

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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FLORIDA PUBLIC
SERVICE COMMISSION
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FLORIDA POWER CORPORATION,

Appellant,

vs.

JOE GARCIA, etc., et al.,

Appellees;

980283

980509

CASE NO. 94,664

FLORIDA POWER CORPORATION

Appellant,

vs.

JOE GARCIA, etc., et al.

Appellees.

CASE NO. 94,665

**FLORIDA POWER'S NOTICE OF FILING
APPELLANT'S AMENDED APPENDIX**

Appellant, Florida Power Corporation ("FPC"), hereby gives notice of filing an amended appendix. This amended appendix differs from the original appendix only in that the table of contents page reflects that all of the materials in the appendix

are in the record on appeal pursuant to the Court's Order of June 2, 1999.

- AFA _____
- APP _____
- CAF _____
- CMR _____
- CTR _____
- EAG _____
- LEG _____
- REG _____
- CPA _____
- RPT _____
- SEC _____
- CTI _____

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, as well as the Amended Appendix referenced therein, was furnished by U.S. Mail to Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; James D. Wing, Esquire, 701 Brickell Ave., 30th Floor, P.O. Box 015441, Miami, FL 33101, Gail P. Fels, Esquire, Assistant County Attorney, Dade County Aviation Department, Post Office Box 592075 AMF, Miami, Florida 33159 (counsel for Dade County); Robert Scheffel Wright, Esquire, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302 (counsel for Montenay); and David E. Smith, Esquire, Director of Appeals, Florida Public Service PSC, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850 (counsel for Florida Public Service PSC) and

John Beranek, Esquire, Ausley & McMullen, P.O. Box 391,
Tallahassee, Florida 32302 (counsel for Lake Cogeneration),
this 2nd day of August, 1999.

Paul L. C. [Signature]
Attorney

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

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CASE NO. 94,664

JOE GARCIA, etc., et al.,

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APPELLANT'S AMENDED APPENDIX

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Orders 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.

DOCKET NO. 980283-EQ
ORDER NO. PSC-98-1620-FOF-EQ
ISSUED: December 4, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING FLORIDA POWER CORPORATION'S
PETITION FOR DECLARATORY STATEMENT

BACKGROUND

Florida Power Corporation (FPC) and Metropolitan Dade County (Dade), a qualifying facility (QF), entered into a Negotiated Contract (Contract) on March 15, 1991. The term of the contract is 22 years, beginning November 1, 1991 when the facility began commercial operation, and expiring July 21, 2013. The Contract was one of eight QF contracts which were originally approved for cost

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recovery by the Commission in Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ (Approval Order).

On July 21, 1994, FPC filed a petition (Docket No. 940771-EQ) seeking a Declaratory Statement that a provision of its negotiated contract was consistent with a Commission rule. In Order No. PSC-95-0210-FOF-EQ (Order 0210), the Commission granted the filed Motions to Dismiss. The Commission found that FPC was asking the Commission to adjudicate a contract dispute. The Commission held that it had no jurisdiction to adjudicate contract disputes involving negotiated cogeneration contracts.

Subsequent to the filing of FPC's petition in Docket No. 940771-EQ, Dade and other QFs filed lawsuits in the state courts for breach of contract. On January 23, 1996, the Fifth Judicial Circuit Court issued a Partial Summary Judgment for Lake Cogen Ltd. (Lake) in Case No. 94-2354-CA-01.

On February 24, 1998, FPC filed a Petition for Declaratory Statement arguing that Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ, together with Orders Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Section 366.051, Florida Statutes, and Rule 25-17.082, F.A.C., establish that its contractual energy payments to Dade, including when firm or as-available payment is due, are limited to the analysis of avoided costs based upon the avoided unit's contractually-specified characteristics.

On March 11, 1998, Dade and Montenay-Dade, Ltd. (Montenay) filed a joint petition to intervene. On April 6, 1998, Dade and Montenay filed a motion to dismiss FPC's petition for Declaratory Statement. Also on April 6, 1998, Dade and Montenay filed a request for Oral Argument concerning the topics of res judicata, collateral estoppel and administrative finality.

DISCUSSION

In our consideration of this Petition for Declaratory Statement (Petition), Florida Power Corporation (FPC) asks us to declare that the contract between FPC and Metropolitan Dade County (Dade) that we approved in Order No. 24734 (Docket No. 910401-EQ) requires that FPC (A) pay for energy based upon avoided energy costs, strictly as reflected in the contract; (B) use only the avoided unit's contractually specified characteristics rather than additional characteristics that might have been applicable to a plant that had actually been built, in assessing operational status

for determining whether Dade is to receive firm or as-available energy payments; and (C) use the actual chargeout price of fuel to FPC's Crystal River Plants 1 and 2 in computing the level of firm energy payments to Dade, rather than the price at the time the contract was executed, or some other basis of calculation.

In responding to this petition, we are mindful of FPC's earlier petitions, dated July 21, 1994 and November 1, 1994, which also addressed the interpretation of pricing clauses in the series of negotiated cogeneration contracts which includes this contract with Dade. We dismissed those earlier petitions in Order No. PSC-95-0210-FOF-EQ (Docket No. 940771-EQ), based on the following conclusions:

...PURPA [Public Utility Regulatory Policies Act of 1978] and FERC's [Federal Energy Regulatory Commission] regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process ~~once it has been successful~~ and the contracts have been approved.

While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts.

Order 0210 at p. 6.

Therefore, whether FPC's implementation of the pricing provision [in these negotiated contracts] is consistent with the [standard offer] rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. [e.s.]

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We defer to the courts to answer the question of contract interpretation raised in this case.

Order 0210 at p. 9.

In its current Petition, FPC asks us to consider certain authorities which post-date Order 0210 in determining whether the Commission can nonetheless exercise jurisdiction to issue the declaratory statement that FPC now petitions for. Those cases include the New York Public Service Commission's opinion in Orange and Rockland Utilities, Inc. (Crossroads), Case 96-E-0728; the Florida Supreme Court's decision in Panda-Kathleen, L.P. v. Clark, et al. (Panda), 701 So. 2d 322 (Fla. 1997) and our own Order Denying Approval of Proposed Settlement (Lake), Order No. PSC-97-1437-FOF-EQ in Docket No. 961477-EQ.

In Crossroads, which concerned a negotiated power purchase agreement between a utility and a cogenerator, the NYPS&C held that

it is within our authority to interpret our power purchase contract approvals.... The precedents involving interpretation of past policies and approvals, and not the contract non-interference policy that Crossroads cites, control here. [e.s.]

Crossroads, p. 5

While Panda involved a standard offer contract, FPC interprets the Florida Supreme Court's opinion to provide that

the Commission has jurisdiction to clarify its orders and to construe its rules in order to ensure that contracts and payments thereunder do not exceed avoided cost.

Petition, at p. 14.

Finally, FPC points out that, consistent with Crossroads and other like holdings of the NYPS&C, our Lake order reasoned that the cited New York cases

involve a question that turns on what was meant when the contract was approved, and not on the determination of

disputed facts and the application of those facts to an unambiguous provision.

Petition, p. 13-14.

In the adjudication of the instant petition, however, we find that we are unable to apply these more recent cases as directly to the case at hand as FPC argues we should. First, this case is distinguishable from both Crossroads and Panda in that neither of those cases involved a prior determination which could be claimed to be, in effect, res judicata as to the current controversy concerning pricing between FPC and parties (including Dade) to the negotiated cogeneration contracts containing these identical pricing provisions. The cogenerators, during oral argument, asserted that, however we may decide to reflect such holdings as Crossroads or Panda in our future dispositions as to negotiated cogeneration contract issues, this controversy has already been determined in our dismissal of FPC's prior petitions in Order 0210 and may not be re-adjudicated now. We agree with that point and find that the doctrine of administrative finality precludes such re-adjudication as a matter of fairness to those who prevailed in the litigation of this issue previously. Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966). Moreover, our Lake order was only proposed agency action (PAA), which then became a legal nullity when the settlement proposal considered therein lapsed. Therefore, it never matured into a final order so as to constitute this Commission's precedent.

In thus denying FPC's petition, we need not reach today the issue of whether such cases as Crossroads, the reasoning in our Lake order or FPC's interpretation of Panda will or will not play a role in our consideration of future cases concerning negotiated cogeneration contracts post-approval. We only decide that, having resolved this pricing controversy previously in Order 0210, the prior resolution must stand, consistent with the principles of administrative finality.

Based on the above, it is

ORDERED by the Florida Public Service Commission that Metropolitan Dade County and Montenay-Dade, Ltd's Request for Oral Argument is granted. It is further

ORDERED that Florida Power Corporation's Petition for Declaratory Statement is denied. It is further

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ORDERED that Metropolitan Dade County and Montenay-Dade, Ltd.'s Motion to Dismiss is moot. It is further

ORDERED that this docket is closed.

By Direction of the Florida Public Service Commission, this
4th day of December, 1998.

Blanca S. Sayo

BLANCA S. SAYO, Director
Division of Records and Reporting

(S E A L)

RCB

Commissioner Deason dissents. Chairman Johnson dissents, as set forth below:

I dissent. On November 25, 1996, FPC filed a Petition for Approval of a Settlement Agreement with Lake Cogen which resolved the energy pricing dispute as between itself and Lake. At the August 18, 1997, agenda conference, the item was deferred and the parties were directed to file supplemental briefs on the issues of 1) the "regulatory out" clause contained in the power purchase agreement and 2) the impact of the New York Public Service Commission's decision that it had jurisdiction to interpret and clarify its approval of negotiated power purchase agreements. Orange and Rockland Utilities, Inc., Case No. 96-E-0728 (Crossroads). The supplemental briefs were filed on August 29, 1997. The Commission ultimately denied the Settlement Agreement by Order No. PSC-97-1437-FOF-EQ, issued November 14, 1997 (Lake Order), finding in part that it would result in costs that were in excess of the current contract.

The majority declines to apply the holdings in the Crossroads and Panda decisions, or even the analysis in the Lake order, which was identical to the analysis FPC asks us to declare in the Petition before us here, because this case

involved a prior determination which could be claimed to be, in effect, res judicata as to the current controversy concerning pricing between FPC and parties (including Dade) to the negotiated cogeneration contracts containing these identical pricing provisions.

Supra, p. 6.

I believe that claim fails because it inaccurately describes both the past and present determinations. While both cases have in common the concern re: pricing of cogenerated power under the same contract terms, the two cases actually litigate two different jurisdictional issues. The first case dealt with what we considered to be an attempt to create general FPC adjudicatory jurisdiction over post-approval contract disputes concerning negotiated cogeneration contracts, an attempt which we correctly rejected. This case, in contrast, concerns the application of recent precedents which have authoritatively been found not to constitute the assertion of the kind of negotiated contract adjudication jurisdiction which we previously rejected. Indeed, Crossroads explicitly concerned

[t]he precedents involving interpretation of past policies and approvals, and not the contract non-interference policy... [e.s.]

As the New York Public Service Commission therein stated,

...it is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. [e.s.]

Case 96-E-0728, p. 5.

Therefore, I believe we had before us in this case a different question than the one previously reached in Order 0210. Here, we were asked whether we would issue a declaratory statement explaining our approval of the contract in question, as an entirely separate matter from the assertion of jurisdiction over the contract dispute now before the court. Moreover, like the New York Commission in Crossroads, our authority to interpret our power purchase contract approvals has been upheld by the courts. Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), cert den, U.S. (1999). It is inappropriate to condition the Commission's jurisdiction on such concepts as res judicata under

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these circumstances. Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So. 2d 249, 253 (1982).

This is especially so because of our ongoing roles in the areas of reviewing cost recovery and proposed settlements. If we are to carry out these responsibilities in a manner that provides fairness to the parties and the ratepayers, we must, as a matter of policy, be willing to explain or clarify what we approved, when uncertainty arises. In Order 0210, we noted that, under FERC's regulations implementing PURPA,

[s]tates and their utility commissions are directed to encourage cogeneration...

Supra, p. 5. There is nothing to suggest, however, that encouraging cogeneration should take the form of saving or protecting cogenerators from the effects of the agreements they freely entered into when those agreements -- as approved by us -- yield less than was hoped for. Yet, our failure to explain or clarify what we approved may have that result.

As the Lake order concerning a settlement proposal between FPC and another cogenerator involving the same contract pricing controversy illustrates, this issue will unavoidably be presented to us for resolution again for reasons other than the contract disputes before the courts. The majority's decision avoiding the issue only postpones the inevitable.

The Commission has been, for some time, in need of a path midway between the extremes of post-approval interference with negotiated cogeneration contracts, like the actions taken by the regulatory board in Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F. 3d 1179 (3rd Cir. 1995), and leaving the parties and the courts without any explanation whatsoever by this Commission, the expert agency which approved the agreement, as to what was approved. Crossroads provides a path "between Scylla and Charybdis" in these cases, and I would have taken that path.¹

¹ Given the independence of the courts, I reject the suggestion that it would be unfair to any party for us to explain what was approved. First, no party can claim unfairness in being limited to what was approved, if that is the result. Second, we have often explained our position in cases where there were

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

important Florida ratepayer interests, even though a different tribunal had ultimate jurisdiction. See, Consolidated Gas v. City Gas; TEC v. FPL; Praxair v. FPL & FPC; DOE v. State of Michigan; Iowa State Board v. FCC; all of which were in the jurisdiction of the federal courts and in all of which we informed the court of our position.

2

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 No. PSC-97-1437-FOP-EQ and 24989, FCPA, Florida Statute 366.031, 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. 980203-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-FOP-EQ, Rule 25-17.082, 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. 980309-EQ

BEFORE:

CHAIRMAN JULIA A. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUEAN 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

PROCEEDINGS

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

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

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

And I might point out very briefly that the

APPEARANCES:

CHRIS COOTROULIS and JIM MCGEE, ESQUIRE,
representing Florida Power Corporation

LEE WILLIS, ESQUIRE, representing Lake Cogen

SCHIFFEL WRIGHT, ESQUIRE, representing Dade
County and Montanary

STAFF RECOMMENDATION FOR 13A

Issue 1: Should the Commission grant Dade's request for
OFAL 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
HEXSLING 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.

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

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

CHAIRMAN JOHNSON: Thank you, Mr. Bellak.

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

MR. BELLAK: That was a standard offer contract. But apparently that was not the basis on which the 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 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 309 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 these

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 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 138,

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 Agric. 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 how 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: Oh-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 these 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 ways on declaratory statements as to the grant of an
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 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 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 these 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 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 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 Montannay (phonetic.) My primary purpose
12 sitting at the table today is to speak on behalf of
13 Dade County and Montannay. 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 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 these 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 1993, it
25 ruled that it lacked jurisdiction to determine whether

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 1993 order I
25 referenced before ruled that it lacked jurisdiction to

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 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 interveners 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 Freshfield 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 Freshfield clearly does
8 not preempt the Commission from explaining and
9 clarifying what it, in fact, approved in 1991
10 unmodified. Indeed, as Mr. Ballak 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 166.051 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 forget.

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 forget 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 3B, 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 4B, it is now 3B. 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 These 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 these 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 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 these 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 these 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 these contracts were approved by the
16 Commission in 1991. The same language had to mean the
17 same thing. And we knew 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 cogener-
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 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 a
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 these agreements, or
19 these 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 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 these 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 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.

ask for this. PC, I think, acted in good faith. They said -- they came to us and there I do believe we do have jurisdiction, and you are absolutely right, in that case you came before us not to say to the right or wrong. You said, Commissioner, this is our possible exposure. MR. CORTHOUS: But the Commission construed that '94 petition -- with all due respect, Commissioner Garcia -- right or wrong, in asking the Commission to resolve the contract dispute. The order is clear on that. I don't think that was the right way for the Commission to look at that petition, but it's clearly the way they looked at it. COMMISSIONER CLARK: Hold on, which petition are you talking about, the original one? COMMISSIONER GARCIA: Which petition are you talking about? MR. CORTHOUS: Yes, the '94 petition. How we are simply asking please clarify the date -- COMMISSIONER GARCIA: But you are taking that out of context. You were before -- your client was before a court with the people you had entered into a contract with, were before a court, and we -- Florida, let me not say we. Florida had a potential exposure to the employers, it's company, and this party who

MR. CORTHOUS: And it is particularly a central issue, though, because of something that happens to arise in this negotiated contract, and that is this negotiated contract happens to have a reg out clause. It did not have to have a reg out clause. They are not required to be in negotiated contracts. They are permitted. If you didn't have a reg out clause in this contract this Commission could say, we approved \$100 for cost recovery, but we can't tell you what we agreed to in the contract, we can tell you what we approached when we approved the contract. The parties go to a court and the court says, well, I think the utility obligated itself to pay \$100. Well, that happens then? No one \$100, but this Commission is only going to pass-through 100.

We are saying there is something you very clearly have jurisdiction to do. You have jurisdiction to explain and clarify the basis on which you approved this thing for cost recovery in 1991. We believe you should tell us what terms and conditions and rates you approved in 1991. It's highly relevant. It is relevant to our administration of the contract. COMMISSIONER GARCIA: It's a central issue to this dispute.

MR. CORTHOUS: And it is particularly a central issue, though, because of something that happens to arise in this negotiated contract, and that is this negotiated contract happens to have a reg out clause. It did not have to have a reg out clause. They are not required to be in negotiated contracts. They are permitted. If you didn't have a reg out clause in this contract this Commission could say, we approved \$100 for cost recovery, but we can't tell you what we agreed to in the contract, we can tell you what we approached when we approved the contract. The parties go to a court and the court says, well, I think the utility obligated itself to pay \$100. Well, that happens then? No one \$100, but this Commission is only going to pass-through 100.

COMMISSIONER CLARK: And they are between a rock and a hard place because on identical facts we approved a settlement and the next time it came around we disagreed it. COMMISSIONER GARCIA: You are absolutely right. You are absolutely right. COMMISSIONER CLARK: And that is all he is saying. As I understood it when he came out and said this is a housekeeping matter, what we want to know is what you are going to say that you would approve pursuant to -- as a way of explaining your order when you approved it. COMMISSIONER GARCIA: Madam Chairman. MR. CORTHOUS: That terms and conditions did you approve back in 1991. COMMISSIONER GARCIA: Commissioner Clark, but we put ourselves in that position. COMMISSIONER CLARK: I agree with that. COMMISSIONER GARCIA: And that we -- that there -- that the majority which is -- we have a different Commission now. Time has passed. There are different numbers of this Commission. Hopefully, new members of this Commission won't make the same mistake. But that being said, that being said, we put ourselves in this place. The parties who signed this contract did not

had signed a contract. And so you came to us and said, look, solve this contractual dispute. But we weren't solving a contractual dispute, we were proceeding from that point forward. To limit the exposure to our ratepayers, to limit the exposure to our IOU, and to honor the terms of a contract that we had entered into that this state had promised through federal legislation and our own policies to move forward from that point. And so what were doing wasn't resolving a contractual dispute, we were resolving something that you brought before us and this was the proper place, because your client had to get cost recovery. Your client had to figure out how it worked, and here is where you brought it. MR. CORTHOUS: But, Commissioner Garcia, you are referring to the late settlement, and I was referring back to the 1994 pricing petition that Florida Power filed. Florida Power filed a petition right after it implemented section 9.1.2. This Commission construed that petition, right or wrong, in asking this Commission to resolve a contract dispute between two parties to a negotiated contract. And this Commission held it had no jurisdiction to do that, and we are not challenging that determination

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 copans
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 these
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 these
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 them 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 McMillen
13 representing Lake Cogan 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 Kieseling. 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 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 Cogan 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 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 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 1999, 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 1969, 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 Corp's 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 say --

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 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 -- as 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 price 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 MR. WILLIS: You approved a contract in 1991 --

2 CHAIRMAN JOHNSON: Oh-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 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 these 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 1998 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 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 knew
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 that, and that you said that FURPA 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. FURPA 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 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 -- Mr. 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 Freshfield, if you look
3 at Crossroads, no material issue was affected in
4 either one of these decisions. One was for mere
5 generation, if I'm not mistaken, Crossroads. And
6 Freshfield 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 held 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 Freshfield, there was no material issue in

1 Crossroads.

2 By attending both of these 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 FPC 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 Gutar,

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 want 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 these 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 own 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 these
19 contracts?

20 MR. DOOLBY: 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 these 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 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 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, FPC, if you deal with any utility in Florida,
9 watch out, because the FPC retains jurisdiction over
10 these 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 rell 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 Guntar, 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 these decisions has to do with a contract. That's why
25 staff steps up and says, "Well, in the contract. I,

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 these 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 these 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 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:
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 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 while 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 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. BELLAR: 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. BELLAR: 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 as 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 it 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 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 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 leak 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
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 contemplates a real operable 1991 pulverized coal we
2 having all the pertinent characteristics.

3 COMMISSIONER JACOBS: Understood. Understood.
4 That's not my focus. My focus here is that this was
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. DODLEY: Florida Power Corp's 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 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 Cogum 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 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. DODLEY: 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 25-17.00324, 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 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 FPC 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. COUROLIS: Commissioner Garcia, this

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 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. COUROLIS: 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. COUROLIS: -- 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. COUROLIS: 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 avoided cost, and the template benchmark was the
2 standard offer contract rule. Just look at
3 25-17.06322, 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 these 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 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 listened 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 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 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 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 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 Schaffal
10 Wright, I'm with the law firm of Landers and Parsons.
11 I am here representing Miami Dade County and Montanay
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 Montanay 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 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 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 apologise,
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 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 doc statement

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 Freshhold, 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 these 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 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 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: Sub-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 Coutreoulis' 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 filed a motion for summary judgment on the very issue
2 in dispute. The court denied their summary judgment.
3 They lost. We didn't win in that the court denied on
4 partial motion for summary judgment, as well, but the
5 invoked the court's jurisdiction, they lost. They ar
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 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 say or say 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 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 see 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 Freshfield 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 want 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 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 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 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 OF 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 Montanary,
4 and by Lake-Cogan, and by three other OFs, 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 Montanary 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 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 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 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 GP 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 Montanney 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 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 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 CHAIRMAN JOHNSON: You have about a minute left.

2 MR. COUTROULIS: Rule 23-22.022 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 1991 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 1993.
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 1993 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 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 those
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 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 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 these 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 held 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 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 --

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 SRC 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 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 cogan had a reason to be upset because
23 the New Jersey Commission in trying to help the
24 ratepayers wanted to undo the cogan from the fruits of
25 what was approved by the New Jersey Commission. The

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 cogan'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 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 cogan 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 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 knew 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 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. Now
4 is what it meant. The court said something else, I
5 got 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 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 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 affects 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 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 new 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 and not new. 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 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 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, is 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: Oh -- 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 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 these?

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 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 -- FTC 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 these 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 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 action 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 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 prudance
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 action was to
17 defer?

18 COMMISSIONER CLARK: To deny it.

19 CHAIRMAN JOHNSON: Let me ask may be a question
20 for Commissioner Clark. That 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 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 these 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

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1 COMMISSIONER JOHNSON: I have been applying for cost recovery with respect to the payments we make, and the periodic fuel and purchase power adjustment proceedings --

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

3 MR. JOHNSON: I can't hear you. Speak up a bit.

4 MR. COTTELL: I have been applying for cost recovery in the periodic fuel and purchase power adjustment proceedings, but we are in doubt as to whether or not we are going forward in a manner that is consistent with what the Commission had in mind when it approved the contract in 1991. And I submit with all due respect, Commissioner Clark, that having gone through the 1994 pricing docket where the Commission said we think you are asking us to conserve the contract, and we are not going to do that. And then we went ahead and settled the Lake water, and came back here and everyone argued, Florida Power argued and Lake argued administrative finality. We said you had jurisdiction in '94, we still think you have jurisdiction now, but you should decline to exercise it with respect to the Lake settlement because you declined to exercise it in '94. And the Commission said no, we are going to cost that

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1 COLLECTOR ATTACK AND THEY SAY THAT STATE TRIBUNAL DOES NOT HAVE JURISDICTION. THAT IS NOT WHAT WE ARE DOING HERE. WE ARE NOT GOING TO A COURT AND SAYING YOUR JURISDICTIONAL DETERMINATION WAS WRONG. WE ARE RIGHT BACK HERE. AND THERE HAVE BEEN DEVELOPMENTS IN THE LAW THAT HAVE TAKEN PLACE. CROSSROADS, WITH ALL DUE RESPECT, THE COMMISSION'S OPINION IN CROSSROADS DOES EQUALLY SPEAK TO THE ISSUE BECAUSE THE COURT THERE ARGUED --

2 COMMISSIONER CLARK: THE NEW YORK COMMISSION HAS SPOKEN TO THE ISSUE.

3 MR. COTTELL: I'M SORRY?

4 COMMISSIONER CLARK: THE NEW YORK COMMISSION HAS SPOKEN TO THE ISSUE. MR. COTTELL: YES, THAT'S CORRECT.

5 MR. COTTELL: YES, THAT'S CORRECT.

6 COMMISSIONER CLARK: NO COURT HAS OTHER THAN SAYING YOU CAN'T COLLECTIVELY ATTACK IT.

7 MR. COTTELL: I AGREE. THE NEW YORK COMMISSION SPOKE TO IT, AND THE FEDERAL DISTRICT COURT DID NOT ALLOW A COLLECTIVE ATTACK. BUT THAT COMMISSION Felt IT COULD CLARIFY ITS RULING. IT'S A BINDING ON THE COMMISSION, BUT WE THINK IT'S PERTINENT.

8 COMMISSIONER CLARK: YOU KNOW, HAD ALL OF DISCUSSION WITH RESPECT TO OUR RULES AND OTHER THINGS

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1 SETTLEMENT AGAINST THAT WE THINK WE APPROVED IN '91. AND NOW THEY GO AHEAD AND DISMISSES THAT 20-PAGE ORDER AS A NULLITY. I CAN'T THINK OF A MORE APPROPRIATE TIME TO ASK FOR --

2 COMMISSIONER CLARK: MR. COTTELL --

3 MR. COTTELL: -- SOME FINALITY.

4 COMMISSIONER CLARK: -- I WOULD POINT OUT TO YOU THAT I DISSENTED FROM THAT ORDER. I STILL DISSENT FROM THAT ORDER. AND FOR THAT REASON I THINK IT IS FOR JUDICIALS WITH RESPECT TO THE ORIGINAL DECISION AND WE OUGHT TO MOVE FORWARD.

5 MR. COTTELL: I UNDERSTAND, COMMISSIONER CLARK.

6 COMMISSIONER CLARK: THEN MAYBE WHEN IT COMES BACK BEFORE US AS TO WHETHER COST RECOVERY IS ALLOWED, IT WE REJECT IT, THEN YOU HAVE THE ISSUE AS TO WHETHER REGULATORY-OVERS APPLIES.

7 MR. COTTELL: I JUST WANTED TO SAY WE DID COST THE BULLIVAN CASE OUT OF THE STATE DOX THAT SAID A COMMISSION'S DETERMINATION OF THE JURISDICTION IS NEVER CONCLUSIVE ON WHETHER OR NOT THE SAME TRIBUNAL CAN EXERCISE JURISDICTION WHEN PROPERLY ASKED TO DO SO. EVERY CASE THEY CITE ON THE JUDICIALS INVOLVES A COLLECTIVE ATTACK WHERE SOMEBODY IS NOT HAPPY WITH THE DECISION THAT CAME OUT OF THE TRIBUNAL, SO THEY TRY A

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1 YOUR CASE?

2 MR. COTTELL: WE HAVE BEEN APPLYING FOR COST RECOVERY WITH RESPECT TO THE PAYMENTS WE MAKE, AND THE PERIODIC FUEL AND PURCHASE POWER ADJUSTMENT PROCEEDINGS --

3 CALVIN JOHNSON: I CAN'T HEAR YOU. SPEAK UP A BIT.

4 MR. COTTELL: I HAVE BEEN APPLYING FOR COST RECOVERY IN THE PERIODIC FUEL AND PURCHASE POWER ADJUSTMENT PROCEEDINGS, BUT WE ARE IN DOUBT AS TO WHETHER OR NOT WE ARE GOING FORWARD IN A MANNER THAT IS CONSISTENT WITH WHAT THE COMMISSION HAD IN MIND WHEN IT APPROVED THE CONTRACT IN 1991. AND I SUBMIT WITH ALL DUE RESPECT, COMMISSIONER CLARK, THAT HAVING GONE THROUGH THE 1994 PRICING DOCKET WHERE THE COMMISSION SAID WE THINK YOU ARE ASKING US TO CONSERVE THE CONTRACT, AND WE ARE NOT GOING TO DO THAT. AND THEN WE WENT AHEAD AND SETTLED THE LAKE WATER, AND CAME BACK HERE AND EVERYONE ARGUED, FLORIDA POWER ARGUED AND LAKE ARGUED ADMINISTRATIVE FINALITY. WE SAID YOU HAD JURISDICTION IN '94, WE STILL THINK YOU HAVE JURISDICTION NOW, BUT YOU SHOULD DECLINE TO EXERCISE IT WITH RESPECT TO THE LAKE SETTLEMENT BECAUSE YOU DECLINED TO EXERCISE IT IN '94. AND THE COMMISSION SAID NO, WE ARE GOING TO COST THAT

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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 bank 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 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 Fever 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 these
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 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 These 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 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

jurisdictional control?

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

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

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

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

CHAIRMAN JOHNSON: All right. There is a motion and a second. All these in favor signify by saying aye.

COMMISSIONER CLARK: Aye.

COMMISSIONER GARCIA: Aye.

COMMISSIONER JACOBS: Aye.

CHAIRMAN JOHNSON: Opposed. Nay.

COMMISSIONER DEASON: Nay.

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

COMMISSIONER CLARK: Right.

CHAIRMAN JOHNSON: In both 13 and 13A.

COMMISSIONER CLARK: 13A and B.

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

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

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

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

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

COMMISSIONER JACOBS: (Inaudible, microphone not on.)

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

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

COMMISSIONER GARCIA: Absolutely.

appreciate the same thing this time.

CHAIRMAN JOHNSON: There was one --

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

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

(Recess.)

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

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

CHAIRMAN JOHNSON: We might as well.

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

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 5 CERTIFICATE OF REPORTER
 6 STATE OF FLORIDA)
 7 COUNTY OF LEON)
 8 I, JAMES FABROT, RPR, do hereby certify that the
 9 foregoing proceeding was transcribed from cassette tape,
 10 and the foregoing pages number 1 through 90 are a true and
 11 correct record of the proceedings.
 12 I FURTHER CERTIFY that I am not a relative, employee,
 13 attorney or counsel of any of the parties, nor relative or
 14 employee of such attorney or counsel, or financially
 15 interested in the foregoing action.
 16 DATED THIS _____ day of October, 1998.
 17
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 24
 25

JAMES FABROT, RPR
 P. O. Box 10751
 Tallahassee, Florida 32302

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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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

by Florida Power Corporation

PETITION FOR DECLARATORY STATEMENT

Florida Power Corporation ("FPC" or the "Company") hereby petitions the Florida Public Service Commission ("the Commission"), pursuant to Rule 25-22.020, et. seq., F.A.C., as follows.

FOR A DECLARATORY STATEMENT that, under Order No. PSC-97-1437-FOF-EQ entered in Dkt. 961477-EQ, Nov. 14, 1997 (the "Lake Docket"), the Public Utilities Regulatory Policy Act ("PURPA"), Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C, the Commission interprets its Order No. 24734 entered in Dkt. 910401-EQ, July 1, 1991 (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between the Company and Metropolitan Dade County (the "Negotiated Contract" or "Contract" between FPC and "Dade"), to require that FPC:

- (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
- (B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments;
- (C) Use the actual chargeout price of coal to FPC's Crystal River ("CR") plants 1 and 2, resulting from FPC's prevailing mix of transportation, rather than the mix of transportation in effect at the time the Contract was executed or some other mix, to compute the level of firm energy payments to Dade.^{1/ 2/}

^{1/} It should be noted that the Lake Order is the subject of a petition filed by NCP Lake Power, Inc. and Lake Cogen, Ltd., protesting the proposed PSC action. FPC has opposed that petition. In light of the language and reasoning in the Lake Order expressing the Commission's views concerning the determination of energy payments, the need for the declaratory statement requested by this Petition will remain regardless of what action is taken on Lake's pending petition.

^{2/} Although FPC has filed this Petition as a request for a declaratory statement and believes that is the appropriate procedural vehicle for resolving these issues; if the Commission is of the view that the scope of this proceeding should be expanded, FPC would not object to converting the matter to one brought under Fla. Stat. 120.57. FPC would only request that, notwithstanding such a revised procedural format, the Petition proceed expeditiously in light of the ongoing dispute with Dade and Montenay (as described below).

NAME AND BUSINESS ADDRESS

The petitioner's name and business address are:

Florida Power Corporation
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P.O. Box 14042
St. Petersburg, FL 33733-4042

All notices, pleadings and correspondence should be directed to:

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CONTEXT AND BACKGROUND

The 1991 Approval Docket

1. On March 19, 1991, FPC presented to the Commission eight negotiated contracts it had reached with Dade County, Lake Cogen, Pasco Cogen, Auburndale Power Partners (El Dorado), Orlando Cogen Limited, Ridge Generating Station, Mulberry, and Royster. As contemplated by these contracts, FPC asked the Commission to approve the stream of energy payments to be made thereunder. On July 1, 1991, by Order No. 24734, the Commission issued its order of approval.

The 1994 Pricing Docket

2. On July 21, 1994, FPC initiated the Pricing Docket, petitioning the Commission for a declaratory statement that FPC's reliance on the pricing mechanism specified in § 9.1.2 of the negotiated contracts with certain QFs complied with Rule 25-17.0832(4)(b), F.A.C., and the Commission's 1991 Order No. 24734 approving those contracts. On October 31, 1994, FPC amended its petition to seek a determination that its manner of implementing the pricing mechanism in § 9.1.2 was lawful under § 366.051, Fla. Stat., and complied with Rule 25-17.0832(4)(b), F.A.C. as well as Commission Order No. 24734.

3. A number of affected QFs, including Dade, filed motions to dismiss on the ground that the Commission lacked jurisdiction to consider the petition. By its Order dated February 15, 1995, the Commission granted those motions and dismissed the petition. Although stating that § 9.1.2 of the negotiated contracts "establishes the method to determine when cogenerators

are entitled to receive firm energy payments or as-available energy payments," the Commission concluded that, absent a showing of fraud, misrepresentation or mistake, it would not exercise continuing control to interpret the meaning of a disputed term in a negotiated contract it had previously approved. However, as the Commission later noted, the Order in the Pricing Docket "recognized the Commission's continued responsibility for cost recovery review." Lake Order at 3. No appeal was taken from the Commission's Order.

**The Commission's Order
Rejecting the Lake Settlement**

4. As the Commission is aware, following the dismissal of FPC's petition in the Pricing Docket, the Circuit Court for Lake County entered summary judgment against FPC stemming from the Company's methodology for determining when firm or as-available energy payments are due under § 9.1.2. NCP Lake Power, Inc. v. FPC, Case No. 94-2354-CA-01 (Lake Cir. Ct.). The Lake Court held that, in determining whether to pay at the firm or as-available rate, FPC must make payments "with reference to modeling the operation of a real, operable 1991 Pulverized Coal Unit, having the characteristics required by law to be installed on such a unit as well as all other characteristics associated with such a unit...." It found that FPC had breached the Lake Contract by determining whether to pay the firm or as-available rate using only the characteristics specified in the contract.²

5. On December 6, 1996, after the Lake Court's Order was entered, FPC and Lake entered into a settlement agreement, compromising their dispute. The agreement was presented

² With respect to energy payments, FPC's Contract with Dade is identical, in all material respects, to its contract with Lake.

to the Commission for approval by FPC's petition in Dkt. No. 961477-EQ, dated December 12, 1996. By Notice of Proposed Agency Action, dated November 14, 1997, the Commission exercised its jurisdiction to decline approval of the settlement on the grounds that the payments to Lake thereunder would be too high in relation to the Commission's view of avoided costs and the energy payments that would otherwise be due under the parties' existing contract as previously approved. The Lake Order, as well as the governing statutes and rules cited above, provides the impetus for the instant petition.

FPC's Determination of Avoided Energy Costs

6. Florida Power is obligated to ensure that its ratepayers pay no more than avoided cost for energy. Thus, consistent with its understanding of the Lake Order, as well as PURPA, Fla. Stat. § 366.051, and Rule 25-17.0832, FPC looks to the Commission's Order in the Approval Docket and the energy pricing provision of the Negotiated Contract to determine the energy payments made to Dade.

7. Section 9.1.2 of the Contract defines the pricing mechanism for determining, on an hour-by-hour basis, when Dade is to be paid the Firm Energy Cost and when Dade is to be paid the As-Available Energy Cost. It also provides the mechanism for calculating the level of the Firm Energy Cost. Section 9.1.2 provides as follows:

Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based on the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii)

during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

8. On July 18, 1994, Florida Power notified Dade that, effective August 1, 1994, it would be implementing the pricing mechanism specified in the Contract to establish the periods when as-available energy payments, rather than firm energy payments, would be made. FPC has been paying Dade for energy under its Negotiated Contract in this fashion since August, 1994, and continues to do so. Also, over the years since the Negotiated Contract was signed, FPC has instituted changes in its transportation of coal to CR 1 & 2, increasing the mix of rail transportation vis a vis barge to those facilities.

9. FPC determines the operational status of the avoided unit against which Dade's Negotiated Contract is priced by modeling it in FPC's computer dispatch pricing runs. In conducting the computer analysis of its system, Florida Power implements the Contract pricing mechanism in a manner consistent with the established methodologies for dispatching units and calculating avoided energy costs. The status of the avoided unit, as defined by the payment options elected in each of the negotiated contracts which were the subjects of the Approval Docket (Options A, B or C),^{4/} is determined by a production cost model (WesCougher, a type of economic optimization model; formerly Unit Commit), which is standard practice in the electric utility industry. The production cost model enables FPC to "dispatch" its generating

^{4/} Option A, which Dade chose, provides for energy payments based on operating characteristics specified in Section 9.1.2 (the Avoided Unit Fuel Reference Plant fuel price, times a 1.0 Fuel Multiplier, times the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M). Option B provides the same energy payment except that the Avoided Unit Variable O&M is removed and included in the capacity payment. Option C provides the same energy payment except that the Avoided Unit Variable O&M and 20% of the Avoided Unit fuel price are removed and included in the capacity payment.

plants (i.e. determine their on/off status) and manage its power purchases on a least-cost basis during each hour. The model operates by comparing the cost of the avoided unit to all other available resources and selecting a group of units and power purchases that minimize the total cost of meeting the demand for electricity. In so doing, the model determines whether the "avoided unit" as contractually defined is on or off, and also determines the level of the as-available energy payments when the model indicates that the avoided unit does not operate.

10. More specifically, to implement § 9.1.2, FPC first determines the cost of the amount of power in a given hour FPC generated from its own resources. Then, FPC increases system load to include the amount of power provided by various cogenerators, including Dade, that same hour. An additional system resource is added to FPC's generation in this step: a unit with the characteristics and numeric values specified in the Dade (and other similar) cogen contracts in § 9.1.2 and the referenced appendices. Thus, for this resource, FPC utilizes the applicable monthly chargeout price of fuel, the fuel multiplier, the average heat rate, and the variable operation and maintenance expense specified in the Negotiated Contract.^y The operational status of the avoided unit (i.e., whether it would be scheduled on-line or off-line) is based solely on these specified proxy characteristics as set forth in § 9.1.2 and its referenced appendices. The determination of the avoided unit's operational status is not affected by the myriad of other or additional characteristics, which are not contained in the Negotiated Contract but which could have been associated with a coal unit, had it actually been built instead of avoided.

^y Variable O&M, as specified in the contract, is included for this unit as well as for FPC's actual steam generation units. Variable O&M is also a component of the firm energy price as specified in 9.1.2.

11. The production cost model is then run again. If the avoided unit, represented by the proxy characteristics set forth above, would have been dispatched (i.e., turned on) at any level of output, Dade and the other similarly situated cogens receive the firm energy price for all the power they supplied to FPC in that hour. If this unit would not have been dispatched at any level of output, the energy provided by Dade and the other similarly situated cogens is added to the as-available block size for those hours. An as-available energy price is then calculated and paid to Dade and the other similarly situated cogens for the power they provided that hour.

12. The methodology used by FPC is required by § 9.1.2 because that section serves as a pricing proxy for determining when firm or as-available payments are due. It does this by calling for an hour-by-hour determination of the on/off status of the avoided unit, based upon the enumerated four characteristics of that unit that are specifically set forth in the Contract and reflect its avoided cost. FPC believes it would be improper to assume a myriad of other or additional characteristics or values for them that are not contained in the Contract, or to consider them in making the on/off determination. FPC also believes that its method for dispatching the avoided unit, based solely on the enumerated characteristics in the Contract, is consistent with the way the Commission has interpreted Rule 25-17.0832(5), the energy pricing rule that governs standard offer contracts.⁴⁷ The methodology yields a result that closely approximates FPC's avoided energy cost, since it compares, on an hourly basis, FPC's system marginal cost

⁴⁷ Prior to amendment in 1997, the Rule appeared as 25-17.0832(4).

with the avoided energy cost from the unit (represented by the Contract's firm energy price), and, with limited exceptions,^{2/} effectively pays the lesser of the two.

13. In calculating the level of the firm energy payments when they are due under § 9.1.2 of the Contract, FPC utilizes the actual delivered price of coal at the Fuel Reference Plant specified in the Contract, namely CR 1 & 2. The mix of transportation of coal, as between rail and barge, has changed over time in favor of rail, thereby lowering overall transportation costs to CR 1 & 2 and hence the level of the firm energy payments calculated in accordance with the formula in § 9.1.2. The Contract nowhere constrains FPC's ability to alter the transportation mix to CR 1 & 2 in order to reduce the delivered price of coal to these units, and it is entirely appropriate -- and indeed expected -- for FPC to take such action.

^{2/} For example, during shoulder hours, when system loads are increasing or decreasing, Dade may receive the firm energy price even though it is slightly higher than the as available price, since more efficient FPC units have not yet been optimally dispatched and the avoided unit is not entirely off. Moreover, under the implementation of § 9.1.2 in the Contract, the cogenerator will receive payment at the firm energy cost for all power that it supplies in a particular hour, even though the "avoided unit" may have been partially dispatched during that hour. Finally, the cogenerators are added to the as-available block size to determine the as-available energy cost only after a determination has been made that cheaper sources of power are available elsewhere on FPC's system and, hence, the "avoided unit" was not dispatched at all. When this occurs the size of the capacity block that must be met increases, potentially requiring more expensive sources of power to meet that capacity and, as a result, driving up the as-available energy price to the point that it might exceed the firm energy price. Nonetheless, the cogenerators will be paid at the higher as-available cost because the "avoided unit" was "off." As can be seen, these limited exceptions work to the benefit of the cogenerators.

Dade's and Montenay's View

14. Dade and the operator of its solid waste resource recovery facility, Montenay-Dade Ltd., through its general partner Montenay Power Corp. (collectively "Montenay"), do not agree that FPC's methodology is called for by § 9.1.2 and the Commission's Order approving the Negotiated Contract.

15. According to Dade and Montenay, the Negotiated Contract does not even set forth the method for determining when firm or as-available payments are due. Their position is that FPC must make firm energy payments for all hours that a real, operable "bricks and mortar" generating unit would have operated. In modeling this "real" unit, Dade and Montenay contend that the Company should not consider the express terms of § 9.1.2 and the enumerated proxy characteristics therein, but should instead determine its operational status by taking into account a myriad of other or additional operating characteristics and constraints that may have been associated with such a unit had it actually been built. These characteristics are nowhere contained in the Contract. Dade and Montenay similarly take the position that Rule 25-17.0832(5)(b), which applies to standard offer contracts, contemplates that a determination of the applicable avoided unit's operational status must likewise be made by dispatching a fully characterized unit as though it had actually been built, and not on the basis of a narrower set of proxy characteristics used to represent the unit and its avoided cost.

16. In addition, Dade and Montenay urge that FPC is prevented from shifting its mode of coal transportation so that the cost of coal to CR 1 & 2 is reduced from that which existed at the time the Negotiated Contract was executed unless, by changing the transportation mix, FPC reduces its overall transportation costs to all its Crystal River coal facilities (CR 1 & 2, and

CR 4 & 5). Dade and Montenay urge that, because the coal component of § 9.1.2 looks to coal costs for CR 1 & 2 only, in the absence of such an overall effect, the result of shifting transportation would be to lower payments to Dade and Montenay while not altering FPC's overall coal transportation cost.

17. Dade's and Montenay's positions, both with respect to the firm versus as-available determination and the coal transportation mix, are directly at odds with the Commission's Order denying approval of the settlement in Lake, as well as PURPA, Fla. Stat. 366.051, and Rule 25-17.0832.

18. As the Commission is aware, the dispute between FPC and Dade is the subject of on-going litigation -- in federal and state court -- where the gravamen of plaintiffs' claims is that FPC has allegedly underpaid Dade, and is continuing to underpay it, for energy supplied under the Contract, and that these underpayments are part of an anticompetitive scheme in violation of federal antitrust law.^{8/} This past summer, both FPC's and plaintiffs' cross motions for summary judgment in the state court action on the contract issues were denied by Order dated September 19, 1997. Unified discovery is ongoing with respect to both cases. Pursuant to the federal court's scheduling order, the federal case has been set for the court's October 19, 1998 trial calendar. The state court action has not yet been set for trial, but may be tried in advance of the federal action since the issues in that case are subsets of the issues in federal court.

^{8/} In addition, as part of their antitrust claims, Dade and Montenay allege that FPC's initiation of the Pricing Docket before the PSC in 1994 constituted "sham" litigation and a further anticompetitive act.

**THE COMMISSION'S ORDER IN LAKE, AS WELL AS THE SUPREME COURT'S
OPINION IN PANDA, ESTABLISH THAT THE COMMISSION HAS
JURISDICTION TO INTERPRET ITS EARLIER ORDER APPROVING
DADE'S NEGOTIATED CONTRACT WITH RESPECT TO ENERGY PRICING**

19. In its Order denying approval of the Lake Settlement, the Commission considered arguments advanced by the cogenerator that it lacked jurisdiction to disapprove the settlement because such a determination would necessarily involve it in interpreting what the Contract meant at the time it was initially approved, and that would be inconsistent with its Order in the Pricing Docket holding that it had no such jurisdiction. (Lake Order at 12) The Commission rejected those arguments, determining that its jurisdiction was broader than it had believed at the time the Pricing Docket Order was entered. (Id. at 16) The Commission cited to several more recent decisions from other jurisdictions, holding that a commission does have jurisdiction to interpret the legal meaning of a term in a PURPA contract it previously approved, irrespective of whether it is a negotiated contract:

The decision rendered by the New York Commission with respect to the Crossroads contract [a negotiated contract], and the decision by the Federal District Court suggests that the Commission's jurisdiction in the area of clarifying/explaining/interpreting its contract approvals is not as limited as previously thought.

Id. at 16.

[D]ecisions of the New York Public Service Commission are illustrative of the Commission's continuing jurisdiction to interpret and clarify its approvals. ...

* * *

[A]ll three New York determinations have a common and, irrefutable similarity with the contract proposed for modification: All involve a question that turns on what was meant when the contract was approved, and not on the determination of disputed facts and the application of those facts to an unambiguous contract

provision. In this docket, the resolution of the energy pricing issue, in so far as the cost-effectiveness of buy-out/modification is concerned, turns on what the contract meant at the time it was approved. No party has cited to any authority which suggests that this type determination is not within the Commission's jurisdiction.

Id. at 11-12.

20. Agreeing with the New York decisions, the Commission concluded that a request to confirm that FPC is properly paying for energy under an approved negotiated contract (such as the one with Lake or Dade) "is inextricably linked to what the Commission approved" and that it has jurisdiction "over matters addressing the interpretation and clarification of past policies and approvals." Id. at 10.

21. These observations by the Commission are consistent with the Florida Supreme Court's recent decision in Panda-Kathleen, L.P. v. Clark, et al. as the Florida Public Service Commission, and Florida Power Corp., 701 So. 2d 322 (Fla. 1997). In that case, the Court reasoned that the "Commission's approval of a contract term conflicting with the Commission's rule as to avoided cost ... would have violated PURPA and section 366.051, Florida Statutes (1991)." Id. at 328. This is because PURPA and the Commission's rules governing negotiated contracts permit cogenerators to "sell energy to utility companies at but not exceeding full avoided cost, ... [which] is the cost that a utility avoids by purchasing electrical power from a QF rather than generating the electrical power itself or purchasing the power from another source." Id. at 324. Thus, as Panda makes clear, the Commission has jurisdiction to clarify its orders and to construe its rules in order to ensure that contracts and payments thereunder do not exceed avoided cost.

UNDER THE COMMISSION'S ORDER IN LAKE, FPC IS LIMITED TO PAYING DADE FOR ENERGY BASED UPON AVOIDED COSTS AS REFLECTED IN THE CONTRACT BY THE AVOIDED UNIT'S SPECIFIED CHARACTERISTICS

22. FPC believes that, under the reasoning of the Lake Order, the Commission's approval of the Negotiated Contract limits FPC to paying Dade for energy based upon avoided costs as reflected in the Contract itself. Thus, FPC must determine the avoided unit's operational status -- which governs whether the firm or as-available payment is due in any given hour -- on the basis of the proxy characteristics specified in § 9.1.2, rather than on the basis of other or additional characteristics that may have been associated with such a unit had it actually been built. (As noted, the Lake Contract is identical to the Dade Contract with respect to its energy payment provisions). Specifically, the Commission wrote:

FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract. As with all avoided cost calculations, Section 9.1.2 of the Contract was constructed as a pricing proxy and was not intended to be fully representative of a real operable "bricks-and-mortar" generating unit.

Id. at 4-5.

In this case, approval of the original contract recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed.

Id. at 9.

23. These statements by the Commission clearly indicate that FPC is limited to paying Dade for energy based upon the avoided unit's contractually-specified characteristics, not other or additional characteristics that may have been associated with an actually-built, operable, bricks and mortar unit. The Contract's characteristics govern the operational status of the

avoided unit (and thus whether the firm or as-available rate is to be paid). That being so, it likewise follows that the Commission will evaluate requests for cost recovery of energy payments based upon its interpretation of the Contract as approved because "where cost recovery review finds that a utility is requesting recovery of QF payments that exceed its full avoided costs, those costs are subject to disallowance." Id. at 13.

RULE 25-17.0832(5)(B), WHICH GOVERNS ENERGY PAYMENTS UNDER STANDARD OFFER CONTRACTS, FURTHER SUPPORTS THE CONCLUSION THAT THE COMMISSION'S APPROVAL ORDER CONTEMPLATES ENERGY PAYMENTS THAT ARE DETERMINED WITH REFERENCE ONLY TO THE AVOIDED UNIT'S CONTRACTUALLY-SPECIFIED CHARACTERISTICS

24. On its face, Rule 25-17.0832(5)(b), as amended to its present substantive form in 1990, closely resembles § 9.1.2 of the Contract, and both Dade and FPC agree that the proper construction of that Rule, which governs energy payments under standard offer contracts, is instructive with respect to § 9.1.2. In fact, John Seelke, FPC's former manager of cogeneration, later a paid consultant with some of the cogenerators in litigation with FPC, has testified that the Rule was the basis for the language of § 9.1.2. Seelke dep. Dade litigation, "Seelke Dep.," at 766 (a copy of the cited portions of the Seelke deposition transcript are attached as Ex. A). It is thus appropriate for the Commission's statement to comment on the correct construction of Rule 25-17.0832(5)(b) as it applies to energy payments, since that is not only highly relevant to the on-going dispute between FPC and Dade, but is also relevant to the proper interpretation of the Commission's Order approving the Negotiated Contract.

25. The history and subsequent construction of the Rule clearly shows that the Rule does not require full-scale modeling. Prior to the amendment to Rule 25-17.0832(5)(b) in 1990,² the Rule explicitly required utilities such as FPC to pay cogenerators for energy based on a cost comparison of a contract's firm energy price with the utility's as-available (i.e., system incremental) energy cost. This is the so-called "lesser-of" methodology and, under it, there is no computer simulation of whether the avoided unit would or would not have operated.

26. In 1989-90, the Commission held rule-making hearings to consider whether to approve an amendment to Rule 25-17.0832(4)(b) [now 25-17.0832(5)(b)] suggested by staff. At those hearings, a number of the Commissioners were concerned that the language of the proposed amended rule appeared to require fully characterized modeling of the avoided unit, which would leave open numerous terms and much room for dispute and complication. PSC Dkt. No. 891049-EU; Hearing Transcript, Rule Hearing Vol. IV, p. 444-45 (a copy of the cited portions of the hearing transcript are attached as Ex. B). As Tampa Electric Company's witness described that perception:

[The proposed rule] seems to imply that in our dispatch of our system, we would have to do some additional calculations which would require dispatching a hypothetical avoided unit, and so our dispatchers, on an hourly basis, would have to actually put in the characteristics of an avoided unit in their dispatch and make many additional calculations in order to determine whether that avoided unit would have operated.

² As noted, before 1997, the Rule appeared in the Florida Administrative Code as 25-17.0832(4)(b).

Tr. 445. But Seelke responded to these concerns and corrected the misperception, explaining that the amendment to the rule did not change its essential character and that full-scale modeling of the avoided unit was unnecessary:

. . . I think that both the proposed rule and the existing rule hit the same spot but is just stated differently . . . [T]o do the lesser of we would have to figure out whether the unit would have been. We would have to have the heat rate and what not. And I think, in terms of whether it would have been economically dispatched in the language in the proposed rule . . . it's a comparison of cost. So I would interpret them to come to the same point as well. It's just semantics as to whether we are actually going -- and I think Gordon, maybe you were looking at it as if we actually had to dispatch it, and I was never going to do that, conceptually. I was just going to look at the cost and get to the same point.

Tr. 462-463 (emphasis supplied).

27. The fact that the proposed amendment essentially was a refinement to the "lesser of" cost comparison rather than a complicated operational dispatch exercise was noted throughout the hearing. For example, the "intent" of the proposed amendment was described by Seelke as a "simple comparison that [can be] incorporated into our economic dispatch and pricing," which compares "whether the avoided unit has a cost that's lower than the incremental cost curve . . . for that particular hour." Tr. 449. Seelke contrasted the simple comparison called for by the Rule to a complex operational dispatch exercise which "you would not want to take on." Id. Similarly, the dispatch determination for a combined cycle avoided unit was explained as "being the combined cycle's cost, which is a function of its heat rate and fuel cost, which gets compared with your system incremental cost. So it's really a cost comparison." Tr. 448.

28. At several points in the hearing, Seelke conceded that Staff's proposed rule change (which he has testified is substantively the same as the rule in the form actually passed) is the

lesser-of approach and, in fact, that a consensus to that effect was reached among the various witnesses appearing before the Commission. Seelke Dep. p. 775-76; 781. For example, Commissioner Easley directly asked: "Well, what I am hearing is that the lesser of, or whatever the easiest language with the block, gets you to the same thing, and that nobody has any big objection to that." Seelke responded: "Right exactly." Tr. 463-464.

29. Earlier, Seelke described the new proposed rule and the old explicit lesser-of rule as "six of one, half dozen of the other." Tr. 464. Thus, in summarizing where the participants had ended up, Commissioner Easley explained:

Well, it sure sounds to me like you don't need an awful lot of post-hearing comments other than to make sure in your own calculations that it is half a dozen of one and six of the other. My inclination would be to go with whatever is the easiest way of getting you to the same answer.

Tr. 463.

30. Seelke now suggests that one ambiguous passage in Florida Power's post-hearing submission reversed his and the other witnesses' clear explanations to the Commission at the rule making hearing concerning the operation of the amendment. Based on this, Seelke now says the Rule as amended by the Commission does require full-scale modeling of the avoided unit -- and not the simple cost comparison described above -- even though there is no evidence that the Commission intended to do anything other than to accomplish the consensus reached at the hearing. Seelke Dep. p. 789-92. FPC strongly disagrees with Seelke's revised view. The important point, however, is that the Commission, not any individual, has the jurisdiction to interpret what its own rules mean -- and it has done so here.

**UNDER THE COMMISSION'S ORDER IN LAKE, FIRM ENERGY PAYMENTS
UNDER THE CONTRACT ARE CALCULATED BASED UPON AVOIDED COSTS
AS REFLECTED BY THE CHARGEOUT PRICE OF COAL AT
CR 1 & 2, INCLUDING THE ACTUAL TRANSPORTATION COST**

34. FPC also believes that, under the reasoning of the Lake Order, in determining the level of firm energy payments to Dade, it must take into account the actual transportation cost for coal to CR 1 & 2. In the Lake Order, the Commission discussed pricing for coal under the Lake contract and the proposed settlement which altered that pricing mechanism. The Commission stated:

Though the Settlement Agreement eliminates any potential for litigation concerning FPC's coal procurement actions, staff believes this was unnecessary. The contract contains no provisions governing the modes of transporting fuel to the Reference Plant. Furthermore, FPC should take any and all actions which, legally, lowers the cost of providing electricity to its ratepayers [T]his lower cost should be reflected in FPC's calculation of avoided costs.

Id. at 5. These statements by the Commission clearly indicate that, in determining the level of FPC's firm energy payment to Dade when that payment is due under the Contract, FPC should reflect the actual coal transportation cost to CR 1 & 2, not the transportation cost associated with the mix between barge and rail when the Contract was signed, or transportation cost calculated on any other basis.

THE NEED FOR A DETERMINATION AS PRAYED FOR IN THIS PETITION.

35. In light of all the foregoing, to interpret the Contract as calling for payments in excess of the amounts generated by the methodology used by FPC -- as Dade urges -- would result in payments above avoided cost, in violation of PURPA, the Florida Supreme Court's decision in Panda, and Commission Rule 25-17.0832, which looks to the applicable contract's

"rates, terms and other conditions" as the determinants of avoided cost. In the absence of the Commission's declaratory statement as sought by this Petition, FPC could find itself in a posture where it must pay for energy -- however erroneously -- at a level which is inconsistent with these authorities and the Commission's Order approving the Negotiated Contract, as well as in excess of avoided cost as reflected in the Negotiated Contract. Based on the precedent set in the Commission's Order in the Lake Docket, and the other legal authorities discussed above, this, in turn, could result in a denial of cost recovery by the Commission.

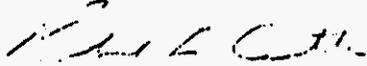
WHEREFORE, FPC requests that the Commission issue a statement that, under Order No. PSC-97-1437-FOF-EQ, PURPA, Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C, the Commission interprets its Order No. 24734 approving the Negotiated Contract with Metropolitan Dade County to require that FPC:

- (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
- (B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments;
- (C) Use the actual chargeout price of coal to FPC's CR 1 & 2 resulting from FPC's current mix of transportation, rather than the mix of transportation in effect at the

time the Contract was executed or some other mix, to compute firm energy payments to Dade.



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1 Q. Without violating any Public Service
2 Commission rule?

3 A. Correct.

4 Q. I believe you testified, though, that as
5 someone who was extensively involved in the
6 preparation of that contract, it was your intention
7 in Section 9.1.2 of the contract to implement the
8 approach as you understood it of the revised Public
9 Service Commission rules relating to energy pricing
10 to cogens?

11 A. Correct. Can I add a little appendix to
12 that answer? In fact, the standard offer language
13 that was eventually adopted for Florida Power's
14 standard offer contract had the same language as
15 the negotiated contracts with respect to Section
16 9.1.2.

17 Q. Can we agree that the lesser-of approach
18 is hardly unusual or unknown in cogen contracts
19 with utilities?

20 A. It's not unusual with respect to Florida.
21 Again, I'm not sure about other states.

22 Q. Many contracts in Florida are priced
23 based upon a lesser-of approach?

24 A. Many of the -- the standard offer
25 contracts that I've seen are priced on a lesser-of

1 approach. I've seen others that are not.

2 Q. All right. And you haven't seen cogens
3 going out of business because they had a lesser-of
4 contract, have you?

5 A. No. That presumes, though, that they
6 knew they had a lesser-of contract going into the
7 contract. I mean, there's a -- and this is, again,
8 the heart of the dispute that I see existing here
9 is what was agreed to --

10 Q. We're going to get to that.

11 A. -- at the outset.

12 Q. I'm going to give you plenty of
13 opportunity --

14 A. Okay.

15 Q. -- to talk about that some more. Let's
16 continue with a few preliminaries. You also
17 discussed the value of deferral method of pricing
18 cogen contracts; do you recall that generally?

19 A. Yes.

20 Q. And that method backloads the capacity
21 payments so that in the later years of the contract
22 those payments are much higher than in the earlier
23 years?

24 A. That's correct.

25 Q. Is it accurate that that value of

1 deferral method doesn't have anything to do with
2 the use of a lesser-of methodology for energy
3 pricing or some other methodology for energy
4 pricing; it's a separate concept?

5 A. It's a separate concept, yes. I would
6 agree with that.

7 Q. And you weren't trying to suggest that
8 there was some relationship there?

9 A. I hope not.

10 Q. Is it correct that the purpose and intent
11 of the lesser-of rule was to approximate a
12 utility's avoided energy cost for the purpose of
13 paying cogenerators?

14 A. When it was drafted, at that time -- and
15 I probably participated in the drafting of that
16 rule too -- it was an attempt to approximate. And
17 I think the key word here is approximate.

18 Q. All right. Is it fair to say it was also
19 an attempt to approximate the way the avoided unit
20 would have operated?

21 A. Oh, boy. Yes, in a way. And, again,
22 it's the use of the word approximate. I'm going
23 to -- I'm going to -- it was attempting to -- no,
24 let me back up. It didn't attempt to approximate
25 how the unit would have operated. It really

1 attempted to set pricing that was close to the
2 pricing that might have been experienced from a
3 real unit, but it was not -- again, the operation
4 of a real unit and the payments under a real unit
5 were not based on whenever its average price
6 changed to the lesser-of, became less than the
7 as-available price.

8 Q. Well, you would agree that lesser-of was
9 an approach to approximate avoided cost.

10 A. It was an approach to approximate avoided
11 cost. And what happened when the rule changed,
12 Chris, is that the approximation -- in fact, when I
13 looked at the approximation -- and others agreed --
14 that approximation was not a good approximation in
15 hindsight. And the new language that was
16 eventually adopted was a better approximation.

17 Q. Okay. Let's talk about that new
18 language. As I understand your testimony, you're
19 saying that the Commission changed the rule from
20 lesser-of to something else; right?

21 A. Correct.

22 Q. And I believe you indicated to the jury
23 here that that was a change that you advocated;
24 correct?

25 A. Correct.

1 Q. You thought it was pretty important?

2 A. Yes.

3 Q. You submitted pre-filed testimony to the
4 Commission in connection with its rule change
5 proceeding in which that rule and other rules were
6 changed; correct?

7 A. Correct.

8 MR. COUTROULIS: And I believe that's
9 been marked as an exhibit. Do you have that, Bob?

10 MR. CIOTTI: Yeah, I do.

11 BY MR. COUTROULIS:

12 Q. Were you the only FPC witness who
13 submitted pre-filed testimony?

14 A. Yes.

15 MR. COUTROULIS: Let's go off the record
16 for a second while we find this.

17 (Discussion held off the record.)

18 MR. COUTROULIS: Okay. Back on the
19 record.

20 BY MR. COUTROULIS:

21 Q. Mr. Seelke, you have Exhibit 84 in front
22 of you. Is that a copy of your pre-filed testimony
23 in the rule-making proceeding?

24 A. Yes.

25 Q. Is it correct that in your pre-filed

1 testimony you never referred to a change in the
2 rules being made from the lesser-of?

3 A. That's correct.

4 Q. You just don't address that issue at all
5 in the pre-filed; correct?

6 A. That's correct.

7 Q. Now, you do comment on quite a few other
8 issues. For example, you talk about the QF's
9 enhanced ability to develop a viable project
10 through the ability to eliminate risk discounts and
11 capacity payments and to receive levelized as well
12 as early capacity payments; correct?

13 A. Correct.

14 Q. And you talk about the QF's ability to
15 change its billing methods once every five years;
16 true?

17 A. That's true.

18 Q. And you talk about the QF's having their
19 payments from the utility reflect an offset against
20 the bill they get from the utility for things like
21 backup power?

22 A. Correct.

23 Q. And you talk about the various utilities'
24 ability to tie capacity and energy payments to
25 their individual utility avoided cost parameters

1 rather than to the statewide unit?

2 MR. WING: I think you meant QF's
3 ability. I think you said utilities' ability.

4 BY MR. COUTROULIS:

5 Q. I did mean QF's. No, I'm sorry, that's
6 not right. Utilities. Let me -- let me start
7 Again: You talk about the utilities' ability to
8 tie capacity and energy payments to their
9 individual avoided cost parameters rather than to
10 the statewide avoided cost parameters; correct?

11 A. That's true.

12 Q. And that was a big point about this whole
13 rule-making proceeding, was it not, moving away
14 from the statewide avoided unit to individual
15 utility avoided costs?

16 A. That's correct.

17 Q. And you also talk about provisions
18 governing energy interchange transactions; correct?

19 A. Correct.

20 Q. But nowhere do you discuss moving away
21 from the lesser-of rule?

22 A. That's true.

23 Q. Even though you viewed that as important?

24 A. Well, this rule-making was -- true. And
25 this rule-making took place -- we had a short time

1 to prepare testimony, is my recollection. We
2 didn't get all the issues on the table at the
3 outset of the rule-making.

4 Q. And that issue got left out of your
5 pre-filed?

6 A. It got left out of the pre-filed.

7 Q. You did regard these proceedings as
8 important?

9 A. Oh, they were important.

10 Q. Very important?

11 A. Yes.

12 Q. You would not have wanted to mislead the
13 commissioners in your oral remarks before them,
14 would you?

15 A. No, I would not have wanted to.

16 Q. Or in your pre-filed testimony?

17 A. That's true.

18 Q. Now, you do recall appearing in front of
19 the Commission and speaking to various aspects of
20 the rule-making that was going forward?

21 A. Yes.

22 Q. Do you recall whether you were under oath
23 on January 11, 1990, when you spoke to the proposed
24 staff's rule regarding energy pricing?

25 A. Yes.

1 Q. Were you under oath?

2 A. Yes.

3 Q. And is it fair to say you wanted to be as
4 precise and accurate as you could be at that time?

5 A. Yes.

6 Q. Isn't it true that you told the
7 Commission that both the proposed staff rule and
8 the existing lesser-of rule hit the same spot but
9 stated a little differently?

10 A. I believe I did. I have looked at my
11 comments that were -- the transcript of that
12 proceeding. And while I -- my objective was to be
13 as clear and precise as I wanted -- as I -- as you
14 stated earlier, I don't believe I met that goal on
15 that particular day.

16 Q. All right. In fairness, why don't we get
17 your remarks and take a look at it so you'll have
18 it in front of you.

19 MR. COUTROULIS: This has not been
20 marked, I believe; correct?

21 MR. CIOTTI: That's correct.

22 MR. COUTROULIS: So we will mark this as
23 the next exhibit.

24 BY MR. COUTROULIS:

25 Q. Can you please identify Exhibit 151?

1 A. It's a transcript of the rule hearing on
2 January 11, 1990.

3 Q. And this was a discussion about staff's
4 proposed rule which would read, quote, "To the
5 extent that the avoided unit would have been
6 economically dispatched, had the avoided unit been
7 in the utility's dispatch, avoided energy costs
8 associated with firm energy shall be the energy
9 cost of the purchasing utility's avoided unit";
10 correct?

11 A. I believe so. Can you -- are you looking
12 at a particular page?

13 Q. I can show you a document if you'd like
14 to refresh yourself on that.

15 A. Yes, I would.

16 Q. You do recall that the version of the
17 rule as actually passed was slightly different from
18 the staff's proposed version?

19 A. Yes.

20 Q. You testified about that in some of your
21 previous sessions?

22 A. Yes.

23 Q. Although I believe you testified that the
24 rule as passed compared to the staff's proposed
25 rule was substantively the same?

1 A. It was very similar, yes.

2 Q. Okay. Substantively the same?

3 A. Yes.

4 MR. COUTROULIS: Let's mark this as the
5 next exhibit, please.

6 BY MR. COUTROULIS:

7 Q. You have in front of you Exhibit 152.

8 Mr. Seelke, I believe I showed you this exhibit in
9 your OCL deposition as well?

10 A. Yes.

11 Q. It appears to be a markup of the staff's
12 proposed rule against the rule as actually passed.
13 If you'd take a look at that. Can you agree that
14 the staff's rule stated, "To the extent that the
15 avoided unit would have been economically
16 dispatched, had the avoided unit been in the
17 utility's dispatch, avoided energy costs associated
18 with firm energy shall be the energy cost of the
19 purchasing utility's avoided unit"?

20 A. Yes.

21 Q. Okay. Now, if you would direct your
22 attention, please, to Exhibit 151. Is that a
23 transcript of a hearing that took place before the
24 Commission on January 11, 1990?

25 A. Yes.

1 Q. And you participated in that?

2 A. Yes.

3 Q. And you were under oath at the time?

4 A. Yes.

5 Q. Can you please look at page 449. Let me
6 direct your attention to line 13. And let me ask
7 you first if these remarks are remarks that you
8 made. And if you need to look back to check that,
9 that's fine.

10 A. They appear to be my remarks, yes.

11 Q. Can you please read your own words
12 beginning on line 13 with the word "we'll," W-E
13 apostrophe L-L.

14 A. "We'll just look at the incremental cost
15 curves every hour and see whether the avoided unit
16 has a cost that's lower than the incremental cost
17 curve, which means it would have been dispatched,
18 or if the unit -- avoided unit's cost is higher
19 than the incremental cost curve that exists for
20 that particular hour, it would not have been
21 dispatched."

22 Q. Go on.

23 A. "That's a sort of simple comparison that
24 we can incorporate into our economic dispatch and
25 pricing. And that's a little -- I think that meets

1 the intent of this proposed staff rule."

2 Q. Did you make that comment at the
3 commission hearing?

4 A. Yes.

5 Q. Please turn to page 463. Let me direct
6 your attention to line 1, beginning with the word
7 "and I think." Do you see that? Line 1.

8 A. Yes. Okay.

9 Q. Are those your remarks? And if you need
10 to look at the previous page, that's fine.

11 A. Yes, they are.

12 Q. At the place I directed you, can you
13 please read out loud what you said to the
14 Commission.

15 A. "And I think in terms of whether it would
16 have been economically dispatched in the language
17 in the proposed rule, I wouldn't propose that the
18 actual dispatch -- that we actually dispatch the
19 unit as a cost. It's a comparison of cost."

20 Q. So you stated, I wouldn't propose that we
21 actually dispatch the unit as a cost, it's a
22 comparison of cost; correct?

23 A. Correct.

24 Q. And then can you continue on that same
25 page through the end of line 12, and please read

1 your remarks out loud.

2 A. "So I would interpret them to come to the
3 same point as well. It's just a matter of
4 semantics as to whether we are actually going --
5 and I think, Gordon, maybe you were looking at it
6 as if we actually had to dispatch it, and I was
7 never going to do that, conceptually, I was just
8 going to look at the cost and get to the same
9 point. So it's six of one and half a dozen of the
10 other."

11 Q. And you made that remark under oath to
12 the Commission --

13 A. Yes.

14 Q. -- on that date; correct? Now, further
15 on down the page, there is a remark attributed
16 to -- attributed to Commissioner Easley on line 23,
17 and he said, "Well, what I am hearing is that the
18 lesser-of, or whatever is the easiest language with
19 the block, gets you to the same thing, and that
20 nobody has any big objection to that." And what
21 did you say, sir?

22 A. I said, "Right, exactly."

23 MR. WING: I'm going to object because
24 you have left off the colloquy beginning with line
25 13 just above that where Commissioner Easley talks

1 about the possibility of post-hearing comments and
2 to verify if what Mr. Seelke is saying at that
3 point really is the case. And I think to be fair
4 you ought to read that into the record as well.

5 MR. COUTROULIS: Mr. Wing, you're free to
6 ask Mr. Seelke questions on redirect if you like.

7 MR. WING: Well, I object to doing this
8 totally out of context.

9 BY MR. COUTROULIS:

10 Q. Now, you were telling the Commission that
11 the staff's recommended rule was essentially the
12 same as a lesser-of determination at that hearing,
13 were you not, Mr. Seelke?

14 A. Yes, I was. But, in fact, in reviewing
15 this transcript later on --

16 Q. You're saying you were wrong?

17 A. I was wrong.

18 Q. Okay. Isn't it a fact that you
19 acknowledged that there was a consensus among the
20 people present at the hearing that the staff
21 version of the rule reached essentially the same
22 result as the lesser-of rule?

23 A. My comment on line -- on page 464 would
24 lead you to that conclusion. The remarks that we
25 talked about earlier were not intended to lead to

1 that conclusion.

2 Q. Which remarks? The remarks that you
3 read?

4 A. Yes.

5 Q. But my question now, sir, is whether you
6 acknowledge that there was a consensus among the
7 people present at the hearing that the staff
8 version of the rule reached essentially the same
9 result as the lesser-of rule?

10 A. Yes, there was.

11 Q. Okay. And you agreed with that consensus
12 at the hearing, did you not?

13 A. Yes.

14 Q. Now, is it correct that what you're
15 saying about the improper -- about the proper
16 interpretation of the new rule in this deposition
17 that it requires full-scale modeling of the avoided
18 unit is not what you told the Commission back in
19 1990 when it was considering adopting the rule
20 change?

21 A. That's true.

22 Q. You didn't discuss at the Commission any
23 need to model the avoided unit and you did not
24 discuss how to go about full-scale modeling of the
25 avoided unit as though built, installed, operated,

1 and fully characterized; correct?

2 A. No, that's not true.

3 Q. Sir, why is that not true?

4 A. That's not true. Because it goes back to
5 the interpretation of the remarks that I made
6 earlier and which, unfortunately, I characterized
7 differently at the end. The concern being
8 expressed by -- let me go back to where I first
9 read remarks about --

10 Q. Sure. The first thing I called your
11 attention to was page 449.

12 A. Okay.

13 Q. I believe we started at line 13.

14 A. That's correct. The concept that's
15 discussed in line 13 is similar to -- and I'd have
16 to go back to a memorandum that I did for
17 Mr. Watson and perhaps amplify what I intended
18 there. That's explained more fully.

19 Q. Just so we're clear, Mr. Watson is one of
20 the attorneys who was representing Pasco?

21 A. Pasco, yes.

22 Q. And you were consulting with them?

23 A. That's correct.

24 Q. All right.

25 A. The concept here is that if you wanted to

1 determine whether a unit would have been operated,
2 that you didn't necessarily -- that one simple way
3 to do that was to look at the incremental cost of
4 the system --

5 Q. Yes.

6 A. -- the as-available energy cost --

7 Q. Yes.

8 A. -- and ask yourself would the unit have
9 had an incremental energy cost between its minimum
10 and maximum load point that would have been equal
11 to or greater than that as-available, but not the
12 unit's average cost, the unit's incremental cost.
13 When I say whether the unit has a cost that's lower
14 than the incremental cost curve, the concept that's
15 left out here and what I believe I intended was an
16 incremental cost concept, not an average cost
17 concept. And unfortunately, in this hearing
18 process the discussion that we're talking about
19 here, Chris, involves calculus concepts, which are
20 virtually impossible to transmit to a Commission in
21 a hearing process.

22 The concept, if we go back to -- and I
23 can explain this fully in a memorandum that I did
24 to Mr. Watson -- using just the incremental cost
25 data, incremental cost curves of a unit, which are

1 not present in a pricing formula, just using those
2 cost curves and incremental fuel cost data, we can
3 make a very good approximation on whether the unit
4 would have been operating or not operating without
5 going through a full-scale model dispatch.

6 Q. That's not what you said here though, is
7 it?

8 A. No, that's not what I said. And that's
9 why we had post-hearing comments.

10 Q. All right. But what you're now saying is
11 if you were to compare system incremental cost,
12 which is the as-available energy cost, to
13 incremental cost of the avoided unit, that would be
14 a way to approximate when the avoided unit would
15 run and when it would not run?

16 A. That's correct. And, in fact, that
17 whole --

18 Q. Excuse me.

19 MR. WING: Wait. No, wait. Wait. Go
20 ahead. You can finish your answer.

21 A. Well, let's let -- let me let Chris
22 finish, and then I'll --

23 BY MR. COUTROULIS:

24 Q. I want to -- I want to let you finish as
25 well. This is cross-examination, but I'm trying to

1 be as --

2 A. Sure.

3 Q. -- as fair as I can, so I apologize if we
4 talk over each other, but we'll try to do the best
5 we can.

6 If you were comparing system incremental
7 costs to incremental costs of the avoided unit,
8 that would be a simple cost comparison, but it
9 would be different from the lesser-of where you
10 compare average cost of the avoided unit against
11 system incremental cost?

12 A. That's correct.

13 Q. Okay. You still wouldn't be looking at
14 other operational parameters of the avoided unit?

15 A. No, you could look at other operational
16 parameters.

17 Q. But not necessarily?

18 A. But not necessarily.

19 Q. All right.

20 A. Because -- and if I can go back to a --
21 this concept is more fully explained in a
22 memorandum that I did for Mr. Watson that's dated
23 November of 1994.

24 Q. Do you need to get that memorandum in
25 order to explain this?

1 A. Well, I'd like to -- I'd like to show
2 this. Yes, I would, I'd like to -- I'd like to
3 refer to that.

4 Q. But do you need -- do you need the
5 memorandum in order to refresh your recollection
6 about this, how this works?

7 A. Yes. I would like to see the
8 memorandum --

9 Q. All right.

10 A. -- to refresh my recollection.

11 Q. Do we need to go off the record to do
12 that?

13 A. Let's do that for just one minute.

14 Q. I will let you do that.

15 (Discussion held off the record.)

16 MR. COUTROULIS: We're back on the
17 record.

18 BY MR. COUTROULIS:

19 Q. And you now have in front of you a copy
20 of this memorandum that you indicated you needed to
21 look at?

22 A. That's correct.

23 Q. And for the record, that's something -- a
24 memorandum, actually, that you wrote to Attorney
25 Ansley Watson representing Pasco dated November 11,

1 1994; correct?

2 A. Correct.

3 Q. And when you wrote this memorandum, you
4 were acting as a consultant to Pasco and being
5 compensated for your time accordingly; correct?

6 A. That's correct.

7 Q. All right.

8 A. One of the concepts here that could have
9 been implemented -- and I'm explaining in this
10 memorandum, I'm on page 7, Paragraph 5, which is
11 referring to the same types of issues we've been
12 talking about. It's referencing my quote on page 8
13 of FPC's petition, which this is a petition in this
14 Docket No. 940771-EQ, which I don't have that in
15 front of me, but I believe we're talking about the
16 same kinds of language that this refers -- that
17 particular reference refers to the rule-making
18 proceeding and quotes my discussion on the same day
19 here. So I believe we're talking about the same
20 concept here.

21 But this -- if one went through a look
22 at -- and this example what I did is I actually
23 took incremental cost of this coal -- of the coal
24 plant that is in the CFR contract and incremental
25 fuel cost and developed an estimate of how many

1 hours a unit might be turned off, if you will,
2 considered off just based on a cost comparison of
3 incremental cost of the unit versus system
4 as-available energy cost.

5 Q. Just so we're clear, the CFR contract is
6 not the same contract form as the Dade contract, is
7 it?

8 A. No, it's not.

9 Q. The CFR contract has an incremental -- an
10 incremental heat rate curve, does it not?

11 A. Yes.

12 Q. The Dade contract doesn't have one at
13 all?

14 A. That's true.

15 Q. Okay.

16 A. The concept here, though, that I was
17 expressing at the rule-making hearing was to
18 compare the cost, the incremental cost as we've
19 discussed earlier, the incremental cost of the unit
20 versus the system incremental cost, which would
21 give you a judgment as to whether the unit would
22 have been off or on. It would have given you an
23 estimate. And in this particular case, one can
24 estimate how many off hours might occur just based
25 on a strict cost comparison. But that method

1 ignores operational considerations, and I'm quoting
2 from page 8.

3 Q. Page 8 of your memo?

4 A. Of my memorandum here. Regarding
5 start-up and shut-down. And, for example, if the
6 cost dropped -- I'm not quoting at this point, but
7 ~~the right to shut~~
8 mean you'd shut the unit off for an hour. And
9 there were -- you can take into account minimum
10 down time with this method. And -- and override,
11 if you will, when a unit might have been shut
12 down. So this method allows one to model, in
13 effect, on a realtime basis the implementation of
14 contract language of a real unit.

15 Q. What you're talking about here is a
16 comparison of incremental cost of the avoided unit
17 versus incremental cost of the system?

18 A. That's right.

19 Q. And that's not what you do on a
20 lesser-of?

21 A. That's not what you do on lesser-of. And
22 the error that I made in here was acknowledging
23 that the two concepts were the same.

24 Q. You said they were six of one, half a
25 dozen of the other?

1 A. That's right.

2 Q. That means the same; right?

3 A. That's right.

4 Q. So you were wrong when you said that?

5 A. I was wrong on that. That's right.

6 Q. You didn't intentionally mislead the
7 Commission, did you?

8 A. No. It was a long day, I'm sure, and I
9 just -- and I think the decision was made at that
10 point in time the company, and I -- Betty Easley,
11 as I recall, was on a let's get -- we were on a
12 time frame to get things moving along with the
13 Commission. It was not the time to start
14 explaining calculus to the Commission and the
15 concepts I've discussed here. The time to do that
16 was in post-hearing comments.

17 Q. But you certainly wouldn't want to say
18 something is the same as a lesser-of, despite the
19 fact you don't want to explain calculus to the
20 Commission, if you were sitting there thinking to
21 yourself it's not lesser-of, so you were confused,
22 were you not?

23 A. No, I wasn't confused. I think at that
24 point in time I made a statement that was not
25 correct and accurate, and --

1 Q. Several statements that weren't correct
2 and accurate?

3 A. No. The only statement I made that was
4 not correct and accurate.

5 Q. Okay. So the statement -- the statement
6 that we read before on page 449, that is correct
7 and accurate?

8 A. That is correct if you consider that
9 we're looking at the -- whether the avoided unit
10 has a -- if you would insert in your reading of
11 that sentence, look at the incremental cost curves
12 every hour to see whether the avoided unit has an
13 incremental cost that's lower.

14 Q. So for that statement to be accurate, I
15 have to insert some words?

16 A. You'd have to insert that word in there,
17 right.

18 Q. Okay. And what about for the statement
19 it's six of one, half a dozen of the other, what
20 would I have to do to make that accurate?

21 A. You'd have to take it out of there.

22 Q. Okay. And where you agreed with
23 Commissioner Easley and said "right, exactly," we'd
24 have to take those words out too; right?

25 A. Which -- where is that? Yeah.

1 Q. We'd have to change "right, exactly" on
2 page 464 to wrong, would we not?

3 A. Yes, we'd have to say wrong.

4 Q. Okay. And when you said on page 463, one
5 of the other places we looked at, on line 8, "I
6 think, Gordon, maybe you were looking at it as if
7 we actually had to dispatch it, and I was never
8 going to do that, conceptually, I was just going to
9 look at the cost and get to the same point," is
10 that right or wrong?

11 A. That's correct.

12 Q. So you were never going to dispatch it,
13 you were just going to do a cost comparison?

14 A. I was going to do a cost comparison, but
15 my cost comparison would have taken into account
16 the parameters that would result in the same -- it
17 would have gotten to the same point of a full
18 economic dispatch.

19 Q. And those parameters would include
20 start-up and shut-down, for example?

21 A. They would include -- which would --
22 those parameters would have included those costs
23 which would have been reflected in the minimum up
24 and down time consideration.

25 Q. You didn't talk about minimum up and down

1 time --

2 A. No, we didn't talk about that.

3 Q. -- at this hearing, did you?

4 A. No.

5 Q. Or start-up and shut-down cost?

6 A. No.

7 Q. Or ramp rates?

8 A. No.

9 Q. Or the spot price of coal?

10 A. No, didn't talk about that. But that's
11 all incorporated -- spot price of coal is
12 incorporated in the concept of incremental cost of
13 the unit. If you insert the word "incremental" on
14 page 449 in front of the word "cost," the avoided
15 unit cost, if it's the avoided unit incremental
16 cost, then that concept of spot coal prices is
17 incorporated in it automatically.

18 Q. Okay. So if we incorporated a word that
19 wasn't there, you're saying maybe somebody would
20 have figured out that that new word encompassed a
21 lot of other things within it as well? . . .

22 MR. WING: Object to the form.

23 BY MR. COUTROULIS:

24 Q. Right?

25 A. Yes.

1 Q. Now, you wrote this memo to Mr. Watson
2 four and a half years after -- after this hearing
3 before the Public Service Commission?

4 A. Yes.

5 Q. Okay. By the way, you indicated before
6 that maybe you were tired. In fact, when you made
7 these remarks, it was pretty early in the morning
8 because this hearing started at 8:30, didn't it?
9 If you look at page 442, it says "Hearing
10 reconvened at 8:30 a.m."; right?

11 A. Yes, it does.

12 Q. And that's on page 442, and the remarks
13 we were looking at conclude by page 464, so you're
14 talking about 22 pages. How long would it take
15 to --

16 A. It was --

17 Q. -- make 22 pages of remarks at a hearing
18 like this?

19 A. I'm sure we were still in the, you know,
20 in the morning session, so --

21 Q. Okay. Pretty early in the morning?

22 A. Probably.

23 Q. Okay.

24 A. But we'd been going for three days.

25 Q. Okay. Now, did the rule change that the

1 Commission adopted move away from the statewide
2 avoided unit and go to the individual utility's
3 avoided cost?

4 A. Yes.

5 Q. And that was something that you thought
6 was a good idea?

7 A. Yes.

8 Q. And the rule change accomplished that?

9 A. That's correct.

10 Q. Do you recall whether the rule change
11 also changed the as-available block size that you
12 would use to calculate the as-available price?

13 A. Yes, it did.

14 Q. And that was something you were
15 advocating as well, was it not?

16 A. Yes.

17 Q. You were suggesting that the as-available
18 block size should be variable so that every
19 cogenerator being paid the as-available rate in any
20 given hour would be included in the block size?

21 A. That's correct.

22 Q. And actually you talk about that on page
23 450; right?

24 A. 450 of the --

25 Q. Of the hearing, yes, sir. Yes. Let me

1 direct your attention to lines 21 and 22.

2 A. Yes.

3 Q. Okay. Now, do you know if Florida Power
4 actually does that?

5 A. Do you mean do they do that today?

6 Q. Yeah. Maybe I can sharpen my question a
7 bit. Do you know whether or not when Florida
8 Power, in administering these cogen contracts like
9 the Dade contract, makes a determination that the
10 avoided unit would be off whether it adds the
11 amount of cogen power to the as-available block
12 size for purposes of calculating the as-available
13 price?

14 A. No, I don't know if they do or not.

15 Q. Do you know whether or not Florida Power
16 pays Dade based on the same type of lesser-of
17 approach that existed before the rule change?

18 A. The information that I was given with
19 respect to the payments would indicate that that
20 was the case. But there was not a clear statement
21 of exactly what the payment methodology was, as I
22 recall, by Florida Power.

23 Q. Do you know if we were, for example, to
24 look at the payments being made to Dade, whether
25 we'd find payments at certain hours at the

4

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited approval of settlement agreement with Lake Cogen, Ltd., by Florida Power Corporation.

DOCKET NO. 961477-EQ
ORDER NO. PSC-97-1437-FOF-EQ
ISSUED: November 14, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION TO APPROVE SETTLEMENT AGREEMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. CASE BACKGROUND

Florida Power Corporation (FPC) and Lake Cogen Ltd. (Lake), a qualifying facility (QF), entered into a Negotiated Contract (Contract) on March 13, 1991. The term of the Contract is 20 years, beginning July 1, 1993 when the facility began commercial operation, and expiring July 31, 2013. Committed capacity under the Contract is 110 megawatts, with capacity payments based on a 1991 pulverized coal-fired avoided unit. The Contract was one of eight QF contracts which were originally approved for cost recovery by the Commission in Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ.

Section 9.1.2 of the Contract details the energy pricing methodology as follows:

Except as otherwise provided in section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based upon the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

In 1991, when FPC entered into its contract with Lake, FPC's forecasts indicated that as-available energy prices would exceed firm energy prices throughout the entire term of the Contract. Based on these projections, prior to August 1994, FPC paid Lake firm energy payments for all energy delivered from the cogeneration facility.

In 1994, FPC conducted an internal audit of its cogeneration contracts. Because of falling coal, oil, and natural gas prices, excess generation during low load conditions, and exceptional nuclear performance, FPC's modeling of the avoided unit indicated that during certain hours, firm energy prices would be greater than as-available energy prices indicating that the avoided unit would be cycled off in FPC's dispatch. FPC adjusted its payments to Lake and other cogenerators to reflect these changes in the operation of the avoided unit. This reduced the total energy payment to Lake and ultimately led to the pricing dispute.

On July 21, 1994, FPC filed a petition (Docket No. 940771-EQ) seeking a declaratory statement that Section 9.1.2 of the negotiated contract was consistent with then Rule 25-17.0832(4)(b), Florida Administrative Code. This rule referenced avoided energy payments for standard offer contracts, and was a basis for evaluating negotiated contracts. Several cogenerators, including Lake, filed motions to dismiss FPC's petition. FPC later amended its petition and asked the Commission to determine whether its implementation of Section 9.1.2 was lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. In Order No. PSC-95-0210-FOF-EQ, we

granted the motions to dismiss on the grounds that the Commission did not have jurisdiction to adjudicate a dispute over a provision in a negotiated contract. However, the Order recognized the Commission's continued responsibility for cost recovery review.

Subsequent to the filing of FPC's petition in Docket No. 940771-EQ, Lake and other QFs, filed lawsuits in the state courts for breach of contract. On January 23, 1996, the Fifth Judicial Circuit Court issued a Partial Summary Judgement for Lake in Case No. 94-2354-CA-01 regarding the energy pricing dispute.

On November 25, 1996, FPC filed a Petition for Approval of a Settlement Agreement between FPC and Lake. The Settlement Agreement resolves all issues in the pending litigation. The modifications to the Contract pursuant to the Settlement Agreement have the following components:

- 1) A revised energy pricing methodology for future energy payments and settlement of a coal transportation issue.
- 2) Restructuring of variable O&M and capacity payments.
- 3) Reimbursement for the historic energy pricing dispute.
- 4) Curtailment of energy during off-peak periods from 110 MW to 92 MW.
- 5) A buy-out of the last three years and seven months of the Contract, resulting in a termination date of December 31, 2009, rather than July 31, 2013.

The cost for the buy-out will be paid to Lake in monthly payments from November, 1996 to December, 2008. On December 11, 1996, FPC paid Lake \$5,512,056 to reimburse the QF for the disputed portion of energy payments made during the period August 9, 1994 through October 31, 1996. FPC requested that the Settlement Agreement be approved on an expedited basis, including confirmation that the Negotiated Contract between FPC and Lake, as modified by the Settlement Agreement, continues to qualify for cost recovery.

FPC believes that the Settlement Agreement will result in approximately \$26.6 million Net Present Value (NPV) in benefits to its ratepayers through 2013. These benefits are based on a comparison of costs between Lake prevailing in the lawsuit and the modified Contract.

We approved the Petition for Expedited approval by a 3-2 vote at the June 24, 1997, agenda conference. At the July 15, 1997, agenda conference, the Commission voted to reconsider its decision after being advised that one Commissioner voting with the majority had mistakenly voted to approve the agreement.

The parties were directed to brief the issue of the Commission's jurisdiction to deny cost recovery of any part of a civil court judgement concerning the terms of the contract.

At the August 18, 1997, agenda conference, the item was deferred and the parties were directed to file supplemental briefs on the issues of 1) the "regulatory out" clause contained in the power purchase agreement and 2) the impact of the New York State Public Service Commission's decision that it had jurisdiction to interpret and clarify its approval of negotiated purchase power agreements (the Crossroads decision). The supplemental briefs were filed on August 29, 1997. Lake also requested Oral Argument on this matter. Since interested persons may always participate in the discussion of items scheduled for proposed agency action, this request is moot.

II. THE SETTLEMENT AGREEMENT

As discussed in the Case Background, the proposed Settlement Agreement contains five modifications to FPC's and Lake's existing contract. A discussion of each modification is contained in the following sections.

A. Revised Energy Pricing and Coal Transportation Agreement

1. Revised Energy Pricing

Pursuant to Rule 25-17.0836, F.A.C., this Commission is required to evaluate modifications to a negotiated contract against both the existing contract and the current value of the purchasing utility's avoided cost. The modified Contract requires FPC's ratepayers to pay firm energy prices every hour that Lake generates electricity. In other words, the modified contract assumes the avoided unit will be available and fully dispatched 100 percent of the time. Obviously, no real unit operates in this manner. Furthermore, this would also presume that had FPC built the "avoided-unit", this Commission would want FPC to run the unit without regard for any changes in operating expenses. That would not be an appropriate burden for FPC's ratepayers. FPC's modeling

of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract. As with all avoided cost calculations, Section 9.1.2 of the Contract was constructed as a pricing proxy and was not intended to be fully representative of a real operable "bricks-and-mortar" generating unit. The goal of the contractual language was to ensure that, consistent with Section 210 of PURPA and our cogeneration rules, FPC would not be put in a situation where it would be required to purchase energy at a cost greater than what it could either purchase elsewhere or generate itself. The revised energy pricing methodology, 100% firm, will render this goal meaningless.

2. Coal Transportation Agreement

The firm energy price under the Settlement Agreement will be determined using the higher of the actual monthly inventory charge out price of coal at CR 1&2 or \$1.76/MMBtu. This floor is based on the average price of coal at CR 1&2 in 1996 plus an \$0.08/MMBtu adder. This adder was included to prevent a potential dispute between FPC and Lake similar to the one between FPC and Pasco regarding FPC's coal procurement and transportation actions. This is another example of how the proposed energy pricing methodology is not representative of avoided cost. Though the Settlement Agreement eliminates any potential for litigation concerning FPC's coal procurement actions, staff believes this was unnecessary. The Contract contains no provisions governing the modes of transporting fuel to the Reference Plant. Furthermore, FPC should take any and all actions which, legally, lowers the cost of providing electricity to its ratepayers such that cost is fair and reasonable as required by Section 366.03 Florida Statutes. Furthermore, this lower cost should be reflected in FPC's calculation of avoided costs.

B. Restructuring of Capacity Payments and Variable O&M

The Settlement Agreement removes variable O&M expenses from the energy payment, and includes it in the capacity payment. The revised capacity payments, including the variable O&M amount, are approximately \$12.1 million NPV less than capacity and variable O&M payments under the original contract. This provision of the Settlement Agreement is projected to reduce FPC's ratepayers cost liability in addition to providing a more stable revenue stream for Lake. However, the benefits of this provision of the Settlement Agreement do not outweigh the negative impact of the 100% firm energy payment.

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C. Historic Pricing Dispute

The Settlement Agreement provides for FPC to pay Lake \$5,512,056 as reimbursement, with interest, for the disputed energy payments during the period August 9, 1994 through October, 31, 1996. FPC paid the settlement payment to Lake on December, 11, 1996. However, at the February, 1997 hearing in Docket No. 970001-EI, we voted to exclude this payment for recovery, because the costs at that time had not been approved for recovery. As discussed previously, we believe that FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract.

D. Curtailment

Lake has agreed to curtail energy deliveries from 110 MW to 92 MW during the thirteen off-peak hours as defined by the Settlement Agreement. In addition, Lake will be treated as a Group A N.G. under FPC's Generation Curtailment Plan as approved pursuant to Order No. PSC-95-1133-FOF-EQ, issued September 11, 1995. This provision will confer benefits to FPC in the form of increased flexibility during low load situations when generation exceeds load requirements as well as allowing FPC to replace the curtailed energy, if needed, at a lower system energy cost.

FPC projects that this provision of the Settlement Agreement will result in a savings of approximately \$2.4 Million NPV as compared to the existing contract. Existence of these savings further demonstrates that approving 100% firm energy pricing will result in payments which exceed FPC's avoided energy cost. Furthermore, these savings are overstated as FPC has the authority to curtail Lake and other Cogenerators during those hours which the energy is not needed or when such purchases will result in negative avoided costs. According to Rule 25-17.086, Florida Administrative Code, a utility is relieved of its obligation to purchase electricity from a GP due to operational circumstances or when such purchases will result in costs greater than those which the utility would incur if it did not make such purchases. Despite this authority, we recognize that a voluntary curtailment agreement could avoid litigation.

E. Contract Buy-Out

Lake and FPC have agreed to terminate the Contract three years and seven months earlier than originally proposed. In exchange for

this provision, FPC will pay Lake monthly payments from 1996 through 2008 totaling approximately \$50.4 Million. Since the current contract is greater than today's avoided costs, this provision will allow FPC's ratepayers to purchase market priced power sooner. After the revised contract terminates, FPC will be able to obtain capacity and energy at a cost it believes will be less than the existing contract. FPC's cost projections for replacement capacity and energy are based on currently budgeted amounts for its Polk Unit. This methodology is appropriate, as the projections have a more defined basis and FPC's current projections indicate that the replacement capacity and energy will come from a similar type of combined-cycle technology.

When compared to FPC's modeling of the avoided unit, which more closely approximates avoided energy cost, the buy-out portion of the Settlement Agreement is not cost effective. In fact, the Contract buy-out will actually result in approximately \$1.2 Million NFV of additional costs to FPC's ratepayers.

The savings/additional costs of each provision are summarized in the following table. The comparison is to the existing contract, assuming FPC's interpretation of the existing agreement is correct.

NET SAVINGS OF FPC/LAKE SETTLEMENT AGREEMENT (\$Millions NFV)	
Component	Savings
Energy Pricing & Coal Transportation Agreement	(\$24.9)
Capacity and Variable O&M	\$12.1
Historic Pricing Dispute	(\$5.3)
Curtailement	\$2.4
Buy-out	(\$1.2)
TOTAL	(\$17.1)

(Numbers may not add due to rounding)

III. DECISION

Approval of a newly negotiated contract is based on avoided cost as defined by the utility's next identified capacity addition.

However, in evaluating contract modifications, "avoided cost" becomes the existing contract. In this case, approval of the original contract recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed. FPC's modeling of the avoided unit is consistent with this Commission's order approving the Contract and more closely approximates avoided cost. Energy payments under the modified contract reflect Lake's court position of 100% firm energy, which clearly exceeds avoided cost. This revision, plus the remaining components of the Settlement Agreement, requires that FPC's ratepayers commit to pay approximately \$17.1 million NPV over what they would pay under the Contract before the Settlement Agreement. We recognize the risks associated with litigation, however as discussed below, this Commission is not required, based on a circuit court's decision, to approve recovery of QF payments that are in excess of a utility's avoided cost.

A recent decision suggests that a state Commission's jurisdiction with respect to negotiated QF contracts is not as limited as this Commission has previously concluded.

On November 29, 1996, the New York Public Service Commission (NYPSC) issued a declaratory ruling concerning a negotiated QF contract between Orange and Rockland Utilities and Crossroads Cogeneration, Inc. (Crossroads). The specific question involved Orange and Rockland's obligation to purchase additional output from an expansion of the facility. Crossroads contended that the contract, which was approved in 1988, required Orange and Rockland to purchase the output. Crossroads contended that the New York Commission did not have jurisdiction to adjudicate its claim, citing as authority Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995).

In its decision granting the request for a declaratory ruling, the New York Commission stated:

As was recently reaffirmed, it is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. The precedents involving interpretation of past policies and approvals, and not the contract non-interference policy that Crossroads cites, control here. As a result, the approval of the original contract for the Crossroads site may be explained and interpreted, and O&R's petition may be construed as requesting that relief.

Crossroads then filed a five count complaint in Federal District Court, seeking both contractual and antitrust damages.

Crossroads alleged that the New York State Commission lacked subject matter jurisdiction. In an opinion issued June 30, 1997, the Court granted Orange and Rockland's Motion to Dismiss the complaint, finding, among other things, that Crossroads was collaterally estopped from asserting the jurisdictional issue in the Federal Court. The Court relied on the Restatement (2nd) of Judgements in assessing Crossroad's claim:

When a court has rendered a judgement in a contested action, the judgement precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgement to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgement was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgement should have opportunity belatedly to attack the court's subject matter jurisdiction.

Restatement (Second) of Judgements § 12 (1982). Having carefully considered the arguments set forth by the parties in their briefs and at oral argument, the Court determines that none of the three above-mentioned exceptions applies to the jurisdictional determination made by the NYPSC. Accordingly, plaintiff is precluded from relitigating the issue of the NYPSC's subject matter jurisdiction in this, the second proceeding between these parties.

The court found that none of these exceptions applied and dismissed Crossroads' complaint.

We recognize that a finding that a QF is collaterally estopped from challenging a jurisdictional finding is not as compelling as a determination of the issue on a direct appeal. However, it is probative on the issue, especially given the Court's reliance on the exception stated in the Restatement 2d. We also note that Florida Power Corporation has recently filed this Opinion, and the New York Commission's ruling as supplemental authority with the

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Florida Supreme Court (Case No. 88,280) Panda-Kathleen, L.P., v. Florida Power Corporation and Florida Public Service Commission. On September 19, 1997, the Court issued its decision affirming the Commission's order. A motion for rehearing is pending.

The New York Commission seems to have drawn a distinction on the jurisdictional question not along the standard offer tariff/negotiated contract line. Rather, it asserts jurisdiction over matters addressing the interpretation and clarification of past policies and approvals and eschews jurisdiction to apply those interpretations and policies to disputed factual determination.

Such a policy has significant application in this docket. Florida Power Corporation first asked this Commission to declare that FPC had properly calculated the energy payments due Lake pursuant to the contract. This determination is inextricably linked to what the Commission approved when it approved the contract.

If as FPC contends, the contract contemplates that the "avoided unit" would cycle in FPC's system economic dispatch and if as we believe and FPC contends, the contract provides for the use of actual fuel prices and not projected fuel prices, then Lake's assertion in the circuit that it is entitled to firm energy payments 100% of the time is suspect. If this assertion is suspect, then the "savings" associated with the buy out are overstated. If the Commission does in fact have the jurisdiction to resolve the question of what was contemplated at the time of approval, the uncertainty of the outcome of the circuit court litigation would not be a factor in the decision to approve the buy out.

In its supplemental brief filed August 29, 1997, FPC states:

The *Crossroads* decision cited in Florida Power's initial brief dated July 29, 1997 supports the position that Florida Power asserted in Docket No. 940771-EQ that the Commission had jurisdiction to determine the proper interpretation of section 9.1.2 of the cogeneration contracts it had previously approved for cost recovery. However, although Florida Power continues to believe that the Commission has such jurisdiction as a general matter, just as in *Crossroads*, given the Commission's decision in Order No. PSC-95-0210-FOF-EQ (Order 0210) issued in that docket, the doctrine of administrative finality precludes the Commission from now exercising that

jurisdiction under the facts and circumstances of this case.

In essence, Florida Power Corporation argues that, given the Commission's previous determination that it would defer to the circuit court, the Commission cannot revisit that question in the guise of a cost recovery approval/disallowance.

However, we are not, at this juncture, "revisiting" anything. What is before the Commission is a contract modification that we believe is based on an erroneous assumption. That is, that the cost effectiveness of the modification is based on the "litigation risk" associated with a circuit court determination of the operating characteristics of the "avoided unit" in a manner not contemplated or intended when the contract was approved. If, as FPC suggests (and Crossroads supports), this Commission has the jurisdiction to interpret and clarify its approval, there is no "risk" associated with an erroneous circuit court interpretation. The modification/buy-out then is clearly not cost-effective when measured by the standard of Rule 25-17.0836, Florida Administrative Code.

Other decisions of the New York Public Service Commission are illustrative of the Commission's continuing jurisdiction to interpret and clarify its approvals. For example, in Indeck-Yerkes Energy Service of Yonkers v. Consolidated Edison Co. of New York, 1994 WL 62394 (S.D.N.Y.) ("Indeck-Yerkes"), the QF ("Indeck") had entered into a contract with the utility ("Con Ed"), which was approved by the NYPSC on the basis of Indeck's representation that the cogeneration facility would be located at a certain "Federal Plaza site." A dispute subsequently arose when Indeck wanted to build the facility at a different site. The NYPSC issued an order "clarifying" that its prior order approving the Indeck-Con Ed contract was subject to the NYPSC's then-existing "site certainty policy." In contract litigation before the U.S. District Court for the Southern District of New York, the Court granted summary judgment in favor of Con Ed, holding that the contract contemplated adherence to the NYPSC's contract approval conditions, which included, the Court held, the "site certainty policy" then in effect.

Similarly, in Re Niagara Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C., March 26, 1996), the utility, Niagara Mohawk ("NiMo") alleged that the QF, Lyonsdale Power L.P., had exceeded the output level contemplated under their contract. The New York PSC held

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that its approval order for the Lyonsdale-NiMo contract required, by its own terms, "strict" compliance with the output limitation condition set forth in the order.

We believe that all three New York determinations have a common and irrefutable similarity with the contract proposed for modification: All involve a question that turns on what was meant when the contract was approved, and not on the determination of disputed facts and the application of those facts to an unambiguous contract provision. In this docket, the resolution of the energy pricing issue, in so far as the cost-effectiveness of buy-out/modification is concerned, turns on what the contract meant at the time it was approved. No party has cited to any authority which suggests that this type determination is not within the Commission's jurisdiction.

Public utilities, over which this Commission has rate setting authority, are required to provide adequate, reliable electric service at fair and reasonable rates. In the administration of cogeneration contracts, Chapter 366.051, Florida Statutes, states in part:

In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs.

This Commission's rules are consistent with the guidelines set out in the Florida Statutes and PURPA. Specifically, Rule 25-17.0825, Florida Administrative Code states in part:

As-available energy sold by a qualifying facility shall be purchased by the utility at a rate, in cents per kilowatt-hour, not to exceed the utility's avoided energy cost. (Emphasis added)

Rule 25-17.0832(2) states in part that:

Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract. (Emphasis added)

Rule 25-17.086 states that:

Where purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082 to purchase electricity from a qualifying facility. (Emphasis added)

The Commission's decision in Docket No. 940771-EQ, Order No. PSC-95-0210-FOF-EQ, specifically recognized these constraints. We believe that where cost recovery review finds that a utility is requesting recovery of QF payments that exceed its full avoided costs, those costs are subject to disallowance.

When the Commission initially approves a negotiated contract, the determination of avoided costs is based on the utility's next identified capacity addition. At that point in time, the contract is evaluated for cost recovery purposes in accordance with the above referenced rules. However, in evaluating contract modifications, continued cost recovery is based on savings compared to the existing contract.

Rule 25-17.036(6) requires that:

The modifications and concessions of the utility and developer shall be evaluated against both the existing contract and the current value of the purchasing utility's avoided cost. (Emphasis added)

Absent a modification, the utility's ratepayers remain obligated to pay costs as specified within the current contract. Therefore, modifications which result in costs above the existing contract are not appropriate for approval.

The result of the provisions of the Settlement Agreement is energy costs that are approximately \$24.9 million NPV greater than what FPC is currently authorized to recover today. Approving the Settlement Agreement is inconsistent with the requirements of Section 366.051, Florida Statutes, Section 210 of PURPA and this Commission's Rules governing cost recovery of cogeneration contracts.

We recognize the benefits of electricity produced by cogeneration and small power producers and the requirements to purchase such power when available. However both the Federal and state law limit the price to be paid for this type of power. To ensure that benefits remained with a utility's ratepayers, PURPA and the Florida Statutes established that rates for the purchase of power from QFs shall not exceed a utility's avoided cost. Such assurance was necessary to avoid situations that would require a utility to purchase electricity from a QF when in fact it could produce or purchase alternative power at a lower cost.

The Settlement Agreement achieves benefits in the form of curtailment savings and reduced capacity and variable O&M payments. However, compared to the more appropriate method of determining energy payments under the existing contract, the Settlement Agreement increases costs to FPC's ratepayers by approximately \$17.1 million NPV. Furthermore, contrary to Section 366.051, Florida Statutes, Section 210 of PURPA, and this Commission's rules, approval of the Settlement Agreement commits FPC's ratepayers to costs in excess of current avoided energy costs. For these reasons, we find that the Settlement Agreement should be denied.

IV. ADMINISTRATIVE FINALITY

Both Lake and FPC argue the doctrine of administrative finality, although in slightly different contexts. Lake suggests

that Order No. 25668, Implementation of Rules 25-17.080 through 25-17.091, Regarding Cogeneration and Small Power Production and the Florida Supreme Court's affirmation in Florida Power & Light Co. v. Beard, 626 So.2d 660 (Fla. 1993) of the Commission's actions, articulate a policy of not revisiting prior determinations with respect to QF contracts, except in certain limited situations. A decision by the Commission not to approve a contract modification which results in increases costs above what was contemplated at the time of the contract is not a "revisitation" of cost recovery or contract approval. Both cases cited by Lake (Freehold, supra and West Penn, supra) involve attempts by a utility and/or a state commission to change a contract based on changed circumstances. That is not the action taken by the Commission in this case.

Florida Power suggests that, having determined this was a matter for civil court determination, the doctrine of administrative finality precludes the denial of cost recovery in a subsequent proceeding. This argument is compelling, but not applicable. Parties and others whose substantial interests are affected by the Commission's decisions, need to be able to rely on the finality of those decisions. However, in its brief, Florida Power Corporation states: "...Florida Power believed, and continues to believe, that the Commission did have jurisdiction to interpret this pricing provision". The New York Public Service Commission's determinations discussed in this order tend to support this position. The circuit court has not yet ruled on the ultimate question. Further the action taken in this order is not a denial of cost recovery, but a determination that a proposed modification to a contract (which both parties recognize requires our approval) is not cost-effective.

V. EQUAL PROTECTION

Both Lake and FPC argue that the Commission's denial of this petition would be "arbitrary and capricious" and violative of Section 120.68(12)(b), Florida Statutes. That section provides for remand where agency action is inconsistent with prior decisions if not adequately explained by the agency. Both parties suggest that the decision in Docket No. 961407-EQ, Petition for Expedited Approval of Settlement Agreement with Pasco Cogen., Ltd., to approve a contract modification requires an identical result in this docket. The two petitions are not so "similarly situated" as to compel approval of this petition. At least four bases distinguish the instant contract:

1. This settlement has additional rate impacts of approximately 50 cents per month per customer through the year 2009.
2. This settlement has additional intergenerational equity impact, with the effect of the buy outs being cumulative.
3. The decision rendered by the New York Commission with respect to the Crossroads contract, and the decision by the Federal District Court suggests that the Commission's jurisdiction in the area of clarifying/explaining/interpreting its contract approvals is not as limited as previously thought. Part of the rationale for approving the Pasco settlement was the risk associated with a civil court's interpretation of the contract. Having concluded, based in part on the subsequent opinion of the District Court that the "risk" does not exist, the two buy-outs are different.
4. Less ratepayer savings are associated with this settlement than the ratepayer savings associated with the FPC/Pasco Settlement. As presented in these two cases, the Lake Settlement's ratepayer savings are \$26.6 M, whereas the Pasco Settlement's ratepayer savings are estimated to be \$39.0 M. These results would be expected if the courts were to determine the pricing dispute in favor of the cogenerators rather than FPC.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's Petition for Expedited Approval of the Settlement Agreement with Lake Cogen, Ltd. is denied. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036,

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Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 14th day of November, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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COMMISSIONER GARCIA DISSENTS.

COMMISSIONER CLARK DISSENTS, as set forth below:

I dissent from the majority's decision because their basis for rejecting the settlement is flawed. The majority concludes that this Commission could reject for cost recovery a decision by the court hearing the dispute regarding section 9.1.2 of the contract between Florida Power Corporation (FPC) and Lake Cogen Ltd. Such a rejection would essentially overrule our unanimous decision in Order No. PSC-95-0210-FOF-EQ, which the parties relied on in seeking the court's resolution to this contract dispute. Further, the majority's decision is arbitrary and capricious because, on the same material facts, the Commission approved a settlement agreement between FPC and Pasco Cogen, Ltd., in Order No. PSC-97-0523-FOF-EQ, issued May 7, 1997. Finally, the majority decision has the effect

of undermining important policies established by the Commission to encourage cogeneration, policies which ultimately lead to benefits to ratepayers derived from increased competition in the wholesale generation segment of the industry.

The facts in this case have their genesis in a dispute that arose between the parties on June 18, 1994, when FPC notified numerous cogenerators connected to its system that FPC had reviewed the operational status of the avoided unit described in section 9.1.2 of the contracts during minimum load conditions, and would be implementing section 9.1.2 in a way that resulted in the cogenerators being paid "as available" energy prices at those times, rather than "firm" energy prices at all hours. In order to clarify its interpretation of the section 9.1.2, FPC filed a petition for declaratory statement (Docket No. 940771-EQ) seeking a ruling from the Commission that FPC's interpretation was consistent with the Commission's rules (subsequent to FPC filing its petition, Lake and other cogenerators filed lawsuits in the state courts for breach of contract and declaratory judgment).

In response to FPC's petition, the Commission issued Order No. PSC-95-0210-FOF-EQ, on February 15, 1995. The Commission's decision dismissing the petition recognized that the PURPA -- the law requiring electric utilities to purchase electricity offered for sale by Qualifying Facilities (QF) -- does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs. The Commission's decision also recognized the more limited role to be played by the Commission with respect to negotiated contracts. The Commission has a rule on settling disputes in contract negotiations, but no provisions for resolving disputes once contracts have been executed and approved for cost recovery. The Commission's decision also recognized that the PURPA, and the Commission's and the Federal Energy Regulatory Commission's rules carve out a limited role for states in the regulation of the relationship between utilities and QFs. As Order No. PSC-97-0210-FOF-EQ states, "[t]hat limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved." The Commission's order also reviewed several court decisions in arriving at its decision. In response to these cases, the Commission stated that

[t]he facts vary in these cases, but the general consensus appears to be that under federal and state regulation of the relationship between utilities and

cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In dismissing the case, the Commission further stated that "[w]e have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake" Statements such as those made in Order No. PSC-95-0210-FOF-EQ sent a strong signal to the parties that the Commission would not interfere in the ongoing contractual relationship between the parties.

Since February 15, 1995, at which time the Commission dismissed FPC's Petition, the parties have been engaged in litigation. It is fair to assume that FPC's and the cogenerator's behavior in the lawsuit has been materially influenced by the assumption that the Commission would not involve itself with interpretation of any contract terms.

It is apparent that the direction of the Commission as indicated by Order PSC-95-0210-FOF-EQ influenced other parties as well. Specifically, another cogenerator, Pasco Cogen, Ltd., followed a track similar to that followed by Lake with respect to FPC. Pasco disputed FPC's determination that as-available energy payments were to be paid during certain off-peak hours rather than firm energy payments, filed a lawsuit against FPC, and subsequently settled with FPC on terms that are in all material respects identical to the terms of the instant settlement agreement. The Commission approved the settlement agreement between FPC and Pasco. In its Order No. PSC-97-0523-FOF-EQ, the Commission reasoned that, given that contract disputes are a matter for civil courts to resolve, it ". . . must test the appropriateness of a settlement of a contract dispute based on the possible outcomes of the court decision and its potential impact on ratepayers." The same basic fact pattern exists in both the Lake and Pasco cases, and a contrary decision here is, therefore, arbitrary and capricious.

The majority relies on the notion that the Commission could reject the court's interpretation of the contract if it was inconsistent with the basis on which the Commission approved the contract for cost recovery. The rejection would take the form of denying cost recovery to FPC based on the court's interpretation. The contract has a "regulatory out" provision, which means that if FPC is denied cost recovery by the Commission, it is not obligated

to make payments to Lake Cogen, Ltd. I agree that the Commission could deny cost recovery based on a subsequent contract interpretation if it was contrary to the basis on which the contract was originally approved, but that it not the case here. The Order originally approving the contract had no specific amplification as to how the payments due under section 9.1.2 would be calculated, and when asked for clarification with respect to the calculation in the Petition for Declaratory Statement, it was acknowledged that the dispute involved a contract interpretation, not a clarification of the basis on which the contract was approved for cost recovery.

Finally, this argument goes against the very concerns that prompted the Commission to state in its Order implementing its cogeneration rules (see Docket No. 910603-EQ) that it would not revisit its cost recovery determinations absent a showing of fraud, misrepresentation or mistake. This type of assurance was considered by the Commission as necessary to encourage cogeneration in the electric utility industry. It was also important in bringing about negotiated cogeneration agreements, which were and continue to be viewed by the Commission as a superior arrangement between a cogenerator and a utility over the standard offer. It is important to note that it appears as though the Commission's policies have been successful in bringing about cogeneration and in fostering competition among suppliers of electric energy in the wholesale market to the benefit of Florida's electric utility customers.

In summary, the majority view in this docket has the effect of reversing an important decision on which these and other parties have relied. It also has the effect of undermining the Commission's policies of encouraging competition in the wholesale generation segment of Florida's electric utility industry.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 5, 1997.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The

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notice of appeal must be in the form specified in Rule 9.900(a),
Florida Rules of Appellate Procedure.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for) DOCKET NO. 940771-EQ
determination that) ORDER NO. PSC-95-0210-FOF-EQ
implementation of contractual) ISSUED: February 15, 1995
pricing mechanism for energy)
payments to qualifying)
facilities complies with Rule)
25-17.0832, F.A.C., by Florida)
Power Corporation.)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING MOTIONS TO DISMISS

BACKGROUND

In 1991 and 1992, Florida Power Corporation (FPC) entered into eleven negotiated cogeneration contracts with various cogenerators. Those contracts provide approximately 735 megawatts (MW) out of approximately 1,045 MWs of cogenerated capacity that FPC will have on its system by the end of 1995. The negotiated contracts in question are between FPC and the following cogenerators: Seminole Fertilizer, Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, Ridge Generating Station, Dade County, Polk Power Partners-Mulberry, Polk Power Partners-Royster, EcoPeat Avon Park, and CFR Biogen.

The contracts all contain the following provision, section 9.1.2:

Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based on the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided

Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

This provision establishes the method to determine when cogenerators are entitled to receive firm energy payments or as-available energy payments under the contract. The Commission reviewed the 11 negotiated contracts and found them to be cost-effective for FPC's ratepayers under the criteria established in Rules 25-17.082 and 25-17.0832(2), Florida Administrative Code.¹ The information the Commission received at that time was based on simplified assumptions to arrive at the estimated energy payments.

Recently, FPC states, it reviewed the operational status of the avoided unit described in section 9.1.2 of the contracts during minimum load conditions. FPC determined that the avoided unit would be scheduled off during certain minimum load hours of the day. On July 18, 1994, FPC notified the parties to the contracts that it would begin implementing section 9.1.2, effective August 1, 1994. Prior to that time FPC had paid cogenerators firm energy prices at all hours.

Three days later, on July 21, 1994, FPC filed a petition seeking our declaratory statement that section 9.1.2 of its negotiated cogeneration contracts is consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. Rules 25-17.0832(4)(a) and (b) provide:

(4) Avoided energy payments.

(a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825(2)(a).

¹ See Order No. 24099, issued February 12, 1991 in Docket No. 900917-EQ; Order No. 24734, issued July 1, 1991 in Docket No. 910401-EQ; Order No. 24923, issued August 19, 1991 in Docket No. 910549-EQ; and Order No. PSC-92-0129-FOF-EQ, issued March 31, 1992 in Docket No. 900363-EQ.

(b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825 (2)(a).

Several cogenerators petitioned for leave to intervene and questioned whether the declaratory statement was the appropriate procedure to resolve the issue. In addition, in September 1994, OCL, Pasco, Lake, Metro-Dade County, and Auburndale filed motions to dismiss on the grounds that we do not have jurisdiction to consider FPC's petition. Also, subsequent to the filing of FPC's petition, Pasco Cogen and Lake Cogen initiated lawsuits in the state courts for breach of contract and declaratory judgment.

On November 1, 1994, FPC amended its petition and asked the Commission to determine whether its implementation of section 9.1.2 is lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. FPC also requested a formal evidentiary proceeding. Thereafter the cogenerators filed additional motions to dismiss the amended petition.

7 On January 5, 1995, we heard oral argument on the motions to dismiss filed in this docket and the motions to dismiss filed in two other dockets involving cogeneration contracts. We have fully considered the merits of the motions to dismiss, and we find that they should be granted. Our reasons for this decision are set out below.

DECISION

In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), to develop ways to lessen the country's dependence on foreign oil and natural gas. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. In developing PURPA, Congress identified three major obstacles that hindered the development of a strong cogeneration market. First, monopoly electric utilities resisted purchasing power from other generation suppliers instead of building their own generating units. Second, monopoly electric utilities could refuse to sell needed backup

power to cogenerators. Third, cogenerators and small power producers could be subject to extensive, expensive federal and state regulation as electric utilities.

PURPA contains several provisions designed to overcome these obstacles. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against QF's, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(c) directs FERC to adopt rules exempting QFs from most state and federal utility regulation, and section 210(f) directs state regulatory authorities to implement FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, "the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. s. 292.101(b)(6). FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of purchased power agreements, including price, as long as they are at or below a utilities' avoided cost. 18 C.F.R. s. 292.301.

In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities "must purchase electricity offered for sale by QFs, "in accordance with applicable law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs.

The Commission's implementation of Section 366.051 is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity: by means of a standard offer contract, or an individually negotiated power purchase contract. See Rules 25-17.082(1) and 25-17.0832. The two types of contracts are treated very differently in our rules. The rules require utilities to

publish a standard offer contract in their tariffs which we must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, and insurance. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832(3)(d), Florida Administrative Code.

In contrast, our rules are more limited in their treatment of negotiated contracts. Rule 25-17.082(2), Florida Administrative Code, simply encourages utilities and QFs to negotiate contracts, and provides the criteria the Commission will consider when it determines whether the contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations", imposes an obligation to negotiate cogeneration contracts in good faith, and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. The rule makes no provision for resolution of a dispute once the contract has been executed and approved for cost recovery.

We use certain standard offer contract rules as guidelines in determining the cost-effectiveness of negotiated contracts for cost recovery purposes, but we have not required any standard provisions to be included in negotiated contracts. In Docket No. 910603-EQ, we specifically addressed the issue of standard provisions for negotiated contracts. In that docket the cogenerators urged us to prescribe certain standard provisions in negotiated contracts and prohibit other provisions, like regulatory out clauses. In Order No. 25668, issued February 3, 1992, we said:

We will not prescribe standard provisions in negotiated contracts, because negotiated contracts are just that -- negotiated contracts. Standardized provisions are not necessary in negotiated contracts, and they can impair the negotiating process.

Rule 25-17.0834, Florida Administrative Code, provides a remedy to QFs when a utility does not negotiate in good faith. If a utility insists on an unreasonable requirement, QFs are free to petition the Commission for relief. . . .

Standardized terms in negotiated contracts could impair negotiating flexibility to the detriment of the utility and the QF. As Witness Dolan stated, "[e]ven if guidelines and standards at a given time did reflect the parties' perceptions, guidelines and standards cannot be modified easily or quickly in response to changes in conditions that bear on the risks and benefits of the transaction". Standard terms that suit the needs of some parties will not suit the needs of other QFs wishing to negotiate contracts. Even in this docket, the QFs do not agree as to which terms should be standardized. . . . It is clear from the differing opinions that negotiated contracts should not contain standard provisions.

Order No. 25668, p. 7

This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. As Auburndale's attorney pointed out in oral argument, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction.

While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts. We have interpreted the provisions of standard offer contracts on several occasions,² but we have not

² In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991,

interpreted the provisions of negotiated contracts. See Docket No. 840438-EI, In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Cogener Cogeneration Agreement, Order No. 14207, issued March 31, 1985, where we refused to construe a paragraph of the agreement that concerned renegotiation of contract terms. There we said that while we could interpret our cogeneration rules and decide that the new rules did not apply to preexisting contracts, matters of contractual interpretation were properly left to the civil courts. Our Cogener decision, while not controlling here, does lend support to the proposition that we have limited our involvement in negotiated contracts to the contract formation process and cost recovery review.

The weight of authority from other states that have addressed similar issues supports this position. See, eg. Afton Energy Inc. v. Idaho Power Co., 729 P.2d 400 (Id. 1986); Bates Fabrics, Inc. v. PUC, 447 A.2d 1211 (ME. 1992); Barasch v. Pennsylvania Public Utility Commission, 546 A.2d 1296, reargument denied, 550 A.2d 257 (1988); Eric Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric & Gas Corporation Remains in Effect, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 1995 WL 4897 (3rd Cir. (N.J. 1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation, Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the general consensus appears to be that under federal and state regulation of the relationship between utilities and cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In Afton, supra, Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditioned on the Idaho Supreme Court's determination whether the Idaho commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that

Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

the lesser payment option would be in effect. The Commission dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In Eric Associates, supra, the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had cancelled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

Eric's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.

We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such questions do not involve our authority, under PURPA and PSL066-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.

. . . Eric has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source for the authority to exercise jurisdiction over such issues.

FPC has asked us to determine if its implementation of the pricing provision is lawful and consistent with Commission Rule 25-17.0832(4), Florida Administrative Code. We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to decide that its interpretation of the contract's pricing provision is correct. We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. Furthermore, we agree with the cogenerators that the pricing methodology outlined in Rule 25-17.0832(4), Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts. We have clearly said that we would not require any standard provisions, pricing or otherwise, for negotiated

contracts. Therefore, whether FPC's implementation of the pricing provision is consistent with the rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. In this case, we will defer to the courts to resolve that dispute. We note however, that courts have the discretion to refer matters to us for consideration to maintain uniformity and to bring the Commission's specialized expertise to bear upon the issues at hand.

We disagree with FPC's proposition that when the Commission issues an order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that we have continuing jurisdiction to interpret. It is true that the Supreme Court has determined that territorial agreements merge into Commission orders approving them, but territorial agreements are not valid commercial purchased power contracts. They are otherwise unlawful, anticompetitive agreements that have no validity under the law until we approve them. Furthermore, territorial agreements involve the provision of retail electric service over which we have exclusive and preemptive authority. As explained above, we do not enjoy such authority over QFs or their negotiated power purchase contracts.

Under certain circumstances we will exercise continuing regulatory supervision over power purchases made pursuant to negotiated contracts. We have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake;¹ but if it is determined that any of those facts existed when we approved a contract for cost recovery, we will review our initial decision. That power has been clearly recognized by the parties through the "regulatory out" provisions of those contracts. We do not think, however, that the regulatory out provisions of negotiated contracts somehow confer continuing responsibility or authority to resolve contract interpretation disputes. Our authority derives from the statutes. United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986). It cannot be conferred or inferred from the provisions of a contract.

For these reasons we find that the motions to dismiss should be granted. FPC's petition fails to set forth any claim that the Commission should resolve. We defer to the courts to answer the question of contract interpretation raised in this case. Thus, FPC's petition is dismissed.

¹ See Docket No. 910603-EQ, In Re: Implementation of Rules 25-17.080 through 25-17.091, Florida Administrative Code, Order No. 25668, issued February 3, 1992.

ORDER NO. PSC-95-0210-FOF-EQ
DOCKET NO. 940771-EQ
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It is therefore

ORDERED by the Florida Public Service Commission that the Motions to Dismiss filed by Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, and Metro Dade County/Montenay are granted. Florida Power Corporation's Petition is dismissed. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 15th day of February, 1995.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-488-8371.

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

6

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Approval of)
Contracts for Purchase of Firm Capacity)
and Energy by Florida Power Corporation)
_____)

DOCKET NO. 910401-EQ

ORDER NO. 24734

ISSUED: 7-1-91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
GERALD L. GUNTER
MICHAEL McK. WILSON

NOTICE OF PROPOSED AGENCY ACTION

ORDER APPROVING FIRM CAPACITY AND ENERGY CONTRACTS

BY THE COMMISSION:

~~NOTICE~~ is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

On January 11, 1991, Florida Power Corporation (FPC) solicited power through a Request for Proposal (RFP) from those prospective Qualifying Facilities (QFs) that had previously indicated their interest in selling firm capacity and energy to FPC from proposed projects with an in-service date no later than December 1, 1993.

In response to its request FPC received thirteen proposals from prospective QFs. FPC retained a consultant from National Economic Research Associates, Inc. to help evaluate the proposals. Two proposals were eliminated based upon the lack of development maturity. A third project was eliminated because of the pricing risk associated with the proposed fixed capacity and energy payments. The consultant ranked the remaining ten projects in order of preference. FPC selected the following eight projects from this group:

<u>PROJECT FUEL TYPE & LOCATION</u>	<u>COMMITTED CAPACITY</u>	<u>COMMITTED ON-PEAK CAPACITY FACTOR</u>	<u>CONTRACT DATE OF THE OF</u>
Dade County Municipal Solid Waste Miami	43 MW	83%	November, 1991
El Dorado Energy Natural Gas Auburndale	103.8 MW	92%	January, 1991
Lake Cogen Limited Natural Gas Umatilla	102 MW	90%	August, 1993
Mulberry Energy Company, Inc. Orimulsion Bartow	72 MW	90%	January, 1993
Orlando Cogen Limited L.P. Natural Gas Orlando	72 MW	90%	January, 1994
Pasco Cogen Limited Natural Gas Dade City	102 MW	90%	August, 1993
Ridge Generating Station Limited Partnership Agricultural & Wood Waste Polk County	36 MW	85%	January, 1994
Royster Phosphates Waste Heat from Processing Palmetto	28 MW	85%	December, 1993

FPC'S ADDITIONAL CAPACITY NEEDS

The eight negotiated contracts total 559 MW of capacity. If a utility were to construct this amount of capacity itself, it would have to come before the Commission with a petition for a need

determination. The capacity FPC has contracted to purchase here, however, is made up of small projects with a steam capacity of less than 75 MW each, and the projects are thus not large enough to fall within the jurisdiction of the Florida Power Plant Siting Act.

The QF projects are projected to avoid the FPC's 1991 need for 300 MW of coal and 150 MW of combustion turbine capacity identified in Docket No. 910004-EU, the Annual Planning Hearing (APH). The 1991 need for 450 MW of capacity is different from the Standard Offer need identified in the same docket. FPC identifies an 80 MW combustion turbine unit with an 1997 in-service date for its Standard Offer contract.

In the request for proposals, FPC gave the QFs a choice of coal unit or combustion turbine unit pricing. All eight QFs chose the coal unit price. FPC maintains that the prices associated with the eight contracts are below the price of the 450 MW of coal-fired generation. FPC also maintains that the contract prices are below the price associated with the 300 MW coal and 150 MW combustion turbine. On a present worth basis, using FPC's planning assumptions, the 450 MW of coal capacity has total fuel and capacity costs very close to the 300 MW coal and 150 MW combustion turbine option. FPC's projections indicate that beginning in 2008, a coal unit's total avoided costs (capacity and fuel) fall below a combustion turbine's total avoided cost on a net present value basis. Since the terms of all eight contracts extend beyond the year 2008, FPC states that it considers the contracts to avoid part of the 450 MW of coal-fired generation.

In addition to the eight contracts, FPC signed two other contracts against their 1991 need, one with Seminole Fertilizer (47 MW) and one with Ecopeat (36.5 MW). The Seminole Fertilizer contract was approved in Order No. 24099. The Ecopeat contract is presently awaiting Commission approval.

The 559 MW of the negotiated contracts and the 83.5 MW associated with the Seminole and Ecopeat contracts exceed FPC's 450 MW need identified in their 1990 Facility Plan. FPC states that the excess capacity will cover present qualifying facility projects that may not come to fruition. For example, FPC believes that its two contracts with the Corporation for Future Resources, which total 74 MW, are doubtful and may not perform. Also, Pinellas County and General Peat have requested in-service delays of one to two years for projects totalling 196 MW. FPC states that it

negotiated contracts for the excess capacity because it is in :
of capacity immediately, and would not have time to acquire more
capacity to replace any contracts that might not perform. FPC
winter reserve margin for the 1991-1995 period ranges from 7.1%
10.8% without the eight QF contracts and 7.7% to 17.6% with the
contracts.

FPC's need for additional capacity identified in its 1
Annual Planning Hearing has increased considerably in its current
1991 expansion plan. The 1989 plan identified a need for 260 MW
combustion turbine capacity with a 1995 in-service date. The
current 1991 plan identifies a need of 450 MW with a 1991
service date.

FPC maintains that the additional need is a result of the
factors:

1) Higher Demand

FPC's demand and energy is higher than projected because
FPC's forecast underestimated customer growth,
underestimated per capita energy usage, and
overestimated per customer demand reductions from
conservation and load management programs.

2) Remodeled Interface

FPC changed its method of modelling emergency assistance.
The old method of modelling emergency assistance
overstated the reliability of FPC's system, and thus
reduced the apparent need for capacity. By more
accurately modelling emergency assistance, FPC's plan
showed an accelerated need for capacity in 1991.

FPC's old method of modelling emergency assistance did
not consider the tie-line limitation of 3200 MW into
Florida. The Company previously modeled the Peninsula
and Southern as one assistance area with no transmission
constraints between Southern and the Peninsula. The
effect was to assume that FPC could receive assistance
from Southern as long as it had capacity available,
whether or not the capacity could be transmitted to FPC.

Now, FPC's model accounts for the limitation on the tie-lines by modelling the Peninsula as the assistance area and by modelling Southern as a 2,800 MW unit in the peninsula (3,200 MW interface capacity minus FPC's firm purchase of 400 MW). This new modelling technique recognizes the limitations in transmitting capacity between the Southern Company and Florida, and results in a more accurate representation of FPC's reliability.

3) Lower Assistance From Peninsular Florida Utilities

Because the peninsular Florida utilities have experienced higher than anticipated loads, they have less capacity available to sell FPC on an emergency basis.

As a result of these changes, the FPC Loss of Load Probability (LOLP) has increased, thereby accelerating FPC's need into 1991.

CONTRACT TERMS AND CONDITIONS

The negotiated contracts considered here contain several terms and conditions that are relatively unique. The unique terms and conditions are described below.

Security Guaranties

Within sixty days after the contract approval date, the QF shall post a Completion Security Guarantee of \$10 per KW of Committed Capacity or \$1,000,000 per 100 MW to ensure completion of the QF facility in a timely fashion. The contract agreement will terminate if the completion security guarantee is not tendered in a timely fashion. FPC will refund to the QF any cash completion security guarantee if the facility achieves commercial in-service at or prior to the contract in-service date.

The negotiated contracts contain an Operational Security Guarantee of \$20 per KW of committed capacity or \$2,000,000 per 100 MW to ensure timely performance by the QF of its obligations under the agreement. The operational security guarantee must be cash or suitable letter of credit, and terminates with the term of the agreement.

Changes in Committed Capacity

For the period ending one year immediately after the contract in-service date, the QF may, on one occasion only, increase or decrease the committed capacity by no more than 10%. After the one year period, and throughout the term of the agreement, the QF may decrease its committed capacity by up to 20%. The QF will be charged a penalty if it provides less than three years notice of a decrease in capacity occurring one year after the in-service date. The capacity payment will be prorated to the new capacity amount.

Capacity and Energy Payments

The negotiated contracts allow the QFs to receive a monthly capacity payment based on the value of the committed capacity factor during the month. The respective payment streams for the QFs are based on their committed on-peak capacity factors (83% to 93%). See appendix 2. FPC's avoided coal unit used for pricing these contracts contains a 83% on-peak capacity factor. The payment stream of the contracts with capacity factors above 83% are increased by their committed capacity divided by 83% (ex. 90/83 = 1.084%) to reflect the additional value of higher availability and reliability to FPC. The contracts also include a capacity performance adjustment which will decrease the capacity payment in the event the monthly on-peak capacity factor is below the respective contractual minimum amount but greater than or equal to 50%. No capacity payment will be made if the on-peak capacity factor falls below 50%.

Beginning with the contract in-service date, the QF will receive electric energy payments based upon the firm energy cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O & M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the as-available energy cost. There is also an hourly performance adjustment to the energy payment which provides an incentive to the QF to operate in a manner similar to the operation of the avoided unit.

Events of Default

The negotiated contracts permit the QF to delay commercial operation by up to 90 days beyond the Contract In-Service Date with the payment of \$0.15 per kW or \$15,000 per 100 MW per day of delay. If the Operational Security Guarantee is not tendered on or before the applicable due date the QF is in default.

If there are delays in commercial in-service, the Negotiated Contract requires renegotiations to begin at least thirty days prior to termination if the QF has commenced construction and is not in arrears for monies owed to FPC.

Interconnection Formats

Three interconnection formats were used as the basis for all eight negotiated contracts. All eight QFs are located south of FPC's Central Florida Substation, therefore FPC did not have to acquire additional interface capacity. The contract format used for each contract is summarized below:

1. Interconnected and Non-Interconnected:

- El Dorado Energy
- Ridge Generating Station Limited Partnership

These two contracts use the base contract format which permits the QF to either be directly interconnected to the company or to be interconnected to a transmission service utility which provides wheeling services. The two QFs who have selected this format have facilities which will be located close to FPC's system but they may elect to wheel.

2. Interconnected

- Lake Cogen Limited
- Mulberry Energy Company, Inc.
- Orlando Cogen Limited
- Pasco Cogen Limited

This contract version is for the QFs directly interconnected to FPC.

3. Non-Interconnected Version

- Dade County
- Royster Phosphates, Inc.

This contract version is for the QFs that will wheel their power through a transmission service utility.

APPROVAL OF THE CONTRACTS

Under the provisions of Sections 25-17.082 NS 25-17.0832(2), Florida Administrative Code, we grant Florida Power Corporation's petition for approval of the eight negotiated QF contracts discussed above. Section 25-17.082, Florida Administrative Code requires electric utilities to purchase electricity produced and sold by qualifying facilities at rates which have been agreed upon by the utility and qualifying facility, or at the utility's published tariff rate. Section 25-17.0832(2), Florida Administrative Code states that in reviewing a negotiated firm capacity and energy contract for purposes of cost recovery, the Commission shall consider the following factors:

- a. Whether the additional firm capacity and energy is needed by the purchasing utility and by Florida utilities from a statewide perspective;
- b. Whether the present worth of the utility's payments for firm capacity and energy to the QF over the life of the contract is projected to be no greater than the present worth of the year-by-year deferral of the construction and operation of a generating facility by the purchasing utility over the life of the contract, or the present worth of other capacity and energy costs that the contract is designed to avoid;
- c. Whether, to the extent that annual firm capacity and energy payments made to the QF in any year exceed that year's annual value of deferring the construction and operation of a generating facility, or other capacity and energy related costs, the contract contains provisions to ensure repayment of the amounts that exceed that year's value of deferring the capacity if the QF fails to deliver firm capacity and energy under the terms of the contract; and

- d. Whether, considering the technical reliability, viability and financial stability of the QF, the contract contains provisions to protect the purchasing utility's ratepayers if the QF fails to deliver firm capacity and energy under the terms of the contract.

Need For Power

It is with certain reservations that we approve contracts amounting to 642.5 MW (including Seminole and Ecopeat), when FPC has only identified a need for 450 MW. We do not believe, as a general rule, that utilities should sign up more capacity than they need. There are, however, certain circumstances which support such an action in this case. FPC's need is immediate and they cannot risk obtaining less than 450 MW because of possible QF defaults or delays. Also, FPC's need is probably greater than the 450 MW they identified in their 1990 plan because that plan did not anticipate recently requested delays in existing QF projects, or the anticipated one-year delay in FPC's 500 kV transmission line.

In the event that all QF projects do come on-line as agreed, and FPC has excess capacity, FPC can reduce its purchase from Southern Company by 200 MW in 1994 and delay or cancel the construction of 1993 combustion turbines to mitigate any harmful effect to its ratepayers.

Furthermore, FPC needs to purchase capacity and energy from the QF's to meet reliability and reserve margin requirements. The purchases will contribute to maintaining a loss of load probability of less than 0.1 days per year. The capacity provided by the QF's will improve the loss of load probability for the state, and thus contribute to the capacity needs of the state.

Cost-Effectiveness

The analysis provided by FPC with its petition indicated that the present value of its payments to each of the QFs for firm capacity and energy will be no greater than the present worth of the value of a year-to-year deferral of FPC's avoided costs. The analysis showed a present worth savings of \$42,516,772 compared to FPC's full avoided costs for the eight negotiated contracts. FPC's avoided costs are derived from its 1991 need for 450 MW of pulverized coal and combustion turbine capacity.

At the time the petition for approval was filed, FPC was in the process of updating the K factor associated with its avoided cost. Since that time FPC has completed its update of the K factor and recalculated its avoided costs accordingly. According to the revised figures submitted by FPC (Appendix 1), the present savings of the cogeneration contracts have increased to \$44,273,600. Our approval of the cogeneration contracts is still appropriate, since the present worth savings, compared to FPC's full avoided costs, has increased.

Security for Early Payments

None of the eight QF's will be paid early capacity payments and therefore, there is no need to establish a capacity cost account to ensure repayment of capacity payments exceeding a year's value of deferral.

Security Against Default

The contract contains security to protect FPC's ratepayer in the event a QF fails to deliver firm capacity and energy as required in the contract. The contract contains several performance milestone dates which, if not achieved, would permit FPC to terminate the contract.

CONCLUSION

We find that the negotiated cogeneration contracts between Dade County, El Dorado Energy, Lake Cogen Ltd., Mulberry Energy Co., Orlando Cogen Ltd., Pasco Cogen Ltd., Ridge Generation Services Ltd., and Royster Phosphates are viable generation alternatives because:

1. The capacity and energy generated by the facilities needed by Dade County and Florida's utilities;
2. The contracts appear to be cost-effective to FPC ratepayers;

3. FPC's ratepayers are reasonably protected from default by the QFs; and
4. The contracts meet all the requirements and rules governing qualifying facilities.

It is therefore

ORDERED by the Florida Public Service Commission that the contracts are approved for the reasons set forth in the body of this order. It is further

ORDERED that this Order shall become final unless an appropriate petition for formal proceeding is timely filed herein. It is further

ORDERED that this Order shall become final and this docket shall be closed unless an appropriate petition for a formal proceeding is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.

By ORDER of the Florida Public Service Commission, this 1st
day of July, 1991.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that

is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on
7-22-91

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

7

**NEGOTIATED CONTRACT FOR THE
PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY**

between

DADE COUNTY

and

FLORIDA POWER CORPORATION

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**NEGOTIATED CONTRACT FOR THE PURCHASE OF
FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY**

This Agreement ("Agreement") is made and entered by and between Dade County, a political subdivision of the State of Florida, having its principal place of business at Miami, Florida (hereinafter referred to as the "QF"), and Florida Power Corporation, a private utility corporation organized under the laws of the State of Florida, having its principal place of business at St. Petersburg, Florida (hereinafter referred to as the "Company"). The QF and the Company may be hereinafter referred to individually as a "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, the QF desires to sell, and the Company desires to purchase, electricity to be generated by the Facility and made available for sale to the Company, consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date; and

WHEREAS, the QF will engage in interconnected operation of the QF's generating facility or with Florida Power & Light Company's system (hereinafter referred as the "Transmission Service Utility") which is directly interconnected at one or more points with the Company.

NOW, THEREFORE, for mutual consideration, the Parties covenant and agree as follows:

1.4 Avoided Unit Fuel Reference Plant means that Company unit(s) whose delivered price of fuel shall be used as a proxy for the fuel associated with the avoided unit type selected in section 8.2.1 hereof as such unit(s) are defined in Appendix C.

1.5 Avoided Unit Heat Rate means the average annual heat rate associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.6 Avoided Unit Variable O & M means the variable operation and maintenance expense associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.7 BTU means British thermal unit.

1.8 Capacity Account means that account which complies with the procedure in section 8.5 hereof.

1.9 Capacity Discount Factor means the value specified pursuant to section 8.4 hereof.

1.10 Capacity Payment Adjustment means the value calculated pursuant to Appendix C.

1.11 Commercial In-Service Status means (i) that the Facility is in compliance with all applicable Facility permits; (ii) that the Facility has maintained an hourly KW output, as metered at the Point of Delivery, equal to or greater than the Committed Capacity for a consecutive twenty-four (24) hour period or during the on-peak hours specified in Appendix C of two consecutive days; and (iii) that such twenty-four (24) hour period is reasonably reflective of the Facility's day to day operations.

1.18 Construction Commencement Date means the date on which work on the concrete foundation for the turbine generator begins and substantial construction activity at the Facility site thereafter continues.

1.19 Control Area means a utility system capable of regulating its generation in order to maintain its interchange schedule with other utility systems and contribute its frequency bias obligation to the interconnection.

1.20 Execution Date means the latter of the date on which the Company or the QF executes this Agreement.

1.21 Facility means all equipment, as described in this Agreement, used to produce electric energy and, for a cogeneration facility, used to produce useful thermal energy through the sequential use of energy and all equipment that is owned or controlled by the QF required for parallel operation with the interconnected utility.

1.22 FERC means the Federal Energy Regulatory Commission and any successor.

1.23 Firm Energy Cost means the energy rate calculated in accordance with section 9.1.2 hereof.

1.24 Florida-Southern Interface means the points of interconnection between the electric Control Areas of (1) Florida Power & Light Company, Florida Power Corporation, Jacksonville Electric Authority, and the City of Tallahassee and (2) Southern Company.

1.33 Minimum On-Peak Capacity Factor means that value which is associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.34 MWH means one (1) megawatthour of electric energy.

1.35 On-Peak Hours means the lesser of those daily time periods specified in Appendix C or the hours that the Company would have operated a unit with the characteristics defined in section 9.1.2 (i) hereof.

1.36 On-Peak Capacity Factor means the ratio calculated pursuant to section 8.3 hereof.

1.37 Operational Event of Default means an event or circumstance defined as such in Article XV hereof.

1.38 Operational Security Guaranty means the deposits or other assurances as specified in section 13.3 hereof.

1.39 Performance Adjustment means the value calculated pursuant to Appendix C.

1.40 Point of Delivery means the point(s) where electric energy delivered to the Company pursuant to this Agreement enters the Company's system.

1.41 Point of Metering means the point(s) where electric energy made available for delivery to the Company, subject to adjustment for losses, is measured.

1.42 Point of Ownership means the interconnection point(s) between the Facility and the interconnected utility.

ARTICLE III: FACILITY

3.1 The Facility shall be located in Section 17, Township 53S, Range 40E. The Facility shall meet all other specifications identified in the Appendices hereto in all material respects and no change in the designated location of the Facility shall be made by the QF. The Facility shall be designed and constructed by the QF or its agents at the QF's sole expense.

3.2 Throughout the Term of this Agreement, the Facility shall be a Qualifying Small Power Production Facility.

3.3 Except for Force Majeure Events declared by the Facility's fuel supplier(s) or fuel transporter(s) which comply with the definition of Force Majeure Events as specified in this Agreement and occur after the Contract In-Service Date, the Facility's ability to deliver its Committed Capacity shall not be encumbered by interruptions in its fuel supply.

3.4 The QF shall either (i) arrange for and maintain standby electrical service under a firm tariff; or (ii) maintain the ability to restart and/or continue operations during interruptions of electric service; or (iii) maintain multiple independent sources of generation.

3.5 From the Execution Date through the Contract In-Service Date, the QF shall provide the Company with progress reports on the first day of January, April, July and October which describe the current status of Facility development in such detail as the Company may reasonably require.

requested; and provided, further, that the maximum extension of such date shall in no event exceed a total of one hundred and eighty (180) days. Such delay shall not be considered a Force Majeure Event for purposes of this Agreement.

4.2.2 Upon written request by the QF not more than sixty (60) days after the declaration of a Force Majeure Event by the QF, which event contributes proximately and materially to a delay in the QF's schedule, these three dates each may be extended on a day-for-day basis for each day of delay so caused by the Force Majeure Event; provided, however, that the QF shall specifically identify: (i) each date for which extension is being requested; and (ii) the expected duration of the Force Majeure Event; and provided further, that the maximum extension of any of these three dates shall in no event exceed a total of one hundred and eighty (180) days, irrespective of the nature or number of Force Majeure Events declared by the QF.

4.2.3 The Contract In-Service Date shall be extended on a day-for-day basis for any delays directly attributable to the Company's failure to complete its obligations hereunder.

4.2.4 If the Contract In-Service Date is extended pursuant to sections 4.2.1, 4.2.2 or 4.2.3 hereof, then the Term of the Agreement may be extended for the same number of days upon separate written request by the QF not more than thirty (30) days after the Contract In-Service Date.

4.2.5 The QF shall have the one-time option of accelerating the Contract In-Service Date by up to six (6) months upon written notice to the Company not less than thirty (30) days before the accelerated Contract In-Service Date; provided, however, that (i) the QF shall

reasonable efforts to schedule outages and maintenance during such times as are designated by the Company.

5.1.6 Comply with reasonable requirements of the Company regarding day-to-day or hour-by-hour communications with the Company or with the Transmission Service Utility relative to the performance of this Agreement.

5.2 The estimates and schedules provided by the QF under this Article V shall be prepared in good faith, based on conditions known or anticipated at the time such estimates and schedules are made, and shall not be binding upon either Party; provided, however, that the QF shall in no event be relieved of its obligation to deliver Committed Capacity under the terms and conditions of this Agreement.

ARTICLE VI: PURCHASE AND SALE OF CAPACITY AND ENERGY

6.1 Commencing on the Contract In-Service Date, the QF shall commit, sell and arrange for delivery of the Committed Capacity to the Company and the Company agrees to purchase, accept and pay for the Committed Capacity made available to the Company at the Point of Delivery in accordance with the terms and conditions of this Agreement. The QF also shall sell and deliver or arrange for the delivery of the electric energy to the Company and the Company agrees to purchase, accept, and pay for such electric energy as is made available for sale to and received by the Company at the Point of Delivery.

6.2 The Committed Capacity and electric energy made available at the Point of Delivery to the Company shall be (X) net of any electric energy used on the QF's side of the Point of Ownership or () simultaneous with any purchases from the interconnected utility. This selection in billing methodology shall not be changed.

7.3 After the one (1) year period specified in section 7.2, and except as provided in section 7.4, the QF may decrease its Committed Capacity over the Term of this Agreement by amounts not to exceed in the aggregate more than twenty percent (20%) of the initial Committed Capacity specified in section 7.1 hereof as of the Execution Date. Notwithstanding any other provision of this Agreement, if less than three (3) years prior written notice is provided for any such decrease, the QF shall be subject to an adjustment to the otherwise applicable payments (except as provided in section 7.4) which shall begin when the Committed Capacity is decreased and which shall end three (3) years after notice of such decrease is provided. For each month, this adjustment shall be equal to the lesser of (i) the estimated increased costs incurred by the Company to generate or purchase an equivalent amount of replacement capacity and energy and (ii) the reduction in Committed Capacity times the applicable Normal Capacity Payment rate from Appendix C. Such adjustment shall assume that the difference between the original Committed Capacity and the redesignated Committed Capacity, during all hours of the replacement period, would operate at the On-Peak Capacity Factor at the time notice is provided.

7.4 During a Force Majeure Event declared by the QF, the QF may temporarily redesignate the Committed Capacity for up to twenty-four (24) consecutive months; provided, however, that no more than one such temporary redesignation may be made within any twenty-four (24) month period unless otherwise agreed by the Company in writing. Within three (3) months after such Force Majeure Event is cured, the QF may, on one occasion, without penalty, designate a new Committed Capacity to apply for the remaining Term; provided, however, that such new Committed Capacity shall be subject to the aggregate capacity reduction limit specified in section 7.3. Any temporary or final redesignation of the Committed Capacity pursuant to this section 7.4 must, in the Company's judgment, be directly attributable to the Force Majeure Event and of a magnitude commensurate with the scope of the Force Majeure Event. Redesignations of Committed Capacity pursuant to this section 7.4 shall not be subject to the payment adjustment provisions of section 7.3.

8.3 At the end of each billing month, beginning with the first full month following the Contract In-Service Date, the Company will calculate the On-Peak Capacity Factor on a rolling average basis for the most recent twelve (12) month period, including such month, or for the actual number of full months since the Contract In-Service Date if less than twelve (12) months, based on the On-Peak Hours defined in Appendix C. The On-Peak Capacity Factor shall be calculated as the electric energy actually received by the Company at the Point of Delivery during the On-Peak Hours of the applicable period divided by the product of the Committed Capacity and the number of On-Peak Hours during the applicable period. In calculating the On-Peak Capacity Factor, the Company shall exclude hours and electric energy delivered by the QF during periods in which: (i) the Company does not or cannot perform its obligations to receive all the electric energy which the QF has made available at the Point of Delivery; or (ii) the QF's payments for electric energy are being calculated pursuant to section 9.1.1 hereof.

8.4 The monthly capacity payment shall equal the product of (i) the applicable capacity payment rate; (ii) the Committed Capacity; (iii) the ratio of the Committed On-Peak Capacity Factor to the Minimum On-Peak Capacity Factor; (iv) the Capacity Payment Adjustment; (v) the Capacity Discount Factor of 1.00 and (vi) the ratio of the total number of hours in the billing period less the number of hours during which the QF is being paid for energy pursuant to section 9.1.1 to the total number of hours in the billing period.

8.5 The Parties recognize that Accelerated Capacity Payments are in the nature of "early payment" for a future capacity benefit to the Company when such payments exceed Normal Capacity Payments without consideration of the Capacity Discount Factor. To ensure that the Company will receive a capacity benefit for such difference in capacity payments which have been made, or alternatively, that the QF will repay the amount of such difference in payments received to the extent the capacity benefit has not been conferred, the following provisions will apply:

8.5.5 The QF's obligation to pay the credit balance in the Capacity Account shall survive termination or expiration of this Agreement.

ARTICLE IX: ENERGY PAYMENTS

9.1 For that electric energy received by the Company at the Point of Delivery each month, the Company will pay the QF an amount computed as follows:

9.1.1 Prior to the Contract In-Service Date and for the duration of an Event of Default or a Force Majeure Event declared by the QF prior to a permitted redesignation of the Committed Capacity by the QF, the QF will receive electric energy payments based on the Company's As-Available Energy Cost as calculated hourly in accordance with FPSC Rule 25-17.0825; provided, however, that the calculation shall be based on such rule as it may be amended from time to time.

9.1.2 Except as otherwise provided in section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based upon the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O & M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

ARTICLE XI: METERING

11.1 All electric energy delivered to the Company shall be capable of being measured hourly at the Point of Metering. All electric energy delivered to the Company shall be adjusted for losses from the Point of Metering to the Point of Delivery. Metering equipment required to measure electric energy delivered to the Company and the telemetering equipment required to transmit such measurements to a location specified by the Company shall be installed, calibrated and maintained by the Transmission Service Utility.

11.2 All meter testing and related billing corrections, for electricity sold and purchased by the Company, shall conform to the metering and billing guidelines contained in FPSC Rules 25-6.052 through 25-6.060 and FPSC Rule 25-6.103, as they may be amended from time to time, notwithstanding that such guidelines apply to the utility as the seller of electricity.

11.3 The QF shall have the right to install, at its own expense, metering equipment capable of measuring energy on an hourly basis at the Point of Metering. At the request of the QF, the Company shall provide the QF hourly energy cost data from the Company's system; provided that the QF agrees to reimburse the Company for its cost to provide such data.

12.1.4 Except for charges for retail electric service, any amount due and payable from either Party to the other pursuant to this Agreement that is not received by the due date shall accrue interest from the due date at the rate specified in section 13.3 hereof.

ARTICLE XIII: SECURITY GUARANTIES

13.1 Within sixty (60) days after the Contract Approval Date, the QF shall post an Completion Security Guaranty with the Company equal to \$10.00 per KW of Committed Capacity to ensure completion of the Facility in a timely fashion as contemplated by this Agreement. This Agreement shall terminate if the Completion Security Guaranty is not tendered by the QF on or before the applicable due date specified herein. The QF shall either: (i) pay the Company cash in the form of a certified check in an amount equal to the Completion Security Guaranty; or (ii) provide the Company an unconditional and irrevocable direct pay letter of credit or other promise to pay such amount upon failure of the QF to perform its obligations under this Agreement; provided that the entity issuing such promise, the form of the promise, and the means of securing payment all shall be acceptable to the Company in its sole discretion.

13.2 From the date on which the QF first becomes entitled to capacity payments under this Agreement through the remaining Term, the QF shall post an Operational Security Guaranty with the Company equal to \$20.00 per KW of Committed Capacity to ensure timely performance by the QF of its obligations under this Agreement. The QF shall either: (i) pay the Company cash in the form of a certified check in an amount equal to the Operational Security Guaranty; or (ii) provide the Company an unconditional and irrevocable direct pay letter of credit or other promise to pay such amount upon failure of the QF to perform its obligations under this Agreement; provided that the entity issuing such promise, the form of the promise, and the means of securing payment all shall be acceptable to the Company in its sole discretion. Furthermore, if

Guaranty which the Company has accepted in lieu of a cash deposit shall become immediately due and payable to the Company.

ARTICLE XIV: REPRESENTATIONS, WARRANTIES AND COVENANTS

14.1 The QF makes the following additional representations, warranties and covenants as the basis for the benefits and obligations contained in this Agreement:

14.1.1 The QF represents and warrants that it is a political subdivision of the State of Florida in good standing under the laws of the State of Florida and is qualified to do business under the laws of the State of Florida.

14.1.2 The QF represents, covenants and warrants that, to the best of the QF's knowledge, throughout the Term of this Agreement the QF will be in compliance with, or will have acted in good faith and used its best efforts to be in compliance with, all laws, judicial and administrative orders, rules and regulations, with respect to the ownership and operation of the Facility, including but not limited to applicable certificates, licenses, permits and governmental approvals; environmental impact analyses, and, if applicable, the mitigation of environmental impacts.

14.1.3 The QF represents and warrants that it is not prohibited by any law or contract from entering into this Agreement and discharging and performing all covenants and obligations on its part to be performed pursuant to this Agreement.

15.1.3 The QF has not entered into the Transmission Service Agreement which has been approved or accepted for filing by the FERC on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV.

15.1.4 The Construction Commencement Date has not occurred on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV.

15.1.5 The QF fails to diligently pursue construction of the Facility after the Construction Commencement Date.

15.1.6 The Facility fails to achieve Commercial In-Service Status on or before the Contract In-Service Date unless the QF notifies the Company on or before the Contract In-Service Date that it agrees to pay the Company in weekly installments in cash or certified check an amount equal to \$0.15 per KW times the Committed Capacity specified in section 7.1 hereof for every day between the date that the Facility achieves Commercial In-Service Status and the Contract In-Service Date and the Facility subsequently achieves Commercial In-Service Status no later than ninety (90) days after the Contract In-Service Date.

15.1.7 The QF fails to comply with any other material terms and conditions of this Agreement and fails to conform to said term and condition within sixty (60) days after a demand by the Company to do so.

15.3.1 The Operational Security Guaranty required under Article XIII is not tendered on or before the applicable due date specified in the Article.

15.3.2 The QF fails upon request by the Company pursuant to section 7.6 hereof to re-demonstrate the Facility's Commercial In-Service Status to the satisfaction of the Company.

15.3.3 The QF fails for any reason, including Force Majeure Events, to qualify for capacity payments under Article VIII hereof for any consecutive twenty-four (24) month period.

15.3.4 The QF, without a prior assignment permitted pursuant to Article XXIII hereof, becomes insolvent, becomes subject to bankruptcy or receivership proceedings, or dissolves as a legal business entity.

15.3.5 The QF fails to perform or comply with any other material terms and conditions of this Agreement and fails to conform to said term and conditions within sixty (60) days after a demand by the Company to do so.

ARTICLE XVI: PERMITS

The QF hereby agrees to seek to obtain, at its sole expense, any and all governmental permits, certificates, or other authorization the QF is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement. The Company hereby agrees, at the QF's expense, to seek to obtain any and all governmental permits, certificates, or other authorization the Company is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement.

ARTICLE XVII: INDEMNIFICATION

The QF agrees to indemnify and save harmless the Company and its employees, officers, and directors against any and all liability, loss, damage, costs or expense which the Company, its employees, officers and directors may hereafter incur, suffer or be required to pay by reason of negligence on the part of the QF in performing its obligations pursuant to this Agreement or the QF's failure to abide by the provisions of this Agreement. The Company agrees to indemnify and save harmless the QF and its employees, officers, and directors against any and all liability, loss, damage, cost or expense which the QF, its employees, officers, and directors may hereafter incur, suffer, or be required to pay by reason of negligence on the part of the Company in performing its obligations pursuant to this Agreement or the Company's failure to abide by the provisions of this Agreement. The QF agrees to include the Company as an additional insured in any liability insurance policy or policies the QF obtains to protect the QF's interests with respect to the QF's indemnity and hold harmless assurance to the Company contained in Article XVII.

ARTICLE XX: REGULATORY CHANGES

20.1 The Parties agree that the Company's payment obligations under this Agreement are expressly conditioned upon the mutual commitments set forth in this Agreement and upon the Company's being fully reimbursed for all payments to the QF through the Fuel and Purchased Power Costs Recovery Clause or other authorized rates or charges. Notwithstanding any other provision of this Agreement, should the Company at any time during the Term of this Agreement be denied the FPSC's or the FERC's authorization, or the authorization of any other regulatory bodies which in the future may have jurisdiction over the Company's rates and charges, to recover from its customers all payments required to be made to the QF under the terms of this Agreement, payments to the QF from the Company shall be reduced accordingly. Neither Party shall initiate any action to deny recovery of payments under this Agreement and each Party shall participate in defending all terms and conditions of this Agreement, including, without limitation, the payment levels specified in this Agreement. Any amounts initially recovered by the Company from its ratepayers but for which recovery is subsequently disallowed by the FPSC or the FERC and charged back to the Company may be off-set or credited against subsequent payments made by the Company for purchases from the QF, or alternatively, shall be repaid by the QF. If any disallowance is subsequently reversed, the Company shall repay the QF such disallowed payments with interest at the rate specified in section 13.3 hereof to the extent such payments and interest are recovered by the Company.

20.2 If the QF's payments are reduced pursuant to section 20.1 hereof, the QF may terminate this Agreement upon thirty (30) days notice; provided that the QF gives the Company written notice of said termination within eighteen (18) months after the effective date of such reduction in the QF's payments.

lockouts or other labor disputes shall be entirely within the discretion of the affected Party.

21.1.5 When the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall so notify the other Party in writing.

21.2 Unless and until the QF temporarily redesignates the Committed Capacity pursuant to section 7.4 hereof, no capacity payment obligation pursuant to Article VII hereof shall accrue during any period of a declared Force Majeure Event pursuant to section 21.1.1 through 21.1.5. During any such period, the Company will pay for such energy as may be received and accepted pursuant to section 9.1.1 hereof.

21.3 If the QF temporarily or permanently redesignates the Committed Capacity pursuant to section 7.4 hereof, then capacity payment obligations shall thereafter resume at the applicable redesignated level and the Company will resume energy payments pursuant to section 9.1.2 hereof.

ARTICLE XXII: FACILITY RESPONSIBILITY AND ACCESS

22.1 Representatives of the Company shall at all reasonable times have access to the Facility and to property owned or controlled by the QF for the purpose of inspecting, testing, and obtaining other technical information deemed necessary by the Company in connection with this Agreement. Any inspections or testing by the Company shall not relieve the QF of its obligation to maintain the Facility.

22.2 In no event shall any Company statement, representation, or lack thereof, either express or implied, relieve the QF of its exclusive responsibility for the Facility and its exclusive obligations with the Transmission Service Utility. Any Company inspection of property or equipment owned or controlled by the QF or the Transmission

ARTICLE XXV: WAIVERS

The failure of either Party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a general waiver of any such provision or the relinquishment of any such right, but the same shall continue and remain in full force and effect, except with respect to the particular instance or instances.

ARTICLE XXVI: COMPLETE AGREEMENT

The terms and provisions contained in this Agreement constitute the entire agreement between the Parties and shall supersede all previous communications, representations, or agreements, either verbal or written, between the Parties with respect to the Facility and this Agreement.

ARTICLE XXVII: COUNTERPARTS

This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

28.2 Communications made for emergency or operational reasons may be made to the following persons and shall thereafter be confirmed promptly in writing.

To The Company: System Dispatcher on Duty
Title: System Dispatcher
Telephone: (813)866-5888
Telecopier: (813)384-7865

To The QF: Name: Juan Portuondo
Title: President, Montenay International Corp
Telephone: 305/372-8075
Telecopier: 305/381-8808

28.3 Either Party may change its representatives in sections 28.1 or 28.2 by prior written notice to the other Party.

28.4 The Parties' representatives designated above shall have full authority to act for their respective principals in all technical matters relating to the performance of this Agreement. However, they shall not have the authority to amend, modify, or waive any provision of this Agreement.

ARTICLE XXIX: SECTION HEADINGS FOR CONVENIENCE

Article or section headings appearing in this Agreement are inserted for convenience only and shall not be construed as interpretations of text.

ARTICLE XXX: GOVERNING LAW

The interpretation and performance of this Agreement and each of its provisions shall be governed by the laws of the State of Florida.

APPENDIX A

INTERCONNECTION SCHEDULING AND COST RESPONSIBILITY

1.0 Purpose.

This appendix provides the procedures for the scheduling of construction for the Company's Interconnection Facilities as well as the cost responsibility of the QF for the payment of Interconnection Costs. This appendix applies to all QF's, whether or not their Facility will be directly interconnected with the Company's system. All requirements contained herein shall apply in addition to and not in lieu of the provisions of the Agreement.

2.0 Submission of Plans and Development of Interconnection Schedules and Cost Estimates.

2.1 No later than sixty (60) days after the Contract Approval Date, the QF shall specify the date it desires the Company's Interconnection Facilities to be available for receipt of the electric energy and shall provide a preliminary written description of the Facility and the QF's anticipated arrangements with the Transmission Service Utility, including, without limitation, a one-line diagram, anticipated Facility site data and any additional facilities anticipated to be needed by the Transmission Service Utility. Based upon the information provided, the Company shall develop preliminary written Interconnection Costs and scheduling estimates for the Company's Interconnection Facilities within sixty (60) days after the information is provided. The schedule developed hereunder will indicate when the QF's final electrical plans must be submitted to the Company pursuant to section 2.2 hereof.

2.3 Any subsequent change in the final electrical plans shall be submitted to the Company and it is understood and agreed that any such changes may affect the Company's schedules and Interconnection Costs as previously estimated.

2.4 The QF shall pay the actual costs incurred by the Company to develop all estimates pursuant to section 2.1 and 2.2 hereof and to evaluate any changes proposed by the QF under section 2.3 hereof, as such costs are billed pursuant to Article XII of the Agreement. At the Company's option, advance payment for these cost estimates may be required, in which event the Company will issue an adjusted bill reflecting actual costs following completion of the cost estimates.

2.5 The Parties agree that any cost or scheduling estimates provided by the Company hereunder shall be prepared in good faith but shall not be binding. The Company may modify such schedules as necessary to accommodate contingencies that affect the Company's ability to initiate or complete the Company's Interconnection Facilities and actual costs will be used as the basis for all final charges hereunder.

3.0 Payment Obligations for Interconnection Costs.

3.1 The Company shall have no obligation to initiate construction of the Company's Interconnection Facilities prior to a written notice from the QF agreeing to the Company's interconnection design requirements and notifying the Company to initiate its activities to construct the Company's Interconnection Facilities; provided, however, that such notice shall be received not later than the date specified by the Company under section 2.2 hereof. The QF shall be liable for and agrees to pay all Interconnection Costs incurred by the Company on or after the specified date for initiation of construction.

3.3 If the QF notifies the Company in writing to interrupt or cease interconnection work at any time and for any reason, the QF shall nonetheless be obligated to pay the Company for all costs incurred in connection with the Company's Interconnection Facilities through the date of such notification and for all additional costs for which the Company is responsible pursuant to binding contracts with third parties.

4.0 Payment Obligations for Operation, Maintenance and Repair of the Company's Interconnection Facilities

The QF also agrees to pay monthly through the Term of the Agreement for all costs associated with the operation, maintenance and repair of the Company's Interconnection Facilities, based on a percentage of the total Interconnection Costs net of the Interconnection Costs Offset, as set forth in Appendix C.

**APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY**

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APPENDIX C
 RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
 FROM A QUALIFYING FACILITY

SCHEDULE 2

Payments for Avoided 1991 Combustion Turbine Unit

Page 1 of 1

Fuel Multiplier = 1.0

(1) CALENDAR YEAR	(2)		(3)	(4)	(5)	(6)
	CAPACITY PAYMENT - \$/KW/MONTH		ACCELERATED PAYMENT RATE (b)	ENERGY PAYMENT - \$/MM (c)		
	NORMAL PAYMENT RATE			FUEL	QEM	TOTAL
1991	3.96			29.78	0.76	30.54
1992	4.17			31.62	0.80	32.42
1993	4.37			34.28	0.84	35.12
1994	4.59			39.75	0.88	40.63
1995	4.84			44.64	0.93	45.57
1996	5.08			47.98	0.98	48.96
1997	5.33			52.63	1.03	53.66
1998	5.61			55.82	1.08	56.90
1999	5.90			53.70	1.13	54.83
2000	6.20			58.78	1.19	59.97
2001	6.51			56.42	1.25	57.67
2002	6.84			62.36	1.32	63.68
2003	7.19			66.46	1.38	67.84
2004	7.56			72.25	1.45	73.70
2005	7.94			79.70	1.53	81.23
2006	8.36			83.76	1.61	85.37
2007	8.77			88.04	1.69	89.73
2008	9.22			92.53	1.77	94.30
2009	9.70			97.25	1.86	99.11
2010	10.19			102.20	1.96	104.16
2011	10.71			107.42	2.06	109.48
2012	11.25			112.90	2.16	115.06
2013	11.83			118.65	2.27	120.92
2014	12.43			124.70	2.39	127.09
2015	13.07			131.06	2.51	133.57
2016	13.73			137.75	2.64	140.39
2017	14.43			144.77	2.78	147.55
2018	15.17			152.16	2.92	155.08
2019	15.94			159.92	3.07	162.99
2020	16.76			168.07	3.22	171.29
2021	17.61			176.64	3.38	180.02
2022	18.51			185.65	3.56	189.21
2023	19.46(a)			195.12	3.74	198.86

NOTES:

- (a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.
- (b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments of if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so that the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.
- (c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

APPENDIX C
 RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
 FROM A QUALIFYING FACILITY

SCHEDULE 4

Payments for Avoided 1991 Pulverized Coal Unit

Page 1 of 3

Option A

Fuel Multiplier = 1.0

(1) CALENDAR YEAR	(2) CAPACITY PAYMENT - \$/KW/MONTH		(4) ENERGY PAYMENT - \$/MWH (c)		
	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (b)	(5) (ESTIMATED)		
			FUEL	OGM	TOTAL
1991	10.92		21.07	4.70	25.77
1992	11.48		21.94	4.94	26.88
1993	12.07		22.86	5.19	28.05
1994	12.68		23.87	5.45	29.32
1995	13.32		25.09	5.73	30.82
1996	14.00		26.37	6.02	32.39
1997	14.72		27.71	6.33	34.04
1998	15.46		29.13	6.65	35.78
1999	16.25		30.61	6.99	37.60
2000	17.08		32.17	7.35	39.52
2001	17.95		33.81	7.73	41.54
2002	18.87		35.54	8.12	43.66
2003	19.83		37.35	8.53	45.88
2004	20.85		39.26	8.97	48.23
2005	21.91		41.26	9.43	50.69
2006	23.02		43.36	9.91	53.27
2007	24.20		45.57	10.41	55.98
2008	25.43		47.90	10.94	58.84
2009	26.74		50.34	11.50	61.84
2010	28.09		52.91	12.09	65.00
2011	29.53		55.61	12.70	68.31
2012	31.04		58.44	13.35	71.79
2013	32.61		61.42	14.03	75.45
2014	34.28		64.55	14.75	79.30
2015	36.03		67.85	15.50	83.35
2016	37.86		71.31	16.29	87.60
2017	39.80		74.94	17.12	92.06
2018	41.82		78.77	18.00	96.77
2019	43.96		82.78	18.91	101.69
2020	46.20		87.01	19.88	106.89
2021	48.56		91.45	20.89	112.34
2022	51.03		96.11	21.96	118.07
2023	53.64(a)		101.11	23.08	124.19

NOTES:

- (a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.
- (b) The GF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the GF prior to the commencement of capacity payments or if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so that the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.
- (c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 4

Payments for Avoided 1991 Pulverized Coal Unit

Page 3 of 3

Option C

Fuel Multiplier = 0.8

(1) CALENDAR YEAR	(2) CAPACITY PAYMENT - \$/KW/MONTH		(4) ENERGY PAYMENT - \$/MWH (C) (ESTIMATED)
	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (D)	
1991	16.37		16.86
1992	17.18		17.55
1993	18.04		18.29
1994	18.93		19.10
1995	19.90		20.07
1996	20.91		21.10
1997	21.98		22.17
1998	23.09		23.30
1999	24.27		24.49
2000	25.52		25.74
2001	26.81		27.05
2002	28.18		28.43
2003	29.62		29.88
2004	31.13		31.41
2005	32.72		33.01
2006	34.38		34.69
2007	36.14		36.46
2008	37.99		38.32
2009	39.93		40.27
2010	41.96		42.33
2011	44.10		44.49
2012	46.35		46.75
2013	48.70		49.14
2014	51.20		51.64
2015	53.81		54.28
2016	56.54		57.05
2017	59.43		59.95
2018	62.47		63.02
2019	65.65		66.22
2020	69.00		69.61
2021	72.52		73.16
2022	76.21		76.89
2023	80.11(a)		80.81

NOTES:

- (a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.
- (b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments or if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.
- (c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

**APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY**

**SCHEDULE 6
Performance Adjustment**

Page 1 of 1

The Performance Adjustment provision of Article IX in this Agreement shall be calculated as follows each month after the Contract In-Service Date for all hours in the month:

per hour

$$\sum_{\text{hour } i} \text{PERAD}_i = \text{DEM}_i - (\text{CC} \times 1.0 \text{ hr.} \times \text{CF}/100) \times (\text{EP}_1 - \text{EP}_2)$$

hour i = each hour

Where:

- PERAD_i = the Performance Adjustment for hour i.
- DEM_i = the hourly energy delivered to the Company by the GF during hour i.
- CC = the Committed Capacity in KW.
- CF = if the On-Peak Capacity Factor (%) is 50.0% or greater, then CF equals the lesser of (a) the Committed On-Peak Capacity Factor (%) or (b) the On-Peak Capacity Factor (%); if the On-Peak Capacity Factor is less than 50.0%, then CF equals zero.
- EP₁ = the As-Available Energy Cost in \$/KW for hour i.
- EP₂ = the Firm Energy Cost in \$/KW for hour i.

Note:

The Performance Adjustment shall not apply to any hour in which the following condition occurs:

- (a) the energy payment is determined on the basis of the of As-Available Energy Cost;
- (b) the Company cannot perform its obligation to receive all energy which the GF has made available for sale at the Point of Delivery;
- (c) the Firm Energy Cost exceeds the As-Available Energy Cost.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 8
Delivery Voltage Adjustment

Page 1 of 1

The QF's energy payment will be multiplied by a Delivery Voltage Adjustment whose value will depend upon (i) the delivery voltage at the Point of Delivery and (ii) the methodology approved by the FPSC to determine the adjustment for standard offer contracts pursuant to the rules in Appendix E.

otherwise would have to participate as a full party before the FERC when the Transmission Service Agreement or amendments thereto is tendered for filing.

2.3 To ensure the continuous availability to the Company of the Committed Capacity during the Term of the Agreement, the Transmission Service Agreement shall contain provisions satisfying the following minimum criteria:

- (i) the Transmission Service Utility's transmission commitment shall be for the full amount of the Committed Capacity plus any losses assessed by the Transmission Service Utility from the Point of Metering to the Point of Delivery;
- (ii) the duration of the Transmission Service Utility's transmission commitment shall be for a term at least as long as the Term of the Agreement with termination provisions that are acceptable to the Company;
- (iii) the Transmission Service Utility's transmission commitment shall not be interruptible or curtailable to a greater extent than the Transmission Service Utility's transmission service to its own firm requirements customers;
- (iv) The QF and the Transmission Service Utility shall not be permitted to amend the Transmission Service Agreement in a manner that adversely affects the Company's rights without the Company's prior written consent;
- (v) the Company shall be provided with prompt notification of any default under the Transmission Service Agreement;

- (x) As an alternative to section 2.3(ix) hereof, electric energy from the Facility shall be scheduled for delivery to the Point of Delivery by the Transmission Service Utility and such electric energy as is scheduled shall be considered as electric energy delivered to the Company for billing purposes.

- (xi) The Transmission Service Utility and the Company shall coordinate with one another concerning any inability to deliver or receive the electric energy as adjusted pursuant to section 8.3 (ix) hereof. Whenever the Transmission Service Utility is unable to deliver or the Company does not accept such energy, such energy shall no longer be considered within the Company's Control Area if energy is delivered pursuant to section 2.3(ix) hereof; and

- (xii) a contact person for the Transmission Service Utility shall be designated for day-to-day communications between the Transmission Service Utility and the Parties.

PART III

UTILITIES' OBLIGATIONS WITH REGARD TO
COGENERATORS AND SMALL POWER PRODUCERS

25-17.080	Definitions and Qualifying Criteria
25-17.081	Reserved
25-17.082	The Utility's Obligation to Purchase
25-17.0825	As-Available Energy
25-17.083	Firm Energy and Capacity (Repealed)
25-17.0831	Contracts (Repealed)
25-17.0832	Firm Capacity and Energy Contracts
25-17.0833	Planning Hearings
25-17.0834	Settlement of Disputes in Contract Negotiations
25-17.0835	Wheeling (Repealed)
25-17.084	The Utility's Obligation to Sell
25-17.085	Reserved
25-17.086	Periods During Which Purchases Are Not Required
25-17.087	Interconnection and Standards
25-17.088	Transmission Service for Qualifying Facilities (Repealed)
25-17.0882	Transmission Service Not Required for Self-Service (Repealed)
25-17.0883	Conditions Requiring Transmission Service for Self-service
25-17.089	Transmission Service for Qualifying Facilities
25-17.090	Reserved
25-17.091	Governmental Solid Waste Energy and Capacity

25-17.080 Definitions and Qualifying Criteria.

(1) For the purpose of these rules the Commission adopts the Federal Energy Regulatory Commission Rules 292.101 through 292.207, effective March 20, 1980, regarding definitions and criteria that a small power producer or cogenerator must meet to achieve the status of a qualifying facility. Small power producers and cogenerators which fail to meet the FERC criteria for achieving qualifying facility status but otherwise meet the objectives of economically reducing Florida's dependence on oil and the economic deferral of utility power plant expenditures may petition the Commission to be granted qualifying facility status for the purpose of receiving energy and capacity payments pursuant to these rules.

(2) In general, under the FERC regulations, a small power producer is a qualifying facility if:

- (a) the small power producer does not exceed 80 MW; and
- (b) the primary (at least 50%) energy source of the small power producer is biomass, waste, or another renewable resource; and
- (c) the small power production facility is not owned by a person primarily engaged in the generation or sale of electricity. This criterion is met if less than 50% of the equity interest in the facility is owned by a utility, utility holding company, or a subsidiary of them.

(3) In general, under the FERC regulations, a cogenerator is a qualifying facility if:

- (a) the useful thermal energy output of a topping cycle cogeneration facility is not less than 5% of the facility's total energy output per year; and
- (b) the useful power output plus half of the useful thermal energy output of a topping cycle cogeneration facility built after March 13, 1980, with any energy input of natural gas or oil is greater than 42.5% or 45% if the useful thermal energy output is less than 15% of the total energy output of the facility; and
- (c) the useful power output of a bottoming cycle cogeneration facility built after March 13, 1980, with any energy input as supplementary firing of natural gas or oil is not less than 45% of the natural gas or oil input on an annual basis; and

- J. upon completion and approval by the utility of any alterations to the interconnection reasonably required to effect the change in billing and upon payment by the qualifying facility for such alterations.

(c) Should a qualifying facility elect to make simultaneous purchases and sales, purchases of electric service by the qualifying facility from the interconnecting utility shall be billed at the retail rate schedule under which the qualifying facility load would receive service as a non-generating customer of the utility; sales of electricity delivered by the qualifying facility to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832.

(d) Should a qualifying facility elect a net billing arrangement, the hourly net energy and capacity sales delivered to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832; purchases from the interconnecting utility shall be billed pursuant to the utility's applicable standby service or supplemental service rate schedules.

(4)(a) Payments for energy and capacity sold by a qualifying facility shall be rendered monthly by the purchasing utility and as promptly as possible, normally by the twentieth business day following the day the meter is read. The kilowatt-hours sold by the qualifying facility, the applicable avoided energy rate at which payments were made, and the rate and amount of the applicable capacity payment shall accompany the payment by the utility to the qualifying facility.

(b) Where simultaneous purchases and sales are made by a qualifying facility, avoided energy and capacity payments to the qualifying facility may, at the option of the qualifying facility, be shown as a credit to the qualifying facility's bill; the kilowatt-hours produced by the qualifying facility, the avoided energy rate at which payments were made, and the rate and amount of the capacity payment shall accompany the bill to the qualifying facility. A credit shall not exceed the amount of the qualifying facility's bill from the utility and the excess, if any, shall be paid directly to the qualifying facility in accordance with this rule.

(5) A utility may require a security deposit from each interconnected qualifying facility in accordance with Rule 25-6.097 for the qualifying facility's purchase of power from the utility. Each utility's tariff shall contain specific criteria for determining the applicability and amount of a deposit from an interconnected qualifying facility consistent with projected net cash flow on a monthly basis.

(6) Each utility shall keep separate accounts for sales to qualifying facilities and purchases from qualifying facilities.

Specific Authority: 366.051, 350.127(2), F.S.

Law Implemented: 366.051, F.S.

History: New 5/13/81, Amended 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.0825 As-Available Energy.

(1) As-available energy is energy produced and sold by a qualifying facility on an hour-by-hour basis for which contractual commitments as to the quantity, time, or reliability of delivery are not required. Each utility shall purchase as-available energy from any qualifying facility. As-available energy shall be sold by a qualifying facility and purchased by a utility pursuant to the terms and conditions of a published tariff or a separately negotiated contract.

As-available energy sold by a qualifying facility shall be purchased by the utility at a rate, in cents per kilowatt-hour, not to exceed the utility's avoided energy cost. Because of the lack of assurances as to the quantity, time, or reliability of delivery of as-available energy, no capacity payments shall be made to a qualifying facility for the delivery of as-available energy.

(a) Tariff Rates: Each utility shall publish a tariff for the purchase of as-available energy from qualifying facilities. Each utility's published tariff shall state that the rate of payment for as-available energy is the utility's

off-peak periods during the month, and the average of their actual hourly avoided energy costs for the month with the Commission. A copy shall be furnished to any individual who requests such information.

(5) Upon request by a qualifying facility or any interested person, each utility shall provide within 30 days its most current projections of its generation mix, fuel price by type of fuel, and at least a five year projection of fuel forecasts to estimate future as-available energy prices as well as any other information reasonably required by the qualifying facility to project future avoided cost prices including, but not limited to, a 24 hour advance forecast of hour-by-hour avoided energy costs. The utility may charge an appropriate fee, not to exceed the actual cost of production and copying, for providing such information.

(6) Utility payments for as-available energy made to qualifying facilities pursuant to the utility's tariff shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power. Utility payments for as-available energy made to qualifying facilities pursuant to a separately negotiated contract shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power costs if the payments are not reasonably projected to result in higher cost electric service to the utility's general body of ratepayers or adversely affect the adequacy or reliability of electric service to all customers.

Specific Authority: 366.051, 350.127(2), F.S.

Law Implemented: 366.051, F.S.

History: New 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.083 Firm Energy and Capacity.

Specific Authority: 366.04(1), 366.05(1), 366.05(9), 350.127(2), F.S.

Law Implemented: 366.05(9), F.S.

History: New 9/4/83, formerly 25-17.83, Repealed 10/25/90.

25-17.0831 Contracts.

Specific Authority: 366.05(9), 350.127(2), F.S.

Law Implemented: 366.05(9), F.S.

History: New 5/13/81, amended 9/4/83, formerly 25-17.831, Repealed 10/25/90.

25-17.0832 Firm Capacity and Energy Contracts.

(1) Firm capacity and energy are capacity and energy produced and sold by a qualifying facility and purchased by a utility pursuant to a negotiated contract or a standard offer contract subject to certain contractual provisions as to the quantity, time and reliability of delivery.

(a) Within one working day of the execution of a negotiated contract or the receipt of a signed standard offer contract, the utility shall notify the Director of the Division of Electric and Gas and provide the amount of committed capacity and the avoided unit, if any, to which the contract should be applied.

(b) Within 10 working days of the execution of a negotiated contract for the purchase of firm capacity and energy or within 10 working days of receipt of a signed standard offer contract, the purchasing utility shall file with the Commission a copy of the signed contract and a summary of its terms and conditions.

At a minimum, such a summary shall report:

1. the name of the utility and the owner and/or operator of the qualifying facility, who are signatories of the contract;
2. the amount of committed capacity specified in the contract, the size of the facility, the type of the facility its location, and its interconnection and transmission requirements;
3. the amount of annual and on-peak and off-peak energy expected to be delivered to the utility;
4. the type of unit being avoided, its size and its in-service year;
5. the in-service date of the qualifying facility; and

capacity or parts thereof by the purchasing utility. Rates for payment of capacity sold by a qualifying facility shall be specified in the contract for the duration of the contract. In reviewing a utility's standard offer contract or contracts, the Commission shall consider the criteria specified in paragraphs (2)(a) through (2)(d) of this rule, as well as any other information relating to the determination of the utility's full avoided costs.

(c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts or a solid waste facility as defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2). Should a utility fail to negotiate in good faith, any qualifying facility may apply to the Commission for relief pursuant to Rule 25-17.0834, F.A.C.

(d) Within 60 days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions may be based on:

1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer.

A standard offer contract which has been accepted by a qualifying facility shall apply towards the subscription limit of the unit designated in the contract effective the date the utility receives the accepted contract. If the contract is not accepted by the utility, its effect shall be removed from the subscription limit effective the date of the Commission order granting the utility's petition.

(e) Minimum Specifications. Each standard offer contract shall, at minimum, specify:

1. the avoided unit or units on which the contract is based;
2. the total amount of committed capacity, in megawatts, needed to fully subscribe the avoided unit specified in the contract;
3. the payment options available to the qualifying facility including all financial and economic assumptions necessary to calculate the firm capacity payments available under each payment option and an illustrative calculation of firm capacity payments for a minimum ten year term contract commencing with the in-service date of the avoided unit for each payment option;
4. the date on which the standard contract offer expires. This date shall be at least four years before the anticipated in-service date of the avoided unit or units unless the avoided unit could be constructed in less than four years, or when the subscription limit has been reached;
5. the date by which firm capacity and energy deliveries from the qualifying facility to the utility shall commence. This date shall be no later than the anticipated in-service date of the avoided unit specified in the contract;
6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit;

3. **Levelized capacity payments.** Levelized capacity payments shall commence on the anticipated in-service date of the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance portion of capacity payments shall be equal to the value of the year-by-year deferral of fixed operation and maintenance expense associated with the avoided unit calculated in conformance with paragraph (5)(a) of this rule. Where levelized capacity payments are elected, the cumulative present value of the levelized capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule, value of deferral capacity payments.
4. **Early levelized capacity payments.** Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early levelized capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance expense shall be calculated in conformance with paragraph (5)(b) of this rule. At the option of the qualifying facility, early levelized capacity payments shall commence at any time after the specified early capacity date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early levelized capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule.
 - (4) **Avoided Energy Payments.**
 - (a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825.
 - (b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility. During the periods that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825(2)(a).
 - (c) The energy cost of the avoided unit specified in the contract shall be defined as the cost of fuel, in cents per kilowatt-hour, which would have been burned at the avoided unit plus variable operation and maintenance expense plus avoided line losses. The cost of fuel shall be calculated as the average market

t = the term, in years, of the contract for the purchase of firm capacity;

$$A_C = F \begin{bmatrix} (1 + ip) \\ 1 - (1 + r)^t \\ (1 + ip)^t \\ 1 - (1 + r)^t \end{bmatrix}$$

Where: F = the cumulative present value in the year that the contractual payments will begin, of the avoided capital cost component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit(s); and
 r = annual discount rate, defined as the utility's incremental after tax cost of capital; and

$$A_O = G \begin{bmatrix} (1 + io) \\ 1 - (1 + r)^t \\ (1 + io)^t \\ 1 - (1 + r)^t \end{bmatrix}$$

Where: G = The cumulative present value in the year that the contractual payments will begin, of the avoided fixed operation and maintenance expense component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit.

(c) Levelized and early levelized capacity payments. Monthly levelized and early levelized capacity payments shall be calculated as follows:

$$P_L = \frac{F \times r}{12 \times (1 - (1 + r)^{-t})} + G$$

Where: P_L = the monthly levelized capacity payment, starting on or prior to the in-service date of the avoided unit;
 F = the cumulative present value, in the year that the contractual payments will begin, of the avoided capital cost component of the capacity payments which would have been made had the capacity payments not been levelized;
 r = the annual discount rate, defined as the utility's incremental after tax cost of capital; and
 t = the term, in years, of the contract for the purchase of firm capacity.
 G = the monthly fixed operation and maintenance component of the capacity payments, calculated in accordance with paragraph (5)(a) for levelized capacity payments or with paragraph (5)(b) for early levelized capacity payments.

(6) Sale of Excess Firm Energy and Capacity. To the extent that firm energy and capacity purchased from a qualifying facility pursuant to a standard offer contract or an individually negotiated contract is not needed by the purchasing utility, these rules shall be construed to encourage the

(3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility as approved by section 350.127, Florida Statutes.

Specific Authority: 366.051, 350.127(2), F.S.

Law Implemented: 366.051, F.S.

History: New 10/25/90.

25-17.0835 Wheeling.

Specific Authority: 366.05(9), 350.127(2), F.S.

Law Implemented: 366.05(9), 366.055(3), F.S.

History: New 9/4/83, repealed 10/4/83, formerly 25-17.835.

25-17.086 The Utility's Obligation to Sell.

Upon compliance with Rule 25-17.087, each utility shall sell energy to qualifying facilities at rates which are just, reasonable, and non-discriminatory.

Specific Authority: 366.05(9), 350.127(2), F.S.

Law Implemented: 366.05(9), F.S.

History: New 5/13/81, amended 9/4/83, formerly 25-17.86.

25-17.085 Reserved.

25-17.086 Periods During Which Purchases are not Required.

Where purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082 to purchase electricity from a qualifying facility. The utility shall notify the qualifying facility(ies) prior to the instance giving rise to those conditions, if practicable. If prior notice is not practicable, the utility shall notify the qualifying facility(ies) as soon as practicable after the fact. In either event the utility shall notify the Commission, and the Commission staff shall, upon request of the affected qualifying facility(ies), investigate the utility's claim. Nothing in this section shall operate to relieve the utility of its general obligation to purchase pursuant to Rule 25-17.082.

Specific Authority: 366.05(9), 350.127(2), F.S.

Law Implemented: 366.05(9), F.S.

History: New 5/13/81, Amended 9/4/83, formerly 25-17.86.

25-17.087 Interconnection and Standards.

(1) Each utility shall interconnect with any qualifying facility which:

- (a) is in its service area;
- (b) requests interconnection;
- (c) agrees to meet system standards specified in this rule; (d) agrees to pay the cost of interconnection; and
- (e) signs an interconnection agreement.

(2) Nothing in this rule shall be construed to preclude a utility from evaluating each request for interconnection on its own merits and modifying the general standards specified in this rule to reflect the result of such an evaluation.

(3) Where a utility refuses to interconnect with a qualifying facility or attempts to impose unreasonable standards pursuant to subsection (2) of this rule, the qualifying facility may petition the Commission for relief. The utility shall have the burden of demonstrating to the Commission why

the utility and be capable of being locked in the open position with a utility padlock. The utility may reserve the right to open the switch (i.e. isolating the qualifying facility's generation system) without prior notice to the qualifying facility. To the extent practicable, however, prior notice shall be given.

Any of the following conditions shall be cause for disconnection:

1. Utility system emergencies and/or maintenance requirements;
2. Hazardous conditions existing on the qualifying facility's generating or protective equipment as determined by the utility;
3. Adverse effects of the qualifying facility's generation to the utility's other electric consumers and/or system as determined by the utility;
4. Failure of the qualifying facility to maintain any required insurance; or
5. Failure of the qualifying facility to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the qualifying facility's electric generating equipment or the operation of such equipment.

(b) Responsibility and Liability. The utility and the qualifying facility shall each be responsible for its own facilities. The utility and the qualifying facility shall each be responsible for ensuring adequate safeguards for other utility customers, utility and qualifying facility personnel and equipment, and for the protection of its own generating system. The utility and the qualifying facility shall each indemnify and save the other harmless from any and all claims, demands, costs, or expense for loss, damage, or injury to persons or property of the other caused by, arising out of, or resulting from:

1. Any act or omission by a party or that party's contractors, agents, servants and employees in connection with the installation or operation of that party's generation system or the operation thereof in connection with the other party's system;
2. Any defect in, failure of, or fault related to a party's generation system;
3. The negligence of a party or negligence of that party's contractors, agents servants and employees; or
4. Any other event or act that is the result of, or proximately caused by, a party.

For the purposes of this subsection, the term party shall mean either utility or qualifying facility, as the case may be.

(c) Insurance. The qualifying facility shall deliver to the utility, at least fifteen days prior to the start of any interconnection work, a certificate of insurance certifying the qualifying facility's coverage under a liability insurance policy issued by a reputable insurance company authorized to do business in the State of Florida naming the qualifying facility as named insured, and the utility as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering the liabilities accepted under this agreement arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.

The policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than \$300,000 for each occurrence; more insurance may be required as deemed necessary by

(d) Exceptions. A qualifying facility's generator having a capacity rating that can:

1. produce power in excess of 1/2 of the minimum utility customer requirements of the interconnected distribution or transmission circuit; or
2. produce power flows approaching or exceeding the thermal capacity of the connected utility distribution or transmission lines or transformers; or
3. adversely affect the operation of the utility or other utility customer's voltage, frequency or overcurrent control and protection devices; or
4. adversely affect the quality of service to other utility customers; or
5. interconnect at voltage levels greater than distribution voltages,

will require more complex interconnection facilities as deemed necessary by the utility.

(8) Quality of Service. The qualifying facility's generated electricity shall meet the following minimum guidelines:

(a) Frequency. The governor control on the prime mover shall be capable of maintaining the generator output frequency within limits for loads from no-load up to rated output. The limits for frequency shall be 60 hertz (cycles per second), plus or minus an instantaneous variation of less than 1%.

(b) Voltage. The regulator control shall be capable of maintaining the generator output voltage within limits for loads from no-load up to rated output. The limits for voltage shall be the nominal operating voltage level, plus or minus 5%.

(c) Harmonics. The output sine wave distortion shall be deemed acceptable when it does not have a higher content (root mean square) of harmonics than the utility's normal harmonic content at the interconnection point.

(d) Power Factor. The qualifying facility's generation system shall be designed, operated and controlled to provide reactive power requirements from 0.85 lagging to 0.85 leading power factor. Induction generators shall have static capacitors that provide at least 85% of the magnetizing current requirements of the induction generator field. (Capacitors shall not be so large as to permit self-excitation of the qualifying facility's generator field).

(e) DC Generators. Direct current generators may be operated in parallel with the utility's system through a synchronous inverter. The inverter must meet all criteria in these rules.

(9) Metering. The actual metering equipment required, its voltage rating, number of phases, size, current transformers, potential transformers, number of inputs and associated memory is dependent on the type, size and location of the electric service provided. In situations where power may flow both in and out of the qualifying facility's system, power flowing into the qualifying facility's system will be measured separately from power flowing out of the qualifying facility's system.

The utility will provide, at no additional cost to the qualifying facility, the metering equipment necessary to measure capacity and energy deliveries to the qualifying facility. The utility will provide, at the qualifying facility's expense, the necessary additional metering equipment to measure energy deliveries by the qualifying facility to the utility.

(10) Cost Responsibility. The qualifying facility is required to bear all costs associated with the change-out, upgrading or addition of protective devices, transformers, lines, services, meters, switches, and associated equipment and devices beyond that which would be required to

(3) An electric utility may deny, curtail, or discontinue transmission service to a Qualifying Facility on a non-discriminatory basis if the provision of such service would adversely affect the safety, adequacy, reliability, or cost of providing electric service to the utility's general body of retail and wholesale customers.

Specific Authority: 366.051, 350.127(2), P.S.

Law Implemented: 366.051, 366.055(3), P.S.

History: New 10/25/90.

25-17.090 Reserved.

25-17.091 Governmental Solid Waste Energy and Capacity.

(1) Definitions and Applicability:

(a) "Solid Waste Facility" means a facility owned or operated by, or on behalf of, local government, the purpose of which is to dispose of solid waste, as that term is defined in section 403.703(13), Fla. Stat. (1988), and to generate electricity.

(b) A facility is owned by or operated on behalf of a local government if the power purchase agreement is between the local government and the electric utility.

(c) A solid waste facility shall include a facility which is not owned or operated by a local government but is operated on its behalf. When the power purchase agreement is between a non-governmental entity and an electric utility, the facility is operated by a private entity on behalf of a local government if:

1. One or more local governments have entered into a long-term agreement with the private entity for the disposal of solid waste for which the local governments are responsible and that agreement has a term at least as long as the term of the contract for the purchase of energy and capacity from the facility; and
2. The Commission determines there is no undue risk imposed on the electric ratepayers of the purchasing utility, based on:
 - a. The local government's acceptance of responsibility for the private entity's performance of the power purchase contract, or
 - b. Such other factors as the Commission deems appropriate, including, without limitation, the issuance of bonds by the local government to finance all, or a substantial portion, of the costs of the facility; the reliability of the solid waste technology; and the financial capability of the private owner and operator.
3. The requirements of subparagraph 2 shall be satisfied if a local government described in subparagraph 1 enters into an agreement with the purchasing utility providing that in the event of a default by the private entity under the power purchase contract, the local government shall perform the private entity's obligations, or cause them to be performed, for the remaining term of the contract, and shall not seek to renegotiate the power purchase contract.

(d) This rule shall apply to all contracts for the purchase of energy or capacity from solid waste facilities entered into, or renegotiated as provided in subsection (3), after October 1, 1988.

(2) Except as provided in subsections (3) and (4) of this rule, the provisions of Rules 25-17.080 - 25-17.089, Florida Administrative Code, are applicable to contracts for the purchase of energy and capacity from a solid waste facility.