IN THE
SUPREME COURT OF FLORIDA

CASE NO. 68,540

FLORIDA POWER & LIGHT COMPANY,
a Florida corporation,
Plaintiff, Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a Pennsylvania corporation qualified
to do business in Florida,
Defendant, Appellee.

ON CERTIFICATION FROM
THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT FLORIDA POWER & LIGHT COMPANY

ALVIN B. DAVIS
NANCY E. SWERDLOW
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2398
Telephone: (305) 577-2835

Attorneys for Appellant
FLORIDA POWER & LIGHT COMPANY

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

ARGUMENT

I.

FLORIDA LAW PERMITS A BUYER IN A CONTRACTUAL RELATIONSHIP TO RECOVER ECONOMIC LOSSES CAUSED BY A SELLER-MANUFACTURER'S NEGLIGENT PERFORMANCE OF CONTRACTUAL DUTIES.

A. The Contract Does Not Excuse Westinghouse From Liability For The Consequences Of Its Tortious Conduct.

Westinghouse repeatedly seeks refuge in the naked assertion that the "bargain struck" in the Contract precludes FPL from pursuing any tort relief against Westinghouse. (E.g., W.B.[1/] at 7, 8). In more candid moments in this litigation, Westinghouse has conceded that the Contract does not address, and certainly does not limit, any tort remedies. (V.4 at 599; V.5 at 755). The district court has agreed. (V.5 at 755). FPL is not seeking to be excused from any contractual limitation. There is none from which it requires relief. The Contract intentionally does not address tort or negligence remedies. The questions certified to this Court contain no issue of contract interpretation. They are confined purely to an analysis of Florida tort law principles -- whether Florida tort law allows a purchaser to recover economic loss caused by a seller-manufacturer's negligent performance of contractual duties.

1/ References to the Initial Brief of Appellant, Florida Power & Light Company ("FPL"), will be cited as "FPL I.B. at _____." References to the Brief of Appellee, Westinghouse Electric Corporation ("Westinghouse"), will be cited as "W.B. at _____." Citations to the record on appeal will be designated "V._____ at _____."

The absence of any provision in the Contract limiting FPL's tort or negligence remedies is not inadvertent. No one familiar with the negotiations would expect such a limitation to appear. FPL's acknowledged concern that it not be saddled with the unknown risks of a technology with which it had no commercial history or familiarity precluded any suggestion that its rights or remedies be limited in the manner now urged by Westinghouse. The conscious absence of such a limitation is in harmony with the negotiating strategy adopted by Westinghouse, as illuminated in Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440 (E.D. Va. 1981),[2/] in order to obtain this key contract in the pivotal developmental stage of the commercial nuclear industry.[3/]

2/ Westinghouse incorrectly states that the findings in the Virginia case, Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440 (E.D. Va. 1981), have since been altered. (W.B. at 3 n.2). Neither the findings of fact nor the conclusion of law, holding Westinghouse liable for breaching its fuel contract with FPL, have been modified by any court.

3/ Westinghouse would ignore the detailed findings of the companion decision in Florida Power & Light Company v. Westinghouse Electric Corporation, 517 F.Supp. 440 (E.D. Va. 1981), (W.B. at 3 n.2). Because of the limited discovery conducted to date, the Order to which the certified questions are directed contains no factual findings. See V.7 at 1091-94. The decision in the Virginia litigation hinged on the nature of the relationship between Westinghouse and FPL at the time the Plant Equipment Contract and the contemporaneous fuel contract were negotiated and the parties' respective intentions, expectations, needs, negotiating strategies and objectives. That relationship and the historical and commercial setting out of which it arose were examined in painstaking detail by Judge Merhige. His findings and conclusions provide a useful prologue to an analysis of the issues before this Court and illuminate and underscore the deliberate absence of a contractual waiver of or limitation on FPL's tort or negligence remedies.

Having failed to obtain the contractual language necessary to limit its liability,[4] Westinghouse now contends that the mere existence of the contract itself prevents recovery in negligence. As discussed in Part I, B of FPL's Initial Brief, that theory is inimical to well-established Florida tort law and has been repeatedly rejected by this Court. FPL's contractual relationship with Westinghouse imposes no limitation on the availability of tort remedies. While FPL, of course, does not seek to be compensated twice for the same wrong, with no contractual restraints on its tort remedies, FPL is free to pursue the full panoply of negligence relief available under Florida law. See Parrish v. Clark, 107 Fla. 598, 145 So. 848, 850 (1933).[5]

B. Florida Should Not Abandon Its Time-Honored Adherence To Traditional Negligence Law Concepts.

This Court should decline Westinghouse's invitation to import into Florida's negligence law the artificial, ephemeral concepts of the economic loss rule first announced in Seely v. White Motor Company, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145

4/ In Part I, B of FPL's Initial Brief at pp. 17-18, there is reference to other contracts entered into by Westinghouse contemporaneously with the FPL Contract in which negligence was explicitly considered and negligence remedies specifically limited. This lends obvious significance to the absence of such provisions from the Contract at issue here.

5/ See also FPL I.B. at pp. 13-19, and accompanying footnotes, discussing numerous Florida cases which recognize the right to pursue tort and contract remedies simultaneously.

(1965). Westinghouse advances four arguments to justify its proposal that Florida adopt some version of the economic loss rule. The arguments are premised upon fundamental misconceptions. They ignore the logic, the rationale and the fundamentally sound results obtained under existing Florida law.

Westinghouse, in a transparent effort to venerate its position after the fact, argues first that the economic loss rule it now sponsors is based on a "long-standing doctrine." (W.B. at 8-9, 10 and cases cited in W.B. at 57). The cases cited by Westinghouse, however, hold directly to the contrary and confirm that the economic loss rule is a relatively recent judicial experiment, which clearly post-dates the Contract at issue here. Westinghouse's "long-standing" authority stands for the uncontroversial notion that no cause of action exists for negligent performance of a contractual duty unless the aggrieved party had a contractual relationship with the defendant. In each case the plaintiffs were precluded from recovering solely because they were not in privity with the defendant.[6/] That is not the case here.

6/ In fact, Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842) (cited in W.B. at 10, 44), did not even involve economic loss. The plaintiff, a mail-coach driver, sustained physical injury. The court held that he could not maintain a cause of action against the carrier because he was not party to the contract with the carrier. The court acknowledged, however, that the carrier may be sued either in contract or in tort by the party with whom the carrier contracted. See also Creedon v. Automatic Voting Machine Corporation, 243 A.D. 339, 276 N.Y.S. 609, 612 (1935)(cited in W.B. at 10, 57)(holding that there can be no liability for negligence arising out of contractual relations unless there is privity, or its equivalent, between the parties).

Indeed, the acknowledged privity between FPL and Westinghouse uncontrovertibly establishes that Westinghouse owed a duty to FPL to use reasonable care in the performance of the contract and a duty to warn FPL of known defects. See Navajo Circle, Inc. v. Development Concepts Corporation, 373 So.2d 689, 691 (Fla. 2d DCA 1979). Moreover, that contractual privity narrows and simplifies the issues presented in this case. This Court need not reach the thorny question of whether a manufacturer who distributes a product in the open market is liable in tort to the multitude of potential consumers who may suffer economic loss if the product is defective. Here, we have a much clearer duty, a much higher degree of foreseeability of economic injury and a much narrower range of potential liability, all of which fit comfortably within Florida's existing body of tort law.

The second misconception permeating Westinghouse's brief is that FPL's negligence claims should be precluded because they are based simply on FPL's disappointed, and apparently, wholly private, expectations of the level of performance of Westinghouse's steam generators. FPL agrees that Westinghouse had no duty imposed by tort law to satisfy the subjective, private economic expectations of FPL. See Monsanto Agricultural Products Co. v. Edenfield, 426 So.2d 574, 576 (Fla. 1st DCA 1982). This case, however, does not involve a remote purchaser seeking to vindicate economic expectations of which the manufacturer could not have been aware. The losses which FPL seeks to recover resulted not from failed expectations, but from the total destruction of the machine itself, under circumstances in which

the manufacturer knew to the kilowatt the purchaser's specific needs, the precise use to which the machine would be put and the manner in which it would operate. There remains a great deal of difference between proving that a product does not work as expected by the purchaser--breach of warranty--and proving that the product was negligently manufactured and that the manufacturer failed to warn of known defects--negligence. FPL has pled and must prove the latter in order to prevail on its negligence claims. See also FPL's I.B. at 17 n.10.

Thirdly, Westinghouse's extensive reliance on the admiralty law concepts articulated in East River Steamship Corp. v. Transamerica Delaval Inc., 106 S.Ct. 2295 (1986), as well as the decisions of other states which have adopted some version of the economic loss rule, is simply uninstructive here. With respect to the East River Steamship decision, this Court is clearly not bound by a decision of a federal court exercising admiralty jurisdiction, even the United States Supreme Court, with respect to issues of state law. Yale Inv. Co. v. Williams, 105 Fla. 308, 141 So. 308, 309 (1932); Stonom v. Wainwright, 235 So.2d 545, 547 (Fla. 1st DCA 1970). It is axiomatic that this Court is supreme in matters of state law, particularly in the area of common law torts, in which federal courts invariably defer to the state court rulings. Meredith v. City of Winter Haven, 134 F.2d 202, 207 n.7 (5th Cir.), rev'd on other grounds, 320 U.S. 228 (1943). Indeed, the preemptive authority of this Court on issues of state law was clearly recognized and acknowledged by the

Eleventh Circuit in certifying to this Court the two questions of Florida substantive law presented here.

Moreover, Florida is noteworthy for its steadfast commitment to and sedulous application of traditional tort law concepts as the mechanism for limiting liability in negligence. The resulting predictability and consistency of Florida tort law are vastly superior to the mercurial and frequently confusing results obtained in those jurisdictions which have resorted to some mutation of the economic loss rule to limit liability. The arbitrary constraints of the economic loss rule would be gratuitous and wholly inferior substitutes for Florida's traditional concepts of foreseeability, duty and proximate cause.[7/]

Finally, Westinghouse argues that "[p]ermitting recovery of purely economic losses in tort would expose a manufacturer to an indeterminable amount of liability, thus making it impossible to structure business dealings in a commercial setting." (W.B. at 23). That position finds no support in the facts of this case or

---

7/ Additionally, East River Steamship, as well as Seely v. White Motor Company, 63 Cal.2d 9, 45 Cal.Rptr 17, 403 P.2d 145 (1965), and most of its progeny, involved parties who were not in privity. In each case, the courts struggled to find a mechanism or rule which would limit a manufacturer's otherwise unknown and unlimited liability to the public generally. See, e.g., East River Steamship, 106 S.Ct. at 2304; Seely v. White Motor Company, 403 P.2d at 150-151. Here, there was no mystery as to the scope of Westinghouse's exposure. After decades of direct commerce with FPL and after more than a year of intense negotiations, Westinghouse knew all of FPL's needs, expectations and requirements, and knew that FPL was totally dependent on Westinghouse to produce a usable product and to warn FPL of any known defects. Because of its intimate knowledge of the utility industry and its operations, Westinghouse knew both the type and extent of damage FPL was likely to suffer if Westinghouse performed negligently.

in commercial common sense. A manufacturer clearly has the opportunity, and Westinghouse manifestly had the knowledge, to tailor responsibility for its negligence in the negotiating process. Where, as here, the buyer refuses to permit the manufacturer to bargain away its liability in negligence, a court may not reallocate those risks.

Additionally, Westinghouse's fear of boundless liability does not justify wholesale rejection of recovery in all cases. "The difficulties of adjudication [should not] frustrate the principle that there be a remedy for every substantial wrong." Dillon v. Legg, 68 Cal.2d 728, 739, 69 Cal.Rptr. 72, 79, 441 P.2d 912, 919 (1968). Application of the concepts of duty, foreseeability and proximate cause, which serve negligence doctrines well in cases where there is physical harm, can and do function equally well in cases where there is economic loss. See Peoples Express Airlines, Inc. v. Consolidated Rail Corporation, 100 N.J. 246, 495 A.2d 107 (1985).

C. Florida Courts Impose Liability For Negligent Performance Of Contractual Duties Resulting In Economic Loss.

Westinghouse agrees that in Florida tort liability extends to all consequences that normally, proximately and reasonably flow from a breach of duty. Westinghouse must also concede that this concept has been applied in numerous Florida cases that have permitted recovery of "economic loss," in those precise terms, for negligent performance of contractual duties. However, Westinghouse attempts to dismiss this substantial body

of Florida law by classifying these decisions as "service cases" and arguing that "Florida law clearly distinguished between service cases and product cases." See W.B. at 37 and FPL I.B. at 27. FPL's Initial Brief contains both an extensive discussion of the Florida "economic loss" decisions and a response to Westinghouse's unenlightened treatment of Florida law. Accordingly, FPL need only briefly reply to Part I, C and D of Westinghouse's Brief. See FPL I.B. at 20-30.

Westinghouse's effort to ignore this sizable body of Florida law founders in the language of the very cases which Westinghouse seeks to adulterate. The Florida "service cases" expressly and repeatedly recognize that the tort law principles applied in these cases to impose liability for negligence causing economic loss are derived from and are "a natural extension of" the tort law principles developed in the "product cases." See FPL I.B. at 27 and accompanying footnote.[8/]

8/ Westinghouse's analysis of this Court's decision in First American Title Insurance Company, Inc. v. First Title Service Company of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984), is particularly misleading. Citing the portion of First American which discusses elimination of the privity requirement in products liability cases but declines to abrogate privity requirements when addressing an abstractor's negligence, Westinghouse asserts that First American "makes it clear that Florida ... does not apply the same rule to professional service contract cases as to product liability cases." (W.B. at 40). This Court's requirement of privity, or knowledge of third-party reliance, in abstractor liability cases is irrelevant here, where privity exists. Moreover, First American does not purport in any way to limit liability for economic loss in negligence to professional service cases. Indeed, this Court specifically recognized that the tort duty of manufacturers to consumers is more encompassing than the duty of abstractors and other professional service providers to the public. First American, 457 So.2d at 471.

Moreover, Westinghouse is unable to supply a rational basis for distinguishing the instant case from the numerous Florida cases which have permitted recovery of purely economic losses in negligence. In each case, the defendant's negligent conduct resulted in foreseeable economic injury to a person to whom a legal duty was owed. There is no conceptual or pragmatic basis for distinguishing this case from those upon which FPL relies.

Hoping to finesse the apposite Florida decisions, Westinghouse misdirects the Court's attention to three Florida district court of appeal decisions which it claims "unequivocally" preclude the recovery sought by FPL. (W.B. at 28). See also FPL I.B. at 31-34, for a more detailed discussion of Westinghouse's Florida authority.

Westinghouse's principle authority, Monsanto Agricultural Products Co. v. Edenfield, 426 So.2d 574 (Fla. 1st DCA 1982), is not at all inconsistent with the tort principles applied in the Florida cases recognizing liability in negligence for economic loss. In Monsanto, as well as in all the cases relied upon by FPL, liability in negligence for any injury depends upon whether the defendant owed a legal duty to the plaintiff and whether the negligent performance of that duty proximately caused foreseeable injury to the plaintiff. Unlike the plaintiff in Monsanto, FPL has alleged that Westinghouse's negligent manufacture or design or failure to warn of known defects was the proximate, direct and foreseeable cause of FPL's

damage. More importantly, FPL's negligence claim is not based upon a remote purchaser's disappointed expectations about the level of performance of a product. Here, the product, specifically designed and manufactured for this consumer, was so replete with tube leaks, disintegration and other defects that within one year of operation it essentially destroyed itself.

The only Florida decision precluding recovery of economic damage in negligence is GAF Corp. v. Zack Co., 445 So.2d 350 (Fla. 3d DCA), pet. for rev. denied, 453 So.2d 45 (Fla. 1984). To the extent that GAF is in conflict and irreconcilable with the principles enunciated in the numerous decisions cited in Part I, C of FPL's Initial Brief, it does not define Florida law.[9/]

Finally, Westinghouse's reliance on Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, Inc., 444 So.2d 1068 (Fla. 3d DCA 1984), ignores major doctrinal differences between strict liability and negligence. See FPL I.B. at 34-48. Cedars determined only that strict liability in tort should be reserved for those cases where there are personal injuries or damage to other property. Whatever the limitations upon a strict liability action, those restrictions have no influence upon the outcome of this negligence action.

9/ Of note, GAF, unlike the instant case, did not involve parties in privity.

II.

FPL'S RELIANCE ON PRINCIPLES OF LAW EXISTING AT THE TIME OF THE CONTRACT MUST BE HONORED.

Westinghouse may not reduce the range of duties which it owes to FPL under tort law by relying on a doctrine not in existence when those duties were created. Indeed, such a doctrine still does not exist in Florida. Westinghouse's contention that the "rule adopted in Monsanto" should be applied retroactively, to define the parties' rights some twenty years after their relationship was structured, erroneously assumes that Monsanto enunciated a "rule" which precludes FPL from pursuing a negligence action. Monsanto did not devise or address any rule that defines liability in negligence based upon the type of damage sustained. Monsanto simply addressed the traditional Florida tort law principles of duty and causation.[10/]

Moreover, at the time the Contract was negotiated and executed in the instant case, there was no doctrine in Florida

---

10/ Even if Monsanto had created and retroactively applied a rule precluding recovery of economic damages, it would have been applied in that case to a transaction that occurred more than a decade after the economic loss rule had been adopted in other jurisdictions. Monsanto, therefore, did not involve the application of a new principle which was unforeshadowed at the time the transaction was entered. Additionally, Monsanto involved an action by an ultimate consumer against a manufacturer, with whom there was no privity of contract or other direct relation at the time of the purchase. Accordingly, Monsanto would not have implicated the retroactivity question since it did not involve reliance by persons on a prior rule in structuring their contractual or other business relations. See FPL I.B. at 51-52, 55-57.

or in any other jurisdiction precluding FPL from recovering economic loss under a negligence theory. Essentially every decision and commentary on the economic loss doctrine traces the origin of that doctrine to Seely v. White Motor Co., 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965).11/ In the East River Steamship decision, from which Westinghouse derives such great comfort, the Supreme Court describes Seely as the case that "created" the doctrine. 106 S.Ct. at 2301. Westinghouse's remarkable--and solitary--attempt to trace the doctrine "back to at least 1842" taints its whole argument on this point with a fatal implausibility, that is heightened by the authority upon which it relies. (See W.B. at 43. See also W.B. at 44-46, 57-58). As discussed supra at 4, that authority simply holds

---

11/ As detailed in FPL's Initial Brief, it was not until 1965 that a rule was first announced, in California, which precluded recovery based upon the type, or manner, of damages sustained. That same year New Jersey adopted the antithesis to California's economic loss rule. See Seely v. White Motor Company, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) and Santor v. A and M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). Both of those cases, however, involved strict liability actions. Subsequently, after the FPL-Westinghouse contract was negotiated and executed, several jurisdictions, outside of Florida, adopted various versions of the "economic loss rule," with some states eventually extending its application to cases involving negligence and negligent performance of contractual duties. To the extent it can be said that some version of the economic loss rule found voice in Florida, that occurred 17 years after the FPL-Westinghouse Contract was executed. At the time of the Contract, there was no limitation in Florida on FPL's right to recover in a negligence action any and all foreseeable damages in the event of Westinghouse's negligent performance.

that a defendant's liability in negligence for economic loss is restricted by the contractual requirement of privity. The focus in each case is on the relationship between the parties, not the type of damages sustained. Westinghouse's authority precludes recovery in negligence absent a contractual relation. Seely was not presaged in those decisions.

Westinghouse is also mistaken in its analysis and application of Florida principles of retroactivity. Its effort to dismiss offhandedly all analyses of the retroactivity question by federal courts since "this case ... involves a question of purely Florida law" (W.B. at 47) is, at best, disingenuous. Westinghouse dogmatically attempts to contrive a singular, definitive Florida-based formula which automatically dictates the prospective or retrospective effect to be given a decision establishing a new principle of law. (W.B. at 53-55). As discussed in FPL's Initial Brief at 50-58, contemporary courts have developed a more sophisticated approach to the retroactivity versus prospectivity problem. As opposed to the rigid, formalistic concepts urged by Westinghouse, the judiciary (federal, Florida and other states) have developed a flexible, pragmatic approach to the question. While a variety of factors are weighed in analyzing the prospective-retrospective issue, the universal focus of both Florida and federal courts is on analyzing and protecting the reliance interests of the

parties.[12/] In those cases where the parties relied on the prior law in structuring their contractual and other business relationships, courts will protect the parties from retroactive application of a new rule. Regardless of whether the parties are in a federal or Florida or other state court, where, as here, they have relied on existing judicial doctrines in dealing with one another, fairness and judicial respect for commercial realities compel nonretroactive application of new judicial doctrines.[13/]

Likewise, there is nothing instructive in the numerous Florida decisions cited by Westinghouse which have applied new concepts of tort law retroactively. (W.B. at 52-53). Those cases, free of the compelling facts which pertain here, merely

---

12/ See, e.g., Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973) (holding taxing statute to be unconstitutional, but applying ruling prospectively only in view of "good faith reliance" by school board on presumptively valid statute); Florida Forest and Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944) (applying new judicial construction of Workmen's Compensation Act prospectively only where claimant acted "in reliance" upon a prevailing decision construing the statute); International Studio Apartment Association, Inc. v. Lockwood, 421 So.2d 1119 (Fla. 4th DCA 1982), pet. for rev. denied, 430 So.2d 451 (Fla. 1983), cert. denied, 464 U.S. 895 (1983) (declaring unconstitutional state statute which permitted clerk to retain interest on money deposited in court's registry, but applying ruling prospectively only in view of "good faith reliance" of clerk's office on validity of statute). See also FPL I.B. at 55-58 and Annot., 10 A.L.R.3d 1371, 1379 (1966).

13/ Westinghouse also errs in its contention that the retroactivity question is implicated only in cases where a person has acquired vested property or contract rights. (W.B. at 53-55). The vested rights concept is simply one of several measures or constituents of the broader reliance element. See also supra n. 12 and authorities cited therein.

apply the general rule that, absent exceptional circumstances, new principles of law have retroactive as well as prospective effect. In those cases there was no risk that application of the new law would disturb complex contractual relationships or modes of dealing which had been premised on the former law. The parties involved in a train or car accident certainly cannot be said to have structured their dealings with each other based upon reliance on former contributory negligence or loss of consortium principles. The equitable doctrine of nonretroactive application of new, judicially created law is only implicated where persons may have contracted, acquired rights, or acted in reliance on the prior decision.

To buttress its very fragile argument on the retroactivity issue, Westinghouse borrows indiscriminately the concept of Florida law which permits certain limited changes by the legislature in contractual remedies or in the enforcement of contracts. (W.B. at 47-49). That doctrinal misappropriation overlooks three dispositive factors. First, FPL is not seeking to enforce a contract remedy here. It is seeking to enforce a separate, substantive right under tort law, which is wholly independent of the Contract. Second, the "change" at issue is not the product of a reasoned legislative process, but a travel-worn, judicially-created doctrine which has yet to come to rest, particularly in Florida. Finally, even if these first two impediments did not exist, the cases upon which Westinghouse relies clearly require that if existing remedies are modified,

there must be specific provision for some other, equally efficacious, substantive remedy by which the party affected can enforce his rights. For example, in Ruhl v. Perry, 390 So.2d 353 (Fla. 1980), because a statutory limitation period was altered, the legislature provided a mechanism for the timely commencement of actions which would otherwise have been barred by the strict application of the new statute.

Mischaracterizing FPL's independent tort action as a "mere remedy" under the Contract, Westinghouse cynically suggests that this "remedy" can be eliminated by the Court because, after all, "FPL is still entitled to seek the recovery of economic loss on the contract as executed." (W.B. at 49). There is, as Westinghouse knows, no provision for this type of "economic loss" in the Contract "as executed," because when it was negotiated there was not the slightest hint that such a loss was not recoverable in tort. There was no need to include it in the Contract.

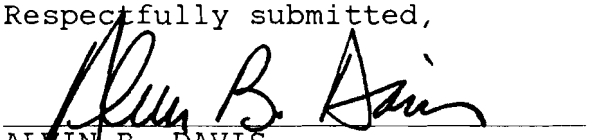
The balance struck between Westinghouse and FPL when this Contract was executed included the rights and obligations created in the Contract itself as well as the rights and obligations created by the body of law which co-existed with and was outside of the law of contracts. Westinghouse argues that this balance is unimpaired by the removal of one of the fundamental rights relied upon by the parties but existing outside of the Contract. It is neither a sensible nor a fair position. It makes far more sense for parties to be bound by the terms of a Contract and by the body of law out of which that Contract was created at the time the Contract was drafted. There is no law to the contrary.

Westinghouse has presented none. Effective long-term contractual relationships cannot be created on the foundation recommended by Westinghouse. It is not commercially or legally sound.

CONCLUSION

FPL respectfully requests that this Court answer the first certified question in the affirmative or, alternatively, answer the second certified question in the negative.

Respectfully submitted,



ALVIN B. DAVIS
NANCY E. SWERDLOW

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2398
(305) 577-2835

Attorneys for Appellant
FLORIDA POWER & LIGHT COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was furnished by mail this 24th day of September, 1986 to:

R. BENJAMINE REID, ESQ.
PAUL L. NETTLETON, ESQ.
KIMBRELL & HAMANN, P.A.
Suite 900 Brickell Centre
799 Brickell Plaza
Miami, Florida 33131

Nancy E. Swerdlow
NANCY E. SWERDLOW