State of Florida

Public Service Commission

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RECORDS AND REPORTING

DATE: JUNE 18, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (BELLAK) RCB by RVJB
DIVISION OF ELECTRIC AND GAS (DUDLEY, BREMAN) KD TXB RLT

RE: DOCKET NO. 980283 - PETITION BY FLORIDA POWER CORPORATION FOR DECLARATORY STATEMENT THAT COMMISSION'S APPROVAL OF NEGOTIATED CONTRACT FOR PURCHASE OF FIRM CAPACITY AND ENERGY BETWEEN FPC AND METROPOLITAN DADE COUNTY IN ORDER NO. 24734, TOGETHER WITH ORDERS NOS. PSC-97-1437-FOF-EQ AND 24989, PURPA, FLORIDA STATUTE 366.051, AND RULE 25-17.082, F.A.C., ESTABLISH THAT ENERGY PAYMENTS THEREUNDER, INCLUDING WHEN FIRM OR AS-AVAILABLE PAYMENT IS DUE, ARE LIMITED TO ANALYSIS OF AVOIDED COSTS BASED UPON AVOIDED UNIT'S CONTRACTUALLY-SPECIFIED CHARACTERISTICS.

AGENDA: JUNE 30, 1998 - REGULAR AGENDA - DECLARATORY PETITION - INTERESTED PERSONS MAY PARTICIPATE AT COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\EAG\WP\980283.RCM

CASE BACKGROUND

Florida Power Corporation (FPC) and Metropolitan Dade County (Dade), a qualifying facility (QF), entered into a Negotiated Contract (Contract) on March 15, 1991. The term of the contract is 22 years, beginning November 1, 1991 when the facility began commercial operation, and expiring July 21, 2013. Committed capacity under the Contract is 43 megawatts, with capacity payments based on a 1991 pulverized coal-fired avoided unit. The Contract was one of eight QF contracts which were originally approved for cost recovery by the Commission in Order No. 24734, issued July 1, 1991, in Docket No. 910401-EQ (Approval Order).

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

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

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

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

On July 21, 1994, FPC filed a petition (Docket No. 940771-EQ) seeking a declaratory statement that Section 9.1.2 of the negotiated contract was consistent with then Rule 25-17.0832(4)(b), Florida Administrative Code. This rule referenced avoided energy payments for standard offer contracts, and was a basis for evaluating negotiated contracts. Several cogenerators, including Dade, filed motions to dismiss FPC's petition. FPC later amended its petition and asked the Commission to determine whether its implementation of Section 9.1.2 was lawful under Section 366.051, Florida Statutes, and consistent with Rule 25-17.0832(4)(b), Florida Administrative Code (F.A.C.). In Order No. PSC-95-0210-FOF-EQ, the Commission granted the motions to dismiss on the grounds that the Commission did not have jurisdiction to adjudicate a dispute over a provision in a negotiated contract. However, the Order recognized the Commission's continued responsibility for cost recovery review.

Subsequent to the filing of FPC's petition in Docket No. 940771-EQ, Dade and other QFs filed lawsuits in the state courts for breach of contract. On January 23, 1996, the Fifth Judicial Circuit Court issued a Partial Summary Judgement for Lake Cogen Ltd. (Lake) in Case No. 94-2354-CA-01.

The Dade contract, along with the Lake Cogen contract, are the last remaining "Option A" negotiated contracts that were affected by FPC's implementation of Section 9.1.2 which have not been resolved. Disputes concerning the other four affected "Option A" contracts that were originally approved by Order No. 24734 have previously been settled through Commission approved agreements (Auburndale, OCL, Ridge, and Pasco). With respect to energy payments, FPC's contract with Dade is identical, in all material aspects, to its contract with Lake.

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

Order No. PSC-98-0450-FOF-EQ, issued March 30, 1998, declared the Lake Order to be a nullity due to the expiration of the Settlement Agreement prior to the order becoming final.

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

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

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Dade's request for Oral Argument?

RECOMMENDATION: Yes. Oral argument should be granted.

STAFF ANALYSIS: Pursuant to Rule 25-22.022(3), the Commission has the discretion to either grant or deny oral argument in a declaratory statement proceeding. Since both Intervenor Dade and Petitioner FPC are affected by the Commission's action in this docket, staff recommends that the Commission allow the parties to participate, given the procedural and substantive complexity of this matter.

ISSUE 2: Should the Commission grant FPC's Declaratory Petition?

RECOMMENDATION: Yes, the Commission should grant FPC's Petition for Declaratory Statement.

STAFF ANALYSIS: The focus of FPC's declaratory petition is divided into two subject matter areas involving contractual energy payments pursuant to its negotiated contract with Dade. The first area involves the characteristics necessary to determine the operational status of the avoided unit, and the second centers on the appropriate chargeout price of coal at FPC's Crystal River Units 1 and 2. This recommendation addresses the appropriateness of granting FPC's declaratory petition.

This recommendation begins with a discussion of the focus of the prudence review process at the time a negotiated cogeneration contract is considered for approval. The next section attempts to interpret and clarify the intent of the Commission's order approving the contract. Lastly, the recommendation presents staff's views of the Commission's intent regarding the appropriate chargeout price of coal pursuant to the contract at approval.

BASIS FOR APPROVAL

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

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

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

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

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

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

The Commission's decisions in Orders No. 24734, PSC-95-0210-FOF-EQ and PSC-97-1437-FOF-EQ, recognized these constraints. Staff believes that these rules provide guidance as to the Commission's policy both at the time a negotiated QF contract is considered for approval and where cost recovery review occurs.

OPERATIONAL STATUS

FPC's request asks the Commission to find that the Approval Order intended that FPC is only required to pay Dade for energy based upon avoided energy costs as determined by using the contractually-specified characteristics in Section 9.1.2. It is important to note that throughout this recommendation, staff considers "payments" to be synonymous with "recoverable amounts", once a determination of contract prudence has been made.

As recognized in Order No. PSC-95-0210-FOF-EQ, issued January 5, 1995, the Commission cannot adjudicate whether an interpretation of a contract pricing provision is right or wrong. That would go beyond our statutory authority and also be inconsistent with the intent of PURPA to limit the Commission's involvement in negotiated contracts once they have been approved for cost recovery. However, recent legal decisions suggest that the Commission should not be unwilling to interpret or clarify the basis on which a negotiated contract was originally approved. Commissioner Clark acknowledged in her dissent in the <u>Lake</u> Order, that the Commission could deny cost recovery of QF payments based on a subsequent contract interpretation if that interpretation was found to be contrary to the basis on which the contract was originally approved for cost recovery. Staff agrees that such action would be appropriate.

The Commission has confirmed that it would not deny cost recovery of payments made to a QF pursuant to a negotiated contract, once our determination of prudence becomes final by operation of law, absent some extraordinary circumstance, such as where the finding of prudence was induced through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information. Order No. 25668-EQ, Implementation of Rules 25-17.080 through 25-17.091, Regarding Cogeneration and Small Power Production, February 3, 1992, p. 14. FPC's declaratory petition does not suggest a new prudence review of its contract, but rather questions the compliance of its method for determining energy payments to Dade with the Commission's understanding of the order approving the contract.

In Order No. PSC-95-0210-FOF-EQ, the Commission reasoned that it did not have the continuing jurisdiction to interpret an order approving a negotiated cogeneration contract once that contract was approved. In the Crossroads'[1] decision, the New York Commission was found to have the authority to assert jurisdiction for purpose of interpreting or clarifying policies that existed at the time the contract was approved. Staff believes that, as in Crossroads, this Commission possesses the same authority and does not believe that granting FPC's declaratory petition would violate the contract non-interference policy.

Dade believes that FPC's energy payments must be based on the operational status of a "fully characterized operating unit". Yet, within Dade's background statement of the case, it describes the contract as being "based upon a Pulverized Coal, Schedule 4, Option A unit elected in Section 8.2.1 of the Contract." (Motion at p. 3) The payments depicted on Schedule 4, Option A are based on the four-parameter modeling Dade is contesting. Section 9.1.2 specifically lists the contractually agreed upon method of characterizing the avoided unit by using "these characteristics" as listed within the language the Commission approved. Neither Section 9.1.2 of the Contract, any other portion of the Contract, or the Approval Order mentions the parameters needed to describe a "fully characterized" unit. Moreover, as with all avoided cost calculations, Section 9.1.2 of the Contract was construed as a pricing proxy and was not intended to be fully representative of a real, operable "bricks-and-mortar" generating unit.

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[1] Orange and Rockland Utilities, Inc. - Petition for a Declaratory Ruling that the company and its ratepayers are not required to pay for electricity generated by a gas turbine owned by Crossroads Cogeneration Corporation, 1996 N.Y. PUC LEXIS 674 (New York P.S.C., Case 96-E-0728, November 29, 1996.

In interpreting the Approval Order's understanding of Section 9.1.2 of the Contract, FPC has suggested that the rule hearing transcripts concerning the adoption of Rule 25-17.0832(5)(b), F.A.C., would prove instrumental in determining the Commission's perception of the "lesser-of-methodology" prior to the time FPC's contract with Dade was approved. Staff agrees. Although it is evident that this rule generally applies to standard offer contracts and not negotiated ones, as indicated by Mr. Seelke, Section 9.1.2 was an attempt at duplicating the "lesser-of-methodology" from the Rule. <u>Petition</u>, Exh. A, p. 766. Therefore, while staff agrees with the Commission's decision in Order No. PSC-95-0210-FOF-EQ, that FPC's pricing methodology is not subject to Rule 25-17.0832(5)(b), F.A.C., as that rule applies to standard offer contracts, in this instance, it is appropriate to focus on clarifying the intent of the language as it was understood at the time the instant contract was approved. In keeping with Commission policy, a utility expenditure, investment, or obligation will be reviewed, if at all, with respect to the facts and circumstances that were known to the utility and the Commission at the time the investment was made or the obligation incurred. Upon reviewing the rule hearing transcripts it becomes clear that the Commission and <u>all parties</u> were fully aware of the implications of the proposed rule language and its link to the "lesser-of-methodology" at the time the obligation was incurred.

In accordance with Section 210 of PURPA and FERC requirements, the Commission enacted several rules during the early 1980s relating to cogeneration contracts. Among them, Rule 25-17.083(6), F.A.C., required a cogeneration contract to undergo a litmus test against a utility's full avoided cost in the following manner:

> For the purposes of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to the utility's standard offer shall be defined as the <u>lesser of</u> the as-available avoided energy cost of the utility planning the statewide avoided unit and the statewide avoided unit energy cost, commencing with the anticipated in-service date of the statewide avoided unit and continuing throughout the term of the contract.

Reacting to Legislative changes in 1989, the Commission revised its cogeneration rules to, among other things, modify the methodology of calculating avoided cost so that it more accurately represented the purchasing utility's full avoided cost as opposed to the statewide avoided unit. After an extensive deliberative process, the Commission ultimately adopted Rule 25-17.0832(4)(b) and (c), F.A.C.[2], in 1990, which required the following:

> (b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility. During the periods that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25-17.0825(2)(a).
>
> (c) The energy cost of the avoided unit specified in the contract shall be defined as the cost of fuel, in cents per kilowatt-hour, which would have been burned at the avoided unit plus variable operation and maintenance expense plus avoided line losses. The cost of fuel shall be calculated as the average market price of fuel, in cents per million Btu, associated with the avoided unit multiplied by the average heat rate associated with the avoided unit. The variable operating and maintenance expense shall be estimated based on the unit fuel type and technology of the avoided unit.

These changes were discussed at great length during the 1990 Rule hearings with several parties, as well as the Commissioners, expressing views on the impact of the changes:

> **Mr. Seelke:** (*FPC*) Frank, I think maybe I'm misunderstood. I would calculate the contracts to have the same net present value capacity and energy, but I would fix the capacity component and allow the energy to be tied to proxy prices of coal, or whatever the fuel of that avoided unit might be, so that those would float in the future.
>
> (Page 384)
>
> **Commissioner Gunter:** Yes, but you're certainly not going to have -- I don't think any Commission in the country is

[2] This Rule was renumbered as Rule 25-17.0832(5)(b) and (c), F.A.C., in 1997.

going to let the ratepayers be at risk on energy beyond what the actual avoided energy is.

(Page 385)

Ms. Harvey: (*Staff*) And the lesser of is meant to mimic the dispatch of the unit.

(Page 454)

Mr. Gillette: (*TECO*) So we believe that the lesser-of language gives the cogenerator, dollar for dollar, the same amount as the new language, while simplifying the calculations significantly.

(Page 461)

Mr. Seelke: (*FPC*) I think that both the proposed rule and the existing rule hit the same spot but is just stated differently.

(Page 462)

Mr. Seelke: (*FPC*) And I think, in terms of whether it would have been economically dispatched in the language in the proposed rule, I wouldn't propose that we actually dispatch the unit as a cost -- its a comparison of cost.

Commissioner Easley: Well, what I am hearing is that the lesser of, or whatever is the easiest language with the block, gets you to the same thing, and that nobody has any big objection to that.

Mr. Seelke: (*FPC*) Right, exactly.

(Page 463-464)

After addressing the dialogue during the Hearing as well as all post-hearing comments, a final version of the rule was voted on during the August 28, 1990 Agenda Conference.[3] Though limited

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[3] Staff felt it important to note that the phrase "economic dispatch" in the version of the rule discussed during the hearing was ultimately and appropriately changed to "operated". This revision was made in order to correct for the potential that a

discussion regarding the pricing provision of cogeneration contracts took place, Commissioner Gunter and Jim Dean of staff discussed it to the following extent:

> **Commissioner Gunter:** ...Because you could have for instance, somebody would be building a plant, a cogeneration facility, as I understand it, and you could correct me if I'm wrong in my understanding, build a cogeneration facility against a combined cycle unit, and for, assume it was gas, a combination of gas and oil, 40 percent of the time, and then the remainder, the possibility is if it dropped down to the coal price.
>
> **Mr. Dean:** That is correct, and that is, that is the --
>
> **Commissioner Gunter:** That is staff's recommendation.
>
> **Mr. Dean:** That is the way it works now. It's, there is an avoided unit, if it had been dispatched for that hour, fuel would have been consumed in it, the QF would get fuel value in his payment. If that unit had been cut off for economic reasons for that hour because it was too expensive of a unit, the next level of payment the QF would get would be the current as-available for that hour, because that is what the utility is avoiding in their fuel burn.
>
> Agenda Transcript, p. 45.

The consensus at both the hearing and the subsequent agenda conference appeared to be that the original intent of the "lesser-of-methodology" to limit energy payments received by a QF to a utility's full avoided cost, as required by PURPA, was preserved in the revised language. Moreover, as demonstrated by the transcripts of Mr. Seelke's deposition attached to FPC's petition which was taken as part of the FPC/Dade Federal Court proceedings, it is this newly adopted language that was used as a template for FPC's contract with Dade. <u>Petition</u>, Exh. A, p. 766. During this deposition, Mr. Seelke testified that he was extensively involved in the preparation of the Dade contract, and that it was his

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cogenerator would be paid at the firm energy rate when the as-available rate was less pursuant to an economic dispatch based on incremental cost. Futher, even though the hearing version of the rule included the phrase "economic dispatch", all parties still viewed it as a pricing proxy.

intention that Section 9.1.2 of the contract would implement the revised Commission cogeneration rules related to energy pricing.

Under the terms of the contract, Dade chose to have its energy payments based upon the Avoided 1991 Pulverized Coal Unit as detailed on Schedule 3 and page 1 of 3 of Schedule 4 of Appendix "C" to the contract. Staff has included these schedules in this recommendation as Attachment 1. This schedule itemizes the year by year capacity and energy payments Dade was projected to receive throughout the course of the contract. Dade appears to believe that these payments were fixed and not subject to changes over the course of time. However, the projected $/MWH Energy payments were not fixed and more specifically, as it is clearly labeled via Note "c", the "Information provided is estimated." Further, it is equally important that this note does not apply to the $/KW/Month Capacity payments. Allowing capacity payments to fluctuate during the course of the contract would not be reflective of FPC having to build a unit in the absence of the negotiated contract.

Staff believes that the Approval Order contemplated Section 9.1.2 of the Contract as a pricing proxy and was never intended to hold FPC's ratepayers liable for payments based on modeling characteristics that were not within the four corners of the contract and were never reviewed by this Commission. Staff also believes that FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, not only more closely approximates actual avoided energy costs, but is consistent with the intent of the Commission's order approving the contract. As with all avoided cost calculations, Section 9.1.2 of the Contract was constructed as a pricing proxy and was not intended to be fully representative of a real, operable "bricks-and-mortar" generating unit. The goal of the contractual language was to ensure that, consistent with Section 210 of PURPA and the cogeneration rules, FPC would not be put in a situation where it would be required to purchase energy at a cost greater than what it could either purchase elsewhere or generate itself. Holding energy payment projections constant, implying energy prices would not fluctuate over the contract term, renders this goal meaningless. Staff believes that the ratepayers are as much entitled to the benefits of what was approved as the parties, as long as no modification of what was approved is at issue.

COAL CHARGE OUT PRICE

FPC's petition asks the Commission to find that the Approval Order intended for the fuel price portion of the firm energy payments to be based on the actual charge out price of coal currently delivered to FPC's Crystal River Units 1 and 2 as opposed to the mix of barge vs. rail transportation that existed at the time the contract was executed.

Since FPC's contract with Dade was first approved, FPC has instituted changes in its transportation of coal to its Crystal River Units 1 and 2, increasing the mix of rail transportation over barge to those facilities. Staff believes that these changes are the direct result of Commission direction. Two years before FPC's contract with Dade was approved, in Order No. 21847, issued September 7, 1989, the Commission addressed the issue of FPC's mode of transporting coal to its facilities:

> While it is desirable and appropriate for a utility to have a dual mode of transportation, we do not believe it is appropriate for a utility to favor an affiliate transportation route over a less costly non-affiliate transportation route to the detriment of its ratepayers.
>
> We, therefore, conclude that $5,370,000 plus interest should be disallowed for excess barge usage in 1984, 1985, and 1986.
>
> Order, at pages 14 and 18.

Since 1976, FPC has had an agreement to purchase waterborne coal transportation services from its affiliate Electric Fuels Corporation. However, rail transportation is often less costly. Reacting to the favorable economics, FPC has, as a prudent utility should, begun favoring the least expensive mode of transportation. A by-product of this proactive management is the effect on FPC's energy payments to Dade and other QFs. Section 9.1.2 of the contract requires in part that:

> the QF will receive Firm energy payments based on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant...

By reducing the delivered fuel cost to its Crystal River Units 1 and 2, the Avoided Unit Fuel Reference Plant under the FPC/Dade contract, FPC in turn lowers the average monthly chargeout price of fuel being burned and thus lowers the cost basis of its Energy payments.

Dade alleges that FPC has, by certain uncontemplated manipulations of coal delivery methods, and possibly by likewise uncontemplated manipulations of other elements of the chargeout price of coal at the Avoided Unit Fuel Reference Plant, breached the implied duty of good faith and fair dealing that is inherent in every contract governed by Florida Law. (Motion at p. 32) In other words, Dade believes that the contractual language intended for the "average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant" to remain fixed at the prevailing mix of transportation in effect at the time the Contract was executed. However, neither the Contract nor the Approval Order contains provisions governing the modes of transporting fuel to the Reference Plant. In addition, Attachment 1 to this recommendation clearly labels the energy payments Dade was projected to receive throughout the course of the contract as "estimated."

Staff believes that the above discussion indicates that the Commission was very mindful of FPC's coal transportation activities and was fully aware that the contract did not intend to base FPC's energy payments on fictitious fuel prices.

ISSUE 3: Should the Commission grant Dade's Motion to Dismiss:

RECOMMENDATION: No. The Motion to Dismiss should be denied.

STAFF ANALYSIS: It should be noted at the outset that the dissent to the Lake Order, PSC-97-1437-FOF-EQ, as well as Order No. PSC-95-0210-FOF-EQ (Order 0210), as cited within that dissent, both provide a reasonable basis on which the Commission could grant the Motion to Dismiss. Therefore, there is no question that this is a close issue.

In recommending denial, staff would also note that concerns listed by Dade as to the issues of res judicata, collateral estoppel, and administrative finality are, when FPC's responses are considered, admittedly also close, but not dispositive in favor of Dade. As the Florida Supreme Court recently noted in McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996).

> the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time ... such considerations [warn against] inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

This doctrine has a long history. See, e.g., Matthews v. State, 149 So. 648 (Fla. 1933).

While the public interest concerns underlying the dissent in the Lake order and Order 0210 are still fully present, other aspects of relevant fact and law have changed. As indicated in the analysis by technical staff on the merits of FPC's petition, technical staff believes that the policy underlying the Commission's approval of the contract for cost recovery is consistent with FPC's position and inconsistent with Dade's. Staff believes it has demonstrated that by reference to the record of the discussion which took place prior to approval of the contract and which led directly to that approval. Based on Crossroads, supra, the Commission's explanation of its order approving the contract based on the policy articulated in the record of that approval process would not constitute Commission interference with the parties' dispute over their negotiated contract. Indeed, had both parties been in accord with Dade's position, staff's review of the cost recovery status of performance under the contract would lead to the same concerns expressed in this recommendation. Therefore, staff views the need here for the Commission to explain its order approving the contract as independent of the contract dispute between the parties.

Moreover, FPC has directed its current petition to allaying reasonable cost recovery and settlement concerns. Even the most "hands off" stance taken by the Commission toward disputes involving negotiated cogeneration contracts must acknowledge the Commission's role in both approving settlements and the cost recovery process. Indeed, the dissent in the Lake order agrees that

> the Commission could deny cost recovery based on a subsequent contract interpretation if it was contrary to the basis on which the contract was originally approved...

While the dissent states "that is not the case here", technical staff strongly believes that the record presents enough evidence to the contrary that it is reasonable for FPC to ask for a statement to that effect and for the Commission to grant it.

The petitioned statement would, as noted, be relevant to reasonable concerns as to settlement and cost recovery issues. Not only does the Crossroads rationale provide an avenue for this to be accomplished, but a change in Florida law to the effect that petitions for declaratory statement are no longer invalid if they affect persons other than the petitioner, should also be noted. This resolves another arguable obstacle to granting the petition. Lawton Chiles and Robert Milligan v. Dept. of State, Division of Elections, 23 Fla. L. Weekly D 1225 (1st DCA 1998).

The Commission has always forthrightly disclaimed any jurisdictional role in adjudicating contract disputes involving negotiated cogeneration contracts and has been correct in doing so. The foregoing does not change that since it responds to concerns separate and apart from any such dispute regardless of any issue overlap that may be present. What the effect, if any, on that dispute would be of a statement by the Commission in response to FPC's petition is speculative, just as would be the effect of the Commission's participation as an amicus curiae. In any event, the rationale for granting the petition is not to create an advisory opinion, or to have any such effect, but to respond to legitimate concerns concerning settlement and cost recovery processes in which the Commission has an undeniable role.

Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F. 3rd 1178 (3d Cir. 1995), often cited as the model example of federal preemption of state commission attempts to reconsider approval of contracts between cogenerators and utilities or deny passage of the approved rates to the utility's customers, is cited by Dade here as well. Motion to Dismiss, p. 24-25. However, staff views the case before the Commission not as equivalent to Freehold, but as a "reverse Freehold". In Freehold, the New Jersey Board of Regulatory Commissioners (BRC) approved a contract containing rates found to be equal to the utility's avoided cost as of the date of approval. Later, when changed conditions caused a substantial fall in avoided cost, the BRC tried to effect a modification of the contract to protect the ratepayers from what was, clearly, now an expensive deal from the ratepayers' perspective. The BRC was properly preempted from implementing its well-intentioned, but mistaken, solution to the problem.

Here, in contrast, staff believes the record indicates that the reverse of the Freehold facts is at issue. The Commission approved a contract mechanism that all participants agreed on the pre-approved record was a "pricing proxy", rather than an operable plant model. When conditions changed, the contract which the Commission approved -- without any modifications -- as reflected by the policy statements of record which led to the approval, created favorable results for the ratepayers. Therefore, though a contract interpretation may be forwarded by participants in the ongoing contract litigation which is "contrary to the basis on which the contract was originally approved", the Commission's explanation of what was approved is not an attempt to modify the approved agreement equivalent to the BRC's actions in Freehold. It is, instead, an attempt to explain what it was that the Commission approved, as in Crossroads. As in Panda Kathleen, L.P. v. Florida Power Corporation and Florida Public Service Commission, 701 So. 2d 322 (Fla. 1998), where the Freehold rationale did not preempt the Commission's ability to construe Commission rules incorporated in Panda's standard offer contract, the Freehold rationale, in staff's view, does not preempt the Commission's explanation of what was approved by its Order approving Dade's contract, based on pre-approval evidence of record. Crossroads, supra. Instead of trying to modify what was approved, staff recommends that the Commission explain what was approved unmodified so as to preclude any untoward results of conflicting interpretations on those aspects of the process in which the Commission does have a role, including settlement and cost recovery.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: Whether the Commission grants or denies the petition, a final order can be issued and the docket closed.

Attachment

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 3
GENERAL INFORMATION FOR 1991 PULVERIZED COAL UNIT

GENERAL
YEAR OF AVOIDED UNIT = 1991
AVOIDED UNIT FUEL REFERENCE PLANT = CRYSTAL RIVER UNITS 1&2

OPERATING DATA
AVOIDED UNIT VARIABLE O&M COSTS IN 1/90 $'s = $4.36/MWH (Option A only)
ANNUAL ESCALATION RATE OF O&M COSTS = 5.10%
MINIMUM ON-PEAK CAPACITY FACTOR = 83.0%
AVOIDED UNIT HEAT RATE = 9,830 BTU/KWH
TYPE OF FUEL = COAL WITH 1.15% SULFUR BY WEIGHT MAXIMUM AT 11,000 BTU/LB., ADJUSTABLE IN DIRECT PROPORTION TO THE BTU/LB. OF COAL

ON-PEAK HOURS
(1) FOR THE CALENDAR MONTHS OF NOVEMBER THROUGH MARCH,
ALL DAYS: 6:00 A.M. TO 12:00 NOON, AND
5:00 P.M. TO 10:00 P.M.
(2) FOR THE CALENDAR MONTHS OF APRIL THROUGH OCTOBER,
ALL DAYS: 11:00 A.M. TO 10:00 P.M.

APPENDIX C
RATES FOR PURCHASE OF FIRM CAPACITY AND ENERGY
FROM A QUALIFYING FACILITY

SCHEDULE 4

Payments for Avoided 1991 Pulverized Coal Unit

Option A

Fuel Multiplier = 1.0

(1)	(2)	(3)	(4)	(5)	(6)
	CAPACITY PAYMENT - $/KW/MONTH		ENERGY PAYMENT - $/MWH (c) (ESTIMATED)		
CALENDAR YEAR	NORMAL PAYMENT RATE	ACCELERATED PAYMENT RATE (b)	FUEL	O&M	TOTAL
1991	10.92		21.07	4.70	25.77
1992	11.48		21.94	4.94	26.88
1993	12.07	12.07	22.86	5.19	28.05
1994	12.68	12.68	23.87	5.45	29.32
1995	13.32	13.32	25.09	5.73	30.82
1996	14.00	14.00	26.37	6.02	32.39
1997	14.72	14.72	27.71	6.33	34.04
1998	15.46	15.32	29.13	6.65	35.78
1999	16.25	15.93	30.61	6.99	37.60
2000	17.08	16.74	32.17	7.35	39.52
2001	17.95	17.60	33.81	7.73	41.54
2002	18.87	18.49	35.54	8.12	43.66
2003	19.83	19.33	37.35	8.53	45.88
2004	20.85	20.22	39.26	8.97	48.23
2005	21.91	21.25	41.26	9.43	50.69
2006	23.02	22.34	43.36	9.91	53.27
2007	24.20	23.47	45.57	10.41	55.98
2008	25.43	24.54	47.90	10.94	58.84
2009	26.74	25.66	50.34	11.50	61.84
2010	28.09	26.97	52.91	12.09	65.00
2011	29.53	28.35	55.61	12.70	68.31
2012	31.04	29.79	58.44	13.35	71.79
2013	32.61	31.32	61.42	14.03	75.45
2014	34.28		64.55	14.75	79.30
2015	36.03		67.85	15.50	83.35
2016	37.86		71.31	16.29	87.60
2017	39.80		74.94	17.12	92.06
2018	41.82		78.77	18.00	96.77
2019	43.96		82.78	18.91	101.69
2020	46.20		87.01	19.88	106.89
2021	48.56		91.45	20.89	112.34
2022	51.03		96.11	21.96	118.07
2023	53.64(a)		101.11	23.08	124.19

NOTES:

(a) If the Term of the Agreement is extended beyond 2023 pursuant to Article IV hereof, the normal payment rate schedule shall be escalated at 5.1% per year.

(b) The QF may structure an accelerated payment rate schedule that has the same or lower net present value over the Term as the normal payment rate schedule using the discount rate specified in section 8.5.3 hereof and which assumes the Contract In-Service Date specified as of the Execution Date. At the request of the QF prior to the commencement of capacity payments or if the Contract In-Service Date differs from the date specified as of the Execution Date, the accelerated payment rate schedule in this schedule will be recalculated so that the ratio of the net present value as of January 1, 1991, of the recalculated schedule to the normal payment schedule over the Term is not increased.

(c) Information provided is estimated and excludes the Delivery Voltage Adjustment.