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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
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CITIZENS OF THE STATE OF FLORIDA,

Appellants,

v.

CASE NO. 64,928

FLORIDA PUBLIC SERVICE COMMISSION,
FLORIDA POWER CORPORATION,
FLORIDA POWER & LIGHT COMPANY,
GULF POWER COMPANY, and
TAMPA ELECTRIC COMPANY,

and

CASE NO. 65,200

Appellees.

ON APPEAL OF FLORIDA PUBLIC SERVICE COMMISSION
ORDER NOS. 12923 and 13092

ANSWER BRIEF OF APPELLEE
GULF POWER COMPANY

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PRELIMINARY STATEMENT

The appellants will be referred to in this brief as "appellant" or "Public Counsel."

Appellee, Gulf Power Company, will be referred to by that name or as "Gulf Power." Appellee, Florida Public Service Commission, will be referred to by that name or as "the PSC." Appellee, Florida Power Corporation, will be referred to by that name or "FPC." Appellee, Florida Power & Light Company, will be referred to by that name or as "FP&L." Appellee, Tampa Electric Company, will be referred to by that name or as "Tampa Electric."

References to the transcript of the December 15, 1983, hearing before the Florida Public Service Commission shall be designated (Tr. ____). Any other references to the record on appeal shall be made in the same manner as described in the Symbols and Designation of Parties contained in Public Counsel's Initial Brief.

STATEMENT OF THE CASE AND OF THE FACTS

Gulf Power Company accepts the Statement of the Case and of the Facts contained in Public Counsel's brief except for Public Counsel's omission of the material facts discussed below; and except for Public Counsel's assertion that the two proposed changes to the treatment of gains on economy energy sales are independent of each other and that the PSC's Staff proposal would allow implementing one change without implementing the other.

The proposal of the PSC's Staff is comprised of two components which are inextricably intertwined: the transfer of the accounting treatment of economy energy sales from full rate case proceedings to the fuel adjustment clause, coupled with the simultaneous implementation of an 80/20 incentive procedure by which ratepayers would receive 80% of economy energy sales profits and the selling utility would be allowed to retain 20% of economy sales profits for its shareholders. (Tr. 12-14, 64, 143, 149, 204-206) The purpose of the new proposal is to provide an adequate and reasonable replacement for the old treatment of economy energy sales profits. The new accounting treatment removes the difficulties and uncertainties associated with projecting economy energy sales profits and with determining the level

of economy sales profits to be included in base rates (under the old treatment), while at the same time provides for a procedure which retains the economic and monetary incentives inherent in the old treatment. (Tr. 13-14, 24, 39, 52, 87, 88-89, 145-146, 205-206) Public Counsel's own witness, James R. Dittmer, even stated and agreed that this was the actual structure incorporated within PSC's Staff's proposal. (Tr. 87, 88-89) Indeed, the testimony of the witnesses, including Public Counsel's witness, established that an accounting treatment change from rate case proceedings to the fuel adjustment clause proceedings without a concomitant implementation of incentives, which would retain in some form the incentives inherent in the old treatment, would have a negative impact on the utilities' willingness to engage in economy energy sales transactions. (Tr. 27, 52, 90, 106-107, 146, 152, 158, 214-215)

Public Counsel's statement of facts also omits material facts which provide substantial evidence in support of the PSC's decision. The testimony of the various parties' experts demonstrated differing, if not dissonant, opinions as to the level of monetary incentive necessary to further the PSC's goal of encouraging an increase in economy energy sales. Only Public Counsel's witness asserted that no incentive was necessary. (Tr. 66, 74, 77) The witness for the PSC's Staff, Mr. Stan Hvostik, testified that an incentive

to replace the inherent incentive in the old treatment of economy energy sales was necessary and that an 80%/20% split of the profits from such sales between the ratepayers and the utilities (for their shareholders) would be reasonable. (Tr. 13-15) He further stated that, in his opinion, the 20% incentive for the utilities and their shareholders was the level which would be required to either maintain the present level of sales or cause an increase in sales. Without this level of incentive, the amount of economy sales could drop. (Tr. 27) Mr. G. Pierce Wood, Tampa Electric's expert witness, stated that Mr. Hvostik's recommendation of a 20% incentive would be "the minimum necessary to provide real economic incentive." (Tr. 146) According to Mr. Wood, if Public Counsel's recommendation of eliminating any sharing of the profits with utilities was adopted, all economic incentive to enter into economy energy sales would likewise be eliminated. (Tr. 146) Any reduction of an incentive for economic profit would result in a less overall incentive. (Tr. 152)

Jack L. Haskins, Gulf Power's expert witness, testified that consistent with the PSC's policies in other areas, the utilities should receive an incentive in the form of a reward for making economy energy sales that contribute to reduction of the retail customer's costs. (Tr. 178-179, 181) Mr. Haskins proposed that the profits be split so that

the utility retained one-half of the profits from economy energy sales for its shareholders and the other half of the profits would be passed to the utility's retail customers through the fuel and purchased power cost recovery clause. (Tr. 179, 181-182)

Florida Power Corporation's expert, Karl H. Wieland, concurred with the 80/20 incentive proposal of the PSC's Staff and urged its adoption by the PSC. (Tr. 204) Mr. Wieland stated that the larger the incentive given a utility, the greater the effort would be to engage in more economy energy sales. (Tr. 214) The 80/20 incentive proposal, in Mr. Wieland's judgment, is a reasonable and well founded means for continuing "to provide an incentive for greater economy sales, but in a different manner than the current base rate treatment." (Tr. 205-206, 208)

The PSC's former treatment of economy energy sales under ratemaking provided direct incentives for utilities to maximize their economy sales. (Tr. 24, 39) Under the old treatment, utilities were permitted to keep 100% of all economy energy sales revenues over the amount included in their base rates. (Tr. 13, 14, 157). Public Counsel's witness conceded that this previous treatment had this built-in incentive and admitted that the present proposal of the PSC's Staff would continue these incentives in a different

form. (Tr. 87) Other experts agreed that if, upon changing of the accounting treatment, the prior incentive was deleted without substituting one in its place, efforts to engage in and increase sales would be discouraged. (Tr. 52, 146, 152, 204-205, 208, 214-215)

The benefits of the adoption of the PSC's Staff's proposal were enumerated by the witnesses. All parties essentially agreed that projections of what level of economy energy sales are to be included in a utility's base rates were difficult to determine with any degree of certainty. (Tr 14, 25, 54, 65, 146, 178, 205) Indeed, Mr. Hvostik, witness for the PSC's Staff, testified that the inability to set reliable target projections for economy energy sales renders arbitrary any incentive based on rewards for performance above and penalties for performance below the targeted level. (Tr. 26) Thus, by substituting the uncertain targeting incentive procedures inherent in ratemaking with the 80/20 incentive, the PSC would be eliminating this arbitrariness while providing a positive incentive to utilities and a net benefit to ratepayers. (Tr. 14-15, 147, 205-206)

Tampa Electric's witness noted that the change of accounting treatment and the 80/20 incentive for economy energy sales eliminates the problem of estimating economy energy revenues accurately. The new proposal allows revenues and revenue requirements to be more accurately matched and

on a more timely basis. The positive incentive, from the customer's standpoint, encourages maximizing economy sales which in turn aids in minimizing costs to the customers of both buying and selling utilities. This savings is passed through the customer more accurately and sooner. The new proposal provides greater revenue stability for the utilities. (Tr. 147) Mr. Wood added that a financial incentive encourages a utility to reduce the maintenance down time of base load units required for the economy energy sales. (Tr. 151)

Public Counsel's witness admitted that even under the proposed 20% incentive, the benefits to the participating utilities would only produce a 10% after-tax share of the economy sales revenues. (Tr. 100-101) Following a similar economic analysis during questioning by the Commission, Tampa Electric's witness noted that if the proposed 20% incentive was applied to its economy energy sales revenues, as reflected in its last rate case, the benefit to Tampa Electric would have been only two-tenths of one percent (0.2%) added to the utility's return on common equity. (Tr. 173-174)

Under questioning by the Commission, Florida Power Corporation's witness noted that in 1983, under the old treatment of economy energy sales profits, FPC had a projected profit of \$2.1 million and would expect to have an actual profit of \$3 million. Thus, under the old treatment, FPC

would realize the excess profit of \$900,000. However, under the 80/20 incentive plan the customers would realize \$2.4 million of the profit (\$300,000 more than under the old treatment) and the utility would retain only \$600,000. In this example based on historical data, the ratepayer receives an added benefit, while the utility and its shareholders still receive an incentive reward. (Tr. 216-217) The witness stated that this was just another example which supported his opinion that the ratepayer would benefit in the long run under the new accounting treatment and 80/20 incentive plan. (Tr. 217-218) Mr. Wieland also noted that the new proposal would eliminate the time and costs associated with estimating future sales and holding hearings to determine proper sales levels under the old treatment. (Tr. 218)

Finally, Mr. Hvostik, witness for PSC's Staff, reviewed historical data for treatment of economy energy sales during the period of 1978 through 1982 under the old treatment. He compared the benefits obtained under the old treatment with those which would have been achieved if the proposed treatment with the 80/20 incentive had been implemented during that period. Mr. Hvostik testified that the customers would have realized an additional benefit in excess of \$10 million if the new treatment had been in effect between 1978 and 1982. (Tr. 220-223)

ARGUMENT

POINT I

THE FLORIDA PUBLIC SERVICE COMMISSION'S INCLUSION OF A MONETARY INCENTIVE IN ITS NEW TREATMENT OF PROFITS FROM ECONOMY ENERGY SALES IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND EXPERT TESTIMONY AND DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW

The Florida Supreme Court's task when reviewing the orders of the Florida Public Service Commission is to determine whether competent substantial evidence supports the order and whether it comports with the essential requirements of law. Gulf Power Company v. Florida Public Service Commission, ___ So.2d ___, 9 Fla.L.W. 286 (Fla. July 12, 1984); Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983); Citizens v. Public Service Commission, 425 So.2d 134 (Fla. 1982); City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981); Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353 (Fla. 1980); Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973). The record in this case contains substantial evidence to support the PSC's order. While the expert witnesses expressed divergent views on the issue of a monetary incentive, as specifically outlined previously in this brief in the Statement of Facts, the PSC is not required to pursue all alternative measures. It is only required to take action which is supported by competent substantial

evidence. Id. When faced with competing expert testimony, as in this case, the PSC is allowed to consider and accord such weight to the testimony as it determines before taking final action. The Florida Supreme Court has specifically held:

It is the PSC's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary. See United Telephone Co. v. Mayo, 345 So.2d 648, 654 (Fla. 1977). . . . [T]his Court may not now substitute its judgment for the PSC's own action taken within the statutory range discretion. See Citizens v. Public Service Commission, 435 So.2d 784; Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1978).

Gulf Power Company, ___ So.2d at ___, 9 Fla.L.W. at 288, 289.

Public Counsel has been, and still is in this appeal, totally opposed to any application of an incentive for encouraging economy energy sales which permits the utilities a share of the revenues. The PSC, after weighing the testimony and evaluating the evidence, disagreed with Public Counsel and his witness and rejected their proposals. Public Counsel's argument in his brief is merely a request for the Court to reweigh the evidence and substitute its judgment for that of the Commission. The Court's duty, in its judicial review of the PSC's order, is not to reweigh and reevaluate the conflicting evidence, as Public Counsel

demands, but only to determine whether the record contains competent substantial evidence to support the order. Jacksonville Suburban Utilities Corporation v. Hawkins, 380 So.2d 425, 426 (Fla. 1980). The Court has recently reiterated its responsibility and has stated:

We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order.

Gulf Power Company, ____ So.2d at ____, 9 Fla.L.W. at 287.

The record in this case provides competent substantial evidence to support the PSC's order. Public Counsel's brief conveniently ignores the facts established at the hearing by the testimony of the witnesses for the utilities and the PSC's Staff. These omitted facts, which have been specified in Gulf Power Company's Statement of the Facts, provide the requisite substantiation for and demonstrate the reasonableness of the PSC's decision.

Public Counsel has consistently overlooked that under the old ratemaking treatment of economy sales, utilities had a very real incentive to participate in and maximize their economy energy sales. Public Counsel has ignored that the evidence demonstrated that this incentive inherent in the old treatment was a significant factor to be included

in any economy energy sales treatment. Public Counsel brushes aside that the PSC's Staff's proposal is a solution to the real problem involving the difficulties of accurately projecting economy energy sales and the resulting arbitrariness in determining target profit levels while at the same time maintaining the same incentives which were inherent in the old system. The PSC and all the parties, except Public Counsel, recognized the importance of retaining incentives and substituting a workable plan which would be reasonable and fair to customers and shareholders alike.

Indeed, Public Counsel's own witness recognized the built-in incentive of the old treatment and the merits of the Staff's proposal for retaining the incentive but in a different form. (Tr. 87) The witness also admitted that positive financial incentives were superior to punishment for inferior performance. (Tr. 107)

Public Counsel contends that the record shows no necessity for an incentive, that there is no indication that the utilities need an incentive to engage in economy energy sales or to maximize them. Public Counsel is wrong. The record is replete with testimony that the old treatment of economy energy sales had a built-in incentive through which the utilities could realize 100% of profits once economy energy sales revenues exceeded the projected profits to be included in the base rates. This incentive clearly encouraged

utilities to maximize their sales. The utilities' witnesses unconditionally said that the no-incentive approach proposed by Public Counsel would negatively impact and discourage economy energy sales. Indeed, the outright removal of the incentive provided under the old treatment would constitute a penalty or disincentive. Under the old system, the shareholders would realize a benefit for increased sales; under Public Counsel's proposal, shareholders would be penalized and receive none.

More significantly, however, the customers would also suffer without the proposed incentive. Under the treatment now ordered by the PSC, the customers are beneficiaries of 80% of each additional increment of savings which the utilities achieve through economy energy sales. Thus, when the 20% utility share of the savings results in the production of savings over and above the level which might otherwise have occurred, the customers receive 80% of the value of those savings without incurring any costs. If the 20% incentive is removed, the incremental savings are lost, and the customers do not benefit.

The record clearly shows that the customers would have benefited greatly if the 80%/20% formula had been in effect between 1978 and 1982. Mr. Hvostik, witness for the PSC's Staff, stated that his analysis of the application of the 80%/20% formula to economy energy sales revenues during

that period revealed that the customers would have saved in excess of \$10 million over the savings under the old system. (Tr. 222-223)

Public Counsel also asserts that the record does not support the finding of a need for an incentive because the witnesses could not testify to anything they would do differently than they do now with or without an incentive. Public Counsel's assertion is inaccurate. A specific example of how the incentive would work was given by Mr. Wood, Tampa Electric's witness. He stated that if a coal fired generating unit (a low-cost type of generating unit) were off line for repairs, a utility's ability to participate in the profits derived from economy energy sales from that unit would certainly spur the utility to get that generating unit back on line as quickly as possible. (Tr. 151)

Additionally, as a utility is continually encouraged to engage in economy energy sales by an incentive to participate in profits from those sales, it will strive to develop new methods for marketing economy energy sales. For example, as Mr. Wood testified, Tampa Electric has been involved in new programs of coordinating plant maintenance in an attempt to involve the sale of economy energy on a continuous basis over a week or more instead of the shorter periods previously used. (Tr. 170-171)

As can be seen from the discussion above and from a review of the record, what occurred in the proceeding before the PSC was a presentation of competing views and competing policy alternatives on how to implement a plan which would provide a substitute for the incentive inherent in the old ratemaking treatment of economy energy sales. Public Counsel advocated his point of view at that proceeding; but it was rejected by the PSC. Public Counsel's brief, of course, focuses on his argument below and the testimony of his witness; but it ignores the competing testimony of the other witnesses.

The Florida Supreme Court in Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308 (Fla. 1976), has noted that the PSC, as a regulatory body, must often select and decide matters from various competing policy alternatives. The record in the present case affirmatively shows that the PSC was performing such a regulatory task during the proceeding below. The PSC was required to sift through competing and divergent expert opinions as to what policy and plan would be used to replace the type of incentives intrinsic to the old ratemaking treatment. When, as here, competent substantial evidence exists in the record to support the various policy alternatives, the Court cannot interfere with the PSC's ruling, even though the Court may have been persuaded itself to choose a different avenue than the PSC did. Id. at 311. The Court in Florida Retail Federation, Inc., when faced

with a similar review of the PSC's selection of a policy from divergent expert opinion and alternatives, stated:

Even were we persuaded to one policy or the other . . . , it is not our prerogative to impose that policy upon the Commission. So long as the policy adopted by the Commission comports with the essential requirements of law, we may not meddle. The Legislature has reposed in the Commission the responsibility to make just the kind of choice between competing policies in its area of expertise as it has done here.

Id.

Public Counsel's contentions notwithstanding, the record supports the PSC selection of the policy alternative to provide incentives for encouraging greater economy energy sales. The PSC's determination should not be disturbed, but should be affirmed. 331 So.2d at 311.

POINT II

THE INCENTIVE MEASURE SELECTED BY THE FLORIDA PUBLIC SERVICE COMMISSION IN ITS NEW TREATMENT OF ECONOMY ENERGY SALES IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND COMPORTS WITH THE REQUIREMENTS OF THE LAW

Public Counsel's Point II is another attempt to have this Court reweigh the evidence and usurp the regulatory function of the PSC. Public Counsel raises four points as grounds for his contention that the 80%/20% incentive treatment is somehow wrong or defective. Public Counsel's contentions are without merit.

First, Public Counsel attacks the adoption of the 20% incentive as not being supported by any study or analysis. The PSC had before it testimony from several expert witnesses. Public Counsel never challenged the expertise of these witnesses, and their expert opinions stand as evidence. The witnesses acknowledged that the level of incentive was, and had to be, a matter of judgment; however, their judgments were based on their knowledge and experience with economy energy sales and with business practices. They provided their analyses from this perspective. The experts noted the obvious: the higher the percentage of shared revenues, the greater the economic incentive. (Tr. 146) According to Mr. Wood, the 20% level would be a minimum. Florida Power Corporation's witness concurred with this opinion. (Tr. 204) Gulf Power Company's witness, Mr. Haskins, opined that

a logical approach would be to have the customers and utilities "split the savings" or share equally in the savings resulting from economy energy sales as had been done between the buying and selling utilities. (Tr. 179) Of course, Public Counsel's witness proposed no incentive be given. All witnesses, including Public Counsel's witness, agreed that without retaining some incentive, the willingness to engage in economy energy sales would be negatively impacted. Thus, the testimony of the utilities' witnesses and the Staff's witness, after drawing upon their own expertise and experience within their respective companies or profession, established both the need for the incentive and at what minimum level the incentive would be effective in encouraging economy energy sales.

During the hearing, the Commission tested and examined the reasonableness of the 20% incentive by applying it to historical data. It was determined that if the 80/20 incentive had been applied to FPC's economy energy sales revenues for 1983, the customers would have realized \$300,000 more than they had under the old ratemaking treatment. (Tr. 216-217) Likewise, if the 20% incentive had been in effect between 1978 and 1982, additional benefits in excess of \$10 million dollars would have inured to the ratepayers. (Tr. 222-223)

It was also determined at the hearing that the

80/20 incentive formula would not result in any excessively large and unreasonable returns for the utilities. Tampa Electric's witness testified that if the 20% incentive had been applied to its 1983 economy energy sales, that utility's 20% share would have produced only approximately two-tenths of one percent (0.2%) increase in its return on common equity. (Tr. 173-174) The significance of this analysis is underscored by the fact that Tampa Electric sold more than twice as much economy energy as the other three major utilities. (Tr. 173)

It is clear, then, that there is support in the record for the PSC's selection of the 20% incentive. This selection was just another example of the PSC performing its regulatory task of selecting policy from competing alternatives. Accordingly, the Court must also leave this finding of the PSC undisturbed. Florida Retail Federation, Inc., 331 So.2d at 311.

Public Counsel's next contention is specious. He asserts that the new incentive will not encourage increased sales because it is not aimed at utilities who sell more, but is rather aimed at those who merely sell. Public Counsel is merely voicing his apparent dislike and disbelief that the concept of sales commissions provides an incentive to increase sales. The PSC has properly rejected this contention.

It is a fundamental economic precept under the principle of sales commissions that the more you sell, the more you benefit; the less you endeavor to sell, the less you will realize in returns. It is in this sense that the reward/penalty concept, which Public Counsel complains is absent, is actually embodied in the 80/20 incentive formula.

The final two points of Public Counsel's Point II were previously raised, as he admits, in Point I of his brief. They actually are directed to the issue of the necessity for an incentive and are merely another plea for the Court to reweigh the evidence. These points were addressed in Point I of this brief, and for the same reasons given there, should be rejected by the Court.

Point III of the Public Counsel's brief also challenges the incentive adopted by the PSC, and therefore, it shall be addressed in this portion of Gulf Power's brief. Public Counsel asserts that the 80/20 incentive formula is in some way defective because it does not provide for penalties as well as rewards. This contention is inaccurate. As noted above, the incentive adopted by the PSC is in the nature of a sales commission. It has both positive and negative aspects. The positive incentive exists for the utility to aggressively pursue economy energy sales and increase the total of its share of the savings. On the negative side, if the utility does not make the extra effort, it does not realize the additional benefits and profits.

Public Counsel's witness essentially has conceded that the adopted incentive formula had positive and negative aspects. He admitted that the opportunity to realize a \$20 profit has the same motivating influence as the combined motivation of avoiding a \$10 penalty while making an extra \$10 profit. (Tr. 90)

Clearly, a rational basis exists in this case for using a positive financial incentive over a penalty/reward scheme. In order to determine whether a penalty or reward is to be assessed, it is necessary to have a preestablished target level. If revenues exceed the target, a reward is given; if revenues are below, a penalty is assessed. All witnesses testified, and no party disputes, that there is great difficulty in accurately projecting anticipated economy energy sales. Indeed, that is the chief reason this proceeding was instituted: to develop a new treatment of economy energy sales which eliminates the inaccuracy and arbitrariness intrinsic to the ratemaking treatment. A reliable target cannot be forecasted. Thus, for purposes of economy energy sales, without a reliable target, a penalty/reward scheme is infeasible.

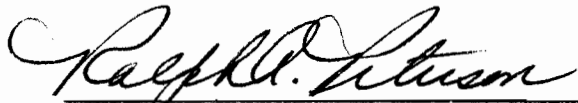
Again, Public Counsel's mere disagreement with the PSC's decision and his disappointment over the PSC's rejection of his proposals are insufficient to warrant overturning the

PSC's order. The record amply supports the adopted incentive,
and the PSC's order should be affirmed.

CONCLUSION

Public Counsel has failed to demonstrate that the Florida Public Service Commission's order is not supported by substantial evidence or that it departs from the essential requirements of law. While the record presents divergent views and alternative policy proposals, the PSC has properly performed its regulatory responsibility in selecting the policy it adopted, based on the record and facts before it. Accordingly, the orders of the PSC on review should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true copy of the Answer Brief of Appellee Gulf Power Company has been furnished by U.S. Mail to the following parties on this 31st day of August, 1984.

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