ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re Petition of Florida Power Corporation for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Lake Cogen, Ltd., in Order No. 24734, Together with Order No. 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 Payments Are Due, Are Limited to Analysis of Avoided Costs Based upon Avoided Unit's Contractually-Specified Characteristics.	Docket No, 9805O9-EQ Submitted for Filing May 21, 1998

PETITION OF
NORTH CANADIAN MARKETING CORPORATION
TO INTERVENE FOR THE LIMITED PURPOSE
OF SUBMITTING A MEMORANDUM IN SUPPORT OF
LAKE COGEN, LTD.'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
BRIEF AS *AMICUS CURIAE* IN SUPPORT OF
LAKE COGEN, LTD.'S MOTION TO DISMISS

I. PETITION TO INTERVENE

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Pursuant to Rule 25-33.039, Florida Administrative Code, ("FAC"), North Canadian Marketing Corporation, ("NCMC") hereby petitions the Florida Public Service Commission ("Commission") for leave to intervene in the above-styled docket for the limited purpose of supporting the motion of Lake Cogen, Ltd. ("Lake Cogen" or "Lake") to dismiss the petition for declaratory statement sought herein by Florida Power Corporation ("FPC"). In support of its Petition to NCMC states as follows:

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FPSC-RECORDS/REPORTING

All pleadings motions, notices, orders, or other documents required to be served in this docket should be addressed to the following:

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2. NCMC is a California corporation engaged in the sale of natural gas throughout North America. NCMC is a wholly-owned subsidiary of Norcen Explorer, Inc., a wholly owned subsidiary of Union Pacific Resources Co. NCMC's corporate offices are located at the above address.

3. Lake Cogen owns and operates a 112-megawatt (MW) gas-fired cogeneration facility in Umatilla, Lake County, Florida, ("Facility"), and sells firm capacity and energy from the Facility to FPC pursuant to that certain *Negotiated Contract For The Purchase of Firm Capacity And Energy From A Qualifying Facility Between Lake Cogen And Florida Power Corporation* dated March 13,1991 (the "Contract"). The Contract provides for Lake

Cogen to produce and deliver to FPC, and for FPC to purchase 110 MW of firm electric capacity and energy at a minimum committed on-peak capacity factor of 90 percent from the Facility. Thermal energy produced by Lake Cogen's Facility (in the form of steam) is sold to Golden Gem Growers, Inc., for use in its citrus processing plant.

4. Lake Cogen is a qualifying cogeneration facility or "QF" as contemplated by the applicable rules of the Commission and the Federal Energy Regulatory Commission (the "FERC").

5. Pursuant to the Gas Purchase Agreement ("GPA") signed between Lake Cogen and NCMC on July 29, 1992, as amended, NCMC has the exclusive right to supply the first 20,472 million Btus of gas to the Lake Cogen plant each day, equivalent to more than 95% of the Facilities maximum sustained gas requirements. In reliance on its rights and obligations under the Contract, NCMC has entered upstream contracts to obtain significant quantities of the necessary gas from other suppliers, primarily Vastar, Inc., an affiliate of ARCO Natural Gas Marketing, Inc.

6. The GPA establishes the price of natural gas sold by NCMC to Lake in accordance with a formula which is directly and substantially affected by the formula in the Contract under which Lake sells power to FPC. NCMC therefore has a direct, vital, and non-substitutable interest in any proposed interpretation of the Contract which would have the effect of interpreting the formula for such power sales. Accordingly, NCMC has

a direct interest in the Contract proposed to be interpreted in the Petition presented to the Commission in this docket. No other party can adequately represent NCMC's interest in this matter.

7. In accord with Commission Rule 25-17.0832(2), F.A.C., the Contract was approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991 in Docket No. 910401-EQ. *In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation*, 91 FPSC 7:60 (July 1, 1991) (hereinafter the "Contract Approval Order"). By the same order, the Commission approved seven other negotiated contracts for the purchase by FPC of firm capacity and energy from other QFs. These eight negotiated contracts, together with three others approved in separate proceedings[1], are referred to collectively herein as "the Negotiated Contracts." The Commission's Contract Approval Order found that Lake Cogen's Contract was expected to provide savings to FPC's ratepayers of more than $3 million based upon the then-current forecasts of FPC's avoided costs, 91 FPSC 7:71.

8. For the initial thirteen months of the contract, July 1, 1993 through July 31, 1994, Lake billed FPC, and FPC paid to Lake, a price for energy based the full costs avoided by

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[1] *In Re: Complaint by CFR Biogen Corporation Against Florida Power Corporation for Alleged Violation of Standard Offer Contract*, 92 FPSC 3:657; *In Re: Petition for Approval of Contract for Purchase of Firm Capacity and Energy between Ecopeat Avon Park and Florida Power Corporation*, 91 FPSC 8:196; *In re: Petition for Approval of Cogeneration Contract Between Florida Power Corporation and Seminole Fertilizer Corporation*, 91 FPSC 2:271.

a real, operable, fully characterized pulverized coal generating unit, as required by Section 9.1.2 of the Contract. As a result of using the fully-characterized avoided unit, FPC's energy payment to Lake reflected the firm energy costs for virtually all of the hours of Lake's sales to FPC.

9. In a letter to Lake Cogen dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating" "an avoided unit" with certain limited characteristics during certain hours, and further declared that, as a result of this determination, FPC would pay for energy delivered in those hours at a rate based on FPC's as-available energy costs, which are less than the firm energy prices that FPC would otherwise be obligated to pay to Lake Cogen. FPC claimed that these actions were being taken pursuant to the provisions of Section 9.1.2 of the Contract. FPC sent similar letters, announcing similar claims and intentions, to the other QFs that are parties to the Negotiated Contracts.

10. On April 10, 1998, FPC initiated the instant docket as a petition for declaratory statement. FPC has asked the Commission:

> for a declaratory statement that, under the rational [sic] articulated in order No. PSC-97-1437-F0F-EQ, issued November 14, 1997 in Docket 961477-EQ,(the "Lake Order" or the "Lake Docket"), the Public Utilities Regulatory Policy Act ("PURPA"), Fla. Stat. §366.051, and Rule 25-17.0832, F.A.C., the Commission interprets its Order No. 24734, issued July 1, 1991 in Docket 910401-EQ (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between Florida Power and Lake Cogen, Ltd. (the "Negotiated Contract" or "Contract" between FPC and "Lake"), requires that Florida Power:

(A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;

(B) Use only the avoided unit's contractually-specified characteristics in §9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Lake is entitled to receive firm or as-available energy payments;

(C) Use the actual chargeout price of coal to Florida Power's Crystal River ("CR") Units 1 and 2, resulting from Florida Power's prevailing mix of transportation, rather than the mix of transportation in effect at the time the Contract was executed or some other mix, to compute the level of firm energy payments to Lake.

FPC's Fourth Petition at 1-2. (Footnote omitted.)

11. This petition for leave to intervene is filed for the limited purpose of supporting Lake Cogen's Motion to dismiss FPC's petition. The Commission has previously granted intervention for the limited purpose of moving to dismiss a petition.[2] As demonstrated herein, NCMC's substantial interests will be affected by any decision that the Commission might make in this docket, and accordingly, the Commission should grant this petition for leave to intervene to assure fundamental due process to NCMC.[3]

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[2] See *In Re: Petition for Determination that Implementation of Contractual Pricing Mechanism for Energy Payments to Qualifying Facilities Complies with Rule 25-17.0832* F.A.C., (*Energy Pricing Docket*), Order No. PSC-94-1406-PCO-EQ at 1; *In Re Petition of Nassau Power Corporation to Determine Need for Electrical Power Plant* Docket No.920768-EQ, Order No. PSC-92-1074-PCO-EQ (September 29, 1992)

[3] NCMC's participation in this proceeding meets the two-part test established in *Agrico Chemical Company v. Dept. Of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981): NCMC (1) will suffer immediate and significant injury if the Petition is granted and the Contract is reinterpreted in a manner that results in payments to Lake reduced below those that were paid and recovered by FPC prior to August, 1994; and (2)

12. As described above, this petition for leave to intervene is filed for the limited purpose of supporting Lake's motion to dismiss FPC's petition. Neither this petition, nor the filing hereof with the Commission, should be construed as agreement or acquiescence of NCMC that the Commission has jurisdiction over the issues raised by FPC's petition. NCMC reserves its right to seek the Commission's leave to participate as a full party intervenor in this proceeding if the Commission, after considering this motion, determines that it has jurisdiction to proceed or to grant the petition.

13. In the event that the Commission determines not to grant NCMC the limited intervenor status that it seeks, NCMC nonetheless respectfully requests the Commission to accept this memorandum of law as a brief of *Amicus Curiae.*

II. MEMORANDUM OF LAW OR BRIEF *AMICUS CURIAE*

FPC's Petition, on its face, requests that the Commission issue "a declaratory statement that . . . the Commission interprets its [Contract Approval] Order approving the [Contract] to require that Florida Power . . . [use only the avoided unit's contractually

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has an interest within the ambit of the Commission's jurisdiction if the Commission were to assert that it does have the jurisdiction to reinterpret the pricing provision of the Contract, an act which would also have the effect of asserting jurisdiction over the gas-pricing provision in the GPA between NCMC and Lake.

specified characteristics in §9.1.2] . . . to assess its operational status for the purpose of determining when Lake is entitled to receive firm or as-available energy payments..." FPC Petition at 1-2. At the same time, FPC implicitly asks the Commission to create the conditions which, under FPC's flawed theory, would avoid a disallowance or denial of cost recovery for the payments that it must make under the Contract. FPC Petition at 4,13-14, 19.

In reality -- and as a matter of law -- FPC can only be asking for something very different from the declaratory statement which it purports to seek: it is either asking for (1) a reinterpretation of the Contract itself, irrespective of what the Lake Circuit Court has said, or may say, the Contract requires; (2) a reversal of the Commission's prior holding that this precise issue is a matter for the Courts and beyond the Commission's jurisdiction; (3) a reversal of the Commission's own prior decisions finding the costs prudent and allowing recovery; or (4) a disallowance of recovery of costs in excess of those required under its requested reinterpretation. Interpreted in any of these ways, FPC's Petition is improper and must be dismissed. Both its explicit request and its underlying real request are barred by limitations on the Commission's statutory jurisdiction, doctrines of prior adjudication and preemption by federal law.[4] NCMC submits this memorandum in order to emphasize the clear distinction between FPC's

[4] As Lake Cogen has pointed out in its Memorandum of Law filed on April 30, 1998, the precise relief that FPC is now requesting is barred by extensive prior adjudication, both before this Commission and by an Order Granting Partial Summary Judgment issued by the Lake Circuit Court hearing the contract dispute between Lake Cogen and FPC. NCMC fully agrees with these arguments and does not duplicate them herein.

explicit request for reinterpretation of the Commission's prior order and its implicit request for a predetermination to deny pass-through of costs paid in excess of those consistent with that reinterpretation. NCMC also herein amplifies the reasons why FPC's actual request is preempted by federal law.

A. FPC is Seeking an Impermissible Contract Interpretation

FPC has gone to some length in its Petition to posture its pleading so that it purports to be asking only for interpretation of the Commission's Contract Approval Order rather than an interpretation of the Contract. Indeed, FPC seems to be well aware that its entire position rests on the thin reed that the Commission, in granting the petition, would be interpreting its own order rather than the Contract itself.

This Commission has already recognized, however, that FPC is seeking contract interpretation, relief that cannot be granted under PURPA and Florida State law. On July 21, 1994, FPC filed a Petition for a declaratory statement in Docket No. 940771-EQ that is indistinguishable from the statement it requests in this proceeding. In the previous Petition, FPC sought a finding that its implementation of the §9.1.2 pricing provision -- use of only the four §9.1.2 factors to determine operational status as well as cost levels-- is consistent with the orders approving the Contract. FPC 1994 Petition at 6.

In dismissing that Petition, the Commission found:

> that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to determine that its interpretation of the pricing provision is correct.

Id.

Nothing has occurred in the interim to change that finding. None of the cases or

other materials FPC cites in its petition support a different conclusion than the Commission has already reached on this issue in 1995. FPC primarily leans on the null proposed agency action the Commission voted upon last year, the Lake decision, in which a New York PSC case was cited as authority for the proposition that the Commission can reinterpret its own original order approving a power purchase agreement ("PPA").[5] At the very most, *Crossroads*, so clearly distinquishable from the facts presented herein, holds that a Commission is within its authority to articulate the scope of its previous contract approvals in light of the rules and policies that existed at the time of its prior authorization. A passage from *Crossroads*, quoted in the Lake PAA order, demonstrates the limitations of *Crossroads* and NYPSC's recognition of those limitations:

> As a result, the approval of the original contract for the Crossroads site may be explained and interpreted, and O&R's petition may be construed as requesting that relief.[citation omitted]

Lake PAA Order at 8.

However, there simply is no escaping the essence of what the Commission is being asked by FPC to do: to declare what the Contract "require[s] that Florida Power" pay Lake. FPC Petition at 1-2. This is not an interpretation of the Commission's original order. It is in fact a request to interpret, or, more accurately, reinterpret the Contract in

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[5] *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 Public Service Commission, decided November 29, 1996 ("*Crossroads*"); affirmed on grounds of *res judicata* and *collateral estoppel* under *Crossroads Cogeneration Corp. v. Orange and Rocklands Utilities, Inc.*, 969 F. Supp. 907; U.S. Dist. Ct. for New Jersey, decided June 30, 1997.

a manner directly contrary to the conclusive finding that the Lake Circuit Court has already made on Summary Judgment. The Commission has previously, and definitively, decided as a matter of law that it is without authority to do this.[6]

Since it is unable to fashion a request that is not actually requesting a contract interpretation, FPC's argument relies heavily on blurring the distinction between the impermissible reinterpretation of the contract and an interpretation of the Commission's previous rules and orders that it claims is permitted under *Crossroads*. At page 11 of its Motion, FPC asserts that the New York cases now establish that the Commission "has jurisdiction to interpret the legal meaning of a term in a PURPA contract." As this statement reveals, FPC is clearly seeking an interpretation of the Contract, not the Commission's prior approval of the contract.

FPC of course makes every effort to fit the square peg into the round hole; the literal meaning of its request is that the Commission declare that its original order says what Florida Power is required to pay to Lake, as if in reviewing the Contract, it were the Commission's task to decide what FPC must pay to Lake, rather than what it may recover from its ratepayers. FPC Petition at 1.

The Commission's review of the Contract, however, is limited as a matter of law to the latter determination: it is for the courts alone to decide what the Contract says FPC must pay.[7] Furthermore, the scope of the Commission's authority for purposes of

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[6] 1995 Dismissal Order, 95 FPSC 2:263, 267-70.

[7] 1995 Dismissal Order at 267-270.

determining what FPC may recover from its ratepayers -- in the context of this Contract at this point in time -- is circumscribed by the Commission's orders explicitly recognizing the critical importance of the Commission's initial approval of QF contracts. As the Commission stated in 1992:

> ISSUE 14: Does Commission approval of a negotiated contract for firm energy and capacity sales from a QF to a utility constitute a determination by the Commission that capacity and energy payments made to a QF by the purchasing utility in accordance with the contract constitute a reasonable and prudent expenditure by the utility based on information submitted to the Commission at the time of approval?
>
> For cost recovery purposes the effect of Commission approval of a negotiated contract should be the same as that which results from approval of a standard offer contract.
>
> Our approval of the terms and conditions of a utility's contract and the firm capacity and energy prices stated therein, constitutes a determination that any payments made to a QF under the contract constitute a reasonable and prudent expenditure by the utility under Section 366.06, Florida Statutes, based on information submitted to the Commission at the time of approval.[8]

FPC argues that its request is justified because the Commission may decide that its request -- like that of *Crossroads* or *Panda* -- is "inextricably linked" to an interpretation of the Contract Approval Order or the Commission's rules. FPC Petition at 11-12. That argument stands *Crossroads* and *Panda* on their heads. In both of those cases, the petitioners were asking their Commissions exclusively for an interpretation of previous approval orders. FPC, by contrast, is asking directly and primarily for a contract

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[8] *In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., regarding cogeneration and small power production,* Order No. 25668; 1992 Fla. PUC LEXIS 267; 92 FPSC 2; 24 (1992), pp.23-24.

interpretation -- what it is "required" to pay -- and attempting to bootstrap that request into an interpretation of the Contract Approval Order that is entirely secondary to its fundamental objective.[9]

Thus, FPC's position is untenable from either perspective: if it is asking for a determination of what it is "required" to pay Lake, it is asking for an adjudication of the contract and not an interpretation of a Commission rule or order. If it is asking for an interpretation of the Contract Approval Order, it is asking only for an interpretation of what was approved for cost recovery, and not what it is "required" by the pricing term to pay to Lake. Read either way, consideration of FPC's Petition is barred. If FPC's request is construed as the former -- a determination of its contract obligations -- it is a request for determination of contract rights and obligations that is not only beyond the jurisdiction of the Commission, but has been decided against FPC by the Lake Circuit Court. Even construed in the light most favorable to FPC, however, as a request for a ruling as to the "recoverability" of the Contract payments, such relief is barred by the Commission's own orders on the effect of QF contract approvals and, as set forth below, federal preemption principles.

B. The Result FPC is Actually Seeking is Preempted by Federal Law

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[9] There is no language in the Contract Approval Order concerning the meaning of the pricing provision in the Contract or the other Negotiated Contracts that is in any way supportive of FPC's interpretation. It is NCMC's understanding, based on Commission statements on the record at the time of consideration of the Lake decision, that there was also nothing in the record supporting that order that interpreted or considered these issues concerning the pricing clause.

Lake has demonstrated that the FPC Petition is barred by *res judicata* and collateral estoppel. Moreover, it is also clearly barred by the doctrine of federal preemption as most authoritatively declared in *Freehold v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1994.) That case holds that an injunction under federal preemption doctrine will lie where a state regulatory agency attempts to take action affecting prices paid under approved PURPA contracts between its regulated utilities and a QF. In *Freehold,* the U.S. Court of Appeals for the Third Circuit declared:

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

Freehold, at 1194 (emphasis supplied).

In that case, the New Jersey Board of Regulatory Commissioners ("BRC") ordered Freehold Cogeneration to renegotiate a buy-down or buy-out of its power purchase agreement with Jersey Central Power & Light. Freehold sought an injunction in federal district court on the grounds that the BRC order amounted to utility-type regulation of Freehold's prices, regulation from which the QF was specifically exempted under PURPA. The district court dismissed the action for want of subject matter jurisdiction, construing it as requiring a direct review of the BRC's implementation of PURPA, rather than as a claim under federal law itself.

The Third Circuit reversed the District Court's holding that it did not have jurisdiction. This was not a review, according to the Third Circuit, of how a state was implementing PURPA, but rather an action under the supremacy clause of the

Constitution and PURPA to preempt a state PUC's violation of the QF's PURPA rights. The court then noted that Freehold had not acquiesced to BRC jurisdiction over the issues of its rates for power sold to Jersey Central Power & Light. Finally, the court held that Congressional intent in PURPA was to exempt QFs from state utility commission rate regulation, and the BRC was attempting to impose rate regulation on Freehold after having given final approval to the contract.

Freehold has been widely followed in other cases and jurisdictions. It has been followed in numerous similar cases where QFs alleged interference by states with their PURPA protection against state economic regulatory control or changes.[10] Indeed, as recently as May 1, 1998, the Superior Court of New Jersey, Appellate Division, approvingly noted that "the Third Circuit accepted Freehold's argument that **any attempt to revisit a previously approved [QF] contract** as a result of changed circumstances deprived the [QF] of the 'benefits of the bargain.' *Id at 1193." In the matter of the Petition of Atlantic City Electric Company for a Final Increase in its Energy Adjustment Charge*; 1998 N.J. Super. LEXIS 195; Superior Court of New Jersey, decided May 1, 1998. (emphasis added). The Court went on to observe that the Federal Energy Regulatory Commission had reached an identical conclusion: "the appropriate time to challenge a [QF] contract is 'up to the time the contract is signed, not years into a contract'". Id at 8, citing *New York State Electric and Gas Corp.*, 71 FERC ¶ 61027 (April 12, 1995). As the Superior Court

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[10] See *West Penn Power Company v. Pennsylvania Public Utility Commission;* 659 A.2d 1055; 1995 Pa. Commw. LEXIS 255. Commonwealth Court of Pennsylvania, decided May 25, 1995.

concluded, "once a [QF] contract is executed and becomes operational, there can be no retroactive invalidation of the contract just because energy rates in the market fall below the contract rates". *Id.* at 13.[11]

As in *Freehold* and its progeny, this Contract was executed; it became operational without challenge; and years later, the utility seeks to invoke this Commission's assistance in revisiting and reconsidering the essential pricing term under a federally mandated program in a manner that would deny Lake, and perhaps a host of others, the benefit of their respective bargains. And, as in *Freehold*, there can be only one lawful response: No.

Where *Freehold* has been cited in cases where state power to review QF activities was upheld, it has only been in cases clearly distinguishable from the Petition FPC has put before this Commission. For example, a Colorado court found that a QF that had (1) changed its site, (2) changed its prime mover from hydro power to natural gas, and (3) enlarged its proposed megawatts of capacity had sufficiently changed its originally approved contract that it did not qualify to retain the approved pricing under its original contract.[12] Even in that case, however, the dissent cited *Freehold* in arguing that even

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[11] *Freehold* has also been followed in non-QF cases for the general principle that a state regulatory agency is preempted by a federal statutory scheme that occupies the field even if the state has jurisdiction over some aspects of the activity. *Pic-a-State Pa, Inc., Scott McLean v. Janet Reno, Attorney General of the U.S.;* 76 F.3d 1294; 1996 U.S. App. Lexis 2392; U.S. Ct. of Appeal for the Third Circuit, decided February 13, 1996; *Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination, et al.;* 70 F.3d 1361; 1995 U.S. LEXIS 33253; 150 L.R.R.M. 2961; U.S. Court of Appeals for First Circuit, decided November 27, 1995.

[12] *Phoenix Power Partners, L.P. v. Colorado Public Utilities Commission, et al.*; 952 P.2d 359; 1998 Colo. LEXIS 143; Supreme Court of Colorado, decided February 2, 1998.

with such changes, the price term should have been inviolate. An Idaho Supreme Court decision distinguished *Freehold* on the basis that the QF had not in fact reached the stage of having a fully approved contract before rate changes took effect, and therefore did not have the entitlement to the prior-approved rates.[13]

A number of cases address the issue of state public utility commission or utility monitoring of QFs to enforce PURPA requirements. This sort of a program was rejected as inconsistent with PURPA even before *Freehold* where the California Public Utility Commission attempted to correct violations with reduced avoided cost rates and was reminded that QF designation is an exclusive FERC activity.[14] Since then, New York has engaged in similar monitoring activity, but steered clear of using the results of monitoring to reduce approved QF contract rates or decertify QFs, and thus has to date avoided conflict with *Freehold.*[15]

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[13] *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission and Pacificorp, dba Utah Power & Light Company;* 128 Idaho 609; 917 P.2d 766; 1996 Ida. LEXIS 64; Supreme Court of Idaho, decided May 30, 1996.

[14] *Independent Energy Producers Association v. California Public Utilities Commission, et al.* 1995 U.S. Dist LEXIS 7349; U.S. Dist. Ct. for Northern Dist. of California, decided May 30, 1995.

[15] *Proceeding on a Motion of the Commission to Establish Programs for Monitoring Qualifying Facility Status; Niagara Mohawk Power Corporation - Petition for a Declaratory Ruling and for Approval of a Qualifying Facility Monitoring Program - PETITIONS FOR REHEARING: Order Authorizing the Monitoring of Qualifying Facility Status and Denying Petitions for Rehearing;* 1997 N.Y. PUBLIC UTILITY COMMISSION LEXIS 22 (1997); *Proceeding on a Motion of the Commission to Establish Programs for Monitoring Qualifying Facility Status; Niagara Mohawk Power Corporation - Petition for a Declaratory Ruling That Qualifying Facilities Are Required to Provide Certain Information Sufficient to Determine Compliance With the Requirements of the Public Utility Regulatory Policies Act of 1978 Regulations;* 1996 N.Y. PUBLIC UTILITY COMMISSION LEXIS 484.

In its Petition, FPC purports to assert this Commission's jurisdiction solely on the basis of *Crossroads*, a case that does not interpret Florida law, was not decided on its merits and is clearly distinguishable, and *Panda,* a case that is also distinguishable on its facts and legal principles from the one before the Commission. FPC ignores the controlling principle of *Freehold*, presumably because it has no answer to the holding in that case.

Crossroads involved a New York QF's effort to expand its generation from 3.3 MW within an approved contract calling for a maximum of 4 MW of capacity by adding a 7 MW gas turbine, thus assuring that it would operate at a 100% load factor. Crossroads Cogeneration wanted to preserve the pricing under its original contract for all energy produced from its enlarged facility, and argued, citing *Freehold,* that state regulatory jurisdiction over its contract ended with its approval. The NYPSC ruled that it had the jurisdiction to determine that its original order was specific to the capacity limits, and that Crossroads required a new contract for its new turbine. On appeal, the NYPSC was upheld, but not on the issue of whether or not it had interfered with Crossroads' original contract — instead, the court ruled that Crossroads had fully litigated the issue of the NYPSC's jurisdiction in the original case, and was precluded from attacking the decision in that proceeding under the doctrines of collateral estoppel and *res judicata.* The *Crossroads* court never reached the issue of whether *Freehold* would preempt the NYPSC action in that case. Thus, this Commission cannot rely on *Crossroads* at all to support FPC's contention that the Commission has jurisdiction here in the face of *Freehold.*

Crossroads is also distinguished on its facts. There was little doubt as to what the

contract did and did not provide; the only question was what the Commission had and had not approved. There was nothing ambiguous about the NYPSC's earlier order, which was explicit concerning capacity and configuration, and the NYPSC did nothing more than uphold its earlier order. The NYPSC itself determined that it did not have the power to interpret Crossroads' existing contract with Orange & Rockland, in keeping with *Freehold*, but that requiring a new contract for a new generator and increased capacity was not a matter of interpreting the existing authority in the PPA for construction of capacity by the QF.

Unlike *Crossroads*, there is no suggestion here that it is the QF, Lake, that is proposing a new pricing term or a new or amended contract. Instead, it is the utility which has clearly changed the approach to pricing by "implementing" a new interpretation of the pricing clause more than a year after payments had been made under a prior interpretation. Unlike *Crossroads*, FPC is not seeking a statement interpreting the Commission's Order. That order is clear: it approved the contract as written. FPC is seeking only an interpretation of the contract pricing term itself, relief neither sought nor approved in *Crossroads.*

Panda is no more pertinent than *Crossroads* to FPC's present request. In that case the Supreme Court of Florida upheld the Commission's order that a QF, Panda-Kathleen, LP, could no longer retain standard offer QF status if it increased its generation to 115 MW because the maximum capacity for a standard-offer QF was 75 MW. In addition, Panda had filed for a thirty-year contract rather than the twenty-year maximum specified for a standard-offer plant. Panda had formally acceded to the FPSC's jurisdiction,

acknowledging in its pleadings the Commission's right and obligations to conduct a full hearing. Then in 1995, Panda changed course, and sought to preempt further proceedings under *Freehold.*

The Florida Supreme Court upheld the FPSC's denial of standard-offer status to Panda for Panda's 115 MW project, distinguishing *Panda* from *Freehold* on the basis that *Panda* turned on the interpretation of a rule incorporated into Panda's contract. In *Freehold*, the New Jersey regulators were not "construing and interpreting their own regulations. Rather, that case involved utility-type regulation in the form of efforts of the New Jersey regulatory commission to induce a cogenerator to renegotiate a reduction in the amount of capacity payments to save money for ratepayers."[16] The Court further held that the original approval of the thirty-year term had been a mistake by the FPSC, since the contract simultaneously referenced twenty-year and thirty-year terms, and could also be resolved by reference to the regulations for standard-offer contracts. Thus, properly read, *Panda* supports Lake Cogen's opposition to FPC's Petition in that *Panda* explicitly recognizes the limitations upon the Commission's authority as a result of *Freehold.*

In summary, there is nothing in *Crossroads* or *Panda* that provides any support for the relief FPC is explicitly requesting in this proceeding. Indeed, the issue before the Commission is not whether FPC's Petition could be considered under the criteria of those cases, but whether it is prohibited by *Freehold*; that is, whether FPC is requesting the Commission either to reconsider its previous approval of the Contract or to deny pass-

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[16] *Panda*, at p. 327.

through of the price called for by the contract. The relief requested by FPC is preempted by federal law because it asks the Commission, under color of purported state authority, to attempt to determine the prices that Lake Cogen receives for its power under its approved contract with FPC.

C. The FPC Petition Would Require the Commission to Reverse Itself With Respect to Both its Prior Approval of the Contract and its Initial Orders Granting Cost Recovery Under the Contract

The Commission, in the Approval Order, approved the Contract exactly as written, without qualification or limitation. The Lake Circuit Court has now handed down its binding determination of what was meant by the pricing clause that the Commission previously approved. The Commission cannot now disapprove any of the amounts included in that pricing clause as written without reconsidering -- and disapproving -- the contract as written, an action also specifically forbidden under *Freehold.*

This Commission has also previously approved for cost recovery payments to Lake Cogen consistent with the judgment of the Lake Circuit Court. Once the contract terms are approved, as the Courts and FERC have declared, tthe Commission's continuing responsibility for cost recovery review is extremely limited. That responsibility has already been exercised with respect to the payments made for the first thirteen months of the Contract, from July 1, 1993 to July 31, 1994.[17] FPC's request for a determination that the Contract pricing clause calls for the "contractually defined unit" rather than the one

[17] See, e.g. *In Re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor*, Docket No. 950001-EI, Order No. PSC-95-0450-FOF-EI, April 6, 1995, Order Approving . . . True-up Amounts, etc.

required by the summary judgment would include, at least by implication, a determination the costs it collected between July of 1993 and August of 1994 were in excess of the amounts it was "required" to pay to Lake, notwithstanding that it paid such amounts to Lake for over a year and has already sought and received approval from the Commission to collect those costs from ratepayers, and has done so.

FPC cannot now expect a determination that it is required to pay only according to its purported "contractually defined" pricing model without the Commission reversing itself. In order to stand by its approval of the amounts already passed through, yet disallow similar amounts required to be paid after August of 1994, the Commission would have to do what was specifically forbidden under *Freehold*; to impose a price change on the contract effective only after August of 1994 by disallowing recovery of the court-required amounts after that date.

FPC, of course, has been careful to couch its explicit request not in terms of disapproval or disallowance for pass-through (while referring to the issues of pass-through) but in terms of a Commission order "requiring" that it pay only certain amounts, ostensibly thereby avoiding rather than requiring a disallowance. FPC Petition at 14, 19. FPC cannot avoid, however, the effects of the Lake Circuit Court's judgment by arguing that the Commission may order it not to pay according to the contract. That would be tantamount to an argument that the Commission has ordered the utility to breach its contract.

Beyond whatever effect that may have with respect to FPC's contractual liability in the circuit court whose judgment FPC collaterally attacks in this petition, that outcome

would be an obvious and direct interference by the Commission in the Contract itself, also an action forbidden under *Freehold.*

If FPC's petition were granted in substance, it would leave FPC with a determination by the Lake Circuit Court that it must pay according to Lake's interpretation of the Contract and a determination by the Commission that such payments are in excess of what the Commission has approved. The Commission is not empowered to require that FPC make payments to Lake according to any particular formula. The only relief that the Commission could even conceivably provide in the circumstance that FPC's contractual liabilities exceed its rate approvals is disapproval and disallowance of cost recovery, but this is precisely the result forbidden under *Freehold.*

CONCLUSION

WHEREFORE, for the foregoing reasons, NCMC respectfully requests to be granted intervention in this proceeding for the limited purpose of submitting its Memorandum In Support of Lake Cogen's Motion to Dismiss the Petition of Florida Power Corporation, or in the alternative, to submit its Brief of *Amicus Curiae* in support of said motion.

Respectfully submitted,

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May 21, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 20th day of May, 1998, by U.S. Mail to Robert S. Wright, Esquire, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302; James A. McGee, Esquire, Office of the General Counsel, Florida Power Corporation, 3201 34th Street South, Post Office Box 14042, St. Petersburg, Florida 33733-4042; and by hand delivery to Richard C. Bellak, Esquire, Division of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850.

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