IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. Case No. 94,665 and
Case No. 94,664
FLORIDA PUBLIC SERVICE COMMISSION, CONSOLIDATED

Agency/Appellee,

LAKE COGEN, LTD.

Intervenors/Appellees.
_____/

FLORIDA POWER CORPORATION'S
REPLY BRIEF IN CASE NO. 94,665

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PREFACE

All references to the parties, the record, and the appendix filed simultaneously with Florida Power's Initial Brief will be the same as in the Initial Brief.

SUMMARY OF REPLY ARGUMENT

The Commission did not deny Florida Power's Petition for Declaratory Statement based on technical or other matters solely within the expertise of the Commission. Therefore, the Commission's order is not entitled to the deference normally accorded an administrative agency's order, and instead, this court should review the Commission's Order *de novo.*

The Commission erred by denying Florida Power's Petition based on the doctrine of administrative finality instead of considering the Petition on the merits. Principles of administrative finality only apply to the same question judged under the same standard. That was not the case here. First, the Commission's counsel conceded that 1998 Petition asked a different question from the 1994 Petition on which the Commission based its decision. Second, to the extent the question was similar to the earlier question, it is undisputed that the question presented by the 1998 Petition was not litigated, let alone fully litigated, in connection with the 1994 Petition. Thus, doctrines of finality do not apply.

Finally, Florida Power's 1998 Petition was not intended to circumvent or otherwise supplant the circuit court's jurisdiction to interpret the Contract. Regardless of the outcome in the circuit court, the Commission ultimately will need to determine what it meant when it approved the contract in 1991, precisely the question presented by the 1998 Petition. This Court should reverse the Commission's Order and remand for a proceeding on the merits.

ARGUMENT

I. STANDARD OF REVIEW

Imploring the Court to blindly follow the yellow brick road and defer to the Commission's expertise and discretion, Lake tries to convince this Court not to look behind the curtain to see what the Commission did wrong here. Contrary to Lake and the Commission's characterization of the Commission's order, the order did not resolve matters within the technical expertise of the Commission, nor did it involve policy questions peculiar to the Commission or within its discretion. Therefore, the deference normally accorded to Commission orders is unwarranted.

Usually a court defers to "decisions of an administrative agency acting within the scope of its authority. However, when the question is one of law and does not involve the expertise of an agency," a court is not bound by the decision. *Charter Limousine, Inc. v. Dade County*, 678 F.2d 586 (5th Cir. 1982) (applying Florida law); *see also Ortega v. Charter*, 933 F. Supp. 1071 (S.D. Fla. 1996) (no presumption of validity to Commission's conclusions of law); *Atlantic Coast Line R. Co. v. King*, 51 So. 2d 723 (Fla. 1951) (no deference where Railroad Commission fails to correctly construe or interpret legal effect of the testimony). Since, the entire rationale for deferring to an agency decision disappears when the decision is not based on matters of technical expertise and policy as in this case, there is no reason for this Court to presume the Commission's Order is correct. *See Gulf Coast Elec. Co-Op, Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999) (deferential standard is appropriate when reviewing matters within technical expertise of Commission).

Here, the Commission's denial was based on administrative finality because the Commission incorrectly determined that the 1998 Petition raised the same question as the 1994 Petition. Even counsel for the Commission admitted that the question

presented in the 1998 Petition was a matter within the Commission's jurisdiction and was a matter not resolved by its ruling on the 1994 Petition. (R-284). The Commission's decision was in the nature of a legal conclusion on the applicability of legal doctrines, rather than a question of fact based on matters within the Commission's technical expertise; therefore, this Court need not defer to the Commission's discretion. *See Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *Bateman v. U.S. Dept. of Commerce*, 768 F. Supp. 805, 806 (S.D. Fla. 1991) (questions of law are fully reviewable).

II. PRINCIPLES OF ADMINISTRATIVE FINALITY DO NOT BAR FLORIDA POWER'S PETITION.

A. The 1998 Petition Asked a New Question.

Res judicata does not apply because the Commission's action on Florida Power's 1994 Petition was not a decision on the merits. *See Kent v. Sutker*, 40 So. 2d 145 (Fla. 1949) (judgment to be used as basis of res judicata must be a decision on the merits)*; see also Albrecht v. State*, 444 So. 2d 8, 12 (Fla. 1984) (if a second suit between the same parties is based upon a different action, neither res judicata nor collateral estoppel bars suit except as to issues actually litigated and determined). Unless the former case was decided on the merits, which did not occur here because the Commission dismissed the 1994 Petition for lack of jurisdiction, res judicata does not apply. *Barnacle Bill's Seafood Galley, Inc. v. Ford*, 453 So. 2d 165 (Fla. 1st DCA 1984).

Thus, the crucial question remaining - - the only real question in this appeal - - is whether the matters actually litigated in relation to the 1994 Petition are the same as what Florida Power attempted to litigate in the 1998 Petition. They are not. In 1994,

the Commission flatly rejected the suggestion that it was being asked to interpret a rule or order and stated that the 1994 Petition asked it to interpret the Contract, something it determined it did not have jurisdiction to do. Conversely, the 1998 Petition asked the Commission to interpret its Approval Order, a question wholly within the Commission's jurisdiction as this Court recognized in *Panda-Kathleen L.P. v. Clark,* 701 So. 2d 322 (Fla. 1997) (noting Commission retains jurisdiction to interpret its own rules and orders). Since the Commission dismissed the 1994 Petition based on lack of jurisdiction to resolve a contract dispute, the earlier order did not dispose of the issues raised by the 1998 Petition. Hence, neither collateral estoppel nor res judicata allow the Commission to deny the 1998 Petition.

Lake Cogen and the Commission argue that it is really the same question couched in different terms. However, at the Agenda Conference the Commission staff argued to the contrary.

> It is correct that the parties are engaged in contract disputes in courts, however, the Crossroads opinion indicates that the Commission's approve [sic] of a contract without change or modification can be explained or clarified without interfering in a contract dispute. And there is also some previous litigation which is cited as a reason not to be receptive to these declaratory petitions, however, <u>none of the previous litigation addressed precisely this issue</u>. And that is the Commission's approval of the contract, the basis of that approval and explanation or clarification of that approval, again, without any change or modification. (R-284).

A few of the Commissioners also noted the distinction between the two petitions. (R-333-334) (Chairman Johnson, "And what they have placed before us today [the 1998 petition] is a clarification as to our intent. And that that is a totally separate issue" [from the 1994 Petition seeking a contract interpretation]).

To decide whether two actions are the same for purposes of preclusion, the court

should consider "whether the evidence in both cases is in essence the same." *Gordon v. Gordon*, 59 So. 2d 40, 45 (Fla. 1952). Here it is not. Because neither petition was resolved on the merits, res judicata does not apply. Even if we look only to the jurisdictional question presented by each petition, issue preclusion does not apply. As the Commission viewed it, the 1994 Petition sought a contract interpretation, which the Commission concluded it had no jurisdiction to do. The 1998 Petition asked the Commission to review and interpret the language of the 1991 Approval Order, an entirely distinct jurisdictional question and one that the Commission has the jurisdiction to resolve. The 1998 Petition was not barred.

Relying on *Dep't of Transp. v. Bailey*, 603 So. 2d 1384 (Fla. 1st DCA 1992) and *Underwriters Nat'l Assur. Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 6706 (1982), Lake asserts that res judicata bars re-litigation as to the jurisdiction of the Commission. Unlike this case, in *Underwriters Nat'l* the earlier action was resolved on the merits. Here, the 1994 Petition was not resolved on the merits and cannot form the basis for res judicata. Just as with all questions of res judicata if a different jurisdictional question is raised, then res judicata simply does not apply. *Underwriters*, 455 U.S. at 706.

For example, even in litigation between the same parties, a previous jurisdictional determination is not applicable where the two causes of action are different. *Pipkin v. Wiggins*, 526 So. 2d 1002, 1003 (Fla. 3d DCA 1988). In *Pipkin*, the court found it had no personal jurisdiction over the defendant in a breach of contract suit. In a later lawsuit alleging an interference with the same contract, the defendant asserted that res judicata precluded the court from exercising jurisdiction over him.

The Third District disagreed finding that even though both actions related to the same contract, the second action differed from the first, and therefore, presented a different jurisdictional issue and this time the defendant fell within the reach of the court's jurisdiction. Thus, res judicata was not applicable. This case fits squarely within the analysis of the *Pipkin* court. Here too, although both petitions both relate to the same Contract, they presented different jurisdictional questions. Dismissing the 1994 Petition, the Commission concluded that it impermissibly asked the Commission to interpret a negotiated contract, something the Commission had no jurisdiction to do. The 1998 Petition, however, sought interpretation of a Commission order, something exclusively within the power of the Commission. *See Panda-Kathleen,* 701 So. 2d at 327-38. (Commission has jurisdiction to clarify its orders).

Actually, it is puzzling that Lake relies on *Bailey*, where the court found that the court's first ruling did <u>not</u> have res judicata effect. In *Bailey*, after an award of prejudgment interest, DOT moved for relief from judgment asserting that the award was void for lack of subject matter jurisdiction. After the motion was denied on the merits, DOT filed a second motion asserting the jurisdictional matter again. Finding that the jurisdictional issue had not been fully litigated, the court did not consider the court's denial of the first motion to have preclusive effect. Likewise, in this case, even though the 1994 Petition asked the Commission to interpret its 1991 Approval Order, the Commission did not do so. Rather, the Commission dismissed the 1994 Petition as one solely seeking a contract interpretation, which it refused to do. Thus, even though the question raised in the 1998 Petition was mentioned before, the question has never been fully litigated and cannot properly be barred by preclusion doctrines.

Moreover, as even Lake admits, res judicata is also not applicable where there has been a change in circumstances. *See Heck v. Heck*, 714 So. 2d 1200, 1200 (Fla. 4th DCA 1998) (different circumstances preclude application of res judicata); *Essenson v. Polo Club Assoc.,* 688 So. 2d 981, 983 (Fla. 2d DCA 1997) (changed circumstances overcome res judicata). Changed circumstances are merely an outgrowth of the general rule that if the question at issue was not fully litigated in the earlier proceeding -- as in this case -- res judicata cannot bar the second proceeding. Likewise, res judicata does not bar a second application to an administrative agency where the second application is based on new facts or changed conditions. *McCaw Communications of Fla., Inc. v. Clark,* 679 So. 2d 1177, 1179 (Fla. 1996). In *McCaw*, this Court again emphasized the differences between the courts and administrative agencies that necessitate differences in applying principles of finality and which mandate great caution in applying those principles to administrative decisions. Courts generally decide matters on fixed principles of law, whereas agencies decide matters based on shifting circumstances. In fact, *McCaw* specifically upheld the Commission revisiting a prior order where it was justified by changed circumstances. *Id.*

In fact, precisely because the Commission is an administrative body subject to "fluid facts and shifting policies," the Commission should have applied the doctrine of res judicata with great caution and not as it did here. *See Thomson v. Dep't of Envtl. Reg.*, 511 So. 2d 989, 991 (Fla. 1987) ("the principles of res judicata do not always fit neatly within the scope of administrative proceedings"). The test for determining when previous determinations are subject to res judicata, is when the second administrative proceeding is "not supported by new facts, changed conditions, or additional

submissions by the applicant." *Id.* at 991. Such is not the case here.

Florida Power's 1998 Petition is properly viewed in light of this Court's decision in *Thomson*. In *Thomson*, the Thomsons applied for a permit to build a dock. The Department of Environmental Regulation ("DER") denied the permit because of the potential that sea grass existing below the proposed dock would be adversely affected. The Thomsons reconfigured the proposed dock and filed a new application. Finding that the reconfigured dock would be located over areas that were capable of supporting sea grasses, the DER found the second permit barred by res judicata.

Reversing the DER, the court noted that the two permit applications asked different questions and the agency had shifted its focus between them. In denying the first application, DER considered the existing sea grasses; in denying the second application DER considered potential for harming sea grasses which might grow in the future. Thus, because the agency had shifted its focus in reviewing the two applications from existing to future sea grasses, it could not rely on principles of res judicata to deny the second application. Res judicata only applies to the same facts judged under the same standard.

In this case, the Commission shifted its focus just as the DER did in *Thomson*. The Commission viewed the 1994 Petition as asking the Commission to interpret its Contract, and the Commission concluded it did not have jurisdiction to do so. Thereafter, the Commission acknowledged that it had the jurisdiction to interpret its own orders. And, in *Panda-Kathleen* this court agreed that the Commission has jurisdiction to clarify its rules and orders. Florida Power carefully crafted its 1998 Petition to be certain that it asked questions solely within the Commission's scope of

jurisdiction as the Commission itself drew the distinction. Just as the Thomsons reconfigured their dock to address the DER's concerns over the existing sea grasses, Florida Power asked questions solely related to the Commission's Approval Order, an area where the Commission and the Florida Supreme Court had agreed it possessed jurisdiction.[1] Then, like the DER, the Commission erroneously found the 1998 Petition barred by principles of administrative finality. The 1994 and 1998 petitions were entirely distinct and raised different issues. Thus, the Commission erred by failing to consider the 1998 Petition on the merits and improperly invoked principles of administrative finality.

B. A Change in the Law Constitutes Changed Circumstances.

Lake disputes that anything changed. Yet, the situation was vitally altered between the time of the Commission's ruling on the 1994 Petition and Florida Power's filing the 1998 Petition. In fact, *Panda-Kathleen-, are precisely the type of intervening decisions that make res judicata inapplicable here, and perhaps why administrative agencies use principles of finality rather than strictly applying court-made doctrines like res judicata. Lake asserts incorrectly that a change in controlling case law cannot constitute a change in circumstances. However, case law is clear in applying the doctrine of collateral estoppel, an outgrowth of res judicata, that it does not apply where the legal situation has changed, Univ. Hosp., Ltd. v. Agency for Health Care*

[1] Denying approval of the Lake settlement, the Commission not only stated that it had the jurisdiction to determine what its orders meant, but also, the Commission acknowledged that its 1994 decision - - the one it deemed dispositive here -- was probably too restrictive. (Order No. 1437; A-4 at p.8). Order No. 1437 is the order that was ultimately deemed a nullity. Florida Power cites this order to demonstrate the Commission's shifting position, not as binding precedent.

Admin., 697 So. 2d 909, 912 (Fla. 1st 1997). *See also Al-Site Corp. v. USI Intern, Inc.*, 902 F. Supp. 1551, 1553 (S.D. Fla. 1995) ("[c]ollateral estoppel is inapplicable when there has been a [change in fact] . . . or a change or development in the controlling legal principles, statute or case law, which may have the effect of making the first determination obsolete or erroneous, at least for future purposes." (emphasis added)). Administrative finality also should not apply where the controlling case law has changed since the first application to an administrative agency. Here, there is no question that in *Panda-Kathleen*- provides persuasive authority for the Commission to exercise jurisdiction to resolve the 1998 Petition on the merits. Both of these intervening decisions certainly affected the circumstances under which Florida Power filed the 1998 Petition, and if nothing more, constitute changed circumstances, which militate against applying principles of administrative finality.

C. The 1998 Petition Was Not A Collateral Attack on the Circuit Court Proceeding.[2]

Regardless of the outcome in the circuit court litigation - - win, lose or settle - - the Commission ultimately will need to determine what it meant when it approved the contract in 1991. This will inevitably occur when Florida Power seeks cost recovery for payments made to Lake in accordance with the circuit court's final decision.[3] The

[2] Though Lake thought it suitable to advise this Court of the status of the circuit court case, Lake greatly exaggerates the impact of the partial summary judgment. Lake conspicuously failed to advise the Court that despite the partial summary judgment, the court held a three-week trial, which resulted in the circuit court finding that neither party's interpretation of the Contract was correct.

[3] In the slim chance of a settlement before a verdict, Florida Power would also need the Commission to approve any possible settlement and this again would require the Commission to consider what it meant in the 1991 Approval Order, just as the Commission explained in the order which eventually became a nullity.

Commissioners recognize that they will ultimately need to interpret the Contract and approval order when Florida Power comes in for cost-recovery. See R-353, 367.[4] Lake also admitted that the Commission will need to decide the issue when Florida Power seeks cost recovery. See R-383. Thus, the 1998 Petition constitutes neither improper forum shopping nor a collateral attack on the Circuit Court's jurisdiction.

Even the cases on which Lake relies suggest that if the Commission had exercised jurisdiction over the Contract dispute, as Florida Power asked in 1994, the Circuit Court would not have been required to rely on the Commission's decision. *See Southern Bell Tel. & Tel. Co. v. Mobile Am.Corp., Inc.*, 291 So. 2d 199, 202 (Fla. 1974). Commission staff agreed that the circuit court need not give dispositive weight to what the Commission determined by a declaratory statement. (R-416). If the circuit court is not required to give dispositive weight, then Florida Power's petition for declaratory statement cannot constitute forum shopping or a collateral attack on the court's jurisdiction.

Furthermore, the Michigan case that Lake cites as authority, *Muskegon Agency v. General Tel. Co. of Mich.*, 65 N.W.2d 748 (Mich. 1954), is equally irrelevant to this appeal. That case held that the Michigan Public Service Commission had no jurisdiction to award damages for breach of contract or negligence. By its 1998 Petition, Florida Power did not ask the Commission to award damages. Florida Power asked only for the Commission to interpret one of its orders, something wholly within

[4] Commissioner Clark: "I was thinking about that. It seems to be one avenue that we can take is to not grant it, let it go to court, let it come back here, and reject what the court does if we don't like it, and it gets appealed, or we accept it." (R-367).

its power and jurisdiction.

Even the Commission knows that it will ultimately need to address the issues that Florida Power sought to determine by way of the 1998 Petition. In its Answer Brief, the Commission implies that Florida Power should take solace in knowing that since its denial of the 1994 Petition, the Commission has approved other settlements of litigation over contracts identical to the one with Lake -- virtually asking Florida Power to bring another settlement to it for approval. However, the last time Florida Power brought a settlement to the Commission, the Commission denied it even though it had inconsistently approved similar settlements. Acknowledging that the Commission has acted inconsistently, to Florida Power's detriment, the Commission states only that the administrative process is not perfect and that the Commission was merely attempting this time -- for the first time -- to remain consistent with its prior decision. Moreover, the Commission understands that it will need to clarify its Approval Order when Florida Power seeks cost recovery. This Court should remand this matter to the Commission for a decision on the merits of the 1998 Petition.

D. Florida Power has Not Appealed the Wrong Order.

In its Answer Brief, Lake continually asserts that Florida Power has appealed the wrong order. This ignores that the 1998 Petition raised a different issue from the 1994 Petition and for all of the reasons discussed above, this is the correct appeal to challenge the Commission's denial of the 1998 Petition. Lake's continual references to the partial summary judgment are equally irrelevant. Not only has the partial summary judgment not had the impact in the court that Lake would have liked, but also, the partial summary judgment remains an appealable order at the conclusion of the circuit court litigation, and therefore was not a missed opportunity. This Court should reject Lake's attempt to avoid the real issues here and remand this matter to the Commission for a proceeding on the merits of the 1998 Petition.

CONCLUSION

Based on Florida Power's Initial and Reply Briefs, this Court should reverse the Commission's Order and remand this matter to the Commission for a proceeding on the merits of Florida Power's 1998 Petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32349-9850; Richard C. Bellack, Division of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; John Beranek and Lee L. Willis, Ausley & McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301; John R. Marks, III, Knowles, Marks & Randolph, P.A., 215 South Monroe Street, Suite 130, Tallahassee, Florida 32301; Robert Scheffel Wright and John T. LaVia, III, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302, Gail P. Fels, Office of the County Attorney, Dade County Aviation Division, Post Office Box 592075 AMF, Miami, Florida 33159 and Sylvia H. Walbolt, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Box 3239, Tampa, Florida 33601-3239 this 2nd day of August, 1999.

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