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

REPLY BRIEF OF APPELLANT FLORIDA POWER AND LIGHT COMPANY

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ARGUMENT
(Regulatory Out Clause)

The Florida Public Service Commission's ("Commission") Order No. 24989 (R. V, p. 906) directs Florida Power and Light Company ("FPL") to delete a clause from its Commission-required contracts with small qualifying facilities ("QFs") that would allow FPL to reduce its payments to a QF if and to the extent the Commission later determines that FPL's customers cannot be charged the full contract amount for the QF's power (the "regulatory out clause"). The basis for the Commission's decision, as expressed in Order No. 24989, is that the clause is "unnecessary" since the Commission is precluded by the doctrine of administrative finality from reviewing this charge to FPL's customers throughout the life of the contract. Order No. 24989 at pp. 70-72 (R. V, p. 975-77).

The central issue presented by the first question on appeal is whether Order No. 24989 precludes the State[1] from eliminating or adjusting the charges paid by FPL's customers for the QF's electricity for 36 years.[2] The Commission's statement of the issue is similar. See Commission Brief at 11. Although the Commission originally concluded that its order carried this long-

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[1] Public utility rate regulation is a legislative function. Chiles v. Public Service Comm'n Nominating Council, 573 So. 2d 829, 832 (Fla. 1991). The Legislature has delegated this function to the Commission with specific guidelines. But the function is still legislative, and is therefore subject to future revision by the legislature itself. See id.; City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 495-96 (Fla. 1973).

[2] FPL is required to offer small QF's a standard offer contract with a term of 30 years (although the QF can elect a shorter term). The 30-year term would begin to run when the QF began selling capacity and energy to FPL in 1997.

term consequence because of the doctrine of administrative finality, the Commission's appellate counsel now characterize the order as an affirmative declaration that this charge is exempt from rate regulation for the life of the contract. Either way, the Commission is incorrect. Its order cannot bind the State from exercising its police power to review and adjust the QF contract payments for the next 36 years. Because there is no valid rationale supporting the Commission's direction in Order No. 24989 (R. V, p. 906) that FPL remove the regulatory out clause from small QF contracts, the order must be reversed. § 120.68(9), (12), Fla. Stat. (1991); see also Florida Power Corp. v. Florida Public Service Comm'n, 487 So. 2d 1061, 1063 (Fla. 1986).

I.

BY PLACING THE RISK OF REGULATORY DISALLOWANCE ON FPL, THE COMMISSION'S FINAL ORDER ADVERSELY AFFECTS FPL'S INTERESTS, GIVING FPL A RIGHT TO APPEAL.

In Order No. 25668, the Commission recognized that:

> The risk [of regulatory disallowance] would be transferred to the utility if the regulatory out clause is removed. It would lie with the QF if the clause remains.

Order No. 25668 at 8 (R. V, p. 1018).

FPL is not seeking a declaratory judgment from this Court, as argued by appellees, but is asking the Court to overturn a Commission order that jeopardizes FPL's immediate and long-term financial interests. Order No. 24989 forces FPL to forgo a contract right shielding FPL from potential liability totalling in the millions of dollars (R. X, Ex. 18). The order will also have an immediate adverse economic impact on FPL's shareholders and

customers.[3] Neither the authority cited nor the reasoning advanced by appellees suggests that FPL lacks the right to appeal under these circumstances.

Two of the cases cited by Air Products merely recite the general rule that judicial review is only available under Section 120.68, Florida Statutes (1991), to a party adversely affected by final agency action.[4] The three remaining cases relied upon by appellees are not applicable. In each, the appellants had won below but desired rulings on legal issues that the court or agency had not reached in rendering its decision in their favor.[5] In this case, FPL lost below. FPL is challenging the legal basis for the Commission's decision because it seeks to reverse the Commission's order -- clearly and significantly distinguishing this case from

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[3] As pointed out by Air Products, the record on appeal demonstrates that the financial community views regulatory disallowance as a real risk. Air Products' Brief at 11. Air Products argues that it and other QFs would have been harmed if the Commission had not forced FPL to remove the regulatory out clause, because if the contract provides that they have to bear the risk of regulatory disallowance they would have to pay higher interest rates for money they borrow. Id. If the risk is shifted from QFs to FPL, it can only be expected that FPL's financial ratings will likewise be affected, thereby increasing FPL's financing costs. Higher financing costs are increased expenses that must be borne by FPL's customers or shareholders -- today.

[4] See Fox v. Smith, 508 So. 2d 1280, 1281 (Fla. 3d DCA 1987); Daniels V. Florida Parole and Probation Comm'n, 401 So. 2d 1351, 1353 (Fla. 1st DCA 1981).

[5] See North Shore Bank v. Town of Surfside, 72 So. 2d 659, 661 (Fla. 1954); General Development Utilities v. Florida Public Service Comm'n, 385 So. 2d 1050, 1051 (Fla. 1st DCA 1980); Morgan v. Morgan, 404 So. 2d 1101, 1102 (Fla. 3d DCA 1981). Unlike the first two cases cited by appellees, the Morgan opinion does not expressly state the reason for the appeal, only that the appellant had been fully awarded the relief sought from the trial court.

the cases cited by appellees.

Appellees' analysis of this issue is flawed. They beg the question of standing by assuming that the Commission's decision is correct. Appellees argue that because Order No. 24989 "guarantee[s] recovery of payments over the life of the standard offer contract," the Commission eliminated the risk of regulatory disallowance, thereby benefiting FPL. Commission Brief at 7. The right to appeal cannot be assumed away by assuming the outcome of the appeal. As FPL argued to the Commission below and is arguing now, the Commission cannot guarantee cost-recovery for the life of the contract; therefore, the Commission's order strips FPL of a valuable contract right and shifts a real risk to FPL and its shareholders. As a party adversely affected by an agency's final order, FPL has standing to appeal Order No. 24989. § 120.68(1), Fla. Stat. (1991).

The Commission also asks the Court to avoid reaching the substantive issue on appeal because it is not "ripe" for appeal. To support this proposition, the Commission cites Sun Oil Co. v. Federal Power Comm'n, 304 F.2d 293 (5th Cir.), cert. denied, 371 U.S. 861 (1962), a decision applying the appeal provision of the Natural Gas Act, 15 U.S.C. § 717r(b). Sun Oil does not suggest that FPL's appeal is premature.

First, the standard for appeal of agency action in Florida's Administrative Procedure Act ("APA") is whether the Commission's order is final, and adversely affects a party's interests. § 120.68(1), Fla. Stat. (1991). As discussed above,

that test is met. Under Section 717r(b) of the Natural Gas Act, a petitioner must show that the order appealed "adjudge[s] rights or obligations []or direct[s] the taking or refraining from [a] particular action." Sun Oil, 304 F.2d at 294.

Second, even if FPL were appealing a federal agency action under the Natural Gas Act, the Section 717r(b) standard would not preclude FPL from pursuing this appeal now. In Sun Oil, the Federal Power Commission ("FPC") announced by rule that it would not enforce certain provisions in contracts.[6] It did not direct natural gas companies to remove the contract provisions, or prohibit them from including the provisions in future contracts. Id. By contrast, the Commission's Order No. 24989 directs FPL to remove the regulatory out clause from its standard offer contracts. Therefore, it does "direct the taking or refraining from [a] particular action," and would meet the test for appeal under the federal Natural Gas Act.

Third, as recently reiterated by this Court, it is an established principle of appellate review that a party must appeal the agency order actually in controversy. Nassau Power Corp. v. Beard, Case No. 78,275, Fla. L. Weekly S314, S315 (Fla. May 28, 1992); accord Central Truck Lines v. Boyd, 106 So. 2d 547, 548-49

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[6] Applying the judicial review provisions in Florida's APA, Sun Oil Company could have challenged the agency's rule immediately, either through a direct appeal under Section 120.68, Florida Statutes, or by appeal from an administrative hearing requested pursuant to Sections 120.54 or 120.56, Florida Statutes. Adam Smith Enterprises, Inc. v. Florida Dept. of Env. Regulation, 553 So. 2d 1260, 1268 (Fla. 1st DCA 1989); 4245 Corp., Mother's Lounge, Inc. v. Div. of Beverage, 348 So. 2d 934, 936 (Fla. 1st DCA 1977).

(Fla. 1958); see also Great Southern Trucking Co. v. Carter, 113 So. 2d 555, 556-57 (Fla. 1959). FPL would be precluded from attacking the Commission's decision in Order No. 24989 if it waited (perhaps as long as three decades) and appealed a subsequent order denying cost recovery for a QF's capacity payments. Id. This appeal from Order No. 24989 is FPL's only opportunity to challenge the action at issue. Id. Therefore, FPL clearly has a right to appeal now.

II.

THE COMMISSION CANNOT ORDER THAT CHARGES TO CUSTOMERS FOR ELECTRIC SERVICE WILL BE EXEMPTED FROM REGULATORY REVIEW FOR THE NEXT 36 YEARS.

The Commission's only express rationale for requiring FPL to delete the regulatory out clause from the standard offer contract is its legal conclusion that the doctrine of administrative finality renders the regulatory out clause unnecessary. See Order No. 24989 at pp. 70-72 (R. V, pp. 975-77). In its answer brief, however, the Commission does not even attempt to argue that the doctrine of administrative finality can prevent future regulatory disallowance. Apparently, the Commission no longer disputes FPL's position on this issue.

Instead, the Commission argues that this case is distinguishable from cases addressing the doctrine of administrative finality because, here, 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." Commission Brief at 14. Rather, the Commission's appellate

counsel claims that Order No. 24989 "affirmatively guarantees" that the Commission will not revisit its decision to permit cost recovery and that the Commission "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." Commission Brief at 11.

The language cited by the Commission's appellate counsel to support this interpretation is, at best, ambiguous. See Order No. 24989 at 70-72 (R. V, p. 975-77). The language is more fairly read as a statement of the Commission's understanding of its order's effect, and not as a statement of the Commission's policy decision to affirmatively guarantee cost recovery as an exercise of its discretion. However, even if the Court were to accept appellate counsel's interpretation of the Commission's reasoning, the order still does not and cannot remove the risk of regulatory disallowance from the contracts at issue.

Section 366.06(1) & (2), Florida Statutes, requires the Commission to determine fair, just, and reasonable rates and to disallow any charges it finds to be unreasonable. § 366.06(1), (2), Fla. Stat. (1991). Section 366.07 also provides that whenever the Commission, on its own motion or upon the filing of a complaint, finds rates or charges to be unreasonable or excessive, it shall determine and fix fair and reasonable rates and charges. Therefore, the Commission's attempt here to bar itself from exercising its delegated authority is plainly inconsistent with the Commission's charge from the Legislature, and is therefore invalid.

See § 120.68(12)(a), (d), Fla. Stat. (1991).

More importantly, this Court long ago rejected the argument, advanced by the Commission here, that a grant of authority to regulate carries with it the power to refuse to regulate. City of Tampa v. Tampa Waterworks Company, 34 So. 631, 639 (1903), aff'd, 199 U.S. 241 (1905). As stated in City of Tampa:

> With this section in force [recognizing the Legislature's authority to fix reasonable rates and charges] the power to surrender ... the right to regulate rates is taken away; for the authority to surrender cannot co-exist with the ever-present, continuing power to regulate ....

Id. An entity to which the Legislature delegates its statutory authority over public utility rates and charges cannot bind itself through an inflexible commitment that would prevent the exercise of its delegated power. Id.; City of Clearwater v. Bonsey, 180 So. 2d 200, 203-05 (Fla. 2d DCA 1965); Southern Gulf Utilities, Inc. v. City of North Miami Beach, 323 So. 2d 699, 670-71 (Fla. 2d DCA 1975); Anchor Hocking Corp. v. Jacksonville Electric Authority, 419 F. Supp. 992, 994-95 (M.D. Fla. 1976).

The Commission simply does not have the authority to completely exempt a charge to FPL customers from future rate regulation for a period of 36 years. The Commission erroneously interpreted a provision of law, and used its faulty interpretation as the basis for a decision adversely affecting FPL. Because there is no legally valid basis articulated by the Commission for its decision to direct FPL to remove the regulatory out clause, the

Court should reverse Order No. 24989 and remand to the Commission for further action under a correct interpretation of law.

III.

AIR PRODUCTS BASES ITS ARGUMENT ON "FINDINGS" THAT DO NOT EXIST AND, THEREFORE, CANNOT SUPPORT THE COMMISSION'S DECISION TO STRIP FPL OF A CONTRACT RIGHT.

Order No. 24989 makes clear that the Commission's decision to require FPL to remove the regulatory out clause from standard offer contracts is grounded on the Commission's belief that the clause is unnecessary because there is no risk of future regulatory disallowance. Id. at 70-72 (R. V, p. 675-77). Appellee Air Products ignores the express language of the order and argues that the Commission did what it did based on a series of "implicit findings" (i.e., findings in no way expressed by the Commission itself) from which follows a legal conclusion (also unstated by the Commission) that the regulatory out clause "unreasonably impede[s] the development of cost-effective cogeneration." Air Products' Brief at 15.[7]

It is a fundamental rule of administrative law that "an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962) (citing Securities and Exchange Comm'n v. Chenery Corp., 332

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[7] Air Products also advanced these arguments before the Commission, and asked the Commission to find that the regulatory out clause impeded cost-effective cogeneration contrary to the Public Utility Regulatory Policies Act of 1978 ("PURPA") and related Florida statutes. See R. V, p. 837-47. The Commission did not do so. Order No. 24989 (R. V, p. 975-77).

U.S. 194, 196 (1947)); see also Florida Power Corp., 487 So. 2d at 1063 (Commission order must be reversed where the fundamental premise supporting the order fails to comply with the essential requirements of the law); McDonald v. Dep't of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977) (Florida's APA requires an agency to "expose and elucidate its reasons for discretionary action" and requires reversal of the agency's action for failure to do so). Because the Commission nowhere articulates that its decision to force FPL to remove the regulatory out clause was based on directives under PURPA or related Florida statutes, these statutes and the evidence discussed by Air Products are irrelevant to this appeal. Id.; see also Ryder Truck Lines, Inc. v. King, 155 So. 2d 540, 541 (Fla. 1963).[8]

The wisdom of requiring an agency to state a basis for its discretionary decisions, and refusing to uphold discretionary agency action if the basis articulated by the agency is found to be

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[8] Moreover, shifting the risk of regulatory disallowance to FPL would be completely at odds with PURPA. PURPA was never intended to be interpreted in a way that would require utilities to subsidize QFs. Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1369 n. 30 (N.D. Ga. 1986) (citing H.R.Rep. No. 1750, 95th Cong., 2d Sess. at 98, reprinted in 1978 U.S.Code Cong. & Ad.News at 7832). Under the standard offer contracts at issue, QFs are paid a capacity price equal to the full cost to FPL of building a power plant to serve the same electrical load that the QF plant will serve. See Order No. 24989 at pp. 30-32 (R. V, pp. 935-37). Therefore, the compensation to the QF inherently includes compensation for the risk of regulatory disallowance. See R. VI, Tr. p. 315; R. X, Tr. p. 1639. As also discussed in Re Hawaiian Electric Co., Inc., 108 PUR4th 533, 546 (Haw. Pub. Util. Comm'n 1989), PURPA does not dictate how state regulatory commissions should provide for recovery of payments to QFs. Although cited by appellees, the Hawaii Commission in this case refused to guarantee cost recovery of QF payments for the life of a QF's contract. Id.

erroneous, is obvious. Here, for example, because the Commission never got past its erroneous legal conclusion that there was no risk of regulatory disallowance, it never reached the issues and evidence discussed in Air Products' brief before rendering Order No. 24989. Typically in such circumstances, there would be no way for the Court to discern with certainty how the Commission would have exercised its discretion if it had determined that there was a real risk to be allocated. This case may present a rare exception only because the Commission has expressly addressed the issue in a separate order.

After the initial hearing which addressed this issue, the Commission held an additional "spin off" hearing to determine whether or not it should preclude Florida utilities from placing regulatory out clauses in negotiated contracts with large QFs. Order No. 25668 (R. V, p. 1018). In its "spin-off" order, the Commission held that if it "assum[ed] that there is more than negligible risk [of regulatory disallowance]" (R. V, p. 1017), "the QFs' arguments are not strong enough to mandate the removal of regulatory out clauses . . . ." R. V, p. 1018.[9] If the risk of regulatory disallowance were assumed to be real, the Commission ruled, removing the regulatory out clause "would afford the QFs a benefit at no cost and open the utility to potential harm without compensation." Id. Therefore, if the Court were inclined to

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[9] Consistent with the evidence in the record on appeal (R. X, Tr. pp. 1630 & 1639-40), the Commission also determined in Order No. 25668 that developers were able to finance QF projects based on a contract containing a regulatory out clause. Id. at p. 8 (R. V, p. 1018).

accept Air Products' invitation to attempt to divine from the record what the Commission would have done if it had not erroneously interpreted the doctrine of administrative finality, it should conclude that the Commission would have permitted FPL to retain the regulatory out clause in its small QF contracts. The Commission has effectively said so in Order No. 25668.

ARGUMENT
(Insurance Provision)

Order No. 24989 eliminates FPL's ability to determine whether a QF should provide more insurance than the specified $300,000 minimum. This directly conflicts with Subsection (6)(c) of Rule 25-17.087, Florida Administrative Code (the "Rule"), which provides in material part "more insurance [than the $300,000 minimum] may be required as deemed necessary by the utility." The Commission's action also conflicts with Section (2) of the Rule, which provides that:

> Nothing in this rule shall be construed to preclude a utility from evaluating each request for interconnection [by a QF] on its own merits and modifying the general standards specified in this rule to reflect the result of such an evaluation.

Id. Because the Commission's directions in Order No. 24989 directly conflict with subsections (2) and (6)(c) of Rule 25-17.087, they are "inconsistent" with the Commission's rules and must be reversed. § 120.68(12)(b), Fla. Stat. (1991).

Appellees fail to confront the straightforward legal error made by the Commission when it contradicted its Rule. Instead, appellees' answer briefs argue, without any supporting

authority, that FPL has "waived" or "opted out" of the Rule. Moreover, ignoring that Section 120.68(12)(b) no longer permits an agency to act inconsistently with its rule regardless of whether the deviation is explained, appellees also argue that competent substantial evidence supports the Commission's action. Absent the ability to deviate from a rule by providing explanation, the existence of substantial competent evidence is irrelevant. FPL will address each of these arguments.[10]

V.

THE APPELLEES' CONTENTION THAT FPL HAS "WAIVED" OR "OPTED OUT" OF THE RULES IS ERRONEOUS.

Air Products and the Commission's appellate counsel maintain that FPL has "waived" or "opted out" of the Rule because, they assert, FPL requires QFs to provide insurance for losses not permitted by the Rule. Their contention requires acceptance of both their novel constructions of the Rule as well as their suggested inference that FPL's Commission-approved standard agreements (which are not part of the record on appeal) do require insurance for losses not permitted by the Rule. Moreover, their contention requires acceptance of the "waiver" proposition even though no legal authority is presented to support its application. Appellees' contentions are erroneous.

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[10] FPL will not present a separate section addressing the contentions of the Commission's appellate counsel that the revised minimum level of insurance of $1,000,000 was "within the accepted range of the rule $300,000 and up and that the $1,000,000 minimum insurance requirements does not place a burden on FPL.". Commission Brief at 15. The lack of logic supporting Staff's contention is readily apparent.

The constructions of the Rule offered to support the "waiver" or "opting out" argument are: (1) that the Rule permits a utility to require insurance only for losses "which affect utility operations" (Air Products' Brief at 12); and (2) that the Rule permits a utility to require insurance only for "interconnection facilities".[11] (Commission Brief at 15).

Both of these inconsistent constructions should be rejected. First, Order No. 24989 does not reflect any similar construction of the Rule by the Commission, and no other source for a similar or supporting construction of the Rule is provided. Second, the offered constructions produce a conflict with Section (2) of Rule 25-17.087, Florida Administrative Code, because they would preclude a utility from modifying the general standards specified in the Rule to reflect the results of the utility's own evaluation of the merits of each request for interconnection. The constructions offered by Air Products and the Commission's appellate counsel are the type of construction that this Section (2) of Rule 25-17.087 states even the Commission may not make. Third, the Rule is clear and unambiguous; it does not create categories of permitted and prohibited insurance[12] based on either

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[11] The Commission's appellate counsel's construction is only a "construction by declaration" because no explanation, analysis or discussion is offered in support.

[12] Appellate counsel's statement -- apparently to cover the obvious gap in insurance coverage created by his interpretation -- "[t]hat the Commission has in no way impaired FPL's ability to negotiate more insurance for a total coverage package" (Commission Brief at 19) is somewhat disingenuous. Not only is it contradicted by Order No. 24989's failure to address it, but it also suggests that the Commission does not review and approve standard offer

cause (i.e. transmission facility) or effect (i.e. that affects utility operations) as asserted by the Commission's appellate counsel and Air Products, respectively. Instead, the Rule provides in material part that the insurance policy which the QF "shall deliver" to the utility shall be one:

> 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.

Because of this clear language, FPL submits that the constructions advanced by the Commission's appellate counsel and Air Products would be clearly erroneous even had they been made by the Commission.[13] See Woodley v. Dep't of Health and Rehabilitative Serv., 505 So. 2d 676, 678 (Fla. 1st DCA 1987).

There is no credible basis to accept the contention of

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agreements and, contrary to the Commission's Cogeneration Rules, that a utility may require "through negotiation" more than is contained in the approved standard agreements.

[13] Appellees have asserted that FPL's "preference" for or "insistence" upon one insurance policy was the vehicle by which FPL improperly obtained more insurance than permitted by the Rule. (Air Products Brief at 12; Commission Brief at 17). Even though their misconstructions of the Rule make this point irrelevant, appellees fail to point out to the Court that it was the Commission's own counsel who requested FPL to furnish Exhibit 24 so QFs would not be misled to think that two policies must be purchased. T. 502. Moreover, it is the Commission that approves the content of the standard contracts -- not FPL. Thus, appellees' "one policy argument" really is that the Commission is free to deviate from its rule and limit the amount of insurance where it has also deviated from its rule concerning the type of insurance required.

Air Products and the Commission's appellate counsel that FPL has "waived" or "opted out" of the Rule.

VI.

RELIANCE UPON "COMPETENT SUBSTANTIAL EVIDENCE" TO JUSTIFY ACTING INCONSISTENTLY WITH RULE 25-17.087(6)(c) IS MISPLACED AND ERRONEOUS.

Air Products and the Commission's appellate counsel also attempt to justify the Commission's deviation from the Rule by arguing that the Commission's decision is supported by substantial competent evidence. (Air Products Brief at 23-24 and Commission Brief at 15-19). The Commission's appellate counsel goes several steps further and also injects his observations about the fairness of the proceeding before the Commission and the Commission's responsibility to correct abuse. (Commission Brief at 18 and 19) Had the Commission thought that such deviation was supportable because the deviation was explained and the deviation was supported by competent substantial evidence, it could have said so when it denied FPL's request for reconsideration. It did not.[14]

Since Section 120.68(12)(b) was amended in 1984 (Ch. 84-173, Laws of Fla., 1984), it is no longer permissible for an

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[14] It is indeed curious how, if the Commission did not believe it was deviating from its own Rule when it acted, it is now credible to argue that the Commission's deviation from its rule is justified by substantial competent evidence. FPL sought reconsideration of Order No. 24989. Reconsideration was denied by Order No. 25569 with the Commission concluding that because the Rule did not address the maximum insurance that may be required, Order No. 24989 "addressed an area not addressed by the rule." Order No. 25569 at p. 2 (R. V., p. 1008). Appellees do not now present this Commission justification to the Court. Appellees' argument is inconsistent with the Commission's own rationale for acting.

agency to act inconsistently with its own rules by explaining such deviation. Therefore, the presence or absence of substantial competent evidence to support the Commission's deviation from its rules or the Commission's explanation of its deviation is irrelevant. The Commission's Order No. 24989 deviating from its Rule 25-17.087(6)(c), should be remanded to the Commission as called for by Section 120.68(12)(b).

Assuming arguendo that Section 120.68(12)(b) had not been amended and that the Commission's exercise of discretion to act inconsistently with its own rule would be proper if the deviation from the rule were explained, the presence or absence of substantial competent evidence to support the Commission's action would still be irrelevant in this case. That evidence would be irrelevant because neither Air Products nor the Commission's appellate counsel identify any explanation of deviation in Order No. 24989 to which that evidence could relate.

The Commission's appellate counsel seeks to achieve an almost unassailable position by making the companion assertions that the evidence gave rise to serious concerns about FPL's administration of the liability insurance requirements of Rule 25-17.087(6)(c) and that "[t]he Commission based its decision on the evidence before it." (Commission Brief at 17-18). No record reference is made to support the suggested implication that the Commission made any factual finding to support deviation from the Rule or ever relied upon the evidence now identified in the appellees' answer briefs as competent and substantial evidence in

making these findings.[15]

In effect, the Court is asked to assume that the Commission made the findings of fact to which the evidence now identified in appellees' briefs might relate.[16] Even if Section 120.68(12)(b) permitted an agency to deviate from its rules where an explanation had been given, the presence of that explanation should not be assumed. In Couch Construction Co. v. Dept. of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978) the Court noted that among the due process checks to prevent arbitrary agency action "are the requirements that reasons be stated for all agency action taken or omitted [and] that reasons be supported 'by the record.'" (emphasis added).

Finally, in support of the contention that substantial competent evidence supports the Commission's action (despite the lack of explanatory findings), both the Commission's appellate

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[15] In its Motion to Supplement the Record, FPL has sought to have selected relevant portions of the Commission Staff's recommendation and the agenda conference transcript included in the Record of Appeal so the Court can see that neither the Commission staff's recommendations nor the Commission in its deliberations reached the conclusions now offered by the Commission's appellate counsel.

[16] Order No. 24989 (R. V, pp. 949-50) did contain two "factual statements" from the record concerning FPL's insurance requirements. First, the Order notes that Exhibit 25 showed insurance amounts of between $2,000,000 and $30,000,000 for existing facilities. It notes that the Exhibit did not indicate whether these amounts were voluntary or mandatory. Id. at 44. Second, it observes that while Exhibit 24 does list factors which impact the relative interconnection risk -- it is still not clear how FPL intends to weigh these factors. Id.at 45. However, no request to provide this information was made. (R. V., Tr. p. 503).

counsel and Air Products have misstated the record and ignored relevant findings actually made by the Commission.[17]

Relevant findings on insurance were made by the Commission in Order No. 25668. These directly contradict the phantom findings it is now urged are supported by substantial competent evidence. First, in addressing whether a utility might insist on an unreasonable insurance (a recurring theme in appellees' argument here) or other requirement, the Commission found: "so far, no QF has petitioned this Commission for relief claiming that a utility has taken an unreasonable position on a "regulatory out" clause, insurance provision, ... or any other provision at issue in this docket." Order No. 25668 at p. 10) (R. V., p. 1020). The Commission also rejected the position that insurance requirements in negotiated contracts be limited because of the contention that insurance provisions are susceptible to

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[17] For example, both the Commission's appellate counsel and Air Products emphasize Exhibit 25, asserting that it showed FPL "required" insurance of between $2,000,000 and $30,000,000 or that FPL abused its discretion. (Commission Brief at 16; Air Products Brief at 23). The Commission's appellate counsel makes three references to FPL requiring as much as $30,000,000 in liability insurance (Commission Brief at 4, 16), characterizing this amount as "whopping" and "one hundred times the minimum". (Commission Brief at 6) Unfortunately, the Commission's appellate counsel fails to point out that his characterization is absolutely wrong. The unrefuted testimony at the hearing showed that FPL did not require the $30,000,000 of insurance. Instead, it was explained that "[the QF] had an existing policy for $30 million and they simply offered to include Florida Power & Light and the interconnection in that policy; and we, of course, accepted that". (T. 562). Moreover, the Commission's appellate counsel fails to point out that in the factual discussion in Order No. 24989 (R. V, p. 949) concerning insurance, the Commission said: "The exhibit [No. 25] did not indicate whether these amounts were voluntary or mandatory." Id. at 44.

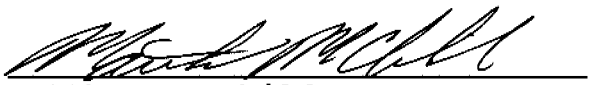
abuse by the utility (once again, a recurring theme in appellees' argument here). It said, "we disagree".[18] Id. (R. V., p. 1020).

Section 120.68(12)(b) does not permit an agency to deviate from its own rule upon the furnishing of an explanation for that deviation. Therefore, reliance upon competent substantial evidence to justify an explanation of deviation, even if provided, is improper.

Conclusion

For the foregoing reasons, FPL asks this Court to reverse the Commission's Order No. 24989, with instructions requiring the Commission to reinstate the regulatory out clause, or take other action consistent with a correct interpretation of the law, and requiring the Commission to permit FPL to reinstate FPL's proposed contract language regarding insurance, or other language consistent with the Rule 25-17.087(2) & (6)(c).

Respectfully submitted,



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[18] The Order went on to note that several factors affect the level of insurance to be required including size, design and complexity of the facility and its interconnection with the utility. The Commission also pointed out that although it did set a cap on insurance for the standard offer, that contract was limited to facilities under 75 MW. Order No. 25668 at p. 10 (R. V., p. 1020).

CERTIFICATE OF SERVICE
CASE NO. 79,338
DOCKET NOS. 910004-EU & 920004-EU

I HEREBY CERTIFY that a true and correct copy of Appellant Florida Power & Light Company's Reply Brief has been furnished to the following individuals by Hand Delivery* or U. S. Mail** on this 15th day of June, 1992.

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