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IN THE SUPREME COURT OF FLORIDA

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

ANSWER BRIEF OF
AIR PRODUCTS AND CHEMCIALS, INC.
IN SUPPORT OF APPELLEE

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission is referred to as the "FPSC" or the "Commission". Appellant, Florida Power & Light Company os referre to as "FPL". Air Products and Chemicals, Inc., a party to the proceeding below, is referred to as "Air Products".

References to the record on appeal are designated by volume and page number (Vol. ______ at ____), except for references to the transcripts of the May 20, 22 and 23, 1991 hearing contained in Voolumes VI-X of the reocrd which are designated "T. ___". Exhibits contained in Volume X are referenced as "Exhibit ___".

STATEMENT OF THE CASE AND FACTS

Background

Pursuant to Section 366.051, F.S., the Florida Public Service Commission (FSPC, Commission) is required to establish guidelines for the purchase of power or energy by public utilities from cogenerators or small power producers and may establish the rates at which a public utility must purchase power or energy from a these types of facilities. A cogeneration facility is equipment used to produce electric energy and useful forms of thermal energy (such as heat or steam) used for industrial, commercial, heating or cooling purposes through the sequential use of energy. 18 C.F.R. § 292.202(c). A small power production facility is equipment used to produce electricity which has as its primary fuel biomass, waste or another renewable resource. 16 U.S.C. §796 (17)(A) (1985).

Both the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §§ 824 a-3 (1985) and the Federal Energy Regulatory Commission (FERC) rules which implement it classify certain types of cogenerators and small power producers as "qualifying facilities" (QFs).[1] It is these types of cogenerators

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[1] A qualifying small power producer does not exceed 80 MW; has at least 50% of its fuel as biomass, waste or other renewable resource and is not owned by a person primarily engaged in the generation or sale of electricity. i.e., has less than 50% of its equity owned by a utility, utility holding company or a subsidiary of either. 18 C.F.R.§ 292.203(a).

A cogeneration facility is a qualifying facility if: the useful thermal energy output of a topping cycle facility is 5% of the facility's total energy output per year or more; and the useful power output plus half of the useful thermal energy output of a topping cycle cogeneration facility built after March 13, 1980, with any energy input of natural gas or oil is greater than 42.5% or 45% if the useful thermal energy output is less than 15% of the and small power producers to which Section 366.051, F.S., applies. In accord with Section 366.051, the FPSC has promulgated Rules 25-17.080-091, F.A.C, hereinafter referred to as the Cogeneration Rules. These rules incorporate the definitions of cogenerator, small power producer and qualifying facility set forth in FERC's Rules 18 C.F.R. §§ 292.101 through 292.207[2] and set forth the manner in which QF power is purchased in Florida.

Pursuant to the Cogeneration Rules, there are two ways to purchase firm energy and capacity from a QF: a standard offer contract or a negotiated contract. Rule 25-17.0832, F.A.C. A negotiated contract has no set terms and conditions and is submitted to the FPSC for approval of cost recovery from a utility's ratepayers after both parties have executed the contract.[3] Orders which approve or reject negotiated contracts are issued as Proposed Agency Actions. Thus negotiated contracts could become the subject of an evidentiary hearing should a protest and request for hearing be filed by a substantially affected person but seldom, if ever, actually do.

A standard offer contract has terms and conditions which have previously been approved by the Commission as the result of an

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total energy output of the facility; and the useful power output of a bottoming cycle facility built after March 13, 1980, with any energy input as supplementary firing of natural gas or oil is not less than 45% of the natural gas or oil input on an annual basis; and the facility is not owned by a person primarily engaged in the generation or sale of electricity.

[2] Rule 25-17.080(1), F.A.C.

[3] Rule 25-17.0832(1) and (2), F.A.C.

evidentiary Planning Hearing[4]. Orders which issue approving standard offer contracts are final agency action. Standard offer contracts are considered to be permanent offers and can only be rejected if, within 60 days of its tender, the utility petitions the Commission and alleges that its subscription limit has been exceeded, i.e., it no longer needs the capacity, or has material reason to believe that the QF is not financially or technically viable. If accepted by the utility, payments made pursuant to standard offer contracts are recoverable by the utility through the Fuel and Purchased Power Cost Recovery Clause (Fuel Adjustment Clause) without further action by the FPSC. Rule 25-17.0832(8), F.A.C. Standard offer contracts are only available to solid waste facilities as defined by Rule 25-17.091, F.A.C., or qualifying facilities less than 75 MW. Rule 25-17.032(3)(a), F.A.C.

The subject of this appeal by Florida Power and Light Company (FPL) are two terms and conditions which were either excluded, in the case of the regulatory out provision, or included, in the case of the million dollar limitation on QF liability insurance, from FPL's most recently approved standard offer contract.

The genesis of this contract was Order No. 23625[5], issued on October 16, 1990, which required each investor-owned utility to file its most recent ten-year generation expansion plan, a standard

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[4] Rule 25-17.0833, F.A.C.

[5] <u>In re: Proposed revisions to Rules 25-17.082, 25-17.0825, 25-17.083, 25-17.0831, 25-17.088, 15-17.0882, 25-17.091 and the creation of Rules 25-17.0832, 25-17.0833, 25-17.0834, and 25-17.089, F.A.C., Cogeneration Rules</u>, 90 F.P.S.C. 10:412.

interconnection agreement and one or more standard offer contracts designed to avoid the construction of capacity identified in its plan. FPL filed its standard offer contract on October 30, 1990 and that contract along with the associated COG-2 tariff implementing it, were suspended pending an evidentiary hearing by Order No. 24014[6], issued on January 23, 1991. The evidentiary hearing was held before all five Commissioners on May 20, 22, and 23, 1991.

Regulatory out provision

FPL's proposed standard offer contract contained the following language:

> **12.5 Renegotiations Due to Regulatory Changes**
>
> Notwithstanding anything in this Contract to the contrary, should FPL at any time during the term of this Contract fail to obtain or be denied the FPSC's authorization, or the authorization of any other regulatory or governmental body which now has or in the future may have jurisdiction over FPL's rates and charges, to recover from its customers all of the payments required to be made to the QF under the terms of this Contract or any subsequent amendment to this Contract, the Parties agree that, at FPL's option, they shall renegotiate this Contract, or any applicable amendment. If FPL exercises such option to renegotiate, FPL shall not be required to make such payments to the extent that FPL's authorization to recover them from its customers is not obtained or is denied. FPL's exercise of its option to renegotiate shall not relieve the QF of its obligation to repay the balance in the Capacity Account. It is the intent of the Parties that FPL's payment obligations under this Contract or any

[6] In re: Planning hearings on load forecasts, generation expansion plans, and cogeneration prices for Florida's electric utilities, 91 F.P.S.C. 1:454.

> <u>amendment hereto are conditioned upon FPL being fully reimbursed for such payments through the Fuel and Purchased Power Cost Recovery Clause or other authorized rates and charges</u>. Any amounts initially recovered by FPL from its ratepayers but for which recovery is subsequently disallowed by the FPSC and charged back to FPL may be set off or credited against subsequent payments made by FPL for purchases from the QF, or alternatively, shall be repaid by the QF.

[Exhibit 18, Document 1 at 7; Emphasis added.]

The key aspect of this provision, and the one most thoroughly explored in the evidentiary hearing, was the fact that should FPL at some future date be denied cost recovery for payments made to cogenerators FPL could, at its sole discretion: terminate the contract, renegotiate the contract, or continue payment of the lower, allowed payments with no other changes in the terms of the contract. [T. 496-99]

By its very language, Section 12.5 can be applied both retroactively as well as prospectively. In addition, Section 12.5 does not indicate under what circumstances, if any, the clause could or would be invoked. Neither does this section prohibit FPL from petitioning the Commission or other regulatory body to disallow QF capacity payments. Finally, Section 12.5 acts as a cap for QF capacity payments; adjustments are always down, never up.

<u>Liability Insurance</u>

FPL's proposed standard offer contract and standard interconnection agreement contained the following language in Sections 12.4.2 and 10, respectively:

> **12.4.2** The policy in Section 12.4.1 [liability insurance] <u>shall have a minimum limit of</u>

$300,000, per occurrence, combined single limit, for bodily injury (including death) or property damage. A higher limit of insurance shall be provided if required by FPL. Provided,however, in the event that such insurance becomes totally unavailable or procurement becomes commercially impracticable, such unavailability shall not constitute an Event of Default under this Contract, but FPL and the QF shall enter into negotiations to develop substitute protection for FPL Entities which FPL, in its reasonable judgment, deems adequate. Any premium assessment or deductible shall be for the account of the QF and not FPL Entities.

[Exhibit 18, Document 1 of Rebuttal Testimony of G.R. Cepero; Vol. X; Emphasis added.]

Liability insurance premiums for QF interconnections are addressed by Rule 25-17.087(6)(c), F.A.C. which states, in relevant part:

(c) Insurance. The qualifying facility shall deliver to the utility, at least fifteen days prior to the start of any interconnection work, a certificate of insurance certifying the qualifying facility's coverage under a liability insurance policy . . . which policy shall contain a broad form contractual endorsement specifically covering the liabilities accepted under this agreement arising out of the interconnection to the qualifying facility, or caused by operation of any of the qualifying facility's equipment or by the qualifying facility's failure to maintain the qualifying facility's equipment in satisfactory and safe operating condition.

The policy providing such coverage shall provide public liability insurance, including property damage, in an amount not less than $300,000 for each occurrence; more insurance may be required as deemed necessary by the utility.

[Emphasis added.]

Rule 25-17.087(6)(b), F.A.C., covers liabilities which result from the operation of the qualifying facility or utility facilities. This rule states as follows:

> (b) Responsibility and Liability. <u>The utility and the qualifying facility shall each be responsible for its own facilities</u>. The <u>utility and the qualifying facility shall each be responsible for</u> ensuring adequate safeguards for other utility customers, utility and qualifying facility personnel and equipment, and <u>for the protection of its own generating system</u>. The <u>utility and the qualifying facility shall each indemnify and save the other harmless from any and all claims, demands, costs, or expense for loss, damage, or injury to persons or property of the other caused by, arising out of, or resulting from</u>:
>
> 1. <u>Any act or omission by a party</u> or that party's contractors, agents, servants and employees <u>in connection with the installation or operation of that party's generation system</u> or the operation thereof in connection with the other party's system;
> 2. <u>Any defect in, failure of, or fault related to a party's generation system</u>;
> 3. The <u>negligence of a party or negligence of that party's contractors, agents, servants and employees</u>; or
> 4. <u>Any other event or act that is the result of, or proximately caused by, a party</u>.
>
> For the purposes of this subsection, the term party shall mean either utility or qualifying facility, as the case may be.
>
> [Emphasis added.]

At hearing, FPL took the position that there should only be one insurance policy covering any and all QF negligence associated with the operation of the QF and the interconnection. [T. 505-11; Exhibit 24] FPL also proposed that this policy cover the negligent acts of FPL employees and agents as well as those of the QF. [T. 505] FPL conceded that this requirement could be deemed burdensome for QFs,[7] but insisted that it was reasonable since it would aid in the timely collection of any claims made as the result of the operation of the facility or the interconnection. [T. 505-506]

Exhibit 25 lists the liability agreements between FPL and its QFs. The liability limits range from a low of $2 million for a 121 MW coal facility to a high of $30 million for a 15 MW facility which burns sugarcane waste as fuel. At hearing FPL submitted Exhibit 24 as an addition to Sections 12.4.2 and 10 of the standard offer contract and interconnection agreement. Exhibit 24 contains a list of factors by which FPL would establish insurance liability coverages on a case by case basis for QFs.

FPSC's ruling in Order No. 24989

Regulatory out

In Order No. 24989 the FPSC found that regulatory out provisions were "unnecessary surplusage" in standard offer contracts. [Vol. V at 976 (Order No. 24989 at 71)] The FPSC based this decision on several factors. First, that Commission approval of a standard offer contract constitutes a determination by the

[7] Sections 12.4.2 & 10 provides no limit no how much insurance FPL may require. [T. 1366] FPL indicated at hearing that it would take "a few weeks" for a QF to know how much insurance would be required. [T. 353] FPL also agreed that a QF had basically two options: sign a standard offer without knowing the amount of insurance FPL would require or wait to receive this information from FPL and risk getting shut out of FPL's standard offer. [T. 355]

FPSC that any payments made to a QF pursuant to that contract are reasonable and prudent as defined by Section 366.06, F.S. [Vol. V at 976 (Order No. 24989 at 71)] This conclusion was stipulated to by all parties to the docket. Second, that Commission approval of a standard offer contract evidences the FPSC's commitment to allow full cost-recovery for that contract since such contracts, as a rule, are binding on the utilities. [Vol. V. at 975-76 (Order No. 24989 at 70-1)] Third, that regulatory out provisions create a mistaken perception that revenues under a standard offer are not reliable when such is not the case. [Vol. V at 976 (Order No. 24989 at 71)] Fourth, that orders of administrative agencies must eventually pass out of the agency's control and become final, and, therefore, no longer subject to unilateral agency modification. [Vol. V at 977 (Order No. 24989 at 72)] The FPSC qualified its ability to modify orders which had passed through the administrative process as limited to orders which were not based on "fraud, collusion, deceit or mistake" or where the finding of contract prudence was not "induced by the intentional withholding of key information." [Id.; Vol.V at 976 (Order No. 24989 at 71-2)]

In its Motion for Clarification and Reconsideration of Order No. 24989, FPL raised, for the first time, the specter of "changed circumstances". These changed circumstances, according to FPL, could require the FPSC to alter the payments of a previously approved standard offer contract in order to serve the needs of a newly discovered "public interest." This, FPL argued, is consistent with the doctrine of administrative finality as well as the Commission's regulatory mandate. [Vol V at 982-84 (FPL's Motion for Clarification and Reconsideration at 3-5)] Therefore, FPL requested that the Commission clearly state that "changed circumstances" would not cause the FPSC to revisit its previous decision on cost recovery for standard offer contract payments. [Vol. V at 984 (FPL's Motion for Clarification and Reconsideration at 5)]

In Order No. 25569, issued on January 6, 1992, the Commission found that there was nothing which required clarification noting that FPL had precisely restated the Commission decision. [Vol. V at 1007 (Order No. 25569 at 1)] With regard to "changed circumstances" the Commission noted that it was bound to uphold the law and would comply with it. Vol. V. at 1008 (Order No. 25569 at 2)]

<u>Liability Insurance</u>

Based upon a review of Exhibits 24 and 25 and the record before it, the Commission required FPL to raise its minimum insurance requirement from $300,000 to $1,000,000 and to leave the amount of insurance over this minimum to the discretion of the QF. [Vol. V at 949-50 (Order No. 24989 at 44-45)]

SUMMARY OF ARGUMENT

<u>Regulatory out</u>

Section 366.81, F.S., gives the FPSC the legislative mandate to encourage the development of cost-effective cogeneration as a means of decreasing the state's dependence on petroleum products.

There is competent substantial evidence of record to support the FPSC's conclusion that regulatory out provisions create an arbitrary impediment to the development of otherwise viable, financable cogeneration projects. The record is also clear that where financing is found, the perceived increased risk of contracts with regulatory out provisions drives up the cost significantly. Under these uncontested facts, the removal of the regulatory out provision is a necessary step toward fulfilling that mandate. FPL has not questioned the existence of this mandate or the reasonableness of the removal of the clause as a means of implementing that mandate. Neither has FPL questioned the ability of the Commission under either state or federal law to make factual or policy decisions which affect avoided cost pricing or the payments made to QFs by investor-owned utilities for cogenerated power.

FPL is not harmed by the removal of this clause; without injury it has no grounds for appeal. FPL cannot be harmed by a Commission ruling which states unequivocally that it will be made completely whole for payments made pursuant to a previously approved standard offer contract. FPL is actually seeking from this body, as it did from the FPSC below, an advisory opinion on "changed circumstances" as generically applied to standard offer contracts. This is not a remedy this Court should provide.

Insurance Liability

The Commission has not violated its rules by setting a cap of $1,000,000 for liability insurance associated with the operation of

QF facilities and interconnections. Rule 25-17.087(6)(c), F.A.C., applies only to liabilities which arise from the operation of QF facilities and interconnections which affect utility operations "over the fence". Rule 25-17.087(6)(b), F.A.C., applies to liabilities arising from the operation of facilities and interconnections which do not affect utility operations. The utility's ability to set the amount of insurance for QF liability in excess of $300,000 is only found in Rule 25-17.087(6)(c), F.A.C. Rule 25-17.087(6)(b), F.A.C., sets neither minimum or maximum coverage limits for liabilities which affect only the QF. It is FPL which "prefers" to have one policy covering both types of QF operational liabilities. FPL cannot use this preference to attach to QF-contained liabilities the limits imposed upon QF liabilities which affect utility operations. Finally, there is competent substantial evidence in the record to support the Commission's conclusion that $1,000,000 worth of liability insurance is reasonable and that giving QFs the discretion to set limits over that amount of coverage is necessary to stop a historical pattern of abuse in this area.

ARGUMENT

I.

REMOVAL OF THE REGULATORY OUT CLAUSE IS NECESSARY TO IMPLEMENT FLORIDA LAW

A. Florida law mandates the encouragement of cost-effective cogeneration.

Section 366.81, F.S., the Legislative intent section of the

Florida Energy and Efficiency and Conservation Act (FEECA)[8], states in relevant part:

> The Legislature finds and declares that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Reduction in, and control of, the growth rates of electric consumption and of weather sensitive peak demand are of particular importance.
>
> . . .
>
> Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged.
>
> . . .
>
> The Legislature further finds and declares that ss. 366.80-366.85 and 403.519 are to be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; encouraging further development of cogeneration facilities; and conserving expensive resources, particularly petroleum fuels. [Emphasis added.]

This mandate to encourage cogeneration is reiterated in the intent language of Section 366.051, F.S., which states:

> Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer.
>
> . . .
>
> The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a

[8] Sections 366.80-366.85 and 403.519, F.S.

> public utility <u>must</u> purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission <u>shall</u> authorize a rate equal to the purchasing utility's full avoided costs.
>
> . . .
>
> <u>If the cogenerators or small power producer provides adequate security based on its financial stability</u>, and no costs in excess of full avoided costs are to be incurred by the electric utility over the term during which electricity is to be provided, <u>the commission shall authorize . . . the elimination of discounts due to risk factors in determining the rates</u>.
>
> [Emphasis added.]

Based on the above statutory language, it is clear that the state of Florida, through the Legislature, has made the following policy decisions:

- that cogenerated power is beneficial to the state when the cost of that power does not exceed the cost to the purchasing utility of providing the power itself;
- that cogenerated power is not to be discriminated against;
- that the development of cogenerated power is to be encouraged;
- that "discounts" associated with "risk factors" are to be eliminated when adequate security is provided by the cogenerator; and
- that the FPSC is responsible for implementing the Legislature's mandates in this area.

B. Competent, substantial evidence supports the FPSC'S conclusion that regulatory out clauses impede the development of cost-effective cogeneration.

FPL does not dispute that the Commission has the jurisdiction under state law to implement the policies state above.

Additionally, FPL does not, and could not, dispute that the record below supports the conclusion that the presence of a regulatory out clause is contrary to these enumerated policy decisions.[9] The Commission itself acknowledges this when it states that regulatory out provisions "create a mistaken perception that revenues under a standard offer are not reliable." [Vol. V at 976 (Order No. 24989 at 71)]

Implicit in this statement are several factual findings: 1) that regulatory out provisions make the financing of cogeneration projects difficult, if not impossible [T. 1442, 1489-1492]; that most cogeneration projects are "project financed" on the stream of revenues associated with that project [T. 1443, 1487-1489, 1497; that regulatory out provisions created the perceived risk that those revenues were subject to prospective and retroactive disallowance through no fault of the QF during the term of the initial financing [T. 1489-1490, 1497, 1461, 1429] and that this perceived risk translates into either the outright denial of project financing or financing at a greater, often prohibitive, cost. [T. 1441-1445, 1518]

The culmination of these implicit findings is the legal conclusion that regulatory out clauses in standard offer contracts, because they affect the certainty of revenues payable under the contract, unreasonably impede the development of cost-effective cogeneration. Given these conclusions, the reasonable thing to do

[9] See: Vol. V at 839-49 (Brief of Air Products and Chemicals, Inc. at 47-57.)

is to delete the clause and remove the impediment. FPL does not contest the reasonableness of this action as a means of addressing the problem presented. Given the record developed below and the legislative mandates clearly expressed in Florida law, the Commission has acted reasonably within its statutory jurisdiction to implement the mandates with which it is charged.

II.

FPL IS SEEKING AN ADVISORY OPINION FROM THIS COURT

If not seeking to contest the decision below as unsupported by the record, exactly what is FPL asking for in this appeal? Air Products submits that FPL is requesting an advisory opinion from this Court on the effect of "changed circumstances" as generically applied to standard offer contracts. This is not a remedy this Court can or should provide.

A. FPL has no injury in fact.

Section 120.68(1), F.S., delineates the basic guideline for appellate review of agency action: that the party below must have been "adversely affected" by final agency action. Fox v. Smith, 508 So. 2d 1280 (Fla. 3 DCA 1987); Daniels v. Florida Parole and Probation Comm., 401 So. 2d 1351, 1353 (Fla. 1 DCA 1981). This criteria for administrative review is consistent with general principles of appellate law. North Shore Bank v. Town of Surfside, 72 So. 2d 659, 661 (Fla. 1954); Morgan v. Morgan, 404 So. 2d 1101, 1102 (Fla. 3 DCA 1981). FPL fails to meet this basic appellate test. The Commission has stated clearly that it has no intention of revoking cost recovery for cogeneration payments made pursuant to approved standard offer contracts unless approval of that contract was procured by perjury, fraud or the intentional withholding of key information. [Vol. V. at 976; (Order No. 24989 at 71)] Assuming that FPL does not engage in any of those activities in obtaining its standard offer contract approval, the removal of the regulatory out provision can not adversely affect it. How can FPL be damaged by full cost recovery paid every six months through the Fuel Adjustment Clause? There is no immediate, non-speculative injury in fact which results from the Commission's action here. FPL's appeal of the exclusion of regulatory out clauses should be dismissed on these grounds.

The remedies provided by Chapter 120 as a result of appellate review are tied to demonstrated injury: an agency hearing if there are disputed issues of material fact on which the agency based it decision and no hearing was held [Section 120.68(6), F.S.] or a remand to the agency, or modification of the decision below. The latter relief is granted if: 1) there has been an erroneous interpretation of the law and a correct interpretation of the law compels a particular action [Section 120.68(9), F.S.]; there is no competent substantial evidence in the record to support the decision [Section 120.68(10), F.S.]; the facts compel a particular action as a matter of law [Section 120.68(11), F.S.]; or the agency has exceeded its delegated discretion [Section 120.68(12)].

B. Even if the FPSC'S legal interpretation of administrative is incorrect, no particular action is compelled.

Of the remedies listed above, the only category of relief to which FPL may be entitled, and the only relief argued for in its brief, is reversal based on an incorrect interpretation of the law of administrative finality. Assuming for the sake of argument that FPL is correct that administrative finality in the regulatory arena is bounded by "changed circumstances" in the economic climate of either the electric industry as a whole or FPL in particular, does that error "compel a particular action", i.e., the reinstitution of the regulatory out clause? No, it does not.

The reason for this is simple. By removing the regulatory out provision from standard offer contracts, the Commission has placed standard offer contract payments on an equal footing with all other prudent regulatory expenses: no more and no less. FPL may dislike this decision, but it is a reasonable one. It is supported by the record and consistent with state policy objectives. The Commission simply did not agree that FPL should be completely insulated from any imaginable risk, no matter how remote, associated with cogeneration contracts.

C. The issue of "change circumstances" is not ripe for review.

With regard to the effect of changed circumstances on standard offer contract payments, Air Products would suggest that the Court address that question when a specific set of facts is presented to this body, rather than in the abstract. The determination of changed circumstances with regard to standard offer contract payments is itself a factual finding which could not be acted upon by the Commission without affording all substantially affected parties an opportunity for an evidentiary Section 120.57(1), F.S., hearing. This issue simply is not ripe for review.

D. This court is not empowered to issue purely advisory opinions.

Without a specific set of facts with which to work, this body would be rendering an advisory opinion which, except in instances required or authorized by the Constitution, it is prohibited from doing. Sarasota-Fruitville Drainage District v. Certain Lands etc., 80 So. 2d 335, 336 (Fla. 1955); Sabio v. Russell, 472 So. 2d 869 (Fla. 3 DCA 1985).

Air Products is aware that this Court is empowered to render a decision which is declaratory in form by Section 120.68(13)(a), F.S. However, declaratory statements by their nature are opinions which address the application of case law, rule or statute to a set of proposed facts where there is some doubt or controversy regarding the outcome. Section 120.565, F.S. FPL has proposed no factual scenario or scenarios which would constitute changed circumstances, nor has it expressed any doubt as to the outcome should such circumstances be found to exist. [FPL's Initial Brief at 18].

Further, the form of the final agency action being reviewed here is not that of an agency declaratory statement. FPL can not change the nature of the proceeding being reviewed from a Section 120.57(1), F.S., evidentiary hearing to a Section 120.565, F.S., declaratory statement on appeal.

FPL has presented no basis for reversal of the Commission's decision to remove regulatory out provisions from standard offer contracts. It's request to do so should be denied.

III.

THE FPSC HAS NOT VIOLATED ITS RULES

A. The insurance limitations of Rule 25-17.087(6)(c), F.A.C., apply only to liabilities which arise from QF operations and subsequently affect utility operations.

The structure of Rules 25-17.087(6)(b) and (6)(c), F.A.C., reflects the fact that liabilities associated with the operation of QF facilities and interconnections arise from two distinct sources: the operation of the qualifying facility and the interconnection with the utility which has an effect on the interconnected utility and operations of the facility and the interconnection which have no effect on that utility. To the extent that negligence at the facility is contained there and not transferred via the interconnection to the utility, the utility is not harmed. In that instance Rule 25-17.087(6)(b), F.A.C., applies and the QF is totally responsible for whatever damages result. To the extent that negligence at the facility results in damages which are transferred "across the fence" from the QF to the utility, Rule 25-17.087(6)(c), F.A.C., applies.

This interpretation of the rules is reinforced by the fact that the QF is only required to provide the insurance covered by Rule 25-17.087(6)(c), F.A.C., "fifteen days prior to the <u>start of any interconnection work</u>; or stated differently, fifteen days before there can be any possibility that negligence associated with the operation of the QF facility or interconnection can affect the interconnecting utility. There is no time limit associated with the procurement of insurance under Rule 25-17.087(6)(b), F.A.C., nor any mention that insurance is required at all for liabilities which arise and are contained on the QFs side of the fence.

This makes sense. Rule 25-17.087(6)(b), F.A.C., clearly assigns specific risks of QF facility and interconnection operation to the QF. The QF is then free to make whatever arrangements it will in whatever amounts it deems appropriate to mitigate those assigned risks of facility and interconnection operation.

The $300,000 minimum and ability of the utility to require liability insurance in excess of that amount are only mentioned in Rule 25-17.087(6)(c), F.A.C. This also makes sense. It is QF facility and interconnection operation which adversely affects the regulated utility which ultimately adversely impacts the ratepayers of the interconnected utility. The FPSC does not have the statutory authority to "regulate" actions of a QF which do not affect either public utility ratepayers or the state's electric power grid. Sections 366.04(1), (5) and (6), F.S.

In sum, the limiting language of Rule 25-17.087(6)(c), F.A.C., can only apply to liabilities associated with QF facility and interconnection operations which ultimately affect the operation of the interconnected public utility.

B. FPL's insistence on one QF liability policy is a waiver of the limitations contained in Rule 25-17.087(6)(c), F.A.C.

Both in prefiled testimony and at hearing, FPL expressed its strong "preference" for a single policy covering all types of liabilities associated with the operation and the QF facility and the interconnection. [T. 440, 505-508; Exhibit 24] When questioned on this point, FPL indicated that it wished this policy not only to cover the negligence of the QF's personnel in the operation of the QF facility and interconnection, but also the negligence of FPL's own employees and agents. [T. 440, 505-506] Apparently sensing that the Commissioners believed this approach to be draconian in light of the fact that FPL had its own liability coverage and designs, operates and maintains its system's QF interconnections, FPL introduced Exhibit 24 containing language that FPL would pay "the reasonable incremental cost of covering liabilities from FPL's negligent acts or omissions, and will assist the QF in obtaining the above policy or policies if requested by the QF." [T. 444-445, 507-508, 511]

FPL's preference for a single policy covering all liabilities associated with the operation of a QF facility and interconnection acts as a waiver of its rights under Rule 25-17.087(6)(c), F.A.C. FPL can't have it both ways. This Court should not allow FPL's insistence on one policy to impose limitations on liability coverage for acts associated with the QF facility and interconnection which do not affect the utility. As stated above, the Commission cannot impose limitations on QF liability insurance per se. FPL should not be allowed to do so by this procedural maneuver.

C. Competent substantial evidence of record supports the Commissions imposition of a $1,000,000 cap on liability insurance.

As discussed by Commissioners Gunter and Beard at hearing, there seems to be no discernable pattern to the amount of liability insurance which FPL has required from QFs. [T. 511-515] Exhibit 25 shows a range of coverage from a low of $2,000,000 to a high of $30,000,000 for units which are 121 MW and 15 MW, respectively. Although FPL's witness did, with the prompting of Commissioner Beard, list several factors which might be used to arrive at a particular liability insurance figure, factors which were subsequently included in Exhibit 24, he did not divulge how these factors would be evaluated or weighted in arriving at the ultimate liability coverage. [T. 514-516] Nor did FPL's witness attempt to explain why a 32 MW facility located in downtown Miami required the same amount of liability insurance as a 330 MW facility located in Indiantown. There also is some question about how many policies have been required of QFs by FPL. [T. 512]

Given the bare facts as reported on FPL's own exhibit, the Commission could reasonably conclude that FPL had abused its discretion in this area. All of the other investor owned utilities in the state found a $1,000,000 maximum insurance provision with additional coverage acquired at the discretion of the QF to be reasonable and incorporated those terms into their interconnection agreements. As a means of addressing FPL's apparent abuse, the FPSC was justified in applying that figure to FPL as well. [Vol. V at 933, 964, 973-974 (Order No. 24989 at 28, 59, 68-69)]

For these reasons, FPL's request to remand this issue back to the Commission with instructions to approve the insurance requirements originally proposed by FPL in its standard offer and interconnection contracts should be denied.

CONCLUSION

The Commission's removal of the regulatory out provision is based on competent substantial evidence of record, implements the legislative mandate to encourage cost-effective cogeneration and does no concrete, nonspeculative harm to FPL. That being the case, FPL has no grounds for appellate reversal or review by this Court. FPL is really seeking an advisory opinion on the generic effect of changed circumstances on standard offer contract payments. This Court cannot issue such an opinion.

The Commission acted reasonably and in accord with the evidence developed at hearing in the imposition of a $1,000,000 cap on liability insurance associated with the operation of QF facilities and interconnections. Neither this cap nor the provision allowing QFs to determine the amount of liability insurance in excess of that cap violates Rule 25-17.087(6)(b), F.A.C., and to the extent that FPL requires one insurance policy for all types of liabilities associated with the operation of the QF facility and interconnection, FPL has waived the limits imposed by Rule 25-17.087(6)(c), F.A.C.

The record developed below supports the Commission's actions with regard to both the regulatory out clause and insurance liability limits. FPL has made no showing that the FPSC's actions are clearly erroneous and has not overcome the presumption of validity which attaches to the orders of administrative agencies. PW Ventures v. Nichols, 533 So. 2d 281 (Fla. 1988). The Commission's actions should, therefore, be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Air Products and Chemicals, Inc. in Support of Appellee has been furnished by U.S. Mail to the following parties on this 15th day of May, 1992.

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