IN THE
SUPREME COURT OF FLORIDA

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| C.F. INDUSTRIES, INC., | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | CASE NO. 70,196 |
| | ) | |
| KATIE NICHOLS, ET. AL., | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

# ANSWER BRIEF OF APPELLEE
# FLORIDA PUBLIC SERVICE COMMISSION

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## DESIGNATIONS

Appellants, C.F. Industries, Inc., are referred to in this brief as the "Industrial Cogenerators."

Appellee, Florida Public Service Commission is referred to as the "Commission."

Cites to the record on appeal will be to volume number and page number, except where the cite is to an exhibit. Exhibits are designated by number and page of the exhibit, if appropriate. E.g.: (R. Vol. I, at 90; R. Vol. VIII, Ex. 2 at 3).

## STATEMENT OF THE CASE AND FACTS

This is an appeal of the Commission's Order No. 17159 issued February 6, 1987, in Docket No. 850673-EU, In re: Generic Investigation of Standby Rates for Electric Utilities. Order No. 17159 approved a rate structure for sales of power to cogenerators and small power producers. Affected electric utilities were directed by Order No. 17159 to file tariffs embodying the new rate structure. Jurisdiction is vested in this Court by Article V, Section 3(b)(2), Florida Constitution.

### Background

The Commission's actions in this docket were driven by the necessity of complying with the mandates of federal law. In 1978 Congress passed the Public Utilities Regulatory Policies Act of 1978 (PURPA).[1] As is relevant to this proceeding, PURPA Section 210(a), 16 U.S.C. §824a-3(a), required the Federal Energy Regulatory Commission (FERC) to adopt rules requiring electric utilities to buy electrical energy from, and sell electrical energy to, small power producers and cogenerators, generally known collectively as qualifying facilities (QFs).[2] PURPA further required that within one year of the adoption of rules by the FERC each state regulatory agency with ratemaking authority over

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[1]Public Law 95-617, 92 Stat. 3144 (1978) (Codified in scattered sections of 16 U.S.C.)

[2]At some points in the brief, the term "self-generating customer" is used to refer to QFs for the purpose of contrasting QFs to nongenerating customers.

electric utilities had to implement the provisions of the FERC's rules promulgated under PURPA. 16 U.S.C. §824a-3(f) The FERC in turn responded to PURPA by adopting its rules on QFs. 18 C.F.R. §292.101, et seq. Among the FERC's rules is §292.401(a) which requires the Commission and other state regulatory authorities to implement the FERC's rules on the purchase of electricity from, and the sale of, electricity to QFs. Such implementation may be by rule, case-by-case adjudication or other reasonable means. Id.

In response to PURPA and the adoption of rules by the FERC, the Commission initiated rulemaking proceedings in 1981, ultimately leading to the adoption of Rules 25-17.080 through 17.089, Florida Administrative Code, entitled "Utilities' Obligations with Regard to Cogenerators and Small Power Producers." The Commission initiated a second rulemaking proceeding in 1983 which led to the amendment of its cogeneration rules. It was during the 1983 proceedings that the Commission also adopted the current version of Rule 25-17.082, Florida Administrative Code. Section (3)(f) of Rule 25-17.082 provides that, when a QF cannot meet its total internal needs for electric power, for whatever reason, then the utility must supply that power at rates which:

> shall be billed at the utility's retail rate schedule under which the qualifying facility would receive service as a nongenerating customer of the utility.

Rule 25-17.082(3)(f) does not set individual rates for power sold to QFs based on their status as self-generators. It simply provides that power will be sold to the QF under the tariff classification which would be applicable to the QF, if it were a nongenerating customer. For example, a QF which is a small manufacturer might take power under the General Service Large Demand (GSLD) classification applicable for nongenerating customers with similar load requirements.

Docket No. 850673-EU

In 1985 the Commission opened Docket No. 850673-EU, In re: Generic Investigation of Standby Rates for Electric Utilities, specifically to further investigate the rates at which electric utilities sell power to QFs. It was begun in response to the concerns of cogenerators and other small power producers and in response to the requirements of PURPA. (R. Vol. I, at 9.) The investigation was originally designated a rulemaking proceeding. Specifically, the Commission was concerned that Rule 25-17.082(3)(f), Florida Administrative Code, had not adequately implemented the FERC's Rule 18 C.F.R. 292.305(b). Unlike the Commission's Rule, Rule 292.305(b), seemed on its face to require rates to be differentiated based on the load and cost characteristics of the QFs as consumers. The text of Rule 292.305(b) is as follows:

> (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.

The FERC rule recognizes that a QF may need to purchase power for a number of reasons. It may not be producing enough electricity to meet the total needs of its facilities, in which case power will be purchased to supplement the energy produced by its own generating facilities. Power supplied by an electric utility under these circumstances is usually referred to as "supplementary" or "supplemental" power. A QF will also need to purchase electricity when it experiences a forced or scheduled outage of its generating facilities. The electricity supplied during a forced outage is called "back-up" power, while in the case of a planned outage, the electricity would be classified "maintenance" power. Generally speaking, rates identified to meet specific needs for supplementary, back-up and maintenance power, are classified as "standby" rates; ergo, the Commission docket title: "Generic Investigation of Standby Rates...."

The parties to the Commission investigation included the staff of the Commission, the four major investor-owned electric utilities (Florida Power and Light Company, Florida Power Corporation, Gulf Power Company and Tampa Electric Company) as well as intervenors, Metropolitan Dade County and the Industrial Cogenerators. The Commission intended from the very beginning that Docket No. 850673-EU, would be conducted in a manner which

would assure "the greatest possible understanding and involvement" of the parties on the standby rates issue. (Order No. 16011, R. Vol. I, at 9.)

In keeping with its desire to involve the affected parties, the Commission conducted workshops on February 12, March 26-27, April 16 and May 21, 1986. All parties submitted draft tariffs for standby rates for consideration at the workshops. Upon review of those draft tariffs the Commission concluded that it should foreshorten the protracted rulemaking process and proceed directly to a section 120.57(1), Florida Statutes, hearing on the utilities' proposed standby tariffs.

As stated in Order No. 16011, the Commission believed that this measure "would achieve the goal of having standby rates in effect by the end of 1986, earlier than under the former [rulemaking] schedule" (R. Vol. I, at 9.) Moreover, the Commission concluded that rulemaking was inappropriate because:

> ... The specific determinations to be made by the Commission in this process constitute policy that is not 'ripe' ... for rulemaking at this time. The Commission has not refined its policies regarding standby rates to such a consistent application that rulemaking is appropriate.[3]

Id.

In accordance with its decision to convert the proceedings from a rulemaking to an adjudicatory format, the Commission directed the four major investor-owned utilities to file final proposed tariffs to be considered at a hearing in August, 1986. (R. Vol. I, at 9.)

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[3]As noted below at page 12, a rulemaking docket was initiated after Order No. 17159 was issued.

As it typically does in formal proceedings, the Commission issued an Order on Prehearing Procedure requesting the parties to file prehearing statements which would set out, among other things: (1) A statement of each question of fact the party considered at issue; (2) A statement of each question of law the party considered at issue; and (3) A statement of each policy question the party considered at issue. (R. Vol. I, at 14.) These specific requirements are also set out in the Commission's Rule 25-22.038(3), Florida Administrative Code. In compliance with the provisions of Rule 25-22.038(5)(b), the Prehearing Order, Order No. 16341, explicitly provided that "any issue not raised by a party prior to issuance of the prehearing order shall be waived by that party, except for good cause shown." (Emphasis supplied; R. Vol. I, at 15.)

The Industrial Cogenerators participated fully in the development of the issues in this case through the workshops that were held and in the give and take between staff and the parties. They filed a prehearing statement and a supplemental prehearing statement in which they extensively set out their positions on the issues to be heard. (R. Vol. I, at 51-62; 131-138.) The Industrial Cogenerators also participated in the prehearing conference held on August 12, 1986 and provided their input into the ultimate list of issues and positions for hearing embodied in Prehearing Order No. 16483. (R. Vol. IV, at 1-125; R. Vol. I, at 82.)

Significantly, at no time prior to, or during, the hearings in this docket did Appellants raise the issues which they now claim are violative of Chapter 120 and Chapter 366, Florida Statutes.

The Industrial Cogenerators made no assertion that the Commission's adoption of a separate rate structure for standby rates in a section 120.57(1) proceeding would lead to a conflict with Rule 25-17.082(3)(f). Nor did they assert that this conflict could form the basis for their claim on appeal that the Commission's order is subject to remand as an exercise of discretion "inconsistent with an agency rule" under section 120.68(12)(b), Florida Statutes. Likewise, the Industrial Cogenerators made no claim at hearing that the ratchet provision adopted by Order No. 17159 would produce discriminatory rates; on the contrary, the testimony of their own witnesses supported such a provision.

A. Prehearing and Hearing

On the threshold issue of whether there should be separate rates for standby service, i.e., rates based on the unique load and cost characteristics of the self-generating customer, as opposed to uniform rates under Rule 25-17.082(3)(f), the Industrial Cogenerators took the position that there should be. Specifically, they advocated a separate standby rate for backup and maintenance service, based on the "known or expected load characteristics of self-generating customers."[4]

[4]The issue and the Industrial Cogenerators' exact position are as follows:

> (d) A Statement of each question of fact the party considers at issue and which witness will address the issue.
>
> 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?

The Industrial Cogenerators also advocated the use of demand charges designed to recover the costs of generation capacity and bulk transmission as well as distribution facilities. These are the minimum reservation and local facilities charges calculated by application of a "ratchet."[5]

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4 Industrial Cogenerator Response: Yes, as to backup and maintenance service. No as to supplemental.

Witness: Brubaker, Ross. (R. Vol. I, at 53.)

[5]The Industrial Cogenerators' Prehearing Statement specifically advocated the minimum reservation and local facilities charges in the following issues:

(Cost-of-service and ratemaking issues)

Issue 2: How should these costs [production and bulk transmission] 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 equal to the product of the system per kilowatt demand cost for production and bulk transmission facilities, times the equivalent forced outage rate of the most reliable facility expected to be served. The second part would amount to a 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 ongoing 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.

The Commission's decision to adopt standby rates specifically for QFs was not reached in a vacuum. The Commission was guided by the principles enunciated by the FERC in its Order No. 69. [Transfer Binder 1979-1980 FERC Orders.] Util. L. Rep. (CCH) ¶ 5782. As the Commission notes in Order No. 17159, the FERC found that implementation of section 210(c) of PURPA should ensure that sales of electric energy to qualifying facilities are "just and reasonable, in the public interest, and non-discriminatory with respect to qualifying cogenerators or small power producers." Id.

The FERC's Order No. 69 also found that Section 210(c) "contemplates formulation of rates on the basis of traditional ratemaking (i.e., cost-of-service) concepts." Id. This is precisely the approach advocated by the Appellants witnesses, Maurice Brubaker and James A. Ross, and followed by the Commission. Testifying to the necessity of distinguishing the different types of standby service (back-up, maintenance and supplemental), Mr. Brubaker said:

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5 Witness: Brubaker, Ross.

(Emphasis supplied.)

R. Vol. I, at 56.

The above issues and positions of the Industrial Cogenerators were incorporated in the Commission's Prehearing Order as Issues 1, 16 and 17. (R. Vol. I, at 87; 101-102.)

> Yes, it is very important to distinguish these types of power if appropriate tariffs and rate levels are to be developed. The load characteristics and conditions of service for supplementary power, back-up power, and maintenance power are all different.
>
> The loads associated with each type of service must be carefully and accurately distinguished so that the appropriate charges can be applied to each. Failure to make appropriate separations will result in inappropriate charges being applied to these types of service. (Emphasis supplied.)

(R. Vol. V, at 26.)

Mr. Brubaker further emphasized that it was his belief that QF's should pay "cost-based rates." (R. Vol. V, at 27.)

The Industrial Cogenerators' witnesses Brubaker and Ross went on to identify seven elements which should be considered in establishing cost-based standby rates, among them the minimum local facilities and reservation charges. Both charges were advocated by the Industrial Cogenerators' witnesses as necessary to recognize the unique load characteristics of standby customers. (R. Vol. V, at 34.) Both charges were included with minor modifications in the rate design approved by the Commission. (Order No. 17159, at 21.)

Not only did the Industrial Cogenerators advocate the minimum reservation and local facilities charges, they also advocated the application of a ratchet to these charges. Under the ratchet concept advocated by the Industrial Cogenerators, the maximum standby demand would be initially set by mutual agreement between the utility and the QF. After 12 months, the specified demand

could be adjusted (ratcheted up) on a monthly basis. (R. Vol. V, at 44; R. Vol. VIII, Exh. 2, Sch. 1, p. 2.) That is, in any given month the specified standby demand, on which the reservation and local facilities charges are based, would be the greater of the maximum standby power demand registered in the current month or the maximum standby demand recorded in the preceding eleven months. Thus, the QF will always be paying according to the highest demand level achieved in the 12-month period.

As with the minimum reservation and local facilities charges, the Commission adopted a ratchet provision very similar to the one advocated by the Industrial Cogenerators. The only difference is that the Commission's Order allowed utilities to increase the contract demand based on a 24-month period. (Order No. 17159, at 21.) Under the Commission-approved ratchet, the customer will always be paying according to the highest demand achieved in a 24-month period.[6]

Order No. 17159 made the new standby rates mandatory for all QFs. The net result is that some QFs will pay more for standby service than they would have, had they retained the right under Rule 25-17.082(3)(f) to take service at rates applicable to nongenerating customers.

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[6]Of course, the Industrial Cogenerators were not the only party to the proceeding advocating cost-based rates including minimum demand charges and a ratchet. For example, Florida Power Corporation's witness, William C. Slusser also proposed these charges and the use of a ratchet. (R. Vol. V, at 352-4; Vol. VI, at 388-393.)

Appeal And Post Hearing Procedural Developments

The Industrial Cogenerators filed their Notice of Appeal in this case on March 9, 1987. They had previously filed a motion for reconsideration of Order No. 17159 with the Commission on February 23, 1987. (R. Vol. III, at 466.) The Court granted a stay of the Industrial Cogenerator's appeal pending reconsideration by the Commission, but denied a second motion to stay after the Commission had granted reconsideration in Order No. 18418 issued November 10, 1987. Appellants did not request reconsideration on either of the issues raised on appeal. Order No. 18418, also approved standby rate tariffs for Florida Power and Light Company, Florida Power Corporation and Gulf Power Company. The Commission has also administratively approved a standby rate tariff for Tampa Electric Company.

Rulemaking To Amend Rule 25-17.082

After it had issued Order No. 17159, but before it had approved standby tariffs for the affected electric utilities, the Commission opened a rulemaking docket to revise Rule 25-17.082. Docket No. 870352-EI, In re: Revision to Rule 25-17.082, Florida Administrative Code, was opened April 6, 1987. The Commission's current internal scheduling document (Case Assignment and Scheduling Record) calls for initial Commission review of the proposed rule at its September 20, 1988 agenda.

## SUMMARY OF ARGUMENT

The Industrial Cogenerators had every opportunity in the Commission's standby rate proceedings to raise the issues they now assert on appeal. Yet no issue was raised, nor any objection voiced, to either the alleged inconsistency of the Commission's action with Rule 25-17.082(3)(f), Florida Administrative Code, or the claimed discriminatory nature of a standby rate structure including a ratchet. The Industrial Cogenerators' own witnesses took positions favoring the Commission's actions which are contrary to the arguments raised on appeal. The Industrial Cogenerators have foregone any right to raise these issues on appeal.

Even if the issues are properly before this Court, the Commission's decision in Order No. 17159 produces no violation of the Industrial Cogenerators' rights. The Commission was required by PURPA and the FERC's rules to develop cost-based, nondiscriminatory rates for QFs. Its actions were not an exercise of discretion inconsistent with a rule requiring remand within the meaning of section 120.54(12)(b), Florida Statutes. Remand of Order No. 17159 would, in any case, be inappropriate, because it would allow QFs to take service at rates shown to be improper under federal law. The ratchet contained in the standby rate structure approved for QFs is based on the evidence developed at hearing, and recognizes the unique load and cost characteristics of QFs. It does not produce discrimination.

## POINT I

**THE INDUSTRIAL COGENERATORS CANNOT ON APPEAL CONTEST THE ALLEGED INCONSISTENCY OF THE COMMISSION'S ORDER WITH RULE 25-17.082(3)(F) OR THE COMMISSION-APPROVED RATCHET PROVISION FOR STANDBY SERVICE, WHEN THE ISSUES WERE NOT RAISED BELOW AND APPELLANTS' OWN WITNESSES TOOK POSITIONS FAVORING THE COMMISSION'S ACTIONS.**

It is axiomatic that a reviewing Court will not review points raised for the first time on appeal. In order to preserve a question for appeal, a party must object and obtain a ruling on the alleged error. This is a basic principle of fairness which encourages judicial economy and prevents abuse of the appellate process. Castor v. State, 365 So.2d 701 (Fla. 1978). Appellants, Industrial Cogenerators now ask this Court to violate this long-standing appellate principle. Not only did the Industrial Cogenerators fail to raise any issue on the inconsistency of separate, cost-based standby rates with Rule 25-17.082(3)(f), or the discriminatory nature of the ratchet provision, their own witnesses took positions contrary to the claims they now make on appeal. This they cannot do. See, City of Jacksonville Beach v. Public Employees Relations Commission, 381 So.2d 283 (Fla. 1st DCA 1980).

On the first issue, it is clear that the Industrial Cogenerator's prehearing positions and testimony supported distinct, cost-based rates for standby service. This is not consistent with the provisions of Rule 25-17.082(f)(3), so far as it allows QFs to take service at rates applicable to the class of

nongenerating customers to which the QF would otherwise belong. There has never been a determination that the rates applicable to QFs under Rule 25-17.082(3)(f), are cost-based in accordance with FERC requirements. That is the problem that the Commission and the parties, most certainly the Industrial Cogenerators, set out to explore and correct. The Industrial Cogenerators cannot now come back and complain to this Court that they never understood the import of the position they were advocating in the proceedings below. They may not like the result produced by the Commission's action, i.e., separate, cost-based, rates for backup and maintenance service, and they may now want to be able to choose between rates under Rule 25-17.082 and Order No. 17159, but they cannot assert that they didn't have an opportunity to raise the inconsistency issue below. Whatever right the Industrial Cogenerators had to claim that the Commission's action embodied in Order No. 17159 is inconsistent with Rule 25-17.082(3)(f) and, therefore, subject to remand under section 120.68(12)(b), Florida Statutes, has been waived.

The foregoing applies with equal validity to the Industrial Cogenerator's newly voiced protestations against the ratchet provision of the standby rates tariffs. Their own witnesses presented testimony in favor of both the minimum reservation and local facilities charges to which the ratcheted demand level applies and suggested a ratchet provision of their own.

The only difference between the ratchet proposed by the

Industrial Cogenerators and the Commission's is a quantitative one. The Commission opted for a maximum 24-month ratchet instead of the 12-month ratchet of the Industrial Cogenerators. The essential nature of the ratchet mechanism, which permits the utility to modify the contract demand to meet a previously achieved maximum demand, is the same. To allow the Industrial Cogenerators to pursue this issue on appeal would be to allow them to repudiate their own witnesses and the positions they advocated at hearing. Appellants cannot be allowed to contest the ratchet concept as discriminatory on appeal when they embraced it as reasonable at the hearing. They have waived the right to review on this issue.

A. Any errors raised by the Industrial Cogenerators, even if theoretically valid, are errors invited by them and must be rejected.

If the Commission's proceedings were somehow flawed because of the errors alleged on appeal, they are errors of which the Industrial Cogenerators were well aware and which they were willing to encourage and accept until the end result, Order No. 17159, proved not to their liking. Any errors committed by the Commission were at worst errors invited by the Industrial Cogenerators. As such, they cannot be used to topple the results of a proceeding which was conducted with the utmost attention to assure "greatest possible understanding and involvement of all parties" (Order No. 16011, R. Vol I at 9.) The Appellants cannot

complain of alleged errors which they never raised, and even invited. Wasden v. Seaboard Coastline Railroad Co., 474 So.2d 825 (Fla. 2nd DCA 1985).

B. Even if the Industrial Cogenerators have properly raised their issues on appeal, any errors asserted by them would have to be considered harmless.

A basic test for reversible error is that, given the facts of the particular case, it is likely that the lower court would have reached a different result more favorable to the Appellant, absent the error. Stecher v. Pomeroy, 253 So.2d 421 (Fla. 1971). There has been no assertion by the Industrial Cogenerators that, on the evidence they and other parties presented in this case, the Commission would have reached a different result on the standby rate issue. The only substantive point the Industrial Cogenerators have raised is the alleged discriminatory nature of the ratchet provision. It strains credibility to assert that the Commission would have reached a different result on that point, had it followed a different procedure, when the Industrial Cogenerators' witnesses were advocating the use of the ratchet. There being no showing by the Industrial Cogenerators that the Commission would likely have reached a different result in approving standby rates, any error, even if properly raised, should be considered a harmless error by this Court.

## POINT II

THE COMMISSION'S DECISION IN ORDER NO. 17159 IS NOT AN EXERCISE OF DISCRETION "INCONSISTENT WITH AN AGENCY RULE" WITHIN THE MEANING OF SECTION 120.68(12)(B), FLORIDA STATUTES.

In accordance with the directives of section 210 of PURPA, the FERC's Rule 18 C.F.R. 292.401, provides for state implementation of the federal agency's rules governing rates for sales to QFs. Specifically, Rule 292.401(a), addressing state regulatory authorities, provides:

> Not later than one year after these rules take effect, each state regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C ... Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such Subpart ...[7] (Emphasis supplied.)

It is absolutely clear on the face of the FERC's Rule 292.401(a), that the Commission must implement Rule 292.305(b)(1) requiring electric utilities to offer supplementary, backup and maintenance power to QFs. However, it is also clear on the face of Rule 292.401(a) that the Commission is not specifically required to adopt a rule to implement FERC Rule 292.305(b)(1). The FERC rules provide the Commission with a choice of

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[7]Subpart C contains FERC Rules 18 C.F.R. 292.301-.308 regulating sales and purchases between QFs and electric utilities.

implementation methods: Rules, case-by-case adjudication or other reasonable action. The Commission has chosen in its standby rate proceeding to proceed on a case-by-case basis, weighing the competing evidence supplied by the parties.

While the Commission has exercised discretion in its choice of methods to implement the FERC's rule, it, in effect, has no discretion in choosing the policy embodied in the rule. The FERC has, carrying out the mandates of PURPA, decreed that electric utilities shall offer cost-based, non-discriminatory standby rates. That is the policy that has been adopted; it is but for the Commission to carry out the implementation.

When the Commission's role as implementor of the FERC's policy is recognized, it makes little sense to claim, as the Industrial Cogenerators do, that the Commission has exercised its discretion inconsistently with its Rule 25-17.082. The Commission has done what it was bound by federal law to do, and that in an adjudicatory forum providing the least possible discretion and greatest judicial constraints. The Commission committed itself to render a decision based on the evidence presented. It seems unlikely that the remand provision of section 120.68(12)(b), was ever intended to apply to a situation where an agency's claimed abuse of discretion was the result implementing a federal rule. The more common occurrence has been for the agency to adopt a rule, then proceed to interpret it in a manner inconsistent with

the rule.[8] That is not what occurred here, and the abuse which section 120.68(12)(b) is designed to guard against, unpredictable deviations from rule policies, did not either. If the Commission's action was an exercise of discretion in any sense related to section 120.68(12)(b), Florida Statutes, the Industrial Cogenerators participated in it and influenced it to the maximum extent. The Commission's actions were an acceptable, and indeed preferable means of implementing the policies embodied in the FERC's rules. See, McDonald v. Dept. of Banking and Finance, 346 So.2d 1177 (Fla. 1st DCA 1981). The proceeding was adjudicatory, bringing in the constraints of competent, substantial evidence, rather than a rulemaking proceeding, which embodies a less stringent standard for Commission action.

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[8]In those cases where the limitations of section 120.68(12)(b), have been raised, both in its pre-1984 form allowing deviation from an agency's rule, if adequately explained, and in the current, seemingly absolute prohibition, the issue has been whether an agency's interpretation of its rule was inconsistent with the terms of the rule. For example, in Best Western Tivoli Inn v. Department of Transportation, 435 So.2d 321 (Fla. 1st DCA 1983), the question under the pre-1984 version of section 120.68(12)(b), was whether the Department of Transportation had deviated from its rule on billboards by a liberal reading which substituted the disjunctive "or" for the conjunctive "and" actually contained the rule. The Department's substitution of "or" for "and" allowed it to deny the Appellant's right to erect billboards near Interstate Highway 10. The Court found that this was indeed a deviation from the plain meaning of the Department's rule and that the deviation had not been adequately explained in accordance with section 120.68(12)(b).

Under the current version of section 120.68(12)(b), the First District Court of Appeal remanded an order of the Department of Health and Rehabilative Services in Woodley v. Dept. of Health and Rehabilitative Services, Dist. 3, Lake County AFDC, 505 So.2d 676 (Fla. 1st DCA 1987). In that case, the agency construed its Rule 10C-1.102(9), Florida Administrative Code, to deny benefits to an applicant for Aid to Families With Dependent Children where the plain language of another section of the rule showed that HRS had not followed its own guidelines.

A. Remand of Order No. 17159 as Inconsistent with Rule 25-17.82(3)(f) would produce the untenable result of forcing the Commission to adhere to a rule shown inconsistent with federal law.

The Industrial Cogenerators arguments in favor of remand pursuant to section 120.68(12)(b) should be rejected for the reasons of the statute's inapplicability stated above. However, an analysis of the negative effects that mechanical application of section 120.68(12)(b) would have in this case further demonstrate the inappropriateness of the relief sought by the Industrial Cogenerators.

Merely on the basis of the claimed inconsistency with Rule 25-17.082(3)(f), the Industrial Cogenerators would have this Court scuttle the Commission's Order No. 17159. That result would allow them to skirt the requirement that they purchase standby electrical service only through the utilities' approved standby tariffs. The Commission would be required to allow QFs to take standby service "at the utility's retail rate schedule under which the qualifying facility would receive service as a nongenerating customer" as provided in Rule 25-17.082(3)(f). This, in turn, would force the Commission to act contrary to the mandates of PURPA and the FERC rules requiring that sales to QF's be just, reasonable and nondiscriminatory.

In their plea for a return to the good old days, when they could purchase standby energy at the rate otherwise applicable to nongenerating customers, the Industrial Cogenerators conveniently overlook the basis for allowing such sales in the first place. The FERC's rule 18 C.F.R. 292.305(a)(2), provides that:

> rates for sales which are based on accurate data and consistent system-wide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics. (Emphasis supplied.)

This section of the FERC rule is consistent with the Commission's Rule 25-17.082(3)(f), allowing QF's to take energy at rates applicable to nongenerators only if such rates have been determined to be based on similar load and cost characteristics. There had been no such determination prior to Order No. 17159. In fact, it has been the argument of the Industrial Cogenerators from the beginning of this proceeding that their load and cost characteristics are different and that they, therefore, should be allowed to purchase energy under the separate rates for supplementary power, back-up power, maintenance power, interruptible power found in the FERC's Rule 292.305(b). As the Industrial Cogenerators' Witness Brubaker succinctly put it, that was the basic purpose of his testimony:

> 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 distinct 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.)

The long and short of the Industrial Cogenerators position taken in their brief on the continued validity of Rule

25-17.082(3)(f), is that they want to have their cake and eat it too. While testifying extensively that QFs have unique cost and load characteristics and must have separate rates, they at the same time want to return to standby purchases at rates which have been shown by their own efforts to be inappropriate for them. Such rates would be discriminatory under Rule 292.305(a)(2).

The result of these hearings has been that the parties, including the Industrial Cogenerators, have demonstrated to the Commission that a separate rate for maintenance and backup power supplied to QFs is appropriate, based on their unique characteristics. The Commission has found the tariffs approved by its Order to contain "the most equitable, cost-based and nondiscriminatory rate schedules possible based upon the record of this proceeding." (Order No. 17159, at 23.) This is clearly in line with the requirements of PURPA and the FERC's rules that the rates for QFs be cost-based and nondiscriminatory.

If the Commission's Order No. 17159 were remanded with the proviso that the Industrial Cogenerators could once again rely on the utilities' obligation to sell power in accordance with Rule 25-17.082(3)(f), the Commission would be put in the position of violating its federal mandate to salvage a rule, the operation of which has been demonstrated to produce inappropriate and discriminatory results.

The Court should not pillory the Commission on its own rule by the myopic interpretation of section 120.68(12)(b), urged by the Industrial Cogenerators. The Court should not scuttle the

constructive results reached by the parties in developing standby rates, but allow the Commission to proceed with orderly development of its policies. To do otherwise would be to assert the dominance of the Commission's rule over the federal statutes and rules requiring it to treat QFs in a nondiscriminatory manner.

The Commission does not contest that it would now be appropriate to repeal or modify Rule 25-17.082, and it is proceeding to do so. The Commission has initiated rulemaking in Docket No. 870352-EI, In re: Revision to Rule 25-17.082, Florida Administrative Code. The Court should uphold the Commission's standby rate order and allow it to proceed with the implementation of standby rates in accordance with federal guidelines.

## POINT III

**THE COMMISSION'S DECISION ADOPTING A RATCHET PROVISION IN ITS STANDBY RATE DESIGN IS BASED ON THE LOAD AND COST CHARACTERISTICS OF QFS AS SELF-GENERATORS AND IS NOT DISCRIMINATORY.**

Even if the issue were properly raised, the Industrial Cogenerator's argument that the ratchet provision approved by the Commission's Order No. 17159 is discriminatory against QFs and in violation of section 366.81, Florida Statutes, is totally without merit. Upon review of the record, it is readily apparent that the Commission has considered the specific load and cost characteristics of QFs in developing standby rates. Contrary to the Industrial Cogenerator's assertions that the ratchet is discriminatory, the application of a ratchet in calculating the minimum reservation and local facilities charges assures that QFs pay their fair share of the utilities' costs.

Minimum Reservation Charges

The FERC staff has stated that proper development of a cost-based rate structure for self-generating customers must take into consideration three basic factors: 1) the reliability of the QF's equipment; 2) the extent to which the customer will call upon the utility to provide electricity when its equipment is not operating, and 3) the degree of coincidence between the QF's outages and the utility's peak demand periods. Staff Discussion Paper, 44 Fed. Reg. 38863, 38868 (1979). These factors were also testified to by the Industrial Cogenerators' witness Brubaker.

(R. Vol. V, at 30-2.) These factors are important because of the intermittent, random nature of standby services. This randomness makes the full recovery of the costs of the capacity and local facilities necessary to provide that service a key issue from the regulatory standpoint. Staff Discussion Paper, 44 Fed. Reg. 38863, 38869 (1979).

This problem was addressed in the Staff Discussion Paper as follows:

> One likely area of contention that arises in connection with interruptible and standby service is the recovery of the utility's customer or facilities costs.... Where smaller customers are involved, however, the rate design for the class to which the customer is assigned may provide for the recovery of some customer costs through energy charges. In these situations the utility is likely to assert--and with considerable merit--that minimum charges have to be increased so as to assure the recovery of its fixed costs (and some expenses) from dedicated facilities when the customer does not buy enough energy in a given period to reimburse the utility under the conventional rate design. A minimum bill calculated to recover these costs would seem to be a reasonable approach to this matter ....

Id.

The rate design approved by the Commission for standby service is comprised of seven sections. The first section is a minimum reservation charge which recovers the cost of production and bulk transmission. The second section is a minimum local facilities charge which recovers subtransmission and distribution costs. The third section is a daily demand charge based on daily maximum on-peak KW demands which recovers the cost of production and bulk

transmission and is off-set against the reservation charge. Under this rate design the nongenerating customer pays the higher of the computed daily demand charge or the reservation charge. The fourth is a non-fuel energy charge which recovers energy related operation and maintenance expenses and energy related production costs. The fifth is a fuel charge. The sixth section is a customer charge which recovers administrative, metering and billing expenses. The seventh section recovers charges for approved oil backout and conservation programs. (Order No. 17159, at 18-19.)

The rate design approved by the Commission and described above is, with few modifications, exactly the scheme proposed by the Industrial Cogenerator's own witnesses, Messrs. Brubaker and Ross. (R. Vol. V, at 34-45, 47-9; R. Vol. VIII, Exhibit 2 at 3, 5-6; Exhibit 3 at 3, 5-6.) This, then, is the scheme that would best compensate the utility for providing standby services and "charge the appropriate amount to facilities having varying equivalent forced outage rates. (R. Vol. V, at 34.) This scheme would also recognize class diversity within the generating customer class and properly recovers the costs associated with facilities which the utility has to have available to provide intermittent service to self-generators. (R. Vol. V, at 151.) In short, the Industrial Cogenerators agree that this is exactly the type of rate design needed to properly recover the costs associated with the provision of standby services.

Ratchet Provisions

Order No. 17159 allows a ratchet provision to be applied to both the reservation and local facilities charges described above. (Order No. 17159 at 21.) Under the order, the maximum demand on which the initial reservation and local facilities charges are computed are set by mutual agreement of the QF and the utility providing service. This set amount is only increased (ratcheted up) when the demand which the QF actually puts on the system exceeds this contractually set amount. Order No. 17159 allows each utility to continue computing reservation and local facilities charges on this ratcheted amount for up to 24 months. Id.

Under the minimum reservation and local facilities charges discussed above, a minimum amount is paid based on the initial contracted demand mutually agreed to by the self-generator and the utility. This amount is paid even when the standby customer takes no service under the tariff. The ratchet provision allows for the collection of reservation and local facilities payments based on the ratcheted amount of demand from the self-generator under similar circumstances. Since ratchets are not applied to other customers, the Industrial Cogenerators complain that this scheme is discriminatory.

As with the minimum reservation charge, here, too, the Industrial Cogenerators have testified that a ratchet provision is the appropriate rate design mechanism to properly recover the cost to serve standby customers. (R. Vol. VIII, Exhibit 2 at 2;

Exhibit 3 at 2.) Here, too, the rate design properly addresses the unique load characteristics of self-generators created by their random and intermittent demands on a utility's system.

The arguments presented above that the minimum reservation and local facilities charges do not discriminate against self-generators also apply here. The rate design is different because the load characteristics of each class of customers are different. So different, in fact, that a separate rate is necessary to avoid discrimination. The Industrial Cogenerators simply cannot have it both ways: on the one hand they assert that application of the same rate design as applied to nongenerating customers is discriminatory because of the unique load characteristics of the standby customers, and on the other hand they assert that the rate design for standby customers must be exactly the same as that of nongenerating customers.

The Industrial Cogenerators assert that the Commission's deletion of ratchets and minimum demand charges from the rate design of nongenerating customers is prima facie evidence that discrimination has occurred. (Brief at 16.) This argument is specious. The arguments advanced in the Commission's orders deleting ratchets from nongenerating customers are valid for those customers with their respective load characteristics, but inapposite for QFs with markedly different load characteristics. Rates are not discriminatory just because they are different for different customers. Tampa Electric Company v. Cooper, 14 So.2d 388 (Fla. 1943).

The Commission's policy on the application of ratchets to nongenerating customers was not at issue in this case. The Commission has based its application of a ratchet to standby rates on the record before it, as it was bound to do. See, E.M. Watkins & Company, Inc. v. Board of Regents, 414 So.2d 583 (Fla. 1st DCA 1982).

In summary the Commission has not discriminated against the Industrial Cogenerators or any other self-generating customer by the use of minimum ratcheted reservation and local facilities charges. These charges correctly assess the cost of providing the production, transmission and distribution facilities and functions necessary to provide those customers with intermittent standby service. Without such provisions, the standby customer would not bear his portion of the burden for these facilities to the detriment of the general body of ratepayers. All other customer classes contribute equitably to these costs; the QF customer is not discriminated against when he is required to do the same.

## CONCLUSION

The Industrial Cogenerators have no right to raise the issues they assert on appeal. Their appeal should be dismissed forthwith and Order No. 17159 affirmed.

If the issues are found to be properly before the Court, the Commission's Order should nevertheless be affirmed. Order No. 17159 does not represent an exercise of discretion inconsistent with a rule and should not be remanded. Remand would force the Commission to support a rule now found inappropriate under federal law. The ratchet provision approved by Order No. 17159 produces no discrimination against the Industrial Cogenerators.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of the Florida Public Service Commission has been furnished to the following persons by U.S. Mail this 15th day of April, 1988.

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