IN THE SUPREME COURT OF FLORIDA

C. F. INDUSTRIES, INC.,

Appellants,

v.

CASE NO.: 70,196

KATIE NICHOLS, ET AL.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES
GULF POWER COMPANY

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Mr. Holland does not object to Justice Ehrlich sitting on this case. Does not wish case to be rescheduled

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PRELIMINARY STATEMENT

This case is an appeal of Order No. 17159 issued in Docket No. 850673-EU by the Florida Public Service Commission ("Commission"). Gulf Power Company ("Gulf") was an active party before the Commission in Docket No. 850673-EU. Gulf's participation in this case on appeal is in the role of an appellee in support of Order No. 17159 and the Commission.

STATEMENT OF THE CASE AND FACTS

In the interest of brevity, Gulf accepts and adopts the statement of the case and facts set forth in the answer brief filed in this appeal by Florida Power & Light Company ("FPL"). The abbreviations used by Gulf in this brief will have the same meaning as the abbreviations adopted by FPL.

INTRODUCTION

AND

SUMMARY OF ARGUMENT

By this appeal the Industrial Cogenerators attack the Commission's Order No. 17159 on the basis that the Commission has acted in violation of two statutory provisions. The appellants have not questioned the findings of fact made by the Commission in Order 17159. Therefore, given the unchallenged findings of fact made by the Commission, the proper standard for review is whether the order on appeal is in accord with the essential requirements of law. The burden is on the Industrial Cogenerators to prove that the Commission's construction of the statute and its own rules is clearly erroneous. See Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

Until it had entered the order now on appeal, the Commission had not previously defined the concept of standby service either through rule or by order. The subject matter of Florida Administrative Code Rule 25-17.082 is entirely different from the subject matter of Order 17159. As a result, there is no inconsistency between the two. Order 17159 is consistent with the Commission's established rule addressing a utility's obligation to sell energy to qualifying facilities. See Fla. Admin. Code Rule 25-17.084.

Order 17159 identifies a type of service which the self-generating customer contracting for standby service will receive that is equivalent to the service received by a full requirements customer of a utility. This service is identified in the order on appeal as supplemental service. The order also provides that both self-generating customers and full requirements customers will receive this service at the same retail rate schedule.

Although Order 17159 adopts a different rate structure for standby service from the standard structure for full requirements service, this difference is not unlawful discrimination against the use of renewable energy resources or highly efficient systems as contended by the Industrial Cogenerators. First, no distinction was made between QF self-generating customers (which by definition use highly efficient systems or renewable energy resources) and non-QF self-generating customers. Second, the Commission's unchallenged factual finding that there are differences between the standby service to a self-generating customer and service to a full requirements customer in terms of demand costs supports the differences in rate structure between these two classes of customer. Where comparable service is received by the standby customer, (i.e. supplemental service) it is charged the same rate as the full requirements customer.

Finally, the issues raised by the Industrial Cogenerators on appeal were not raised before the Commission below despite the fact that all parties were notified that any issues not raised through prehearing statements would be deemed waived. The appellants failed to raise and preserve these issues with the Commission and they sponsored expert testimony in favor of the objectionable provisions, therefore, they should not now be heard to complain.

The appellants having failed to prove that the Commission's order departs from the essential requirements of law, the order on appeal should be affirmed.

ORDER NO. 17159 IS NOT INCONSISTENT WITH FLORIDA ADMINISTRATIVE CODE RULE 25-17.082 AND THEREFORE SECTION 120.68, FLORIDA STATUTES HAS NOT BEEN VIOLATED.

For the first time in Florida, the Commission, through its Order No. 17159, defines the terms "standby electric service," "backup service" and "maintenance service" [hereinafter collectively referred to as standby service.] Prior to the entry of Order 17159, the concept of standby service had not been defined by the Commission either by order or through its rules. The very purpose of the Commission's proceedings in Docket No. 850673-EU was to define the type of service electric utilities must provide their self-generating customers. After providing definition to the concept of standby service, Order 17159 goes on to set up the rates, terms, conditions, applicability criteria and other provisions appropriate for a standby tariff. (Order at page 3).

Florida Administrative Code Rule 25-17.082 was not intended by the Commission to establish criteria by which electric utilities would provide standby service. The title of the rule is "The Utility's Obligation to Purchase" (emphasis added). The rule was adopted by the Commission to implement Section 366.05(9) of the Florida Statutes which concerns the authority of the Commission to establish guidelines and set rates related to the purchase of power or energy by public utilities

from cogenerators or small power producers. Order 17159 does not address the utility's obligation to purchase from the self-generating customer. Order 17159 does address for the first time the obligation of the utility to provide standby service and the terms under which the self-generating customer may purchase and receive this service from the utility. Since the subject matter of Order 17159 is entirely different from the subject matter of Rule 25-17.082, there is no inconsistency between them and thus no violation of Section 120.68 has occurred.

The appellants fail to mention that there is an established Commission rule concerning a utility's obligation to sell energy to QFs. Florida Administrative Code Rule 25-17.084 simply requires each utility to sell energy to QFs at rates that are just, reasonable and non-discriminatory. There is nothing in the order on appeal which is inconsistent with Rule 25-17.084.

In addition to defining the concept of standby service, Order 17159 also defines the term "supplemental service." Supplemental service is the electric energy a self-generating customer receives from a utility over and above the energy that is normally provided by the customer's own generator(s). (Order at page 4.) This electric service was found by the Commission to be equivalent to the service received by the utility's non-generating customers. As a result of this finding, Order 17159 provides that the self-generating customer shall receive

supplemental service at the same retail rate schedule that it would receive the service as a non-generating customer of the utility. (Order at page 5). This action of the Commission is consistent with Florida Administrative Code Rule 25-17.082(3)(f).

Order 17159 simply requires all customers who take standby service to do so under standby rates. The appellants protest this requirement. They want the "option" to take standby service from the utility and pretend that they are taking full requirements service. The Commission saw through that pretense. No one should be entitled to take standby service, pretend that it is really full requirements service, and pay the less demand intensive rate associated with full requirements service.

The Commission correctly determined that the costs of providing standby service are not fully recovered through the rate structure for full requirements service. This finding has not been challenged on appeal. Therefore, an inappropriate result would occur if Rule 25-17.082(3)(f) were interpreted by this Court to apply to standby service. The Commission's order on appeal does not violate Section 120.68 of the Florida Statutes. Therefore, Order 17159 should not be overturned on the grounds alleged by the appellants.

THE RATE STRUCTURE FOR STANDBY SERVICE APPROVED AND ADOPTED BY ORDER 17159 DOES NOT DISCRIMINATE AGAINST THE USE OF RENEWABLE ENERGY RESOURCES OR HIGHLY EFFICIENT SYSTEMS, AND THEREFORE SECTION 366.81, FLORIDA STATUTES HAS NOT BEEN VIOLATED.

In the order on appeal, the Commission recognized, at the appellant's urging, that standby service was different from full requirements service. The Commission determined that the differences justify different rate structures for these two types of service. The different rate structure adopted by the Commission for standby service was not adopted on account of the use of systems utilizing renewable resources or highly efficient systems. Instead, the different rate structure was adopted because of the differences in the character of the standby service. No distinction was made among QF self-generating customers and non-QF self-generating customers and, therefore, there is no unlawful discrimination.

Again, it must be pointed out that the Commission mandated that supplemental service be provided to QFs at the otherwise applicable rate. Where the service taken by the full requirements customer is comparable to the service taken by the self-generating customer (i.e. supplemental service), there is no distinction in the rate structure and thus no discrimination. There is no service received by the full requirements customer comparable to the standby service received by the self-generating

customer. The fact that a different rate structure has been adopted for this different class of service is not unlawful discrimination. The mere fact that different customers are charged different rates does not establish discrimination. Cooper v. Tampa Electric Co., 154 Fla. 410, 17 So.2d 785, 786 (1944). To hold otherwise in this case would require this Court to read into Section 366.81 a legislative intent to discriminate against the full requirements customer by requiring him to subsidize QFs. Such an intent cannot be legitimately gleaned from the language of Section 366.81.

The appellants urge rejection of the standby rate structure adopted in Order 17159 on the grounds that it employs a ratchet provision to which other retail customers are not subjected. The appellants ignore the testimony presented by their own expert witnesses which showed that standby service to a QF with its own self-serving generation is quite unlike full requirements service to other retail customers in terms of demand costs. The general rule adopted in Florida has been that different rates may be charged if justified because of differences in the cost of furnishing the electric service. See Clay Utility Company v. City of Jacksonville, 227 So.2d 516, 518 (Fla. 1st DCA 1969). The burden of establishing unlawful discrimination rests on the appellants to show that the difference in rates cannot be justified on the basis of the cost

of furnishing the service to the two different customer classes. Id at 518.

The ratchet feature of the standby rate structure to which the appellants now object is appropriately applicable only to standby service. The customer taking standby service is in the unique position of setting his own billing demand level. The ratchet was adopted into the rate structure to ensure that the rates are based on the level of standby demand that actually occurs rather than an arbitrary figure set by either the utility or the QF. The ratchet is initial and temporary. The Commission clearly expects that the utility and the QF will renegotiate the contract demand after the QF has had a sufficient period of operation on which predictions for the future can reasonably be based. The Commission has the power to resolve a dispute that may occur between a QF and a utility as to the proper standby demand level. The ratchet feature along with the other unchallenged unique features of the standby rate structure, is essential to ensure that the overall standby rate is fair, just and non-discriminatory.

By asking this Court to overturn the Commission's order on appeal and require that QFs be treated exactly like customers without their own generating capacity, the appellants are suggesting that the Court should ignore the facts developed before the Commission, particularly as to demand costs. If the

appellants truly want to be treated the same as a full requirements customer, then they are free to adopt the simultaneous purchase and sale option set forth in Florida Administrative Code Rule 25-17.082. This option allows the customer to sell all of the output of his generator(s) to the utility and purchase all of his site electrical requirements from the utility. The exercise of this option would result in the customer paying the full requirements rate for his purchases from the utility. This Court should not go beyond the relief which the Commission has provided the appellants and others similarly situated through the simultaneous purchase and sale mechanism.

THE APPELLANTS WAIVED THEIR RIGHT TO COMPLAIN OF THE ALLEGED STATUTORY VIOLATIONS ASSERTED IN THEIR INITIAL BRIEF ON APPEAL THROUGH THEIR ACTIONS BEFORE THE COMMISSION BELOW.

As noted in the statement of the case and facts, the Commission issued an order setting forth a prehearing procedure which required all parties to file prehearing statements setting forth the questions of law and policy questions which each party considered to be at issue in the evidentiary hearing. In addition to requiring the issues be raised, the Commission required each party to state its position on the issues. Any issue not raised prior to the issuance of the prehearing order was deemed by the Commission to have been waived. R.Vol. I at 15; Fla. Admin. Code Rule 25-22.038(3); See Citizens v. Public Service Commission, 435 So.2d 784; 787 (Fla. 1983).

Despite having filed prehearing statements, participated at the prehearing conference, and filed post hearing briefs, the appellants raise for the first time in this appeal their concerns that requiring a separate standby rate by order would be inconsistent with Rule 25-17.082(3)(f) and that ratchet provisions in the separate standby rate are discriminatory. The general rule is that issues not preserved for appeal are waived. See Bill's Equipment and Rentals v. Teel, 498 So. 2d 536, 537 (Fla. 1st DCA 1986). Having been given the opportunity to raise and address these issues with the Commission below, and having

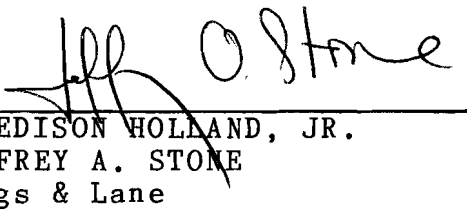
failed to do so, the appellants should not now be heard to complain.

Furthermore, the expert witnesses sponsored by the appellants themselves advocated the Commission's approval of a standby rate different from the otherwise applicable retail rate as well as the use of demand ratchets. As a result, the appellants should not now be heard to complain in this court that these very provisions were in fact adopted by the Commission. If this court were to allow such an inconsistent position to be taken by appellants, then the interests of justice at the administrative and trial levels of this state would be thwarted. To paraphrase the addage, justice would be delayed and therefore denied.

CONCLUSION

The Commission's order on appeal complies with the essential requirements of the law of the State of Florida. Appellants having failed to meet their burden on appeal, Order 17159 should be approved by this court and the relief sought by the appellants should be denied.

Respectfully submitted,



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