IN THE SUPREME COURT OF FLORIDA

Florida Gas Transmission Company, Appellant, v. Florida Public Service Commission, et al., Appellees.	)	CASE NO. 82,171 PSC Docket No.: 920807-GP

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

INITIAL BRIEF OF APPELLANT
FLORIDA GAS TRANSMISSION COMPANY

William L. Hyde
Fla. Bar No. 265500

EARL, BLANK, KAVANAUGH & STOTTS, P.A.
Attorneys for Florida Gas Transmission Company
215 S. Monroe Street
Suite 350
Tallahassee, Florida 32301
(904) 681-1900

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes and Rules:

Other:

PREFACE

Appellant Florida Gas Transmission Company shall be referred to throughout this Brief as "FGT." Appellee Florida Public Service Commission shall be referred to as the "PSC." Appellee SunShine Pipeline Partners shall be referred to as "SunShine," and SunShine's proposed intrastate natural gas pipeline, which was the subject of the proceeding below before the PSC, shall be referred to as "the SunShine Pipeline." Appellee Florida Power Corporation shall be referred to as "FPC." The Natural Gas Pipeline Siting Act, §§ 403.9401-.9425, Fla. Stat. (Supp. 1992) shall be referred to as the "Siting Act."

References to the record before the PSC shall be as follows: "[R:__]." References to the transcript of the final hearing on May 10-11, 1993, which is found in Volumes X through XIII of the record on appeal prepared by the PSC, shall be referred to as follows: "[TR:__]." References to the Appendix to this Brief shall be as follows: "[A:__, p.__]."

The exhibits for the final hearing, which are found in Volumes XIV through XXIII of the record on appeal, shall be referred to as follows: "[EX.__, pp.__]."

Certain of the exhibits involve deposition transcripts which were admitted into the record at the final hearing and which themselves have exhibits appended thereto. This Brief, however, refers only to certain exhibits appended to the deposition transcripts of E. J. Burgin (Exhibit 1) and Dr. Paul R. Carpenter (Exhibit 18), which are found in Volumes XIV and XXIII, respec-

tively, of the record on appeal. Therefore, references to the exhibits to Mr. Burgin's deposition transcript shall be as follows: "[EX.1, EJB-__]," and references to the exhibits to Dr. Carpenter's deposition transcript shall be as follows: "[EX.18, PRC-__]."

STATEMENT OF THE CASE AND FACTS

Introduction

This proceeding was commenced below when SunShine Pipeline Partners ("SunShine") filed an application for a determination of need for its proposed intrastate natural gas pipeline with the Florida Public Service Commission ("PSC") pursuant to section 403.9422(1)(b), Florida Statutes (Supp. 1992). [R:10-19] Florida Gas Transmission Company ("FGT"), the owner of Florida's existing statewide natural gas pipeline, [R:1-8] as well as numerous other parties intervened, [R:9] and after an expedited discovery process a final administrative hearing was held before the PSC on May 10-11, 1993. At that final hearing the following facts were adduced.

SunShine is a Florida General Partnership between Coastal Southern Pipeline Company, Power Energy Services Corporation ("PESCORP"), a special purpose and wholly owned subsidiary of Florida Power Corporation ("FPC"), and TCPL SunShine Limited ("TCPL"), a subsidiary of TransCanada Pipelines, Limited [EX:22; TR:36] It was formed for the purpose of constructing, owning and operating an intrastate natural gas pipeline system to serve the State of Florida.\[1] [Id. at p. 1]

---

[1] In the companion SunShine Interstate Transmission Company proceeding pending before the Federal Energy Regulatory Commission ("FERC") in Docket No. CP93-361, FGT protested the attempt of SunShine's beneficial owners to bifurcate the comprehensive interstate transmission system into interstate/intrastate pieces, thereby avoiding FERC jurisdiction over much of its system, and creating a detrimentally unequal and biased playing field. Any references in this brief to the SunShine Pipeline as an "intrastate" pipeline are not to be construed as an admission that the SunShine Pipeline is a bona fide intrastate pipeline.

SunShine proposes to construct in Florida an intrastate natural gas pipeline ("the SunShine Pipeline"), which, if approved, would commence at a point in Okaloosa County and extend east and south in order to serve anticipated markets in peninsular and central Florida. [TR:42]

The initial facilities for the proposed SunShine Pipeline for 1995 would consist of approximately 502 miles of 30-inch mainline pipe and numerous lateral and branch lines. In the years 1998 and 1999, SunShine would add an additional 113 miles of new lateral pipelines as well as five compressor stations with approximately 45,000 installed horsepower. [TR:41]

Seven laterals to the main pipeline were proposed: (1) Ocala lateral, a 5-mile 4-inch diameter pipeline in Marion County; (2) the Leesburg lateral; (3) the Anclote lateral; (4) the Florida Crushed Stone lateral; (5) the Dade City lateral; (6) the North Tampa lateral; and (7) the Auburndale lateral. [TR:149] There is no testimony or record evidence, however, that the Ocala, Florida Crushed Stone, Dade City, or North Tampa lateral serve any customers with executed precedent agreements.

Initial system capacity for the SunShine Pipeline will be 250,000 million cubic feet ("Mcf") per day. Two 10,000-horsepower compressor stations would be added in 1998, increasing capacity to 425,000 Mcf per day. In 1999, three more compressors having 25,000 horsepower would be placed in service, bringing total system capacity to 550,000 Mcf per day. [TR:42]

The SunShine Pipeline must be connected to a new interstate pipeline to be constructed simultaneously by SunShine Interstate Pipeline Partners ("SITCO"), which is beneficially owned by the same interests as SunShine. The SITCO Pipeline would extend from an interconnection with Chandeleur Pipeline Company at an undetermined point in Pascagoula, Mississippi, and terminating at the point of interconnection with the SunShine Pipeline in Okaloosa County, Florida. [TR:41-42] All natural gas volumes reaching the SunShine Pipeline must be transported solely through the SITCO Pipeline; the SunShine Pipeline will have no interconnects with any other pipelines other than SITCO. [TR:43]

The partners in SunShine intend to use project-based financing, which means that the contracts and precedent agreements will secure the loans for the seventy-five percent (75%) debt of the partnership, and there will not be recourse financing by any of the principals to the partnership. No specific presentations, however, have been made to any lending institutions concerning the feasibility of financing this pipeline project. [TR:66-67, 77]

Traditional Approach versus Market-based Approach

While neither the Natural Gas Pipeline Siting Act, §§ 403.9401-.9425, Fla. Stat. (Supp. 1992) ("Siting Act"), nor the PSC's rules and regulations or prior orders speak precisely to the issue, the undisputed testimony of FGT's primary expert witness, Dr. Paul Carpenter, established that there are essentially two alternatives available for determining whether the proposed SunShine Pipeline project is needed: (1) the "traditional

approach" which determines need on the basis of an explicit cost-benefit and cost-effective analysis of the proposed project; and (2) the "market-based" or "let-the-market-decide" approach, in which need is evaluated based on the willingness of third-party customers and shippers to commit contractually to the project and on the requirement that the project's economic and financial risks will be borne by the project sponsors and not by other customers or ratepayers. [TR:512-13]

The traditional approach, as explained by the unrebutted testimony of Dr. Paul Carpenter, requires that a regulatory commission such as the PSC make an affirmative finding that the project is likely to provide net benefits to consumers and that it is economically superior to other alternatives, including the alternative of delaying the project. To the extent that alternative projects are mutually exclusive, this approach may require the regulatory commission to choose between competing projects. [TR:513]

Two types of analysis are required for this approach: A cost-benefit and a cost-effectiveness analysis. Through a cost-benefit analysis the applicant would be required to demonstrate whether the benefits to gas consumers and electric ratepayers outweigh the costs of the project. The cost-effectiveness analysis would evaluate whether the proposed project was the alternative producing those benefits at the least cost. [TR:513]

The benefits of a new gas pipeline typically involve economic as well as environmental considerations. Economic benefits which

might be considered include the fulfilling of a new or unmet demand for gas or gas transportation services, reduced delivered gas prices, increased service reliability, and the like. [TR:513-14] Project costs, on the other hand, would include capital and operating costs and the cost of any environmental mitigation necessary in the project's construction or operation. [TR:514]

The market-based or "let-the-market-decide" approach, again according to the unrebutted testimony of Dr. Carpenter, relies on competition between alternative projects to determine which project(s) will be constructed, but the regulatory commission must still insure that the competition is effective and that there are no explicit or implicit cross-subsidies that would unfairly advantage any one competitor or distort customers' comparisons of the alternatives. [TR:513]

Dr. Carpenter explained that the market-based approach, however, is not a "hands-off" approach. Because it relies on competition to insure that the amount and timing of new capacity additions are optimally developed, the regulatory commission must insure that the competition will be unbiased and effective. [TR:515-16] Dr. Carpenter also warned the PSC that scrutiny is also required of any situation which might unfairly skew the results of the competition to one particular project, such as a cross-subsidy from ratepayers of a particular competitor due to the shifting of costs or risks away from the project and toward ratepayers. [TR:516]

Under the market-based approach, therefore, need is demonstrated by the willingness of new shippers to commit to the project at the project's incremental rates and by the assurance that the project is not involuntarily subsidized by ratepayers. [TR:516] This showing should include the filing of signed long-term contracts or precedent agreements in which shippers have committed to paying demand or reservation charges for a significant percentage of the capacity of the pipeline over its lifetime. [Id.]

Inadequacy of SunShine's Forecasts of Future Need for Pipeline.

SunShine's attempt to forecast need for its proposed pipeline was predicated primarily on the testimony of its economic forecaster, Judah Rose. Mr. Rose's testimony, which was based upon a proprietary model owned by his employer, initially purported to establish that in the Year 2,000 there will be a demand for approximately 3.4 billion cubic feet ("Bcf") per day by Florida's electric utilities, with an additional .4 Bcf per day of demand by other non-electric uses (e.g., residential uses). Given this projection, Mr. Rose noted that FGT's system will have capacity (once its third phase is built) of 1.5 Bcf per day. The difference between his 3.8 Bcf of projected natural gas demand and 1.5 Bcf of FGT's existing and proposed capacity reflects his original projected unmet demand or need (2.3 Bcf) for additional natural gas pipeline capacity in Florida. [TR:307, 885]

However, Mr. Rose originally did not look at the actual generating capacity plans for Florida's electric utilities. Because he ignored these plans, he 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. [TR:528-29, 885; EX:21]

FGT argued that looking to the Year 2,000 and beyond as justifying a need for a pipeline which would commence operations in 1995 is simply not informative. Mr. Rose candidly admitted that he did not attempt to ascertain whether there would be any projected demand for the SunShine Pipeline in 1995, when its first phase would actually come on line. [TR:532, 898]

At the hearing Mr. Rose conceded that he didn't develop or even run the model upon which his forecast is based. The computer work 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 is based on. [TR:376]

More importantly, Mr. Rose's analysis was macroeconomic in nature and not tied to the specifics of the SunShine Pipeline proposal. Indeed, by his own admission, his analysis could be applied to any pipeline proposal or even to FGT's future expansions of its existing pipeline. [TR:374]

In his rebuttal testimony, Mr. Rose attempted to tie his demand forecast to the specifics of the SunShine Pipeline proposal, but his accessibility analysis [TR:829-42] was predicated, by his own admission, on a hearsay memorandum from SunShine's President, E. G. Burgin. Mr. Rose admittedly failed to evaluate the relative costs of SunShine's and FGT's servicing the gross or aggregate

demand that he is projecting or whether SunShine will be better able than FGT to serve this gross or aggregate demand. [TR:861-863]

Lack of Market Commitment for the SunShine Pipeline.

SunShine essentially asserted that based upon executed precedent agreements and letters of intent that SunShine has obtained from prospective shipper customers, as well as Judah Rose's forecast for future natural gas demand in the electrical power generation industry, SunShine has adequately supported the transmission capacity that it seeks to certify.

As of the date of the final hearing, the SunShine Pipeline had obtained executed precedent agreements for 177,000 Mcf of its initial in-service capacity of 250,000 Mcf for 1995 and 292,000 Mcf for its build-out capacity of 550,000 Mcf in 1999. These figures, respectively, amount to approximately seventy-one percent (71%) of the initial in-service capacity in 1995 and fifty-three percent (53%) of the build-out capacity of the SunShine Pipeline in 1999. [TR:42,77]

But Dr. Carpenter stated in unrebutted testimony that because the project's rates are based upon capturing the economies of scale associated with the expanded 1999 configuration (550,000 Mcf per day), once construction is started and if only 250,000 Mcf per day of demand materializes by 1999, there is no economic option available to the sponsors to downsize the project to match the demand and avoid losing massive amounts of money. [TR:549]

Thus, Dr. Carpenter testified without rebuttal, if the project attracts only the volumes contemplated as necessary to support this smaller project envisioned in SunShine's financial pro formas (400,000 Mcf per day) at the 52.5 cent rate, the 1995 present value of the pre-tax revenue shortfall from such an outcome will be approximately $200 Million, a sum greater than the total equity to be invested in the project. [TR:553; EX:18, PRC-11]

The letters of intent on their face reflect no genuine commitment by the proposed shipper; they are only an indication of some generalized interest in obtaining some degree of capacity on the proposed pipeline. [TR:534, 923] The Cypress Energy letter of intent, for example, has expired by its own terms. More importantly, it is for a non-existent power plant near Lake Okeechobee, the need for which has expressly been denied by the PSC. Still, approximately $75 to $85 Million of the pipeline's total projected costs are devoted to an extension to service this disapproved and non-existent facility. [TR:80-82, 211, 215; EX:1, EJB-8]

The demand associated with the FPC conversion of its Anclote powerplant to gas, which is the linchpin of this pipeline proposal, is itself questionable. As FPC's own task force concluded, the net economic benefit of the Anclote conversion is very sensitive to natural gas prices, it assumes that FPC's Crystal River powerplant units are not converted, and the stream of benefits does not become positive for FPC and hence to its ratepayers until the Year 2000. [EX:18, PRC-7, pp. II-2 to II-14, TR:556-57, 743-44]

The proposed timing of the Anclote conversion was also questioned by the financial analysts of FPC's parent corporation, Florida Progress Corporation. They concluded that the proposed timing of the Anclote conversion cannot be supported on economic grounds and that there should be a reevaluation of the proper timing of the conversion of Anclote to gas. [TR:557-59; EX:18, PRC-7, pp. V-2 to V-4]

The Florida Progress analysts further described how FPC's conflict of interest in being both an owner and a shipper on the pipeline is compromising its capacity planning decisions with regard to the Anclote plant conversion. As those financial analysts noted: "The very urgency to proceed thus discussed in Section III of this report speaks primarily to the needs of the new pipeline, rather than to the appropriate timing to meet FPC's needs." [TR:557-59, 591-92, 764; EX:18, PRC-7, pp. VI-25 to VI-26]

SunShine's Reliability as a Supplier of Natural Gas.

The operating company for the SunShine Pipeline has not yet been incorporated and possesses no assets. It has no offices either. Indeed, all that it appears to have at this time is a President and a Vice President. [TR:30, 68, 913]

SunShine will be an intrastate pipeline that will move one hundred percent (100%) of its gas through SITCO. Without SITCO, however, SunShine connects to nothing, and the federal authorization for SITCO could take, by the admission of SunShine's President, E. J. Burgin, years, and the application had not yet even been filed. [TR:36, 43, 68; EX:1, p. 33-34]

As to whether SITCO itself would have access to adequate supplies of divertible natural gas, SunShine's only witness in this regard, Ronald Hrehor, admitted that he did not specifically examine the capacity of the pipelines upstream of SITCO or their supply areas. He did not even know the rates of the upstream pipelines to which the SITCO pipeline would interconnect. [TR:278, 279-80]

Adoption of Final Order

Subsequent to the final hearing FGT submitted in accordance with section 120.57(1)(b)4., Florida Statutes, its Proposed Findings of Fact and Conclusions of Law/Argument. [A:2; R:1571-1623]

Despite the above-noted and other facts of record, the PSC at the Commissioners' agenda conference on June 11, 1993, voted to approve SunShine's application subject to several conditions which are not germane to this appeal. The Commissioners also ruled on the various parties', including FGT's, proposed findings of fact. In doing so, however, the Commissioners did not themselves rule on each and every proposed finding; instead, they adopted without comment, explanation or variation the PSC staff's recommended rulings on these proposed findings of fact. [TR to Special Agenda Conf., pp. 1-61]

The PSC's approval was eventually reduced to writing by Final Order rendered July 2, 1993. [A:1; R:1628-1704] FGT timely filed its Notice of Appeal on August 2, 1993. [R:1705-1707]

INTRODUCTION TO ARGUMENT

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. At issue is a Final Order of the PSC certifying a need for SunShine's proposed natural gas pipeline pursuant to section 403.9422(1)(b), Florida Statutes (Supp. 1992).

Perhaps this Court will be relieved to know that the salient facts of this case--an appeal from a Final Order of the PSC--are actually quite straightforward and do not require any familiarity or expertise in economics or the arcane science and art of public utilities regulation. The narrow constitutional and administrative law questions posed by this case do not require any lengthy exposition of natural gas pipeline design, construction, or regulation.

SUMMARY OF THE ARGUMENTS

ISSUE I:

Section 403.9422(1)(b), Florida Statutes (Supp. 1992) impermissibly delegates to the PSC the authority to determine what the law shall be in violation of article II, section 3 of the Florida Constitution (1968). It provides no definitions, much less standards or priorities, to limit or guide the agency's reach in a Siting Act determination of need hearing. Quite the contrary, it allows the PSC in such a proceeding to consider all "other matters

within its jurisdiction deemed relevant to the determination of need." As such, the Florida Legislature has invested the PSC with the power to determine, in the first instance, what the law shall be.

Furthermore, there is a complete "absence of legislative delineation of priorities" among the factors that are listed in the statute for the PSC to consider, for the statute "treats alike, as fungible goods, disparate categories" such as "reliability," "safety," "integrity," "economics," and the like. Askew v. Cross Key Waterways, 372 So. 2d 913, 919 (Fla. 1978). The statute does not reference or require consistency with another statutory scheme. Compare Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).

It is, moreover, not impracticable to lay down a definite comprehensive rule, for this regulation does not turn on the question of personal fitness nor is it a police regulation necessary to protect the general welfare, morals, and safety of the public. See, e.g., North Broward Hospital Dist. v. Mizell, 148 So. 2d 1, 4 n. 11 (Fla. 1962). Hence, this is not a case where the courts will simply infer that a standard of reasonableness is to be applied.

ISSUE II:

Assuming, however, that our constitution would tolerate such open-ended delegations of authority by statute, then this Court must at least require the PSC to flesh out the details of its

policy choices in its Final Order. The PSC's Final Order falls far short of this requirement.

Because the PSC has decided to use adjudication instead of rulemaking to implement section 403.9422(1)(b), it must fully explain its reasoning in its Final Order. McDonald v. Department of Banking & Finance, 346 So. 2d 569, 583 (Fla. 1st DCA 1977). As this Court once reminded the PSC, "when an agency elects to adopt incipient policy in a nonrule proceeding, there must be an adequate support for its decision in the record of the proceeding." Florida Cities Water Co. v. Public Service Comm'n, 384 So. 2d 1280 (Fla. 1980).

There are numerous instances where the PSC has failed to adequately address the concerns raised by FGT. They naturally group into four categories: (1) those rulings that summarily reject undisputed facts and proposed findings; (2) those rulings that inexplicably refuse to discuss FGT's proposals on the grounds that they raise questions of policy; (3) those rulings that arbitrarily refuse to consider "argumentative" proposed findings; and (4) those portions of the order that attempt to offer a policy discussion, but require further explication.

Three provisions of the APA require the PSC to address all of FGT's concerns. First, sections 120.59 and 120.57 require that all agency orders explicate policy. Second, section 120.68 requires that the "record on appeal" include the agency's statement of reasoning so that a reviewing court can test the sufficiency of the findings. Finally section 120.68 also guarantees parties a full,

fair and meaningful review--a right that would be denied to FGT if no or inadequate reasons are given for the agency action.

FGT therefore raises a similar concern in both its arguments. It is urged that the statute is so vague and standardless as to constitute an impermissible delegation of authority. Alternatively, if the Legislature will not be required to expand upon the statute, then the agency must. Under chapter 120 agencies are required to explain the policy choices and decisions made in the course of adjudication. Both arguments reach the same conclusion: someone, either the agency or the Legislature, should be required to "flesh out" the statute.

ARGUMENT

ISSUE I. Section 403.9422(1)(b), Florida Statutes (Supp. 1992) Violates the Separation of Powers Doctrine Embodied in Article II, Section 3 of the Florida Constitution (1968).

> *I think the delegation (separation of powers) doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies. At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body. That concept is as important now as it was a century and a half ago when it was first propounded.*[2]

This Court recently warned the Legislature "that under the doctrine of separation of powers, the Legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch. Any attempt by the Legislature to abdicate its

---

[2] Skelly Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 583-84 (1972).

particular constitutional duty is void." Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260, 264 (Fla. 1991). Yet the Legislature did not heed this warning when it enacted section 403.9422(1)(b), Florida Statutes (Supp. 1992), for this statute impermissibly delegates to the PSC the authority to determine what the law shall be in violation of article II, section 3 of the Florida Constitution (1968).\[3]

In order to appreciate the constitutional implications of this unlawful delegation, it is necessary to first understand in general terms the statutory framework in which section 403.9422(1)(b) is found. In its 1992 session, the Florida Legislature enacted the Natural Gas Pipeline Siting Act ("Siting Act"), §§ 403.9401-403.9425, Fla. Stat. (Supp. 1992). Its purpose in doing so was expressed in section 403.9402:

> 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.

§ 403.9422(1)(a), Fla. Stat.

An essential element of this pipeline certification process is that the PSC first determine the "need" for the pipeline. In fact, the PSC is by statute "the sole forum for the determination of

---

[3] The powers of this state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein. (emphasis supplied)

need," § 403.9422(1)(c), Fla. Stat., and its deliberations are to be governed by the provisions of section 403.9422(1)(b), which 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. (emphasis supplied)\[4]

It is primarily this underscored passage that is constitutionally offensive, for on its face it makes the PSC "the lawgiver rather than the administrator of the law." Askew v. Cross Key Waterways, 372 So. 2d 913, 919 (Fla. 1978). But that is not the statute's only constitutional infirmity.

A. Florida Has Continually Refused to Abrogate its Non-Delegation Doctrine.

As this Court has recently observed, the separation of powers doctrine "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." Chiles, 589 So. 2d at 264. Thus, until the provisions of article II, section 3 of the Florida Constitution are amended, "fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the

---

[4] The Siting Act provides no other statutory criteria for this determination of need process by the PSC.

enactment establishing the program." Askew v. Cross Key Waterways, 372 So. 2d at 925. What the legislature cannot do is delegate to an agency "the authority to determine what the law shall be." In re: Advisory Committee to the Governor, 509 So. 2d 292, 311 (Fla. 1987) (citing Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974); Florida Welding & Erection Serv., Inc. v. American Mutual Ins. Co., 285 So. 2d 386 (Fla. 1973).

B. Section 403.9422(1)(b) Violates Separation of Powers.

Section 403.9422(1)(b) offends this basic principle. It admonishes the PSC to think hard and long (e.g., the "need for abundant, clean-burning natural gas to assure the economic well-being of the public"), but provides no definitions, much less any standards or priorities to limit and guide the agency's reach.

The Siting Act fails in two respects. First, it contains an open-ended clause allowing the PSC to base a need determination on "other matters within its jurisdiction deemed relevant." § 403.9422(1)(b), Fla. Stat. (Supp. 1992). Second, what little guidance the statute does provide is not broken down in terms of priority or importance.

For these constitutional purposes, the first of these concerns is most troubling. The statute invests the PSC with an amorphous, catchall provision allowing it to consider "other matters within its jurisdiction deemed relevant to the determination of need." § 403.9422(1)(b), Fla. Stat. (Supp. 1992). As such, the statute has invested the PSC with the power to determine, in the first instance, what the law shall be, bound only by the inherently

subjective limitation to those "matters within its jurisdiction deemed relevant to the determination of need," whatever they may be.\[5]

This is no meaningful standard for or limitation upon the PSC's powers. Rather, it is a prescription for "an Alice-in-Wonderland of unchanneled, unreviewable, untrammeled discretion." Wright, 81 Yale L.J. at 576. If this statute is allowed to stand, the PSC will be beyond the power of the law to control, for how can a reviewing court second-guess a PSC determination that some factor, no matter how remote, is somehow a "matter within its jurisdiction deemed relevant to the determination of need"?

Even were this underscored passage stricken or construed to mean something other than what it says, the statute would still not pass constitutional muster. Just as in Askew v. Cross Key Waterways, 372 So. 2d at 919, there is still an "absence of legislative delineation of priorities" among the factors that are listed, for the statute "treats alike, as fungible goods, disparate categories" such as "reliability," "safety," "integrity," "economics," and the like. None of these terms are defined, nor do they reasonably convey objective and readily ascertainable standards. The statute, moreover, does not reference or require consistency with another statutory scheme. Compare Department of

---

[5] The PSC, after all, is charged with enforcing numerous statutes, most of which have little, if anything, to do with natural gas pipelines. Even if one considers only those statutes which are strictly germane to natural gas pipelines, e.g., ch. 368, Fla. Stat., there is no guidance as to the relationship or relevancy of those other statutes to a need determination.

Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976)(where statute expressly admonished that great weight should be given to interpretation of similar terms in federal act).

The PSC likewise cannot cleanse the statute's infirmities through application of the disciplines found in the Florida Administrative Procedure Act, ch. 120, Fla. Stat. True, through rulemaking, declaratory statements, and the proper development of nonrule policy, "approximations of the threshold of legislative concern," Askew v. Cross Key Waterways, 372 So. 2d at 919, can be "fleshed out" by administrative action. But as this Court has noted:

> [F]or an administrative agency to "flesh out" an articulated legislative policy is far different from that agency making the initial determination of what the policy shall be.

Askew v. Cross Key Waterways, 372 So. 2d at 920. Here, the statute at issue clearly and unequivocally makes the PSC the first, final and only arbiter of what Florida's determination of need policies for intrastate natural gas pipelines shall be.

C. Issues of Public Safety Are Not Implicated by Section 403.9422(1)(b), Florida Statutes.

The PSC, of course, will predictably argue that Florida's strict nondelegation doctrine is subject to exception. True, some have noted that where it is impracticable to lay down a definite comprehensive rule, such as where the regulation turns upon the question of personal fitness or where the act relates to the administration of a police regulation and is necessary to protect the general welfare, morals, and safety of the public, it is not

essential that a specific prescribed standard be expressly stated in the legislation. In such situations, the courts will infer that the standard of reasonableness is to be applied. See, e.g., North Broward Hospital District v. Mizell, 148 So. 2d 1, 4 n. 11 (Fla. 1962).

The fallacy in such an argument is manifest. Section 403.9422(1)(b) is not the ordinary regulatory scheme which turns upon the question of the personal fitness of an applicant for a license. Indeed, an applicant for a pipeline certification may be perfectly fit, yet the certification can still be denied for reasons that have nothing to do with fitness. Instead, the Siting Act poses as its central inquiry whether there is a need in Florida for a given pipeline, and an applicant's "fitness" is, at best, only a small part of that calculaiton. And in that regard, the PSC has been invested with the unfettered discretion to determine not only whether such a need exists, but also by what standards and criteria that need is to be determined. Thus, the tolerance given to ordinary licensing statutes should not apply.

Similarly, the Siting Act is not excused from the nondelegation doctrine as a police regulation "necessary to protect the general welfare, morals, and safety of the public." North Broward Hosp. Dist. v. Mizell, 148 So. 2d at 4. It arguably may be a "police regulation" within the general meaning of that term (as most statutes are), but it is certainly not a police power regulation "necessary to protect the general welfare, morals, and safety of the public." It is self-evidently an economic regulatory

scheme designed to help restructure the competitive nature of natural gas delivery in Florida. Compare § 368.03, Fla. Stat., which addresses natural gas pipeline design, fabrication, installation, inspection, testing and safety standards.

D. Relief Requested.

This Court must therefore reject any suggestion that the Siting Act represents an exception to Florida's strict nondelegation doctrine. If the Court is to be true to its own precedents, it has no choice but to declare section 403.9422(1)(b), Florida Statutes (Supp. 1992) unconstitutional under the separation of powers doctrine embodied in article II, section 3 of the Florida Constitution (1968). To hold otherwise would be to effectively immunize the PSC and its organic statutes from that doctrine, a result to which this Court has not previously subscribed.

ISSUE II. The PSC's Order Does Not Adequately Explain Its Discretionary Action.

Even if one is skeptical about the unconstitutionality of section 403.9422(1)(b), Florida Statutes, the PSC's actions in this matter nonetheless require judicial attention. The PSC has failed to fulfill its duty under the Administrative Procedures Act ("APA"), chapter 120, Florida Statutes, by not stating adequate reasons for the policy choices made in its final order. The order is incomplete because it (1) fails to show the agency's rationale for its policy choices, as required by sections 120.57 and 120.59, Florida Statutes; (2) deprives this Court of a complete record for review as defined by section 120.68; and (3) denies FGT its right to a fair and meaningful review. Consistent with section

120.68(13), Florida Statutes, this Court needs to remand this matter to the agency with instructions that further proceedings must grapple with the policy issues raised by the parties.

A. Agencies Choosing to Develop Policy Through Adjudication Must Explicate Their Decisions.

The APA recognizes every agency action as either a rule or an order, see § 120.52(2), Fla. Stat. (1991) (defining "agency action" as either of the two), and with some restrictions agencies may carry out their duties by choosing either of these modes of procedure. But agency use of rulemaking is decidedly favored by both the APA, see § 120.535, Fla. Stat. (1991) (stating that "[r]ulemaking is not a matter of agency discretion" and defining instances where rulemaking is mandatory), and the courts, see Anheuser-Busch, Inc. v. Department of Business, 393 So. 2d 1177 (Fla. 1st DCA 1981) (seminal case; placing burden of proof on agencies that choose to use adjudication instead of rulemaking); accord Florida Cities Water Co. v. Public Service Comm'n, 384 So. 2d 1280 (Fla. 1980) (stating that rulemaking "is preferable where established industry-wide policy is being altered").

As a result, if agencies proceed in the absence of rules, they pay a price for their discretion: they have to explicate their nonrule policies. See McDonald v. Department of Banking & Finance, 346 So. 2d 569, 583 (Fla. 1st DCA 1977) (seminal case) ("The final order must display the agency's rationale."); Florida Cities Water Co., 384 So. 2d at 1280 ("[W]hen an agency elects to adopt incipient policy in a non-rule proceeding, there must be an

adequate support for its decision in the record of the proceeding.") (citing McDonald, supra).

The public policies behind this requirement are as plain as the doctrine itself. Agencies should be required to discuss and explain their policy decisions in their orders because (1) it invites a searching review of agency action, thereby encouraging more objective decision-making; and (2) it provides an incentive for agencies to rely more on rules than unstated or incipient policy, thereby providing notice to the public as to what conduct will be required of them.

It is no surprise, therefore, that the case law has consistently held that "[w]hen the agency opts for nonrule or adjudicative policymaking . . . the agency's final order and the record must contain a predicate to support the policy." Rabren v. Department of Professional Regulation, 568 So. 2d 1283, 1289 (Fla. 1st DCA 1990). The PSC's orders are no exception to this rule. See Florida Cities Water Co. v. Public Service Comm'n, 384 So. 2d 1280 (Fla. 1980). The PSC's decision to eschew the rulemaking permitted by section 403.9422, and proceed right to adjudication therefore required that its Final Order discuss and explain its policy decisions. This the PSC did not do.

B. The PSC's Final Order Is Deficient and Incomplete.

The PSC's Final Order proves that looks can be deceiving. Weighing almost one pound, and spanning some seventy-seven pages, the single-spaced document at first appears comprehensive. Yet any quick reading of the order reveals its substance to be quite brief.

Just over half of the order is made up of attachments, including proposed findings of fact written by the parties, and the balance of the order is consumed by a recitation of the procedural history of the application, an examination of safety issues (not contested here), and a discussion of certain certificate conditions (i.e., the so-called "at-risk" condition).

In the entire document, only a few lines deal with the policy issues identified by the Siting Act and raised by FGT. All in all, the order fails to "address contervailing arguments developed in the record and urged by . . . proposed findings submitted to the agency." McDonald, 346 So. 2d at 583. The order is therefore deficient and incomplete.

To better illustrate the problems with the order, it is helpful to organize the order's deficiencies into four categories: (1) those rulings that summarily reject FGT's proposed findings that are undisputed in the record; (2) those rulings that refuse to discuss FGT's proposals on the grounds that they raise questions of policy; (3) those rulings that arbitrarily refuse to consider FGT's proposed findings on the grounds that they were "argumentative" or "conclusory" in nature; and (4) those portions of the order that purport to discuss policy, but require further explication.

1. The Final Order Summarily Rejects Uncontested Proposed Findings of Fact.

The most puzzling problem with the Final Order comes from the PSC's refusal to rule on FGT's proposed findings that are undisputed in the record. In many instances, the PSC rejected findings urged by FGT that could not be reasonably disputed by the

record. For example, FGT suggested the following finding of fact with an eye towards the "reliability" required by section 403.9422(1)(b):

> 18. SunShine Pipeline Partners currently has no assets. It intends to do business through an operating company, which has not yet been incorporated. [TR:68]
>
> **Reject. Immaterial to a decision on the issues in this case.**

[A:1, p. 40]. The PSC's rejection of this simple statement of fact (in bold) is inexplicable. The PSC's refusal to entertain inquiry in this area becomes insupportable when one realizes that SunShine freely admitted that it had no assets. Inexplicably, the PSC decided to "reject" an entirely uncontroverted fact!

FGT submits that the financial viability of a company asking for status as a utility wielding eminent domain authority, see § 403.9416(1), .9423, and 360.05, Fla. Stat., is indeed highly relevant. Such an inquiry goes to the "need for natural gas delivery reliability" that the Legislature identified, but never fully explained. § 403.9422(1)(b), Fla. Stat. (emphasis added). The PSC, however, dismissed this inquiry, calling it wholly immaterial. This Court needs to know from the PSC why this is "immaterial" so that it can appropriately "deal separately with disputed . . . interpretations of law, determinations of fact, or policy." § 120.68(7), Fla. Stat. (1991). The public needs to know what type of solvency is expected of its utilities so that affected individuals can challenge rules or seek new legislation. The PSC obviously has an idea as to what makes a company reliable, but has not shared this policy with the public. FGT's proposed findings

and conclusions were designed to discover this policy and deconstruct its reasoning. But by refusing to accept even uncontested facts on this issue, the PSC has rebuffed all attempts at developing and expressing agency policy.

To continue the examination of the passage quoted above, FGT does not suggest that the PSC has no discretion to give monopoly status to a company with no assets. To the contrary, the PSC could create a policy or rule tolerating a high debt/equity ratio in an applicant. Alternatively, the PSC could favor a policy of looking solely at potential investors in a company instead of proven assets. But in making this policy decision by order and not by rule, the PSC must explain why its decision is reasonable, and define with particular reference to SunShine's application what constitutes a "reliable" company. It is not enough to label FGT's proposed finding "immaterial" because this does not address a "contervailing argument[] developed in the record and urged by . . . [a] proposed finding[] submitted to the agency." McDonald, 346 So. 2d at 583. To the contrary, the term "reliability" needs to be fleshed out and explained by the agency's order, and later by rule.

2. The Final Order Refuses to Discuss Relevant Policy Questions Raised in the Record.

By far the most disturbing problem with the PSC's Final Order is its failure to discuss relevant policy questions. One might almost chalk this deficiency up as neglect or mere oversight were it not for the fact that FGT repeatedly requested rulings that required a discussion of policy. Yet, despite FGT's efforts to probe the agency's rationale and test its reasoning, the PSC

refused to explain how it arrived at its policy decisions. Instead, the PSC rested on the assertion--and this is no exaggeration--that it was not required to explicate its policy decisions because parties may not raise questions of policy in their proposed findings!

One example in particular bears close examination. To assist the PSC in its need determination, FGT proposed two alternative frameworks for evaluating "need" under section 403.9422, Florida Statutes: (1) a traditional "cost-benefit analysis," similar to the method used in power plant certification proceedings; and (2) a "market-based approach" which required that the applicant show enough third-party interest to justify the expense of building a new pipeline. [A:2, pp. 41-44]

The PSC rejected this proposed framework for analysis, stating as follows:

> **Reject. This proposed finding is an argument of law and regulatory policy. It is not a fact. Also it is an incomplete statement. There are other regulatory alternatives to determine the need for the proposed pipeline project.**

[A:1, p.41] Similar proposed findings, elaborating on the method of determining need, were likewise rejected because they posed policy questions. [A:1, pp.41-44, ¶¶ 22-23, 25-34]

Essentially, the PSC objected to FGT's proposal because it was "an argument of law and regulatory policy." Well, certainly. There is nothing unorthodox about asking an agency to make up its mind and decide a matter of policy; indeed "the agency's nonrule policy is fair game for a party's challenge both in the public and

his private interest." McDonald, 346 So. 2d at 583. But the grounds for rejecting FGT's proposal go beyond mere disagreement with its wording. The PSC's refusal to discuss FGT's proposal is an abdication of the agency's duty to explicate policy. Because the PSC must point to "an adequate support for its decision in the record of the proceeding," Florida Cities Water Co., 384 So. 2d at 1280, it cannot simply refuse to discuss policy.

Nor is it enough to reject FGT's proposal because it resembled more closely a question of law than a pure question of fact. The drafters of the APA had no tolerance for such hair line distinctions in agency orders. "In fact, agency proceedings frequently affect individual rights and create general policy at the same time, so that they partake of adjudication and rule-making at the same time." Reporter's Comments on Proposed APA, p. 6, reprinted in 3 Arthur England et al., Florida Administrative Practice Manual (1979). The PSC's reliance on these sorts of "fact" and "law" labels is decidedly unhelpful. Cf. Bowling v. Department of Insurance, 394 So. 2d 165, 174 n.17 (Fla. 1st DCA 1981) disapproved on other grounds, Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987) ("This court has recently determined to avoid this abstract and unprofitable debate over definitions, preferring to require proof even of 'legislative' facts.").

Thus, when the PSC rejected FGT's proposed two-pronged policy approach to a need determination, and stated that "[t]here are other regulatory alternatives to determine the need for the proposed pipeline project," [A:1, p. 41, ¶ 21], one must ask: Well,

what are these other regulatory alternatives, for there is no mention of them in this record? What factors do these alternatives consider? How do they expand on section 403.9422(1)(b), Florida Statutes, and how are they applied? These and other questions come readily to mind. Under section 120.59(2), Florida Statutes, one is entitled to an answer. The order should be remanded to require record citation and discussion for all decisions and policy questions raised by the parties.

3. The Final Order Rejects FGT's Proposed Findings on the Grounds That They Are Argumentative or Conclusory.

A third category of problems in the Final Order can be perceived in the PSC's refusal to address the numerous proposed findings that it found "argumentative" or "conclusory" in nature. Instead of addressing the portion of public policy found in every proposed finding of fact, and its corresponding record support, the PSC rejected the findings based purely on the tone of the proposals.

A few examples make this clear. In the proceeding below, FGT pointed out that Dr. Rose, SunShine's consultant on future projected demand for natural gas, had grossly overestimated the amount of gas Florida would need in the year 2,000 because he started with the wrong set of data. Dr. Rose admitted this flaw in his analysis. [TR:528-9, 885] Yet the PSC did not properly credit this criticism, or even consider how it undermines Dr. Rose's credibility as an expert. FGT's proposed finding, and the PSC's response, follow:

> 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. (TR:528-29, 885; EX:21)
>
> **Reject. Conclusory and argumentative.**

[A:1, p. 45, ¶ 37].

The proposed finding by FGT was a very plain, factual account of the record. Dr. Paul Carpenter, FGT's expert, stated in direct testimony that:

> The one thing Mr. Rose's testimony never really does is to look at the actual generating capacity expansion plans of Florida's electric utilities. His workpapers indicate that he had the specific project information available to him, however, his only use for it was in estimating the proportion of new plants that would be gas-fired. Mr. Rose's analysis is at best a poor substitute for the actual plans developed by Florida's electric utilities. By ignoring these plans and instead analyzing the problem in an aggregate manner, Mr. Rose loses a great deal of valuable information and grossly overestimates the demand for SunShine. [TR 529-30].

Dr. Carpenter's criticisms of Mr. Rose's opinion were made even more damaging by Rose's concession that he was forced to go back and rework his calculations to rationalize them with the utilities' actual plans. [TR:884].

When FGT offered this criticism of Mr. Rose's analysis as a proposed finding, the PSC was faced with a dilemma. The agency could have accepted the finding as uncontroverted (which it was); it could have rejected the finding, based on whatever relevant evidence it could cull from other testimony; it could have accepted the finding, but found that Mr. Rose's analysis was nonetheless

believable; or it could have accepted it as one of the many findings that go to the overall weight and credibility of Mr. Rose as an expert.

The PSC cannot, however, merely side-step the attack on Mr. Rose's credibility because it arbitrarily finds the form and tone of the proposal to be argumentative and conclusory. To entertain this sort of fastidious agency fact-finding elevates form over substance, and allows the agency to duck the requirement that it provide a "statement of reasons" for all policy decisions. § 120.68(5)(a), Fla. Stat. (1991) (emphasis added).

At the risk of belaboring the point, consider further this additional example of the PSC's failure to engage the parties' debate:

> 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 is based on. [TR:376]
>
> **Reject. Conclusory, argumentative and irrelevant.**

[A:1, pp. 45-46, ¶ 39]. This proposed finding was amply supported by the record, see [TR:375-76], and was highly relevant to whether SunShine had met its full burden of proof and whether Mr. Rose's analysis was reliable. Undeniably, the PSC could have accepted this proposed finding, noted the holes in Mr. Rose's analysis, and still charitably credited his testimony with reference to other record evidence. FGT submits, however, that if the PSC is forced to concede these numerous, uncontroverted problems with Mr. Rose's

testimony, and really start to think about its decisions, then it would ultimately change its mind.

By labeling FGT's unflattering observations about Mr. Rose's analysis as "argumentative" and "conclusory" the PSC avoids the issue. Understandably, the agency sought to avoid the more difficult chore of rehabilitating a damaged expert opinion by searching the record for competent, substantial evidence. But the APA requires that the PSC's order provide a "statement of reasons" for its policy decisions, § 120.68(5)(a), Fla. Stat. (1991) (emphasis added), and "include a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request." § 120.59(2), Fla. Stat. (1991). This Court needs to instruct the PSC to fulfill its duties under chapter 120.

Numerous other portions of the order repeat this same fundamental error. There is not enough space to permit a detailed analysis of each instance where the PSC rejected a proposed finding merely because it felt that it was conclusory or argumentative.\[6] Instead, the following points summarize the more extreme examples.

a. Price and Capacity Requirement Forecasts.

The PSC's prehearing order identified as issues number 1 and 6 an inquiry into whether SunShine's forecasts for future price and capacity requirements were reasonable for planning purposes. In

---

[6] 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 allegedly "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).

other words, the PSC had to scrutinize SunShine's estimates, offered through witness Rose's testimony, as to how much gas Florida would need in the near future, and at what costs. Through cross examination and expert testimony, FGT marshalled evidence that Mr. Rose (1) originally overestimated demand (and admitted his mistake!), [TR:528-9, 885; Ex. 21] (2) did not personally perform his analysis, thereby rendering his analysis questionable, [TR:376] (3) failed to analyze the annual projected need for gas for the years between 1993 and 2000, thereby making his analysis of the year 2000 unhelpful to a pipeline proposed for service in 1995, [TR:532, 898] (4) looked only at macroeconomic data about gas demand instead of the requirements for specific power plants, [TR:374] (5) later attempted to tie his analysis into specific power plant needs by use of hearsay evidence about "accessibility,"\[7] [TR:829-842] (6) conceded that his general, macroeconomic analysis about future gas requirements could be applied to any pipeline, including the needs that will be served by FGT's planned expansion, [TR:374] and (7) failed to compare the relative costs of service provided by either building SunShine's new pipeline from scratch or simply increasing the flow of gas through FGT's existing pipeline. [TR:861-3, 528, 554-5]

FGT's proposed findings of fact numbered 36 through 44 (inclusive) [A:2, pp. 9-11] pointed out the record evidence that

---

[7] As a hearsay document, that memorandum cannot form the basis of a finding of fact, § 120.58(1), Fla. Stat., and there is no other competent, substantial evidence in this record to confirm or corroborate this accessibility analysis by Mr. Burgin.

supported these criticisms. As a whole, they undermine confidence in Rose, discredit his estimates, and show how Florida's future gas needs can be met by existing gas pipelines. Without exception, the PSC rejected all of these proposed findings because they were "argumentative" and "conclusory" in nature. The PSC cannot so easily reject these arguments, because the APA requires it to compare its reasoning to the record.

b. Evidence of Sufficient Market Interest in SunShine.

A second category of findings is found in issues 2, 5 and 11, which as a whole generally look at the timing of the pipeline proposal, and whether there was sufficient third-party market interest in SunShine's proposal to warrant construction of a new pipeline. In other words, the PSC had to consider whether there existed a fair, undistorted market demand for new gas beyond what FGT's existing pipeline would provide.

FGT presented evidence to support the following conclusions: (1) through precedent agreements and letters of intent, SunShine had demonstrated that only 71% of its pipeline capacity would be subscribed in 1995, and only 53% would be used in 1999; [TR:42, 77] (2) the adequacy of the market response to SunShine should be based on the 1999 build-out capacity (for which there was only a 53% market response) and not the 1995 capacity (which might have been 71% subscribed) because the tariff rates for the precedent agreements were based on an assumed 100% subscription of the 1999 volumes; [TR:549] (3) since SunShine's project depends on the economies of scale available only to the larger 1999 build-out

volume, there would be no other options available to the sponsors (such as downsizing the project) if demand for the 1995 capacity continues to fall short; [Id.] (4) SunShine's pipeline is so under-subscribed that based on SunShine's own pro formas, and at its present level of subscription and tariff rate, the project would experience a $200 million shortfall in 1995--a sum greater than the total equity to be invested in the project; [TR:553, Ex. 18, PRC-11] (5) SunShine exaggerated the amount of market interest in its pipeline by relying on letters of intent, which do not commit to any volumes and only state the desire of a shipper to engage in future, non-binding negotiations; [TR:534, 923] (6) the letters of intent were also unreliable evidence of a market interest because many had either expired by their own terms, required further approval, or were for power plant projects for which the PSC had already denied certification; [TR:80-82, 211, 215; Ex. 1, EJB-8] (7) the SunShine proposal was based primarily on the conversion of a powerplant known as FPC's Anclote facility to natural gas; [TR:556-7, 743-4; Ex. 18, PRC-7, pp. II-2 to II-4] (8) a group of experts within Florida Progress (FPC's parent corporation) had noted that the proposed conversion of the Anclote facility was being driven (at significant cost) not by any real economic necessity, but rather to meet the demands of the pipeline--a case of the tail wagging the dog; [TR:557-9, 591-2, 764; Ex. 18, PRC-7, pp. VI-25 to VI-26] (9) FPC's equity participation in SunShine would make it both customer and part-owner of the pipeline, thereby skewing the market interest it had expressed in its own pipeline;

(10) FPC's dual role as an owner and customer of the pipeline would permit FPC essentially to sell gas to itself, with the entire cost of the fuel (plus, presumably, a profit) being paid for by the electric rate payers; [TR:550-551] and (11) SunShine's precedent agreement for supplying gas to a proposed FPC power plant known as the Polk County facility was questionable, given problems FPC was experiencing in obtaining regulatory approval. [TR:489-503]

FGT asserted that all of these facts undermine SunShine's attempt to demonstrate a sufficient market interest in the pipeline. FGT offered these observations with record citation in proposed findings 45 through 64 (inclusive). [A:2, pp. 12-17] The PSC rejected virtually all of these proposed findings (for the most part uncontested and often derived from documents or witnesses of SunShine or SunShine's part-owner FPC) because they were "argumentative" and "conclusory" in nature. FGT believes that if the PSC were forced to grapple with each of these findings, it would arrive at the inevitable conclusion that the market was cool to SunShine's ill-timed pipeline and that what little market interest there was reflected primarily the interests of FPC--a part-owner of the proposed project. Given the probing nature of this inquiry, the PSC should be required to give "a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request." § 120.59(2), Fla. Stat. (1991). Merely rejecting these points as "argumentative" and "conclusory" dodges the real issue: that there is no market need for SunShine.

c. The Financing for the Pipeline.

Issues numbered 18 and 19 by the prehearing order jointly addressed the issue of funding. Specifically, the PSC was asked to consider whether SunShine could secure adequate funding for the pipeline and whether the project could proceed without FPC's participation.

On these points, FGT pointed to record evidence that (1) SunShine plans on using non-recourse project-financing--that is, loans against the future profits of the pipeline; [A:1, p. 1] (2) that SunShine's financial pro formas use a levelized rate structure based on 100% utilization of its maximum capacity in 1999; [TR:549] (3) that SunShine's final capacity was only 53% subscribed; [TR:42, 47, 49-50] and (4) SunShine has not yet approached any lending institutions about funding this seemingly unprofitable venture. [TR:66-7, 77] These observations were raised in proposed findings numbered 82 to 85, inclusive. [A:2, pp. 22-23]

FGT believes that these proposed findings--many drawn from the admissions of SunShine's president--went directly to the issue of SunShine's reliability and likelihood of success. And as before, the PSC rejected these proposals (many uncontroverted by the other parties) because it imagined they had an argumentative tone.

4. The Portions of the Final Order That Discuss Policy Questions Require Further Treatment.

To be fair, portions of the PSC's order do attempt a discussion of some policy questions. But in every situation the PSC's Final Order does not offer record citation, distinguish or discredit countervailing record evidence, or otherwise engage the

testimony and proof offered by FGT. Instead, the PSC trivializes FGT's arguments by summarizing and misstating them. This cursory treatment of issues raised by parties effectively prevents the PSC from developing policy through its orders.

One passage in particular illustrates this problem. In comparing the conflicting forecasts for natural gas demands, the PSC attempted to weigh the arguments of FGT and SunShine. Both parties offered expert testimony. Both had conflicting views of the future need for gas in Florida. But in the entire three-page discussion of how one determines need, [A:1, pp. 3-6], the PSC devoted a single paragraph to FGT's criticisms:

> FGT did not agree with SunShine's forecast procedure, because it was macroeconomic in nature and did not include consideration of utilities plant-by-plant plants 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 too low.

[A:1, p. 5]. Evidently, this paragraph is supposed to sum up all of FGT's numerous arguments against the project.

Astonishingly, the PSC never compared the conflicting testimony, or examined their assumptions, qualifications, and analysis. Instead, the PSC asks that the following passage pass for the analysis required by section 120.68:

> SunShine and FGT presented conflicting analyses of the gas capacity requirements available to SunShine to serve in the year 2000. FGT based its analysis on Florida electric utilities' generation and expansion plans. SunShine's forecast of gas capacity requirements available to its proposed pipeline in the year 2000 appears to be somewhat higher then that reflected in the Florida electric utilities' 1992 Ten Year Plan. Nevertheless, SunShine's gas capacity requirements forecast is based on a sound economic analysis of fuel

costs, conversion costs, and powerplant construction costs.

[A:1, p. 6] (emphasis added). The last sentence of the quote, underscored above, is the only portion of the order that contrasts and resolves even a small part of the conflicting need analyses offered by FGT and SunShine.

This sort of discussion deals only in surfaces; no attempt is made to penetrate the expert testimony, point out inconsistencies, assumptions, bias, or the like. Instead, the PSC was satisfied to state that "nevertheless" SunShine's analysis should be preferred better because it "is based on a sound economic analysis." Could this mean that the expert testimony offered by FGT--the views of a Ph.D. economist from MIT--was not itself "based on a sound economic analysis"? Or does this mean that SunShine's estimates nonetheless displayed the degree of accuracy needed in a certificate proceeding? The public, this Court, and FGT are left guessing by this single, unexplained policy decision.

C. The APA Requires More of the PSC's Final Order.

These four categories of deficiencies with the PSC's Final Order give rise to a number of problems. In particular, three sections of the APA necessitate a remand for further proceeding: (1) sections 120.59 and 120.57 require that orders explicate policy; (2) section 120.68 requires that the "record on appeal" include the agency's reasoning; and (3) section 120.68 guarantees a full, fair and meaningful review to all parties. Each element is addressed in order:

1. Sections 120.57 and 120.59 Require Agencies To Explicate Their Nonrule Policies in Orders.

A section 120.57(1) proceeding is designed to develop agency policy. McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977) ("[S]ection 120.57 proceedings are intended to formulate formal agency action, not to review action taken earlier and preliminarily."); Szkolny v. State Awards Committee, 395 So. 2d 1290 (Fla. 1st DCA 1981) ("Section 120.57(1) proceedings do not perform a review function; rather, this procedure is utilized to formulate agency action.") To facilitate the development of policy in 120.57 proceedings, the APA requires that all agency final orders adhere to certain minimum guidelines. § 120.59, Fla. Stat. (1991). They must be in writing. Id. at § 120.59(1)(a). They must separately deal with questions of law and fact. Id. Above all, specific findings must be made:

> Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings. If, in accordance with agency rules, a party submitted proposed findings of fact or filed any written application or other request in connection with the proceeding, the order must include a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request.

§ 120.59(2), Fla. Stat. (1991) (emphasis added). Far from a bureaucratic preoccupation with form, this section requires substance and thought of all orders. This mandate finds its genesis in the drafters' concerns about the potential for agency abuse:

> Three due process checks to prevent the arbitrary agency action are the requirements that reasons be stated

> for all action taken or omitted, that reasons be supported by "the record," and that specific judicial review procedures allow the courts to remedy defects of substance.
> . . . .
> [A]dequate mastery of evidentiary records . . . should be available through the requirements . . . (ii) that the proposed order expressly contain findings of fact and reasons for all conclusions of law.

Reporter's Comments, ¶¶ 0120.8(1)(a), 0120.8(1)(e), reprinted in 3 Arthur England et al., Florida Administrative Practice Manual (1979) (emphasis added).

The PSC's attempt at a final order falls far short of this record-and-reasoning requirement. Pivotal conclusions in the order track the statutory language of section 403.9422, Florida Statutes, but fail to offer a "concise and explicit statement of the underlying facts of record which support the findings." § 120.59(1)(a), Fla. Stat. For example, the order states at one point that "the SunShine Pipeline, at a minimum, will maintain delivery reliability and integrity in the state of Florida, and in critical situations will have the ability to enhance that reliability." [A:1, p. 10]. This finding corresponds to the vague, ill-defined statutory requirement that the PSC examine "the need for natural gas delivery, reliability, . . . and integrity." § 403.9422(1)(b), Fla. Stat.

Yet nowhere does the order explain what factors make a pipeline "reliable" (e.g., financial resources of the pipeline company, performance history of the pipeline company in other states, quantity of gas available, price range for available gas). The only "concise and explicit statement of the underlying facts of

record," § 120.59(2), Fla. Stat., supporting this conclusion is the order's sweeping assumption that "[s]hippers on SunShine's pipeline will have access to every major supply area in the United States." [A:1, p. 10].

The PSC's conclusion does not take into account FGT's countervailing arguments. The PSC is free to find that there is convincing evidence of adequate available gas supplies, but "[t]he substantiality of [such] evidence must take into account whatever in the record fairly detracts from its weight." McDonald, 346 So. 2d at 578-79 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)). Thus, the PSC's affirmative finding of adequate upstream gas supplies must consider FGT's assertions to the contrary. Instead, they were disregarded.

In summary, the shortcomings of the PSC's Final Order place it in violation of section 120.59's requirement that orders reflect the full record evidence, including the countervailing arguments urged by parties. On this much alone, the PSC's Final Order should be remanded for further explication.

2. In Order For This Court to Adequately Review the Final Order, the PSC Must Fully Develop Its Reasoning in the Record.

The failure of the Final Order to explicate agency policy does not merely fall short of section 120.59's definition of an order; the order's failures make the record incomplete, thereby depriving this Court of a basis for review. Under section 120.68, this Court needs a full, complete discussion of policy options in the record.

The PSC can be expected to confuse the issues and point out the complex, technical nature of natural gas pipeline regulation. But the thrust of this appeal does not ask that the Justices of this Court become economists, regulators, or pipeline experts. Neither does FGT ask that this Court immerse itself in the intricacies of need determinations, equity participation, and economic forecasting. Instead, FGT merely asks that "[j]udicial review . . . be confined to the record transmitted," § 120.68(4), Fla. Stat. (1991), and that the record requirement of the APA be enforced to include "[t]he agency's written document expressing the order, [and] the statement of reasons therefor." § 120.68(5)(a), Fla. Stat. (1991) (emphasis added).

The Legislature has required this Court to base its review on the record. Id. To complete this task, this Court needs a full explanation of the PSC's policy decisions and reasoning. This requirement is necessary not only that the public may understand what the PSC is really up to; not only that FGT may go away from a hearing satisfied that it helped shape policy; not only that the staff be forced to think long and hard about their decisions; indeed, remand for further proceedings is necessary for this Court to preserve its power and fulfill its primary function as a reviewing body, one that looks at a record for error in fact and law. How can the Court do this if the PSC refuses to discuss relevant facts and policy?

A similar dilemma faced the United States Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402

(1971). In Overton Park, an agency requested the Supreme Court to affirm an administrative decision that failed to address or consider alternatives proposed by other parties. Despite the deference owed to agencies unique to federal administrative law,[8] the Court remanded for further proceedings. Since its review had to be made "on the record," the Court found inadequate an administrative order that did not fully consider suggestions made by other parties.

A similar reasoning applies here. The Legislature asked that this Court police the PSC's actions based solely on the record below. § 120.68(4), Fla. Stat. (1991). The record, however, has to include the agency's order and "statement of reasons therefor." § 120.68(5)(a), Fla. Stat. (1991); see Manasota-88, Inc. v. Department of Envtl. Regulation, 567 So. 2d 895 (1st DCA 1990), rev. denied 581 So. 2d 164 (Fla. 1991)(stating that the record should reveal if and how the agency considered each factor throughout the process of policy formation). District Courts of Appeal have therefore consistently held that "to the extent that agency action depends on nonrule policy, section 120.68 requires its exposition as a credential of that expertise and experience." McDonald, 346 So. 2d at 583.

---

[8] E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (stating in general that federal courts must defer to agency policy decisions). In Florida, however, "the agency's nonrule policy is fair game for a party's challenge both in the public and his private interest." McDonald, supra.

The PSC's present order runs afoul of this requirement, and lacks the type of discussion, comparison of policy options, and reasoning that enables this Court to complete a meaningful review. The specific instances discussed above require a remand for further proceedings. This Court should require this much of the PSC because "[i]n the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature." Askew v. Cross Key Waterways, 372 So. 2d at 918.

3. The Incomplete Order Deprives FGT of a Fair and Meaningful Review.

This Court is not the only one left guessing as to what policy choices the PSC has made. FGT, the party that raised the most probing questions about the PSC's policy choices, is left with a bare record and no explanation. In effect, the PSC's failure to discuss its policy decisions in the record deprives FGT of a meaningful opportunity for a review on the merits.

In other contexts, this Court has recognized that "[a]n accurate and comprehensive record of proceedings below is absolutely essential to fair and efficient appellate review." Haist v. Scarp, 366 So. 2d 402 (Fla. 1978). A similar principle applies to the preparation of an administrative record. If parties in a docket before the PSC are to have an opportunity for a fair appeal, and if the public is to find meaningful discoverable precedent in the agency's orders, then the PSC must be required to fully explicate its choices.

On remand, the PSC may still hold that SunShine deserves a certificate of need under section 403.9422, Florida Statutes. It is FGT's belief, however, that if the PSC is forced to discuss its policy decisions and address the countervailing evidence in the record, it will ultimately deny the certificate of need. By this process, FGT had hoped to "subject[] agency policymakers to the sobering realization that their policy lacks convincing wisdom." McDonald v. Dept. of Banking & Finance, 346 So. 2d at 583. The PSC's reluctance to listen, however, denies FGT the opportunity to help develop agency policy, and deprives FGT of its right to a meaningful review on a full record.

D. Appropriate Relief.

Should the Court be at all persuaded by the points above, the relief required is certain and direct. "Failure by the agency to expose and elucidate its reasons for discretionary action will, on judicial review, result in the relief authorized by section 120.68(13): an order requiring or setting aside agency action, remanding the case for further proceedings or deciding the case, otherwise redressing." McDonald, 346 So. 2d at 584. The PSC should be directed to fully address FGT's proposed findings, accepting those that reflect competent, substantial record evidence, and explaining those it chooses to reject.

REQUEST FOR RELIEF

Florida Gas Transmission Company requests the following relief: (1) that section 403.9422(1)(b), Florida Statutes (Supp. 1992) be declared unconstitutional under article II, section 3 of

the Florida Constitution (1968); and/or (2) that this cause be remanded to the PSC with directions that it meaningfully expose and elucidate the reasons for its discretionary action.

EARL, BLANK, KAVANAUGH & STOTTS, P.A.
Attorneys for Florida Gas Transmission Company
215 S. Monroe Street
Suite 350
Tallahassee, Florida 32301
(904) 681-1900

William L. Hyde
Fla. Bar No. 265500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been served by U. S. Mail on the following persons this 18th day of October, 1993:

James P. Fama, Esquire
Florida Power Corporation
Post Office Box 14042
3201 34th Street South
St. Petersburg, FL 33733

David Smith, Esquire
Staff Counsel
Florida Public Service Commission
111 East Gaines Street
Tallahassee, FL 32399-0850

Peter M. Dunbar, Esquire
Bram Canter, Esquire
Haben, Culpepper, Dunbar and French, P.A.
306 North Monroe Street
Tallahassee, FL 32301

Gary C. Smallridge
Assistant General Counsel
Florida Department of Environmental Protection
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399-2400

Wayne L. Schiefelbein, Esquire
Gatlin, Woods, Carlson & Cowdery
1709-D Mahan Drive
Tallahassee, FL 32308

Barrett G. Johnson, Esquire
Johnson and Associates
315 S. Calhoun Street
750 Barnett Bank Bldg.
Tallahassee, FL 32301

Ansley Watson, Jr., Esquire
MacFarlane Ferguson
P. O. Box 1531
Tampa, FL 33601

C. Everett Boyd, Jr., Esquire
Ervin, Varn, Jacobs, Odom & Ervin
P. O. Drawer 1170
Tallahassee, FL 32302

William L. Hyde
William L. Hyde