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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Power Corporation for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Lake Cogen, Ltd., in Order No. 24734, Together with Order No. PSC-97-1437-F0F-EQ, Rule 25-17.0832, F.A.C., and Order No. 24989, Establish that Energy Payments Thereunder, Including When Firm or As-Available Payments Are Due, Are Limited to Analysis of Avoided Costs Based Upon Avoided Unit's Contractually-Specified Characteristics.	Docket No. 980509-EQ Submitted for Filing: April 30, 1998

LAKE COGEN, LTD.'S MOTION TO DISMISS FLORIDA POWER CORPORATION'S PETITION FOR DECLARATORY STATEMENT AND SUPPORTING MEMORANDUM OF LAW

LAKE COGEN, LTD., by and through NCP Lake Power, Inc., its general partner, hereinafter collectively referred to as "Lake Cogen" or "Lake," pursuant to Rule 25-22.037(2), Florida Administrative Code ("F.A.C."), respectfully moves the Florida Public Service Commission ("the Commission" or "FPSC") to dismiss the Petition for Declaratory Statement ("the Fourth Petition") filed on April 10, 1998 by Florida Power Corporation ("FPC") that initiated this docket. In summary, and as explained more fully in Lake Cogen's supporting memorandum of law herein, the Commission should dismiss FPC's latest petition for the following reasons.

1. FPC's April 10 Petition for Declaratory Statement is the third petition that FPC has filed in its efforts to induce the Commission to attempt to determine FPC's and Lake Cogen's rights under a certain negotiated power sales contract, and the fourth similar petition that FPC has filed in attempting to induce the Commission to determine the rights of FPC and QFs under the same contract provisions. This "Fourth Petition" is barred by the doctrines of res judicata, collateral estoppel, and administrative finality.

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2. In light of the fact that Lake Cogen has already been granted summary judgment on the basic liability issue in its dispute with FPC, FPC's Fourth Petition is worse than forum-shopping: it is a deliberate and inappropriate collateral attack on the Lake Circuit Court's jurisdiction and decision. Even if the Commission had subject matter jurisdiction, collateral estoppel would also apply, on the merits, to FPC's asserted claim regarding the energy pricing methodology under the Contract.

3. The primary authority upon which FPC bases its request for a declaratory statement is a legally null Proposed Agency Action order.

4. Converting this docket to a Section 120.57 proceeding will not save it from lack of subject matter jurisdiction.

BACKGROUND AND STATEMENT OF THE CASE

1. Lake Cogen Ltd. owns and operates a 112 MW gas-fired cogeneration facility in Umatilla, Lake County, Florida (the "Facility"), and sells firm capacity and energy from the Facility to FPC pursuant to that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Lake Cogen And Florida Power Corporation dated March 13, 1991 (the "Contract"). The Contract provides for Lake Cogen to produce and deliver to FPC, and for FPC to purchase, 110 megawatts (MW) of firm electric capacity and energy at a minimum committed on-peak capacity factor of 90 percent from the Facility. Thermal energy produced by Lake Cogen's Facility (in the form of steam) is sold to Golden Gem Growers, Inc., for use in its citrus processing plant. Lake Cogen is a qualifying cogeneration facility or "QF" as contemplated by the applicable rules of the Commission and the Federal Energy Regulatory Commission (the "FERC").

2. In accord with Commission Rule 25-17.0832(2), F.A.C., the Contract was approved for cost recovery by Commission Order No. 24734, issued on July 1, 1991 in Docket No. 910401-EQ. In Re:

Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60 (July 1, 1991) (hereinafter the "Contract Approval Order"). By the same order, the Commission approved seven other negotiated contracts for the purchase by FPC of firm capacity and energy from other QFs. These eight negotiated contracts, together with three others approved in separate proceedings[1], are referred to collectively herein as "the Negotiated Contracts." The Commission's Contract Approval Order found that Lake Cogen's Contract was expected to provide savings to FPC's ratepayers of more than $3 million (Net Present Value) based upon then-current forecasts of FPC's avoided costs. 91 FPSC 7:71.

3. In reliance on the Contract and the Commission's approval thereof, Lake Cogen constructed the Facility, at a cost in excess of $102 million, and has operated it in accord with the Contract since July 1, 1993.

4. When the Facility became commercially operational, FPC commenced making firm capacity and energy payments to Lake Cogen in accordance with the Contract. From the time the Facility began commercial operation in July 1993 until August 8, 1994, FPC consistently paid Lake Cogen for all energy delivered to FPC based on the "firm energy price" calculated using the formula set forth in section 9.1.2(i) of the Contract; during these thirteen months,

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[1] In Re: Complaint by CFR BioGen Corporation Against Florida Power Corporation for Alleged Violation of Standard Offer Contract, 92 FPSC 3:657; In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy between Ecopeat Avon Park and Florida Power Corporation, 91 FPSC 8:196; In Re: Petition for Approval of Cogeneration Contract Between Florida Power Corporation and Seminole Fertilizer Corporation, 91 FPSC 2:271.

FPC made no payments based on as-available energy pricing. Under the other Negotiated Contracts with identical energy payment provisions, FPC paid the firm energy price for all energy delivered from each respective QF's commercial in-service date through August 8, 1994. Under one of these Negotiated Contracts, FPC paid Dade County and Montenay-Dade, Ltd., the operator of the Dade County Resources Recovery Facility, the firm energy price for all energy delivered from December 1, 1991 until August 8, 1994, when FPC unilaterally implemented a new pricing methodology.

5. In a letter to Lake Cogen dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating" "an avoided unit" with certain limited characteristics during certain hours, and further declared that, as a result of this determination, FPC would pay for energy delivered in those hours at a rate based on FPC's as-available energy costs, which are less than the firm energy prices that FPC would otherwise be obligated to pay to Lake Cogen. FPC claimed that these actions were being taken pursuant to the provisions of Section 9.1.2 of the Contract. FPC sent similar letters, announcing similar claims and intentions, to the other QFs that are parties to the Negotiated Contracts.

6. On July 21, 1994, FPC initiated Docket No. 940771-EQ, In Re: Petition for Declaratory Statement Regarding Application of Rule 25-17.0832, F.A.C., To Certain Negotiated Contracts for Purchase of Firm Capacity and Energy, By Florida Power Corporation, hereinafter cited as the "Energy Pricing Docket," by filing a Petition for Declaratory Statement ("the First Petition"). In that First Petition, FPC asked the Commission to issue an order:

declaring that the utilization of the pricing mechanism

> specified in Section 9.1.2 of the Negotiated Contracts to determine the periods when as-available energy payments are to be substituted for firm energy payments, complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Petition for Declaratory Statement at page 6. (Emphasis supplied.)

7. By petition dated August 18, 1994, Lake Cogen requested the Commission's leave to intervene in the Energy Pricing Docket for the limited purpose of moving to dismiss FPC's First Petition. By its Order No. PSC-94-1406-PCO-EQ, issued November 16, 1994, the Commission granted Lake Cogen's petition. Order No. PSC-94-1406-PCO-EQ at 1. On October 31, 1994, after the Commission Staff recommended that the Commission deny FPC's First Petition because it was inappropriate for a declaratory statement,[2] FPC filed a pleading styled an "Amended Petition" (hereinafter "the Second Petition"), in which FPC asked the Commission:

> for a determination that [FPC's] manner of implementing the pricing mechanism specified in Section 9.1.2 of the negotiated contracts for the purchase of firm capacity and energy from certain Qualifying Facilities . . . to determine the periods when as-available energy payments are to be substituted for firm energy payments, is lawful under Section 366.051, F.S., and complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Second Petition at 1. (Emphasis supplied.)

8. On December 1, 1994, Lake Cogen filed its Motion to Dismiss FPC's Second Petition. Several other QFs also intervened, and also moved to dismiss FPC's petitions on or about the same date. The Commission heard oral argument on the motions to dismiss on January 5, 1995, and, by Order No. 95-0210-FOF-EQ (hereinafter "the 1995 Dismissal Order"), unanimously granted Lake's motion to

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[2] See Energy Pricing Docket, Staff Recommendation at 5 (FPSC Document No. 10249, October 6, 1994).

dismiss, as well as the motions of the other QFs, and dismissed FPC's Second Petition. Further details regarding the factual background of these disputes are set forth in Lake Cogen's above-mentioned Motion to Dismiss and Supporting Memorandum of Law, a copy of which is attached hereto as Appendix A.

9. In the 1995 Dismissal Order, the Commission stated, among other things:

> This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a limited role for the states in the regulation of the relationship between utilities and qualifying facilities. States and their utility commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities under a state-controlled contract if they are unable to negotiate a power purchase agreement, encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' ratepayers. That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved. As Auburndale's attorney pointed out in oral argument, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a wholesale power transaction.
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> * * *
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> FPC has asked us to determine if its implementation of the pricing provision is lawful and consistent with Commission Rule 25-17.0832(4), Florida Administrative Code. We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to determine that its interpretation of the contract's pricing provision is correct. We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. Furthermore, we agree with the cogenerators that the pricing methodology outlined in Rule 25-17.0832(4), Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts.
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> We disagree with FPC's proposition that when the

> Commission issues an order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that we have continuing jurisdiction to interpret.
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> * * *
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> For these reasons we find that the motions to dismiss should be granted. FPC's petition 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. Thus, FPC's petition is dismissed.

1995 Dismissal Order, 95 FPSC 2:263, 267-70. FPC did not appeal the 1995 Dismissal Order.

10. While the proceedings in the Energy Pricing Docket were continuing, on October 7, 1994, Lake Cogen, recognizing the courts' jurisdiction over its claims under the Contract, filed suit in the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida (hereinafter "the Lake Circuit Court" or "the Court"), seeking both declaratory relief and damages on its contract claims. NCP Lake Power, Incorporated, a Delaware corporation, as General Partner of Lake Cogen Ltd., a Florida limited partnership, Plaintiff v. Florida Power Corporation, a Florida corporation, Defendant, Case No. 94-2354 CA01 ("the Lake Circuit Court action"). On October 19, 1994, Lake filed its Amended Complaint. On November 10, 1994, FPC moved the Lake Circuit Court to dismiss Lake's Amended Complaint or, alternatively, to abate the Lake Circuit Court action. By order dated February 7, 1995, the Court denied FPC's motion. On February 20, 1995, FPC filed its answer and affirmative defenses.

11. On November 17, 1995, Lake Cogen moved the Lake Circuit Court for partial summary judgment as to FPC's liability to make energy payments to Lake Cogen on the basis of the "real," fully

characterized avoided unit contemplated by the Contract. On December 14, 1995, FPC cross-moved for summary judgment on this same energy pricing issue. After hearing oral argument, the Court entered its Order granting partial summary judgment in favor of Lake and against FPC. Lake Cogen v. FPC, Case No. 94-2354 CA01, Order Granting Partial Summary Judgment for the Plaintiff and Against the Defendant (Fla. 5th Cir., January 23, 1996). Copies of Lake Cogen's motion for summary judgment, FPC's motion for summary judgment, and the Lake Circuit Court's order are attached as Appendix B.

12. Shortly after the Court granted Lake's motion for partial summary judgment, the parties resumed settlement negotiations, which ultimately led to a settlement agreement that was executed in early December of 1996. This settlement was presented by FPC to the Commission for its approval, for cost recovery purposes, in In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation, Docket No. 961477-EQ ("the Lake-FPC Settlement Docket"). The Commission eventually voted, 3-to-2, to reject the Lake-FPC settlement agreement. This decision was reflected in the Commission's Proposed Agency Action Order No. 97-1437-FOF-EQ ("the Lake PAA Order"), issued on November 14, 1997. Lake timely protested the Lake PAA Order, and subsequently moved to dismiss the proceeding; FPC opposed Lake's protest and also opposed Lake's motion to dismiss the proceeding. On March 30, 1998, by Order No. PSC-98-0450-FOF-EQ, the Commission unanimously granted Lake's motion to dismiss, holding that the Lake-FPC Settlement Docket was moot and that the Lake PAA Order is a nullity.

13. As a result of the Commission's rejecting the Lake-FPC Settlement Agreement, active litigation in the Lake Circuit Court action has resumed. The Court has scheduled the case for trial in November 1998.

14. On April 10, 1998, FPC filed yet another improper petition for declaratory statement (the "Fourth Petition"), seeking Commission action on its contract disputes with a QF, i.e., Lake Cogen. This time, attempting to rely on the same authorities that it cited in its First Petition and in its Second Petition, plus the legally null Lake PAA Order, FPC has asked the Commission:

> for a declaratory statement that, under the rational articulated in Order No. PSC-97-1437-FOF-EQ, issued November 14, 1997 in Docket 961477-EQ, (the "Lake Order" or the "Lake Docket"), the Public Utilities Regulatory Policy Act [sic[3]] ("PURPA"), Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C., the Commission interprets its Order No. 24734, issued July 1, 1991 in Docket 910401-EQ (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between Florida Power and Lake Cogen Ltd. (the "Negotiated Contract" or "Contract" between FPC and "Lake"), <u>to require that Florida Power</u>:
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> (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
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> (B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Lake is entitled to receive firm or as-available energy payments;
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> (C) Use the actual chargeout price of coal to Florida Power's Crystal River ("CR") Units 1 and 2, resulting from Florida Power's prevailing mix of transportation, rather than the mix of transportation in effect at the time the Contract was executed or some other mix, to compute the level of firm energy payments to Lake.

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[3] The correct title of PURPA is the Public Utility Regulatory Policies Act of 1978.

FPC's Fourth Petition at 1-2. (Emphasis supplied.) (Footnotes omitted.)[4]

15. Neither PURPA nor Section 366.051, Florida Statutes ("F.S."), has changed since the Commission issued its 1995 Dismissal Order. Nor has the Contract Approval Order been amended, clarified, or appealed; indeed, as specifically contemplated by the Contract, "all opportunities for requesting a hearing, requesting clarification and filing for judicial review have expired or are barred by law." Contract at Section 1.16, page 4. Nor, in fact, did FPC appeal the 1995 Dismissal Order. This leaves, as the sole purported new -- since the 1995 Dismissal Order was rendered -- authority for FPC's requested declaratory statement the Lake PAA Order. As noted above, the Commission unanimously held the Lake PAA Order to be a nullity and the underlying docket was dismissed.

SUMMARY OF GROUNDS FOR DISMISSAL

16. FPC's Fourth Petition is barred by the doctrines of res judicata, collateral estoppel, or both, as well as by the doctrine of administrative finality. The issue here is the Commission's jurisdiction. The Commission has already spoken clearly on this

[4] On February 24, 1998, FPC filed a nearly identical petition for declaratory statement ("the Third Petition") relating to its negotiated power sales contract with Dade County and Montenay Power Corp. In Re: Petition for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Metropolitan Dade County, Order No. 24734, Together with Order Nos. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C., and Order No. 24989, 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, FPSC Docket No. 980283-EQ. Dade County and Montenay have moved to dismiss FPC's Third Petition.

issue, holding that it lacks jurisdiction to decide this dispute, specifically as between FPC and Lake Cogen, and specifically with respect to the instant contract dispute regarding energy pricing.

17. In view of the fact that the Lake Circuit Court has already ruled that FPC is liable to pay Lake Cogen for energy in accord with Lake's interpretation of the Contract, and where FPC has itself moved, unsuccessfully, for summary judgment on the energy pricing issue raised in its Fourth Petition, it is clear that FPC's Fourth Petition is a deliberate collateral attack on the Lake Circuit Court's jurisdiction and on that Court's order granting summary judgment in favor of Lake.

18. The Commission must see FPC's Fourth Petition for what it is -- a deliberate collateral attack on the Lake Circuit Court's jurisdiction and on the Court's order granting Lake Cogen's motion for partial summary judgment. It represents FPC's attempt to get yet another bite at the apple. FPC's Fourth Petition is barred, legally flawed, and otherwise inappropriate, and the Commission should dismiss it.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Lake Cogen, Ltd., by and through NCP Lake Power, Inc., its general partner, respectfully moves the Commission to DISMISS FPC's Fourth Petition for the reasons set forth in the following memorandum of law.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. FPC'S FOURTH PETITION IS BARRED BY THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL, OR BOTH, AND BY THE DOCTRINE OF ADMINISTRATIVE FINALITY.

By filing its Fourth Petition, FPC is attempting to relitigate the issue of whether the Commission possesses the jurisdiction to resolve the ongoing contract interpretation dispute between FPC and Lake Cogen. This threshold jurisdictional issue was fully litigated by FPC, Lake Cogen, and other QFs in the Energy Pricing Docket, FPSC Docket No. 940771-EQ, and the Commission made a final determination on the merits in the 1995 Dismissal Order, wherein the Commission unequivocally held that it lacked jurisdiction to grant FPC the relief it requested. See Order No. PSC-95-0210-FOF-EQ, 95 FPSC at 2:270. Accordingly, the doctrines of res judicata and collateral estoppel, or both,[5] operate to bar FPC from attempting to invoke the Commission's jurisdiction to grant FPC the relief requested in the Fourth Petition; the Fourth Petition must therefore be dismissed. In addition, Lake Cogen has reasonably relied on the 1995 Dismissal Order, and any attempt by the Commission to recede from the jurisdictional determinations in that order is contrary to the doctrine of administrative finality.

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[5] Courts often apply the doctrines of res judicata and collateral estoppel interchangeably. See City of Miami Beach v. Prevatt, 97 So. 2d 473, 477,(Fla. 1957), cert denied sub nom, Wags Transportation System, Inc. v. Prevatt, 355 U.S. 957, 78 S.Ct. 543, 2 L. Ed. 2d 532 (1958). Res judicata is often referred to as "claim preclusion," and collateral estoppel is referred to as "issue preclusion." Lake Cogen believes that both doctrines apply in this case to bar FPC's attempt to relitigate the jurisdictional issues decided by Order No. PSC-95-0210-FOF-EQ.

A. Res Judicata

The general principle underlying the doctrine of res judicata is that a final judgment by a tribunal of competent jurisdiction is absolute and conclusively puts to rest every justiciable issue between the parties, as well as every actually litigated issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984). It is well-settled that res judicata may be applied to bar relitigation of issues resolved in an administrative proceeding. See Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987) (citing several cases, including Wager v. City of Green Grove Springs, 261 So. 2d 827 (Fla. 1972)). It is also well-settled that the principles of res judicata apply to questions of jurisdiction. See Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, 455 U.S. 691, 706, 102 S.Ct. 1357, 716 L. Ed. 2d 558, 571 (1982) (citing American Surety Co. v. Baldwin, 287 U.S. 156, 166, 53 S.Ct. 98, 77 L.Ed. 231 (1932)); see also State Commission on Ethics v. Sullivan, 430 So. 2d 928, 934-35 (Fla. 1st DCA 1983) (applying res judicata to a jurisdictional issue).

In a recent case, the Commission utilized the test adopted by the United States Eleventh Circuit Court of Appeals to determine the applicability of the doctrine of res judicata. See In Re: Application for Certificates to Provide Water and Wastewater Services in Alachua County under Grandfather Rights by Turkey Creek, Inc. and Family Diner, Inc., d/b/a/ Turkey Creek Utilities, 95 FPSC 11:625, 627-28 (Order No. PSC-95-1445-FOF-WS) (November 28, 1995) (hereinafter "Turkey Creek") (applying the test set forth in I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549

(11th Cir. 1986) (hereinafter "Durbin")).

In Turkey Creek, the Commission found that, for the doctrine of res judicata to bar a subsequent suit, four elements[6] must be present:

> (1) there must be a final judgment on the merits, (2) the decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases.

Turkey Creek, 95 FPSC at 11:628 (citing Durbin, 793 F.2d at 1549 (11th Cir. 1986); Harte v. Yamaha Parts Distributer, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L. Ed. 2d 994)).

All four elements of res judicata are satisfied with respect to the jurisdictional issue posed in this case, and the Commission must therefore, as a matter of law, dismiss FPC's Fourth Petition. As to the first element, the 1995 Dismissal Order represents a final order as that term is defined in Section 120.52(7), F.S., and

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[6] The Commission has also described the elements of res judicata as consisting of

> 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the parties; and 4) identity of the quality in the person for or against whom the claim is made.

In Re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc. Regarding Termination of Water and Wastewater Services in Lee County, 94 FPSC 2:357, 365. (Order No. PSC-94-0210-FOF-WS) (February 21, 1994) (hereinafter "Tamiami Village") (citing Albrecht, 444 So. 2d at 12.) This test is functionally equivalent to the 11th Circuit test, and, for the reasons set forth in this memorandum of law, all of the elements of both tests are satisfied in this case.

FPC's failure to appeal that final order means that the 1995 Dismissal Order is a final judgment on the merits as to the issue of jurisdiction. Regarding the second element, the 1995 Dismissal Order was rendered by the Commission which, like every tribunal, has the jurisdiction to declare whether it has jurisdiction over a matter. Third, the parties are exactly the same parties who litigated the jurisdictional issue decided by the Commission in the Energy Pricing Docket: FPC filed both its First Petition initiating FPSC Docket No. 940771-EQ and its subsequent Second Petition therein. By Order No. PSC-94-1406-PCO-EQ, the Commission granted Lake Cogen intervenor status in FPSC Docket No. 940771-EQ for the purpose of moving to dismiss FPC's petitions. Thus, the parties to the instant docket both fully litigated the jurisdictional issue in FPSC Docket No. 940771-EQ.

Finally, with regard to the fourth element of res judicata, FPC's Fourth Petition represents an attempt by FPC to litigate the same cause of action stated in FPC's First and Second Petitions, namely, whether the Commission possesses jurisdiction to grant a declaratory statement interpreting the Contract and the Contract Approval Order. Indeed, FPC's Fourth Petition seeks declaratory relief that is substantively identical to that which FPC sought in the earlier docket, i.e., the Commission's declaration that, under its earlier Order No. 24734, FPC is justified in its unilateral reinterpretation of the energy payment terms of the Contract.

While the doctrine of res judicata should generally be applied sparingly, see, e.g., In Re: Petition for Interim and Permanent Rate Increase in Franklin County by St. George Utility Island Company, Ltd., 94 FPSC 11:141, 152, the Commission has previously

applied the doctrines of res judicata and collateral estoppel to prevent a party from relitigating issues determined in a prior Commission order. See Turkey Creek, 95 FPSC at 11:628. In this docket, the applicability of res judicata is clear: the essential elements of res judicata are present, and FPC offers no legally sufficient basis for relitigating the issue.

The Commission determined that it did not have jurisdiction over these disputes in 1995, and the Commission does not have jurisdiction today. The only new legal authority cited by FPC in its Fourth Petition for the proposition that the Commission has authority to "require" FPC to take certain actions in performing its duties under the Contract is the Lake PAA Order, which is a legal nullity. Thus, any attempt by FPC to rely on the Lake PAA Order as an independent basis for a ruling that the Commission has jurisdiction in this case is clearly misplaced.

B. Collateral Estoppel

Collateral estoppel, also known as estoppel by judgment or judicial estoppel, is a legal doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them. See Mobil Oil Corporation v. Shevin, 354 So. 2d 372, 374 (Fla. 1977). In Turkey Creek, the Commission once again adopted a standard applied by the 11th Circuit in finding that the following elements[7] must be present for

[7] The test for collateral estoppel applied by the 11th Circuit is functionally equivalent to the test utilized by Florida courts. See Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995) (finding that the essential elements of collateral estoppel are that the parties and issues be identical and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction).

collateral estoppel to apply:

> 1) the issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior suit; 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgement in that action; and 4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Turkey Creek, 95 FPSC at 11:628 (citing Durbin, 793 F.2d at 1549; Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985)).

In this docket, the issue of the Commission's jurisdiction to grant the relief requested by FPC in its Fourth Petition is identical to the jurisdictional issue decided by the Commission in the 1995 Dismissal Order in FPSC Docket No. 940771-EQ. In both its First Petition and Second Petition, FPC asked the Commission to declare that FPC's actions "complie[d] with" the Contract Approval Order; in its Fourth Petition, FPC asks the Commission to declare that its actions are "require[d]" by the same Contract Approval Order. Moreover, FPC and Lake Cogen were both parties to the 1995 Dismissal Order and, as such, all had a full and fair opportunity to litigate[8] -- and did in fact litigate -- the key threshold issue

[8] Any attempt to differentiate "complies with" from "requires" is semantic at best; moreover, in the Energy Pricing Docket, the Commission gave extensive consideration to FPC's theory that the Commission's Contract Approval Order conferred continuing jurisdiction over disputes arising under the Contract. The Commission rejected this argument. In any event, even if there were some technical, hypothetical difference between what FPC asked for in its First and Second Petitions and what it is now asking for in its Fourth Petition, it is abundantly clear that FPC surely could have litigated the issue whether the Contract Approval Order "requires" FPC to take certain actions in

of jurisdiction.[9] Accordingly, FPC is collaterally estopped from relitigating the issue of the Commission's jurisdiction to resolve the pending contract interpretation dispute between FPC and Lake Cogen under the guise of interpreting the Contract Approval Order or otherwise, and FPC's Fourth Petition should be dismissed.

C. Administrative Finality

The doctrine of administrative finality provides that

> orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.[10]

McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996) (quoting Peoples Gas System, Inc. v. Mason, 187

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performing under the Contract. Accordingly, the doctrine of res judicata applies to bar FPC's Fourth Petition in any event.

[9] FPC's failure to appeal the 1995 Dismissal Order in no way affects the applicability of the doctrine of collateral estoppel to this case. Rather, FPC's decision not to appeal the 1995 Dismissal Order should be viewed as recognition by FPC that the 1995 Dismissal Order was correctly decided and a waiver by FPC of its right to appeal.

[10] In McCaw, the Florida Supreme Court cautioned against applying the rule of administrative finality in "too doctrinaire" a fashion to agencies acting in an administrative capacity by exercising continuing regulatory authority over persons or activities. McCaw, 679 So. 2d at 1179 (quoting Mason, 187 So. 2d at 339). However, in this case, the jurisdictional determination made by the Commission in the 1995 Dismissal Order is more judicial in nature than regulatory and, as such, the cautionary warnings of the Florida Supreme Court in McCaw do not apply. The point is that, as the Commission correctly concluded in 1995, the Commission does not have continuing regulatory authority or jurisdiction over negotiated contracts.

So. 2d 335, 339 (Fla. 1966)). In addressing the implementation of its cogeneration rules with respect to negotiated contracts, the Commission explained how the doctrine of administrative finality applies to its approval of negotiated QF power sales contracts:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract.

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

The rationale behind the doctrine of administrative finality, as explained by the Florida Supreme Court in McCaw and by the Commission in Implementation of Cogeneration Rules, applies equally to this case. Lake Cogen has reasonably relied on the finality of the 1995 Dismissal Order's determination that the Commission lacks jurisdiction to interpret the Contract, as well as on the finality of the 1991 Contract Approval Order, and Lake has expended significant sums on litigation as a result of such reliance. As a matter of fairness, the Commission should reject FPC's invitation for the Commission to revisit the issue of jurisdiction.

In this context, more than fairness is at stake: if the Commission is to fulfill its responsibilities under PURPA and Florida law to encourage cogeneration and small power production, it must respect QF contracts and its role with respect to those contracts, as enunciated in Order No. 25668 and Order No. PSC-95-0210-FOF-EQ. As Commissioner Clark stated in her dissenting

opinion to the Lake PAA Order, the majority's view in that Order

> goes against the very concerns that prompted the Commission to state in its Order implementing its cogeneration rules (see Docket No. 910603-EQ) that it would not revisit its cost recovery determinations absent a showing of fraud, misrepresentation or mistake. This type of assurance was considered by the Commission as necessary to encourage cogeneration in the electric utility industry.
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> * * *
>
> In summary, the majority view in this docket has the effect of reversing an important decision on which these and other parties have relied. It also has the effect of undermining the Commission's policies of encouraging competition in the wholesale generation segment of Florida's electric utility industry.

Lake PAA Order at 20 (Commissioner Clark, dissenting).

FPC's efforts to induce the Commission to interpret the Contract Approval Order -- and the Contract -- now are barred by the doctrine of administrative finality, as well as by federal preemption as enunciated in the United States Third Circuit Court of Appeals' decision in Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3rd Cir. 1995). In Freehold, the Third Circuit held that "once the [state regulatory authority] approved the power purchase agreement between [the QF] and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [regulatory authority] to reconsider its approval or to deny the passage of those rates to [the utility's] customers under purported state authority was preempted by federal law." Id. at 1194; see also Independent Energy Producers v. California Public Utilities Commission, 36 F.3d 848 (9th Cir. 1994)(California PUC program

under which the PUC attempted to authorize utilities to monitor QFs' compliance with FERC's QF efficiency standards, and to authorize utilities to substitute lower payment rates to non-complying QFs, was preempted by PURPA); Smith Cogeneration, Inc. v. Corporation Commission, 863 P.2d 1227, 1240-41 (Okla. 1953) ("[r]econsideration of long-term contracts with established estimated avoided costs" is preempted by PURPA); West Penn Power Company v. Pennsylvania Public Utility Commission, 659 A.2d 1055 (Pa. Cmwlth. 1995) (PURPA preempts Pennsylvania Public Utility Commission from reconsidering its prior approval of agreements governing utility's power purchases from QFs).

D. FPC's Attempt To Seek a Declaration With Respect To Coal Cost Calculations Is Likewise Beyond the Commission's Jurisdiction.

FPC apparently believes that Lake Cogen may seek leave to amend its complaint to allege that FPC has manipulated its coal delivery methods and cost and thereby breached the implied duty of good faith and fair dealing that is inherent in every contract governed by Florida law. See Green Companies, Inc. v. Kendall Racquetball Investments, Ltd., 560 So. 2d 1208, 1210 (Fla. 3d DCA 1990) (citing Restatement (Second) of Contracts § 205 (1981)). But if Lake Cogen were granted leave to amend its complaint, it would simply present another contract dispute between the parties that the courts have the exclusive jurisdiction to resolve. See 1995 Dismissal Order, 95 FPSC 2:263, 270; see also In Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, 85 FPSC 3:228. Thus, FPC's plea for the Commission's declaration on this issue is misplaced, and affords no

ground for the requested declaration.

II. THE LAKE CIRCUIT COURT HAS ALREADY ADJUDICATED FPC LIABLE FOR BREACH OF THE CONTRACT, REJECTING FPC'S OWN MOTION FOR SUMMARY JUDGMENT IN THE PROCESS. ACCORDINGLY, FPC'S FOURTH PETITION REPRESENTS A DELIBERATE AND IMPROPER COLLATERAL ATTACK ON THE COURT'S JURISDICTION AND ORDER.

Having already failed to persuade the Commission to take jurisdiction over these contractual disputes, FPC moved the Lake Circuit Court for summary judgment on the energy pricing issue. FPC lost. Here, FPC again attempts to have the Commission take jurisdiction over the disputes. This is worse than forum-shopping: it is a deliberate effort to circumvent the acknowledged jurisdiction and the order of the Lake Circuit Court. FPC's latest attempt to revisit the issues that were previously addressed should also be dismissed.[11]

Having lost the energy pricing issue on summary judgment, and faced with going to trial on the merits, at which time the facts regarding FPC's conduct will come out, FPC has **now** attempted to come back to the Commission with essentially the same claims that were dismissed more than three years ago and that are currently pending in the Lake Circuit Court. If the Lake Court had not already ruled on the basic liability issue in the dispute, FPC's efforts would be blatant forum-shopping. See Couch v. Department

[11] FPC's Fourth Petition represents at least a fourth and perhaps even a fifth bite at the apple by FPC. The first two "bites" were FPC's First Petition and Second Petition filed at the Commission in 1994, which were dismissed by Order No. PSC-95-0210-FOF-EQ. FPC's attempted third bite was its unsuccessful motion for summary judgment in the Lake Circuit Court action, and its fourth attempted bite is its pending Third Petition regarding the negotiated contract between FPC and Dade County and Montenay.

of Health and Rehabilitative Services, 377 So. 2d 32, 33 (Fla. 1st DCA 1979) (finding that a declaratory statement proceeding before a state agency is not proper where there is an action pending in state court that can provide adequate relief).

In this instance, however, FPC's conduct represents a deliberate collateral attack on both the Lake Circuit Court's jurisdiction and on the Court's earlier order. Even if the Commission had jurisdiction over the contract dispute, FPC would be collaterally estopped on the merits as to the energy pricing dispute. The Lake Circuit Court decided the basic energy pricing issue in Lake's favor in the Order Granting Partial Summary Judgement in 1996, and FPC is therefore collaterally estopped from seeking a contrary order from the Commission.

FPC's request for the declaratory statement sought by its Fourth Petition is no more than an effort to avoid the approaching day of reckoning in the courts, when, having already been adjudicated in breach of the Contract, it will have to litigate the issue of damages owed to Lake. FPC is trying, desperately, to avoid that day of reckoning.

III. FPC'S PRIMARY "AUTHORITY" IS A LEGAL NULLITY.

FPC's Fourth Petition asks the Commission to interpret Order No. 24734 to "require" FPC to take certain actions in performing its duties under the Contract based on the Lake PAA Order. Any attempts by FPC to rely on the Lake PAA Order, or on the reasoning set forth by the three-member majority therein, are unsupportable as a matter of law.

The Commission issued the Lake PAA Order on November 14, 1997.

On December 5, 1998, in compliance with the Commission's rules and the Lake PAA Order itself, Lake Cogen timely filed a petition protesting the order. See In Re: Petition for Expedited Approval of Settlement Agreement Between Lake Cogen, Ltd. and Florida Power Corporation, FPSC Order No. PSC-98-0450-FOF-EQ at 1 (FPSC Docket No. 961477-EQ, March 30, 1998). Lake Cogen's timely filing of its petition protesting the Lake PAA Order rendered that Order a legal nullity. FPSC Order No. PSC-98-0450-FOF-EQ at 5; see also In Re: Rate Setting Procedures and Alternatives for Water and Sewer Utilities, Docket No. 880883-WS, Order No. 21202, and In Re: Modified Minimum Filing Requirements of Southland Telephone Company, Docket No. 920196-TL, Order No. PSC-94-0282-FOF-TL (1994 WL 162089 Fla. P.S.C.) Accordingly, when FPC filed its Fourth Petition on April 10, it knew that the Lake PAA Order was not legal authority as FPC suggests in its Fourth Petition.[12] See Fourth Petition at 22.

Moreover, the Lake PAA Order is legally irrelevant to the subject matter of the disputes between FPC and Lake. The Lake PAA Order addressed a proposed amendment to the FPC-Lake Cogen contract, which amendment the Commission has the authority to approve or disapprove for cost recovery pursuant to Rule 25-17.0836, F.A.C. No such contract amendment is at issue here.

Notwithstanding the fact that the Lake PAA Order is a legal nullity, FPC's Fourth Petition -- by invoking the "rationale" of the Lake PAA Order -- appears to be an attempt to squeeze this

[12] See Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) (stating that proposed agency action is merely preliminary action which becomes final only if no administrative hearing is timely requested).

dispute under the New York Public Service Commission's Crossroads decision[13] and under the Florida Supreme Court's recent Panda decision.[14] Neither case affords any support for FPC's Fourth Petition.

A. Crossroads

Crossroads involved a QF contract, approved by the New York Public Service Commission ("NYPSC"), providing for the sale of 3.3 MW of capacity and associated energy to a utility. The QF subsequently expanded its generating capacity and then demanded payment at the contract rates, which were greater than the utility's then-current avoided costs. The utility sought and obtained the NYPSC's declaratory ruling that the QF was not entitled to the higher pricing for the incremental output because the NYPSC's initial approval of the contract was limited to the original 3.3 MW project and contract. The NYPSC expressly declined

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[13] 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). At this point in the Crossroads proceedings, it cannot be ruled out that the New York PSC's decision is incorrect. In November 1996, the QF in Crossroads sued the electric utility in federal district court, alleging breach of contract, breach of implied covenant of good faith and fair dealing, anticipatory repudiation, and antitrust violations. In Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907 (D.N.J. 1996), the district court dismissed all of the QF's claims. An appeal of this decision is pending at the Third Circuit; an appeal of the NYPSC's ruling is also pending, but has been voluntarily stayed by agreement of the parties.

[14] Panda-Kathleen, L.P./Panda Energy Corporation v. Clark, 701 So. 2d 322 (Fla. 1997). It also appears that an appeal of the Panda decision is pending at the U.S. Supreme Court. This memorandum of law assumes, for the sake of argument, that Crossroads and Panda will be upheld with respect to the non-contract issues addressed.

to involve itself in any contract dispute between the QF and the utility.

The Crossroads decision is simply inapposite to the Lake-FPC contract dispute if for no other reason than that it does not involve a contract interpretation issue, but rather involves the NYPSC's interpretation of its contract approval policies, terms, and conditions--specifically, that the NYPSC's initial approval of the contract did not cover the new, incremental capacity at issue.

Decisions of the NYPSC, including Crossroads and the decisions cited therein, clearly hold that the NYPSC has no jurisdiction over contract disputes between QFs and utilities. The Florida PSC has expressly held, and its Staff has expressly recognized, that the dispute between Lake Cogen and FPC involves a contract interpretation dispute between Lake Cogen and FPC. 1995 Dismissal Order, 95 FPSC 2:263 at 269, 270; In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation, FPSC Docket No. 961477-EQ, Staff Recommendation dated August 12, 1997 at 1. As this Commission has independently acknowledged, this clearly takes this matter beyond the scope of the NYPSC's Crossroads decision and beyond the jurisdiction or authority of state regulatory authorities. See 95 FPSC 2:263 at 269-70. Even the NYPSC recognized in Crossroads that its authority does not extend to involvement in contract disputes between QFs and utilities. Crossroads, 1996 N.Y. PUC LEXIS 674 at *9.

Crossroads simply does not represent any new precedent. The decision is simply the latest in a line of NYPSC orders holding that the NYPSC may interpret certain aspects of its own prior approval orders regarding QF-utility contracts, including the

applicability of policies relating to facility capacity and facility location as they existed at the time that the specific QF-utility contracts were entered into.[15] In short, neither Crossroads nor any case cited therein stands for the proposition that the NYPSC or any similar state regulatory authority may interpret a contract between a QF and a utility under any circumstances.

B. Panda

Panda is both factually and legally distinguishable from this case. In Panda, the Commission construed its own rules that were incorporated as part of the power sales agreement between the QF and the utility.[16] In short, Panda stands for the proposition that

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[15] See Indeck-Yerkes Energy Service of Yonkers v. Consolidated Edison Co. of New York, 1994 WL 62394 (S.D.N.Y.), wherein the NYPSC issued an order "clarifying" that its prior order approving the Indeck-Con Ed contract was subject to the NYPSC's then-existing "site certainty policy." In subsequent contract litigation, the U.S. District Court granted summary judgment in favor of Con Ed, holding that the contract contemplated adherence to the NYPSC's contract approval conditions, which included, the Court held, the "site certainty policy" then in effect. It is important to note that the Court, and not the NYPSC, decided the contract interpretation dispute between the QF and the utility. See also Re Niagara Mohawk Power Corp., 1996 WL 161415 (N.Y.P.S.C., March 26, 1996), wherein the NYPSC's contract approval was expressly conditioned on an output limitation tied to the pricing available for smaller QFs: "The Approval Order effectuated that intent by providing that 'this contract approval will be strictly conditioned on the operation of Lyonsdale's facility at 20 MW or less.'" Id. at 1996 WL 161415 at *2 (citing to the Approval Order at pp. 9-10).

[16] See, e.g., Panda, 701 So. 2d at 327, where the Court stated: "We believe 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." See also id. at 327 (" . . . to forbid the Commission to resolve disputes concerning its rules . . . would render the Commission powerless to limit standard offer-contracts . . . .") And similarly, in upholding the Commission's ruling with respect to the facility size issue, the Court stated "we find that the regulations and the contract specify a contract for a facility with a capacity less than seventy-five megawatts." Id. The Court went on to refer to "the Commission's interpretation of its own

the Commission has the jurisdiction to interpret its rules that are incorporated as part of standard offer contracts to resolve disputes arising from conflicts between rule provisions and other contract provisions. Where there is a conflict, an applicable Commission-adopted rule, incorporated as part of the contract, will govern: as the Court stated,

> FPC's conduct and any understandings of the parties contrary to the Commission's rules are irrelevant to the Commission's enforcement of its rules. Our determination rests on whether the Commission's construction of its rules departed from the essential requirements of law and whether its decision was based on competent, substantial evidence.

Id. at 328. Panda does not support the proposition that the Commission has any jurisdiction over disputes regarding the terms of negotiated contracts.

FPC's problem in attempting to fit the instant dispute under Panda is obvious: the Commission has held, in a final order, that the energy pricing rule for standard offer contracts, upon which FPC purports to rely in its Fourth Petition, does not apply to negotiated contracts. 95 FPSC 2:269.

IV. CONVERTING FPC'S FOURTH PETITION TO A SECTION 120.57(1) PROCEEDING WILL NOT SAVE IT FROM DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION.

FPC states in its Fourth Petition that it would not object to the Commission converting its Fourth Petition from a declaratory statement proceeding to an action "brought under Fla. Stat. 120.57." Fourth Petition at 2, n. 1. It is not at all clear

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rules" and the application of "the Commission's construction of its rule . . ." in reaching the Court's conclusions. Id.

precisely what type of Section 120.57 proceeding FPC contemplates its improper declaratory statement action might be converted to; it cannot be a complaint, and it could only be a proceeding to determine FPC's and Lake's substantial interests if the Commission had subject matter jurisdiction over the parties for these purposes. The Commission's Approval Order (Order No. 24734) simply does not give the Commission continuing jurisdiction over such disputes. See the 1995 Dismissal Order, 95 FPSC 2:263 at 269.

Even if the Commission could disallow payments for cost recovery in this case, FPC's request for a declaration relative to the operation of a Commission order on cost recovery and the "regulatory out" clause of the Contract is not a matter for the Commission to resolve. The "reg-out" clause is simply another contract term, the interpretation, applicability, and enforcement of which is a matter of contract law for the courts.

CONCLUSION

The issue here is the Commission's jurisdiction. The Commission has already spoken clearly on this, holding that it lacks jurisdiction to decide disputes under negotiated QF contracts, specifically as between FPC and Lake Cogen, and specifically with respect to the instant energy pricing dispute, even when FPC previously asked the Commission for such relief based on the Contract Approval Order. The potential coal cost manipulation dispute likewise presents issues to be decided by a judge or jury.

Given that FPC has lost outright on summary judgment on the

key energy pricing issue raised in its Fourth Petition, the Commission must see FPC's Fourth Petition for what it is -- a direct collateral attack on the Lake Circuit Court's jurisdiction and on that Court's order granting summary judgement in favor of Lake Cogen. FPC's Fourth Petition is barred, legally flawed, and otherwise inappropriate, and the Commission should dismiss it summarily.

Respectfully submitted this 30th day of April, 1998.

LAKE COGEN, LTD.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 30th day of April, 1998, by U. S. Mail to James A. McGee, Esquire, Office of the General Counsel, Florida Power Corporation, 3201 34th Street South, Post Office Box 14042, St. Petersburg, Florida 33733-4042; and by hand delivery to Richard C. Bellak, Esquire, Division of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850.

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APPENDIX A

MOTION TO DISMISS AND SUPPORTING MEMO OF LAW

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

RECEIVED 1994 FPSC-RECORDS/REPORTING

In Re: Petition for Declaratory Statement Regarding Application of Rule 25-17.0832, F.A.C., to Certain Negotiated Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation.	Docket No. 9407[illegible] Submitted for Filing: December 1, 1994

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

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

1. Resolution of the real dispute -- the meaning of the energy pricing terms of the Negotiated Contracts between FPC and QFs -- requires that the disputed sections of the subject contracts be interpreted, but the Commission has no authority to interpret cogeneration contracts.

2. Neither the Commission's statutes, nor its rules, nor its approval of the Contracts "for cost recovery purposes" give the Commission authority to interpret the Contracts or continuing jurisdiction over the Contracts.

3. Rule 25-17.0832(4)(b) does not apply to negotiated contracts, nor does it prescribe a mechanism for determining the operational status of the avoided unit. Moreover, FPC's version of the Rule's history is plainly contradicted by FPC's own rule proposals and post-hearing comments in Docket No. 891049-EU.

4. Notwithstanding FPC's changes in phrasing, substituting "determination" for "declaration" and "implementation" for "interpretation," its Amended Petition is still, necessarily, a request for interpretation of the Contracts. Moreover, none of FPC's requested "determinations" would resolve the underlying contract dispute.

In support of its Motion to Dismiss, Lake Cogen states as follows.

A. BACKGROUND

1. Lake Cogen Ltd. owns and operates a 112 MW gas-fired cogeneration facility in Umatilla, Lake County, Florida (the "Facility"), and sells firm capacity and energy from the Facility to FPC pursuant to that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Lake Cogen And Florida Power Corporation dated March 13, 1991 (the "Contract"). The Contract provides for Lake Cogen to produce and deliver to FPC, and for FPC to purchase, approximately 112 megawatts (MW) of firm electric capacity and energy at a minimum committed on-peak capacity factor of 90 percent from the Facility. Thermal energy produced by Lake Cogen's Facility (in the form of steam) is sold to Golden Gem Growers, Inc. for use in its citrus processing plant. Lake Cogen is a qualifying cogeneration facility or "QF" as contemplated by the applicable rules of the Florida Public Service Commission (the "Commission") and the Federal Energy Regulatory Commission (the "FERC").

2. In accord with Commission Rule 25-17.0832(2), the Contract was approved for cost recovery by Commission Order No.

24734, issued on July 1, 1991 in Docket No. 910401-EQ. In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60 (July 1, 1991). By the same order, the Commission approved seven other negotiated contracts for the purchase by FPC of firm capacity and energy from other QFs. These eight negotiated contracts, together with three others approved in separate proceedings[1], are referred to collectively herein as "the Negotiated Contracts."

3. In reliance on the Contract and the Commission's approval thereof, Lake Cogen constructed the Facility, at a cost in excess of $102 million, and has operated it in accord with the Contract since July 1, 1993.

4. Florida Power Corporation, initially in its own name and later through an affiliate, was intimately involved in the evaluation of the Lake Cogen project as to feasibility and profitability, and in the development of the Lake Cogen project, and in the preparation and submission of the Lake Cogen project proposal that led to the formation of the Contract. In mid-1990, representatives of Peoples Cogeneration Company ("PCC") and Florida Power Corporation began meeting together for the purpose of jointly developing cogeneration facilities in Florida. PCC and FPC intended that any such facilities ultimately developed by the two

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[1] In Re: Complaint by CFR BioGen Corporation Against Florida Power Corporation for Alleged Violation of Standard Offer Contract, 92 FPSC 3:657; In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy between Ecopeat Avon Park and Florida Power Corporation, 91 FPSC 8:196; In Re: Petition for Approval of Cogeneration Contract Between Florida Power Corporation and Seminole Fertilizer Corporation, 91 FPSC 2:271.

companies would be owned equally by the two companies, or by respective affiliates of each, and entered into written agreements reflecting that intent.

5. The joint venture between FPC and PCC entailed numerous meetings and considerable correspondence between the two parties. During the course of this joint venture relationship, FPC advised PCC that it would be issuing a request for proposals ("RFP") by which it would seek to purchase baseload firm capacity and energy from qualifying facilities ("QFs") as defined in the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"). FPC issued its RFP on January 11, 1991. In response to the RFP, PCC and Power Cogen, Inc., an affiliate of FPC formed to continue the joint venture in place of FPC, submitted two proposals to FPC; one was submitted in the name of Lake Cogen, Ltd. and the other in the name of Pasco Cogen, Ltd. ("Pasco Cogen").

6. In developing the Lake Cogen and Pasco Cogen proposals submitted to FPC, PCC relied on the advice and counsel of FPC, and subsequently on the advice and counsel of Power Cogen, Inc., with respect to projections and evaluation of the various operating parameters of FPC's avoided unit. FPC and Power Cogen knew that PCC would rely on these projections, and FPC and Power Cogen knew that these projections would affect the projects' profitability as well as the joint venture's ability to obtain financing for the projects. None of the assumptions used by FPC or Power Cogen, Inc. in modeling the operation of the two jointly developed projects submitted to FPC, i.e., the Lake Cogen and Pasco Cogen projects, ever included or reflected the possibility that either project

would be paid an "as-available" price for energy (kWh) delivered to FPC. Every pro forma financial projection related to the two projects, up to and including the time that the Lake Cogen and Pasco Cogen proposals were submitted to FPC in response to the RFP, was made by FPC or Power Cogen, Inc. Every pro forma financial projection related to the two projects and to FPC's avoided unit assumed that FPC's avoided unit was a "must run" unit. These pro forma projections were based on the assumption that FPC's avoided unit, and the projects, would operate as real, as opposed to "contractually defined," baseload-type generating facilities: that is, FPC's pro forma projections assumed that the avoided unit would operate continuously and would not be cycled on and off on a daily basis. The computer model that FPC and Power Cogen, Inc. used for the purpose of projecting and evaluating the cash flows and equity returns to the joint venture partners assumes that only firm energy prices would be made by FPC over the twenty-year terms of the power purchase agreements. Indeed, this computer model has no field for the input of as-available pricing data.

7. In connection with the FPC-PCC joint venture, each party -- i.e., FPC and PCC -- placed its own order with Stewart & Stevenson Services, Inc. ("S&S") for two (2) LM6000 gas turbine generators, and each party paid S&S a deposit of $250,000 in connection with its order.

8. On February 18, 1991, after PCC and Power Cogen, Inc. submitted their bids in response to the RFP, the joint venture between PCC and Power Cogen, Inc. was terminated. FPC subsequently

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

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

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

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

taken pursuant to the provisions of Section 9.1.2 of the Contract. FPC sent similar letters, announcing similar claims and intentions, to the other QFs that are parties to the Negotiated Contracts.

B. STATEMENT OF THE CASE

12. On July 21, 1994, FPC, correctly anticipating that QFs would dispute FPC's new interpretation of the Contracts, initiated this docket by filing its Petition for Declaratory Statement. By that pleading, FPC asked the Commission to issue an order:

> declaring that the utilization of the pricing mechanism specified in Section 9.1.2 of the Negotiated Contracts to determine the periods when as-available energy payments are to be substituted for firm energy payments, complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Petition for Declaratory Statement at page 6.

Although FPC's initial request for a declaratory statement was less than clear, FPC revealed the true nature of that request in its purported "Answer" to Pasco Cogen's petition to intervene, where FPC stated that:

> [t]he purpose of the declaratory petition is to clarify and validate Florida Power's reliance on the contract language and Florida Power's methodology for implementing it.

Docket No. 940771-EQ, FPSC Doc. No. 08270 at 5 (August 15, 1994). In short, FPC asked the Commission to interpret the contract language and declare that FPC's new methodology comported with that interpretation.

13. In its Amended Petition, FPC asks the Commission

> for a determination that [FPC's] manner of implementing the pricing mechanism specified in Section 9.1.2 of the negotiated contracts for the purchase of firm capacity and energy from certain Qualifying Facilities . . . to

> determine the periods when as-available energy payments are to be substituted for firm energy payments, is lawful under Section 366.051, F.S., and complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission approving the Negotiated Contracts.

Amended Petition at 1.

FPC's Amended Petition does not state an appropriate cause of action before the Commission: though FPC has changed the phrasing of its request, FPC has asked for essentially the same declaratory relief. Its new Amended Petition is still, necessarily, a request for interpretation of the Contracts. Without interpretation of the Negotiated Contracts' pricing terms, none of FPC's requested "determinations" will resolve the underlying contract dispute.

14. The crux of the dispute is the meaning of the energy pricing term of the Contract. Lake Cogen, and the other QFs, entered into Negotiated Contracts with FPC pursuant to which they are to be paid prices less than or equal to the costs that FPC would have incurred to build and operate a pulverized coal-fired electric power plant. Pursuant to Rule 25-17.0832(2), the Commission approved these Contracts for cost recovery upon finding that they would provide needed capacity and that they would be cost-effective as compared to FPC's next-best alternative source of power supply, i.e., a pulverized coal generating unit that FPC would otherwise have built to meet its additional capacity and energy needs. Section 9.1.2 of the Contract provides (a) that when the avoided coal-fired unit would have run, had FPC constructed it, FPC will pay Lake Cogen for energy at the cost that FPC would have incurred to generate the same amount of energy from the avoided unit (the "firm energy price"); and (b) that when the avoided unit

would not have run, had it been built and dispatched on the same basis as FPC's other generating units, FPC will pay Lake Cogen FPC's otherwise applicable as-available energy price.

15. Accordingly, to determine which of these prices applies in any hour, FPC must be able to tell whether the avoided unit would have been operated; this determination is made via computer simulation analyses. The proper simulation analyses must include all the pertinent operating characteristics and constraints of the pulverized coal unit that Lake Cogen, and the other QFs, enabled FPC to cost-effectively avoid.

16. From the time the Facility began commercial operation in July 1993 until August 8, 1994, FPC consistently paid Lake Cogen for all energy delivered to FPC based on the firm energy price; during this thirteen months, FPC made no payments based on as-available energy pricing. Under another of the Negotiated Contracts, FPC paid another QF the firm energy price for all energy delivered from December 1, 1991 until August 8, 1994, when FPC unilaterally implemented its new pricing methodology.

17. FPC, however, now claims, for the first time, that section 9.1.2 of the Contract defines a methodology for determining when the avoided unit would have been operated. FPC now claims, for the first time, that the specifications of the avoided unit, for purposes of the requisite computer simulation, are limited to three factors only: fuel costs, the avoided unit's heat rate, and avoided unit variable operation and maintenance expense. In short, FPC now claims that the Contract prescribes a methodology -- an "on-off switch" -- for determining when the avoided unit would and

would not have operated. In essence, FPC's new interpretation would result in pricing for energy delivered pursuant to the Contracts on the basis of the "lesser of firm or as-available energy cost" methodology formerly embodied in standard offer contracts. Lake Cogen and other QF parties to the Negotiated Contracts reject FPC's new assertion.

18. By petition dated August 18, 1994, Lake Cogen requested the Commission's leave to intervene for the limited purpose of moving to dismiss FPC's petition for declaratory statement. By its Order No. PSC-94-1406-PCO-EQ, issued November 16, 1994, the Commission granted Lake Cogen's petition "to intervene for the limited purpose of moving to dismiss FPC's petition in this proceeding." Order No. PSC-94-1406-PCO-EQ at 1.

19. Lake Cogen Ltd. hereby moves the Commission to enter its order dismissing FPC's Amended Petition for the reasons set forth in the following memorandum of law.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Commission should dismiss FPC's Amended Petition for the following reasons.

1. Resolution of the real dispute -- the meaning of the energy pricing terms of the Negotiated Contracts between FPC and QFs -- requires interpretation of the disputed sections of the subject contracts, but the Commission has no authority to interpret cogeneration contracts.

2. Neither the Commission's statutes, nor its rules, nor its approval of the Contracts "for cost recovery purposes" give

the Commission authority to interpret the Contracts or continuing jurisdiction over the Contracts.

3. Rule 25-17.0832(4)(b) neither applies to negotiated contracts nor prescribes a mechanism for determining the operational status of the avoided unit. Moreover, FPC's version of the Rule's history is plainly contradicted by FPC's own rule proposals and post-hearing comments in Docket No. 891049-EU.

4. Notwithstanding FPC's changes in phrasing, substituting "determination" for "declaration" and "implementation" for "interpretation," its Amended Petition is still, necessarily, a request for interpretation of the Contracts. Moreover, none of FPC's requested "determinations" would resolve the underlying contract dispute.

Each of these matters is discussed in turn in this Memorandum of Law.

I. FPC Has Improperly Asked The Commission To Resolve a Contract Dispute.

Jurisdiction to interpret contracts is vested solely in the judiciary, and it is difficult to imagine a purer, clearer contract question than that involved here: the interpretation of an alleged pricing term. FPC has improperly asked the Commission to assume this authority.

A. FPC's Request for a "Determination" Would Require the Commission to Interpret The Contract.

In its entirety, the subject Section 9.1.2 of the Contract provides as follows:

> 9.1.2 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 chargeout price of fuel burned at the Avoided Unit Fuel 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.

By its own terms, this section states what energy price is to be paid in hours when the avoided unit would have run -- the "firm energy price" -- and what energy price is to be paid in hours when the avoided unit would not have run -- the "as-available energy price."

FPC alleges, however, that this section 9.1.2 does more than state that firm energy prices will be paid when the avoided unit would have been operated and that as-available energy prices will be paid in all other hours. FPC asserts that section 9.1.2 actually defines a methodology for determining when the avoided unit would have been operated. Lake Cogen rejects FPC's newly fabricated "avoided unit on/off" determination methodology.

Therefore, before any determination can be made with respect to whether FPC's implementation of its alleged pricing mechanism complies with either the Commission's rules or orders, if necessary or applicable, the Contract must be interpreted to determine whether the Contract, and the subject section 9.1.2, contains such a mechanism. In order to reach the questions propounded by FPC, the Commission would first have to construe the Contract and determine that section 9.1.2 of the Contract actually contains a

mechanism for determining when the avoided unit would and would not have operated. FPC is trying to simply leap over this crucial threshold issue via a bald allegation that the Contract contains the avoided unit "on-off switch" now asserted by FPC.

B. FPC Has Improperly Asked The Commission To Interpret A Contract, Which Is An Exclusively Judicial Function.

FPC has chosen the wrong forum. Jurisdiction to interpret contracts is vested solely in the judiciary. Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 371 So.2d 152, 154 (Fla. 1st DCA 1979) (Court of Appeals vacated agency's order attempting to interpret a condominium contract between certain parties thereto). The Florida Constitution vests the judicial power exclusively in the judiciary. Fla. Const. art. V, § 1. Moreover,

> [i]t is a generally accepted principle of administrative law that an agency, being a creature of statute, has only those powers given to it by the legislature. . . .

Peck Plaza, 371 So.2d 154, quoting Division of Family Services v. State, 31 So.2d 72 (Fla. 1st DCA 1975).

The Florida Public Service Commission itself has wisely recognized this fundamental principle of our legal system. In a 1985 case, a cogenerator that wished to renegotiate its power sales contract with Tampa Electric Company opposed TECO's petition for declaratory statement[2] on jurisdictional grounds, including, inter alia, the assertion "that TECO was requesting the Commission to

[2] In Conserv, TECO asked the Commission to construe certain provisions of its contract with Conserv, a QF; Conserv then brought an action in court for declaratory and other relief, including a declaration of Conserv's rights to renegotiate its contract.

interpret the Agreement, a task that was within the exclusive jurisdiction of the civil courts." In re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserv Cogeneration Agreement, 85 FPSC 3:229 (Order No. 14207, March 21, 1985) ("Conserv"). The Commission stated: "we agree with Conserv that matters of contractual interpretation are properly left to the civil courts." Conserv, 85 FPSC 3:229 at 232.

The Commission's decision therein followed fundamental principles of Florida administrative law. Jurisdiction to interpret contracts is vested solely in the judiciary: "It is to the judiciary that the citizenry turns when their rights under a document are unclear and they desire an interpretation thereof." Peck Plaza Condominium, 371 So.2d at 154; Point Management, Inc. v. Dep't. of Business Regulation, 449 So.2d 306 (Fla. 4th DCA 1984) (state agency exceeded its jurisdiction by interpreting contracts between the parties; error held where agency denied motion to dismiss on jurisdictional grounds); Ruiz v. Dep't. of Health & Rehabilitative Services, 15 FALR 2864 (Fla. Dep't. HRS 1993) (petitioner, a physician, was denied an administrative hearing where her underlying dispute was contractual in nature and where petitioner had adequate opportunity to seek redress of contractual claims in court of law). "[A]n agency, being a creature of statute, has only those powers given to it by the Legislature." Peck Plaza, 371 So.2d at 154 (quoting from Division of Family Services v. State, 319 So.2d 72 (Fla. 1st DCA 1975)).

The instant dispute presents a clear case of contract law: the intent of the parties to a contract regarding an alleged pricing

term thereof. It is difficult to imagine an issue better, or more appropriately, suited to determination by the courts. The Commission must dismiss FPC's petition.

II. Neither The Commission's Statutes, Nor Its Rules, Nor Its Approval Of The Contracts "For Cost Recovery Purposes" Give The Commission Authority To Interpret The Contracts Or Continuing Jurisdiction Over The Contracts.

The Legislature has not given the Commission the authority to construe or interpret the Contract, nor is continuing jurisdiction over QF contracts clearly and necessarily implied by the statutes. Consistent with its statutory authority, the Commission's rules implementing those statutes do not purport to create or claim such authority, nor has the Commission, in its orders approving the Lake Cogen-FPC Contract and the other Negotiated Contracts for cost recovery, attempted to claim continuing authority or jurisdiction over the Contract.

Granted, in other contexts, the PSC has the authority to take otherwise lawful actions that modify or abrogate certain utility contracts, where such actions are necessary to protect the public interest. In this case, the public interest is not threatened, and accordingly, no Commission intervention is necessary. Moreover, any attempt to exercise such authority would be contrary to the Commission's pronounced doctrine of administrative finality and would have a chilling effect on cogeneration development in Florida, contrary both to applicable statutes and to the Commission's expressed policies. FPC's petition must be dismissed.

A. The Commission's Statutes Do Not Empower It, Either Expressly Or By Clear And Necessary Implication, To Interpret Contracts Between QFs and Utilities.

The Commission's statutes relating to cogeneration include sections 366.051 and 366.81-.82, the latter being a part of the Florida Energy Efficiency and Conservation Act ("FEECA"). These statutes recognize the benefits of electricity produced by cogenerators and small power producers, require the Commission to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers," Fla. Stat. § 366.051 (1993), and declare the Legislature's intent that cogeneration be encouraged. Fla. Stat. § 366.81 (1993).

Even assuming, for the sake of argument, that such delegation were possible, nowhere in either section 366.051 or in sections 366.81-.82 does the Legislature give the PSC jurisdiction to interpret executed and approved contracts between QFs and utilities; nowhere in these sections does the Legislature vest the Commission with continuing jurisdiction over those contractual relationships. Nothing in section 366.051, nor in any other section of the Commission's statutes, indicates that the Legislature even attempted to grant the Commission the authority to modify QF contracts, let alone the judicial power to interpret such contracts.

Neither is the authority to interpret QF contracts "given by clear or necessary implication from the provisions of the statute." See City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965). Rather, the statutes affirmatively describe the Commission's duty thereunder to "establish guidelines relating to

the purchase of power or energy by public utilities" from QFs and declare the Legislature's policy that cogeneration be encouraged. Jurisdiction to interpret QF contracts is not necessary to "establish guidelines" relating to QF power purchases, to encourage cogeneration, nor to protect the public interest.

Because the statutes are silent with respect to the Commission's power to interpret QF contracts, the Commission may not claim such authority. United Telephone Co. of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986) ("United Telephone"). In United Telephone, the Commission issued an order by which it attempted to authorize Southern Bell to withdraw some $9.7 million from the intrastate toll pool, which was governed by "a network of interrelated contractual agreements," because it believed that Southern Bell would experience a revenue shortfall as a result of certain equipment transfers made pursuant to the divestiture of Southern Bell and other local exchange companies by AT&T. Id. at 116. The Supreme Court quashed the Commission's order, finding, inter alia, that the statutory authority claimed by the Commission was "silent on the commission's power (or lack thereof) to modify contracts between telephone companies" and that the cited statutes "do not confer jurisdiction upon the commission to alter the contractual relationship between telephone companies." Id. at 116, 118-119.

Like the statutes in United Telephone, the Commission's cogeneration statutes are silent on the PSC's power to interpret or modify contracts between utilities and QFs. Like the statutes involved in United Telephone, the Commission's cogeneration

statutes do not "confer jurisdiction" to interpret QF contracts, nor do they confer any other continuing jurisdiction over such contracts.

Moreover, any doubt as to the existence of an agency's power must be resolved against its exercise. As the Florida Supreme Court has stated,

> If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

United Telephone, 496 So.2d at 118 (quoting Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1965)); Edgerton v. International Company, 89 So.2d 488 (Fla. 1956).

In this case, there is no doubt: the Commission's cogeneration statutes confer no jurisdiction over QF contracts, nor is such jurisdiction clearly and necessarily implied therefrom. The Commission simply lacks the authority that FPC asks it to exercise. Accordingly, FPC's petition must be dismissed.

B. The PSC's Authority To Modify Orders And Certain Utility Contracts Is Limited To Cases Where Such Modification Is Necessary To Protect The Public Interest. No Such Necessity Exists In This Contract Dispute.

The Commission may take actions that modify orders or abrogate private contracts only where necessary to protect the public interest. In a territorial case, Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966), the Supreme Court held that the Commission could not modify a final order, entered more than four years earlier, where there was no finding that the public interest required partial abrogation of that order (approving a

service area agreement). See also United Telephone v. Public Service Comm'n, 496 So.2d 116, 119 (Fla. 1986) (citing to Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n, 261 U.S. 379 (1923)). In United Telephone, the Florida Supreme Court noted the U.S. Supreme Court's holding

> that a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify private contracts in the absence of such public necessity constitutes a violation of the impairment clause of the United States Constitution.

496 So.2d at 119.

In certain contexts, the PSC does have the authority to take lawful actions that modify or abrogate contracts where such actions are necessary to protect the public interest. For example, the Commission has the authority to modify territorial agreements.[3] The Legislature has, and, where granted by the Legislature, the Commission also has, the power to regulate charges and services performed by public utilities, pursuant to the police power. Rates established pursuant to that power will supersede rates established in private contracts without unconstitutionally impairing those contracts.[4] Further, Commission regulation of rates and billing

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[3] City of Homestead v. Beard, 600 So.2d 450 (Fla. 1992); Public Service Comm'n v. Fuller, 551 So.2d 1210 (Fla. 1989); Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966); City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 436 (Fla. 1965).

[4] H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979) (Commission-approved water and sewer rate increase operated to increase rates otherwise due pursuant to previously executed developer agreement); Miami Bridge Co. v. Railroad Comm'n, 20 So.2d 356, 361 (Fla. 1944) (the Legislature, after granting franchise to toll bridge operator, had authority to enact statute transferring rate-setting authority from franchise holder to State Railroad Commission); Cohee v. Crestridge Utilities Corp., 324 So.2d 155

practices will, subject to proper Commission proceedings, supersede franchise agreements between municipalities and utilities without unconstitutionally impairing those agreements.[5]

In territorial cases, the Commission has continuing authority over its orders, which, as a "practical matter," include territorial agreements approved by the PSC's orders pursuant to express statutory authority, Fla. Stat. § 366.04(2)(d) (1993). Formerly, this continuing authority was "given by clear and necessary implication from the provisions of the statute" establishing the Commission's continuing jurisdiction to "require repairs, improvements, additions, and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public . . . ." City Gas, 182 So.2d at 436. In these cases, "the practical effect of such approval is to make the approved contract an order of the commission, binding as such upon the parties." Id.

Unlike the Commission's statutes pertaining to territorial agreements, the Commission's cogeneration statutes neither expressly vest the Commission with continuing supervisory authority over contractual relationships between utilities and QFs, nor create an overall regulatory system that clearly and necessarily

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(Fla. 2nd DCA 1975) (Commission has authority to raise or lower rates established by preexisting contract when necessary in the public interest); see also Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (1919).

[5] City of Plant City v. Mayo, 337 So.2d 966, 973 (Fla. 1976); City of Plantation v. Utilities Operating Co., 156 So.2d 842, 843-844 (Fla. 1963).

implies such jurisdiction. Therefore, the Contracts, once formed, do not merge into the PSC's orders approving them.

None of the cases cited here, except Conserv, involves contracts between a utility and a QF. None of these cases stands for the proposition that the PSC may construe or interpret a contract between a utility and another party. None of these cases supports the proposition that the PSC may construe or interpret a contract between a utility and a supplier of goods or services to the utility. None of these cases supports the proposition that the Commission has continuing jurisdiction over utility-QF contracts or over any other utility-supplier contracts. Indeed, in the only Commission case addressing the PSC's authority to interpret QF contracts, the Commission itself stated that such action was "a task . . . within the exclusive jurisdiction of the civil courts." Conserv, 85 FPSC 3:229.

Moreover, no Commission intervention is necessary to protect the public interest in this case. The Commission has already found that the Contract, incorporating Lake Cogen's understanding of section 9.1.2 of the Contract, complies with the Commission's applicable rules by which the PSC approved the Contract for cost recovery. Nothing has changed except FPC's unilateral implementation of its new interpretation of the Contracts' pricing terms. Even under the scenario in which FPC and its ratepayers would pay for energy pursuant to the Contract as interpreted by Lake, and as performed under another of the Negotiated Contracts by FPC from 1991 until August of this year, the pricing of energy purchased from Lake Cogen will be exactly that upon which the

Commission based its finding that the Contract is cost-effective (providing more than $3 million in savings to FPC and its ratepayers, 91 FPSC 7:71) and its decision to approve the Contract for cost recovery;[6] the public interest cannot be harmed thereby, and accordingly, no ground for Commission intervention exists.[7] FPC's petition must be dismissed.

C. Pursuant to Its Rules, The Commission's Review and Approval of Negotiated Contracts Is For Cost Recovery Purposes Only.

Of course, the Commission cannot, by rule or order, claim authority or jurisdiction beyond that authorized by statutes. Accordingly, the Commission has never purported to assert, by rule or order, any more authority over negotiated contracts than to review them "for the purpose of cost recovery." Commission Rule 25-17.0832(2) clearly states that the Commission reviews negotiated QF contracts "for the purpose of cost recovery." This limited review of negotiated contracts is consistent with its mandate to encourage cogeneration and to establish guidelines for QF power

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[6] If the ultimate issue here is whether the Commission can, in the name of the police power, modify a contractual obligation just to obtain a lower price for ratepayers, then the Commission must reject it summarily: to allow such a proceeding to continue not only would trespass on judicial authority, it would lead to chaos in all aspects of utility purchasing. The proposition that the Commission can modify a contract solely to obtain a lower price would open the door for the Commission to revisit need determinations, purchases of power plants, contracts for the purchase of power plants pursuant to need determination orders, and contracts for the purchase of any other commodity or service used by a utility in providing service.

[7] Nor do any grounds exist, within the scope of those "extraordinary circumstances" enumerated in Commission Order No. 25668, 92 FPSC 2:37, to warrant "revisiting" the Commission's approval of the Contracts for cost recovery.

purchases. The Commission's review and approval for cost recovery provides utilities and QFs with certainty that, once a negotiated contract is finally approved for cost recovery purposes, the Commission "cannot deny the utility cost recovery of payments made to the QF pursuant to the negotiated contract, absent some extraordinary circumstance." In Re: Implementation of Rules 25-17.080 through 25-17.091, F.A.C., Regarding Cogeneration and Small Power Production, 92 FPSC 2:24,37 (Docket No. 910603-EQ, Order No. 25668, February 3, 1992) ("Implementation of Cogeneration Rules Affecting Negotiated Contracts").

The Commission's policy and procedures regarding the negotiation of power purchase contracts, the submission of such negotiated contracts, and the Commission's review thereof are set forth in Commission Rule 25-17.0832(1)&(2), Florida Administrative Code (1993). Subsection (1) requires a utility that enters into a negotiated contract to provide next-day notice to the Commission Staff and to file, within ten days of execution, "a copy of the signed contract and a summary of its terms and conditions," including certain specified data.

Subsection (2) declares the Commission's policy encouraging negotiated contracts and states that such negotiated contracts "will be considered prudent for cost recovery purposes if it is demonstrated that" the purchase of firm capacity and energy pursuant to such contracts can reasonably be expected to cost-effectively defer or avoid additional generating capacity costs. (Emphasis added.) Subsection (2) further describes and defines the

purpose of the Commission's review of negotiated contracts, as follows:

> In reviewing negotiated firm capacity and energy contracts for the purpose of cost recovery, the Commission shall consider factors relating to the contract that would impact the utility's general body of retail and wholesale customers including:

the need for firm capacity and energy, cost-effectiveness, and whether the contract contains provisions to protect the purchasing utility's ratepayers if the QF fails to deliver firm capacity and energy as promised. (Emphasis added.) As discussed above, this review for cost recovery purposes is consistent with the Commission's mandate to encourage cogeneration[8] and to establish guidelines for the purchase of QF power by utilities.

These rules provide a basis for the Commission to review and approve QF contracts "for the purpose of cost recovery," nothing less and nothing more. They provide no basis for the Commission to construe or interpret approved QF contracts.

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[8] With respect to the Commission's mandate under FEECA to encourage cogeneration, it is clear that allowing FPC to invoke the Commission's authority to unilaterally change the pricing terms of Negotiated Contracts, including changing the method by which they have been making payments thereunder for periods approaching three years, would have significant chilling effects on cogeneration development in Florida. Moreover, allowing such an action to proceed would be contrary to the doctrines of fairness and administrative finality enunciated and explicated by the Commission in Order No. 25668: "The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract." 92 FPSC 2:38.

D. Commission Order No. 24734 Approving the Contracts Did Not, and Does Not, Incorporate the Contracts as Part of That Order Subject to the Commission's Continuing Jurisdiction.

By its Order No. 24734, issued July 1, 1991, the Florida Public Service Commission found that:

> the negotiated cogeneration contracts between FPC and Dade County, El Dorado Energy, Lake Cogen Ltd., Mulberry Energy Co., Orlando Cogen Ltd., Pasco Cogen Ltd., Ridge Generation Stn. Ltd., and Royster Phosphates are viable generation alternatives because:
>
> 1. The capacity and energy generated by the facilities is needed by FPC and Florida's utilities;
>
> 2. The contracts appear to be cost-effective to FPC's ratepayers;
>
> 3. FPC's ratepayers are reasonably protected from default by the QFs; and
>
> 4. The contracts meet all the requirements and rules governing qualifying facilities.

In Re: Petition for Approval of Contracts for Purchase of Firm Capacity and Energy by Florida Power Corporation, 91 FPSC 7:60, 69-70, Order No. 24724 (July 1, 1991).

The ordering language of Order No. 24734 declared that it is:

> ORDERED by the Florida Public Service Commission that the contracts are approved for the reasons set forth in the body of this order.

Id. at 70.

In sum, the Commission's findings tracked the provisions of Rule 25-17.0832(2)(a)-(d) -- need for capacity, cost-effectiveness vs. utility-build options, and protection against QFs' failure to deliver as promised -- and recognized that the supplying facilities satisfied the underlying eligibility requirement, i.e., that they were, or would be, qualifying cogeneration or small power production facilities. The Commission gave no hint nor suggestion

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

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

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

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

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a Commission ruling approving cost recovery under a negotiated contract.

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

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

grounds that such clauses "create a mistaken perception that revenues under a standard offer are not reliable," Id. at 662 (quoting from FPSC Order No. 24989 at 70-71), and that "utilities and QFs should be able to rely on the finality of the approval of cost recovery under standard offer contracts without fear of modification." Id.

In the Commission's separate proceeding to consider the implementation of its cogeneration rules with respect to negotiated contracts, the Commission wrestled with the differences between standard offer contracts and negotiated contracts and concluded "that negotiated contracts should be treated in the same manner as standard offer contracts for cost recovery purposes." Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:36.

Allowing FPC to proceed with this action would do exactly what the Commission has declared it hopes to avoid: it would create a perception, hopefully a mistaken one, that revenues under approved QF contracts are not reliable. The chilling effects on cogenerators, on potential cogenerators, on cogeneration developers, and on institutions that finance cogeneration projects are obvious. This is contrary to the Commission's stated policy.

As a matter of principle, the Commission, having promulgated rules by which it approves QF contracts "for the purpose of cost recovery," having embraced the doctrine of administrative finality in explaining the meaning of those same rules, and having specifically approved the FPC-Lake Cogen Contract pursuant to those rules, may not revisit the Contract absent some extraordinary

circumstance. Such revisitation would run directly contrary to the doctrine of administrative finality, contrary to the Commission's established policy against "micro-managing" utilities, and contrary to the fundamental notion of fairness, followed by the Commission, that approval of 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. If anything, the Commission should regard Lake Cogen's Contract and the other Contracts that are the subject of this proceeding as even "more final" than other utility-supplier contracts because of its express approval of them for cost recovery and because of its express pronouncements regarding the finality of that approval. Accordingly, FPC's petition must be dismissed.

III. Commission Rule 25-17.0832(4)(b) Does Not Apply To Negotiated Contracts. Moreover, FPC's Version Of The Rule's History Is Plainly Contradicted By FPC's Own Rule Proposals and Post-Hearing Comments In Docket No. 891049-EU.

Commission Rule 25-17.0832, Fla. Admin. Code, does not apply to negotiated contracts. Further, the Rule does only what section 9.1.2 of the Contract does, i.e., it prescribes what the energy payments will be when the avoided unit would or would not have been operating; it does not so much as hint at any intent to determine when the avoided unit would or would not have run.

Finally, **FPC's own** proposed rule language and post-hearing comments in Docket No. 891049-EU formed the basis for the Commission's rejection of the "lesser of" methodology and adoption of the current rule's "true avoided firm energy cost" methodology.

FPC cannot invoke Rule 25-17.0832(4)(b) as support for its new efforts to read a "lesser of" methodology into the Contracts.

A. Rule 25-17.0832(4)(b) Does Not Apply to Negotiated Contracts.

FPC asks the Commission to determine that FPC's implementation of section 9.1.2 of the Contracts complies with Rule 25-17.0832(4)(b), Florida Administrative Code (1993). While the Commission assuredly has the jurisdiction to interpret its own rules, the subject Rule does not apply to negotiated contracts. On its face, Commission Rule 25-17.0832(4) applies to standard offer contracts, not to negotiated contracts; it is therefore not properly invoked as a basis for any determination with respect to negotiated contracts.

Subsection (4)(a) provides that energy payments to a QF "pursuant to a utility's standard offer contract" shall commence with the in-service date of the avoided unit, with as-available energy pricing applicable before then. Subsection (4)(b) goes on to provide as follows:

> (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).

Nothing in Rule 25-17.0832(4)(b) indicates that it would apply to negotiated contracts; rather, it is the logical extension of the scheme begun in subsection 25-17.0832(4)(a).

Moreover, the Commission, at least partly at FPC's urging, expressly rejected "standard provisions" in negotiated contracts. Implementation of Cogeneration Rules Affecting Negotiated Contracts, 92 FPSC 2:29,30. By their nature, administrative rules, where they apply, impose exactly such "standard provisions." In this instance, if the Rule governed negotiated contracts, it would, by its inherent legal nature, dictate the energy pricing provisions of all negotiated contracts, just as it dictates the energy pricing provisions of standard offer contracts. This was clearly not the Commission's intent in adopting Rule 25-17.0832(4)(b); therefore, this Rule affords no basis for FPC's requested "determination."

Finally, FPC's own negotiated contracts, by their own terms, offer QFs three different energy pricing options: Options A, B, and C, each with different treatment of avoided variable O&M costs. If the Rule governed energy pricing under all negotiated contracts, FPC's own contracts would violate the Rule. This is obviously absurd: FPC has negotiated and executed, and the Commission has approved, at least Option A and Option C contracts. The Rule does not apply to negotiated contracts, and accordingly, it affords no basis for FPC's requested "determinations."

B. Rule 25-17.0832(4)(b) Does Not Purport To Determine When "The Avoided Unit" That "Would Have Been Installed" Would Or Would Not Have Operated.

The plain language of Rule 25-17.0832(4)(b) states what the basis for energy payments (pursuant to contracts subject to the Rule) will be under two operational states of "the avoided unit:"

1. When "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;" and

2. When "the avoided unit would not have been operated, the avoided energy costs shall be the as-available avoided energy cost of the purchasing utility."

Nothing in this language, nor in the rest of Rule 25-17.0832, purports to define or prescribe a methodology for determining the avoided unit's status in any hour, or in what hours the avoided unit would have been operating. It merely states what the prices will be if the avoided unit would or would not have been operating in any given hour. FPC's efforts to draw the Commission's attention to this Rule as a basis for its requested "determination" are misplaced, and its petition must be dismissed.

C. FPC's History of Rule 25-17.0832(4)(b) Is Incomplete. FPC's Own Contributions To The Rule Do Not Support Its New Claims.

While the Rule does not even apply to negotiated contracts, in an effort to reduce confusion and to clarify the record, Lake will respond briefly to FPC's claims regarding the history of Rule 25-17.0832(4)(b).

FPC's efforts to draw on the Rule's history are not only misplaced, they blatantly ignore important parts of that history: FPC's own proposed rule language and post-hearing comments that led to the rejection of the "lesser of" methodology and to the adoption of the new method that "better models the true avoided firm energy cost." Docket No. 891049-EU, Post-Hearing Comments of Florida Power Corporation, FPSC Document No. 01214 at 7 (February 8, 1990).

FPC's citations to the testimony of its witness in the last general cogeneration rulemaking proceeding, FPSC Docket No. 891049-EU, not only miss the mark, in that they address a different version of the rule than that adopted by the Commission, they also omit any discussion of FPC's own significant role in the adoption of the final rule language that corrected the error inherent in the "lesser of" methodology.

The adopted rule language was different from the version that was the vehicle for discussion at the January 1990 hearings. Major post-hearing changes in the energy pricing language of the Rule were apparently derived by Staff from FPC's own post-hearing comments. FPC's post-hearing filing titled "Florida Power Corporation's Proposed Rule Language" apparently was the initial source of rule language providing that "[t]o the extent that the avoided unit . . . would have operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit." FPSC Docket No. 891049-EU, Florida Power Corporation's Proposed Rule Language, FPSC Document No. 00874 at 1 (January 26, 1990).

In its reply comments submitted on February 8, 1990, FPC explained that:

> . . . our firm energy language will pay the QF the firm energy cost of the avoided unit to the extent that the unit "would have operated." The Staff's proposed language paid this amount when the unit "would have been economically dispatched." Our language is broader and can account for operation which deviates from strict marginal operating cost economics.
>
> During the hearings, there was general agreement that the proposed firm energy language would produce the same energy payment to QF's as the proposed language. Upon reflection, we believe the [sic] our proposed language better models the true avoided firm energy cost.

> For example, consider an avoided coal unit. Florida Power dispatches all of its capacity based upon the incremented [sic] fuel cost of its units. For coal, this represents a spot price which is presently less than the long term contract price. Our as-available avoided energy cost reflects these incremented [sic] fuel prices. During periods of the year when the avoided unit might have been fully dispatched, the as-available price can be less than the firm energy price because the as-available price reflects spot coal prices while the firm energy price reflects average delivered coal prices which are a blend of contract and spot prices. Our proposed language will correct this error.

Docket No. 891049-EU, Post-Hearing Comments of Florida Power Corporation, FPSC Document No. 01214 at 7 (February 8, 1990).

From these comments, it is clear that Florida Power anticipated periods when FPC would pay the firm energy price to QFs even when the as-available, economic-dispatch-based energy price was lower than the firm rate. FPC cannot now credibly claim that Rule 25-17.0832(4)(b) provides grounds for imposing its new energy pricing methodology that embodies the "lesser of firm or as-available energy cost" methodology that its proposed rule language was designed to correct.

IV. Without Interpretation Of The Disputed Contract Term, None of FPC's Requested "Determinations" Would Resolve The Real Issue In Dispute.

All that FPC's purported "amendment" to its petition has done is request a "determination" with respect to "implementation" rather than a "declaration" with respect to "interpretation." FPC's "amendments" do not cure the pleading's fatal defect: it still, necessarily, requires interpretation of the Contracts. Moreover, the Amended Petition is inappropriate for the same fundamental reason as FPC's previous petition for declaratory statement: it will not resolve the real issue in dispute.

FPC has asked for the Commission's determination that its method of implementing its alleged pricing mechanism is lawful under section 366.051, Florida Statutes, and that it complies with Rule 25-17.0832(4)(b) and the Commission's orders approving the Negotiated Contracts. Such determinations, however, would not resolve the underlying contract dispute over whether the Contract, and the other Negotiated Contracts, contain a provision that determines when the avoided unit would or would not have operated.

Either of the competing interpretations of the pricing term would probably be lawful within the scope of section 366.051, if the subject contract accurately reflected the parties' intention and if the subject contract were approved for cost recovery by the Commission. The mere fact that one of several competing interpretations may be permitted within the statutory framework does not make it the sole permissible interpretation; in the present case, it does not resolve the underlying contract dispute. Here, the Commission's approval of the Contract (and the other Negotiated Contracts) was predicated on the Commission's evaluation of the Contracts for cost recovery purposes. The Commission's evaluation reflected energy prices projected at the firm, avoided-unit-based energy cost, i.e., the interpretation understood by Lake Cogen and the other QFs. There can be no doubt that this interpretation -- essentially the interpretation that Lake Cogen and the other QFs understand to be the intent of the Contracts, and the interpretation by which FPC performed the Contracts for periods of nearly three years -- is lawful. Nota bene: FPC does not assert that the QFs' interpretation is unlawful.

Nor would a determination that FPC's interpretation "complies with Rule 25-17.0832(4)(b), F.A.C., and the orders of this Commission" resolve the underlying contract dispute: at the very least, Lake's interpretation -- the interpretation reflected in FPC's cost and revenue projections upon which the Commission based its approval of the Contracts, and by which FPC performed the Lake-FPC Contract for more than a year and by which FPC performed another of the Negotiated Contracts for nearly three years -- complies with the Commission's rules and orders.

Thus, while FPC has rephrased its request, it still seeks declaratory relief that will not resolve the underlying contract dispute. Accordingly, the Commission must dismiss FPC's Amended Petition.

CONCLUSION

Florida Power has improperly asked the PSC to engage in an exclusively judicial function, i.e., to interpret a contract in a pricing dispute between a utility and several of its suppliers. In so doing, FPC has improperly asked the Commission to exceed its statutory jurisdiction and authority. The Commission's cogeneration statutes neither expressly grant the PSC the authority to construe contracts nor create a system in which such authority is clearly and necessarily implied. The Commission's approval, pursuant to its rules, of the Contract "for the purpose of cost recovery" neither vests the PSC with continuing jurisdiction over the Contract nor establishes the Commission's authority to construe it. No action by the Commission is necessary here to protect the

public interest, and no grounds exist to warrant "revisiting" the Commission's approval of the Contracts for cost recovery.

FPC's requested "determinations" that its "implementation" of the pricing term is lawful under section 366.051, and "complies with" certain Commission rules and orders, will not resolve the contract dispute between FPC and the QFs.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Lake Cogen Ltd. prays the Commission to enter its Order DISMISSING Florida Power Corporation's petition.

Respectfully submitted this 1st day of December, 1994.

LAKE COGEN, LTD.
a Florida Limited Partnership

By: Robert Scheffel Wright, Esquire
Its Attorney

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165

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery (*) or by United States Mail, postage prepaid, on the following individuals this 1st day of December, 1994:

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APPENDIX B

LAKE COGEN'S MOTION FOR SUMMARY JDUGEMENT;
FPC'S MOTION FOR SUMMARY JUDGEMENT;
LAKE CIRCUIT COURT'S ORDER

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

NCP LAKE POWER, INCORPORATED,
a Delaware corporation,
as General Partner of LAKE
COGEN LTD., a Florida
limited partnership,

Plaintiff, CASE NO. 94-2354-CA-01

vs.

FLORIDA POWER CORPORATION,

Defendant.
_____/

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiff, NCP LAKE POWER, INCORPORATED, a Delaware corporation, as General Partner of LAKE COGEN LTD., a Florida limited partnership (hereafter "LAKE COGEN"), pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, moves this Court for entry of a Partial Summary Judgment against the Defendant, FLORIDA POWER CORPORATION (hereafter "FPC"), on the sole issue of liability for breach of contract and as grounds therefor states:

1. This Court has jurisdiction over the subject matter of this action, and over the Plaintiff and Defendant in this matter.

2. The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there are no genuine issues of material fact concerning

the following and LAKE COGEN is entitled to a partial summary judgment as a matter of law:

(A) On March 13, 1991, FPC and LAKE COGEN entered into that certain Negotiated Contract For The Purchase of Firm Capacity and Energy From A Qualifying Facility Between Lake Cogen Limited and Florida Power Corporation (hereinafter the "LAKE COGEN-FPC Agreement"), whereby LAKE COGEN would provide, and FPC would purchase, electrical capacity and energy. A true and correct copy of the LAKE COGEN-FPC Agreement is attached to the Amended Complaint as Exhibit "A".

(B) LAKE COGEN is a Qualifying Cogeneration Facility (hereafter "QF") as defined by Section 1.44 of the LAKE COGEN-FPC Agreement.

(C) FPC drafted the LAKE COGEN-FPC Agreement.

(D) FPC is obligated to pay LAKE COGEN an amount that is computed according to the terms of Section 9.1.2 of the LAKE COGEN-FPC Agreement.

(E) Section 9.1.2 of the LAKE COGEN-FPC Agreement provides as follows:

> 9.1.2 Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with 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 chargeout price of fuel burned at the Avoided Unit Fuel 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.

(F) Under Section 9.1.2 of the LAKE COGEN-FPC Agreement, FPC is obligated to pay LAKE COGEN the "Firm Energy Cost" rate for energy delivered to FPC when FPC "would have had a unit with these characteristics operating", and the "As-Available Energy Cost" rate at all other times.

(G) The "unit" referred to in Section 9.1.2 is what is commonly known in the utility industry as an "avoided unit" and refers to the unit that a utility would have built and operated but for purchases from QFs, such as LAKE COGEN.

(H) Consistent with the language of the LAKE COGEN-FPC Agreement, Florida Public Service Commission ("FPSC") Rule 25-17.0832(4)(b), Florida Administrative Code, provides:

> (4) Avoided Energy Payments
>
> (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.

(Emphasis added.) A copy of FPSC Rule 25-17.0832 is included as Appendix "A" to this Motion.

(I) The FPSC's rules require that payments for firm energy pursuant to "Standard Offer Contracts," a species of power purchase agreement required by the FPSC's rules, must be made with reference to the operational status of the avoided unit, "had that unit been installed." The energy payment language of FPC's Standard Offer Contract, which

was promulgated in 1991 pursuant to the above rules, is nearly identical to that in the LAKE COGEN-FPC Agreement. A copy of FPC's Standard Offer Contract is attached as Appendix "B" to this Motion.

(J) By analogy, energy payments pursuant to the FPC-LAKE COGEN Agreement must likewise be determined with respect to the status of an operational unit, "had that unit been installed."

(K) Under the provisions of Section 8.2.1 of the LAKE COGEN-FPC Agreement, LAKE COGEN selected a Pulverized Coal Unit as the avoided unit, with the characteristics outlined in Appendix C, schedules 3 and 4, upon which LAKE COGEN's capacity and energy payments would be based.

(L) The avoided Pulverized Coal Unit selected by LAKE COGEN was based upon a 700 Megawatt Pulverized Coal Unit specific to FPC's system, identified by FPC as Crystal River 6 (hereafter "CR6").

(M) At the time of the execution of the LAKE COGEN-FPC Agreement, the avoided Pulverized Coal Unit selected by LAKE COGEN under Section 8.2.1 of the LAKE COGEN-FPC Agreement, i.e., CR6, was to have operational characteristics similar to Crystal River 4 and 5 (two existing and similar pulverized coal units in FPC's system) but with flue gas desulfurization equipment commonly known as "scrubbers" added.

(N) Prior to the execution of the LAKE COGEN-FPC Agreement, FPC or its affiliates prepared all pro forma financial projections for the LAKE COGEN project.

(O) Prior to the execution of the LAKE COGEN-FPC Agreement, all pro formas prepared by FPC or its affiliates projected that LAKE COGEN would be paid the Firm Energy Cost rate for all energy delivered to FPC for the life of the LAKE COGEN-FPC Agreement.

(P) All of the information submitted by FPC to the FPSC in connection with FPC's obtaining approval of the LAKE COGEN-FPC Agreement reflected FPC's projections that LAKE COGEN would be paid at the Firm Energy Cost rate for the life of the LAKE COGEN-FPC Agreement.

(Q) The LAKE COGEN cogeneration facility achieved Commercial In-Service Status on July 1, 1993, which date became the "Contract In-Service Date" referred to in Section 9.1.2 of the LAKE COGEN-FPC Agreement.

(R) On that date, FPC became obligated under the LAKE COGEN-FPC Agreement to make energy payments to LAKE COGEN pursuant to Section 9.1.2 of the LAKE COGEN-FPC Agreement.

(S) From July 1, 1993 through August 8, 1994, FPC paid LAKE COGEN the Firm Energy Cost rate for all energy delivered to FPC by LAKE COGEN plus, where applicable, the Performance Adjustment pursuant to Section 9.1.3 and Appendix C, Schedule 6 of the LAKE COGEN-FPC Agreement.

(T) FPC also entered into agreements with certain other QFs, including, among others, PASCO COGEN LIMITED and Metropolitan Dade County, which contain language identical to that in Section 9.1.2 of the LAKE COGEN-FPC Agreement.

(U) FPC performed its energy payment duties under its agreement with PASCO COGEN LIMITED by paying PASCO COGEN LIMITED the Firm Energy Cost rate, plus, where applicable, the Performance Adjustment pursuant to Section 9.1.3 and Appendix C, Schedule 6 of the respective agreement, for all energy delivered to FPC from July 1, 1993, when PASCO COGEN LIMITED achieved Commercial In-Service Status, through and including August 8, 1994. FPC paid the Firm Energy Cost rate to other QFs through and including August 8, 1994.

(V) FPC performed its energy payment duties under its agreement with Dade County by paying Dade County the Firm Energy Cost rate plus, where applicable, the Performance Adjustment pursuant to Section 9.1.3 and Appendix C, Schedule 6 of the respective agreements, for all energy delivered to FPC by Dade County from December 1, 1991 through and including August 8, 1994.

(W) By letter dated August 8, 1994, FPC announced to LAKE COGEN, PASCO COGEN LIMITED, and Dade County (and other QFs with agreements having the same language regarding energy payments in Section 9.1.2 thereof) that effective August 9, 1994, FPC would begin making payments to those QFs based on whether a unit defined by FPC as having only those characteristics listed in Section 9.1.2(i) of the agreements would have been scheduled on or off.

(X) On August 9, 1994, FPC changed its payments to LAKE COGEN, PASCO COGEN LIMITED, and Dade County, and certain other cogenerators and began paying either the As-Available Energy Cost rate or the Firm Energy Cost rate depending on

whether a unit defined by FPC as having only those characteristics listed in Section 9.1.2(i) of the QFs' Agreements would have been scheduled on or off.

(Y) The operational -- i.e., "on" or "off" -- status of FPC's existing generation units is not determined by the characteristics set forth in Section 9.1.2(i) of the LAKE COGEN-FPC Agreement or the other Contracts. The operational status of FPC's existing generating units is determined by numerous operational characteristics, including, without limitation: unit start-up cost, unit shutdown cost, minimum operating load, the unit's incremental heat rate curve, minimum "up time" once a unit is started, and the minimum "down time" between unit starts.

(Z) When FPC changed its method of determining energy payments to LAKE COGEN (and other QFs), FPC stated that it was thenceforth determining those energy payments with respect to whether a "hypothetical," "contractually defined" generating unit having only those characteristics listed in Section 9.1.2(i) of the LAKE COGEN-FPC Agreement "would be scheduled on-line or off-line," **rather than** with respect to whether FPC would have had an actual, operational avoided unit --i.e., CR6 -- operating. (See the certified copies of FPC's two primary pleadings in FPSC Docket No. 940771-EQ, In Re: Petition of Florida Power Corporation For a Declaratory Statement, specifically FPC's July 21, 1994 Petition for Declaratory Statement and its October 31, 1994 Amended Petition, which are attached to the Affidavits of Amy E. Hendry dated November 13, 1995 and filed simultaneously to this Motion).

(AA) FPC does not cycle CR4 or CR5 on and off on a daily basis.

3. FPC breached the LAKE COGEN-FPC Agreement by basing energy payments to LAKE COGEN under Section 9.1.2 thereof with reference to a "hypothetical," "contractually defined" generating unit defined by FPC as having only certain limited characteristics rather than with reference to the actual avoided unit (CR6) contemplated by the LAKE COGEN-FPC Agreement. The limited characteristics being used for this purpose by FPC, i.e., the characteristics listed in Section 9.1.2(i) of the LAKE COGEN-FPC Agreement, are not considered by FPC in determining the operational status of its own generating units and are not contemplated by the LAKE COGEN-FPC Agreement to be considered in determining the operational status of the avoided unit referenced in Section 9.1.2 of the LAKE COGEN-FPC Agreement.

4. There are no genuine issues of material fact regarding the breach of contract and LAKE COGEN is entitled to a partial summary judgment as a matter of law.

WHEREFORE, Plaintiff, NCP LAKE POWER, INCORPORATED, a Delaware corporation, as General Partner of LAKE COGEN LTD., a Florida limited partnership, respectfully requests that this Court enter an Order granting Partial Summary Judgment in its favor and against the Defendant on the issue of liability for failure to pay LAKE COGEN at the Firm Energy Cost rate when the operable "avoided unit" (CR6) contemplated by the LAKE COGEN-FPC Agreement would have been operating and the As-Available Energy Cost rate during those times when the operable "avoided unit" (CR6) contemplated by the LAKE COGEN-FPC Agreement would not have been operating.

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By: Phillip S. Smith
PHILLIP S. SMITH

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail this 17 day of November, 1995 to:

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Phillip S. Smith
PHILLIP S. SMITH

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11/16/95

IN THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, STATE OF FLORIDA
CIVIL DIVISION

NCP LAKE POWER, INCORPORATED,
a Delaware corporation,
as General Partner of LAKE COGEN LTD., a
Florida limited partnership,

Plaintiff, CASE NO. 94-2354-CA-01

vs.

FLORIDA POWER CORPORATION,

Defendant.
_____/

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, FLORIDA POWER CORPORATION (hereafter "FPC"), by and through its undersigned attorneys, and pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, files this, its Motion for Summary Judgment on Count II of the Amended Complaint filed by the plaintiff, NCP LAKE POWER, INCORPORATED, a Delaware corporation, as General Partner of LAKE COGEN LTD. (hereafter "LAKE COGEN"), and states:

1. The pleadings, depositions, answers to interrogatories, and affidavits on file establish that there are no genuine issues of material fact concerning the issues alleged in this matter, and FPC is entitled to summary judgment as a matter of law as to Count II of the Amended Complaint.

2. Attached to the Amended Complaint as Exhibit "A" is a true and correct copy of the Negotiated Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility ("Contract") between plaintiff and defendant. The Contract involves the purchase of

electrical capacity and energy by FPC from LAKE COGEN.

3. The Contract provides that FPC must pay LAKE COGEN at a rate based on a cost specified and defined in the Contract as the "Firm Energy Cost" during certain hours and at a rate specified and defined in the Contract as the "As-Available Energy cost" during all other hours. The Contract clearly and explicitly provides for the payment of these two different rates. (See Section 9.1.2 of the Contract annexed hereto as Exhibit "A").

4. Section 9.1.2 ties FPC's payments to LAKE COGEN to an objective standard, specifically requiring FPC to make an "hour-by-hour" determination of whether FPC would have operated the contractually-defined unit with the characteristics specifically identified in Section 9.1.2(i). The on/off status of the unit determines whether LAKE COGEN receives Firm or As-Available payments for the energy delivered to FPC under the Contract. (See Affidavit of Lee G. Schuster attached).

5. The characteristics set forth in Section 9.1.2 enable the parties to calculate, exactly, the cost of operating the contractually defined unit in Section 9.1.2 which FPC uses to schedule the unit either on or off at any given hour. The certainty of this calculation is not only desirable, but essential to enable the parties to carry out the payment provision of the Contract.

6. Despite the clear language of Section 9.1.2, LAKE COGEN asserts that there are other characteristics which should be considered in making the determination as to whether payments should be made at the "Firm Energy Cost" or the "As-Available Energy Cost," although no other factors are listed in the Contract.

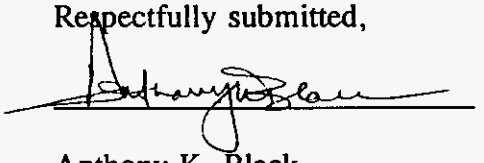
7. FPC will show that the terms of the Contract are unambiguous, and do not require the court to look outside its four corners, requiring that LAKE COGEN'S claims be rejected

as a matter of law.

8. In its Motion For Partial Summary Judgment, LAKE COGEN, contrary to Florida law, urges this court to go outside the four corners of the Contract and consider numerous affidavits which are attached, not to explain the Contract, but to create an ambiguity which does not exist. For example, in paragraph 3 of its motion, LAKE COGEN asserts that the cost factors specifically listed in 9.1.2 "are not contemplated" by the LAKE COGEN-FPC Agreement, when in fact they are the only characteristics contemplated in the Agreement. This contention flies in the face of the express integration clause in the Contract nullifying the legal effect of representations made before the Contract was signed, stating that all such representations are superseded by the terms of the Contract. (See Article XXVI of the Contract).

WHEREFORE, FLORIDA POWER CORPORATION requests that this court grant summary final judgment in its favor on Count II of the Amended Complaint.

Respectfully submitted,



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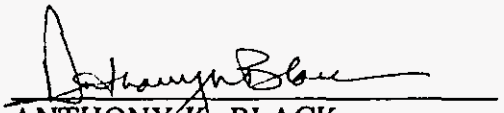
I hereby certify that a true and correct copy of the foregoing was served this 14th day of December by Facsimile and by Federal Express to Walter S. McLin, III, 1000 West Main Street, Leesburg, Florida 34749-1357 and to Robert Scheffel Wright, 310 West College Avenue, Tallahassee, Florida 32302



ANTHONY K. BLACK
Attorney for FLORIDA POWER CORP.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

NCP LAKE POWER, INCORPORATED,
a Delaware corporation,
as General Partner of LAKE
COGEN LTD., a Florida
limited partnership,

Plaintiff,

vs.

FLORIDA POWER CORPORATION,

Defendant.
_____/

CASE NO. 94-2354-CA-01

DIVISION NO. 8

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF AND AGAINST THE DEFENDANT

This cause came on to be heard on Plaintiff, NCP LAKE POWER, INCORPORATED's, a Delaware corporation, as General Partner of LAKE COGEN, LTD., a Florida limited partnership ("LAKE COGEN"), Motion for Partial Summary Judgment and Defendant, FLORIDA POWER CORPORATION's ("FPC"), Motion for Partial Summary Judgment and the Court having heard argument from counsel for both parties hereto and otherwise being fully advised in these premises, the Court finds as follows:

A. The pleadings, depositions, answers to interrogatories, admissions, and the affidavits filed in support of the Plaintiff's Motion for Partial Summary Judgment show that there are no genuine issues of material fact concerning the interpretation of Section 9.1.2 of the Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying

* Defendant's proposed order was considered by the Court. DFB

Facility Between Lake Cogen Limited and Florida Power Corporation (the "Lake Cogen-FPC Agreement") which is attached to the Plaintiff's Amended Complaint filed herein.

B. Section 9.1.2 of the Agreement between the parties, read in conjunction with the entire Agreement is unambiguous as it relates to the type of unit used to model the calculation of the electric energy payments to the Plaintiff.

C. Section 9.1.2 of the Agreement, together with the other pertinent sections of the Agreement, requires the Defendant FPC to make electric energy payments to the Plaintiff with reference to modeling the operation of a real, operable 1991 Pulverized Coal Unit, having the characteristics required by law to be installed on such a unit as well as all other characteristics associated with such a unit, as selected by the Plaintiff in Section 8.2.1 of the Agreement and described in Appendix "C", Schedules 3 and 4 of the Agreement.

D. The Court has also considered the Defendant's Motion for Partial Summary Judgment and finds that the terms of the Agreement at issue are unambiguous and do not require the Court to look outside its four corners for its interpretation of Section 9.1.2 of the Agreement. However, the Court disagrees with the Defendant's conclusions regarding the interpretation of the Agreement at issue before the Court.

IT IS THEREFORE, ORDERED AND ADJUDGED that:

1. A Partial Summary Judgment is hereby entered for LAKE COGEN and against FPC on the issue of liability for FPC's failure to pay LAKE COGEN at the firm energy cost rate when the avoided unit with operational characteristics of an operable 1991 Pulverized Coal Unit contemplated by the Lake Cogen-FPC Agreement would have been operating and

at the as-available energy cost rate during those times when said avoided unit would not have been operating.

2. The Defendant's Motion for Partial Summary Judgment is denied to the extent that it is inconsistent with this Order.

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida this 23 day of January, 1996.

DON F. BRIGGS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail this 23 day of January, 1996 to:

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