IN THE SUPREME COURT OF FLORIDA

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

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

CORRECTED INITIAL BRIEF OF APPELLANT, FLORIDA POWER & LIGHT COMPANY

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STATEMENT OF THE CASE AND FACTS

This is an appeal from Order No. 24989[1/] issued by the Florida Public Service Commission in Docket No. 910004-EU.[2/] Order No. 24989 (hereinafter "Standard Offer Order" or "Order") resulted from the Florida Public Service Commission's ("Commission") proceedings to approve new standard offer contracts.

The portions of the Standard Offer Order FPL appeals from relate to the elimination of the "regulatory out" clause from standard offer contracts and to the amount of liability insurance that a qualifying facility ("QF") may be required to provide.

A. Background

In 1989 the Commission opened Docket No. 891049 to revise its rules relating to cogenerators and small power producers. See

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1/ Order 24989 (V) dated August 29, 1991; Citations to Florida Public Service Commission Orders that are part of the record on appeal will be made by giving the Order Number and page number when appropriate followed by the record volume number where the order is located in parentheses. For example, Order 23625 at 2(I), refers to page 2 of Order 23625 which is located in volume I of the record on appeal.

2/ Order No. 25569 (V), issued on January 6, 1992 denied Florida Power & Light Company's motion for clarification and reconsideration of a portion of Order No. 24989.

Order No. 23623.[3/] The amended cogeneration rules became effective October 25, 1990.

As a result of those rule changes, the Commission voted on September 18, 1990, directed each investor-owned utility to file its most recent ten-year generation expansion plan, a standard interconnection agreement and one or more standard offer contracts to purchase capacity from QFs to avoid the construction of capacity identified in their plans. Order No. 23625(I). In addition, the Commission opened Docket No. 910004-EU, to conduct an annual planning hearing to review, evaluate and approve the utilities' submissions. Order No. 23953(I).

B. Standard Offer Contracts

Rule 25-17.0832(3)-(8) Fla. Admin. Code, governs standard offer contracts. A standard offer contract is an agreement between a utility and a QF for the purchase of firm capacity and energy. The tariff and standard offer contract set forth the rates, terms and other conditions pursuant to which the utility will purchase firm energy and capacity from the QF. Rule 25-17.0832(3), Fla. Admin. Code, requires each public utility to submit for Commission approval a tariff and a standard offer

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[3/] In Re: Proposed revisions to Rules 25-17.082, 25-17.0825, 25-17.083, 25-17.0831, 25-17.088, 25-17.0882, 25-17.091, and creation of Rules 25-17.0832, 25-17.0833, 25-127.0834, and 25-17.089, F.A.C., Cogeneration Rules, 90 F.P.S.C. 10:405.

contract for the purchase of firm capacity and energy from small QFs.[4/]

The price terms of the standard offer contract are to be based on the forecast of the utility's avoided costs, that is, the cost of deferring or avoiding the construction of additional generation capacity. Rule 25-17.0832(3)(b), Fla. Admin. Code. The price term, then, depends on the Commission's decision regarding the utility's "avoided unit," the unit that the standard offer contract will avoid (in whole or in part).

The minimum term of the standard offer contract is ten years and the maximum term is a period of time equal to the anticipated life of the avoided unit. Rule 25-17.0832(3)(e)(6). The anticipated life of FPL's avoided unit that was considered in the Standard Offer Order is 30 years. See Standard Offer Order at 31.

Within 60 days of receiving a standard offer contract signed by a QF, the utility must either "accept and sign the contract" or "petition the Commission not to accept the contract and provide justification for the refusal. " Rule 25-17.0832(3)(d), Fla. Admin. Code. The only stated grounds for refusal of the standard offer contract are that (1) acceptance would exceed the megawatt

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4/ Pursuant to Rule 25-17.0832(3), Fla. Admin. Code, standard offer contracts are available for acceptance only by qualifying facilities less than 75 megawatts (routinely called "small qualifying facilities") and solid waste facilities as defined in Rule 25-17.091. The Commission has adopted the Federal Energy Regulatory Commission's definition of "qualifying facility" which is codified at 18 C.F.R. § 292.101(b)(1)(1989). Fla. Admin. Code Rule 25-17.080(1).

limit established by the Commission for standard offer contracts, or (2) the QF is not financially or technically viable and would be unable to deliver the committed capacity and energy by the date specified in the contract. Id.

The utility's obligation to purchase from a QF pursuant to a standard offer contract is a legal one imposed upon the utility by the Commission. The obligation is premised upon the utility's ability to recover from its customers the costs of the payments made to the QF. Accordingly, Rule 25-17.0832(8)(b) provides:

> Upon acceptance of the contract by both parties, firm energy and capacity payments made to a qualifying facility pursuant to a standard offer contract shall be recoverable by a utility through the Commission's periodic review of fuel and purchased power costs.

C. The "Regulatory Out" Clause and the Commission's Ruling Below

Regulatory out clauses suspend the utility's payment obligations to a QF to the extent that the utility is not allowed to recover those payments from its customers:

> In general, regulatory out clauses provide that, in the event the utility is not permitted to recover payments made to a QF, payments made to the QF are reduced to the level the utility is permitted to recover.

Order No. 25668 at 8(V).

The "regulatory out" clause that FPL was ordered to remove from its standard offer contract read as follows:

12.5 Renegotiations Due to Regulatory Changes.

Notwithstanding anything in the 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 its 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 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 or charges. 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.

Docket No. 910004-EU, Florida Power & Light Company Exhibit No. 18 (Document 1) (contained in Volume X of the record on appeal).

The Commission declared that its approval of a utility's standard offer contract "constitutes a determination by the commission that any payments made to a QF under the standard offer constitute a reasonable and prudent expenditure by the utility under Section 366.06, Florida Statutes . . . ." Standard Offer Order at 71. Pursuant to this prudency determination, the utility will be permitted to recover the cost of its payments to the QF.

Therefore, the Commission concluded that the regulatory out provision was "unnecessary surplusage."

The Commission's determination that the "regulatory out" clause is "unnecessary surplusage" in standard offer contracts turned on the finality that it found attached to its finding of prudency. Not only did the Commission commit not to revisit its decision to allow cost recovery, id. at 70-71, the Commission determined that the doctrine of administrative finality will preclude any subsequent denial of cost recovery absent certain narrow exceptions:

> We now find that once our determination of prudence becomes final by operation of law, we cannot deny the utility cost recovery of payments made to the QF pursuant to the standard offer contract, absent some extraordinary circumstances, such as where our finding of prudence was induced through perjury, fraud or the intentional withholding of key information.

Id. at 71. The Commission discussed the doctrine of administrative finality and recognized only orders "made through fraud, collusion, deceit, or mistake" as subject to being opened, vacated or modified. Id. at 72.

FPL moved for clarification of whether the Standard Offer Order intended to preclude a subsequent determination by the Commission, that, due to changed circumstances, the public interest would be served by a modification of the recovery of payments made pursuant to a standard offer contract. See Record on Appeal at page 980 (Motion for Clarification and Reconsideration of Order No. 24989). The Commission denied FPL's motion for clarification and with regard to the law on changed

circumstances stated only that "we will comply with the law." Order 25569 at 2.

D. Liability Insurance and the Commission's Ruling Below

The Florida Administrative Code rule that addresses the interconnection insurance requirement in connection with standard offer contracts calls for "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." Rule 25-17.087(6)(c), Fla. Admin. Code (emphasis added).

The Commission noted that:

> . . . most parties, including Staff, have come to the general agreement that $1,000,000, for each occurrence, is an appropriate minimum insurance requirement to cover potential public liabilities associated with the interconnection facilities.

Standard Offer Order at 44. The Commission therefore found that

> . . . FPL should raise its minimum insurance requirement from $300,000 to $1,000,000. We also instruct FPL to include a provision which would leave any amount over the minimum insurance requirement of $1,000,000 to the discretion of the QF.

Id. at 45 (emphasis added).

A qualifying facility located in a utility's service territory must be electrically linked to the utility to accomplish the sale of its power; this is referred to as "interconnection". Rule 25-17.087, Fla. Admin. Code, prescribes the safety and reliability standards, including insurance, by which an interconnection must be accomplished. The Commission has approved a Standard Offer

interconnection agreement which is a comparison of the Standard Offer price sales contract. A QF located in a utility's service territory must execute an Interconnection Agreement to effectuate its Standard Offer contract.

FPL's motion for reconsideration was denied by the Commission.

SUMMARY OF ARGUMENT

A. The Regulatory Out Clause

The Commission has misinterpreted the doctrine of administrative finality by failing to consider the possible effects of changed circumstances, which may require the Commission to revisit the issue of cost recovery in its ratemaking function should the public interest so dictate. Finally, the Commission's Order fails to recognize that a future act of the Florida Legislature may impact FPL's ability to recover costs incurred pursuant to a standard offer contract.

Although there is no doubt that the Commission acted with the best of intentions, for all of these reasons, the Commission's determination that the regulatory out clause has become unnecessary surplusage is legally flawed. Accordingly, the regulatory out clause should be reinstated into FPL's standard offer contract.

B. Liability Insurance

The Commission's dictate that any amount over the minimum insurance requirement of $1,000,000 be left to the discretion of the QF squarely conflicts with the Commission's Rule 25-17.087(6)(c), which leaves to the utility the discretion to require additional insurance beyond the minimum amount stated in

the Rule. Because the Commission's order conflicts with one of its rules, the Order should be remanded to the Commission pursuant to Section 120.68, Florida Statutes.

ARGUMENT

I.

THE COMMISSION HAS MISINTERPRETED THE DOCTRINE OF ADMINISTRATIVE FINALITY

A. **The Commission's Rationale**

By Order No. 24989, the Commission concluded that because there was no need for a "regulatory out" provision in a standard offer contract, one should not be included.[5/]

The rationale of the Commission in reaching this conclusion was relatively straightforward:

1. Because the Commission requires utilities to purchase pursuant to standard offer contracts, when a standard offer contract is approved the Commission makes a commitment to allow cost recovery of payments made.[6/]

2. Approval of a standard offer contract by the Commission constitutes a determination that payments made

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5/ Order No. 24989 also noted that such provisions create a mistaken that revenues under a standard offer are not reliable and observed "[t]his is not the case." Id. at p. 71.

6/ Although not stated as a rationale, Fla. Admin. Code Rule 25-17.0832(8)(a) and (b) provide for the recoverability of payments to a Qualifying Facility pursuant to a standard offer contract or an approved negotiated contract.

pursuant thereto constitute a reasonable and prudent expenditure under Section 366.06, Fla. Stat. 1991.

3. Once the Commission's determination of prudence becomes final by operation of law, the Commission cannot deny a utility cost recovery of payments made to the Qualifying Facility pursuant to the standard offer contract, absent some extraordinary circumstance relating to the finding of prudence.

B. The General Rule of Administrative Finality

In support of this final point of its rationale, the Commission accurately points to the general rule, which has been enunciated several times by this Court:

> orders of administration agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein.

Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966); Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So.2d 249 (Fla. 1982) at 253 (quoting Peoples Gas); Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679, 681 (Fla. 1979) (citing Peoples Gas); Standard Offer Order at 72.

C. The Nature of the Commission's Duties and Powers May Mandate Exceptions to the Doctrine of Administrative Finality

The Commission failed to recognize the exceptions to the doctrine of administrative finality. The same cases that the Commission cited for the general rule on administrative finality point out exceptions to the doctrine. In Peoples Gas, the Court found that the Commission exceeded its authority by issuing a modifying order four years after the original order, but then immediately noted several factors which appear to have made a difference, in reaching that conclusion, most notably that the modifying order was not "based on any change in circumstances or on any demonstrated public need or interest." 187 So.2d at 339. The Court went further to discuss the Commission's "broad powers to regulate the operation of the subject utilities," which, if exercised "after proper notice and hearing" and upon specific findings, may be used to modify or vacate previous rulings if such modification or withdrawal is "necessary in the public interest because of changed conditions or other circumstances not present" in the original proceedings. Id.

Likewise, in finding that the Commission improperly revisited an issue already litigated, in Austin Tupler, the Court pointed out that the Commission had "failed to show any significant change in circumstances or great public interest which would be served" by modification. 377 So.2d at 681.

More recently, in Reedy Creek, this Court recognized what could be a significantly broader exception to the doctrine of administrative finality:

> The power of the Commission to modify its orders is inherent by reason of the nature of the agency and the functions it is empowered to perform.
>
> * * *
>
> When the Commission determined that it had erred to the detriment of the using public, it had the inherent power and the statutory duty to amend its order.

418 So.2d at 253. While this language appears to follow the standard of regulation in the public interest, it does not require "great public interest," as the Court suggested in Austin Tupler would be necessary for the Commission to revisit an issue already litigated. 377 So.2d at 681. Instead, the Reedy Creek opinion stressed the Commission's continuing obligation to supervise and regulate utilities with respect to their rates, and then found that when the Commission had erred to the detriment of the ratepayer, it had the statutory obligation to amend its order to protect the customer. 418 So.2d at 253.

1. Agency vs. Court Distinctions

The applicability of administrative finality to Commission orders turns in large part on the Commission's continuing duty to regulate and the nature of the decisions it renders, as well as the fact that the Commission operates pursuant to the police power of the state.

The doctrine of administrative finality derives from the rule that governs the finality of decisions of courts, i.e., res

judicata. See People Gas, 187 So.2d 339. Indeed, when addressing the issue of the finality of administrative rulings, courts often cite to the doctrine of res judicata, rather than administrative finality. See, e.g., Hollingsworth v. Dept. of Envir. Reg., 466 So.2d 383, 386 (Fla. 1st DCA 1985)(the doctrine of res judicata applies in administrative proceedings); Mann, D.D.S. v. Dept. of Prof. Reg., Bd. of Dentistry, 585 So.2d 1059, 1061 (Fla. 1st DCA 1991)(using terms "administrative finality" and "administrative res judicata" interchangeably).

Nevertheless, this Court has recognized that application of the doctrine of finality must be carefully circumscribed in the context of agency decisions. This is because of "the differences between the functions and orders of courts and those of agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated." Peoples Gas, 187 So.2d at 339. Moreover, the nature of agency decisions distinguishes the applicability of the doctrine:

> [T]he actions of administrative agencies are usually concerned with deciding issues according to public interest that often changes with shifting circumstances and passage of time.

Id. In light of these differences, the Court counsels that:

> Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

Id.

Florida courts have often considered the functions and purposes of agency action when addressing the applicability of administrative finality. See, e.g., City of Miami Beach v., Prevatt, 97 So.2d 471, 477-78 (Fla. 1957)(in a zoning case, "changed conditions" rendered "inoperative and inapplicable the principal of res judicata"); Mann, 585 So.2d at 1061 (Board of Professional Regulation's continuing oversight and jurisdiction made preclusion of order revisitation inappropriate); Hollingsworth, 466 So.2d at 386 (DER's finding that res judicata established a certain fact was proper only insofar as that finding is construed so as not to preclude a contrary determination at the present time based on changed circumstances); Marell v. Hardy, 450 So.2d 1207, 1210 (Fla. 4th DCA 1984)(change of circumstances during 12 years from original zoning order rendered inapplicable the effect of administrative res judicata).

2. The Commission Acts Pursuant to the Police Power of the State.

Another factor counselling against too rigid an application of the doctrine of administrative finality to Commission decisions is the recognition that the Commission operates pursuant to the police power of the State.

The "police power" is generally defined as "the sovereign right of the state to enact laws for the protection of lives, health, morale, comfort, and general welfare." Burnsed v. Seaboard Coastline Railroad Co., 290 So.2d 13, 18 (Fla. 1974). The Commission exercises this power pursuant to legislative delegation:

> Legislative declaration. -- The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

Section 366.01, Fla. Stat. (1990).

The force attaching to the exercise of the police power in rate regulation as it relates to other constitutional rights was discussed in Miami Bridge Co. v. Railroad Comm'n, 20 So.2d 356, 361 (Fla. 1944)(en banc):

> It is established law that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process, or the equal protection of the law by the States are not violated by the legitimate exercise of legislative power in securing the health, safety, morals and general welfare. The governmental powers cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations. The right to exercise the police power is a continuing one.
>
> The State as an attribute of sovereignty is endowed with inherent power to regulate the rates to be charged by a public utility for its products or service. Contracts by public service corporations for their services or products, because of the interest of the public therein, are not to be classed with personal and private contracts, the impairment of which is forbidden by constitutional provisions.

The standard offer order also failed to consider that subsequent legislative acts may affect the recovery of payments pursuant to a standard offer contract. It is the Legislature that

is vested with the authority to legislate in the interests of the citizens of Florida.

In City of Plantation v. Utilities Operating Co., 156 So.2d 842 (Fla. 1963), the Florida Supreme Court discussed the possible impact on a pre-existing contract of the State's exercise of its continuing police power to regulate rates. The city and a utility company had entered into a thirty-year contract for utility services at "reasonable rates" with the city retaining final authority to determine what the term meant. Five years into the contract, the Legislature enacted a statute that vested regulatory authority over the utility services with the Railroad and Public Utilities Commission. The city sought declaratory relief concerning the validity of its contract. The Supreme Court held that the subsequent enactment by the Legislature was an exercise of the State's continuing police power that pre-empted the pre-existing contractual authority of the city. The city could not "foreclose the exercise of the State's police power" over the life of such a contract. Id. Furthermore, every contract such as that:

> is presumed to have been made with full knowledge of the inherent reserved power of the State to alter the contract regarding rates at such time as the Legislature deems it appropriate to assert the power under the Constitution. It also follows that when the parties enter into such a contract, they do so with the full realization that the contractual provisions are ineffective to preclude subsequent legislative action in the exercise of the State's police power.

Id. at 843-44.

In H. Miller & Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979), this Court approved the Commission's decision to modify a private contract between a housing developer and a regulated water and sewer utility by increasing service availability charges after the developer had completed its payment of the contractually agreed amount. The Court noted: "Rates are characterized as prospective in nature and thus clearly subject to the police power," 373 So.2d at 915. Accordingly, the Court approved of the Commission's action because:

> The Commission's decision was based upon the well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts.
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> * * *
>
> In exercising its ratemaking authority, the Commission must take into account existing facts which will affect future rates.

Id. at 914-15. See also Richter v. Florida Power Corp., 366 So.2d 798, 800 (Fla. 2d DCA 1979)(In light of the purposes of Chapter 366 and the broad power granted to the Commission thereunder, Commission has power to alter previously entered final rate orders under extraordinary circumstances).

In Miller, the Court ruled that the Commission must have the authority to alter a rate contract prospectively in light of changing economic factors; otherwise the purpose of the charges would be lost and existing customers would subsidize future expenses. Id. at 916. By analogy, if the Commission does not have the ability to later alter charges to the ratepayer in light

of changed economic (or other) factors that have an impact on the prudency of those charges, FPL's customers will subsidize the QF through imprudent payments to it.

In short, the finality this Commission sought to attach to a utility's recovery of the cost of payments made to a qualifying facility, where the payments are made pursuant to a Commission order, is tempered by the Commission's statutory mandate to regulate in the public interest, and the impact changed circumstances or future legislation may have on the continued cost recovery of such payments. Because the doctrine of administrative finality is bounded by these principles, the Commission erred in eliminating the regulatory out provision from the Standard Offer contract as "unnecessary surplusage." This portion of the Standard Offer order should be reversed.

II.

THE COMMISSION'S ORDER ON LIABILITY INSURANCE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Commission's Standard Offer Order improperly limits the amount of liability insurance which may be required by a utility pursuant to a standard offer contract and an interconnection agreement. This limitation conflicts with Florida Administrative Code Rule 25-17.087(6)(c). Because the decision to limit the level of liability insurance conflicts with the Commission's Rule, this Court should remand the order to the Commission pursuant to Section 120.68(12)(b), Florida Statutes.

A. The Requirements of Rule 25-17.087(6)(c)

Rule 25-17.087(6)(c) provides that a qualifying facility seeking interconnection, including a QF signing a standard offer contract, must deliver a certificate of insurance certifying to the qualifying facility's coverage under a liability insurance policy. This Rule then provides with respect to the amount of insurance coverage required:

> 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).

Quite simply, Rule 25-17.087(6)(c) prescribes the minimum amount of public liability insurance that a qualifying facility is required to provide and permits the utility to require more coverage if "deemed necessary by the utility".[7/]

B. The Commission's Decision

The Standard Offer Order not only raised the minimum insurance requirement specified by Rule 25-17.087(6)(c) from $300,000 to $1,000,000, it eliminated the ability of the utility, as permitted by the Rule, to require more insurance than the $300,000 minimum. Instead of the utility being permitted to require more insurance if "deemed necessary by the utility," the

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7/ Rule 25-17.087(3), Fla. Admin. Code, gives the qualifying facility the right to contest the amount of insurance requested by the utility (along with other matters) if the qualifying facility believes the amount unreasonable and imposes the burden of demonstrating the reasonableness of the insurance amount requested on the utility if such a protest is made.

Commission transferred the authority to decide on the level of insurance from the utility to the qualifying facility stating:

> We therefore find that FPL should raise its minimum insurance requirement from $300,000 to $1,000,000. We also instruct FPL to include a provision [in its standard offer contract and interconnection agreement] which would leave any amount over the minimum insurance requirement of $1,000,000 to the discretion of the QF. Said provision would permit the QF to set any additional coverage it may wish over the $1,000,000 minimum.

Standard Offer Order at page 45.

FPL's Motion for Reconsideration of this Commission finding and direction was denied by Order No. 25569. The Commission concluded that its decision on the level of insurance that could be required did not conflict with Rule 25-17.087(6)(c). Instead, Order No. 25569 concluded, in part:

> The rule [Rule 25-17.087(6)(c)] addresses minimum insurance requirements. The rule does not set a maximum that may be required. Nor does the rule prohibit the Commission from setting a maximum for a particular contract.
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> ***
>
> Order No. 24989, which sets a maximum of $1 million for this particular standard offer contract does not conflict with the rule, but rather addresses an area which was not addressed by the rule.

Order No. 25569 at 2.

The Commission's logic supporting its conclusion that its decision in the Standard Offer Order was not in conflict with Rule 25-17.087(6)(c) is simply wrong. The Rule authorizes the utility to require more than the $300,000 minimum level of insurance if it

is "deemed necessary" by the utility. Order No. 24989 increased the minimum level of insurance from the $300,000, specified by Rule 25-17.087(6)(c) to $1,000,000, eliminated the ability of the utility to request more insurance if it "deemed necessary" and instead gave the qualifying facility the right to provide any coverage level "it may wish" above the $1,000,000 minimum.

C. The Commission's Decision on Insurance Requirements Should be Remanded to the Commission with Instructions.

The Commission's Standard Offer Order is in conflict with Rule 25-17.087(6)(c), Fla. Admin. Code, and therefore should be remanded to the Commission pursuant to Section 120.68(12)(b). Decarion v. Martinez, 537 So. 2d 1083 (Fla. 1st DCA 1989); Woodley v. Dept. H.R.S., 505 So. 2d 676 (Fla. 1st DCA 1987). Because the insurance requirements proposed by FPL complied with Rule 25-17.087(6)(c), FPL believes it appropriate for this Court's decision to instruct the Commission to approve the insurance requirements proposed by FPL pursuant to Section 120.68(13)(e)1.

CONCLUSION

The Commission removed the "regulatory out" clause from FPL's standard offer contract because it viewed its decision regarding cost recovery as final and unalterable absent specified extraordinary circumstances. Accordingly, the Commission determined that the "regulatory out" clause was "unnecessary surplusage." The Commission's Order, however, misinterprets the

law of administrative finality. The Commission failed to consider that changed circumstances or the public interest may mandate exceptions to the doctrine of administrative finality, particularly in light of the nature of the Commission's duties and powers. Therefore, the Commission's Order should be reversed as it relates to the regulatory out clause and administrative finality.

Rule 25-17.087(6)(c) sets forth the minimum amount of liability insurance of a QF must provide and permits the utility to require more coverage if "deemed necessary by the utility." The Commission's elimination of the utility's ability to request insurance in excess of $1,000,000 is in direct conflict with the Rule. Accordingly, pursuant to Section 120.68(12)(b), Florida Statutes, the liability insurance issue should be remanded to the Commission with instructions to approve the insurance requirements proposed by FPL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case No. 79,338

Docket No. 910004-EU

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Corrected Initial Brief has been furnished to the following individuals by hand delivery (when indicated with an asterisk) or U.S. mail on this 20th day of April, 1992.

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