BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power Corporation for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy With Lake Cogen, LTD., in Order No. 24734, Together With Order No. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C., and Order No. 24989, Establish That Energy Payments Thereunder, Including When Firm or As-Available Payments are due, are Limited to Analysis of Avoided Costs Based Upon Avoided Unit's Contractually-Specified Characteristics.	DOCKET NO. 980509-EQ ORDER NO. PSC-98-1621-FOF-EQ ISSUED: December 4, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING FLORIDA POWER CORPORATION'S PETITION FOR DECLARATORY STATEMENT

BACKGROUND

Florida Power Corporation (FPC) and Lake Cogen, Ltd., (Lake) a qualifying facility (QF), entered into a Negotiated Contract (Contract) on March 13, 1991. The term of the Contract is 20 years, beginning July 1, 1993 when the facility began commercial operation, and expiring July 31, 2013. Committed capacity under the Contract is 110 megawatts, with capacity payments based on a 1991 pulverized coal-fired avoided unit. The Contract was one of eight QF contracts which were originally approved for cost recovery by the Commission in Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ.

On July 21, 1994, FPC filed a petition (Docket No. 940771-EQ) seeking a declaratory statement that a provision of its negotiated contract was consistent with a Commission rule. In Order No. PSC-95-0210-FOF-EQ [Order 0210], the Commission granted the filed motions to dismiss. The Commission found that FPC was asking the Commission to adjudicate a contract dispute. The Commission held that it had no jurisdiction to adjudicate contract disputes involving negotiated cogeneration contracts.

Subsequent to the filing of FPC's petition in Docket No. 940771-EQ, Lake and other QFs, filed lawsuits in the state courts for breach of contract. On January 23, 1996, the Fifth Judicial Circuit Court issued a Partial Summary Judgement for Lake in Case No. 94-2354-CA-01.

On April 9, 1998, FPC filed a Petition for a Declaratory Statement arguing that Order No. 24734, issued July 1, 1991, in Docket No. 901401-EQ, together with Orders Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Section 366.051, Florida Statutes, and Rule 25-17.082, F.A.C., establish that its contractual energy payments to Lake, including when firm or as-available payment is due, are limited to the analysis of avoided costs based upon the avoided unit's contractually-specified characteristics.

On April 30, 1998, Lake filed a motion to dismiss FPC's request for a Declaratory Statement, a petition to intervene and a request for Oral Argument on the topics of *res judicata*, collateral estoppel and administrative finality. On May 21, 1998, North Canadian Marketing Corporation filed a petition to intervene or in the alternative, to submit *amicus curiae* brief.

DISCUSSION

In our consideration of this Petition for Declaratory Statement (Petition), Florida Power Corporation (FPC) asks us to declare that the contract between FPC and Lake Cogen, Ltd. (Lake) that we approved in Order No. 24734 (Docket No. 910401-EQ) requires that FPC (A) pay for energy based upon avoided energy costs, strictly as reflected in the contract; (B) use only the avoided unit's contractually specified characteristics rather than additional characteristics that might have been applicable to a plant that had actually been built, in assessing operational status for determining whether Lake is to receive firm or as-available energy payments; and (C) use the actual chargeout price of fuel to FPC's Crystal River Plants 1 and 2 in computing the level of firm

energy payments to Lake, rather than the price at the time the contract was executed, or some other basis of calculation.

In responding to this petition, we are mindful of FPC's earlier petitions, dated July 21, 1994 and November 1, 1994, which also addressed the interpretation of pricing clauses in the series of negotiated cogeneration contracts which includes this contract with Dade. We dismissed those earlier petitions in Order No. PSC-95-0210-FOF-EQ (Docket No. 940771-EQ), based on the following conclusions:

> ...PURPA [Public Utility Regulatory Policies Act of 1978] and FERC's [Federal Energy Regulatory Commission] regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved.
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> While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts.

Order 0210 at p. 6.

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> Therefore, whether FPC's implementation of the pricing provision [in these negotiated contracts] is consistent with the [standard offer] rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. [e.s.]

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> We defer to the courts to answer the question of contract interpretation raised in this case.

Order 0210 at p. 9.

In its current Petition, FPC asks us to consider certain authorities which post-date Order 0210 in determining whether the Commission can nonetheless exercise jurisdiction to issue the declaratory statement that FPC now petitions for. Those cases include the New York Public Service Commission's opinion in Orange and Rockland Utilities, Inc. (Crossroads), Case 96-E-0728; the Florida Supreme Court's decision in Panda-Kathleen, L.P. v. Clark, et al. (Panda), 701 So. 2d 322 (Fla. 1997) and our own Order Denying Approval of Proposed Settlement (Lake), Order No. PSC-97-1437-FOF-EQ in Docket No. 961477-EQ.

In Crossroads, which concerned a negotiated power purchase agreement between a utility and a cogenerator, the NYPSC held that

> it is within our authority to interpret our power purchase contract approvals.... The precedents involving interpretation of past policies and approvals, and not the contract non-interference policy that Crossroads cites, control here. [e.s.]

Crossroads, p. 5

While Panda involved a standard offer contract, FPC interprets the Florida Supreme Court's opinion to provide that

> the Commission has jurisdiction to clarify its orders and to construe its rules in order to ensure that contracts and payments thereunder do not exceed avoided cost.

Petition, at p. 14.

Finally, FPC points out that, consistent with Crossroads and other like holdings of the NYPSC, our Lake order reasoned that the cited New York cases

> involve a question that turns on what was meant when the contract was approved, and not on the determination of disputed facts and the application of those facts to an unambiguous provision.

Petition, p. 13-14.

In the adjudication of the instant petition, however, we find that we are unable to apply these more recent cases as directly to the case at hand as FPC argues we should. First, this case is distinguishable from both Crossroads and Panda in that neither of those cases involved a prior determination which could be claimed to be, in effect, res judicata as to the current controversy concerning pricing between FPC and parties (including Lake) to the negotiated cogeneration contracts containing these identical pricing provisions. The cogenerators, during oral argument, asserted that, however we may decide to reflect such holdings as Crossroads or Panda in our future dispositions as to negotiated cogeneration contract issues, this controversy has already been determined in our dismissal of FPC's prior petitions in Order 0210 and may not be re-adjudicated now. We agree with that point and find that the doctrine of administrative finality precludes such re-adjudication as a matter of fairness to those who prevailed in the litigation of this issue previously. Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1966). Moreover, our Lake order was only proposed agency action (PAA), which then became a legal nullity when the settlement proposal considered therein lapsed. Therefore, it never matured into a final order so as to constitute this Commission's precedent.

In thus denying FPC's petition, we need not reach today the issue of whether such cases as Crossroads, the reasoning in our Lake order or FPC's interpretation of Panda will or will not play a role in our consideration of future cases concerning negotiated cogeneration contracts post-approval. We only decide that, having resolved this pricing controversy previously in Order 0210, the prior resolution must stand, consistent with the principles of administrative finality.

Based on the above, it is

ORDERED by the Florida Public Service Commission that North Canadian Marketing Corporation's petition to intervene or, in the alternative, to submit amicus curiae brief, is denied. It is further

ORDERED that Lake Cogen, Ltd.'s Request for Oral Argument is granted. It is further

ORDERED that Florida Power Corporation's Petition for Declaratory Statement is denied. It is further

ORDERED that Lake Cogen, Ltd.'s Motion to Dismiss is moot. It is further

ORDERED that this docket is closed.

By Direction of the Florida Public Service Commission, this 4th day of December, 1998.

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BLANCA S. BAYO, Director
Division of Records and Reporting

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RCB

Commissioner Deason dissents. Chairman Johnson dissents, as set forth below:

I dissent. On November 25, 1996, FPC filed a Petition for Approval of a Settlement Agreement with Lake Cogen which resolved the energy pricing dispute as between itself and Lake. At the August 18, 1997, agenda conference, the item was deferred and the parties were directed to file supplemental briefs on the issues of 1) the "regulatory out" clause contained in the power purchase agreement and 2) the impact of the New York Public Service Commission's decision that it had jurisdiction to interpret and clarify its approval of negotiated power purchase agreements. Orange and Rockland Utilities, Inc., Case No. 96-E-0728 (Crossroads). The supplemental briefs were filed on August 29, 1997. The Commission ultimately denied the Settlement Agreement by Order No. PSC-97-1437-FOF-EQ, issued November 14, 1997 (Lake Order), finding in part that it would result in costs that were in excess of the current contract.

The majority declines to apply the holdings in the Crossroads and Panda decisions, or even the analysis in the Lake order, which

was identical to the analysis FPC asks us to declare in the Petition before us here, because this case

> involved a prior determination which could be claimed to be, in effect, res judicata as to the current controversy concerning pricing between FPC and parties (including Lake) to the negotiated cogeneration contracts containing these identical pricing provisions.

Supra, p. 6.

I believe that claim fails because it inaccurately describes both the past and present determinations. While both cases have in common the concern re: pricing of cogenerated power under the same contract terms, the two cases actually litigate two different jurisdictional issues. The first case dealt with what we considered to be an attempt to create general FPSC adjudicatory jurisdiction over post-approval contract disputes concerning negotiated cogeneration contracts, an attempt which we correctly rejected. This case, in contrast, concerns the application of recent precedents which have authoritatively been found not to constitute the assertion of the kind of negotiated contract adjudication jurisdiction which we previously rejected. Indeed, Crossroads explicitly concerned

> [t]he precedents involving interpretation of past policies and approvals, and not the contract non-interference policy... [e.s.]

As the New York Public Service Commission therein stated,

> ...it is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. [e.s.]

Case 96-E-0728, p. 5.

Therefore, I believe we had before us in this case a different question than the one previously reached in Order 0210. Here, we were asked whether we would issue a declaratory statement explaining our approval of the contract in question, as an entirely separate matter from the assertion of jurisdiction over the contract dispute now before the court. Moreover, like the New York Commission in Crossroads, our authority to interpret our power purchase contract approvals has been upheld by the courts. Panda-

Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), cert den, ____ U.S. ____ (1998). It is inappropriate to condition the Commission's jurisdiction on such concepts as res judicata under these circumstances. Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So. 2d 249, 253 (1982).

This is especially so because of our ongoing roles in the areas of reviewing cost recovery and proposed settlements. If we are to carry out these responsibilities in a manner that provides fairness to the parties and the ratepayers, we must, as a matter of policy, be willing to explain or clarify what we approved, when uncertainty arises. In Order 0210, we noted that, under FERC's regulations implementing PURPA,

> [s]tates and their utility commissions are directed to encourage cogeneration...

Supra, p. 5. There is nothing to suggest, however, that encouraging cogeneration should take the form of saving or protecting cogenerators from the effects of the agreements they freely entered into when those agreements -- as approved by us -- yield less than was hoped for. Yet, our failure to explain or clarify what we approved may have that result.

As the Lake order concerning a settlement proposal between FPC and Lake involving the same contract pricing controversy illustrates, this issue will unavoidably be presented to us for resolution again for reasons other than the contract disputes before the courts. The majority's decision avoiding the issue only postpones the inevitable.

The Commission has been, for some time, in need of a path midway between the extremes of post-approval interference with negotiated cogeneration contracts, like the actions taken by the regulatory board in Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F. 3rd 1178 (3rd Cir. 1995), and leaving the parties and the courts without any explanation whatsoever by this Commission, the expert agency which approved the agreement, as to what was approved. Crossroads provides a path "between Scylla and Charybdis" in these cases and I would have taken that path.[1]

[1] Given the independence of the courts, I reject the suggestion that it would be unfair to any party for us to explain

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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what was approved. First, no party can claim unfairness in being limited to what was approved, if that is the result. Second, we have often explained our position in cases where there were important Florida ratepayer interests, even though a different tribunal had ultimate jurisdiction. See, Consolidated Gas v. City Gas; TEC v. FPL; Praxair v. FPL & FPC; DOE v. State of Michigan; Iowa State Board v. FCC; all of which were in the jurisdiction of the federal courts and in all of which we informed the court of our position.