

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition for a declaratory statement concerning the
financing of a cogeneration facility by SEMINOLE FERTILIZER
CORPORATION.

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BEFORE: Florida Public Service Commission CHAIRMAN MICHAEL WILSON
COMMISSIONER GERALD GUNTER
COMMISSIONER THOMAS BEARD
COMMISSIONER BETTY EASLEY
COMMISSIONER FRANK MESSERSMITH

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 3

DATE: Tuesday, October 16, 1990

PLACE: 106 Fletcher Building
Tallahassee, Florida

REPORTED BY: JANE FAUROT
Notary Public in and for the
State of Florida at Large

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

DOCUMENT NO.
10795-90
12/6/90

PARTICIPATING:

Cindy Miller, Commission Staff
Richard Zambo, Seminole Fertilizer Corporation
Paul Sexton, Seminole Fertilizer Corporation
Wilkes McClave (phonetic), Seminole Fertilizer Corp.
Elliot Loyola (phonetic), Seminole Fertilizer Corp.

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STAFF RECOMMENDATIONS

Recommendation 1: That the Commission issue a declaratory statement. The petition appears to meet the threshold standards for issuing a declaratory statement.

Recommendation 2: That since this is a close question, the petitioner should be allowed to participate at the Conference.

Recommendation 3: That the Commission issue the proposed declaratory statement which answers Seminole's petition in the negative. Denial is appropriate because the issue raised concerns this Commission's jurisdiction. A legal determination is being requested which should be consistent with Florida and federal precedents. Those precedents allow for ordinary leases of cogeneration equipment and for sale-leaseback financing of such equipment. This is, however, no precedent for the proposal before us, where a lessee cogenerates power, a lessor non-cogenerator owns and sells some of that power to utilities, and the expense of power production is shared between the two.

Alternative Recommendation: The Commission could, as a matter of policy, grant the petition.

P R O C E E D I N G S

1
2 MS. MILLER: Commissioners, Item 3 is a petition for
3 declaratory statement by Seminole Fertilizer Corporation.
4 The key issue is whether the proposed financing
5 restructure would result in the jurisdictional supplying
6 of electricity to or for the public within the state.
7 Section 366.02, Florida Statutes, sets forth that test
8 for when an entity is deemed a public utility which is
9 subject to our jurisdiction. We believe this to be a
10 close call and have provided alternative analyses for
11 your consideration. The primary recommendation is
12 against the Petitioner's request that we essentially
13 disclaim jurisdiction. The alternative recommendation is
14 that we grant the request. This is an unusual
15 jurisdictional situation where we find ourselves
16 believing that either path would be legal.

17 The first alternative more closely aligns with your
18 past decisions of P.W. Ventures and Metropolitan Dade.
19 The alternative recommendation follows new statutory
20 guidance about encouraging cogeneration. This petition
21 does not present the same set of facts which you denied
22 in P.W. Ventures. It also presents a different set of
23 facts than you had in Monsanto, which you granted.

24 Petitioners are here to speak on this, and in Issue
25 2 we requested that they be allowed to do so, even though

1 normally in declaratory statements we do not do that.

2 CHAIRMAN WILSON: All right. Commissioners, are
3 there any questions to begin with?

4 COMMISSIONER BEARD: Do we need to do something on
5 Issues 1 and 2 in order to get to 3?

6 MS. MILLER: We have recommended that you do address
7 this petition. I know that in some of our petitions for
8 a declaratory statement we have said we didn't think it
9 met the test.

10 COMMISSIONER BEARD: I guess what I am saying, let
11 me make it simple, I would move Issues 1 and 2 which
12 allows us then to get to 3 for the more substantive
13 discussion.

14 COMMISSIONER GUNTER: I have no problem with that.

15 CHAIRMAN WILSON: All right, without objection,
16 then, the Staff recommendation on Issues 1 and 2. Mr.
17 Zambo?

18 MR. ZAMBO: Commissioners, Richard Zambo and Paul
19 Sexton appearing on behalf of Seminole Fertilizer
20 Corporation. I also have with me today two
21 representatives of Seminole Fertilizer, I have Mr. Wilkes
22 McClave (phonetic) seated at my left, who is a director
23 and an officer of Seminole, I also have Mr. Elliot Loyola
24 (phonetic) seated at my right who is the manager of
25 engineering for Seminole Electric at their Bartow

1 facilities. Commissioners, this is an extremely
2 important and crucial issue for Seminole, because of that
3 we beg your indulgence. We would like to present a short
4 presentation by each of these gentlemen to more fully
5 inform you of the facts and circumstances surrounding the
6 project. The issuance of the declaratory statement is
7 really key to Seminole being able to proceed with
8 financing of the facility, and ultimately adding about 60
9 megawatts of waste heat cogeneration to their existing
10 site where they currently operate a 37 megawatt plant.

11 Mr. Loyola will first speak to you and address
12 technical and operational aspects of the proposed
13 facility, and Mr. McClave will address financial and
14 structural issues surrounding the lease financing that we
15 propose. Following that, Mr. Sexton and I would be
16 prepared to address any legal questions or legal issues
17 that might come up. If there is no objection to that
18 approach I would like to have Mr. Loyola briefly discuss
19 the operational aspects with you.

20 CHAIRMAN WILSON: All right, Mr. Loyola?

21 MR. LOYOLA: First, I will tell you who Seminole
22 Fertilizer Corporation is. We are a wholly-owned
23 subsidiary of Tosco Oil Company (phonetic), a Fortune 500
24 company, and Seminole owns and operates a large phosphate
25 mine and a 14-plant chemical complex where we convert the

1 mined phosphate rock to fertilizer. All of that is in
2 Polk County in central Florida. We are the fifth largest
3 phosphate fertilizer producer in the country. We sell
4 most of our product in the export market, it is a very
5 highly competitive market and it contributes a great deal
6 to our positive balance of trade. And to make it easier
7 for some of you that have been around here a good while,
8 these are the former facilities of W. R. Grace and
9 Company. The reactions, the chemical reactions in our
10 chemical processes at the chemical complex produce a
11 great deal of waste heat and we currently capture about
12 half of that waste heat to convert it to steam and make
13 electricity in a 37-megawatt cogeneration facility. We
14 have been doing that for five years, doing it very
15 successfully, we have a 99.9 percent operating factor and
16 that supplied about 80 percent of our electricity
17 requirements. But it's not good enough, we are still
18 letting half of that waste heat literally go up the stack
19 and be wasted to the atmosphere, and that is free energy
20 just getting away from us. And we are in a highly
21 competitive commodity business and simply can't afford
22 that. Our solution is to capture the rest of that heat.
23 With current technology we can get most of the rest of
24 that heat and wring all of it out. We would do that with
25 another 37-megawatt waste heat steam driven generator.

1 And because this bottom-of-the-barrel heat is not the
2 high quality super heated steam we used on the other, we
3 will also supplement that with a gas-fired combustion
4 turbine. The exhaust from that will superheat this steam
5 so that we can get the last drop of energy out of this
6 process. Now, I only mentioned the sizes of these
7 machines and how they interrelate because we have been
8 asked several times why not just dedicate one
9 cogeneration facility to selling power, and dedicate one
10 to using ourselves, and they are just not the convenient
11 size for doing that. They have been sized for the most
12 efficiency and the economic optimum size.

13 What we have proposed to do there, which is adding
14 about 65 more megawatts of cogeneration, I think is good
15 for everybody; we get to utilize our waste heat to
16 improve our position in a very competitive market, so we
17 can stay a good healthy taxpayer and employer in Florida.

18 Florida Power Corporation, to whom we propose to
19 sell the electricity, and are very near an agreement with
20 them, they get 40 or 50 megawatts of firm capacity
21 beginning in 1992, which is the time that they need it
22 the most. To put that in perspective, that 40 to 50
23 megawatts is enough to take care of the electricity needs
24 of 20,000 Florida homes. Florida is a growing state, you
25 can say that means 20,000 more families can move in

1 without having to build an expensive new power plant to
2 put it in the rate base, or you could say during the next
3 big Christmas freeze maybe there will be 20,000 homes
4 less subject to rolling blackouts. Anyway, it is
5 something that is going to be good for everybody. We
6 want to do it, Florida Power Corporation wants us to do
7 it, as I understand the policy of this Commission, this
8 is good natural cogeneration, and you would want us to do
9 it. There is one, only one obstacle that keeps us from
10 doing it overnight and that is that it takes some money.
11 I referred to this as free energy going up the stack, and
12 it is free energy but it's not free electricity. It
13 takes a tremendous amount of capital for the conversion
14 machinery to make that waste heat into electricity, and
15 Wilkes McClave, who is with us today has been charged
16 with finding a way to find us these tens of millions of
17 dollars to do this project, and I think he can explain
18 why we have chosen a particular financing vehicle.

19 CHAIRMAN WILSON: Before you go on let me ask you a
20 couple of questions. The generation you currently have
21 is 37 megawatts?

22 MR. LOYOLA: That is the nameplate, yes, sir.

23 CHAIRMAN WILSON: The name plate capacity, and you
24 plan to add an additional 37-megawatt nameplate?

25 MR. LOYOLA: That's correct.

1 CHAIRMAN WILSON: And your load is approximately
2 what.

3 MR. LOYOLA: About 42, in that range.

4 CHAIRMAN WILSON: And the current 37-megawatt
5 generation unit you have will be driven by your waste
6 heat --

7 MR. LOYOLA: Waste heat, as it is today, yes, sir.

8 CHAIRMAN WILSON: -- process and the additional, the
9 second --

10 MR. LOYOLA: That one will also be driven by waste
11 heat entirely. There is a third generator contemplated
12 which would be a gas powered combustion turbine.

13 COMMISSIONER BEARD: That is to superheat the, as
14 you call it, the bottom-of-the-barrel heat that you are
15 taking off of the second 37 megawatt?

16 MR. LOYOLA: Yes, sir, Commissioner. It will
17 produce a good deal of electricity itself, and the
18 exhaust gases.

19 CHAIRMAN WILSON: All right.

20 MR. McCLAVE: My I name is Wilkes McClave, and I am
21 an officer and director of Seminole. As Elliot has
22 pointed out, in looking at our business and being in the
23 commodity business we need to be as competitive as we can
24 because we really only compete on price. And looking
25 around at the company we identified this tremendous

1 amount of waste heat that was truly being wasted, and, in
2 fact, we had to pay to dissipate through cooling towers,
3 so in looking at the project as Elliot has also pointed
4 out while the fuel is free the conversion to electrical
5 energy is not, and it would require considerable extra
6 capital to build this.

7 As prudent businessmen, we don't feel that Seminole
8 should really be loaded up with any additional debt, and
9 so starting with a clean sheet of paper, knowing what we
10 wanted to accomplish, we laid out a project which would
11 allow us to do off balance sheet financing to raise the
12 capital at economic rates, because while you have
13 physical efficiencies you also have to have economic
14 efficiencies to make the project a good one. And then
15 also looking at accounting standards, tax rules, and
16 particularly the rules of this Commission to make sure
17 that it was proper, and also from our own operational
18 point of view we have our own requirement that we retain
19 operational control of this project. So starting with a
20 clean sheet of paper and with the assistance of Mr. Zambo
21 and Mr. Sexton we built a structure that we believe met
22 all the requirements of these varying disciplines, and,
23 in fact, a great deal of the shaping of the structure has
24 gone into the view of meeting the proper requirements of
25 the State of Florida and the Public Service Commission.

1 We believe that what we have come up with does meet the
2 requirements of the Commission and we were unpleasantly
3 surprised that perhaps it might not, and so we are here
4 to address you if you have any questions about why we
5 have done things in certain ways. I would just like to
6 point out some of the three key elements to us: The
7 amount that Seminole will pay for leasing the equipment
8 is fixed, it's not based on how much electricity it gets,
9 both in its lease payments and in its operating and
10 maintenance agreement retains, and we retain operational
11 control of the project. It is Seminoles' project and we
12 are running it. The reason that a third-party has been
13 interjected is that for accounting standards it is
14 required that there be some third-party element in the
15 project in order to allow us to do off-balance sheet
16 financing. We used a limited partnership structure
17 because as you probably know in a limited partnership the
18 limited partners can have no operational control, they
19 have some very broad rights if the general partner, which
20 Seminole is the general partner and will remain the
21 general partner, only with the defalcations of the
22 general partner, et cetera, but it is a sole purpose
23 general partnership or limited partnership for the
24 purpose of running this project.

25 COMMISSIONER GUNTER: I've got a question or two,

1 Mr. Chairman, if I may. As I understand the partnership
2 would raise money, would build a facility and lease the
3 facility to Seminole, is that correct?

4 MR. McCLAVE: We will lease part of this facility to
5 Seminole.

6 COMMISSIONER GUNTER: Lease part of the facility.
7 If you have got control of the facility, if Seminole
8 Fertilizer has control why -- and you are going to
9 operate and maintain it, there is where I begin to, that
10 is where it begins to break apart with me. I don't
11 understand how you can have operation and maintenance and
12 control where you are only leasing a piece of it.

13 MR. McCLAVE: Seminole will enter into -- on the one
14 hand you have the limited partnership which has limited
15 partners who are mere passive investors, and then you
16 have a general partner who operates and controls the
17 facility, and that will be Seminole Fertilizer. Seminole
18 Fertilizer, also wearing a different hat, will lease,
19 have an undivided interest in the project, and will
20 generate its own electricity from that portion.

21 COMMISSIONER EASLEY: I am a little bit confused.

22 COMMISSIONER GUNTER: I am, too.

23 COMMISSIONER EASLEY: Seminole Fertilizer, according
24 to the diagram I got, will participate with a
25 wholly-owned subsidiary being the general partner in the

1 limited partnership, not Seminole Fertilizer, per se, is
2 that correct?

3 MR. McCLAVE: The only purpose for that subsidiary
4 in there, and you are absolutely right, I had forgotten
5 that, is for tax purposes in setting up the partnership.
6 The subsidiary is wholly-owned by Seminole Fertilizer and
7 will be controlled and will always be controlled by
8 Seminole Fertilizer, so we tend to identify the two in
9 our mind.

10 CHAIRMAN WILSON: If I can interject real quick, for
11 the purposes of our analysis can we just simply ignore
12 the existence of a separate subsidiary and treat the
13 general partner as, in fact, being Seminole Fertilizer?

14 MR. McCLAVE: In practice that is what it is,
15 because Seminole controls that sub, it owns 100 percent
16 of it, nobody else will own any part of it, and as I say
17 it is set up for the tax structure going into this.

18 COMMISSIONER EASLEY: Then the limited partners are
19 all passive investors?

20 MR. McCLAVE: Yes.

21 COMMISSIONER EASLEY: And is that spelled out in the
22 agreement?

23 MR. McCLAVE: Well, first of all, by definition a
24 limited partner is a passive investor. If they were not
25 a passive investor, they would lose their status as a

1 limited partner. For instance, the type of people we are
2 talking to for limited partners are GE Capital, are
3 Chrysler Capital, people like this. This whole
4 transaction is a financing transaction, it is a way to
5 raise money economically to finance the project.

6 COMMISSIONER EASLEY: And I understand that right up
7 until the time that the limited partnership owns excess
8 energy for resale and has priority as to energy. Now I
9 am starting to get --

10 COMMISSIONER BEARD: Let me translate that to my
11 question, it is the same one but asked differently. Why
12 do you need for the limited partnership to sell to the
13 utility as opposed to Seminole, the leasee, to sell
14 excess power to the utility? That is the real question.

15 MR. McCLAVE: In other words, why don't we lease the
16 whole facility to Seminole. Because if you think about
17 it, and we thought about it a great deal, and a great
18 expense, it is primarily an accounting problem that we
19 presently, Seminole presently owns the existing
20 cogenerator and it owns the rights to the project that is
21 being developed. The transactions that are contemplated
22 for legal purposes really take place almost
23 simultaneously. And the accountants -- it would severely
24 impact our ability to take it off balance sheet. If we
25 sell to the limited partnership and the limited

1 partnership turns around and leases the whole thing right
2 back to Seminole on the same day, the accountants are
3 just going to say, "That didn't happen, that is not going
4 off balance sheet." That is the problem.

5 COMMISSIONER GUNTER: Well, are your accountants
6 advising you that if somebody -- if you participate and
7 you lease a whole building and you participate in a
8 limited partnership that they are going to treat that as
9 a capital lease? We have some experience that that is
10 not the case.

11 MR. McCLAVE: Because of the relative values, I am
12 not an accountant, and I don't pretend to be, but under
13 the Financial Accounting Standards 13, where you have to
14 set up certain ratios and you have to meet certain ratios
15 as to whether you treat it as an operating lease or a
16 capital lease, the ratios that we have come up with here
17 meet the operating leases, and our accountants have
18 advised us that they would be entitled to off balance
19 sheet treatment, whereas if we do the other it wouldn't.
20 That is the difficulty we ran into, and that is why it is
21 structured this way.

22 CHAIRMAN WILSON: Commissioner Easley, I think your
23 question is still unanswered, which is why the
24 partnership would own the excess electricity and the
25 contract with Florida Power Corp --

1 MR. McCLAVE: And why the priority?

2 COMMISSIONER EASLEY: And have the priority.

3 CHAIRMAN WILSON: Would take priority. And if I
4 understand that correctly, it would be no different than
5 any cogenerator who has a firm contract with a utility
6 and also generates power for itself, that its efforts
7 would be to maintain that contract with the utility
8 because of the obligations and penalties that they would
9 incur for failure to supply that electricity as
10 contracted for. So the sale to, it is the sale to the
11 utility that has priority because it is a firm contract.

12 COMMISSIONER EASLEY: Let me follow that, then. You
13 are in whose service territory now, FP&L or TECO?

14 MR. McCLAVE: We are in TECO.

15 CHAIRMAN WILSON: Florida Power Corp.

16 COMMISSIONER EASLEY: Well, who is your contract with?

17 MR. McCLAVE: FPC, Power Corp.

18 COMMISSIONER EASLEY: Sorry. I wrote down the wrong
19 one. You are currently generating 42?

20 MR. McCLAVE: About 36, 37.

21 COMMISSIONER EASLEY: And your load is 42?

22 MR. McCLAVE: 42 or a little more, yes.

23 COMMISSIONER EASLEY: So you are currently buying
24 five or so megawatts from TECO?

25 MR. McCLAVE: Yes.

1 COMMISSIONER EASLEY: If you generate more than you
2 need --

3 MR. McCLAVE: Which we sincerely hope we will do.

4 COMMISSIONER EASLEY: -- would you have TECO in a
5 position of having to offer you backup power if Seminole
6 goes down? Let's say a hurricane comes through, you have
7 a natural disaster, whatever happens, for some reason you
8 are down?

9 MR. McCLAVE: We presently have a standby
10 arrangement with TECO, and, yes, we would continue to
11 have one, but only to serve our needs.

12 COMMISSIONER EASLEY: But if the limited partnership
13 has priority as to energy, and if the first obligation
14 then is to meet the firm capacity contract with FP&L, and
15 you are having to buy capacity because you are down, does
16 that then mean that you've got to buy the total amount,
17 not only your operating need but the amount of the firm
18 contract to FP&L in order to satisfy that contract?

19 MR. McCLAVE: No.

20 COMMISSIONER EASLEY: Why not?

21 MR. McCLAVE: First of all, I don't believe its
22 permitted.

23 MR. ZAMBO: Commissioner, if I could address that.
24 First of all, it would be illegal because the tariff
25 under which we would purchase that power from Tampa

1 Electric would specifically provide that it's not for
2 resale, so we could not do anything with that power
3 except use it to serve our own load.

4 COMMISSIONER EASLEY: So that portion that gives
5 priority to the limited partnership is abrogated by the
6 TECO contract as far as resale of any purchase from TECO?

7 MR. ZAMBO: That's correct, and besides that, aside
8 from the fact that the tariff provides that, there would
9 be adequate metering on this equipment and at the
10 interconnection that I am sure the utility would know if
11 that were happening inadvertently and they would prevent
12 that from happening.

13 COMMISSIONER EASLEY: What happens to the firm
14 contract that the limited partnership has, then, in the
15 event that Seminole goes down, the limited partnership is
16 generating absolutely zip, right? They are not doing
17 anything.

18 MR. ZAMBO: That would be correct. In that case
19 they could not deliver any power, and hopefully they
20 would have enough of a reserve in their capacity factor
21 that they had delivered to the utility that that wouldn't
22 trigger a penalty.

23 CHAIRMAN WILSON: Otherwise they would suffer the
24 penalties that are in the contract?

25 MR. ZAMBO: That's correct. In that case it would

1 be the same as if Seminole had directly entered into that
2 firm power sales agreement, they would suffer whatever
3 consequences.

4 COMMISSIONER EASLEY: Now I am back to --

5 MR. McCLAVE: This would be no different no matter
6 how we financed it. We would always want to first meet
7 the needs of that contract because we don't want to
8 suffer the penalties of a default.

9 COMMISSIONER EASLEY: Okay. Having said that, that
10 Seminole then remains the cogenerator no matter what
11 happens --

12 MR. McCLAVE: (Indicating yes.)

13 COMMISSIONER EASLEY: -- explain to me, and I think
14 you have done it, but I didn't understand it completely,
15 explain to me again why it is necessary then to have a
16 limited partnership acting, if you will, as a broker?
17 Why Seminole could not enter into a 100 percent lease
18 with the limited partnership, keeping the limited
19 partnership whole as to the financial arrangements, but
20 having Seminole be the qualified facility?

21 MR. McCLAVE: Two things. First of all, the
22 qualifying facility are the pieces of equipment, not the
23 people, or not the entities involved. Secondly, there
24 are two very practical reasons; if we take --

25 COMMISSIONER EASLEY: No, let me understand that

1 before you go too much further with it. The pieces of
2 equipment that Seminole leases most of it, not all of it,
3 if I understand, about two-thirds of it?

4 MR. McCLAVE: No, less than half.

5 COMMISSIONER EASLEY: Less than half. Seminole is
6 leasing less than half, but Seminole is doing all of the
7 cogeneration?

8 MR. McCLAVE: The qualifying facility is doing the
9 cogeneration.

10 COMMISSIONER EASLEY: Who is the qualifying
11 facility?

12 MR. McCLAVE: It is this cogeneration project.

13 COMMISSIONER EASLEY: No, it has to be one or the
14 other, it can't be both of them.

15 MR. ZAMBO: Commissioner Easley, if I can try to
16 clarify that issue. There was some misunderstanding
17 apparently in the Staff recommendation on this issue,
18 they may have gotten some clarification on it, but the
19 bottom line is that a qualifying facility is an assembly
20 of equipment, any electricity generated by a qualifying
21 facility can then be sold to a utility by the owner, or
22 operator, or both of that facility, so in this case --

23 COMMISSIONER EASLEY: Then both the limited
24 partnership and Seminole are the qualifying facility?

25 MR. ZAMBO: No, the qualifying facility is the

1 cogeneration facilities that the partnership will own,
2 but both Seminole and the limited partnership will have
3 the right to sell electricity from that facility. The
4 key is that it is generated by a qualifying facility.

5 COMMISSIONER EASLEY: To whom is Seminole selling
6 electricity?

7 MR. ZAMBO: Well, Seminole would not sell any
8 electricity, Seminole --

9 COMMISSIONER EASLEY: I am sorry, I am getting
10 thoroughly confused, Mr. Zambo.

11 MR. McCLAVE: Seminole is selling no electricity, it
12 is generating electricity for its own use, and the
13 partnership is generating electricity and selling it
14 under the power contract of Florida Power Corp.

15 COMMISSIONER EASLEY: Are you telling me that FERC
16 will identify a third non-entity as being the equipment
17 that is the QF?

18 MR. ZAMBO: They will identify the equipment at the
19 fertilizer plant as the qualifying facility. The QF
20 status goes to equipment, Commissioner, not to --

21 COMMISSIONER GUNTER: Yes, but it is issued to -- I
22 even have the application forms, because I wanted to
23 understand how it was done, and it is issued to somebody;
24 they are issued, there are requirements in the
25 application. I got one of the forms, it is issued to

1 somebody, it's not issued to a piece of equipment.

2 MR. ZAMBO: Commissioner, they are issued to
3 someone, but the way the law works the federal code says
4 that a cogeneration facility is a qualifying facility if
5 it meets certain criteria. But there is then an
6 obligation --

7 COMMISSIONER GUNTER: It is still issued to somebody.

8 MR. ZAMBO: Well, an obligation is then placed on
9 the owner or operator of that facility to notify FERC of
10 the existence of such a facility. So FERC puts the
11 obligation on the owner or operator on a person, but the
12 qualifying facility status falls on equipment.

13 COMMISSIONER GUNTER: But it is issued to somebody,
14 you all are confusing it, it is issued to somebody.

15 CHAIRMAN WILSON: Who would hold that obligation
16 under the federal statutes of this partnership?

17 MR. ZAMBO: In this case I think it would be the
18 limited partnership and Seminole. Seminole as the
19 operator --

20 CHAIRMAN WILSON: Let me make sure I understand what
21 is going on here. Seminole Fertilizer is going to
22 transfer the assets that you currently operate,
23 cogenerate power to the limited partnership.

24 MR. ZAMBO: That's correct.

25 CHAIRMAN WILSON: The limited partnership is going

1 to build an additional 37 nameplate megawatt capacity
2 generation unit?

3 MR. ZAMBO: That is correct.

4 CHAIRMAN WILSON: Which will be owned by the general
5 partner.

6 MR. ZAMBO: Yes, sir.

7 CHAIRMAN WILSON: Seminole Fertilizer is then going
8 to lease sufficient of that plant to meet its steam
9 needs?

10 MR. ZAMBO: Steam and electric.

11 CHAIRMAN WILSON: Steam and electric needs?

12 MR. ZAMBO: Yes, sir.

13 CHAIRMAN WILSON: And anything in excess of that
14 will be basically passed through under your contract to
15 Florida Power Corp., under your firm contract for sale of
16 electricity?

17 MR. ZAMBO: Yes, sir.

18 MR. McCLAVE: And we have consulted with FERC on
19 this, I believe, Richard.

20 MR. ZAMBO: Yes, we have consulted with FERC, and we
21 have an opinion from the General Counsel's Office, verbal
22 over the phone that yes, both Seminole and the limited
23 partnership would have QF status. And the reason
24 Seminole will have that status is they are the operator
25 and they have to have it in order to interconnect with

1 their utility and purchase standby power.

2 MR. McCLAVE: And going to a second element of your
3 question, Commissioner Easley, there were two reasons why
4 it is preferable to have, from our point of view, to have
5 the limited partnership selling directly to the utility.
6 The first being the off balance sheet financing treatment
7 which is crucial to us proceeding with the project, but
8 the second is in term of the requirements of lenders, we
9 are not completely masters in our own house, and lenders
10 prefer in the limited partnership structure to have the
11 limited partnership have a direct contract with Florida
12 Power Corp., and that is the other reason for it. Rather
13 than passing the funds all through Seminole.

14 COMMISSIONER GUNTER: Let me ask you as far as I
15 can, let's talk about the money just for a minute. In
16 the limited partnership monies the limited partners put
17 in would be classified as equity, would it not?

18 MR. McCLAVE: Yes, they would, and that is what
19 entitles us to the off balance sheet treatment.

20 COMMISSIONER GUNTER: I understand. I am trying to
21 understand even if it were a capital lease, even if it
22 were classified as a capital lease, I am trying to
23 understand the negative impacts, if any, to Seminole
24 Fertilizer.

25 MR. McCLAVE: Were we required to treat this as a

1 capital lease, i.e., the obligations that Seminole --
2 Seminole will be signing a lease, and the lease has in it
3 obligations to pay money. If we are required to treat
4 that as a capital lease by our accountants, then the net
5 present value of that entire stream of lease payments for
6 15 years shows up as debt on our balance sheet, just like
7 you went and borrowed the money from the bank. That is a
8 big number.

9 COMMISSIONER GUNTER: How how do you treat the
10 revenue, the expected revenue over that time period?

11 MR. McCLAVE: Well, the revenue comes into the
12 partnership because what Seminole is doing, Seminole is
13 paying, Seminole is leasing and paying to the
14 partnership.

15 COMMISSIONER GUNTER: No, I am saying if Seminole,
16 if the facility were leased to Seminole, the limited
17 partnership constructs it, provides the financing, and
18 whatever, leases it to Seminole, all the sales go through
19 Seminole. On a capital lease arrangement where all the
20 money that is received, you have got two benefits; one,
21 you've got the benefit to your fertilizer operation, and
22 then you are selling whatever else, another --

23 MR. McCLAVE: Oh, if we lease the entire facility?

24 COMMISSIONER GUNTER: Yes. Because there has to be
25 a both sides. I understand bookkeeping enough to say

1 that there are entries on both sides; it's not all
2 negative.

3 MR. McCLAVE: Presently the way it is set up, and if
4 you give me one second I will answer both sides of it.
5 The way we have set up the transaction, Seminole has a
6 lease obligation which it pays to the limited
7 partnership. And we anticipate being able to treat that
8 as an operating lease, and, therefore, it doesn't appear
9 on your balance sheet, you just pay it every year as an
10 expense as it comes up. Were we to lease the entire
11 facility and have to treat that as a capital lease, first
12 of all, you would take the net present value of that
13 entire stream of lease payments, which would be a very
14 large number, put it on your balance sheet as debt, or as
15 a lease obligation section, but basically it shows up as
16 long-term debt. At the same time as the income came in,
17 because in this case there would be income, presently
18 there is no income to Seminole, but if we did it as you
19 have posited it there would be income to Seminole which
20 would come in and be taxable every year, but that doesn't
21 appear on your balance sheet except every year as the
22 profit and loss comes in, so in the first year of the
23 project you would be hit with this huge number. But you
24 would have no -- you wouldn't have any offsetting income
25 until it was earned and as it came in over the years.

1 And that, it would just blow our balance sheet out of the
2 water.

3 COMMISSIONER GUNTER: A gain income would come in on
4 a monthly basis to Seminole --

5 MR. McCLAVE: If we lease the whole project.

6 COMMISSIONER GUNTER: You see, you are answering
7 questions I am not asking you. I'm talking about if the
8 cogeneration facility, if it was constructed and leased
9 to Seminole you would have a revenue stream the first
10 month that you sold it into Seminole.

11 MR. McCLAVE: Let me make sure I understand your
12 hypothesis, and that is that Seminole, the partnership
13 would have leased the entire project to Seminole?

14 COMMISSIONER GUNTER: That is exactly right, and
15 Seminole would make all the sales.

16 MR. McCLAVE: Yes, it would, and it would have
17 income every month as it came in.

18 COMMISSIONER GUNTER: It would have income.

19 MR. McCLAVE: But that income, you would have all of
20 the long-term debt, or lease obligation, whatever you
21 want to call it would show up in your balance sheet in
22 the first instant, right away, and the benefit that would
23 accrue to you would accrue over 15 years as the project
24 worked its way through its term, as the lease worked its
25 way through its term. So you would end up with a very

1 big number on the debt side of your balance sheet.

2 COMMISSIONER GUNTER: Well, trying to understand the
3 way you all have it, and I am trying to understand the
4 money, I am trying to understand the bubble charge. The
5 way you have it structured now the limited partnership
6 raises the money, builds the facility, Seminole transfers
7 over to the limited partnership its existing cogeneration
8 facility, isn't that right?

9 MR. McCLAVE: Yes.

10 COMMISSIONER GUNTER: Any sales that are made, the
11 sales money comes back into the limited partnership?

12 MR. McCLAVE: Yes, the income presently comes into
13 the limited partnership, that is correct.

14 COMMISSIONER GUNTER: Okay. So the limited
15 partnership receives all of the benefits from all of the
16 cogeneration facilities that exist there, and the
17 company, Seminole Fertilizer, has an outflow of funds
18 continuously, I don't see any flip side to Seminole
19 Fertilizer.

20 MR. McCLAVE: Yes. The benefit that Seminole
21 Fertilizer is receiving is it is paying lease payments
22 and it is getting the right to use the equipment which is
23 generating electricity, that is the benefit we are
24 getting. And at the time of the initial transfer there
25 is a payment for the facilities that are being sold.

1 also.

2 COMMISSIONER BEARD: And your debt equity ratio
3 remains constant.

4 MR. McCLAVE: The debt equity ratio should improve,
5 and that is why we are doing it like this.

6 COMMISSIONER BEARD: As opposed to a fully --

7 MR. McCLAVE: Well, if we leased the whole facility
8 the debt equity ratio would go off the chart.

9 CHAIRMAN WILSON: Commissioners, I think what we
10 need to look at here, and I appreciate your questions,
11 Commissioner Gunter, they are interesting, but quite
12 frankly, I am not sure it is any of our business how this
13 company chooses, what business form it chooses to take.
14 I think our inquiry needs to be confined to fairly narrow
15 questions here under prior decisions that we have made.
16 One is whether there is a retail sale involved. I think
17 that is one of the first questions that we --

18 COMMISSIONER MESSERSMITH: That is the question that
19 I think we need to follow up on, that is still the fuzzy
20 part as far as I am concerned when they set up --

21 CHAIRMAN WILSON: Yes, because I think the choice of
22 a company to do off balance sheet financing or however
23 they want to do it, is essentially their decision. Now,
24 what we need to assure ourselves is that this
25 transaction, when we pierce through all of their

1 financial machinations, to see whether, in fact, the
2 transaction that underlies all of this violates Florida
3 law or our rules.

4 COMMISSIONER MESSERSMITH: Well, that is exactly the
5 point, and I am just following up on what Commissioner
6 Basley started with, is where you set up the separate
7 corporation, and it, in fact, has priority ownership of
8 the power generation and does the contracts of the sale
9 to the power company, when you set it up like that I
10 don't think Seminole really owns it and is running it, in
11 my mind. And I don't know then if that doesn't put you
12 in conflict with 366 which says you, I mean, the separate
13 corporation is, in fact, that which is selling the excess
14 power.

15 CHAIRMAN WILSON: I think you have to look at the
16 fact that Seminole Fertilizer and this limited
17 partnership, in fact, have a unity of interest. I mean,
18 they are the same people. The tax code may look at you,
19 and your accountants may look at you and say this is all
20 different, they are different folks, and so they get a
21 particular tax treatment, but if we look underneath the
22 transaction what you have got is Seminole Fertilizer
23 raising some financing to do a cogeneration project, and
24 structuring it in a way that you can fool the taxman.
25 Which, you know, I have no objection to; I think

1 everybody's God-given American right is to try to fool
2 the taxman.

3 COMMISSIONER EASLEY: Mr. Chairman, the thing I was
4 having problems with to begin with on whether or not it
5 is retail or wholesale was that at first the way the
6 structure looks and with the statement about owning the
7 excess energy, the limited partnership owning the excess
8 energy, and the limited partnership having the priority
9 for energy, bothered me until I got through the argument
10 that number one, the limited partnerships, none of the
11 parties within the limited partnerships are consuming any
12 of the energy. That the power being generated is going
13 in two places, one, it is being self-generated by
14 Seminole and used by Seminole, the excess then is
15 brokered, for want of a better description, through the
16 limited partnership directly to Florida Power Corp, there
17 are no other sales of any kind even permitted, as I
18 understand it, under the treatment, is that correct?

19 MR. McCLAVE: That is correct.

20 COMMISSIONER BEARD: Which answers the first
21 question, who is the retail customer? I can't find one.

22 COMMISSIONER EASLEY: No, I can't either.

23 CHAIRMAN WILSON: I can't either, and I have looked
24 at this because I am -- when you see something like this
25 that is a little different, your suspicions are

1 automatically raised. And I want to make sure as we look
2 at these kinds of transactions that we are not in a few
3 years subject to the law of unintended consequences, that
4 we do something without knowing what the effect is. But
5 I can't -- I am looking --

6 COMMISSIONER EASLEY: I can't find a sale to the
7 public.

8 CHAIRMAN WILSON: And the other thing is this is a
9 declaratory statement, and you are accepting this
10 arrangement precisely as it is.

11 COMMISSIONER EASLEY: But you also have to put in
12 there a caveat that the arrangement does not change.

13 CHAIRMAN WILSON: That's right. Well, if the
14 arrangement changes the declaratory statement has
15 absolutely no meaning, you might as well wad it up and
16 throw it in the trash.

17 COMMISSIONER BEARD: The other piece of this, and
18 the theory behind this as we are looking at this is the
19 benefit or harm to the ratepayer and the discussion that
20 you just said, one unit specifically assigned that to
21 Seminole as opposed to a less defined rule, it would
22 appear to be more protective of the ratepayer in a firm
23 capacity contract because there is less likelihood of all
24 three of these units going down simultaneously than there
25 would be if it were in one package and separated out. So

1 to me there is some, it may be subtle, but some further
2 protection because the utility that is purchasing this
3 gets first shot, and Seminole loses theirs first, and you
4 would have a greater probability that the utility and the
5 ratepayer would be held harmless, if you will, even on
6 the capacity factor.

7 COMMISSIONER EASLEY: All right, so --

8 COMMISSIONER MESSERSMITH: Well, in the event that
9 some failure of the limited partnership could not provide
10 power under a firm contract, who would be at risk in that
11 situation, would it be the limited partnership or
12 Seminole?

13 MR. McCLAVE: Well, the way we see the risks,
14 because the priority first goes to the Power Corp.
15 contract, if there is any shortfall Seminole will bear
16 the first risk and most of the risk. Obviously, if the
17 whole project just doesn't run, Seminole would be at risk
18 and the limited partnership may go into default of its
19 contract and there is a risk there, but it is really just
20 the same risk that any lender makes if the company to
21 which it lends money just totally goes down the tubes
22 they are at risk. But it is structured so that most of
23 the practical risk, or all the practical risk is on
24 Seminole. And all the control, I mean, the two go
25 together.

1 MS. MILLER: If I could just go back and clarify the
2 concern about whether there was any provision of
3 electricity, a retail sale. I think your analysis is
4 just right, and I agree with it, but I just wanted to say
5 why there was this concern is because of the dollars
6 going both ways between Seminole and the limited
7 partnership we couldn't rule out that there was a
8 provision of electricity with dollars going based on some
9 fluctuation dealing with the production of energy, and so
10 the concern had been about the provision of energy from
11 Seminole to the limited partnership. I think that the
12 Petitioners would say, "Well, there isn't really a
13 provision from there to there because the limited
14 partnership retains a portion of the facility and
15 Seminole is merely doing the operation and maintenance on
16 it." But this was where the concern had arisen, "Gee, can
17 we really tell as a matter of law that there is not a
18 sale," that is where the concern had been. And the
19 second step was, "Well, even if there is it is to the
20 public," and that is your kind of close nexus test coming
21 in.

22 COMMISSIONER GUNTER: Cindy, if I could, one of the
23 things that my line of questioning was trying to get at,
24 the two things that we had, one was P.W. Ventures and the
25 other one with Metro Dade. And if you understand the

1 flow of money you can, all of a sudden you can very
2 clearly see the differences, and they are not so subtle
3 differences between Metro-Dade and P.W. Ventures.
4 Metro-Dade was by wheeling --

5 MR. MILLER: That's correct.

6 COMMISSIONER GUNTER: -- out to another Dade County
7 process. Now, if you recall the decision, because I read
8 your recommendation very carefully, the decision in that
9 proceeding was that Metro-Dade was not even a signatory
10 to the agreement that Thermal Electron and other folks
11 had, they were not even a signatory.

12 MS. MILLER: That is correct. There was not clearly
13 as close a nexus.

14 COMMISSIONER GUNTER: That is clearly a retail sale.
15 That is the reason of trying to understand how the money
16 flows and what the pieces were. P.W. Ventures, P.W.
17 Ventures was not P.W. Ventures to Westinghouse, I mean,
18 to Pratt-Whitney. P.W. Ventures was selling to other
19 folks in that complex.

20 MS. MILLER: And, in addition, they were very
21 separate entities, and there was not a wholly-owned
22 subsidiary.

23 COMMISSIONER GUNTER: That's exactly correct. And,
24 Mr. Chairman, that was the reason for the line of
25 questioning on the flows of monies.

1 CHAIRMAN WILSON: I misunderstood your thrust there.

2 COMMISSIONER GUNTER: And you are trying to
3 understand where there is a one-way flow of money that
4 passes the test of being able to identify the differences
5 between Metro-Dade, of where you didn't even have the
6 parties, Dade County didn't even sign that agreement, so
7 that clearly would have been a retail sale. I will lay
8 that one aside. P.W. Ventures, I look at that flow of
9 money, P.W. Ventures is really different. I don't think
10 that we have any -- I don't think we are violating any
11 precedent in either of those cases that you referred to.

12 MS. MILLER: I don't either.

13 COMMISSIONER GUNTER: That was the thrust.

14 CHAIRMAN WILSON: I appreciate that, and I
15 misunderstood the thrust of your questions.

16 COMMISSIONER EASLEY: The only concern I have, Mr.
17 Chairman, and I assume it can be addressed in a
18 declaratory statement, and I assume needs to be addressed
19 in a declaratory statement if only for the comfort level,
20 and that is that I would want to have some kind of
21 contingency language, or depending upon, or whatever the
22 proper term is, that both facilities, both entities, with
23 their joint facility receive QF status. Now, you know,
24 the parties have said that they have gotten some kind of
25 oral statement from FERC that that would occur.

1 MR. McCLAVE: Commissioner Easley, I can assure you
2 that the debt will insist on it as well. The people
3 lending money will insist on that.

4 COMMISSIONER EASLEY: But the only reason I would
5 want it in there would be that even though, if
6 circumstances change, the declaratory statement is no
7 longer valid, to me I can't even make the declaratory
8 statement unless that is a part of it.

9 MR. McCLAVE: We have no problem with that.

10 MR. ZAMBO: Commissioner Easley, if I may, this is
11 no big deal, we can do that and we can live with it, but
12 I just wanted to make sure you are aware that, first of
13 all, if we were not a QF the utility who we are selling
14 the power to will not be obligated to purchase it. There
15 is a provision in that contract which you will see when
16 it comes to you for approval --

17 COMMISSIONER EASLEY: Wouldn't be obligated, but
18 could, and then we may be back in the argument about what
19 is retail and wholesale.

20 COMMISSIONER MESSERSMITH: Who did you say you were
21 talking with about becoming a limited partner?

22 MR. McCLAVE: The kind of people that we are
23 approaching are Chrysler Capital, GE Capital, people such
24 as that, traditional sources of money. And other people
25 who would be interested in investing in projects of this

1 type.

2 COMMISSIONER MESSERSMITH: It is my understanding
3 that --

4 MR. McCLAVE: They are not consumers, they are
5 sources of funds.

6 COMMISSIONER MESSERSMITH: A number of utilities are
7 interested in becoming --

8 MR. McCLAVE: They may. I believe some of the gas
9 transmission companies may be, I am not really on the
10 financing side, but some of the -- we have spoken -- some
11 of the utilities, it is my understanding, have
12 subsidiaries that are interested in investing in
13 cogeneration projects.

14 COMMISSIONER EASLEY: Have you talked to any of the
15 telephone companies yet, they are about the only ones we
16 haven't mentioned?

17 MR. McCLAVE: It is mainly what I would call the
18 traditional sources of project finance, and these
19 utility-type companies because they understand projects
20 like this.

21 COMMISSIONER EASLEY: Mr. Chairman, I would move the
22 ultimate recommendation, but with the addition that I
23 would like the language concerning the QF status of both
24 entities.

25 CHAIRMAN WILSON: I don't have any problem with

1 that; a second?

2 COMMISSIONER GUNTER: I will second it.

3 CHAIRMAN WILSON: I would also like to comment that
4 the analysis for both recommendations was very good, and
5 caused us to look very closely at this to really
6 determine what the nature of the transaction was. Both
7 sides were very well presented, and it isolated those
8 issues, and it allowed the kind of analysis that would, I
9 hope, I think satisfies us that, in fact, we are not
10 looking at retail sale, that this appears to be purely a
11 financing scheme, and it does not, I don't think it
12 violates the precedent for the statute.

13 COMMISSIONER MESSERSMITH: Well, I hope it doesn't,
14 either. But I tell you it is so confusing that if we go
15 forward with this declaratory statement that we keep in
16 mind that this is something we need to watch because I
17 think we are going to see a lot of this come about if we
18 proceed with this, and I think there are some things here
19 we don't really have a full grasp on. Some of the
20 nuances that are involved in the financing part of it, or
21 whatever, but I think we are going to see a lot of this
22 and we should be anticipating looking at it further.

23 CHAIRMAN WILSON: And I think we need to keep in
24 mind that with this declaratory statement it rests on the
25 grounds that it is this factual situation as represented

1 to us with these parties and this arrangement. And as
2 things depart from that then our, I guess, tacit approval
3 by issuing the declaratory statement has absolutely no
4 meaning whatsoever at that point. If, in fact, the
5 arrangement changes so that this does become a retail
6 sale or changes the nature of the transaction so that it
7 does, in fact, violate our rules, the statute, then we
8 look at it again.

9 COMMISSIONER EASLEY: Or even change the
10 understanding that we have of the project at the present
11 time. It doesn't necessarily have to violate a rule or a
12 law. If it changes materially, it is going to change a
13 lot of things.

14 COMMISSIONER BEARD: In one sense maybe it is
15 helpful because we have had a yea on one side and a nay
16 on one side, and this got greyer and perhaps we are
17 finally achieving that line where people in Florida will
18 understand, and that is something I think we need to do.
19 And we also don't need to try to provide too much burden
20 and barrier to innovative financing, as long as it still
21 meets the true intent of our rules.

22 CHAIRMAN WILSON: All right. Without any objection
23 to Commissioner Easley's motion? Without objection,
24 then, it is approved.

25 (Whereupon, the discussion of the above item was

concluded.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)


COUNTY OF LEON)

I, JANE FAUROT, Court Reporter, Notary Public in and
for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing proceedings was
taken before me at the time and place therein designated; that
before testimony was taken the witness/witnesses were duly
sworn; that my shorthand notes were thereafter reduced to
typewriting; and the foregoing pages numbered 1 through 41 are
a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee,
attorney or counsel of any of the parties, nor relative or
employee of such attorney or counsel, or financially interested
in the foregoing action.

WITNESS MY HAND AND SEAL this 6th day of December,
1990, in the City of Tallahassee, County of Leon, State of
Florida.


JANE FAUROT, Court Reporter
Notary Public in and for the
State of Florida at Large

My Commission Expires: July 16, 1993