IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER & LIGHT COMPANY Appellant vs. FLORIDA PUBLIC SERVICE COMMISSION Appellee.	)	CASE NO. 79,338

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, The Public Service Commission, is referred to in this brief as the "Commission." Appellant, Florida Power and Light Company is referred to as "FPL" or the "utility".

References to the record on appeal are designated "R. ____", except that references to the transcripts of the May 20, 22 and 23, 1991 hearing contained in Volumes VI-X of the record are designated "T. __". Exhibits contained in Volume X are referenced "Ex.__". Operators of cogeneration facilities are referred to as "QF's" (Qualifying Facilities).

STATEMENT OF THE CASE AND FACTS

The Commission generally accepts the statement of the case and the facts presented by FPL. Any additional facts on which the Commission relies are limited and are incorporated in the text of the argument.

SUMMARY OF THE ARGUMENT

FPL has no standing to appeal the Commission's orders eliminating the regulatory out clause. The decision was wholly favorable to FPL. The Commission has in effect guaranteed FPL's recovery of payments made to QFs over the life of the standard offer contract. The only condition placed on that guarantee was that the original determination of prudence of the contract must not have been induced by perjury, fraud, withholding of key information or other act of bad faith. FPL has not been aggrieved by the decision and cannot maintain this appeal.

FPL requests this Court to render a purely advisory opinion. The Commission has taken no action giving rise to a controversy between it and FPL. The existence of a controversy at some future date is purely hypothetical. This Court should not indulge FPL's request for an advisory opinion. This Court and others have consistently rejected such speculative appeals.

Even if FPL's appeal is properly before this Court, its argument on the regulatory out clause is without merit. The Commission has the authority under Section 366.06 and Section 366.81, Florida Statutes, to make its determination of prudence non-reviewable for the life of the standard offer contract. The Commission has the authority to create, modify or eliminate contract rights of public utilities where it is in the public interest to do so. That authority encompasses the power to mandate that the contract term will be enforceable for the life of the

contract and not subject to further review absent extraordinary circumstances.

The Commission decision on the regulatory out clause is entirely consistent with the law of administrative finality. The Commission does not assert that its determination of prudence will be binding simply because it cannot revisit its orders after they have passed out of its control and become final. Rather, the Commission has acted affirmatively in this case. It does not argue that its standard offer contract approval will remain in effect by default. The only application of the law of administrative finality to this case is that it further limits the Commission's ability to revisit its orders, even if it wanted to.

FPL attempts to present an argument to this Court on which it presumably cannot lose. If the Court affirms the Commission's order, FPL has a judicially approved guarantee that payments to QFs will be considered prudent over the life of the contract, absent extraordinary circumstances. If the Commission is overturned and the regulatory out clause reinstated, FPL will be in the same position as before. It will be able to reduce payments or re-negotiate the contract, if some regulatory action threatens recovery of the payments to QFs. Clearly, FPL is seeking a gratuitous pronouncement by this Court, which would shore up its recovery of payments to the QFs, whatever happens.

As a result of changes in the Commission's cogeneration rules, standard offer contracts were approved on an individual basis for

investor-owned utilities. Specific issues were raised concerning the various components of the contracts, and the utilities, including FPL, and intervenors were allowed to present testimony and written evidence. The three other major utilities stipulated that a $1,000,000 liability insurance requirement was a reasonable amount to include in the standard interconnection agreement. The $1,000,000 requirement is consistent with the guidelines of Rule 25-17.087(6)(c). That provision requires at least $300,000 public liability insurance per occurrence, and $1,000,000 per occurrence complies with that requirement. Moreover, this requirement is imposed on the QF, not the utility. FPL has no standing to complain that the QF's are required to provide $1,000,000 of insurance per occurrence.

The record showed that FPL had used the insurance provision of the rule to require coverage ranging from $2,000,000 to $30,000,000. The insurance provisions were apparently applied on an inconsistent basis and heavily favored FPL's interests. The Commission correctly found that, based on the evidence before it, FPL's discretion in this matter should be preempted. The Commission's decision is consistent with its authority to approve specific provisions of the standard offer implementing the guidelines set out in the cogeneration rules. Any claim of inconsistency between the Commission's order and the rule is purely superficial and does not rise to the level of violation of the Administrative Procedure Act. The Commission has carried out its

statutory mandate to approve a standard offer contract for FPL which balances the equities between the utility and the QFs. FPL's appeal is procedurally and substantively insufficient. It has not overcome the presumption of validity attached to the Commission's orders, and they should be affirmed.

ARGUMENT

I. THE COMMISSION'S FINDING THAT THE REGULATORY OUT CLAUSE WAS AN UNNECESSARY PROVISION OF THE STANDARD OFFER IS NOT A DECISION APPEALABLE BY FPL.

A. The Commission's decision is not adverse to the interest of FPL.

It is axiomatic that a party may not take an appeal from a decision entered in his favor. North Shore Bank v. Town of Surfside, 72 So.2d 659 (Fla. 1954). A party must be able to demonstrate that he is somehow aggrieved by the decision, otherwise the appeal should be dismissed. General Development Utilities v. Florida Public Service Commission, Division of Administrative Hearings, 385 So.2d 1050 (Fla. 1st DCA 1980). FPL has not demonstrated and cannot demonstrate to this court that it is aggrieved by the Commission's decision finding the regulatory out clause unnecessary.

FPL favored the regulatory out clause because it shifted the risk of non-recovery of payments from the utility to the QF. If for some reason the Commission did not allow full recovery of the payments made to QFs, the contract allowed the utility the option of reducing the payments or renegotiating the contract to serve the interest of the shareholders. The QF had the risk of not being paid the full amount specified in the standard offer contract. T. 314-315.

The Commission's decision did not in any way shift that risk of non-recovery back to FPL and its shareholders. On the contrary, the Commission went to some length to provide assurances to the

utilities that that would not be the case. Order No. 24989 specifically stated that approval of the standard offer contract constituted a finding that payments to QFs were a prudent expenditure by the utility. The Commission declared that, once its order had become final, it would not revisit that determination of prudence, absent some finding of "perjury, fraud or the intentional withholding of key information". Order No. 24989 at 71. The Commission's decision guaranteeing recovery of payments over the life of the standard offer contract was wholly favorable to FPL. The utility has no basis to take an appeal of the Commission's decision finding the regulatory out clause unnecessary.

B. This is no controversy ripe for decision in this case.

The Commission has issued a statement interpreting its regulatory obligations and the extent of its authority to make its determination of prudence non-reviewable for the life of the standard offer contract. Any controversy that may arise out of this decision will become ripe for decision when an individual contract is disputed. The situation presented to this Court is similar to that presented to the court in Sun Oil Company v. Federal Power Commission, 304 F.2d 293 (5th Cir. 1962). In that case, the Federal Power Commission (FPC) had issued two orders amending its regulations. Specifically, the orders had approved rule provisions which stated that, in contracts for the sale of natural gas, any provision for a change in price would be invalid unless it appeared on the FPC's enumerated list of acceptable

provisions. Sun Oil asked for rehearing, and the FPC denied the request. Sun Oil appealed, claiming that the orders were beyond the authority of the FPC and interfered with petitioners' constitutional rights.

The court determined that Commission's orders did not "adjudge rights or obligations nor direct the taking or refraining from any particular action" and were, therefore, not reviewable. Id. at 294. The court also found that a reviewable controversy could only arise, if Sun Oil sought to change prices pursuant to particular contract provisions. The court went on to conclude:

> Until the Commission, in a proceeding before it, has entered an order or made a decision applying or enforcing the Regulation so as to place Sun in a position where it is required to do or refrain from taking some action, or is presently to be deprived of property or of a legal right, or some relationship or status is to be changed to its detriment, Sun will not be aggrieved within the meaning of the [Federal Power] Act. Id. at 294-295.

The court refused to answer Sun's questions about interference with contract and the authority of the Commission. It concluded that there was no reason to answer hypothetical inquiries and dismissed the case for lack of jurisdiction. Id. at 295.

This Court should reach the same conclusion as the court in Sun Oil. At this point, FPL is free to go forth and enter into standard offer contracts with small QFs and solid waste facilities with the assurance that the Commission will allow recovery of the payments over the life of the contracts. Nothing has occurred which in any way challenges or negates that assurance. Any claims

FPL has of being aggrieved by the Commission's order are purely hypothetical at this point. At best, its arguments on the regulatory out clause provide an interesting academic discussion of the case law on the finality of Commission's orders.

Only if the Commission takes some action interfering with FPL's recovery of payments to QFs will there be a controversy which can be decided by this Court. Moreover, the Court should not be mislead, as FPL's arguments suggest, that the utility would be totally without recourse. Even if the Commission at some future date, for whatever reason, decided to disallow some recovery of payments to QFs, there is no certainty that it would not fashion some other remedy for the utility or apportion costs in some way to keep the utility whole.

Finally, one is left to wonder what comfort FPL takes in the regulatory out clause that it does not find in the Commission's order guaranteeing recovery of payments made under the standard offer contract. The utility bemoans the uncertainty of future regulatory actions which would override the provisions of the standard offer contract. Yet, if that uncertainty is unsettling, so should be the inclusion of a regulatory out provision in the contract. Theoretically, the Commission could just as easily, at some future date, decree that regulatory out provisions would be of no further force and effect, leaving FPL to absorb the risk of reduced recovery of payments to QFs. This points out the utterly

speculative nature of this whole controversy, as FPL has presented it to this Court.

FPL asks this Court to enter an advisory opinion on the scope of the Commission's authority to regulate payments to QFs under the standard offer contract. Such requests for advisory rulings are improper and will not be granted. North Shore Bank, Supra. FPL's appeal of the provisions of the Commission's order relating to the regulatory out clause should be summarily dismissed.

II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN FINDING THAT A REGULATORY OUT CLAUSE WAS NO LONGER NEEDED IN THE STANDARD OFFER CONTRACT.

A. The Commission has the authority to approve the prudence of payments made under the standard offer for the life of the contract.

Even if FPL has a basis to appeal the Commission's order, it has failed to establish any abuse of discretion or error on the Commission's part which would warrant reversal. In fact, FPL has failed completely to address the only relevant issue in the case: Whether the Commission has the authority to affirmatively guarantee recovery of payments of the standard offer contract, based on an initial finding of prudence.

The Commission does not dispute that it has authority to modify contract provisions in the public interest consistent with the holdings of H. Miller and Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979) and other cases. (Brief of Appellant, pp.16-18). However, the Commission further asserts that it has the authority, where it finds it to be in the public interest, to declare its determination of the prudence of payments to QFs binding and non-reviewable for the life of the standard offer contract.

The Commission has the express authority to allow utilities to recover reasonable and prudent expenditures under Section 366.06, Florida Statutes. All parties to the annual planning hearing, including FPL, agreed that the Commission's approval of the terms and conditions of a utility standard offer contract and tariff represented a finding that the payments to be made under the

contracts were reasonable and prudent expenditures. Order No. 24989 at 71. It is also clear that the Commission has a specific directive to encourage cogeneration in Florida under Section 366.81, Florida Statutes. One way of doing that is to eliminate the regulatory out clause, which the Commission found tends to hamper financing of cogeneration projects. Id. It defies logic to argue that the Commission, with the acknowledged power to create, modify or destroy contract rights of public utilities in the public interest, has no authority to declare its determination of prudence of the contract to be final and irrevocable for the life of the contract.

The Commission has found it in the public interest to sanction recovery of payments made to QFs for the life of the standard offer contract. A utility could hardly ask for a better deal than that. It is fair to the utility and the stockholders because the utility is required to purchase the QF's power, and it is fair to the QF because it provides the financial stability needed for successful operation.[1]

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[1] A number of other state commissions have found it appropriate do away with the regulatory out clause. Re Hawaiian Electric Company, Inc., 108 PUR4th 533 (1989) is an illustrative case. The Hawaii commission explained its rationale as follows:

> There is something to be said for requiring certainty and finality in the Commission's decision. Reasonable certainty and finality in the Commission's findings and conclusions are important to a utility in the utility's planning for the future. This compels us to hold that we ought not re-evaluate at a later date any decision we might make that HECO reasonably and prudently exercised its judgment in opting for a power purchase contract to

B. The Commission's decision is consistent with the law of administrative finality.

All of the cases cited by FPL in its brief concern instances in which the Commission has sought to change its prior orders. They do not address orders which the Commission has made effective and not subject to change for a specified period of time. The law of administrative finality as discussed by FPL only relates to continuing viability of the Commission's orders in instances where it finds reason to change an order after it has become final. Nothing in these cases indicates that the Commission cannot declare its finding of prudence final, absent extraordinary circumstances.

The Commission acknowledges that it has power to revisit an order which has been entered based on perjury, fraud or intentional withholding of key information. Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979). That is why it conditioned its declaration on the continued validity of standard offer contract on the absence of extraordinary circumstances. Order No. 24989 at 71. The Commission also acknowledges that, in a proper instance, it can correct or amend orders still under its control or where the amendment or correction is embraced in the testimony taken at a

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> meet its generation needs and that the power purchase contract is reasonable, except where our determination as to reasonableness is procured through fraud or deception or through conscious or deliberate misrepresentation of data . . . . Id. at 543.

As the HECO case notes, other states, including Pennsylvania, Oklahoma, Connecticut and New Jersey have taken similar action to limit the reviewability of an initial determination of prudence for cogeneration contracts. Id. at 544.

previous hearing. Alterman Transport Line v. Yarborough, 267 So.2d 34 (Fla. 1973); Reedy Creek Utilities Company v. Florida Public Service Commission, 418 So.2d (Fla. 1982).

The Commission relies on this Court's finding in Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679, 681 that "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to change or modification". The doctrine of administrative finality is one which serves the public interest by protecting persons, such as the utilities and QFs, who rely on the Commission's decisions. Reedy Creek, 418 So.2d 253. However, the Commission has not, as FPL would have it, sought to establish the continuing validity of its approval of the recovery of QF payments by its inability to act. On the contrary, the Commission asserts that it has the authority to provide one-time, non-reviewable approval of the prudence of payments made under a standard offer contract. Administrative finality does not cause the Commission's approval to be effective, but administrative finality would bar the Commission's revisiting its approval of the contract, absent some extraordinary circumstances.

In the final analysis, the Commission's authority to enter an order declaring the regulatory out clause unnecessary on the grounds stated has not even been challenged, much less refuted.

III. THE COMMISSION'S FINDING THAT $1,000,000 WAS THE APPROPRIATE AMOUNT FOR FPL'S INTERCONNECTION INSURANCE REQUIREMENT DOES NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

A. The $1,000,000 insurance requirement is consistent with Rule 25-17.087(6)(c), Florida Administrative Code.

Rule 25-17.087(6)(c), F.A.C. requires QFs to provide public liability insurance for interconnection facilities "in an amount not less than $300,000 for each occurrence". It is clear that the rule's purpose is to establish a floor amount of liability insurance for the interconnection agreement, below which the QF may not go. A $1,000,000 insurance requirement is within the accepted range required by the rule, $300,000 and up.

Not only is the $1,000,000 insurance requirement consistent with the rule, but FPL has no standing to complain of its imposition. The $1,000,000 insurance requirement does not place a burden on FPL. It places it on the QFs, and they, if anyone, would have standing to object. They have not done so.

B. The Commission's finding that $1,000,000 was the appropriate amount of liability insurance for FPL to require of QFs for interconnection was reasonable, based on the evidence presented.

FPL complains that it no longer has the discretion to require as much insurance as it wants under the standard offer contract and interconnection agreement. Yet, three of the major investor-owned electric utilities, Florida Power Corporation (FPC), Gulf Power Company (Gulf) and Tampa Electric Company (TECO), believed that a $1,000,000 maximum insurance provision was reasonable, and

incorporated it in their interconnection agreements. Order No. 24989 at 28; 59; 68-69. Only FPL made any objection to that provision.

The Commission was very concerned with FPL's insurance practices, and with good reason. The evidence showed that FPL had required interconnecting cogenerators to purchase from $2,000,000 to $30,000,000 in liability insurance. Ex. 25. Within that range, there was no discernable pattern for the amount of insurance required. T. 513-514. For example, FPL required $2,000,000 in insurance for a 121 MW facility and $10,000,000 for a 17 MW facility. Similarly, the utility required $20,000,000 in insurance for a 32 MW facility and an equal amount for a 330 MW project. For U.S. Sugar's facility it required a whopping $30,000,000, one hundred times the minimum amount. Ex. 25; R. 56. The lack of a pattern in insurance requirements and the high amounts led Commissioner Gunter to observe that FPL's practices "almost looks punitive". T. 514.

When confronted with the inconsistencies and lack of established criteria for setting insurance amounts FPL agreed to list factors that it would consider in its interconnection agreement. T. 502; 514; Ex. 24. Moreover, FPL conceded that, under its agreement, a QF seeking interconnection had limited options on the liability insurance issue. The QF could, on the one hand, sign the interconnection agreement without knowing how much insurance FPL would require and wait to be informed of the amount

at some future date. On the other hand, the QF could attempt to negotiate the amount of the insurance pending signing of the standard offer. The latter process put the QF at risk that it might not be able to sign a standard offer agreement before FPL had reached its subscription limit for cogenerator power. Thus, the QF could be left without any possibility of obtaining a standard offer contract. T. 353-354.

The record further showed that FPL had a unique provision in its standard offer and interconnection agreement which required that all insurance for the interconnection and the generating facilities be under one policy. T. 505-511. Moreover, the insurance had to cover liability for negligent acts not only of the cogenerator but of FPL as well. T. 505. This was the case, notwithstanding that FPL required that it design, build, and maintain the interconnection facilities. T. 504-505. The only explanation for this burdensome requirement was that it was convenient for FPL to have one policy in case multiple suits were brought. T. 505-506.

The evidence presented to the Commission gave rise to serious concerns about FPL's administration of the liability insurance requirements of Rule 25-17.087(6)(c). The Commission could reasonably conclude on the evidence before it that FPL needed to be brought into line with the other major utilities, FPC, Gulf, and TECO. The Commission correctly concluded that, for purposes of this standard offer contract and interconnection agreement, FPL

should be limited to requiring $1,000,000 in liability insurance. It also correctly concluded that the policy of the other utilities of allowing any additional insurance to be acquired at the discretion of the QF was reasonable and should be followed by FPL.

The cogeneration rules provide guidelines to the utilities for the development of standard offer contracts. Rule 25-17.087(2), F.A.C. Obviously, as FPL's case showed, the administration of those rules by the utilities can vary and in some cases lead to undesirable results. The issue of the appropriateness of FPL's interconnection liability insurance was specifically raised in the Annual Planning Hearing. R. 176. FPL, the other major utilities and intervenors had an opportunity to address the issue and put on evidence to support the implementation of this provision of the rule. The Commission based its decision on the evidence before it in requiring FPL to bring its insurance requirements in line with the other utilities. The decision is applicable to this particular standard offer contract and was based on a fair opportunity to be heard for FPL and all parties concerned. The Commission has a duty under Section 366.81 not only to see that cogenerators are treated fairly but that cogeneration is encouraged. The Commission acted within its discretion in placing specific limits on the administration of the insurance requirement of the rule. Any perceived inconsistency with the result fashioned by Commission for FPL and the literal language of the rule is purely form over

substance. As this Court recognized in C. F. Industries, Inc. v. Nichols, 536 So.2d 234 (Fla. 1988), the primary duty of the Commission is to see that its statutory mandate is carried out in a reasonable manner. Notwithstanding that Rule 25-17.087(6)(c) allows the utility to determine how much insurance it will require over the minimum, the Commission would have been derelict in its duty had it not taken FPL to task on the insurance provision and corrected an apparently an intolerable situation.

C. FPL has voluntarily opted to act in a manner inconsistent with Rule 25-17.087(6)(c).

FPL is unique in that it requires the QF to procure liability insurance for the generation facilities and interconnection facilities under one policy. Normally, two policies are obtained and the insurance amounts determined separately. T. 505-508. Since FPL has insisted that there be only one policy it has no right to complain about the applicability of the rule provisions. It has, in effect, opted out of the rule's specific application. The Commission has in no way impaired FPL's ability to negotiate more insurance for a total coverage package. The cogeneration rules do not address the issue of what amount of insurance should be required for coverage of the generation facilities, or what amount would be appropriate for a total coverage policy. FPL simply no longer has a free hand to require an unlimited amount under the interconnection agreement.

CONCLUSION

FPL has no right to take an appeal of the Commission's decision eliminating the regulatory out clause. That portion of the appeal should be summarily dismissed. If the Court nevertheless finds that the issue is properly before it, the Commission's orders should be affirmed in all respects. The Commission's interpretation of its statutes and authority is entitled to great weight, and its orders carry a presumption of validity. PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988); Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983) FPL has made no argument to show that the Commission's action is clearly erroneous and has not overcome the presumption of validity of Commission's orders in this case.

Respectfully Submitted,

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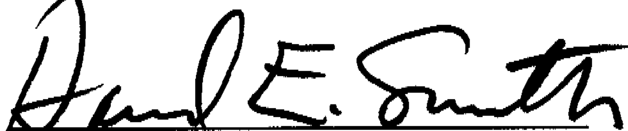

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I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission have been furnished by U. S. Mail to the following parties on this 11th day of May, 1992.

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