# CARLTON FIELDS

ATTORNEYS AT LAW

ONE HARBOUR PLACE
777 S. HARBOUR ISLAND BOULEVARD
TAMPA, FLORIDA 33602-5799

MAILING ADDRESS:
P.O. BOX 3239, TAMPA, FL 33601-3239
TEL (813) 223-7000 FAX (813) 229-4133


March 29, 1999



**via FedEx**

Ms. Barbara Maxwell
Clerk of The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925

980283-EQ

Re: *Florida Power Corporation v. Florida Public Service Commission, et al.*
Case No. 94, 664

Dear Ms. Maxwell:

As you requested, enclosed is an original and seven copies of Appellant's Amended Initial Brief, along with one additional copy of the Appendix to Appellant's Initial Brief, and a diskette of Appellant's Amended Initial Brief.

We have corrected the pagination error. No other changes have been made. We regret the inconvenience.

See

Very truly yours,

Chris S. Coutroulis

CSC:mm

Enclosures

Cc: all counsel of record

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

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

FLORIDA POWER CORPORATION,

Appellant,

vs. Case No. 94,664

Florida Public Service Commission,
Agency / Appellee;

Metropolitan Dade County; and
Montenay-Dade, Ltd.

Intervenors / Appellees.
_____/

# APPELLANT'S AMENDED INITIAL BRIEF


Rodney Gaddy Esq. FBN 314943
James A. McGee Esq. FBN 150483
Florida Power Corporation

Sylvia H. Walbolt FBN 033604
Chris S. Coutroulis FBN 300705
Robert L. Ciotti FBN 333141
Joseph H. Lang, Jr. FBN 0059404
Carlton, Fields, Ward, Emmanuel
Smith & Cutler, P.A.

Attorneys for Appellant
Florida Power Corporation

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## CERTIFICATE AS TO TYPE SIZE

It is hereby certified that this brief was prepared with a 12-point Courier New font.

## PRELIMINARY STATEMENT

In this brief, appellant Florida Power Corporation is referred to as "FPC." Appellees, the Florida Public Service Commission, Metropolitan Dade County, and Montenay-Dade, Ltd., are referred to as the "PSC" or "Commission," "Dade," and "Montenay," respectively.

The PSC's December 4, 1998 Order No. 980283, which is the subject of this appeal, is referred to as the "PSC's Order." A copy of the PSC's Order is located at A.1 of FPC's separately filed Appendix. That Order denied, for lack of jurisdiction based on application of decisional finality, FPC's February 24, 1998 Petition for Declaratory Statement, which is referred to as the "Petition." A copy of the Petition is located at A.3 of FPC's Appendix. In their appearance before the PSC, Dade and Montenay jointly presented argument on the jurisdictional issue. Any reference to their argument is referred to as "Dade's" argument.

There are several other PSC Orders discussed within the brief. The PSC's July 1, 1991 Order No. 24734, which approved eight cogeneration contracts between FPC and others, including the Negotiated Contract for the Purchase of Firm Capacity and Energy between FPC and Dade, is referred to as the "Approval Order" and is found at A.6 of the Appendix. The FPC/Dade

contract, located at A.7 of the Appendix, is referenced herein as the "Contract." The PSC's 1995 Order No. 95-0210, in which the PSC denied FPC's 1994 Petition as requesting an interpretation of the pricing term of its negotiated contracts, is the "1995 Order," and it is found at A.5 of the Appendix. The PSC's November 14, 1997 proposed agency action, denying approval of the settlement agreement between FPC and Lake Cogen, Ltd. (Order No. 97-1437), is the "PAA" or "Lake Order." It is found at A.4 of the Appendix. The proceeding in which that Order issued is referred to as Lake Cogen.

In addition, the Public Utilities Regulatory Policy Act and the Federal Energy Regulatory Commission will be referred to by their more common acronyms, "PURPA" and "FERC," respectively.

The Appendix also includes a transcript of the Agenda Conference at which the Petition was discussed, at A.2. References to that Appendix, and the tab and page therein at which cited material may be found, are in the form, "A._:_." Thus, for example, a reference to page 4 of the PSC's Order would be in the form, "A.1:4."

All emphasis in this brief is supplied unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

This appeal raises the straight-forward legal issue of whether the PSC erred in ruling that it was precluded by the doctrine of decisional finality from taking jurisdiction over a 1997 Petition which requested that it interpret its orders and rules regarding cogeneration pricing terms. The PSC refused to take jurisdiction based upon a 1995 Order in which it had held that it lacked jurisdiction to interpret the terms of negotiated contracts. The facts material to this appeal are as follows.

On December 4, 1998, by a vote of 3-2, the PSC rejected its Staff's unanimous recommendation and denied FPC's Petition for Declaratory Statement. (A.1). The requested declaration related to the PSC's 1991 Approval Order, which approved the 20-year negotiated Contract between FPC and Dade. (A.3). Under the Contract, FPC is obligated to purchase capacity and energy from Dade based upon FPC's avoided cost, as mandated by PURPA and the PSC regulations implementing PURPA. (A.7).

FPC's contract with Dade was one of several approved in the PSC's Approval Order. (A.6). Each of these contracts contains an identical energy payment term geared to the operational status of a so-called "avoided unit." Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 324 (Fla. 1997), cert. denied, 118 S. Ct. 1514 (1998).

A utility cannot pay more than its "avoided cost" without violating PURPA, and under the PSC's Rules, in approving each contract, the PSC was required to determine that the payment terms did not require FPC to pay the cogenerator more than Florida Power's avoided construction and operating costs, as defined in those Rules. (Rule 25-17.0832(2) and (4)(b); quoted in full at A.7:Appendix E thereto).

Disagreements subsequently arose between Florida Power and certain of the cogenerators regarding the interpretation of the energy payment terms. In 1994, in an attempt to resolve these disagreements, FPC sought a declaration from the PSC. In the 1995 Order, the PSC dismissed FPC's petition, describing it as "a request to interpret the meaning of the contract term." (A.5:8). Based on that characterization, the PSC determined that it would "defer to the courts to answer the question of contract interpretation ...." (Id. at 9). The PSC concluded that, under PURPA and FERC regulations, its jurisdiction with respect to negotiated contracts was limited to "encourag[ing] the negotiation process, and review[ing] and approv[ing] the terms of negotiated contracts for cost recovery from the utilities' ratepayers." (Id. at 6). The PSC specifically distinguished FPC's request for an interpretation of the contractual pricing provisions from a request that the PSC

interpret its own rules, expressly noting that "FPC is not asking us to interpret the [pricing] rule." (Id. at 8).

Thereafter, in 1996, FPC presented the PSC with a settlement agreement it had reached with Lake Cogen to resolve the lawsuit between them regarding the energy pricing terms of their contract. The Lake Cogen contract had been approved as part of the same 1991 Order in which the Dade contract was approved (A.6:10), and the pricing provisions of both contracts, and the disputes about the calculation of payments under them, were identical in all material respects.

In late 1997, the PSC, by Proposed Agency Action, rejected the settlement. The PSC held that the 1995 Order did not preclude it from taking its interpretation of the pricing terms of the Lake Cogen contract into account in considering the proposed settlement, specifically ruling that it is "within the [PSC's] jurisdiction" to determine "what the contract meant at the time it was approved." (A.4:12). The PSC then went on to determine that, as approved in 1991, FPC is obligated to make energy payments "calculated using the parameters specified in the contract," and contained energy payments terms that were a "pricing proxy" and "not intended to be fully representative of a real operable 'bricks-and-mortar' generating unit." (A.4:8,5). The PSC also concluded that FPC's modeling of the

avoided unit "is consistent with" the PSC's approval and thus FPC's avoided cost. (A.4:4-5,8). On the other hand, the PSC rejected Lake's interpretation of the energy payment provision as calling for payments that would "clearly exceed[] avoided cost." (A.4:8).

On this basis, the PSC rejected the Lake settlement. That rejection caused that settlement to expire of its own terms for failure to receive PSC approval by a specified date certain. In turn, this resulted, under PSC Rules, in the Lake Order becoming a technical "nullity," after it had the legal effect of causing the demise of the proposed settlement between FPC and Lake Cogen.

In light of the PSC's analysis in the Lake Order, FPC filed the Petition at issue here, requesting that the PSC issue a declaratory statement explaining and clarifying its Approval Order and the rules related thereto in the same manner as it had just done in the Lake Order. In its Petition, FPC was careful to follow the PSC's jurisdictional rulings in the 1995 Order and the Lake Order. It limited its request to PSC consideration of the Approval Order and its associated PSC rules (the interpretation of which the PSC had found to be within its jurisdiction in the Lake Order), and it did not ask the PSC to interpret the Dade contract

itself (as the PSC had construed FPC's 1994 petition to do). (A.3:22-23).

Dade, as intervenor, moved to dismiss the Petition on jurisdictional grounds and asserted that the PSC was precluded, based on decisional finality, from exercising jurisdiction. A bare majority of the PSC denied the Petition, declining to reach its merits. Although the PSC held that Dade's motion was thereby rendered moot, in denying the Petition it accepted Dade's argument that the PSC could not exercise jurisdiction.

Specifically, the PSC concluded that FPC's 1997 Petition raised the same jurisdictional issue as that addressed in the PSC's 1995 Order. On this basis, the PSC ruled that its jurisdiction "already ha[d] been determined" by the 1995 Order, and that "the doctrine of administrative finality preclude[d] a re-adjudication" of the jurisdictional controversy that was resolved by that Order. Accordingly, the "prior resolution" of the jurisdictional issue had to stand. (A.1:5). The PSC so ruled despite the fact that Lake Cogen had been a party both to the 1995 PSC proceeding and to the later proceeding in which the PSC rejected the Lake settlement based on the PSC's interpretation of its orders approving cogeneration contracts, as well as its rules relating thereto.

As both majority and dissenting Commissioners agreed, this pinned FPC between the proverbial "rock and a hard place." (A.2:37, Commissioner Clark; A.2:37,42, Commissioner Garcia). FPC cannot assure that it is administering the Contract in the manner the PSC intended in approving it, nor can it properly evaluate a settlement offer in litigation challenging that contract administration, without certainty as to how the PSC construes its Approval Order and related rules. The dissenting PSC Commissioners described the PSC's application of decisional finality as having unfairly left FPC - and the courts - "without any explanation whatsoever by th[e] Commission, the expert agency which approved the [Contract], as to what was approved." (A.1:8, dissenting opinion). This result would have been avoided if the PSC had followed the path "'between Scylla and Charybdis'" set forth in the decisions relied upon in the Lake Order and explained what the Commission had contemplated in its Approval Order. (Id.).

To correct the PSC's erroneous application of decisional finality, and subsequently to obtain the required FPC interpretation of the Approval Order and related rules, FPC timely filed this appeal.

## STANDARD OF REVIEW

This Court should review this appeal de novo. The issue presented here is purely legal: whether the doctrine of decisional finality barred the PSC from taking jurisdiction over FPC's Petition requesting an interpretation of the PSC's Approval Order and its rules related thereto. The PSC has no particular expertise in making a legal determination such as this. Accordingly, in this case, the deference generally accorded to PSC orders that are within its area of technical knowledge and expertise is unwarranted. Compare Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994) (giving full plenary review to PSC's rulings on attorney-client and work product privilege issues) with Gulf Coast Electric Cooperative, Inc. v. Johnson, 1999 WL 74016 (Fla. Feb. 18, 1999) (deference is appropriate on determination of territorial dispute "[c]onsidering the PSC's knowledge and expertise in this area").

## SUMMARY OF ARGUMENT

The PSC erroneously applied Florida law by applying the doctrine of decisional finality as a bar to taking jurisdiction of FPC's Petition. That Petition, filed in 1998, very pointedly sought an interpretation of the PSC's Approval Order and related rules, not an interpretation of the underlying contract itself, as the PSC had concluded was the issue presented by FPC's 1994 petition. On its face, then, the issue addressed in the PSC's 1995 Order on that earlier petition was fundamentally different from that raised by the 1998 Petition. Thus, contrary to the PSC's view, any jurisdictional issue presented by FPC's new and different Petition had not previously been determined. As such, there was no legal basis on which decisional finality could be applied to bar the PSC from taking jurisdiction over the Petition.

Moreover, the PSC's use of decisional finality went beyond the proper use of that doctrine by effectively binding the PSC to a prior determination of its lack of jurisdiction to construe cogeneration contracts, despite intervening decisions establishing the PSC's jurisdiction to clarify and explain its orders approving cogeneration contracts and its rules authorizing such contracts. In the time between its 1995 and 1998 Orders, a decision of first impression from this Court and

other decisions had made that jurisdiction clear. See Panda-Kathleen, 701 So. 2d at 327; Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129 (3rd Cir. 1998). The PSC acknowledged as much just three months before FPC filed its Petition, when it indicated that its "jurisdiction with respect to negotiated contracts is not as limited as this Commission has previously concluded" (A.4:8), and rejected a proposed settlement between FPC and Lake Cogen, based precisely upon the PSC's construction of its order approving their negotiated contract. (A.4:7-8,12-14).

By applying the doctrine of decisional finality here, the PSC discarded the legal effect of these post-1995 authorities, and instead refused to exercise the jurisdiction it had squarely acknowledged in the Lake Order. That was a misapplication of the decisional finality doctrine: the intervening authorities constituted exactly the type of "significant change in circumstances" that precludes a regulatory body like the PSC from applying that doctrine in too "doctrinaire" a manner. Gulf Coast Electric Cooperative, 1999 WL at *6.

Clearly, the PSC had jurisdiction to consider FPC's Petition. Indeed, under controlling law, the PSC never loses its jurisdiction, whether by decisional finality or otherwise, to carry out its regulatory responsibilities under Florida law.

Its failure to exercise that jurisdiction unfairly leaves FPC - a regulated utility - without the guidance that it is entitled to have from that regulatory body to assure that it complies with the PSC's orders and rules which are binding upon FPC. This Court should reverse and remand for an adjudication by the PSC of FPC's Petition on its merits.

## ARGUMENT

As shown below, the PSC erroneously applied decisional finality to deny jurisdiction over FPC's Petition. Decisional finality was never meant to apply to preclude a governmental agency from exercising jurisdiction it in fact possesses under the law, and the PSC's doctrinaire application of that rule under the circumstances of this case should be reversed by this Court.

### I. Decisional Finality Does Not Apply Because the Issue Raised by FPC's 1997 Petition Differed from that Resolved in the 1995 Order.

In applying the bar of decisional finality to preclude its jurisdiction here, the PSC concluded that the issue raised by FPC's 1997 Petition "already ha[d] been determined" by its 1995 Order. (A.1:5). As even a cursory comparison of the two establishes, that was plainly wrong. Although the 1995 Order and the 1997 Petition both involved the same FPC contract, they did not involve the same issue.

In its 1995 Order, the PSC stated very clearly what it viewed as being requested in FPC's 1994 petition and why jurisdiction was therefore being declined over that petition. Specifically, the PSC stated that the 1994 petition was "a request to interpret the meaning of the contract term," and

that, under PURPA and FERC regulations, it did not have jurisdiction to entertain such a request. (A.5:8). Instead, the PSC concluded, it would "defer to the courts to answer the question of contract interpretation. . ." (A.5:9). In so ruling, the PSC distinguished FPC's request for a contract interpretation from a request that the PSC interpret its own rules, expressly stating that "FPC is not asking us to interpret the [pricing] rule." (A.5:8).

But that is exactly what FPC's 1997 Petition sought from the PSC. Consistent with what the PSC's 1995 Order had suggested would be within the PSC's jurisdiction, FPC specifically asked the PSC to interpret its pricing rules as they related to the Order approving the Dade Contract, which expressly incorporated those rules. (A.3:22-23). FPC further asked the PSC to interpret the Approval Order itself, which was precisely what the PSC had done in the Lake Order only a few months earlier. (Id.) Neither in the prayer for relief nor anywhere else in the Petition did FPC ask the PSC to interpret the contract terms, which the 1995 Order had declared would be outside the PSC's jurisdiction.

Thus, the 1995 Order - where the PSC predicated its holding on a lack of jurisdiction over "the question of contract interpretation" - did not address the issue raised by FPC's 1997

Petition, which sought an interpretation of the Commission's order and rules rather than the contract itself. As a matter of law, then, the doctrine of decisional finality did not bar the PSC from exercising jurisdiction over the issue presented here. Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 337 (Fla. 1966) (decisional finality requires that the issues decided by the earlier decisions be the same as those now presented).

## II. Decisional Finality Does Not Apply Because Intervening Authorities Constitute "a Significant Change in Circumstances".

The fact that FPC's 1998 Petition requested an interpretation of the Approval Order and the PSC's rules was critical to the determination of the jurisdictional issue raised by Dade for another reason as well. Subsequent to the PSC's 1995 Order, this Court expressly held, in a case of first impression, that the PSC has jurisdiction -- and indeed the responsibility -- to make interpretations of its own orders and rules as to cogeneration contracts. This decision, together with other intervening authorities establishing the existence of jurisdiction over this issue, constitutes "a significant change in circumstances" militating against "too doctrinaire" an application of decisional finality. Gulf Coast Electric Cooperative, 1999 WL at *6.

In Panda-Kathleen, 701 So. 2d at 327, this Court expressly agreed with the PSC that denial of its jurisdiction to resolve a dispute concerning the payment terms of a cogeneration contract would be contrary to "the federal and state legislative enactments as well as the judicial decisions applying the statutes," and would "render the PSC powerless ... to fulfill its obligation under both federal and state statutes to limit capacity payments [there] to avoided cost." This Court went on to affirm a PSC order in which the PSC had exercised jurisdiction to interpret provisions of a standard offer cogeneration contract. The Court did not focus on the fact the contract was standard offer rather than negotiated; instead, it directly focused on the PSC's "obligation" to ensure that payments under its approved contracts do not exceed the utility's avoided cost. Id. That, of course, is an obligation that exists under PURPA, irrespective of whether the contract is a standard offer or negotiated one. See infra at 19-20.

As this Court explained in Panda-Kathleen, the PURPA regulatory scheme "clearly contemplate[d] that the Commission shall bear the responsibility of resolving" issues regarding what its implementing rules mean, even in those instances where the resolution of such issues also would relate to a dispute regarding the terms of a cogeneration contract. 701 So. 2d at 327. In the

Court's words, "it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations." Id.

In this regard, the Court specifically followed the United State's Supreme Court's decision in FERC v. Mississippi, where that Court stated that the PURPA regulatory scheme requires state commissions to implement PURPA by, "among other things, an undertaking to resolve disputes between [QFs] and electric utilities arising under [it]." 456 U.S. 742, 760, (1982), quoting 18 C.F.R. §292.401(a) (1980). "Dispute resolution of this kind", the Supreme Court explained, was "the very type of activity customarily engaged in by" state regulatory commissions. Id.

Consistent with the teachings of this Court in Panda-Kathleen, the PSC acknowledged in its subsequent Lake Order that recent decisions had indicated that its jurisdiction was "not as limited as [it had] previously concluded," and that it had jurisdiction to clarify and explain its prior orders approving cogeneration contracts and the rules for such contracts. (A.4:8,11-12). Specifically, the PSC explained that its "[a]pproval of a newly negotiated contract is based on avoided cost," and therefore it is "within the [PSC's] jurisdiction" to

state "what the contract meant at the time it was approved." (A.4:7,12). The PSC expressly concluded that it had such jurisdiction, even if exercising it would bear on the resolution of the parties' pricing dispute. (Id. at 12).

The PSC then compared FPC's contract payments to the PSC's Approval Order. It found that "FPC's modeling of the avoided unit is consistent with this Commission's order approving the Contract," and that Lake Cogen's view of how the contract should be administered, if implemented, would "clearly exceed[] avoided cost." (A.4:8). With this construction of its order approving the contract, the PSC then rejected the Lake Cogen settlement because the energy payments proposed to be made by FPC under that settlement would depart from what the Approval Order had authorized and improperly exceed FPC's avoided cost.

In so ruling in its Lake Order, the PSC specifically recognized that the jurisdiction of state regulatory agencies to clarify and explain past policies and approvals of negotiated cogeneration contracts had been confirmed by the New York Public Service Commission. 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 Corp., 1996 N.Y. PUC LEXIS 674 (New York PSC, Case 96-E-0728, Nov. 29, 1996)

("Crossroads"); see also Indeck-Yerkes Energy Services, Inc. v. Public Service Commission of New York, 1994 WL 62394 (S.D.N.Y. 1994) (commission order "clarifying" that prior order approving the cogeneration contract was subject to the utility's site-certainty policy); In re Niagara Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C. March 26, 1996) (commission held its order approving the cogeneration contract required strict compliance with the output limitations set forth in that order).

In the Lake Order, the PSC relied on Crossroads and other decisions of the New York Commission in concluding that the PSC's jurisdiction with respect to negotiated QF contracts was broader than the PSC previously had believed it to be. (A.4:8-12). As the PSC recognized, these authorities all involved "a question that turns on what was meant when the contract was approved," and asserted jurisdiction "to resolve the question of what was contemplated at the time of approval." (A.4:12,10). Applying the same analysis in Lake, the PSC found that the energy pricing question there also "turn[ed] on what the contract meant at the time it was approved," which was, the PSC stated, "inextricably linked to what the Commission approved." (Id.) As a result, the PSC concluded, the determination of what was contemplated at the time of approval is "within the Commission's jurisdiction." (A.4:12).

Significantly, the distinction between an agency's jurisdiction to interpret contracts and its jurisdiction to interpret its orders was addressed late last year by the Third Circuit Court of Appeals in Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129 (3rd Cir. 1998). There, the court considered whether the New York Commission's Crossroads decision would preclude a breach of contract claim in district court. In holding that such claim preclusion would not apply, the court specifically distinguished between clarification of an approval order and interpretation of the underlying contract - the same distinction the New York Commission, as well as the Florida PSC, had drawn with respect to jurisdiction. As a result, the court did not consider the Commission's clarification of its approval order to be an interpretation of the contract itself, even though, as the court put it, the terms of the Commission's approval "may be highly relevant [to the district court] in determining the parties' understanding of their respective rights and duties under the contract," and the Commission's clarification of its approval "can be, and in most circumstances would properly be, viewed as a declaration on the same issue" as that raised in the contract claim. Id. at 139.

The same jurisdictional analysis was equally controlling here, as FPC and the Commission's own staff urged. Unlike the

PSC's view of FPC's 1994 Petition, FPC's 1998 Petition clearly did not ask for an interpretation of the Contract. Rather, the Petition only requested a declaration clarifying and explaining the Approval Order and the PSC's energy pricing and authorization rules relating to that approval, an issue which was plainly within the PSC's jurisdiction. (See supra at 4). That was precisely the PSC's conclusion in its Lake Order. Nevertheless, based on its 1995 Order and its application of decisional finality, the PSC now refused to exercise jurisdiction and render a declaratory statement on the exact issue it had resolved in rejecting the Lake settlement. This leaves FPC in an untenable position -- a point strongly emphasized by the dissenting commissioners.

The impropriety of the PSC's application of the decisional finality doctrine to bar the exercise of its jurisdiction is confirmed by this Court's holding in Panda-Kathleen. There, this Court held that, under the statutory and regulatory scheme regarding cogeneration contracts, the PSC has an obligation to interpret its energy pricing rules and orders approving cogeneration contracts to ensure that the payments to be made by the utility do not exceed that utility's avoided cost. As this Court explained, PURPA and Fla. Stat. §366.051 permit cogenerators to sell energy to utilities, but only at a price which does "not

exceed[] full avoided cost." Panda-Kathleen, 701 So. 2d at 328; Fla. Stat. § 366.051; Rule 25-17.0832. Similarly, the PSC declared in the Lake Order with respect to its approval of the payment terms in the contract, that "the goal of the contractual language was to ensure that, consistent with Section 210 of PURPA and our cogeneration rules, FPC would not be put in a situation where it would be required to purchase energy at a cost greater than what it could either purchase elsewhere or generate itself," i.e., avoided cost. (A.4:5).

More specifically, PURPA provides that the utility's obligation to purchase cogenerated power is limited to purchasing such power at rates that are "just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. §824a-3(a) and (b); Fla. Stat. § 366.051; and Rule 25-17.0832. Under PURPA and Florida law implementing PURPA, rates are "just and reasonable" when they do not exceed the utility's avoided cost. 16 U.S.C. §824a-3(b) and (d); Fla. Stat. § 366.051; Rule 25-17.0832.

The PSC's rules governing negotiated contracts authorize PSC approval when "it is demonstrated that the purchase of firm capacity and energy from the [QF] pursuant to the rates, terms and other conditions of the contract can reasonably be expected to contribute to the deferral or avoidance of additional

capacity construction . . . at a cost to the utility's ratepayers which does not exceed full avoided costs . . . ." (Rule 25-17.0832(2). See Rules 25-17.080 - 25-17.091, quoted in A.7: Appendix E thereto). In determining whether this requisite demonstration has been made at the time of requested contract approval, the PSC considers, pursuant to Rule 25-17.0832, whether the energy payments called for under the negotiated contract do not exceed the cost of operating the avoided unit as "calculated in accordance with" Rule 25-17.0832(4)(b), which is the energy pricing rule for standard offer contracts.[1]

Thus, in approving FPC's negotiated Contract with Dade, the PSC was required by its governing rules to determine that the energy payments called for under that Contract would not exceed avoided energy costs called for under the rules governing standard offer contracts. As was the case with the contract at issue in Panda-Kathleen, the PSC's energy pricing rules for standard offer contracts were made part of the Dade Contract by the parties and attached to it as an appendix. See A.7:§ 1.1; 1.15.

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[1] Based on 1997 revisions to the Rules, this is now subsection (5)(b). Reference to the Commission's rules are to those in effect at the time of the Order. Later amendments, however, have not affected the substance of the rules.

In light of the clear regulatory scheme applicable at the time of contract approval, the PSC clearly had jurisdiction to entertain the Petition to ensure that the Approval Order and the PSC's rules related thereto are correctly understood and that payments made by FPC do not exceed avoided cost. The rendition of this Court's decision in Panda-Kathleen, coupled with other developments in the law clarifying the PSC's jurisdiction over cogeneration contracts, is exactly the type of change that precludes the "doctrinaire" application of decisional finality which the PSC engaged in here.

### III. Decisional Finality Does Not Preclude the PSC from Exercising Jurisdiction where Jurisdiction Legally Exists.

For yet another reason, decisional finality should not have been applied here as a matter of law. The PSC always has the right, and indeed the duty, to exercise its jurisdiction, regardless of any prior orders it may have set forth on the issue. Otherwise, the PSC would be forever foreclosed from exercising jurisdiction lawfully delegated to it, and would be required to abdicate its duties under its enabling statutes and rules, simply because it initially determined, whether rightly or wrongly, that it lacked jurisdiction.

Simply put, the PSC's jurisdiction to carry out its statutory duties cannot be thwarted by application of preclusion doctrines

such as decisional finality. That would permit the PSC to confer or negate authority imposed upon it by the Legislature if the PSC, on one occasion, wrongly decided the extent of its jurisdiction. Indeed, under the PSC's view of decisional finality, since a number of FPC's negotiated contracts were subject to the 1995 proceeding, the 1995 Order would preclude the PSC from exercising jurisdiction to explain its rules and orders as to any of those contracts.

This Court has emphasized that doctrines of claim preclusion developed in the courts do not precisely transmute from the judicial forum to the administrative decision-making process. See Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987)(indicating that a doctrine of claim preclusion does "not always neatly fit within the scope of administrative proceedings" because administrative agencies often deal with "fluid facts and shifting policies;" quoting K. Davis, Administrative Law Treatise, § 18.01, at 545-46 (1958)). Accordingly, a doctrinaire approach to decision finality, while unwarranted for those reasons already explained, is further unwarranted in light of the significant shift in law which has occurred.

The First District's decision in State PSC on Ethics v. Sullivan, 430 So. 2d 928, 932-33 (Fla. 1st DCA 1983) demonstrates

that decisional finality is not applied in doctrinaire fashion to administrative rulings on jurisdiction. In Sullivan, the First District determined that its prior affirmance of the PSC's denial of the Sullivans' motion to dismiss an administrative proceeding for lack of jurisdiction precluded the Sullivans from later challenging that determination in court. However, the Court made clear that its affirmance was limited and merely established that, "at the particular point in the administrative proceedings at which the PSC denied the Sullivans' motion to dismiss," that denial was "a permissible one." The First District did not suggest that the PSC could not at a later point determine that the Sullivans' alleged offenses were not "cognizable by the PSC under its own interpretation of its constitutional and statutory authority" and, therefore, that the PSC did not have jurisdiction. Id. at 933 n. 3; see Weissmann v. Euker, 147 N.Y.S.2d 101, 105 (N.Y. App. Div. 1955) (current complaint was not barred by prior dismissal on personal jurisdiction grounds because a "decision that it had no jurisdiction is not conclusive between the parties either on the merits of their controversy, or, indeed, on the jurisdictional point itself").

The cases cited by Dade in urging the PSC to apply decisional finality likewise caution against applying such preclusion in "too doctrinaire" a fashion to agencies like the PSC with "continuing

supervisory jurisdiction over the persons and activities regulated." McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996); see also Gulf Coast Electric Cooperative, 1999 WL 74016. As this Court has explained, "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" and that, as a result, "such considerations" warn against "inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order." Peoples Gas System, 187 So. 2d at 339 (recognizing the PSC's inherent power to reconsider orders under its control as a result of any change in circumstance or any demonstrated public need or interest).

The issue of a regulatory agency's jurisdiction to assure compliance with its rules and orders is obviously an issue that directly impacts on the public interest, as well as the interest of the ratepayers that a utility pay no more for cogenerated energy than its avoided cost. See Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So. 2d 249, 253 (Fla. 1982) (holding that the PSC has the inherent power to revisit determinations in prior orders to protect the customer). The PSC spoke to that issue in the Lake Order, but then refused to address that issue in a definitive manner after its Lake Order became a

procedural nullity. The unfairness of that is patent. Under these circumstances, there was no legal basis to apply decisional finality to bar the PSC from telling FPC, by a declaratory statement, the PSC's view of its Approval Order and its cogeneration rules as the PSC expressed it in rejecting the Lake settlement. Indeed, the PSC had every obligation to do so.

## CONCLUSION

The PSC's Order should be reversed and the matter remanded to the PSC with instructions that FPC's Petition be adjudicated on the merits.

Respectfully submitted,

Rodney Gaddy Esq. FBN 314943
James A. McGee Esq. FBN 150483
Florida Power Corporation
NationsBank Tower
200 Central Avenue, Suite 1500
St. Petersburg, Fl 33701
Phone: (727) 820-5593

Sylvia H. Walbolt FBN 033604
Chris C. Coutroulis FBN 300705
Robert L. Ciotti FBN 333141
Joseph H. Lang, Jr. FBN 0059404
Carlton, Fields, Ward, Emmanuel
Smith & Cutler, P.A
777 S. Harbour Island Boulevard
Tampa, Florida 33602
Phone: (813) 223-7000

Attorneys for Appellant
Florida Power Corporation

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing,as well as FPC's Appendix to Appellant's Initial Brief, was furnished by U.S. Mail on the 26th of March, 1999, and a true and correct copy of this Appellant's Amended Initial Brief was furnished by U.S. Mail on this 29th day of March, 1999 to Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; James D. Wing, Esquire, 701 Brickell Ave., 30th Floor, P.O. Box 015441 , Miami, FL 33101, Gail P. Fels, Esquire, Assistant County Attorney, Dade County Aviation Department, Post Office Box 592075 AMF, Miami, Florida 33159 (counsel for Dade County); Robert Scheffel Wright, Esquire, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302 (counsel for Montenay); and David E. Smith, Esquire, Director of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850.

Attorney