IN THE SUPREME COURT OF FLORIDA

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

ON APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA POWER & LIGHT COMPANY'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The matter before the court is an appeal of a rule amendment adopted by the Florida Public Service Commission ("Commission") in Order No. 17119 in Docket No. 860599-EI. App., p.A-1. The amendment to Sections (2) and (3) of Florida Administrative Code Rule 25-17.088 purports to vest authority in the Commission to establish the terms and conditions (other than charges) for electrical transmission service provided by electric utilities to qualifying cogenerators and small power producers ("Qualifying Facilities" or "QFs"). The Court has jurisdiction in this matter pursuant to Article V, Section 3(b)(2), Florida Constitution; Section 366.10, Florida Statutes (1985); and Florida Rules of Appellate Procedure 9.030(a)(1)(B)(ii). Florida Power & Light Company ("FPL" or "the Company") seeks a determination by the Court that the Commission has erroneously interpreted its statutory authority in adopting the rule amendment in question and asks that the Court remand the case to the Commission for an action consistent with and within the Commission's authority.

Prior to Docket No. 860599-EI, Rule 25-17.088 contained a general statement of policy and seven subsections. Section (2) provided that the charges, terms and conditions for interstate wheeling [1/] of QF power were to be established by the Federal Energy Regulatory Commission ("FERC").

1/ Throughout this brief the terms "wheeling" and "transmission service" are used interchangeably. "Wheeling" may be defined as the transfer by direct transmission or displacement of electric power from one entity to another over the facilities of an intermediate utility. For a definition of wheeling among utilities, see Florida Power & Light Co. v. Federal Energy Regulatory Commission, 660 F.2d 668, 669 n.1 (5th Cir. 1981).

Section (3) of the rule provided that the charges, terms and conditions for intrastate wheeling were to be approved by the Commission. Section (5) of the rule created a tariff filing requirements with the Commission for the charges, terms and conditions for wheeling service established under Sections (2) and (3).[2/] The entire text of the rule prior to amendment is set forth on column 1 of pages A-7 through A-11 of the Appendix.[3/] As originally written when adopted in September, 1985,[4/] Rule 25-17.088 recognized that the Commission had no jurisdiction over the charges, terms

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2/ Other portions of the rule are not summarized as they are not relevant to FPL's appeal of the amendments to Sections (2) and (3) of the Rule.

3/ Pages A-7 through A-11 of the Appendix comprise a comparison of Rule 25-17.088: (1) before FPL's petition; (2) as requested in FPL's petition; (3) as suggested by the industrial intervenors; and (4) as adopted by the Commission.

4/ A brief history of the Commission's earlier treatment of the wheeling by public utilities of QF power may prove helpful in understanding how this case arose. In 1981 the Commission adopted an entire set of rules governing utilities' interactions with cogenerators and never even mentioned wheeling. In re: Adoption of Rules 25-17.80 through 25-17.89 - Utilities' obligations with regard to cogenerators and small power producers, 81 F.P.S.C. 4:130 (1981). In 1983 the Commission made a wholesale revision to its cogeneration rules and adopted Fla. Admin. Code Rule 25-17.835, which required utilities to wheel QF power to other utilities but which made no attempt to establish the charges, terms and conditions for such wheeling. In re: Amendment of Rules 25-17.80 through 25-17.89 Relation to Cogeneration, 83 F.P.S.C. 10:150 (1983). In 1984 the Commission attempted to impose a one mill per kwh rate on the wheeling of QF capacity but recognized its ability to do so may be foreclosed by the FERC. In re: Proceeding to Implement Cogeneration Rules, 84 F.P.S.C. 5:4 (1984). The FERC ruled that the wheeling required by the Commission would be wheeling in interstate commerce and that it had the exclusive jurisdiction to set the rates for such transactions. Florida Power & Light Co. and Florida Public Service Commission, 29 FERC ¶61,140 (1984). The Commission subsequently adopted Fla. Admin. Code Rule 25-17.088 which recognized that the Commission had no jurisdiction to set the charges or the other terms and conditions for the interstate wheeling of QF power and which suggested the Commission had the jurisdiction to set the charges, terms and conditions for intrastate wheeling. In re: Repeal of Rule 25-17.835 and Adoption of Rules 25-17.88, 25-17.882 and 25-17.883 -Wheeling of Cogenerated Energy; Retail Sales, 85 F.P.S.C. 9:298 (1985).

and conditions for the interstate transmission of QF power and that such jurisdiction rested with the FERC.

FPL initiated Docket No. 860599-EI by filing with the Commission on May 14, 1986 a petition to initiate rulemaking to amend Florida Administrative Code Rule 25-17.088. R., p. 1.[5/] As FPL indicated in the introduction of its petition, the general relief being sought was a rule amendment, "to remove the requirement that each electric utility in the state shall file a tariff containing an estimate of charges, terms and other conditions for the provision of intrastate transmission service." R., p. 1. The specific relief requested by FPL is shown in column 2 on pages A-8 through A-11 of the Appendix. Essentially, FPL asked the Commission to remove the references in the rule to intrastate wheeling (since such a transaction within Florida's interstate connected transmission system was a legal impossibility)[6/] and retain the portion of the Commission's rule which

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[5/] Throughout this brief, all emphasis has been supplied unless otherwise indicated, and references to the record will be designated with an "R.," for the Record on Appeal followed by the appropriate page number from the Index of Record.

[6/] The petition was premised in large part on the United States Supreme Court's holding in Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 92 S.Ct. 637, 30 L.Ed 2d 600 (1972) that transmissions of energy on FPL's system were transmissions of energy in interstate commerce; consequently, it was a legal impossibility for there to be intrastate wheeling of QF power to another utility over FPL's system, so FPL should be relieved of its pointless tariff filing requirement in Subsection (5) of the rule. The petition also pointed out that in a declaratory statement proceeding, in which both the Commission and FPL were parties, the FERC had determined that FPC v FPL was "equally applicable in a transmission context and that the FERC had exclusive jurisdiction over the rates for the wheeling of power produced by qualifying facilities, Florida Power and Light Company and Florida Public Service Commission, 29 FERC ¶61,140 (1984). R.,p.4. In oral argument before the Commission, FPL pointed out that under the Federal Power Act, Sections

recognized that the FERC had jurisdiction over the interstate wheeling of QF power by utilities. R., pp. 9, 10; App., p. A-8.

In response to FPL's petition, the Commission issued an order indicating its intention to amend the rule as proposed by FPL. R., p. 10. [7/] In its Notice of Rulemaking dated October 13, 1986, the Commission provided for a comment period through November 7, 1986. R., p. 11.

On the last day of the comment period, a group of firms known as the "Industrial Cogenerators" [8/] filed comments on the proposed rule. R., pp.

Footnote 6 Continued

205 and 206, and Part 35 of the FERC's rules (18 CFR ¶ 35.1), jurisdiction over rates includes jurisdiction over the "classification, practices, rules and regulations affecting such rates and charges" (terms and conditions).

7/ The Commission specifically noted:

> We have reviewed the Petition and conclude that it should be granted. The United States Supreme Court in FPC v Florida Power and Light Company, 404 U.S. 453 (1972), held that the Federal Power Commission (FERC) has jurisdiction over transmission of energy by investor-owned utilities within Florida because some of that energy leaves the state. Accordingly, there is no discreet transmission of energy in Florida by an investor-owned electric utility that is not subject to FERC jurisdiction and subject [sic] (3) of Rule 25-17.88 serves no purpose. Accordingly, we will initiate rulemaking to amend Rule 25-17.88 as FPL has proposed.

R., p.10.

8/ This group consists of Florida Crushed Stone Company; International Minerals & Chemical Corporation; Occidental Chemical Agricultural Products, Inc.; The Royster Company; United States Sugar Corporation; and W. R. Grace & Co.

18-26. The Industrial Cogenerators suggested alternative amendments to Sections (2) and (3) of Rule 25-17.088. The alternative rule amendments proposed by the Industrial Cogenerators are shown in column 3 on page A-8 of the Appendix. The effect of the Industrial Cogenerators' amendments was a rule which stated that the FERC had jurisdiction to determine the rates for transmission service but that the Commission had jurisdiction to determine the other terms and conditions for transmission service. No request for hearing was made by the Industrial Cogenerators.

At the Commission's regularly scheduled Agenda Conference on January 6, 1987, the Commission Staff presented to the Commission for its consideration an amended version of Rule 25-17.088 dramatically different in effect from the rule originally advocated by FPL and proposed by the Commission in its Notice of Rulemaking. At the close of this portion of the Agenda Conference, the Commission adopted the rule amendment ultimately issued in Order No. 17119. The Commission did not consider the rule amendments originally proposed by FPL and the Commission in its Notice of Rulemaking, and it declined to adopt the rule amendments proposed by the Industrial Cogenerators or the rule amendment proposed by its Staff.

When read literally, the effect of amended Rule 25-17.088 is that the Commission has the authority to set the terms and conditions for transmission service to QFs. Without knowing the history of the rule, one might read the rule as stating that the Commission has jurisdiction over the

charges for transmission service as well, since the charge is a term or condition of service. However, it appears the Commission intended to assert jurisdiction only over the terms and conditions other than charges as is evidenced by the striking of the word "charges" in the subsection amended. Thus, the ultimate rule amendment adopted recognizes, without explicitly stating, that the FERC has jurisdiction over the charges for transmission service. The rule goes on to state that the Commission has jurisdiction to determine other terms and conditions for transmission service.

The amendment to Rule 25-17.088 adopted by the Commission at its January 6, 1987 Agenda Conference was filed with the Secretary of State on January 14, 1987. R., p. 27. On January 20, 1987 the Commission issued Order No. 17119, Notice of Adoption of Rule Amendment, giving the parties notice of its rule amendment. Id.

In this appeal FPL maintains that the Commission exceeded its statutory authority in adopting the specific amendment to Rule 25-17.088 in Order No. 17119. FPL argues that the Commission has no legislative grant of jurisdiction over the terms and conditions of transmission service of QF power by public utilities. As amended, Rule 25-17.088 is inconsistent with the Commission's limited statutory authority over transmission service, and the Rule is an unlawful attempt to extend the Commission's jurisdiction. FPL intentionally has not raised for resolution in this appeal a number of federal questions which FPL is reserving for resolution by

resolution by federal authorities.[9/]

9/ Those questions include whether the FERC has exclusive jurisdiction over wheeling rates; whether the FERC or Congress has preempted the Commission's exercise of control over wheeling rates; and whether the Commission's amended Rule 25-17.088 violates the Fourteenth Amendment. FPL has reserved these questions consistent with the procedure established in England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed 2d 440 (1964).

Under England and the cases extending England outside the context of abstention, Kay v. The Florida Bar, 323 F.Supp. 1149 (S.D. Fla. 1971); Mr. Boston Distiller Corp. v. Pallott, 342 F.Supp. 770 (N.D. Fla.), aff'd, 469 F.2d 337 (5th Cir. 1972), cert. denied, 411 U. S. 967 (1975), a party seeking relief in a federal court must show that in any earlier resolution of pertinent state law questions in state court the party did not raise federal questions for resolution by the state courts. However, there is also a burden placed on the party that it must have made the state court aware of its potential federal claims. England; Government and Civic Employees Organizing Committee v. Windsor, 353 U. S. 364, 77 S.Ct. 838, 1 L.Ed 2d 894 (1957). To satisfy that notice requirement so that the state statutes at issue here may be construed "in light of" FPL's potential federal claims, FPL briefly summarizes those arguments.

The FERC has exclusive jurisdiction over FPL's wheeling rates for QF power, and the Commission, to the extent it otherwise may have such powers, has been preempted. The FERC has jurisdiction over the transmission of electricity in interstate commerce. 16 U.S.C. § 824(b). The transmission of power on FPL's system is a transmission of electricity in interstate commerce. FPC v. FPL. Wheeling of QF power by FPL would be a transmission of electricity in interstate commerce. Florida Power & Light Co. and Florida Public Service Commission, 29 FERC ¶61,140. Therefore, the FERC has jurisdiction over the wheeling of QF power by FPL. Id. Once jurisdiction under the Federal Power Act is determined, it is exclusive and preempts the states from regulating the transmission of power. Id.

Subsection (4) of Rule 25-17.088 requires the filing of a tariff for the transmission service the Commission requires FPL to offer. The effect of filing a tariff, even if merely informational, can be the imposition of common carrier status. Florida Power & Light Co. v. Federal Energy Regulatory Commission, 660 F.2d 668 (5th Cir. 1981), U.S. cert. den. 459 U.S. 1156 (1983). Up until now, FPL has not been deemed a common carrier for purposes of providing transmission services. A governmental mandate that converts a private carrier into a common carrier against its will contravenes the due process clause of the Fourteenth Amendment. Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed 1093 (1926).

SUMMARY OF ARGUMENT

As an administrative agency, the Commission may exercise only the authority vested it by the Legislature through statutes. In promulgating its rule amendments to Sections (2) and (3) of Florida Administrative Code Rule 25-17.088, the Commission purportedly was implementing three statutory provisions, Sections 366.05(9), 366.04(3) and 366.055(3), Florida Statutes. None of the statutes relied upon by the Commission authorize the Commission to establish the terms and conditions for the wheeling QF power by public utilities.

The sections of the Grid Bill (Chapter 74-196, Laws of Florida) relied upon by the Commission, Sections 366.04(3), 366.055(3), Florida Statutes, do not empower the Commission to establish the terms and conditions for the wheeling of QF power. To the extent these sections grant the Commission any jurisdiction over wheeling, that jurisdiction is limited to ordering wheeling "from one utility to another." A Qualifying Facility is not a utility. There is no jurisdiction granted to "approve terms and conditions" for wheeling "from a QF to another utility." Given that the Grid Bill specifically addressed and limited the Commission's jurisdiction over wheeling to requiring wheeling between utilities, it cannot be read as conferring additional authority on the Commission to set terms and conditions for wheeling from a QF to a utility. Those powers excluded from the statute may not be exercised by the Commission, and the Commission may not expand its authority by rule beyond that conveyed by statute.

Similarly, Section 366.05(9) does not empower the Commission to establish the terms and conditions for wheeling of QF power. The scope of authority conferred on the Commission is clear on the face of the statute. Under Section 366.05(9) the Commission may (1) "...establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers...", and (2) "set rates at which public utilities shall purchase power or energy from a cogenerator or small power producer." The statute is limited to purchases of QF power by utilities and does not refer to wheeling of QF power by utilities. There is no express provision in Section 366.05(9) which authorizes the Commission to establish terms and conditions for wheeling by utilities from a QF to another utility .

Section 366.05(9), Florida Statutes does not impliedly empower the Commission to establish the terms and conditions for wheeling of QF power. Wheeling is not essential to the purchase of QF power by utilities. The Commission may not extend its limited jurisdiction over wheeling by creating a QF power purchasing program which envisions wheeling.

Even when Sections 366.04(3), 366.055(3) and 366.05(9) are construed in pari materia, they do not empower the Commission to set the terms and conditions for wheeling QF power. It must be assumed the Legislature knew the limit on the Commission's jurisdiction over wheeling under the Grid Bill when it passed Section 366.05(9). It nonetheless did not extend that jurisdiction when it authorized the Commission to set guidelines and rates for the purchase of QF power.

ARGUMENT

THE COMMISSION LACKS AUTHORITY TO APPROVE THE TERMS AND CONDITIONS OF TRANSMISSION SERVICES PROVIDED BY A PUBLIC UTILITY TO MOVE POWER FROM A QUALIFYING FACILITY TO ANOTHER PUBLIC UTILITY.

As an administrative body, the Commission is a creature of statute and may exercise only the powers, duties and authority conferred expressly or impliedly by statute. Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973) (See cases cited therein); Southern Armored Service, Inc. v. Mason, 167 So.2d 848 (Fla. 1964). Any reasonable doubt as to the lawful exercise of a particular power being exercised by the Commission must be resolved against the exercise thereof, id., and the further exercise of the power should be arrested. United Telephone Co. of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986) (quoting with approval Radio Telephone Communications, Inc. v. Southern Telephone Co., 170 So.2d 577, 582 (Fla. 1965)).

The rule amendments adopted by the Commission were developed pursuant to the procedures of the Administrative Procedure Act ("APA").[10/] Consistent with the case law recognizing that an administrative agency may exercise only such authority as is conferred by statute, the APA states that "[n]o agency has inherent ratemaking authority...." Section 120.54(15), Florida Statutes (Supp. 1986). The APA also requires that an administrative

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10/ Sections 120.50-120.73, Florida Statutes (1985 & Supp. 1986).

body adopting a rule must refer to the statute being implemented. Section 120.54(7), Florida Statutes (Supp. 1986).

In adopting its amendments to Florida Administrative Code Rule 25-17.088, the Commission indicated it was implementing three statutory sections, Sections 366.04(3), 366.055(3) and 366.05(9), Florida Statutes (1985 & Supp. 1986). R., p. 29. In determining whether the Commission acted within its statutory authority, the court should look to the law implemented which is cited in the rule amendment. General Telephone Co. of Florida v. Marks, 500 So.2d 142 (Fla. 1986); Department of Health and Rehabilitative Services v. Florida Psychiatric Society, Inc., 382 So.2d 1280 (1st DCA 1980). As the following discussion shows, none of the statutes the Commission purports to implement empower the Commission to establish or approve the terms and conditions for the wheeling of power by a utility from a QF to another utility.

A. The Grid Bill Does Not Empower The Commission To Approve The Terms And Conditions For Transmission Service.

Two of the statutory sections which the Commission maintains it was implementing in adopting the amendments to Rule 25-17.088, Sections 366.04(3) and 366.055(3), Florida Statutes (1985 & Supp. 1986), were adopted in 1974 as parts of Chapter 74-196, Laws of Florida, an act commonly known as the "Grid Bill." Pursuant to the Grid Bill, the Commission was given:

> jurisdiction over the planning, development and maintenance of a coordinated electric power 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.

§366.04(3), Fla. Stat. (1986 Supp.). The Grid Bill also specifically addressed the Commission's limited jurisdiction over wheeling. It granted the Commission authority:

> to require any electric utility to transmit electrical energy over its transmission lines from one utility to another or as a part of the total energy supply of the entire grid, subject to the provisions hereof.

§366.055(3), Fla. Stat. (1985). (A copy of the Grid Bill is in the Appendix.)

The Commission's limited authority over wheeling under the Grid Bill is clear and unambiguous. Under the Grid Bill the Commission's power over wheeling is limited to (1) being able to order or require wheeling (2) "from one utility to another or as a part of the total energy supply of the entire grid." §366.055(3), Fla. Stat. (1985). The phrase "as a part of the total energy supply of the entire grid" does not envision the wheeling of QF power. It is a necessary phrase because rural electric cooperatives and municipal utilities are not public utilities, See Section 366.02, Florida Statutes (1985), but they are intended to be part of the statewide grid envisioned in the Grid Bill. Thus, the phrase had to be added to authorize the Commission to be able to require wheeling among public utilities, municipalities and cooperatives. 11/

11/ At the time the Grid Bill was adopted, the Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (codified in scattered sections of 16 U.S.C.), had not yet been adopted, and there was no articulated federal or state policy to encourage cogeneration. Consequently, when the Grid Bill was passed, the Legislature could not have intended for the Grid Bill to address anything other than the specific types of entities it names: public utilities, rural electric cooperatives and

There is no express authority granted the Commission to "approve terms and conditions" for the transmission of electricity by an electric utility "from a QF to another utility," and no such authority may reasonably be implied from the Grid Bill. A QF is not a utility. See Public Utilities Regulatory Policies Act of 1978, § 201; 18 CFR § 292.206; Fla. Admin. Code Rule 25-17.080. In addressing the Commission's limited authority over wheeling, the Legislature excluded any broader Commission authority over other aspects of wheeling. The rule that the mention of one thing implies the exclusion of another is clearly applicable here.[12/] "Where a statute enumerates the things on which it is to operate, it is ordinarily construed as excluding from its operation all those not expressly mentioned." Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348, 356 (Fla. 1st DCA 1985); James v. Department of Corrections, 424 So.2d 826, 827 (Fla. 1st DCA 1982). If the Commission had inherent authority over wheeling, there would have been no need for the legislative grant of authority to "require" wheeling in limited instances (among utilities, cooperatives and municipal utilities constituting the grid); however, the Legislature did find it necessary to authorize the Commission to be able to "require" wheeling "from one utility to another," and in allowing the Commission power to accomplish

Footnote 11 Continued
municipal utilities. It is particularly difficult to imagine that the Legislature intended the Grid Bill to address cogenerators, much less the wheeling of cogenerated power. This improbability is all the more highlighted by the Legislature first passing legislation in 1981 which gave the Commission jurisdiction limited to the purchase by public utilities of cogenerated power.

12/ This general principle of statutory construction is well established in Florida. Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985); Thayer v. State, 335 So.2d 815, 817 (Fla. 1976); Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952); Alsop v. Pierce, 155 Fla. 185, 19 So.2d 799 (Fla. 1944).

that specific end, implicitly refused to grant any broader exercise of power over wheeling. See Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985). The Court should assume that the Legislature thoroughly considered and intentionally limited the Commission's authority over wheeling in passing the Grid Bill, and the Court should not create by implication or judicial fiat authority which the Legislature has failed to grant to the Commission. See Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952).

Having recognized that under the Grid Bill the Commission is not explicitly or implicitly granted power to approve the terms and conditions of the wheeling of power by a utility from a QF to another utility, the Commission's rule amendment asserting such jurisdiction must fail. "The Commission may make rules and regulations within the yardstick prescribed by the Legislature, but it cannot amend, repeal or modify an Act of the Legislature by the adoption of such rules and regulations." Diamond Cab Owners Association v. Florida Railroad & Public Utilities Commission, 66 So.2d 593, 596 (Fla. 1953). An administrative agency may not enlarge its jurisdiction by adopting a rule beyond the authority conveyed by statute. Department of Administration, Division of Retirement v. Albanese, 445 So.2d 639, 641 (Fla. 1st DCA 1984); Florida Department of Law Enforcement v. Hinson, 429 So.2d 723, 724 (Fla. 1st DCA 1983); Department of Transportation v. James, 403 So.2d 1066, 1068 (Fla. 4th DCA 1981). Since neither provision of the Grid Bill relied upon by the Commission confers authority upon the Commission to approve the terms and conditions for wheeling by a utility of power from a QF from another utility, the rule

amendments purporting to vest the Commission with such jurisdiction are made without lawful authority and are void.

B. Section 366.05(9), Florida Statutes (1985) Does Not Empower The Commission To Approve The Terms And Conditions For Transmission Service.

In apparent recognition that in the absence of enabling legislation the Commission did not have the statutory authority to establish guidelines and rates for the purchase of QF power by public utilities, the Legislature passed Chapter 81-131, §1, Laws of Florida. [13/] That portion of the Act, which is codified as Section 366.05(9), Florida Statutes (1985), 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 or small power producer.

This is the third statute which the Commission maintained it was implementing in adopting the rule amendments to Florida Administrative Code Rule 25-17.088. R., p. 29.

Section 366.05(9), Florida Statutes (1985) is a very specific grant of

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13/ See Appendix, p.A-23 for the entire text. Chapter 81-131, Laws of Florida was passed while FPL was pursuing an appeal of the Commission's initial set of cogeneration rules, Florida Administrative Code Rules, 25-17.80 through 25-17.89(1982), which purported to regulate the purchase of QF power by public utilities. One ground for FPL's appeal was lack of statutory authority to adopt the rules. The Court concurred, See Florida Power & Light Co. v. Florida Public Service Commission, 8 F.L.W. 116 (Fla. March 17, 1983), but while a request for rehearing was pending, FPL voluntarily dismissed its appeal, and the opinion was never published in the official reporter.

authority which is clear and unambiguous. Consequently, it requires no interpretation, and there is no need to attempt to identify the intent of the Legislature. Heredia v. Allstate Insurance Co., 358 So.2d 1353 (Fla. 1978); Ross v. Gore, 48 So.2d 412 (Fla. 1950). It conveys power upon the Commission to (1) "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers", and (2) "set rates at which a public utility shall purchase power or energy from a cogenerator or small power producer." Both powers conveyed upon the Commission relate to the purchase of power from QFs; there is no provision authorizing the Commission to set guidelines or rates relating to the wheeling of power by a public utility from a QF to another utility. There is no express or explicit mention of wheeling or transmission service in the Subsection, and it must be concluded from the plain meaning of the statute that the Legislature was not empowering the Commission to regulate the wheeling of QF power. See Gar-Con Development, Inc. v. State Department of Environmental Regulation, 468 So.2d 413, 415 (Fla. 1st DCA 1985), rev. denied 479 So.2d 117.

Similarly, there is no basis to conclude that through this straightforward grant of authority the Commission was impliedly given power to regulate the wheeling of QF power. If the Legislature had intended to confer the authority to regulate the wheeling as well as the purchase of QF power on the Commission, it would have been a simple enough addition to the statute to articulate such intent. Instead it chose not once, but twice, in the section to indicate that the powers conveyed related to the "purchase" of QF power by public utilities.

Here again is an instance where the rule that the mention of one thing implies the exclusion of another governs. If the Commission had existing authority over the regulation of utilities in dealing with QF power, there was no need for this legislative grant of authority; however, the Legislature found it necessary to authorize the Commission to set guidelines and rates for the purchase of QF power by utilities, and in allowing the Commission power to accomplish that specific regulation of utilities in dealing with QF power, implicitly refused to grant the broader power of setting rates and guidelines for the wheeling of QF power. See Towerhouse Condominium, Inc.

In the absence of explicit or implied statutory authority to determine guidelines and rates for the wheeling of power by a public utility from a QF to another public utility, the Commission cannot confer such jurisdiction upon itself by establishing a QF power purchasing program which envisions wheeling and then incorporating a "finding" in its rules that wheeling is necessary to effectuate its QF power purchasing program. In the preamble of Florida Administrative Code Rule 25-17.088, the Commission stated that "transmission service must be available" to allow the Commission statewide marketing program of QF power purchase to function efficiently. The inclusion of such an observation or finding in its rule cannot enlarge the Commission's jurisdiction any more than the rule provisions asserting jurisdiction over wheeling. The fact remains that the Commission lacks statutory authority to regulate the wheeling by an electric utility from a QF to another public utility, and the Commission cannot expand its jurisdiction by rule. Diamond Cab Owners Association.

Finally, even if one were to construe Section 366.05(9), Florida Statutes as empowering the Commission to establish guidelines and rates for not only the purchase but also the wheeling of QF power by utilities, under the Commission's "logic" there is still no authority conferred to approve the "terms and conditions" of the transmission service. It should be remembered that the premise underlying the Commission's rule is that jurisdiction for the setting of charges or rates is distinct from the jurisdiction for setting other terms and conditions. The Commission deleted the word "charges" from amended Subsection (2) in recognition that the jurisdiction for setting wheeling rates rested with the FERC.[14/] However, it maintained that the FERC's jurisdiction was limited to rate setting and that it had the jurisdiction to approve "terms and conditions." While the preemption basis of this anomalous jurisdictional distinction is not being raised before this Court for resolution, the fact that the Commission made the distinction between the jurisdiction to set rates and the jurisdiction to set terms and conditions is being pointed out because Section 366.05(9), if it confers any jurisdiction over wheeling, [15/] confers only the power to set rates. Thus, if one applies the Commission's own distinction in its amended rule between the jurisdiction to set rates and the jurisdiction to set terms and conditions in interpreting Section 366.05(9), one must conclude that, at most, the

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14/ See Florida Power and Light Co. and Florida Public Service Commission, 29 FERC ¶ 61,140 (1984).

15/ Of course, FPL maintains Section 366.05(9), Florida Statutes (1985) confers to the Commission no jurisdiction over wheeling. The sentence in the text should not be construed otherwise.

Commission has been given rate setting jurisdiction over wheeling and the statute conveys no power to approve terms and conditions. Simply stated, the logic of the Commission's rule amendment distinguishing the setting of rates from the setting of other terms and conditions is inconsistent with the expansive interpretation of Section 366.05(9) upon which the Commission relies.

While it is interesting to note that wheeling is not essential to the purchase of QF power and that the Commission's distinction in amending Rule 25-17.088 between jurisdiction over rates and jurisdiction over terms and conditions is inconsistent with its broad reading of Section 366.05(9), Florida Statutes, the basic underlying fact is that Section 366.05(9) does not grant the Commission authority to regulate, in any fashion, the wheeling of QF power. It must be assumed that when the Legislature passed Section 366.05(9), Florida Statutes it knew that under the Grid Bill the Commission had very limited authority to regulate wheeling and that the authority did not extend to the wheeling of QF power. See Oldham v. Rooks, 361 So.2d 140 (Fla. 1978). It would have been a simple matter to write §366.05(9), Florida Statutes where it extended the Commission's jurisdiction to requiring wheeling of QF power. The Legislature did not, and the Commission should not be allowed, through the grace of this Court, to assert jurisdiction the Legislature has seen fit to withhold. Rule 25-17.088 should be set aside for lack of statutory authority.

CONCLUSION

As an administrative body, the Florida Public Service Commission may only exercise such authority as has been conferred explicitly and implicitly by statute. The Commission cannot expand its jurisdiction through the promulgation of rules. None of the statutes the Commission purported to be implementing in adopting the amendments to Florida Administrative Code Rule 25-17.088, empower the Commission to approve the terms and conditions for transmission service provided by a utility to move power from a QF to another utility. Under the Grid Bill, which does not even envision QFs, the Commission's authority over wheeling is limited to requiring wheeling among utilities, cooperatives and municipalities. Under Section 366.05(9) the Commission jurisdiction over utilities is limited to their purchase of QF power and does not extend to wheeling. In specifically defining the Commission's authority in these statutes, the Legislature was limiting the Commission from a broader exercise of power.

The amendment to Rule 25-17.088 in Order No. 17119 is beyond the Commission's authority and should be set aside. FPL respectfully requests that this Court set aside the amendment to Rule 25-17.088 and remand this matter to the Commission for disposition consistent with its statutory authority.

Respectfully submitted,

STEEL HECTOR & DAVIS

By: Charles A. Guyton
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Initial Brief has been furnished by United States Mail on this the 24th day of April, 1987 to the following.

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