BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Consolidated Minerals, Inc. against Florida Power and Light Company for Failure to negotiate cogeneration contract.	DOCKET NO. 911103-EI ORDER NO. PSC-92-0703-FOF-EI ISSUED: 7/22/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
BETTY EASLEY

FINAL ORDER

BY THE COMMISSION:

Pursuant to Notice, the Florida Public Service Commission held a public hearing on this matter in Tallahassee, Florida on March 18-20, 1992. Having considered the record in this proceeding, the Commission now enters its Final Order. Specific responses to Florida Power and Light Company's proposed findings of fact are appended to our order in Appendix I.

Case Background

On October 31, 1991, Consolidated Minerals, Inc. (CMI) filed a complaint with the Commission alleging that Florida Power and Light Company (FPL) failed to negotiate a cogeneration contract with CMI in good faith.[1] On November 20, 1991, Florida Power and Light Company filed a Motion for More Definite Statement, which we denied in Order No. 25413, issued December 2, 1991. FPL then filed its Answer and Affirmative Defenses to the Complaint on December 13, 1991.

The prehearing conference was held on February 24-25, 1992. The prehearing officer issued several procedural orders before the hearing, and ruled on all motions to compel discovery, requests for

[1] CMI simultaneously filed a complaint in the Circuit Court of the Seventh Judicial Circuit based on the same facts alleged in its complaint before the Commission. In response to the Circuit Court action, FPL filed a Motion to Dismiss and Motion to Stay Proceedings on December 9, 1991. The parties have stated that the circuit court proceedings have been stayed until the conclusion of the proceedings before the Commission.

official recognition of Commission documents, and requests for confidentiality. The hearing was originally scheduled for February 6 and 7, 1992. FPL filed a Motion for a Continuance of the hearing on December 20, 1991. The motion was granted, and the hearing was held on March 18-20, 1992.

Decision

Rule 25-17.0834, Florida Administrative Code - The Obligation to Negotiate in Good Faith

Our comprehensive cogeneration rules recognize that cogenerators and small power producers meet the Legislature's objectives of economically reducing dependence on foreign oil and the economic deferral of utility power plant expenditures. To encourage the development of cogeneration and thus further that legislative objective, Rule 25-17.0834, Florida Administrative Code, requires public utilities to negotiate in good faith for the purchase of capacity and energy from cogenerators.

Rule 25-17.0834, entitled, Settlement of Disputes in Contract Negotiations, provides:

> (1) Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in 366.051, Florida Statutes, should the Commission find that the utility failed to negotiate in good faith.
>
> (2) To the extent possible, the Commission will dispose of an application for relief within 90 days of the filing of a petition by either a utility or a qualifying facility.
>
> (3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility as approved by section 350.127, Florida Statutes.

The rule encompasses proposed cogeneration projects as well as those facilities already certified by the Federal Energy Regulatory Commission as Qualifying Facilities (QFs). We do not exclude proposed cogeneration projects from our good faith negotiations rule simply because the proposed cogenerators have not obtained QF status. At some point in the process, a cogenerator is obligated to seek qualifying facility status from FERC, but a utility's obligation to negotiate in good faith with proposed QFs begins when negotiations commence, not when a QF is certified as such from FERC.

There are in fact no threshold requirements that a potential QF must meet before triggering a utility's obligation to negotiate in good faith. A utility has the obligation to negotiate in good faith with QFs under any and all circumstances. In the course of the negotiating process a proposed cogeneration project must be defined with a reasonable degree of specificity, but this reasonable degree of specificity is not a threshold requirement that must be met before a regulated utility must negotiate in good faith with the proposed cogeneration project. A cogenerator is entitled to the benefit of good faith negotiations with a utility at the outset.

Likewise, a utility is entitled to the benefit of good faith negotiations under our rule, as well, and a cogenerator is equally obligated to negotiate in good faith with a utility. Florida law dictates that all contracts shall be entered into in good faith by the parties. From that legal principle, one may reasonably infer that negotiations preceding the contract shall also be conducted in good faith. This principle and its corollary apply to contracts for the purchase of cogenerated power and the negotiations that precede their execution as much as they apply to other contracts. Rule 25-17.0834, Florida Administrative Code, thus imposes the obligation to negotiate in good faith on QFs as well as on utilities. Any other interpretation of this rule would be inconsistent with Florida law.

FPL argues that the party raising a claim under Rule 25-17.0834 must first show that it dealt in good faith with the party it has accused of not acting in good faith. There is no such condition precedent to filing a complaint under the provisions of Rule 25-17.0834. The determination of whether the parties negotiated with each other in good faith is a factual question which should be dealt with in an evidentiary proceeding. If it is

shown that the complaining party itself failed to negotiate in good faith, that fact could well affect the relief we would grant under the particular circumstances of the case. Such an allegation, however, does not preclude us from hearing the complaint at all.

FPL would also have us only grant relief under Rule 25-17.0834, Florida Administrative Code, if a potential QF shows:

> (1) that the contract proposal(s) about which it claims the regulated utility refused to negotiate are reasonably related to the Commission's standards for contract approval and the statutory requirements for an affirmative determination of need; and (2) that the QF provided a reasonable amount of project information to the utility. (FPL's brief at 55).

While a proposed cogeneration project may not meet our standards for contract approval or the statutory requirements for an affirmative need determination initially, this does not preclude the utility and the project proposer from ultimately signing a negotiated contract that would meet the regulatory and statutory requirements. If a utility were only required to negotiate in good faith with those cogenerators that could obtain contract approval or an affirmative determination of need at the outset, why would there be any need to negotiate at all? Most QFs seek an affirmative determination of need after negotiations have concluded and they have executed a contract with a utility. Certainly the negotiation process is related to the contract approval and need determination process when a cogenerator proposes to sell more than 75MW of electricity to a utility, but they are not the same, and they should not be confused with each other.

A utility has the obligation to fulfill its capacity needs by the most cost-effective means available, as Section 403.519, Florida Statutes, prescribes, but under the provisions of Rule 25-17.0834, Florida Administrative Code, a utility does not have the obligation to enter into a <u>contract</u> with every cogenerator that approaches it. If a utility were to sign a negotiated contract with every cogenerator that comes to it with a proposal, it would most probably be ignoring its mandate to obtain the most cost-effective and needed energy for its ratepayers. A utility's obligation to negotiate in good faith is independent of its obligation to fulfill its capacity needs by cost-effective means to the extent that a utility is not relieved of its negotiating obligation toward those cogenerators whose projects ultimately turn out not to be the most cost effective alternative available.

Our rule contemplates a broad interpretation of the phrase "to negotiate." The phrase should not be construed so narrowly as to frustrate the rule's fundamental objective. Since negotiations may vary on a case by case basis, we will determine on a case by case basis whether or not a utility has negotiated in good faith. Any information exchanged between parties is a basis for negotiation, and both parties are required from that starting point to make a good faith effort to reach agreement. Sufficient information must be exchanged for each party to evaluate the other's proposals and to negotiate with the other party. This does not mean, however, that an executed contract will always, or necessarily must, result, and it does not mean that a utility must divulge a price below its own avoided cost at which it will execute a contract. Neither state nor federal law requires a utility to provide a cogenerator with a the ultimate price below its avoided costs at which it would execute a contract. Such a requirement would deprive the utility of its bargaining power and would thus not be in the best interest of the utility's ratepayers. Such a requirement could exclude other proposals that could meet the same need at an even lower cost.

Under applicable state and federal law a utility has three obligations in negotiating to purchase energy and capacity from cogenerators. These obligations consist of negotiating in good faith, providing cogenerators with its avoided costs, and providing cogenerators with expansion plans.

Pursuant to Rule 25-17.0832(7), Florida Administrative Code, a utility is required, upon request, to

> provide ... its most current projections of its future generation mix including type and timing of anticipated generation additions, and at least a 20-year projection of fuel forecasts, as well as any other information reasonably required by the qualifying facility to project future avoided cost prices.

This will provide a cogenerator with adequate information concerning a utility's future need for capacity and energy.

In order to assure that the ratepayers are protected and that the ratepayers are benefited by the best project available, a utility must review and evaluate all information that it receives that is pertinent to a proposed cogeneration project. FPL interprets this obligation as a limitation on its obligation to negotiate in good faith with those projects. FPL contends that it does not have to negotiate in good faith to reach agreement for the

purchase of cogenerated capacity until it has completely reviewed and evaluated a project. This is not so. A utility's obligation to negotiate in good faith with a cogenerator begins at first contact and continues throughout the process until negotiations are consummated by a contract or discontinued for good faith inability to reach agreement.

Good Faith Negotiations

Florida law embraces the principle that a covenant of good faith and fair dealing is implied in the performance and enforcement of every contract. See Restatement 2d of the Law of Contracts, Section 205; The Uniform Commercial Code, Sections 1-201(19), 1-203, and 2-103(1); Department of Insurance, State of Florida v. Teachers Insurance Co., 404 So. 2d 735 (Fla. 1981); and, First Texas Savings Association v. Comprop Investment Properties, Ltd., 752 F. Supp. 1568 (M.D. Fla. 1990). Rule 25-17.0834, Florida Administrative Code, has clearly applied this principle to utility-cogenerator contract negotiations. The rule does not establish specific criteria for evaluating the quality of a utility's negotiations with a cogenerator. The evaluation must be made on the basis of the facts presented in a particular case, and the overall conduct of the parties throughout the course of the negotiations must be considered.

Good faith has generally been described as a moral quality equated with honesty of purpose, freedom from fraudulent intent, and faithfulness to duty or obligation. Lack of good faith involves more than bad judgment, negligence or insufficient zeal. It carries with it an implication of a dishonest purpose, conscious wrong or breach of a duty through self-interested motives or ill will.

The term good faith is defined in the Uniform Commercial Code as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the industry." In labor relations, good faith negotiations require a genuine desire to reach agreement. Parties must make a serious attempt to resolve their differences and reach common ground. They must come to the bargaining table with an open mind and a sincere desire to reach agreement. Duval County School Board v. Florida Public Employee Relations Commission, 353 So. 2d 1244 (Fla. 1st DCA 1978). Good faith bargaining must involve more than superficial efforts to negotiate an agreement. National Labor Relations Board v. Generac, 354 F.2d 625 (7th Cir. 1965). With respect to the relationship between electric utilities and cogenerators, the directive of Rule 25-17.0834 to negotiate in good faith means that all parties to the negotiation should show a willingness and effort to reach a prudent

and reasonable agreement for needed and cost-effective generating capacity. But the requirement to negotiate in good faith does not mean that an agreement must be reached, or that either side must surrender any of its duties and responsibilities. Fargo Education Association v. Paulsen, 239 N.W. 2d 842 (N.D. 1976).

CMI's Complaint

The gravamen of CMI's claim is that for approximately two years beginning in the fall of 1989, Florida Power and Light Company stalled negotiations for the purchase of 400-600 MW of cogenerated capacity from CMI's proposed Pine Level Project, an integrated industrial complex designed to include a phosphate mine and processing plant, a cement plant, a fertilizer plant, a sulfur recovery plant and sulfuric acid plant, and a 600-700 MW cogeneration facility. CMI contends that FPL refused to engage in meaningful negotiations, repeatedly requested additional and repetitive information from CMI about the project, changed negotiating personnel, and changed the standards by which it would consider CMI's proposal. CMI claims that those actions taken together demonstrated a course of conduct by FPL that amounted to a failure to negotiate in good faith with a cogenerator, a violation of Commission Rule 25-17.0834, Florida Administrative

FPL responds that its conduct toward CMI did not constitute a failure to negotiate in good faith, but rather was a reasonable response to a changing cogeneration market, a changing regulatory environment, and CMI's own conduct during the negotiations. FPL claims that it was justified in taking considerable time to negotiate with CMI and to carefully evaluate CMI's project because of the project's size and complexity, because CMI failed to provide it with the information it needed to evaluate the project effectively, because CMI misled FPL with respect to the environmental permitting process for the project and because CMI's proposal to sell 400- 600 MWs of cogenerated capacity was never the most cost-effective alternative available to FPL.

Keeping in mind the legal principles described above, we hold that CMI did not prove by a preponderance of the evidence that FPL failed to negotiate in good faith. CMI has not demonstrated that FPL's negotiations with CMI were motivated by a dishonest purpose, that FPL committed a conscious wrong or breach of a duty through self-interested motives or ill will. Instead, the evidence demonstrates that FPL's intent was to adhere to its obligation to its customers and the regulatory responsibilities imposed upon it. In attempting to do so, it did not fail to negotiate in good faith with CMI.

It is true that negotiation over the Pine Level Project was a lengthy process. It is also true that FPL's negotiating methods changed from 1989 to 1991. But the protracted nature of the negotiations and the change in negotiating methods were not caused by FPL's failure to act in good faith. Rather, they were caused by the change in the cogeneration market, the change in the regulatory environment in which FPL operated, and the large size and complicated nature of the proposed CMI project. Further, CMI's own actions - in failing to provide FPL with needed information, in ending negotiations to sign FPL's standard offer contract, and in neglecting to fully inform FPL of the questionable status of its environmental permitting - contributed to the length and difficulty of the negotiations.

During the course of dealing between CMI and FPL, CMI did not provide sufficient information to FPL in order for a reasonable evaluation of the Pine Level Project to be performed until the spring of 1991. It was CMI's failure to provide adequate information to FPL that prompted FPL's repeated requests for that information. Even in the Summer of 1991, when FPL did make an evaluation of CMI's proposal along with other alternatives, FPL did not have sufficient information concerning the environmental permitting problems CMI was experiencing, including the difficulties CMI was experiencing with the Environmental Protection Agency's phosphogypsum rule, to adequately evaluate the reliability of the proposed project. CMI misrepresented the status of the environmental permitting associated with the Pine Level Project. There is evidence in the record to show that the environmental permitting problems which faced CMI placed the Pine Level Project in jeopardy, a fact CMI specifically alleged in its filings before the EPA requesting reconsideration of the phosphogypsum rule. CMI did not inform FPL of these problems, and, in fact, represented to FPL that there were no problems. Had FPL selected CMI to meet a future capacity need, and the project was not approved for environmental reasons, FPL's ratepayers could have been harmed.

The record shows that while all CMI proposals provided a basis for negotiation, none of the proposals submitted by CMI would have been the most cost-effective alternative available to FPL. Of all the proposals CMI made to FPL, excluding the standard offer it signed in June 1990, only the March 13, 1991 proposal was below FPL's avoided cost, and that proposal was not as cost-effective as other proposals FPL was considering. While this fact does not relieve FPL of its responsibility to negotiate in good faith with CMI, it does it demonstrate that it was reasonable for FPL to compare CMI's proposal to other generating alternatives in the Spring and Summer of 1991. It is a utility's obligation to meet the needs of its customers in the most cost-effective manner

possible. By comparing proposals, FPL was able to determine which were the most cost-effective. The record does not show that FPL used this comparison process in a manner that singled out, or discriminated against, CMI. Nor does the record show that FPL made a commitment to purchase firm capacity and energy from the Pine Level project. FPL made general statements of encouragement and interest, which are reasonable in good faith negotiations. We find that CMI did not reasonably rely upon the statements of FPL in taking the actions it did to develop the Pine Level project.

During the course of negotiations between CMI and FPL, a greater number of alternative generating facilities were proposed to FPL than had ever been proposed before. Several of the proposed projects were quite large compared to earlier cogeneration projects. CMI's Pine Level Project itself was a large, complex industrial facility with interrelated processes. Because of the impact such large cogeneration facilities can have on a utility's system and its ratepayers, a higher degree of understanding of the project is required on the part of the purchasing utility, and extensive evaluations of the proposals are justified. Careful evaluation insures that the proposal selected will be in the best interest of the ratepayers. There were also significant changes in the regulatory environment during the 1989-1990 time period, including changes to our cogeneration rules and our determination to require cogenerators and utilities to seek Commission determination of the utility's need for power from cogeneration projects greater than 75 MWs. FPL's response to these changes was reasonable, in that it committed resources to more effectively negotiate with alternative power generators, including CMI.

With the exception of the period during which FPL organized its bulk power markets department, FPL did not refuse to discuss the Pine Level Project with CMI, and the hiatus in negotiations caused by FPL's reorganization was not directed at CMI alone. We do not find sufficient evidence in the record to show that FPL was motivated by any intent to avoid any obligations it had toward CMI, but rather FPL was motivated by its accurate perception that the changing cogeneration market and the changing regulatory environment required a change in the manner in which it evaluated cogeneration projects and contracted with large cogenerators. CMI's termination of contract negotiations to sign FPL's standard offer contract contributed as much to the protracted nature of the negotiations as FPL's reorganization. FPL intended to adhere to its regulatory obligations and responsibilities. It did not fail to negotiate in good faith with CMI in doing so.

It is, therefore,

ORDERED by the Florida Public Service Commission, for the reasons stated above, that Florida Power and Light did not violate Rule 25-17.0834, Florida Administrative Code, in the conduct of its negotiations with Consolidated Minerals, Inc. It is further

ORDERED that this docket be closed.

By ORDER of the Florida Public Service Commission this 22nd day of July, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by 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.

Proposed Findings of Fact
Docket No. 911103-EI

Appendix I

1. During negotiations from September 1989 through June 1990, FPL's avoided units were 1993, 1994 and 1995 combined cycle units. These units were shown in FPL's APH filings, and combined cycle units were shown as capacity additions on FPL's system in FPL's Ft. Lauderdale and Martin 3 and 4 need filings and FPL's capacity RFP materials, all of which CMI had or had access to. Tr. 378, 370-76 (Bush); Exs. 35, 36, 39, 15, 18; Tr. 218 (Stephens); Ex. 96 (SSW-1), (SSW-2), (SSW-3); Tr. 1225-29 (Waters).

We accept the above proposed finding of fact.

2. The only proposal CMI submitted to FPL between the initiation of discussions in September 1989 and CMI's submission of a Standard Offer in June 1990 was CMI's October 6, 1989 draft contract, supplemented by CMI's December 1989 capacity payment schedule. Ex. 32 (CWB-3) at 10, (CWB-10); Tr. 134-35 (Gregg). CMI's October/December 1989 proposal was not a credible offer. Tr. 1233 (Waters). It combined capacity payments for a coal unit almost three times greater than the capacity payments of FPL's combined cycle avoided unit with oil-based as-available energy prices. Id.; Tr. 135, 138-39 (Gregg).

We accept the above proposed finding of fact.

3. FPL informed CMI that its October 6, 1989 contract proposal was inadequate and that a number of new or additional contract provisions would need to be addressed once sufficient information had been provided to FPL to allow it to assess various aspects of the feasibility of CMI's project. Tr. 726-27, 1266-71 (Hawk).

We accept the above proposed finding of fact.

4. FPL informed CMI at the April 5, 1990 meeting that there was an opportunity to negotiate a contract to meet FPL's 1996 capacity need, an IGCC unit, and CMI committed at the June 5, 1990 meeting to provide the information necessary to conduct such a negotiation. Tr. 926-32, 939, 947, 1081-82, 1084, 1362 (Cepero); Tr. 416, 453 (Bush).

We accept the above proposed finding of fact.

5. CMI's responses to FPL's September 14, 1989 request for information were incomplete. Ex. 32 (CWB-3); Tr. 722, 726-27 (Hawk), 384-86 (Bush); Ex. 112 at 199-21.

We reject the above proposed finding of fact because it is vague, in that it does not refer to specific CMI responses.

6. CMI did not respond to FPL's October 17, 1898 request for information. Tr. 730-31, 805, 814 (Hawk).

We reject the above proposed finding of fact because it is not based on evidence of record. CMI did respond to FPL concerning the PRECO issues. Tr. 732-33 (Hawk).

7. Despite repeated FPL requests for information necessary to evaluate CMI's project, CMI waited until October 16, 1990 to provide FPL with detailed project information. Tr. 413-17, 428-29, 432 (Bush), 1380 (Cepero) ; Ex. 19; Ex. 99 (GRC-26).

We reject the above proposed finding of fact because it is argumentative and contains vague references.

8. CMI repeatedly requested preferential treatment, asking FPL to exclude other potential suppliers from consideration or to disclose the price at which CMI could be assured of a contract. Tr. 939-40, 943, 946, 965, 970, 1044-45, 1051, 1086-87, 1094-95, 1096-97, 1336, 1341, 1360 (Cepero); Tr. 263 (Stephens); Ex. 28 at 1.

We accept the above proposed finding of fact.

9. CMI knew FPL's avoided cost, yet from its first proposal in October/December 1989 until March 1991, every CMI pricing proposal for a negotiated contract was above FPL's avoided cost. Tr. 1230-35, 1435-36 (Waters); Tr. 370-76, 474, 505-06, 531-32 (Bush), Tr. 948-49, 1047, 1329, 1331-32, 1342-48 (Cepero), Ex. 96 (SSW-4), Ex. 15; Ex. 18; Ex. 35; Ex. 36.

We accept the above proposed finding of fact.

10. CMI expressed an intent to provide capacity that would defer FPL's 1995 capacity need, even though it knew FPL's 1995 avoided unit was a combined cycle unit, had determined as early as October 1989 that CMI could not economically build a coal-fired plant on combined cycle avoided costs, and had no intention of deferring FPL's 1995 combined cycle capacity. Tr. 47, 77-8, 140-41 (Gregg), Tr. 204 (Stephens), Tr. 378-79 (Bush), Tr. 574 (Bromwell), Tr. 1272-73 (Hawk), Ex. 112 (Bush Depo.) at 212, 218.

We accept the above proposed finding of fact.

11. In response to FPL's expressed concerns about environmental permitting for CMI's Pine Level project (Tr. 622-23, Bromwell, 730, Hawk), CMI misled FPL by representing that CMI did not believe it would have any problems in securing its permits. Tr. 626-28 (Bromwell), Ex. 51.

We accept the above proposed finding of fact.

12. CMI's October 16, 1990 contract proposal exceeded FPL's avoided cost by over $400 million (Tr. 1234, Waters), the cost of the ICL contract by $127 million (Ex. 104 (SSW-1)) and the standard offer CMI had withdrawn by $176 million (Ex. 104 (SSW-2)).

We accept the above proposed finding of fact.

13. FPL clearly and repeatedly informed CMI that it was considering other alternatives to meet its capacity needs and that CMI's proposals would be compared to other alternatives. Tr. 939-44, 946, 950, 1325-28 (Cepero).

We accept the above proposed finding of fact.

14. CMI was not selected to meet FPL's need for additional capacity in 1998 because of the six projects evaluated by FPL for meeting that need, CMI ranked fourth on the basis of economics and sixth overall. Tr. 1441 (Waters), 1161-62 (Sears); Ex. 104 (SSW-3, Rebuttal).

We accept the above proposed finding of fact.

15. FPL's decision not to select CMI to meet the need for additional generating capacity in 1998 was not based on a plan or intent by FPL to gain favor with public officials and citizens opposed to CMI's proposed Pine Level project so as to lessen the opposition of those groups to potential future FPL construction projects in DeSoto County. Tr. 1221-22 (Waters).

We reject the above proposed finding of fact because it is irrelevant to the decision in this case.

16. In the 1983 conversation between Mr. Collier and Mr. Gregg, where Mr. Collier was attributed to have expressed an interest in FPL purchasing additional cogenerated power (Tr. 45, Gregg), the Ridgeland equipment was not discussed, a starting point or completion date for any project to be developed by Mr. Gregg was not discussed, the price for any power from a project to be

developed by Mr. Gregg would not discussed, and a cogeneration project at the Pine Level site would not have been discussed because Mr. Gregg did not conceive of the Pine Level project until 1989. Tr. 128, 129, 133 (Gregg), 566 (Bromwell); Ex. 112 at 105.

We accept the above proposed finding of fact.

17. In the fall of 1989, FPL told CMI it would have to provide information for FPL to evaluate its project, and FPL told CMI that negotiation would be contingent on FPL having the information it requested and being able to evaluate CMI's project. Tr. 621 (Bromwell), 721, 727, 1265-66 (Hawk); Ex. 32 (CWB-2).

We accept the above proposed finding of fact.

18. FPL informed CMI in the fall 1989 meetings that it was considering other alternatives to meet its capacity needs. Tr. 619-20 (Bromwell), 729-30 (Hawk).

We accept the above proposed finding of fact.

19. In the fall of 1989 FPL did not commit to contract with CMI within 60 days. Tr. 620-21 (Bromwell), 1262, 1269-71 (Hawk).

We accept the above proposed finding of fact.

20. General Electric Credit Corporation (GECC) did not commit to loan CMI $12 million for project development based on FPL's encouragement at the September 14, 1989 meeting; GECC did not commit to preliminary development funds to CMI until over a year later, and the agreement committed neither CMI nor GECC to build the project. Tr. 88-92 (Gregg); Ex. 22.

We accept the above proposed finding of fact.

21. FPL did not ask CMI to fast track permitting for the Pine Level project. Tr. 636 (Bromwell), 1273-77 (Hawk). CMI was already committed to fast track permitting for the Pine Level project when CMI came to meet with FPL in September 1989. Tr. 617-18, 636-38 (Bromwell), Tr. 78 (Gregg).

We accept the above proposed finding of fact.

22. In the fall of 1989, FPL clearly expressed concerns about CMI's environmental circumstances, particularly permit filing and feasibility. FPL expressed unfamiliarity with non-power plant

permitting and looked to CMI for assurance that CMI could license its project and do so on the permitting schedule that it presented to FPL. Tr. 621-24 (Bromwell), 722-32, 730, 800, 805-06, 814, 1265-66, 1273-78 (Hawk); Ex. 32 (CWB-6).

We accept the above proposed finding of fact.

23. CMI never told FPL about its permitting path uncertainty. Tr. 627-28 (Bromwell).

We reject the above proposed finding of fact because it is vague.

24. CMI understood that it was undertaking its permitting costs at its own risk. Tr. 679, 680 (Bromwell).

We accept the above proposed finding of fact.

25. FPL told CMI that CMI was spending money for permitting and project development at CMI's risk. Tr. 1384 (Cepero).

We accept the above proposed finding of fact.

26. CMI knew from the start of negotiations in September 1989 that it was not assured of a contract from FPL. Ex. 66 (GRC-6).

We accept the above proposed finding of fact.