BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Polk Power Partners, L.P. for a Declaratory Statement Concerning the Financing and Ownership Structure of a Cogeneration Facility in Polk County	DOCKET NO. 931190-EQ FILED: DECEMBER 13, 1993

PETITION FOR DECLARATORY STATEMENT

Polk Power Partners, L.P. ("Polk Power Partners" or "PPP"), pursuant to section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code, hereby files its Petition for Declaratory Statement requesting that the Commission enter an order declaring that certain contemplated financing and ownership structures of the Mulberry Cogeneration Facility as described herein: (a) will not be deemed to result in or to constitute an unlawful sale of electricity; (b) will not cause Polk Power Partners or any of its individual partners to be deemed a public utility under Florida law; and (c) will not cause PPP or any of its individual partners to otherwise be subject to regulation by the Commission. In support of its Petition, Polk Power Partners states as follows.

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1. The name and address of the Petitioner are

Polk Power Partners, L.P.
3753 Howard Hughes Parkway
Suite 200
Las Vegas, Nevada 89109

2. All pleadings, motions, orders, notices, and other documents directed to Polk Power Partners, L.P. should be directed to the following:

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Wiggins & Villacorta, P.A.
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Tallahassee, Florida 32302

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A courtesy copy of all pleadings, notices, and documents should also be furnished to:

Mr. Davis G. Reese, Esquire
23046 Avenida de la Carlota
Suite 400
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3. Polk Power Partners seeks an interpretation of the following statutes as they apply to PPP's facts and circumstances: sections 366.02(1), 366.81, and 366.051, Florida Statutes, as explicated through the Commission's declaratory statements in other cases addressing financing and ownership structures of cogeneration facilities, including Commission Order No. 18302-A, In Re: Petition of PW Ventures, Inc. for a Declaratory Statement in Palm Beach County, 87 FPSC 10:21 (1987), aff'd, PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988); Commission Order No. 17009, In Re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, 86 FPSC 12:354 (1986); and Commission Order No. 23729, In Re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, 90 FPSC 11:126 (1990).

4. Polk Power Partners has a real and immediate need for the requested declaratory statements because the Commission's interpretation and application of the subject statutes and orders to PPP's circumstances will directly affect PPP's decisions regarding the financing and ownership structure of the Mulberry Cogeneration Facility and will enable PPP to assure that the selected structure comports with the Commission's policies and rulings.

STATUTES AND ORDERS INVOLVED

5. Polk Power Partners requests the Commission's interpretation of the following statutes, as explained by the Commission through the orders indicated.

a. Section 366.02(1), Florida Statutes, which defines "public utilities" subject to the regulatory jurisdiction of the Commission as follows:

> (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. Section 366.81, Florida Statutes, as amended in 1989, which provides in pertinent part as follows:

> 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.

c. Section 366.051, Florida Statutes, enacted in 1989, which provides in pertinent part as follows:

> 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.

d. Certain language in PSC Order No. 18302-A, the Commission's declaratory statement in the PW Ventures case, as follows:

> 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 the 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. PW Ventures, 87 FPSC 10:24.
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> * * *
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> [T]he 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. PW Ventures, 87 FPSC 10:26.

e. Certain language in PSC Order No. 17009, the Commission's declaratory statement in the Monsanto case, as follows:

> 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. Monsanto, 86 FPSC 12:356.

f. Certain language in PSC Order No. 23729, the Commission's declaratory statement in the Seminole Fertilizer case, as follows:

> Notwithstanding the apparent dissimilarities between the Monsanto lease arrangement and the transaction presented here, our jurisdiction is not automatically triggered. The analysis by the Commission addresses whether the separate entities created primarily for "off-balance sheet accounting" are so strongly related as to be considered one and the same for jurisdictional purposes; . . . . Seminole Fertilizer, 90 FPSC 11:130.
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> * * *
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> The Commission finds that the lessee/QF

(Seminole) and partnership/lessor (Seminole sub L.P.) are so "related" that the arrangement surmounts the jurisdictional boundary identified in Petition of PW Ventures, Inc. (citations omitted). It follows from that finding that the transaction at issue does not create a public utility which is subject to our jurisdiction. Id., 90 FPSC 11:131.

THE FACTS PRESENTED

6. Polk Power Partners, L.P. is a Delaware limited partnership authorized to do business in Florida as Polk Power Partners, L.P., Ltd. Polk Power Partners is engaged in cogeneration development; specifically, PPP is developing a qualifying cogeneration facility in Polk County, Florida, commonly known as the Mulberry Cogeneration Facility. The facility will consist of a natural gas fired cogeneration facility employing combined cycle technology to produce electric power and steam, and a thermal host ethanol plant that will produce ethanol and related co-products. The cogeneration facility will have an average generation output of 118.3 megawatts (net). The ethanol plant will have a peak electric demand of approximately 2,000 kilowatts (2,000 kW). The Mulberry Cogeneration Facility has three power sales contracts: a 1987-vintage 23 MW standard offer contract with Tampa Electric Company executed and filed with the Commission in 1989, and two negotiated contracts with Florida Power Corporation, one providing for the sale of 72 MW of firm capacity and energy, and the other for 28 MW of firm capacity and energy, both approved by the Commission in 1991. In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power

Corporation, 91 FPSC 7:60 (Docket No. 910401-EQ, July 1, 1991). PPP will obtain Qualifying Facility status for the Mulberry Cogeneration Facility under the applicable federal rules.

7. Polk Power Partners has evaluated alternate financing and ownership structures for the cogeneration facility and is considering two such structures for the ethanol plant. Under either option, PPP will develop, construct, and own all of the electricity and thermal energy producing assets and equipment of the Facility. Under the first option (Financing Option 1), PPP would develop, construct, and hold legal title to the entire Facility, including both the electricity and thermal energy producing assets and equipment thereof and the entire ethanol plant, but PPP would lease the ethanol plant to an unrelated operator on a "utilities-included" basis.

8. Under Financing Option 1, the lease of the ethanol plant would provide that PPP as landlord would continue to own all assets of the ethanol plant. The operator lessee would pay contractually determined lease payments for the use of the ethanol plant assets on a utilities-included basis, that is, including all electricity, water, and wastewater treatment for the ethanol plant. The lease payments would not vary with the amount of utilities used in the ethanol plant. More specifically, the ethanol plant lease will provide for determinate rent to be paid during each of two sub-terms within the overall term of the lease: (1) the initial period of the lease, designated the "Base Term," and (2) the remaining lease period following the expiration of the Base Term. The length

of the Base Term depends on when, if at all, the present value of the aggregate rents paid exceeds a negotiated dollar amount (hereinafter the "Negotiated Amount"). If the present value of the aggregate rents paid exceeds the Negotiated Amount within eighteen years following the commencement of the lease, then the Base Term expires when that event occurs. If the present value of the aggregate rents paid does not exceed the Negotiated Amount within eighteen years following the commencement of the lease, then the Base Term is simply eighteen years.

9. During the Base Term, the monthly rent cannot be less than a negotiated minimum monthly amount (the "Minimum Rent"); the monthly rent will be greater than the Minimum Rent if the ethanol plant achieves a monthly distributable cash flow (all monthly ethanol plant revenues less all monthly ethanol plant expenses) that exceeds the Minimum Rent, adjusted in part for cumulative inflation and in part to reflect whether the federal ethanol producers' tax credit is available to the operator lessee during the given month.

10. For the remaining lease period following the expiration of the Base Term, the rent will depend on whether the present value of the aggregate rents paid has exceeded the Negotiated Amount. If so, then the rent will simply be a fixed amount negotiated by the parties (the "Post-Base Term Fixed Rent"). If the aggregate rents paid have not exceeded the Negotiated Amount, then the rent to be paid in any month will be determined by a formula based on the difference between the present value of the aggregate rents paid

and the Negotiated Amount; the greater the difference between the Negotiated Amount less the aggregate rents paid, the greater the rent until the difference becomes zero. Once this difference becomes zero, the rent for the remainder of the lease term is simply the Post-Base Term Fixed Rent.

11. Under another option being considered (Financing Option 2), PPP would develop and construct the entire cogeneration facility as above. After construction was complete, however, PPP would continue to own and operate all electricity and steam production facilities, but would sell the ethanol plant to an unrelated entity. Under this option, PPP would furnish electricity, water, and wastewater treatment to the ethanol plant, and accept condensate from the ethanol plant, in return for a flat monthly fee that would not vary with the amount of electricity, water, and wastewater treatment provided or condensate accepted.

THE DECLARATORY STATEMENTS SOUGHT

12. Polk Power Partners respectfully asks the Commission to enter an order declaring that both alternate structures being contemplated for the Mulberry Cogeneration Facility would be permissible and that neither would subject any of the parties involved to the Commission's regulatory jurisdiction as a public utility. The Commission's declarations will enable PPP to ensure that the final financing and ownership structure of the Facility will be permissible under Florida law.

13. The need for the Commission's declaration arises from the uncertainty as to what financing and ownership structures are

permissible under section 366.02(1), Florida Statutes, as explicated by the Commission in its Monsanto, PW Ventures, and Seminole Fertilizer decisions. Unlike Monsanto and Seminole Fertilizer, which involved leases of electricity producing assets and equipment, the instant situation involves only the lease of the thermal host ethanol plant, which will be developed and constructed, and, under Financing Option 1, owned by Polk Power Partners.

14. The first case posed by Polk Power Partners -- Financing Option 1 -- asks the Commission to declare non-jurisdictional an arrangement wherein there would be identity of ownership of the cogeneration assets, including all electricity and steam producing equipment, and the thermal host assets, i.e., the entire ethanol plant, of the Mulberry Cogeneration Facility. Under Financing Option 1, the ethanol plant would be leased to an unrelated operator on a "utilities-included" basis, whereby the operator lessee would pay determinate rental payments that would include the use of the ethanol producing facilities and equipment and all electricity, water, and wastewater treatment required in the ethanol operation.

15. The second case -- Financing Option 2 -- asks the Commission to extend the "relatedness" doctrine enunciated in the PW Ventures and Seminole Fertilizer cases and to apply the legislative policy encouraging cogeneration set forth in sections 366.81 and 366.051, Florida Statutes, to hold non-jurisdictional an arrangement wherein Polk Power Partners would (a) develop a wholly

new integrated cogeneration facility, including both the energy-producing facilities and the thermal host ethanol plant; (b) subsequently sell the thermal host ethanol plant to an unrelated operator recruited by PPP; and (c) provide electricity, water, and wastewater to the thermal host ethanol plant and accept condensate from the ethanol plant, in return for a flat monthly or annual fee that would not vary with the amount of electricity or water actually used in, or treatment of wastewater generated by, the thermal host ethanol plant.

16. Under both Option 1 and Option 2, PPP asks the Commission to recognize that by virtue of the de novo or "greenfield" development of the entire facility by PPP, there is no cream-skimming of customers that would otherwise be served by the existing utility.

Financing Option 1: Lease of Thermal Host Plant

17. Polk Power Partners first asks the Commission to enter an order declaring that an arrangement wherein:

> (a) PPP owns all of the real property of the Mulberry Cogeneration Facility, including all land and improvements thereon, all electric generating assets and equipment, and all ethanol production assets and equipment of the Facility, and
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> (b) PPP leases the ethanol plant to an unrelated plant operator on a "utilities included basis," at pre-determined lease payments that do not vary with the amount of electricity, water, and wastewater treatment provided or used by the ethanol plant, and
>
> (c) PPP furnishes electricity, water, and wastewater treatment to its ethanol plant,

will not: (I) result in an unlawful sale of electricity, (II)

result in either PPP or any of its individual partners being deemed a public utility, or (III) result in either PPP or any of its individual partners being otherwise subject to regulation by the Commission.

18. In an early case, the Commission held that a lease financing arrangement, where the lessee of cogeneration equipment did not actually own the cogeneration assets but where the lessee was also the consumer of the electricity produced thereby, was permissible without causing either the lessee or the owner of the cogeneration equipment to be deemed a public utility under section 366.02(1). Monsanto, 86 FPSC 12:354. Subsequently, the Commission held that the sale of electricity from a cogeneration facility owned and operated by a cogeneration developer to an unrelated, previously established industrial customer of a Florida utility would cause the developer to be a public utility subject to the Commission's regulation. PW Ventures, 87 FPSC 10:21. More recently, the Commission held non-jurisdictional a proposed lease arrangement wherein an existing industrial energy user, Seminole Fertilizer, would create a subsidiary and transfer existing cogeneration assets to that subsidiary, which would then acquire additional cogeneration assets and transfer all such assets to a limited partnership of which the subsidiary would be the general partner. Seminole would then lease back a part of the cogeneration assets and receive electricity produced therefrom. Seminole Fertilizer, 90 FPSC 11:126.

19. In these cases, the Commission focussed on the

relatedness, or unrelatedness, of the proposed electricity supplier and electricity consumer. PW Ventures, 87 FPSC 10:24, 26, Seminole Fertilizer, 90 FPSC 7:130-131. In the present context, identity of ownership of both the electricity and thermal energy producing facilities and the thermal host ethanol plant establishes relatedness sufficient to overcome the jurisdictional boundary identified in PW Ventures and Seminole Fertilizer: PPP will furnish electricity, water, and wastewater treatment to the ethanol plant that it develops, constructs, and owns.

20. Moreover, the proposed arrangement will not involve "cream-skimming" of revenues from a pre-existing industrial customer of the utility serving the area where the Facility is located. This ethanol plant, with its modest 2,000 kW load, is not, as was the case in PW Ventures, a large, pre-existing industrial customer (Pratt & Whitney) of a Florida electric utility: the Mulberry ethanol plant is a de novo or "greenfield" thermal host that will be in Florida in large part because Polk Power Partners is developing it. Therefore, providing electricity to the ethanol plant on a requirements basis will not have the undesirable result that the Supreme Court recognized in PW Ventures, viz.:

> that revenue that otherwise would have gone to the regulated utilities which served 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. PW Ventures, 533 So.2d at 283.

21. Third, statutory changes subsequent to the Commission's

PW Ventures decision provide additional policy grounds to support allowing this particular financing and ownership arrangement for this new cogeneration facility to go forward. New language added to the Florida Energy Efficiency and Conservation Act, section 366.81, Florida Statutes, declares the Legislature's intent that "cogeneration . . . be encouraged." Additionally, newly enacted section 366.051 declares:

> 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 a small power producer.

Allowing the proposed arrangement to go forward without incurring regulation as a public utility is plainly consistent with these legislative policy statements.

Financing Option 2: Post-Construction Sale of Thermal Host

22. Secondly, PPP asks the Commission to enter an order declaring that an arrangement wherein:

> (a) PPP develops the entire cogeneration facility, including both the electric and thermal energy cogeneration plant and equipment and the ethanol plant and equipment,
>
> (b) PPP subsequently sells the ethanol plant to an unrelated entity,
>
> (c) PPP subsequently provides electricity to the ethanol plant in return for a flat monthly or annual fee that does not vary with the amount of electricity delivered by PPP to the ethanol plant,

will not (I) result in an unlawful sale of electricity, (II) result in either PPP or any of its individual partners being deemed a public utility, or (III) result in either PPP or any of its

individual partners being otherwise subject to regulation by the Commission.

23. On its face, under a strict, narrow application of the PW Ventures doctrine, the second financing-ownership structure would likely result in the electricity provider being deemed a public utility within the meaning of section 366.02(1), Florida Statutes. The simple analysis would correctly observe that after the entire Facility was constructed and the ethanol plant sold to the independent operator, the energy-producing entity, PPP, would be furnishing electricity to an entity not legally related to PPP, and to a facility not owned by PPP.

24. Several factors, however, distinguish this proposed arrangement from the simple electricity sale to an unrelated entity held unlawful in PW Ventures. First, the Commission could and should find sufficient "relatedness" in the fact that PPP is the developer, constructor, and initial owner of the entire Mulberry Cogeneration Facility, including both the electricity and thermal energy producing facilities and the thermal host ethanol plant. Indeed, PPP will bring the ethanol plant into existence.

25. Second, because of this specific development arrangement, there would be no cream-skimming of customers that would otherwise be served by the existing utility. As discussed above, this ethanol plant is not, as was Pratt & Whitney in PW Ventures, a large, pre-existing industrial customer of a Florida electric utility: it is a de novo, "greenfield" facility built by Polk Power Partners.

26. Finally, as noted above, statutory changes subsequent to the Commission's PW Ventures decision support allowing this particular financing and ownership arrangement for this new cogeneration facility to go forward.

27. On the facts presented, the Commission can honor its PW Ventures decision, i.e., that a cogenerator cannot sell to an unrelated entity without being deemed a public utility under section 366.02(1), Florida Statutes, and promote the underlying policy goals of avoiding "cream-skimming" and encouraging cogeneration, by holding that the jurisdictional "relatedness" boundary is surmounted where the cogeneration developer develops and constructs both the energy-producing and thermal host facilities of an integrated cogeneration facility in a "greenfield" context, despite the subsequent sale of the thermal host.

26. Finally, as noted above, statutory changes subsequent to the Commission's PW Ventures decision support allowing this particular financing and ownership arrangement for this new cogeneration facility to go forward.

27. On the facts presented, the Commission can honor its PW Ventures decision, i.e., that a cogenerator cannot sell to an unrelated entity without being deemed a public utility under section 366.02(1), Florida Statutes, and promote the underlying policy goals of avoiding "cream-skimming" and encouraging cogeneration, by holding that the jurisdictional "relatedness" boundary is surmounted where the cogeneration developer develops and constructs both the energy-producing and thermal host facilities of an integrated cogeneration facility in a "greenfield" context, despite the subsequent sale of the thermal host.

CONCLUSION

WHEREFORE, Polk Power Partners respectfully asks the Commission to enter an order declaring that neither of the financing-ownership structures described above would

(I) be deemed to result in or to constitute an unlawful sale of electricity; nor

(II) cause Polk Power Partners or any of its individual partners to be deemed a public utility under Florida law; nor (III) cause PPP or any of its individual partners to otherwise be subject to regulation by the Commission.

Respectfully submitted this 13th day of December, 1993.

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