**STATE OF FLORIDA**



DIVISION OF APPEALS
DAVID SMITH
DIRECTOR
(850) 413-6245

# Public Service Commission

**BY FACSIMILE AND U.S. MAIL**

July 23, 1997

Robert Scheffel Wright, Esquire
Landers and Parsons
P.O. Box 271
Tallahassee, Florida 32302

D. Bruce May, Esquire
Karen D. Walker, Esquire
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, Florida 32302

John W. Jimison, Esquire
Brady & Berliner, P.C.
1225 19th Street, N.W.
Washington, D.C.

James A. McGee, Esquire
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733-4042

ACK ____
AFA ____
APP ____
CAF ____
CMU ____
CTR ____
EAG ____
LEG ____
LIN ____
OPC ____
RCH ____
SEC ____
WAS ____
OTH ____

**Re: Docket No. 961477-EQ - Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd., by Florida Power Corporation**

Dear Messrs. Wright, May, Jimison, and McGee:

On July 15, 1997, the Commission voted to review its decision in the above docket. The purpose of the review is to determine if there was any bias in the information presented by staff to the Commission in this matter after March 31, 1997. An order has not yet issued, however, I am enclosing a copy of the staff recommendation that the Commission approved with minor changes.

Pursuant to the Commission's vote, I have been asked to obtain information from the parties to the docket. I am particularly interested in whether you believe that any information presented by staff to the Commission reflects bias; whether the information was inaccurate, unsupported, or

07523 JUL 25 97

whether certain information that should have been presented was not. Please specifically identify that information. Please also include how the information might have affected the decision of the Commission, and how that may have benefitted Florida Power Corporation or prejudiced any party or person.

I would like to file a recommendation by August 6, 1997, for consideration at the August 18, 1997, agenda conference. In order to do that, I will need the information from you, with a copy to the Director of Records and Reporting, by Friday, August 1. If that time is not adequate for any reason, please let me know as soon as possible. My facsimile number is (904)413-6099 if you wish to fax your comments to me. If you have any questions, please don't hesitate to call me at (904)413-6098.

Sincerely,

Christiana T. Moore

Christiana T. Moore
Associate General Counsel

CTM
Enclosure

cc: Director of Records and Reporting
Office of Public Counsel

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

# M E M O R A N D U M

JULY 11, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (ELIAS) RVE
DIVISION OF ELECTRIC & GAS (JENKINS) JDJ
DIVISION OF AUDIT AND FINANCIAL ANALYSIS (DEVLIN) AJ

RE: DOCKET NO.961184-EQ - PETITION FOR APPROVAL OF EARLY TERMINATION AMENDMENT TO NEGOTIATED QUALIFYING FACILITY CONTRACT WITH ORLANDO COGEN LIMITED, LTD. BY FLORIDA POWER CORPORATION

COMMISSION STAFF (HARLOW, BALLINGER, COLSON, E. DRAPER, DUDLEY, TEW, WHEELER, MORIEGA, STALLCUP)

PARTIES (AIR PRODUCTS & CHEMICALS, INC., FLORIDA POWER CORPORATION, OFFICE OF PUBLIC COUNSEL, ORLANDO COGEN LIMITED)

DOCKET NO. 961407-EQ - PETITION FOR EXPEDITED APPROVAL OF SETTLEMENT AGREEMENT REGARDING NEGOTIATED CONTRACT FOR PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY, WITH PASCO COGEN, LTD. BY FLORIDA POWER CORPORATION.

COMMISSION STAFF (FUTRELL, BOHRMANN, DUDLEY, GOAD, WHEELER, MAUREY, MCNULTY, MORIEGA, SLEMKEWICZ, STALLCUP)

PARTIES (FLORIDA POWER CORPORATION, PASCO COGEN, LTD.)

DOCKET NO. 961477-EQ - PETITION FOR EXPEDITED APPROVAL OF SETTLEMENT AGREEMENT WITH LAKE COGEN, LTD., BY FLORIDA POWER CORPORATION.

COMMISSION STAFF (DUDLEY, BREMAN, HARLOW, WHEELER, MAUREY, MCNULTY, MORIEGA, SLEMKEWICZ, STALLCUP)

PARTIES (FLORIDA POWER CORPORATION, LAKE COGEN, LTD., NCP LAKE POWER, INC.)

**DOCKET NO. 970056-EG - PETITION FOR APPROVAL OF REVISED PROGRAM PARTICIPATION STANDARDS FOR RESIDENTIAL HOME ENERGY IMPROVEMENT AND RESIDENTIAL NEW CONSTRUCTION PROGRAMS BY FLORIDA POWER CORPORATION.**

**COMMISSION STAFF (HARLOW)**

**PARTIES (FLORIDA POWER CORPORATION)**

**DOCKET NO. 970096-EQ - PETITION FOR EXPEDITED APPROVAL OF AGREEMENT WITH TIGER BAY LIMITED PARTNERSHIP TO PURCHASE TIGER BAY COGENERATION FACILITY AND TERMINATE RELATED PURCHASED POWER CONTRACTS BY FLORIDA POWER CORPORATION.**

**COMMISSION STAFF (D. SMITH, CAUSSEAUX, D. DRAPER, P. LEE, MAUREY, MERTA, NORIEGA, L. ROMIG, SLEMKEWICZ, STALLCUP, DUDLEY, KEATING)**

**PARTIES (DESTEC ENERGY, INC., FLORIDA INDUSTRIAL POWER USERS GROUP, FLORIDA POWER CORPORATION, OFFICE OF PUBLIC COUNSEL, TIGER BAY LIMITED PARTNERSHIP)**

**AGENDA:** **07/15/97 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE**

**CRITICAL DATES:** **NONE**

**SPECIAL INSTRUCTIONS:** **S:\PSC\LEG\WP\COGEN.RCM**

---

## CASE BACKGROUND

On Tuesday July 1, 1997, staff learned that Lorna Wagner, a former staff attorney with the Legal Services Division's Bureau of Electric and Gas, had become engaged to Robert Dolan, a Florida Power Corporation (FPC) employee. It has been alleged that Mr. Dolan and Ms. Wagner were dating prior to her last date of employment, June 27, 1997. After learning of these allegations, staff initiated a review of Ms. Wagner's case assignments to assess the possibility of any bias in the information presented to the Commission. In conducting the review, staff examined three categories of cases:

(1) All cases assigned to Ms. Wagner since January 1, 1996.

(2) All cases assigned to Ms. Wagner since January 1, 1996, to which Florida Power Corporation was a party.

(3) All cases pending at the time of her resignation.

The best information available at this time (which is hearsay) is that Ms. Wagner and Mr. Dolan have been dating for a "couple of months." From that information, staff has presumed the relationship began some time after March, 1997. Staff reviewed the assignments dating back to January 1, 1996, in an abundance of caution. Staff would note that of all the dockets involving FPC assigned to Ms. Wagner since January 1, 1996, in only one instance was Legal the office of primary responsibility. Staff's review indicates that Commission action has been taken in five of these cases since March 31, 1997. This recommendation addresses what action the Commission should take concerning the dockets involving Florida Power Corporation assigned to Ms. Wagner in which Commission action was taken after March 31, 1997.

## DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission review, at an agenda conference, the decisions made in each of the dockets involving Florida Power Corporation assigned to Ms. Wagner in which Commission action was taken after March 31, 1997?

**RECOMMENDATION:** After notice to the parties, the Commission should review, at an agenda conference, the decisions made in Dockets Nos. 961407-EQ (Pasco), 961477-EQ (Lake), and 961184-EQ (OCL) to determine if there was any bias in the information presented to the Commission. Those items should be presented to the Commission by attorneys from the Division of Appeals, since that Division was not previously involved in those items. Based on the information known at this time, it does not appear that any further review is necessary with respect to the decisions made in Docket No. 970056-EG (Revision to Conservation Program Participation Standards) and Docket No. 970096-EQ (Tiger Bay).

**STAFF ANALYSIS:** Each of the five dockets is discussed separately:

**Docket No. 970056-EG - Petition for Approval of Revised Program Participation Standards for Residential Home Energy Improvement and Residential New Construction Programs by Florida Power Corporation.** The Commission unanimously approved those tariff revisions at the May 6, 1997 agenda conference. There was

no discussion of this item at the agenda conference and no party to the docket other than FPC. The order was issued as Proposed Agency action on May 28, 1997. No protest was filed. If staff's information is correct, Commission action on this item occurred after the relationship had begun. There were no legal issues in the recommendation. E&G staff indicates that the recommendation was based solely on its analysis of the merits of the petition.

**Docket No. 970096-EQ - Petition for Expedited Approval of Agreement with Tiger Bay Limited Partnership to Purchase Tiger Bay Cogeneration Facility and Terminate Related Purchase Power Contracts by Florida Power Corporation.** A hearing was scheduled for April 17, 1997 on this petition. At the outset of the hearing, the parties (FPC, the Office of Public Counsel, the Florida Industrial Power Users Group, Destec Energy, Inc. and Tiger Bay Limited Partnership) presented a stipulation approving the purchase buy out. The stipulation was approved unanimously at the May 19, 1997 agenda conference. Given that the case was stipulated by all the parties, the possibility of bias appears unlikely. If staff's information is correct, Commission action on this item occurred after the relationship had begun. E&G and AFAD staff indicates that the recommendation was based solely on its analysis of the merits of the ~~petition~~ stipulation.

**Docket No. 961184-EQ - Petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited by Florida Power Corporation.** The Commission voted to deny FPC's petition at the January 7, 1997, agenda conference. FPC protested the Commission's Order and a hearing has been set for October 30 & 31, 1997. If staff's information is correct, this Commission action predates the relationship by at least three months. OPC filed a Motion to Dismiss FPC's protest on February 26, 1997. Staff attorney Cochran Keating prepared, filed, and presented the recommendation denying OPC's Motion at the June 24, 1997 agenda conference. The panel approved staff's recommendation. If staff's information is correct, this action took place after the relationship began. However, Ms. Wagner was not involved in this issue. Mr. Keating has indicated that Ms. Wagner provided no input and did not review the recommendation.

**Docket No. 961407-EQ - Petition for Expedited Approval of Settlement Agreement Regarding Negotiated Contract for Purchase of Firm Capacity and Energy from a Qualifying Facility, with Pasco Cogen, Ltd. by Florida Power Corporation.** Ms. Wagner was the lead attorney and did virtually all of the legal work on this petition, which was approved after much discussion by a 3-2 vote, with Commissioners Deason and Kiesling dissenting, at the April 1, 1997,

agenda conference. If staff's information is correct, this action was taken in the same approximate time frame as the relationship began. No protest was filed and the Order approving the settlement was final on May 29, 1997. E&G and AFAD staff indicate that their recommendation was based solely on the analysis of the merits of the petition.

**Docket No. 961477-EQ - Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd., by Florida Power Corporation.** Ms. Wagner was the lead attorney and did most of the work on this docket. The petition was approved after much discussion by a 3-2 vote with Chairman Johnson and Commissioner Deason dissenting at the June 24, 1997 agenda conference. The Proposed Agency Action Order is scheduled to be issued July 14, 1997. Staff will delay the issuance of this Order until after the Commission's consideration of this recommendation. The recommendation was virtually identical to the one filed with respect to the Pasco docket, with one exception.

After the Pasco discussion at the April 1, 1997 agenda, staff (E&G and Legal staff) were concerned about the apparent confusion surrounding the Commission's jurisdiction to deny cost recovery of amounts found by a court to be due pursuant to a negotiated contract. We met in April and decided that we would include the issue in the Lake recommendation. Mr. Elias took the position that the Commission could deny cost recovery; Ms. Wagner was going to take the alternative position that the Commission could not. After a discussion of the areas Mr. Elias was advancing in the primary recommendation, Ms. Wagner, on the filing date of the recommendation (June 12), decided not to file an alternative recommendation. Ms. Wagner submitted her resignation the next morning. Ms. Wagner did, however, participate in the discussion of the issue at the agenda conference. The Commission decided that no vote was needed on that issue. If staff's information is correct, Commission consideration of this docket took place after the relationship began. E&G and AFAD staff indicate that the recommendation was based solely on their analysis of the merits of the petition.

The Commission has the authority to reconsider its Final Orders if they are based on a mistake Peoples Gas System, Inc. v. Mason, 187 So.2d 335(Fla. 1966). While the information revealed so far does not indicate any affirmative evidence of bias in the information presented to the Commission, this review is ongoing. Further, the parties have not had an opportunity to provide information on the issue of possible bias. As stated above, the Tiger Bay docket was resolved by Commission approval of an arms-length negotiated agreement between the parties. At this time,

there does not appear to be a reason to revisit this decision. The revision to the Program Participation Standards is fairly categorized as a routine filing, whose purpose was to assure that only cost-effective conservation programs are approved for cost-recovery. There were no other parties to the docket, and no protest was filed. At this time, there does not appear to be a reason to revisit this decision.

The Lake, Pasco, and OCL decisions are different.

The Lake decision is not yet final. There was a significant amount of discussion of the item at the June 24, 1997, agenda conference. While Ms. Wagner's participation at the agenda conference was limited to an issue which was not voted and no affirmative evidence of bias in the information presented to the Commission has been found to date, this item was recently decided. While some information (hearsay) suggests that this relationship began very recently, it appears likely that the relationship began before the Commission's consideration of this docket. Staff recommends that in an abundance of caution, after notice to the parties, the Commission should revisit, at an agenda conference, the decision to determine if there was any bias in the information presented to the Commission. Absent a showing of bias in the information presented to the Commission, no review on the merits would be necessary. This item should be presented to the Commission by the attorneys of the Appeals Division, since that Division was not involved in this item.

While it is now a final decision, the Pasco settlement/buy out was extensively discussed at the April ~~14~~, 1997 agenda conference. The relationship may not have started until after Commission action on this item. While no affirmative evidence of bias has been shown to date, staff recommends that in an abundance of caution, after notice to the parties, the Commission should revisit, at an agenda conference, the decision to determine if there was any bias in the information presented to the Commission. Absent a showing of bias in the information presented to the Commission, no review on the merits would be necessary. This item should be presented to the Commission by the attorneys of the Appeals Division, since that Division was not involved in this item.

Ms. Wagner was the lead counsel on Docket No. 961184-EG (Orlando Cogen). The staff recommendation on OPC's Motion to Dismiss FPC's Protest of the Commission's Order Denying the Settlement Agreement was prepared and presented by another attorney. The recommendation was a straight-forward application of well-established law on the question of FPC's substantial interests. The recommendation was approved without discussion at

the June 10, 1997 agenda conference. The attorney has indicated that Ms. Wagner provided no input and did not review his recommendation, nor did she participate in the preparation of the Order. While Ms. Wagner did not participate in any way in the formulation of this recommendation, in an abundance of caution since she was the lead attorney, this item should be revisited at an agenda conference, to allow the parties to provide input on the issue of bias in the information presented to the Commission.

As stated above, staff's review is ongoing. If, at any time, evidence of bias in these dockets is discovered, staff will promptly advise the Commission and the parties.

In summary, the Commission should revisit, at an agenda conference, the decisions made in Docket Nos. 961407-EQ (Pasco), 961477-EQ (Lake), and 961184-EQ (OCL), to enable the parties to the respective dockets to present information to the Commission concerning any bias in the information presented to the Commission in rendering its decisions. Absent a showing of bias in the information presented to the Commission, no review on the merits would be necessary. In the interest of assuring a completely independent review, staff believes it would be appropriate for legal staff from the Appeals Division to participate in the further consideration of these three cases.