IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER & LIGHT COMPANY, APPELLANT, v. KATIE NICHOLS, ET AL., APPELLEES,	)	CASE NO. 70,086

ANSWER BRIEF OF APPELLEES
INDUSTRIAL COGENERATORS

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PREFACE

The Appellant, Florida Power and Light Company, is referred to hereinafter as "Florida Power & Light." Appellee, Florida Public Service Commission is referred to hereinafter as "the Commission." Appellees, International Minerals & Chemical Corporation, The Monsanto Company, United States Sugar Corporation and W.R. Grace & Co. are referred to hereinafter collectively as "Industrial Cogenerators."

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case and of the Facts presented by Florida Power and Light Company (Florida Power & Light) omits facts which are material to this appeal, while presenting irrelevant facts. Accordingly, Appellees, Industrial Cogenerators, present the Court with the following Statement of the Case and of the Facts.

The History of Rule 25-17.088

This case is best understood in light of the history behind Commission Rule 25-17.088, which is the subject of Florida Power & Light's appeal to this Court. Commission Rule 25-17.088 is part of the Florida Public Service Commission's (Commission) cogeneration rules and is contained in Part III of Chapter 25-17, Florida Administrative Code. The Commissions' cogeneration rules, among other things, establish guidelines relating to the purchase of the energy and capacity of cogenerators and small power producers (Qualifying Facilities or QFs).[1]

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[1]The terms Qualifying Facility or QF refer to certain electrical generating facilities defined under Federal Law. They are cogeneration facilities and small power producers which meet specific efficiency standards or fuel use criteria. A cogeneration facility is one which produces (a) electric energy and (b) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes. 16 U.S.C. Sec. 796(18)(A). The term usually refers to the use of heat that would otherwise be wasted after electricity is generated ("topping cycle") or systems that generate electricity from heat left over from an industrial process ("bottoming cycle"). Small power producers are defined as facilities which produce electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources or any combination thereof. 16 U.S.C. Sec. 796(17)(A).

Rule 25-17.088 has its origin in the Commission's 1983 revision of its cogeneration rules, when the Commission implemented a mechanism (under Rule 25-17.83) to establish statewide rates for firm QF energy and capacity. Relying on utility generation expansion plans, Rule 25-17.83 would identify proposed utility generation facilities to be avoided by the generating capacity of QFs (the "statewide avoided unit"). The prices for QF energy and capacity were to be based on that statewide avoided unit.

Along with the adoption of a statewide approach to pricing QF energy and capacity, the Commission adopted Rule 25-17.835, the predecessor to Rule 25-17.088, in order to implement the statewide pricing scheme adopted in Rule 25-17.83. The Commission's statewide pricing scheme required that QF energy and capacity be funneled from QFs scattered across the State to the utility planning to build the statewide avoided unit, thereby maximizing the likelihood that the utility could rely on the QF capacity instead of building the planned generation facility. Since these geographically dispersed QFs would not all be directly connected to the utility planning the statewide avoided unit, the Commission sought to make QF energy and capacity available to that utility by adopting a requirement in Rule 25-17.835 that utilities transmit (wheel) energy produced by QFs to the utility.

Florida Power & Light, who was a party to the 1983 revision of the Commission's Cogeneration rules, did not seek appellate review of the Commission's action.[2]

Subsequent to the 1983 revision of its cogeneration rules, the Commission issued an order setting statewide rates for wheeling QF energy and capacity pursuant to Rule 25-17.835. In re: Proceeding to implement cogeneration rules, Florida Public Service Commission Docket No. 830377-EU, Order No. 13247 (1984). In response to challenges by Florida utilities (including Florida Power & Light), the Commission requested a ruling from the Federal Energy Regulatory Commission (FERC) as to whether its action was preempted by Federal authority. In an Order issued October 31, 1984, FERC held that it had exclusive jurisdiction over the rates for transmission service in interstate commerce. Florida Power and Light Company and Florida Public Service Commission, 29 FERC 61,140 (1984).

Responsive to the FERC ruling, the Commission issued an order establishing a statewide rate for wheeling service in intrastate commerce. In re: Proceeding to implement cogeneration rules, Florida Public Service Commission Docket No. 830377-EU, Order No. 14339 (1985). The Commission also ordered all Florida utilities to file amendments to their cogeneration tariffs establishing the

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[2]In fact, Florida Power & Light defended the validity of the Commission's actions in a direct appeal to this Court taken by Metropolitan Dade County. See Metropolitan Dade County v. Florida Public Service Commission, Florida Supreme Court Case No. 64,330 (Appeal voluntarily dismissed).

availability of intrastate wheeling service for QF energy. Though a party to that proceeding, Florida Power & Light did not seek appellate review of the Commission's action.

In 1985, the Commission repealed Rule 25-17.835 and adopted, in its place, Rule 25-17.88 (now 25-17.088). The Rule recites the Commission's findings, articulated in its 1983 rulemaking proceeding, that wheeling is necessary to accomplish its objective of making QF capacity available statewide:

> The policy of this Commission as set forth in Rules 25-17.080 through 25-17.087, inclusive, is to encourage the development of cogeneration and small power production to the extent that it is cost effective to electric utility ratepayers of the State of Florida. The Commission has determined that this may be accomplished through the establishment of a statewide wholesale market for the sale of energy and capacity produced by Qualifying Facilities to the electric utilities of the State as an alternative to the construction of additional central station generating units in Florida. To enable a statewide market to function in an efficient and cost effective manner, transmission service must be available so that the energy and capacity may be supplied by a Qualifying Facility to that region of the State where it is needed. (emphasis supplied)

Just like Rule 25-17.835, subsection (1) of Rule 25-17.88 required electric utilities to wheel QF energy to other utilities:

> Each electric utility in Florida shall provide, upon request, transmission service to wheel as-available energy or firm energy and capacity produced by a Qualifying Facility from the Qualifying facility to another electric utility.

Consistent with Order No. 14339, subsection (2) of Rule 25-17.88 recognized FERC's authority over interstate wheeling:

> The charges, terms and other conditions of service for transmission service as described in subsection (1) that is provided by an investor-owned utility and that occurs in interstate commerce shall be those approved by the Federal Energy Regulatory Commission. (emphasis supplied)

Also, consistent with Order No. 14339, subsection (3) of the Rule reiterated the Commission's authority to approve the rates, terms and conditions of intrastate wheeling service:

> The charges, terms and other conditions of service for transmission service as described in subsection (1) that is provided by an investor-owned utility and that occurs in intrastate commerce shall be those approved by the Florida Public Service Commission.

Furthermore, consistent with Order No. 14339, subsection (5) of Rule 25-17.88 required utilities to file tariffs reflecting the rates, terms and conditions of wheeling service:

> Each electric utility in Florida shall file a tariff containing, at a minimum, an estimate of the availability of and charges, terms, and other conditions for transmission service as described in subsections (2), (3) and (4) with the Florida Public Service Commission within 90 days of the effective date of this rule.

As before, though Florida Power & Light was a party to the 1985 rule proceeding, it did not seek appellate review of the Commission's actions.

The Rulemaking Proceeding Below

The rulemaking proceeding that is the subject of this appeal was initiated by a Petition to Amend Rule 25-17.88 filed by Florida Power & Light on May 14, 1986. In its Petition, Florida

Power & Light requested that the Commission delete subsection (3) of the Rule, which declared that the Commission would approve the rates, terms and conditions of intrastate wheeling service, and the language in subsection (5) that required the filing of tariffs for intrastate wheeling service. Florida Power & Light did not, however, propose the deletion of subsection (1) of the Rule that required utilities to wheel QF energy and capacity.

In its Petition, Florida Power & Light advanced two reasons for the Amendments it requested: first, that wheeling service by Florida Power & Light was subject to the exclusive jurisdiction of FERC and, second, that filing a wheeling tariff would make Florida Power & Light a common carrier, which was not intended by the Commission. No other reason for the amendment was offered by Florida Power & Light. It did not challenge the Commission's statutory authority to require wheeling under subsection (1) or its statutory authority to set the rates, terms or conditions of wheeling service under subsection (3), or its statutory authority to require the filing of tariffs under subsection (5).

In response to Florida Power & Light's Petition, the Commission issued Order No. 16716, granting the Petition on the grounds that the language in subsections (3) and (5) that Florida Power & Light proposed to delete served no useful purpose due to FERC preemption of Commission authority over charges for interstate wheeling. In re: Petition of Florida Power and Light Company to Amend Fla. Admin. Code Rule 25-17.88, Florida Public Service Commission Docket No. 860599-EI, Order No. 16716 (1986).

The Commission published a Notice of Rulemaking in the Florida Administrative Weekly on October 24, 1986, proposing to amend Rule 25-17.88 as Florida Power & Light had proposed.

In response to the Notice of Rulemaking, and pursuant to the provisions of Section 120.54(3), Florida Statutes, Industrial Cogenerators filed written comments in opposition to the proposed amendment. The comments suggested that the proposed amendment conceded too much authority to FERC and correctly pointed out that while FERC preempted the rates or charges for wheeling service, it lacked statutory authority to require or regulate the availability of such service. In addition, the comments noted that since FERC lacked authority in this area, Commission authority to approve the terms and conditions of wheeling service that effected availability was not preempted. Industrial Cogenerators proposed that the rule be amended only to recognize FERC preemption of wheeling rates pursuant to FERC's 1984 decision, and that the Commission retain its authority over the terms and conditions of wheeling service in Florida, whether intrastate or interstate.

Having considered these comments, the Commission agreed that its proposed rule amendment would concede too much authority to FERC. The reference to FERC jurisdiction in subsection (2) of the Rule was therefore deleted as unnecessary, since FERC jurisdiction is already defined by Federal law. The reference to Commission authority over wheeling rates was similarly deleted in recognition of FERC preemption. The Commission, however, retained the existing language asserting jurisdiction over the terms and

conditions of wheeling service for QF energy and capacity.

Florida Power & Light is now currently pursuing its Federal preemption argument before FERC and has appealed the Commission's action to this Court, challenging for the first time, in spite of numerous prior opportunities, the Commission's statutory authority to approve any of the terms or conditions under which electric utilities wheel QF energy and capacity in Florida.

SUMMARY OF ARGUMENT

The requirement to wheel QF energy and capacity to a purchasing utility, and the supervision of the terms and conditions of such wheeling service are reasonably related to the purpose of the enabling legislation of Rule 25-17.088. Further, the Commission is clearly empowered by the enabling legislation to exercise the authority asserted in the Rule.

Florida Power & Light's Assertions

Florida Power & Light should not be heard to challenge the Commission's authority to require utilities to wheel QF energy or capacity. It conceded the Commission's authority to require wheeling below. When it filed its petition to amend Rule 25-17.088, it did not seek to have the Commission delete the language in Rule 25-17.088(1) that required wheeling and it did not question the Commission's authority to require wheeling. By raising this argument for the first time on appeal, Florida Power & Light is complaining of a denial of relief that it never requested below.

Florida Power & Light's Burden

Florida Power & Light has failed to meet the burden imposed on it as Appellant. It has argued its case as if de novo and has failed to address the standard of review applicable in this case. Florida Power & Light must demonstrate that the challenged provisions of Rule 25-17.088 are not reasonably related to the

purposes of the rule's enabling legislation. This it has completely failed to do.

The Purpose of the Rule Provisions

Rule 25-17.088(1) requires utilities to wheel QF energy and capacity because the Commission has determined that it is necessary to achieve an efficient statewide market for such energy and capacity as an alternative to constructing expensive utility generation facilities and the consumption of foreign oil as fuel for generation. Rule 25-17.088(3) provides for Commission supervision of the terms and conditions of such wheeling service in order to implement the requirement to wheel. These requirements are reasonably related to the purposes of Sections 366.04(3), 366.05(1), 366.05(9) and 366.055(3), Florida Statutes, and, in addition, are clearly authorized by those Sections.

Section 366.04(3), Florida Statutes

One of the purposes of Section 366.04(3)is to "assure . . . the avoidance of further uneconomic duplication of generation . . . facilities." Rule 25-17.088 is reasonably related to this purpose because it promotes QF energy and capacity as an alternative to the construction of expensive utility generation facilities. The Commission has determined that the statewide availability of QF capacity and energy creates the greatest likelihood of avoiding the expense of that construction and that wheeling is necessary to ensure that statewide availability.

Section 366.05(1), Florida Statutes

Section 366.05(1) provides the Commission with comprehensive power to regulate the service rules and regulations of public utilities and to adopt rules necessary and appropriate for the administration and enforcement of Chapter 366. Rule 25-17.088(3) is reasonably related to the purpose of this Section in that it regulates the service rules and regulations (terms and conditions) of wheeling service provided by a public utility. Further, Section 366.05(1) expressly authorizes the Commission to regulate wheeling service is this manner because "transmission" service is recognized by Section 366.05(2) as a service subject to Section 366.05(1).

Section 366.05(9), Florida Statutes

Section 366.05(9) grants the Commission broad authority to set guidelines for the purchase of QF energy and capacity by public utilities. The challenged provisions of Rule 25-17.088 are reasonably related to the purpose of this Section because the Commission has determined that mandatory wheeling is necessary to ensure that QF energy and capacity are available where most needed. This Section expressly authorizes the challenged provisions of the rule because the wheeling of QF energy and capacity is "related to" the purchase of that energy and capacity and, in fact, is essential to that purchase in some cases.

Section 366.055(3), Florida Statutes

The purpose of Section 366.055(3) is to "assure efficient and reliable operation of the state energy grid." The challenged provisions of Rule 25-17.088 are reasonably related to this purpose in that they are intended to maximize the availability of cost-effective QF energy and capacity across the state energy grid. Further, the mandate to wheel QF energy and capacity in subsection (1) of the rule is directly authorized by this Section, which empowers the Commission to require an electric utility to transmit (wheel) energy over its transmission lines from one utility to another, regardless of the source, or as part of the total energy supply of the grid. QF energy and capacity is part of the total energy supply of the grid and plainly falls within the meaning of this Section. This Section authorizes the Commission, by implication, to regulate the terms and conditions of wheeling service as necessary to effectuate the authority to require wheeling.

ARGUMENT

THE PROVISIONS OF RULE 25-17.088 ARE REASONABLY RELATED TO THE PURPOSES OF THE ENABLING LEGISLATION

The requirement of Rule 25-17.088(1) that electric utilities wheel QF energy and capacity to a purchasing utility, and the supervision, under subsection (3) of the Rule, of the terms and conditions of such wheeling service are reasonably related to the purposes of the enabling legislation. Further, the Commission is clearly empowered by those statutory provisions to exercise the authority asserted in the Rule.

Florida Power & Light's Assertions

Florida Power & Light asserts that the Commission lacks authority to approve the terms and conditions under which a public utility wheels QF energy and capacity to another utility. In so doing, it makes two arguments: first, that the Commission lacks authority to require such wheeling, and second, that the Commission lacks authority to approve the terms and conditions of such wheeling service. While this brief demonstrates the fallacy of both arguments, Florida Power & Light should not be heard to raise the first argument at all. Its actions below effectively conceded Commission authority to require the wheeling of QF energy and capacity, contrary to its argument on appeal. The proceeding below was initiated at the behest of Florida Power & Light, requesting that the Commission amend the Rule to delete subsection (3), which governed the rates, terms and conditions of intrastate

wheeling service. Subsection (3) of the Rule does not require the wheeling of QF energy or capacity, subsection (1) does. Florida Power & Light never requested the Commission to delete subsection (1) and it never questioned the Commission's authority to require wheeling. By now questioning the Commission's authority to require wheeling, Florida Power & Light is improperly challenging the denial of relief that it never requested below. See Wood v. Wilson, 84 So.2d 32 (Fla. 1955); Coral Gables v. Levison, 220 So.2d 430 (Fla. 3rd DCA 1969); Williams v. State, 239 So.2d 648 (Fla. 3rd DCA 1970).

Florida Power & Light's Burden

Florida Power & Light has raised two arguments on appeal and, notwithstanding the fact that only one of these should be heard, each will be answered in this brief. However, as a preliminary matter, it is appropriate to emphasize the proper standard of review to be applied in this case.

This Court is an appellate court and, with rare exception, does not consider original actions. Art. V, Sec. 3, Fla. Const. Instead, it reviews actions of lower tribunals, applying accepted standards of appellate review. In its argument, however, Florida Power & Light presents its case as if de novo, never recognizing that the actions of the Commission come to this Court to be judged by established appellate standards.

Actions of the Commission come to this Court clothed with a presumption of validity and the appellant bears the burden to

demonstrate a departure from the essential elements of law. City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981). In this case, Florida Power & Light contends that portions of Rule 25-17.088 exceed the Commission's statutory authority. This Court has stated the standard of review in such a case:

> Where the empowering provision of a statute states simply that an agency may "make such rules and regulations as may be necessary to carry out the provisions of this Act," the validity of the regulations promulgated there under will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious.
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> General Telephone Company of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984).

Accordingly, as appellant, Florida Power & Light must demonstrate that the challenged provisions of Rule 25-17.088 are not reasonably related to the purposes of the enabling legislation. Florida Power & Light has not met its burden. It has not addressed the standard of review announced by this Court. Instead, it has only offered to this Court its own interpretation of three provisions of Chapter 366, Florida Statutes.[3]

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[3]If this Court were reviewing a Commission order instead of a rule, it would apply the long-standing standard of review that the Commission's construction of the statutes it administers will not be overturned unless it is shown to be clearly erroneous. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). Florida Power & Light has not met that burden either.

The Purpose of the Rule Provisions

The basic purpose of Rule 25-17.088 is to promote the statewide availability of cost-effective QF energy and capacity. Electric utilities in Florida are faced with the challenge of planning for and constructing generation facilities to serve a growing public need. To the extent that QF energy and capacity are available, they serve to offset the need for and cost of constructing new utility generating plants, thereby reducing the financial burdens on the utilities and, in turn, the ratepayers of Florida. Florida is also faced with a growing threat of dependence on foreign oil as a fuel for generation. QF energy serves to offset the need to burn foreign oil.

Wheeling of QF energy and capacity is necessary to make such electric power available on a statewide basis since each QF may not be located in the service area of the electric utility with the most urgent need for generating capacity. In such a case, the energy must be wheeled from the QF to the purchasing utility. For instance, the purchasing utility may be immediately adjacent to the utility in whose service area the QF is located (the "native utility"). In that case, the native utility must wheel the QF's energy and capacity from the QF to the purchasing utility. Alternatively, there may be an intervening utility between the native utility and the purchasing utility. In that case, the intervening utility must also then wheel the energy and capacity from the native utility to the purchasing utility.

Subsection (1) of the rule requires electric utilities to wheel QF energy and capacity to a purchasing electric utility. Subsection (3) of the rule provides for Commission approval of the terms and conditions of that wheeling service. The two provisions go hand-in-hand. A utility can thwart the requirement to wheel QF energy and capacity by imposing onerous terms and conditions on the service so that wheeling service is then available in name only. Commission supervision of the terms and conditions of wheeling service under subsection (3) of the rule is essential to police the terms and conditions that effect the availability of wheeling in order to implement the mandate to wheel under subsection (1) of the rule.

Applying the test announced by this Court in General Telephone, supra, the challenged provisions of Rule 25-17.088 are reasonably related to the purposes of the enabling legislation. In fact, they are expressly authorized by that legislation. Four separate statutory provisions each support the challenged provisions of Rule 25-17.088. Specifically, they are Sections 366.04(3), 366.05(1), 366.05(9) and 366.055(3), Florida Statutes.[4] Each provision will be discussed in turn.

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[4]These provisions, in addition to Section 350.127(2), Florida Statutes, are recited by the Commission as authority for the rule. Florida Power & Light's assertion that the Commission may rely only on these statutes is improper because it never raised the issue during rulemaking and the Commission never had the opportunity to expand the citations in the rule where appropriate. If the Court chooses to limit review to the statutes cited, it should render its decision within equally narrow limits.

Section 366.04(3), Florida Statutes

Section 366.04(3), Florida Statutes, provides the Commission with comprehensive jurisdiction over the electric grid throughout Florida:

> to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission and distribution facilities.

The principal purpose of Section 366.04(3) to which the rule relates is the avoidance of further uneconomic duplication of generation facilities. QF capacity serves to reduce the need for utility generation facilities by providing an alternative generation resource to serve utility load. The purpose of Section 366.04(3) is served when cost-effective QF capacity is available to maximize the avoidance of utility generation facilities. Likewise, a Commission rule designed to maximize the impact of cost-effective QF capacity on utility generation expansion plans serves the stated purpose of Section 366.04(3), Florida Statutes.

During its 1983 revision to the cogeneration rules, the Commission stressed the importance of QF energy and capacity to the statewide generation planning process in Order No. 12634, which was issued immediately after the adoption of the revision:

> [W]e continue to believe that cogeneration and small power production, through the establishment of a wholesale market for electricity produced by QFs, should and will result in economic benefits to consumers of electricity and the citizenry of Florida at large. These economic benefits stem from the lessened dependence on the use of foreign oil

> as a boiler fuel, and the deferral or avoidance of the construction of additional generating capacity by electric utilities in Florida.
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> In re: Amendment of Rules 25-17.80 through 25-17.89 relating to cogeneration, Florida Public Service Commission Docket No. 820106-EU, Order No. 12634 (1983). (at 2)

In that same order, the Commission reached two conclusions regarding the use of a statewide avoided unit to price QF energy and capacity under Rule 25-17.83. The Commission determined that: (1) it was consistent with its statewide approach for determining the need for new utility generation facilities, and (2) it would maximize the beneficial effect of QF capacity on the generation expansion plans of Florida Utilities:

> In structuring the standard offer required from each utility, we have decided to take a statewide approach. The capacity related benefit of cogeneration and small power production is the avoidance or deferral of the construction of additional central station generating capacity. Since we determine the need for additional capacity on a statewide basis, we should determine the value of QF capacity from a similar perspective. Of equal importance is the fact that a statewide approach permits us to derive the maximum benefit from QF capacity by funneling geographically dispersed QF capacity to the utility with the most urgent need for it. (Order No. 12634, at 14)

Finally, in that same order, the Commission discussed the importance of wheeling QF capacity to achieve the benefits of cogeneration:

> We believe that the maximum benefit will be achieved from cogeneration and small power production if a statewide wholesale market for QF power is established. With respect to firm energy and capacity, we believe this can best

> be accomplished by setting a statewide price for firm energy and capacity, letting a QF contract with the utility in whose service territory it is located, and then having the utility planning the statewide unit purchase the QF capacity from all other utilities. In that case, the QF would not have to concern itself with wheeling. Alternatively, however, a QF may prefer to deal directly with the utility planning the statewide unit, or a QF may wish to market energy or capacity to a utility (including municipally-owned utilities or rural electric cooperatives) other than the one in whose service territory it is located. In these later situations a QF will need to wheel its power to accomplish the sale. We have, therefore, required the utility in whose service territory a QF is located, and any other intervening utility, to make arrangements to wheel electricity produced by a QF to a purchasing utility. (Order 12634 at 20, 21) (emphasis supplied)

It is clear that by requiring utilities to wheel QF energy and capacity to a purchasing utility and by supervising the terms and conditions of that wheeling service to ensure its availability, Commission Rule 25-17.088 is reasonably related to the purpose of Section 364.04(3), Florida Statutes, to avoid the "further uneconomic duplication of . . . generation facilities." The Commission has concluded that QF capacity is a beneficial alternative to additional utility generation facilities. It has further concluded that making that capacity available statewide will maximize the impact of that capacity on utility generation expansion plans. Finally, it has concluded that mandating the wheeling of QF capacity is necessary to make that capacity available statewide, thereby realizing the full benefit of QF capacity to the State.

Section 366.05(1), Florida Statutes

The purpose of Section 366.05(1), Florida Statutes, is to provide the Commission with comprehensive authority to regulate the rates, terms and conditions of service provided by public utilities, to require adequate facilities to provide that service and to adopt all rules necessary or convenient to administer and enforce Chapter 366, Florida Statutes:

> In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal and clerical employees as it deems necessary to carry out the provisions of this chapter; and to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter.

Section 366.05(1) contemplates comprehensive regulation of services provided by a public utility. Not only does it authorize regulation of rates for service, but also the rules and regulations that affect that service. Further, it authorizes the Commission to adopt rules to enforce and administer the entire chapter. Thus, a rule provision that regulates the terms and conditions of wheeling service provided by public utilities is reasonably related to the purpose of Section 366.05(1), Florida Statutes.

The express provisions of Section 366.05(1), Florida Statutes clearly authorize the Commission to regulate the rates, terms and conditions of wheeling service provided by public utilities. In particular, they authorize the Commission to "prescribe fair and reasonable . . . service rules and regulations to be observed by each public utility." When a public utility transmits (wheels) energy or capacity over its transmission lines it is providing a "service" subject to Section 366.05(1). Section 366.05(2), Florida Statutes, refers to the types of services rendered by public utilities and includes "production, transmission, delivery or furnishing of heat, light, or power." Thus, Section 366.05(1) specifically authorizes the Commission to adopt Rule 25-17.088(3) regulating the terms and conditions of transmission service (wheeling) provided by public utilities.

Section 366.05(9), Florida Statutes

Section 366.05(9), Florida Statutes, provides:

> The Commission may establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set the rates at which a public utility shall purchase power or energy from a cogenerator and small power producer.

This provision grants the Commission broad authority in two areas: (1) to set guidelines relating to the purchase of QF energy and capacity; and (2) to set the rates at which public utilities purchase QF energy and capacity. The challenged provisions of Rule 25-17.088 fall under the first area of

authority as "relating to" the purchase of QF energy and capacity. These provisions are reasonably related to, and authorized by, the Commission's broad power to "establish guidelines relating to the purchase" of QF power or energy.

As previously demonstrated, the Commission has determined that cost effective QF energy and capacity should be promoted in Florida on a statewide basis so as to offset the need for and cost of the construction of additional utility generation facilities and the consumption of foreign oil which is subject to disruption. The Commission has determined that a statewide pricing scheme will serve to maximize these benefits and that the wheeling of QF energy and capacity is necessary to achieve these statewide goals. This was reiterated by the Commission in its 1985 order establishing intrastate wheeling rates:

> The thrust of our decisions in the cogeneration rulemaking (Docket No. 820406-EU) and rule implementation (Docket No. 830377-EU) proceedings is that power produced by cogenerators and small power producers (hereinafter referred to as Qualifying Facilities or QFs) should be viewed as a statewide generating resource and made available to those Florida utilities with the earliest need for additional generating capacity. We found that this ". . . approach permits us to derive the maximum benefit from QF capacity by funneling geographically dispersed QF capacity to the utility with the most urgent need for it.(Order No. 14339 at 1)

These findings unequivocally establish that mandatory wheeling and the supervision of the terms and conditions of wheeling service fall within the broad purpose of Section 366.05(9), Florida

Statutes, as "guidelines relating to the purchase" of QF power or energy.

Not only are the challenged provisions of the rule reasonably related to the purpose of Section 366.05(9), but they are clearly authorized by the express language of the statute. The reference in the statute to "guidelines relating to" covers more than just the purchase transaction itself. Had the legislature intended to grant such narrow authority, it would have only authorized the Commission to establish Guidelines for the purchase of QF energy or power. By using the broader term "guidelines relating to", the legislature clearly intended that the Commission exercise authority over those additional matters which directly affect the purchase of QF energy. Thus, because wheeling QF energy and capacity to a purchasing utility and the terms and conditions of that service are "related to" the purchase, the Commission is empowered by Section 366.05(9) to adopt the challenged provisions. Indeed, where a QF is not directly interconnected to the purchasing utility, wheeling is essential to the purchase.

Section 366.055(3), Florida Statutes

The basic purpose of Section 366.055(3), Florida Statutes, is to "assure efficient and reliable operation of the state energy grid." To achieve this purpose the Commission is empowered "to require any electric utility to transmit electrical energy over its transmission lines (1) from one utility to another or (2) as a part of the total energy supply of the entire grid." (e.s.)

As previously discussed, the Commission has recognized that QF energy and capacity have a two-fold benefit: the displacement of dangerously unreliable foreign oil, and the avoidance of the construction of utility generation facilities. Since Rule 25-17.088 promotes these benefits, it is related to the purpose of Section 366.055(3) "to assure efficient operation of the state energy grid." Further, Rule 25-17.088 itself states that transmission service must be available to enable the statewide market for QF energy and capacity to function in an efficient and cost effective manner. Accordingly, the rule's requirement to wheel QF energy and capacity and the supervision of the terms and conditions of that service are directly related to the purpose of Section 366.055(3), Florida Statutes.

Significantly, Rule 25-17.088 is supported directly by the language of Section 366.055(3), Florida Statutes. When an intervening utility wheels QF energy from a native utility to a purchasing utility it is transmitting electrical energy over its transmission lines "from one utility to another." This quoted phrase is absolutely silent as to the source of the electrical energy.[5] Unlike subsection (2) of Section 366.055, which refers specifically to "energy produced by one electric utility,"

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[5]This Court has recognized that the Grid Bill requires the Commission to consider customer-provided facilities such as QFs. Lee County Electric Cooperative v. Marks, 501 So.2d 585 (1987). The rationale of that case applies equally here, since Sections 366.04(3) and 366.055(3) were both created by Chapter 74-196, Laws of Florida. To treat energy generated by a QF differently from that generated by an electric utility under Section 366.055(3) would collide with very the purpose of the Grid Bill.

subsection (3) makes no such reference. Thus, the quoted provision of Section 366.055(3) directly and expressly authorizes the Commission to require a utility to wheel electrical energy "from one utility to another," regardless of where the energy originated.

This provision however, is followed by an even broader grant of wheeling authority to the Commission. Under this second provision, an electric utility may be required to wheel energy over its transmission lines "as part of the total energy supply of the grid." This latter provision lacks even the limiting language "from one utility to another." Thus, the Commission may require a native utility to wheel QF energy and capacity directly from the QF to another utility, because the QF energy is "part of the total energy supply of the grid."

The reference to "the total energy supply of the grid" was not, as Florida Power & Light erroneously argues in its brief, intended to capture municipal and cooperative electric utilities. They are already subject to Section 366.055, Florida Statutes, because they are "utilities" or "electric utilities" as those terms are used throughout Section 366.055 and in the first phrase of subsection (3). To read these terms otherwise defies the plain meaning of the terms themselves and is clearly an improper construction. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982). It also effectively limits the application of those terms in subsection (1) and (2) of the statute to investor-owned (public) utilities. Such a result is

clearly not logical because it excludes municipal and cooperative utilities from the scope of those subsections and thereby thwarts the statewide approach of the Grid Bill. This result is contrary to the cardinal rule of statutory construction that a statute should be construed in its entirety and effect given to every part of the statute as a whole. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977).

The statutory authority to require wheeling carries with it the authority to enforce that obligation and to ensure that it will be fulfilled. A statutory grant of power carries with it by implication everything necessary to carry out the power or right and make it effectual and complete. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969). As earlier stated, a utility can thwart the requirement to wheel QF energy and capacity by adopting onerous or unreasonable terms and conditions for that service. Supervision of the terms and conditions that affect the availability of wheeling is essential to enforcement of the requirement to wheel. Accordingly, Section 366.055(3), Florida Statutes, grants the Commission the authority to supervise the terms and conditions of wheeling service under subsection (3) of Rule 25-17.088.

The Rule's requirement to wheel QF energy and capacity and its supervision of the terms and conditions of that wheeling service are reasonably related to the purpose of Section 366.055(3), Florida Statutes, because they are designed to promote the efficiency of the state grid. That section expressly empowers

the Commission to require wheeling of electrical energy between utilities, regardless of the source of the energy, and to require the wheeling of electrical energy directly from any source as part of the total energy supply of the grid. That section also empowers the Commission, by implication, to supervise the terms and conditions of that service to ensure that it is truly available.

CONCLUSION

The challenged provisions of Rule 25-17.088 are reasonably related to the purposes of the enabling legislation and, in addition, are clearly authorized by those statutory provisions. Florida Power & Light has effectively conceded the Commission's authority to require the wheeling of QF energy and capacity and has otherwise failed to carry its burden on appeal.

The Rule's requirement to wheel QF energy and capacity and its supervision of the terms and conditions of that service are reasonably related to the purposes of Sections 366.04(3), 366.05(1), 366.05(9) and 366.055(3), Florida Statutes. In addition, they are authorized both by the express terms of the statutes and by implication. The Commission's action below should be upheld.

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Respectfully Submitted,

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