

IN THE SUPREME COURT OF FLORIDA

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S'D J. WHITE

SEP 4 1984

CITIZENS OF THE STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 FLORIDA PUBLIC SERVICE COMMISSION,)
)
et al.,)
)
 Appellees.)
)
 _____)

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Case No. 64,928 ✓

Case No. 65,200 ✓

 Answer Brief of Appellee
 Florida Public Service Commission

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PRELIMINARY STATEMENT

Points I and II of Citizens Brief are closely linked and revolve around the issue of whether there is competent substantial evidence in the record to support the Commission's decision to modify and continue the incentive for economy energy sales. Therefore, to avoid redundancy, the two points are consolidated and jointly addressed under Point I of this Brief.

Consequently, Point II herein responds to Point III of Citizens Brief.

REFERENCES AND ABBREVIATIONS

The references used herein are in the same manner as described in the Symbols and Designation of Parties contained in Citizen's Brief except Florida Public Service Commission is sometimes referred to as the "Commission".

**STATEMENT OF THE CASE
AND OF THE FACTS**

The following combined statement of the case and of the facts is necessary to indicate a disagreement concerning the scope of the appeal and to more thoroughly explain economy energy sales (economy sales). Economy sales transactions are buy/sell arrangements for energy between electric utilities. These sales are on an "as needed" and "as available" basis. The purchasing utility may have alternative supplies available. When the incremental cost for producing energy with its own system exceeds the cost of energy from another utility it is less expensive to purchase than to produce energy (Vol. II., Tr. 63).

The price of energy in an economy sale is the average of the selling utility's generating cost and the purchasing utilities generating cost. For example, assume Tampa Electric Company can generate power at 5¢ per unit and the cost for Florida Power Corporation (FPC) to generate an identical amount of power is 7¢ per unit. If Tampa has excess generation, it is less expensive for Tampa to produce the energy for FPC and an economy sale should take place. Under the sales scheme, the price of the energy to FPC would be 6¢ per unit (the average of the incremental generating cost of 5¢ per unit and the avoided generated cost of 7¢ per unit). No one disputes the calculation of the cost per unit to the purchasing utility. However, this calculation of price is what produces the economy sales profits that are the subject of this appeal. If the price was set at the incremental generating cost of the producing utility, there would be no

profits to apportion. There would also be no incentive to maximize economy sales. In the above example, there are mutual benefits because Tampa receives 1¢ profit (selling energy for 6¢ when it costs 5¢ to produce) and FPC saves 1¢ when it pays 6¢ for purchased energy rather than producing it for 7¢.

This appeal is concerned with what to do with the profits made by the selling utility in economy sales.

Prior to December 15, 1983, the profits made by utilities in economy energy sales was an issue in each electric utility's rate case (Vol. II, Tr. 14, 65). The volume of economy sales was estimated and the profits from the sale were used to offset the amount of any rate increase. The critical issue was accurately predicting the volume of economy sales. If the utility made fewer energy sales than predicted, the utility received less revenue and would not earn its authorized rate of return. If the utility exceeded its energy sales prediction it received more revenues which it was allowed to retain (Vol. II, Tr. 13-14). Under this approach there is considerable pressure for the utility to underestimate the volume of economy sales. After the level of economy sales was predicted, the utility had an incentive to reach or exceed the predicted level. Failure to reach it meant the utility would not earn its authorized rate of return. Exceeding the predicted level meant extra profits. Exhibit No. 4 shows that if the revised incentive system adopted by the Commission had been in place from 1978 - 1982 more than \$10 million more would have been returned to ratepayers, rather than retained by the utilities (Vol. II, Tr. 222-223).

On December 15, 1983, the Commission held a hearing to consider two things: whether economy sales profit should be reflected in the fuel adjustment proceedings rather than in rate cases and what to do with economy sales profits. All parties agreed with the proposal to move economy sales from rate cases to fuel adjustment proceedings (Vol. II, Tr. 65-65, 141-142, 177-178 and 204).

Testimony was received concerning alternative proposals on what to do with the profits from economy sales. Mr. Jack L. Haskins of Gulf Power Company advocated a 50-50 split of the profits between the ratepayers and the utility (Vol. II, Tr. 179). Mr. Stan Hvostik, Utility Systems Engineer, Electric and Gas Department, FPSC testified to an 80-20 split of economy profits with 80% being returned to the ratepayers and the utility retaining 20% (Vol. II, Tr. 13). Mr. G. Pierce Wood, Senior Vice President of the Provisions and Governmental Affairs for Tampa Electric Company testified that the utility should be allowed to retain 20% of the profits as an economic incentive to engage in economy interchange sales to the maximum extent possible (Vol. II, Tr. 142). Carl W. Wheeling, Manager of Florida Power Corporation's Economic Research Department testified that 20% of economy energy sales profits should be retained by the utility as an incentive to encourage sales (Vol. II, Tr. 204-206). Mr. James R. Dittmer, Regulatory Utility Consultant, appeared on behalf of the Citizens and took the position that 100% of the economy profits should be returned to the ratepayers (Vol. II, Tr. 66-67).

After hearing approximately five hours of testimony from five different witnesses, the Commission panel voted to move economy sales profits from rate cases to fuel adjustment proceedings and to allocate economy sales profits with 80% being returned to the customers of the selling utility and 20% of the profits being retained by the utility to encourage economy sales (Vol. II, Tr. 228-233). Commission Order No. 12923 (Vol. 1, R. 8) was issued on January 24, 1984 and reflects that decision.

Citizens have attempted to frame this appeal so that it is limited to the question of what to do with the profit on economy sales, ignoring the moving of economy sales profits from rate cases to fuel adjustment proceedings.

Thus even if this Court reverses the PSC's 20% profit retention decision, the level of economy sales and the amount of profit will still be addressed in the fuel adjustment hearings rather than in each utility's rate case. (Citizens Brief at p. 3).

The proposed changes were not considered as separate, individual matters.

POINT I

THE COMMISSION'S DECISION TO CONTINUE BUT
MODIFY AN INCENTIVE FOR ECONOMY ENERGY SALES
WAS REASONABLE AND IS SUPPORTED BY COMPETENT
AND SUBSTANTIAL EVIDENCE.

The Commission decided to continue an incentive for economy sales after hearing testimony from five different expert witnesses. However, in conjunction with moving the economy sales profits to the fuel adjustment proceedings, the incentive was modified. Rather than estimate economy sales volume in individual utility rate cases and allow the possibility of unlimited extra revenue for utilities that exceeded the estimated sales volume level the incentive system was altered. Eighty percent of economy sales profits is returned to the customers and utility retains 20%.

Four of the five expert witnesses testified that allowing the selling utility to retain some portion of the profits from economy sales would provide an incentive to increase sales. One of those witnesses (Mr. Jack Haskins, Gulf Power, Vol. II, Tr. 179) favored a 50-50 split of economy sales profits between ratepayers and the utility. The other three supported the 80/20 split (Vol II, Tr. 13, 142, 204-206).

In the vast majority of its cases the Commission is required to evaluate the testimony of expert witnesses on various subjects. It is the Commission's responsibility to weigh this conflicting expert testimony. In United Telephone v. Mayo, 345 So.2d 648 (Fla. 1977) the Court stated:

It is the Commission's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems appropriate. Id. at 654.

The conflicting expert witness testimony in this case has been evaluated by the Commission. They have accorded the weight they found appropriate and made a decision. The record contains ample, competent and substantial evidence, upon which the decision was based.

In a 1982 case Citizens appealed a Commission decision to include projected construction work in progress in rate base. There was no study but there was expert witness testimony. This Court affirmed the Commission's decision based solely on the testimony of an expert witness, Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 at 538, (Fla. 1982).

Competent substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred or such relevant evidence as a reasonable mind would accept as adequate to support the conclusion. Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957).

Prior to December 15, 1983 when the profits from economy sales were considered in individual utility rate cases, the incentive was for a utility to exceed the projected level of economy energy sales. Where utilities were able to exceed the projected level they retained all revenues above the projection. In that process the projected level of sales is too critical. Moving the economy sales profits to the fuel adjustment proceedings and providing for an 80/20 percent split of the economy sale profits stabilizes the process and provides an incentive for utilities to maximize

economy sales, not minimize sales projections. The ratepayers are assured of receiving 80% of the economy sales profits and the utilities are limited to 20%.

Mr. G. Pierce Wood, testifying on behalf of Tampa Electric Company, was asked if allowing the selling utility to retain 20 percent of the economy sales profit was appropriate. He replied:

Obviously the higher the number is set, the greater will be the economic incentive. It is a matter of judgment. I would consider it (20%) to be the minimum necessary to provide real economic incentive. (Vol. II, Tr. 146).

Mr. Hvostik, the Commission's staff witness, explained the 20 percent figure as follows:

The 20 percent figure was not developed from any formula. No study has been made on what the exact percentage should be. The amount of the incentive is a subjective policy decision. Staff believes that a positive incentive will preserve the current levels of economy sales and may result in increased sales. The suggested 20 percent incentive should be large enough to maximize the amount of economy sales and provide a net benefit to the ratepayers. (Vol. II, Tr. 14-15).

On cross examination of Mr. Hvostik, the Citizen's attorney asked if it was his subjective opinion that a 20 percent incentive would increase energy sales and Mr. Hvostik answered by stating:

...in my opinion (20%) will likely increase the amount of economy sales that are occurring. (Vol. II, Tr. 27).

Mr. Hvostik holds a Master of Science Degree in Mathematical Statistics and has six years of experience in electric utility

regulation (Vol. II, Tr. 2). Mr. Wood holds a Bachelor of Science Degree and has 30 years of experience in the electric utility industry (Vol. II, Tr. 140). Mr. Weiland holds a Bachelor of Science Degree in Electrical Engineering, a Masters Degree in Engineering Administration, and has 16 years of electric utility experience (Vol. II, Tr. 202). Each of the witnesses gave opinion testimony as an expert on electric utility matters. The 52 years of combined utility and regulatory experience among witnesses, Hvostik, Wood and Weiland, constitutes informed opinions. The Commission evaluated the divergent expert witness opinions and assigned the weight it found appropriate.

The Commission's decision on the appropriate level of the incentive was a determination ^{part with the text} involving the Commission's expertise. In Utilities, Inc., of Florida v. Florida Public Service Commission, 420 So.2d 331 (Fla. 1st DCA 1982), the Court upheld the Commission's decision on the proper rate of return in equity capital. The Court held that the Commission's decision was:

...a matter particularly within the range with utilities cumulative expertise and specialized experience.

Id. at 333.

The Commission's decision in the instant case, like the Utilities, Inc. decision, was:

Essentially a matter of opinion which necessarily has to be infused by policy considerations for which the PSC has special responsibility.

Id. at 333.

The incentive for economy sales has existed since 1978. In going from an estimated sales volume approach, which has proven to be inaccurate and inefficient, to a 20% retention amount, the Commission is continuing the evolutionary process of agency policy formulation.

Naturally, the Commission was concerned with the amount of revenues the utilities would receive under the 20% incentive. The record supports the conclusion that the rate payers would benefit. Mr. Hvostic testified that if the 20% had been in place the ratepayers would have benefited by over \$10 million (Vol II, Tr. 220-223 & Ex. 4). This is because of the economy sales made over the projected levels which were retained by the utilities.

The ratepayers of FPC would have received \$300,000 more under the revised incentive system assuming \$3 million in economy sales (Vol. II, Tr. 217).

If Tampa Electric would have retained 20% of the profits from its economy sales it would have received \$777,900 in revenues after taxes and the return on equity would have increased .2 of 1% (Vol. II, Tr. 173-174). Its customers would have received over \$6 million.

In explaining his motion, to adopt the modified incentive Commissioner Cresse noted that:

...the present system does provide incentives, and I think that has been borne out by the testimony. In this case, and at least in every rate case that I have sat in, it does not provide consistent, positive incentive in my opinion. (Vol. II, Tr. 228).

and

...I think we ought to have the savings based on the end results and the rewards based upon the end results. No matter how hard you try and obviously there is nobody going to testify that they are going to try any less hard, you know, it just isn't going to happen, and so forth. I don't think that it is a relevant issue as to how hard somebody is going to try. I think our system ought to be designed to that, you know, you can try just as hard as you want to but we are going to pay off on result. (Vol. II, Tr. 232).

The incentive plan provides a method whereby an electric utility which lowers its operation costs, thereby enhancing the possibility for economy sales, (Vol. II, Tr. 162), is rewarded for its success. The lower the cost for producing energy the greater the possibility for economy sales. Not only do lower energy costs result in increased probabilities for economy sales but also in lower costs to the utility's customers. Therefore, creating an incentive for economy sales creates an incentive for lower utility costs which directly benefits the utilities customers. The purchasing utility's customers also benefit in that their costs are lower.

The purpose of an incentive is to incite someone toward a particular action. Providing an incentive for economy sales is based on the belief that where utilities engage in economy sales all parties benefit. The seller benefits because it receives profits for the sale of its energy. The buyer benefits because it makes a purchase for less than its avoided costs. The customers of the purchasing and selling utility both benefit because they receive lower costs. Allowing the purchasing utility to retain 20% of the economy sales profits clearly provides an incentive to

maximize those sales and is reasonable.

After hearing the testimony of the various witnesses, Commissioner Cresse concluded that the total amount of economy sales may be controlled somewhat by the selling utility. The company with the cheapest electricity at a given time is the one whose profits should be enhanced the most. He concluded that "I think very strongly that the utility that contributes to the maximum amount of savings for the ratepayers in this State ought to be rewarded proportionately." (Vol. II, Tr. 230).

Citizens are bothered because none of the witnesses in the proceedings could testify that if utilities were provided with an incentive of retaining 20% of the profits from economy sales then these sales would increase to a specific level. This approach ignores basic human nature. People respond to incentives. The State of Florida recognizes the value of monetary incentives. The Department of Administration administers the State Awards Program. Employees of the state who suggest methods for improving the economy and efficiency of state government operations may receive a monetary reward, based on the amount saved by the state through implementation of the employees suggestion. (See Section 110.223, Fla. Stat., Rule 22A - 12.01-12.18, Fla. Admin. Code).

The absence of proof that a particular incentive will cause a specific result is not a basis for elimination of an incentive. An incentive is offered in an attempt to cause a desired result. In this case the desired result is increased economy sales and lower operation costs for electric utilities.

The utility witnesses were not very specific when asked

precisely what additional they would do to increase economy sales if the 20% incentive were adopted. They indicated they were doing all they reasonably could. This only means they have not thought of other methods to stimulate sales yet. The precise purpose of the incentive is to prompt the innovative processes toward increased economy sales. We note that the economy energy interchange system, without which economy sales would not be possible, has only been in existence since early 1978 (Vol. II, Tr. 230).

The nature of a controversy is that after the appropriate process one of the parties will prevail. It is rare that during the course of the proceedings one side will become sufficiently enlightened to the other side's viewpoint that they will adopt it, thus ending the controversy. This controversy is of the first type where neither side sees the wisdom of the other sides point of view. The failure of the Citizens to convince the Commission as to their point of view is an insufficient basis upon which to conclude that the Commission's decision is arbitrary or capricious. Expert witnesses testified concerning the various proposals placed before the Commission for resolution. After hearing the opinions of several experts, the Commission selected an incentive plan they believe will benefit the public interest, consistent with their oath of office and statutory duty (Art. II, Sec. 5, Fla. Const. Section 350.05, Fla. Stat.).

The entire basis for this controversy is that Citizens witness, Mr. Dittmer, does not believe in incentives (Vol. II, Tr. 105). However, Mr. Dittmer does understand that incentives

work for Russian farmers "... they generally perform better when they have incentives." (Vol. II, Tr. 107). Financial incentives in the business world are most typical in this country (Vol. II, Tr. 107).

The citizens are asking this court to reweigh the evidence, reach a decision consistent with their position in the case and substitute that decision in lieu of the Public Service Commission decision, which the Court is has refused to do, (Citizens of the State of Florida v. PSC, 435 So.2d 784 (1983)).

Economy sales are beneficial to utilities and their customers. Continuing to provide an incentive for utilities to maximize the sales was a decision reached by the Commission after hearing testimony from five expert witnesses. The Commission decision is reasonable and is supported by competent substantial evidence.

POINT II

INCENTIVES ARE CONSISTENT WITH PREVIOUS COMMISSION ACTIONS AND ARE CONSISTENT WITH DUE PROCESS.

Since 1980 the Commission has used incentives and rewards and penalties, contrary to Citizen's allegation of a "long standing policy" of rewards and penalties only.

In 1982 the Commission adopted the Oil Backout Cost Recovery Rule, (Rule 25-17.16, Fla. Admin. Code, Docket No. 810241-EU, Order No. 10554, Appendix A). This is an incentive program. Only utilities that participate benefit. Utilities who do not forego any benefits. There are no penalties for failure to participate in oil backout projects. This is analogous to allowing utilities that have economy sales to benefit by receiving economy sales profits.

The Generating Performance Incentive Factor (GPIF), (see Docket No. 800400-CI, Order No. 9558, Appendix B) has rewards and penalties. A standard must be set before rewards and penalties may be implemented. The formula which sets the standard for GPIF is in Order No. 9558, pages 9-15 (see Appendix B). The standard is very precise because of the availability and exactness of the data.

For GPIF the Commission was able to set a precise standard, and for economy sales profits the problem was a precise standard. Oil Backout projects do not have a precise standard. Therefore, these are incentive programs.

Based on the record in this case, the Commission adopted an incentive whereby utilities retain 20% of economy sales profits.

The greater the amount of economy sales, the greater amount of profits. Failure to make economy sales results in zero profits. The ultimate goal of the incentive created by the Commission is to lower utility operating expenses and therefore rates to customers. It is common knowledge that incentives produce results (Vol. II, Tr. 215), and results are clearly what the Commission is seeking. Commissioner Cresse stated:

I am looking for a measure that will pay off on results, and I think the staff has got one that pays off proportionally to each power company, depending on the total savings that their activities result in, in savings to the ratepayers of the State. (Vol II, Tr. 235).

Rewards and penalties are appropriate where a standard may be set. After the standard is set, over achieving results in rewards and under achieving results in penalties. In cases where the standard cannot reasonably be set, the penalty becomes receiving less than you would have if you had a higher level of sales. The difficulty in setting an accurate standard for economy sales levels is clear from the record in this case. If the modified incentive system had been in effect for 1978 - 1982 an additional \$10 million dollars would have been returned to ratepayers (Vol. II, Tr. 220-223).

The so-called "incentive only" system is somewhat analogous to setting a range on the allowable rate of return for a utility. If a utility operates more efficiently they are more likely to earn at the high end of the range of the return which becomes the reward. If they operate less efficiently they are likely to earn at the lower end of the range of return which becomes the penalty.

State employees who participate in the State Awards Program and have a suggestion to improve government efficiency implemented receive financial rewards related to the savings to the State. State employees who do not participate in the program receive no financial rewards but are not penalized. This incentive system does not violate due process of the State employee who does not receive a reward when he does not make suggestions for the State Awards Program.

As earlier explained, a major problem with the previous incentive system for economy sales was the difficulty in accurately projecting the volume of sales for individual utilities. If there was to be a "standard" set and a penalty imposed for failure to meet the standard the Commission would find itself back into attempting to accurately project sales volume again. This is unnecessary and unwise.

Mr. Hvostik testified as to why a penalty provision was not suggested:

In order to try to have some type of penalty provision, it would require agreement or some type of target... I gave it some thought and...it seems like a lot of factors that determine the amount of economy sales that occur are beyond the utilities control, and therefore trying to make--set a target would be very difficult and rewarding or penalizing a utility for not meeting that target would be somewhat arbitrary. (Vol. II, Tr. 26).

Citizens have not demonstrated that the 20% incentive as applied here, would violate due process. In fact, the record demonstrates the uncertainty of the previous system will be eliminated and the customers of the utilities will benefit. By

exceeding anticipated sales volume a utility will not be able to retain millions of dollars. With the current system 80% of those dollars will always be returned to the customers. The incentive becomes increasing economy sales and lowering utility costs rather than setting low projected sales levels which may be exceeded.

CONCLUSION

The record in this case contains competent, substantial evidence to support the Commission's decision to modify and continue the incentive for economy sales. Testimony of expert witnesses is a sufficient basis upon which the Commission may reach a decision and a study is not required.

Economy sales are most appropriately encouraged by the use of an incentive as opposed to rewards and penalties. The use of an incentive for economy sales is consistent with due process requirements.

The Commission decision should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission has been furnished by U.S. Mail this 31st day of August, 1984 to the following:

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