IN THE SUPREME COURT OF FLORIDA

METROPOLITAN DADE COUNTY, ET. AL.,
Appellants,
v.
KATIE NICHOLS, ET. AL,
Appellees,

CASE NO. 70,703

INITIAL BRIEF OF APPELLANTS INDUSTRIAL COGENERATORS

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In re: Amendment of Rules 25-17.80 through 25-17.89 relating to Cogeneration, Florida Public Service Commission Docket No. 12634, Order No. 12634 (1983) 1

PREFACE

The Florida Public Service Commission will be referred to herein as "the Commission." Florida Power and Light Company will be referred to as "FPL." The Appellants, which include the four "Industrial cogenerators" and Metropolitan Dade County, are owners and operators of cogeneration facilities or small power production facilities, also known as "Qualifying Facilities" or "QFs", and will be referred to collectively as "the participating QFs." (Effective July 1, 1987, International Minerals & Chemical Corporation changed its name to IMC Fertilizer, Inc.)

References to the record on appeal will be by volume number and page (R.Vol. I, p.1). References to transcripts will be by volume number, "TR" and transcript page number (R.Vol. IV, TR 1). References to exhibits will be by volume number and exhibit number (R.Vol V., Exh. No. 1).

STATEMENT OF THE CASE AND OF THE FACTS

I. INTRODUCTION

The Public Service Commission (Commission) proceeding below concerned the rates paid by Florida Power and Light Company (FPL) for energy purchased from cogenerators and small power producers (also known as Qualifying Facilities or QFs).[1] FPL proposed to reduce the rates paid to QFs for "as-available energy," that is, energy supplied to FPL by QFs at their discretion. QFs opposed the reduction and the Commission held a hearing on the controversy.

II. HISTORICAL BACKGROUND

Commission Rule 25-17.825, adopted in 1983, governs the rates public utilities pay for "as-available" QF energy. Subsection (1) of the rule requires public utilities to pay for "as-available" QF energy at a rate not to exceed the utility's "avoided energy cost," that is, the cost that the utility would have incurred to produce the same amount of energy with its own generation plants.[2]

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[1]The terms Qualifying Facility or QF refer to certain electrical generating facilities defined under Federal Law. They are cogeneration facilities and small power producers which meet specific efficiency standards or fuel use criteria. A cogeneration facility is one which produces (a) electric energy and (b) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes. 16 U.S.C. Sec. 796(18)(A). Small power producers are defined as facilities which produce electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources or any combination thereof. 16 U.S.C. Sec. 796(17)(A).

[2]In Order No. 12634, issued immediately after adoption of Rule 25-17.825, the Commission concluded that it was required by Federal regulations to set rates for QF energy equal to the utility's avoided energy cost. In re: Amendment of Rules 25-17.80 through 25-17.89 relating to Cogeneration, Florida Public Service Commission Docket No. 12634, Order No. 12634 (1983).

Under Subsection (2) of the rule, a utility's "avoided energy cost" has two components: 1) the cost of the fuel the utility did not burn (avoided fuel cost) and 2) the cost to operate and maintain the utility's generation plants that the utility did not incur (avoided O&M cost).[3]

FPL's rates for "as-available" QF energy were initially set by the Commission in a 1984 proceeding to implement Rule 25-17.825. Subsection (3) of the rule required each public utility to submit a methodology to calculate its "avoided energy cost." However, FPL submitted a methodology calculating only its avoided fuel cost, just one component of its "avoided energy cost." FPL contended that it could not identify any avoided O&M costs, the other component of its "avoided energy cost." Noting that two other utilities had submitted methodologies to calculate their avoided O&M costs, the Commission set FPL's avoided O&M cost component at 1 mill per kilowatt hour (.1 cents/KWH) until FPL provided the Commission with an acceptable methodology of its own to calculate that component. Thereafter, FPL paid QFs for "as-available" energy at a rate consisting of its calculated avoided fuel cost and the 1 mill per kilowatt hour prescribed by the Commission for avoided O&M costs.

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[3]When a utility purchases energy from a QF instead of generating it, the utility's generation units do not work as hard, thereby burning less fuel and reducing the cost to operate and maintain the generation units.

III. THE CURRENT PROCEEDING

A. THE NATURE OF THE CONTROVERSY

In December 1985, FPL filed with the Commission a report on its analysis of the proper level of avoided O&M cost (Final Report).[4] In its Final Report, FPL proposed to reduce its avoided O&M cost component from .1 cents/KWH to zero or, alternatively, to no higher than .0079 cents/KWH. The Final Report contended that FPL's purchases of "as-available" QF energy had no effect on the cost of operating and maintaining its generation units or, alternatively, that the cost savings were no greater than .0079 cents/KWH.

FPL sought to reduce the avoided O&M cost component of its avoided energy cost paid to QFs during the Commission's February 1986 Fuel Adjustment hearing. Interested QFs intervened at that time and objected to any presentation of FPL's Final Report at the hearing because of lack of Commission notice as required by Section 120.57(1)(b)2, Florida Statutes. The Commission was reluctant to consider the procedural objections of the QFs. Ultimately, the Commission approved an agreement of the parties that FPL would apply an avoided O&M cost component of .009 cents/KWH, effective April 1, 1986, to be retroactively adjusted if the Commission later decided that another value was correct.

The Commission created a "spin-off" Docket (Docket No. 860001-EI-E) to consider FPL's Final Report and, shortly

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[4]FPL filed its Final Report in the Commission's Fuel Adjustment proceeding.

thereafter, issued a Notice of Proposed Agency Action to approve a permanent reduction in FPL's avoided O&M cost component (R.Vol. I, p.30).[5] A timely Petition for a formal hearing was filed by Metropolitan Dade County and the Commission scheduled the matter for a formal hearing (R.Vol. I, p.32).

B. ISSUES AND POSITIONS OF THE PARTIES

As part of the Commission's normal prehearing procedure, the parties were required to submit prefiled testimony and exhibits and prehearing statements. A Prehearing Conference was held on November 7, 1986 and the Commission issued a Prehearing Order identifying the parties, their issues and positions, their witnesses and their exhibits. Order No. 16898 (R. Vol. I, P.176).

During the Prehearing Conference, the parties entered into two stipulations which were reflected in the Prehearing Order:

> 1. The purpose of this proceeding is to determine whether the methodology reflected in Attachment IV of FPL's Final Report should be approved or denied.
>
> 2. In the event FPL's proposed methodology is determined not to be acceptable, the rate for avoided variable O&M costs will revert to one mill effective April 1, 1986. (Order No. 16898 at P. 15) (R. Vol. I, p. 191)

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[5]The Notice of Proposed Agency Action was issued pursuant to Commission Rule 25-22.029. This procedure allows the Commission to streamline its decision-making process by proposing to act without a public hearing. Under subsection (6) of the rule, if no petition for a 120.57 hearing is received, the proposed action becomes effective. If a petition for a hearing is filed, the proposed action is nullified and, if the factual basis for the action is challenged, a formal hearing is held pursuant to Section 120.57(1), Florida Statutes.

As stated in the Prehearing Order, FPL generally contended that its Final Report showed that its avoided O&M costs component should be set at zero but that, if the Commission would not accept that level, the methodology in Attachment IV of the Final Report should be used to calculate the avoided O&M cost component (Prehearing Order, at p. 4, R. Vol.I, p. 180).[6] The participating QFs uniformly opposed FPL's contentions, maintaining that FPL's analysis did not support any reduction in its avoided cost component below .1 cents/KWH and that FPL's proposed methodology in Attachment IV was not acceptable.[7] A total of nine issues were identified in the Prehearing Order.[8] Issues 7, 8 and 9 are of importance to this appeal:

> Issue 7: Are the conclusions in FPL's final report correct and properly drawn?
>
> Issue 8: Does FPL's methodology in Attachment IV of FPL's Final Report capture all identifiable O&M expenses?
>
> Issue 9: Is FPL's methodology in Attachment IV of FPL's Final report an acceptable methodology for determining the identifiable variable non-fuel O&M expense component of avoided energy cost associated with as-available energy?

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[6]As will be discussed later, the Commission basically ignored FPL's contention that its avoided O&M cost component should be set at zero and focused, instead, on the stipulated purpose of the proceeding: whether FPL's proposed methodology in Attachment IV was valid and acceptable.

[7]Prehearing Order at Pp. 4 and 5 (R. Vol. I, Pp.180,181).

[8]Issues 1-3 were issues of law. Issues 4-9 were issues of fact.

C. THE EVIDENCE PRESENTED

1. GENERALLY

The final hearing was held in Tallahassee on December 5, 1986. The parties presented the testimony of four witnesses.[9] The testimony basically centered on three issues: 1) whether avoided O&M costs under Rule 25-17.825(2) should be measured on an "average cost" or "incremental cost" basis; 2) whether FPL's statistical methods were appropriate; and 3) whether FPL's methodology in Attachment IV was acceptable as a measure of avoided O&M costs.[10]

Mr. Whiting was FPL's chief witness. He testified as to the intent of Rule 25-17.825(2), the relative accuracy of incremental versus average cost as measures of avoided O&M cost; the validity of FPL's statistical methods and the manner in which FPL's methodology was developed. Mr. Cavendish was sponsored by FPL to provide detailed support for its statistical analyses and its validity. Mr. Seidman testified as to the meaning of Rule 25-17.825(2), the relative accuracy of average versus incremental cost as a measure of avoided O&M costs, the validity of FPL's statistical methods and the validity of FPL's methodology. Dr. Shanker testified as to the relative accuracy of average versus

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[9]The witnesses presented the "prefiled" testimony that had earlier been filed by the parties. FPL sponsored the testimony of Mr. Whiting and Mr. Cavendish. The participating cogenerators sponsored the testimony of Mr. Seidman and Dr. Shanker.

[10]The witnesses generally agreed that avoided O&M cost should be measured by "output," that is, the cost avoided per MWH of energy purchased from QFs by FPL.

incremental cost as a measure of avoided O&M costs and the validity of FPL's statistical methods.

2. FPL'S METHODOLOGY IN ATTACHMENT IV

Mr. Whiting's prefiled direct testimony describing FPL's methodology in Attachment IV was very brief. He testified that Attachment IV:

> describes an engineering analysis of potentially relevant expenses and evaluates the statistical relationship between incremental costs and MWH output.[11] The attachment also evaluates the statistical validity of the results of the analysis. (R, Vol. IV, TR 22) (Emphasis Supplied)
>
> * * *
>
> . . . [W]e were able to develop a methodology based on engineering judgement which exhibited a high degree of statistical correlation of some O&M expenses to MWH output with a high degree of statistical confidence. (R, Vol. IV, TR 23) (Emphasis Supplied)

According to Attachment IV itself, of the 162 EAC's reviewed by FPL's engineers, 3 were selected by the engineers to be included in the analysis (R.Vol. V, Exh. 1). The other 159 EACs were excluded by the engineers. In his direct testimony, Mr. Whiting did not state how the engineering judgments were arrived at or whether they were correct.

According to his direct testimony, Mr Whiting is Staff

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[11]According to Mr. Whiting, if FPL's engineers were of the opinion that a cost category (EAC) was affected by output, it was included in the statistical analysis (R.Vol. IV, TR 49). If, however, the engineers were of the opinion that the cost was unaffected by output, it was excluded (R.Vol. IV, TR 76).

Coordinator in FPL's Power Supply Department. He received a Bachelor of Science degree in Industrial Management in 1972 and a Master of Business Administration degree in 1982. He completed requirements to become a Certified Internal Auditor in 1975. From 1972 through 1982, he worked in FPL's Internal Auditing Department where his duties included performance and supervision of audit activities. In 1982, he transferred to the Power Supply Department where his primary duties include negotiation and administration of FPL's major power purchase agreements and corporate budgetary responsibility for interchange and purchased power. (R.Vol.IV, TR 12,13)

On cross examination, it was established that Mr. Whiting was not an engineer by education and was not a registered professional engineer (R.Vol. IV, TR 29); that he did not prepare Attachment IV (R.Vol. IV, TR 30); and that he did not make the engineering judgments upon which the methodology was based (R.Vol. IV, TR 31).

On redirect examination by counsel for FPL, Mr. Whiting was asked whether he was prepared to discuss the engineering judgments in FPL's methodology and answered affirmatively (R.Vol. IV, TR 57, 58). However, counsel for FPL asked no questions in that regard.[12]

Counsel for the participating QFs then began an extensive voir dire of Mr. Whiting regarding his ability to render

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[12] FPL's Final Report (R.Vol. V, Exh. 1), including Attachment IV, was received into evidence at the close of redirect examination (R.Vol. IV, TR 60).

engineering opinion.[13] He was asked what training or on-the-job experience qualified him to render engineering judgments as to which expense categories should be included in FPL's methodology. In response he stated that he is aware of power plant operations, the types of expenses that are incurred and why they're incurred. (TR, Vol. IV, TR 67). He was again asked what experience he had which qualified him to make the engineering judgments in FPL's methodology and responded that he had an accounting and an operations background and some experience in the administration of the production function (R, Vol.IV, TR 96). However, he provided no detail regarding actual engineering experience.

Because of the general nature of his responses, Mr. Whiting was asked detailed questions regarding his actual engineering experience. His responses showed that he had no specific engineering experience relating to the engineering judgments that underlay FPL's methodology. He testified that he had not participated in the design of an electric generation plant, the design of a steam turbine generation plant, or the design of a gas turbine generation plant (R.Vol. IV, TR 93). He testified that he had never participated in the design of a central station power boiler, had never operated an electric generation plant, had never directed the operations or repair of major equipment located in a central generation plant and had never supervised the operation of

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[13]It was only during voir dire that testimony regarding the reasonableness of the judgments of FPL's engineers was given. In the process of answering questions regarding his expertise, Mr. Whiting stated that he agreed with the opinions of FPL's engineers.

the mechanical components that produce the thermal energy in a generation plant (R.Vol. IV, TR 95). He admitted that he did not have the direct personal experience required to make all of the engineering judgments about which he had been questioned (R.Vol. IV, TR 96).

In addition to questions about his engineering experience, Mr. Whiting was asked questions about how he arrived at his engineering judgments. He was queried extensively about a number of expense categories that had been excluded from FPL's methodology by FPL's engineers. As an example, he was questioned in detail about EAC 701: Chemical Cleaning.[14] Mr. Whiting testified that it was his opinion that this cost was related to unit cycles, not output.[15] According to Mr. Whiting, "in the engineering judgment," none of the deposits that must be chemically cleaned out of a steam boiler are caused by output (R.Vol. IV, TR 71). When pressed on that point, however, Mr. Whiting admitted that he hadn't analyzed the subject (R.Vol. IV, TR 72). Instead, he relied on the engineer who worked on the power plant who said "this is cycling" (R.Vol. IV, TR 72-73). Similarly, he testified that in rendering his opinion he was

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[14]This subaccount contains costs for chemical cleaning of the deposits that accumulate inside FPL's generation plant steam boilers during operation.

[15]A steam-powered generation unit must be "cycled" up to operating speed before it can produce "output." "Cycling," by analogy, is like accelerating a car from a stop to highway speed. "Output" occurs when the generation unit provides energy to the utility's grid. "Output," by analogy, is like driving a car up a hill, requiring the engine to work harder to maintain highway speed.

relying on the opinions of FPL's engineers, "that's where I get my knowledge and background" (R.Vol. IV, TR 77).

Counsel for the participating QFs requested that the Commission strike the testimony of Mr. Whiting where he purported to give an engineering opinion (R. Vol. IV, TR 94). The Commission denied the request but did not state whether Mr. Whiting was qualified to render such opinions (R. Vol. IV,TR 94).

D. POST-HEARING BRIEFS

Post-hearing briefs were submitted by the parties on January 12, 1987. In their post-hearing briefs, the participating QFs continued to challenge the sufficiency of FPL's evidence in support of its methodology (R. Vol. II, Pp. 191, et seq.). They pointed out that the stipulated purpose of the proceeding was to determine if FPL's methodology was acceptable and that FPL, as the proponent of its methodology, had the burden to present evidence to prove the validity of that methodology. Mr. Whiting's expertise to render engineering opinion was again challenged and proposed findings of fact were submitted that questioned Mr. Whiting's qualifications (R.Vol. II, p. 317). The participating QFs pointed out that Mr. Whiting lacked the expertise to render engineering opinion and, in fact, was simply providing hearsay opinions of FPL's engineers. Similarly, they pointed out that Attachment IV was merely hearsay as to FPL's engineers' opinions and, while admissable under Section 120.58(1)(a), Florida Statutes, was not sufficient to prove the reasonableness of the underlying engineering opinions. The participating QFs further

pointed out that, absent competent evidence showing the validity of the engineering judgments underlying FPL's methodology, the Commission could not approve the methodology.

E. THE COMMISSION'S FINAL ORDER

The Commission met at its regularly scheduled Agenda Conference of February 17, 1987 to vote on FPL's methodology. The Commission voted to approve the methodology and issued its final order (Order No. 17273) on March 11, 1987. The Commission's final Order reflected the Commission approval of FPL's methodology as a measurement of its avoided O&M costs.[16]

In its final order, the Commission recognized that FPL's methodology was based on the opinions of FPL's engineers:

> The development of Attachment IV relies on a set of assumptions and engineering judgments.[17] . . . The engineering judgments were applied to each EAC to determine whether the account would be subject to change due to small changes in load. . . .
>
> The engineering judgments were the foundation for determining the causality of the relationship between O&M cost and changes in load. . . . (Order No.17273, at p. 9) (Emphasis Supplied)

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[16]The Commission's final order makes no reference to FPL's contention that its avoided O&M cost component should be set at zero. Instead it focuses exclusively on the general theory of avoided O&M cost and whether FPL's methodology in Attachment IV of its Final Report was valid and acceptable.

[17]The validity of the three assumptions was discussed in the Commission's order in Issue 3 and is not the subject of this appeal.

The Commission ruled on all nine issues listed in the Prehearing Order. Specifically, in ruling on issues 7, 8 and 9, the Commission made the following findings of fact:

> Issue 7: ...The engineering judgments were required due to a lack of truly incremental O&M cost data and represent reasonable conclusions of cost causality.
> (Order No. 17273 at p.9) (R.Vol. II, p. 356) (emphasis supplied)
>
> Issue 8: ...FPL has identified those costs that are subject to change with small variations in output.
> (Order No. 17273 at p.10) (R.Vol. II, p. 357)
>
> Issue 9: ...Based upon our previous findings and discussions in Issues 1 through 8, we find FPL's methodology to be acceptable and appropriate for use.
> (Order No. 17273 at p.10) (R.Vol. II, p. 357)

The Commission's final order made no mention of the evidentiary issues raised in the post-hearing briefs. The Order contained an appendix, purportedly ruling on the Proposed Findings of Fact submitted by the participating QFs. In that Appendix, the Commission approved the proposed findings regarding Mr. Whiting's qualifications, noting, however, that they did not fully describe his qualifications and referring to the order as more fully describing his qualifications. However, the Order itself made no reference at all to the qualifications of Mr. Whiting to render engineering opinion.

IV. THIS APPEAL

A Notice of Administrative Appeal was filed with the Court of Appeals for the First District of Florida on April 9, 1987 (R.Vol. II, p. 360). The Commission filed a motion to transfer jurisdiction to this Court, which was granted by an order of the Court of Appeals dated June 11, 1987.

SUMMARY OF ARGUMENT

The Commission's approval of FPL's methodology may be sustained only if it is supported by competent substantial evidence. FPL's methodology relied on engineering judgments which selected the O&M costs to be included in the methodology. The burden rested on FPL to prove that the engineering judgments in its methodology were correct.

The Commission's approval of FPL's methodology is not supported by competent substantial evidence. FPL did not present testimony of its engineers to substantiate its methodology. Instead, it sponsored the testimony of an FPL employee with a background in accounting, auditing, and administration (Mr. Whiting). Mr Whiting had no engineering experience upon which he could base an opinion as to the correctness of the engineering judgments in FPL's methodology. The only engineering "knowledge and background" that he possessed came from after-the-fact interviews with FPL's engineers. Mr. Whiting did not go behind the opinions the engineers expressed and was unfamiliar with the facts that underlay those opinions.

The Commission abused its discretion in accepting Mr. Whiting's testimony as that of an expert. Mr. Whiting's testimony was merely a hearsay repetition of the opinions of FPL's engineers and, just like Attachment IV which contained the methodology, is not competent nor sufficient to prove the validity of the engineering judgments in FPL's methodology. By accepting Mr.

Whiting's testimony, the Commission effectively denied the participating QFs their right to conduct cross-examination.

The Commission's findings that the conclusions in FPL's methodology were correct and properly drawn and that FPL had identified all costs (EACs) that varied with small changes in output must be reversed. The Commission's approval of FPL's methodology, which rested in part on those two findings, must also be reversed.

THE COMMISSION'S APPROVAL OF FPL'S METHODOLOGY WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

INTRODUCTION

The Commission's final order contains two findings of fact that are central to this appeal:

> 1) the conclusions of FPL's engineers in Attachment IV of its Final Report were correct and properly drawn [at p. 9]; and
>
> 2) FPL had identified all those costs that are subject to change with small variations in output [at p. 10].

Based on these findings, the Commission reached a third finding, that FPL's methodology was acceptable.

A Commission order will be sustained on appeal only if it is supported by competent substantial evidence of record. Sec. 120.68(10), Fla. Stat., Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982). The Commission found that the judgments of FPL's engineers in selecting the cost categories to include in FPL's methodology were correct. To be sustained on appeal, these findings must be based upon competent substantial evidence that the judgments of FPL's engineers were correct.[18]

It is not clear from the Commission's final order whether the Commission actually relied on Mr. Whiting's testimony in entering

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[18]The filing of a petition for a hearing commenced a de novo proceeding, where the burden of proof rested on FPL to show that the engineering judgments upon which its methodology relied were correct. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981). See also Hillsboro-Windsor Condominium Association v. Department of Natural Resources, 418 So.2d 359 (Fla 1st DCA 1982); Boca Raton Artificial Kidney Center, Inc. v. Florida Department of Health and Rehabilitative Services, 475 So.2d 260 (Fla. 1st DCA 1985).

its findings or whether it improperly placed the burden on the participating QFs to prove that the methodology was invalid. Mr. Whiting's testimony is not mentioned in the Commission's final order and, in two places in the order, the Commission placed the burden on the QFs to present evidence:

> ...All other EACs were eliminated because they were considered non-susceptible to small changes in load. The record contains no credible evidence that would contradict the relationship of the EAC's [to] small changes in output. 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. (Order No. 17273 at p. 9)
>
> At the hearing, intervenors' witnesses contended that FPL failed to include all the identifiable O&M expenses. However, they offered no evidence to support this contention. (Order No. 17273 at p. 10) (Emphasis Supplied)

It would clearly be incorrect to place the burden of proof on the QFs. Florida Department of Transportation v. J.W.C. Company, Inc., supra. Appellants believe that the Commission actually recognized that the burden rested on FPL to present evidence to demonstrate the validity of the engineering judgments underlying its methodology and that the order is simply inartfully drawn.

Mr. Whiting was the only witness to testify in support of the validity of the engineering judgments that underlay FPL's methodology. Under Section 90.702, Florida Statutes, Mr. Whiting's opinions on that subject are admissable only if he is shown to have knowledge, skill, experience, training or education in engineering matters and can apply his expertise to evidence in

the record. In order to qualify as an expert witness in a given area, a witness must show that he has acquired special knowledge of the subject matter by either education, training or experience. Kelly v. Kinsey, 362 So.2d 402 (Fla. 1st DCA 1978). A person offered as an expert must be demonstrated to have expertise in that particular field. Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1983), Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla 4th DCA 1983), Sea Fresh Frozen Products, Inc. v. Abdin, 411 So. 2d 218 (Fla. 5th DCA 1982). As this Court has stated: "the witness must have such knowledge as will probably aid the trier of facts in its search for truth," Buchman v. Seaboard Coast Line Railroad Company, 381 So.2d 229 (Fla. 1980).

ARGUMENT

The two Commission findings referred to on page 17 are not supported by competent substantial evidence. Mr. Whiting, FPL's only witness to testify in support of the engineering judgments underlying FPL's methodology, was not qualified to render an opinion on the subject. He did not actually make the engineering judgments in Attachment IV. His "opinions" were based on discussions with the FPL engineers who made the judgments and he lacked knowledge of the facts behind those opinions. His "opinions" and those contained in Attachment IV itself were mere hearsay recitations of the opinions of FPL's engineers, who were not available for cross-examination, and cannot support the Commission's findings. Accordingly, the Commission's third finding, that FPL's methodology is acceptable, must be reversed.

The Commission clearly abused its discretion by accepting Mr. Whiting's testimony as that of an expert on the engineering judgments that underlay FPL's methodology. While the determination of the expertise of a witness rests within the sound discretion of the fact-finder, that discretion is not unfettered. GIW Southern Valve Co. v. Smith, 471 So.2d 81 (Fla. 2nd DCA 1985), Trustees of Central States Southeast and Southwest Areas, Pension Fund v. Indico Corporation, 401 So.2d 904 (Fla. 1st DCA 1981). Mr. Whiting was not qualified to render an opinion as to the correctness of the judgments of FPL's engineers in deciding what categories of expenses should have been included in FPL's methodology. Further, he lacked sufficient knowledge of the underlying facts to render an opinion of his own.

According to his testimony, Mr. Whiting's education is in management and accounting (R.Vol. IV, TR 12). His duties with FPL have been as an auditor [10 years] and as a Staff Coordinator, negotiating and administering contracts [5 years] (R.Vol. IV, TR 12,13). Commissioner Gunter described his qualifications as follows:

> . . . [I]f you read the testimony and are thoroughly prepared you know he's not an engineer. He's got a degree in industrial management and a master's -- an MBA, or something -- was an auditor, those kinds of things -- was a coordinator.

(R.Vol. IV,TR 62)

When initially questioned about his qualifications, Mr Whiting testified that he was not an engineer by education (R.Vol. IV, TR 29). He later testified that he was not an engineer by

training but primarily by education (R.Vol. IV, TR 67). He was asked specifically what experience qualified him to render engineering judgments as to which expense categories should be included in FPL's methodology. His response was that he had a background in accounting and operations and some experience in the administration of the production function (R.Vol. IV, TR 96). These are not experiences that would make him skilled in the area of utility generation engineering.

Mr. Whiting was asked detailed questions regarding his actual engineering experience. His responses showed that he had no specific engineering experience relating to the engineering judgments that underlay FPL's methodology. He testified that he had not participated in the design of an electric generation plant, the design of a steam turbine generation plant, or the design of a gas turbine generation plant (R.Vol. IV, TR 93). He testified that he had never participated in the design of a central station power boiler, had never operated an electric generation plant, had never directed the operations or repair of major equipment located in central generation plants and had never supervised the operation of the mechanical components that produce the thermal energy in a generation plant (R.Vol. IV, TR 95).

In fact, Mr. Whiting admitted that he did not have the engineering expertise to render all of the opinions underlying FPL's methodology:

> 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 the experience which I have. (R.Vol. IV,TR 95,96)

Mr. Whiting's "education and experience" to support his engineering opinions came from after-the-fact interviews with the FPL engineers who made the judgments in question:

Q Okay. I mean, you're using words like, in your notes [in Attachment IV], "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 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, or are you relying on their judgment?

A I'm replying (sic) on their judgment, that's where I get my knowledge and background. (R.Vol. IV,TR 76,77) (Emphasis supplied)

Mr. Whiting himself did not make the engineering judgments in the methodology (R.Vol. IV, TR 31). They were not judgments he made but judgments reported to him by FPL's engineers

(R.Vol. IV, TR 95,96). Mr. Whiting's "engineering judgments" were simply recitations of the judgments of FPL's engineers and are not admissable as opinions of an expert witness:

> [Section 90.704] does not permit an expert witness in one field to testify as to the expert opinion given to him by another expert. Such testimony is inadmissable hearsay pursuant to section 90.801(2)(c), Florida Statutes (1981).

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

Mr. Whiting never went behind the opinions of FPL's engineers and, in at least one instance, was unfamiliar with the facts behind the engineering opinion. When he expressed uncertainty as to whether chemical cleaning (EAC 701) was caused solely by cycling, he was asked to clarify his opinion:

> Q Well, first you told me it's not appropriate because it's typically affected by system cycling. And now you're telling me that there might be some component of it that's affected by running the unit and not cycling.
>
> A There might be?
>
> Q Might be. Is that what you're saying?
>
> A I haven't analyzed this. The engineer, project superintendent who worked at the power plant, said this is cycling. (e.s.)

(R.Vol. IV,TR 72)

Expert opinion is inadmissable where it is apparent that the opinion is based on insufficient data. Husky Industries, Inc. v. Black, supra. It is error to permit a witness to testify as an expert where he admits that he has never done any studies

concerning the subject about which he was being offered to testify. Sea Fresh Frozen Products, Inc. v. Abdin, supra.

The Commission effectively denied the participating QFs their right to conduct cross-examination under Section 120.57(1)(b)4, Florida Statutes, by accepting Mr. Whiting's opinion on the engineering judgments that underlay FPL's methodology. It is impossible to cross-examine an expert witness about his opinions when those opinions are simply those of third persons. Further, it is impossible to cross-examine a witness about the basis for those opinions is he is unaware of the facts behind those opinions.

Allowing the Commission to accept "expert" testimony such as that by Mr. Whiting will lead to absurd results. If a witness can give engineering opinion simply by interviewing engineers, then FPL can easily pare down its cadre of expert witnesses in its next rate case. Instead of the usual dozen expert witnesses, FPL need only sponsor a few select witnesses with backgrounds that enable them to study-up on the appropriate technical areas. With the proper interviews and spot-study, they can become experts in operations, cost-accounting, engineering, cost of capital, fuel procurement, rate design, etc. Just like Mr. Whiting, these witnesses can claim the experience to express expert opinions and can withstand limited cross-examination. Just like Mr. Whiting, these witnesses will be unable to discuss their expert opinions or the basis for those opinions in any depth.

Mr. Whiting's testimony is not sufficient to support the Commission's findings that the conclusions in Attachment IV were correct and properly drawn and that FPL had identified all costs that varied with small variations in output.

Attachment IV itself cannot stand as proof of the validity of the method because the engineers' opinions contained therein were also hearsay. This hearsay evidence, though admissable under Section 120.58(1)(a), Florida Statutes, is not sufficient to sustain the Commission's findings because it would not be admissable over objection in a civil trial.

Hearsay evidence is generally admissible in administrative hearings. Spicer v. Metropolitan Dade County, 458 So.2d 792 (Fla. 3rd DCA 1984). Four of the five District Courts of Appeal have held that hearsay evidence, though admissable in administrative proceedings, is not sufficient, standing alone, to support an agency finding unless it would be admissable over objection in a civil trial. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), CF Chemicals, Inc. v. Florida Department of Labor and Unemployment Security, 400 So.2d 846 (Fla. 2nd DCA 1981), Spicer v. Metropolitan Dade County, supra, Campbell v. Central Florida Zoological Society, 432 So.2d 684 (Fla. 5th DCA 1983).[19] The hearsay evidence presented by FPL in support of the correctness of its methodology would not be admissable in a civil trial and therefore cannot sustain the Commission's findings.

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[19]Apparently, the Court of Appeals for the Fourth District has not yet faced this issue.

Attachment IV itself contains a list of the 162 EACs considered by FPL's engineer's for inclusion in FPL's methodology, along with brief statements of the engineers' reasons for including or excluding the EAC's in the methodology (R.Vol. V, Exh. 1). Clearly, Attachment IV meets the definition of hearsay evidence if it was offered by FPL to prove the validity of the engineering opinions it contained.[20] In such a case, attachment IV would not be admissable in a civil trial under the Florida Evidence Code.[21] Therefore, it is insufficient to support the Commission's findings. Sec. 120.58(1)(a), Fla. Stat.

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[20]"Hearsay" is a statement, other than one made by the declarant while testifying at the . . . hearing, offered in evidence to prove the truth of the matter asserted.

Sec. 90.801(1)(c), Fla. Stat.

[21]Except as provided by statute, hearsay evidence is inadmissable.

Sec. 90.803, Fla. Stat.

CONCLUSION

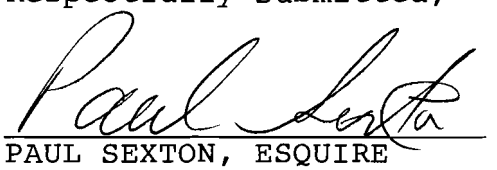
The Commission approved FPL's methodology based on findings that the engineering judgments that underlay the methodology were correct and that the methodology included all identifiable avoidable O&M expenses. To be sustained, these findings must be based on competent substantial evidence that the engineering judgments were correct.

Mr. Whiting, the only witness to testify in support of the correctness of the engineering judgments, was not qualified to render an expert opinion on the subject. Further, he lacked sufficient knowledge of the facts to render an expert opinion. His opinions, and the methodology itself, were merely hearsay repetitions of the opinions of FPL's engineers and are not competent or sufficient to support the Commission's findings. The Commission abused its discretion in relying on Mr. Whiting's testimony as showing the correctness of the engineering judgments in FPL's methodology.

The Commission's findings, and its approval of FPL's methodology must be reversed.

Dated: August 21, 1987

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the following persons this 21st day of August, 1987.

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INDEX TO APPENDIX

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Order No. 17273 . . . . . A-1

FPL's Methodology in Attachment IV to its Final Report (Excerpted from Exhibit No. 1) A-14