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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.	Docket No. 980283-EQ Submitted for Filing: April 6, 1998

MIAMI-DADE COUNTY'S AND MONTENAY-DADE, LTD.'S MOTION TO DISMISS FLORIDA POWER CORPORATIONS' PETITION FOR DECLARATORY STATEMENT AND SUPPORTING MEMORANDUM OF LAW

MIAMI-DADE COUNTY, FLORIDA ("Dade County" or "Dade"), a political subdivision of the State of Florida, formerly Metropolitan Dade County, Florida, and MONTENAY-DADE, LTD., by and through its managing general partner, MONTENAY POWER CORP. (collectively "Montenay"), pursuant to Rule 25-22.037(2), Florida Administrative Code ("F.A.C."), respectfully move the Florida Public Service Commission ("the Commission" or "FPSC") to dismiss the Petition for Declaratory Statement ("Third Petition") filed on February 24, 1998 by Florida Power Corporation ("FPC") that initiated the instant docket. In summary, and as explained more fully in Dade County's and Montenay's supporting memorandum of law herein, the Commission should dismiss FPC's latest petition for the following reasons.

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1. FPC's February 24 Petition for Declaratory Statement is the third petition that FPC has filed in its efforts to induce the Commission to attempt to determine FPC's, and Dade County's and Montenay's, rights under a certain negotiated power sales

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contract. This "Third Petition" is barred by the doctrines of res judicata, collateral estoppel, and administrative finality.

2. FPC's Third Petition asks the Commission for relief that is beyond the authority and jurisdiction of the Commission to grant: specifically, FPC's Third Petition asks the Commission to interpret its earlier Order No. 24734 approving the subject power sales contract for cost recovery to "require" FPC to take certain actions in the course of performing its duties under the contract. The Commission could not have granted such relief in its earlier order approving the contract and cannot grant such relief now.

3. FPC has itself invoked the Circuit Court's jurisdiction over the disputes between it and Dade County and Montenay. Accordingly, FPC's Third Petition is no more than blatant forum-shopping for an advisory opinion that it hopes to use in its litigation against Dade County and Montenay.

4. FPC's Third Petition is inappropriate for a declaratory statement because it is not limited to FPC in its particular set of circumstances; rather, it clearly involves parties other than FPC. Moreover, converting the Third Petition to a Section 120.57 cannot preserve this proceeding.

5. The primary authority upon which FPC bases its request for a declaratory statement is merely a timely protested Proposed Agency Action order that the Commission has now concluded, by a final order, is a legal nullity.

6. FPC has once again failed to be complete in its representations to the Commission regarding the history of the Commission's cogeneration rules applicable to energy payments made pursuant to standard offer contracts; in any event, the Commission has previously ruled that the subject rule does not apply to the contract at issue in the current dispute between FPC and Dade County and Montenay.

BACKGROUND AND STATEMENT OF THE CASE

1. Miami-Dade County is a political subdivision of the State of Florida. It was formerly named Metropolitan Dade County and changed its name on December 2, 1997, by action of the Board of County Commissioners under Ordinance No. 97-212. Montenay Power Corp. is the managing general partner of Montenay-Dade, Ltd. Dade County and Montenay have previously moved to intervene in this docket, for the limited purpose of moving to dismiss FPC's Third

Petition, by petition filed on March 12, 1998.

2. Dade County owns, and Montenay operates, the Dade County Resources Recovery Facility (the "Facility"), a solid waste fired small power production facility, located in Dade County, with nameplate generating capacity of 77 megawatts (MW). Dade sells firm capacity and energy from the Facility to FPC pursuant to that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Dade County And Florida Power Corporation dated March 15, 1991 (the "Contract"). The Contract provides for Dade County to produce and deliver to FPC, and for FPC to purchase, 43 megawatts (MW) of firm electric capacity and energy at a minimum committed on-peak capacity factor of 83 percent from the Facility (Contract, Section 7.1), based upon a Pulverized Coal, Schedule 4, Option A unit elected in Section 8.2.1 of the Contract. The Facility is a qualifying small power production facility or "QF" within the meaning of the rules of the Commission and the U.S. Federal Energy Regulatory Commission.

3. The Contract between FPC and Dade County, as between the parties, was not contingent upon the FPSC's approval. The effectiveness of the Contract was, however, contingent upon its approval and ratification by the Board of County Commissioners of Dade County, Florida. (Contract, Section 4.1.) Consistent with and pursuant to Commission Rule 25-17.0832(2), F.A.C., the Commission approved the Contract for cost recovery by Order No. 24734, issued on July 1, 1991 in Docket No. 910401-EQ. In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60 (the "Contract Approval Order"). By the same order, the Commission approved -- for cost

recovery -- seven other negotiated contracts for the purchase by FPC of firm capacity and energy from other QFs. These eight contracts, together with three others approved in separate proceedings[1], are referred to collectively herein as "the Contracts" or "the Negotiated Contracts."

4. Dade County and Montenay have performed their obligations in accord with the Contract since its inception on March 15, 1991, and have been delivering firm capacity and energy to FPC pursuant to the Contract since November 22, 1991. With the exception of a small part of the payment[2] made in December 1991 for energy delivered between November 22 and 30, 1991, FPC consistently calculated and paid for all energy delivered from the Facility between December 1, 1991 and August 8, 1994 at the "firm energy price" in accord with section 9.1.2(i) of the Contract, plus, where applicable, the Performance Adjustment pursuant to Section 9.2 and Appendix C, Schedule 6 of the Contract.

5. In a letter to Dade and Montenay dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating"

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

[2] Approximately $21,000 out of the total December 1991 payment of approximately $191,500 was identified as being paid at the as-available energy price, which was greater than the firm price during that time period. Dade County and Montenay believe that this payment was an effort, in this brief 8-day or 9-day period at the beginning of their power deliveries to FPC, to reflect what would properly have been due to the County and Montenay pursuant to the Performance Adjustment provisions of the Contract.

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an avoided unit with certain characteristics during certain hours, and further declared that, as a result of this determination, FPC would pay for energy delivered in those hours at a rate based on FPC's as-available energy costs, which were, during those hours, less than the firm energy prices that FPC would otherwise be obligated to pay for energy from the Facility. FPC sent similar letters to the other QFs that provide firm power and energy to FPC pursuant to the Negotiated Contracts.

6. On July 21, 1994, FPC initiated Docket No. 940771-EQ by filing a Petition for Declaratory Statement ("the First Petition"). In that First Petition, FPC asked the Commission to issue an order:

> declaring that the utilization of the pricing mechanism specified in Section 9.1.2 of the Negotiated Contracts to determine the periods when as-available energy payments are to be substituted for firm energy payments, complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

First Petition at page 6. (Emphasis supplied.) In its purported "Answer" to Pasco Cogen Ltd.'s petition to intervene in Docket No. 940771-EQ, FPC clarified the intent of its First Petition, stating plainly that:

> [t]he purpose of the declaratory petition is to clarify and validate Florida Power's reliance on the contract language and Florida Power's methodology for implementing it.

Docket No. 940771-EQ, FPSC Document No. 08270 at 5 (August 15, 1994).

7. By petition dated August 18, 1994, Dade County and Montenay requested the Commission's leave to intervene in Docket No. 940771-EQ for the limited purpose of moving to dismiss FPC's petition for declaratory statement. FPC filed an answer on August 25, 1994, in which it acknowledged Dade County's and Montenay's

entitlement to intervene. By its Order No. PSC-94-1405-PCO-EQ, issued November 16, 1994, the Commission granted Dade County's and Montenay's petition "to intervene for the limited purpose of moving to dismiss FPC's petition in this proceeding." In Re: Petition for Declaratory Statement Regarding Application of Rule 25-17.0832, F.A.C., To Certain Negotiated Contracts for Purchase of Firm Capacity and Energy, By Florida Power Corporation, 94 FPSC 11:283 (hereinafter cited as the "Energy Pricing Docket").

8. On October 31, 1994, after the Commission Staff recommended that the Commission deny FPC's First Petition because it was legally inappropriate for a declaratory statement[3], FPC filed a pleading styled an "Amended Petition" (hereinafter referred to as FPC's "Second Petition"), in which FPC asked the Commission:

> for a determination that [FPC's] manner of implementing the pricing mechanism specified in Section 9.1.2 of the negotiated contracts for the purchase of firm capacity and energy from certain Qualifying Facilities . . . to determine the periods when as-available energy payments are to be substituted for firm energy payments, is lawful under Section 366.051, F.S., and complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Second Petition at 1. (Emphasis supplied.)

9. On December 1, 1994, Dade County and Montenay filed their Motion to Dismiss FPC's Amended Petition and Supporting Memorandum of Law. Several other QFs also intervened, and also moved to dismiss FPC's petitions on or about the same date. The Commission heard oral argument on the motions to dismiss on January 5, 1995, and, by Order No. 95-0210-FOF-EQ (hereinafter "the 1995 Dismissal Order"), unanimously granted Dade's and Montenay's motion to

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[3] See Energy Pricing Docket, Staff Recommendation at 5 (FPSC Document No. 10249, October 6, 1994).

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dismiss, as well as the motions of the other QF's, and dismissed FPC's Second Petition. Further details regarding the factual background of these disputes are set forth in Dade County's and Montenay's Motion to Dismiss and Supporting Memorandum of Law, filed in FPSC Docket No. 940771-EQ on December 1, 1994, which the Commission granted by its Order No. PSC-95-0210-FOF-EQ, rendered on February 15, 1995, Energy Pricing Docket, 95 FPSC at 2:263. A copy of Dade/Montenay's earlier motion and memorandum is attached hereto as Appendix A.

10. In the 1995 Dismissal Order, the Commission stated, among other things:

> 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.
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> 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 determine 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

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> 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.
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> 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.
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> 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.

1995 Dismissal Order, 95 FPSC 2:263, 267-70. FPC did not appeal the 1995 Dismissal Order.

11. Following the 1995 Dismissal Order, Dade County and Montenay initially attempted to resolve their disputes with FPC through settlement negotiations. By February 1996, approximately a year later, these negotiations had failed to progress satisfactorily. Dade County and Montenay, recognizing the courts' jurisdiction over their claims and reasonably relying on the finality of the Contract Approval Order and the 1995 Dismissal Order, filed suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, seeking both (a) declaratory relief and damages on their contract claims and (b) damages for antitrust injury inflicted by FPC. Following the resolution of some procedural issues not relevant here, the litigation between Dade County and Montenay, on the one hand, and FPC, its parent Florida Progress Corporation, and an affiliate, Electric Fuels Corporation, on the other hand, came to encompass two cases: METROPOLITAN DADE

COUNTY, a political subdivision of the State of Florida, and MONTENAY POWER CORP., a Florida corporation, as General Partner of MONTENAY-DADE, LTD., a Florida limited partnership, Plaintiffs, vs. FLORIDA POWER CORPORATION, a Florida corporation, et al., Defendants, Case No. 96-594-CIV-LENARD, now pending in the United States District Court for the Southern District of Florida (the "Federal Court action"), and METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, and MONTENAY POWER CORP., a Florida corporation, as General Partner of MONTENAY-DADE, LTD., a Florida limited partnership, Plaintiffs, vs. FLORIDA POWER CORPORATION, a Florida corporation, Defendant, Case No. 96-09598-CA-30, now pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (the "State Court action"). The parties have been actively litigating these disputes since February 1996.

12. The State Court action involves the contract disputes that FPC is seeking to have the Commission address here. Dade County and Montenay, in their Amended Complaint, have requested declaratory relief and damages resulting from FPC's breach of the Contract by means of its unilateral reinterpretation of Section 9.1.2 thereof, and for damages resulting from certain manipulations affecting coal costs, which are a major component of the energy prices due pursuant to the Contract. In the State Court action, FPC has filed a separate answer and counterclaim against both Dade County and Montenay, respectively, in which FPC specifically invokes the Circuit Court's jurisdiction and seeks declaratory relief from the Circuit Court on both the energy pricing issue and the coal cost issue. FPC also moved the Circuit Court for summary

judgment on both the energy pricing issue and the coal transportation issue; its motion for summary judgment was denied. In its Third Petition, FPC did not advise the Commission that it has specifically invoked the Circuit Court's jurisdiction in its counterclaims. Copies of FPC's answers and counterclaims against both Dade County and Montenay are attached hereto as Appendix B. Copies of FPC's motion for summary judgment and the Circuit Court's order denying that motion are attached as Appendix C.

13. Incredibly, on February 24, 1998, FPC filed yet another improper petition for declaratory statement (the "Third Petition"). This time, attempting to rely on the same authorities that it cited in its First Petition and in its Second Petition, plus a legally null proposed agency action order, FPC has asked the Commission:

> 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 [sic[4]] ("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**:
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> (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
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> (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;
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> (C) Use the actual chargeout price of coal to FPC's Crystal River ("CR") plants 1 and 2, resulting from

[4] The correct title of PURPA is the Public Utility Regulatory Policies Act of 1978.

> 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.

FPC's Third Petition at 1-2. (Emphasis supplied.) (Footnotes omitted.)

14. Neither PURPA nor Section 366.051, Florida Statutes, has changed since the Commission issued its 1995 Dismissal Order. Nor has the Contract Approval Order been amended, clarified, or appealed; indeed, as specifically contemplated by the Contract, "all opportunities for requesting a hearing, requesting clarification and filing for judicial review have expired or are barred by law." Contract at Section 1.16, page 4. Nor, in fact, did FPC appeal the 1995 Dismissal Order. This leaves, as the sole purported new -- since the 1995 Dismissal Order was rendered -- authority for FPC's requested declaratory statement, the Commission's Proposed Agency Action Order No. 97-1437-FOF-EQ (the "Lake PAA Order"), issued on November 14, 1997 in Docket No. 961477-EQ (the "Lake-FPC Settlement Docket"). The Lake PAA Order was timely protested by Lake Cogen, Ltd. ("Lake Cogen"), which subsequently moved to dismiss the proceeding on grounds of mootness. On March 10, 1998, the Commission voted unanimously to find the Lake PAA Order a nullity and to dismiss FPC's petition in the Lake-FPC Settlement Docket. On March 30, 1998, the Commission issued Order No. PSC-98-0450-FOF-EQ memorializing this decision.

SUMMARY OF GROUNDS FOR DISMISSAL

15. FPC's Third Petition is barred by the doctrines of res judicata, collateral estoppel, or both, as well as by the doctrine of administrative finality. The issue here is the Commission's

jurisdiction. The Commission has already spoken clearly on this issue, holding that it lacks jurisdiction to decide this dispute, specifically as between FPC and Dade County and Montenay, and specifically with respect to the instant contract disputes. Moreover, FPC's Third Petition asks the Commission for relief that is beyond the Commission's authority to grant: neither the Commission's earlier Order No. 24734, which approved the Contract for cost recovery purposes, nor any subsequent clarification thereof, can be applied to require FPC to do anything.

16. In plain view of the fact that FPC has itself invoked the Circuit Court's jurisdiction over these disputes in its pending counterclaims, as well as that fact that FPC has moved the Circuit Court for summary judgment on both issues raised in its Third Petition, which motion was denied, it is clear that FPC's Third Petition is no more than blatant forum-shopping. Moreover, FPC has no need for, or right to, the requested declaratory relief: even if FPC loses the State Court action, FPC's sole shareholder (Florida Progress Corp., a co-defendant in the Federal Court action) has no right to a Commission order that might help FPC to escape its court-ordered contract responsibilities.

17. The Third Petition is legally inappropriate because, as observed by the Commission Staff in recommending denial of FPC's First Petition in 1994, it would apply more broadly than to FPC in its particular circumstances only; moreover, FPC's suggestion that this proceeding can be converted to "one brought under Fla. Stat. 120.57" (Third Petition at 2, n.2) is inappropriate because it is an attempt to translate the Commission into the role of the courts in rendering declaratory judgments as to rights and positions under

contracts.

18. In addition, the Third Petition is legally inappropriate because FPC's primary "authority" for it, the Lake PAA Order, is a legal nullity. Finally, FPC has once again improperly attempted to invoke the Commission's energy pricing rule for standard offer contracts[5] as authority for its purported interpretation of the Contract. The Commission correctly rejected FPC's near-identical plea in the 1995 Dismissal Order.

19. The Commission must see FPC's Third Petition for what it is -- blatant forum-shopping in an attempt to get a third -- indeed a fourth -- bite at the apple. FPC's Third Petition is barred, legally flawed, incomplete as to historical fact, and otherwise inappropriate, and the Commission should dismiss it.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Miami-Dade County and Montenay-Dade, Ltd., by and through its managing general partner, Montenay Power Corp., respectfully move the Commission to DISMISS FPC's Third Petition.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. FPC'S THIRD PETITION IS BARRED BY THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL, OR BOTH, AND BY THE DOCTRINE OF ADMINISTRATIVE FINALITY.

By filing its Third Petition, FPC is attempting to relitigate the issue of whether the Commission possesses the jurisdiction to

[5] Formerly codified at Rule 25-17.0832(4)(b), F.A.C., the subject provision was renumbered as Rule 25-17.0832(5)(b), F.A.C. in 1997.

resolve the ongoing contract interpretation dispute between FPC and Dade County and Montenay. This threshold jurisdictional issue was fully litigated by FPC, Dade County and Montenay in the Energy Pricing Docket, FPSC Docket No. 940771-EQ, and the Commission made a final determination on the merits in the 1995 Dismissal Order, wherein the Commission unequivocally held that it lacked jurisdiction to grant FPC the relief it requested. See Order No. PSC-95-0210-FOF-EQ, 95 FPSC at 2:270. Accordingly, the doctrines of res judicata and collateral estoppel, or both,[6] operate to bar FPC from attempting to invoke the Commission's jurisdiction to grant FPC the relief requested in the Third Petition, and the Third Petition must therefore be dismissed. In addition, Dade County and Montenay have reasonably relied on the 1995 Dismissal Order and any attempt by the Commission to recede from the jurisdictional determinations in that order is contrary to the doctrine of administrative finality.

A. Res Judicata

The general principle underlying the doctrine of res judicata is that a final judgment by a tribunal of competent jurisdiction is absolute and conclusively puts to rest every justiciable issue, as well as every actually litigated issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984). It is well-settled that res judicata

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[6] Courts often apply the doctrines of res judicata and collateral estoppel interchangeably. See City of Miami Beach v. Prevatt, 97 So. 2d 473, 477,(Fla. 1957), cert denied sub nom, Wags Transportation System, Inc. v. Prevatt, 355 U.S. 957, 78 S.Ct. 543, 2 L. Ed. 2d 532 (1958). Res judicata is often referred to as "claim preclusion" and collateral estoppel is referred to as "issue preclusion." Dade County and Montenay believe that both doctrines apply in this case to bar FPC's attempt to relitigate the jurisdictional issues decided by Order No. PSC-95-0210-FOF-EQ.

may be applied to bar relitigation of issues in an administrative proceeding. See Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987) (citing several cases, including Wager v. City of Green Grove Springs, 261 So. 2d 827 (Fla. 1972)). It is also well-settled that the principles of res judicata apply to questions of jurisdiction. See Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, 455 U.S. 691, 706, 102 S.Ct. 1357, 716 L. Ed. 2d 558, 571 (1982) (citing American Surety Co. v. Baldwin, 287 U.S. 156, 166, 53 S.Ct. 98, 77 L.Ed. 231 (1932)); see also State Commission on Ethics v. Sullivan, 430 So. 2d 928, 934-35 (Fla. 1st DCA 1983) (applying res judicata to a jurisdictional issue).

In a recent case, the Commission utilized the test adopted by the United States Eleventh Circuit Court of Appeals to determine the applicability of the doctrine of res judicata. See In Re: Application for Certificates to Provide Water and Wastewater Services in Alachua County under Grandfather Rights by Turkey Creek, Inc. and Family Diner, Inc., d/b/a/ Turkey Creek Utilities, 95 FPSC 11:625, 627-28 (Order No. PSC-95-1445-FOF-WS) (November 28, 1995) (hereinafter "Turkey Creek") (applying the test set forth in I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986) (hereinafter "Durbin")).

In Turkey Creek, the Commission found that for the doctrine of res judicata to bar a subsequent suit, four elements[7] must be

[7] The Commission has also described the elements of res judicata as consisting of

> 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the parties; and 4) identity of the

present:

> (1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases.

Turkey Creek, 95 FPSC at 11:628 (citing Durbin, 793 F.2d at 1549 (11th Cir. 1986); Harte v. Yamaha Parts Distributer, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L. Ed. 2d 994)).

All four elements of res judicata are satisfied with respect to the jurisdictional issue posed in this case, and FPC's Third Petition must be dismissed. Specifically, as to the first element, the 1995 Dismissal Order represents a final order as that term is defined in Section 120.52(7), F.S., and FPC's failure to appeal that final order means that the 1995 Dismissal Order is a final judgment on the merits as to the issue of jurisdiction. Regarding the second element, the 1995 Dismissal Order was rendered by a tribunal of competent jurisdiction, the Commission. Third, the parties are exactly the same parties who litigated the jurisdiction issue decided by the Commission in the Energy Pricing Docket: FPC

> quality in the person for or against whom the claim is made.

In Re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc. Regarding Termination of Water and Wastewater Services in Lee County, 94 FPSC 2:357, 365. (Order No. PSC-94-0210-FOF-WS) (February 21, 1994) (hereinafter "Tamiami Village") (citing Albrecht, 444 So. 2d at 12.) This test is functionally equivalent to the 11th Circuit test, and, for the reasons set forth in this memorandum of law, all of the elements of both tests are satisfied in this case.

filed both its First Petition initiating FPSC Docket No. 940771-EQ and its subsequent Second Petition therein. By Order No. PSC-94-1405-PCO-EQ, the Commission granted Dade County and Montenay intervenor status in FPSC Docket No. 940771-EQ for the purpose of moving to dismiss FPC's petitions. Thus, the parties to the instant docket all fully litigated the jurisdictional issue in FPSC Docket No. 940771-EQ. Finally, with regard to the fourth element of res judicata, FPC's Third Petition represents an attempt by FPC to litigate the same cause of action as FPC's First and Second Petitions, namely, whether the Commission possesses jurisdiction to grant a declaratory statement which requires interpretation of the Contract and the Contract Approval Order. (Moreover, FPC's Third Petition seeks declaratory relief that is substantively identical to that which FPC sought in the earlier docket, i.e., the Commission's declaration that, under its earlier Order No. 24734, FPC is justified in its unilateral reinterpretation of the energy payment terms of the Contract.)

While the doctrine of res judicata should generally be applied sparingly, see, e.g., In Re: Petition for Interim and Permanent Rate Increase in Franklin County by St. George Utility Island Company, Ltd., 94 FPSC 11:141, 152, the Commission has previously applied the doctrines of res judicata and collateral estoppel to prevent a party from relitigating issues determined in a prior Commission order. See Turkey Creek, 95 FPSC at 11:628. In this docket, the applicability of res judicata is clear: the essential elements of res judicata are present and FPC has posited no principled rationale for relitigating the issue of whether the Commission possesses the jurisdiction to grant the relief sought by

FPC. The Commission did not have jurisdiction over these disputes in 1994 or 1995 and the Commission does not have jurisdiction today. The only new legal authority cited by FPC in its Third Petition for the proposition that the Commission has authority to "require" FPC to take certain actions in performing its duties under the Contract is the Lake PAA Order. As explained above, however, the Commission has now, by a unanimous final order, concluded that the Lake PAA Order is a legal nullity. Thus, any attempt by FPC to rely on the Lake PAA Order as an independent basis for jurisdiction in this case is clearly misplaced. Incredibly, even in spite of the Commission's unanimous decision and order finding the Lake PAA Order a nullity, FPC has neither withdrawn nor even amended its Third Petition.

B. Collateral Estoppel

Collateral estoppel, also known as estoppel by judgment or judicial estoppel, is a legal doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them. See Mobil Oil Corporation v. Shevin, 354 So. 2d 372, 374 (Fla. 1977). In Turkey Creek, the Commission once again adopted a standard applied by the United States 11th Circuit Court of Appeals in finding that the following elements[8] must be present for collateral estoppel to apply:

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[8] The test for collateral estoppel applied by the United States 11th Circuit Court of Appeals is functionally equivalent to the test utilized by Florida courts. See Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995) (finding that the essential elements of collateral estoppel are that the parties and issues be identical and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction).

> 1) the issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and 4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Turkey Creek, 95 FPSC at 11:628 (citing Durbin, 793 F.2d at 1549; Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985)).

In this docket, the issue of the Commission's jurisdiction to grant the relief requested by FPC in its Third Petition is identical to the jurisdictional issue decided by the Commission in the 1995 Dismissal Order in FPSC Docket No. 940771-EQ. In its First Petition and Second Petition, FPC asked the Commission to declare that FPC's actions "complie[d] with" the Contract Approval Order; in its Third Petition, FPC asks the Commission to declare that its actions are "require[d]" by the same Contract Approval Order. Moreover, FPC, Dade County and Montenay were all parties to the 1995 Dismissal Order and, as such, all had a full and fair opportunity to litigate[9] -- and did in fact litigate -- the key

[9] Dade County and Montenay believe that any attempt to differentiate "complies with" from "requires" is semantic at best; moreover, in the Energy Pricing Docket, the Commission gave extensive consideration to FPC's theory that the Commission's Contract Approval Order conferred continuing jurisdiction over disputes arising under the Contract. The Commission rejected this argument. In any event, even if there were some technical, hypothetical difference between what FPC asked for in its First and Second Petitions and what it is now asking for in its Third Petition, it is abundantly clear that FPC surely could have litigated the issue whether the Contract Approval Order "requires" FPC to take certain actions in performing under the Contract. Accordingly, the doctrine of res judicata applies to bar FPC's Third Petition in any event.

threshold issue of jurisdiction.[10] Accordingly, FPC is collaterally estopped from relitigating the issue of the Commission's jurisdiction to resolve the pending contract interpretation dispute between FPC and Dade County and Montenay, under the guise of interpreting the Contract Approval Order or otherwise, and FPC's Third Petition should be dismissed.

C. Administrative Finality

The doctrine of administrative finality provides that

> orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.[11]

McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996) (quoting Peoples Gas System, Inc. v. Mason, 187

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[10] FPC's failure to appeal the 1995 Dismissal Order in no way affects the applicability of the doctrine of collateral estoppel to this case. Rather, FPC's decision not to appeal the 1995 Dismissal Order should be viewed as recognition by FPC that the 1995 Dismissal Order was correctly decided and a waiver by FPC of its right to appeal.

[11] In McCaw, the Florida Supreme Court cautioned against applying the rule of administrative finality in "too doctrinaire" a fashion to agencies acting in an administrative capacity by exercising continuing regulatory authority over persons or activities. McCaw, 679 So. 2d at 1179 (quoting Mason, 187 So. 2d at 339). However, in this case, the jurisdictional determination made by the Commission in the 1995 Dismissal Order is more judicial in nature than regulatory, and as such, the cautionary warnings of the Florida Supreme Court in MaCaw do not apply. The point is that, as the Commission correctly concluded in 1995, the Commission does not have continuing regulatory authority or jurisdiction over negotiated contracts.

So. 2d 335, 339 (Fla. 1966)). In addressing the implementation of its cogeneration rules with respect to negotiated contracts, the Commission explained how the doctrine of administrative finality applies to its approval of negotiated QF power sales contracts:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract.

Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:24, 38.

The rationale behind the doctrine of administrative finality as explained by the Florida Supreme Court in McCaw and by the Commission in Implementation of Cogeneration Rules applies equally to this case. Dade County and Montenay have reasonably relied on the finality of the 1995 Dismissal Order's (as well as the 1991 Contract Approval Order's) determination that the Commission lacks jurisdiction to interpret the Contract and have expended significant sums on litigation as a result of such reliance. As a matter of fairness[12], the Commission should reject FPC's invitation for the Commission to revisit the issue of jurisdiction.

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[12] In this context, more than fairness is at stake: if the Commission is to fulfill its responsibilities under PURPA and Florida law to encourage cogeneration and small power production, it must respect QF contracts and its role with respect to those contracts, as enunciated in Order No. 25668 and Order No. PSC-95-0210-FOF-EQ. Action like that sought by FPC in this case would undermine confidence in QF contracts in Florida, and would thus discourage the development of cogeneration and small power production facilities.

II. FPC'S THIRD PETITION REQUESTS RELIEF THAT IS BEYOND THE COMMISSION'S AUTHORITY AND JURISDICTION TO GRANT.

Once again, in the guise of seeking the Commission's declaration that FPC's actions are justified under an earlier Commission order, FPC has asked the Commission to interpret the Contract and to exercise jurisdiction that the Commission clearly does not have, specifically, to order FPC to take certain actions. FPC's request is legally inappropriate: the Commission has already held that it lacks jurisdiction to interpret the Contract as between the parties thereto, i.e., between Dade County and Montenay, as the power suppliers under the Contract on the one hand, and FPC as the power purchaser on the other. Moreover, the Commission lacks the jurisdiction or the authority to require that FPC do anything under the Contract. A Commission order granting FPC's request would clearly exceed the Commission's statutory authority, because it would amount to either a declaratory judgment[13], which only courts can grant, or a mandatory injunction, which, likewise, only courts can grant.

As provided by the Commission's own rules and consistent with all applicable federal and state law, the Contract Approval Order was solely for the purpose of approving the Contract for cost recovery purposes. Commission Rule 25-17.0832(2), F.A.C., explains the purpose of the Commission's evaluation of negotiated QF contracts: "Negotiated contracts will be considered prudent for cost recovery if it is demonstrated by the utility" that the

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[13] FPC has itself, in its answers and counterclaims against Dade County and Montenay, asked the Circuit Court for a declaratory judgment and for summary judgment on the disputed issues.

capacity is needed and that costs under the contracts do not exceed full avoided costs. Rule 25-17.0832(3), F.A.C., identifies the factors that the Commission considers "[i]n reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery." FPC is now asking the Commission to apply its order far more broadly than it was intended to, far more broadly than contemplated by the Commission's cogeneration rules, and far more broadly than is permitted under either state or federal law, including PURPA and the U.S. Constitution.

When the Commission approved the Contracts, its role in the contract formation process was at an end, as the Commission correctly concluded in the 1995 Dismissal Order. 95 FPSC at 2:267; see also In Re: Petition for Resolution of a Cogeneration Contract Dispute with Orlando Cogen Limited, L.P., by Florida Power Corporation, 95 FPSC 2:257. Effectively, the Commission let the Contracts go without further comment, with the legal effect that, consistent with the Commission's Conserv decision[14], the courts would have the jurisdiction to resolve any subsequent contractual disputes that might arise between FPC and any of the QFs.

Significantly, by its own terms, the Contract did not become final until all opportunities for requesting clarification had expired or became barred by law. Contract, Section 1.16. FPC is now purportedly seeking clarification of the final order that is barred by the Contract, the finality of which FPC has acknowledged by its course of performance since 1991.

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[14] In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, 85 FPSC 3:228.

The point with respect to FPC's Third Petition is that the Commission can only do what the Commission can do, i.e., in this instance, to review negotiated QF contracts for cost recovery purposes pursuant to Rules 25-17.0832(2)&(3), F.A.C. In 1991, the Commission could have conditioned -- but did not -- its approval of the Contracts for cost recovery on a declared understanding that payments were to be made on a certain basis. Of course, there's no evidence that the Commission ever intended its interpretation of the Contract to mean what FPC now claims it means, and it cannot do so now. As Commissioner Clark pointed out in discussing the contract interpretation in the Lake-FPC Settlement Docket:

> Well, and the point is we probably should have explored [the interpretation of the Contract] at the beginning so it was clear what we were approving
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> * * *
>
> That's it. That is the point, is that if that was our interpretation from the beginning it should have been clear, and I have asked staff, and they don't find it in the information that that was how we were interpreting that contract. Because that way we could point to it and say that was the basis on which we approved it, but we don't have that.

FPSC Docket No. 961477-EQ; Agenda Conference Transcript, (June 24, 1997) Item No. 7**PAA at 56.

FPC's efforts to induce the Commission to interpret the Contract Approval Order -- and the Contract -- now are barred by the doctrine of administrative finality, as well as by federal preemption as enunciated in the United States Third Circuit Court of Appeals' Freehold decision.[15] The Commission could not have

[15] Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3rd Cir. 1995). In Freehold, the Third Circuit held that "once the [state regulatory authority] approved the power purchase agreement between [the QF]

required FPC to make payments on any particular basis; rather, it could merely have denied approval of the Contract for cost recovery or conditioned FPC's right to cost recovery on a particular basis, but did not do so.

III. FPC HAS ALREADY ACKNOWLEDGED -- INDEED, IT HAS INVOKED -- THE CIRCUIT COURT'S JURISDICTION OVER THE CONTRACT DISPUTES. ACCORDINGLY, FPC'S THIRD PETITION REPRESENTS BLATANT FORUM-SHOPPING.

Having been dismissed in its earlier efforts to induce the Commission to improperly take jurisdiction over these contractual disputes, even where FPC asked the Commission for its requested declaratory relief based on the Commission's prior orders, FPC properly took its claims to the Circuit Court. **Now**, two years into this litigation, FPC -- with its counterclaims against Dade and Montenay still pending and having been denied summary judgment on both issues presented in its Third Petition -- has again tried to get the Commission to take jurisdiction over the disputes. This is blatant forum-shopping by FPC in an effort to end-run the jurisdiction of the Circuit Court, because FPC doesn't like the way its counterclaims are progressing in that venue. FPC's attempted fourth bite at the apple should also be dismissed.[16]

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and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [regulatory authority] to reconsider its approval or to deny the passage of those rates to [the utility's] customers under purported state authority was preempted by federal law." Id. at 1194.

[16] The first two "bites" were FPC's First Petition and Second Petition filed at the Commission in 1994, which were dismissed by Order No. PSC-95-0210-FOF-EQ. FPC's attempted third bite is its pending counterclaim, and its fourth attempted bite is its pending Third Petition.

A. FPC's Third Petition Is Blatant Forum-Shopping.

In its answer and counterclaim against Dade County, and again in its answer and counterclaim against Montenay, all filed in the State Court action, FPC invoked the Circuit Court's jurisdiction over the contract disputes between FPC and Dade County and Montenay. Specifically, FPC stated to the Circuit Court that the Circuit Court "has jurisdiction over this declaratory action pursuant to Chapter 86.011, Florida Statutes" and that "[v]enue lies in the Eleventh Judicial Circuit pursuant to the local action doctrine." FPC's Counterclaim against Dade County, ¶36-37 at page 8; FPC's Counterclaim against Montenay, ¶36-37 at pages 8-9. FPC has also moved the Circuit Court for summary judgment on both the energy pricing dispute involving Section 9.1.2 and the coal transportation and coal cost manipulation dispute. Both motions were denied.

Having lost its attempts at summary judgment, and faced with going to trial on the merits, at which time the facts regarding FPC's conduct will come out[17], FPC has **now** attempted to come back to the Commission with essentially the same claims that were dismissed more than three years ago and that are currently pending in the Eleventh Judicial Circuit of Florida. This is blatant forum-shopping. See Couch v. Department of Health and Rehabilitative Services, 377 So. 2d 32, 33 (Fla. 1st DCA 1979)

[17] FPC is again attempting to induce the Commission to make a decision in the dark -- without any facts before it relating to the parties' intent under the Contract. The Commission, of course, does not have these facts precisely because, as it has held, it is not in the business of interpreting contracts between QFs and utilities. Thus, the problem is not that the Commission is in the dark, but that FPC is asking the Commission to make a decision that it lacks the jurisdiction to make.

(finding that a declaratory statement proceeding before a state agency is not proper where there is an action pending in state court that can provide adequate relief). In short, FPC itself is on record that jurisdiction over these disputes is vested in the Circuit Court, and FPC has itself asked **the Circuit Court** to resolve the disputes between it and Dade County and Montenay. It is thus obvious that FPC's Third Petition represents not just a third, but indeed a fourth bite at the apple, and that its Third Petition to the Commission is no more than blatant forum-shopping. This cannot be countenanced, and FPC's Third Petition should be dismissed.

B. FPC Has No Need For The Requested Declaratory Statement.

As discussed above, FPC has previously asked the Commission for the same relief that it now seeks through its Third Petition, i.e., for the Commission's determination that FPC's interpretation of the energy payment provisions of the Contract is consistent with, or -- this time around -- "required" by, Order No. 24734. The Commission properly dismissed FPC's earlier efforts more than three years ago. 95 FPSC 2:263. Moreover, FPC has no immediate need for the requested declaration because it has already asked, and still has pending, a request for substantially the same relief before the Circuit Court for the Eleventh Circuit, i.e., a declaratory judgment that FPC is not liable for either (1) breach of Section 9.1.2 of the Contract or (2) breach of the Contract's covenant of good faith and fair dealing by manipulating coal deliveries to the Avoided Unit Fuel Reference Plant, i.e., Crystal River 1 and 2, in order to reduce payments to QFs.

If, assuming for the sake of argument that FPC is asking for

something other than what it has written, it must be that FPC is asking for a declaratory statement that, under certain speculative future circumstances, the Commission would treat court-ordered contract payments in a certain way. See FPC's Third Petition at 21-22. If this is what FPC wants, it is at best premature and speculative, and FPC has no right to the requested statement.

Dade County and Montenay strongly believe that what FPC really wants is a Commission declaration that FPC is interpreting the Contract correctly, and that, if successful, FPC intends to take such declaration and attempt to use it as an advisory opinion to influence the Circuit Court. Such a declaration is irrelevant to the Circuit Court's decision: it is the exclusive province of the Circuit Court to interpret the Contract between FPC and Dade and Montenay. The Commission should have nothing to do with FPC's efforts to obtain this requested advance advisory opinion[18] in its attempts to end-run the jurisdiction and judgments of the courts.

Moreover, FPC's request is speculative. For the requested "declaration" to ever apply, at a minimum, the following would have to occur. The Circuit Court would have to hold in favor of Dade County and Montenay and order FPC to pay damages as payments due under the Contract. The Commission would subsequently have to hold (and be upheld on appeal) that it has the authority to disallow cost recovery of court-ordered payments made to QFs pursuant to previously approved utility-QF power sales contracts. And,

[18] It is well-settled that, with the exception of several narrow instances not applicable in this case, advisory opinions are improper in Florida. See Page v. State, 677 So. 2d 55, 56 (Fla. 1st DCA 1996); Walker v. State, 459 So. 2d 333, 335 (Fla. 5th DCA 1984). Accordingly, FPC's Third Petition is inappropriate for this reason as well, and must be dismissed.

finally, the Commission would have to issue an order disallowing cost recovery.[19]

Dade County and Montenay strongly believe that FPC's perceived "need" for the declaratory statement sought by its Third Petition is to postpone or avoid the approaching day of reckoning in the courts, when, in the face of overwhelming evidence against it, it will have to face the judgments of judge and jury. FPC has already had summary judgment adjudicating it liable for breaching another of the Negotiated Contracts that FPC itself declares to be "identical" to the FPC-Dade/Montenay Contract,[20] and FPC has failed in its efforts to obtain summary judgment in the State Court action involving Dade County and Montenay. This denial of summary judgment leaves disputed issues of fact to be decided by a jury; Dade County and Montenay strongly believe that FPC knows that the evidence against it is overwhelming, and that FPC is therefore trying, desperately, to avoid that day of reckoning.

IV. FPC'S THIRD PETITION IS NOT APPROPRIATE FOR A DECLARATORY STATEMENT.

FPC's Third Petition is inappropriate for a declaratory

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[19] Even following the rationale in the legally null Lake PAA Order, the most that the Commission might do is attempt to apply its own contract interpretation in a fuel cost recovery proceeding. In such a proceeding, as expressed by Staff and some commissioners, the Commission might attempt to interpret the contract as between FPC and its ratepayers. Dade County and Montenay believe any such effort would be federally preempted under PURPA. See Freehold, 44 F.3d 1178, 1994.

[20] See NCP Lake Power, Incorporated, a Delaware Corporation as General Partner of Lake Cogen, Ltd., a Florida Limited Partnership v. Florida Power Corporation, Case No. 94-2354-CA-01, (Fla. 5th Cir. in and for Lake Co., Jan. 23, 1996) (Order Granting Partial Summary Judgment For the Plaintiff and Against the Defendant).

statement because it is not limited to FPC in its particular circumstances only. See Fla. Stat. § 120.565 (1997). Moreover, converting the Third Petition into a proceeding under Section 120.57, Florida Statutes, will not salvage it because the Commission lacks subject matter jurisdiction over the dispute. Finally, FPC's attempt to obtain a declaratory statement (or other determination) with respect to disputes under the Contract relating to coal transportation and coal cost determinations must likewise be dismissed because the Commission lacks jurisdiction to determine these breach of contract claims.

A. FPC's Third Petition Is Inappropriate For a Declaratory Statement.

Section 120.565(1), Florida Statutes, provides that

> [a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of an agency, as it applies to the petitioner's particular set of circumstances.

(Emphasis supplied.) Thus, under the Florida Administrative Procedure Act, declaratory statements are appropriate only when the petition establishes that the questions presented relate only to the petitioner and the petitioners' particular set of circumstances. See Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 936 (Fla. 1st DCA 1990) (stating that "there will normally be no person, other than the petitioner, who will be affected by the declaratory statement.")

Here, in its Third Petition, FPC has asked the Commission to interpret an earlier order to "require" that FPC take certain actions with respect to performing its duties under the Contract to make payments to Dade County and Montenay. This would clearly

determine Dade County's and Montenay's substantial interests. Thus, FPC's Third Petition is thus legally inappropriate and should be dismissed.

B. Converting FPC's Third Petition To A Section 120.57(1) Proceeding Will Not Save It From Dismissal For Lack Of Subject Matter Jurisdiction.

FPC states in its Third Petition that it would not object to the Commission converting its Third Petition from a declaratory statement proceeding to an action "brought under Fla. Stat. 120.57." It is not at all clear precisely what type of Section 120.57 proceeding FPC contemplates its improper declaratory statement action might be converted to; it cannot be a complaint, and it could only be a proceeding to determine FPC's and Dade's and Montenay's substantial interests if the Commission had subject matter jurisdiction over the parties for these purposes. The Commission's Approval Order (Order No. 24734) simply does not give the Commission continuing jurisdiction over such disputes. See the 1995 Dismissal Order, 95 FPSC 2:263 at 269.

Even if the Commission could disallow payments for cost recovery in this case, FPC's request for a declaration relative to the operation of a Commission order on cost recovery and the "regulatory out" clause of the Contract is not a matter for the Commission to resolve. The "reg-out" clause is simply another contract term, the interpretation, applicability, and enforcement of which is a matter of contract law for the courts.

C. FPC's Attempt to Seek A Declaration With Respect To Coal Cost Calculations Is Likewise Beyond The Commission's Jurisdiction.

The underlying dispute on the issue of coal cost calculations is based on Dade County's and Montenay's claim that FPC has, by

certain uncontemplated manipulations of coal delivery methods, and possibly by likewise uncontemplated manipulations of other elements of the chargeout price of coal at the Avoided Unit Fuel Reference Plant (defined in the Contract), breached the implied duty of good faith and fair dealing that is inherent in every contract governed by Florida law. See Green Companies, Inc. v. Kendall Racquetball Investments, Ltd., 560 So. 2d 1208, 1210 (Fla. 3d DCA 1990) (citing Restatement (Second) of Contracts § 205 (1981)). Accordingly, this is also a contract dispute between the parties that the courts have the exclusive jurisdiction to resolve. Thus, FPC's plea for the Commission's declaration on this issue is misplaced, and affords no ground for the requested declaration.

V. FPC'S PRIMARY "AUTHORITY" IS A LEGAL NULLITY.

FPC's Third Petition asks the Commission to interpret Order No. 24734 to "require" FPC to take certain actions in performing its duties under the Contract. FPC asks the Commission to render the requested declaration based on the Lake PAA Order. Indeed, FPC cites to the Lake PAA Order multiple times throughout its Third Petition and spends between three and four pages discussing it. Any attempts by FPC to rely on that Order, or on the reasoning set forth by the three-member majority therein, is misplaced.

The Lake PAA Order was rendered on November 14, 1997. On December 5, 1998, in compliance with the Commission's rules and the Lake PAA Order itself, Lake Cogen timely filed a petition protesting the order. See In Re: Petition for Expedited Approval of Settlement Agreement Between Lake Cogen, Ltd. and Florida Power Corporation, FPSC Order No. PSC-98-0450-FOF-EQ at 1 (FPSC Docket

No. 961477-EQ, March 30, 1998). Lake Cogen's timely filing of its petition protesting the Lake PAA Order rendered that Order a legal nullity. FPSC Order No. PSC-98-0450-FOF-EQ at 5; see also In Re: Rate Setting Procedures and Alternatives for Water and Sewer Utilities, Docket No. 880883-WS, Order No. 21202, and In Re: Modified Minimum Filing Requirements of Southland Telephone Company, Docket No. 920196-TL, Order No. PSC-94-0282-FOF-TL (1994 WL 162089 Fla. P.S.C.) Accordingly, even when FPC filed its Third Petition, it knew -- or certainly should have known -- that, based on applicable Commission procedures and precedent, as well as on other applicable precedent under the Florida Administrative Procedure Act[21], the Lake PAA Order was not legal authority, and certainly not "precedent set" as FPC refers to the Lake PAA Order in its Third Petition. See Third Petition at 22.

Moreover, the Lake PAA Order is legally irrelevant to the subject matter of the disputes between FPC and Dade and Montenay. The Lake PAA Order addressed a proposed amendment to the FPC-Lake Cogen contract, which amendment the Commission has the authority to approve or disapprove for cost recovery pursuant to Rule 25-17.0836, F.A.C. No such contract amendment is at issue here.

Notwithstanding the fact that the Lake PAA Order is a legal nullity, FPC's Third Petition appears to be an attempt to squeeze this dispute under the New York Public Service Commission's Crossroads decision[22] and under the Florida Supreme Court's recent

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[21] See Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

[22] Orange and Rockland Utilities, Inc. - Petition for a Declaratory Ruling That the Company and its Ratepayers Are Not Required To Pay for Electricity Generated By a Gas Turbine Owned

Panda decision.[23] Neither case affords any ground for FPC's Third Petition.

A. Crossroads

Crossroads involved a QF that had a contract, approved by the New York Public Service Commission ("NYPSC") to sell 3.3 MW of capacity and associated energy to a utility. The QF subsequently expanded its generating capacity and then demanded payment at the contract rates, which were greater than the utility's then-current avoided costs. The utility sought and obtained the NYPSC's declaratory ruling that the QF was not entitled to the higher pricing for the expanded output because the NYPSC's initial approval of the contract was limited to the original 3.3 MW project and contract. The NYPSC expressly declined to involve itself in any contract dispute between the QF and the utility.

The Crossroads decision is inapposite to the instant contract dispute for several reasons, including the following:

1. it appears, on its face, that Crossroads may have involved an

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By Crossroads Cogeneration Corporation, 1996 N.Y. PUC LEXIS 674 (New York P.S.C., Case 96-E-0728, November 29, 1996). At this point in the Crossroads proceedings, it cannot be ruled out that the New York PSC's decision is incorrect. In November 1996, the QF in Crossroads sued the electric utility in federal district court, alleging breach of contract, breach of implied covenant of good faith and fair dealing, anticipatory repudiation, and antitrust violations. In Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907 (D.N.J. 1996), the district court dismissed all of the QF's claims. An appeal of this decision is pending at the Third Circuit; an appeal of the NYPSC's ruling is also pending, but has been voluntarily stayed by agreement of the parties.

[23] Panda-Kathleen, L.P./Panda Energy Corporation v. Clark, 701 So. 2d 322 (Fla. 1997). It also appears that an appeal of the Panda decision is pending at the U.S. Supreme Court. This memorandum of law assumes, for the sake of argument, that Crossroads and Panda will be upheld with respect to the non-contract issues addressed.

attempt by the QF to manufacture a dispute under an existing contract where the QF's real claim was for a new contract for additional capacity not covered in its existing contract;

2. it does not involve pricing under the contract between the QF and the utility in question;

3. it does not involve cost recovery or the meaning or application of "regulatory out" clauses; and

4. it does not involve a contract interpretation issue, but rather involves the NYPSC's interpretation of its contract approval policies, terms, and conditions.

Moreover, relevant decisions of the NYPSC, including Crossroads and other decisions cited therein, clearly hold that the NYPSC has no jurisdiction over contract disputes between QFs and utilities. The Florida PSC has expressly held, and its Staff have expressly recognized, that the dispute between Lake Cogen and FPC, which was the subject of the Lake PAA Order and which involves "identical" contract terms as those in dispute between FPC and Dade/Montenay, involves a contract interpretation dispute between Lake Cogen and FPC. Energy Pricing Docket, 95 FPSC 2:263 at 269, 270; In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation, FPSC Docket No. 961477-EQ, Staff Recommendation dated August 12, 1997 at 1. Relative to Crossroads, and as this Commission has independently acknowledged, this clearly takes this matter beyond the scope of the NYPSC's Crossroads decision and beyond the jurisdiction or authority of state regulatory authorities. See 95 FPSC 2:263 at 269-70. Even the NYPSC recognized in Crossroads that its authority does not extend to involvement in contract disputes between QFs and

utilities. Crossroads, 1996 N.Y. PUC LEXIS 674 at *9.

The cases cited in Crossroads also stand for the basic proposition that the NYPSC may interpret certain aspects of its own prior approval orders regarding QF-utility contracts, including the applicability of policies relating to facility capacity and facility location as they existed at the time that the specific QF-utility contracts were entered into.[24] In short, neither Crossroads nor any case cited therein stands for the proposition that the NYPSC or any similar state regulatory authority may interpret a contract between a QF and a utility under any circumstances.

Crossroads thus would have no bearing in the hypothetical scenario in which Dade County and Montenay thus would win their lawsuit against FPC and, in turn, FPC would seek cost recovery of amounts paid to Dade and Montenay pursuant to the Contract as interpreted by the Court. Crossroads did not involve a contract issue, a cost recovery issue, or an issue relating to the effect of a "regulatory out" clause. Indeed, to the extent that the QF in

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[24] See Indeck-Yerkes Energy Service of Yonkers v. Consolidated Edison Co. of New York, 1994 WL 62394 (S.D.N.Y.), wherein 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 subsequent contract litigation, the U.S. District 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. It is important to note that the Court, and not the NYPSC, decided the contract interpretation dispute between the QF and the utility. See also Re Niagara Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C., March 26, 1996), wherein the New York PSC's contract approval was expressly conditioned on an output limitation tied to the pricing available for smaller QFs: "The Approval Order effectuated that intent by providing that 'this contract approval will be strictly conditioned on the operation of Lyonsdale's facility at 20 MW or less.'" Id. at 1996 WL 161415 at *2 (citing to the Approval Order at pp. 9-10).

that case attempted to present contract interpretation issues, the NYPSC expressly declined jurisdiction over such issues.

B. Panda

Panda is both factually and legally distinguishable from the instant case. In Panda, the Commission construed rules that were incorporated as part of the power sales agreement between the QF and the utility.[25] In short, Panda stands for the proposition that the Commission has the jurisdiction to interpret its rules that are incorporated as part of standard offer contracts to resolve disputes arising from conflicts between rule provisions and other contract provisions. Where there is a conflict, an applicable rule, incorporated as part of the contract, governs: as the Court stated,

> FPC's conduct and any understandings of the parties contrary to the Commission's rules are irrelevant to the Commission's enforcement of its rules. Our determination rests on whether the Commission's construction of its rules departed from the essential requirements of law and whether its decision was based on competent, substantial evidence.

Id. at 328. Panda does not support the proposition that the Commission has any jurisdiction over disputes regarding the terms

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[25] See, e.g., Panda, 701 So. 2d at 327, where the Court stated: "We believe it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted." See also id. at 327 (" . . . to forbid the Commission to resolve disputes concerning its rules . . . would render the Commission powerless to limit standard offer-contracts . . . .") And similarly, in upholding the Commission's ruling with respect to the facility size issue, the Court stated "we find that the regulations and the contract specify a contract for a facility with a capacity less than seventy-five megawatts." Id. The Court went on to refer to "the Commission's interpretation of its own rules" and the application of "the Commission's construction of its rule . . ." in reaching the Court's conclusions. Id.

of negotiated contracts.

FPC's problem in attempting to fit the instant dispute under Panda is obvious: the Commission held, in a final order which FPC did not appeal, that the energy pricing rule for standard offer contracts, upon which FPC purports to rely in its Third Petition, does not apply to negotiated contracts. 95 FPSC 2:269.

VI. FPC HAS ONCE AGAIN FAILED TO BE COMPLETE IN ITS REPRESENTATIONS TO THE COMMISSION REGARDING THE COMMISSION'S COGENERATION RULES. MOREOVER, THE COMMISSION HAS ALREADY DETERMINED THAT THE RULE THAT FPC REFERS TO DOES NOT APPLY TO THE CONTRACT IN DISPUTE HERE.

In its Second Petition, FPC attempted to convince the Commission to declare that its actions were consistent with Rule 25-17.0832(4)(b), F.A.C., now renumbered as Rule 25-17.0832(5)(b), and with the Contract Approval Order, and cited to the rule history in an unsuccessful effort to support its position on the contract interpretation issue that is the gravamen of the dispute between FPC and Dade/Montenay. FPC has attempted the same ploy once again. The Commission, however, rejected FPC's arguments in 1995, holding that the subject Rule does not apply to negotiated contracts. 95 FPSC 2:263 at 269.[26] The Commission should again reject these misplaced efforts.

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[26] See also Dade County's and Montenay's Motion to Dismiss and Memorandum of Law in Docket No. 940771-EQ, attached hereto as Appendix A. The memo explains in detail the history of the subject rule, including FPC's own contributions thereto as well as FPC's written, on-the-record explanation of how and why FPC's rule language, which was essentially adopted into the final rule, was superior to the version discussed at the rulemaking hearing.

CONCLUSION

The issue here is the Commission's jurisdiction. The Commission has already spoken clearly on this, holding that it lacks jurisdiction to decide this dispute, specifically as between FPC and Dade County and Montenay, and specifically with respect to the instant contract disputes, even when FPC previously asked the Commission for such relief based on the Contract Approval Order.

Given that FPC has invoked the Circuit Court's jurisdiction over these disputes, and has even moved for -- unsuccessfully -- summary judgment on the same issues raised in its Third Petition, the Commission must see FPC's Third Petition for what it is -- blatant forum-shopping in an attempt to get at least a third, perhaps even a fourth, bite at the apple. FPC's Third Petition is barred, legally flawed, incomplete as to historical fact, and otherwise inappropriate, and the Commission should dismiss it summarily.

Respectfully submitted this 6th day of April, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 6th day of April, 1998, by Priority Mail to Chris S. Coutroulis, Esquire and Robert L. Ciotti, Esquire, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Post Office Box 3239, 777 S. Harbour Island Boulevard, Tampa, Florida 33602 and James A. McGee, Esquire, Office of the General Counsel, Florida Power Corporation, 3201 34th Street South, Post Office Box 14042, St. Petersburg, Florida 33733-4042 and by hand-delivery to Richard C. Bellak, Esquire, Division of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850.

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APPENDIX A

METROPOLITAN DADE COUNTY'S AND MONTENAY-DADE, LTD.'S MOTION TO DISMISS FPC'S AMENDED PETITION AND SUPPORTING MEMORANDUM OF LAW

DOCKET NO. 940771-EQ

29 52 file nt.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Declaratory Statement Regarding Application of Rule 25-17.0832, F.A.C., to Certain Negotiated Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation.	)	Docket No. 940771-EQ Submitted for Filing: December 1, 1994

METROPOLITAN DADE COUNTY'S AND MONTENAY-DADE, LTD.'S MOTION TO DISMISS FPC'S AMENDED PETITION AND SUPPORTING MEMORANDUM OF LAW

METROPOLITAN DADE COUNTY ("Dade County" or "Dade") and Montenay-Dade Ltd. ("Montenay"), pursuant to Rule 25-22.039, F.A.C., respectfully move the Commission to dismiss the Amended Petition sought herein by FLORIDA POWER CORPORATION ("FPC"). The Commission should dismiss FPC's petition for the following reasons.

1. Resolution of the real dispute -- the meaning of the energy pricing terms of the Negotiated Contracts between FPC and QFs -- requires that the disputed sections of the subject contracts be interpreted, but the Commission has no authority to interpret cogeneration contracts.

2. The Commission's approval of the subject contracts for cost recovery, pursuant to its rules, neither establishes continuing jurisdiction over the contracts nor establishes the Commission's authority to construe them.

3. Rule 25-17.0832(4)(b) neither applies to negotiated contracts nor prescribes a mechanism for determining the operational status of the avoided unit -- if it did, the Rule would affirm that the QFs' position, and not FPC's, is consistent with the Rule's spirit and conceptual framework.

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Moreover, FPC's version of the Rule's history is plainly contradicted by FPC's own rule proposals and post-hearing comments in Docket No. 891049-EU.

4. Notwithstanding FPC's changes in phrasing, substituting "determination" for "declaration" and "implementation" for "interpretation," its Amended Petition is still, necessarily, a request for interpretation of the Contracts. However, without interpretation of the disputed pricing term, none of FPC's requested "determinations" would resolve the underlying contract dispute. Such interpretation is a matter for courts of law, and therefore inappropriate for Commission action.

In support of their Motion to Dismiss, Dade County and Montenay state as follows.

BACKGROUND AND STATEMENT OF THE CASE

1. Dade County owns, and Montenay operates, the Dade County Resources Recovery Facility (the "Facility"), an approximately 77 megawatt (MW) solid waste fired small power production facility located in Dade County. Dade sells firm capacity and energy from the Facility to FPC pursuant to that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Dade County And Florida Power Corporation dated March 13, 1991 (the "Contract"). The Contract provides for Dade County to produce and deliver to FPC, and for FPC to purchase, 43 megawatts (MW) of firm electric capacity and energy at a minimum committed on-peak capacity factor of 83 percent from the Facility (Contract, Section 7.1), based upon a Pulverized Coal, Schedule 4, Option A unit elected in Section 8.2.1 of the Contract. The

Facility is a qualifying small power production facility or "QF" within the meaning of the rules of the Florida Public Service Commission (the "Commission" or "PSC") and the Federal Energy Regulatory Commission (the "FERC").

2. The Contract between FPC and Dade County, as between the parties, was not contingent upon the PSC's approval.[1] The effectiveness of the Contract was, however, contingent upon its approval and ratification by the Board of County Commissioners of Dade County, Florida. (Contract, Section 4.1.) Consistent with and pursuant to Commission Rule 25-17.0832(2), the Contract was approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991 in Docket No. 910401-EQ. In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60 (July 1, 1991). By the same order, the Commission approved seven other negotiated contracts for the

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[1] By its own terms, the Contract began on March 13, 1991. (Contract, Section 4.1). Section 8.1 of the Contract provides that FPC's obligation to make capacity payments pursuant to the Contract does (did) not commence until the Contract Approval Date, which is defined in section 1.16 of the Contract as follows:

> 1.16 Contract Approval Date means the date of issuance of a final FPSC order approving this Agreement, without change, finding that it is prudent and cost recoverable by the Company through the FPSC's periodic review of fuel and purchased power costs, which order shall be considered final when all opportunities for requesting a hearing, requesting clarification and filing for judicial review have expired or are barred by law.

It is particularly interesting, in light of this provision, that FPC now purports to seek a "clarification" of the Contract by which it hopes to implement a different energy payment methodology than that it has been using to compute energy payments under the Contract since December 1991. FPC's commencement of capacity payments pursuant to the contract in December 1991, nearly three years ago, appears to confirm FPC's understanding that "all opportunities for . . . requesting clarification . . . have expired or are barred by law."

purchase by FPC of firm capacity and energy from other QFs. These eight contracts, together with three others approved in separate proceedings[2], are referred to collectively herein as "the Contracts" or "the Negotiated Contracts."

3. Dade County and Montenay have performed their obligations in accord with the Contract since its inception on March 13, 1991, and have been delivering firm capacity and energy to FPC pursuant to the Contract since November 22, 1991. With the exception of a small part of the payment[3] made in December 1991 for energy delivered between November 22 and 30, 1991, FPC consistently calculated and paid for all energy delivered from the Facility between December 1, 1991 and August 8, 1994 at the "firm energy price" in accord with section 9.1.2(i) of the Contract.

4. In a letter to Dade and Montenay dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating" an avoided unit with certain characteristics during certain hours, and further declared that, as a result of this determination, FPC would pay for energy delivered in those hours at a rate based on FPC's as-available energy costs, which are less than the firm energy prices that FPC would otherwise be obligated to pay for energy from the Facility. FPC sent similar letters to the other

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

[3] Approximately $21,000 out of the total December 1991 payment of approximately $191,500 was identified as being paid at the as-available energy price. Since that time, all energy has been paid for at the firm energy price.

QFs that provide firm power and energy to FPC pursuant to the Negotiated Contracts.

5. On July 21, 1994, FPC initiated this docket by filing its Petition for Declaratory Statement. FPC asks the Commission to issue an order:

> declaring that the utilization of the pricing mechanism specified in Section 9.1.2 of the Negotiated Contracts to determine the periods when as-available energy payments are to be substituted for firm energy payments, complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Petition for Declaratory Statement at page 6.

In its purported "Answer" to Pasco Cogen Ltd.'s petition to intervene, FPC clarified the intent of its petition for a declaratory statement, stating that:

> [t]he purpose of the declaratory petition is to clarify and validate Florida Power's reliance on the contract language and Florida Power's methodology for implementing it.

Docket No. 940771-EQ, FPSC Document No. 08270 at 5 (August 15, 1994).

6. In its Amended Petition, FPC asks the Commission:

> for a determination that [FPC's] manner of implementing the pricing mechanism specified in Section 9.1.2 of the negotiated contracts for the purchase of firm capacity and energy from certain Qualifying Facilities . . . to determine the periods when as-available energy payments are to be substituted for firm energy payments, is lawful under Section 366.051, F.S., and complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Amended Petition at 1.

FPC's Amended Petition fails to state an appropriate cause of action before the Commission: though FPC has changed the phrasing of its request, this new Amended Petition is still, necessarily, a request for a declaratory judgment or declaratory statement as to

FPC's position under the Negotiated Contracts. Absent interpretation of the Negotiated Contracts' pricing terms, nothing that FPC has requested will resolve the underlying contract dispute.

7. FPC correctly anticipated that QFs would dispute its new interpretation of the Contracts. The core of the dispute is this: Dade County entered into a Negotiated Contract with FPC pursuant to which the County is paid prices less than or equal to the costs that FPC would have incurred to build and operate a pulverized coal-fired electric power plant. With respect to payments for energy delivered to FPC, the Contract provides (a) that when the avoided coal-fired unit would have run, had FPC constructed it, FPC will pay Dade County for energy at the cost that FPC would have incurred to generate the same amount of energy from the avoided unit (the "firm energy price"); and (b) that when the avoided unit would not have run, had it been built and dispatched on the same basis as FPC's other units, FPC will pay Dade County FPC's otherwise applicable as-available energy rate. Of course, to determine which of these prices would apply in any hour, FPC must be able to tell whether the avoided unit would have been operated; this is done via computer simulation analyses that model the operating status of the avoided unit, given all of its operating characteristics and constraints, as part of FPC's generating system.

8. The proper simulation analyses include all the pertinent operating characteristics of the pulverized coal unit that Dade County, and the other QFs, enabled FPC to cost-effectively avoid. Contrary to FPC's consistent payment for all energy at the firm

energy price from December 1, 1991 until August 8, 1994, FPC now claims, for the first time, that section 9.1.2 of the Contract defines a methodology for determining whether the avoided unit would have run. FPC now claims, for the first time, that the specifications of the avoided unit, for purposes of the requisite computer simulation, are limited to three factors only: fuel costs, the avoided unit's heat rate, and avoided unit variable operation and maintenance expense. FPC now claims, for the first time, that energy pricing pursuant to the Contract is to be determined with respect to a hypothetical, "contractually defined" unit with some (three), but not all, of the characteristics of the unit that Dade County enabled FPC to avoid.

9. By petition dated August 18, 1994, Dade County and Montenay requested the Commission's leave to intervene for the limited purpose of moving to dismiss FPC's petition for declaratory statement. FPC answered on August 25, 1994, acknowledging Dade County's and Montenay's entitlement to intervene. By its Order No. PSC-94-1405-PCO-EQ, issued November 16, 1994, the Commission granted Dade County's and Montenay's petition "to intervene for the limited purpose of moving to dismiss FPC's petition in this proceeding." Order No. PSC-94-1405-PCO-EQ at 1.

10. Dade County and Montenay-Dade Ltd. hereby move the Commission to enter its order dismissing FPC's Amended Petition for the following reasons.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Commission should dismiss FPC's Amended Petition for the following reasons.

1. Resolution of the real dispute -- the meaning of the energy pricing terms of the Negotiated Contracts between FPC and QFs -- requires interpretation of the disputed sections of the subject contracts, but the Commission has no authority to interpret cogeneration contracts.

2. The Commission's approval of the Contract "for cost recovery purposes," pursuant to its rules, neither vests the Commission with continuing jurisdiction over the Contract nor establishes any authority for the Commission to construe it.

3. Rule 25-17.0832(4)(b) neither applies to negotiated contracts nor prescribes a mechanism for determining the operational status of the avoided unit -- if it did, the Rule would affirm that the QFs' position, and not FPC's, is consistent with the Rule's spirit and conceptual framework. Moreover, FPC's version of the Rule's history is plainly contradicted by FPC's own rule proposals and post-hearing comments in Docket No. 891049-EU.

4. Notwithstanding FPC's changes in phrasing, substituting "determination" for "declaration" and "implementation" for "interpretation," its Amended Petition is still, necessarily, a request for interpretation of the Contracts. However, none of FPC's requested "determinations" would resolve the underlying contract dispute.

Each of these matters is discussed in turn in this Memorandum of Law.

I. FPC Has Improperly Asked The Commission To Resolve a Contract Dispute.

Florida Power has improvidently asked the Commission to interpret the Contract. Jurisdiction to interpret contracts is vested solely in the judiciary, and there is no purer, clearer question of contract law than the interpretation of an alleged pricing term. The Commission should not attempt to assume this judicial authority. Moreover, in order to render the determinations requested by FPC, the Commission would first have to construe the Contract and determine that section 9.1.2 of the Contract actually contains a mechanism for determining when the avoided unit would and would not have operated. FPC is trying to simply leap over this crucial threshold issue via a bald allegation that the Contract contains its newly asserted "avoided unit on-off switch."

A. FPC's Request for a "Determination" Would Require the Commission to Interpret The Contract.

In its entirety, the subject Section 9.1.2 of the Contract provides as follows:

> 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.

By its own terms, this section states what energy price -- "firm" or "as-available" -- will be paid relative to the "on-or-

off" status of the avoided unit. FPC alleges, however, that this section 9.1.2 does more than state that firm energy prices will be paid when the avoided unit would have been operated and that as-available energy prices will be paid in all other hours. FPC asserts that section 9.1.2 actually prescribes or defines a methodology for determining when the avoided unit would have been operated, by claiming that the factors listed in subsection (i) thereof define a hypothetical avoided unit with those, and only those, characteristics. Dade County and Montenay reject this position: the factors enumerated in subsection 9.1.2(i) are specified only for the purpose of calculating the firm energy price and not for the purpose of defining whether the avoided unit would have run.[4] Therefore, before any determination could be made with respect to whether FPC's desired utilization of its alleged pricing mechanism complies with either the Commission's rules or orders, if applicable, necessary, or legally appropriate, the Contracts must be interpreted to determine whether the Contract contains such a mechanism.

B. FPC Has Improperly Asked The Commission To Interpret The Contract, Which Is An Exclusively Judicial Function.

FPC has chosen the wrong forum. Jurisdiction to interpret contracts is vested solely in the judiciary. In a Florida case where a regulatory agency attempted to interpret a contract, the reviewing court held that "[j]urisdiction to interpret . . .

[4] On this point, the Commission should recall that Order No. 24734, by which it approved the Contracts for cost recovery, correctly observed that the Contracts contain "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." Order No. 24734 at 8 (emphasis added).

contracts, under our system, is vested solely in the judiciary." Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Dep't. of Business Regulation, 371 So.2d 152, 154 (Fla. 1st DCA 1979). This is because

> [I]t is a generally accepted principle of administrative law that an agency, being a creature of statute, has only those powers given to it by the legislature . . .

Peck Plaza, 371 So.2d at 154 (quoting Division of Family Services v. State, 319 So.2d 72 (Fla. 1st DCA 1975).

The Florida Public Service Commission itself has wisely recognized this fundamental principle of our legal system. In a 1985 case, a cogenerator that wished to renegotiate its power sales contract with Tampa Electric Company opposed TECO's petition for declaratory statement on jurisdictional grounds, including, inter alia, the assertion "that TECO was requesting the Commission to interpret the Agreement, a task that was within the exclusive jurisdiction of the civil courts." In re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, 85 FPSC 3:229 (Order No. 14207, March 21, 1985) ("Conserv"). The Commission stated that, "we agree with Conserv that matters of contractual interpretation are properly left to the civil courts." Conserv, 85 FPSC 3:229 at 232.

The Commission's decision followed fundamental principles of Florida administrative law. Jurisdiction to interpret contracts is vested solely in the judiciary: "It is to the judiciary that the citizenry turns when their rights under a document are unclear and they desire an interpretation thereof." Peck Plaza Condominium, 371 So.2d at 154; Point Management, Inc. v. Dep't. of Business Regulation, 449 So.2d 306 (Fla. 4th DCA 1984) (state agency

exceeded its jurisdiction by interpreting contracts between the parties; error held where agency denied motion to dismiss on jurisdictional grounds); Ruiz v. Dep't. of Health & Rehabilitative Services, 15 FALR 2864 (Fla. Dep't. HRS 1993) (petitioner, a physician, was denied an administrative hearing where her underlying dispute was contractual in nature and where petitioner had adequate opportunity to seek redress of contractual claims in court of law).

The instant dispute presents a case of pure contract law: the intent of the parties to a contract regarding an alleged pricing term thereof. Few issues are better, or more appropriately, suited to determination by the courts. The Commission must not let Florida Power lead it astray, beyond its jurisdiction: the Commission must dismiss FPC's petition.

II. Commission Approval Of The Contracts "For The Purpose Of Cost Recovery" Does Not Give The Commission The Judicial Authority To Construe Them.

Neither the Commission's statutes, nor its rules, nor any order empower the Commission to interpret contracts between QFs and utilities. The Commission itself has, in its rules relating to negotiated QF contracts, clearly stated that its review and approval are "for the purpose of cost recovery." Rule 25-17.0832(2), Fla. Admin. Code (1993). This is consistent with the Commission's formal recognition of the doctrine of administrative finality as applied to approval of cogeneration contracts. In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:38 (Docket No. 910603-EQ, Order No. 25668, February 3, 1992)

("Implementation of Cogeneration Rules Affecting Negotiated Contracts"). It is also consistent with the Commission's policy not to "micro-manage" utilities and with the Commission's established policy that expenditures and investments are subject to review for prudence based on the facts at the time they are made.

Moreover, this limited review and approval for cost recovery purposes is not part of an overall statutorily established system for the Commission's approval of power purchase contracts between utilities and QFs nor for the Commission's continuing supervision of the contractual relationships, once formed, between utilities and QFs. The statute makes no reference to such authority, nor is such power "given by clear or necessary implication from . . . the statute." See City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965). Therefore, the Contracts, once formed, do not merge into the PSC's orders approving them for cost recovery.

A. The Commission's Statutes Do Not Authorize It, Either Expressly Or By Implication, To Interpret Contracts Between QFs and Utilities.

The Commission's statutes relating to cogeneration include sections 366.051 and 366.81-.82, Florida Statutes, the latter being a part of the Florida Energy Efficiency and Conservation Act ("FEECA"). These statutes recognize the benefits of electricity produced by cogenerators and small power producers, require the Commission to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers," Fla. Stat. § 366.051 (1993), and declare the Legislature's intent that cogeneration be encouraged. Fla. Stat.

§ 366.81 (1993). Nowhere in these sections does the Legislature give the PSC jurisdiction to interpret contracts between QFs and utilities; nowhere in these sections does the Legislature give the Commission jurisdiction over those continuing contractual relationships.

Nor is such jurisdiction "given by clear and necessary implication from the provisions of the statute." See City Gas, 182 So.2d at 436. Such jurisdiction is not necessary to fulfill the Commission's statutory mandates to encourage cogeneration and to "establish guidelines relating to the purchase of power or energy by public utilities" from QFs. Fla. Stat. § 366.051 (1993).

Moreover, any doubt as to the existence of an agency's power must be resolved against its exercise. As the Florida Supreme Court stated,

> If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

United Telephone Co. v. Public Service Comm'n, 496 So.2d 116, 118 (Fla. 1986) (quoting from Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577, 582 (Fla. 1965)).

Because the Commission's statutes are silent with respect to the Commission's authority to construe cogeneration contracts, the Commission may not claim such authority. In United Telephone, the Commission issued an order by which it attempted to authorize Southern Bell to withdraw some $9.7 million from the intrastate toll pool, which was governed by "a network of interrelated contractual agreements," because it believed that Southern Bell would experience a revenue shortfall as a result of certain equipment transfers made pursuant to the divestiture of Southern

Bell and other local exchange companies by AT&T. Id. at 116. The Supreme Court quashed the Commission's order, finding, inter alia, that the statutory authority claimed by the Commission was "silent on the commission's power (or lack thereof) to modify contracts between telephone companies" and that the cited statutes "do not confer jurisdiction upon the commission to alter the contractual relationship between telephone companies." Id. at 116, 118-119. The subject contracts between telephone companies in United Telephone are analogous to the utility-wholesale supplier relationship established by the Negotiated Contracts herein.

Like the statutes involved in United Telephone, the Commission's cogeneration statutes are similarly silent on the PSC's power to construe or to modify contracts between QFs and utilities; like the statutes involved in United Telephone, the Commission's cogeneration statutes confer no jurisdiction on the Commission to do so. FPC's petition asks the Commission to exercise power -- to interpret contracts -- beyond its statutory authority. This request is legally inappropriate, and FPC's petition must be dismissed.

B. Pursuant to Its Rules, The Commission's Review and Approval of Negotiated Contracts Is For Cost Recovery Purposes Only.

The Commission's rules indicate only that negotiated contracts will be reviewed "for the purpose of cost recovery." Rule 25-17.0832(2), Fla. Admin. Code (1993). Moreover, the Commission has never purported to assert, by rule, any more authority than to "review[] negotiated firm capacity and energy contracts for the purpose of cost recovery." Rule 25-17.0832(2), Fla. Admin. Code (1993).

The Commission's policy and procedures regarding the negotiation of power purchase contracts, the submission of such negotiated contracts, and the Commission's review thereof are set forth in Commission Rule 25-17.0832(1)&(2), Florida Administrative Code (1993). Subsection (1) requires a utility that enters into a negotiated contract to provide next-day notice to the Commission Staff and further requires the utility to file, within ten days of execution, "a copy of the signed contract and a summary of its terms and conditions," including certain specified data.

Subsection (2) declares the Commission's policy encouraging negotiated contracts and further states that such negotiated contracts "will be considered prudent for cost recovery purposes if it is demonstrated that" the purchase of firm capacity and energy pursuant to such contracts can reasonably be expected to cost-effectively defer or avoid additional generating capacity costs. Id. (Emphasis added). Rule 25-17.0832(2) further defines the purpose of the Commission's review of negotiated contracts filed pursuant to subsection (1), as follows:

> In reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery, the Commission shall consider factors relating to the contract that would impact the utility's general body of retail and wholesale customers including:

the individual utility's and the State's need for additional capacity and energy, the cost-effectiveness of the contract measured against the utility's alternative cost of obtaining additional capacity, and provisions to protect the utility's ratepayers if the QF does not perform as promised. (Emphasis added). Neither subsection (1) or (2) provides for or permits any review other than "for the purpose of cost recovery."

Commission Rule 25-17.0832(2), which provides for limited review of negotiated contracts "for the purpose of cost recovery," is consistent with its mandate to encourage cogeneration and to establish guidelines for QF power purchases. Commission approval provides utilities and QFs with certainty that, once a negotiated contract is finally approved for cost recovery purposes, the Commission "cannot deny the utility cost recovery of payments made to the QF pursuant to the negotiated contract, absent some extraordinary circumstance." Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:37.

As discussed above, this review for cost recovery purposes is consistent with the Commission's mandate to encourage cogeneration and to establish guidelines for the purchase of QF power by utilities. It is also consistent with the PSC's policy against "micro-managing" utilities: indeed, for the PSC to attempt to intervene in a contract dispute between a QF and a utility over prices would be tantamount to the virtually unthinkable intervention in a pricing dispute with any supplier of fuel, equipment, or any other service or commodity that the utility purchases in its daily affairs.

Allowing FPC's petition to proceed would also be contrary to the doctrine of administrative finality enunciated and explicated by the Commission in Order No. 25668:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract.

Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:38. (See discussion at page 24, infra.) Moreover, in this order explicating the "administrative finality" doctrine, the Commission never hinted that even where grounds for revisiting a prior contract approval order exist, its subsequent revisitation would be for anything other than a determination whether a contract should, in light of the circumstances occasioning the revisitation, still be approved for cost recovery.

C. The Commission's Order No. 24734 Approving the Contracts Did Not, and Does Not, Incorporate the Contracts as Part of That Order Subject to the Commission's Continuing Jurisdiction.

By its Order No. 24734, issued July 1, 1991, the Florida Public Service Commission found:

> the negotiated cogeneration contracts between FPC and Dade County, El Dorado Energy, Lake Cogen Ltd., Mulberry Energy Co., Orlando Cogen Ltd., Pasco Cogen Ltd., Ridge Generation Stn. Ltd., and Royster Phosphates are viable generation alternatives because:
>
> 1. The capacity and energy generated by the facilities is needed by FPC and Florida's utilities;
>
> 2. The contracts appear to be cost-effective to FPC's 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.

In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60, 69-70, Order No. 24724 (July 1, 1991).

The ordering language of Order No. 24734 declared that it is:

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

91 FPSC 7 at 70.

The Commission's findings directly tracked the provisions of Rule 25-17.0832(2)(a)-(d) (need for capacity, cost-effectiveness of the contract vs. the utility-build option, and protection against QFs' failure to deliver as promised) and recognized that the contracting facilities were eligible, i.e., that they were qualifying cogeneration or small power production facilities. Commission Order No. 24734 gave no hint that the PSC's approval of the Contracts was made for any purpose other than cost recovery.

A related contract jurisdiction issue has been raised in a pending case In Re: Petition for Resolution of a Cogeneration Contract Dispute with Orlando Cogen Limited, L.P., by Florida Power Corporation, Docket No. 940357-EQ ("FPC v. Orlando Cogen"). There, FPC has attempted to invoke the Commission's jurisdiction over one of the Negotiated Contracts by claiming that the Commission's approval thereof made the subject Contract part of the Commission's order, thereby subject to the Commission's continuing jurisdiction over the Contract as part of the order. FPC's arguments generally rely on the theory that the Negotiated Contracts, having been approved by the Commission, become part of the Commission's order, thereby vesting in the PSC continuing jurisdiction over the Contracts when considered as part of the order.

In certain contexts, the PSC has the authority to take lawful actions that modify or abrogate contracts where such actions are necessary to protect the public interest. For example, the Commission has the authority to modify territorial agreements.[5]

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[5] City of Homestead v. Beard, 600 So.2d 450 (Fla. 1992); Public Service Comm'n v. Fuller, 551 So.2d 1210 (Fla. 1989);

The Legislature has, and, where granted by the Legislature, the Commission also has, the power to regulate charges and services performed by public utilities, pursuant to the police power. Rates established pursuant to that power will supersede rates established in private contracts without unconstitutionally impairing those contracts.[6] Further, Commission regulation of rates and billing practices will, subject to proper Commission proceedings, supersede franchise agreements between municipalities and utilities without unconstitutionally impairing those agreements.[7]

In territorial cases, the Commission has continuing authority over its orders, which include territorial agreements approved by the PSC pursuant to express statutory authority, Fla. Stat. § 366.04(2)(d) (1993), or formerly, "given by clear and necessary implication from the provisions of the statute" establishing the Commission's continuing jurisdiction to "require repairs, improvements, additions, and extensions to the plant and equipment of any public utility reasonably necessary to promote the

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Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966); City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 436 (Fla. 1965).

[6] H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979) (Commission-approved water and sewer rate increase operated to increase rates otherwise due pursuant to previously executed developer agreement); Miami Bridge Co. v. Railroad Comm'n, 20 So.2d 356, 361 (Fla. 1944) (the Legislature, after granting franchise to toll bridge operator, had authority to enact statute transferring rate-setting authority from franchise holder to State Railroad Commission); Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2nd DCA 1975) (Commission has authority to raise or lower rates established by preexisting contract when necessary in the public interest); see also Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (1919).

[7] City of Plant City v. Mayo, 337 So.2d 966, 973 (Fla. 1976); City of Plantation v. Utilities Operating Co., 156 So.2d 842, 843-844 (Fla. 1963).

convenience and welfare of the public . . . ." City Gas, 182 So.2d at 436. In these cases, "the practical effect of such approval is to make the approved contract an order of the commission, binding as such upon the parties." Id. Unlike territorial agreements and the Commission's related statutes, the Commission's cogeneration statutes neither establish Commission authority to construe or modify QF contracts nor create a system in which such authority is clearly and necessarily implied from the statutes. Therefore, negotiated QF contracts, once formed, do not merge into the PSC's orders approving them. Accord Erie 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, 1992 N.Y. PUC LEXIS 52 (March 4, 1992) at 4. ("Jurisdiction [of the Commission] under . . . PURPA and [New York statutes] is generally limited to the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.") None of these cases stands for the proposition that the PSC may construe or interpret a contract between a utility and another party. None of these cases supports the proposition that the PSC may construe or interpret a contract between a utility and a supplier of goods or services to the utility.

Nor is Commission jurisdiction to interpret QF contracts "given by clear and necessary implication from the provisions of the statute." See City Gas, 182 So.2d at 436. Such jurisdiction is not necessary to encourage cogeneration, nor is such jurisdiction necessary to protect the public interest: indeed, what is necessary to encourage cogeneration is the consistent application of the doctrine of administrative finality as enunciated by the

Commission. Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:35-38.

In Florida Power & Light Co. v. Beard, 626 So.2d 660 (Fla. 1993), the Court upheld the Commission's prohibition, by rule, of "regulatory out" clauses from standard offer contracts on the grounds that such clauses "create a mistaken perception that revenues under a standard offer are not reliable," Id. at 662 (quoting from FPSC Order No. 24989 at 70-71), and that "utilities and QFs should be able to rely on the finality of the approval of cost recovery under standard offer contracts without fear of modification." Id. After wrestling with the differences between standard offer contracts and negotiated contracts, the Commission concluded "that negotiated contracts should be treated in the same manner as standard offer contracts for cost recovery purposes." Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:36.

Moreover, the Commission has never entered an order attempting to construe or interpret a negotiated contract between a utility and a QF. Indeed, in Conserv, the Commission expressly stated that "matters of contractual interpretation are properly left to the civil courts." Conserv, 85 FPSC 3:229 at 232.

Finally, the Commission's approval of Dade County's Contract with FPC was clearly based solely on its review of the Contract for cost recovery purposes pursuant to Rule 25-17.0832(2), and Commission Order No. 24734 granting that approval gave no suggestion that the Commission intended to claim continuing jurisdiction over the contractual relationship between the parties.

D. The PSC's Authority To Modify Its Orders Is Limited To Cases Where Such Modification Is Necessary To Protect The Public Interest. No Such Necessity Exists In This Contract Dispute.

Moreover, the Commission may take actions that modify or abrogate a contract only where necessary to protect the public interest. In another territorial case, Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966), the Supreme Court held that the Commission could not modify a final order, entered more than four years earlier, where there was no finding that the public interest required partial abrogation of that order (approving a service area agreement). See also United Telephone v. Public Service Comm'n, 496 So.2d 116, 119 (Fla. 1986) (citing Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n, 261 U.S. 379 (1923)). In United Telephone, the Florida Supreme Court noted the U.S. Supreme Court's holding

> that a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify private contracts in the absence of such public necessity constitutes a violation of the impairment clause of the United States Constitution.

United Telephone, 496 So.2d at 119.

Moreover, the Commission must recognize that regardless of a court's construction of the disputed pricing terms of the Contract, there would be no adverse effect on the public interest and accordingly not ground to revisit the Contract. FPC has fulfilled its threat to pay lower energy prices pursuant to its alleged construction of the Contract, and at least three QFs have sued FPC for its breach of contract. These actions will necessarily require a court to adjudicate the proper, intended meaning of the disputed section of the Contract.

Even if a court rules that, under the Contract, FPC must continue to pay for energy pursuant to the Contract as interpreted by Dade and Montenay, and as performed under the Dade County-FPC Contract by FPC from 1991 until August of this year, the pricing of energy purchased from Dade County will be exactly that upon which the Commission based its finding that the Contract is cost-effective (providing more than $128,000 in savings to FPC and its ratepayers, 91 FPSC 7:71) and its decision to approve the Contract for cost recovery by Order No. 24734.[8] The public interest cannot be harmed thereby, and no ground to revisit the Contract exists. FPC's petition must be dismissed.

E. Commission Intervention In This Contract Pricing Dispute Would Be Contrary To The Doctrine Of Administrative Finality

Commission jurisdiction to interpret contracts between utilities and QFs is neither expressly granted nor clearly and necessarily implied by the Commission's statutory mandates to establish guidelines for QF power purchases and to encourage cogeneration. If anything, the reverse is true: what is necessary to encourage cogeneration is the consistent application of the doctrine of administrative finality, with respect to approved cogeneration contracts, as enunciated by the Commission. In

[8] If the ultimate issue here is whether the Commission can, in the name of the police power, modify a contractual obligation just to obtain a lower price for ratepayers, then the Commission must reject it summarily: to allow such a proceeding to continue not only would trespass on judicial authority, it would lead to chaos in all aspects of utility purchasing. The proposition that the Commission can modify a contract solely to obtain a lower price would open the door for the Commission to revisit need determinations, purchases of power plants, contracts for the purchase of power plants pursuant to need determination orders, and contracts for the purchase of any other commodity or service used by a utility in providing service.

addressing the implementation of its cogeneration rules with respect to negotiated contracts, the Commission explained how the doctrine of "administrative finality" applies to its approval of negotiated QF power sales contracts:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract.

In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:24,38 (Docket No. 910603-EQ, Order No. 25668, February 3, 1992) ("Implementation of Cogeneration Rules Affecting Negotiated Contracts").

In Florida Power & Light Co. v. Beard, 626 So.2d 660 (Fla. 1993), the Court upheld the Commission's prohibition, by rule, of "regulatory out" clauses from standard offer contracts on the grounds that such clauses "create a mistaken perception that revenues under a standard offer are not reliable," Id. at 662 (quoting from FPSC Order No. 24989 at 70-71), and that "utilities and QFs should be able to rely on the finality of the approval of cost recovery under standard offer contracts without fear of modification." Id.

In the Commission's separate proceeding to consider the implementation of its cogeneration rules with respect to negotiated contracts, the Commission wrestled with the differences between standard offer contracts and negotiated contracts and concluded "that negotiated contracts should be treated in the same manner as standard offer contracts for cost recovery purposes."

Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:36.

Allowing FPC to proceed with this action would do exactly what the Commission has declared it hopes to avoid: it would create a perception, hopefully a mistaken one, that revenues under approved QF contracts are not reliable. The chilling effects on cogenerators, on potential cogenerators, on cogeneration developers, and on institutions that finance cogeneration projects are obvious. This is contrary to the Commission's stated policy.

As a matter of principle, the Commission, having promulgated rules by which it approves QF contracts "for the purpose of cost recovery," having embraced the doctrine of administrative finality in explicating the meaning of those same rules, and having specifically approved Dade County's Contract pursuant to those rules, may not revisit the Contract "absent some extraordinary circumstance, such as where [the Commission's] finding of prudence was induced through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information." Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:37. Such revisitation would run directly contrary to the Commission's established policy against "micro-managing" utilities and against the fundamental notion of fairness, followed by the Commission, that approval of a utility expenditure, investment, or obligation will be reviewed, if at all, with respect to the facts and circumstances that were known to the utility and the Commission at the time the investment was made or the obligation incurred. If anything, the Commission should regard Dade County's Contract and the other Contracts that are the subject

of this proceeding as even "more final" than other utility contracts because of its express approval thereof for cost recovery and because of its pronouncements regarding the finality of that approval.

On the facts of the current situation, no grounds for revisiting the Contract exist. FPC has alleged no "extraordinary circumstance" such as perjury, fraud, misrepresentation, or the like. The Commission has already found that the Contract, incorporating Dade County's understanding of the disputed section 9.1.2 of the Contract, complies with the Commission's applicable rules by which the PSC approved the Contract for cost recovery. Nothing has changed except FPC's unilateral implementation of its newly asserted interpretation of the energy pricing terms of the Contract.

F. The Commission Must Distinguish **FPC v. Orlando Cogen** From The Instant Energy Pricing Dispute.

While Dade County and Montenay do not agree that, as a matter of law, the Commission has the authority to construe FPC's contract with Orlando Cogen, the Commission must distinguish FPC v. Orlando Cogen from the instant case on the basis of different subject matter. In this case, there is no issue relating to the reliability of Dade County's Facility nor to any other matter under the Commission's continuing jurisdiction other than the utility's costs. (Here, even FPC's costs incurred pursuant to the Contract have already been found to be prudent by Order No. 24734.) For the Commission to attempt to intervene in this contract pricing dispute would trample its Order No. 24734 approving the Contract for cost

recovery purposes as well as its pronouncements on "administrative finality" in Order No. 25668.

III. Commission Rule 25-17.0832(4)(b) Does Not Apply To Negotiated Contracts. Moreover, FPC's Version Of The Rule's History Is Plainly Contradicted By FPC's Own Rule Proposals and Post-Hearing Comments In Docket No. 891049-EU.

Commission Rule 25-17.0832, Fla. Admin. Code, does not apply to negotiated contracts. Further, the Rule does only what section 9.1.2 of the Contract does, i.e., it prescribes what the energy payments will be when the avoided unit would or would not have been operating; it does not so much as hint at any intent to determine when the avoided unit would or would not have run.

Finally, **FPC's own** proposed rule language and post-hearing comments in Docket No. 891049-EU formed the basis for the Commission's rejection of the "lesser of" methodology and adoption of the current rule's "true avoided firm energy cost" methodology. FPC cannot invoke Rule 25-17.0832)(4)(b) as support for its new efforts to read a "lesser of" methodology into the Contracts.

A. Rule 25-17.0832(4)(b) Does Not Apply to Negotiated Contracts.

FPC asks the Commission to determine that FPC's implementation of section 9.1.2 of the Contracts complies with Rule 25-17.0832(4)(b), Florida Administrative Code (1993). While the Commission assuredly has the jurisdiction to interpret its own rules, the subject Rule does not apply to negotiated contracts. On its face, Commission Rule 25-17.0832(4) applies to standard offer contracts, not to negotiated contracts; it is therefore not properly invoked as a basis for any determination with respect to negotiated contracts.

Subsection (4)(a) provides that energy payments to a QF "pursuant to a utility's standard offer contract" shall commence with the in-service date of the avoided unit, with as-available energy pricing applicable before then. Subsection (4)(b) goes on to provide as follows:

> (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).

Nothing in Rule 25-17.0832(4)(b) indicates that it would apply to negotiated contracts; rather, it is the logical extension of the scheme begun in subsection 25-17.0832(4)(a).

Moreover, the Commission, at least partly at FPC's urging, expressly rejected "standard provisions" in negotiated contracts. Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:29,30. By their nature, administrative rules, where they apply, impose exactly such "standard provisions." In this instance, if the Rule governed negotiated contracts, it would, by its inherent legal nature, dictate the energy pricing provisions of all negotiated contracts, just as it dictates the energy pricing provisions of standard offer contracts. This was clearly not the Commission's intent in adopting Rule 25-17.0832(4)(b); therefore, this Rule affords no basis for FPC's requested "determination."

Finally, FPC's own negotiated contracts, by their own terms, offer QFs three different energy pricing options: Options A, B, and C, each with different treatment of avoided variable O&M costs. If

the Rule governed energy pricing under all negotiated contracts, FPC's own contracts would violate the Rule. This is obviously absurd: FPC has negotiated and executed, and the Commission has approved, at least Option A and Option C contracts. The Rule does not apply to negotiated contracts, and accordingly, it affords no basis for FPC's requested "determinations."

B. Rule 25-17.0832(4)(b) Does Not Purport To Determine When "The Avoided Unit" That "Would Have Been Installed" Would Or Would Not Have Operated.

Assuming, for the sake of argument, that the Rule has relevance to a determination of price for negotiated QF contracts, the plain language of Rule 25-17.0832(4)(b) simply states what the basis for energy payments (pursuant to contracts subject to the Rule) will be under two operational states of "the avoided unit:"

1. When "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;" and

2. When "the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility."

Nothing in this language, nor in the rest of Rule 25-17.0832, purports to define or prescribe a methodology for determining the avoided unit's status in any hour, or in what hours the avoided unit would have been operating. It merely states what the prices will be if the avoided unit would or would not have been operating in any given hour.

FPC's efforts to draw the Commission's attention to this Rule as a basis for its requested "determination" are misplaced because

the Rule does not apply to negotiated contracts and because the Rule does not prescribe a methodology for determining when the avoided unit would or would not have been operating. The Rule provides no basis for FPC's requested "determination," and FPC's petition must be dismissed.

C. FPC's History of Rule 25-17.0832(4)(b) Is Incomplete. FPC's Own Contributions To The Rule Do Not Support Its New Claims.

As explained above, the Rule does not apply to negotiated contracts; moreover, the Rule, on its face, does not determine when the avoided unit would have been operated. Because FPC has raised it, however, Dade County and Montenay, in an effort to reduce confusion and to clarify the record, here respond briefly to FPC's claims regarding the history of Rule 25-17.0832(4)(b).

FPC's efforts to draw on the Rule's history are not only misplaced, they blatantly ignore important parts of that history -- FPC's own proposed rule language and post-hearing comments that led to the rejection of the "lesser of" methodology and to the adoption of the new method that "better models the true avoided firm energy cost." Docket No. 891049-EU, Post-Hearing Comments of Florida Power Corporation, FPSC Document No. 01214 at 7 (February 8, 1990).

FPC's citations to the testimony of its witness in the last general cogeneration rulemaking proceeding, FPSC Docket No. 891049-EU, not only miss the mark, in that they address a different version of the rule than that adopted by the Commission, they also omit any discussion of FPC's own significant role in the adoption of the final rule language that corrected the error inherent in the "lesser of" methodology.

The adopted rule language was different from the version that was the vehicle for discussion at the January 1990 hearings. Major post-hearing changes in the energy pricing language of the Rule were apparently derived by Staff from FPC's own post-hearing comments. FPC's post-hearing filing titled "Florida Power Corporation's Proposed Rule Language" apparently was the initial source of rule language providing that "[t]o the extent that the avoided unit . . . would have operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit." FPSC Docket No. 891049-EU, Florida Power Corporation's Proposed Rule Language, FPSC Document No. 00874 at 1 (January 26, 1990).

In its reply comments submitted on February 8, 1990, FPC explained that:

> . . . our firm energy language will pay the QF the firm energy cost of the avoided unit to the extent that the unit "would have operated." The Staff's proposed language paid this amount when the unit "would have been economically dispatched." Our language is broader and can account for operation which deviates from strict marginal operating cost economics.
>
> During the hearings, there was general agreement that the proposed firm energy language would produce the same energy payment to QF's as the proposed language. Upon reflection, we believe the [sic] our proposed language better models the true avoided firm energy cost. For example, consider an avoided coal unit. Florida Power dispatches all of its capacity based upon the incremented [sic] fuel cost of its units. For coal, this represents a spot price which is presently less than the long term contract price. Our as-available avoided energy cost reflects these incremented [sic] fuel prices. During periods of the year when the avoided unit might have been fully dispatched, the as-available price can be less than the firm energy price because the as-available price reflects spot coal prices while the firm energy price reflects average delivered coal prices which are a blend of contract and spot prices. Our proposed language will correct this error.

Docket No. 891049-EU, Post-Hearing Comments of Florida Power Corporation, FPSC Document No. 01214 at 7 (February 8, 1990).

From these comments, it is clear that Florida Power anticipated periods when FPC would pay the firm energy price to QFs even when the as-available, economic-dispatch-based energy price was lower than the firm rate. FPC cannot now credibly claim that Rule 25-17.0832(4)(b) provides grounds for imposing its new energy pricing methodology that embodies the "lesser of firm or as-available energy cost" methodology that its proposed rule language was designed to correct.

IV. Without Interpretation Of The Disputed Contract Term, None of FPC's Requested "Determinations" Would Resolve The Real Issue In Dispute.

All that FPC's purported "amendment" to its petition has done is to request a "determination" with respect to "implementation" rather than a "declaration" with respect to "interpretation," request a section 120.57 hearing, and acknowledge, as FPC did previously, that affected QFs have the right to participate in such a determination. FPC's "amendments" do not cure the pleading's fatal defect: it still, necessarily, requires interpretation of the Contracts. The Amended Petition is inappropriate for the same fundamental reason as FPC's previous petition for declaratory statement: it will not resolve the real issue in dispute.

FPC has asked for the Commission's determination that its method of implementing its alleged pricing mechanism is lawful under section 366.051, Florida Statutes, and that it complies with Rule 25-17.0832(4)(b) and the Commission's orders approving the Negotiated Contracts. Such determinations, however, would not

resolve the underlying contract dispute over whether the Contract, and the other Negotiated Contracts, contain a provision that determines when the avoided unit would or would not have operated.

Either of the competing provisions would probably be lawful within the scope of section 366.051, if the subject contract accurately reflected the parties' intention and if the subject contract were approved for cost recovery by the Commission. The mere fact that one of several competing interpretations may be permitted within the statutory framework does not make it the sole permissible interpretation; in the present case, it does not resolve the underlying contract dispute. Here, the Commission's approval of the Contract (and the other Negotiated Contracts) was predicated on the Commission's evaluation of the Contracts for cost recovery purposes. Here, the Commission's evaluation reflected energy prices projected at the firm energy cost of a "real" avoided baseload coal unit operated as a baseload unit, i.e., operating all the time: the Commission's evaluation thus reflected the interpretation understood by Dade County and the other QFs. There can be no doubt that this interpretation -- essentially the interpretation that Dade County and the other QFs understand to be the intent of the Contracts, and the interpretation by which FPC performed the Contracts for periods of nearly three years -- is lawful. Nota bene: FPC does not assert that the QFs' interpretation is unlawful.

Nor would a determination that FPC's interpretation "complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission" resolve the underlying contract dispute: at the very least, Dade County's and Montenay's interpretation -- the

interpretation reflected in the cost and revenue projections upon which the Commission based its approval of the Contracts, and the interpretation by which FPC performed the Contract for nearly three years -- complies with the Commission's rules and orders.

Thus, while FPC has rephrased its request, it still seeks declaratory relief that will not resolve the underlying contract dispute. Accordingly, the Commission must dismiss FPC's Amended Petition.

CONCLUSION

Florida Power has improperly asked the PSC to engage in an exclusively judicial function, i.e., to interpret a contract in a pricing dispute between a utility and several of its suppliers. In so doing, FPC has improperly asked the Commission to exceed its jurisdiction, both that expressly granted and that clearly and necessarily implied by its organic statutes. The Commission's approval, pursuant to its rules, of the Contract "for the purpose of cost recovery" neither establishes continuing jurisdiction over the Contract nor establishes the Commission's authority to construe it. Commission Rule 25-17.0832(4)(b), with respect to which FPC purports to seek the Commission's determination, applies to standard offer contracts and not to the Negotiated Contracts in question, and therefore affords no ground for FPC's requested relief. Further, any determination as to the "lawful-ness" of FPC's asserted energy pricing methodology would not resolve the real issue in dispute, i.e., whether the Contract contains the methodology advocated by FPC.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Dade County and Montenay-Dade Ltd. pray the Commission to enter its Order DISMISSING Florida Power Corporation's Amended Petition.

Respectfully submitted this 1st day of December, 1994.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 1st day of December, 1994:

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APPENDIX B

FLORIDA POWER CORPORATION'S ANSWER TO MONTENAY'S COMPLAINT AND COUNTERCLAIM AGAINST MONTENAY

AND

FLORIDA POWER CORPORATION'S ANSWER TO DADE'S COMPLAINT AND COUNTERCLAIM AGAINST DADE

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA
CASE NO: 96-09598

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CASE NO: 96-09598

METROPOLITAN DADE COUNTY,
a political subdivision of
the State of Florida, and
MONTENAY POWER CORP., a
Florida corporation, as
General Partner of **MONTENAY-DADE, LTD.**, a Florida limited
partnership,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.
_____/

FLORIDA POWER CORPORATION'S ANSWER TO MONTENAY'S COMPLAINT AND COUNTERCLAIM AGAINST MONTENAY

Defendant/Counter-Plaintiff, Florida Power Corporation ("FPC"), by its undersigned attorneys, hereby answers and interposes defenses to the Complaint filed by Montenay Power Corporation as General Partner of Montenay Dade, LTD., (collectively "Montenay"). In addition, FPC sets forth its counterclaim against Montenay.

First Defense

Responding to the corresponding numbered paragraphs of the Amended Complaint, FPC states:

General Allegations

1. Admitted that Montenay has attempted to frame an action for damages in excess of $15,000 and also seeks declaratory relief. Otherwise Denied.

2. Without knowledge, except admitted that Dade is a political subdivision of the State of Florida. Also admitted that the Facility has been certified as a qualifying small power production facility ("QF") within the meaning of PURPA and that certain Florida regulations expressly adopt certain regulations of the Federal Energy Regulatory Commission promulgated under PURPA. Otherwise denied.

3. Admitted.

4. Admitted that on March 15, 1991, Dade County and FPC entered into a Contract, a copy of which is attached to Plaintiff's Complaint as Exhibit A. Admitted that, under the Contract, Dade committed to begin supplying firm capacity and energy to FPC as of November 1, 1991, but denied that this actually occurred. Without knowledge as to what Montenay is entitled to receive in connection with the O & M agreement or otherwise. Otherwise denied.

5. Admitted.

Statutory Background

6. Paragraphs six and seven are styled "Statutory Background," as distinguished from later paragraphs styled "Facts." Such statutory background is in the nature of legal argument to which no responsive pleading is required. Moreover,

such statutes and legislative history speak for themselves. FPC is unable to respond specifically to those portions of the allegations premised on authority contained in the Federal Register because the citation provided is incorrect. Otherwise denied.

7. This paragraph consists of plaintiff's selected legal propositions. One would expect to find such propositions in a brief rather than a complaint (the purpose of which is simply to set forth ultimate facts which demonstrate the existence of a cause of action and entitlement to the relief sought), and no admission or denial by way of a responsive pleading is required to these allegations. As to the numerous statutory propositions related to PURPA and associated case law, such statutes and case authority speak for themselves. Admitted that the Facility has been certified as a QF. Otherwise denied.

Facts Relevant to Both Claims

8. Admitted that, subject to various terms and conditions specified in the Contract, which Contract speaks for itself, or as provided under applicable state and federal law, the Contract requires Dade to deliver and FPC to receive and purchase, 43,000 kilowatts ("kW") of firm electric capacity and energy from the Facility. Otherwise denied.

9. Admitted that the Contract has two payment components: capacity payments, pursuant to Article VIII, and energy payments, pursuant to Article IX. Otherwise denied.

10. Denied that Plaintiff has accurately construed Article IX, including Section 9.1.2. Admitted that Plaintiff has accurately quoted part of Section 9.1.2 of the Contract. Otherwise denied.

11. Denied that plaintiff has accurately represented FPC's petition, which petition speaks for itself. Admitted that the contract provides that Capacity Payments are based on the selection of a pulverized coal unit, Schedule 4, Option A. Admitted that plaintiff has accurately quoted selected portions of Schedule 4, Option C. Otherwise denied.

12. Denied.

13. Denied.

14. Admitted that the Contract had to be approved by the Florida Public Service Commission (the "FPSC," "PSC," or "Commission"). Admitted that the enforceability of the Contract was conditioned upon Commission approval. The PSC rules relating to approval and cost recovery speak for themselves. Otherwise denied.

15. Admitted that FPC advised the Commission that it did not believe that all the cogeneration facilities would be able to provide the promised capacity, that consumer demands had increased, and that outdated modeling formulas and overestimation of other available capacity had caused FPC to underestimate capacity requirements in the past. Further admitted that approval of the Contracts was granted in Order No. 24724 and dated July 1, 1991. The PSC order approving the Contracts and

the PSC rules relating to that approval speak for themselves. Otherwise denied.

16. Admitted that FPC provided the PSC with certain financial information. Otherwise denied.

17. Admitted that the Commission approved the Contract between FPC and Dade and that a copy of the Commission's order is attached to Plaintiff's Complaint as Exhibit B. The Order of the PSC approving the Contract and the PSC rules relating to that approval speak for themselves. Otherwise denied.

18. Without knowledge as to what Dade or relied upon in contracting with FPC or whether the "Facility" must run almost continuously to dispose of Dade's municipal solid waste by incineration. Otherwise denied.

19. Admitted that FPC knew that the Resources Recovery Facility was a municipal solid waste facility. Without knowledge of what Dade relied upon in entering into the Contract with FPC. Otherwise denied.

20. Admitted that the Facility began supplying power to FPC on November 22, 1991, and that FPC paid Dade firm energy payments plus the Performance Adjustment from December 1, 1991, through August 8, 1994. Admitted that approximately $21,000 out of the total November 1991 payment of $191,500 was identified as being paid at the as-available energy rate. Otherwise denied.

21. Admitted that FPC's letter to Dade of July 18, 1994, which letter speaks for itself, is attached to Plaintiff's initial Complaint as Exhibit C. Otherwise denied.

22. Denied.

23. Denied.

Count I - Damages For Breach of Contract

24. Admitted that Montenay has attempted to frame an action for damages in excess of $15,000. Otherwise Denied.

25. FPC hereby repeats and incorporates its Answers to the corresponding paragraphs numbered 1-23 above. Otherwise Denied.

26. Admitted that on or about September 26, 1994, Dade received payment from FPC for energy delivered to FPC from the facility in August 1994, and that FPC's payment included payments based upon the As-Available Energy Cost. Also Admitted that Dade, by letter dated November 1, 1994, made demand upon FPC for $57,521. Otherwise Denied.

27. Denied.

28. Denied.

29. Denied.

As for the "Wherefore" clause of this count, FPC denies that Dade and Montenay are entitled to the relief they seek.

Count II - Declaratory Judgment

30. Admitted that Montenay has attempted to frame an action for declaratory judgment pursuant to Section 86.021, Florida Statutes, but denied that it is entitled to the declaratory relief it seeks. Otherwise Denied.

31. FPC hereby repeats and incorporates its Answers to the corresponding paragraphs numbered 1-23 above. Otherwise Denied.

32. Admitted that Dade responded to FPC's July 18, 1994 letter, by letter dated November 1, 1994 and that Dade objected to FPC's enforcement of its contractual rights and demanded payment of $ 57,521. Also admitted that a copy of Dade's letter is attached to the Complaint as Exhibit D. Otherwise denied.

33. Admitted that FPC's November 10, 1994 letter, which speaks for itself, is attached to the Complaint as Exhibit E. Otherwise denied.

34. Admitted that an actual controversy exists between Dade County and FPC that substantially affects the present contractual arrangement between these two parties and that it is appropriate for the Court to declare the rights and obligations of the parties. Otherwise Denied.

35. Denied.

As for the "Wherefore" clause of this count, FPC denies that Dade and Montenay are entitled to the relief they seek.

ALL ALLEGATIONS NOT EXPRESSLY ADMITTED HEREIN ARE HEREBY DENIED.

Second Defense

Plaintiff has failed to allege sufficient ultimate facts to state a cognizable cause of action or to establish entitlement to the relief requested.

Third Defense

The Contract, as interpreted by Montenay to require the consideration of unit characteristics not enumerated in the contract, would fail for indefiniteness.

Fourth Defense

That Montenay is not, and has never been, a party to, nor had any legally cognizable interest in, the negotiated Contract between FPC and Dade; accordingly, Montenay can derive no rights from that Contract, and lacks standing to sue FPC for affirmative or declaratory relief pursuant to it, whether as a contracting party, third party beneficiary or otherwise.

Fifth Defense

Plaintiff is not entitled to injunctive, monetary, or any of the other relief it seeks.

Sixth Defense

FPC has not breached any legally cognizable duty to plaintiff and has not caused any legally cognizable harm to plaintiff.

COUNTERCLAIM

Without waiving its defense that Montenay is not, and has never been, a party to, nor had any legally cognizable interest in, the negotiated Contract between FPC and Dade, Counter-Plaintiff, Florida Power Corporation ("FPC"), pursuant to Section 86.021, Florida Statutes, files an action for Declaratory Relief against Counter-Defendant, Montenay Power Corporation, as general partner of Montenay Dade LTD, (collectively "Montenay"), and in support thereof states:

JURISDICTION AND VENUE

36. This court has jurisdiction over this declaratory action pursuant to Chapter 86.011, Florida Statutes.

37. Venue lies in the Eleventh Judicial Circuit pursuant to Florida Statute Section 47.011 because it is brought in the County where Plaintiff/Counter-Defendant, Montenay resides.

FACTS RELEVANT TO ALL CLAIMS

38. On or about March 15, 1991, FPC entered into a negotiated Contract (the "Contract") with Metropolitan Dade County ("Dade") for the supply of electric capacity and energy. Montenay is not, and has never been, a party to this Contract. Although Plaintiffs allege Montenay operates the Facility pursuant to a separate agreement with Dade, FPC is not a party to any such agreement. Nor, at the time the contract was made did either FPC or Dade intend Montenay to be a third party beneficiary to the Negotiated contract.

39. Dade owns a power plant in Dade County and has a contract with FPC to sell all of that Facility's electric capacity and energy to FPC. Montenay has brought this suit to challenge which of two possible payment rates is to be used for determining the total energy payments due Dade under the contract. The contract expressly provides for the payment of two different rates -- "Firm" and "As-Available" -- in different hours. In its complaint, Montenay nevertheless insists that FPC is committed to pay Dade at the Firm rate all the time for the entire term of the contract.

40. FPC produces some of the electricity that it provides to its customers by means of its own facilities, and it purchases some of that electricity from others. Under federal and state

law, FPC is obligated to purchase power from certain facilities called "Qualifying Facilities" ("QFs" or "cogenerators") when these facilities meet certain federal standards and when it will be at least as cheap for FPC to buy power from QFs as it would be for FPC to obtain that power in some other fashion. When FPC enters into a contract with a QF to purchase power, FPC is required under applicable regulations to pay the QF no more than it would cost FPC to produce the same power by means of a new unit on its own system or by means of either existing units on FPC's system or purchases of energy elsewhere on the energy market, e.g., a neighboring utility. Put another way, FPC must pay the QF no more than the cost that FPC "avoids" by purchasing power from the QF rather than producing the electricity itself or purchasing it.

41. Under the contract, Dade elected to supply some of the energy that might otherwise have been supplied by a new coal plant, and to have its contract payments linked to the estimated costs associated with coal generation. Because FPC never built such a coal plant, however, the essential characteristics of the plant that are to be used to determine FPC's costs, and thus to determine the QF's payment stream, are and must be set forth in the contract. Inasmuch as FPC never built the plant, it is sometimes referred to as an "avoided unit."

42. Under Section 9.1.2 of the Contract, FPC must pay Dade at either FPC's "Firm Energy Cost" or at FPC's "As-Available Energy Cost." Consistent with applicable regulations, these

rates are based on an approximation of the costs FPC would expect to incur in producing the electricity itself, whether from the avoided unit or from its other units, or purchasing electricity in the energy markets.

43. More specifically, the "Firm Energy Cost" is an approximation of the cost that FPC would have incurred to produce electricity by means of the hypothetical avoided unit. Since that unit was never built, the Firm Energy Cost is estimated based on those unit characteristics, and their numeric values, specified and defined in the Contract. The "As-Available Energy Cost" represents the cost that FPC would have incurred to produce the needed electricity from other sources within its system or purchase it in the energy markets. That cost is calculated in accordance with PSC regulations incorporated into the contract.

44. Under Section 9.1.2, FPC must make an "hour-by-hour" determination whether it would have generated the electricity by means of the hypothetical unit as specified in the contract -- a determination necessarily based on those characteristics and their numeric values explicitly set forth therein -- or from other sources available to it. Under Section 9.1.2(i), FPC must pay Dade at the "Firm Energy Cost" for each hour that it would have operated this "reference" unit. Under Section 9.1.2(ii), FPC pays Dade at the "As-Available Energy Cost" for "all other hours."

45. In its lawsuit, Montenay insists -- contrary to the plain language of Section 9.1.2 -- that FPC is never entitled to

pay Dade at the "As-Available Energy Cost" for its electricity. Montenay contends that FPC must instead always pay Dade at the "Firm Energy Cost" rate, alleging that payment at the firm rate is warranted by Dade's reliance on certain financial "projections" prepared by FPC. Hence, Montenay effectively seeks to read Section 9.1.2 (ii) -- providing for payments based on FPC's As-Available Energy Cost during certain hours -- out of the contract entirely, and also ignores other pertinent terms set forth in the parties' Contract.

46. FPC informed Dade County by its letter of July 18, 1994 (attached hereto as Exhibit 1), that effective August 1, 1994, FPC would enforce its rights under Section 9.1.2 by using the pricing mechanism set forth in that section to determine the hours during which as-available energy payments would be made rather than firm energy payments.

47. By letter dated November 1, 1994 (attached hereto as Exhibit 2), Dade responded to FPC's July 18, 1994, letter objecting to FPC's enforcement of Section 9.1.2. Dade asserted that such enforcement was a breach of the Contract and demanded payment of $57,521, the amount it claimed to have been underpaid for energy delivered in the month of August.

48. By its own letter, dated November 10, 1994 (attached hereto as Exhibit 3), FPC denied that it had calculated payments in a manner violating Section 9.1.2 of the Contract; rather, FPC asserted that the payments had been calculated strictly in accordance with the explicit terms of the Contract.

49. On or about May 14, 1996, Dade and Montenay filed the complaint giving rise to this action in Dade County Circuit Court. The Complaint alleges a cause of action for breach of contract and also seeks declaratory relief.

50. In the Complaint, Montenay maintains that FPC is breaching the payment terms of the contract with respect to FPC's purchase of energy from Dade. Specifically, Montenay disputes FPC's methodology for determining energy payments, asserting that FPC's method for calculating those payments is flawed. According to Montenay, in determining whether the hypothetical "avoided unit" would have been in operation during each hour that Dade provides energy, FPC must take into account "all pertinent characteristics and constraints of the pulverized coal-fired unit that FPC was able to avoid by entering into contracts with Dade County. . . ," not simply those characteristics enumerated in the Contract. Montenay, however, does not specify what those other characteristics are, or what numeric values are associated with them, and the Contract does not identify those other characteristics or values. Moreover, while urging that characteristics not contained in the Contract must be used in determining the unit's operational status, Montenay does not dispute the use of only the enumerated characteristics to determine the level of the firm energy rate. Montenay's positions are thus fundamentally inconsistent in sometimes rejecting and other times invoking the Contract's written terms.

51. FPC strenuously disagrees that it has engaged in any wrongdoing or breached its contract with Dade, and affirmatively alleges that it has properly invoked and implemented Section 9.1.2 of the Contract. More specifically, FPC maintains that, because the avoided unit does not actually exist, in order to make its operational status a basis for an agreement between the parties it was necessary to specify in the body of the Contract itself the unit characteristics that are to be used to implement the Contract's payment provisions.

52. Thus, Section 9.1.2 sets forth the method for determining when energy payments should be computed using the Firm Energy Cost, as opposed to the As-Available Energy Cost, 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.

53. The "characteristics" identified in Section 9.1.2 (i) are given defined values in an appendix to the Contract. Those values are:

(1) the average monthly inventory chargeout price of fuel, defined as "coal with 1.15% Sulfur by weight maximum at 11,000 BTU/lb., adjustable in direct proportion to the BTU/lb of coal," at "Crystal River Units 1 and 2;"

(2) the Fuel Multiplier of "1.0;"

(3) the Avoided Unit Heat Rate of "9,830 BTU/KWH;" and

(4) the "Avoided Unit Variable O&M Costs in 1/90 $'s = $4.36/MWH (Option A only)" with an "Annual/Escalation Rate of O&M Costs = 5.10%." (Contract, App. C, Schedules 3 and 4).

54. The discrete characteristics set forth in Section 9.1.2 (i), together with the contractually agreed upon values set forth in the appendix, enable FPC (and Dade as well) to calculate with certainty the cost of operating the "unit" described in that section. By virtue of this calculation, FPC is able to determine whether it would be economical to operate that "unit" during any given hour to produce the energy that it is purchasing from Dade. If so, FPC pays Dade at a rate based on the Firm Energy Cost. If not, Section 9.1.2 (ii) provides that FPC pays Dade during <u>those</u> hours at a rate based on the As-Available Energy Cost. That is plain from the two different parts of this payment provision.

FPC is making payments to Dade in strict accordance with Section 9.1.2 (i) and (ii), as construed in this manner.

55. Nevertheless, Montenay assert alternative arguments that are flatly inconsistent with the Contract's plain terms. First, Montenay maintain that Dade's entitlement to the firm energy rate should be determined through the simulated operation of a unit that includes characteristics and constraints nowhere specified in the Contract. Alternatively, contends Dade is entitled to the firm energy rate for all hours, without regard to the simulated operation of any unit (much less the unit as defined in the Contract).

56. Either position is fatally defective, ignoring the Contract's plain terms. The parties cannot reasonably be deemed to have left unsettled (and hence for future identification and determination) unit characteristics that may have a material impact on the amount being paid by FPC in consideration for the electricity it purchases. Such an approach would lead to the conclusion that the parties never finished negotiating their deal and would render the Contract legally unenforceable.

57. Even if FPC's method of implementing Section 9.1.2 is not correct, and it is determined that additional characteristics must be considered in determining when the firm energy rate should be paid, those characteristics and their values should be those FPC within its reasonable discretion concludes are appropriate to determine the operational status of the avoided unit, and the Court should not endeavor to rewrite the contract

and come up with a judicially created set of characteristics which must be used.

Count I: Contract Breach

58. This is an action for declaratory relief.

59. FPC incorporates by reference its allegations in paragraphs 1-57.

60. By this action, FPC seeks a declaration that it has not breached the contract in computing payments owed under §9.1.2 thereof.

61. Although FPC strenuously denies any wrongdoing, in light of the positions taken and the lawsuits filed by Dade and Montenay, an actual controversy exists between Dade and Montenay and FPC regarding whether FPC's actions breached, and will continue to breach, contractual duties owed by FPC to Dade. This actual controversy substantially affects the rights and obligations of, and between, these parties, including but not limited to the present and future contractual rights and obligations between these parties. The presence of an actual controversy is demonstrated further, among other things, by (1) the exchange of correspondence between Dade and FPC in which those parties have disputed each other's positions regarding energy payments and (2) Dade and Montenay's instigation of suit against FPC alleging that FPC has breached its contractual obligations. All parties necessary to the determination of this controversy are currently before the court by proper process.

62. The controversy is definite and concrete, touching parties having adverse legal interests. It is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

WHEREFORE, Florida Power Corporation demands judgment determining the rights, status and equitable and legal relations of the parties, and awarding FPC its costs and such other relief as may be appropriate, including declarations of the following:

a. That neither Dade nor Montenay is entitled, under the terms of the contract or due to any course of conduct or representations made by FPC or otherwise, to receive payment at the firm energy rate for all hours Dade delivers energy to FPC pursuant to the Negotiated contract;

b. That FPC has correctly interpreted and implemented the pricing mechanism contained in Section 9.1.2 of the negotiated Contract and is entitled to enforce that provision in the very manner it has been enforcing it since August of 1994; and

c. That FPC has not underpaid Dade since the inception of the Contract and owes Dade no money in connection with energy payments made under the Contract.

Count II Declaratory Judgment in the Alternative as to FPC's Rights under the Contract

63. This is an action for declaratory relief.

64. FPC incorporates by reference its allegations in paragraphs 1-57.

65. By this action, FPC -- without waiving its position as plead in Count I -- seeks a declaration in the alternative, that if this Court should find that additional characteristics, other than those specified in § 9.1.2. of the contract with Dade, must be considered in determining whether Dade is entitled to receive the firm energy or as available energy rate for a given hour, then such additional characteristics and the values attributed to them would include only those which FPC, in its reasonable discretion, concludes are appropriate to determine the operational status of the hypothetical avoided unit.

66. Although FPC strenuously denies that it has breached its contract with Dade, in light of the positions taken and the lawsuits filed by Dade and Montenay, an actual controversy exists between Dade and Montenay and FPC regarding whether FPC's actions breached the contract, whether such actions will continue to breach the contract. Such controversy substantially affects the rights and obligations of and between these parties, including but not limited to the present and future contractual rights and obligations between these parties. The presence of an actual controversy is demonstrated further, among other things, by (1) the exchange of correspondence between Dade and FPC in which those parties have disputed each other's positions regarding energy payments and (2) Dade and Montenay's instigation of suit against FPC alleging that FPC has breached its contractual obligations. All parties necessary to the determination of this controversy are currently before the Court by proper process.

67. The controversy is definite and concrete, touching parties having adverse legal interests. It is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Wherefore, Florida Power Corporation demands judgment, in the alternative, determining the rights, status and equitable and legal relations of the parties, and awarding FPC its costs and such other relief as may be appropriate, including declarations of the following:

a. That neither Dade nor Montenay is entitled, under the terms of the contract, or due to any course of conduct or representations made by FPC or otherwise, to receive payment at the firm energy rate during all hours Dade delivers energy to FPC pursuant to the Negotiated contract;

b. That should the Court find that additional characteristics, other than those found in § 9.1.2 of the Contract between FPC and Dade, must be considered in determining whether Dade is entitled to receive the firm energy or as available energy rate for a given hour, then such additional characteristics and the values attributed to them would include only those which FPC in its reasonable discretion concludes are

appropriate to determine the operational status of the hypothetical avoided unit.

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One Progress Plaza
Post Office Box 2861
St. Petersburg, FL 33731-2861

Attorneys for Defendant
Florida Power Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via Federal Express on this 13th day of January, 1997, to **James D. Wing, Esq.**, Holland & Knight, 701 Brickell Ave., 30th Floor (33131), Post Office Box 015441, Miami, Florida 33101 and via U.S. Mail to **Robert Scheffel Wright, Esq.**, Landers & Parsons, 310 West College Avenue (32301), Post Office Box 271, Tallahassee, Florida 32302, Counsel for MONTENAY POWER CORP., and MONTENAY-DADE, LTD.; and, **Robert A. Ginsburg, Esq.**, and **Gail P. Fels, Esq.**, County Attorney's Office, Aviation Division, Miami International Airport, Post Office Box 592075 AMF, Miami, Florida 33159, Counsel for METROPOLITAN DADE COUNTY.

Attorney

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CASE NO: 96-09598

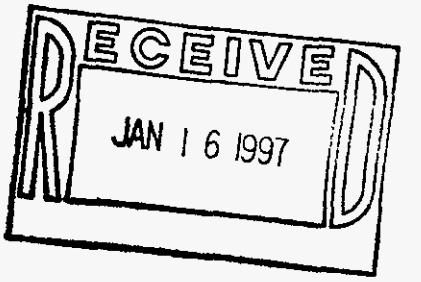
METROPOLITAN DADE COUNTY,
a political subdivision of
the State of Florida, and
MONTENAY POWER CORP., a
Florida corporation, as
General Partner of **MONTENAY-DADE, LTD.**, a Florida limited
partnership,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.
_____/



FLORIDA POWER CORPORATION'S ANSWER TO DADE'S COMPLAINT AND COUNTERCLAIM AGAINST DADE

Defendant/Counter-Plaintiff, Florida Power Corporation ("FPC"), by its undersigned attorneys, hereby answers and interposes defenses to the Complaint filed by Metropolitan Dade County ("Dade"). In addition, FPC sets forth its counterclaim against Dade.

First Defense

Responding to the corresponding numbered paragraphs of the Amended Complaint, FPC states:

General Allegations

1. Admitted that Dade has attempted to frame an action for damages in excess of $15,000 and for declaratory relief. Otherwise Denied.

2. Without knowledge, except admitted that Dade is a political subdivision of the State of Florida. Also admitted that the Facility has been certified as a qualifying small power production facility ("QF") within the meaning of PURPA and that certain Florida regulations expressly adopt certain regulations of the Federal Energy Regulatory Commission promulgated under PURPA. Otherwise denied.

3. Admitted.

4. Admitted that on March 15, 1991, Dade County and FPC entered into a Contract, a copy of which is attached to Plaintiff's Complaint as Exhibit A. Admitted that, under the Contract, Dade committed to begin supplying firm capacity and energy to FPC as of November 1, 1991, but denied that this actually occurred. Without knowledge as to what Montenay Power Corporation., as General Partner of Montenay LTD, (collectively "Montenay") is entitled to receive in connection with the O & M Agreement or otherwise. Otherwise denied.

5. Admitted.

Statutory Background

6. Paragraphs six and seven are styled "Statutory Background," as distinguished from later paragraphs styled "Facts." Such statutory background is in the nature of legal

argument to which no responsive pleading is required. Moreover, such statutes and legislative history speak for themselves. FPC is unable to respond specifically to those portions of the allegations premised on authority contained in the Federal Register because the citation provided is incorrect. Otherwise denied.

7. This paragraph consists of plaintiff's selected legal propositions. One would expect to find such propositions in a brief rather than a complaint (the purpose of which is simply to set forth ultimate facts which demonstrate the existence of a cause of action and entitlement to the relief sought), and no admission or denial by way of a responsive pleading is required to these allegations. As to the numerous statutory propositions related to PURPA and associated case law, such statutes and case authority speak for themselves. Admitted that the Facility has been certified as a QF. Otherwise denied.

Facts Relevant to Both Claims

8. Admitted that, subject to various terms and conditions specified in the Contract, which Contract speaks for itself, or as provided under applicable state and federal law, the Contract requires Dade to deliver and FPC to receive and purchase, 43,000 kilowatts ("kW") of firm electric capacity and energy from the Facility. Otherwise denied.

9. Admitted that the Contract has two payment components: capacity payments, pursuant to Article VIII, and energy payments, pursuant to Article IX. Otherwise denied.

10. Denied that Plaintiff has accurately construed Article IX, including Section 9.1.2. Admitted that Plaintiff has accurately quoted part of Section 9.1.2 of the Contract. Otherwise denied.

11. Denied that plaintiff has accurately represented FPC's petition, which petition speaks for itself. Admitted that the contract provides that Capacity Payments are based on the selection of a pulverized coal unit, Schedule 4, Option A. Admitted that plaintiff has accurately quoted selected portions of Schedule 4, Option C. Otherwise denied.

12. Denied.

13. Denied.

14. Admitted that the Contract had to be approved by the Florida Public Service Commission (the "FPSC," "PSC," or "Commission"). Admitted that the enforceability of the Contract was conditioned upon Commission approval. The PSC rules relating to approval and cost recovery speak for themselves. Otherwise denied.

15. Admitted that FPC advised the Commission that it did not believe that all the cogeneration facilities would be able to provide the promised capacity, that consumer demands had increased, and that outdated modeling formulas and overestimation of other available capacity had caused FPC to underestimate capacity requirements in the past. Further admitted that approval of the Contracts was granted in Order No. 24724 dated July 1, 1991. The PSC order approving the Contracts and the PSC

rules relating to that approval speak for themselves. Otherwise denied.

16. Admitted that FPC provided the PSC with certain financial information. Otherwise denied.

17. Admitted that the Commission approved the Contract between FPC and Dade and that a copy of the Commission's order is attached to Plaintiff's Complaint as Exhibit B. The Order of the PSC approving the Contract and the PSC rules relating to that approval speak for themselves. Otherwise denied.

18. Without knowledge as to what Dade relied upon in contracting with FPC or whether the "Facility" must run almost continuously to dispose of Dade's municipal solid waste by incineration. Otherwise denied.

19. Admitted that FPC knew that the Resources Recovery Facility was a municipal solid waste facility. Without knowledge of what Dade relied upon in entering into the Contract with FPC. Otherwise denied.

20. Admitted that the Facility began supplying power to FPC on November 22, 1991, and that FPC paid Dade firm energy payments plus the Performance Adjustment from December 1, 1991, through August 8, 1994. Admitted that approximately $21,000 out of the total November 1991 payment of $191,500 was identified as being paid at the as-available energy rate. Otherwise denied.

21. Admitted that FPC's letter to Dade of July 18, 1994, which letter speaks for itself, is attached to Plaintiff's initial Complaint as Exhibit C. Otherwise denied.

22. Denied.

23. Denied.

Count I - Damages For Breach of Contract

24. Admitted that Dade County has attempted to frame an action for damages in excess of $15,000. Otherwise Denied.

25. FPC hereby repeats and incorporates its Answers to the corresponding paragraphs numbered 1-23 above. Otherwise Denied.

26. Admitted that on or about September 26, 1994, Dade received payment from FPC for energy delivered to FPC from the facility in August 1994, and that FPC's payment included payments based upon the As-Available Energy Cost. Also Admitted that Dade, by letter dated November 1, 1994, made demand upon FPC for $57,521. Otherwise Denied.

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29. Denied.

As for the "Wherefore" clause of this count, FPC denies that Dade and Montenay are entitled to the relief they seek.

Count II - Declaratory Judgment

30. Admitted that Dade has attempted to frame an action for declaratory judgment pursuant to Section 86.021, Florida Statutes, but denied that it is entitled to the declaratory relief it seeks. Otherwise Denied.

31. FPC hereby repeats and incorporates its Answers to the corresponding paragraphs numbered 1-23 above. Otherwise Denied.

32. Admitted that Dade responded to FPC's July 18, 1994 letter, by letter dated November 1, 1994, and that Dade objected to FPC's enforcement of its contractual rights and demanded payment of $ 57,521. Also admitted that a copy of Dade's letter is attached to the Complaint as Exhibit D. Otherwise denied.

33. Admitted that FPC's November 10, 1994 letter, which speaks for itself, is attached to the Complaint as Exhibit E. Otherwise denied.

34. Admitted that an actual controversy exists between Dade County and FPC which substantially affects the present contractual arrangement between these two parties and that it is appropriate for the Court to declare the rights and obligations of the parties. Otherwise Denied.

35. Denied.

As for the "Wherefore" clause of this count, FPC denies that Dade and Montenay are entitled to the relief they seek.

ALL ALLEGATIONS NOT EXPRESSLY ADMITTED HEREIN ARE HEREBY DENIED.

Second Defense

Plaintiff has failed to allege sufficient ultimate facts to state a cognizable cause of action or to establish entitlement to the relief requested.

Third Defense

The Contract, as interpreted by Dade to require the consideration of unit characteristics not enumerated in the contract, would fail for indefiniteness.

Fourth Defense

Plaintiff is not entitled to injunctive, monetary, or any of the other relief it seeks.

Fifth Defense

FPC has not breached any legally cognizable duty to plaintiff and has not caused any legally cognizable harm to plaintiff.

COUNTERCLAIM

Counter-Plaintiff, Florida Power Corporation ("FPC"), pursuant to Section 86.021, Florida Statutes, files an action for Declaratory Relief against Counter-Defendant, Metropolitan Dade County ("Dade"), and in support thereof states:

JURISDICTION AND VENUE

36. This court has jurisdiction over this declaratory action pursuant to Chapter 86.011, Florida Statutes.

37. Venue lies in the Eleventh Judicial Circuit pursuant to the local action doctrine.

FACTS RELEVANT TO BOTH CLAIMS

38. On or about March 15, 1991, FPC entered into a negotiated Contract (the "Contract") with Dade for the supply of electric capacity and energy. Montenay is not, and has never been, a party to this Contract. Although Plaintiffs allege

Montenay operates the Facility pursuant to a separate agreement with Dade, FPC is not a party to any such agreement.

39. Dade owns a power plant in Dade County and has a contract with FPC to sell all of that Facility's electric capacity and energy to FPC. Dade has brought this suit to challenge which of two possible payment rates is to be used for determining the total energy payments due Dade under the contract. The contract expressly provides for the payment of two different rates -- "Firm" and "As-Available" -- in different hours. In its complaint, Dade nevertheless insists that FPC is committed to pay Dade at the Firm rate all the time for the entire term of the contract.

40. FPC produces some of the electricity that it provides to its customers by means of its own facilities, and it purchases some of that electricity from others. Under federal and state law, FPC is obligated to purchase power from certain facilities called "Qualifying Facilities" ("QFs" or "cogenerators") when these facilities meet certain federal standards and when it will be at least as cheap for FPC to buy power from QFs as it would be for FPC to obtain that power in some other fashion. When FPC enters into a contract with a QF to purchase power, FPC is required under applicable regulations to pay the QF no more than it would cost FPC to produce the same power by means of a new unit on its own system or by means of either existing units on FPC's system or purchases of energy elsewhere on the energy market, e.g., a neighboring utility. Put another way, FPC must

pay the QF no more than the cost that FPC "avoids" by purchasing power from the QF rather than producing the electricity itself or purchasing it.

41. Under the contract, Dade elected to supply some of the energy that might otherwise have been supplied by a new coal plant, and to have its contract payments linked to the estimated costs associated with coal generation. Because FPC never built such a coal plant, however, the essential characteristics of the plant that are to be used to determine FPC's costs, and thus to determine the QF's payment stream, are and must be set forth in the contract. Inasmuch as FPC never built the plant, it is sometimes referred to as an "avoided unit."

42. Under Section 9.1.2 of the Contract, FPC must pay Dade at either FPC's "Firm Energy Cost" or at FPC's "As-Available Energy Cost." Consistent with applicable regulations, these rates are based on an approximation of the costs FPC would expect to incur in producing the electricity itself, whether from the avoided unit or its other units or by purchasing electricity in the energy markets.

43. More specifically, the "Firm Energy Cost" is an approximation of the cost that FPC would have incurred to produce electricity by means of the hypothetical avoided unit. Since that unit was never built, the Firm Energy Cost is estimated based on those unit characteristics, and their numeric values, specified and defined in the Contract. The "As-Available Energy Cost" represents the cost that FPC would have incurred to produce

the needed electricity from other sources within its system or purchase it in the energy markets. That cost is calculated in accordance with PSC regulations incorporated into the contract.

44. Under Section 9.1.2, FPC must make an "hour-by-hour" determination whether it would have generated the electricity by means of the hypothetical unit as specified in the contract -- a determination necessarily based on those characteristics and their numeric values explicitly set forth therein -- or from other sources available to it. Under Section 9.1.2(i), FPC must pay Dade at the "Firm Energy Cost" for each hour that it would have operated this "reference" unit. Under Section 9.1.2(ii), FPC pays Dade at the "As-Available Energy Cost" for "all other hours."

45. In its lawsuit, Dade insists -- contrary to the plain language of Section 9.1.2 -- that FPC is never entitled to pay Dade at the "As-Available Energy Cost" for its electricity. Dade contends that FPC must instead always pay Dade at the "Firm Energy Cost" rate, alleging that payment at the firm rate is warranted by Dade's reliance on certain financial "projections" prepared by FPC. Hence, Dade effectively seeks to read Section 9.1.2 (ii) -- providing for payments based on FPC's As-Available Energy Cost during certain hours -- out of the contract entirely, and also ignores other pertinent terms set forth in the parties' Contract.

46. FPC informed Dade County by its letter of July 18, 1994 (attached hereto as Exhibit 1), that effective August 1, 1994,

FPC would enforce its rights under Section 9.1.2 by using the pricing mechanism set forth in that section to determine the hours during which as-available energy payments would be made rather than firm energy payments.

47. By letter dated November 1, 1994 (attached hereto as Exhibit 2), Dade responded to FPC's July 18, 1994, letter objecting to FPC's enforcement of Section 9.1.2. Dade asserted that such enforcement was a breach of the Contract and demanded payment of $57,521, the amount it claimed to have been underpaid for energy delivered in the month of August.

48. By its own letter, dated November 10, 1994 (attached hereto as Exhibit 3), FPC denied that it had calculated payments in a manner violating Section 9.1.2 of the Contract; rather, FPC asserted that the payments had been calculated strictly in accordance with the explicit terms of the Contract.

49. On or about May 14, 1996, Dade and Montenay filed the complaint giving rise to this action in Dade County Circuit Court. The Complaint alleges a cause of action for breach of contract and also seeks declaratory relief.

50. In the Complaint, Dade maintains that FPC is breaching the payment terms of the contract with respect to FPC's purchase of energy from Dade. Specifically, Dade disputes FPC's methodology for determining energy payments, asserting that FPC's method for calculating those payments is flawed. According to Dade, in determining whether the hypothetical "avoided unit" would have been in operation during each hour that Dade provides

energy, FPC must take into account "all pertinent characteristics and constraints of the pulverized coal-fired unit that FPC was able to avoid by entering into contracts with Dade County. . . ," not simply those characteristics enumerated in the Contract. Dade, however, does not specify what those other characteristics are, or what numeric values are associated with them, and the Contract does not identify those other characteristics or values. Moreover, while urging that characteristics not contained in the Contract must be used in determining the unit's operational status, Dade does not dispute the use of only the enumerated characteristics to determine the level of the firm energy rate. Dade's positions are thus fundamentally inconsistent in sometimes rejecting and other times invoking the Contract's written terms.

51. FPC strenuously disagrees that it has engaged in any wrongdoing or breached its contract with Dade, and affirmatively alleges that it has properly invoked and implemented Section 9.1.2 of the Contract. More specifically, FPC maintains that, because the avoided unit does not actually exist, in order to make its operational status a basis for an agreement between the parties it was necessary to specify <u>in the body of the Contract itself</u> the unit characteristics that are to be used to implement the Contract's payment provisions.

52. Thus, Section 9.1.2 sets forth the method for determining <u>when</u> energy payments should be computed using the Firm Energy Cost, as opposed to the As-Available Energy Cost, 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.

53. The "characteristics" identified in Section 9.1.2 (i) are given defined values in an appendix to the Contract. Those values are:

(1) the average monthly inventory chargeout price of fuel, defined as "coal with 1.15% Sulfur by weight maximum at 11,000 BTU/lb., adjustable in direct proportion to the BTU/lb of coal," at "Crystal River Units 1 and 2;"

(2) the Fuel Multiplier of "1.0;"

(3) the Avoided Unit Heat Rate of "9,830 BTU/KWH;" and

(4) the "Avoided Unit Variable O&M Costs in 1/90 $'s = $4.36/MWH (Option A only)" with an "Annual/Escalation Rate of O&M Costs = 5.10%." (Contract, App. C, Schedules 3 and 4).

54. The discrete characteristics set forth in Section 9.1.2 (i), together with the contractually agreed upon values set forth in the appendix, enable FPC (and Dade as well) to calculate with certainty the cost of operating the "unit" described in that section. By virtue of this calculation, FPC is able to determine whether it would be economical to operate that "unit" during any given hour to produce the energy that it is purchasing from Dade. If so, FPC pays Dade at a rate based on the Firm Energy Cost. If not, Section 9.1.2 (ii) provides that FPC pays Dade during those hours at a rate based on the As-Available Energy Cost. That is plain from the two different parts of this payment provision. FPC is making payments to Dade in strict accordance with Section 9.1.2 (i) and (ii), as construed in this manner.

55. Nevertheless, Dade asserts alternative arguments that are flatly inconsistent with the Contract's plain terms. First, Dade and Montenay maintain that Dade's entitlement to the firm energy rate should be determined through the simulated operation of a unit that includes characteristics and constraints nowhere specified in the Contract. Alternatively, Dade contends it is entitled to the firm energy rate for all hours, without regard to the simulated operation of any unit (much less the unit as defined in the Contract).

56. Either position is fatally defective, ignoring the Contract's plain terms. The parties cannot reasonably be deemed to have left unsettled (and hence for future identification and determination) unit characteristics that may have a material

impact on the amount being paid by FPC in consideration for the electricity it purchases. Such an approach would lead to the conclusion that the parties never finished negotiating their deal and would render the Contract legally unenforceable.

57. Even if FPC's method of implementing Section 9.1.2 is not correct, and it is determined that additional characteristics must be considered in determining when the firm energy rate should be paid, those characteristics and their values should be those FPC within its reasonable discretion concludes are appropriate to determine the operational status of the avoided unit, and the Court should not endeavor to rewrite the contract and come up with a judicially created set of characteristics which must be used.

Count I: Declaratory Judgment of No Contract Breach

58. This is an action for declaratory relief.

59. FPC incorporates by reference its allegations in paragraphs 1-57.

60. By this action, FPC seeks a declaration that it has not breached the contract in computing payments owed under §9.1.2 thereof.

61. Although FPC strenuously denies any wrongdoing, in light of the positions taken and the lawsuits filed by Dade and Montenay, an actual controversy presently exists between Dade and FPC regarding whether FPC's actions breached, and will continue to breach, contractual duties owed by FPC to Dade. This actual controversy substantially affects the rights and obligations of

and between these parties, including but not limited to the present and future contractual rights and obligations between these parties. The presence of an actual controversy is demonstrated further, among other things, by (1) the exchange of correspondence between Dade and FPC in which those parties have disputed each other's positions regarding energy payments and (2) Dade and Montenay's instigation of suit against FPC alleging that FPC has breached its contractual obligations. All parties necessary to the determination of this controversy are currently before the Court by proper process.

62. The controversy is definite and concrete, touching parties having adverse legal interests. It is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

WHEREFORE, Florida Power Corporation demands judgment determining the rights, status and equitable and legal relations of the parties, and awarding FPC its costs and such other relief as may be appropriate, including declarations of the following:

a. That Dade is not entitled, under the terms of the contract, or due to any course of conduct or representations made by FPC or otherwise, to receive payment at the firm energy rate during all hours it delivers energy to FPC pursuant to the Negotiated Contract;

b. That FPC has correctly interpreted and implemented the pricing mechanism contained in Section 9.1.2 of the

negotiated Contract and is entitled to enforce that provision in the manner it has been enforcing it since August of 1994; and

c. That FPC has not underpaid Dade since the inception of the Contract and owes Dade no money in connection with energy payments made under the Contract.

Count II Declaratory Judgment in the Alternative as to FPC's Rights under the Contract

63. This is an action for declaratory relief.

64. FPC incorporates by reference its allegations in paragraphs 1-57.

65. By this action, FPC -- without waiving its position as plead in Count I -- seeks a declaration in the alternative, that if this Court should find that additional characteristics, beyond those specified in § 9.1.2. of the contract with Dade must be considered in determining whether Dade is entitled to receive the firm energy or as available energy rate for a given hour, then such additional characteristics and the values attributed to them would include only those which FPC, in its reasonable discretion, concludes are appropriate to determine the operational status of the hypothetical avoided unit.

66. Although FPC strenuously denies that it has breached its contract with Dade, in light of the positions taken and the lawsuits filed by Dade and Montenay, an actual controversy exists between Dade and FPC regarding whether FPC's actions breached the contract, whether such actions will continue to breach the contract. Such controversy substantially affects the rights and

obligations of and between these parties, including but not limited to the present and future contractual rights and obligations between these parties. The presence of an actual controversy is demonstrated further, among other things, by (1) the exchange of correspondence between Dade and FPC in which those parties have disputed each other's positions regarding energy payments and (2) Dade and Montenay's instigation of suit against FPC alleging that FPC has breached its contractual obligations. All parties necessary to the determination of this controversy are currently before the Court by proper process.

67. The controversy is definite and concrete, touching parties having adverse legal interests. It is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Wherefore, Florida Power Corporation demands judgment, in the alternative, determining the rights, status and equitable and legal relations of the parties, and awarding FPC its costs and such other relief as may be appropriate, including declarations of the following:

a. That Dade is not entitled, under the terms of the contract, or due to any course of conduct or representations made by FPC or otherwise, to receive payment at the firm energy rate during all hours it delivers energy to FPC pursuant to the Negotiated Contract; and

b. That should the Court find that additional characteristics, other than those found in § 9.1.2 of the

Contract between FPC and Dade, must be considered in determining whether Dade is entitled to receive the firm energy or the as available energy rate for a given hour, then such additional characteristics and the values attributed to them would include only those which FPC in its reasonable discretion concludes are appropriate to determine the operational status of the hypothetical avoided unit.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via Federal Express on this 13th day of January, 1997, to **James D. Wing, Esq.**, Holland & Knight, 701 Brickell Ave., 30th Floor (33131), Post Office Box 015441, Miami, Florida 33101 and via U.S. Mail to **Robert Scheffel Wright, Esq.**, Landers & Parsons, 310 West College Avenue (32301), Post Office Box 271, Tallahassee, Florida 32302, Counsel for MONTENAY POWER CORP., and MONTENAY-DADE, LTD.; and, **Robert A. Ginsburg, Esq.**, and **Gail P. Fels, Esq.**, County Attorney's Office, Aviation Division, Miami International Airport, Post Office Box 592075 AMF, Miami, Florida 33159, Counsel for METROPOLITAN DADE COUNTY.

Attorney

APPENDIX C

FLORIDA POWER CORPORATION'S MOTION
FOR SUMMARY JUDGEMENT

AND

ORDER DENYING SAME

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA
CASE NO: 96-09598

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, and **MONTENAY POWER CORP.**, a Florida corporation, as General Partner of **MONTENAY-DADE, LTD.**, a Florida limited partnership,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION, a Florida corporation,

Defendant.
_____/

CASE NO: 96-09598

FLORIDA POWER CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Florida Power Corporation ("FPC") by its undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.510, moves for summary judgment in FPC's favor on Counts I - III of plaintiffs' complaint. The grounds for this motion and the substantial matters of law that FPC will argue are stated below.

Overview

1. FPC is an electric utility that provides electricity to retail customers throughout various parts of Florida. Metropolitan Dade County ("Dade") owns the Dade County Resource Recovery Facility ("Facility"), which burns solid waste and generates electric power. [Amended Complaint ¶ 2]. Dade sells its power to FPC

pursuant to contract between Dade and FPC.[1] Montenay Power Corp., as general partner of Montenay Dade Ltd. (collectively "Montenay"), operates the Dade Facility pursuant to a separate contract between itself and Dade. [Amended Complaint ¶ 2].[2]

2. In Counts I and II, for breach of contract and declaratory relief, plaintiffs challenge FPC's determination of the rate to use for certain payments due Dade under its contract with FPC. As described more fully below, the contract expressly provides for two types of payments: "capacity payments" and "energy payments." There is no dispute between the parties with respect to "capacity payments." With respect to "energy payments," the contract provides for FPC to pay, for each given hour, either a "Firm" or "As-Available" rate. FPC submits that the methodology for determining whether, in a given hour, Dade receives the "Firm" or "As-Available" rate is set forth clearly and unambiguously in § 9.1.2 of the contract. Conversely, plaintiffs insist that the contract does not provide a methodology for determining when Dade would receive "Firm" or "As-Available" energy rates. However, as explained below, plaintiffs' construction flies in the face of the clear and unambiguous language of the parties' contract. Moreover, if plaintiffs'

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[1] A copy of the contract is contained in the contemporaneously filed Appendix to FPC's Motion as Exhibit 1. Citations to the record in this motion are to exhibits contained in that Appendix. In addition, all emphasis in quotations is supplied unless otherwise indicated.

[2] Montenay is not and has never been a party to FPC's contract with Dade. [Ex. 2, Strong Dep. p. 21, ln 12-22]. Although FPC reserves its right to seek summary judgment at a later date on the ground that Montenay is not a proper party to this action, this motion is directed to the substantive arguments asserted by both plaintiffs. If the Court finds that FPC is entitled to summary judgment on these issues, Montenay's status as a party will be moot.

construction were correct, the contract would fail for indefiniteness, an inconceivable result given that hundreds of millions of dollars are at stake in this dispute. For these reasons, FPC is entitled to summary judgment as a matter of law on Counts I and II.

3. FPC is likewise entitled to summary judgment on Count III of plaintiffs' complaint. There, plaintiffs claim that FPC breached the contract's implied covenant of good faith and fair dealing relating to the pricing of coal, a variable used to calculate the "Firm Energy" rate. Plaintiffs specifically contend that FPC is locked into the same mix of transportation for coal to be delivered to its Crystal River 1 & 2 plants as was being utilized when the contract was signed. However, nowhere does the contract limit -- or even specify -- the types or kinds of transportation to be utilized for delivery of coal to Crystal River 1 & 2. There can be no breach of the covenant of good faith in the absence of such terms.

The Contract

4. FPC produces much of the electricity that it provides to its customers by means of its own facilities, and it purchases some electricity from others. Under federal and state law, FPC is obligated to purchase power from certain cogeneration facilities (called "cogens" or "QFs" in industry parlance) when these facilities meet certain federal standards and when it would be at least as cheap for FPC to buy power from the cogens as it would for FPC to build a new plant. When FPC enters into a contract with a cogen to purchase power, FPC is required under applicable regulations to pay the cogen no more than it would cost FPC to produce

the same power by means of (i) a new unit on its own system, (ii) existing units on its own system, or (iii) purchases of energy elsewhere on the energy market, e.g., a neighboring utility. Put another way, FPC must pay the cogen no more than the cost that FPC "avoided" by purchasing power from the cogen rather than producing the electricity itself or buying it on the energy market.

5. On March 15, 1991, Dade entered into a long-term contract to sell electric power to FPC, which in turn sells that power and other generated and purchased power to wholesale customers and the retail public. [Ex. 3, Nixon Aff. ¶ 4]. The contract obligates FPC to buy electric power from the Facility until November, 2013.

6. Pricing under the contract is based on certain proxy characteristics of a unit FPC avoided building on its own system. Because FPC had no actual plans to build such a unit (and indeed, could not construct such a unit in the time frame necessary to meet its capacity needs), FPC gave the cogens two payment options depending on the type of unit chosen by the cogen: a coal unit or a combustion turbine unit. Dade chose the coal unit. However, because FPC never designed or planned to build this unit ("the avoided unit"), the essential characteristics necessary to approximate its costs are set forth in the contract. [See Ex. 3, Nixon Aff. ¶ 4].

7. Dade receives two types of payments for the power it sells to FPC: capacity payments and energy payments. [Ex. 3, Nixon Aff. ¶ 5]. Both are passed through to FPC's ratepayers pursuant to Florida Public Service Commission ("PSC")

rules and orders. [Ex. 4, Schuster Aff. ¶ 8]. As noted, those payments are based on the coal capacity FPC avoided by entering into the cogeneration contract with Dade. More specifically:

a. Capacity payments approximate the capital cost FPC would have incurred had it built a coal unit. There is no dispute over the amount or method of calculating monthly capacity payments, which is specifically set out in § 8.4. of the contract. Over the last year, fifty-six percent of FPC's payments to Dade were capacity payments. [Ex. 3, Nixon Aff. ¶ 5].

b. The parties' dispute centers around the rate of energy payments made by FPC to Dade. Under § 9.1.2 of the contract, the energy payments will be at one of two possible rates determined on an hourly basis: The "As Available Energy Cost" or the "Firm Energy Cost."

(1) Consistent with applicable regulations, the "Firm Energy" rate approximates the cost that FPC would have incurred to produce electricity by means of the avoided unit, based on the characteristics of this unit specified and defined in the contract. The method for calculating the "Firm Energy" rate is set out in the contract in § 9.1.2.

(2) By contrast, the "As Available" rate is the cost to FPC of producing the needed electricity from other sources within its system or purchasing it on the energy market. It is calculated in accordance with Florida Public Service Commission Rule 25-017.0825 which is incorporated by reference into the contract in § 9.1.1. [See Ex. 3, Nixon Aff. ¶ 6].

8. Additionally, § 9.1.2 also specifies the method to determine when Dade is entitled to receive Firm Energy payments or As-Available energy payments under the contract.

Section 9.1.2

9. Section 9.1.2 states:

> 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. [Ex. 1, § 9.1.2].

10. Thus, § 9.1.2 requires an "hour by hour" determination of whether FPC would have operated the unit specified in that same section of the contract. The determination is made by a computer simulation of the proxy characteristics described in § 9.1.2 and the values of those characteristics as set forth in the contract. Section 9.1.2(i) requires FPC to pay Dade the "Firm Energy" rate for each hour that it would have operated that unit. Section 9.1.2(ii) requires FPC to pay Dade the "As-Available" energy rate for "all other hours." [Ex. 4, Schuster Aff. ¶ 6-9].

11. On August 8, 1994, FPC began implementing § 9.1.2 of the contract in strict compliance with its terms. [Ex. 3, Nixon Aff. ¶ 7]. Before that date, FPC was not implementing § 9.1.2 at all. Accordingly, since August 8, 1994, FPC has paid Dade and other cogens the Firm Energy rate during some hours and the As-

Available Energy rate during other hours; a result expressly contemplated by the plain language of the contract. [Ex. 3, Nixon Aff. ¶ 7].

Section 9.1.2 Requires Determination of Energy Pricing Based Solely on the Four Contractually Specified Characteristics of the Avoided Unit

12. Under Florida law, the construction of a contract is a question of law for the Court. Moreover, where, as here, the language of a contract is unambiguous, the intention of the parties to a contract is to be deduced from the language employed by them. Those terms, when unambiguous, are conclusive, in the absence of mistake, the question being not what intention existed in the minds of the parties, but what intention is expressed by the language used. This is because the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs -- not on the parties having meant the same thing but on their having said the same thing. See Blackhawk Heat. & P. Co. v. Data Lease Fin. Corp., 302 So. 2d 404 (Fla. 1974).

13. The avoided unit specified by the contract does not exist anywhere in the real world. [Ex. 3, Nixon Aff. ¶ 4; Ex. 4, Schuster Aff. ¶ 11-17]. It is a regulatory concept and a creature of contract. Because this avoided unit does not actually exist, the contract specifies characteristics to serve as a proxy for that unit and does so in the body of the contract itself so that the contract can be implemented and administered. [Ex. 4, Schuster Aff. ¶ 5, 17]. These agreed upon characteristics of the avoided unit, which under § 9.1.2 are used to determine the unit's energy cost when it would have operated, as well as its on-off status, permit

contract administration in an agreement that is being implemented with numerous cogenerators over 20- or 30-year terms. [Schuster Aff. ¶ 21].

14. Thus, the contract -- throughout its provisions -- contemplates that the "avoided unit" must be represented by proxy characteristics set forth in the contract and not by all the additional characteristics -- nowhere set forth in the contract -- that it would have if actually built. [See, generally, Ex. 4, Schuster Aff. ¶ 11-22]. For example:

a. Section 9.1.2(i) specifies that the Firm Energy Cost itself is calculated based on the limited characteristics specified in the contract itself -- and no others -- even though it is undisputed that these factors are merely a proxy for the cost of producing energy and do not strictly replicate the operating parameters of a real unit. [Ex. 4, Schuster Aff. ¶ 18]. Plaintiffs' do not dispute this approximation method. [Ex. 5, Shanker Dep. p. 18, ln. 8 - p. 21, ln. 7, p. 37, ln. 8 - ln. 12, and p. 74, ln. 18 - p. 76, ln. 16; Ex. 6, Portuondo Dep. p. 59, ln. 13 - p. 60, ln. 5].

b. Section 1.35 directs that "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." This provision makes unmistakably clear that in simulating the "unit" set forth in § 9.1.2, FPC is to use "the characteristics defined" in that section. In addition, the "on-peak hours" specified in Appendix C are blocks of time amounting

to eleven hours per day. These may or may not reflect FPC's actual peak demand periods. [Ex. 4, Schuster Aff. ¶ 20-21].

c. Section 1.35 further makes clear that the hours that the avoided unit may operate may well be a "lesser" time period than the eleven-hour daily blocks of time listed in Appendix C. [Ex. 4, Schuster Aff. ¶ 22].

d. Section 9.1.2 specifies that the avoided unit must be deemed to be either all the way on or all the way off, even though a real unit would be turned on at varying output levels. [Ex. 4, Schuster Aff. ¶ 18; Ex. 5, Shanker Dep. p. 67, ln 15-18; Ex. 7, Seelke Dep. p. 797, ln. 11 - p. 798, ln 14]. This is significant because the contract artificially constrains FPC to pay Dade "Firm Energy" rates based on the Firm Energy Cost for the Facility's entire output, even on numerous occasions when the avoided unit (had it been built) would be turned "on" at part load. [Ex. 5, Shanker Dep. p. 67, ln. 22 - p. 68, ln 10; Ex. 6, Portuondo Dep. p. 200, ln. 24 - p. 101, ln. 12]. This artificial contract condition, which plaintiffs do not dispute, benefits Dade. [Ex. 5, Shanker Dep. p. 67, ln. 22 - p. 68, ln. 10; Ex. 6, Portuondo Dep. p. 200, ln. 24 - p. 202, ln. 12 and p. 70, ln. 24 - p. 71, ln. 12].

15. Hence, it is readily apparent that the parties, in executing this contract, did not intend to reference a "real" fully characterized unit, but rather, the proxy characteristics of a contractually defined avoided unit. The Court need look no further than the contract itself to ascertain this fact.

16. With this important point in mind, it is clear that § 9.1.2 unambiguously and plainly limits the proxy characteristics to be used in determining

whether the proxy unit would be operating to four specifically delineated characteristics set forth in § 9.1.2: (i) the average monthly inventory chargeout price of fuel burned at the Avoided Unit Reference Plant; (ii) the Fuel Multiplier; (iii) the Avoided Unit heat rate; and (iv) the Avoided Unit Variable O&M, if applicable. [Ex. 1, § 9.1.2].

17. Moreover, these characteristics themselves do not mirror their real world counterparts; they are given defined values in an appendix to the contract, as they must since a real unit was never designed or built. Those values, based on Dade's chosen option as expressly set forth in the contract, are:

> (1) the average monthly inventory chargeout price of fuel, defined as "coal with 1.15% Sulfur by weight maximum at 11,000 BTU/lb., adjustable in direct proportion to the BTU/lb of coal," at "Crystal River Units 1 and 2;"
>
> (2) the Fuel Multiplier of "1.0";
>
> (3) the Avoided Unit Heat Rate of "9,830 BTU/KWH;" and
>
> (4) the "Avoided Unit Variable O&M Costs in 1/90 $'s = $4.36/MWH (Option A only)" with an "Annual/Escalation Rate of O&M Costs = 5.10%."[3]

18. The discrete proxy characteristics set forth in § 9.1.2, together with the agreed upon values set forth in the appendix to the contract, enable FPC (and Dade) to calculate fully the cost of operating the avoided unit. By virtue of this calculation, FPC is able to determine, for each hour, whether it would be economical to operate the avoided unit to produce the energy that it is purchasing

[3] Had Dade chosen a different option, the proxy characteristics would have different values which also are set forth in the contract's appendices.

from the Dade Facility. If so, FPC pays Dade at a rate based on the Firm Energy Cost. If not, Section 9.1.2 (ii) provides that FPC pays Dade during those hours at a rate based on the As-Available Energy Cost. That is plain from the two different parts of this payment provision.

19. FPC is making payments to Dade County in strict accordance with Section 9.1.2 (i) and (ii), as construed in this manner. [Ex. 4, Schuster Aff. ¶ 6-7; Ex. 3, Nixon Aff. ¶ 7].

20. Settled rules of contract construction support FPC's interpretation of § 9.1.2.

a. It is fundamental that a contract consists of terms on which the parties have agreed. The phrase "with these characteristics" in § 9.1.2 of the contract unambiguously refers only to those characteristics listed in that sentence. No other characteristics are mentioned or referred to anywhere in the agreement.

b. To include additional characteristics in determining whether the proxy unit would be operating or not would be contrary to the express terms of the contract. It is well settled law that the enumeration of certain items in a contract is construed as excluding from its operation all items not expressly mentioned.

21. Because the written terms of § 9.1.2 are clear and unambiguous, the parol evidence rule bars the use of extrinsic evidence to vary those terms. See J.M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So. 2d 484 (Fla. 1957);

Lanzalotti v. Cohen, 113 So. 2d 727 (Fla. 3d DCA 1959); Seaway Yacht Sales, Inc. v. Brunswick Corp., 242 So. 2d 192 (Fla. 3d DCA 1970); Avis Rent A Car, Inc. v. Monroe County, 660 So. 2d 413 (Fla. 3d DCA 1995).

22. In addition, the actual language used in the contract is the "best evidence" of the intent of the parties and the plain meaning of the language controls. United States v. South Atlantic Production Credit Ass'n, 606 So. 2d 691 (Fla. 1st DCA 1992).

23. Moreover, because the written terms of § 9.1.2 are clear and unambiguous, the doctrine of merger bars the use of extrinsic evidence. The contract contains an integration clause that commits these sophisticated contracting parties and the Court to relying upon the express terms of the agreement. See Cassara v. Bowman, 136 Fla. 302, 186 So. 514 (1939); Weiss v. Cherry, 477 So. 2d 12 (Fla. 3d DCA 1985); Ortiz v. Orchid Springs Dev. Corp., 504 So. 2d 510 (Fla. 2d DCA 1987).

Plaintiffs' Position -- That the Contract Does Not Provide a Methodology for Determining When the Avoided Unit Would Be Operating -- Contradicts the Plain and Unambiguous Language of § 9.1.2

24. Plaintiffs contend -- contrary to the plain language of § 9.1.2 -- that the contract "does not provide a methodology for determining the times during which the Avoided Unit would or would not be operated." [Amended Complaint ¶ 13]. They instead assert that whether the avoided unit would or would not operate in each given hour should be determined by computer simulations of "all pertinent characteristics and constraints of the pulverized coal-fired unit that FPC was able to

avoid." Id. It is undisputed that these additional characteristics are not contained in the contract. [Ex. 5, Shanker Dep. p. 46, ln. 24 - 48, ln. 11; Ex. 6, Portuondo p. 55, ln. 18 - p. 57, ln. 11; see also Ex. 7, Seelke Dep. p. 891, ln. 21 - p. 892, ln. 1]. Nevertheless, plaintiffs contend that a simulation of "all pertinent characteristics and constraints" would "result in the Avoided Unit being in operation virtually all the time" so that FPC would pay Dade the "Firm Energy" rate "virtually all the time." Id.

25. Plaintiffs' interpretation of the contract is erroneous because it effectively reads § 9.1.2(ii) -- providing for payments based on FPC's As-Available Energy Cost -- out of the contract. Plaintiffs' creative construction of the contract is directly contrary to the unambiguous and plain language of § 9.1.2, as well as the contract read as a whole.

26. Moreover, plaintiffs admit that the contract wholly fails to identify the characteristics (and their values) needed to conduct this simulation. [Ex. 5, Shanker Dep. p. 46, ln. 24 - 48, ln. 11; Ex. 6, Portuondo p. 55, ln. 18 - p. 57, ln. 11; see also Ex. 7, Seelke Dep. p. 891, ln. 21 - p. 892, ln. 1]. They even concede that they cannot identify the exact characteristics (or their values) FPC should use to "properly conduct" these allegedly contractually required simulations. [Ex. 5, Shanker Dep. p. 66, ln 6 - p. 67, ln. 7; Ex. 6, Portuoudo Dep. p. 57, ln. 1 - p. 58, ln. 18; see also Ex. 7, Seelke Dep. p. 894, ln. 18 - p. 898, ln. 21].

27. Indeed, plaintiffs' contract construction is belied by the PSC's unequivocal observation, made directly after quoting § 9.1.2 verbatim, that: "This

provision establishes the method to determine when cogenerators are entitled to receive firm energy payments or as-available energy payments under the contract." Ex. 8, Order No. PSC-95-0210-FOF-EQ, dkt. no. 940771-EQ. The PSC's observation, with which FPC is in agreement, is inconsistent with the position asserted by plaintiffs in this litigation.

28. Although plaintiffs look to PSC Rule 25-17.0832(4)(b) as supporting their interpretation of § 9.1.2, that rule provides them no support. Plaintiffs contend that § 9.1.2 is substantially similar to the language of the rule and that the rule requires full scale modeling. Their reasoning is incorrect.

a. First, as the PSC has declared and as plaintiffs acknowledge, the rule applies to standard offer contracts, not negotiated contracts like the one here between FPC and Dade. [Ex. 5, Shanker Dep. p. 130, ln 3 - ln 10; Order No. PSC-95-0210-FOF-EQ, dkt. no. 940771-EQ at 8].

b. Second, despite plaintiffs' contention to the contrary, the rule does not require full-scale modeling, as demonstrated by the historical record.

(1) Prior to rule 25-17.0832(4)(b)'s amendment in 1990 -- just before the execution of the FPC/Dade contract -- avoided unit energy payments to cogens were calculated pursuant to a methodology most commonly referred to as the "lesser of" approach. The "lesser of" methodology required the utility to compare the "firm energy cost" to the "as-available energy cost" and simply pay the cogen the lesser of the two prices. [Ex. 3, Nixon Aff. ¶ 12; Ex. 5, Shanker Dep. p. 112, ln 6 - p. 113, ln

12]. Thus, the rule required utilities such as FPC to pay cogens Energy Cost rates in accordance with an artificial cost comparision -- without a computer simulation of whether the avoided unit would or would not have operated. Dade's corporate representative has conceded this fact. [Ex. 5, Shanker p. 112, ln 6 - 113, ln. 10].

(2) In 1990, this rule was amended to read (in pertinent part) as follows:

> To the extent that the avoided unit would have been operated, had the unit been installed, avoided energy costs associated with the firm energy cost shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, avoided energy costs shall be the as-available energy cost of each purchasing utility . . . .

Florida Administrative Code, 25-17.0832(4)(b).

(3) In 1989-90, the PSC held informal hearings to consider whether to approve an amendment suggested by staff to rule 25-17.0832(4)(b). At those hearings, a number of the Commissioners were concerned that the proposed amended rule appeared to require fully characterized modeling of the avoided unit leaving open numerous terms and much room for dispute. E.g., Ex. 9, PSC Docket No. 891049-EU; Hearing Transcript, Rule Hearing Vol. IV, p. 444-445. [Transcript Vol. IV p. 441-578]. John Seelke, FPC's then-Manager of Cogeneration Contracts and Administration, responded to these concerns by stating that the amendment

to the rule did not change its essential character and that complex characterization 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 . . . to 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 whatnot. 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.

[Ex. 9, Hearing Transcript Vol. IV p. 463] Indeed, Mr. Seelke unequivocally confirmed the growing consensus of participants at the hearing that the new proposed rule was substantially the same as the "lesser of" approach. [See Nixon Aff. ¶ 14-15]. This consensus is reflected in the following exchange between Commissioner Easley and Mr. Seelke:

Commissioner Easley:	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.
John Seelke:	Right, exactly.

[Ex. 9, Hearing Transcript Vol. IV p. 463-464].[4]

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[4] Mr. Seelke's employment with FPC was subsequently terminated, and over the six years since then (and beginning immediately thereafter), he has spent 80 percent of his time consulting with cogens, including in disputes with FPC. [See Ex. 7, Seelke Dep. p. 717 n. 2 - 721 ln. 18 and p. 724 ln. 15 - 725 ln. 13]. Mr. Seelke now asserts that fully characterized modeling is necessary to determine whether the avoided unit would be on or off and has recanted the sworn testimony he gave before the PSC. He attempts to explain away his testimony by contending that he corrected himself in FPC's post-hearing comments. FPC's post-hearing comments shows no such correction. To the contrary, they merely reiterate

29. Hence, PSC Rule 25-17.0832(4)(b) does not require full-scale modeling of the "avoided unit" and FPC's implementation of § 9.1.2 is consistent with the rule.

If Accepted, Plaintiffs' Position -- That the Contract Does Not Provide a Methodology for Determining When the Avoided Unit Would or Would Not Be Operating -- Results in an Unenforceable Contract

30. In addition, if, as plaintiffs suggest, important characteristics for determining the payment rates are missing from the express contract terms, then the parties' agreement must fail for indefiniteness. This is because no single set of "other characteristics" associated with the unit was agreed upon from among the large array of other proxy characteristics; nor were any values agreed upon for these other, unidentified characteristics. [Ex. 4, Schuster Aff. ¶ 15; Ex. 5, Shanker Dep. p. 43, ln. 10-16].

31. Plaintiffs' position is untenable. This contract is one of several contracts between FPC and various cogens, each of which contains identical versions of § 9.1.2. Each of the cogen contracts was negotiated between sophisticated commercial entities, with legal counsel. The contracts involve hundreds of millions of dollars and extend over twenty or thirty year periods of time. In these circumstances, with millions of dollars at stake, it is inconceivable

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FPC's position that the cost comparison necessary under the new language came closer to the "true avoided firm energy cost," than the former "lesser of" cost comparison. See Ex. 11, FPC's Post Hearing Comments, Docket No. 891049-EQ, Feb. 8, 1990, p. 7. And, of course, Mr. Seelke's current position is directly contrary to the unambiguous language of the contract that he drafted.

that the parties would have left unsettled (and hence for future identification and determination) unit characteristics and their values that may have a critical impact on the amount of payments made by FPC to the cogenerators for the electricity purchased and sold.

32. Plaintiffs' construction of the contract requires this court to find that the parties left a gaping hole in § 9.1.2 -- one that impacts one of the contract's most critical terms the energy payment term. It thus requires this court, or a trier of fact, to go back to a frozen moment in time in 1991, find a "unit" which was never built, and figure out precisely what characteristics (and their values) must be incorporated into a "fully characterized 1991 pulverized coal unit" -- something Plaintiffs concede they are independently incapable of doing themselves. [Ex. 5, Shanker Dep. p. 43, ln. 10-16]. Tellingly, the contract says nothing of the sort. [See Ex. 4, Schuster Aff. ¶ 11-15].

33. Under fundamental rules of contract construction, the Court must avoid, if possible, construing the contract in such a way that would lead to the conclusion that the parties never finished negotiating their deal, for if that were the Court's conclusion, a finding that the contract is void for indefiniteness would be required. See, e.g., Spanish Broadcasting System of Florida, Inc. v. Alfonso, 689 So. 2d 1092 (Fla. 3d DCA 1997); The Gables I Townhomes, Inc. v. Sunmark Restoration, Inc., 687 So. 2d 6 (Fla. 3d DCA 1997); John Alden Life Ins. Co. v. Benefits Management Associates, 675 So. 2d 188 (Fla. 3d DCA 1996); Martin v. Jack Yanks Construction, 650 So. 2d 120 (Fla. 3d DCA 1995); Metropolitan Dade

County v. Estate of Hernandez, 591 So. 2d 1124 (Fla. 3d DCA 1990); Bee Line Air Transport, Inc. v. Dodd, 496 So. 2d 874 (Fla. 3d DCA 1986); Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses, Inc., 125 So. 2d 963 (Fla. 3d DCA 1961); Jacksonville Port Auth. v. W.R. Johnson Enterprises, Inc., 624 So. 2d 313 (Fla. 1st DCA 1993).

34. The Court need not reach that conclusion here. Rather, based on the contract itself, the court must conclude that the characteristics and values expressly set forth therein -- and only those characteristics and values -- are the characteristics the parties intended to use in administering the contract. Accordingly, FPC is entitled to summary judgment on plaintiffs' breach of contract and declaratory judgment claims.

35. It remains only to note that FPC is aware of, and disagrees with the reasoning expressed in the opinion of the Lake County circuit court of the Fifth Judicial Circuit in entering a partial summary judgment in a case brought by another QF, Lake Cogen, Ltd., against FPC. (A copy of that order is attached hereto as Exhibit 10). The court in the Lake Cogen case ruled 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." (Ex. 10 at p. 2). With that portion of the order, FPC agrees. However, the court went on to hold that the contract unambiguously required FPC to simulate characteristics not specified in the contract that a "real" unit might have in making a determination

whether the avoided unit would be on or off. Id. With that portion of the order, FPC respectfully disagrees, for the following reasons:

a. As stated above, the avoided unit is clearly specified in the contract; as a unit never built or designed, it is necessarily hypothetical and must be represented by proxy characteristics set forth in the parties' contract. It simply is not a real unit as plaintiffs would have it, but a creature of contract. [Ex. 4, Schuster Aff. ¶ 11-15].

b. Section 9.1.2 specifically lists the proxy characteristics of the avoided unit that FPC must use to determine those hours when payments will be based on the Firm Energy cost or the As-Available Energy cost, and the values assigned to each of these characteristics is specifically set forth in Appendix C to the contract, in Schedules 3 and 4.

c. To the extent the court in the Lake Cogen case has required FPC to take into account additional characteristics that would be required by law to be installed in a "real" unit, as well as "all other characteristics associated with such a unit," the court has impermissibly rewritten the contract.

d. Moreover, while the Lake court believed, however erroneously, that additional characteristics needed to be supplied, it nowhere identified what those characterists were, what values would be applied to them, or where and how those values were to be determined. This is not surprising since there is a vast array of other proxy characteristics that could be associated with an avoided unit -- none of which were agreed upon by the parties. Moreover, the value for a

particular "other characteristic" is not static; rather, it is subject to continual determination over the life cycle of the unit. This value likewise was not agreed upon by the parties. [Ex. 4, Schuster Aff. ¶ 15]. Thus, if the Lake Court's construction of the contract is correct, then the contract fails for indefiniteness, as discussed above.

36. In short, FPC respectfully suggests that the court in the Lake Cogen litigation erred in determining that the contract imposed a "real unit" on the parties that is not described in the contract.

FPC Did Not Violate Contract's Good Faith Requirement By the Way it Transported Coal to Crystal Rivers 1 & 2

37. Under § 9.1.2 of the contract, one of the contractually specified characteristics used to calculate the Firm Energy rate is the cost of delivered coal to two of FPC's existing coal plants, Crystal River 1 & 2 ("CR 1 & 2"). The delivered price of coal at CR 1 & 2 is impacted by the type of transportation used to bring the coal from the mine to these two power plants. Generally, transportation of coal by barge is more expensive than transportation by rail due to a variety of factors.

38. In Count III, plaintiffs contend that FPC is locked into the transportation mix it used at the time the contract was executed and that FPC cannot take advantage of changes in the economy that make the cost of delivering coal to CR 1 & 2 by rail lower than delivering coal to CR 1 & 2 by barge. They complain that FPC's use of rail transportation to CR 1 & 2 is a "manipulation" of

the delivered coal price and part of an elaborate scheme devised by FPC to damage the cogens. [Amended Complaint ¶ 30].

39. Plaintiffs' argument ignores the contract, and this cannot stand as a matter of law. Neither § 9.1.2 nor any other section of the contract specifies that FPC is required to use a particular method of transportation in delivering coal to CR 1 & 2. The contract is entirely silent on the subject, as even John Seelke acknowledged in the following exchange:

> Q. Would you agree that the contract is completely silent on the method of coal transportation to Crystal River 1 and 2?
>
> A. Yes.
>
> Q. It just speaks to the delivered price of coal at Crystal River 1 and 2, but it doesn't say anything about the method of delivering and it doesn't say anything about the mix between barge and rale; correct?
>
> A. Correct.
>
> * * *
>
> Q. Now, isn't it true, Mr. Seelke, that if Florida Power can transport coal to Crystal River 1 and 2 more cheaply than it was able to historically by altering the mix of barge and rail and save the ratepayers some money, there is nothing in the contract that prevents it from doing that?
>
> A. If it can alter the price of fuel delivered to Crystal River 1 and 2 to save the ratepayers money?
>
> Q. Right.
>
> A. No. There's nothing in the contract that would prevent that.

[Ex. 7, Seelke Dep. p. 933 ln. 17 - p. 934 ln. 22].

40. It is well settled under Florida law that no breach of a contract's implied covenant of good faith and fair dealing can occur unless plaintiffs can point to some provision in the contract which speaks to the issue in dispute. Barnes v.

Burger King Corp., 932 F. Supp. 1420 (S.D. Fla. 1996); Anthony Distributors, Inc. v. Miller Brewing Co., Burger King v. Holder, 844 F. Supp. 1528 (S.D. Fla. 1993); 941 F. Supp. 1567 (M.D. Fla. 1996); Burger King Corp. v. Weaver, Case No. 90-2191-Civ-Marcus (S.D. Fla. Sept. 18, 1995). Here, it is uncontroverted that plaintiffs' cannot point to a provision which discusses coal transportation -- let alone one that imposes limitations on the transportation methods to be used. Accordingly, FPC is entitled to summary judgment on this point as well.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed on this 8th day of August, 1997, to **James D. Wing, Esq.**, Holland & Knight, 701 Brickell Ave., 30th Floor (33131), Post Office Box 015441, Miami, Florida 33101 and **Robert Scheffel Wright, Esq.**, Landers & Parsons, 310 West College Avenue (32301), Post Office Box 271, Tallahassee, Florida 32302, Counsel for MONTENAY POWER CORP., and MONTENAY-DADE, LTD.; and, **Robert A. Ginsburg, Esq.**, and **Gail P. Fels, Esq.**, County Attorney's Office, Aviation Division, Miami International Airport, Post Office Box 592075 AMF, Miami, Florida 33159, Counsel for METROPOLITAN DADE COUNTY.

Attorney

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY,
FLORIDA

CASE NO. 96-09598 (CA22)

METROPOLITAN DADE COUNTY,
a political subdivision of
the State of Florida, and
MONTENAY POWER CORP., a
Florida corporation, as
General Partner of MONTENAY-
DADE, LTD., a Florida limited
partnership,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.
_____/

ORDER DENYING PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

This case came before the Court on the Plaintiffs' Motion For Summary Judgment on Liability on Counts I and II of Plaintiffs' Amended Complaint ("Plaintiffs' Motion For Summary Judgment"), and Counts I and II of Defendants' Counterclaim, and on Defendant's Motion For Summary Judgment on Counts I, II, and III of Plaintiffs' Amended Complaint and Counts I and II of Defendants' Counterclaim ("Defendant's Motion For Summary Judgment"). The parties submitted motions, memoranda of law, and exhibits in support of their motions. The Court having heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. Plaintiffs' Motion For Summary Judgment is DENIED.

[Remainder of page intentionally left blank]

2. Defendant's Motion For Summary Judgment is DENIED.

DONE and ORDERED this 19th day of Sept, 1997, in Chambers at Miami, Florida.

Circuit Court Judge

cc: Counsel of record