

LANDERS & PARSONS, P.A.
ATTORNEYS AT LAW

ORIGINAL

CINDY L. BARTIN
DAVID S. DEE
JOSEPH W. LANDERS, JR.
JOHN T. LAVIA, III
FRED A. McCORMACK
PHILIP S. PARSONS
ROBERT SCHEFFEL WRIGHT

310 WEST COLLEGE AVENUE
POST OFFICE BOX 271
TALLAHASSEE, FLORIDA 32302
TELEPHONE (850) 681-0311
TELECOPY (850) 224-5595
www.landersondparsons.com

HOWELL L. FERGUSON
OF COUNSEL

VICTORIA J. TSCHINKEL
SENIOR CONSULTANT
(NOT A MEMBER OF THE FLORIDA BAR)

May 1, 1998

VIA HAND DELIVERY

Blanco S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Tallahassee, Florida 32399-0850

Re: Petition of Florida Power Corporation for
Declaratory Statement, Docket No. 980509-EQ

Dear Ms. Bayo:

Enclosed are sixteen copies of pages 1, 6, and 26 of the document that was submitted as Attachment A to Lake Cogen's Motion to Dismiss filed yesterday in the above-styled action. We would appreciate your substituting these pages, which are "clean" copies of the originals as filed; if you require complete copies of the originals, please let us know and we will be happy to furnish them.

Thank you very much for your kind and professional assistance. If you have any questions, please give me a call.

Cordially yours,

Robert Scheffel Wright
Robert Scheffel Wright

cc: Richard C. Bellak, Esquire

- ACK _____
- AFA _____
- APP _____
- CAF _____
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- CTR _____
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- PTG _____
- SEC 1 _____
- WAS _____
- OTH _____

DOCUMENT NUMBER-DATE

04931 MAY-18

FPSC-RECORDS/REPORTING

In Re: Petition for Declaratory)
Statement Regarding Application of)
Rule 25-17.0832, F.A.C., to Certain)
Negotiated Contracts for Purchase of)
Firm Capacity and Energy by Florida)
Power Corporation.)

Docket No. 8407 REPORTING
FPC RECORDS REPORTING
Submitted for Filing:
December 1, 1994

LAKE COGEN, LTD.'s MOTION TO DISMISS FPC's AMENDED PETITION
AND SUPPORTING MEMORANDUM OF LAW

LAKE COGEN, LTD., ("Lake Cogen" or "Lake"), pursuant to Rule 25-22.037(2)(a), F.A.C., respectfully moves the Commission to dismiss the Amended Petition filed herein by FLORIDA POWER CORPORATION ("FPC"), for the following reasons.

1. Resolution of the real dispute -- the meaning of the energy pricing terms of the Negotiated Contracts between FPC and QFs -- requires that the disputed sections of the subject contracts be interpreted, but the Commission has no authority to interpret cogeneration contracts.
2. Neither the Commission's statutes, nor its rules, nor its approval of the Contracts "for cost recovery purposes" give the Commission authority to interpret the Contracts or continuing jurisdiction over the Contracts.
3. Rule 25-17.0832(4)(b) does not apply to negotiated contracts, nor does it prescribe a mechanism for determining the operational status of the avoided unit. Moreover, FPC's version of the Rule's history is plainly contradicted by FPC's own rule proposals and post-hearing comments in Docket No. 891049-EU.

assigned to PCC its rights to the two LM6000 generators that it had ordered through S&S.

9. On March 13, 1991, PCC and FPC executed two contracts for the purchase of firm capacity and energy by FPC from QFs, the Contract with Lake Cogen and another with Pasco Cogen. In compliance with Commission Rules 25-17.0832(1)&(2), both contracts were submitted to the Commission and were approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991. 91 FPSC 7:60. The Commission's order found that Lake Cogen's Contract is expected to provide savings to FPC's ratepayers of more than \$3 million (Net Present Value). 91 FPSC 7:71.

10. When the Facility became commercially operational, FPC commenced making firm capacity and energy payments to Lake Cogen in accordance with the Contract. All of FPC's payments for energy delivered by Lake Cogen to FPC since the Facility began commercial operation in July 1993, through the payment made in August 1994 for energy delivered in July 1994, were calculated using the formula set forth in section 9.1.2(i) of the Contract, i.e., the formula for calculating the "firm energy price" under the Contract.

11. In a letter to Lake Cogen dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating" "an avoided unit" with certain limited characteristics during certain hours, and further declared that, as a result of this determination, FPC would pay for energy delivered in those hours at a rate based on FPC's as-available energy costs, which are less than the firm energy prices that FPC would otherwise be obligated to pay to Lake Cogen. FPC claims that these actions are being

that its approval of the Contracts was for any purpose other than cost recovery. This approval cannot and does not establish continuing jurisdiction over the Contracts. FPC's petition must be dismissed.

E. Commission Intervention In This Contract Pricing Dispute Would Be Contrary To The Doctrine Of Administrative Finality.

Commission jurisdiction to interpret contracts between utilities and QFs is neither expressly granted nor clearly and necessarily implied by the Commission's statutory mandates to establish guidelines for QF power purchases and to encourage cogeneration. If anything, the reverse is true: what is necessary to encourage cogeneration is the consistent application of the doctrine of administrative finality, with respect to approved cogeneration contracts, as enunciated by the Commission.

In addressing the implementation of its cogeneration rules with respect to negotiated contracts, the Commission explained how the doctrine of "administrative finality" applies to its approval of negotiated QF power sales contracts:

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 decisions. 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.

Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:24,38.

In Florida Power & Light Co. v. Beard, 626 So.2d 660 (Fla. 1993), the Court upheld the Commission's prohibition, by rule, of "regulatory out" clauses from standard offer contracts on the