IN THE SUPREME COURT OF FLORIDA

METROPOLITAN DADE COUNTY, et al., Appellants, v. KATIE NICHOLS, et al., Appellees.	CASE NO. 70,703

ON APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA POWER & LIGHT COMPANY'S ANSWER BRIEF

Matthew M. Childs, P. A.
Charles A. Guyton
STEEL HECTOR & DAVIS
201 South Monroe, Suite 200
Tallahassee, Florida 32301-1848
(904) 222-4192

Attorneys for Florida Power & Light Company

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	iii
STATEMENT OF THE CASE AND FACTS	I
SUMMARY OF ARGUMENT	3
INTRODUCTION TO ARGUMENT	5
I. THE APPELLANTS HAVE FAILED TO PRESERVE FOR APPEAL THE ISSUE OF MR. WHITING'S QUALIFICATIONS.	6
A. Appellants' Failure At Trial To Object To Mr. Whiting's Qualifications Is A Waiver Of The Opportunity To Raise The Issue On Appeal.	7
B. Appellants' Failure To Object Is Not Cured By An Offer To Forego Questioning If Portions Of The Testimony Were Stricken.	10
C. The Industrial Cogenerators Explicitly Waived Any Challenge To Mr. Whiting's Qualifications By Acknowledging That Their Questions Were Limited To The Weight To Be Given Mr. Whiting's Testimony.	11
D. The Industrial Cogenerators' Attempt To Raise The Issue Of Mr. Whiting's Qualifications In Their Post Hearing Brief Was Not Sufficient To Preserve The Issue For Appeal.	13
II. THE COMMISSION'S FINDINGS AND APPROVAL OF FPL'S METHODOLOGY ARE BASED UPON COMPETENT SUBSTANTIAL EVIDENCE.	16
A. There Are Three Separate Elements Of Evidence That Support The Selections Of Costs In Step One Of FPL's Methodology.	18

TABLE OF CONTENTS - CONTINUED

	Page
B. Statistical Testing Of The Costs Employed In The Gulf Power Company And Florida Power Corporation Methodologies Demonstrated The Validity Of The Selection Of Costs In Step One Of FPL's Methodology.	19
C. Mr. Whiting Was Qualified To Testify As An Expert.	22
D. Mr. Whiting Had Sufficient Personal Knowledge Of The Facts And Rationales Underlying The Treatment Of Costs In Step One Of FPL's Methodology To Testify As An Expert.	30
III. DADE COUNTY'S ATTEMPT TO HAVE THE COURT REWEIGH THE EVIDENCE IS INAPPROPRIATE.	36
CONCLUSION	38
CERTIFICATE OF SERVICE	39
APPENDIX	A-1

TABLE OF CITATIONS

Page

CASES

Buchman v. Seaboard Coast Line Railroad Co., 381 So.2d 229 (Fla. 1980) — 23

Bunyak v. Clyde J. Yancey & Sons Dairy, Inc., 438 So.2d 891 (Fla. 2d DCA 1983), rev. den., 447 So.2d 885 (Fla. 1984) — 35

Castor v. State, 365 So.2d 701 (Fla. 1978) — 14

Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) — 7

Citizens v. Public Service Commission, 464 So.2d 1194 (Fla. 1985) — 37

Dowd v. Star Manufacturing Co., 385 So.2d 179 (Fla. 3d DCA 1980), rev. den., 392 So.2d 1373 (Fla. 1980) — 11, 13

Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940) — 23

Fredericson v. Levinson, 495 So.2d 842 (Fla. 3d DCA 1986) — 8, 9

Guy v. Kight, 431 So.2d 653 (Fla. 5th DCA 1983), rev. den., 440 So.2d 352 (Fla. 1983) — 23

Harris v. Game and Fresh Water Fish Commission, 495 So.2d 806 (Fla. 1st DCA 1986) — 9

Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983) — 33

In re: Proceedings to Implement Cogeneration Rules, 84 F.P.S.C. 5:4, 15 (1984) — 1

Krohne v. Orlando Farming Corp., 102 So.2d 399 (Fla. 2d DCA 1958) — 23

Lineberger v. Domino Canning Co., 68 So.2d 357 (Fla. 1953) — 7, 9

McDonnell Douglas v. Holliday, 397 So.2d 366 (Fla. 1st DCA 1981) — 23

TABLE OF CITATIONS - CONTINUED

	Page
Parry v. Nationwide Mutual Fire Insurance Co., 407 So.2d 936 (Fla. 5th DCA 1982)	8, 9
Saloman v. National Car Rental System, Inc., 247 So.2d 101 (Fla. 3d DCA 1971)	7
Seaboard Air Line Railroad Co. v. Lake Region Packing Assoc., 211 So.2d 25 (Fla. 4th DCA 1968), cert. den., 221 So.2d 748 (Fla. 1968)	23
Sears Roebuck & Co. v. McAfoos, 303 So.2d 336 (Fla. 3d DCA 1974)	7, 9
Swan v. Florida Farm Bureau Insurance Co., 404 So.2d 802 (Fla. 5th DCA 1981)	8, 9, 14
Tri-State Systems, Inc. v. Department of Transportation, 500 So.2d 212 (Fla. 1st DCA 1986), rev. den., 506 So.2d 1041 (Fla. 1987)	9
United Technologies Communications Co. v. Industrial Risk Insurers, 501 So.2d 46 (Fla. 3d DCA 1987)	33
Warning Safety Lights, Inc. v. Gallor, 346 So.2d 92 (Fla. 3d DCA 1977), cert. den., 355 So.2d 518 (Fla. 1978)	15, 23

STATUTES

Section 90.704, Florida Statutes (1985)	35
Section 120.58(1)(a), Florida Statutes (1985)	35

OTHER AUTHORITIES

Fla. R. App. P. 9.210(c)	1
Fla. Admin. Code Rule 25-17.825(6)	1, 5

STATEMENT OF THE CASE AND FACTS

In keeping with Rule 9.210(c), Florida Rules of Appellate Procedure, Florida Power & Light Company ("FPL") can accept in significant part the Statement of the Case and of the Facts in the Industrial Cogenerators' ("ICG") Initial Brief. However, some portions are, at best, incomplete. Therefore, FPL will either supplement or reject the ICG Statement of the Case and of the Facts where FPL differs with the ICGs; otherwise, the ICG's Statement of the Case and of the Facts is accepted.

In regard to "Section II, Historical Background," FPL provides two supplements. At the close of the first paragraph discussing Rule 25-17.825 (ICG Br. at 2), the following should be noted: Subsection (6) of Rule 25-17.825 provides that the payments by a utility for as-available energy made pursuant to the utility's tariff shall be recoverable from customers through the utility's Fuel and Purchased Power. Also on page 2, in the discussion of the 1 mill per kilowatt hour rate initially established by the Commission, it should be noted that the 1 mill adder was not based on any particular methodology but was simply selected by the Commission. In re: Proceedings to Implement Cogeneration Rules, 84 F.P.S.C. 5:4, 15 (1984). Also on page 2, FPL notes that footnote three is not supported by a reference to the record, and it should be understood that the statement merely reflects an assumption underlying the rule.

In regard to Section III, it should be noted in Subsection A on page three that the .009 cents/KWH rate agreed to by the parties and accepted

by the Commission was developed by updating FPL's Methodology for more recent data. R. Vol. IV, Tr. 24.[1] In the discussion of the Prehearing Order in Subsection B, it should be noted that it contained not only the positions of the parties, including the Commission Staff, but also a summary of the background of the case agreed to by all the parties. R. Vol. I, pp. 176-78; R. Vol. III, pp. 47-51.

FPL does not feel Subsection C of Section III is complete and must reject it. FPL has incorporated all relevant evidence into its Argument. Therefore, another summary will not be undertaken here.

FPL acknowledges that Subsections D and E of Section III of the ICG's Statement of the Case and of the Facts are sufficiently accurate to frame the issues before the Court. Therefore, they are not supplemented.

1/ All references to the record shall begin with the symbols indicating the volume of the record "R. Vol.," transmitted to the Court, followed by an appropriate further citation. Prehearing Conference transcript references are introduced with the symbols "R. Vol. III, pp." followed by a page number. References to transcripts of the final hearing are introduced with the symbols "R. Vol. IV, Tr." followed by a page number. References to exhibits admitted into evidence are introduced with the symbols "R. Vol. V, Ex. __, Doc. __" followed by appropriate page numbers where applicable. Thus, a reference to page 43 of Document 1 of Exhibit 1 would read "R. Vol. V, Ex. 1, Doc. 1, p. 43."

SUMMARY OF ARGUMENT

One of the principal arguments made by the Appellants, that Mr. Whiting was not qualified to testify as an expert, was not properly preserved for appeal. No objection to Mr. Whiting's testimony was made, despite numerous opportunities, and a contemporaneous objection is necessary to preserve the issue of an expert's qualifications on appeal. No motion to strike Mr. Whiting's testimony was made, and the limited discussion of striking Mr. Whiting's testimony was untimely even if it is construed to be a motion to strike. An initial challenge to Mr. Whiting's qualifications in a post hearing brief is not sufficient to preserve an issue for appeal, and to allow it to operate in such a fashion in this case would be unfair. Such a procedure would allow neither the Commission nor opposing counsel an opportunity to "cure the error." In this case the inequity is compounded, for the Appellant which raised questions of admissibility in the post hearing brief specifically informed the Commission at the hearing that he was only asking questions meant to go to the weight to be given to Mr. Whiting's testimony.

The Commission's findings and orders are based on competent and substantial evidence from three sources: FPL's multiyear study, Mr. Whiting's expert testimony and the methodologies proposed by cogenerator witnesses coupled with statistical analysis performed by Mr. Whiting. At least two of these sources clearly are not comprised of inadmissible hearsay and are a sufficient basis for the Commission's findings.

Mr. Whiting testified in an area beyond the understanding of the average layman and possessed and evidenced sufficient skill and experience to aid the trier of fact. He had an extensive background and knowledge in the areas necessary to make decisions as to whether nonfuel O&M costs vary hour by hour due to changes in generating unit output resulting from purchases of as-available energy from cogenerators: accounting and system operations. Because of that background he had testified before the Commission previously as FPL's production cost witness in the fuel adjustment docket. His efforts to study the issue began even before FPL's study commenced. He worked on FPL's study, drafted the narrative summary to the study, and was involved in the preparation of FPL's methodology. Moreover, Mr. Whiting's responses to cross examination exhibit a command of the subject. They evidence not only his knowledge of the subject matter but also a sufficient knowledge of the underlying facts.

Dade County's attempt to have the Court reweigh the evidence is inconsistent with the Court's prior decisions on the standard of review of Commission decisions. Rather than reweigh the evidence, the Court will examine the record only to determine if the Commission's order meets the essential requirements of law and is supported by competent substantial evidence.

A review of the record in this case shows the Commission's order is supported by competent and substantial evidence and meets the essential requirements of law. The Commission's order should be affirmed.

INTRODUCTION TO ARGUMENT

The ultimate matter at issue in the proceeding before the Commission was what the avoided O&M component should be for the rate paid by FPL to cogenerators for as-available energy. FPL argued it should be lowered from $1.00/MWH (megawatt hour) to no more than 9 cents/MWH based on FPL's multiyear study and subsequent applications of FPL's methodology. The rate ultimately chosen by the Commission will be recovered by FPL from its customers through its fuel adjustment clause. See Fla. Admin. Code Rule 25-17.825(6).

Because FPL will be made whole regardless of the rate chosen, the real conflict in this matter is not between FPL and cogenerators. The real conflict is between FPL's general body of ratepayers and a small group of cogenerators, only some of whom are FPL's customers. The Commission balanced those interests, and on the record before it decided that the avoided O&M component of FPL's as-available energy rate should be lowered.

The Commission's choice was very simple. Because of the stipulations of the parties, it could either adopt the O&M rate resulting from FPL's methodology, 9 cents/MWH, or continue to require FPL to pay $1.00/MWH, a rate not based on any methodology. In other words, it could choose a rate based on a methodology emerging from a multiyear study which had been critically reviewed first by FPL and then the cogenerators, or it could adopt an arbitrary rate not supported by the record. The Commission clearly

made the proper choice in approving FPL's methodology and the resulting rate.

The cogenerators, having raised numerous issues below, having levied multiple criticisms of FPL's methodology to the Commission, and having freely debated the validity of FPL's methodology, now raise to this Court a technical legal argument based on a few responses of one witness. They do not even argue that the Commission's order is not supported by the evidence. Instead, they argue the evidence supporting the order is not competent, and they raise this argument on appeal without having properly preserved it below.

FPL respectfully submits that a fair reading of all the relevant evidence shows that the Commission order is supported by competent and substantial evidence. The cogenerators cannot legitimately invoke the law, the record or policy. The Commission's order should be affirmed.

I

THE APPELLANTS HAVE FAILED TO PRESERVE FOR APPEAL THE ISSUE OF MR. WHITING'S QUALIFICATIONS.

The essential element of both Appellants' arguments is their attempt to challenge the qualifications of FPL's witness, Mr. Whiting. They attack his education, his experience and his personal knowledge of the facts

underlying the study he presented. While these alleged deficiencies are addressed in subsequent argument, FPL respectfully submits that these various arguments should not be entertained as neither of the Appellants properly preserved these issues for appellate review.

A. Appellants' Failure At Trial To Object To Mr. Whiting's Qualifications Is A Waiver Of The Opportunity To Raise The Issue On Appeal.

It is an axiomatic general principle of the law of appellate review that to preserve an issue for appeal a party must raise a timely and specific objection. An alleged error cannot be raised for the first time on appeal. This principle is perhaps most fully developed in cases addressing the admission of evidence. Where testimony is heard or a document is admitted without objection, the opportunity to raise an issue as to the admissibility of the evidence is waived. See Chenoweth v. Kemp, 396 So.2d 1122, 1125 (Fla. 1981); Lineberger v. Domino Canning Co., 68 So.2d 357, 358, 359 (Fla. 1953). Expert testimony is no different. When expert testimony is heard without contemporaneous objection, a court will not consider issues on appeal challenging such testimony. Saloman v. National Car Rental System, Inc., 247 So.2d 101 (Fla. 3d DCA 1971) (no objection made to witness being an expert); Sears Roebuck & Co. v. McAfoos, 303 So.2d 336, 337 (Fla. 3d DCA 1974) (no objection made to expert's testimony although it was subsequently learned the expert relied upon an erroneous fact in reaching conclusion).

In the case before the Court, no objections to Mr. Whiting's testimony, direct and rebuttal, or Mr. Whiting's exhibits were made by any party, including both of the Appellants. Although the testimony was prefiled, no

pretrial motion was made challenging Mr. Whiting's testimony.[2/] Mr. Whiting's direct testimony, which presented FPL's Final Report, a part of which included "FPL's methodology," was admitted without objection. R. Vol. IV, Tr. 11. Mr. Whiting's exhibit attached to his direct testimony (Exhibit 1), which included FPL's Final Report (the Report contained a discussion of FPL's methodology, the methodology itself and the "engineering judgments" so strenuously contested on appeal), was admitted without objection. R. Vol. IV, Tr. 60, see also 97. Mr. Whiting's rebuttal testimony, in which he clearly expresses his opinion as to the appropriateness of FPL's methodology (R. Vol. IV, Tr. 346), was admitted without objection. R. Vol. IV, Tr. 331. When it became manifestly clear that Mr. Whiting was being offered to support the "engineering judgments" made in step one of the application of FPL's methodology and that he would be offering his opinions as an expert, no objection was made. R. Vol. IV, Tr. 57-67. Even when the various parties finished what they now characterize as voir dire, no objection was raised. R. Vol. IV, Tr. 91, 97. Despite numerous opportunities to raise properly and preserve for appeal any of the numerous deficiencies now alleged regarding Mr. Whiting's testimony and exhibit, no objection was ever made.[3/] The Appellants admit as much in

---

[2/] Such a motion would not have been sufficient to preserve the issue on appeal without a contemporaneous objection at trial when "objectionable" testimony was given. Fredericson v. Levinson, 495 So.2d 842, 843 (Fla. 3d DCA 1986); Parry v. Nationwide Mutual Fire Insurance Co., 407 So.2d 936, 937 (Fla. 5th DCA 1982); Swan v. Florida Farm Bureau Insurance Co., 404 So.2d 802, 803 (Fla. 5th DCA 1981).

[3/] At least counsel for MDC was aware of the need to object to preserve error, for in at least one other instance involving the testimony and exhibit of another witness, counsel for MDC objected and moved to strike testimony noting that he was "just preserving that objection for the record." R. Vol. IV, Tr. 323-24.

their briefs where they assiduously assail Mr. Whiting's testimony and scour the record for any shred of testimony which they can argue supports their position, yet they conspicuously fail to point out where they, or anyone else, objected to the evidence.

Having failed to object to any part of Mr. Whiting's testimony or exhibit, the Appellants are precluded from raising on appeal any alleged error in the Commission's admission or reliance on that evidence.[4/] See Lineberger v. Domino Canning Co., supra; Sears Roebuck & Co. v. McAfoos, supra; Fredericson v. Levinson, supra; Parry v. Nationwide Mutual Fire Insurance Co., supra; Swan v. Florida Farm Bureau Insurance Co., supra. The various arguments challenging Mr. Whiting's qualifications, testimony and exhibit are not properly before the court due to the Appellants' failure to object.

4/ The only exception to this principle may be an argument that an administrative agency relied solely on hearsay. (That argument is made in this case, but it is distinct from the challenges to Mr. Whiting's qualifications.) Section 120.58(1)(a), Florida Statutes provides that hearsay evidence may be admissible to supplement or explain other evidence; however, it is not sufficient by itself to support a finding. The statute does not address whether the party attacking a finding on this basis must point out at the hearing that only hearsay has been offered to support a point. The First District Court of Appeals has addressed the failure to object to hearsay evidence in two seemingly inconsistent decisions. See Harris v. Game and Fresh Water Fish Commission, 495 So.2d 806 (Fla. 1st DCA 1986) (holding a failure to object does not foreclose a challenge); Tri-State Systems, Inc. v. Department of Transportation, 500 So.2d 212 (Fla. 1st DCA 1986), rev. den. 506 So.2d 1041 (Fla. 1987) (holding unobjected to hearsay is usable proof just as any other evidence). FPL submits that the better reasoned opinion is the Tri-State decision; requiring a contemporaneous objection apprises both the agency and opposing counsel of the alleged error and provides an opportunity to "cure" the error. See pages 13 - 15 of this Brief. However, in this case the resolution of this issue is not necessary, for there is clearly evidence other than hearsay evidence which supports the Commission's findings. See pages 18 - 22, 30 - 36 of this Brief.

B. **Appellants' Failure To Object Is Not Cured By An Offer To Forego Questioning If Portions Of The Testimony Were Stricken.**

Rather than object to Mr. Whiting's testimony, several parties, including both Appellants, opted to question Mr. Whiting. R. Vol. IV, Tr. 29-50, 61, 66-97.[5/] During the questioning opinions on the "engineering judgments" as well as other operations questions were solicited by counsel for cogenerators. R. Vol. IV, Tr. 66-91. Apparently, some of the questioning was intended to probe Mr. Whiting's knowledge and experience. After having considered lengthy questioning of this type, at least one Commissioner tired of the cross and suggested to counsel for the Industrial Cogenerators that he was fully apprised of Mr. Whiting's qualifications and that he saw no need to pursue the line of cross. R. Vol. IV, Tr. 93, 94. In response to this reservation from the bench, counsel offered to forego further questions if the Commissioner would strike the portions of Mr. Whiting's testimony that purported to give an engineering opinion. R. Vol. IV, Tr. 94.

The offer by counsel to forego further questioning cannot fairly or reasonably be construed as a motion to strike. It was not made as the result of any particular answers. It lacked specificity and failed to state grounds.

[5/] A review of the pages of the transcript referred to shows no one was denied an opportunity for cross examination. Initial cross was undertaken by all parties, including the Appellants. R. Vol. IV, Tr. 29-50. Once any confusion was removed that Mr. Whiting was offered to support the "engineering judgments" now contested (R. Vol. IV, Tr. 57-67), liberal recross was allowed. (R. Vol. IV, Tr. 66-97). Dade County, which now argues it was denied an opportunity to cross examine, simply waived its opportunity by not asking any further questions. R. Vol. IV, Tr. 66-97.

It was not treated by the Commission as a motion to strike, and no opportunity was given to respond. Most importantly, counsel did not treat it as a motion to strike by foregoing further questioning. It was merely a response to an attempt by the bench to expedite cross. It should not now be read as a motion to strike.

However, even if this offer to forego cross were construed to be a motion to strike, it is not sufficient to preserve the myriad of alleged errors now sought to be raised to the Court. Most of the various errors alleged by the Appellants supposedly arose during the earlier cross examination of Mr. Whiting by counsel for a party other than the Appellants. See R. Vol. IV, Tr. 66-91. If a motion to strike could have preserved the "error," it would have to have been made during the examination in which the answers were given. A motion to strike made in subsequent cross examination is untimely and insufficient to preserve an issue for appeal. Dowd v. Star Manufacturing Co., 385 So.2d 179, 181 (Fla. 3d DCA 1980). rev. den., 392 So.2d 1373 (Fla. 1980). "An untimely motion to strike is not a substitute for a timely objection." Id.

C. The Industrial Cogenerators Explicitly Waived Any Challenge To Mr. Whiting's Qualifications By Acknowledging That Their Questions Were Limited To The Weight To Be Given Mr. Whiting's Testimony.

During the cross examination of Mr. Whiting by counsel for the Industrial Cogenerators, counsel represented twice that while he had reservations about Mr. Whiting's qualifications, his questions were meant to aid the Commission in assessing the weight to be given to Mr. Whiting's testimony. In the first instance where counsel for the Industrial

Cogenerators was responding to an objection to his question, counsel stated:

> MR. ZAMBO: Well, I think, Commissioner, there is still a question here as to whether or not this witness is qualified to answer these questions regarding engineering judgment and to render an opinion on those. And I would just like to explore with him some of his background and experience along these lines to give the Commission a better idea of how much weight to give to his testimony on those issues.

R. Vol. IV, Tr. 92, 93 (Emphasis added). In the second instance where counsel for the Industrial Cogenerators was responding to a suggestion by a Commissioner that counsel's question was not sufficiently germane, counsel stated:

> MR. ZAMBO: And I think it is very important that it be established that this witness is testifying of his own knowledge and not on the basis of hearsay. And I would like to establish what his qualifications are and what his understanding and knowledge of a power plant operation is so that we can understand what weight to give to his testimony.

R. Vol. IV, Tr. 94 (Emphasis added).

When these statements that the cross was meant to go to the weight to be given Mr. Whiting's testimony rather than to the question of admissibility are coupled with the Appellants' failure to object to opinions given in Mr. Whiting's testimony, it is manifestly clear that the Appellants not only failed to preserve their "errors" for review, but also had no intention to contest the admissibility of the evidence offered by Mr. Whiting at the hearing. Having made that conscious decision before the Commission not to object to the admissibility of Mr. Whiting's testimony,

the Industrial Cogenerators should not now be allowed to raise such an "error" on appeal when neither the Commission nor FPL any longer has an opportunity to "cure" it.

D. The Industrial Cogenerators' Attempt To Raise The Issue Of Mr. Whiting's Qualifications In Their Post Hearing Brief Was Not Sufficient To Preserve The Issue For Appeal.

In their post hearing brief the Industrial Cogenerators attempted to challenge Mr. Whiting's qualifications for the first time by making an argument that the "engineering judgments" in step one of FPL's methodology were not supported by competent, substantial evidence.[6/] Having failed to raise a contemporaneous objection or to make a motion to strike, the Industrial Cogenerators' post hearing change in tactics from questioning the weight to be given to evidence to contesting the competency of evidence should not be held to preserve the issue for appeal. The manifest unfairness of such an approach is best seen by referring to cases previously discussed.

As a matter of logic, if an untimely motion to strike made during the hearing when the court or agency could still "cure the error" is not a sufficient substitute for a timely objection (See Dowd, supra), an argument

---

6/ Unlike the ICGs, Dade County never challenged Mr. Whiting's qualifications prior to appeal. Having made no objection at trial, having conducted no cross examination designed to test Mr. Whiting's qualifications and having made no motion to strike, it is not surprising that Dade County continued to waive any challenge to Mr. Whiting's qualifications by completely omitting in its post hearing brief any remark regarding Mr. Whiting's qualifications. Thus, Dade County can point to no attempt it made to preserve any issue it now raises on appeal.

in a post hearing brief, filed after the close of the evidentiary record when there is no opportunity for the court or agency to "cure the error" or for an opposing party to respond by rehabilitating the witness or offering counter arguments, should not be deemed a sufficient substitute for a timely objection. The merit of this position is best seen by looking to the rationale of the requirement of timely objections. As this Court has previously noted:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.

Castor v. State, 365 So.2d 701, 703 (Fla. 1978), quoted with approval in Swan v. Florida Farm Bureau Insurance Co., supra.

Another equally valid rationale for requiring a contemporaneous objection, particularly in the case where a witness' competency and the admissibility of testimony are being questioned, is that it allows the attorney offering the witness an opportunity to respond with specificity to the grounds offered. It also indicates to the attorney that further examination may be necessary to expand on the witness' qualifications. Those opportunities, which are essential to preserving the fairness of the hearing, are lost if a party can forego necessary objections at trial and ambush the opposing party by waiting until the record is closed and file a brief raising the issue.

This case is an excellent example of the essential need for a timely objection to preserve an issue for appeal. If an objection had been posed, it

would had to have been specific. Once the objection had been raised, FPL could have responded with specificity. The issue would have been squarely before the Commission, and the Commission would have been afforded an opportunity to make a ruling. Here, the Appellants changed their tactic and sought to raise issues regarding the admissibility of evidence (rather than the weight to be given the evidence) by making an argument in a post hearing brief which had to be filed contemporaneously with all other briefs. To allow that effort to preserve an issue for appeal would deny the Commission the opportunity to make a ruling and avoid giving either the Commission or the party offering the evidence the opportunity to "cure the error." The inequity of such a circumstance is manifestly apparent.

The record below contains no Commission ruling on Mr. Whiting's qualifications. If the Appellants had objected or made a timely motion to strike, the Commission would have had an opportunity to rule on Mr. Whiting's qualifications. In turn, its ruling would have been discretionary and entitled to great weight on appeal. See Warning Safety Lights, Inc. v. Gallor, 346 So.2d 92 (Fla. 3d DCA 1977), cert. den., 355 So.2d 518 (Fla. 1978). The Court could then examine the Commission's rationale for its ruling. In this record the Court does not have the benefit of a ruling or the Commission's underlying rationale because no objection was made which allowed the Commission to rule. The issue the Appellants seek to raise on appeal is simply not presented in the record. There is no ruling for the Court to address.

II

THE COMMISSION'S FINDINGS AND APPROVAL OF FPL'S METHODOLOGY ARE BASED UPON COMPETENT SUBSTANTIAL EVIDENCE.

Before reviewing the evidence supporting the Commission's findings and approval of FPL's methodology, it is helpful to summarize FPL's methodology. The purpose of the methodology is to identify and measure nonfuel operating and maintenance ("O&M") expenses which vary hour by hour due to purchases of as-available energy from cogenerators. At present, these are relatively small purchases (R. Vol. IV, Tr. 48) which slightly impact the operating levels of several different generating units rather than just one unit (R. Vol. IV, Tr. 83; R. Vol. V, Ex. 1, Doc. 1, p. 4). The methodology was developed to measure the maximum upper boundary of incremental variable operating and maintenance expenses when FPL's earlier studies showed such costs could not be measured objectively. R. Vol. IV, Tr. 23, 24.

FPL's methodology consists of two primary steps. The first step is a comprehensive review of all Expenditure Analysis Codes ("EACs") to determine which EACs include expenses that might vary due to changes in FPL generation due to the purchase of as-available energy from cogenerators.[7/] R. Vol. V, Ex. 1, Doc. 1, p. 7. In the second step the

---

7/ If system operations change due to cogeneration purchases, the EACs selected might change. R. Vol. IV, Tr. 48,49. The selection of EACs is not fixed; thus, even if the Court should find there was not competent evidence to support the choice of EACs, that would not lead to the conclusion the

hypothesis that a change in unit output would cause these costs to vary is tested by performing a least squares regression analysis with the costs identified in step one as the dependent variable and net megawatt hour ("MWH") output as the independent variable. R. Vol. V, Ex. 1, Doc. 1, pp. 64, 65, Doc. 4, pp. 1, 2; R. Vol. IV, Tr. 289. If the results of the regression analysis are statistically significant, the slope of the regression is used to calculate the nonfuel O&M component of the price paid to cogenerators for as-available energy. Id.

Of the various methodologies advocated by the parties in the proceeding below, FPL's is the only method which tests, through statistical analysis (or in any fashion), the validity of the operations judgments which were used to select costs thought to vary with changes in output that result from the receipt of as-available energy. R. Vol. V, Ex. 16; R. Vol. IV, Tr. 284-85. While regression cannot be used to prove cost causation (it only measures association not causation), it can be used to test the theory of cost causation underlying the choice of costs in any methodology. R. Vol. IV, Tr. 290. Simply stated, if the regression does not yield a statistically significant correlation (no association), one may conclude there is no causation between the two variables. R. Vol. IV, Tr. 290, 312-14.

Footnote 7/ Continued:
Appellants reach, that the methodology was not supported. At most, it would lead to the conclusion that the initial application of FPL's methodology was infirm. Of course, FPL rejects that conclusion as well.

A. There Are Three Separate Elements Of Evidence That Support The Selections Of Costs In Step One Of FPL's Methodology.

The Appellants have accurately identified two evidentiary sources which support FPL's selection (and rejection) of costs in step one of its methodology. Of course, FPL's original application of the methodology was admitted into evidence (without objection) as part of Exhibit 1. See R. Vol. V, Ex. 1, Doc. 1, pp. 43-65 admitted at R. Vol. IV, Tr. 60. Pages 44 through 61 of Document 1 of Exhibit 1 show the original treatment of EACs in the application of step one. This is the first element of evidence supporting the Commission's findings regarding "engineering judgments" and "identification of costs" challenged by the Appellants. See ICG Brief at 17.

The second source of evidence supporting the application of step one of FPL's methodology is the testimony of Mr. Whiting regarding the selection and rejection of certain EACs. He testified that the information contained in Exhibit I (which includes the treatment of EACs in step one of FPL's methodology) was true and correct (R. Vol. IV, Tr. 11), and he answered extensive cross examination regarding the rejection of costs in step one. R. Vol. IV, Tr. 66-91. His expertise and knowledge are addressed later in this brief.

The third source of evidence supporting the application of step one of FPL's methodology is based in part on the costs employed by other methodologies and statistical analysis performed by FPL of these costs. This evidence has been overlooked by the Appellants. It supports both the

finding that the "engineering judgments" in Attachment IV were correct and the finding that all costs that vary with small changes in hourly output were identified. To understand the significance of this evidence, it is necessary to review the cost categories in the various methodologies advocated to the Commission.

B. Statistical Testing Of The Costs Employed In The Gulf Power Company And Florida Power Corporation Methodologies Demonstrated The Validity Of The Selection Of Costs In Step One Of FPL's Methodology.

Three other methodologies have been offered by other utilities to calculate the avoided variable O&M nonfuel component of the price paid to cogenerators for as-available energy. They differ from each other in their selection of costs which vary.[8/] R. Vol. IV, Tr. 316-17; R. Vol. V, Ex. 16. However, two of the alternative methodologies, Gulf Power Company's ("Gulf") and Florida Power Corporation's ("FPC"), are consistent with FPL's methodology in one aspect important to this appeal - they reject a significant number of the types of costs which FPL's methodology also rejects as not varying hour by hour due to changes in generation associated with the purchase of as-available energy.

The various methods offered to the Commission are summarized on

---

[8/] They also differ in other significant aspects. The primary differences of these methodologies from FPL's are (1) they develop an average measure of costs whereas FPL's methodology develops an incremental measure, and (2) they do not test the validity of the choice of the costs identified as variable. For a more comprehensive comparison of the methodologies see Exhibit 16 which is attached as part of the Appendix.

Exhibit 16. See the Appendix. The method employed by Tampa Electric Company (TECO) made no attempt to identify specific nonfuel O&M costs thought to vary with changes in output and simply made the assumption (implicitly rejected by the other methodologies) that all O&M costs vary to some extent with output. R. Vol. IV, Tr. 316. Since none of the parties before the Commission maintained the position below that all nonfuel O&M costs vary with output, it will not be discussed further. An examination of the costs employed in the Gulf and FPC methodologies shows that they reject, just as the FPL methodology rejects, the idea that most nonfuel O&M costs vary with output.

The Gulf methodology assumes only two types of nonfuel O&M costs vary with small changes in output on an hour by hour basis: contract labor and operating and maintenance materials. R. Vol. IV, Tr. 316-17; R. Vol. V., Ex. 16. All other O&M costs were rejected as not varying with output (even those chosen by FPL).

The FPC methodology assumes only three types of O&M costs vary with small changes in output on an hour by hour basis: water, chemicals and materials and supplies limited to replacement parts (the first two of which comprise two of the three types of costs chosen by FPL). R. Vol. IV, Tr. 317; R. Vol. V, Ex. 16. All other nonfuel O&M costs were rejected as not varying with output.

The significance of these other methodologies, which were clearly advocated by witnesses testifying for the cogenerators (Seidman, R. Vol. IV,

Tr. 120-22; MDC's witness Dr. Shanker, R. Vol. IV, Tr. 222-29), is that they reject most of the same costs rejected by FPL in step one of its methodology. So, to the extent these two methodologies advocated and put in evidence by the cogenerators reject many of the same costs rejected in step one of FPL's methodology, they support the "engineering judgments" made in step one of FPL's methodology. Thus, the testimony of the cogenerators support most of the "engineering judgments" now contested by the Appellants on appeal.

Just as importantly, in anticipation of hearing FPL tested the validity of the selection of the types of costs used in the Gulf methodology which were not chosen in step one of FPL's methodology. R. Vol. IV, Tr. 78-79, 87-89. These costs were subjected to the same statistical tests employed to test FPL's selection of costs in step one of its methodology. The results of those tests were revealing. All the contractor EACs were tested by regression analysis to test whether Gulf's assumption that contract labor varied due to changes in hourly output was correct. R. Vol. IV, Tr. 78-79, 87-89. The analysis disproved the assumption by showing there was no consistent correlation over time. R. Vol. IV, Tr. 78, 89. The same results were yielded when the other category of costs employed by Gulf, materials, was tested. Id. It should also be noted that the only category of costs in FPC's methodology not in FPL's methodology, replacement parts in materials and supplies, are largely comprised of the maintenance materials used in the Gulf methodology.

The import of this evidence, which relies on the cogenerators'

testimony and on statistical analysis performed by FPL rather than expert opinion, is that it shows (1) that the decision to reject most categories of costs in step one of FPL's methodology is supported by evidence other than that offered by FPL and objected to in this appeal, and (2) that for those few categories of costs subjectively employed in other methodologies but not in FPL's, subsequent statistical analysis confirms FPL's decision not to choose them in step one of its methodology. Based on this evidence alone, the Commission could justify its findings which are now assailed on appeal.

C. Mr. Whiting Was Qualified To Testify As An Expert.

Mr. Whiting was the witness who presented FPL's Final Report, which included the first application of FPL's Methodology. R. Vol. IV, Tr. 11, 13-21; R. Vol. V, Ex. 1, Doc. 1, pp. 43-65. Mr. Whiting was offered to testify regarding the facts leading up to and involved in the preparation of FPL's Final Report. Mr. Whiting was also offered as an expert witness regarding the identification and measurement of O&M costs that vary on an hour by hour basis due to changes in FPL unit output. As will be discussed later, Mr. Whiting's dual responsibilities of the historical reporting of facts and the offering of expert testimony may have resulted in some confusion in the record, but the fact remains that Mr. Whiting was uniquely qualified to present FPL's Final Report, including FPL's Methodology, and to offer his opinions as an expert in identifying and measuring hourly incremental variable nonfuel O&M costs.

Although it has been stated any number of ways, the basic test of

whether expert testimony will be allowed is whether the subject of the witness' testimony is beyond the understanding of the average layman and whether the witness has such skill, knowledge, training, education or experience about the matter upon which he is called to testify that his opinion will aid the trier of fact. Buchman v. Seaboard Coast Line Railroad Co., 381 So.2d 229 (Fla. 1980). As to the requisite amount of knowledge, it may be gained by study of recognized authorities on the subject (See Seaboard Air Line Railroad Co. v. Lake Region Packing Assoc., 211 So.2d 25, 30, 31 (Fla. 4th DCA 1968), cert. den., 221 So.2d 748 (Fla. 1968)) or by practical experience (See Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940) and cases cited therein), and it only needs to be sufficient to provide the fact finder with guidance in resolving a matter for which their own knowledge is inadequate. Nothing more is required to qualify as an expert.

Upon review of a decision to admit expert testimony, the trial court (or in this case the Commission) "must of necessity be granted a great deal of discretion" in determining a witness' expertise. Warning Safety Lights, Inc. v. Gallor, supra. The decision of the fact-finder is entitled to such weight because the trier of fact enjoyed the advantages of hearing the testimony and observing the witness. Krohne v. Orlando Farming Corp., 102 So.2d 399, 401 (Fla. 2d DCA 1958). Thus, the fact finder's decision will not be overturned unless it is so clearly erroneous that it constitutes an abuse of discretion. McDonnell Douglas v. Holliday, 397 So.2d 366 (Fla. 1st DCA 1981); Guy v. Kight, 431 So.2d 653 (Fla. 5th DCA 1983), rev. den., 440 So.2d 352 (Fla. 1983).

Mr. Whiting was offered as an expert on the subject of identifying and measuring nonfuel O&M expenses which might vary hour by hour due to changes in output on FPL's system. The area of expertise does not lend itself to one discipline. It requires an interdisciplinary approach with a knowledge of a number of different disciplines including: knowledge of accounting systems and how they record types of costs, knowledge of power system and power plant operations, and knowledge of statistical testing and measurement techniques. Mr. Whiting was uniquely qualified through his educational background and his work experience in each of these areas.

Mr. Whiting's knowledge and understanding of FPL's accounting system and its Expenditure Analysis Code system is uncontroverted. After graduating with a BS from Georiga Tech in Industrial Management in 1972, Mr. Whiting began working in FPL's Internal Auditing Department. R. Vol. IV, Tr. 12. He completed requirements to become a Certified Internal Auditor in 1975, and from 1972 through 1982 assumed increasing responsibility in FPL's Internal Auditing Department. Id. Those responsibilities included the auditing of power plants. R. Vol. IV, Tr. 12-13. Moreover, his cross examination evidenced his obvious command of how costs are treated within FPL's various systems for categorizing costs. R. Vol. IV, Tr. 66-91.

Mr. Whiting's knowledge of power plant and system operations was also evident from his testimony. Since 1982 Mr. Whiting has worked in FPL's Power Supply Department (R. Vol. IV, Tr. 13), the Department responsible for coordinating system operations through economic dispatch of generating

units. As Power Coordination Manager in the System Operations Department (R. Vol. IV, Tr. 13), Mr. Whiting has been responsible for economic dispatch of FPL's system. Mr. Whiting testified that the importance of identifying and measuring incremental hourly O&M costs transcended payments to cogenerators, for if such costs could be identified and measured, they could be considered in economic dispatch and could influence the order in which units were committed and the levels at which they were operated.[9/] R. Vol. IV, Tr. 16. Mr. Whiting also testified that in his role in the Power Supply Department he negotiates and administers interchange and purchased power agreements with other utilities. R. Vol. IV, Tr. 13. On cross examination it was brought out that several of these agreements have O&M components (R. Vol. IV, Tr. 37-38) which were negotiated and must be administered. When specifically asked what experience and on the job training he possessed which qualified him to testify as to the correctness of the decisions of which EACs should be included in step one of FPL's methodology, Mr. Whiting succinctly stated his operations background:

> A. As to whether or not the EACs collected were appropriate for selection in this docket? I'm aware of power plant operations, the types of expenses that are incurred and why they're incurred. And that's what's necessary to make this judgment.

9/ FPL's system is run using economic dispatch. R. Vol. IV, Tr. 50-51. Economic dispatch is a means of determining the most economic output level of each unit on line capable of responding to changes in load. Id. It is based on incremental production costs. R. Vol. IV, Tr. 16. For instance, if in a given hour FPL's load increased 60 megawatts and required 60 additional megawatts of FPL generation, the additional generation would be spread among all units over the system, a few megawatts apiece (R. Vol. IV, Tr. 13), depending upon which units could generate the additional megawatts most economically.

R. Vol. IV, Tr. 67. Because of his knowledge of system operations and production costs, Mr. Whiting had been chosen by FPL and accepted by the Commission as an expert or skilled witness in these topics on several different occasions in the Commission's Fuel Cost Recovery Docket since 1985. R. Vol. IV, Tr. 13.

Mr. Whiting also evidenced knowledge in statistical analysis and measurement techniques. No doubt, he was taught such skills in pursuing his B.S. in Industrial Management and his Masters Degree in Business. R. Vol. IV, Tr. 12. However, his testimony also showed he had performed regression analyses like those performed in step two of FPL's methodology in testing whether costs used in the Gulf methodology should be used by FPL. R. Vol. IV, Tr. 78-79, 87-89. He also testified he could have performed the regression analysis in FPL's methodology. R. Vol. IV, Tr. 31.

These were the areas of expertise Mr. Whiting brought to FPL's consideration of the identification and measurement of hourly incremental O&M costs. These skills were honed and applied through Mr. Whiting's lengthy involvement of FPL's study effort of this subject. He began examining the issue in 1983, before the Commission required that cogenerators be compensated for avoided O&M and before FPL developed its interdisciplinary team. R. Vol. IV, Tr. 14, 15. When FPL formed its task team to examine this issue in 1984, Mr. Whiting was one of the members. R. Vol. IV, Tr. 16. He participated throughout FPL's study, and when the study effort was complete, he assumed the responsibility for drafting the narrative portion of FPL's Final Report. R. Vol. IV, Tr. 16. That narrative

summarizes FPL's study effort and the various analyses performed, including Attachment IV which was ultimately offered as FPL's methodology. R. Vol. V, Ex. 1, Doc. 1, pp. 2-9. While Mr. Whiting did not prepare Attachment IV to the Report (FPL's methodology), he was involved in the preparation of it. R. Vol. IV, Tr. 30. Based on this rich, diverse experience and knowledge of the subject as well as the skills Mr. Whiting possessed independent of FPL's study of hourly incremental O&M costs, Mr. Whiting was chosen as the witness for the proceeding below to present the FPL study and to testify as an expert on the identification and measurement of hourly incremental O&M costs.

The suggestion that Mr. Whiting was not qualified to answer questions and state opinions regarding FPL's Final Report or FPL's methodology is spurious. By seizing on a characterization by Mr. Whiting of the decisions made in step one of FPL's methodology as "engineering judgments," the Appellants leap to the conclusion that because Mr. Whiting is not an engineer he is not qualified to offer opinions as to the correctness of those judgments.[10/] Without conceding the argument that one must be an engineer to make engineering judgments and without examining, at present, Mr. Whiting's engineering experience and training, it is helpful to examine the various costs considered in step one of FPL's methodology and the

---

[10/] Such an argument from Dade County is particularly curious as the witness it offered to testify as to the appropriate costs which should be included (R. Vol. IV, Tr. 222-291), Dr. Shanker, was not an engineer either. Apparently, at one time this was not perceived as a deficiency which would disqualify a witness since they offered Dr. Shanker without what they now argue is an essential qualification.

rationale for selecting and rejecting them. Such an examination shows most of the decisions to reject costs bear no relationship to the discipline of engineering even though they have been characterized as "engineering judgments" or "engineering assessments."

In step one of FPL's methodology a comprehensive review of all EACs was conducted to determine which contained O&M costs which might vary on an hour by hour basis due to changes in the level of FPL generation (output). One-hundred sixty-two (162) separate EACs were analyzed. Three (3) EACs were chosen, and the remainder (159) were rejected for six basic reasons. Eighty-three (83) of the EACs were rejected because a mere surface examination showed them to be completely unaffected by changes in FPL generation. See R. Vol. V, Ex. 1, Doc. 1, pp. 44-61. These EACs included, among others, Christmas Turkeys, Company Forms, Donations, Insurance, Office Furniture and Postage. Id. Fifty-one (51) other EACs were rejected because they did not include Production Fossil Steam Expenses (Id.), the only type expenses on FPL's system which could potentially vary due to small changes in generation due to purchases of QF power. R. Vol. V, Ex. 1, Doc. 1, p. 2 of 65. Eight (8) more EACs were rejected because they were fuel related expenses (R. Vol. V, Ex. 1, Doc. 1, pp. 44, 51, 52) and the task was to identify nonfuel O&M expenses which might vary hour by hour. Six (6) EACs were rejected because they related to purchased power expenses which are not affected by changes in generation as a result of the receipt of as-available energy. R. Vol. V, Ex. 1, Doc. 1, p. 53; R. Vol. IV, Tr. 28, 156; R. Vol. V, Ex. 1, Doc. 1, p. 8. Thus, out of the 159 EACs rejected, 151 were rejected for reasons which have

nothing to do with "engineering judgments" other than the fact that it was FPL engineers who originally made these decisions to drop certain EACs.

As to the remaining eleven (11) EACs which were rejected and the three (3) EACs which were chosen, the more accurate characterization of the decision as to how these costs should be treated is that they were "operations decisions," i.e. two (2) were rejected as being related to service hours and nine (9) were rejected as being related to cycling (bringing units on and off line). R. Vol. V, Ex. 1, Doc. 1, pp. 44-61. Thus, when Mr. Whiting was asked for his qualifications to support those decisions, he testified he was "aware of power plant operations, the types of expenses that are incurred and why they're incurred." R. Vol. IV, Tr. 67. As previously noted, Mr. Whiting's knowledge and background in power plant and system operations is extensive.[11/]

The foregoing review of Mr. Whiting's qualifications and testimony as well as the nature of the judgments he was offered to support shows that Mr. Whiting more than met the requirements of a skilled or expert witness. His testimony addressed a highly complex subject well beyond the understanding of the common person, and his testimony shows he has

---

[11/] By recharacterizing these cost decisions as "operations judgment" rather than "engineering judgment," FPL does not concede Mr. Whiting was not qualified to offer some "engineering judgments." He testified that in his work he performed engineering type work and that he had informal education on engineering topics in the production area. R. Vol. IV, Tr. 67. This alone would qualify him as having experience above that of the average lay person. The recharacterization is offered simply to show that these decisions, however they are characterized, fit clearly within Mr. Whiting's areas of expertise.

experience, skills, training and education which afford him knowledge helpful to the Commission in addressing the subject of his testimony. The Commission clearly did not abuse its discretion in allowing Mr. Whiting's testimony.

D. Mr. Whiting Had Sufficient Personal Knowledge Of The Facts And Rationales Underlying The Treatment Of Costs In Step One Of FPL's Methodology To Testify As An Expert.

Both Appellants argue that Mr. Whiting lacked sufficient personal knowledge of the facts underlying the judgments in step one of FPL's methodology to testify as to the correctness of those judgments and that because of that lack of knowledge Mr. Whiting's opinions were merely hearsay recitations of the opinions of others. They seize on one transcript reference where Mr. Whiting acknowledged he had not analyzed one particular question (R. Vol. IV, Tr. 72), a question which Mr. Whiting suggested was based on erroneous, assumed facts (R. Vol. IV, Tr. 70). They also seize on Mr. Whiting's candid acknowledgment that he spoke with the people who made the original decisions in step one of the application of FPL's methodology and that in reaching his judgment as to the propriety of those decisions he relied, in part, on the judgments shared with him. Neither of the acknowledgments by Mr. Whiting makes his opinion testimony infirm.

Mr. Whiting stated early on in his recross examination that he had the requisite knowledge on which to base his opinions. R. Vol. IV, Tr. 67. Near the close of his testimony (R. Vol. IV, Tr. 95, line 25 - Tr. 97, line 3), after

he had been asked for his opinion by counsel for one of the cogenerators on a number of occasions (See R. Vol. IV, Tr. 66-91), Mr. Whiting once again was asked about his experience and the basis for his judgments.[12/] Because this exchange succinctly sums Mr. Whiting's qualifications and it has been misinterpreted to the Court by the Appellants, a review of the full exchange is recommended to the Court. (R. Vol. IV, Tr. 95, line 25 - Tr. 97, line 3.)

Three important points emerge from this exchange. First, any judgment Mr. Whiting made, and he made a number in answering earlier cross examination, was based on his own experience. R. Vol. IV, Tr. 96. Only in instances where he stated "I don't know" did Mr. Whiting feel he could not fairly answer the question.[13/] Id. In acknowledging his inability to answer a few questions out of numerous questions posed, Mr. Whiting

---

12/ This followed a series of questions (R. Vol. IV, Tr. 91-95) to which the Appellants now argue that affirmative responses would be necessary to qualify a witness as an expert. Apparently, they did not believe that was necessary at trial for neither of the witnesses relied upon by the Appellants, Dr. Shanker or Mr. Seidman, were qualified by the asking of these questions nor does their testimony indicate that either of them could answer them affirmatively.

13/ There were only two instances in which Mr. Whiting stated he did not know the answer to a question. (R. Vol. IV, Tr. 72, 77). Neither answer nor the answers taken together show that he lacked the expertise to testify. In the first instance (R. Vol. IV, Tr. 72), Mr. Whiting had previously suggested the question could not be answered (R. Vol. IV, Tr. 70). The question was conjectural and based on an erroneous premise. Id. Fossil units do not run "for a year" or "over an extended period of time" without cycling. Id. Moreover, it has to be cycled (brought on line) at least once even if it were run for an extended time. Thus, one would never know if a unit would be crystal clean if it only ran for an extended period of time. Please not that Mr. Whiting also said "he doubted it." R. Vol. IV, Tr. 72. In the second instance (R. Vol. IV, Tr. 77), even if Mr. Whiting's answer showed that his testimony did not support the rejection of EAC (663), which the question was meant to test (a conclusion which FPL rejects), there is other evidence which supports the Commission's finding that the judgment to reject EAC

showed his honesty as well as his knowledge; other experts might have tried to bluff. The Appellants grossly overstate this answer when they characterize it as an admission by Mr. Whiting that he was not qualified to make the judgments and state the opinions he made.

The second point of importance to this exchange is the one made several times earlier: Mr. Whiting's accounting and operations background uniquely qualified him to identify which EACs should be used in determining the variable avoided O&M costs to be included in the payment for as-available energy. Mr. Whiting knew he was qualified to make these judgments and properly asserted that he was. R. Vol. IV, Tr. 96.

The third point which emerges from this exchange is that after succinctly stating his qualifications (R. Vol. IV, Tr. 96, lines 10, 11), Mr. Whiting went on to explain how both of his backgrounds fit both the tasks undertaken when step one of the methodology was initially applied by FPL. The focus of his answer changed from his own qualifications to the study, and this is important in reviewing the next two questions and answers. When Mr. Whiting utlimately agreed that he had not made judgments but that engineers made those judgments and reported them to him (R. Vol. IV, Tr. 96-97), he was simply acknowledging his role as chronicler in drafting the summary and in reporting facts in his testimony. He was not testifying he

---

Footnote [13/] Continued:
663 was correct. This was one of the contractor EACs tested statistically because the Gulf methodology included certain contractor expenses. <u>See</u> pages 18 - 22 of this Brief. The contractor EACs were tested individually and collectively and showed no correlation consistently over time; thereby showing it was properly rejected. R. Vol. IV, Tr. 87-89.

had no independent judgment, and he was not repudiating the answer on the prior page or other instances (R.Vol.IV, Tr. 66,67) where he stated he was making judgments based on his own experience.

While it is true that an expert's opinion must be based on sufficient data (See Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983)), a review of the record shows that Mr. Whiting had extensive experience and knowledge in the areas which underlied his judgments: accounting, operations and statistical techniques. More importantly, he was intimately involved in FPL's three year study of the issue on which he gave his opinions.

This is not a case such as United Technologies Communications Co. v. Industrial Risk Insurers, 501 So.2d 46 (Fla. 3d DCA 1987) where the expert admitted that the area in which he was testifying was outside of his area of expertise, that his work only involved his area of expertise "in a crude sort of way," and that he had never performed tests which could have been performed to support his conclusions. See 501 So.2d at 48. Nor is this a case such as Husky Industries where the expert admitted that his area of expertise did not include the matter about which he was called to testify and that his knowledge was based on data relating to different types of matters than were being considered.[14/] See 434 So.2d at 992-93.

14/ Another distinct difference between this case and those cited by the Appellants is that in the Husky Industries case and the United Technologies case objections regarding the expert testimony were raised at the hearing; none were raised before the Commission.

Mr. Whiting's testimony and the judgments therein are based in significant part on a multiyear FPL study in which he significantly participated. One of the most important conclusions of that study, a conclusion which led to the development by FPL of a methodology that employs some subjective judgment, is the conclusion reached after the first three analyses - whether nonfuel O&M costs vary due to changes in unit output is not a question which can readily be answered by objective observation and measurement. Some judgment is therefore necessary. The background necessary to make these judgments was exactly the type of accounting and operations background Mr. Whiting had and testified was necessary: a knowledge of power plants, the expenses that one incurred and why they are incurred. R. Vol. IV, Tr. 67, 96.

The Appellants' insistence that Mr. Whiting's opinions were mere hearsay recitations should be dismissed. Mr. Whiting clearly stated that his opinions regarding the treatment of EACs were not mere recitations of what others had said. R.Vol.IV, Tr. 66,67. In some instances, Mr. Whiting did indicate he was relying, in part, on the judgments of others in making his own judgments. R. Vol. IV, Tr. 73, 76, 77. It is not surprising Mr. Whiting consulted the people who originally reviewed the EACs. His role was not only to testify as an expert, but also to report how FPL's study was conducted and the results that were reached. In either capacity it was important for Mr. Whiting to be informed as to the rationale for the treatment of the EACs. Having discussed these decisions with the people who originally made them, Mr. Whiting could not truthfully answer that

those discussions were not factors he considered or relied upon in reaching his own judgments. Mr. Whiting's partial reliance on these decisions documented in FPL's study does not make his opinion infirm. Even under the Florida Evidence Code, a code not strictly applicable in proceedings before the Commission (See Section 120.58(1)(a), Florida Statutes (1985)), an expert may rely on facts or data not admissible in evidence if such facts and data are of a type reasonably relied upon by experts in the subject to give opinions. Section 90.704, Florida Statutes (1985).

Mr. Whiting's partial reliance of the judgments of others in reaching his own conclusions is clearly distinguishable from the circumstances in Bunyak v. Clyde J. Yancey & Sons Dairy, Inc., 438 So.2d 891 (Fla. 2d DCA 1983), rev. den., 447 So.2d 885 (Fla. 1984). In the Bunyak case the hydrologist completely relied upon the opinion of another expert in another field; in this case Mr. Whiting relied on the judgment of others only partially. R. Vol. IV, Tr. 73. In fact, he ultimately stated his judgments were based on his own experience. R. Vol. IV, Tr. 96. In Bunyak there were two different disciplines involved which called on different areas of expertise - hydrology and geology; in this case there is only one area of expertise upon which both FPL's engineers and Mr. Whiting draw - knowledge of system and power plant operations. Perhaps the most important difference between the two cases is that in the Bunyak case there was an objective, scientific test which could be performed but which the witness did not undertake; in this case there is no objective test, and Mr. Whiting participated throughout FPL's three year study and even assisted in the preparation of FPL's methodology. Simply stated, Mr. Whiting did not

merely recount an opinion given to him, he pursued the same means of reaching an opinion and reached the same opinion.

The Appellants' suggestions that Mr. Whiting's expert testimony merely constitutes hearsay ignores the record. Mr. Whiting was qualified to make judgments and to state opinions. He had sufficient data and knowledge to draw conclusions. The fact that part of the information he necessarily had to rely on was the judgments of others he was called to defend does not make his testimony mere hearsay. Moreover, even if Mr. Whiting's partial reliance on other people's judgments in FPL's study was considered to be reliance on hearsay, in this instance Mr. Whiting was merely relying, in part, on the type facts or data reasonably relied upon by an expert in this area to support an opinion, since there were no objective means to develop facts or data to support such an opinion. To reject Mr. Whiting's testimony as inadmissible hearsay, would do violence not only to the record but also to the Evidence Code, even though a lesser standard is applicable to the admissibility of evidence before the Commission.

III

DADE COUNTY'S ATTEMPT TO HAVE THE COURT REWEIGH THE EVIDENCE IS INAPPROPRIATE.

In its last issue, Metropolitan Dade County attempts to have the Court consider evidence which Dade County maintains refutes the Commission's findings. They contrast their own "competent substantial evidence" with the "hearsay testimony" upon which they argue the Commission relied. While it

is tempting to address the numerous deficiencies brought out in the record regarding the evidence Dade County champions[15/], the proper response, in light of the cases articulating the standard of review of Commission decisions on appeal, is that the exercise Dade County would have the Court undertake has previously been rejected by this Court on numerous occasions.

In one of the cases which Metropolitan Dade County cites in its Initial Brief, the Court summarized its standard of review in cases on appeal from the Commission:

> As we have repeatedly stated, we will not reweigh or reevaluate the evidence presented to the commission, but will examine the record only to determine whether the order complained of meets the essential requirements of law and whether the agency had available to it competent substantial evidence to support its findings. [Citations omitted.]

Citizens v. Public Service Commission, 464 So.2d 1194 (Fla. 1985). It is clear from the quote above that the review of evidence on appeal is limited to that which supports the Commission's order. Conflicting evidence is irrelevant on appeal. Consequently, the Court has consistently declined to reweigh the evidence. Metropolitan Dade County's attempt to have the Court reweigh the evidence in this case is inappropriate and should be rejected.

15/ Space alone would not allow this. The problems with Dr. Shanker's and Mr. Seidman's testimony were thoroughly developed before the Commission and summarized in FPL's Brief to the Commission.

CONCLUSION

The Commission's Order and the challenged findings therein were supported by competent and substantial evidence from at least three sources. The evidence supporting the Order was competent and was properly admitted. The Appellants have failed to preserve for appeal the issues they now attempt to raise to this Court. The appeals should be dismissed, or, in the alternative, the Commission's order should be affirmed.

Respectfully submitted,

STEEL HECTOR & DAVIS
201 South Monroe, Suite 200
Tallahassee, Florida 32301-1848
(904) 222-4192

By: Charles A. Guyton
Charles A. Guyton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Florida Power & Light Company's Answer Brief has been served by first class United States Mail upon the following, on this the 15th day of September, 1987:

William S. Bilenky, Esq.
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Richard A. Zambo, Esq.
205 North Parsons Avenue
P. O. Box 856
Brandon, Florida 33511

Paul Sexton, Esq.
1017 Thomasville Road
Suite C
Tallahassee, Florida 32303

Robert A. Ginsburg, Esq.
Michael D. Goodstein, Esq.
Office of County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

By: ______________________
Charles A. Guyton