

980283

IN THE SUPREME COURT
STATE OF FLORIDA

In re: Petition by Florida Power Corporation for Declaratory Statement That Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy Between FPC and Metropolitan Dade County in Order No. 24734, Together with Orders Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Florida Statute 366.051 and Rule 25-17.082, F.A.C., Establish That Energy Payments Thereunder, Including When Firm or As-Available Payment is due, are Limited to Analysis of Avoided Costs Based Upon Avoided Unit's Contractually Specified Characteristics.

CASE NO. 94,664

FLORIDA POWER CORPORATION,
Petitioner/Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,
Agency/Appellee;

METROPOLITAN DADE COUNTY; MONTENAY-
DADE, LTD.,
Intervenors/Appellees.

REPLY BY APPELLEE LAKE COGEN, LTD.
ON MOTION TO SUPPLEMENT RECORD

Appellee, Lake Cogen, Ltd., in Case No. 94,665, replies to the objection of Florida Power Corporation (FPC) on supplementation of the record as served May 7 and 11, 1999 in both Case No. 94,664 and 94,665.

The appellees, Lake Cogen and Dade/Montenay, in these two cases (94,664 and 94,665) have moved to supplement the record to add six pleadings and one order not included in the clerk's

APP
CAF
CMU
CTR
EAG
LEG
MAS
OPC
RRR
SEC
WAW
OTH

DOCUMENT NUMBER-DATE
06121 MAY 14 88
FPSC-RECORDS/REPORTING

index. These are only a few of the many pleadings and orders which have not been included in the index because the clerk started the index only with the 1998 petitions for declaratory statement instead of starting the index earlier with the Commission's 1991 contract approval order which was superficially the subject of most of FPC's arguments. A copy of the clerk's index is attached but the clerk has not yet filed the record with this Court.

FPC now argues that the pleadings and order are not in the clerk's index and were not before the Commission. Florida Power Corporation is in serious error because all of the early pleadings and all of the early orders below were properly before the Commission and therefore are part of the appellate record. FPC's major argument in this appeal is that the Commission erred in refusing to interpret its prior July 1, 1991 contract approval order on several cogeneration contracts. This 1991 order and a later Proposed Agency Action order of November 14, 1997 were repeatedly argued before the Commission and are repeatedly argued in FPC's briefs before this Court. These two orders are included in FPC's appendix, but the orders are not in the clerk's index. The clerk started the index only with the current FPC 1998 petitions for declaratory statement. The Commission held its own November 14, 1997 Proposed Agency Action order to be a legal nullity by its order of March 30, 1998 and that "Nullity Order"

is also not in the record and not in FPC's appendix. FPC has been much less than candid in its briefs before this Court concerning this March 30, 1998 Nullity Order. It appears that FPC has attempted to hide the existence of this order and that FPC is now attempting to prevent this March 30, 1998 order from being brought to this Court's attention by objecting to the motion to supplement the record.

Pleadings and Orders Are Part of the Record

Every pleading beginning with the 1991 order by the PSC in this controversy is appropriately a part of the record. The list of documents in Section 120.57, Florida Statutes (1997) and in Rule of Appellate Procedure 9.190(c)(2) include the agency's pleadings and orders plus all other "matters officially recognized" by the Agency. Without question, the Commission recognized all of the pleadings which had been filed over the years in this contract pricing controversy and the Commission certainly recognized its own prior orders. The FPC briefs in the Dade/Montenay matter are in serious violation of the rules governing briefs because the briefs make not a single reference to the documents in the record as prepared by the clerk. Instead, FPC relies solely upon its selective appendix which contains several matters which are not in the clerk's record.¹

¹It is not surprising that the clerk began the record with the 1998 petitions because Rule 9.190(c)(2)(c) seems to indicate that as a starting point. However, the subsection also includes "any pleadings filed with the agency" and further incorporates

The motion to supplement the record should be granted. All of the matters attached to the motion are pleadings or orders and should have been indexed by the clerk. The appealed December 4, 1998 orders specifically recognize FPC's two prior 1994 petitions for declaratory statements and further discuss the Commission's previous orders including: (1) The Contract Approval Order of 7/1/91 (2) The Order dismissing the first Petition for Declaratory Statement of 2/15/95 (3) The Proposed Agency Action Order of 11/14/97, and (4) The "nullity order" holding the proposed order to be null and void of 3/30/98. To suggest that these orders and the pleadings on which they are based are not a part of this record is frivolous and also at odds with FPC's appendix in each case before this Court. FPC includes the first three orders but does not include the last order.

Appellant's Position Warrants Striking Appellant's Briefs

In addition, if FPC's position is correct as to the content of the record, then the FPC's briefs should be stricken and the entire appeal dismissed. FPC has relied upon and argued non-record matters such as the Commission's 1991 contract approval order. Appellee, Lake Cogen has not bothered to move to strike FPC's briefs and selective appendix because it was so patently

subsections (c)(2)(A) and (c)(2)(B) when appropriate. It is simply not necessary to introduce pleadings or orders into evidence. They are, by definition, before the Commission.

obvious that the Commission recognized its own orders and the pleadings supporting them.

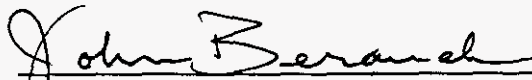
In the alternative, since the clerk of the PSC has yet to transmit the record, this Court may choose to remand to the Commission pursuant to Rule 9.200(f)(1) which provides that the lower tribunal may correct the record before it is transmitted to the appellate court. Subsection (2) of this same rule provides:

If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.

The motion to supplement the record should be granted.

I HEREBY CERTIFY that a copy has been furnished to **ROBERT SCHEFFEL WRIGHT**, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302; **JODI L. CORRIGAN**, **MARILYN E. CULP**, **LISBETH KIRK ROGERS**, Annis, Mitchell, Cockey, Edwards & Roehn, P.A., P.O. Box 3433, Tampa, Florida 33601; **DIRECTOR**, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32349-9850; **DAVID E. SMITH**, Director of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0880; **JAMES D. WING**, 701 Brickell Avenue, 30th Floor, P.O. Box 15441, Miami, Florida 33101; **JOHN R. MARKS, III**, Knowles, Marks & Randolph, P.A., 215 South Monroe Street, Suite 130, Tallahassee, Florida 32301; **RODNEY GADDY**, **JAMES MCGEE**, Florida Power Corporation, Legal Department, P.O. Box 14042, St.

Petersburg, Florida 33733; SYLVIA H. WALBOLT, CHRIS C. COUTROULIS, ROBERT L. CIOTTI, JOSEPH H. LANG, JR., Carlton Fields, 200 Central Avenue, Suite 2300, St. Petersburg, Florida 33701; GAIL P. FELS, Assistant County Attorney, Dade County Aviation Department, P.O. Box 592075 AMF, Miami, Florida 33159; ROBERT D. VANDIVER, RICHARD C. BELLAK, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0850; this 13th day of May, 1999.



JOHN BERANEK, FBN 0005419
L. LEE WILLIS FBN 0135074
Ausley & McMullen
P.O. Box 391
227 S. Calhoun Street (32301)
Tallahassee, Florida 32302
850/224-9115

Attorneys for Intervenor/Appellee
LAKE COGEN, LTD.

h:\data\jrb\pld\lakecogen.reply.664.doc