FILE

Florida Power
CORPORATION

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July 28, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. [redacted]-EQ

Dear Ms. Bayó:

Enclosed for filing in the above subject docket are fifteen copies of Brief of Florida Power Corporation.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Very truly yours,

James A. McGee

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation	Docket No.961477-EQ Submitted for filing: July 28, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Brief of Florida Power Corporation has been furnished to the following individuals by regular U.S. Mail this 28th day of July, 1997:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation.	Docket No. 961477-EQ Submitted for filing: July 29, 1997

BRIEF OF FLORIDA POWER CORPORATION

Florida Power Corporation ("Florida Power"), pursuant to direction by the Florida Public Service Commission ("the Commission") at its June 24 and July 15, 1997 Agenda Conferences, hereby submits its brief on Issue 1 as set forth in the Commission staff's recommendation dated June 12, 1997, to wit:

> Can the Commission deny cost recovery of a portion of the energy payments made to Lake [Cogen, Ltd.] regardless of the outcome of the current litigation?

Summary of Florida Power's position

No. The Commission has previously ruled that it would defer to the courts to interpret the negotiated contract's pricing provision. That order is a final order that is binding upon the Commission in this proceeding under principles of administrative finality. Having deferred the interpretation of the pricing provision to the courts, the Commission may not, in a subsequent cost recovery proceeding, base a disallowance of contract payments on an interpretation of the very same pricing provision that is inconsistent with the interpretation given by the court at the conclusion of the pending litigation between Lake Cogen, Ltd. ("Lake") and

Florida Power. Indeed, to rule inconsistent with the ruling in Pasco Cogen docket would be arbitrary and capricious.

Discussion

In Docket No. 940771-EQ, Florida Power petitioned the Commission to determine whether its implementation of identical pricing provisions for energy payments (Section 9.1.2) contained in 11 negotiated QF contracts was lawful under Florida Statutes and consistent with Commission cogeneration rules. By Order No. PSC-95-0210-FOF-EQ, issued February 15, 1995 ("Order 0210"), the Commission granted motions to dismiss Florida Power's petition filed by various QF intervenors who contented that the Commission lacked jurisdiction to grant the relief sought by Florida Power.

The Commission ruled that, under the federal and state statutory scheme, it played a limited role with respect to negotiated contracts that consisted essentially of encouraging the negotiation process and reviewing and approving the contracts for cost recovery purposes. Order 0210 at p.6. After approval for cost recovery, the Commission concluded that its authority over negotiated contracts effectively ceased altogether. Order 0210 at pp. 6 and 8. This was consistent with the Commission's prior actions that recognized its exceedingly narrow authority over cost recovery once a contract has been approved as prudent. See page 6, infra.

Order 0210 made it clear that the Commission's very narrow view of its post-approval authority also extended to the interpretation of negotiated contract terms. The Commission concluded "[w]e believe that [interpretation of the

contract's pricing provision] would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established." Order 0210 at p. 8. The Commission accordingly dismissed Florida Power's petition, stating:

> Florida Power's petition, seeking a determination as to the proper interpretation of the pricing provision, fails to set forth any claim that the Commission should resolve. We defer to the courts to answer the question of contract interpretation raised in this case. [emphasis added]

In so ruling, the Commission rejected Florida Power's argument that the Commission's ongoing jurisdiction over cost recovery, of necessity, authorized the Commission to ensure that those provisions of a negotiated contract that determined the level of costs subject to Commission review are properly interpreted. Although Florida Power believed, and continues to believe, that the Commission did have jurisdiction to interpret this pricing provision, the Commission ruled to the contrary. In reliance on that ruling, Florida Power entered into the settlement agreement with Lake that is the subject of this proceeding. That settlement must be evaluated on the basis of the Commission's ruling in Order 0210. *Peoples Gas System, Inc. v. Mason,* 187 So. 2d 335 (Fla. 1966), (administrative finality "assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of their rights and issues involved therein.);

Amos v. Dep't of Health & Rehab. Services, 444 So. 2d 43, 47 (Fla. 1st DCA 1983) (inconsistent results based upon similar facts without reasonable explanation violates ... equal protection guarantees of the Florida and United States constitutions.); *North Miami General Hospital, Inc. v. Office of Community Medical Facilities*, 355 So. 2d 1272 (Fla. 1st DCA 1978) (agency's denial of cost recovery was reversed when agency granted cost recovery to another applicant under similar circumstances.); *Gessler v. Dep't of Business & Professional Regulation*, 627 So. 2d 501, (Fla. 4th DCA 1993).

In short, having deferred to the courts as the appropriate authority to make such interpretations, the Commission must now accept the court's ruling on the pricing provision as the proper interpretation. To suggest that the Commission can in fact determine the proper interpretation of the pricing provision, regardless of the court's decision in the pending litigation filed by Lake against Florida Power after entry of Order No. 0210, flies squarely in the face of the Commission's contrary decision in Order 0210 that this was a question for the "courts to answer... ."

Nonetheless, this is precisely what Staff has suggested in its June 12, 1997 recommendation that the Commission can do. In an attempt to avoid the clear conflict between Staff's recommendation on Issue 1 and the Commission's decision in Order 0210, Staff attempts to draw a distinction between the lack of jurisdiction to interpret the pricing terms of a negotiated contract, as held in Order 0210, and the existence of Commission jurisdiction over cost recovery pursuant

to Section 366.051, F.S., and PURPA. No such distinction can be validly relied upon by the Commission in evaluating the settlement.

To begin with, Florida Power previously urged in the pricing docket that the Commission had jurisdiction to interpret the pricing provision of this contract precisely because of its jurisdiction over cost recovery and that jurisdiction necessarily carried with it the concomitant jurisdiction to interpret that pricing provision. As Florida Power argued, if the Commission could interpret the provision at the time of cost recovery, manifestly it could do so earlier. The Commission rejected that argument, granted the motion to dismiss Florida Power's petition, and declared that this was a question for "the courts to answer." Notably, the Commission did not assert that it had jurisdiction to interpret the contract after the courts answered the question of contract interpretation.

Moreover, the supposed distinction between (1) the lack of jurisdiction to interpret the pricing terms of a negotiated contract and (2) the existence of jurisdiction to deny cost recovery is illusory. The only way in which cost recovery of the QF payments in question could be denied (in whole or in part) would be for the Commission to interpret the contract pricing provision under which the payments were calculated in a manner that results in lower payments by Florida Power to the QF. If the Commission lacked jurisdiction to interpret the contract pricing provision at the time Florida Power asked it to do so, as the Commission expressly ruled in Order 0210, the Commission will not acquire jurisdiction at a later time to make that interpretation.

Simply put, this Commission has previously held by its final order in the pricing docket that the question of contract interpretation is for the "courts to answer...." But the Commission could not disallow cost recovery without making exactly the contract interpretations that it said in Order 0210 it "should" not make because this was a "question" the courts should "answer." It makes no sense to say that the Commission can make such an interpretation after the courts have "answered the question," if it could not do so at the time the very same dispute was submitted to it in the first instance. Manifestly, the Commission would not have deferred to the courts in the first instance if it were not in turn going to honor the court's decision.

Significantly, none of the authorities relied on in Order 0210 establish any such distinction in the Commission's jurisdiction, and no such distinction was asserted in that Order. Instead, under that Order, the Commission determined to deferred to the courts to interpret this contract provision. The Commission will be estopped under its rules and prior orders to deny cost recovery of payments made pursuant to the contract.

Thus, Rule 25-17.0832(8)(a), F.A.C., adopted by the Commission in 1990, provides that:

> Firm energy and capacity payments made to a qualifying facility pursuant to a separately negotiated contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs if the

contract is found to be prudent in accordance with subsection (2) of this rule. [emphasis added]

Thereafter, in a 1992 order regarding the implementation of its cogeneration rules, the Commission explained:

> We have already ruled that our approval of a negotiated contract constitutes a determination that payments made by a utility to a QF under the negotiated contract constitute a prudent expenditure by the utility. We now find that once our determination of prudence becomes final by operation of law, we cannot deny the utility cost recovery of payments made to the QF pursuant to the negotiated contract, absent some extraordinary circumstances, such as ... perjury, fraud, collusion, deceit, mistake, inadvertence, or intentional withholding of key information. Order No. 25668, issued February 3, 1992 in Docket No. 910603-EQ. [emphasis added]

Since the Commission has already held in a final order that it will allow cost recovery for payments made by Florida Power pursuant to the provisions of the contract, it is bound by that order to allow cost recovery for payments made pursuant to that contract, as interpreted by the courts. It will not be able to collaterally attack the court's decision as being an incorrect interpretation of the contract.

Order No. 24734 (approving the Lake contract) and Order 0210 are final orders, and the parties have acted in good faith reliance on those orders in entering into this settlement of their contract dispute. Hence, the Commission

cannot now base its determination of the fairness of this settlement on a change in its stated position that the courts are to answer the question of contract interpretation. The fact that the Commission now recognizes that it may not agree with the courts' interpretation is not the type of "mistake" that allows it to revisit its earlier order approving this contract for cost recovery purposes. See Skinner v. Skinner, 579 So.2D 358 (Fla. 4th DCA 1991) (misunderstanding of possible results of judicial degree is not ground for relief from judgment); Schrank v. State Farm Mutual, 438 So.2D 410 (Fla. 4th DCA 1983) (mistaken view of the law constitutes judicial error rather than mistake).

In Order No. 25668, the Commission declared that a utility should be able to rely on the Commission's approval of cost recovery under negotiated contracts. It explained that:

> We determine the prudence of payments to be made to a QF under a cogeneration contract, as of the date of our decision based upon the facts before us at that time. Once our order is no longer subject to modification even an extraordinary event such as the future discovery of some new power source could not affect our determination. A cogeneration contract is either prudent at the time of our determination or it is not. Subsequent events cannot change a determination of prudence (once final) made upon facts contemporaneously before us.

Having approved cost recovery on the basis of the record before it at that time, and having refused to resolve the contract interpretation dispute when it was

presented to the Commission, the Commission is barred from later disallowing cost recovery on the basis of facts subsequently presented to it demonstrating that the court's interpretation of the provision is contrary to the Commission's interpretation. Stated differently, since the Commission expressly ruled in Order 0210 that it would defer to the courts to determine the proper meaning of that provision, the Commission cannot retreat from Order No. 24734's explicit approval of cost recovery, based upon an after-the-fact determination of the meaning of this provision that is contrary to the determination made by the courts.

As noted above, in opposing the motions to dismiss its petition in the pricing docket, Florida Power expressly argued that the Commission had jurisdiction to interpret the disputed pricing provision precisely because on its jurisdiction over cost recovery [cites]. The Commission disagreed and entered its order dismissing Florida Power's petition. In that order, the Commission relied upon a number of out-of-state decisions for the proposition that "state commissions should not generally resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recover," Order 0210 at page 7.

However one characterizes it, the Commission would be resolving a contractual dispute over the interpretation of a negotiated contract if it were to accept Staff's recommendation on Issue 1 -- it would simply be resolving that dispute by stating its disagreement with the court's resolution of the dispute and by then enforcing its contrary interpretation through denial of cost recovery. That

would in turn trigger the "regulatory out" clause, which would be determinative of the contract payments to be received by the QF. Consequently, it is a complete fiction to say that the Commission would not be as a practical matter resolving the parties' contract dispute, which is exactly what it said in Order No. 0210 it would not do.

It remains only to note that the Commission expressly approved the settlement agreement between Florida Power and Pasco Cogen as being a fair and reasonable resolution of this contract dispute that is in the best interests of Florida Power's ratepayers. It would plainly be arbitrary and capricious for the Commission, within a less than 3-month span, to conclude that this settlement--which is in all material respects the same as the settlement with Pasco Cogen--is not a fair and reasonable resolution of this contract dispute. *University Community Hospital v. Dep't of Health & Rehab. Services*, 492 So. 2d 1330 (Fla. 2nd DCA 1985); *University Community Hospital v. Dep't of Health & Rehab. Services*, 493 So. 2d 2 (Fla. 2nd DCA 1986). Sound regulatory policy requires that the Commission act in a manner that allows regulated entities to govern their conduct with some predictability, which would not be the case if the Commission were to reach diametrically opposite results on the same material facts.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By _____

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