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Florida Power
CORPORATION

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July 28, 1994

Ms. Blanca S. Bayo
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Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0870

940797-EQ

Re: Petition for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts

Dear Ms. Bayo:

Enclosed please find for filing with the Commission is an original and 15 copies of Florida Power Corporation's Petition for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Thank you for your assistance.

Very truly yours,

James A. McGee

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition of Florida Power Corporation for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts

Docket No. 940797-EQ

Submitted for filing:
July 28, 1994

PETITION FOR APPROVAL, TO THE EXTENT REQUIRED, OF CERTAIN ACTIONS RELATING TO APPROVED COGENERATION CONTRACTS

Florida Power Corporation ("FPC"), by its undersigned attorneys, hereby petitions the Florida Public Service Commission ("Commission") for approval, to the extent required, with respect to certain actions taken during the course of performance of Commission-approved cogeneration contracts.[1]

Specifically, on various occasions after a cogeneration contract between FPC and a cogenerator has been approved by the Commission, FPC has taken certain actions which it believes were either expressly authorized by the Commission approved contract or which were inherent in the routine administration of the contract. FPC believes that these actions do not require further Commission approval but, based upon a recent Commission staff recommendation in another proceeding and FPC's subsequent discussions with staff, FPC is now concerned that such approval may be required. If such approval is required, FPC requests that it be granted because each of those actions described below is completely consistent with the Commission's approval of the contracts in the first instance and is in the best interest of FPC's ratepayers and the general public.

[1] These contracts are on file with the Commission.

In addition, there are certain post-contract actions that may fall outside of the categories identified above and hence would require Commission approval. As to those actions, which are more specifically described below, FPC also seeks Commission approval to the extent required, for the reasons set forth below.

BACKGROUND

1. During the last decade, the Commission has approved 24 cogeneration contracts between FPC and various cogenerators. Following each such order of approval, FPC and the cogenerator necessarily have taken certain actions in performing under the contracts. In virtually all such instances, the action was either expressly authorized by the approved contract or inherent in its routine administration by the parties, and, in each instance, the action was entirely within the purpose of the approved cogeneration contract. Accordingly, at the time the action was taken, FPC did not believe it was required to submit its post-contract actions to the Commission for further approval, and did not do so. It did, however, inform Commission staff that actions of this type were being taken, and it was FPC's understanding that staff similarly believed that there was no need to submit these matters for Commission approval.

2. On April 19, 1994, Auburndale Power Partners, L.P. ("Auburndale"), and FPC filed a joint petition for declaratory statement. (Docket No. 940378-EQ) (hereinafter "Auburndale"). The petition raised the issue of whether the Commission's new rule governing firm capacity and energy contracts (Rule 25-18.0832) would become applicable to two existing cogeneration contracts after their assignment from LFC No. 47 to Auburndale. The Commission Staff's recommendation (issued July 7, 1994) on that petition has caused FPC concern

as to whether some or all of the various actions it has taken -- and undoubtedly will continue to take in the future -- in performing and administering the Commission-approved cogeneration contracts must be submitted to the Commission for its further approval.

3. Specifically, the Staff's recommendation addressed an issue not presented in the petition: whether the particular assignment there created a novation. Staff concluded that it did, largely because, after the assignment was complete, the assignor would be discharged from its obligations under the contracts.[2] (Recommendation at 5,6). Further, with respect to changes in facility location and the procedures for curtailment which had been agreed upon by FPC and Auburndale and which were to go into effect upon execution of the assignment, the Staff's recommendation seemed to suggest that these too might require Commission approval, even if the changes were expressly authorized under the terms of the contracts. (Id. at 6).

4. Although there has been no ruling by the Commission itself on this question, the Staff's recommendation creates uncertainty as to whether the Commission expects to have a broad range of actions undertaken pursuant to Commission-approved cogeneration contracts submitted to it for further approval. In light of the Commission's regulatory over-sight over FPC in general and over its cogeneration contracts in particular, FPC requests the Commission to approve each of the actions described below, to the extent the Commission concludes that such approval is in fact required with respect to any of those actions.

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[2] The Auburndale assignment has subsequently been amended so that the assignor, LFC No. 47 Corp., remains liable on the obligations and is only discharged to the extent the contract obligations are performed by the assignee.

DISCUSSION

5. Virtually all of the actions taken by FPC in the course of performing under Commission-approved cogeneration contracts were clearly and expressly authorized or by the contracts or were essentially inherent in the parties's performance and administration of them. Thus, in approving the contracts, FPC believes that the Commission necessarily approved the undertaking of these actions and, by FPC's understanding of the Commission's order, thereby obviated any need for additional Commission approval of them once they were in fact undertaken.

6. However, in light of the Commission's Staff Recommendation in Auburndale, FPC is now uncertain as to whether its understanding of the scope of the Commission's approval is correct. Simply put, it is uncertain whether all actions undertaken pursuant to the cogeneration contract -- even those expressly authorized in or inherent in the routine administration and performance of the contract itself -- must be brought to the Commission for further approval.

7. To understand the dimensions of this issue, FPC has submitted herewith a compilation of the various actions it has undertaken in performing under the cogeneration contracts. As discussed below, FPC believes that many of these actions are clearly and expressly authorized by the contracts themselves. Others, although not as clearly set forth in the contracts, are fully consistent with the contracts' purposes and are inherent in the routine administration and performance of the contracts by the parties. Finally, as FPC has considered this question, it has become apparent to it that some of the actions may not have been originally contemplated by the Commission in approving the contracts and hence

would require Commission approval. We address each of these categories of actions in turn.

(a) Actions Expressly Authorized by the Approved Contract.

8. FPC's Commission-approved cogeneration contracts anticipate a number of events which could -- indeed, were almost certain to -- occur in the course of performing under the contract. Among such provisions are those dealing with assignments, regulatory delays, force majeure events, and curtailment. The provisions specifically detail actions the parties may take in such events. Thus, FPC believes that actions taken pursuant to such authorization have already been approved by the Commission, and no further approval is required.

(1) Assignments

9. Each of FPC's Commission-approved contracts expressly states that the cogenerators' obligations and duties thereunder are assignable, but only with FPC's consent. From time to time, in the course of performing under a contract, FPC has given its consent to an assignment of that contract. In giving such consent, FPC is simply taking an action already expressly approved by the Commission. No further approval would appear necessary.

10. However, the Staff's recommendation in Auburndale raises some question about FPC's understanding in this regard. The Staff's recommendation in Auburndale is to the effect that an assignment may "constitute[] a new or substituted contract by novation" which may be subject to rules passed after the contract was approved. Although FPC does not agree with that view, it does

seem to suggest that at least some of FPC's consents to assignments -- even though expressly authorized in the

contract -- are to be submitted to the Commission for further approval. For the following reasons, FPC does not believe that should be the case.

11. As an initial matter, all of FPC's consents to assignments arise in a very different context from that in Auburndale. Typically, FPC's consent to an assignment of an approved cogeneration contract involves an assignment of the contract to a financial institution. The purpose of such an assignment is not so that the financial institution can become the operator of the facility. Rather, the assignment merely provides the institution with security for its financial investment in funding the cogeneration project. Indeed, many of these assignments expressly provide that the cogenerator -- and not the institution -- is obligated to perform under the contract.

12. As the Commission is well aware, these projects require substantial construction costs -- generally tens of millions of dollars. By industry practice, financial institutions advancing such funds require security for that advance, and, in many instances, that security is the cogeneration contract itself. That has been true with many of FPC's approved cogeneration contracts, including the contracts with Reyster, Mulberry, CFR Biogen, Timber Energy Resources, Lake Cogen Limited, Lake County, Orlando Cogen Limited and Pasco Cogen Limited. The Commission obviously understood and intended that, in approving a cogeneration contract with a provision expressly permitting FPC to consent to an assignment of that contract, it was permitting the contract to be assigned (with FPC's consent) as security for a financial institution's investments in the project. Accordingly,

when such an authorized assignment occurs, there should be no need to bring it before the Commission for further approval.

13. On occasion, pursuant to the Commission-approved provision for assignments, FPC has also consented to an assignment of an approved cogeneration contract to an entity which will proceed to undertake the contracting cogenerator's obligations and duties under the contract. However, unlike the assignment in Auburndale wherein, as originally contemplated, after the assignment was complete, the assignor would be discharged from its obligations under the contracts, FPC has, with the two exceptions discussed below, not consented to discharge the original contracting party from its contractual obligations, except to the extent those obligations are actually performed by the assignee.

14. For example, in February, 1992, FPC consented to the assignment to of its contract with Mulberry Energy Company to Polk Power Partners, L.P. However, the agreement by which FPC consented to that assignment, expressly recites that the assignment does not alter FPC's rights against Mulberry and that Mulberry is only discharged from its obligations to the extent of performance of them by Polk Power. Similar provisions are contained in assignments of FPC's cogeneration contracts with Royster (to Polk Power Partners), General Peat Resources (to EcoPeat Power, L.P.), and CFR Bio-Gen (to AP Cogen, L.P. and, thereafter, from AP Cogen to Orange Cogeneration L.P.). As such, there is no change in the duties and obligations of the original parties and hence there is clearly no novation. San Souci v. Division of Florida Land Sales and Condominiums, 421 So. 2d 623, 630 (Fla. 1st DCA 1982)(a novation requires,

among other things, "the extinguishment of the original contractual obligation[s]").

15. Further, in those instances where FPC's consent is silent as to whether the assignor would be discharged of its obligations by the assignment,[3] the law is clear that such consent would not operate as a discharge. Craig v. 60 Minute of Miami, Inc., 267 So. 2d 94, 96 (Fla. 3d DCA 1972); RCA Corp. v. Allapattah Baptist Church, Inc., 365 So. 2d 214, 215 (Fla. 4th DCA 1978); Raimondi v. I.T. Chips, Inc., 480 So. 2d 240, 241 (Fla. 4th DCA 1985); accord Restatement (Second) of Contracts § 318(1) & comment d (1981); 4 Corbin, Contracts, § 866 (1951 & Supp. 1993). Once again, then, there is no novation. Thus, even if the Staff recommendation were correct that the assignment in Auburndale, as originally contemplated, created a novation because the assignor there was discharged of its obligations (Staff Recommendation at 5,6), that is not the case with these other assignments. Rather, the same entity that was party to the contract when approved by the Commission would remain fully obligated to FPC for the contract's performance. As such, FPC's consent to this type of assignment was clearly encompassed by the approved-contract itself and, FPC submits, does not require further Commission approval.

16. Moreover, FPC respectfully disagrees with the Staff's recommendation (at 4) which seems to suggests that, in all instances where the assignor's obligations are discharged by the assignment, the assignment will constitute a "novation" -- that is, "a new or substituted contract" -- and thus potentially be subject to rules not in existence at the time the contract was originally approved.

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[3] The Lake County contract to Ogden Martin Systems of Lake County, and the El Dorado covenant to Auburndale Power Partners.

17. First, the cogeneration contracts expressly authorize FPC to consent to an assignment. The contracts draw no distinction between those assignments where FPC reserves its rights and those where it does not. Thus, when FPC consented to an assignment, it was simply performing under an express term of the contract and no new or substituted contract was created by this performance. Rather, the original contract continued, as FPC's consents to the assignments expressly stated: "neither the Assignment nor this Consent shall alter, waive or modify the Sales Contract, or FPC's rights under the Sales Contract." See San Souci, 421 So. 2d at 630 (novation requires, among other things, "the extinguishment of the original contractual obligation[s]"). As a result of that limitation, the original contract would continue to exist and be subject to the Commission's cogeneration rules which were in existence at the time the contract was approved and incorporated therein. Accordingly, no further approval of the assignment would be necessary.

18. Second, with the change of the Auburndale assignment to one in which the assignor remains obligated under the contract, there are now only two instances -- the assignments of the El Dorado contract to Auburndale and the Seminole Fertilizer contract to Cargill -- in which the assignor has been discharged. Each of those assignments arose in markedly different circumstances than the Auburndale assignment. The assignment from El Dorado to Auburndale was merely reflective of a change in the name of the cogenerator from El Dorado to Auburndale. The assignment from Seminole to Cargill came about because of Cargill's purchase of Seminole. In effect, Seminole was absorbed into Cargill and Cargill became liable on the contract. Thus, in each of these instances, the cogenerator is for all practical purposes the same party already approved in the

cogeneration contract (indeed, in the El Dorado situation it is precisely the same party) and the assignment of that contract is essentially one of form rather than substance; and the assignment certainly did not extinguish the original contractual obligations.

19. Indeed, many of the other assignments are also a result of changes in form, not substance. For example, the EcoPeat Avon contract was assigned to Central Florida Power. However, the original party to that contract was EcoPeat Limited, whose name had been changed to Central Florida Power after Destec became a partner in the enterprise. Thus, even though the contract was assigned, the cogenerator was, for all practical purposes, the same party approved by the Commission in connection with that very contract.

20. In a similar vein, some of these assignments which do not involve an express reservation of rights were made with respect to cogenerators approved by the Commission in connection with other cogeneration contracts. For example, the Timber Energy Resources contract was assigned, through an intermediary, to Tiger Bay Limited, which had formally been named Central Florida Power (and before that, EcoPeat Limited).

21. None of these assignments changed the performance obligations of the contract: electricity still was to be provided under exactly the same terms and conditions of the contract approved by the Commission. Indeed, it was to be provided by a cogenerator approved by the Commission.

22. Third, even if the assignment of the Seminole Fertilizer contract to Cargill (or the El Dorado contract to Auburndale) were properly characterized as a "novation," the fact that the performance obligations are unchanged (and, indeed, are not "alter[ed], waive[ed] or modif[ied]") and that FPC's rights under

the contract are likewise unchanged, should strongly counsel against application of rules adopted by the Commission after the contract was originally approved. See In re CFR BIO, 91 F.P.S.C. 4:109 (Apr. 4, 1991) (1990 cogeneration rules are not curative in nature and therefore do not apply to affect contract obligations established prior to their adoption); Jordan v. Department of Professional Regulation, 522 So. 2d 450 (Fla. 1st DCA 1986)(administrative rules will not be applied retroactively unless the rule is curative in nature or expressly provides for retroactive effect). Indeed, to apply such rules -- without any prior notice that such an application would occur -- simply because the contractually authorized assignment of the approved contract is considered a novation, is particularly unfair. Quite simply, it deprives the parties to the approved contracts of any notice that, should they wish to avoid that application, any assignment of the contract should be structured so as to avoid the possibility that it might subsequently be viewed as a novation.

(2) Operational Matters Such as Regulatory Delays, Force Majeure, and Curtailment.

23. In addition to expressly authorizing assignments, the FPC's Commission approved-contracts specifically identify certain operational matters that might occur during the course of the performance of the contracts and expressly delineate the actions the parties may take in dealing with them.

24. A prime example of this occurs in the area of regulatory delays. With respect to many of FPC's cogeneration contracts, there have been delays in obtaining necessary regulatory approvals. These delays, in turn, have required the parties to extend the dates specified in the contracts for construction commencement and commercial in-service operation. However, such regulatory

delays and consequent date extensions are specifically addressed and authorized in the contracts themselves. (See, e.g., §4.2.1 of FPC's approved cogeneration contract with Lake Cogen Limited).

25. As with regulatory delays, force majeure events occasionally occur and necessitate extensions of the construction commencement and commercial in-service operation dates. Once again, however, the Commission-approved cogeneration contracts expressly authorize such extensions. For example, changes in the Comprehensive Land Use plan for Polk County necessitated extensions of the construction commencement and commercial in-service operation dates with respect to FPC's contracts with Mulberry Energy Company and Ridge Generation Station. These were accomplished pursuant to §4.2.2 of those contracts. Other force majeure events have affected some of FPC's other cogenerators and caused a similar provision in their Commission-approved cogeneration contract to be invoked.

26. Still another type of operational matter expressly authorized under the cogeneration contract involves a one-time ability of the cogenerator to change the committed capacity provided in the contract. This ability is provided because, as the design and construction of the facility proceeds, the facility may perform slightly differently than was originally anticipated. Thus, the contract provides for some degree of flexibility in anticipation of the possibility. For example, after their contracts had reached commercial in-service operation, in accordance with §4.2.2 of their respective contracts, Lake County increased the amount of its committed capacity, while Pinellas Resource Recovery (pursuant to §5.1.2 of its contract) reduced its committed capacity.

27. The cogeneration contracts also incorporate Commission rules which permit FPC to accept less power from the cogenerator during certain periods of lesser demand. In effect, the contract approved by the Commission sets a ceiling on the amount of electricity which the cogenerator will supply to FPC and allows FPC to take less than that amount in certain circumstances. The provision is important because, at certain times of reduced demand, if FPC were required to purchase that ceiling amount, the reliable and economic operation of the system could be compromised. This could result in service interruptions or increased costs to FPC's ratepayers.

28. To implement this provision in an orderly manner, rather than unilaterally acting pursuant to the contract's authorization, FPC has sought curtailment agreements with a number of the cogenerators. Under such an agreement, the cogenerator agrees to curtail its output during periods of lesser demand, and FPC agrees, in turn, not to hold this reduction against the cogenerator in computing the cogenerator's capacity factor and, where applicable, performance adjustment under the contract. As a result, electricity is more efficiently produced and the ratepayer avoids paying higher costs. To that end, FPC has reached agreements with some cogenerators (e.g., Ark Energy with respect to the Royster and Mulberry contracts, Dade County and Destec) pursuant to which they will lower their output during certain hours or months and with others (e.g., Cargill, Lake Cogen and Pasco Cogen) who agree to do their best to lower output during periods of lesser demand.

29. These and other operational actions like them are expressly authorized under the approved cogeneration contracts. Accordingly, FPC believes there is

no need to present these actions to the Commission for approval when they are implemented.

(b) Actions which were Inherent in the Routine Administration of the Contract

30. In addition to actions which were expressly authorized in the approved cogeneration contracts, FPC has also taken other actions in performing the contracts. These actions generally can be described as inherent in the routine administration of the contract by the parties, were fully consistent with the contract's purpose, and served to conform the contract to its proper intent and meaning rather than to substantively alter the parties' obligations. Typically, these actions include such matters as identifying and acknowledging typographical errors.

31. Given the nature of these actions, FPC believed that each of them was encompassed within the Commission's approval of the cogeneration contracts. If that is so, then the actions require no further approval by the Commission. However, unlike actions for which the authorization is clearly and expressly covered in the contract, the authorization for these actions is not so clearly defined. Accordingly, FPC cannot now be certain whether these actions require further Commission approval.

32. A typical example of an action which is inherent in the administration of a long-term contract involves dealing with typographical errors. The cogeneration contracts between FPC and Mulberry Energy, and between FPC and Royster Phosphates are reflective of such instances. Each of those contracts was approved in 1991. In 1994, in the course of performance under the contracts, the parties discovered various typographical errors with respect to cross-references

in the contacts (e.g., a reference in §1.2 to Art. VI should have been to Art. VII). The parties, by letter agreement, acknowledged those mistaken references. Other typographical errors have been noticed in other contracts and likewise have been handled by letter agreement cf the parties.

33. The Commission-approved contracts also contain a provision regarding the address to which contractually required notices are to be sent. Given the length of time these contracts will be in effect, it was virtually assured from the outset that, on occasion, there would be a change in the address set forth in the contract. Obviously, when such changes occur in the routine administrative of the contract, they do not substantively alter the terms of the contract. For example, in March, 1993, the address to which notices for Lake Cogen Limited was changed. The parties handled the matter by letter agreement and otherwise continued to perform the substance of the Commission-approved contract. FPC does not believe there is a need to present such address changes to the Commission for approval.

34. An additional aspect of the administration of the contracts was more technical and occurred in connection with § 8.5 of the Mulberry contract. That section required that, if the cogenerator opted to receive "accelerated capacity payments," it would maintain a "capacity account." In this instance, the capacity account was unnecessary since Mulberry had not elected to receive accelerated payments and had never intended to do so. Although the payment schedule attached to the cogeneration contract approved by the Commission did contain figures in the "accelerated payment" column, these figures did not reflect accelerated payments but payments to be made on a variable discounted basis. Thus, as the figures in the payment schedule demonstrated, there was never any

intent to implement §8.5. Accordingly, in administering the contract, to avoid any possible confusion in this regard, the parties confirmed that neither would incur a repayment obligation pursuant to §8.5 of the contract and that §8.5 was of no force and effect.

35. Simply put, with the possible exception of facility relocations which are discussed in the following section, all of the agreements reached between FPC and the cogenerators are ones which, FPC believes, were either expressly authorized by the contracts or inherent in their routine administration. Thus, no further approval of these agreements should be necessary. However, if such approval were required, FPC submits that these agreements should be approved since they have been consented to by the cogenerator, and are in interests of the public and FPC's ratepayers.

(c) Actions which May Not Have Been Encompassed by the Commission's Order Approving the Contracts.

36. From time to time, in performing under the cogeneration contracts, FPC has agreed to a change in the location of the facility from which the cogeneration power will be provided. A change in the location of the facility usually comes about when FPC has multiple cogeneration contracts with a single cogenerator (e.g., Destec or Ark Energy) who wishes to use one facility to provide the electricity required under the different contracts. The substance of the Commission-approved contracts does not change because the electricity is still being provided on exactly the same terms and conditions. The only change is with respect to the facility being used to generate that electricity. And, that facility is generally one which the Commission has approved in connection with another cogeneration contract. Thus, the change in facility is consistent with the

Commission's intent in approving the contracts. Moreover, the change in facility has no effect on the ratepayers.

37. As a result of this consistency with the contract and the lack of adverse effect on the public or the ratepayers, FPC has not previously submitted these relocation agreements to the Commission for approval. However, after the Staff's recommendation in Auburndale, as FPC again has considered the various types of agreements it has reached with cogenerators, it has become apparent to it that facility relocations may not have been encompassed by the Commission's order in approving the contracts and hence would require Commission approval. If that is so, FPC now seeks that approval.

38. The reasons why approval of these various actions should issue are set forth in the section below.

(d) All of These Actions are In the Public Interest and the Interest of FPC's Ratepayers and Should be Approved by the Commission to the Extent Any Further Approval is required.

39. The accompanying Appendix sets forth the specific agreements which have been reached between FPC and the various cogenerators with respect to the Commission-approved cogeneration contracts. With the exception of a few unique agreements which are discussed in the Appendix, these agreements fall into several generic categories. As discussed below, each of these is consistent with the public interest and that of FPC's ratepayers. Accordingly, FPC submits that, to the extent further Commission approval is necessary for any of them, such approval should issue.

1) **Regulatory, Force Majeure and Interconnection Delays**

40. Each of the approved cogeneration contracts expressly authorizes extensions of time for such matters as commencement of construction and commercial in-service operations if various events occur. These events include regulatory delays, force majeure occurrences, and the timing of FPC's ability to interconnect. Underlying each of these provisions is the common sense rationale that the cogenerator should not put in breach because of delays which are essentially beyond its control.

41. These contract provisions have come into play with respect to many of FPC's cogeneration contracts. Specifically, as the Appendix details, the Royster and Mulberry contracts have required extensions of time due to all three types of events -- regulatory delays, force majeure events, and interconnection delays. Both regulatory and force majeure delays have occurred with respect to the El Dorado and Ridge contracts. In addition, regulatory delays have necessitated extensions of due dates under the Lake Cogen, Orlando Cogen, and Pasco Cogen contracts, and interconnection delays have required extensions of time under the GenPeat contracts.

2) **Facility Relocation**

42. In several instances, the facility from which the power is to be supplied has changed. Specifically, this has occurred with respect to the Royster, EcoPeat, and Timber Energy contracts. It would also occur under the assignment to Auburndale of the LFC contracts, which assignment is the subject of the Auburndale proceeding. In each such instance, the change in facility has been in the interest of the public and of FPC's ratepayers.

43. The Royster relocation provided that the contract would be performed at the facility which would provide power under the Mulberry contract. This relocation has resulted in specific benefits to the public.

44. First, the Mulberry facility would have had a 100 MW capacity, but the Mulberry contract was for 72 MW. As a result, the Mulberry facility would have had more capacity than required. The Royster contract, on the other hand, was for 28 MW. Thus, by having both the Mulberry and Royster contracts supplied by the Mulberry facility, the over-capacity situation at Mulberry would be avoided.

45. Second, the Royster facility would have been located outside FPC's service area. As a result, its power necessarily would have been wheeled by Florida Power & Light Company. By having the Royster contract serviced from the Mulberry facility this also will be avoided.

46. The relocation of the two LFC contracts to Auburndale also benefits the ratepayers. In particular, the LFC facility is located in Northern Florida which is further from the load than the Auburndale facility. The relocation of this generation increases FPC's import capability thereby allowing more economic and reliable operation of the FPC system. In addition, as one of the earliest cogeneration facilities, service from the LFC facility is less reliable due to the nature of its interconnection. Thus, in this way as well, system reliability will be enhanced by the relocation.

47. With respect to EcoPeat, the original facility was to be a facility leased from FPC in Avon Park. EcoPeat was to burn peat as its primary source of fuel. That caused considerable public protest due to concerns that mercury absorbed by the peat would be released into the air. These concerns were alleviated as a result

of FPC's consent to a relocation of the originally designated facility to the same facility providing power under the GenPeat contracts (the Tiger Bay 212 MW gas-fired facility).

48. The third such facility relocation, under the Timber Energy contract, also was a relocation to the Tiger Bay facility. This -- along with the EcoPeat relocation -- benefited FPC's ratepayers (at no harm to the public). That benefit resulted from certain technical aspects associated with the fact that, with the addition of these two contracts, the Tiger Bay facility would be providing power under five cogeneration contracts with FPC.[4] In particular, by allowing the contracts to move south to the Tiger Bay facility, FPC's import capability was increased, thereby allowing more economical operation of the FPC system.

3) Changes in Committed Capacity

49. Each of FPC's cogeneration contracts permits the cogenerator to make a one-time limited change in the amount of its committed capacity. These provisions are necessary -- and serve the public interest -- because, as engineering and construction of the facility are completed, the performance of the facility may differ somewhat from what was originally anticipated. The contract itself recognizes this possibility and provides a means of dealing with it. Pursuant to these provisions, the committed capacity has been changed under the three GenPeat contacts, as well as the Lake Cogen, Lake County, Pasco Cogen, and Pinellas Resource Recovery contracts.

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[4] The other three contracts are the three GenPeat contracts which were always expected to be performed at that facility.

4) Curtailment Agreements

50. FPC has also reached several agreements with cogenerators relating to curtailment. These agreements generally take one of two forms.

51. The first type of agreement typically provides that (1) the cogenerator will reduce output during off-peak hours throughout the term of the contracts (in some instances there will be no output at all during those hours), and that FPC would not be obligated to purchase power during that time, (2) no power would be delivered to FPC during a specific period of time each year, and (3) the effect of this curtailment will not adversely impact the cogenerator with respect to items such as capacity factors and committed capacity.[5] FPC has this type of curtailment agreements applicable to the Tiger Bay project (all five contracts being performed at the Tiger Bay facility) and the Mulberry, Royster, Dade County, and Pasco County contracts.

52. FPC has a second type of curtailment agreement with respect to the Seminole, Lake Cogen and Pasco Cogen contracts. These agreements have come about in situations where the cogenerator, because of the nature of its operations, is unable to commit to specific cutbacks. Instead, the cogenerator agrees that it will cut back production as much as possible during off peak hours. For example, under the Seminole contract, the fuel source is the heat produced as a result of the cogenerator's business of creating sulfuric acid. It was thus difficult for the cogenerator to commit to a specific cutback, but it was willing to cutback its output to the extent possible during off-peak hours.

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[5] This third aspect of the first type of agreement is also present in the second type of agreement.

53. The rationale underlying all of these curtailment agreements is consistent with the interests of the public and FPC's ratepayers. Indeed, the cogeneration contract itself incorporates the Commission's rules, which expressly authorize FPC to curtail its purchases of power for various reasons, including economic ones.

54. The benefits of these curtailment agreements is easily shown. FPC's peak load has been growing substantially faster than its minimum load. In fact, in the near future, it is expected that if FPC were required to take all of the committed power under its cogeneration contracts during periods of lesser demand, the reliability and efficiency of its system would be impaired. The existing formal and informal curtailment agreements, mitigate this impending problem. Moreover, rather than FPC unilaterally exercising its curtailment rights, these agreements have permitted a more orderly and well-planned curtailment for all concerned.

5) Identification and Acknowledgement of Typographical Errors

55. In performing under the cogeneration contracts, the parties have occasionally identified -- and acknowledged -- the existence of typographical errors appearing on the face of the contracts. This has occurred with respect to the Mulberry, El Dorado and Pasco County contracts. For example, the Mulberry contract was found to contain certain typographical errors such as a reference in §1.2 to Art. VI which should have been to Art. VII. Such errors are acknowledged by letter agreement and have no impact on the public or FPC's ratepayers.

6) Assignments

56. As discussed in earlier sections of this petition, each of FPC's cogeneration contracts expressly provides for the assignment of the cogenerator's obligations provided FPC gives its consent. On a number of occasions, FPC has done precisely that.

57. Most assignments come in connection with securing financing for the project, wherein the contract serves as security for the entity providing the financing. FPC has consented to such financing assignments in connection with the CFR Bio-Gen, Timber Energy 2, Lake Cogen, Lake County, Orlando Cogen, and Pasco Cogen contracts. Under such assignments, the assignors remained responsible for contract performance. Thus, other than the fact that these financing-related assignments would enable financing to be obtained and the project completed, exactly as contemplated and authorized by the Commission, these assignments substantively had no impact on the public or FPC's ratepayers.

58. FPC also has consented to certain assignments which were not being undertaken as security for a financing arrangement. These included assignments of the Royster and Mulberry contracts to Polk Power Partners; the CFR Bio-Gen contract to AP Cogen and then to Orange Cogen; the Seminole contract to Cargill Fertilizer; the three GenPeat contracts to EcoPeat; the EcoPeat Avon Park contract to Central Florida Power (subsequently known as Tiger Bay); the Timber Energy 2 contract to Florida Cogen Development and, thereafter, to Tiger Bay; the El Dorado contract to Auburndale Power Partners; the two Sun Bank contracts to LFC No. 47 Corp. and, more recently, to Auburndale Power Partners; and the

NRG Recovery Group contract to Ogden Martin Systems of Lake County.[6] However, none of these assignments effected the interests of the public or FPC's ratepayers.

59. In all but the assignments of the Seminole contract to Cargill Fertilizer and the El Dorado contract to Auburndale, the assignor remains liable for the obligations of the cogenerator under the contract to the extent those obligations are not performed by the assignee. In addition, FPC's consents to the assignments make clear that its rights under the contract remain unchanged. Thus, these assignments have no substantive effect on the contractual obligations as they relate to the provision of capacity from the cogenerator to FPC, and, accordingly, no impact on the public or FPC's ratepayers.

60. The same is true even in connection with the assignments of the Seminole contract to Cargill and the El Dorado contract to Auburndale. The El Dorado assignment is simply reflective of a name change by the cogenerator; in effect, there is has been no change in the parties. The Seminole assignment arose as the result of Cargill's purchase of Seminole. In effect, Seminole was absorbed within Cargill and no longer existed as a legal entity to carry out the contract. Thus, with its absorption of Seminole, the contract obligations became Cargill's. Given these circumstances, the statement in FPC's consent to the assignment that, after its execution, Seminole would not be liable for any of the contractual liabilities and obligations, was essentially a mere recognition of the legal effect of the Cargill purchase.

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[6] In connection with some of the assignments, the address to which notifications were to be sent under the cogeneration contracts was changed. These are set forth in the accompanying Appendix.

61. In short, then, although there have been a number of assignments of the contracts, these have not changed the substantive obligations under the cogeneration contracts. As a result, neither the public interest nor the interest of FPC's ratepayers has been adversely effected by any of them. Indeed, as explained in the accompanying Appendix, there is actually a positive benefit associated with several of these assignments.

CONCLUSION

In sum, the Staff recommendation in the Auburndale matter has placed in issue the scope of actions requiring Commission approval in connection with performing Commission-approved cogeneration contracts. FPC has taken a number of such actions which it believes either (1) are expressly addressed and permitted under the contract or (2) are inherent within the routine administration of the approved contract. Accordingly, it does not believe these actions require any further Commission approval. However, if the Commission disagrees with FPC's view, FPC requests the Commission approve these actions since each is in the public interest, the interest of FPC's ratepayers, and the interests of the contracting parties. Finally, certain actions which may not have been expressly authorized or encompassed by the Commission's approval of the contracts are nonetheless consistent with the purpose of the contracts, are in the interest of the public and FPC's ratepayers, and have been agreed to by the cogenerator. As such, the Commission should also approve these actions, to the extent it concludes further approval is in fact required.

Respectfully submitted,

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By _____

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Docket No.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Petition for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts has been served by U.S. Mail on the 29th day of July, 1994 to the following:

Orange Cogen Limited
c/o Ark/CSW Development Partnership
23293 South Pointe Drive
Laguna Hills, CA 92653

NationsBank of Florida, NA
600 Peachtree Street, NE
Atlanta, GA 30308

GECC
1600 Summer Street
Stamford, Connecticut 06927

TIFD-C, Inc.
c/o GECC
1600 Summer Street, 6th Floor
Stamford, Connecticut 06927
Attn: Manager,Energy Portfolio Admin

Lake Cogen, Ltd.
1551 N. Tustin Avenue, Suite 900
Santa Ana, CA 92701

Mr. Macauley Whiting, Jr.
Ridge Generating Station
400 North New York Ave., Suite 101
Winter Park, FL 32789

Wheelabrator Ridge Energy
3131 K-Ville Avenue
Auburndale, FL 33823

Mr. Jerome L. Glazer
Auburndale Power Partners
12500 Fair Lakes Circle, Suite 420
Fairfax, Virginia 22033

Mr. Don Fields
Executive Director
Auburndale Power Partners
1501 Derby Avenue
Auburndale, FL 33823

Mr. Roger Fernandez
Cargill Fertilizer, Inc.
8813 Highway 41 South
Riverview, FL 33569

Bankers Trust Company
Four Albany Street
New York, New York, 10015
Attn: Corporate Trust & Agency Group

The Prudential Insurance Company of America
Three Gateway Center
Newark, NJ 07102-4077
Attn: Asset Unit/IAU Management

Dade Power Incorporated
1551 N. Tustin Avenue, Suite 900
Santa Ana, CA 92701

The Prudential Insurance Company of America
Four Gateway Center
Newark, NJ 07102-4069
Attn: Project Management Team

Pasco Cogen, Ltd.
220 East Madison Street, Suite 526
Tampa, FL 33602
Attn: Elliott White

Tiger Bay Limited Partners
2500 City West Boulevard
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