IN THE SUPREME COURT OF FLORIDA

C.F. INDUSTRIES, INC., Appellant, v. KATIE NICHOLS, ET AL., Appellees.	Case No. 70,196

REPLY BRIEF OF APPELLANTS FLORIDA CRUSHED STONE COMPANY, ET. AL.

RICHARD A. ZAMBO, ESQUIRE
PAUL SEXTON, ESQUIRE
Richard A. Zambo, P.A.
205 North Parsons Avenue
P. O. Box 856
Brandon, Florida 33511
(813) 681-322

Attorneys for Appellants:

Florida Crushed Stone Company
Occidental Chemical Corporation
U.S. Sugar Corporation

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SUMMARY OF ARGUMENT

Appellants argued in their initial brief that the Commission's Order No. 17159 is inconsistent with Rule 25-17.082(3)(f) because it denies QFs their right under the rule to purchase power from utilities under the non-generating retail rate schedule available to other customers. None of the Appellees disputes that Order No. 17159 is inconsistent with Rule 25-17.082(3)(f). Furthermore, Appellees have not attempted to show that Order No. 17159 satisfies the non-discrimination requirement of §366.81, Florida Statutes.

Instead, Appellees have attempted to raise a host of procedural defenses and have concocted rationales for the Commission's order which are nowhere found in the order itself. In an effort to distract the Court's attention from the Commission's clear failure to comply with the requirements of state law and the Commission's own regulations, Appellees contend that Appellants are not entitled to the benefits of Rule 25-17.082(3)(f), either because Appellants failed to raise issues below or invited error, or because the rule is in conflict with superior state statutes or federal regulations. Contrary to Appellees' assertions, however, the Appellants raised the issue of Rule 25-17.082(3)(f) before the Commission, and took positions below which were fully consistent with the positions they have

taken in this appeal. With regard to Appellees' argument that Rule 25-17.082(3)(f) is overriden by other authority, the Commission below never made such a finding and there is no support in the record and no basis in law for such a finding.

Appellants also argued in their initial brief that Order No. 17159, which applied "ratchets" and minimum charges solely to QFs, is inconsistent with §366.81, Florida Statutes, prohibiting the use of discriminatory rate structures against highly efficient systems such as QFs. Appellees have responded that these rate structures are not discriminatory because they are cost-based. But the fact that particular rate structures are cost-based does not answer the question whether those rate structures are otherwise discriminatory. The Commission below never found that ratchets and minimum charges were appropriately applied to QFs but not to other utility customers. Order No. 17159 is devoid of any finding, and indeed any record support for a finding, that QFs are the only customers to whom these rate structures should be applied.

Appellees have utterly failed to overcome Appellants' showing that QFs are entitled to be served under Rule 25-17.082(3)(f), and that Order No. 17159 discriminates against QFs in contravention of §366.81. Accordingly, Order No. 17159 must be set aside.

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v.	)	Case No. 70,196
KATIE NICHOLS, ET AL., Appellees.	)	

REPLY BRIEF OF APPELLANTS
FLORIDA CRUSHED STONE COMPANY, ET AL.

INTRODUCTION

The sole issue raised in this appeal is whether the Florida Public Service Commission ("Commission") complied with the requirements of state law in establishing standby rates for Qualifying Facilities (QFs). Before the Commission, Appellants raised both state and federal issues. On appeal, however, Appellants have raised only the state issues. The question of the Commission's compliance with the requirements of Federal law, consisting of the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Federal Energy Regulatory Commission's (FERC) regulations implementing PURPA, is not included within this appeal. These independent federal issues are currently pending before FERC.

Appellees, however, have claimed that FERC's regulations preempt state law and therefore moot this appeal. Appellees have taken advantage of Appellants' silence on the federal issues in their initial brief to mischaracterize the

positions of Appellants' and their witnesses below. Appellants, therefore, will discuss the interaction of the state and federal arguments raised below in order to assist the Court in resolving the state issues. Appellees have also contended, in general, that Appellants have for various reasons waived the state law questions which have been raised in this proceeding. None of Appellees' contentions have any merit. Indeed, the purpose of Appellees' contentions appears to be to distract the Court's attention from the Commission's clear failure to comply with the requirements of Commission Rule 25-17.082 and Chapter 366, §366.81 Florida Statutes.

Appellants' Theory Below - FERC's Two-Part Requirement

Appellants' position below is fully consistent with its position before this Court. Appellants argued below that FERC's regulation, 18 C.F.R. §292.305 contains a two-part requirement. The first part, §292.305(a)(2), states a "general rule" that requires utilities to sell energy to QFs at the same rates as for non-generating customers. The second part, §292.305(b), requires that "additional" standby services be made available to QFs at cost-based rates "upon request." 1/ A Florida Public Service Commission regulation, 25-17.082(3)(f), requires that QFs receive the rate for non-generating customers. Appellants have requested this Court to enforce their right under state law to the non-

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1/ Brief of Intervenors, at 12 (R. Vol. II, p. 290). In the interests of clarity, Appellants, unless the context requires otherwise, will refer to the rates under FERC § 292.305(a)(2) as the "non-generating rate" and the rates under FERC § 292.305(b) as the "additional standby service" rate.

generating rate. In so doing, they are merely seeking to obtain the same relief they sought below.

1. The First Part - FERC's "General Rule"

As argued below, FERC's "general rule," §292.305(a), [2] has two subsections. In the preamble to its PURPA regulations, FERC described the non-generating rate provision, §292.305(a)(2), as requiring that sales to QFs be at the rates applicable to non-generating customers:

> . . . This section now provides that for [QFs] which do not simultaneously sell and purchase from the electric utility, the rate for sales shall be the rate that would be charged to the class to which the [QF] would be assigned if it did not have its own generation. [3]

In other words, the "general rule" in §292.305(a)(2) prescribes rates for sales to QFs which are equal to the rates charged non-generating customers of the utility. Appellants also argued below that Commission Rule 25-17.082(3)(f) is an implementation

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2/ (a) General rules.
(1) Rates for sales:
(i) Shall be just and reasonable and in the public interest; and
(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.
(2) 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.

3/ Id. at 11 (R. Vol. II, p. 289).

of this "general rule." [4] Just like FERC's general rule, Rule 25-17.082(3)(f) requires utilities to provide service to QFs under non-generating rates.

2. The Second Part - "Additional Services" For QFs "On Request"

As Appellants argued below, the second part of the FERC requirement -- the additional standby service regulation -- is found in §292.305(b). This section requires utilities to provide "additional services," to QFs "upon request." [5] Appellants argued below, and the Commission basically acknowledged in its final order, that the Commission had yet to implement this portion of §292.305. [6] Appellants argued below that the Commission was required by §292.305(a)(1) and (c) to establish separate, cost-based rates to be applied if (and only if) those

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4/ As stated in their brief below, "Commission Rule 25-17.[082](3)(f), F.A.C., complies with this Federal requirement." (Brief of Intervenors, at 11) (R. Vol. II, p. 289). Indeed, Rule 25-17.082(3)(f) is a virtual restatement of FERC's order:

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

5/ (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.

6/ See Order No. 17159, at 3 (Appendix A-3 to Initial Brief); Brief of Intervenors at 11-12 (R. Vol. II, pp. 289-90).

"additional services" were requested by a QF. 7/ Thus, Appellants sought to have two rates available to QF's, the first of which (the non-generating rate) was already available by reason of Rule 25-17.082(3)(f), and the second of which (the additional standby rate) was to be made available through the Commission's proceeding below.

Optional Rates And Rule 25-17.082(3)(f)

Appellants also argued below that if a QF did not "request" these "additional services" pursuant to §292.305(b), it remained entitled to purchase standby service at the non-generating rate in accordance with FERC's regulation 292.305(a)(2) and Commission Rule 25-17.082(e)(f). 8/ In particular, Appellants argued that FERC regulation 292.305(a)(2) and the Commission's implementing Rule 25-17.082(3)(f) require that QFs be able to purchase energy under non-generating rates if they did not elect to take the "additional services" under FERC regulation 292.305(b). 9/ In fact, Appellants' first basic

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7/ Brief of Intervenors, at 8-10 (R. Vol. II, pp. 286-88).

8/ Brief of Intervenors, at 5, 12-13 (R. Vol. II, pp. 283, 291-92).

9/ Specifically, Appellants argued:

> "Accordingly, regardless of the standby rates ultimately approved by this Commission, they must be optional -- at the QF's request. In the absence of such a request, QFs are entitled to be served under the rate schedule which would otherwise be applicable to a similar non-generating customer (as currently provided in Commission Rule 25-17.[082](3)(f), F.A.C.).

Brief of Intervenors, at 13 (R. Vol. II, p. 292).

position stated in its post-hearing brief was that QFs should be served under Rule 25-17.082(3)(f) if they did not request to be served under the additional standby service rates (Id. at 5) (R. Vol. II, p. 281).

ARGUMENT

I. THE ISSUES ARE PROPERLY BEFORE THE COURT

A. The Issues Are Not Waived For Failure To Raise Below

Appellees begin their arguments by asserting that the Court should not consider the two points raised in the Appellants' Initial Brief -- noncompliance with Rule 25-17.082(3)(f) and discrimination under §366.81 -- because they were not raised below. These contentions are not correct. Both of these issues were raised before the Commission in a manner that clearly placed the issues before it and provided an opportunity to rule. The issues are, therefore, properly before the Court.

1. The Rule 25-17.082(3)(f) Issue Was Raised Below

Below, Appellants clearly and succinctly pointed out to the Commission that its Rule 25-17.082(3)(f) was applicable in this case and that it should continue to be applied in conformance with the FERC non-generating rate regulation. Appellants consistently argued below that FERC's additional standby service regulation, §292.305(b), provided for optional standby service under, cost-based rates and that, if a QF did not "request" that service, it must be served under Rule 25-17.082(3)(f).

The Appellants' assertion that rates for additional standby service are optional was first reflected in the Appellants' Prehearing Statement, filed with the Commission August 4, 1986 and reflected in the Prehearing Order. 10/ This position was reiterated in the testimony of Appellants' witnesses. They sponsored proposed tariffs for additional standby services which contained language clearly showing that the service was available at the option of the QF. 11/ Appellants' witness, Mr. Ross, testified that the tariffs were made optional as required by FERC regulations. 12/ No witness testified to the contrary.

Appellants reiterated this argument in great detail in their post-hearing brief, pointing out that Commission Rule 25-17.082 was an implementation of FERC's regulation and that, if additional standby service was not requested by a QF, the QF was

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10/ "Industrial Cogenerator's basic position is that rates for electric service to generating customers . . . must comply with applicable law. Accordingly . . . generating customers should have available, at their option, firm and interruptible supplementary, backup and maintenance services." (Emphasis Supplied) (R. Vol. I, p. 87).

Also, in response to Issue No. 29 in the Prehearing Order, Appellants stated that the non-generating rate provision, 292.305(a)(2), provided no limitation as to the rates charged for additional standby service under regulation 292.305(b) (Prehearing Order at pp. 32-33; R. Vol. I, pp. 114-15).

11/ "This Rider is optional for Customers having part or all of their load served from non-utility facilities. This Rider is not applicable to Customers who engage in a simultaneous purchase and sale arrangement with the Company." (R. Vol. III, Exh. 2 and 3).

12/ (R. Vol. V, Tr. 70-71).

entitled to receive service under non-generating rates pursuant to Rule 25-17.082(3)(f). [13/] Thus, as here, Appellants specifically contended that the otherwise applicable non-generating rate must be available to QFs based on the requirements of Rule 25-17.082(3)(f).

2. The Section 366.81 Issue Was Raised Below

Contrary to Appellees' contentions, Appellants maintained below that adoption of rate elements for QFs which are not applied to any other customers violates §366.81. Appellants argued below that QFs fall under the protection of §366.81, Florida Statutes. [14/] They also argued that applying rate structures that depart from traditional (e.g., non-ratcheted) charges should be rejected as inconsistent and impermissible under §366.81. [15/]

Most importantly, Appellants' witnesses advocated that QFs remain eligible to take service under the otherwise applicable non-generating rates. Thus, the rate elements contained in the optional tariffs were not discriminatory simply because the QF could still elect to be charged just like a non-

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13/ Brief of Intervenors, Pp. 11-13 (R. Vol. II, pp. 290-292).

14/ "Small Power Production facilities rely on renewable energy sources for electric power generation, and cogeneration facilities are highly efficient systems when compared to conventional electric utility generation. This provision, therefore, provides direct guidance to the Commission regarding cogeneration and small power production (QFs)." (Brief of Intervenors, at 9) (R. Vol. II, p. 287).

15/ Id., at 20. (R. Vol. II, p. 298).

generating customer. 16/ Once the tariff was made mandatory, QFs were obliged to pay charges, such as ratchets, not applicable to any other class of customer, even if they were equally justified for those other customers.

3. The "Waiver" Cases Relied Upon By Appellees Are Inapposite

The Appellees cases on waiver are inapposite. Most involve situations where a party failed to object to the introduction of evidence or to jury instructions prior to the case being submitted to a jury. 17/ Clearly, a judge cannot correct an error of this type after-the-fact. The jury has the case and any error cannot effectively be undone. Unlike these cited cases, as already discussed, both the question of the applicability of the Commission's rule and the question of discrimination under §366.81 were clearly raised in ample time to be considered and resolved by the Commission. The errors asserted by Appellants in the instant case are simply questions of law governing the merits, and they were raised long before the Commission voted on the merits.

16/ The Commission's emphasis on the seven elements to recognize unique load characteristics advocated by the Appellants' witnesses ignores the fact that the witnesses were applying the second part of the FERC rule addressing only the additional standby services, not the first. They were stating principles for setting optional standby rates, not the only rates for QFs.

17/ See Castor v. State, 365 So. 2d 701 (Fla. 1978); Wasden v. Seaboard Coastline Railroad Co., 474 So. 2d 825 (Fla. 1975); Hartford Fire Insurance Company v. Hollis, 50 So.Rep. 985 (Fla. 1909); National Dairy Products Corporation v. Odham, 121 So. 2d 640 (Fla. 1960); Tampa Drug Company v. Waite, 103 So. 2d 603 (Fla. 1958).

The post-hearing briefs were the first point at which any detailed legal argument was presented to the Commission by any party. [18/] Appellants placed their legal argument regarding compliance with its rule squarely before the Commission in its post-hearing brief. [19/] Clearly, a legal argument raised two and one-half months prior to the Commission's decision is timely.

Citizens, is cited by FPL and Gulf for the proposition that the Commission may limit issues not raised prior to hearing. However, that case involved a question of fact, not law. There, the Court upheld the Commission's power to limit factual issues raised after hearing, noting that requiring them to be raised before hearing allowed an adequate mustering of evidence. Id.

18/ Unlike a trial court, the Commission's post-hearing procedure is quite protracted. Lengthy post-hearing briefs are normally filed 30 to 60 days after hearing and the Commission votes on the case from 30 to 60 days after the briefs are submitted. In this case, post-hearing briefs were filed on September 15, 1986 and the Commission voted on the case on December 1, 1986, two and one-half months later.

19/ Likewise, many of the cases cited by Appelless deal with questions of law never raised at all below. See Bill's Equipment and Rentals v. Teel, 498 So. 2d 536 (Fla. 1st DCA 1986), (applicability of statute not raised below); Scott v. Florida Department of Commerce, 353 So. 2d 1192 (Fla. 1st DCA 1978) (procedural issue of noncompliance with 14-day notice under §120.57(1) not raised below); Atlantic Coastline Railroad Co. v. Mack, 57 So. 2d 447 (Fla. 1952) (adequacy of application not challenged below); Carillon Hotel v. Rodriquez, 124 So. 2d 3 (Fla. 1960) (§440.25 required grounds for appeal to be stated, issue added afterward); Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981) (failure to raise affirmative defense in summary judgment); Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492 (1955) (Natural Gas Act required issues to be raised below and legislative history of Federal APA reiterated); Lipe v. Miami, 141 So. 2d 738 (Fla. 1961) (defense to challenge to statute not raised below).

at 787. 20/ Here, however, the questions presented were questions of law.

The Commission has long known that the 1984 amendment of §120.68(12) forced it to conform to its rules. It cannot reasonably claim that the issue of noncompliance with its rule is waived for failure to cite §120.68(12)(b), Florida Statutes. There is no question but that by simply asserting that Rule 25-17.082 was applicable, the Appellants placed the Commission on full notice that it was obliged to comply with that rule. In fact, the 1984 amendment of §120.68(12) merely eliminated a statutory defense. Prior to 1984, an agency could cite that section as a defense to charges of deviating from its rules. Further, that 1984 amendment effectively raised agency rules to the status of statutes as far as agency compliance during §120.57 proceedings is concerned.

An appellant should only need to claim below that a regulation is applicable in order to be able to appeal noncompliance with the regulation's terms. Certainly, no court has ever held that an appellant must cite §120.68(12)(d) below in order to appeal noncompliance with a statute. Likewise, there is no requirement to cite to §120.68(12)(b) below in order to appeal noncompliance with a rule when the Appellant has advised the Commission that it believes the rule is applicable and

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20/ See also Cowart v. City of West Palm Beach, 255 So. 2d 673, 674 (Fla. 1971), cited in Dober v. Worrell, supra, wherein the Court noted that a question raised for first time on appeal was factual and, if properly raised below, would have allowed the Appellee to present evidence.

plainly relies on the rule as a principle basis for a position which the Commission chooses to reject.

B. There Is No Invited Error

1. Appellants Did Not Take Inconsistent Positions Below

Appellees' claim of invited error rests largely upon their false assertion that Appellants took inconsistent positions below and on appeal. There is no inconsistency.

Appellants unsuccessfully sought below to have the Commission conform to Rule 25-17.082(3)(f) as an implementation of a FERC regulation that provided for optional standby rates. 21/ The Appellants failed in their attempt to have the Commission adopt its "rule of law" and are now seeking to have their rejected position vindicated by this Court. Similarly, Appellants unsuccessfully sought below to have nondiscriminatory rates made applicable to QFs, as required by §366.81. Appellants failed in their attempt to obtain these nondiscriminatory rates, and are now seeking to have §366.81 enforced by this Court as well.

With regard to Appellees' suggestion that the testimony of Appellants' witnesses was inconsistent with Appellants' positions on appeal regarding the "optional" nature of standby rates, the fact is that this testimony was predicated on the theory that standby rates were optional under FERC's regulation

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21/ Brief of Intervenors, at 5, 11-13 (R. Vol. II, pp. 283, 289-91), attached hereto as Appendix A-1 .

202.305(b). 22/ Whenever Appellants' witnesses testified about "separate, cost-based" standby rates, it was with the implicit caveat that such rates would apply only to additional standby service provided "upon request." 23/ For example, Appellants' expert, Mr. Ross, testified as follows:

> Q. Do the FERC rules provide that these types of services be made available to customers on an optional basis?
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> A. Yes, they do . . . . Not only is the optional provision [§292.305(b)] consistent with the FERC rules, it provides further encouragement for the development of alternate power resources by allowing a customer maximum flexibility in securing service consistent with the size of his

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22/ They were not testifying with regard to rates under the non-generating regulation 292.305(a)(2) or Commission Rule 25-17.082(3)(f). In fact, they made it quite clear that regulation 292.305(a)(2) did not apply to the setting of standby rates. See note 21, supra.

Mr. Ross testified, for example, that §292.305(a)(2) governed the selection of non-generating rates for QFs and did not limit the selection of rates for "additional services" under section 292.305(b) (R. Vol. VII, Tr. 899-901). This conforms with Appellants' position on Issue No. 29 in the Prehearing Order. See note 10, supra.

23/ It is true that Appellants' witnesses testified in favor of separate rates for backup and maintenance service. However, they were only testifying as to the proper rates for "additional services" available "upon request" of a QF under regulation 292.305(b). The witnesses had, as already noted, contended that QFs should be able to opt for the Rule 25-17.083(3)(f) otherwise applicable rates which did not contain a ratchet.

The witnesses testified that these "additional services" were composed of three distinct kinds of service, each with cost characteristics different from each other, and that failure to carefully and accurately distinguish the cost characteristics between these services would result in inappropriate charges for each type of service. As Mr. Brubaker stated, "I am also advised that the FERC regulations require that these services be provided in this manner." (R. Vol. V, Tr. 26).

> electrical load and the voltage level at which he takes service.
>
> The optional provision may be of particular import depending on specific circumstances. Such circumstances could include the prohibitive cost of additional metering or incompatibility of current operations with the notification requirements for standby power.
>
> Moreover, a customer may want to install load shedding or other conservation equipment before beginning service under a new set of tariff provisions. The optional provision provides the customer with this opportunity. 24/

In light of the foregoing, it is clear that the Appellants' arguments on appeal are fully consistent with the testimony of their witnesses and there is certainly no invited error. 25/

Similarly, the testimony of Appellants' witnesses regarding the use of ratchets is not inconsistent with Appellants' position on appeal. In this regard, it is important to keep in mind that in presenting their proposal for the

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24/ R. Vol. V, Tr. 71-72.

25/ Florida Power Corporation cites Mr. Brubaker as testifying that failure to develop different rates would be an "unjust discrimination." However, again, the caveat is conveniently ignored and, in fact, Mr. Brubaker was simply testifying that it would be unjust discrimination not to establish separate optional standby rates to meet the requirements of §292.305(b) and (c). In other words, it would be improper not to allow QFs to obtain standby service under cost-based rates.

In this regard, the testimony of Appellants' witnesses as to the "correctness" of non-generating rates was based on FERC §292.305(c) wherein rates for "additional services" must be specifically designed for those services. They were not testifying as to whether the current non-generating rates were correct under §292.305(a)(2).

additional standby service rate, Appellants were doing just that -- presenting a single, coherent rate design package. That package was carefully crafted of a number of different elements which all needed to work together in concert to make the whole a fair and nondiscriminatory package. It could not be more obvious that the Commission did not adopt this package. What the Commission did was pick and choose certain elements from Appellants' rate design package and then apply these elements in ways never intended by the Appellants -- ways which now work to their substantial detriment.

The examples of this selective method are numerous, but can be illustrated by the Commission's treatment of ratchets. Contrary to Appellees' misstatements, Appellants advocated ratchets only for additional standby services which were to be optional to QFs, and even then only to firm backup power -- not to interruptible backup or maintenance power. What the Commission did, however, was to apply ratchets to all power sold by utilities to QFs -- a result which the Appellants strongly opposed below and which they oppose here as violative of §366.81.

Accordingly, none of the cited testimony stands for the propositions the Appellees assert. [26]

2. Appellees' Cases On Invited Error Are Inapposite

By definition, invited error occurs when an appellant successfully advocates a rule of law below and then attacks that rule on appeal. [27] This certainly did not occur in this case. Accordingly, the cases cited regarding invited evidentiary error are completely inapposite. [28] In those cases, the appellant "opened the door" to admission of evidence by successfully offering it below and, on appeal, assailed admission of similar evidence as procedural error. [29] There is no parallel in this case. The challenge here is not procedural, it is substantive.

II. THE COMMISSION'S RULE 25-17.082(3)(f) IS NOT PREEMPTED BY SECTION 292.305 OF FERC'S REGULATIONS

Appellees next argue that remand is inappropriate because Rule 25-17.082(3)(f) is preempted by FERC's regulation §292.305. They assert, in this regard, that in Order No. 17159 the Commission rejected its own rule in order to comply with

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26/ Likewise, Appellees' citation to Appellants' positions on Issues 1 and 2 are inapposite. Those positions were intended to address the proper design of rates under the additional standby service part of FERC's rule: rates for separate, cost-based standby rates under §292.305(b).

27/ See Growers Marketing Services, Inc. v. Corner, 249 So. 2d 486 (Fla. 2d DCA 1971), aff'd 261 So. 2d 171 (Fla. 1972); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1971); Florida East Coast Railway v. Rouse, 178 So. 2d 882 (Fla. 3d DCA 1965).

28/ See Guy v. Right, 431 So. 2d 653 (Fla. 5th DCA 1983), rev. den., 440 So. 2d 352 (Fla. 1983); Tampa Drug Co. v. Waite, 103 So. 2d 603 (Fla. 1958).

29/ See Arsenault v. Thomas, 104 So. 2d 120 (Fla. 3d DCA 1958).

"superior federal requirements." (FP&L Answer Brief, at 35. See Commission Answer Brief, at 23-24). This argument is flatly incorrect for the reasons explained below.

A. The Assertion Of Preemption Is Merely A Post Hoc Rationalization Of Counsel

Order No. 17159 is devoid of even a hint, let alone an express statement, by the Commission that Rule 25-17.082 was overridden by the FERC's regulations. Indeed, the very first page of discussion in Order No. 17159 quotes Rule 25-17.082 -- and then never mentions the rule again. Contrary to Appellees' claims, the Commission never, in fact, "found that it was impossible to reconcile the requirements of its own rule with the requirements of the FERC" and never, in fact, "recognized . . . that its own rule should yield to the FERC's requirement." (Compare FP&L Answer Brief, at 35, 37, with Order No. 17159, at 2-3). There is, therefore, no support in Order No. 17159 itself for the claim that the Commission considered Rule 25-17.082 to be preempted by FERC regulation §292.305.

The claim that the State and Federal rules are in conflict thus is nothing more than a post hoc rationalization by counsel for Appellees and should not be considered by the Court. The federal courts follow the principle that such post hoc rationalizations "cannot serve as a sufficient predicate for agency action." American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 539 (1981). Accord, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962) ("[t]he courts may not accept appellate counsel's post hoc rationalizations for agency

action"); NLRB v. Food Store Employees Union, 417 U.S. 1, 9 (1974); SEC v. Chenery Corporation, 332 U.S. 194, 196 (1947). The rationale for this long-standing doctrine is the common sense notion that a court, in determining whether to affirm or reverse an agency order, must consider solely the grounds actually invoked by the agency. If those grounds are insufficient or improper, the court cannot sanction the determination by substituting what appellate counsel might wish the agency had concluded. If the court concludes that the agency has not provided a rational basis for the action, the solution is for the court to remand the order, not for the court to substitute its judgment for that of the agency. Accord, Matter of Claim of Raymus, 477 N.Y.S.2d 751, 752 (3d Dep't 1984).

B. In Any Case The Federal And State Regulations Are Not In Conflict

The case law is clear that preemption cannot be assumed. The guiding premise of any preemption analysis is that "[p]reemption of state law by federal statute or regulation is not favored," Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). Indeed, preemption analysis requires the "basic assumption that Congress did not intend to displace state law," Maryland v. Louisiana, 451 U.S. 725, 746 (1981). And, if any fair interpretation of the federal and state laws is available which would avoid a conflict between the two, that interpretation must be adopted. See Ruckershaus v. Monsanto Co., 467 U.S. 986 (1984); Columbia Gas Development Corp.

v. FERC, 651 F. 2d 1146 (5th Cir. 1981); S&S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600 (M.D. Tenn. 1986).

The Florida courts have long recognized that federal pre-emption should not be presumed, see Louisville & Nashville Railroad Co. v. Hickman, 445 So. 2d 1023 (Fla. 1st DCA 1983), and should not be found unless a conflict is unavoidable. See Phillips v. General Finance Corp. of La., 297 So. 2d 6 (Fla. 1974) (state action is valid and operative in all respects in which there is no direct and positive conflict with the action of the federal government). Accord, Gibson v. Florida Legislative Investigation Committee, 108 So. 2d 729 (Fla. 1959); Kelly v. Florida Department of Commerce, 239 So. 2d 884 (Fla. 3rd DCA 1970). In this regard, the Florida courts have consistently held that they should "exercise extreme caution before finding pre-emption based upon federal agency action even assuming the agency has the delegated power to take such action." Florida Department of Banking and Finance, ex rel. Lewis v. Standard Federal Savings and Loan Ass'n, 463 So. 2d 297 (Fla. 1st DCA 1984).

The Appellees have not demonstrated that an unavoidable conflict exists between Rule 25-17.082 and §292.305. Rule 25-17.082 is a virtual reproduction of the non-generating rate provisions of §292.305(a) and faithfully implements its requirements. As an implementation of a FERC regulation, Rule 25-17.082(3)(f) must be construed consistently with that regulation. A similar rule of construction is applied where state statutes are patterned after Federal law. See Gentele v.

Department of Professional Regulation, Board of Optometry, 513 So. 2d 672, 673 (Fla. 1st DCA 1987); School Board of Polk County v. Public Employees Relations Commission, 399 So. 2d 520, 521-522 (Fla. 2nd DCA 1981). Rules implementing federal regulations should be construed consistently with those regulations. 30/ Thus, for an unavoidable conflict to exist, the FERC rules must provide that the non-generating rate provided by §292.305(a)(2) must be withdrawn whenever a state adopts a rate for additional standby services under §292.305(b). However, the Commission's order made no finding that FERC's rules require that non-generating rates consistent with §292.305(a) must be withdrawn if a state adopts additional standby service rates under §292.305(b)(2).

This Court should not find that Rule 25-17.082(3)(f) has been preempted where there has been no showing that the federal rules prohibit a state from making two rates available to

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30/ Counsel for the Commission does not even explain the policy behind Counsel's interpretation of the meaning of the Commission's rule, nor does Counsel seek to interpret it to conform to FERC's regulation. Instead, Counsel has declared it absolute in its meaning and directly contrary to FERC's regulation. This is not proper. See Gentele, supra. Instead of seeking to construe Rule 25-17.082(3)(f) in a manner that allows it to operate in harmony with federal requirements, Counsel for the Commission urges a construction directly at odds with those requirements. Counsel claims, essentially, that the rule should be given no effect, in spite of the clear intention of the legislature that agency rules be honored.

The Commission adopted Rule 25-17.082(3)(f) in 1983 as an implementation of FERC's regulation, §292.305. It cannot now claim that the rule violates that regulation. That is taking an inconsistent position.

QFs, particularly where nothing remotely approximating a preemption finding has been made by the Commission. Below, Appellants presented an interpretation of federal and state regulations that allowed them to work in harmony. The Commission acknowledged in its order that Rule 25-17.082(3)(f) is an implementation of FERC's regulations. Certainly, a harmonious reading of these regulations is to be favored over a presumption of conflict and preemption. 31/

III. THE COURT SHOULD REMAND THE CASE FOR COMPLIANCE WITH RULE 25-17.082

Commission Rule 25-17.082(3)(f) provides that QFs are to receive service from utilities under the rates applicable to non-generating customers. However, the Commission's order mandating that QFs pay for service exclusively under newly devised additional standby service rates completely vitiates the

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31/ The Commission (Answer Brief, at 21-22) and FPL (Answer Brief, at 36) cite FERC's discussion of §292.305(a)(2), contending that it states that non-generating rates are available to QFs only if cost-based;

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

However, the above-quoted language does not compel the use of these additional standby services to the exclusion of all other rates. (This discussion was published as part of FERC's Order No. 69, which adopted the current FERC regulations. It was quoted in the record by Mr. Ross (R. Vol. II, Tr. 900) and also reproduced as part of an Exhibit (R. Vol. VIII, Exh. 6), included as Appendix A- 6 to this brief.)

rule. The Commission must abide by its own rule. The Appellants are entitled to rely on the rule unless and until it is amended.

Appellees basically raise two arguments against remand: 1) that the Commission was not exercising "discretion" within the meaning of §120.68(12)(b); and 2) that the Commission was compelled to act by §366.07. These arguments are without merit.

A. The Commission Exercised Discretion

Counsel for the Commission makes the nonsensical claim that, in making standby rates mandatory for QFs, the Commission was not exercising discretion under §120.68(12)(b). This claim is contrary to well-established case law that recognizes the Commission's broad discretion in ratemaking. 32/ The Commission's order below involved precisely the type of discretionary act to which §120.68(12)(b) refers. 33/

The Commission's order itself belies the claim of its Counsel. The order makes no statement that the Commission is required to do anything other than to establish standby rates. Rather, the order discusses the need for "a delicate

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32/ See International Minerals and Chemical Corp. v. Mayo, 336 So. 2d 548 (Fla. 1976); Florida Retail Federation, Inc. v. Mayo, 331 So. 2d 308, 312 (Fla. 1976).

33/ The Commission's claim that the superior protection of §120.57(1) takes Order No. 17159 out from under §120.68(12)(b) is simply an argument to have this Court invalidate the 1984 amendment of that statute. The statute was amended for the very purpose of ending the practice of using §120.57(1) proceedings to justify deviations from rules. There would have been no need to amend the statute if the legislature had sought only procedural protection. Section 120.57(1) has always provided the procedural protection the Commission identifies.

balance." 34/ The Commission exercised discretion in choosing the cost methodology to be applied, in choosing among alternative rate structures to recover those costs, and in choosing the terms and conditions of service. 35/

In light of the foregoing, remand pursuant to §120.68 is entirely appropriate. It gives effect to a validly adopted Commission rule that implements Federal policy. Appellants do not request that the rule be given "mechanical application (at 21)." Rather, Appellants ask that it be given effect, consistent with its purpose and the regulations it implements.

B. Section 366.07 Does Not Override Rule 25-17.082(3)(f)

The argument of FPC and FPL that §366.07 required the Commission to reject its own rule fails for several reasons. First of all, like the pre-emption argument, it is an inappropriate post-hoc rationalization of counsel, containing conclusions not even mentioned by the agency. 36/ Neither the Commission's final order nor its Answer Brief mention §366.07. 37/

34/ Order No. 17159, at 4 (Appendix A-4, Initial Brief).

35/ Of course, like any discretionary action, including ratemaking, the discretion is not unfettered. FERC's rules place limits on this discretion. In this case, the outer limits of discretion are established by FERC rules and state law, including Rule 25-17.082(3)(f) and §366.081.

36/ See discussion in Section II.A. of this brief, supra.

37/ Likewise, the Commission's order and its Answer Brief make no mention of rule 25-17.084. It is unclear whether the rule has any application at all. In any case, it cannot be used as a means to invalidate § 120.68(12)(b).

Second, §366.07 itself does not dictate any particular result. The Commission possesses broad discretion in ratemaking, including the ability on a proper record to employ non-cost based principles, such as value of service. 38/ Additionally, the Commission's order did not prescribe any rates. It only prescribed certain terms and conditions of service and established principles governing rate structure and ordered utilities to file tariffs. The subsequent tariff approval process itself involved several workshops, covering some nine months. 39/ Rule 25-17.082(3)(f) could easily have been amended in that time.

Third, the Commission never made the findings necessary to trigger the claimed mandate of the statute. 40/ The Commission never found the rates under Rule 25-17.082(3)(f) to be "unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in anywise in violation of law." 41/ Thus,

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38/ See Florida Retail Federation Inc. v. Mayo, supra.

39/ The Commission's order approving the tariffs was entered on October 10, 1987.

40/ FPL quotes the Commission as finding that load characteristics "justify different rates" (Answer Brief at 32-33) and FPC quotes the Commission as finding that adopted rate structure is the "most equitable, etc.," (Answer Brief at 25). However, these are not findings that the rates under Rule 25-17.082(3)(f) are violative of law.

41/ FPC cites to Mr. Brubaker's testimony regarding "unjust discrimination" and "inappropriate rates" (Answer Brief at 24). However, as earlier shown, this testimony does not support the propositions offered. Further, it is an attempt to have this Court independently review the record and make findings not made by the Commission.

the Commission was not required to "determine and by order fix the fair and reasonable rates, rentals charges and classifications . . . to be imposed . . . in the future."

Fourth, even if §366.07 could be construed, arguendo, to require the Commission to act, it did not dictate when or how the Commission must act. Certainly, if a rule has prescribed certain rates since 1983, a brief delay to engage in rulemaking will not do damage to the public policy of this state. 42/ Nevertheless, to the extent of any conflict between §366.07 and §120.68(12)(b), the latter must prevail. As the legislature's latest statement of policy, the 1984 amendment of §120.68(12) dictates that agencies must follow their own rules. 43/

The related argument of appellees that a statute prevails over a rule is inapposite. 44/ The cited cases simply recognize that an agency cannot by rule exercise power contrary to organic law. The "conflict" here is not between a rule and

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42/ Counsel for the Commission misleads the Court by referring to Docket No. 870352-EI, opened on April 6, 1987. This Docket was not opened to amend Rule 25-17.082(3)(f) to conform rule 25-17.082(3)(f) to the Commission's order. It was opened for an entirely different purpose, specifically, to preclude QFs from changing their mode of power purchases from the simultaneous purchase and sale mode to the net purchasing mode. The rule amendment for which Docket No. 870352-EI was opened would have left Rule 25-17.082(3)(f) unchanged. (See Appendix A-11).

43/ The reference to "order" in §366.07 dates from the original enactment in 1952.

44/ FPL Answer Brief, at 34; FPC Answer Brief, at 17.

organic law but between a rule and an order. 45/ The Commission's policy with respect to cost-based rates for additional standby service is not a statute but simply one of many possible policy choices permissible under statute. Adoption of Appellees' argument would result in repeal of §120.68(12)(b) in all cases where a rule involves discretion granted by statute.

IV. MANDATORY RATCHETS ARE DISCRIMINATORY UNDER SECTION 366.81

The cases cited by Appellees concerning discrimination are inapposite. As shown in Appellants' Initial Brief, §366.81, Florida Statutes, simply prohibits discrimination. Unlike §§366.03-366.07, which adopted the common law standard of "unreasonable discrimination," §366.81 prohibits discrimination per se.

The Legislature adopted this stricter standard because "it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens." Id. Section 366.81, Florida Statutes, quite clearly applies to QFs. The Commission itself has concluded that cogeneration and

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45/ Under current case law, an agency remains free to choose to adopt policy via rulemaking or ad hoc policy. However, the legislature has made it clear that once policy is codified by rule it must be honored in subsequent ad hoc proceedings.

small power production are cost-effective energy conservation measures under §366.81. 46/

Appellees' arguments regarding a cost basis for ratchets for QFs ignore the fact that those ratchets are currently not being applied to non-QFs even if cost-justified. The Commission did not find that ratchets were cost-effective only for QFs. It could not since many other customers have load factors of 10% or less. 47/ In fact, the Commission's order proposes to investigate whether ratchets should be imposed on other customers, clearly implying that the Commission believes that ratchets may be justified for non-QFs. Illegal discrimination occurs because QFs, as QFs, are currently being treated less favorably than non-QFs. The Commission has not made any finding to justify the disparate treatment.

Section 366.81 creates an affirmative duty to scrutinize all rate structures to avoid even inadvertent discrimination against efficient and cost-effective energy conservation systems "to protect the health, prosperity, and general welfare of the state and its citizens." To permit the Commission to impose ratchets as to QFs but not any other

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46/ Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Florida Public Service Commission, Docket No. 820460-EU, Order No. 11611, Page 2, February 14, 1983. And Gulf Power, in its Answer Brief, expressly states that QFs "by definition use highly efficient systems or renewable energy resources." (Gulf Answer Brief, at 3).

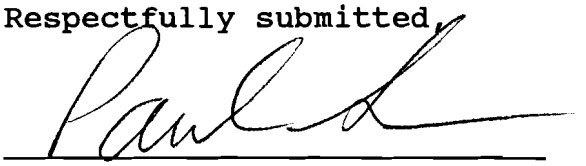
47/ E.g., R. Vol. VI, Tr. 374 (Slusser).

customer without finding that ratchets are only cost-effective for QFs is discriminatory.

CONCLUSION

WHEREFORE, for the foregoing reasons, Order No. 17159 should be remanded to the Florida Public Service Commission with directions that Order No. 17159 be brought into conformance with the requirements of Rule 25-17.082(3)(f) and §366.81, Florida Statutes.

Respectfully submitted,



RICHARD A. ZAMBO, ESQUIRE
Richard A. Zambo, P.A.
205 North Parsons Avenue
P. O. Box 856
Brandon, Florida 33511
(813) 681-3220

PAUL SEXTON, ESQUIRE
Richard A. Zambo, P.A.
820 East Park Avenue
Suite 200, Building A
Tallahassee, Florida 32301
(904) 222-9445

Attorneys for Appellants:

Florida Crushed Stone Company
Occidental Chemical Corporation
U.S. Sugar Corporation

EARLE H. O'DONNELL, ESQUIRE
LAUREL W. GLASSMAN, ESQUIRE
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20004-2404
(202) 383-0100

Dated: May 31, 1988

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was furnished to the following persons by U.S. Mail this 31st day of May, 1988.

Gail P. Fels
Assistant County Attorney
Metro-Dade Center
111 NW First Street
Suite 2810
Miami, FL 33128-1993

James D. Beasley, Esquire
Ausley, McMullen, McGehee,
Carothers & Proctor
227 S. Calhoun Street
P. O. Box 391
Tallahassee, FL 32302

Charles A. Guyton, Esquire
Matthew M. Childs, Esquire
Steel, Hector & Davis
320 Barnett Bank Building
Tallahassee, FL 32301

James A. McGee, Esquire
P. O. Box 14042
St. Petersburg, FL 33733

Alan C. Sunberg, Esquire
Sylvia H. Walbolt, Esquire
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
P. O. Box 3239
Tampa, FL 33601

G. Edison Holland, Esquire
Beggs and Lane
P. O. Box 12950
Pensacola, FL 32576

Paul Sexton

Attorney for Appellants