IN THE SUPREME COURT OF FLORIDA

METROPOLITAN DADE COUNTY, ET. AL., Appellants, v. KATIE NICHOLS, ET. AL, Appellees,	)	CASE NO. 70,703

REPLY BRIEF OF APPELLANTS INDUSTRIAL COGENERATORS

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SUMMARY OF ARGUMENT

The question presented to this Court for consideration is whether the Commission's order was supported by competent, substantial evidence or merely hearsay that would not be admissable in a civil action.

This issue was properly preserved for review. The Commission ruled at hearing that hearsay recitations of FPL engineering judgments were admissable and that their weight would be considered after-the-fact. Mr. Whiting's qualifications and his hearsay testimony were challenged in a timely manner during the hearing. It was demonstrated that his exhibit was hearsay. Mr. Whiting's qualifications and the admissability of hearsay evidence were argued in FPL's post-hearing brief and his qualifications were ruled on by the Commission.

The judgments used to develop FPL's methodology were described as engineering judgments in the testimony of FPL's own witnesses, the statements of counsel for FPL and the findings of the Commission. Mr. Whiting was offered by FPL to "discuss the engineering judgment basis" upon which the EACs were selected. He was not qualified to render opinions on that subject and, instead, was merely reciting hearsay opinions of FPL's engineers. He simply relied on the judgments of FPL's engineers.

The only evidence on the judgments of FPL's engineers is contained in Mr. Whiting's testimony and exhibit. The proposition that FPL's rejection of EACs was also supported by methodologies of other utilities is not supported by the record. It was not argued by FPL in its post-hearing brief. It was not mentioned by the Commission in either its Final Order or its Answer Brief.

FPL's evidence would not be admissable in a civil action. A presentation of the opinion of others is not admissable. Attachment IV contains no data that can support an opinion that FPL's selection of EAC's was proper.

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

A. THE QUESTION WAS PROPERLY PRESERVED FOR REVIEW.

The question presented to this Court for consideration is whether the Commission's order was supported by competent, substantial evidence or merely hearsay that would not be admissable in a civil action.[1] This question was properly preserved for review.

Both Appellees assert that the question of Mr. Whiting's qualifications and the receipt of hearsay testimony were waived by the Appellants for failure to raise contemporaneous objections below. FPL, in particular, complains that Appellant's "changed their tactic" in their post-hearing brief by arguing issues of admissibility (FPL's Answer Brief at p. 15). In fact, it is FPL and the Commission who have changed tactics.

The Commission ruled at hearing that it would receive into evidence hearsay recitations of FPL engineering judgments and consider their weight after-the-fact. The participating cogenerators questioned Mr. Whiting's qualifications to render expert opinion and whether his testimony was, in fact, hearsay in a timely and forthright manner during the Commission hearing. It was demonstrated that his exhibit was hearsay as well. The issues of Mr. Whiting's competence to render expert opinion and the admissability of hearsay evidence were argued in FPL's post-hearing brief and the Commission ruled on Mr. Whiting's expertise in its final order. At no time in the proceeding below did either FPL or the Commission contend that the question of Mr. Whiting's

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[1]Contrary to FPL's assertions, FPL does have a financial interest in the outcome of this case. FPL presented its methodology to avoid having the Commission disallow recovery of the payments from its ratepayers, an outcome that may occur if the methodology is disapproved for lack of adequate proof.

competence or the hearsay nature of FPL's evidence were not timely raised. It is clearly inequitable for the Appellants to now insist that this Court retroactively impose an obligation to formally object to hearsay evidence.

1. The Commission Ruled at Hearing That Hearsay Evidence on the Engineering Judgments Was Admissable.

During the hearing below, Chairman Marks ruled that the Commission would receive hearsay evidence and consider its weight as hearsay after-the-fact:[2]

> CHAIRMAN MARKS: Let's -- why don't you ask the questions, Let's keep in mind, as well, that the Commission can here (sic) 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 [Mr. Whiting] is being offered as an engineering expert and the Commission understands that distinction quite well. (e.s.) (R. Vol. IV, TR 66).[3]

There was no need to "object" to the admission of hearsay evidence presented by FPL because the Commission had ruled that it was admissable.

Mr. Whiting was examined in voir dire to determine whether his testimony was hearsay and the weight that is should be given. In demonstrating that Mr. Whiting was not qualified to render engineering opinion, the participating

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[2]Under Commission practice, the senior presiding Commissioner rules on all evidentiary and procedural issues that arise during a hearing. Thus, Chairman Mark's ruling was a ruling by the Commission.

[3]In making this ruling, Chairman Marks was following the rule announced in Spicer v. Metropolitan Dade County, 458 So. 2d 792 (Fla. 3rd DCA 1984):

> Generally, hearsay evidence is admissable in administrative hearings. Sec. 120.58(1)(a), Fla.Stat. (1983), [citations omitted], But hearsay evidence alone is not sufficient to support a finding unless it would be admissable over objection in civil actions. [citations omitted]. (at 794)

During his ruling, Chairman Marks stated that he did not think that Mr. Whiting was being offered as an expert in engineering. The clear import was that the Commission would receive hearsay recitations of engineering opinion by a witness not qualified to render such opinion.

cogenerators also demonstrated that his opinion testimony was a hearsay recitation of the opinions of FPL's engineers. An objection to this testimony, based on a lack of independent expertise, would have been contrary to the Commission's ruling because the testimony would still be hearsay.

Even if a technical "objection" to Mr. Whiting's opinion testimony was necessary, the participating cogenerators made such an objection.[4] When Commissioner Gunter questioned Mr. Zambo's inquiry into Mr. Whiting's engineering experience, Mr. Zambo first stated that his inquiry was to determine whether Mr. Whiting was testifying of his own knowledge or on the basis of hearsay (R. Vol. IV, TR 94).[5] This was consistent with the prior ruling that hearsay evidence was admissable and its weight would be considered after-the-fact. It also stated a specific challenge to Mr. Whiting's expertise.

However, Mr. Zambo was not certain why Commissioner Gunter was questioning his inquiry and requested that the Commissioner strike Mr. Whiting's engineering opinions in lieu of asking further questions designed to establish the weight of Mr. Whiting's testimony (R. Vol. IV, TR 94).[6] Instead of

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[4]Even if the Commission had not formally ruled that hearsay evidence was admissable, there would be no need to object to FPL's hearsay evidence. Harris v. Game and Fresh Water Fish Commission, 495 So.2d 806 (Fla. 1st DCA 1986). Contrary to FPL's assertion, Harris is better reasoned than Tri-State Systems, Inc. v. Department of Transportation, 500 So.2d 212 (Fla. 1st DCA 1986), rev. den., 506 So.2d 1041 (Fla. 1987), because it recognizes that hearsay evidence is admissable under Section 120.58(1)(a), Florida Statutes (at 80).

Further, failure to make a contemporaneous objection would not preclude the issue on appeal because the error claimed goes to the heart or foundation of FPL's case. Marks v. Del Castillo, 386 So.2d 1259 (Fla. 3rd DCA 1980). If FPL's hearsay evidence had been excluded from evidence, it could not have proven its case and the Commission would have been obliged to reject its methodology.

[5]Chairman Marks was absent from the bench at this moment and Commissioner Gunter was the senior Commissioner present.

[6]In spite of Mr. Zambo's clear attack on Mr. Whiting's expertise and his request that his testimony be stricken, Counsel for FPL chose to remain silent.

entertaining the motion to strike, Commissioner Gunter directed that questioning continue, ratifying Chairman Marks' ruling that even if Mr. Whiting was not qualified, his testimony would be received as hearsay. Of course, Mr. Zambo had no reason to renew his motion thereafter.

2. Mr. Whiting's Qualifications and the Hearsay Nature of FPL's Evidence Were Plainly and Timely Raised at Hearing.

Mr. Whiting's qualifications were challenged openly and explicitly at the hearing before he ever offered an opinion on the engineering judgments in FPL's methodology.[7] The fact that Mr. Whiting did not testify to the engineering judgments during direct or cross-examination is illustrated by the following question that counsel for FPL posed to Mr. Whiting on redirect:

> Q. Are you prepared to discuss the engineering judgement basis upon which the EACs which were chosen to be correlated under Attachment IV were made? (e.s.) (R. Vol. IV, TR 57-58).

To ask a witness if he is "prepared to discuss" judgments is to acknowledge that they have not yet been discussed. This was recognized by the Commission:

> CHAIRMAN MARKS: Now, it does present -- you have interjected something new, Mr. Guyton, because he did ask the witness about those engineering judgments and the witness said no. (R. Vol. IV, TR 63)

FPL was placed on clear and unmistakable notice that Mr. Whiting's qualifications were being challenged and that any testimony on the engineering judgments would be questioned as hearsay. Counsel for Industrial Cogenerators twice questioned whether Mr. Whiting would be offering hearsay testimony before

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[7]His direct testimony was silent on the basis for the engineering judgments in FPL's methodology (R. Vol. IV, TR 9-29). It was established on cross-examination that he did not prepare Attachment IV of FPL's report, that it was based on certain engineering judgments and that he did not perform those engineering judgments (R. Vol. IV, TR 30-31). Contrary to FPL's assertions, Mr. Whiting's rebuttal testimony did not offer support for the engineering judgments in FPL's methodology, but asserted that the methodology was reasonable because it contained a statistical analysis (R. Vol. IV, TR 346).

he ever testified about the engineering judgments in FPL's methodology (R. Vol. IV, TR 64, 65, 66). The entire thrust of the voir dire was to challenge Mr. Whiting's qualifications to render expert opinion on engineering judgments and to demonstrate that the opinions he expressed were hearsay.[8]

At hearing, the participating cogenerators clearly established that Attachment IV to FPL's Exhibit No. 1 was hearsay evidence.[9] Thus, counsel for the participating cogenerators "pointed out" that Attachment IV to Exhibit No. 1 was pure hearsay. This was recognized by counsel for FPL, who attempted to "cure" this deficiency on redirect examination, prior to moving Exhibit No. 1 into evidence, by asking Mr. Whiting if he was prepared to discuss the engineering judgments used to select the EACs (R. Vol. IV, TR 57-58).

3. FPL Chose Not to "Cure" Mr. Whiting's Qualifications or the Hearsay Nature of His Testimony.

Unlike his effort to "cure" the hearsay nature of Attachment IV, counsel for FPL made no effort to "cure" Mr. Whiting's qualifications or the evidence that he was offering hearsay opinion. In spite of this clear challenge by the

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[8]He was asked about his engineering experience or training (R. Vol. IV, TR 67). He was asked questions testing his knowledge of the engineering judgments (R. Vol. IV, TR 71, 72, 75, 81, 83, 84, 85, 86, 87). He was asked if he was relying on the judgment of an engineer (R. Vol. IV, TR 73). He was asked if he was relying on his own knowledge and experience (R. Vol. IV, TR 76). He was asked if he was testifying about what someone else had told him (R. Vol. IV, TR 80). He was asked his qualifications to render the opinions he offered (R. Vol. IV, TR 91, 92, 93). He was asked questions regarding his specific engineering experience (R. Vol. IV, TR 91, 93, 95). He was asked if the engineers had simply told him what EACs were effected by output (R. Vol. IV, TR 96). He was asked if the judgments were made by him (R. Vol. IV, TR 96, 97).

[9]It was established that Mr. Whiting, who sponsored Exhibit No. 1, did not prepare Attachment IV (R. Vol. IV, TR 30), that he did not make the engineering judgments upon which the methodology was based (R. Vol. IV, TR 31), and that he did not perform the statistical evaluations contained in Attachment IV (R. Vol. IV, TR 31).

participating cogenerators, he asked no questions of Mr. Whiting after participating cogenerators had completed voir dire (R. Vol. IV, TR 97).

4. FPL Argued the Questions in its Post-Hearing Brief.

Not only were the issues of Mr. Whitings qualifications and hearsay evidence raised at hearing, but the participating cogenerators and FPL argued those points in their post-hearing briefs to the Commission (See Brief of Florida Power & Light Company, footnote 9, Pp. 22-23, R. Vol. II, Pp. 250-251). FPL never once even suggested that the question of Mr. Whiting's qualifications was waived and it even argued that the Commission could receive the hearsay evidence offered by Mr. Whiting (at p. 23, R. Vol. II, p. 251).

5. The Commission Ruled on Mr. Whiting's Qualifications.

Not only did FPL argue the issue directly in its post-hearing brief, but the Commission actually ruled on Mr. Whiting's qualifications. This ruling appears on page 12 of the Final Order where the Commission ruled on proposed findings of fact concerning Mr. Whiting's qualifications:

> .13-.16 Partially accepted to the extent the proposed findings set forth a part of witness Whiting's qualifications. However, they are incomplete and fail to fully describe and assess the witness's qualifications to provide expert testimony as more fully set forth in the Final Order.[10]

Had the issue of Mr. Whiting's qualifications been waived by a failure to make a timely objection, the Commission would have so stated in its Final Order and would not have ruled on the proposed findings regarding his qualifications.

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[10](R. Vol. II, p. 354) Curiously, the body of the Final Order does not contain any statements about Mr. Whiting's qualifications.

B. FPL'S CASE WAS BASED SOLELY ON HEARSAY OPINIONS OF FPL'S ENGINEERS THAT WOULD NOT BE ADMISSABLE IN CIVIL ACTIONS.

1. The Selection of EAC's was based on Engineering Judgment.

FPL's methodology has been uniformly described as based on "engineering judgments" throughout the proceeding below. It is only now, on appeal, that FPL proposes to change this description to "operations judgments."

In his testimony, Mr. Whiting referred to the selection of the EACs for FPL's methodology as "an engineering analysis" (R. Vol. IV, TR 22, 49) which relied on "engineering judgment" (R. Vol. IV, TR 23). He replied "yes" when asked if the methodology was "based on certain engineering judgment" (R. Vol. IV, TR 30-31). During redirect examination of Mr. Whiting, counsel for FPL described the judgments as "engineering judgment" (R. Vol. IV, TR 57-58, 64). Mr. Cavendish, FPL's other witness, described FPL's methodology as beginning with an "engineering assessment" (R. Vol. IV, TR 289). Most importantly, the Commission's Final Order itself adopted this same characterization. On page nine of the Final Order, the Commission refers to "engineering judgments" no less than four times in describing the first step of FPL's methodology (Order No. 17273, p. 9, R.Vol.II, p. 351).

Thus, based on the testimony of FPL's own witnesses, the statements of counsel for FPL and the findings of the Commission itself, the judgments used to develop FPL's methodology were engineering judgments. Indeed, why would FPL have relied on its engineers to render these judgments if engineering principles were not involved?

2. Mr. Whiting was not Qualified to Render an Opinion that the Engineers' Judgments Were Correct.

Industrial Cogenerators demonstrated in their Initial Brief that Mr. Whiting did not show the necessary education, knowledge or experience regarding

the operation or maintenance of FPL's generation plants to provide an expert opinion on the engineering judgments that underlay FPL's methodology. See Pp. 8-11, 20-23. That presentation will not be repeated herein. Rather, his lack of expertise will be illustrated through an example.

A witness must be possessed of special knowledge about the discrete subject upon which he is called to testify. United Technologies Communications Company v. Industrial Risk Insurers, 501 So.2d 46 (Fla. 3rd DCA 1987). Mr. Whiting was offered to "discuss the engineering judgment basis" upon which the EACs were selected (R. Vol. IV, TR 57-58). He was asked to state why EAC 701 was excluded by FPL's engineers and he stated that it was excluded because the chemical cleaning of the boilers was caused by cycling, not output (R. Vol. IV, TR 70). He was then asked a question to clarify the nature of his opinion. He did not offer his own opinion, however, but the judgment of FPL's engineers:

> Q. Okay. So, none of these costs -- none of this grunge that you clean out accumulates based on running the unit as opposed to cycling it? Not one scrap?
>
> A. In the engineering judgment, no.
> (R. Vol. IV, TR 71) (e.s.)

He was then asked a detailed question underlying that engineering judgment:

> Q. Did you tell me that if you run a unit continuously for a period of time, and don't cycle it, its going to be crystal clean?
>
> A. I don't know.
>
> Q. You don't know?
>
> A. No, I don't know that. I would doubt it.[11]
> (R. Vol. IV, TR 72) (e.s.)

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[11]Mr. Whiting did not question the facts in this question, as FPL contends. This question had been worded in light of an earlier "suggestion" by Mr. Whiting (at R. Vol IV, TR 70). Unlike his response on page 70 of the transcript, Mr. Whiting answered this question directly, without any qualification.

Answers such as "I don't know" and "I don't know that" are clear statements acknowledging ignorance of the specific subject. When pressed further on the subject, he stated that he had not analyzed it at all (R. Vol. IV, TR 72).

This example is illustrative of the fact that Mr. Whiting lacked sufficient knowledge, training or experience to render an opinion on the specific area of the engineering judgments used to select the EACs for FPL's methodology. In the case of EAC 701, it matters not whether the judgments involved "engineering" or "operations," Mr. Whiting was not qualified to offer an opinion on them.

Appellee's references to Mr. Whiting's unspecified engineering experience and his assertions of "operations" expertise do not overcome the fact that he could not answer questions about why EAC 701 was excluded. Nor do they overcome the fact that he admitted he lacked expertise to render opinions on all of the engineering judgments, or the fact that his "knowledge and background" was acquired through after-the-fact interviews with FPL's engineers. Additionally, most of the Appellees' recitations of Mr. Whiting's education, experience and knowledge have no relation to the area in which he offered his opinions.

Mr. Whiting's experience in FPL's "multiyear" study of avoided O&M costs provided no experience in either engineering or operations. The summary of FPL's Final Report describes the first three studies as "statistical evaluations" and the last study as an "engineering/accounting" study. Only in the last study (Attachment IV) did FPL employ "engineering judgment."[12]

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[12]The Commission's assertion that calculation of correlations is in the nature of engineering is inapposite (Answer Brief at p. 17) Mr. Whiting himself distinguished the "engineering analysis" in the first part of FPL's methodology from the statistical analyses performed by FPL (R. Vol. IV, TR 22).

Mr. Whiting played no meaningful role in that last study. He did not make the engineering judgments, perform the statistical analysis or prepare the Attachment (R. Vol. IV, TR 30, 31). The record does not show that Mr. Whiting was directly involved in the FPL study of reports of other utilities' methodologies (R. Vol. IV, TR 20). Even if he had reviewed those reports, his criticism of those methodologies was that they measured average cost (R. Vol. IV, TR 21), which has nothing to do with the engineering judgments in FPL's methodology.[13]

Appellees refer to Mr. Whiting's experience in negotiating FPL's purchase power contracts, pointing out that they contain O&M components, but neglect to state that these O&M components are simply total O&M costs taken directly from FPL's accounting records and not variable O&M (R. Vol. IV, TR 38).[14] Mr. Whiting's contract negotiations provide no background upon which to base an expert opinion to determine whether EACs contain variable O&M costs, i.e., O&M costs that vary with output.

The Commission's references to pages 40 and 41 of the transcript of hearing are irrelevant (Answer Brief at p. 16). Mr. Whiting's discussion centered on the effects of QF energy on FPL's system dispatch, which was an assumption ruled on by the Commission in Issue No. 5, not an "engineering judgement."

Mr. Whiting's role as a fuel adjustment witness contributes nothing to his expertise to render opinion on the engineering judgments in Attachment IV. The

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[13]There is no evidence in the record to support the Commission's assertion that Mr. Whiting supervised, reviewed, and consulted with FPL's engineers (Answer Brief at 14). At most, the record shows that Mr. Whiting discussed the engineering judgments with FPL's engineers after-the-fact (R. Vol. IV, TR 96).

[14](FPL at p.25; Commission at 6).

fuel adjustment involves fuel cost, while FPL's study involved nonfuel cost (R. Vol. IV, TR 16).[15]

Mr. Whiting's responsibility for the economic dispatch of FPL's generating units provides no background for his opinions. Mr. Whiting's duties in that area predated the development of Attachment IV. It was not until Attachment IV was developed that FPL employed engineering judgement to identify incremental hourly O&M costs (R. Vol. IV, TR 22).

The Appellees refer to Mr. Whiting's knowledge of "operations" as if it were equivalent to the operation of FPL's generation plants. "Operations," as that term is used in management, is the day-to-day management of a business. It does not include analysis of the internal operation or maintenance of FPL's generation plants. That function is left to FPL's engineers.

3. Mr. Whiting's "opinions" were hearsay repetitions of the opinions of FPL's engineers.

The record shows that Mr. Whiting was actually reciting the opinions of FPL's engineers as his own. He was asked questions about exactly who's opinion he was expressing. He stated that he had discussed all of the engineer's judgments with them and agreed with them (R. Vol. IV, TR 76). When asked whether he was testifying of his own knowledge and background, he stated that he was relying on the engineers' judgment and, most importantly, that their judgment was where he got his knowledge and background (R. Vol. IV, TR 77).[16]

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[15]The Commission's reference to transcript page 13 shows no supervisory authority in any area involving the analysis of nonfuel costs that vary with load.

[16]FPL claims that, in giving his opinion, Mr. Whiting only partially relied on FPL's engineers. (Answer Brief at 35) It is clear from the record, however, that he relied entirely on their judgments. Mr. Whiting did not refer to any of his own education, knowledge or experience in "operations" as contributing to his "knowledge and background." Instead, he referred exclusively to the engineers' judgments. (Cont. on next page)

Mr. Whiting admitted that he lacked the direct, personal experience necessary to make all of the engineering judgments (R. Vol. IV, TR 96). He stated that the engineers told him what events do within the EACs and that those were not judgments that he had made but were made by FPL's engineers and reported to him (R. Vol. IV, TR 96-97).[17]

4. Mr. Whiting's testimony and exhibit would not be admissable in a civil action.

Mr. Whiting cannot rely on the judgments of FPL's engineers in giving his opinion. Section 90.704, Florida Statutes, does not permit an expert witness in one field to testify as to expert opinion given to him by another expert. Bunyak v. Clyde J. Yancy & Sons Dairy, Inc., 438 So.2d 891 (Fla. 2nd DCA 1985), rev. den., 447 So.2d 885 (1984). Mr. Whiting appeared to express his own opinions, however, they were simply the opinions of others. His "knowledge and background" to render an opinion was gained simply by discussing the engineer's opinions with them.[18] His testimony would not be admissable in a civil action.

The engineers' notes in Attachment IV would be inadmissable in a civil action. Bunyak v. Clyde Yancey & Sons Dairy, Inc., supra. Likewise, Attachment IV contains no "data" that can reasonably be relied upon by an

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Q. Based on your own knowledge and experience, 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 66, 67).

[17]FPL contends that this last exchange simply showed Mr. Whiting in his role as "chronicler" (Answer Brief at 32). However, this distinction is irrelevant, since Mr. Whiting stated that he obtained his knowledge and background "from their judgment."

[18]Section 90.704, Florida Statutes, does not permit an otherwise unqualified witness to give opinion in support of expert judgments simply by discussing them with the experts who made them. His opinion remains hearsay.

expert to support an opinion that FPL's selection of EAC's was proper. The only "data" in Attachment IV concerning the selection of the EACs are the summary "notes" of FPL's engineers. The record shows that FPL's methodology in Attachment IV has never been used by any other utility and had never been used before by FPL. FPL's methodology is an incremental cost analysis, while other utilities use average cost methodologies (R. Vol. IV, TR 34, 35). The key to FPL's incremental cost analysis is the engineering analysis that selected the EACs (R. Vol. IV, TR 23). The Commission stated in its Final Order, "the engineering judgments were required due to a lack of truly incremental O&M data" (at p.9). Where the expert's actual opinion parallels that of an outside witness, then the outside witness should be produced to testify directly. Sikes v. Seaboard Coastline Railroad Company, 429 So.2d 1216 (Fla. 1st DCA), rev. den., 397 So.2d 778 (Fla. 1981).

The summary notes of FPL's engineers in Attachment IV are cryptic statements which provide no explanation of how the judgments were arrived at. Without independent explanation, Attachment IV cannot be relied upon by an expert to show that FPL's engineer's acted reasonably in selecting the EACs.[19]

5. There is No Third Source of Evidence.

There are only two sources of evidence on the selection of EACs by FPL's engineers: Mr. Whiting's testimony and his exhibit. FPL's argument that the methodologies of other utilities support FPL's decision to reject 159 out of 162 EACs is an attempt to tie together a smattering of unrelated evidence, supplemented by a hearsay exhibit and testimony by counsel in FPL's brief.

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[19]Similarly, even if Attachment IV is received as direct evidence for lack of a contemporaneous objection, it cannot stand as competent substantial evidence that the engineering judgments were correct. Duval Utility Company v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980).

The record does not show how or why Gulf Power Company or Florida Power Corporation selected the costs that they did, nor does it show how those costs compare to FPL's EACs.[20] No witness ever testified that there were similarities between FPL's and other methodologies that supported FPL's methodology. In fact, FPL's witnesses went to great lengths to emphasize the differences between the methodologies. Likewise, FPL made no mention of those methodologies as supporting its selection of EACs in its post-hearing brief. The proposition was simply never presented to the Commission. In presenting this "evidence" in its Answer Brief, FPL is asking this Court to take on the role of fact-finder. The Commission's Final Order makes no mention of the proposition advanced by FPL and, most importantly for this Court, the Commission makes no reference to this "evidence" in its Answer Brief.

CONCLUSION

The question before this Court was properly preserved for review. The Commission's approval of FPL's methodology is not supported by competent substantial evidence and must be reversed.

Dated: September 23, 1987

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[20]Exhibit 16 is simply a hearsay representation of other utility's methodologies. Moreover, Exhibit 16 shows that Gulf and Florida Power Corporation used their main FERC accounts for their methodologies, not EACs as FPL had done (R. Vol. V, Exh. No. 16). FERC main accounts are organized completely differently from EACs and FPL provided no analysis as to how its EACs related to the main FERC accounts (R. Vol. IV, TR 91).