BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Power Corporation for determination that its plan for curtailing purchases from Qualifying Facilities in minimum load conditions is consistent with Rule 25-17.086, F.A.C.	DOCKET NO. 941101-EQ FILED: June 15, 1995

BRIEF

OF

ORLANDO COGEN LIMITED, L.P.

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

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PRELIMINARY STATEMENT

Pursuant to Rule 25-22.056(1), Florida Administrative Code, Orlando CoGen Limited files its Posthearing Brief. As required by Rule 25-22.056(3)(a), OCL is also filing simultaneously its Posthearing Statement of Issues and Positions, which contains a summary of the positions developed and supported in its brief.

The following abbreviations are used in this brief. Orlando CoGen Limited is referred to as OCL. Pasco Cogen, Ltd. is called Pasco. Florida Power Corporation is referred to as FPC. The Florida Public Service Commission is referred to as the Commission, and the Federal Energy Regulatory Commission is FERC. The Public Utilities Regulatory Policies Act of 1978 is shortened to PURPA.

STATEMENT OF FACTS

In 1991, as a result of a study of its future needs for capacity, FPC decided to purchase more than 600 MW of firm capacity and energy from Qualifying Facilities (QFs). At that time, FPC considered whether it should negotiate contractual rights to dispatch the QFs' units. (Exh. 9, RJS-9). FPC evaluated the pros and cons and elected not to seek dispatchability.

As early as 1993, FPC projected that it would begin experiencing periods of excess generation in 1994 when it added to its base resources a portion of the block of firm, non-dispatchable QF capacity that it had acquired in 1991. (Tr. 79-80). FPC estimated that the period of occasional imbalances

would last for approximately five years, after which the minimum load on the system would have increased sufficiently to eliminate the problem. (Tr. 115-116).

In 1994, FPC management formulated a corporate strategy to attempt to utilize the curtailment rule to gain contractual dispatch rights at no cost. (Tr. 493; Exh. 9, RJS-8). FPC recognized at the time that the purpose of the curtailment regulation was extremely limited and that it may have waived its rights to curtail when it executed the firm contracts. (Exh. 9, RJS-8). FPC's strategy included pushing for voluntary long-term reductions in QF output and conducting an actual curtailment prior to the time of the Commission's hearing on its curtailment proposal.

FPC proceeded to negotiate individual output reduction agreements with numerous QFs. Of nine such individual agreements, only two were limited to the anticipated period of generation imbalances; the rest were permanent modifications to the long-term contracts. (Tr. 116; Exh. 1, RDD-3).

In October 1994, FPC submitted the proposed curtailment plan that is the subject of this docket. Between October 1994 and January 1995, FPC curtailed deliveries of firm QF power seven times pursuant to its proposed plan. (Exh. 3, CJH-1). FPC did not attempt to measure the production costs it would incur with and without QF deliveries at any time prior to any of its seven decisions to curtail QFs, (Tr. 912). During two of the curtailment events, FPC bought more power from Southern Company under its UPS contract than the amount it refused to

accept from firm QFs. (Tr. 651). During some of the curtailment hours, other Florida utilities successfully sold power on the Florida Energy Broker by posting prices lower than those offered by FPC. (Tr. 223). Prior to four of the seven curtailment periods, FPC elected to place all five of its Crystal River base load units into service. (Tr. 653). On each of those occasions, feasible alternative combinations of units employing cycling capacity were available to FPC. (Tr. 654; Exh. 11, KJS-3). On at least two other occasions during the same time frame, FPC avoided an imbalance between generation and load by keeping a Crystal River base load unit that was receiving scheduled maintenance out of service longer than planned. (Tr. 943).

SUMMARY OF ARGUMENT

PURPA's Curtailment Queue

Section 210(a) of PURPA required FERC to implement "such rules as it determines necessary to encourage cogeneration and small power production." In response, FERC issued rules that contained two essential elements designed to encourage the development of QFs. First, FERC decided that the rates paid by utilities to QFs must be based on the utilities' full avoided costs. Second, FERC imposed a mandatory purchase requirement on utilities. The mandatory purchase element is at the heart of the controversy in this proceeding.

Section 303(a) of FERC's PURPA regulations, 18 C.F.R. § 292.303(a), provides that "[e]ach electric utility shall

purchase . . . any energy and capacity which is made available from a qualifying facility" (emphasis added). No limitation on the obligation to purchase appears in Section 303. In effect, FERC established a resource curtailment queue for electric utilities in which all other resources of the utility, including requirements contracts with other utilities and its own base load units, would have to be curtailed if necessary to permit purchases of power "made available from a qualifying facility."

FERC's regulations provide only two limited exceptions to this stringent, mandatory purchase requirement. First, Section 307(b) of FERC's PURPA regulations permit a utility to discontinue purchases during a system emergency. As OCL will show, FPC has not seriously attempted to invoke this standard.

The second exception, 18 C.F.R. § 292.304(f), allows utilities to curtail purchases "during any period during which, 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, but instead generated an equivalent amount of energy itself." It is this provision, referenced by FPC through the Commission's implementing Rule 25-17.086, upon which FPC relies to justify its proposed curtailment plan and its past curtailments.

In instances in which the requisite showing can be made, Section 304(f) modifies slightly the resource curtailment priority that, absent contractual curtailment rights, requires the utility to curtail takes from all other resources, including base load resources. Otherwise, however, the FERC regulations

give QF purchases absolute priority over all other utility resources.

The above exceptions to the utility's obligation to purchase are implemented by Commission Rule 25-17.086. FPC's proposed curtailment plan must conform to them. However, FPC's proposed plan violates the strictures of PURPA in several fundamental respects. The plan fails to identify the type of operational circumstances which the regulations were intended to address; it fails to require FPC to fully mitigate imbalances before curtailing; and it fails to require FPC to make a proper showing of negative avoided costs. As a consequence, the proposed plan is grossly deficient, and the curtailments that FPC has conducted pursuant to the proposed plan to date have been unwarranted and unauthorized.

Lack of Operational Circumstances

FPC's conscious decision in 1991 to forgo dispatchability of the block of firm QF power that came on line in the 1993-1994 time frame was one element within various trade-offs in a long-term planning process. That process resulted in numerous beneficial firm QF contracts for low-cost power. However, with the decision to forgo dispatchability came the risk associated with the absence of operational flexibility that dispatchability would have provided. FPC has realized since 1993 that its load growth patterns and firm base resources would lead (absent effective mitigation measures) to a period of low load situations beginning in 1994. This consequence of long-term

planning tradeoffs is not the type of unpredictable and unavoidable short-term "operational circumstance" that justifies curtailing firm QF deliveries under the regulations implementing PURPA. Having opted for low-cost, must-run firm resources, FPC cannot now "have it both ways" by misusing the narrow curtailment regulations to effectively dispatch QF units.

Inadequate Mitigation Measures

Despite FERC's clear directions to the contrary, FPC's proposed plan would subordinate firm QF purchases to its Unit Power Sales contract with Southern Company. If FPC had recognized the priority that PURPA places on firm QF contracts in its proposed plan, it would have eliminated two of the seven imbalances that have led FPC to curtail firm QF purchases.

A more significant failure to mitigate is FPC's refusal to incorporate in its proposed plan a requirement that FPC properly price quotes on the Energy Broker and elsewhere when it has excess generation to sell, even though FPC acknowledges that its incremental cost associated with generating the excess energy at minimum load is zero. The injury caused by FPC's recalcitrance goes far beyond the effect of its failure to mitigate imbalances between generation and energy on firm QFs. The objective of the Florida Energy Broker is to replace the most expensive energy in the state with the most economical energy in the state. The amount of savings achieved for ratepayers by the Energy Broker is measured by the difference between the high cost of the buying utility to generate its own power (which it would pass on

to its ratepayers) and the lower price of the energy it can purchase instead from another utility: in other words, the lower the seller's price, the greater the savings realized by ratepayers. By refusing to lower the price it posts on the Florida Energy Broker when it has excess energy that has a zero incremental cost, FPC prevents the Broker from achieving the maximum savings that could be accomplished for ratepayers throughout the state. The Commission should direct FPC to properly recognize the marginal cost of excess generation and to compete aggressively for off-system economy sales. While requiring appropriate mitigation efforts by FPC, the Commission will simultaneously enhance the prospect for lower ratepayer bills throughout the state.

FPC's plan does not require it to use available short-term planning techniques to mitigate imbalances. FPC is obligated to recognize the firm nature of its QF contracts when it decides which of its own units to have on line prior to a low load situation. Instead, prior to four of seven curtailment episodes, FPC chose to commit all five of its Crystal River base load units, virtually assuring it would then face a minimum load "dilemma". On rare occasions, FPC properly avoided such a situation by delaying the scheduled return of certain Crystal River units to service. This type of effective short-term forward planning should be the required norm. As long as it remains the exception and not the rule, the Commission must regard FPC's proposed curtailment plan as deficient.

No Increase in Generation Costs ("No Negative Avoided Costs")

FPC has the burden to prove that accepting firm QF generation during low load periods would constitute operational circumstances and would cause FPC to incur higher costs of production than it would incur if it produced sufficient energy with its own generators to serve the entire system load ("negative avoided costs"). Yet, with respect to the cost criterion, FPC's proposed plan and its decisions to curtail firm QFs to date are based on the naked supposition that the alternative of removing a base load unit necessarily results in negative avoided costs. An empirical analysis of FPC's declared curtailment events demonstrates that, given the load characteristics of FPC's system and the ability of its base load generators in all cases to recover in time to meet rising load, FPC's costs during each curtailment period would have been lower if it had continued to accept firm QF deliveries. That is, purchases from QFs would not have resulted in "negative avoided costs."

In short, FPC has failed to carry its burden to demonstrate that its proposed curtailment plan and decisions to curtail QFs comply with the applicable regulations. Instead, the plan would effectively establish an absolute resource curtailment priority for FPC's own base load units over firm QF deliveries, in direct contravention of federal standards implemented by Rule 25-17.086.

ARGUMENT

ISSUE 1

HAS FLORIDA POWER CORPORATION ADEQUATELY DEMONSTRATED THAT THE MINIMUM LOAD CONDITIONS FOR CURTAILMENT OUTLINED IN ITS PLAN COMPLY WITH COMMISSION RULE 25-17.086, FLORIDA ADMINISTRATIVE CODE?

No. Rule 25-17.086, Florida Administrative Code, implements FERC regulations that permit a utility to curtail a QF in only two very limited circumstances. The utility must demonstrate that there is a system emergency[1] or that operational circumstances exist which would cause the utility to incur higher production costs if it accepted deliveries of QF power.[2] FPC has failed to carry its burden as to either criterion.

System Emergency

Though there are passing references to "system emergency" in FPC's testimony, there has been no serious contention (or substantive evidence) that FPC's minimum load situations constitute system emergencies within the meaning of § 292.307 of the FERC regulations.[3] FPC's witness Southwick may have been trying to allude to the system emergency standard when he used the term "minimum load emergency." (Tr. 331). If so, it was a feeble effort. By using that term he apparently intended to

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[1] 18 C.F.R. § 292.307.

[2] 18 C.F.R. § 292.304(f)(1).

[3] For the most part, FPC's evidence in this case relates to the economic consequences of FPC's response during light load situations. (Tr. 490).

refer to those times when a utility's load and generation do not balance exactly. (Tr. 381, 384). However, contrary to Mr. Southwick's characterizations, a utility's generation and load rarely match. As Mr. Southwick admitted, inadvertent energy is a fact of life in the utility business. (Tr. 385). Generating equipment is designed to tolerate or compensate for imbalances of a certain magnitude. (Tr. 384-385). The NERC guidelines that appear so prominently in FPC's prefiled testimony permit FPC to have swings of 30 MWs above or below its load. (Tr. 385).

More importantly, a minimum load situation does not mean that FPC's system is about to fail or sustain damage. It simply means that FPC must take some appropriate action to bring the system back into acceptable tolerances. (Tr. 384). Such action can take many forms and certainly does not have to involve curtailing QFs.

Nor can FPC claim that system reliability will be jeopardized by a minimum load situation unless firm QFs are curtailed. At one point, FPC asserted that its base load coal units - Crystal River units 1, 2, 4, and 5 - could not be removed to correct a minimum load situation because of their role in Automatic Generation Control (AGC) and system security. (Tr. 350-51). FPC's own evidence belies this claim. As FPC witness Southwick admitted, Crystal River 1 and Crystal River 2 are assigned no role in AGC. (Tr. 393-394). While Crystal River 4 and 5 do serve this function, FPC's operating practices demonstrate that FPC can operate those units with a degree of flexibility and still meet reliability criteria. Specifically,

FPC's data indicates that FPC sometimes brings these units below their claimed minimum operating levels to maintain its system in balance. (Tr. 775-776). In addition, some of the "change cases" presented by FPC as the alternatives it would have followed had it not curtailed QFs -- which implicitly incorporate the constraints that FPC regards as necessary -- involve removing Crystal River 4 from service. (Tr. 777-78; Exh. 7, HIS-3; Exh. 16, LDB-1). Thus, FPC can and does take actions other than curtailment to avoid imbalances without impairing its obligation to provide reliable service. The system emergency standard is simply inapplicable.

Operational Circumstances

Under Section 304(f), purchases of QF power do not have priority if curtailment of a base load resource due to operational circumstances would cause the utility to operate peaking or intermediate resources with faster start-up capabilities to replace power from the base load unit, but with higher costs so that the utility would incur greater costs than if it had not purchased the power from the QF.

When the Commission interprets and applies the "operational circumstances" standard, it must be guided by the following fundamental principles, all of which were established in the record of this case and are pertinent to the correct application of the curtailment regulation.

Purpose of PURPA

It is undisputed that PURPA was designed to encourage cogeneration and to create a mandatory purchase obligation on the part of utilities.

Intended Beneficiary of Curtailment Regulations

As the legislative history of § 292.304(f)(1) demonstrates, the FERC curtailment regulation was devised -- not as an escape clause for the utility -- but to protect the QF's interests during rare and anomalous operational circumstances. (Tr. 556-57).

Genesis of Exception to Obligation to Purchase

The source of the curtailment regulation and of the illustration regarding minimum load conditions set out in the Preamble to the FERC regulations was the concern expressed by one commenter (Commonwealth Edison) during rulemaking regarding the possible inability of its nuclear unit to return to service after a minimum load situation in time to serve rising load. (Tr. 540). The example in the Preamble specifically addresses the ability of a unit to return to service as system demand increases, (Exh. 9, RJS-6 at 14), and thus emphasizes the narrowness of the permissible operational circumstances.

Desire of FERC to Forestall Abuse of Regulation by Utilities

During the rulemaking process, a recurring theme expressed to FERC in written comments and during a public hearing was that utilities might abuse the curtailment exception by using it as

an excuse to circumvent PURPA's mandatory purchase obligation. (Tr. 500-501; Exh. 9, RJS-5). The final regulation was purposely and narrowly drawn to respond to such concerns.

Curtailment Regulation Does Not Override Negotiated Contracts

FERC underscored that the curtailment regulation was not intended to override the contractual obligations of a utility to purchase from a QF. FERC recognized that the avoided cost associated with a firm QF contract is to be measured over the contract's life. (Tr. 536; 18 C.F.R. § 292.304(b)(5)). Once the avoided cost is set in the contract, those avoided costs do not change just because the utility's situation may change. (Tr. 536; New York State Electric & Gas Corp., FERC Docket No. EL95-28-000 (April 12, 1995) (FERC refused to permit abrogation of QF contracts which the utility argued were above its avoided cost)). These principles are clearly set out in the Preamble as well:

> The Commission does not intend that this paragraph override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility. In such arrangements, the established rate is based on the recognition that the value of the purchase will vary with the changes in the utility's operating costs. These variations ordinarily are taken into account, and the resulting rate represents the average value of the purchase over the duration of the obligation. The occurrence of such periods may similarly be taken into account in determining rates for purchases.

(Preamble at 12,228, Exh. 9, RJS-6 at 15). Thus, even though the relative cost of a QF purchase when compared to utility

costs may vary (as such costs rise or fall), these variations are taken into account in the overall rate paid for QF power. The Commission's application of "operational circumstances" must reflect FERC's explicit deference to the integrity of long-term agreements.

FPC Has Not Met Its Burden to Demonstrate the Existence of Operational Circumstances

The impact of the above considerations on a proposed curtailment plan is inescapable. In fact, those impacts have been recognized in the manner in which the issues in this case have been framed. To appropriately invoke the curtailment rule, a utility must show that it will experience a short-term operational problem that arises from unforeseen and extraordinary circumstances (Tr. 504); that it has done all it can to mitigate the situation (Tr. 492, 542); and that it will experience negative avoided costs if it does not curtail QFs.[4] (Tr. 492, 542). FPC's proposed plan fails in every respect.

As to operational circumstances, FPC's current minimum load situation is neither extraordinary nor unexpected. On the contrary, FPC's situation is the direct result of long-term planning trade-offs which FPC knowingly accepted when it entered into the negotiated QF contracts with OCL and others. (Tr. 493, 509).

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[4] The alternative would be to sanction a curtailment declared because of an ordinary or routine circumstance, or a circumstance that could have been averted, or one that has no adverse consequences -- a result that is clearly unacceptable given the priorities and principles discussed above.

The QF contracts are firm, must-take contracts. The contracts are based on the explicit recognition that they will supply firm generation and economic benefits (compared to the utility's avoided cost) over the long term. FPC made a conscious choice to enter into non-dispatchable contracts rather than more expensive dispatchable contracts which would have given FPC control over the QFs' output. (Tr. 509-510). Having made this choice and having received the benefit of this bargain in the form of low-cost firm power, FPC must honor its contractual obligations.

FPC wants to renege on that commitment through a wholly inappropriate application of the curtailment rule. It wants to obtain at no cost dispatch rights that it did not include (or pay for) when it executed the QF contracts. (Tr. 509-510).

FPC's motives in this regard are clear. FPC's internal documents establish that at the time FPC was developing the cogeneration contracts, it analyzed and discussed internally whether it should include dispatch rights in the QF contracts. (Exh. 9, RJS-9). FPC ultimately decided that it did not need dispatch rights and did not want to pay for them. (Tr. 510-511). Later, as other FPC documents reveal, FPC decided to pursue a strategy calculated to obtain those dispatch rights at no cost.

In its 1994 Strategic Proposal, FPC recognized that its 1991 firm QF contracts are not dispatchable. (Exh. 9, RJS-10 at 18). In another document, FPC reiterated that the QF contracts are non-dispatchable but added:

> Ideally, FPC would schedule, dispatch, and operate the various cogenerator units in the same manner its other plants are operated/dispatched.

(Exh. 9, RJS-8 at 46).

In its Cogeneration Review, FPC stated:

> FPC has been engaged in renegotiations with some cogenerators, without additional costs to FPC's ratepayers, to obtain dispatch and scheduling or cycling rights. Niagra Mohawk and PG&E have been forced to pay QFs to obtain dispatch rights during minimum load periods utilizing an auction type approach. FPC is actively pursuing these negotiations through the FPSC rule 25-17.086 "Periods During Which Purchases Are Not Required". This regulation has limited application during extreme conditions only. The implementation of this regulation by FPC would undoubtedly result in immediate cogenerator litigation. The regulation speaks to curtailments when "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, but instead generated an equivalent amount of energy itself." However, the same regulation requires the utility to verify the claim to the FPSC on each occurrence. FPC has decided to implement an actual curtailment prior to a hearing at the FPSC. It has not been determined if FPC waived certain rights by signing contracts with the various parties.

(Emphasis supplied). (Exh. 9, RJS-8 at 3). Without any embellishment, and without any need for inference, this FPC statement illustrates that FPC planned to circumvent its mandatory and contractual obligation to purchase by using the curtailment rule to obtain dispatch rights for which it did not pay. The proposed plan and curtailments to date reflect FPC's attempt to execute its plan. However, the circumstances on

which FPC based its plan do not comply with the requirements of governing regulations. (Tr. 511-512).

The issues of mitigation and negative avoided costs are discussed elsewhere in this brief in response to Issues 2, 2a, 2b, 2c, 6, 6a and 6b. That discussion, which is not repeated here but is incorporated by reference, illustrates that FPC has failed to meet those standards as well.

FPC has failed to meet its burden of proof in this case. Its proposed curtailment plan should not be approved.

ISSUE 2

HAS FLORIDA POWER CORPORATION ADEQUATELY DEMONSTRATED THAT ITS PLAN INCORPORATES ALL APPROPRIATE MEASURES TO MITIGATE THE NEED FOR CURTAILMENT DURING MINIMUM LOAD CONDITIONS?

A necessary part of the requirement that the specified "operational circumstances" exist as a precondition to the curtailment of QF purchases under section 304(f) of the PURPA regulations is that FPC must have taken all steps to mitigate the operational circumstances that otherwise would justify curtailment. By definition, appropriate curtailment conditions cannot be deemed to exist if there are steps that still can be taken to eliminate those conditions. Otherwise, FPC would be able to manipulate its system at will to economically dispatch the non-dispatchable QF contracts.

The dispute between the parties concerning mitigation is one of degree. FPC has described certain mitigation measures that it undertakes when it is in a minimum load situation. (Tr.

77). OCL asserts that FPC's mitigation efforts are inadequate. As discussed in the subissues that follow, FPC has failed to use a feasible commitment schedule, has failed to curtail its Southern purchases before curtailing QFs, and has refused to price its excess energy properly when trying to sell it.

ISSUE 2a

HAS FLORIDA POWER CORPORATION ADEQUATELY DEMONSTRATED THAT IT HAS ATTEMPTED TO MITIGATE ANY FORESEEABLE IMBALANCE BETWEEN GENERATION AND LOAD DURING MINIMUM LOAD CONDITIONS BY COMMITTING THE MOST APPROPRIATE COMBINATION OF GENERATION RESOURCES FOR THE CIRCUMSTANCES?

No. OCL and other QFs holding long-term contracts are firm resources. Fundamentally, the contracts require FPC to count them as firm and add only sufficient generation from its own sources to meet expected load. FPC must attempt to reconfigure the commitment of all of its own generation, including base load generation, before curtailing QF purchases. It follows that if FPC deliberately overcommits its base load units prior to a low load period -- say, to enable it to make a sale -- and thereby creates a subsequent excess generation situation, then it must be prepared to remove the superfluous base load unit and absorb the related costs. (Tr. 683-84).

OCL/Pasco witness Ken Slater delineated FPC's responsibility to schedule the feasible least-cost combination of units in advance of a low load period. (Tr. 667-68). He analyzed the resources that were available to FPC prior to the minimum load events that led it to curtail and the units it

chose to commit. Mr. Slater ascertained that FPC committed four of its five Crystal River base load units prior to all seven curtailment events. FPC committed all five of the units before four of the events. (Exh. 11, KJS-2).

FPC chose to commit this high level of base load resources even though it had an ample inventory of available intermediate and peaking capacity during each of the relevant periods. (Tr. 654; Exh. 11, KJS-3). FPC could have substituted some of this capacity for one of the base load units and averted the minimum load situation without diminishing the reliability of its service. (Tr. 654). As Mr. Slater testified, in each instance, it would have been a relatively simple matter for FPC to have reconfigured its mix of power resources in such a way as to have avoided curtailing QFs, even without curtailing the Southern Company's minimum take contract or making additional off-system sales. Instead, FPC created the "dilemmas" on which it based its decisions to curtail by overcommitting its base load units.

FPC knows how to plan around a minimum load situation. Once, it slowed the return to service of Crystal River 3, its nuclear unit, to avoid an overabundance of base load energy. (Tr. 176). On other occasions, it delayed the return of base load units that were down for scheduled maintenance for the same reason. (Tr. 943). The opportunities identified by Mr. Slater were no different. FPC's proposed plan should require FPC to utilize such techniques in every instance in which they are available. Absent such a requirement, the Commission must reject the plan as deficient.

ISSUE 2b

DOES THE PROPOSED CURTAILMENT PLAN PROPERLY REQUIRE FLORIDA POWER CORPORATION TO TAKE ALL APPROPRIATE MEASURES TO DECREASE OTHER SOURCES OF GENERATION TO MITIGATE ANY IMBALANCE BETWEEN GENERATION AND LOAD?

No. FPC's proposed plan ignores the higher priority of contracts between QFs and utilities (as compared to inter-utility agreements) that the FERC has established explicitly.

OCL understands the apparent facial inequity of requiring FPC to incur payments to the Southern Companies for power not taken instead of curtailing QF purchases. However, the Commission must understand that OCL and other QFs also have firm contracts with FPC that contain minimum take provisions. The issue is which of these minimum take provisions should yield in a minimum load situation. That answer is found in PURPA, which gives QF purchases priority over purchases from other utilities.

This issue was addressed three times in the history of FERC's curtailment rule. First, in the original NOPR, FERC proposed to identify the costs of other power purchases as among those to be considered in determining whether QF purchases would result in increased costs. (Tr. 517; NOPR at 61,204, Exh. 9, RJS-4). However, when the final regulation was adopted, this language was deleted. Costs of purchases from utilities were no longer included in the regulation as contributing to the justification for curtailment. (Tr. 517). Therefore, it is clear that purchases from other utilities are not to be

considered as part of a utility's resources in determining whether or not operational circumstances exist.

Similarly, the Preamble makes it clear that only the utility's operation of its <u>own</u> base load units is to be considered in determining whether a curtailment situation exists. The Preamble states:

> This section was intended to deal with a certain condition which can occur during light loading periods. If a utility operating <u>only base load units</u> during these periods were forced to cut back output from the units in order to accommodate purchases from qualifying facilities, these base load units might not be able to increase their output level rapidly when the system demand later increased.

(Preamble at 12,227 (emphasis supplied), Exh. 9, RJS-6 at 14).

Operational circumstances cannot include situations created by purchases from other utilities because FERC presumed that purchases from other utilities would not be made if those purchases would affect the operation of the utility's own base load units. Therefore, such purchases must be curtailed before QFs. (Tr. 518).

The Preamble's discussion of the impact of QF contracts on full requirements contracts[5] eliminates any doubt concerning whether FERC intended QF contracts to be superior to utility contracts. Some commenters argued that the mandatory purchase obligation would conflict with all-requirements contracts they had signed with other utilities. FERC made it clear that such

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[5] A full requirements contract requires the purchaser to buy all its power from one source.

contracts would not supersede the utility's obligation to buy from QFs:

> . . . The Commission observes that, in general, if it permitted such contractual provisions to override the obligations to purchase from qualifying facilities, these contractual devices might be used to hinder the development of cogeneration . . . . The Commission believes that the mandate of PURPA to encourage cogeneration . . . requires that obligations to purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a qualifying facility.

(Preamble at 12,219, Exh. 11, RJS-6 at 6).

The priority established by FERC is only logical. To permit a utility to curtail a QF before purchases from other utilities are curtailed would make the QF mandatory purchase obligation inferior to purchase obligations between utilities. It would allow utilities to circumvent PURPA simply by entering into other utility purchase contracts. (Tr. 517-518). This would be directly contrary to the purpose of PURPA.

Finally, the New York Public Service Commission has determined that off-system purchases are not to be included in determining whether curtailment is appropriate. In Proceeding on Motion of the Commission to Establish Conditions Governing Curtailment Clauses in Contracts for On-Site Generation, Case

88-E-081 (June 27, 1989),[6],[7] the New York Public Service Commission said:

> Off-system purchases, however, may not be included in minimum generation levels. SEO [State Energy Office] is correct in arguing that PURPA must be interpreted as precluding recognition of these purchases.

Order at 24.

ISSUE 2c

DOES THE PROPOSED CURTAILMENT PLAN PROPERLY REQUIRE FLORIDA POWER CORPORATION TO TAKE ALL APPROPRIATE MEASURES TO INCREASE SALES TO MITIGATE ANY IMBALANCE BETWEEN GENERATION AND LOAD?

No. OCL/Pasco witness Ken Slater demonstrated that the ideal way for a utility to alleviate a generation imbalance is to sell the excess. When a utility sells the amount of its excess energy off-system, it restores the balance between generation and load without affecting the status of its own generators and without affecting the production costs of its own

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[6] The Commission took official notice of this order at hearing. (Tr. 11).

[7] Recently, the Public Service Commission of Nevada reached a contrary result. Saguaro Power Co. v. Nevada Power Co., Docket Nos. 93-5037, 93-5067, 93-5068 (Nov. 21, 1994). However, OCL believes this is not a persuasive precedent for FPC. In its order, the Nevada Commission refused to require utilities to reduce contracts and base load units from their usual levels to minimum levels before curtailing QFs -- a position so extreme and so counter to the objectives of PURPA that FPC has not espoused it. In the order, the Nevada Commission makes no effort to rationalize its decision in light of New York State Electric & Gas Corp., FERC Docket No. EL95-28-000 (April 12, 1995), in which FERC articulated an explicit preference for QF contracts over utility agreements. The Commission should not find the Nevada order persuasive.

units. (Tr. 654-56; Exh. 11, KJS-4). This axiom holds true regardless of the price at which the sale takes place. (Tr. 657).

Significantly, FPC's witness Southwick agreed that if FPC sells its excess energy at any price, then FPC will have experienced no negative avoided costs within the meaning of PURPA. (Tr. 393). FPC also agreed that its incremental cost of generating any excess energy is zero. (Tr. 220).

In light of these acknowledgments by FPC, one would expect FPC to aggressively market excess energy to others. However, in minimum load situations FPC rotely applies the same price sheet to excess energy that it uses to quote prices during normal periods. (Tr. 211, 214-16). FPC's idea of "aggressively marketing" excess power is to call an unreceptive prospect a second time and say, "If it wasn't clear the first time, we really want to sell you this power at our same high price." (Tr. 222-23, 225-26). As a result, other utilities bid prices lower than those quoted by FPC. At times those utilities are selling power -- as could FPC -- during the very hours FPC is curtailing purchases from firm QFs. (Tr. 235).

In taking the position that it will not makes sales below figures quoted in the price sheet, FPC is attempting have it both ways. On the one hand, FPC argues that it is experiencing "negative avoided costs" and therefore must curtail purchases from QFs. On the other hand, FPC argues that it cannot be

required to makes sales below certain price levels because it would lose money on those sales.

Both arguments cannot be correct. If FPC truly is experiencing negative avoided costs, an off-system sale at any price by definition would be profitable. On the other hand, if a sale at below a certain positive price level would not be profitable, that is because FPC would be incurring costs that could be avoided by making purchases from QFs. As a consequence, FPC should not be permitted to curtail purchases from QFs unless it is unable to make off-system sales at any positive price.

Firm QFs are not the only parties affected by FPC's intransigence. The Florida Energy Broker, the Florida utilities' primary market for short-term sales of power, is designed to achieve savings for Florida ratepayers by putting a utility who must otherwise generate at high cost (and collect those hign costs from its ratepayers) in contact with a utility who has power to sell at a lower cost. Obviously, the amount of savings achieved by a transaction on the Energy Broker is measured by the difference between the high cost of the buying utility to generate and the lower price it will pay instead to the selling utility: the lower the seller's price, the greater the savings realized by ratepayers. The savings are divided between the utilities through the Broker's "split the savings" pricing arrangement. (Tr. 426-428). The savings inure to the ratepayers of each utility. By refusing to reduce its price low

enough to capture any market, FPC prevents the Energy Broker from maximizing savings to the state's ratepayers.

At first, FPC claimed its pricing practice was required by FERC standards. (Tr. 347-48). Then, OCL/Pasco witnesses Ken Slater and Dr. Roy Shanker identified other utilities subject to FERC standards who routinely reflect the zero cost of excess power in their prices. (Tr. 658). In rebuttal testimony, FPC witness Southwick argued that FPC was following a long-standing Florida pricing tradition. (Tr. 951, 953). At hearing, FPC's Mr. Southwick acknowledged that this "tradition" was set by FPC and other Florida utilities, who control "Broker sales." (Tr. 1001-1002).

FPC tried to portray OCL (and Pasco) as advocating that FPC should give energy away. (Tr. 593-94). This is not the case. Instead, OCL merely calls on FPC to utilize the marginal cost advantage it has over other sellers to attempt to become the low bidder. When it does, the split-the-savings formula of the Energy Broker will very possibly result in a price higher than the incremental cost that FPC presently -- and incorrectly -- calculates. (Tr. 594-95).

FPC also claims its policy is necessary to prevent ratepayers from subsidizing QFs who would receive prices computed with the formula in FPC's as-available tariff that are higher than the price FPC would post on the Broker. In making such a claim, FPC obviously regards QFs as the source of any excess energy. FPC's premise is faulty. All firm resources,

including QF contracts and FPC's own base generators, contribute to and together constitute the block of must-run capacity. (Tr. 609).

To be clear, OCL does not object to an as-available pricing methodology that incorporates the price of energy sold off system as a component of the as-available pricing formula. The fact that it is not already incorporated simply reflects the Commission's deliberate policy decision during rulemaking to ensure that ratepayers, not QFs, are credited with the profits from off-system sales in normal situations. (Tr. 725). The Commission's rule and FPC's tariff did not contemplate minimum load situations in which the selling utility would have excess energy at zero incremental cost to sell. The Commission should entertain a revised FPC tariff specific to excess generation situations. (Tr. 551-52). In all events, it should reject FPC's claim that FPC's half-hearted efforts to market excess energy entitle it to curtail firm QFs.

ISSUE 3

HAS FLORIDA POWER CORPORATION ADEQUATELY DEMONSTRATED THAT THE PROCEDURES FOR CURTAILMENT OUTLINED IN ITS PLAN ARE REASONABLE AND APPROPRIATE?

No. See Issues 2, 2a, 2b, 2c (mitigation) and 6, 6a, 6b (negative avoided costs), which are incorporated herein by reference.

ISSUE 4

HAS FLORIDA POWER CORPORATION ADEQUATELY DEMONSTRATED THAT ITS PROPOSED PLAN ALLOCATES JUSTIFIABLE CURTAILMENTS AMONG QF'S IN A FAIR AND NOT UNDULY DISCRIMINATORY MANNER?

FPC and OCL have settled their differences with regard to this issue.

ISSUE 5

IF THE PROCEDURES SET FORTH IN FLORIDA POWER CORPORATION'S CURTAILMENT PLAN ARE CONSISTENT WITH RULE 25-17.086, DID FLORIDA POWER CORPORATION PROPERLY IMPLEMENT THE PROCEDURES DURING THE CURTAILMENTS THAT OCCURRED FROM OCTOBER, 1994 THROUGH JANUARY, 1995?

No. FPC curtailed when it could have lowered its production costs by accepting QF deliveries. See the discussion responding to Issue 6, which OCL incorporates by reference.

Issue 6 will follow the discussion of subissues (a) and (b).

ISSUE 6a

IN DETERMINING WHETHER PURCHASES OF FIRM QFS' GENERATION DURING AN OPERATIONAL CIRCUMSTANCE THAT SATISFIES RULE 25-17.086 WOULD CAUSE FPC TO INCUR COSTS GREATER THAN THE COSTS FPC WOULD INCUR IF FPC SUPPLIED THE ENERGY, WHAT COSTS ARE APPROPRIATE TO CONSIDER?

Mr. Southwick, FPC's chief policy witness in this case, agrees that the question of whether to curtail QFs or alternatively remove a base load unit from service during minimum load conditions is but one example of many operational decisions FPC must make. (Tr. 389). Other examples include

whether to ramp up a unit's output to make a sale possible, (Tr. 393), and the determination of which units to commit in the coming period. (Tr. 389).

For these other short-term operational decisions FPC measures only short-term, out-of-pocket costs like fuel and start-up costs. (Tr. 664, 691). Similarly, FPC captures only short-term, out-of-pocket costs when it models its system to calculate as-available energy payments. (Tr. 691). FPC therefore attempts to employ a double standard against QFs by including long-term "cycling costs" when it measures whether accepting QF deliveries during low load conditions would increase its production costs.

The inclusion of cycling costs would result in an apples and oranges comparison in another respect. If FPC were to include costs which occur over the life of the contract, equity and consistency would require FPC to incorporate the benefits that it would realize over the corresponding time frame. (Tr. 513). Instead, FPC has offered a self-serving mismatch of long-term costs and short-term benefits.

Even if cycling costs were pertinent to the issue, Mr. Lefton's study is incomplete and speculative. Mr. Lefton's results depend too much on reckless extrapolations from scant data. (Tr. 660, 664). His approach, which would have been suspect in any event, was rendered even more meaningless by the limited scope of the work that FPC authorized him to undertake. His company, Aptech Engineering Services, Inc. (Aptech), recommended an elaborate project consisting of eleven detailed

tasks to FPC. FPC engaged Aptech to perform only three of the eleven tasks: Unit Survey, Develop Preliminary Damage Mode and Cost of Cycling Estimates, and Project Management. (Tr. 667; Exh. 11, KJS-6 at 2). As a result, Aptech was obliged to hedge time and again in its work product:

> The results in Table 2 include conservative upper and lower bound cost estimates, since it is recognized that there is a significant amount of uncertainty in the estimates.

(Exh. 11, KJS-5 at 2 of 10).

> The information shown in Tables 2-1 and 2-2 indicates that there remains significant uncertainty in the cost of cycling figures. There are many sources of uncertainty in the cycling cost estimates. . . .

(Exh. 11, KJS-5 at 3 of 10).

> . . . [A]ll work herein must be viewed as preliminary for a variety of reasons. Most important is that we are using only hourly loads data to compute damage and that we are normalizing loads for each unit only by its capacity. This normalizing fails to account for the varying abilities of unit types and designs to sustain loading cycles and starts.

(Exh. 11, KJS-5 at 8 of 10).[8]

Clearly, FPC did not commission and did not receive a serious analysis of cycling costs. FPC has used the numbers only to weight the results of its "with and without" curtailment comparisons. In short, FPC wants its thumb on the scale.

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[8] Due to space constraints, OCL has not quoted all the disclaimers found in the Aptech study. (See Exh. 11, KJS-5, pp. 1-10).

Mr. Lefton's numbers are irrelevant, and unreliable in any event. They should be ignored in any calculation of avoided costs, just as FPC ignores them for all other purposes.

ISSUE 6b

IN DETERMINING WHETHER PURCHASES OF FIRM QFS' GENERATION DURING AN OPERATIONAL CIRCUMSTANCE THAT SATISFIES RULE 25-17.086 WOULD CAUSE FPC TO INCUR COSTS GREATER THAN FPC WOULD INCUR IF FPC SUPPLIED THE ENERGY, WHAT IS THE APPROPRIATE TIME FRAME TO MEASURE?

The measurement of avoided costs with and without QFs is one of many quantitative analyses FPC must perform in the course of its operations. Another is the consideration of which of its own units it should commit to service. When FPC performs a cost/benefit analysis of its own units, it analyzes a period of several days with a system simulation program that captures all expected costs and benefits during that period. (Tr. 685).

However, in assessing whether QFs would cause negative avoided costs, FPC values QFs -- not over the same commitment schedule that FPC uses when evaluating its own units -- but over the curtailment period of roughly 3-6 hours. (Tr. 670). Again, FPC's decision to curtail depends on the application of a double standard.

FPC seizes on the language of § 292.304(f) that says a utility can curtail if "during any period" avoided costs would be negative. (Tr. 61). As FERC has noted, the relative value of QF power as compared to a utility's cost will vary over time. If a study period is defined narrowly enough, it is possible to

"prove" almost anything; however, the integrity of long-term negotiated trade-offs must be sacrificed in the process.

FPC's position is palpably wrong. The Preamble to § 292.304(f) refers to the possibility of higher replacement costs due to the unavailability of an affected base load unit when load picks back up. Many times such costs would be incurred during the period following the curtailment hours. (Tr. 394-95). If the comparison of costs with and without QF deliveries incorporates <u>costs</u> that are incurred following curtailment hours, the comparison certainly must incorporate any <u>benefits</u> (in the form of positive avoided costs) that QFs contribute during the same period. Otherwise, the regulation designed explicitly to protect QFs would be deliberately handicapping the QF delivery scenario -- a proposition that is absurd on its face.

At hearing, FPC witness Linda Brousseau objected to the use of a period longer than the few curtailment hours because a longer period would undoubtedly include some hours in which QFs would displace higher costing energy, thereby generating positive avoided costs. (Tr. 899). This portion of FPC's testimony displays the bias in FPC's approach. It appears that FPC views QF benefits in the form of positive avoided costs as something that would get in the way of the result it wants its analysis to produce. However, the purpose of the exercise is to fairly compare the relative costs of two alternatives, <u>not</u> to exclude QF benefits from the comparison.

ISSUE 6

HAS FLORIDA POWER CORPORATION ADEQUATELY DEMONSTRATED THAT THE CURTAILMENTS THAT HAVE OCCURRED FROM OCTOBER 1, 1994, THROUGH JANUARY 31, 1995, WERE NECESSARY TO AVOID NEGATIVE AVOIDED COSTS?

FPC's witness Linda Brousseau said humans, not computers, must operate FPC's system. (Tr. 889). Yet, FPC's claim of negative avoided costs depends on the uncritical acceptance of the results of a dated, quirky computer simulation program -- a program that requires human judgment and involvement to winnow answers ranging from sub-optimal to silly when the program is applied to the task of comparing the costs of curtailment and shutdown scenarios.[9]

For example, when determining which units to shut down in a "change case" (no curtailment) simulation, FPC's "Unit Commit" program does not have the ability to take into account the size of the targeted curtailment. That skill was not built into its logic. The program is thus oblivious to one of the key variables of the situation it is instructed to analyze. (Tr. 687). When simulating the October 19 event, Unit Commit shut down two coal units in the "no-curtailment" change case when the

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[9] FPC also supports its claim of negative avoided costs by reference to certain "manual calculations" sponsored by Mr. Southwick. This evidence shares the same double standard found in much of FPC's case. It employs a "proxy" value for start-up times rather than the value in Unit Commit. (Tr. 399). Also, Mr. Southwick acknowledged that the utility uses the computer simulation tool, and not manual calculations, for other analyses supporting operations. (Tr. 400-01). The manual calculations demonstrate only that start-up costs can exceed fuel savings when a narrow time frame is examined. They do not meet FERC's test, which involves a comparison of the utility's production costs with and without QF deliveries.

removal of one would have provided an adequate reduction in generation. Unit Commit thereby doubled unnecessarily the start-up costs that would be attributed to the decision to purchase from QFs. (Tr. 676-77, 687). Obviously, an operator would not take down two coal units when one would suffice; yet, FPC offered this Unit Commit "solution" as "proof" of negative avoided costs in its testimony. (Tr. 687).

In its change cases, FPC put Unit Commit on automatic pilot, and its imperfect logic steered it off course. By contrast, OCL/Pasco witness Ken Slater devised alternative shutdown strategies that appeared advantageous based on the circumstances of each event; he then used Unit Commit to cost them out -- a task well within the program's capabilities.

FPC filed direct testimony in which it offered Unit Commit comparisons for each of the seven curtailment events. For each event, FPC purported to show costs for the non-curtailment (change case) scenario that were higher than the curtailment (base case) scenario. In his testimony and exhibits, Mr. Slater demonstrated that, by using less costly, readily available shutdown alternatives, FPC could have continued to accept QF deliveries in all seven cases without incurring negative avoided costs.

Three days prior to hearing, FPC abruptly changed the input values in all seven of its base (curtailment) cases. FPC brandished a new slate of Unit Commit solutions showing non-curtailment (change case) scenarios that were more expensive than the new base (curtailment) cases to which they related.

FPC claimed that it changed its seven base cases at the eleventh hour in part to correct errors unrelated to those that Mr. Slater had identified and to revise certain policies underlying its original calculations. OCL believes FPC was actually trying to escape the headlock Mr. Slater had seized on FPC's avoided cost case. The attempt did not work. Before he took the stand, Mr. Slater had proved again that accepting QF deliveries was FPC's less costly alternative. Using FPC's new base cases and FPC's self-serving time frame consisting of only the hours of curtailment, he readily identified feasible shutdown alternatives for six of the seven revised base cases that translated into positive avoided costs. (Tr. 687-88, 692).

It is critical to focus on the reason why Mr. Slater was able to demonstrate positive avoided costs in his change cases. Mr. Slater's results derive from and demonstrate the properties of FPC's system -- principally its load characteristics and the operating capabilities of its base load units. In the Preamble to its cogeneration regulations, FERC expressed the concern that a base load unit removed from service might not be available in time to meet rising load following a low load situation, in which case the utility would realize higher replacement energy costs. (Preamble at 12,227, Exh. 9, RJS-6). However, all of the Unit Commit "reenactments" of the minimum load events -- including those performed by FPC -- display system dynamics very different from the concerns that led FERC to promulgate its curtailment regulation. In every change case, utilizing actual load data and FPC's own detailed system simulation technique,

FPC's base load units returned in time to meet rising load without incurring higher replacement costs. (Tr. 782-83).

FPC complained about Mr. Slater's use of the assumption -- in the form of FPC's input to its version of the Unit Commit program -- that FPC's coal units can restart in six hours. (Tr. 763). However, Mr. Slater employed the same Unit Commit system simulation program (and the same start-up assumption) on which FPC relies to formulate its generation dispatch decisions. (Tr. 795-96, 886). It is also the same Unit Commit program and data that FPC uses to perform the after-the-fact calculation of the system costs it avoids by buying as-available energy from QFs during a given period. (Tr. 886). In fact, FPC's base case calculations were derived from Unit Commit billing runs that FPC had used to price past purchases of as-available power. (Tr. 763-64). In this case, FPC argues for a value for coal unit start-up time longer than its own assumption because a longer start-up would translate into calculations of higher system costs, thereby rendering Mr. Slater's change cases more expensive. However, the same longer start-up assumption that would increase indicated production costs in this context would also increase the production costs quantified in the analysis FPC performs to derive the value of as-available energy. Stated differently: either FPC's start-up assumption is appropriate for modeling purposes, or FPC is deliberately understating the amount it must pay QFs for as-available energy. (Tr. 763-64). Again, FPC seeks to apply a double standard to

the calculation of avoided costs. Again, FPC cannot have it both ways.

FPC performed no analysis of generation costs with and without QF deliveries prior to its decisions to curtail. (Tr. 912). After the fact, as part of direct testimony, FPC performed the calculations which, according to witness Southwick, prove "that negative avoided costs would have been incurred if we had not called for curtailments." (Tr. 364).

After FPC filed this direct testimony, and shortly prior to the time Mr. Slater produced the results of his analyses, FPC began to studiously distance itself from its earlier reliance on its comparisons of costs. Instead, FPC maintained essentially that the theoretical proposition that removing a base load unit will always translate into negative avoided costs is beyond challenge, regardless of the evidence presented. The quantified costs that FPC earlier had described as positive proof were transformed in Ms. Brousseau's rebuttal into mere "directional" indications. (Tr. 890). Thus, FPC began laying the foundation for the claim that the premise underlying its proposed curtailment plan should be affirmed even if its supporting evidence was discredited.

True to this theme, in rebuttal of Mr. Slater's testimony, FPC witness Brousseau claimed that OCL/Pasco witnesses had not even called into question FPC's "general" claim that removing a base load unit in a minimum load situation necessarily entails negative avoided costs, (Tr. 887), -- this despite the fact that, in the OCL/Pasco testimony she was "rebutting," Mr. Slater

had assessed each of FPC's seven cost comparisons and had disproven the claims of negative avoided costs in all of them.

From the position that it could assume negative avoided costs without evidence (a straightforward failure to meet its burden), FPC proceeded to the argument that its assumption is even insulated from the impact of overwhelming countervailing evidence (a claim of absolute immunity). This line of reasoning -- that no number of individual demonstrations of positive avoided costs can "call into question" FPC's assertion that it will always experience negative avoided costs -- is disingenuous.[10] More importantly, from the Commission's point of view, it flies in the face of the requirement FERC placed on utilities to prove upon demand that individual curtailments are warranted by a factual showing of negative avoided costs. (18 C.F.R. § 292.304(f)(4)). Obviously, FERC does not share FPC's theory of the "incontrovertible assumption." The very argument merely highlights again FPC's abject failure to meet its burden of proof.

Undoubtedly, FPC will claim in its brief that Mr. Slater's alternatives would "imperil" customers or equipment, just as FPC's counsel tried to suggest in cross-examination. However, Mr. Slater amply demonstrated in his testimony that his alternatives respected FPC system constraints and emulated FPC's own operating practices. (Tr. 762, 797). For example, while

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[10] At hearing, Ms. Brousseau acknowledged that FPC does not know with certainty that cycling a base load unit off necessarily results in negative avoided costs. (Tr. 912).

FPC criticized Mr. Slater's decision to cycle off Crystal River 4 in several of his change cases, the very same action was taken by FPC in its change cases of January 2 and January 7. (Tr. 796). Therefore, only by indicting its own work and devising yet another double standard can FPC criticize Mr. Slater's shutdown choices.

During the hearing, FPC's witness asserted that it would be infeasible for FPC to perform "with and without" comparisons prior to the decision to curtail. This testimony is effectively refuted by Mr. Slater's example. Once he digested the computerized information furnished by FPC describing the status of FPC's units prior to the curtailment events -- in other words, once he shared the awareness and knowledge of circumstances that the system operator held going into the minimum load event -- Mr. Slater needed only a very few minutes to fashion an alternative to curtailment and test it with Unit Commit. (Tr. 754, 798).

Besides, how could FPC know what measurements are possible to accomplish? It has never tried. (Tr. 912). From the outset, FPC's case has depended on the proposition that in minimum load situations, negative avoided costs are a given and that the federal regulation constitutes blanket approval to curtail in low load periods. Having explicitly accepted the burden of proof in this case, FPC's position is that it does not have to prove anything. The void in FPC's presentation in this case is the epitome of a party's failure to meet its burden of proof. FPC now hopes to bootstrap its prior refusal to measure

avoided costs before a decision to curtail into "proof" that it is unable to perform any analyses. The Commission should reject the attempt.

ISSUE 7

WHAT IS THE PERMISSIBLE SCOPE OF RULE 25-17.086, FLORIDA ADMINISTRATIVE CODE, IN VIEW OF THE FEDERAL STANDARDS IMPLEMENTING SECTION 210 OF PURPA?

As demonstrated above, FPC's curtailment plan is in direct conflict with the limited curtailment rights provided under 18 C.F.R. § 292.307 and § 292.304(f), included in FERC's rules implementing Section 210 of PURPA. Necessarily, then, FPC's curtailment plan also violates Rule 25-17.086, the rule of the Commission that implements the federal standards. This result follows because, in order to avoid federal preemption, the Commission rule must be read to be co-extensive with 18 C.F.R. § 292.304(f). That is, the exception to the utility's mandatory obligation to purchase in Rule 25-17.086 can be no broader in scope than the FERC rule that it implements.

Particularly in view of the fact that the negative avoided cost/operating circumstances standards of § 292.304(f)(1) were the only justifications that FPC attempted (unsuccessfully) to develop in support of its proposed curtailment plan during the hearing, OCL believes that this subject may be a non-issue. That is to say, unless FPC tries to alter the entire foundation for its request in post-hearing documents, this issue properly should be deemed to be moot as a practical result of the progress of the case. However, if FPC (or the Commission) were

to attempt at any point in this case to interpret Rule 25-17.086 as a separate source of authority that would permit curtailments that are not authorized under 18 C.F.R. § 292.304(f), such an application of Rule 25-17.086 would be federally preempted pursuant to the principles discussed below.

General Principles of Federal Preemption

Under the doctrine of federal preemption, the states, including this Commission, are preempted from recasting the mandate of federal law -- in this case PURPA and FERC's PURPA regulations. The preemption doctrine has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and is designed to ensure that federal law will prevail over conflicting state law. See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 157 (1982). State law may be preempted in three ways. See Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988).

First, in enacting federal law, state law may be expressly preempted. See FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990); Schneidewind, 485 U.S. at 299; Jones v. Rath Packing, 430 U.S. 519, 525 (1977). Second, absent explicit preemptive language, federal law may occupy the entire field of regulation. See Schneidewind, 485 U.S. at 300; Fidelity, 458 U.S. at 153. Third, even if state regulation is not completely displaced in a specific area, implied preemption will apply -- and state law is nullified -- when "compliance with both federal and state regulation is a physical impossibility." Florida Lime & Avocado

Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). See also Schneidewind, 485 U.S. at 300; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Preemption of State Law by Federal Agencies

Federal agencies authorized to implement federal laws may also expressly state an intent to preempt state authority. See Fidelity, 458 U.S. at 154. Federal regulations, therefore, are entitled to the same preemptive effect given to federal statutes. Id. at 153. In addition, the articulation by a federal agency that its exercise of authority is exclusive on an issue preempts state exercise of regulatory power on that issue. See, e.g., Mississippi Power & Light v. Mississippi Ex Rel Moore, 487 U.S. 354 (1988); City of New York v. F.C.C., 486 U.S. 57 (1988). Thus, preemption of state law as a result of federal agency action is permitted if (i) the federal agency intended to preempt a conflicting state law and (ii) the federal agency's action is within the scope of the agency's duties. See, e.g., Fidelity, 458 U.S. at 154.

PURPA and the PURPA Regulations
Explicitly Preempt State Law

Intent to Preempt
Conflicting State Law

In deciding whether FERC's PURPA regulations preempt state law, the first prong of the analysis requires a showing that the federal agency intended to preempt a conflicting state law. In this instance, FERC has explicitly declared an intent to preempt

any state law that would conflict with the provisions of the PURPA regulations.

FERC's Action is Within
the Scope of Its Duties

The second prong of the preemption test is also satisfied, since PURPA clearly manifests Congress' intent to instill FERC with the authority to preempt state laws affecting the regulation of QFs. PURPA provides that:

> . . . [FERC] shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production. . . .

16 U.S.C. § 824a-3(a) (1990). It could not be more clear that FERC was acting within the scope of its duties.

Numerous Courts Have Recognized the
Preemptive Effect of FERC's PURPA Rules

The above analysis is not novel or unique. Numerous courts have recognized that FERC's PURPA rules have preemptive effect. See Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995) (states preempted from retroactively revising rates in QF long term contract); Independent Energy Producers Ass'n v. California Publ. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994) (state program for monitoring compliance with PURPA operating and efficiency standards preempted); Smith Cogeneration, Inc. v. Corporation Comm'n, 863 P.2d 1227 (Okla. 1993) (state rule requiring a notice allowing Corporation Commission to modify QF contracts preempted). Similarly, if Rule 25-17.086 is read to permit

curtailment of purchases from QFs not authorized under FERC's PURPA regulations, that aspect of the rule would be preempted.

Although FERC Gives the States Discretion to Implement its PURPA Rules, the States May Not Enact Rules Contrary to FERC's PURPA Rules

Finally, although it is true that FERC gave the states "great latitude in determining the manner of implementation of [FERC's] rules", (Preamble at 12,230-31, Exh. 11, RJS-6 at 23-24), FERC went on to provide that the states' implementation must be "reasonably designed to implement the requirements of [the PURPA rules.]" Id. And, FERC stated that the purpose of the PURPA regulations is "to encourage cogeneration and small power production." Id. Thus, "state laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement of these technologies, and must yield to federal law." Id. at 12,222; Exh. 11, RJS-6 at 9.

Thus, while this Commission has some discretion in how it implements FERC's PURPA regulations, the overriding goal must be "to encourage cogeneration and small power production." In this regard, the Commission cannot implement a rule that permits greater curtailment of purchases from QFs than FERC would allow under its PURPA rules. Such a rule "would fail to provide the requisite encouragement" of QFs, "and must yield to federal law."

ISSUE 8

SHOULD THE COMMISSION APPROVE FLORIDA POWER CORPORATION'S CURTAILMENT PLAN AS BEING IN COMPLIANCE WITH RULE 25-17.086?

No. As demonstrated by the record in this case and the discussion herein, FPC's proposed curtailment plan does not comply with Rule 25-17.086. Its petition in this docket should be denied.

CONCLUSION

In advocating its proposed plan, FPC has ignored FERC's explicit preference for QF contracts over agreements between utilities; has resisted a mitigation measure (sales) that it acknowledges would preclude negative avoided costs (which are the sole justification for curtailment) and that would also increase Broker-based savings; and has eschewed another measure (short-term planning) that must be deemed obligatory to recognize the firm nature of the QFs' contracts. FPC has curtailed firm QFs seven times based on a mere assumption of negative avoided costs. It now clings to that assumption in the face of empirical evidence demonstrating time and again the ability of FPC's system to shut down a base load unit and return it in time to avoid incurring negative avoided costs. The record shows FPC's request for carte blanche authority to curtail is not based on "operational circumstances," but is an attempt to carry out FPC's plan to use the curtailment

regulation as a means of dispatching QFs' output. The Commission should emphatically reject the proposed plan.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Orlando CoGen Limited's Brief has been furnished by hand delivery* or by U.S. Mail to the following parties of record, this 15th day of June, 1995.

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