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September 16, 1994

**BY HAND-DELIVERY**

Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
101 E. Gaines Street, Fletcher Bldg.
Tallahassee, Florida 32399-0863

RE: Petition for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts by FPC.
Docket No. 940797-EQ

Dear Ms. Bayo:

Enclosed for filing in the above-styled docket are the original and fifteen (15) copies of Dade County's and Montenay-Dade, Ltd.'s Motion to Dismiss and Request for Oral Argument.

Also enclosed is a 3.5 inch diskette containing the above-referenced document in Word Perfect format.

Please acknowledge receipt and filing of the above by stamping the enclosed duplicate copy and returning the same to my attention.

Thank you for your assistance in this matter.

Sincerely,

Robert Scheffel Wright

Robert Scheffel Wright

ACK ✓
AFA
APP
CAF
CMU
CTR
EAG Elias
LEG Elias
LIN 6
OPC 1 RSW/dc
RCH Enclosures
SEC 1
WAS
OTH

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

Motion Dismiss
DOCUMENT NUMBER-DATE
09565 SEP 16 ☆
FPSC-RECORDS/REPORTING

Re Oral Argument
DOCUMENT NUMBER-DATE
09566 SEP 16 ☆
FPSC-RECORDS/REPORTING

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In Re: Petition Of Florida Power Corporation for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts | ) | Docket No. 940797-EQ |
| | ) | Submitted for Filing: September 16, 1994 |

**METROPOLITAN DADE COUNTY'S AND MONTENAY-DADE, LTD.'S MOTION TO DISMISS**

METROPOLITAN DADE COUNTY ("Dade County" or "Dade") and MONTENAY-DADE, LTD. ("Montenay"), pursuant to Rule 25-22.039, Fla. Admin. Code, respectfully move the Commission to dismiss the Petition of FLORIDA POWER CORPORATION ("FPC") for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts (the "Petition" or "Petition for Contract Approval").

As grounds for their Motion to Dismiss, Dade and Montenay say:

1. No approval of the subject actions is required or authorized.

2. The Commission's jurisdiction has not been invoked by any reference to a statute or rule of the Commission.

3. No jurisdiction to review actions under contracts has been given either expressly or by clear and necessary implication from the Commission's statutes.

4. The Commission's rules do not provide for approval of actions taken during the course of contract performanc.

5. The Commission reviews cogeneration and small power production contracts for cost recovery purposes only.

6. Contracts are subject to Commission revisitation, after approval, only where the PSC's approval was obtained "through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information." In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:24, 37 (Order No. 25668, February 3, 1992). There is no suggestion or allegation that such grounds exist here.

7. There is no suggestion that any of the actions taken are in any way contrary to the public interest or the interests of FPC's ratepayers.

8. There is no suggestion or allegation that any of the actions identified in FPC's Petition have had, or will have, any material effect on any factor related to the PSC's approval of the contracts for cost recovery.

9. This proceeding is unnecessary because the actions taken are either expressly provided for in the contracts or are within the contract administration authority.

Accordingly, FPC's Petition must be dismissed.

In support of their Motion to Dismiss, Dade County and Montenay state as follows.

## MEMORANDUM OF LAW

## BACKGROUND AND STATEMENT OF FACTS

1. Dade County owns, and Montenay operates, the Dade County Resources Recovery Facility (the "Facility"), an approximately 77 megawatt (MW) solid waste fired small power production facility located in Dade County. Dade sells firm capacity and energy from the Facility to FPC pursuant to that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Dade County And Florida Power Corporation dated March 13, 1991 (the "Contract"). The Contract provides for Dade County to produce and deliver to FPC, and for FPC to purchase, approximately 43 MW of firm electric capacity and energy at a minimum committed on-peak capacity factor of 83 percent. The Facility is a qualifying small power production facility or "QF" within the meaning of the rules of the Florida Public Service Commission (the "Commission" or "PSC") and the Federal Energy Regulatory Commission (the "FERC").

2. The effectiveness of the Contract between FPC and Dade County, as between the parties, was not contingent upon the PSC's approval. This was not inadvertence in drafting, because the parties knew how to draft such a clause. The effectiveness of the Contract was contingent upon its approval and ratification by the Board of County Commissioners of Dade County, Florida. (Contract, Section 4.1.) Pursuant to and consistent with Commission Rule 25-17.0832(2)&(8)(a), the Contract was approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991 in Docket No.

910401-EQ. In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60 (July 1, 1991). The Contract did acknowledge that firm capacity payments would not begin until the Contract was approved by the Commission.

3. Dade County and Montenay have performed their obligations in accord with the Contract since its inception on March 13, 1991, and have been delivering firm capacity and energy to FPC pursuant to the Contract since November 22, 1991.

4. Following negotiations regarding certain operational conditions at the Facility and FPC's desire for off-peak output reductions from QFs, in November 1993, Dade County, Montenay-Dade, Ltd. and Florida Power Corporation executed a certain Settlement Agreement addressing those and other matters. This Settlement Agreement was appended to FPC's Petition for Contract Approval. By its own terms, that Settlement Agreement did not require the PSC's approval for its effectiveness as between the parties.

5. On July 28, 1994, FPC initiated this docket by filing its Petition for Contract Approval. The Petition asks the Commission "for approval, to the extent required, with respect to certain actions taken during the course of performance of Commission-approved cogeneration contracts." Petition at 1. FPC has identified three major categories of "actions," as follows:

A. Matters specifically contemplated within the contracts, including assignments, operational matters such as extension of performance dates due to regulatory delays

and force majeure events, curtailments under certain circumstances, and changes in committed capacity.

B. Matters inherent in the routine administration of the contracts, including correction of typographical errors, changes of address for the respective parties' designees to receive various notices and communications, and recognition that certain terms in the contract, which was based on a form contract developed by FPC, are inapplicable to certain contracts.

C. Matters that may not have been specifically encompassed within the scope of the contracts but which are nonetheless appropriate to the purposes of the Contracts and consistent with the public interest and the interests of FPC's ratepayers.

6. By petition dated August 18, 1994, Dade County and Montenay requested the Commission's leave to intervene for the limited purpose of moving to dismiss FPC's petition for contract approval. Dade and Montenay were granted intervention on August 30 by Commission Order No. PSC-94-1068-PCO-EQ.

**ARGUMENT**

From the outset, Dade County and Montenay wish to make it clear that they agree, wholeheartedly, with Florida Power Corporation's conclusion that the "actions taken during the course of performance of Commission-approved cogeneration contracts" . . . "do not require further Commission approval." Petition at 1.

While Dade County and Montenay empathize with FPC's concerns regarding the uncertainty created by the Staff's recommendation in another case[1], as described herein, FPC has asked the Commission for relief that is neither required nor authorized by statute or rule, and which, moreover, following the doctrine of administrative finality as embraced by the Commission, is unnecessary.

A motion to dismiss tests the sufficiency of the pleading. FPC's Petition gives no indication as to the Commission's authority or jurisdiction over the matters raised therein. In fact, there is no such jurisdiction vested in the Commission. The authority to grant approval of "actions taken during the course of performance of Commission-approved cogeneration contracts" is not given to the Commission either expressly or by clear and necessary implication from the provisions of the statute. Such authority is neither claimed nor set forth in the Commission's rules. Neither do the statutes or the Commission's rules require Florida Power to seek approval for any of the subject actions.

The specific actions described in FPC's petition are either: (A) expressly contemplated by and encompassed within the contracts as approved by the Commission, and therefore already approved by the Commission's prior approval of the contracts for cost recovery purposes; (B) inherent in the routine administration of the contracts and therefore within the scope of FPC's managerial

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[1] Petition at 2-3. In Re: Joint Petition for Declaratory Statement Concerning Assignment of the LFC No. 47 Corporation Standard Offer Contracts, by Auburndale Power Corporation, Limited Partnership and Florida Power Corporation (FPSC Docket No. 940378-EQ) (withdrawn).

prerogatives, subject only to review, if at all, by the Commission's standard review of utility investments and expenditures for prudence and reasonableness; or (C) otherwise within the scope of FPC's managerial prerogatives, again subject only to review for reasonableness and prudence.

The scope of Commission review of negotiated power sales contracts between utilities and qualifying facilities ("QFs") is limited to review "for the purpose of cost recovery." Rule 25-17.0832(2), Fla. Admin. Code (1993) (the "Rule"). Nor does the Commission have the authority to approve such actions by way of clarifying its previous orders approving the contracts for cost recovery purposes.

The PSC does not have, nor could FPC cite to, any authority to approve actions taken after contract approval. There is no suggestion that any of the actions described in FPC's Petition affect the cost-effectiveness of any of the subject contracts nor have any material effect on any of the criteria set forth in the Rule. Moreover, there is no suggestion that any of the actions is contrary to the public interest or the interests of FPC's ratepayers. Therefore, there is no occasion to review those actions. This proceeding is unnecessary and should be dismissed.

## I. The Commission Has Neither Statutory Nor Rule Authority To Approve "Actions Taken During The Course Of Performance Of Commission-Approved Cogeneration Contracts."

FPC does not cite any enabling statutes or rules which purport to give the Commission the authority to review "actions taken

during the course of performance of Commission-approved cogeneration contracts." In fact, in the Petition, FPC concludes that the "actions taken during the course of performance of Commission-approved cogeneration contracts . . . do not require further Commission approval." Dade County and Montenay wholeheartedly agree.

A. The Commission's Statutes Do Not Authorize It, Either Expressly Or By Implication, To Approve "Actions Taken During The Course Of Performance Of Commission-Approved Cogeneration Contracts.

The Commission has only such authority as is given to it either expressly or "by clear and necessary implication from the provisions of the statute." City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965).

The Commission's statutes relating to cogeneration include sections 366.051 and 366.81-.82, the latter being a part of the Florida Energy Efficiency and Conservation Act. These statutes recognize the benefits of electricity produced by cogenerators and small power producers and require the Commission to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers," Fla. Stat. § 366.051 (1993), and declare the Legislature's intent that cogeneration be encouraged. Fla. Stat. § 366.81 (1993).

Nowhere in these sections does the Legislature give the PSC the authority to approve actions taken during the course of performance of Commission-approved cogeneration contracts, nor jurisdiction over those continuing contractual relationships. Nor

is such jurisdiction "given by clear and necessary implication from the provisions of the statute." City Gas, 182 So.2d at 436. Such jurisdiction is not necessary to fulfill the Commission's statutory mandates to encourage cogeneration and to "establish guidelines relating to the purchase of power or energy by public utilities" from QFs. Fla. Stat. § 366.051 (1993). Moreover, any doubt as to the existence of an agency's power must be resolved against its exercise. As the Florida Supreme Court stated,

> If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

United Telephone Co. v. Public Service Comm'n, 496 So.2d 116, 118 (Fla. 1986) (quoting from Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577, 582 (Fla. 1965)). Similarly, the pertinent statutes do not require electric utilities to submit for Commission approval any actions or matters of the nature identified in FPC's Petition.

B. Pursuant to Its Rules, The Commission's Review and Approval of Negotiated Contracts Is For Cost Recovery Purposes Only.

There is no authority in the Commission's rules for review and approval of actions taken during the course of performance of a contract. Pursuant to its rules, the Commission's review of cogeneration and small power production contracts is, in the first place, "for the purpose of cost recovery." Rule 25-17.0832(2), Fla. Admin. Code (1993). Neither this rule, nor the Commission's other rules regarding negotiated cogeneration contracts, vests the Commission with authority to review or approve "actions taken during the course of performance of Commission-approved

cogeneration contracts." Nowhere do the Commission's rules intimate that the Commission will undertake to approve the parties' performance under approved contracts.

This review, solely for cost recovery purposes, is consistent with the Commission's mandate to encourage cogeneration and to establish guidelines for the purchase of QF power by utilities. It is also consistent with the PSC's policy against "micro-managing" utilities.

C. The Commission Does Not Derive Authority To Review Or Approve The Subject Actions As Part Of Its Orders.

It may also be suggested that the PSC derives authority to rule on the propriety of the subject actions through some general authority to clarify its prior orders, or that those orders come to include the subject cogeneration contracts, thereby vesting the Commission with jurisdiction. Numerous cases stand for the proposition that the Public Service Commission may take otherwise authorized actions that have the effect of modifying or abrogating contracts[2] without unconstitutionally impairing them, and that the

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[2] H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979) (Commission-approved water and sewer rate increase operated to increase rates otherwise due pursuant to previously executed developer agreement); Miami Bridge Co. v. Railroad Comm'n, 20 So.2d 356, 361 (Fla. 1944) (the Legislature, after granting franchise to toll bridge operator, had authority to enact statute transferring rate-setting authority from franchise holder to State Railroad Commission); Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2nd DCA 1975) (Commission has authority to raise or lower rates established by preexisting contract when necessary in the public interest); see also Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (1919).

PSC has limited authority to clarify its orders.[3] In territorial cases, "the practical effect of such approval is to make the approved contract an order of the commission, binding as such upon the parties." City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965).

Instances where contracts may be modified without constitutional impairment are predicated, however, on the necessity of the regulatory action to protect the public interest. In Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966), the Supreme Court held that the Commission could not modify a final order, entered more than four years earlier, where there was no finding that the public interest required partial abrogation of that order (approving a service area agreement). See also United Telephone v. Public Service Comm'n, 496 So.2d 116, 119 (Fla. 1986) (citing to Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n, 261 U.S. 379 (1923)). In United Telephone, the Florida Supreme Court noted the U.S. Supreme Court's holding

> that a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify private contracts in the absence of such public necessity constitutes a violation of the impairment clause of the United States Constitution. 496 So.2d at 119.

No such circumstance exists here. There is no allegation that any of the subject actions has had, or will have, any adverse effect on the public interest or on the interests of FPC's ratepayers.

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[3] Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966).

Instances where the Commission has the continuing authority over contracts that become part of its orders are apparently limited to territorial cases specifically, and generically where such authority is either given expressly or "given by clear and necessary implication from the provisions of the statute." City Gas, 182 So.2d at 436. That is not the case with respect to cogeneration contracts approved for cost recovery pursuant to Commission Rule 25-17.0832(2). Such authority is not expressly given, nor is it necessary to the Commission's fulfillment of its mandates under section 366.051 or 366.081, Florida Statutes. The directive to "establish guidelines" for the purchase of power from QFs is vastly different from the authority "[t]o approve territorial agreements . . . " and "[t]o resolve . . . any territorial dispute involving service areas between and among . . . utilities . . . ." Fla. Stat. § 366.04(2)(d)&(e) (1993).

## II. Approved Cogeneration Contracts Are Subject To Further Commission Review Only Where Commission Approval Was Obtained Through Fraud, Mistake, Or The Like.

Pursuant to the doctrine of administrative finality, negotiated cogeneration contracts are subject to Commission revisitation, after approval, only where the PSC's approval was obtained "through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information." In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:24, 37

(Order No. 25668, February 3, 1992). There is no suggestion or allegation that such grounds exist here.

In ruling on a motion to dismiss, the PSC can only look to the clear allegations on the face of the Petition. The Petition contains no allegations that any of the factors that might trigger review or revisitation are present in this instance, or in the actions identified in FPC's Petition.

## III. This Proceeding Is Unnecessary Because There Is No Suggestion That Any Of The Actions Has Had, Or Will Have, Any Adverse Effect On The Public Interest Or On The Interests Of FPC's Ratepayers.

This is a matter of common sense as well as law. There has been no suggestion or allegation that either the cost-effectiveness of the contracts, or the Commission's approval of the contracts for cost recovery under the criteria specified in Rule 25-17.0832(2), has been affected in any way by any of the subject actions. Nor has there been any suggestion or allegation that any of the actions identified by FPC has had, or will have, any adverse effect on FPC's ratepayers. Nor has there been any suggestion or allegation that any of the actions has had, or will have, any adverse effect on the public interest. Therefore, there is no occasion for the PSC to involve itself in FPC's actions taken during the course of performance under contracts approved by the Commission for cost recovery or in related actions in the conduct of its business relations.

## IV. This Proceeding Is Unnecessary Because The Subject Actions Are Either Expressly Authorized Within The Contracts Or Are Within The Scope Of FPC's Contract Administration Authority.

This proceeding is further unnecessary because most of the actions taken by FPC are specifically authorized by the contracts as approved by the Commission, and therefore further approval is neither required nor authorized. Those actions not expressly provided for within the contracts are either inherent in the routine administration of the contracts, and therefore within the scope of FPC's managerial prerogatives, at least to the extent that they are consistent with its rights and responsibilities under the contracts[4], or otherwise within the scope of FPC' contract administration activities in conducting its business affairs with its contract partners (again subject to the contracts). Such actions by a utility are subject to review, if at all, on a case-by-case basis for prudence and reasonableness: for the PSC to review such actions here would be micro-management.

As an analog, consider the nature of potential Commission review of a utility's construction or relocation of a 69kV or 115kV transmission line, i.e., a line or transmission project not subject to the Transmission Line Siting Act, or a distribution substation. Such actions clearly are within the scope of the Company's authority in the day-to-day conduct of its business subject to PSC review, if at all, on a case-by-case basis for reasonableness and

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[4] There are apparently no disputes between FPC and any of the QFs regarding any of the actions identified in FPC's Petition in this docket. Petition at 25.

prudence. Or consider a scenario where a utility projects certain expenditures in a projected rate case test year based on its expected purchase of trucks from General Motors, meters and transformers from General Electric, and paper clips from Office Depot. Now suppose that several months into the test year, the utility discovers that it can save money, at no sacrifice in quality of service, by buying trucks from Ford, meters and transformers from Westinghouse, and paper clips from General Office Supply. Changing suppliers would apparently be prudent, and the utility could be expected to do so. The Commission would not involve itself in reviewing such actions until and unless their prudence was questioned in a subsequent proceeding. FPC's actions taken with respect to the negotiated contracts should be treated on the same basis as other expenditures and investments.

**CONCLUSION**

Florida Power Corporation has asked the Commission "for approval, to the extent required, with respect to certain actions taken during the course of performance of Commission-approved cogeneration contracts." The Commission is without statutory authority or rule authority to grant this approval, and FPC is not required to obtain it. Moreover, there is no need, nor even any allegation of any need, for such approval. While Dade County and Montenay empathize with Florida Power's concerns raised by the Staff's recommendation in another case, a Staff memorandum that has not been voted upon by the Commission cannot give rise to this

action. As a matter of law and as a matter of common sense, FPC's Petition for Contract Approval should be dismissed.

**RELIEF REQUESTED**

WHEREFORE, based on the foregoing, Dade County and Montenay-Dade Ltd. pray the Commission to enter its Order DISMISSING Florida Power Corporation's Petition for Contract Approval.

Respectfully submitted this 16th day of September, 1994.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 16th day of September, 1994:

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