IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. 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

FILED
SID J. WHITE
AUG 14 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

ON APPEAL OF PUBLIC SERVICE COMMISSION
ORDER NOS. 12923 AND 13092

INITIAL BRIEF OF APPELLANTS,
CITIZENS OF THE STATE OF FLORIDA

Jack Shreve
Public Counsel

Stephen Fogel
Associate Public Counsel

Office of the Public Counsel
624 Crown Building
202 Blount Street
Tallahassee, FL 32301

(904) 488-9330

Attorneys for the Citizens
of the State of Florida

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CASES (con't)	Page No.

(citation of authorities continues on next page)

SYMBOLS AND DESIGNATION OF PARTIES

Appellants, Citizens of the State of Florida, will be referred to by that name or as "the Citizens".

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 as "FPC."

Appellee, Florida Power & Light Company, will be referred to by that name or as "FP&L."

Appellee, Gulf Power Company, will be referred to by that name or as "Gulf."

Appellee, Tampa Electric Company, will be referred to by that name or as "Tampa."

This Initial Brief addresses two appeals that have been consolidated for review before this Court. For all practical purposes, the two cases can be treated as one proceeding, with the first order (Case No. 64,928) approving a new ratemaking treatment for economy energy sales profits, and the second order (Case No. 65,200) implementing the new treatment. The transcript of the hearing held on 15 December 1983 is contained in Volume II of the record transmitted to this Court. The transcript of the hearing held on 23-24 February 1984 is contained in Volume III. The pages are numbered sequentially and will be referred to by a "Vol. , T. " In brackets followed by volume and page numbers: [Vol. , T.].

Exhibits received at the December 15th hearing are contained in Volume II of the record, and the exhibits received at the February 23-24 hearing are contained in Volume III. The exhibits will be referred to by a "Vol. , Ex. " in brackets followed by the Volume and exhibit numbers: [Vol. , Ex.].

References to the record of the proceeding below, other than to the transcripts or exhibits, are contained in Volume I of the record and will be referred to by a "Vol. I, R. " in brackets followed by the page number: [Vol. I, R.].

References to the Appendix to the Citizens' Initial Brief will be referred to by an "A - " in brackets followed by the page number: [A -].

STATEMENT OF THE CASE AND OF THE FACTS

By Order of this Court, Case Nos. 64,928 and 65,200 have been consolidated for appellate purposes. Both cases below involved the Citizens, the PSC, FPC, FP&L, Gulf, Tampa, and the treatment of economy energy sales profits. This Court has jurisdiction. Art. V, Section (3)(b)(2), Fla. Const.; Section 350.128 and 366.10, Fla. Stat.; Fla. R. App. P. 9.030(a)(1)(ii).

Economy energy sales ("economy sales") occur between electric utilities that have generating capacity. [Vol. II, T. 63]. In determining how it will obtain the energy to meet its customers' needs in the next hour, a generating utility can use a combination of energy produced from its own generating capacity (that is, its own capacity and capacity that it has purchased from other utilities) and energy purchased from and generated by other utilities. One of these types of energy purchases is economy energy. For example, utility B will determine that it would cost it 5¢ per kilowatt-hour to generate a certain amount of its own energy, but that utility S could generate that amount for 3¢ per kilowatt-hour. Utility S will then sell that amount of energy to Utility B at 4¢ per kilowatt-hour, that is, the utilities will split the difference between their generating prices. Utility S will make a 1¢ per kilowatt-hour profit (4¢ selling price minus the 3¢ generating cost) and utility B will have saved its customers 1¢ per kilowatt-hour (5¢ generating price minus the 4¢ purchase price). [Vol. II, T. 23, 63-64].

This appeal centers upon the ratemaking treatment of the profit that the selling utility makes on these economy sales. Prior to 15 December 1983, the level of economy sales, and thus the profit, was a hotly contested issued in each utility's rate case. [Vol. II, T. 14, 65, 146, 178, 205]. The utility would want the estimated level of these sales to be as low as possible, and the Citizens and the PSC staff ("Staff or "the Staff") would want the estimated profits to be as high as possible. [Vol. II, T. 14, 65, 146, 178, 205]. The higher the sales, the greater the profit, which is used as an offset against a utility's rate request. For example, if a utility requests a $100 million rate increase, and economy sales profits are $2 million, then the $2 million is credited to the utility's revenues and the customers would face a $98 million, rather than a $100 million, rate increase.

On 15 December 1983, the PSC held a hearing to consider the Staff's two-fold proposal to remove the economy sales profits controversy from rate cases. The first part of the proposal was to eliminate all consideration of economy sales profits from rate cases and to consider the level of sales and amount of profits in the fuel adjustment proceedings. [Vol. II, T. 12-13]. The utilities would estimate the amount of sales and profits when projecting their fuel costs for a six-month fuel recovery period, and any deviation from this estimate would be trued-up with actual data after the six-month period was over. [Vol. II, T. 16]. All parties agreed with this first part of the proposal. [Vol. II, T. 64-65, 141-42, 177-78, 204]. Order No. 12923, page 2. [Vol. I, R. 9] [A-2].

The second part of the proposal, on the other hand, saw the parties go their different ways, with the Citizens on one side versus the Staff and the four generating utilities (FPC, FP&L, Gulf, and Tampa) on the other side. Under this part of the proposal, the utilities would be allowed to retain 20% of the economy sales profits as an incentive to engage in these sales.

[Vol. II, T. 12-13]. Thus when fuel costs for a six-month recovery period are trued-up with actual data, the ratepayers would be credited with 80% of the profit. [Vol. II, T. 13]. The utilities' 20% share would never be recognized for ratemaking purposes. That is, the PSC would never consider the dollars associated with the 20% when establishing fair and reasonable rates in rate cases. [Vol. II, T. 20].

The Staff, three of the four utilities (all except FP&L), and the Citizens each presented a witness to testify on its behalf. Mr. C. K. Hvostik explained the Staff's proposal. [Vol. II, T. 10]. Messrs. G. Pierce Wood (Tampa) [Vol. II, T. 142, 146] and Karl H. Wieland (FPC) [Vol. II, T. 204] agreed with Mr. Hvostik that the utilities should retain 20% of the economy sales profits. Mr. Jack L. Haskins (Gulf) advocated that utilities should receive 50% of the profits. [Vol. II, T. 179]. Opposed to these four witnesses, Mr. James R. Dittmer (the Citizens) tesified that 100% of the profit should be credited to ratepayers. [Vol. II, T. 66-67].

After all five witnesses had testified, the three PSC commissioners conducting the hearing voted to approve both parts of the Staff's proposal. [Vol. II, T. 227-33]. The order reflecting this decision, Order No. 12923 [Vol. I, R. 8] [A-1], was issued on 24 January 1984. The Citizens filed a timely Notice of Appeal of Order No. 12923 [Vol. I, R. 34], which expressly stated that this appeal is limited to the PSC's directive that utilities retain 20% of the economy sales profits. [Vol. I, R. 34]. 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.

On 23-24 February 1984, the PSC conducted its semi-annual fuel adjustment hearing to establish, among other things, the utilities' fuel factors for the six-month fuel recovery period starting on 1 April 1984. [Vol. III, testimony and exhibits]. In calculating the fuel factors, the PSC implemented its decision to remove economy sales profits from base reates and to allow the utilities to retain 20% of the profit. This decision is reflected in Order No. 13092, at pages 7-8 [Vol. I, R. 50-51] [A-11-12], rendered on 16 March 1984, which the Citizens timely appealed on 16 April 1984 [Vol. I, R. 75]. The order from the February hearing (Order No. 13092) has been appealed because it implements the twenty percent incentive adopted in the December hearing (Order No. 12923). There is nothing wrong with the February decision other than that it carries out the December incentive decision. Consequently, this Initial Brief will focus on the initial incentive decision.

ARGUMENT

I. THE NECESSITY FOR GRANTING ELECTRIC UTILITIES AN INCENTIVE TO SELL ECONOMY ENERGY IS UNSUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

If Earle Stanley Gardner were writing this brief, he might entitle it, "The Case of the Misplaced Incentive." Consider the following situation. If you dangled a sales incentive in front of a utility, and the utility told you that it did not need the incentive to sell the product, that it was now doing everything that it could think of to promote the product, that if you withheld the incentive it would continue to do what it is now doing to sell the product, and that it is unable to tell you what it would start to do if it did get the incentive, you would not give it the incentive. The PSC, however, would. Not only that, the PSC would give the utility a greater percentage of the sales profits even if the utility sold less of the product that it sold before the incentive was established. If that were not enough, the PSC would give the utility twenty percent of the sales profits even though no one could say where the twenty percent figure came from. If that were too little, the PSC would give the utility a reward with no penalty as an incentive even though the PSC had always rejected penalty-only incentives as unfair and had used rewards and penalties in its incentive programs.

Why would the PSC do this? The PSC would do this because it had already made up its mind that it wanted to give the utilities an incentive. The PSC did not want to be confused with the facts.

This is no exaggeration. All of this occurred. As the three points raised in this brief will explain, the PSC has made a mockery of the requirement that an administrative agency's decision must be based upon the record. See Sections 120.57(1)(b)7, 120.59(2), 120.61, Florida Statutes; General Development Utilities v. Hawkins, 357 So.2d 408 (Fla. 1978). The PSC was bound and determined to given an incentive and it was not going to let the niceties of the law stop it.

To begin with, establishing an incentive to engage in economy energy sales is unfair. As this Court has stated, Florida Power & Light Co. v. Florida Public Service Commission, No. 60,671, slip op. at 8 (Fla. March 17, 1983) (motion for rehearing pending), and as the witnesses agreed [Vol. II, T. 30, 67, 154], utilities have the obligation to minimize their costs in providing adequate costs to customers. One of the ways to do this is to engage in economy sales and to make a profit on the sales. [Vol. II, T. 30, 67]. If the utilities are attempting to fulfill their obligations, they will engage in these transactions without the need for this incentive. By adopting this incentive, the PSC is telling the public that ratepayers cannot expect the most efficient operations possible absent an additional incentive factor. [Vol. II, T. 67].

The utilities' retail customers (that is, the customers in the utilities' service areas regulated by the PSC) pay for the fixed costs of the generating units that produce economy energy. [Vol. II, T. 24, 64, 157]. The selling price always includes enough to cover the variable costs (fuel and operating and maintenance expense) of generating economy sales plus a profit. [Vol.II, T. 63]. Therefore, as a utility's witness even agrees, there are not additional risks, no additional investments, and no unrecovered costs associated with selling economy energy. [Vol. II, T. 74-75, 150, 158].

In Gulf's 1982 rate case, Gulf argued that it, rather than the ratepayers, should retain the profits from economy sales. Contrary to its decision in the proceeding below, the PSC sharply rejected Gulf's position and credited Gulf's ratepayers with 100% of Gulf's estimated economy sales profits.

> [T]he Company did not include the income it receives from economy energy sales. The Company contends one, that economy energy sales cannot be forecasted accurately, and two, since the plant out of which economy sales are made is always available to serve retail customers, that the profits of economy energy sales should go to the stockholders rather than to the ratepayers. <u>We disagree sharply with the Company's second contention. Since the ratepayers are paying the full cost of the generating facilities out of which economy sales are made, any income derived from the use of those facilities should inure to the ratepayers' benefit.</u> [Emphasis added.]

Order No. 11498, at page 17. [A-23]. Simply put, but for the enormous investment in generating facilities for which the firm customers are ultimately 100% responsible, utilities would be unable to engage in the off-system economy sales. [Vol. II, T. 71]. Given the utilities' obligation to minimize costs and given that there is no additional stockholders' risk incurred by entering into these sales, there is no need to share the profits between stockholders and ratepayers. [Vol. II, T. 71-72]. As the PSC itself has recognized,

> The investor's rights are satisfied if he has the opportunity to recover his original investment over the life of that investment and an opportunity to earn a return on unrecovered investment. <u>Re Southern California Edison</u>, 32 PUR 4th 423, 436-57 (Calif. P.U.C. 1978)

In re Petition of Florida Power Corp., Order No. 11628, at 32. [A-27]

Until the proceeding below, the PSC, in rate case, had always credited 100% of the estimated economy profits to ratepayers. The utility might earn more than that rate case amount because the actual sales exceeded the estimated amount, but, as was discussed at the hearing, these excess earnings were unintentional. [Vol. II, T. 89-90]. They were the inevitable difference between actual and projected profits. As explained in the statement of the case and of the facts, the constant controversy in rate cases about the amount of profits lead to the proposal, with which all parties concurred, to transfer consideration of economy sales profits from rate cases to the fuel adjustment clause.

All other things being equal, the twenty percent incentive will cause the utilities to earn in excess of their authorized returns on equity. [Vol. II, T. 72]. All fixed costs are covered in base rates (set in a rate case) and all variable costs are covered in either base rates or certain of the special cost recovery clause (fuel, conservation, oil-backout, nuclear decommissioning, etc). [Vol. II, T. 72]. To the extent that a utility receives incremental revenue above incremental cost, as would occur with economy sales, excess profits would accrue to utility stockholders. [Vol. II, T. 72]. This additional return above that found to be just and reasonable will occur without added risk, effort, or investment by utility management or stockholders. [Vol. II, T. 73].

As Mr. Dittmer explained at the hearing, there is no reason to believe that the utilities are failing to engage in economy sales to the fullest extent possible. [Vol. II, T. 73]. Nothing in the record contradicts Mr. Dittmer's statement. In fact, when asked what specific actions FPC would take, if it got the incentive, that it does not now take, Mr. Wieland, FPC's witness, acknowledged that "if I could identify one specific item," FPC would be looking at it already. [Vol. II, T. 215].

As Mr. Dittmer also pointed out, the Florida Electric Power Coordinating Group (an association funded by the electric industry) operates a broker system that economically dispatches (that is, coordinates the sale and purchase of electricity between utilities to minimize overall generating and fuel expense) the utilities in Peninsular Florida (all generating utilities except Gulf) on a statewide basis. [Vol. II, T. 23, 73]. This being the case, the PSC's incentive would be rewarding utilities for doing what is already being done. [Vol. II, T. 73]. If the PSC is concerned about the efficiency and operation of the broker system, that problem could be eliminated by other means, such as requiring all utilities to participate in a fully integrated dispatch system with all generating units in the state being loaded (that is, ordered to operate based upon a ranking of generating costs) from a central computer dispatch center. [Vol. II, T. 73]. This and other alternatives to an incentive, however, were never explored at the hearing. Thus the Staff and the PSC never identified any problem with the utilities' current economy sales efforts and never considered any solution, other than the twenty percent incentive, to solve this non-existent problem. Perhaps there is a problem and the incentive is the best way to deal with it, but one would never know that by reviewing <u>this</u> record. All that one would see is that there is no problem, but the utilities are to receive an incentive anyway.

One weakness with establishing an incentive to promote economy sales is that, as Mr. Hvostik (the Staff) acknowledged, the amount of economy sales are,99 to a certain extent, outside the selling utility's control. [Vol.

II, T. 26]. As all of the witnesses discussed, uncertainties associated with fuel prices, weather, ratepayers' demand for electricity, the reliability of generating units and transmission lines, and the available capacity on neighboring utility systems affect how much economy energy utilities would want to buy [Vol. II, T. 14, 25, 65, 161-62, 178, 185-86, 189, 205], and consequently, how much would be sold. If there is no buyer, there is no sale. Yet the twenty percent incentive addresses only the supply side of the sales. It contains nothing to encourage utilities to demand (that is, buy) economy energy. [Vol. II, T. 25-26]. As Mr. Haskins, Gulf's witness, observed, if everyone wants to sell, then no one is left to buy. [Vol. II, T. 185-86]. Thus the PSC is offering an incentive for something that is outside the utilties' control. [Vol. II, T. 26]. The PSC might as well offer an incentive to promote mild weather in order to reduce the demand for fuel oil.

As both Messrs. Hvostik (the Staff) and Dittmer (the Citizens) recognized, even without the twenty percent incentive, the utilities would still want to engage in the maximum amount of economy sales because of their obligation to minimize costs to ratepayers. [Vol. II, T. 25, 88, 119-20]. A utility will offer to sell economy energy at one point because at another point it will want to buy the cheaper economy energy to provide its customers with the lowest total cost of generation.

> COMMISSIONER CRESSE: Where is the incentive in that system [to eliminate the utilities' 20% share of the profit]?
>
> WITNESS DITTMER: One, you will hold down total costs for your customers, that's your obligation. When you decide to become a utility, and operate a utility, and say you are going to operate in a monopolistic environment, you are going to try to hold down total costs and this is one thing that you can do.

> The second thing is that there is an incentive between the utility companies. You know, they enter into these things because there is mutual benefits and you would hope that by me providing you service at a certain hour because I have it available at a cost that is less than yours, that you will reciprocate at a some point in time and offer me the lowest total cost. You know, it is an obligation and they should be doing this. If they are not, if you have a reason to conclude that they are not, then you should jump on them. [Emphasis added].

[Vol. II, T. 119-20].

The PSC's misplaced incentive (misplaced because the purchase of economy energy, rather than the sale, should be encouraged if the goal is to minimize costs) for something that is beyond the utilities' control can be contrasted with the absence of an incentive to encourage the lowest possible fuel costs, which is within the utilities' control. Although the PSC has never established a monetary split-the-savings incentive to keep fuel cost as low as possible, Mr. Wood, Tampa's witness, stated that there is an incentive to keep costs low and that the utility gets the opportunity to earn a fair and reasonable rate of return for doing that good job.

> Q. So is your company's ultimate goal to produce electricity at the lowest total cost to the ratepayers?
>
> A. Yes, sir, it certainly is our goal and we expect to be rewarded for doing it as well.
>
> ...
>
> Q. What incentives do you have now to keep your fuel costs as low as possible?
>
> A. We have the incentive to lower--keep our bills for our customers as low as possible.
>
> Q. Do you get a monetary split-the-savings with customers for that?
>
> A. We get to earn a fair and adequate return for doing a good job.

. . .

> Q. Mr. Wood, didn't you tell me that there is no monetary incentive to keep your total fuel cost low other than fair and reasonable rate of return you got in the most recent rate case?
>
> A. We certainly want to do a good job for our customers and we want to retain their good will by every means possible.

[Vol. II, T. 154-56]. By combining Mr. Wood's comments with the twenty percent incentive, it appears that when utilities have control over a way to reduce costs, for example, fuel costs, the PSC considers the opportunity to earn a fair and reasonable rate of return to be a sufficient incentive, but when a way to reduce costs is beyond the utilties' control, for example, economy energy sales, then the PSC believes that a monetary incentive in excess of a fair and reasonable return should be adopted. This is the inescapable conclusion gleaned from the record below.

Throughout the hearing, the utilities' witnesses were unable to state what efforts the utilities would take to encourage sales if an incentive was established. The witnesses claimed that the utilities were acting as diligently as possible now and that the utilities would continue to act diligently if no incentive were given. When asked what actions would be taken if the twenty percent was given, the responses were that the utilities would try harder because of some "psychic" incentive. No one was able to identify any specific activity. For example, when Tampa's witness, Mr. Wood, was asked to name a specific action that Tampa would take, he danced around the question by referring to incentives in general, neatly avoiding the simple request to name one step that the utility would take.

> Q. Now, if this proposal is adopted to remove the economy energy profits from base rates but the Commission declines to give any sort of incentive, straight pass-through to the customers, what

activities TECO is now doing to encourage economy sales would you stop doing?

A. I'd say that there is no question but what we would continue to diligently promote economy interchange sales. ...

Q. So there is something you could do to reduce the total fuel cost to jurisdictional customers that you might not do it it weren't for the fact that the economy profit moved [sic] out there?

A. There is nothing I know of that we're not trying to do and diligently trying to do.

...

Q. What actual activities -- and by actual activities I mean any engineering operational activities, any activity of the top management or middle management reviewing reports or issuing memorandums would you stop doing if you didn't get this incentive?

A. What would I stop doing? There's nothing I would stop doing, perhaps I wouldn't try as hard.

Q. But is that stopped from doing something by not trying as hard?

A. No. No.

...

Q. Now, if you were actually to -- Commission does take this profit out of base rates, and decides to give an incentive whether it's 1%, 20%, 50%, whatever the percent -- what actual activities can you describe to us that you would undertake doing?

A. Well, I think this goes all down through our system. I think our people would work harder if they knew that they could earn a return from the stockholders through their efforts, they'd work even harder than they do to produce the results of providing good service to our customers. ...

...

Q. So you can't name anything specifically that you would start to do as [sic: should be "except"] some sort of psychic incentive?

A. <u>That's correct</u>.

[Vol. II, T. 150-54 (emphasis added); the complete cross-examination on this point is reproduced in the appendix, pages A-28-32]. Even though this witness was testifying in favor of the twenty percent incentive, he could not give the PSC one tiny, specific thing that a utility would start to do if the incentive were granted.

FPC's witness, Mr. Wieland, suffered from this same inability to name anything specific.

> Q. <u>What actions would Florida Power Corporation take if it actually got a 20% incentive; actions it does not take now?</u>
>
> A. <u>I don't think I could give you any specific actions that we would take. ...</u>
>
> Q. <u>But you can't name anything specific that your company would do?</u>
>
> A. <u>Not anything specific</u>. I think it would take place either through--for the allocation of resources, through just better thinking, some innovation, could be any number of things, and I'm convinced that the results would be there, <u>but I can't name you one. Because if I could identify one specific item we'd probably go ahead and, you know, take a look at it anyway.</u> But I think in the long run if you provide incentives you're going to get results.

[Vol. II, T. 214-15].

What all utility witnesses fall back upon is that incentives will somehow increase sales. Yet no one could name anything specific. Just as no one was able to identify any problem with the utiltiies' current sales effort, no one could say how to improve that effort. Before the PSC creates an incentive to get the utilities to do what they should do anyway, the PSC should have some firm basis for finding that the incentive has a reasonable chance of achieving the desired result. Maybe that basis exists, but no one would discover it from reviewing this record. As will be discussed in Point II of this brief, this twenty percent profit retention will allow utilities to increase their earnings even if the utilities sell less economy energy that they did before the incentive was established. Therefore, the PSC is giving an incentive based upon vague references to trying harder, which could produce more profit for utilities and less economy energy for ratepayers.

The choice of a twenty percent incentive is another mystery, which will be explored in greater depth in Point II. Briefly, however, the record reveals that the twenty percent figure is unsupported by any study or analysis of any witness. [Vol. II, T. 26-27, 164, 212]. The PSC decided that an incentive was needed, and twenty percent sounded good.

To understand why the PSC adopted an incentive without bothering to support it, one can start by recalling that the level of economy profits has always been a highly controversial item in rate cases. As a result, in Gulf's most recent rate case order, the PSC stated that it would review the situation on a generic basis.

> Our review of this whole issue [level of economy sales and amount of profit] has lead us to conclude that the Commission should institute a generic investigation to consider a true-up of economy sales forecasts for all electric companies in the fuel adjustment clause docket.

Order No. 11498, at 17. [A-23]. It appears, however, that this investigation was done outside the context of a formal hearing, that matters that were not developed at the hearing were explored as part of this investigation, and that the PSC commissioners had, for the most part, made up their mind about what to do so that it did not matter what occurred at the hearing.

First, at the conclusion of one of the Commissioner's cross-examination of Mr. Wieland (FPC), one Commissioner told another Commissioner that he knew that the Commissioner would like the idea of an incentive once the Commissioner learned about it.

> COMMISSIONER CRESSE: Mr. Chairman, this looks more meritouous all the time.
>
> COMMISSIONER GUNTER: I thought that you'd like that when we started talking about it.

[Vol. II, T. 219]. Second, during his cross-examination of Mr. Hvostik (the staff), one of the Commissioners made reference to a 24 May 1983 memorandum by the Director of the PSC's Electric and Gas Department, which was never made part of the record. [Vol. II, T. 39-43]. By not knowing what reports the PSC is relying upon, a party is unable to address it in the party's direct testimony or in cross-examination. Use of reports such as this might cause any reasonable person to rely upon what he had read rather than upon what he heard at a hearing. Through cross-examining a witness about this report (actually it was more akin to a direct examination that was intended to support a decision that one wanted to make), one of the Commissioners was trying to make the point that over the past few years, the ratepayers would have been better off with economy profits in the fuel adjustment clause, rather than in rate cases, with the utilities retaining twenty percent of the profits. What the Commissioner failed to recognize, however, is that the ratepayers would have been even better off if there had been a true-up, with the customers being credited with 100% of the profit. All that this non-exhibit shows is that the projected level of profits in rate cases has been grossly inaccurate. This memorandum is a great argument for removing economy profits from rate cases and considering actual amounts, with true-ups, in the fuel adjustment clause. It says nothing about incentives.

Third, during the hearing, one of the Commisisoners seized upon Exhibit 1, page 1 [Vol. II, Ex. 1, page 1] [A-33] to support his conclusion that the utilities need an incentive to engage in economy sales. [Vol. II, T. 114-18, 130-32]. Mr. Dittmer (the Citizens), the exhibit's sponsor, disagreed that this exhibit could lead to any conclusion about incentives. [Vol. II, T. 115, 134]. The exhibit's purpose was to identify the dollar amount of each utility's economy profits. [Vol. II, T. 62]. It had nothing to do with incentives, as Mr. Haskins (Gulf) [Vol. II, T. 183-84] and Mr. Wieland (FPC) [Vol. II, T. 208-10] agreed. In spite of this testimony, the Commissioner persisted in believing that the exhibit supported the need for incentives. [Vol. II, T. 229].

To show the extreme to which the Commissioner valued this exhibit, after Mr. Dittmer stated that the exhibit failed to support the Commissioner's conclusion, the Citizens thought that the matter had been put to rest and did not raise the exhibit with the next witness, Mr. Wood (Tampa). When it came time for the Commissioner to cross-examine Mr. Wood, which is after all the parties have had the opportunity to cross-examine the witness, the Commissioner got Mr. Wood to agree that this exhibit supported the need for an incentive9[Vol. II, T. 17273], which the witness would, of course, do because his utility sells the most economy energy and stands to gain the most from the twenty percent profit retention. Realizing that this exhibit was being misused, the Citizens got the next witness, Mr. Haskins (Gulf), to agree that the exhibit did not support the Commissioner's conclusion. [Vol. II, T. 183-84]. At that point, the Commissioner interrupted the Citizens' cross-examiantion and attempted to use Mr. Haskins to rehabilitate the exhibit. [Vol. II, T. 184-86]. Rather than acknowledging defeat when Mr. Haskins stood firm and refused to help revive the exhibit [Vol. II, T. 186], the Commissioner (1) dismissed Mr. Haskins's conclusion on the ground that Gulf should not be compared, for incentive purposes, with the other three utilities because Gulf is part of the Southern Company System rather than part of Peninsular Florida and the broker system [Vol. II, T. 186], and (2) referred to the exhibit when explaining his vote in favor of an incentive. [Vol. II, T. 229].

Fourth, the only witness who opposed the twenty percent incentive was Mr. Dittmer (the Citizens). The longest cross-examination of Mr. Dittmer was by one of the Commissioners, not by the Staff or a utility. This Commissioner's cross-examination [Vol. II, T. 104-135] actually is longer than the combined cross-examination of all the parties in the proceeding. [Vol. II, T. 81-104: even these pages include questions by one of the Commissioners, e.g. T. 84-86]. A review of the Commissioner's cross-examination shows that the Commissioner was engaged in advocating on behalf of incentives rather than eliciting facts from the witness. At various points in the cross-examination, the Commissioner would cut-short the witness's response and refuse to allow the witness to respond to the question. For example, twice on transcript page 108, the witness is cut-off in mid-sentence after saying no more than three words. This mode of examination is remarkable because the PSC never lets parties cut-off a witness and always allows a witness to explain his answer and to say whatever he wants, no matter how evasive, nonresponsive, or irrelevant the comment.

Fifth and last, during his cross-examination of Mr. Hvostik (again which was more akin to a direct examination), one of the Commissioners made reference to wheeling charges (payment for use of utility B's transmission lines to carry energy from utility A to utility C) and tried to make the point that wheeling charges are a detriment to making more economy sales. [Vol. II, T. 45-46]. No witness discussed this in his prefiled direct testimony, so apparently the Commissioner was referring to information that is outside this record. To repeat what was said earlier, using this non-record information might cause a reasonable person to rely upon that information rather than upon what he heard at a hearing. Maybe a problem with wheeling charges is a good reason to use an sales incentive, but one would not know that from this record. Basic due process considerations require that a party have the opportunity to confront the evidence that is to be used by the decisionmaker.

As this Court has noted, "[g]overnmental bodies authorized by law to pass upon utility rates must base their decisions upon evidence and not upon some undisclosed factor or factors." North Florida Water Co. v. City of Marianna, 235 So.2d 487, 489 (Fla. 1970). In the proceeding below, which affects utility rates, it appears that the PSC did not put all of its cards on the table. The PSC had decided that an incentive was needed and, therefore, was unconcerned about the need to develop a record.

To repeat, if the matter were fully explored, there may be excellent reasons for granting an incentive to encourage economy sales. This record, however, supports nothing of the kind. The PSC has failed to identify any problem with the utilities' current efforts to sell economy energy, as Mr. Dittmer's uncontroverted testimony on this point makes clear. The utilities acknowledge that they are diligently pursuing economy sales now and will continue that diligence if no incentive is given. No witness was able to given one, single, simple specific example of what a utility would start to do if an incentive were granted. All of the witnesses agreed that the amount of economy sales is outside the selling utility's control, yet the PSC established an incentive anyway. The ratepayers are paying the fixed costs of, and fair and reasonable return on, the generating plants from which economy sales are made. The utilities face no risk by making these sales, make no investment to engage in these sales, and have no unrecovered cost associated with these sales. To use slang, this profit is pure gravy.

On many occasions, this Court has stated that its standard on review is whether the PSC Order at issue is supported by competent, substantial evidence. See, e.g., Citizens v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982); De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). This Court has also explained that it will reverse a PSC Order that is

> arbitrary and unsuppported by substantial competent evidence, or in violation of a statute or a constitutionally guaranteed right.

Shevin v. Yarborough, 274 So.2d 505, 509, (Fla. 1973); Citizens v. Public Service Commission, supra, at 538. As has been shown, all of these conditions exist in the case at bar.

The PSC's decision to allow the utilities to retain 20% of the economy sales profits should be set aside as a departure from the essential requirements of law.

II. THE SPECIFIC INCENTIVE ADOPTED BY THE PUBLIC SERVICE COMMISSION IS ARBITRARY OR CAPRICIOUS BECAUSE IT WAS DEVELOPED WITHOUT REGARD TO THE RECORD, WHICH SHOWED, AMONG OTHER THINGS, THAT THE INCENTIVE THAT WAS ADOPTED WAS PULLED OUT OF THIN AIR, WILL ENABLE A UTILITY TO MAKE MORE PROFIT EVEN IF IT FAILS TO REACT TO THE INCENTIVE AND MAKES FEWER SALES, AND WILL INCREASE A UTILITY'S RATE OF RETURN EVEN THOUGH THERE IS NO ADDITIONAL RISK, NO ADDITIONAL INVESTMENT, AND NO UNRECOVERED COSTS ASSOCIATED WITH SELLING ECONOMY ENERGY

Agency action is arbitrary or capricious when it is irrational, illogical, or unsupported by facts.

> A capricious action is one which is taken without thought or reason or <u>irrationally</u>. An arbitrary action is not supported by <u>facts or logic</u>, or despotic. [Emphasis added.]

<u>Agrico Chemical Co. v. State Dept. of Environmental Regulation,</u> 365 So.2d 759, 763 (Fla. 1st DCA 1978), <u>cert. denied</u>, 376 So.2d 759 (Fla. 1979). <u>See also</u> <u>Florida Bridge Co. v. Bevis</u>, 363 So.2d 799,801 (Fla. 1978) (action arbitrary because unsupported by logic, precedent, or policy). Building upon the discussion in Point I, this section of the brief will demonstrate that even if the record supports the general need for an incentive to encourage economy sales, the specific incentive that the PSC adopted is arbitrary or capricious for four reasons.

First, the choice of twenty percent as the amount of the incentive was pulled out of thin air, no study, analysis, memorandum, or piece of paper supports it. Neither Mr. Hvostik (the Staff), who suggested the figure, nor any of the utility witnesses, all of whom supported the amount, were able to say why twenty percent was chosen or how it was developed.

> Q. How was the suggested twenty percent figure developed?
>
> A. The twenty percent figure was not developed from any formula. No study has been made on what the exact percentage should be. . . . [Emphasis added.]

[Vol. II, T. 14: Hvostik].

> Q. Now, your 80/20 split is not based on any study, is that correct?
>
> A. That's correct.
>
> Q. It's basically your subjective opintion [sic: should be "opinion"] that if a 20% incentive is given that will increase the amount of sales that the companies want to make?
>
> A. Yes. It is may [sic: should be "my"] feeling that the 20% incentive will either -- it should maintain the current level of economy sales, in my opinion will likely increase the amount of economy sales that are occuring.
>
> Q. Do you think that without this incentive the amount of economy sales would drop?
>
> A. I think that's a very definite possibility.
>
> Q. Do you have any studies to indicate that?
>
> A. No, I don't see any way to make a study like that. [Empahsis added].

[Vol. II, T. 26-27: Hvostik].

> COMMISSIONER CRESSE: Now, have you measured, or have you done any study to determine whether or not under the 80/20 proposal the ratepayers would have been better off or worse off as opposed to the present system?
>
> WITNESS HVOSTIK: No Sir, I haven't. [Emphasis added].

[Vol. II, T. 43].

> Q. Now, I'd like to change a bit, to your advocacy of saying the 20% is the minimum incentive necessary to provide real economic incentive. Have you conducted any studies to show that 20% is the minimum necessary?

> A. No, sir, I have not. In fact, I think in my testimony I say it's a matter of judgment.
>
> Q. Well, do you have any studies to show that maybe the correct incentive would be a 10%, 1% or --.
>
> A. No sir, I'd say that it's a matter of judgment and in my judgment and in my opinion 20% is the minimum to make a real effective economic incentive. [Emphasis added].

[Vol. II, T. 164: Wood].

> Q. Now, you state in your testimony that Mr. Hvostik's 20% incentive proposal is well founded. Is that correct?
>
> A. Yes.
>
> Q. Have you seen any studies by you or any of the other witnesses in this proceeding to show that 20% is necessary, or the 20% is appropriate?
>
> A. I think that's a matter of judgment.
>
> Q. Do you have anything that shows that 1% or 1 and 1/2% would be any better or worse?
>
> A. No, I can only say I think if you used the 1% as an example, I don't think there's sufficient incentive there to do any good. I would agree with the people from Tampa that 20% is probably about as low as you want to go.
>
> Q. But you don't have any study to show that.
>
> A. No, I don't. [Emphasis added].

[Vol. II, T. 212: Wieland]

These witnesses' bald, unsubstantiated assertions parading as informed opinions fail to constitute evidence that the PSC can rely upon to support its decision. See Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980) (reliance upon conclusory statements is insufficient to support PSC's action).

All of the witnesses fall back upon a subjective feeling that an incentive is necessary and that twenty percent sounds right. If the initial

Staff proposal had been forty, fifty, or sixty percent, the PSC would have heard witnesses endorse that amount as a minimum that felt right. Obviously, the utilities will endorse any incentive that is proposed because it increases their share of the pie. The PSC might as easily ask the president of a utility whether he wants his rates increased and use that affirmative response as all the evidence needed to support and grant an unsolicated rate increase.

The PSC has used gut reactions in lieu of even the most ill-conceived and conducted study to give the utilities twenty percent of the revenue that, up to now, had been credited to ratepayers or would have been credited to ratepayers if the estimated level of economy profits had been accurately projected in rate cases. Before taking away money from ratepayers and giving it to utilities, the PSC should have some evidence that there is a problem, that an incentive is needed, and that the percentage chosen as the incentive is reasonably related to producing the desired result. Based upon this record, there is no way of knowing whether twenty percent is within a range of fair and reasonable incentives that will sufficiently motivate the utilities but not give away the store. The PSC has failed to give serious thought, on the record, to how to achieve its goal of increasing economy sales. Rather than taking a step back and saying that the percentage amount of an incentive needed more study, the PSC grasped the first idea it heard.

Second, the structure of this incentive is insufficiently related to encouraging additional economy sales because a utility will earn twenty percent of the profit for merely engaging in economy sales. Even if a utility sells less economy energy that it did before the incentive was established, it will receive twenty percent of the profit. A utility could sell a decreasing amount of economy energy for each of the next ten years and still be eligible for the incentive.

> Q. And under your proposal even if the company sold less economy -- had less economy profits than from the previous years, made less sales and less profits than the previous year, and maybe made only half the effort, they would still retain some 20% of the profit as an incentive?
>
> A. That's true.

[Vol. II, T. 29-30: Hvostik]. The twenty percent is being given to the utilities in the <u>hope</u> that it will lead to an increase in sales. It is neither tied to any increase in sales nor calculated to reward <u>only</u> those who actually increase their sales. Every utility, regardless of performance, participates. There is no standard that must be met to qualify for the reward. The mere act of engaging in economy sales is enough to qualify for a reward. [Vol. II, T. 74].

Mr. Hvostik worked through several calculations to show how the 80%-20% split would operate. [Vol. II, T. 15, 31]. These exercises revealed the incentive's arbitrary nature. Consider the following hypothetical.

<u>Year Zero</u>

> (1) Year Zero is prior to the incentive.
>
> (2) In Year Zero, utility A sells 100 million kilowatt-hours of economy energy at an average profit of 1¢ per kilowatt-hour, for a profit of $1 million.
>
> (3) The $1 million dollars of economy profit is credited to ratepayers in a rate case.

Year One

(4) Year One is the first year of the 20% incentive.

(5) To transfer economy profits from base rates (rates set in a rate case) to the fuel adjustment clause, the $1 million credit for economy profit is removed from base rates. Thus base rates increase $1 million. In order for the ratepayers to break even, they must be credited with $1 million in profit through the fuel clause.

(6) In Year One, utility A sells 100 million kilowatt-hours of economy energy at an average profit of 1¢ per kilowatt-hour, for a profit of $1 million.

(7) In the fuel clause, the ratepayers are credited with $800,000, and utility A retains $200,000.

(8) Therefore, the ratepayers are worse-off by $200,000.

(9) Utility A has made an additional $200,000 even though its sales have not increased.

Year Two

(10) Year Two is the second year of the incentive.

(11) In Year Two, utility A sells 80 million kilowatt-hours of economy energy at an average profit of 1¢ per kilowatt-hour, for a profit of $800,000.

(12) In the fuel clause, the ratepayers are credited with $640,000, and utility A retains $160,000.

(13) Therefore, compared to Year Zero (no incentive), ratepayers are worse-off by $360,000 ($1 million minus $640,000). Compared to Year One, ratepayers are worse off by $160,000 ($800,000 credit minus $640,000 credit).

(14) Even though its sales have declined since the incentive started and are less than the level in Year Zero, utility A has made an additional $160,000.

It appears, then, that the PSC is rewarding the mere act of selling economy energy. There is no standard or base level that triggers a sharing of the profit. Without a trigger mechanism, even though the ratepayers bear the full brunt of lower profits (because their revenue credit is less, and 20% of this lower amount has to be paid to the utility), they are denied the full benefit when profits rise. Stated the other way, even though the utility is insulated from the consequences of lower sales (because it is still recovering its costs and a return through base rates), it comes out of its shell to scoop up part of any profit.

This is an illogically structured incentive. It is not aimed at those who sell more. It is aimed at those who merely sell. The ratepayers can be worse off at the same time that the utility is better off. Given that the goal of the 80%-20% split is to increase economy sales and profits, a rational incentive would make some attempt to ensure that a utility improves its performance before it participates in the profit sharing.

Third, as explained under point I, a utility particpates in this incentive even though (1) the ratepayers are paying the full cost (including a fair and reasonable return on the shareholders' investment) of the generating facilities from which economy sales are made, and (2) from a utility's perspective, economy sales entail zero risk, require zero additional investment, and leave zero unrecovered costs. Thus there is no countervailing tendency to try to avoid these sales. [Vol. III, T. 74]. No witness identified any problem with the utilities' economy sales efforts. In addition, as was discussed in point 1, the Florida Electric Power Coordinating Group already operates a broker system to encourage and coordinate economy sales. Thus this incentive rewards utilities for what would occur anyway. [Vol. II, T. 73, 74]. One sees, then, that the PSC has established an incentive when the utilities' current sales effort is unsullied, when there is every reason (including its statutory obligation to minimize its cost of providing adequate service) for a utility to promote these sales, and when these sales will occur in the normal course of utility operations. Therefore, the PSC has illogically, and contrary to the record, created an incentive where none is needed.

Fourth and last, as was also brought out in point I, the level of economy sales is, to a certain extent, beyond the control of the selling utility. Yet the incentive ignores the buyer, completely focusing instead upon the seller. A utility can try all it wants to sell economy energy, but if no one buys, the utility is out of luck. The proposal is arbitrary because certain utilities are in a better natural position (due to location, neighboring utilities' needs, etc.) to make economy sales, even though other utilities pursue the sales with equal intensity. [Vol. II, T. 72]. Basically, the PSC is rewarding a utility for weather conditions (which affect demand), for relative fuel prices (the price of coal versus oil, which affects the price of generating electricity), and for those internal operating conditions that cause a utility to buy economy energy. It appears that the PSC is using this new treatment of economy profits to reward blind luck rather than hard work.

The PSC's reliance upon gut reactions, use of an illogically structured incentive that is unrelated to improved performance, creation of an incentive to address an unindentified problem, and reward of chance over enterprise makes Order No. 12923 arbitrary or capricious. It should be set aside as a departure from the essential requirements of law.

III. RATHER THAN ADHERING TO ITS POLICY OF ADOPTING TWO-SIDED INCENTIVES (REWARDS AND PENALTIES), THE PUBLIC SERVICE COMMISSION HAS ACTED ARBITRARILY OR CAPRICIOUSLY OR IN VIOLATION OF DUE PROCESS BY ADOPTING A ONE-SIDED INCENTIVE (REWARDS ONLY, NO PENALTIES).

The PSC has deviated, without explanation, from its long-standing policy of adopting two-sided incentives (rewards and penalties). Since 1980 when it approved the Generating Performance Incentive Factor, the PSC has consistently made clear that one-sided incentives (penalties without rewards or rewards without penalties) are unfair to all parties and has declined to seriously consider the various one-sided proposals that it hears.

As advocates trying to advance our own interests, the Citizens have argued that utilities are obligated to provide safe, reliable service at the lowest total cost possible for their customers, and that, in return, utilities are rewarded through certain privileges unavailable to regulated industries. As Mr. Dittmer explained,

> Utilities have an obligation to provide safe, reliable service at the lowest total cost possible for their customers. Furthermore, companies have an obligation to provide service to all customers without discrimination. These obligations do not go "unrewarded" per se, but rather, in exchange for these obligations, utility companies receive certain privileges not afforded industries operating in a competitive environment. First and foremost, utilities have the right to operate without fear of competition from entities providing identical products. Second, the service being provided in many cases is considered a "necessity" and thus, the demand is relatively inelastic. A third right or privilege afforded monopolistic utilities is the right of eminent domain, or the right to acquire private property when it is shown to be in the public interest. And fourth, utilities are afforded the opportunity to earn a fair rate of return. In summary, utilities

> operating as regulated monopolies have certain obligations--one of which is to minimize their costs in providing adequate service to their customers.

[Vol. II, T. 66-67]. Thus the Citizens have advocated one-sided incentives (no rewards, just penalties) that would come into play only if a utility failed to fulfill its obligation to minimize cost in providing adequate service.

The PSC has routinely rejected this one-sided approach as being unfair. For example, in the PSC's 1983 hearings on adding St. Lucie Unit No. 2 to FP&L's rate base, the Citizens sponsored the testimony of Philip E. Miller, who suggested that a form of ratemaking be adopted that would reduce FPL's rates if the new nuclear unit failed to meet certain performance standards. The PSC's final order in that proceeding was sharply critical of Mr. Miller's proposal because the proposal was one-sided, with a penalty but no reward for superior operating performance.

> Mr. Miller's proposal suffers from several deficiencies. First, his sliding scale would provide for penalties but no rewards for superior performance.

Order No. 12348, at 14 [A-36]. The Order went on to explain that a "reward/penalty" program was being established as an incentive to operate the new unit efficiently. <u>Id</u>. at 14-15 [A-36-37].

Imagine the Citizens' surprise when the Staff proposed a one-sided incentive for economy energy profits. The Citizens had always been told that one-sided penalty-only proposals were wrong, but now the Staff was advocating a one-sided reward-only incentive.

Thinking that the PSC would be consistent from case-to-case and reject the Staff's one-sided incentive, Mr. Dittmer discussed the PSC's response to

Mr. Miller and referred to two other incentive programs that have rewards and penalties.

> [A] distinction should be made between the Generating Performance Incentive Factor (GPIF) clause and the proposed incentive factor in the Conservation Cost Recovery Clause and what the Staff is proposing in this case. In the GPIF and the Conservation Cost Recovery Clause there is the possiblity of reward and <u>penalty</u>. In the Staff's proposal in this case there is only the opportunity for reward--never a penalty. At least with the GPIF the companies must do better than some calculated "standard". In this proposal there is no standard to be achieved first, and thus, the companies can enjoy additional profits immediately with no added risks or effort.

[Vol. II, T. 68-69]

Apparently unconcerned about its past decisions and the need to reconcile its actions, the PSC shocked the Citizens by endorsing the Staff's one-sided approach to incentives. As advocates, the Citizens are entitled to advance their own interests, as are the utilities. Basic due process requires, however, that a regulatory body, such as the PSC, adhere to its decisions from case-to-case or at least explain its deviations. Consistency dictates that if the PSC views penalty-only ratemaking incentives as unfair, then a reward-only incentive, as was adopted in the case at bar, also should be viewed as unfair. [Vol. II, T. 69].

In <u>Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission</u>, 443 So.2d 92 (Fla. 1983), the telephone company argued, among other points, that the PSC's decision to disallow the company's charitable contribution as an operating expense was arbitrary or capricious or a violation of due process. <u>Id</u>. at 95-97. The Conpany claimed that since 1977 the PSC had been inconsistent in its decisions, sometimes allowing the expense and sometimes disallowing it. <u>Id</u>. at 95-96. In rejecting the company's argument, this Court explained that although the PSC had been inconsistent in its charitable contribution decisions between 1977 and 1981, a clear policy to consistently disallow the expense had emerged in 1981. Thus the PSC acted within its discretion to disallow the expense. Id. at 96-97. Given that the disallowance or allowance of charitable contributions was a non-rule policy decision, Southern Bell appears to indicate that once a clear industry-wide practice emerges, an agency, such as the PSC, cannot deviate from its unchallenged policy. If the non-rule policy is challenged by conventional methods of proof and the various actions that could be taken are all supported by the record, then the agency need not follow its past practice. If, however, as the PSC itself has recognized,

> an existing policy is not contested, it may be presumed that all parties agree to its continued application, and McDonald [v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977),] and Florida Cities Water Company [v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980),] would preclude our adoption of a new policy in such a situation. [Emphasis added.]

In re Petition of Florida Power Corp., Order No. 12009, at 2 [A-39]. Accord, e.g., Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980); State v. Hawkins (Holiday Lake Water Co.), 364 So.2d 723 (Fla. 1978); City of Plant City v. Mayo, 337 So.2d 996 (Fla. 1976); McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

Applied to the case at bar, Southern Bell, PSC Order No. 12009, and the other authorities cited in the previous paragraph show that the PSC improperly deviated from its long-standing policy of rejecting one-sided incentives and adopting two-sided, reward and penalty incentives. No party challenged, through means of conventional proof or otherwise, the policy of two-sided incentives. Thus the PSC's deviation from its uncontested non-rule policy is arbitrary or capricious or a violation of due process. Even if the PSC could have deviated, it should have explained the reasons for its change of heart.

> To the extent an agency may intend in its final order to rely upon or refer to policy not recorded in rules for discoverable precedents, that policy must be established by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action. Florida Cities Water Co. v. Public Service Commission, 384 So.2d 1280 (Fla. 1980); Anheuser-Busch, Inc. v. Dept. of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA 1981); McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

E.M. Watkins & Co. v. Board of Regents, 414 So.2d 583, 587-88 (Fla. 1st DCA 1982), review denied, 421 So.2d 67 (Fla. 1982). Accord, International Minerals and Chemical Corp. v. Mayo, 336 So.2d 548, 553 (Fla. 1976) ("The requirement of explicit fact findings makes for more careful consideration by the Commission, helps assure that this Court does not usurp the PSC's fact finding prerogatives, and otherwise facilitates review of Commission orders by this Court.")

Order No. 12923, however, is silent about why the PSC has spurned a two-sided incentive and embraced a proposal that it had previously rejected as unfair. Nothing in the Order explains this drastic reversal. Even Mr. Hvostik, the sponsor of the one-sided incentive, told the PSC that,

> Yeah, I really believe that incentives ought to work both ways.

[Vol. II, T. 37].

During the hearing, the utility witnesses tried to make the point that this one-sided economy energy incentive actually did contain a penalty because the less economy energy that a utility sold, the less would be its twenty percent. Thus the utility would be penalized for selling less economy energy. [Vol. II, T. 158-59]. This is tantamount to say that, even though there are not risks, additional investments, or unrecovered costs associated with making economy sales and even though the utility's base rates and fair rate of return are unaffected by the amount of its economy sales profits, the utility is being penalized because no one will pay it for work it failed to do. One might as well claim that one is being penalized because one failed to pick the winner of the Kentucky Derby or because one's car is too slow to win the Daytona 500 auto race.

The flip side of the utilities' strained argument is that less of a penalty is a reward. If, as the utilites believe, making $800,000 in economy profit as opposed to making $1,000,000 is a penalty, then being docked $100,000 for making fewer sales as opposed to being docked $200,000 is a reward.

In any event, these semantic distinctions are irrelevant for this appeal. Even if what is called a reward-only or a penalty-only incentive contains both rewards and penalties, the PSC's policy has been to establish a base level of performance and to provide monetary incentives for rising above that level and monetary penalties for falling below. The PSC failed to follow this clear, established policy in the case at bar. It looked at one side instead of its usual policy of two.

Order No. 12923 should be set aside as arbitrary or capricious or a violation of due process.

CONCLUSION

The record in the instant case is deficient. The PSC has been unable to identify any problem with the utilities' current economy sales efforts and has failed to show why an incentive is needed. No utility was able to name one tiny action it would take if it received the incentive. Even if there were good reasons for the PSC's actions, which the Citizens doubt, one would be unable to determine that from this record. In addition, the choice of twenty percent as the incentive is based upon gut reactions masquerading as informed opinion. The specific incentive chosen is illogically structured and unrelated to improved performance. Finally, the PSC's adoption of a one-sided penalty is an improper deviation from its uncontested, long-standing policy of considering only two-sided incentives.

The PSC's decision in Order Nos. 12923 and 13092 to allow utilities to retain twenty percent of economy sales profits should be set aside for being a departure from the essential requirements of law and for being arbitrary or capricious or a violation of due process.

Respectfully submitted,

Jack Shreve by SF

Jack Shreve
Public Counsel

Stephen Fogel

Stephen Fogel
Associate Public Counsel

Office of the Public Counsel
624 Crown Building
202 Blount Street
Tallahassee, FL 32301

(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
Case Nos. 64,928 and 65,200

I HEREBY CERTIFY that a true copy of the Citizens' Revised Initial Brief has been furnished by U.S. Mail or by hand-delivery to the following parties on this 14th day of August, 1984.

Matthew M. Childs, Esquire
Steel, Hector & Davis
320 Barnett Bank Building
Tallahassee, FL 32301

Patrick K. Wiggins, Esquire
Messer, Rhodes & Vickers
Post Office Box 1876
Tallahassee, FL 32302

Lee G. Schmudde, Esquire
Walt Disney World Company
Post Office Box 40
Lake Buena Vista, FL 32830

James D. Beasley, Esquire
Lee L. Willis, Esquire
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, FL 32302

G. Edison Holland, Jr., Esquire
Beggs and Lane
Post Office Box 12950
Pensacola, FL 32576

Richard W. Neiser, Esquire
James A. McGee, Esquire
Post Office Box 14042
St. Petersburg, FL 33733

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

John Radey, Esquire
Holland & Knight
Post Office Drawer 810
Tallahassee, FL 32302

William S. Bilenky, General Counsel
Robert Vandiver, Esquire
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Neil Chonin, Esquire
Floridians United for
Safe Energy
304 Palermo Avenue
Coral Gables, FL 33134

Stephen Fogel

Stephen Fogel