ORIGINAL

Florida Power
CORPORATION

JAMES A. McGEE
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May 18, 1998

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 980509-EQ

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of Florida Power Corporation's Response in Opposition to Lake Cogen, Ltd.'s Motion to Dismiss.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee

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CERTIFICATE OF SERVICE

Docket No. 990509-EQ

I HEREBY CERTIFY that a true copy of Florida Power Corporation's Response in Opposition to Lake Cogen, Ltd.'s Motion to Dismiss has been furnished to the following individuals by hand or express delivery(*), facsimile(**), or by U.S. Mail this 18th day of May, 1998:

Robert Scheffel Wright, Esquire
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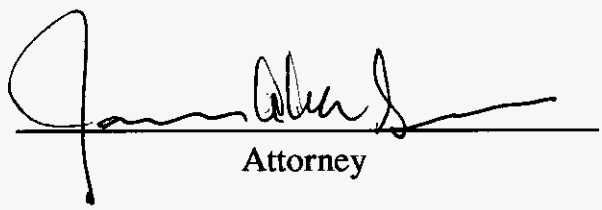

Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Petition of Florida Power Corporation for declaratory statement that Commission's approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Lake Cogen, Ltd., in Order No. 24734, together with Order No. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, establish that energy payments thereunder, including when Firm or As-Available payments are due, are limited to analysis of avoided costs based upon Avoided Unit's contractually-specified characteristics.

Docket No. 980509-EQ

Submitted for filing:
May 19, 1998

FLORIDA POWER CORPORATION'S
RESPONSE IN OPPOSITION TO
LAKE COGEN, LTD.'S MOTION TO DISMISS

Florida Power Corporation ("Florida Power" or "FPC") hereby submits its response in opposition to the motion to dismiss Florida Power's Petition for Declaratory Statement filed by Lake Cogen, Ltd. (Lake).

INTRODUCTION

By its Petition, Florida Power seeks to have the Commission exercise its authority and responsibility to interpret and clarify Order No. 24734 (the "Order") approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between FPC and Lake (the "Contract"). Lake's Motion to Dismiss demands from the Commission an abdication of that authority and responsibility. The Motion should be denied.

The Commission plainly has the authority to interpret and clarify its rules and orders approving negotiated cogeneration contracts under the Public Utilities Regulatory Policy Act ("PURPA") and Florida law implementing PURPA (Fla. Stat. § 366.051, and Rules

25-17.080-.091).[1] It has done so with respect to a variety of issues over the years. See In re: Implementation of Rules 25-17.080 through 25-17.091, Docket No. 910603-EQ, Order No. 25668, Feb. 3, 1992. Other state regulatory commissions have recognized such authority as well. See e.g., Orange and Rockland Utilities, Inc. - Petition for a Declaratory Ruling that the Company and its Ratepayers are not Required to Pay for Electricity Generated by a Gas Turbine Owned by Crossroads Cogeneration Corp., 1996 N.Y. PUC LEXIS 674 (New York PSC, Case 96-E-0728, Nov. 29, 1996) (Crossroads).

This authority exists because the Commission alone has the responsibility under PURPA to ensure that electric utility customers pay no more than the utility's avoided cost for cogenerated electrical power. 16 U.S.C. §824a-3(f); Rule 25-17.0832(2). Accordingly, Commission approval of such contracts is required before payments to the cogenerators under the contracts are passed on to the utility's customers. Rule 25-17.0832(2) and (8). Commission approval of a cogeneration contract, and its subsequent orders in fuel adjustment proceedings permitting a pass-through of the utility's payments to its customers, signifies that the payments do not exceed the utility's avoided cost. Id.

In fact, under PURPA and the concomitant Florida law, the Commission may not approve payments that exceed avoided cost. The Florida Supreme Court recently made that absolutely clear, holding that any approval of a contract payment term that conflicted with the Commission's avoided cost rules would violate PURPA and Fla. Stat. § 366.051. Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 328 (Fla. 1997), cert. denied, __ U.S. __ (1998). Thus, in entering its Order, the Commission had to have determined what the energy payments were under the Contract, because that is the only way it could determine that those payments would not exceed avoided cost.

By its petition, Florida Power asks the Commission to state that it established in its Order that Florida Power's energy payments were strictly limited to the avoided energy

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[1] Reference to the Commission's rules are to those in effect at the time of the Order. Later amendments, however, have not affected the substance of the rules relevant to Florida Power's Petition. Further, all emphasis is supplied unless otherwise noted.

cost reflected in the terms of the Contract.[2] In particular, Florida Power requests a statement from the Commission that it is required, consistent with the Order and the Commission's rules, to use only the avoided unit's contractually-specified characteristics in order to assess the unit's operational status for the purpose of determining when Lake is entitled to receive firm energy payments, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built.

Florida Power's Petition was filed in light of Order No. PSC-97-1437-FOF-EQ entered on Nov. 14, 1997 (the "Lake Order"), where the Commission addressed payment terms of the same Lake Contract. In doing so, the Commission expressly interpreted and clarified the Order, explaining that whether Florida Power's calculation of the energy payments was proper was "inextricably linked to what this Commission approved when it approved the contract." Lake Order at 7. Turning to the Contract's energy payment terms, the Commission declared that "the goal of the contractual language was to ensure that, consistent with Section 210 of PURPA and our cogeneration rules, FPC would not be put in a situation where it would be required to purchase energy at a cost greater than what it could either purchase elsewhere or generate itself," i.e., avoided cost. Id. at 3.

Most importantly, the Commission concluded that "FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract." Id. "As with all avoided cost calculations," the Commission reasoned, the energy payment provision of the Contract "was constructed as a pricing proxy and was not intended to be fully representative of a real operable `bricks-and-mortar' generating unit." Id. The Commission further recognized that Lake's position "clearly exceeds avoided cost." Id. at 5. Accordingly, the Commission then disapproved Florida Power's settlement with Lake precisely because the energy payments

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[2] Florida Power also asks for an interpretation of the Order and the Commission's rules implementing PURPA, as they affect Florida Power's use of the actual chargeout price of coal to FPC's Crystal River Units 1 and 2.

under the settlement agreement departed from what Florida Power was currently paying under the Contract and would have exceeded its avoided cost, which the Commission refused to allow.

Florida Power requests the Commission to interpret and clarify the Order in the same manner here. Its need for such a statement from the Commission is incontestable. Although the Commission's recent interpretation and clarification of the Order in its Lake Order could not be clearer on this point, Lake dismisses the Lake Order as a "nullity." This in itself demonstrates Florida Power's need for a declaration as to the Commission's interpretation of that Order.

Moreover, because of the Commission's disapproval of the settlement, Florida Power is currently in litigation with Lake over the proper calculation of the energy payments under the Contract. Given Lake's claim, Florida Power is entitled to assurance from the Commission that it is complying with the Commission's Order and rules implementing PURPA in calculating its payments to Lake in the manner it has. If, on the other hand, the Commission were to determine that this is not the case, Florida Power could then change the manner in which it is making payments and bring itself in compliance with the Commission's Order, thereby mitigating its litigation risk and potential damages. Florida Power should not have to wait until some later time, as Lake would have it do, to find out whether the Commission believes it has acted in accordance with the Commission's Order.

The Commission has the authority -- indeed, the responsibility -- to issue the requested declaratory statement now. It should not heed Lake's call to abdicate that authority and responsibility.

ARGUMENT

I. Florida Power is entitled to a Declaratory Statement

The Commission's rules provide for a declaratory statement as "a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order." Rule 25-22.021, F.A.C. There can be no doubt that the propriety of the manner in which Florida Power is calculating its energy payments to Lake under the Order, Florida law, and PURPA is of current importance to Florida Power for a number of reasons. Accordingly, Florida Power is entitled to a statement by the Commission at this time that its implementation of the energy payment terms under the Contract is proper under all applicable law.

A statement by the Commission that Florida Power is calculating its energy payments to Lake in an manner consistent with the Order, PURPA, and Florida law implementing PURPA will answer Florida Power's legitimate questions with respect to its current and future administration of the Contract. Florida Power is currently calculating the energy payments on an hourly basis under the Contract's express terms, making monthly energy payments to Lake thereunder, and facing a continuing obligation to make such calculations and payments to Lake for the remainder of the twenty-year term of the Contract. FPC's manner of implementing energy payments under the Contract is at issue and of importance now, thereby justifying an immediate declaration by the Commission of the propriety under the Order of FPC's implementation of the pricing provision of the Contract.

As the Court recognized in Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So. 2d 294, 295 (Fla. 3d DCA 1989), declaratory relief as to the correct interpretation of a license agreement fee abatement provision was proper where the "parties have a continuing relationship under the contract and are entitled to know the provision's meaning." For the same reason, a declaratory statement by the Commission interpreting

and clarifying its Order approving the payment provisions of this Contract is proper under the Commission's rules providing for a declaratory statement.

That is especially so because, as noted earlier, Florida Power and Lake are now in litigation over the manner in which Florida Power is making its energy payments to Lake. Lake claims FPC has breached the Contract by taking the very position with respect to its energy payments that the Commission declared in the Lake Order to be consistent with its Order and required under PURPA. Faced with proceeding at its peril with such litigation, Florida Power is entitled to a declaration by the Commission on the issues presented by its Petition. See Sheldon v. Powell, 128 So. 258, 262 (Fla. 1930) (ruling that declaratory judgments "serve as an instrument of preventive justice, to render practical help in determining issues, and to adjudicate the rights or status of parties, without the peril of committing a crime or resorting to violence or breach to put the legal machinery in motion"). Moreover, as a regulated utility, Florida Power must obtain the Commission's approval of the recovery of the payments made to Lake from its ratepayers. Rule 25-17.0832(8), F.A.C. As a result of the conflict between (I) the Lake's interpretation of the Order and the Commission's rules and (ii) the Commission's interpretation of them in the Lake Order, and in view of the ultimate outcome of that proceeding under the Commission's procedural rules, Florida Power has a legitimate need for a declaratory statement regarding the recovery of the payments made to Lake from its ratepayers for the remaining term of the Contract. Simply put, Florida Power needs the Commission to declare that it stands by its interpretation of the Order, as set forth in its Lake Order, even though the Lake Order itself may now be a "nullity." [3]

Indeed, it is in the Commission's interest to resolve this issue at this time by a declaratory statement. If the Commission were to agree with Lake, there would then be

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[3] In any event, it bears emphasis that the Commission's rule provides that a declaratory statement may be sought to establish how the Commission's rules or orders "may apply" to the petitioner. Rule 25 - 22.021, F.A.C. Demonstration of an "immediate" need for the declaratory statement is not required. Rather, all that is required is a showing of a need for the statement because of how the Commission's rules and orders "may apply" to the petitioner.

a concomitant need to pass higher costs on to the ratepayers. The later that determination is made, the greater the impact those higher payments will have on the ratepayers. On the other hand, if the Commission were to make that decision now, the impact of those higher payments could be spread out over a longer period of time, thereby ameliorating the impact upon the ratepayers.

Further, Florida Power is entitled to the requested declaratory statement so that it may bring the Commission's view on this issue to the attention of the courts and the trier of fact. As the Florida Supreme Court recognized in Panda and the Commission recognized in its Lake Order, the Commission is obligated under PURPA and Florida law implementing PURPA to assure that the energy payments under the Contract do not exceed avoided cost. Given that statutory responsibility, the Commission's views on the issues presented by Florida Power's Petition are entitled to great deference from the courts. Florida Interexchange Carriers Ass'n v. Beard, 624 So. 2d 248, 250-51 (Fla. 1993) ("An agency's interpretation of a statute it is charged with enforcing is entitled to great deference. ..."); Pan American World Airways, Inc. v. Public Service Comm'n, 427 So. 2d 716, 719 (Fla. 1983) (courts must pay great deference to an agency's interpretation of its own rules, and it "should not be overturned unless clearly erroneous"). Accordingly, the courts and trier of fact should be made aware of the Commission's determination.

Finally, it must be remembered that the result of the position taken by the Commission in the Lake Order was the Commission's disapproval of Florida Power's settlement with Lake. That agreement represented a compromise of the same issues that are now, once again, in dispute in the litigation with Lake. Florida Power had pursued that settlement in part to mitigate risks associated with the litigation with Lake, and those risks have now been revived. Settlements of such disputes are not only a potentially advantageous means for Florida Power and the cogenerators to eliminate litigation risks, they are encouraged as a matter of policy by the Federal Energy Regulatory Commission

("FERC"). See, e.g., West Penn Power Co., 71 FERC ¶ 61,153 at 61,497 (encouraging consensual buy-outs or buy-downs of cogeneration contracts).

As it stands now, however, absent a declaratory statement by the Commission, Florida Power is foreclosed from pursuing further attempts at settlement of the Lake litigation. While this would normally be an option considered by FPC, any settlement of that litigation would necessarily reflect a compromise of the positions taken by Florida Power and Lake in the dispute over the energy payments. The Lake Order precludes this option since the Commission declared there that FPC's proposed compromise was unwarranted and would not be approved precisely because the payments Florida Power is currently making are "consistent with this Commission's order approving the contract and more closely approximates avoided cost." Lake Order at 5.

It obviously would be unfair for the Commission to deny Florida Power the option of settling its dispute with Lake and force it to proceed with the risks of litigation, but nevertheless refuse to state formally what "rates, terms and other conditions of the contract" the Commission intended to approve as consistent with FPC's "full avoided costs" when the Commission approved the Contract as "prudent" for "cost recovery purposes." Rule 25-17.0832(2), F.A.C. Since the Lake settlement proceeding was mooted before there was a final determination by the Commission of this issue, the presently requested declaratory statement is required.

For all of these reasons, Florida Power has a legitimate need for the declaratory statement to "answer[] [its] questions" in view of the Commission's recent clarification of its Order and to potentially "resolv[e] a controversy" with respect to Florida Power's energy payment obligation under the Commission's Order approving the Contract. Rule 25-22.021; Mental Health District Board v. Florida Dept. of Health and Rehabilitative Services, 425 So. 2d 160, 162 (Fla. 1st DCA 1983) (affirming declaratory statement that particular statutory provision applied to petitioner, even though the statement had implications for the relationship between the petitioner and another entity); Regal

Kitchens, Inc. v. Florida Dept. of Revenue, 641 So. 2d, 163-64 (Fla. 1st DCA, 1994) (upholding portions of declaratory statement addressed to application of exemption from taxation to transactions between the petitioner and an affiliated general partnership); In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corp., Order No. PSC-98-0449-FOF-EI, at 3-4 (granting FPC a declaratory statement with respect to master metering at two condominiums, even though it could be applicable to other condominiums as well).

II. The Commission has jurisdiction to issue the statement sought in Florida Power's Petition for Declaratory Statement.

A. The Commission has jurisdiction to interpret and clarify its rules and orders implementing PURPA.

The Commission approved the Contract in the Order, along with seven other negotiated contracts. The Commission thereby carried out its statutory and regulatory obligations to implement PURPA's dual objectives (1) to encourage the development of cogeneration and small power production (2) at rates that are "just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. §824a-3(a) and (b); Fla. Stat. § 366.051; and Rule 25-17.0832, F.A.C.

By definition, under PURPA and Florida law implementing PURPA, rates are "just and reasonable" to the consumer when they do not exceed the utility's full avoided cost. 16 U.S.C. §824a-3(b) and (d); Fla. Stat. § 366.051; Rule 25-17.0832. It follows that the Commission necessarily determined in the Order that the energy payments to be made to Lake under the Contract did not exceed Florida Power's avoided cost. To do that, of course, the Commission had to determine what those payments would be.

The Commission's rules implementing PURPA authorize and govern the negotiation of contracts for the purchase of energy from cogenerators. See Rules 25-17.080 - 25-17.091, F.A.C. Among other things, the rules specify how to determine capacity and energy payments. See Rules 25-17.082, .0825, .0832, F.A.C. Further, the rules specifically provide for Commission review of such contracts and for a determination by

the Commission whether those contracts are "prudent." Rule 25-17.0832, F.A.C. In this regard, the Commission's rules provide that "[f]irm energy and capacity payments made to a qualifying facility [`QF'] pursuant to a separately negotiated contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs if the contract is found to be prudent . . . ." Rule 25-17.0832(8)(a), F.A.C.

Negotiated contracts are considered "prudent" for cost recovery by the Commission when "it is demonstrated that the purchase of firm capacity and energy from the [QF] pursuant to the rates, terms and other conditions of the contract can reasonably be expected to contribute to the deferral or avoidance of additional capacity construction . . . at a cost to the utility's ratepayers which does not exceed full avoided costs . . ." Rule 25-17.0832(2), F.A.C. In determining if the contract is "prudent," the Commission considers "factors relating to the contract that would impact the utility's general body of retail . . . customers," the first of which is the determination that the payments for firm capacity and energy under the contract do not exceed the value of the construction and operation of the avoided unit over the term of the contract, "calculated in accordance with" Rule 25-17.0832(4) and (5). Rule 25-17.0832, F.A.C. Of course, Rule 25-17.0832(4) addresses the Avoided Energy Payments, specifying in subpart (b) the calculation of those payments.

In this connection, the Commission has specifically held that the approval of a negotiated contract includes approval of "the terms and conditions" of that contract and, particularly, approval of "the firm capacity and energy prices stated therein." In re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Order No. 25668, issued February 3, 1992 in Docket No. 910603-EQ, p. 10. Moreover, that approval "constitutes a determination that any payments made to a QF under the contract" are "reasonable and prudent." Id. at 10. Because public utilities are authorized to recover from their ratepayers the cost of payments made to QFs pursuant to contracts approved by the Commission, the Commission is necessarily concerned to ensure that the costs thus passed

through to ratepayers do not exceed avoided cost and thus are, in fact, fair and prudent. By its Petition, Florida Power seeks a declaration that it has properly calculated the energy payments in accordance with the Commission's determination of avoided cost under the Order approving the Contract and hence that it is and will be entitled to recover them from its ratepayers through its fuel adjustment charges. Florida Power's request concerns the meaning of a provision that goes to the core concern of the Commission; namely, the magnitude of the rates that Florida Power must pay Lake for purchased power and that FPC therefore will be allowed to recover from its ratepayers through the fuel adjustment clause. Jurisdiction exists to issue a declaratory statement with respect to that core concern.

B. New developments in the law confirm the Commission's recent view that it has the authority to interpret and clarify its Order and its PURPA rules.

The Commission has repeatedly exercised jurisdiction to review and interpret provisions of standard offer cogeneration contracts, including In re Panda-Kathleen, L.P., Order No. PSC 96-0671-FOF-EI.[4] On the other hand, it initially declined to exercise that same jurisdiction over negotiated contracts. E.g., Order No. PSC-95-0210-FOF-EQ. In affirming the Commission's order in Panda, however, the Florida Supreme Court drew no such distinction and instead, by its reasoning, made clear that the Commission has jurisdiction to interpret its orders and construe its PURPA rules to ensure that payments under its approved contracts do not exceed the utility's avoided cost.

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[4] See also In re: Petition for Approval of Contract for the Purchase of Firm Capacity and Energy Between General Peat Resources, L.P., and Florida Power and Light Company, Docket No. 9309277-EQ; In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991 in Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest, Order No. 24729, issued July 1, 1991 in Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989 in Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990 in Docket No. 900277-EQ.

In Panda, the Court affirmed this Commission's power to resolve a conflict concerning the terms of a cogeneration contract that incorporated the Commission's PURPA rules. Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), cert. denied, _ U.S. __ (1998). The Court expressly agreed with this Commission that denial of its jurisdiction to resolve that conflict would "render the Commission powerless ... to fulfill its obligation under both federal and state statutes to limit capacity payments [there] to avoided cost." Id. at 327. As the Court pointed out, approval of a contract term at odds with the Commission's rule as to avoided cost "would have violated PURPA" and Fla. Stat. §366.051 because they permit cogenerators to "sell energy to [utilities] at but not exceeding full avoided cost." Id. at 328.

The Panda Court further explained that a decision denying the Commission the jurisdiction to resolve that dispute would be contrary to "the federal and state legislative enactments as well as the judicial decisions applying the statutes." Id. at 327. That regulatory scheme requires state commissions to implement PURPA by, "among other things, an undertaking to resolve disputes between [QFs] and electric utilities arising under [PURPA]." FERC v. Mississippi, 456 U.S. 742, 760, (1982), quoting 18 C.F.R. §292.401(a) (1980). As the United States Supreme Court explained in FERC, "[d]ispute resolution of this kind" was the very type of activity customarily engaged in by state regulatory commissions. Id. Consistent with the teachings of FERC, the Panda Court concluded that the regulatory scheme under PURPA "clearly contemplate[d] that the Commission shall bear the responsibility of resolving" issues regarding what its rules implementing PURPA mean. Id. at 327.

As Panda makes clear, the Commission has a responsibility to resolve issues implicating its avoided cost determination under PURPA through its approval of the Contract. That is all Florida Power has asked the Commission to do by this Petition.

Recent decisions by other state regulatory bodies have likewise made clear that the Commission would be acting well within its authority to issue the requested declaratory

statement. In Crossroads, for example, the New York Public Service Commission declared that it had jurisdiction to interpret and clarify its past policies and approvals of negotiated cogeneration contracts. In the Lake settlement docket, the Commission Staff and the Commission both relied on Crossroads and other decisions of the New York Commission in concluding that the Commission's jurisdiction with respect to negotiated QF contracts was broader than it previously had believed it to be. Lake Order at 6-7, quoting Crossroads.[5]

As the Commission recognized in its Lake Order, these authorities all involved "a question that turns on what was meant when the contract was approved." Lake Order at 8. That question "is inextricably linked to what the Commission approved." Id. at 7. Therefore, "resolution of the energy pricing issue turn[ed] on what the contract meant at the time it was approved." Id. at 8. This determination, the Commission concluded, is "within the Commission's jurisdiction." Id.

The same is equally true here. Florida Power's Petition seeks a declaration by the Commission that "turns on what the [Contract] meant at the time it was approved." Florida Power needs to know whether its current payments to Lake are in accordance with what the Commission determined, at the time the Contract was approved. Under the Commission's reasoning in the Lake Order, this determination is within the Commission's exclusive jurisdiction.

The Commission explained in the Lake Order that, "where cost recovery review finds that a utility is requesting recovery of QF payments that exceed its full avoided costs, those costs are subject to disallowance" and, further, "this Commission is not required, based on a circuit court's decision, to approve recovery of QF payments that are in excess of a utility's avoided cost." Lake Order at 9, 5. Florida Power must, of

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[5] See also, Indeck-Yerkes Energy Services, Inc. v. Public Service Comm'n of New York, 1994 WL 62394 (S.D.N.Y. 1994) (commission order "clarifying" that prior order approving the cogeneration contract was subject to the utility's site-certainty policy); In re Niagra Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C. March 26, 1996) (commission held its order approving the cogeneration contract required strict compliance with the output limitations set forth in that order).

course, return to the Commission in fuel adjustment hearings to obtain approval to pass along to its customers the payments it has made to Lake. Since the Commission must make that determination, as the Commission noted in the Lake Order, it must have the power to do so. It certainly can exercise that power and make that determination now. Indeed, the Commission has every interest and every right to determine this issue now.

The Commission determined in the Lake Order that its initial approval of the Contract "recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed" and that "FPC's modeling of the avoided unit is consistent with" the Order and, thus, with its avoided cost. Id. at 5. The Commission reasoned that the energy payment terms were a "pricing proxy" and were "not intended to be fully representative of a real operable `bricks-and-mortar' unit." Id. at 3. Conversely, the Commission concluded that Lake's calculation of those payments "clearly exceed[ed] avoided cost." Id. Florida Power simply requests the Commission to issue a statement declaring that it is currently making payments to Lake in accordance with its avoided cost, as that cost was understood by the Commission at the time the Contract was approved. The Commission plainly has jurisdiction to issue that statement.

III. Lake's Motion to Dismiss fails to raise any ground that requires dismissal of Florida Power's Petition.

Lake asserts in its Motion to Dismiss that the Commission does not have jurisdiction to grant Florida Power's Petition and that they are correct on the merits of that Petition. Drawing on those assumptions, Lake proceeds to attack the Petition on several grounds. None supports its contention that the Commission lacks jurisdiction to resolve Florida Power's Petition at this time. Each argument is addressed in turn below.

1. Based on the Commission's prior ruling in Order No. PSC-95-0210-FOF-EQ granting motions to dismiss on jurisdictional grounds, Lake contends that Florida Power's Petition is barred by the judicial doctrines of res judicata, collateral estoppel, and

administrative finality. To the contrary, none of these doctrines bars the Commission from exercising jurisdiction here.

At the outset, it is critical to appreciate, as the Lake fails to do, that the Commission's jurisdiction to carry out its statutory duties cannot be thwarted by an uncritical application of the cited doctrines. Rather, the Commission always has the right to determine its jurisdiction, regardless of prior determinations at different points in time. Otherwise, the Commission would be forever foreclosed from exercising jurisdiction lawfully delegated to it, simply because it initially determined, albeit wrongly, that it lacked such jurisdiction. The First District's decision in State Commission on Ethics v. Sullivan, 430 So. 2d 928, 932-33 (Fla. 1st DCA 1983) -- cited by Lake -- demonstrates this very point.[6]

In Sullivan, the First District determined that, as a result of its prior affirmance of the Ethics Commission's denial of the Sullivans' motion to dismiss an administrative proceeding for lack of jurisdiction, the Sullivans were precluded from later challenging that determination in court. However, the Court made clear that its determination was limited and intended only to indicate that the Commission's determination of its jurisdiction "at the particular point in the administrative proceedings at which the Commission denied the Sullivans' motion to dismiss" was "a permissible one." The First District did not suggest that the Commission could not at a later point determine that the Sullivans' alleged offenses were not "cognizable by the Commission under its own

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[6] In the only other cases cited by Lake that involved a jurisdictional determination, the doctrines of res judicata and collateral estoppel were applied to preclude one tribunal from reconsidering the jurisdictional determination of another tribunal; in other words, they applied where one party sought to attack collaterally an adverse judgment in a different forum. See, e.g., Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Assurance Guaranty Ass'n, 455 U.S. 691, 706-07 (1982) (holding that determination by Indiana Rehabilitation Court was entitled to full faith and credit in North Carolina court where it was challenged on jurisdictional grounds); American Surety Co. v. Baldwin, 287 U.S. 156, 166-67 (1932) (giving full faith and credit to Idaho judgment in present suit seeking to enjoin enforcement of the judgment for want of jurisdiction). Florida Power, of course, does not seek by this declaratory statement proceeding to attack collaterally a prior order by the Commission on the ground that the Commission lacked jurisdiction.

interpretation of its constitutional and statutory authority" and that the Commission therefore did not have jurisdiction. Id. at 933, n. 3. See also Weissmann v. Euker, 147 N.Y.S. 2d 101, 105 (N.Y. App. Div. 1955) (current complaint was not barred by prior dismissal on personal jurisdiction grounds because a "decision that it had not jurisdiction is not conclusive between the parties either on the merits of their controversy, or, indeed, on the jurisdictional point itself").

As the First District recognized in Sullivan, administrative agencies like the Commission always have the right to revisit their jurisdiction to ensure that they are carrying out their "constitutional and statutory authority." If that were not the case, the agency's "constitutional and statutory authority" would be unlawfully abrogated in any instance where the Commission had at some point concluded it did not have jurisdiction, however erroneous that conclusion might later be demonstrated to have been. The principles of res judicata and collateral estoppel do not have that effect.

Likewise, the doctrines of res judicata and collateral estoppel have not been applied to bar a later administrative proceeding when that proceeding involves new facts, additional submissions not previously considered by the agency, or changed conditions such as a shift in the concerns addressed by the agency in such proceedings. Thomson v. Dept. of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987) (holding that res judicata did not bar applicant's second application based on "a shift of concern" by the agency that was not previously addressed and additional information from the applicant that was not previously considered); City of Miami Beach v. Prevatt, 97 So. 2d 473, 477 (Fla. 1957) (refusing to apply res judicata to bar consideration of later zoning application because of a prior zoning determination "based upon the facts existing at that time" when the record revealed "changed conditions" at the time of the later proceeding). Because the Commission's concerns have shifted here, due among other things to the development of the law with respect to the Commission's obligations to implement PURPA, these doctrines have no bearing on Florida Power's present Petition. See deCancino v. Eastern

Airlines, Inc., 283 So. 2d 97, 98 (Fla. 1973) (res judicata "will not be invoked where it will work an injustice"); Universal Constr. Co. v. City of Fort Lauderdale, 68 So. 2d 366, 369 (Fla. 1953) (same).

Lake also relies on the doctrine of administrative finality in an attempt to preclude this Commission from determining its jurisdiction over Florida Power's Petition. However, Lake cites no case nor Commission order where this doctrine has been applied to bar the Commission from determining its jurisdiction when it is presented with a new request for the Commission to exercise such jurisdiction.

Quite apart from that fundamental distinction, even in the cases cited by Lake, the courts have cautioned against applying this doctrine in "too doctrinaire" a fashion to agencies like the Commission with "continuing supervisory jurisdiction over the persons and activities regulated." McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996). As the Florida Supreme Court has explained, "the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time" and that, as a result, "such considerations" warn against "inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order." Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966) (recognizing the Commission's inherent power to reconsider orders under its control as a result of any change in circumstance or any demonstrated public need or interest).

This is especially true when arbitrary adherence to a prior determination by the Commission would adversely affect the ratepayers. The Commission always has the inherent power and duty to act to protect the ratepayers. Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So. 2d 249, 253 (Fla. 1982) (holding that the Commission has the inherent power to revisit determinations in prior orders to protect the customer). Their interests cannot be jeopardized in circumstances where the law, as currently and correctly understood, requires the Commission to act.

It is beyond dispute that the law has developed more fully since the Commission initially considered its jurisdiction over issues such as those presented by Florida Power's Petition. In particular, the Florida Supreme Court has now ruled that the Commission has the power to resolve issues under Commission-approved cogeneration contracts to ensure that payments thereunder are limited to avoided cost. Panda, 701 So. 2d at 327. Further, subsequent decisions out of the New York Public Service Commission have directly considered the jurisdiction of public service commissions and the courts with respect to negotiated cogeneration contracts and concluded that the commissions' jurisdiction is broader than it previously believed to exist.

In Crossroads, for example, the New York Commission issued a declaratory ruling concerning a negotiated contract between a utility and cogenerator on the issue of the utility's obligation to purchase additional output under the commission-approved contract. The cogenerator asserted -- just as Lake does in this case -- that the commission lacked jurisdiction to issue the declaratory statement under Freehold Cogeneration Assoc., L.P. v. Board of Regulatory Commissioners, 44 F. 3d 1178 (3d Cir. 1995). The New York Commission, however, granted the declaratory ruling, holding that:

> [i]t is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. The precedents involving interpretations of past policies and approvals, and not the contract non-interference policy that [the cogenerator] cites, control here. As a result, the approval of the original contract for the [cogenerator's] site may be explained and interpreted, and [the utility's] petition may be construed as requesting that relief.

Crossroads, supra.

Lake attempts to distinguish Crossroads on its merits, arguing that the cogenerator was seeking a "new" contract for additional firm energy and capacity not covered by the existing contract. Motion, at 25-27. This misses the point: the cogenerator claimed it was entitled to that relief under its existing commission-approved contract, and the New York Commission correctly determined it had jurisdiction to interpret and to clarify what it had approved.

In light of the recent decisions out of the New York Commission, this Commission recently acknowledged an evolution in its view of its obligations to implement PURPA and it concluded that its jurisdiction with respect to negotiated contracts is not as limited as it originally believed. Lake Order at 5. As a result, this Commission has now acknowledged that it has a responsibility to interpret and clarify its orders approving negotiated cogeneration contracts for cost recovery to ensure that the utility's ratepayers are receiving the benefit due them under those contracts by paying no more than the utility's full avoided cost as determined by the Commission. Id. at 9. The doctrine of administrative finality does not bar the Commission from exercising that responsibility here. To hold otherwise would be an unlawful abrogation of powers delegated to the Commission by PURPA and the Florida Legislature.

Lake finally urges that it would be "unfair" to Lake if the Commission determines it has jurisdiction over the Petition because they have relied on the finality of "the 1995 Dismissal Orders" by expending significant sums in litigation. Motion at 19. Lake ignores, however, the fact that it would be even more unfair to complete the litigation, only to be told at that time that, consistent with the Commission's views in the Lake Order, there will be no cost recovery. It is incontestable that the Commission has exclusive jurisdiction over cost recovery, as it expressly recognized in the Lake Order. Lake Order at 5. Florida Power simply seeks to have that issue determined now by the only body with jurisdiction to do so. Moreover, Lake wholly ignores the unfairness to Florida Power and its ratepayers of being forced to await the conclusion of Lake's litigation before receiving the Commission's declaration as to the amount of payments that will be allowed to be passed through to the ratepayers. As pointed out above, if the payments were to be passed through at the level demanded by Lake, the "hit" upon the ratepayers would be enormous. It is obviously much fairer to them to resolve this issue sooner rather than later.

2. Almost in passing, Lake includes in its Motion a contention that Florida Power's request for a declaration regarding its coal transportation practices to minimize the chargeout price of coal used in calculating Lake's energy payments is also beyond the Commission's jurisdiction. Lake argues that "if"[7] it were to amend its breach of contract complaint to include this coal transportation practice of Florida Power's, "it would simply present another contract dispute between the parties that the courts have exclusive jurisdiction to resolve." Motion at 21.

While Lake may wish to characterize the coal transportation issue, like it attempts to do with the energy pricing issue, as "simply" another contract dispute between the parties, it is considerably more than that. As with the energy pricing issue, the coal transportation issue directly effects the energy payments made to Lake that Florida Power seeks to recover from its ratepayers. Only the Commission, not the courts, can determine whether Florida Power's coal transportation costs reflected in its payments to Lake were prudently incurred and therefore eligible for cost recovery. For the reasons discussed above at pages 5 through 7, Florida Power has a present need to know if prudency considerations require that it continue to follow its disputed coal transportation practices in calculating energy payments to Lake, as the Commission found in the now null Lake Order (at page 3).

3. Lake asserts that the declaratory statement sought by Florida Power constitutes "forum shopping" and a collateral attack on the Lake Court's jurisdiction and its order granting Lake partial summary judgment. Motion at 22 and 23. Neither is true.

Lake's claim of "forum shopping" and collateral attack by Florida Power is based on the on-going litigation with Lake in circuit court. The fact that this proceeding exists, however, does not mean that the Commission does not have jurisdiction to resolve Florida

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[7] This amendment of Lake's complaint is no longer a hypothetical "if". As anticipated in Florida Power's Petition, Lake filed a motion for leave to file an amended complaint on May __, 1998, accompanied by the amended complaint itself, which raised the coal transportation issue. Lake's motion was granted on May 13, 1998.

Power's Petition. Florida Power is a regulated entity and it can recover its payments to Lake from its ratepayers only if this Commission determines those payments are proper under the Order and therefore recoverable through FPC's fuel adjustment clause. It is neither "forum shopping" nor a collateral attack on the Lake Court to ask that a ruling regarding cost recovery be made by the only entity with authority to make it.

Couch v. State, Dept. of Health and Rehabilitation Services, 377 So. 2d 32 (Fla. 1st DCA 1979) -- the only authority cited by Lake with respect to "forum shopping" -- is inapposite. There, the court affirmed a decision by the Department that the petitioner was not entitled to a declaratory statement because the petitioner presented no evidence in support of its petition and admitted that the state court had the "power to finally determine the issues presented to the Department." Id. at 33. That is not this case because the Commission's jurisdiction over cost recovery under its rules implementing PURPA is exclusive. 16 U.S.C. §824a-3(f); Fla. Stat. § 366.051; Rule 25-17.0832. Hence, the Commission has the sole authority to determine what its Order approving the Contract for cost recovery means; as the Commission explained in the Lake Order, it "is not required, based on a circuit court's decision, to approve recovery of QF payments that are in excess of a utility's avoided cost." Lake Order at 5. Thus, Florida Power is not "forum shopping," as Lake claims, because there is only one forum to which Florida Power can go for a determination regarding cost recovery.

By the same token, the relief sought by Florida Power from this Commission is not a collateral attack on either the Lake Court's jurisdiction or its order granting partial summary judgment. The Lake Court has no jurisdiction to determine the amount of energy payments made to Lake that Florida Power is entitled to recover from its ratepayers. That jurisdiction lies with the Commission exclusively. It follows, then, that Florida Power's Petition to invoke the Commission's jurisdiction cannot possibly constitute an attack, collateral or otherwise, on jurisdiction that the Lake Court does not have. It also follows that the Court's partial summary judgment order did not, and could

not, adjudicate Florida Power's rights to recover from its ratepayers the energy payments made to Lake under the Contract. Florida Power's request for such an adjudication by the Commission, therefore, is not a collateral attack on the Lake Court's order.

4. Lake claims that the Lake Order is a nullity and therefore "legally irrelevant" to Florida Power's Petition. That is all the more reason why FPC is entitled to the requested declaratory statement in order to know whether the Commission intends to stand by its determination there, even though the issue in that case was ultimately mooted.

Moreover, it bears emphasis that the Lake Order was rendered a nullity only after the Commission had disapproved the settlement between Florida Power and Lake based on that order. Thus, the Lake Order was effective for that purpose -- it precluded settlement. As such, it is highly relevant to Florida Power's questions regarding its ability to pursue settlement discussions and to try to reach a settlement with Lake on its claims. No matter how strongly Florida Power believes in its position, FPC must recognize the risk that a jury or judge without expertise about this industry may reach a well-intended but erroneous conclusion. Therefore, Florida Power must pursue settlements with cogenerators when it is advantageous to do so, as it has done in the past with the Commission's approval. The Lake Order is directly relevant to Florida Power's Petition in this regard.

Lake cannot deny that the Lake Order represents the Commission's most recent announcement with respect to the issues presented by Florida Power's Petition. Indeed, Lake recognized the relevance of the reasoning in the Lake Order, despite its null status, when it saw fit to quote extensively from the Order in a different section of its Motion (at 19-20). Moreover, Lake spent several pages attempting to distinguish the cases and authority relied upon by the Commission in that same Order. Motion at 23-27. But these arguments go to the merits of Florida Power's Petition and not to the Commission's

jurisdiction over the Petition which is challenged by Lake's Motion.[8] Because the Lake Order represents the Commission's most recent thoughts and reasoning on the exact issue presented by Florida Power's Petition, but is dismissed by Lake as merely a "nullity," Florida Power has an obvious need for a declaration from the Commission regarding its interpretation of the Order in order to resolve the current controversy over that issue.

CONCLUSION

WHEREFORE, Florida Power Corporation requests that the Commission deny Lake's Motion to Dismiss and issue the statement requested in Florida Power's Petition for Declaratory Statement.

Respectfully submitted,

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[8] Once the merits of its Petition are reached, Florida Power will demonstrate why the Crossroads and Panda decisions are relevant to the merits of its Petition. It is sufficient here to say that just as this Commission has recognized in the Lake Order, Freehold Cogeneration Assoc., L.P. v. Board of Regulatory Commissioners, 44 F. 3d 1178 (3d Cir. 1995), is not the be all and end all that Lake want everyone to believe, just as it was not in Panda. Freehold certainly precludes the Commission from changing its avoided cost determination, but it certainly does not prevent the Commission from saying what that determination in fact was, which is all that is sought by Florida Power's Petition.