

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Petition by Florida Power Corporation for declaratory statement that Commission's approval of Negotiated Contract for Purchase of Firm Capacity and Energy between FPC and Metropolitan Dade County in Order No. 24734, together with Order Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Florida Statute 366.051, and Rule 25-17.082, F.A.C., 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. (Deferred from the September 22, 1998 Commission Conference.)

DOCKET NO. 980283-EQ

IN RE: Petition of Florida Power Corporation for declaratory statement that Commission's approval of negotiated contract for Purchase of Firm Capacity and Energy with 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. (Deferred from the September 22, 1998 Commission Conference.)

DOCKET NO. 980509-EQ

COPY

BEFORE:

CHAIRMAN JULIA A. JOHNSON  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK  
COMMISSIONER JOE GARCIA  
COMMISSIONER E. LEON JACOBS

PROCEEDING:

AGENDA CONFERENCE

ITEM NUMBER:

13A and 13B

DATE:

October 6, 1998

PLACE:

4075 Esplanade Way, Room 148  
Tallahassee, Florida

BUREAU OF REPORTING

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APPEARANCES:

CHRIS COUTROULIS and JIM McGEE, ESQUIRE,  
representing Florida Power Corporation

LEE WILLIS, ESQUIRE, representing Lake Cogen

SCHEFFEL WRIGHT, ESQUIRE, representing Dade  
County and Montennay

STAFF RECOMMENDATION FOR 13A

Issue 1: Should the Commission grant Dade's request for  
Oral Argument?

Recommendation: Yes. Oral argument should be granted.

Issue 2: Should the Commission grant FPC's Declaratory  
Petition?

Recommendation: Yes, the Commission should grant FPC's  
Petition Declaratory Statement.

Issue 3: Should the Commission grant Dade's Motion to  
Dismiss?

Recommendation: No. The Motion to Dismiss should be  
denied.

Issue 4: Should this docket be closed?

Recommendation: Yes.

STAFF RECOMMENDATION FOR 13B

Issue 1: Should the Commission grant North Canadian  
Marketing Corporation's petition to intervene or in the  
alternative, to submit amicus curiae brief?

Recommendation: No. Intervention or participation as  
amicus curiae should be denied.

Issue 2: Should the Commission grant FPC's Declaratory  
Petition?

Recommendation: Yes, the Commission should grant FPC's  
Petition for Declaratory Statement?

Issue 3: Should the Commission grant Lake's Motions to  
Dismiss?

Recommendation: No.

Issue 4: Should this docket be closed?

Recommendation: Yes.

P R O C E E D I N G S

1  
2 CHAIRMAN JOHNSON: We're going to go back on the  
3 record, and we are on Item 13A.

4 MR. BELLAK: Commissioners, Item 13A and the  
5 parallel Item 13B, which is very similar, relate to a  
6 pricing clause and transportation issue which is of  
7 importance to the staff in terms of cost recovery  
8 concerns, and important to Florida Power in terms of  
9 its settlement negotiations.

10 It is correct that the parties are engaged in  
11 contract disputes in courts, however, the Crossroads  
12 opinion indicates that the Commission's approve of a  
13 contract without change or modification can be  
14 explained or clarified without interfering in a  
15 contract dispute. And there is also some previous  
16 litigation which is cited as a reason not to be  
17 receptive to these declaratory petitions, however,  
18 none of the previous litigation addressed precisely  
19 this issue. And that is the Commission's approval of  
20 the contract, the basis of that approval and the  
21 explanation or clarification of the that approval,  
22 again, without any change or modification. Nor is  
23 this issue the same as a post-approval attempt to  
24 change or modify a contract as in the Freehold case.

25 And I might point out very briefly that the

1           Commissioners I'm sure are very familiar with the  
2           Panda case. And in Panda the same arguments based on  
3           Freehold were made against the Commission's position  
4           that it could explain and clarify the contract in that  
5           case. And the Florida Supreme Court rejected those  
6           Freehold arguments, and also the United States Supreme  
7           Court rejected a petition for certiorari, again, based  
8           on the same Freehold arguments. And, in fact, just  
9           today a motion for a temporary restraining order again  
10          based on the Freehold argument has been denied.

11                 Now, this matter has been deferred for a lengthy  
12          period of time. At the point when it first came up,  
13          staff recommended that the Commission hear oral  
14          argument. It may be that the length of time that it  
15          has been deferred has enabled the Commission to become  
16          at least more familiar with these issues so that a  
17          briefer oral argument may be necessary than was  
18          originally contemplated. With that, of course, all  
19          those things are within the Commission's discretion.

20                 CHAIRMAN JOHNSON: Thank you, Mr. Bellak.

21                 COMMISSIONER CLARK: I just wanted to -- Panda,  
22          was that standard offer or negotiated?

23                 MR. BELLAK: That was a standard offer contract.  
24          But apparently that was not the basis on which the  
25          Florida Supreme Court based the substance of its

1 discussion.

2 COMMISSIONER CLARK: Okay.

3 CHAIRMAN JOHNSON: Commissioners, as to the  
4 motion on the oral argument --

5 COMMISSIONER JACOBS: Move staff.

6 CHAIRMAN JOHNSON: And with a time limit?

7 COMMISSIONER DEASON: Yes.

8 CHAIRMAN JOHNSON: What is the time limit that  
9 you suggest? Did you move staff?

10 COMMISSIONER CLARK: Before dinner. Which is not  
11 that funny.

12 CHAIRMAN JOHNSON: Not that far away, either.

13 COMMISSIONER JACOBS: Three, four, five minutes.

14 CHAIRMAN JOHNSON: Mr. Willis, you don't have to  
15 look like that.

16 COMMISSIONER GARCIA: Commissioners, I think  
17 there is a considerable amount of money at stake here.  
18 There is a considerable issue about what this does to  
19 policy in the state, what this does to contracts in  
20 the state, what this does to recovery. As much as --  
21 I mean, I have to leave tonight because I've got a  
22 speech tomorrow morning, so I'm limited even by  
23 flight. I may have to drive tonight, but -- I have  
24 company, Madam Chairman.

25 COMMISSIONER JACOBS: What would be your

1 pleasure, how long?

2 COMMISSIONER GARCIA: That done, I think we need  
3 to give as much time as possible, because the issues  
4 here are very complex. I think staff did a good job,  
5 but I would just caution you that the issues are very  
6 complex and very important and they come at you from  
7 very different angles in terms of what the parties  
8 want here.

9 COMMISSIONER CLARK: Madam Chairman, I would  
10 recommend no more than -- I guess I would say 15  
11 minutes a side. And I take it there are two sides.

12 COMMISSIONER GARCIA: Well, the problem is that  
13 we are making a decision here. There are sides here  
14 who have nothing at stake except the policy concerns  
15 that this statement makes, but the policy has very  
16 definite concerns for different -- I see Mr. Moyle  
17 sitting up here. I don't think he is a party to this  
18 case.

19 MR. MOYLE: That's correct. I was going to, if  
20 the Commission so desired, provide some comments.

21 COMMISSIONER GARCIA: I don't think you are  
22 coming through the --

23 MR. MOYLE: They told me I could sit here because  
24 the mike didn't work.

25 COMMISSIONER JACOBS: If that's not agreeable,

1 let's go with ten minutes a speaker.

2 CHAIRMAN JOHNSON: I'm sorry?

3 COMMISSIONER JACOBS: Ten minutes per speaker.

4 Is that okay, Commissioner Clark?

5 COMMISSIONER CLARK: Well, I'm not sure anyone  
6 but the parties should speak. I know it is a  
7 declaratory statement. What have we done in the past,  
8 we have limited the parties, right?

9 CHAIRMAN JOHNSON: Mr. Bellak.

10 MR. BELLAK: Well, I only addressed the issue of  
11 whether Dade's request in 283 and whether Lakes'  
12 request in 509 should be granted, and I recommend that  
13 they be granted.

14 CHAIRMAN JOHNSON: What is your legal opinion as  
15 to whether or not nonparties can speak at all.

16 MR. BELLAK: Well, I think that declaratory  
17 statements, the edge goes to not permitting oral  
18 argument because of the nature of declaratory  
19 statements. And if we transgress that to the extent  
20 of allowing exceptions when it is necessary for the  
21 Commission to hear arguments that are procedurally and  
22 substantively complex and when they involve matters of  
23 where not only the petitioner is involved, but also  
24 the other party to the contract is involved, I think  
25 that that justifies hearing oral arguments from those

1 participants, but not to go beyond that unless it's  
2 the desire of the Commission to have further input.

3 CHAIRMAN JOHNSON: In the recommendation in 13B,  
4 as to North Canadian Marketing Corporation filing an  
5 amicus or a motion to intervene, you have suggested  
6 that we deny that.

7 MR. BELLAK: That is correct.

8 CHAIRMAN JOHNSON: And I'm assuming you are using  
9 the same rationale for even allowing parties to speak  
10 in this particular proceeding?

11 MR. BELLAK: Right. I don't know really what the  
12 status of the additional would-be participants, but if  
13 they have the same status as North Canadian Marketing,  
14 they were recommended for denial because they don't  
15 meet the standing test in Agrico. If it is simply  
16 another cogenerator, it could proliferate the oral  
17 argument beyond the point where it is useful for the  
18 Commission.

19 CHAIRMAN JOHNSON: We have two issues at hand;  
20 first, with respect to the motion at hand for oral  
21 argument for the parties. There was a motion -- or is  
22 there a motion?

23 COMMISSIONER JACOBS: Well, I guess I'm wondering  
24 now should we -- well, I guess it's your prerogative.  
25 If you want to move forward and go on a motion on



1           whether or not to grant it and a time?

2           CHAIRMAN JOHNSON: Uh-huh.

3           COMMISSIONER JACOBS: Okay. I would reiterate my  
4 motion that we do grant oral argument. The time --  
5 but I would say, you know, I'm leaning towards five  
6 minutes, but in deference to Commissioner Clark I will  
7 go ten minutes per speaker.

8           CHAIRMAN JOHNSON: There is a motion. Is there a  
9 second?

10          COMMISSIONER DEASON: Second.

11          CHAIRMAN JOHNSON: There is a motion and second.  
12 Any further discussion? All those in favor signify by  
13 saying aye.

14          COMMISSIONER DEASON: Aye.

15          COMMISSIONER JACOBS: Aye.

16          CHAIRMAN JOHNSON: Aye. Opposed.

17          COMMISSIONER GARCIA: Nay.

18          COMMISSIONER CLARK: I would say aye, but at this  
19 point we are only hearing from the parties?

20          CHAIRMAN JOHNSON: Yes. And I understand -- and  
21 I don't know how we even address whether or not others  
22 can participate. Nothing has been filed, but I see  
23 people sitting around. How do you suggest, Mr.  
24 Bellak, that we --

25          MR. BELLAK: Well, again, your rule, the

1 Commission rule states that -- and this is Commission  
2 Rule 25-22.022, states that -- (3), except as provided  
3 in Subsection 1, which relates to hearings, which is  
4 not relevant here, oral argument or rebuttal to staff  
5 recommendation regarding the petition are  
6 inappropriate to the proceedings under this part, and  
7 the Commission may deny requests for same. Therefore,  
8 within the word may is your ability to actually hear  
9 oral argument regardless of the rule. But it seems to  
10 point out that oral argument is not so appropriate  
11 that you should be permissive as to granting oral  
12 argument. There should be a definite basis on which  
13 to grant it. And, therefore, it should be limited  
14 just to those who apply for leave to argue and for  
15 whom there has been a recommendation to grant in the  
16 staff's view.

17 CHAIRMAN JOHNSON: Okay. Mr. Vandiver.

18 MR. VANDIVER: I was just going to say that  
19 historically you all have gone both ways on oral  
20 argument on declaratory statements. I don't think we  
21 have been presented with the precise issue of a  
22 nonparty seeking to participate in a declaratory  
23 statement, which as Mr. Bellak pointed out, is  
24 supposed to be limited to the petitioner and their  
25 circumstances only. But the Commission has gone both

1 ways on declaratory statements as to the grant of oral  
2 argument.

3 CHAIRMAN JOHNSON: Commissioners. Do you  
4 remember what we did the last time we were presented  
5 with this case?

6 COMMISSIONER CLARK: Madam Chair, I would be  
7 willing to state that I think it should be limited to  
8 the parties. It has been a long day, it's going to be  
9 a longer day, and I'm looking at the array of people  
10 in front of us representing the parties, I'm sure they  
11 will tell us everything we need to know.

12 CHAIRMAN JOHNSON: Is that a motion?

13 COMMISSIONER CLARK: That would be my motion.

14 COMMISSIONER JACOBS: I would second.

15 CHAIRMAN JOHNSON: There is a motion and a  
16 second.

17 COMMISSIONER GARCIA: Madam Chairman, I'm going  
18 to vote against that motion. Again, I want to caution  
19 the Commission that the repercussions of this vote are  
20 very serious. They go against standing policy of this  
21 Commission, and we are determining if we are going to  
22 go against that. Now, I understand there is a lot of  
23 parties here. Unless we parachute some more, at ten  
24 minutes a head we will probably be out of here in an  
25 hour. That's not including questions, but the

1 determination that we are going to make today if we go  
2 with staff, changes longstanding policy of this  
3 Commission. And I can understand why other parties  
4 who are in similar situations need to speak to us.  
5 Because once we go down this path, we can't just pull  
6 out. And that said, I just caution us that -- let's  
7 listen to the arguments. I mean, we have limited them  
8 already, so there is a limit to it. The only thing  
9 that will make it go longer is if some of us have  
10 questions. And I hope that that is the case, but the  
11 issues are complex and the positions of the parties  
12 are varied, but the decision that is recommended by  
13 staff today changes policy of this Commission and that  
14 alone merits that we listen to all sides of it.  
15 Especially not in a hearing context. It's not like we  
16 are going to hearing here. This is it. This is all  
17 we get.

18 CHAIRMAN JOHNSON: Any other questions,  
19 Commissioners? I had one outstanding question, Mr.  
20 Bellak, and perhaps you or Mr. Vandiver may recall.  
21 The last time we dealt with a dec action, did we -- it  
22 strikes me that we let people participate.

23 MR. BELLAK: We did, but all of them had filed  
24 motions for oral argument. And there was one would-be  
25 participant that had not and asked for permission from

1 the bench to participate, and it was denied.

2 CHAIRMAN JOHNSON: It was denied? There is a  
3 motion and a second. Any further discussion?

4 COMMISSIONER CLARK: I would only point out that  
5 it seems fairer to me to those people who have asked  
6 for it that they know who is going to speak and from  
7 what standpoint. That would be the reason I would  
8 continue to support the motion. Or I guess I made the  
9 motion.

10 CHAIRMAN JOHNSON: There is a motion and a  
11 second. Any further discussion? All those in favor  
12 signify by saying aye.

13 COMMISSIONER DEASON: Aye.

14 COMMISSIONER JACOBS: Aye.

15 COMMISSIONER CLARK: Aye.

16 CHAIRMAN JOHNSON: Aye. Opposed.

17 COMMISSIONER GARCIA: Nay.

18 CHAIRMAN JOHNSON: Show it approved on a  
19 four-to-one vote. And, I'm sorry, Commissioner  
20 Jacobs, you limited it to --

21 COMMISSIONER JACOBS: Ten minutes per speaker.

22 COMMISSIONER CLARK: Now Mr. Coutroulis is going  
23 to point out that there are two speakers on one side  
24 and only one on your side, is that it?

25 MR. COUTROULIS: Commissioner Clark, I represent

1 Florida Power with respect to the Dade petition. Mr.  
2 McGee represents Florida Power with respect to the  
3 Lake petition.

4 COMMISSIONER JACOBS: Innovative.

5 MR. COUTROULIS: Actually, I have a conflict with  
6 respect to the Lake.

7 CHAIRMAN JOHNSON: Mr. Wright, did you have --  
8 you were raising your hand.

9 MR. WRIGHT: I was just going to say that, as I  
10 think you know, I do represent both Lake and Dade  
11 County in Montennay (phonetic.) My primary purpose  
12 sitting at the table today is to speak on behalf of  
13 Dade County and Montennay. Mr. Willis will speak on  
14 behalf of Lake. If it is acceptable to you, Mr.  
15 Willis and I have discussed an allocation of time, and  
16 I think if you limit us to 20 minutes to our side that  
17 would be acceptable to us, because I think he has a  
18 little more to say than I do.

19 MR. COUTROULIS: Would we, as well, then, have 20  
20 minutes combined?

21 CHAIRMAN JOHNSON: I guess so. Yes, that is  
22 manageable. Would you proceed then?

23 MR. MCGEE: And, Madam Chairman, since the Lake  
24 petition asked for the same declaratory statement as  
25 in the Dade petition, and since the fundamental order

1 that we are asking --

2 CHAIRMAN JOHNSON: You are going to have to speak  
3 up just a bit.

4 MR. McGEE: -- for interpretation is the same in  
5 both, I'm going to cede my ten minutes so that we can  
6 deal with the matter in a more comprehensive and  
7 concise way.

8 CHAIRMAN JOHNSON: I didn't hear you.

9 COMMISSIONER CLARK: MR. COUTROULIS is going to  
10 go first and take most of the time.

11 MR. McGEE: Yes.

12 CHAIRMAN JOHNSON: Okay.

13 MR. McGEE: I am ceding my ten minutes to him.

14 CHAIRMAN JOHNSON: Okay.

15 MR. COUTROULIS: Shall I begin?

16 CHAIRMAN JOHNSON: Yes.

17 MR. COUTROULIS: May it please the Commission.  
18 FPC seeks a declaratory statement that explains and  
19 clarifies the Commission's 1991 order approving for  
20 cost recovery FPC's negotiated power purchase  
21 agreement with Dade. It does not seek a modification  
22 of that order. Staff supports FPC's petition in all  
23 respects, as set forth in its recommendation.

24 Our petition falls squarely within Rule  
25 25-22.022. As the Florida Supreme Court recently held

1 in the Panda decision, the Commission clearly has  
2 jurisdiction. Indeed, Commissioners, it alone has  
3 jurisdiction to interpret its orders and construe its  
4 PURPA rules to ensure that payments under approved  
5 contracts do not exceed its avoided cost  
6 determination, since approval of a contract at odds  
7 with the Commission's avoided cost rules would violate  
8 both PURPA and Florida Statute 366.051.

9 To parrot a point that was made by Mr. Bellak, in  
10 making those observations, the Florida Supreme Court  
11 drew no distinction between negotiated contracts and  
12 standard offer contracts. Specifically, FPC asks this  
13 Commission to clarify that consistent with its order  
14 disapproving the Lake settlement, consistent with  
15 PURPA, consistent with Florida Statute 366.051, and  
16 Rule 25-17.08322, which governs negotiated contracts  
17 when they are approved, the Commission's order  
18 approving the Dade contract contemplated that FPC  
19 would pay for energy based on avoided energy costs  
20 strictly as reflected in the contract.

21 That FPC would use the avoided units  
22 contractually specified proxy characteristics  
23 referenced in 912 and not some other or additional  
24 characteristics that are nowhere contained in the  
25 contract, nowhere contained in the Commission's



1 approval order, and nowhere contained in the  
2 Commission's rules to assess the avoided unit's  
3 operational status for the purpose of determining when  
4 the as-available payments are made and when the firm  
5 payment is made.

6 And, finally, that the Commission's order  
7 contemplated that FPC would use the actual charge out  
8 price of coal to Crystal River 1 and 2 resulting from  
9 its prevailing mix of transportation, and not some  
10 fictitious mix, or some mix that was in effect when  
11 the contract was approved.

12 Commissioners, FPC's petition is inextricably  
13 linked to what this Commission approved in 1991 when  
14 it approved the negotiated contract. Moreover, and I  
15 would like to emphasize this, given the relevant  
16 history to which I intend to turn now, FPC believes  
17 that the granting of its petition for declaratory  
18 statement should be a housekeeping matter for the  
19 Commission. And in saying that, I do not mean to  
20 suggest this is not an important matter, it most  
21 certainly is. But it should be a housekeeping matter  
22 since the Commission has already determined that FPC  
23 is correct in what it seeks. And let me explain why.

24 The Commission will recall in February 1995, it  
25 ruled that it lacked jurisdiction to determine whether

1 FPC's method for determining firm or as-available  
2 payments to Dade, Lake, and other similarly situated  
3 cogenerators was correct under their contracts. And  
4 thereafter litigation ensued with Lake and  
5 the Lake court held that to determine when the  
6 as-available or the firm payment should be made FPC  
7 must model the avoided unit based on all the relevant  
8 characteristics and constraints that would have been  
9 associated with a unit had it actually been built.

10 Under the Lake court's ruling, FPC could not  
11 limit its modeling of the avoided unit's operation to  
12 the proxy characteristics set forth in the contract.  
13 It would instead be required to consider  
14 characteristics nowhere found in the contract. Now,  
15 sometime after that court's ruling, Lake and FPC, as  
16 the Commission will recall, entered into a settlement  
17 agreement compromising their dispute. And that  
18 agreement was brought to this Commission for approval.  
19 This Commission disapproved the proposed settlement  
20 with Lake. And in its three-to-two order it squarely  
21 held, A, its jurisdiction was broader than it had  
22 previously believed, and that it had jurisdiction to  
23 explain and clarify what a negotiated contract meant  
24 at the time it was approved. Indeed, it noted that no  
25 party had cited any authority to the contrary.

1           B, the Commission held that Section 912 of the  
2 contract, like all avoided cost calculations, was  
3 never intended to be fully representative of a real  
4 operable bricks and mortar unit, but was instead  
5 intended as a pricing proxy. It further held that  
6 approval of the contract recognized that energy  
7 payments would be calculated using the parameters  
8 specified in the contract and were not fixed. And,  
9 quote, FPC's modeling of the avoided unit, which  
10 results in a mixture of firm and as-available energy  
11 prices, more closely approximates actual avoided  
12 energy costs, and is consistent with this Commission's  
13 1991 order approving the contract. I'm quoting from  
14 Page 9 of the Commission's order disapproving the Lake  
15 settlement.

16           Finally, the Commission held there that neither  
17 the contract nor the approval order contains  
18 provisions governing the modes of transporting coal to  
19 the referenced plant, and that FPC should take any and  
20 all action regarding coal transportation which legally  
21 lowers the cost of providing electricity to the  
22 ratepayers.

23           Now, the Commission reached that decision in Lake  
24 despite the fact that it had in the 1995 order I  
25 referenced before ruled that it lacked jurisdiction to

1 actually adjudicate the contractual dispute over  
2 energy pricing between Florida Power and the QFs. And  
3 although Commissioners Garcia and Clark dissented in  
4 the Lake settlement docket, as staff discusses,  
5 Commissioner Clark filed an opinion in which she  
6 observed at Page 21, quote, "The Commission could deny  
7 cost recovery based on a subsequent contract  
8 interpretation." And here is the key, "if it was  
9 contrary to the basis on which the contract was  
10 originally approved."

11 Thus, we know at least four of the Commissioners  
12 in Lake were of the view that this Commission retains  
13 jurisdiction in the context of a negotiated contract  
14 to determine whether energy payments are consistent  
15 with the basis on which the contract was originally  
16 approved for cost recovery. Having approved the  
17 contract, the Commission has the authority and  
18 responsibility to ensure that FPC makes payments in  
19 accordance with what were, in fact, the avoided energy  
20 cost terms approved in its order.

21 To discharge that responsibility, the Commission  
22 must exercise its jurisdiction to consider and  
23 determine what the contract meant when it was  
24 approved. The Commission cannot, consistent with its  
25 cost recovery duties, be relegated to a rubber stamp

1 as intervenors would have it, whose role with respect  
2 to cost recovery completely ended in 1991.

3 Commissioners, that is not a requirement of the  
4 Freehold decision which holds that a Commission cannot  
5 modify the basis on which it originally approved a  
6 PURPA contract to bring the energy payments in line  
7 with current avoided costs. But Freehold clearly does  
8 not preempt the Commission from explaining and  
9 clarifying what it, in fact, approved in 1991  
10 unmodified. Indeed, as Mr. Bellak noted, that precise  
11 preemption argument was made in Panda. It was  
12 rejected by the Florida Supreme Court and cert was  
13 denied.

14 Now, I would like to discuss that it is very  
15 clear that the Commission had to consider the energy  
16 payments called for under this contract in relation to  
17 avoided costs when it approved the contract back in  
18 1991. Because under 366.051 and Rule 25-17.08322, and  
19 as confirmed by the Panda decision, this Commission in  
20 '91 could not have approved the contract if the energy  
21 payments would exceed avoided cost. And as I intend  
22 to show, there really is no question that the  
23 Commission did, in fact, determine in 1991 when it  
24 approved the Dade contract that the energy payments  
25 would be based on a lesser of type methodology. A

1 methodology that compares firm rates to as-available  
2 rates, and essentially pays the lesser of the two.  
3 Not some full-blown bricks and mortar modeling  
4 involving characteristics nowhere referenced in the  
5 contract or in any Commission rule or order.

6 Indeed, Commissioners, if the 1991 Commission  
7 determined that the contract would make energy  
8 payments based on some methodology that materially  
9 paid more than a lesser of methodology, I intend to  
10 show that under its governing rules the Commission  
11 could not have approved it for cost recovery.

12 Let me begin with that. The PSC has held that  
13 the approval of a negotiated contract includes  
14 approval of the terms and conditions of that contract,  
15 particularly the capacity and energy payments.

16 CHAIRMAN JOHNSON: You have about two minutes  
17 left.

18 MR. COUTROULIS: All right. Under the explicit  
19 direction of 25-17.08322, as it existed in '91, and as  
20 it exists today, in order to approve a negotiated  
21 contract -- I was going to take the full 20 minutes.

22 CHAIRMAN JOHNSON: I'm sorry, I forgot.

23 COMMISSIONER CLARK: I'm struggling with the fact  
24 she has told you to hurry up, and I need you to slow  
25 down.

1 MR. COUTROULIS: And I would like to slow down.

2 CHAIRMAN JOHNSON: I had forgot that he had said  
3 he was deferring to you.

4 MR. COUTROULIS: I think I started at around  
5 3:13. Let me back up. The PSC has held that the  
6 approval of a negotiated contract includes approval of  
7 the terms and conditions of that contract,  
8 particularly the firm capacity and energy payments.  
9 It held that in Docket 910603, which we cited in our  
10 briefs.

11 Under the explicit direction of 25-17.08322, that  
12 is the rule that governs approval of a negotiated  
13 contract, back in 1991 and still today, in order to  
14 approve a negotiated contract, the PSC was required to  
15 measure the energy and capacity payments in that  
16 contract against the avoided cost standard. The  
17 benchmark, if you will, specified in the Commission's  
18 rules for calculating such payments under a standard  
19 offer contract.

20 Specifically, the Commission's rules provided  
21 that it would evaluate a negotiated contracts payments  
22 for firm energy and capacity against the utility's  
23 avoided construction and operating costs. And here is  
24 the key. Calculated -- and I'm reading from the rule  
25 -- calculated in accordance with Subsection 4 and

1 Paragraph 5A of 25-17.0832. Paragraph 4 of 25-17.0832  
2 is the avoided energy pricing rule for standard offer  
3 contracts.

4 That is one of the benchmark rules that this  
5 Commission was required to consider under .08322 in  
6 determining that this negotiated contract was  
7 cost-effective. And as we demonstrated in our  
8 petition, and as staff further demonstrated in its  
9 recommendation, under the benchmark against which it  
10 needed to measure energy payments in this contract  
11 against the benchmark for standard offer contract  
12 energy payments, it had to look at the payments called  
13 for in this contract and say do they pay no more than  
14 avoided costs calculated in accordance with the  
15 standard offer rules. Because if that negotiated  
16 contract paid more, it could not have been approved.

17 Now, its true the negotiated contract doesn't  
18 necessarily have to incorporate the same energy  
19 pricing rule as a standard offer contract. The  
20 parties can decide they want to figure out the energy  
21 pricing in some different way. But when this contract  
22 was taken to the Commission for cost approval under  
23 25-17.08322, it is very clear the Commission had to  
24 say how does this contract pay for energy against our  
25 avoided cost benchmark. And the avoided cost



1 benchmark right in the rule is the energy pricing rule  
2 for standard offer contracts. And I invite the  
3 Commission, look at .08322, it references directly  
4 .0832, what is now 5B, but back in '91 it was 4B,  
5 which is the energy pricing rule for standard offer  
6 contracts.

7 Now, as we have demonstrated, the Commission's  
8 standard offer energy pricing rule clearly calls for a  
9 lesser of approach. Staff discusses that extensively  
10 in their recommendation. We cited all of the hearing  
11 transcripts before this Commission when that rule was  
12 passed, and it's crystal clear that that rule calls  
13 for a lesser of determination. It, therefore, follows  
14 logically that this Commission had to determine in  
15 1991 that the Dade negotiated contract paid on the  
16 basis of a lesser of approach or something less,  
17 because if it paid something more, it would have been  
18 in excess of the standard offer benchmark that the  
19 rules say this Commission had to consider. And if  
20 there are any questions on that, please interrupt me,  
21 because I think this is a crucial point.

22 The bottom line is that the Commission  
23 necessarily determined in the order approving the Dade  
24 contract that the energy contracts did not exceed  
25 avoided cost. To do that it had to determine what

1           those payments would be against the avoided cost  
2           benchmark prescribed by its own rule for standard  
3           offer contracts. That's what the negotiated contract  
4           rule says on its face. And the instant petition  
5           simply asks the Commission to clarify what it  
6           necessarily determined in that regard something that  
7           is clearly within its jurisdiction.

8           Now, less there be any question that this  
9           Commission apprehended this contract in 1991 as  
10          calling for a lesser of approach, there is more  
11          evidence. First, as I mentioned, the rule for  
12          standard offer contracts was the subject of extensive  
13          rulemaking proceedings that are discussed in staff's  
14          recommendation, discussed in our brief, and it is  
15          clear that the Commission was told very directly that  
16          the standard offer pricing rule called for a lesser  
17          of.

18          In addition, two months before this Commission  
19          approved the negotiated contract with Dade, Florida  
20          Power filed its standard offer contract. The standard  
21          offer contract contains a substantively identical  
22          provision to Section 912 of the negotiated contract.  
23          Now, as a standard offer contract, it had to  
24          explicitly provide for energy payments to be made  
25          under the standard offer rule, 25-17.0832, it was then

1 4B, it is now 5B. It wasn't simply it had to pay no  
2 more than that benchmark rule, it had to pay on the  
3 basis of that because it was a standard offer  
4 contract. And that standard offer contract was  
5 approved. It was approved by Commission Order 24989.  
6 So the Commission obviously determined that that  
7 contract did pay on the basis of the rule. It,  
8 therefore, follows that the Commission must have  
9 viewed the identical language in the negotiated  
10 contract with Dade as meaning the same thing as in  
11 FPC's standard offer contract and calling for the  
12 determination of firm or as-available payments based  
13 on an hourly comparison of the firm rate to the  
14 as-available rate.

15 And, indeed, its order approving FPC's and Gulf's  
16 and FPL's standard offer contract clearly recites the  
17 factors that are required to determine energy payments  
18 under that standard offer pricing rule, and it  
19 mentions only the energy pricing characteristics used  
20 by FPC under the negotiated contract here. Type of  
21 fuel, fuel costs, average heat rate, and variable O&M,  
22 as well as an escalating factor by years.

23 Those are the factors that appear in both the  
24 standard offer contract and the negotiated contract.  
25 There are no additional or different characteristics

1 as intervenors suggest there should be that might have  
2 been associated with a fully characterized unit.

3 COMMISSIONER CLARK: What were those four, again?  
4 Type of fuel, fuel cost --

5 MR. COUTROULIS: Type of fuel, cost of fuel,  
6 average heat rate, and variable O&M. And,  
7 Commissioner Clark, if you look at Order Number 24989  
8 approving those three standard offer contracts, the  
9 order squarely recites these are the characteristics  
10 that are required to comply with the standard offer  
11 pricing rule. And those are the same ones in the  
12 negotiated contract, and the language in both  
13 contracts is identical. It is inconceivable that it  
14 meant two different things to the Commissioners in  
15 1991. Both of those contracts were approved by the  
16 Commission in 1991. The same language had to mean the  
17 same thing. And we know that the energy pricing rule  
18 of this Commission was a lesser of rule because we  
19 have extensive evidence both in staff's recommendation  
20 and in our petition to that effect.

21 I would like to turn now to FPC's need for the  
22 declaratory statement it is seeking, and I will then  
23 briefly get into why the arguments of intervenors in  
24 support of their motion should be rejected.

25 Commissioners, it is obviously unfair for the

1 Commission to deny FPC the option of settling its  
2 dispute with Dade, which the Lake order effectively  
3 does, because they are the same contract, the same  
4 issues, and force FPC to proceed with the risk of  
5 litigation, but nevertheless, refuse to state formally  
6 what rates, terms, and other conditions of the  
7 contract the Commission intended to approve as  
8 consistent with full avoided costs. FPC should not  
9 have to wait to some later time to find out whether or  
10 not its contract administration is in accord with what  
11 this Commission believed in 1991. And intervenors  
12 dismiss the Lake order now as a nullity. They say,  
13 well, after the Commission issued the Lake order, the  
14 Lake settlement expired by its terms because too much  
15 time had passed, so that's now a nullity. Well,  
16 technically they are right. Florida Power is entitled  
17 to know that the Commission is standing by the  
18 reasoning in that order.

19 Let me turn in the one and a half minutes I have  
20 left to res judicata, collateral estoppel, and  
21 administrative finality. As an overall matter, it is  
22 important to appreciate that the instant petition does  
23 not ask the Commission to do what it earlier  
24 determined it lacked jurisdiction to do. Right or  
25 wrong, the Commission viewed the 1994 petition as a

1 request to resolve the disputed contract issue. The  
2 Commission could not have been clearer on the point.  
3 Its order at Page 6 says that is the way they  
4 construed the petitions. This petition is asking the  
5 Commission to explain and clarify its order of  
6 approval of this contract in 1991. It is not even the  
7 same issue. Therefore, there is no res judicata.

8 Another thing, intervenors talk about  
9 administrative finality. Well, the fact of the matter  
10 is they made those very same arguments when the Lake  
11 settlement was presented to the Commission. They said  
12 to the Commission at that point you should not look at  
13 this settlement agreement against what you approved  
14 back in 1991, because your jurisdiction was at an end  
15 after 1991, and you determined back in that 1994  
16 pricing docket that you wanted to resolve the pricing  
17 dispute between the parties, and so you should not  
18 interject yourselves now and make the determination  
19 that the settlement is cost-effective in relation to  
20 what was originally approved. This Commission  
21 rejected those arguments. It rejected the idea of  
22 administrative finality. All the arguments that were  
23 made in here were made connection with that Lake  
24 settlement, and yet this Commission went ahead and  
25 disapproved that Lake settlement and placed us in the

1 position that we are in now.

2 There is no bar to this Commission going ahead.  
3 We have cited cases in our brief that talk about the  
4 fact that a jurisdictional determination is not  
5 something that is given res judicata effect when the  
6 same tribunal that entered the earlier order was being  
7 asked to invoke its jurisdiction --

8 COMMISSIONER GARCIA: Didn't this same tribunal,  
9 though, approve one of those settlement offers and  
10 vote it out?

11 MR. COUTROULIS: I'm sorry, Commissioner Garcia?

12 COMMISSIONER GARCIA: Didn't this same board  
13 approve one of the settlements of the contract?

14 MR. COUTROULIS: This Commission has approved  
15 some of the settlements between Florida Power and  
16 other cogenerators, yes.

17 COMMISSIONER GARCIA: Let me ask you, why do we  
18 need a contract at all? If we retain jurisdiction,  
19 why not simply retain jurisdiction and simply  
20 determine this as we go? We say you must enter -- you  
21 must enter -- you must get a partner to produce cogen  
22 power or whatever type of power, you must have avoided  
23 -- we figure it out and then we go from there, and  
24 this Commission goes determining cost as we go on, and  
25 thereby not invoking the possible jurisdiction of

1 another party. We don't need a contract. This  
2 Commission has jurisdiction, so we keep it.

3 MR. COUTROULIS: Well, Your Honor, I'm suggesting  
4 that this Commission has jurisdiction to explain and  
5 clarify the basis on which it approved this contract.  
6 I'm not suggesting that this Commission has plenary  
7 jurisdiction to resolve every contract dispute that  
8 might -- that the parties might get into in the course  
9 of the 20-year contract and the administration of that  
10 contract. But if there is a need for this Commission  
11 to explain and clarify the basis on which it approved  
12 something --

13 COMMISSIONER GARCIA: I understand. But aren't  
14 you telling me that it's crystal clear? You're saying  
15 to me and have repeated several times that it's  
16 crystal clear what the Commission meant. If it's  
17 crystal clear, why don't we let it fall within the  
18 borders of what a contract is supposed to be and we go  
19 to court and let the judge decide it, since it's so  
20 clear? We already spoke on the issue. We spoke in  
21 '91. There it is. It's in black and white, these are  
22 two sophisticated parties. It's not even a negotiated  
23 -- this is a negotiated contract. It's not even a  
24 standard offer contract. Both parties entered into  
25 this contract on equal footing, this Commission



1 approved it, why not allow both parties, both  
2 sophisticated parties to make it as crystal clear as  
3 you say it is before a judge?

4 MR. COUTROULIS: Because it's appropriate. It is  
5 only this Commission and no court that can clarify and  
6 explain what this Commission approved in 1991. A  
7 court can determine what the contract provides as  
8 between the parties. Theoretically, you could have a  
9 negotiated contract where this Commission approved on  
10 a certain basis that contract for cost recovery, but  
11 down the road a court determines that's not what the  
12 two parties obligated themselves to do, and there is a  
13 mismatch there. This Commission is only going to pass  
14 through for cost recovery payments that are consistent  
15 with the basis on which it approved the contract --

16 COMMISSIONER GARCIA: Which cost recovery? You  
17 do agree cost recovery comes much later on?

18 MR. COUTROULIS: Cost recovery comes in the fuel  
19 and purchased power adjustment clause, but nonetheless  
20 we have a real dispute, we have --

21 COMMISSIONER GARCIA: Which we kept setting and  
22 improving as we moved on in this contract.

23 MR. COUTROULIS: Yes, but --

24 COMMISSIONER GARCIA: And are still part of  
25 rates.

1           MR. COUTROULIS: But, Commissioner Garcia, there  
2 is a very real dispute between Florida Power and Dade  
3 and Florida Power & Light. There is litigation.  
4 There are questions about cost recovery. There are  
5 questions about contract administration. FPC has a  
6 right to know that it is paying in accordance with  
7 what this Commission had in mind when it approved this  
8 thing in 1991. If FPC is wrong in that regard, then  
9 FPC wants to bring itself in compliance with what this  
10 Commission had in mind when it approved this for cost  
11 recovery.

12           COMMISSIONER GARCIA: But hasn't FPC acted along  
13 those lines? FPC is making payments based on what it  
14 believes the contract says, therefore, FPC is acting  
15 within the boundaries of what it feels it has in the  
16 contract, and has gone before a court, and, in fact,  
17 has shifted, if I'm not mistaken, and you can correct  
18 me if I'm wrong, is paying according to what it feels  
19 is in the contract. So it has already acted upon the  
20 contract that it signed.

21           MR. COUTROULIS: FPC is doing that, Commissioner.  
22 But FPC would like the assurance from this Commission  
23 which is the only body that had the right to approve  
24 this for cost recovery, and the only body that  
25 protects the ratepayers, and the only body that

1 ensures that these payments do not exceed avoided  
2 cost, and if they do they are not passed through to  
3 the ratepayers.

4 COMMISSIONER GARCIA: Don't you think it puts  
5 this Commission in a difficult position? We stated to  
6 a party, come to Florida. We are going to lay out the  
7 rules of the game for you. We sat and we drew the  
8 rules of the game with your client. And, in fact,  
9 when staff cites, they are not citing to a discussion  
10 that occurred with all parties here, they are citing  
11 to a discussion that occurred with our IOUs, this  
12 Commission, and -- the Commissioners, because it  
13 wasn't these Commissioners, and staff. And we came up  
14 with a series of rules. When we came up with that  
15 series of rules, people entered our state to do  
16 business in our state. And these obviously were  
17 sophisticated parties which knew what they were doing,  
18 which got financing based on those agreements, or  
19 those rules that we had before this Commission. They  
20 didn't enter under jurisdiction of this Commission,  
21 they entered our state under a contract which you  
22 provided and this Commission approved and said let's  
23 play ball.

24 MR. COUTROULIS: Correct.

25 COMMISSIONER GARCIA: We leave from that point

1 and now you return into the seventh inning of the game  
2 and you are telling me -- you are telling these  
3 parties that you signed a contract with, that a  
4 material issue in the contract is at dispute, and only  
5 this Commission can determine that material issue of  
6 this contract.

7 MR. COUTROULIS: No, Commissioner, I am not  
8 saying that.

9 COMMISSIONER GARCIA: You don't think that this  
10 is a material central issue on which this contract's  
11 value rises or falls completely?

12 MR. COUTROULIS: The petition does not ask this  
13 Commission -- and I want to clarify that -- the  
14 petition does not ask this Commission to resolve the  
15 contract dispute between the parties. That is hanging  
16 in the court.

17 COMMISSIONER GARCIA: If we resolve this issue,  
18 have we not resolved this whole case? Is this not a  
19 central issue to what you are before the court on?

20 MR. COUTROULIS: Not necessarily, Commissioner.

21 COMMISSIONER CLARK: Can I say something? I  
22 understand MR. COUTROULIS' argument to basically be  
23 you are between a rock and a hard place.

24 MR. COUTROULIS: That's right. That is exactly  
25 right.

1           COMMISSIONER CLARK: And they are between a rock  
2 and a hard place because on identical facts we  
3 approved a settlement and the next time it came around  
4 we disapproved it.

5           COMMISSIONER GARCIA: You are absolutely right.  
6 You are absolutely right.

7           COMMISSIONER CLARK: And that is all he is  
8 saying. As I understood it when he came out and said  
9 this is a housekeeping measure, what we want to know  
10 is what you are going to say that you would approve  
11 pursuant to -- as a way of explaining your order when  
12 you approved it.

13           COMMISSIONER GARCIA: Madam Chairman.

14           MR. COUTROULIS: What terms and conditions did  
15 you approve back in 1991.

16           COMMISSIONER GARCIA: Commissioner Clark, but we  
17 put ourselves in that position.

18           COMMISSIONER CLARK: I agree with that.

19           COMMISSIONER GARCIA: And that we -- that there  
20 -- that the majority which is -- we have a different  
21 Commission now. Time has passed. There are different  
22 members of this Commission. Hopefully, new members of  
23 this Commission won't make the same mistake. But that  
24 being said, that being said, we put ourselves in this  
25 place. The parties who signed this contract did not

1 ask for this. FPC, I think, acted in good faith.  
2 They said -- they came to us and there I do believe we  
3 do have jurisdiction, and you are absolutely right, in  
4 that case you came before us not to say is this right  
5 or wrong. You said, Commissioners, this is our  
6 possible exposure.

7 MR. COUTROULIS: But the Commission construed  
8 that '94 petition -- with all due respect,  
9 Commissioner Garcia -- right or wrong, as asking the  
10 Commission to resolve the contract dispute. The order  
11 is clear on that. I don't think that was the right  
12 way for the Commission to look at that petition, but  
13 it's clearly the way they looked at it.

14 COMMISSIONER CLARK: Hold on. Which petition are  
15 you talking about, the original one?

16 COMMISSIONER GARCIA: Which petition are you  
17 talking about?

18 MR. COUTROULIS: Yes, the '94 petition. Now we  
19 are simply asking please clarify the basis --

20 COMMISSIONER GARCIA: But you are taking that out  
21 of context. You were before -- your client was before  
22 a court with the people you had entered into a  
23 contract with, were before a court, and we -- Florida.  
24 Let me not say we. Florida had a potential exposure  
25 to its ratepayers, it's company, and this party who

1 had signed a contract. And so you came to us and  
2 said, look, solve this contractual dispute. But we  
3 weren't solving a contractual dispute, we were  
4 agreeing on a settlement from which you were going to  
5 proceed from that point forward. To limit the  
6 exposure to our ratepayers, to limit the exposure to  
7 our IOU, and to honor the terms of a contract that we  
8 had entered into that this state had promoted through  
9 federal legislation and our own policies to move  
10 forward from that point. And so what were doing  
11 wasn't resolving a contractual dispute, we were  
12 resolving something that you brought before us and  
13 this was the proper place, because your client had to  
14 get cost recovery. Your client had to figure out how  
15 it worked, and here is where you brought it.

16 MR. COUTROULIS: But, Commissioner Garcia, you  
17 are referring to the Lake settlement, and I was  
18 referring back to the 1994 pricing petition that  
19 Florida Power filed. Florida Power filed a petition  
20 right after it implemented Section 9.1.2. This  
21 Commission construed that petition, right or wrong, as  
22 asking this Commission to resolve a contract dispute  
23 between two parties to a negotiated contract. And  
24 this Commission held it had no jurisdiction to do  
25 that, and we are not challenging that determination

1 here today.

2 We are saying there is something you very clearly  
3 have jurisdiction to do. You have jurisdiction to  
4 explain and clarify the basis on which you approved  
5 this thing for cost recovery in 1991. We believe you  
6 should tell us what terms and conditions and rates you  
7 approved in 1991. It's highly relevant. It is  
8 relevant to our administration of the contract.

9 COMMISSIONER GARCIA: It's a central issue to  
10 this dispute.

11 MR. COUTROULIS: And it is particularly a central  
12 issue, though, because of something that happens to  
13 exist in this negotiated contract, and that is this  
14 negotiated contract happens to have a reg out clause.  
15 It did not have to have a reg out clause. They are  
16 not required to be in negotiated contracts. They are  
17 permitted. If you didn't have a reg out clause in  
18 this contract this Commission could say, we approved  
19 \$100 for cost recovery, but we can't tell you what you  
20 agreed to in the contract, we can tell you what we  
21 apprehended when we approved the contract. The  
22 parties go to a court and the court says, well, I  
23 think the utility obligated itself to pay \$110. Well,  
24 what happens then? We owe \$110, but this Commission  
25 is only going to pass-through 100.



1           In this case there happens to be a reg out  
2           clause. Now the parties may not agree on its  
3           enforceability, that is not before the Commission. It  
4           may be before the courts at some point. But it's only  
5           if that reg out to clause is enforceable -- we happen  
6           to think it is, they probably disagree -- that what  
7           this Commission decides it's going to pass-through for  
8           cost recovery may wind up being what the cogens  
9           ultimately get paid. That's not because this  
10          Commission is stepping on the toes of the court's  
11          jurisdiction to resolve a contract dispute, it's  
12          because these two parties in an arm's-length  
13          negotiation agreed to a reg out clause. And that  
14          should not concern the Commission at all. It's not  
15          before the Commission. It may come up in the courts  
16          at some point.

17                 All we want from this Commission is please  
18                 clarify what you meant when you approved this in 1991.  
19                 You already told us that in Lake, in the Lake order  
20                 when you disapproved the settlement, but now  
21                 intervenors say that is a nullity. We continue to go  
22                 forward with litigation, we try to settle the  
23                 disputes, we really can't, and we submit --

24                         COMMISSIONER GARCIA: Let me tell you, I  
25                         sympathize with your position. In no way am I saying

1 that what you are trying to do is wrong. In fact, I  
2 think what you are trying to do is to some degree put  
3 yourself in a position where you can protect your  
4 shareholders and the ratepayers of Florida. And I  
5 accept that. I mean, that is -- you are not the bad  
6 guy here. You are simply -- unfortunately, I think  
7 the bad guy here is this Commission. I think this  
8 Commission may have erred in the past, or erred in the  
9 past and puts us -- puts you in particular, between a  
10 rock and a hard place. And then puts us in a  
11 difficult spot because where do we go from here. But  
12 that said, I know you -- I have taken your time and  
13 added some to it, so maybe we should --

14 MR. COUTROULIS: That's all right. I appreciate  
15 the questions, Commissioner Garcia. They are very  
16 insightful questions. And I do want to come back by  
17 emphasizing with consideration to all of those  
18 factors, we very carefully drafted this petition to  
19 ask for very narrow carefully structured relief that  
20 we submit is in the interests of all parties to know.  
21 Because if four Commissioners said in Lake we retain  
22 jurisdiction to tell you whether we are going to pass  
23 through payments for cost or not --

24 COMMISSIONER GARCIA: We retain jurisdiction over  
25 you, not over the party that you have a contract with.

1 We have very specific jurisdiction over whether we are  
2 going to allow cost recovery or not. And I believe  
3 that your client would have recourse if we didn't  
4 because of precedent set by this Commission on those  
5 very issues.

6 MR. COUTROULIS: But, Commissioner Garcia, if the  
7 Commission's view as it has stated is that it has  
8 jurisdiction to do that, then it clearly has  
9 jurisdiction to tell us now what it approved back in  
10 1991. They are one in the same issue. We have  
11 ongoing disputes, it would be nice to have a  
12 declaratory statement that once and for all makes this  
13 clear. It has been going on and on for a long time.

14 COMMISSIONER GARCIA: You're absolutely right.  
15 Once you have that the argument is over.

16 MR. COUTROULIS: I think I'm out of time. I  
17 would love to talk some more.

18 CHAIRMAN JOHNSON: Actually we stopped you when  
19 you had about a minute left. So if you want to  
20 summarize.

21 MR. COUTROULIS: All right. Give me one second.

22 COMMISSIONER CLARK: Madam Chairman, I will  
23 probably have questions, but I think I want to wait to  
24 hear from the opposing side and --

25 COMMISSIONER GARCIA: And I'm sorry, Madam

1 Chairman, I jumped in because I was interested. I  
2 understood him much better when he was going quicker.  
3 So when he slowed down I was able to think up and  
4 formulate some questions.

5 MR. COUTROULIS: I should have stayed faster.  
6 Would you like then to hear from the other side and  
7 can I have a minute or so for rebuttal?

8 CHAIRMAN JOHNSON: If you want to save the  
9 minute.

10 MR. COUTROULIS: Yes.

11 Chairman Johnson: Mr. Willis.

12 MR. WILLIS: I'm Lee Willis of Ausley McMullen  
13 representing Lake Cogen in this matter. Commissioner,  
14 I would like to first review again --

15 COMMISSIONER GARCIA: We can barely hear you.

16 MR. WILLIS: I would like to review again the  
17 procedural history of this matter. This is the third  
18 petition for declaratory statement involving the same  
19 parties in the same contract that has been before this  
20 Commission. The first one was in 1994, and the second  
21 one was in 1994, and it was denied by this Commission  
22 in a definitive order after extensive oral arguments  
23 were held, and careful consideration was made, and a  
24 final order issued, which was not appealed.

25 In that order, which essentially the present

1 Commission entered, Commissioners Garcia, Deason,  
2 Johnson, Clark, and at the time it was Commissioner  
3 Kiesling. But it's not an ancient order. You held  
4 that matters of contractual interpretation were  
5 properly left to the civil courts, and that we defer  
6 to the courts to answer the question of contract  
7 interpretation raised in this case. Thus, FPC's  
8 petition is denied.

9 Now, the points that I have just read are quotes  
10 from your order. This was your decision on the very  
11 contract at issue here, and the very contract  
12 provision that is at issue here. The Commission --

13 COMMISSIONER GARCIA: Mr. Willis, while you are  
14 still there, though, it is pointed out by parties and  
15 by staff that Crossroads give us more power than we  
16 had at the time. And that Freehold gives us much more  
17 power than we had at the time. Now we know what the  
18 law is and we can decide these terms because we keep  
19 jurisdiction.

20 MR. WILLIS: Commissioner Garcia, I respectfully  
21 will point out to you that the law of this case was  
22 made in the order that I just quoted to you. And that  
23 while you might want to use -- or someone could argue  
24 that Crossroads might be persuasive in some future  
25 time in some future controversy that has not been

1 decided by this Commission, that has not been subject  
2 to the provision of res judicata and collateral  
3 estoppel and administrative finality, that you might  
4 consider that. That is a New York Commission. It did  
5 not change the jurisdiction of this Commission nor the  
6 decision that you made.

7 And what you did is this Commission carefully and  
8 exhaustively considered the very issue presented in  
9 this docket and clearly directed the parties to go to  
10 court to resolve the contract interpretation issue.

11 Now, we can call it whatever you want to, but it  
12 comes back to we are -- they are asking you to  
13 interpret that contract. They clothe it with a lot of  
14 smoke, but that is exactly what it is. The parties  
15 went to court in October of 1994. They settled the  
16 matter. They brought it to you, it was rejected. And  
17 the order that was entered is a legal nullity. And  
18 even the reference to it is inappropriate here because  
19 it is not an order of this Commission.

20 The parties are back in court where you said  
21 originally was the proper place to be. The trial is  
22 now set for November the 2nd, and it would be  
23 outrageous for you now to step in and try to answer  
24 the question of a contract interpretation.

25 COMMISSIONER GARCIA: Mr. Willis, is this an

1 issue before the court? Is the court looking at this  
2 issue?

3 MR. WILLIS: The court --

4 COMMISSIONER GARCIA: The court has taken  
5 jurisdiction of that issue.

6 MR. WILLIS: Well, the fact is that Judge Briggs  
7 has already unequivocally ruled that the terms of the  
8 agreement are unambiguous and do not require the court  
9 to look outside its four corners for an interpretation  
10 of Section 9.1.2 of the agreement. And the court held  
11 that the payments are due to Lake Cogen based on a  
12 real operable 1991 pulverized coal unit, and has ruled  
13 that any further attempt by FPC to argue any other  
14 interpretation of this agreement is inadmissible at  
15 trial. So that is the circumstances there now.

16 COMMISSIONER DEASON: Then why are you concerned  
17 about this declaratory statement?

18 MR. WILLIS: Well, because you heard them here  
19 argue an order that is a nullity, and they brought it  
20 back up to you. And they are going to try to use it  
21 in that fashion, and if they are not trying to do  
22 that, there is no reason for us -- for you to decide  
23 this --

24 COMMISSIONER DEASON: Is it our position to  
25 determine what their motives are and how they are

1 going use to use it in a court, or is it our  
2 responsibility to address the declaratory statement,  
3 and parties use it for whatever purpose they feel is  
4 useful for them?

5 MR. WILLIS: Commissioner, I believe that you  
6 should decide this case, if at all, based on what you  
7 have already decided previously.

8 I mean, that was the word that you gave to these  
9 parties. It was the same thing as you entering a  
10 contract with the various parties. And the parties  
11 have relied on that, and they have gone to court, and  
12 that's where that controversy should be decided. And  
13 I think you should look through what the motives are  
14 here, and if it genuinely is for matters of  
15 settlement, it can come up and be argued when that  
16 time comes in a settlement. There is no settlement  
17 pending. It can come up in cost recovery at the time  
18 cost recovery is brought. It does not need to be  
19 addressed now.

20 You should defer your decision on this. There  
21 are three principles; res judicata --

22 COMMISSIONER DEASON: Well, Mr. Willis, let me  
23 ask you, it does not need to be addressed now. Are  
24 you saying then there is never a need for a  
25 declaratory statement? You just wait until there is a



1 rate proceeding or something else when the issue is  
2 squarely in front of you?

3 MR. WILLIS: No, I'm not saying that. I'm saying  
4 that, Commissioner, after this has been brought to you  
5 three times, and that you have made a definitive  
6 determination on this in 1995, that you should stick  
7 by what you held in that order. And where the  
8 argument was made by Florida Power that with respect  
9 to a whole lot of detail about standard offers in that  
10 order, that I first quoted you from, you said there  
11 are two types of contract treated very differently in  
12 the rules. And that you considered the very things  
13 that were here, and pointed out that you would not be  
14 involved in such a matter in interpreting the contract  
15 and sent this matter to court.

16 Now, there are three principles that are  
17 important for you to realize here no matter how much  
18 you may want to go back and address this again. They  
19 are res judicata, collateral estoppel, and  
20 administrative finality. And it says that once you  
21 litigate an issue between identical parties and you  
22 have a final order, that case is over with. You can't  
23 come back over and over again with the same question.  
24 And the Commission has been posed the question  
25 presented here, you have given an answer in a final

1 order, and that should be the end of the matter.

2 Now, res judicata applies not only to issues that  
3 were previously litigated, but it applies to issues  
4 that could have been litigated under the same  
5 transaction. And res judicata applies here because  
6 there was a final order on the merits of jurisdiction.  
7 This Commission was a competent tribunal with  
8 jurisdiction and had the authority to declare your own  
9 jurisdiction. The parties are the same, the cause is  
10 the same. And here, again, this Commission clearly  
11 stated in that order that you have no jurisdiction to  
12 interpret the very contract that is at issue here.

13 Now --

14 COMMISSIONER JACOBS: Mr. Willis, how do you  
15 respond to the argument that the question on this  
16 petition is not the same question?

17 MR. WILLIS: Well, the response to that,  
18 Commissioner, is that they were obligated to raise in  
19 the first petition all matters relating to that  
20 transaction. If they didn't raise it or if they come  
21 back and add some little subtlety which is really a  
22 little bit of smoke to add to it to get back to the  
23 same issue, then that thing was subsumed. That issue  
24 was subsumed in the earlier order. You can't come  
25 back. After you decide this, we can't come back in

1 another year and say but we have got another twist we  
2 want you to consider and go back to 1989, or 1975, or  
3 some other time to try to put together something for  
4 you to consider.

5 Now, again, the court that has jurisdiction that  
6 you sent this to clearly and unequivocally determined  
7 that the section in the contract required the  
8 defendant, FPC, to make electric energy payments to  
9 the plaintiff with reference to modeling in the  
10 operation of a real operable 1991 pulverized coal unit  
11 having the characteristics required by the law to be  
12 installed on such an unit. Now, they are arguing  
13 something different here, but that is what the court  
14 has held.

15 Now, also, I want to point out --

16 CHAIRMAN JOHNSON: I have a question related to  
17 something you said a little earlier. I'm  
18 understanding Florida Power Corps' argument -- there  
19 doesn't seem to be a dispute with respect to who gets  
20 to interpret contracts. And although Florida Power  
21 Corp thought that in their 1991 filing that it was  
22 broader than that, that we only answered the one  
23 question as to contract disputes. And that what they  
24 have placed before us today is a clarification as to  
25 our intent. And that that is a totally separate

1 issue.

2 MR. WILLIS: I think it's exactly the same issue.  
3 You can call it different, but what your intent is  
4 when you entered the contract is a fact and  
5 circumstances surrounding the entry of that order  
6 which -- and surrounding that contract that a court  
7 would consider in interpreting what that contract  
8 means. And it is the exactly the same thing. It  
9 really is nothing different. They are trying to call  
10 it something different, but it's not. It is an  
11 attempt to interpret this contract. In the staff  
12 recommendation they stated that this Commission had  
13 forthrightly determined that it has no jurisdiction to  
14 interpret contracts. But then goes on for pages and  
15 pages actually setting out and interpreting the  
16 contract.

17 CHAIRMAN JOHNSON: Let me ask that question in a  
18 different way, sir. Are you suggesting that in the  
19 state court proceeding if the court determined that  
20 both parties intended firm all the time, but that the  
21 Commission intended something else, that they are  
22 going to look at what the Commission versus the party  
23 intended or would they enforce what the two parties to  
24 the contract intended?

25 MR. WILLIS: Commissioner, you referred that

1 contract to the court to interpret.

2 CHAIRMAN JOHNSON: As between the parties.

3 MR. WILLIS: As between the parties. And that  
4 court is and has interpreted that contract. Now,  
5 while we may not like it from time to time, we are  
6 stuck with the decisions of certain tribunals. And  
7 having once referred this matter to the court, and the  
8 court having made a decision, then that decision is  
9 something that has to be factored into this Commission  
10 in its further action. That's not something that you  
11 can take back.

12 Now, you may --

13 CHAIRMAN JOHNSON: So do you think -- let me make  
14 sure I understand what you mean by that. And maybe  
15 I'm reading too much into what you are saying. But,  
16 are you by that then suggesting that we have  
17 relinquished control over cost recovery when you --

18 MR. WILLIS: No, I'm not saying that at all. You  
19 have not relinquished that over cost recovery, but you  
20 may be limited with respect to how that contract is  
21 interpreted when it comes before you for cost  
22 recovery. But in any event --

23 CHAIRMAN JOHNSON: Wait. What does that mean?

24 MR. WILLIS: Well, it means this, that --

25 (Simultaneous conversation.)

1 MR. WILLIS: You approved a contract in 1991 --

2 CHAIRMAN JOHNSON: Uh-huh.

3 MR. WILLIS: -- and the parties relied on that  
4 contract and have spent lots of money on it, have  
5 built plants. And now that contract has had a  
6 contract dispute arise, you declined to interpret that  
7 contract. You declined to do exactly what they have  
8 asked you to do here, and sent that matter to court  
9 through your action.

10 Now, the court is going to determine what that  
11 contract meant. Now, I think that is a given once it  
12 comes back to you. You certainly have jurisdiction  
13 over cost recovery, but --

14 CHAIRMAN JOHNSON: But no matter what we do  
15 today, won't the court still have the authority to  
16 determine what was intended between the parties? And  
17 I don't see my staff disputing that the court can make  
18 that determination. What I understand staff to say is  
19 that we can clarify for Florida Power Corp what we  
20 meant.

21 CHAIRMAN JOHNSON: I know that's what staff has  
22 argued to you. I respectfully disagree with that,  
23 Commissioner. The law of this case governing these  
24 parties and this contract was settled finally in your  
25 1995 order. You can't go back and undo that.

1           COMMISSIONER GARCIA: Let me ask something. When  
2 do we determine the cost recovery of this, because how  
3 would we determine it, or when does that happen? I'm  
4 not arguing what you have just stated. But when is it  
5 that we determine cost recovery? For example, FPC  
6 paid for 18 months this fixed -- am I mistaken, Mr.  
7 Ballinger?

8           MR. BALLINGER: I'm sorry, it was about 12.

9           COMMISSIONER GARCIA: Twelve months they paid  
10 this fixed priced and then they recalculated and  
11 decided to pay another price.

12          COMMISSIONER CLARK: I don't think there is any  
13 doubt that there is -- and that's something I wanted  
14 to ask. You don't argue that there is a floor and a  
15 ceiling here, it's how you calculate one of those  
16 things, right?

17          COMMISSIONER GARCIA: Could you explain what you  
18 mean.

19          COMMISSIONER CLARK: You either get firm energy  
20 or as-available, right?

21          MR. WRIGHT: Commissioner Clark, may I respond?  
22 There are two prices, Commissioner Clark, the floor  
23 and ceiling terminology threw me off slightly. There  
24 is two prices. If the company would have been  
25 operating the avoided unit contemplated by the

1 contract, we have a firm price. If they would have  
2 not been operating, would not have been operating the  
3 avoided unit contemplated by the contract, the QFs  
4 gets as-available price, that's true.

5 COMMISSIONER CLARK: Okay.

6 COMMISSIONER DEASON: And as to whether the unit  
7 would be operating or not depends upon avoided costs,  
8 whether they can obtain energy at a lesser cost by  
9 another means as opposed to running that plant, is  
10 that correct?

11 MR. WILLIS: That's the matter before the court,  
12 Commissioner. Commissioner, if you defer this case to  
13 a court and it interprets what that contract means,  
14 and you come back in a subsequent proceeding and say  
15 it means something else, then you have run square,  
16 squarely into the Freehold case where you have  
17 modified that contract. There is no other way to look  
18 at it.

19 Now, again, with Crossroads and these other  
20 things, there are things that you might want to do in  
21 the future with other circumstances, but those options  
22 are aren't open to you now. I urge you to stand on  
23 your earlier decision. The word that you gave to  
24 these parties, and realize that they have spent an  
25 enormous amount of money in litigation, and that there



1 is no reason for you to address these issues now. I  
2 urge you to defer it, abstain from it, or grant the  
3 motion to dismiss.

4 COMMISSIONER DEASON: I'm going to tell you a  
5 very brief interpretation of what I think happened in  
6 that '94 decision, and tell me if you agree or  
7 disagree.

8 MR. WILLIS: In which court?

9 COMMISSIONER DEASON: In the '94 decision. It  
10 seems to me what this Commission said in 1994 was that  
11 we do not have the authority to interpret the contract  
12 for purposes of binding the parties between  
13 themselves, but that we retain the jurisdiction to  
14 interpret the contract for purposes of cost recovery.  
15 That we have the obligation to protect ratepayers and  
16 that we are going to fulfill that obligation.

17 Now, to me, in a nutshell, that's what we  
18 decided. Do you agree or disagree with that?

19 MR. WILLIS: I do not believe you made that  
20 reservation at all in the 1995 order. I think that  
21 you referred the matter to the court, and that was  
22 that. I mean, you considered these same arguments  
23 that were made here that this was like a standard  
24 offer contract and these provisions were there.

25 You have provisions in this order which address

1 that, and that you said that PURPA and FERC's  
2 regulations carve out a limited role for states in the  
3 regulation of relationships between utilities and  
4 qualifying facilities, and that limited role does not  
5 encompass continuing control over the fruits of the  
6 negotiation process once it has been successful and  
7 the contracts have been approved. PURPA and FERC's  
8 regulations are not designed to open the door to state  
9 regulation where it would otherwise be a wholesale  
10 transaction. While the Commission controls the  
11 provisions of standard offer contracts, we do not  
12 exercise similar controls over the provision of  
13 negotiated contracts. That's what you said, and that  
14 is the law of this case.

15 COMMISSIONER DEASON: And to me that language is  
16 not contrary to my interpretation of that decision.

17 CHAIRMAN JOHNSON: And, Mr. Willis, following up  
18 again on the last point that you made. So it is your  
19 interpretation of the law and perhaps our orders,  
20 also, that once the court makes the determination on  
21 -- if the court were to rule in your favor as to the  
22 contractual dispute, and then the company came to the  
23 Commission, even if we had intended something else,  
24 you're telling us that we are obligated to allow the  
25 recovery that was pursuant to the court's

1 interpretation?

2 COMMISSIONER GARCIA: If I could just address  
3 that, Madam Chairman, for a second while Mr. Willis  
4 straightens out what -- think about what you are  
5 saying. I mean, that would also -- that same  
6 rationale would say that we should have approved the  
7 settlement that was brought before this Commission,  
8 and yet we didn't because we had done it before.  
9 Clearly, the company is going to bring us what it gets  
10 at court and is going to say we demand cost recovery  
11 on this because the court determined it. They know  
12 they are going to do that whatever happens.

13 The problem is that now we are put in an awkward  
14 position by a decision made formally by this  
15 Commission in denying a settlement. And I'm not  
16 saying that we had to agree to that settlement. What  
17 I'm saying is that by denying that settlement, which  
18 was exactly the same as the settlement offered before,  
19 we basically left the company no option. The company  
20 comes to us to try to figure out --

21 CHAIRMAN JOHNSON: But did we have an option? If  
22 you're saying by denying the settlement, so we had to  
23 accept the settlement. So we had no option.

24 COMMISSIONER GARCIA: No, we didn't have to  
25 accept it. We could have offered other terms that

1 they could have gone back and negotiated. But one of  
2 the reasons we accepted the first settlement is  
3 because there was pending litigation, and there was  
4 exposure of Florida's ratepayers.

5 The question is -- Ms. Willis is quite right, we  
6 said, no, we are not going to look at this. They went  
7 on to federal court, and now when it is going to be  
8 decided in federal court, we are going to say to the  
9 court, by the way, we retrain cost recovery on this.  
10 And this is what was meant in '91 when we drafted  
11 these rules. Something that FPC says is crystal  
12 clear. They are telling us that we are going to  
13 determine it for the court.

14 Well, what FPC is doing is logical. It wants to  
15 protect itself either way. But obviously when FPC  
16 walks in here with a decision for or against it,  
17 clearly it has that court there, and the ones that are  
18 exposed are Florida's ratepayers.

19 But FPC gets this decision today, I think it puts  
20 us in an untenable position because obviously we are  
21 going to decide with FPC, because it's a question of  
22 our company, a Florida company, our ratepayers versus  
23 a party that entered into a contract with them which  
24 we have no jurisdiction over. And that is the key  
25 essence here.

1           Why have a contract if we can interpret issues in  
2           that contract? If you look at Freehold, if you look  
3           at Crossroads, no material issue was affected in  
4           either one of those decisions. One was for more  
5           generation, if I'm not mistaken, Crossroads. And  
6           Freehold was exactly the opposite of what we have here  
7           today. And what I'm trying to contend, Madam  
8           Chairman, obviously if a court decision came down we  
9           would have to respect that court decision, because we  
10          decided not to determine this. But if we hold what  
11          FPC asks us to do today, why have a contract? How  
12          could you finance a project of that sort if it was  
13          always up to interpretation of this Commission. And  
14          that is what worries me. What is the signal we are  
15          saying to people to do business in Florida?

16                 Here we are talking about starting a project of  
17                 such magnitude; millions, hundreds of millions of  
18                 dollars are at stake, basically. A company comes into  
19                 our state, plays by our rules, which are written,  
20                 negotiates a contract with FPC. These are  
21                 knowledgeable parties. You know, this isn't a hotdog  
22                 salesman on the corner. These are knowledgeable  
23                 parties which enter into a contract. The issues  
24                 within that contract are within the four corners, and  
25                 FPC comes in here -- and I understand their position

1 -- but comes in here and says, Commissioners, what did  
2 you mean by this term?

3 But we then have to ask the question which falls  
4 further from that point, is what was FPC paying on  
5 this contract? Well, for a year they were paying what  
6 they thought they had to pay. Suddenly they changed  
7 it. The reason they changed it, they didn't come in  
8 here to change it, they didn't come in here and ask  
9 this Commission to change it. They changed it on  
10 their own because they felt that is what that meant.  
11 When they changed that it triggered litigation. They  
12 started to negotiate and they went off to court. Why?  
13 Because they had a contract. Because this wasn't some  
14 open-ended order of this Commission that we were going  
15 to keep revisiting.

16 The way we revisit most of the things that  
17 Florida utilities do because we have a right to do  
18 that, because they are regulated by us. They don't  
19 play in the courts, they play before us. But the  
20 precedent that we establish if we do what FPC asks us  
21 to do today is that we can review all sorts of  
22 arrangements that FPC enters, because we have a right  
23 to play with these numbers all the time. This is a  
24 material issue of the contract. There was no material  
25 issue in Freehold, there was no material issue in

1 Crossroads.

2 By extending both of those cases to this issue,  
3 we have basically said there was no contract. Because  
4 once we determine this issue, obviously the court is  
5 going to -- I mean, it's walking in and declaring the  
6 state of mind of this Commission, which I remind the  
7 Commissioners none of us were here. Well, maybe Susan  
8 was out there, but none of us were here as  
9 Commissioners. And we are saying to the court this is  
10 what we meant then. Which if FPC is right, let the  
11 court determine that issue. But once we start down  
12 that slippery slope, we are going to be determining  
13 key elements of contracts that we approved through  
14 this Commission.

15 And we are not in a rate -- I mean, if FPC wants  
16 to come in and have a rate case and determine whether  
17 that is good for cost recovery or not, then they can  
18 do that. But what they want to do is bind us either  
19 way. Because they -- but in court we are going to be  
20 bound either way anyway. And the reason we approved  
21 the settlement offer is to protect Florida ratepayers.  
22 And in that case we weren't impartial observers.

23 Mr. Willis' company came to us, Mr. Wright's  
24 company came to us, and said here is what we have got,  
25 Commission. We have got a litigation that we are

1 involved with with FPC. If we lose this there is a  
2 potential exposure for our company and Florida  
3 ratepayers of X amount of dollars. However, if we  
4 settle it's going to cost Florida ratepayers this  
5 amount, a much lesser. Sort of like the pay me now or  
6 pay me later.

7 Because of this Commission -- I'm not saying we  
8 are bound to it, but I'm pretty sure we are. Because  
9 we approved that contract here, not us, but  
10 Commissioners before us approved that contract, aren't  
11 we committed to try to resolve the issue for Florida  
12 ratepayers? But once we said we are not going to  
13 determine these contractual issues, and the reason we  
14 say that is because we have a contract. That's why  
15 PURPA let that go out, because the truth is it forces  
16 us to enter into a contract so that we can keep  
17 parties on a fair basis. Two sophisticated parties  
18 entered into an agreement.

19 COMMISSIONER DEASON: Well, why does the  
20 Commission even then approve the contracts?

21 COMMISSIONER GARCIA: The Commission approves the  
22 contracts because we have a -- we were promoting a  
23 policy.

24 COMMISSIONER DEASON: It's required by PURPA, but  
25 why is it improper policy for us to approve the



1 contract?

2 COMMISSIONER GARCIA: We were protecting Florida  
3 ratepayers. And when we approve that contract we are  
4 also protecting FPC, because FPC doesn't want to enter  
5 into a contract that later on this Commission will do  
6 exactly the same question that Commissioner Johnson  
7 just asked of LEAF. Well, if the court determines  
8 what this issue is, then do we have to grant recovery?  
9 Of course we do. We have to grant recovery either  
10 way. That's what made the settlement offer so  
11 attractive. I'm not saying it was the best possible  
12 of all worlds, but they brought a contract before us  
13 in -- when was the contract first brought for  
14 approval? '91. They brought a contract to us and  
15 they said take a look at this, Commission. And we  
16 said, well, it falls within PURPA, it looks like it's  
17 all right. Florida ratepayers are protected. And we  
18 let the parties --

19 COMMISSIONER DEASON: And Florida ratepayers are  
20 protected because it has an avoided cost standard in  
21 it. We felt comfortable with that, and it's within  
22 our jurisdiction to interpret that to make sure that  
23 ratepayers are protected.

24 COMMISSIONER GARCIA: It's in our jurisdiction to  
25 interpret it specifically towards FPC, not against a

1 party which signs a contract. Commissioner, if we  
2 were willing to do that, why even have it? Why not  
3 have an -- these are sophisticated parties. Why  
4 didn't we include it in the contract? We could have  
5 said and the PSC every six months will determine this  
6 crucial issue of the contract. And then I can  
7 guarantee you that Mr. Willis and Mr. Wright's client  
8 would have gone off to Wall Street and they would have  
9 been laughed out of Wall Street. How can you have a  
10 central key issue to a contract open-ended to  
11 interpretation by a Commission at will when it  
12 decides? And the reason the --

13 COMMISSIONER DEASON: Let me tell you, that is  
14 exactly what is in this contract. The argument you're  
15 making very eloquently was all argued when we  
16 considered whether there should or should not be  
17 regulatory-out clauses in these contracts. These  
18 parties negotiated voluntarily and included a  
19 regulatory-out clause in the contract.

20 COMMISSIONER GARCIA: The regulatory-out clause  
21 speaks specifically to a change in policy by this  
22 Commission. We are not changing policy of this  
23 Commission. We are changing a material issue of  
24 contract. See, when staff tries to put us in the  
25 heads of Commissioner Easley and Commissioner Gunter,

1 I understand that. But Mr. Willis' or Mr. Wright's  
2 client wasn't sitting here through that discussion.  
3 That was a one-sided discussion.

4 What we said to our ball team, here are the  
5 rules. Let's figure out a series of rules, and we've  
6 got the rules. Then we put out our rules for people  
7 to come to Florida. We invited people into Florida  
8 because federal law dictated it, and we encouraged  
9 that policy. And some of our -- some of the  
10 companies, like FPC, took us on our word, and that's  
11 why we have to be honest to them, also. They took us  
12 for our word. Back then. Not my word, not your word.  
13 I didn't approve this. I don't know if you did, but I  
14 didn't vote for this. They went out there -- and I'm  
15 still stuck on that. I agree with you, that was our  
16 word back then. We said to them -- they brought it  
17 before us, here are the issues of this contract.

18 Now, if FPC does something ludicrous within that  
19 contract, we still regulate them, we have a right.  
20 Just like if FPC tomorrow comes in here and says,  
21 Commissioner Deason, we entered into a contract with  
22 Staples and we are paying \$20 for a sheet of paper at  
23 FPC, and I want you to approve that for cost recovery  
24 because we entered into this contract with Staples.  
25 We are going to tell FPC to take its contract and tell

1 its shareholders that they are out of luck, all right.

2 The problem in this case is that we looked at  
3 those very specific issues, we issued a series of  
4 rules so that others could understand how Florida law  
5 worked. We said here are our rules, here are the  
6 issues, and then we let two sophisticated parties,  
7 based on the parameters that this Commission created  
8 in '91, enter into an agreement. They enter into an  
9 agreement and then a few years later FPC decides this  
10 is not a good deal. They didn't come to this  
11 Commission and say, I want you, Commission, to tell me  
12 to stop paying Mr. Willis' client. They didn't do  
13 that. They simply on their on move stopped paying, or  
14 they paid on a different thing which they interpreted  
15 the contract to mean.

16 Now, the question I have for staff is what were  
17 they paying before '94 when they decided to change  
18 payments? Were they paying too much on those  
19 contracts?

20 MR. DUDLEY: When they originally started making  
21 payments in 1994 or so when it started, that was based  
22 on the projections at the time the contract was  
23 originally approved, in which FPC projected their  
24 as-available costs to exceed the firm contract cost in  
25 every year of the contract term.

1           COMMISSIONER CLARK: They were being paid firm  
2 costs?

3           MR. DUDLEY: Yes, ma'am.

4           COMMISSIONER CLARK: And then FPC took a look at  
5 whether or not they thought that unit would be  
6 operating, determined that it would not, so they paid  
7 as-available?

8           MR. DUDLEY: It's my understanding they have an  
9 audit procedure that goes through each segment of the  
10 business, and it happened to be the cogeneration's  
11 turn. And upon reviewing those contracts there was a  
12 provision within the contract that allowed and  
13 required you --

14           COMMISSIONER GARCIA: Stop right there. That's  
15 precisely the point. There was a provision inside the  
16 contract, and here is staff stepping up to the bench.  
17 Let me tell you what that means, Commissioners. We  
18 are in the contract. It's within the four corners.  
19 Let them go to court and figure that out.

20           We had our crack at this, Commissioners. We  
21 stated a policy. We stated we are not going to look  
22 at these contracts. We issued a series of rules. And  
23 by the way, our engineers are now determining what was  
24 meant in a contract that this Commission approved.

25           Think about where we are going with this, because

1           once we start down this road there is no way to pull  
2           out. How do we then say to the other either standard  
3           offer -- and there is only a few of them out there,  
4           because we have approved settlements in these because  
5           we realize there is a problem, just like the rest of  
6           the nation is doing. But, no, in Florida law doesn't  
7           apply. In Florida, a contract isn't a contract. In  
8           Florida, PSC, if you deal with any utility in Florida,  
9           watch out, because the FPSC retains jurisdiction over  
10          those companies, and we do. We can say to FPC, you  
11          were wrong in this contract; you shouldn't have signed  
12          that contract. You know what FPC is going to say?  
13          You're crazy, Commissioners. Back in '91 -- and then  
14          they will throw this same argument back at us and say,  
15          "What are you doing?" And they will go to court with  
16          that and they will probably roll us there.

17                 But what we cannot do is continually interpret a  
18          document that we let sophisticated parties that we set  
19          parameters for, and then walk back into what was in  
20          the head of Commissioner Gunter, Commissioner Easley,  
21          of the Commission's majority a few years back when I  
22          first got here, and then somebody say, "And by the  
23          way, here is what we mean." Because every one of  
24          those decisions has to do with a contract. That's why  
25          staff steps up and says, "Well, in the contract. I

1 don't care. We already had our chance at, "in the  
2 contract."

3 I know you know what the contract means, I know  
4 you have a strong opinion about what the contract  
5 means, but that's none of our business anymore. It  
6 will be when FPC comes in for cost recovery. But if  
7 they show up here with a federal court decision that  
8 says you are out of luck, I'll tell you what, they are  
9 probably going to be -- we are going to have to  
10 recognize it in some way or another.

11 COMMISSIONER CLARK: Can I ask a couple of  
12 questions? Are you out of breath? I don't know,  
13 maybe we should check and see if Mr. Willis and Mr.  
14 Wright are done.

15 CHAIRMAN JOHNSON: Mr. Wright still has ten  
16 minutes.

17 MR. WILLIS: I will defer to Mr. Wright for the  
18 conclusion of our remarks.

19 CHAIRMAN JOHNSON: You do have ten minutes.

20 COMMISSIONER CLARK: Well, before you start, let  
21 me ask --

22 COMMISSIONER DEASON: I thought Mr. Willis was  
23 taking some of Mr. Wright's time. And if Mr. Willis  
24 went over ten minutes, he ate into Mr. Wright's time.

25 MR. WILLIS: Well, I only did so in response to

1 questions.

2 CHAIRMAN JOHNSON: Actually he didn't go over.

3 COMMISSIONER GARCIA: Commissioner, I think I  
4 interrupted him, and I think I stole most of his time.

5 CHAIRMAN JOHNSON: You did. Yes, you didn't go  
6 over.

7 COMMISSIONER CLARK: I just want to be clear  
8 about what staff is saying here, and I guess it's  
9 based on what FPC has filed with you. You are saying  
10 that when we did our original rules it was clear that  
11 we were looking at lesser of; whichever is less, the  
12 firm energy or the as-available would be paid.

13 MR. DUDLEY: Yes, ma'am. Anything other than  
14 that is clearly subsidization.

15 COMMISSIONER CLARK: That's under the rules and  
16 the standard -- all right.

17 MR. DUDLEY: I'll just answer the question.

18 COMMISSIONER CLARK: Kenneth, answer only my  
19 question, okay?

20 MR. DUDLEY: Yes, ma'am, that is what I am  
21 talking of.

22 COMMISSIONER CLARK: I know what your position is  
23 on this one.

24 COMMISSIONER GARCIA: I'm taking up a fund. I'm  
25 going to send him to law school on this one, because



1 he is --

2 UNIDENTIFIED SPEAKER: He is better than most of  
3 us.

4 COMMISSIONER CLARK: Here is my question. What  
5 you're saying is at the time those rules were adopted,  
6 the Commission knew that's what it's policy was with  
7 the standard offer, and they wouldn't have approved  
8 anything else that didn't provide for a lesser of  
9 payment.

10 MR. DUDLEY: Yes, ma'am.

11 COMMISSIONER CLARK: And in this case if we --  
12 what you are saying is that that was part and parcel  
13 of the thinking that went into the order even though  
14 it's not specifically stated in the order.

15 MR. DUDLEY: Yes, ma'am.

16 COMMISSIONER CLARK: There would not have been an  
17 approval without that understanding.

18 MR. DUDLEY: Yes, ma'am.

19 COMMISSIONER CLARK: And what is happening here  
20 is that the court is saying that it won't just accept  
21 those four parameters that are in here, avoided --  
22 let's see, I guess the type of fuel --

23 MR. DUDLEY: Is this the partial summary judgment  
24 you are talking about?

25 COMMISSIONER CLARK: Right. The court said they

1 are going to look at something as if it were a bricks  
2 and mortar unit.

3 COMMISSION STAFF: Yes. It's curious what they  
4 say, because they say it's an unambiguous term of the  
5 contract, and yet you need not go outside the four  
6 corners of the contract to determine it, but yet you  
7 need to model this as a fully characterized unit had  
8 it been installed, and that is nowhere within the  
9 contract.

10 COMMISSIONER CLARK: Well, it says -- at the end  
11 it says for each hour the company would have had a  
12 unit with these characteristics operating.

13 MR. DUDLEY: That is the liability section.

14 COMMISSIONER CLARK: And I suppose the argument  
15 is that it's not only these parameters, it's more.

16 MR. DUDLEY: It's a few sections above that  
17 liability statement in which they make the statement  
18 that Mr. Willis quoted awhile ago.

19 COMMISSIONER CLARK: Right. Now, you are saying  
20 that this language should be interpreted as strictly  
21 being the lesser of because that's what we did in our  
22 rules?

23 MR. DUDLEY: Yes, ma'am. Merely a pricing proxy.

24 COMMISSIONER CLARK: And that's what we approved  
25 for cost recovery, and if the court comes back and

1 adds to that such that at some point they would be  
2 being paid firm energy when as-available is less, you  
3 are going to recommend that it not be paid.

4 MR. DUDLEY: Most definitely.

5 COMMISSIONER CLARK: And you are -- it's clear to  
6 you that that was the basis on which this was approved  
7 in the order.

8 MR. DUDLEY: You know, like the rec lays out,  
9 that is the mind set that the Commission must take  
10 when they review these contracts. There is a limit.  
11 You know, cogeneration was encouraged, but it said  
12 that we will not impose a cost on the utility or its  
13 ratepayers that would exceed the cost of them to  
14 acquire generation elsewhere or for them to generate  
15 it themselves. You begin allowing cost recovery of  
16 firm all the time when the utility's as-available cost  
17 is less than that, well, you are just merely  
18 supporting the return of the cogenerator at the  
19 detriment of the ratepayers.

20 COMMISSIONER CLARK: Well, what I'm trying to get  
21 at is the notion of -- you are clearly hanging your  
22 hat on what the Crossroads said you could do, and that  
23 is interpret your order. And the issue I have always  
24 had with what has been recommended with respect to  
25 that is it didn't come up at agenda, it isn't in the

1 order. You are saying it had to be in our minds, or  
2 the Commissioners' minds because that's the way the  
3 rules came out and that is what the discussion was.

4 MR. BALLINGER: Commissioner, I think more  
5 broadly, energy pricing has always been a pricing  
6 proxy. That is the Commission's mind-set since our  
7 first cogeneration rules. Even before these changes,  
8 energy pricing has been just that, a pricing proxy.

9 COMMISSIONER CLARK: This is a still a proxy.

10 MR. BALLINGER: Yes.

11 COMMISSIONER CLARK: It's a different proxy.

12 MR. BALLINGER: Yes.

13 MR. BELLAK: Commissioners, if I could just  
14 briefly refer to the Crossroads case. I don't think  
15 that any argument has been made which distinguishes  
16 Crossroads. Now, Crossroads is the product of the New  
17 York Commission --

18 COMMISSIONER GARCIA: What was the issue in  
19 Crossroads?

20 MR. BELLAK: The New York Commission consists of  
21 human beings; they might be wrong. But the point is  
22 that to say that there was not a substantial issue in  
23 Crossroads -- Crossroads, the cogen interpreted the  
24 contract so as to cause many, many millions of dollars  
25 of additional revenue flow if they could interpret it

1 in such a way --

2 COMMISSIONER GARCIA: But if I'm not mistaken,  
3 and correct me, wasn't it about generation?

4 COMMISSIONER CLARK: Yes. They wanted to say  
5 that they were eligible to sell more generation than  
6 was needed.

7 COMMISSIONER GARCIA: At an agreed contract price  
8 that had existed before they entered into --

9 MR. BELLAK: No. They wanted to add a new  
10 generator. They didn't want to go beyond the limit.  
11 But with the old generator they were never going to do  
12 better than 90 percent of what they were allowed.  
13 With the new one they could sell 100 percent of what  
14 the amount allowed was, and the New York Commission  
15 probably also never had an agenda where that came up.  
16 It wasn't -- it was a point where the Commission had  
17 to explain what it is that was approved if this thing  
18 was going to be within what the Commission  
19 contemplated. And they explained what it was they  
20 approved. It is not a Freehold. They didn't try to  
21 modify anything.

22 And I think from the argument I have heard, I  
23 have heard a lot of argument that you should not  
24 exercise your Crossroads jurisdiction if, in fact, it  
25 exists, but no argument that demonstrates that it

1 doesn't exist, and no precedent supporting that.

2 MR. WILLIS: Commissioner, why would you ever  
3 follow a New York Commission case and ignore a  
4 decision of a Florida court to which you have deferred  
5 your jurisdiction to decide? I mean, that does not  
6 make any sense.

7 COMMISSIONER CLARK: You probably could have left  
8 it at why would you have ever followed a New York  
9 case, but -- I do have a question on that. What is  
10 the status of that New York case? The cite you give  
11 doesn't indicate -- that indicates the Commission has  
12 decided. Has the court decided it?

13 MR. BELLAK: It was upheld in a district -- there  
14 was a suit filed in federal district court, and they  
15 relied on it.

16 MR. WILLIS: But let me point out --

17 COMMISSIONER CLARK: That was a collateral  
18 attack, right? And they said -- in that case I think  
19 they said if that was the argument you wanted to make,  
20 you needed to make it back there and you can't  
21 collaterally attack it here.

22 MR. BELLAK: Right. I haven't heard -- I am  
23 without knowledge that Crossroads has ever been  
24 overruled, if that what is you are asking.

25 COMMISSION STAFF: I just checked, there has been

1 no appellate decision in it.

2 MR. BELLAK: I would assume that those who oppose  
3 the case would have cited that if it were true.

4 COMMISSIONER CLARK: Right. They evidently ran  
5 out of time. They didn't appeal it when they should  
6 of, so they tried to collaterally attack at in a  
7 federal court, I think. Am I right?

8 MR. WILLIS: And that court, Commissioner, said  
9 for this court to allow relitigation of the same issue  
10 would be to sanction exactly the type of judgment  
11 shopping that the doctrine of collateral estoppel is  
12 meant to avoid. That decision is on all fours with  
13 what we are asking you to do here, is to stick by your  
14 earlier decision.

15 CHAIRMAN JOHNSON: Let me ask you a question as  
16 to the proposition set forth by staff. Do you believe  
17 that the Commission does have the authority to clarify  
18 its orders?

19 MR. WILLIS: Commissioner Johnson, in this  
20 instance I do not believe that you have the authority  
21 to clarify this order, which is, in effect, an  
22 interpretation of this contract. That's the only  
23 reason that that really is being --

24 COMMISSIONER GARCIA: May I ask you a question  
25 before you finish the answer. Which order are you

1 talking about? Are we talking about the order where  
2 this Commission decided to dismiss, or are we talking  
3 about the order which allowed this contract to go  
4 forward? I mean, are we interpreting the order that  
5 approved this contract to go forward, is that the  
6 order that we have a right to revisit, or is it the  
7 order where we said -- we referred this to the court?

8 MR. WILLIS: Well, what happened was that you  
9 entered an order in 1991, you declined to interpret  
10 that order and the contract that it approved in 1994.  
11 And having done that, having made that decision, you  
12 made that decision and entrusted the court to  
13 interpret the contract for you. Then when that is  
14 done, that interpretation governs your future actions.  
15 So, yes, it does.

16 COMMISSIONER JACOBS: Now, that is an interesting  
17 point to me. The provision that we are looking at  
18 here, could you walk me through how it got into the  
19 contract in the first place, how that negotiation  
20 happened? Because it's my understanding that this  
21 doesn't operate -- this provision is not operating  
22 pursuant -- this is a negotiated contract, and the  
23 provision has to do with standard offer. So walk me  
24 through how it got into this contract.

25 MR. WRIGHT: Madam Chairman, may I respond to



1 Commissioner Jacobs?

2 CHAIRMAN JOHNSON: Yes. And afterwards we are  
3 going to take a short break.

4 MR. WRIGHT: Commissioner Jacobs, if your  
5 question -- I want to make sure I understand your  
6 question. Your question is how did this energy  
7 payment, energy pricing term get into the contract?

8 COMMISSIONER JACOBS: The reg-out clause.

9 MR. WRIGHT: The reg-out clause?

10 COMMISSIONER JACOBS: Let me make sure I'm  
11 talking about the same thing.

12 MR. WRIGHT: Well, I'll tell you, the whole  
13 contract was essentially drafted by Florida Power  
14 Corporation and presented to the QFs, and said this is  
15 the contract. You can make some changes if you want  
16 to, but we're going to look with serious disfavor on  
17 any changes that you want to make. Fill in the blank  
18 for the capacity you want to sell us, fill in the  
19 blank for the amount of capacity, and fill in the  
20 blank for the prices.

21 COMMISSIONER JACOBS: Right. I want to get to  
22 the payments clause. Now, the argument I'm getting go  
23 to is, as I have understood it, and if I'm wrong,  
24 correct me. That this provision, the lesser than  
25 provision, whatever that's called, and I may not --

1           okay. That does not normally apply to a negotiated  
2           contract, is that correct?

3           COMMISSIONER CLARK: Staff is saying it does.

4           MR. BALLINGER: No, that's a pretty common  
5           provision in most negotiated contracts. They compare  
6           firm energy under parameters to as-available energy.

7           COMMISSIONER JACOBS: Do our rules require that  
8           it -- because we don't have been anything to do with  
9           negotiated contracts.

10          MR. BALLINGER: Exactly. Negotiated contracts  
11          are just that; they are negotiated.

12          COMMISSIONER JACOBS: So it got into this  
13          contract as a result of the parties negotiating it  
14          into it?

15          MR. WRIGHT: Commissioner Jacobs, for reasons I  
16          will explain momentarily, I am going to respond on  
17          behalf of Lake Cogen here. We do not agree that this  
18          provision is a lesser of provision. Judge Briggs in  
19          Lake County Circuit Court does not agree that this is  
20          a lesser of provision. He read the contract, he said  
21          the contract says when the company would have had a  
22          unit with these characteristics operating, the QF will  
23          be paid the firm price and at other times will be paid  
24          the as-available price.

25          Now, he said in his order that the contract

1           contemplates a real operable 1991 pulverized coal unit  
2           having all the pertinent characteristics.

3           COMMISSIONER JACOBS: Understood. Understood.  
4           That's not my focus. My focus here is that this was a  
5           provision that was included in the contract pursuant  
6           to negotiations of the parties. And I understand your  
7           differentiation about what negotiation meant. The  
8           bottom line is you guys negotiated this into the  
9           contract.

10          Now, let me tell you where I think I'm going.  
11          Then this contract came back to us to ask us to  
12          interpret this contract. And the basis of that  
13          interpretation would have been how we look at standard  
14          offer contracts when that same language occurs in  
15          standard offer contracts? Would that have been the  
16          basis of that interpretation?

17          MR. DUDLEY: Florida Power Corps' original  
18          request was that their actions were consistent with a  
19          certain rule, and that rule was the standard offer.

20          COMMISSIONER JACOBS: So even then we weren't  
21          looking at this contract as to how it would comply  
22          with our rule, we were looking at how this contract  
23          language paralleled our rules, is that correct?

24          MR. WILLIS: Commissioner Jacobs, let me read you  
25          your order. You said that FPC has asked us to

1 determine if its implementation of the pricing  
2 provision is lawful and consistent with Rule  
3 25-17.08324, Florida Administrative Code.

4 COMMISSIONER JACOBS: Can I interrupt you for a  
5 minute. Why were we concerned with whether or not it  
6 was lawful and consistent with that rule?

7 MR. WILLIS: Well, you said that you weren't.  
8 You said that, "We believe that FPC's request is  
9 really a request to interpret the meaning of the  
10 contract term. FPC is not asking us to interpret the  
11 rule, it is asking us to decide if the interpretation  
12 of the contract pricing provision is correct. We  
13 believe that that endeavor would be inconsistent with  
14 the intent of PURPA to limit our involvement in  
15 negotiated contracts once they have been established."  
16 That's what this Commission said.

17 MR. DUDLEY: Commissioner Jacobs, the  
18 significance of the rule was -- as it states in the  
19 recommendation, that standard offer language was used  
20 as template for these negotiated contracts. Power  
21 Corp thereby thinking if you take and say that this is  
22 consistent with the lesser of intent in the standard  
23 offer language, then they were doing it correctly.  
24 That is the significance of it, not all the --

25 MR. WILLIS: This order also said, "We believe

1 that endeavor would be inconsistent with the intent of  
2 PURPA to limit our involvement in negotiated contracts  
3 once they have been established. Furthermore, we  
4 agree that with cogenerators that the pricing  
5 methodologies outlined in Rule 25-17.08324, Florida  
6 Administrative Code, is intended to apply to standard  
7 offer contracts, not negotiated contracts." That's  
8 what this Commission said in the order in this case.

9 COMMISSIONER GARCIA: And, Commissioner, let me  
10 point out the fallacy of following that thought  
11 process. If the court ignores what we decide here  
12 today, where does that put FPC? Because we have  
13 already determined what that provision meant in the  
14 contract. Therefore, when FPC marches back into here  
15 we are going to say to FPC, you were paying the wrong  
16 price; you got taken on that contract. Would we have  
17 the power to then say we are not going to grant  
18 recovery of that contract, what you are recovering is  
19 incorrect?

20 COMMISSIONER CLARK: I was thinking about that.  
21 It seems to be one avenue that we can take is to not  
22 grant it, let it go to court, let it come back here,  
23 and reject what the court does if we don't like it,  
24 and it gets appealed, or we accept it.

25 MR. WILLIS: Exactly.

1           COMMISSIONER CLARK: But I have to say we have --  
2 in my view, that is the same thing as interpreting the  
3 contract if we reject it on the basis that is  
4 recommended here. We are interpreting the contract  
5 under the guise of interpreting our rule.

6           MR. WILLIS: You could abstain or defer the  
7 matter.

8           COMMISSIONER CLARK: What?

9           MR. WILLIS: You could abstain or defer the  
10 matter entirely, just not answer it.

11          MR. DUDLEY: Commissioner Clark, you are going to  
12 have to take it up sometime.

13          COMMISSIONER GARCIA: More importantly, I think  
14 you have pointed out the circularness of where we end  
15 up here. That regardless of what we do, we are  
16 constrained like the companies are by how we have  
17 acted. And we approved this contract. So now we are  
18 going to tell the court, by the way, this is what we  
19 think when we approve this contract, and that is what  
20 we meant in '91. And the court can take or not take  
21 what we say.

22          I could almost see that -- what FPC is doing is  
23 to some degree dangerous. Because if this Commission  
24 decides what that cost recovery is, when they come  
25 back here, now that I have determined it, because

1 basically what I've had is a cost recovery  
2 determination, I'm going to tell you here is what Mr.  
3 Dudley thought we meant in that contract. This is  
4 what we are going to let you recover. Your ratepayers  
5 have to pay the rest, because obviously you got into  
6 the wrong contract. I don't think you want me to say  
7 that. I don't think you want this Commission to say  
8 that, because we approved this for recovery, right?

9 Let me ask you -- I'm asking you. Let's say the  
10 issue I decide for you here. In other words, I do  
11 what you ask me here, and you go to court and the  
12 course rejects that argument. The PSC is crazy. This  
13 is what the contract says. It's on all four corners.  
14 I'm no idiot. You know, we may agree or not agree  
15 with that, but he says this is what the contract  
16 meant. And he says it is crystal clear, but not with  
17 your interpretation, he has a different interpretation  
18 of that contract, and he decides against you. Where  
19 does this Commission put itself when you walk back in  
20 here and you say to us, Commissioners, I agreed with  
21 you, but you know what, this provision of the contract  
22 is firm, and this is what the ratepayers of Florida  
23 have to pay. Are you going to argue that we shouldn't  
24 pay?

25 MR. COUTROULIS: Commissioner Garcia, this

1 Commission has to determine what it approved for cost  
2 recovery back in '91, and what it is going to allow to  
3 be passed through to the ratepayers. Let me answer  
4 your question. If Florida Power is found by some  
5 court of competent jurisdiction to have obligated  
6 itself to pay more than that, then because of the  
7 peculiarities of this contract that contains a reg-out  
8 clause, there will be a question in the courts as to  
9 whether or not, since this Commission would presumably  
10 deny for cost recovery the extra amount that was not  
11 within its contemplation in '91 --

12 COMMISSIONER GARCIA: No, we haven't done that  
13 yet. We haven't done that yet.

14 MR. COUTROULIS: Well, but if you are telling us  
15 this is the basis on which we approved this  
16 contract --

17 COMMISSIONER GARCIA: No, no.

18 MR. COUTROULIS: -- this is what we thought  
19 avoided costs were, then presumably when a request is  
20 made to pass it through to the ratepayers, this  
21 Commission is going to act consist with what it  
22 believed the contract required to be paid back in  
23 1991.

24 COMMISSIONER GARCIA: Correct.

25 MR. COUTROULIS: And if it does that, and



1           assuming it does that, and it does not pass through  
2           all of what the court has now said is owed, then the  
3           question will be, given the peculiarities of this  
4           contract, will a court determine that Florida Power  
5           has the right to invoke the reg-out clause. And if a  
6           court determines it does, then Florida Power will be  
7           able to recoup from the cogenerators the amounts that  
8           were not allowed to be passed through. But if a court  
9           decides the reg-out clause is not enforceable for some  
10          reason, and that is affirmed on appeal, then Florida  
11          Power will still owe the cogenerator the extra money  
12          and this Commission will not pass it all through for  
13          cost recovery. And we are not afraid of that  
14          situation at all. We want this Commission to tell us  
15          what it is going to pass through for cost recovery,  
16          and we understand that a court theoretically --

17                COMMISSIONER GARCIA: Now you are giving me the  
18                best of all possible worlds. You are saying to me  
19                that I can protect Florida ratepayers by giving your  
20                decision -- by giving credence to Mr. Dudley's  
21                decision today, I have forever protected Florida  
22                ratepayers. I have left you to the courts, and you  
23                are telling me if you lose in court against Mr.  
24                Willis and Mr. Wright's clients, that your  
25                shareholders are going to pay the difference?

1           MR. COUTROULIS: Commissioner Garcia, what I'm  
2 saying, Florida Power believed in 1994 and believes  
3 today that this Commission had broader jurisdiction  
4 than this Commission viewed back in '94. But that is  
5 not before this Commission today. Clearly, this  
6 Commission under Panda -- and they are just turning  
7 back the clock. They want to pretend the Panda  
8 decision was never decided. They want to pretend the  
9 Lake settlement was never rejected in a 20-page  
10 opinion by this Commission.

11           But, you know, they want to basically say that  
12 this Commission is just relegated to a rubber stamp,  
13 and having approved things in '91, what they are  
14 really saying, and I have listen very carefully, is at  
15 no point are you going to be able to deny cost  
16 recovery. If a court says this is what the contract  
17 requires, then you are going to have to pass that  
18 through. Well, that's not what four Commissioners of  
19 this Commission held in denying approval of that Lake  
20 settlement.

21           And so Florida Power is prepared to recognize  
22 that if this Commission declares that what it had in  
23 mind back in 1991, which it had to have in mind under  
24 its rules to approve negotiated contracts, it couldn't  
25 have approved this contract if it paid more than

1           avoided cost, and the template benchmark was the  
2           standard offer contract rule. Just look at  
3           25-17.08322, it couldn't be clearer.

4           But if a court decides, well, Florida Power, you  
5           obligated yourself to pay \$100, and that is above  
6           avoided cost, and the Commission has said we are only  
7           going to allow cost recovery represented by avoided  
8           cost, which is \$90, there is a \$10 difference. Either  
9           Florida Power is going to have to eat that, or I would  
10          submit to you that because this contract has a reg-out  
11          clause, that that reg-out clause would be enforced by  
12          a court and in this instance Florida Power could  
13          recoup that \$10 not passed through to the ratepayers  
14          from the cogen. But that should not concern the  
15          Commission, because they agreed to the reg-out clause.

16          If for some reason that reg-out clause is not  
17          enforceable, well, the court determines what the  
18          contract requires, and this court, this Commission  
19          determines avoided cost and what it is going to pass  
20          through to the ratepayers. And if there is a  
21          disconnect between those two things, this Commission  
22          should not be concerned about that, that is for  
23          Florida Power to deal with.

24          And let me say I don't agree for a minute with  
25          what intervenors said that a court is going to

1 determine that this contract requires anything other  
2 than the lesser of that this Commission perceived back  
3 in 1991. Not because the court is not going to be  
4 free to make its own decision, but because the  
5 evidence is going to overwhelmingly establish that  
6 that is the case. But if it doesn't, it doesn't.

7 MR. WILLIS: But the court has said that it's not  
8 going to even receive evidence on that fact.

9 CHAIRMAN JOHNSON: Mr. Willis, hold on. You will  
10 be allowed to respond, but let's let the Commissioner  
11 finish his question.

12 COMMISSIONER GARCIA: So then you are saying to  
13 me, just so we can get it on the record, because that  
14 makes me much more comfortable, that you -- that FPC  
15 will not be back to this Commission to interpret, to  
16 use Mr. Dudley's interpretation or the court's  
17 interpretation, you accept Mr. Dudley's  
18 interpretation, or staff's interpretation of this  
19 contract. And so whatever difference, if you lose at  
20 federal court, you are going to eat it is what you are  
21 telling me. Your shareholders, FPC -- and I know you  
22 are adding caveats to what I'm saying, and you have  
23 answered very eloquently adding caveats. I want to  
24 make sure --

25 MR. COUTROULIS: I want to direct my answer.

1           COMMISSIONER GARCIA: I want you to directly  
2 answer. Are you saying to me that if the court  
3 determines against you -- I don't want to know about  
4 the regulatory-out clause, that's not coming here.  
5 You have told me that goes to court. So let's stay  
6 out of the court. You are saying to me that if we  
7 hold for you here today, FPC, its shareholders will be  
8 not be back to this Commission if it loses in federal  
9 court to get the difference on this contract?

10           MR. COUTROULIS: Let me be very precise. This  
11 court issues the declaratory statement today, and says  
12 when we approved this contract for cost recovery back  
13 in 1991, we apprehended that the energy payments in it  
14 would not pay more than avoided cost, and the  
15 benchmark against which we measured avoided cost,  
16 right in the rules, was the provision that we use for  
17 standard offer contracts. Not that this contract had  
18 to provide necessarily for a lesser of, but whatever  
19 it provided it couldn't pay more than a lesser of  
20 because if it did it would pay more than avoided cost  
21 and you can't do that under PURPA or the Florida  
22 rules. Okay. So this Commission so holds.

23           COMMISSIONER GARCIA: This Commission moves  
24 staff. That's where we are at.

25           MR. COUTROULIS: Fine. We go to court --

1           COMMISSIONER GARCIA: You define staff a little  
2 bit more strenuously --

3           (Simultaneous conversation).

4           COMMISSIONER GARCIA: We approve staff today.

5           MR. COUTROULIS: All right. We go to court.  
6 Contrary to what I think is going to occur, I will  
7 assume the court decides this thing called for a  
8 different kind of modeling, and then we have to also  
9 assume that under that different kind of modeling it  
10 winds up paying more. Because if the court decides it  
11 called for a different kind of modeling but it doesn't  
12 pay more, it doesn't matter. But let's assume  
13 different kind of modeling, not limited to the four  
14 parameters, and it pays more, okay. What Florida  
15 Power I would assume would do at that point is  
16 whatever payments it makes -- it would probably appeal  
17 the order, but assuming the order is final, it would  
18 then make payments in accordance with what the court  
19 ordered and it would apply for the cost recovery of  
20 those payments to this Commission.

21           Now, I would assume, but I can't speak for the  
22 Commission, I would assume that since the Commission  
23 would then be faced with a request to pass through to  
24 the ratepayers something that exceeds what they have  
25 said today was the basis on which they approved the

1 contract in '91, that they probably would not allow  
2 all of that to be passed through. I can't say what  
3 they would do for sure, but I think it's a fair  
4 inference --

5 COMMISSIONER GARCIA: Let's assume that that is  
6 what we did.

7 MR. COUTROULIS: -- that's what we had in mind in  
8 '91, and now under the fuel and purchased power  
9 recovery clause we say we have just paid this, we were  
10 ordered by a court to do it, we want you to pass it  
11 through to the ratepayers. I would assume the  
12 Commission would test that against what they  
13 apprehended this contract to require when they  
14 approved it in 1991. And I will assume, but I don't  
15 want to speak for a future Commission, that they will  
16 say we are not going to allow it all to go through.

17 At that point Florida Power would invoke the  
18 reg-out clause, and in the next months statement to  
19 the cogen would subtract the amount that was  
20 disallowed. Now I'm speculating, but probably the  
21 cogen will say, that reg-out clause is not  
22 enforceable. I don't know why it wouldn't be  
23 enforceable. It's not limited in the manner you said,  
24 Commissioner Garcia. It is very broad. It says any  
25 payment that is disallowed, you know, we get to recoup

1 from the cogen.

2 And this Commission has said those kinds of  
3 clauses are okay in negotiated contracts. This is not  
4 a PURPA issue.

5 COMMISSIONER GARCIA: Right.

6 MR. COUTROULIS: But if they conjure some kind of  
7 contract issue, and they say we don't think you can  
8 invoke that reg-out clause --

9 COMMISSIONER GARCIA: That is the longest direct  
10 answer we've had in the history of my --

11 MR. COUTROULIS: -- then we will litigate it. We  
12 will litigate the reg-out clause. And, you know, if  
13 we lose it, and we appeal it and we lose it, then I  
14 guess we are stuck.

15 MR. WILLIS: You know what they are trying to do  
16 is get way ahead of ourselves with the reg-out clause  
17 and other matters that don't need to be decided until  
18 cost recovery. I urge you to defer this matter, to  
19 abstain from this matter until it comes up. Let the  
20 litigation go forward, let the courts do their work  
21 that you referred to them, or deferred to them, and  
22 determine what happens after that rather than in  
23 anticipation of all of that make a decision here  
24 today.

25 CHAIRMAN JOHNSON: Thank you, Mr. Willis. We are



1 going to take a ten-minute break and we will come back  
2 with Mr. Wright.

3 (Recess).

4 CHAIRMAN JOHNSON: We are going to reconvene the  
5 agenda conference. Mr. Wright, I think we are  
6 prepared to hear your remarks. And you have ten  
7 minutes.

8 MR. WRIGHT: Thank you, Chairman Johnson.  
9 Chairman Johnson at the -- my name is Robert Scheffel  
10 Wright, I'm with the law firm of Landers and Parsons.  
11 I am here representing Miami Dade County and Montennay  
12 Power Corporation.

13 As I mentioned, I also do represent Lake Cogen,  
14 and in a response to a question from Commissioner  
15 Jacobs, I answered on behalf of Lake Cogen. I want to  
16 expand on that answer very briefly. But I want to  
17 make it clear that Montennay Power Corp and Miami Dade  
18 County do not consent to the Commission's jurisdiction  
19 over the matters in dispute here. We have moved to --  
20 we have petitioned to intervene for the purpose of  
21 moving to dismiss. We don't think it is a proper  
22 declaratory statement. We think it's barred and  
23 outside of your jurisdiction by virtue of those  
24 reasons.

25 Having said that, on behalf of Lake I want to ---

1 I would like to add a response that I frankly just  
2 didn't get a chance to give in the extensive  
3 conversation before the break to the question posed by  
4 Commissioner Jacobs. (Pause). I apologize,  
5 Commissioner. Since it was your question, you asked  
6 about the lesser of provision in the contract, and I  
7 just wanted to make one point. There is not a lesser  
8 of provision in this contract.

9 Before 1991 -- 1990/'91, when the Commission  
10 adopted its new rules, there were lesser of provisions  
11 in the contract, and in your standard offer contract  
12 rules. They said the payments shall be the lesser of  
13 the avoided -- the avoided unit's energy cost or the  
14 as-available cost. You all changed your rules and  
15 these contracts do not reflect a lesser of provision.  
16 Florida Power Corporation has lesser of -- what we  
17 call lesser of contracts. Contracts with lesser of  
18 provisions. This is not one of them.

19 COMMISSIONER JACOBS: This predates that. I  
20 understand.

21 MR. WRIGHT: Pardon?

22 COMMISSIONER JACOBS: I understand your argument.

23 MR. WRIGHT: Yes, sir. Commissioners,  
24 appreciating the time constraints and the hour, I will  
25 be as brief as I can. I would like to begin by

1 summarizing our main legal arguments and then talk to  
2 you about some basic and practical concerns.

3 Florida Power Corporation's petition for  
4 declaratory statement is barred by res judicata. In  
5 Florida law res judicata applies to bar all claims  
6 that were litigated and all claims that could have  
7 been litigated. In the language of the courts, it  
8 puts to rest every issue actually litigated as well as  
9 every justiciable issue in the case.

10 They did raise the issue of the Commission's  
11 order in their 1994 petitions. They specifically  
12 asked you both in their first petition and in their  
13 amended petition to declare that their new  
14 methodology, their newly implemented energy payment  
15 methodology complies with the Commission's order  
16 approving the contract.

17 They made extensive argument to the effect that  
18 that contract approval order gave you continuing  
19 jurisdiction over the contract. You rejected that  
20 argument. All they have asked you for here is they  
21 have changed complies with to required thought. They  
22 have asked you now to say that your contract approval  
23 order that they specifically cited to and referred to  
24 in their previous petitions requires them to make  
25 payments in accord with this methodology. That

1 difference is semantic at best. That issue was  
2 litigated. And if you even consider the possibility  
3 that there is some semantic difference, they put the  
4 order in their previous petition, it surely could have  
5 been litigated, and we submit to you it was, and this  
6 is barred by res judicata.

7 It is also for similar reasons barred by  
8 collateral estoppel, and it is barred by the doctrine  
9 of administrative finality. This is not a proper  
10 petition for declaratory statement. It is no more  
11 than a request for an advisory opinion. It's no more  
12 -- the declaratory statement that they have asked for  
13 is no more or would be no more than an advisory  
14 opinion on a subject that is not before the Commission  
15 for action that would affect anything.

16 This Commission acts on matters in more formal  
17 proceedings. It acts on these types of matters --

18 COMMISSIONER GARCIA: Mr. Wright, how could they  
19 get before us? If this isn't the forum, how do they  
20 get before us? In this issue of cost recovery, how do  
21 they get before us?

22 MR. WRIGHT: In a cost recovery proceeding, Your  
23 Honor, or in a settlement docket.

24 COMMISSIONER GARCIA: Or do we have to have a  
25 rate case maybe?

1 MR. WRIGHT: It would be my understanding,  
2 Commissioner Garcia, that this is not the type of  
3 matter that would come up in a general rate case.

4 The rubber hits the road on these issues,  
5 Commissioners, in your cost recovery proceedings.  
6 What you do here will not affect your jurisdiction to  
7 whatever extent that it exists, and we do have some  
8 differences of opinion on that, to act on cost  
9 recovery made under this contract in accord with what  
10 the court orders is required. We would suggest --

11 CHAIRMAN JOHNSON: Mr. Wright --

12 MR. WRIGHT: Yes, ma'am.

13 CHAIRMAN JOHNSON: -- I want you to expound upon  
14 that point again. You started off by stating that we  
15 can't interpret contracts, and that we acknowledge  
16 that we can't determine what the parties meant to the  
17 contract, and that that's within the court and that to  
18 the extent that we issued a statement today it would  
19 be no more than an advisory opinion of no weight. But  
20 when you say that our jurisdiction -- we still have  
21 cost recovery jurisdiction, is it ministerial? I  
22 mean, what kind of --

23 MR. WRIGHT: Madam Chairman, to be completely  
24 clear, what I said was, or at least what I think I  
25 said and what I meant to say was this dec statement

1 does not affect whatever jurisdiction you have.

2 CHAIRMAN JOHNSON: Okay. What jurisdiction do we  
3 have?

4 MR. WRIGHT: I don't agree that you have any  
5 continuing jurisdiction, and my clients do not agree  
6 that you have any continuing jurisdiction over cost  
7 recovery under approved cogeneration and small power  
8 production --

9 COMMISSIONER GARCIA: Why don't we.

10 MR. WRIGHT: -- power purchase contracts once you  
11 have approved them pursuant to your rules and pursuant  
12 to the PURPA framework for that cost approval. You  
13 exercised -- and this is in response to the question  
14 posed, I believe by Commissioner Deason earlier -- you  
15 exercised your full jurisdiction expressly in  
16 accordance with your rules over this contract, over  
17 the Lake contract, and over the other contracts in  
18 1991 when you evaluated them with respect to cost  
19 recovery, cost-effectiveness, and when you approved  
20 them at that time. And you may recall at that time  
21 they all showed that they were beneficial to Florida  
22 Power Corporation per your evaluation.

23 COMMISSIONER JACOBS: Do you think that  
24 interpretation applies to standard offer contracts, as  
25 well? That's what Panda says, I think, that it

1 doesn't, right?

2 MR. WRIGHT: Commissioner Jacobs, personally I  
3 believe that the question on standard offer contracts  
4 is somewhat open. Panda, I believe, says that the  
5 Commission has the authority to interpret its rules as  
6 they govern the provisions of contracts as those rules  
7 were in effect and, in fact, in the Panda case  
8 incorporated within the standard offer contract that  
9 was in dispute in that case. That is what I believe  
10 the holding of Panda is, sir.

11 COMMISSIONER JACOBS: Thank you.

12 CHAIRMAN JOHNSON: Mr. Wright, under your  
13 analysis, the Crossroads case, the Freehold, it's just  
14 irrelevant to your analysis, it adds nothing, it  
15 distracts nothing. Your position would be the same.

16 MR. WRIGHT: Madam Chairman, I believe Crossroads  
17 is not applicable to this instance. Crossroads was  
18 applicable to -- and in other New York Public Service  
19 Commission cases covers scenarios wherein the New York  
20 PSC had the authority to interpret its policies and  
21 rules as those existed at the time that contracts were  
22 approved. And so by analogy it brings it around to  
23 the question what about the standard offer contract  
24 rule as it may have impacted this contract, and you  
25 have already addressed that in a final order that

1 Florida Power Corporation didn't appeal, where you  
2 said we agree with the cogenerators that the standard  
3 offer contract energy pricing rule applies only to  
4 standard offer contracts and does not apply to  
5 negotiated contracts. Now, that's what you said 3-1/2  
6 years ago.

7 CHAIRMAN JOHNSON: And, Mr. Wright, as it relates  
8 to this particular issue, it's your position, then,  
9 that -- and I'm vaguely remembering your arguments  
10 from before. I guess it would be your position that  
11 it doesn't matter what we intended. That if we didn't  
12 get it right and if we didn't put it in writing in the  
13 contract, it just doesn't matter. And that we had our  
14 shot and our shot was when we approved the contract.  
15 Even though we thought it was clear, if it wasn't  
16 clear, we can't clarify that. Because once we approve  
17 these contracts, you said we have exercised our full  
18 jurisdiction, we don't have jurisdiction over cost  
19 recovery.

20 COMMISSIONER GARCIA: I'm sure that that is  
21 distinguished as it applies to you. In other words,  
22 the distinction there would be, Madam Chairman, as  
23 that contract applies to his client, not to FPC. FPC  
24 has actually told us that they invite us to relitigate  
25 this when they come into cost recovery. But as to you



1 -- you don't agree?

2 CHAIRMAN JOHNSON: Huh-uh.

3 MR. WRIGHT: No. Commissioner Garcia, I don't  
4 agree, and I intended to come to this at the last, but  
5 I will come to it right now. I think it applies not  
6 only us, but also to FPC. Frankly, I think Mr.  
7 Coutroulis' representations as to their possibly being  
8 stuck under the reg-out clause were just flat hollow.  
9 Nobody can give you jurisdiction that you do not have.  
10 The Freehold decision has two prongs to it. One  
11 protects the QFs, one protects the utilities. And  
12 that says that once the state regulatory authority  
13 approves a contract on the basis that it is just,  
14 reasonable, and consistent with avoided cost, any  
15 further action to attempt to disallow payments under  
16 that contract or to disallow passage of those payments  
17 through by the utility to its ratepayers is preempted  
18 under PURPA.

19 CHAIRMAN JOHNSON: Thank you. I understood.

20 MR. WRIGHT: Continuing, we would suggest that  
21 you wait. Just to summarize kind of where I was, the  
22 rubber hits the road for your decisions in cost  
23 recovery proceedings. We would suggest that at a  
24 minimum you wait until there is a live real  
25 justiciable cost recovery issue before you to act, if

1 we ever even get there, and there are a number of  
2 events that have to take place before we even get  
3 there, and you can consider whatever it is you want to  
4 do at that time.

5 Secondly, I strongly believe that --

6 CHAIRMAN JOHNSON: Do you want me to wait to ask  
7 you the questions?

8 MR. WRIGHT: No, go ahead. This is a good time.

9 CHAIRMAN JOHNSON: Because that point just  
10 confused me again. You are saying that we should wait  
11 till the cost -- if we are faced with a cost recovery  
12 issue. But I guess I was interpreting your  
13 interpretation of Freehold to say that we never get  
14 there. That we have relinquished jurisdiction. So  
15 why do we wait on something we can't do anything about  
16 anyway?

17 MR. WRIGHT: Well, I think you shouldn't grant  
18 this declaratory statement because it's an advisory  
19 opinion, and all they are really trying to do is set  
20 this up for a reg-out that they may or may not be able  
21 to enforce. This is an advisory opinion. There is  
22 nothing before you today and it's forum shop.

23 They themselves, Florida Power Corporation itself  
24 went to the circuit court in Dade County, filed a  
25 counterclaim, invoked the court's jurisdiction and

1 filed a motion for summary judgment on the very issues  
2 in dispute. The court denied their summary judgment.  
3 They lost. We didn't win in that the court denied our  
4 partial motion for summary judgment, as well, but they  
5 invoked the court's jurisdiction, they lost. They are  
6 back here trying to get the second, third, fourth,  
7 whatever it is bite at the apple.

8 COMMISSIONER GARCIA: What do you suggest they  
9 would have done? When this issue came up, what should  
10 they have done? Filed with this Commission for cost  
11 recovery and figure out exactly what we meant and  
12 continue to make your payments and then invoke the  
13 regulatory-out clause? Would that have made sense to  
14 you?

15 MR. WRIGHT: I'm not sure.

16 COMMISSIONER GARCIA: All right.

17 MR. WRIGHT: What they should have done --

18 COMMISSIONER GARCIA: Let's put ourselves -- no,  
19 because I think it's important. I want -- I think the  
20 Chairman is making a very good point. I mean, if this  
21 is ministerial from here on out, which I can't argue  
22 with you, I think Freehold to some agree holds that,  
23 but let's say Freehold doesn't apply. What does  
24 Florida Power Corp do? Florida Power Corp interprets  
25 the contract in a way, what should they have done?

1           Should they have come to this Commission, and said,  
2           Commission, I'm applying for cost recovery now of this  
3           contract because I think that my -- the people I'm  
4           buying from don't understand the contract, have made  
5           us make a determination and thereby invoking the  
6           regulatory-out clause, which would then have come into  
7           effect?

8           MR. WRIGHT: No, sir. They should have gone to  
9           court, as they subsequently did, and filed an action  
10          for a declaratory judgment that they are interpreting  
11          the contract correctly, or not.

12          COMMISSIONER GARCIA: So then our authority, our  
13          jurisdiction is strictly ministerial after we approved  
14          this contract, as per Chairman Johnson states?

15          MR. WRIGHT: I apologize, would you repeat the  
16          question?

17          COMMISSIONER GARCIA: I know you were talking --  
18          the issue with Chairman Johnson, which to some degree  
19          I agree, and I'm not putting words in your mouth. I  
20          agree that perhaps it is ministerial. In other words,  
21          once we saw the contract -- this is following your  
22          line of thinking, and the Chairman is right, you made  
23          an argument that was circular. Once we approve this  
24          contract, that's it. FPC can come in for cost  
25          recovery and they get it.

1 MR. WRIGHT: As a general proposition, I believe  
2 that's correct under Freehold and under PURPA, yes,  
3 sir. I would like to speak -- sorry, was there a  
4 question?

5 CHAIRMAN JOHNSON: No. And you have a lot of  
6 time.

7 COMMISSIONER DEASON: So you are saying that  
8 whatever they -- however they want to interpret the  
9 contract and pay you whatever, we are obligated to  
10 pass that through to customers?

11 MR. WRIGHT: No, sir.

12 COMMISSIONER DEASON: Okay. Clarify that for me,  
13 again.

14 MR. WRIGHT: I believe they are obligated to pay  
15 us in accordance with the contract as in this case,  
16 the contract is interpreted by the courts of the State  
17 of Florida. And whatever the court says they have to  
18 pay us under the contract is what they have to pay,  
19 and I believe what you are obligated to permit them to  
20 pay us and to permit them to recover from their  
21 ratepayers.

22 COMMISSIONER DEASON: Well, let's assume that the  
23 reverse has happened. That you went to Power Corp and  
24 said, "Oh, something has changed in the economy or the  
25 economics, or the finance of this, and we interpret

1 this contract where you are going to start paying us  
2 more." And Power Corp says, "Well, to prevent having  
3 to go to court, I'm going to agree just to pay you  
4 more because the Public Service Commission is  
5 obligated to pass-through whatever I pay you under the  
6 contract. So I will just avoid litigation and I am  
7 made whole, so I'm happy." And they start paying you  
8 10 percent more than they have been paying you in the  
9 past to avoid litigation. And you are saying it's  
10 ministerial at this point, we can't look at anything  
11 in the contract and, therefore, we have to pass it  
12 through to customers, is that correct?

13 MR. WRIGHT: As to the example that you posed to  
14 me, no, sir, I don't think that is correct.

15 COMMISSIONER DEASON: Because it's okay in one  
16 direction, but not in the other direction.

17 MR. WRIGHT: The example you posed to me was  
18 where Florida Power simply acquiesced without going to  
19 court. You said, your hypothesis was that Florida  
20 Power Cooperation just says, okay, we will pay you  
21 more. I think you could say that their decision to  
22 pay more was arguably imprudent, and what they should  
23 have done was to have gone to court --

24 COMMISSIONER DEASON: Why can't we say their  
25 decision not to pay less is arguably imprudent, as

1 well?

2 MR. WRIGHT: It's a decision as to how they pay,  
3 rather than just going to court.

4 COMMISSIONER DEASON: It's a decision as to how  
5 you interpret the contract and whether we are going to  
6 have any authority to interpret the contract.

7 MR. WRIGHT: Commissioner Deason, as to how the  
8 contract is to be interpreted and enforced.

9 COMMISSIONER GARCIA: You're mistaken. It is a  
10 decision as to what the authority of this Commission  
11 is over FPC. Clearly, Commissioner Deason, I think  
12 your point is well made. That's why I don't agree  
13 with Mr. Wright that it is purely ministerial. We do  
14 have a responsibility. We do have a responsibility to  
15 keep FPC honest. That's why they come under our  
16 jurisdiction, certain laws of contract don't apply to  
17 FPC, certain laws of market don't apply to FPC. Why?  
18 Because they are regulated by the Florida Power -- by  
19 the Florida Public Service Commission. I almost  
20 changed our agency's name.

21 The point is that is where they are regulated.  
22 Now, if that exact scenario happened, it's not a  
23 question about going to court or not going to court;  
24 it's a question of what is right for the ratepayers.  
25 And we allow litigation costs all the same when they

1 are correct to be allowed. And if we think -- the  
2 reason we approved these settlement issues is because  
3 we thought that it was good for Florida ratepayers.

4 If FPC isn't doing right by ratepayers, it is  
5 going to get hurt. But if it is acting within the  
6 confines of the contract and what we think the  
7 contract is, well, Mr. Dudley's interpretation I think  
8 is fine. Now, that is a discussion that he will make  
9 before this Commission, and we may determine whether  
10 it is or it isn't. But that's not what we are being  
11 asked to do. We are being asked to interpret cost  
12 recovery up front. Whatever they get out of today,  
13 they have gotten that determination without even going  
14 through the proper process that all companies that are  
15 regulated by this Commission must go through.

16 CHAIRMAN JOHNSON: Mr. Wright, you can pick up  
17 from wherever.

18 MR. WRIGHT: Finally, Commissioners, I want to  
19 speak about basic fairness. In your orders you have  
20 consistently recognized the doctrine of administrative  
21 finality, and you have specifically recognized its  
22 applicability to QF contracts. This doctrine, as you  
23 have said, is one of fairness. Parties must be able  
24 to rely on the finality of Commission orders.

25 More than 3-1/2 years ago, you dismissed a very



1 similar petition from Florida Power Corporation asking  
2 for nearly identical relief. When you granted the  
3 motions to dismiss filed by Dade County and Montennay,  
4 and by Lake Cogen, and by three other QFs, you said,  
5 we are not going to entertain this petition. The rule  
6 doesn't apply. There was extensive discussion of the  
7 applicability of the contract approval order possibly  
8 giving jurisdiction, you said no. We are gone. You  
9 said the courts should resolve this. In reliance on  
10 this Commission's order in February of 1995, 3-1/2  
11 years ago, Dade County and Montennay have spent well  
12 over one million dollars, well over one million  
13 dollars litigating this matter in the courts. For you  
14 to effectively take back your order now would be  
15 fundamentally unfair.

16 All Florida Power Corporation is asking you for  
17 is an advisory opinion that has nothing to do with any  
18 cost recovery matter that is currently before the  
19 Commission. And that is speculative in that it  
20 depends on what the court may do and what may happen  
21 in the meantime. We may settle the case. I hope so.  
22 You should not be a party to Florida Power  
23 Corporation's forum shopping and its attempts to  
24 induce you to give an advisory opinion on a matter  
25 that is not properly before you.

1           Now, I agree with what Commissioner Clark said,  
2           and that is you should just deny the declaratory  
3           statement and let the matter proceed. And I think Mr.  
4           Coutroulis summed up what Florida Power is really  
5           asking for very nicely when he said it would be nice  
6           to have this declaratory statement. It would be nice  
7           for Florida Power Corporation to have this declaratory  
8           statement to go wave at the court and say, "Look, this  
9           is evidence of what somebody thinks about this."

10           You all should not be in the business of giving  
11           declaratory statements because somebody thinks it  
12           would be nice to have. Thank you.

13           CHAIRMAN JOHNSON: Do you think we have the -- I  
14           guess you don't, but maybe you have already answered  
15           this. You don't think -- it's not just that you don't  
16           think we should do it because it's not prudent, but  
17           you don't think that we can legally issue this dec  
18           statement, or are you just telling us we shouldn't?

19           MR. WRIGHT: I'm telling you both, Madam  
20           Chairman. I think not only is it not prudent, not  
21           only do I think it's wrong, I think it's barred by  
22           your doctrine of administrative finality or the  
23           Florida Administrative Law doctrine of administrative  
24           finality, it's barred by res judicata. All four  
25           elements, as we pointed out in our brief, of res

1           judicata are met, and it's barred by collateral  
2           estoppel. All four elements of collateral estoppel  
3           are met, as well.

4           And Mr. Willis said -- I think he wants to say  
5           something -- as he said, that is the law of this case.  
6           That is the law of this dispute between the parties  
7           who are sitting at the table today.

8           CHAIRMAN JOHNSON: So subsumed in your answer,  
9           then, is the proposition, and I'm sure Mr. Willis  
10          would say this, that our earlier ruling went to not  
11          only would we not interpret contracts, but we would  
12          not clarify 9.1.2?

13          MR. WRIGHT: Well, that's the same thing, and,  
14          Commissioner, Madam Chairman, if you granted  
15          dismissal, they asked you specifically to give them an  
16          order, a declaratory statement, that their newly  
17          implemented pricing methodology, payment methodology,  
18          complied with the orders. If there was a ground for  
19          you to allow that petition for declaratory statement  
20          somewhere in there, if there was one ground to allow  
21          that petition for declaratory statement to go forward  
22          in 1995, you shouldn't have dismissed it. You did.  
23          They didn't appeal. It's over 3-1/2 years ago.

24          MR. WILLIS: (Inaudible. Microphone off.)

25          COMMISSIONER CLARK: Can I ask a question? Does

1 your argument with respect to res judicata,  
2 administrative finality, and collateral attack also  
3 apply to the question on the coal price? I don't  
4 recall that being before us before.

5 MR. WILLIS: (Inaudible. Microphone off.)

6 COMMISSIONER CLARK: Now, Mr. Willis, you are  
7 going way further than I'm willing to go. Because I  
8 don't remember that being before us as an issue at  
9 that time. And part of my thinking is, you know, to  
10 some extent the same -- I am somewhat persuaded by  
11 your arguments of res judicata, that we have decided  
12 this. There was an opportunity to raise it, and I  
13 think in a way it was raised. And in deference to you  
14 all, we understood your argument then, we rejected it.  
15 I know that there was discussion, and I can back up  
16 what Commissioner Deason said, that doesn't -- he was  
17 comfortable with what we were deciding based on the  
18 fact he believed that we still had -- that it would  
19 come back to us under cost recovery, and there may be  
20 an opportunity there. I think that has some merit.  
21 But coal prices didn't come up, and it doesn't look to  
22 me like the coal price is the matter of contract. You  
23 are suggesting that they manipulated it.

24 MR. WRIGHT: Madam Chairman.

25 COMMISSIONER CLARK: I'm not saying I'm willing

1 to do that, but I hope I'm giving you a clear signal  
2 that I'm uncomfortable with that part of it.

3 MR. WRIGHT: Well, a couple of responses,  
4 Commissioner Clark. That was an issue that could have  
5 been raised in 1994 as part of this overall  
6 transaction, and it was not.

7 COMMISSIONER CLARK: I had only understood the  
8 issue of the avoided unit to be before us. Am I  
9 wrong?

10 MR. WRIGHT: No, ma'am. I keep wanting to call  
11 you, Madam Chair. Commissioner Clark, no, you are not  
12 wrong. My point, though, is that Florida Power  
13 Corporation could have brought that issue to your  
14 attention in its petitions for declaratory statement  
15 at that time. At least one QF was actively litigating  
16 that issue against them at that time.

17 COMMISSIONER CLARK: Maybe they thought it was so  
18 clear it didn't need to come to us.

19 MR. WILLIS: (Inaudible. Microphone not on.)

20 MR. WRIGHT: And what I would like to say,  
21 Commissioner Clark, is this. The allegations of both  
22 Montennay Power Corp and Dade County as plaintiffs in  
23 the one litigation, and Lake Cogen as plaintiff in the  
24 other litigation, is that the actions complained of,  
25 Florida Power Corporation's actions complained of are

1 we assert a breach of the duty of good faith and fair  
2 dealing that is inherent in every Florida contract as  
3 a matter of Florida contract law. Only a court can  
4 determine whether that has been breached.

5 COMMISSIONER CLARK: That is in the nature of  
6 damages, nothing that we would have to let you  
7 recover.

8 MR. WRIGHT: It's in the -- Commissioner Clark, I  
9 am not sure about that. It's both in the nature of  
10 liability for a breach of the duty of good faith and  
11 fair dealing and in the nature of damages. And I will  
12 say this, I don't disagree with the staff's  
13 proposition that the utility can and should do  
14 everything that it legally -- and that is what their  
15 recommendation says -- that it legally can do to lower  
16 costs.

17 Our position is that what they have done is  
18 illegal. It is a breach of the duty of good faith and  
19 fair dealing, and that remains to be litigated. And  
20 if a court determines that their action --

21 COMMISSIONER GARCIA: We don't have jurisdiction  
22 over that.

23 MR. WRIGHT: If the court determines that what  
24 they did was legal, we are out of luck. If the court  
25 determines that what they did was illegal --

1           COMMISSIONER CLARK: Let me just say I don't  
2 think they are --

3           MR. WRIGHT: -- then they have to pay us  
4 accordingly. And I think going back to what the staff  
5 has said, if the court determines that what they did  
6 was illegal, then I would apply the same logic  
7 enunciated in the staff recommendation to say, well,  
8 if it wasn't legal for them to do it, then they can't  
9 do it and they do have to pay according to what is  
10 legal.

11           I don't think you would want to be in the  
12 position of suggesting that they can break the law, do  
13 something illegal and then escape having to pay in  
14 accordance with the consequence of their illegal acts.

15           COMMISSIONER CLARK: It may not be a cost that  
16 should be visited on the ratepayers, though. But, you  
17 know, I only addressed the notion of the fact that  
18 it's not -- I don't think it's res judicata here. I  
19 don't think your argument applies to that because I  
20 don't remember it being before us. I guess if it was  
21 before us, it does apply, but I don't remember it.

22           Madam Chairman, I don't know if you saved time  
23 for a response, but I wanted to indicate to you that I  
24 feel comfortable at this point making a motion. But  
25 Mr. Coutroulis may want to speak.

1 CHAIRMAN JOHNSON: You have about a minute left.

2 MR. COUTROULIS: Rule 25-22.022 provides for a  
3 declaratory statement as a means for resolving a  
4 controversy or answering questions or doubts  
5 concerning the applicability of any statutory  
6 provision, rule, or order. FPC seeks a declaratory  
7 statement that explains and clarifies the Commission's  
8 1991 order. That is clearly within your jurisdiction.

9 These arguments about administrative finality,  
10 the precise arguments were made when the Lake  
11 settlement was before you for approval.  
12 Commissioners, you rejected them. It was a divided  
13 vote, but you rejected those administrative finality  
14 arguments. They said your role was at an end in  
15 1991 when you approved this contract. It has gone to  
16 court, the parties have resolved it by way of  
17 settlement, you are obligated to approve it. This  
18 Commission said that is not right, we always retain  
19 jurisdiction for cost recovery. And even Commissioner  
20 Clark in dissent made that precise point. So I submit  
21 to you these arguments about administrative finality  
22 have already been rejected.

23 Now, they just want to ignore, like it didn't  
24 happen, everything that occurred since that 1995 order  
25 in the pricing docket where this Commission said we



1 don't have jurisdiction. I want to quote you from  
2 your order at Page 6, quote, "We believe FPC's request  
3 is really a request to interpret the meaning of the  
4 contract term. FPC is not asking us to interpret the  
5 rule. It is asking us to decide that its  
6 interpretation of the contract's pricing provision is  
7 correct."

8 That's the way you viewed the matter in 1995.  
9 That is not what this petition remotely asks for  
10 today. And when the matter came back to you on the  
11 Lake settlement, you didn't find that 1995 order as a  
12 sufficient basis to require you to approve the Lake  
13 settlement. You issued a 20-page order. And they  
14 want to just ignore it. They say it shouldn't even be  
15 mentioned here today, like the ink just disappeared on  
16 the paper. I mean, the reason it's a nullity is  
17 because the time for the settlement between the  
18 parties expired by its terms. The order didn't go  
19 away in the sense that it no longer --

20 COMMISSIONER GARCIA: Aren't there facts there  
21 that you are not bringing out, though? Aren't there  
22 facts there that you are not bringing out? This  
23 Commission acted because of those time constraints.  
24 Staff moved quicker because of those time constraints.  
25 This Commission was trying to -- some of us trying,

1 others -- and perhaps not successfully -- to protect  
2 ratepayers and this happened. And it doesn't exist.  
3 There were a whole series of things that happened that  
4 are no longer there. And that order --

5 MR. COUTROULIS: Which is why we asked for this  
6 declaratory statement, Commissioner Garcia, for the  
7 Commission to tell us that it stands by the rationale  
8 and reasoning that it set forth in about 20 pages just  
9 a few months ago in that order where it was very clear  
10 on what it understood this contract to require in 1991  
11 when it approved it. That order is crystal clear on  
12 the point, which is why I submitted this ought to be a  
13 housekeeping matter. They just want to pretend none  
14 of that happened.

15 COMMISSIONER CLARK: I do want to pretend that  
16 didn't happen, and I want to go back to the other one.

17 MR. COUTROULIS: Well, they also want to just  
18 forget about the Panda decision, and I don't think you  
19 can do that.

20 COMMISSIONER GARCIA: I think there are a series  
21 of facts that distinguish Panda, but --

22 MR. COUTROULIS: Well, with all due respect,  
23 Commissioner, the Florida Supreme Court held in Panda  
24 that the Commission alone has jurisdiction to  
25 interpret its orders and construe its PURPA rules to

1 ensure that payments under approved contracts do not  
2 exceed avoided cost.

3 Now, let's keep in mind what was at issue. Yes,  
4 it was a standard offer contract. That doesn't make  
5 any difference in the sense that standard offer and  
6 negotiated contract you can't approve it if it exceeds  
7 avoided cost. While it's true you require certain  
8 provisions to be in standard offer contracts, you  
9 don't necessarily require those same provisions to be  
10 in negotiated contracts.

11 The benchmark test is the same. Contracts can't  
12 exceed avoided costs under PURPA. In order for you to  
13 approve them, as we went through, your own rules in  
14 1991 said when you get a negotiated contract measure  
15 the payments against the benchmark of avoided cost  
16 that your own rules set out for standard offer  
17 contracts. So, you have to do that.

18 In Panda, the dispute involved the terms of a  
19 contract which impacted the energy payments to be made  
20 to the QF. And you know the administrative finality  
21 arguments you heard today, you also heard these  
22 arguments about preemption, those are the exact  
23 arguments they made to the Florida Supreme Court.  
24 They said Freehold preempted the matter. The  
25 Commission didn't have jurisdiction. They didn't make

1 any distinction between standard offer contracts and  
2 negotiated contracts.

3 And the Florida Supreme Court and this Commission  
4 was a party to that action. And this Commission  
5 argued that they were wrong in the way they  
6 interpreted Freehold, and the Florida Supreme Court  
7 agreed. And it said preemption doesn't apply here,  
8 and it distinguished Freehold, and I think this is a  
9 very important distinction. It said Freehold applies  
10 when you are trying to change the rules of the game.

11 And, Commissioner Garcia, if I may, in light of  
12 some of the questions you asked about what does this  
13 do to contracts and all of that, we are not here  
14 asking this Commission to change anything. We want  
15 this Commission to explain and clarify what it, in  
16 fact, approved in 1991. We don't want it to change  
17 anything.

18 Sure avoided costs have changed over time. That  
19 doesn't matter. You can't change that. We understand  
20 that that can't occur. We are simply asking for a  
21 clarifying statement.

22 COMMISSIONER GARCIA: Who am I protecting here?  
23 Who am I protecting here? You are asking -- you are a  
24 company that we have plenary jurisdiction over. We  
25 can decide all sorts of things in your corporate life.

1 That is because you don't play by the same rules that  
2 everyone plays in a market economy. You are a  
3 monopoly. Therefore, I can deny you cost recovery, I  
4 can grant you cost recovery, I can do all sorts of  
5 things. That said, you play by those rules.

6 The reason we make you sign a contract with these  
7 gentlemen, with their clients, is because I don't  
8 control them. I can't deny them, I can't interpret  
9 how they are going to produce, I can't say whether  
10 they are producing it right or wrong. I hold you  
11 responsible to do that. That's why I don't disagree  
12 with you trying to get this.

13 MR. COUTROULIS: But you understand, Commissioner  
14 Garcia, that contract very squarely on its face says  
15 that it is subject to approval by this Commission for  
16 cost recovery. They say that is not right in their  
17 papers, but they are mistaken in that regard. The  
18 contract is very clear in saying that.

19 Take a look at Section 1.16. It defines the  
20 contract approval date as the date of issuance of a  
21 final PSC order approving the contract, finding it  
22 prudent and cost recoverable through FPC's -- sorry,  
23 through the PSC's review of FPC's fuel and purchased  
24 power costs. And then Section 8.1 says capacity  
25 payments shall not even commence before the contract

1 approval date. The contract right on the first page  
2 attaches all of this Commission's rules to it and  
3 incorporates them by reference as fully set forth  
4 therein.

5 So, they understood the contract they were  
6 signing and it was subject to cost approval by this  
7 Commission.

8 COMMISSIONER GARCIA: Correct.

9 MR. COUTROULIS: We are not asking this  
10 Commission to change anything. There is nothing  
11 unfair vis-a-vis them, because all this Commission --  
12 all we are asking this Commission to do is clarify and  
13 explain what you approved in 1991 unmodified. We are  
14 not asking you to change a thing. This Commission is  
15 preempted under federal law and would be in violation  
16 of Freehold if it tried to do what the BRC did in that  
17 case and say avoided costs have changed, this isn't  
18 great for the ratepayers, let's change the rules of  
19 the game. They were entitled to rely on --

20 COMMISSIONER GARCIA: Distinguish that for me in  
21 this case.

22 MR. COUTROULIS: I will attempt to do so,  
23 Commissioner Garcia. The difference is that here we  
24 are asking the Commission to explain and clarify and  
25 tell us what it approved in 1991 unmodified, looking

1 at --

2 COMMISSIONER GARCIA: Stop right there.

3 MR. COUTROULIS: -- it against its rules that if  
4 you --

5 COMMISSIONER GARCIA: So you are telling me that  
6 the signers of this contract didn't know what the  
7 contract meant when they signed it? They showed up at  
8 Wall Street with a contract, nobody knew what it meant  
9 this PSC, and Mr. Dudley and our staff knew what the  
10 contract -- we had the secret key to the contract.

11 MR. COUTROULIS: No, Commissioner.

12 COMMISSIONER GARCIA: And Wall Street made loans  
13 based on our secrets at Florida and relied on the fact  
14 that this Commission wouldn't look at this?

15 MR. COUTROULIS: No, Commissioner. I think the  
16 contract is clear, but a dispute has now arisen  
17 between the parties as to what it means, which is  
18 being litigated in the courts. The contract was  
19 conditioned on cost approval by this Commission. This  
20 Commission was required in 1991 in deciding whether to  
21 approve this to do so with reference to its rules.

22 COMMISSIONER GARCIA: Agreed. That's why you  
23 brought it to us.

24 MR. COUTROULIS: We would like this Commission --

25 COMMISSIONER GARCIA: That's why you brought it

1 us, did you not?

2 MR. COUTROULIS: And we would like this  
3 Commission to clarify and explain what it found in  
4 1991. Not to change anything. Just as this  
5 Commission undertook to do when it disapproved the  
6 Lake settlement, and did so for the precise reason  
7 that it believed the settlement paid more than what it  
8 had in mind in 1991, and inferentially what this  
9 Commission would be likely to approve for cost  
10 recovery to the ratepayers.

11 We come clearly within the declaratory petition.  
12 There is a dispute, there is some uncertainty --

13 COMMISSIONER GARCIA: You did then. You did  
14 then. You are repeating that now. But what --

15 MR. BELLAK: Commissioner, could I make a very  
16 brief comment? When I was involved with litigating  
17 the Panda case, I had the experience of sitting in the  
18 Florida Supreme Court and watching Justice Overton ask  
19 counsel for Panda -- and, of course, the Panda  
20 contract involved a limitation of it had to be less  
21 than 70 megawatts for the plant they were  
22 constructing, and Justice Overton asked counsel for  
23 Panda if he believed that under the terms of the  
24 contract that Panda could build a 1000 megawatt plant.  
25 And counsel for Panda replied that yes, he did.



1 COMMISSIONER CLARK: Well, Mr. Bellak --

2 MR. BELLAK: And what I'm concerned about is, I  
3 have done a very thorough analysis of Freehold because  
4 I have had no choice. I have been living with  
5 Freehold for the last three years. Five years  
6 actually. Four years. Because of the Panda case.  
7 And what concerns me, and I really don't want to  
8 inject myself into this debate, but it concerns me  
9 that this Commission will without any precedent allow  
10 itself to be struck dumb and not allowed to speak as  
11 to these issues.

12 I notice that there was an attempt to get a TRO,  
13 that is to stop you from listening to this debate.  
14 There is an attempt to have you defer anything you do  
15 as to what you believe we approved in 1991. I think  
16 there is sufficient precedent out there to warn the  
17 Commission not to do what the New Jersey Commission  
18 did in the Freehold case. And based on my analysis of  
19 it, for what it's worth, that is not what is occurring  
20 here. In fact, it's a reverse of Freehold.

21 The reverse of Freehold occurs because in  
22 Freehold the cogen had a reason to be upset because  
23 the New Jersey Commission in trying to help the  
24 ratepayers wanted to undo the cogen from the fruits of  
25 what was approved by the New Jersey Commission. The

1 New Jersey Commission was well motivated, but it was  
2 trying to do the wrong thing. It was trying to --

3 COMMISSIONER GARCIA: Richard, stop right there.

4 MR. BELLAK: -- deprive the cogen of the benefit  
5 of the deal. In this case, staff is unhappy, staff is  
6 motivated, staff is incensed because it believes that  
7 the ratepayers are going to be deprived of the good  
8 thing that the Commission did when it approved these  
9 contracts in 1991. It approved a very sophisticated  
10 mechanism to keep from happening what happened in so  
11 many other jurisdictions. So it is a reverse Freehold  
12 because it is the staff that wants the benefit of what  
13 the Commission approved back in 1991.

14 And if a situation is created that there is no  
15 precedent supporting in which the Commission can't  
16 file an amicus brief, in which the Commission can't  
17 issue a declaratory opinion, in which the Commission  
18 can't intervene, and, in fact, is struck dumb, that  
19 may be what the Commission decides to do, but I notice  
20 there is no case supporting that. And we have got a  
21 case called Crossroads, which says exactly the  
22 opposite. And had not the New York Commission felt  
23 that it was not struck dumb in that circumstance their  
24 ratepayers would be paying for an entirely different  
25 and more expensive configuration than anything they

1 thought they approved when they approved that  
2 negotiated contract.

3 COMMISSIONER GARCIA: I disagree. You are  
4 stretching Crossroads far afield from where it ended  
5 up. And, Richard, further from that, you are having  
6 us have a proceeding on cost recovery so that FPC  
7 knows where its at. You are doing exactly what they  
8 denied the Commission doing in Freehold. I don't  
9 argue with staff's position. It is a clear position.  
10 I don't argue with FPC trying to come here to get  
11 this, but this isn't the way to get it. Because  
12 basically we are being boxed into an interpretation of  
13 the contract to send it to the court. Are we struck  
14 dumb, then, when the court -- if the court rules  
15 against us?

16 MR. BELLAK: You are not struck dumb if you are  
17 willing to state what it is we thought we approved,  
18 and it has the effect of giving the court the same  
19 leeway that the court had, the district court had in  
20 Crossroads. In Crossroads they decided that it was  
21 collateral estoppel on the cogen's issues. This judge  
22 may decide something different. He may accord what  
23 you say a lot of weight. He may accord it less  
24 weight. It does not conclude the --

25 COMMISSIONER CLARK: You really can't conclude

1 that the Crossroads is dispositive law. It was really  
2 -- the only thing that was decided was if you wanted  
3 to raise that argument you had to raise it before the  
4 Commission. You can't go to court and raise that  
5 argument as the basis for --

6 MR. BELLAK: But which Crossroads? I'm talking  
7 about Crossroads I, the New York Commission's  
8 Crossroads. All that the New York Commission said in  
9 Crossroads was that this is what we think we approved.  
10 If you want to go fight about it in some other  
11 tribunal, that's fine. That judge can give accord  
12 what we are saying --

13 COMMISSIONER GARCIA: In that case, Richard, it  
14 was not within the contract. It was not in any shape,  
15 way, or form within the contract or ever discussed by  
16 the Commission or ever dealt with.

17 MR. BELLAK: Crossroads thought it was. They  
18 were relying on the contract. They said this is how  
19 we are interpreting this clause, this clause, and this  
20 clause in the contract. It was no more far afield  
21 than Panda's claim that they could build a 1000  
22 megawatt plant. They thought they found that in the  
23 contract, too.

24 COMMISSIONER CLARK: But if you will recall, and  
25 I think this Commission has made a distinction between

1 negotiated and standard offer contracts. Now, I don't  
2 know if the Supreme Court has made that distinction,  
3 but the only thing before them was a standard offer  
4 contract, and the standard offer contract is provided  
5 by tariffs, and I agree that we can interpret our  
6 tariffs, and we did in that case. We specifically  
7 limit it to 75. I don't think it carries over to  
8 negotiated. In fact, as I recall when this came up we  
9 made a clear distinction between what authority we had  
10 with respect to standard offer and what authority we  
11 had with respect to negotiated.

12 MR. BELLAK: Well, the problem is that even the  
13 negotiated contracts references our rules, and it's  
14 not apparent that a calculation of avoided costs would  
15 not have been based to some extent on our rules. So I  
16 didn't have to cope with that because all I had to do  
17 was defend our ability to explain what we meant in a  
18 standard offer contract, so the issue wasn't before  
19 me. But I have to say that I don't see that -- I see  
20 the case as supporting what the staff is trying to do,  
21 but I don't see the cases which so limit the ability  
22 of the Commission --

23 (Simultaneous conversation.)

24 COMMISSIONER GARCIA: Richard, but your own line  
25 in the rec -- the Commission has always forthrightly

1           disclaimed any jurisdictional role in adjudicating  
2           contract disputes involving negotiated cogeneration  
3           contracts and has been correct in doing so.

4           MR. BELLAK: Right. That is consistent with the  
5           staff recommendation.

6           COMMISSIONER CLARK: Where did you just quote  
7           from?

8           COMMISSIONER GARCIA: From Page 17. I'm quoting  
9           Richard.

10          MR. BELLAK: Right. And that's consistent with  
11          what the staff is trying to do. If this declaratory  
12          statement issues, the court is still going to  
13          adjudicate this contract dispute. They can give what  
14          you say dispositive weight, they could give it no  
15          weight.

16          COMMISSIONER CLARK: So, Richard, why don't we  
17          wait until they do it and then deal with it when it  
18          gets here?

19          COMMISSIONER GARCIA: And you know what, Richard,  
20          following that, we are stuck then, and so is FPC. I  
21          mean, we make the argument now, but then I'm stuck. I  
22          have made a determination.

23          COMMISSIONER CLARK: If they can ignore us, then  
24          why do it?

25          COMMISSIONER GARCIA: FPC can walk in -- exactly.

1 They can ignore us one, Richard, and FPC can walk in  
2 after we make this decision, because FPC wouldn't  
3 answer the question, and say pay up, Commission. Here  
4 is what it meant. The court said something else, I  
5 get the money.

6 MR. BELLAK: Well, again, I don't want to insert  
7 myself in the debate, but I would just close by saying  
8 I think Mr. Wright gave you a very good reason not to  
9 wait, because he said that whatever you are thinking  
10 about in terms of cost recovery is going to be  
11 ministerial. It flows through whatever they get out  
12 of the court and --

13 COMMISSIONER GARCIA: And he is wrong.

14 MR. BELLAK: And the Commission has to pay --

15 (Simultaneous conversation.)

16 MR. BELLAK: -- be just as silent then as they  
17 want you to be now.

18 COMMISSIONER GARCIA: Mr. Wright is overreaching,  
19 and I can understand he is overreaching for his  
20 client. But the truth is he is wrong, and this was  
21 the issue when we voted this out last time, and I  
22 remember Commissioner Deason making the point, because  
23 he was right, we do have -- we have so much control  
24 over what FPC does. I mean, a word from us causes a  
25 problem in their stock value. The truth is because we

1 have issues that we control because they are not  
2 operated by the typical laws of the marketplace. They  
3 work under a different series of things. We get to  
4 make all sorts of determinations on how they spend,  
5 why they spend, if it is appropriate, if it is not  
6 appropriate, and that's why, that's why I can see them  
7 coming here. But they are going to come in here when  
8 they ask for cost recovery.

9 COMMISSIONER DEASON: We regulate FPC, but we  
10 cannot be arbitrary and capricious in that regulation,  
11 either. If we approved a contract, we can't say then  
12 but we are going to interpret it differently now  
13 because we can save the ratepayers money. We cannot  
14 do that.

15 COMMISSIONER GARCIA: I absolutely agree with  
16 you. I absolutely -- that is exactly the point. But  
17 what we do, what we do when we do this here is we are  
18 going to be arbitrary and capricious to the very  
19 argument that FPC is making here today, they are going  
20 to make when they come in for cost recovery. The very  
21 opposite of that argument. They are going to argue  
22 Mr. Wright's case. They are going to say, Commission,  
23 in '91 you approved this rule. In '94 you decided not  
24 -- or in '95 you decided not to step into this  
25 argument, and then they are going to argue you've got



1 to give me what the court decided that we had to give.  
2 We will make a determination whether prudent or not,  
3 but what we cannot do is make that decision here in a  
4 declaratory statement which effects other peoples'  
5 rights who came into the State of Florida to do  
6 business.

7 MR. COUTROULIS: Madam Chairman, may I make one  
8 very --

9 MR. WILLIS: It's really time for you all to  
10 bring this to close. I would urge that you all --

11 CHAIRMAN JOHNSON: Excuse me.

12 MR. COUTROULIS: This point has not been taken.

13 CHAIRMAN JOHNSON: Hold on. And Mr. Willis has  
14 been waiting for quite awhile. I'm going to allow to  
15 you wrap up and then I may allow you, I'm not sure.  
16 Go ahead, Mr. Willis.

17 MR. WILLIS: I was going to say that,  
18 Commissioners, we asked you to be true to your word  
19 that you gave in your order in 1995 where you deferred  
20 this matter to the court for interpretation. The  
21 court has that before it, the trial is November the  
22 2nd, we urge you to stand by and let that process take  
23 its course, and then when you have a case before you  
24 in cost recovery or otherwise, come back to these  
25 issues and decide it when you have a case before you

1 and not now. It is time to wrap this up.

2 COMMISSIONER DEASON: I agree with that. It's  
3 time to wrap this up. This is Item 13B?

4 COMMISSIONER DEASON: 13A and B.

5 COMMISSIONER CLARK: I'm ready to make a motion.  
6 And let me just add one thing. The Crossroads  
7 decision, you indicated there are two Crossroads  
8 decisions.

9 MR. BELLAK: Right. Crossroads from the New York  
10 Commission --

11 COMMISSIONER CLARK: Right.

12 MR. BELLAK: They said, well, if we explain or  
13 clarify what it is we approved, and this was a  
14 negotiated contract, that does not insert us in any  
15 way in your contract dispute. And, in fact, that  
16 played out in district court.

17 COMMISSIONER CLARK: What is the other case? The  
18 other case is the district court.

19 MR. BELLAK: Right. The district court case,  
20 they said, well, we are going to accept what the New  
21 York Commission said as dispositive.

22 COMMISSIONER CLARK: Well, let me ask you, didn't  
23 they say they were not going to allow the collateral  
24 attack of that order, because that is what it was?

25 MR. BELLAK: That is one of the things they said.

1           COMMISSIONER CLARK: This is important, Richard.  
2 I understood -- I think I read it that it was simply  
3 that if you had wanted to make that argument, you  
4 needed to bring it up before the New York court, and  
5 you needed to appeal it if you didn't think it was  
6 right. You don't come to this court and do a  
7 collateral attack on it to reach that result. Wasn't  
8 that what they decided?

9           MR. BELLAK: I believe that is the case.

10          COMMISSIONER CLARK: Okay. Well, Commissioners,  
11 let me indicate that I don't -- you know, let me ask  
12 another thing. Do we have to issue -- can we just  
13 decide that there are enough -- do we have to issue a  
14 declaratory statement?

15          MR. BELLAK: Well, given the experience of the  
16 EWG case, I would say no. I mean, in that case there  
17 were some problems with it and you denied it. I think  
18 you can grant or deny one on whatever basis you wish.

19          COMMISSIONER CLARK: Commissioners, let me just  
20 indicate that I don't -- I don't think issuing a  
21 declaratory statement now sort of furthers this  
22 process. We had a unanimous decision where we said  
23 contract disputes should be left to the courts, and  
24 then when they come to us for cost recovery we will  
25 deal with whether it should be the matter of cost

1 recovery. I think we should stick by that. And it  
2 will come back to us.

3 What intervened and what put, I think, which  
4 instigated Power Corporation to come to us was the  
5 fact that we rejected a settlement and as part of our  
6 rationale we indicated that we probably wouldn't  
7 approve for cost recovery what Lake or whoever it was  
8 believed they should get. And we discussed the notion  
9 of rejecting it for cost recovery.

10 I can understand why they have come here. But  
11 it's my view that a good argument can be made that  
12 what we decided with respect to the contract is res  
13 judicata. But I think a better way to get it decided  
14 is let the parties go back and perhaps litigate or  
15 settle. If they litigate and the court gives us  
16 something, and we don't believe we can live with it,  
17 if we think we still have the jurisdiction to reject  
18 it, we can reject it then, and then the Supreme Court  
19 will decide. I don't think -- I think it's my feeling  
20 that issuing this now just is not the best course to  
21 follow.

22 COMMISSIONER DEASON: Your motion is based upon  
23 the assumption that you feel that the issuance of the  
24 declaratory statement will not add anything to the  
25 debate particularly at the court.

1 COMMISSIONER CLARK: Right.

2 COMMISSIONER DEASON: Why don't we let the court  
3 decide that. We issue the declaratory statement, if  
4 they want to give it any weight whatsoever, they will,  
5 and if they want to totally ignore it, the court will.  
6 That is their decision.

7 COMMISSIONER CLARK: Because I think it comes  
8 close to an advisory opinion, and as I understand we  
9 are supposed to sort of stay away from advisory  
10 opinions. Declaratory statements are supposed to be  
11 used when you can sort of avoid litigation or avoid  
12 parties taking actions to their detriment that can't  
13 be undone later on. I just don't see this --

14 COMMISSIONER DEASON: Well, to an extent I agree  
15 with you. I think that we should issue a declaratory  
16 statement or not, not because of whether there is or  
17 is not a court proceeding, it's because either -- the  
18 requirement has been met for a declaratory statement  
19 and we need to issue it. It's part of our  
20 responsibility to issue a declaratory statement when  
21 all of the appropriate measures have been met to that  
22 one issue. And it doesn't matter whether there is a  
23 court proceeding or not.

24 MR. BELLAK: Well, they asked for this  
25 specifically. They are here to deny this if I'm

1 wrong, but as I understood it, it was because of the  
2 settlement. That if they had this declaratory  
3 statement it would help them structure a settlement  
4 that the Commission would be more likely to approve.  
5 And it's not advisory as to that. It may be advisory  
6 as to their contract dispute, but they had other  
7 reasons to file the petition.

8 MR. DUDLEY: That is correct.

9 COMMISSIONER CLARK: I would make a motion that  
10 we not issue the declaratory statement.

11 COMMISSIONER GARCIA: I will second that motion.

12 CHAIRMAN JOHNSON: There is a motion and a  
13 second. Any further discussion?

14 COMMISSIONER JACOBS: I have a question for  
15 staff. There are some provisions on cost recovery  
16 from negotiated contracts in the rules, and I'm  
17 wondering were they in place when this came the first  
18 time?

19 MR. DUDLEY: Yes, sir.

20 COMMISSIONER JACOBS: Why didn't we apply those?

21 MR. DUDLEY: Why didn't we apply them?

22 COMMISSIONER JACOBS: Yes.

23 MR. DUDLEY: I would expect we thought we were  
24 applying them.

25 COMMISSIONER JACOBS: But they don't, they don't

1 deal with this other clause, do they? They don't deal  
2 with the other provisions, they have to do with other  
3 tests, don't they?

4 MR. DUDLEY: They are a limitation to full  
5 avoided costs. That is the rule cited within the  
6 recommendation, if that is what you're referring to.

7 COMMISSIONER JACOBS: Subsection 3.

8 MR. DUDLEY: I'm not real sure what section it  
9 is. Yes. We have cited Chapter 366, as well as Rule  
10 25-17.0825 and 25-17.08322.

11 COMMISSIONER JACOBS: 08 -- well, without delving  
12 too deeply into it, the discussion has been largely  
13 about the language that was put into the contract  
14 which was barred from the standard offer section, is  
15 that correct?

16 MR. DUDLEY: Yes, sir.

17 COMMISSIONER JACOBS: And my question has to do  
18 with there is some language here that has to do with  
19 cost recovery for negotiated contracts in Subsection  
20 3. Is that different from the standard offer  
21 provision? And if so, why wasn't it applied?

22 MR. DUDLEY: Not to the extent that it restricts  
23 cost recovery to full avoided cost. To the extent  
24 that it specifies the actual language to be put in the  
25 contract, yes, it is different. Negotiated contracts

1 are more open than the standard offer contracts. But  
2 both of them maintain that threshold that what we  
3 allow for cost recovery shall not exceed the utility's  
4 full avoided costs.

5 COMMISSIONER GARCIA: I agree with you.

6 MR. DUDLEY: Then approve the dec statement.

7 COMMISSIONER GARCIA: Close.

8 COMMISSIONER JACOBS: See, here is where I am --

9 COMMISSIONER GARCIA: Commissioner, we are not  
10 giving up jurisdiction.

11 COMMISSIONER CLARK: My reasons for dissenting in  
12 the Lake are still there.

13 COMMISSIONER GARCIA: Exactly. And, you know, I  
14 think it was inspirational to staff to intertwine your  
15 dissent in that case with this statement to try to  
16 bind a vote. But the truth is that those same issues  
17 are still there, the issues that we discussed. And  
18 the truth is we had every right to deny a settlement.  
19 I mean, we didn't like it, but I wasn't in the  
20 majority. I thought we had every right, just like  
21 Commissioner Deason has every right to say about cost  
22 recovery when we have a cost recovery proceeding.

23 However, what we do here today binds us to your  
24 position in that cost recovery and binds them. And we  
25 are announcing today this is what we are going to



1 allow, and that's it. And I think it's going to be to  
2 their detriment, but it's better than -- because what  
3 I don't want is him to come into this -- FPC to walk  
4 into this hearing, standing with four million  
5 ratepayers behind them, and saying, "Commissioners,  
6 here is what you meant." And obviously we are going  
7 to decide with them. Because every common sense move  
8 in my body says let me protect the ratepayers as  
9 opposed to these other participants. I am expounding  
10 on it, I know, but this is my feeling.

11 COMMISSIONER CLARK: But I think you are  
12 protecting the ratepayers. Because as I said in the  
13 dissent, I think it has the effect of -- giving  
14 sanctity to these contracts has the effect of  
15 promoting the competitive wholesale market. If you  
16 don't give sanctity to those contracts, then I think  
17 you won't have people coming into the state to  
18 competitively provide this service. And I think in  
19 this case it was the specific language that was before  
20 us, we declined to issue the declaratory statement,  
21 and arguments were made that we were interpreting our  
22 rule or order, we still said it was a contract  
23 interpretation, and it was a unanimous decision.

24 I understand that the Lake settlement had in it  
25 -- I don't know what the majority agreed on in terms

1 of the basis for rejecting it, but they rejected it.  
2 That was not a unanimous decision. I think it should  
3 go forward. Send it back the way it was when we  
4 decided in 1994 or whenever it was that the courts  
5 needed to just construe the contract.

6 COMMISSIONER JACOBS: I am persuaded that we do,  
7 we have jurisdiction to look at it for prudence  
8 purposes. I don't think that there is much question  
9 about that. The troubling part is that we did have a  
10 bite at the apple, and I'm wondering what effect there  
11 was of not having taken that opportunity.

12 I would love for us this to have gone back with  
13 us as a party, and we have been able to deal with  
14 anything the court did when they ruled on this, and  
15 resolve any issues then and there. But unfortunately  
16 we find ourselves here today. The motion was to  
17 defer?

18 COMMISSIONER CLARK: To deny it.

19 CHAIRMAN JOHNSON: Let me ask may be a question  
20 for Commissioner Clark. Then is it your position that  
21 we don't have the authority to clarify what we meant  
22 or what we thought we were approving, or does it go to  
23 we had that opportunity, and we didn't take advantage  
24 of it? It is to me two separate issues, because I'm  
25 convinced by the analysis provided by staff that we do

1 have the authority to clarify our intentions, and I  
2 think we need that kind of authority. I understand  
3 Mr. Wright's argument is that you don't. Really you  
4 have one bite at the apple and that is when you  
5 approve these negotiated contracts. After that you  
6 are kind of out of the game.

7 Now, that may not be Mr. Willis' position, but I  
8 understand it to be Mr. Wright's position. But I'm  
9 not sure what your motion is turning on. Is it  
10 turning on the fact that you believe that we have the  
11 ability to interpret that contract, we did interpret  
12 the contract, we even spoke to the issue of clarifying  
13 our intentions, and it is res judicata or --

14 COMMISSIONER CLARK: Yes. I guess about what I'm  
15 looking at is maybe getting you to concur in the  
16 action, but not in the rationale for it.

17 CHAIRMAN JOHNSON: (Laughing.)

18 COMMISSIONER CLARK: That happens all the time,  
19 you know. I mean, that's what concurring opinions  
20 are. It would be my opinion that it is res judicata.  
21 I think we had our opportunity to make a decision.  
22 These arguments with respect to the rulemaking and  
23 what happened in the rulemaking and the applicability  
24 were not brought up at that point. And I'm not even  
25 sure if Crossroads had been decided, and I have -- I

1 don't even know if Crossroads rises to the level of  
2 what our law school used to tell us was persuasive  
3 authority. It is certainly not binding authority. It  
4 was that court's opinion.

5 I think there are real policy arguments to be  
6 made with respect to letting the court decide the  
7 contract issues so we can promote a robust competitive  
8 market. And if those people in the wholesale market  
9 see the cost recovery issue continually coming back  
10 before the Commission, I don't think we will have that  
11 robust market.

12 So I guess I am willing to decide it on the issue  
13 that we had our opportunity, we decided that it should  
14 first be decided by the courts. It was a contract  
15 dispute. It will probably come back to us for  
16 recovery, and if a majority at that time thinks that  
17 we have the authority to reject it on the notion of  
18 cost recovery and that's not what our order allows  
19 for, we can do it then.

20 CHAIRMAN JOHNSON: And where does that leave  
21 Florida Power Corp, I mean, still in a state of flux  
22 with respect to --

23 COMMISSIONER CLARK: But their cost -- if it is  
24 determined that you owe the amount the court finds  
25 ultimately, you have been recovering that, right, in

1 your rates?

2 MR. COUTROULIS: We have been applying for cost  
3 recovery with respect to the payments we make, and the  
4 periodic fuel and purchase power adjustment  
5 proceedings --

6 CHAIRMAN JOHNSON: I can't hear you. Speak up a  
7 bit.

8 MR. COUTROULIS: I have been applying for cost  
9 recovery in the periodic fuel and purchase power  
10 adjustment proceedings, but we are in doubt as to  
11 whether or not we are going forward in a manner that  
12 is consistent with what this Commission had in mind  
13 when it approved this contract in 1991. And I submit  
14 with all due respect, Commissioner Clark, that having  
15 gone through the 1994 pricing docket where this  
16 Commission said we think you are asking us to construe  
17 the contract, and we are not going to do that. And  
18 then we went ahead and settled the Lake matter, and  
19 came back here and everyone argued, Florida Power  
20 argued and Lake argued administrative finality. We  
21 said you had jurisdiction in '94, we still think you  
22 have jurisdiction now, but you should decline to  
23 exercise it with respect to the Lake settlement  
24 because you declined to exercise it in '94. And the  
25 Commission said no, we are going to test that

1 settlement against what we think we approved in '91.  
2 And now they go ahead and dismiss that 20-page order  
3 as a nullity. I can't think of a more ripe and  
4 appropriate time to ask for --

5 COMMISSIONER CLARK: Mr. Coutroulis --

6 MR. COUTROULIS: -- some finality.

7 COMMISSIONER CLARK: -- I would point out to you  
8 that I dissented from that order, I still dissent from  
9 that order. And for that reason I think it is res  
10 judicata with respect to the original decision and we  
11 ought to move forward.

12 MR. COUTROULIS: I understand, Commissioner  
13 Clark.

14 COMMISSIONER CLARK: Then maybe when it comes  
15 back before us as to whether cost recovery is allowed,  
16 if we reject it, then you have the issue as to whether  
17 regulatory-out applies.

18 MR. COUTROULIS: I just wanted to say we did cite  
19 the Sullivan case out of the First DCA that said a  
20 Commission's determination of its jurisdiction is  
21 never conclusive on whether or not the same tribunal  
22 can exercise jurisdiction when properly asked to do  
23 so. Every case they cite on res judicata involves a  
24 collateral attack where somebody is not happy with the  
25 decision that came out of one tribunal, so they try a

1 collateral attack and they say that first tribunal did  
2 not have jurisdiction. That is not what we are doing  
3 here. We are not going to a court and saying your  
4 jurisdictional determination was wrong. We are right  
5 back here. And there have been developments in the  
6 law that have taken place. Crossroads, with all due  
7 respect, the Commission's opinion in Crossroads does  
8 squarely speak to the issue because the cogen there  
9 argued --

10 COMMISSIONER CLARK: The New York Commission has  
11 spoken to the issue.

12 MR. COUTROULIS: I'm sorry?

13 COMMISSIONER CLARK: The New York Commission has  
14 spoken to the issue.

15 MR. COUTROULIS: Yes, that's correct.

16 COMMISSIONER CLARK: No court has other than  
17 saying you can't collaterally attack it.

18 MR. COUTROULIS: I agree. The New York  
19 Commission spoke to it, and the federal district court  
20 did not allow a collateral attack. But that  
21 Commission felt it could clarify its ruling. It's not  
22 binding on this Commission, but we think it's  
23 persuasive.

24 COMMISSIONER CLARK: You know, had all of  
25 discussion with respect to our rules and other things

1           come up at that time, there may been a different  
2           result. And I don't think that this decision today  
3           should be taken for the proposition that Mr. Wright  
4           has advanced that it is purely ministerial. I sure  
5           don't think it's purely ministerial. But we have  
6           spoken on this particular contract issue and indicated  
7           it was a contract dispute, it should be resolved at  
8           the courts. I understand that when Commissioner  
9           Deason voted for that unanimous decision he was  
10          comforted by the fact it came back here for cost  
11          recovery. I would suggest let's do it in cost  
12          recovery at that time.

13                 MR. BELLAK: If Mr. Wright turns out to be  
14                 correct about it being ministerial, will you not be  
15                 regretting these missed opportunities to declare what  
16                 it is.

17                 COMMISSIONER JACOBS: That is not our  
18                 interpretation of the statute.

19                 COMMISSIONER CLARK: But if it is ministerial, I  
20                 think that is a result of PURPA or it's a result of  
21                 the fact that we don't have -- it's a constitutional  
22                 matter of interpretation of contract, and it's not  
23                 something we had to give away to begin with.

24                 MR. COUTROULIS: Commissioners, without knowing  
25                 if it is ministerial, without knowing, if a majority



1 of this Commission -- if they are not inclined to do  
2 it now, and we think they should do it now, but if you  
3 are not inclined to do it now without knowing whether  
4 or not you believe you retain jurisdiction over cost  
5 recovery down the road, we are right back where we  
6 are. We can't settle this case, we can't govern  
7 ourselves with respect to contract administration, we  
8 can't do --

9 COMMISSIONER GARCIA: Of course you can. You've  
10 got a majority --

11 COMMISSIONER CLARK: Mr. Coutroulis, you said  
12 that you were going to win at the court.

13 MR. COUTROULIS: I intend to do so. I intend to  
14 do so.

15 COMMISSIONER GARCIA: Go win.

16 COMMISSIONER CLARK: Well, that may settle this  
17 whole thing for us if you do win.

18 MR. COUTROULIS: I don't think, though, that  
19 militates against the propriety of the declaratory  
20 statement.

21 COMMISSIONER CLARK: I understand that, and I  
22 have confidence in your abilities, but I also have  
23 confidence of the abilities of your opponents.

24 COMMISSIONER JACOBS: But even outside of that, I  
25 think the argument that it is ministerial is going to

1 have a very tough --

2 COMMISSIONER CLARK: Commissioner Jacobs, that is  
3 not the basis on which I am making --

4 COMMISSIONER JACOBS: No, I understand. But that  
5 is a very high hurdle, clearly given the -- I mean,  
6 the Panda decision has a lot of weight, and I'm drawn  
7 to the rationale of the case. I think it makes the  
8 distinction on negotiated versus standard offer.  
9 Well, it is very expressed in its terms in mentioning  
10 standard offer contracts. It could be that we are not  
11 reading that decision correctly, and if the court  
12 comes back and says we meant that to apply both to  
13 negotiated and to standard offer, then we are in a  
14 different place.

15 Those issues, though, have to evolve and have to  
16 mature. I do not -- I do want to be very clear I do  
17 not like being here. I think this is a bad place for  
18 us to be, and I will state up front that when this  
19 comes back for cost recovery, it will be very much  
20 about applying what we understand to be the prudence  
21 review for this contract, whatever that means.

22 CHAIRMAN JOHNSON: Let me be clear on one point.  
23 And I was having a discussion with Commissioner Clark,  
24 but on both of those points, on the res judicata point  
25 and whether or not we have the authority to clarify,

1 Commissioner Jacobs may be somewhere else, but I don't  
2 believe this is res judicata. I believe that the way  
3 the issues have been framed are clearly different than  
4 the way that they were framed before. Florida  
5 Power Corp is not disputing the fact, as we thought  
6 they did the last time, whether or not we have the  
7 right to interpret contract provisions as between  
8 parties. They have raised the issue as to what did  
9 this Commission intend or what were the -- to clarify  
10 our thoughts as it related to the provision 9.1.2.  
11 They framed it in such a way that I think it is  
12 appropriate for us to decide the issue, and I think  
13 that it would be necessary for us to decide the issue  
14 to provide not for the court case, but for the benefit  
15 of the companies we regulate and for the benefit of  
16 all the parties involved as to how we feel about those  
17 issues. So I would be inclined to approve staff on  
18 all issues. But we do have a motion.

19 COMMISSIONER CLARK: Well, let me just try one  
20 more time to persuade you. I guess, you know, I lost  
21 this battle the last time, and maybe I will lose it  
22 again. But one of the things that was pointed out in  
23 argument is that if they could have raised the issue  
24 at the time it came up, they were under an obligation  
25 to do that. Think about what you do for the judicial

1 system if you say, well, they didn't raise it last  
2 time and we're going to consider it this time, is that  
3 every time a party comes in and makes their argument  
4 and the court rejects that, they can come in and say,  
5 well, we didn't make this argument, but here is the  
6 argument.

7 COMMISSIONER GARCIA: Exactly. Here is another  
8 one.

9 COMMISSIONER CLARK: This specific contract  
10 provision we had before us. We were asked to  
11 interpret it, and interpret it -- and we were asked to  
12 do it with respect to our rules and orders, as I  
13 recall. And we said, no, this is a contract matter  
14 and it should be resolved that way. I think if you  
15 issue this declaratory statement you are reversing  
16 that decision.

17 COMMISSIONER DEASON: Let me say I totally  
18 disagree with that. I don't think we are reversing  
19 any decision that we made prior.

20 COMMISSIONER GARCIA: We are opening ourselves up  
21 to nit-picking. You know, you come in and you start  
22 asking for declaratory statements every other week,  
23 you are bound to hit something. Someone in staff is  
24 going to figure out, hey, we do have jurisdictional  
25 control, and so then we step up and we take

1 jurisdictional control?

2 COMMISSIONER DEASON: The reason that we denied  
3 the declaratory statement in the '94 case, I guess it  
4 was a '95 order, was that we determined that we did  
5 not have jurisdiction is because just about every  
6 attorney that I asked the question told me no, that  
7 you couldn't, so I had to accept that. That we did  
8 not have the jurisdiction to determine how the  
9 contract was going to be interpreted to bind the  
10 parties.

11 But that is not what is being requested here. It  
12 is not a request for us to interpret the contract as  
13 it would be binding on the parties. This is totally  
14 -- a totally different question. And if I had known  
15 at the time that I voted for dismissing the prior  
16 declaratory statement that it was going to be  
17 interpreted such that it could also be applied to a  
18 situation where we would be prevented from  
19 interpreting a contract as to how we would implement  
20 it for cost recovery purposes, I would have declined  
21 to have voted for the original declaratory statement.  
22 So that's why I personally think that it's a different  
23 situation altogether. But I'm ready to get this  
24 resolved. We have a motion and a second. I'm ready  
25 to take this to a vote and however it turns out, it

1 turns out, and we can go on to other business.

2 COMMISSIONER CLARK: Well, the point -- all  
3 right. I have advocated this at least twice. I'm  
4 ready to vote, too.

5 CHAIRMAN JOHNSON: There is a motion and a  
6 second. I knew it. I knew you were going to do that.

7 COMMISSIONER JACOBS: (Inaudible, microphone not  
8 on.)

9 COMMISSIONER CLARK: I think -- let me just say  
10 that, you know, I think our ultimate decision should  
11 be to deny. I think it is res judicata, but I also  
12 think it amounts to an advisory opinion to the court.  
13 We have already said we are going to send it to the  
14 court on the contract decision.

15 Commissioner Deason, I understand that you  
16 believe that notwithstanding what the court may say  
17 that under our authority to approve it for cost  
18 recovery we might reach a different result. I would  
19 suggest to you that is the time to do it. It is going  
20 to come back to us if that results. It may not come  
21 back to us. I think it is not advisable at this time  
22 to issue a declaratory statement. And let me --  
23 having said that, I understand why you have asked for  
24 it.

25 COMMISSIONER GARCIA: Absolutely.

1 UNIDENTIFIED SPEAKER: You are between the  
2 proverbial rock and the hard place with respect to  
3 some of these cases.

4 COMMISSIONER CLARK: Yes, and I guess -- you  
5 know, I feel like I am being consistent in where I  
6 have been coming from on this.

7 CHAIRMAN JOHNSON: All right. There is a motion  
8 and a second. All those in favor signify by saying  
9 aye.

10 COMMISSIONER CLARK: Aye.

11 COMMISSIONER GARCIA: Aye.

12 COMMISSIONER JACOBS: Aye.

13 CHAIRMAN JOHNSON: Opposed. Nay.

14 COMMISSIONER DEASON: Nay.

15 CHAIRMAN JOHNSON: The motion passes on a  
16 three-to-two vote. And the motion went to all issues.

17 COMMISSIONER CLARK: Right.

18 CHAIRMAN JOHNSON: In both 13 and 13A.

19 COMMISSIONER CLARK: 13A and B.

20 CHAIRMAN JOHNSON: Yes, A and B. Thank you for  
21 your participation. Thank you, Mr. Bellak and staff.

22 COMMISSIONER CLARK: Let me say once again, I  
23 appreciate the level of advocacy and the information  
24 that we have gotten. I felt the same way in the  
25 original case, that we got a lot of good advice, and I

1 appreciate the same thing this time.

2 CHAIRMAN JOHNSON: There was one --

3 COMMISSIONER GARCIA: Before we get off of this  
4 point, you know, I think that -- I believe that there  
5 was a lack of consistency when the settlement offer  
6 was brought. We have a new Commission. I think the  
7 parties should try to negotiate this out so that we  
8 can protect the interests of Florida ratepayers.

9 CHAIRMAN JOHNSON: We are going to take a short  
10 three-minute break, then we are going to come back to  
11 first Item 24A and then Item 24.

12 (Recess.)

13 CHAIRMAN JOHNSON: We are going to reconvene the  
14 agenda conference. We need to make some  
15 clarifications on Items 13A and 13B as to the motions.

16 COMMISSIONER CLARK: Madam Chairman, with respect  
17 to -- we already did Issue 1. Shall we go 13A and  
18 then do B?

19 CHAIRMAN JOHNSON: We might as well.

20 COMMISSIONER CLARK: Okay. With respect to 13A,  
21 we did Issue 1. 13B, I would move that we not issue a  
22 declaratory statement. That being the case, then I  
23 would move Issue 3 as being moot, that we don't have  
24 to decide it, and I would move we approve staff on  
25 Issue 4.



1 COMMISSIONER GARCIA: Second.

2 CHAIRMAN JOHNSON: Show that then -- well, as it  
3 relates to Issues 1, 2 -- 1 and 2, show that approved  
4 on a three-to-two vote.

5 COMMISSIONER CLARK: No, 1 was unanimously  
6 approved. That was the oral argument.

7 CHAIRMAN JOHNSON: The oral argument, yes. Show  
8 Issue 1 unanimously approved. Show Issue 2 approved  
9 on a three-to-two vote. Show Issue 3, since it is  
10 just a moot issue, I guess, unanimously approved, and  
11 Issue 4 unanimously approved.

12 COMMISSIONER CLARK: Well, I think Issue 3 should  
13 just be shown no vote, that it was moot.

14 CHAIRMAN JOHNSON: Okay, fine. Thanks.

15 COMMISSIONER CLARK: With respect to 13B, I can  
16 move staff on Issue 1.

17 COMMISSIONER GARCIA: Second.

18 CHAIRMAN JOHNSON: Any discussion? Show it  
19 approved without objection.

20 COMMISSIONER CLARK: On Issue 2, I would again  
21 move that we do not issue the declaratory statement.

22 COMMISSIONER DEASON: No, Issue 2 is a request  
23 for oral argument.

24 COMMISSIONER CLARK: That's not what I had for  
25 13B.

1           COMMISSIONER DEASON: Oh, I'm sorry, I'm looking  
2 at the wrong one.

3           CHAIRMAN JOHNSON: Oh, that's the dec statement?

4           COMMISSIONER CLARK: Right.

5           CHAIRMAN JOHNSON: Show that approved on a  
6 three-to-two vote.

7           COMMISSIONER CLARK: And then Issue 3 would be  
8 moot, and I would move staff on Issue 4.

9           CHAIRMAN JOHNSON: Show 4 approved unanimously.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA )

COUNTY OF LEON )

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 90 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 20th day of October, 1998.

Jane Faurot  
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