IN THE SUPREME COURT OF FLORIDA

FLORIDA GAS TRANSMISSION COMPANY,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION, et al.,

Appellees.

CASE NO. 82,171 ~~81,296~~

ON APPEAL FROM A FINAL ORDER OF THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE SUNSHINE PIPELINE PARTNERS

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STATEMENT OF THE CASE AND OF THE FACTS

The numerous misstatements of the record evidence, omissions of material facts, and improper argument contained in the "Statement of the Case and Facts" of Florida Gas Transmission Company (FGT) make it necessary for SunShine Pipeline Partners (SunShine) to present the following corrective and supplemental statement.

In 1992, Florida enacted comprehensive legislation to regulate intrastate natural gas pipelines. The Natural Gas Transmission Pipeline Siting Act, ss. 403.9401-403.9425, Florida Statutes, together with the Natural Gas Transmission Pipeline Intrastate Regulatory Act, ss. 368.101-368.112, Florida Statutes, provide for the determination of the need for proposed natural gas pipelines, the siting of pipelines, and the regulation of pipeline rates and services.

On March 5, 1993, SunShine filed its Application for Determination of Need with the Florida Public Service Commission (PSC). The Florida Department of Environmental Regulation and five other intervenors who are natural gas consumers in Florida supported SunShine's application.[1] SunShine's application was

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[1] The natural gas consumers who supported SunShine's application are: Florida Power Corporation (FPC), Peoples Gas System, Inc. (Peoples), Chesapeake Utilities Corporation, Chevron U.S.A. Inc., and Florida Cities which is a group comprised of Jacksonville Electric Authority, Orlando Utilities Commission, City of Tallahassee Electric Department, Lakeland Department of Electric and Water Utilities, City of Gainesville, City of Homestead, Kissimmee Utility Authority, City of Stark, City of St. Cloud, City of Clearwater, Lake Apopka Natural Gas District, City of Leesburg, City of Pensacola, and Okaloosa County Natural Gas District.

opposed by FGT, which for over thirty years has been the only natural gas pipeline operating in peninsular Florida.[2]

SunShine is a Florida General Partnership whose general partners are Coastal Southern Pipeline Company, a subsidiary of The Coastal Corporation; TCPL SunShine, Ltd., a subsidiary of TransCanada Pipelines, Ltd.; and Power Energy Services Corporation, a subsidiary of Florida Power Corporation. [TR:31] The Coastal Corporation is the parent company of ANR Pipeline Company and Colorado Interstate Pipeline Company which together have constructed and operated approximately 18,800 miles of natural gas pipelines in the United States. [TR:99] TransCanada also has extensive experience in the construction and operation of natural gas pipelines in the United States and Canada. [TR:99, 100]

The SunShine Pipeline is an intrastate pipeline that will be built entirely within the State of Florida. [EX.1, EJB-1] It will be constructed in three phases with the first phase commencing at a point in Okaloosa County and extending east and south to a terminus in Polk County. [R:11] The first phase would be placed in service in 1995 with a capacity of 250,000 Mcf per day (not 250,000 million Mcf as stated by FGT). *Id.* System expansions planned in 1998 and 1999 would increase capacity to 425,000 Mcf and 550,000 Mcf, respectively, and extend the pipeline south to Okeechobee County. [R:12-13]

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[2] Three other intervenors opposed the need determination solely on the basis of their contention that safety issues were not adequately addressed: West Coast Regional Water Supply Authority, Pasco County, and Pinellas County.

The SunShine Pipeline will be connected to an interstate natural gas pipeline, the SITCO Pipeline, which will be directly or indirectly interconnected to several other major interstate pipelines. [TR:268] These pipeline interconnections will provide shippers on the SunShine Pipeline with access to all of the major gas producing fields in the United States. [TR:269, 275]

The Federal Energy Regulatory Commission (FERC) issued a series of policy orders following the passage of the Natural Gas Policy Act of 1978, in particular FERC Order 636, which have had the effect of increasing competition in the natural gas industry through, among other measures, creating open access transportation and unbundling of pipeline services. [TR:46] Pipeline operators must now provide capacity to shippers on a non-discriminatory basis. [TR:271] FERC's Order 636 improves access to gas supplies but it does not increase pipeline capacity. [TR:727, 930] The principal problem in Florida's natural gas market is lack of pipeline capacity, not the allocation of existing capacity. [TR:853]

SunShine has contracts (precedent agreements) for future natural gas transportation with Florida Power Corporation (FPC) (EX. 1, EJB-2), Peoples Gas System (Peoples) (EX. 1, EJB-6), the City of Lakeland (EX. 1, EJB-11), Chesapeake Utilities (EX. 1, 2EJB-15) and the City of Clearwater (EX. 1, EJB-19). [TR:47] SunShine has also obtained a Letter of Intent from the City of Leesburg (EX. 1, EJB-5, EX. 22, Letter dated April 6, 1993).

SunShine expects to sign precedent agreements with other shippers in the near future. [TR:939] It is customary in the natural gas industry for shippers to take a greater interest in a proposed pipeline after it has obtained required governmental approvals. [TR:49]

As of the date of the hearing before the PSC in this docket, SunShine had signed precedent agreements for 177,000 Mcf, or approximately 71%, of the pipeline's initial 1995 capacity of 250,000 Mcf. [TR:77] These precedent agreements also establish commitments for 292,000 Mcf, or approximately 53%, of its final 1999 buildout capacity of 550,000 Mcf. [TR:77]. These advance subscription levels are comparable to subscription levels for other new pipelines constructed elsewhere in the United States. [TR:918-19]

A new pipeline, sometimes referred to as "greenfield" project, usually requires an anchor load to justify its financing and construction. [TR:107] Anchor loads are volumes that would justify the initial investment to build a new pipeline. [TR:107] For example, FGT was first constructed in Florida in 1959 as a result of its ability to obtain anchor loads from Florida Power and Light Company and Florida Power Corporation. [TR:105]

SunShine's anchor load is FPC's 128,000 Mcf per day and Peoples' 47,500 Mcf per day. [TR:109, 403, 458, 920] It is very unlikely that an anchor load like the combination of FPC and Peoples will be available again in Florida to make a second pipeline possible. [TR:109, 441, 723, 725, 924, 932-33]

At the hearing before the PSC, SunShine presented evidence of future natural gas pipeline demand in Florida developed by Mr. Judah Rose of ICF Resources, Inc. in Washington, D.C. The primary demand for natural gas in Florida is in the generation of electricity. [TR:105] Therefore, Mr. Rose's forecast was based on an assessment of the demand for new electric powerplants and an estimate of the volume of natural gas that new powerplants will need. [TR:303] The forecast took account of the economics of new powerplants and their fuel options, existing powerplants and their conversion options and fuel choices, and the projected growth rate in electric generation demand in Florida. [TR:304-305] He concluded that the growth in electric generation needs in Florida will justify more pipeline capacity in order to serve new powerplants that will use natural gas as a fuel, and to serve existing powerplants that will likely convert to natural gas. [TR:305]

As a component of Mr. Rose's research and development of a pipeline capacity demand forecast, he reviewed the Florida Electric Power Coordinating Group's 1992 Ten Year Plan, and the individual plans of Florida's electric utilities. [TR:308, 310, 378] FGT asserts in its Brief that Mr. Rose ignored the plans of the electric utilities but, that is contrary to the record evidence. [TR:305, 321, 847-49] Mr. Rose considered the utilities plans to be important sources of information, but did not rely solely on them because the plans did not attempt to estimate pipeline capacity demand, did not contain sufficient information to conduct

an independent analysis of alternative generation options, and did not contain sensitivity analyses. [TR:848-850]

Mr. Rose forecast that by the Year 2000, demand for pipeline capacity in Florida will greatly exceed the amount of capacity in the State, even taking into account FGT's planned Phase III expansion and the construction of the SunShine Pipeline. [TR:372] Demand in 2000 would be approximately 2.3 billion cubic feet per day greater than the capacity of both the FGT and SunShine pipelines. [TR:370, 842-43, 889] Mr. Rose used several conservative assumptions regarding future pipeline capacity demands attributable to the electric power industry, so actual demand could be higher. [TR:306-07, 312]

FGT's primary witness, Dr. Paul Carpenter, questioned some of the components of Mr. Rose's forecast, but Dr. Carpenter did not develop his own forecast of future demand for pipeline capacity. [TR:628] He agreed that there is potential future demand for all of the proposed capacity on the SunShine Pipeline [TR:646] in the time frames in which it is planned to be constructed. [TR:652] He also agreed that a new pipeline or pipeline expansion in Florida would be necessary to serve the demand that would exist by the Year 2000. [TR:641, 656, 658] In FGT's own application to FERC for a Certificate of Public Convenience and Necessity, filed on November 15, 1991, FGT informed FERC of its conclusion "that there will be a strong market for natural gas in Florida in the mid to late 1990s." [TR:852]

FGT suggested that FPC's decision to convert its Anclote powerplant to gas fuel was not based on sound economics, and also that FPC's Polk Units 1 and 2 would never be constructed. [TR:559, 589] However, these claims by FGT are belied by the fact that FGT was competing with SunShine to serve these very same facilities. [TR:804-05]

FGT claims that its Phase III expansion could better serve the need that SunShine proposes to serve, even though FGT's Phase III expansion is already fully subscribed, through "interruptible" capacity or capacity releases from other shippers. [TR:620] However, there is little chance that there will be interruptible capacity available or shippers willing to release capacity when it is needed. During the periods of peak demand in Florida, the Summer, shippers with firm capacity have no capacity to release. [TR:445, 464, 472, 931] Furthermore, as admitted by Dr. Carpenter, the price of released capacity would probably be at the maximum allowable rate. [TR:623, 625] Therefore, it is highly unlikely that major capital investments in the conversion or construction of a powerplant would be made if its operation would be dependent on the availability of natural gas through capacity releases. [TR:756] For example, FPC's plan to convert the Anclote powerplant from oil to gas in 1996 is not possible unless the SunShine Pipeline is built because the volumes of gas needed are too large to be supplied by FGT, even with FGT's Phase III expansion. [TR:620-21, 756]

The SunShine Pipeline will be designed, constructed, and operated to meet or exceed all of the safety requirements set forth in Chapter 25-12, Florida Administrative Code, and the federal regulations of the U.S. Department of Transportation. [TR:154]

The SunShine Pipeline will cost approximately $619 million to build. [TR:153] It is intended to be "project financed" at a ratio of 25% equity to 75% debt. [TR:67] Project financing means that the financing would be secured on the basis of the precedent agreements and government approvals. [TR:75, 925]

It is typical in the natural gas pipeline industry to obtain permanent project financing for a pipeline project six to nine months prior to the commencement of construction. [TR:131, 925] That is because lenders want to know the terms of regulatory approvals, pipeline transportation contracts, construction contracts, and other contracts associated with the construction of the pipeline. [TR:925]

Just the prospect of the SunShine Pipeline coming into existence has brought competition for natural gas transportation services to Florida. [TR:51] Some of the benefits of competition have already been manifested through concessions that Florida gas customers have obtained in their precedent agreements with both SunShine and FGT in the past several months. [TR:51, 401, 408] These benefits include lower rate caps [TR:104] and seasonal flexibility in deliveries [TR:464]. However, these benefits cannot continue to inure to the marketplace and be sustained over the long term unless a competing pipeline becomes a reality. [TR:933]

With a second pipeline in Florida, the long term benefits of competition that would be realized by natural gas shippers and other customers would include reduced rates, improved terms and conditions, greater access to supplies, improved services generally, and enhanced reliability and deliverability. [TR:446, 465, 473, 619, 643, 813, 933] Construction of the SunShine Pipeline would make natural gas more abundant in Florida [TR:933] and would enhance the reliability and integrity of natural gas deliveries by reducing the possibility that natural gas deliveries will be interrupted during natural disasters or other public emergencies. [TR:101-102]

At the formal hearing held before the PSC on May 10-11, 1993, SunShine presented evidence on the need for natural gas delivery reliability, safety, 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 pipeline. On July 2, 1993, the PSC issued its Final Order addressing the evidence presented by all parties with respect to the these issues and concluded that there is a need for the SunShine Pipeline. The PSC's Final Order imposed five conditions on SunShine: 1) to odorize the gas in its system, 2) to file all signed precedent agreements with the PSC, 3) to only build certain laterals or mainline when SunShine has obtained adequate supporting contracts, 4) to connect to upstream capacity, and 5) to bear any risk of under recovery of its investments or earnings. [R:1628, Final Order at 30-31]

Having failed to stop its potential competitor in the proceedings before the PSC, FGT now questions the constitutionality of the Siting Act and, alternatively, claims that the PSC did not adequately explain its decision.

SUMMARY OF ARGUMENT

Section 403.9422(1)(b) does not violate the nondelegation doctrine of the Florida Constitution. The Legislature determined what the law is and established the fundamental and primary policy decisions through specific prescribed standards and guidelines. These standards and guidelines are sufficient to enable the PSC and the courts to judge whether the PSC's exercise of discretion in determining the need for a proposed natural gas pipeline is consistent with the Legislature's intent.

With respect to FGT's alternative argument, the PSC's Final Order complies with the requirements of the Administrative Procedure Act, Chapter 120, Florida Statutes. It contains a detailed discussion of the reasoning behind its decision and the record evidence upon which it is based. To the extent that the PSC has exercised discretion in the application of the legislative standards provided in section 403.9422(1)(b), those policies are clearly articulated in the Final Order. The PSC's responses to FGT's proposed findings were proper when judged in the context of the entire Final Order. There was no error or omission in the PSC's responses that affected the fairness of the proceedings or the correctness of the PSC's action so as to require remand of this matter to the PSC. Taken as a whole, the Final Order provides an

explanation of policy, a statement of the PSC's reasoning, and provided FGT with the opportunity to obtain a fair and meaningful review of the PSC's action by this Court.

ARGUMENT

I. SECTION 403.9422(1)(b) DOES NOT VIOLATE THE NON-DELEGATION DOCTRINE

FGT's argument in Issue I of its Brief that section 403.9422(1)(b) is an unconstitutional delegation of legislative authority because it lacks objective and readily ascertainable standards is disingenuous at best when one considers the following statement contained in FGT's earlier brief to the PSC:

> Perhaps appreciating the difficulty in making determinations of need, the legislature instructed the PSC to focus on specific factors. The Natural Gas Transmission Siting Act of 1992 requires the PSC to examine "the need for natural gas [1] delivery reliability, [2] safety, and [3] integrity; [4] the need for abundant, clean-burning natural gas to assure the economic well-being of the public; [5] the appropriate commencement and terminus of the line; [6] and other matters within [the Commission's] jurisdiction deemed relevant to the determination of need." s. 403.9422(1)(b), Fla. Stat. (Supp. 1992). An applicant for a determination of need bears the burden of proving it meets these criteria.

[R:1571, FGT's brief to the PSC at 27] This acknowledgement by FGT of the inherent complexity involved in this regulatory program and the Legislature's intent to guide the PSC in its determinations of need with "specific factors" stands in stark contrast and contradiction to the argument in Issue I of FGT's Brief to this Court.

One who challenges the constitutionality of a statute must overcome three heavy burdens established in Florida law. The challenger must overcome the presumption of validity that all legislative acts enjoy. *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986). Second, the challenger must prove the statute is unconstitutional beyond a reasonable doubt. *Burch v. State*, 558 So. 2d 3 (Fla. 1990). If there is any doubt in a law's validity, it will be resolved in the law's favor. *A.A. v. State*, 605 So. 2d 106 (Fla. 1st DCA 1992). The third burden the challenger must overcome is to show that there is no reasonable construction of the statute that would make it constitutional. *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981, 988 (Fla. 1981). FGT has not overcome any of these burdens in its attack on section 403.9422(1)(b) as an unconstitutional delegation of legislative authority.

The nondelegation doctrine, as articulated by the Florida Supreme Court in *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978) dictates that:

> fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform the tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

In *Department of Insurance v. Southeast Volusia Hospital Dist.*, 438 So. 2d 815 (Fla. 1983), a case decided five years after *Askew*, this Court cited *Askew* as the source of the test for determining whether a statute violates the nondelegation standard:

> [T]he crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent.

Id. at 819, *appeal dismissed sub. nom. Southeast Volusia Hospital Dist.*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed. 2d 149 (1984).

At least one appellate court has suggested that *Askew* involved a relatively rigorous application of the nondelegation doctrine in Florida that has been gradually abandoned and replaced in recent appellate court decisions by a more pragmatic approach that looks to whether the Legislature made the "fundamental and primary decision" regarding a regulatory program and left implementation to the agency. *A.A. v. State*, 605 So. 2d at 107 (J. Ervin's concurring opinion). *See Microtel, Inc. v. Florida Public Service Commission*, 483 So. 2d 415, 418-19 (Fla. 1986); *Southeast Volusia Hospital Dist.*, 438 So. 2d at 819. As discussed more fully below, whether section 403.9422(1)(b) is judged under the approach used in *Askew* or the more pragmatic approach used in *Microtel,* the statute is constitutionally sound because the Legislature made the fundamental and primary policy decisions when it created the Siting Act *and* provided sufficient standards and guidelines to enable the PSC and this Court to determine whether the PSC is carrying out the Legislature's intent.

A. Section 403.9422(1)(b) Contains Express Legislative Standards to Guide the PSC's Exercise of Discretion

A statute does not unconstitutionally delegate legislative power simply because it leaves some matters to the agency's discretion to decide. The Legislature may delegate to agencies the authority to determine the facts to which the established policies of the legislature are to apply. *Southeast Volusia Hospital Dist.*, 438 So. 2d at 820; *Florida Welding & Erection Service, Inc. v. American Mutual Insurance Co.*, 285 So. 2d 386, 388 (Fla. 1973). Obviously, it would be impractical for the Legislature to address by statute every detail of a regulatory program that it has created, and the Constitution does not require that of the Legislature. *Southeast Volusia Hospital Dist.*, 438 So. 2d at 820. It is only the power to say what the law is that the Legislature may not delegate. *Coca-Cola Co., Food Div. v. State, Dep't of Citrus*, 406 So. 2d 1079 (Fla. 1981), *appeal dismissed sub nom. Kraft, Inc. v. Florida Dep't of Citrus*, 456 U.S. 1002, 102 S.Ct. 2288, 73 L.Ed.2d 1297 (1982); *Rosslow v. State*, 401 So. 2d 1107 (Fla. 1981).

In enacting the Natural Gas Transmission Pipeline Siting Act (Siting Act), the Florida Legislature determined what the law is and established the fundamental and primary policies that guide the PSC in determining the need for a proposed natural gas pipeline. Nothing could be more fundamental or primary than the Legislature's decision in 1992 to create an entirely new and comprehensive regulatory program governing the construction and operation of

intrastate natural gas pipelines. The need determination in section 403.9422(1)(b) that FGT objects to is just one component of this comprehensive program which the Legislature established.

It was the Legislature that enunciated the intent of the Siting Act:

> It is the Legislature's intent by adoption of ss. 403.9401-403.9425 to establish a centralized and coordinated permitting process for the location of natural gas transmission pipeline corridors and the construction and maintenance of natural gas transmission pipelines, which necessarily involves several broad interests of the public addressed through the subject matter jurisdiction of several agencies. Recognizing the need to ensure natural gas delivery reliability, safety, and integrity, and in order to meet natural gas energy needs in an orderly and timely fashion, the centralized and coordinated permitting process established by ss. 403.9401-403.9425 is intended to further the legislative goals of ensuring, through available and reasonable methods that the location of natural gas transmission pipelines produce minimal adverse effect on the environment and public health, safety, and welfare. It is the intent of ss. 403.9401-403.9425 to fully balance the need for natural gas supplies with the broad interests of the public in order to effect a reasonable balance between the need for the natural gas transmission pipeline as a means of providing abundant clean-burning natural gas and the impact on the public and the environment resulting from the location of the natural gas transmission pipeline corridor and the construction and maintenance of the natural gas transmission pipelines.

Section 403.9402, Fla. Stat. (Supp. 1992).

It was also the Legislature that established the "specific factors" in section 403.9422(1)(b) that would guide the PSC's need determinations:

> 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.

Section 403.9422(1)(b), Fla. Stat. (Supp. 1992).

FGT claims that the Siting Act places no limitation upon the PSC's powers," but as admitted by FGT in its brief to the PSC, a plain reading of these sections reveals several "specific factors" that the PSC must take into account in its determination of need for a natural gas transmission pipeline: 1) the need for natural gas delivery reliability; 2) pipeline safety; 3) pipeline integrity; 4) the need for abundant, clean burning natural gas; 5) the economic well-being of the public; 6) the appropriate commencement and terminus of the line; 7) providing for timely and orderly pipeline development; and 8) balancing the need for the natural gas transmission pipeline and the impact on the public and the environment resulting from the pipeline's construction and maintenance.

FGT further asserts that section 403.9422(1)(b) is an invalid delegation of legislative authority because the factors are "not broken down in terms of priority or importance," citing *Askew*. [Appellant's Brief at 19]. The *Askew* decision, however, does not stand for the proposition that the Legislature must abstractly pre-evaluate and prioritize any list of statutory criteria it provides to guide an agency's actions. The Legislature may clearly grant an

agency the discretion to balance and weigh the various statutory criteria provided by the Legislature in the course of the agency's application of those criteria to the facts before it. *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1378 (Fla. 1981), *cert. denied sub. nom. Taylor v. Graham*, 454 U.S. 1083, 102 S. Ct. 640, 70 L. Ed. 2d (1981). The *Askew* court itself explicitly recognized that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society." *Askew*, 372 So. 2d, at 924. Many regulatory programs in the Florida Statutes resemble the format of section 403.9422(1)(b), listing factors that an agency must consider in making regulatory decisions, without prioritizing these factors.[3] Representative of such a regulatory scheme is section 403.519 which, since its enactment in 1980, has governed the PSC's determinations of need for new electric power plants:

> In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for

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[3] *See Generally*, Section 196.015, Florida Statutes (1991) (delegating power to property appraisers to determine permanent residency from a list of statutory factors); Section 240.382, Florida Statutes (1991) (delegating power to a local board of trustees to determine fees for community college child care centers from a list of statutory factors); Section 240.531, Florida Statutes (1991) (delegating power to the Board of Regents to determine fees for education research centers for child development from a list of statutory factors); Section 310.151, Florida Statutes (1991) (delegating power to a board to fix rates of harbor pilotage from a list of statutory factors); Section 364.337, Florida Statutes (1991) (delegating power to the Public Service Commission to determine the need and/or presence of duplicative or competitive services based upon a list of statutory factors); Section 364.339, Florida Statutes (1991) (delegating power to the Public Service Commission to determine carriers of shared tenant service from a list of statutory factors).

> adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and any other matters within its jurisdiction which it deems relevant.

FGT expresses particular concern about what it calls "the amorphous, catchall provision" of section 403.9422(1)(b) which permits the PSC to consider "other factors within its jurisdiction deemed relevant to the determination of need." If this was the only direction given to the PSC by the Legislature, FGT's argument might have some merit, but this language accompanies a detailed listing of regulatory criteria. Statutes that set out criteria and then allow administrative bodies discretion to "flesh out" the regulatory programs are the rule and not the exception.[4] In fact, the restriction stated in section 403.9422(1)(b) (which is also found in section 403.519, as shown above) that any other relevant factors considered by the PSC must be "within its jurisdiction" makes this grant of discretionary authority more limited than the

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[4] *See Generally*, Section 240.382, Florida Statutes (1991) (delegating power to a local board of trustees to determine fees for community college child care centers from "factors deemed relevant by the board"); Section 240.531, Florida Statutes (1991) (delegating power to the Board of Regents to determine fees for education research centers for child development from "factors deemed relevant by the Board of Regents"); Section 364.337, Florida Statutes (1991) (delegating power to the Public Service Commission to determine the need and/or presence of duplicative or competitive services based upon a list of factors along with "any other factors deemed relevant by the Commission"); Section 364.339, Florida Statutes (1991) (delegating power to the Public Service Commission to determine carriers of shared tenant service from a list of factors along with "any other factors deemed relevant by the Commission").

discretionary authority in other statutes that have been upheld by the courts.

In *Graham v. Estuary Properties*, this Court evaluated the validity of section 380.06(8) which outlines a list of factors to be considered by regional planning agencies when making recommendations regarding developments of regional impact.[5] The

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[5] Section 380.06(8), evaluated by the *Graham* court, stated as follows:

> Within 50 days after receipt of the notice required in paragraph (7)(d), the regional planning agency, if one has been designated for the area including the local government, shall prepare and submit to the local government a report and recommendations on the regional impact of the proposed development. In preparing its report and recommendations the regional planning agency shall consider whether, and the extent to which:
>
> (a) The development will have a favorable or unfavorable impact on the environment and natural resources of the region;
>
> (b) The development will have a favorable or unfavorable impact on the economy of the region;
>
> (c) The development will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities;
>
> (d) The development will efficiently use or unduly burden public transportation facilities;
>
> (e) The development will favorable or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment; and
>
> (f) The development complies or does not comply with <u>such other criteria for determining regional impact as the regional planning agency shall deem appropriate</u>.
>
> (emphasis added)

statute includes an authorization for the regional planning agency to consider "such other criteria for determining regional impact as the regional planning agency shall deem appropriate." Justice McDonald writing for the court looked to the *Askew* decision in upholding the validity of this statute and reasoned as follows:

> In *Askew v. Cross Key Waterway*, 372 So. 2d 913 (Fla. 1978), we stated that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society." *Id.* at 924. Section 380.06(8) sets out guidelines for implementing the policies of the act. The guidelines may permit discretion on the part of the agency when balancing applicable considerations.

Graham, 399 So. 2d at 1327 (emphasis added). Section 403.9422 (1)(b) gives the PSC the same discretion to balance applicable considerations with guidelines articulated by the Legislature.

The Legislature can delegate regulatory functions to an agency so long the Legislature provides sufficient guidelines in its enactments, thus assuring that an agency will exercise its delegated authority to effectuate the Legislature's specified policies. *Askew*, 372 So. 2d at 925, *Burgess v. Florida Dep't of Commerce*, 463 So. 2d 356, 358 (Fla. 1st DCA 1983). This is precisely what has occurred in the instant case. Applying the reasoning of this Court in *Graham* to the detailed explication of the Legislature's intent in the Siting Act, there is clearly no violation of the nondelegation doctrine in the present case.

B. Section 403.9422(1)(b) is a Police Power Regulation for Which Express Statutory Standards are not Required

As discussed above, there are specific prescribed standards in section 403.9422(1)(b) to guide the PSC in its determination of need for a proposed natural gas transmission pipeline. However, when a statute addresses a police power regulation and is necessary to protect the general welfare, morals, and safety of the public, the Legislature may be less specific in expressing the prescribed standards which guide agency action. *North Broward Hospital District v. Mizell*, 148 So. 2d 1, 4, n.11 (Fla. 1962). Such a move is especially appropriate when the statute regulates a business which may have potentially significant effects on the public health, safety, and welfare. *Apalachee Regional Planning Council v. Brown*, 546 So. 2d 451, 452-53 (Fla. 1st DCA 1989), *decision approved* 560 So. 2d 782 (Fla. 1990); *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n*, 473 So. 2d 237, 245 (Fla. 1st DCA 1985), *review denied*, 486 So. 2d 596 (Fla. 1986). In these situations, the Legislature may constitutionally choose to allow an agency greater discretion in pursuing these broader police power goals. *Apalachee Regional Planning Council*, 546 So. 2d at 452-53; *Florida Waterworks*, 473 So. 2d at 245; *Mizell*, 148 So. 2d at 4 n.11. Courts review agency action under these less specific standards using a test of reasonableness. *Mizell*, 148 So. 2d at 4. If an agency's action reasonably pursues the Legislature's broader public welfare goals, such actions are valid. *Id.*

Contrary to FGT's inexplicable position, the Legislature clearly intended to make the Siting Act a police power regulation to which the above legal principles apply. Section 403.9402 contains the straightforward statement that the Siting Act is intended to further the legislative goal to assure "minimal adverse effect on the environment and public health, safety, and welfare." Further, section 403.9422(1)(b) directs the PSC to assess the need for greater natural gas transmission capacity "to assure the economic well-being of the public." Clearly, the Legislature recognizes the natural gas industry is a business with great potential impact on the public. *See Apalachee Regional Planning Council*, 546 So. 2d at 452-53; *Florida Waterworks*, 473 So. 2d at 245.

Despite the Legislature's clear pronouncements to the contrary, FGT suggests that the above principles of law do not apply to the natural gas industry, but only to licensure statutes designed to protect the public from unqualified applicants. [Appellant's Brief at 21]. Further, FGT argues that an economic regulatory scheme designed to insure the availability of natural gas and maintain a competitive marketplace for the public benefit cannot properly be considered a police power regulation "necessary to protect the general welfare." [Id. at 21-22] FGT thus defines the ambit of "necessary to protect the general welfare" to include only those laws that protect the public from imminent physical peril. Such a narrow definition of the state's police power is not supported by case law. *See Apalachee Regional Planning Council*,

546 So. 2d at 452-53 (public impact of large-scale land developments qualifies DRI statute for more general legislative standards); *Florida Waterworks*, 473 So. 2d at 245-46 (public impact of utilities' service availability qualifies relevant statute for more general legislative standards).

According to the Florida Legislature, and the court decisions discussed above, the Siting Act is a police power regulation. Therefore, its legislative guidance, even if not precise enough to satisfy FGT, is specific enough to satisfy the requirements of the Florida Constitution. As such, the PSC's order approving SunShine's application is clearly in reasonable pursuit of the Legislature's expressed goals because the PSC justified its order based upon detailed statements of legislative intent and decision-making criteria set forth in the Siting Act.

II. THE PSC'S FINAL ORDER COMPLIES WITH THE REQUIREMENTS OF CHAPTER 120, FLORIDA STATUTES

FGT claims in Issue II of its Brief that the PSC's Final Order violates the requirements of the Administrative Procedure Act, Chapter 120 of the Florida Statutes. Ultimately, FGT takes issue with the sufficiency of the PSC's explanation of its policy choices in the Final Order, both in explaining the PSC's policies generally and in explaining the policy choices leading to the PSC's rejection of FGT's proposed findings of fact. In essence, FGT argues that a PSC order is required as a matter of law to explicitly set forth a detailed, detached statement of its policy and to apply that policy individually to each and every proposed finding of fact. Such a

requirement is nowhere to be found in the Administrative Procedure Act, nor is such a formalistic requirement mandated by the *McDonald* case as FGT claims.

The whole point of allowing agencies to develop policy through adjudicative processes is to give the agency flexibility to experiment with its policy as it is faced with unique factual scenarios. *See McDonald v. Department of Banking & Finance*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977). As such, an agency is not required to set forth its policy in the abstract but in reference to the facts presented for the agency's review. *See Occidental Chemical Co. v. Mayo*, 351 So. 2d 336, 340-41 (Fla. 1977); *McDonald*, 346 So. at 583-586. Once an agency demonstrates the choices underlying its decision and the factual support for these choices, its responsibility is complete. *See Mayo*, 351 So. 2d at 340-41; *McDonald*, 346 So. 2d at 583-86. The agency's policy is explicated by the evidence that the agency considered and rejected in making its final determination. *See Mayo*, 351 So. 2d at 340-41; *McDonald*, 346 So. 2d at 583-86.

Contrary to FGT's argument, the PSC is not required to set forth a summary of all testimony presented, nor to recite each and every evidentiary fact on which it ruled. *Mayo*, 351 So. 2d at 341. The PSC is only required to supply a succinct statement of the "ultimate facts" upon which it relied and to address the significant contentions of the parties. *Id.* Florida courts have specifically rejected FGT's position in this regard, citing it as an attempt to elevate form over substance. *Health Care Management,*

Inc. v. Department of Health & Rehab. Servs., 479 So. 2d 193, 195 (Fla. 1st DCA 1985); *Schomer v. Department of Professional Regulation*, 417 So. 2d 1089, 1090-91 (Fla. 3d DCA 1982). All the agency must do, in its entirety, is provide the written foundation upon which a reviewing court "may assure that all proposed findings of fact have been considered and ruled upon and not overlooked or concealed." *Schomer*, 417 So. 2d at 1090. As set forth more fully below, the PSC's Final Order in the instant case fully complies with these requirements.

Ultimately then, the PSC's explication of policy must be reviewed to determine whether it was sufficiently based upon competent and substantial evidence. *Citizens v. Public Service Commission*, 448 So. 2d 1024, 1026 (Fla. 1984); *Mayo*, 351 So. 2d at 340-41; *McDonald*, 346 So. 2d at 583-86. As such, PSC orders come before this Court with a presumption of validity. *Citizens*, 448 So. 2d at 1026. This Court will not reweigh or re-evaluate the evidence presented to the PSC, as evidentiary conflicts and varying interpretations of evidence are matters properly for the PSC to resolve. *Manatee County v. Marks*, 504 So. 2d 763, 765 (Fla. 1987). Where such interpretations of evidence are heavily infused with policy considerations, as in the instant case, this Court has consistently refused to supplant an agency's discretionary policy choices with its own. *General Tel. Co. of Fla. v. Fla. Public Service Commission*, 446 So. 2d 1063, 1067 (Fla. 1984) (upholding PSC calculation method as no single correct method existed); *Mayo*, 351 So. 2d at 340 (upholding PSC's use of range of criteria in

structuring utility rates given multiplicity of methods presented). The burden is on the party challenging the PSC order to show that the order is arbitrary or unsupported by the evidence. *Manatee County v. Marks*, 504 So. 2d 763, 765 (Fla. 1987).

A. The PSC's Order Meets The Test Established By This Court For Specificity In PSC Orders

The discussion in the PSC's Final Order is organized by reference to the statutory criteria in section 403.9422(1)(b) so that affected parties and interested persons can easily discern in the Final Order the PSC's reasoning and the factual findings upon which the PSC relied in reaching its ultimate decision to certify the need for the SunShine Pipeline. This Court recently reviewed and affirmed a similar PSC order in *Floridians for Responsible Utility Growth v. Beard*, 621 So. 2d 410 (Fla. 1993), which involved a determination of need for a proposed electric powerplant, noting that the order discussed in detail each factor required by section 403.519 and made detailed findings of fact relative to each criterion in the statute. *Id.*, at 412. The PSC's Final Order in the instant case does the same.

The specificity required in PSC orders was at issue in the *Mayo* case, *supra*. There, this Court established the relevant test as whether the order is a "succinct and sufficient statement of the ultimate facts upon which the Commission relied ...." *Id.* at 341.; See *H. Miller & Sons, Inc. v. Hawkins*, 373 So. 2d 913, 915. (Fla. 1979). The PSC order under review in *Mayo* was found to meet the test because it included specific findings of fact upon which the

ultimate conclusion of the PSC was based, and it included commentary directed to the appellant's contentions. *Mayo* at 341. This Court explained in *Mayo* that the PSC was not required to summarize all the testimony it heard or to recite every fact upon which it ruled. *Id.*

Despite the PSC's careful and comprehensive discussion in its Final Order of each statutory criterion in section 403.9422(1)(b) and its findings regarding each criterion, FGT complains that the PSC has made policy choices which are not evident in the agency's responses to FGT's proposed findings. However, every policy directly or indirectly referred to in FGT's proposed findings is explicated in the PSC's discussion of the issues raised at the hearing and the ultimate facts from the record upon which it relied. FGT's argument regarding the PSC's responses to FGT's proposed findings appears to rest on the presumption that the sufficiency of a response must be judged without reference to the rest of the Final Order wherein the PSC sets forth its own factual findings, policies and legal conclusions. That is an illogical presumption, specifically rejected by Florida courts as an attempt to elevate form over substance. *Health Care Management*, 479 So. 2d at 195; *Schomer*, 417 So. 2d at 1090-91. All the agency must do, in its entirety, is provide the written foundation upon which a reviewing court "may assure that all proposed findings of fact have been considered and ruled upon and not overlooked or concealed." *Schomer*, 417 So. 2d at 1090. The PSC's Final Order in the instant case satisfies this requirement.

FGT urges as the best example of the PSC's deficient responses the one made regarding FGT's proposed finding 18:

> SunShine Pipeline Partners currently has no assets. It intends to do business through an operating company, which has not yet been incorporated.
>
> Reject. Immaterial to a decision on the issues in this case.

FGT calls the PSC's rejection of this proposed finding "inexplicable," yet the PSC's explanation was clearly stated. The proposed finding was immaterial. FGT's claim that this proposed finding is an uncontroverted fact misses the point. If immaterial, an uncontroverted fact can be rejected without further explanation by the agency. *Health Care Management*, 479 So. 2d at 195; *Schomer*, 417 So. 2d at 1091.

The need determination in section 403.9422 addresses a *proposed* natural gas pipeline. The proposed financing, organization, construction and operation of the pipeline was the subject of the PSC's proceedings and its Final Order. Whether SunShine currently has assets or has incorporated its operating company is immaterial to whether the project, as proposed, will meet the criteria in section 403.9422(1)(b).

FGT states that its proposed finding 18 was offered "with an toward the 'reliability' required by section 403.9422(1)(b)," but FGT presented no testimony or other evidence that would explain how SunShine's lack of current assets and the fact that its operating company is not yet incorporated prevent the proposed SunShine Pipeline from meeting the statutory criterion of "natural gas

delivery reliability." Nevertheless, the PSC was very concerned with natural gas delivery reliability and discussed it at length in the Final Order. For example:

> Currently, FGT is in the process of obtaining FERC approval to construct and operate Phase III of its system, and even though FGT has not obtained all approvals necessary to begin construction of Phase III, the capacity of this addition is fully subscribed. When a mainline is fully subscribed, new shippers and established shippers cannot obtain additional capacity on a firm basis.
>
> * * * *
>
> FGT states that it is planning to file for approval of Phase IV with FERC, and the new capacity could come on line as early as 1996. FGT contends that this expansion could be used to provide the gas capacity requirements of the Anclote facility. By acknowledging the need for the Phase IV to serve Anclote, FGT has demonstrated that current gas capacity is insufficient to satisfy the gas capacity requirement of the state.
>
> * * * *
>
> Utilities, whether electric generation or local distributors, have an obligation to serve. This obligation could be jeopardized by relying on interruptible or capacity release [from FGT's Phase III expansion] that may or may not be available to serve their needs and the ultimate needs of the end users. We find, therefore, that United, South Georgia, and FGT do not have the capability to serve the loads required by SunShine's customers. Even if FGT does construct and operate Phase III, the reliance on interruptible capacity or capacity release would not be in the best interest of the utilities, and the end use customers they serve.
>
> Additional gas capacity will facilitate increased access to gas supply. Natural gas delivery reliability and integrity will be improved by the construction of additional natural gas transmission capacity to increase the availability of natural gas supplies. Furthermore, dual pipelines can be beneficial in times of shortfall due to cold weather.

> Dual pipelines can also be beneficial when a lateral or main line is damaged. Volumes of gas can be redirected from one pipeline to another so that the chance of outage is reduced.
>
> A reliable pipeline system provides end-use customers the opportunity to obtain the supplies of natural gas they need. FGT has not been able to provide capacity only in summer that customers in Florida need. SunShine will be able to supply the additional summer capacity required. Through SunShine's ability to provide additional capacity in the summer, the reliability of the transportation system in Florida will be improved.

[R:1628, Final Order at 8-10]

FGT next objects to the PSC's rejection of FGT's proposed finding 21 which argues that the PSC is confined to two alternative approaches in making its need determination under section 403.9422(1)(b), a "traditional cost-benefit analysis similar to the method used in power plant certification proceedings" or a "market-based approach." The PSC rejected this proposed finding and FGT's other proposed findings that supplement it on the basis that they were arguments of law and regulatory policy. The PSC's rejection of these proposed findings was proper. Because these proposed findings purport to identify the statutorily mandated criteria that must be applied by the PSC under section 403.9422(1)(b), they constitute arguments of law and not statements of fact.

A cost-benefit analysis is expressly required in section 403.519 for power plant need determinations, but it is not required in section 403.9422(1)(b) for natural gas pipeline need determinations. Because of the obvious parallel between the two statutory programs, the omission of the cost-benefit criterion from

section 403.9422(1)(b) must be deemed deliberate on the part of the Legislature. *Florida State Racing Commission v. Bourquardez*, 425 So. 2d 87 (Fla. 1949); *St. George Island v. Rudd*, 547 So. 2d 958 (Fla. 1st DCA 1989), *modified at Brown v. St. George Island*, 561 So. 2d 253 (Fla. 1990)

The PSC's Final Order shows that the PSC took into account the economic factors suggested by FGT's witness Dr. Carpenter. The PSC considered market-based evidence of need such as precedent agreements and the pipeline capacity demand forecast made by Mr. Rose. [R:1628, Final Order at 4-7] It considered Dr. Carpenter's claim that the market-based analysis required the financial risks of the project to be borne solely by the project's sponsors and not by the customers or ratepayers. The PSC even imposed as one condition of its determination of need that SunShine's owners must bear any risk of under recovery of its investment or earnings. [R:1628, Final Order at 31] It also considered whether FGT's pipeline, including its Phase III expansion, would be able to serve the natural gas needs SunShine proposed to serve. [R:1628, Final Order at 8-9] Nevertheless, the PSC was clearly not limited to the specific methodology urged by Dr. Carpenter.

FGT claims that the PSC did not disclose in its Final Order its reasoning in accepting Mr. Rose's pipeline capacity need forecast despite Dr. Carpenter's criticisms, but the PSC's Final Order thoroughly explicated its reasoning regarding the analysis of need in the section of the Final Order entitled, "SunShine's forecast." [R:1628, Final Order at 4-6] Furthermore, the PSC did

not accept Mr. Rose's forecast without critical review. For example, the PSC adjusted Mr. Rose's forecast where the PSC thought an adjustment was necessary:

> We do find that one minor adjustment to SunShine's forecast of gas capacity requirements available to the proposed pipeline is appropriate. The company provided testimony that western Florida and the Tallahassee area are not readily accessible to the new pipeline. These areas account for gas capacity requirements of 0.3 Bcf/day. Excluding this gas capacity amount, the appropriate gas capacity requirements available to the SunShine pipeline in the year 2000 is 2.0 Bcf/day. The gas capacity requirements available to the pipeline in 2010 is 3.2 Bcf/day. Even with this adjustment, it is clear that gas capacity requirements will exceed supply in the year 2000, even if the SunShine pipeline is built.

[R:1628, Final Order at 6]

Next, FGT argues that certain of its findings were improperly rejected by the PSC as argumentative, and gives as an example FGT's proposed finding 37 and the PSC's response:

> First of all, Mr. Rose originally did not look at the actual generating capacity plans for Florida's electric utilities. Because he ignored these plans, he grossly overestimated the demand for the SunShine Pipeline. Had he used the Florida utilities own plans, he would have projected, by his own admission, only 1.96 Bcf per day of demand by Florida's utilities in the Year 2,000, not 3.4 Bcf.
>
> Reject. Conclusory and argumentative.

This proposed finding could have been rejected as contrary to the evidence, but it is also argumentative. It is contrary to the evidence because Mr. Rose did review the generating capacity plans of the individual electric utilities and he did not overestimate

demand. [TR:305-11, 321, 836-37] The proposed finding is also argumentative because it deliberately distorts Mr. Rose's testimony into an admission of error. The proposed finding was worded by FGT to mislead the PSC to believe that Mr. Rose had conceded that his own forecast was wrong. Yes, Mr. Rose "admitted" that the utilities had projected a smaller demand for natural gas than he did, but he also "admitted" that his own forecast was superior and explained why it was superior. [TR:873, 880, 884, 890-91] Furthermore, even using the utilities' own numbers results in excess demand for pipeline capacity. [TR:884, 887-88] Because FGT's proposed finding distorted the actual record evidence, the finding was properly rejected by the PSC as argumentative.

The PSC addressed FGT's contentions on this issue in its Final Order. For example:

> FGT did not agree with SunShine's forecast procedure, because it was macroeconomic in nature and did not include consideration of the utilities plant-by-plant plans for power plant expansion, conversion, and fuel choice. FGT also indicated that SunShine's fuel price forecast, an input used to determine the gas capacity requirement forecast, appeared to be too low.
>
> 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 the FCG and DOE, he used the more conservative end of the fuel price forecast ranges to account for the volatility and uncertainty in prices.
>
> While FGT proposes that the fuel price forecast is not reasonable for planning purposes, FGT does not offer and specific argument to support that position. FGT's witness Carpenter stated that he believed Mr. Rose's determination of what percentages of baseload, intermediate, and seasonal peaking additions were going to use gas appeared to be based on fairly attractive forecasts for gas prices, relative to oil, but Mr. Carpenter did not present a fuel price forecast that he believed to be more reasonable. We find that SunShine's fuel price forecast is reasonable for planning purposes.

[R:1628, Final Order at 5-6]

The next proposed finding and response that FGT calls the Court's attention to is FGT's proposed finding 39:

> Mr. Rose didn't develop or even run the model upon which his forecast is based. The computer run was done by others, apparently under his supervision, but without any explanation or testimony as to whether the model was correctly run or what it was based on.
>
> Reject. Conclusory, argumentative and irrelevant.

FGT claims that this proposed finding was relevant to the issue of whether SunShine met its burden of proof, but FGT failed to show any error in Mr. Rose's use of the computer model or its results. Mr. Rose testified that he used a computer model developed by ICF Resources, Inc. which has been in continuous use for 15 years and is currently being used by the U.S. Environmental Protection Agency, the U.S. Department of Energy, as well as many of the major electric utility companies in the United States. [TR:375] The burden shifted to FGT to articulate and demonstrate error. *See*

Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 779 (Fla. 1st DCA 1981). The facts contained in FGT's proposed finding 39 are not evidence of any kind of error related to Mr. Rose's use of the computer model and, therefore, are irrelevant to any ultimate issue in the case.

All of the other policy issues that FGT claims the PSC failed to address when it rejected FGT's proposed findings are discussed by the PSC in the Final Order. The PSC discussed price and capacity requirement forecasts at pages 3 through 6 of the Final Order. Market interest is discussed at pages 6 through 8 of the Final Order. Project financing is discussed at pages 22 and 23 of the Final Order. FGT lists certain "evidence" at pages 34 through 38 of its Brief which it claims the PSC ignored when it rejected FGT's proposed findings, but the statements listed by FGT are a combination of arguments, distortions of the actual record evidence, and allegations that were rebutted by more competent testimony and exhibits in the record. It is not the province of this Court to repeat the task of the trier of fact and reweigh the evidence that was heard by the PSC. *Citizens, 448 So. 2d at 1026; Manatee County, 504 So. 2d at 765.* The PSC considered all of the evidence presented to it by the parties and discusses in its Final Order the significant countervailing arguments and the ultimate facts upon which it relied in resolving those arguments. The PSC is not required to refer to each and every factual allegation presented to it during the two-day hearing and rule on them individually. *Mayo*, 351 So. 2d at 341. FGT obviously wishes that

the testimony of its witness had been found compelling by the PSC, but the PSC found the evidence presented by SunShine to be the most compelling. This Court should decline FGT's invitation to retry the case under review.

B. There Was No Error Or Omission In The PSC's Responses To FGT's Proposed Findings That Affected The Fairness Of The Proceedings Or The Correctness Of The PSC's Action

Even if the PSC's treatment of one or more of FGT's proposed findings was not satisfactory to FGT, the Final Order taken as a whole clearly identifies the PSC's rationale, the record evidence upon which it is based, and the policy components of its decision that there is a need for the proposed SunShine Pipeline. An agency's failure to explicitly address a proposed finding would not require reversal and remand unless such failure has the effect of impairing the fairness of the proceeding or the correctness of the action. *Health Care Management, Inc. v. Department of Health & Rehab. Servs.*, 479 So. 2d 193, 195 (Fla. 1st DCA 1985), section 120.68(8) Fla. Stat. (1991). *See also Fla. Ch. of Sierra Club v. Orlando Utility Commission*, 436 So. 2d 383, 388 (5th DCA 1983); *Parekh v. Career Service Commission*, 346 So. 2d 145, 146 (Fla. 1st DCA 1977);

Every proposed finding presented by FGT is addressed by the PSC's Final Order in this case and, therefore, the fairness of the proceedings and the correctness of the action were not impaired. *Schomer*, 417 So. 2d at 1091.

The cases cited by FGT in support of its contention that this matter should be remanded to the PSC for further explication of its decision deal with facts and law so far removed from the circumstances pertaining here that they are of no support to FGT and of no assistance to the Court. For example, *Florida Cities Water Company v. Florida Public Service Commission*, 384 So. 2d 1280 (Fla. 1980), involved an agency's "abrupt" departure from long standing policy in an order with "absolutely no record foundation" with the bare explanation that the appellant's action was "wrong as a matter of law." *Id.*, 1281. Similarly, *Anheuser-Busch, Inc. v. Dept. of Business Regulation*, 393 So. 2d 11767 (Fla. 1st DCA 1991), dealt with disciplinary action against a licensee based on an agency's alteration without notice of a long established industry-wide practice. Like *Florida Cities Water*, the court found a complete absence of proof in the record to substantiate the agency's action. *Id.* at 1182; *see also Rabren v. Department of Professional Regulation*, 568 So. 2d 1283, 1288-89 (Fla 1st DCA 1990) (finding error on the same grounds). *Bowling v. Department of Insurance*, 394 So. 2d 165 (Fla. 1st DCA 1981) and *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987) are equally unhelpful, as both cases involved the revocation of professional licenses and the courts' application of a "clear and convincing evidence" standard of review. The instant case does not involve a license revocation to which the clear and convincing evidence standard would apply. Lastly, both *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971) and *Haist v. Scarp*,

366 So. 2d 402 (Fla. 1978) are cases where there was *no record* from the lower proceedings for the appellate court to review. All the above cases are readily distinguishable from the instant case, where there is a very complete record and a PSC Final Order that discusses in a comprehensive and detailed fashion the relevant statutory criteria, policy issues, and the factual basis for the PSC's determination that the proposed SunShine Pipeline is needed in Florida.

CONCLUSION

The PSC reviewed SunShine's Application for Determination of Need pursuant to the provisions of the Natural Gas Transmission Pipeline Siting Act, a comprehensive regulatory scheme enacted by the Florida Legislature in 1992. The intent of the Legislature in creating the Siting Act is enunciated in detail in the Act. In formal administrative proceedings, the PSC considered the evidence of need presented by SunShine and other parties with reference to specific standards and guidelines contained in section 403.9422(1)(b). It also fully considered the opposing contentions of FGT, which for the first time in over thirty years is facing the threat of real competition in a growing natural gas market which it would like to continue to have to itself.

Section 403.9422(1)(b) does not violate Florida's nondelegation doctrine. The Legislature made the fundamental and primary policy decisions regarding the regulation of intrastate natural gas pipelines in Florida and set forth in section 403.9422(1)(b) sufficient standards and guidelines to enable the

PSC and this Court to determine whether the PSC's determinations of need are consistent with the Legislature's intent.

The PSC's Final Order determining that there is a need for the SunShine Pipelinefully satisfies the requirements of the Administrative Procedure Act. The Final Order contains a detailed discussion of each of the standards contained in section 403.9422(1)(b) and all of the issues that were formally identified prior to the hearing. Every policy issue which underlies the PSC's action is addressed in the Final Order, along with the PSC's reasoning and supporting factual findings. There is no basis for remanding the matter to the PSC for further explanation of its order.

For the reasons stated above, SunShine respectfully requests this Court to affirm the Final Order of the PSC determining that Florida needs the SunShine Pipeline.

RESPECTFULLY SUBMITTED this 8th day of November, 1993.

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