980283

IN THE SUPREME COURT OF THE STATE OF FLORIDA

980509

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE NO. 94,664

JOE GARCIA, etc., et al.,

Appellees;

FLORIDA POWER CORPORATION

Appellant,

vs. CASE NO. 94,665

JOE GARCIA, etc., et al.

Appellees.

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REPLY BRIEF OF
APPELLANT FLORIDA POWER
IN CASE NO. 94,664

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STANDARD OF REVIEW

Decisional finality is not a matter of discretion; it is a matter of law which this Court should review de novo. The Administrative Procedure Act specifies that "[t]he court shall remand a case to the agency" when it "has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Fla. Stat. § 120.68(7) (1997).

This point was recently emphasized by Lawrence E. Sellers, Jr. in More APA Reform: The 1999 Amendments to Florida's Administrative Procedure Act, 73 Fla. B.J. 79 (Aug. 1999), where he noted that "nothing in the APA requires the court to defer to the agency's interpretation and nothing limits the reviewing court's authority to those cases in which the court determines that the agency's interpretation is 'clearly' erroneous. Rather, the court is to review the agency's interpretation of law de novo." Since use of a "clearly erroneous" standard would controvene the APA, Appellees' attempt to distinguish Southern Bell Telephone & Telegraph v. Deason, 632 So. 2d 1377 (Fla. 1994) is determinatively undermined.

Moreover, the legal doctrine of decisional finality is not dependent upon the PSC's expertise and thus the PSC is not entitled to deference on this pure issue of law. In Gulf Coast Electric Cooperative v. Johnson, 727 So. 2d 259, 262, 265 (Fla. 1999), this Court recognized that deference is appropriate on those issues where the PSC has specialized knowledge and expertise, but the Court made no mention of deferring to the PSC's ruling on decisional finality.

Appellees' reliance on Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) is misplaced. The decision as to whether a party should be allowed to intervene in an administrative proceeding requires substantial fact-finding by the agency. See id. at 477 (discussing required factual inquiries). Not surprisingly, Ameristeel did not even assert that the intervention ruling should be reviewed de novo, instead urging an abuse of discretion standard. Id. In contrast, decisional finality is a matter of law, not one of fact, and the de novo review standard is therefore the correct one. On this record, moreover, remand would be appropriate even if the "clearly erroneous" standard were applied.

Dade's final point, based on "policy considerations," goes to whether the PSC should exercise its jurisdiction, not to whether it has the power to do so. The Order under review, however, was based on the PSC's determination that it lacked the power to assert jurisdiction and that its prior resolution therefore "must stand." (A.1:5). Dade's policy arguments are therefore irrelevant to the legal issue before this Court.

ARGUMENT

I. Decisional Finality Does Not Apply Because the Issue Raised by FPC's 1998 Petition Differed from that Resolved in the 1995 Order

In its 1995 Order, the PSC stated that FPC was seeking an interpretation of a cogeneration contract over which the PSC had no post-approval jurisdiction, rather than an interpretation of

the PSC's rules or its Approval Order. Appellees contend that, in refusing to exercise jurisdiction over FPC's 1998 Petition, the Commission was merely adhering to its 1995 Order. That argument, however, is erroneously premised on Appellees' improper characterization of FPC's 1998 Petition as a request for a contract interpretation.

FPC's 1998 Petition was nothing of the sort. FPC quite deliberately did not seek a contract interpretation, and the PSC's order makes no suggestion that it did. On its face, the Petition expressly requested only a clarification of the PSC's energy pricing rules implementing PURPA and the Approval Order, matters which this Court held in Panda Kathleen, L.P. v. Clark, 701 So. 2d 322 (Fla. 1997), were squarely within the PSC's jurisdiction.

Based on their misconstruction of FPC's 1998 Petition, Appellees argue that the Crossroads and Panda decisions, which involved commission jurisdiction to clarify approval of their orders and rules, are irrelevant here. Remarkably, they suggest that Freehold, which decided an entirely different issue not raised here at all (whether a cogeneration contract could be modified after its approval), is the relevant authority. However, FPC's Petition seeks clarification of the PSC's rules and orders -- just as in Panda and Crossroads -- not a modification of the parties' contract as in Freehold. As this Court held in Panda, Freehold does not apply in this context.

On appeal, Appellees ridicule this crucial distinction. But those very points were forcefully made before the Commission by the PSC's own counsel:

> [N]one of the previous litigation [giving rise to the 1995 Order] addressed precisely this issue. And that is the PSC's approval of the contract, the basis of the approval, and the explanation or clarification of the approval. (A.2:3).
>
> Nor is this issue the same as a post-approval attempt to change or modify a contract as in the Freehold case. ... [I]n Panda, the same arguments based on Freehold were made against the PSC's position that it could explain and clarify the contract in that case [a]nd the Florida Supreme Court rejected those Freehold arguments. (A.2:3-4).
>
> Although Panda was a standard offer contract ... that was not the basis on which the Florida Supreme Court based the substance of its discussion. (A.2:4-5).
>
> By refusing jurisdiction, the PSC, allow[ed] itself to be struck dumb and not allowed to speak to these issues." That is "without any precedent;. . .there is no case supporting that. And we have got a case called Crossroads which says exactly the opposite." (A.2:129, 129-30).

Each of these points is absolutely correct. The issue addressed in the 1995 Order was fundamentally different from those raised in FPC's 1998 petition, and Panda and Crossroads make clear that the PSC has jurisdiction over the discrete issues it presented. In fact, the PSC's own brief acknowledges that the PSC has "Crossroads jurisdiction to explain what it had approved." (PSC Br.30).

It bears emphasis that only a few months before refusing to consider FPC's Petition, the PSC exercised jurisdiction in the Lake Order to interpret what it meant in its Approval Order, and it rejected FPC's proposed $30 million settlement with Lake Cogen (involving an analogous negotiated contract) on that exact basis. This action by the PSC nullifies Commissioner Clark's concern that the PSC may not know what it meant at the time of approval. (PSC

Br. 5). Moreover, the PSC can hardly be heard to say that, in refusing to exercise jurisdiction over the 1998 Petition, it was merely adhering to its 1995 order. Otherwise, the Lake Order deviated from the 1995 order and the PSC's jurisdictional rulings have been wholly arbitrary.

Appellees argue that, because the Lake Order became a nullity when the settlement died, the Lake Order should be treated as if it never existed -- as a mere jurisdictional "hiccup." (See, e.g., PSC Br. 20-21, 28 n.12). But the fact is, the PSC did exercise jurisdiction in Lake Cogen to clarify its Approval Order and rules, just as it did in Panda. Its failure to exercise such jurisdiction here leaves FPC, as two of the commissioners in the majority put it, "between a rock and a hard place," (A.2:37, 40-44), since FPC is left to guess what the PSC may rule in a future case regarding the rules and Approval Order FPC must follow.

The arbitrariness of the PSC's actions is patent. It exercised its jurisdiction to interpret its rules and the Approval Order to reject FPC's proposed settlement with Lake Cogen. But, after the Lake Order became a procedural nullity because the settlement terminated, the PSC ruled it lacked jurisdiction to make precisely the same interpretation here. Obviously, the PSC had not in the interim mysteriously lost jurisdiction to interpret its rules and orders.[1] Quite to the contrary, this Court's

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[1] Indeed, a majority of the Commissioners have acknowledged that the Commission has jurisdiction at the cost recovery stage to deny a pass through to the ratepayers of the costs FPC incurs in paying Dade and other such facilities for power, if those costs are based on a contract interpretation which is contrary to the basis on which the contract was originally approved by

decision in Panda squarely confirmed the existence of such jurisdiction.

Simply put, the legal distinction between (i) the Commission's jurisdiction to clarify its own rules and orders and (ii) its lack of jurisdiction to resolve actual contract disputes or modify a previously approved contract answers the narrow question presented here. The PSC majority denied jurisdiction, based on the erroneous conclusion that they were bound by the 1995 Order which the PSC characterized as requesting a contract interpretation. But FPC's 1998 Petition carefully avoided such a request, and only sought a ruling from the PSC clarifying its rules and the Approval Order. Panda makes it abundantly clear that the PSC has jurisdiction over such a petition. Appellees cannot circumvent Panda by suggesting that the PSC was free to characterize FPC's Petition as seeking relief the Petition no where seeks.

Appellees' remaining arguments regarding the supposedly controlling nature of the 1995 Order are equally without merit. First, in its 1995 Order, the PSC expressly stated that it viewed FPC's 1995 petition as seeking an interpretation of the contract rather than of the PSC's rules. (A.5:8). Thus, its order there cannot be read, as Appellees would have it, to hold that the PSC has no jurisdiction to clarify its rules and orders -- otherwise, the distinction would have been meaningless.

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the PSC. (See A.4:20; A.2: 85, 139-52). It obviously makes no sense to conclude there is jurisdiction to make that determination at the cost recovery stage, but no jurisdiction to make it in connection with FPC's Petition.

Second, Dade argues that the Commission properly invoked principles of res judicata in denying FPC's petition. They claim that "a final judgment . . . is absolute and conclusively puts to rest every justiciable issue, as well as every actually litigated issue." (Dade Br. 25). Appellees' reliance on the doctrine of res judicata is wholly misplaced. It is a well-settled, elementary principle of Florida law that "a judgment rendered on any grounds which do not involve the merits of the action may not be used as basis for the operation of the doctrine of res judicata." Kent v. Sutker, 40 So. 2d 145, 147 (Fla. 1949). The very PSC case cited by Dade -- Turkey Creek, 95 FPSC at 11:628 (Dade Br. 27,n.12) -- makes that precise point: "there must be a final judgment on the merits." The other res judicata cases Dade cites all involve situations where there was a prior determination on the merits after the first tribunal found it had jurisdiction.

Of course, a dismissal for lack of jurisdiction -- which is all the 1995 order was -- is not an adjudication on the merits and can not serve as the basis for invoking res judicata. O'Neil v. Percival, 25 Fla. 118, 5 So. 809 (1889); Miami Super Cold Co. v. Giffin Industries, Inc. 178 So. 2d 604 (Fla. 3rd DCA 1965). It makes no difference that the 1995 order was a final order of the Commission: all that order did was grant a motion to dismiss, thereby concluding the docket without the PSC ever reaching the merits. In such circumstances, res judicata has no application.

Dade's invocation of collateral estoppel likewise fails

here. Unlike res judicata, collateral estoppel requires that the same issue be presented in the second tribunal as was "actually litigated" in the first. Kent, 40 So. 2d at 147; Stogniew v. McQueen, 656 So. 2d 917, 919 (Fla. 1995). But that clearly is not the case here: the jurisdictional issue raised by the 1998 Petition was completely different from the jurisdictional issue adjudicated by the 1995 order.

In all events, Appellees' attempt to expansively apply preclusion principles in the administrative context would improperly swallow whole Florida's long-standing doctrine of decisional finality. This Court has long "cautioned against a 'too doctrinaire' application of the rule" in the administrative context, Gulf Coast, 727 So. 2d at 265, emphasizing the extra latitude required by agencies to deal with issues on an ongoing basis:

> We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. . . . [W]hereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.

Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 338 (Fla.

1966). The Court's instruction is particularly applicable where, as here, there is intervening precedent establishing the existence of jurisdiction over the later-filed claim.

II. Decisional Finality Does Not Apply Because Intervening Authorities Constitute "a Significant Change in Circumstances"

In its opening brief, FPC cited Crossroads, Panda, and the PSC's own Lake Order as reflecting PSC jurisdiction over clarifications of PSC rules and approval orders. Even if the 1995 Order had held that no such jurisdiction existed (which it did not), these decisions -- all of which post-dated that Order -- constitute a significant change in circumstance precluding application of decisional finality. See Peoples Gas, 187 So. 2d at 339.

Incredibly, despite having caused the demise of the proposed Lake Cogen settlement on the precise basis of its interpretation of what its Approval Order meant, the PSC now urges this Court to ignore the Lake Order, as if it never existed at all. (PSC Br. 28). It is, of course, true that the Lake Order is now a technical nullity, without precedential value. But that is exactly why FPC needs the declaratory statement sought by its later petition: although the Lake Order set forth the PSC's clarification of its Approval Order as the basis for disapproving the Lake Cogen settlement, no party can now rely on that clarification in determining its future conduct.

Moreover, the 180 degree difference between the PSC's approach in Lake Cogen and its approach here underscores the

arbitrariness of the PSC's jurisdictional rulings. In its Lake Order, the PSC specifically rejected the parties' argument that, given its 1995 Order, it could not consider what it meant in the 1991 Approval Order. The PSC instead construed the 1991 Approval Order and concluded that the settlement would cost more than the PSC had authorized for cost recovery in approving the Contract in the first place. Then, only a few months later, the PSC held -- just as the parties had unsuccessfully urged in Lake Cogen -- that the 1995 Order precluded it from considering what it had originally approved in 1991. The PSC cannot have it both ways.

This pattern of arbitrariness and abuse of discretion is likely to occur in the future since as, the PSC tells us, it may later choose to exercise its jurisdiction on similar facts. (PSC Br. 30). But agency jurisdiction does not shift with the sands -- it is granted by the Legislature and it either exists or it does not. As to FPC's 1998 petition, it exists here. Crossroads and Panda leave no doubt as to that.

Appellees' attempts to distinguish Crossroads and Panda should be rejected out-of-hand. Appellees contend the Third Circuit's Crossroads opinion should be ignored because it issued after the PSC's hearing and was not brought to the PSC's attention. However, the earlier Crossroads opinions were before the PSC, and they directly supported FPC's position. As the PSC's own counsel explained to the Commission at the hearing, in its Crossroads decision, the New York Public Utilities Commission (NYPUC) distinguished between jurisdiction to resolve

a disputed contract interpretation (which is for the courts) and jurisdiction to clarify a prior contract approval order (which is for the commission). (See A.2:129-34). Although the federal district court then gave the NYPUC's clarification of the approval order controlling effect on the contract dispute before it, which the Third Circuit held to be error, the Third Circuit otherwise reiterated the propriety of the NYPUC's jurisdictional distinction between contract interpretation and approval order clarification. Crossroads, 159 F.3d at 139. As such, no Crossroad decision has questioned or disagreed with the NYPUC's jurisdiction to clarify its approval order on the contract at issue there.

Thus, whether the PSC here had the Third Circuit's decision before it is of no legal moment because it had the underlying decisions before it, which the appellate court re-affirmed as to the point relevant to this appeal -- namely a commission's jurisdiction to interpret and explain its own prior orders. Notably, in its Lake Order, the PSC exercised precisely that jurisdiction in rejecting FPC's settlement with Lake Cogen.

As to Panda, Appellees concede that this Court held the PSC had jurisdiction to clarify its cogeneration rules. They contend, however, that Panda has no application here because (a) it involved a standard offer, rather than a negotiated, contract as here, and (b) the cogeneration pricing rules as they relate to standard offer contracts are irrelevant to negotiated contracts. Neither argument offers any basis for disregarding Panda.

First, as PSC's counsel correctly emphasized below, although Panda "was a standard offer contract ... that was not the basis on which the Florida Supreme Court based the substance of its discussion." (A.2:4-5). Rather, referring to the PSC's rules implementing PURPA (as required under section 366.051, Florida Statutes), this Court held "it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the rules it has adopted in furtherance of that [PURPA] program and to resolve conflicts concerning implementation of those regulations." Id. at 327

Second, contrary to Appellees' argument, all of the PSC's rules governing cogeneration contracts were appended to and expressly made part of the Contract between Dade and FPC. (A.7: §§ 1.1; 1.15). This included not only the negotiated contract pricing rules, but also the standard offer pricing rules -- and with good reason. Under Rule 28-17.0832(2), which governs negotiated contracts, the avoided energy cost benchmark is Rule 25-17.0832(5)(b), which sets forth pricing for standard offer contracts. Thus, at the time of its approval of the FPC-Dade Contract, the benchmark against which the PSC assessed the energy payments in that Contract were set forth in the standard offer contract rules which were expressly incorporated in the Dade Contract. Under Rule 28-17.0832(2), the PSC could have approved the Dade contract only if it were forecasted to pay no more for energy than what would be paid under the energy pricing rule for standard offer contracts.

Manifestly, since the PSC has jurisdiction to clarify its rules when they are incorporated in a standard offer contract, as Panda teaches, it likewise has jurisdiction when those same rules are incorporated in a negotiated contract and were required to be applied by the PSC in determining that the contract could be approved. Otherwise, as this Court explained in Panda, the contract could violate PURPA and section 366.051, Florida Statutes, by requiring FPC to pay more than the PSC approved under its energy pricing rules. Id. at 328. So too here, as the PSC's counsel emphasized below, the PSC's refusal to exercise its jurisdiction may result in "the ratepayers [being] deprived of the good thing that the PSC did when it approved these contracts in 1991." (A.2:130).

III. Decisional Finality Does Not Preclude the PSC from Exercising Jurisdiction where Jurisdiction Legally Exists

Dade and the PSC finally argue that the Order should be upheld on grounds other than decisional finality. In particular, Dade argues that FPC's Petition was "an improper attempt to interfere" with court litigation between the parties (Dade Br. 21, 43, citing Suntide Condominium Ass'n v. Div. of Florida Land Sales, Condominiums and Mobil Homes, 504 So. 2d 1343 (Fla. 1st DCA 1987)). But, as the PSC's counsel correctly pointed out below, the "PSC's approv[al] of a contract ... can be explained or clarified without interfering in a contract dispute." (A.2:3). That clearly is true: under the doctrine of primary jurisdiction, an agency may act on matters within its particular expertise without interfering with the jurisdiction of the

courts. The limited relief FPC sought from the PSC also takes this situation far from the principle expressed in Suntide. (See Dade Br. 43-44).

Moreover, there is no interference with litigation here, any more than there was in Panda, which came to this Court in the same posture as this appeal. The cogenerator argued there that the issue should be "left to the courts." Panda, 701 So. 2d at 324-325. But, just as in Panda, FPC carefully limited its Petition here only to clarification of the Approval Order and the PSC's PURPA pricing rules, a matter the PSC is well -- indeed uniquely -- suited to address. The relationship between administrative agencies and the courts is properly preserved when agencies address issues within their special province. That is what the doctrine of primary jurisdiction is all about.

The PSC asserts a concern that, if it were to issue the requested interpretation, that might be misunderstood or misapplied by the state courts. But that did not stop the PSC from rendering its interpretation in Panda. Moreover, this issue will exist anytime there is interplay between courts and administrative agencies. It obviously cannot permit the PSC to shirk its jurisdictional duty to address matters within its province.[2]

Dade also is wrong in suggesting that FPC's Petition would render cogeneration contracts meaningless. (Dade Br. 21, 25). As this Court recognized in Panda, cogeneration contracts must comply

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[2] As Commissioner Deason and the PSC's counsel pointed out at the hearing, it is for the trial court to decide what effect is to be given the PSC's declaratory statement. (A.2:141).

with the PSC rules and orders, and the PSC is fully authorized to explain those rules and orders when issues arise regarding their meaning. Panda, 701 So. 2d at 326, 327-28. Far from rendering the PSC-approved contract "meaningless," clarification by the PSC of its rules and Approval Order may aid in determining the meaning of the contract.

Simply put, FPC is asking only that the PSC clarify what it intended as to energy pricing at the time it approved the Contract. FPC is not asking that the Contract or the Approval Order be changed in any fashion. Thus, Freehold is as off point here as it was in Panda, and Dade's hyperbole urging that such a clarification would render cogeneration contracts "meaningless" should be seen for the hollow scare tactic that it is.

The fact of the matter is, as this Court explained in Panda, 701 So. 2d at 328, it would violate PURPA for FPC to pay higher energy or capacity payments than the PSC's rules implementing PURPA allow. The PSC has jurisdiction to interpret its rules and Approval Order to assure that does not occur.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, was furnished by U.S. Mail to Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; James D. Wing, Esquire, 701 Brickell Ave., 30th Floor, P.O. Box 015441 , Miami, FL 33101, Gail P. Fels, Esquire, Assistant County Attorney, Dade County Aviation Department, Post Office Box 592075 AMF, Miami, Florida 33159 (counsel for Dade County); Robert Scheffel Wright, Esquire, Landers & Parsons, 310 West College Avenue, Post Office Box 271, Tallahassee, Florida 32302 (counsel for Montenay); and David E. Smith, Esquire, Director of Appeals, Florida Public Service PSC, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850 (counsel for Florida Public Service PSC) and John Beranek, Esquire, Auslely & McMullen,P.O. Box 391, Tallahassee, Florida 32302 (counsel for Lake Cogeneration), this 2nd day of August, 1999.

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