IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. FLORIDA PUBLIC SERVICE COMMISSION, FLORIDA POWER CORPORATION, FLORIDA POWER & LIGHT COMPANY, GULF POWER COMPANY, and TAMPA ELECTRIC COMPANY, Appellees.	)	CASE NO. 64,928 and CASE NO. 65,200

ON APPEAL OF FLORIDA PUBLIC SERVICE COMMISSION
ORDER NOS. 12923 AND 13092 IN DOCKET NO. 830001-EU-B

ANSWER BRIEF OF APPELLEE, TAMPA ELECTRIC COMPANY

LEE L. WILLIS
JAMES D. BEASLEY
Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904)224-9115

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

TABLE OF CONTENTS

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Tampa Electric Company has analyzed the Statement of the Case and of the Facts contained in Public Counsel's Initial Brief. Tampa Electric disagrees with Public Counsel's apparent inference that the Commission's Staff put forth two independent proposals at the December 15, 1983 hearing:

(1) the proposal to transfer the accounting treatment of economy sales from full rate case proceedings to the fuel adjustment clause, and

(2) the 80/20 incentive procedure by which ratepayers would receive 80% of savings from economy sales with the utility itself receiving 20%.

These provisions of the Commission's approved treatment of gains on economy sales are interdependent and inseparably tied. The Commission's Staff witness stated that without the incentive, the accounting switch from rate case treatment to the fuel adjustment clause would negatively impact the utilities' willingness to engage in these transactions (Tr. 52).

Public Counsel further states that all parties agreed with the first part of the proposal (the accounting treatment modification). Again, all parties excepting Public Counsel, agreed to such modification coupled with an incentive provision — but not the accounting change without the incentive.

In addition to the foregoing points of disagreement, Tampa Electric submits that Public Cousel's Statement of the Case and of the Facts is deficient in that it omits the following relevant facts established during the course of the December 15, 1983 hearing:

Public Counsel's version of the facts fails to describe the divergence of expert opinion presented on the record as to (1) the reasonableness of applying incentives in the regulation of investor-owned electric utilities, and (2) the question of what level

of monetary incentive is necessary to further the Commission's goal of encouraging greater levels of economy interchange sales. Mr. Stan Hvostik, for the Commission Staff, testified that an incentive should be adopted and that an 80%/20% split between the ratepayers and the utility would be reasonable (Tr. 13 - 15). Mr. Hvostik indicated that the 20% incentive was designed to increase the current level of economy interchange sales (Tr. 27). Tampa Electric's expert witness, Mr. G. Pierce Wood, argued that the 20% recommended by Mr. Hvostik would be the minimum level necessary to afford a real economic incentive (Tr. 146). Gulf Power's expert urged a 50/50 split (Tr. 179), while Florida Power Corporation's expert supported the Staff's position (Tr. 204). Public Counsel's witness on the other hand was the only witness who contended that no incentive was necessary.

There are numerous alternatives available to utility management to increase economy interchange sales. Mr. Wood, for Tampa Electric, testified that a financial incentive could prompt utility management to reduce the maintenance down time of base load units required for economy interchange sales (Tr. 151).

Under the Commission's old economy sales treatment, utilities had an incentive to pursue economy sales. They had to achieve the estimated level of sales included in their base rates in order for economy interchange sales to be a break even activity. In addition, they were able to keep 100% of all economy sales revenues over and above the amount included in their base rates (Tr. 13, 14, 157).

If the newly adopted 20% incentive factor had been applied to Tampa Electric (whose economy interchange sales recently had been more than twice the total amount for the other three major investor-owned electric utilities), it would have produced a benefit to Tampa Electric of only two-tenths of one percent added to the Company's return on common equity (Tr. 173-174).

Under the new methodology a selling utility's share of profits from economy sales is only 10% of the statewide savings produced by those sales, with the remaining 90% of the savings being flowed through directly to the ratepayers of the buying and selling utilities (Tr. 172, 223).

Virtually all the witnesses agreed that it is difficult to project with any degree of certainty the level of economy sales to include in a utility's base rates. The Staff's witness testified that this inability to set reliable targets for future sales would render arbitrary any incentive based on a target level of sales with rewards for performance above and penalties for performance below the preestablished targets (Tr. 26).

The Staff's witness testified that the ratemaking treatment of economy sales which was replaced in the decision below provided direct incentives for utilities to maximize their economy sales (Tr. 24, 39). The witness further testified that to delete the prior incentive without substituting one in its place would discourage utility efforts to increase economy sales (Tr. 52). Mr. Wood, for Tampa Electric, concurred (Tr. 157). Even Public Counsel's witness conceded that the previous treatment of economy sales had built-in incentives and that the Staff's proposal would continue incentives in a different form (Tr. 87).

Public Counsel's witness further conceded that benefits to participating utilities under the proposed incentive would only produce a 10% after tax share of economy sales revenues (Tr. 100 - 101).

Reference Abbreviations

References to the transcript of the December 15, 1983 hearing before the Florida Public Service Commission shall be designated "(Tr. ___)".

References to the Appendix to this brief shall be designated "(A. ___)".

ARGUMENT

POINT I

THE PUBLIC COUNSEL HAS FAILED TO ESTABLISH THAT THE COMMISSION DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY INCLUDING A MONETARY INCENTIVE IN THE NEW RATE-MAKING TREATMENT OF ECONOMY INTERCHANGE SALES.

This proceeding is predicated on Public Counsel's continuing disagreement with the Commission as to the appropriate policy to apply in a ratemaking area for which the Commission has a special responsiblity. It is readily apparent from Public Counsel's Initial Brief that he totally opposes the Commission's application of an incentive to encourage greater levels of economy interchange sales among the electric utilities the Commission regulates. In essence Public Counsel is asking the Court to reweigh the evidence and substitute its judgment for that of the Commission on the issue of how best to encourage utility efficiency.

Tampa Electric submits that the record now before this Court affirmatively demonstrates the reasonableness of the Commission's decision to include an incentive provision in the new ratemaking treatment of economy sales. Public Counsel's Initial Brief overlooks these aspects of the record, and fails even to approach the burden of proof Public Counsel has assumed.

Point I of Public Counsel's Initial Brief first suggests that it is "unfair" to have an incentive for utilities to engage in economy interchange sales, because utilities have an obligation to operate in the most efficient manner possible (Public Counsel's Initial Brief, Page 6). Public Counsel's view is apparently based on the premise that every individual or entity charged with a particular duty is obligated to, and in fact does, perform that duty to perfection. Carried to its logical extreme, Public Counsel's reasoning would erase all incentives from every aspect of our society.

Incentives play a big role in the daily lives of those whose regular assignment is to perform reasonably. This is true even though the job is expected to be performed reasonably without an incentive. Employees in state government have such an assignment, yet the Legislature has seen fit to provide positive incentives. Section 110.223, Fla. Stat., provides for a meritorious service award program which would benefit:

> employees who propose procedures or ideas which are adopted and which will result in eliminating or reducing state expenditures or improving operations, provided such proposals are placed in effect, or who, by their superior accomplishments, make exceptional contributions to the efficiency, economy, or other improvement in the operations of the state government. . . .

Public Counsel, no doubt, would do away with this incentive.

Section 110.122, Fla. Stat., provides an incentive for state employees not to use accumulated sick leave by allowing for payment at retirement or termination for days not used. Public Counsel, no doubt would do away with terminal incentive pay, as well.

Section 110.403(d), Fla. Stat., authorizes the Department of Administration to adopt rules providing for appropriate incentives through salary and benefit plans for the recruitment and retention of outstanding management personnel. Since it's their job, Public Counsel would, no doubt, say these personnel need no incentive.

In each of these examples, as in the case of the particular incentive before the Court, the taxpayers (or, in this case, the ratepayers) are the primary beneficiaries of efforts made in pursuit of the incentives. Tampa Electric would suggest there is not one major activity of any importance within our society which is not influenced by positive incentives of one form or another.

Both the Legislature and the Commission below have recognized the important role of monetary incentives in utility regulation. Section 366.03, Fla. Stat., which defines the general duties of public utilities, affords a basis for incentives. That statute requires that public utilities furnish "reasonably" efficient service. This standard alone shows a legislative recognition that there may be room for efficiency improvements even among utilities already meeting the required level of "reasonable" efficiency.

Section 366.06, Fla. Stat., which prescribes the Commission's regulatory functions relative to the rates and service of public utilities, likewise calls for "reasonable" rates and service. Here, again, the Legislature has recognized that public utilities do not all provide service at identical levels of efficiency.

Section 366.075, Fla. Stat., likewise evidences the legislative belief that incentives have a place in the regulation of public utilities. That section authorizes the Commission to approve experimental rates in order to encourage energy conservation or to encourage efficiency.

Section 366.082, Fla. Stat., is yet another example of legislative authorization for the Commission to utilize incentives in the regulation of public utilities. That section, contained in the Florida Energy Efficiency and Conservation Act, provides in part:

> . . .the Commission shall also consider the performance of each utility pursuant to [the Florida Energy Efficiency and Conservation Act]. . .when establishing rates for those utilities over which this Commission has rate setting authority." (§366.82(4), Fla. Stat.)

Implicit in the above provision is the Commission's authority to employ rate incentives to encourage greater conservation efforts by Commission regulated utilities.

The Commission has adopted a Generating Performance Incentive Factor (GPIF) in conjunction with the fuel adjustment procedures in an effort to encourage greater efficiency in the generation of electricity.

Perhaps even more important, Public Counsel's "fairness" argument totally ignores the fact that ratepayers are the beneficiaries of 80% of each additional increment of savings which the utilities are able to achieve through economy sales. To the extent that the incentive produces savings over and above the level which might otherwise occur, the ratepayers derive 80% of the value of those savings without spending one extra nickel. If the incentive were removed and the incremental savings lost, ratepayers would suffer most.

On page 7 of his Initial Brief, Public Counsel refers to the Commission's decision in Gulf Power Company's 1982 rate case. In that case the Commission adhered to the old system of including a particular level of estimated economy sales in base rates, thus permitting Gulf to retain all revenues in excess of that assumed amount. Public Counsel brushes aside the fact that under the old ratemaking treatment of economy sales, utilities had a very real incentive to pursue economy sales. This resulted from the fact that the utilties were permitted to keep 100% of all revenues from such sales in excess of the level incorporated in the utility's most recent rate case.

In the very same Gulf Power decision relied upon by Public Counsel, the Commission evidenced its continuing reliance upon incentives in the ratemaking process by noting, at page 38 (A 2):

> Conservation Award
>
> In Gulf's previous two rate cases we granted the company ten additional basis points on the overall rate of return reward for its superior efforts in conservation. Rather than consider it in this

proceeding, all parties agreed to sever that issue from this case and consider it in the Company's Conservation Cost Recovery Proceeding.

Public Counsel contends that an incentive payment would cause the utilities to earn in excess of their authorized returns on equity. This is simply not the case. Had Tampa Electric been awarded a 20% incentive for its superior economy sales during 1983, the effect would have been only an approximate two-tenths of one percent increase in the Company's return on common equity (Tr. 173 - 174). Moreover, the other utilities with far less economy sales than Tampa Electric would have received proportionately smaller amounts (Tr. 174).

Public Counsel's witness, Mr. Dittmer, simply assumed away the question of whether utilities are doing all they can to stimulate greater levels of economy sales. However, the facts adduced in the hearing indicate a great potential for improvement. As Mr. Wood testified for Tampa Electric, the management of an electric utility is faced with many alternatives for increasing its economy sales. Mr. Wood posed the specific example of a coal fired generating unit being off line for repair, and stated that an incentive to get that unit back on line as quickly as possible would flow from the utility's ability to participate in the profits derived from economy sales from that unit (Tr. 151).

Mr. Wood further testified that new methods for marketing economy sales are being developed. Management's coordination of plant maintenance with anticipated levels of demand have enabled Tampa Electric to pursue extended economy interchange sales. This involves the sale of economy energy over a continuous basis for a week or more rather than for shorter periods of time previously utilized (Tr. 170 - 171).

Without question a utility must be able to generate low cost electricity in order to sell economy energy to other utilities. The incentive provision incorporated in

Order No. 12923 directly encourages utilities to lower their generation costs so that they can take advantage of the 20% incentive incorporated in that order. The chief beneficiaries are the ratepayers because 80% of the resulting savings directly reduce the fuel adjustment charge.

Public Counsel criticizes the Commission's incentive plan because it rewards utilities who sell, rather than buy, economy energy (Public Counsel's Initial Brief, Page 10). Public Counsel's argument in this regard is simply another attempt by Public Counsel to have the Court redesign a regulatory policy which is well within the scope of the Commission's discretion. Certainly the Commission could have pursued greater economy interchange transactions by rewarding the seller, the buyer, or both. However, that does not mean that any one method is right or wrong.

Automobiles typically are sold by a salesperson on a commission basis. This type of compensation motivates the salesperson to go out and make sales. Rebates are occasionally offered in order to motivate potential buyers. However, the absence of a rebate program doesn't prevent the car salesman from seeking out buyers more aggressively on a commission basis than he would if employed on a straight hourly basis without a commission.

Where there are alternative measures available to achieve a desired result (here, an increased level of economy interchange transactions), the Commission need not pursue all of them at once. In Florida Retail Federation, Inc. v. Mayo, 331 So. 2d 308 (Fla. 1976), wherein the Court noted the Commission's regulatory task of selecting from various competing policy alternatives. In affirming a rate order which considered factors other than cost of service, the Court observed (at 331 So. 2d 312):

> It is our view, based upon the authorities cited herein with respect to our function in reviewing an order of the Commission, that petitioner has not met the burden incumbent upon it of showing that

> such order is "invalid, arbitrary, or unsupported by the evidence." Obviously, there is a divergence of expert opinion as to the policy of including "cost of service" as an essential element in designing a rate structure. Even were we persuaded to one policy or the other ("cost of service" or "value of service" as the essential element) 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. Shevin v. Yarborough, supra. (Emphasis supplied)

Even if we venture beyond the standard for judicial review of the Commission's decision and analyze policy considerations underlying the Commission's decision to place the incentive on the selling utilities, such an approach appears reasonable. The Commission's decision to allow the selling utility to share in gains on economy sales may well have been grounded on the fact that the selling utility, by definition, must have the lower cost of generation vis-a-vis the buying utility. Thus, in order to benefit from the incentive, some utilities might well have to improve their efficiency in order to reduce their cost of generation to the point where they are able to assume the role of the selling utility in economy interchange transactions.

As between selling utilities (with more efficient generation) and buying utilities (with comparatively less efficient generation), the Commission quite logically elected to reward the former. The Commission likewise could have concluded that rewarding all participants in these transactions (even if they are on the less efficient "buy" side of the transaction) could foster complacency and thus prove counterproductive.

On pages 12 - 15 of Initial Brief, Public Counsel points to the fact that the public utility witnesses in the hearing below did not describe in detail the various additional efforts their companies would pursue in response to the monetary incentive

included in the Commission's new treatment of economy sales. Public Counsel's line of argument is that unless a utility can say how it will improve its performance in the future, then the current level of performance must be perfect. Although regulated public utilities might like to see Public Counsel pursue this approach to examining public utility efficiency, Tampa Electric must say Public Counsel is incorrect.

Public Counsel fails to recognize that an incentive works prospectively to stimulate innovation. The improvements which result are developed over time. Public Counsel misses this point entirely with his suggestion that public utility management, presumably through clairvoyance, should be able to describe at the outset the various innovations which the incentives will produce.

Public Counsel's demand for a description of future utility efforts is not an appropriate test for the reasonableness of an incentive. Instead, justification for an incentive stems from the endless array of management alternatives available to public utilities. Mr. Wood, for Tampa Electric, described examples of how management can pursue various alternatives or combinations of alternatives, and develop new alternatives, for increasing economy sales (Tr. 151, 170 - 171). Public Counsel cannot dispute the fact that managing one of the state's four largest investor-owned electric utilities is a very complex, dynamic and everchanging task. By its very nature it is ripe for regulatory incentives.

At page 15 of his Initial Brief, Public Counsel briefly addresses the level of the incentive (20%) adopted by the Commission but digresses for the remainder of Point I of his Initial Brief into criticism of the manner in which the December 15, 1983 hearing was conducted. Much of this criticism is directed at Commissioner Cresse's active inquiry of witnesses who testified at the hearing. Judging from his repeated references to the number of questions posed to various witnesses by Commissioner

Cresse (Public Counsel's Initial Brief at pages 16 - 19), Public Counsel apparently feels that regulators should express no active interest in the regulatory process which they are charged with the duty of performing.

Public Counsel surmises that the Commission set out with the goal of incorporating an incentive in the new ratemaking treatment of economy sales, without regard of the evidence presented at the December 15, 1983 hearing. Public Counsel's speculation as to what was in the minds of the Commissioners, or intended by the Commissioners, during the course of the December 15, 1983 hearing is entirely unsupported. If Public Counsel is arguing bias or prejudice on the part of one or more of the Commissioners, he certainly has not followed the proper statutory procedures. What is readily apparent from the record is that there was a wide range of expert testimony which was evaluated on the record by the Commissioners. Where, as in the proceeding below, the Commission must select from various alternatives supported by conflicting testimony, this Court has repeatedly indicated that its function is to focus on that record evidence which provides a sound basis for the decision on review.

Public Counsel criticizes Commissioner Cresse's reference to a May 24, 1983 memorandum prepared by the Commission's Electric and Gas Department. In fact, what Commissioner Cresse did was inquire of Staff witness Hvostik as to what the impact would have been on electric utility ratepayers had the 80%/20% split, here challenged by Public Counsel, been in effect between 1978 and 1982. Mr. Hvostik responded that the ratepayers would have saved approximately $10 million more than under the old system which the decision on review replaces (Tr. 222 - 223). Mr. Hvostik referred to the Staff Memorandum in explaining his calculation. The fact that this reference document was not made an exhibit does not detract from Mr. Hvostik's testimony.

All parties, including Public Counsel, had copies of the memorandum in question and were free to cross-examine the witness regarding its contents. Had he chosen to do so, Public Counsel could have requested that the memorandum be made a part of the record. It is interesting that even though Public Counsel elected not to do so, he refers in his Initial Brief to the content of the memorandum as being supportive of the positions Public Counsel urged below (Public Counsel's Initial Brief, Pages 16-17).

All in all, Point I of Public Counsel's Initial Brief completely overlooks the record basis for the decision below and focuses instead on the contrary arguments which Public Counsel presented to the Commission and which the Commission unanimously rejected. In essence, Public Counsel seeks to have the Court reweigh the evidence presented and substitute its judgment in place of that exercised by the Commission below. As this Court has repeatedly observed, such is not the Court's function on review of Commission decisions.

In Smith Terminal Warehouse Company v. Bevis, 312 So. 2d 721 (Fla. 1975), the Court, while stating that it might have granted a permanent for-hire permit where the Commission had denied the issuance of such permit, nevertheless affirmed the Commission's decision. Said the Court, at 312 So. 2d 722:

> We, if sitting as the Commission, might well have granted the permit on the record in this cause. However, it is not the function of this tribunal to substitute its judgment for that of the Commission through its examiners. We find no improper application of the appropriate statutory provisions. On review by certiorari of an administrative order, it is our function to determine whether the order departs from the essential requirements of law and whether the agency had before it competent, substantial evidence to support its findings and conclusions. See, e.g., Tamiami Trail Tours, Inc. v. Bevis, 299 So. 2d 22 (Fla. 1974); Schreiber Express, Inc. v. Yarborough, 257 So. 2d 245 (Fla. 1971); Florida Rate Conference v. Florida R.R. & Public Utilities Com'n., 108 So. 2d 601 (Fla. 1959). We find

> no departure from the essential requirements of law in the present case, the Commission's order being supported by substantial competent evidence. (Emphasis supplied)

Again, in Jacksonville Suburban Utilities Corporation v. Hawkins, 380 So. 2d 425 (Fla. 1980), the Court observed, at 380 So. 2d 426:

> This Court's responsibility is not to reweigh or re-evaluate conflicting evidence, but only to ascertain whether the Commission's order is supported by competent substantial evidence.

The Court has consistently recognized that ratemaking is a regulatory function which is very judgmental, and that the Commission has considerable discretion in evaluating competing alternatives. In Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983), the Court affirmed a Commission ruling that Florida Power and Light Company had authority under Commission rules to require a customer deposit from Pan Am. In so doing the Court indicated that it would not disturb the Commission's ruling unless it was clearly erroneous. Observing the Commission's discretion to choose from among available regulatory alternatives, the Court stated the following (at 427 So. 2d 719 - 720):

> [I]f an agency's interpretation of its own regulation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other alternative. Expedient Services, Inc. v. Weaver, 614 F.2d 56 (5th Cir. 1980). The PSC's reading of its rules regarding the required content of public utility tariffs has not been shown to be clearly erroneous. Thus, we conclude that on this issue, as on the other points raised, Pan Am has failed to demonstrate that the order appealed from departs in any way from the essential requirements of law. Nor has the order been shown to be unsupported by substantial competent evidence.

The incentive provision adopted by the Commission in the proceeding below falls squarely within the category of policy determinations which the Court has

affirmed in the cases cited above. Certainly there was conflicting testimony on the subject. Here, where the record fully supports the policy alternative chosen by the Commission in pursuit of the legitimate goal of encouraging greater economy sales, the Commission's determination should be affirmed.

POINT II

PUBLIC COUNSEL HAS FAILED TO DEMONSTRATE THAT THE INCENTIVE MEASURE INCORPORATED BY THE COMMISSION IN ITS NEW TREATMENT OF ECONOMY SALES REVENUES LACKS THE SUPPORT OF COMPETENT SUBSTANTIAL EVIDENCE OR IN ANY WAY IS IN VIOLATION OF LAW.

In Point II of his Initial Brief, Public Counsel assumes for purposes of argument that an incentive for increased levels of economy sales is justified, then puts forth four reasons why Public Counsel feels the incentive adopted by the Commission is somehow defective. There is no merit to any one of Public Counsel's four criticisms of the Commission approved incentive plan in the decision on review. What's more, Public Counsel's efforts in this regard further exemplify Public Counsel's goal of having the Court usurp the Commission's regulatory function.

First, Public Counsel criticizes the 20% incentive, claiming no "study, analysis, memorandum or piece of paper" supports it (Public Counsel's Initial Brief at Page 21). If every decision by the Commission required a formal "study, analysis, memorandum or piece of paper" to support it, regulation of public utilities would grind to a halt.

The 20% incentive was initially recommended by the Commission's Staff. The Staff witness in the December 15, 1983 hearing offered in his direct testimony that the proposed 20% incentive was judgmental, as it obviously would have to be. Nonetheless, the Staff's recommended incentive weighed heavily in favor of utility ratepayers -- giving them 80% of the benefits of all cost savings from economy sales.

Tampa Electric's witness, G. Pierce Wood, testified likewise, at Tr. 146:

> Q. Do you consider the 20% recommended by Mr. Hvostik to be appropriate?

A. Obviously the higher the number is set, the greater will be the economic incentive. It is a matter of judgment. I would consider it to be the minimum necessary to provide real economic incentive.

Gulf Power Company's witness recommended a "split the savings" approach whereby the utility and its ratepayers would share equally in the savings brought about by economy sales (Tr. 179). This approach has been in use for some time in dividing up the savings between utilities who engage in economy sales.

Florida Power Corporation's witness concurred in the Staff witness' recommended 80%/20% incentive plan (Tr. 204).

Public Counsel's witness obviously recommended a zero incentive.

The 20% incentive selected by the Commission was tested for reasonableness. As the Commission's Staff witness indicated, such incentive would have produced approximately $10 million of additional benefits to Florida electric utility ratepayers had it been in effect during the period 1978 - 1982 in place of the incentive which preceded it (Tr. 222 - 223). Moreover, Tampa Electric's witness, Mr. Wood, testified that if the approved incentive had been in effect during 1983, the Company's 20% share of economy sales would only have produced a monetary incentive of approximately two-tenths of one percent increase in the Company's return on common equity (Tr. 173 - 174). This is notwithstanding the fact that Tampa Electric sold more than twice as much economy energy as the other three major investor-owned electric utilities combined.

Tampa Electric's 1983 economy interchange profits of $7,779,000 actually represent only one half of the statewide savings which resulted from these sales. This is because such sales were made on a "split the savings" basis between Tampa Electric and the buying utilities. Generation costs are saved by the buying utilities in

amounts equal to the profits earned by Tampa Electric on these sales. The total statewide savings from Tampa Electric's sales alone during 1983 were approximately $15.5 million (Tr. 172). Under the new 20% incentive, actually 90% of the total statewide savings resulting from these sales would have flowed directly to the ratepayers of Tampa Electric and the buying utilities (Tr. 223). What appears on the surface to be a 20% allocation of profits to the selling utility is really only 10% of the statewide savings produced by the utility's economy sales.

Clearly there was a record basis for the Commission's selection of 20% incentive. Equally obvious is the fact that selection of any incentive is a judgmental determination which does not necessarily require "studies, analyses, memoranda or pieces or paper". What the Commission did have before it was an array of expert testimony which would have supported incentive levels of up to 50%. Thus, the Commission faced the same task of selecting a policy from among competing alternatives as it did in the decision affirmed in Florida Retail Federation, Inc. v. Mayo, discussed on pages 9 - 10 of this brief.

Public Counsel next questions the fact that the incentive reward to utilities who engage in economy sales is a direct function of the extent to which they do so. Public Counsel states at page 27 of his Initial Brief that the approved incentive is not aimed at those who sell more, but that it is aimed at those who merely sell. This is ridiculous. The incentive approved by the Commission is just like the car salesman's commission. The more you sell, the more you benefit; the more you sit back and relax, the less you reap on the bottom line. In essence, Public Counsel is not so much criticizing the particular incentive measure adopted by the Commission as he is challenging a fundamental economic principle.

Public Counsel's third criticism of the 20% incentive is a throwback to the contention, set forth in Point I of Public Counsel's Initial Brief, that no incentive whatsoever is warranted. So is the fourth and final point which Public Counsel attempts to make in Point II of his Initial Brief. (This is Public Counsel's suggestion that a utility is powerless to stimulate greater levels of economy interchange sales). These last two points are addressed in Point I of this Brief.

Although Public Counsel obviously disagrees with the approved incentive plan incorporated in the Commission's new treatment of economy sales, Point II of his Initial Brief fails even to approach the burden of proof Public Counsel has assumed by this appeal.

POINT III

PUBLIC COUNSEL HAS FAILED TO ESTABLISH THAT THE PARTICULAR INCENTIVE ADOPTED BY THE COMMISSION IS IN ANY WAY DEFECTIVE.

As should be apparent from the above heading, Point III of Public Counsel's Initial Brief is merely a restatement of Point II with different allegations thrown in. Public Counsel urges in Point III of his Initial Brief that if an incentive is included in the new treatment of economy interchange sales, it must be of a particular design which includes both rewards and penalties. Not only is Public Counsel's predicate wrong (that the Commission has never had a "reward only" incentive), but even beyond that, Public Counsel has overlooked record evidence distinguishing the incentive adopted in this case from reward/penalty incentives applied by the Commission in other circumstances.

The Commission has not consistently demanded that ratemaking incentives encompass positive and negative aspects. In the Commission's oil backout cost recovery rules, for example, the incentive (rapid recovery of investment in conservation oriented projects through accelerated depreciation) is purely a positive one. Affected utilities may invest funds to reduce oil-fired generation and thus receive the benefits the rules afford, or they may refrain from so doing and forego the benefits.

Similarly, the incentive here challenged by Public Counsel offers the participating utility an opportunity to vigorously pursue economy sales in order to increase their portion of the savings. Alternatively, the utility may refrain from putting forth extra effort and thereby forego the additional revenues.

The Staff's witness testified that it is very difficult to accurately project anticipated levels of economy sales (Tr. 34). No one disputed this. Public Counsel even acknowledges this in his Initial Brief. It follows that it would be very difficult to establish any targeted sales level for each company. Thus, without a reliable target, it would be difficult to prescribe a reward for performance in excess of the target and a penalty for below target performance. This was testified to in detail by the Commission's Staff witness (at Tr. 51 - 55). Even Mr. Dittmer (Public Counsel's witness) conceded the difficulty of predicting future levels of economy interchange sales (Tr. 65).

Mr. Dittmer candidly admitted during the course of the hearing that the most typical way of providing incentives, at least in this country, is through financial incentives. He went on to agree that positive financial incentives are superior to punishment for inferior performance (Tr. 107). Moreover, Mr. Dittmer conceded on cross-examination that the opportunity to realize a $20 profit has the same motivating influence as the combined motivitation of (1) avoiding a $10 penalty, and (2) in addition, making an extra $10 profit (Tr. 90).

The record evidence discussed above amply supports the type of incentive adopted by the Commission. Public Counsel has failed to meet his burden of proof on appeal. Mere disagreement by Public Counsel with the Commission's final determination in the proceeding below is not enough.

CONCLUSION

Public Counsel has failed to establish that the Commission, in adopting and implementing a new ratemaking treatment of economy sales, has in any way departed from the essential requirements of law. The Commission Orders on review, being supported by competent substantial evidence, should be affirmed.

DATED this 31st day of August, 1984.

Respectfully submitted,

LEE L. WILLIS
JAMES D. BEASLEY of
Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, Florida 32301
(904)224-9115

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Tampa Electric Company and the Appendix thereto, has been furnished by U. S. Mail or Hand Delivery, on this the 31st day of August, 1984, to the following:

Mr. William S. Bilenky, General Counsel
Mr. Robert Vandiver, Staff Counsel
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Mr. Jack Shreve, Public Counsel
Mr. Stephen Fogel, Associate Public Counsel
624 Crown Building
202 Blount Street
Tallahassee, Florida 32301

Mr. John W. McWhirter, Jr.
Mr. Joseph A. McGlothlin
Lawson, McWhirter, Grandoff & Reeves
Post Office Box 3350
Tampa, Florida 33601-3350

Mr. Neil Chonin
Attorney for Floridians United
for Safe Energy, Inc.
304 Palermo Avenue
Coral Gables, Florida 33134

Mr. Matthew M. Childs
Steel Hector & Davis
320 Barnett Bank Building
Tallahassee, Florida 32301

Mr. Richard W. Neiser
Mr. James A. McGee
Florida Power Corporation
Post Office Box 14042
St. Petersburg, Florida 33733

Mr. G. Edison Holland
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576

Mr. Patrick K. Wiggins
Messer, Rhodes & Vickers
Post Office 1876
Tallahassee, Florida 32302

Mr. Lee G. Schmudde
Reedy Creek Utilities, Inc
Post Office Box 40
Lake Buena Vista, Florida 32830

ATTORNEY