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 REPLY BRIEF

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THE MATTER AT ISSUE IS THE COMMISSION'S LACK OF AUTHORITY TO SET TERMS AND CONDITIONS FOR THE INTERSTATE WHEELING OF QUALIFYING FACILITY POWER BY PUBLIC UTILITIES.

The Appellees have attempted to shift the focus of this appeal by devoting most of their briefs to a matter not at issue - whether the Commission has authority to order public utilities to wheel power produced by qualifying facilities ("QFs"). In making their misdirected argument, they have tried to put FPL's conduct at issue and have argued that FPL has acquiesced in the Commission's authority to order wheeling. While these irrelevant arguments will require some brief rejoinder, the only matter raised by FPL in this appeal is - whether the Commission has authority to set the terms and conditions for the interstate[1/] wheeling of QF power by public utilities.

FPL has consciously chosen to limit its challenge of Rule 25-17.088 to the Commission's assertion of authority to set the terms and conditions for the interstate wheeling of QF power by public utilities. FPL's argument is straightforward.[2/] However, FPL has not asked the Court to resolve whether the Commission may order the wheeling of QF power.

[1/] FPL argued before the Commission (R., pp. 1-4) and the Commission has recognized (R., p. 10) that intrastate wheeling on FPL's system is a legal impossibility in light of the United States Supreme Court's decision in Federal Power Commission v. Florida Power & Light Company, 404 U.S. 453, 92 S. Ct. 637, 30 L. Ed 2d 600 (1972). The logic of the Court in that case is equally applicable to the entire Florida grid which is interconnected with other states. Thus, any wheeling of QF power in Florida is interstate, and the amendment to the rule can only affect interstate wheeling.

[2/] The Commission has no explicit statutory authority to establish the terms and conditions for the interstate wheeling of QF power by public utilities. Given the Legislature's specific limitation of the Commission's authority over wheeling and the purchase of cogenerated power, the

FPL's choice not to put at issue in this or prior proceedings the Commission's asserted authority to order the wheeling of QF power is irrelevant to the merits of this appeal; however, given the suggestions in the Answer Briefs that FPL has taken inconsistent positions or previously conceded jurisdiction by not taking appeals, the Appellees' assertions regarding FPL's conduct require a brief response. FPL is already required under the terms of its Nuclear Regulatory Commission license for St. Lucie Unit No. 2 to wheel power from QFs to electric utilities; therefore, the Commission's wheeling mandate in Rule 25-17.835 and now in Rule 25-17.088 is redundant and without significance in and of itself. An appeal which challenged that assertion of authority would not have changed FPL's obligations, so it would have served no purpose. Prior to the rule amendment challenged by FPL, the Commission had not asserted an intent to set the terms and conditions for interstate wheeling[3/], thereby creating

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Footnote [2/] Continued:
Commission's authority cannot be extended by implication. The Commission's only statutory authority over wheeling by public utilities is limited (1) to ordering or requiring wheeling, (2) among public utilities, municipal utilities and cooperatives, and (3) to assure grid reliability, efficiency and integrity are maintained. In so limiting the Commission's authority over wheeling, the Legislature intended no further extension of the Commission's authority in this regard, and the Commission's amended rule 25-17.088 asserting jurisdiction to set the terms and conditions over the interstate wheeling of QF power is just such an unintended extension. The Commission cannot by rule extend its limited authority beyond that conferred by the Legislature through statute. Therefore, the rule amendment is void.

[3/] Initially, in Docket 830377, the Commission expressed such an intent, (See 84 F.P.S.C. 5:4 (1984)), but upon FPL's request for reconsideration, it stayed that portion of its order pending its joint petition with FPL to the Federal Energy Regulatory Commission ("FERC"). After the FERC's ruling that the FERC had exclusive authority over the rates for interstate wheeling, the Commission no longer asserted authority to set any of the terms and conditions for interstate wheeling. In re: Proceeding to implement cogeneration rules, 85 F.P.S.C. 5:7 (1985). The Commission has

the prospect of making FPL a common carrier for transmission service.[4/] Thus, until the Commission significantly rewrote[5/] and changed the basic statement in Rule 25-17.088 as to whether it or the FERC had jurisdiction over the terms and conditions for interstate wheeling, FPL had no reason or practical incentive to challenge the Commission's asserted authority over wheeling.

Finally, while FPL has not raised for resolution in this appeal whether

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Footnote 3/ Continued:
asserted authority to set the terms and conditions for intrastate wheeling, but FPL recognized that intrastate wheeling was a legal impossibility on its sytem or on the Florida grid (See Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 92 S.Ct. 637, 30 L.Ed. 2d 600 (1972)), so it did not need to challenge the Commission's authority in this regard. Of course, the Commission now also recognizes that intrastate wheeling is a legal impossibility. R., p. 10; See also In re: Generic investigation of wheeling rate structure issues, Order No. 17608 (May 26, 1987) attached as an Appendix to this brief.

4/ The filing of a tariff, even an informational tariff, is a holding out of service to the public, and such a holding out is the primary attribute of a common carrier. Florida Power & Light Co. v. Federal Energy Regulatory Commission, 660 F.2d 668 (5th Cir. 1981). Because the business of a common carrier is impressed with the public interest and a common carrier must provide service for all people indifferently, FPL has successfully resisted for a number of years tariff filing requirements related to providing transmission service. Id. Avoiding common carrier status affords FPL flexibility in the use of its transmission system to assure reliable service to its customers.

5/ Prior to amendment, Rule 25-17.088 recognized that the FERC had jurisdiction over the terms and conditions of interstate wheeling while the Commission had jurisdiction over intrastate wheeling. Under the rule amendment as originally proposed by FPL and the Commission, the rule recognized that all wheeling of QF power was interstate and that the FERC had exclusive jurisdiction to establish the terms and conditions for such wheeling. There was no need for FPL to challenge the Commission's authority, for the Commission asserted no authority to set terms and conditions. However, after comments and the time for requesting a hearing, the Commission completely reversed the rule. As adopted, the rule now recognizes that all wheeling of QF power is interstate but asserts the Commission, rather than the FERC, has jurisdiction to set terms and conditions. Given this significant eleventh hour change to the rule amendment, this appeal is FPL's first practical opportunity to challenge the Commission's underlying authority.

the Commission has authority to order public utilities to wheel QF power, it should be understood that FPL has not conceded or acquiesced in the Commission's authority to order wheeling. However, even if it had, FPL cannot confer jurisdiction or authority on the Commission by its consent or acquiescence. Thus, the Appellees' arguments regarding FPL's purported acquiescence are irrelevant.

SECTION 366.05(1), FLORIDA STATUTES DOES NOT EMPOWER THE COMMISSION TO REGULATE THE TERMS AND CONDITIONS OF THE INTERSTATE WHEELING OF QF POWER BY PUBLIC UTILITIES.

The Industrial Cogenerators (IGC Br., 11, 21, 22) argue that Section 366.05(1), Florida Statutes authorizes the Commission to establish the terms and conditions of interstate wheeling of QF power by public utilities. This novel argument, which is not made by the Commission and which was not a justification advanced by the Commission when it adopted the amendment to Rule 25-17.088, misrepresents the nature of the Commission's reliance on Section 366.05(1) and grossly misconstrues the nature of wheeling.

The Commission's Only Reliance Upon Section 366.05(1) Was For Rulemaking Authority.

Under Section 120.54(7), Florida Statutes (Supp. 1986), an administrative agency adopting a rule must refer to (1) its specific statutory rulemaking authority, and (2) the specific statute the rule implements or interprets. In this case Section 366.05(1) was cited only as the Commission's rulemaking authority, not as the statute being implemented. R., pp. 29, 31.

FPL's challenge is not whether the Commission has authority to adopt

rules to implement Chapter 366, Florida Statutes but whether there is statutory authority in Chapter 366 upon which the Commission can base its assertion in amended Rule 25-17.088 of jurisdiction over the terms and conditions for interstate wheeling of QF power by utilities. In addressing such a challenge, the court should look to the citations of the statutes purportedly being implemented. 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). The statutes cited as those being implemented or interpreted did not include Section 366.05(1), Florida Statutes, and the Industrial Cogenerators' reference to Section 366.05(1) as a statute being implemented is wrong.

Wheeling Is Not A Public Utility Service.

Even if Section 366.05(1), Florida Statutes had been relied upon by the Commission in the fashion argued by the Industrial Cogenerators, it does not empower the Commission to establish the terms and conditions for interstate wheeling of QF power by public utilities, because wheeling is not a public utility service. The attempt by the Industrial Cogenerators to cast wheeling as a public utility service subject to regulation by the Commission offends the purpose and intent of Chapter 366 and is inconsistent with the Commission's rules implementing §366.05(1), Florida Statutes.

Chapter 366, Florida Statutes empowers the Public Service Commission to regulate public utilities. Section 366.01, Florida Statutes (1985). Public utilities are defined as the legal entities "supplying electricity or gas. . .to or for the public within this state. . . ." Section 366.02(1), Florida Statutes (1985). The services of public utilities which are

subject to regulation by the Commission are the services which make the entities public utilities - the supplying of gas or electricity to the public. It is over this service that the Commission has jurisdiction to set rates, classifications, standards of quality, etc... Quite simply, the wheeling of QF power, or any type of power, by a public utility to another public utility is not the supplying of electricity to the public; therefore, it is not a public utility service subject to regulation.[6/]

That wheeling is not a public utility service is evidenced by the Commission's rules implementing Section 366.05(1). Florida Administrative Code Rule 25-6.001 notes that Section 366.05(1), Florida Statutes gives the Commission power to establish rules for "electric utility service." Florida Adminstrative Code Rule 25-6.003(6) defines the term "service" as:

> The supply by the utility of electricity to the customer, including the readiness to serve and availability of electrical energy at the customer's point of delivery at the standard available voltage and frequency whether or not utilized by the customer. (Emphasis added.)

When this definition (as well as the definitions of the other terms employed in Rule 25-6.003) is considered, it is clear that "electric utility service" as employed in Section 366.05(1) has been construed by the Commission to be the sale of electricity to a retail customer. In contrast, the wheeling at issue here does not involve: (1) the sale or supply of power by the public utility (wheeling is the transfer of power produced by an entity other than

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[6/] The Industrial Cogenerators' strained construction of Section 366.05(2), Florida Statutes as defining the transmission of power as a public utility service (ICG Br., 22) must be dismissed. That statutory subsection is only intended to address the appropriate bookkeeping and ratemaking treatment of appliance and merchandise sales by utilities.

the wheeling utility) or (2) the receipt of the power from a public utility by a retail customer (the wheeling at issue here involved the transfer of power to another utility not a retail customer).

A strong indication that the wheeling of power is not a public utility service subject to regulation under Section 366.05(1), Florida Statutes is the subsequent adoption of Section 366.055(3), Florida Statutes. If the Legislature perceived or intended all wheeling by a public utility to be a public utility service already subject to Commission regulation pursuant to Section 366.05(1), there would have been no reason to enact Section 366.055(3), which authorized wheeling only in limited instances to preserve grid reliability. Because the Legislature vested the Commission in Section 366.055(3), Florida Statutes with limited authority over wheeling, it must be assumed that the Legislature did not intend Section 366.05(1), Florida Statutes to empower the Commission to regulate wheeling as a public utility service.

SECTION 366.05(9), FLORIDA STATUTES DOES NOT EMPOWER THE COMMISSION TO ESTABLISH THE TERMS AND CONDITIONS OF THE INTERSTATE WHEELING OF QF POWER BY PUBLIC UTILITIES.

The Commission's sole attempt to justify Section 366.05(9) as a source of authority for the amendment to Rule 25-17.088 is the sentence:

> PSC jurisdiction over the wheeling of QF energy provides the QF's with the opportunity to negotiate with more than one potential purchaser of its energy, providing QF's with a broader market for their energy.

PSC Br. 4. The Commission's observation provides no helpful assistance in interpreting §366.05(9), Florida Statutes. It does not evidence how the

Legislature meant "wheeling" when it said "purchase" in Section 366.05(9). The Commission essentially says, "it would be nice for us to have jurisdiction over wheeling so we could expand the market for QF energy." This is no explanation of how Section 366.05(9) authorizes the Commission's assertion of jurisdiction over wheeling nor is this an explanation of how the amended rule reasonably relates to Section 366.05(9). The Commission forgets that neither the desirability of nor even the need for an administrative rule creates authority to promulgate a rule. See 4245 Corp. v. Div. of Beverage, 371 So.2d 1032 (Fla. 1st DCA 1978).

In their initial argument regarding Section 366.05(9), the Industrial Cogenerators develop an elaborate argument based solely upon prior findings by the Commission. After recounting three Commission findings and without establishing that any of these findings have been made by the Legislature, they then make the broad leap that these Commission findings establish that mandatory wheeling and the supervision of the terms and conditions of wheeling fall within the purpose of the Legislature in enacting Section 366.05(9). The "argument" is a non sequitur. There is no effort to show how Section 366.05(9) addresses the wheeling of QF power at all;[7/] there is only an elaborately constructed house of cards reviewing the Commission's, not the Legislature's, findings that wheeling is necessary to effectuate the purchase of QF power by utilities. Interestingly, there is not even a Commission finding recounting why it is necessary for the

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7/ This is a crucial omission, for the only statute in Chapter 366 which gives the Commission any authority over wheeling, and that authority is very limited, is Section 366.055(3). To read Section 366.055(3) as requiring the wheeling of QF power when it was seven years later with the passage of Section 366.05(9) that the Commission was first given authority to order public utilities to purchase QF power is an absurdity.

Commission to set the terms and conditions for wheeling so that the purchase of QF power can be effectuated. Perhaps that finding is omitted because prior to the amendment challenged here, Rule 25-17.088 recognized that the FERC, rather than the Commission, had the jurisdiction to regulate the terms and conditions of the interstate wheeling of QF power.

The argument advanced by the Industrial Cogenerators would result in inappropriate legislation by rulemaking. While an administrative agency may regulate, it may not legislate. 4245 Corp. v. Div. of Beverage, 371 So.2d 1032 (Fla. 1st DCA 1978). Its power to adopt rules and regulations is limited to the yardstick laid down by the Legislature. Id; Lee v. Delmar, 66 So.2d 252 (Fla. 1953). In Section 366.05(9), Florida Statutes the legislative yardstick is limited to "purchases" of QF power. The standard of review the Industrial Cogenerators ask the Court to apply is whether the rule amendment is reasonably related to the purpose of the statute, yet all they argue is that the rule amendment in question is reasonably related to prior statements of Commission policy. To treat Commission policy as the surrogate for the purpose of legislation[8/] in applying the standard of review advocated by the Industrial Cogenerators (whether a rule reasonably relates to the purpose of legislation) makes a mockery of the standard, guarantees affirmance and gives the Commission the power to legislate at will.

In making their argument that Section 366.05(9) means more than it

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8/ Actually, the exercise is more complex. The ICGs not only treat Commission policy as a surrogate for legislative purpose but also add another step that the powers asserted can be implied because they are necessary to effectuate the Commission's policy. In short, the ICGs argue implied authority arising from Commission policy rather than legislative purpose or intent by treating Commission policy as legislative purpose.

says, the Industrial Cogenerators reach at least four separate conclusions or findings not made by the Legislature. Several of the conclusions have not been made by the Commission either, and they are inconsistent with the "statewide" scheme actually implemented by the Commission. Each conclusion is essential to their argument, which is summarized (by conclusion) as follows: because the Commission may regulate the purchase of QF power, and because the Commission has decided a statewide market is desirable (although not essential) for the purchase of QF power by utilities,[9/] and the Commission has decided wheeling is a desirable (although not essential) aspect of a QF power purchasing scheme,[10/] and because public utilities will not wheel without being required to do so,[11/] and because even if public utilities were required to wheel QF power they would frustrate that requirement by imposing onerous terms and conditions,[12/]

9/ A statewide market is not essential. See Fla. Admin. Code Rules 25-17.80 through 25-17.89 (1982). Moreover, under the Commission's application of its existing cogeneration rules, a statewide price for QF capacity is set, making a "statewide market" meaningless for firm QF energy. (A QF gets the same price wherever it sells in the state.)

10/ Wheeling is not essential. See Fla. Admin. Code Rules 25-17.80 through 25-17.89 (1982). With the same price for QF capacity anywhere in the state under the Commission's existing rules, a QF does not need to wheel. In fact, wheeling is to the QF's disadvantage because the QF must pay for it and suffer line losses, reducing the revenues it will receive. Wheeling under the Commission scheme was meant to result in the "funneling" of power to the utility that needed it to avoid building the statewide unit (note the need was long term and unrelated to the short term grid reliability concerns addressed in the Grid Bill). However, in practice the Commission has abandoned this approach by never identifying the utility with the statewide avoided unit.

11/ There was no evidence before the Commission supporting this implicit conclusion nor did the Commission make this finding.

12/ This conflicts with the Commission's experience from 1983-87 under Rule 25-17.835 and the original version of Rule 25-17.088. Also, see note 11.

therefore, the Commission has authority to establish the terms and conditions for the wheeling of QF power.

FPL submits that this interpretation of Section 366.05(9), Florida Statutes is inconsistent with the plain wording of the statute, which clearly is limited to "purchases" of QF power, and is therefore improper. See Gar Con Development, Inc. v. State Department of Environmental Regulation, 468 So.2d 413 (Fla. 1st DCA 1985) rev. denied 479 So.2d 117. Moreover, the multiple step inference offered is not a "clear and necessary implication" of authority over wheeling arising from the provisions of Section 366.05(9). See City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). The correct interpretation of Section 366.05(9) is that found in FPL's Initial Brief at page 17 (see also pp. 13-14) -the Legislature's express mention and grant of one power (regulating purchases) implies the exclusion of other authority not mentioned (regulating wheeling).

The Industrial Cogenerators' other argument interpreting Section 366.05(9), that the grant of authority to the Commission to adopt "guidelines relating to purchases" is an express grant of authority to the Commission to set the terms and conditions for the interstate wheeling of QF power (ICG Br. 24), hardly deserves rebuttal. It is best addressed by referring to one of the cases cited by the Industrial Cogenerators. The argument defies and does violence to the plain meaning of the statute. Such a construction is clearly improper. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982). Trying as hard as they might, the Industrial Cogenerators cannot make "purchase" mean "wheeling."

SECTION 366.04(3), FLORIDA STATUTES DOES NOT EMPOWER THE COMMISSION TO ESTABLISH THE TERMS AND CONDITIONS FOR THE INTERSTATE WHEELING OF QF POWER BY PUBLIC UTILITIES.

Although the Commission asserts several times in its Answer Brief that the power to order the wheeling of QF power is a power included in the Commission's jurisdiction under Section 366.04(3), Florida Statutes over the planning, development and maintenance of a coordinated grid, the Commission never attempts to explain this relationship. By discussing Section 366.04(3) always in conjunction with Section 366.055(3) and indiscriminately mixing the language and the purposes of the two sections, the Commission attempts to suggest to the Court that Section 366.04(3) somehow addresses wheeling. It does not.

Section 366.04(3), Florida Statutes gives the Commission jurisdiction over "the planning, development, and maintenance of a coordinated electric power grid...." It is a grant of authority to see that a statewide transmission system is created (i.e. planned and developed) and maintained. Section 366.04(3) says nothing about what jurisdiction the Commission has in ordering the use of the transmission system. That jurisdiction is addressed separately in Section 366.055(3), Florida Statutes. The suggestion that Section 366.04(3) is a general grant of authority to order wheeling (and therefore can reasonably be construed as implied authority to set the terms and conditions of wheeling) does not comport with the plain language of the statute.

The Industrial Cogenerators take an entirely different approach in construing Section 366.04(3). They seize on one of the purposes stated for the Commission's jurisdiction over the creation of the grid - the avoidance

of further uneconomic duplication of utility facilities. Putting aside the tenuous and improbable relationship postulated and the convoluted logic necessary to argue that setting the terms and conditions for the wheeling of QF power is essential to avoiding the duplication of generating facilities, it is important to focus on the difference between the avoidance of duplicative generating units intended in Section 366.04(3) and the avoidance of generating units contemplated through cogeneration.

The establishment of a coordinated statewide grid allows the generating reserves of each public utility, municipality and cooperative to be available to meet the power needs of all other such entities. Without the grid, units which otherwise could have been used to meet other entities' loads could not be used because of transmission (grid) restrictions. By creating a grid, the entities comprising the grid can take advantage of the diversity of the loads on their individual systems and employ reserves of other interconnected entities when their own reserves are low or depleted and avoid having to build generating units duplicative of units otherwise available.

This avoidance of duplicating generating units under Section 366.04(3) is not the same avoidance of generating units accomplished through cogeneration. Cogeneration does not avoid "duplicative" units necessary only in absence of a grid; cogeneration avoids generating units which are needed even with a statewide grid. When a duplicative utility generating unit is avoided under Section 366.04(3), there is an economic advantage to customers; however, there is no economic advantage to customers when a utility generating unit is avoided through cogeneration, because the utility pays to the cogenerator a price equivalent to its avoided cost - what it

would have cost the utility to build and operate the plant anyway. The ICGs' argument fails because it tries to fit into the context of Section 366.04(3) something not envisioned - cogeneration.

The Commission's argument about avoiding QFs having to build duplicative transmission lines, an argument seemingly based on Section 366.04(3) but which contains no citation (PSC Br. 12, 13), fails to consider the historical context and purpose of Section 366.04(3), disregards the record and ignores the Commission's own rules. First, Section 366.04(3) was passed to avoid the uneconomic duplication of facilities by public utilities, municipalities and cooperatives. Those were the entities whose transmission facilities would comprise the grid. They were and are the only entities serving retail customers; it was the duplication of their facilities which resulted in the economic waste passed on to customers. There was no legislative expression of concern about cogenerators uneconomically duplicating transmission facilities. Second, the suggestion in the Commission's brief that absent the Commission ordering wheeling and setting its terms and conditions QFs will become captive, is not supported in the record.[13/] The Commission's own experience from 1983 through 1987 under Rule 25-17.835 and the original Rule 25-17.088, which required wheeling without setting terms, is also inconsistent with this argument. To

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13/ Remember, the rulemaking proceeding was initiated with the Commission's rule recognizing that the FERC had the jurisdiction to set the rates, terms and conditions for interstate wheeling. FPL did not ask, and the Commission originally did not propose, to change that. No evidence was offered to show that absent the Commission establishing the terms and conditions for interstate wheeling, public utilities would impose onerous terms, wheeling would not be available, and a QF would be captive. Consequently, the Commission made no such finding, yet the change in the rule presupposes this essential (and entirely unsupported and erroneous) finding, as is evidenced by both Appellees' arguments to this effect.

suggest that FPL advances a statutory interpretation that will leave it with an anticompetitive monopoly over all QF power grossly disregards the facts and reflects a failure of the Commission to understand its own rules.[14/]

SECTION 366.055(3), FLORIDA STATUTES DOES NOT EMPOWER THE COMMISSION TO ESTABLISH THE TERMS AND CONDITIONS FOR THE WHEELING OF QF POWER BY PUBLIC UTILITIES.

Both Appellees argue that Section 366.055(3), Florida Statutes empowers the Commission to set the terms and conditions for the wheeling of QF power. The Commission treats the subsection as a broad grant of authority over wheeling, and the Industrial Cogenerators make a two pronged argument. They substitute the Commission's goal of the creation of a statewide cogeneration market for the stated legislative purpose of creating a reliable grid, and they argue the phrase "as part of the total energy supply of the entire grid" is specific authority over wheeling of cogenerated power. None of these arguments can withstand critical scrutiny.

Section 366.055(3) Must Be Read As An Integral Part Of Section 366.055

The purpose of Section 366.055 in its entirety is succinctly stated in

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[14/] See PSC Br. 3. First, not all QFs are in FPL's service area, so even if they were captive to their native utility, FPL would not be entitled to all QF power. Second, this argument ignores not only FPL's NRC licensing requirement to wheel but also its past conduct. Finally, even if a QF were captive, this would not be anticompetitive or harmful to the QF because under the Commission's cogeneration rules the same price, which is based on the highest justifiable basis, must be paid for QF capacity by all public utilities ("uniform statewide price"). See 83 F.P.S.C. 10:150, 163; Fla. Admin. Code Rule 25-17.083(3)(b). In fact, wheeling is disadvantageous to a QF because a QF must pay to wheel, and the QF suffers line losses.

subsection (1) - it is intended to make the reserves of all utilities available to assure grid reliability and integrity (avoid service interruptions). Subsections (2) and (3) explain how the reserves made available in subsection (1) are to get where they are needed to assure grid reliability. If necessary, the Commission can order utilities to sell their reserves to other utilities to avoid service interruptions.[15/] Also, if the utility selling the power is not contiguous to the utility where it is needed to assure grid reliability, the Commission can require a series of resale transactions (See Section 366.055(2)(a)) or the Commission can order the intermediate utility to wheel the power which it is requiring be sold. (See Section 366.055(2)(b), (3)).[16/]

When construing the Commission's limited authority over wheeling in Section 366.055(3), the subsection must be read as a part of the rest of the Section. Indeed, subsection (3) explicitly states it is to be read "subject to the provisions hereof." When subsection (3) is read as an integral part of Section 366.055, it is clear that the Commission's authority over wheeling is clearly defined and limited to: (1) the ordering or requiring of wheeling of (2) power produced by a utility and which the Commission has ordered to be sold (3) over a grid comprised of public utilities, municipalities and cooperatives and (4) to assure grid reliability and efficiency. By limiting the Commission's grant of authority over wheeling, the Legislature was withholding any broader exercise of authority over wheeling. See

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15/ Of course, this is a limited exception to the clearly articulated principle in Section 366.03, Florida Statutes that no public utility shall be required to furnish electricity for resale. As such, it should be construed narrowly.

16/ Note that if wheeling is required it is only part of the transaction. There is also a corrollary sale of power required by the Commission which necessitates the wheeling.

Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985).

Cogeneration Was Not Envisioned In Section 366.055.

The Appellees' attempts to fit cogeneration into Section 366.055 and the wheeling of QF power to create a statewide market for QF power into Section 366.055(3) are repugnant to the historical context and legislative history of Section 366.055, its plain meaning, and its purpose. Each defect is addressed in turn.

Throughout its arduous journey through the Legislature, the bills leading up to the Grid Bill never once mentioned cogeneration. There was no suggestion that cogenerated power was intended to be a part of the energy supply of the grid or subject to Commission regulation. In fact, at least the Senate Staff read the Grid Bill[17/] as being limited to power generated by utilities:

> The effect of this bill will be to require all utilities in Florida to begin planning a statewide electrical grid system. Such a system would create ties between all Florida utilities which, in the event of a power failure by one company, would enable other utility companies to generate sufficient power to make up for the power losses. (Emphasis added.)

Analysis of CS/HB 1543 by Staff of Senate Governmental Operations Committee, Florida State Archives. Certainly, there was no expression of intent to create a statewide market for cogenerated power.

It is not surprising cogeneration was not considered by the Legislature

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17/ Chapter 74-196, Laws of Florida, which created Section 366.055, Florida Statutes, is commonly known as the Grid Bill. It was originally introduced in 1973 as House Bill 1543. The versions of HB 1543 and its successors leading up to the Grid bill, at least those versions available at the State Archives, are included in the Appendix.

in adopting the Grid Bill. The primary purpose was to establish a reliable grid which would avoid the repeated service interruptions Florida had been suffering. To do this public utilities, cooperatives and municipalities, the only entities producing power which are mentioned in the Grid Bill, had to be forced to interconnect in an efficient grid. That was why the Commission jurisdiction was extended, in a limited fashion, over cooperatives and municipalities. See Section 366.04(2)(a), Florida Statutes; §1, Ch. 74-196, Laws of Fla. Cogeneration was not made subject to Commission jurisdiction. Nor was cogenerated power considered to be an energy reserve of a utility within the meaning of Section 366.055(1). It would be five years before public utilities were required under PURPA to purchase power from cogenerators or to interconnect so that cogenerators could run in parallel with utilities. It would be over seven years before the Florida Legislature addressed cogeneration. See §1, Ch. 81-131, Laws of Fla. When the Legislature did acknowledge cogeneration, its grant of authority to the Commission was limited only to the purchase of cogenerated power by public utilities. Thus, the Appellees' suggestion that the Grid Bill was intended to address cogenerated power in any fashion ignores not only the history preceding and subsequent to passage of the Grid Bill but also its legislative history.

This Court has previously rejected an attempt to ignore the historical context in which an act granting the Commission authority was passed. See Radio Telephone Communications v. Southeastern Telephone Co., 170 So.2d 577 (Fla. 1964). There, the Court was asked to apply the literal words of a statute, but the Court refused saying it could not give the Commission authority to regulate activity not envisioned when the law was passed.

Here, the Appellees ask the Court not to apply the literal words of the statute but to recognize power by implication, even though it is clear such authority was not intended by the Legislature. In this case, as in the Radio Telephone Communications case, the Court should reject the Commission's argument interpreting its governing statute and not afford the Commission's rule amendment any presumption of validity, for the Commission clearly seeks to exercise jurisdiction it has not been given.

The plain meaning of Section 366.055 evidences that cogenerated power was not intended to be addressed. Subsection (1) addresses the power to be used (through sales and wheeling) to maintain grid reliability - energy reserves of utilities. Cogenerated power is not a utility energy reserve: QFs do not have to sell power to utilities; as-available QF energy is sold at the QF's discretion as to times, amounts and receiving utility; and even "firm" QF power is not required to be available when needed and cannot be dispatched by the utility. Moreover, under the Commission's QF power purchasing scheme, when QF power is being purchased, it does not constitute a "reserve" as it is used simultaneously on the system. It is not a reserve or extra source of available power which can be sent to another utility which lacks sufficient reserves to meet load requirements. Subsection (2), to which subsection (3) is intended to be read "subject to," clearly states that the power sold and wheeled to preserve grid reliability is power produced by a utility.[18/] Wheeling under subsection (3) presumes the

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18/ Regardless of whether one reads the term "utility" to mean a public utility as argued by FPL or inclusive of public utilities, municipalities and cooperatives as argued by the ICGs, the term does not mean or include QFs. In support of FPL's argument that the term utility in Section 366.055(3) refers to "public utilities," see Fla. Admin. Code Rule 25-6.003(12) where the Commission has defined the terms interchangeably.

Commission has ordered a corrollary power sale under subsections (1) and (2)(a) which requires wheeling, yet neither the Commission nor utilities can order cogenerators to sell to utilities. The ICGs attempt to read the phrase "as part of the total energy supply of the entire grid" as an explicit reference to cogenerated power ignores the plain meaning of the rest of the statute.

Perhaps the most telling failure of the Appellees' interpretation of Section 366.055 is their complete failure to recognize that the Commission's attempt to require and set the terms and conditions for the wheeling of QF power frustrates rather than facilitates the purpose of the statute. The purpose of the statute is to maintain a reliable and efficient grid to prevent service interruptions. The Appellees acknowledge that the purpose of Rule 25-17.088 is to create a statewide cogeneration market. See ICG Br. 16. Under the Commission's scheme of requiring utilities to purchase QF power and setting the terms and conditions, including the price, of purchases, the QFs dictate when and where public utilities will purchase, and thus, where power will be wheeled over the grid. Of course, where and when a QF sends power over the grid at its disposal is an economic decision unrelated to grid reliability and efficiency. If the need arises for the grid to move power for reliability purposes (as it does all the time), it will only be coincidental if the place where the power is needed coincides with the location where the power has the highest economic value to the QF. The most likely result of tying up the grid to create a statewide market for QF power (a market not needed because the Commission has already set a uniform statewide price) is that the grid will either be unavailable for reliability purposes or additional transmission facilities will have to be built. In short, the

Commission's attempt to create a statewide QF market through wheeling will frustrate both the purposes the Appellees ascribe to the statute they argue gives the Commission authority over wheeling.

What the Court really has before it is not a rule amendment which relates to or attempts to effectuate the legislative purposes of the Grid Bill, but a rule amendment designed solely to effectuate a Commission goal - the creation of an unnecessary statewide QF market.[19/] To allow the Appellees to substitute Commission policy for legislative purpose would be tantamount to allowing the Commission to legislate, something it cannot do.

The Authority To Set The Terms And Conditions For Wheeling Is Not Necessary To Implement The Authority To Order Wheeling.

Both Appellees admit that if the Commission has authority under the Grid Bill to set the terms and conditions for the interstate wheeling of QF power it is implied authority necessary and incident to the Commission's authority to order wheeling. However, it is clear by looking no farther than Section 366.055 itself that the power to set the terms and conditions for a power transaction is not necessary or incident to the power to order the transaction. Moreover, this conclusion is also evidenced by the Commission's prior conduct.

While it is clear that Section 366.055(1), Florida Statutes authorizes the Commission to order, in limited circumstances, the sale of the power

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19/ The Commission's own conduct evidences that establishing the terms and conditions for wheeling is not essential to maintaining an efficient grid. Most wheeling transactions on the grid involve power other than QF power, yet the Commission has never asserted jurisdiction over the terms and conditions for the wheeling on the grid of power produced by entities other than QFs. This alone shows the rule amendment was adopted not to assure an efficient grid but to create a statewide market for QF power.

produced by utilities, it is equally clear that the Legislature in subsection (2) of Section 366.055 withheld from the Commission the power to set the terms and conditions for such sales. The Legislature clearly recognized that the jurisdiction to set terms and conditions for sales need not rest with the Commission, even though it had given the Commission the right to order the sales. Thus, even the Legislature recognizes that it is not necessary for the Commission to be able to set the terms and conditions for transactions when it gives the Commission authority to order transactions.

The Commission also recognizes that the power to order wheeling does not need to be supplemented by setting the terms and conditions for wheeling. Clearly Section 366.055(3) empowers the Commission to order wheeling of power produced by a utility, and such wheeling transactions are common, yet the Commission has never asserted jurisdiction over or tried to set the terms and conditions for the wheeling of power produced by a utility. In addition, Florida Administrative Code Rule 25-17.835 and the original version of Rule 25-17.088, which only required the wheeling of QF power and did not attempt to set the terms and conditions for the transaction, were in effect over three years without a single instance of a utility imposing onerous terms. The Commission's own experience and practice belies the "necessity" it advances for it to be able to establish the terms and conditions for wheeling transactions.

STANDARD OF REVIEW

The Appellees advance two distinct standards for review. While FPL agrees that each Appellee has identified applicable legal principles, neither Appellee properly applies the principles, and when the applicable legal

precepts are properly applied, the amendment to Rule 25-17.088 must fail as an attempt of the Commission to act beyond its grant of authority.

The Industrial Cogenerators argue that the only question for review is whether the amendment to Rule 25-17.088 reasonably relates to the purposes of the statutes the Commission purports to be implementing, citing General Telephone Company of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984). FPL agrees that is the applicable standard of review but suggests it is misapplied by the ICGs. As previously pointed out, in almost every instance the ICGs treat Commission findings or statements of policy as surrogates for the purposes of legislation. Such an exercise makes a mockery of the standard and assures affirmance unless the Commission adopts a rule inconsistent with its own findings or policy. The ICGs also apply the standard as if it does not matter whether the exercise of power by the Commission has been granted by the Legislature, so long as they can somehow "relate" the Commission's action to an enabling statute. FPL does not read the General Telephone case in this fashion. General Telephone has not reversed the long line of cases which recognize that the Commission is of statutory creation and can exercise only those powers conveyed by statute, that only those powers clearly necessary and intended will be implied, and that any reasonable doubt as to the lawful exercise of power by the Commission should be resolved against the Commission. Those questions are subsumed in the standard articulated in General Telephone, and if FPL shows that the Commission lacks explicit statutory authority in the statutes cited and there is no reasonable basis to conclude that the Commission has implied power to set the terms and conditions of wheeling,

the standard of General Telephone is met.[20/]

The Commission argues that the standard of review is that the Commission's interpretation of the statutes it administers is entitled to great weight and its actions are clothed with a presumption of validity. While both legal principles are applicable, these presumptions can be, and have been, overcome.

As has been discussed previously, neither presumption can survive when it is shown that the Legislature did not envision the jurisdiction the Commission is asserting. See Radio Telephone Communications. It has been shown that the Legislature did not intend to address cogeneration when it passed the Grid Bill. When it ultimately addressed cogeneration seven years later, it did so in a limited fashion giving the Commission authority only over the "purchase" of QF power. In light of the historical context of the Grid Bill and the conduct of the Legislature in limiting the Commission's authority over cogeneration in Chapter 81-131, Laws of Florida, there is a most reasonable doubt as to whether the Commission has the authority to set the terms and conditions for the wheeling of QF power; consequently, the further exercise of that power should be arrested. Id.

Respectfully submitted,

STEEL HECTOR & DAVIS

By: Charles A. Guyton

20/ That these questions are subsumed in the question of whether the rule reasonably relates to the enabling legislation is best evidenced by looking to the case relied upon by the Supreme Court when it adopted this standard of review. See Agrico Chemical Co. v. State Dept. of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1978), cert. denied, 376 So.2d 74 (Fla. 1979).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Power & Light Company's Reply Brief has been served by first class United States Mail upon the following, on this the 15th day of June, 1987:

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