MEMORANDUM

NOVEMBER 14, 1997

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (ELIAS) RVE

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

PSC 97-1437 FOF-EQ

Attached is an Order Denying Petition to Approve Settlement Agreement, with attachments, to be issued in the above referenced docket. (Number of pages in order - 22)

RVE/js
Attachment
cc: Division of Electric and Gas (Dudley, Breman, Harlow, Wheeler)
Division of Auditing and Financial Analysis (Maurey, McNulty, Noriega, Slemkewicz, Stallcup)

I:961477or.rve

O/S KH

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 ORDER NO. PSC-97-1437-FOF-EQ ISSUED: November 14, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING PETITION TO APPROVE SETTLEMENT AGREEMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. CASE 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.

Section 9.1.2 of the Contract details the energy pricing methodology as follows:

> Except as otherwise provided in section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based upon the Firm Energy Cost calculated on an hour-by-hour basis as follows: (I) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

In 1991, when FPC entered into its contract with Lake, FPC's forecasts indicated that as-available energy prices would exceed firm energy prices throughout the entire term of the Contract. Based on these projections, prior to August 1994, FPC paid Lake firm energy payments for all energy delivered from the cogeneration facility.

In 1994, FPC conducted an internal audit of its cogeneration contracts. Because of falling coal, oil, and natural gas prices, excess generation during low load conditions, and exceptional nuclear performance, FPC's modeling of the avoided unit indicated that during certain hours, firm energy prices would be greater than as-available energy prices indicating that the avoided unit would be cycled off in FPC's dispatch. FPC adjusted its payments to Lake and other cogenerators to reflect these changes in the operation of the avoided unit. This reduced the total energy payment to Lake and ultimately led to the pricing dispute.

On July 21, 1994, FPC filed a petition (Docket No. 940771-EQ) seeking a declaratory statement that Section 9.1.2 of the negotiated contract was consistent with then Rule 25-17.0832(4)(b), Florida Administrative Code. This rule referenced avoided energy payments for standard offer contracts, and was a basis for evaluating negotiated contracts. Several cogenerators, including Lake, filed motions to dismiss FPC's petition. FPC later amended its petition and asked the Commission to determine whether its implementation of Section 9.1.2 was lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. In Order No. PSC-95-0210-FOF-EQ, we

granted the motions to dismiss on the grounds that the Commission did not have jurisdiction to adjudicate a dispute over a provision in a negotiated contract. However, the Order recognized the Commission's continued responsibility for cost recovery review.

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 regarding the energy pricing dispute.

On November 25, 1996, FPC filed a Petition for Approval of a Settlement Agreement between FPC and Lake. The Settlement Agreement resolves all issues in the pending litigation. The modifications to the Contract pursuant to the Settlement Agreement have the following components:

1) A revised energy pricing methodology for future energy payments and settlement of a coal transportation issue.

2) Restructuring of variable O&M and capacity payments.

3) Reimbursement for the historic energy pricing dispute.

4) Curtailment of energy during off-peak periods from 110 MW to 92 MW.

5) A buy-out of the last three years and seven months of the Contract, resulting in a termination date of December 31, 2009, rather than July 31, 2013.

The cost for the buy-out will be paid to Lake in monthly payments from November, 1996 to December, 2008. On December 11, 1996, FPC paid Lake $5,512,056 to reimburse the QF for the disputed portion of energy payments made during the period August 9, 1994 through October 31, 1996. FPC requested that the Settlement Agreement be approved on an expedited basis, including confirmation that the Negotiated Contract between FPC and Lake, as modified by the Settlement Agreement, continues to qualify for cost recovery.

FPC believes that the Settlement Agreement will result in approximately $26.6 million Net Present Value (NPV) in benefits to its ratepayers through 2013. These benefits are based on a comparison of costs between Lake prevailing in the lawsuit and the modified Contract.

We approved the Petition for Expedited approval by a 3-2 vote at the June 24, 1997, agenda conference. At the July 15, 1997, agenda conference, the Commission voted to reconsider its decision after being advised that one Commissioner voting with the majority had mistakenly voted to approve the agreement.

The parties were directed to brief the issue of the Commission's jurisdiction to deny cost recovery of any part of a civil court judgement concerning the terms of the contract.

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 State Public Service Commission's decision that it had jurisdiction to interpret and clarify its approval of negotiated purchase power agreements (the Crossroads decision).The supplemental briefs were filed on August 29, 1997. Lake also requested Oral Argument on this matter. Since interested persons may always participate in the discussion of items scheduled for proposed agency action, this request is moot.

II. THE SETTLEMENT AGREEMENT

As discussed in the Case Background, the proposed Settlement Agreement contains five modifications to FPC's and Lake's existing contract. A discussion of each modification is contained in the following sections.

A. Revised Energy Pricing and Coal Transportation Agreement

1. Revised Energy Pricing

Pursuant to Rule 25-17.0836, F.A.C., this Commission is required to evaluate modifications to a negotiated contract against both the existing contract and the current value of the purchasing utility's avoided cost. The modified Contract requires FPC's ratepayers to pay firm energy prices every hour that Lake generates electricity. In other words, the modified contract assumes the avoided unit will be available and fully dispatched 100 percent of the time. Obviously, no real unit operates in this manner. Furthermore, this would also presume that had FPC built the "avoided-unit", this Commission would want FPC to run the unit without regard for any changes in operating expenses. That would not be an appropriate burden for FPC's ratepayers. FPC's modeling

of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract. As with all avoided cost calculations, Section 9.1.2 of the Contract was constructed as a pricing proxy and was not intended to be fully representative of a real operable "bricks-and-mortar" generating unit. The goal of the contractual language was to ensure that, consistent with Section 210 of PURPA and our cogeneration rules, FPC would not be put in a situation where it would be required to purchase energy at a cost greater than what it could either purchase elsewhere or generate itself. The revised energy pricing methodology, 100% firm, will render this goal meaningless.

2. Coal Transportation Agreement

The firm energy price under the Settlement Agreement will be determined using the higher of the actual monthly inventory charge out price of coal at CR 1&2 or $1.76/MMBtu. This floor is based on the average price of coal at CR 1&2 in 1996 plus an $0.08/MMBtu adder. This adder was included to prevent a potential dispute between FPC and Lake similar to the one between FPC and Pasco regarding FPC's coal procurement and transportation actions. This is another example of how the proposed energy pricing methodology is not representative of avoided cost. Though the Settlement Agreement eliminates any potential for litigation concerning FPC's coal procurement actions, staff believes this was unnecessary. The Contract contains no provisions governing the modes of transporting fuel to the Reference Plant. Furthermore, FPC should take any and all actions which, legally, lowers the cost of providing electricity to its ratepayers such that cost is fair and reasonable as required by Section 366.03 Florida Statutes. Furthermore, this lower cost should be reflected in FPC's calculation of avoided costs.

B. Restructuring of Capacity Payments and Variable O&M

The Settlement Agreement removes variable O&M expenses from the energy payment, and includes it in the capacity payment. The revised capacity payments, including the variable O&M amount, are approximately $12.1 million NPV less than capacity and variable O&M payments under the original contract. This provision of the Settlement Agreement is projected to reduce FPC's ratepayers cost liability in addition to providing a more stable revenue stream for Lake. However, the benefits of this provision of the Settlement Agreement do not outweigh the negative impact of the 100% firm energy payment.

C. Historic Pricing Dispute

The Settlement Agreement provides for FPC to pay Lake $5,512,056 as reimbursement, with interest, for the disputed energy payments during the period August 9, 1994 through October, 31, 1996. FPC paid the settlement payment to Lake on December, 11, 1996. However, at the February, 1997 hearing in Docket No. 970001-EI, we voted to exclude this payment for recovery, because the costs at that time had not been approved for recovery. As discussed previously, we believe that FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract.

D. Curtailment

Lake has agreed to curtail energy deliveries from 110 MW to 92 MW during the thirteen off-peak hours as defined by the Settlement Agreement. In addition, Lake will be treated as a Group A N.G. under FPC's Generation Curtailment Plan as approved pursuant to Order No. PSC-95-1133-FOF-EQ, issued September 11, 1995. This provision will confer benefits to FPC in the form of increased flexibility during low load situations when generation exceeds load requirements as well as allowing FPC to replace the curtailed energy, if needed, at a lower system energy cost.

FPC projects that this provision of the Settlement Agreement will result in a savings of approximately $2.4 Million NPV as compared to the existing contract. Existence of these savings further demonstrates that approving 100% firm energy pricing will result in payments which exceed FPC's avoided energy cost. Furthermore, these savings are overstated as FPC has the authority to curtail Lake and other Cogenerators during those hours which the energy is not needed or when such purchases will result in negative avoided costs. According to Rule 25-17.086, Florida Administrative Code, a utility is relieved of its obligation to purchase electricity from a QF due to operational circumstances or when such purchases will result in costs greater than those which the utility would incur if it did not make such purchases. Despite this authority, we recognize that a voluntary curtailment agreement could avoid litigation.

E. Contract Buy-Out

Lake and FPC have agreed to terminate the Contract three years and seven months earlier than originally proposed. In exchange for

this provision, FPC will pay Lake monthly payments from 1996 through 2008 totaling approximately $50.4 Million. Since the current contract is greater than today's avoided costs, this provision will allow FPC's ratepayers to purchase market priced power sooner. After the revised contract terminates, FPC will be able to obtain capacity and energy at a cost it believes will be less than the existing contract. FPC's cost projections for replacement capacity and energy are based on currently budgeted amounts for its Polk Unit. This methodology is appropriate, as the projections have a more defined basis and FPC's current projections indicate that the replacement capacity and energy will come from a similar type of combined-cycle technology.

When compared to FPC's modeling of the avoided unit, which more closely approximates avoided energy cost, the buy-out portion of the Settlement Agreement is not cost effective. In fact, the Contract buy-out will actually result in approximately $1.2 Million NPV of additional costs to FPC's ratepayers.

The savings/additional costs of each provision are summarized in the following table. The comparison is to the existing contract, assuming FPC's interpretation of the existing agreement is correct.

NET SAVINGS OF FPC/LAKE SETTLEMENT AGREEMENT
($Millions NPV)

Component	Savings
Energy Pricing & Coal Transportation Agreement	($24.9)
Capacity and Variable O&M	$12.1
Historic Pricing Dispute	($5.3)
Curtailment	$2.4
Buy-out	($1.2)
TOTAL	($17.1)

(Numbers may not add due to rounding)

III. DECISION

Approval of a newly negotiated contract is based on avoided cost as defined by the utility's next identified capacity addition.

However, in evaluating contract modifications, "avoided cost" becomes the existing contract. In this case, approval of the original contract recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed. FPC's modeling of the avoided unit is consistent with this Commission's order approving the Contract and more closely approximates avoided cost. Energy payments under the modified contract reflect Lake's court position of 100% firm energy, which clearly exceeds avoided cost. This revision, plus the remaining components of the Settlement Agreement, requires that FPC's ratepayers commit to pay approximately $17.1 million NPV over what they would pay under the Contract before the Settlement Agreement. We recognize the risks associated with litigation, however as discussed below, this Commission is not required, based on a circuit court's decision, to approve recovery of QF payments that are in excess of a utility's avoided cost.

A recent decision suggests that a state Commission's jurisdiction with respect to negotiated QF contracts is not as limited as this Commission has previously concluded.

On November 29, 1996, the New York Public Service Commission (NYPSC) issued a declaratory ruling concerning a negotiated QF contract between Orange and Rockland Utilities and Crossroads Cogeneration, Inc. (Crossroads). The specific question involved Orange and Rockland's obligation to purchase additional output from an expansion of the facility. Crossroads contended that the contract, which was approved in 1988, required Orange and Rockland to purchase the output. Crossroads contended that the New York Commission did not have jurisdiction to adjudicate its claim, citing as authority Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995).

In its decision granting the request for a declaratory ruling, the New York Commission stated:

> As was recently reaffirmed, it is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. 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 as requesting that relief.

Crossroads then filed a five count complaint in Federal District Court, seeking both contractual and antitrust damages.

Crossroads alleged that the New York State Commission lacked subject matter jurisdiction. In an opinion issued June 30, 1997, the Court granted Orange and Rockland's Motion to Dismiss the complaint, finding, among other things, that Crossroads was collaterally estopped from asserting the jurisdictional issue in the Federal Court. The Court relied on the Restatement (2nd) of Judgements in assessing Crossroad's claim:

> When a court has rendered a judgement in a contested action, the judgement 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 judgement to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> (3) The judgement was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgement should have opportunity belatedly to attack the court's subject matter jurisdiction.
>
> Restatement (Second) of Judgements § 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 preluded from relitigating the issue of the NYPSC's subject matter jurisdiction in this, the second proceeding between these parties.

The court found that none of these exceptions applied and dismissed Crossroads' complaint.

We recognize that a finding that a QF is collaterally estopped from challenging a jurisdictional finding is not as compelling as a determination of the issue on a direct appeal. However, it is probative on the issue, especially given the Court's reliance on the exception stated in the Restatement 2d. We also note that Florida Power Corporation has recently filed this Opinion, and the New York Commission's ruling as supplemental authority with the

Florida Supreme Court (Case No. 88,280) Panda-Kathleen, L.P., v. Florida Power Corporation and Florida Public Service Commission. On September 19, 1997, the Court issued its decision affirming the Commission's order. A motion for rehearing is pending.

The New York Commission seems to have drawn a distinction on the jurisdictional question not along the standard offer tariff/negotiated contract line. Rather, it asserts jurisdiction over matters addressing the interpretation and clarification of past policies and approvals and eschews jurisdiction to apply those interpretations and policies to disputed factual determination.

Such a policy has significant application in this docket. Florida Power Corporation first asked this Commission to declare that FPC had properly calculated the energy payments due Lake pursuant to the contract. This determination is inextricably linked to what the Commission approved when it approved the contract.

If as FPC contends, the contract contemplates that the "avoided unit" would cycle in FPC's system economic dispatch and if as we believe and FPC contends, the contract provides for the use of actual fuel prices and not projected fuel prices, then Lake's assertion in the circuit that it is entitled to firm energy payments 100% of the time is suspect. If this assertion is suspect, then the "savings" associated with the buy out are overstated. If the Commission does in fact have the jurisdiction to resolve the question of what was contemplated at the time of approval, the uncertainty of the outcome of the circuit court litigation would not be a factor in the decision to approve the buy out.

In its supplemental brief filed August 29, 1997, FPC states:

> 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 recovery. 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.

In essence, Florida Power Corporation argues that, given the Commission's previous determination that it would defer to the circuit court, the Commission cannot revisit that question in the guise of a cost recovery approval/disallowance.

However, we are not, at this juncture, "revisiting" anything. What is before the Commission is a contract modification that we believe is based on an erroneous assumption. That is, that the cost effectiveness of the modification is based on the "litigation risk" associated with a circuit court determination of the operating characteristics of the "avoided unit" in a manner not contemplated or intended when the contract was approved. If, as FPC suggests (and Crossroads supports), this Commission has the jurisdiction to interpret and clarify its approval, there is no "risk" associated with an erroneous circuit court interpretation. The modification/buy-out then is clearly not cost-effective when measured by the standard of Rule 25-17.0836, Florida Administrative Code.

Other decisions of the New York Public Service Commission are illustrative of the Commission's continuing jurisdiction to interpret and clarify its approvals. For example, in Indeck-Yerkes Energy Service of Yonkers v. Consolidated Edison Co. of New York, 1994 WL 62394 (S.D.N.Y.) ("Indeck-Yerkes"), the QF ("Indeck") had entered into a contract with the utility ("Con Ed"), which was approved by the NYPSC on the basis of Indeck's representation that the cogeneration facility would be located at a certain "Federal Plaza site." A dispute subsequently arose when Indeck wanted to build the facility at a different site. The NYPSC issued an order "clarifying" that its prior order approving the Indeck-Con Ed contract was subject to the NYPSC's then-existing "site certainty policy." In contract litigation before the U.S. District Court for the Southern District of New York, the Court granted summary judgment in favor of Con Ed, holding that the contract contemplated adherence to the NYPSC's contract approval conditions, which included, the Court held, the "site certainty policy" then in effect.

Similarly, in Re Niagara Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C., March 26, 1996), the utility, Niagara Mohawk ("NiMo") alleged that the QF, Lyonsdale Power L.P., had exceeded the output level contemplated under their contract. The New York PSC held

that its approval order for the Lyonsdale-NiMo contract required, by its own terms, "strict" compliance with the output limitation condition set forth in the order.

We believe that all three New York determinations have a common and irrefutable similarity with the contract proposed for modification: All 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 contract provision. In this docket, the resolution of the energy pricing issue, in so far as the cost-effectiveness of buy-out/ modification is concerned, turns on what the contract meant at the time it was approved. No party has cited to any authority which suggests that this type determination is not within the Commission's jurisdiction.

Public utilities, over which this Commission has rate setting authority, are required to provide adequate, reliable electric service at fair and reasonable rates. In the administration of cogeneration contracts, Chapter 366.051, Florida Statutes, states in part:

> In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs.

This Commission's rules are consistent with the guidelines set out in the Florida Statutes and PURPA. Specifically, Rule 25-17.0825, Florida Administrative Code states in part:

> As-available energy sold by a qualifying facility shall be purchased by the utility at a rate, in cents per kilowatt-hour, **not to exceed the utility's avoided energy cost**. (Emphasis added)

Rule 25-17.0832(2) states in part that:

> Negotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers **which does not exceed full avoided costs**, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract. (Emphasis added)

Rule 25-17.086 states that:

> Where purchases from a qualifying facility will impair the utility's ability to give adequate service to the rest of its customers or, due to operational circumstances, purchases from qualifying facilities will **result in costs greater than those which the utility would incur if it did not make such purchases**, or otherwise place an undue burden on the utility, the utility shall be relieved of its obligation under Rule 25-17.082 to purchase electricity from a qualifying facility. (Emphasis added)

The Commission's decision in Docket No. 940771-EQ, Order No. PSC-95-0210-FOF-EQ, specifically recognized these constraints. We believe that where cost recovery review finds that a utility is requesting recovery of QF payments that exceed its full avoided costs, those costs are subject to disallowance.

When the Commission initially approves a negotiated contract, the determination of avoided costs is based on the utility's next identified capacity addition. At that point in time, the contract is evaluated for cost recovery purposes in accordance with the above referenced rules. However, in evaluating contract modifications, continued cost recovery is based on savings compared to the existing contract.

Rule 25-17.036(6) requires that:

> The modifications and concessions of the utility and developer shall be evaluated against both the **existing contract and the current value of the purchasing utility's avoided cost.** (Emphasis added)

Absent a modification, the utility's ratepayers remain obligated to pay costs as specified within the current contract. Therefore, modifications which result in costs above the existing contract are not appropriate for approval.

The result of the provisions of the Settlement Agreement is energy costs that are approximately $24.9 million NPV greater than what FPC is currently authorized to recover today. Approving the Settlement Agreement is inconsistent with the requirements of Section 366.051, Florida Statutes, Section 210 of PURPA and this Commission's Rules governing cost recovery of cogeneration contracts.

We recognize the benefits of electricity produced by cogeneration and small power producers and the requirements to purchase such power when available. However both the Federal and state law limit the price to be paid for this type of power. To ensure that benefits remained with a utility's ratepayers, PURPA and the Florida Statutes established that rates for the purchase of power from QFs shall not exceed a utility's avoided cost. Such assurance was necessary to avoid situations that would require a utility to purchase electricity from a QF when in fact it could produce or purchase alternative power at a lower cost.

The Settlement Agreement achieves benefits in the form of curtailment savings and reduced capacity and variable O&M payments. However, compared to the more appropriate method of determining energy payments under the existing contract, the Settlement Agreement increases costs to FPC's ratepayers by approximately $17.1 million NPV. Furthermore, contrary to Section 366.051, Florida Statutes, Section 210 of PURPA, and this Commission's rules, approval of the Settlement Agreement commits FPC's ratepayers to costs in excess of current avoided energy costs. For these reasons, we find that the Settlement Agreement should be denied.

IV. ADMINISTRATIVE FINALITY

Both Lake and FPC argue the doctrine of administrative finality, although in slightly different contexts. Lake suggests

that Order No. 25668, Implementation of Rules 25-17.080 through 25-17.091, Regarding Cogeneration and Small Power Production and the Florida Supreme Court's affirmation in Florida Power & Light Co. v. Beard, 626 So.2d 660 (Fla. 1993) of the Commission's actions, articulate a policy of not revisiting prior determinations with respect to QF contracts, except in certain limited situations. A decision by the Commission not to approve a contract modification which results in increases costs above what was contemplated at the time of the contract is not a "revisitation" of cost recovery of contract approval. Both cases cited by Lake (Freehold, supra and West Penn, supra) involve attempts by a utility and/or a state commission to change a contract based on changed circumstances. That is not the action taken by the Commission in this case.

Florida Power suggests that, having determined this was a matter for civil court determination, the doctrine of administrative finality precludes the denial of cost recovery in a subsequent proceeding. This argument is compelling, but not applicable. Parties and others whose substantial interests are affected by the Commission's decisions, need to be able to rely on the finality of those decisions. However, in its brief, Florida Power Corporation states: "...Florida Power believed, and continues to believe, that the Commission did have jurisdiction to interpret this pricing provision". The New York Public Service Commission's determinations discussed in this order tend to support this position. The circuit court has not yet ruled on the ultimate question. Further the action taken in this order is not a denial of cost recovery, but a determination that a proposed modification to a contract (which both parties recognize requires our approval) is not cost-effective.

V. EQUAL PROTECTION

Both Lake and FPC argue that the Commission's denial of this petition would be "arbitrary and capricious" and violative of Section 120.68(12)(b), Florida Statutes. That section provides for remand where agency action is inconsistent with prior decisions if not adequately explained by the agency. Both parties suggest that the decision in Docket No. 961407-EQ, Petition for Expedited Approval of Settlement Agreement with Pasco Cogen., Ltd., to approve a contract modification requires an identical result in this docket. The two petitions are not so "similarly situated" as to compel approval of this petition. At least four bases distinguish the instant contract:

1. This settlement has additional rate impacts of approximately 50 cents per month per customer through the year 2009.

2. This settlement has additional intergenerational equity impact, with the effect of the buy outs being cumulative.

3. The decision rendered by the New York Commission with respect to the Crossroads contract, and the decision by the Federal District Court suggests that the Commission's jurisdiction in the area of clarifying/explaining/interpreting its contract approvals is not as limited as previously thought. Part of the rationale for approving the Pasco settlement was the risk associated with a civil court's interpretation of the contract. Having concluded, based in part on the subsequent opinion of the District Court that the "risk" does not exist, the two buy-outs are different.

4. Less ratepayer savings are associated with this settlement than the ratepayer savings associated with the FPC/Pasco Settlement. As presented in these two cases, the Lake Settlement's ratepayer savings are $26.6 M, whereas the Pasco Settlement's ratepayer savings are estimated to be $39.0 M. These results would be expected if the courts were to determine the pricing dispute in favor of the cogenerators rather than FPC.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's Petition for Expedited Approval of the Settlement Agreement with Lake Cogen, Ltd. is denied. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036,

Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 14th day of November, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RVE

COMMISSIONER GARCIA DISSENTS.

COMMISSIONER CLARK DISSENTS, as set forth below:

I dissent from the majority's decision because their basis for rejecting the settlement is flawed. The majority concludes that this Commission could reject for cost recovery a decision by the court hearing the dispute regarding section 9.1.2 of the contract between Florida Power Corporation (FPC) and Lake Cogen Ltd. Such a rejection would essentially overrule our unanimous decision in Order No. PSC-95-0210-FOF-EQ, which the parties relied on in seeking the court's resolution to this contract dispute. Further, the majority's decision is arbitrary and capricious because, on the same material facts, the Commission approved a settlement agreement between FPC and Pasco Cogen, Ltd., in Order No. PSC-97-0523-FOF-EQ, issued May 7, 1997. Finally, the majority decision has the effect

of undermining important policies established by the Commission to encourage cogeneration, policies which ultimately lead to benefits to ratepayers derived from increased competition in the wholesale generation segment of the industry.

The facts in this case have their genesis in a dispute that arose between the parties on June 18, 1994, when FPC notified numerous cogenerators connected to its system that FPC had reviewed the operational status of the avoided unit described in section 9.1.2 of the contracts during minimum load conditions, and would be implementing section 9.1.2 in a way that resulted in the cogenerators being paid "as available" energy prices at those times, rather than "firm" energy prices at all hours. In order to clarify its interpretation of the section 9.1.2, FPC filed a petition for declaratory statement (Docket No. 940771-EQ) seeking a ruling from the Commission that FPC's interpretation was consistent with the Commission's rules (subsequent to FPC filing its petition, Lake and other cogenerators filed lawsuits in the state courts for breach of contract and declaratory judgement).

In response to FPC's petition, the Commission issued Order No. PSC-95-0210-FOF-EQ, on February 15, 1995. The Commission's decision dismissing the petition recognized that the PURPA -- the law requiring electric utilities to purchase electricity offered for sale by Qualifying Facilities (QF) -- does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs. The Commission's decision also recognized the more limited role to be played by the Commission with respect to negotiated contracts. The Commission has a rule on settling disputes in <u>contract negotiations</u>, but no provisions for resolving disputes once contracts have been executed and approved for cost recovery. The Commission's decision also recognized that the PURPA, and the Commission's and the Federal Energy Regulatory Commission's rules carve out a limited role for states in the regulation of the relationship between utilities and QFs. As Order No. PSC-97-0210-FOF-EQ states, "[t]hat 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." The Commission's order also reviewed several court decisions in arriving at its decision. In response to these cases, the Commission stated that

> [t]he facts vary in these cases, but the general consensus appears to be that under federal and state regulation of the relationship between utilities and

> cogenerators, state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In dismissing the case, the Commission further stated that "[w]e have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake . . .." Statements such as those made in Order No. PSC-95-0210-FOF-EQ sent a strong signal to the parties that the Commission would not interfere in the ongoing contractual relationship between the parties.

Since February 15, 1995, at which time the Commission dismissed FPC's Petition, the parties have been engaged in litigation. It is fair to assume that FPC's and the cogenerator's behavior in the lawsuit has been materially influenced by the assumption that the Commission would not involve itself with interpretation of any contract terms.

It is apparent that the direction of the Commission as indicated by Order PSC-95-0210-FOF-EQ influenced other parties as well. Specifically, another cogenerator, Pasco Cogen, Ltd., followed a track similar to that followed by Lake with respect to FPC. Pasco disputed FPC's determination that as-available energy payments were to be paid during certain off-peak hours rather than firm energy payments, filed a lawsuit against FPC, and subsequently settled with FPC on terms that are in all material respects identical to the terms of the instant settlement agreement. The Commission approved the settlement agreement between FPC and Pasco. In its Order No. PSC-97-0523-FOF-EQ, the Commission reasoned that, given that contract disputes are a matter for civil courts to resolve, it ". . . must test the appropriateness of a settlement of a contract dispute based on the possible outcomes of the court decision and its potential impact on ratepayers." The same basic fact pattern exists in both the Lake and Pasco cases, and a contrary decision here is, therefore, arbitrary and capricious.

The majority relies on the notion that the Commission could reject the court's interpretation of the contract if it was inconsistent with the basis on which the Commission approved the contract for cost recovery. The rejection would take the form of denying cost recovery to FPC based on the court's interpretation. The contract has a "regulatory out" provision, which means that if FPC is denied cost recovery by the Commission, it is not obligated

to make payments to Lake Cogen, Ltd. I agree that the Commission could deny cost recovery based on a subsequent contract interpretation if it was contrary to the basis on which the contract was originally approved, but that it not the case here. The Order originally approving the contract had no specific amplification as to how the payments due under section 9.1.2 would be calculated, and when asked for clarification with respect to the calculation in the Petition for Declaratory Statement, it was acknowledged that the dispute involved a contract interpretation, not a clarification of the basis on which the contract was approved for cost recovery.

Finally, this argument goes against the very concerns that prompted the Commission to state in its Order implementing its cogeneration rules (see Docket No. 910603-EQ) that it would not revisit its cost recovery determinations absent a showing of fraud, misrepresentation or mistake. This type of assurance was considered by the Commission as necessary to encourage cogeneration in the electric utility industry. It was also important in bringing about negotiated cogeneration agreements, which were and continue to be viewed by the Commission as a superior arrangement between a cogenerator and a utility over the standard offer. It is important to note that it appears as though the Commission's policies have been successful in bringing about cogeneration and in fostering competition among suppliers of electric energy in the wholesale market to the benefit of Florida's electric utility customers.

In summary, the majority view in this docket has the effect of reversing an important decision on which these and other parties have relied. It also has the effect of undermining the Commission's policies of encouraging competition in the wholesale generation segment of Florida's electric utility industry.

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 5, 1997.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water 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 of the effective date 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.