ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,

Agency/Appellee;

MIAMI-DADE COUNTY; MONTENAY-DADE, LTD.; and LAKE COGEN, LTD.,

Intervenors/Appellees.
_____/

CASE NOS. 94,664 and 94,665
CONSOLIDATED

On Appeal From Final Orders of the
Florida Public Service Commission of December 4, 1998

ANSWER BRIEF OF APPELLEE LAKE COGEN, LTD.

AFA _____
APP _____
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CMU _____
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RRR _____
SEC 1
WAW _____
OTH _____

JOHN BERANEK, FBN 0005419
LEE L. WILLIS FBN 0135074
Ausley & McMullen
P.O. Box 391
227 S. Calhoun Street (32301)
Tallahassee, Florida 32302
850/224-9115

Attorneys for Intervenor/Appellee
LAKE COGEN, LTD.

The brief is prepared using Courier 12-point font.

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PREFACE

The appellant is Florida Power Corporation, designated as "FPC." The appellees are the Florida Public Service Commission designated as the "PSC" or the "Commission" and two electrical cogeneration companies; (1) Lake Cogen, Ltd. and (2) Miami-Dade County in conjunction with Montenay-Dade, Ltd. These appellees are designated as "Lake Cogen" or "Lake" and as "Dade/Montenay" or "Dade." Appellant FPC has filed two appeals and briefs by separate counsel from the Commission's two orders which are identical except for the identity of the parties. Separate law firms were used because the primary law firm (Carlton, Fields) has an ethical conflict which prevents it from directly arguing against Lake Cogen. (R. Lake 29, Tr. p. 14). The separate appellant's brief in the Lake Cogen case (94,665) is very short and incorporates the entire brief from the other case by the Carlton, Fields firm. Thus, Lake must respond to both appellant's briefs. Unless stated otherwise, all references to the appellant's brief herein will be by (Br.___). This will designate FPC's brief in Case No. 94,664; the Dade/Montenay case.

The two records are designated (R.__) with an appropriate designation for the Lake (94,665) record and the Dade (94,664) record. The supplemental record is designated (Supp. R.___). The transcript of the hearing of October 6, 1998 which resulted in the two orders in question will be referred to as (Tr.___). The Public Utility Regulatory Policies Act of 1978 (16 U.S.C. § 824 a-3) will be designated as PURPA and the Federal Energy Regulatory Commission

will be designated FERC. These same statutory designations were used in FPC's briefs.

Lake Cogen disputes FPC's assertion that the standard of review should be *de novo* and without deference to the determinations of the PSC. (Br. p. 7). The Commission simply declined to issue a declaratory statement as sought by FPC. Contrary to FPC's arguments, the Commission did not determine that it lacked subject matter jurisdiction. The word "jurisdiction" is not even contained in the two final orders on appeal. (R. Lake 445; Dade 506).

In an unappealed 1995 final order the Commission had already denied FPC's earlier petition for the same declaratory statement on the same contract dispute. In 1998, the Commission simply chose to adhere to its prior 1995 order. The principle of decisional or administrative finality was applied but not in an overly "doctrinaire" fashion as repeatedly urged by FPC. Whether the doctrine was reasonably applied, certainly cannot be reviewed as a pure question of law as suggested by FPC. (Br. p. 7).

There is indeed a presumption of correctness before this Court because the PSC was dealing with policy considerations in its decision herein. The application of administrative finality to duplicitous requests for declaratory statements on a contract interpretation issue was a matter involving Commission policy. Further, even if there could have been subject matter jurisdiction that does not mean the Commission must grant every request for an advisory opinion. Suntide Condo. v. Div. of Fla. Land Sales, 504 So. 2d 1343, 1345 (Fla. 1987), holds:

> [A]n agency should decline to resolve a question presented to it by a petition for declaratory statement when the parties are involved in litigation in either state or federal court, and the question raised by the petition is pending before the court.

Here, in 1995 the Commission had already deferred to the courts to determine the contract dispute and the parties have been litigating in court ever since. The PSC simply has no jurisdiction whatsoever to determine a contract dispute concerning a negotiated contract and to award money damages. Southern Bell Tel. & Tel. Co. v. Mobile Am. Corp., 291 So. 2d 199 (Fla. 1974) and Florida Power and Light Co. v. Glazer, 671 So. 2d 211 (Fla. 3d DCA 1996) rev. denied 677 So. 2d 840 (Fla. 1996). Also see, Muskegon Agency, Inc. v. General Tel. Co. of Michigan, 65 NW 2d 748 (Mich. 1954) as cited in Glazer at p. 214.

The general law on review of declaratory statements establishes a clearly erroneous standard and great deference will be accorded the agency decision unless there is clear error or conflict with a statute. Sans Souci v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 421 So. 2d 623 (Fla. 1st DCA 1982) and Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994).

The latest opinion of this Court on the standard of review in PSC matters is Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999). There the Court stated:

> Moreover, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. The party challenging an order of the Commission bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law.

This Court does not substitute its judgment for the actions of the

PSC taken within the statutory range of the PSC's discretion. Section 120.68(12), Florida Statutes and Citizens v. Public Service Commission, 436 So. 2d 784 (Fla. 1983).

This was a matter of Commission policy and discretion and, as the challenging party, FPC must overcome the presumption of correctness by showing a serious departure from law. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983) and Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997). In Ameristeel, the Court held the PSC's determination that a party lacked legal standing did not constitute an abuse of discretion. Thus, this Court applied the deferential standard of review to the Commission's legal ruling on standing.

STATEMENT OF THE CASE AND FACTS

Chronology of the Case--1991 to 1999

The clearest way to describe this case is by detailing the chronology of the price dispute over the last eight years. This brief is by Lake Cogen alone and Dade/Montenay will be filing a separate brief. Thus, only minimal detail will be included as to Dade/Montenay. Almost all of these events are drawn directly from the face of the pleadings and orders below. It is important to recognize that Lake and FPC have now been litigating these same contract issues in circuit court since October 7, 1994. Most of the early rulings in the circuit court including a partial summary judgment on contract liability have been in favor of Lake Cogen and against the utility FPC. (R. Lake 182-5). Obviously, the circuit court interprets the contract, which FPC claims to be unambiguous,

to produce at least some of the higher payments sought by Lake Cogen rather than the lower payments argued for by FPC. This higher pricing computation was consistent with FPC's own earlier view of the contract because this was the methodology by which FPC voluntarily made energy payments for the entire first year of the Lake contract and for almost three years of the Dade contract. The circuit court agreed with FPC that the contract was unambiguous, but rejected FPC's new contract interpretation producing the lower payments by using a different methodology. (R. Lake 182-5)

The overall chronology is as follows:

3/13/91 Lake Cogen and FPC sign a negotiated contract the terms of which the PSC does not control as it does in standard offer contracts.

7/1/91 PSC issues Order 24734 approving the contracts for future cost recovery purposes. ("Contract Approval Order"). 91 FPSC 7:60.

7/1/93 After construction, Lake Cogen's 110 facility becomes operational and the 20 year contract term begins with FPC making monthly energy payments to Lake Cogen.

7/18/94 After making energy payments at the firm rate for one year, FPC's letter informs Lake Cogen that it is changing the methodology of calculating payments and lowering the payments. There is disagreement over the meaning of the payment terms which are based on the operational status of a coal plant (the avoided plant) which would have been built by FPC in 1991. (R.Lake101).

7/21/94 FPC files its first petition for declaratory statement asking the Commission to approve its lower payments and to find that FPC's new interpretation of the contract pricing mechanism complies with Commission rules and the 1991 Contract Approval Order. Lake moved to dismiss this first petition. (Supp.R.Tab A).

10/7/94 Lake files suit in Circuit Court for money damages for breach of contract and for a declaratory decree against FPC based on its having reduced payments. FPC filed counterclaims to establish the lower pricing approach under its new contract interpretation. (No final judgment

has yet been rendered).

10/31/94 FPC files an amended second petition for declaratory statement, essentially asking for the same relief as its 7/21/94 petition.

2/15/95 PSC issues Final Order No. 95-0210 denying FPC's petition. ("1995 Dismissal Order"). The order held FPC was really seeking a contract interpretation and that the Commission had no jurisdiction to resolve contract disputes--the Commission expressly deferred to the Courts to decide the contract issues. 95 FPSC 2:263.

3/17/95 Time to appeal Final Order No. 95-0210 expires.

11/17/95 Lake moves for summary judgment on liability in the Circuit Court, asserting FPC breached the contract by failing to base energy payments on the operational status of a real, operational pulverized coal plant. FPC cross-moves for summary judgment, asserting the contract is unambiguous and asking the Court to uphold its new payment methodology. (R.Lake168).

1/23/96 The Court rules in favor of Lake Cogen and against FPC and enters a partial summary judgment on liability in favor of Lake. (R.Lake182).

2/13/96 Dade/Montenay files suit against FPC in Circuit Court in Dade County for breach of contract and for other relief. (No final judgment has yet been rendered.) (R.Dade112).

2/23/96 Time to appeal the summary judgment on liability in Lake's favor expires.

12/12/96 FPC files a PSC petition for expedited approval of an attempted settlement between FPC and Lake. The tentative settlement had an automatic expiration date of 10/31/97. This settlement called for a substantial modification of the 1991 contract on energy pricing, a buy-out with a reduced term of years and other changes. (R.Lake105).

9/23/97 The PSC orally denies the requested expedited approval of the new contract, leaving the 20 year existing contract in effect.

10/31/97 Automatic expiration of the settlement agreement.

11/14/97 The PSC issues Proposed Agency Action Order 97-1437. (PAA Order). This proposed order reflected the denial of the modified contract. The order also noted mootness because the settlement had expired. 97 FPSC 11:202.

12/5/97 Lake filed its Petition for a formal proceeding contesting the Proposed Agency Action Order. The proposed language of the order never became agency action.

2/24/98 FPC files a third petition for declaratory statement on the same price dispute with Dade/Montenay. (R.Dade1).

3/30/98 PSC issues Final Order No. 98-0450 titled: ORDER DISMISSING PROCEEDINGS AND FINDING ORDER NO. PSC-97-1437-FOF-EQ [the PAA Order] TO BE A NULLITY. The PAA Order never became a final or effective order because of Lake's petition and motion to dismiss. The proposed order was declared to be a nullity over FPC's objection. Again, FPC chose not to appeal this order. (Supp.R.Tab G).

4/6/98 Dade/Montenay moves to dismiss FPC's third petition for declaratory statement.

4/10/98 FPC files a fourth petition for declaratory statement on the same energy payments dispute on the Lake Cogen contract. This petition was again based on the Commission's rules, the 1991 Contract Approval Order and the Lake Cogen PAA Order, which had been held to be a nullity 10 days before the fourth petition. (R.Lake1-83).

4/30/98 FPC fails to appeal the 3/30/98 final nullity order.

4/30/98 Lake Cogen moves to dismiss FPC's fourth petition for declaratory statement on grounds of res judicata, collateral estoppel and administrative finality. (R.Lake98).

10/6/98 After extensive briefing, oral Argument occurs on the two FPC petitions (the third and fourth petitions) and the two motions to dismiss by Lake and Dade/Montenay. A single vote on both petitions is taken and the PSC votes to deny and dismiss both petitions based on its own previous 1995 Dismissal Order and the doctrine of administrative finality. (T.Lake282-444).

12/4/98 PSC renders two Orders, Nos. 98-1620 and 98-1621 denying FPC's two petitions for declaratory statement based on administrative finality. FPC appealed both orders.

The Lake Cogen Facts

As to Lake Cogen alone, the facts are as follows. Early in 1991, FPC solicited power purchase contracts through a Request for Proposals (RFP). Lake Cogen was one of the proposals selected and

the parties signed a negotiated contract rather than a standard offer contract. Thus, the PSC did not dictate the contract terms.[1] The Lake contract was for the sale of firm capacity and energy and was approved by the PSC for purposes of cost recovery by the Contract Approval Order of July 1, 1991. In approving the contract, pursuant to Rule 25-17.0832(2) the PSC was required to and did find that it could "reasonably be expected" that the payments would not exceed FPC's avoided costs. 91 FPSC 7:60.

This 1991 Contract Approval Order does not detail the pricing mechanism between the parties. The contract itself included pricing terms in section 9.1.2 based on the operational status of a pulverized coal plant which would have been built at the time of the 1991 contract. The construction and operational costs of this plant became the "avoided cost" of the new capacity.

In reliance on the approved negotiated contract, Lake Cogen constructed the cogeneration facility at a cost in excess of $102 million and has operated it since July 1, 1993. (R. Lake 100). When the facility went into commercial operation, FPC commenced making firm capacity and energy payments to Lake Cogen. From July of 1993 to August 8, 1994, FPC consistently paid Lake Cogen according to the methodology which FPC and Lake Cogen both believed to be the correct

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[1]Under Fla. Admin. Code § 25-17.0832 and In Re: Implementation of Rules 25-17.080 Through 25-17.091, F.A.C., 92 FPSC 2:24; there are "standard offer contracts" and "negotiated contracts." The Commission controls the terms of the standard contracts but not of the negotiated contracts. The Commission will not interpret the terms of a negotiated contract after it has been approved. 95 FPSC 2:267-8. The energy pricing rule for standard offer contracts does not apply to negotiated contracts. 95 FPSC 2:269.

basis for calculating energy payments under section 9.1.2 of the contract. Energy payments were always firm rather than as-available. (R. Lake 100-101)

In a letter to Lake Cogen dated July 18, 1994, FPC claimed to have determined that a different method of calculating energy payments was appropriate. (Supp. R. Tab A 3-5). Thus, after interpreting the contract payment terms for several years in one fashion, FPC then changed its interpretation and thereby sought to reduce its payments.

Three days after its July 18, 1994 letter, FPC filed its First Petition for Declaratory Statement with the PSC on July 21, 1994. FPC initiated Docket No. 940771-EQ, the "Energy Pricing Docket" asking the Commission to issue an advisory order:

> Declaring that the [new] utilization of the pricing mechanism specified in Section 9.1.2 of the Negotiated Contracts
>
> • • *
>
> complies with Rule 25-17.0832(4)(b) and the orders of this Commission approving the Negotiated Contracts. (emphasis supplied).

(Supp. R. Tab A 6.)

On October 31, 1994, after the Commission Staff recommended that the Commission deny FPC's First Petition because it was inappropriate for a declaratory statement, FPC filed an "Amended Petition" ("the Second Petition"), in which FPC again asked the Commission:

> for a determination that [FPC's new] manner of implementing the pricing mechanism specified in Section 9.1.2 of the Negotiated Contracts

* * *

> is lawful under Section 366.051, F.S. and complies with Rule 25-17.0832(4)(b), F.A.C. and the orders of this Commission approving the Negotiated Contracts. (emphasis supplied).

(Supp. R. Tab B1).

Lake Cogen moved to dismiss the Second Petition and several other QFs also intervened and moved to dismiss. The Commission heard oral argument on January 5, 1995, and granted dismissal in its order of February 15, 1995. This Dismissal Order made it clear that under PURPA negotiated contracts with a cogenerator were not subject to public utility regulation. The distinction between negotiated and standard offer contracts was stressed and dismissal was granted. The order stated:

> [s]tate 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.
>
> * * *
>
> 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 [1994] request is really a request to interpret the meaning of the contract term. FPC is not [really] 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. (emphasis added).
>
> * * *

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

The PSC thus held that it lacked jurisdiction to determine the contract dispute between the parties to this negotiated contract and that was what FPC was really asking it to do. 95 FPSC 2:263, 269-70. The Commission rejected any suggestion that FPC was seeking interpretation of a rule or order as form over substance and looked beneath the surface to what FPC was "really" seeking. Clearly, the Commission had the discretion to do so.

Shortly after the administrative proceedings in the Energy Pricing Docket began, Lake Cogen sued for breach of the contract in the Circuit Court of the Fifth Judicial Circuit for Lake County, Florida. This suit was filed October 7, 1994, and sought both declaratory relief and money damages for FPC's breach of the contract. FPC affirmatively sought relief in the court by filing a counterclaim asserting that its new interpretation of the contract pricing terms was correct. (R. Lake 178). Lake Cogen moved for summary judgment on liability and FPC filed a cross-motion for summary judgment. (R. Lake 178, 182).

After a hearing on both motions, on January 23, 1996, the Circuit Court entered its order granting a partial summary judgment on liability in favor of Lake Cogen and against FPC. (R. Lake 182). The Circuit Court concluded as follows:

> A Partial Summary Judgment is hereby entered for LAKE COGEN and against FPC on the issue of liability for FPC's failure to pay LAKE COGEN at the firm energy cost rate when the avoided unit with operational characteristics of an operable 1991 Pulverized Coal Unit contemplated

> by the Lake Cogen-FPC Agreement would have been operating and at the as-available energy cost rate during those times when said avoided unit would not have been operating. (R. Lake 183).

This order was subject to a non-final appeal under Rule of Appellate Procedure 9.130(a)(3)(C)(iv), as a determination of liability in favor of a party seeking affirmative relief. FPC again chose not to appeal. A non-final appeal begun in January of 1996 would have been completed within one year.

After the Circuit Court's summary judgment rejecting FPC's novel contract interpretation, the parties engaged in settlement negotiations which lead to a tentative agreement. The resulting substantially modified negotiated contract was presented by FPC to the Commission for its approval again for cost recovery purposes. Expedited approval was sought by FPC in In re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. By Florida Power Corporation, Docket No. 961477-EQ ("the Settlement Docket").

The Commission voted, 3-to-2, to reject the settlement and the substantially modified new contract. This vote, with two dissents, was reflected in the Commission's Proposed Agency Action Order No. 97-1437-FOF-EQ ("the PAA Order"), issued November 14, 1997. (Supp. R. Tab G). Lake Cogen timely filed its Section 120.57 protest of the Lake PAA Order and also moved to dismiss the proceeding for mootness. FPC opposed Lake Cogen's formal administrative protest and also opposed Lake's motion to dismiss the proceeding. FPC did not protest the settlement denial. No evidentiary hearing under Section 120.57 on the proposed agency action ever occurred and the

November 14, 1997, PAA Order never became final or effective. On March 30, 1998, by Order No. 98-0450, the Commission unanimously granted Lake's motion to dismiss, holding that the Lake-FPC Settlement Docket was moot and that the Lake PAA Order was a nullity. (Supp. R. Tab G). The existing 20 year contract remained in effect and active litigation of the existing contract in the Circuit Court continued to a partial summary judgment.[2]

It should be noted that Lake Cogen never presented evidence or legal argument against the PAA Order in an actual administrative hearing nor in a direct appeal to this Court as it would have done if the proposed order had become final. Instead, the order was held to be null and void by a unanimous vote of the Commission. FPC could have, but did not, appeal this nullity order. The FPC briefs before this Court are lacking in candor in failing to fully recognize the proposed nature of the PAA Order and the further nullity order of March 30, 1998. FPC tries to sweep this nullity order under the rug and repeatedly relies upon and quotes from the void order. That order did contain proposed language that the Commission's jurisdiction may not have been "as limited as previously thought," but that language never gained Commission approval in a final order and was held void. Again, FPC did not

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[2]Although it should play no direct part in the decision, we believe it proper to advise the Court that a trial on various issues occurred in the Circuit Court case in November and December of 1998. A partial non-final judgment was entered April 6, 1999 and rehearing motions were denied on May 3, 1999. FPC's Lake Cogen brief was served shortly before the Circuit Court's judgment of April 6, 1999. A further trial on the damages found to be due to Lake must now occur. A Final judgment has not yet been rendered, but should occur in the near future.

appeal that nullity order.

On April 10, 1998, FPC filed yet another petition for declaratory statement (the Fourth Petition), again seeking Commission action on its contract dispute with Lake Cogen. This Fourth Petition sought interpretations of the same orders and rules which FPC cited in its First, Second and Third Petitions. This Fourth Petition asked the Commission for a declaratory statement that:

> . . . the Commission interprets its Order No. 24734, issued July 1, 1991 in Docket No. 910401-EQ (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between Florida Power and Lake Cogen Ltd. (the "Negotiated Contract" or "Contract" between FPC and "Lake"), to require that Florida Power: (emphasis supplied).
>
> (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 . . . [in] determining when Lake is entitled to receive firm or as-available energy payments;
> (C) Use the actual chargeout price of coal...

This Fourth Petition also relied upon and asked for an interpretation of the PAA Order which had, of course, been declared a nullity 10 days before.

The April 10, 1998 prayer for relief was merely a rewording of the prayer in FPC's July 21, 1994 petition asking for an advisory order:

> Declaring that the [new] utilization of the pricing mechanism specified in Section 9.1.2 of the Negotiated Contracts.

* * *

> complies with Rule 25-17.0832(4)(b) and the orders of this Commission approving the Negotiated Contracts. (emphasis added).

On December 4, 1998, the Commission issued the orders which are the subject of the present appeal, Order Nos. PSC-98-1620 and PSC-1621, denying both of FPC's petitions for declaratory statement (the Third and Fourth Petitions). These orders state in pertinent part:

> . . .[H]aving resolved this pricing controversy previously in [1995] Order 0210, the prior resolution must stand, consistent with the principles of administrative finality.

The present consolidated appeals result. As indicated, the litigation before the circuit court is in its final stages, but a final judgment has not yet been rendered.

SUMMARY OF ARGUMENT

In 1991, public utility FPC solicited and gained PSC approval of several negotiated electrical cogeneration contracts including a negotiated contract with Lake Cogen. Lake spent over $100 million building a plant to supply FPC and began delivering power in mid-1993. FPC made payments to Lake for the first year of the 20 year contract at the rate both parties accepted as required by the contract. Pursuant to the contract, FPC makes two types of payments to Lake Cogen. These are (1) capacity payments pursuant to article VIII, and (2) energy payments pursuant to article IX. It is the energy payments that are at the core of the dispute between FPC, Lake Cogen and numerous of the other cogenerators, including Dade/Montenay. In mid-1994, FPC gave notice that it was reducing its energy payments to Lake and immediately filed a petition for declaratory statement with the Commission seeking authorization to reduce payments to Lake based on its new contract interpretation.

Lake resisted FPC's petition and promptly filed its own breach of contract action for money damages in the circuit court. The same contract dispute was thus on separate and parallel tracks, one administrative and one judicial.

The Commission entered a 1995 Final Order holding that it had no jurisdiction to resolve the contract dispute and that the Commission would defer to the courts to decide the contract issues between these parties. FPC did not appeal this Final Order declining jurisdiction and deferring to the courts. Instead, FPC counter-claimed in the circuit court asserting its own contract

interpretations. A 1996 summary judgment on liability in favor of plaintiff Lake on its contract claim was entered. This prompted a proposed settlement in the form of a substantially modified cogeneration contract. The Commission rejected this new contract and the settlement agreement expired of its own terms and was not renegotiated. FPC also chose not to appeal the 1996 summary judgment on liability and the litigation continued. Although it was not before the Commission, a trial on certain liability issues occurred and a non-final judgment was very recently entered. Damages are yet to be tried.

In 1998, before the contract case had gone to trial, FPC recycled and reasserted its contract arguments in yet another petition for declaratory statement again asking the Commission to resolve the same contract dispute in its favor and against Lake. Recognizing that parties have a right to rely on uncontested and unappealed final orders, the Commission exercised its discretion and denied the 1998 Petition. The Commission held that it would adhere to its 1995 Dismissal Order based on principles of administrative finality and *res judicata*.

For the first time, FPC now appeals after choosing not to appeal the 1995 order. FPC is appealing the "wrong order." See Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992). FPC also asserts a totally improper (*de novo*) standard of review. No error whatsoever has been clearly (or even arguably) demonstrated and the Commission's 1998 order should thus be affirmed under the appropriate standards for review.

FPC's arguments are based on several intervening cases which are easily and obviously distinguished. No case urged by FPC involves an administrative body declining jurisdiction and deferring to the courts, followed by years of civil litigation and then followed by a last ditch "play it again" administrative petition seeking to overrule the prior administrative order deferring to the court. This last administrative petition was also a collateral attack on the circuit court's jurisdiction and directly on the court's summary judgment entered in Lake Cogen's favor.

FPC also places heavy reliance on a proposed Commission order which order was protested by Lake and was directly held by the Commission to be a nullity over FPC's objections. This void order is now continually touted by FPC as grounds for reversal with no regard for admitting the context of the order and the true void nature of the order.

The Commission could not have overruled its 1995 order without committing serious error. However, for the sake of argument alone, even if the Commission could have overruled its 1995 order, it also certainly had the discretion to adhere to that order which Lake and others had so obviously relied upon. Administrative finality was correctly applied. In the 1999 words of this Court, there must be a "terminal point in every proceeding both administrative and judicial. . . ." Gulf Coast Elec. Coop., Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999). This Court should affirm the Commission.

ARGUMENT

The three issues posed by FPC in the Dade brief and incorporated into the Lake brief make unwarranted assumptions and do not accurately portray the proceedings or the issues before the PSC. However, for convenience sake, appellee Lake Cogen will accept and argue the issues at least as to their organizational format.

I. THE ISSUES RAISED AND DECIDED ON THE 1994 PETITIONS AND THE 1998 PETITIONS WERE SUBSTANTIALLY THE SAME.

As a result of FPC's 1994 petitions for declaratory statement concerning Lake Cogen, the Commission issued its February 15, 1995 Dismissed Order. This was a final order holding that: "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." 95 FPSC 2:263, 270. The parties then litigated in the circuit court for several years and a summary judgment on liability in favor of the plaintiff Lake was entered in 1996 leaving damages and certain other issues to be tried. In 1998, FPC filed two further petitions for declaratory statement on precisely the same contract issue as ruled upon earlier. One of these petitions concerned Dade/Montenay and the other concerned Lake. Predictably, the Commission chose to adhere to its final and unappealed 1995 order and dismissed the 1998 petitions. FPC now argues that the issues decided in the 1995 order were different from the issues in its 1998 petitions.

Appealing the Wrong Order

FPC's April 10, 1998 petition for declaratory statement

dismissed by the Commission on December 4, 1998 is the third petition by FPC in its attempts to administratively determine the contract pricing dispute between FPC and Lake Cogen. In all its petitions, FPC superficially asked the Commission to interpret its rules and the 1991 Approval Order. Despite the references to the rules and the order, the Commission found in its 1995 Dismissal Order that FPC was actually seeking an interpretation of the disputed contract terms. The Dismissal Order stated: "FPC's request is really a request to interpret the meaning of the contract term. . . . We will defer to the courts to resolve that dispute." 95 FPSC 2:263 at 269.

This most recent 1998 petition is an attempt by FPC to relitigate the same contract issues involving the same parties. The 1995 Order was not appealed by FPC and it is obviously binding between these parties. Quite simply, FPC is now appealing the wrong order. In 1995, the Commission denied FPC's petition and held it would not resolve the FPC/Lake contract dispute. FPC now seeks to reverse that 1995 ruling by an unauthorized 1998 petition for declaratory statement.

In Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992), this Court was faced with an appeal from the Commission's denial of a petition for a determination of need. The Court found that Nassau had appealed the wrong order. Nassau appealed an order applying a policy that had been adopted by the Commission in a previous order which had been issued in a docket in which Nassau had participated. The Court upheld the Commission stating:

> Under established principles of appellate review a party must appeal the order in controversy, not a subsequent order that merely reiterates established precedent. [citations omitted] Consequently, Nassau should have challenged the PSC's determination by appealing order number 23234--the order which affirmed order 22341. Nassau cannot do so now under the guise of appealing the present orders.

The Court also quoted the Commission's own order as appealed from by Nassau as follows:

> In the face of order number 22341, Nassau chose to sign its standard offer contract, and Nassau should not now be surprised that we chose to follow our own precedent.

FPC should have appealed the Commission's earlier order entered in 1995 and the fact that it received a further order reiterating the established precedent in 1998 does not breathe new life into an otherwise concluded matter.

In the two prior petitions which led to the issuance of the 1995 Dismissal Order, FPC specifically asked for a declaration that the pricing mechanism in the negotiated contract complies with the orders of the Commission approving the negotiated contracts. The Commission held that ". . . FPC"s request is really a request to interpret the meaning of a contract term" and ". . . fails to set forth any claim that the Commission should resolve." The Commission then deferred to the courts where the parties were already in active litigation.

The Lake County Circuit Court proceeded to interpret the contract, which FPC expressly argued to be unambiguous, and in January 1996 granted a partial summary judgment in favor of Lake

Cogen on liability. Again, FPC did not appeal this order.[3]

FPC's 1998 petition is worse than forum shopping -- it is a deliberate improper collateral attack on the jurisdiction and orders of the Lake County Circuit Court where the contract dispute has been litigated with the express approval of the Commission. Even if the PSC had subject matter jurisdiction of the 1998 petition, *res judicata* and administrative finality were still applicable. In any situation where a party tries to litigate the same issue for a second time, the tribunal has jurisdiction to determine its own jurisdiction. State Dept. of Transportation v. Bailey, 603 So. 2d 1384 (Fla. 1st DCA 1992) and Morand v. Stoneburner, 516 So. 2d 270 (Fla. 5th DCA 1987). Even FPC does not seem to contend that the PSC may determine contract disputes and award damages. This is solely a judicial function which was why the PSC deferred to the court in the first place.

FPC's 1998 petition recycled the same arguments rejected in the 1995 Dismissal Order. FPC's prayer for relief in its 1998 petition asks for a declaratory statement that the Commission interpret its 1991 Contract Approval Order to require that FPC make payments under FPC's interpretation of the contract. This is obviously the very same issue pled by FPC in both the first and second petitions filed in 1994 when FPC asked the Commission "for a determination that

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[3]FPC's cross motion for summary judgment of December 14, 1995 argued, "the terms of the contracts are unambiguous, and do not require the court to look outside its four corners." FPC chose not to take an appeal of the summary judgment on liability in favor of Lake Cogen. This case is a repeated story of intentionally missed appellate opportunities by FPC.

[FPC's] manner of implementing the pricing mechanism . . . complies with the orders of the Commission approving the negotiated contracts." The 1998 petition even repeated all of the details of how FPC attempted to lower its energy payments to Lake in 1994 plus a description of Lake's litigation position that it was entitled to firm energy payments for all energy delivered under the contract. (R. Lake 10).

The 1995 Dismissal Order is binding between these parties and the 1998 petition is barred by the doctrines of *res judicata* and administration finality. FPC now disagrees with the 1995 Dismissal Order, but FPC did not appeal that order. Instead, at the time FPC was willing to live by and litigate pursuant to that order. Now, FPC has filed two briefs before this Court without even commenting on its failure to appeal the 1995 order. At this point, FPC is "really" seeking a reversal of that order.

Decisional Finality in Administrative Tribunals

The doctrine of *res judicata* and its counterpart; administrative finality, operate to bar FPC from invoking the Commission's jurisdiction to determine this contract dispute. Lake Cogen reasonably relied upon the 1995 Dismissal Order and both parties have engaged in expensive and time-consuming litigation before a court which is now close to a final judgment. If ever there were a set of circumstances under which administrative finality was appropriately applied, this is certainly it.

The Commission has clearly explained the application of the doctrine of the administrative finality to its approval of

negotiated power sales contracts. In Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:24 at p. 38, the Commission held as follows:

> We determine the prudence of payments to be made to a QF under a cogeneration contract, as of the date of our decision based upon the facts before us at that time. Once our order is no longer subject to modification even an extraordinary event such as the future discovery of some new power source could not affect our determination. A cogeneration contact is either prudent at the time of our determination or it is not. Subsequent events cannot change a determination of prudence (once final) made upon facts contemporaneously before us.
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> * * *
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> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decision. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract.

The principle of res judicata is that a final judgment by a tribunal of competent jurisdiction is absolute and conclusively puts to rest every justiciable issue between the parties. This includes every actually litigated issue as well as those that could have been litigated. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984). As stated in Albrecht at p. 12, "The first judgment is conclusive as to all matters which were or could have been determined." This holding was based on Gordon v. Gordon, 59 So. 2d 40, 44 (Fla. 1952), (*res judicata* is "conclusive as to all matters germane thereto that were or could have been raised.")

Res judicata also bars relitigation of issues in administrative

proceedings. See Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987) (citing several cases, including Wager v. City of Green Grove Springs, 261 So. 2d. 827 (Fla. 1972)). It is also well-settled that *res judicata* applies to decided questions of jurisdiction. See Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, 455 U.S. 691, 706, 102 S.Ct. 1357, 716 L. Ed. 2d 558, 571 (1982) (citing American Surety Co. v. Baldwin, 287 U.S. 156, 166, 53 S.Ct. 98, 77 L.Ed. 231 (1932)); see also State Commission on Ethics v. Sullivan, 430 So. 2d 928, 934-35 (Fla. 1st DCA 1983) (applying *res judicata* to a jurisdictional issue) and State Dept. of Transp. v. Bailey, supra, at p. 1387 where the First District Court of Appeal in 1992 applied *res judicata* to even an erroneous determination of subject matter jurisdiction.

The Commission recently used the test adopted by the Eleventh Circuit Court of Appeals to determine the applicability of the doctrine of *res judicata*. See In Re: Application for Certificates to Provide Water and Waste Water Services in Alachua County under Grandfather Rights by Turkey Creek, Inc. and Family Diner, Inc., d/b/a Turkey Creek Utilities, 95 FPSC 11:625, 627-28 (Order No. PSC-95-1445-FOF-WS) (November 28, 1995), applying the test set forth in I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

In Turkey Creek, the Commission found that, for the doctrine of

res judicata to bar a subsequent suit, four elements[4] must be present:

> (1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases.

Turkey Creek, 95 FPSC at 11:628 (citing Durbin, 973 F.2d at 1549 (11th Cir. 1986); Harte v. Yamaha Parts Distributer, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L. Ed. 2d 994)).

All four elements of *res judicata* are present here. Initially, the 1995 Dismissal Order is a final order as that term is defined in Section 120.52(7). The unappealed 1995 Dismissal Order is a final disposition on the merits as to the issues of jurisdiction and deferral to the courts.

Regarding the second element, the 1995 Dismissal Order was rendered by the Commission which, like every tribunal, has the jurisdiction to declare whether it has jurisdiction over a matter.

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[4]The Commission has also described the elements of *res judicata* as consisting of

> 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the parties; and 4) identity of the quality in the person for or against whom the claim is made.

In Re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc. Regarding Termination of Water and Waste Water Services in Lee County, 94 FPSC 2:357, 365. (Order No. PSC-94-0210-FOF-WS) (February 21, 1994) (citing Albrecht, 444 So. 2d at 12.)

In State Dept. of Trans. v. Bailey, supra, the Court dealt with a question of an administrative agency's jurisdiction to determine its own jurisdiction along with the application of the doctrine of *res judicata*. At p. 1387 the court stated:

> We are mindful of the principle that a court has jurisdiction to determine its jurisdiction, and that even an erroneous determination of the question of subject matter jurisdiction may be res judicata on that issue if the jurisdictional question was actually litigated and decided, or if a party had an opportunity to contest subject matter jurisdiction and failed to do so. See 11 C. Wright and A. Miller Federal Practice and Procedure 2862 (Supp. 1992).

There is no question that FPC fully litigated the jurisdictional issue in 1995 and it does not contend to the contrary. The parties are exactly the same parties who litigated the jurisdictional issue in 1995 so the third element is clear.

As to the same cause of action element, FPC's Fourth Petition seeks declaratory relief that is substantively identical to that which FPC sought in the earlier docket, i.e., the Commission's declaration that, under its earlier Order No. 24734, FPC is justified in its unilateral reinterpretation of the energy payment terms of the contract. In short, FPC reduced its payments to Lake and wants Commission approval of that unilateral change.

FPC can not avoid the *res judicata* bar by changing the arguments or emphasis of its 1998 petition. A new twist or rephrasing of an argument is simply not enough. In its 1994 petition, FPC argued its new pricing methodology "complies" with the 1991 Approval Order while in the 1998 petition it asked the

Commission to declare that its actions were "required" by the same order. FPC was required to litigate all of the related issues in its 1994 petitions. *Res judicata* applies to all issues which were actually litigated or could have been litigated. The semantic differences between the FPC petitions are immaterial.

In McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996), this Court stated:

> Orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification.

This rule assures that there will be a stopping point in every proceeding. In the recent case of Gulf Coast Electric Cooperative, Inc. v. Johnson, supra, this Court considered both the standard of review and the definition of administrative finality in a PSC context. This latest pronouncement on the doctrine demonstrates the Commission's full compliance. Gulf Coast holds that there must be a "terminal point in every proceeding, both administrative and judicial".

II. THE ASSERTED "INTERVENING AUTHORITIES" DO NOT CONSTITUTE A CHANGE IN CIRCUMSTANCES WARRANTING ABANDONMENT OF THE COMMISSION'S 1995 ORDER DECLINING JURISDICTION AND DEFERRING TO THE COURTS.

FPC asserts that new cases decided by this Court, the New York Public Service Commission and the Federal Third Circuit Court of Appeals constitute significant changed circumstances warranting nonapplication of the normal rules of decisional finality. This new case law is not a change in the factual circumstances of this case. The invalidity of FPC's argument is demonstrated by the Lake Cogen/FPC brief's reliance on a real estate rezoning case; Miller v. Booth, 702 So. 2d 290 (Fla. 3d DCA 1997). That case is cited for the proposition that only a "substantial change of circumstances relating to the subject matter" will justify the rezoning of real estate by a zoning authority. Obviously, once a property has been initially zoned for a particular use, it may not be rezoned for a more intensive use unless there has been a substantial change in factual circumstances of the property. FPC's reliance on this rezoning case dramatizes the inapplicability of the changed circumstances doctrine here.

Intervening judicial authority is not a changed circumstance which will warrant a *de novo* factual review of a previous administrative final order which has not been appealed. This Court's reference to a "change in circumstances" in the recent Gulf Coast Electric case was a reference to a change in the factual situation rather than a change in the case law. In any event, even if the new case law asserted by FPC could be seen as a changed

circumstance, these new cases do not support FPC's position.

For this argument, FPC relies upon Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), cert. den., 118 S.Ct. 1514 (1998); Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 159 F.3d 129 (3d Cir. 1998) and the void proposed Agency Action Order of November 14, 1997. In neither court case was litigation already pending between the parties as is the situation here. This is a distinction of substantial importance. Furthermore, the PAA Order was directly held by the Commission to be a nullity but FPC attempts to hide this fact.

The Panda case is readily distinguishable and actually supports the Commission's denial of FPC's request for a declaratory statement. Panda involved a standard offer contract rather than a negotiated contract. Contrary to FPC's arguments, the Court's opinion indeed "focused" on the difference between standard offer and negotiated contracts. The Commission does not control or construe the terms of negotiated contracts, as it does on standard offer contracts. The Commission so stated in its 1995 Dismissal Order at p. 4-7. Panda also makes it clear that a small electrical cogeneration company may not be subjected to utility-type rate regulation which is preempted pursuant to exemptions of qualifying facilities from state laws regulating the rates of electrical utilities.

In Panda the Commission merely corrected a mistake or an oversight in its approval of the standard offer contract which contained an erroneous 30 year term instead of the required 20 year

term. This was an error and the Commission did no more than correct that error. There are absolutely no mistakes asserted as to the Lake/FPC contract.

Another important distinguishing factor is that in Panda there had been no construction whatsoever on the new proposed cogeneration facility. Lake built a $102 million plant based on an approved contract in which there were no mistakes. Panda was simply attempting to enforce an erroneous 30 year term to its own advantage in a contract situation in which it had not even begun construction. This absence of any action in reliance is a compelling difference.

Also of importance is the fact that this Court in Panda went to the extent of distinguishing Freehold Cogeneration Associates L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995). As the Panda opinion described the facts of Freehold, it is clear that the Lake situation and the Freehold situation are the same in all material respects. Freehold, held that after state approval of the "power purchase agreement between [the QF] and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [regulatory authority] to reconsider its approval or to deny the passage of those rates to [the utility's] customers under purported state authority was preempted by federal law." Freehold at 1194.

The regulatory body was preempted from imposing utility-type rate regulation on the cogenerator and this is the situation presented in Lake. Freehold is specifically applicable and this Court's distinguishing of that case in Panda supports the Florida

Commission's actions below. Freehold is the most applicable out-of-state authority and should be applied here to affirm the PSC.

FPC also relies upon Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 159 F.3d 129 (3rd Cir. 1998), but again, the case is not applicable. Indeed, the case is distinguishable on its basic facts which concerned an obvious change in circumstances concerning the actual cogeneration plant. In Crossroads, the New York Commission approved a 20 year cogeneration contract in 1988 by a letter to the parties. The plant had three internal combustion engines and limited capacity. The plant was sold to a new QF nine years after the initial contract and the new owner installed a modern gas turbine generator which more than doubled the generating capacity of the facility. The original plant never produced more than the 4 MW limit which the utility was required to purchase under the contract. The price on the contract was locked in and the utility complained because it was required to buy an increment of power at more than current market rates. The cogenerating company demanded the utility purchase power from the new turbine generator which the utility refused. The New York Commission ruled that the initial approval of the contract only contemplated that the utility would purchase the output of the three old engines and that no new turbines were ever contemplated. The New York Commission held it had no jurisdiction to interpret the contract, but said it could interpret its own approval of the contract.

Crossroads appealed the New York Commission's decision to a New

York state court. Crossroads also filed suit in Federal District Court for the utility's breach of contract. The parties stipulated the state court appeal would be stayed pending the outcome in the federal court case. (See footnote 3 to the Crossroads opinion.) The Federal District Court dismissed the complaint based upon issue and claims preclusion (*res judicata*) finding that the issue of breach of contract had already been litigated before the New York Commission.

An appeal of the federal dismissal then occurred while the state court appeal still remained pending. The Third Circuit reversed as to dismissal of the breach of contract claim. In an extremely technical opinion, the Circuit Court of Appeals held that since the New York Commission had explicitly stated it had no jurisdiction over the breach of contract, that the appellate court would take the Commission at its word and conclude that the breach of contract issues had not been litigated before the Commission. Thus, the Court held that Crossroads could still litigate its breach of contract claims in the Federal District Court. The Appellate Court found it important that the New York Commission reached its decision:

> Only by looking beneath the Commission's ultimate conclusion to its foundation, i.e., its determination that in 1988 it had considered and subjectively approved only the sale of energy from the existing [three combustion engine] facilities at the contract price. (emphasis supplied).

Thus, the New York Commission had expressed its subjective intent as to what it intended when it wrote its letter approving the contract

in 1988. Reliance on the subjective and unstated intent of prior Commission members would be directly contrary to Florida law. The Florida Commission acts through its written orders which this Court and the Commission itself have routinely held parties can rely upon.

Again, as with Panda, the Crossroads case actually supports the Lake position. According to Crossroads, even if the Florida Commission had rendered a declaratory statement, such a ruling could not have barred the breach of contract litigation in the Florida circuit court. This is precisely what the Third Circuit held. Thus, even if FPC had convinced the Florida Commission that FPC's pricing calculations were what the Commission had subjectively intended in 1991, Lake could still sue for breach of contract in the circuit court based on the written contract just as Crossroads was allowed to do in the Federal District Court.

Of course, the New York case law is most certainly not binding on the Florida Commission and the Commissioners recognized this. A majority of the Commission panel was never convinced by the reasoning of the New York Commission or by the reliance on these non-binding opinions. Commissioner Clark stated:

> . . . [I]n my view . . . We are interpreting the contract under the guise of interpreting our rule. (R. Dade 428, Tr. 86).
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> I think I read it [the Federal District Court Crossroads opinion] that it was simply that if you had wanted to make that [contract dispute] argument, you needed to bring it before the New York court; and you needed to appeal it if you didn't think it was right. (R. Dade 481, Tr. 139).

Commissioner Garcia further stated:

> If we resolve this [pricing] issue, have we not resolved this whole case? Is this not a central issue to what you are before the court on? (R. Dade 378, Tr. 36).

Commissioner Clark summed up her feelings by stating that anything other than a denial of the petition would constitute an "advisory opinion to the court." (R. Dade 500, Tr. 158). Commissioner Clark found Crossroads not binding and not even persuasive authority. (R. Dade 490, Tr. 148).

FPC's brief also asserts that another changed circumstance can be found in the Commission's own PAA order. Indeed, the primary authority on which this appeal is now based is this void order. The repeated citation of and quotation from that void order is inappropriate and misleading. Contrary to FPC's characterization, the order did not become a mere "technical" nullity.[5] FPC's use of this order is at best poor form and at worst deliberately misleading. It is improper to repeatedly quote from a proposed order that was never consummated and became a legal nullity pursuant to an order by the Commission over FPC's objections. The FPC briefs bury this fact either in footnotes or by oblique reference away from the citation and extensive discussion of the voided order. The order ruling the PAA Order was a nullity was omitted from the appellant's appendix while the null and void PAA Order was included. The March 30, 1998 order vaporized the PAA Order and it was FPC's

[5]The Commission noted that FPC filed a motion contending the proposed order was not moot and that it should be held to be a final order. The Commission denied the FPC motion on the merits. (Supp. R. Tab G2).

duty to be sure that this Court understood that fact.

The entire FPC "changed circumstances" argument is negated by reference to the Commission's own rule 25-17.0832(2) which provides for Commission approval of a negotiated contract when:

> It is demonstrated that the purchase of firm capacity and energy from the [QF] pursuant to the rates, terms and other conditions of the contract can reasonably be expected to contribute to the deferral or avoidance of additional capacity construction at a cost to the utilities rate payers which does not exceed full avoided costs . . . .

This contract was approved in 1991 and implemented upon completion of the plant. The 20 year contract term thus began in 1993. As with any negotiated cogeneration contract, the Commission is required to predict the future and to do so on the basis of reasonable expectations. The whole PURPA concept is to encourage small cogeneration power producers to contract for the long term supply of electrical power to avoid reliance on foreign energy sources. Congress and this Court, as well as the Commission, well-know that foreign energy markets and indeed domestic fuel supplies and costs are volatile and may change in any given 20 year period. There is no requirement of a guarantee and the standard is what "can reasonably be expected" at the time the contract is approved.

There is absolutely no provision for the Commission to continue supervision of costs by "utility-type regulation" on an on-going basis. Panda makes it clear that such regulation of cogenerators is preempted by PURPA. After a negotiated contract is approved, the parties live by that contract and the Commission does not have continuing jurisdiction to readjust the contract based on changed

circumstances. Obviously, the parties are bound by their negotiated contract and the Commission is similarly bound. In its Implementation order, quoted at page 24 of this brief, the Commission made it clear that unexpected future development cannot change the initial determination that a cogeneration contract was prudent when approved.

We again point out that standard offer contracts and individually negotiated contracts "are treated very differently in [the PSC's] rules" and the parties were well-aware of this fact.

As stated by the Commission in its 1995 Dismissal Order:

> . . . our rules are more limited in their treatment of negotiated contracts. Rule 25-17.082(2), Florida Administrative Code, simply encourages utilities and QF's to negotiate contracts, and provides the criteria [reasonable expectations] the Commission will consider when it determines whether the contract is prudent for cost recovery purposes . . . the rule makes no provision for resolution of a dispute once the contract has been executed and approved for cost recovery.
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> . . . we have not required any standard provisions to be included in negotiated contracts.

FPC attempts to convince this Court that both the Commission and the Lake Circuit Court have committed violations of PURPA and the FERC's regulations in regard to this negotiated contract. However, FPC again disregards the Commission's own findings:

> . . . PURPA and FERC's regulations carve out a limited role of the state's in the regulation of the relationship between utilities and qualifying facilities . . . 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 of what would otherwise be a wholesale power transaction.
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> While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts.

FPC steadfastly refuses to recognize the differences between standard and negotiated contracts.

III. THE COMMISSION DOES NOT HAVE LEGAL JURISDICTION REQUIRING AN ANSWER TO ANY AND EVERY PETITION FOR DECLARATORY STATEMENT.

Taking a page from the Rules of Civil Procedure, FPC makes a Rule 1.540 argument in favor of setting aside the Commission's 1995 ruling on the grounds of mistake. FPC asserts that "if the PSC, on one occasion, wrongly decided the extent of its jurisdiction" then the Commission would be forever bound. However, FPC never suggests that the Commission was wrong in its 1995 order when it held it lacked jurisdiction to address the contested contract issue and deferred the matter to the courts where the parties were already litigating those issues. Now FPC has argued to the circuit court that there is absolutely no ambiguity in the contract, but the circuit court has construed the contract in a markedly different manner than the construction suggested by FPC. FPC believes this partial summary judgment on liability is incorrect, but instead of taking a non-final appeal which would have clearly determined the issue, FPC chose to return to the Commission where it apparently thought it would receive a more favorable reception.

All administrative agencies have subject matter jurisdiction

over petitions for declaratory statements just as circuit courts have subject matter jurisdiction over complaints for declaratory decrees under Chapter 86 of the Florida Statutes. Despite this general jurisdiction, a Commission or a court is not bound to answer every demand for advice. Couch v. Department of Health and Rehabilitative Services, 377 So. 2d 32, 33 (Fla. 1st DCA 1979) and Fox v. State Board of Osteopathic Medical Examiners, 395 So. 2d 192 (Fla. 1st DCA 1981). The last FPC point on appeal is no more than this--FPC wants advice on its contract problems because it does not like the rulings of the circuit court below.

FPC has chosen not to appeal three separate adverse rulings. The first was the 1995 Dismissal Order, the second was the nullity order and the third was the circuit court's partial summary judgment on liability. After consistently walking away from its appellate rights, FPC now demands that this Court construe the very same contract which the Commission properly chose to defer to the trial court. There has been no overly "doctrinaire" application of the doctrine of administrative finality and there has been no significant shift in the law which mandates a reversal herein.

In a last ditch effort under this section of its brief, FPC cites this Court's 33 year old opinion in People's Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966) plus Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So. 2d 249 (Fla. 1982), for the supposed proposition that agencies always have the inherent power to modify prior orders. As stated by this Court in Reedy Creek at p. 253: "This inherent authority to modify is not without

limitation." Indeed, in Reedy Creek, this Court discussed the circumstances under which an administrative agency can modify its own prior orders under an inherent power theory. The Court voiced a two element test: (1) when an agency has committed a mistake, a miscalculation or an oversight and has a statutory duty to amend its order to protect the public, and (2) where the entity before the Commission has not acted in reliance upon the Commission's order.

There has been no pleading assertion by FPC that the Commission's 1995 Dismissal Order should be set aside as a mistake, a miscalculation or an oversight. FPC has not even made this argument to the Commission in its 1998 petition. FPC's Petition for Declaratory Statement of April 10, 1998 simply recognized the 1995 ruling as a "background" fact and certainly did not attack the ruling. (R. Lake 3, 4). In addition, it is absolutely clear that Lake Cogen has acted in reliance upon the 1995 order. Indeed, FPC has also acted in reliance upon that order. Both parties have been litigating this contract dispute in the circuit court for several years and the circuit court has ruled in favor of Lake Cogen on liability and is close to a final judgment on all issues.

The Requested Ruling Would Have Been Error

If the Commission had abandoned its 1995 order and attempted to retake jurisdiction from the circuit court, severe prejudice would result to Lake Cogen. Such an order would have authorized rank forum shopping by a litigant who chose to make its arguments to the circuit court, but is now disappointed in the result. The PSC was correct in choosing to abide by its own relied upon and unappealed

previous order. Indeed, the Commission would have abused its authority and committed serious error had it granted the FPC 1998 petition for declaratory statement. Travelers Insurance Co. v. Emery, 579 So. 2d 789, 800 (Fla. 1st DCA 1991) and Couch, 377 So. 2d at 33.

CONCLUSION

The orders below should be affirmed. Rarely has a more blatant attempt at forum shopping occurred. Lake Cogen had the right to enter into a negotiated contract and contract disputes and the money damages growing out of those disputes are decided in the courts. The Commission fully recognized this state of the law in its initial 1995 order and the same dispute has been recycled by FPC in an attempt to avoid the adverse rulings of the circuit court. The PSC correctly adhered to its prior ruling in this same controversy between the same parties. Most certainly the Commission acted properly rather than in a "doctrinaire" manner. Indeed, it would have been error for the Commission to have accepted FPC's improper forum shopping attempt. Administrative finality and *res judicata* were correctly applied by the Commission.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to **ROBERT SCHEFFEL WRIGHT**, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302; **JODI L. CORRIGAN, MARILYN E. CULP, LISBETH KIRK ROGERS,** Annis, Mitchell, Cockey, Edwards & Roehn, P.A., P.O. Box 3433, Tampa, Florida 33601; **DIRECTOR,** Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32349-9850; **DAVID E. SMITH,** Director of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0880; **JAMES D. WING**, 701 Brickell Avenue, 30th Floor, P.O. Box 15441, Miami, Florida 33101; **JOHN R. MARKS, III,** Knowles, Marks & Randolph, P.A., 215 South Monroe Street, Suite 130, Tallahassee, Florida 32301; **RODNEY GADDY, JAMES MCGEE,** Florida Power Corporation, Legal Department, P.O. Box 14042, St. Petersburg, Florida 33733; **SYLVIA H. WALBOLT, CHRIS C. COUTROULIS, ROBERT L. CIOTTI, JOSEPH H. LANG, JR.,** Carlton Fields, 200 Central Avenue, Suite 2300, St. Petersburg, Florida 33701; **GAIL P. FELS,** Assistant County Attorney, Dade County Aviation Department, P.O. Box 592075 AMF, Miami, Florida 33159; **ROBERT D. VANDIVER, RICHARD C. BELLAK**, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0850; this 7th day of June, 1999.

JOHN BERANEK, FBN 0005419

LEE L. WILLIS FBN 0135074
Ausley & McMullen
P.O. Box 391
227 S. Calhoun Street (32301)
Tallahassee, Florida 32302
850/224-9115

Attorneys for Intervenor/Appellee
LAKE COGEN, LTD.

pld\lakecoge.brf