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NEW YORK, NY

October 26, 1994

Direct Dial (904) 425-5612

VIA HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
101 E. Gaines Street
Tallahassee, FL 32301

Re: In re: Petition for Approval, to the Extent Required, of
Certain Actions Relating to Approved Cogeneration Contracts by
Florida Power Corporation, Docket No. 940797-EQ

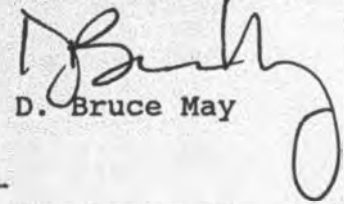
Dear Ms. Bayo:

Enclosed for filing in the docket referenced above are the original and 15 copies of Auburndale Power Partners, Limited Partnership's Petition to Intervene. Also enclosed is a copy for our records to be date stamped by you and returned to our office.

Thank you for your consideration in this matter.

Sincerely,

HOLLAND & KNIGHT

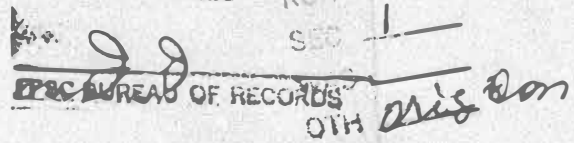


D. Bruce May

ACK _____
AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAC _____
LES _____
LIT 6 _____
CFC _____
RCH _____
SEC _____

Enclosure
DBM/sms
cc: All Parties of Record
Robert F. Riley

TAL-51583 RECEIVED & FILED


FPSC BUREAU OF RECORDS
OTH *aris Don*

DOCUMENT NUMBER-DATE

10902 OCT 26 94

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
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In re: Petition for Approval, to)
the Extent Required, of Certain) Docket No. 940797-EQ
Actions Relating to Approved)
Cogeneration Contracts by) Filed: October 26, 1994
Florida Power Corporation.)
_____ /

**AUBURNDALE POWER PARTNERS, LIMITED PARTNERSHIP'S
PETITION TO INTERVENE**

Auburndale Power Partners, Limited Partnership ("APP"), by and through undersigned counsel, pursuant to Rule 25-22.039, Florida Administrative Code, hereby files this Petition to Intervene and in support thereof, states:

Intervenor Information

1. Intervenor, APP is a limited partnership formed under the laws of the State of Delaware and authorized to do business in Florida. APP's full name and address are:

Auburndale Power Partners, Limited Partnership
12500 Fair Lakes Circle, Suite 420
Fairfax, VA 22033

2. Copies of pleadings, notices and other documents in this proceeding directed to APP should be served on:

D. Bruce May
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, FL 32302

and

Robert F. Riley
Auburndale Power Partners, Limited Partnership
12500 Fair Lakes Circle, Suite 420
Fairfax, VA 22033

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

Background

3. El Dorado Energy Company ("El Dorado") and Florida Power Corporation ("FPC") entered into a Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility (the "Negotiated Contract"). On July 1, 1991, the Commission issued proposed agency action Order No. 24734 approving the Negotiated Contract for purposes of cost recovery. This order matured into final agency action following the required protest period.¹

4. On March 3, 1993, El Dorado assigned its Negotiated Contract with FPC to APP, a limited partnership of which El Dorado is a general partner. FPC consented to the assignment in accordance with Article XXIII of the Negotiated Contract.

5. On April 7, 1994, APP and FPC executed a letter agreement ("April 7 Letter Agreement") whereby APP and FPC agreed, among other things, to modifications of the Negotiated Contract relating to curtailment of power. This letter agreement was amended on August 5, 1994. The August 5, 1994 amendment, however, did not alter any of the modifications to the Negotiated Contract set forth in the April 7 Letter Agreement.

6. Pursuant to Section 7.2 of the Negotiated Contract, APP notified FPC in writing that it was electing to increase the committed capacity under the Negotiated Contract from 103,800 KW to 114,180 KW.

¹In re: Petition for Approval of Contracts for the Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 F.P.S.C. 7:60, Docket No. 910401-EQ, Order No. 24734 (July 1, 1991).

7. On July 28, 1994, FPC initiated this docket by filing a Petition for Approval, to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts (the "Petition"). FPC's Petition identifies certain actions taken during the course of performing its negotiated cogeneration contracts, including several actions relating to the Negotiated Contract.² On August 25, 1994, FPC filed with the Commission a Supplemental Filing to Petition for Approval to the Extent Required, of Certain Actions Relating to Approved Cogeneration Contracts (the "Supplemental Filing") incorporating in its Petition actions taken by FPC and APP in the April 7 Letter Agreement that affect the Negotiated Contract. The Petition and Supplemental Filing are collectively referred to below as the "Petition".

Jurisdiction

8. FPC's Petition seeks Commission confirmation, only to the extent required, that certain actions concerning its cogeneration contracts do not require Commission approval. FPC's Petition neither asks nor requires the Commission to interpret the terms of the negotiated cogeneration contracts. Indeed, the contract interpretation question is a jurisdictional issue which is extraneous to, and has no bearing on, this proceeding. Thus, by filing this Petition to Intervene, APP does not concede that the

²FPC's Petition also raises issues relating to the assignment of LFC No. 47 Corp.'s ("LFC"'s) standard offer contracts with FPC to APP as set forth in the Petition. These issues have been addressed and resolved by the Commission in Order No. PSC-94-1306-FOF-EQ, Docket No. 940819-EQ. Thus, the Commission need not, and should not, address the LFC standard offer contracts, as assigned to APP, in this docket.

Commission has the authority to interpret the terms of a negotiated contract or to resolve disputes relating to a negotiated contract once approved for cost recovery. APP reserves its right to question the Commission's authority in this or any other Commission proceeding over the interpretation of negotiated contracts or the resolution of disputes relating to negotiated contracts.

Substantial Interest Affected

9. APP has standing to intervene in this proceeding, and such intervention is necessary for APP to fully protect its interests. Intervention in a Commission proceeding is granted to those entities whose substantial interests are subject to determination or will be affected through the proceeding. Rule 25-22.039, Florida Administrative Code. It is undisputed that APP is a party to the Negotiated Contract, which is one of the contracts that is the subject of FPC's Petition, and that a Commission decision in this docket will impact APP's rights under the Negotiated Contract. Further, for the Commission to take action in this docket that could adversely affect APP's rights and interests in a contract without permitting APP to intervene in the proceeding would violate APP's fundamental due process rights. Because APP's rights under the Negotiated Contract will be subject to determination and affected in this proceeding, APP has standing to intervene.

Basic Position

10. APP agrees with FPC's position that Commission approval is not required for the actions described in the Petition relating

to the Negotiated Contract. The Negotiated Contract is not a static agreement and provides the parties with certain flexibility to agree on actions to administer the contract. The Commission has recognized that "negotiated contracts are just that - - negotiated contracts" and has refused to prescribe standard forms for such contracts.³ The mutually agreed on actions which FPC identifies in its Petition are actions taken by the parties in the general course of administering the contracts; and, in accordance with established Commission policies, should not be reevaluated.⁴

11. However, should the Commission determine that additional approval of any of the actions described in the Petition is required,⁵ APP respectfully requests that the Commission grant such approval because the actions taken by FPC and APP as set forth in the Petition are consistent with the Commission's prior approval of the Negotiated Contract for cost recovery purposes and are in the interest of FPC's ratepayers. The benefits of the contract actions taken by FPC and APP are more fully set forth in the FPC Petition.

³In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., regarding cogeneration and small power production., 92 F.P.S.C. 2:24, 30, Docket No. 910603-EQ, Order No. 25668 (February 8, 1992).

⁴ Id. at 37.

⁵Though not specified in the FPC Petition, APP has elected to increase its committed capacity under the Negotiated Contract from 103,800 KW to 114,180 KW in accordance with Article VII of the Negotiated Contract. To the extent required, APP requests approval of this election by APP.

Assignment

12. APP agrees with FPC's assertion that El Dorado's assignment of the Negotiated Contract to APP (an action expressly provided for in the contract) did not affect the interests of the public or FPC's ratepayers. FPC also suggests, however, that El Dorado may not be obligated under the Negotiated Contract after the assignment. In fact, El Dorado continues to remain obligated under the Negotiated Contract as a general partner of APP. Thus, APP feels compelled to clarify the discussion in FPC's Petition relating to El Dorado's assignment to APP.

13. El Dorado is a general partner of APP. The assignment from El Dorado to APP simply reflects a change in the form of the organization of the seller, i.e., from a corporation to a partnership of which the corporation is a general partner. Under Florida law, to which the Negotiated Contract is expressly subject, El Dorado, as a general partner of APP, is jointly liable for all debts and obligations of APP. Thus, El Dorado is not discharged of its obligations to FPC under the Negotiated Contract, but remains obligated under the contract before and after the assignment.

14. APP also concurs with FPC's Petition that the assignment of the Negotiated Contract to APP does not constitute a novation and submits further that the concept of novation is not relevant to the issues in this proceeding. Florida courts have set forth four essential elements of a novation: (1) the existence of a previously valid contract; (2) the agreement of all the parties to a new contract; (3) the extinguishment of the original contractual

obligation; and (4) the validity of the new contract.⁶ The assignment of the Negotiated Contract by El Dorado to APP does not satisfy these essential elements and thus did not result in a novation.

15. The assignment lacks at least two essential elements of novation. First, El Dorado, APP and FPC never intended the assignment to create a new contract. The question of whether a novation occurs is controlled by the intent of the parties.⁷ The Consent to Assignment executed by FPC, El Dorado, and APP states that "neither the Assumption and Release nor this Consent shall alter, waive or modify the Sale Contract, or FPC's rights under the Sale Contract." Therefore, when El Dorado assigned the Negotiated Contract to APP and FPC consented to such assignment, the parties never intended to create a new contract and no new contract was created. Second, El Dorado's obligations under the Negotiated Contract are not extinguished by the assignment.⁸ After the assignment, El Dorado, as general partner of APP, remains obligated under the Negotiated Contract to FPC pursuant to the laws of

⁶See Young v. Morris Realty Company, 569 So. 2d 813, 814 (Fla. 1st D.C.A. 1990); S.N.W. Corp. v. Hauser, 461 So.2d 188 (Fla. 4th D.C.A. 1985), rev. denied, Hauser v. S.N.W. Corp., 471 So. 2d 43 (Fla. 1985); Sans Souci v. Division of Florida Land Sales and Condominiums, 421 So.2d 623, 630 (Fla. 1st D.C.A. 1982), rev'd on other grounds, 448 So. 2d 1116 (Fla. 1st D.C.A. 1984).

⁷Electro-Protective Corp. v. Creative Jewelry by Kempf, Inc., 513 So.2d 190, 192 (Fla. 5th D.C.A. 1987).

⁸In order for a novation to occur, the original contractual obligations must be extinguished. San Souci v. Division of Florida Land Sales and Condominiums, 421 So.2d 623, 630 (Fla. 1st D.C.A. 1985).

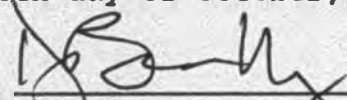
Delaware and the Florida Revised Uniform Limited Partnership Act (1986).⁹ Thus, after the assignment, El Dorado continues to be a principal party to the contract which does not give rise to a novation.

16. As demonstrated above, the assignment did not result in the formation of a new contract and, thus, does not affect the Commission's prior cost recovery approval of the Negotiated Contract. Indeed, the assignment was specifically provided for in the Negotiated Contract. Article XXIII of the Negotiated Contract provides: "Neither party shall have the right to assign its obligations, benefits, and duties without the written consent of the other Party, which shall not be unreasonably withheld or delayed." The Commission approved the Negotiated Contract with this assignment provision for cost recovery purposes and FPC consented in writing to the assignment. Further, the assignment did not affect the interests of the public or FPC's ratepayers. Thus, Commission approval of the assignment, which was consistent with the previously approved Negotiated Contract, is not required.

⁹A general partner of a limited partnership is liable for the debts and obligations of the partnership. Brinkley, McNerney, Morgan & Solomon v. Community Acres Associates, Ltd., 602 So.2d 685 (Fla. 4th D.C.A. 1992); §§ 620.125(2), 620.632(2) Fla. Stat. (1993). The Negotiated Contract is governed by Florida law. Further, the Delaware Code contains language identical to that in Section 620.125(2), Florida Statutes, regarding the responsibilities and liabilities of a general partner in a limited partnership. Del. Code Ann. Tit. 6 §17-403(b) (1993).

WHEREFORE, based on the foregoing, further Commission approval of the mutually agreed upon actions identified in the Petition is not required and indeed would be counter to the Commission's stated policy of not revisiting cost recovery under cogeneration contracts once approved. If, however, the Commission determines that additional approval is required, FPC's filings in this docket and this Petition to Intervene sufficiently demonstrate that such actions are consistent with the Commission's prior cost recovery approval of the Negotiated Contract and are in the interests of FPC's ratepayers. Therefore, to the extent that the Commission determines that further approval is required, APP respectfully requests that the Commission grant such approval.

Respectfully submitted this 26th day of October, 1994.



D. Bruce May
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Karen D. Walker
Florida Bar No. 0982921
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Tallahassee, FL 32302
(904) 224-7000
Attorneys for Auburndale Power
Partners, Limited Partnership.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand delivery to Martha Brown, Division of Legal Services, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, FL 32399; and by U.S. Mail to James A. McGee, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Fl 33733-4042; Gail Fels, Dade County Attorneys Office, 111 NW 1st Street, Suite

2810, Miami, Fl 33128; Robert Scheffel Wright, Landers & Parsons,
310 West College Avenue, P.O. Box 271, Tallahassee, FL 32302;
Joseph A. McGlothlin and Vicki Gordon Kaufman, McWhirter, Reeves,
McGlothlin, Davidson & Bakas, 315 S. Calhoun Street, Suite 716,
Tallahassee, FL 32301; Mr. Wayne A. Hinman, Orlando Cogen Limited,
L.P. c/o Air Products and Chemicals, 7201 Hamilton Blvd.,
Allentown, PA 18595-1501; and Gregory Presnell, Akerman, Senterfitt
& Eidson, P.O. Box 231, Orlando, FL 32802-0231 this 26th day of
October, 1994.


D. Bruce May

TAL-51625.8