IN THE SUPREME COURT OF FLORIDA

C. F. Industries, Inc., Et Al., Appellant v. Katie Nichols, Et Al., Appellees	)	CASE NO. 70,196

ON APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA POWER & LIGHT COMPANY'S ANSWER BRIEF

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9-27-88 - Mr. Guyton - has no objections to Justice Ehrlich sitting on this case - no obj. to O.A. 10-4-88 Sara

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STATEMENT OF THE CASE AND FACTS

The matter before the Court is an appeal of Order No. 17159 issued by the Florida Public Service Commission ("Commission") on February 6, 1987. Order No. 17159 was issued after the conclusion of an adjudicatory proceeding held by the Commission in Docket No. 850673-EU. In Order No. 17159 the Commission considered and approved the appropriate rate design for rates charged by electric utilities for service to self-generating customers and ordered the electric utilities to file compliance tariffs. Therefore, this Court has jurisdiction in this matter. Art. V, § 3(b)(2), Fla. Const; § 366.10, Fla. Stat. (1987); Fla. R. App. P. 9.030(a)(1)(B)(ii). Florida Power & Light Company ("FPL") was an active party before the Commission and is participating in this appeal as an appellee in support of the Commission and Order No. 17159.

HISTORICAL BACKGROUND

The genesis of this proceeding may be traced back to Congress' adoption of the Public Utilities Regulatory Policies Act of 1978 ("PURPA").[1/] Section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), required the Federal Energy Regulatory Commission ("FERC") to promulgate within one year rules requiring electric utilities (1) to sell electric energy to qualifying facilities ("QFs")[2/] and (2) to purchase electric energy from QFs. Congress also

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1/ Public Law No. 95-617, 92 Stat. 3117 (1978) (codified in scattered sections of 16 U.S.C.).

2/ Actually, the phrase used in PURPA was "qualifying cogeneration facilities and qualifying small power production facilities." Section 210(c), PURPA, 16 U.S.C. § 824a-3(c). The FERC actually coined the phrase

required that under the FERC's rules the rates for sale by electric utilities to QFs should be "just and reasonable to the electric consumers of the utility and in the public interest" and should "not discriminate against" QFs. Section 210(c), PURPA, 16 U.S.C. § 824a-3(c). Congress further provided that within one year of the FERC promulgating rules, each state regulatory authority with ratemaking jurisdiction was to begin implementing the FERC's rules for each electric utility over which it had jurisdiction. Section 210(f), PURPA, 16 U.S.C. § 824a-3(f).

Pursuant to the mandate of Congress, the FERC promulgated rules implementing Section 210 of PURPA.[3/] Those rules are codified at 18 C.F.R. §§ 292.301 to 292.403. Of particular import to this appeal are 18 C.F.R. §§ 292.303(b), 292.305 and 292.401(a).[4/] The FERC implemented its mandate under PURPA to require utilities to sell power to QFs by adopting 18 C.F.R.

Footnote 2/ Continued
"qualifying facility" when it adopted rules implementing PURPA. See 18 C.F.R. § 292.101(b)(1). Under the FERC's regulations, qualifying facilities include small power production facilities meeting specified criteria for maximum size, fuel use and ownership and cogeneration facilities meeting applicable operating and efficiency standards and ownership criteria. See 18 C.F.R. § 292.303. The Florida Commission had adopted the FERC's definition of "qualifying facility", but it also includes small power producers and cogenerators that fail to meet the FERC's qualifying criteria but which otherwise meet the Commission's objectives of economically reducing Florida's dependence on oil and the economic deferral of utility power plant expenditures and which have petitioned the Commission for qualifying status. Fla. Admin. Code Rule 25-17.080(1).

3/ Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utilities Regulatory Policies Act of 1978, 45 Fed. Reg. 12214, FERC Statutes and Regulations ¶ 30,128 (February 25, 1980).

4/ See Appendix A.

§§ 292.303(b), 292.305(b). This latter rule provided:

> (b) Additional Services to be Provided to Qualifying Facilities. (1) Upon request of a qualifying facility, each electric utility shall provide:
> (i) Supplementary power;
> (ii) Back-up power;
> (iii) Maintenance power; and
> (iv) Interruptible power.

18 C.F.R. § 292.305(b)(1). The FERC's requirements regarding the rates for sales by utilities to QFs are found at 18 C.F.R. § 292.305(a),(c). The responsibility of state regulatory authorities in implementing these regulations is found at 18 C.F.R. § 292.401(a). Under this latter rule state regulatory authorities were given one year to commence implementation of the FERC's rules. Implementation could consist of rule adoptions, case by case dispute resolution between QFs and electric utilities or "any such other action reasonably designed to implement" the rules. Id.

Consistent with the requirement of 18 C.F.R. § 292.401(a), the Commission initiated a rulemaking proceeding in January 1981 to consider rules regarding utilities' obligations to QFs, FPSC Docket No. 780235-EU(RA). That rulemaking proceeding resulted in the adoption of a set of extensive rules, Florida Administrative Code Rules 25-17.80 to 25-17.89[5/] (commonly referred to as the Commission's "cogeneration rules").

5/ 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) (Order No. 9970). As this Court may recall, the Commission's authority to adopt these rules as well as the Commission's denial of a Section 120.57 type hearing in this proceeding was appealed to this Court by FPL. See Florida Power & Light v. Florida Public Service Commission, 8 F.L.W. 116 (Fla. March 17, 1983) (opinion withdrawn and appeal voluntarily dismissed).

Subsequently, in September, 1983 the Commission substantially amended its cogeneration rules.[6/] In this wholesale amendment the Commission modified two rules of import to this proceeding: Florida Administrative Code Rules 25-17.082 and 25-17.084.[7/] Section (3) of Rule 25-17.082 allows a QF to elect to make either simultaneous purchases from and sales to an electric utility or net sales to an electric utility. Under the net sales option a QF uses its own electricity and sells its excess to the utility, and it may look to the utility to provide electricity when the QF's generator is experiencing an outage. In regard to the net sales option, Section (3) of Rule 25-17.082 provides:

> For those hours during which a qualifying facility is a net purchaser, purchases from the utility shall be billed at the utility's retail rate schedule under which the qualifying facility would receive service as a non-generating customer of the utility.

The other rule applicable to this proceeding and which was adopted by the Commission in September, 1983 was Florida Administrative Code Rule 25-17.084:

> **25-17.084 The Utility's Obligation to Sell.** Upon Compliance with Rule 25-17.087, each utility shall sell energy to qualifying facilities at rates which are just, reasonable and non-discriminatory.

No specific mention of supplementary, backup or maintenance power was made in the Commission's order or in the rules adopted.

6/ In re: Amendment of Rules 25-17.80 through 25-17.89 relation to cogeneration, 83 F.P.S.C. 9:14 (1983) (Order No. 12443).

7/ See Appendix B.

Shortly after the extensive amendment of its cogeneration rules, the Commission initiated a rule implementation proceeding, FPSC Docket No. 830377-EU. However, this proceeding focused primarily on the utilities' obligation to purchase QF power. It ultimately resulted in an order requiring utilities to submit tariffs for the purchase of QF power.[8/] The Commission's final order in the proceeding did not address sales by utilities to QFs.

DOCKET NO. 850673-EU

In 1985 the Commission opened a docket to investigate standby rates[9/] for QFs, FPSC Docket No. 850673-EU. It was this docket in which the Commission issued Order No. 17159, the order appealed by the Industrial Cogenerators.[10/] The reasons given by the Commission for initiating this generic investigation of standby rates were that the Commission was (1)

8/ In re: Proceedings to Implement Cogeneration Rules, 84 F.P.S.C. 5:4 (1984) (Order No. 13247).

9/ The term "standby" is used in this brief as it was used by the Commission in Order No. 17159. " 'Standby electric service' refers to backup or maintenance service or both." Order No. 17159 at 3. It does not include supplemental service. Backup service refers to electricity or capacity provided by a utility which replaces the customer's generation during a self-generating customer's unscheduled or forced outage. Maintenance service refers to electricity or capacity provided by a utility during a self-generating customer's scheduled outage which replaces the customer's generation.

10/ Before the Commission a group of ten industrial self-generating customers referred to as the "Industrial Cogenerators" intervened and participated extensively. R. Vol. I at 18. It was nine of these ten firms which filed the Notice of Administrative Appeal initiating this proceeding. R. Vol. III at 470. Subsequent to the filing of the Notice of Administrative Appeal six of the nine initial Appellants voluntarily dismissed their appeals, but three Appellants remain. The remaining Appellants are members of the group known as the Industrial Cogenerators, and for ease of reference they are referred to in that fashion throughout this Brief.

"responding to the concerns of cogenerators and other standby customers" and (2) "mindful of the PURPA requirements."[11/] In understanding how and why the Commission proceeded as it did in Docket No. 850673-EU, it is important to keep in mind that the Commission was responding to the concerns of cogenerators and was implementing more fully the FERC's regulations under PURPA.

During the early stages of the proceeding, the Commission, through its Staff, held a series of workshops (February 12, March 26, 27, April 16 and May 21 of 1986) in which all interested parties were asked to prepare standby tariffs reflecting their positions. Order No. 16011 at 1. The earlier workshops had been employed as part of the Commission's initial design to proceed to rulemaking to adopt a standby rates rule sometime after hearings scheduled for late August, 1986. Id. Under that approach standby tariffs would not have even been filed for approval until late 1986. Id. Such a delay would have worked to the disadvantage of cogenerators. However, after reviewing the tariffs filed by all parties at the workshops, the Commission determined that "the parties [were] far enough along for the Commission to proceed directly to a tariff submission and review process, using the August hearing dates already reserved." Id. Consequently, the Commission ordered Florida Power Corporation ("FPC"), Tampa Electric Company ("TECO"), Gulf Power Company ("Gulf") and FPL to file by June 16, 1986 proposed standby tariffs, for illustrative purposes only, to be considered by the Commission at an evidentiary hearing in August. Id.

11/ R. Vol. I at 9 (hereinafter, Order No. 16011).

The Commission specifically addressed its rationale for refocusing the nature of the proceeding:

> This would achieve the goal of having standby rates in effect by the end of 1986, earlier than under the former schedule. Additionally, the specific determinations to be made by the Commission in this process constitute policy that is not "ripe" or appropriate for rulemaking at this time. The Commission has not refined its policies regarding standby rates to such a consistent application that rulemaking is appropriate.

Id. By refocusing the proceeding and accelerating the time at which standby tariffs would be filed, the Commission perceived it was "responding to the concerns of cogenerators" and was acting to implement more fully the FERC's regulation regarding standby services.

The Participation Of The Industrial Cogenerators.

The Industrial Cogenerators actively participated throughout Docket No. 850673-EU. They attended all the workshops, formally intervened, filed a prehearing statement, retained consultants, presented evidence, cross-examined witnesses, submitted a brief and requested reconsideration.

Despite their extensive involvement before the Commission, the Industrial Cogenerators never raised the issues before the Commission which they now ask this Court to address. In fact, they took positions before the Commission which were inconsistent with the arguments they are now making to the Court.

The Industrial Cogenerators' Prehearing Participation.

In the workshops which predated the Commission's refocusing of Docket No. 850673-EU, the Industrial Cogenerators advocated the adoption of a standby rate separate from the rate at which they would receive service if they had no generating units. In fact, they proposed a rate for standby service that included minimum charges. They made no suggestion to the Commission that the approval of such a rate would be inconsistent with Rule 25-17.082(3), that the rule would need to be amended before the Commission could adopt a separate standby rate or that their proposed rate design would be discriminatory.

Although they had participated in the earlier workshops, the Industrial Cogenerators formally petitioned to intervene (R. Vol. I at 18) after the Commission had refocused Docket No. 850673-EU (R. Vol. I at 9) and indicated its intent to hold an adjudicatory proceeding. In their petition to intervene the Industrial Cogenerators did not raise the issue that adoption of a separate standby rate would contravene Rule 25-17.082(3), nor did they petition for a rulemaking to amend Rule 25-17.082(3). R. Vol. I at 18-21.

As is its typical practice, the Commission issued an Order On Prehearing Procedure in this docket, Order No. 16341. R. Vol. I at 14. In that Order the Commission required the parties to file prehearing statements which were to set forth, among other things:

> (d) a statement of each question of fact the party considers at issue and which of the party's witnesses will address the issue;

(e) a statement of each question of law the party considers at issue;

(f) a statement of each policy question the party considers at issue and which of the party's witnesses will address the issue;

(g) a statement of the party's position on each issue identified pursuant to paragraphs (d), (e) and (f) and the appropriate witness.

Id. The Order also specified that "[a]ny issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown." R. Vol. I at 15.

The Industrial Cogenerators filed a prehearing statement (R. Vol. I at 51-62) as well as a supplement to their prehearing statement (R. Vol. I at 131-138) and appeared at and participated in the prehearing conference (R. Vol. IV at 2, 4). At no time prior to the issuance of the Prehearing Order, Order No. 16483, did the Industrial Cogenerators raise the issue that the Commission's approval of a separate standby rate would be inconsistent with Rule 25-17.082(3) or that ratchet provisions in the separate standby rate would be discriminatory.

More importantly, in their prehearing statement the Industrial Cogenerators took the position that a separate rate for standby service (backup and maintenance service) was warranted:

> Issue 1: Are the known or expected load characteristics of self-generating customers sufficiently different from those of the utility's full requirement customers to justify having different rates for their electric service?
>
> Industrial Cogenerator Response: Yes, as to backup and maintenance service. No as to supplemental.

R. Vol. I at 53. They also took the position that minimum reservation

charges[12/] were an appropriate feature for this standby service rate design:

> Issue 2: How should these costs [for production and bulk transmission plant to serve backup and maintenance loads] be recovered?
>
> Industrial Cogenerator Response: The charge for firm backup service should be in two parts. The first part would be an ongoing charge per kilowatt of capacity for which backup is desired.... The second part would amount to daily proration which would impose additional charges on those facilities that actually experience equivalent forced outage rates greater than the rate used to establish the minimum outgoing [sic] charge.
>
> Witness: Brubaker, Ross.
>
> Issue 3: How should the costs of dedicated local facilities be recovered?
>
> Industrial Cogenerator Response: A tariff charge to recover the local T&D [Transmission & Distribution] costs should be an ongoing demand charge applied to the specified backup demand. As an option, the standby customer should have an opportunity to purchase such facilities from the utility.
>
> Witness: Brubaker, Ross. (emphasis partially added)

R. Vol. I at 56.

The Industrial Cogenerators did not modify these positions in their supplement to their prehearing statement (R. Vol. I at 131-138) or at the

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12/ In their Initial Brief the Industrial Cogenerators have referred to minimum charges as "ratchets," but in their Argument minimum charges are not attacked, while the separate ratchet provisions are attacked. Initial Brief of Appellants at 5, 14-16. In their prehearing statement the Industrial Cogenerators referred to these minimum reservation charges as "an ongoing charge per kilowatt of capacity for which backup is desired," "the minimum outgoing [sic] charge" or "an ongoing demand charge applied to the specified backup demand." Given the limited attack on the standby rate structure in the Initial Brief (limited solely to the use of ratchets), the Industrial Cogenerators should not be allowed in their Reply Brief to expand their argument to other aspects of the standby rate structure.

prehearing conference. R. Vol. IV. Consequently, the Prehearing Order, Order No. 16483, reflects these same positions as well as an absence of either of the issues now raised by the Industrial Cogenerators on appeal. R. Vol. I at 82-130.

The Positions Of The Industrial Cogenerators At The Hearing.

At the hearing the Industrial Cogenerators did not raise the issue that approval of a standby rate different than the retail rate under which the self-generating customer would receive service as a non-generating customer (hereinafter "the otherwise applicable retail rate") would be inconsistent with Rule 25-17.082(3). Instead, their witnesses advocated the adoption of separate standby rates.[13/] R. Vol. V at 16, 17, 24, 57, 60; R. Vol. VIII, Ex. 2, 3.

The position of the Industrial Cogenerators' expert witnesses was that standby service had distinctly different load and cost-causative characteristics; therefore, the application of the otherwise applicable retail rate would be inappropriate. In his summary Mr. Brubaker, one of the Industrial Cogenerators' two expert witnesses, specifically addressed this point:

13/ The separate standby rates proposed by the Industrial Cogenerators contained a provision which would make them optionally available. R. Vol. V at 70-72 (Ross). However, whether the separate standby rate was optional or mandatory does not affect the question of whether the Commission could approve a separate rate in light of Rule 25-17.082(3). An optional rate would be just as different from the "retail rate schedule under which the qualifying facility would receive service as a non-generating customer of the utility" as a mandatory rate would be.

> Among other things, my testimony addresses the need to separately identify and bill these customers for their supplementary power, backup power, and maintenance power. These different kinds of service have distinctly different load characteristics, and as a result, impose different costs upon the utility's system. And in our view, failure to identify and bill these services separately will result in inappropriate rates.

R. Vol. V at 17. He proceeded to testify that supplementary service could be provided at the otherwise applicable retail rate (R. Vol. V at 26), but consistent with this summary he proposed an entirely different pricing scheme for backup and maintenance service (R. Vol. V at 28-49).

Mr. Brubaker's testimony regarding the distinctive cost and load characteristics of backup service and the need to reflect these cost characteristics in the rate charged for backup service is instructive. Mr. Brubaker explained that there were three types of costs incurred by an electric utility in supplying backup service on a firm basis: generation, bulk power transmission, and local transmission and distribution. R. Vol. V at 28. As to cost incurrence in providing service, he testified that "[c]osts in each of these functions are incurred (but to a different extent) in supplying service to customers who take all of their power requirements from the utility, as well as in supplying customers who serve a portion of their own load [standby customers]...." R. Vol. V at 29. He went on to explain the extent to which cost incurrence for standby service was different, ultimately developing the conclusion that the cost to the utility for providing standby service was less than the cost to the utility of providing regular service. R. Vol. V at 29-30. Mr. Brubaker then testified as to how these cost differences could be recognized in the rate charged for standby service. R. Vol. V at 30-46. In beginning that discussion Mr. Brubaker specifically distinguished the load

characteristics of backup service from regular service:

> First, we have established that the back-up service is required only when the non-utility owned facilities are out of service as a result of a forced outage — which means that the characteristics of the load to be served is different from the characteristic of a load which must be served on a continuous basis.

R. Vol. V at 31.

After explaining the distinctive load and cost characteristics for backup service, Mr. Brubaker advanced a distinctive rate design he thought was appropriate for backup service. Mr. Brubaker recommended that the same energy and customer charges be applied for backup service as were applied for non-generating customers under the otherwise applicable retail rate (R. Vol. V at 45-46, 48), but that the demand portion of the charge for backup service should be designed completely differently from the demand charge in the otherwise applicable retail rate (R. Vol. V at 39-45). The demand component of Mr. Brubaker's firm backup service rate contained three elements. The first two elements, a minimum reservation charge and a daily demand charge, were alternative charges to recover the generation and bulk transmission costs associated with standby service. R. Vol. V at 39-40. The third element, a minimum reservation charge for local transmission and distribution costs, completed Mr. Brubaker's unique design of the demand component for his proposed firm backup rate. R. Vol. V at 43-45.

Mr. Brubaker specifically addressed why the demand charge in the otherwise applicable retail rate was not appropriate for standby service:

> Q. COULD NOT THIS ENTIRE PROCESS BE SIMPLIFIED BY APPLYING THE REGULAR FIRM RATE DEMAND CHARGE TO THE BACK-

UP SERVICE ACTUALLY SUPPLIED TO A CUSTOMER IN A GIVEN MONTH?

A. That is obviously a simple approach — however even more so than it is simple — it is clearly wrong. Customers who normally supply their load with non-utility owned generating resources do not require the same degree of service from the utility as do customers who require the utility to supply their entire load. The foregoing discussion of the random nature of forced outages makes it clear that the cost to the utility of backing-up these facilities is substantially less than the cost of supplying loads on a continuous basis. (emphasis added)

R. Vol. V at 40, 41.

Mr. Brubaker also testified during cross-examination that the application of the same rates for different services would constitute unjust discrimination if the cost of service was different for the different services:

Q. If the intent of the law were to allow the use of - to require on-site electricity, electricity generated by cogenerators, to be sold back to utilities, would there be any purpose in requiring utilities to offer standby services?

A. If the intent were to only allow simultaneous buy/sell transaction?

Q. Correct.

A. Then there would be no need for back-up and maintenance tariffs.

Q. In your opinion would it be an unjust discrimination not to allow different rates in the event that cost of services were different for those different services?

A. Yeah, if there are cost of service differences, they should be reflected in the rates.

R. Vol. VI at 213. Of course, Mr. Brubaker had already clearly established that the cost of service was different for standby and regular services.

The import of Mr. Brubaker's testimony was clear. Customers taking standby service had distinctive load and cost characteristics. The otherwise applicable retail rates were "clearly wrong" for standby service. Indeed, they may even be discriminatory. Therefore, he proposed a separate standby rate with a unique tariff design to reflect the load and cost characteristics of standby service. At no time did Mr. Brubaker assert that approval of a separate standby rate designed as he suggested would contravene Rule 25-17.082(3).

The Industrial Cogenerators' expert witnesses also advocated that the Commission employ ratchet provisions in the separate standby tariff. As previously noted, Mr. Brubaker proposed a minimum monthly reservation charge for the recovery of production and bulk transmission costs associated with providing standby service. R. Vol. V at 40-42. He also advocated minimum monthly local transmission and distribution charge. R. Vol. V at 43-45. In both instances these charges would not be applied to the customer's actual kilowatt ("kW") demand for the month but to a specified level of backup demand. R. Vol. V at 40, 44 (Brubaker). This specified level of backup demand was to be mutually agreed upon by the customer and the utility prior to the provision of service. R. Vol. III, Ex. 2,3 at 2 of 6. In his testimony Mr. Ross, the Industrial Cogenerators' other expert witness, recognized that in some months a standby customer's actual level of backup demand might exceed the specified level of backup demand. R. Vol. V at 77-78. His proposal to address this phenomenon was to increase the specified level of backup demand to the higher actual level of backup demand for the month in which the excess occurred and for the ensuing 11 months. Id. This proposal was a ratchet

provision specifically advocated by the Industrial Cogenerators' own witness. The ratchet provisions were drafted into the proposed backup tariffs sponsored by Messrs. Brubaker and Ross (R. Vol. VIII, Ex. 2, 3), as explicitly acknowledged by Mr. Brubaker: "So the ratchet, if you will, will apply to that portion of the load that is backup...." R. Vol. V at 18-19.

In advocating their own separate standby tariffs with ratchet provisions, Messrs. Brubaker and Ross were aware that the scope of the proceeding was limited to the proper design of standby tariffs and that such tariffs could not be discriminatory. Mr. Brubaker testified in regard to the limited nature of the proceeding:

> At this point, it is important to keep in mind that the task at hand is to develop appropriate rates, terms and conditions applicable to back-up and maintenance service. ... Nor is the task at hand to develop new concepts for the rates, terms and conditions contained in the utility's tariff books that are applicable to customers without generating facilities.

R. Vol. V at 28. Mr. Ross testified that a discriminatory charge for standby service would be "contrary to the spirit of PURPA, the FERC Rules Implementing Section 210 of PURPA and sound rate-making principles." R. Vol. VII at 882. The Industrial Cogenerators' witnesses were clearly aware that the rates approved for standby service could not be discriminatory, and with full knowledge of this requirement, they advocated separate standby rates which included ratchet provisions.

The Industrial Cogenerators' Post Hearing Conduct

Subsequent to the evidentiary proceeding the Industrial Cogenerators

filed a brief addressing the issues before the Commission. R. Vol. II at 276. Once again, the Industrial Cogenerators did not raise either of the issues they now press upon the Court. However, they did continue to maintain positions which are inconsistent with the arguments they now make.

Despite their witnesses' testimony that the otherwise applicable retail rates were "clearly wrong" when applied to standby service and that they might even be discriminatory, the Industrial Cogenerators still urged the Commission to approve optional standby rates which would allow self-generating customers to take service under either the standby rate or the otherwise applicable retail rate:

> Accordingly, regardless of standby rates ultimately approved by this Commission, they must be optional -- at the QF's request. In the absence of such a request, QFs are to be served under the rate schedule which would otherwise be applicable to a similar non-generating customer (as currently provided in Commission Rule 25-17.81(3)(f) [sic], F.A.C.).

R. Vol. II at 154. The Industrial Cogenerators clearly interpreted Rule 25-17.082(3), the rule they now invoke as inviolate, as allowing a rate other than the otherwise applicable retail rate, if the QF requested it.

They also urged the Commission to adopt the standby rates proposed by their witnesses:

> Industrial Cogenerators urge the Commission to adopt the "standby" tariffs proposed by Witnesses Brubaker and Ross which have been identified as Exhibits 2 and 3 in this proceeding. They are consistent with the positions of Florida Power Corporation and Dade County and comply with the long-standing tradition of this Commission to develop rates based on the cost to serve.

R. Vol. II at 145. Of course, these were the very rates which contained

ratchet provisions. The Industrial Cogenerators advocated that these rates "be adopted without change." R. Vol. II at 179.

Order No. 17159

In its final order resolving the issues in the evidentiary proceeding, the Commission adopted a rate design for standby rates incorporating many of the Industrial Cogenerators' positions before the Commission, including the positions they now seek to challenge. Consistent with the Industrial Cogenerators' interpretation of Rule 25-17.082(3), the Commission approved a standby rate separate from the otherwise applicable retail rate; however, it made the rate mandatory rather than optional. Order No. 17159 at 4-6, 16-17. Consistent with the recommendation of the Industrial Cogenerators and their witnesses, the Commission adopted a rate design for the standby rate which included the same three elements in the demand component, with the two minimum monthly charges containing a ratchet provision. Order No. 17159 at 12-17, 21. The only difference in the Commission's ratchet provision was that it operated for 24 instead of 12 months. Order No. 17159 at 21.

Early on in Order No. 17159 the Commission juxtaposed its requirement in Rule 25-17.082(3) that QFs be billed "at the utility's retail rate schedule under which the qualifying facility would receive service as a non-generating customer" with the requirements of the FERC in 18 C.F.R. § 292.305(b). Order No. 17159 at 2-3. While it is unspoken on the face of the Order, the Commission clearly suggested through the juxtaposition of these rules that it was considering the extent to which it needed to implement further the FERC

rule. The answer to that question was not apparent on the face of the rules and depended to a large extent on what the evidence before the Commission showed regarding the load and cost characteristics of the various services.

The Commission acknowledged the importance of the record in introducing its discussion:

> A threshold issue was whether the known or expected load characteristics of self-generating customers were sufficiently different from those of the utilities' full requirements customers to justify having different rates.

Order No. 17159 at 4. The Commission then summarized each party's position on this issue, correctly noting that "the Industrial Cogenerators took the position that the expected load characteristics for backup and maintenance services would be sufficiently different from existing service classes and from each other to warrant different rates." Order No. 17159 at 5.

After addressing the parties' positions, the Commission made its finding:

> Based upon the record in this case, we believe and find that the expected load characteristics of self-generating customers are sufficiently different [from non-generating customers] to justify different rates for backup and maintenance service. This is so because backup and maintenance services are expected to be relatively low load-factor services reflecting the low forced and scheduled outage rates expected from the self-generating customers. Supplemental service, on the other hand, is expected to vary broadly from intermittent use to nearly constant use and in this regard may be expected not to differ significantly, on average, from the characteristics of full requirements power service.

Order No. 17159 at 5. Of course, this finding was entirely consistent with Messrs. Ross and Brubaker's testimony regarding the distinctive load characteristics of standby service.

The Commission expanded on its distinction between the load characteristics of full requirements customers and standby customers when it found that the separate standby rate should be mandatory. Recognizing that self-generating customers taking standby service were expected to have low load factors, i.e. 10% versus 60-70%, (infrequent usage over the year) and that the application of the otherwise applicable retail rate to these low load factor customers would likely result in them paying less than their fair share of local facilities costs (because the otherwise applicable retail rate was designed to recover these costs from much higher load factor customers with more usage over the year), the Commission made the standby rate mandatory and precluded service to self-generating customers under the otherwise applicable retail rate. Order No. 17159 at 16-17. This was merely the logical extension of Messrs. Brubaker and Ross' testimony that (1) the rates for standby service should reflect the load and other cost characteristics of standby customers and (2) the otherwise applicable retail rates were "clearly wrong" and perhaps discriminatory when applied to standby customers.

Consistent with the recommendation of Messrs. Ross and Brubaker, the Commission approved a rate design for standby rates that permitted ratchet provisions in the demand component of the standby rate. Just as Messrs. Ross and Brubaker advocated, the demand component contained three elements: alternative minimum monthly reservation charges and daily demand charges for the recovery of production and bulk transmission costs (Order No. 17159 at 12-15) and a separate minimum monthly charge for dedicated local facilities (Order No. 17159 at 16-17). Just as Messrs. Ross and Brubaker testified, the billing units to which the minimum monthly charges applied were

to be mutually agreed to by the customer and the utility. Order No. 17159 at 21. Just as Messrs. Ross and Brubaker urged, the Commission permitted this level of contract demand to move upward for a period of time once the customer experienced an actual standby demand higher than the contract standby demand. Id. The only differences in the ratchet provisions permitted and those advocated by the Industrial Cogenerators were (1) the Commission specified that the ratchet provisions could operate for up to 24 rather than 12 months and (2) the ratchet provisions were permissive rather than mandatory.

The Commission made a specific finding regarding contract demand and associated ratchet provisions. Order No. 17159 at 21. In explaining its rationale for the ratchet provisions, the Commission stated that the level of contract demand "should represent the maximum backup or maintenance power load that the customer expects to impose on the utility," and it was allowing the imposition of a ratchet "[t]o discourage initial misrepresentation of maximum standby power demand levels." Id.

The Industrial Cogenerators' Request For Rehearing

Subsequent to the issuance of Order No. 17159, the Industrial Cogenerators sought reconsideration of Order No. 17159. R. Vol. III at 466. The request for reconsideration was limited to assuring the confidentiality of certain customer information to be derived from meters to be installed to measure the output of customers' generating units. Id. The Industrial Cogenerators did not raise in their request for reconsideration either of the issues they now argue to the Court. Id.

Subsequent Developments

In Order No. 17159 four electric utilities were ordered to file standby tariffs consistent with the Commission's findings. Those tariff filings were made, and the parties were given an opportunity to comment on the filings. Upon consideration of the parties' comments and the utilities' tariff filings, the Commission approved the tariff filings by Gulf, FPC and FPL and granted the Industrial Cogenerators' motion for reconsideration of Order No. 17159. Order No. 18418. TECO has subsequently filed compliance tariffs approved administratively by the Commission's Staff. In the tariffs approved for each of the utilities there are ratchet provisions applicable to the level of contract standby demand.

APPELLATE PROCEEDINGS

Despite their pending motion for reconsideration, the Industrial Cogenerators filed a notice of appeal of Order No. 17159 on March 9, 1987. This Court stayed the appeal pending reconsideration, and subsequently lifted the stay upon notice that the Commission had acted on the motion for reconsideration. During the stay of the appeal the Commission and the utilities continued to implement Order No. 17159. A second motion to stay the appeal pending the filing and resolution of an enforcement action before the FERC by the Industrial Cogenerators pursuant to Section 210(h) of PURPA, 16 U.S.C. § 823a-3(h), was denied on January 26, 1988.

SUMMARY OF ARGUMENT

Under two separate principles of appellate law, the Industrial Cogenerators' arguments should not be considered. Despite countless opportunities to raise their arguments to the Commission, they declined to do so, thereby failing to preserve their issues for appeal. Moreover, the Industrial Cogenerators induced the Commission to rule in the fashion they now challenge and cannot successfully complain under the invited error doctrine.

Given the convincing evidence of the Industrial Cogenerators' witnesses that charging the otherwise applicable retail rate for standby service was "clearly wrong" and perhaps discriminatory, the Commission had a duty under Florida and federal law to adopt a fair and reasonable standby rate. To the extent that the requirement of Rule 25-17.082(3) to charge the otherwise applicable retail rate for sales to QFs was inconsistent with the Commission's duty under Section 366.07, Florida Statutes (1987) to set fair and reasonable rates or the Commission's duty to implement 18 C.F.R § 292.305 and Section 210(c) of PURPA, the Commission's rule must yield.

The ratchet provisions permitted by the Commission in the standby rate are one of several rate design features applicable only to standby service, but it is not discriminatory. Every difference in rate does not constitute a discrimination in law, and the record fully supports the Commission's conclusion that the unique load and cost characteristics of standby service warranted a unique or distinctive rate design. The ratchet provisions are necessary to prevent customers from abusing another unique aspect of the rate favorable to self-generating customers. Even the Industrial Cogenerators' own witnesses saw the need for ratchet provisions and advocated their use. There is no evidence that the ratchet provisions are discriminatory.

ARGUMENT

I

THE INDUSTRIAL COGENERATORS FAILED TO PRESERVE FOR APPEAL THE ERRORS THEY ALLEGE

The Industrial Cogenerators raise two novel issues for this Court to decide which neither they nor any other party raised before the Commission: (1) whether adoption of a standby rate different than the otherwise applicable retail rate is inconsistent with Rule 25-17.082(3) and therefore infirm, and (2) whether ratchet provisions applicable soley to minimum charges in the standby rate are discriminatory. Those issues should not be heard for the first time on appeal.

Appellate courts in Florida have long recognized the principle that issues not raised in the lower tribunal should not be considered on appeal. See Hartford Fire Insurance Co. v. Hollis, 58 Fla. 268, 50 So. 985, 989 (1909). "This rule is founded on considerations of practical necessity and fairness to the trial court and the opposite party." 3 Fla. Jur. 2d, Appellate Review § 92 at 130. Consequently, the courts have declined to pass judgment on errors the lower tribunal was given no opportunity to correct or obviate. Hartford, 50 So. at 989.

Despite innumerable opportunities extending from prehearing workshops to a posthearing request for reconsideration, the Industrial Cogenerators never raised the issues that the adoption of a standby rate different than the otherwise applicable retail rate would be inconsistent with Rule 25-17.082(3) or that the adoption of a standby rate with ratchet provisions would be

discriminatory. While the Industrial Cogenerators' repeated failure to preserve these issues for appellate consideration is extensively chronicled in the Statement of the Case and Facts, one particular omission deserves emphasis.

The Commission provided notice to the Industrial Cogenerators that their failure to raise legal, factual or policy issues prior to the issuance of the prehearing order would result in the waiver of such issues, absent a showing of good cause. R. Vol. I at 15, Order No. 16341 at 2. This requirement of raising or waiving issues was consistent with the Commission's rule regarding prehearing conferences. See Fla. Admin. Code Rule 25-22.038. This Court has held that the Commission has discretionary authority to determine issues to be litigated in a proceeding and that barring the consideration of issues not properly raised was well within the Commission's discretionary authority. Citizens v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983).

The Industrial Cogenerators clearly failed to raise either of their current issues before the issuance of the prehearing order, and they did not show good cause for their failure.[14/] Therefore, under the terms of Order No. 16341

14/ Given that they urged the Commission to approve an optional standby rate (with ratchets) different than the otherwise applicable retail rate, the Industrial Cogenerators could not have shown good cause for their failure to raise their issues. Their own witnesses advocated ratchets. R. Vol. V at 18, 78; R. Vol. VIII, Ex. 2, 3. The Industrial Cogenerators were aware of the requirements of Rule 25-17.082(3) (R. Vol. II at 154) and consciously chose not to raise this issue of inconsistency because they anticipated that the separate standby rate would be lower as suggested by their witness (R. Vol. V at 29-30) and work to their advantage. Having consciously declined to raise issues before the Commission because the resolution of the issues might work to their disadvantage, the Industrial Cogenerators should not be allowed to raise the issues for the first time on appeal.

they waived these issues for consideration by the Commission. Even if the Industrial Cogenerators had sought to raise these issues subsequent to the issuance of the prehearing order, the Commission would have been within its discretion not to consider them. Id. However, the Industrial Cogenerators chose not to raise these issues, arguing instead that Rule 25-17.082(3) allowed a separate standby rate, if elected by a QF (R. Vol. II at 154), and that ratchet provisions were appropriate (R. Vol. V at 18, 78; R. Vol. III, Ex. 2, 3).

If the Commission had the discretion not to consider the issues the Industrial Cogenerators now attempt to raise, then certainly this Court should not allow the consideration of these issues for the first time on appeal. Florida courts have declined to consider on review issues which could have been but were not raised before administrative bodies. See National Dairy Products Corporation v. Odham, 121 So.2d 640, 642 (Fla. 1960); Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108, 114-115 (Fla. 1st DCA 1978); Scott v. Florida Department of Commerce, 353 So.2d 1192, 1193 (Fla. 1st DCA 1978). Application of that same principle here is even more compelling because the Industrial Cogenerators were apprised below that the failure to raise issues would mean a waiver of the issues, and they nonetheless failed, perhaps consciously, to raise the issues. Because the Industrial Cogenerators failed to raise these issues before the Commission, they failed to preserve any error for review by this Court. Neither of the Industrial Cogenerators' arguments should be indulged.

II

THE INDUSTRIAL COGENERATORS IMPROPERLY ALLEGE AS ERROR ACTIONS THEY INVITED

Another longstanding principle of appellate review in Florida is that "a party cannot successfully complain of error for which he is responsible, or of rulings that he has invited the trial court to make." County of Volusia v. Niles, 445 So.2d 1043 (Fla. 5th DCA 1984) citing Bould v. Touchette, 349 So.2d 1181 (Fla. 1971); Hawkins v. Perry, 146 Fla. 766, 1 So.2d 620 (1941). This doctrine of "invited error" is premised on a basic notion of fair play: a party should not be able to take advantage of error which the party injected into the proceeding. The "invited error" doctrine also appears to be more preclusive than the doctrine regarding failure to preserve error, since the "invited error" doctrine does not appear to have an exception for "fundamental error." See Florida East Coast Railway v. Rouse, 178 So.2d 882 (Fla. 3d DCA 1965).

In the case at bar the Industrial Cogenerators urged the Commission to take positions which the Commission ultimately took. Now the Industrial Cogenerators argue that the Commission's adoption of their positions constitutes reversible error. These arguments are improper and should be rejected.

A. The Industrial Cogenerators Urged The Commission To Interpret Florida Administrative Code Rule 25-17.082(3) As Allowing A Standby Tariff Different Than The Otherwise Applicable Retail Rate.

The initial argument pressed upon the Court by the Industrial Cogenerators is that the Commission approved rates for standby service which differ from the rates under which QFs would take service as non-generating

customers and that the approval of such separate standby rates is inconsistent with Florida Administrative Code Rule 25-17.082(3).[15/] Therefore, pursuant to Section 120.68(12)(b), Florida Statutes (1987) the Commission's order must be remanded. This argument is entirely inconsistent with the interpretation of Rule 25-17.082(3) advocated by the Industrial Cogenerators to the Commission.

Before the Commission the Industrial Cogenerators argued that the distinctive load and cost characteristics of standby service warranted separate rates for standby service. R. Vol. I at 53 (Issue 1). Their witness maintained that the application of the otherwise applicable retail rate to standby services would be "clearly wrong." R. Vol. V at 40-41. Nonetheless, the Industrial Cogenerators urged the Commission to make the standby rates optional, allowing self-generating customers to opt for the separate standby rate. R. Vol. II at 154.

In arguing for these optional rates for standby service, the Industrial Cogenerators clearly construed Rule 25-17.082(3) as allowing a standby rate different from the otherwise applicable retail rate:

> Accordingly, regardless of standby rates ultimately approved by this Commission, they must be optional - at the QF's request. In the absence of such a request, QFs are to be served under the rate schedule which would otherwise be applicable to a similar non-generating customer (as currently provided in Commission Rule 25-17.81[sic](3)(f), F.A.C.).

[15/] Because of the frequency with which this rule is cited hereafter, it will be referred to simply as "Rule 25-17.082(3)."

Id. Of course, Rule 25-17.082(3) does not recognize an optional standby rate different than the otherwise applicable retail rate any more than it recognizes a mandatory standby rate.[16/] However, the import of the point is not what the Rule actually provides but what the Industrial Cogenerators argued to the Commission that the Rule provided.

"Invited error occurs when a rule of law is contended for by a party in the trial court who alleges on appeal that the rule was erroneous." Growers Marketing Services, Inc. v. Conner, 249 So.2d 486 (Fla. 2d DCA 1971), aff'd 261 So.2d 171 (Fla. 1972). That is exactly the situation with which this Court is presented. The Industrial Cogenerators argued to the Commission that the adoption of a standby rate different than the otherwise applicable retail rate would be consistent with or permissible under Rule 25-17.082(3). R. Vol. II at 154. The Commission embraced that interpretation of Rule 25-17.082(3). The Industrial Cogenerators' attempt to challenge this interpretation of Rule 25-17.082(3) is impermissible. "Where a litigant requests and receives a favorable ruling, he cannot later on appeal be heard to complain of the actions of the trial judge in acceding to his requests." Arsenault v. Thomas, 104 So.2d 120, 122 (Fla. 3d DCA 1958).

16/ Perhaps in reply the Industrial Cogenerators will argue that Rule 25-17.082(3), when read in light of 18 C.F.R. § 292.305(b), allows an optional standby rate. See Industrial Cogenerators' Initial Brief at 10, n.11. Such an argument recognizes the preeminence of the FERC rule as FPL argues in Section IV infra. It also reflects a different interpretation of the FERC rule. The FERC rule, 18 C.F.R. § 292.305(b), does not address rates at all; it addresses service. More importantly, it speaks of "Additional services", not "optional services". The FERC rule does not mandate, allow or even address the notion of an optional standby rate, and should not be read as somehow modifying Rule 25-17.082(3) or creating a separate right under federal law to taking standby service under an optional rate.

B. The Industrial Cogenerators Introduced Expert Testimony And Exhibits Proposing Ratchet Provisions In The Standby Tariff.

Although the Industrial Cogenerators would have this Court find that the Commission's approved rate design for standby rates, which contained minimum reservation charges and ratchet provisions, was discriminatory, the Industrial Cogenerators' own witnesses, who professed to be fully conversant with the concept of discrimination, proposed a standby rate design containing minimum charges and ratchet provisions. R. Vol. V at 18, 39-45 (Brubaker), 77-78 (Ross); R. Vol. VIII, Ex. 2, 3. In their posthearing brief the Industrial Cogenerators argued that their witnesses' proposed tariffs should be adopted "without change." R. Vol. II at 179. Once again this is an instance of invited "error" where the Industrial Cogenerators explicitly sought a certain ruling from the Commission, and having received it, they are attempting to challenge the propriety of the ruling.

The question of discrimination is a question of law applied to specific facts. Here the facts that support the Commission's determination that minimum charges and ratchet provisions were not discriminatory are the facts introduced in large part by the Industrial Cogenerators' own witnesses. The doctrine of invited error has been found to apply in instances where an appellant attempts to raise on appeal the lower tribunal's reliance on evidence which the appellant initially introduced into the record. See Tampa Drug Co. v. Waite, 103 So.2d 603, 610 (Fla. 1958); Guy v. Kight, 431 So.2d 653 (Fla. 5th DCA 1983), rev. den. 440 So.2d 352 (Fla. 1983).

In light of the Industrial Cogenerators' introduction of evidence which

contradicts and refutes their discrimination argument and in light of the Industrial Cogenerators' position before the Commission that the Commission should adopt standby rates that contain minimum charges and ratchet provisions, the Court should find that the doctrine of invited error precludes the consideration of the Industrial Cogenerators' discrimination argument. Any other ruling would invite parties to take inconsistent positions before the Commission and this Court and encourage parties to introduce evidence or otherwise seek Commission rulings solely to establish grounds for an appeal.

III

THE COMMISSION'S APPROVAL OF A STANDBY RATE DIFFERENT THAN THE OTHERWISE APPLICABLE RETAIL RATE WAS NECESSARY TO SATISFY STATUTORY REQUIREMENTS

The Industrial Cogenerators would have this Court ignore the substantial body of evidence before the Commission which compelled the Commission to approve a mandatory standby rate and focus instead on an alleged inconsistency between the Commission's approval of a mandatory standby rate and the language of Rule 25-17.082(3). This argument fails to recognize that in approving the mandatory standby rate design, a rate design wholly supported by competent substantial evidence, the Commission was merely satisfying its statutory responsibility to establish fair and reasonable rates. To the extent that Rule 25-17.082(3) required the use of rates which the Commission had found to be unjust and unreasonable, the Rule must yield to the Commission's governing statute.

In pertinent part Section 366.07, Florida Statutes (1987) provides:

> Whenever the commission, after public hearing

> either upon its own motion or upon complaint, shall find the rates ... proposed, demanded, observed, charged or collected by any public utility for any service ... are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in anywise in violation of law ... the commission shall determine and by order fix the fair and reasonable rates ... to be imposed, observed, furnished or followed in the future.

In the case now on appeal, the Commission faithfully applied this statute, and it recognized that to the extent Rule 25-17.082(3) required otherwise, the statutory requirement prevailed.

The Commission initiated this proceeding to investigate the rates charged by utilities for standby service, and an important part of its rationale for doing so was to respond to the concerns of customers like the Industrial Cogenerators. R. Vol. I at 9. At the required public hearing, the Industrial Cogenerators offered extensive evidence to show that the load and cost characteristics for standby service were different than the load and cost characteristics of regular, full requirements service. R. Vol. V at 17, 28-31, 40-41 (Brubaker), 63-64 (Ross). Their witness testified that the application of the regular or otherwise applicable retail rate to standby service was "clearly wrong" and that it might constitute "unjust discrimination" if there were cost of service differences in providing the services. R. Vol. V at 40-41, 213 (Brubaker). Undoubtedly relying at least in part on this evidence, after the public hearing the Commission essentially found that the rates currently being charged and collected for service to QFs, the utilities' "retail rate schedule[s] under which the QF would receive service as a non-generating customer, were unjust and unreasonable when applied to standby service:

> A threshold issue was whether the known or expected load characteristics of self-generating

> customers were sufficiently different from those of the utilities full requirements customers to justify having different rates.
>
> . . .
>
> Based upon the record in this case, we believe and find that the expected load characteristics of self-generating customers are sufficiently different to justify different rates for backup and maintenance power.

Order No. 17159 at 4-5. Consistent with its statutory responsibility to fix fair and reasonable rates, it authorized different rates for standby service:

> Furthermore, each utility shall offer cost-based rates for backup and maintenance power, which rates may be identical until such time as an evidentiary demonstration is made that different rates for these services are warranted on a cost-of-service basis.

Order No. 17159.

In authorizing standby rates for service to QFs separate from the rates under which QFs would be billed as non-generating customers, the Commission was aware that it was departing from Rule 25-17.082(3). Order No. 17159 at 2, 3. However, in light of the evidence which clearly showed that the rates to be charged under the Rule were unjust and unreasonable when applied to standby service, the Commission had to approve a new set of rates for standby service which were fair and reasonable. To do less would have been an abrogation of its statutory duty.[17/]

17/ A related argument which should be mentioned is that to the extent evidence showed that the otherwise applicable retail rates were unjust and unreasonable when applied to standby service, the Commission had not only a statutory duty to establish just and reasonable standby rates but also a duty under Florida Administrative Code Rule 25-17.084 to act. Thus, even if the requirements of Rule 25-17.082(3) did not have to yield to the requirements of Section 366.07, Florida Statutes (1987), the Commission still would have been faced with a conflict between its own rules given the evidence before it that charging the otherwise applicable retail rates for standby service was unreasonable.

The Commission was faced with a classic case of its rule being in conflict with its governing statute. The Commission acted appropriately. When an administrative body's rule is in conflict with its governing statute, the statute governs. Star Employment Service, Inc. v. Florida Industrial Commission, 109 So.2d 608, 610 (Fla. 3d DCA 1959); Accord Seitz v. Duval County School Board, 366 So.2d 119 (Fla. 1st DCA 1979), cert. den. 375 So.2d 911 (Fla. 1979); State v. Salvation Limited, Inc.; 452 So.2d 65 (Fla. 1st DCA 1984).

IV

IN LIGHT OF THE EVIDENCE BEFORE THE COMMISSION, THE COMMISSION'S RULE HAD TO YIELD TO THE FERC'S REQUIREMENTS

Aside from responding to the concerns of cogenerators, the Commission's other principal motivation in Docket No. 850673-EU was to implement more fully the FERC's regulations regarding the provision of service by utilities to qualifying facilities. Early in this proceeding the Commission stated it was "mindful of PURPA requirements" (R. Vol. I at 9), and throughout the order now challenged, Order No. 17159, there were references to PURPA, applicable FERC regulations and the FERC's order adopting its regulations, Order No. 69. See Order No. 17159 at 3-6, 10, 16, 19, 23.

Prior to Docket No. 850673-EU, the Commission had conducted extensive proceedings on at least three separate occasions as part of its implementation process. However, in the cogeneration rules applicable when Docket No. 850673-EU was initiated, the Commission had not specifically addressed its obligation under 18 C.F.R. § 292.305. Consequently, in the

proceeding below the Commission focused on the requirements of 18 C.F.R. § 292.305.

Upon consideration of 18 C.F.R. § 292.305 and the evidence before it, the Commission determined that it was necessary to adopt a standby rate different than the otherwise applicable retail rates which were being applied to standby service consistent with Rule 25-17.082(3). The Commission found that it was impossible to reconcile the requirements of its own rule with the requirements of the FERC. Consequently, it complied with the superior federal requirements.

Under the applicable FERC rule, 18 C.F.R. § 292.305(a), it is envisioned that under certain circumstances the charges for sales by utilities to QFs should be pursuant to otherwise applicable retail rates and in other circumstances they should be pursuant to separate, cost-based tariffs. A utility may not discriminate against a QF in comparison to rates charged other customers. 18 C.F.R. § 292.305(a)(ii). However, this provision does not mean that the QF must be served at a utility's most favorable rate. Order No. 69, 45 Fed. Reg. at 12228. Instead this provision means that a QF should be charged at the rate which would otherwise be applicable to it if it were a non-generating customer, unless it is shown that a different rate is justified on the basis of load and other cost characteristics. Id.

Subparagraph (a)(2) of 18 C.F.R. § 292.305 further provides that a rate for sales which is based on these justified load characteristics and consistent systemwide costing principles shall not be deemed to discriminate against a

QF. The FERC explained this provision as follows:

> Subparagraph (2) provides that if, on the basis of accurate data and consistent systemwide costing principles, the utility demonstrates that the rate that would be charged to a comparable customer without its own generation is not appropriate, the utility may base its rates for sales upon those data and principles.

Order No. 69, 45 Fed. Reg. at 12228.

Thus, under the applicable FERC rule, 18 C.F.R. § 292.305(a), utilities may charge their otherwise applicable retail rates for standby service provided to QFs unless there is a showing that the load and cost characteristics of standby service make the otherwise applicable retail rate inappropriate. When the otherwise applicable retail rate is demonstrated to be inappropriate and a separate rate is shown to be justified, the separate rate should be charged.

In attempting to implement this FERC rule, the Commission was faced with a record that demonstrated that the otherwise applicable retail rate was inappropriate for standby service given the distinctive load and cost characteristics of standby service. Order No. 17159 at 4-5. Several utilities took the position that the load characteristics of self-generating customers justified rates different than full requirements rates. Id. Moreover, the Industrial Cogenerators' witness had testified that the application of the utilities' regular rates to standby service was "clearly wrong" and perhaps discriminatory. R. Vol. V at 40-41, 213 (Brubaker).

Given the record before it, the Commission faced a dilemma. It could continue to allow the utilities' otherwise applicable retail rates to be charged for standby service, thereby following its own rule, Rule 25-17.082(3), and

disregarding 18 C.F.R. § 292.305(a), or it could follow the course envisioned in 18 C.F.R. § 292.305(a) of adopting a separate, cost-based rate for standby service when the evidence demonstrates that the otherwise applicable retail rates were inappropriate. The Commission was confronted with a conflict of federal and state requirements.

The Commission responded to the dilemma appropriately. It recognized that under the Supremacy Clause of the United States Constitution, Article VI, clause 2, that its own rule should yield to the FERC's requirement since compliance with both was impossible. "A federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 90 L.Ed 2d 369, 106 S.Ct. 1890 (1986). The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field...." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963). Here, federal superintendence could not be preserved without the state regulation giving way. There was an outright conflict between federal and state requirements, and the state rule stood as an obstacle to the accomplishment and execution of the full objectives of Congress in PURPA as manifested in the regulations of the FERC. Either circumstance was an adequate basis for the Commission to conclude its rule should yield to the implementation of the FERC's rule. See, Free v. Bland, 369 U.S. 663, 8 L.Ed. 2d 180, 82 S.Ct. 1089 (1962); Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581, 61 S.Ct. 399 (1941).

Throughout their Initial Brief the Industrial Cogenerators acknowledged that the proceeding below was initiated to implement the regulations of the FERC. Industrial Cogenerators' Initial Brief at 1, 3, 10 n. 11. Even though they recognize the FERC's superior authority and the Commission's duty to implement the FERC's regulations, they nonetheless insist that the Commission must act in a fashion which is consistent with its own rules. Their position is internally inconsistent. Once one recognizes that the Commission had to implement the FERC rules, the Commission's own rules must give way if they stand in the way of the implementation. The Commission recognized this, and its decision should be affirmed.

V

THE COMMISSION'S RATE DESIGN FOR STANDBY SERVICE IS NOT DISCRIMINATORY

There are any number of statutes and rules which require the Commission not to approve a rate design for standby service which is discriminatory.[18/] While FPL does not agree that the prohibition of discrimination in Section 366.81, Florida Statutes (1987) is applicable to the rates charged to QFs[19/], under any reasonable interpretation of the concept of

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18/ See Section 366.03, 366.05(1), 366.06, 366.07, Fla. Stat. (1987); Fla. Admin. Code Rule 25-17.084; Section 210(c), PURPA, 16 U.S.C. § 824a-3(c); 18 C.F.R. § 292.305(a).

19/ Section 366.81, Florida Statutes (1987) is part of the Florida Energy Efficiency and Conservation Act ("FEECA"). See § 366.80, Florida Statutes (1987). When FEECA is read in its entirety, with the exception of Section 403.519, Florida Statutes (1987) which deals with capacity added by utilities, it clearly deals with reducing the consumption of electricity. It is a "demand-side" solution to the energy crisis. Cogeneration and small power production facilities are "supply-side" solutions to the energy crisis. They do not reduce consumption of electricity; they merely represent an alternative supply. When

discrimination the Commission's rate design for standby rates passes muster.

To appreciate fully why the use of ratchet provisions in the standby rate is appropriate and is not discriminatory, it is helpful to understand the rate design adopted. The Commission approved a rate design for the demand component of the standby rate which consists of three elements. The first two elements are alternative charges to recover production and bulk transmission costs associated with standby service. They are a monthly minimum reservation charge and a daily demand charge. The minimum reservation charge is to be incurred whether or not the standby customer actually purchases power during the month, because the utility is providing the service of having production and bulk transmission facilities available to serve the customer regardless of whether the customer's generating unit experiences an outage. The daily demand charge is to be charged when the customer experiences an outage and takes service. In any given month the higher of the two charges will be billed to the customer. The third element of the demand component of the standby rate is a monthly minimum charge to recover the costs of dedicated local facilities, local transmission and distribution facilities devoted to serving this type of customer. Each of these three rate design

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Footnote 19/ Continued
the Legislature in 1980 spoke to "highly efficient systems" and "renewable energy resources" in FEECA and prohibited discrimination against customers using such systems, they were addressing discrimination against customers with demand-side alternatives such as highly efficient appliances, energy efficient manufacturing systems or passive solar systems which would reduce the consumption of electricity. It was a year later in 1981 with the adoption of Chapter 81-131, Laws of Florida that the Legislature first addressed cognerators or small power producers, and when it did so, it identified them directly. The Industrial Cogenerators' attempt to mix state and federal regulatory schemes to suggest cogenerators fit under FEECA is ingenious, but it ignores the context of the Act.

features are unique to the standby rate design. For customers without their own generation, these costs (production, bulk transmission and local transmission and distribution) are recovered through simple demand charge and energy charges. Although each of the three charges comprising the demand component of the standby rate are employed only with self-generating customers, the Industrial Cogenerators have not alleged that any of these charges in the standby rate are discriminatory.

A common feature of the two minimum charges in the standby rate which is also unique is that the billing units (kWs) to which the charges are applied are set by mutual agreement of the utility and the customer. Order No. 17159 at 21. Therefore, these billing units are referred to as "contract demand." Id. The level of contract demand "should represent the maximum backup or maintenance power load that the customer expects to impose on the utility." (emphasis added) Id. Thus, because it is the customer's expectation of load that guides this determination, the customer essentially determines the billing units (kWs) to which these two charges are applied. The Industrial Cogenerators have not attacked this aspect of the standby rate, although it is also unique to self-generating customers.

In its order the Commission recognized that this feature of the two minimum charges would invite underestimates, thereby reducing the bills of self-generating customers. "To discourage initial misrepresentation of maximum standby power demand levels," the Commission permitted (but did not require) utilities to incorporate "ratchet" provisions into their tariffs for these two charges. Id. The effect of a ratchet provision would be to increase

the level of contract demand for up to twenty-four months once a self-generating customer's actual standby demand exceeded its contractually specified level of maximum backup demand. Id. In other words, the ratchet provision was allowed to afford a corrective mechanism to assure that the self-generating customer paid a charge each month that reflected the actual costs the customer imposed on the utility by asking the utility to stand ready to serve its load if or when the customer's generator experienced an outage. To prevent standby customers from being unduly penalized by a ratchet in instances where the customer could show that it was not likely to exceed its initially specified level of contract demand again, the Commission required that the standby tariffs, "should also provide for the periodic renegotiation of this contract level." Id.

Despite the various unique features of the standby rate, the Industrial Cogenerators only attack the ratchet provision. Essentially, their argument has two prongs: (1) ratchet provisions are unique to the standby rate, are not used on rates for other service, and therefore, are discriminatory against QFs 20/; and (2) the Commission has a policy against the use of ratchet provisions, and the use of ratchets applicable solely to standby customers violates that policy and is discriminatory. Neither argument can withstand critical scrutiny.

20/ The Industrial Cogenerators' argument is that the ratchet provisions discriminate against QFs and therefore are infirm under FEECA. This argument supposes the ratchet provisions are solely applicable to QFs, but the standby rates with ratchet provisions approved by the Commission are applicable to all self-generating customers, not just QFs. Order No. 17159 at 6-7. Thus, QFs are treated like any other self-generating customers and are not discriminated against.

The Industrial Cogenerators' failure to challenge all the unique features of the standby rate belie their challenge that the ratchet provision is discriminatory. By not challenging all the features of the standby rate which are applicable solely to self-generating customers, the Industrial Cogenerators implicitly recognize that unique rate features are not necessarily discriminatory. The fact that rates and rate designs differ for different classes of customers or different types of services does not mean they are discriminatory. "[E]very difference in rate does not constitute a discrimination in law." Tampa Electric Co. v. Cooper, 14 So.2d 388 (1943). Here it is true that the ratchet provision and a host of other rate design elements are unique to the standby rates for self-generating customers, but it is also true that the Commission found standby service to have distinctive load characteristics which justified a distinctive rate design: "the expected diversity of backup and maintenance power loads is so different as to warrant the recommended treatment." Order No. 17159 at 14.

In regard to the Industrial Cogenerators' argument that the Commission's permissive use of ratchet provisions in standby tariffs violates preexisting Commission policy, the Commission has the discretion to act inconsistently with its own policy as long as its deviation is adequately explained. Section 120.68(12)(c), Fla. Stat. (1987). In this instance the Commission's rationale for allowing a ratchet provision was fully explained, and self-generating customers were protected from potential abuse of the ratchet provisions. Order No. 17159 at 21.

The ratchet provisions permitted are necessary, because without them

standby customers would have an incentive to take advantage of another unique feature of the minimum charges -- the customer being able initially to establish his own billing units.[21] Ratchets are not necessary on other tariffs "to discourage initial misrepresentation" because tariffs charged other customers do not allow customers to set their own billing units. Ratchets were rejected on other rates because they were inequitable in accomplishing their stated purpose -- to provide a price signal that on-peak consumption was more costly to the utility.[22] The ratchet provisions in the standby rate serve an entirely different purpose, and are entirely equitable in accomplishing that purpose.

Finally, perhaps the most telling argument that the ratchet provisions in the standby rate design are not discriminatory is that the Industrial Cogenerators' own witnesses recommended that the Commission adopt ratchet provisions. R. Vol. V at 18-19 (Brubaker) 78 (Ross); R. Vol. VIII at Ex. 2, 3. In fact, Mr. Brubaker testified that the determination of the proper minimum charge must give consideration to whether or not the charge would be applied to ratcheted billing units. R. Vol. V at 44-45. Both witnesses evidenced in their testimony that they were fully conversant with the concept of discrimination, and they recognized that the rates approved for standby service could not discriminate against QFs. R. Vol. V at 28 (Brubaker); R. Vol.

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[21] Not surprisingly, the Industrial Cogenerators do not challenge this advantageous but unique feature of the standby rate as being discriminatory, although no other customer is allowed to set its own billing units. Similarly, no other customer is charged a daily demand charge as are standby customers, but the Industrial Cogenerators do not attack that advantageous feature of the standby rate as being discriminatory.

[22] See Industrial Cogenerators' Initial Brief at 15-16.

VII at 882 (Ross). Certainly these honorable witnesses would not have recommended a rate feature or structure which they believed to be discriminatory. The better conclusion is that the Industrial Cogenerators' own witnesses recognized that ratchet provisions in the standby rate were not discriminatory.[23/]

There is no basis for this Court to conclude that the ratchet provisions approved by the Commission in Order No. 17159 are discriminatory. The argument that no other customer is served under a tariff with ratchet provisions is specious. "[A]bsolute uniformity in the rates charged for public services is not necessarily required." State v. Dade County, 127 So.2d 881 (Fla. 1961). Moreover, the Commission fully explained why it was permitting ratchet provisions. In this instance, given the other advantageous and unique feature of the standby rate which could have been abused by self-generating customers in the absence of a ratchet, the ratchet provisions were warranted.

23/ The Industrial Cogenerators' witnesses also recognized something else that their attorneys now fail to recognize -- that the purpose of the proceedings was only to develop rates for backup and maintenance service, it was not to develop rates for customers without generating facilities. R. Vol. V at 28. The Commission could not have acted in regard to the rates charged other customers even if it had found modifications of those rates to be appropriate. What the Commission did or did not do in the FPC rate case subsequent to this case is clearly outside the record and therefore improper for brief or consideration by the Court, but if it is considered, perhaps the Industrial Cogenerators should be questioned as to whether at least one member of their group advocated that the Commission not make rate design changes in accepting the FPC rate case settlement.

CONCLUSION

The Industrial Cogenerators' arguments should not be heard for the first time on appeal. They failed to preserve the "errors" they now allege, and actually encouraged the Commission to rule in the fashion they now attempt to challenge. Such conduct should not support an appeal.

In adopting a separate rate for standby service, the Commission fulfilled its statutory duty to fix just and reasonable rates and its duty to implement the FERC's requirements. It appropriately recognized that the requirements of its own rule must yield when in conflict with these superior duties.

The ratchet provisions allowed by the Commission were necessary and appropriate. They were supported by the record, and there was no evidence in the record that they were discriminatory. The Commission fully explained why such provisions were justified; no more is required.

Order No. 17159 should be affirmed.

Respectfully submitted,

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