IN THE SUPREME COURT OF THE STATE OF FLORIDA

In re: Petition by Florida Power Corporation for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy Between FPC and Metropolitan Dade County in Order No. 24734, Together with Orders Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Florida Statute 366.051 and Rule 25-17.082, F.A.C., Establish that Energy Payments Thereunder, Including When Firm or As-Available Payment is due, are Limited to Analysis of Avoided Costs Based Upon Avoided Unit's Contractually-Specified Characteristics.

FLORIDA POWER CORPORATION,

Appellant,

vs.

980283-EQ
Case No. 94,664

Florida Public Service Commission,
Agency / Appellee;

Metropolitan Dade County; and
Montenay-Dade, Ltd.

Intervenors / Appellees.
_____/

APPENDIX TO APPELLANT'S INITIAL BRIEF

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power Corporation for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy Between FPC and Metropolitan Dade County in Order No. 24734, Together with Orders Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Florida Statute 366.051, and Rule 25-17.082, F.A.C., Establish that Energy Payments Thereunder, Including When Firm or As-Available Payment is due, are Limited to Analysis of Avoided Costs Based Upon Avoided Unit's Contractually-Specified Characteristics.	DOCKET NO. 980283-EQ ORDER NO. PSC-98-1620-FOF-EQ ISSUED: December 4, 1998

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING FLORIDA POWER CORPORATION'S PETITION FOR DECLARATORY STATEMENT

BACKGROUND

Florida Power Corporation (FPC) and Metropolitan Dade County (Dade), a qualifying facility (QF), entered into a Negotiated Contract (Contract) on March 15, 1991. The term of the contract is 22 years, beginning November 1, 1991 when the facility began commercial operation, and expiring July 21, 2013. 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 (Approval Order).

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

Subsequent to the filing of FPC's petition in Docket No. 940771-EQ, Dade 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 Cogen Ltd. (Lake) in Case No. 94-2354-CA-01.

On February 24, 1998, FPC filed a Petition for Declaratory Statement arguing that Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ, together with Orders Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Section 366.051, Florida Statutes, and Rule 25-17.082, F.A.C., establish that its contractual energy payments to Dade, including when firm or as-available payment is due, are limited to the analysis of avoided costs based upon the avoided unit's contractually-specified characteristics.

On March 11, 1998, Dade and Montenay-Dade, Ltd. (Montenay) filed a joint petition to intervene. On April 6, 1998, Dade and Montenay filed a motion to dismiss FPC's petition for Declaratory Statement. Also on April 6, 1998, Dade and Montenay filed a request for Oral Argument concerning the topics of *res judicata*, collateral estoppel and administrative finality.

DISCUSSION

In our consideration of this Petition for Declaratory Statement (Petition), Florida Power Corporation (FPC) asks us to declare that the contract between FPC and Metropolitan Dade County (Dade) that we approved in Order No. 24734 (Docket No. 910401-EQ) requires that FPC (A) pay for energy based upon avoided energy costs, strictly as reflected in the contract; (B) use only the avoided unit's contractually specified characteristics rather than additional characteristics that might have been applicable to a plant that had actually been built, in assessing operational status

for determining whether Dade is to receive firm or as-available energy payments; and (C) use the actual chargeout price of fuel to FPC's Crystal River Plants 1 and 2 in computing the level of firm energy payments to Dade, rather than the price at the time the contract was executed, or some other basis of calculation.

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

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

Order 0210 at p. 6.

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

****

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

Order 0210 at p. 9.

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

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

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

Crossroads, p. 5

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

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

Petition, at p. 14.

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

> involve a question that turns on what was meant when the contract was approved, and not on the determination of

disputed facts and the application of those facts to an unambiguous provision.

Petition, p. 13-14.

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

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

Based on the above, it is

ORDERED by the Florida Public Service Commission that Metropolitan Dade County and Montenay-Dade, Ltd's Request for Oral Argument is granted. It is further

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

ORDERED that Metropolitan Dade County and Montenay-Dade, Ltd.'s Motion to Dismiss is moot. It is further

ORDERED that this docket is closed.

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

Blanca S. Bayó
BLANCA S. BAYO, Director
Division of Records and Reporting

(S E A L)

RCB

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

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

The majority declines to apply the holdings in the Crossroads and Panda decisions, or even the analysis in the Lake order, which was identical to the analysis FPC asks us to declare in the Petition before us here, because this case

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

Supra, p. 6.

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

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

As the New York Public Service Commission therein stated,

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

Case 96-E-0728, p. 5.

Therefore, I believe we had before us in this case a different question than the one previously reached in Order 0210. Here, we were asked whether we would issue a declaratory statement explaining our approval of the contract in question, as an entirely separate matter from the assertion of jurisdiction over the contract dispute now before the court. Moreover, like the New York Commission in Crossroads, our authority to interpret our power purchase contract approvals has been upheld by the courts. Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), cert den, ____ U.S. ____ (1998). It is inappropriate to condition the Commission's jurisdiction on such concepts as res judicata under

these circumstances. Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So. 2d 249, 253 (1982).

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

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

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

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

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

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[1] Given the independence of the courts, I reject the suggestion that it would be unfair to any party for us to explain what was approved. First, no party can claim unfairness in being limited to what was approved, if that is the result. Second, we have often explained our position in cases where there were

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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

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important Florida ratepayer interests, even though a different tribunal had ultimate jurisdiction. See, Consolidated Gas v. City Gas; TEC v. FPL; Praxair v. FPL & FPC; DOE v. State of Michigan; Iowa State Board v. FCC; all of which were in the jurisdiction of the federal courts and in all of which we informed the court of our position.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition by Florida Power Corporation for declaratory statement that Commission's approval of Negotiated Contract for Purchase of Firm Capacity and Energy between FPC and Metropolitan Dade County in Order No. 24734, together with Order Nos. PSC-97-1437-FOF-EQ and 24989, PURPA, Florida Statute 366.051, and Rule 25-17.082, F.A.C., establish that energy payments thereunder, including when firm or as-available payment is due, are limited to analysis of avoided costs based upon avoided unit's contractually-specified characteristics. (Deferred from the September 22, 1998 Commission Conference.)

DOCKET NO. 980283-EQ

IN RE: Petition of Florida Power Corporation for declaratory statement that Commission's approval of negotiated contract for Purchase of Firm Capacity and Energy with Lake Cogen, Ltd., in Order No. 24734, together with Order No. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, establish that energy payments thereunder, including when firm or as-available payments are due, are limited to analysis of avoided costs based upon avoided unit's contractually-specified characteristics. (Deferred from the September 22, 1998 Commission Conference.)
DOCKET NO. 980509-EQ

BEFORE:	CHAIRMAN JULIA A. JOHNSON COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER JOE GARCIA COMMISSIONER E. LEON JACOBS
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	13A and 13B
DATE:	October 6, 1998
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida

APPEARANCES:

CHRIS COUTROULIS and JIM McGEE, ESQUIRE, representing Florida Power Corporation

LEE WILLIS, ESQUIRE, representing Lake Cogen

SCHEFFEL WRIGHT, ESQUIRE, representing Dade County and Montanmay

STAFF RECOMMENDATION FOR 13A

Issue 1: Should the Commission grant Dade's request for Oral Argument?
Recommendation: Yes. Oral argument should be granted.
Issue 2: Should the Commission grant FPC's Declaratory Petition?
Recommendation: Yes, the Commission should grant FPC's Petition for Declaratory Statement.
Issue 3: Should the Commission grant Dade's Motion to Dismiss?
Recommendation: No. The Motion to Dismiss should be denied.
Issue 4: Should this docket be closed?
Recommendation: Yes.

STAFF RECOMMENDATION FOR 13B

Issue 1: Should the Commission grant North Canadian Marketing Corporation's petition to intervene or in the alternative, to submit amicus curiae brief?
Recommendation: No. Intervention or participation as amicus curiae should be denied.
Issue 2: Should the Commission grant FPC's Declaratory Petition?
Recommendation: Yes, the Commission should grant FPC's Petition for Declaratory Statement?
Issue 3: Should the Commission grant Lake's Motions to Dismiss?
Recommendation: No.
Issue 4: Should this docket be closed?
Recommendation: Yes.

PROCEEDINGS

CHAIRMAN JOHNSON: We're going to go back on the record, and we are on Item 13A.

MR. BELLAK: Commissioners, Item 13A and the parallel Item 13B, which is very similar, relate to a pricing clause and transportation issue which is of importance to the staff in terms of cost recovery concerns, and important to Florida Power in terms of its settlement negotiations.

It is correct that the parties are engaged in contract disputes in courts, however, the Crossroads opinion indicates that the Commission's approve of a contract without change or modification can be explained or clarified without interfering in a contract dispute. And there is also some previous litigation which is cited as a reason not to be receptive to these declaratory petitions, however, none of the previous litigation addressed precisely this issue. And that is the Commission's approval of the contract, the basis of that approval and the explanation or clarification of the that approval, again, without any change or modification. Nor is this issue the same as a post-approval attempt to change or modify a contract as in the Freehold case.

And I might point out very briefly that the

Commissioners I'm sure are very familiar with the Panda case. And in Panda the same arguments based on Freehold were made against the Commission's position that it could explain and clarify the contract in that case. And the Florida Supreme Court rejected those Freehold arguments, and also the United States Supreme Court rejected a petition for certiorari, again, based on the same Freehold arguments. And, in fact, just today a motion for a temporary restraining order again based on the Freehold argument has been denied.

Now, this matter has been deferred for a lengthy period of time. At the point when it first came up, staff recommended that the Commission hear oral argument. It may be that the length of time that it has been deferred has enabled the Commission to become at least more familiar with these issues so that a briefer oral argument may be necessary than was originally contemplated. With that, of course, all these things are within the Commission's discretion.

CHAIRMAN JOHNSON: Thank you, Mr. Bellak.

COMMISSIONER CLARK: I just wanted to -- Panda, was that standard offer or negotiated?

MR. BELLAK: That was a standard offer contract. But apparently that was not the basis on which the Florida Supreme Court based the substance of its

discussion.

COMMISSIONER CLARK: Okay.

CHAIRMAN JOHNSON: Commissioners, as to the motion on the oral argument --

COMMISSIONER JACOBS: Move staff.

CHAIRMAN JOHNSON: And with a time limit?

COMMISSIONER DEASON: Yes.

CHAIRMAN JOHNSON: What is the time limit that you suggest? Did you move staff?

COMMISSIONER CLARK: Before dinner. Which is not that funny.

CHAIRMAN JOHNSON: Not that far away, either.

COMMISSIONER JACOBS: Three, four, five minutes.

CHAIRMAN JOHNSON: Mr. Willis, you don't have to look like that.

COMMISSIONER GARCIA: Commissioners, I think there is a considerable amount of money at stake here. There is a considerable issue about what this does to policy in the state, what this does to contracts in the state, what this does to recovery. As much as -- I mean, I have to leave tonight because I've got a speech tomorrow morning, so I'm limited even by flight. I may have to drive tonight, but -- I have company, Madam Chairman.

COMMISSIONER JACOBS: What would be your

pleasure, how long?

COMMISSIONER GARCIA: That done, I think we need to give as much time as possible, because the issues here are very complex. I think staff did a good job, but I would just caution you that the issues are very complex and very important and they come at you from very different angles in terms of what the parties want here.

COMMISSIONER CLARK: Madam Chairman, I would recommend no more than -- I guess I would say 15 minutes a side. And I take it there are two sides.

COMMISSIONER GARCIA: Well, the problem is that we are making a decision here. There are sides here who have nothing at stake except the policy concerns that this statement makes, but the policy has very definite concerns for different -- I see Mr. Moyle sitting up here. I don't think he is a party to this case.

MR. MOYLE: That's correct. I was going to, if the Commission so desired, provide some comments.

COMMISSIONER GARCIA: I don't think you are coming through the --

MR. MOYLE: They told me I could sit here because the mike didn't work.

COMMISSIONER JACOBS: If that's not agreeable,

let's go with ten minutes a speaker.

CHAIRMAN JOHNSON: I'm sorry?

COMMISSIONER JACOBS: Ten minutes per speaker. Is that okay, Commissioner Clark?

COMMISSIONER CLARK: Well, I'm not sure anyone but the parties should speak. I know it is a declaratory statement. What have we done in the past we have limited the parties, right?

CHAIRMAN JOHNSON: Mr. Bellak.

MR. BELLAK: Well, I only addressed the issue of whether Dade's request in 283 and whether Lakes' request in 509 should be granted, and I recommend that they be granted.

CHAIRMAN JOHNSON: What is your legal opinion as to whether or not nonparties can speak at all.

MR. BELLAK: Well, I think that declaratory statements, the edge goes to not permitting oral argument because of the nature of declaratory statements. And if we transgress that to the extent of allowing exceptions when it is necessary for the Commission to hear arguments that are procedurally and substantively complex and when they involve matters of where not only the petitioner is involved, but also the other party to the contract is involved, I think that that justifies hearing oral arguments from those

participants, but not to go beyond that unless it's the desire of the Commission to have further input.

CHAIRMAN JOHNSON: In the recommendation in 13B, as to North Canadian Marketing Corporation filing an amicus or a motion to intervene, you have suggested that we deny that.

MR. BELLAK: That is correct.

CHAIRMAN JOHNSON: And I'm assuming you are using the same rationale for even allowing parties to speak in this particular proceeding?

MR. BELLAK: Right. I don't know really what the status of the additional would-be participants, but if they have the same status as North Canadian Marketing, they were recommended for denial because they don't meet the standing test in Agrico. If it is simply another cogenerator, it could proliferate the oral argument beyond the point where it is useful for the Commission.

CHAIRMAN JOHNSON: We have two issues at hand; first, with respect to the motion at hand for oral argument for the parties. There was a motion -- or is there a motion?

COMMISSIONER JACOBS: Well, I guess I'm wondering now should we -- well, I guess it's your prerogative. If you want to move forward and go on a motion on

whether or not to grant it and a time?

CHAIRMAN JOHNSON: Uh-huh.

COMMISSIONER JACOBS: Okay. I would reiterate my motion that we do grant oral argument. The time -- but I would say, you know, I'm leaning towards five minutes, but in deference to Commissioner Clark I will go ten minutes per speaker.

CHAIRMAN JOHNSON: There is a motion. Is there a second?

COMMISSIONER DEASON: Second.

CHAIRMAN JOHNSON: There is a motion and second. Any further discussion? All those in favor signify by saying aye.

COMMISSIONER DEASON: Aye.

COMMISSIONER JACOBS: Aye.

CHAIRMAN JOHNSON: Aye. Opposed.

COMMISSIONER GARCIA: Nay.

COMMISSIONER CLARK: I would say aye, but at this point we are only hearing from the parties?

CHAIRMAN JOHNSON: Yes. And I understand -- and I don't know how we even address whether or not others can participate. Nothing has been filed, but I see people sitting around. How do you suggest, Mr. Bellak, that we --

MR. BELLAK: Well, again, your rule, the

Commission rule states that -- and this is Commission Rule 25-22.022, states that -- (3), except as provided in Subsection 1, which relates to hearings, which is not relevant here, oral argument or rebuttal to staff recommendation regarding the petition are inappropriate to the proceedings under this part, and the Commission may deny requests for same. Therefore, within the word may is your ability to actually hear oral argument regardless of the rule. But it seems to point out that oral argument is not so appropriate that you should be permissive as to granting oral argument. There should be a definite basis on which to grant it. And, therefore, it should be limited just to those who apply for leave to argue and for whom there has been a recommendation to grant in the staff's view.

CHAIRMAN JOHNSON: Okay. Mr. Vandiver.

MR. VANDIVER: I was just going to say that historically you all have gone both ways on oral argument on declaratory statements. I don't think we have been presented with the precise issue of a nonparty seeking to participate in a declaratory statement, which as Mr. Bellak pointed out, is supposed to be limited to the petitioner and their circumstances only. But the Commission has gone both

ways on declaratory statements as to the grant of ora argument.

CHAIRMAN JOHNSON: Commissioners. Do you remember what we did the last time we were presented with this case?

COMMISSIONER CLARK: Madam Chair, I would be willing to state that I think it should be limited to the parties. It has been a long day, it's going to b a longer day, and I'm looking at the array of people in front of us representing the parties, I'm sure the will tell us everything we need to know.

CHAIRMAN JOHNSON: Is that a motion?

COMMISSIONER CLARK: That would be my motion.

COMMISSIONER JACOBS: I would second.

CHAIRMAN JOHNSON: There is a motion and a second.

COMMISSIONER GARCIA: Madam Chairman, I'm going to vote against that motion. Again, I want to caution the Commission that the repercussions of this vote ar very serious. They go against standing policy of thi Commission, and we are determining if we are going to go against that. Now, I understand there is a lot of parties here. Unless we parachute some more, at ten minutes a head we will probably be out of here in an hour. That's not including questions, but the

determination that we are going to make today if we go with staff, changes longstanding policy of this Commission. And I can understand why other parties who are in similar situations need to speak to us. Because once we go down this path, we can't just pull out. And that said, I just caution us that -- let's listen to the arguments. I mean, we have limited them already, so there is a limit to it. The only thing that will make it go longer is if some of us have questions. And I hope that that is the case, but the issues are complex and the positions of the parties are varied, but the decision that is recommended by staff today changes policy of this Commission and that alone merits that we listen to all sides of it. Especially not in a hearing context. It's not like we are going to hearing here. This is it. This is all we get.

CHAIRMAN JOHNSON: Any other questions, Commissioners? I had one outstanding question, Mr. Bellak, and perhaps you or Mr. Vandiver may recall. The last time we dealt with a dec action, did we -- it strikes me that we let people participate.

MR. BELLAK: We did, but all of them had filed motions for oral argument. And there was one would-be participant that had not and asked for permission from

the bench to participate, and it was denied.
CHAIRMAN JOHNSON: It was denied? There is a motion and a second. Any further discussion?
COMMISSIONER CLARK: I would only point out that it seems fairer to me to those people who have asked for it that they know who is going to speak and from what standpoint. That would be the reason I would continue to support the motion. Or I guess I made the motion.
CHAIRMAN JOHNSON: There is a motion and a second. Any further discussion? All those in favor signify by saying aye.
COMMISSIONER DEASON: Aye.
COMMISSIONER JACOBS: Aye.
COMMISSIONER CLARK: Aye.
CHAIRMAN JOHNSON: Aye. Opposed.
COMMISSIONER GARCIA: Nay.
CHAIRMAN JOHNSON: Show it approved on a four-to-one vote. And, I'm sorry, Commissioner Jacobs, you limited it to --
COMMISSIONER JACOBS: Ten minutes per speaker.
COMMISSIONER CLARK: Now Mr. Coutroulis is going to point out that there are two speakers on one side and only one on your side, is that it?
MR. COUTROULIS: Commissioner Clark, I represent

Florida Power with respect to the Dade petition. Mr. McGee represents Florida Power with respect to the Lake petition.
COMMISSIONER JACOBS: Innovative.
MR. COUTROULIS: Actually, I have a conflict with respect to the Lake.
CHAIRMAN JOHNSON: Mr. Wright, did you have -- you were raising your hand.
MR. WRIGHT: I was just going to say that, as I think you know, I do represent both Lake and Dade County in Montannay (phonetic.) My primary purpose sitting at the table today is to speak on behalf of Dade County and Montennay. Mr. Willis will speak on behalf of Lake. If it is acceptable to you, Mr. Willis and I have discussed an allocation of time, and I think if you limit us to 20 minutes to our side that would be acceptable to us, because I think he has a little more to say than I do.
MR. COUTROULIS: Would we, as well, then, have 20 minutes combined?
CHAIRMAN JOHNSON: I guess so. Yes, that is manageable. Would you proceed then?
MR. McGEE: And, Madam Chairman, since the Lake petition asked for the same declaratory statement as in the Dade petition, and since the fundamental order

that we are asking --
CHAIRMAN JOHNSON: You are going to have to speak up just a bit.
MR. McGEE: -- for interpretation is the same in both, I'm going to cede my ten minutes so that we can deal with the matter in a more comprehensive and concise way.
CHAIRMAN JOHNSON: I didn't hear you.
COMMISSIONER CLARK: MR. COUTROULIS is going to go first and take most of the time.
MR. McGEE: Yes.
CHAIRMAN JOHNSON: Okay.
MR. McGEE: I am ceding my ten minutes to him.
CHAIRMAN JOHNSON: Okay.
MR. COUTROULIS: Shall I begin?
CHAIRMAN JOHNSON: Yes.
MR. COUTROULIS: May it please the Commission. FPC seeks a declaratory statement that explains and clarifies the Commission's 1991 order approving for cost recovery FPC's negotiated power purchase agreement with Dade. It does not seek a modification of that order. Staff supports FPC's petition in all respects, as set forth in its recommendation.
Our petition falls squarely within Rule 25-22.022. As the Florida Supreme Court recently held

in the Panda decision, the Commission clearly has jurisdiction. Indeed, Commissioners, it alone has jurisdiction to interpret its orders and construe its PURPA rules to ensure that payments under approved contracts do not exceed its avoided cost determination, since approval of a contract at odds with the Commission's avoided cost rules would violate both PURPA and Florida Statute 366.051.
To parrot a point that was made by Mr. Bellak, in making those observations, the Florida Supreme Court drew no distinction between negotiated contracts and standard offer contracts. Specifically, FPC asks this Commission to clarify that consistent with its order disapproving the Lake settlement, consistent with PURPA, consistent with Florida Statute 366.051, and Rule 25-17.08322, which governs negotiated contracts when they are approved, the Commission's order approving the Dade contract contemplated that FPC would pay for energy based on avoided energy costs strictly as reflected in the contract.
That FPC would use the avoided units contractually specified proxy characteristics referenced in 912 and not some other or additional characteristics that are nowhere contained in the contract, nowhere contained in the Commission's

approval order, and nowhere contained in the Commission's rules to assess the avoided unit's operational status for the purpose of determining when the as-available payments are made and when the firm payment is made.

And, finally, that the Commission's order contemplated that FPC would use the actual charge out price of coal to Crystal River 1 and 2 resulting from its prevailing mix of transportation, and not some fictitious mix, or some mix that was in effect when the contract was approved.

Commissioners, FPC's petition is inextricably linked to what this Commission approved in 1991 when it approved the negotiated contract. Moreover, and I would like to emphasize this, given the relevant history to which I intend to turn now, FPC believes that the granting of its petition for declaratory statement should be a housekeeping matter for the Commission. And in saying that, I do not mean to suggest this is not an important matter, it most certainly is. But it should be a housekeeping matter since the Commission has already determined that FPC is correct in what it seeks. And let me explain why.

The Commission will recall in February 1995, it ruled that it lacked jurisdiction to determine whether

FPC's method for determining firm or as-available payments to Dade, Lake, and other similarly situated cogenerators was correct under their contracts. And thereafter litigation ensued with Lake and the Lake court held that to determine when the as-available or the firm payment should be made FPC must model the avoided unit based on all the relevant characteristics and constraints that would have been associated with a unit had it actually been built.

Under the Lake court's ruling, FPC could not limit its modeling of the avoided unit's operation to the proxy characteristics set forth in the contract. It would instead be required to consider characteristics nowhere found in the contract. Now, sometime after that court's ruling, Lake and FPC, as the Commission will recall, entered into a settlement agreement compromising their dispute. And that agreement was brought to this Commission for approval. This Commission disapproved the proposed settlement with Lake. And in its three-to-two order it squarely held, A, its jurisdiction was broader than it had previously believed, and that it had jurisdiction to explain and clarify what a negotiated contract meant at the time it was approved. Indeed, it noted that no party had cited any authority to the contrary.

B, the Commission held that Section 912 of the contract, like all avoided cost calculations, was never intended to be fully representative of a real operable bricks and mortar unit, but was instead intended as a pricing proxy. It further held that approval of the contract recognized that energy payments would be calculated using the parameters specified in the contract and were not fixed. And, quote, 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 1991 order approving the contract. I'm quoting from Page 9 of the Commission's order disapproving the Lake settlement.

Finally, the Commission held there that neither the contract nor the approval order contains provisions governing the modes of transporting coal to the referenced plant, and that FPC should take any and all action regarding coal transportation which legally lowers the cost of providing electricity to the ratepayers.

Now, the Commission reached that decision in Lake despite the fact that it had in the 1995 order I referenced before ruled that it lacked jurisdiction to

actually adjudicate the contractual dispute over energy pricing between Florida Power and the QFs. And although Commissioners Garcia and Clark dissented in the Lake settlement docket, as staff discusses, Commissioner Clark filed an opinion in which she observed at Page 21, quote, "The Commission could deny cost recovery based on a subsequent contract interpretation." And here is the key, "if it was contrary to the basis on which the contract was originally approved."

Thus, we know at least four of the Commissioners in Lake were of the view that this Commission retains jurisdiction in the context of a negotiated contract to determine whether energy payments are consistent with the basis on which the contract was originally approved for cost recovery. Having approved the contract, the Commission has the authority and responsibility to ensure that FPC makes payments in accordance with what were, in fact, the avoided energy cost terms approved in its order.

To discharge that responsibility, the Commission must exercise its jurisdiction to consider and determine what the contract meant when it was approved. The Commission cannot, consistent with its cost recovery duties, be relegated to a rubber stamp

as intervenors would have it, whose role with respect to cost recovery completely ended in 1991.

Commissioners, that is not a requirement of the Freehold decision which holds that a Commission cannot modify the basis on which it originally approved a PURPA contract to bring the energy payments in line with current avoided costs. But Freehold clearly does not preempt the Commission from explaining and clarifying what it, in fact, approved in 1991 unmodified. Indeed, as Mr. Ballak noted, that precise preemption argument was made in Panda. It was rejected by the Florida Supreme Court and cert was denied.

Now, I would like to discuss that it is very clear that the Commission had to consider the energy payments called for under this contract in relation to avoided costs when it approved the contract back in 1991. Because under 366.051 and Rule 25-17.08322, and as confirmed by the Panda decision, this Commission in '91 could not have approved the contract if the energy payments would exceed avoided cost. And as I intend to show, there really is no question that the Commission did, in fact, determine in 1991 when it approved the Dade contract that the energy payments would be based on a lesser of type methodology. A

methodology that compares firm rates to as-available rates, and essentially pays the lesser of the two. Not some full-blown bricks and mortar modeling involving characteristics nowhere referenced in the contract or in any Commission rule or order.

Indeed, Commissioners, if the 1991 Commission determined that the contract would make energy payments based on some methodology that materially paid more than a lesser of methodology, I intend to show that under its governing rules the Commission could not have approved it for cost recovery.

Let me begin with that. The PSC has held that the approval of a negotiated contract includes approval of the terms and conditions of that contract, particularly the capacity and energy payments.

CHAIRMAN JOHNSON: You have about two minutes left.

MR. COUTROULIS: All right. Under the explicit direction of 25-17.08322, as it existed in '91, and as it exists today, in order to approve a negotiated contract -- I was going to take the full 20 minutes.

CHAIRMAN JOHNSON: I'm sorry, I forgot.

COMMISSIONER CLARK: I'm struggling with the fact she has told you to hurry up, and I need you to slow down.

MR. COUTROULIS: And I would like to slow down.

CHAIRMAN JOHNSON: I had forgot that he had said he was deferring to you.

MR. COUTROULIS: I think I started at around 3:13. Let me back up. The PSC has held that the approval of a negotiated contract includes approval of the terms and conditions of that contract, particularly the firm capacity and energy payments. It held that in Docket 910603, which we cited in our briefs.

Under the explicit direction of 25-17.08322, that is the rule that governs approval of a negotiated contract, back in 1991 and still today, in order to approve a negotiated contract, the PSC was required to measure the energy and capacity payments in that contract against the avoided cost standard. The benchmark, if you will, specified in the Commission's rules for calculating such payments under a standard offer contract.

Specifically, the Commission's rules provided that it would evaluate a negotiated contracts payments for firm energy and capacity against the utility's avoided construction and operating costs. And here is the key. Calculated -- and I'm reading from the rule -- calculated in accordance with Subsection 4 and

Paragraph 5A of 25-17.0832. Paragraph 4 of 25-17.0832 is the avoided energy pricing rule for standard offer contracts.

That is one of the benchmark rules that this Commission was required to consider under .08322 in determining that this negotiated contract was cost-effective. And as we demonstrated in our petition, and as staff further demonstrated in its recommendation, under the benchmark against which it needed to measure energy payments in this contract against the benchmark for standard offer contract energy payments, it had to look at the payments called for in this contract and say do they pay no more than avoided costs calculated in accordance with the standard offer rules. Because if that negotiated contract paid more, it could not have been approved.

Now, its true the negotiated contract doesn't necessarily have to incorporate the same energy pricing rule as a standard offer contract. The parties can decide they want to figure out the energy pricing in some different way. But when this contract was taken to the Commission for cost approval under 25-17.08322, it is very clear the Commission had to say how does this contract pay for energy against our avoided cost benchmark. And the avoided cost

benchmark right in the rule is the energy pricing rule for standard offer contracts. And I invite the Commission, look at .08322, it references directly .0832, what is now 5B, but back in '91 it was 4B, which is the energy pricing rule for standard offer contracts.

Now, as we have demonstrated, the Commission's standard offer energy pricing rule clearly calls for a lesser of approach. Staff discusses that extensively in their recommendation. We cited all of the hearing transcripts before this Commission when that rule was passed, and it's crystal clear that that rule calls for a lesser of determination. It, therefore, follows logically that this Commission had to determine in 1991 that the Dade negotiated contract paid on the basis of a lesser of approach or something less, because if it paid something more, it would have been in excess of the standard offer benchmark that the rules say this Commission had to consider. And if there are any questions on that, please interrupt me, because I think this is a crucial point.

The bottom line is that the Commission necessarily determined in the order approving the Dade contract that the energy contracts did not exceed avoided cost. To do that it had to determine what

those payments would be against the avoided cost benchmark prescribed by its own rule for standard offer contracts. That's what the negotiated contract rule says on its face. And the instant petition simply asks the Commission to clarify what it necessarily determined in that regard something that is clearly within its jurisdiction.

Now, less there be any question that this Commission apprehended this contract in 1991 as calling for a lesser of approach, there is more evidence. First, as I mentioned, the rule for standard offer contracts was the subject of extensive rulemaking proceedings that are discussed in staff's recommendation, discussed in our brief, and it is clear that the Commission was told very directly that the standard offer pricing rule called for a lesser of.

In addition, two months before this Commission approved the negotiated contract with Dade, Florida Power filed its standard offer contract. The standard offer contract contains a substantively identical provision to Section 912 of the negotiated contract. Now, as a standard offer contract, it had to explicitly provide for energy payments to be made under the standard offer rule, 25-17.0832, it was then

4B, it is now 5B. It wasn't simply it had to pay no more than that benchmark rule, it had to pay on the basis of that because it was a standard offer contract. And that standard offer contract was approved. It was approved by Commission Order 24989. So the Commission obviously determined that that contract did pay on the basis of the rule. It, therefore, follows that the Commission must have viewed the identical language in the negotiated contract with Dade as meaning the same thing as in FPC's standard offer contract and calling for the determination of firm or as-available payments based on an hourly comparison of the firm rate to the as-available rate.

And, indeed, its order approving FPC's and Gulf's and FPL's standard offer contract clearly recites the factors that are required to determine energy payments under that standard offer pricing rule, and it mentions only the energy pricing characteristics used by FPC under the negotiated contract here. Type of fuel, fuel costs, average heat rate, and variable O&M, as well as an escalating factor by years.

Those are the factors that appear in both the standard offer contract and the negotiated contract. There are no additional or different characteristics

as intervenors suggest there should be that might have been associated with a fully characterized unit.

COMMISSIONER CLARK: What were those four, again? Type of fuel, fuel cost --

MR. COUTROULIS: Type of fuel, cost of fuel, average heat rate, and variable O&M. And, Commissioner Clark, if you look at Order Number 24989 approving those three standard offer contracts, the order squarely recites these are the characteristics that are required to comply with the standard offer pricing rule. And those are the same ones in the negotiated contract, and the language in both contracts is identical. It is inconceivable that it meant two different things to the Commissioners in 1991. Both of those contracts were approved by the Commission in 1991. The same language had to mean the same thing. And we know that the energy pricing rule of this Commission was a lesser of rule because we have extensive evidence both in staff's recommendation and in our petition to that effect.

I would like to turn now to FPC's need for the declaratory statement it is seeking, and I will then briefly get into why the arguments of intervenors in support of their motion should be rejected.

Commissioners, it is obviously unfair for the

Commission to deny FPC the option of settling its dispute with Dade, which the Lake order effectively does, because they are the same contract, the same issues, and force FPC to proceed with the risk of litigation, but nevertheless, refuse to state formally what rates, terms, and other conditions of the contract the Commission intended to approve as consistent with full avoided costs. FPC should not have to wait to some later time to find out whether or not its contract administration is in accord with what this Commission believed in 1991. And intervenors dismiss the Lake order now as a nullity. They say, well, after the Commission issued the Lake order, the Lake settlement expired by its terms because too much time had passed, so that's now a nullity. Well, technically they are right. Florida Power is entitled to know that the Commission is standing by the reasoning in that order.

Let me turn in the one and a half minutes I have left to res judicata, collateral estoppel, and administrative finality. As an overall matter, it is important to appreciate that the instant petition does not ask the Commission to do what it earlier determined it lacked jurisdiction to do. Right or wrong, the Commission viewed the 1994 petition as a

request to resolve the disputed contract issue. The Commission could not have been clearer on the point. Its order at Page 6 says that is the way they construed the petitions. This petition is asking the Commission to explain and clarify its order of approval of this contract in 1991. It is not even the same issue. Therefore, there is no res judicata.

Another thing, intervenors talk about administrative finality. Well, the fact of the matter is they made those very same arguments when the Lake settlement was presented to the Commission. They said to the Commission at that point you should not look at this settlement agreement against what you approved back in 1991, because your jurisdiction was at an end after 19491, and you determined back in that 1994 pricing docket that you wanted to resolve the pricing dispute between the parties, and so you should not interject yourselves now and make the determination that the settlement is cost-effective in relation to what was originally approved. This Commission rejected those arguments. It rejected the idea of administrative finality. All the arguments that were made in here were made connection with that Lake settlement, and yet this Commission went ahead and disapproved that Lake settlement and placed us in the

position that we are in now.

There is no bar to this Commission going ahead. We have cited cases in our brief that talk about the fact that a jurisdictional determination is not something that is given res judicata effect when the same tribunal that entered the earlier order was being asked to invoke its jurisdiction --

COMMISSIONER GARCIA: Didn't this same tribunal, though, approve one of those settlement offers and vote it out?

MR. COUTROULIS: I'm sorry, Commissioner Garcia?

COMMISSIONER GARCIA: Didn't this same board approve one of the settlements of the contract?

MR. COUTROULIS: This Commission has approved some of the settlements between Florida Power and other cogenerators, yes.

COMMISSIONER GARCIA: Let me ask you, why do we need a contract at all? If we retain jurisdiction, why not simply retain jurisdiction and simply determine this as we go? We say you must enter -- you must enter -- you must get a partner to produce cogen power or whatever type of power, you must have avoided -- we figure it out and then we go from there, and this Commission goes determining cost as we go on, and thereby not invoking the possible jurisdiction of

another party. We don't need a contract. This Commission has jurisdiction, so we keep it.

MR. COUTROULIS: Well, Your Honor, I'm suggesting that this Commission has jurisdiction to explain and clarify the basis on which it approved this contract. I'm not suggesting that this Commission has plenary jurisdiction to resolve every contract dispute that might -- that the parties might get into in the course of the 20-year contract and the administration of that contract. But if there is a need for this Commission to explain and clarify the basis on which it approved something --

COMMISSIONER GARCIA: I understand. But aren't you telling me that it's crystal clear? You're saying to me and have repeated several times that it's crystal clear what the Commission meant. If it's crystal clear, why don't we let it fall within the borders of what a contract is supposed to be and we go to court and let the judge decide it, since it's so clear? We already spoke on the issue. We spoke in '91. There it is. It's in black and white, these are two sophisticated parties. It's not even a negotiated -- this is a negotiated contract. It's not even a standard offer contract. Both parties entered into this contract on equal footing, this Commission

approved it, why not allow both parties, both sophisticated parties to make it as crystal clear as you say it is before a judge?

MR. COUTROULIS: Because it's appropriate. It is only this Commission and no court that can clarify and explain what this Commission approved in 1991. A court can determine what the contract provides as between the parties. Theoretically, you could have a negotiated contract where this Commission approved on a certain basis that contract for cost recovery, but down the road a court determines that's not what the two parties obligated themselves to do, and there is a mismatch there. This Commission is only going to pass through for cost recovery payments that are consistent with the basis on which it approved the contract --

COMMISSIONER GARCIA: Which cost recovery? You do agree cost recovery comes much later on?

MR. COUTROULIS: Cost recovery comes in the fuel and purchased power adjustment clause, but nonetheless we have a real dispute, we have --

COMMISSIONER GARCIA: Which we kept setting and improving as we moved on in this contract.

MR. COUTROULIS: Yes, but --

COMMISSIONER GARCIA: And are still part of rates.

MR. COUTROULIS: But, Commissioner Garcia, there is a very real dispute between Florida Power and Dade and Florida Power & Light. There is litigation. There are questions about cost recovery. There are questions about contract administration. FPC has a right to know that it is paying in accordance with what this Commission had in mind when it approved this thing in 1991. If FPC is wrong in that regard, then FPC wants to bring itself in compliance with what this Commission had in mind when it approved this for cost recovery.

COMMISSIONER GARCIA: But hasn't FPC acted along those lines? FPC is making payments based on what it believes the contract says, therefore, FPC is acting within the boundaries of what it feels it has in the contract, and has gone before a court, and, in fact, has shifted, if I'm not mistaken, and you can correct me if I'm wrong, is paying according to what it feels is in the contract. So it has already acted upon the contract that it signed.

MR. COUTROULIS: FPC is doing that, Commissioner. But FPC would like the assurance from this Commission which is the only body that had the right to approve this for cost recovery, and the only body that protects the ratepayers, and the only body that

ensures that these payments do not exceed avoided cost, and if they do they are not passed through to the ratepayers.

COMMISSIONER GARCIA: Don't you think it puts this Commission in a difficult position? We stated t a party, come to Florida. We are going to lay out th rules of the game for you. We sat and we drew the rules of the game with your client. And, in fact, when staff cites, they are not citing to a discussion that occurred with all parties here, they are citing to a discussion that occurred with our IOUs, this Commission, and -- the Commissioners, because it wasn't these Commissioners, and staff. And we came up with a series of rules. When we came up with that series of rules, people entered our state to do business in our state. And these obviously were sophisticated parties which knew what they were doing, which got financing based on those agreements, or those rules that we had before this Commission. They didn't enter under jurisdiction of this Commission, they entered our state under a contract which you provided and this Commission approved and said let's play ball.

MR. COUTROULIS: Correct.

COMMISSIONER GARCIA: We leave from that point

and now you return into the seventh inning of the game and you are telling me -- you are telling these parties that you signed a contract with, that a material issue in the contract is at dispute, and only this Commission can determine that material issue of this contract.

MR. COUTROULIS: No, Commissioner, I am not saying that.

COMMISSIONER GARCIA: You don't think that this is a material central issue on which this contract's value rises or falls completely?

MR. COUTROULIS: The petition does not ask this Commission -- and I want to clarify that -- the petition does not ask this Commission to resolve the contract dispute between the parties. That is hanging in the court.

COMMISSIONER GARCIA: If we resolve this issue, have we not resolved this whole case? Is this not a central issue to what you are before the court on?

MR. COUTROULIS: Not necessarily, Commissioner.

COMMISSIONER CLARK: Can I say something? I understand MR. COUTROULIS' argument to basically be you are between a rock and a hard place.

MR. COUTROULIS: That's right. That is exactly right.

COMMISSIONER CLARK: And they are between a rock and a hard place because on identical facts we approved a settlement and the next time it came around we disapproved it.

COMMISSIONER GARCIA: You are absolutely right. You are absolutely right.

COMMISSIONER CLARK: And that is all he is saying. As I understood it when he came out and said this is a housekeeping measure, what we want to know is what you are going to say that you would approve pursuant to -- as a way of explaining your order when you approved it.

COMMISSIONER GARCIA: Madam Chairman.

MR. COUTROULIS: What terms and conditions did you approve back in 1991.

COMMISSIONER GARCIA: Commissioner Clark, but we put ourselves in that position.

COMMISSIONER CLARK: I agree with that.

COMMISSIONER GARCIA: And that we -- that there -- that the majority which is -- we have a different Commission now. Time has passed. There are different members of this Commission. Hopefully, new members of this Commission won't make the same mistake. But that being said, that being said, we put ourselves in this place. The parties who signed this contract did not

ask for this. FPC, I think, acted in good faith. They said -- they came to us and there I do believe we do have jurisdiction, and you are absolutely right, in that case you came before us not to say is this right or wrong. You said, Commissioners, this is our possible exposure.

MR. COUTROULIS: But the Commission construed that '94 petition -- with all due respect, Commissioner Garcia -- right or wrong, as asking the Commission to resolve the contract dispute. The order is clear on that. I don't think that was the right way for the Commission to look at that petition, but it's clearly the way they looked at it.

COMMISSIONER CLARK: Hold on. Which petition are you talking about, the original one?

COMMISSIONER GARCIA: Which petition are you talking about?

MR. COUTROULIS: Yes, the '94 petition. Now we are simply asking please clarify the basis --

COMMISSIONER GARCIA: But you are taking that out of context. You were before -- your client was before a court with the people you had entered into a contract with, were before a court, and we -- Florida. Let me not say we. Florida had a potential exposure to its ratepayers, it's company, and this party who

had signed a contract. And so you came to us and said, look, solve this contractual dispute. But we weren't solving a contractual dispute, we were agreeing on a settlement from which you were going to proceed from that point forward. To limit the exposure to our ratepayers, to limit the exposure to our IOU, and to honor the terms of a contract that we had entered into that this state had promoted through federal legislation and our own policies to move forward from that point. And so what were doing wasn't resolving a contractual dispute, we were resolving something that you brought before us and this was the proper place, because your client had to get cost recovery. Your client had to figure out how it worked, and here is where you brought it.

MR. COUTROULIS: But, Commissioner Garcia, you are referring to the Lake settlement, and I was referring back to the 1994 pricing petition that Florida Power filed. Florida Power filed a petition right after it implemented Section 9.1.2. This Commission construed that petition, right or wrong, as asking this Commission to resolve a contract dispute between two parties to a negotiated contract. And this Commission held it had no jurisdiction to do that, and we are not challenging that determination

here today.

We are saying there is something you very clearly have jurisdiction to do. You have jurisdiction to explain and clarify the basis on which you approved this thing for cost recovery in 1991. We believe you should tell us what terms and conditions and rates you approved in 1991. It's highly relevant. It is relevant to our administration of the contract.

COMMISSIONER GARCIA: It's a central issue to this dispute.

MR. COUTROULIS: And it is particularly a central issue, though, because of something that happens to exist in this negotiated contract, and that is this negotiated contract happens to have a reg out clause. It did not have to have a reg out clause. They are not required to be in negotiated contracts. They are permitted. If you didn't have a reg out clause in this contract this Commission could say, we approved $100 for cost recovery, but we can't tell you what you agreed to in the contract, we can tell you what we apprehended when we approved the contract. The parties go to a court and the court says, well, I think the utility obligated itself to pay $110. Well, what happens then? We owe $110, but this Commission is only going to pass-through 100.

In this case there happens to be a reg out clause. Now the parties may not agree on its enforceability, that is not before the Commission. It may be before the courts at some point. But it's only if that reg out to clause is enforceable -- we happen to think it is, they probably disagree -- that what this Commission decides it's going to pass-through for cost recovery may wind up being what the cogens ultimately get paid. That's not because this Commission is stepping on the toes of the court's jurisdiction to resolve a contract dispute, it's because these two parties in an arm's-length negotiation agreed to a reg out clause. And that should not concern the Commission at all. It's not before the Commission. It may come up in the courts at some point.

All we want from this Commission is please clarify what you meant when you approved this in 1991. You already told us that in Lake, in the Lake order when you disapproved the settlement, but now intervenors say that is a nullity. We continue to go forward with litigation, we try to settle the disputes, we really can't, and we submit --

COMMISSIONER GARCIA: Let me tell you, I sympathize with your position. In no way am I saying

that what you are trying to do is wrong. In fact, I think what you are trying to do is to some degree put yourself in a position where you can protect your shareholders and the ratepayers of Florida. And I accept that. I mean, that is -- you are not the bad guy here. You are simply -- unfortunately, I think the bad guy here is this Commission. I think this Commission may have erred in the past, or erred in the past and puts us -- puts you in particular, between a rock and a hard place. And then puts us in a difficult spot because where do we go from here. But that said, I know you -- I have taken your time and added some to it, so maybe we should --

MR. COUTROULIS: That's all right. I appreciate the questions, Commissioner Garcia. They are very insightful questions. And I do want to come back by emphasizing with consideration to all of these factors, we very carefully drafted this petition to ask for very narrow carefully structured relief that we submit is in the interests of all parties to know. Because if four Commissioners said in Lake we retain jurisdiction to tell you whether we are going to pass through payments for cost or not --

COMMISSIONER GARCIA: We retain jurisdiction over you, not over the party that you have a contract with.

We have very specific jurisdiction over whether we ar going to allow cost recovery or not. And I believe that your client would have recourse if we didn't because of precedent set by this Commission on those very issues.

MR. COUTROULIS: But, Commissioner Garcia, if th Commission's view as it has stated is that it has jurisdiction to do that, then it clearly has jurisdiction to tell us now what it approved back in 1991. They are one in the same issue. We have ongoing disputes, it would be nice to have a declaratory statement that once and for all makes thi clear. It has been going on and on for a long time.

COMMISSIONER GARCIA: You're absolutely right. Once you have that the argument is over.

MR. COUTROULIS: I think I'm out of time. I would love to talk some more.

CHAIRMAN JOHNSON: Actually we stopped you when you had about a minute left. So if you want to summarize.

MR. COUTROULIS: All right. Give me one second.

COMMISSIONER CLARK: Madam Chairman, I will probably have questions, but I think I want to wait to hear from the opposing side and --

COMMISSIONER GARCIA: And I'm sorry, Ma'am

Chairman, I jumped in because I was interested. I understood him much better when he was going quicker. So when he slowed down I was able to think up and formulate some questions.

MR. COUTROULIS: I should have stayed faster. Would you like then to hear from the other side and can I have a minute or so for rebuttal?

CHAIRMAN JOHNSON: If you want to save the minute.

MR. COUTROULIS: Yes.

Chairman Johnson: Mr. Willis.

MR. WILLIS: I'm Lee Willis of Ausley McMullen representing Lake Cogen in this matter. Commissioner, I would like to first review again --

COMMISSIONER GARCIA: We can barely hear you.

MR. WILLIS: I would like to review again the procedural history of this matter. This is the third petition for declaratory statement involving the same parties in the same contract that has been before this Commission. The first one was in 1994, and the second one was in 1994, and it was denied by this Commission in a definitive order after extensive oral arguments were held, and careful consideration was made, and a final order issued, which was not appealed.

In that order, which essentially the present

Commission entered, Commissioners Garcia, Deason, Johnson, Clark, and at the time it was Commissioner Kiesling. But it's not an ancient order. You held that matters of contractual interpretation were properly left to the civil courts, and that we defer to the courts to answer the question of contract interpretation raised in this case. Thus, FPC's petition is denied.

Now, the points that I have just read are quotes from your order. This was your decision on the very contract at issue here, and the very contract provision that is at issue here. The Commission --

COMMISSIONER GARCIA: Mr. Willis, while you are still there, though, it is pointed out by parties and by staff that Crossroads give us more power than we had at the time. And that Freehold gives us much more power than we had at the time. Now we know what the law is and we can decide these terms because we keep jurisdiction.

MR. WILLIS: Commissioner Garcia, I respectfully will point out to you that the law of this case was made in the order that I just quoted to you. And that while you might want to use -- or someone could argue that Crossroads might be persuasive in some future time in some future controversy that has not been

decided by this Commission, that has not been subject to the provision of res judicata and collateral estoppel and administrative finality, that you might consider that. That is a New York Commission. It did not change the jurisdiction of this Commission nor the decision that you made.

And what you did is this Commission carefully and exhaustively considered the very issue presented in this docket and clearly directed the parties to go to court to resolve the contract interpretation issue.

Now, we can call it whatever you want to, but it comes back to we are -- they are asking you to interpret that contract. They clothe it with a lot of smoke, but that is exactly what it is. The parties went to court in October of 1994. They settled the matter. They brought it to you, it was rejected. And the order that was entered is a legal nullity. And even the reference to it is inappropriate here because it is not an order of this Commission.

The parties are back in court where you said originally was the proper place to be. The trial is now set for November the 2nd, and it would be outrageous for you now to step in and try to answer the question of a contract interpretation.

COMMISSIONER GARCIA: Mr. Willis, is this an

issue before the court? Is the court looking at this issue?

MR. WILLIS: The court --

COMMISSIONER GARCIA: The court has taken jurisdiction of that issue.

MR. WILLIS: Well, the fact is that Judge Briggs has already unequivocally ruled that the terms of the agreement are unambiguous and do not require the court to look outside its four corners for an interpretation of Section 9.1.2 of the agreement. And the court held that the payments are due to Lake Cogen based on a real operable 1991 pulverized coal unit, and has ruled that any further attempt by FPC to argue any other interpretation of this agreement is inadmissible at trial. So that is the circumstances there now.

COMMISSIONER DEASON: Then why are you concerned about this declaratory statement?

MR. WILLIS: Well, because you heard them here argue an order that is a nullity, and they brought it back up to you. And they are going to try to use it in that fashion, and if they are not trying to do that, there is no reason for us -- for you to decide this --

COMMISSIONER DEASON: Is it our position to determine what their motives are and how they are

going use to use it in a court, or is it our responsibility to address the declaratory statement, and parties use it for whatever purpose they feel is useful for them?

MR. WILLIS: Commissioner, I believe that you should decide this case, if at all, based on what you have already decided previously.

I mean, that was the word that you gave to these parties. It was the same thing as you entering a contract with the various parties. And the parties have relied on that, and they have gone to court, and that's where that controversy should be decided. And I think you should look through what the motives are here, and if it genuinely is for matters of settlement, it can come up and be argued when that time comes in a settlement. There is no settlement pending. It can come up in cost recovery at the time cost recovery is brought. It does not need to be addressed now.

You should defer your decision on this. There are three principles; res judicata --

COMMISSIONER DEASON: Well, Mr. Willis, let me ask you, it does not need to be addressed now. Are you saying then there is never a need for a declaratory statement? You just wait until there is a

rate proceeding or something else when the issue is squarely in front of you?

MR. WILLIS: No, I'm not saying that. I'm saying that, Commissioner, after this has been brought to you three times, and that you have made a definitive determination on this in 1995, that you should stick by what you held in that order. And where the argument was made by Florida Power that with respect to a whole lot of detail about standard offers in that order, that I first quoted you from, you said there are two types of contract treated very differently in the rules. And that you considered the very things that were here, and pointed out that you would not be involved in such a matter in interpreting the contract and sent this matter to court.

Now, there are three principles that are important for you to realize here no matter how much you may want to go back and address this again. They are res judicata, collateral estoppel, and administrative finality. And it says that once you litigate an issue between identical parties and you have a final order, that case is over with. You can't come back over and over again with the same question. And the Commission has been posed the question presented here, you have given an answer in a final

order, and that should be the end of the matter.

Now, res judicata applies not only to issues that were previously litigated, but it applies to issues that could have been litigated under the same transaction. And res judicata applies here because there was a final order on the merits of jurisdiction. This Commission was a competant tribunal with jurisdiction and had the authority to declare your own jurisdiction. The parties are the same, the cause is the same. And here, again, this Commission clearly stated in that order that you have no jurisdiction to interpret the very contract that is at issue here.

Now --

COMMISSIONER JACOBS: Mr. Willis, how do you respond to the argument that the question on this petition is not the same question?

MR. WILLIS: Well, the response to that, Commissioner, is that they were obligated to raise in the first petition all matters relating to that transaction. If they didn't raise it or if they come back and add some little subtlety which is really a little bit of smoke to add to it to get back to the same issue, then that thing was subsumed. That issue was subsumed in the earlier order. You can't come back. After you decide this, we can't come back in

another year and say but we have got another twist we want you to consider and go back to 1989, or 1975, or some other time to try to put together something for you to consider.

Now, again, the court that has jurisdiction that you sent this to clearly and unequivocally determined that the section in the contract required the defendant, FPC, to make electric energy payments to the plaintiff with reference to modeling in the operation of a real operable 1991 pulverized coal unit having the characteristics required by the law to be installed on such an unit. Now, they are arguing something different here, but that is what the court has held.

Now, also, I want to point out --

CHAIRMAN JOHNSON: I have a question related to something you said a little earlier. I'm understanding Florida Power Corps' argument -- there doesn't seem to be a dispute with respect to who gets to interpret contracts. And although Florida Power Corp thought that in their 1991 filing that it was broader than that, that we only answered the one question as to contract disputes. And that what they have placed before us today is a clarification as to our intent. And that that is a totally separate

issue.

MR. WILLIS: I think it's exactly the same issue. You can call it different, but what your intent is when you entered the contract is a fact and circumstances surrounding the entry of that order which -- and surrounding that contract that a court would consider in interpreting what that contract means. And it is the exactly the same thing. It really is nothing different. They are trying to call it something different, but it's not. It is an attempt to interpret this contract. In the staff recommendation they stated that this Commission had forthrightly determined that it has no jurisdiction to interpret contracts. But than goes on for pages and pages actually setting out and interpreting the contract.

CHAIRMAN JOHNSON: Let me ask that question in a different way, sir. Are you suggesting that in the state court proceeding if the court determined that both parties intended firm all the time, but that the Commission intended something else, that they are going to look at what the Commission versus the party intended or would they enforce what the two parties to the contract intended?

MR. WILLIS: Commissioner, you referred that

contract to the court to interpret.

CHAIRMAN JOHNSON: As between the parties.

MR. WILLIS: As between the parties. And that court is and has interpreted that contract. Now, while we may not like it from time to time, we are stuck with the decisions of certain tribunals. And having once referred this matter to the court, and the court having made a decision, then that decision is something that has to be factored into this Commission in its further action. That's not something that you can take back.

Now, you may --

CHAIRMAN JOHNSON: So do you think -- let me make sure I understand what you mean by that. And maybe I'm reading too much into what you are saying. But, are you by that then suggesting that we have relinquished control over cost recovery when you --

MR. WILLIS: No, I'm not saying that at all. You have not relinquished that over cost recovery, but you may be limited with respect to how that contract is interpreted when it comes before you for cost recovery. But in any event --

CHAIRMAN JOHNSON: Wait. What does that mean?

MR. WILLIS: Well, it means this, that --

(Simultaneous conversation.)

MR. WILLIS: You approved a contract in 1991 --

CHAIRMAN JOHNSON: Uh-huh.

MR. WILLIS: -- and the parties relied on that contract and have spent lots of money on it, have built plants. And now that contract has had a contract dispute arise, you declined to interpret that contract. You declined to do exactly what they have asked you to do here, and sent that matter to court through your action.

Now, the court is going to determine what that contract meant. Now, I think that is a given once it comes back to you. You certainly have jurisdiction over cost recovery, but --

CHAIRMAN JOHNSON: But no matter what we do today, won't the court still have the authority to determine what was intended between the parties? And I don't see my staff disputing that the court can make that determination. What I understand staff to say is that we can clarify for Florida Power Corp what we meant.

CHAIRMAN JOHNSON: I know that's what staff has argued to you. I respectfully disagree with that, Commissioner. The law of this case governing these parties and this contract was settled finally in your 1995 order. You can't go back and undo that.

COMMISSIONER GARCIA: Let me ask something. When do we determine the cost recovery of this, because how would we determine it, or when does that happen? I'm not arguing what you have just stated. But when is it that we determine cost recovery? For example, FPC paid for 18 months this fixed -- am I mistaken, Mr. Ballinger?

MR. BALLINGER: I'm sorry, it was about 12.

COMMISSIONER GARCIA: Twelve months they paid this fixed priced and then they recalculated and decided to pay another price.

COMMISSIONER CLARK: I don't think there is any doubt that there is -- and that's something I wanted to ask. You don't argue that there is a floor and a ceiling here, it's how you calculate one of those things, right?

COMMISSIONER GARCIA: Could you explain what you mean.

COMMISSIONER CLARK: You either get firm energy or as-available, right?

MR. WRIGHT: Commissioner Clark, may I respond? There are two prices, Commissioner Clark, the floor and ceiling terminology threw me off slightly. There is two prices. If the company would have been operating the avoided unit contemplated by the

contract, we have a firm price. If they would have not been operating, would not have been operating the avoided unit contemplated by the contract, the QFs gets as-available price, that's true.

COMMISSIONER CLARK: Okay.

COMMISSIONER DEASON: And as to whether the unit would be operating or not depends upon avoided costs, whether they can obtain energy at a lesser cost by another means as opposed to running that plant, is that correct?

MR. WILLIS: That's the matter before the court, Commissioner. Commissioner, if you defer this case to a court and it interprets what that contract means, and you come back in a subsequent proceeding and say it means something else, then you have run square, squarely into the Freehold case where you have modified that contract. There is no other way to look at it.

Now, again, with Crossroads and these other things, there are things that you might want to do in the future with other circumstances, but those options are aren't open to you now. I urge you to stand on your earlier decision. The word that you gave to these parties, and realize that they have spent an enormous amount of money in litigation, and that there

is no reason for you to address these issues now. I urge you to defer it, abstain from it, or grant the motion to dismiss.

COMMISSIONER DEASON: I'm going to tell you a very brief interpretation of what I think happened in that '94 decision, and tell me if you agree or disagree.

MR. WILLIS: In which court?

COMMISSIONER DEASON: In the '94 decision. It seems to me what this Commission said in 1994 was that we do not have the authority to interpret the contract for purposes of binding the parties between themselves, but that we retain the jurisdiction to interpret the contract for purposes of cost recovery. That we have the obligation to protect ratepayers and that we are going to fulfill that obligation.

Now, to me, in a nutshell, that's what we decided. Do you agree or disagree with that?

MR. WILLIS: I do not believe you made that reservation at all in the 1995 order. I think that you referred the matter to the court, and that was that. I mean, you considered these same arguments that were made here that this was like a standard offer contract and these provisions were there.

You have provisions in this order which address

that, and that you said that PURPA and FERC's regulations carve out a limited role for states in the regulation of relationships between utilities and qualifying facilities, and that limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. PURPA and FERC's regulations are not designed to open the door to state regulation where it would otherwise be a wholesale transaction. While the Commission controls the provisions of standard offer contracts, we do not exercise similar controls over the provision of negotiated contracts. That's what you said, and that is the law of this case.

COMMISSIONER DEASON: And to me that language is not contrary to my interpretation of that decision.

CHAIRMAN JOHNSON: And, Mr. Willis, following up again on the last point that you made. So it is your interpretation of the law and perhaps our orders, also, that once the court makes the determination on -- if the court were to rule in your favor as to the contractual dispute, and then the company came to the Commission, even if we had intended something else, you're telling us that we are obligated to allow the recovery that was pursuant to the court's

interpretation?

COMMISSIONER GARCIA: If I could just address that, Madam Chairman, for a second while Mr. Willis straightens out what -- think about what you are saying. I mean, that would also -- that same rationale would say that we should have approved the settlement that was brought before this Commission, and yet we didn't because we had done it before. Clearly, the company is going to bring us what it gets at court and is going to say we demand cost recovery on this because the court determined it. They know they are going to do that whatever happens.

The problem is that now we are put in an awkward position by a decision made formally by this Commission in denying a settlement. And I'm not saying that we had to agree to that settlement. What I'm saying is that by denying that settlement, which was exactly the same as the settlement offered before, we basically left the company no option. The company comes to us to try to figure out --

CHAIRMAN JOHNSON: But did we have an option? If you're saying by denying the settlement, so we had to accept the settlement. So we had no option.

COMMISSIONER GARCIA: No, we didn't have to accept it. We could have offered other terms that

they could have gone back and negotiated. But one of the reasons we accepted the first settlement is because there was pending litigation, and there was exposure of Florida's ratepayers.

The question is -- Ms. Willis is quite right, we said, no, we are not going to look at this. They went on to federal court, and now when it is going to be decided in federal court, we are going to say to the court, by the way, we retrain cost recovery on this. And this is what was meant in '91 when we drafted these rules. Something that FPC says is crystal clear. They are telling us that we are going to determine it for the court.

Well, what FPC is doing is logical. It wants to protect itself either way. But obviously when FPC walks in here with a decision for or against it, clearly it has that court there, and the ones that are exposed are Florida's ratepayers.

But FPC gets this decision today, I think it puts us in an untenable position because obviously we are going to decide with FPC, because it's a question of our company, a Florida company, our ratepayers versus a party that entered into a contract with them which we have no jurisdiction over. And that is the key essence here.

Why have a contract if we can interpret issues in that contract? If you look at Freehold, if you look at Crossroads, no material issue was affected in either one of those decisions. One was for more generation, if I'm not mistaken, Crossroads. And Freehold was exactly the opposite of what we have here today. And what I'm trying to contend, Madam Chairman, obviously if a court decision came down we would have to respect that court decision, because we decided not to determine this. But if we hold what FPC asks us to do today, why have a contract? How could you finance a project of that sort if it was always up to interpretation of this Commission. And that is what worries me. What is the signal we are saying to people to do business in Florida?

Here we are talking about starting a project of such magnitude; millions, hundreds of millions of dollars are at stake, basically. A company comes into our state, plays by our rules, which are written, negotiates a contract with FPC. These are knowledgeable parties. You know, this isn't a hotdog salesman on the corner. These are knowledgeable parties which enter into a contract. The issues within that contract are within the four corners, and FPC comes in here -- and I understand their position

-- but comes in here and says, Commissioners, what did you mean by this term?

But we then have to ask the question which falls further from that point, is what was FPC paying on this contract? Well, for a year they were paying what they thought they had to pay. Suddenly they changed it. The reason they changed it, they didn't come in here to change it, they didn't come in here and ask this Commission to change it. They changed it on their own because they felt that is what that meant. When they changed that it triggered litigation. They started to negotiate and they went off to court. Why? Because they had a contract. Because this wasn't some open-ended order of this Commission that we were going to keep revisiting.

The way we revisit most of the things that Florida utilities do because we have a right to do that, because they are regulated by us. They don't play in the courts, they play before us. But the precedent that we establish if we do what FPC asks us to do today is that we can review all sorts of arrangements that FPC enters, because we have a right to play with these numbers all the time. This is a material issue of the contract. There was no material issue in Freehold, there was no material issue in

Crossroads.

By extending both of those cases to this issue, we have basically said there was no contract. Because once we determine this issue, obviously the Court is going to -- I mean, it's walking in and declaring the state of mind of this Commission, which I remind the Commissioners none of us were here. Well, maybe Susa was out there, but none of us were here as Commissioners. And we are saying to the court this is what we meant then. Which if FPC is right, let the court determine that issue. But once we start down that slippery slope, we are going to be determining key elements of contracts that we approved through this Commission.

And we are not in a rate -- I mean, if FPC wants to come in and have a rate case and determine whether that is good for cost recovery or not, then they can do that. But what they want to do is bind us either way. Because they -- but in court we are going to be bound either way anyway. And the reason we approved the settlement offer is to protect Florida ratepayers. And in that case we weren't impartial observers.

Mr. Willis' company came to us, Mr. Wright's company came to us, and said here is what we have got, Commission. We have got a litigation that we are

involved with with FPC. If we lose this there is a potential exposure for our company and Florida ratepayers of X amount of dollars. However, if we settle it's going to cost Florida ratepayers this amount, a much lesser. Sort of like the pay me now or pay me later.

Because of this Commission -- I'm not saying we are bound to it, but I'm pretty sure we are. Because we approved that contract here, not us, but Commissioners before us approved that contract, aren't we committed to try to resolve the issue for Florida ratepayers? But once we said we are not going to determine these contractual issues, and the reason we say that is because we have a contract. That's why PURPA let that go out, because the truth is it forces us to enter into a contract so that we can keep parties on a fair basis. Two sophisticated parties entered into an agreement.

COMMISSIONER DEASON: Well, why does the Commission even then approve the contracts?

COMMISSIONER GARCIA: The Commission approves the contracts because we have a -- we were promoting a policy.

COMMISSIONER DEASON: It's required by PURPA, but why is it improper policy for us to approve the

contract?

COMMISSIONER GARCIA: We were protecting Florida ratepayers. And when we approve that contract we are also protecting FPC, because FPC doesn't want to enter into a contract that later on this Commission will do exactly the same question that Commissioner Johnson just asked of LEAF. Well, if the court determines what this issue is, then do we have to grant recovery? Of course we do. We have to grant recovery either way. That's what made the settlement offer so attractive. I'm not saying it was the best possible of all worlds, but they brought a contract before us in -- when was the contract first brought for approval? '91. They brought a contract to us and they said take a look at this, Commission. And we said, well, it falls within PURPA, it looks like it's all right. Florida ratepayers are protected. And we let the parties --

COMMISSIONER DEASON: And Florida ratepayers are protected because it has an avoided cost standard in it. We felt comfortable with that, and it's within our jurisdiction to interpret that to make sure that ratepayers are protected.

COMMISSIONER GARCIA: It's in our jurisdiction to interpret it specifically towards FPC, not against a

party which signs a contract. Commissioner, if we were willing to do that, why even have it? Why not have an -- these are sophisticated parties. Why didn't we include it in the contract? We could have said and the PSC every six months will determine this crucial issue of the contract. And then I can guarantee you that Mr. Willis and Mr. Wright's client would have gone off to Wall Street and they would have been laughed out of Wall Street. How can you have a central key issue to a contract open-ended to interpretation by a Commission at will when it decides? And the reason the --

COMMISSIONER DEASON: Let me tell you, that is exactly what is in this contract. The argument you're making very eloquently was all argued when we considered whether there should or should not be regulatory-out clauses in these contracts. These parties negotiated voluntarily and included a regulatory-out clause in the contract.

COMMISSIONER GARCIA: The regulatory-out clause speaks specifically to a change in policy by this Commission. We are not changing policy of this Commission. We are changing a material issue of contract. See, when staff tries to put us in the heads of Commissioner Easley and Commissioner Gunter,

I understand that. But Mr. Willis' or Mr. Wright's client wasn't sitting here through that discussion. That was a one-sided discussion.

What we said to our ball team, here are the rules. Let's figure out a series of rules, and we've got the rules. Then we put out our rules for people to come to Florida. We invited people into Florida because federal law dictated it, and we encouraged that policy. And some of our -- some of the companies, like FPC, took us on our word, and that's why we have to be honest to them, also. They took us for our word. Back then. Not my word, not your word. I didn't approve this. I don't know if you did, but I didn't vote for this. They went out there -- and I'm still stuck on that. I agree with you, that was our word back then. We said to them -- they brought it before us, here are the issues of this contract.

Now, if FPC does something ludicrous within that contract, we still regulate them, we have a right. Just like if FPC tomorrow comes in here and says, Commissioner Deason, we entered into a contract with Staples and we are paying $20 for a sheet of paper at FPC, and I want you to approve that for cost recovery because we entered into this contract with Staples. We are going to tell FPC to take its contract and tell

its shareholders that they are out of luck, all right.

The problem in this case is that we looked at those very specific issues, we issued a series of rules so that others could understand how Florida law worked. We said here are our rules, here are the issues, and then we let two sophisticated parties, based on the parameters that this Commission created in '91, enter into an agreement. They enter into an agreement and then a few years later FPC decides this is not a good deal. They didn't come to this Commission and say, I want you, Commission, to tell me to stop paying Mr. Willis' client. They didn't do that. They simply on their on move stopped paying, or they paid on a different thing which they interpreted the contract to mean.

Now, the question I have for staff is what were they paying before '94 when they decided to change payments? Were they paying too much on those contracts?

MR. DUDLEY: When they originally started making payments in 1994 or so when it started, that was based on the projections at the time the contract was originally approved, in which FPC projected their as-available costs to exceed the firm contract cost in every year of the contract term.

COMMISSIONER CLARK: They were being paid firm costs?

MR. DUDLEY: Yes, ma'am.

COMMISSIONER CLARK: And then FPC took a look at whether or not they thought that unit would be operating, determined that it would not, so they paid as-available?

MR. DUDLEY: It's my understanding they have an audit procedure that goes through each segment of the business, and it happened to be the cogeneration's turn. And upon reviewing those contracts there was a provision within the contract that allowed and required you --

COMMISSIONER GARCIA: Stop right there. That's precisely the point. There was a provision inside the contract, and here is staff stepping up to the bench. Let me tell you what that means, Commissioners. We are in the contract. It's within the four corners. Let them go to court and figure that out.

We had our crack at this, Commissioners. We stated a policy. We stated we are not going to look at these contracts. We issued a series of rules. And by the way, our engineers are now determining what was meant in a contract that this Commission approved.

Think about where we are going with this, because

once we start down this road there is no way to pull out. How do we then say to the other either standard offer -- and there is only a few of them out there, because we have approved settlements in these because we realize there is a problem, just like the rest of the nation is doing. But, no, in Florida law doesn't apply. In Florida, a contract isn't a contract. In Florida, PSC, if you deal with any utility in Florida, watch out, because the FPSC retains jurisdiction over those companies, and we do. We can say to FPC, you were wrong in this contract; you shouldn't have signed that contract. You know what FPC is going to say? You're crazy, Commissioners. Back in '91 -- and then they will throw this same argument back at us and say, "What are you doing?" And they will go to court with that and they will probably roll us there.

But what we cannot do is continually interpret a document that we let sophisticated parties that we set parameters for, and then walk back into what was in the head of Commissioner Gunter, Commissioner Easley, of the Commission's majority a few years back when I first got here, and then somebody say, "And by the way, here is what we mean." Because every one of those decisions has to do with a contract. That's why staff steps up and says, "Well, in the contract. I

don't care. We already had our chance at, "in the contract."

I know you know what the contract means, I know you have a strong opinion about what the contract means, but that's none of our business anymore. It will be when FPC comes in for cost recovery. But if they show up here with a federal court decision that says you are out of luck, I'll tell you what, they are probably going to be -- we are going to have to recognize it in some way or another.

COMMISSIONER CLARK: Can I ask a couple of questions? Are you out of breath? I don't know, maybe we should check and see if Mr. Willis and Mr. Wright are done.

CHAIRMAN JOHNSON: Mr. Wright still has ten minutes.

MR. WILLIS: I will defer to Mr. Wright for the conclusion of our remarks.

CHAIRMAN JOHNSON: You do have ten minutes.

COMMISSIONER CLARK: Well, before you start, let me ask --

COMMISSIONER DEASON: I thought Mr. Willis was taking some of Mr. Wright's time. And if Mr. Willis went over ten minutes, he ate into Mr. Wright's time.

MR. WILLIS: Well, I only did so in response to

questions.

CHAIRMAN JOHNSON: Actually he didn't go over.

COMMISSIONER GARCIA: Commissioner, I think I interrupted him, and I think I stole most of his time.

CHAIRMAN JOHNSON: You did. Yes, you didn't go over.

COMMISSIONER CLARK: I just want to be clear about what staff is saying here, and I guess it's based on what FPC has filed with you. You are saying that when we did our original rules it was clear that we were looking at lesser of; whichever is less, the firm energy or the as-available would be paid.

MR. DUDLEY: Yes, ma'am. Anything other than that is clearly subsidization.

COMMISSIONER CLARK: That's under the rules and the standard -- all right.

MR. DUDLEY: I'll just answer the question.

COMMISSIONER CLARK: Kenneth, answer only my question, okay?

MR. DUDLEY: Yes, ma'am, that is what I am talking of.

COMMISSIONER CLARK: I know what your position is on this one.

COMMISSIONER GARCIA: I'm taking up a fund. I'm going to send him to law school on this one, because

he is --

UNIDENTIFIED SPEAKER: He is better than most of us.

COMMISSIONER CLARK: Here is my question. What you're saying is at the time these rules were adopted, the Commission knew that's what it's policy was with the standard offer, and they wouldn't have approved anything else that didn't provide for a lesser of payment.

MR. DUDLEY: Yes, ma'am.

COMMISSIONER CLARK: And in this case if we -- what you are saying is that that was part and parcel of the thinking that went into the order even though it's not specifically stated in the order.

MR. DUDLEY: Yes, ma'am.

COMMISSIONER CLARK: There would not have been an approval without that understanding.

MR. DUDLEY: Yes, ma'am.

COMMISSIONER CLARK: And what is happening here is that the court is saying that it won't just accept those four parameters that are in here, avoided -- let's see, I guess the type of fuel --

MR. DUDLEY: Is this the partial summary judgment you are talking about?

COMMISSIONER CLARK: Right. The court said they

are going to look at something as if it were a bricks and mortar unit.

COMMISSION STAFF: Yes. It's curious what they say, because they say it's an unambiguous term of the contract, and yet you need not go outside the four corners of the contract to determine it, but yet you need to model this as a fully characterized unit had it been installed, and that is nowhere within the contract.

COMMISSIONER CLARK: Well, it says -- at the end it says for each hour the company would have had a unit with these characteristics operating.

MR. DUDLEY: That is the liability section.

COMMISSIONER CLARK: And I suppose the argument is that it's not only these parameters, it's more.

MR. DUDLEY: It's a few sections above that liability statement in which they make the statement that Mr. Willis quoted awhile ago.

COMMISSIONER CLARK: Right. Now, you are saying that this language should be interpreted as strictly being the lesser of because that's what we did in our rules?

MR. DUDLEY: Yes, ma'am. Merely a pricing proxy.

COMMISSIONER CLARK: And that's what we approved for cost recovery, and if the court comes back and

adds to that such that at some point they would be being paid firm energy when as-available is less, yo are going to recommend that it not be paid.

MR. DUDLEY: Most definitely.

COMMISSIONER CLARK: And you are -- it's clear t you that that was the basis on which this was approve in the order.

MR. DUDLEY: You know, like the rec lays out, that is the mind set that the Commission must take when they review these contracts. There is a limit. You know, cogeneration was encouraged, but it said that we will not impose a cost on the utility or its ratepayers that would exceed the cost of them to acquire generation elsewhere or for them to generate it themselves. You begin allowing cost recovery of firm all the time when the utility's as-available cos is less than that, well, you are just merely supporting the return of the cogenerator at the detriment of the ratepayers.

COMMISSIONER CLARK: Well, what I'm trying to get at is the notion of -- you are clearly hanging your hat on what the Crossroads said you could do, and that is interpret your order. And the issue I have always had with what has been recommended with respect to that is it didn't come up at agenda, it isn't in the

order. You are saying it had to be in our minds, or the Commissioners' minds because that's the way the rules came out and that is what the discussion was.

MR. BALLINGER: Commissioner, I think more broadly, energy pricing has always been a pricing proxy. That is the Commission's mind-set since our first cogeneration rules. Even before these changes, energy pricing has been just that, a pricing proxy.

COMMISSIONER CLARK: This is a still a proxy.

MR. BALLINGER: Yes.

COMMISSIONER CLARK: It's a different proxy.

MR. BALLINGER: Yes.

MR. BELLAK: Commissioners, if I could just briefly refer to the Crossroads case. I don't think that any argument has been made which distinguishes Crossroads. Now, Crossroads is the product of the New York Commission --

COMMISSIONER GARCIA: What was the issue in Crossroads?

MR. BELLAK: The New York Commission consists of human beings; they might be wrong. But the point is that to say that there was not a substantial issue in Crossroads -- Crossroads, the cogen interpreted the contract so as to cause many, many millions of dollars of additional revenue flow if they could interpret it

in such a way --

COMMISSIONER GARCIA: But if I'm not mistaken, and correct me, wasn't it about generation?

COMMISSIONER CLARK: Yes. They wanted to say that they were eligible to sell more generation than was needed.

COMMISSIONER GARCIA: At an agreed contract price that had existed before they entered into --

MR. BELLAK: No. They wanted to add a new generator. They didn't want to go beyond the limit. But with the old generator they were never going to do better than 90 percent of what they were allowed. With the new one they could sell 100 percent of what the amount allowed was, and the New York Commission probably also never had an agenda where that came up. It wasn't -- it was a point where the Commission had to explain what it is that was approved if this thing was going to be within what the Commission contemplated. And they explained what it was they approved. It is not a freehold. They didn't try to modify anything.

And I think from the argument I have heard, I have heard a lot of argument that you should not exercise your Crossroads jurisdiction if, in fact, it exists, but no argument that demonstrates that it

doesn't exist, and no precedent supporting that.

MR. WILLIS: Commissioner, why would you ever follow a New York Commission case and ignore a decision of a Florida court to which you have deferred your jurisdiction to decide? I mean, that does not make any sense.

COMMISSIONER CLARK: You probably could have left it at why would you have ever followed a New York case, but -- I do have a question on that. What is the status of that New York case? The cite you give doesn't indicate -- that indicates the Commission has decided. Has the court decided it?

MR. BELLAK: It was upheld in a district -- there was a suit filed in federal district court, and they relied on it.

MR. WILLIS: But let me point out --

COMMISSIONER CLARK: That was a collateral attack, right? And they said -- in that case I think they said if that was the argument you wanted to make, you needed to make it back there and you can't collaterally attack it here.

MR. BELLAK: Right. I haven't heard -- I am without knowledge that Crossroads has ever been overruled, if that what is you are asking.

COMMISSION STAFF: I just checked, there has been

no appellate decision in it.

MR. BELLAK: I would assume that those who oppose the case would have cited that if it were true.

COMMISSIONER CLARK: Right. They evidently ran out of time. They didn't appeal it when they should of, so they tried to collaterally attack at in a federal court, I think. Am I right?

MR. WILLIS: And that court, Commissioner, said for this court to allow relitigation of the same issue would be to sanction exactly the type of judgment shopping that the doctrine of collateral estoppel is meant to avoid. That decision is on all fours with what we are asking you to do here, is to stick by your earlier decision.

CHAIRMAN JOHNSON: Let me ask you a question as to the proposition set forth by staff. Do you believe that the Commission does have the authority to clarify its orders?

MR. WILLIS: Commissioner Johnson, in this instance I do not believe that you have the authority to clarify this order, which is, in effect, an interpretation of this contract. That's the only reason that that really is being --

COMMISSIONER GARCIA: May I ask you a question before you finish the answer. Which order are you

talking about? Are we talking about the order where this Commission decided to dismiss, or are we talking about the order which allowed this contract to go forward? I mean, are we interpreting the order that approved this contract to go forward, is that the order that we have a right to revisit, or is it the order where we said -- we referred this to the court?

MR. WILLIS: Well, what happened was that you entered an order in 1991, you declined to interpret that order and the contract that it approved in 1994. And having done that, having made that decision, you made that decision and entrusted the court to interpret the contract for you. Then when that is done, that interpretation governs your future actions. So, yes, it does.

COMMISSIONER JACOBS: Now, that is an interesting point to me. The provision that we are looking at here, could you walk me through how it got into the contract in the first place, how that negotiation happened? Because it's my understanding that this doesn't operate -- this provision is not operating pursuant -- this is a negotiated contract, and the provision has to do with standard offer. So walk me through how it got into this contract.

MR. WRIGHT: Madam Chairman, may I respond to

Commissioner Jacobs?

CHAIRMAN JOHNSON: Yes. And afterwards we are going to take a short break.

MR. WRIGHT: Commissioner Jacobs, if your question -- I want to make sure I understand your question. Your question is how did this energy payment, energy pricing term get into the contract?

COMMISSIONER JACOBS: The req-out clause.

MR. WRIGHT: The req-out clause?

COMMISSIONER JACOBS: Let me make sure I'm talking about the same thing.

MR. WRIGHT: Well, I'll tell you, the whole contract was essentially drafted by Florida Power Corporation and presented to the QFs, and said this is the contract. You can make some changes if you want to, but we're going to look with serious disfavor on any changes that you want to make. Fill in the blank for the capacity you want to sell us, fill in the blank for the amount of capacity, and fill in the blank for the prices.

COMMISSIONER JACOBS: Right. I want to get to the payments clause. Now, the argument I'm getting go to is, as I have understood it, and if I'm wrong, correct me. That this provision, the lesser than provision, whatever that's called, and I may not --

okay. That does not normally apply to a negotiated contract, is that correct?

COMMISSIONER CLARK: Staff is saying it does.

MR. BALLINGER: No, that's a pretty common provision in most negotiated contracts. They compare firm energy under parameters to as-available energy.

COMMISSIONER JACOBS: Do our rules require that it -- because we don't have been anything to do with negotiated contracts.

MR. BALLINGER: Exactly. Negotiated contracts are just that; they are negotiated.

COMMISSIONER JACOBS: So it got into this contract as a result of the parties negotiating it into it?

MR. WRIGHT: Commissioner Jacobs, for reasons I will explain momentarily, I am going to respond on behalf of Lake Cogen here. We do not agree that this provision is a lesser of provision. Judge Briggs in Lake County Circuit Court does not agree that this is a lesser of provision. He read the contract, he said the contract says when the company would have had a unit with these charactaristics operating, the QF will be paid the firm price and at other times will be paid the as-available price.

Now, he said in his order that the contract

contemplates a real operable 1991 pulverized coal u having all the pertinent characteristics.

COMMISSIONER JACOBS: Understood. Understood. That's not my focus. My focus here is that this was provision that was included in the contract pursuant to negotiations of the parties. And I understand yo differentiation about what negotiation meant. The bottom line is you guys negotiated this into the contract.

Now, let me tell you where I think I'm going. Then this contract came back to us to ask us to interpret this contract. And the basis of that interpretation would have been how we look at standar offer contacts when that same language occurs in standard offer contracts? Would that have been the basis of that interpretation?

MR. DUDLEY: Florida Power Corps' original request was that their actions were consistent with a certain rule, and that rule was the standard offer.

COMMISSIONER JACOBS: So even then we weren't looking at this contract as to how it would comply with our rule, we were looking at how this contract language paralleled our rules, is that correct?

MR. WILLIS: Commissioner Jacobs, let me read you your order. You said that FPC has asked us to

determine if its implementation of the pricing provision is lawful and consistent with Rule 25-17.08324, Florida Administrative Code.

COMMISSIONER JACOBS: Can I interrupt you for a minute. Why were we concerned with whether or not it was lawful and consistent with that rule?

MR. WILLIS: Well, you said that you weren't. You said that, "We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule, it is asking us to decide if the interpretation of the contract pricing provision is correct. We believe that that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established." That's what this Commission said.

MR. DUDLEY: Commissioner Jacobs, the significance of the rule was -- as it states in the recommendation, that standard offer language was used as template for these negotiated contracts. Power Corp thereby thinking if you take and say that this is consistant with the lesser of intent in the standard offer language, then they were doing it correctly. That is the significance of it, not all the --

MR. WILLIS: This order also said, "We believe

that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. Furthermore, we agree that with cogenerators that the pricing methodologies outlined in Rule 25-17.08324, Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts." That's what this Commission said in the order in this case.

COMMISSIONER GARCIA: And, Commissioner, let me point out the fallacy of following that thought process. If the court ignores what we decide here today, where does that put FPC? Because we have already determined what that provision meant in the contract. Therefore, when FPC marches back into here we are going to say to FPC, you were paying the wrong price; you got taken on that contract. Would we have the power to then say we are not going to grant recovery of that contract, what you are recovering is incorrect?

COMMISSIONER CLARK: I was thinking about that. It seems to be one avenue that we can take is to not grant it, let it go to court, let it come back here, and reject what the court does if we don't like it, and it gets appealed, or we accept it.

MR. WILLIS: Exactly.

COMMISSIONER CLARK: But I have to say we have -- in my view, that is the same thing as interpreting the contract if we reject it on the basis that is recommended here. We are interpreting the contract under the guise of interpreting our rule.

MR. WILLIS: You could abstain or defer the matter.

COMMISSIONER CLARK: What?

MR. WILLIS: You could abstain or defer the matter entirely, just not answer it.

MR. DUDLEY: Commissioner Clark, you are going to have to take it up sometime.

COMMISSIONER GARCIA: More importantly, I think you have pointed out the circularness of where we end up here. That regardless of what we do, we are constrained like the companies are by how we have acted. And we approved this contract. So now we are going to tell the court, by the way, this is what we think when we approve this contract, and that is what we meant in '91. And the court can take or not take what we say.

I could almost see that -- what FPC is doing is to some degree dangerous. Because if this Commission decides what that cost recovery is, when they come back here, now that I have determined it, because

basically what I've had is a cost recovery determination, I'm going to tell you here is what Mr. Dudley thought we meant in that contract. This is what we are going to let you recover. Your ratepayers have to pay the rest, because obviously you got into the wrong contract. I don't think you want me to say that. I don't think you want this Commission to say that, because we approved this for recovery, right?

Let me ask you -- I'm asking you. Let's say the issue I decide for you here. In other words, I do what you ask me here, and you go to court and the course rejects that argument. The PSC is crazy. This is what the contract says. It's on all four corners. I'm no idiot. You know, we may agree or not agree with that, but he says this is what the contract meant. And he says it is crystal clear, but not with your interpretation, he has a different interpretation of that contract, and he decides against you. Where does this Commission put itself when you walk back in here and you say to us, Commissioners, I agreed with you, but you know what, this provision of the contract is firm, and this is what the ratepayers of Florida have to pay. Are you going to argue that we shouldn't pay?

MR. COUTROULIS: Commissioner Garcia, this

Commission has to determine what it approved for cost recovery back in '91, and what it is going to allow to be passed through to the ratepayers. Let me answer your question. If Florida Power is found by some court of competent jurisdiction to have obligated itself to pay more than that, then because of the peculiarities of this contract that contains a reg-out clause, there will be a question in the courts as to whether or not, since this Commission would presumably deny for cost recovery the extra amount that was not within its contemplation in '91 --

COMMISSIONER GARCIA: No, we haven't done that yet. We haven't done that yet.

MR. COUTROULIS: Well, but if you are telling us this is the basis on which we approved this contract --

COMMISSIONER GARCIA: No, no.

MR. COUTROULIS: -- this is what we thought avoided costs were, then presumably when a request is made to pass it through to the ratepayers, this Commission is going to act consist with what it believed the contract required to be paid back in 1991.

COMMISSIONER GARCIA: Correct.

MR. COUTROULIS: And if it does that, and

assuming it does that, and it does not pass through all of what the court has now said is owed, then the question will be, given the peculiarities of this contract, will a court determine that Florida Power has the right to invoke the reg-out clause. And if a court determines it does, then Florida Power will be able to recoup from the cogenerators the amounts that were not allowed to be passed through. But if a court decides the reg-out clause is not enforceable for some reason, and that is affirmed on appeal, then Florida Power will still owe the cogenerator the extra money and this Commission will not pass it all through for cost recovery. And we are not afraid of that situation at all. We want this Commission to tell us what it is going to pass through for cost recovery, and we understand that a court theoretically --

COMMISSIONER GARCIA: Now you are giving me the best of all possible worlds. You are saying to me that I can protect Florida ratepayers by giving your decision -- by giving credence to Mr. Dudley's decision today, I have forever protected Florida ratepayers. I have left you to the courts, and you are telling me if you lose in court against Mr. Willis and Mr. Wright's clients, that your shareholders are going to pay the difference?

MR. COUTROULIS: Commissioner Garcia, what I'm saying, Florida Power believed in 1994 and believes today that this Commission had broader jurisdiction than this Commission viewed back in '94. But that is not before this Commission today. Clearly, this Commission under Panda -- and they are just turning back the clock. They want to pretend the Panda decision was never decided. They want to pretend the Lake settlement was never rejected in a 20-page opinion by this Commission.

But, you know, they want to basically say that this Commission is just relegated to a rubber stamp, and having approved things in '91, what they are really saying, and I have listen very carefully, is at no point are you going to be able to deny cost recovery. If a court says this is what the contract requires, then you are going to have to pass that through. Well, that's not what four Commissioners of this Commission held in denying approval of that Lake settlement.

And so Florida Power is prepared to recognize that if this Commission declares that what it had in mind back in 1991, which it had to have in mind under its rules to approve negotiated contracts, it couldn't have approved this contract if it paid more than

avoided cost, and the template benchmark was the standard offer contract rule. Just look at 25-17.08322, it couldn't be clearer.

But if a court decides, well, Florida Power, you obligated yourself to pay $100, and that is above avoided cost, and the Commission has said we are only going to allow cost recovery represented by avoided cost, which is $90, there is a $10 difference. Either Florida Power is going to have to eat that, or I would submit to you that because this contract has a reg-out clause, that that reg-out clause would be enforced by a court and in this instance Florida Power could recoup that $10 not passed through to the ratepayers from the cogen. But that should not concern the Commission, because they agreed to the reg-out clause.

If for some reason that reg-out clause is not enforceable, well, the court determines what the contract requires, and this court, this Commission determines avoided cost and what it is going to pass through to the ratepayers. And if there is a disconnect between those two things, this Commission should not be concerned about that, that is for Florida Power to deal with.

And let me say I don't agree for a minute with what intervenors said that a court is going to

determine that this contract requires anything other than the lesser of that this Commission perceived back in 1991. Not because the court is not going to be free to make its own decision, but because the evidence is going to overwhelmingly establish that that is the case. But if it doesn't, it doesn't.

MR. WILLIS: But the court has said that it's not going to even receive evidence on that fact.

CHAIRMAN JOHNSON: Mr. Willis, hold on. You will be allowed to respond, but let's let the Commissioner finish his question.

COMMISSIONER GARCIA: So then you are saying to me, just so we can get it on the record, because that makes me much more comfortable, that you -- that FPC will not be back to this Commission to interpret, to use Mr. Dudley's interpretation or the court's interpretation, you accept Mr. Dudley's interpretation, or staff's interpretation of this contract. And so whatever difference, if you lose at federal court, you are going to eat it is what you are telling me. Your shareholders, FPC -- and I know you are adding caveats to what I'm saying, and you have answered very eloquently adding caveats. I want to make sure --

MR. COUTROULIS: I want to direct my answer.

COMMISSIONER GARCIA: I want you to directly answer. Are you saying to me that if the court determines against you -- I don't want to know about the regulatory-out clause, that's not coming here. You have told me that goes to court. So let's stay out of the court. You are saying to me that if we hold for you here today, FPC, its shareholders will be not be back to this Commission if it loses in federal court to get the difference on this contract?

MR. COUTROULIS: Let me be very precise. This court issues the declaratory statement today, and says when we approved this contract for cost recovery back in 1991, we apprehended that the energy payments in it would not pay more than avoided cost, and the benchmark against which we measured avoided cost, right in the rules, was the provision that we use for standard offer contracts. Not that this contract had to provide necessarily for a lesser of, but whatever it provided it couldn't pay more than a lesser of because if it did it would pay more than avoided cost and you can't do that under PURPA or the Florida rules. Okay. So this Commission so holds.

COMMISSIONER GARCIA: This Commission moves staff. That's where we are at.

MR. COUTROULIS: Fine. We go to court --

COMMISSIONER GARCIA: You define staff a little bit more strenuously --

(Simultaneous conversation).

COMMISSIONER GARCIA: We approve staff today.

MR. COUTROULIS: All right. We go to court. Contrary to what I think is going to occur, I will assume the court decides this thing called for a different kind of modeling, and then we have to also assume that under that different kind of modeling it winds up paying more. Because if the court decides it called for a different kind of modeling but it doesn't pay more, it doesn't matter. But let's assume, different kind of modeling, not limited to the four parameters, and it pays more, okay. What Florida Power I would assume would do at that point is whatever payments it makes -- it would probably appeal the order, but assuming the order is final, it would then make payments in accordance with what the court ordered and it would apply for the cost recovery of those payments to this Commission.

Now, I would assume, but I can't speak for the Commission, I would assume that since the Commission would then be faced with a request to pass through to the ratepayers something that exceeds what they have said today was the basis on which they approved the

contract in '91, that they probably would not allow all of that to be passed through. I can't say what they would do for sure, but I think it's a fair inference --

COMMISSIONER GARCIA: Let's assume that that is what we did.

MR. COUTROULIS: -- that's what we had in mind in '91, and now under the fuel and purchased power recovery clause we say we have just paid this, we were ordered by a court to do it, we want you to pass it through to the ratepayers. I would assume the Commission would test that against what they apprehended this contract to require when they approved it in 1991. And I will assume, but I don't want to speak for a future Commission, that they will say we are not going to allow it all to go through.

At that point Florida Power would invoke the reg-out clause, and in the next months statement to the cogen would subtract the amount that was disallowed. Now I'm speculating, but probably the cogen will say, that reg-out clause is not enforceable. I don't know why it wouldn't be enforceable. It's not limited in the manner you said, Commissioner Garcia. It is very broad. It says any payment that is disalloved, you know, we get to recoup

from the cogen.

And this Commission has said those kinds of clauses are okay in negotiated contracts. This is not a PURPA issue.

COMMISSIONER GARCIA: Right.

MR. COUTROULIS: But if they conjure some kind of contract issue, and they say we don't think you can invoke that reg-out clause --

COMMISSIONER GARCIA: That is the longest direct answer we've had in the history of my --

MR. COUTROULIS: -- then we will litigate it. We will litigate the reg-out clause. And, you know, if we lose it, and we appeal it and we lose it, then I guess we are stuck.

MR. WILLIS: You know what they are trying to do is get way ahead of ourselves with the reg-out clause and other matters that don't need to be decided until cost recovery. I urge you to defer this matter, to abstain from this matter until it comes up. Let the litigation go forward, let the courts do their work that you referred to them, or deferred to them, and determine what happens after that rather than in anticipation of all of that make a decision here today.

CHAIRMAN JOHNSON: Thank you, Mr. Willis. We are

going to take a ten-minute break and we will come back with Mr. Wright.

(Recess).

CHAIRMAN JOHNSON: We are going to reconvene the agenda conference. Mr. Wright, I think we are prepared to hear your remarks. And you have ten minutes.

MR. WRIGHT: Thank you, Chairman Johnson. Chairman Johnson at the -- my name is Robert Scheffel Wright, I'm with the law firm of Landers and Parsons. I am here representing Miami Dade County and Montenmay Power Corporation.

As I mentioned, I also do represent Lake Cogen, and in a response to a question from Commissioner Jacobs, I answered on behalf of Lake Cogen. I want to expand on that answer very briefly. But I want to make it clear that Montenmay Power Corp and Miami Dade County do not consent to the Commission's jurisdiction over the matters in dispute here. We have moved to -- we have petitioned to intervene for the purpose of moving to dismiss. We don't think it is a proper declaratory statement. We think it's barred and outside of your jurisdiction by virtue of those reasons.

Having said that, on behalf of Lake I want to ---

I would like to add a response that I frankly just didn't get a chance to give in the extensive conversation before the break to the question posed by Commissioner Jacobs. (Pause). I apologize, Commissioner. Since it was your question, you asked about the lesser of provision in the contract, and I just wanted to make one point. There is not a lesser of provision in this contract.

Before 1991 -- 1990/'91, when the Commission adopted its new rules, there were lesser of provisions in the contract, and in your standard offer contract rules. They said the payments shall be the lesser of the avoided -- the avoided unit's energy cost or the as-available cost. You all changed your rules and these contracts do not reflect a lesser of provision. Florida Power Corporation has lesser of -- what we call lesser of contracts. Contracts with lesser of provisions. This is not one of them.

COMMISSIONER JACOBS: This predates that. I understand.

MR. WRIGHT: Pardon?

COMMISSIONER JACOBS: I understand your argument.

MR. WRIGHT: Yes, sir. Commissioners, appreciating the time constraints and the hour, I will be as brief as I can. I would like to begin by

summarizing our main legal arguments and then talk to you about some basic and practical concerns.

Florida Power Corporation's petition for declaratory statement is barred by res judicata. In Florida law res judicata applies to bar all claims that were litigated and all claims that could have been litigated. In the language of the courts, it puts to rest every issue actually litigated as well as every justiciable issue in the case.

They did raise the issue of the Commission's order in their 1994 petitions. They specifically asked you both in their first petition and in their amended petition to declare that their new methodology, their newly implemented energy payment methodology complies with the Commission's order approving the contract.

They made extensive argument to the effect that that contract approval order gave you continuing jurisdiction over the contract. You rejected that argument. All they have asked you for here is they have changed complies with to required thought. They have asked you now to say that your contract approval order that they specifically cited to and referred to in their previous petitions requires them to make payments in accord with this methodology. That

difference is semantic at best. That issue was litigated. And if you even consider the possibility that there is some semantic difference, they put the order in their previous petition, it surely could have been litigated, and we submit to you it was, and this is barred by res judicata.

It is also for similar reasons barred by collateral estoppel, and it is barred by the doctrine of administrative finality. This is not a proper petition for declaratory statement. It is no more than a request for an advisory opinion. It's no more -- the declaratory statement that they have asked for is no more or would be no more than an advisory opinion on a subject that is not before the Commission for action that would affect anything.

This Commission acts on matters in more formal proceedings. It acts on these types of matters --

COMMISSIONER GARCIA: Mr. Wright, how could they get before us? If this isn't the forum, how do they get before us? In this issue of cost recovery, how do they get before us?

MR. WRIGHT: In a cost recovery proceeding, Your Honor, or in a settlement docket.

COMMISSIONER GARCIA: Or do we have to have a rate case maybe?

MR. WRIGHT: It would be my understanding, Commissioner Garcia, that this is not the type of matter that would come up in a general rate case.

The rubber hits the road on these issues, Commissioners, in your cost recovery proceedings. What you do here will not affect your jurisdiction to whatever extent that it exists, and we do have some differences of opinion on that, to act on cost recovery made under this contract in accord with what the court orders is required. We would suggest --

CHAIRMAN JOHNSON: Mr. Wright --

MR. WRIGHT: Yes, ma'am.

CHAIRMAN JOHNSON: -- I want you to expound upon that point again. You started off by stating that we can't interpret contracts, and that we acknowledge that we can't determine what the parties meant to the contract, and that that's within the court and that to the extent that we issued a statement today it would be no more than an advisory opinion of no weight. But when you say that our jurisdiction -- we still have cost recovery jurisdiction, is it ministerial? I mean, what kind of --

MR. WRIGHT: Madam Chairman, to be completely clear, what I said was, or at least what I think I said and what I meant to say was this doc statement

does not affect whatever jurisdiction you have.

CHAIRMAN JOHNSON: Okay. What jurisdiction do we have?

MR. WRIGHT: I don't agree that you have any continuing jurisdiction, and my clients do not agree that you have any continuing jurisdiction over cost recovery under approved cogeneration and small power production --

COMMISSIONER GARCIA: Why don't we.

MR. WRIGHT: -- power purchase contracts once you have approved them pursuant to your rules and pursuant to the PURPA framework for that cost approval. You exercised -- and this is in response to the question posed, I believe by Commissioner Deason earlier -- you exercised your full jurisdiction expressly in accordance with your rules over this contract, over the Lake contract, and over the other contracts in 1991 when you evaluated them with respect to cost recovery, cost-effectiveness, and when you approved them at that time. And you may recall at that time they all showed that they were beneficial to Florida Power Corporation per your evaluation.

COMMISSIONER JACOBS: Do you think that interpretation applies to standard offer contracts, as well? That's what Panda says, I think, that it

doesn't, right?

MR. WRIGHT: Commissioner Jacobs, personally I believe that the question on standard offer contracts is somewhat open. Panda, I believe, says that the Commission has the authority to interpret its rules as they govern the provisions of contracts as those rules were in effect and, in fact, in the Panda case incorporated within the standard offer contract that was in dispute in that case. That is what I believe the holding of Panda is, sir.

COMMISSIONER JACOBS: Thank you.

CHAIRMAN JOHNSON: Mr. Wright, under your analysis, the Crossroads case, the Freehold, it's just irrelevant to your analysis, it adds nothing, it distracts nothing. Your position would be the same.

MR. WRIGHT: Madam Chairman, I believe Crossroads is not applicable to this instance. Crossroads was applicable to -- and in other New York Public Service Commission cases covers scenarios wherein the New York PSC had the authority to interpret its policies and rules as those existed at the time that contracts were approved. And so by analogy it brings it around to the question what about the standard offer contract rule as it may have impacted this contract, and you have already addressed that in a final order that

Florida Power Corporation didn't appeal, where you said we agree with the cogenerators that the standard offer contract energy pricing rule applies only to standard offer contracts and does not apply to negotiated contracts. Now, that's what you said 3-1/2 years ago.

CHAIRMAN JOHNSON: And, Mr. Wright, as it relates to this particular issue, it's your position, then, that -- and I'm vaguely remembering your arguments from before. I guess it would be your position that it doesn't matter what we intended. That if we didn't get it right and if we didn't put it in writing in the contract, it just doesn't matter. And that we had our shot and our shot was when we approved the contract. Even though we thought it was clear, if it wasn't clear, we can't clarify that. Because once we approve these contracts, you said we have exercised our full jurisdiction, we don't have jurisdiction over cost recovery.

COMMISSIONER GARCIA: I'm sure that that is distinguished as it applies to you. In other words, the distinction there would be, Madam Chairman, as that contract applies to his client, not to FPC. FPC has actually told us that they invite us to relitigate this when they come into cost recovery. But as to you

-- you don't agree?

CHAIRMAN JOHNSON: Huh-uh.

MR. WRIGHT: No. Commissioner Garcia, I don't agree, and I intended to come to this at the last, but I will come to it right now. I think it applies not only us, but also to FPC. Frankly, I think Mr. Coutroulis' representations as to their possibly being stuck under the reg-out clause were just flat hollow. Nobody can give you jurisdiction that you do not have. The Freehold decision has two prongs to it. One protects the QFs, one protects the utilities. And that says that once the state regulatory authority approves a contract on the basis that it is just, reasonable, and consistent with avoided cost, any further action to attempt to disallow payments under that contract or to disallow passage of those payments through by the utility to its ratepayers is preempted under PURPA.

CHAIRMAN JOHNSON: Thank you. I understood.

MR. WRIGHT: Continuing, we would suggest that you wait. Just to summarize kind of where I was, the rubber hits the road for your decisions in cost recovery proceedings. We would suggest that at a minimum you wait until there is a live real justiciable cost recovery issue before you to act, if

we ever even get there, and there are a number of events that have to take place before we even get there, and you can consider whatever it is you want to do at that time.

Secondly, I strongly believe that --

CHAIRMAN JOHNSON: Do you want me to wait to ask you the questions?

MR. WRIGHT: No, go ahead. This is a good time.

CHAIRMAN JOHNSON: Because that point just confused me again. You are saying that we should wait till the cost -- if we are faced with a cost recovery issue. But I guess I was interpreting your interpretation of Freehold to say that we never get there. That we have relinquished jurisdiction. So why do we wait on something we can't do anything about anyway?

MR. WRIGHT: Well, I think you shouldn't grant this declaratory statement because it's an advisory opinion, and all they are really trying to do is set this up for a reg-out that they may or may not be able to enforce. This is an advisory opinion. There is nothing before you today and it's forum shop.

They themselves, Florida Power Corporation itself went to the circuit court in Dade County, filed a counterclaim, invoked the court's jurisdiction and

filed a motion for summary judgment on the very issue in dispute. The court denied their summary judgment. They lost. We didn't win in that the court denied our partial motion for summary judgment, as well, but they invoked the court's jurisdiction, they lost. They are back here trying to get the second, third, fourth, whatever it is bite at the apple.

COMMISSIONER GARCIA: What do you suggest they would have done? When this issue came up, what should they have done? Filed with this Commission for cost recovery and figure out exactly what we meant and continue to make your payments and then invoke the regulatory-out clause? Would that have made sense to you?

MR. WRIGHT: I'm not sure.

COMMISSIONER GARCIA: All right.

MR. WRIGHT: What they should have done --

COMMISSIONER GARCIA: Let's put ourselves -- no, because I think it's important. I want -- I think the Chairman is making a very good point. I mean, if this is ministerial from here on out, which I can't argue with you, I think Freehold to some agree holds that, but let's say Freehold doesn't apply. What does Florida Power Corp do? Florida Power Corp interprets the contract in a way, what should they have done?

Should they have come to this Commission, and said, Commission, I'm applying for cost recovery now of this contract because I think that my -- the people I'm buying from don't understand the contract, have made us make a determination and thereby invoking the regulatory-out clause, which would then have come into effect?

MR. WRIGHT: No, sir. They should have gone to court, as they subsequently did, and filed an action for a declaratory judgment that they are interpreting the contract correctly, or not.

COMMISSIONER GARCIA: So then our authority, our jurisdiction is strictly ministerial after we approved this contract, as per Chairman Johnson states?

MR. WRIGHT: I apologize, would you repeat the question?

COMMISSIONER GARCIA: I know you were talking -- the issue with Chairman Johnson, which to some degree I agree, and I'm not putting words in your mouth. I agree that perhaps it is ministerial. In other words, once we saw the contract -- this is following your line of thinking, and the Chairman is right, you made an argument that was circular. Once we approve this contract, that's it. FPC can come in for cost recovery and they get it.

MR. WRIGHT: As a general proposition, I believe that's correct under Freehold and under PURPA, yes, sir. I would like to speak -- sorry, was there a question?

CHAIRMAN JOHNSON: No. And you have a lot of time.

COMMISSIONER DEASON: So you are saying that whatever they -- however they want to interpret the contract and pay you whatever, we are obligated to pass that through to customers?

MR. WRIGHT: No, sir.

COMMISSIONER DEASON: Okay. Clarify that for me, again.

MR. WRIGHT: I believe they are obligated to pay us in accordance with the contract as in this case, the contract is interpreted by the courts of the State of Florida. And whatever the court says they have to pay us under the contract is what they have to pay, and I believe what you are obligated to permit them to pay us and to permit them to recover from their ratepayers.

COMMISSIONER DEASON: Well, let's assume that the reverse has happened. That you went to Power Corp and said, "Oh, something has changed in the economy or the economics, or the finance of this, and we interpret

this contract where you are going to start paying us more." And Power Corp says, "Well, to prevent having to go to court, I'm going to agree just to pay you more because the Public Service Commission is obligated to pass-through whatever I pay you under the contract. So I will just avoid litigation and I am made whole, so I'm happy." And they start paying you 10 percent more than they have been paying you in the past to avoid litigation. And you are saying it's ministerial at this point, we can't look at anything in the contract and, therefore, we have to pass it through to customers, is that correct?

MR. WRIGHT: As to the example that you posed to me, no, sir, I don't think that is correct.

COMMISSIONER DEASON: Because it's okay in one direction, but not in the other direction.

MR. WRIGHT: The example you posed to me was where Florida Power simply acquiesced without going to court. You said, your hypothesis was that Florida Power Cooperation just says, okay, we will pay you more. I think you could say that their decision to pay more was arguably imprudent, and what they should have done was to have gone to court --

COMMISSIONER DEASON: Why can't we say their decision not to pay less is arguably imprudent, as

well?

MR. WRIGHT: It's a decision as to how they pay, rather than just going to court.

COMMISSIONER DEASON: It's a decision as to how you interpret the contract and whether we are going t have any authority to interpret the contract.

MR. WRIGHT: Commissioner Deason, as to how the contract is to be interpreted and enforced.

COMMISSIONER GARCIA: You're mistaken. It is a decision as to what the authority of this Commission is over FPC. Clearly, Commissioner Deason, I think your point is well made. That's why I don't agree with Mr. Wright that it is purely ministerial. We do have a responsibility. We do have a responsibility to keep FPC honest. That's why they come under our jurisdiction, certain laws of contract don't apply to FPC, certain laws of market don't apply to FPC. Why? Because they are regulated by the Florida Power -- by the Florida Public Service Commission. I almost changed our agency's name.

The point is that is where they are regulated. Now, if that exact scenario happened, it's not a question about going to court or not going to court; it's a question of what is right for the ratepayers. And we allow litigation costs all the same when they

are correct to be allowed. And if we think -- the reason we approved these settlement issues is because we thought that it was good for Florida ratepayers.

If FPC isn't doing right by ratepayers, it is going to get hurt. But if it is acting within the confines of the contract and what we think the contract is, well, Mr. Dudley's interpretation I think is fine. Now, that is a discussion that he will make before this Commission, and we may determine whether it is or it isn't. But that's not what we are being asked to do. We are being asked to interpret cost recovery up front. Whatever they get out of today, they have gotten that determination without even going through the proper process that all companies that are regulated by this Commission must go through.

CHAIRMAN JOHNSON: Mr. Wright, you can pick up from wherever.

MR. WRIGHT: Finally, Commissioners, I want to speak about basic fairness. In your orders you have consistently recognized the doctrine of administrative finality, and you have specifically recognized its applicability to QF contracts. This doctrine, as you have said, is one of fairness. Parties must be able to rely on the finality of Commission orders.

More than 3-1/2 years ago, you dismissed a very

similar petition from Florida Power Corporation asking for nearly identical relief. When you granted the motions to dismiss filed by Dade County and Montennay, and by Lake Cogen, and by three other QFs, you said, we are not going to entertain this petition. The rule doesn't apply. There was extensive discussion of the applicability of the contract approval order possibly giving jurisdiction, you said no. We are gone. You said the courts should resolve this. In reliance on this Commission's order in February of 1995, 3-1/2 years ago, Dade County and Montennay have spent well over one million dollars, well over one million dollars litigating this matter in the courts. For you to effectively take back your order now would be fundamentally unfair.

All Florida Power Corporation is asking you for is an advisory opinion that has nothing to do with any cost recovery matter that is currently before the Commission. And that is speculative in that it depends on what the court may do and what may happen in the meantime. We may settle the case. I hope so. You should not be a party to Florida Power Corporation's forum shopping and its attempts to induce you to give an advisory opinion on a matter that is not properly before you.

Now, I agree with what Commissioner Clark said, and that is you should just deny the declaratory statement and let the matter proceed. And I think Mr. Coutroulis summed up what Florida Power is really asking for very nicely when he said it would be nice to have this declaratory statement. It would be nice for Florida Power Corporation to have this declaratory statement to go wave at the court and say, "Look, this is evidence of what somebody thinks about this."

You all should not be in the business of giving declaratory statements because somebody thinks it would be nice to have. Thank you.

CHAIRMAN JOHNSON: Do you think we have the -- I guess you don't, but maybe you have already answered this. You don't think -- it's not just that you don't think we should do it because it's not prudent, but you don't think that we can legally issue this dec statement, or are you just telling us we shouldn't?

MR. WRIGHT: I'm telling you both, Madam Chairman. I think not only is it not prudent, not only do I think it's wrong, I think it's barred by your doctrine of administrative finality or the Florida Administrative Law doctrine of administrative finality, it's barred by res judicata. All four elements, as we pointed out in our brief, of res

judicata are met, and it's barred by collateral estoppel. All four elements of collateral estoppel are met, as well.

And Mr. Willis said -- I think he wants to say something -- as he said, that is the law of this case That is the law of this dispute between the parties who are sitting at the table today.

CHAIRMAN JOHNSON: So subsumed in your answer, then, is the proposition, and I'm sure Mr. Willis would say this, that our earlier ruling went to not only would we not interpret contracts, but we would not clarify 9.1.2?

MR. WRIGHT: Well, that's the same thing, and, Commissioner, Madam Chairman, if you granted dismissal, they asked you specifically to give them an order, a declaratory statement, that their newly implemented pricing methodology, payment methodology, complied with the orders. If there was a ground for you to allow that petition for declaratory statement somewhere in there, if there was one ground to allow that petition for declaratory statement to go forward in 1995, you shouldn't have dismissed it. You did. They didn't appeal. It's over 3-1/2 years ago.

MR. WILLIS: (Inaudible. Microphone off.)

COMMISSIONER CLARK: Can I ask a question? Does

your argument with respect to res judicata, administrative finality, and collateral attack also apply to the question on the coal price? I don't recall that being before us before.

MR. WILLIS: (Inaudible. Microphone off.)

COMMISSIONER CLARK: Now, Mr. Willis, you are going way further than I'm willing to go. Because I don't remember that being before us as an issue at that time. And part of my thinking is, you know, to some extent the same -- I am somewhat persuaded by your arguments of res judicata, that we have decided this. There was an opportunity to raise it, and I think in a way it was raised. And in deference to you all, we understood your argument then, we rejected it. I know that there was discussion, and I can back up what Commissioner Deason said, that doesn't -- he was comfortable with what we were deciding based on the fact he believed that we still had -- that it would come back to us under cost recovery, and there may be an opportunity there. I think that has some merit. But coal prices didn't come up, and it doesn't look to me like the coal price is the matter of contract. You are suggesting that they manipulated it.

MR. WRIGHT: Madam Chairman.

COMMISSIONER CLARK: I'm not saying I'm willing

to do that, but I hope I'm giving you a clear signal that I'm uncomfortable with that part of it.

MR. WRIGHT: Well, a couple of responses, Commissioner Clark. That was an issue that could have been raised in 1994 as part of this overall transaction, and it was not.

COMMISSIONER CLARK: I had only understood the issue of the avoided unit to be before us. Am I wrong?

MR. WRIGHT: No, ma'am. I keep wanting to call you, Madam Chair. Commissioner Clark, no, you are not wrong. My point, though, is that Florida Power Corporation could have brought that issue to your attention in its petitions for declaratory statement at that time. At least one QF was actively litigating that issue against them at that time.

COMMISSIONER CLARK: Maybe they thought it was so clear it didn't need to come to us.

MR. WILLIS: (Inaudible. Microphone not on.)

MR. WRIGHT: And what I would like to say, Commissioner Clark, is this. The allegations of both Montenay Power Corp and Dade County as plaintiffs in the one litigation, and Lake Cogen as plaintiff in the other litigation, is that the actions complained of, Florida Power Corporation's actions complained of are

we assert a breach of the duty of good faith and fair dealing that is inherent in every Florida contract as a matter of Florida contract law. Only a court can determine whether that has been breached.

COMMISSIONER CLARK: That is in the nature of damages, nothing that we would have to let you recover.

MR. WRIGHT: It's in the -- Commissioner Clark, I am not sure about that. It's both in the nature of liability for a breach of the duty of good faith and fair dealing and in the nature of damages. And I will say this, I don't disagree with the staff's proposition that the utility can and should do everything that it legally -- and that is what their recommendation says -- that it legally can do to lower costs.

Our position is that what they have done is illegal. It is a breach of the duty of good faith and fair dealing, and that remains to be litigated. And if a court determines that their action --

COMMISSIONER GARCIA: We don't have jurisdiction over that.

MR. WRIGHT: If the court determines that what they did was legal, we are out of luck. If the court determines that what they did was illegal --

COMMISSIONER CLARK: Let me just say I don't think they are --

MR. WRIGHT: -- then they have to pay us accordingly. And I think going back to what the staff has said, if the court determines that what they did was illegal, then I would apply the same logic enunciated in the staff recommendation to say, well, if it wasn't legal for them to do it, then they can't do it and they do have to pay according to what is legal.

I don't think you would want to be in the position of suggesting that they can break the law, do something illegal and then escape having to pay in accordance with the consequence of their illegal acts.

COMMISSIONER CLARK: It may not be a cost that should be visited on the ratepayers, though. But, you know, I only addressed the notion of the fact that it's not -- I don't think it's res judicata here. I don't think your argument applies to that because I don't remember it being before us. I guess if it was before us, it does apply, but I don't remember it.

Madam Chairman, I don't know if you saved time for a response, but I wanted to indicate to you that I feel comfortable at this point making a motion. But Mr. Coutroulis may want to speak.

CHAIRMAN JOHNSON: You have about a minute left.

MR. COUTROULIS: Rule 25-22.022 provides for a declaratory statement as a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule, or order. FPC seeks a declaratory statement that explains and clarifies the Commission's 1991 order. That is clearly within your jurisdiction.

These arguments about administrative finality, the precise arguments were made when the Lake settlement was before you for approval. Commissioners, you rejected them. It was a divided vote, but you rejected those administrative finality arguments. They said your role was at an end in 1991 when you approved this contract. It has gone to court, the parties have resolved it by way of settlement, you are obligated to approve it. This Commission said that is not right, we always retain jurisdiction for cost recovery. And even Commissioner Clark in dissent made that precise point. So I submit to you these arguments about administrative finality have already been rejected.

Now, they just want to ignore, like it didn't happen, everything that occurred since that 1995 order in the pricing docket where this Commission said we

don't have jurisdiction. I want to quote you from your order at Page 6, quote, "We believe FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to decide that its interpretation of the contract's pricing provision is correct."

That's the way you viewed the matter in 1995. That is not what this petition remotely asks for today. And when the matter came back to you on the Lake settlement, you didn't find that 1995 order as a sufficient basis to require you to approve the Lake settlement. You issued a 20-page order. And they want to just ignore it. They say it shouldn't even be mentioned here today, like the ink just disappeared on the paper. I mean, the reason it's a nullity is because the time for the settlement between the parties expired by its terms. The order didn't go away in the sense that it no longer --

COMMISSIONER GARCIA: Aren't there facts there that you are not bringing out, though? Aren't there facts there that you are not bringing out? This Commission acted because of those time constraints. Staff moved quicker because of those time constraints. This Commission was trying to -- some of us trying,

others -- and perhaps not successfully -- to protect ratepayers and this happened. And it doesn't exist. There were a whole series of things that happened that are no longer there. And that order --

MR. COUTROULIS: Which is why we asked for this declaratory statement, Commissioner Garcia, for the Commission to tell us that it stands by the rationale and reasoning that it set forth in about 20 pages just a few months ago in that order where it was very clear on what it understood this contract to require in 1991 when it approved it. That order is crystal clear on the point, which is why I submitted this ought to be a housekeeping matter. They just want to pretend none of that happened.

COMMISSIONER CLARK: I do want to pretend that didn't happen, and I want to go back to the other one.

MR. COUTROULIS: Well, they also want to just forget about the Panda decision, and I don't think you can do that.

COMMISSIONER GARCIA: I think there are a series of facts that distinguish Panda, but --

MR. COUTROULIS: Well, with all due respect, Commissioner, the Florida Supreme Court held in Panda that the Commission alone has jurisdiction to interpret its orders and construe its PURPA rules to

ensure that payments under approved contracts do not exceed avoided cost.

Now, let's keep in mind what was at issue. Yes, it was a standard offer contract. That doesn't make any difference in the sense that standard offer and negotiated contract you can't approve it if it exceeds avoided cost. While it's true you require certain provisions to be in standard offer contracts, you don't necessarily require those same provisions to be in negotiated contracts.

The benchmark test is the same. Contracts can't exceed avoided costs under PURPA. In order for you to approve them, as we want through, your own rules in 1991 said when you get a negotiated contract measure the payments against the benchmark of avoided cost that your own rules set out for standard offer contracts. So, you have to do that.

In Panda, the dispute involved the terms of a contract which impacted the energy payments to be made to the QF. And you know the administrative finality arguments you heard today, you also heard these arguments about preemption, those are the exact arguments they made to the Florida Supreme Court. They said Freehold preempted the matter. The Commission didn't have jurisdiction. They didn't make

any distinction between standard offer contracts and negotiated contracts.

And the Florida Supreme Court and this Commission was a party to that action. And this Commission argued that they were wrong in the way they interpreted Freehold, and the Florida Supreme Court agreed. And it said preemption doesn't apply here, and it distinguished Freehold, and I think this is a very important distinction. It said Freehold applies when you are trying to change the rules of the game.

And, Commissioner Garcia, if I may, in light of some of the questions you asked about what does this do to contracts and all of that, we are not here asking this Commission to change anything. We want this Commission to explain and clarify what it, in fact, approved in 1991. We don't want it to change anything.

Sure avoided costs have changed over time. That doesn't matter. You can't change that. We understand that that can't occur. We are simply asking for a clarifying statement.

COMMISSIONER GARCIA: Who am I protecting here? Who am I protecting here? You are asking -- you are a company that we have plenary jurisdiction over. We can decide all sorts of things in your corporate life.

That is because you don't play by the same rules that everyone plays in a market economy. You are a monopoly. Therefore, I can deny you cost recovery, I can grant you cost recovery, I can do all sorts of things. That said, you play by those rules.

The reason we make you sign a contract with these gentleman, with their clients, is because I don't control them. I can't deny them, I can't interpret how they are going to produce, I can't say whether they are producing it right or wrong. I hold you responsible to do that. That's why I don't disagree with you trying to get this.

MR. COUTROULIS: But you understand, Commissioner Garcia, that contract very squarely on its face says that it is subject to approval by this Commission for cost recovery. They say that is not right in their papers, but they are mistaken in that regard. The contract is very clear in saying that.

Take a look at Section 1.16. It defines the contract approval date as the date of issuance of a final PSC order approving the contract, finding it prudent and cost recoverable through FPC's -- sorry, through the PSC's review of FPC's fuel and purchased power costs. And then Section 8.1 says capacity payments shall not even commence before the contract

approval date. The contract right on the first page attaches all of this Commission's rules to it and incorporates them by reference as fully set forth therein.

So, they understood the contract they were signing and it was subject to cost approval by this Commission.

COMMISSIONER GARCIA: Correct.

MR. COUTROULIS: We are not asking this Commission to change anything. There is nothing unfair vis-a-vis them, because all this Commission -- all we are asking this Commission to do is clarify and explain what you approved in 1991 unmodified. We are not asking you to change a thing. This Commission is preempted under federal law and would be in violation of Freehold if it tried to do what the BRC did in that case and say avoided costs have changed, this isn't great for the ratepayers, let's change the rules of the game. They were entitled to rely on --

COMMISSIONER GARCIA: Distinguish that for me in this case.

MR. COUTROULIS: I will attempt to do so, Commissioner Garcia. The difference is that here we are asking the Commission to explain and clarify and tell us what it approved in 1991 unmodified, looking

at --

COMMISSIONER GARCIA: Stop right there.

MR. COUTROULIS: -- it against its rules that if you --

COMMISSIONER GARCIA: So you are telling me that the signers of this contract didn't know what the contract meant when they signed it? They showed up at Wall Street with a contract, nobody knew what it meant this PSC, and Mr. Dudley and our staff knew what the contract -- we had the secret key to the contract.

MR. COUTROULIS: No, Commissioner.

COMMISSIONER GARCIA: And Wall Street made loans based on our secrets at Florida and relied on the fact that this Commission wouldn't look at this?

MR. COUTROULIS: No, Commissioner. I think the contract is clear, but a dispute has now arisen between the parties as to what it means, which is being litigated in the courts. The contract was conditioned on cost approval by this Commission. This Commission was required in 1991 in deciding whether to approve this to do so with reference to its rules.

COMMISSIONER GARCIA: Agreed. That's why you brought it to us.

MR. COUTROULIS: We would like this C[illegible].

COMMISSIONER GARCIA: That's why [illegible].

us, did you not?

MR. COUTROULIS: And we would like this Commission to clarify and explain what it found in 1991. Not to change anything. Just as this Commission undertook to do when it disapproved the Lake settlement, and did so for the precise reason that it believed the settlement paid more than what it had in mind in 1991, and inferentially what this Commission would be likely to approve for cost recovery to the ratepayers.

We come clearly within the declaratory petition. There is a dispute, there is some uncertainty --

COMMISSIONER GARCIA: You did then. You did then. You are repeating that now. But what --

MR. BELLAK: Commissioner, could I make a very brief comment? When I was involved with litigating the Panda case, I had the experience of sitting in the Florida Supreme Court and watching Justice Overton ask counsel for Panda -- and, of course, the Panda contract involved a limitation of it had to be less than 70 megawatts for the plant they were constructing, and Justice Overton asked counsel for Panda if he believed that under the terms of the contract that Panda could build a 1000 megawatt plant. And counsel for Panda replied that yes, he did.

COMMISSIONER CLARK: Well, Mr. Bellak --

MR. BELLAK: And what I'm concerned about is, I have done a very thorough analysis of Freehold because I have had no choice. I have been living with Freehold for the last three years. Five years actually. Four years. Because of the Panda case. And what concerns me, and I really don't want to inject myself into this debate, but it concerns me that this Commission will without any precedent allow itself to be struck dumb and not allowed to speak as to these issues.

I notice that there was an attempt to get a TRO, that is to stop you from listening to this debate. There is an attempt to have you defer anything you do as to what you believe we approved in 1991. I think there is sufficient precedent out there to warn the Commission not to do what the New Jersey Commission did in the Freehold case. And based on my analysis of it, for what it's worth, that is not what is occurring here. In fact, it's a reverse of Freehold.

The reverse of Freehold occurs because in Freehold the cogen had a reason to be upset because the New Jersey Commission in trying to help the ratepayers wanted to undo the cogen from the fruits of what was approved by the New Jersey Commission. The

New Jersey Commission was well motivated, but it was trying to do the wrong thing. It was trying to --

COMMISSIONER GARCIA: Richard, stop right there.

MR. BELLAK: -- deprive the cogen of the benefit of the deal. In this case, staff is unhappy, staff is motivated, staff is incensed because it believes that the ratepayers are going to be deprived of the good thing that the Commission did when it approved these contracts in 1991. It approved a very sophisticated mechanism to keep from happening what happened in so many other jurisdictions. So it is a reverse Freehold because it is the staff that wants the benefit of what the Commission approved back in 1991.

And if a situation is created that there is no precedent supporting in which the Commission can't file an amicus brief, in which the Commission can't issue a declaratory opinion, in which the Commission can't intervene, and, in fact, is struck dumb, that may be what the Commission decides to do, but I notice there is no case supporting that. And we have got a case called Crossroads, which says exactly the opposite. And had not the New York Commission felt that it was not struck dumb in that circumstance their ratepayers would be paying for an entirely different and more expensive configuration than anything they

thought they approved when they approved that negotiated contract.

COMMISSIONER GARCIA: I disagree. You are stretching Crossroads far afield from where it ended up. And, Richard, further from that, you are having us have a proceeding on cost recovery so that FPC knows where its at. You are doing exactly what they denied the Commission doing in Freehold. I don't argue with staff's position. It is a clear position. I don't argue with FPC trying to come here to get this, but this isn't the way to get it. Because basically we are being boxed into an interpretation of the contract to send it to the court. Are we struck dumb, then, when the court -- if the court rules against us?

MR. BELLAK: You are not struck dumb if you are willing to state what it is we thought we approved, and it has the effect of giving the court the same leeway that the court had, the district court had in Crossroads. In Crossroads they decided that it was collateral estoppel on the cogen's issues. This judge may decide something different. He may accord what you say a lot of weight. He may accord it less weight. It does not conclude the --

COMMISSIONER CLARK: You really can't conclude

that the Crossroads is dispositive law. It was really -- the only thing that was decided was if you wanted to raise that argument you had to raise it before the Commission. You can't go to court and raise that argument as the basis for --

MR. BELLAK: But which Crossroads? I'm talking about Crossroads I, the New York Commission's Crossroads. All that the New York Commission said in Crossroads was that this is what we think we approved. If you want to go fight about it in some other tribunal, that's fine. That judge can give accord what we are saying --

COMMISSIONER GARCIA: In that case, Richard, it was not within the contract. It was not in any shape, way, or form within the contract or ever discussed by the Commission or ever dealt with.

MR. BELLAK: Crossroads thought it was. They were relying on the contract. They said this is how we are interpreting this clause, this clause, and this clause in the contract. It was no more far afield than Panda's claim that they could build a 1000 megawatt plant. They thought they found that in the contract, too.

COMMISSIONER CLARK: But if you will recall, and I think this Commission has made a distinction between

negotiated and standard offer contracts. Now, I don't know if the Supreme Court has made that distinction, but the only thing before them was a standard offer contract, and the standard offer contract is provided by tariffs, and I agree that we can interpret our tariffs, and we did in that case. We specifically limit it to 75. I don't think it carries over to negotiated. In fact, as I recall when this came up we made a clear distinction between what authority we had with respect to standard offer and what authority we had with respect to negotiated.

MR. BELLAK: Well, the problem is that even the negotiated contracts references our rules, and it's not apparent that a calculation of avoided costs would not have been based to some extent on our rules. So I didn't have to cope with that because all I had to do was defend our ability to explain what we meant in a standard offer contract, so the issue wasn't before me. But I have to say that I don't see that -- I see the case as supporting what the staff is trying to do, but I don't see the cases which so limit the ability of the Commission --

(Simultaneous conversation.)

COMMISSIONER GARCIA: Richard, but your own line in the rec -- the Commission has always forthrightly

disclaimed any jurisdictional role in adjudicating contract disputes involving negotiated cogeneration contracts and has been correct in doing so.

MR. BELLAK: Right. That is consistent with the staff recommendation.

COMMISSIONER CLARK: Where did you just quote from?

COMMISSIONER GARCIA: From Page 17. I'm quoting Richard.

MR. BELLAK: Right. And that's consistent with what the staff is trying to do. If this declaratory statement issues, the court is still going to adjudicate this contract dispute. They can give what you say dispositive weight, they could give it no weight.

COMMISSIONER CLARK: So, Richard, why don't we wait until they do it and then deal with it when it gets here?

COMMISSIONER GARCIA: And you know what, Richard, following that, we are stuck then, and so is FPC. I mean, we make the argument now, but then I'm stuck. I have made a determination.

COMMISSIONER CLARK: If they can ignore us, then why do it?

COMMISSIONER GARCIA: FPC can walk in -- exactly.

They can ignore us one, Richard, and FPC can walk in after we make this decision, because FPC wouldn't answer the question, and say pay up, Commission. Ker is what it meant. The court said something else, I get the money.

MR. BELLAK: Well, again, I don't want to insert myself in the debate, but I would just close by saying I think Mr. Wright gave you a very good reason not to wait, because he said that whatever you are thinking about in terms of cost recovery is going to be ministerial. It flows through whatever they get out of the court and --

COMMISSIONER GARCIA: And he is wrong.

MR. BELLAK: And the Commission has to pay --

(Simultaneous conversation.)

MR. BELLAK: -- be just as silent then as they want you to be now.

COMMISSIONER GARCIA: Mr. Wright is overreaching, and I can understand he is overreaching for his client. But the truth is he is wrong, and this was the issue when we voted this out last time, and I remember Commissioner Deason making the point, because he was right, we do have -- we have so much control over what FPC does. I mean, a word from us causes a problem in their stock value. The truth is because we

have issues that we control because they are not operated by the typical laws of the marketplace. They work under a different series of things. We get to make all sorts of determinations on how they spend, why they spend, if it is appropriate, if it is not appropriate, and that's why, that's why I can see them coming here. But they are going to come in here when they ask for cost recovery.

COMMISSIONER DEASON: We regulate FPC, but we cannot be arbitrary and capricious in that regulation, either. If we approved a contract, we can't say then but we are going to interpret it differently now because we can save the ratepayers money. We cannot do that.

COMMISSIONER GARCIA: I absolutely agree with you. I absolutely -- that is exactly the point. But what we do, what we do when we do this here is we are going to be arbitrary and capricious to the very argument that FPC is making here today, they are going to make when they come in for cost recovery. The very opposite of that argument. They are going to argue Mr. Wright's case. They are going to say, Commission, in '91 you approved this rule. In '94 you decided not -- or in '95 you decided not to step into this argument, and then they are going to argue you've got

to give me what the court decided that we had to give. We will make a determination whether prudent or not, but what we cannot do is make that decision here in a declaratory statement which effects other peoples' rights who came into the State of Florida to do business.

MR. COUTROULIS: Madam Chairman, may I make one very --

MR. WILLIS: It's really time for you all to bring this to close. I would urge that you all --

CHAIRMAN JOHNSON: Excuse me.

MR. COUTROULIS: This point has not been taken.

CHAIRMAN JOHNSON: Hold on. And Mr. Willis has been waiting for quite awhile. I'm going to allow to you wrap up and then I may allow you, I'm not sure. Go ahead, Mr. Willis.

MR. WILLIS: I was going to say that, Commissioners, we asked you to be true to your word that you gave in your order in 1995 where you deferred this matter to the court for interpretation. The court has that before it, the trial is November the 2nd, we urge you to stand by and let that process take its course, and then when you have a case before you in cost recovery or otherwise, come back to these issues and decide it when you have a case before you

and not now. It is time to wrap this up.

COMMISSIONER DEASON: I agree with that. It's time to wrap this up. This is Item 13B?

COMMISSIONER DEASON: 13A and B.

COMMISSIONER CLARK: I'm ready to make a motion. And let me just add one thing. The Crossroads decision, you indicated there are two Crossroads decisions.

MR. BELLAK: Right. Crossroads from the New York Commission --

COMMISSIONER CLARK: Right.

MR. BELLAK: They said, well, if we explain or clarify what it is we approved, and this was a negotiated contract, that does not insert us in any way in your contract dispute. And, in fact, that played out in district court.

COMMISSIONER CLARK: What is the other case? The other case is the district court.

MR. BELLAK: Right. The district court case, they said, well, we are going to accept what the New York Commission said as dispositive.

COMMISSIONER CLARK: Well, let me ask you, didn't they say they were not going to allow the collateral attack of that order, because that is what it was?

MR. BELLAK: That is one of the things they said.

COMMISSIONER CLARK: This is important, Richard. I understood -- I think I read it that it was simply that if you had wanted to make that argument, you needed to bring it up before the New York court, and you needed to appeal it if you didn't think it was right. You don't come to this court and do a collateral attack on it to reach that result. Wasn't that what they decided?

MR. BELLAK: I believe that is the case.

COMMISSIONER CLARK: Okay. Well, Commissioners, let me indicate that I don't -- you know, let me ask another thing. Do we have to issue -- can we just decide that there are enough -- do we have to issue a declaratory statement?

MR. BELLAK: Well, given the experience of the ENG case, I would say no. I mean, in that case there were some problems with it and you denied it. I think you can grant or deny one on whatever basis you wish.

COMMISSIONER CLARK: Commissioners, let me just indicate that I don't -- I don't think issuing a declaratory statement now sort of furthers this process. We had a unanimous decision where we said contract disputes should be left to the courts, and then when they come to us for cost recovery we will deal with whether it should be the matter of cost

recovery. I think we should stick by that. And it will come back to us.

What intervened and what put, I think, which instigated Power Corporation to come to us was the fact that we rejected a settlement and as part of our rationale we indicated that we probably wouldn't approve for cost recovery what Lake or whoever it was believed they should get. And we discussed the notion of rejecting it for cost recovery.

I can understand why they have come here. But it's my view that a good argument can be made that what we decided with respect to the contract is res judicata. But I think a better way to get it decided is let the parties go back and perhaps litigate or settle. If they litigate and the court gives us something, and we don't believe we can live with it, if we think we still have the jurisdiction to reject it, we can reject it then, and then the Supreme Court will decide. I don't think -- I think it's my feeling that issuing this now just is not the best course to follow.

COMMISSIONER DEASON: Your motion is based upon the assumption that you feel that the issuance of the declaratory statement will not add anything to the debate particularly at the court.

COMMISSIONER CLARK: Right.

COMMISSIONER DEASON: Why don't we let the court decide that. We issue the declaratory statement, if they want to give it any weight whatsoever, they will, and if they want to totally ignore it, the court will. That is their decision.

COMMISSIONER CLARK: Because I think it comes close to an advisory opinion, and as I understand we are supposed to sort of stay away from advisory opinions. Declaratory statements are supposed to be used when you can sort of avoid litigation or avoid parties taking actions to their detriment that can't be undone later on. I just don't see this --

COMMISSIONER DEASON: Well, to an extent I agree with you. I think that we should issue a declaratory statement or not, not because of whether there is or is not a court proceeding, it's because either -- the requirement has been met for a declaratory statement and we need to issue it. It's part of our responsibility to issue a declaratory statement when all of the appropriate measures have been met to that one issue. And it doesn't matter whether there is a court proceeding or not.

MR. BELLAK: Well, they asked for this specifically. They are here to deny this if I'm

wrong, but as I understood it, it was because of the settlement. That if they had this declaratory statement it would help them structure a settlement that the Commission would be more likely to approve. And it's not advisory as to that. It may be advisory as to their contract dispute, but they had other reasons to file the petition.

MR. DUDLEY: That is correct.

COMMISSIONER CLARK: I would make a motion that we not issue the declarstory statement.

COMMISSIONER GARCIA: I will second that motion.

CHAIRMAN JOHNSON: There is a motion and a second. Any further discussion?

COMMISSIONER JACOBS: I have a question for staff. There are some provisions on cost recovery from negotiated contracts in the rules, and I'm wondering were they in place when this came the first time?

MR. DUDLEY: Yes, sir.

COMMISSIONER JACOBS: Why didn't we apply those?

MR. DUDLEY: Why didn't we apply them?

COMMISSIONER JACOBS: Yes.

MR. DUDLEY: I would expect we thought we were applying them.

COMMISSIONER JACOBS: But they don't, they don't

deal with this other clause, do they? They don't deal with the other provisions, they have to do with other tests, don't they?

MR. DUDLEY: They are a limitation to full avoided costs. That is the rule cited within the recommandation, if that is what you're referring to.

COMMISSIONER JACOBS: Subsection 3.

MR. DUDLEY: I'm not real sure what section it is. Yes. We have cited Chapter 366, as well as Rule 25-17.0825 and 25-17.08322.

COMMISSIONER JACOBS: 08 -- well, without delving too deeply into it, the discussion has been largely about the language that was put into the contract which was barred from the standard offer section, is that correct?

MR. DUDLEY: Yes, sir.

COMMISSIONER JACOBS: And my question has to do with there is some language here that has to do with cost recovery for negotiated contracts in Subsection 3. Is that different from the standard offer provision? And if so, why wasn't it applied?

MR. DUDLEY: Not to the extent that it restricts cost recovery to full avoided cost. To the extent that it specifies the actual language to be put in the contract, yes, it is different. Negotiated contracts

are more open than the standard offer contracts. But both of them maintain that threshold that what we allow for cost recovery shall not exceed the utility's full avoided costs.

COMMISSIONER GARCIA: I agree with you.

MR. DUDLEY: Then approve the dec statement.

COMMISSIONER GARCIA: Close.

COMMISSIONER JACOBS: See, here is where I am --

COMMISSIONER GARCIA: Commissioner, we are not giving up jurisdiction.

COMMISSIONER CLARK: My reasons for dissenting in the Lake are still there.

COMMISSIONER GARCIA: Exactly. And, you know, I think it was inspirational to staff to intertwine your dissent in that case with this statement to try to bind a vote. But the truth is that those same issues are still there, the issues that we discussed. And the truth is we had every right to deny a settlement. I mean, we didn't like it, but I wasn't in the majority. I thought we had every right, just like Commissioner Deason has every right to say about cost recovery when we have a cost recovery proceeding.

However, what we do here today binds us to your position in that cost recovery and binds them. And we are announcing today this is what we are going to

allow, and that's it. And I think it's going to be to their detriment, but it's better than -- because what I don't want is him to come into this -- FPC to walk into this hearing, standing with four million ratepayers behind them, and saying, "Commissioners, here is what you meant." And obviously we are going to decide with them. Because every common sense move in my body says let me protect the ratepayers as opposed to these other participants. I am expounding on it, I know, but this is my feeling.

COMMISSIONER CLARK: But I think you are protecting the ratepayers. Because as I said in the dissent, I think it has the effect of -- giving sanctity to these contracts has the effect of promoting the competitive wholesale market. If you don't give sanctity to these contracts, then I think you won't have people coming into the state to competitively provide this service. And I think in this case it was the specific language that was before us, we declined to issue the declaratory statement, and arguments were made that we were interpreting our rule or order, we still said it was a contract interpretation, and it was a unanimous decision.

I understand that the Lake settlement had in it -- I don't know what the majority agreed on in terms

of the basis for rejecting it, but they rejected it. That was not a unanimous decision. I think it should go forward. Send it back the way it was when we decided in 1994 or whenever it was that the courts needed to just construe the contract.

COMMISSIONER JACOBS: I am persuaded that we do, we have jurisdiction to look at it for prudence purposes. I don't think that there is much question about that. The troubling part is that we did have a bite at the apple, and I'm wondering what effect there was of not having taken that opportunity.

I would love for us this to have gone back with us as a party, and we have been able to deal with anything the court did when they ruled on this, and resolve any issues then and there. But unfortunately we find ourselves here today. The motion was to defer?

COMMISSIONER CLARK: To deny it.

CHAIRMAN JOHNSON: Let me ask may be a question for Commissioner Clark. Then is it your position that we don't have the authority to clarify what we meant or what we thought we were approving, or does it go to we had that opportunity, and we didn't take advantage of it? It is to me two separate issues, because I'm convinced by the analysis provided by staff that we do

have the authority to clarify our intentions, and I think we need that kind of authority. I understand Mr. Wright's argument is that you don't. Really you have one bite at the apple and that is when you approve these negotiated contracts. After that you are kind of out of the game.

Now, that may not be Mr. Willis' position, but I understand it to be Mr. Wright's position. But I'm not sure what your motion is turning on. Is it turning on the fact that you believe that we have the ability to interpret that contract, we did interpret the contract, we even spoke to the issue of clarifying our intentions, and it is res judicata or --

COMMISSIONER CLARK: Yes. I guess about what I'm looking at is maybe getting you to concur in the action, but not in the rationale for it.

CHAIRMAN JOHNSON: (Laughing.)

COMMISSIONER CLARK: That happens all the time, you know. I mean, that's what concurring opinions are. It would be my opinion that it is res judicata. I think we had our opportunity to make a decision. These arguments with respect to the rulemaking and what happened in the rulemaking and the applicability were not brought up at that point. And I'm not even sure if Crossroads had been decided, and I have -- I

don't even know if Crossroads rises to the level of what our law school used to tell us was persuasive authority. It is certainly not binding authority. It was that court's opinion.

I think there are real policy arguments to be made with respect to letting the court decide the contract issues so we can promote a robust competitive market. And if these people in the wholesale market see the cost recovery issue continually coming back before the Commission, I don't think we will have that robust market.

So I guess I am willing to decide it on the issue that we had our opportunity, we decided that it should first be decided by the courts. It was a contract dispute. It will probably come back to us for recovery, and if a majority at that time thinks that we have the authority to reject it on the notion of cost recovery and that's not what our order allows for, we can do it then.

CHAIRMAN JOHNSON: And where does that leave Florida Power Corp, I mean, still in a state of flux with respect to --

COMMISSIONER CLARK: But their cost -- if it is determined that you owe the amount the court finds ultimately, you have been recovering that, right, in

your rates?

MR. COUTROULIS: We have been applying for cost recovery with respect to the payments we make, and the periodic fuel and purchase power adjustment proceedings --

CHAIRMAN JOHNSON: I can't hear you. Speak up a bit.

MR. COUTROULIS: I have been applying for cost recovery in the periodic field and purchase power adjustment proceedings, but we are in doubt as to whether or not we are going forward in a manner that is consistent with what this Commission had in mind when it approved this contract in 1991. And I submit with all due respect, Commissioner Clark, that having gone through the 1994 pricing docket where this Commission said we think you are asking us to construe the contract, and we are not going to do that. And then we went ahead and settled the Lake matter, and came back here and everyone argued, Florida Power argued and Lake argued administrative finality. We said you had jurisdiction in '94, we still think you have jurisdiction now, but you should decline to exercise it with respect to the Lake settlement because you declined to exercise it in '94. And the Commission said no, we are going to test that

settlement against what we think we approved in '91. And now they go ahead and dismiss that 20-page order as a nullity. I can't think of a more ripe and appropriate time to ask for --

COMMISSIONER CLARK: Mr. Coutroulis --

MR. COUTROULIS: -- some finality.

COMMISSIONER CLARK: -- I would point out to you that I dissented from that order, I still dissent from that order. And for that reason I think it is res judicata with respect to the original decision and we ought to move forward.

MR. COUTROULIS: I understand, Commissioner Clark.

COMMISSIONER CLARK: Then maybe when it comes back before us as to whether cost recovery is allowed, if we reject it, then you have the issue as to whether regulatory-out applies.

MR. COUTROULIS: I just wanted to say we did cite the Sullivan case out of the First DCA that said a Commission's determination of its jurisdiction is never conclusive on whether or not the same tribunal can exercise jurisdiction when properly asked to do so. Every case they cite on res judicata involves a collateral attack where somebody is not happy with the decision that came out of one tribunal, so they try a

collateral attack and they say that first tribunal did not have jurisdiction. That is not what we are doing here. We are not going to a court and saying your jurisdictional determination was wrong. We are right back here. And there have been developments in the law that have taken place. Crossroads, with all due respect, the Commission's opinion in Crossroads does squarely speak to the issue because the cogen there argued --

COMMISSIONER CLARK: The New York Commission has spoken to the issue.

MR. COUTROULIS: I'm sorry?

COMMISSIONER CLARK: The New York Commission has spoken to the issue.

MR. COUTROULIS: Yes, that's correct.

COMMISSIONER CLARK: No court has other than saying you can't collaterally attack it.

MR. COUTROULIS: I agree. The New York Commission spoke to it, and the federal district court did not allow a collateral attack. But that Commission felt it could clarify its ruling. It's not binding on this Commission, but we think it's persuasive.

COMMISSIONER CLARK: You know, had all of discussion with respect to our rules and other things

come up at that time, there may been a different result. And I don't think that this decision today should be taken for the proposition that Mr. Wright has advanced that it is purely ministerial. I sure don't think it's purely ministerial. But we have spoken on this particular contract issue and indicated it was a contract dispute, it should be resolved at the courts. I understand that when Commissioner Deason voted for that unanimous decision he was comforted by the fact it came back here for cost recovery. I would suggest let's do it in cost recovery at that time.

MR. BELLAK: If Mr. Wright turns out to be correct about it being ministerial, will you not be regretting these missed opportunities to declare what it is.

COMMISSIONER JACOBS: That is not our interpretation of the statute.

COMMISSIONER CLARK: But if it is ministerial, I think that is a result of PURPA or it's a result of the fact that we don't have -- it's a constitutional matter of interpretation of contract, and it's not something we had to give away to begin with.

MR. COUTROULIS: Commissioners, without knowing if it is ministerial, without knowing, if a majority

of this Commission -- if they are not inclined to do it now, and we think they should do it now, but if you are not inclined to do it now without knowing whether or not you believe you retain jurisdiction over cost recovery down the road, we are right back where we are. We can't settle this case, we can't govern ourselves with respect to contract administration, we can't do --

COMMISSIONER GARCIA: Of course you can. You've got a majority --

COMMISSIONER CLARK: Mr. Coutroulis, you said that you were going to win at the court.

MR. COUTROULIS: I intend to do so. I intend to do so.

COMMISSIONER GARCIA: Go win.

COMMISSIONER CLARK: Well, that may settle this whole thing for us if you do win.

MR. COUTROULIS: I don't think, though, that militates against the propriety of the declaratory statement.

COMMISSIONER CLARK: I understand that, and I have confidence in your abilities, but I also have confidence of the abilities of your opponents.

COMMISSIONER JACOBS: But even outside of that, I think the argument that it is ministerial is going to

have a very tough --

COMMISSIONER CLARK: Commissioner Jacobs, that is not the basis on which I am making --

COMMISSIONER JACOBS: No, I understand. But that is a very high hurdle, clearly given the -- I mean, the Panda decision has a lot of weight, and I'm drawn to the rationale of the case. I think it makes the distinction on negotiated versus standard offer. Well, it is very expressed in its terms in mentioning standard offer contracts. It could be that we are not reading that decision correctly, and if the court comes back and says we meant that to apply both to negotiated and to standard offer, then we are in a different place.

Those issues, though, have to evolve and have to mature. I do not -- I do want to be very clear I do not like being here. I think this is a bad place for us to be, and I will state up front that when this comes back for cost recovery, it will be very much about applying what we understand to be the prudency review for this contract, whatever that means.

CHAIRMAN JOHNSON: Let me be clear on one point. And I was having a discussion with Commissioner Clark, but on both of those points, on the res judicata point and whether or not we have the authority to clarify,

Commissioner Jacobs may be somewhere else, but I don' believe this is res judicata. I believe that the way the issues have been framed are clearly different tha the way that they were framed before. Florida Power Corp is not disputing the fact, as we thought they did the last time, whether or not we have the right to interpret contract provisions as between parties. They have raised the issue as to what did this Commission intend or what were the -- to clarify our thoughts as it related to the provision 9.1.2. They framed it in such a way that I think it is appropriate for us to decide the issue, and I think that it would be necessary for us to decide the issue to provide not for the court case, but for the benefit of the companies we regulate and for the benefit of all the parties involved as to how we feel about those issues. So I would be inclined to approve staff on all issues. But we do have a motion.

COMMISSIONER CLARK: Well, let me just try one more time to persuade you. I guess, you know, I lost this battle the last time, and maybe I will lose it again. But one of the things that was pointed out in argument is that if they could have raised the issue at the time it came up, they were under an obligation to do that. Think about what you do for the judicial

system if you say, well, they didn't raise it last time and we're going to consider it this time, is that every time a party comes in and makes their argument and the court rejects that, they can come in and say, well, we didn't make this argument, but here is the argument.

COMMISSIONER GARCIA: Exactly. Here is another one.

COMMISSIONER CLARK: This specific contract provision we had before us. We were asked to interpret it, and interpret it -- and we were asked to do it with respect to our rules and orders, as I recall. And we said, no, this is a contract matter and it should be resolved that way. I think if you issue this declaratory statement you are reversing that decision.

COMMISSIONER DEASON: Let me say I totally disagree with that. I don't think we are reversing any decision that we made prior.

COMMISSIONER GARCIA: We are opening ourselves up to nit-picking. You know, you come in and you start asking for declarstory statements every other week, you are bound to hit something. Someone in staff is going to figure out, hey, we do have jurisdictional control, and so then we step up and we take

jurisdictional control?

COMMISSIONER DEASON: The reason that we denied the declaratory statement in the '94 case, I guess it was a '95 order, was that we determined that we did not have jurisdiction is because just about every attorney that I asked the question told me no, that you couldn't, so I had to accept that. That we did not have the jurisdiction to determine how the contract was going to be interpreted to bind the parties.

But that is not what is being requested here. It is not a request for us to interpret the contract as it would be binding on the parties. This is totally -- a totally different question. And if I had known at the time that I voted for dismissing the prior declaratory statement that it was going to be interpreted such that it could also be applied to a situation where we would be prevented from interpreting a contract as to how we would implement it for cost recovery purposes, I would have declined to have voted for the original declaratory statement. So that's why I personally think that it's a different situation altogether. But I'm ready to get this resolved. We have a motion and a second. I'm ready to take this to a vote and however it turns out, it

turns out, and we can go on to other business.

COMMISSIONER CLARK: Well, the point -- all right. I have advocated this at least twice. I'm ready to vote, too.

CHAIRMAN JOHNSON: There is a motion and a second. I knew it. I knew you were going to do that.

COMMISSIONER JACOBS: (Inaudible, microphone not on.)

COMMISSIONER CLARK: I think -- let me just say that, you know, I think our ultimate decision should be to deny. I think it is res judicata, but I also think it amounts to an advisory opinion to the court. We have already said we are going to send it to the court on the contract decision.

Commissioner Deason, I understand that you believe that notwithstanding what the court may say that under our authority to approve it for cost recovery we might reach a different result. I would suggest to you that is the time to do it. It is going to come back to us if that results. It may not come back to us. I think it is not advisable at this time to issue a declaratory statement. And let me -- having said that, I understand why you have asked for it.

COMMISSIONER GARCIA: Absolutely.

UNIDENTIFIED SPEAKER: You are between the proverbial rock and the hard place with respect to some of these cases.

COMMISSIONER CLARK: Yes, and I guess -- you know, I feel like I am being consistent in where I have been coming from on this.

CHAIRMAN JOHNSON: All right. There is a motion and a second. All those in favor signify by saying aye.

COMMISSIONER CLARK: Aye.

COMMISSIONER GARCIA: Aye.

COMMISSIONER JACOBS: Aye.

CHAIRMAN JOHNSON: Opposed. Nay.

COMMISSIONER DEASON: Nay.

CHAIRMAN JOHNSON: The motion passes on a three-to-two vote. And the motion went to all issues.

COMMISSIONER CLARK: Right.

CHAIRMAN JOHNSON: In both 13 and 13A.

COMMISSIONER CLARK: 13A and B.

CHAIRMAN JOHNSON: Yes, A and B. Thank you for your participation. Thank you, Mr. Bellak and staff.

COMMISSIONER CLARK: Let me say once again, I appreciate the level of advocacy and the information that we have gotten. I felt the same way in the original case, that we got a lot of good advice, and I

appreciate the same thing this time.

CHAIRMAN JOHNSON: There was one --

COMMISSIONER GARCIA: Before we get off of this point, you know, I think that -- I believe that there was a lack of consistency when the settlement offer was brought. We have a new Commission. I think the parties should try to negotiate this out so that we can protect the interests of Florida ratepayers.

CHAIRMAN JOHNSON: We are going to take a short three-minute break, then we are going to come back to first Item 24A and then Item 24.

(Recess.)

CHAIRMAN JOHNSON: We are going to reconvene the agenda conference. We need to make some clarifications on Items 13A and 13B as to the motions.

COMMISSIONER CLARK: Madam Chairman, with respect to -- we already did Issue 1. Shall we go 13A and then do B?

CHAIRMAN JOHNSON: We might as well.

COMMISSIONER CLARK: Okay. With respect to 13A, we did Issue 1. 13B, I would move that we not issue a declaratory statement. That being the case, then I would move Issue 3 as being moot, that we don't have to decide it, and I would move we approve staff on Issue 4.

COMMISSIONER GARCIA: Second.

CHAIRMAN JOHNSON: Show that then -- well, as it relates to Issues 1, 2 -- 1 and 2, show that approved on a three-to-two vote.

COMMISSIONER CLARK: No, 1 was unanimously approved. That was the oral argument.

CHAIRMAN JOHNSON: The oral argument, yes. Show Issue 1 unanimously approved. Show Issue 2 approved on a three-to-two vote. Show Issue 3, since it is just a moot issue, I guess, unanimously approved, and Issue 4 unanimously approved.

COMMISSIONER CLARK: Well, I think Issue 3 should just be shown no vote, that it was moot.

CHAIRMAN JOHNSON: Okay, fine. Thanks.

COMMISSIONER CLARK: With respect to 13B, I can move staff on Issue 1.

COMMISSIONER GARCIA: Second.

CHAIRMAN JOHNSON: Any discussion? Show it approved without objection.

COMMISSIONER CLARK: On Issue 2, I would again move that we do not issue the declaratory statement.

COMMISSIONER DEASON: No, Issue 2 is a request for oral argument.

COMMISSIONER CLARK: That's not what I had for 13B.

COMMISSIONER DEASON: Oh, I'm sorry, I'm looking at the wrong one.

CHAIRMAN JOHNSON: Oh, that's the dec statement?

COMMISSIONER CLARK: Right.

CHAIRMAN JOHNSON: Show that approved on a three-to-two vote.

COMMISSIONER CLARK: And then Issue 3 would be moot, and I would move staff on Issue 4.

CHAIRMAN JOHNSON: Show 4 approved unanimously.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 90 are a true and correct record of the proceedings.

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

DATED THIS _____ day of October, 1998.

JANE FAUROT, RPR
P. O. Box 10751
Tallahassee, Florida 32302

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Metropolitan Dade County, Order No. 24734, Together with Order Nos. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, Establish that Energy Payments thereunder, including when Firm or As-Available Payment is Due, Are Limited to Analysis of Avoided Costs based upon Avoided Unit's Contractually-Specified Characteristics,

by Florida Power Corporation

PETITION FOR DECLARATORY STATEMENT

Florida Power Corporation ("FPC" or the "Company") hereby petitions the Florida Public Service Commission ("the Commission"), pursuant to Rule 25-22.020, et. seq., F.A.C., as follows.

FOR A DECLARATORY STATEMENT that, under Order No. PSC-97-1437-FOF-EQ entered in Dkt. 961477-EQ, Nov. 14, 1997 (the "Lake Docket"), the Public Utilities Regulatory Policy Act ("PURPA"), Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C, the Commission interprets its Order No. 24734 entered in Dkt. 910401-EQ, July 1, 1991 (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between the Company and Metropolitan Dade County (the "Negotiated Contract" or "Contract" between FPC and "Dade"), to require that FPC:

(A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;

(B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments;

(C) Use the actual chargeout price of coal to FPC's Crystal River ("CR") plants 1 and 2, resulting from FPC's prevailing mix of transportation, rather than the mix of transportation in effect at the time the Contract was executed or some other mix, to compute the level of firm energy payments to Dade.[1/] [2/]

[1/] It should be noted that the Lake Order is the subject of a petition filed by NCP Lake Power, Inc. and Lake Cogen, Ltd., protesting the proposed PSC action. FPC has opposed that petition. In light of the language and reasoning in the Lake Order expressing the Commission's views concerning the determination of energy payments, the need for the declaratory statement requested by this Petition will remain regardless of what action is taken on Lake's pending petition.

[2/] Although FPC has filed this Petition as a request for a declaratory statement and believes that is the appropriate procedural vehicle for resolving these issues; if the Commission is of the view that the scope of this proceeding should be expanded, FPC would not object to converting the matter to one brought under Fla. Stat. 120.57. FPC would only request that, notwithstanding such a revised procedural format, the Petition proceed expeditiously in light of the ongoing dispute with Dade and Montenay (as described below).

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CONTEXT AND BACKGROUND

The 1991 Approval Docket

1. On March 19, 1991, FPC presented to the Commission eight negotiated contracts it had reached with Dade County, Lake Cogen, Pasco Cogen, Auburndale Power Partners (El Dorado), Orlando Cogen Limited, Ridge Generating Station, Mulberry, and Royster. As contemplated by these contracts, FPC asked the Commission to approve the stream of energy payments to be made thereunder. On July 1, 1991, by Order No. 24734, the Commission issued its order of approval.

The 1994 Pricing Docket

2. On July 21, 1994, FPC initiated the Pricing Docket, petitioning the Commission for a declaratory statement that FPC's reliance on the pricing mechanism specified in § 9.1.2 of the negotiated contracts with certain QFs complied with Rule 25-17.0832(4)(b), F.A.C., and the Commission's 1991 Order No. 24734 approving those contracts. On October 31, 1994, FPC amended its petition to seek a determination that its manner of implementing the pricing mechanism in § 9.1.2 was lawful under § 366.051, Fla. Stat., and complied with Rule 25-17.0832(4)(b), F.A.C. as well as Commission Order No. 24734.

3. A number of affected QFs, including Dade, filed motions to dismiss on the ground that the Commission lacked jurisdiction to consider the petition. By its Order dated February 15, 1995, the Commission granted those motions and dismissed the petition. Although stating that § 9.1.2 of the negotiated contracts "establishes the method to determine when cogenerators

are entitled to receive firm energy payments or as-available energy payments," the Commission concluded that, absent a showing of fraud, misrepresentation or mistake, it would not exercise continuing control to interpret the meaning of a disputed term in a negotiated contract it had previously approved. However, as the Commission later noted, the Order in the Pricing Docket "recognized the Commission's continued responsibility for cost recovery review." Lake Order at 3. No appeal was taken from the Commission's Order.

The Commission's Order
Rejecting the Lake Settlement

4. As the Commission is aware, following the dismissal of FPC's petition in the Pricing Docket, the Circuit Court for Lake County entered summary judgment against FPC stemming from the Company's methodology for determining when firm or as-available energy payments are due under § 9.1.2. NCP Lake Power, Inc. v. FPC, Case No. 94-2354-CA-01 (Lake Cir. Ct.). The Lake Court held that, in determining whether to pay at the firm or as-available rate, FPC must make payments "with reference to modeling the operation of a real, operable 1991 Pulverized Coal Unit, having the characteristics required by law to be installed on such a unit as well as all other characteristics associated with such a unit...." It found that FPC had breached the Lake Contract by determining whether to pay the firm or as-available rate using only the characteristics specified in the contract.[3/]

5. On December 6, 1996, after the Lake Court's Order was entered, FPC and Lake entered into a settlement agreement, compromising their dispute. The agreement was presented

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[3/] With respect to energy payments, FPC's Contract with Dade is identical, in all material respects, to its contract with Lake.

to the Commission for approval by FPC's petition in Dkt. No. 961477-EQ, dated December 12, 1996. By Notice of Proposed Agency Action, dated November 14, 1997, the Commission exercised its jurisdiction to decline approval of the settlement on the grounds that the payments to Lake thereunder would be too high in relation to the Commission's view of avoided costs and the energy payments that would otherwise be due under the parties' existing contract as previously approved. The Lake Order, as well as the governing statutes and rules cited above, provides the impetus for the instant petition.

FPC's Determination of Avoided Energy Costs

6. Florida Power is obligated to ensure that its ratepayers pay no more than avoided cost for energy. Thus, consistent with its understanding of the Lake Order, as well as PURPA, Fla. Stat. § 366.051, and Rule 25-17.0832, FPC looks to the Commission's Order in the Approval Docket and the energy pricing provision of the Negotiated Contract to determine the energy payments made to Dade.

7. Section 9.1.2 of the Contract defines the pricing mechanism for determining, on an hour-by-hour basis, when Dade is to be paid the Firm Energy Cost and when Dade is to be paid the As-Available Energy Cost. It also provides the mechanism for calculating the level of the Firm Energy Cost. Section 9.1.2 provides 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 on 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 Fuel 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.

8. On July 18, 1994, Florida Power notified Dade that, effective August 1, 1994, it would be implementing the pricing mechanism specified in the Contract to establish the periods when as-available energy payments, rather than firm energy payments, would be made. FPC has been paying Dade for energy under its Negotiated Contract in this fashion since August, 1994, and continues to do so. Also, over the years since the Negotiated Contract was signed, FPC has instituted changes in its transportation of coal to CR 1 & 2, increasing the mix of rail transportation vis a vis barge to those facilities.

9. FPC determines the operational status of the avoided unit against which Dade's Negotiated Contract is priced by modeling it in FPC's computer dispatch pricing runs. In conducting the computer analysis of its system, Florida Power implements the Contract pricing mechanism in a manner consistent with the established methodologies for dispatching units and calculating avoided energy costs. The status of the avoided unit, as defined by the payment options elected in each of the negotiated contracts which were the subjects of the Approval Docket (Options A, B or C),[4/] is determined by a production cost model (WesCouger, a type of economic optimization model; formerly Unit Commit), which is standard practice in the electric utility industry. The production cost model enables FPC to "dispatch" its generating

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[4/] Option A, which Dade chose, provides for energy payments based on operating characteristics specified in Section 9.1.2 (the Avoided Unit Fuel Reference Plant fuel price, times a 1.0 Fuel Multiplier, times the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M). Option B provides the same energy payment except that the Avoided Unit Variable O&M is removed and included in the capacity payment. Option C provides the same energy payment except that the Avoided Unit Variable O&M and 20% of the Avoided Unit fuel price are removed and included in the capacity payment.

plants (i.e. determine their on/off status) and manage its power purchases on a least-cost basis during each hour. The model operates by comparing the cost of the avoided unit to all other available resources and selecting a group of units and power purchases that minimize the total cost of meeting the demand for electricity. In so doing, the model determines whether the "avoided unit" as contractually defined is on or off, and also determines the level of the as-available energy payments when the model indicates that the avoided unit does not operate.

10. More specifically, to implement § 9.1.2, FPC first determines the cost of the amount of power in a given hour FPC generated from its own resources. Then, FPC increases system load to include the amount of power provided by various cogenerators, including Dade, that same hour. An additional system resource is added to FPC's generation in this step: a unit with the characteristics and numeric values specified in the Dade (and other similar) cogen contracts in § 9.1.2 and the referenced appendices. Thus, for this resource, FPC utilizes the applicable monthly chargeout price of fuel, the fuel multiplier, the average heat rate, and the variable operation and maintenance expense specified in the Negotiated Contract.[5/] The operational status of the avoided unit (i.e., whether it would be scheduled on-line or off-line) is based solely on these specified proxy characteristics as set forth in § 9.1.2 and its referenced appendixes. The determination of the avoided unit's operational status is not affected by the myriad of other or additional characteristics, which are not contained in the Negotiated Contract but which could have been associated with a coal unit, had it actually been built instead of avoided.

[5/] Variable O&M, as specified in the contract, is included for this unit as well as for FPC's actual steam generation units. Variable O&M is also a component of the firm energy price as specified in 9.1.2.

11. The production cost model is then run again. If the avoided unit, represented by the proxy characteristics set forth above, would have been dispatched (i.e., turned on) at any level of output, Dade and the other similarly situated cogens receive the firm energy price for all the power they supplied to FPC in that hour. If this unit would not have been dispatched at any level of output, the energy provided by Dade and the other similarly situated cogens is added to the as-available block size for those hours. An as-available energy price is then calculated and paid to Dade and the other similarly situated cogens for the power they provided that hour.

12. The methodology used by FPC is required by § 9.1.2 because that section serves as a pricing proxy for determining when firm or as-available payments are due. It does this by calling for an hour-by-hour determination of the on/off status of the avoided unit, based upon the enumerated four characteristics of that unit that are specifically set forth in the Contract and reflect its avoided cost. FPC believes it would be improper to assume a myriad of other or additional characteristics or values for them that are not contained in the Contract, or to consider them in making the on/off determination. FPC also believes that its method for dispatching the avoided unit, based solely on the enumerated characteristics in the Contract, is consistent with the way the Commission has interpreted Rule 25-17.0832(5), the energy pricing rule that governs standard offer contracts.[6/] The methodology yields a result that closely approximates FPC's avoided energy cost, since it compares, on an hourly basis, FPC's system marginal cost

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[6/] Prior to amendment in 1997, the Rule appeared as 25-17.0832(4).

with the avoided energy cost from the unit (represented by the Contract's firm energy price), and, with limited exceptions,[7/] effectively pays the lesser of the two.

13. In calculating the level of the firm energy payments when they are due under § 9.1.2 of the Contract, FPC utilizes the actual delivered price of coal at the Fuel Reference Plant specified in the Contract, namely CR 1 & 2. The mix of transportation of coal, as between rail and barge, has changed over time in favor of rail, thereby lowering overall transportation costs to CR 1 & 2 and hence the level of the firm energy payments calculated in accordance with the formula in § 9.1.2. The Contract nowhere constrains FPC's ability to alter the transportation mix to CR 1 & 2 in order to reduce the delivered price of coal to these units, and it is entirely appropriate -- and indeed expected -- for FPC to take such action.

[7/] For example, during shoulder hours, when system loads are increasing or decreasing, Dade may receive the firm energy price even though it is slightly higher than the as available price, since more efficient FPC units have not yet been optimally dispatched and the avoided unit is not entirely off. Moreover, under the implementation of § 9.1.2 in the Contract, the cogenerator will receive payment at the firm energy cost for all power that it supplies in a particular hour, even though the "avoided unit" may have been partially dispatched during that hour. Finally, the cogenerators are added to the as-available block size to determine the as-available energy cost only after a determination has been made that cheaper sources of power are available elsewhere on FPC's system and, hence, the "avoided unit" was not dispatched at all. When this occurs the size of the capacity block that must be met increases, potentially requiring more expensive sources of power to meet that capacity and, as a result, driving up the as-available energy price to the point that it might exceed the firm energy price. Nonetheless, the cogenerators will be paid at the higher as-available cost because the "avoided unit" was "off." As can be seen, these limited exceptions work to the benefit of the cogenerators.

Dade's and Montenay's View

14. Dade and the operator of its solid waste resource recovery facility, Montenay-Dade Ltd., through its general partner Montenay Power Corp. (collectively "Montenay"), do not agree that FPC's methodology is called for by § 9.1.2 and the Commission's Order approving the Negotiated Contract.

15. According to Dade and Montenay, the Negotiated Contract does not even set forth the method for determining when firm or as-available payments are due. Their position is that FPC must make firm energy payments for all hours that a real, operable "bricks and mortar" generating unit would have operated. In modeling this "real" unit, Dade and Montenay contend that the Company should not consider the express terms of § 9.1.2 and the enumerated proxy characteristics therein, but should instead determine its operational status by taking into account a myriad of other or additional operating characteristics and constraints that may have been associated with such a unit had it actually been built. These characteristics are nowhere contained in the Contract. Dade and Montenay similarly take the position that Rule 25-17.0832(5)(b), which applies to standard offer contracts, contemplates that a determination of the applicable avoided unit's operational status must likewise be made by dispatching a fully characterized unit as though it had actually been built, and not on the basis of a narrower set of proxy characteristics used to represent the unit and its avoided cost.

16. In addition, Dade and Montenay urge that FPC is prevented from shifting its mode of coal transportation so that the cost of coal to CR 1 & 2 is reduced from that which existed at the time the Negotiated Contract was executed unless, by changing the transportation mix, FPC reduces its overall transportation costs to all its Crystal River coal facilities (CR 1 & 2, and

CR 4 & 5). Dade and Montenay urge that, because the coal component of § 9.1.2 looks to coal costs for CR 1 & 2 only, in the absence of such an overall effect, the result of shifting transportation would be to lower payments to Dade and Montenay while not altering FPC's overall coal transportation cost.

17. Dade's and Montenay's positions, both with respect to the firm versus as-available determination and the coal transportation mix, are directly at odds with the Commission's Order denying approval of the settlement in Lake, as well as PURPA, Fla. Stat. 366.051, and Rule 25-17.0832.

18. As the Commission is aware, the dispute between FPC and Dade is the subject of on-going litigation -- in federal and state court -- where the gravamen of plaintiffs' claims is that FPC has allegedly underpaid Dade, and is continuing to underpay it, for energy supplied under the Contract, and that these underpayments are part of an anticompetitive scheme in violation of federal antitrust law.[8/] This past summer, both FPC's and plaintiffs' cross motions for summary judgment in the state court action on the contract issues were denied by Order dated September 19, 1997. Unified discovery is ongoing with respect to both cases. Pursuant to the federal court's scheduling order, the federal case has been set for the court's October 19, 1998 trial calendar. The state court action has not yet been set for trial, but may be tried in advance of the federal action since the issues in that case are subsets of the issues in federal court.

[8/] In addition, as part of their antitrust claims, Dade and Montenay allege that FPC's initiation of the Pricing Docket before the PSC in 1994 constituted "sham" litigation and a further anticompetitive act.

THE COMMISSION'S ORDER IN LAKE, AS WELL AS THE SUPREME COURT'S OPINION IN PANDA, ESTABLISH THAT THE COMMISSION HAS JURISDICTION TO INTERPRET ITS EARLIER ORDER APPROVING DADE'S NEGOTIATED CONTRACT WITH RESPECT TO ENERGY PRICING

19. In its Order denying approval of the Lake Settlement, the Commission considered arguments advanced by the cogenerator that it lacked jurisdiction to disapprove the settlement because such a determination would necessarily involve it in interpreting what the Contract meant at the time it was initially approved, and that would be inconsistent with its Order in the Pricing Docket holding that it had no such jurisdiction. (Lake Order at 12) The Commission rejected those arguments, determining that its jurisdiction was broader than it had believed at the time the Pricing Docket Order was entered. (Id. at 16) The Commission cited to several more recent decisions from other jurisdictions, holding that a commission does have jurisdiction to interpret the legal meaning of a term in a PURPA contract it previously approved, irrespective of whether it is a negotiated contract:

> The decision rendered by the New York Commission with respect to the Crossroads contract [a negotiated 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.

Id. at 16.

> [D]ecisions of the New York Public Service Commission are illustrative of the Commission's continuing jurisdiction to interpret and clarify its approvals. ...
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> * * *
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> [A]ll 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.

Id. at 11-12.

20. Agreeing with the New York decisions, the Commission concluded that a request to confirm that FPC is properly paying for energy under an approved negotiated contract (such as the one with Lake or Dade) "is inextricably linked to what the Commission approved ...," and that it has jurisdiction "over matters addressing the interpretation and clarification of past policies and approvals." Id. at 10.

21. These observations by the Commission are consistent with the Florida Supreme Court's recent decision in Panda-Kathleen, L.P. v. Clark, et al. as the Florida Public Service Commission, and Florida Power Corp., 701 So. 2d 322 (Fla. 1997). In that case, the Court reasoned that the "Commission's approval of a contract term conflicting with the Commission's rule as to avoided cost ... would have violated PURPA and section 366.051, Florida Statutes (1991)." Id. at 328. This is because PURPA and the Commission's rules governing negotiated contracts permit cogenerators to "sell energy to utility companies at but not exceeding full avoided cost, ... [which] is the cost that a utility avoids by purchasing electrical power from a QF rather than generating the electrical power itself or purchasing the power from another source." Id. at 324. Thus, as Panda makes clear, the Commission has jurisdiction to clarify its orders and to construe its rules in order to ensure that contracts and payments thereunder do not exceed avoided cost.

UNDER THE COMMISSION'S ORDER IN LAKE, FPC IS LIMITED TO PAYING DADE FOR ENERGY BASED UPON AVOIDED COSTS AS REFLECTED IN THE CONTRACT BY THE AVOIDED UNIT'S SPECIFIED CHARACTERISTICS

22. FPC believes that, under the reasoning of the Lake Order, the Commission's approval of the Negotiated Contract limits FPC to paying Dade for energy based upon avoided costs as reflected in the Contract itself. Thus, FPC must determine the avoided unit's operational status -- which governs whether the firm or as-available payment is due in any given hour -- on the basis of the proxy characteristics specified in § 9.1.2, rather than on the basis of other or additional characteristics that may have been associated with such a unit had it actually been built. (As noted, the Lake Contract is identical to the Dade Contract with respect to its energy payment provisions). Specifically, the Commission wrote:

> 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.

Id. at 4-5.

> 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.

Id. at 9.

23. These statements by the Commission clearly indicate that FPC is limited to paying Dade for energy based upon the avoided unit's contractually-specified characteristics, not other or additional characteristics that may have been associated with an actually-built, operable, bricks and mortar unit. The Contract's characteristics govern the operational status of the

avoided unit (and thus whether the firm or as-available rate is to be paid). That being so, it likewise follows that the Commission will evaluate requests for cost recovery of energy payments based upon its interpretation of the Contract as approved because "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." Id. at 13.

RULE 25-17.0832(5)(B), WHICH GOVERNS ENERGY PAYMENTS UNDER STANDARD OFFER CONTRACTS, FURTHER SUPPORTS THE CONCLUSION THAT THE COMMISSION'S APPROVAL ORDER CONTEMPLATES ENERGY PAYMENTS THAT ARE DETERMINED WITH REFERENCE ONLY TO THE AVOIDED UNIT'S CONTRACTUALLY-SPECIFIED CHARACTERISTICS

24. On its face, Rule 25-17.0832(5)(b), as amended to its present substantive form in 1990, closely resembles § 9.1.2 of the Contract, and both Dade and FPC agree that the proper construction of that Rule, which governs energy payments under standard offer contracts, is instructive with respect to § 9.1.2. In fact, John Seelke, FPC's former manager of cogeneration, later a paid consultant with some of the cogenerators in litigation with FPC, has testified that the Rule was the basis for the language of § 9.1.2. Seelke dep. Dade litigation, "Seelke Dep.," at 766 (a copy of the cited portions of the Seelke deposition transcript are attached as Ex. A). It is thus appropriate for the Commission's statement to comment on the correct construction of Rule 25-17.0832(5)(b) as it applies to energy payments, since that is not only highly relevant to the on-going dispute between FPC and Dade, but is also relevant to the proper interpretation of the Commission's Order approving the Negotiated Contract.

25. The history and subsequent construction of the Rule clearly shows that the Rule does not require full-scale modeling. Prior to the amendment to Rule 25-17.0832(5)(b) in 1990,[2/] the Rule explicitly required utilities such as FPC to pay cogenerators for energy based on a cost comparison of a contract's firm energy price with the utility's as-available (i.e., system incremental) energy cost. This is the so-called "lesser-of" methodology and, under it, there is no computer simulation of whether the avoided unit would or would not have operated.

26. In 1989-90, the Commission held rule-making hearings to consider whether to approve an amendment to Rule 25-17.0832(4)(b) [now 25-17.0832(5)(b)] suggested by staff. At those hearings, a number of the Commissioners were concerned that the language of the proposed amended rule appeared to require fully characterized modeling of the avoided unit, which would leave open numerous terms and much room for dispute and complication. PSC Dkt. No. 891049-EU; Hearing Transcript, Rule Hearing Vol. IV, p. 444-45 (a copy of the cited portions of the hearing transcript are attached as Ex. B). As Tampa Electric Company's witness described that perception:

> [The proposed rule] seems to imply that in our dispatch of our system, we would have to do some additional calculations which would require dispatching a hypothetical avoided unit, and so our dispatchers, on an hourly basis, would have to actually put in the characteristics of an avoided unit in their dispatch and make many additional calculations in order to determine whether that avoided unit would have operated.

2/ As noted, before 1997, the Rule appeared in the Florida Administrative Code as 25-17.0832(4)(b).

Tr. 445. But Seelke responded to these concerns and corrected the misperception, explaining that the amendment to the rule did not change its essential character and that full-scale modeling of the avoided unit was unnecessary:

> . . . I think that both the proposed rule and the existing rule hit the same spot but is just stated differently . . . [T]o do the lesser of we would have to figure out whether the unit would have been. We would have to have the heat rate and what not. And I think, in terms of whether it would have been economically dispatched in the language in the proposed rule . . . it's a comparison of cost. So I would interpret them to come to the same point as well. It's just semantics as to whether we are actually going -- and I think Gordon, maybe you were looking at it as if we actually had to dispatch it, and I was never going to do that, conceptually. I was just going to look at the cost and get to the same point.

Tr. 462-463 (emphasis supplied).

27. The fact that the proposed amendment essentially was a refinement to the "lesser of" cost comparison rather than a complicated operational dispatch exercise was noted throughout the hearing. For example, the "intent" of the proposed amendment was described by Seelke as a "simple comparison that [can be] incorporated into our economic dispatch and pricing," which compares "whether the avoided unit has a cost that's lower than the incremental cost curve ... for that particular hour." Tr. 449. Seelke contrasted the simple comparison called for by the Rule to a complex operational dispatch exercise which "you would not want to take on." Id. Similarly, the dispatch determination for a combined cycle avoided unit was explained as "being the combined cycle's cost, which is a function of its heat rate and fuel cost, which gets compared with your system incremental cost. So it's really a cost comparison." Tr. 448.

28. At several points in the hearing, Seelke conceded that Staff's proposed rule change (which he has testified is substantively the same as the rule in the form actually passed) is the

lesser-of approach and, in fact, that a consensus to that effect was reached among the various witnesses appearing before the Commission. Seelke Dep. p. 775-76; 781. For example, Commissioner Easley directly asked: "Well, what I am hearing is that the lesser of, or whatever the easiest language with the block, gets you to the same thing, and that nobody has any big objection to that." Seelke responded: "Right exactly." Tr. 463-464.

29. Earlier, Seelke described the new proposed rule and the old explicit lesser-of rule as "six of one, half dozen of the other." Tr. 464. Thus, in summarizing where the participants had ended up, Commissioner Easley explained:

> Well, it sure sounds to me like you don't need an awful lot of post-hearing comments other than to make sure in your own calculations that it is half a dozen of one and six of the other. My inclination would be to go with whatever is the easiest way of getting you to the same answer.

Tr. 463.

30. Seelke now suggests that one ambiguous passage in Florida Power's post-hearing submission reversed his and the other witnesses' clear explanations to the Commission at the rule making hearing concerning the operation of the amendment. Based on this, Seelke now says the Rule as amended by the Commission does require full-scale modeling of the avoided unit -- and not the simple cost comparison described above -- even though there is no evidence that the Commission intended to do anything other than to accomplish the consensus reached at the hearing. Seelke Dep. p. 789-92. FPC strongly disagrees with Seelke's revised view. The important point, however, is that the Commission, not any individual, has the jurisdiction to interpret what its own rules mean -- and it has done so here.

UNDER THE COMMISSION'S ORDER IN LAKE, FIRM ENERGY PAYMENTS UNDER THE CONTRACT ARE CALCULATED BASED UPON AVOIDED COSTS AS REFLECTED BY THE CHARGEOUT PRICE OF COAL AT CR 1 & 2, INCLUDING THE ACTUAL TRANSPORTATION COST

34. FPC also believes that, under the reasoning of the Lake Order, in determining the level of firm energy payments to Dade, it must take into account the actual transportation cost for coal to CR 1 & 2. In the Lake Order, the Commission discussed pricing for coal under the Lake contract and the proposed settlement which altered that pricing mechanism. The Commission stated:

> 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 .... [T]his lower cost should be reflected in FPC's calculation of avoided costs.

Id. at 5. These statements by the Commission clearly indicate that, in determining the level of FPC's firm energy payment to Dade when that payment is due under the Contract, FPC should reflect the actual coal transportation cost to CR 1 & 2, not the transportation cost associated with the mix between barge and rail when the Contract was signed, or transportation cost calculated on any other basis.

THE NEED FOR A DETERMINATION AS PRAYED FOR IN THIS PETITION.

35. In light of all the foregoing, to interpret the Contract as calling for payments in excess of the amounts generated by the methodology used by FPC -- as Dade urges -- would result in payments above avoided cost, in violation of PURPA, the Florida Supreme Court's decision in Panda, and Commission Rule 25-17.0832, which looks to the applicable contract's

"rates, terms and other conditions" as the determinants of avoided cost. In the absence of the Commission's declaratory statement as sought by this Petition, FPC could find itself in a posture where it must pay for energy -- however erroneously -- at a level which is inconsistent with these authorities and the Commission's Order approving the Negotiated Contract, as well as in excess of avoided cost as reflected in the Negotiated Contract. Based on the precedent set in the Commission's Order in the Lake Docket, and the other legal authorities discussed above, this, in turn, could result in a denial of cost recovery by the Commission.

WHEREFORE, FPC requests that the Commission issue a statement that, under Order No. PSC-97-1437-FOF-EQ, PURPA, Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C, the Commission interprets its Order No. 24734 approving the Negotiated Contract with Metropolitan Dade County to require that FPC:

(A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;

(B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments;

(C) Use the actual chargeout price of coal to FPC's CR 1 & 2 resulting from FPC's current mix of transportation, rather than the mix of transportation in effect at the

time the Contract was executed or some other mix, to compute firm energy payments to Dade.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 96-0594-CIV-LENARD

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, and MONTENAY POWER CORP., a Florida corporation, as General Partner of MONTENAY-DADE, LTD., a Florida limited partnership, Plaintiffs, vs. FLORIDA PROGRESS CORPORATION, a Florida corporation, FLORIDA POWER CORPORATION, a Florida corporation, and ELECTRIC FUELS CORPORATION, a Florida corporation, Defendants.	VIDEOTAPED DEPOSITION OF: JOHN L. SEELKE VOLUME VI Pages 708 - 852

TAKEN BY: Attorney for Plaintiffs

DATE: Friday, July 18, 1997

TIME: Commencing at 9:30 a.m.

PLACE: Holland & Knight
Barnett Tower, Suite 1600
One Progress Plaza
St. Petersburg, Florida

REPORTED BY: Donna W. Everhart
CSR, RPR, CP, CM
Certified Shorthand Reporter
Notary Public
State of Florida at Large

Q. Without violating any Public Service Commission rule?

A. Correct.

Q. I believe you testified, though, that as someone who was extensively involved in the preparation of that contract, it was your intention in Section 9.1.2 of the contract to implement the approach as you understood it of the revised Public Service Commission rules relating to energy pricing to cogens?

A. Correct. Can I add a little appendix to that answer? In fact, the standard offer language that was eventually adopted for Florida Power's standard offer contract had the same language as the negotiated contracts with respect to Section 9.1.2.

Q. Can we agree that the lesser-of approach is hardly unusual or unknown in cogen contracts with utilities?

A. It's not unusual with respect to Florida. Again, I'm not sure about other states.

Q. Many contracts in Florida are priced based upon a lesser-of approach?

A. Many of the -- the standard offer contracts that I've seen are priced on a lesser-of

approach. I've seen others that are not.

Q. All right. And you haven't seen cogens going out of business because they had a lesser-of contract, have you?

A. No. That presumes, though, that they knew they had a lesser-of contract going into the contract. I mean, there's a -- and this is, again, the heart of the dispute that I see existing here is what was agreed to --

Q. We're going to get to that.

A. -- at the outset.

Q. I'm going to give you plenty of opportunity --

A. Okay.

Q. -- to talk about that some more. Let's continue with a few preliminaries. You also discussed the value of deferral method of pricing cogen contracts; do you recall that generally?

A. Yes.

Q. And that method backloads the capacity payments so that in the later years of the contract those payments are much higher than in the earlier years?

A. That's correct.

Q. Is it accurate that that value of

deferral method doesn't have anything to do with the use of a lesser-of methodology for energy pricing or some other methodology for energy pricing; it's a separate concept?

A. It's a separate concept, yes. I would agree with that.

Q. And you weren't trying to suggest that there was some relationship there?

A. I hope not.

Q. Is it correct that the purpose and intent of the lesser-of rule was to approximate a utility's avoided energy cost for the purpose of paying cogenerators?

A. When it was drafted, at that time -- and I probably participated in the drafting of that rule too -- it was an attempt to approximate. And I think the key word here is approximate.

Q. All right. Is it fair to say it was also an attempt to approximate the way the avoided unit would have operated?

A. Oh, boy. Yes, in a way. And, again, it's the use of the word approximate. I'm going to -- I'm going to -- it was attempting to -- no, let me back up. It didn't attempt to approximate how the unit would have operated. It really

attempted to set pricing that was close to the pricing that might have been experienced from a real unit, but it was not -- again, the operation of a real unit and the payments under a real unit were not based on whenever its average price changed to the lesser-of, became less than the as-available price.

Q. Well, you would agree that lesser-of was an approach to approximate avoided cost.

A. It was an approach to approximate avoided cost. And what happened when the rule changed, Chris, is that the approximation -- in fact, when I looked at the approximation -- and others agreed -- that approximation was not a good approximation in hindsight. And the new language that was eventually adopted was a better approximation.

Q. Okay. Let's talk about that new language. As I understand your testimony, you're saying that the Commission changed the rule from lesser-of to something else; right?

A. Correct.

Q. And I believe you indicated to the jury here that that was a change that you advocated; correct?

A. Correct.

Q. You thought it was pretty important?
A. Yes.
Q. You submitted pre-filed testimony to the Commission in connection with its rule change proceeding in which that rule and other rules were changed; correct?
A. Correct.
MR. COUTROULIS: And I believe that's been marked as an exhibit. Do you have that, Bob?
MR. CIOTTI: Yeah, I do.
BY MR. COUTROULIS:
Q. Were you the only FPC witness who submitted pre-filed testimony?
A. Yes.
MR. COUTROULIS: Let's go off the record for a second while we find this.
(Discussion held off the record.)
MR. COUTROULIS: Okay. Back on the record.
BY MR. COUTROULIS:
Q. Mr. Seelke, you have Exhibit 84 in front of you. Is that a copy of your pre-filed testimony in the rule-making proceeding?
A. Yes.
Q. Is it correct that in your pre-filed

testimony you never referred to a change in the rules being made from the lesser-of?

A. That's correct.

Q. You just don't address that issue at all in the pre-filed; correct?

A. That's correct.

Q. Now, you do comment on quite a few other issues. For example, you talk about the QF's enhanced ability to develop a viable project through the ability to eliminate risk discounts and capacity payments and to receive levelized as well as early capacity payments; correct?

A. Correct.

Q. And you talk about the QF's ability to change its billing methods once every five years; true?

A. That's true.

Q. And you talk about the QF's having their payments from the utility reflect an offset against the bill they get from the utility for things like backup power?

A. Correct.

Q. And you talk about the various utilities' ability to tie capacity and energy payments to their individual utility avoided cost parameters

rather than to the statewide unit?

MR. WING: I think you meant QF's ability. I think you said utilities' ability.

BY MR. COUTROULIS:

Q. I did mean QF's. No, I'm sorry, that's not right. Utilities. Let me -- let me start again. You talk about the utilities' ability to tie capacity and energy payments to their individual avoided cost parameters rather than to the statewide avoided cost parameters; correct?

A. That's true.

Q. And that was a big point about this whole rule-making proceeding, was it not, moving away from the statewide avoided unit to individual utility avoided costs?

A. That's correct.

Q. And you also talk about provisions governing energy interchange transactions; correct?

A. Correct.

Q. But nowhere do you discuss moving away from the lesser-of rule?

A. That's true.

Q. Even though you viewed that as important?

A. Well, this rule-making was -- true. And this rule-making took place -- we had a short time

to prepare testimony, is my recollection. We didn't get all the issues on the table at the outset of the rule-making.

Q. And that issue got left out of your pre-filed?

A. It got left out of the pre-filed.

Q. You did regard these proceedings as important?

A. Oh, they were important.

Q. Very important?

A. Yes.

Q. You would not have wanted to mislead the commissioners in your oral remarks before them, would you?

A. No, I would not have wanted to.

Q. Or in your pre-filed testimony?

A. That's true.

Q. Now, you do recall appearing in front of the Commission and speaking to various aspects of the rule-making that was going forward?

A. Yes.

Q. Do you recall whether you were under oath on January 11, 1990, when you spoke to the proposed staff's rule regarding energy pricing?

A. Yes.

Q. Were you under oath?
A. Yes.
Q. And is it fair to say you wanted to be as precise and accurate as you could be at that time?
A. Yes.
Q. Isn't it true that you told the Commission that both the proposed staff rule and the existing lesser-of rule hit the same spot but stated a little differently?
A. I believe I did. I have looked at my comments that were -- the transcript of that proceeding. And while I -- my objective was to be as clear and precise as I wanted -- as I -- as you stated earlier, I don't believe I met that goal on that particular day.
Q. All right. In fairness, why don't we get your remarks and take a look at it so you'll have it in front of you.
MR. COUTROULIS: This has not been marked, I believe; correct?
MR. CIOTTI: That's correct.
MR. COUTROULIS: So we will mark this as the next exhibit.
BY MR. COUTROULIS:
Q. Can you please identify Exhibit 151?

A. It's a transcript of the rule hearing on January 11, 1990.

Q. And this was a discussion about staff's proposed rule which would read, quote, "To the extent that the avoided unit would have been economically dispatched, had the avoided unit been in the utility's dispatch, avoided energy costs associated with firm energy shall be the energy cost of the purchasing utility's avoided unit"; correct?

A. I believe so. Can you -- are you looking at a particular page?

Q. I can show you a document if you'd like to refresh yourself on that.

A. Yes, I would.

Q. You do recall that the version of the rule as actually passed was slightly different from the staff's proposed version?

A. Yes.

Q. You testified about that in some of your previous sessions?

A. Yes.

Q. Although I believe you testified that the rule as passed compared to the staff's proposed rule was substantively the same?

A. It was very similar, yes.

Q. Okay. Substantively the same?

A. Yes.

MR. COUTROULIS: Let's mark this as the next exhibit, please.

BY MR. COUTROULIS:

Q. You have in front of you Exhibit 152. Mr. Seelke, I believe I showed you this exhibit in your OCL deposition as well?

A. Yes.

Q. It appears to be a markup of the staff's proposed rule against the rule as actually passed. If you'd take a look at that. Can you agree that the staff's rule stated, "To the extent that the avoided unit would have been economically dispatched, had the avoided unit been in the utility's dispatch, avoided energy costs associated with firm energy shall be the energy cost of the purchasing utility's avoided unit"?

A. Yes.

Q. Okay. Now, if you would direct your attention, please, to Exhibit 151. Is that a transcript of a hearing that took place before the Commission on January 11, 1990?

A. Yes.

Q. And you participated in that?
A. Yes.
Q. And you were under oath at the time?
A. Yes.
Q. Can you please look at page 449. Let me direct your attention to line 13. And let me ask you first if these remarks are remarks that you made. And if you need to look back to check that, that's fine.
A. They appear to be my remarks, yes.
Q. Can you please read your own words beginning on line 13 with the word "we'll," W-E apostrophe L-L.
A. "We'll just look at the incremental cost curves every hour and see whether the avoided unit has a cost that's lower than the incremental cost curve, which means it would have been dispatched, or if the unit -- avoided unit's cost is higher than the incremental cost curve that exists for that particular hour, it would not have been dispatched."
Q. Go on.
A. "That's a sort of simple comparison that we can incorporate into our economic dispatch and pricing. And that's a little -- I think that meets

the intent of this proposed staff rule."

Q. Did you make that comment at the commission hearing?

A. Yes.

Q. Please turn to page 463. Let me direct your attention to line 1, beginning with the word "and I think." Do you see that? Line 1.

A. Yes. Okay.

Q. Are those your remarks? And if you need to look at the previous page, that's fine.

A. Yes, they are.

Q. At the place I directed you, can you please read out loud what you said to the Commission.

A. "And I think in terms of whether it would have been economically dispatched in the language in the proposed rule, I wouldn't propose that the actual dispatch -- that we actually dispatch the unit as a cost. It's a comparison of cost."

Q. So you stated, I wouldn't propose that we actually dispatch the unit as a cost, it's a comparison of cost; correct?

A. Correct.

Q. And then can you continue on that same page through the end of line 12, and please read

your remarks out loud.

A. "So I would interpret them to come to the same point as well. It's just a matter of semantics as to whether we are actually going -- and I think, Gordon, maybe you were looking at it as if we actually had to dispatch it, and I was never going to do that, conceptually, I was just going to look at the cost and get to the same point. So it's six of one and half a dozen of the other."

Q. And you made that remark under oath to the Commission --

A. Yes.

Q. -- on that date; correct? Now, further on down the page, there is a remark attributed to -- attributed to Commissioner Easley on line 23, and he said, "Well, what I am hearing is that the lesser-of, or whatever is the easiest language with the block, gets you to the same thing, and that nobody has any big objection to that." And what did you say, sir?

A. I said, "Right, exactly."

MR. WING: I'm going to object because you have left off the colloquy beginning with line 13 just above that where Commissioner Easley talks

about the possibility of post-hearing comments and to verify if what Mr. Seelke is saying at that point really is the case. And I think to be fair you ought to read that into the record as well.

MR. COUTROULIS: Mr. Wing, you're free to ask Mr. Seelke questions on redirect if you like.

MR. WING: Well, I object to doing this totally out of context.

BY MR. COUTROULIS:

Q. Now, you were telling the Commission that the staff's recommended rule was essentially the same as a lesser-of determination at that hearing, were you not, Mr. Seelke?

A. Yes, I was. But, in fact, in reviewing this transcript later on --

Q. You're saying you were wrong?

A. I was wrong.

Q. Okay. Isn't it a fact that you acknowledged that there was a consensus among the people present at the hearing that the staff version of the rule reached essentially the same result as the lesser-of rule?

A. My comment on line -- on page 464 would lead you to that conclusion. The remarks that we talked about earlier were not intended to lead to

that conclusion.

Q. Which remarks? The remarks that you read?

A. Yes.

Q. But my question now, sir, is whether you acknowledge that there was a consensus among the people present at the hearing that the staff version of the rule reached essentially the same result as the lesser-of rule?

A. Yes, there was.

Q. Okay. And you agreed with that consensus at the hearing, did you not?

A. Yes.

Q. Now, is it correct that what you're saying about the improper -- about the proper interpretation of the new rule in this deposition that it requires full-scale modeling of the avoided unit is not what you told the Commission back in 1990 when it was considering adopting the rule change?

A. That's true.

Q. You didn't discuss at the Commission any need to model the avoided unit and you did not discuss how to go about full-scale modeling of the avoided unit as though built, installed, operated,

and fully characterized; correct?

A. No, that's not true.

Q. Sir, why is that not true?

A. That's not true. Because it goes back to the interpretation of the remarks that I made earlier and which, unfortunately, I characterized differently at the end. The concern being expressed by -- let me go back to where I first read remarks about --

Q. Sure. The first thing I called your attention to was page 449.

A. Okay.

Q. I believe we started at line 13.

A. That's correct. The concept that's discussed in line 13 is similar to -- and I'd have to go back to a memorandum that I did for Mr. Watson and perhaps amplify what I intended there. That's explained more fully.

Q. Just so we're clear, Mr. Watson is one of the attorneys who was representing Pasco?

A. Pasco, yes.

Q. And you were consulting with them?

A. That's correct.

Q. All right.

A. The concept here is that if you wanted to

determine whether a unit would have been operated, that you didn't necessarily -- that one simple way to do that was to look at the incremental cost of the system --

Q. Yes.

A. -- the as-available energy cost --

Q. Yes.

A. -- and ask yourself would the unit have had an incremental energy cost between its minimum and maximum load point that would have been equal to or greater than that as-available, but not the unit's average cost, the unit's incremental cost. When I say whether the unit has a cost that's lower than the incremental cost curve, the concept that's left out here and what I believe I intended was an incremental cost concept, not an average cost concept. And unfortunately, in this hearing process the discussion that we're talking about here, Chris, involves calculus concepts, which are virtually impossible to transmit to a Commission in a hearing process.

The concept, if we go back to -- and I can explain this fully in a memorandum that I did to Mr. Watson -- using just the incremental cost data, incremental cost curves of a unit, which are

not present in a pricing formula, just using those cost curves and incremental fuel cost data, we can make a very good approximation on whether the unit would have been operating or not operating without going through a full-scale model dispatch.

Q. That's not what you said here though, is it?

A. No, that's not what I said. And that's why we had post-hearing comments.

Q. All right. But what you're now saying is if you were to compare system incremental cost, which is the as-available energy cost, to incremental cost of the avoided unit, that would be a way to approximate when the avoided unit would run and when it would not run?

A. That's correct. And, in fact, that whole --

Q. Excuse me.

MR. WING: Wait. No, wait. Wait. Go ahead. You can finish your answer.

A. Well, let's let -- let me let Chris finish, and then I'll --

BY MR. COUTROULIS:

Q. I want to -- I want to let you finish as well. This is cross-examination, but I'm trying to

be as --

A. Sure.

Q. -- as fair as I can, so I apologize if we talk over each other, but we'll try to do the best we can.

If you were comparing system incremental costs to incremental costs of the avoided unit, that would be a simple cost comparison, but it would be different from the lesser-of where you compare average cost of the avoided unit against system incremental cost?

A. That's correct.

Q. Okay. You still wouldn't be looking at other operational parameters of the avoided unit?

A. No, you could look at other operational parameters.

Q. But not necessarily?

A. But not necessarily.

Q. All right.

A. Because -- and if I can go back to a -- this concept is more fully explained in a memorandum that I did for Mr. Watson that's dated November of 1994.

Q. Do you need to get that memorandum in order to explain this?

A. Well, I'd like to -- I'd like to show this. Yes, I would, I'd like to -- I'd like to refer to that.

Q. But do you need -- do you need the memorandum in order to refresh your recollection about this, how this works?

A. Yes. I would like to see the memorandum --

Q. All right.

A. -- to refresh my recollection.

Q. Do we need to go off the record to do that?

A. Let's do that for just one minute.

Q. I will let you do that.

(Discussion held off the record.)

MR. COUTROULIS: We're back on the record.

BY MR. COUTROULIS:

Q. And you now have in front of you a copy of this memorandum that you indicated you needed to look at?

A. That's correct.

Q. And for the record, that's something -- a memorandum, actually, that you wrote to Attorney Ansley Watson representing Pasco dated November 11,

1994; correct?

A. Correct.

Q. And when you wrote this memorandum, you were acting as a consultant to Pasco and being compensated for your time accordingly; correct?

A. That's correct.

Q. All right.

A. One of the concepts here that could have been implemented -- and I'm explaining in this memorandum, I'm on page 7, Paragraph 5, which is referring to the same types of issues we've been talking about. It's referencing my quote on page 8 of FPC's petition, which this is a petition in this Docket No. 940771-EQ, which I don't have that in front of me, but I believe we're talking about the same kinds of language that this refers -- that particular reference refers to the rule-making proceeding and quotes my discussion on the same day here. So I believe we're talking about the same concept here.

But this -- if one went through a look at -- and this example what I did is I actually took incremental cost of this coal -- of the coal plant that is in the CFR contract and incremental fuel cost and developed an estimate of how many

hours a unit might be turned off, if you will, considered off just based on a cost comparison of incremental cost of the unit versus system as-available energy cost.

Q. Just so we're clear, the CFR contract is not the same contract form as the Dade contract, is it?

A. No, it's not.

Q. The CFR contract has an incremental -- an incremental heat rate curve, does it not?

A. Yes.

Q. The Dade contract doesn't have one at all?

A. That's true.

Q. Okay.

A. The concept here, though, that I was expressing at the rule-making hearing was to compare the cost, the incremental cost as we've discussed earlier, the incremental cost of the unit versus the system incremental cost, which would give you a judgment as to whether the unit would have been off or on. It would have given you an estimate. And in this particular case, one can estimate how many off hours might occur just based on a strict cost comparison. But that method

ignores operational considerations, and I'm quoting from page 8.

Q. Page 8 of your memo?

A. Of my memorandum here. Regarding start-up and shut-down. And, for example, if the cost dropped -- I'm not quoting at this point, but if the cost dropped for a unit, I will mean you'd shut the unit off for an hour. And there were -- you can take into account minimum down time with this method. And -- and override, if you will, when a unit might have been shut down. So this method allows one to model, in effect, on a realtime basis the implementation of contract language of a real unit.

Q. What you're talking about here is a comparison of incremental cost of the avoided unit versus incremental cost of the system?

A. That's right.

Q. And that's not what you do on a lesser-of?

A. That's not what you do on lesser-of. And the error that I made in here was acknowledging that the two concepts were the same.

Q. You said they were six of one, half a dozen of the other?

A. That's right.
Q. That means the same; right?
A. That's right.
Q. So you were wrong when you said that?
A. I was wrong on that. That's right.
Q. You didn't intentionally mislead the Commission, did you?
A. No. It was a long day, I'm sure, and I just -- and I think the decision was made at that point in time the company, and I -- Betty Easley, as I recall, was on a let's get -- we were on a time frame to get things moving along with the Commission. It was not the time to start explaining calculus to the Commission and the concepts I've discussed here. The time to do that was in post-hearing comments.
Q. But you certainly wouldn't want to say something is the same as a lesser-of, despite the fact you don't want to explain calculus to the Commission, if you were sitting there thinking to yourself it's not lesser-of, so you were confused, were you not?
A. No, I wasn't confused. I think at that point in time I made a statement that was not correct and accurate, and --

Q. Several statements that weren't correct and accurate?

A. No. The only statement I made that was not correct and accurate.

Q. Okay. So the statement -- the statement that we read before on page 449, that is correct and accurate?

A. That is correct if you consider that we're looking at the -- whether the avoided unit has a -- if you would insert in your reading of that sentence, look at the incremental cost curves every hour to see whether the avoided unit has an incremental cost that's lower.

Q. So for that statement to be accurate, I have to insert some words?

A. You'd have to insert that word in there, right.

Q. Okay. And what about for the statement it's six of one, half a dozen of the other, what would I have to do to make that accurate?

A. You'd have to take it out of there.

Q. Okay. And where you agreed with Commissioner Easley and said "right, exactly," we'd have to take those words out too; right?

A. Which -- where is that? Yeah.

Q. We'd have to change "right, exactly" on page 464 to wrong, would we not?

A. Yes, we'd have to say wrong.

Q. Okay. And when you said on page 463, one of the other places we looked at, on line 8, "I think, Gordon, maybe you were looking at it as if we actually had to dispatch it, and I was never going to do that, conceptually, I was just going to look at the cost and get to the same point," is that right or wrong?

A. That's correct.

Q. So you were never going to dispatch it, you were just going to do a cost comparison?

A. I was going to do a cost comparison, but my cost comparison would have taken into account the parameters that would result in the same -- it would have gotten to the same point of a full economic dispatch.

Q. And those parameters would include start-up and shut-down, for example?

A. They would include -- which would -- those parameters would have included those costs which would have been reflected in the minimum up and down time consideration.

Q. You didn't talk about minimum up and down

time --

A. No, we didn't talk about that.

Q. -- at this hearing, did you?

A. No.

Q. Or start-up and shut-down cost?

A. No.

Q. Or ramp rates?

A. No.

Q. Or the spot price of coal?

A. No, didn't talk about that. But that's all incorporated -- spot price of coal is incorporated in the concept of incremental cost of the unit. If you insert the word "incremental" on page 449 in front of the word "cost," the avoided unit cost, if it's the avoided unit incremental cost, then that concept of spot coal prices is incorporated in it automatically.

Q. Okay. So if we incorporated a word that wasn't there, you're saying maybe somebody would have figured out that that new word encompassed a lot of other things within it as well?

MR. WING: Object to the form.

BY MR. COUTROULIS:

Q. Right?

A. Yes.

Q. Now, you wrote this memo to Mr. Watson four and a half years after -- after this hearing before the Public Service Commission?

A. Yes.

Q. Okay. By the way, you indicated before that maybe you were tired. In fact, when you made these remarks, it was pretty early in the morning because this hearing started at 8:30, didn't it? If you look at page 442, it says "Hearing reconvened at 8:30 a.m."; right?

A. Yes, it does.

Q. And that's on page 442, and the remarks we were looking at conclude by page 464, so you're talking about 22 pages. How long would it take to --

A. It was --

Q. -- make 22 pages of remarks at a hearing like this?

A. I'm sure we were still in the, you know, in the morning session, so --

Q. Okay. Pretty early in the morning?

A. Probably.

Q. Okay.

A. But we'd been going for three days.

Q. Okay. Now, did the rule change that the

Commission adopted move away from the statewide avoided unit and go to the individual utility's avoided cost?

A. Yes.

Q. And that was something that you thought was a good idea?

A. Yes.

Q. And the rule change accomplished that?

A. That's correct.

Q. Do you recall whether the rule change also changed the as-available block size that you would use to calculate the as-available price?

A. Yes, it did.

Q. And that was something you were advocating as well, was it not?

A. Yes.

Q. You were suggesting that the as-available block size should be variable so that every cogenerator being paid the as-available rate in any given hour would be included in the block size?

A. That's correct.

Q. And actually you talk about that on page 450; right?

A. 450 of the --

Q. Of the hearing, yes, sir. Yes. Let me

direct your attention to lines 21 and 22.

A. Yes.

Q. Okay. Now, do you know if Florida Power actually does that?

A. Do you mean do they do that today?

Q. Yeah. Maybe I can sharpen my question a bit. Do you know whether or not when Florida Power, in administering these cogen contracts like the Dade contract, makes a determination that the avoided unit would be off whether it adds the amount of cogen power to the as-available block size for purposes of calculating the as-available price?

A. No, I don't know if they do or not.

Q. Do you know whether or not Florida Power pays Dade based on the same type of lesser-of approach that existed before the rule change?

A. The information that I was given with respect to the payments would indicate that that was the case. But there was not a clear statement of exactly what the payment methodology was, as I recall, by Florida Power.

Q. Do you know if we were, for example, to look at the payments being made to Dade, whether we'd find payments at certain hours at the

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 or 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.

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BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 contract negotiations, 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.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for determination that implementation of contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, F.A.C., by Florida Power Corporation.	DOCKET NO. 940771-EQ ORDER NO. PSC-95-0210-FOF-EQ ISSUED: February 15, 1995

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING MOTIONS TO DISMISS

BACKGROUND

In 1991 and 1992, Florida Power Corporation (FPC) entered into eleven negotiated cogeneration contracts with various cogenerators. Those contracts provide approximately 735 megawatts (MW) out of approximately 1,045 MWs of cogenerated capacity that FPC will have on its system by the end of 1995. The negotiated contracts in question are between FPC and the following cogenerators: Seminole Fertilizer, Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, Ridge Generating Station, Dade County, Polk Power Partners-Mulberry, Polk Power Partners-Royster, EcoPeat Avon Park, and CFR Biogen.

The contracts all contain the following provision, section 9.1.2:

> 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 on 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 Fuel 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.

This provision establishes the method to determine when cogenerators are entitled to receive firm energy payments or as-available energy payments under the contract. The Commission reviewed the 11 negotiated contracts and found them to be cost-effective for FPC's ratepayers under the criteria established in Rules 25-17.082 and 25-17.0832(2), Florida Administrative Code. [1] The information the Commission received at that time was based on simplified assumptions to arrive at the estimated energy payments.

Recently, FPC states, it reviewed the operational status of the avoided unit described in section 9.1.2 of the contracts during minimum load conditions. FPC determined that the avoided unit would be scheduled off during certain minimum load hours of the day. On July 18, 1994, FPC notified the parties to the contracts that it would begin implementing section 9.1.2, effective August 1, 1994. Prior to that time FPC had paid cogenerators firm energy prices at all hours.

Three days later, on July 21, 1994, FPC filed a petition seeking our declaratory statement that section 9.1.2 of its negotiated cogeneration contracts is consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. Rules 25-17.0832(4)(a) and (b) provide:

> (4) Avoided energy payments.
> (a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825(2)(a).

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[1] See Order No. 24099, issued February 12, 1991 in Docket No. 900917-EQ; Order No. 24734, issued July 1, 1991 in Docket No. 910401-EQ; Order No. 24923, issued August 19, 1991 in Docket No. 910549-EQ; and Order No. PSC-92-0129-FOF-EQ, issued March 31, 1992 in Docket No. 900383-EQ.

> (b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825 (2)(a).

Several cogenerators petitioned for leave to intervene and questioned whether the declaratory statement was the appropriate procedure to resolve the issue. In addition, in September 1994, OCL, Pasco, Lake, Metro-Dade County, and Auburndale filed motions to dismiss on the grounds that we do not have jurisdiction to consider FPC's petition. Also, subsequent to the filing of FPC's petition, Pasco Cogen and Lake Cogen initiated lawsuits in the state courts for breach of contract and declaratory judgment.

On November 1, 1994, FPC amended its petition and asked the Commission to determine whether its implementation of section 9.1.2 is lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code. FPC also requested a formal evidentiary proceeding. Thereafter the cogenerators filed additional motions to dismiss the amended petition.

On January 5, 1995, we heard oral argument on the motions to dismiss filed in this docket and the motions to dismiss filed in two other dockets involving cogeneration contracts. We have fully considered the merits of the motions to dismiss, and we find that they should be granted. Our reasons for this decision are set out below.

DECISION

In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), to develop ways to lessen the country's dependence on foreign oil and natural gas. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. In developing PURPA, Congress identified three major obstacles that hindered the development of a strong cogeneration market. First, monopoly electric utilities resisted purchasing power from other generation suppliers instead of building their own generating units. Second, monopoly electric utilities could refuse to sell needed backup

power to cogenerators. Third, cogenerators and small power producers could be subject to extensive, expensive federal and state regulation as electric utilities.

PURPA contains several provisions designed to overcome these obstacles. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against QF's, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(e) directs FERC to adopt rules exempting QFs from most state and federal utility regulation, and section 210(f) directs state regulatory authorities to implement FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost, " the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. s. 292.101(b)(6). FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of purchased power agreements, including price, as long as they are at or below a utilities' avoided cost. 18 C.F.R. s. 292.301.

In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities must purchase electricity offered for sale by QFs, "in accordance with applicable law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs.

The Commission's implementation of Section 366.051 is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity; by means of a standard offer contract, or an individually negotiated power purchase contract. See Rules 25-17.082(1) and 25-17.0832. The two types of contracts are treated very differently in our rules. The rules require utilities to

publish a standard offer contract in their tariffs which we must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, and insurance. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832(3)(d), Florida Administrative Code.

In contrast, our rules are more limited in their treatment of negotiated contracts. Rule 25-17.082(2), Florida Administrative Code, simply encourages utilities and QFs to negotiate contracts, and provides the criteria the Commission will consider when it determines whether the contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations", imposes an obligation to negotiate cogeneration contracts in good faith, and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. The rule makes no provision for resolution of a dispute once the contract has been executed and approved for cost recovery.

We use certain standard offer contract rules as guidelines in determining the cost-effectiveness of negotiated contracts for cost recovery purposes, but we have not required any standard provisions to be included in negotiated contracts. In Docket No. 910603-EQ, we specifically addressed the issue of standard provisions for negotiated contracts. In that docket the cogenerators urged us to prescribe certain standard provisions in negotiated contracts and prohibit other provisions, like regulatory out clauses. In Order No.25668, issued February 3, 1992, we said:

> We will not prescribe standard provisions in negotiated contracts, because negotiated contracts are just that --<u>negotiated</u> contracts. Standardized provisions are not necessary in negotiated contracts, and they can impair the negotiating process.
>
> Rule 25-17.0834, Florida Administrative Code, provides a remedy to QFs when a utility does not negotiate in good faith. If a utility insists on an unreasonable requirement, QFs are free to petition the Commission for relief. . . .

> Standardized terms in negotiated contracts could impair negotiating flexibility to the detriment of the utility and the QF. As Witness Dolan stated, "[e]ven if guidelines and standards at a given time did reflect the parties' perceptions, guidelines and standards cannot be modified easily or quickly in response to changes in conditions that bear on the risks and benefits of the transaction". Standard terms that suit the needs of some parties will not suit the needs of other QFs wishing to negotiate contracts. Even in this docket, the QFs do not agree as to which terms should be standardized. . . . It is clear from the differing opinions that negotiated contracts should not contain standard provisions.

Order No. 25668, p. 7

This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. As Auburndale's attorney pointed out in oral argument, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction.

While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts. We have interpreted the provisions of standard offer contracts on several occasions,[2] but we have not

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[2] In re: CFR Bio-Gen's Petition For Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract and request for determination of substantial interest, Order No. 24729, issued July 1, 1991,

interpreted the provisions of negotiated contracts. See Docket No. 840438-EI, In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, Order No. 14207, issued March 31, 1985, where we refused to construe a paragraph of the agreement that concerned renegotiation of contract terms. There we said that while we could interpret our cogeneration rules and decide that the new rules did not apply to preexisting contracts, matters of contractual interpretation were properly left to the civil courts. Our Conserv decision, while not controlling here, does lend support to the proposition that we have limited our involvement in negotiated contracts to the contract formation process and cost recovery review.

The weight of authority from other states that have addressed similar issues supports this position. See, eg. Afton Energy, Inc v. Idaho Power Co., 729 P.2d 400 (Id. 1986); Bates Fabrics, Inc. v. PUC, 447 A.2d 1211 (ME. 1992); Barasch v. Pennsylvania Public Utility Commission, 546 A.2d 1296, reargument denied, 550 A.2d 257 (1988); Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric & Gas Corporation Remains in Effect, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey, 1995 WL 4897 (3rd Cir. (N.J. 1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation, Case No. 92-CV-14112 (N.D.N.Y. 1993). The 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 Afton, supra., Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditioned on the Idaho Supreme Court's determination whether the Idaho commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that

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Docket No. 900383-EQ; In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc., Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

the lesser payment option would be in effect. The Commission dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In Erie Associates, supra., the New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had cancelled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

> Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.
>
> We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such questions do not involve our authority, under PURPA and PSL§66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.
>
> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source for the authority to exercise jurisdiction over such issues.

FPC has asked us to determine if its implementation of the pricing provision is lawful and consistent with Commission Rule 25-17.0832(4), Florida Administrative Code. We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to decide that its interpretation of the contract's pricing provision is correct. We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. Furthermore, we agree with the cogenerators that the pricing methodology outlined in Rule 25-17.0832(4), Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts. We have clearly said that we would not require any standard provisions, pricing or otherwise, for negotiated

contracts. Therefore, whether FPC's implementation of the pricing provision is consistent with the rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. In this case, we will defer to the courts to resolve that dispute. We note however, that courts have the discretion to refer matters to us for consideration to maintain uniformity and to bring the Commission's specialized expertise to bear upon the issues at hand.

We disagree with FPC's proposition that when the Commission issues an order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that we have continuing jurisdiction to interpret. It is true that the Supreme Court has determined that territorial agreements merge into Commission orders approving them, but territorial agreements are not valid commercial purchased power contracts. They are otherwise unlawful, anticompetitive agreements that have no validity under the law until we approve them. Furthermore, territorial agreements involve the provision of retail electric service over which we have exclusive and preemptive authority. As explained above, we do not enjoy such authority over QFs or their negotiated power purchase contracts.

Under certain circumstances we will exercise continuing regulatory supervision over power purchases made pursuant to negotiated contracts. We have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake;[3] but if it is determined that any of those facts existed when we approved a contract for cost recovery, we will review our initial decision. That power has been clearly recognized by the parties through the "regulatory out" provisions of those contracts. We do not think, however, that the regulatory out provisions of negotiated contracts somehow confer continuing responsibility or authority to resolve contract interpretation disputes. Our authority derives from the statutes. United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986). It cannot be conferred or inferred from the provisions of a contract.

For these reasons we find that the motions to dismiss should be granted. FPC's petition fails to set forth any claim that the Commission should resolve. We defer to the courts to answer the question of contract interpretation raised in this case. Thus, FPC's petition is dismissed.

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[3] See Docket No. 910603-EQ, In Re: Implementation of Rules 25-17.080 through 25-17.091, Florida Administrative Code, Order No. 25668, issued February 3, 1992.

It is therefore

ORDERED by the Florida Public Service Commission that the Motions to Dismiss filed by Lake Cogen Limited, Pasco Cogen Limited, Auburndale Power Partners, Orlando Cogen Limited, and Metro Dade County/Montenay are granted. Florida Power Corporation's Petition is dismissed. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 15th day of February, 1995.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-488-8371.

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation	DOCKET NO. 910401-EQ ORDER NO. 24734 ISSUED: 7-1-91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
GERALD L. GUNTER
MICHAEL McK. WILSON

NOTICE OF PROPOSED AGENCY ACTION

ORDER APPROVING FIRM CAPACITY AND ENERGY CONTRACTS

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 adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

On January 11, 1991, Florida Power Corporation (FPC) solicited power through a Request for Proposal (RFP) from those prospective Qualifying Facilities (QFs) that had previously indicated their interest in selling firm capacity and energy to FPC from proposed projects with an in-service date no later than December 1, 1993.

In response to its request FPC received thirteen proposals from prospective QFs. FPC retained a consultant from National Economic Research Associates, Inc. to help evaluate the proposals. Two proposals were eliminated based upon the lack of development maturity. A third project was eliminated because of the pricing risk associated with the proposed fixed capacity and energy payments. The consultant ranked the remaining ten projects in order of preference. FPC selected the following eight projects from this group:

PROJECT FUEL TYPE & LOCATION	COMMITTED CAPACITY	COMMITTED ON-PEAK CAPACITY FACTOR	CONTRACT DATE OF THE OF
Dade County Municipal Solid Waste Miami	43 MW	83%	November, 1991
El Dorado Energy Natural Gas Auburndale	103.8 MW	92%	January, 1991
Lake Cogen Limited Natural Gas Umatilla	102 MW	90%	August, 1993
Mulberry Energy Company, Inc. Orimulsion Bartow	72 MW	90%	January, 1993
Orlando Cogen Limited L.P. Natural Gas Orlando	72 MW	90%	January, 1994
Pasco Cogen Limited Natural Gas Dade City	102 MW	90%	August, 1993
Ridge Generating Station Limited Partnership Agricultural & Wood Waste Polk County	36 MW	85%	January, 1994
Royster Phosphates Waste Heat from Processing Palmetto	28 MW	85%	December, 1993

FPC'S ADDITIONAL CAPACITY NEEDS

The eight negotiated contracts total 559 MW of capacity. If a utility were to construct this amount of capacity itself, it would have to come before the Commission with a petition for a need

determination. The capacity FPC has contracted to purchase he: however, is made up of small projects with a steam capacity of le than 75 MW each, and the projects are thus not large enough to fa within the jurisdiction of the Florida Power Plant Siting Act.

The QF projects are projected to avoid the FPC's 1991 need 300 MW of coal and 150 MW of combustion turbine capacity : identified in Docket No. 910004-EU, the Annual Planning Hearir (APH). The 1991 need for 450 MW of capacity is different from th Standard Offer need identified in the same docket. FPC identifie an 80 MW combustion turbine unit with an 1997 in-service date fc its Standard Offer contract.

In the request for proposals, FPC gave the QFs a choice o: coal unit or combustion turbine unit pricing. All eight QFs chose the coal unit price. FPC maintains that the prices associated with the eight contracts are below the price of the 450 MW of coal-fired generation. FPC also maintains that the contract prices are below the price associated with the 300 MW coal and 150 MW combustion turbine. On a present worth basis, using FPC's planning assumptions, the 450 MW of coal capacity has total fuel and capacity costs very close to the 300 MW coal and 150 MW combustion turbine option. FPC's projections indicate that beginning in 2008, a coal unit's total avoided costs (capacity and fuel) fall below a combustion turbine's total avoided cost on a net present value basis. Since the terms of all eight contracts extend beyond the year 2008, FPC states that it considers the contracts to avoid part of the 450 MW of coal-fired generation.

In addition to the eight contracts, FPC signed two other contracts against their 1991 need, one with Seminole Fertilizer (47 MW) and one with Ecopeat (36.5 MW). The Seminole Fertilizer contract was approved in Order No. 24099. The Ecopeat contract is presently awaiting Commission approval.

The 559 MW of the negotiated contracts and the 83.5 MW associated with the Seminole and Ecopeat contracts exceed FPC's 450 MW need identified in their 1990 Facility Plan. FPC states that the excess capacity will cover present qualifying facility projects that may not come to fruition. For example, FPC believes that its two contracts with the Corporation for Future Resources, which total 74 MW, are doubtful and may not perform. Also, Pinellas County and General Peat have requested in-service delays of one to two years for projects totalling 196 MW. FPC states that it

negotiated contracts for the excess capacity because it is in r of capacity immediately, and would not have time to acquire more capacity to replace any contracts that might not perform. FP winter reserve margin for the 1991-1995 period ranges from 7.1% 10.8% without the eight QF contracts and 7.7% to 17.6% with the contracts.

FPC's need for additional capacity identified in its 1 Annual Planning Hearing has increased considerably in its curr 1991 expansion plan. The 1989 plan identified a need for 260 MW combustion turbine capacity with a 1995 in-service date. T current 1991 plan identifies a need of 450 MW with a 1991 i service date.

FPC maintains that the additional need is a result of thr factors:

1) Higher Demand

FPC's demand and energy is higher than projected because FPC's forecast underestimated customer growth, underestimated per capita energy usage, and overestimated per customer demand reductions from conservation and load management programs.

2) Remodeled Interface

FPC changed its method of modelling emergency assistance. The old method of modelling emergency assistance overstated the reliability of FPC's system, and thus reduced the apparent need for capacity. By more accurately modelling emergency assistance, FPC's plan showed an accelerated need for capacity in 1991.

FPC's old method of modelling emergency assistance did not consider the tie-line limitation of 3200 MW into Florida. The Company previously modeled the Peninsula and Southern as one assistance area with no transmission constraints between Southern and the Peninsula. The effect was to assume that FPC could receive assistance from Southern as long as it had capacity available, whether or not the capacity could be transmitted to FPC.

Now, FPC's model accounts for the limitation on the tie-lines by modelling the Peninsula as the assistance area and by modelling Southern as a 2,800 MW unit in the peninsula (3,200 MW interface capacity minus FPC's firm purchase of 400 MW). This new modelling technique recognizes the limitations in transmitting capacity between the Southern Company and Florida, and results in a more accurate representation of FPC's reliability.

3) Lower Assistance From Peninsular Florida Utilities

Because the peninsular Florida utilities have experienced higher than anticipated loads, they have less capacity available to sell FPC on an emergency basis.

As a result of these changes, the FPC Loss of Load Probability (LOLP) has increased, thereby accelerating FPC's need into 1991.

CONTRACT TERMS AND CONDITIONS

The negotiated contracts considered here contain several terms and conditions that are relatively unique. The unique terms and conditions are described below.

Security Guaranties

Within sixty days after the contract approval date, the QF shall post a Completion Security Guarantee of $10 per KW of Committed Capacity or $1,000,000 per 100 MW to ensure completion of the QF facility in a timely fashion. The contract agreement will terminate if the completion security guarantee is not tendered in a timely fashion. FPC will refund to the QF any cash completion security guarantee if the facility achieves commercial in-service at or prior to the contract in-service date.

The negotiated contracts contain an Operational Security Guarantee of $20 per KW of committed capacity or $2,000,000 per 100 MW to ensure timely performance by the QF of its obligations under the agreement. The operational security guarantee must be cash or suitable letter of credit, and terminates with the term of the agreement.

Changes in Committed Capacity

For the period ending one year immediately after the cont: in-service date, the QF may, on one occasion only, increase decrease the committed capacity by no more than 10%. After the year period, and throughout the term of the agreement, the QF r decrease its committed capacity by up to 20%. The QF will charged a penalty if it provides less than three years notice a decrease in capacity occurring one year after the in-serv date. The capacity payment will be prorated to the new capac amount.

Capacity and Energy Payments

The negotiated contracts allow the QFs to receive a month capacity payment based on the value of the committed capaci factor during the month. The respective payment streams for t QFs are based on their committed on-peak capacity factors (83 93%). See appendix 2. FPC's avoided coal unit used for prici these contracts contains a 83% on-peak capacity factor. T payment stream of the contracts with capacity factors above 83% a increased by their committed capacity divided by 83% (ex. 90/83 1.084%) to reflect the additional value of higher availability a reliability to FPC. The contracts also include a capacit performance adjustment which will decrease the capacity payment i the event the monthly on-peak capacity factor is below th respective contractual minimum amount but greater than or equal t 50%. No capacity payment will be made if the on-peak capacit factor falls below 50%.

Beginning with the contract in-service date, the QF wil receive electric energy payments based upon the firm energy cost calculated on an hour-by-hour basis as follows: (i) the product o the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel 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. There is also an hourly performance adjustment to the energy payment which provides an incentive to the QF to operate in a manner similar to the operation of the avoided unit.

Events of Default

The negotiated contracts permit the QF to delay commercial operation by up to 90 days beyond the Contract In-Service Date with the payment of $0.15 per kW or $15,000 per 100 MW per day of delay. If the Operational Security Guarantee is not tendered on or before the applicable due date the QF is in default.

If there are delays in commercial in-service, the Negotiated Contract requires renegotiations to begin at least thirty days prior to termination if the QF has commenced construction and is not in arrears for monies owed to FPC.

Interconnection Formats

Three interconnection formats were used as the basis for all eight negotiated contracts. All eight QFs are located south of FPC's Central Florida Substation, therefore FPC did not have to acquire additional interface capacity. The contract format used for each contract is summarized below:

1. Interconnected and Non-Interconnected:

   - El Dorado Energy
   - Ridge Generating Station Limited Partnership

   These two contracts use the base contract format which permits the QF to either be directly interconnected to the company or to be interconnected to a transmission service utility which provides wheeling services. The two QFs who have selected this format have facilities which will be located close to FPC's system but they may elect to wheel.

2. Interconnected

   - Lake Cogen Limited
   - Mulberry Energy Company, Inc.
   - Orlando Cogen Limited
   - Pasco Cogen Limited

   This contract version is for the QFs directly interconnected to FPC.

3. Non-Interconnected Version

- Dade County
- Royster Phosphates, Inc.

This contract version is for the QFs that will wheel their power through a transmission service utility.

APPROVAL OF THE CONTRACTS

Under the provisions of Sections 25-17.082 NS 25-17.0832(2), Florida Administrative Code, we grant Florida Power Corporation's petition for approval of the eight negotiated QF contracts discussed above. Section 25-17.082, Florida Administrative Code requires electric utilities to purchase electricity produced and sold by qualifying facilities at rates which have been agreed upon by the utility and qualifying facility, or at the utility's published tariff rate. Section 25-17.0832(2), Florida Administrative Code states that in reviewing a negotiated firm capacity and energy contract for purposes of cost recovery, the Commission shall consider the following factors:

a. Whether the additional firm capacity and energy is needed by the purchasing utility and by Florida utilities from a statewide perspective;

b. Whether the present worth of the utility's payments for firm capacity and energy to the QF over the life of the contract is projected to be no greater than the present worth of the year-by-year deferral of the construction and operation of a generating facility by the purchasing utility over the life of the contract, or the present worth of other capacity and energy costs that the contract is designed to avoid;

c. Whether, to the extent that annual firm capacity and energy payments made to the QF in any year exceed that year's annual value of deferring the construction and operation of a generating facility, or other capacity and energy related costs, the contract contains provisions to ensure repayment of the amounts that exceed that year's value of deferring the capacity if the QF fails to deliver firm capacity and energy under the terms of the contract; and

d. Whether, considering the technical reliability, viability and financial stability of the QF, the contract contains provisions to protect the purchasing utility's ratepayers if the QF fails to deliver firm capacity and energy under the terms of the contract.

Need For Power

It is with certain reservations that we approve contracts amounting to 642.5 MW (including Seminole and Ecopeat), when FPC has only identified a need for 450 MW. We do not believe, as a general rule, that utilities should sign up more capacity than they need. There are, however, certain circumstances which support such an action in this case. FPC's need is immediate and they cannot risk obtaining less than 450 MW because of possible QF defaults or delays. Also, FPC's need is probably greater than the 450 MW they identified in their 1990 plan because that plan did not anticipate recently requested delays in existing QF projects, or the anticipated one-year delay in FPC's 500 kV transmission line.

In the event that all QF projects do come on-line as agreed, and FPC has excess capacity, FPC can reduce its purchase from Southern Company by 200 MW in 1994 and delay or cancel the construction of 1993 combustion turbines to mitigate any harmful effect to its ratepayers.

Furthermore, FPC needs to purchase capacity and energy from the QF's to meet reliability and reserve margin requirements. The purchases will contribute to maintaining a loss of load probability of less than 0.1 days per year. The capacity provided by the QF's will improve the loss of load probability for the state, and thus contribute to the capacity needs of the state.

Cost-Effectiveness

The analysis provided by FPC with its petition indicated that the present value of its payments to each of the QFs for firm capacity and energy will be no greater than the present worth of the value of a year-by-year deferral of FPC's avoided costs. The analysis showed a present worth savings of $42,516,772 compared to FPC's full avoided costs for the eight negotiated contracts. FPC's avoided costs are derived from its 1991 need for 450 MW of pulverized coal and combustion turbine capacity.

At the time the petition for approval was filed, FPC the process of updating the K factor associated with its a cost. Since that time FPC has completed its update of the K and recalculated its avoided costs accordingly. According t revised figures submitted by FPC (Appendix 1), the present savings of the ei tracts have increased to $44,273,6C Our approval of t. tracts is still appropriate, sinc present worth savings, compared to FPC's full avoided costs increased.

Security for Early Payments

None of the eight QF's will be paid early capacity paym and therefore, there is no need to establish a capacity c account to ensure repayment of capacity payments exceeding year's value of deferral.

Security Against Default

The contract contains security to protect FPC's ratepayer the event a QF fails to deliver firm capacity and energy required in the contract. The contract contains seve performance milestone dates which, if not achieved, would per FPC to terminate the contract.

CONCLUSION

We find that the negotiated cogeneration contracts between and Dade County, El Dorado Energy, Lake Cogen Ltd., Mulberry Ene Co., Orlando Cogen Ltd., Pasco Cogen Ltd., Ridge Generation S Ltd., and Royster Phosphates are viable generation alternati because:

1. The capacity nd energy generated by the facilities needed by nd Florida's utilities;

2. The contracts appear to be cost-effective to FPC ratepayers;

3. FPC's ratepayers are reasonably protected from default by the QFs; and

4. The contracts meet all the requirements and rules governing qualifying facilities.

It is therefore

ORDERED by the Florida Public Service Commission that the contracts are approved for the reasons set forth in the body of this order. It is further

ORDERED that this Order shall become final unless an appropriate petition for formal proceeding is timely filed herein. It is further

ORDERED that this Order shall become final and this docket shall be closed unless an appropriate petition for a formal proceeding is received by the Division of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on the date indicated in the Notice of Further Proceedings or Judicial Review.

By ORDER of the Florida Public Service Commission, this 1st day of July, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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 at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on 7-22-91.

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 adversely 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 sewer 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.

Non-Interconnected

NEGOTIATED CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY

between

DADE COUNTY

and

FLORIDA POWER CORPORATION

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NEGOTIATED CONTRACT FOR THE PURCHASE OF FIRM CAPACITY AND ENERGY FROM A QUALIFYING FACILITY

This Agreement ("Agreement") is made and entered by and between Dade County, a political subdivision of the State of Florida, having its principal place of business at Miami, Florida (hereinafter referred to as the "QF"), and Florida Power Corporation, a private utility corporation organized under the laws of the State of Florida, having its principal place of business at St. Petersburg, Florida (hereinafter referred to as the "Company"). The QF and the Company may be hereinafter referred to individually as a "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, the QF desires to sell, and the Company desires to purchase, electricity to be generated by the Facility and made available for sale to the Company, consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date; and

WHEREAS, the QF will engage in interconnected operation of the QF's generating facility or with Florida Power & Light Company's system (hereinafter referred as the "Transmission Service Utility") which is directly interconnected at one or more points with the Company.

NOW, THEREFORE, for mutual consideration, the Parties covenant and agree as follows:

ARTICLE I: DEFINITIONS

As used in this Agreement and in the Appendices hereto, the following capitalized terms shall have the following meanings:

1.1 Appendices means the schedules, exhibits and attachments which are appended hereto and are hereby incorporated by reference and made a part of this Agreement.

1.1.1 Appendix A sets forth the Company's Interconnection Scheduling and Cost Procedures.

1.1.2 Appendix B is reserved.

1.1.3 Appendix C sets forth the Company's Rates for Purchase of Firm Capacity and Energy from a Qualifying Facility.

1.1.4 Appendix D sets forth the Company's Transmission Service Standards.

1.1.5 Appendix E sets forth FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date.

1.2 Accelerated Capacity Payment means payments based upon the accelerated payment rates in Appendix C.

1.3 As-Available Energy Cost means the energy rate calculated in accordance with FPSC Rule 25-17.0825 as such rule may be amended from time to time.

1.4 Avoided Unit Fuel Reference Plant means that Company unit(s) whose delivered price of fuel shall be used as a proxy for the fuel associated with the avoided unit type selected in section 8.2.1 hereof as such unit(s) are defined in Appendix C.

1.5 Avoided Unit Heat Rate means the average annual heat rate associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.6 Avoided Unit Variable O & M means the variable operation and maintenance expense associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.7 BTU means British thermal unit.

1.8 Capacity Account means that account which complies with the procedure in section 8.5 hereof.

1.9 Capacity Discount Factor means the value specified pursuant to section 8.4 hereof.

1.10 Capacity Payment Adjustment means the value calculated pursuant to Appendix C.

1.11 Commercial In-Service Status means (i) that the Facility is in compliance with all applicable Facility permits; (ii) that the Facility has maintained an hourly KW output, as metered at the Point of Delivery, equal to or greater than the Committed Capacity for a consecutive twenty-four (24) hour period or during the on-peak hours specified in Appendix C of two consecutive days; and (iii) that such twenty-four (24) hour period is reasonably reflective of the Facility's day to day operations.

1.12 Committed Capacity means the KW capacity, as defined in Article VI hereof, which the QF has agreed to make available on a firm basis during the On-Peak Hours at the Point of Delivery.

1.13 Committed On-Peak Capacity Factor means the On-Peak Capacity Factor, as defined in Article VII hereof, which the QF has agreed to make available on a firm basis at the Point of Delivery.

1.14 Company's Interconnection Facilities means all equipment which is constructed, owned, operated and maintained by the Company located on the Company's side of the Point of Delivery, including without limitation, equipment for connection, switching, transmission, distribution, protective relaying and safety provisions which, in the Company's reasonable judgment, is required to be installed for the delivery and measurement of electric energy into the Company's system on behalf of the QF, including all metering and telemetering equipment installed for the measurement of such energy regardless of its location in relation to the Point of Delivery.

1.15 Completion Security Guaranty means the deposits or other assurances as specified in section 13.1 hereof.

1.16 Contract Approval Date means the date of issuance of a final FPSC order approving this Agreement, without change, finding that it is prudent and cost recoverable by the Company through the FPSC's periodic review of fuel and purchased power costs, which order shall be considered final when all opportunities for requesting a hearing, requesting reconsideration, requesting clarification and filing for judicial review have expired or are barred by law.

1.17 Contract In-Service Date means the date, as specified in Article IV hereof, by which the QF has agreed to achieve Commercial In-Service Status.

1.18 Construction Commencement Date means the date on which work on the concrete foundation for the turbine generator begins and substantial construction activity at the Facility site thereafter continues.

1.19 Control Area means a utility system capable of regulating its generation in order to maintain its interchange schedule with other utility systems and contribute its frequency bias obligation to the interconnection.

1.20 Execution Date means the latter of the date on which the Company or the QF executes this Agreement.

1.21 Facility means all equipment, as described in this Agreement, used to produce electric energy and, for a cogeneration facility, used to produce useful thermal energy through the sequential use of energy and all equipment that is owned or controlled by the QF required for parallel operation with the interconnected utility.

1.22 FERC means the Federal Energy Regulatory Commission and any successor.

1.23 Firm Energy Cost means the energy rate calculated in accordance with section 9.1.2 hereof.

1.24 Florida-Southern Interface means the points of interconnection between the electric Control Areas of (1) Florida Power & Light Company, Florida Power Corporation, Jacksonville Electric Authority, and the City of Tallahassee and (2) Southern Company.

1.25 Force Majeure Event means an event or occurrence that is not reasonably foreseeable by a Party, is beyond its reasonable control, and is not caused by its negligence or lack of due diligence, including, but not limited to, natural disasters, fire, lightning, wind, perils of the sea, flood, explosions, acts of God or the public enemy, strikes, lockouts, vandalism, blockages, insurrections, riots, war, sabotage, action of a court or public authority, or accidents to or failure of equipment or machinery, including equipment of the Transmission Service Utility.

1.26 FPSC means the Florida Public Service Commission and any successor.

1.27 Fuel Multiplier means that value associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.28 Import Capability means the capability to import power at the Florida-Southern Interface, giving consideration to the various limitations imposed upon those facilities by the electric systems to which they are directly or indirectly connected.

1.29 Interconnection Costs means the actual costs incurred by the Company for the Company's Interconnection Facilities, including, without limitation, the cost of equipment, engineering, communication and administrative activities.

1.30 Interconnection Costs Offset means the estimated costs included in the Interconnection Costs that the Company would have incurred if it were not purchasing Committed Capacity and electric energy but instead itself generated or purchased from other sources an equivalent amount of Committed Capacity and electric energy and provided normal service to the Facility as if it were a non-generating customer.

1.31 KW means one (1) kilowatt of electric capacity.

1.32 KWH means one (1) kilowatthour of electric energy.

1.33 Minimum On-Peak Capacity Factor means that value which is associated with the unit type selected in section 8.2.1 hereof as it is defined in Appendix C.

1.34 MWH means one (1) megawatthour of electric energy.

1.35 On-Peak Hours means the lesser of those daily time periods specified in Appendix C or the hours that the Company would have operated a unit with the characteristics defined in section 9.1.2 (i) hereof.

1.36 On-Peak Capacity Factor means the ratio calculated pursuant to section 8.3 hereof.

1.37 Operational Event of Default means an event or circumstance defined as such in Article XV hereof.

1.38 Operational Security Guaranty means the deposits or other assurances as specified in section 13.3 hereof.

1.39 Performance Adjustment means the value calculated pursuant to Appendix C.

1.40 Point of Delivery means the point(s) where electric energy delivered to the Company pursuant to this Agreement enters the Company's system.

1.41 Point of Metering means the point(s) where electric energy made available for delivery to the Company, subject to adjustment for losses, is measured.

1.42 Point of Ownership means the interconnection point(s) between the Facility and the interconnected utility.

1.43 Pre-Operational Event of Default means an event or circumstance defined as such in Article XV hereof.

1.44 Qualifying Small Power Production Facility means a facility that meets the requirements defined in section 3(17)(C) of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978, and that is certified as such by the FERC pursuant to applicable FERC regulations.

1.45 Term means the duration of this Agreement as specified in Article IV hereof.

1.46 Transmission Service Agreement means that agreement between the QF and the Transmission Service Utility which meets the requirements of Appendix D.

ARTICLE II: TRANSMISSION LIMITATIONS

2.1 For a QF with a Facility located north of the latitude of the Company's Central Florida Substation, the Company will use its best efforts to obtain an amount of Import Capability equal to the diminution of Import Capability caused by the Facility during the Term of this Agreement and the QF agrees to reimburse the Company for the costs of such Import Capability.

2.2 The Company will notify the QF in writing of the availability and cost of the required Import Capability within sixty (60) days after the Execution Date. Such reimbursement shall not be considered as a reduction in the payments made by the Company to the QF for capacity and energy under this Agreement. The QF may terminate this Agreement after receiving such notification without penalty prior to the date that the Completion Security Guaranty is due pursuant to section 13.1 hereof.

ARTICLE III: FACILITY

3.1 The Facility shall be located in Section 17, Township 53S, Range 40E. The Facility shall meet all other specifications identified in the Appendices hereto in all material respects and no change in the designated location of the Facility shall be made by the QF. The Facility shall be designed and constructed by the QF or its agents at the QF's sole expense.

3.2 Throughout the Term of this Agreement, the Facility shall be a Qualifying Small Power Production Facility.

3.3 Except for Force Majeure Events declared by the Facility's fuel supplier(s) or fuel transporter(s) which comply with the definition of Force Majeure Events as specified in this Agreement and occur after the Contract In-Service Date, the Facility's ability to deliver its Committed Capacity shall not be encumbered by interruptions in its fuel supply.

3.4 The QF shall either (i) arrange for and maintain standby electrical service under a firm tariff; or (ii) maintain the ability to restart and/or continue operations during interruptions of electric service; or (iii) maintain multiple independent sources of generation.

3.5 From the Execution Date through the Contract In-Service Date, the QF shall provide the Company with progress reports on the first day of January, April, July and October which describe the current status of Facility development in such detail as the Company may reasonably require.

ARTICLE IV: TERM AND MILESTONES

4.1 The Term of this Agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of November, 2013, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this Agreement. Upon termination or expiration of this Agreement, the Parties shall be relieved of their obligations under this Agreement except for the obligation to pay each other all monies under this Agreement, which obligation shall survive termination or expiration. Each Party shall use its best efforts to enforce the validity of this Agreement and to expedite FPSC action on the Company's request for FPSC approval of this Agreement. The Company shall submit this Agreement and related documentation to the FPSC for approval within ten (10) days of the Execution Date. This Agreement shall automatically terminate without any penalties, obligations, or liabilities on either Party on May 31, 1991 unless the Board of County Commissioners of Dade County, Florida approves and ratifies this Agreement by Resolution.

4.2 The Parties agree that time is of the essence and that: (i) the QF shall execute the Transmission Service Agreement which shall be approved or accepted for filing by the FERC on or before the first day of September, 1991, (ii) the Construction Commencement Date shall occur on or before the first day of not applicable; and (iii) the Facility shall achieve Commercial In-Service Status on or before the first day of November, 1991, which date shall constitute the Contract In-Service Date. These three dates shall not be modified except as provided in section 4.2.1, 4.2.2, 4.2.3 and 4.2.5 hereof.

4.2.1 Upon written request by the QF, these three dates each may be extended on a day-for-day basis for each day that the Contract Approval Date exceeds one hundred twenty (120) days after the date the Company submits this Agreement and related documentation to the FPSC for approval; provided, however, that the QF's notice shall specifically identify the date and duration for which extension is being

requested; and provided, further, that the maximum extension of such date shall in no event exceed a total of one hundred and eighty (180) days. Such delay shall not be considered a Force Majeure Event for purposes of this Agreement.

4.2.2 Upon written request by the QF not more than sixty (60) days after the declaration of a Force Majeure Event by the QF, which event contributes proximately and materially to a delay in the QF's schedule, these three dates each may be extended on a day-for-day basis for each day of delay so caused by the Force Majeure Event; provided, however, that the QF shall specifically identify: (i) each date for which extension is being requested; and (ii) the expected duration of the Force Majeure Event; and provided further, that the maximum extension of any of these three dates shall in no event exceed a total of one hundred and eighty (180) days, irrespective of the nature or number of Force Majeure Events declared by the QF.

4.2.3 The Contract In-Service Date shall be extended on a day-for-day basis for any delays directly attributable to the Company's failure to complete its obligations hereunder.

4.2.4 If the Contract In-Service Date is extended pursuant to sections 4.2.1, 4.2.2 or 4.2.3 hereof, then the Term of the Agreement may be extended for the same number of days upon separate written request by the QF not more than thirty (30) days after the Contract In-Service Date.

4.2.5 The QF shall have the one-time option of accelerating the Contract In-Service Date by up to six (6) months upon written notice to the Company not less than thirty (30) days before the accelerated Contract In-Service Date; provided, however, that (i) the QF shall

be in compliance with all applicable requirements of this Agreement as of such earlier date; and (ii) the Company's Interconnection Facilities can reasonably be expected to be operational as of such earlier date.

ARTICLE V: QF OPERATING RESPONSIBILITIES

5.1 During the Term of this Agreement, the QF shall:

5.1.1 Have the sole responsibility to, and shall at its sole expense, operate and maintain the Facility in accordance with all requirements set forth in this Agreement.

5.1.2 Provide the Company prior to October 1 of each calendar year the estimated amounts of electricity to be generated by the Facility and delivered to the Company for each month of the following calendar year, including the estimated time, duration and magnitude of any planned outages or reductions in capacity.

5.1.3 Promptly notify the Company of any changes to the yearly generation and maintenance schedules.

5.1.4 Provide the Company by telephone or facsimile prior to 9:00 A.M. of each day an estimate of the hourly amounts of electric energy to be delivered at the Point of Delivery for the next succeeding day.

5.1.5 Coordinate scheduled outages and maintenance of the Facility with the Company. The QF agrees to recognize and accommodate the Company's system demands and obligations by exercising

reasonable efforts to schedule outages and maintenance during such times as are designated by the Company.

5.1.6 Comply with reasonable requirements of the Company regarding day-to-day or hour-by-hour communications with the Company or with the Transmission Service Utility relative to the performance of this Agreement.

5.2 The estimates and schedules provided by the QF under this Article V shall be prepared in good faith, based on conditions known or anticipated at the time such estimates and schedules are made, and shall not be binding upon either Party; provided, however, that the QF shall in no event be relieved of its obligation to deliver Committed Capacity under the terms and conditions of this Agreement.

ARTICLE VI: PURCHASE AND SALE OF CAPACITY AND ENERGY

6.1 Commencing on the Contract In-Service Date, the QF shall commit, sell and arrange for delivery of the Committed Capacity to the Company and the Company agrees to purchase, accept and pay for the Committed Capacity made available to the Company at the Point of Delivery in accordance with the terms and conditions of this Agreement. The QF also shall sell and deliver or arrange for the delivery of the electric energy to the Company and the Company agrees to purchase, accept, and pay for such electric energy as is made available for sale to and received by the Company at the Point of Delivery.

6.2 The Committed Capacity and electric energy made available at the Point of Delivery to the Company shall be (X) net of any electric energy used on the QF's side of the Point of Ownership or ( ) simultaneous with any purchases from the interconnected utility. This selection in billing methodology shall not be changed.

6.3 If the Company is unable to receive part or all of the Committed Capacity which the QF has made available for sale to the Company at the Point of Delivery by reason of (i) a Force Majeure Event; or (ii) pursuant to FPSC Rule 25-17.086, notice and procedural requirements of Article XXI shall apply and the Company will nevertheless be obligated to make capacity payments which the QF would be otherwise qualified to receive, and to pay for energy actually received, if any. The Company shall not be obligated to pay for energy which the QF would have delivered but for such occurrences and QF shall be entitled to sell or otherwise dispose of such energy in any lawful manner; provided, however, such entitlement to sell shall not be construed to require the Company to transmit such energy to another entity.

6.4 The QF shall not commence initial deliveries of energy to the Point of Delivery without the prior written consent of the Company, which consent shall not be unreasonably withheld. The QF shall provide the Company not less than thirty (30) days written notice before any testing to establish the Facility's Commercial In-Service Status. Representatives of the Company shall have the right to be present during any such testing.

ARTICLE VII: CAPACITY COMMITMENT

7.1 The Committed Capacity shall be 43,000 KW, unless modified in accordance with this Article VII. The Committed Capacity shall be made available at the Point of Delivery from the Contract In-Service Date through the remaining Term of this Agreement at a Committed On-Peak Capacity Factor of 83%.

7.2 For the period ending one (1) year immediately after the Contract In-Service Date, the QF may, on one occasion only, increase or decrease the initial Committed Capacity by no more than ten percent (10%) of the Committed Capacity specified in section 7.1 hereof as of the Execution Date upon written notice to the Company before such change is to be effective.

7.3 After the one (1) year period specified in section 7.2, and except as provided in section 7.4, the QF may decrease its Committed Capacity over the Term of this Agreement by amounts not to exceed in the aggregate more than twenty percent (20%) of the initial Committed Capacity specified in section 7.1 hereof as of the Execution Date. Notwithstanding any other provision of this Agreement, if less than three (3) years prior written notice is provided for any such decrease, the QF shall be subject to an adjustment to the otherwise applicable payments (except as provided in section 7.4) which shall begin when the Committed Capacity is decreased and which shall end three (3) years after notice of such decrease is provided. For each month, this adjustment shall be equal to the lesser of (i) the estimated increased costs incurred by the Company to generate or purchase an equivalent amount of replacement capacity and energy and (ii) the reduction in Committed Capacity times the applicable Normal Capacity Payment rate from Appendix C. Such adjustment shall assume that the difference between the original Committed Capacity and the redesignated Committed Capacity, during all hours of the replacement period, would operate at the On-Peak Capacity Factor at the time notice is provided.

7.4 During a Force Majeure Event declared by the QF, the QF may temporarily redesignate the Committed Capacity for up to twenty-four (24) consecutive months; provided, however, that no more than one such temporary redesignation may be made within any twenty-four (24) month period unless otherwise agreed by the Company in writing. Within three (3) months after such Force Majeure Event is cured, the QF may, on one occasion, without penalty, designate a new Committed Capacity to apply for the remaining Term; provided, however, that such new Committed Capacity shall be subject to the aggregate capacity reduction limit specified in section 7.3. Any temporary or final redesignation of the Committed Capacity pursuant to this section 7.4 must, in the Company's judgment, be directly attributable to the Force Majeure Event and of a magnitude commensurate with the scope of the Force Majeure Event. Redesignations of Committed Capacity pursuant to this section 7.4 shall not be subject to the payment adjustment provisions of section 7.3.

7.5 A redesignated Committed Capacity pursuant to this Article VII shall be stated to the nearest whole KW and shall be effective only on the commencement of a full billing period.

7.6 The Company shall have the right to require that the QF, not more than once in any twelve (12) month period, re-demonstrate the Commercial In-Service Status of the Facility within sixty (60) days of the demand; provided, however, that such demand shall be coordinated with the QF so that the sixty (60) day period for re-demonstration avoids, if practical, previously notified periods of planned outages and reduction in capacity pursuant to Article V.

ARTICLE VIII: CAPACITY PAYMENTS

8.1 Capacity payments shall not commence before the Contract Approval Date and before the Contract In-Service Date and (i) until the QF has achieved Commercial In-Service Status and (ii) until the QF has posted the Operational Security Guaranty pursuant to section 13.2 hereof.

8.2 Capacity payments shall be based upon the following selections as described in Appendix C.

8.2.1 Unit type:

( ) Combustion turbine, Schedule 2

(X) Pulverized coal, Schedule 4, Option A

8.2.2 Payment options:

(X) Normal Capacity Payments

( ) Accelerated Capacity Payments

8.3 At the end of each billing month, beginning with the first full month following the Contract In-Service Date, the Company will calculate the On-Peak Capacity Factor on a rolling average basis for the most recent twelve (12) month period, including such month, or for the actual number of full months since the Contract In-Service Date if less than twelve (12) months, based on the On-Peak Hours defined in Appendix C. The On-Peak Capacity Factor shall be calculated as the electric energy actually received by the Company at the Point of Delivery during the On-Peak Hours of the applicable period divided by the product of the Committed Capacity and the number of On-Peak Hours during the applicable period. In calculating the On-Peak Capacity Factor, the Company shall exclude hours and electric energy delivered by the QF during periods in which: (i) the Company does not or cannot perform its obligations to receive all the electric energy which the QF has made available at the Point of Delivery; or (ii) the QF's payments for electric energy are being calculated pursuant to section 9.1.1 hereof.

8.4 The monthly capacity payment shall equal the product of (i) the applicable capacity payment rate; (ii) the Committed Capacity; (iii) the ratio of the Committed On-Peak Capacity Factor to the Minimum On-Peak Capacity Factor; (iv) the Capacity Payment Adjustment; (v) the Capacity Discount Factor of 1.00 and (vi) the ratio of the total number of hours in the billing period less the number of hours during which the QF is being paid for energy pursuant to section 9.1.1 to the total number of hours in the billing period.

8.5 The Parties recognize that Accelerated Capacity Payments are in the nature of "early payment" for a future capacity benefit to the Company when such payments exceed Normal Capacity Payments without consideration of the Capacity Discount Factor. To ensure that the Company will receive a capacity benefit for such difference in capacity payments which have been made, or alternatively, that the QF will repay the amount of such difference in payments received to the extent the capacity benefit has not been conferred, the following provisions will apply:

8.5.1 When the QF is first entitled to a capacity payment, the Company shall establish a Capacity Account. Each month the Capacity Account shall be credited in the amount of the Company's Accelerate Capacity Payments and shall be debited in the amount which the Company would have paid for capacity in the month pursuant to the Normal Capacity Payment without consideration of the Capacity Discount Factor.

8.5.2 In addition to the amounts pursuant to section 8.5.1 hereof, each month the Capacity Account shall be credited in the amount of any increased income taxes owed by the Company resulting from Accelerated Capacity Payments and shall be debited in the amount of any decreased income taxes owned by the Company resulting from Accelerated Capacity Payments. If such tax impacts are recovered by the Company, the Company will adjust the Capacity Account accordingly.

8.5.3 The monthly balance in the Capacity Account shall accrue interest at the annual rate of 9.96%, or 0.79436% per month.

8.5.4 The QF shall owe the Company and be liable for the credit balance in the Capacity Account. The Company agrees to notify QF monthly as to the current Capacity Account balance. Prior to receipt of Accelerated Capacity Payments, the QF shall execute a promise to repay any credit balance in the Capacity Account; provided that the entity issuing such promise, the form of the promise, and the means of securing payment all shall be acceptable to the Company in its sole discretion.

8.5.5 The QF's obligation to pay the credit balance in the Capacity Account shall survive termination or expiration of this Agreement.

ARTICLE IX: ENERGY PAYMENTS

9.1 For that electric energy received by the Company at the Point of Delivery each month, the Company will pay the QF an amount computed as follows:

9.1.1 Prior to the Contract In-Service Date and for the duration of an Event of Default or a Force Majeure Event declared by the QF prior to a permitted redesignation of the Committed Capacity by the QF, the QF will receive electric energy payments based on the Company's As-Available Energy Cost as calculated hourly in accordance with FPSC Rule 25-17.0825; provided, however, that the calculation shall be based on such rule as it may be amended from time to time.

9.1.2 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 Fuel 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.

9.1.3 Energy payments shall be equal to the sum, over all hours of the month, of the product of each hour's energy cost as determined pursuant to section 9.1.1 hereof or section 9.1.2 hereof, whichever is applicable, and the energy received by the Company at the Point of Delivery, plus the Performance Adjustment.

9.2 Energy payments pursuant to sections 9.1.1 and 9.1.2 hereof shall be subject to the Delivery Voltage Adjustment pursuant to Appendix C.

ARTICLE X: CHARGES TO THE QF

10.1 The Company shall bill and the QF shall pay all charges applicable under this Agreement.

10.2 To the extent not otherwise included in the charges under section 10.1 hereof, the Company shall bill and the QF shall pay a monthly charge equal to any taxes, assessments or other impositions for which the Company may be liable as a result of its installation of facilities in connection with this Agreement, its purchases of Committed Capacity and electric energy from the QF or any other activity undertaken pursuant to this Agreement. Such amounts billed shall not include any amounts (i) for which the Company would have been liable had it generated or purchased from other sources an equivalent amount of Committed Capacity and electric energy; or (ii) which are recovered by the Company; or (iii) which are accrued in the Capacity Account pursuant to section 8.5.2 hereof.

ARTICLE XI: METERING

11.1 All electric energy delivered to the Company shall be capable of being measured hourly at the Point of Metering. All electric energy delivered to the Company shall be adjusted for losses from the Point of Metering to the Point of Delivery. Metering equipment required to measure electric energy delivered to the Company and the telemetering equipment required to transmit such measurements to a location specified by the Company shall be installed, calibrated and maintained by the Transmission Service Utility.

11.2 All meter testing and related billing corrections, for electricity sold and purchased by the Company, shall conform to the metering and billing guidelines contained in FPSC Rules 25-6.052 through 25-6.060 and FPSC Rule 25-6.103, as they may be amended from time to time, notwithstanding that such guidelines apply to the utility as the seller of electricity.

11.3 The QF shall have the right to install, at its own expense, metering equipment capable of measuring energy on an hourly basis at the Point of Metering. At the request of the QF, the Company shall provide the QF hourly energy cost data from the Company's system; provided that the QF agrees to reimburse the Company for its cost to provide such data.

ARTICLE XII: PAYMENT PROCEDURE

12.1 Bills shall be issued and payments shall be made monthly to the QF and by the QF in accordance with the following procedures:

12.1.1 The capacity payment, if any, calculated for a given month pursuant to Article VIII hereof shall be added to the electric energy payment, if any, calculated for such month pursuant to Article IX hereof, and the total shall be reduced by the amount of any payment adjustments pursuant to section 7.3 hereof. The resulting amount, if any, shall be tendered, with cost tabulations showing the basis for payment, by the Company to the QF as a single payment. Such payments to the QF shall be due and payable twenty (20) business days following the date the meters are read.

12.1.2 When any amount is owing from the QF, the Company shall issue a monthly bill to the QF with cost tabulations showing the basis for the charges. All amounts owing to the Company from the QF shall be due and payable twenty (20) business days after the date of the Company's billing statement. Amounts owing to the Company for retail electric service shall be payable in accordance with the provisions of the applicable rate schedule.

12.1.3 At the option of the QF, the Company will provide a net payment or net bill, whichever is applicable, that consolidates amounts owing to the QF with amounts owing to the Company.

12.1.4 Except for charges for retail electric service, any amount due and payable from either Party to the other pursuant to this Agreement that is not received by the due date shall accrue interest from the due date at the rate specified in section 13.3 hereof.

ARTICLE XIII: SECURITY GUARANTIES

13.1 Within sixty (60) days after the Contract Approval Date, the QF shall post an Completion Security Guaranty with the Company equal to $10.00 per KW of Committed Capacity to ensure completion of the Facility in a timely fashion as contemplated by this Agreement. This Agreement shall terminate if the Completion Security Guaranty is not tendered by the QF on or before the applicable due date specified herein. The QF shall either: (i) pay the Company cash in the form of a certified check in an amount equal to the Completion Security Guaranty; or (ii) provide the Company an unconditional and irrevocable direct pay letter of credit or other promise to pay such amount upon failure of the QF to perform its obligations under this Agreement; provided that the entity issuing such promise, the form of the promise, and the means of securing payment all shall be acceptable to the Company in its sole discretion.

13.2 From the date on which the QF first becomes entitled to capacity payments under this Agreement through the remaining Term, the QF shall post an Operational Security Guaranty with the Company equal to $20.00 per KW of Committed Capacity to ensure timely performance by the QF of its obligations under this Agreement. The QF shall either: (i) pay the Company cash in the form of a certified check in an amount equal to the Operational Security Guaranty; or (ii) provide the Company an unconditional and irrevocable direct pay letter of credit or other promise to pay such amount upon failure of the QF to perform its obligations under this Agreement; provided that the entity issuing such promise, the form of the promise, and the means of securing payment all shall be acceptable to the Company in its sole discretion. Furthermore, if

option (ii) is selected, the Operational Security Guaranty shall be increased monthly as if it had accrued interest pursuant to section 13.3 hereof.

13.3 All Completion and Operational Security Guaranties paid in cash to the Company shall accrue interest at a rate equal to the thirty (30) day highest grade commercial paper rate as published in the Wall Street Journal on the first business day of each month. Such interest shall be compounded monthly.

13.4 If the Facility achieves Commercial In-Service Status on or before the Contract In-Service Date, the Company shall refund to the QF any cash Completion Security Guaranty and accrued interest within thirty (30) days thereafter and shall cancel any other form of Completion Security Guaranty which the Company has accepted in lieu of a cash deposit. If the Facility fails to achieve Commercial In-Service Status on or before the Contract In-Service Date for any reason, including Force Majeure Events, except as provided in section 4.2.2 hereof, then in addition to any other rights or obligations of the Parties, the QF shall immediately forfeit and the Company, in lieu of any other remedies except as provided in section 15.1.6 hereof, shall retain any cash Completion Security Guaranty and accrued interest, and any other form of Completion Security Guaranty which the Company has accepted in lieu of a cash deposit shall become immediately due and payable to the Company.

13.5 Upon conclusion of the Term of this Agreement, without early termination by either Party, the Company shall refund to the QF any cash Operational Security Guaranty and accrued interest within thirty (30) days thereafter and shall cancel any other form of Operational Security Guaranty which the Company has accepted in lieu of a cash deposit. Upon any earlier termination of this Agreement for any reason, including Force Majeure Events, but excluding an early termination by the QF permitted pursuant to this Agreement, then in addition to any other rights or obligation of the Parties, the QF shall immediately forfeit and the Company shall retain the Operational Security Guaranty and accrued interest, and any other form of Operational Security

Guaranty which the Company has accepted in lieu of a cash deposit shall become immediately due and payable to the Company.

ARTICLE XIV: REPRESENTATIONS, WARRANTIES AND COVENANTS

14.1 The QF makes the following additional representations, warranties and covenants as the basis for the benefits and obligations contained in this Agreement:

14.1.1 The QF represents and warrants that it is a political subdivision of the State of Florida in good standing under the laws of the State of Florida and is qualified to do business under the laws of the State of Florida.

14.1.2 The QF represents, covenants and warrants that, to the best of the QF's knowledge, throughout the Term of this Agreement the QF will be in compliance with, or will have acted in good faith and used its best efforts to be in compliance with, all laws, judicial and administrative orders, rules and regulations, with respect to the ownership and operation of the Facility, including but not limited to applicable certificates, licenses, permits and governmental approvals; environmental impact analyses, and, if applicable, the mitigation of environmental impacts.

14.1.3 The QF represents and warrants that it is not prohibited by any law or contract from entering into this Agreement and discharging and performing all covenants and obligations on its part to be performed pursuant to this Agreement.

14.1.4 The QF represents and warrants that there is no pending or threatened action or proceeding affecting the QF before any court, governmental agency or arbitrator that could reasonably be expected to affect materially and adversely the ability of the QF to perform its obligations hereunder, or which purports to affect the legality, validity or enforceability of this Agreement.

14.2 All representations and warranties made by the QF in or under this Agreement shall survive the execution and delivery of this Agreement and any action taken pursuant hereto.

ARTICLE XV: EVENTS OF DEFAULT; REMEDIES

15.1 PRE-OPERATIONAL EVENTS OF DEFAULT

Any one or more of the following events occurring before the Contract In-Service Date, except events caused by the Company, shall constitute a Pre-Operational Event of Default and shall give the Company the right to exercise, without limitation, the remedies specified under section 15.2 hereof:

15.1.1 The QF, without a prior assignment permitted pursuant to Article XXIII hereof, becomes insolvent, becomes subject to bankruptcy or receivership proceedings, or dissolves as a legal business entity.

15.1.2 Any representation or warranty furnished by the QF to the Company is false or misleading in any material respect when made and the QF fails to conform to said representation or warranty within sixty (60) days after a demand by the Company to do so.

15.1.3 The QF has not entered into the Transmission Service Agreement which has been approved or accepted for filing by the FERC on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV.

15.1.4 The Construction Commencement Date has not occurred on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV.

15.1.5 The QF fails to diligently pursue construction of the Facility after the Construction Commencement Date.

15.1.6 The Facility fails to achieve Commercial In-Service Status on or before the Contract In-Service Date unless the QF notifies the Company on or before the Contract In-Service Date that it agrees to pay the Company in weekly installments in cash or certified check an amount equal to $0.15 per KW times the Committed Capacity specified in section 7.1 hereof for every day between the date that the Facility achieves Commercial In-Service Status and the Contract In-Service Date and the Facility subsequently achieves Commercial In-Service Status no later than ninety (90) days after the Contract In-Service Date.

15.1.7 The QF fails to comply with any other material terms and conditions of this Agreement and fails to conform to said term and condition within sixty (60) days after a demand by the Company to do so.

15.2 REMEDIES FOR PRE-OPERATIONAL EVENTS OF DEFAULT

For any Pre-Operational Event of Default specified under section 15.1 hereof, the Company may, in its sole discretion and without an election of one remedy to the exclusion of the other remedy, take any of the actions pursuant to sections 15.2.1 and 15.2.2 hereof; provided, however, that the Company shall first exercise the remedy pursuant to section 15.2.1 hereof if (i) the Construction Commencement Date has occurred on or before the date specified in Article IV hereof, as extended only pursuant to said Article IV; and (ii) the QF is not in arrears for any monies owed to the Company pursuant to this Agreement.

15.2.1 Renegotiate any applicable provisions of this Agreement with the QF when necessary to preserve its validity. If the Parties cannot agree within thirty (30) days from the date of the Pre-Operational Event of Default, the Company shall have the right to exercise the remedy pursuant to section 15.2.2 hereof.

15.2.2 Terminate this Agreement.

15.3 OPERATIONAL EVENTS OF DEFAULT

Any one or more of the following events except events caused by Force Majeure Events unless otherwise stated, occurring on or after the Contract In-Service Date shall constitute an Operational Event of Default by the QF and shall give the Company the right, without limitation, to exercise the remedies under section 15.4 hereof:

15.3.1 The Operational Security Guaranty required under Article XIII is not tendered on or before the applicable due date specified in the Article.

15.3.2 The QF fails upon request by the Company pursuant to section 7.6 hereof to re-demonstrate the Facility's Commercial In-Service Status to the satisfaction of the Company.

15.3.3 The QF fails for any reason, including Force Majeure Events, to qualify for capacity payments under Article VIII hereof for any consecutive twenty-four (24) month period.

15.3.4 The QF, without a prior assignment permitted pursuant to Article XXIII hereof, becomes insolvent, becomes subject to bankruptcy or receivership proceedings, or dissolves as a legal business entity.

15.3.5 The QF fails to perform or comply with any other material terms and conditions of this Agreement and fails to conform to said term and conditions within sixty (60) days after a demand by the Company to do so.

15.4 REMEDIES FOR OPERATIONAL EVENTS OF DEFAULT

For any Operational Event of Default specified under section 15.3 hereof, the Company may, without an election of one remedy to the exclusion of the other remedies, take any of the actions pursuant to sections 15.4.1, 15.4.2, and 15.4.3 hereof; provided, however, that the Company shall first exercise the remedy pursuant to section 15.4.1 hereof except for an Operational Event of Default pursuant to section 15.3.3 hereof.

15.4.1 Allow the QF a reasonable opportunity to cure the Operational Event of Default and suspend its capacity payment obligations upon written notice whereupon the QF shall be entitled only to energy payments calculated pursuant to section 9.1.1 hereof. Thereafter, if the Operational Event of Default is cured: (i) capacity payments shall resume and subsequent energy payments shall be paid pursuant to section 9.1.2 hereof; and (ii) the On-Peak Capacity Factor shall be calculated on the assumption that the first full month after the Operational Event of Default is cured is the first month that the On-Peak Capacity factor is calculated.

15.4.2 Terminate this Agreement.

15.4.3 Exercise all remedies available at law or in equity.

ARTICLE XVI: PERMITS

The QF hereby agrees to seek to obtain, at its sole expense, any and all governmental permits, certificates, or other authorization the QF is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement. The Company hereby agrees, at the QF's expense, to seek to obtain any and all governmental permits, certificates, or other authorization the Company is required to obtain as a prerequisite to engaging in the activities provided for in this Agreement.

ARTICLE XVII: INDEMNIFICATION

The QF agrees to indemnify and save harmless the Company and its employees, officers, and directors against any and all liability, loss, damage, costs or expense which the Company, its employees, officers and directors may hereafter incur, suffer or be required to pay by reason of negligence on the part of the QF in performing its obligations pursuant to this Agreement or the QF's failure to abide by the provisions of this Agreement. The Company agrees to indemnify and save harmless the QF and its employees, officers, and directors against any and all liability, loss, damage, cost or expense which the QF, its employees, officers, and directors may hereafter incur, suffer, or be required to pay by reason of negligence on the part of the Company in performing its obligations pursuant to this Agreement or the Company's failure to abide by the provisions of this Agreement. The QF agrees to include the Company as an additional insured in any liability insurance policy or policies the QF obtains to protect the QF's interests with respect to the QF's indemnity and hold harmless assurance to the Company contained in Article XVII.

ARTICLE XVIII: EXCLUSION OF INCIDENTAL, CONSEQUENTIAL, AND INDIRECT DAMAGES

Neither Party shall be liable to the other for incidental, consequential or indirect damages, including, but not limited to, the cost of replacement capacity and energy (except as provided for in section 7.3 hereof), whether arising in contract, tort, or otherwise.

ARTICLE XIX: RESERVED

ARTICLE XX: REGULATORY CHANGES

20.1 The Parties agree that the Company's payment obligations under this Agreement are expressly conditioned upon the mutual commitments set forth in this Agreement and upon the Company's being fully reimbursed for all payments to the QF through the Fuel and Purchased Power Costs Recovery Clause or other authorized rates or charges. Notwithstanding any other provision of this Agreement, should the Company at any time during the Term of this Agreement be denied the FPSC's or the FERC's authorization, or the authorization of any other regulatory bodies which in the future may have jurisdiction over the Company's rates and charges, to recover from its customers all payments required to be made to the QF under the terms of this Agreement, payments to the QF from the Company shall be reduced accordingly. Neither Party shall initiate any action to deny recovery of payments under this Agreement and each Party shall participate in defending all terms and conditions of this Agreement, including, without limitation, the payment levels specified in this Agreement. Any amounts initially recovered by the Company from its ratepayers but for which recovery is subsequently disallowed by the FPSC or the FERC and charged back to the Company may be off-set or credited against subsequent payments made by the Company for purchases from the QF, or alternatively, shall be repaid by the QF. If any disallowance is subsequently reversed, the Company shall repay the QF such disallowed payments with interest at the rate specified in section 13.3 hereof to the extent such payments and interest are recovered by the Company.

20.2 If the QF's payments are reduced pursuant to section 20.1 hereof, the QF may terminate this Agreement upon thirty (30) days notice; provided that the QF gives the Company written notice of said termination within eighteen (18) months after the effective date of such reduction in the QF's payments.

ARTICLE XXI: FORCE MAJEURE

21.1 If either Party because of Force Majeure Event is rendered wholly or partly unable to perform its obligations under this Agreement, other than the obligation of that Party to make payments of money, that Party shall, except as otherwise provided in this Agreement, be excused from whatever performance is affected by the Force Majeure Event to the extent so affected, provided that:

21.1.1 The non-performing Party, as soon as possible after it becomes aware of its inability to perform, shall declare a Force Majeure Event and give the other Party written notice of the particulars of the occurrence(s), including without limitation, the nature, cause, and date and time of commencement of the occurrence(s), the anticipated scope and duration of any delay, and any date(s) that may be affected thereby.

21.1.2 The suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure Event.

21.1.3 Obligations of either Party which arose before the occurrence causing the suspension of performance are not excused as a result of the occurrence.

21.1.4 The non-performing Party uses its best efforts to remedy its inability to perform with all reasonable dispatch; provided, however, that nothing contained herein shall require the settlement of any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the affected Party, are contrary to its interests. It is understood and agreed that the settlement of strikes, walkouts,

lockouts or other labor disputes shall be entirely within the discretion of the affected Party.

21.1.5 When the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall so notify the other Party in writing.

21.2 Unless and until the QF temporarily redesignates the Committed Capacity pursuant to section 7.4 hereof, no capacity payment obligation pursuant to Article VII hereof shall accrue during any period of a declared Force Majeure Event pursuant to section 21.1.1 through 21.1.5. During any such period, the Company will pay for such energy as may be received and accepted pursuant to section 9.1.1 hereof.

21.3 If the QF temporarily or permanently redesignates the Committed Capacity pursuant to section 7.4 hereof, then capacity payment obligations shall thereafter resume at the applicable redesignated level and the Company will resume energy payments pursuant to section 9.1.2 hereof.

ARTICLE XXII: FACILITY RESPONSIBILITY AND ACCESS

22.1 Representatives of the Company shall at all reasonable times have access to the Facility and to property owned or controlled by the QF for the purpose of inspecting, testing, and obtaining other technical information deemed necessary by the Company in connection with this Agreement. Any inspections or testing by the Company shall not relieve the QF of its obligation to maintain the Facility.

22.2 In no event shall any Company statement, representation, or lack thereof, either express or implied, relieve the QF of its exclusive responsibility for the Facility and its exclusive obligations with the Transmission Service Utility. Any Company inspection of property or equipment owned or controlled by the QF or the Transmission

Service Utility, or any Company review of or consent to the QF's or the Transmission Service Utility's plans, shall not be construed as endorsing the design, fitness or operation of the Facility or the Transmission Service Utility's equipment nor as a warranty or guarantee.

22.3 The QF shall reactivate the Facility and shall arrange for the Transmission Service Utility's delivery of electric energy to the Point of Delivery at its own expense if either the Facility or the equipment of the Transmission Service Utility is rendered inoperable due to actions of the QF or its agents, or a Force Majeure Event. The Company shall reactivate the Company's Interconnection Facilities at its own expense if the same are rendered inoperable due to actions of the Company or its agents, or a Force Majeure Event.

ARTICLE XXIII: SUCCESSORS AND ASSIGNS

Neither Party shall have the right to assign its obligations, benefits, and duties without the written consent of the other Party, which shall not be unreasonably withheld or delayed.

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[illegible]greement, the Company does not, nor should it be cor[illegible] or financial support for the benefit of any third parties lending mon[illegible] other transactions with the QF or any assignee of this Agreement, nor does it cr[illegible] any third party beneficiary rights. Nothing contained in this Agreement shall be construed to create an association, trust, partnership, or joint venture between the Parties. No payment by the Company to the QF for energy or capacity shall be construed as payment by the Company for the acquisition of any ownership or property interest in the Facility.

ARTICLE XXV: WAIVERS

The failure of either Party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights under this Agreement shall not be construed as a general waiver of any such provision or the relinquishment of any such right, but the same shall continue and remain in full force and effect, except with respect to the particular instance or instances.

ARTICLE XXVI: COMPLETE AGREEMENT

The terms and provisions contained in this Agreement constitute the entire agreement between the Parties and shall supersede all previous communications, representations, or agreements, either verbal or written, between the Parties with respect to the Facility and this Agreement.

ARTICLE XXVII: COUNTERPARTS

This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

ARTICLE XXVIII: COMMUNICATIONS

28.1 Any non-emergency or operational notice, request, consent, payment or other communication made pursuant to this Agreement to be given by one Party to the other Party shall be in writing, either personally delivered or mailed to the representative of said other Party designated in this section, and shall be deemed to be given when received. Notices and other communications by the Company to the QF shall be addressed to:

Dennis Carter
Assistant County Manager
Metro-Dade Center
111 NW 1st. St., 29th Floor
Miami, Fla. 33128

and

Gail Fels
Assistant County Attorney
Metro-Dade Center
111 NW 1st. St., Suite 2800
Miami, Fla. 33128

Notices to the Company shall be addressed to:

Manager, Cogeneration Contracts & Administration
Florida Power Corporation
P. O. Box 14042
St. Petersburg, FL 33733

28.2 Communications made for emergency or operational reasons may be made to the following persons and shall thereafter be confirmed promptly in writing.

To The Company:	System Dispatcher on Duty
Title:	System Dispatcher
Telephone:	(813)866-5888
Telecopier:	(813)384-7865

To The QF: Name:	Juan Portuondo
Title:	President, Montenay International Corp
Telephone:	305/372-8075
Telecopier:	305/381-8808

28.3 Either Party may change its representatives in sections 28.1 or 28.2 by prior written notice to the other Party.

28.4 The Parties' representatives designated above shall have full authority to act for their respective principals in all technical matters relating to the performance of this Agreement. However, they shall not have the authority to amend, modify, or waive any provision of this Agreement.

ARTICLE XXIX: SECTION HEADINGS FOR CONVENIENCE

Article or section headings appearing in this Agreement are inserted for convenience only and shall not be construed as interpretations of text.

ARTICLE XXX: GOVERNING LAW

The interpretation and performance of this Agreement and each of its provisions shall be governed by the laws of the State of Florida.

IN WITNESS WHEREOF, the QF and the Company have caused this Agreement to be executed by their duly authorized representatives on the day and year first above written.

The Qualifying Facility:

By: _____

Title: ASSISTANT COUNTY MANAGER

Date: 3/15/91

ATTEST:

_____

The Company:

By: _____
M. H. Phillips
Executive Vice President

Date: 3/12/91

ATTEST:

_____

APPENDIX A

INTERCONNECTION SCHEDULING AND COST RESPONSIBILITY

1.0 Purpose.

This appendix provides the procedures for the scheduling of construction for the Company's Interconnection Facilities as well as the cost responsibility of the QF for the payment of Interconnection Costs. This appendix applies to all QF's, whether or not their Facility will be directly interconnected with the Company's system. All requirements contained herein shall apply in addition to and not in lieu of the provisions of the Agreement.

2.0 Submission of Plans and Development of Interconnection Schedules and Cost Estimates.

2.1 No later than sixty (60) days after the Contract Approval Date, the QF shall specify the date it desires the Company's Interconnection Facilities to be available for receipt of the electric energy and shall provide a preliminary written description of the Facility and the QF's anticipated arrangements with the Transmission Service Utility, including, without limitation, a one-line diagram, anticipated Facility site data and any additional facilities anticipated to be needed by the Transmission Service Utility. Based upon the information provided, the Company shall develop preliminary written Interconnection Costs and scheduling estimates for the Company's Interconnection Facilities within sixty (60) days after the information is provided. The schedule developed hereunder will indicate when the QF's final electrical plans must be submitted to the Company pursuant to section 2.2 hereof.

2.2 The QF shall submit the Facility's final electrical plans and all revisions to the information previously submitted under section 2.1 hereof to the Company no later than the date specified under section 2.1 hereof, unless such date is modified in the Company's reasonable discretion. Based upon the information provided and within sixty (60) days after the information is provided, the Company shall update its written Interconnection Costs and schedule estimates, provide the estimated time period required for construction of the Company's Interconnection Facilities, and specify the date by which the Company must receive notice from the QF to initiate construction, which date shall, to the extent practical, be consistent with the QF's schedule for delivery of energy into the Company's system. The final electrical plans shall include the following information, unless all or a portion of such information is waived by the Company in its discretion:

a. Physical layout drawings, including dimensions;

b. All associated equipment specifications and characteristics including technical parameters, ratings, basic impulse levels, electrical main one-line diagrams, schematic diagrams, system protections, frequency, voltage, current and interconnection distance;

c. Functional and logic diagrams, control and meter diagrams, conductor sizes and length, and any other relevant data which might be necessary to understand the Facility's proposed system and to be able to make a coordinated system;

d. Power requirements in watts and vars;

e. Expected radio-noise, harmonic generation and telephone interference factor;

f. Synchronizing methods; and

g. Facility operating/instruction manuals.

h. Detailed description of the facilities to be utilized by the Transmission Service Utility to deliver energy to the Point of Delivery.

2.3 Any subsequent change in the final electrical plans shall be submitted to the Company and it is understood and agreed that any such changes may affect the Company's schedules and Interconnection Costs as previously estimated.

2.4 The QF shall pay the actual costs incurred by the Company to develop all estimates pursuant to section 2.1 and 2.2 hereof and to evaluate any changes proposed by the QF under section 2.3 hereof, as such costs are billed pursuant to Article XII of the Agreement. At the Company's option, advance payment for these cost estimates may be required, in which event the Company will issue an adjusted bill reflecting actual costs following completion of the cost estimates.

2.5 The Parties agree that any cost or scheduling estimates provided by the Company hereunder shall be prepared in good faith but shall not be binding. The Company may modify such schedules as necessary to accommodate contingencies that affect the Company's ability to initiate or complete the Company's Interconnection Facilities and actual costs will be used as the basis for all final charges hereunder.

3.0 Payment Obligations for Interconnection Costs.

3.1 The Company shall have no obligation to initiate construction of the Company's Interconnection Facilities prior to a written notice from the QF agreeing to the Company's interconnection design requirements and notifying the Company to initiate its activities to construct the Company's Interconnection Facilities; provided, however, that such notice shall be received not later than the date specified by the Company under section 2.2 hereof. The QF shall be liable for and agrees to pay all Interconnection Costs incurred by the Company on or after the specified date for initiation of construction.

3.2 The QF agrees to pay all of the Company's actual Interconnection Costs as such costs are incurred and billed in accordance with Article XII of the Agreement. Such amounts shall be billed pursuant to section 3.2.1 if the QF elects the payment option permitted by FPSC Rule 25-17.087(4). Otherwise the QF shall be billed pursuant to section 3.2.2.

3.2.1 Upon a showing of credit worthiness, the QF shall have the option of making monthly installment payments for Interconnection Costs over a period no longer than thirty six (36) months. The period selected is _____ months. Principal payments will be based on the estimated Interconnection Costs less the Interconnection Costs Offset, divided by the repayment period in months to determine the monthly principal payment. Payments will be invoiced in the first month following first incurrence of Interconnection Costs by the Company. Invoices to the QF will include principal payments plus interest on the unpaid balance, if any, calculated at a rate equal to the thirty (30) day highest grade commercial paper rate as published in the Wall Street Journal on the first business day of each month. The final payment or payments will be adjusted to cause the sum of principal payments to equal the actual Interconnection Costs.

3.2.2 When Interconnection Costs are incurred by the Company, such costs will be billed to the QF to the extent that they exceed the Interconnection Costs Offset.

3.3 If the QF notifies the Company in writing to interrupt or cease interconnection work at any time and for any reason, the QF shall nonetheless be obligated to pay the Company for all costs incurred in connection with the Company's Interconnection Facilities through the date of such notification and for all additional costs for which the Company is responsible pursuant to binding contracts with third parties.

4.0 Payment Obligations for Operation, Maintenance and Repair of the Company's Interconnection Facilities

The QF also agrees to pay monthly through the Term of the Agreement for all costs associated with the operation, maintenance and repair of the Company's Interconnection Facilities, based on a percentage of the total Interconnection Costs net of the Interconnection Costs Offset, as set forth in Appendix C.

APPENDIX B

RESERVED

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

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APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 1

GENERAL INFORMATION FOR 1991 COMBUSTION TURBINE UNIT

GENERAL

YEAR OF AVOIDED UNIT = 1991
AVOIDED UNIT FUEL REFERENCE PLANT = BARTOW CT UNITS

OPERATING DATA

AVOIDED UNIT VARIABLE O&M COSTS IN 1/90 $'s = $1.74/MWH
SYSTEM VARIABLE O&M COSTS IN 1/90 $'s = $0.592/MWH
ANNUAL ESCALATION RATE OF O&M COSTS = 5.10%
MINIMUM ON-PEAK CAPACITY FACTOR = 90.0%
AVOIDED UNIT HEAT RATE = 12,480 BTU/KWH
TYPE OF FUEL = DISTILLATE

ON-PEAK HOURS

(1) FOR THE CALENDAR MONTHS OF NOVEMBER THROUGH MARCH,
ALL DAYS: 6:00 A.M. TO 12:00 NOON, AND
5:00 P.M. TO 10:00 P.M.
(2) FOR THE CALENDAR MONTHS OF APRIL THROUGH OCTOBER,
ALL DAYS: 11:00 A.M. TO 10:00 P.M.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 2

Payments for Avoided 1991 Combustion Turbine Unit

Fuel Multiplier = 1.0

(1)	(2)	(3)	(4)	(5)	(6)
	CAPACITY PAYMENT - $/KW/MONTH		ENERGY PAYMENT - $/MWH (c) (ESTIMATED)		
CALENDAR YEAR	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (b)	FUEL	O&M	TOTAL
1991	3.96		29.78	0.76	30.54
1992	4.17		31.62	0.80	32.42
1993	4.37		34.28	0.84	35.12
1994	4.59		39.75	0.88	40.63
1995	4.84		44.64	0.93	45.57
1996	5.08		47.98	0.98	48.96
1997	5.33		52.63	1.03	53.66
1998	5.61		55.82	1.08	56.90
1999	5.90		53.70	1.13	54.83
2000	6.20		58.78	1.19	59.97
2001	6.51		56.42	1.25	57.67
2002	6.84		62.36	1.32	63.68
2003	7.19		66.46	1.38	67.84
2004	7.56		72.25	1.45	73.70
2005	7.94		79.70	1.53	81.23
2006	8.36		83.76	1.61	85.37
2007	8.77		88.04	1.69	89.73
2008	9.22		92.53	1.77	94.30
2009	9.70		97.25	1.86	99.11
2010	10.19		102.20	1.96	104.16
2011	10.71		107.42	2.06	109.48
2012	11.25		112.90	2.16	115.06
2013	11.83		118.65	2.27	120.92
2014	12.43		124.70	2.39	127.09
2015	13.07		131.06	2.51	133.57
2016	13.73		137.75	2.64	140.39
2017	14.43		144.77	2.78	147.55
2018	15.17		152.16	2.92	155.08
2019	15.94		159.92	3.07	162.99
2020	16.76		168.07	3.22	171.29
2021	17.61		176.64	3.38	180.02
2022	18.51		185.65	3.56	189.21
2023	19.46(a)		195.12	3.74	198.86

NOTES:

(a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.

(b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments of if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so that the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.

(c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 3
GENERAL INFORMATION FOR 1991 PULVERIZED COAL UNIT

GENERAL

YEAR OF AVOIDED UNIT = 1991
AVOIDED UNIT FUEL REFERENCE PLANT = CRYSTAL RIVER UNITS 1&2

OPERATING DATA

AVOIDED UNIT VARIABLE O&M COSTS IN 1/90 $'s = $4.36/MWH (Option A only)
ANNUAL ESCALATION RATE OF O&M COSTS = 5.10%
MINIMUM ON-PEAK CAPACITY FACTOR = 83.0%
AVOIDED UNIT HEAT RATE = 9,830 BTU/KWH
TYPE OF FUEL = COAL WITH 1.15% SULFUR BY WEIGHT MAXIMUM AT 11,000 BTU/LB., ADJUSTABLE IN DIRECT PROPORTION TO THE BTU/LB. OF COAL

ON-PEAK HOURS

(1) FOR THE CALENDAR MONTHS OF NOVEMBER THROUGH MARCH,
ALL DAYS: 6:00 A.M. TO 12:00 NOON, AND
5:00 P.M. TO 10:00 P.M.
(2) FOR THE CALENDAR MONTHS OF APRIL THROUGH OCTOBER,
ALL DAYS: 11:00 A.M. TO 10:00 P.M.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 4

Payments for Avoided 1991 Pulverized Coal Unit

Option A

Fuel Multiplier = 1.0

(1)	(2)	(3)	(4)	(5)	(6)
	CAPACITY PAYMENT - $/KW/MONTH		ENERGY PAYMENT - $/MWH (c) (ESTIMATED)		
CALENDAR YEAR	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (b)	FUEL	O&M	TOTAL
1991	10.92		21.07	4.70	25.77
1992	11.48		21.94	4.94	26.88
1993	12.07		22.86	5.19	28.05
1994	12.68		23.87	5.45	29.32
1995	13.32		25.09	5.73	30.82
1996	14.00		26.37	6.02	32.39
1997	14.72		27.71	6.33	34.04
1998	15.46		29.13	6.65	35.78
1999	16.25		30.61	6.99	37.60
2000	17.08		32.17	7.35	39.52
2001	17.95		33.81	7.73	41.54
2002	18.87		35.54	8.12	43.66
2003	19.83		37.35	8.53	45.88
2004	20.85		39.26	8.97	48.23
2005	21.91		41.26	9.43	50.69
2006	23.02		43.36	9.91	53.27
2007	24.20		45.57	10.41	55.98
2008	25.43		47.90	10.94	58.84
2009	26.74		50.34	11.50	61.84
2010	28.09		52.91	12.09	65.00
2011	29.53		55.61	12.70	68.31
2012	31.04		58.44	13.35	71.79
2013	32.61		61.42	14.03	75.45
2014	34.28		64.55	14.75	79.30
2015	36.03		67.85	15.50	83.35
2016	37.86		71.31	16.29	87.60
2017	39.80		74.94	17.12	92.06
2018	41.82		78.77	18.00	96.77
2019	43.96		82.78	18.91	101.69
2020	46.20		87.01	19.88	106.89
2021	48.56		91.45	20.89	112.34
2022	51.03		96.11	21.96	118.07
2023	53.64(a)		101.11	23.08	124.19

NOTES:

(a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.

(b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments or if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so that the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.

(c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 4

Payments for Avoided 1991 Pulverized Coal Unit

Option B

Fuel Multiplier = 1.0

(1)	(2)	(3)	(4)
	CAPACITY PAYMENT - $/KW/MONTH		ENERGY PAYMENT - $/MWH (c)
CALENDAR YEAR	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (b)	(ESTIMATED) FUEL
1991	13.77		21.07
1992	14.47		21.94
1993	15.21		22.86
1994	15.98		23.87
1995	16.80		25.09
1996	17.65		26.37
1997	18.55		27.71
1998	19.49		29.13
1999	20.49		30.61
2000	21.54		32.17
2001	22.63		33.81
2002	23.79		35.54
2003	25.00		37.35
2004	26.28		39.26
2005	27.62		41.26
2006	29.02		43.36
2007	30.51		45.57
2008	32.07		47.90
2009	33.71		50.34
2010	35.42		52.91
2011	37.23		55.61
2012	39.13		58.44
2013	41.11		61.42
2014	43.22		64.55
2015	45.42		67.85
2016	47.73		71.31
2017	50.17		74.94
2018	52.73		78.77
2019	55.42		82.78
2020	58.25		87.01
2021	61.22		91.45
2022	64.33		96.11
2023	67.62(a)		101.01

NOTES:

(a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.

(b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments or if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so that the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.

(c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 4

Payments for Avoided 1991 Pulverized Coal Unit

Option C

Fuel Multiplier = 0.8

(1)	(2)	(3)	(4)
	CAPACITY PAYMENT - $/KW/MONTH		ENERGY PAYMENT - $/MWH (c)
CALENDAR YEAR	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (b)	(ESTIMATED)
1991	16.37		16.86
1992	17.18		17.55
1993	18.04		18.29
1994	18.93		19.10
1995	19.90		20.07
1996	20.91		21.10
1997	21.98		22.17
1998	23.09		23.30
1999	24.27		24.49
2000	25.52		25.74
2001	26.81		27.05
2002	28.18		28.43
2003	29.62		29.88
2004	31.13		31.41
2005	32.72		33.01
2006	34.38		34.69
2007	36.14		36.46
2008	37.99		38.32
2009	39.93		40.27
2010	41.96		42.33
2011	44.10		44.49
2012	46.35		46.75
2013	48.70		49.14
2014	51.20		51.64
2015	53.81		54.28
2016	56.54		57.05
2017	59.43		59.95
2018	62.47		63.02
2019	65.65		66.22
2020	69.00		69.61
2021	72.52		73.16
2022	76.21		76.89
2023	80.11(a)		80.81

NOTES:

(a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.

(b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments or if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.

(c) Information provided is estimated and excludes the Delivery Voltage Adjustment.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 5
Capacity Payment Adjustment for On-Peak Capacity Factor

O.P.C.F.	CAPACITY PAYMENT ADJUSTMENT MULTIPLYING FACTOR
Greater than or Equal to the Committed O.P.C.F.	1.0
From 50.0% to the Committed O.P.C.F.	$\left[\frac{\text{O.P.C.F.}}{\text{Committed O.P.C.F.}}\right]^{1.5}$
Below 50.0%	0

NOTE: O.P.C.F. = On-Peak Capacity Factor

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 6
Performance Adjustment

The Performance Adjustment provision of Article IX in this Agreement shall be calculated as follows each month after the Contract In-Service Date for all hours in the month:

$$\sum_{\text{for } i = \text{first hour}}^{\text{last hour}} PERADJ_i = [KWH_i - (CC \times 1.0 \text{ hr.} \times CF/100)] \times (EP1_i - EP2_i)$$

Where:

$PERADJ_i$ = the Performance Adjustment for hour i.

KWH_i = the hourly energy delivered to the Company by the QF during hour i.

CC = the Committed Capacity in KW.

CF = if the On-Peak Capacity Factor (%) is 50.0% or greater, then CF equals the lesser of (a) the Committed On-Peak Capacity Factor (%) or (b) the On-Peak Capacity Factor (%); if the On-Peak Capacity Factor is less than 50.0%, then CF equals zero.

$EP1_i$ = the As-Available Energy Cost in $/KWH for hour i.

$EP2_i$ = the Firm Energy Cost in $/KWH for hour i.

Note:

The Performance Adjustment shall not apply to any hour in which the following condition occurs:

(a) the energy payment is determined on the basis of the of As-Available Energy Cost;

(b) the Company cannot perform its obligation to receive all energy which the QF has made available for sale at the Point of Delivery;

(c) the Firm Energy Cost exceeds the As-Available Energy Cost.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 7
Charges to Qualifying Facility

Customer Charges:

The Qualifying Facility shall be billed monthly for the costs of meter reading, billing, and other appropriate administrative costs. The charge shall be set equal to the stated Customer Charge of the Company's applicable rate schedule for service to the Qualifying Facility load as a non-generating customer of the Company.

Operation, Maintenance, and Repair Charges:

The Qualifying Facility shall be billed monthly for the costs associated with the operation, maintenance, and repair of the interconnection. These include (a) the Company's inspections of the interconnection and (b) maintenance of any equipment beyond that which would be required to provide normal electric service to the Qualifying Facility if no sales to the Company were involved.

In lieu of payments for actual charges, the Qualifying Facility shall pay a monthly charge equal to 0.50% of the Interconnection Costs less the Interconnection Costs Offset. This monthly rate shall be adjusted periodically to the same rate applicable to standard offer contacts pursuant to the rules in Appendix E.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE B
Delivery Voltage Adjustment

The QF's energy payment will be multiplied by a Delivery Voltage Adjustment whose value will depend upon (i) the delivery voltage at the Point of Delivery and (ii) the methodology approved by the FPSC to determine the adjustment for standard offer contracts pursuant to the rules in Appendix E.

APPENDIX D

TRANSMISSION SERVICE STANDARDS

1.0 Purpose.

This appendix provides minimum standards required by the Company in the Transmission Service Agreement and applies to QF's whose Facility is not directly interconnected with the Company and who are selling firm capacity and energy to the Company.

2.0 Standards for QF's Selling Firm Capacity and Energy.

2.1 The QF shall ensure that, throughout the Term of the Agreement, the Transmission Service Utility or its lawful successors but no other party shall deliver the Committed Capacity and electric energy to the Company on behalf of the QF.

2.2 A proposed Transmission Service Agreement and any amendments thereto shall be submitted to the Company for its review and consent no less than sixty (60) days before said Transmission Service Agreement or amendment is proposed to be tendered for filing with the FERC. Such consent shall not be unreasonably withheld. No review, recommendations or consent by the Company shall be deemed an approval of any safety or other arrangements between the QF and the Transmission Service Utility nor shall it relieve the QF and the Transmission Service Utility of their responsibility with respect to the adequate engineering, design, construction and operation of any facilities other than the Company's Interconnection Facilities and for any injury to property or persons associated with any failure to perform in a proper and safe manner for any reason. Nothing contained herein shall prevent the Company from exercising any rights that it

otherwise would have to participate as a full party before the FERC when the Transmission Service Agreement or amendments thereto is tendered for filing.

2.3 To ensure the continuous availability to the Company of the Committed Capacity during the Term of the Agreement, the Transmission Service Agreement shall contain provisions satisfying the following minimum criteria:

(i) the Transmission Service Utility's transmission commitment shall be for the full amount of the Committed Capacity plus any losses assessed by the Transmission Service Utility from the Point of Metering to the Point of Delivery;

(ii) the duration of the Transmission Service Utility's transmission commitment shall be for a term at least as long as the Term of the Agreement with termination provisions that are acceptable to the Company;

(iii) the Transmission Service Utility's transmission commitment shall not be interruptible or curtailable to a greater extent than the Transmission Service Utility's transmission service to its own firm requirements customers;

(iv) The QF and the Transmission Service Utility shall not be permitted to amend the Transmission Service Agreement in a manner that adversely affects the Company's rights without the Company's prior written consent;

(v) the Company shall be provided with prompt notification of any default under the Transmission Service Agreement;

(vi) the QF and/or the Transmission Service Utility shall expressly indemnify and hold the Company harmless for any and all liability or cost responsibility in connection with the Transmission Service Agreement and the activities undertaken thereunder, including, without limitation, any facility costs, service charges, or third party impact claims;

(vii) the Company shall be entitled to reasonable access at all times to property and equipment owned or controlled by either the QF or the Transmission Service Utility and at reasonable times to records and schedules maintained by either the QF or the Transmission Service Utility, in order to carry out the purposes of the Agreement in a safe, reliable and economical manner;

(viii) unless otherwise agreed by the Company, the Point of Delivery into the Company's system shall be defined as all points of interconnection at transmission voltages between the Company and the Transmission Service Utility pursuant to any tariffs or interchange agreements on file with the FERC and in effect from time to time;

(ix) the electric energy made available from the Facility for transmission to the Company shall be telemetered to the Company and shall be reduced for all losses assessed by the Transmission Service Agreement from the Point of Metering to the Point of Delivery; the electric energy as so adjusted shall be considered the electric energy delivered to the Company for billing purposes and shall be considered as if within the Company's Control Area, provided that the Transmission Service Utility can deliver and the Company accept the electric energy as so adjusted;

(x) As an alternative to section 2.3(ix) hereof, electric energy from the Facility shall be scheduled for delivery to the Point of Delivery by the Transmission Service Utility and such electric energy as is scheduled shall be considered as electric energy delivered to the Company for billing purposes.

(xi) The Transmission Service Utility and the Company shall coordinate with one another concerning any inability to deliver or receive the electric energy as adjusted pursuant to section 8.3 (ix) hereof. Whenever the Transmission Service Utility is unable to deliver or the Company does not accept such energy, such energy shall no longer be considered within the Company's Control Area if energy is delivered pursuant to section 2.3(ix) hereof; and

(xii) a contact person for the Transmission Service Utility shall be designated for day-to-day communications between the Transmission Service Utility and the Parties.

APPENDIX E
FPSC RULES 25-17.080 THROUGH 25-17.091

PART III

UTILITIES' OBLIGATIONS WITH REGARD TO COGENERATORS AND SMALL POWER PRODUCERS

25-17.080 Definitions and Qualifying Criteria.

(1) For the purpose of these rules the Commission adopts the Federal Energy Regulatory Commission Rules 292.101 through 292.207, effective March 20, 1980, regarding definitions and criteria that a small power producer or cogenerator must meet to achieve the status of a qualifying facility. Small power producers and cogenerators which fail to meet the FERC criteria for achieving qualifying facility status but otherwise meet the objectives of economically reducing Florida's dependence on oil and the economic deferral of utility power plant expenditures may petition the Commission to be granted qualifying facility status for the purpose of receiving energy and capacity payments pursuant to these rules.

(2) In general, under the FERC regulations, a small power producer is a qualifying facility if:

(a) the small power producer does not exceed 80 MW; and

(b) the primary (at least 50%) energy source of the small power producer is biomass, waste, or another renewable resource; and

(c) the small power production facility is not owned by a person primarily engaged in the generation or sale of electricity. This criterion is met if less than 50% of the equity interest in the facility is owned by a utility, utility holding company, or a subsidiary of them.

(3) In general, under the FERC regulations, a cogenerator is a qualifying facility if:

(a) the useful thermal energy output of a topping cycle cogeneration facility is not less than 5% of the facility's total energy output per year; and

(b) the useful power output plus half of the useful thermal energy output of a topping cycle cogeneration facility built after March 13, 1980, with any energy input of natural gas or oil is greater than 42.5% or 45% if the useful thermal energy output is less than 15% of the total energy output of the facility; and

(c) the useful power output of a bottoming cycle cogeneration facility built after March 13, 1980, with any energy input as supplementary firing of natural gas or oil is not less than 45% of the natural gas or oil input on an annual basis; and

(d) the cogeneration facility is not owned by a person primarily engaged in the generation or sale of electricity. This criterion is met if less than 50% of the equity interest in the facility is owned by a utility, utility holding company, or a subsidiary of them.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.80.

25-17.081 Reserved.

25-17.082 The Utility's Obligation to Purchase; Customer's Selection of Billing Method.

(1) Upon compliance by the qualifying facility with Rule 25-17.087, each utility shall purchase electricity produced and sold by qualifying facilities at rates which have been agreed upon by the utility and qualifying facility or at the utility's published tariff. Each utility shall file a tariff or tariffs and a standard offer contract or contracts for the purchase of energy and capacity from qualifying facilities which reflects the provisions set forth in these rules.

(2) Unless the Commission determines that alternative metering requirements cause no adverse effect on the cost or reliability of electric service to the utility's general body of customers, each tariff and standard offer contract shall specify the following metering requirements for billing purposes:

(a) Hourly recording meters shall be required for qualifying facilities with an installed capacity of 100 kilowatts or more.

(b) For qualifying facilities with an installed capacity of less than 100 kilowatts, at the option of the qualifying facility, either hourly recording meters, dual kilowatt-hour register time-of-day meters, or standard kilowatt-hour meters shall be installed. Unless special circumstances warrant, meters shall be read at monthly intervals on the approximate corresponding day of each meter reading period.

(3)(a) A qualifying facility, upon entering into a contract for the sale of firm capacity and energy or prior to delivery of as-available energy to a utility, shall elect to make either simultaneous purchases from the interconnecting utility and sales to the purchasing utility or net sales to the purchasing utility. Once made, the selection of a billing methodology may only be changed:

1. when a qualifying facility selling as-available energy enters into a negotiated contract or standard offer contract for the sale of firm capacity and energy; or
2. when a firm capacity and energy contract expires or is lawfully terminated by either the qualifying facility or the purchasing utility; or
3. when the qualifying facility is selling as-available energy and has not changed billing methods within the last twelve months; and
4. when the election to change billing methods will not contravene the provisions of Rule 25-17.0832 or any contract between the qualifying facility and the utility.

Firm capacity and energy contracts in effect prior to the effective date of this rule shall remain unchanged.

(b) If a qualifying facility elects to change billing methods in accordance with this rule, such change shall be subject to the following provisions:

1. upon at least thirty days advance written notice;
2. upon the installation by the utility of any additional metering equipment reasonably required to effect the change in billing and upon payment by the qualifying facility for such metering equipment and its installation; and

3. upon completion and approval by the utility of any alterations to the interconnection reasonably required to effect the change in billing and upon payment by the qualifying facility for such alterations.

(c) Should a qualifying facility elect to make simultaneous purchases and sales, purchases of electric service by the qualifying facility from the interconnecting utility shall be billed at the retail rate schedule under which the qualifying facility load would receive service as a non-generating customer of the utility; sales of electricity delivered by the qualifying facility to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832.

(d) Should a qualifying facility elect a net billing arrangement, the hourly net energy and capacity sales delivered to the purchasing utility shall be purchased at the utility's avoided energy and capacity rates, where applicable, in accordance with Rules 25-17.0825 and 25-17.0832; purchases from the interconnecting utility shall be billed pursuant to the utility's applicable standby service or supplemental service rate schedules.

(4)(a) Payments for energy and capacity sold by a qualifying facility shall be rendered monthly by the purchasing utility and as promptly as possible, normally by the twentieth business day following the day the meter is read. The kilowatt-hours sold by the qualifying facility, the applicable avoided energy rate at which payments were made, and the rate and amount of the applicable capacity payment shall accompany the payment by the utility to the qualifying facility.

(b) Where simultaneous purchases and sales are made by a qualifying facility, avoided energy and capacity payments to the qualifying facility may, at the option of the qualifying facility, be shown as a credit to the qualifying facility's bill; the kilowatt-hours produced by the qualifying facility, the avoided energy rate at which payments were made, and the rate and amount of the capacity payment shall accompany the bill to the qualifying facility. A credit shall not exceed the amount of the qualifying facility's bill from the utility and the excess, if any, shall be paid directly to the qualifying facility in accordance with this rule.

(5) A utility may require a security deposit from each interconnected qualifying facility in accordance with Rule 25-6.097 for the qualifying facility's purchase of power from the utility. Each utility's tariff shall contain specific criteria for determining the applicability and amount of a deposit from an interconnected qualifying facility consistent with projected net cash flow on a monthly basis.

(6) Each utility shall keep separate accounts for sales to qualifying facilities and purchases from qualifying facilities.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 5/13/81, Amended 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.0825 As-Available Energy.

(1) As-available energy is energy produced and sold by a qualifying facility on an hour-by-hour basis for which contractual commitments as to the quantity, time, or reliability of delivery are not required. Each utility shall purchase as-available energy from any qualifying facility. As-available energy shall be sold by a qualifying facility and purchased by a utility pursuant to the terms and conditions of a published tariff or a separately negotiated contract.

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. Because of the lack of assurances as to the quantity, time, or reliability of delivery of as-available energy, no capacity payments shall be made to a qualifying facility for the delivery of as-available energy.

(a) Tariff Rates: Each utility shall publish a tariff for the purchase of as-available energy from qualifying facilities. Each utility's published tariff shall state that the rate of payment for as-available energy is the utility's

avoided energy cost as defined in subsection (2) of this rule, less the additional costs directly attributable to the purchase of such energy from a qualifying facility. The additional costs directly associated with the purchase of as-available energy from qualifying facilities shall be specifically identified in the utility's tariff.

(b) Contract Rates: Each utility may enter into a separately negotiated contract for the purchase of as-available energy from a qualifying facility. All contracts for the purchase of as-available energy between a qualifying facility and a utility shall be filed with the Commission within 10 working days of their signing. Those qualifying facilities wishing to negotiate a contract for the sale of firm capacity and energy with terms different from those in a utility's standard offer contract may do so pursuant to Rule 25-17.0832(2). Where parties cannot agree on the terms and conditions of a negotiated contract, either party may apply to the Commission for relief pursuant to Rule 25-17.0834.

(2)(a) Avoided energy costs associated with as-available energy are defined as the utility's actual avoided energy cost before the sale of interchange energy. Avoided energy costs associated with as-available energy shall be all costs the utility avoided due to the purchase of as-available energy, including the utility's incremental fuel, identifiable variable operating and maintenance expense, and identifiable variable utility power purchases. Demonstrable utility administrative costs required to calculate avoided energy costs may be deducted from avoided energy payments. Avoided line losses reflecting the voltage at which generation by the qualifying facility is received by the utility shall also be included in the determination of avoided energy costs. Each utility shall calculate its avoided energy cost associated with as-available energy deterministically, on an hour-by-hour basis, after accounting for interchange sales which have taken place, using the utility's actual avoided energy cost for the hour, as affected by the output of the qualifying facilities connected to the utility's system. A megawatt block size at least equal to the most recent available estimate of the combined average hourly generation of all qualifying facilities making energy sales based on the utility's as-available energy rate to the utility shall be used to calculate the utility's hourly avoided energy costs associated with as-available energy. For the purpose of this subsection, interchange sales are inter-utility sales which are provided at the option of the selling utility exclusive of central pool dispatch transactions.

(b) Each utility's tariff shall include a description of the methodology to be used in the calculation of avoided energy cost implementing subsection (2) of this Rule. Each utility's implementation methodology shall specify the method by which the utility's incremental fuel and operating and maintenance costs and line losses are determined.

(3)(a) For qualifying facilities with hourly recording meters, monthly payments for as-available energy shall be made and shall be calculated based on the product of: (1) the utility's actual avoided energy rate for each hour during the month; and (2) the quantity of energy sold by the qualifying facility during that hour.

(b) For qualifying facilities with dual kilowatt-hour register time-of-day meters, monthly payments for as-available energy shall be calculated based on the average of the utility's actual hourly avoided energy rate for the on-peak and off-peak periods during the month.

(c) For qualifying facilities with standard kilowatt-hour meters, monthly payments for as-available energy shall be calculated based on the average of the utility's actual hourly avoided energy rate for the off-peak periods during the month.

(4) Each utility shall file with the Commission by the twentieth business day of the following month, a monthly report of their actual hourly avoided energy costs, the average of their actual hourly avoided energy costs for the on-peak and

off-peak periods during the month, and the average of their actual hourly avoided energy costs for the month with the Commission. A copy shall be furnished to any individual who requests such information.

(5) Upon request by a qualifying facility or any interested person, each utility shall provide within 30 days its most current projections of its generation mix, fuel price by type of fuel, and at least a five year projection of fuel forecasts to estimate future as-available energy prices as well as any other information reasonably required by the qualifying facility to project future avoided cost prices including, but not limited to, a 24 hour advance forecast of hour-by-hour avoided energy costs. The utility may charge an appropriate fee, not to exceed the actual cost of production and copying, for providing such information.

(6) Utility payments for as-available energy made to qualifying facilities pursuant to the utility's tariff shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power. Utility payments for as-available energy made to qualifying facilities pursuant to a separately negotiated contract shall be recoverable by the utility through the Commission's periodic review of fuel and purchased power costs if the payments are not reasonably projected to result in higher cost electric service to the utility's general body of ratepayers or adversely affect the adequacy or reliability of electric service to all customers.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 9/4/83, formerly 25-17.82, amended 10/25/90.

25-17.083 Firm Energy and Capacity.
Specific Authority: 366.04(1), 366.05(1), 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 9/4/83, formerly 25-17.83, Repealed 10/25/90.

25-17.0831 Contracts.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.831, Repealed 10/25/90.

25-17.0832 Firm Capacity and Energy Contracts.

(1) Firm capacity and energy are capacity and energy produced and sold by a qualifying facility and purchased by a utility pursuant to a negotiated contract or a standard offer contract subject to certain contractual provisions as to the quantity, time and reliability of delivery.

(a) Within one working day of the execution of a negotiated contract or the receipt of a signed standard offer contract, the utility shall notify the Director of the Division of Electric and Gas and provide the amount of committed capacity and the avoided unit, if any, to which the contract should be applied.

(b) Within 10 working days of the execution of a negotiated contract for the purchase of firm capacity and energy or within 10 working days of receipt of a signed standard offer contract, the purchasing utility shall file with the Commission a copy of the signed contract and a summary of its terms and conditions. At a minimum, such a summary shall report:

1. the name of the utility and the owner and/or operator of the qualifying facility, who are signatories of the contract;
2. the amount of committed capacity specified in the contract, the size of the facility, the type of the facility its location, and its interconnection and transmission requirements;
3. the amount of annual and on-peak and off-peak energy expected to be delivered to the utility;
4. the type of unit being avoided, its size and its in-service year;
5. the in-service date of the qualifying facility; and

6. the date by which the delivery of firm capacity and energy is expected to commence.

(c) Prior to the anticipated in-service date of the avoided unit specified in the contract, a qualifying facility which has negotiated a firm capacity and energy contract or has accepted a utility's standard offer contract may sell as-available energy to any utility pursuant to Rule 25-17.0825.

(2) Negotiated Contracts. Utilities and qualifying facilities are encouraged to negotiate contracts for the purchase of firm capacity and energy. Such contracts will be considered prudent for cost recovery purposes if it is demonstrated 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 the 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. Negotiated contracts shall not be evaluated against an avoided unit in a standard offer contract, thus preserving the standard offer for small qualifying facilities as described in subsection (3). In reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery, the Commission shall consider factors relating to the contract that would impact the utility's general body of retail and wholesale customers including:

(a) whether additional firm capacity and energy is needed by the purchasing utility and by Florida utilities from a statewide perspective; and

(b) whether the cumulative present worth of firm capacity and energy payments made to the qualifying facility over the term of the contract are projected to be no greater than:

1. the cumulative present worth of the value of a year-by-year deferral of the construction and operation of generation or parts thereof by the purchasing utility over the term of the contract; calculated in accordance with subsection (4) and paragraph (5)(a) of this rule, providing that the contract is designed to contribute towards the deferral or avoidance of such capacity; or
2. the cummulative present worth of other capacity and energy related costs that the contract is designed to avoid such as fuel, operation and maintenance expenses or alternative purchases of capacity, providing that the contract is designed to avoid such costs; and

(c) to the extent that annual firm capacity and energy payments made to the qualifying facility in any year exceed that year's annual value of deferring the construction and operation of generation by the purchasing utility or other capacity and energy related costs, whether the contract contains provisions to ensure repayment of such payments exceeding that year's value of deferring that capacity in the event that the qualifying facility fails to deliver firm capacity and energy pursuant to the terms and conditions of the contract; provided, however, that provisions to ensure repayment may be based on forecasted data; and

(d) considering the technical reliability, viability and financial stability of the qualifying facility, whether the contract contains provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract.

(3) Standard Offer Contracts.

(a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091.

(b) The rates, terms, and other conditions contained in each utility's standard offer contract or contracts shall be based on the need for and equal to the avoided cost of deferring or avoiding the construction of additional generatic

capacity or parts thereof by the purchasing utility. Rates for payment of capacity sold by a qualifying facility shall be specified in the contract for the duration of the contract. In reviewing a utility's standard offer contract or contracts, the Commission shall consider the criteria specified in paragraphs (2)(a) through (2)(d) of this rule, as well as any other information relating to the determination of the utility's full avoided costs.

(c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts or a solid waste facility as defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2). Should a utility fail to negotiate in good faith, any qualifying facility may apply to the Commission for relief pursuant to Rule 25-17.0834, F.A.C.

(d) Within 60 days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions may be based on:

1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer.

A standard offer contract which has been accepted by a qualifying facility shall apply towards the subscription limit of the unit designated in the contract effective the date the utility receives the accepted contract. If the contract is not accepted by the utility, its effect shall be removed from the subscription limit effective the date of the Commission order granting the utility's petition.

(e) Minimum Specifications. Each standard offer contract shall, at minimum, specify:

1. the avoided unit or units on which the contract is based;
2. the total amount of committed capacity, in megawatts, needed to fully subscribe the avoided unit specified in the contract;
3. the payment options available to the qualifying facility including all financial and economic assumptions necessary to calculate the firm capacity payments available under each payment option and an illustrative calculation of firm capacity payments for a minimum ten year term contract commencing with the in-service date of the avoided unit for each payment option;
4. the date on which the standard contract offer expires. This date shall be at least four years before the anticipated in-service date of the avoided unit or units unless the avoided unit could be constructed in less than four years, or when the subscription limit has been reached;
5. the date by which firm capacity and energy deliveries from the qualifying facility to the utility shall commence. This date shall be no later than the anticipated in-service date of the avoided unit specified in the contract;
6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the anticipated in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit;

7. the minimum performance standards for the delivery of firm capacity and energy by the qualifying facility during the utility's daily seasonal peak and off-peak periods. These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract;
8. provisions to ensure repayment of payments to the extent that annual firm capacity and energy payments made to the qualifying facility in any year exceed that year's annual value of deferring the avoided unit specified in the contract in the event that the qualifying facility fails to perform pursuant to the terms and conditions of the contract. Such provisions may be in the form of a surety bond or equivalent assurance of repayment of payments exceeding the year-by-year value of deferring the avoided unit specified in the contract.

(f) The Commission may approve contracts that specify:
1. provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract which may be in the form of an up-front payment, surety bond, or equivalent assurance of payment. Such payment or surety shall be refunded upon completion of the facility and demonstration that the facility can deliver the amount of capacity and energy specified in the contract; and
2. a listing of the parameters, including any impact on electric power transfer capability, associated with the qualifying facility as compared to the avoided unit necessary for the calculation of the avoided cost.

(g) Firm Capacity Payment Options. Each standard offer contract shall also contain, at a minimum, the following options for the payment of firm capacity delivered by the qualifying facility:
1. Value of deferral capacity payments. Value of deferral capacity payments shall commence on the anticipated in-service date of the avoided unit. Capacity payments under this option shall consist of monthly payments escalating annually of the avoided capital and fixed operation and maintenance expense associated with the avoided unit and shall be equal to the value of a year-by-year deferral of the avoided unit, calculated in accordance with paragraph (5)(a) of this rule.
2. Early capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. Early capacity payments shall consist of monthly payments escalating annually of the avoided capital and fixed operation and maintenance expense associated with the avoided unit, calculated in conformance with paragraph (5)(b) of the rule. At the option of the qualifying facility, early capacity payments may commence at any time after the specified early capacity payment date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule.

3. Levelized capacity payments. Levelized capacity payments shall commence on the anticipated in-service date of the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance portion of capacity payments shall be equal to the value of the year-by-year deferral of fixed operation and maintenance expense associated with the avoided unit calculated in conformance with paragraph (5)(a) of this rule. Where levelized capacity payments are elected, the cumulative present value of the levelized capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule, value of deferral capacity payments.
4. Early levelized capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early levelized capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance expense shall be calculated in conformance with paragraph (5)(b) of this rule. At the option of the qualifying facility, early levelized capacity payments shall commence at any time after the specified early capacity date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early levelized capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1 of this rule.

(4) Avoided Energy Payments.

(a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25-17.0825.

(b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility. During the periods that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825(2)(a).

(c) The energy cost of the avoided unit specified in the contract shall be defined as the cost of fuel, in cents per kilowatt-hour, which would have been burned at the avoided unit plus variable operation and maintenance expense plus avoided line losses. The cost of fuel shall be calculated as the average market

price of fuel, in cents per million Btu, associated with the avoided unit multiplied by the average heat rate associated with the avoided unit. The variable operating and maintenance expense shall be estimated based on the unit fuel type and technology of the avoided unit.

(5) Calculation of standard offer contract firm capacity payment options.

(a) Calculation of year-by-year value of deferral. The year-by-year value of deferral of an avoided unit shall be the difference in revenue requirements associated with deferring the avoided unit one year and shall be calculated as follows:

$$VAC_m = \frac{1}{12}\left[KI_n \left[\frac{1 - (1+ip)}{1 - (1+r)^{L}_{(1+ip)^{L}}} \right] + O_n \right]$$

Where, for a one year deferral:

VAC_m = utility's monthly value of avoided capacity, in dollars per kilowatt per month, for each month of year n;

K = present value of carrying charges for one dollar of investment over L years with carrying charges computed using average annual rate base and assumed to be paid at the middle of each year and present value to the middle of the first year;

I_n = total direct and indirect cost, in mid-year dollars per kilowatt including AFUDC but excluding CWIP, of the avoided unit with an in-service date of year n, including all identifiable and quantifiable costs relating to the construction of the avoided unit that would have been paid had the avoided unit been constructed;

O_n = total fixed operation and maintenance expense for the year n, in mid-year dollars per kilowatt per year, of the avoided unit;

i_p = annual escalation rate associated with the plant cost of the avoided unit(s);

i_o = annual escalation rate associated with the operation and maintenance expense of the avoided unit(s);

r = annual discount rate, defined as the utility's incremental after tax cost of capital;

L = expected life of the avoided unit; and

n = year for which the avoided unit is deferred starting with its original anticipated in-service date and ending with the termination of the contract for the purchase of firm energy and capacity.

(b) Calculation of early capacity payments. Monthly early capacity payments shall be calculated as follows:

$$A_m = A_C \frac{(1+ip)^{(m-1)}}{12} + A_O \frac{(1+io)^{(m-1)}}{12} \quad \text{for m=1 to t}$$

Where: A_m = monthly early capacity payments to be made to the qualifying facility for each month of the contract year n, in dollars per kilowatt per month;

i_p = annual escalation rate associated with the plant cost of the avoided unit;

i_o = annual escalation note associated with the operation and maintenance expense of the avoided unit(s);

m = year for which early capacity payments to a qualifying facility are made, starting in year one and ending in the year t;

t = the term, in years, of the contract for the purchase of firm capacity;

$$A_C = F \left[\frac{(1 + ip)}{1 - \frac{(1 + r)_t}{(1 + ip)^t}} \right]$$

Where: F = the cumulative present value in the year that the contractual payments will begin, of the avoided capital cost component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit(s); and

r = annual discount rate, defined as the utility's incremental after tax cost of capital; and

$$A_O = G \left[\frac{(1 + io)}{1 - \frac{(1 + r)_t}{(1 + io)^t}} \right]$$

Where: G = The cumulative present value in the year that the contractual payments will begin, of the avoided fixed operation and maintenance expense component of capacity payments which would have been made had capacity payments commenced with the anticipated in-service date of the avoided unit.

(c) Levelized and early levelized capacity payments. Monthly levelized and early levelized capacity payments shall be calculated as follows:

$$P_L = F \times \frac{r}{12\left[1-(1+r)^{-t}\right]} + O$$

Where: P_L = the monthly levelized capacity payment, starting on or prior to the in-service date of the avoided unit;

F = the cumulative present value, in the year that the contractual payments will begin, of the avoided capital cost component of the capacity payments which would have been made had the capacity payments not been levelized;

r = the annual discount rate, defined as the utility's incremental after tax cost of capital; and

t = the term, in years, of the contract for the purchase of firm capacity.

O = the monthly fixed operation and maintenance component of the capacity payments, calculated in accordance with paragraph (5)(a) for levelized capacity payments or with paragraph (5)(b) for early levelized capacity payments.

(6) Sale of Excess Firm Energy and Capacity. To the extent that firm energy and capacity purchased from a qualifying facility pursuant to a standard offer contract or an individually negotiated contract is not needed by the purchasing utility, these rules shall be construed to encourage the

purchasing utility to sell all or part of the energy and capacity to the utility in need of energy and capacity at a mutually agreed upon price which is cost effective to the ratepayers.

(7) Upon request by a qualifying facility or any interested person, each utility shall provide within 30 days its most current projections of its future generation mix including type and timing of anticipated generation additions, and at least a 20-year projection of fuel forecasts, as well as any other information reasonably required by the qualifying facility to project future avoided cost prices. The utility may charge an appropriate fee, not to exceed the actual cost of production and copying, for providing such information.

(8)(a) Firm energy and capacity payments made to a qualifying facility pursuant to a separately negotiated contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs if the contract is found to be prudent in accordance with subsection (2) of this rule.

(b) Upon acceptance of the contract by both parties, firm energy and capacity payments made to a qualifying facility pursuant to a standard offer contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs.

(c) Firm energy and capacity payments made pursuant to a standard offer contract signed by the qualifying facility, for which the utility has petitioned the Commission to reject, is recoverable through the Commission's periodic review of fuel and purchased power costs if the Commission requires the utility to accept the contract because it satisfies subsection (3) of this rule.

Specific Authority: 350.127, 366.04(1), 366.051, 366.05(8), F.S.
Law Implemented: 366.051, 403.503, F.S.
History: New 10/25/90.

25-17.0833 Planning Hearings.

(1) Upon petition or on its own motion, the Commission shall periodically review optimal generation and transmission plans from a statewide and individual utility perspective. In connection with these proceedings, the Commission shall consider the need for capacity from both a statewide and individual utility perspective, the adequacy of the transmission grid, and other strategic planning concerns affecting the Florida electric grid.

(2) Upon petition, or on its own motion, the Commission, as needed, shall review individual utility generation and expansion plans at any time.

Specific Authority: 366.05(8), 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.0834 Settlement of Disputes in Contract Negotiations.

(1) Public utilities shall negotiate in good faith for the purchase of capacity and energy from qualifying facilities and interconnection with qualifying facilities. In the event that a utility and a qualifying facility cannot agree on the rates, terms, and other conditions for the purchase of capacity and energy, either party may apply to the Commission for relief. Qualifying facilities may petition the Commission to order a utility to sign a contract for the purchase of capacity and energy which does not exceed a utility's full avoided costs as defined in 366.051, Florida Statutes, should the Commission find that the utility failed to negotiate in good faith.

(2) To the extent possible, the Commission will dispose of an application for relief within 90 days of the filing of a petition by either a utility or a qualifying facility.

(3) If the Commission finds that a utility has failed to negotiate or deal in good faith with qualifying facilities, or has explicitly dealt in bad faith with qualifying facilities, it shall impose an appropriate penalty on the utility as approved by section 350.127, Florida Statutes.
Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.0835 Wheeling.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), 366.055(3), F.S.
History: New 9/4/83, repealed 10/4/85, formerly 25-17.835.

25-17.084 The Utility's Obligation to Sell.
Upon compliance with Rule 25-17.087, each utility shall sell energy to qualifying facilities at rates which are just, reasonable, and non-discriminatory.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, amended 9/4/83, formerly 25-17.84.

25-17.085 Reserved.

25-17.086 Periods During Which Purchases are not Required.
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. The utility shall notify the qualifying facility(ies) prior to the instance giving rise to those conditions, if practicable. If prior notice is not practicable, the utility shall notify the qualifying facility(ies) as soon as practicable after the fact. In either event the utility shall notify the Commission, and the Commission staff shall, upon request of the affected qualifying facility(ies), investigate the utility's claim. Nothing in this section shall operate to relieve the utility of its general obligation to purchase pursuant to Rule 25-17.082.
Specific Authority: 366.05(9), 350.127(2), F.S.
Law Implemented: 366.05(9), F.S.
History: New 5/13/81, Amended 9/4/83, formerly 25-17.86.

25-17.087 Interconnection and Standards.
(1) Each utility shall interconnect with any qualifying facility which:
(a) is in its service area;
(b) requests interconnection;
(c) agrees to meet system standards specified in this rule; (d) agrees to pay the cost of interconnection; and
(e) signs an interconnection agreement.
(2) Nothing in this rule shall be construed to preclude a utility from evaluating each request for interconnection on its own merits and modifying the general standards specified in this rule to reflect the result of such an evaluation.
(3) Where a utility refuses to interconnect with a qualifying facility or attempts to impose unreasonable standards pursuant to subsection (2) of this rule, the qualifying facility may petition the Commission for relief. The utility shall have the burden of demonstrating to the Commission why

interconnection with the qualifying facility should not be required or that the standards the utility seeks to impose on the qualifying facility pursuant to subsection (2) are reasonable.

(4) Upon a showing of credit worthiness, the qualifying facility shall have the option of making monthly installment payments over a period no longer than 36 months toward the full cost of interconnection. However, where the qualifying facility exercises that option the utility shall charge interest on the amount owing. The utility shall charge such interest at the 30-day commercial paper rate. In any event, no utility may bear the cost of interconnection.

(5) Application for Interconnection. A qualifying facility shall not operate electric generating equipment in parallel with the utility's electric system without the prior written consent of the utility. Formal application for interconnection shall be made by the qualifying facility prior to the installation of any generation related equipment. This application shall be accompanied by the following:

(a) Physical layout drawings, including dimensions;

(b) All associated equipment specifications and characteristics including technical parameters, ratings, basic impulse levels, electrical main one-line diagrams, schematic diagrams, system protections, frequency, voltage, current and interconnection distance;

(c) Functional and logic diagrams, control and meter diagrams, conductor sizes and length, and any other relevant data which might be necessary to understand the proposed system and to be able to make a coordinated system;

(d) Power requirements in watts and vars;

(e) Expected radio-noise, harmonic generation and telephone interference factor;

(f) Synchronizing methods; and

(g) Operating/instruction manuals.

Any subsequent change in the system must also be submitted for review and written approval prior to actual modification. The above mentioned review, recommendations and approval by the utility do not relieve the qualifying facility from complete responsibility for the adequate engineering design, construction and operation of the qualifying facility equipment and for any liability for injuries to property or persons associated with any failure to perform in a proper and safe manner for any reason.

(6) Personnel Safety. Adequate protection and safe operational procedures must be developed and followed by the joint system. These operating procedures must be approved by both the utility and the qualifying facility. The qualifying facility shall be required to furnish, install, operate and maintain in good order and repair, and be solely responsible for, without cost to the utility, all facilities required for the safe operation of the generation system in parallel with the utility's system.

The qualifying facility shall permit the utility's employees to enter upon its property at any reasonable time for the purpose of inspection and/or testing the qualifying facility's equipment, facilities, or apparatus. Such inspections shall not relieve the qualifying facility from its obligation to maintain its equipment in safe and satisfactory operating condition.

The utility's approval of isolating devices used by the qualifying facility will be required to ensure that these will comply with the utility's switching and tagging procedure for safe working clearances.

(a) Disconnect Switch. A manual disconnect switch, of the visible load break type, to provide a separation point between the qualifying facility's generation system and the utility's system, shall be required. The utility will specify the location of the disconnect switch. The switch shall be mounted separate from the meter socket and shall be readily accessible to

the utility and be capable of being locked in the open position with a utility padlock. The utility may reserve the right to open the switch (i.e. isolating the qualifying facility's generation system) without prior notice to the qualifying facility. To the extent practicable, however, prior notice shall be given.

Any of the following conditions shall be cause for disconnection:

1. Utility system emergencies and/or maintenance requirements;
2. Hazardous conditions existing on the qualifying facility's generating or protective equipment as determined by the utility;
3. Adverse effects of the qualifying facility's generation to the utility's other electric consumers and/or system as determined by the utility;
4. Failure of the qualifying facility to maintain any required insurance; or
5. Failure of the qualifying facility to comply with any existing or future regulations, rules, orders or decisions of any governmental or regulatory authority having jurisdiction over the qualifying facility's electric generating equipment or the operation of such equipment.

(b) Responsibility and Liability. The utility and the qualifying facility shall each be responsible for its own facilities. The utility and the qualifying facility shall each be responsible for ensuring adequate safeguards for other utility customers, utility and qualifying facility personnel and equipment, and for the protection of its own generating system. The utility and the qualifying facility shall each indemnify and save the other harmless from any and all claims, demands, costs, or expense for loss, damage, or injury to persons or property of the other caused by, arising out of, or resulting from:

1. Any act or omission by a party or that party's contractors, agents, servants and employees in connection with the installation or operation of that party's generation system or the operation thereof in connection with the other party's system;
2. Any defect in, failure of, or fault related to a party's generation system;
3. The negligence of a party or negligence of that party's contractors, agents servants and employees; or
4. Any other event or act that is the result of, or proximately caused by, a party.

For the purposes of this subsection, the term party shall mean either utility or qualifying facility, as the case may be.

(c) Insurance. The qualifying facility shall deliver to the utility, at least fifteen days prior to the start of any interconnection work, a certificate of insurance certifying the qualifying facility's coverage under a liability insurance policy issued by a reputable insurance company authorized to do business in the State of Florida naming the qualifying facility as named insured, and the utility as an additional named insured, which policy shall contain a broad form contractual endorsement specifically covering the liabilities accepted under this agreement arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.

The policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than $300,000 for each occurrence; more insurance may be required as deemed necessary by

the utility. In addition, the above required policy shall be endorsed with a provision whereby the insurance company will notify the utility thirty days prior to the effective date of cancellation or material change in the policy.

The qualifying facility shall pay all premiums and other charges due on said policy and keep said policy in force during the entire period of interconnection with the utility.

(7) Protection and Operation. It will be the responsibility of the qualifying facility to provide all devices necessary to protect the qualifying facility's equipment from damage by the abnormal conditions and operations which occur on the utility system that result in interruptions and restorations of service by the utility's equipment and personnel. The qualifying facility shall protect its generator and associated equipment from overvoltage, undervoltage, overload, short circuits (including ground fault condition), open circuits, phase unbalance and reversal, over or under frequency condition, and other injurious electrical conditions that may arise on the utility's system and any reclose attempt by the utility.

The utility may reserve the right to perform such tests as it deems necessary to ensure safe and efficient protection and operation of the qualifying facility's equipment.

(a) Loss of Source: The qualifying facility shall provide, or the utility will provide at the qualifying facility's expense, approved protective equipment necessary to immediately, completely, and automatically disconnect the qualifying facility's generation from the utility's system in the event of a fault on the qualifying facility's system, a fault of the utility's system, or loss of source on the utility's system. Disconnection must be completed within the time specified by the utility in its standard operating procedure for its electric system for loss of a source on the utility's system.

This automatic disconnecting device may be of the manual or automatic reclose type and shall not be capable of reclosing until after service is restored by the utility. The type and size of the device shall be approved by the utility depending upon the installation. Adequate test data or technical proof that the device meets the above criteria must be supplied by the qualifying facility to the utility. The utility shall approve a device that will perform the above functions at minimal capital and operating costs to the qualifying facility.

(b) Coordination and Synchronization. The qualifying facility shall be responsible for coordination and synchronization of the qualifying facility's equipment with the utility's electrical system, and assumes all responsibility for damage that may occur from improper coordination or synchronization of the generator with the utility's system.

(c) Electrical Characteristics. Single phase generator interconnections with the utility are permitted at power levels up to 20 KW. For power levels exceeding 20 KW, a three phase balanced interconnection will normally be required. For the purpose of calculating connected generation, 1 horsepower equals 1 kilowatt. The qualifying facility shall interconnect with the utility at the voltage of the available distribution or the transmission line of the utility for the locality of the interconnection, and shall utilize one of the standard connections (single phase, three phase, wye, delta) as approved by the utility.

The utility may reserve the right to require a separate transformation and/or service for a qualifying facility's generation system, at the qualifying facility's expense. The qualifying facility shall bond all neutrals of the qualifying facility's system to the utility's neutral, and shall install a separate driven ground with a resistance value which shall be determined by the utility and bond this ground to the qualifying facility's system neutral.

(d) Exceptions. A qualifying facility's generator having a capacity rating that can:

1. produce power in excess of 1/2 of the minimum utility customer requirements of the interconnected distribution or transmission circuit; or
2. produce power flows approaching or exceeding the thermal capacity of the connected utility distribution or transmission lines or transformers; or
3. adversely affect the operation of the utility or other utility customer's voltage, frequency or overcurrent control and protection devices; or
4. adversely affect the quality of service to other utility customers; or
5. interconnect at voltage levels greater than distribution voltages,

will require more complex interconnection facilities as deemed necessary by the utility.

(8) Quality of Service. The qualifying facility's generated electricity shall meet the following minimum guidelines:

(a) Frequency. The governor control on the prime mover shall be capable of maintaining the generator output frequency within limits for loads from no-load up to rated output. The limits for frequency shall be 60 hertz (cycles per second), plus or minus an instantaneous variation of less than 1%.

(b) Voltage. The regulator control shall be capable of maintaining the generator output voltage within limits for loads from no-load up to rated output. The limits for voltage shall be the nominal operating voltage level, plus or minus 5%.

(c) Harmonics. The output sine wave distortion shall be deemed acceptable when it does not have a higher content (root mean square) of harmonics than the utility's normal harmonic content at the interconnection point.

(d) Power Factor. The qualifying facility's generation system shall be designed, operated and controlled to provide reactive power requirements from 0.85 lagging to 0.85 leading power factor. Induction generators shall have static capacitors that provide at least 85% of the magnetizing current requirements of the induction generator field. (Capacitors shall not be so large as to permit self-excitation of the qualifying facility's generator field).

(e) DC Generators. Direct current generators may be operated in parallel with the utility's system through a synchronous invertor. The inverter must meet all criteria in these rules.

(9) Metering. The actual metering equipment required, its voltage rating, number of phases, size, current transformers, potential transformers, number of inputs and associated memory is dependent on the type, size and location of the electric service provided. In situations where power may flow both in and out of the qualifying facility's system, power flowing into the qualifying facility's system will be measured separately from power flowing out of the qualifying facility's system.

The utility will provide, at no additional cost to the qualifying facility, the metering equipment necessary to measure capacity and energy deliveries to the qualifying facility. The utility will provide, at the qualifying facility's expense, the necessary additional metering equipment to measure energy deliveries by the qualifying facility to the utility.

(10) Cost Responsibility. The qualifying facility is required to bear all costs associated with the change-out, upgrading or addition of protective devices, transformers, lines, services, meters, switches, and associated equipment and devices beyond that which would be required to

provide normal service to the qualifying facility if the qualifying facility were a non-generating customer. These costs shall be paid by the qualifying facility to the utility for all material and labor that is required. Prior to any work being done by the utility, the utility shall supply the qualifying facility with a written cost estimate of all its required materials and labor and an estimate of the date by which construction of the interconnection will be completed. This estimate shall be provided to the qualifying facility within 60 days after the qualifying facility supplies the utility with its final electrical plans. The utility shall also provide project timing and feasibility information to the qualifying facility.

(11) Each utility shall submit to the Commission, a standard agreement for interconnection by qualifying facilities as part of their standard offer contract or contracts required by Rule 25-17.0832(3).

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 9/4/83, formerly 25-17.87, Amended 10/25/90.

25-17.088 Transmission Service for Qualifying Facilities.
Specific Authority: 350.127(2), 366.051, F.S.
Law Implemented: 366.051, 366.04(3), 366.055(3), F.S.
History: New 10/4/85, formerly 25-17.88, Amended 2/3/87, Repealed 10/25/90.

25-17.0882 Transmission Service Not Required for Self-Service.
Specific Authority: 350.127(2), 366.05(1), F.S.
Law Implemented: 366.05(9), 366.04(3), 366.055(3), F.S.
History: New 10/4/85, formerly 25-17.882, Repealed 10/25/90.

25-17.0883 Conditions Requiring Transmission Service for Self-service.

Public utilities are required to provide transmission and distribution services to enable a retail customer to transmit electrical power generated at one location to the customer's facilities at another location when the provision of such service and its associated charges, terms, and other conditions are not reasonably projected to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. The determination of whether transmission service for self service is likely to result in higher cost electric service may be made using cost effectiveness methodology employed by the Commission in evaluating conservation programs of the utility, adjusted as appropriate to reflect the qualifying facility's contribution to the utility for standby service and wheeling charges, other utility program costs, the fact that qualifying facility self-service performance can be precisely metered and monitored, and taking into consideration the unique load characteristics of the qualifying facility compared to other conservation programs.

Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, F.S.
History: New 10/25/90.

25-17.089 Transmission Service for Qualifying Facilities.

(1) Upon request by a qualifying facility, each electric utility in Florida shall provide, subject to the provisions of subsection (3) of this rule, transmission service to wheel as-available energy or firm energy and capacity produced by a Qualifying Facility from the Qualifying Facility to another electric utility.

(2) The rates, terms, and conditions for transmission services as described in subsection (1) and in Rule 25-17.0883 which are provided by an investor-owned utility shall be those approved by the Federal Energy Regulatory Commission.

(3) An electric utility may deny, curtail, or discontinue transmission service to a Qualifying Facility on a non- discriminatory basis if the provision of such service would adversely affect the safety, adequacy, reliability, or cost of providing electric service to the utility's general body of retail and wholesale customers.
Specific Authority: 366.051, 350.127(2), F.S.
Law Implemented: 366.051, 366.055(3), F.S.
History: New 10/25/90.

25-17.090 Reserved.

25-17.091 Governmental Solid Waste Energy and Capacity.
(1) Definitions and Applicability:
(a) "Solid Waste Facility" means a facility owned or operated by, or on behalf of, local government, the purpose of which is to dispose of solid waste, as that term is defined in section 403.703(13), Fla. Stat. (1988), and to generate electricity.
(b) A facility is owned by or operated on behalf of a local government if the power purchase agreement is between the local government and the electric utility.
(c) A solid waste facility shall include a facility which is not owned or operated by a local government but is operated on its behalf. When the power purchase agreement is between a non-governmental entity and an electric utility, the facility is operated by a private entity on behalf of a local government if:
1. One or more local governments have entered into a long-term agreement with the private entity for the disposal of solid waste for which the local governments are responsible and that agreement has a term at least as long as the term of the contract for the purchase of energy and capacity from the facility; and
2. The Commission determines there is no undue risk imposed on the electric ratepayers of the purchasing utility, based on:
a. The local government's acceptance of responsibility for the private entity's performance of the power purchase contract, or
b. Such other factors as the Commission deems appropriate, including, without limitation, the issuance of bonds by the local government to finance all, or a substantial portion, of the costs of the facility; the reliability of the solid waste technology; and the financial capability of the private owner and operator.
3. The requirements of subparagraph 2 shall be satisfied if a local government described in subparagraph 1 enters into an agreement with the purchasing utility providing that in the event of a default by the private entity under the power purchase contract, the local government shall perform the private entity's obligations, or cause them to be performed, for the remaining term of the contract, and shall not seek to renegotiate the power purchase contract.
(d) This rule shall apply to all contracts for the purchase of energy or capacity from solid waste facilities entered into, or renegotiated as provided in subsection (3), after October 1, 1988.
(2) Except as provided in subsections (3) and (4) of this rule, the provisions of Rules 25-17.080 - 25-17.089, Florida Administrative Code, are applicable to contracts for the purchase of energy and capacity from a solid waste facility.

(3) Any solid waste facility which has an existing firm energy and capacity contract in effect before October 1, 1988, shall have a one-time option to renegotiate that contract to incorporate any or all of the provisions of subsection (2) and (4) into their contract. This renegotiation shall be based on the unit that the contract was designed to avoid but applying the most recent Commission-approved cost estimates of Rule 25-17.0832(5)(a), Florida Administrative Code, for the same unit type and in-service year to determine the utility's value of avoided capacity over the remaining term of the contract.

(4) Because section 377.709(4), Fla. Stat., requires the local government to refund early capacity payments should a solid waste facility be abandoned, closed down or rendered illegal, a utility may not require risk-related guarantees as required in Rule 25-17.0832, paragraph (2)(c), (2)(d), (3)(e)8, and (3)(f)1. However, at its option, a solid waste facility may provide such risk related guarantee.

(5) Nothing in this rule shall preclude a solid waste facility from electing advance capacity payments authorized pursuant to section 377.709(3)(b), F.S., which advanced capacity payments shall be in lieu of firm capacity payments otherwise authorized pursuant to this rule and Rule 25-17.0832, F.A.C. The provisions of subsection (4) are applicable to solid waste facilities electing advanced capacity payments.

Specific Authority: 350.127(2), 377.709(5), F.S.
Law Implemented: 366.051, 366.055(3), 377.709, F.S.
History: New 8/8/85, formerly 25-17.91, Amended 4/26/89, 10/25/90.