IN THE SUPREME COURT OF FLORIDA

FLORIDA GAS TRANSMISSION COMPANY, Appellant, vs. FLORIDA PUBLIC SERVICE COMMISSION, et al., Appellees.	)	CASE NO. 82,171

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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Appellant, Florida Gas Transmission Company, will be referred to in the Answer Brief as "FGT" or "Appellant". Appellee, the Florida Public Service Commission will be referred to as the "Commission". Appellee, SunShine Pipeline Partners will be referred to as "SunShine".

Cites to the Record on Appeal are referenced "R._____"; the transcripts of the May 10-11, 1993 hearing "T.____". References to FGT's Initial Brief will be designated "Brief at___".

STATEMENT OF THE CASE AND FACTS

The Commission accepts FGT's Statement of the Case and Facts to the extent that it presents objective information about the proposed SunShine Pipeline and the course of proceedings at the Commission. The Commission is constrained to observe, however, that FGT's Statement presses the limits of subjectivity and argument permissible in this section of the brief. See, Williams v. Winn-Dixie Stores, Inc., 548 So.2d 829 (Fla. 1st DCA 1989), (Brief stricken where it contain excessive legal argument).

From page 3 on, FGT's presentation consists largely of an argumentative presentation of the testimony of its witness, Dr. Carpenter, and criticism of SunShine's witnesses. The Statement is structured with clearly argumentative subheadings such as "Inadequacy of SunShine's Forecasts of Future Need for Pipeline" and "Lack of Market Commitment for the SunShine Pipeline". Brief at 6; 8. The text is liberally peppered with references to "undisputed" and "unrebutted" testimony. Id. at 3,4, 5, 6, 7, 8 and 9.

Perhaps the clinching statement is at page 11 in FGT's sarcastic references to the Commission's "Adoption of Final Order." There, the Court is told that "[d]espite the above-noted facts . . . the Commission voted to approve SunShine's application . . . ." A more appropriate ending would have been that "in consideration of the evidence presented by SunShine and other parties, the Commission found that the applicant had met it burden of proof to establish need".

The statement that the Commission "did not themselves rule on FGT's findings of fact" is misleading and erroneous. The Commission accepted and adopted as its own the staff's recommendations on FGT's 94 findings, including the 24 findings which were accepted. There is certainly no requirement that the Commissioners spend hours mulling over a party's proposed findings at agenda conference before ruling. It is the function of the Commission staff to make such recommendations, as FGT is well aware.

In view of the one sided presentation of facts and the case in FGT's Brief, the Commission adopts the Statements of the Case and Facts as presented in the Answer Briefs of SunShine and Florida Power Corporation, filed October 8, 1993. Moreover, the Commission relies on the facts established in its final order approving SunShine's application and the formulation of issues to be heard in its prehearing order. Final Order PSC-93-0987-FOF-GP, R.1628-1704; Prehearing Order PSC-93-0696-GP, R.465-503. Indeed, given FGT's purely legal challenge to Section 403.9422(1)(b), Florida Statutes, and purely procedural challenge to the Commission's order, these orders contain the majority of the material relevant to this appeal.[1]

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[1]That formulation of issues is found at page 12 of FGT's Brief where it states:

> FGT asks of this Court two central questions: whether a statute's lack of guidelines makes it unconstitutional under Florida's non-delegation doctrine, and in the alternative, whether an agency may refuse to flesh out such a statute in a final order by refusing to elucidate, discuss, or explain its public policy choices.

SUMMARY OF ARGUMENT

In construing the constitutionality of Section 403.9422(1)(b), Florida Statutes (Supp. 1992), the Court should be guided by the maxim that a statute should be construed in a way that ascertains its meaning and give effect to the intent of the Legislature enacting it. All doubts as to the constitutionality of the law should be resolved in its favor. The Natural Gas Transmission Pipeline Siting Act, of which Section 403.9422(1)(b) is a part, was enacted as a companion statute to the Natural Gas Transmission Pipeline Intrastate Regulatory Act, Sections 368.101-386.112, Florida Statutes (Supp. 1992). These statutes provide a comprehensive grant of authority to the Commission to determine need for new gas transmission facilities and to regulate rates and service. The grant of authority contained in Section 403.9422 is parallel to the authority granted the Commission under the Florida Electric Power Plant Siting Act and the Transmission Line Siting Act in Sections 403.519 and 403.537, Florida Statutes, respectively.

Any constitutional questions arising as to the delegation of authority in Section 403.9422(1)(b) do not involve the separation of powers doctrine. The Commission is a branch of the Legislature and the only valid question presented in this appeal is one of proper delegation of authority to an administrative agency.

Since its inception in 1887, the Commission has been recognized as the proper body to execute the legislative power over the rates, service and facilities of public utilities. Complex and

fluid conditions attendant to utility rate-setting and regulation require delegation of such functions to the Commission. It is not a violation of the delegation doctrine to grant discretionary authority to the Commission to carry out the general scheme of regulation enacted by the Legislature.

Section 403.9422(1)(b) articulates legislative policy and sets out clear and unambiguous criteria to be followed in making a determination of need for a gas pipeline. There is nothing inherently ambiguous about the legislative directive to consider the need for "natural gas delivery reliability, safety and integrity; the need for abundant, clean-burning natural gas to assure the economic well-being of the public; and the appropriate commencement and terminus of the line".

The discretionary provision of Section 403.9422(1)(b) that allows the Commission to consider "other matters within its jurisdiction deemed relevant to the determination of need" is not a grant of unbridled discretion to the Commission. The provisions of the statute taken together direct the Commission to make broad inquiries into the need for additional natural gas transmission facilities in Florida. That is exactly what the Commission did in the SunShine need determination. The remedy of judicial review in this Court is available to any party who believes the Commission has violated its mandate under Section 403.9422(1)(b). There is no claim in this appeal that the Commission has abused its discretion in considering matters irrelevant to a determination of need or outside of its jurisdiction.

Florida courts have specifically upheld the Commission's discretionary exercise of delegated authority. The Commission's determination of need in the instant case is consistent with judicial precedent.

The Commission's order is neither deficient in form nor content. The order meets the test for sufficiency articulated in this Court's decisions and the decisions of other Florida courts. The order systemically addresses each of the statutory criteria of Section 403.9422(1)(b) and presents detailed discussions of the evidence taken on each of the issues raised in the proceeding. The Commission ruled on each of FGT's 94 proposed findings of fact consistent with the Florida Administrative Procedure Act and interpretative case law.

FGT's detailed presentation of its evidence and criticism of the Commission's findings is simply a round-a-bout way of attempting to have this Court reweigh the evidence and substitute its judgment for the Commission's. That would be an improper role for the Court. FGT's arguments should be rejected, and the Commission's order affirmed.

ARGUMENT

I. SECTION 403.9422(1)(b) FLORIDA STATUTES (SUPP. 1992) IS NOT AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY AND DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION (1968).

It is a cardinal rule of statutory interpretation that a statute should be construed in a manner which will ascertain and give effect to the intent of the legislature enacting the statute. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905, 907 (Fla. 1969). Determination of the constitutionality of a statute is a "most grave and important power". In the Interest of A.A. v. State, 605 So.2d 106, (Fla. 1st DCA 1992). The Court should not exercise its power over the constitutionality of a statute lightly or rashly, and all doubts as to the validity of the law should be resolved in favor of its constitutionality. Id.

FGT would have this Court blithely ignore these basic tenets of statutory interpretation and invalidate a key provision of the Natural Gas Transmission Pipeline Siting Act. There is no basis for such a drastic action either on the face of the statute or in the law of delegation.

A. THE NATURAL GAS TRANSMISSION PIPELINE SITING ACT AND NATURAL GAS TRANSMISSION PIPELINE INTRASTATE REGULATORY ACT ADOPTED IN CHAPTER 92-284, LAWS OF FLORIDA, PROVIDE A COMPREHENSIVE GRANT OF REGULATORY AUTHORITY TO THE COMMISSION.

The regulation of intrastate natural gas pipelines approved by the Legislature in 1992 involves much more than the narrow certification provision focused on by FGT. The Commission is recognized as the sole forum for determination of need under the Siting Act in Section 403.9422, and it is also given comprehensive

rate regulation under the provisions of the Act embodied in Section 368.101-386.112, Florida Statutes, (Supp. 1992). Section 368.102-Legislative Declaration, states:

> The Legislature has determined that regulation of natural gas intrastate transportation and sale is in the public interest and ss. 368.101-368.112 shall be deemed to be an exercise of the police power of the state for the protection of the public welfare. The Legislature intends that the provisions of Chapter 120 apply to ss. 368.101-368.112 and to proceedings pursuant to those sections except as otherwise expressly exempted.

Clearly, the Commission's role in need determinations is linked to its overall regulatory authority. Section 403.9422 is simply another aspect of the broad powers granted the Commission under the Natural Gas Transmission Pipeline Intrastate Regulatory Act.

The Legislature's 1992 enactment has given the Commission a broad range of discretion to carry out the general purposes of the Regulatory Act and the Siting Act. Moreover, it should be noted that the authority for determination of need for natural gas transmission lines is parallel to that authorized for the Commission in the siting of electric power plants and electric transmission lines in Sections 403.519 and 403.537, Florida Statutes. In fact, the language of the applicable Transmission Line Siting Act provision is almost exactly parallel to that contained in the natural gas pipeline certification provision. Section 403.537(1)(b) states:

> In the determination of need, the Commission shall take in account the need for electric system reliability and integrity, the need for

> abundant low cost electrical energy to ensure the economic well-being of the citizens of this state, the appropriate starting and ending point of the line, and other matters within its jurisdiction deemed relevant to the determination of need.

Section 403.9422(1)(b), under attack by FGT in this appeal, states

> In the determination of need, the commission shall take into account the need for natural gas delivery reliability, safety, and integrity; the need for abundant, clean-burning natural gas to assure the economic well-being of the public; the appropriate commencement and terminus of the line; and other matters within its jurisdiction deemed relevant to the determination of need.

The grant of authority contained in Section 403.9422(1)(b) is thus not without precedent in Florida law. It is clear that this legislative enactment for the regulation of intrastate natural gas pipelines is consistent, almost to the letter as to 403.537 and 403.9422, with a long-standing provisions of the Power Plant Siting Act and the Transmission Line Siting Act. There is no reason to believe, as FGT suggests at page 19 of its Brief, that the grant of authority in the statute will send the Commission on a regulatory binge or that the Commission will now be "beyond the law to control".

B. THE DELEGATION OF AUTHORITY IN 403.9422 IS CONSISTENT WITH FLORIDA CASE LAW.

Somewhat curiously, FGT claims that Section 403.9422(1)(b) violates a separation of power doctrine. Apparently, FGT did not pause to consider that the Commission is an arm of the Legislature. Chiles v. Public Service Commission Nominating Council, 573 So.2d

829 (Fla. 1991). Appellant's invocation of the Court's admonition to the Legislature against delegating power to another branch of government in Chiles v. Children A, B, C, D, E and F, 589 So.2d 260, 264 (Fla. 1991), is thus clearly off base. The question for this Court in this appeal is one of delegation of authority to an administrative agency, not a separation of powers question. The issue for this Court to decide is whether the Legislature, in view of the Commission's unique role in regulating utilities, has enacted a law which is sufficient to meet the various tests formulated by Florida courts to judge unlawful delegation of legislative authority. A review of extensive case law in the subject, specifically those cases involving the Commission, indicates that the Legislature has met this burden.

Almost since the inception of the Commission in 1887, legislative grants of power to the Commission have been subject to challenge as unlawful delegation. In M'Whorter v. Pensacola and A.R. Co., 5 So. 129 (Fla. 1888), a railroad company challenged the statutes allowing the Railroad Commission to set rates on the basis that it was an unlawful delegation of legislative authority.[2] The Court found that the power to fix rates was legislative in nature but that it was also delegable. Id. at 136. The Court went on to further state that determining just and reasonable rates is an ongoing and complex process which "can only be satisfactorily solved by a board which is in perpetual session, and whose time is

[2]The predecessor agency of the present Public Service Commission was established as the Florida Railroad Commission.

largely given to the consideration of the subject." Id. at 137. The Court declared that it would be virtually impossible for the Legislature to carry out this function itself and that ratemaking by the Legislature would "result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice in some cases to the railroad companies, and in others to the people of the state." Id. The Court recognized in M'Whorter that utility regulation was an area where delegation of authority was both constitutionally permissible and practical.

In State v. Atlantic Coast Line R. Co., 47 So. 969 (Fla. 1908), the Court provided a much expanded discussion of the doctrine of legislative delegation as it applied to the Commission. The Court recognized that, in the exercise of its authority, there are some things that the Legislature cannot effectively do by itself. The Court noted that in these instances ". . . the subject matter may be such that only a general scheme or policy can with advantage be laid down by the Legislature, and the working out in detail of the policy indicated may be left to the discretion of administrative or executive officials." (Citation omitted) Id. at 971.

The Court went on to explain in detail how this basic principle applied to regulation by the Railroad Commission and formulated its test for unlawful delegation as follows:

> The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law,

> complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. This principle of law is peculiarly applicable in the regulation of common carriers. The complex and ever changing conditions that attend or effect the performance of the useful public service rendered by common carriers make it impracticable for the Legislature to prescribe all the necessary rules and regulations. If the details of the general legislative purpose, within definite limitations as expressed in a complete law, cannot be committed to administrative officers, the sovereign power and duty to regulate would be impotent, to the great detriment of the public welfare. Id. at 976.

The Court ultimately found in Atlantic Coast Line that the Railroad Commission was authorized to adopt a rule imposing a $1.00 per day charge for each rail car improperly detained by the railroad.

The basic tenets of these early cases are applicable to the question before this Court. The Legislature has enacted two statutes which clearly express the legislative intent that intrastate gas pipelines be comprehensively regulated. As rate regulation is a complex issue best left to the ongoing oversight of the Commission, so is the determination of need for a natural gas pipeline.

The mandatory provisions of 403.9422(1)(b)

Contrary to Appellant's assertions, the Legislature has in Section 403.9422(1)(b) established reasonable guidelines for the Commission's exercise of discretion. The statute unequivocally requires the Commission to take into account the need for "natural

gas delivery reliability, safety and integrity; the need for abundant, clean-burning natural gas to assure the economic well-being of the public, and the appropriate commencement and terminus of the line." These terms are not inherently ambiguous nor subject to widely varying interpretations in the context in which they are used. There may be many factors which bear on the reliability, safety and integrity of a gas pipeline, the need for gas to assure economic well-being of the public or the determination of the appropriate commencement and terminus of the gas line. These, however, are factual matters upon which the law operates. It is the duty of the Commission to make those factual determinations and that is precisely what it did in the proceedings giving rise to this appeal. One need only examine the 22 substantive issues listed in the Commission's Prehearing Order to realize that this is true. Order No. PSC-93-0696-PHO-GP, R.465-503. It is no criticism of the statutory directive that elaborate definitions of its terms are not given nor that there is no weighting system attached to the various elements the Commission is to consider. See, Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1378 (Fla. 1981) (Legislature did not place specific values on considerations for making Development of Regional Impact recommendations pursuant to 380.06(8), Florida Statutes, and there is no requirement that each be given equal weight). Indeed, this Court has recently upheld the Commission's discretion to interpret the statutory criteria to be applied in determining need under the Electrical Power Plant Siting Act, Section 403.519. Floridians for Responsible Utility Growth v.

Beard, 621 So.2d 410, 412 (Fla. 1993). (Commission did not err in its interpretation of statutory terms and its findings under Section 403.519 were clearly presented and supported by competent substantial evidence).

The discretionary provisions of 403.9422(1)(b)

The final provision of Section 403.9422(1)(b), which gives the Commission discretion to consider "other matters within its jurisdiction deemed relevant to the determination of need", likewise does no violence to the doctrine of delegation of authority. This provision by no means allows the Commission to establish what the law will be in the first instance. The Legislature has decreed that intrastate gas pipelines will be regulated and that, as a first step in the certification process, the pipeline must demonstrate that there is a need for the facility. The discretionary provision of the statute allows the Commission to raise issues and gather evidence on matters which may affect this determination. As the Commission's order and the 22 issues that were addressed in the hearing indicate, a determination of need is a complex process involving sophisticated issues of economics, engineering, financial analysis, and safety regulation. It would be impractical for the Legislature to have designated each factor which the Commission might logically need to consider in making that determination. It was for the very purpose of dealing with these complex and fluid issues of utility regulation that the Commission was established.

The discretion granted to the Commission in the final clause of Section 403.9422(1)(b) is by no means unbridled, nor beyond judicial control. This Court has held that the key element in determining whether a delegation of legislative authority is unconstitutional is its reviewability in Court. North Broward Hospital District v. Mizell, 148 So.2d 1, 4 (Fla. 1962); Coca Cola Company, Food Division v. State, Department of Citrus, 406 So.2d 1079, 1084 (Fla. 1981). The Court has the power to determine if the decisions on discretionary issues raised in need proceedings are arbitrary or not supported by competent substantial evidence. It is nonsense to suggest as FGT does at page 19 of its Brief that no reviewing Court will be able to "second guess a PSC determination that some factor, . . . is somehow a 'matter within its jurisdiction deemed relevant to the determination of need'".

The unique position of the Commission in carrying out the legislative function of utility regulation has been recognized by this Court and others in more recent cases. In Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985), this Court upheld the Commission's discretionary authority to determine when a long-distance carrier certificate should be issued based on a public interest standard. Microtel had asserted that the Commission's authority to determine its certification was in the public interest under 364.335, Florida Statutes, violated the non-delegation doctrine. The Court reiterated the basic delegation standard applicable to the Commission:

> In implementing this policy decision, the Legislature is obliged by the non-delegation

> doctrine to establish adequate standards and guidelines. Subordinate functions may be transferred by the Legislature to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions. Id. at 1191. (Citations omitted).

The Court went on to find in Microtel that the Legislature had adopted a statute with the purpose of fostering competition in the telecommunications market. The Court concluded that the delegation to the Commission of the implementation of this act was proper. The role of the Commission was to foster competition through a review of the technical and financial ability of the applicant and an evaluation of the service, facilities and territory to be served. Id.

The parallels with Microtel in the instant case are obvious. As in Microtel, the Legislature has enacted a general statute setting forth a general policy, in this case one requiring the comprehensive regulation of intrastate gas pipelines. It has delegated to the Commission, as the body with the appropriate expertise, the role of evaluating the fluid and complex market conditions giving rise to the need for the pipeline, as well as the overall fitness of the applicant to meet that need.

The First District Court of Appeal reached a conclusion similar to this Court's Microtel holding in Florida Waterworks Association v. Florida Public Service Commission, 473 So.2d 237 (Fla. 1st DCA 1985). In that case, appellants challenged the Commission's authority to regulate a utility's level of contributions-in-aid-of-construction (CIAC). The basis of the

challenge was that the statute did not contain specific language conferring that authority on the Commission. Id. at 244. The Court observed that the applicable regulatory statute, Chapter 367, Florida Statutes, explicitly stated that regulation of water and sewer utilities was an exercise of the police power to protect the public health, safety and welfare. Id. at 245. The Court went on to explain that there were exceptions to the general law of non-delegation. These apply where the subject of the statute relates to licensing and the determination of the fitness of an applicant and where a business, potentially dangerous to the public, is operated as a privilege rather than a right. Id. The Court relied on Astral Liquors, Inc. v. The Department of Business Regulation, 463 So.2d 1130 (Fla. 1985), to hold that the appropriate standard to be applied in judging the validity of this delegation to the Commission was one of reasonableness. The Court accepted the conclusion in Astral, that where enforcement of the police powers were concerned "the Legislature is not required to provide specific rules to cover all conceivable situations that may confront the agency". Id.

Although Section 403.9422 does not specifically state that determination of need is exercise of the police power, this function cannot be separated from the Commission's general regulatory duties under Chapter 368. As noted above, that statute specifically states that regulation of natural gas pipeline safety, rates and services is an exercise of the police power. Those same considerations of safety, economic well-being and protection of

utility ratepayers from adverse effects of pipeline competition such as cross-subsidies was the subject of the Commission's need determination hearing. In fact, FGT built much of its case on the claim that the introduction of the SunShine Pipeline could have adverse affects on Florida's utility ratepayers in view of the equity position of Florida Power Corporation in the pipeline. T. 636-639.

The Legislature has sanctioned and the courts have recognized a pragmatic approach to the delegation doctrine in complex fields such as utility regulation. See, In the Interest of A.A., supra, 605 So.2d 107 (Citing Microtel and Florida Waterworks for a broad interpretation of the non-delegation doctrine). The arguments advanced by FGT would clearly defeat the purpose of the Legislature's enactment of the Natural Gas Pipeline Act. Perhaps more clearly than any other agency, the Commission's role is to carry the policies of the Legislature in areas involving complex and fluid conditions. Enumeration of every criterion that the Commission should apply in carrying out its role is virtually impossible.

This Court has often stated that as the agency responsible for utility regulation, the Commission's interpretation of its statutory authority is entitled to great weight. P.W. Ventures v. Nichols 533 So.2d 281 (Fla. 1988). That principle also applies where constitutionality is at issue. As the Court noted in Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 820 (Fla. 1983):

> A statute is not unconstitutional simply because it is subject to different interpretations. The administrative construction of the statute of the agency charged with its administration is entitled to great weight. We will not overturn that agency's interpretation unless clearly erroneous. (Citation omitted)

II. THE COMMISSION'S FINAL ORDER COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF THE LAW AND ADEQUATELY SETS FORTH THE BASIS OF THE DECISION.

In Issue II of its Initial Brief, FGT reargues its case to the Court. With considerable taxonomic acumen, FGT marshals its evidence into categories and subcategories. It does not complain in the end that the Commission's decision was not supported by competent substantial evidence and is, therefore, erroneous. Instead, FGT asks the Court to look at the evidence it presented from its perspective. FGT would have the Court decide that the Commission could have reached a different decision. Thus, the relief requested is that the proceedings be remanded to the Commission, so that it can once again "grapple with" the arguments presented by FGT.

FGT's arguments truly elevate form over substance and ask this Court to assume an improper role. As has been stated many times, the object of judicial review is not for the Court to substitute its judgment for the agency's or to overturn the decision because it might have reached a different conclusion on the evidence presented. Citizens v. Public Service Commission, 435 So.2d 534 (Fla. 1983).

A. THE COMMISSION'S ORDER IS SUFFICIENT IN FORM AND CONTENT.

This Court articulated the standard by which it would review the adequacy of the Commission's orders in Occidental Chemical Company v. Mayo, 351 So.2d 336 (Fla. 1977). In that case, the appellants challenged the sufficiency of the Commission's statement of facts in its order. The Court stated that "the Commission was not required to include in its order a summary of the testimony it heard or a recitation of every evidentiary fact on which it ruled". Id. at 341. The Court found the Commission's order adequate where it contained "a succinct and sufficient statement of the ultimate facts upon which the Commission relied, including commentary expressly directed to Occidental's contentions". Id.

The Court reiterated the Occidental test in H. Miller and Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979). In that case, appellant Miller claimed that the Commission, in superseding contract charges for new water and sewer connections, had made no express finding in its order that the CIAC contract at issue was unreasonable or adversely affected the public. The Court did not agree that the order was deficient, based on the statements it contained setting forth the Commission's ultimate reliance on the applicable statute and basic ratemaking concepts. Id. at 915.

A similar test for the adequacy of an agency's order was stated in Schomer v. Department of Professional Regulation, 417 So.2d 1089, 1090 (Fla. 3rd DCA 1982) where the Court held:

> It is sufficient that the agency provide in its decision a written foundation upon which the reviewing Court may assure that all proposed findings of fact have been considered

> and ruled upon and not overlooked or concealed.

As even a cursory look at its order will reveal, the Commission's findings of fact and rulings on FGT's proposed findings are more than adequate to meet the tests articulated by this Court and others. FGT's claim at page 25 of its Brief that "only a few lines deal with the policy issues identified by the siting act and raised by FGT" is utterly baseless. The Commission's order begins at page 3 with a recitation of the four criteria contained in Section 403.9422(1)(b). R. 1630. The order then proceeds in detail to discuss the Commission's findings on all issues relevant to these criteria as developed in the prehearing process and contained in the Commission's prehearing order. R. 465-503.

To illustrate the point, Part I of the order - The Need for an Additional Natural Gas Transmission Pipeline - addresses the following topics: A. SunShine's Forecast; B. Precedent Agreements; C. Natural Gas Delivery Reliability and Integrity; D. Access to Natural Gas Supply; E. Pipeline to Pipeline Competition in Florida; F. Timing; and G. Consequences of Delay. Order at 3-17; R. 1630-1644. Part II of the order - The Pipeline Project to Fill the Need for Additional Gas Transmission - addresses: A. Commencement and Terminus of the Pipeline; B. The Route and Location of Associated Facilities; C. Pipeline Diameter, Configuration and Cost; D. Upstream Pipeline Capacity; E. Financial Viability of the Pipeline Project; F. the Safety of the Pipeline Project. Order at 17-28; R.1644-1655. The order then goes on to articulate the

Commission's general conclusions and to establish certain conditions that must be met for certification. Order at 28-32; R. 1655-1659.

At page 33 of its Brief, FGT marshals its evidence for the Court's review to show the Commission's order is inadequate. Reference to the order illustrates that the Commission adequately addressed each of the topics FGT chose to illustrate its points. As to "price and capacity requirement forecasts" the Commission's order contains nearly three pages of discussion of the evidence on that issue. Order at 4-6; R.1631-1633. The Commission presented a thorough analysis of the testimony of SunShine's witness, Mr. Rose, and noted FGT's criticism. It then stated its conclusions on this matter:

> We believe that Mr. Rose's procedure reflects the impact of key factors driving gas capacity requirements, such as competition between fuel alternatives and power plant utilization levels. In addition, Mr. Rose's procedure did include power plant plans. We believe it is an acceptable method of forecasting capacity requirements. Recognizing that gas prices are volatile and uncertain, Mr. Rose developed a range of forecasted fuel prices that incorporated forecasts used by the Florida Electric Coordinating Group and the Department of Energy (DOE). While Mr. Rose stated that his forecasted fuel prices are lower than those of FCG and the DOE, he used the more conservative end of the fuel price forecast ranges to account for the volatility and uncertainty in prices. Order at 5-6; R.1632-1633.

The Commission then explained the reasons why it did not accept FGT's criticism of the fuel forecast, that is, primarily because "Mr. Carpenter did not present a fuel price forecast that he believed to be more reasonable". Order at 6; R.1633.

The Commission then went on to conclude that, notwithstanding the conflicting analyses of gas capacity requirements available to SunShine in the year 2000, the forecast was sound based on "economic analysis of fuel cost, conversion cost and power plant construction cost". Id.

The Commission likewise made detailed findings on the other topics that FGT finds inadequately discussed in the order. As to "evidence of sufficient market interest in SunShine", (Brief at 33) the Commission stated:

> While the precedent agreements demonstrate consumer interest in the pipeline, the capacity requested is lower than 100%. It would be preferable to have complete subscription prior to granting a determination of need, but it is not realistic to expect full subscription at the earliest stages of greenfield pipeline project development. We do not believe that full subscription of the pipeline prior to a determination of need is necessary if the following two conditions are met: the forecasted gas capacity requirements are sufficient to achieve full pipeline capacity; and a competitive environment is expected to exist for transportation of natural gas.
>
> It is our judgment that the 1995 subscription level of an approximately 70% is reasonable to justify construction of the first phase of the project, but the signed precedent agreements SunShine has acquired thus far do not by themselves demonstrate that there is sufficient demand for the proposed expansions of the project. When we consider the signed precedent agreements along with SunShine's forecast of future capacity requirements of electric generators, however, we do find that SunShine has provided adequate support to justify its designed pipeline capacity in the years proposed. Order at 7; R.1634.

Clearly the Commission did not unthinkingly accept SunShine's representation of the effect of the precedent agreements without weighing countervailing evidence.

The Commission's order likewise deals in detail with the financing for the pipeline. The Commission noted FGT's claim that SunShine had not proven that it could obtain the necessary financing for the project. However, it found that testimony of FGT's witness, Dr. Carpenter, concerning Florida Power Corporation's equity investment in the project did not support a conclusion that the project was not financially viable. The Commission weighed the testimony of FGT's witness as follows:

> Dr. Carpenter admitted that FPC's precedent agreement committed it to buy gas transportation, whether or not it maintains its equity position. Dr. Carpenter also admitted that had it not been for FPC's proposed equity participation in the project, he would not have testified in this case. Moreover, he stated that "if there were no equity position that created this conflict and avenues for cross-subsidy, I would not have a problem at all with certificating a project under competitive circumstances". Order at 23; R. 1658.

The Commission went on to conclude:

> We do not find evidence in the record to refute SunShine and FPC's position that the partnership can secure the necessary financing for the pipeline project. We find that SunShine can secure the appropriate financing for the project with or without FPC as an investor. Id.

The foregoing illustrates that FGT's criticism of the Commission's factfinding and elucidation of the basis for its policy-related decisions is unfounded. The Commission has

addressed each of the policy considerations for determination of need set out in 403.9422(1)(b). The order on its face meets the test for policy elucidation set forth in McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

FGT is right about one thing in its Brief, the Commission does argue that the matter of determining a need for a gas pipeline is a complex matter. Brief at 44. The Commission was required to illustrate the ultimate basis of its decision, but it was not required and it could not reasonably be expected to state every evidentiary fact upon which it relied. See, National Auto. Transporters Ass'n. v. United States, 121 F. Supp. 289, 290 (E.D. Mich. 1954) (A Commission or a Court in its order or opinion rarely mentions all the evidence it heard, and there is no presumption that unless it does it must have failed to consider whatever evidence is not covered).

The remainder of FGT's argument illustrates its refusal to accept that is the Commission's job to act as trier of fact, to weigh the evidence and to determine what is relevant to its final decision. FGT's criticism that "the final order summarily rejects uncontested proposed findings of fact", is no criticism. Brief at 25. There is absolutely no reason why the Commission has to accept every uncontested fact submitted by a party. The Court stated in Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 476 So.2d 1350, 1352 (Fla. 1st DCA 1985):

> It is perfectly clear . . . that identified proposed findings deemed subordinate, cumulative, immaterial, or unnecessary may be rejected by the simple statement that

they are just that, so that no further explicit reason need be stated for rejecting the finding.

The Commission was, for example, perfectly within its discretion to find that FGT's proposed finding of fact No. 18 referring to SunShine's current lack of assets was "immaterial to the decision on the issues in this case". Order at 40; R.1667. SunShine is, after all, in the process of organization and development at this point. FGT might wish for the Commission to savor every morsel of evidence it presented in the proceeding; however, that is not its job as a decision-maker. Its job is to consider the evidence, determine what is and what is not relevant or material and give evidence the weight to which it is entitled.

The Commission was likewise within its discretion to reject as argumentative or conclusory those statements in which FGT attempted to force its subjective perspective on the issues. The proposed finding cited by FGT at page 31 of its Brief as a "very plain factual account of the record" illustrates the point. The statement contained in finding of fact No. 37 concerning Mr. Rose's testimony is fairly dripping with subjectivity. No plain statement of fact would begin with an argumentative lead-in such as "[f]irst of all . . ." or continue with language such as "because he ignored these plans he grossly overestimated the demand . . . ." (emphasis supplied).

The statement in proposed finding 37 is a good illustration of FGT's apparent inability to comprehend the difference between fact and opinion. FGT goes on in its Brief at page 31 to quote the opinion of its witness, Dr. Carpenter, on the inadequacies of Mr.

Rose's testimony. Supposedly, the Court is to accept as an indisputable fact Dr. Carpenter's opinion that "Mr. Rose's analysis is at best a poor substitute for the actual plans developed by Florida's electric utilities". Id. Indeed, on the point of FGT's misunderstanding about these matters, footnote 6 at page 33 is very telling. There FGT states:

> A proposed finding of fact for a PSC proceeding is by its very nature conclusory in form, especially given the PSC's peculiar requirement that the proposed finding not exceed three sentences. Fla. Admin. Code r. 25-22.056. As for the alleged "argumentative" tone of these proposed findings, they are an almost verbatim restatement of what a witness actually stated (as a comparison of any proposed finding to its record citation will clearly reveal). (Emphasis supplied).

As is the case with Dr. Carpenter's statement above, it appears that FGT considers anything said by witness to be a fact which must be accepted by the Commission. That is, of course, incorrect.

The Commission ruled on each and every one of FGT's 94 proposed findings of fact. The Commission has stated its reasons for rejecting FGT's findings which it found immaterial, cumulative, conclusive and argumentative. That is what the law requires. Schomer, Island Harbor, supra.

FGT stands before this Court in essentially the same posture as the appellant in Floridians for Responsible Utility Growth, supra. In that case, the appellant argued that the Commission had neither adequately considered the criteria of the Power Plant Siting Act, Section 403.519, nor given due credence to the proposed

findings of fact that had been submitted. The Court found that the Commission's order contained adequate findings on the statutory criteria and that the order was supported by competent substantial evidence. The Court further noted that the Commission had ruled on each of the appellant's findings of fact. 621 So.2d 412.

There is no allegation by FGT in this case that the Commission's order is not supported by competent substantial evidence. FGT only argues that the Commission might have reached a different conclusion, had it weighed the evidence differently. It is not the Court's role to reweigh the evidence, and FGT should not be aided in its attempt to scuttle or further delay the Commission's decision on arguments so lacking in substance. Citizens, supra. It would be inappropriate, based on FGT's criticisms, to remand the case to the Commission. There has been no demonstration that the fairness of the proceeding or the final action has been impaired by the Commission's rulings. Health Care Management, Inc. v. Department of Health and Rehabilitative Services, 479 So.2d 193, 195 (Fla. 1st DCA 1985.

CONCLUSION

FGT has not met its burden of overcoming the presumption of correctness that attaches to the Commission's orders. City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981). It has neither shown that Section 403.9422(1)(b) is unconstitutional nor that the Commission's order is deficient in content or form. Accordingly, Order No. PSC-93-0987-FOF-GP should be affirmed.

Respectfully submitted,

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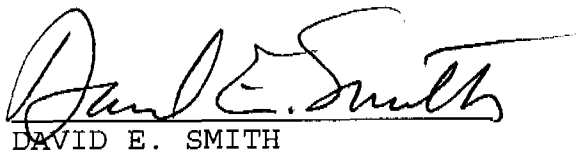

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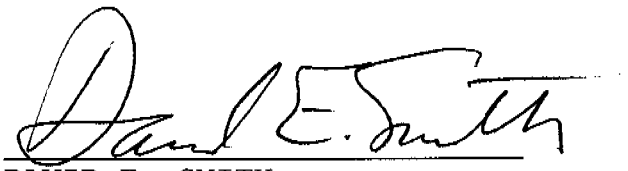
Dated: November 12, 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 12th day of November, 1993 to the following:



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