pratt to be unregulated if it were for natural gas services. Section 366.02(1) provides the following exemption: "[T]he term 'public utility' as used herein does not include ... any natural gas pipeline transmission company making only sales of natural gas at wholesale and to direct industrial consumers...." The legislature did not provide a similar exemption for electricity. The express mention of one thing implies the exclusion of another. *Thayer v. State,* 335 So.2d 815 (Fla.1976).

This rationale is further illustrated in the statutory regulation of water and sewer utilities. As explained in the PSC order:

> In parallel with Section 366.02(1), Section 367.021, Florida Statutes (1985), defines a water or sewer utility as every person "providing, or who proposes to provide, water or sewer service to the public for compensation." Section 367.022(6), Florida Statutes, expressly exempts from this definition "systems with the capacity or proposed capacity to serve 100 or fewer persons". There is not a parallel numerical exemption to the statutory definition of a public utility supplying electricity. Yet the statutory interpretation advocated by PW Ventures would require a line to be drawn somewhere between sales to some members of the public, as a presumably non-jurisdictional activity, and sales to the public generally and indiscriminately, an admittedly jurisdictional activity.

[3, 4] Moreover, the PSC's interpretation is consistent with the legislative scheme of chapter 366. The regulation of the production and sale of electricity necessarily contemplates the granting of monopolies in the public interest. *Storey v. Mayo,* 217 So.2d 304 (Fla.1968), *cert. denied,* 395 U.S. 909, 89 S.Ct. 1751, 23 L.Ed. 2d 222 (1969). Section 366.04(3), Florida Statutes (1985), directs the PSC to exercise its powers to avoid "uneconomic duplication of generation, transmission, and distribution facilities." If the proposed sale of electricity by PW Ventures is outside of PSC jurisdiction, the duplication of facilities could occur. What PW Ventures proposes is to go into an area served by a utility and take one of its major customers.[5] Under PW Ventures' 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 in this state. The effect of this practice would be that revenue that otherwise would have gone to the regulated utilities which serve the affected areas would be diverted to unregulated producers. This revenue would have to be made up by the remaining customers of the regulated utilities since the fixed costs of the regulated systems would not have been reduced.

5. Initially, Florida Power and Light had an interest in PW Ventures and would, in effect, transfer its own client to a subsidiary. FP & L is not now involved. Yet, if the argument of PW Ventures is accepted, there might be nothing to prevent one utility company from forming a subsidiary and raiding large industrial clients within areas served by another utility.

We do not believe that *Fletcher Properties v. Florida Public Service Commission*, 356 So.2d 289 (Fla.1978), mandates a different result. In that case, we did approve a PSC order which included reasoning to the effect that service to the public meant service to the indefinite public or to all individuals within a given area. However, the case did not arise in the context of a sale to a single customer. We simply affirmed the PSC's determination that the developer and owner of lines and lift stations who proposed to furnish water and sewer service to single family homes at the same rate as it was charged by the area water and sewer utility occupied the status of a public utility.[6]

The fact that the PSC would have no jurisdiction over the proposed generating facility if Pratt exercised its option under the letter of intent to buy the facility and elected to furnish its own power is irrelevant. The expertise and investment needed to build a power plant, coupled with economies of scale, would deter many individuals from producing power for themselves rather than simply purchasing it. The legislature determined that the protection of the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation.

We approve the decision of the Public Service Commission.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT and KOGAN, JJ., concur.

McDONALD, J., dissents with an opinion.

McDONALD, Justice, dissenting.

I dissent. In doing so, I accept the argument of PW Ventures, Inc. as set forth in its brief where it urges:

> The cornerstone of "public utility" status and Commission jurisdiction under Chapter 366 is the provision of electric service "to the public". This phrase is not defined in Chapter 366, nor in any of the Commission's other jurisdictional statutes. Under Florida's rules of statutory construction, the phrase "to the public" must therefore be given either its plain and ordinary meaning or, if it is a legal term of art, its legal meaning. *City of Tampa v. Thatcher Glass Corporation*, 445 So.2d 578 (Fla.1984); *Citizens v. Florida Public Service Commission*, 425 So.2d 534 (Fla.1982); *Tatzel v. State*, 356 So.2d 787 (Fla.1978); *Ocasio v. Bureau of Crimes Compensation*, 408 So.2d 751 (Fla. 3d DCA 1982). Under either test, a sale to a single industrial host in the circumstances of this case is not a sale "to the public."
>
> * * * * * *
>
> The phrase "to the public" commonly connotes the people as a whole, or at least a group of people. Webster's Ninth New Collegiate Dictionary (1983) gives two relevant definitions for "public":
>
> > 2: the people as a whole: POPULACE
> >
> > 3: a group of people having common interests or characteristics: *specif:* the group at which a particular activity or enterprise aims
>
> Black's Law Dictionary (Revised 4th ed.) similarly defines "public" to mean:
>
> > The whole body politic, or the aggregate of the citizens of a state, district, or municipality.... In one sense, everybody; and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people. In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many as contradistinguishes them from a few.
>
> Thus if Section 366.02(1) is given its plain and ordinary meaning, a person is not supplying electricity "to the public," if it supplies electricity only to a single

6. The holding of that case actually supports the PSC's alternative position that PW Ventures will actually serve several customers at the Pratt facility.

industrial customer on whose property the electric generating facility is located.

Walter Grant KYSER, Appellant,

v.

STATE of Florida, Appellee.

No. 69736.

Supreme Court of Florida.

Oct. 27, 1988.

Defendant was convicted in the Circuit Court, Bay County, W. Fred Turner, J., of first-degree murder and was sentenced to death, and defendant appealed. The Supreme Court held that: (1) statements made after defendant stated "Can we talk about something else, I think I want to talk to a lawyer before I talk about that and I hope you understand that," were obtained in violation of defendant's constitutional rights, and thus, were inadmissible in defendant's first-degree murder prosecution, and (2) escape could not be used as underlying felony for purposes of conviction under felony-murder theory.

Vacated and remanded for new trial.

1. Criminal Law ⟹412.1(4)

Statements made after defendant stated "Can we talk about something else, I think I want to talk to a lawyer before I talk about that and I hope you understand that," were obtained in violation of defendant's constitutional rights, and thus, were inadmissible in defendant's first-degree murder prosecution. U.S.C.A. Const. Amends. 5, 6.

2. Escape ⟹1

For there to be escape, there must be valid arrest.

3. Homicide ⟹18(1)

In absence of evidence that off-duty deputy ever communicated to defendant that he was under arrest, escape could not be used as underlying felony under felony-murder theory of first-degree murder of defendant for murder of off-duty police officer.

Michael E. Allen, Public Defender and W.C. McLain, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen. and Gary L. Printy, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

[1] Walter Grant Kyser appeals his conviction for first-degree murder and sentence of death imposed by the trial judge in accordance with the jury's recommendation. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. Kyser raises nine issues in this appeal, arguing, inter alia, that the trial court erroneously admitted his statements obtained during custodial interrogations after he had requested counsel. We find this issue dispositive and hold that the United States Supreme Court decisions in *Smith v. Illinois,* 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), *Edwards v. Arizona,* 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), and *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), require us to vacate Kyser's conviction and sentence and remand this cause for a new trial.

Kyser was convicted of the first-degree shooting murder of a deputy sheriff who was working off duty as a security guard at a Panama City apartment complex in Bay County, Florida. Following Kyser's arrest in the parking lot of a restaurant in Columbus, Georgia, he was read his *Miranda* rights in the patrol car before he was transported to the police station. When asked at that time for identification, Kyser gave the officers an alias. Kyser

rates are currently approximately the same as Indiana Gas and will not be lowered. This argument ignores the fact that the benefits of reduced operating costs, greater financial resources and diversity of supplies will be enjoyed by Westport's customers in the future. For all of the foregoing reasons, we reaffirm our finding that the proposed acquisition will provide benefits to Westport's customers.

(c) *Arm's Length Negotiation.* With respect to our finding that the proposed purchase and sale was established as a result of extensive arm's length negotiations, the Public's only allegation is that our Order did not indicate upon what evidence our finding was based. We acknowledge that our Order did not specifically mention the name of Petitioners' witness, Mr. Ellerbrook, in conjunction with our finding that the proposed purchase and sale was negotiated at arm's length. Nonetheless, our finding was supported by convincing, uncontroverted evidence of record and we therefore reaffirm it.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The Public's Petition for Reconsideration shall be and is hereby denied.

2. This Order shall be effective on and after the date of its approval.

Re Bridgeport Resco Company, L.P.

Docket No. EC88-15-000
43 FERC ¶ 62,168

Federal Energy Regulatory Commission
May 6, 1988

ORDER authorizing the sale and leaseback of a qualifying small power production facility.

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1. COGENERATION, § 3 — Regulatory jurisdiction — FERC — Sale and leaseback.

[F.E.R.C.] The sale and leaseback of a qualifying small power production facility, which exceeded 30 megawatts and which included step-up transformers with a value in excess of $50,000, was a jurisdictional transaction subject to the approval of the Federal Energy Regulatory Commission, pursuant to § 210(e)(2) of the Public Utility Regulatory Policies Act and § 203 of the Federal Power Act.
p. 88.

2. COGENERATION, § 3 — Regulatory jurisdiction — FERC — Sale of facilities.

[F.E.R.C.] Section 203(a) of the Federal Power Act provides that a sale of jurisdictional facilities may be approved by the Federal Energy Regulatory Commission only upon a finding that the proposed disposition will be consistent with the public interest; a showing only of compatibility with the public interest, rather than a showing of positive benefit to the public, is required for purposes of finding that a disposition, consolidation, or purchase of securities is in the public interest.
p. 89.

3. PUBLIC UTILITIES, § 34 — Tests of public utility character — Ownership — Facilities leased to operator.

[F.E.R.C.] In approving a sale and leaseback of a qualifying small power production facility (QF) by the QF operator to an "owner trustee," which would hold the QF for the benefit of an institutional investor (the "owner participant"), the Federal Energy Regulatory Commission determined that neither the owner trustee (whose interest was solely legal) nor the owner participant (whose interest was solely beneficial) became a public utility as a result of the lease financing arrangement, because the QF operator would retain possession and control of the facility, and was liable for performance of a power sales agreement with an electric utility.
p. 89.

4. COGENERATION, § 17 — Operating practices — Contracts — Lease security agreement.

[F.E.R.C.] In conjunction with the sale and leaseback of a qualifying small power production facility (QF), the Federal Energy Regulatory Commission determined that an operating lease security agreement that included a pledge of all assets of the QF operator to the owner trustee,

which would hold the QF in trust for the benefit of the owner participant, provided only security for payment and performance of the QF operator's obligations under the lease, and did not constitute a present assignment of any rights in the QF to the owner trustee.
p. 89.

5. COGENERATION, § 5 — Qualifying status — Change in ownership — Sale and leaseback.

[F.E.R.C.] A change in ownership of a qualifying small power production facility (QF) in a sale and leaseback transaction did not cause the QF to lose its qualifying status, because there was no present assignment of rights by the QF operator, and the continued applicability of size, fuel-use, and ownership criteria contained in Part 292 of the regulations of the Federal Energy Regulatory Commission were not affected by the lease financing transaction.
p. 89.

6. COGENERATION, § 24 — Rates — Change in ownership — Sale and leaseback.

[F.E.R.C.] A sale and leaseback of a qualifying small power production facility (QF) did not affect the QF's existing rate schedule, because the change in ownership did not alter the rates, terms, or conditions of a power sales agreement with an electric utility; the original rate schedule had been made effective based on the QF's qualifying status and on the utility's avoided costs in producing electricity, neither of which was affected by the lease financing arrangement.
p. 89.

By the COMMISSION:

On March 2, 1988, as supplemented on March 21 and April 19, 1988, Bridgeport Resco company, L.P. (Resco) filed an application pursuant to section 203 of the Federal Power Act (FPA)[1] seeking Commission authorization to sell and leaseback a qualifying small power production facility (QF or Facility). The Facility will be sold to a trust established for the benefit of one or more institutional investors, including the Ford Motor Credit Company (Owner Participant) and administered by The First National Bank of Boston (Owner Trustee). The application also requests that the Commission: (1) disclaim jurisdiction over the Owner Participant and the Owner Trustee in order to exempt them from regulation as public utilities; (2) determine that the change in ownership under the lease financing arrangement will not result in the Facility losing its status as a qualifying facility; and (3) confirm the continued applicability of Resco's existing rate schedule to sales of electricity to The United Illuminating Company (UI).

Notice of the application was published in the Federal Register with motions to intervene or protests due on or before March 21, 1988. No such motions or protests were received.

Resco has constructed a 62 MW electric generating facility in Bridgeport, Connecticut, which is the subject of the lease financing arrangement. On September 3, 1985, the Commission issued an order certifying the facility as a qualifying small power production facility.[2] On August 5, 1987, the Commission accepted for filing the initial rate schedule for sales of electricity from the Facility to UI. The filed rate is based upon UI's avoided cost.

In its application, Resco proposes to sell the Facility to the Owner Trustee who will hold legal title to the Facility in trust for the Owner Participant. Resco also will sublease the Facility site to the Owner Trustee for the life of the Facility. Simultaneously with the sale and sublease, Resco will lease the entire facility back from the Owner Trustee under a long-term lease for an initial term of twenty years with a renewal option. The sale and leaseback transaction will enable the Owner Participant to take advantage of the income tax benefits associated with the property.[3] Resco will retain possession and control of the QF and will remain liable for the performance of its sales agreement with UI.

[1] Section 203 states in pertinent part:

> No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Com-

> mission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.

Under section 210(e)(2) of the Public Utility Regulatory Policies Act of 1978 (PURPA),[4] because the Facility exceeds 30 MW, it is subject to the requirements of the FPA. Resco has stipulated in its application that the Facility "includes step-up transformers with a value in excess of $50,000." Therefore, consistent with the holding in *Re Baltimore Refuse Energy Systems Co., (BRESCO/Wheelabrator)*,[5] because the QF includes transmission facilities, the sale and leaseback is a jurisdictional transaction that requires section 203 approval. However, in that order it was noted:

> In order to minimize the burden on QFs subject to FPA jurisdiction, the Commission has granted waiver of the filing requirements under Part 33 of the Commission's regulations to permit QFs to file only minimal information in support of any transaction subject to Commission authorization pursuant to section 203.[6]

Accordingly, and in the absence of any opposition, the application submitted by Resco is found to satisfy the minimal filing requirements for section 203 applications involving QFs.

[2] Section 203(a) provides that the sale of jurisdictional facilities may only be approved upon a finding that the proposed disposition will be consistent with the public interest. However, section 203(a) does not require a showing of a positive benefit to the public in order for a disposition, consolidation, or purchase of securities to be found to be in the public interest. Only a showing of compatibility is required.[7] Based upon the information submitted by Resco, the proposed sale and leaseback of the Facility is found to be consistent with the public interest.

[3-6] Resco has requested that the Commission disclaim jurisdiction over the Owner Participant (whose interest in the facility will be purely beneficial) and the Owner Trustee (whose interest in the facility will be purely legal) and states that neither should be considered a "public utility" as that term is defined in section 201(e) of the FPA.[8] In its application, Resco states that neither the Owner Participant nor the Owner Trustee will have operational responsibility for the Facility, nor will they be in the business of producing or selling electric power or control the performance of such functions by Resco.[9] In *Re Pacific Power & Light Co.*,[10] the Commission found that the owner participant and the owner trustee of a leveraged lease transaction were not to be considered to be public utilities. In *BRESCO/Wheelabrator*, the Commission characterized the owner participant as "merely a passive investor" and the owner trustee as a paid fiduciary with "no individual interest in the transactions."[11] Similar circumstances are present in this case. Therefore, it is found that neither the Owner Participant nor the Owner Trustee will become public utilities subject to the Commission's jurisdiction as a result of the proposed lease financing arrangement.

It is noted, however, that pursuant to an "Operating Lease Security Agreement," Resco will be pledging all of its assets, including its rights under existing energy sales agreements with UI as security for the payment and performance of its obligations under the lease. Furthermore, in the event of default, the Owner Trustee may take possession of the Facility and, at its sole discretion, "may hold, keep idle, operate, assign or lease" the Facility.[12] However, in its application, Resco states that those pledges are for security purposes only, and do not constitute "a present assignment of any such rights."[13] Therefore, consistent with *BRESCO/Wheelabrator*, it is concluded that there is no present assignment of rights to the Owner Trustee.

Furthermore, the continued applicability of the size, fuel-use, and ownership criteria of Part 292 of the Commission's regulations should be unaffected by the lease financing transaction.[14] Therefore, it is found that the proposed change in ownership of the facility will not cause the Facility to lose its status as a QF.

However, Resco admits that the exercise by the Owner Trustee or the Bond Trustee of its rights to dispose of the Facility may require action by the Commission at that time.[15] Therefore, in the event of default by Resco, the invocation by the Owner Trustee (or the Bond Trustee) of its rights under Operating Lease Agreement may require Commission authorization to the extent that any action to be taken constitutes a sale, lease, disposition, merger or consolidation of jurisdictional facilities pursuant to section 203. Similarly, if the Owner Trustee or the Bond Trustee invokes its default rights in a manner such that the successor operator would be considered to be a "public utility" subject to Commission jurisdiction, reexamination of the Facility's QF status may be required.[16]

Finally, in regard to the continued applicability of Resco's existing rate schedule, the proposed changes in ownership do not appear to alter the rates, terms, or conditions of the electric power sales agreement with UI. The original rate schedule was accepted and made effective based on the QF status at the time of the application. That status has not changed. The existing rate is based upon UI's avoided costs in producing electricity. UI's avoided cost will not be affected by the lease financing transactions. According to the application, all of the power produced by the facility will continue to be sold to UI. Accordingly, it is found that the proposed transactions will not affect the applicability of the filed rate schedule.

After consideration, it is concluded that the sale and leaseback of the facility by Resco is consistent with the public interest and is authorized subject to the following conditions:

(1) The proposed transaction is authorized upon the terms and conditions and for the purposes set forth in the application;

(2) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of cost or any other matter whatsoever now pending or which may come before the Commission; and

(3) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

Authority to act on this matter is delegated to the Director, Division of Electric Power Application Review, under Title 18, Code of Federal Regulations, section 375.308.

FOOTNOTES

[1]16 U.S.C. § 824b (1982).

[2]32 FERC ¶ 62,502 (1985).

[3]The Loan Participants were not identified in the application. The Owner Trustee, The First National Bank of Boston, will mortgage and pledge to a Bond Trustee, The Connecticut National Bank, all of its rights under the Bridgeport Resco Lease and under the Operating Lease Security Agreement as well as all of its rights in and to the QF and its site.

[4]16 U.S.C. § 824a-3(e)(2) (1982).

[5]40 FERC ¶ 61,366 (1987).

[6]*Id.*, 40 FERC ¶ 61,366 at 62,118. *See also, Re Resources Recovery (Dade County), Inc.*, 20 FERC ¶ 61,138 (1982).

[7]*Pacific Power & Light Co. v. Federal Power Commission*, 34 PUR NS 153, 111 F.2d 1014 (9th Cir.1940).

[8]16 U.S.C. § 824(e) (1982).

[9]Application at p. 14.

[10]3 FERC ¶ 61,119 (1978).

[11]40 FERC ¶ 61,366 at 62,119.

[12]Operating Lease Agreement, section 16.

[13]Application at p. 8.

[14]18 C.F.R. Part 292 (1987).

[15]Application at p. 10.

[16]*See*, § 292.207(d).