

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

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

DOCKET NO. 961477-EQ

COPY

BEFORE:

CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA

PROCEEDING:

AGENDA CONFERENCE

ITEM NUMBER:

7**PAA

DATE:

June 24, 1997

PLACE:

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Tallahassee, Florida

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BUREAU OF REPORTING

RECEIVED 7-7-97

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679 | JUL-97

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1 PARTICIPATING:

2 James Fama, Esquire, and Sam Nixon, representing
 3 Florida Power Corporation
 4 Shef Wright, Esquire, representing Lake Cogen,
 Ltd. and NCP Lake Power
 5 Roger Howe, Esquire, representing Office of Public
 Counsel

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7 STAFF RECOMMENDATIONS

8 Issue 1: Can the Commission deny cost recovery of a portion
 of the energy payments made to Lake regardless of the
 outcome of the current litigation?

9 Recommendation: Yes. Jurisdiction over retail cost
 10 recovery is exclusive to this Commission. An adjudication
 of rights between a utility and a qualifying facility by a
 11 court is not dispositive of the utility's authorization to
 recover those costs from the ratepayers.

12 Issue 2: Should the Settlement Agreement between Florida
 Power Corporation and Lake Cogen, Ltd. (Lake) be approved
 for cost recovery?

13 Primary Recommendation: Yes. Approval of the Settlement
 Agreement mitigates the risks associated with the
 14 uncertainty of civil litigation. On balance, because there
 is more monetary risk in rejecting the Settlement Agreement
 15 than approving it, giving at least some intuitive
 recognition to the reduced need for replacement capacity due
 16 to deregulation increases the Settlement Agreement's cost-
 effectiveness, and using traditional regulatory rate base
 17 accounting as the basis to calculate simple payback, the
 contract buy-out should be approved.

18 Alternative Recommendation: No. The proposed Settlement
 Agreement should not be approved because it is not cost-
 19 effective. The modifications to the Contract result in a
 net overpayment of avoided costs of approximately \$17.1
 20 million NPV. Chapter 366.051, Florida Statutes, Section 210
 of PURPA and this Commission's Rules require that QF
 21 payments not exceed a utility's full avoided costs.

22 Second Alternative Recommendation: No. The proposed
 Settlement Agreement should be denied since it cannot be
 shown to be cost-effective. Based on reasonable economic
 23 and legal assumptions, sensitivity analyses indicate that
 the likelihood of the agreement yielding ratepayer losses is
 24 roughly equivalent to the likelihood of it yielding
 ratepayer savings.

25 Issue 3: If approved, how should the settlement payment and
 revised capacity and energy payments pursuant to the

1 Settlement Agreement be recovered from the ratepayers?
2 Recommendation: The energy settlement payment of \$5.5
3 million and the ongoing energy payments made pursuant to the
4 Settlement Agreement should be recovered through the Fuel
5 and Purchased Power Cost Recovery (Fuel) Clause. The
6 capacity payments as determined and paid pursuant to the
7 Settlement Agreement should be recovered through the
8 Capacity Cost Recovery Clause. The recovery of payments
9 made prior to their inclusion for recovery through the
10 adjustment clauses should include interest from the date the
11 payments were made. Should the Settlement Agreement not be
12 approved, any necessary adjustments to the Fuel Clause to
13 reflect the method of pricing energy under the Contract
14 prior to the Settlement Agreement should be made at the next
15 Fuel Adjustment hearing.

16 Issue 4: If the Settlement Agreement is approved, what is
17 the appropriate method for recovering the Special Monthly
18 Payments associated with terminating the contract on
19 December 31, 2009?

20 Recommendation: If the Settlement Agreement is approved, 72
21 percent of the special monthly payments should be recovered
22 through the Capacity Cost Recovery Clause and 28 percent
23 should be recovered through the Fuel and Purchased Power
24 Cost Recovery Clause. This split between the clauses
25 reflects the fact that the payments are justified based on
anticipated capacity and energy savings in the buy-out
years. The recovery of payments made prior to their
inclusion for recovery through the adjustment clauses should
include interest from the date the payments were made.

26 Issue 5: Should this docket be closed?

27 Recommendation: Yes. If no person whose substantial
28 interests are affected by the Commission's proposed agency
29 action files a protest within twenty-one days of the
30 issuance of this order, this docket should be closed.

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PROCEEDINGS

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CHAIRMAN JOHNSON: Item 7.

COMMISSION STAFF: Commissioners, Item Number 7 is FPC's petition for approval of a settlement agreement with Lake Cogen, Ltd. This item is divided into five separate issues. The first issue asks whether or not this Commission can deny cost recovery of a portion of the energy payments regardless of the outcome of the current litigation. The second issue addresses whether or not the settlement agreement should be approved. The third agreement addresses, if approved, how should the settlement agreement and revised capacity and energy payments be recovered. The fourth addresses whether, if approved, how should the buy-out payments be recovered. And the last issue addresses whether or not the docket should be closed.

There is one correction on Page 26, the sixth line of the staff analysis. The recommendation references the year 2005, that date should be 2008. Page 26, the sixth line of the analysis.

Staff is here to answer any questions regarding each of these issues. I believe FPC and probably Lake is here, as well.

CHAIRMAN JOHNSON: Okay. Commissioners, how would you like to proceed? Bob, were you going to run

1 through Issue 1? Is that yours?

2 MR. ELIAS: I can do that.

3 COMMISSIONER CLARK: Is it true that it's
4 virtually the same as the Pasco Cogen?

5 COMMISSION STAFF: With respect to Issues 2, 3, 4,
6 and 5, yes, ma'am.

7 COMMISSIONER CLARK: Okay. Why do we have to vote
8 on Issue 1?

9 MR. ELIAS: We think that if the Commission
10 approves Issue 1, it is not inconsistent with the
11 primary and supports the first and second alternative
12 recommendations on Issue 2.

13 COMMISSIONER CLARK: You haven't answered my
14 question. Why do we have to vote on Issue 1? It's not
15 necessary to the disposition of this case, is it?

16 MR. ELIAS: You can vote on Issues 2 through 5
17 without addressing Issue 1.

18 COMMISSIONER CLARK: I mean, it's implicit in
19 those other issues depending on how you vote. And it
20 has previously been addressed in the order on the
21 declaratory statement.

22 MR. ELIAS: The one that was converted to a 120.57
23 proceeding.

24 COMMISSIONER CLARK: The declaratory statement
25 when we said we didn't have the authority to do this.

1 MR. ELIAS: That was converted to a 120.57
2 proceeding.

3 CHAIRMAN JOHNSON: Let me ask it in a different
4 way just for my edification. What is the purpose of
5 Issue 1?

6 MR. ELIAS: And, again, we think that it is
7 consistent with the first and second alternative on
8 Issue 2, and we think that based on the discussion at
9 the last agenda conference when the Pasco rec was
10 considered, that this point wasn't made clear and that
11 perhaps some Commissioners were uncertain about what
12 their ability was or what the scope of the Commission's
13 jurisdiction was with respect to cost recovery
14 pass-through after a court's decision on a contract.

15 CHAIRMAN JOHNSON: So this is more of an
16 educational -- which I'm fine with that, because -- or
17 I'm fine with discussing it, and perhaps not voting on
18 it, because we have raised some issues here.

19 MR. ELIAS: And I think, too, we could have
20 written an awful lot more on this, and we want to
21 pursue a course of action that will not require this
22 Commission to address what we believe is an
23 inconsistent interpretation by a circuit court.
24 Whether it's through referrals where they are
25 appropriate, whether it's through participation as a

1 party, or an amicus in civil court actions where they
2 are appropriate. We think that -- if I can coin a new
3 term of art -- informed comity, and that is C-O-M-I-T-Y
4 -- is really the best course of action for this
5 Commission to take. We have already brought to
6 Internal Affairs a recommendation concerning this
7 particular contract in the event that this settlement
8 agreement is not approved, and there are several
9 others, both negotiated and standard offer contracts
10 that are in litigation now that we will probably be
11 bringing similar recommendations to Internal Affairs as
12 far as Commission involvement in the circuit court
13 action. But we do not intend to let a court make a
14 decision inconsistent with what we believe the basis
15 for the Commission's initial approval was without
16 actively involving ourselves in that proceeding to
17 advance the ratepayers' and the Commission's interests.

18 CHAIRMAN JOHNSON: Could you explain for me how
19 and on what basis we could deny cost recovery of a
20 portion of energy payments regardless of the outcome of
21 a case?

22 MR. ELIAS: If it is inconsistent with the basis
23 that the Commission initially approved and inconsistent
24 with the statutes with respect to avoided costs, I do
25 not believe that this Commission has any affirmative

1 obligation to pass those costs through to ratepayers.
2 If it is determined by a circuit court that Florida
3 Power Corporation -- well, you said energy payments,
4 that would be as far as the energy payments. But
5 things like attorneys fees, punitive damages, interest,
6 all of those kinds of issues, I think, are
7 appropriately a separate issue for consideration by the
8 Commission when a company seeks cost recovery through
9 the fuel and purchased power costs.

10 CHAIRMAN JOHNSON: Let me ask it in this way. If
11 we determined in that motion to dismiss that the courts
12 had the authority to interpret contracts, and that
13 Provision 9.1.2 dealt with -- and the rule that was
14 referenced dealt with the avoided cost analysis, it
15 appeared to me that in that motion to dismiss we stated
16 that the courts had jurisdiction to interpret contracts
17 and, therefore, the term that they were interpreting,
18 the terms are the avoided cost terms.

19 Now, the Court came out and said avoided cost
20 means firm at all times. You're saying that we could
21 then say, no, the court's interpretation was wrong,
22 and, therefore, we are not going to allow cost recovery
23 because the court's interpretation was wrong? And if
24 we are saying that, why did we send it to the court to
25 interpret in the first place?

1 MR. ELIAS: The first step is the Commission -- if
2 it goes to the court, or when it goes to the court, we
3 intend to participate in whatever way possible to make
4 sure that the appropriate assessment of avoided cost is
5 reached by the court.

6 CHAIRMAN JOHNSON: But what if we disagree?

7 MR. ELIAS: I think that it's an open question. I
8 think if a court says it's X, and at the time the
9 Commission approved the contract the Commission said it
10 was Y, and if that was the basis for the Commission's
11 decision that the ratepayers should pick up the cost,
12 and X is greater than Y, I think the difference is
13 still at issue.

14 CHAIRMAN JOHNSON: Why would we send it -- and I
15 am just trying to better understand this. Why would we
16 send it to the courts? It appears to me that somewhere
17 -- one of these decisions is wrong. Either we
18 shouldn't have send it to the court, because really we
19 are saying we can second-guess the court, or we should
20 have sent it to the court, and if we send it to the
21 court and they determine avoided cost, we can't later
22 say avoided cost is something else. I agree that we
23 have the authority over cost recovery, but when someone
24 else has defined avoided cost, then when we are looking
25 at that for purposes of cost recovery, if that's what

1 avoided cost is, that's what it is as the court has
2 defined it. So I'm getting --

3 MR. ELIAS: And what I think as a first step that
4 we will be before that judge saying this is what we
5 said avoided cost was when we approved it, and here are
6 the orders, and this was the basis that we approved the
7 contract for cost recovery. I don't ever want to get
8 to the issue of having to disagree with a court's
9 interpretation of what avoided cost is, and that's why
10 we are going to vigorously pursue participation in the
11 civil courts.

12 CHAIRMAN JOHNSON: But you think we have the
13 authority to disagree and do something other than what
14 they have said in their --

15 MR. ELIAS: I think you have a statutory mandate
16 to approve costs through the clause that are no more
17 than a utility's avoided cost. And I think that that
18 is an easily defined term in the context of the
19 approval, that when the contract was initially
20 approved, and I think that that's what controls as far
21 as cost recovery.

22 CHAIRMAN JOHNSON: And I just want to be clear on
23 this. So who gets to determine avoided cost, the
24 courts or the Commission?

25 MR. ELIAS: With respect -- as between the two

1 parties?

2 CHAIRMAN JOHNSON: No, as between the jurisdiction
3 of the Commission or the court.

4 MR. ELIAS: Insofar as -- and the reason I asked
5 as between the parties, because we have said that the
6 circuit courts or the civil courts have the authority
7 to interpret those contracts between the parties. And
8 there is a whole raft of issues that with respect to
9 the ratepayers' obligations we are neutral on. You
10 know, we don't really have any kind of interest in
11 determining what the rights are between the respective
12 parties with respect to backup fuel, with respect to
13 whether this particular provision of the contract is
14 met, or a whole host of things. But when it affects
15 the bottom line amount that the ratepayers are going to
16 be asked to pay and that amount is different, i.e.,
17 greater than what was originally contemplated when the
18 contract was approved by this Commission, I think that
19 that increment is a matter of Commission jurisdiction.

20 CHAIRMAN JOHNSON: So in that answer are you
21 saying that the Commission then would have the
22 authority to interpret the contract, determine avoided
23 cost, and then allow or disallow cost recovery?

24 MR. ELIAS: As between the company and the
25 ratepayers, yes.

1 **CHAIRMAN JOHNSON:** And what was your authority for
2 that in this analysis?

3 **MR. ELIAS:** I think that that goes to 366.051,
4 which is the avoided cost statute.

5 **CHAIRMAN JOHNSON:** So, again, I'm getting to the
6 point maybe the court shouldn't be interpreting avoided
7 cost.

8 **COMMISSIONER DEASON:** Let me try to add some
9 perspective to it, at least what my understanding is.
10 As we all recall, there was a big debate as to whether
11 we were going to let the court interpret the contract
12 or not, or at least whether we thought that we had the
13 authority to interpret the contract. And at least
14 there was a great deal of difficulty for me given the
15 fact that we were asked to approve the contract to
16 begin with, but it was determined, and I think
17 rightfully so, that we do not have the jurisdiction to
18 interpret the contract as it relates to the parties
19 involved in the contract.

20 It would be similar to whether if Florida Power
21 entered into a contract with some independent third
22 party to supply them, you know, office supplies, and we
23 said, no, you're paying too much, we are going to void
24 this contract. We don't have the authority to void the
25 contract between those two parties. If Florida Power

1 entered into the contract and another party signed the
2 contract, that's between those, and if there is a
3 dispute in that contract, it doesn't come to us, it
4 goes to a court. And that's what we said applied here.

5 But I think this Commission has a long history of
6 always jealously guarding our jurisdiction, what is
7 clearly our jurisdiction, and that is to set just,
8 fair, and reasonable rates. And just because we have
9 said a court is going to interpret the contract as it
10 applies between two parties, does not relieve us of our
11 obligation to set just and reasonable rates for the
12 ratepayers. We still have that obligation, and
13 regardless of what the court decides, that is not going
14 to relieve us, and we have got to make that
15 interpretation. And it would be nice if our
16 interpretation is consistent with the court's, but it
17 doesn't mean that it has to be consistent. You can
18 have an interpretation of the court as it pertains to
19 the parties and have a different interpretation as it
20 pertains to cost recovery and our jurisdiction to set
21 just, fair, and reasonable rates.

22 That's how I understood it, as to what we did, and
23 why it was necessary to have the contract provisions
24 interpreted by the court. But we never relinquished
25 any of our jurisdiction. In, fact, I don't think we

1 can relinquish our jurisdiction. Our jurisdiction is
2 as it is and we have got to set just, fair, and
3 reasonable rates.

4 CHAIRMAN JOHNSON: Well, let me ask a question,
5 because this is I think the best time for us to have
6 this -- the only time we can have this dialogue. Then
7 it would be your opinion that the court has
8 jurisdiction to interpret the contract as it relates to
9 the contractual parties, but then we also have the
10 authority to interpret the contract as it relates to
11 the impact that it might have on the ratepayers?

12 COMMISSIONER DEASON: Yes, absolutely.

13 CHAIRMAN JOHNSON: Is that, Bob, your --

14 MR. ELIAS: That is consistent with what we have
15 recommended here, and that is the basis for our
16 recommendation, yes.

17 CHAIRMAN JOHNSON: And what do we -- at that point
18 in time, if we disagree with what the court said, then
19 we just -- we aren't bound -- and I want to tell you
20 why I'm getting into this issue, because if we ever get
21 to regulatory out, I know this gets so complicated, but
22 if we ever get to the regulatory out clause and we say
23 we didn't listen to what the court's interpretation,
24 someone is going to get caught up there. How do we --
25 just walk me through that for purposes of the impact

1 that this kind of a decision might have.

2 MR. ELIAS: The starting point for any analysis is
3 the avoided cost and the costs that are due under the
4 contract as we reasonably interpreted it at the time
5 that it was approved. That is the baseline. And above
6 that, I think they are all at issue. I think the
7 regulatory out clause is a whole separate and distinct
8 matter and represents something that the parties
9 arguing at arm's-length agreed to among themselves. It
10 amounts to an assumption of risk under the contract.
11 And I think -- I believe it was Mr. Watson that said in
12 here the application of the regulatory out clause to
13 Mr. McGlothlin is something that the circuit court
14 might reasonably be expected to interpret. And that's
15 not something that we have a concern about at this
16 point, either.

17 Again, our focus is going to be on making sure
18 that the circuit court's determinations or a civil
19 court's determinations are consistent with what we
20 approved wherever we can get in there and play or get
21 the matter referred to hear, so hopefully we won't have
22 to address some of these thorny issues. But I think
23 the regulatory out clause is a separate and distinct
24 issue and represents an allocation of the risks between
25 the parties. And that our decision as to the costs

1 that were contemplated under the contract is separate
2 and apart from any discussion of whether or not that
3 contract has a regulatory out clause.

4 CHAIRMAN JOHNSON: But your opinion is that you
5 could have two separate interpretations? We don't want
6 to, and I agree, we want to be able to go into the
7 court and convince them. But to the extent that we can
8 and they come out with one interpretation and we come
9 out with a different interpretation, for purposes of
10 our ratepayers we can go with our interpretation?

11 MR. ELIAS: I believe so, yes.

12 COMMISSIONER CLARK: And then what is the effect
13 of the regulatory out clause if we don't approve it for
14 cost recovery, what happens then?

15 MR. ELIAS: I think it's to the cogenerator if the
16 contract contains a regulatory out clause. I think
17 that the cogenerator or the non-utility contracting
18 party has agreed when they sign the contract that if
19 the costs weren't approved by this Commission, it was
20 their responsibility or that they weren't going to get
21 paid for that.

22 COMMISSIONER DEASON: I think it would be FPC's
23 call at that point as to whether they are going to try
24 to invoke a reading of the regulatory out clause which
25 relieves them of actually pay those amounts under the

1 provisions of the contract. But that would be their
2 call if that scenario plays out if they want to try to
3 enforce that provision as they understand that
4 provision.

5 COMMISSIONER CLARK: What does the regulatory out
6 clause provide in this context, what is the language?

7 COMMISSION STAFF: The regulatory out clause
8 provides that if a regulatory body were to take an
9 action that adjusted the payments which the utility was
10 making to the cogenerator, FPC would adjust those
11 payments to reflect that action and pass that adjusted
12 amount on to the QF.

13 COMMISSIONER CLARK: So if we disallow a certain
14 amount, there is no obligation for Florida Power Corp
15 to pay that amount to the cogenerator.

16 COMMISSION STAFF: I don't believe so under the
17 terms of this contract. And it's at that point that
18 the QF says, I live with this, okay, or I can't take
19 this anymore, I'm out of here.

20 COMMISSIONER CLARK: So why did we send it to the
21 court to begin with?

22 COMMISSION STAFF: I don't know, ma'am.

23 MS. WAGNER: Commissioner Clark, I would like to
24 say something on the regulatory out clause. I'm not
25 sure that we have the jurisdiction to interpret that

1 clause, so when staff says at this point in time that
2 they believe that Florida Power Corp can invoke the
3 regulatory out clause, that is just we are interpreting
4 that clause. I would like to point that out.

5 CHAIRMAN JOHNSON: Well, one of the things that
6 concerns me, and I want to make sure we look at all of
7 the parameters of this particular case, is that to the
8 extent that we decide that certainly we can send this
9 case to the court, and the court has the jurisdiction
10 to interpret contracts, but we also have the
11 jurisdiction to interpret contracts as it relates to
12 the ratepayer. If we ever get to the regulatory out
13 provision, that is going to go back to that same
14 circuit court and they are going to look at their
15 interpretation of the contract, I would think, as
16 opposed to our interpretation. If we ever got to that
17 point, and I know we don't want to get to that point,
18 and that's why I don't want to be involved in these
19 cases. But it does concern me that there appears to be
20 some inconsistency or some struggle there between the
21 two entities that are interpreting the same provisions
22 of the same contract and who really has the final say
23 as it relates to, I guess, the parties or the
24 ratepayers.

25 MS. WAGNER: Chairman Johnson -- I'm sorry, I

1 didn't mean to interrupt you, but I would like to point
2 out when you talk about the regulatory out clause, that
3 I came across a case which the regulatory out clause
4 that the Commission -- and I can't recall the
5 Commission. I think it was in the Freehold case
6 (phonetic), but I'm not positive, or it was referenced
7 in the Freehold case, was federally preempted from
8 interpreting that regulatory out clause and it was
9 taken from their jurisdiction.

10 MR. ELIAS: And I think factually that case is
11 very much distinguishable from the situation that we
12 are confronted with here. Essentially, in that case,
13 the New Jersey Commission and a New Jersey utility were
14 trying to use the regulatory out clause to force the
15 cogenerator into a different deal than the one that had
16 been originally agreed to, agreed upon by all the
17 parties and approved by the Commission. And that is
18 not what we are trying to do here. We want the deal
19 that the Commission approved that the parties agreed to
20 at the outset. And any changes to the deal need to be
21 measured against that standard.

22 CHAIRMAN JOHNSON: See, and in that vein -- I want
23 that deal, too, but in that vein, it appears -- it's
24 hard for me to reconcile these theories. It's almost
25 like then we shouldn't have sent it to the circuit

1 court at all. Because the way I look at it, what I
2 thought we did was we said the court has the
3 jurisdiction to interpret contracts, and we cited those
4 provisions. Florida Power Corp came to us and tried to
5 get us to interpret it, we said no. Then we sent the
6 case to the court, and I agree that we always have
7 jurisdiction over cost recovery, but it seems that we
8 are limited by the definition that the court has given
9 us for avoided cost. And you're saying we aren't
10 limited, because if they give us the wrong definition,
11 if we don't like that definition --

12 MR. ELIAS: It's not a case of liking or disliking
13 the definition. The definition that controls for cost
14 recovery purposes is the basis that we approved the
15 contract on initially.

16 CHAIRMAN JOHNSON: So do you really think that we
17 should have sent this to the court? Did we kind of
18 abdicate our jurisdiction at that point?

19 COMMISSIONER DEASON: I think we need to clarify
20 something. I'm not so sure we sent it to the court.
21 We just kind of acquiesced and backed away. The
22 parties, or at least one party was already saying that
23 the court had jurisdiction and we had no jurisdiction.
24 So it wasn't like we sent it over there. I'm not so
25 sure that was the -- we acknowledged that the court had

1 jurisdiction to interpret the provisions of the
2 contract as it pertains to the parties, and I don't
3 think -- but by doing that we did not back away one
4 step from acknowledging our jurisdiction to set rates
5 which are just, fair, and reasonable. And to do that
6 and to protect the ratepayer we have to look at avoided
7 cost as we understand avoided cost, and under our
8 understanding of avoided cost that is the basis that we
9 approved the contract to begin with. And that's what
10 my understanding is of what --

11 MR. ELIAS: And I think there are two sets of
12 interests here; there is the company/independent power
13 producer, and company/ratepayers. Company/independent
14 power producer, courts; company/ratepayers, Commission.
15 And that is the dichotomy that I would draw.

16 CHAIRMAN JOHNSON: And that is a dichotomy --
17 that's a problem, too, to have all these different
18 entities interpreting these contracts for different
19 purposes.

20 MR. ELIAS: And if the Commission was to assert
21 jurisdiction over these contracts for all purposes, I
22 see problems with that, too.

23 CHAIRMAN JOHNSON: What about for purposes of
24 avoided cost analysis and --

25 MR. ELIAS: I'm sorry?

1 **CHAIRMAN JOHNSON:** What about not for all
2 purposes, but for purposes of what Florida Power Corp
3 originally did, said could you tell us if we are right
4 with respect to how we are doing this avoided cost
5 methodology?

6 **MR. ELIAS:** And I think that that's the policy
7 that we are pursuing now is to make sure that what we
8 believe, the basis of the contract was originally
9 approved under is before the fact-finder, wherever it
10 is, whether it's in a civil court or whether it's
11 before this Commission.

12 **CHAIRMAN JOHNSON:** And where do you think it
13 should be?

14 **COMMISSIONER DEASON:** Here.

15 **MR. ELIAS:** Well, as far as avoided cost, I think
16 clearly we have the better understanding, the better
17 familiarity with the subject matter, and the
18 institutional knowledge to put on the factual evidence
19 to make the most informed determination and consistent
20 throughout a utility and statewide. That's one of my
21 concerns with ceding this matter or letting the circuit
22 courts decide this matter is inconsistent
23 determinations among the 20 different circuits.

24 **CHAIRMAN JOHNSON:** So you think it should be
25 decided here? And can it legally be decided here?

1 MR. ELIAS: I'm sorry?

2 CHAIRMAN JOHNSON: Do you think it should be
3 decided here and do we have the legal authority to
4 decide it?

5 MR. ELIAS: Well, I think we need to seek referral
6 wherever it's appropriate.

7 CHAIRMAN JOHNSON: Seek what?

8 MR. ELIAS: Seek referral from the circuit courts
9 the way we did in the teleco cases and some of the
10 others, Home Shopping Network, to have those issues
11 decided here.

12 COMMISSIONER CLARK: I don't think we sought
13 referral in the Home Shopping case, I think they gave
14 it to us. And I could be wrong. But I support the
15 notion that the way to address it is through
16 intervention to make sure that the court has the
17 benefit of what expertise we may have on it. Another
18 way to address it is to be very clear when we have
19 approved the contract to say this is how we interpret
20 this contract provision, which I understand we didn't
21 do in this case.

22 MR. FLOYD: Commissioner Johnson, could I just
23 make two very brief points? I know that this is mostly
24 a legal argument, but just a couple of philosophical
25 background points. And this is just my personal

1 opinion here, but when the Commission first analyzed
2 and approved these contracts, the Commission took some
3 risk on behalf of ratepayers. Regulation is not risk
4 free. And I think part of the risk we take is that our
5 interpretations of things may turn out to be different
6 than the way the courts interpret it. And as much as
7 we would like to make this process risk free for the
8 ratepayers, I don't think we can do it.

9 Now, I'm not going so far as to say if somebody
10 got punitive damages in the court that we would have to
11 allow that. That is where our cost recovery come in.
12 I think we have some discretion there to come back
13 there and say we are not giving you cost recovery
14 because you mismanaged the company or for whatever
15 reason you got punitive damages, we are not passing
16 that through, but the legitimate avoided costs. That's
17 point number one, that I don't think we can make this
18 risk free the way that we are trying to, at least the
19 alternate recommendation.

20 Point number two, very briefly is that we have
21 raised this point of avoided cost to the ultimate law,
22 in other words, that supersedes all other points of law
23 and equity, and I just don't believe that. I think
24 initially when we look at these contracts, that's
25 certainly the primary interest is that we do not want

1 to exceed avoided cost. But once you get into a
2 dispute and a possibility of litigation and that kind
3 of thing, then I think you have to look at it broader
4 to make sure that everybody is treated -- fairness
5 comes in, not just points of law. And I don't think
6 you can go to a court or tell people to go to court --
7 maybe we didn't tell them to go there, but they went
8 there, and the court said one thing and we say, well,
9 we are not going to allow but a part of this. I just
10 don't think that's fair. And that's my second point,
11 and I appreciate it.

12 COMMISSIONER CLARK: I want it to be clear that
13 it's not a matter that we gave up jurisdiction. I
14 believe the declaratory statement was based on the fact
15 that courts are given the authority to interpret
16 contracts, not this Commission.

17 MS. WAGNER: That's correct, Commissioner Clark.
18 And also in Order Number 950210, which we have
19 discussed quite a bit and Docket 940771, we have gone
20 back to this many times and said that we can only
21 revisit cost recovery if we can show fraud,
22 misrepresentation, or mistake. And it was my
23 suggestion that -- and I think Chairman Johnson
24 mentioned it earlier, that it might be premature for us
25 to make or to have you all make a decision on cost

1 recovery at this point. And if the time comes where in
2 the circuit court there is a difference of
3 interpretation, and, let's say, in the Lake court
4 proceedings that the judge interpreted it to be, let's
5 say, 39 million, whereas according to our staff
6 calculations it should be, let's say, 15 million. At
7 that time, I think it might be appropriate for it to be
8 brought back to us and then we hold some sort of
9 evidentiary hearing to find out whether or not there
10 was fraud, misrepresentation, or mistake. That would
11 be my recommendation.

12 COMMISSIONER CLARK: You're making -- that's with
13 reference to Issue 1?

14 MS. WAGNER: That's correct.

15 CHAIRMAN JOHNSON: Any other comments on Issue 1?
16 Did the parties want to speak to Issue 1?

17 MR. FAMA: Yes, Chairman Johnson. Jim Fama on
18 behalf of Florida Power. I would like to follow up on
19 a couple of points that were discussed among the
20 Commissioners. As far as the jurisdiction is
21 concerned, I think the Commission clearly has
22 jurisdiction over the negotiated contract, and that's
23 what you looked at at the time you approved it back in
24 1991. There is no question about that jurisdiction,
25 and that you have continuing cost recovery

1 jurisdiction. But also there is a concurrent
2 jurisdiction in the courts to interpret the contract,
3 and I think the Commission correctly recognized that
4 jurisdiction, particularly when it pertains to disputes
5 between the parties.

6 COMMISSIONER CLARK: Mr. Fama, is it a concurrent
7 jurisdiction or do they have jurisdiction over
8 interpreting contracts?

9 MR. FAMA: Well, I think in this case,
10 Commissioner Clark, it's concurrent, because I think
11 that the calculation of avoided cost is a special --
12 that's within the province of the Commission under
13 PURPA, and you have a situation where the calculation
14 of avoided cost is exactly what is at dispute in the
15 courts, as well. And that's why I say it that way.

16 CHAIRMAN JOHNSON: And I'm sorry for interrupting,
17 too. And do you agree with what Mr. Elias is saying?

18 MR. FAMA: No. No, I don't agree, because,
19 Chairman Johnson, I think what you did is, this
20 Commission has consistently and repeatedly said that
21 after the initial actions it takes with respect to its
22 jurisdiction approving a negotiated contract, that
23 after that, it will really decline to exercise its
24 jurisdiction any further. And you have said that
25 repeatedly. You said that -- you said that in 1995

1 when you, in essence, said to the -- I will let the
2 court decide what I approved in 1991.

3 You said it in your rules when you had a
4 proceeding back in 1991 and 1992 on implementation of
5 the cogen rules. And that order stated once the
6 Commission's determination of prudence becomes final by
7 operation of law, the utility cannot, absent
8 extraordinary circumstances, be denied cost recovery of
9 payments made to a QF under a negotiated contract.
10 That's what you said in that order. You issued a rule
11 that said something similar. Firm energy and capacity
12 payments made to a qualifying facility pursuant to a
13 separately negotiated contract shall be recoverable by
14 a utility through the Commission's periodic review of
15 fuel and purchased power costs if the contract is found
16 to be prudent. So, again, sort of the notion is you do
17 your work up front and you don't revisit absent fraud,
18 mistake, or misrepresentation.

19 You talked about the reg out clause in '95, and
20 you decided that that -- you said that we do not think,
21 however, that the regulatory out provision of the
22 negotiated contract somehow confer continuing
23 responsibility or authority. Again, you didn't want to
24 continue with the jurisdiction.

25 Administrative finality comes into play here. The

1 party that detrimentally relied on this, they have
2 settled, they have built a project, the parties have
3 settled the case. At what point does the Commission's
4 order become final and pass out of its hands and so the
5 parties can rely on it. I mean, this started in 1991.
6 If we wait another two years for the Lake court to make
7 a decision, could it be that the Commission is saying
8 you have to wait eight years before this becomes final
9 before you really know? I think that's unreasonable.

10 And what I'm suggesting is that I agree that you
11 have, you can't give away your cost recovery
12 jurisdiction. But, in the course of the Commission's
13 actions over the years in this area, you have pretty
14 consistently said you were going to look at it hard
15 initially and you won't look at it again absent fraud,
16 mistake, or misrepresentation. And for you to switch
17 gears now at this point, I think would be arbitrary and
18 capricious, and I think you run a fairly high risk that
19 a court would say, wait a minute, Commission, you can't
20 switch gears like this eight years down the line
21 between 1991 and say 1999, if that's when the Lake
22 court order would finally come out.

23 CHAIRMAN JOHNSON: Explain to me how we would be
24 shifting gears? What do you mean shifting gears?

25 MR. FAMA: Well, you would be -- you have

1 consistently said you would not -- just what you said,
2 Commissioner Johnson, you would not interpret 9.1.2.
3 You didn't interpret it, you just interpreted it kind
4 of in a gross way when you originally approved the
5 contract in '91. You declined to do it in '95, you
6 gave to the courts, you said you wouldn't look at --
7 reg out really didn't give you anything extra. You
8 just had the Pasco case six weeks ago, okay. And then
9 -- but then the staff recommendations are founded upon
10 the notion, well, if we don't like what the court does
11 in Lake, we are going to interpret 9.1.2 the way we
12 want to interpret it. If we disagree with the court,
13 trigger reg out. And I'm suggesting that is a reversal
14 eight years down the line, and I think that a court
15 might find that arbitrary and capricious given that
16 sort of a consistent course of action.

17 CHAIRMAN JOHNSON: Mr. Elias, you were shaking
18 your head.

19 MR. ELIAS: Yes. It's not a question of
20 interpreting the clauses of the contract the way we
21 want to, it's what they were at the time the Commission
22 approved the contract. What the reasonable
23 understanding of what the terms of those contracts
24 meant at the time that they were approved. And I think
25 that that is a fact question that we can put on

1 evidence to demonstrate that avoided cost was
2 considered to be A, B, C, D, and here is the basis for
3 it. And it's not a question of deciding that we don't
4 like what the court did, it's a question of whether or
5 not it is consistent with the basis that the Commission
6 approved it at the outset.

7 And the second thing is that I believe, and the
8 recommendation says that such a finding by a court that
9 avoided cost is X+2, when we can demonstrate that it
10 was X at the time of approval is a mistake and is
11 consistent with every pronouncement the Commission has
12 made concerning its jurisdiction over cost recovery in
13 these matters. And then the other thing that I would
14 take issue with is whether or not this constitutes
15 revisiting the issue of cost recovery or just enforcing
16 the deal that was made way back when. And we think
17 it's the latter.

18 CHAIRMAN JOHNSON: So the mistake goes not to the
19 parties, but to the court as having made a mistake, and
20 we can do that?

21 MR. ELIAS: Yes. Or that it was our mistake, that
22 we thought it meant something different from what it
23 really did at the time it was approved, and if we had
24 known what it was at the time that we would not have
25 approved it in that amount. I think that's consistent

1 with the contract definition of mistake.

2 CHAIRMAN JOHNSON: And how do we get around -- and
3 maybe we don't, maybe this is okay, but how do we get
4 around the awkwardness of -- and I don't think we are
5 trying to interpret the contract the way we want to
6 interpret the contract, I agree with you there, but
7 that the way we intended it, the awkwardness of us
8 putting on a case before us as to the interpretation of
9 the contract and the whole idea of why we let courts do
10 it. Because there seems to be some maybe balancing of
11 the positions of the parties when it would be the
12 Commission putting on the case before the Commission to
13 convince the Commission as to what we meant. Is that
14 okay, or did I just bring that incorrectly?

15 MR. ELIAS: Our bottom line charge here is to
16 represent the public interest, and this is the kind of
17 issue where there may not be somebody else willing to
18 step forward and make an affirmative case that this is
19 what the Commission meant at the time because it's in
20 no one else's own self interest. And in that
21 circumstance, you know, I think it's entirely
22 appropriate for the staff to demonstrate to the same
23 standard as everybody else, with competent substantial
24 evidence, to the extent that we can that this is what
25 the Commission meant at the time it approved the

1 contract.

2 CHAIRMAN JOHNSON: Thank you.

3 MR. FAMA: You see, Chairman Johnson, that's our
4 problem. We asked the Commission in 1995 and in 1994
5 to tell us what they meant when they originally
6 approved the contract, and the Commission declined to
7 do that. And then to say years later, oh, now we are
8 going to tell what we meant, we wouldn't do it in '95,
9 but we are going to wait until after the court decides
10 and then we are going to say, no, we meant something
11 different. I think administrative finality prevents
12 that sort of thing from happening.

13 MR. ELIAS: And the problem that you have is that
14 there are contractual issues between the parties that
15 are clearly outside the jurisdiction of this
16 Commission. You know, we are not going to award
17 punitive damages based on a failure to perform.

18 COMMISSIONER CLARK: But, Mr. Elias, wasn't this
19 case about the interpretation of avoided cost, and that
20 was part of the declaratory statement when we said even
21 that is a contract matter to be resolved in the courts?

22 MR. ELIAS: And I don't think that we reserved any
23 jurisdiction, if I can use that term loosely, two years
24 ago when we issued the order determining that the
25 circuit court was the --

1 **COMMISSIONER CLARK:** So then is what Mr. Fama said
2 correct?

3 **MR. ELIAS:** I think you have a different set of
4 interests as between the cogenerator and the utility
5 and the utility and its ratepayers, and that's where
6 the line gets drawn.

7 **CHAIRMAN JOHNSON:** So the answer is no, he wasn't
8 correct?

9 **MR. ELIAS:** As far as the interests between the
10 parties, I think he is, but I don't think that that is
11 the final word as far as an adjudication of interest
12 between the utility and its ratepayers.

13 **COMMISSIONER DEASON:** Refresh my memory. It seems
14 to me that what was presented to us at the time that we
15 issued the declaratory statement was there was an
16 effort to have this Commission interpret avoided cost
17 for purposes of what the payment would be between
18 Florida Power Corporation and the cogenerator. It was
19 not for the purpose of telling us, define avoided cost
20 to tell us what is going to be the amount, the maximum
21 amount you are going to allow cost recovery if this
22 ever becomes an issue. It was tell us what we have to
23 pay this cogenerator. And we said, sorry, we can't
24 interpret the contract to tell you what you have to pay
25 the cogenerator. But by us doing that we did not say,

1 but we are not ever going to interpret the contract
2 when it becomes an issue to determine what is fair,
3 just, and reasonable to ask the ratepayers to pay under
4 this contract. And what truly is avoided cost under
5 the standard under which the contract was originally
6 approved. I think there is a difference there, and I
7 think that's what we did. If I'm wrong, correct me,
8 but I think that's the situation. At least that's the
9 way I understood it.

10 COMMISSIONER CLARK: I didn't understand it that
11 way. Because, in effect, because there is a regulatory
12 out clause, the answer is the same as what FPC is
13 obligated to pay the parties. We shouldn't have sent
14 it, we shouldn't have conceded jurisdiction.

15 COMMISSIONER DEASON: Well, I was very reluctant
16 to do it to start with, and perhaps I'm sad to admit
17 it, but I was kind of -- I was overwhelmed by all the
18 legal argument. That was the only thing that we had to
19 do, and I wasn't comfortable doing it then, but it
20 appeared that legally that is the only thing that we
21 could do.

22 COMMISSIONER CLARK: Well, Commissioner Deason,
23 let me just say that none of us, I think, were
24 comfortable with it, but the fact of the matter is we
25 are required to follow the law, and the question was

1 who has the authority to interpret contracts.

2 COMMISSIONER DEASON: For purposes of determining
3 what the payment is. That was what was in dispute, the
4 payment. When they write that check every month or
5 whenever it is, how much is that check going to be.
6 And we said, sorry, we can't interpret that. But by
7 saying that we did not say but we are going to
8 interpret it when it comes to ask the customers to pay
9 their monthly check to Power Corp how much that is
10 going to be, and that is our jurisdiction.

11 MR. FAMA: Chairman Johnson, I have nothing
12 further. Mr. Nixon is here to discuss the business
13 deal, but I think since we are on the legal issues
14 maybe I will defer to Mr. Wright, he has some legal
15 issues to discuss.

16 CHAIRMAN JOHNSON: Mr. Wright.

17 MR. WRIGHT: Thank you, Chairman Johnson.
18 Commissioners, I'm going to be very brief, despite the
19 fact that I over-prepared here. As to Issue 1 --

20 COMMISSIONER CLARK: Mr. Wright, who do you
21 represent?

22 MR. WRIGHT: I'm sorry. Shef Wright, law firm of
23 Landers and Parsons, representing Lake Cogen, Ltd. and
24 NCP Lake Power, Incorporated, its general partner.
25 With me also is David N. Hicks, business manager for

1 the Lake Cogen project. Mr. Hicks is here to answer
2 any questions. Thank you, Commissioner Clark.

3 Just to follow along some remarks that were made
4 both from this side of the bench and that side of the
5 bench. Lake Cogen believes that you should not address
6 Issue 1. This issue is not necessary to decide any of
7 the issues that are properly before the Commission
8 today. The issue before the Commission today is
9 whether to approve a settlement agreement that we agree
10 with Florida Power, provides significant benefits to
11 Florida Power Corporation and its ratepayers. And, in
12 addition, provides significant protection to FPC and
13 its ratepayers against further contingencies in the
14 outcome of the litigation that is still pending.

15 This issue, Issue 1, has not been put before you
16 by either Lake or FPC. A decision on this issue would
17 not determine any party's substantial interests. If
18 anything, if you are ever going to try to get to this
19 issue, it should be a case-by-case determination.

20 CHAIRMAN JOHNSON: Let me ask you a question as to
21 the relevance of this issue. I see this issue as
22 relevant because the primary analysis is based on risk,
23 and risk for the ratepayers. But if this issue is
24 saying the ratepayers don't even have a risk here,
25 because we get to determine the avoided cost, so there

1 is no risk of what the courts might do, then that
2 really does in my mind impact whether or not that whole
3 risk analysis set out in the primary recommendation is
4 accurate. Could you respond?

5 MR. WRIGHT: Well, it may take me a few seconds to
6 get there. Again, I don't think this is part of the
7 issue that is before you, which is whether to approve
8 the settlement agreement. I agree with just about
9 everything Mr. Pama has said as to why Commission
10 precedent, I think, precludes you from revisiting cost
11 recovery. As he put it in 1995, you guys said, no, we
12 are not going to do this. That is up to the courts. I
13 don't think that you can --

14 COMMISSIONER DEASON: Mr. Wright, let me interrupt
15 you just a second. When you say revisit cost recovery,
16 it seems to me that the question has never been put
17 before the Commission. This contract operated and
18 there was no dispute among the parties, there was no
19 issue under an interpretation of what constituted
20 avoided cost. Some parameters changed and it appeared
21 that this unit would not be dispatched as it previously
22 was understood it would be dispatched. The question of
23 avoided cost came into question, and that this is the
24 first opportunity. We are not revisiting anything.
25 This is the first time.

1 MR. WRIGHT: But, Commissioner Deason,
2 respectfully I think you approved this contract for
3 cost recovery in your Order 24734 on July 1st of 1991.
4 And, furthermore, you approved recovery of payments
5 under the Lake contract and under 7, 8, or 9, depending
6 on how you count, other cogeneration contracts for
7 periods well in excess of two years as requested by
8 Florida Power that were consistent with projections
9 that Florida Power made to you at the time they came to
10 you, sought and obtained your approval of these
11 contracts for cost recovery.

12 Now, if I could just continue briefly. I think
13 there are a lot of good reasons not to address this
14 issue. I have ticked off several already. I don't
15 think it's necessary, it hasn't really been put before
16 you by either of the parties who are supporting this
17 settlement agreement.

18 Additionally, there are a lot of other issues that
19 are implicated here. There is potentially a fact issue
20 as to whether there was a mistake, and there are
21 numerous legal issues. I think there is a potential
22 issue as to whether a statement of this type in this
23 context would be a rule. If so, it would not be
24 validly promulgated. There are constitutional contract
25 issues, there are separation of powers and primary

1 jurisdiction issues, and there is, as Ms. Wagner
2 pointed out, the federal preemption issue.

3 Not surprisingly, I don't agree with Mr. Elias
4 that the Freehold case is very distinguishable at all
5 from the instant case, and I would like to read to you
6 just the final holding statement from the Freehold
7 decision, which is reported at 44 Fed. 3d, 1178. The
8 court stated -- this is the Third Circuit of Appeals--
9 stated, "Finally, we hold that once the BRC, the New
10 Jersey Board of Regulatory Commissioners, approved the
11 power purchase agreement between Freehold and JCP&L,"
12 Jersey Central Power and Light, the utility involved in
13 that case, "on the ground that the rates were
14 consistent with avoided cost, just, reasonably, and
15 prudentially incurred, any action or order by the BRC
16 to reconsider its approval or to deny the passage of
17 those rates to JCP&L's consumers under purported state
18 authority was preempted by federal law."

19 MS. WAGNER: Chairman Johnson, may I try to -- and
20 this is strictly my opinion here. May I try to answer
21 the question that you just posed to -- gosh, Mr.
22 Wright. I forgot your name for a moment, and I see you
23 all the time. It's my opinion that -- the reason why I
24 feel that it would be premature for you to make a
25 decision on this issue is because unless we have

1 evidence in front of us or we can assert with some sort
2 of certainty fraud, misrepresentation, or mistake, I
3 don't feel comfortable saying irregardless of what a
4 court's decision is we can deny cost recovery.

5 CHAIRMAN JOHNSON: One of the issues that I'm
6 dealing with is that to me it appears as if its a legal
7 issue whether or not -- and the whole issue that Bob
8 Elias raised with respect to us having the authority to
9 interpret the contract as it relates to Florida Power
10 Corp and the ratepayer, that that's a legal issue. And
11 if the answer to that legal issue is, yes, we have the
12 authority, then a lot of the -- the primary
13 recommendation says, well, we need to accept this
14 settlement to mitigate the risk associated with
15 litigation. But if Bob's analysis is right, there is
16 really no risk associated with the litigation. So,
17 that whole premise kind of falls.

18 And if Bob's analysis is right that there is no
19 risk associated with the litigation and the court --
20 and the PSC does indeed have the authority to calculate
21 avoided cost, then as the alternative recommendation
22 states, if we have that authority and if we determine
23 that avoided cost is -- that the recovery being allowed
24 is more than the avoided cost, and we have the
25 authority to do something about that, then we have to

1 do something about it. And so to me the answer to that
2 legal question really does impact both the primary and
3 the alternative recommendations and how I would view
4 them.

5 MS. WAGNER: I understand what you're saying,
6 Chairman Johnson, but I don't feel comfortable when we
7 make this decision based on what we have in front of us
8 without first letting the parties respond to this
9 question.

10 CHAIRMAN JOHNSON: I agree.

11 MS. WAGNER: And, therefore, I think it is
12 premature what constitutes mistake, what constitutes
13 fraud, misrepresentation, and I would feel it
14 appropriate to allow some other arguments and to allow
15 us to delve into it a little deeper to determine what
16 actually would encompass that.

17 CHAIRMAN JOHNSON: Well, I'm starting to feel that
18 same way. This issue wasn't couched this way in the
19 last case that we determined, but -- and Commissioner
20 Deason is perhaps correct, that we haven't addressed
21 this question, neither have the parties, this legal
22 issue. And even the analysis that staff provided, it's
23 not a very strong legal position. It just kind of lays
24 out what happened in another case by a different
25 attorney and what he said. So it does appear before

1 making a decision on something like this that at least
2 the issue should be briefed and better understood, at
3 least by me, before I make a vote, because I do believe
4 that the resolution of that legal issue impacts both
5 the primary and the alternative.

6 COMMISSIONER CLARK: I think you could not -- in
7 my opinion, there may be circumstances under which we
8 could deny it. To me you can reach a decision on the
9 other issues without affirmatively deciding one way or
10 another. You can believe there is enough of a risk in
11 a court saying that we don't have that jurisdiction to
12 make a decision to accept the settlement. So what I'm
13 suggesting is we don't have the last word on that
14 issue.

15 CHAIRMAN JOHNSON: Whether even if we were to
16 frame a position on the legal issue, you're saying the
17 courts could still say that you're wrong.

18 COMMISSIONER CLARK: Right. Well, the Supreme
19 Court could say we were wrong.

20 COMMISSIONER DEASON: Well, that's true with
21 everything we do here. I mean, the court could tell us
22 we are wrong in all our decisions. So that amount of
23 risk is going to be regardless of what we do. But I
24 think, if I understand what Chairman Johnson is saying,
25 is that to her it's relevant on how she evaluates the

1 risk factors and what is appropriate under the various
2 staff recommendation and alternate recommendations as
3 to how that risk is going to be evaluated in her own
4 mind, and I tend to agree with her. It does have a
5 bearing on it. And while I agree that a court may
6 ultimately agree or disagree with whatever we do, there
7 is a risk factor as to how this Commission interprets
8 Issue 1, and if we can discuss that and get a consensus
9 one way or the other, then we know at least how the
10 Commission interprets that legal issue, realizing that
11 a court may disagree with that legal issue.

12 COMMISSIONER CLARK: I don't believe it's
13 necessary to make a decision. How we personally may
14 evaluate that risk may go into our decisions on the
15 other one, but it's not something that I think we
16 should do in this case, particularly when it has not
17 been briefed and fully discussed.

18 CHAIRMAN JOHNSON: Well, I agree that it -- my
19 thoughts are that it should be briefed and fully
20 discussed.

21 COMMISSIONER CLARK: I would also point out if
22 that's what you want to do, we have got to go back to
23 the other settlement we approved.

24 CHAIRMAN JOHNSON: Well, it's a new issue that has
25 been raised by staff in this particular case. Would

1 you agree with that, Mr. Elias, and could we do that?

2 COMMISSIONER CLARK: Is that order final?

3 MR. ELIAS: That order is final, yes. And it is
4 -- we raised it this time because we were concerned
5 after the discussion at the last agenda that the
6 question of cost recovery of amounts approved by a
7 civil court was a question that was closed at that
8 point in time, and that's something that we strongly
9 disagree with.

10 COMMISSIONER DEASON: While I would like to
11 reconsider the previous one, while I would like to, but
12 I don't think we should. I mean, I was on the minority
13 decision, I think it was a bad decision, but that being
14 it was made and that is the decision and the order is
15 final. So I don't think that we should be revisiting
16 that at this point.

17 I do think that the question that we are debating
18 here was raised and discussed to some extent under the
19 previous agenda item, and I congratulate staff for
20 bringing it forward and trying to amplify it to some
21 extent, because I think it is very relevant to how we
22 evaluate what the risk factors are. Because any time
23 you approve a settlement you are trying to evaluate
24 risk factors. And I think that if need be we can defer
25 this matter and let the parties brief this and make a

1 decision later. But to me it is extremely important to
2 have an understanding of how this legal issue impacts
3 the risk factors that are part of the analysis of the
4 various staff recommendations.

5 CHAIRMAN JOHNSON: Any other comments on that?

6 MR. FAMA: Commissioner Johnson, can I address
7 that? Florida Power does not want, does definitely not
8 want deferral in this case. I think there is a risk
9 attendant to that. The risk is the benefits of the
10 settlement may be gone forever if we defer this case.
11 I think what the Commission can do is -- and we have
12 done some research on this -- revisit the
13 jurisdictional order made in 1995, and it can open a
14 docket to do that. And there is still another cogen
15 case out there, the Dade case, where you don't have
16 finality triggering because there is no court decision
17 and there is no settlement of the parties.

18 I'm sure Mr. Wright is going to disagree with
19 that, but the fact of the matter is I think the
20 cleanest way to deal with this rather than defer and
21 run the risk of losing the Lake settlement or
22 disrupting settlements already approved is to revisit
23 your jurisdiction. I think the Commission always has
24 authority to revisit its jurisdiction and what it did
25 in 1995. That's what the court cases say, and I think

1 that's the correct way to do it.

2 **CHAIRMAN JOHNSON:** Mr. Wright.

3 **MR. WRIGHT:** Lake agrees with Florida Power
4 Corporation, that we do not want to see this deferred.
5 We don't think it needs to be deferred. I don't agree
6 that you can revisit your order that you made in 1995.
7 You might possibly be able to undertake a rulemaking to
8 try to assert this type of authority if you wanted to
9 pursue something generic. I'm not sure, and I will
10 tell you that Lake's position and my belief is that you
11 don't have that authority. But if you're going to try
12 to pursue it, it would be better to pursue it in a
13 separate docket rather than hold up this settlement and
14 possibly lose its benefits.

15 **CHAIRMAN JOHNSON:** Say that again. You say you
16 don't, but fundamentally you don't believe we have the
17 authority to do what Florida Power Corp suggested that
18 we have the authority to do.

19 **MR. WRIGHT:** That's what I said, yes, ma'am. I
20 don't think you can revisit your order from 1995. I
21 think to do so would be inconsistent with your prior
22 orders regarding cost recovery, with your prior
23 decisions and your 1995 decision regarding your
24 jurisdiction with respect to contracts. And, frankly,
25 I think federal preemption will apply.

1 **CHAIRMAN JOHNSON:** And what is your argument as to
2 why this issue that has been raised, Issue 1, should
3 not be briefed and further explored?

4 **MR. WRIGHT:** It's not necessary to this docket.
5 It's a generic issue. If you want to address it,
6 address it generically.

7 **CHAIRMAN JOHNSON:** And it will be applicable to
8 the Dade case?

9 **MR. WRIGHT:** Possibly.

10 **COMMISSIONER CLARK:** Madam Chairman, I don't know
11 if we are through discussing it, but I know there are
12 people on the back row that I assume they came up to
13 discuss this issue. I have seen Mr. Howe for the first
14 time on this issue. Are you here to speak on it?

15 **MR. HOWE:** (Inaudible).

16 **COMMISSIONER CLARK:** Oh, you are in line for
17 another item?

18 **MR. HOWE:** No, no, I just don't need to speak on
19 Issue 1.

20 **COMMISSIONER CLARK:** All right. I guess I'm
21 confused as to where we are. Are we just on Issue 1 or
22 the whole item?

23 **CHAIRMAN JOHNSON:** We were on Issue 1. But, Mr.
24 Howe, are you going to want to speak on some of the
25 other issues?

1 MR. HOWE: Yes, ma'am.

2 CHAIRMAN JOHNSON: Okay. Then we can -- and, Mr.
3 Wright, you had completed your comments, had you not?

4 MR. WRIGHT: At least with respect to Issue 1,
5 yes, ma'am. Thank you.

6 CHAIRMAN JOHNSON: Staff, any other comments?

7 MR. ELIAS: Just one very briefly. Mr. Wright
8 concluded with a quote from the holding in the Freehold
9 case, and I think the operative word there was that the
10 New Jersey Commission could not reconsider its decision
11 to approve those rates. Those rates were the ones that
12 were approved in the contract when it was initially
13 approved, and that is what we believe the ratepayers
14 should be responsible for here. And we don't think
15 that assuring that what is passed through for cost
16 recovery as consistent with what was initially approved
17 is inconsistent with the holding in the Freehold case.

18 CHAIRMAN JOHNSON: Okay. On the other issues, did
19 staff want to make any preliminary comments or go
20 directly to the parties?

21 MR. ELIAS: We don't have any initial comments to
22 make.

23 CHAIRMAN JOHNSON: Does Florida Power Corp have
24 anything else to add?

25 MR. NIXON: Yes. My name is Sam Nixon with

1 Florida Power Corporation, and I just would like to
2 make a brief comment. We have a handout that is very
3 similar to the Pasco handout that we made in that
4 docket, and that is before you to answer any questions
5 that may come up on those issues or how this settlement
6 compares to other settlements approved by the
7 Commission.

8 Basically, this settlement is almost identical to
9 the Pasco settlement approved by this Commission on
10 April 1st, 1997, and no new information or facts have
11 been presented by any party which could cause the
12 Commission to reach a different decision. And,
13 therefore, the Commission should adopt staff's primary
14 recommendation and approve the Lake settlement.

15 Only the primary recommendation recognizes that
16 the Commission decided that only the courts have the
17 authority over the correct interpretation of Section
18 9.1.2 of the negotiated contracts. And as a result,
19 does not base its analysis of the settlement and
20 recommendation on contract interpretation.

21 The alternative and second alternative
22 recommendations are somewhat identical to those
23 presented by staff in the Pasco docket. The
24 alternative recommendation requires the Commission to
25 interpret the terms of a negotiated contract, while the

1 second alternative recommendation identifies no new
2 information for the Commission different from what was
3 presented in the Pasco docket. And, further, the staff
4 states that the likelihood of the agreement yielding
5 ratepayer losses is roughly equivalent to the
6 likelihood of it yielding ratepayer savings. This
7 statement was true of the Pasco settlement approved by
8 this Commission on April 1st, 1997, and is definitely
9 true of the Lake settlement. Thank you.

10 CHAIRMAN JOHNSON: Mr. Wright.

11 MR. WRIGHT: Thank you, Chairman Johnson. I will
12 be as brief as I can. Lake agrees with Florida Power
13 that you should adopt the primary staff recommendation
14 and deny both alternative staff recommendations. This
15 settlement agreement provides substantial benefits to
16 FPC and its ratepayers, and protection against
17 significant additional risks to FPC and its ratepayers
18 if you should approve it.

19 With respect to the alternative staff
20 recommendations, I agree with the brief points that Mr.
21 Nixon made. I would like to make a couple in addition
22 more specifically. The first alternative staff
23 recommendation incorrectly criticizes the modified
24 contracts requirement that Lake will be paid a firm
25 energy price for all energy delivered to FPC. Now,

1 it's true that the contract as it would be modified by
2 the settlement agreement would pay Lake a firm energy
3 price for all energy delivered. But this is not the
4 same as the firm energy price under the existing
5 contract. This is a convenience that was negotiated by
6 Lake and FPC hopefully to avoid any future similar
7 disputes such as the one pending in the current
8 litigation.

9 The firm energy price under the modified contract
10 is simply the weighted average cost of fuel at the
11 avoided unit fuel reference plant under the contract.
12 The totality of the payments to be effected and to be
13 made by FPC to Lake under the amended contract reflects
14 a splitting of the difference, a pretty sizable
15 splitting of the difference between the firm energy
16 payments according to Lake's position in the litigation
17 and FPC's position in the litigation. It is not
18 correct to say you get firm all the time when other
19 modifications to the contract make it clear that Lake
20 is giving up its right to firm all the time as it
21 believes the contract should be interpreted.

22 In addition, the first alternative staff, in my
23 opinion, have used the wrong framework for analysis.
24 They assert that approval of the settlement agreement
25 would violate Section 366.051 and PURPA on the grounds

1 **apparently that they are comparing the payments under**
2 **the contract to FPC's now current avoided costs. In**
3 **the handout that Mr. Nixon has given you, he points out**
4 **correctly that the correct standard for reviewing**
5 **negotiated contracts is avoided cost at the time the**
6 **contract is executed and initially approved for cost**
7 **recovery. At Page 18 of the recommendation the staff**
8 **states, "Staff recommends that FPC's modeling of the**
9 **avoided unit more closely approximates avoided cost."**
10 **The only way that has any meaning is to say that it**
11 **more closely approximates FPC's current avoided costs,**
12 **and they proceed to argue that approval of the**
13 **settlement would thereby violate 366.051.**

14 **I think the fallacy of this approach is easily**
15 **seen by applying the time honored legal principle that**
16 **what is good for the goose is good for the gander.**
17 **Consider the following: Suppose that the reverse of**
18 **the recent trend in electric generation costs had**
19 **actually come to pass. That current avoided costs,**
20 **today's current avoided costs were greater than**
21 **projected at the time the contract was approved. And**
22 **then suppose that a QF came into court or wherever and**
23 **said, you know, we don't think this contract is being**
24 **interpreted correctly, and we think the right**
25 **interpretation is we get paid more. And that's closer**

1 to avoided cost and, therefore, you guys should approve
2 it. Would the staff apply the same analysis? Would
3 the Commission countenance it? Would FPC think it was
4 fair? I don't think so. On the contrary --

5 COMMISSIONER DEASON: Mr. Wright, let me ask you a
6 question on that point. I don't understand that to be
7 staff's position and part of their alternative
8 analysis. What I understand their position to be is
9 that avoided cost is subject to interpretation. It is
10 based upon the cost of a pulverized coal unit at the
11 time the contract was approved. That is not being
12 changed one iota. The question is if that unit had
13 been built by Power Corp, how would that unit be
14 dispatched? And what staff is saying is that the
15 cogenerator is not entitled to any more payment than
16 what the cost would be for that fictional pulverized
17 coal unit to run if it had been built, and how it would
18 be dispatched if it had been built. And that is the
19 issue.

20 MR. WRIGHT: Yes, sir. And the way Power Corp is
21 administering the contract today effectively amounts
22 with very, very few exceptions, effectively amounts to
23 a lesser of. If the as-available price falls below the
24 firm price as calculated, then they say the unit would
25 be off. They don't take anything else into

1 consideration. That's their extreme end of the
2 spectrum.

3 COMMISSIONER DEASON: So you admit, then, there is
4 room for interpretation under what constitutes avoided
5 cost and perhaps we need to have a proceeding here at
6 the Commission and get the facts and determine that?

7 MR. WRIGHT: Well, I don't agree with you that it
8 is appropriate for you to have the proceeding here
9 because that would be interpreting the contract. I do
10 think the issue is how much of the time the avoided
11 unit had it been built, the fictitious, hypothetical
12 avoided 1991 pulverized coal unit that is specified in
13 the contract would have operated.

14 Now, one thing is clear, and that is Florida Power
15 Corporation's extreme position that that unit is to be
16 dispatched on the basis solely of four parameters that
17 are in our opinion set forth in the contract for
18 pricing purposes only has been rejected by the circuit
19 court in the Lake Cogen v. Florida Power Corporation
20 litigation. And I would submit to you that the outcome
21 is somewhere between something significantly greater
22 than Power Corp's position and what staff has
23 represented is Lake's position, which is firm all the
24 time. Lake's position is we get paid according to the
25 operation of the real unit. We happen to believe that

1 the appropriate factual determination by the
2 appropriate trier of fact as to the intent of the
3 parties when they entered into this contract will
4 indicate that that unit would have run nearly all the
5 time.

6 COMMISSIONER DEASON: And it's your position the
7 court should decide that?

8 MR. WRIGHT: Yes, sir.

9 COMMISSIONER DEASON: For purposes of the payment
10 between you and Power Corp, from Power Corp to you?

11 MR. WRIGHT: Yes, sir.

12 COMMISSIONER DEASON: And for purposes of cost
13 recovery?

14 MR. WRIGHT: I believe that once -- I think you
15 approved this contract for cost recovery in 1991.

16 COMMISSIONER DEASON: How could we have known all
17 of that when we approved that contract when you, the
18 two parties that signed the contract, are in
19 disagreement over that? And it seems to me that only
20 with evidence and facts to determine how that unit
21 would be dispatched could we make an appropriate and
22 intelligent determination as to what constitutes
23 avoided cost and what is fair for the ratepayers to
24 pay.

25 MR. WRIGHT: Well, I think you had a lot of

1 information about what that avoided unit was, and I
2 think that any reasonable determination will show that
3 the avoided costs were well within the range of what
4 you approved. If you want to talk about hypothetical
5 mistake, I ask you to consider what you would have to
6 say to say there had been a mistake in this case. You
7 would have to say that if Lake won and was getting paid
8 firm all the time, Lake would be getting paid exactly
9 consistent with the projections that FPC made to the
10 Commission when it sought and obtained your approval
11 for cost recovery. Lake would be getting paid exactly
12 consistent --

13 COMMISSIONER DEASON: Wasn't that a worst case
14 scenario projection to show that it was cost-effective
15 even under that scenario, and it was not to say this is
16 the way the contract should be interpreted?

17 MR. WRIGHT: Commissioner Deason, I don't recall
18 any discussion of that being a worst case scenario. I
19 recall that being projections as to the projected
20 payments to be made under the contract. That's what
21 the exhibits your order reflects and that's what FPC's
22 performance and your approval of the contract and the
23 other negotiated contracts --

24 COMMISSIONER DEASON: Well, if that was the case,
25 why didn't the contract specifically say that and have

1 that amount in the contract? There would not be any
2 dispute as to what that number was.

3 COMMISSIONER CLARK: Well, and the point is we
4 probably should have explored it at the beginning so it
5 was clear what we were approving.

6 COMMISSIONER DEASON: I'm sorry, what?

7 MR. WRIGHT: I think the answer is --

8 COMMISSIONER DEASON: I have a question. I'm
9 sorry, we should have done what?

10 COMMISSIONER CLARK: That's it. That is the
11 point, is that if that was our interpretation from the
12 beginning it should have been clear, and I have asked
13 staff, and they don't find it in the information that
14 that was how we were interpreting that contract.
15 Because that way we could point to it and say that was
16 the basis on which we approved it, but we don't have
17 that.

18 COMMISSIONER DEASON: We don't have that
19 information. All we have is language in the contract
20 that says it is going to be avoided cost. And that
21 gave comfort to the Commission to know that in no
22 circumstance was there going to be a payment to the
23 cogenerator in excess of avoided cost. In fact, that's
24 what PURPA acquires, correct? It all depends on how
25 you interpret what avoided cost is.

1 **MR. WRIGHT:** At the time the contract is entered
2 into and approved by the Commission. On the contract
3 buy-out issue --

4 **COMMISSIONER CLARK:** Commissioner Deason, what it
5 means to me is we need -- and I have discussed it with
6 staff -- is we need to be very careful at the beginning
7 as to fully explain the basis on which we are approving
8 it, and be more careful about the terms of the
9 contract. And to intervene at a very early point in
10 these court cases when the courts are going to be
11 interpreting these, you know, terms of our regulations
12 to make sure that our view is represented and hopefully
13 adopted by the court. But it doesn't change the fact
14 that I think the courts have the authority to interpret
15 the contract. And that's where the dilemma --

16 **COMMISSIONER DEASON:** And the authority to
17 interpret the contract for cost recovery purposes.

18 **COMMISSIONER CLARK:** If you believe that you can
19 come up with a different interpretation and, therefore,
20 deny cost recovery, then you have, in effect, voided
21 their interpretation.

22 **COMMISSIONER DEASON:** We have not voided for
23 purposes of what constitutes the way the contract is to
24 be interpreted for the parties and what the payment is
25 between Power Corp and the cogenerator, I agree with

1 that.

2 **CHAIRMAN JOHNSON:** Mr. Wright.

3 **MR. WRIGHT:** Thank you, Chairman Johnson. I have
4 about five more points that I will make as briefly as
5 possible.

6 On the contract buy-out issue, Lake agrees with
7 the primary staff that there are several assumptions
8 underlying the alternative staff's analysis, not all of
9 which are likely to come to pass. We agree that you do
10 need to give some intuitive credence and recognition to
11 the probability that future market costs will be less
12 than what the staff has assumed, which would render the
13 buy-out even more cost-effective.

14 On the coal transportation issue, which implicates
15 the \$1.76 per million BTU coal floor price that the
16 parties have agreed to, I just want to make one simple
17 point. This is a compromised resolution of a
18 potentially major issue in the litigation. It is not a
19 one-way issue in Lake's favor. It is a split the
20 difference resolution of a contended issue.

21 As to the second alternative recommendation, we
22 agree with the primary staff that all that the second
23 alternative recommendation really does is include
24 certain inflation and fuel price sensitivities, none of
25 which alter the outcome of the analyses if either Lake

1 wins or FPC wins. We agree with the primary staff that
2 the second alternative staff's recommendation is based
3 on numerous assumptions that are not likely to come to
4 pass. Key among these, in my view, as somebody who is
5 around this a lot, is the assumption that generation
6 technology will be frozen at the efficiency and cost
7 levels associated with Polk 1 and 2.

8 Finally, we think that the second alternative
9 staff recommendation is methodologically flawed because
10 it gives no weight to the fact that the court in the
11 lawsuit that is being settled by the proposed
12 settlement here today has already been decided against
13 FPC on the key issue. The outcome cannot and will not
14 be way down here at the effectively lessor of
15 interpretation advanced by Florida Power. It may not
16 be all the way up here. We think it's likely to be
17 very close to up there, but a proper methodological
18 analysis of this settlement agreement would reflect the
19 fact that that issue has been decided and that the
20 range is not from here to here, the range is probably
21 from here to here. And my guess is that the low end of
22 this range is probably above the agreed upon
23 settlement.

24 COMMISSIONER DEASON: Mr. Fama, do you agree with
25 that?

1 **MR. FAMA:** Commissioner Deason, I need to hear the
2 last part of it again.

3 **COMMISSIONER DEASON:** He is basically saying the
4 court has already decided this to an extent, and just
5 to get to the point, Mr. Wright is saying that they
6 already have one and that the extent to your
7 interpretation is already out the window and now it's a
8 question of somewhere between the middle and his
9 position as opposed to your position and his position.

10 **MR. FAMA:** In the Lake case, I think we did lose
11 the issue on four parameters, that's what we argued.
12 The court ruled on a real unit, but we haven't gotten
13 to the point of fleshing out the real unit. And in
14 Florida Power's opinion, the real unit will stay off a
15 lot of the time under the facts that we have. So in
16 our opinion we would ultimately hope to show in that
17 case that the real unit will operate in a fashion
18 similar to the four parameter unit, and it won't be on
19 all the time. So I think we are in the middle. I
20 think hopefully we are closer to four parameters than
21 we are to on all the time.

22 **CHAIRMAN JOHNSON:** Anything else, Mr. Wright?

23 **MR. WRIGHT:** No, ma'am. You all ought to approve
24 the settlement. Thank you.

25 **MR. HOWE:** Commissioners, I'm Roger Howe with the

1 Public Counsel's office. I would like to just address
2 a narrow issue that I don't think you have looked at
3 yet. And mostly I'm focusing on the staff's second
4 alternate recommendation and the statement there on
5 Page 23 that FPC ratepayers are not expected to realize
6 positive net savings until 15 years after occurring
7 costs associated with the FPC/Lake agreement.

8 Commissioners, I think one of the things you need
9 to consider in all of these purchased power buy-outs is
10 whether you can compare a benefit horizon for the
11 company with a benefit horizon for the customers and
12 reach a meaningful result. I asked -- in our building
13 we have the legislature's economic and demographic
14 research division, and I asked for them to give me an
15 idea of the age groups of the people that live in the
16 counties served by Florida Power Corporation.

17 And I'm not saying this is exactly scientific, but
18 I think it's a reasonable approximation. And, for
19 example, in Pinellas County, 266,000 people out of
20 880,000 residents are 60 and above. You're asking them
21 to wait for 15 years to see any benefit. I also asked
22 the economic and demographic research division to give
23 me data for all the counties that Florida Power
24 Corporation serves. And as of January 1st, 1997, from
25 the demographic estimating conference data base, which

1 was updated January 1st, 1997, of 4,776,631 people
2 residing in Florida in the counties served by Florida
3 Power Corporation, 1,203,013 are 60 and above. Now,
4 here we are just talking about age groups, but I think
5 you also have to consider such things as --

6 COMMISSIONER CLARK: Mr. Howe, I want to make it
7 clear that I hope they all live to see the benefits of
8 this, and if you are suggesting they are not, I want to
9 make it clear that I'm hoping that they do.

10 MR. HOWE: I hope they do, too. But one of the
11 things you have to consider is, of course, the age and
12 the migration in and out of the service area. So,
13 where on the one hand you have a long lived or
14 basically an indefinitely lived corporation, and you
15 compare that against customers I think you need to give
16 some meaningful thought to can you reasonably expect
17 that a large percentage of the customers who are going
18 to pay these up-front costs are going to see any
19 benefit either because of age or because of migration
20 in and out of the service area. And it's just a point
21 I wanted to bring to your attention. I should say also
22 this is consistent with a position we were taking in
23 the Tiger Bay buy-out and with which we have taken in
24 the Orlando Cogen buy-out.

25 COMMISSIONER CLARK: And your position in those

1 was what?

2 MR. HOWE: Our position as stated in those was
3 that when you consider the age groups, the migration in
4 and out of the service area, that it is not reasonable
5 to assume that a significant portion of Florida Power
6 Corporation's customers will see any benefit over the
7 buy-out terms.

8 COMMISSIONER CLARK: So what should we do? What
9 is the Public Counsel recommending we do?

10 MR. HOWE: I guess right now I'm just recommending
11 that you take this into consideration. And the reason
12 I'm equivocating is that I realize that the Lake
13 contract has certain nuances that aren't there with
14 some of the others, and you have to consider the fact
15 that there has been a circuit court proceeding and so
16 forth. Were this just a typical buy-out, I would
17 suggest that that buy-out term is too long and the
18 company has not even tried to show any demonstrable
19 benefit to a significant group of customers.

20 COMMISSIONER CLARK: Let me ask you this. Would
21 you address the notion that there is a benefit if you
22 compare it to them actually building a plant which has
23 a loaded up-front cost because you begin depreciating
24 it, or I think staff mentioned it, that you would
25 consider in this analysis also a comparison to actually

1 building it? To that -- let me put it a different way.
2 Does that to some extent mitigate a concern about
3 benefits?

4 MR. HOWE: Probably not, because it's just not the
5 factual circumstances we are faced with. The factual
6 circumstances are the buy-out versus the purchased
7 power contract. I think what you're suggesting is
8 another alternative where if there had not been a
9 purchased power contract.

10 COMMISSIONER CLARK: Right.

11 COMMISSIONER DEASON: One thing is clear though,
12 under that scenario if Power Corp had built the plant
13 they would be responsible for dispatching and hopefully
14 they would be dispatching in an economic manner, and
15 there would be no way that there would be additional
16 costs being asked to be passed onto the ratepayers.

17 MR. HOWE: They would have to dispatch it in a
18 economic fashion.

19 COMMISSIONER CLARK: Mr. Howe, just so I'm clear,
20 Public Counsel takes no position on this case?

21 MR. HOWE: We are looking at this case closely.
22 We have looked at all of these purchased power buy-outs
23 closely.

24 COMMISSIONER CLARK: Oh, so does this get issued
25 as a Proposed Agency Action?

1 MR. HOWE: This is a Proposed Agency Action, so we
2 have an opportunity to look at it based on how the
3 Commission finally acts.

4 COMMISSIONER DEASON: Mr. Howe, let me ask you a
5 question, and I will just be very direct. If the
6 Commission approves the settlement agreement and we
7 know that is going to impact fuel adjustment, is it
8 going to be Public Counsel's position, then, that that
9 constitutes suitable and adequate evidence to support
10 an increase in fuel adjustment charges?

11 MR. HOWE: Commissioner Deason, I guess if we did
12 not protest it, it would be an implicit concession that
13 those amounts should be flowed through the fuel clause.

14 CHAIRMAN JOHNSON: Let me ask you another
15 question, Mr. Howe. I know you stated that you haven't
16 had an opportunity to make a determination on the case,
17 but how do you feel about briefing a legal issue, the
18 issue regarding whether or not the Commission has the
19 authority to interpret the contract as it relates to
20 the company and the ratepayers for purposes of fuel
21 cost recovery?

22 MR. HOWE: Well, on this I'm going to have to kind
23 of speak off the top of my head from long experience.
24 I agree that the Commission has jealously guarded its
25 jurisdiction in the past. I do believe that they are

1 two separate issues; the bargain between the utility
2 and the cogenerator and the question of cost recovery.
3 Now, I'm not sure it's a good analogy but, for example,
4 if the Commission were to approve the purchase price of
5 vehicles at a Chevrolet price and later in a dispute
6 between the parties the vendor was able to establish
7 they were entitled to Cadillac payments, the Commission
8 would not have to let those higher costs be flowed
9 through to the customer.

10 An element that I'm not clear on here is what is
11 the effect of PURPA and what is the effect of the fact
12 this is a cogeneration contract under PURPA. I just
13 don't know. I do believe that generally, though, the
14 Commission has the primary and the preemptive
15 jurisdiction under relevant Supreme Court decisions to
16 determine the cost that Florida Power Corporation can
17 pass on to its customers.

18 CHAIRMAN JOHNSON: Any final comments?

19 MR. FAMA: Chairman.

20 CHAIRMAN JOHNSON: Uh-huh. Could you, and after
21 you make whatever comments you want to make, you had
22 stated earlier, because I am very interested in seeing
23 this legal issue addressed to make sure that we are
24 making the proper determination and assessment as to
25 Issues 2 and 3.

1 You stated that if we were to do that, that
2 somehow impacts the settlement and the negotiation and
3 where we are. After you have made whatever initial
4 points you were going to make, could you address that
5 and help me understand why delaying this to allow the
6 parties to brief the legal issue would have a
7 detrimental impact on this.

8 MR. FAMA: I can address that up front. We have a
9 settlement agreement, it has conditions in it. One
10 condition is Commission approval. Another condition is
11 lender approval. Partnership approval is another
12 condition. We had been struggling to get all of that
13 done. The court in the Lake case basically gave us a
14 deadline and said if you can't get these approvals by a
15 date certain, and I believe the date was June 1st --
16 2nd, June 2nd, that the court is going to move ahead in
17 the Lake case, and set a schedule and we are going to
18 go to trial.

19 MR. WRIGHT: Could I just clarify that. The
20 specific approvals that Judge Griggs (phonetic)
21 required us to obtain were approval of the partnership
22 or the partners in the partnership to the extent
23 required. We took care of that by buying out. The
24 partners first went to a preexisting option contract
25 and the approval of the lender, GECC, General Electric

1 Capital Corp. We also obtained GECC's approval. The
2 judge did not -- the judge recognized that there would
3 be some time lag up to the time that you all would
4 vote.

5 CHAIRMAN JOHNSON: So is there a problem or not?

6 MR. WRIGHT: There is a problem.

7 MR. FAMA: There is a problem, Chairman Johnson,
8 and the problem is that if we have a significant delay
9 and we brief this issue, the court is going to move
10 ahead in the Lake case. The settlement terminates, the
11 settlement is gone. No parties are bound by it. Did
12 we extend it one month until July 1? I think we
13 extended it -- the settlement vaporizes on July 1. The
14 parties are no longer bound. And I would suggest to
15 you that the parties will attempt to retrade the deal,
16 basically, and it will be another protracted
17 settlement.

18 I mean, it took us -- it has taken us a couple of
19 years to settle the Lake case. As a matter of fact, I
20 have settled it about three or four times personally
21 myself. And the settlement, you know, keeps falling
22 apart because of different things. So if some of the
23 parties think they are advantaged by the Commission's
24 briefing schedule, they are going to be reluctant to
25 settle, and the benefits to the ratepayers that the

1 primary recommendation sees here today are probably
2 gone for the foreseeable future. The parties may be
3 back and settle, I don't want to say this will never
4 settle again, but I don't think the parties will settle
5 while it is being briefed before the Commission, that's
6 for sure.

7 COMMISSION STAFF: Chairman Johnson, I would like
8 to point out something. In the Lake proceeding, this
9 is one of the proceedings in which the judge has asked
10 for the Commission's expertise, and all along the way
11 we have been involved in the proceeding. And this is
12 the proceeding that we went to the Internal Affairs
13 conference and spoke to you about, I guess, doing an
14 amicus brief, and I'm not for sure how that was
15 resolved, but we have been involved in the litigation.
16 So if you decide to have the parties file a brief, I
17 think that we could continue and give our expertise and
18 help facilitate the judge's decision with regard to
19 this terms of the contract.

20 CHAIRMAN JOHNSON: Thank you. Any other -- I
21 interrupted you.

22 MR. FAMA: Yes. Chairman Johnson, just one other
23 point. I think that as Commissioner Clark said
24 earlier, there is a risk if we let this settlement go,
25 and, therefore, we don't want deferral, we want the

1 Commission to move forward. We think the cleaner way
2 is to revisit your jurisdiction. I did some research
3 on res judicata before coming here today to satisfy
4 myself that you could revisit what you did in 1995,
5 because clearly the Commission has had a lot of angst
6 about this. I mean, you had it six or seven weeks ago
7 in the Pasco case, you had it back in 1994 and '95 when
8 you first looked at it. The staff recommendations have
9 flip-flopped on this issue. Res judicata is just a
10 legal notion that the thing has already been decided.

11 COMMISSIONER CLARK: I'm sorry, Mr. Fama, you said
12 the staff recommendations have flip-flopped on this
13 issue. What issue and what staff recommendations?

14 MR. FAMA: The staff recommendation -- originally
15 the staff thought the Commission should -- back in
16 1994, the original staff recommendation said the
17 Commission should take jurisdiction over --

18 COMMISSIONER CLARK: All right. Was that a
19 Proposed Agency Action? And then we had a hearing or
20 an argument, because it was a declaratory statement,
21 right, and then we converted to a 120.57, and then the
22 recommendation was different. Is that what you're
23 talking about?

24 MR. FAMA: I can't remember the procedural history
25 that well, Commissioner Clark, but I just recall the

1 original staff recommendation.

2 MR. WRIGHT: Commissioner Clark.

3 COMMISSIONER CLARK: Well, it's important. I
4 mean, I don't think the staff has flip-flopped on this
5 issue.

6 MR. WRIGHT: If I may.

7 COMMISSIONER CLARK: Notwithstanding the fact I
8 may disagree with them on some points, I don't think
9 they have been inconsistent.

10 MR. WRIGHT: May I, Chairman Johnson?

11 COMMISSIONER CLARK: It may not be relevant.

12 MR. WRIGHT: I think I can answer Commissioner
13 Clark's question.

14 CHAIRMAN JOHNSON: Go ahead.

15 MR. WRIGHT: I think that Mr. Fama is possibly
16 confusing the dispute docket that related to a
17 different provision of the contract between FPC and
18 Orlando Cogen in which the staff initially recommended
19 something to the effect that they had jurisdiction or
20 something along those lines. I'm not exactly sure
21 about that. My recollection is that the initial
22 recommendation that was rendered in 940771, the
23 so-called energy pricing docket that was initiated by
24 Florida Power Cooperation's initial petition for
25 declaratory statement was that that petition as posed

1 to the Commission was not appropriate for resolution by
2 a declaratory statement.

3 On motion by Florida Power, I believe, the issue
4 was never discussed at the agenda conference after the
5 staff recommendation was issued. Florida Power then
6 filed an amended position -- petition, I'm sorry, by
7 which it attempted to reframe the issue as a 120.57
8 proceeding. And it was that petition that my client
9 and several others moved to dismiss, that the staff
10 ultimately recommended dismissal, and the Commission
11 voted it to be dismissed in February of 1995.

12 MR. FAMA: I stand corrected, Commissioner Clark.
13 I just said that as a way of prologue just to point out
14 that the --

15 COMMISSIONER CLARK: Well, I would agree with you
16 that it has been a difficult point for all of us, and
17 it's difficult from the standpoint of risk. I think
18 Roland Floyd sort of summed it up very well that to the
19 extent we can we would like to eliminate all risk to
20 the ratepayers. I don't believe we have, and I think
21 in this particular case the issue of our jurisdiction,
22 and what the court's jurisdiction was, and what our
23 jurisdiction was was one of the best researched and
24 briefed and argued cases we have ever had before us.
25 So I'm not interested in going back and reviewing that.

1 I thought it was well done the first time, and I
2 thought we reached the right decision. It may have
3 some consequences that are less than optimal.

4 MR. FAMA: Well, Commissioner Clark, my point is
5 simple. I think you have the authority to revisit your
6 jurisdiction if you want to. You are not barred by res
7 judicata. That is what the law says, and I think
8 that's a cleaner way to do it than to walk away from
9 the settlement you have got in your hand right now.
10 That is the only point. Thank you. That's all I have.

11 CHAIRMAN JOHNSON: Commissioners.

12 COMMISSIONER CLARK: Madam Chair, just to move us
13 off dead center on this, I'm not going to move Issue
14 Number 1. I will move primary staff on Issue 2, but
15 with the understanding that there is some language in
16 the recommendation that I don't agree with, and I don't
17 want to see it in the order. There is a gratuitous
18 statement that deregulation at the retail level is on
19 the horizon and many customers may be switching power
20 supplies. That doesn't figure into my decision, and I
21 don't think it should be a statement we are making.

22 COMMISSION STAFF: Commissioner Clark, what page
23 was that on, so I will know --

24 COMMISSIONER CLARK: Page 9, the bottom of Page 9,
25 and over to Page 10. But other than that, I'm willing

1 to move staff on Issues 2 through 5, is it? Issues 2
2 through 5.

3 COMMISSIONER GARCIA: Second.

4 CHAIRMAN JOHNSON: There is a motion and a second.
5 All those in favor signify -- any discussion? I will
6 provide some. I don't know if that's where I would be
7 or not. I think that it is necessary to do the
8 additional research. I would defer this and have that
9 question answered, or at least briefed by the parties
10 as to the legal issue. Particularly the issue of
11 whether or not the Commission has the authority or is
12 actually bound to look at the contract in terms of the
13 relationships between the company and the ratepayers
14 for purposes of fuel cost recovery. I think that's
15 important enough to have it briefed. To the extent
16 that the settlement falls apart, I still feel so
17 strongly enough that I would want to have that issue
18 further discussed and resolved before making a vote on
19 this particular issue. There is a motion and a second.
20 All those --

21 COMMISSIONER DEASON: Well, before we proceed
22 further, is it necessary to take 2 -- the motion is --

23 COMMISSIONER CLARK: Commissioner Deason, we can
24 do that. I will just move Issue 2. I'm willing to
25 amend my motion to just do 2.

1 **COMMISSIONER GARCIA:** That's fine.

2 **COMMISSIONER CLARK:** And the second still stands.

3 **CHAIRMAN JOHNSON:** There is a motion and a second
4 on Issue 2. All those in favor signify by saying aye.

5 **COMMISSIONER GARCIA:** Aye.

6 **COMMISSIONER CLARK:** Aye.

7 **COMMISSIONER KIESLING:** Aye.

8 **CHAIRMAN JOHNSON:** Opposed. Nay.

9 **COMMISSIONER DEASON:** Nay.

10 **CHAIRMAN JOHNSON:** Issue 2 passes on a
11 three-to-two vote.

12 **COMMISSIONER CLARK:** And I will move staff on
13 Issue 3.

14 **COMMISSIONER GARCIA:** Second.

15 **CHAIRMAN JOHNSON:** There is a motion and a second
16 on Issue 3. All those in favor signify by saying aye.

17 **COMMISSIONER KIESLING:** Aye.

18 **COMMISSIONER GARCIA:** Aye.

19 **COMMISSIONER CLARK:** Aye.

20 **COMMISSIONER DEASON:** Aye. And let me clarify. I
21 don't think that the settlement should be approved, but
22 now that it has been approved, I don't have a problem
23 with the way staff is recommending that it be recovered
24 within the confines of Issue 3.

25 **COMMISSIONER CLARK:** Can I move Issue 4 and 5 then

1 together, too?

2 COMMISSIONER GARCIA: Second.

3 COMMISSIONER DEASON: And I have a question, I
4 think, on Issue 4, if you will give me just a moment.

5 CHAIRMAN JOHNSON: Okay. So we will show Issue 3
6 approved unanimously. And you have moved 4, but we are
7 into discussion. There is a second on 4. Discussion?

8 COMMISSIONER DEASON: Where do issue -- I see it.
9 Issue 4 begins on Page 26. In your recommendation when
10 you make the statement that -- I will just read it.
11 It's within the recommendation at the top of Page 26
12 about middle ways in the paragraph there. It states,
13 "This split between the clauses reflects the fact that
14 the payments are justified based on anticipated
15 capacity and energy savings in the buy-out years."
16 When you say in the buy-out years, what years are
17 those?

18 COMMISSION STAFF: It's the years shown on Page 27
19 of the recommendation, and what that did was take a
20 comparison of the contract. First is the replacement
21 capacity and energy cost during those years, and then
22 based on where the dollars fell, whether that was
23 capacity or energy is how you arrived at the 72 percent
24 and the 28 percent ratio.

25 COMMISSIONER DEASON: And why did you do it in

1 that way, looking at only those years as opposed to all
2 of the years that constitutes the settlement agreement?

3 **COMMISSION STAFF:** I may be speaking a little out
4 of turn given that this was a rate sponsored issue, but
5 I understand that the methodology behind that was the
6 costs incurred were for the sole purpose of deferring
7 or replacing capacity energy in those particular years.
8 The reason, then, that you take and only look at those
9 years is that is where you are receiving your benefit
10 from.

11 **COMMISSIONER DEASON:** Well, I'm looking at Pages
12 12 and 13 of the recommendation. Now, one may dispute
13 the exact numbers shown in that table, but it appears
14 that the buy-out portion of this agreement is very
15 small in comparison to the issue of what constitutes
16 the total net present value of the settlement. There
17 are a number of other issues involved in this. It
18 seems that the buy-out, which is only for the shortness
19 of length of the contract by some three years and ten
20 months or three years and seven months, is just a small
21 portion of what goes into this settlement. Things
22 concerning the agreement on transportation and energy
23 pricing appears to be the most significant item, and I
24 assume that that's for the entire period of the
25 settlement agreement.

1 And so I guess I'm having a problem of why you're
2 trying to divide or allocate the costs between energy
3 and capacity based upon the buy-out years, when it
4 appears that's just a small portion of what constitutes
5 the net present value of the settlement. Can you
6 comment on that?

7 COMMISSION STAFF: Only to the extent that those
8 were specifically identified costs and associated with
9 that provision of the contract. Looking at the costs
10 incurred versus where the savings materialize is how
11 that methodology came about is my understanding.

12 COMMISSIONER DEASON: Well, if we assume that the
13 majority of the savings, and I'm sure it's up to some
14 debate, but that the majority of the savings is related
15 to transportation and energy pricing, shouldn't then
16 that mean that that's the majority of the reason for
17 the settlement agreement and that the majority of that
18 associated with energy, kilowatt hours as opposed to
19 capacity?

20 COMMISSION STAFF: As you referenced on Page 12,
21 that 24.9 is not a savings, that is a cost.

22 COMMISSIONER DEASON: Okay. Where are the savings
23 then?

24 COMMISSION STAFF: The savings come when we get
25 back to this legal issue and whether or not you base it

1 on the settlement agreement, and compare that to Lake's
2 -- compare it to the 100 percent firm position or FPC's
3 position.

4 COMMISSIONER DEASON: And the fact that the
5 savings don't start until well into the settlement
6 period, some 15 years into the settlement period, is
7 that correct?

8 COMMISSION STAFF: Yes, sir.

9 COMMISSIONER DEASON: So we are hinging not only
10 the recovery of the costs, but the allocation of those
11 costs based upon the assumption that the whole reason
12 for this settlement agreement is to achieve those
13 savings which start some 15 years out, and that is the
14 reason for allocating costs right now upon your
15 recommendation of -- what is it, 28 and 72 percent
16 split?

17 COMMISSION STAFF: No, I don't think that the
18 allocation has to do with the time lag. It doesn't.
19 It is simply a weighing of costs which you have to
20 recover, versus where the benefits are derived from.
21 It's irrespective of when it occurs.

22 COMMISSIONER DEASON: Well, you are saying that
23 the primary driver for this settlement agreement is the
24 fact that there has been a buy-out of some three years
25 and seven months, and that because of that buy-out

1 there are savings in capacity dollars that otherwise
2 would exist during those years and, therefore, you are
3 recommending that 72 percent of these costs be passed
4 through the capacity cost recovery as opposed to the
5 energy cost recovery clause, is that what you're
6 saying?

7 COMMISSION STAFF: Kind of. It's not so much that
8 there is capacity dollars that -- the capacity dollars
9 that would have occurred, it is not 72 percent. It is
10 the difference between the contract versus the cost of
11 replacement. So that is your savings being derived.
12 Do you understand that part?

13 COMMISSIONER DEASON: Savings in cost of
14 replacement. I thought that the savings was between
15 what --

16 COMMISSION STAFF: What you would have paid versus
17 what you are going to pay.

18 COMMISSIONER DEASON: Under the contract.

19 COMMISSION STAFF: Yes, sir. During the buy-out
20 period. I don't think I'm answering what you're
21 asking.

22 COMMISSIONER DEASON: It just seems to me that we
23 are putting a whole lot of cost for recovery purposes
24 under capacity, which we know under the way costs are
25 allocated which primarily falls on the residential

1 class of customers.

2 COMMISSION STAFF: Yes, sir.

3 COMMISSIONER DEASON: And that causes we come
4 problems. And I have difficulty understanding why that
5 this analysis was done strictly on the buy-out years
6 and how that result is obtained. Now, if you can
7 explain it to me, fine. That's my difficulty.

8 COMMISSIONER CLARK: And would you clarify whether
9 or not it's similar to what we did in Pasco.

10 COMMISSION STAFF: Yes, ma'am, it is.

11 COMMISSIONER CLARK: Excuse me?

12 COMMISSION STAFF: Yes, ma'am, it is. All I can
13 say, Commissioner Deason, is the methodology that was
14 implemented here was the ratepayers are going to
15 realize an expense. That expense is going to be paid
16 up front for the purpose under these contract terms of
17 avoiding more expensive capacity and energy costs
18 during the buy-out years. In order to -- what was
19 implemented here, fairly --

20 COMMISSIONER DEASON: Let me interrupt you just a
21 second. During the buy-out years, that is the last
22 years, the tail end of this thing.

23 COMMISSION STAFF: Yes, sir.

24 COMMISSIONER DEASON: I thought part of the reason
25 why this is determined to be cost-effective is that

1 during those later years, if there is going to be any
2 needed more capacity, it's probably going to be at a
3 lessor cost.

4 COMMISSION STAFF: That is correct.

5 COMMISSIONER DEASON: Okay. And so that is the
6 reason that you are primarily allocating this on a
7 capacity basis, these costs?

8 COMMISSION STAFF: No, sir.

9 COMMISSIONER CLARK: As I understand it, the
10 reason that they are doing it on -- that they allocate
11 it to capacity is just because its a capacity cost.
12 Capacity cost in a later year, so therefore they are
13 treating it as a capacity cost in this year. And if
14 that is inappropriate to do, I think that should be
15 explored.

16 COMMISSION STAFF: We are not trying to assign it
17 as a capacity or energy cost. It is merely -- this is
18 an expense, here are capacity and energy related costs
19 that you would have incurred under the contract during
20 those years versus what FPC anticipates they will incur
21 because they no longer are under the contract, taking
22 the difference between those two is where the sayings
23 are being derived from. The bulk of those savings is
24 in capacity costs versus energy costs simply because --
25 I hope I speak right here -- you've got these

1 escalating 1991 pulverized coal capacity payments, they
2 are getting larger, larger, and larger.

3 In those buy-out years you have placement capacity
4 being based on a combined cycle unit. There is a
5 larger difference there in between -- this is the part
6 I may mess up on -- in between the energy differential.
7 That is the reason you see the bulk of your dollars
8 being recovered through the capacity clause or being
9 recommended to be recovered through there, because the
10 largest savings that they are deriving because of
11 avoiding the contract payments is under the capacity
12 clause.

13 COMMISSIONER DEASON: Okay. But by buying out the
14 contract, the contract goes away three years and seven
15 months earlier. So to the extent that Power Corp needs
16 more capacity at that point they are going to go out on
17 the market and buy it. And what I have been telling
18 you is that is going to be cheaper than what is
19 currently the avoided pulverized coal unit and probably
20 due to competition and all the other benefits that are
21 going to be derived even cheaper than what is
22 contemplated in the contract.

23 COMMISSION STAFF: That may be, and that's what is
24 addressed in the primary of Issue 2.

25 COMMISSION STAFF: But, Commissioner, if they go

1 out and buy that power it will be allocated on a
2 capacity and energy basis and recovered through the
3 separate clauses the way it is proposed here. So it
4 doesn't avoid the problem that you are talking about.
5 Purchased power capacity generally has a demand portion
6 and an energy portion. The demand portion goes to
7 capacity cost recovery and energy goes through fuel.
8 So even if they purchase power out in the future,
9 you're going to have the same bifurcated recovery.

10 It may be less, I agree, but you will still have
11 the bifurcated recovery. And that is what this
12 attempts to capture, is that if you are talking about
13 capacity or avoiding capacity, it just seemed to make
14 sense to us from a cost allocation viewpoint to treat a
15 certain portion as demand and a certain portion as
16 energy. And this is the way that it was done in Pasco.
17 This is exactly the way we are recommending in Pasco.

18 COMMISSIONER DEASON: And let me make one other
19 clarification or ask for one other clarification. The
20 reason you're doing it over the last three years and
21 seven months is because that's where the savings occur.

22 COMMISSION STAFF: Yes, sir.

23 COMMISSIONER DEASON: Because that's where the
24 savings are in those last three years and seven months,
25 and then we are using that as the allocator for the

1 entire period of time that this settlement is in
2 effect?

3 COMMISSION STAFF: The entire time period in which
4 they are recovering the buy-out costs, yes, sir, that
5 is correct. It's what, 1998 or so through 2008, like
6 it says in the recommendation. The allocators will be
7 used to recover those costs.

8 COMMISSIONER DEASON: All right. Thank you.

9 CHAIRMAN JOHNSON: Issue 4 has been moved and I
10 think there was a second. Any further discussion?
11 Seeing none, all those in favor signify by my saying
12 aye.

13 (Unanimous affirmative vote.)

14 CHAIRMAN JOHNSON: Opposed. Show it approved
15 unanimously. Issue 5.

16 COMMISSIONER CLARK: I move staff on Issue 5.

17 CHAIRMAN JOHNSON: Is there a second?

18 COMMISSIONER KIESLING: Second.

19 CHAIRMAN JOHNSON: Show it approved unanimously.
20 Yes, ma'am.

21 COMMISSION STAFF: Chairman Johnson, with regards
22 to Issue 1, did you --

23 COMMISSIONER CLARK: There has been no motion.

24 COMMISSION STAFF: No motion. Did you still want
25 to -- are you recommending that we open up a generic

1 docket and take up what Mr. Fama said was the res
2 judicata and look at cost recovery on that basis to
3 whether or not you had continuing jurisdiction? How do
4 you want staff to proceed?

5 CHAIRMAN JOHNSON: Let me think about that. I
6 don't want to do anything unless some of the other
7 Commissioners want to act on it right now, but I will
8 get together with the legal staff and we will make a
9 determination as to how to proceed and make a
10 recommendation back to the Commission.

11 COMMISSION STAFF: Then I would like to mention on
12 Issue 5 on close the docket, you just voted to close
13 the docket. Should we keep it open pending --

14 CHAIRMAN JOHNSON: No. I think if we do anything
15 it will probably be through a separate docket anyway.

16 COMMISSION STAFF: Thank you.

17 CHAIRMAN JOHNSON: Thank you for clarifying that.

18 COMMISSIONER CLARK: Let me ask a question. Are
19 there any more of these out there?

20 MR. FAMA: The last one, the last 9.1.2 piece of
21 litigation involves Dade County Cogen, and that is --
22 at this point the posture of that case is it is
23 partially in federal district court in the Southern
24 District, and it's partly in Dade County circuit court.
25 The antitrust piece is in federal court, the other

1 piece is in circuit court. The only other outstanding
2 cogen litigation Florida Power is involved with is
3 Panda, but that does not involve 9.1.2.

4 COMMISSION STAFF: There are also some cases
5 pending involving Florida Power & Light in some
6 standard offer contracts.

7 CHAIRMAN JOHNSON: With similar issues?

8 MR. ELIAS: Yes. Not avoided cost, but issues of
9 contract interpretation, yes.

10 COMMISSIONER CLARK: Have we intervened in those?

11 MR. ELIAS: Not yet. That's something that I had
12 mentioned to you the other day that we needed to talk
13 about and bring to Internal Affairs in fairly short
14 order.

15 CHAIRMAN JOHNSON: Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, JANE FAUROT, Court Reporter, do hereby certify that the foregoing proceedings was transcribed from cassette tape, and the foregoing pages are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 30th day of June, 1997.

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