New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-91(5)C
Corporation Tax
February 14, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C890616A

On June 16, 1989, a Petition for Advisory Opinion was received from PEC Fort Drum, Inc., c/o George M. Temple, Esq., Florida Progress Corporation, 270 First Ave. South, P.O. Box 33042, St. Petersburg, Florida 33733.

The issue raised by Petitioner, PEC Fort Drum, Inc., is whether it is subject to New York State franchise tax where it has an ownership interest in a limited partnership doing business in New York State.

Petitioner is a corporation incorporated under the laws of the State of Florida. It has its principal offices in St. Petersburg, Florida. Petitioner's immediate parent company is Progress Energy Corporation whose office address is the same as Petitioner's. Petitioner is a member of an affiliated group of companies as defined under section 1504 of the Internal Revenue Code. The common parent of the affiliated group is Florida Progress Corporation whose offices are also located in St. Petersburg, Florida. Neither Petitioner, nor any other member of the affiliated group conducts or does business in the State of New York. Neither Petitioner, nor any member of the affiliated group, maintains an office, owns or leases property, or employs capital in the State of New York.

Petitioner participates as a foreign corporate limited partner in the Black River Limited Partnership (hereinafter the "Partnership") which is a tiered partnership. The Partnership was organized December 23, 1986, under the Delaware Revised Uniform Limited Partnership Act, and operates in New York State.

Petitioner has a 10 percent limited partnership interest in the Partnership. Petitioner's 10 percent limited partnership interest was assigned to Petitioner by its immediate parent company, Progress Energy Corporation. Progress Energy Corporation purchased the 10 percent limited partnership interest on December 30, 1988, and assigned such interest to its subsidiary, Petitioner, on May 9, 1989. This 10 percent interest is calculated in the following manner:

- Petitioner owns 88.89 percent as a foreign corporate limited partner in the Westmoreland - Fort Drum Limited Partnership, a Delaware limited partnership, which is a tier of the Partnership.

- The Westmoreland - Fort Drum Limited Partnership owns 75 percent of Dominion Energy - Fort Drum Associates, a Virginia partnership. Dominion Associates - Fort Drum Partnership (also a tier of the Partnership) owns 15 percent of the Partnership. Thus, Petitioner owns a 10 percent foreign corporate limited partnership interest in the Partnership (88.89 percent X 75 percent x 15 percent equals 10 percent).

The purpose of the Partnership is to acquire, own, develop, and operate the 49.9 megawatt coal-fired cogeneration system at the United States Army facility at Fort Drum, near Watertown, New York.

The Partnership's business activity is to sell, pursuant to long-term contracts, hot water and steam to the U.S. Army facility at Fort Drum and electricity to Niagara Mohawk Power Corporation.

The Partnership is managed and the conduct of its business is controlled solely by the general partners of the Partnership. The Partnership's interests are not publicly traded and no limited partner owns a majority interest in the Partnership. Petitioner's participation as a foreign corporate limited partner is that of a passive investor, and it has no personal liability with respect to liabilities and obligations of the Partnership.

Section 209.1 of Article 9-A of the Tax Law imposes an annual franchise tax on domestic or foreign corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property in a corporate or organized capacity, or maintaining an office, in New York State. In interpreting this section, section 1-3.2(a)(6) of the Regulations sets forth a rule which holds that if a partnership is exercising any of the privileges of section 209.1, then its foreign corporate limited partner is subject to the tax imposed by Article 9-A if such foreign corporate limited partner is engaged directly or indirectly in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership.

Section 1-3.2(a)(6) of the Business Corporation Franchise Tax Regulations (hereinafter the "Regulations") states:

(6)(i) A foreign corporation is doing business, employing capital, owning or leasing property or maintaining an office in New York State if it is a limited partner of a partnership which is doing business, employing capital, owning or leasing property or maintaining an office in New York State and if it is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership. A foreign corporation is engaged in such manner in the business activities or affairs of the partnership if one or more of certain factual situations, including but not limited to the following, exist during the taxable year or, except for clause (a) of this subparagraph, any previous taxable year -

(a) The foreign corporation has a one percent or more interest as a limited partner in a partnership and/or the basis of the foreign corporation's interest in the limited partnership, determined pursuant to section 705 of the Internal Revenue Code, is more than $1,000,000. For purposes of determining whether the level of interest in the partnership or level of basis of the interest in the partnership is met, the percentage of interest in the partnership and basis of interest in the partnership of members of the foreign corporation's affiliated group, of officers or directors of the foreign corporation or of officers or directors of members of the foreign corporation's affiliated

group are added to the foreign corporation's interest in the partnership or the basis of its interest in the partnership, respectively.

(b) An officer, employee, or director of the foreign corporation or an officer, employee, or director of a member of an affiliated group which includes such foreign corporation or a member of such an affiliated group, is a general partner of the partnership.

(c) The foreign corporation or a member of an affiliated group which includes the foreign corporation is a five percent or more stockholder in a general partner of the partnership.

(d) One or more officers, employees, directors or agents of the foreign corporation, or of a member of an affiliated group which includes such foreign corporation, perform acts usually performed by a general partner.

(e) The foreign corporation becomes a limited partner after one or more officers, employees, directors or agents of such corporation, or of a member of an affiliated group which includes such foreign corporation, negotiates the terms of the partnership agreement instead of merely accepting an existing agreement.

(f) There is substantial communication between one or more officers, employees, directors or agents of the foreign corporation, or of a member of an affiliated group which includes such foreign corporation, and the general partner regarding the business activities or affairs of the partnership.

(g) The foreign corporation, a member of an affiliated group which includes such foreign corporation, or an officer, employee, or director of the foreign corporation or of a member of such an affiliated group, guarantees payment of one or more loans to the partnership.

(h) The foreign corporation, a member of an affiliated group which includes such foreign corporation, or an officer, employee, or director of the foreign corporation or of a member of such an affiliated group, makes loans to the partnership.

(i) The foreign corporation is a limited partner which for purposes of section 469 of the Internal Revenue Code is materially participating in the partnership as defined in section 1.469-5T(e)(2) of the Federal income tax regulations (26 CFR 1.469-ST(e)(2)). For purposes of this clause, references to "taxpayer" in such section 469 shall be deemed to mean any person, as defined in section 7701(a)(1) of the Internal Revenue Code.

(j) The foreign corporation entered into the limited partnership arrangement not for a valid business or economic purpose, but for the principal purpose of avoiding or evading the payment of tax.

(ii) Other factual situations, during the taxable year or any previous taxable year, to be considered as indications that a foreign corporation is engaged, directly or indirectly, in the participation in or the domination or control of all or any portion of the business activities or affairs of the partnership, include the following -

(a) The foreign corporation, or a member of an affiliated group which includes such foreign corporation, sells its products and/or services to the partnership.

(b) The foreign corporation, or a member of an affiliated group which includes such foreign corporation, purchases the partnership's products and/or services.

(c) The foreign corporation, or a member of an affiliated group which includes such foreign corporation, is engaged in a similar or identical business to that of the partnership.

(d) 50 percent or more of the foreign corporation's assets or those of a member of an affiliated group which includes such foreign corporation are a limited partnership interest in the partnership.

(e) The business carried on by the partnership is integrally related to the business of the foreign corporation or a member of an affiliated group which includes such foreign corporation.

(f) The foreign corporation exercises its voting rights as a limited partner to remove a general partner, to approve the sale of the partnership assets, to amend the partnership agreement or to dissolve the partnership.

(g) The foreign corporation, or a member of an affiliated group which includes such foreign corporation, is interrelated with the partnership through one or more of the following factors:

(1) common management;

(2) common policy and directives including policy and directives relating to legal services, assignment or transfer of executive personnel, determination and enforcement of procedures to ensure compliance with the law, salary guidelines or uniform pay scale and/or labor relations activities;

(3) common or inter-entity use of intelligent assets, such as patents, trademarks or copyrights;

(4) common or inter-entity use of product distribution systems and/or warehouse functions;

(5) common or inter-entity use of facilities, equipment, or employees;

(6) common or inter-entity personnel recruitment;

(7) common or inter-entity research and development activities;

(8) common or inter-entity marketing and/or advertising;

(9) common or inter-entity information processing and computer support, printing, telecommunications, and/or other support services;

(10) common or inter-entity transfer or pooling of technical information;

(11) common or inter-entity pension plans and/or insurance plans; or

(12) common or inter-entity credit analysis and coordination of credit extension.

(iii) As used in this paragraph, the following terms have these meanings -

(a) The term "one percent or more interest" means a distributive share of one percent or more of a limited partnership's income, gain, loss, deduction, or credit determined pursuant to section 704 of the Internal Revenue Code.

(b) The term "inter-entity" means business activities or affairs carried on between a foreign corporation which is a limited partner of a partnership, or a member of an affiliated group which includes such foreign corporation, and such partnership.

(c) The term "affiliated group" shall have the same meaning as such term is defined in section 1504 of the Internal Revenue Code, except that the term "common parent corporation" shall be deemed to mean any person, as defined in section 7701(a)(1) of the Internal Revenue Code, and except that references to nat least eighty percent" in such section 1504 shall be read as "fifty percent or more". Such section 1504 shall be read without regard to the exclusions provided for in section 1504(b).

Petitioner states that, under section 1-3.2(a)(6)(i) of the Regulations, only clause (a) is applicable to Petitioner and that the factors in clauses (b) through (j) have no relationship and are not applicable to Petitioner or any member of its affiliated group.

Clause(a) of section 1-3.2(a)(6)(i) requests information as to the percentage interest the foreign corporate limited partner has in the partnership and/or its basis in such partnership determined pursuant to section 705 of the Internal Revenue Code. Petitioner has stated that it has a 10 percent limited partnership interest in the Partnership. Petitioner also states that the basis of Petitioner's interest in the limited partnership pursuant to section 705 of the Internal Revenue Code is as follows:

•	Contribution to capital	$ 6,200,000
•	Liabilities assumed	10,395,059
	Total purchase price (basis)	$16,595,059

Petitioner also states that under section 1-3.2(a)(6)(ii) of the Regulations, only clauses (c), (d), (e) and (f) have any applicability to Petitioner and that the factual situations in clauses (a), (b), (g) and the 12 sub-parts of clause (g) are not applicable to the Petitioner or any member of its affiliated group.

Petitioner provides that section 1-3.2(a)(6)(ii) of the Regulations is applicable as follows:

Clause (c) ----- other members of Petitioner's affiliated group are engaged in a similar or identical business to that of the Partnership;

Clause (d) ----- more than 50 percent of Petitioner's assets are a limited partnership interest in the Partnership;

Clause (e) ----- may be applicable since Petitioner's only business interest is the holding of a limited partnership interest in the Partnership and could be considered integrally related to the Partnership on that basis;

Clause (f) ----- may be applicable because of Petitioner's limited voting rights.

Herein, the Partnership's purpose is to acquire, own, develop and operate a 49.9 megawatt coal-fired cogeneration system in New York State and the Partnership's business activity is to sell, pursuant to long-term contracts, hot water and steam to the U.S. Army facility at Fort Drum, New York, and electricity to Niagara Mohawk Power Corporation. As such, the Partnership is doing business in New York State.

Based on the applicability to Petitioner of the factual situations contained in section 1-3.2(a)(6)(i) and (ii) of the Regulations, Petitioner is engaged, directly or indirectly in the participation in or the domination or control of all or any portion of the business activities or affairs of the Partnership. Accordingly, Petitioner is doing business, employing capital, owning or leasing property or maintaining an office in New York State pursuant to section 209.1 of the Tax Law and is subject to tax under Article 9-A. However, section 209.4 of the Tax Law, provides that a corporation liable to tax under section 186 of Article 9 of the Tax Law is not subject to tax under Article 9-A.

Section 186 of Article 9 of the Tax Law imposes a franchise tax, on a corporation, joint stock company or association formed for or principally engaged in the business of supplying water, steam or gas, when delivered through mains or pipes, or electricity, or principally engaged in two or more

such businesses, for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in New York State.

To determine the classification and proper taxability of a corporation under either Article 9 or Article 9-A, an examination of the nature of the corporation's activities is necessary, regardless of the purposes for which the corporation was organized. See Matter of McAllister Bros., Inc. v Bates, 272 App Div 511, 517 (3d Dept 1947).

In The Partners of Buffalo Telephone Company, Adv Op, Comm T & F, February 22, 1989, TSB-A-89(3)C, Buffalo Telephone Company, a general partnership, was engaged in a telephone business in New York State and it was held that each corporate partner, as agent of the partnership, was also engaged in a telephone business in New York State. Therefore, each corporate partner that was principally engaged in such telephone business was subject to the tax under sections 183 and 184 of Article 9.

Accordingly, corporate general partners in a partnership are treated the same under both Article 9-A and section 186 of Article 9 of the Tax Law. Therefore, it is appropriate to apply the Article 9-A treatment of certain corporate limited partners contained in section 1-3.2(a)(6)(i) and (ii) of the Regulations in a consistent manner to such corporate limited partners under section 186 of Article 9 of the Tax Law.

Herein, Petitioner is engaged, directly or indirectly in the participation in or the domination or control of all or any portion of the business activities or affairs of the Partnership. Since the Partnership is in the business of supplying water, steam and electricity in New York State, each corporate partner as agent of the partnership, is also engaged in the business of supplying water, steam and electricity in New York State. Therefore, each corporate partner of the Partnership that is principally engaged in such business is subject to tax under section 186 of Article 9.

Ordinarily, a corporation is deemed to be principally engaged in the activity from which more than 50 percent of its receipts are derived. See, e.g. Joseph Bucciero Contracting Inc., Adv Op, St Tax Comm, August 27, 1981, TSB-A-81(5)C. The determination of whether Petitioner is principally engaged in the business of supplying water, steam or electricity is a question of fact not susceptible of determination in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts". Tax Law, §171, subd. twenty-fourth; 20 NYCRR 901.1(a).

Accordingly, if more than 50 percent of Petitioner's receipts are derived from the Partnership business, it will be principally engaged in the business of supplying water, steam or electricity and Petitioner will be subject to tax under section 186 of the Tax Law. If subject to tax under section 186, Petitioner will not be subject to tax under Article 9-A of the Tax Law.

DATED: February 14, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.