ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION, Appellant, vs. JOE GARCIA, etc., et al., Appellees.	*	Case No. 94,664
FLORIDA POWER CORPORATION, Appellant, vs. JOE GARCIA, etc., et al., Appellees.	*	Case No. 94,665

ANSWER BRIEF OF MIAMI-DADE COUNTY, FLORIDA AND MONTENAY-DADE, LTD., INTERVENORS/APPELLEES

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

PRELIMINARY STATEMENT

Citations to the record on appeal are in the form Dade R. abc, where abc denotes the page number of the cited material in the record on appeal of Case No. 94,664. Citations to the record on appeal of Case No. 94,665 are in the form Lake R. abc, where abc denotes the page number of the cited material in the record on appeal of Case No. 94,665. Citations to materials with which the record on appeal has been supplemented are in the form Dade Supp. R. Att. x at def, where Att. x identifies the supplemental material cited and def identifies the page number of the cited supplementary material. All references to the Florida Statutes are to the 1997 edition, unless specifically noted otherwise.

The following abbreviations are used in this brief.

FPC - Florida Power Corporation.

Commission or **FPSC** - the Florida Public Service Commission.

Dade County - Miami-Dade County, Florida, formerly known as Metropolitan Dade County, Florida.

Montenay - Montenay-Dade, Ltd.

Lake Cogen - Lake Cogen, Ltd.

FPC-Dade Contract - that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Dade County And Florida Power Corporation dated March 15, 1991.

FPC-Lake Contract - that certain Negotiated Contract For The Purchase Of Firm Capacity And Energy From A Qualifying Facility Between Lake Cogen Ltd. And Florida Power Corporation dated March 15, 1991.

QF - a qualifying facility as defined in the rules of the Federal Energy Regulatory Commission, 18 CFR § 292.101 et seq.

Contract Approval Order - Commission Order No. 24734, issued in Commission 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, by which the FPC-Dade Contract, the FPC-Lake Contract, and certain other contracts between FPC and QFs were approved by the Commission for cost recovery purposes.

Energy Pricing Docket - Commission Docket No. 940771-EQ, In Re: Petition for Determination that Implementation of Contractual Pricing Mechanism for Energy Payments to Qualifying Facilities Complies with Rule 25-17.0832, F.A.C., by Florida Power Corporation.

FPC's First 1994 Petition - FPC's Petition for Declaratory Statement filed on July 21, 1994, in the Energy Pricing Docket, Dade Supp. R. Att. A.

FPC's Second 1994 Petition - FPC's Amended Petition, filed on October 31, 1994, in the Energy Pricing Docket, Dade Supp. R. Att. B.

FPC's 1994 Petitions - Collectively, FPC's First 1994 Petition and FPC's Second 1994 Petition.

1995 Dismissal Order - Commission Order No. PSC-95-0210-FOF-EQ, issued in the Energy Pricing Docket, by which the Commission dismissed FPC's 1994 Petitions.

Lake PAA Order - Commission Order No. PSC-97-1437-FOF-EQ, a proposed agency action order issued by the Commission in Docket No. 961477-EQ, In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation. The Lake PAA Order never became a final order of the Commission.

Lake PAA Nullity Order - Commission Order No. PSC-98-0450-FOF-EQ, titled "Order Dismissing Proceedings and Finding Order No. PSC-97-1437-FOF-EQ To Be A Nullity," also rendered in Commission Docket No. 961477-EQ. FPC did not appeal the Lake PAA Nullity Order.

FPC's 1998 Petition - FPC's Petition for Declaratory Statement filed in Commission Docket No. 980283-EQ on February 24, 1998 (relating to the FPC-Dade Contract), the denial of which gave rise to the appeal in Case No. 94,664. (In its Initial Brief, FPC erroneously referred to this pleading as its "1997 Petition" in numerous instances.) FPC filed a nearly identical Petition for Declaratory Statement in FPSC Docket No. 980509-EQ on April 10, 1998 (relating to the FPC-Lake Contract), which gave rise to the appeal in Case No. 94,665. Where appropriate, these two petitions are referred to collectively as **FPC's 1998 Petitions.**

1998 Dismissal Orders - Commission Order No. PSC-98-1620-FOF-EQ, the order appealed from in this Court's Case No. 94,664, and Commission Order No. PSC-98-1621-FOF-EQ, the order appealed from in Case No. 94,665. (FPC incorrectly identified Order No. PSC-98-1620-FOF-EQ as Order No. 980283 in its Initial Brief at page iv.)

JURISDICTION OF THE COURT

The Florida Supreme Court has jurisdiction over this appeal pursuant to article V, section 3, subsection (b)(2) of the Florida Constitution and Section 350.128(1), Florida Statutes.

STATEMENT OF THE CASE AND FACTS

The issue presented by these consolidated appeals is whether the Commission erred when it denied FPC's 1998 Petition in the proceeding below. Because this appeal arises from the latest in a long-running series of legal proceedings, both before the Commission and in the courts, and because the Commission denied FPC's 1998 Petition based on considerations of administrative finality and related doctrines, it will be helpful to review the complete factual and procedural history of this matter. Moreover, because Dade County and Montenay disagree with so many components or elements of FPC's statement of the facts, we believe it necessary to state the full factual history of the case on our own. Accordingly, Dade County and Montenay reject FPC's statement of the case and facts and substitute the following.

The following is a brief chronology of the events from the

execution of the FPC-Dade Contract and the FPC-Lake Contract through the issuance of the 1998 Dismissal Orders.

3/91	FPC executes negotiated contracts with Dade County, Lake Cogen, and other QFs, and files petition for approval with the Commission. See FPC Supp. R. Att. D.
7/1/91	FPSC issues Contract Approval Order 91 FPSC 7:60.
11/22/91	Dade County begins delivering electricity to FPC pursuant to the FPC-Dade Contract. Dade R. 108.
12/91	FPC begins making payments to Dade County pursuant to the FPC-Dade Contract. Dade R. 108.
7/18/94	FPC notifies Dade County, Montenay, Lake Cogen, and other QFs by letter that it intends to change energy payment methodology under their respective contracts. Dade R. 108-09.
7/21/94	FPC files FPC's First 1994 Petition. Dade R. 109.
10/6/94	FPSC Staff recommends that FPC's First 1994 Petition be denied as legally inappropriate. Dade R. 110.
10/7/94	Lake Cogen files suit against FPC. Lake R. 104.
10/31/94	FPC files FPC's Second 1994 Petition. Dade R. 110.
12/1/94	Dade County, Montenay, Lake Cogen, and other QFs move to dismiss FPC's 1994 Petitions. Dade R. 110.
1/5/95	FPSC holds oral argument on the QFs' motions to dismiss. 1995 Dismissal Order, 95 FPSC 2:263 at 265.
2/15/95	FPSC issues the 1995 Dismissal Order, 95 FPSC 2:263.
3/17/95	The jurisdictional time for filing a notice of appeal of the 1995 Dismissal Order expired. 1995 Dismissal Order, 95 FPSC 2:273.
2/13/96	Dade County and Montenay file suit against FPC. Dade R. 112-13.
12/12/96	Settlement agreement between FPC and Lake Cogen submitted to FPSC for approval. Lake R. 105.
1/13/97	FPC files counterclaims against both Dade County and Montenay. Dade R. 113-14, 185-206, 207-27.
11/14/97	FPSC issues Lake PAA Order, 97 FPSC 11:202.

2/24/98 FPC files FPC's 1998 Petition with respect to the FPC-Dade Contract. Dade R. 1.

3/10/98 FPSC votes to dismiss proceedings in Docket No. 961477-EQ and to hold the Lake PAA Order a nullity. See Dade Supp. R. Att. G.

3/30/98 FPSC issues the Lake PAA Nullity Order. Dade Supp. R. Att. G.

4/9/98 FPC files FPC's 1998 Petition with respect to the FPC-Lake Contract. Lake R. 1.

10/6/98 FPSC holds oral argument on Dade County's and Montenay's, and Lake Cogen's, motions to dismiss FPC's 1998 Petitions and votes to deny FPC's 1998 Petitions. Dade R. 345.

12/4/98 FPSC issues 1998 Dismissal Orders. Dade R. 506, Lake R. 445.

In 1991, FPC was faced with an immediate need for power supply resources due to FPC's having erred significantly in forecasting its power supply requirements. Contract Approval Order, 91 FPSC 7:62-64. To meet part of its needs, FPC voluntarily -- i.e., without being subject to a mandate by the FPSC or any other agency -- solicited proposals from QFs for power sales contracts that would enable FPC to obtain needed power supply resources in a timely and cost-effective manner. Contract Approval Order, 91 FPSC 7:60. As a result of this voluntary solicitation process, FPC entered into negotiated contracts[1] with eight QFs, including Dade County (one of the

[1] Under the Commission's rules, there are two types of contracts, "standard offer contracts" and "negotiated contracts." See Fla. Admin. Code § 25-17.0832. Standard offer contracts, as their name implies, have standardized terms, including standard pricing terms, and are available only to certain types of QFs. Negotiated contracts are somewhat more flexible, allowing for negotiated pricing and other terms and conditions. See In Re: Implementation of Rules 25-17.080 Through 25-17.091, F.A.C.,

appellees in Case No. 94,664) and Lake Cogen Ltd. (the appellee in Case No. 94,665). Contract Approval Order, 91 FPSC 7:61. Consistent with the FPSC's rules, FPC petitioned the FPSC for approval of these contracts for cost recovery purposes -- i.e., for the FPSC's advance "determination that payments made by a utility to a QF under the negotiated contract constitute a prudent expenditure by the utility." Implementation of Cogeneration Rules, 92 FPSC 2:24, 36-37.

As between the parties, the eight contracts were not contingent on FPSC approval for their effectiveness, but only as to certain post-execution obligations. See, e.g., FPC-Dade Contract, §§ 1.16, 4.1 and 8.1, FPC Supp. R. Att. D at 4, 10, 20. Following its review of the contracts, the FPSC issued the Contract Approval Order, holding

> that the negotiated contracts between FPC and Dade County, . . . , Lake Cogen Ltd., [and the other six QFs] 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.

Regarding Cogeneration and Small Power Production, 92 FPSC 2:24, 30 ("Implementation of Cogeneration Rules"), in which the Commission stated "[w]e will not prescribe standard provisions in negotiated contracts because negotiated contracts are just that -- negotiated contracts. Standardized provisions are not necessary in negotiated contracts and they can impair the negotiation process." This passage was also cited in the Commission's 1995 Dismissal Order, 95 FPSC 2:267-68.

It is therefore

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

91 FPSC 7:60, 69-70. The Contract Approval Order was never appealed, amended, clarified, or reconsidered; as specifically recognized within the FPC-Dade Contract, "all opportunities for requesting a hearing, requesting clarification and filing for judicial review have expired or are barred by law." FPC-Dade Contract, FPC Supp. R. Att. D at 4.

Appellee Miami-Dade County is a political subdivision of the State of Florida. It was formerly named Metropolitan Dade County and changed its name on December 2, 1997, by action of the Board of County Commissioners under Ordinance No. 97-212. Dade County owns the Dade County Resources Recovery Facility (the "Facility"), a solid waste fired QF located in Dade County, with nameplate generating capacity of 77 megawatts (MW). Appellee Montenay-Dade, Ltd. operates the Facility pursuant to a long-term operation and management contract with Dade County. FPC purchases firm capacity and energy from the Facility pursuant to the FPC-Dade Contract. The FPC-Dade Contract provides for Dade County to produce and deliver to FPC, and for FPC to purchase, specified amounts of electric capacity and energy at specified production levels, with payments based on the costs associated with a pulverized coal-fired power plant ("the avoided unit")[2]

[2] At page 1 of its Initial Brief, FPC cites to Panda-Kathleen, L.P. v. Clark, 701 So. 2d 322, 324 (Fla. 1997) with reference to the sentence preceding the footnote. The cited

that FPC would have built and operated had it not been able to purchase electricity from the Facility and the other QFs whose contracts were approved by the Contract Approval Order. The Facility is a qualifying small power production facility within the meaning of the rules of the Commission and the U.S. Federal Energy Regulatory Commission.

The FPC-Dade Contract, as between the parties, was not contingent upon the FPSC's approval. The effectiveness of the FPC-Dade Contract was, however, contingent upon its approval and ratification by the Board of County Commissioners of Dade County, Florida. FPC-Dade Contract, Section 4.1, FPC Supp. R. Att. D at 10. Consistent with and pursuant to Commission Rule 25-17.0832(2), Florida Administrative Code, the Commission approved the FPC-Dade Contract for cost recovery by the Contract Approval Order. By the same order, the Commission approved -- for cost recovery -- seven other negotiated contracts, including the FPC-Lake Contract for the purchase by FPC of firm capacity and energy from other QFs. These eight contracts, together with three others approved in separate proceedings[3], are referred to

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material does refer to "avoided cost" and the "avoided unit" concept, but the citation cannot be read to support the entirety of the sentence in FPC's brief: that is, the cited material in Panda does not refer to energy payment terms or their being geared to the operational status of an avoided unit. Panda is simply inapplicable to the case at hand on this point.

[3] 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

collectively herein as "the Negotiated Contracts."

Dade County and Montenay have performed their obligations in accord with the FPC-Dade Contract since its inception on March 15, 1991, and have been delivering firm capacity and energy to FPC pursuant to that contract since November 22, 1991. With the exception of a small part of the payment[4] made in December 1991 for energy delivered between November 22 and 30, 1991, FPC consistently calculated and paid for all energy delivered from the Facility between December 1, 1991 and August 8, 1994 at the "firm energy price" in accord with section 9.1.2(i) of the FPC-Dade Contract, plus, where applicable, the Performance Adjustment pursuant to Section 9.2 and Appendix C, Schedule 6 of the FPC-Dade Contract. FPC Supp. R. Att. D at 20.

In a letter to Dade County and Montenay dated July 18, 1994, FPC claimed to have determined that it (FPC) "would not be operating" an avoided unit with certain 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 were,

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Florida Power Corporation and Seminole Fertilizer Corporation, 91 FPSC 2:271.

[4] Approximately $21,000 out of the total December 1991 payment of approximately $191,500 was identified as being paid at the as-available energy price, which was greater than the firm price during that time period. Dade County and Montenay believe that this payment was an effort, in this brief 8-day or 9-day period at the beginning of their power deliveries to FPC, to reflect what would properly have been due to Dade County and Montenay pursuant to the Performance Adjustment provisions of the FPC-Dade Contract.

during those hours, less than the firm energy prices that FPC would otherwise be obligated to pay for energy from the Facility. FPC sent similar letters to the other QFs that provide firm power and energy to FPC pursuant to the Negotiated Contracts. Dade R. 108-09.

On July 21, 1994, FPC initiated Docket No. 940771-EQ by filing FPC's First 1994 Petition. Dade Supp. R. Att. A. In that First 1994 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.

FPC's First 1994 Petition, Dade Supp. R. Att. A at 6 (emphasis supplied).

On October 31, 1994, after the Commission Staff recommended that the Commission deny FPC's First 1994 Petition because it was legally inappropriate for a declaratory statement, see Dade R. 110, FPC filed its Second 1994 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.

FPC's Second 1994 Petition, Dade Supp. R. Att. B at 1 (emphasis supplied).

By the 1995 Dismissal Order, the Commission unanimously granted Dade County's and Montenay's motion to dismiss, as well as the motions of the other QFs, and dismissed FPC's 1994 Petitions. Further details regarding the factual background of these disputes are set forth in Dade County's and Montenay's Motion to Dismiss FPC's Amended Petition and Supporting Memorandum of Law, filed in FPSC Docket No. 940771-EQ on December 1, 1994. Dade R. 147-183.

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

> 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.
>
> * * *
>
> 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 (emphasis supplied). By the express terms of the 1995 Dismissal Order, the time to appeal that order expired on March 17, 1995. 95 FPSC 2:273. FPC did not appeal the 1995 Dismissal Order.

Following the 1995 Dismissal Order, Dade County and Montenay initially attempted to resolve their disputes with FPC through settlement negotiations. By February 1996, approximately a year later, these negotiations had failed to progress satisfactorily. Dade County and Montenay, recognizing the courts' jurisdiction

over their claims and reasonably relying on the finality of the Contract Approval Order and the 1995 Dismissal Order, filed suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, seeking both (a) declaratory relief and damages on their contract claims and (b) damages for antitrust injury inflicted by FPC. Following the resolution of some procedural issues not relevant here, the litigation between Dade County and Montenay, on the one hand, and FPC, its parent Florida Progress Corporation, and an affiliate, Electric Fuels Corporation, on the other hand, came to encompass two cases: METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, and MONTENAY POWER CORP., a Florida corporation, as General Partner of MONTENAY-DADE, LTD., a Florida limited partnership, Plaintiffs, vs. FLORIDA POWER CORPORATION, a Florida corporation, et al., Defendants, Case No. 96-594-CIV-LENARD, in which the trial court's order granting summary judgment in favor of FPC is now pending on appeal in the United States Eleventh Circuit Court of Appeals, and METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, and MONTENAY POWER CORP., a Florida corporation, as General Partner of MONTENAY-DADE, LTD., a Florida limited partnership, Plaintiffs, vs. FLORIDA POWER CORPORATION, a Florida corporation, Defendant, Case No. 96-09598-CA-30, now pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (the "State Court action").

The State Court action involves the contract disputes that FPC sought to have the Commission address in the proceedings

below. In the State Court action, Dade County and Montenay have sought declaratory relief and damages resulting from FPC's breach of the FPC-Dade Contract by means of its unilateral reinterpretation of Section 9.1.2 thereof, and for damages resulting from certain manipulations affecting coal costs, which are a major component of the energy prices due pursuant to the FPC-Dade Contract. In the same action, FPC filed a separate answer and counterclaim against both Dade County and Montenay, respectively, in which FPC specifically invoked the Circuit Court's jurisdiction and seeks declaratory relief from the Circuit Court on both the energy pricing issue and the coal cost issue. FPC also moved the Circuit Court for summary judgment on both the energy pricing issue and the coal transportation issue; its motion for summary judgment was denied. Copies of FPC's answers and counterclaims against both Dade County and Montenay are found at Dade R. 185-206, 207-27. Copies of FPC's motion for summary judgment and the Circuit Court's order denying that motion are found at Dade R. 227-52, 253-54.

In 1996, Lake Cogen and FPC negotiated a settlement of their disputes, which was presented to the Commission by a petition for approval filed December 12, 1996. In Re: Petition for Expedited Approval of Settlement Agreement with Lake Cogen, Ltd. by Florida Power Corporation, 97 FPSC 11:202, 203. On November 14, 1997, the Commission issued the Lake PAA Order, a proposed agency action order by which the Commission gave notice of its intent to deny the petition for approval of the settlement between Lake

Cogen and FPC. Lake Cogen timely protested the Lake PAA Order, and Lake Cogen subsequently moved to dismiss the proceeding on grounds of mootness. On March 30, 1998, the Commission, pursuant to a unanimous vote, issued the Lake PAA Nullity Order holding that the Lake PAA Order was a nullity and dismissing FPC's petition in the Lake-FPC Settlement Docket. Lake PAA Nullity Order, 98 FPSC 3:392, 396. Contrary to FPC's assertion at page 4 of its brief, it was not the Lake PAA Order that caused the demise of the FPC-Lake settlement agreement; rather, that agreement expired by its own terms when a condition precedent to its effectiveness, namely the affirmative approval of the Commission, was not obtained by a October 31, 1997, a date specified within that agreement. Lake PAA Nullity Order, 98 FPSC 3:392, 393.

On February 24, 1998, FPC filed yet another petition for declaratory statement relative to the FPC-Dade Contract, i.e., FPC's 1998 Petition, and on April 10, 1998, FPC filed still another similar petition for declaratory statement relative to the FPC-Lake Contract. This time around, attempting to rely on the same authorities that it cited in its First 1994 Petition and in its Second 1994 Petition, plus the legally null Lake PAA Order, FPC asked the Commission:

> FOR A DECLARATORY STATEMENT that, under Order No. PSC-97-1437-FOF-EQ entered in Dkt. 961477-EQ, Nov. 14, 1997 (the "Lake Docket"), the Public Utilities Regulatory Policy Act [sic[5]] ("PURPA"), Fla. Stat. §

[5] The correct title of PURPA is the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 et seq.

366.051, and Rule 25-17.0832, F.A.C., the Commission interprets its Order No. 24734 entered in Dkt. 910401-EQ, July 1, 1991 (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between the Company and Metropolitan Dade County (the "Negotiated Contract" or "Contract" between FPC and "Dade"), **to require that FPC**:

(A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;

(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 Dade is entitled to receive firm or as-available energy payments;

(C) Use the actual chargeout price of coal to FPC's Crystal River ("CR") plants 1 and 2, resulting from FPC'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 Dade.

FPC's 1998 Petition, Dade R. 1-2 (emphasis supplied) (footnotes omitted). It is clear on the face of its 1998 Petition that FPC was seeking declaratory relief from the Commission on exactly the same issues on which FPC based its counterclaims in the State Court action.

After briefing by all parties to the 1998 declaratory statement dockets, the Commission held a consolidated oral argument on October 6, 1998. See Dade R. 343. Following extensive (more than three hours) of argument, the Commission voted to deny FPC's 1998 Petitions, and this appeal ensued.[6]

[6] As of the submission of this Answer Brief, the parties to the underlying dispute, i.e., Dade County, Montenay, and FPC, have reached an agreement in principle to settle their disputes

STANDARD OF REVIEW

The correct standard of review for this appeal is whether the Commission's decision to deny FPC's petition for declaratory statement was clearly erroneous, an abuse of the Commission's discretion, or a departure from the essential requirements of law. Indeed, it is FPC's burden to show that the Commission's decision was defective on one of these three grounds. FPC's assertion that the appropriate standard of review for this appeal is de novo is incorrect.

Section 120.565(3), Florida Statutes, provides that a Florida administrative agency's disposition of a petition for declaratory statement is "final agency action." Section 120.68(1), Florida Statutes, provides that final agency action is reviewable by appeal. Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 155 (Fla. 1st DCA 1998). The general standard of review applicable to any appellate court reviewing a Florida state administrative agency's disposition of a petition for declaratory statement is that the "appellate court may not reverse a declaratory statement unless the agency's interpretation of the law is clearly erroneous." Id. (emphasis supplied) (citing Regal Kitchens, Inc. v. Florida Department of

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without further litigation. This agreement must still be reduced to a definitive written agreement and that, in turn, must be submitted to the Miami-Dade County Board of County Commissioners for that Board's approval and also to the FPSC for approval for cost recovery purposes. Because of the pendency of, and uncertainty associated with, those activities, Dade County and Montenay have filed their Answer Brief within the schedule established by the Court.

Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994); Grady v. Department of Professional Regulation Board of Cosmetology, 402 So. 2d 438 (Fla. 3d DCA), appeal dismissed, 411 So. 2d 382 (Fla. 1981)).

In the instant case, FPC has appealed from an order in which the Commission denied FPC's request for a declaratory statement. The Commission's order denying FPC's petition for declaratory statement is final agency action disposing of the petition. See Fla. Stat. § 120.565(3). Accordingly, the appropriate standard of review in this case is that the Court should not reverse the Commission's denial of FPC's 1998 Petition unless the Court determines that the Commission's "interpretation of the law is clearly erroneous." Chiles, 711 So. 2d at 155.

Moreover, it is well-settled that orders of the Commission come to the Florida Supreme Court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997) (citing United Tel. Co. v. Public Serv. Comm'n., 496 So. 2d 116, 118 (Fla. 1986) (quoting General Tel. Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1959)). Stated differently, this Court has consistently held that it will approve the Commission's findings and conclusions if they are based on "competent substantial evidence" and if they are not "clearly erroneous." Ameristeel, 691 So. 2d at 477 (citing Fort Pierce Utils. Auth. v. Beard, 626 So. 2d 1356, 1357 (Fla.1993); PW Ventures, Inc. v. Nichols, 553 So. 2d 281, 283 (Fla. 1988)).

FPC asserts that the Court should apply a de novo standard of review in this appeal because the issue presented, according to FPC, is "purely legal." FPC's Initial Brief at 7. In support of its position, FPC relies on Southern Bell Telephone & Telegraph Co. v. Deason, 632 So. 2d 1377 (Fla. 1994). For the reasons set forth below, FPC's assertion that the review in this appeal should be de novo is wrong and its reliance on Southern Bell is misplaced.

First, Southern Bell is easily distinguished from the instant case. Southern Bell involved review by the Court of "non-final administrative orders" of the Commission concerning discovery issues. Id. at 1379-80 (emphasis supplied). The orders on appeal in Southern Bell clearly did not represent final agency action disposing of a petition for declaratory statement. Accordingly, nothing in Southern Bell[7] alters the well-established tenet of Florida administrative law that an agency's disposition of a request for declaratory statement should not be reversed unless the agency's interpretation of law is "clearly erroneous." See Chiles, 711 So. 2d at 155.

Second, contrary to FPC's position, the Court has previously applied a standard of review other than de novo review to "purely legal" questions resolved by the Commission. For example, in Ameristeel the Court was asked to review the quintessentially legal issue of standing. The Commission issued an order

[7]Interestingly, the Southern Bell Court does not specifically address the issue of the applicable standard of review.

determining that Ameristeel lacked the legal standing to challenge a territorial agreement. Ameristeel, 691 So. 2d at 477. In upholding the Commission's order dismissing Ameristeel for lack of standing, the Court clearly articulated a standard of review other than de novo review. As stated above, the Court applied the well-settled rule that the Commission's orders are clothed with a presumption of correctness and will be approved unless they are clearly erroneous. Id. (citations omitted). The Court concluded that the Commission did not "abuse its discretion" in denying Ameristeel standing. Id. at 478. The Court should apply the same standard of review in this case.

Third, FPC has mischaracterized the issue presented in this case as "purely legal." The Commissioners' debate at the October 6, 1998 agenda conference makes it clear that the Commission's determination was infused with numerous policy considerations. For example, as Commissioner Garcia correctly observed in the agenda conference discussion,

> Why have a contract if we can interpret issues in that contract?
>
> * * *
>
> But if we hold what FPC asks us to do today, why have a contract? How could you finance a project of that sort if it was always up to interpretation of this Commission. And that is what worries me. What is the signal we are saying to people to do business in Florida?

Dade R. 403. Accordingly, based on years of this Court's precedents, the Court should defer to the Commission's expertise in reaching its policy-infused decision below. See Ameristeel, 691 So. 2d at 477 (stating that the Commission is entitled to

great deference in interpreting its own statutes and rules).

SUMMARY OF ARGUMENT

The Commission properly denied FPC's 1998 Petitions in the proceedings below, and the orders appealed from in these consolidated proceedings should accordingly be affirmed. The issue on appeal is not, as FPC asserts, whether the Commission has the jurisdiction to render the requested declaratory statements, but rather, whether the Commission erred in denying FPC's 1998 Petitions. The Commission did not err, but properly denied the statements and explained at least part of the considerations that entered into its denial in the orders appealed from.

As explained infra, the Commission properly applied the doctrines of administrative finality and res judicata in denying FPC's 1998 Petition. Additional reasons also support upholding the Commission's decision on appeal. First, FPC's 1998 Petition was not only improper forum-shopping, it was an improper attempt to interfere with the State Court action by obtaining a preemptive declaratory order, on the same issues presented in the State Court action, from the Commission. Second, as articulated by Commissioner Garcia, granting FPC's 1998 Petition would effectively render all Commission-approved QF contracts meaningless. Finally, FPC's 1998 Petition was overreaching, in that it sought relief that is beyond the Commission's authority to grant. Thus, even if the Court were to disagree with the Commission's express denial of FPC's 1998 Petitions by applying

the doctrines of administrative finality and res judicata, the Court should still find that "the chariot drove home" safely and, accordingly, the Court would uphold the Commission's 1998 Dismissal Orders.[8]

ARGUMENT

The three issues framed by FPC in its Initial Brief mischaracterize the real issues in this case. Accordingly, rather than organize this Answer Brief based on FPC's stated issues, Dade County and Montenay have reframed the issues. Dade County and Montenay will rebut FPC's arguments and issues in the appropriate sections of this Answer Brief.

I. THE COMMISSION PROPERLY INVOKED THE DOCTRINES OF ADMINISTRATIVE FINALITY AND RES JUDICATA IN DENYING FPC'S REQUESTS.

In denying FPC's petitions for declaratory statements, the Commission properly invoked the doctrines of administrative finality and res judicata. FPC is simply incorrect in its argument that principles of res judicata do not apply to prior jurisdictional determinations, as well as in its argument that the Commission had jurisdiction in the first place. Moreover,

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[8] As this Court recently reiterated, it is elementary that the reasons expressly articulated by a lower tribunal as the basis for its decision, while helpful, are not controlling on appeal; if the trial court reaches the right result, albeit for the wrong reasons, it will be upheld if there is any basis that would support the judgment in the record. Dade County School Board v. Radio Station WQBA, 24 Fla. L. Weekly 216, 218 (Fla. May 21, 1999) (quoting In re Estate of Yohn, 238 So. 2d 290, 295 (Fla. 1970)). Although Dade County and Montenay agree that the Commission's express reasoning in the 1998 Dismissal Order was correct, the "tipsy coachman" rule may also be applicable here.

the fact that FPC did not appeal the 1995 Dismissal Order in no way affects the applicability of the doctrines of res judicata, collateral estoppel, or administrative finality to this case. FPC waived any opportunity that it ever had to appeal the issue of the Commission's jurisdiction over these disputes when it elected not to appeal the 1995 Dismissal Order. Finally, FPC's arguments regarding assertedly "new authorities" are misplaced.

A. 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.

McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177, 1179 (Fla. 1996) (quoting Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966)). In addressing the implementation of its cogeneration rules with respect to negotiated contracts, like the FPC-Dade Contract and the FPC-Lake Contract, the Commission explained how the doctrine of administrative finality applies to its approval of negotiated QF power sales contracts:

> Fairness dictates that the parties to approved negotiated contracts should be entitled to rely on our decision to approve cost recovery of payments made pursuant to those contracts.

* * *

> We have already ruled that our approval of a negotiated contract constitutes a determination that payments made by a utility to a QF under the negotiated contract constitute a prudent expenditure by the utility. We now find that once our determination of prudence becomes final by operation of law, we cannot deny the utility cost recovery of payments made to the QF pursuant to the negotiated contract, absent some extraordinary circumstance, such as where our finding of prudence was induced through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information.
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> * * *
>
> We determine the prudence of payments to be made to a QF under a cogeneration contract, as of the date of our decision based upon the facts before us at that time. Once our order is no longer subject to modification even an extraordinary event such as the future discovery of some new power source could not affect our determination. A cogeneration contract is either prudent at the time of our determination or it is not. Subsequent events cannot change a determination of prudence (once final) made upon facts contemporaneously before us.
>
> * * *
>
> 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, 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. Dade County and Montenay reasonably relied on the finality of the 1991 Contract Approval Order as well as on the 1995 Dismissal Order's determination that the Commission lacked jurisdiction to interpret the FPC-Dade Contract and have

expended significant sums on litigation as a result of such reliance. As a matter of fairness[9], the Commission properly rejected FPC's invitation, via its 1998 Petitions, for the Commission to revisit the issue of jurisdiction. The Commission's orders should accordingly be upheld.

B. **Res Judicata** and Collateral Estoppel[10]

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, 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 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)).

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[9] 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 Implementation of Cogeneration Rules and the 1995 Dismissal Order. Action like that sought by FPC in this case would undermine confidence in QF contracts in Florida, and would thus discourage the development of cogeneration and small power production facilities.

[10] 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." Both doctrines apply in this case to bar FPC's attempt to relitigate the jurisdictional issues decided by the 1995 Dismissal Order.

As an initial point, FPC argues that "the PSC's jurisdiction to carry out its statutory duties cannot be thwarted by application of preclusion doctrines such as decisional finality."[11] FPC's Initial Brief at 13. In making this argument, FPC has failed to inform this Court of a long line of United States Supreme Court cases that hold otherwise. In Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n, 455 U.S. 691, 706, 102 S.Ct. 1357, 716 L. Ed. 2d 558, 571 (1982), the United States Supreme Court unequivocally stated:

> This Court has long recognized that "[t]he principles of **res judicata** apply to questions of jurisdiction as well as to other issues. . . . Any doubt about this proposition was definitively laid to rest in Durfee v. Duke . . . where this Court held that "a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

Id. at 706 (emphasis supplied) (citing American Surety Co. v. Baldwin, 287 U.S. 156, 166, 53 S.Ct. 98, 77 L.Ed. 231 (1932)); Treinies v. Sunshine Mining Co., 308 U.S. 66, 78, 84 L.Ed. 85, 60 S.Ct. 44 (1939); Davis v. Davis, 305 U.S. 32, 83 L.Ed. 26, 59 S.Ct. 3 (1938); and quoting Durfee v. Duke, 375 U.S. 106, 111, 11 L.Ed. 2d 186, 84 S.Ct. 242 (1963)). Thus, contrary to FPC's protestations, preclusion doctrines such as res judicata are

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[11] Interestingly, throughout its Initial Brief, FPC substitutes the term "decisional finality" for the terms "res judicata" and "administrative finality." However, in this Answer Brief, Dade County and Montenay will employ the terms used by the Commission in the 1998 Dismissal Order, i.e., res judicata and administrative finality. See 1998 Dismissal Order, Dade R. 521.

clearly applicable to issues of jurisdiction.

In Albrecht, this Court enumerated the following four elements of res judicata[12]: "identity of the thing sued for; identity of the cause of action; identity of the parties; [and] identity of the quality in the person for or against whom the claim is made." Albrecht, 444 So. 2d at 12 (citing Donahue v. Davis, 68 So. 2d 163, 169 (Fla. 1953)).

All four elements of res judicata are satisfied with respect to the jurisdictional issue posed in this case, and FPC's 1998 Petition was properly dismissed. Specifically, as to the first and second elements, FPC's 1998 Petition represents an attempt by FPC to litigate the same cause of action as FPC's 1994 Petitions,

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[12] The Commission recently applied the res judicata test adopted by the United States Eleventh Circuit Court of Appeals. 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 res judicata to bar a subsequent suit, four elements 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); Hart v. Yamaha-Parts Distributors, 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)). This test is functionally equivalent to the test articulated by the Court in Albrecht.

namely, whether the Commission possesses jurisdiction to grant a declaratory statement which requires interpretation of the FPC-Dade Contract and the Contract Approval Order. With respect to the third and fourth elements of res judicata, the parties are exactly the same parties who litigated the jurisdiction issue decided by the Commission in the Energy Pricing Docket: FPC filed both its First 1994 Petition initiating the Energy Pricing Docket and its subsequent Second 1994 Petition therein. By Order No. PSC-94-1405-PCO-EQ, the Commission granted Dade County and Montenay intervenor status in the Energy Pricing Docket for the purpose of moving to dismiss FPC's 1994 Petitions. Thus, the parties to the instant docket all fully litigated the jurisdictional issue in the Energy Pricing Docket. Moreover, the 1995 Dismissal Order represents a final order as that term is defined in Section 120.52(7), Florida Statutes, rendered by a tribunal of competent jurisdiction, namely the Commission.

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 Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995), the Court stated 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.[13]

In this case, the issue of the Commission's jurisdiction to grant the relief requested by FPC in its 1998 Petition is identical to the jurisdictional issue decided by the Commission in the 1995 Dismissal Order. In its 1994 Petitions, FPC asked the Commission to declare that FPC's actions "complie[d] with" the Contract Approval Order; in its 1998 Petition, FPC asked the Commission to declare that its actions are "require[d]" by the same Contract Approval Order. Moreover, FPC, Dade County and Montenay were all parties to the 1995 Dismissal Order and, as such, all had a full and fair opportunity to litigate -- and did in fact litigate -- the key threshold issue of jurisdiction. Accordingly, FPC was (and is) collaterally estopped from relitigating the issue of the Commission's jurisdiction to resolve the pending contract interpretation dispute between FPC

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[13] In Turkey Creek, the Commission also adopted the collateral estoppel standard applied by the United States 11th Circuit Court of Appeals:

> 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)). The test for collateral estoppel applied by the United States 11th Circuit Court of Appeals is functionally equivalent to the test utilized by Florida courts.

and Dade County and Montenay, under the guise of interpreting the Contract Approval Order or otherwise, and FPC's 1998 Petition was properly dismissed.

C. FPC's Arguments That Finality Doctrines Are Not Applicable In This Case Are Misplaced.

FPC argues that the doctrines of res judicata, collateral estoppel, and administrative finality do not apply in this case, purportedly because the 1995 Dismissal Order did not address the issues raised in FPC's 1998 Petition.[14] FPC's argument is pure sophistry and should be rejected. First, any attempt to differentiate "complies with" from "requires" is semantic sophistry at best. Second, in the Energy Pricing Docket, the Commission gave extensive consideration to FPC's theory that the Contract Approval Order conferred continuing jurisdiction over disputes arising under the FPC-Dade Contract. The Commission rejected that argument. 95 FPSC 2:271. Third, even if there were some technical or hypothetical difference between what FPC asked for in FPC's 1994 Petitions and what it asked for in its 1998 Petitions, the law of res judicata is clear that it conclusively puts to rest every justiciable issue as well as every actually litigated issue. Albrecht, 444 So. 2d at 12. Here, it is abundantly clear (1) that FPC did ask the Commission for a

[14] Throughout its Initial Brief, FPC refers to "FPC's 1997 Petition." The Commission proceeding below was a docket initiated on February 24, 1998 by the filing of FPC's 1998 Petition. Dade County and Montenay can only assume that FPC intends these references to its "1997 Petition" to relate to its petition filed on February 24, 1998.

declaratory statement with respect to the Contract Approval Order in its 1994 Petitions and (2) that FPC surely could have litigated the issue whether the Contract Approval Order "requires" FPC to take certain actions in performing under the FPC-Dade Contract. FPC could also have appealed the 1995 Dismissal Order, which held, inter alia, that "FPC's petition fails to set forth any claim that the Commission should resolve." 95 FPSC 2:270. FPC, however, elected not to do so. Accordingly, the doctrine of res judicata applies to bar FPC's 1998 Petition in any event.

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, and not in "too doctrinaire" a fashion in certain continuing regulatory contexts, see McCaw, 679 So. 2d at 1179 (quoting Mason, 187 So. 2d at 339), 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 case, the applicability of res judicata is clear: the essential elements of res judicata are present and FPC has posited no principled rationale for relitigating the issue of whether the Commission possesses the jurisdiction to grant the relief sought by FPC. Moreover, 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 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.

D. FPC Waived Its Opportunity To Appeal The Issue of the Commission's Jurisdiction With Respect To The FPC-Dade Contract And The Contract Approval Order When It Failed To Appeal The 1995 Dismissal Order.

FPC is before the Court arguing that the Commission has always had jurisdiction to decide the issues in dispute and to grant FPC the relief that it requested in 1994 and again in 1998. If FPC ever truly believed that the Commission had the jurisdiction and authority to grant a declaratory statement with respect to the Commission's orders, as it asked the Commission to do in its 1994 Petitions, its opportunity to seek the Court's appellate review on that issue was between February 15, 1995 and March 17, 1995, i.e., the thirty-day period provided by law for filing a notice of appeal of the Commission's 1995 Dismissal Order.

At best, even if its jurisdictional claims had merit -- which Dade County and Montenay (and Lake Cogen) vigorously disputed before the Commission both in 1994-95 and again in 1998 -- FPC has appealed the wrong order. In Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992), this Court upheld a Commission order denying a QF's petition for determination of need because the appellant QF was found to have appealed the wrong order. In Nassau, the appellant QF had appealed a

Commission order applying a policy that had been adopted by the Commission in a previous order (issued in a docket in which the appellant QF had fully participated). The Court upheld the Commission, stating

> It is clear that the PSC order actually being attacked by Nassau's present appeal is Order No. 22341. The later orders are mere restatements. It was by virtue of Order No. 22341 that the Commission first articulated the Siting Act policy and interpretation now challenged by Nassau. Under established principles of appellate review a party must appeal the order in controversy, not a subsequent order that merely reiterates established precedent. Central Truck Lines v. Boyd, 106 So. 2d 547, 548-49 (Fla. 1958); see also Great Southern Trucking Co. v. Carter, 113 So. 2d 555, 556-57 (Fla. 1959). Consequently, Nassau should have challenged the PSC's determination by appealing Order No. 23234 -- the order which affirmed Order No. 22341. Nassau cannot do so now under the guise of appealing the present orders.

Nassau, 601 So. 2d at 1178-79. The Court went on to quote from the Commission's order appealed from by Nassau, as follows:

> In the face of Order No. 22341, Nassau chose to sign its standard offer contract, and Nassau should not now be surprised that we choose to follow our own precedent.

Id. at 1179.

As in Nassau, here the Commission enunciated its pertinent jurisdictional holdings in an earlier order -- the 1995 Dismissal Order -- in which the appellant fully participated and fully litigated its positions. Like the appellant in Nassau, FPC should have appealed the Commission's earlier order, i.e., the 1995 Dismissal Order. Like the appellant in Nassau, FPC elected to proceed with its chosen course of action (litigation in the state circuit courts), and like that appellant, FPC should not

now be surprised that the Commission has chosen to follow its precedents, announced three years earlier, which precedents FPC did not appeal.[15] The Commission's 1998 Dismissal Orders must be upheld.

E. No Significant Change of Circumstances Exists In This Case To Override The Application Of **Res Judicata** and Administrative Finality.

FPC argues that the doctrine of "decisional finality" should not apply in this case, purportedly because a "significant change in circumstances" precludes the Commission from applying "decisional finality" in "too doctrinaire" a manner. FPC's Initial Brief at 9, 13. In support of this proposition, FPC relies on Gulf Coast Electric Cooperative, Inc. v. Johnson, 727 So. 2d 259 (Fla. 1999). FPC's argument is without merit. First, the facts of Gulf Coast readily distinguish it from the instant case. Second, as explained infra, the intervening decisions that FPC claims constitute a significant change in circumstances in this case (i.e., the legally null Lake PAA Order, Panda[16], and

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[15] See also Great Southern Trucking Co. v. Carter, 113 So. 2d 555 (Fla. 1959) (petition for writ of certiorari seeking review of a Commission decision dismissing petition for revocation of a trucking certificate held untimely because the order actually being challenged was earlier order granting the subject certificate); Central Truck Lines v. Boyd, 106 So. 2d 547 (Fla. 1958) (petition for writ of certiorari seeking review of a Commission decision denying a petition for reconsideration of a trucking certificate was dismissed by the Court sua sponte where the order actually attacked was the earlier order granting said certificate).

[16] Panda-Kathleen, L.P./Panda Energy Corporation v. Clark, 701 So. 2d 322 (Fla. 1997).

Crossroads II[17]) are inapplicable and in no way affect the Commission's jurisdiction in this case.

In Gulf Coast, the Court explained that it did not apply "decisional finality" because the orders that would have formed the basis for decisional finality were "statements of intent, not 'fully litigated' orders 'disposing' of the issue." Id. at 265 (citation omitted). The Court concluded that "[u]nder these circumstances, the doctrine of decisional finality does not require a contrary result." Id. The circumstances of this case are markedly different from those in Gulf Coast: critically, the Commission's 1995 Dismissal Order was a final order that was fully litigated by all the parties to the Energy Pricing Docket, including FPC, and on its face, the 1995 Dismissal Order disposed of all issues in that case. Accordingly, the Commission correctly applied the doctrines of res judicata and administrative finality in denying FPC's 1998 attempts to relitigate the issues decided by the 1995 Dismissal Order.

As noted above, the Commission expressly declared, in a final order that FPC did not appeal, that the Lake PAA Order is a

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[17] Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129 (3d Cir. 1998) (hereinafter "Crossroads II"). This decision was an appeal that grew out of disputes addressed by the New York Public Service Commission in 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), (hereinafter "Crossroads I").

legal nullity.[18] Lake PAA Nullity Order at 5. Accordingly, it is not legal authority for anything whatsoever. Notwithstanding the Lake PAA Nullity Order, FPC relied heavily on the Lake PAA Order in its 1998 Petitions and relies heavily on it in its Initial Brief. FPC's reliance on the Lake PAA Order is unfounded and potentially misleading, and the Court should ignore it because it has "absolutely no legal force or effect." (Interestingly, FPC, which claims to be so aggrieved and so unfairly treated by the Commission's denial of its settlement with Lake Cogen, never challenged the Lake PAA Order, though it had an opportunity to do so, nor did it ever appeal the Lake PAA Nullity Order.)

FPC is equally wrong in its assertions that the Crossroads II and Panda decisions change the analysis in this case. Neither case affords any ground for FPC's 1998 Petition, nor for the Commission to reverse its holdings in the 1995 Dismissal Order.

The Crossroads decisions involved a QF that had a contract, approved by the New York Public Service Commission ("NYPSC") to sell 3.3 MW of capacity and associated energy to a utility. The QF subsequently expanded its generating capacity and then

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[18] FPC euphemistically describes the Lake PAA Order as a "technical nullity." FPC's Initial Brief at 4. This is misleading. The term "nullity" means "[n]othing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." Black's Law Dictionary 1067 (6th ed. 1990). The Commission unequivocally held, in the Lake PAA Nullity Order which FPC did not appeal, that the Lake PAA Order is a nullity. Lake PAA Nullity Order at 5. FPC's attempt to describe the Lake PAA Order as a "technical" nullity does not change the fact that the Lake PAA Order has "absolutely no legal force or effect."

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 expanded 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 to involve itself in any contract dispute between the QF and the utility. Crossroads II, 159 F.3d at 131-34.

Contrary to FPC's assertions, the Crossroads II decision is inapposite to the instant contract dispute for several reasons. These decisions did not involve a contract issue or a cost recovery issue. Indeed, to the extent that the QF in that case attempted to present contract interpretation issues, the NYPSC expressly declined jurisdiction over such issues. Significantly, as noted by the Commission in the 1998 Dismissal Order, the Crossroads I decision did not involve a procedural scenario wherein the NYPSC had issued a prior order that could be considered to be res judicata with respect to the dispute therein. See 1998 Dismissal Order, Dade R. 521.

Moreover, relevant decisions of the NYPSC, including Crossroads I and other decisions cited therein, clearly hold that the NYPSC has no jurisdiction over contract disputes between QFs and utilities. The FPSC has expressly held, and its Staff have expressly recognized, that the dispute between Lake Cogen and FPC, which was the subject of the Lake PAA Order and which involves "identical" contract terms as those in dispute between

FPC and Dade County and Montenay, involves a contract interpretation dispute between Lake Cogen and FPC. Energy Pricing Docket, 95 FPSC 2:263 at 269, 270. Relative to Crossroads I, and as the FPSC has independently acknowledged, this clearly takes the instant case beyond the scope of the NYPSC's Crossroads I decision and beyond the jurisdiction or authority of state regulatory authorities. See Energy Pricing Docket, 95 FPSC 2:263 at 269-70. Even the NYPSC recognized in Crossroads I that its authority does not extend to involvement in contract disputes between QFs and utilities. Crossroads I, 1996 N.Y. PUC LEXIS 674 at *9.

The cases cited in Crossroads I also stand for the basic proposition 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.[19] Neither

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[19] 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 New York PSC'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

Crossroads decision 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. Moreover, the best argument that FPC can muster in this regard is that the Commission's rule that governs pricing under standard offer contracts, Rule 25-17.0832(5), Florida Administrative Code, also applies to negotiated contracts like the FPC-Dade Contract. However, this argument fails straight out of the box, because the Commission held expressly in the 1995 Dismissal Order, which FPC did not appeal, that the subject rule does not apply to negotiated contracts. 95 FPSC 2:269.

Panda is also both factually and legally distinguishable from the instant case. In Panda, the Commission construed rules that were incorporated as part of the power sales agreement between the QF and the utility.[20] In short, Panda stands for the proposition that the Commission has the jurisdiction to interpret

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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).

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

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 rule, incorporated as part of the contract, governs. 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 held, in a final order that FPC did not appeal, that the energy pricing rule for standard offer contracts, upon which FPC purports to rely in its 1998 Petition, does not apply to negotiated contracts. 95 FPSC 2:269.

Thus, FPC's purported "substantial change in circumstances" is a house of cards built on inapplicable and easily distinguishable cases (Panda and Crossroads II) and a nullity (the Lake PAA Order). These intervening decisions do not rise to the level of a substantial change in circumstances, and the Court should reject FPC's assertions to the contrary.

II. THE COMMISSION PROPERLY REJECTED FPC'S EFFORTS TO OBTAIN, VIA IMPROPER FORUM-SHOPPING, ADMINISTRATIVE PREEMPTION OF THE DADE COUNTY CIRCUIT COURT'S ACTIONS IN PENDING CIVIL LITIGATION WHEREIN FPC ITSELF INVOKED THE CIRCUIT COURT'S JURISDICTION.

After the Commission dismissed FPC's 1994 Petitions, **FPC itself** invoked the jurisdiction of the state circuit courts in the State Court action, see Dade R. 185, 192-93, 207, 214, and in similar litigation with Lake Cogen. See Lake R. 168-180. Two years thereafter, FPC filed its 1998 Petitions with the Commission in an improper attempt to obtain substantively identical relief to that which it sought in its 1994 Petitions **and** to that which it sought in the State Court action. This was, at best, improper forum-shopping. Not only did the Commission correctly dismiss FPC's 1998 Petitions, it would have been error for the Commission to allow FPC to induce it to render a preemptive declaratory order on the same issues pending in the subject State Court action.

A. FPC's 1998 Petition Represents Improper Forum-Shopping.

In FPC's answer and counterclaim against Dade County, and again in its answer and counterclaim against Montenay, all filed in the State Court action, FPC invoked the Circuit Court's jurisdiction over the contract disputes between FPC and Dade County and Montenay. Specifically, FPC stated to the Circuit Court that the Circuit Court "has jurisdiction over this declaratory action pursuant to Chapter 86.011, Florida Statutes" and that "[v]enue lies in the Eleventh Judicial Circuit pursuant to the local action doctrine." FPC's Counterclaim against Dade

County, ¶36-37 at page 8, Dade R. 214; FPC's Counterclaim against Montenay, ¶36-37 at pages 8-9, Dade R. 192-93. FPC also moved the Circuit Court for summary judgment on both the energy pricing dispute involving Section 9.1.2 and the coal transportation and coal cost manipulation dispute. Both motions were denied.

FPC then attempted to come back to the Commission with essentially the same claims that were dismissed more than three years earlier and that are currently pending in the Eleventh Judicial Circuit of Florida. This is improper forum-shopping. See Couch v. Department 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). The Commission properly dismissed FPC's 1998 Petitions.

B. The Commission Would Have Abused Its Authority If It Had Granted FPC's 1998 Petition.

It is well-settled that the Commission has broad discretion in determining whether to grant declaratory relief. See Travelers Insurance Co. v. Emery, 579 So. 2d 798, 800 (Fla. 1st DCA 1991); see also Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (Fla. 1930).[21] Even assuming, arguendo, that the Commission did possess the discretion to overrule its 1995 Dismissal Order and

[21] The courts have endorsed looking to the law of declaratory judgments under Section 86.011, et seq., Florida Statutes, for guidance in interpreting the declaratory statement provisions of Section 120.565, Florida Statutes, at issue in this case. See Couch, 377 So. 2d at 33.

grant FPC's 1998 Petition, the Commission clearly did not err in deciding to follow its 1995 Dismissal Order, and the Commission clearly did not err in denying FPC's 1998 Petition accordingly. Moreover, if the Commission had granted the declaratory statement requested by FPC's 1998 Petition, it would have abused its discretionary authority.

By requesting that the Commission grant a petition for declaratory statement concerning issues currently pending in the State Court action, FPC is attempting to improperly obstruct Dade County's and Montenay's pursuit of a judicial remedy of this dispute by having the Commission in essence administratively preempt the State Court action. FPC's request for a declaratory statement during the pendency of a civil action specifically addressing the issues raised in FPC's petition for declaratory statement represented a calculated attempt by FPC to induce the Commission to abuse its discretionary authority to issue declaratory statements. See Suntide Condominium Ass'n, Inc. v. Division of Florida Land Sales, 504 So. 2d 1343 (Fla. 1st DCA 1987). The Commission properly rejected FPC's invitation to interfere in the State Court action.

In Suntide, the First District Court of Appeal addressed the issue of whether a party to a pending civil action may utilize Section 120.565, Florida Statutes (the declaratory statement provision at issue in this case), to resolve issues raised in the pending civil action. The court stated:

> We do not view the declaratory statement provision as conferring upon an agency the obligation either to

> give advice as to the jurisdiction of a court to determine matters then pending before the court, or to issue opinions or decisions settling doubts or questions as to the outcome of controversies then pending in a court. We do view it as an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means of obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties.

Suntide, 504 So. 2d at 1345 (emphasis supplied); accord Kruer v. Board of Trustees of the Internal Improvement Trust Fund, 647 So. 2d 129, 134 (Fla. 1st DCA 1994).

The reasoning of the First District Court of Appeal in Suntide and Kruer is equally applicable in this case. Dade County and Montenay properly and timely invoked the circuit court's jurisdiction by filing an action to resolve what is essentially a garden-variety contract dispute. FPC, in turn, also invoked the circuit court's jurisdiction over this contract dispute by filing counterclaims against both Dade County and Montenay.[22] By requesting a declaratory statement from the Commission during the pendency of the State Court action, FPC is attempting an end run around the circuit court. This is precisely the type of administrative preemption that the First District Court of Appeal cautioned against in Suntide and that this Court should not tolerate. Accordingly, by denying FPC's 1998 Petition, the Commission appropriately chose not to take FPC's bait to commit an abuse of authority.

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[22]At no time has FPC challenged the circuit court's jurisdiction to resolve this contract dispute.

III. POLICY CONSIDERATIONS STRONGLY SUPPORT THE COMMISSION'S DECISION TO REJECT FPC'S PETITIONS FOR DECLARATORY STATEMENTS.

In the Commission's deliberations on Dade County's and Montenay's motion to dismiss FPC's 1998 Petition (and Lake Cogen's motion to dismiss FPC's similar petition relating to the FPC-Lake Contract), the Commissioners expressly considered and discussed critical policy issues surrounding their decision. Specifically, it was noted that a decision to grant FPC's 1998 Petitions would effectively render Commission approval of contracts between utilities and QFs meaningless, send inappropriate signals to the economic community, and start the Commission on an uncontrollable, unmanageable course. See Dade R. 402-13.

First, Commissioner Garcia explained that if the Commission were to grant FPC's 1998 Petitions, it would send an inappropriate and discouraging signal to entities seeking to do business in Florida, stating as follows:

> Why have a contract if we can interpret issues in that contract?
>
> * * *
>
> But if we hold what FPC asks us to do today, why have a contract? How could you finance a project of that sort if it was always up to interpretation of this Commission. And that is what worries me. What is the signal we are saying to people to do business in Florida?
>
> * * *
>
> When [FPC] changed [the payment method] it triggered litigation. They started to negotiate and they went off to court. Why? Because they had a contract. Because this wasn't some open-ended order of the

Commission that we were going to keep revisiting.

Dade R. 403-04.

Commissioner Garcia correctly recognized that granting FPC's 1998 Petitions would start the Commission down an untenable and unmanageable path, stating as follows:

> But once we start down that slippery slope, we are going to be determining key elements of contracts that we approved through this Commission.
>
> * * *
>
> But what we cannot do is continually interpret a document that we let sophisticated parties that we set parameters for, and then work back into what was in the head of Commissioner Gunter, Commissioner Easley, of the Commission's majority a few years back when I first got here, and then somebody say, "And by the way, here is what we mean." Because every one of those decisions has to do with a contract.

Dade R. 412-13.

IV. THE COMMISSION PROPERLY DENIED FPC'S PETITIONS BECAUSE THE SPECIFIC RELIEF REQUESTED THEREIN IS BEYOND THE AUTHORITY OF THE COMMISSION TO GRANT.

The Commission properly denied FPC's 1998 Petitions because the specific relief requested -- a Commission order that FPC was **required** to pay Dade County and Lake Cogen on a certain basis -- was and is beyond the authority of the Commission to grant. Neither the Commission's 1991 Contract Approval Order, by which the Commission approved the FPC-Dade Contract for cost recovery purposes, nor any subsequent clarification thereof, can be applied to require FPC to do anything under the FPC-Dade Contract (or under the FPC-Lake Contract, or any other contract with any other QF, for that matter).

Moreover, the Commission lacks the jurisdiction or the authority to require that FPC do anything under the FPC-Dade Contract. A Commission order granting FPC's request would clearly exceed the Commission's statutory authority, because it would amount to either a declaratory judgment[23], which only courts can grant, or a mandatory injunction, which, likewise, only courts can grant.

CONCLUSION

The Florida Public Service Commission properly denied FPC's 1998 Petitions with respect to both the FPC-Dade Contract and the FPC-Lake Contract. The Commission correctly applied doctrines of administrative finality and res judicata in the 1998 Dismissal Orders, and in accord with those doctrines, the Commission properly dismissed FPC's 1998 Petitions. Indeed, it would have been error for the Commission to accept FPC's improper forum-shopping request for the Commission to issue an order preempting the Circuit Court's jurisdiction over the subject matter of the dispute between the parties, which jurisdiction FPC has itself invoked. Moreover, FPC's purported "new authorities" amount to no more than a legal nullity, as confirmed by the Commission in a final order that FPC chose not to appeal, and cases that are readily distinguishable on both their facts and their legal aspects.

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[23] FPC has itself, in its answers and counterclaims against Dade County and Montenay, asked the Dade County Circuit Court for a declaratory judgment and for summary judgment on the disputed issues.

The policy considerations expressly articulated during the Commission's deliberations -- that contracts would effectively be worthless and unfinanceable, and that a decision granting FPC's petition would send the wrong signal to persons and companies considering doing business in Florida -- should also be respected, and given deference, by the Court. Finally, FPC's 1998 Petitions were legally inappropriate because they sought relief beyond the authority of the Commission to grant.

Accordingly, for the foregoing reasons, the Florida Public Service Commission's Order No. PSC-98-1620-FOF-EQ and Order No. PSC-98-1621-FOF-EQ should be affirmed.

Respectfully submitted this 7th day of June, 1999.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail on the following this 7th day of June, 1999.

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