BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., regarding cogeneration and small power production.	DOCKET NO. 910603-EQ ORDER NO. 25668 ISSUED: 2/3/92

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY

FINAL ORDER

BY THE COMMISSION:

At the annual planning hearing (Docket No. 910004) we were unable because of time constraints to address issues related to the negotiation of cogeneration contracts. We therefore opened this docket in order to give cogenerators, investor owned utilities, and other interested parties, the opportunity to raise, and ourselves adequate time to consider, negotiated contract issues.

A hearing was held in this docket on September 18 and 19, 1991. The following parties appeared and participated in the hearing: Florida Power and Light Company (FPL); Florida Power Corporation (FPC); Tampa Electric Company (TECO); Gulf Power Company (Gulf); Consolidated Minerals, Inc. (CMI); Falcon Seaboard Power Corporation (Falcon); Nassau Power Corporation (Nassau); Hadson Development Corporation (Hadson); PG&E-Bechtel Generating Company (Bechtel); Indiantown Cogeneration, L.P. (Indiantown); Decker Energy International (Decker); Mulberry Energy Company, Inc. (Mulberry); Florida Industrial Cogeneration Association (FICA); Air Products and Chemicals, Inc. (Air Products); Destec Energy, Inc. (Destec) and Ark Energy, Inc. (Ark).

At the hearing, testimony was presented and evidence introduced on fifteen issues raised by the parties. We will address each of the issues individually in this order.

ISSUE 1: If the generation expansion plan reviewed pursuant to Rule 25-17.0833 significantly changes, should the utility be required to take any specific action and, if so, what?

We find that utilities should be required to notify the Commission and interested qualifying facilities (QFs) of changes in their generation expansion plan within a reasonable time after management approval of the changes.

The QF intervenors in this docket have requested that utilities be required to file new generation expansion plans and that such plans be reviewed by the Commission with an opportunity for all parties to participate [Tr. 377 - 378, 437]. This request stems from two concerns: 1) that QFs will not become aware of plan changes; and 2) that QFs will not have the opportunity to participate in the review of a utility's generation expansion plan. Intervenor Falcon expressed a third concern that a utility might try to change its avoided unit in the middle of negotiations [Tr. 377 - 378].

We believe these concerns will be alleviated if the utilities notify the Commission and interested QFs of a significant change in plans in a timely manner. A more formal notification procedure is not necessary because there are already in place several means by which QFs may learn about changes in utility plans: 1) QFs can request such information from utilities under Rule 25-17.0832; 2) through the utilities' yearly submission of 10-year site plans to the Department of Community Affairs; 3) through the Commission's review of plans when a plan change affects a standard offer avoided unit; 4) through the Commission's review of plans in conjunction with a need determination proceeding; and 5) through the Commission's review of plans in conjunction with approving negotiated contracts [Tr. 692 -697, 708 - 709].

There are also mechanisms in place by which the QF's second concern is remedied. Every time a plan change triggers a change in the standard offer avoided unit, the utility must file its new generation plan for review in order to defend its choice of avoided unit. If a change in the plan does not affect the avoided unit, QFs still have the opportunity to request a Commission review of the utility's new plan. Rule 25-17.0833, Florida Administrative Code, states that "[u]pon petition or on its own motion, the Commission shall periodically review optimal generation and transmission plans..." These provisions, which are already in place, provide sufficient opportunity for QFs to participate in the review of the utilities' plans.

The only way to remedy Falcon's third concern would be to dictate that utilities could only negotiate against units in a Commission-reviewed plan. We believe that such a ruling would cause the ratepayers to incur costs in excess of those they would have incurred absent the QF generation. Generally, when a utility makes a significant change to its plan, the change is made because there has been a change in circumstances or assumptions which caused the utility's previous plan to no longer be the most cost-effective alternative. A QF unit based on an outdated plan could be less cost-effective than one the utility could have built itself--a result that would harm the ratepayers.

While we understand the concern that a utility may change avoided units in mid-negotiations in an effort to thwart negotiations, no QF provided evidence that utilities in Florida have done this. If a utility does change avoided units in an effort to thwart negotiations, Rule 25-17.0834, Florida Administrative Code, provides a mechanism for relief to the QF [724 - 725].

To require Commission review of a utility's plan every time it changes would cause ambiguity as to which plan utilities should use as a basis for negotiated contracts. Such ambiguity would continue from the time a utility adopted a new plan until the time the Commission completed its review of the plan. It takes anywhere from five to twelve months to review a utility plan, and changes may occur frequently. Witness Seidman testified that "some utilities have experienced significant changes to their plans as frequently as two to three times in a year" [Tr. 438]. This could have a chilling effect on negotiated contracts.

QFs and utilities should negotiate against the utilities' most recently identified capacity needs, rather than an outdated "Commission-reviewed" plan. To require utilities to negotiate against their "reviewed" plans, would introduce a regulatory lag into the process which would harm the ratepayers. Rather than being able to take advantage of new information regarding load growth, technology type, conservation programs, or fuel forecasts at the time it is available, utilities would have to wait for the completion of a potentially lengthy planning hearing. Witness Pope stated that "[t]he lag created by these proposals would create a significant risk that the mix of generating capacity secured by utilities to serve their customers over the long term would not be optimal for the ratepayers from a financial and/or service related viewpoint" [Tr. 705]. We agree.

We can alleviate the concerns expressed by the QFs without subjecting the ratepayers to higher costs caused by regulatory lag, by requiring utilities to notify the Commission and QFs when their plans change. Utilities and QFs should negotiate against the utilities' most recently identified needs, <u>not</u> the most recently reviewed plan.

We will not mandate the review of a utility's generation expansion plan every time it changes. Such reviews are lengthy and they are likely to confuse contract negotiations, rather than facilitate them.

<u>ISSUE 2</u>: As a matter of law is a utility obligated to negotiate contracts for the purchase of firm capacity and energy from QFs based on any unit identified in the generation expansion plan on which the utility is relying?

Under Section 366.051, Florida Statutes, our cogeneration rules (see generally Rule 25-17.082, Florida Administrative Code), and PURPA, a utility is generally required to purchase all electricity offered for sale by a QF which could avoid or defer a planned utility unit. Rule 25-17.0834, Florida Administrative Code, requires that public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities. From this authority it follows that generally a utility is required to negotiate for the purchase of firm capacity and energy from QFs based on any unit identified in the utility's generation expansion plan.

There are exceptions to this general proposition however. Rule 25-17.086, Florida Administrative Code, describes three circumstances under which a utility shall be relieved of its obligation to purchase electricity from a qualifying facility:

1. Where purchases from QFs would impair the utility's ability to give adequate service to the rest of its customers.

2. Where, due to operational circumstances, purchases from QFs will result in costs greater than those which the utility would incur if it did not make such purchases.

3. Where purchases from QFs would otherwise place an undue burden on the utility.

In the absence of one of these circumstances a utility would be obligated to negotiate for the purchase of firm capacity and energy from QFs based on any unit identified in the utility's generation expansion plan. We would point out, however, that generation expansion planning is a dynamic process, and a utility's plans will sometimes change. Therefore, a utility is generally obligated to negotiate against its most recent plans, and not necessarily those submitted to the Commission for the annual planning hearing.

ISSUE 3: As a matter of law, is a utility precluded from constructing new capacity while it has pending offers from cogenerators for like capacity at less than avoided cost?

Under Section 403.519, Florida Statutes, in determining the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act, the Commission shall take into account whether the proposed plant is the most cost-effective alternative available. Cost however, is just one of the factors the Commission must consider in determining whether a plant is needed. Electric system reliability and integrity are others. Thus it is conceivable that need could be found even if the proposed plant was not the most cost-effective alternative available. As a general rule, however, need will be denied where a proposed plant is not the most cost-effective alternative available. Therefore, the presence of pending offers from cogenerators, at less than the utility's cost, would be likely to result in the denial of a determination of need by the Commission.

We would point out however, that once need is determined by the Commission under Section 403.519, Florida Statutes, a presumption of public need and necessity exits. Therefore, a cogenerator's offer for like capacity at less than avoided cost, made after the Commission has already determined need, would not in and of itself preclude the utility from constructing the new capacity.

ISSUE 4: Should QFs have an opportunity to sell capacity and energy to a utility in lieu of new purchases from another source? If so, what procedures, if any, should be implemented.

All parties to this docket agreed that QFs should have the opportunity to sell capacity and energy to a utility in lieu of purchases from another source [Tr. 229 - 230, 279 - 280, 685]. However, there is disagreement as to whether procedures should be implemented to facilitate these sales.

The QFs responding to this issue advocate a formal notification and/or bidding procedure to notify QFs of an opportunity to avoid a power purchase [Tr. 439 - 441]. The QFs seek a solution to a problem they have not shown exists. Witnesses Divine and Seidman acknowledged that they are not aware of any instances in which a utility had purchased power from another utility when a QF could have supplied like power instead [Tr. 417, 506]. Neither witness has ever notified a utility that they had the desire and ability to sell short-term capacity to the utility [Tr. 416, 505].

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We do not wish to initiate rulemaking to solve a nonexistent problem. Instead, we encourage QFs to notify utilities of any desire and ability to sell short-term capacity. Only if and when QFs can demonstrate an inability to make short-term sales do we believe rulemaking would be appropriate

<u>ISSUE 5</u>: As a matter of law, does Rule 25-17.0832(2)(a) intend that the same type of documentation or evidence be used for standard offer and negotiated contracts to satisfy the "statewide need" consideration?

Rule 25-17.0832(3)(b), Florida Administrative Code, provides in pertinent part:

> In reviewing a utility's standard offer contract or contracts, the Commission shall consider the criteria specified in paragraph (2)(a) through (2)(d) of this rule, as well as any other information relating to the determination of the utility's full avoided costs.

The criteria referred to in paragraphs (2)(a) through (2)(d) of the rule, are those criteria to be considered by the Commission in evaluating negotiated contracts. Therefore, it can be concluded that common criteria are to be reviewed in evaluating both negotiated and standard offer contracts.

The criteria specified in subsection (2)(a) is "whether additional firm capacity and energy is needed by the purchasing utility and by Florida facilities from a statewide perspective." The rule does not specify, however, what type of documentation or evidence should be used to satisfy the "statewide need" criteria.

While subsection (2)(a) applies the same consideration for approval of standard offer and negotiated contracts, the rule doesn't specify the type of information to be considered by the Commission in determining "statewide need". The statewide need criteria can therefore be satisfied by different submissions.

<u>ISSUE 6</u>: Should the Commission prescribe guidelines or standard provisions in negotiated contracts, and if so, to what extent?

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We will not prescribe standard provisions in negotiated contracts because negotiated contracts are just that--negotiated contracts. Standardized provisions are not necessary in negotiated contracts and they can impair the negotiation process.

Rule 25-17.0834, Florida Administrative Code, provides a remedy to QFs when a utility does not negotiate in good faith. If a utility insists on an unreasonable requirement, QFs are free to petition the Commission for relief. So far, no QF has petitioned the Commission for relief claiming that a utility has taken an unreasonable position on a "regulatory out" clause, insurance provision, Clean Air Act compensation provision, tax "flow-through" provision, or any other provision at issue in this docket.

Standard terms in negotiated contracts could impair negotiating flexibility to the detriment of the utility and the QF. As Witness Dolan stated, "[e]ven if guidelines and standards at a given time did reflect the parties' perceptions, guidelines and standards cannot be modified easily or quickly in response to changes in conditions that bear on the risks and benefits of the transaction" [Tr. 223]. Standard terms that suit the needs of some parties will not suit the needs of other QFs wishing to negotiate contracts. Even in this docket, the QFs do not agree as to which terms should be standardized. For example, Witness Stauffacher only supported standard provisions for the regulatory out clause [Tr. 341]; whereas, Witnesses Whiting and Seidman supported standard provisions for the regulatory out clause, tax flow-through provisions, and Clean Air Act compliance provisions [T. 27 - 29, 36 - 38, 442, 454], and Witness Seidman supported an upper limit on insurance requirements [Tr. 450]. The only provision that all QF parties agreed should be standard, or preferably eliminated, was the regulatory out provision (see Issue 7 for discussion). It is clear from the differing opinions that negotiated contracts should not contain standard provisions.

ISSUE 7: May negotiated contracts contain a "regulatory out" provision which allows modification of the contract in the event that the utility's ability to recover payments made to QFs from its customers is denied or altered by the Commission after initial contract approval?

In general, regulatory out clauses provide that, in the event the utility is not permitted to recover payments made to a QF, payments to the QF are reduced to the level the utility is permitted to recover. In essence, these clauses transfer the risk of a regulatory disallowance from the utility to the QF (assuming that there is more than negligible risk). During the hearing in this docket, there were discussions as to who should bear the risk--the utility, the QF, or the ratepayer. The risk would be transferred to the utility if the regulatory out clause is removed. It would lie with the QF if the clause remains. And it would be transferred to the ratepayer if the U.S. Congress or the Florida Legislature passed a law saying that the Commission could never disallow payments made to QFs.

The QFs argue that the QF should not bear the risk because increased project risk, increases project cost, making it difficult to obtain financing on favorable terms [Tr. 517]. They argue that regulatory out clauses are one-sided and inequitable because they assume that the event triggering the disallowance was caused by the QF and they only allow payments to be adjusted downward [Tr. 380 - 381]. Witness Whiting observed that many states have taken steps to eliminate the regulatory out risk from QF contracts [Tr. 23 - 25]; however, neither he nor Witness Larsen were aware of any State Commission that prohibited regulatory out clauses in negotiated contracts [Tr. 59 - 62, 176].

The utilities argue that they should not be expected to bear the risk of disallowance because stockholders are not compensated for bearing this risk [Tr. 264 - 265]. They argue that the party that has the potential for receiving a profit should bear the risk of disallowance. Therefore, QFs should bear the risk of disallowance of contract payments, just as the utility bears the risk of disallowance on a plant it constructs--in each case, the party bearing the risk has the opportunity to profit. They maintain that the presence of a regulatory out clause does not "kill" a QF project because QFs are able to obtain financing for projects which have regulatory out clauses in the contracts [Tr. 555, 557 - 558, 720]. In addition, Witness Hazle testified that the presence of a regulatory out clause in a contract will reduce the probability that QF purchases will adversely impact a utility's credit worthiness [Tr. 592].

Both parties have made valid points, but the QFs' arguments are not strong enough to mandate the removal of regulatory out clauses from all negotiated contracts. Such a mandate would afford the QFs a benefit at no cost and open the utility to potential harm without compensation. The record demonstrates that acquiring financing may be more difficult for contracts with regulatory out clauses, but it is not impossible. We believe that the inclusion and the form of the regulatory out clause should be negotiated between the parties.

We, therefore, find that contracts may contain regulatory out clauses, but utilities may not require such clauses. The inclusion of a regulatory out clause should be negotiated by the parties. Should a party refuse to negotiate a regulatory out provision in good faith, either party may apply for relief under Rule 25-17.0834, Florida Administrative Code.

<u>ISSUE 8</u>: If the Commission determines that a utility's negotiated contracts may contain a "regulatory out" clause, should the Commission prescribe guidelines or terms and conditions of this clause? If so, what should they be?

As we have previously discussed, we will not prescribe standard terms in negotiated contracts.

<u>ISSUE 9</u>: Should the Commission prescribe a uniform force majeure clause for all negotiated QF power sales contracts?

As we have previously discussed, we will not prescribe standard terms in negotiated contracts. Force majeure clauses should be negotiated by the parties to best suit the desires of the parties. We have been shown no reason to prescribe a uniform force majeure clause. Witness Divine testified that he has no reason to believe that any QFs have had any difficulties negotiating a force majeure clause in Florida [Tr. 417]. In addition, Mr. Seidman and Mr. Stauffacher testified that no standard force majeure provision is necessary [Tr. 449 - 450, 342 - 343].

<u>ISSUE 10</u>: Should the Commission prescribe minimum standards for the insurance provisions to be included in negotiated QF power sales contracts?

We do not need to prescribe further insurance guidelines. We have recently completed rulemaking in which we prescribed minimum standards for insurance provisions in QF contracts. Rule 25-17.087 states:

> [t]he qualifying facility shall deliver to the utility...a certificate of insurance...naming the qualifying facility as named insured, and the utility as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering the liabilities...arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment

> or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.
>
> The policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than $300,000 for each occurrence; more insurance may be required as deemed necessary by the utility...

The QFs argue that there should be a cap on the amount of insurance that a utility can require. They argue that the Commission should prescribe terms and conditions because insurance provisions are susceptible to abuse by utilities [Tr. 383].

We disagree. The level of insurance required for a QF facility depends on several factors, including the size, design and complexity of the facility and its interconnection with the utility [Tr. 246, 418]. While we did establish a cap of $1,000,000 in standard offer contracts, it is important to realize that the standard offer contract is limited to facilities under 75 MW and negotiated contracts are available to QFs of all sizes. An insurance amount which is acceptable for facilities under 75 MW may not be acceptable for facilities in excess of 500 MW. Insurance amounts should be negotiated by the parties based on the unique characteristics of the QF's facility. If a utility is being unreasonable in its demands, the QF may petition for relief under Rule 25-17.0834, Florida Administrative Code.

ISSUE 11: As a matter of law, may the QF negotiate to own whatever portion of the interconnection it is required to pay for?

The Florida Statutes and Administrative Rules, as well as PURPA, are silent on whether a QF may negotiate to own any portion of the interconnection. Thus, there is no express authority, by statute or rule, conveying to the QF this legal right.

On the other hand, there is no legal principle which would prohibit a QF from owning the portion of the interconnection that it has paid for. Therefore, the QF may negotiate to own whatever portion of the interconnection it is required to pay for.

<u>ISSUE 12</u>: May negotiated contracts contain provisions which assess a QF for assumed Federal income tax consequences resulting from the payment to the QF of early, and/or levelized capacity payments without obligating the utility to first seek an IRS ruling that the taxes ought not to apply?

The utilities have identified an income tax liability that occurs when a QF elects early or levelized capacity payments. This tax liability is incurred because the utility pays capacity payments prior to receiving the benefit of the capacity. The utility may not deduct the payment for income tax purposes until the year the benefit is realized. While the payment is ultimately deductible, the utility experiences a loss because of the time value of money between the time it pays the QF and the time it is able to deduct the payment. Since this liability would not have been incurred, had the utility constructed the unit, the utilities' contracts have clauses requiring the QFs to pay any additional tax-related costs they cause.

The QFs object to the fact that utilities include such language without first obtaining an IRS letter ruling that the taxes apply. They argue that since the utility passes the tax effect to the QF, the utility has no incentive to question whether the taxes apply. They also argue that utilities lack any incentive to negotiate the tax flow-through clause [Tr. 48, 75, 101, 103, 451 - 452]. However, the QFs failed to demonstrate that a problem exists--no QF witness testified that they had ever asked a utility to obtain an IRS ruling [Tr. 111 - 112, 506].

The utilities maintain that parties should negotiate the issue of whether to obtain an IRS ruling because the parties are in the best position to assess whether it would be cost beneficial to apply for a ruling [Tr. 728]. They also maintain that utilities should not be required to seek an IRS ruling prior to passing these additional income tax-related expenses to the QF since this is an expense that the utilities would not have incurred absent the QF.

We agree. The parties should negotiate whether to seek an IRS ruling--no Commission action is necessary. The QFs and utilities both agree that the QF, not the utility, should pay the costs associated with obtaining an IRS ruling [Tr. 111, 247, 507 - 508, 658]. A QF wanting such a ruling should approach a utility and offer to pay the utility's expenses in seeking the ruling. Since no QF has made such a request [Tr. 111 - 1152, 506 - 507], or had difficulty in negotiating such a request, there is no indication that a Commission-prescribed solution is required, or desirable.

ISSUE 13: Should the Commission prescribe the methods for compensating QFs for reducing costs (if any) for utility compliance with the Clean Air Act amendments in negotiated contracts?

All parties agreed that a QF should be compensated to the extent that it reduces the utility's Clean Air Act compliance costs [Tr. 285, 344, 454, 652]. The parties disagree as to whether the Commission should prescribe the methods for compensating the QF. We believe that the parties should negotiate compensation on a case-by-case basis. The Clean Air Act benefit that a utility receives by virtue of purchasing from QFs varies on a case-by-case basis [Tr. 113]. Prescribing a uniform methodology might result in providing compensation that does not match the savings--some QFs may be overcompensated and some may be undercompensated.

In any event, we will not consider prescribing a uniform methodology at this time because there is not enough information available to determine the effects of the Clean Air Act. It is premature to consider this issue now [Tr. 112, 511].

ISSUE 14: Does Commission approval of a negotiated contract for firm energy and capacity sales from a QF to a utility constitute a determination by the Commission that capacity and energy payments made to a QF by the purchasing utility in accordance with the contract constitute a reasonable and prudent expenditure by the utility based on information submitted to the Commission at the time of approval?

For cost recovery purposes the effect of Commission approval of a negotiated contract should be the same as that which results from approval of a standard offer contract.

Our approval of the terms and conditions of a utility's contract and the firm capacity and energy prices stated therein, constitutes a determination that any payments made to a QF under the contract constitute a reasonable and prudent expenditure by the utility under Section 366.06, Florida Statutes, based on information submitted to the Commission at the time of approval.

ISSUE 15: May the Commission, having approved a negotiated contract between a QF and utility after finding it to be prudent, at a later date deny cost recovery to the utility of payments made to or yet to be made to the QF pursuant to the contract? If so, what would be a legal basis for such denial?

This issue, as it relates to standard offer contracts, was resolved by the Commission in Order No. 24989, Docket No. 910004-EU (August 29, 1991). The question of whether we should treat negotiated contracts in the same manner as standard offer contracts is a difficult one. There are several differences between the treatment of standard offer and negotiated contracts which have caused considerable debate on this issue.

One significant difference between standard offer and negotiated contracts is that we require utilities to purchase firm capacity and energy pursuant to standard offer contracts. The utilities are given no choice. Therefore, when we approve the standard offer contract, we make a commitment that we will allow cost recovery of payments made to small QFs.

Another significant difference is that standard offer contracts are limited to 75 megawatts. A negotiated contract may be of any size, and we make a much greater commitment when we approve a massive negotiated contract for cost recovery.

A third difference is the fact that standard offer contracts are meticulously reviewed by this Commission and its staff, before they are made available for acceptance by the QFs. Negotiated contracts have not always been the subject of such intense scrutiny.

Despite these differences, we believe that negotiated contracts should be treated in the same manner as standard offer contracts for cost recovery purposes. Fairness dictates that the parties to approved negotiated contracts should be entitled to rely on our decision to approve cost recovery of payments made pursuant to those contracts. If our analysis of negotiated contracts has not been meticulous in the past, the solution is for the Commission and its staff to conduct a more thorough review (to include requiring more information from the parties). We may also decide to make final approval of all negotiated contracts for over 75 megawatts in conjunction with the need determination proceeding (if one is required), where an extremely thorough analysis of the proposed project is done. The solution should not be to suggest that this Commission may at a later date revisit its determination of prudence.

We therefore believe that negotiated contracts should be given the same treatment as standard offer contracts for cost recovery purposes.

We have already ruled that our approval of a negotiated contract constitutes a determination that payments made by a utility to a QF under the negotiated contract constitute a prudent expenditure by the utility. We now find that once our determination of prudence becomes final by operation of law, we cannot deny the utility cost recovery of payments made to the QF pursuant to the negotiated contract, absent some extraordinary circumstance, such as where our finding of prudence was induced through perjury, fraud, collusion, deceit, mistake, inadvertance, or the intentional withholding of key information.

We have previously stated that we "cannot bind future Commissions." (Order No. 13846 at p. 3) This statement is true, to the extent this Commission cannot dictate the votes of Commissioners who will later sit on the Commission. However, case law indicates that the Commission has only limited power to change its prior decisions. In fact, at some point we lose the power to change our decisions and must live with them.

The Supreme Court of Florida has set the ground rules under which we may correct or amend our orders. If an order has not become final by operation of law, the Commission may, on its own motion or by request, correct or amend any order under its control without notice and hearing if the matters corrected and amended were embraced in the testimony taken at a previous hearing. Alterman Transport Line v. Yarborough, 267 So.2d 34 (Fla. 1973).

Orders of administrative agencies must eventually pass out of the agency's control and become final, and, therefore, no longer subject to modification. There must be in every proceeding a terminal point at which the parties and the public may rely on a decision of an administrative agency as final and dispositive of the rights and issues involved therein. Peoples Gas Systems, Inc. v. Mason, 187 So.2d 335 (Fla. 1966); also, Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979). However, the Supreme Court of Florida has recognized the rule that "[o]rders, decrees, or judgments, made through fraud, collusion, deceit, or mistake, may be opened, vacated, or modified at any time, on the proper showing made by the parties injured." Davis v. Combination Awning & Shutter Co., 62 So.2d 742, 745 (Fla. 1953).

The Court has acknowledged that the Commission has some inherent power to modify its orders. Peoples Gas System v. Mason, 187 So.2d 335, 339 (Fla. 1966); Reedy Creek Utilities Company v. Florida Public Service Commission, 418 So.2d 249, 253 (Fla. 1982). However, the Supreme Court has determined that the Commission's inherent power to modify is not without limitation. As stated in Reedy Creek, "an underlying purpose of the doctrine of finality is to protect those who rely on a judgment or ruling." In this respect, we believe that the parties to approved negotiated contracts should be entitled to rely on a Commission decision to approve cost recovery of payments made pursuant to those contracts.

We determine the prudence of payments to be made to a QF under a cogeneration contract, as of the date of our decision based upon the facts before us at that time. Once our order is no longer subject to modification even an extraordinary event such as the future discovery of some new power source could not affect our determination. A cogeneration contract is either prudent at the time of our determination or it is not. Subsequent events cannot change a determination of prudence (once final) made upon facts contemporaneously before us.

The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract. Once an order approving a negotiated contract becomes final by operation of law, we may not at a later date deny cost recovery to the utility, absent a showing that our approval was induced through perjury, fraud, collusion, deceit, mistake, inadvertance, or the intentional withholding of key information. Our decision here applies only to Commission approval of the terms and conditions of cogeneration contracts for the purchase of firm capacity and energy from qualifying facilities. Specifically it is our intent that future Commissions should not be invited to revisit approval of cost recovery under such contracts.

It is also our intent that this decision be interpreted narrowly, to apply only to cogeneration contracts, and that it have no precedential bearing on any subject matter other than approval of cogeneration contracts for cost recovery purposes.

Therefore, it is

ORDERED by the Florida Public Service Commission that issues one through fifteen as stated above, are hereby resolved as set forth in the body of this order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 3rd day of FEBRUARY, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

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