BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation	Docket No. 961477-EQ Filed: August 29, 1997

SUPPLEMENTAL BRIEF OF LAKE COGEN, LTD.

LAKE COGEN, LTD. (hereinafter "Lake" or "Lake Cogen"), pursuant to the Commission's instructions given at its agenda conference on August 18, 1997, hereby files this supplemental brief in support of the petition for approval of the settlement agreement between Lake Cogen and Florida Power Corporation ("FPC") currently pending in this docket.

STATEMENT OF THE CASE AND FACTS

The history of the Negotiated Contract between Lake Cogen and FPC, of the dispute and litigation under that Contract, and of the settlement reached by the parties is recounted in Lake's Brief filed in this docket on July 29, 1997. The issues raised at the Commission's June 24 and August 18 agenda conferences address the possible consequences of the potential outcomes of litigation between Lake Cogen and FPC, which litigation would be settled definitively by the settlement agreement pending in this docket. More specifically, these issues address what action, if any, the Commission might be able to take with respect to disallowing cost recovery of amounts that the Lake County Circuit Court finds FPC owes to Lake Cogen under the Contract. The rationale for considering these issues appears to be the Staff's

suggestion that, if the Commission may subsequently disallow recovery by FPC of any amounts held owing by the Court, there is no risk to FPC's ratepayers from the Commission's refusal to approve the settlement.

At the Commission's agenda conference on August 18, at the request of Commissioner Garcia, action on the settlement was deferred and the parties were asked to provide supplemental briefing on the following issues:

1. the Commission's authority to explain its prior approvals of contracts between utilities and Qualifying Facilities, in light of the Crossroads decision[1] of the New York Public Service Commission ("New York PSC" or "NYPSC");
2. the meaning, purpose, and effect of "regulatory out" clauses in utility-QF contracts, and the authority or jurisdiction, if any, that such clauses confer on state utility regulatory authorities; and
3. the legal implications of the statements, cited by the Commission Staff in its recommendations on the Lake Cogen-FPC settlement agreement, made by Mr. Ansley Watson and Mr. Gary Sasso at the oral argument on January 5, 1995, in FPSC Docket No. 940771-EQ, In Re: Petition for Determination That Implementation of

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[1] Orange and Rockland Utilities, Inc. - Petition for a Declaratory Ruling That the Company and its Ratepayers Are Not Required To Pay for Electricity Generated By a Gas Turbine Owned By Crossroads Cogeneration Corporation, 1996 N.Y. PUC LEXIS 674 (New York P.S.C., Case 96-E-0728, November 29, 1996).

Contractual Pricing Mechanism for Energy Payments to Qualifying Facilities Complies With Rule 25-17.0832, F.A.C., by Florida Power Corporation (hereinafter the "Energy Pricing Docket").

SUMMARY OF ARGUMENT

1. The Commission is preempted by federal law from revisiting or reconsidering its prior approval, for cost recovery purposes, of the Lake Cogen-FPC Contract and from denying FPC the opportunity to recover payments made pursuant to the Lake Cogen-FPC Contract as it may be interpreted by a court of competent jurisdiction. This is the express holding of the Third Circuit Court of Appeals in Freehold and is the conclusion commanded by PURPA itself, the FERC's regulations and opinions implementing PURPA, and other reported cases.

The Crossroads decision of the New York PSC is inapposite for several reasons, including the following:

- it does not address the federal preemption issue;
- it does not involve a contract interpretation issue, but rather involves the New York PSC's interpretation of its contract approval policies, terms, and conditions;
- it does not involve pricing under the contract in question;
- it does not involve cost recovery or the meaning or application of "regulatory out" clauses; and
- it clearly involves an attempt by a QF to improvidently

create a dispute under an existing contract where its real claim is for a new contract for additional capacity not covered by its existing contract. Moreover, relevant decisions of the New York Public Service Commission, including Crossroads and other decisions cited therein, clearly hold that the New York Commission has no jurisdiction over contract disputes between QFs and utilities. The Florida PSC and the Staff have expressly recognized that the instant dispute between Lake and FPC (which will be resolved by the settlement) involves a contract interpretation issue. Energy Pricing Docket, 95 FPSC 2:263 at 269, 270; In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation, FPSC Docket No. 961477-EQ, Staff Recommendation dated August 12, 1997 at 1 (hereinafter "Lake-FPC Settlement Docket"). Relative to Crossroads, and as this Commission has independently acknowledged, this clearly takes this matter beyond the jurisdiction or authority of state regulatory authorities. See 95 FPSC 2:263 at 269-70.

2. "Regulatory out" clauses do not confer any jurisdiction on the Commission, or on any state regulatory authorities, that such authorities do not already have. As the U.S. Third Circuit Court of Appeals held in Freehold, any action by a state regulatory authority to attempt to disallow payments to a QF pursuant to an approved contract, or to disallow recovery of the costs of such payments by the purchasing utility, is preempted by federal law, and the presence of a "regulatory out" clause in QF

contracts does not change this result. Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey, 44 F.3d 1178, 1193-94 (3rd Cir. 1995). According to the Third Circuit, the purpose and effect of "regulatory out" clauses is to allocate, between QFs and utilities, the business risk that the utility's right to cost recovery might be lost via an unanticipated change in governing laws.

3. Finally, the extemporaneous remarks made by Mr. Watson and Mr. Sasso have no weight as legal authority, did not address an issue that was even before the Commission in that proceeding, and, significantly, predated the Freehold decision by four days. Lake Cogen did not and does not agree with the analysis proffered by Mr. Watson and Mr. Sasso. More importantly, the Commission had the Freehold decision before it in the record of the Energy Pricing Docket when it made its decision, consistent with Freehold, to dismiss Florida Power's petitions therein on jurisdictional grounds.

For the foregoing reasons, and for the reasons set forth in Lake Cogen's Brief of July 29, 1997, the Commission should not disturb its prior approval of the Settlement Agreement between Lake Cogen and FPC. In particular, the Commission should act on the Settlement Agreement with the firm knowledge that it will have no authority to impair FPC's cost recovery of any amounts that the Circuit Court orders FPC to pay to Lake Cogen under the Contract.

ARGUMENT

I. THE COMMISSION CANNOT DENY FPC COST RECOVERY FOR ENERGY PAYMENTS MADE TO LAKE COGEN THAT ARE CONSISTENT WITH THE CONTRACT AS INTERPRETED BY A COURT OF COMPETENT JURISDICTION. THE Crossroads DECISION OF THE NEW YORK PUBLIC SERVICE COMMISSION IS INAPPLICABLE TO THIS ISSUE.

The Staff attempt to rely on the New York Public Service Commission's Crossroads decision to support their contention that the law with respect to state regulatory authorities' jurisdiction to interpret the provisions of approved power sales contracts between utilities and QFs is "somewhat unsettled." Staff Recommendation at 10. This reliance is entirely misplaced.

Crossroads, simply does not -- and cannot -- support a state regulatory commission's authority to interpret the payment terms of approved QF contracts and then to disallow payments based on the state commission's interpretation of such contracts. Crossroads did not even involve the interpretation of a contract, but rather the interpretation of the New York Commission's own prior order approving the facility involved in that case. Indeed, contrary to the Staff's assertion, the Crossroads decision actually supports the position advocated by Lake because the New York PSC expressly eschewed jurisdiction with respect to the QF's contract claims. Crossroads, 1996 N.Y. PUC LEXIS 674 at page *9.[2] In short, both the Florida PSC and its Staff recognize that the dispute between Lake Cogen and FPC involves a "question

[2] At this point in the Crossroads proceedings, it cannot be ruled out that the New York PSC's decision is incorrect. It appears that an appeal of the New York PSC's decision is pending. The discussion in this Supplemental Brief assumes, for the sake of argument, that Crossroads will be upheld with respect to the non-contract issues addressed.

of contract interpretation." 95 FPSC 2:263 at 270, Lake-FPC Settlement Docket, Staff Recommendation at 1. The New York PSC, however, recognized in Crossroads that its authority does not extend to involvement in such contract disputes between QFs and utilities.

The cases cited in Crossroads also stand for the basic proposition that the New York PSC may interpret certain aspects of its own prior approval orders regarding QF-utility contracts, including the applicability of policies relating to facility capacity and facility location as they existed at the time that the specific QF-utility contracts were entered into.[3] For example, in Indeck-Yerkes Energy Service of Yonkers v. Consolidated Edison Co. of New York, 1994 WL 62394 (S.D.N.Y.) ("Indeck-Yerkes"), the QF ("Indeck") had entered into a contract with the utility ("Con Ed"), which was approved by the NYPSC on the basis of Indeck's representation that the cogeneration facility would be located at a certain "Federal Plaza site." A dispute subsequently arose when Indeck wanted to build the facility at a different site. The NYPSC issued an order "clarifying" that its prior order approving the Indeck-Con Ed contract was subject to the NYPSC's then-existing "site certainty policy." In contract litigation before the U.S. District Court for the Southern District of New York, the Court granted summary

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[3] Crossroads thus appears to be consistent with recently adopted Commission Rule 25-17.0836, pursuant to which the Commission requires the submission, for approval for cost recovery purposes, of material modifications to existing contracts, including changes in committed capacity above those expressly contemplated by the terms of the initial contract, changes in fuel type, changes in location, and changes in capacity or energy payments.

judgment in favor of Con Ed, holding that the contract contemplated adherence to the NYPSC's contract approval conditions, which included, the Court held, the "site certainty policy" then in effect. In the context of the instant proceeding, it is important to note that the Court, and not the New York PSC, decided the contract interpretation dispute between the QF and the utility.

Similarly, in Re Niagara Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C., March 26, 1996), the utility, Niagara Mohawk ("NiMo") alleged that the QF, Lyonsdale Power L.P., had exceeded the output level contemplated under their contract. The New York PSC held that its approval order for the Lyonsdale-NiMo contract required, by its own terms, "strict" compliance with the output limitation condition set forth in the order. The NYPSC went on to hold that regulatory intervention was premature and directed NiMo and Lyonsdale to negotiate a resolution of the dispute that would address the prevention of excess power deliveries and remedies for any such violations in the future.

In short, neither Crossroads nor any case cited therein stands for the proposition that the New York PSC or any similar state regulatory authority may interpret a contract between a QF and a utility under any circumstances. In fact, relevant NYPSC precedent that was cited in Crossroads clearly stands for the opposite proposition:

> Exercising the plenary jurisdiction over contract terms that Erie [a QF] desires is not possible, because the PURPA regulations provide that contractual arrangements between a QF like Erie and the utility purchasing its power are binding and beyond state interference. Indeed, contracts that

> included clauses requiring the exercise of continuing jurisdiction over all contract terms were denied approval until modified.

Erie Energy Associates - Petition for a Declaratory Ruling That Its Power Purchase Contract With New York State Electric & Gas Corporation Remains in Effect, Case 92-E-0032, New York Public Service Commission, 1991 N.Y. PUC LEXIS 52 at page *8. (emphasis supplied) (footnotes omitted) The New York PSC followed this rule in Crossroads itself, where it affirmed that it would not resolve the contract issues raised by the QF.

The Commission itself cited Erie in its order dismissing FPC's petitions in the Energy Pricing Docket, as follows:

> Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
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> * * *
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> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source for the authority to exercise jurisdiction over such issues.

Energy Pricing Docket, 95 FPSC 2:268-69.

Crossroads thus would have no bearing in the hypothetical scenario in which Lake Cogen would win its lawsuit against FPC and, in turn, FPC would seek cost recovery of amounts paid to Lake pursuant to the contract as interpreted by the Court. Crossroads did not involve a contract issue, a cost recovery issue, or an issue relating to the effect of a "regulatory out" clause. Indeed, to the extent that the QF in that case attempted to present contract interpretation issues, the New York PSC

expressly declined jurisdiction over such issues.

By contrast, the "Lake wins the lawsuit" scenario is expressly controlled by Freehold. Both the Lake-FPC lawsuit scenario and Freehold involve energy pricing, both involve the potential subsequent application of a "regulatory out" clause, and both address the issue of the state regulatory commission's authority to disallow cost recovery under approved contracts between QFs and utilities. Indeed, like the Staff here, the New Jersey Board of Regulatory Commissioners ("BRC") asserted that it was interpreting its own approval order and not modifying the utility-QF contract. This assertion was rejected by the Third Circuit:

> Absent legislative restriction, the BRC also asserts, reconsideration of its prior approval of the PPA is inherent in the authority of all administrative agencies . . . . However, in this instance, there is specific federal statutory legislation, PURPA, that bars reconsideration of the prior approval of the PPA at least absent some basis in the law of contracts for setting aside the PPA. No such basis is referred to here.

Freehold, 44 F.3d at 1192. (emphasis supplied)

The difference between Crossroads and Freehold can be summarized easily. Crossroads involved the New York PSC's authority to say whether the output from a QF's plant expansion had to be sold under a new contract, in light of the NYPSC's policies in effect at the time that the contract for the original plant's capacity was approved. Freehold, on the other hand, involved an effort by the New Jersey BRC to impact QF pricing under an approved contract. This effort was preempted by federal law. The Oklahoma Supreme Court reached the same conclusion --

that the Oklahoma regulatory commission was preempted by PURPA from adopting or enforcing a rule by which it attempted to require a provision in all QF-utility contracts allowing the commission to subsequently review those contracts to reconsider the avoided costs upon which they were based. Smith Cogeneration Associates, 863 P.2d 1227, 1240-41 (Okla. 1993). See also Independent Energy Producers v. California Public Utilities Comm'n, 36 F.3d 848 (9th Cir. 1994) (California PUC program under which the PUC attempted to authorize utilities to monitor QFs' compliance with FERC's QF efficiency standards, and to authorize utilities to substitute lower payment rates to non-complying QFs, was preempted by PURPA.)

The Third Circuit's Freehold decision holds that the "regulatory out" "clause does not purport to confer on the BRC any jurisdiction it would not otherwise have." Freehold further holds that

> once the BRC approved the power purchase agreement between [the QF] and [the utility] on the ground that the rates were consistent with avoided cost, just, reasonably, and prudentially incurred, any action or order by the BRC to reconsider its approval or to deny the passage of those rates to [the utility's] consumers under purported state authority was preempted by federal law.

Freehold, 44 F.3d at 1194. Any Commission action that failed to abide by this controlling ruling would, like the New Jersey BRC's actions in Freehold, be preempted by federal law.

II. THE "REGULATORY OUT" CLAUSES IN THE LAKE COGEN-FPC CONTRACT AND THE OTHER NEGOTIATED CONTRACTS DO NOT CONFER ANY JURISDICTION OR AUTHORITY ON THE FLORIDA PUBLIC SERVICE COMMISSION TO INTERPRET CONTRACTS OR TO DISALLOW COST RECOVERY UNDER APPROVED CONTRACTS.

The "regulatory out" clause, Section 20.1 of the Lake Cogen Contract and the other Negotiated Contracts approved at the same time, does not confer any jurisdiction on the Florida Public Service Commission that it does not already have, nor does it expand the Commission's jurisdiction, nor does it deprive QFs of any protections that they enjoy under PURPA, including the protection against state rate regulation. That is the express holding of Freehold, 44 F.3d at 1194.

As a general proposition, such clauses were included in contracts, at the insistence of utilities, because, even though both utilities and QFs believed that such action would be preempted by and under PURPA, the utilities still had twinges of concern that the governing law -- i.e., PURPA -- might be changed (e.g., repeal of PURPA without protection of contracts and the utility's right to recover payments thereunder). Thus, "regulatory out" clauses represent an allocation of the business risk of a change in underlying law.

As the Commission itself stated in the Energy Pricing Docket:

> We do not think, however, that the regulatory out provisions in negotiated contracts somehow confer continuing responsibility or authority to resolve contract interpretation disputes. Our authority derives from the statutes. United Telephone Company v. Public Service Commission, 496 So. 2d 116 (Fla. 1986). It cannot be conferred or inferred from the provisions of a contract.

Energy Pricing Docket, 95 FPSC 2:263 at 269-70.

In summary, the "regulatory out" clauses in the Negotiated Contracts do not -- and could not -- give the Commission the authority or jurisdiction to resolve contract disputes. Nor do such provisions give any state regulatory authority jurisdiction over, or the ability to interfere with, a QF's rights to payments under approved contracts. Finally, such clauses do not authorize state commissions to violate PURPA by disallowing recovery of such payments by the purchasing utility.

III. THE REMARKS OF ATTORNEYS FOR ANOTHER QF AND FPC AT ORAL ARGUMENT ARE NOT SOUND AUTHORITY FOR THE PROPOSITIONS ADVANCED BY THE STAFF, NOR ARE THEY BINDING ON LAKE COGEN.

The Staff attempt to make much of remarks made by Mr. Ansley Watson, Jr., Esquire, on behalf of Pasco Cogen, Ltd., and by Mr. Gary Sasso, Esquire, on behalf of FPC, during the oral argument in the Energy Pricing Docket. In particular, although their comments were unsupported by any case authority from any jurisdiction, the Staff quote Mr. Watson and Mr. Sasso at length and conclude that their remarks "fairly describe the correct interpretation of the applicable law" relating to the Commission's authority to subsequently disallow recovery of amounts held owing under a negotiated contract by a court of competent jurisdiction and relating to the "regulatory out" clause's effect in the event of such a disallowance. The Staff also appear to rely on the fact that these remarks were made at the oral argument in the Energy Pricing Docket to support their conclusion that "[t]he parties to the Commission's determination

in Docket No. 940771-EQ recognized that a civil court's determination of contract rights is not dispositive of the issue of cost recovery from the ratepayers." Staff Rec'n at 12.

As to the latter point, Lake Cogen did not, and does not, "recognize" this assertion as true. Moreover, Lake Cogen is clearly justified in relying on the decision of the United States Court of Appeals in Freehold, made after the oral argument in the Energy Pricing Docket and included in the record of that docket, for its understanding and interpretation of the applicable law.

As to the weight to be accorded to the attorneys' remarks, Lake observes the following. In the first instance, the remarks of these fine attorneys are simply not precedential. In the second place, Mr. Watson expressly pointed out in his remarks that, even if the Commission were to disallow cost recovery to FPC, it was his belief that FPC would still be obliged to pay his client, Pasco Cogen, Ltd., the payments required under the Pasco-FPC Contract as interpreted by the Court. Staff Rec'n at 13, citing to the Energy Pricing Docket Transcript at 63-64.

More significantly, Mr. Watson's remarks addressed an issue that was not even before the Commission in that oral argument. When posed a question regarding whether the "regulatory out" clause could be implemented following a court's final order adjudicating FPC liable for breach of contract and upholding a QF's right to payments higher than the Commission felt should be passed through to FPC's ratepayers, Mr. Watson's response was: "Maybe, maybe not. That's not the issue here today." Staff Rec'n at 13, citing to the Energy Pricing Docket Transcript at 63-64.

Still more importantly, the oral argument in the Energy Pricing Docket was held four days before the Third Circuit rendered its Freehold decision. Thus, to the extent that Mr. Watson's remarks, e.g., "You [the FPSC] pass on the as-available, their stockholders pay the rest," were inconsistent with the Third Circuit's holding in Freehold, it appears that he was simply incorrect and, at that point in time, uninformed as to the applicability of federal preemption doctrine under PURPA. Similarly, Mr. Sasso's remarks that "if this Commission decides that the court was in error, . . . the reg-out clause . . . will be triggered and the QFs will be denied the illusory benefit of their court effort," Energy Pricing Docket Transcript at 78-79, also pre-dated Freehold and were also incorrect or uninformed. This is exactly the issue that was decided against the New Jersey Board of Regulatory Commissioners, and against the purchasing utility, in Freehold.

Perhaps most importantly, two of the QF parties to the Energy Pricing Docket, Orlando Cogen, Ltd. and Auburndale Power Partners, L.P., filed the Freehold decision with the Commission, in the record of the Energy Pricing Docket, under appropriate notices of supplemental authority. Energy Pricing Docket, Auburndale Power Partners, Limited Partnership's Notice of Supplemental Authority, FPSC Docket No. 940771-EQ (January 12, 1995) and Orlando Cogen Limited's Notice of Filing Supplemental Authority, FPSC Docket No. 940771-EQ (January 13, 1995). Auburndale's Notice of Supplemental Authority, in addition to including a copy of the Freehold decision, specifically advised the Commission that

> Freehold responds to the issue raised by the Commission during the January 5, 1995 oral argument conducted in this docket regarding whether a regulatory-out clause confers upon the Commission continuing jurisdiction over a negotiated contract. In Freehold, the United States Third Circuit Court of Appeals found that the presence of a regulatory-out clause in a power purchase agreement between a QF and a utility did not confer upon the Board of Regulatory Commissioners of the State of New Jersey (the "BRC") "any jurisdiction it would not otherwise have," and did not reflect an intent by the QF to waive the exemption from state rate regulation conferred on it by PURPA. Id. at 12. The court further held that "once the BRC approved the power purchase agreement . . . on the ground that the rates were consistent with avoided cost . . . any action or order by the BRC to reconsider its approval . . . under purported state authority was preempted by federal law." Id.

The Commission Staff cited Freehold in their recommendation to dismiss FPC's petitions, and the Commission itself cited Freehold in its order dismissing FPC's petitions in the Energy Pricing Docket. See 95 FPSC 2:268.

In substance, the Staff are asserting to the Commission that the remarks of two attorneys in an oral argument four days before the issuance of an on-point decision by one of the second-highest courts in the nation was rendered, which decision was promptly supplied into the record of the docket in which the oral argument was held, and which decision was subsequently cited in the Commission's own order dismissing FPC's petitions on jurisdictional grounds, "fairly describe the correct interpretation of the applicable law" regarding the effect of "regulatory out" clauses in QF contracts. The Commission should simply reject this baseless assertion. The explicit holding in

Freehold to the contrary must be followed, particularly given that the Staff are unable to cite to any authority contrary to Freehold on this point.

CONCLUSION

WHEREFORE, based on the foregoing, the Commission should recognize that it is preempted by federal law from revisiting cost recovery under the already-approved Contract between Lake Cogen and FPC, regardless of the interpretation of that Contract that may be applied by the Lake County Circuit Court. The Crossroads decision of the New York PSC simply does not address energy payments, pricing under QF contracts, federal preemption, or the effect of "regulatory out" clauses. Crossroads does not support the extension of a state regulatory authority's ability to interpret its policies regarding contract approval terms and conditions to encompass the ability to interpret QF-utility contracts or to disallow cost recovery under approved contracts. Such actions are clearly preempted by PURPA. "Regulatory out" clauses do not confer any jurisdiction or authority on the Commission that it does not already have. Under Freehold, "reg-out" clauses are effectively unenforceable, and in any event, they do not confer jurisdiction on regulatory bodies where none exists in the first place. Staff have cited no authority to the contrary. Finally, the suggestion that the pre-Freehold remarks of attorneys at an oral argument where the effect of the "reg-out" clauses was not at issue "fairly describe the correct interpretation of the applicable law" better than the Third Circuit's holding in Freehold is baseless and unsupported by any

legal authority from any jurisdiction.

Accordingly, the Commission should not disturb its prior approval of the Settlement Agreement between Lake Cogen and Florida Power Corporation.

Respectfully submitted this 29th day of August, 1997.

LAKE COGEN, LTD.,
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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 29th day of August, 1997:

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