Florida Power
CORPORATION

JAMES A. McGEE
SENIOR COUNSEL

August 28, 1997

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

Re: Docket No. 961477-EQ

Dear Ms. Bayó:

Enclosed for filing in the above subject docket are fifteen copies of Supplemental Brief of Florida Power Corporation.

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

Very truly yours,

James A. McGee

JAM/kp
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation	Docket No.961477-EQ Submitted for filing: August 29, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Supplemental Brief of Florida Power Corporation has been furnished to the following individuals by regular U.S. Mail this 28th day of August, 1997:

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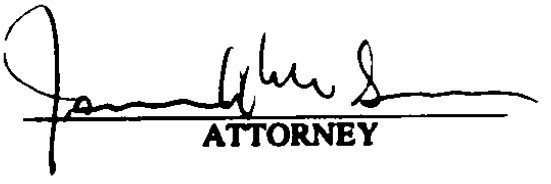

ATTORNEY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation.	Docket No. 961477-EQ Submitted for filing: August 29, 1997

SUPPLEMENTAL BRIEF OF FLORIDA POWER CORPORATION

Florida Power Corporation ("Florida Power"), pursuant to direction by the Florida Public Service Commission ("the Commission") at its August 18, 1997 Agenda Conferences, hereby submits its supplemental brief with respect to the effect of the *Crossroads* decisions[1] and the regulatory out ("reg out") clause on the issue of whether the Commission can deny cost recovery of a portion of the energy payments made to Lake Cogen regardless of the outcome of the current litigation.

1. The effect of *Crossroads* on this case.

The *Crossroads* decision cited in Florida Power's initial brief dated July 29, 1997 supports the position that Florida Power asserted in Docket No. 940771-EQ that the Commission had jurisdiction to determine the proper interpretation of section 9.1.2 of the cogeneration contracts it had previously approved for cost

[1] As used herein, *Crossroads* refers to the decision of the New York Public Service Commission issued November 29, 1996 in Case 96-E-0728 (1996 N. Y. PUC LEXIS 674) and the related U.S. District Court decision issued June 30, 1997 in Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, (1997 U.S. Dist. LEXIS 9390), copies of which are attached.

recovery.[2] However, although Florida Power continues to believe that the Commission has such jurisdiction as a general matter, just as in *Crossroads*, given the Commission's decision in Order No. PSC-95-0210-FOF-EQ (Order 0210) issued in that docket, the doctrine of administrative finality precludes the Commission from now exercising that jurisdiction under the facts and circumstances of this case. See Brief of Florida Power dated July 29, 1997, at pages 3-4.

Crossroads certainly does not give the Commission a right to refuse cost recovery of payments made under a contract that has been subject to final interpretation by the courts where -- as here -- the Commission has previously deferred, through a final unappealable order that has not been modified in any way, to the courts to make that interpretation. Hence, *Crossroads* provides no basis for the Commission to refuse to approve this settlement agreement.

2. The effect of the reg out clause on this case

The reg out clause does not, in itself, provide a basis upon which the Commission can disallow payments for cost recovery. It is nothing more than a mechanism that is triggered where disallowance of cost recovery is properly made in the first instance. When the Commission ruled it lacked jurisdiction in Docket No. 940771-EQ, it expressly determined it would defer to the courts to determine the proper interpretation of the pricing provision in the contract. The Commission

[2] In *Crossroads*, of course, the Commission ruled it did have jurisdiction to interpret the cogeneration contract, and that ruling was later held to be binding upon the Commission. Here, the Commission ruled it did not have such jurisdiction, but that ruling is equally binding upon the Commission in this proceeding.

cannot now avoid that ruling by simply disallowing Florida Power's contractual payments for purposes of cost recovery, which would result in the cessation of those payments through the operation of the reg out clause. That would allow the Commission to thereby do indirectly what it has ruled it could not do directly.

Although it is true that jurisdiction over recovery of costs is a matter between the utility and its ratepayers in the first instance, the exercise of that jurisdiction directly impacts the right of the parties to the contract -- i.e., the QF and the utility -- through operation of the reg out clause. That is precisely why the Commission explicitly stated in Rule 25-17.0832(8)(a) and in Order No. 25668, issued February 3, 1992 in Docket No. 910603-EQ, that, by its approval of the purchase and sale contract, it was also providing that it would allow recovery of payments made under the contract. *See*, Order No. 25668 at pages 12-15. After discussing the principle of administrative finality and the need for certainty as to cost recovery under in these contracts, the Commission declared that "we believe that the parties to approved negotiated contracts should be entitled to rely on a Commission decision to approve cost recovery of payments made pursuant to those contracts." Order No. 25668 at page 14-15. The Commission went on to state: "Specifically it is our intent that future Commissions should not be invited to revisit approval of cost recovery under such contracts." Order No. 25668 at page 15.

Although the Commission noted that this ruling was subject to an exception where its "finding of prudence was induced through perjury, fraud, collusion,

deceit, mistake, inadvertence, or the intentional withholding of key information," (Order No. 25668 at pages 14-15), that exception plainly referred to matters which were existing at the time the finding of prudence was made.[3] Only then could such matters have improperly "induced" the finding of prudence. In other words, if a witness gave false testimony or if incorrect figures were supplied to the Commission, the issue of prudence could be re-visited once the fact of perjury or mistake was discovered. But, to disallow cost recovery based on subsequently discovered facts --such as a later ruling by a court as to the meaning of section 9.1.2 -- that were not before the Commission at the time of its finding of prudence would be to do exactly what the Commission said in its order it would not do -- deny cost recovery based on matters arising after the finding of prudence was made. That is exactly the type of after-the-fact change to the Commission-approved contract and the Commission's determination of prudency for purposes of cost recovery that *Freehold*[4] made clear could not be made under PURPA.

The point is, once a court has by final decision determined the proper interpretation of section 9.1.2, that decision establishes what payments Florida Power must make under the contract. The Commission unequivocally ruled in Order No. 25668 that it would allow cost recovery of payments made under the

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[3] Furthermore, mistakes of law do not constitute the kind of extraordinary circumstance that warrant an exception to the doctrine of administrative finality. See Skinner v. Skinner, 579 So.2D 358 (Fla. 4th DCA 1991) (misunderstanding of possible results of judicial degree is not ground for relief from judgment); Schrank v. State Farm Mutual, 438 So.2D 410 (Fla. 4th DCA 1983) (mistaken view of the law constitutes judicial error rather than mistake).

[4] Freehold Cogeneration Assocs. v. Bd. of Reg. Commissioners, 44 F.3d 1178 (3rd Cir. 1995), cert. den. 116 S.Ct. 68.

contract. If the Commission were to disallow cost recovery of payments made under the contract in accordance with the court's interpretation, Florida Power would be entitled to stop its contract payments to the extent they were disallowed by the Commission --but only if the Commission had jurisdiction to disallow the payments based on its after-the-fact disagreement with the court's interpretation. In that event, of course, the Commission would have plainly resolved the contract rights of the parties by its disallowance of cost recovery, even though it said in Order 0210 that it would defer this issue to the courts. Thus, the rights of the parties as to the level of payments to be made under the contract and the rights of the utility and the ratepayer as to the level of cost recovery to be allowed are inextricably intertwined by virtue of the reg out clause, because Florida Power is not required to make payments that have been disallowed by the Commission.

In sum, if the Commission were to deny cost recovery on the basis of its subsequent disagreement with a court's interpretation of section 9.1.2, it would be doing exactly what it said in Order 0210 it would not do -- it would be interpreting the contract and determining what payments Florida Power is contractually required to make under the contract. It would obviously have been a futile act for the Commission to defer to the courts to resolve the parties' contract dispute if the Commission could then resolve that dispute in a contrary manner than the courts through denial of cost recovery with the concomitant operation of the reg out clause.

Having declined by Order 0210 to resolve this dispute as to the proper interpretation of 9.1.2 -- which order was fully in effect and binding on all parties, as well as the Commission itself, at the time Lake and Florida Power entered into the settlement agreement as to which Commission approval is sought in this proceeding -- the Commission cannot now attempt to resolve this dispute through the simple tactic of denial of cost recovery. To do so would impermissibly fly in the face of its rule and prior order that payments required to be made under this contract would be allowed for purposes of cost recovery. Principles of administrative finality make that clear.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By _____

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1ST OPINION of Level 1 printed in FULL format.

Orange and Rockland Utilities, Inc. - Petition For a Declaratory Ruling That the Company and Its Ratepayers Are Not Required To Pay For Electricity Generated By a Gas Turbine Owned By Crossroads Cogeneration Corporation

Case 96-E-0728

New York Public Service Commission

1996 N.Y. PUC LEXIS 674

November 29, 1996

PANEL:
[*1]

COMMISSIONERS: John F. O'Mara, Chairman; Eugene W. Zeltmann; Harold A. Jerry, Jr ; William D. Cotter; Thomas J. Dunleavy

OPINION:

At a Session of the Public Service Commission held in the City of Albany on November 6, 1996

DECLARATORY RULING

(Issued and Effective November 29, 1996)

BY THE COMMISSION:

BACKGROUND

On August 12, 1996, Orange and Rockland Utilities, Inc. (O&R) filed a Petition For a Declaratory Ruling, asking for a declaration that the utility is not obligated to expand its purchases of electricity from Crossroads Cogeneration Corporation (Crossroads) under the existing contract between the two. O&R entered into that contract on October 8, 1987 with Crossroads' predecessor, Onsite/US Power Limited Partnership (Onsite). The contract was supplemented on January 21 and October 4, 1988, and was approved on December 2, 1988, upon the terms set forth in the latter supplement. n1

n1 Case 28689, Orange and Rockland Utilities, Inc. and Onsite/US Power L.P. - Contract No. E-139, Letter Order (Issued December 2, 1988) and Staff Memorandum (November 21, 1988).

According to O&R, the original agreement with Onsite provided for the purchase of electric capacity and energy [*2] from a plant designed to generate 3.3 MW nominally, and sized at no more than 4.0 MW of gross capacity. The utility complains that Crossroads has expanded its plant beyond the 3.3 MW and 4.0 MW size limits, by installing a 7 MW turbine, and plans to compel the utility to purchase at least some of the generation produced by the new turbine under the original contract. O&R asks for a finding that it has no obligation to purchase that additional energy at the original contract prices.

On August 30, 1996, Crossroads replied to O&R. It maintains that, as a qualifying facility (QF) under federal and state law, it is exempt from state

regulatory interference into its contract with O&R. Contending that O&R requests a contract interpretation that is both beyond our jurisdiction and contradicts our stated policies for addressing contract disputes, Crossroads asks that the petition be denied. The positions of the parties are set forth below.

POSITIONS OF THE PARTIES

According to O&R, its contract with Crossroads provides for the purchase of electricity from a plant nominally sized at 3.3 MW, and explicitly limits the purchase obligation to capacity produced from a plant of a maximum size [*3] of 4.0 MW, net of the capacity and energy directed to operating the plant. O&R stresses that the existing contract is priced significantly in excess of avoided cost, and was entered into in compliance with former contract pricing policies that are now expired and outmoded.

O&R reports that the plant commenced operation in December 1987, generating no more than 4.0 MW (gross) from three reciprocating engines that could be fueled with either oil or gas. Crossroads then assumed ownership from the original developer in 1990. In 1995, the utility complains, Crossroads announced its intention to install an additional 7 MW gas turbine at the site. O&R relates that, despite its refusal to purchase any of the generation produced from that new plant component under the original contract, Crossroads proceeded to complete installation and commence operation of the turbine by May 24, 1996.

Crossroads intends, says O&R, to supplement production of the original plant with electricity produced by the new turbine, and demand payment for that electricity under the original contract. As O&R describes it, the original plant historically operated at a yearly availability factor of approximately 85% [*4] to 90%, and Crossroads will now enhance that factor to 100% by substituting the turbine's electricity for the original equipment's production, whenever any of the original equipment is not operating. According to O&R, this will force it and its ratepayers to pay approximately $ 430,000 per year more than contemplated under the contract, and, since the contract has a remaining life of ten years, the overpayment to Crossroads will total more than $ 4.3 million (nominal).

Conceding that the contract entitles it to exercise a right of first refusal for any increased generation produced at the Crossroads site, O&R asserts it declined to exercise that right. This decision was reasonable, it explains, because the original contract provides for pricing premised upon the 6¢ minimum rate and the long-run avoided cost (LRAC) estimates in effect in the 1980's. Current prices, the utility points out, are much lower. Compelling it to purchase the additional electricity under the original contract, the utility argues, would run counter to the policy of encouraging utilities to reduce their electric rates, and would "needlessly expand the legacy of New York's misguided past energy policy." n1 O&R [*5] concludes that a ruling advising that it has no obligation to purchase the additional energy would be consistent with the Public Service Law mandate to establish just and reasonable rates.

n1 O&R Petition, p. 7.

Crossroads' Response

Emphasizing that this controversy involves the sale of electric energy by a QF to a utility under a binding power purchase contract, Crossroads asserts

that the dispute is beyond our jurisdiction. Citing the Freehold decision, n1 Crossroads maintains that state regulatory jurisdiction over this contract ended at the time it was approved. As a result, Crossroads believes that federal law would preempt a state regulatory effort to resolve disputes over this contract.

n1 Freehold Cogeneration Assocs. v. Bd. of Reg. Commissioners of New Jersey, 44 F.3d 1178 (3rd Cir. 1995), cert. den. 116 S.Ct. 68.

Moreover, Crossroads contends, we have repeatedly eschewed involvement in contract disputes like that O&R raises. n2 Under these precedents, Crossroads continues, it has been decided that these disputes are not unique to utility regulation, and are best resolved through negotiation or application of commercial law principles by the courts. [*6] The QF complains that O&R has not explained why it fails to concede that those precedents control under these circumstances.

n2 See Case 94-E-0205, Kamine/Besicorp Allegany L.P., Order Denying Petition and Counter-Complaint (Issued September 15, 1994); Case 92-E-0032, Erie Energy Associates, Declaratory Ruling (Issued March 2, 1992).

Crossroads also maintains that this commercial dispute is more complex than O&R implies. Interpreting the provisions of the contract that allow the utility of right of first refusal, and permit the developer to expand capacity for sales to third parties, Crossroads discerns a concession by the utility that the plant could be enlarged. Crossroads contends further that installation of a gas turbine was an option reflected in the original plan for the facility that was provided to O&R in early 1986. Crossroads also argues that correspondence it received from O&R prior to the genesis of this dispute undermines the interpretation of the contract that the utility sets forth in its petition. As a result, the developer argues, the dispute cannot be decided on the basis of the facts that O&R has presented.

Moreover, Crossroads maintains that [*7] the linchpin of O&R's position is that the contract limits availability of the existing plant to approximately 90%. According to the QF, however, the contract does not so provide, and instead permits the developer to sell electricity produced by up to 4.0 MW of generation capacity, without restricting the source of that capacity.

Conceding that we can assert jurisdiction to interpret or clarify policies that existed at a time a contract was approved, Crossroads notes that O&R does not request such an interpretation. According to the QF, it should be decided that it is the courts, rather than state regulatory agencies, that have continuing jurisdiction over the interpretation of this contract.

DISCUSSION AND CONCLUSION

As was recently reaffirmed, it is within our authority to interpret our power purchase contract approvals, n1 and that jurisdiction has been upheld by the courts. n2 The precedents involving interpretation of past policies and approvals, and not the contract non-interference policy that Crossroads cites, control here. As a result, the approval of the original contract for the Crossroads site may be explained and interpreted, and O&R's petition may be construed [*8] as requesting that relief. That approval was limited to a project consisting of three reciprocating engines, sized at a net capacity of 3.3 MW, with an estimated annual electrical output of 26,300 MWh. n1 Under the

approval, therefore, Crossroads may not supplement electricity produced by its reciprocating engine capacity with electricity produced from its new turbine capacity.

n1 Case 95-E-1177, Niagara Mohawk Power Corporation, Order Directing Further Negotiations (Issued March 26, 1996); Case 89-E-1158, Consolidated Edison Company of New York, Inc., Order Clarifying Prior Order (Issued December 28, 1993).

n2 Indeck-Yerkes Energy Services v. Public Service Commission, 114 A.D.2d 618 (3rd Dept., 1991); Indack Energy Services of Yonkers v. Consolidated Edison Co. of N.Y., Inc., 93 Civ. 4528 (MVM) (S.D.N.Y., February 24, 1994).

n1 Staff Memorandum, p. 1.

To the extent that Crossroads raises a contract issue, it is that O&R has waived, modified or otherwise altered its obligations under the original agreement through its course of conduct in the years since the approval. Involvement in that dispute is eschewed, because of the contract non-interpretation [*9] policy Crossroads cites.

Under our approval of the contract for the Crossroads site, the QF may not expand the generation production entitled to the contract pricing. Instead, the approval of the contract was limited to production from a three reciprocating engine facility, sized at approximately 3.3 MW (net), with an annual output of about 26,300 MWh per year. n2 As O&R demonstrates, Crossroads intends to supplement the 3.3 MW of net production from the reciprocating engine generator sets with electricity from a 7.0 MW turbine, resulting in yearly production levels of approximately 35,040 MWh that far exceed the 26,300 MWh figure. n3 As a result, the expanded production made possible by Crossroads' new turbine is beyond the terms and conditions approved for this contract. n4

n2 Staff Memorandum, pp. 1-2.

n3 O&R Petition, Exh. D.

n4 Case 90-E-0238, American Ref-Fuel Company of Hempstead, Declaratory Ruling (Issued August 22, 1990); Case 88-E-114, Indeck-Yerkes Energy Services, Inc., Declaratory Ruling (Issued September 14, 1988) and Order Denying Petition For Rehearing (Issued February 28, 1989) (Indeck Decisions).

Contrary to Crossroads' assertions, [*10] we may make such a determination. In fact, in Indeck-Yerkes Energy Services, the courts upheld our authority to find that a new contract was needed, under circumstances that resemble those here. There, the anticipated size for the plant discussed in the approval was approximately 49 MW, and 400,000 MWh of generation per year was expected. When the developer increased the size of the facility to 53.38 MW, it was determined that the additional production must be priced under a new contract, rather than the original contract. The court found both that we had the authority to determine the scope of our prior approval and that our determination was reasonable. n1

n1 Indeck-Yerkes Energy Services, Inc., 164 A.D.2d at 621-22.

Moreover, the court specifically rejected an argument that the original contract provided for expansion of the facility -- the same argument Crossroads makes here. The court found that the right to expand could have been clearly set forth in the contract, but, as it was not, there was no basis for presuming that right. n2 Under the court's analysis, neither the right of first refusal accorded O&R nor the right to make third party sales accorded Crossroads [*11] in this contract constitute the kind of explicit right to expand that would have fallen within the initial approval, and the pricing contemplated there.

n2 Indeck-Yerkes Energy Services, Inc., 164 A.D.2d at 622.

It was also decided in Indeck-Yerkes Energy Services that concern over a link between the pricing of a contract and the amount of capacity brought into production under that contract was appropriate. Here, the December 2, 1988 contract approval followed rejection of an earlier contract pricing formula, which might have provided for even higher payments to Crossroads. n3 Therefore, the pricing of the generation purchased under this contract was of concern, and there was a proper purpose to limiting, in the approval, the capacity that could receive the contract pricing.

n3 Case 28689, Orange and Rockland Utilities, Inc. and Onsite/US Power L.P. Contract No. E-139, Letter Order (Issued July 13, 1988).

After it was determined that the developer of the Indeck-Yerkes plant had added capacity to its facility beyond that contemplated under the approval of the contract, it was required to enter into a new contract to price that additional capacity. It did [*12] so, allocating generation produced from the capacity at the site between the two contracts. n1 Nothing in the approval of this contract exempts Crossroads from a similar obligation.

n1 Case 90-E-0084, Niagara Mohawk Power Corporation and Indeck-Yerkes Energy Services, Inc., Order Approving Contract Subject to Condition (Issued April 30, 1991).

Crossroads, however, does raise a contract interpretation issue. Construing that issue in the light most favorable to Crossroads, it maintains that O&R, by its course of conduct after approval of the original agreement, has waived, modified, or otherwise altered either the requirements of that agreement or the relationship between the parties. Such a dispute implicates the contract non-interference policy established in the precedents that Crossroads cites. Therefore, involvement in that aspect of the dispute between O&R and Crossroads is eschewed.

Accordingly, we find and declare that the petition of Orange and Rockland Utilities, Inc. is granted in part, to the extent that the December 2, 1988 approval of Contract No. E-139 between O&R and Onsite (Crossroads' predecessor) is construed as limiting the contract pricing to electric [*13] production from the three reciprocating engine facility that was installed in 1987, and does not extend to production from the gas-fired turbine that was installed in 1996.

By the Commission

1ST CASE of Level 1 printed in FULL format.

CROSSROADS COGENERATION CORPORATION, Plaintiff, v. ORANGE AND ROCKLAND UTILITIES, INC., Defendant.

Civil Action No. 96-5287

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1997 U.S. Dist. LEXIS 9390

June 30, 1997, Decided

DISPOSITION: [*1] Defendant's motion to dismiss the Complaint granted. Complaint dismissed in its entirety; plaintiff's cross-motion for summary judgment dismissed.

COUNSEL: APPEARANCES

DeCOTIIS, FitzPATRICK & GLUCK, By: William Harla, Esquire, Teaneck, New Jersey, (Attorneys for Plaintiff).

MORGAN, LEWIS & BOCKIUS, By: Robert A. White, Esquire, Princeton, New Jersey - and - MORGAN, LEWIS & BOCKIUS, By: Glen R. Stuart, Esquire, Stephen Paul Mahinka, Esquire, Elizabeth A. Giuliani, Esquire, Philadelphia, Pennsylvania. PHILIP GOLDSTEIN, ESQUIRE, Orange and Rockland Utilities, Inc., Pearl River, New York, (Attorneys for Defendant).

JUDGES: JOHN W. BISSELL, United States District Judge

OPINIONBY: JOHN W. BISSELL

OPINION: OPINION

BISSELL, District Judge

This matter comes before the Court on defendant's motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and plaintiff's cross-motion for partial summary judgment. Plaintiff, Crossroads Cogeneration Corporation, filed a five-count Complaint in this Court on November 12, 1996, seeking damages from and injunctive relief against defendant, Orange and Rockland Utilities, Inc., for breach of contract, breach of the covenant of good faith [*2] and fair dealing, anticipatory repudiation and violations of the federal antitrust laws. The Court has jurisdiction over plaintiff's federal antitrust claims pursuant to *28 U.S.C. § 1337* and over its contract claims pursuant to *28 U.S.C. § 1332*.

FACTS

Plaintiff is a Delaware corporation with its principal place of business in Mahway, New Jersey. It is an independent, non-regulated producer of electric power that owns and operates a cogeneration n1 facility which meets the applicable operating and efficiency standards and ownership criteria necessary to classify it as a "qualifying facility" under the federal Public Utility Regulatory Policies Act ("PURPA"), Public Law No. 95-717, 92 Stat. 3117 (1978) (codified at *16 U.S.C. § 824a* et seq.) and the implementing regulations n2 promulgated by the Federal Energy Regulatory Commission ("FERC") (Compl., PP 11-16).

n1 Cogeneration is the production of electricity and useful thermal energy at a single facility

n2 These are cited at 18 C.F.R. §§ 292.203(b), 292.205(a) and (b), and 292.206.

[*3]

Defendant is a New York corporation with its principal place of business in Rockland County, New York. It is a public utility engaged (along with two corporate affiliates) in the supply and delivery of electricity in Rockland and Orange Counties in New York, Pike County, Pennsylvania and Bergen County, New Jersey (Id., PP 18-20). Defendant purchases electricity from relatively small (in terms of output capacity), independent generators of energy such as plaintiff. Defendant is virtually the sole provider of electricity at retail cost to residential, commercial and industrial customers in the above-mentioned counties. (Id., P 22).

Pursuant to PURPA, qualifying facilities (or "QF's"), such as plaintiff, are exempt from regulation under the Federal Power Act and from state law or regulation

respecting the rates of electric utilities and the financial and organizational regulation of electric utilities. Instead, FERC regulations set forth the principal obligations of public utilities, such as defendant, in dealing with QF's. State administrative agencies such as the New York Public Service Commission ("NYPSC") have promulgated regulations implementing the FERC regulations application [*4] to QF's. The FERC regulations require the state administrative agencies to actively supervise the formation and performance of QF contracts. Thus, under the provisions of the New York statute establishing the NYPSC, QF contracts must be submitted to the NYPSC for review and approval. See N.Y. Pub. Serv. Law § 66-c(1).

On October 2, 1987, defendant entered into a contract (the Power Service Agreement, or the "Agreement") with an energy supplier for the purchase of electric energy for a period of 20 years. That supplier assigned the Agreement to plaintiff on July 31, 1990. (Id., PP 24-25; Defendant's Br., Exh. 1). The Agreement provided, inter alia, that it be approved by NYPSC, which approval was eventually obtained on December 2, 1988. (Defendant's Br., Exh. 1 at Article XIX and Exh. 2 at 1-4). The Agreement contains a New York choice of law provision. (Id., Exh. 1 at Article XXI(6)). The dispute giving rise to the instant litigation arose in May 1996, when plaintiff installed a new 5 MW gas turbine at its Bergen County plant and began delivering to defendant electricity generated by the new turbine. (Compl., PP 41, 47-48). Defendant objected to the additional energy [*5] being provided, because in its view, the Agreement between the parties, as approved by the NYPSC, only required it to purchase (at the contract price) energy generated by the equipment plaintiff owned at the time of the assignment of the Agreement to it. Plaintiff, on the other hand, argued that the Agreement required defendant to purchase (at the contract price) all the energy plaintiff was capable of generating up to 4MW. (Id., PP 54-56, 74).

On August 12, 1996, prior to plaintiff's filing the Complaint in this action, defendant filed a Petition for a Declaratory Ruling with the NYSPC seeking a declaration that it was not obligated to purchase electricity from plaintiff in excess of that generated by the plant's original generating equipment. (See Defendant's Br., Exh. 2 at 1). Plaintiff filed a Response on August 30, 1996, wherein it conceded the NYPSC's jurisdiction over the approval of the Agreement (which took place in 1988), but challenged the NYPSC's jurisdiction to resolve the contract dispute brought before it by defendant. (See id. at 2-3). On November 6, 1996, the NYPSC issued a ruling in favor of defendant. In its written Opinion dated November 29, 1996, the [*6] NYPSC specifically held that (1) it had jurisdiction to interpret and explain its approval of the Agreement, and (2) its December 2, 1988 approval of the Agreement limited defendant's obligation to energy generated by plaintiff's original equipment. (See id. at 3-4)

Six days after the NYPSC announced its decision, plaintiff instituted the instant litigation. Plaintiff states five causes of action in its Complaint. The first four are state law claims. They are as follows: the First Cause of Action seeks damages for breach of contract (specifically, for breach of the Power Sales Agreement (the "Agreement") entered into by the parties on October 2, 1987); the Second Cause of Action states a claim for breach of the implied covenant of good faith and fair dealing; the Third states a claim for anticipatory breach of contract; and the Fourth seeks a declaratory judgment as to the parties' rights and obligations under the Agreement. (See Compl., PP 64-83). The Fifth Cause of Action seeks relief for alleged violations of (1) Section 2 of the Sherman Act, *15 U.S.C. § 2;* (2) Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13.* (See id., PP 84-94). [*7]

ANALYSIS

I. Defendant's Motion to Dismiss the Complaint

A. Standard for Motion to Dismiss Pursuant to Fed R. Civ. P. 12(b)(6)

Fed. R. Civ. P. 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams, 490 U.S. 319, 326, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989)* (citing *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)). Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* In disposing of a motion to dismiss, the court operates on the assumption that the factual allegations in the complaint or counterclaim are true. *Neitzke, 490 U.S. at 326-27.* A motion to dismiss may be granted if the opposing party would not be entitled to relief under any set of facts consistent with the allegations in the complaint or counterclaim. As the Supreme Court stated in Neitzke:

> nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon, supra [*8] at 73, 104 S. Ct. 2229,* a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations

(490 U.S. at 327).

B. Plaintiff's Fifth Cause of Action (Asserting Federal Antitrust Claims) is Dismissed for Failure to State a Claim Upon Which Relief can be Granted.

(1) Alleged violations of Section 2 of the Sherman Act

In its Fifth Cause of Action, plaintiff alleges both a claim of monopolization and of attempted monopolization under Section 2 of the Sherman Act. (Compl., PP 89, 90). Section 2 of the Sherman Act provides that: "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...." *15 U.S.C. § 2.*

In order to state a claim for monopolization, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that [*9] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Company, 113 F.3d 405* (3d Cir., 1997) (quoting *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 197 (3d Cir. 1992)*, and *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)).* To state a claim for attempted monopolization, a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize [the relevant market] and (3) a dangerous probability of achieving a monopoly power." Schuylkill at 7 (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)).*

Accepting as true all of the allegations in the Complaint, plaintiff nevertheless fails to make out a claim for either the offense of monopolization or attempted monopolization, because (1) it fails to plead a relevant market and (2) it fails to plead that defendant possesses or dangerously threatens to possess monopoly power in such a relevant market. Both of plaintiff's [*10] Sherman Act claims require the identification of the relevant market within which the alleged anticompetitive activities can be assessed. See *Walker Process Equip., Inc. v. Food Machs. & Chem Corp., 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965).* Plaintiff contends that it has alleged injury to competition in the market "for electricity" (see Plaintiff's Opp. Br. at 23); however, nowhere in the Complaint is such a market alleged. Moreover, even if the Court were to accept plaintiff's argument that the relevant market can be ascertained by reading the Complaint as a whole, the Court would nevertheless be left with only vague statements of the market "for electricity" to which plaintiffs refers. For example, the Court would be forced to guess as to whether plaintiff means to identify as the relevant market "the supply of electric power" or "the purchase of long term wholesale power." (Comp., PP 85, 90).

Further, plaintiff fails, as a matter of law, to sufficiently allege monopoly power. Plaintiff merely states that defendant is the sole provider of electricity to certain customers in the counties it services. (See Compl. P 22; Plaintiff's Opp. Br. at 23-24). [*11] Plaintiff fails to allege such necessary facts as defendant's market share in the markets in which plaintiff is a competitor or the barriers that exist which prevent plaintiff's entry into such markets. These deficiencies in the Complaint mandate dismissal of plaintiff's Sherman Act claims. See *Barr Lab, Inc. v. Abbott Lab, 978 F.2d 98, 112-13 (3d Cir. 1992).*

Additionally, plaintiff fails to allege an injury cognizable under the antitrust laws. As was true of the plaintiff in Schuylkill, plaintiff here is not a direct competitor of defendant but, rather, it is defendant's supplier. "A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury." Schuylkill at 12 (quoting *Vinci v. Waste Management, Inc., 80 F.3d 1372 (9th Cir. 1996)).* There is some evidence in the record that plaintiff has the potential to be or may sometime in the future become a competitor of defendant, but that prospect is speculative, at best. Second, the basis of plaintiff's claims here is that in refusing to pay the contract price for energy generated by the new equipment, defendant violated the parties' power purchase agreement. n3 As the Third [*12] Circuit explained in Schuylkill, such actions are not a concern of the federal antitrust laws, but are instead, an issue to be decided according to principals of contract law and PURPA. See Schuylkill at 17. See also *Kamine/Besicorp Allegheny L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194, 1204 (W.D.N.Y. 1995).* Defendant's actions may have caused injury to plaintiff, but they did not cause injury to competition in a defined market. This is not the sort of injury the antitrust laws were meant to prevent.

n3 In Schuylkill, the Third Circuit affirmed the dismissal of an independent power producer's antitrust claims on the ground that there were insufficient allegations of injury to competition or harm to consumers. There, as here, the independent power producer was suing an electric utility company that had cut back on the amount of energy it was pur-

chasing from that independent producer.

(2) Alleged violation of Section 13 of the Robinson-Patman Act

In its Fifth Cause of Action, [*13] plaintiff also alleges that defendant offered a customer of plaintiff a reduced price for electricity not offered to all customers and that such action constitutes a violation of the Robinson-Patman Act. (Compl., PP 49, 62-63, 88, 91). The Robinson-Patman Act, which amended § 2 of the Clayton Act, is phrased more broadly than the Sherman Act. It prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." *15 U.S.C. § 13*(a). In order to properly state a claim for a violation of the Robinson-Patman Act, a plaintiff must allege facts to show that: (1) the defendant made at least two contemporaneous sales of the same commodity at different prices to different purchasers; and (2) the effect of such discrimination was to injure competition. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Group, 509 U.S. 209, 220-27, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*. See also *O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 346-48 (3d Cir. 1981)*, cert. denied, *455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)*.

Plaintiff does not allege, nor does it present facts which suggest, that defendant in [*14] fact made sales of electricity to any purchaser at a reduced price. Rather, plaintiff's entire claim is based on its assertion that defendant "offered" to sell electricity at a reduced rate to Crossroads Corporate Center, one of plaintiff's customers. Both the Fourth and Eighth Circuits have held that a plaintiff's failure to allege two completed sales at a reduced price is grounds for dismissal of a Robinson-Patman Act claim under Fed. R. Civ. P. 12(b)(6). See *Terry's Floor Fashions, Inc. v. Burlington Indus., 763 F.2d 604, 615 (4th Cir. 1985)*, and *Fusco v. Xerox Corp., 676 F.2d 332, 334-38 (8th Cir. 1982)*.

Further, plaintiff fails to allege the second essential element of establishing a price discrimination claim under the Robinson-Patman Act in that it does not set forth facts which show injury to competition as a result of defendant's alleged price discrimination. Plaintiff's entire Robinson-Patman claim is premised on defendant's injury to plaintiff, not to competition, which is not the type of "predatory conduct" the antitrust laws are meant to prevent. See, i.e. *Hommel, 659 F.2d at 348*. As plaintiff fails to meet the threshold requirements necessary for stating [*15] a claim under the Robinson-Patman Act, this claim must be dismissed.

C. Plaintiff's First, Third and Fourth Causes of Action are Dismissed

Defendant argues that plaintiff's First, Third and Fourth Causes of Action should be dismissed for the reason that plaintiff is collaterally estopped from litigating the issue of whether defendant breached its obligations under the Agreement and that this is the central issue upon which these three claims are based. As an initial matter, the Court addresses plaintiff's contention that defendant's motion to dismiss must be converted to a motion for summary judgment because defendant relied upon a matter outside the pleadings to support its collateral estoppel claim, namely the decision rendered by the NYPSC on November 29, 1996. A court may take judicial notice of decisions of administrative bodies without converting motions to dismiss into motions for summary judgment. See *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1197 (3d Cir. 1993)*. The NYPSC is an administrative body, and its ruling on the contract between the parties to this action is a matter of public record. Accordingly, the Court may properly consider [*16] that decision and adjudicate its collateral estoppel effect without converting defendant's present motion to dismiss into a motion for summary judgment.

Turning now to the question of whether plaintiff is barred by the doctrine of collateral estoppel from going forward with the claims identified in the first four causes of action in the Complaint, the Court thinks it prudent, at the outset of this analysis, to first discuss the basis for the Court's subject matter jurisdiction over the plaintiff's claims in these four counts. Plaintiff premises the Court's jurisdiction over its Fourth Cause of Action, which seeks a declaratory judgment of its rights and defendant's obligations under the Agreement, on *28 U.S.C § 1331*, stating that this action "is based on rights arising under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), *16 U.S.C. § 823a* et seq." (Compl., P 8). Overlooking the fact that plaintiff does not point the Court to the specific section of PURPA under which its claims purportedly arise, the Court determines that, contrary to plaintiff's jurisdictional statement, the Court does not have a § 1331 basis for jurisdiction over this action.

While [*17] plaintiff alleges against defendants various violations of contract law, nowhere in the complaint does plaintiff allege that defendants violated PURPA; rather, PURPA becomes relevant only in that it defines the rights and duties of the parties under the Agreement plaintiff claims was breached. A declaratory judgment is a procedural vehicle only; it affects only the remedies available in federal court, not a federal court's jurisdiction. *Franchise Tax Board v. Construction Laborers*

Vacation Trust, 463 U.S. 1, 15, 17-21, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983). See also *Shelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)*. The Court's subject matter jurisdiction over plaintiff's cause of action seeking a declaratory judgment, like its jurisdiction over plaintiff's three other contract claims, is premised on diversity of citizenship.

In adjudicating defendant's motion to dismiss plaintiff's First, Third and Fourth Causes of Action, the first question the Court must answer is whether, as defendant contends, plaintiff is collaterally estopped from bringing these claims before this Court. Defendant asserts that all three of these claims are [*18] premised on plaintiff's contention that defendant breached its obligations under the terms of the Agreement by refusing to pay the contract price for energy generated by the new gas turbine installed by plaintiff in May 1996. Defendant asserts that the nature of its obligation to plaintiff under the Agreement was the subject of its Petition for a Declaratory Ruling by the NYPSC and that under the doctrine of collateral estopped, plaintiff is precluded from relitigating in this action the very issue already litigated before and decided by the NYSPC in November 1996.

The Court determines that plaintiff's First, Third and Fourth Causes of Action are barred by principles of both collateral estoppel and res judicata. Res judicata and collateral estoppel are related doctrines that are based on the principle that a party should not be permitted to relitigate issues already decided against it. The constitutional directive regarding full faith and credit (as further implemented by federal statute) requires that "judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from [*19] which they are taken." *28 U.S.C. § 1738; Durfee v. Duke, 375 U.S. 106, 109, 11 L. Ed. 2d 186, 84 S. Ct. 242 (1963)*. The question under either doctrine thus becomes what preclusive effect would a New York state court give a determination made by an administrative agency, specifically the NYPSC. n4

n4 As plaintiff is not seeking a review of the NYPSC's determination on the merits, the body of cases adjudicated pursuant to Article 78 of New York's Civil Practice Law and Rules, a unique procedural device available for challenging, inter alia, the decisions of administrative agencies, is inapposite. Here, plaintiff is collaterally attacking the decision of an administrative agency and, thus, the standards of review applicable in Article 78 proceedings are irrelevant for present purposes.

In *Allied Chem. v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230 (N.Y. 1988)*, cert. denied, *488 U.S. 1005, 102 L. Ed. 2d 777, 109 S. Ct. 785 (1989)*, the New York Court of Appeals [*20] set forth a test for determining whether an administrative proceeding may be characterized as "quasi-judicial" in nature, such that decisions rendered pursuant to its adjudicatory authority may be given preclusive effect in subsequent proceedings. The reviewing court must examine several factors: (1) whether the agency has statutory authority to act adjudicatively; (2) whether the procedures used in the administrative proceeding assured that the information presented to the agency was sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested; (3) the parties expectations; and (4) whether according a preclusive effect would be consistent with the agency's scheme for administration.

In Allied, the New York Court of Appeals gave preclusive effect to a Declaratory Ruling issued by the NYPSC in a contractual dispute between an electric utility and an independent power producer. As is the case in the present litigation, the plaintiff in Allied was issued an unfavorable determination by the NYPSC and, rather than seek direct review of that decision, proceeded to collaterally attack the NYPSC's determination in a subsequent [*21] state court proceeding. n5 The Allied court specifically considered all four factors relevant to determining whether the NYPSC was a quasi-judicial body and held there was no doubt that an NYPSC ruling could be given preclusive effect. *(528 N.E.2d at 156-57)*.

n5 The Court notes that by operation of statute in New York, plaintiff had a window of opportunity (30 days) in which to seek a rehearing of its contractual dispute before the NYPSC. Plaintiff, however, did not avail itself of this opportunity. (See Defendant's Reply Br. at 14, n.13). There is some indication that plaintiff has filed a direct appeal of the NYPSC's determination in state court in New York, presumably in an Article 78 proceeding.

Having determined that under New York law, the Declaratory Ruling issued by the NYPSC may be given preclusive effect, the Court turns its attention to the question of whether the necessary elements for application of res judicata and/or collateral estoppel are present here. Res judicata (or "claim preclusion") [*22] embodies the

idea that a final judgment of a claim on the merits between the same parties resolves both that claim and all others arising out of the same transaction. *Ryan v New York Tel. Co., 62 N.Y.2d 494, 467 N.E.2d 487, 488-91, 478 N.Y.S.2d 823 (N.Y. 1984).* Collateral estoppel (or "issue preclusion") prevents relitigation by a party of an issue decided against it in prior litigation in which it had a full and fair opportunity to litigate the issue. (Id.) Both doctrines (1) avoid the unfairness that would result from allowing a party to obtain multiple hearings on the same issue, (2) prevent inconsistent judgments and (3) conserve judicial resources. See id.; *International 800 Telecom Corp. v. Kramer, Levin, Nessen, Kamin & Frankel, 155 Misc. 2d 975, 978, 591 N.Y.S.2d 313 (N.Y. Sup. Ct. 1992).*

New York takes a transactional analysis approach to res judicata issues. Under that approach, all claims which could have been brought out of a transaction are barred by a prior final resolution. *O'Brien v City of Syracuse, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (N.Y. 1981);* International 800 Telecom, 155 Misc. 2d at 978. This furthers the interest of finality. [*23] In the present case, new York's doctrine of res judicata bars plaintiff from asserting here, for the second time, the claims embodied in its First, Third and Fourth causes of action. Those claims were already litigated between these parties before the NYPSC, which reached a final determination of those claims on the merits.

Plaintiff is also barred by the closely-related doctrine of collateral estoppel from relitigating the same issues already decided against it. Under New York law, three elements must be established in order for collateral estoppel to apply: (1) the issue in the present proceeding must be identical to the issue in the prior proceeding; (2) the issue decided in the prior proceeding must have been material to that proceeding; and (3) the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Ryan, 467 N.E.2d at 490-91.* When applying the doctrine of collateral estoppel to an administrative determination, the Ryan court determined that the party seeking to invoke the doctrine bears the burden of demonstrating the identical nature and decisiveness of the issue, the party opposing [*24] the application of the doctrine bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior proceeding. (Id. at 491).

The Court determines that defendant, as the party seeking to invoke the doctrine of collateral estoppel, has met its burden. (See the NYPSC's written Opinion at Defendant's Br., Exh. 2 at 1-4). Plaintiff does not dispute either the identity or decisiveness of the issue but, rather, challenges the application of the doctrine here on the ground that the NYPSC lacked jurisdiction to render its decision in the first instance. (See Plaintiff's Opp Br. at 12-21). Plaintiff argues that NYPSC's jurisdiction over the Agreement ended upon its approval of the Agreement in 1988 and that, therefore, "its determination can be given no effect." (Id. at 12). Plaintiff made the same argument to the NYPSC in its Response to Defendant's Petition for a Declaratory Ruling, and the NYPSC expressly determined that it did, in fact, have jurisdiction to resolve the particular contractual dispute brought before it.

The issue for this Court to address is not whether the NYPSC, in fact, had jurisdiction to render the decision [*25] it did but, rather, whether the collateral estoppel doctrine bars plaintiff's relitigation not just of the underlying contract issues raised before the NYPSC but of the question of the propriety of the NYPSC's jurisdiction to hear the dispute, as well. This issue is often referred to as "jurisdictional finality." In *Underwriters National Assurance Co. v North Carolina Life and Accident and Health Ins. Guar. Assn., 455 U.S. 691, 706, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982),* the United States Supreme Court reaffirmed the rule of jurisdictional finality established in *Durfee, 375 U.S. at 113-15,* stating that "the principles of res judicata apply to questions of jurisdiction as well as to other issues." See also *Thrinlas v Sunshine Mining Co., 308 U.S. 66, 78, 84 L. Ed. 85, 60 S. Ct. 44 (1939)* (holding that collateral estoppel applied to a court's determination of its own jurisdiction). Holding that collateral estoppel applied to a determination made by the Rehabilitation Court (a lower court in North Carolina) about its own subject matter jurisdiction over a particular dispute, the Supreme Court stated:

> Any doubt about this proposition [of jurisdictional finality] [*26] was definitely laid to rest in Durfee v Duke (citation omitted), where this Court held that "a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

Underwriters National, 455 U.S. at 706 (emphasis added). See also *Stoll v Gottlieb, 305 U.S. 165, 172, 59 S. Ct. 134, 83 L. Ed. 104 (1938).*

In the instant case, plaintiff fully and fairly litigated the issue of the NYPSC's jurisdiction over the dispute between the parties in the proceedings before the NYPSC, and the NYPSC expressly determined that it did, in fact, have jurisdiction to render a decision. (See

Defendant's Br., Exh. B at 2-4). The Court has every reason to think that the courts of New York, who have not expressly stated their position on the rule of jurisdictional finality established in Durfee, would follow the holding of the United States Supreme Court in Underwriters National and the holdings of the various other Supreme Court and state court cases that have specifically addressed this issue.

The Court draws [*27] support for this proposition, as well, from the Restatement (Second) of Judgments § 12, wherein the modern rule which stresses finality of judgments is codified. It is the rule followed in most jurisdictions and, although this Court can find no New York case which cites § 12 specifically, the courts of New York do follow the Restatement (Second) of Judgments generally. Furthermore, the principles underlying the modern rule codified in § 12 are the very same principles underlying the doctrines of res judicata and collateral estoppel as defined by the courts of that State. Section 12 reads as follows:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an [*28] adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Restatement (Second) of Judgments § 12 (1982). Having carefully considered the arguments set forth by the parties in their briefs and at oral argument, the Court determines that none of the three above-mentioned exceptions applies to the jurisdictional determination made by the NYPSC. Accordingly, plaintiff is precluded from relitigating the issue of the NYPSC's subject matter jurisdiction in this, the second proceeding between these parties.

In support of its position to the contrary, plaintiff cites, for example, *Salwen Paper Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 72 A.D.2d 385, 391, 424 N.Y.S.2d 918 (N.Y. App. Div. 1980)*; and *Schwartz v. Public Adm'r of Bronx, 24 N.Y.2d 65, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955 (N.Y. 1969)*. Those cases are distinguishable from the case at bar, however, because in neither was the question of whether the first tribunal had jurisdiction to render its decision actually litigated in that forum. Here, of course, [*29] plaintiff availed itself of the opportunity it had to fully litigate the issue of the NYPSC's jurisdiction over the Agreement. Plaintiff also cites the Ryan decision, but the Court determines that Ryan actually supports defendant's position and, moreover, provides evidence that if confronted with the facts of the instant case, the New York Court of Appeals would follow Durfee and Underwriters National, holding that plaintiff should be barred by the doctrine of collateral estoppel from relitigating the issue of the NYPSC's jurisdiction over the Agreement.

The Ryan court unequivocally stated the fundamental principle that unless attacked for being fraudulent, a judgment would be rendered conclusive, as to all questions litigated and decided, among the parties thereto. *467 N.E.2d at 490*. Further, the Ryan court went on to state as the rationale underlying its decision the very same reasons the Durfee court gave for making its determination:

It is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause [*30] be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.

Ryan, 467 N.E.2d at 490.

In Durfee, the Supreme Court, quoting an earlier decision, stated the reasons for the rule of jurisdictional finality as follows:

"We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.... It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than

the first."

Durfee, 375 U.S. at 113-14 (quoting *Stoll, 305 U.S. at 172*) (emphasis [*31] added). Plaintiff has already had the opportunity to litigate the issue of the NYPSC's jurisdiction over the Agreement, and it did, in fact, fully and fairly litigate that issue. For this Court to allow relitigation of the same issue would be to sanction exactly the type of judgment shopping the doctrine of collateral estoppel is meant to avoid.

Based on the foregoing analysis, the Court also determines that plaintiff is collaterally estopped from relitigating the contract issues raised in the proceedings before the NYPSC. Plaintiff had a full and fair opportunity to litigate these issues, which issues were actually litigated and their outcome decisively determined by the NYPSC. Accordingly, the Court determines that plaintiff's First, Third and Fourth Causes of Action must be dismissed for the reason that under the closely-related doctrines of res judicata and collateral estoppel, plaintiff is barred from bringing these claims anew.

D. Plaintiff's Second Cause of Actions is also Dismissed

Plaintiff's Second Cause of Action, which seeks relief for an alleged breach of the implied covenant of good faith and fair dealing that may be read into every contract is also dismissed. [*32] In New York, the doctrine of res judicata not only bars those claims that were actually litigated between two parties, but also those that could have been litigated and that arose out of the same transaction. See International 800 Telecom, 155 Misc. 2d at 978. Thus, although plaintiff did not raise its claim for breach of the implied covenant of good faith and fair dealing before the NYPSC, that claim arose out of the same transaction as the other contract claims and could have been brought before the NYPSC. Because the same underlying facts form the basis for both the asserted (contract) and the unasserted (implied covenant) claims -- namely, defendant's refusal to purchase energy generated by plaintiff's new equipment -- plaintiff was obligated to raise both claims before the NYPSC. See *Reilly v. Reid, 45 N.Y.2d 24, 379 N.E.2d 172, 407 N.Y.S.2d 645 (N.Y. 1978)*. Having failed to do so, plaintiff is barred from raising either of them for the first time here.

Plaintiff's Second Cause of Action should also be dismissed on the ground that New York courts frequently dismiss claims for breach of the implied covenant of good faith and fair dealing where, as here, such claims [*33] are predicated upon the same conduct underlying a claim for breach of contract, which has been dismissed. In *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 767 F. Supp. 1269, 1281 (S.D.N.Y. 1991)*, aff'd in part, rev'd in part on other grounds, *970 F.2d 1138 (2d Cir. 1992)*, aff'd, *510 U.S. 86 (1993)*, the court held that a party to a contract cannot violate the covenant of good faith and fair dealing by exercising its rights under the contract. Here, the NYPSC determined that defendant did not breach the terms of the Agreement approved by the NYPSC in 1988 when it refused to purchase energy generated by plaintiff's new gas turbine. Having determined that plaintiff is precluded from relitigating the breach of contract issues raised before the NYPSC, the Court determines that its claim for breach of the covenant of good faith and fair dealing must be dismissed for the reason that it attacks the same conduct of defendant already found to be consistent with the terms of the Agreement. n6 In the case at bar, as a matter of law, defendant cannot be liable for breaching the implied covenant of good faith and fair dealing by exercising its rights under the Agreement. [*34] Accordingly, plaintiff's Second Cause of Action must be dismissed.

n6 Even the case cited by plaintiff as support for its position that a contract's implied terms may be breached even where its express terms are not recognizes that a covenant may be implied only where the implied term is consistent with other express terms in the contract. *Metropolitan Life Ins. Co. v. RJR Nabisco, Ind., 716 F. Supp. 1504, 1517 (S.D.N.Y. 1989)*. Accordingly, the Court may not read an implied covenant into the Agreement that is inconsistent with its express terms, which the NYPSC has already determined were not breached.

II. Plaintiff's Cross-Motion for Partial Summary Judgment

Having dismissed the Complaint in its entirety, plaintiff's cross-motion for summary judgment is moot.

CONCLUSION

For the foregoing reasons, the Court determines that plaintiff fails to state a legally cognizable claim for relief; accordingly, defendant's motion to dismiss the Complaint is hereby granted. The Complaint is dismissed [*35] in its entirety; therefore, plaintiff's cross-motion for summary judgment is also dismissed.

JOHN W. BISSELL

United States District Judge

DATED: June 30, 1997

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 30th day of June, 1997,

ORDERED that defendant's motion to dismiss the Complaint herein be and it hereby is granted, and plaintiff's Complaint is hereby dismissed, in its entirety, with prejudice; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment be and it hereby is dismissed as moot.

JOHN W. BISSELL

United States District Judge