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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

CASE NO. 950110-EI

ORIGINAL FILE COPY

In re: Petition for Declaratory Statement Regarding Eligibility for Standard Offer Contract and Payment Thereunder by Florida Power Corporation,

PANDA'S REQUEST FOR OFFICIAL RECOGNITION

Panda-Kathleen L.P. ("Panda") hereby requests official recognition of the following final orders of the Commission:

1. Order No. PSC-95-1041-AS-EQ (8/21/95), In Re: Joint Petition for Expedited Approval of Settlement Agreement by Auburndale Power Partners, Limited Partnership and Florida Power Corporation, Notice of Proposed Agency Action Order Approving Settlement Agreement;

2. Order No. PSC-94-1306-FOF-EQ (10/24/94), In Re: Joint Petition for Approval of Standard Offer Contracts of Florida Power Corporation and Auburndale Power Partners, Limited Partnership, Order Approving Contract Modifications; and

3. Order No. 94-0197-DS-EQ (2/16/94), In Re: Polk Power Partners L.P., Order Granting Petition For Declaratory Statement In The Negative.

In addition, Panda request that the Commission take official recognition of the Petition for Declaratory Statement in In re: Polk Power Partners for a Declaratory Statement Regarding Eligibility for Standard Offer Contracts, Docket No. 92-0556-EQ, dated May 28, 1992. The facts and statements contained in that petition will assist the Commission in interpreting the final Order rendered in that proceeding. Therefore, Panda requests the entry

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of that petition into the record of this proceeding. See DuPont v. Rubin, 237 So.2d 795, 796 n. 1 (Fla. 3d DCA 1970).

Respectfully submitted,

GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A.
Attorneys for Panda Kathleen, L.P.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

By: _____
DAVID L. ROSS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: **Donald R. Schmidt, Esq. and Steven Dupre, Esq.**, Carlton Fields et al., Post Office Box 2861, St. Petersburg, Florida 33731, **Robert Vandiver, Esq. and Martha Carter-Brown, Esq.**, Florida Public Service Commission, 2450 Shumard Oak Boulevard, Tallahassee, Florida 32399-0892, and **James A. McGee, Esq.**, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, this 19th day of February, 1996.

_____
DAVID L. ROSS

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(Cite as: 1995 WL 522904 (Fla.P.S.C.))

In Re: Joint Petition for Expedited Approval of Settlement Agreement by **Auburndale** Power Partners, Limited Partnership and Florida Power Corporation.
Docket No. 950567-EQ
Order No. PSC-95-1041-AS-EQ
Florida Public Service Commission
August 21, 1995

Before Susan F. Clark, Chairman, J. Terry Deason, Joe Garcia, Julia L. Johnson and Diane K. Kiesling, Commissioners.

***1** NOTICE OF PROPOSED AGENCY ACTION ORDER APPROVING SETTLEMENT AGREEMENT

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

On May 17, 1995, Florida Power Corporation (FPC) and **Auburndale** Power Partners, Limited Partnership (APP) filed a joint petition for expedited approval of a Settlement Agreement. The agreement affects one negotiated contract and two standard offer contracts that we previously approved.

APP's obligations under the contracts are served from APP's cogeneration facility located near the city of **Auburndale,** Florida, which began commercial operation on July 1, 1994. Some time after July 1, 1994, various disputes arose between APP and FPC concerning the method for calculating the energy price to be paid to APP and the on-peak capacity factor under the negotiated contract.

In Docket No. 940771-EQ, FPC filed a petition regarding the pricing dispute. We ruled that it was appropriate to defer the contract dispute to the civil court. To avoid the expense of civil litigation, the parties have agreed to certain modifications in the contracts. The modifications are subject to our confirmation that the contracts continue to qualify for cost recovery. The modifications to the contracts are addressed below.

ENERGY PAYMENTS UNDER THE NEGOTIATED CONTRACT

The Settlement Agreement modifies the methodology for computing energy payments under the negotiated contract in two ways: (1) During on-peak hours, energy payments to APP will be based on the firm energy Cost; and (2) during off-peak hours, APP will be paid the greater of as-available energy cost of 90% of firm energy cost, not to exceed the firm energy cost.

The changes apply only to energy delivered up to the committed capacity. For energy delivered above the committed capacity, APP will be paid based on as-available energy cost. These modifications resolve the main controversy between APP and FPC that was the subject of FPC's petition in Docket No. 940771-EQ. Item (2) above establishes a floor for energy payments during Off-Peak hours. FPC estimates that the floor will add an additional cost to the contract of approximately $3.6 million.

ALLOCATION OF ENERGY AMONG THE CONTRACTS

The total committed capacity under the contracts is 131.18 Mw. The net capability of the APP facility is 150 Mw. before the Settlement Agreement, the parties were in dispute as to how to allocate and price energy purchases above the committed capacity.

Based on the Settlement Agreement, energy purchased from APP is allocated to the individual contracts based on the ratio of each contract's committed capacity to the total committed capacity. Energy purchased above the committed capacity for all the contracts will be paid based on as-available energy cost. For purposes of computing the capacity factor for each contract, all delivered energy will be included in the allocation, provided that no capacity factor exceeds 110% for any month. FPC cannot rely on any energy delivered above committed capacity, therefore these purchases should be based on as-available energy cost.

*2 CURTAILMENT

The Settlement Agreement contains extensive provisions regarding the time periods and conditions when energy purchases from APP may be curtailed. The provisions are consistent with FPC's Curtailment Plan, which we approved at our August 15, 1995 Agenda Conference.

The curtailment provisions of the Settlement Agreement include a category of "Special Curtailment Periods." These periods apply only to the years 1995 through 1999 and are limited to ten per calendar year. In order to compensate APP for additional startup costs, FPC will pay APP $8,000 for each curtailment beyond the initial five special curtailment periods.

On a net present value basis, FPC estimates that the curtailment provisions will result in savings of approximately $15.3 million. While these savings may be overstated, an agreement to voluntarily curtail could avoid expensive litigation.

AVOIDED UNIT VARIABLE O&M

Under the negotiated contract, the escalation rate for variable Operating & Maintenance expense (O&M) is fixed at 5.1% per year. The Settlement Agreement defines the escalation rate as the greater of 3% or the change in the consumer price index (CPI) from the preceding year. The modified escalation rate more closely reflects current and future economic conditions. Currently, CPI is projected to be less than the 5.1% contained in the original contract. The use of CPI as an escalator for variable O&M is reasonable because variable expenses such as labor and consumables typically track the CPI. FPC estimates that this provision alone will save its ratepayers approximately $6.8 million. If the CPI exceeds 5.1%, these estimated savings will be diminished.

CONTRACT RESTRUCTURING

When the standard offer contracts were executed, we established a price for capacity that was based on a statewide avoided unit which is significantly more

expensive than FPC's current avoided costs. The Settlement Agreement terminates the last eleven years of the standard offer contracts and mitigates the effects of using the more expensive Statewide avoided unit. It also establishes concurrent terms for all three contracts.

As compensation for the early termination, beginning in 1996, FPC will pay APP a monthly "restructuring payment" for sixty (60) months. The payment is based on the difference between the costs of the standard offer contracts and FPC's current avoided costs. Using a discount rate of 11.5%, the present value of the stream of the restructuring payments is equal to the present value of the savings in the outer years.

The difference in the discount rate used to determine the restructuring payments (11.5%) and FPC's current after-tax cost of capital (8.95%) yields a net savings to FPC's ratepayers of approximately $5.1 million. As shown on Attachment 1 under the heading "Estimated Buydown Savings," there will be additional costs in the years 1996 through 2000, along with the savings that will occur in the years 2014 through 2024. The buydown savings shown in these latter years is the difference between the pre-settlement costs of the standard offer contracts and current projected replacement costs.

*3 SETTLEMENT PAYMENT

The methodology to be used in calculating energy payments has been in dispute since August 1994. In order to resolve that dispute, FPC will pay APP a one-time settlement payment of $1,156,114. This amount reflects the difference between what FPC would have paid to APP for energy had the Settlement Agreement been in effect since August 9, 1994, and what was actually paid.

Upon review, we find that the modifications are reasonable and should be approved for cost recovery. The Settlement Agreement has many benefits and some additional costs, but in total, the modified contracts provide a net benefit to FPC's ratepayers. The restructuring payments are largely capacity related. As such, they should be collected through the Capacity Cost Recovery Clause. The settlement payment is based on the retroactive application of the energy pricing provisions of the Settlement Agreement, which is necessary to fully resolve the dispute between FPC and APP. The settlement payment and any special curtailment payments are energy related. Since FPC's ratepayers receive the benefits of the Settlement Agreement, these energy related payments should be recovered through the Fuel Cost Recovery Clause.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Settlement Agreement between Florida Power Corporation and **Auburndale** Power Partners, Limited Partnership is approved. The modifications to the parties' cogeneration contracts are approved for cost recovery as discussed in the body of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket should be closed.

By ORDER of the Florida Public Service Commission, this 21st day of August, 1995.

BLANCA S. BAYO, Director Division of Records and Reporting

(SEAL)

VDJ

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.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 11, 1995.

***4** In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date 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.

1995 WL 522904 (Fla.P.S.C.)

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(Cite as: 1994 WL 596261 (Fla.P.S.C.))

In Re: Joint Petition for Approval of Standard Offer Contracts of FLORIDA POWER CORPORATION and **AUBURNDALE** POWER PARTNERS, LIMITED PARTNERSHIP
Docket No. 940819-EQ
Order No. PSC-94-1306-FOF-EQ
Florida Public Service Commission
October 24, 1994

Before J. Terry Deason, Chairman, Susan F. Clark, Joe Garcia, Julia L. Johnson, Diane K. Kiesling, Commissioners.

NOTICE OF PROPOSED AGENCY ACTION

ORDER APPROVING CONTRACT MODIFICATIONS

BY THE COMMISSION:

***1** NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

By Order No. 21947, issued September 27, 1989, we approved a standard offer contract between Florida Power Corporation (FPC) and the Sun Bank of Tampa Bay (Sun Bank) for 8.5 MW of capacity generated by a wood waste burning cogeneration unit in Jefferson County. In Order No. 21948, a companion order issued that same date, we approved a standard offer contract between FPC and Sun Bank for 7.969 MW of capacity generated by a similar unit in Madison County.

Both standard offer contracts contained provisions that permitted assignment of the contracts with FPC's prior written approval, and in fact Sun Bank had already assigned both standard offer contracts to LFC Corporation (LFC) on April 14, 1989. Both standard offer contracts also contemplated a one-time adjustment of committed capacity; and on December 18, 1992, LFC increased the committed capacity for the Madison facility from 7.969 MW to 8.5 MW. The combined committed capacity of the facilities is now 17 MW. The facilities have been operational since 1990.

The standard offer contracts were assigned again by LFC to **Auburndale** Power Partners, Limited Partnership **(Auburndale)** in a "Consent and Agreement" (Consent), executed by LFC, FPC and **Auburndale** on April 18, 1994. By the terms of the Consent, **Auburndale** would generate the firm capacity and energy committed by LFC's standard offer contracts from **Auburndale's** own existing 150 MW natural gas fired cogeneration facility in Polk County, not from LFC's existing wood waste burning cogeneration facilities in Madison and Jefferson Counties. **Auburndale** already plans to sell 114 MW of firm capacity to FPC pursuant to a negotiated contract that we approved in Order No. 24634, Docket No. 910401-EQ, issued July 1, 1991. The Consent also provided that FPC could curtail energy purchases from **Auburndale** under certain circumstances. If the Consent is approved, LFC plans to discontinue operations at the Madison and Jefferson County facilities.

On August 5, 1994, **Auburndale** and FPC filed this Joint Petition for Expedited Approval of Contract Modifications. In the joint petition the parties have asked us to confirm that the standard offer contracts as modified continue to qualify for cost recovery and are not subject to the provisions of the Commission's current Rule 25-17.0832(3)(a), which limits the availability of Standard Offer Contracts to Qualified Cogeneration Facilities (QF) under 75 MW. The modifications in question include: LFC's assignment of the standard offer contracts to **Auburndale;** a change in location and facilities from LFC's plants in Madison and Jefferson counties to **Auburndale's** natural gas fired plant in **Auburndale;** and, curtailment provisions that permit FPC to reduce energy purchases from **Auburndale** during certain periods when FPC's load is reduced.

***2** At our September 20, 1994 Agenda Conference we addressed four substantive issues raised by the joint petition:

1) Is LFC's assignment of its standard offer contracts with Florida Power Corporation to **Auburndale** Power Partners contemplated by the terms of those contracts?

2) Is the change in location from the existing LFC facilities in Madison and Jefferson counties to the **Auburndale** facility in Polk county, Florida contemplated pursuant to the original standard offer contracts?

3) Are the agreed upon "Off-Peak Curtailment Periods" as defined in the Consent and Agreement between **Auburndale,** FPC, and LFC contemplated pursuant to Sections 5(a) and 5(c) of LFC's original standard offer contract?

4) Should the joint petition for approval of contract modifications be approved?

Our decision on those issues is memorialized below.

The Assignment

The standard offer contracts in question specifically provide for assignment with the prior written approval of FPC. This requirement was met when LFC, **Auburndale,** and FPC entered into the Consent and Agreement. The Consent assigned the responsibility of generating the power and the rights and benefits of the standard offer contracts to **Auburndale.** By an amendment to the Consent, LFC has retained its original obligations to FPC. Upon consideration we find that this type of assignment was contemplated in the original standard offer contracts that were approved by the Commission in Order Nos. 21947 and 21948. Therefore, no further Commission approval is required.

The Change in Facilities and Location

While the terms of the standard offer contracts provided for assignment, the terms of the contracts did not provide for a change in location and facilities from the existing woodburning facilities in Madison and Jefferson counties to the **Auburndale** natural gas facility in Polk county.

As the name implies, a standard offer contract is just that, an "off-the-shelf" offering that has certain blank terms to be filled in when a particular QF executes the contract. Those terms include the name of the QF, the effective date of the contract, the location of the facility, the size of the facility, the term of the contract, the committed capacity, the in-service

date, and the capacity payment option. Once the blanks are filled in and the standard offer is signed, those terms are not subject to negotiation or modification unless the contracts specifically provide for the modification.
Auburndale and FPC suggest that the change in location is a minor modification, because the location was originally left blank in the standard offer contract. The location provision of a standard offer contract is left blank because the utility does not know the location or type of a facility when it publishes its standard offer contract tariff. The fact that this information was not specified by the utility before the standard offer was executed does not mean that the information is insignificant and can be changed at will. It means that at the outset the cogenerator has the flexibility and the responsibility to provide the location information so that the purchasing utility can, from that point on, manage its purchased power contracts and plan its system accordingly. The changes in location and facilities significantly modify the project that was the subject of the original standard offers. We must evaluate the current effect of those changes on the ratepayers.
***3** FPC indicated that the current LFC standard offer contracts are more expensive than FPC's current avoided costs by approximately $20 million. FPC's analysis of the benefits of the proposed changes shows a net present value benefit of approximately $12 million compared to the original standard offers. **Auburndale** and FPC state in their joint petition that the "new location will reduce line loss incurred in the transmission of power to the load center, provide greater reliability as the transmission distance will be significantly shortened, and increase FPC's opportunity for purchase of bargain and emergency power from the non-peninsular Florida System." At the Agenda Conference, FPC indicated that the majority of the $12 million benefit was the result of replacing expensive as-available energy with less expensive firm energy. We believe that in this instance there are significant benefits to be gained by FPC's ratepayers, and accordingly we approve the modification.

Curtailment

Section 4(d) of the Consent and Agreement defines "Off-Peak Curtailment Periods" as the off-peak hours, 12:00 a.m. to 6:00 a.m, for certain months of the year. These are the "[t]imes the Company shall be deemed unable to accept energy and capacity deliveries". This section relieves FPC of the obligation to purchase excess as-available energy which may not be economical.
Section 5 of LFC's standard offer contract reads as follows:
During the term of this agreement, QF agrees to:
(a) Provide The Company prior to October 1 of each calendar year an estimate of the amount of electricity generated by the Facility and delivered to The Company for each month of the following calendar year, including the time, duration and magnitude of any planned outages or reductions in capacity;
(b) Promptly update the yearly generation schedule and maintenance schedule as and when any changes may be determined necessary;
(c) Coordinate its scheduled Facility outages with The Company;
(d) Comply with reasonable requirements of The Company regarding day-to-day or hour-by-hour communications between the parties relative to the performance of this Agreement; and
(e) Adjust reactive power flow in the interconnection so as to remain within

the range of 85% leading to 85% lagging power factor.
Section 5 of the standard offer requires that the QF and the utility coordinate planned outages of the QF so the utility can manage its system. Typically, planned outages are for maintenance purposes for the QF. They are not to relieve minimum load problems of the utility. The "Off-Peak Curtailment Periods" provision in the Consent are intended to relieve minimum load problems that FPC contends exist, to avoid economic penalties associated with the continuing purchase of as-available energy during off-peak hours. The "Off-Peak Curtailment Periods" provision is a modification to the terms of the original standard offer contract that is not provided for in the contract.
***4** Having said that, we do believe the parties have adequately demonstrated that the new curtailment provisions will provide FPC the opportunity to avoid the continuing purchase of as-available energy during off-peak hours, and thus, like the change in location and facilities, will provide benefits to FPC's ratepayers. We therefore approve the curtailment provisions. We view the question of whether current Rule 25-17.0832(3)(a), Florida Administrative Code applies to these contracts as modified to be moot. It is, therefore,
ORDERED by the Florida Public Service Commission that the Joint Petition for Expedited Approval of Contract Modifications of Florida Power Corporation and **Auburndale** Power Partners, Limited Partnership is approved for purposes of cost recovery. It is further
ORDERED that this Order shall become final and this docket shall be closed unless an appropriate petition for formal proceedings is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.
By ORDER of the Florida Public Service Commission, this 24th day of October, 1994.
BLANCA S. BAYO, Director Division of Records and Reporting
by: Chief, Bureau of Records
(S E A L)

Chairman Deason and Commissioner Clark concur in the Commission's decision that the proposed modifications to the standard offer contracts are beneficial to FPC and its ratepayers and should be approved. They do not believe that it is necessary to decide whether the modifications were contemplated in the original contracts.

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.
The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding,

as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on November 14, 1994.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

***5** Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date 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.

1994 WL 596261 (Fla.P.S.C.)

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Re Polk Power Partners, L.P.
Docket No. **931190-EQ**
PSC-94-0197-DS-EQ
Florida Public Service Commission
February 16, 1994

Before Deason, chairman, and Clark (dissenting), Johnson (dissenting), Kiesling, and Lauredo, commissioners.

BY THE COMMISSION:

*1 ORDER GRANTING PETITION FOR DECLARATORY STATEMENT IN THE NEGATIVE

BACKGROUND

By petition filed December 13, 1993, Polk Power Partners, L.P. ('Polk '), sought a declaratory statement to the effect that certain contemplated financing and ownership structures of the Mulberry Cogeneration Facility as described in the petition a) will not be deemed an unlawful sale of electricity; b) will not cause Polk or its individual partners to be deemed a public utility under Florida law; c) and will not cause Polk or its individual partners to be subject to regulation by the Commission.

The cogeneration facility at issue will have an average generation output of 118.3 megawatts net. It 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 Mulberry Cogeneration Facility has a Commission-approved 23 MW standard offer contract (Tampa Electric Company) and Commission-approved negotiated contracts for the sale of 72 MW of firm capacity and energy and 28 MW of firm capacity and energy (Florida Power Corporation). [FN1]

Under financing option 1, Polk would develop, construct and hold legal title to the entire facility, but lease the ethanol plant on a 'utilities included ' basis to an unrelated operator. The lease payments would not vary based on the amount of utilities (electricity, water and wastewater) used, but would exceed a negotiated minimum monthly amount if the adjusted monthly cash flow (revenues less expenses for the ethanol plant) exceeds that minimum rent. Under financing Option 2, the ethanol plant would be sold to an unrelated purchaser, but be supplied with electricity, water and wastewater services by Polk.

DISCUSSION

Polk first petitions us to issue a declaratory statement to the effect that Polk's financing Option 1 would not be deemed a sale of electricity, cause Polk or any of its partners to be deemed a public utility or cause Polk or any of its partners to be deemed subject to Commission regulation? [FN2] However, we conclude that the declaratory statement should be issued in the negative.

In support of its petition, Polk cites s 366.81 and s 366.051, which speak to the policy of encouraging cogeneration and the benefits to the public thereof. Polk also notes that in Order No. 17009, Monsanto, we concluded that

> Monsanto is leasing equipment which produces electricity rather than buying electricity that the equipment generates.

Monsanto, 86 FPSC 12:356

In addition, the Seminole Fertilizer case is cited for the point 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 P.W. Ventures, Inc.

In P.W. Ventures, Order No. 18302-A, we held that the supply of electricity to an unrelated entity invoked our jurisdiction. Here, Polk argues that in supplying electricity to an unrelated lessee of its ethanol plant, Polk is, in effect, merely supplying its own facility which is leased out on a 'utilities included' basis.

***2** We believe that Polk's arguments confuse a number of issues. First, while cogeneration is to be encouraged, we have never encouraged sales of electricity by cogenerators to the public. In testing whether that would be the case here, we note that in Monsanto, generation equipment was leased and the lessee then produced and consumed the power generated. There was no sale of the power to an unrelated entity. Similarly, in Seminole, transactions between Seminole, a QF/lessee, and Seminole Sub L.P., the partnership/lessor, were found not to be transactions between unrelated entities, such as would have invoked our jurisdiction. In effect, no sale of electricity to the public was present.

In contrast, Polk would be supplying power, under the facts presented, which would then be consumed by an unrelated lessee in its operation of Polk's ethanol plant. Though the rental payments would not vary with the amount of electricity consumed, the separate identities of the power producer (Polk) and power consumer (lessee) differentiate these facts from those in Seminole and Monsanto. Under this analysis, the common ownership of the power generator and the ethanol plant is no more dispositive than the lack of such common ownership was in Monsanto and Seminole. In our view, what is dispositive for jurisdictional purposes is the contemplated generation of electric power by one entity, Polk, for consumption by an unrelated entity, the lessee of Polk's ethanol plant, in return for payment. Such an arrangement is encompassed by s 366.02(1), Florida Statutes, read in the light of P.W. Ventures.

However, Polk would distinguish this case from P.W. Ventures on the ground that no pre-existing large industrial customer exists where Polk owns the entire project initially and then leases out the ethanol plant on a 'utilities included' basis to an unrelated operator. Polk argues that whereas 'creamskimming' of the utility revenues that the customer previously paid to the utility would occur if those revenues were directed to P.W. Ventures at the expense of the utility's other ratepayers, no creamskimming can occur here because of the 'greenfield' nature of Polk's project. In effect, there would be no ethanol plant at all absent the project, so revenues from a pre-existing industrial customer will not be diverted away from a utility.

In our view, this does not change the result. While the creamskimming issue

supported our conclusion in P.W. Ventures as a matter of policy, that conclusion interpreted s 366.02(1) to include cogenerators as subject to our regulatory jurisdiction when 'supplying electricity , to the public within this state ', which remains the case unaffected by the greenfield nature of the project.

A final complexity in the comparison of Polk's facts with those in P.W. Ventures is that payment for electricity under the lease in P.W. Ventures included a take or pay minimum plus a negotiated rate. Here, Polk contemplates a minimum lease amount which would not vary with the electricity consumed, plus increases based on production. We note, however, that under s 366.02(1), Commission regulatory jurisdiction is invoked when persons are 'supplying ' electricity to the public. Moreover, we are unable to conclude that no sale of electricity takes place under these facts where electricity is supplied for rent payments. See, by analogy, rule 25-6.049(5)(1), F.A.C., which requires individual electric metering for separate occupancy units of new commercial establishments.

***3** In conclusion, we do not agree that s 366.051 or s 366.81 or the greenfield nature of Polk's project changes the result of the analysis in P.W. Ventures when applied to these facts. Therefore, financing Option 1 would be deemed an unlawful sale of electricity, would cause Polk and its individual partners to be deemed a public utility under Florida law and would cause Polk and its individual partners to be subject to regulation by the Commission.

Polk also petitions us to issue a declaratory statement to the effect that Polk's financing Option 2 would not be deemed a sale of electricity, cause Polk or any of its partners to be deemed a public utility or cause Polk or any of its partners to be deemed subject to Commission regulation. However, we conclude that the declaratory statement should be issued in the negative.

The analysis is the same as in financing Option 1, except that ownership of the ethanol plant, as well as its operation and resulting consumption of the power, is by an entity separate from and unrelated to the supplier of the power. Under authorities cited, the declaratory statement must therefore be issued in the negative. Accordingly, financing Option 2 would be deemed an unlawful sale of electricity, would cause Polk and its individual partners to be deemed a public utility under Florida law and would cause Polk and its individual partners to be subject to regulation by the Commission.

In view of the above, it is

ORDERED by the Florida Public Service Commission that the Petition of Polk Power Partners L.P. be granted in the negative as to financing Option 1. It is further

ORDERED that the Petition of Polk Power Partners, L.P. be granted in the negative as to financing Option 2. It is further

ORDERED that the docket be closed.

By ORDER of the Florida Public Service Commission this 16th day of February, 1994. STEVE TRIBBLE, Director Division of Records and Reporting

(SEAL) by: Signature Chief, Bureau of Records

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 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

***4** FOOTNOTES

FN1 Polk has explained the slight shortfall in energy output (118.3 MW) as compared to total contract requirements (123MW) by stating that peak output will exceed 118.3 MW and that another facility will eventually share the load.

FN2 No jurisdictional issue as to the provision of water and wastewater is raised by this petition because Polk County, where the facility is to be located, rather than the Commission, regulates water and wastewater utilities located therein.

PUR Slip Copy, 1994 WL 52768 (Fla.P.S.C.)

END OF DOCUMENT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Polk Power Partners for a Declaratory Statement Regarding Eligibility for Standard Offer Contracts	)))	Docket No. _____ Submitted for Filing: May 28, 1992

PETITION FOR DECLARATORY STATEMENT

Polk Power Partners, L.P., Ltd., pursuant to section 120.565, Florida Statutes, and Commission Rule 25-22.020, Florida Administrative Code, hereby files this Petition for Declaratory Statement and asks the Florida Public Service Commission to enter an order declaring that Polk Power Partners may sell additional capacity from a qualifying cogeneration facility via a standard offer contract, where the project's total net generating capacity exceeds 75 megawatts (MW) and where the contemplated standard offer contract provides for committed capacity of less than 75 MW.

BACKGROUND

1. Polk Power Partners, L.P., is a limited partnership organized and existing under the laws of Delaware and licensed to do business in Florida as Polk Power Partners, L.P., Ltd. ("Polk Power Partners"). Polk Power Partners' business address is:

Polk Power Partners, L.P., Ltd.
23293 South Pointe Drive
Suite 100
Laguna Hills, California 92653

2. The person authorized to receive notices, communications, and other documents in connection with this petition is:

Patrick K. Wiggins, Esq.
Wiggins & Villacorta, P.A.
Post Office Drawer 1657
Tallahassee, Florida 32302.

For hand delivery and courier delivery, the street address is:

501 East Tennessee Street
Tallahassee, Florida 32308.

A courtesy copy of all notices, communications, and other documents in connection with this petition should also be sent to:

Mr. William R. Malenius, Senior Program Manager
Polk Power Partners, L.P., Ltd.
23293 South Pointe Drive
Suite 100
Laguna Hills, California 92653.

3. The rule provisions that Polk Power Partners seeks to have interpreted are Commission Rules 25-17.0832(3)(a)&(c), Florida Administrative Code. In their entirety, the subject rules provide as follows:

25-17.0832 Firm Capacity and Energy Contracts.

* * *

(3) Standard Offer Contracts. (a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091.

* * *

(c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts or a solid waste facility as defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2). Should a utility fail to negotiate in good faith, any qualifying facility may apply to the Commission for relief pursuant to Rule 25-17.0834, F.A.C.

4. Polk Power Partners seeks the Commission's declaration that (1) generically, the 75 MW size limitation stated in the rules

applies to the committed capacity that a qualifying facility sells to purchasing utilities via a standard offer contract or contracts, rather than to the QF's total net generating capacity; and (2) specifically, Polk Power Partners may lawfully execute any utility's standard offer contract for additional power sales from its Mulberry Cogeneration Facility, so long as any such contract provides for no more than 74.999 MW of committed capacity to be sold to the purchasing utility.

5. Polk Power Partners has a real and immediate need for the requested declaratory statement because the Commission's interpretation and application of its rules will directly affect Polk Power's ability to sell the additional available capacity from its Mulberry Cogeneration Facility, as well as Polk Power Partners' plans for specific projects that it intends to develop in anticipation of new standard offer contracts that will become effective in the near future.

DEFINITIONS

6. Total Net Generating Capacity. As used herein, the term "total net generating capacity" means the same as the "useful power output" of a qualifying facility, as that term is defined at section 292.202(g) of the rules of the U.S. Federal Energy Regulatory Commission implementing PURPA:

> (g) "Useful power output" of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process.

PURPA Cogeneration Rules, 18 C.F.R. § 292.202(g) (1988).

7. Committed Capacity. As used herein, the term "committed capacity" means that amount of electric generating capacity, expressed in kilowatts or megawatts, which the qualifying facility has contractually committed to deliver on a firm basis to a purchasing electric utility, measured at the point of delivery to the purchasing utility.

8. If the Public Service Commission means to apply any different definitions in rendering its declaratory statements on the questions presented, it would greatly assist Polk Power Partners, other cogenerators, and utilities in understanding their rights and responsibilities under the rules if the Commission would clearly state those definitions in its order.

FACTS

Polk Power Partners and the Mulberry Cogeneration Facility

9. Polk Power Partners, L.P., Ltd., is a limited partnership engaged in cogeneration development. Polk Power Partners is presently developing a qualifying cogeneration facility in Polk County, Florida, that is 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 liquid carbon dioxide plant that will be the thermal host of the QF. The cogeneration facility will have a design capacity of 120.6 megawatts (net).

10. At the present time, the Mulberry Cogeneration Facility has two power sales contracts, a 1987-vintage standard offer contract with Tampa Electric Company and a negotiated contract with Florida Power Corporation, approved by the Commission in 1991. In re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, Fla. Pub. Serv. Comm'n Docket No. 910401-EQ, Order No. 24734 (July 1, 1991). Pursuant to the negotiated contract with FPC, the Mulberry Cogeneration Facility is scheduled to begin delivering 72 MW of firm capacity and energy to FPC in April 1994; the contract provides the QF the option of increasing its committed capacity by ten percent, so that the maximum amount of firm capacity that may be sold under this contract is 79.2 MW. The standard offer contract with TECO provides for the sale of 23 MW of firm capacity and energy beginning in 1995.

11. After satisfying its contractual commitments to Florida Power and Tampa Electric, Polk Power Partners still has approximately 18 to 25 MW of cogeneration capacity available to sell into Florida's electric power supply grid.

Additional Cogeneration Projects

12. In addition, Polk Power Partners is planning to develop additional cogeneration projects in Florida. One or more of these projects would likely be in the same size class as the Mulberry Cogeneration Facility, i.e., total net generating capacity of 80 MW to 130 MW, depending on overall project economics, economies of scale in electricity generation and thermal energy recovery,

thermal and electric requirements of potential thermal hosts, and other pertinent factors. Polk Power Partners desires to have the opportunity to sell firm capacity and energy from these projects via standard offer contracts, subject to the rule-imposed limitation that any such standard offer contract would have to provide for the sale of less than 75 MW of firm capacity and energy to the purchasing utility.

Standard Offer Contracts

13. Florida Power Corporation's currently effective standard offer contract has at least 5.1 MW of capacity remaining within its subscription limit. See Florida Power Corporation Tariff, Original Reissue Sheets No. 9.511 & 9.710 (total subscription limit is 80 MW), and Commission Order No. PSC-92-0038-FOF-EQ at page 3 (proposed agency action order requiring that FPC's currently effective standard offer contract remain available "to the extent the eighty megawatt subscription limit remains unfilled").

14. Tampa Electric Company presently has pending before the Commission an application for approval of a new standard offer contract with a subscription limit of 75 MW. In re: Petition for Approval of Standard Offer Contract for Cogenerators and Small Power Producers by Tampa Electric Company, Fla. Pub. Serv. Comm'n Docket No. 920137-EQ, Document No. 01618 in docket file (February 14, 1992). According to the present case schedule, Tampa Electric's proposed new standard offer may become effective as early as June 1992, when the Commission is scheduled to vote and to issue its order on the proposed standard offer tariff.

STATE OF FLORIDA

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

FACSIMILE TRANSMITTAL COVER SHEET

DATE 2/16/96

To: Larry Silverman

Office/Business: Greenberg, Traurig

FACSIMILE NUMBER: 305-579-0717

Telephone Number: _____

From: Martha Carter Brown

Office/Division: PSC

FACSIMILE NUMBER: (904) 413-6250

Telephone Number: (904) _____

COMMENTS: Here is the petition

Number of Pages Including This Cover Sheet: 13

15. Florida Power & Light Company has advised the Commission that "a new FPL standard offer contract will be submitted for the Commission's approval on or about July 1, 1992." In re: Petition of Florida Power & Light Company for Closure of Its Standard Offer Contract Subscription Limit, and for Approval of Cost Recovery of Payments to Be Made Under Two Negotiated Power Purchase Agreements with Wheelabrator North Broward Inc. and Wheelabrator South Broward Inc., Fla. Pub. Serv. Comm'n Docket No. 911140-EQ, Document No. 11468 in docket file, at page 9 (November 19, 1991).

QUESTIONS PRESENTED AND DECLARATORY STATEMENTS REQUESTED

16. Simply, Polk Power Partners respectfully requests the Commission to declare the meaning and applicability of its rules with respect to the availability of standard offer contracts to Polk Power Partners' Mulberry Cogeneration Facility and with respect to additional projects planned by Polk Power Partners. Polk Power Partners has a real and immediate need to know whether it may sign a standard offer contract with a utility for the sale of additional capacity from its Mulberry Cogeneration Facility, or whether, by operation of the Commission's rules, Polk Power Partners' only opportunity to sell that capacity is via a negotiated contract or contracts. Similarly, in view of Polk Power Partners' plans to develop additional QFs, and in view of the fact that both Tampa Electric Company and Florida Power & Light will soon have new standard offers in effect, Polk Power Partners has a real and immediate need to know the meaning of the Commission's rules pertaining to the size limitation for standard offer

contracts with respect to the planned additional qualifying cogeneration facilities. Determination of these issues will affect both Polk Power Partners' immediate ability to sell the additional capacity available from its Mulberry Cogeneration Facility and its near-future cogeneration development plans for other projects.

17. This Petition for Declaratory Statement presents two basic questions of law for the Commission's determination:

> 1. Does the size limitation criterion set forth in Commission Rules 25-17.0832(3)(a)&(c) apply to the committed capacity that a qualifying cogeneration facility sells pursuant to a standard offer contract, or does the size limitation apply to the total net generating capacity of the qualifying facility?
>
> 2. Is a qualifying cogeneration facility with total net generating capacity of more than 75 MW precluded by these rules from accepting a standard offer contract by which it would sell less than 75 MW of firm capacity and energy to a purchasing utility, so that such a QF's only opportunity to sell its cogenerated capacity and energy is via a negotiated contract or contracts?

18. The need for the Commission's declaration arises from the potential ambiguity of the rules with respect to the total net generating capacity of qualifying facilities vis-a-vis the amount of committed capacity that a QF sells to a utility. The terms are frequently used interchangeably, such that a QF with a total net generating capacity of 95 MW that sells only 70 MW to a purchasing utility is frequently referred to as a 70 MW QF.

19. Polk Power Partners respectfully requests the Commission to enter an order declaring that Polk Power Partners may lawfully:

> a. Sell additional capacity from its Mulberry Cogeneration Facility via Commission-approved standard offer contracts; and

b. Sell capacity from other qualifying cogeneration facilities via standard offer contracts, even where the total net generating capacity of the QF exceeds 75 MW, so long as the committed capacity pursuant to any accepted standard offer contract is less than the 75 MW size limitation set forth in the rules.

CONCLUSION

20. Polk Power Partners is in doubt as to its rights under the Commission's cogeneration rules to sell firm capacity and energy from facilities that may have more than 75 MW of total net generating capacity. Polk Power Partners has a real and immediate need to know the Commission's interpretation of its rules because it has additional cogeneration capacity available for sale from its Mulberry Cogeneration Facility, because the Commission's determination of these questions will affect Polk Power Partners' current development efforts regarding other projects, and because Florida's three largest investor-owned utilities either presently have or will soon have standard offer contracts in effect.

WHEREFORE, Polk Power Partners respectfully asks the Commission to enter its order declaring the meaning of its rules, and declaring that Polk Power Partners may lawfully:

a. Sell additional capacity from its Mulberry Cogeneration Facility via Commission-approved standard offer contracts; and

b. Sell capacity from other qualifying cogeneration facilities via standard offer contracts, even where the total net generating capacity of the QF exceeds 75 MW, so long as the committed capacity pursuant to any accepted standard offer contract is less than the 75 MW size limitation set forth in the rules.

Respectfully submitted this 28th day of May, 1992.

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Counsel for Polk Power Partners, L.P., Ltd.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Polk Power Partners for a Declaratory Statement Regarding Eligibility for Standard Offer Contracts	Docket No. _____ Submitted for Filing: May 28, 1992

MOTION FOR EXPEDITED DISPOSITION

Polk Power Partners, L.P., Ltd. ("Polk Power Partners"), pursuant to Commission Rule 25-22.037, respectfully moves the Commission to expedite its consideration and disposition of Polk Power Partners' Petition for Declaratory Statement filed concurrently herewith. As grounds for the requested expedited treatment of its petition, Polk Power Partners states as follows.

1. Polk Power Partners has simultaneously filed a Petition for Declaratory Statement requesting the Commission to issue an order declaring that Polk Power Partners may, via Commission-approved standard offer contracts, lawfully sell firm capacity and energy from qualifying facilities that have total net generating capacity greater than 75 megawatts (MW), so long as the committed capacity in any such standard offer contract is less than 75 MW.

2. The facts upon which the Petition for Declaratory Statement is predicated establish the following:

a. Polk Power Partners is presently developing one qualifying cogeneration facility, the Mulberry Cogeneration Facility in Polk County, Florida, and is planning to develop additional cogeneration facilities in Florida;

b. Polk Power Partners desires to sell capacity from the Mulberry Cogeneration Facility and from its other planned

facilities via standard offer contracts;

c. Tampa Electric Company currently has pending before the Commission an application for approval of a new standard offer contract that will likely become effective in June 1992; and

d. Florida Power & Light Company has advised the Commission that FPL expects to file a new standard offer contract for the Commission's approval on or about July 1, 1992.

3. Accordingly, Polk Power Partners' interests will be substantially affected by the Commission's interpretation of the subject rules, and in view of the timing of TECO's and FPL's new standard offer contracts, Polk Power Partners has a real and immediate need to know whether it can sell capacity via standard offer contracts or whether it can lawfully do so only pursuant to negotiated contracts.

4. Polk Power Partners is in doubt as to its rights under the Commission's rules because of potential ambiguity as to whether the 75 MW maximum size limitation applies to the total net generating capacity of the qualifying facility or to the amount of committed capacity that the QF proposes to sell via a standard offer contract.

5. The questions of law posed by the Petition for Declaratory Statement do not present complex legal or factual issues. Rather, they are straightforward requests for the Commission's determination and interpretation of the meaning of its standard offer contract rules. Accordingly, no hearing or oral argument should be necessary for the Commission to render the declaratory

statements requested by Polk Power Partners' Petition.

WHEREFORE, Polk Power Partners respectfully requests that the Commission consider and dispose of its Petition for Declaratory Statement as soon as possible.

Respectfully submitted this 28th day of May, 1992.

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