

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER & LIGHT COMPANY,)
)
 Appellant,)
 v.) CASE NO. 70,086
)
 KATIE NICHOLS, et al., in the)
 official capacity as and)
 constituting the)
 FLORIDA PUBLIC SERVICE COMMISSION,)
)
 Appellee.)
 _____)

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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DESIGNATIONS

Appellant, Florida Power and Light Company, will be referred to as "FP&L."

Appellee, the Florida Public Service Commission, will be referred to as the "PSC" or "Commission."

STATEMENT OF THE CASE

The subject matter of this appeal is the Florida Public Service Commission's authority to impose terms and conditions on the transmission of energy produced by Qualifying Facilities (QF's) over the facilities of electric utilities in Florida. "Qualifying Facility" is a term defined by federal law which refers to a small producer of power generically known as a cogenerator. The transmission of energy is commonly known as wheeling.

Rule 25-17.088,¹ Florida Administrative Code, was adopted by the Commission in September of 1984 to advise affected parties how the Commission intended to implement its authority to regulate the transmission of energy produced by Qualifying Facilities. The Commission's jurisdiction to regulate is provided in sections 366.04, 366.05 and 366.055, Florida Statutes, each of which is cited in the Commission's original rule.

Federal authorities have preempted a narrow aspect of wheeling: specifically, the authority of the states--and of the Commission--to regulate the rate charged by an electric utility for wheeling services when the wheeling affects interstate commerce. It did not preempt Commission jurisdiction over any other aspect of wheeling. The basis for this federal preemption is the federally-held notion that all transmission of electricity affects interstate commerce.

Rule 25-17.088,¹ Florida Administrative Code, was originally

¹Originally numbered 25-17.88, Florida Administrative Code.

adopted by the Commission before the federal preemption had been redefined in a Declaratory Statement order from the Federal Energy Regulatory Commission. The rule drew a distinction between interstate wheeling and intrastate wheeling, recognizing interstate as a matter for federal jurisdiction and intrastate for the Florida Commission.

This appeal arose when Florida Power and Light Company petitioned the Commission to amend Rule 25-17.088, Florida Administrative Code, to eliminate the language that implied Commission jurisdiction over rates charged for wheeling in intrastate commerce. However, the amendment urged by FP&L would have accomplished far more: it would have implied lack of jurisdiction over all but the bare authority to order wheeling from a QF to a utility. Having failed to persuade the Commission to amend the rule as requested, FP&L now complains to this Court not only of the amendment, but of the original rule as well. The Commission amended the rule to accurately reflect the status of Commission jurisdiction after the federal preemption. It acknowledges Commission jurisdiction over the terms and conditions of wheeling provided by Florida electric utilities

From the rule amendment FP&L takes this appeal. FP&L argues that the Commission lacks jurisdiction to regulate terms and conditions of wheeling provided by Florida electric utilities when it reserves what it calls "federal questions" for "federal authorities." Far more broadly, however, FP&L takes exception with all aspects of Commission jurisdiction over wheeling services provided to QF's. FP&L's position is fallacious as a matter of logic and mistaken as a matter of law.

SUMMARY OF ARGUMENT

1) STANDARD OF REVIEW: This Court has long recognized that the construction of a statute by an agency or body responsible for its administration is entitled to great weight and should not be overturned unless clearly erroneous. The rule amendment and the underlying rule of which Appellant complains are necessary and by fair implication within the legislative authority.

2) STATUTORY COMPLIANCE: The Commission is expected to implement the statutory law of the state so as to provide a rational result. In the Grid Bill (Chapter 74-196, Laws of Florida), the Legislature empowered the Commission with the authority to oversee the planning, development and maintenance of a coordinated power grid. Specifically, that bill addressed the subject of wheeling and provides the Commission with the authority to order wheeling, where it promotes the stated legislative goals.

FP&L is advocating a position that would preclude a QF from selling its power to any entity other than FP&L. It states that "wheeling is not essential to the purchase of QF's power by utilities." This conclusion makes the QF captive and subject to the greater economic power of the utility. Such an outcome frustrates the legislative intent to assure an efficient and reliable state energy grid. It is anticompetitive and discourages energy conservation by discouraging competition with FP&L in the generation of electricity.

It is incumbent upon the Commission to use the authority provided by the Legislature for compliance with the legislative

goals. The Commission is empowered to oversee the flow of energy over an efficient grid. FP&L advocates an exclusion of QF's as a source of generated power from the application of the Grid Bill and regulation by the Commission. Efficiency of the grid is not a function of the source of the energy. In addition, the bare authority to order wheeling without the authority to address the reasonableness of the terms and conditions reduces the authority to an absurdity. This Commission must interpret its authority with a presumption that the Legislature sought rational ends by rational means.

In section 366.055(3), Florida Statutes, the Commission is given an additional source of jurisdiction over electric utility wheeling of QF energy. It provides the Commission with the authority to set guidelines and rates relating to the purchase of power by electric utilities (like FP&L) from cogenerators (QF's). PSC jurisdiction over the wheeling of QF energy provides the QF's with the opportunity to negotiate with more than one potential purchaser of its energy, providing QF's with a broader market for their energy.

3) FP&L OBJECTS TO THAT WHICH IT SUGGESTED: As is shown on page A-8 of the Appellant's brief, FP&L not only acquiesced in, but included in its petition for rulemaking, language which clearly recognizes PSC jurisdiction to require public utilities to wheel on behalf of QF's. Simply put, this case originated with FP&L's petition to amend Rule 25-17.088, Florida Administrative Code. FP&L's proposed change included the following language:

(1) Each electric utility in Florida shall provide, upon request, transmission service to wheel as-available energy or firm energy and capacity produced by a Qualifying Facility from the Qualifying Facility to another electric utility.

At least to this extent, FP&L had its way. This language is not challenged by FP&L. In fact, it is retained in the language suggested by FP&L and is retained by the Commission in the rule as amended. Under the pretext of a rule amendment challenge, however, FP&L now questions the organic authority of the PSC to require electric utilities to wheel QF-produced energy. FP&L shows inconsistent positions to this Court: on the one hand, it states that the Commission lacks organic authority to order the wheeling in question; on the other it supports suggested language to this Court which implicitly recognizes that very authority. (Appellant's Brief, p. A-8)

This Court should affirm the Commission order amending Rule 25-17.088, Florida Administrative Code.

POINT ON APPEAL

THE LEGISLATIVE GRANT OF AUTHORITY TO ORDER WHEELING CARRIES WITH IT, BY NECESSARY AND FAIR IMPLICATION, THE AUTHORITY TO SPECIFY THE TERMS AND CONDITIONS UNDER WHICH WHEELING WILL OCCUR.

Under subsection (3) of section 366.055, Florida Statutes, the Commission is empowered to require a public utility, such as FP&L, "to transmit electrical energy over its transmission lines ... as a part of the total energy supply of the entire grid...." As a byproduct from their manufacturing of other commodities, cogenerators generate electricity which they sell to utilities. This electrical generation provides part of the energy supply of the entire grid. Electricity is a commodity produced either through the burning of waste from the disposal of urban trash or the use of other fuel to produce other forms of energy such as steam and hot water used in processes of the cogenerators. The federal government, during the oil embargo in the late 1970's passed the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824a-3, to encourage the use of cogenerator facilities to ease the energy crisis. Cogenerated power is one of the alternative sources of power, the use of which is advocated as an alternative for non-renewable resources and as a means for delaying the construction of costly generating facilities. As such, cogeneration is one of the sources of power contemplated in the Commission's jurisdiction over:

[T]he planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency

purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

§366.04(3), Fla. Stat., (1987).

The Commission operates under a clear legislative mandate that the state should plan for, construct and maintain a grid capable of providing an adequate and reliable source of power without further uneconomic duplication of transmission and distribution facilities. All utilities in the state are interconnected and supply power at various points on the grid to serve the customers of the state. When a QF interconnects with a utility it supplies power into the grid. Through wheeling, the QF can sell power anywhere it is economically efficient. It is not limited to sales to the closest utility. Consistent with this, the Commission is authorized to require a utility to transmit reliable energy from any source to any user.

Within the certification of the rule filed with the Secretary of State (Appellant's Brief, p. A-3), the Commission indicated its specific rulemaking authority in subsection (1), section 366.05, Florida Statutes. It provides in pertinent part:

[T]he commission shall have the power to prescribe ... classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; ... and to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter. (Emphasis Supplied)

The Commission has adopted rules which establish the terms and conditions for the transmission (or wheeling) of electrical energy

over utility transmission lines.² The power to order wheeling is in keeping with broad objectives to be accomplished by the legislative enactment of the Grid Bill. This coupled with the authority to promulgate rules for the necessary administration of Chapter 366, Florida Statutes, gives the Commission the necessary authority to specify the terms and conditions under which this transmission of electrical energy over FP&L's transmission facilities is to occur.

In State Board of Education v. Nelson, 372 So.2d 114 (Fla. 1st DCA 1979), the Court discussed the scope and extent of powers and implied powers of agencies. Quoting from Florida Jurisprudence Second, the Court accepted the proposition that where lawful rulemaking authority is clearly conferred and that authority is consistent with the general statutory duties of the agency, wide discretion is accorded in the exercise of that authority. As to implied authority, the Court stated that it exists by fair implication and intendment incident to and included in the authority expressly conferred.

In the Nelson case, the court was confronted with an agency rule that imposed terms and conditions under which a teaching certificate could be held and revoked. The Court found the following:

1. The agency had a general grant of authority to promulgate rules and regulations for certification of teaching personnel.

²The authority to order terms and conditions arises as a result of the authority to order wheeling.

2. The rulemaking authority was consistent with the broad legislative mandate to improve the state system of public education and to prescribe minimum standards.
3. That the rule imposing conditions for holding and revoking certificates was necessary and by fair implication within the authority to specify conditions.

This case is analogous and consistent with the Court's decision in the Nelson, case.

1. The Commission has a grant of general authority to promulgate rules and regulations concerning the conditions for the provision of services by a regulated utility. §366.05(1), Fla. Stat.
2. The rulemaking authority of the Commission is consistent with the broad legislative policy to foster a coordinated electric power grid and avoid further uneconomic duplication of transmission facilities. §366.04(3), Fla. Stat.
3. The rule specifying the terms and conditions for the transmission of electrical energy generated by qualifying facilities over the transmission facilities of a utility is necessary and by fair implication within the authority granted by the legislature.

FP&L pays lip service to the principle of reading statutes in pari materia. If it had considered the Commission's statutory authority read in pari materia, it could come to no other conclusion than the Court reached in the Nelson case.³

³Although the First DCA distinguished the Nelson case in Department of Health and Rehabilitative Services v. Fla. Psychiatric Society, Inc., 382 So.2d 1280 (Fla. 1st DCA 1980), cited by FP&L, Nelson was specifically followed by the same Court in Cirnigliaro v. Fla. Police Standards & Training Comm., 462 So.2d 528, 530 (Fla. 1st DCA 1985).

Rule 25-17.088, Florida Administrative Code, and its subparts represent the Commission's interpretation and implementation of sections 366.04(9) and 366.055(3), Florida Statutes. Both sections are part of Chapter 74-196, Laws of Florida, commonly known as the Grid Bill. The Grid Bill, as the name implies, authorizes the Commission to oversee the planning, and development of a coordinated power grid. All sources of electrical energy in existence in 1974 were necessarily included to facilitate the free exchange of electrical energy throughout the state. The bill did not enumerate a list of sources so as to exclude others. It made a general statement that the Commission has the jurisdiction to "assure an adequate and reliable source of energy" without defining and consequently without restricting the source.

Section 366.055(3), Florida Statutes, provides the Commission two areas of authority:

- 1) To require any electrical utility to transmit electrical energy over its transmission lines from one utility to another; and
- 2) to require any electrical utility to transmit electrical energy over its transmission lines as a part of the total energy supply of the entire grid.

As may be seen from the simple wording of these statutes, the Legislature attached no importance to the source of the energy: it regarded as very important that the total energy supply of the entire grid was subject to the wheeling authority of the Commission.

Following this mandate, the Commission adopted Rule 25-17.088, Florida Administrative Code. Subsection (1) of the rule

recognizes Commission jurisdiction to require electric utilities in the state to wheel energy for QF's:

(1) Each electric utility in Florida shall provide, upon request, transmission service to wheel as-available energy or firm energy and capacity produced by a qualifying facility from the qualifying facility to another electric utility.

Despite FP&L's having suggested the retention of this language to the Commission, FP&L's brief is cast to question whether the Commission has jurisdiction to order the described wheeling.

The Commission's construction of the statute easily meets the criteria set by this Court, in Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

This Court said:

We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous....

(At 719.)

The focus of the legislation is an efficient grid. The Commission's rule is clearly within that mandate. The exclusion of jurisdiction over the wheeling of energy produced by QF's as advocated by the Appellant is an illogical interpretation of the statute, and is contrary to the clear and unambiguous wording of the statute. "Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent." Citizens of Florida v. Public Service Commission, 435 So.2d 784, 786 (Fla. 1983). Moreover, the

exclusion of QF produced energy from the statutory scheme would frustrate the legislative purpose. As this Court has instructed:

The cardinal rule of statutory construction is 'that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute.' Deltona Corporation v. Florida Public Service Commission, 220 So.2d 905, 907 (Fla. 1969).

City of Tampa v. Thatcher Glass Corporation, 445 So.2d 578, 579 (Fla. 1984).

The exclusion of QF produced energy from and the inclusion of all other produced energy in PSC oversight of the grid produces a patently absurd result. Among the rules of statutory construction enunciated by this Court in State v. Webb, 398 So.2d 820, 824 (Fla. 1981), appears this language: "Furthermore, construction of a statute which would lead to an absurd or unreasonable result or which would render a statute purposeless should be avoided." No purpose would have been served by charging the Commission with authority over the grid and excluding from that authority an important source of energy which flows on that grid.

Cogenerators compete with utilities in the production of electricity. The transmission of power generated by a cogenerator to another utility displaces load that the utility could be generating and selling to another utility. Wheeling is the only economic method a cogenerator has to offer its electricity to a broader market than just to the local utility. The only other alternative would be for the cogenerator to construct its own transmission facilities that would duplicate those of the utility. It is this further uneconomic duplication that the Grid

Bill sought to prohibit. If a utility had the unregulated authority to demand any terms and conditions on the transmission of a cogenerator's power, it could impose sufficiently onerous terms and conditions that the cogenerator could only sell to the utility. This would be anticompetitive, placing the utility in a better bargaining position than other utilities. Finally, if the conditions were restrictive enough, cogenerated power could be eliminated from the grid by the imposition of artificial restraints on the viability of this source of energy

Sections 366.04(3) and 366.055(3), Florida Statutes, provide the Commission with the authority to oversee the efficiency and reliability of the power grid of Florida, which includes the authority to order wheeling irrespective of the source of the energy. Rule 25-17.088(1), Florida Administrative Code, accurately implements this authority and represents a reasonable agency interpretation of the statute implemented.

The subsequent amendment of Rule 25-17.088, Florida Administrative Code, was adopted by the Commission to provide the detail necessary for the accurate implementation of the cited statutes. As the rule appeared before the amendment, the Commission implemented jurisdiction over the charges, terms and other conditions of wheeling offered by investor-owned utilities. The amendment eliminated the assertion of jurisdiction over the charges. The measure of jurisdiction asserted by the Commission was thereby constricted.

However, jurisdiction over the terms and conditions of wheeling for QF's was logically retained by the Commission.

Jurisdiction over the terms and conditions of wheeling is the essence of jurisdiction itself. FP&L's allegation of the absence of jurisdiction over the terms and conditions leads to the absurd result that the Commission has no jurisdiction to consider all sources of power under the authority in the Grid Bill. Again, a statutory construction which leads to an absurd result should be avoided. State v. Webb, supra.

CONCLUSION

The Commission has clear authority to oversee a coordinated, efficient grid in the State of Florida, irrespective of the source of the energy. Essential to that task is the authority to order wheeling of all energy between and among utilities, and the authority to control the terms and conditions under which the wheeling is offered by electric utilities, including FP&L. Both the original rule and the amendment of the rule are reasonable implementations of the Grid Bill. The order adopting the amendment--which is the only matter under appeal here--should be affirmed by this Court.

Respectfully submitted,


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May 18, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail this 18th day of May, 1987 to the following:

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