IN THE SUPREME COURT
STATE OF FLORIDA

C. F. INDUSTRIES, INC.,

Appellant,

vs. Case No. 70,196

KATIE NICHOLS, et. al.,

Appellees

_____/

ON APPEAL FROM AN ORDER OF THE
FLORIDA PUBLIC SERVICE COMMISSION

APPELLEE FLORIDA POWER CORPORATION'S ANSWER BRIEF

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COUNTER-STATEMENT OF THE CASE AND OF THE FACTS

This appeal arises from an order issued on February 6, 1987 by the Florida Public Service Commission ("Commission") at the conclusion of a proceeding entitled "In re: Generic Investigation of Standby Rates for Electric Utilities." (A-1).[1/] The purpose of this proceeding, as its name suggests, was to determine appropriate rate schedules for "standby" electrical power services. These services are provided by power companies to businesses that use their own equipment to generate much of the electrical power they need. These businesses are referred to by the Commission as "self-generating customers."

Certain self-generating customers are specially recognized under federal law because they meet federal efficiency standards or fuel use criteria. 16 U.S.C. § 796(17)(A), (18)(A). These companies are called "qualifying facilities," or "QFs."

As the result of hearings in 1981 and 1983, the Commission promulgated rules regarding the provision of services to QFs. One such rule provided that electric service furnished by utilities to QFs "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." Fla. Admin. Code Rule 25-17.082(3)(f).

[1/] Citations in this brief to the Commission's Order will be denoted "A - ___," with the appropriate page numbers from appellants' appendix to their brief. Unless otherwise indicated, all emphasis in quoted material has been added by counsel.

Because of the distinct differences between QFs and those companies that obtain all their energy needs from electric utilities, QFs expressed concern to the Commission about its rule applying a single rate schedule to both classes of customers, and they encouraged the adoption of separate rates for standby services. "Responding to the concerns of cogenerators and other standby customers [i.e., self-generating customers, including QFs], . . . the Commission initiated a generic investigation of standby rates in 1985." Commission Order No. 16011, at 1 (April 16, 1986). Appellants in this case -- who refer to themselves on this appeal, and who were designated by the Commission below, as "Industrial Cogenerators" -- participated fully in all stages of the proceedings before the Commission.

The Commission commenced those proceedings by conducting workshops in March, April, and May 1986. These workshops identified, addressed, and sought to narrow and resolve a host of issues relating to standby services. Appellants participated in these workshops, together with representatives of Florida Power Corporation, other utilities, Metropolitan Dade County, and the Commission's staff.

By Order No. 16011, issued April 16, 1986, the Commission required Florida Power and Light Company, Florida Power Corporation, Tampa Electric Company, and Gulf Power Company to file illustrative standby tariffs on or before June 16, 1986, for consideration at hearings in August 1986. (A-3). Appellants raised no objection to consideration of separate tariffs for standby services.

The Commission conducted a Prehearing Conference, after notice to appellants and other interested parties, on August 12, 1986. Appellants sent representatives to the conference, identified witnesses and exhibits they intended to produce at hearing, and participated in the formulation of fifty-one issues concerning standby services that would be addressed at hearing. Order No. 16483 (Aug. 18, 1986).

At no time did appellants object to the procedures the Commission was following to set standby rates. Nor did appellants contend before the Commission, as they now argue on appeal, that the Commission could not establish rate schedules for standby services that varied from the schedule applicable under Rule 25-17.082(3)(f) to non-generating customers.

To the contrary, as evidenced by the Commission's Prehearing Order, appellants urged the Commission to do exactly that. The Order lists the following as the first issue to be taken up at the hearings on standby rates:

> 1. Issue. Are the known or expected load characteristics of self-generating customers sufficiently different from those of the utilities' full requirements customers to justify having different rates for their electric service?

Appellants' stated position on this issue was:

> Industrial Cogenerators: Yes, as to backup and maintenance service [i.e., "standby" service, as defined by the Commission in its final Order]. No as to supplemental [which was treated just as appellants requested in the Commission's final Order].

The second issue specified in the Prehearing Order was as follows:

2. Issue. Are the known or expected supplemental, backup, and maintenance load characteristics sufficiently different to justify having different rate schedules for each?

Appellants' stated position on this issue was:

> Industrial Cogenerators: Yes, however only backup and maintenance [i.e., standby] rate schedules need be developed in this proceeding.

(Order No. 16483, at 6-8).

The Commission conducted formal hearings on the issues framed in its Prehearing Order in August 1986. Appellants participated fully in these hearings and produced witnesses and exhibits.

Appellants' witnesses at the hearings supported the development of separate rate schedules for the provision of standby services to self-generating customers, in view of the special costs incurred by utilities in connection with such sporadic services. Appellants' lead witness, Maurice Brubaker, testified that he and his colleague were "here to support a specialty rate for qualifying facilities . . . [s]eparate and distinct from the rates which now exist for all customers who are served by electric utilities in Florida." (Tr. 140). In fact, Mr. Brubaker testified that a failure to develop different rates for standby services to reflect the different costs of those services would constitute "unjust discrimination":

> 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 services differences, they should be reflected in the rates.

(Tr. 213).

Appellants submitted a post-hearing brief to the Commission on September 12, 1986. The brief suggested that "[t]he issues before the Commission for resolution in the proceeding are relatively straight forward -- at what rates and under what terms and conditions is standby service to be made available?" (Brief of Intervenors, at 2). Appellants specifically endorsed Florida Power Corporation's proposal for standby rates, which were "cost-based standby rates designed to recover the costs of providing standby service; recognizing the characteristics of standby customers; and 'separating' supplemental service from backup and maintenance." (Id. at 3). Appellants argued that, in setting standby rates, the Commission should apply its long-standing policy "of requiring rates for the sale of electricity by utilities to be 'cost-based', using traditional cost-of-service principles and average embedded cost pricing." (Id. at 8).

Appellants did not urge that standby services must be provided at rates applicable to non-generating customers. Quite to the contrary, appellants contended that a separate standby rate schedule should be adopted, consistent with Florida Power Corporation's proposal, and that these rates "should be optional at the request of the QF." (Id. at 5).

At the conclusion of their brief (id. at 39), appellants reconfirmed the position they had taken before the hearings on the issues before the Commission:

> 1. Issue: 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?

Position: Yes, as to backup and maintenance [i.e., standby] service. No as to supplemental.

2. Issue: Are the known or expected supplemental, backup and maintenance load characteristics sufficiently different to justify having different rate schedules for each?

Position: Yes, however only backup and maintenance rate schedules [i.e., standby rate schedules] need be developed in this proceeding. Supplemental service should be furnished under existing tariffs for non-generating customers.

On February 6, 1987, the Commission issued its final Order in the proceeding below. The Order established principles for determining rates for "standby" and "supplemental" services. Standby services were defined to include "backup or maintenance service or both," which were, in turn, defined as follows:

> "Backup service" means electric energy or capacity supplied by the utility to replace energy or capacity ordinarily generated by a customer's own generation equipment during an unscheduled outage of the customer's generation.
>
> "Maintenance service" means electric energy or capacity supplied by the utility to replace energy or capacity ordinarily generated by a customer's own generation equipment during a scheduled outage of the customer's generation [e.g., during maintenance or repair of the customer's equipment].

(A-3, A-4). The third category of auxiliary services, "supplemental service" was defined as "electric energy or capacity supplied by the utility in addition to that which is normally provided by the customer's own generation equipment." (A-4).

The Commission then addressed the "threshold issue . . . 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." (A-4). Reviewing the positions of the various parties on this question, the Commission observed that "the Industrial Cogenerators took the position that the expected load characteristics for backup and maintenance services [i.e., standby services] would be sufficiently different from existing service classes and from each other to warrant different rates." (A-5). By contrast, the Industrial Cogenerators "felt that until information to the contrary was obtained, the load characteristics for supplemental service should be presumed to be the same as those of the otherwise applicable full requirements rate classes." (Id.).

The Commission's resolution of this issue tracked the position urged by appellants. The Commission concluded (A-5):

> 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. 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. Accordingly, we shall require that supplemental service be provided under the utilities' otherwise applicable full requirements service tariffs.

Having concluded, based on the record developed at the hearings, that separate rate schedules for standby services were appropriate in light of the distinct characteristics of those services, the Commission next determined that those rate schedules must be applied in a nondiscriminatory manner to all self-generating customers, not just to QFs. As the Commission explained:

> [S]ervices to be provided to QF and non-QF generating customers should be based on the load characteristics and cost to serve of each. ... [I]f each group of customers imposes similar costs on the utilities' systems, the same services should be provided to each group at the same price. ... Clearly, if non-QF generating customers impose similar or identical costs on the utilities for the provision of supplemental, backup and maintenance services they should be charged the same rates. (A-6)

Accordingly, the Commission concluded that, in view of the special costs associated with providing standby services to self-generating customers -- "whether or not they have obtained qualifying facility (QF) status" -- it was appropriate to "require that the tariffs resulting from this proceeding shall be mandatory for all self-generating customers." (A-6, A-7). To make clear that this measure was being taken solely to reflect the different costs attendant to furnishing standby power to self-generating customers, the Commission specifically provided that the separate tariffs would not apply when "there is evidence to demonstrate that their load characteristics resemble those of normal full requirements customers." (A-6).

In fashioning the actual rate mechanisms that would govern the provision of standby services, the Commission started by recognizing its obligation under federal and state law to develop rates that are nondiscriminatory. Quoting an order adopted by the Federal Energy Regulatory Commission ("FERC"), the Commission observed that applicable federal law:

> provides that the rules requiring utilities to sell electric energy to qualifying facilities shall ensure that the rates for such sales are just and reasonable, in the public interest, and nondiscriminatory with respect to qualifying cogenerators or small power producers [i.e., QFs]. This section contemplates formulation of rates on the basis of traditional ratemaking (i.e., cost-of-service) concepts. (A-4)

The Commission observed that "[b]eing true to the cost-of-service concept requires a delicate balance to remain on the line between rates that 'subsidize' QFs at the expense of the general body of ratepayers and those that unfairly 'saddle' QFs with unwarranted costs." (A-4). Thus, "[a] primary objective of this hearing was to identify specifically those costs that are appropriate for inclusion in the rates for standby services and those that are not." (Id.).

In striking that "delicate balance," the Commission concluded that essentially the rate structure proposed by Florida Power Corporation should be adopted. It was the Commission's "determination that the approved rate structure will recover from any SGC [self-generating customer] approximately the demand-

related production and transmission costs that his actual power usage imposes on the utility system as determined by traditionally accepted cost of service methods." (A-15).

Based on the record of these proceedings, and at appellants' suggestion, the Commission incorporated a "ratchet" mechanism in the tariff to enable utilities to recover the costs of maintaining local transmission and distribution facilities needed to serve standby customers.

The rates charged to all-requirements customers "include[d] an element of cost recovery for local facilities" (A-17). But the demand placed on those facilities by all-requirements users and standby customers differs considerably. Standby services are provided on an intermittent, erratic basis. Appellants' witness, Mr. Brubaker, analogized these services to a "spare tire" of a car, "used [only] when one of the four tires fails." (Tr. 30). Mr. Brubaker emphasized "the need to separately identify and bill [standby] customers for their supplementary power, backup power, and maintenance power." (Tr. 17). As he explained, "[t]hese different kinds of service have distinctly different load characteristics, and as a result, impose different costs upon the utility's system[,] [a]nd in our view, failure to identify and bill these services separately will result in inappropriate rates." (Id.).

Because standby services may be demanded rarely during the course of a month, the amount of power supplied may be minimal compared to the power furnished to non-generating customers. The standby customer's total monthly demand, however, will not fairly

reflect the cost to the utility of maintaining local facilities built to meet that customer's needs. This is true because local facilities must be built with sufficient capacity to meet the standby customer's maximum or peak demand even though it occurs rarely.

To accommodate this problem, appellants' own witness, Mr. Brubaker, proposed at the hearings that the Commission apply a ratchet mechanism to standby services in order to enable utilities to recover the cost of maintaining local transmission and distribution facilities to provide such services. The ratchet he proposed would conform the rate schedule to the standby capacity that utilities would be required to maintain in order to serve the maximum load of standby customers. Specifically, Mr. Brubaker testified:

> In terms of the local transmission and distribution facilities, which are those that are close to the customer, we have proposed that there be, in effect, an ongoing charge per kilowatt of required standby capacity to recognize that those facilities are required to be in place to serve that maximum load. But at the same time, it is important to understand that we are advocating that backup service be separated from the regular or supplementary service. So the ratchet, if you will, will apply to that portion of the load that is backup, and the same rate that applies to tariff customers for the supplementary service would apply to the supplementary load of the cogeneration customers . . . . (Tr. 18-19; 43-45).

Florida Power Corporation's witness, William Slusser, likewise supported "a ratcheted local facilities charge" to "recover [the] costs incurred by the utility to provide the local facilities required to serve standby customers." (Tr. 450).

Based on the record below, the Commission found that "the costs of dedicated local facilities for serving the backup and maintenance power loads of standby customers" would be "recovered through a charge consisting of the distribution unit cost, calculated using 100% ratcheted billing KW as the billing determinant," while "supplemental power service shall be billed under the otherwise applicable rate," i.e., the all-requirements rate. (A-17). The Commission concluded "that calculating the charge in this manner will result in a rate which appropriately reflects any economies or diseconomies of scale that may exist as a result of serving customers with different size loads." (Id.). As described, standby services, by their nature, impose "diseconomies of scale" upon utilities insofar as local facilities must be sized to meet the peak demand of standby customers even though those facilities will be used only occasionally.

The Commission specifically found that "permitting a standby customer to take backup and maintenance power service on the otherwise applicable [full-requirements] rate schedule could result in his avoiding payment for the costs of the dedicated local facilities installed to serve him." (A-17). The Commission observed:

> It is essential that sufficient local transmission and distribution capacity be in place to serve the maximum demand of each standby customer. Likewise, equity demands that the customers pay for the costs of these facilities. The failure of standby customers to pay these costs would ultimately result in a utility's general body of ratepayers having to bear them. (A-16, A-17).

These concerns, the Commission determined, were best met by use of the ratchet mechanism for standby services.

With respect to its entire standby rate schedule, the Commission concluded that, in sum, the schedule "represent[s] the most equitable, cost-based and non-discriminatory rate schedule[] possible based upon the record of this proceeding." (A-23).

On February 23, 1987, the Industrial Cogenerators filed with the Commission a "Motion for Reconsideration or Clarification" of the Order challenged on this appeal. This motion asserted neither of the two issues now presented to this Court. Rather, the motion addressed only appellants' concern about the confidentiality of data relating to standby customers that the Commission's Order required utilities to collect and report. The sole relief requested in the motion was "the issuance of an order . . . which requires the utilities to treat individual customer data as confidential but which allows them to report to the Commission the 'aggregated data' of self-generating customers." (Motion, at 2-3).

On November 10, 1987, the Commission issued an Order determining that appellants' request was "consistent with the intent of Order No. 17159," and granting the motion for reconsideration. (Order No. 18418, at 8).

As appellants acknowledge in their brief (at p. 5), the notice of appeal in this case was filed on March 9, 1987, immediately after the Industrial Cogenerators filed their motion for reconsideration with the Commission. In fact, this Court stayed the instant appeal on appellants' motion pending the

Commission's disposition of the motion for reconsideration. After the Commission ruled on that motion, appellants prosecuted their appeal in this Court on grounds they never asserted before the Commission prior to the hearings, during them, or on motion for reconsideration -- indeed, on grounds directly contrary to appellants' position before the Commission.

SUMMARY OF ARGUMENT

On this appeal, the Industrial Cogenerators attack the Commission for taking action that they supported and encouraged during the proceedings before the Commission: namely, adoption of a separate standby rate schedule and use of a "ratchet" billing device for recovery of local facilities costs.

With respect to the first ground, appellants contend that, by making separate schedules applicable to standby services, the Commission impermissibly disregarded its own rule requiring that standby services be provided at all-requirements rates. Appellants insist that the Commission was required under Florida law to follow that rule unless the Commission determined through formal rulemaking proceedings not to retain it.

The Commission's primary obligation, however, in establishing rates, is to obey the Legislature's directive to change rates "by order" "[w]henever" the Commission finds after public hearing that existing rates "are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential." Section 366.07, Florida Statutes. This statutory command overrides any Commission rule that might otherwise require the imposition of rates that are inconsistent with that statutory mandate.

Appellants themselves contended before the Commission below that the existing requirement that standby services be governed by the all-requirements rate schedule was inappropriate and discriminatory because standby services are distinctly different from services provided to non-generating customers. Based on the record in the proceeding, including appellants' own evidence, the Commission found that special standby rate schedules ought to be adopted in order to recognize these differences and to ensure reasonable and nondiscriminatory treatment of standby customers. In these circumstances, the Commission's rule imposing on all customers the all-requirements rate had to yield to the overriding statutory mandate.

Second, appellants contend that the particular rate mechanism adopted by the Commission improperly "discriminates" against QFs insofar as it uses ratcheted billing to recover local facilities costs. But once again, appellants' own witness testified in support of this device. Use of the device, as that testimony showed, was necessary and appropriate to ensure even-handed treatment of self-generating customers in relation to non-generating customers in view of the special costs to utilities associated with serving the former. Under well settled principles of Florida law, taking into account cost differences in establishing rates does not constitute "discrimination"; rather, it avoids it.

In any event, appellants are precluded from asserting now on appeal that the Commission erred by taking action that appellants supported and encouraged in the proceedings below. As described

above, appellants specifically urged the Commission to establish separate rate schedules and a ratchet billing determinant for standby services.

It is evident that appellants' real grievance here is not that the Commission's final order establishes separate tariffs and billing devices for standby services, but that the Commission rejected appellants' request that standby customers be able to pick and choose, at their option, whether to be charged under that tariff or under the rates applicable to non-generating customers.

This option, however, contravenes the basic tenet that appellants advocated before the Commission: that standby rates and billing determinants must be tailored to reflect the costs of providing standby services. Enabling QFs to elect the rate schedule they desire would result in the application of the lowest rate, not the rate that best reflects the cost of providing standby services.

Appellants' complaint, therefore, is not that the Commission has established separate tariffs and billing determinant for QFs, but that it has not done so in the manner appellants desired. Having -- for their own purposes -- prodded the Commission into fashioning rate schedules for standby services that take into account the distinct characteristics of such services demonstrated at the hearings by appellants' own witnesses, appellants are not free to attack the Commission's actions on appeal on grounds diametrically at odds with appellants' position below. "[P]laying 'fast and loose with the courts'" in this fashion is "an evil the courts should not tolerate." Scarano v. Central R. Co., 203 F.2d

510, 513 (3d Cir. 1953). At a minimum, by failing to assert before the Commission the grounds now argued on appeal, appellants have waived those contentions.

ARGUMENT

I. The Commission's Order Complies With a Statutory Command that Overrides Inconsistent Rules.

It is well settled that "[t]o the extent . . . that [an agency's] rule conflicts with [a] statute, the latter must, under familiar principles, govern." Star Employment Services, Inc. v. Florida Industrial Commission, 109 So.2d 608, 610 (Fla. 3d DCA 1959); see, e.g., Atlantic Coast Line R. Co. v. Mack, 57 So.2d 447, 451 (Fla. 1952); State v. Smith, 35 So.2d 650, 652 (Fla. 1948). "It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute." State, Dept. of Bus. Reg. v. Salvation Ltd., 452 So.2d 65, 66 (Fla. 1st DCA 1984); see, e.g., Seitz v. Duval County Sch. Bd., 366 So.2d 119, 121 (Fla. 1st DCA 1979). Consistent with these principles, the Commission below adhered to a controlling statutory mandate in establishing separate standby rate schedules that varied from the Commission's preexisting rule.

The statutory provision that governs here is codified at Section 366.07, Florida Statutes. That section declares, in pertinent part:

> Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates . . . charged or collected by any public utility for any service . . . are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential . . . the commission shall

> determine and by order fix the fair and reasonable rates . . . to be imposed . . . or followed in the future.

The Commission's Order challenged on appeal implements this statutory command.

The rates charged to QFs for electric power at the time the Commission commenced the proceedings below were the rates applicable to services provided to non-generating customers. The Commission's rules required that electric service furnished by utilities to QFs "shall be billed at the retail rate schedule under which the qualifying facility would receive services as a non-generating customer of the utility." Rule 25-17.082(3)(f), Florida Admin. Code.

Based on the distinct differences between standby services and services to non-generating customers, appellants encouraged the Commission to investigate the appropriateness of establishing special standby rate schedules that reflected these differences. Before, during, and after the hearings below, appellants themselves urged the Commission to adopt such schedules, and specifically supported the standby tariffs proposed by Florida Power Corporation. (Pp. 3-14, supra).

The Industrial Cogenerators' own key witness emphasized at the hearings "the need to separately identify and bill [standby] customers for their supplementary power, backup power, and maintenance power." (P. 10, supra). He testified that "[t]hese different kinds of service have distinctly different load characteristics, and as a result, impose different costs upon the utility's system [,] [a]nd in our view, failure to identify and

bill these services separately will result in inappropriate rates." (P. 10, supra). His unequivocal testimony was that "if there are cost of services differences, they should be reflected in the rates." (P. 4, supra).

"Based upon the record in this case" -- including the evidence introduced by appellants themselves -- the Commission found that "the expected load characteristics of self-generating customers" warranted "different rates for backup and maintenance power," i.e., standby services. Perpetuating the all-requirements rate for standby services in the face of that record, and the Commission's findings based thereon, would have violated the command of Section 366.07 that the Commission establish new rates "[w]henever" it appears after public hearing that existing rates "are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential." In these circumstances, the Commission's preexisting rule -- to the extent it may have required application of the all-requirements rate to standby services -- had to yield to this statutory command.

In any event, appellants are precluded on this appeal from contending otherwise. As described above, appellants affirmatively encouraged the Commission to adopt separate standby service rates. Appellants' witnesses appeared at the hearings for the express purpose of supporting such action. (P. 4, supra).

To be sure, appellants argued before the Commission that QFs should have the option of paying for standby services under separate rate schedules adopted in the proceeding or under the

schedule applicable to non-generating customers.[2/] But this option itself varies from the preexisting rule, which contemplates application of the all-requirements rate to all standby services. Appellants' complaint, therefore, is not that the Commission's Order departs from the preexisting rule, but that it does not depart in the same manner appellants desired.

Having sought for their own purposes to have the Commission take the action at issue on this appeal, appellants may not now contend that such action is improper. As this Court has held, "a party cannot . . . in the course of litigation . . . occupy inconsistent positions." Hodkin v. Perry, 88 So.2d 139, 140 (Fla. 1956). "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which [is] an evil the courts should not tolerate." Scarano, 203 F.2d at 513. "[T]his is more than affront to judicial dignity [;] intentional self-contradiction [would obtain] unfair advantage in a forum provided for suitors seeking justice." Id.

At a minimum, by failing to assert before the Commission the contentions appellants now raise on this appeal, appellants have waived those contentions. "It has long been the rule that, in the absence of some good excuse, this Court is not required to determine points not raised and determined" in proceedings below.

[2/] This option, of course, contravenes the basic tenet that appellants advocated before the Commission: that standby rates must be tailored to reflect the costs of providing standby services. Enabling QF's to elect the rate schedule they desire will result in the application of the lowest rate, not the rate that best reflects the cost of providing the service. The special standby rate, by definition, will best reflect the cost of providing standby services.

Carillon Hotel v. Rodriguez, 124 So.2d 3, 5 (Fla. 1960) (refusing to review issues not raised before Florida Industrial Commission); see, e.g., Dober v. Worrell, 401 So.2d 1322, 1323-24 (Fla. 1981); Lipe v. Miami, 141 So.2d 738, 743 (Fla. 1962); Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492 (1955). "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts." Federal Power Commission, 348 U.S. at 500.

Participating fully at all stages of the proceedings below, appellants took no steps to object to the establishment of special standby schedules in those proceedings or to assert that any variance from the preexisting rule could be accomplished solely through rulemaking procedures. The Commission's procedural rules afforded appellants ample opportunity to object to the Commission's stated intention to consider establishing special standby rate schedules. The question whether to establish such schedules was plainly set forth in the Commission's Prehearing Order. (P. 3, supra). If appellants wished to preclude the Commission from establishing special standby rate schedules in that proceeding, appellants had the opportunity and the obligation to assert an objection to that effect "at the start of or prior to hearing." Rule 25-22.038(5)(a). Appellants not only failed to assert such an objection below, but affirmatively supported action at variance from the preexisting rule on standby service rates.

Having failed to insist before the Commission that it must adhere strictly to its preexisting rule unless and until the rule is changed through rulemaking proceedings, appellants cannot be heard to assert that argument now. This is all the more true because appellants encouraged the Commission to depart from its rule to serve appellants' own ends. Federal Power Commission, 348 U.S. at 501-502.

II. The Commission's Adoption of a Ratchet Mechanism to Recover Local Facilities Costs Is Nondiscriminatory.

Appellants attack the Commission's Order on another ground contrary to appellants' position below. Appellants contend that the Commission's incorporation of a ratchet mechanism into its standby rate schedule (to enable utilities to recover the cost of maintaining local facilities needed to supply standby services) unlawfully discriminates against QFs. Through appellants' key witness, appellants supported adoption of the very ratchet mechanism the Commission embraced in order to ensure even-handed treatment of self-generating customers in relation to non-generating customers. (P. 11, supra). Appellants' posture before the Commission not only precludes appellants from challenging in this Court the Commission's use of the ratchet billing feature, it affirmatively demonstrates that this feature does not disadvantage self-generating customers in relation to non-generating customers, but ensures equitable treatment of each.

Appellants contend that the ratchet feature is impermissibly "discriminatory" under Section 366.81, Florida Statutes. That provision states in part that it is the Legislature's intent that

the Commission "not approve any rate or rate structure which discriminates against any class of customers on account of the use of [certain] systems or devices." Appellants argue that this provision applies to QFs. As discussed in Part I, supra, Section 366.07 has direct application here, and it is doubtful that Section 366.81 was intended to apply to QFs.3/ It does not do so expressly. Assuming arguendo, however, that Section 366.81 does apply to QFs, the Commission's decision in this case satisfies its provisions.

Section 366.81 incorporates the familiar prohibition against "discriminatory" rate structures. This Court, and the lower courts in this State, have consistently held that utility rates are not "discriminatory" in a legal sense if they recognize actual differences in costs of providing service. Thus, this Court has held that "every difference in rate does not constitute a discrimination in law." Tampa Elec. Co. v. Cooper, 14 So.2d 388, 389 (Fla. 1943). Thus, for example, "[t]he mere fact that customers outside the city are charged different rates for service from those inside the city is no showing of discrimination." Cooper v. Tampa Elec. Co., 17 So.2d 785, 786 (Fla. 1944). "There

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3/ The evident purpose of Section 366.81 is to encourage efforts to reduce consumer electrical needs and thus to minimize the exhaustion of natural energy-producing resources. The Act containing that provision refers throughout to the reduction of energy consumption. See, e.g., §§ 366.81, .82 (2),(5), .84. Electrical needs of energy consumers may be reduced, for example, by use of insulation, energy-efficient manufacturing equipment, or other practices used by the consumer. Self-generation of power does not reduce the consumption of power as such, but constitutes an alternative supply of power. Thus, it is far from clear that Section 366.81 has any application to QF's.

must be positive allegations of fact on which to base this charge," which will "involve[] the comparative cost of production and delivery to customers inside and outside the city." Id. 786-87; see, e.g., Clay Utility Co. v. Jacksonville, 227 So.2d 516 (Fla. 1st DCA 1969). "Discrimination to be unlawful must draw an unfair line or strike an unfair balance between those in like circumstances . . . ." Pinellas Apt. Assn. v. St. Petersburg, 294 So.2d 676, 678 (Fla. 2d DCA 1974). See, e.g., Arvida Corp. v. Jacksonville Elec. Authority, 369 So.2d 672, 673 (1st DCA 1979).

Indeed, as discussed at pp. 17-19 above, a failure to tailor rates to reflect cost differences would discriminate improperly among differently situated energy consumers by conferring unwarranted windfalls on some at the expense of others. Appellants' witness testified exactly to this effect before the Commission. He acknowledged that it would "be an unjust discrimination not to allow different rates in the event that cost[s] of services were different for those different services" and stated that "in our view, failure to identify and bill [standby] services separately will result in inappropriate rates."4/ (Pp. 10, 17-18, supra.)

4/ It is revealing that appellants assert no challenge to the Commission's decision to adopt a "daily demand charge" for standby services, despite the fact that this feature is not used for non-generating customers. The Commission adopted this feature -- which generally will result in lower charges to standby customers than the demand charge applied to all-requirements customers -- based on the finding "that the expected diversity of backup and maintenance power loads is so different as to warrant" that approach. (A-14). Appellants are content to accept the benefits of different rate mechanisms for standby service based on cost differences, but attack as "discriminatory" cost-based rate mechanisms that deny them a windfall.

Based on the evidence adduced at the proceeding, including the testimony of appellants' own witness, the Commission determined that ratcheted billing was an appropriate means to recover local facilities costs associated with the irregular demand patterns of standby services. (P. 18, supra). This achieved, in the Commission's view, "the most equitable, cost-based and non-discriminatory rate schedule[ ] possible based upon the record of this proceeding."5/

Further, to ensure that the resulting rate schedule would not discriminate against self-generating customers, the Commission specifically provided in its Order that the separate standby tariffs would not apply when "there is evidence to demonstrate that [the] load characteristics [of self-generating customers] resemble those of normal full requirements customers." (P. 8, supra).

Where, as here, a ratepayer challenges rates established by the Commission, "the question on review of [the Commission's] order will be whether the findings are based on competent, substantial evidence." Tallahassee v. Mann, 411 So.2d 162, 164 (Fla. 1981). The Commission's order "will be clothed with a

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5/ Appellants contend that the Commission's disapproval of ratchets in other orders somehow shows that the use of a ratchet here is discriminatory. None of the orders cited in, and attached to, appellants' brief concerned rate mechanisms to recover the costs of local facilities dedicated to standby customers. Dedicated local facilities by definition, are sized to the needs of specific standby customers. This gives rise to the problem discussed above (at pp. 10-13), which appellants proposed to resolve by use of a ratchet. Whatever may be said about ratcheted billing in other contexts, the fairness and soundness of that device in the context of this case was conclusively shown on the record below.

presumption of validity," and "[i]t will be the [ratepayer's] burden, if aggrieved, to overcome that presumption by showing a departure from the essential requirements of law." Id.; see, e.g., Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308, 312 (Fla. 1976), quoting General Tel. Co. v. Carter, 115 So.2d 554, 557 (Fla. 1959). Particularly given that the Commission's use of the ratchet was supported by the testimony of appellants' own witness, it is evident in the circumstances of this case that appellants have not met their burden. The Commission's determination that the ratchet achieved even-handed, equitable treatment of self-generating customers was fully supported by the record.

CONCLUSION

For the foregoing reasons, the Commission's Order should be affirmed.

Respectfully submitted,

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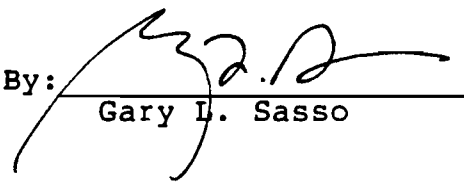
By: 
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