IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 70,703

METROPOLITAN DADE COUNTY,

Appellant,

vs.

KATIE NICHOLS, et al.,

Appellees.
_____/

INITIAL BRIEF OF APPELLANT METROPOLITAN DADE COUNTY

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STATEMENT OF THE CASE AND FACTS

Background

In September 1983, the Florida Public Service Commission (hereinafter "the Commission" or "PSC") adopted rules governing the purchase of power by electric utilities from cogenerators[1/] and small power producers.[2/] Order No. 12443, Docket No. 820406-EU, issued September 2, 1983. The PSC's cogeneration rules provided that the rate paid by utilities must include "the utility's incremental fuel and identifiable variable operating and maintenance expenses." FAC 25-17.825.[3/]

1/ A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. §796(17)(A). Reliance on these sources of energy can reduce the need to consume traditional fossil fuels to generate electric power and reduce the nation's dependence on foreign oil.

2/ A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. 16 U.S.C. §796(17)(A). Reliance on these sources of energy can reduce the need to consume traditional fossil fuels to generate electric power and reduce the nation's dependence on foreign oil.

3/ The Commission's cogeneration rules implemented the "full avoided cost rule" promulgated by the Federal Energy Regulatory Commission (FERC) under authority of the Public Utilities Regulatory Policies Act of 1978, Pub.L.No. 95-617, 92 Stat. 3117 (PURPA). Under Section 210 of PURPA's Title II, 16 U.S.C. §824a-3, FERC was directed to promulgate rules to encourage the development of non-traditional electric generating facilities.

The "full avoided cost rule" was developed to provide the maximum incentive for the development of non-traditional electric generating facilities while still keeping utilities customers whole and paying the same rate as they would have paid had the utility not purchased energy and capacity from the non-traditional source. The "full

(Footnote Continued)

A docket was then opened by the PSC for the purpose of implementing the cogeneration rules. Docket No. 830337. During that proceeding, the Florida Power and Light Company (hereinafter "FPL") developed a methodology for calculating energy payments to QF's which consisted only of an avoided fuel cost component and did not include an avoided operation and maintenance cost component. FPL contended it was unable to identify any operation and maintenance (O&M) costs which varied with as-available[4/] purchases from cogenerators and small power producers. At least three other utilities, however, have identified and included variable O&M cost components in their payments to QF's. (R. Vol. IV, Tr. 223).

Since other investor owned utilities had developed methodologies which included an avoided O&M cost component, the Commission rejected FPL's position:

> In light of the fact that both Gulf and TECO have developed methodologies to identify their avoided variable O&M costs, we find it appropriate to require . . . Florida Power & Light Company to add one mil per kilowatt hour to the as-available energy rates paid to QF's . . . until such time as [it] can provide the Commission with an acceptable methodology for calculating [its] specific avoided variable O&M costs.

Order No. 13247, issued May 1, 1984.

4/ As-available energy is energy produced and sold by a qualifying facility on an hour-by-hour basis for which contractrual commitments as to quantity, time or reliability of delivery are not required. Rule 25-17.0825 FAC.

On December 31, 1985, FPL responded to the Commission's Order by filing its Final Report on Investigations of Avoided Variable O&M Costs Due to Cogeneration ("FPL Final Report"). In that report, FPL repeated its previous argument that the non-fuel O&M costs it avoided by receiving energy from cogenerators and small power producers were extremely small and might be negative. (R. Vol. IV, Tr. 22-23; R. Vol V., Ex. 1, 7-8).[5/] FPL's report concluded that the avoided variable O&M component for FPL's as-available energy rate should be established at $0 per megawatt hour (mwh). (R. Vol. IV, Tr. 22-23; R. Vol. V, Ex. 1, 7-8). In the alternative, FPL recommended that the avoided non-fuel O&M cost component of its avoided energy cost be calculated in accordance with the methodology set forth in Attachment 4 of the FPL Final Report. (R. Vol. IV, Tr. 23; R. Vol. V, Ex. 1, 7-8).

The methodology proposed by FPL consists of a process whereby FPL selects, based on engineering judgments, those expense categories that are likely to vary with generating unit output. FPL then applies a statistical technique to the selected accounts to test the functional relationship between those costs and generating unit output. This results in an equation, a part of which FPL uses to establish the variable O&M cost component. (R. Vol. IV, 30-31). The engineering

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5/ References to the transcript of the final hearing, Volume IV of the Record, will be designated as "R. Vol. IV, Tr." followed by the transcript page numbers. References to the exhibits introduced at the final hearing, Volume V of the Record, will be designated as "R. Vol. V Ex." followed by the exhibit number and page number.

judgments upon which FPL's methodology is based result in costs from only three out of 162 categories of expenses being considered. (R. Vol. V, Exhibit 1, Att. 4 at 1-18).

In February, 1986, during hearings before the Commission regarding Fuel Cost Recovery, FPL sought to reduce its avoided variable O&M payments to qualifying facilities from the $1.00 per mwh rate previously established by the Commission to a $.09 per mwh rate (as calculated under its proposed methodology). Several parties intervened and raised questions about the appropriateness of considering this issue in the Fuel Cost Recovery Proceeding. After much discussion, the Commission established that, beginning April 1, 1986, FPL would pay $.09 per mwh for the O&M component of its as-available energy rate subject to adjustment if a different rate was ultimately determined to be proper. The Commission also established the subject docket, No. 860001-EI-E, for the purpose of considering the reasonableness of FPL's request to reduce its avoided variable O&M payments to qualifying cogenerators and small power producers. Prehearing Order, Order No. 16898, Docket No. 860001-EI-E, issued March 26, 1986. (R. 176).

The Case Sub Judice

On April 3, 1986, the Commission issued its proposed agency action notice, Order No. 15944, allowing parties whose substantial interests were affected to challenge FPL's proposed methodology for calculating avoided variable O&M costs and the resulting rate reduction. Appellant, here, Metropolitan Dade County (hereinafter "MDC" or "Dade County") petitioned for a hearing in accordance with §120.57, Fla. Stat. (1985).

(R. 32). Dade County is currently operating a solid waste fired small power qualifying facility (resource recovery facility) that receives payments from FPL for the electricity that it generates. Dade County's payments from FPL have been reduced by the PSC's approval of FPL's methodology. The Commission's action has resulted in the elimination of at least 90% of the current avoided O&M payments from FPL to Dade County. (Tr. 216).

After MDC's request for a hearing, the Commission received and granted petitions to intervene from Florida Crushed Stone and Conserv., Inc. et al. (comprised of Conserv. Inc., International Minerals and Chemical Corporation, the Monsanto Company, Occidental Chemical Agricultural Products, Inc., the Royster Company, United States Sugar Corporation, and W. R. Grace & Co.).

The final hearing in this proceeding was conducted on December 5, 1986. The ultimate issue tried was whether the methodology reflected in Attachment 4 of the FPL Final Report should have been approved or denied. The parties to the proceeding before the PSC stipulated that in the event FPL's methodology was not approved by the PSC, FPL's rate for avoided variable O&M costs would revert to $1.00 per megawatt hour effective April 1, 1986. Prehearing Order, Order No. 16898 at 15. (R. 176).

At the final hearing in the subject docket FPL called two witnesses in support of its proposed methodology, G. L. Whiting, Jr. and Daryl Cavendish. (R. Vol. IV. Tr. 9-91, 272-324). Two witnesses testified in opposition to FPL's proposed

methodology: Mr. Frank Siedman, on behalf of Florida Crushed Stone, and Dr. Roy Shanker on behalf of Metro-Dade County. (R. Vol. IV. Tr. 97-207, 210-263). All witnesses prefiled written direct and rebuttal testimony. As each witness was called to testify he briefly summarized his prefiled testimony and was then proffered for cross-examination.

Mr. Whiting, FPL's chief witness, is a manager and a certified auditor employed by FPL. He testified that the purpose of his testimony was "to present the final report on investigations of avoidable variable O&M costs due to cogeneration." (R. Vol. IV., Tr. 26). On cross-examination of Mr. Whiting it was established that he had not prepared FPL's final report. (R. Vol. IV, Tr. 30). It was also established that he was not an engineer and had not made the engineering judgments that were the basis of FPL's proposed rate change. (R. Vol. IV, Tr. 29, 31). On redirect examination of Mr. Whiting, it was established, however, that he was "prepared to testify" about the engineering judgments that comprised the basis of the report. (R. Vol. IV, Tr. 57). Before recross-examination of Mr. Whiting was undertaken regarding FPL's engineering judgments, there were objections by intervenors and informal findings by several Commissioners regarding Mr. Whiting's qualifications. (R. Vol. IV, Tr. 61-66). Specifically, intervenors objected to Mr. Whiting's offering opinion testimony regarding FPL's engineering judgments since his background did not reveal any training or experience in engineering. It is not clear whether or not Mr. Whiting was

being offered as an expert engineering witness. (R. Vol. IV, Tr. 62). Several Commissioners acknowledged that his background was not in engineering and that, therefore, his testimony was most likely being offered to substantiate other direct testimony. (R. Vol. IV, Tr. 62, 65-66). On recross-examination however, Mr. Whiting claimed to be qualified to offer opinions on some of the engineering judgments in FPL's report despite his apparent lack of first-hand knowledge and experience in engineering. (R. Vol. IV, Tr. 67). When pressed Mr. Whiting conceded that his opinions were based at least in large part on the opinions of the FPL engineers who actually made the engineering judgments upon which FPL's proposed rate change was based. (R. Vol. IV, Tr. 72, 73, 76-77, 96-97).

FPL's only other witness, Daryl Cavendish, did not testify or offer an opinion about the engineering judgments underlying FPL's proposed methodology. (R. Vol. IV, Tr. 272-324). Mr. Cavendish merely testified regarding FPL's statistical analysis of cost-to-output relationships that were performed on the few categories of costs which had been selected by FPL engineers as possibly being affected by the receipt of QF power.

For the intervenors, Frank Siedman, a professional electrical engineer registered in the State of Florida with a degree in electrical engineering, testified on behalf of Florida Crushed Stone. Mr. Siedman directly took exception to FPL's engineering judgments as excluding cost categories that should properly have been included. (R. Vol. IV, Tr. 133-136). Mr. Siedman offered specific examples of costs categories that

were improperly excluded. (R. Vol. IV, Tr. 133-134). Additionally, Dr. Roy Shanker, a natural resources consultant with a speciality in electric utility consulting, testified on behalf of Metropolitan Dade County and also challenged FPL's proposed methodology as erroneously excluding O&M costs that should have properly been included in calculating payments to QF's. (R. Vol. IV, Tr. 223-224).

In post-hearing briefs to the Commission Intervenors argued that FPL had not met its burden of proving that the engineering judgments underlying FPL's study were correct. Specifically, Intervenors argued that all evidence presented by FPL to support the engineering judgments was hearsay in the form of written reports and Mr. Whiting's testimony, which merely reported the determinations of FPL's engineers. The intervenors also argued that any opinion testimony about the engineering judgments given by Mr. Whiting was improper because Mr. Whiting was not qualified to give expert engineering opinion testimony. (Brief of Intervenors at 7-13, R. 191).

FPL argued in its post-hearing brief that Mr. Whiting was qualified to give opinion testimony on the engineering judgments and that his direct testimony was sufficient to support a finding by the Commission that the engineering judgments were correct. FPL conceded in its post-hearing brief that all other evidence presented in support of the engineering judgments, besides Mr. Whiting's opinion testimony, was hearsay. (Brief of Florida Power and Light Company at 22, footnote 9). (R. 225).

The PSC's Order

Despite intervenors' objections that they had not had an adequate opportunity to cross-examine FPL regarding the engineering judgments underlying the proposed methodology, the Commission approved FPL's methodology for determining avoided O&M payments to QF's. (Brief of Intervenors at 13, R.191). Order No. 17273 issued March 11, 1987 (A copy of which is attached hereto as Exhibit "A").

The order also approved Florida Power and Light Company's request to Reduce Its Avoided Variable Operations And Maintenance Expense Payments to Qualifying Facilities in accordance with FPL's methodology. (Page 10, Exhibit "A" attached hereto).

In so ordering, the PSC made the following findings of fact with regard to Issue #7, i.e., whether the conclusions in FPL's final report were correct and property drawn:

(1) The development of Attachment IV (FPL's methodology) relied on a set of assumptions and engineering judgments. . . .

(2) The engineering judgments were the foundation for determining the causality of the relationship between O&M cost and changes in load. . . .

(3) The engineering judgments were required due to a lack of truly incremental O&M cost data and represent reasonable conclusions of cost causality. . . .

(4) . . . . The engineering judgments were applied to each EAC [expenditure analysis code][6/] to determine whether the account would be subject to change due to small changes in load. . . .

(5) The process of selecting the accounts to be analyzed is predicated on the assumption that as-available energy purchases will not alter individual unit generation by a significant amount.

(6) With this in mind FPL engineers reviewed each of its EAC's and determined which, if any, would be susceptible to change with small changes in load. . . .

(7) We agree with the selection of the EAC's used in attachment IV and find that these costs currently represent all identifiable O&M costs which vary with small changes in load.

(8) Based on the foregoing assumptions and the fact that the accounts selected do contain values which would be expected to vary with small changes in load, we find the conclusions reached by FPL in Attachment IV of their Final Report to be correct and properly drawn. (Order No. 17273, p. 9, Exhibit "A" hereto).

Without making a specific finding with regard to Mr. Whiting's qualifications and the propriety of the engineering opinions he offered, the Commission found FPL's engineering judgments contained in its final report correct and accurate.

6/ Expenditure analysis codes are expense categories in FPL's accounting system. (R. Vol. V, Exhibit 1, p.6). Out of 162 accounts, FPL's methodology identified only three

(Footnote Continued)

Thereafter, Dade County filed its notice of appeal seeking judicial review of the PSC's action.

(Footnote Continued)
categories of expenses that might vary with output. (R. Vol. V, Exhibit 1, Att. 4 at 1-18).

SUMMARY OF ARGUMENT

The Public Service Commission's Order approving FPL's methodology for calculating avoided variable O & M payments and reducing the rate paid to Qualifying Facilities, departed from the essential requirements of law and was not based on competent substantial evidence.

FPL's methodology is based on engineering judgments that are not supported in the record. FPL's engineering judgments result in costs from only three out of 162 cost categories being considered in determining FPL's avoided variable O&M payments to QF's. FPL presented only hearsay and improper opinion testimony in support of the engineering judgments. Therefore, the Commission's findings that FPL's engineering judgments are correct have no proper basis in the record. The only competent substantial evidence in the record regarding the engineering judgments establishes that they are incorrect.

ARGUMENT

I. THE COMMISSION'S ORDER WAS NOT BASED ON COMPETENT SUBSTANTIAL EVIDENCE AND DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW.

In the State of Florida agency actions must be supported by "competent substantial evidence in the record" and not be arbitrary. §120.68, Fla. Stat. (1985). See MCI Telecommunications v. Florida Public Service Com'n, 491 So.2d 539 (Fla. 1986); Citizens of the State of Florida v. Public Service Commission, 464 So.2d 1194 (Fla. 1985).

Appellant, Metropolitan Dade County, invokes the review of this Court to examine the record to determine whether the Commission's order is in accord with the essential requirements of law and whether the agency had before it competent substantial evidence to support its findings and conclusions. See Lee County Elec. Corp. v. Marks, 501 So.2d 585 (Fla. 1987); Florida Power Corp. v. Public Service Com'n, 487 So.2d 1061 (Fla. 1986).

The Commission's approval of FPL's avoided variable O&M rate decrease is not supported by substantial competent evidence in the record, departs from the essential requirements of law and is arbitrary.

The Commission found that FPL's engineering judgments contained in FPL's final report were proper. These engineering judgments excluded the vast majority of FPL's operation and maintenance costs from consideration in developing an appropriate rate for payments to qualifying cogeneration and small power production facilities (costs from only three out of 162 expense accounts were considered). There is no substantial

competent evidence in the record to support these engineering judgments; therefore, the approval of the rate decrease is arbitrary. Moreover, since FPL did not sponsor proper engineering testimony to support the engineering judgments made, Metropolitan Dade County and the other intervenors were deprived of their right of cross-examination.[7/]

[7/] See FAC 25-22.048(2) and 120.57(6)(4) Fla. Stat. (1985), which provide in pertinent part:

> All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel. (Emphasis added).

II. THE COMMISSION'S FINDINGS REGARDING FPL'S ENGINEERING JUDGMENTS ARE BASED EXCLUSIVELY ON HEARSAY.

Underlying FPL's proposed rate change was a study that purported to show FPL saved little or no variable O&M costs as a result of receiving energy from QF's. (R. Vol. V. Exhibit 1). FPL's study is based on engineering judgments made by FPL engineers evaluating which O&M costs varied with changes in unit output and which might be affected by QF power production. Nonetheless, FPL did not sponsor any engineering testimony regarding these crucial engineering judgments. FPL merely presented auditing testimony that compiled and reported the results of the engineers' determinations. Therefore, the Commission's findings that these judgments were correct were based on hearsay.[8/]

Testimony at the hearing established that the methodology proposed by FPL to calculate its avoided variable O&M cost payments is comprised of two steps. "Step one" involves the exercise of engineering judgment to determine which of FPL's non-fuel O&M expenses are likely to vary due to as-available energy purchases from qualifying facilities. (R. Vol. IV, Tr. 30-31). "Step two" involves the application of the

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8/ "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. Section 90.801(1)(c), Fla. Stat. (1985). While it may be admissible in administrative procedings hearsay alone cannot support a finding of fact unless it is otherwise admissable under the Rules of Civil Procedure. §120.58(1)(a) Fla.Stat. (1985)

statistical technique of regression to test whether the causative relations postulated in "step one" are statistically significant. The validity of the rate resulting from FPL's proposed methodology is dependent on the propriety of the engineering judgments made in "step one" of the methodology. (R. Vol. IV, Tr. 302). Despite the crucial nature of the engineering judgments to the viability of FPL's methodology, FPL did not sponsor any direct engineering testimony in support of the judgments made. The only testimony presented regarding the propriety of FPL's engineering judgments was that of G. L. Whiting, Jr. (R. Vol. IV, Tr. 9-97). Mr. Whiting's prefiled direct and rebuttal testimony regarding FPL's engineering judgments merely compiled and presented opinions given to him by FPL engineers. (R. Vol. IV, Tr. 9-29, 330-350).

Mr. Whiting's initial cross-examination testimony confirmed that he did not make the engineering judgments that went into "step one" of FPL's proposed methodology. (R. Vol. IV, Tr. 31, 76, 96).

(By Mr. Sellers, Counsel for Florida Crushed Stone)

Q: Do you agree that the methodology is based on certain engineering judgment as to which Florida Power and Light's expense categories might vary with unit output?

A: Yes.

Q: Now you didn't make those engineering judgments, did you?

A: No, I did not. (R. Vol. IV, Tr. 31).

This early cross-examination established that all of Mr. Whiting's prefiled direct and rebuttal testimony regarding FPL's engineering judgments was purely hearsay. On redirect

examination, in response to a leading question from FPL's counsel, witness Whiting indicated that he was "prepared to discuss the engineering judgments". (R. Vol. IV, Tr. 57).

The intervenors then inquired whether or not FPL was tendering witness Whiting as an expert engineering witness who would offer opinion testimony in the area of engineering and whether or not he was qualified to give such testimony:

> MR. SELLERS (COUNSEL FOR FLORIDA CRUSHED STONE): Quite frankly, our position would be that if Mr. Whiting is not an engineer and he didn't make those engineering judgments, that it would be inappropriate for us to ask him any questions about those ...
>
> CHAIRMAN MARKS: Well, is he being submitted as an expert in engineering?
>
> MR. GUYTON (counsel for FPL): He is being offered and has prepared to discuss the basis for the engineering judgments that were used in the selection of the EACs in Attachment No. 4. That's to the extent that there is any testimony that might be characterized as engineering related, it is to the extent. . . .
>
> MR. ZAMBO: Mr. Chairman, I would like to inquire whether or not Mr. Whiting is ready to render engineering opinions on that testimony. Otherwise, I think what he would offer would be pure hearsay ...
>
> CHAIRMAN MARKS: Well, I think he's being offered, and Mr. Guyton can clarify this. He didn't make the engineering judgments but he's able and he's willing to substantiate that to the extent that he can. (Emphasis added)

At this point in the proceedings, it seemed clear that any of Mr. Whiting's testimony which pertained to the engineering judgments was hearsay and would not exclusively be relied on by

the Commission to support findings of fact. This was further reinforced by another comment from Commission Chairman Marks:

> CHAIRMAN MARKS: ... Let's keep in mind, as well, that the Commission can hear hearsay testimony. We're quite capable of discerning what is appropriate hearsay and what is not. And we'll give that hearsay testimony the weight that it should be given. I didn't get an answer to this question but I don't believe this witness is being offered as an engineering expert and the Commission understands that distinction quite well. (Emphasis added).

On recross-examination, however, Mr. Whiting claimed that he was qualified by his experience to offer direct expert opinion testimony regarding FPL's engineering judgments:

> Q: (By Mr. Sellers) ... Are you prepared to testify regarding the correctness of these judgments, or are you simply going to tell me what somebody else that works for Florida Power and Light told you?
>
> A: I'm prepared to testify as to the correctness of these judgments.
>
> Q: Okay. Now, you told me you're not an engineer, is that correct?
>
> A: That's correct. By training.
>
> Q: Are you an engineer by education?
>
> A: Primarily, I do a lot of engineering work in my current vocation. And I have some informal education in engineering topics, particularly in the production area.
>
> Q: Okay. Could you tell me what that training or on-the-job experience might be that would qualify you to give these kind of judgments?
>
> A: What kind of judgments are you asking me to make?
>
> Q: Whether these engineering judgments as to which accounts should be included in effect are correct?

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. (R. Vol. IV, Tr. 67).

Despite his assertion that he was qualified to give expert engineering testimony, when Mr. Whiting attempted to give direct testimony regarding several of the engineering judgments which formed the basis of FPL's study he inevitably had to defer to those engineers who had made the judgments. Since no FPL engineers were present to testify, the intervenors were deprived of their right to cross-examination[9/] regarding those critical engineering judgments:

Q: Did you tell me that if you run a unit continuously for a period of time, and don't cycle it, it's going to be crystal clean?

A: I don't know.

Q: You don't know.

A: No, I do not know that. I would doubt it ...

Q: Well, I don't understand. Are you telling me it's your judgment that none of this grunge in here that you need to clean out accumulates with running the unit as opposed to cycling? None? That's your judgment?

A: That's my judgment, but I am depending on the judgment of the people we mentioned to you in our interrogatories who prepared this analysis. I'm depending on their judgment of these things too.

9/ See FAC 25-22.048(2) and 120.57(6)(4) Fla. Stat. (1985).

Q: Wait a minute, now. They're not here. You're here, you're being offered as the witness --

A: That's correct. (R. Vol. IV, Tr. 70-73).

* * * *

Q: Okay. I mean, you're using words like, in your notes, "This account is typically affected by system cycling." And you have testified most of this account is this, and affected by cycling. Are all of these costs excluded because none of them have nothing to do and none of them vary with output?

A: They were excluded because, going back to an engineer's assessment, the engineers and the production superintendent that looked at this said, "No, that's not attributable to changes in the load of a unit."

Q: Okay. Now that's your judgment or their judgment?

A: That's their judgment.

Q: Okay.

A: I have discussed all their judgments with them and agree with them. And I am prepared to --

Q: Based on your own knowledge and background, are you relying on their judgment?

A: I'm relying on their judgment that's where I get my knowledge and expertise. (R. Vol. IV, Tr. 75-76).

The Commission did not properly exclusively rely on this testimony as the basis for their finding FPL's engineering judgments correct. To the extent that Mr. Whiting offered direct expert engineering opinion testimony in support of FPL's engineering judgments his testimony was improper. Expert opinion testimony requiring special expertise is properly

allowed only if the witness is qualified in the area of inquiry. Section 90.702, Fla. Stat. (1985), Rule 1.390(a), Fla.R.Civ.P. United Technologies v. Indus. Risk Insurers, 501 So.2d 46 (Fla. 3d DCA 1987); Gulf Power Co. v. Kay, 493 So.2d 1067 (Fla. 1st DCA 1986); Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983); Guy and Knight, 431 So.2d 653 (Fla. 3d DCA), pet. for rev. den., 440 So.2d 352 (Fla. 1983); Dragon v. Grant, 429 So.2d 1329 (Fla. 5th DCA 1983) and cases cited therein at 49 and 50. It is the burden of the party sponsoring the expert testimony to establish sufficient expertise in the area of the opinion testimony. §§90.701 and 90.702 Fla. Stat. (1985) and Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1983). Although the rules of evidence do not strictly apply in administrative proceedings, the question of admissibility involves a determination of fundamental fairness. Jones v. Hialeah, 294 So.2d. 686 (Fla. 3d DCA 1974), writ discharged, 313 So.2d 689 (Fla. 1975). Moreover, while the Commission has broad discretion in determining whether or not a witness is qualified to offer expert opinion testimony, this discretion is not unbridled. See GIW Southern Valve Co. v. Smith, 471 So.2d. 81 (Fla.2d. DCA 1985), and cases cited therein at 82.

Mr. Whiting's direct testimony establishes that he is not an engineer by education or experience. He has a B.S. in Industrial Management and a Masters of Business Administration and is a Certified Public Auditor. He has been employed by FPL since graduation. He has worked in the Internal Auditing Department supervising audit activities, and has performed

other administrative functions in the Power Supply Department such as negotiating power purchase agreements and performing corporate budgetary responsibilities. He has also performed temporary duties as Supervisor of Budgets in the Management Control Department as a Power Coordination Manager in the Systems Operations Department. While Mr. Whiting arguably has extensive auditing and managerial experience, he has had no experience in engineering despite his claims. It was confirmed through cross-examination by counsel for Conserv., Inc., et al. that he had no such experience:

> Q: (By Mr. Zambo) Have you ever participated in the design of a central station power boiler?
>
> A: No.
>
> Q: Have you ever operated an electric generating plant?
>
> A: No.
>
> Q: Have you ever repaired any major mechanical components of an electric generating plant?
>
> A: No.
>
> Q: Have you ever supervised or directed the operations or repair of major equipment located in the central generation plant?
>
> A: I have supervised the operation of our power system.
>
> Q: Specifically, have you supervised the operation of the mechanical components that produce the thermal energy that produces electric energy?
>
> A: No.

In the face of this cross-examination, Mr. Whiting was forced to concede that he is not qualified to make engineering judgments:

Q: Would it be fair to say, then, that you have no direct personal experience which would qualify you to make the engineering judgments you've made here today?

A: Some of them, yes; some of them no. Where I say, "I don't know," I mean I don't know. Where I've made a judgment it's based on experience which I have.

Q: Which experience do you have which lends you or which would allow you to make determinations of which EACs would be included in variable avoided O&M costs or as-available energy?

A: I have both an accounting and an operations background. Engineers wouldn't be able to tell you without an accountant sitting by their side what EACs mean. And that was one of the components of what we had to do when we evaluated these things. Somebody described each EAC and said, "These includes expenses for such and such type of work." At that point the engineer could say, "Well, that type of work is caused by this," and roll on. And I do know what the EACs mean, and I have some experience in the administration of the production function, and that's why I'm the fuel costs recovery witness in the production function.

Q: Okay. I think the key, from my perspective, the key to what you just said was that the engineers tell you within those EACs what certain events do.

A: That's correct.

Q: Okay, those are not judgments that you've made. Those are judgments that were made by engineers reporting to you for purposes of putting these reports together.

A: In this specific case, that's correct. (R. Vol. IV, Tr. 95-97).

After this recross-examination it was clear that Mr. Whiting was not qualified to offer expert opinion testimony to substantiate FPL's engineering judgments. It is not enough that he was expertly qualified to testify about some portion of the process by which FPL excluded EAC accounts from consideration. An expert must be qualified in the specific area of inquiry to properly offer opinion testimony. See United Technologies v. Indus. Risk Insurers, 501 So.2d. 46 (Fla. 3d DCA 1987) Fla.R.Civ.P. 1.390(a). In United Technologies for example, the expert testimony upon which plaintiff's case hinged was found to be inappropriately given and the reviewing court reversed. United Technologies involved an action by a hospital against a telecommunications company alleging that the company's negligence in repair of the phone system led to more extensive costs by the hospital. The hospital's chief witness was an engineer with expertise in combustibles who was allowed by the trial court to offer an opinion on the effects of a phosphoric acid spill on the metal of the frame of the telecommunications system. The Third District Court of Appeals reversed the lower court's decision after analyzing a number of cases dealing with the requirement that experts be qualified in the specific area in which they are offering their opinion:

> We do not believe it can be fairly said that Saunders, despite whatever other credentials he may have had, knew anything whatsoever about the subject at hand. Absent his expert opinion there is no evidence to support the conclusion that United was negligent or that its negligence caused damage to the plaintiff.

United at 50.

The same result should occur here. FPL's entire case in support of the engineering judgments which formed the basis of their methodology was hearsay except for the half-hearted opinions Mr. Whiting offered to substantiate the engineering judgments. While Mr. Whiting had training and experience in auditing and management, he had no first-hand engineering experience which would qualify him to offer expert opinions in engineering. When pressed, he conceded he was basically reporting on the judgments of others.

The only other evidence FPL presented regarding the engineering judgments besides the testimony of witness G. L. Whiting was the written report which contained the engineering judgments. (R. Vol. V, Exhibit 1). Excluding Whiting's improper opinions, all of the testimony and evidence presented in support of FPL's engineering judgments is hearsay and cannot properly be relied on by the Commission as the sole basis for its findings of fact.

While hearsay may be admissible in administrative proceedings, hearsay alone cannot support a finding of fact unless it is otherwise admissible under Rules of Civil Procedure. FAC 25-22.048(3), Section 120.58(1)(a), Fla. Stat. (1985); State v. Hewitt, 495 So.2d 809 (Fla. 1st DCA 1986); Sheriff of Monroe v. Unemp. Appeals Com'n., 490 So.2d 961 (Fla. 3d DCA 1986); Spicer v. Metropolitan Dade County, 458 So.2d 792 (Fla. 3d DCA 1984); Campbell v. Central Fl. Zoo Society, 432 So.2d 684 (Fla. 5th DCA 1983). The hearsay evidence presented by FPL falls under none of the exceptions for the admission of hearsay under the

under the Rules of Civil Procedure. Therefore, there was insufficient evidence in the record to support the Commission's finding that FPL's engineering judgments were correct.

III. SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD BEFORE THE COMMISSION ESTABLISHES THAT FPL'S ENGINEERING JUDGMENTS ARE INCORRECT.

In contrast to the hearsay evidence presented by FPL, all other evidence at the final hearing established that FPL's engineering judgments were erroneous. In the face of direct expert testimony, with only hearsay testimony and evidence in the record supporting the engineering judgments, the Commission improperly found that the judgments were correct.

Frank Siedman testified on behalf of Florida Crushed Stone regarding the impropriety of FPL's engineering judgments. (R. Vol. IV, Tr. 101). Mr. Siedman is a registered professional electrical engineer with a B.S. degree in electrical engineering. (R. Vol. IV, Tr. 101, Exhibit 2). Mr. Siedman testified that the engineering judgments in FPL's methodology improperly excluded avoided O&M costs. (R. Vol. IV, Tr. 133, 136). Mr. Siedman established that out of 162 expense categories in FPL's accounting system FPL's engineers erroneously identified only three of these categories of expenses which contained costs that might vary with small changes in unit output. (R. Vol. IV, Tr. 136-137).

Metropolitan Dade County's witness, Dr. Roy Shanker, also testified that FPL's methodology did not capture all avoided variable O&M costs. Dr. Shanker is an experienced consultant in the natural resources area with extensive experience in the electric utility industry. (R. Vol.IV, Tr. 213). Dr. Shanker's direct testimony established that FPL's engineering judgments as to which cost categories would be affected by QF power production were erroneously narrow. Dr. Shanker noted

specific types of expenses that would properly be identified as being affected but were not included by FPL such as "costs of maintenance, fuel handling, waste disposal, fuel inventories, auxiliary materials and power requirements, working capital, etc." (R. Vol. IV, Tr. 223-224).

Despite the substantial competent evidence in the record establishing that FPL's engineering judgments were erroneous, the Commission relied exclusively on hearsay testimony and evidence to find the judgments correct.

CONCLUSION

Payments from utilities to QF's are required to reflect the 100 percent full value of costs that QF's enable utilities to avoid. An arbitrary reduction of such payments that is not based on competent substantial evidence and in compliance with the essential requirements of law is a patent violation of Florida administrative law. In the case of Metropolitan Dade County, the arbitrary rate decrease at issue here will make it more difficult to economically operate a municipal resource recovery facility that processes a major portion of Dade County's solid waste in an environmentally sound manner.

Appellant, Metropolitan Dade County, respectfully requests that this Honorable Court determine the PSC's findings regarding FPL's engineering judgments unsupported by competent substantial evidence and a departure from the essential requirements of law. It is requested that the Commission's order approving the rate decrease based on FPL's engineering judgments be quashed and that the rate effective prior to April 1, 1986 be retroactively reinstated pursuant to the stipulation of the parties until such time as FPL properly substantiates the basis for a rate change.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of August, 1987, to: WILLIAM S. BILENKY, General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0850; CHARLES A. GUYTON, ESQUIRE, Steel, Hector & Davis, 201 South Monroe Street, Tallahassee, Florida 32301; and to PAUL SEXTON, ESQUIRE, Richard A. Zambo, P.A., 1017 Thomasville Road, Suite C, Tallahassee, Florida 32303.

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