# CARLTON FIELDS

ATTORNEYS AT LAW

ORIGINAL

215 SOUTH MONROE STREET, SUITE 500
TALLAHASSEE, FLORIDA 32301-1866
TEL (850) 224-1585 FAX (850) 222-0398

MAILING ADDRESS:
POST OFFICE DRAWER 190
TALLAHASSEE, FL 32302-0190

May 12, 1998

Clerk, Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Re: Docket No: 980283-EQ; Florida Power Corporation's Memorandum in Opposition to Motion to Dismiss Petition for Declaratory Statement

Dear Ms. Ropes:

I enclose an original and fifteen (15) copies of Florida Power Corporation's Memorandum in Opposition to Motion to Dismiss Petition for Declaratory Statement along with a diskette. Please stamp a copy of this letter indicating receipt of the above.

Thank you.

Sincerely,

Robert Pass

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Petition for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Metropolitan Dade County, Order No. 24734, Together with Order Nos. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, Establish that Energy Payments thereunder, including when Firm or As-Available Payment is Due, Are Limited to Analysis of Avoided Costs based upon Avoided Unit's Contractually-Specified Characteristics,<br><br>by Florida Power Corporation | Docket No. 980283-EQ<br><br>Submitted for filing on May 12, 1998 |

**FLORIDA POWER CORPORATION'S**
**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**
**PETITION FOR DECLARATORY STATEMENT**

Florida Power Corporation ("FPC") submits this memorandum in opposition to the motion to dismiss FPC's Petition for Declaratory Statement filed by Miami-Dade County ("Dade") and Montenay-Dade Ltd. ("Montenay") (collectively referred to as "Intervenors").

**INTRODUCTION**

By its Petition, FPC seeks to have the Commission exercise its authority and responsibility to interpret and clarify Order No. 24734 (the "Order") approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between FPC and Dade (the "Contract"). Intervenors' Motion to Dismiss demands from the Commission an abdication of that authority and responsibility. The Motion should be denied.

The Commission plainly has the authority to interpret and clarify its rules and orders approving negotiated cogeneration contracts under the Public Utilities Regulatory Policy Act

("PURPA") and Florida law implementing PURPA (Fla. Stat. § 366.051, and Rules 25-17.080-.091).[1/] It has done so with respect to a variety of issues over the years. See In re: Implementation of Rules 25-17.080 through 25-17.091, Docket No. 910603-EQ, Order No. 25668, Feb. 3, 1992. Other state regulatory commissions have recognized such authority as well. See e.g., 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 Corp., 1996 N.Y. PUC LEXIS 674 (New York PSC, Case 96-E-0728, Nov. 29, 1996) ("Crossroads").

This authority exists because the Commission alone has the responsibility under PURPA to ensure that electric utility customers pay no more than the utility's avoided cost for cogenerated electrical power. 16 U.S.C. §824a-3(f); Rule 25-17.0832(2). Accordingly, Commission approval of such contracts is required before payments to the cogenerators under the contracts are passed on to the utility's customers. Rule 25-17.0832(2), .0832(8). Commission approval of a cogeneration contract, and its subsequent orders in fuel adjustment proceedings permitting a pass-through of the utility's payments to its customers, signifies that the payments do not exceed the utility's avoided cost. Id.

In fact, under PURPA and the concomitant Florida law, the Commission may not approve payments that exceed avoided cost. The Florida Supreme Court recently made that absolutely clear, holding that any approval of a contract payment term that conflicted with the Commission's avoided cost rules would violate PURPA and Fla. Stat. § 366.051. Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 328 (Fla. 1997), cert. denied, __ U.S. __ (1998).

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[1/] Reference to the Commission's rules are to those in effect at the time of the Order. Later amendments, however, have not affected the substance of the rules relevant to FPC's Petition. Further, all emphasis is supplied unless otherwise noted.

Thus, in entering its Order, the Commission had to have determined what the energy payments were under the Contract, because that is the only way it could determine that those payments would not exceed avoided cost.

By its petition, FPC asks the Commission to state that it established in its Order that FPC's energy payments were strictly limited to the avoided energy cost reflected in the terms of the Contract.[2/] In particular, FPC requests a statement from the Commission that FPC is required, consistent with the Order and the Commission's rules, to use only the avoided unit's contractually-specified characteristics in order to assess the unit's operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built.

FPC's Petition was filed in light of Order No. PSC-97-1437-FOF-EQ entered on Nov. 14, 1997 (the "Lake Order"), where the Commission addressed payment terms identical to those in the Contract. In doing so, the Commission expressly interpreted and clarified the Order, explaining that whether FPC's calculation of the energy payments was proper was "inextricably linked to what this Commission approved when it approved the contract." Lake Order at 7. Turning to the energy payment terms in the contract, the Commission declared that "the goal of the contractual language was to ensure that, consistent with Section 210 of PURPA and our cogeneration rules, FPC would not be put in a situation where it would be required to purchase energy at a cost greater than what it could either purchase elsewhere or generate itself," i.e.,

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[2/] FPC also asks for an interpretation of the Order and the Commission's rules implementing PURPA, as they affect FPC's use of the actual chargeout price of coal to FPC's Crystal River plants 1 and 2. This issue as well was addressed in the Lake Order, with the Commission specifically declaring that it was FPC's "duty" as a regulated utility to price in this manner. Lake Order at 3.

avoided cost. Id. at 3.

Most importantly, the Commission concluded that "FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract." Id. "As with all avoided cost calculations," the Commission reasoned, the energy payment provision of the Contract "was constructed as a pricing proxy and was not intended to be fully representative of a real operable 'bricks-and-mortar' generating unit." Id. The Commission further recognized that Lake's position "clearly exceeds avoided cost." Id. at 5. Accordingly, the Commission then disapproved FPC's settlement with Lake precisely because the energy payments under the settlement agreement departed from what FPC was currently paying under the contract and would have exceeded FPC's avoided cost, which the Commission refused to allow.

FPC requests the Commission to interpret and clarify the Order in the same manner here. Its need for such a statement from the Commission is incontestable. Although the Commission's recent interpretation and clarification of the Order in its Lake Order could not be clearer on this point, Intervenors dismiss the Lake Order as a "nullity." This in itself demonstrates FPC's need for a declaration as to the Commission's interpretation of that Order.

Moreover, as with Lake, FPC is currently in litigation with Dade over the proper calculation of the energy payments under the Contract, and Dade seeks treble damages from FPC based on FPC's manner of calculating those payments. Dade's interpretation of the payment terms is the same as Lake's. Given Dade's claim, FPC is entitled to assurance from the Commission that it is complying with the Commission's Order and rules implementing PURPA in calculating its payments to Dade in the manner it has. If, on the other hand, the

Commission were to determine (contrary to the Lake Order) that this is not the case, FPC could then change the manner in which it is making payments and bring itself in compliance with the Commission's Order, thereby mitigating its litigation risk and potential damages. FPC should not have to wait until some later time, as Intervenors would have it do, to find out whether the Commission believes FPC has acted in accordance with the Commission's Order.

The Commission has the authority -- indeed, the responsibility -- to issue the requested declaratory statement now. It should not heed Intervenors' call to abdicate that authority and responsibility.

## ARGUMENT

### I. FPC is entitled to a Declaratory Statement under Rule 25-22.020-021.

The Commission 's rules provide for a declaratory statement as "a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order." Rule 25-22.021. There can be no doubt that the propriety of the manner in which FPC is calculating its energy payments to Dade under the Order, Florida law, and PURPA is of current importance to FPC for a number of reasons. Accordingly, FPC is entitled to a statement by the Commission at this time that FPC's implementation of the energy payment terms under the Contract is proper under all applicable law.

A statement by the Commission that FPC is calculating its energy payments to Dade in an manner consistent with the Order, PURPA, and Florida law implementing PURPA will answer FPC's legitimate questions with respect to its current and future administration of the Contract. FPC is currently calculating the energy payments on an hourly basis under the Contract's express terms, making monthly energy payments to Dade thereunder, and facing a continuing obligation to make such calculations and payments to Dade for the remainder of the

twenty-two year term of the Contract. FPC's manner of implementing energy payments under the Contract is at issue and of importance now, thereby justifying an immediate declaration by the Commission of the propriety under the Order of FPC's implementation of the pricing provision of the Contract.

As the Court recognized in Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So. 2d 294, 295 (Fla. 3d DCA 1989), declaratory relief as to the correct interpretation of a license agreement fee abatement provision was proper where the "parties have a continuing relationship under the contract and are entitled to know the provision's meaning." For the same reason, a declaratory statement by the Commission interpreting and clarifying its Order approving the payment provisions of this Contract is proper under the Commission's rules providing for a declaratory statement.

That is especially so because, as noted earlier, FPC and Dade are now in litigation over the manner in which FPC is making its energy payments to Dade. Dade claims FPC has breached the Contract and violated the antitrust laws by taking the very position with respect to its energy payments that the Commission declared in the Lake Order to be consistent with its Order and required under PURPA. Faced with proceeding at its peril with such litigation, FPC is entitled to a declaration by the Commission on the issues presented by FPC's Petition. See Sheldon v. Powell, 128 So. 258, 262 (Fla. 1930) (ruling that declaratory judgments "serve as an instrument of preventive justice, to render practical help in determining issues, and to adjudicate the rights or status of parties, without the peril of committing a crime or resorting to violence or breach to put the legal machinery in motion").

Moreover, as a regulated utility, FPC must obtain the Commission's approval of the recovery of the payments made to Dade from its ratepayers. Rule 25-17.0832(8). As a result

of the conflict between (i) the Intervenors' interpretation of the Order and the Commission's rules and (ii) the Commission's interpretation of them in the Lake Order, and in view of the ultimate outcome of that proceeding under the Commission's procedural rules, FPC has a legitimate need for a declaratory statement regarding the recovery of the payments made to Dade from its ratepayers for the remaining term of the Contract. Simply put, FPC needs the Commission to declare that it stands by its interpretation of the Order, as set forth in its Lake Order, even though the Lake Order itself may now be a "nullity." [3/]

the litigation.

Indeed, it is in the Commission's interest to resolve this issue at this time by a declaratory statement. If the Commission were to agree with Dade, there would then be a concomitant need to pass higher costs on to the ratepayers. The later that determination is made, the greater the impact those higher payments will have on the ratepayers. On the other hand, if the Commission were to make that decision now, the impact of those higher payments could be spread out over a longer period of time, thereby ameliorating the impact upon the ratepayers.

Further, FPC is entitled to the requested declaratory statement so that it may bring the Commission's view on this issue to the attention of the courts and the trier of fact. As the Florida Supreme Court recognized in Panda and the Commission recognized in its Lake Order,

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[3/] In any event, it bears emphasis that the Commission's rule provides that a declaratory statement may be sought to establish how the Commission's rules or orders "may apply" to the petitioner. Rule 25 - 22.021. Demonstration of an "immediate" need for the declaratory statement is not required, as Intervenors assume in their response. Rather, all that is required is a showing of a need for the statement because of how the Commission's rules and orders "may apply" to the petitioner. FPC seeks a statement from the Commission with respect to the proper implementation of the energy payment provision in the Contract under the Order, PURPA, and Florida law implementing PURPA, as they may apply to FPC. FPC certainly has met this basic test to obtain the requested declaratory statement.

the Commission is obligated under PURPA and Florida law implementing PURPA to assure that the energy payments under the Contract do not exceed avoided cost. Given that statutory responsibility, the Commission's views on the issues presented by FPC's Petition are entitled to great deference from the courts. Florida Interexchange Carriers Ass'n v. Beard, 624 So. 2d 248, 250-51 (Fla. 1993) ("An agency's interpretation of a statute it is charged with enforcing is entitled to great deference. ..."); Pan American World Airways, Inc. v. Public Service Comm'n, 427 So. 2d 716, 719 (Fla. 1983) (courts must pay great deference to an agency's interpretation of its own rules, and it "should not be overturned unless clearly erroneous"). Accordingly, the courts and trier of fact should be made aware of the Commission's determination.

Finally, it must be remembered that the result of the position taken by the Commission in the Lake Order was the Commission's disapproval of FPC's settlement with Lake. That agreement represented a compromise of the same issues that are currently in dispute in the litigation with Dade. FPC had pursued that settlement in part to mitigate risks associated with the litigation with Lake that are similar to those FPC faces in its litigation with Dade. Settlements of such disputes are not only a potentially advantageous means for FPC and the cogenerators to eliminate litigation risks, they are encouraged as a matter of policy by the Federal Energy Regulatory Commission ("FERC"). See, e.g., West Penn Power Co., 71 FERC ¶ 61,153 at 61,497 (encouraging consensual buy-outs or buy-downs of cogeneration contracts).

As it stands now, however, absent a declaratory statement by the Commission, FPC is foreclosed from pursuing a settlement of the Dade litigation. Normally this would be an option considered by FPC, especially since that litigation poses even greater risks than Lake's suit because Lake did not assert, as Dade has done, that FPC violated the antitrust laws -- and thus

is allegedly liable for treble damages -- by asserting and implementing its understanding of its rights and obligations under the Contract. But any settlement of that litigation would necessarily reflect a compromise of the positions taken by FPC and Dade in the litigation over the energy payments. The Lake Order precludes this option since the Commission declared there that FPC's proposed compromise was unwarranted and would not be approved precisely because the payments FPC is currently making are "consistent with this Commission's order approving the contract and more closely approximates avoided cost." Lake Order at 5.

It obviously would be unfair for the Commission to deny FPC the option of settling its dispute with Dade and force FPC to proceed with the risks of litigation, but nevertheless refuse to state formally what "rates, terms and other conditions of the contract" the Commission intended to approve as consistent with FPC's "full avoided costs" when the Commission approved the Contract as "prudent" for "cost recovery purposes." Rule 25-17.0832(2). Since the Lake proceeding was mooted before there was a final determination by the Commission of this issue, the presently requested declaratory statement is required.

For all of these reasons, FPC has a legitimate need for the declaratory statement to "answer[] [its] questions" in view of the Commission's recent clarification of its Order and to potentially "resolv[e] a controversy" with respect to FPC's energy payment obligation under the Commission's Order approving the Contract. Rule 25-22.021; Mental Health District Board v. Florida Dept. of Health and Rehabilitative Services, 425 So. 2d 160, 162 (Fla. 1st DCA 1983) (affirming declaratory statement that particular statutory provision applied to petitioner, even though the statement had implications for the relationship between the petitioner and another entity); Regal Kitchens, Inc. v. Florida Dept. of Revenue, 641 So. 2d, 163-64 (Fla. 1st DCA, 1994) (upholding portions of declaratory statement addressed to application of exemption from

taxation to transactions between the petitioner and an affiliated general partnership); In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corp., Order No. PSC-98-0449-FOF-EI, at 3-4 (granting FPC a declaratory statement with respect to the metering at two condominiums, even though it could be applicable to other condominiums as well).

## II. The Commission has jurisdiction to issue the statement sought in FPC's Petition for Declaratory Statement.

### A. The Commission has jurisdiction to interpret and clarify its rules and orders implementing PURPA.

The Commission approved the Contract in the Order, along with seven other negotiated contracts, including the one between FPC and Lake. The Commission thereby carried out its statutory and regulatory obligations to implement PURPA's dual objectives (1) to encourage the development of cogeneration and small power production (2) at rates that are "just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. §824a-3(a) and (b); Fla. Stat. § 366.051; and Rule 25-17.0832.

By definition, under PURPA and Florida law implementing PURPA, rates are "just and reasonable" to the consumer when they do not exceed the utility's full avoided cost. 16 U.S.C. §824a-3(b) and (d); Fla. Stat. § 366.051; Rule 25-17.0832. It follows that the Commission necessarily determined in the Order that the energy payments to be made to Dade under the Contract did not exceed FPC's avoided cost. To do that, of course, the Commission had to determine what those payments would be.

The Commission's rules implementing PURPA authorize and govern the negotiation of contracts for the purchase of energy from cogenerators. See Rules 25-17.080 - 25-17.091. Among other things, the rules specify how to determine capacity and energy payments. See

Rules 25-17.082, .0825, .0832. Further, the rules specifically provide for Commission review of such contracts and for a determination by the Commission whether those contracts are "prudent." Rule 25-17.0832. In this regard, the Commission's rules provide that "[f]irm energy and capacity payments made to a qualifying facility ['QF'] pursuant to a separately negotiated contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs if the contract is found to be prudent . . . ." Rule 25-17.0832(8)(a).

Negotiated contracts are considered "prudent" for cost recovery by the Commission when "it is demonstrated that the purchase of firm capacity and energy from the [QF] pursuant to the rates, terms and other conditions of the contract can reasonably be expected to contribute to the deferral or avoidance of additional capacity construction . . . at a cost to the utility's ratepayers which does not exceed full avoided costs . . . ." Rule 25-17.0832(2). In determining if the contract is "prudent," the Commission considers "factors relating to the contract that would impact the utility's general body of retail . . . customers," the first of which is the determination that the payments for firm capacity and energy under the contract do not exceed the value of the construction and operation of the avoided unit over the term of the contract, "calculated in accordance with" Rule 25-17.0832(4) and (5). Rule 25-17.0832. Of course, Rule 25-17.0832(4) addresses the Avoided Energy Payments, specifying in subpart (b) the calculation of those payments.

In this connection, the Commission has specifically held that the approval of a negotiated contract includes approval of "the terms and conditions" of that contract and, particularly, approval of "the firm capacity and energy prices stated therein." In re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Docket No. 910603-EQ, Order No. 25668, Feb. 3, 1992, p. 10. Moreover, that approval "constitutes a determination that any payments made to

a QF under the contract" are "reasonable and prudent." Id. at 10. Because public utilities are authorized to recover from their ratepayers the cost of payments made to QFs pursuant to contracts approved by the Commission, the Commission is necessarily concerned to ensure that the costs thus passed through to ratepayers do not exceed avoided cost and thus are, in fact, fair and prudent.

By its Petition, FPC seeks a declaration that it has properly calculated the energy payments in accordance with the Commission's determination of avoided cost under the Order approving the Contract and hence that it is and will be entitled to recover them from its ratepayers through its fuel adjustment charges. FPC's request concerns the meaning of a provision that goes to the core concern of the Commission: namely, the magnitude of the rates that FPC must pay Dade for purchased power and that FPC therefore will be allowed to recover from its ratepayers through the fuel adjustment clause. Jurisdiction exists to issue a declaratory statement with respect to that core concern.

B. New developments in the law confirm the Commission's recent view that it has the authority to interpret and clarify its Order and rules implementing PURPA.

The Commission has repeatedly exercised jurisdiction to review and interpret provisions of standard offer cogeneration contracts, including In re Panda-Kathleen, L.P., Order No. PSC 96-0671-FOF-EI.[4/] On the other hand, it initially declined to exercise that same jurisdiction

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[4/] See also In re: Petition for Approval of Contract for the Purchase of Firm Capacity and Energy Between General Peat Resources, L.P., and Florida Power and Light Company, Docket No. 9309277-EQ; In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation,Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991, Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed

(continued...)

over negotiated contracts. E.g., Order No. PSC-95-0210-FOF-EQ. In affirming the Commission's order in Panda, however, the Florida Supreme Court drew no such distinction and instead, by its reasoning, made clear that the Commission has jurisdiction to interpret its orders and construe its PURPA rules to ensure that payments under its approved contracts do not exceed the utility's avoided cost.

In Panda, the Court affirmed this Commission's power to resolve a conflict concerning the terms of a cogeneration contract that incorporated the Commission's PURPA rules. Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), cert. denied, __ U.S. __ (1998). The Court expressly agreed with this Commission that denial of its jurisdiction to resolve that conflict would "render the Commission powerless ... to fulfill its obligation under both federal and state statutes to limit capacity payments [there] to avoided cost." Id. at 327. As the Court pointed out, approval of a contract term at odds with the Commission's rule as to avoided cost "would have violated PURPA" and Fla. Stat. §366.051 because they permit cogenerators to "sell energy to [utilities] at but not exceeding full avoided cost." Id. at 328.

The Panda Court further explained that a decision denying the Commission the jurisdiction to resolve that dispute would be contrary to "the federal and state legislative enactments as well as the judicial decisions applying the statutes." Id. at 327. That regulatory scheme requires state commissions to implement PURPA by, "among other things, an undertaking to resolve disputes between [Qfs] and electric utilities arising under [PURPA]." FERC v. Mississippi, 456 U.S. 742, 760, (1982), quoting 18 C.F.R. §292.401(a) (1980). As

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4/ (...continued)
capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

the United States Supreme Court explained in FERC, "[d]ispute resolution of this kind" was the very type of activity customarily engaged in by state regulatory commissions. Id. Consistent with the teachings of FERC, the Panda Court concluded that the regulatory scheme under PURPA "clearly contemplate[d] that the Commission shall bear the responsibility of resolving" issues regarding what its rules implementing PURPA mean. Id. at 327.

As Panda makes clear, the Commission has a responsibility to resolve issues implicating its avoided cost determination under PURPA through its approval of the Contract. That is all FPC has asked the Commission to do by this Petition.

Recent decisions by other state regulatory bodies have likewise made clear that the Commission would be acting well within its authority to issue the requested declaratory statement. In Crossroads, for example, the New York Public Service Commission declared that it had jurisdiction to interpret and clarify its past policies and approvals of negotiated cogeneration contracts. In the Lake docket, the Commission Staff and the Commission both relied on Crossroads and other decisions of the New York Commission in concluding that the Commission's jurisdiction with respect to negotiated QF contracts was broader than it previously had believed it to be. Lake Order at 6-7, quoting Crossroads. See also Indeck-Yerkes Energy Services, Inc. v. Public Service Comm'n of New York, 1994 WL 62394 (S.D.N.Y. 1994) (commission order "clarifying" that prior order approving the cogeneration contract was subject to the utility's site-certainty policy); In re Niagra Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C. March 26, 1996) (commission held its order approving the cogeneration contract required strict compliance with the output limitations set forth in that order).

As the Commission recognized in Lake, these authorities all involved "a question that turns on what was meant when the contract was approved." Lake Order at 8. That question

"is inextricably linked to what the Commission approved." Id. at 7. Therefore, "resolution of the energy pricing issue" in Lake "turn[ed] on what the contract meant at the time it was approved." Id. at 8. This determination, the Commission concluded, is "within the Commission's jurisdiction." Id.

The same is equally true here. FPC's Petition seeks a declaration by the Commission that "turns on what the [Contract] meant at the time it was approved." FPC needs to know whether its current payments to Dade are in accordance with what the Commission determined, at the time the Contract was approved. Under the Commission's reasoning in the Lake Order, this determination is within the Commission's exclusive jurisdiction.

The Commission explained in the Lake Order that, "where cost recovery review finds that a utility is requesting recovery of QF payments that exceed its full avoided costs, those costs are subject to disallowance" and, further, "this Commission is not required, based on a circuit court's decision, to approve recovery of QF payments that are in excess of a utility's avoided cost." Lake Order at 9, 5. FPC must, of course, return to the Commission in fuel adjustment hearings to obtain approval to pass along to FPC's customers the payments it has made to Dade. Since the Commission must make that determination, as the Commission noted in the Lake Order, it must have the power to do so. It certainly can exercise that power and make that determination now. Indeed, the Commission has every interest and every right to determine this issue now.

The Commission determined in the Lake Order that its approval of a similar contract under the same Order "recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed" and that "FPC's modeling of the avoided unit is consistent with" the Order and, thus, the avoided cost. Id. at 5. The

Commission reasoned that the energy payment terms were a "pricing proxy" and were "not intended to be fully representative of a real operable 'bricks-and-mortar' unit." Id. at 3. Conversely, the Commission concluded that Lake's calculation of those payments -- the same position urged by Dade -- "clearly exceed[ed] avoided cost." Id. FPC simply requests the Commission to issue a statement declaring that FPC is currently making payments to Dade in accordance with the avoided cost, as that cost was understood by the Commission at the time the Contract was approved. The Commission plainly has jurisdiction to issue that statement.

### III. Intervenors' Motion to Dismiss fails to raise any ground that requires dismissal of FPC's Petition.

Intervenors assert in their Motion to Dismiss that the Commission does not have jurisdiction to grant FPC's Petition and that they are correct on the merits of that Petition. Drawing on those assumptions, they proceed to attack the Petition on six grounds. None supports their contention that the Commission lacks jurisdiction to resolve FPC's Petition at this time. We address each argument in turn.

1. Based on the Commission's prior ruling in Order No. PSC-95-0210-FOF-EQ granting motions to dismiss on jurisdictional grounds, Intervenors contend that FPC's Petition is barred by the judicial doctrines of res judicata, collateral estoppel, and administrative finality. To the contrary, none of these doctrines bars the Commission from exercising jurisdiction here.

At the outset, it is critical to appreciate, as the Intervenors fail to do, that the Commission's jurisdiction to carry out its statutory duties cannot be thwarted by an uncritical application of the cited doctrines. Rather, the Commission always has the right to determine its jurisdiction, regardless of prior determinations at different points in time. Otherwise, the Commission would be forever foreclosed from exercising jurisdiction lawfully delegated to it, simply because it initially determined, albeit wrongly, that it lacked such jurisdiction. The First

District's decision in State Commission on Ethics v. Sullivan, 430 So. 2d 928, 932-33 (Fla. 1st DCA 1983) -- cited by Intervenors -- demonstrates this very point.[5/]

In Sullivan, the First District determined that, as a result of its prior affirmance of the Ethics Commission's denial of the Sullivans' motion to dismiss an administrative proceeding for lack of jurisdiction, the Sullivans were precluded from later challenging that determination in court. However, the Court made clear that its determination was limited and intended only to indicate that the Commission's determination of its jurisdiction "at the particular point in the administrative proceedings at which the Commission denied the Sullivans' motion to dismiss" was "a permissible one." The First District did not suggest that the Commission could not at a later point determine that the Sullivans' alleged offenses were not "cognizable by the Commission under its own interpretation of its constitutional and statutory authority" and that the Commission therefore did not have jurisdiction. Id. at 933, n. 3. See also Weissmann v. Euker, 147 N.Y.S. 2d 101, 105 (N.Y. App. Div. 1955) (current complaint was not barred by prior dismissal on personal jurisdiction grounds because a "decision that it had not jurisdiction is not conclusive between the parties either on the merits of their controversy, or, indeed, on the jurisdictional point itself").

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[5/] In the only other cases cited by Intervenors that involved a jurisdictional determination, the doctrines of res judicata and collateral estoppel were applied to preclude one tribunal from reconsidering the jurisdictional determination of another tribunal; in other words, they applied where one party sought to attack collaterally an adverse judgment in a different forum. See, e.g., Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Assurance Guaranty Ass'n, 455 U.S. 691, 706-07 (1982) (holding that determination by Indiana Rehabilitation Court was entitled to full faith and credit in North Carolina court where it was challenged on jurisdictional grounds); American Surety Co. v. Baldwin, 287 U.S. 156, 166-67 (1932) (giving full faith and credit to Idaho judgment in present suit seeking to enjoin enforcement of the judgment for want of jurisdiction). FPC, of course, does not seek by this declaratory statement proceeding to attack collaterally a prior order by the Commission on the ground that the Commission lacked jurisdiction.

As the First District recognized in Sullivan, administrative agencies like the Commission always have the right to revisit their jurisdiction to ensure that they are carrying out their "constitutional and statutory authority." If that were not the case, the agency's "constitutional and statutory authority" would be unlawfully abrogated in any instance where the Commission had at some point concluded it did not have jurisdiction, however erroneous that conclusion might later be demonstrated to have been. The principles of res judicata and collateral estoppel do not have that effect.

Likewise, the doctrines of res judicata and collateral estoppel have not been applied to bar a later administrative proceeding when that proceeding involves new facts, additional submissions not previously considered by the agency, or changed conditions such as a shift in the concerns addressed by the agency in such proceedings. Thomson v. Dept. of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987) (holding that res judicata did not bar applicant's second application based on "a shift of concern" by the agency that was not previously addressed and additional information from the applicant that was not previously considered); City of Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. 1957) (refusing to apply res judicata to bar consideration of later zoning application because of a prior zoning determination "based upon the facts existing at that time" when the record revealed "changed conditions" at the time of the later proceeding). Because the Commission's concerns have shifted here, due among other things to the development of the law with respect to the Commission's obligations to implement PURPA, these doctrines have no bearing on FPC's present Petition. See deCancino v. Eastern Airlines, Inc., 283 So. 2d 97, 98 (Fla. 1973) (res judicata "will not be invoked where it will work an injustice"); Universal Constr. Co. v. City of Fort Lauderdale, 68 So. 2d 366, 369 (Fla. 1953) (same).

Intervenors also rely on the doctrine of administrative finality in an attempt to preclude this Commission from determining its jurisdiction over FPC's Petition. However, they cite no case nor Commission order where this doctrine has been applied to bar the Commission from determining its jurisdiction when it is presented with a new request for the Commission to exercise such jurisdiction.

Quite apart from that fundamental distinction, even in the cases cited by Intervenors the courts have cautioned against applying this doctrine in "too doctrinaire" a fashion to agencies like the Commission with "continuing supervisory jurisdiction over the persons and activities regulated." McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996). As the Florida Supreme Court has explained, "the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time" and that, as a result, "such considerations" warn against "inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order." Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966) (recognizing the Commission's inherent power to reconsider orders under its control as a result of any change in circumstance or any demonstrated public need or interest).

This is especially true when arbitrary adherence to a prior determination by the Commission would adversely affect the ratepayers. The Commission always has the inherent power and duty to act to protect the ratepayers. Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So. 2d 249, 253 (Fla. 1982) (holding that the Commission has the inherent power to revisit determinations in prior orders to protect the customer). Their interests cannot be jeopardized in circumstances where the law, as currently and correctly understood, requires the Commission to act.

It is beyond dispute that the law has developed more fully since the Commission initially considered its jurisdiction over issues such as those presented by FPC's Petition. In particular, the Florida Supreme Court has now ruled that the Commission has the power to resolve issues under Commission-approved cogeneration contracts to ensure that payments thereunder are limited to avoided cost. Panda, 701 So. 2d at 327. Further, subsequent decisions out of the New York Public Service Commission have directly considered the jurisdiction of public service commissions and the courts with respect to negotiated cogeneration contracts and concluded that the commissions' jurisdiction is broader than it previously believed to exist.

In Crossroads, for example, the New York Commission issued a declaratory ruling concerning a negotiated contract between a utility and cogenerator on the issue of the utility's obligation to purchase additional output under the commission-approved contract. The cogenerator asserted -- just as Intervenors do in this case -- that the commission lacked jurisdiction to issue the declaratory statement under Freehold Cogeneration Assoc., L.P. v. Board of Regulatory Commissioners, 44 F. 3d 1178 (3d Cir. 1995). The New York Commission, however, granted the declaratory ruling, holding that:

> [i]t is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. The precedents involving interpretations of past policies and approvals, and not the contract non-interference policy that [the cogenerator] cites, control here. As a result, the approval of the original contract for the [cogenerator's] site may be explained and interpreted, and [the utility's] petition may be construed as requesting that relief.

Staff Rec. in Lake Dkt. at 5-6, quoting Crossroads, supra.

Intervenors attempt to distinguish Crossroads on its merits, arguing that the cogenerator was seeking a "new" contract for additional firm energy and capacity not covered by the existing contract. Motion, at 34-35. This misses the point: the cogenerator claimed it was entitled to that relief under its existing commission-approved contract, and the New York Commission

correctly determined it had jurisdiction to interpret and to clarify what it had approved.

In light of the recent decisions out of the New York Commission, this Commission recently acknowledged an evolution in its view of its obligations to implement PURPA and it concluded that its jurisdiction with respect to negotiated contracts is not as limited as it originally believed. Lake Order at 5. As a result, this Commission has now acknowledged that it has a responsibility to interpret and clarify its orders approving negotiated cogeneration contracts for cost recovery to ensure that the utility's ratepayers are receiving the benefit due them under those contracts by paying no more than the utility's full avoided cost as determined by the Commission. Id. at 9. The doctrine of administrative finality does not bar the Commission from exercising that responsibility here. To hold otherwise would be an unlawful abrogation of powers delegated to the Commission by PURPA and the Florida Legislature.

Intervenors finally urge that it would be "unfair" to them if the Commission determines it has jurisdiction over the Petition because they have relied on the finality of "the 1995 Dismissal Orders" by expending significant sums in litigation. Motion at 21. They ignore, however, the fact that it would be even more unfair to complete the litigation, only to be told at that time that, consistent with the Commission's views in the Lake Order, there will be no cost recovery. It is incontestable that the Commission has exclusive jurisdiction over cost recovery, as it expressly recognized in the Lake Order. Lake Order at 5. FPC simply seeks to have that issue determined now by the only body with jurisdiction to do so.

Moreover, Intervenors wholly ignore the unfairness to FPC and its ratepayers of being forced to await the conclusion of Intervenors' litigation before receiving the Commission's declaration as to the amount of payments that will be allowed to be passed through to the ratepayers. As pointed out above, if the payments were to be passed through at the level

demanded by Intervenors, the "hit" upon the ratepayers would be enormous. It is obviously much fairer to them to resolve this issue sooner rather than later.

2. Intervenors contend that the Commission's jurisdiction to review and approve the Contract is limited to "cost recovery" issues. They argue that the Commission's concern is limited to ensuring that the cost of FPC's cogeneration contracts is no greater than FPC's avoided cost, that the Commission made that determination when it issued the Order, and that the Commission's role "was at an end" at that time. Motion at 22-23. This argument misses the fact that the Commission's approval of the Contract constituted a determination only that payments made "under [the Contract] constitute a reasonable and prudent expenditure by" FPC. In Re: Implementation of Rules 25-17.080 through 25-17.091, Order No. 25668, supra, at 10. Thus, Intervenors' argument begs the question that must be answered by the Commission's statement here, namely, that the energy payments that the Commission approved "under the Contract" are limited to avoided cost based upon the avoided unit's contractually specified characteristics, not additional characteristics nowhere specified in the Contract.

Thus, the Commission's approval means simply that the purchase of firm energy from Dade "pursuant to the rates, terms and other conditions of the contract" would not exceed FPC's full avoided cost. Rule 25-17.0832. Having approved FPC's Contract, this Commission has the authority and responsibility to ensure that FPC makes payment to Dade in accordance with what were in fact the avoided energy cost terms set forth in the Contract and approved in the Order. Rule 25-17.0832(8)(a); Panda, supra. To discharge that responsibility the Commission must exercise its jurisdiction to consider and determine what the Contract meant when the Contract was approved. Crossroads, supra, (holding that "it is within our authority to interpret our power purchase approvals"); Lake Order at 7 (holding that the proper calculation of the

energy payments due under the contract is a "determination [that] is inextricably linked to what the Commission approved when it approved the contract"). See also Indeck-Yerkes Energy Services, Inc. v. Public Service Comm'n of New York, 564 N.Y.S. 2d 841, 843 (N.Y. App. Div. 1991) (reversing court annulment of declaratory ruling by commission that its approval of the terms of a cogeneration contract did not cover the increased capacity sought by the cogenerator).

If the Commission failed to exercise this jurisdiction, it would be left in the untenable position of rubber-stamping FPC's request for recovery of payments to Dade. Intervenors' assertion that the Commission's role "was at an end" when the Commission approved the Contract -- the same argument that was made and rejected in Panda -- is manifestly incorrect.

Remarkably, Intervenors assert that they know what payments were approved for cost recovery in the Order. They maintain that the Commission considered, but rejected, declaring in its Order that payments were to be made on a certain basis; they also say there is no evidence the Commission intended the energy payments to be made in the manner FPC is making them. Intervenors conclude that the Commission therefore did not intend to approve the manner of making payments implemented by FPC. Motion at 24-25. This argument by Intervenors on the merits of what the Commission's Order meant -- an argument that is directly contrary to the Commission's determinations in its Lake Order -- proves FPC's point: the Commission must itself interpret and clarify its Order and lay to rest once and for all what energy payments were approved in that Order. That is the whole purpose of a declaratory statement proceeding. E.g., Sheldon, 128 So. at 262; Miami Dolphins, Ltd., 545 So. 2d at 295.

Two other points need to be made with respect to Intervenors' argument on the merits of what the Order meant. First, Intervenors incorrectly argue there is no evidence to support

FPC's implementation of the energy payment provision of the Contract. On the contrary, FPC's energy payments are based on the express terms of the Contract, which themselves were patterned after the Commission's rules and orders applicable to standard offer contracts. Rule 25-17.0832(4)(b); Order No. 24989, Dkt. No. 910004-EU. The Commission, of course, had the Contract before it when it approved the Contract.

Second, Intervenors rely upon the statement of one Commissioner in the Lake Docket to the effect that the Commission could not clarify its Order because she could not determine what the Commission had in mind at that time. Motion at 24. But the fact remains that the Commission did proceed there to determine what its prior Order meant -- that was exactly the basis for its refusal to approve FPC's proposed settlement with Lake. Moreover, its clarification was completely appropriate. The Commission is an official agency that can interpret and clarify its prior orders even though the make-up of the Commission may have changed since the orders were entered. To hold otherwise would prevent the current Commission from fulfilling its statutory and regulatory obligations.

3. Intervenors assert that FPC is "forum shopping" and that FPC does not truly need a declaratory statement. Motion at 25-29. Neither is true.

The claim that FPC is "forum shopping" is based on the on-going litigation in the courts with Dade. The fact that these proceedings exist, however, does not mean that the Commission does not have jurisdiction to resolve FPC's Petition. FPC is a regulated entity and it can recover its payments to Dade from its ratepayers only if this Commission determines those payments are proper under the Order and therefore recoverable through FPC's fuel adjustment clause. It is not "forum-shopping" to ask for that determination to be made by the only entity with authority to make it.

Couch v. State, Dept. of Health and Rehabilitation Services, 377 So. 2d 32 (Fla. 1st DCA 1979) -- the only authority cited by Intervenors -- is inapposite. There, the court affirmed a decision by the Department that the petitioner was not entitled to a declaratory statement because the petitioner presented no evidence in support of its petition and admitted that the state court had the "power to finally determine the issues presented to the Department." Id. at 33. That is not this case because the Commission's jurisdiction over cost recovery under its rules implementing PURPA is exclusive. 16 U.S.C. §824a-3(f); Fla. Stat. § 366.051; Rule 25-17.0832. Hence, the Commission has the sole authority to determine what its Order approving the Contract for cost recovery means; as the Commission explained in the Lake Order, it "is not required, based on a circuit court's decision, to approve recovery of QF payments that are in excess of a utility's avoided cost." Lake Order at 5.

Thus, FPC is not "forum shopping," as Intervenors claim. It is seeking a determination from the only agency with jurisdiction over cost recovery.

The Intervenors also argue that FPC does not need a declaration from the Commission, asserting that FPC's request is "speculative" because for the requested declaration "to ever apply" (i) the court would have to hold in favor of Intervenors, (ii) the Commission would have to then hold "(and be upheld on appeal)" that it had the authority to disallow "cost recovery of court-ordered payments" made to Dade under the Contract, and (iii) the Commission would have to issue an order disallowing cost recovery with respect to the payments to Dade. Motion at 28-29. That argument ignores FPC's obligations as a regulated utility. FPC will obviously conform its conduct to that declared by the Commission to be required under the Commission's Order and rules. But, for FPC to be assured that it is acting in accordance with the Commission's view of the law, the Commission must decide the issue presented by the Petition:

whether the energy payments are being made as the Commission intended, in a manner consistent with the avoided energy cost reflected by the specified proxy characteristics for the avoided unit. FPC's request, therefore, does not call for "speculation" about cost recovery at all; the very purpose of its petition is to end any speculation on this issue by clarifying what the Commission's Order required in this regard, just as the Commission did in the Lake Order.

Potentially "resolving a controversy" is, of course, one of the purposes of a declaratory statement. Rule 25-22.021 ("A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order.... "). Given the ongoing controversy with Dade over the energy payments, it follows that there is an "actual, present and practical need" for the declaration requested by FPC. Couch, 377 So. 2d at 33; Rule 25-22.021.[6/]

4. Intervenors argue that FPC's Petition is not appropriate for a declaratory statement, because Dade -- although not Montenay -- is also a party to the Contract. Motion at 29-32. But the fact remains, the declaratory statement proceeding is available to regulated utilities like FPC to answer their questions and resolve controversies under any existing statutory provision, rule, or order of the Commission. Rule 25-22.021. That is exactly what is sought by FPC in the Petition.

The mere fact that some other entity may be affected by that determination does not make the declaratory statement a statement of general applicability. If it did, the Commission would

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[6/] Intervenors also assert that FPC is before the Commission because FPC "knows that the evidence against it is overwhelming and that FPC is therefore trying, desperately to avoid that day of reckoning." Motion at 29. That is absurd. If the Commission takes jurisdiction and resolves FPC's Petition, it will advance, not delay, the purported "day of reckoning." It is the Intervenors, not FPC, who seek to put off the Commission's determination of what its Order meant -- a determination that the Commission must inevitably make at some point in time. FPC simply asks that it be made now, not later as the Intervenors demand.

never be able to issue a declaratory statement because some person or entity other than the petitioner would always be affected in some way by the declaratory statement. See Mental Health District Board, 425 So. 2d at 162 (affirming declaratory statement issued by Department that particular statutory provision applied to petitioner even though the statement had implications for the relationship between the petitioner and the Board of Mental Health and "to some extent may limit the Board's options"); Regal Kitchens, Inc., 641 So. 2d at 163-64 (upholding portions of declaratory statement addressing application of exemption from taxation to transaction between the petitioner corporation and an affiliated general partnership). See also In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corp., Order No. PSC-98-0449-FOF-EI, at 3-4 (granting FPC a declaratory statement with respect to the metering at two condominiums, even though it could be applicable to other condominiums as well).

5. Intervenors claim that the Lake Order is a nullity and therefore "legally irrelevant" to FPC's Petition. That is all the more reason why FPC is entitled to the requested declaratory statement in order to know whether the Commission intends to stand by its determination there, even though the issue was ultimately mooted in that particular case.

Moreover, it bears emphasis that the Lake Order was rendered a nullity only after the Commission had disapproved the settlement between FPC and Lake based on that order. Thus, the Lake Order was effective for that purpose -- it precluded settlement. As such, it is highly relevant to FPC's questions regarding its ability to pursue settlement discussions and to try to reach a settlement with Dade on its claims. No matter how strongly FPC believes in its position, FPC must recognize the risk that a jury or judge without expertise about this industry may reach a well-intended but erroneous conclusion. Therefore, FPC must pursue settlements

with cogenerators when it is advantageous to do so, as FPC has done in the past with the Commission's approval. The Lake Order is directly relevant to FPC's Petition in this regard.

Intervenors cannot deny that the Lake Order represents the Commission's most recent announcement with respect to the issues presented by FPC's Petition. Indeed, Intervenors spend several pages attempting to distinguish the cases and authority relied upon by the Commission in that Order. Motion at 34-38. But these arguments go to the merits of FPC's Petition and not the Commission's jurisdiction over the Petition which is challenged by Intervenors' Motion.[7/] Because the Lake Order represents the Commission's most recent thoughts and reasoning on the exact issue presented by FPC's Petition but is dismissed by Intervenors as merely a "nullity," FPC has an obvious need for a declaration from the Commission to answer its questions as to the Commission's interpretation of the Order and to resolve the current controversy over that issue.

Intervenors also make much of the choice of words used by FPC in its Petition for a declaratory statement that, under the Commission's orders and statutory and regulatory law implementing PURPA, the Commission interprets the Order "to require" that FPC make energy payments in the manner FPC is making payments to Dade. They claim that the Commission does not have the power to "require" FPC to take certain actions under the Commission-approved Contract. Motion at 2, 32. This, again, misses the mark. FPC is clearly regulated

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[7/] Once the merits of its Petition are reached, FPC will demonstrate why the Crossroads and Panda decisions are relevant to the merits of FPC's Petition. It is sufficient here to say that just as this Commission has recognized in the Lake Order, Freehold Cogeneration Assoc., L.P. v. Board of Regulatory Commissioners, 44 F. 3d 1178 (3d Cir. 1995), is not the be all and end all that Intervenors want everyone to believe, just as it was not in Panda. Freehold certainly precludes the Commission from changing its avoided cost determination but it certainly does not prevent the Commission from saying what that determination in fact was, which is all that is sought by FPC's Petition.

by the Commission and obligated to follow the Commission's orders or suffer penalties for the failure to do so. Fla. Stat. §366.095. Once the Commission issues its clarification of the Order, FPC will in all respects comply with it, just as required under Florida law.

6. Finally, Intervenors challenge FPC's request for a declaration under the Commission's rules, arguing that Rule 25-17.0832(4)(b) does not apply to negotiated contracts and that, even if it did, it supports Intervenors' position, not FPC's. Once again, however, their argument misapprehends the real issue. FPC does not ask the Commission to apply Rule 25-17.0832(4)(b); it asks the Commission to interpret that rule because it is directly relevant to the issue presented by FPC's Petition.

As pointed out in FPC's Petition, John Seelke, FPC's former manager of cogeneration and later paid consultant to cogenerators in litigation with FPC, testified that Rule 25-17.0832(4)(b) was the basis for the language of the energy payment provision in the Contract. This makes sense, given that the Commission, in approving the Contract for cost recovery, was required to consider among the factors that would impact FPC's ratepayers the determination that the payments over the term of the Contract would not exceed avoided cost "calculated in accordance with" Rule 25-17.0832(4)(b). See, supra, at 11. Hence, the Commission's construction of Rule 25-17.0832(4)(b) is highly relevant to the proper interpretation of the Order and, in turn, to the ongoing dispute between FPC and Dade. As Panda makes clear, the Commission plainly has jurisdiction to interpret its rules implementing PURPA.

Additionally, Intervenors' argument addresses the merits, not whether the Commission has jurisdiction in the first place. Indeed, this argument on the merits confirms that the Commission must determine the scope of its Order and its rules implementing PURPA, a determination that is within the Commission's exclusive jurisdiction.

## CONCLUSION

WHEREFORE, FPC requests that the Commission deny Intervenors' Motion to Dismiss and issue the statement requested in FPC's Petition for Declaratory Statement.

Respectfully submitted by:

Chris S. Coutroulis, Esquire
Fla. Bar No. 300705
Robert L. Ciotti, Esquire
Fla. Bar No. 333141
Robert Pass, Esquire
Fla. Bar No. 183169
**CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.**
One Harbour Place
P.O. Box 3239
Tampa, Florida 33601-3239
Telephone: (813) 222-7000
Facsimile: (813) 229-4133

AND

James A. McGee, Esquire
Fla. Bar. No. 0150483
**FLORIDA POWER CORPORATION**
3201 34th St. South
P.O. Box 14042
St. Petersburg, FL 33733-4042

Attorneys for Petitioner
**Florida Power Corporation**

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 12th day of May, 1998, to the following:

Gail P. Fels
Dade County Aviation Division
Post Office Box 592075 AMF
Miami, Florida 33159

Robert Scheffel Wright
LANDERS & PARSONS, P.A.
310 West College Avenue
Post Office Box 271
Tallahassee, Florida 32302