ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

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FLORIDA POWER CORPORATION,

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Agency/Appellee;

MIAMI-DADE COUNTY; MONTENAY-DADE, LTD.; and LAKE COGEN, LTD.,

Intervenors/Appellees.

CASE NOS. 94,664 and 94,665

CONSOLIDATED

980283-EQ
980509-EQ

NOTICE OF FINAL JUDGMENT IN RELATED LITIGATION

Appellee, Lake Cogen, Ltd., files herewith copies of the attached documents in the closely related litigation between the parties hereto. This litigation has been previously discussed in the parties' briefs before this court but the final judgment was issued subsequent to the last brief in this case.

I HEREBY CERTIFY that a copy has been furnished to **ROBERT SCHEFFEL WRIGHT**, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302; **JODI L. CORRIGAN, MARILYN E. CULP, LISBETH KIRK ROGERS,** Annis, Mitchell, Cockey, Edwards & Roehn, P.A., P.O. Box 3433, Tampa, Florida 33601; **DIRECTOR,** Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32349-9850; **DAVID E. SMITH,** Director of Appeals, Florida Public Service Commission,

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2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0880; **JAMES D. WING**, 701 Brickell Avenue, 30th Floor, P.O. Box 15441, Miami, Florida 33101; **JOHN R. MARKS, III**, Knowles, Marks & Randolph, P.A., 215 South Monroe Street, Suite 130, Tallahassee, Florida 32301; **RODNEY GADDY, JAMES MCGEE**, Florida Power Corporation, Legal Department, P.O. Box 14042, St. Petersburg, Florida 33733; **SYLVIA H. WALBOLT, CHRIS C. COUTROULIS, ROBERT L. CIOTTI, JOSEPH H. LANG, JR.**, Carlton Fields, 200 Central Avenue, Suite 2300, St. Petersburg, Florida 33701; **GAIL P. FELS**, Assistant County Attorney, Dade County Aviation Department, P.O. Box 592075 AMF, Miami, Florida 33159; **ROBERT D. VANDIVER, RICHARD C. BELLAK**, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0850; this 1st day of December, 1999.

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ATTORNEYS FOR LAKE COGEN, LTD.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR LAKE COUNTY

NCP LAKE POWER, INCORPORATED,
a Delaware Corporation,
as General Partner of LAKE
COGEN, LTD., a Florida
limited partnership,

Plaintiff,

v. Case No.:94-2354-CA

FLORIDA POWER CORPORATION,

Defendant.

NON-FINAL TRIAL ORDER

THIS CAUSE came on to be tried before the Court. On the evidence presented the Court makes the following findings of fact and adjudications.

The Plaintiff, NCP LAKE POWER, INC., a Delaware corporation, as General Partner of LAKE COGEN, LTD, hereinafter "LAKE COGEN", is a qualifying cogeneration facility ("QF") within the meaning of the applicable federal and state statutes and regulations. The Defendant, FLORIDA POWER CORPORATION, hereinafter, "FPC", is a public utility within the meaning of §366.02(1) of the Florida Statutes. On March 13, 1991, LAKE COGEN and FPC entered into an agreement for the purchase of electrical capacity and energy by FPC from LAKE COGEN. This agreement, entitled "Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility", the "contract", was drafted by FPC, and the interpretation of this document is the gravamen of the present lawsuit.

The contract required payment by FPC for capacity and energy delivered to FPC from the

LAKE COGEN facility in two components: capacity payments, pursuant to Article VIII of the contract, and energy payments, pursuant to Article IX of the contract. Attached to the contract were a number of different schedules. These schedules were offered by FPC to allow the QF to project payment plans based on various models of the avoided unit[1]. The QF had the option of choosing the schedule it preferred. The effect of the choice was to define the characteristics of the avoided unit for which the QF was substituted, and the payment schedule the QF would be paid on for its energy payments. The method of calculating energy payments is dependent upon whether the Avoided Unit, as selected by the QF in the contract, would have been operating, (thus the QF would be paid firm payments), or not operating, (thus the QF would be paid as-available payments). Most of the issues litigated concern a difference of opinion as to how the energy payments (pursuant to Article IX and in conjunction with the schedule LAKE COGEN chose), should be calculated.

This Court had previously concluded that Section 9.1.2 of the contract was unambiguous in the order on partial summary judgment. This conclusion applies to each of the terms of the contract which were litigated during the thirteen day trial. Each party presented their own interpretation of the contract, but a difference of opinion does not render the contract ambiguous. The parties proffered a tremendous amount of evidence and testimony which this Court admitted. The evidence was not admitted as parole evidence to vary ambiguous terms of the contract, but to explain to the Court the meaning of the contract. Southeast Banks Trust Co., N.A. v. Higginbotham Chevrolet-Oldsmobile, Inc., 445 So.2d 347, 349 (Fla. 5th DCA 1984).

> "In Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1048 (5th Cir. 1971), it was stated that evidence to 'show the

[1]"Avoided Unit" is a term of art used throughout the electric generating industry which refers to the generating unit the utility would have built and purchased energy from but for the availability to purchase power from the QFs.

> meaning of technical terms, and the like, is not regarded as an exception to the ... [parol evidence rule], because it does not contradict or vary the written instrument, but simply places the court in the position of the parties when they made the contract, and enables it to appreciate the force of the words they used in reducing ... [the agreement] to writing.'"

Id. at 348.

Given this general background, the Court chooses to address each count of the complaint, and each counterclaim, individually.

Count I of the Complaint, Breach of Contract

The schedule LAKE COGEN chose to be incorporated into the contract with FPC, Appendix "C", schedules three (3) and four (4), describes Lake Cogen's chosen avoided unit as a 1991 Pulverized Coal Unit with a minimum on-peak capacity factor of 83.0%[2]. Section 9.1.2 of the contract provides, "the QF will receive electric energy payments based upon the Firm Energy Cost ... for each hour that the Company would have had **a unit with these characteristics** operating, ..."

Each party went to great lengths, and presumably great expense, to provide the Court with modeling[3] of the 1991 Pulverized Coal Unit in an effort to show what "these characteristics" would have been had FPC built a pulverized coal unit. According to LAKE COGEN's model, the avoided unit would have been running all the time. Hence, LAKE COGEN should be paid at the firm energy rate all the time. Conversely, FPC's model indicated that the avoided unit would be in operation

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[2]The on-peak capacity factor is the electric energy actually received by FPC at the point of delivery during the on-peak hours divided by the product of the Committed Capacity and the number of on-peak hours during the applicable period.

[3]Modeling is a common practice in the industry whereby a computer simulation is used to determine if a given unit, in this case the avoided unit, would be operational or not. Like every computer simulation, whatever result the program calculates is directly tied to the values the operator of the program has entered.

much less frequently. Hence, LAKE COGEN would be paid at an as-available rate much of the time.

FPC astutely pointed out to the Court that the LAKE COGEN model was fatally flawed because LAKE COGEN had used parameters, (input data), outside the four corners of the contract. Likewise, LAKE COGEN, adeptly pointed out to the Court that FPC'S model was fatally flawed because while FPC used only the four parameters listed in the contract, their input included zeros as input for data which had to be entered in order for the simulation program to run. The zeros which FPC input have value: They are not just "place holders."

Each party argued so zealously and convincingly that the other party's interpretation of the contract was misplaced, the Court is quite persuaded by both arguments. Neither party's interpretation of the contract gives meaning to each provision of the contract in a reasonable manner.

For the reasons pointed out by the experts, the Court finds the modeling is susceptible to being skewed in favor of the proponent of the model. For this reason alone, the modeling would not be afforded a great deal of consideration, but as the Court has determined the contract is unambiguous, and the modeling goes beyond the four corners of the contract, the modeling is irrelevant. This leaves the plain language of the contract.

The contract specifies that LAKE COGEN should be paid either "firm" or "as-available"[4] energy payments for all energy it provides to FPC. Section 9.1.2 of the contract states not only how FPC must calculate firm energy prices, but also when FPC must make firm energy payments. Specifically, Section 9.1.2 provides

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[4]Section 1.3 of the contract defines as-available energy costs as the energy rate calculated in accordance with PSC Rule 25-17.0825. The method of calculating as-available energy payment is not at issue here.

> 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 charge out price of the 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 during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

From Section 9.1.2, one can only determine the properties of the "unit" by referring to the attached schedule in which LAKE COGEN chose the avoided unit they wanted. Applying the four characteristics in Section 9.1.2 to the avoided unit in schedule 4, the contract specifies how the firm energy payments are to be calculated. The when is also determined by looking to the selected schedule, schedule 3. This schedule, entitled "Rates For Purchase Of Firm Capacity and Energy From A Qualifying Facility," provides not only the operating data of the avoided unit, including the On-Peak Capacity Factor, but also the On-Peak Hours. To reach an On-Peak Capacity Factor of 83.0%, which is what the schedule calls for, the testimony showed the avoided unit would have to run continuously during the On-Peak hours, barring down-time for maintenance and repairs. Hence, the avoided unit would be running during the On-Peak Hours as set forth in Appendix "C" schedule 3.

Section 1.35 defines "On-Peak Hours" to mean 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). The characteristics defined in section 9.1.2 (I) only have meaning when applied to the avoided unit chosen by the QF in the schedules. The schedule LAKE COGEN chose provided for an avoided unit with an 83.0% On-Peak Capacity Factor. Therefore, the avoided unit would be running continuously during the On-Peak hours. The daily time periods that the avoided unit would be running are the same as the On-Peak hours, in this instance. It is the

only way the 83.0% On-Peak Capacity Factor can be achieved. While the definition of On-Peak hours reads as a "lesser of" provision, by virtue of the avoided unit LAKE COGEN chose, the daily time periods are the same in this contract. Ironically, FPC's own witness testified that this is not a "lessor of" contract.

Neither of the two modeling efforts accurately reflect only the provisions of the contract and the schedules. Modeling is not envisioned by the terms of the contract. Indeed, FPC did not model during the first contract year, an action they now call a "mistake". If the proposed modeling is accepted, the contract terms lack reason and become susceptible to manipulation. When possible, courts should give effect to each provision of a written instrument in order to ascertain the true meaning of the instrument. Inter-Active Services, Inc. v. Heathrow Master Association, Inc., 721 So.2d 433, 435 (Fla. 5th DCA 1998). Where the contract is susceptible to an interpretation that gives effect to all of its provisions, the court should select that interpretation over an alternative interpretation that relies on negation of some of the contractual provisions. Id. This Court chooses to read the contract in its entirety and to give meaning to all of the provisions. When section 9.1.2 is read together with the attached schedule, and meaning is given to terms On-Peak Hours and On-Peak Capacity Factor, the contract reasonably states that FPC must pay firm-energy payments to LAKE COGEN during the On-Peak Hours, as set out in Appendix C, schedule 3. For all other hours, i.e., Off-Peak Hours, FPC must pay the as-available rate calculated in accordance with PSC Rule 25-17.0825. Based upon the foregoing analysis and the evidence presented it is hereby

ORDERED AND ADJUDGED that LAKE COGEN's claim for breach of contract, count I of the complaint, is **granted.** The Court reserves jurisdiction on this issue to enable the parties to present evidence to support an award of damages calculated in accordance with the Court's ruling. Plaintiff shall schedule an appropriate amount of court time to present both parties' evidence on this

issue.

Count II of the Complaint, Declaratory Judgment

LAKE COGEN has asked the Court to declare that FPC has no right to implement the payment methodology based upon the four parameter modeling, and declare FPC must pay LAKE COGEN at the firm energy cost rate for all power provided to FPC by LAKE COGEN. The Court has determined that the modeling proposed by FPC does not accurately reflect the terms of the contract. However, the contract does not contemplate LAKE COGEN being paid firm energy cost rate at all times regardless of any other consideration. Therefore, it is hereby

ORDERED AND ADJUDGED that FPC does not have the right to calculate its payments to LAKE COGEN on the four parameter model, but shall calculate the payments in accordance with this Court's current order.

Count III of the Complaint, Breach of Contract Re: Coal Pricing

LAKE COGEN has alleged that FPC has breached both the express terms of the contract, and the implied covenant of good faith by manipulating the price of coal burned at its Crystal River facilities 1 and 2. FPC operates four coal-fired generating plants in the vicinity of Crystal River which are commonly known as CR 1&2, and CR 4&5. Under section 9.1.2 of the contract, the energy payments FPC is obligated to make to LAKE COGEN are tied to the monthly inventory charge out price of fuel burned at the Avoided Unit Reference Plant. The contract expressly defines the Avoided Unit Fuel Reference Plant as the FPC 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 of the contract as such unit(s) are defined in Appendix C. To determine which FPC unit the Avoided Unit Fuel Reference Plant is based upon, one must again refer to Appendix C. In this instance, LAKE COGEN chose CR 1&2 to be the Avoided Unit Fuel Reference Plants. Historically, coal has been delivered

to CR 1&2 and CR 4&5 by a combination of barge and rail. The transportation cost of delivering the coal by barge is generally more expensive than delivering the coal by rail. LAKE COGEN alleges that some time after it executed the contract, FPC began manipulating the price of coal delivered to CR 1&2 by transporting a greater percentage of coal via rail instead of barge, thus, lowering the delivered price of coal at CR 1&2.

LAKE COGEN's argument that FPC breached the express terms of the contract is belied by the very terms of the contract. The definition of Avoided Unit Fuel Reference Plant is the FPC unit whose **delivered** price of fuel shall be used as a proxy. There is no section of the contract that LAKE COGEN can point to which delineates what the transportation mix of rail and barge delivery of coal to CR 1&2 had to be. LAKE COGEN argues they relied on the historic transportation costs, but there is no section which states the historic mix had to remain static. Further, LAKE COGEN has not alleged fraud in the inducement.

LAKE COGEN also argues that even if FPC did not breach an express term of the contract, FPC breached the implied covenant of good faith and fair dealing, and commercial reasonableness. FPC offered several explanations for the change in the transportation mix to CR 1&2 including 1) the coal delivery is governed by the PSC's fuel procurement policy, 2) natural forces mandate the transportation mix, and 3) the change in the transportation mix occurred independently from any request by FPC.

One of the implied contract terms recognized in Florida law is the implied covenant of good faith. Cox v. CSX Intermodal, Inc., 1999 WL 9764 (Fla. 1st DCA Jan. 13, 1999). Where the terms of the contract afford a party substantial discretion to promote that party's self interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party. Id. Assuming, arguendo, LAKE COGEN

met their burden of showing FPC acted capriciously so as to contravene LAKE COGEN's reasonable contractual expectations, the claim would still fail because LAKE COGEN failed to present any evidence concerning damages. For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that LAKE COGEN's third cause of action, breach of contract regarding coal pricing, is **dismissed.**

Count IV of the Complaint, Declaratory and Injunctive Relief re: FPC petitioning the PSC

The final cause of action pleaded by LAKE COGEN is for declaratory relief and a prayer for injunctive relief. FPC has previously petitioned the PSC to interpret its 1991 order approving the FPC/LAKE COGEN contract. LAKE COGEN argues the purpose the previous petitions was to encourage the PSC to reduce the rates and charges that FPC may charge the ratepayers. LAKE COGEN then argues, should the PSC reduce the rates, the FPC will attempt to use Article XX of the contract to reduce its payments to LAKE COGEN. LAKE COGEN is asking this Court to restrict FPC's access to the PSC, and to enjoin FPC from employing Article XX of the contract.

The Court ruled at trial that LAKE COGEN failed to produce any evidence that it was damaged by FPC petitioning the PSC. This Court does not see that LAKE COGEN's complaint for declaratory relief in this lawsuit is in any way distinguishable from FPC petitioning the PSC for declaratory relief. FPC has as much right to petition the PSC as LAKE COGEN has to file the instant lawsuit. Finally, allegations of what FPC might do if the PCS were to reduce rates is too speculative to show the future irreparable harm necessary for an injunction to issue. Accordingly, it is hereby

ORDERED AND ADJUDGED that LAKE COGEN's fourth cause of action, declaratory and injunctive relief regarding FPC's petitioning the PSC, is **dismissed.**

FPC'S COUNTERCLAIMS

FPC's Count II, Breach of Section 3.3 re: Lake Cogen's inability to deliver committed capacity

Section 3.3 of the contract provides

> Except for Force Majeure Events declared by the Facility's fuel supplier(s) or fuel transporter(s) which comply with the definition of 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[5] shall not be encumbered by interruptions in its fuel supply.

FPC argues LAKE COGEN breached the contract in two ways. First, FPC alleges that because LAKE COGEN did not maintain the required fuel back up, its ability to deliver its Committed Capacity was encumbered from March 3, 1994 to October , 1998. FPC seeks damages for the entire 56 month period. Second, FPC seeks damages because LAKE COGEN did not deliver energy during the period of August 14 through August 17, 1998.

Although FPC argues that the QF was "required" to have back up fuel on premises, the contract simply does not support that assertion. The contract requires that the QF's committed capacity shall not be encumbered by interruptions in its fuel supply. The testimony showed the QFs had wide latitude in how to comply with section 3.3.

The testimony further showed that LAKE COGEN does have a curtailment plan in place. The gas that LAKE COGEN purchases from its fuel supplier, UP Fuels, travels across the lines of Florida Gas Transmission. People Gas Systems (PSG) is responsible for ensuring that the gas is transported across those lines. LAKE COGEN's gas transportation agreement with PSG is

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[5]The term committed capacity is defined as the kilo-watt capacity which the QF has agreed to make available on a firm basis during the On-Peak Hours at the point of delivery.

interruptible. The unrebutted testimony showed that LAKE COGEN could not have negotiated an un-interruptible contract with PSG. Instead of having an un-interruptible gas transportation contract, LAKE COGEN has a curtailment plan whereby, in the event PSG interrupts LAKE COGEN's gas supply, BP Oil would bring fuel to the site within two to three hours. According to the testimony, this plan is preferable to LAKE COGEN storing the oil on the premises in the fuel tank because the oil could spoil if not used on a regular basis.

Even assuming that LAKE COGEN's failure to store the back up fuel on the premises was a material breach of contract as FPC argues, section 15.3.5 of the contract provides that if the QF fails to perform or comply with any material term or condition of the contract, and fails to conform to said term or condition within sixty (60) days after a demand by FPC, FPC may exercise any of the remedies in section 15.4, which includes remedies at law, i.e. suing LAKE COGEN for breach of contract. The evidence showed that, notwithstanding the fact FPC had the ability to inspect LAKE COGEN's facility, FPC never made a demand on LAKE COGEN to store its back up fuel on the premises during the 56 month period. The contract does not require the QF to store back up fuel on the premises, and even assuming, arguendo, it did, FPC was required to give notice to LAKE COGEN of the material breach, and allow LAKE COGEN sixty days to cure the breach.

Additionally, FPC argues LAKE COGEN failed to deliver its committed capacity due to an interruption in its gas supply for the dates August 14, 1998 through August 17, 1998. The testimony was undisputed that the cause of the interruption was a lightning strike. The lightning strike caused a fire that disabled all of Florida Gas Transmission's, (FGT's) lines, so that no gas was flowing into the state of Florida over FGT's lines. FPC points specifically to the three days in August 1998 to support its position that LAKE COGEN failed to deliver its committed capacity. FPC argues that section 3.3 imposes upon LAKE COGEN an obligation to be able to deliver its committed capacity

every hour of the day. However, the contract calls for LAKE COGEN to meet a 90% Committed On-Peak Capacity Factor over a rolling 12 month average. If LAKE COGEN fails to meet this average, it is subject to the contract's performance adjustment and reduced capacity payment. Under section 15.3.3, only if the QF fails to qualify for capacity payments under Article VIII for any consecutive twenty-four (24) month period will the failure constitute an operational events default. FPC has failed to meet its burden of showing that LAKE COGEN failed to deliver its committed capacity. Based on the foregoing analysis, it is hereby

ORDERED AND ADJUDGED that FPC's counterclaim for breach of contract re: capacity payments is **dismissed.**

DONE AND ORDERED in chambers at Tavares, Florida this 6 day of April, 1999.

Don F. Briggs, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the following has been forwarded by mail this 6 day of April, 1999 to the following parties:

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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR LAKE COUNTY

CASE NO. 94-2354-CA-01

NCP LAKE POWER, INCORPORATED, a Delaware corporation, as General Partner of LAKE COGEN LTD., a Florida limited partnership,
Plaintiff,

vs.

FLORIDA POWER CORPORATION,

Defendant.
_____/

ORDER

The plaintiff has filed a motion for clarification and/or reconsideration. The court has considered the motion and therefore ORDERS:

The plaintiff argues that the non final trial order related to count one ignored the partial summary judgment previously entered by the court. The court was fully aware that a previously entered summary judgment related to the type of unit at issue in this case. However, the type of unit, whether it is real or imaginary, must still comport with the remaining requirements and provisions of the contract. In this case both parties have historically used modeling to simulate the operation of the avoided unit. In fact, at least two different types of software have been used in the modeling process. In each software application, parameters of the avoided unit have to be input for the software to function. Florida Power and NCP greatly differ on the input parameters. NCP sought to have its version of the parameters inserted into the various software programs to determine

whether the unit would run or not. There are two problems associated with each parties position on this issue.

First of all, there is absolutely nothing in the contract which would envision modeling. The contract is essentially a payment contract, which artificially determines the amount of money to be paid to NCP, under 9.1.2 of the contract. To compound the problem, both parties have not used just one modeling software but have in fact used two. There is nothing in the contract which would lead the court to believe that the parties agreed to use a particular modeling software, or that they had agreed on the values to be input into the software. Simply stated, it is clear that a party can make the "avoided unit" run or not run depending upon the data which is input into the software. There is even a disagreement in the evidence between two of the plaintiff's own experts related to some of the input data.

Second, the addendums, which are appended to the contract and are a part thereof, do not contain any input parameter data for any times other than the on-peak hours. Instead, the parties agreed in the contract that the off-peak hours would be paid under the Florida Public Service Commission Rule, which is appended to and incorporated in the contract. Based upon the foregoing the court therefore DENIES the motion as to count one.

As to count three, the plaintiff argues that they did in fact show the damages resulting from FPC's breach of the implied covenant of good faith and fair dealing. The court disagrees. In support of their argument, the plaintiff relies upon two exhibits in evidence. The evidence, which is the summary of burned coal costs introduced during Pat Wells'

testimony, simply showed the cost of coal delivered to the plant through July 1998. The other exhibit is the calculation of revenues owed as a result of a breach of the entire purchase contract.

Count three stands alone as a cause of action, and damages related to it must be proved separately. There was no evidence before the court which showed the measure of damages related to what the plaintiff perceives as a breach of the implied covenant of good faith. In other words, the plaintiff would be required to show the money they should have received, had the covenant not been breached, versus the amount they did receive, and separate those damages for presentation. In this case, the damages were intermingled with calculations for the entire damages, which took into account modeling and firm versus as available energy pricing.

The plaintiff also argues that the mix of the coal should be the percentage applied to the A coal (used in Crystal River 4&5) and D coal (used in Crystal River 1&2). Those two types of coal are dissimilar, come from different regions of the country, and are separately subject to market fluctuations and vagaries. It is inappropriate to simply apply a rail to barge ratio for A coal to the D coal. At the very least the testimony in this regard between the experts was conflicting and the court has resolved that conflict.

The court does not envision that the damages presentation will be as complex as that stated by plaintiff. The on-peak hours are stated in the exhibits to the contract, and the plaintiff is to be paid firm prices during that time. During the other times they are to be paid

according to the terms of the Public Service Commission Rule, which assuming it is allowed by the rule, could be higher than firm price, since the court has, based on Florida Power's admissions, determined that this is not a "lesser of" contract.

For the above reasons the motion for clarification and/or reconsideration is DENIED.

DONE AND ORDERED in chambers at Tavares, Lake County, Florida, this 3rd day of May, 1999.

/s/ Don F. [illegible]

DON F. BRIGGS, CIRCUIT JUDGE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. Mail this 3rd day of May, 1999 to:

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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR LAKE COUNTY

NCP LAKE POWER, INCORPORATED,
a Delaware Corporation,
as General Partner of LAKE
COGEN, LTD., a Florida
limited partnership,

Plaintiff,

v. Case No.:94-2354-CA

FLORIDA POWER CORPORATION,

Defendant.

ORDER SPECIFYING AS-AVAILABLE ENERGY PAYMENTS NOT CAPPED AT FIRM ENERGY PAYMENTS

THIS MATTER came before the Court on the Parties request to resolve two final matters in calculating damages in light of the Court's non-final trial order. A hearing was had on July 29, 1999 in which the issues of 1) when the breach occurred; and 2) whether or not PSC Rule 25-17.0825 mandates that as-available energy payments are capped at firm energy prices. The Court ruled on the first issue, determining that energy payments had never been calculated in accordance with the terms of the contract as interpreted by this Court, thus the breach occurred day one of the contract. The Court took the final issue under advisement, and after having heard the argument of counsel[1], reviewing the contract, the Court file, the PSC rules, and the scant case law available, the Court finds as follows:

First, it is abundantly clear to the Court after having heard the argument of counsel for the

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[1] LAKE COGEN filed a memorandum of law subsequent to the hearing, and FPC has moved to strike the memorandum as it was unsolicited. The memorandum raises no new arguments, and the Court is relying on the arguments as they were presented at the hearing. It is unnecessary for the Court to strike the memorandum.

respective parties that some confusion persists as to the nature of the contract entered into by LAKE COGEN and FPC. The Court has determined that at its heart, the contract is a payment contract. During On-peak hours, LAKE COGEN is to be paid "firm" energy payments for energy actually produced. During Off-peak hours, LAKE COGEN is to be paid "as-available[2]" energy payments contemplated by PSC rule 25-17.0825 for energy actually produced. On-peak and Off-peak hours are simply triggering mechanisms dictating when one of the two methods of payment is to be made. The hours are not directly tied to whether the "avoided unit" would be running or not, nor are they directly tied to whether LAKE's physical plant is producing energy or not, as these issues go to LAKE producing its committed capacity, and the payments associated with capacity. On-peak and Off-peak hours relate to the method of calculating the energy payments.

The first sentence of the Rule 25-17.0825 of the Public Service Commission states: 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. Hence, LAKE is under no obligation to produce energy during Off-peak hours by virtue of PSC rule 25.17.0825, but may be obligated to produce energy during this time to fulfill a separate obligation under its contract with FPC, i.e., committed capacity. If LAKE is not producing energy, FPC is not required to make an energy payment simply because the time of day is an Off-Peak hour. That would defeat the purpose of energy payments. During Off-Peak hours, if LAKE produces energy, and LAKE sells energy, and FPC purchases energy from LAKE, then how much money FPC must pay LAKE for the energy sold is controlled by PSC Rule 25.17.0825. This naturally begs the question, "what does PSC Rule 25.17.0825 dictate?"

The methodology of calculating as-available energy payments is not in dispute, but it is

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[2]"As-available" energy cost is the cost of the commodity "electricity" on the open, or free, market.

FPC's contention that Rule 25-17.0835 caps as-available energy payments at the firm energy price. According to FPC's argument, their avoided unit costs would never exceed firm energy price rates. During the trial, FPC's experts testified that the contract between LAKE and FPC was not a "lesser-of" contract, but that is exactly what FPC is now arguing. The position espoused by FPC in view of the Court's interpretation of the contract is that FPC will pay LAKE the firm energy contract price rate during On-Peak hours, and during Off-Peak hours FPC will pay LAKE as-available price rate *as long as the as-available rate is less-than the firm rate*, but at no time will FPC pay LAKE above the firm rate. This is not what the parties contracted. The parties contracted to FPC paying LAKE as-available energy payments during Off-Peak hours for energy actually purchased. The only way as-available payments are capped at the firm rate, in this case, is if the PSC rule requires they be capped.

The rule states 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. To take the leap that this caps as-available payments at the firm rate, FPC would have to show had they built the avoided unit, and had the unit produced energy which FPC purchased, the cost of purchasing this energy would never exceed the rate FPC is paying LAKE for firm energy payments. FPC has not shown this to be the case. The Court has rejected the "modeling" theories of both parties as prior orders have discussed in detail.

It is true that the rule warns a utility that "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." It may

be that the utility energy payments to LAKE may not be recoverable, but this does not mean that FPC could not or did not contract for a non-capped as-available rate. The risks associated with this contract are not completely allocated to LAKE. Likewise, FPC has not assumed all the risk. As counsel for FPC agreed at the hearing, there will be times when the as-available rate is lower than the firm rate, and times when the as-available rate will exceed the firm rate. The risk of FPC paying more than the firm rate during Off-Peak hours is part and parcel of the contract. To offset this risk, FPC enjoys the benefit of paying less when the as-available rate is lower than the firm rate during Off-Peak hours. Whether or not the respective parties have entered into an advantageous or disastrous contract is left for them to decide. This Court finds neither the contract, nor PSC Rule 25-17.0825 caps the as-available rate at the firm energy rate price.

The evidence at trial alluded to the prospect that FPC may now be fearing the pinch of possible de-regulation of the electric industry, and , thus, competition for consumers. De-regulation has apparently become more of a reality since this contract was negotiated. However, changing market conditions cannot serve to modify an existing contract unless contemplated by that contract.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Parties have twenty days from the date of this order to submit a proposed final judgment based upon, and incorporating within, this Court's Non-Final Trial Order and the present Order.

DONE AND ORDERED in chambers at Tavares, Florida this 5 day of AUGUST, 1999.

Don F. Briggs, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the following has been forwarded by mail this 5 day of August 1999 to the following parties:

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Rodney E. Gaddy
Florida Power Corporation
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Robert Scheffel Wright
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Judicial Assistant/Clerk

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

NCP LAKE POWER, INCORPORATED,
a Delaware corporation,
as General Partner of LAKE
COGEN LTD., a Florida
limited partnership,

Plaintiff,

vs.

FLORIDA POWER CORPORATION,

Defendant.
_____/

CASE NO. 94-2354-CA-01

DIVISION NO. 8

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF AND AGAINST THE DEFENDANT

This cause came on to be heard on Plaintiff, NCP LAKE POWER, INCORPORATED's, a Delaware corporation, as General Partner of LAKE COGEN, LTD., a Florida limited partnership ("LAKE COGEN"), Motion for Partial Summary Judgment and Defendant, FLORIDA POWER CORPORATION's ("FPC"), Motion for Partial Summary Judgment and the Court having heard argument from counsel for both parties hereto and otherwise being fully advised in these premises,* the Court finds as follows:

A. The pleadings, depositions, answers to interrogatories, admissions, and the affidavits filed in support of the Plaintiff's Motion for Partial Summary Judgment show that there are no genuine issues of material fact concerning the interpretation of Section 9.1.2 of the Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying

* Defendant's proposed order was considered by the Court. DFB

Facility Between Lake Cogen Limited and Florida Power Corporation (the "Lake Cogen-FPC Agreement") which is attached to the Plaintiff's Amended Complaint filed herein.

B. Section 9.1.2 of the Agreement between the parties, read in conjunction with the entire Agreement is unambiguous as it relates to the type of unit used to model the calculation of the electric energy payments to the Plaintiff.

C. Section 9.1.2 of the Agreement, together with the other pertinent sections of the Agreement, requires the Defendant FPC to make electric energy payments to the Plaintiff 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, as selected by the Plaintiff in Section 8.2.1 of the Agreement and described in Appendix "C", Schedules 3 and 4 of the Agreement.

D. The Court has also considered the Defendant's Motion for Partial Summary Judgment and finds that the terms of the Agreement at issue are unambiguous and do not require the Court to look outside its four corners for its interpretation of Section 9.1.2 of the Agreement. However, the Court disagrees with the Defendant's conclusions regarding the interpretation of the Agreement at issue before the Court.

IT IS THEREFORE, ORDERED AND ADJUDGED that:

1. A Partial Summary Judgment is hereby entered for LAKE COGEN and against FPC on the issue of liability for FPC's failure to pay LAKE COGEN at the firm energy cost rate when the avoided unit with operational characteristics of an operable 1991 Pulverized Coal Unit contemplated by the Lake Cogen-FPC Agreement would have been operating and

at the as-available energy cost rate during those times when said avoided unit would not have been operating.

2. The Defendant's Motion for Partial Summary Judgment is denied to the extent that it is inconsistent with this Order.

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida this 23 day of January, 1996.

DON F. BRIGGS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail this 23 day of January, 1996 to:

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Judy A. Shafer
~~JUDICIAL ASSISTANT~~ DC

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR LAKE COUNTY

NCP LAKE POWER, INCORPORATED,
a Delaware Corporation,
as General Partner of LAKE
COGEN, LTD., a Florida
limited partnership,

Plaintiff,

v. Case No.:94-2354-CA

FLORIDA POWER CORPORATION,

Defendant.

FINAL JUDGMENT

THIS CAUSE came before the Court for final disposition on July 29, 1999. A complete trial of all issues concluded in December, 1998. Counsel was directed by the Court to submit written closing arguments which were received by the Court at the end of February, 1999. This Court entered a Non-Final Trial Order in April, 1999, which adjudicated liability, but reserved ruling on damages as the Court's interpretation of the contract at issue did not comport with the interpretations given by the respective Parties. The Parties were left to calculate damages in accordance with the Court's interpretation of the contract. Two issues arose concerning 1) the date of breach; and 2) whether as-available energy payments were capped at the firm rate, and these issues were argued before the Court in July, 1999. An order was entered in August, which brought the Parties closer to agreeing on the amount of damages. It appears there is only one issue remaining to be addressed in this, the Final Judgment. The Court, being fully advised in the premises, and having considered both Parties respective proposed Final Judgments and correspondence, it is thereupon:

ORDERED AND ADJUDGED AS FOLLOWS:

1. The address of the Defendant, Florida Power Corporation (FEIN 59-0247770) is One Progress Plaza, Suite 1500, St. Petersburg, Florida 33701.

2. The address of the Plaintiff, NCP Lake Power, Incorporated, as General Partner of Lake Cogen Ltd., is One Upper Pond Road, Parsippany, New Jersey 07054.

3. The Plaintiff, NCP Lake Power, Incorporated, as General Partner of Lake Cogen, Ltd., shall recover from the Defendant, Florida Power Corporation, the amount of Four Million Four-Hundred Eighty Thousand Two-Hundred Forty-Seven and no/100 Dollars ($4,480,247.00) which includes pre-judgment interest and all other damages for FPC's breach of contract. The Judgment shall accrue interest at the post-judgment legal rate pursuant to Section 55.03, Florida Statutes.[1]

4. This Court specifically incorporates by reference its Non-Final Trial Order dated April 6, 1999; Order dated May 3, 1999; and Order Specifying As-Available Energy Payments Not Capped at Firm Energy Payments, dated August 5, 1999, into this Final Judgment as if such rulings were fully set forth herein.

5. Each party shall bear its own attorney's fees. This Court reserves jurisdiction to determine entitlement to costs.

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[1]The Parties were in disagreement as to the proper rate of interest to be applied post-judgment. Specifically, Florida Power submitted a partial transcript of the trial dated 12/2/98, in which Florida Power and NCP stipulated on the record that "in the event that the Court would determine damages, that the damages would be at the contract rate, which is the commercial paper rate rather than the statutory interest rate." This stipulation spoke to the calculation of damages, pre-judgment interest, and not to the interest rate to be applied to a judgment. The Court finds Florida law controls this issue as the contract does not address the rate of interest to be applied post-judgment. Therefore Section 55.03, Florida Statutes sets the rate of interest to be applied to this judgment.

FOR ALL OF WHICH LET EXECUTION ISSUE.

DONE AND ORDERED in chambers at Tavares, Florida this 26 day of August, 1999.

Don F. Briggs, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the following has been forwarded by mail this 26 day of August, 1999 to the following parties:

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