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

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

REPLY 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

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CITATION OF AUTHORITIES

SYMBOLS AND DESIGNATION OF PARTIES

The symbols and designation of parties used in the Citizens' Initial Brief are continued in this Reply Brief, with several additional designations.

The Citizens Initial Brief will be referred to as "Citizens' Brief at _____."

The PSC's Answer Brief will be referred to as "PSC's Brief at _____."

Gulf's Answer Brief will be referred to as "Gulf's Brief _____."

Tampa's Answer Brief will be referred to as "Tampa's Brief at _____."

For purposes of responding to the three answer briefs, the PSC, Gulf, and Tampa will be referred to collectively as "the Appellees."

STATEMENT OF THE CASE AND OF THE FACTS

The Citizens adhere to the Statement of the Case and of the Facts presented in their Initial Brief and raise seven areas of disagreement with the PSC's, Gulf's, and Tampa's Statements.

First, the Appellees have incorrectly represented that the Staff's two-fold proposal (to consider the profits in the fuel proceeding and to give the utilities 20% of the profit) are inextricably tied. This is wrong. In his prefiled testimony [Vol. II, T. 12-13] and in his summary [Vol. II, T. 18], the Staff's witness, Mr. Hvostik, talked about two separate proposals. Mr. Dittmer, the Citizens' witness, treated the two proposals as separate [Vol. II, T. 64-66] and was never cross-examined about whether the Staff's two proposals should be treated as one. The first time that the Appellees have raised this argument is on appeal. Gulf's witness, Mr. Haskins, obviously considered the two proposals as separable because he agreed with the first part but disagreed with the second. [Vol. II, T. 177-70]. Finally, as the Order on appeal shows, the PSC itself considered the Staff proposal to have two distinct parts. After noting that all of the parties agreed to remove the economy profits from rate cases and to consider them in the fuel proceeding, the PSC then went on to address the incentive proposal. Order No. 12923 at 2. [Vol. I, R. 9] [Appendix to Initial Brief at A-2 (second full paragraph)]. The PSC never stated that the resolution of the incentive proposal was affected by or tied to the decision about which proceeding (rate case or fuel clause) would be used to account for the profit.

Second, other than the disagreement just discussed, the PSC's Answer Brief fails to clearly specify any area of disagreement with the Citizens' Statement as directed by Rule 9.210(c), Florida Rules of Appellate Procedure. In spite of this failure, the PSC offers its own Statment of the Case and of the Facts, which, for the most part, rehashes the facts laid out in the Citizens' Statement. Except for the final paragraph on page 4 of the PSC's Brief, the PSC's Statement is surplusage, which should be disregarded. See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Trolinger v. State, 296 So. 2d 87 (Fla. 2d DCA 1974).

Third, Tampa incorrectly states (on pages 1-2 of its Brief) that the Citizens failed to describe the range of opinions about the level of incentives. One can find this description on page 3 of the Initial Brief.

Fourth, although Tampa states that "[t]here are numerous alternatives available to utility management to increase economy interchange sales" (Tampa's Brief at 2), there is no citation to where in the record these numerous alternatives were discussed (because, of course, they were never discussed). When asked point blank to name one action that Tampa would take, Mr. Wood, Tampa's witness, agreed that he was unable to name anything specific. [Vol. II, T. 154]. The example that Tampa gives in its Statement (page 2; repeated in Gulf's Brief at 6) is something that it could now do, and Mr. Wood stated that Tampa would not stop doing what it could do now if the ratepayers received 100% of the profit. [Vol. II, T. 150, 152, 153].

Fifth, Tampa and Gulf accuarately point out that, during Tampa's cross-examination, Mr. Dittmer (the Citizens) agreed that the old treatment of the profits had an incentive. These parties, however, failed to report that Mr. Dittmer explained, also during Tampa's cross-examination, that the old

incentive was unintentional and that, even without a 20% share of the pie, additional incentives would exist under the new ratemaking treatment. [Vol. II, T. 87-88, 89-90].

Sixth, according to Gulf's Brief (page 3), Mr. Haskins (Gulf) stated that an incentive in the form of a reward is consistent with what the PSC had done in other areas. A review of the record, however, reveals that Mr. Haskins named only one specific program: the Generating Performance Incentive Factor ("GPIF"). [Vol. II, T. 179]. As Gulf well knows, the GPIF, unlike the order on appeal, provides for rewards and penalties based upon surpassing or falling below a performance standard. See Order No. 9558 at 2 [Appendix B to PSC's Brief].

Seventh and last, the Appellees' Statements refer to facts that allegedly show that the ratepayers would have been or will be better off under the new treatment of economy profits than if the old system had been retained. Whether or not these facts show what the Appellees claim is precisely the reason for this appeal and is more properly treated in the argument section than in a statement of facts. In the argument section of this brief, one will see that these facts are unable to withstand analysis and are actually unsupported suppositions rather than uncontrovertible facts.

ARGUMENT

I. NO SUPPORT FOR AN INCENTIVE.

Answer Briefs are curious creations. Having been given an opportunity to join on the issues, appellees ignore what could be the most interesting aspect of an appeal, such as the environment in which the order on appeal was issued. Although appellees may refuse to touch this situation with a ten-foot pole, it exists nonetheless, and it might come back to haunt those who are now wishing away the problem.

In the case at bar, the environment below is really what is on appeal. The Citizens concede that the PSC could have done what it did if it had properly developed a record to support its action. The crux of the instant controversy is that the PSC has rendered an unfair decision and has reached it in a procedurally incorrect manner. Whatever the outcome of this appeal, this Court needs to be aware of the routine procedural improprieties that are the normal order of business in proceedings below.

As the appellees should know but made no effort to convey to this Court, the Citizens are in favor of properly constructed incentives when they are shown to be necessary. Contrary to the assertion on page 11 of Gulf's Brief, the Citizens want to be fair to both themselves and the utilities. The PSC's new treatment of economy profits contains incentives that the Citizens support. As Mr. Dittmer (the Citizens) explained, in order to fulfill its obligation to minimize costs to ratepayers, a utility will offer to sell economy energy at one point because at another time it will want to buy the cheaper economy energy to provide its customers with the lowest total cost of generation. [Vol. II, T. 119-20]. In return for minimizing

costs, utilities are rewarded with certain privileges that are unavailable to unregulated industries: monopolistic service areas; relatively inelastic demand due to providing a necessity of life; the right of eminent domain; and the opportunity to earn a fair rate of return. [Vol. II, T. 66-67].

Apparently contending that these incentive are insufficient to ensure that the utilities will maintain their end of the regulatory bargain, the PSC and the utilities want to exact an additional payment to guarantee the utilities' performance. This is particularly troubling because the ratepayers pay the fixed costs of the generating units from which economy energy is sold. [Vol. II, T. 24, 64, 157]. Even if no economy sales are made, the utilities are still given the opportunity to earn a fair and reasonable rate of rate on their investment in those units. 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. [Vol. II, T. 74-75, 150, 158].

As explained in the Initial Brief, no one identified any deficiency in the utilites' sales efforts under the old treatment of economy profits. The PSC moved the accounting from rate cases to the fuel clause in order to eliminate the controversy about projecting the level of profits. This problem with the projections gave rise to an <u>unintentional</u> incentive [Vol. II, T. 89-90], which the utilities and the PSC object to correcting. The move had nothing to do with dissatisfaction about sales efforts. The utilities said that they were trying as hard as possible to make sales under the old system and that they would continue that effort under the new system. [Vol. II, T. 150, 152, 153].

These sales are going to occur anyway through the Florida broker system. [Vol. II, T. 73]. The proponents of the 20% profit giveaway were unable to produce any concrete evidence to show a need to give the utilities 20% of the profit. Try as they might, the witnesses were unable to explain what the utilities would do to improve sales. It would have been one thing if the utilities had been able to identify some action that they would like to take but that they could not afford to do without a share of the profit. At least then the PSC could point to something that would occur. That, however, was not the case, and it can never be the case because the selling price always covers the variable cost of making the sale plus a profit. [Vol. II, T. 63]. It is impossible to lose money on a sale.

The PSC's Brief acknowledges that even though the economy energy interchange system has existed for five and a half years, the witnesses were unable to give any specific examples of what additional action would be taken if the utilities were given 20% of the profit.

> The utility witnesses were not very specific when asked what additional they would do to increase economy sales if the 20% incentive were adopted. They indicated they were doing all they reasonably could.

PSC's Brief at 11-12.

Even though the PSC concedes that nothing specific was offered, Gulf and Tampa strain to find something in the record. The argument section of Tampa's Brief (page 8; repeated in Gulf's Brief at 13) repeats the alleged example given in Tampa's statement of facts (page 2). As discussed in the fourth area of disagreement in the Statement in this Reply Brief, Mr. Wood (Tampa) honestly answered (after he supposedly gave this alleged example) that he was unable to give any specific example of what Tampa would do to

increase sales if it got 20% of the profit. [Vol. II, T. 154]. Tampa goes on to state (page 8; repeated in Gulf's Brief at 13) that Mr. Wood identified a second example, which is extended economy sales. To be accurate, this was not an example of what would occur if the 20% were approved. Mr. Wood was telling the PSC about activities that occur already, even without the 20% share of the profit. Mr. Wood explained that the utilities are working "very hard" and "real hard" right now on extended sales and that "there is an exchange of information between companies" at this time to facilitate those sale. [Vol. II, T. 170-71]. Thus, this is an example of what is occurring under the old system. It is not something additional that will occur due to the new 20% profit retention. Tampa's final try is to reiterate these two questionable examples and state that there is an "endless array of management alternatives available." (Tampa's Brief at 11). This might be so, but, as the PSC notes, no example can be found in this record.

Tampa also attempts to provide some insight into what "may well have ... grounded" the PSC's decision to create this incentive for selling utilities and into what the PSC "could have concluded" in reaching its decision. (Tampa's Brief at 10; emphasis added). The problem is that the PSC's Order contains none of these reasons. Actually, Order No. 12923 [Vol. I, R. 8] [Appendix to Initial Brief at A-1] gives precious little, if any, understanding into the PSC's thinking about incentives. That alone may be reason for remand. See generally International Minerals and Chemical Corp. v. Mayo, 336 So.2d 548, 552-53 (Fla. 1976). In any event, as this Court has noted, it rejects attempts to put words into the PSC's mouth, as Tampa has tried to do. The Order on appeal must stand or fall on its own merits, without new reasons being proffered on appeal.

> In its brief the Commission suggests a number of other reasons for ... [its decision]. These suggestions provide some insight into the philosophy undergirding the Commission's action, but they are legally irrelevant to support the reasons recited in Order No. 6681. Section 120.68(4), Fla. Stat. (1975).

City of Plant City v. Mayo, 337 So.2d 966, 974 n. 23 (Fla. 1976).

Although this record is devoid of any reasoned support for an incentive, Tampa's attempt to interject a rationale for the PSC's decision makes the Citizens' point: it is possible to conduct an evidentiary hearing to collect facts on this issue.

> The Commission chose to ground its new policy on new billing technology and the absence of benefits to non-municipal electric customers, two "facts" which wholly lack evidentiary support in this record. ... As to the ... [second fact], however, competent and substantial evidence is not available to support the Commission's finding. Most of the parties here have extensively briefed the Commission's "no-benefit" conclusion, suggesting economic, technological and geographical reasons for and against the Commission's result. The arguments are persuasive of one thing only - the issue is capable of fact-gathering on both sides and therefore properly requires an evidentiary hearing.

Id. at 974 (emphasis added). Just as the "no-benefit" issue in City of Plant City required evidentiary support, likewise the factual assumptions underlying the need for an incentive to engage in economy sales are "susceptible of verification by evidence," see Grove Isle, Ltd. v. Bayshore Homeowners' Association, Inc., 418 So.2d 1046, 1049 (Fla. 1st DCA 1982), and require some discussion in an order.

The Appellees' attempts to show that the ratepayers benefit by giving the utilities 20% of the profits are grossly misleading. The appellees have confused the benefits flowing from each step in the Staff's proposal. It is

true that the ratepayers are better off by having the profits considered in the fuel clause rather than in rate cases. This is because the unintentional, inevitable difference between projected and actual levels of profit is eliminated. By treating the profits in the fuel clause, the ratepayers would, without the 20% incentive, receive credit for 100% of the profits, which was the PSC's initial intent when it started to account for economy profits.

The forum for considering the profits, however, is not at issue. This issue is: given that the profits will be treated in the fuel clause, are the ratepayers better of by receiving 80% of the profit as opposed to the 100% that the PSC was trying to credit to them under the old system. Despite the appellees' briefs, the ratepayers are worse off. Gulf (Brief at 12) and Tampa (Brief at 7) imply that the ratepayers are the beneficiaries of the new system because the ratepayers will receive 80% of the profit above what otherwise might occur. As the utilities well know, they get to retain 20% of the profit on any sale. Even if the profits are less than they have been in the past, the ratepayers must give the utilities 20% of this lesser amount. The 20% applies to all profits, not just to those profits above a previous level. As was shown in the Initial Brief, the ratepayers can be worse off with an 80%-20% split at the same time that the utilites are better off.

The PSC's Brief (page 9) repeats this canard by trying to show that if Tampa had profits of $7,779,000, then Tampa would receive $779,000 (after taxes) and that the ratepayers would get $6.2 million. This example leads this Court astray. The $7,779,000 is Tampa's level of profit under the old system. [Vol. II, Ex. 1] [Appendix to Initial Brief at A-33]. Under the old system, the ratepayers are credited with 100% of this amount. Under the

new system, if Tampa has the same amount of profit, the ratepayers will receive only $6,223,000, or $1,555,800 less than they would receive under the old system. If Tampa generates only $6.0 million in profits, it will still receive $1.2 million more than it would have gotten under the old system, even though the ratepayers are worse off.

Turning to the hearing itself, although the Citizens' Brief (pages 15-19) contained a detailed discussion of five common (for the PSC) procedural improprieties that call the fairness of the hearing below into question, both the PSC and Gulf declined to challenge the Citizens on this point. If the Citizens had mischaracterized what had occurred, no doubt the appellees would have been eager to make this clear. There must be something very scary about these events (perhaps the truth) that make the PSC and Gulf shy away from defending the PSC's actions. The appellees' attitude of see no evil, hear no evil, speak no evil will not make this reign of procedural terror go away.

Tampa gingerly attempts to address a few of the Citizens' concerns (Tampa's Brief at 11-13), but nowhere does it dispute the accuracy of what the Citizens described. Contrary to Tampa's suggestion (pages 11-12), the Citizens applaud regulators' "active interest in the regulatory process." What we decry (and what happended in the case below), however, is railroading a result. There is nothing wrong with commissioners questioning witnesses. On the other hand, it is procedurally improper for commissioners to disregard what the sponsor of an exhibit and other witnesses say that an exhibit shows, to interrupt cross-examination in order to try to rehabilitate a witness or an exhibit, to refuse to let a witness finish or explain his answer (especially when counsel are always admonished to let a witness complete his response, no matter how lengthly, before proceeding to

the next question), to conduct a direct examination after a witness has been tendered for cross-examination and after an adversary party has already conducted its cross-examination of the witness, and to refer to documents that are outside of the record and that the commissioners might consider to be more important than what they hear or see on the record.

Tampa is dead wrong when it says that the Citizens had a copy of the 24 May 1983 memorandum. Perhaps Tampa had been forwarned about this document, but the Citizens had not. Based upon the questions asked about the memorandum, it was possible to determine what it was intended to show. The points about the memorandum are that (1) the PSC had conducted its investigation outside the context of a formal hearing and that it felt no need develop a record to support its conclusion, and (2) once analyzed, the memorandum fails to support the conclusions that the PSC drew.

II. THE INCENTIVE IS ARBITRARY OR CAPRICIOUS

There are four reasons why the specific incentive that the PSC adopted is arbitrary or capricious. As to the first reason, all parties appear to agree that there is nothing to support the choice of 20% other than the witnesses' bare statements that 20% is the appropriate amount. The appellees contend that these bald, unsubstantiated assertations are all that the PSC needs to support its decision. This is incorrect. The Appellees' argument <u>assumes</u> that their witnesses' statements constitute proof to support the witnesses' assertions <u>and</u> <u>then</u> argues that the PSC was faced with conflicting evidence, between which the PSC was free to choose. This argument begs the question of <u>whether</u> the assertions are indeed sufficient proof to support the PSC's decision. They are not. If, as will be shown, these statements are not proof of their own conclusions, then there is an

absence of evidence to support the PSC's decision, and that decision must fall.

Whether a witness is an expert or not, his unsupported sentiments or inklings are valueless unless applied to some evidence. Braddock v. School Board of Nassau County, ____So.2d ____, 9 F.L.W. 1822 (Fla 1st DCA 1984) (on motion for rehearing). "On cross examination an expert is required to specify the facts or data upon which he bases his opinion." Id. In the case at bar, there was no evidence. The Citizens' cross-examination showed that the witnesses had no basis for their conclusory statements other than gut reactions. (Citizens' Brief at 21-24). A witness's opinion fails to serve as proof of the facts or inferences that are necessary to support that opinion. Something more is needed.

> It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value. It is equally well settled that the basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion.

Arkin Construction Co. v. Simpkins, 99 So.2d 557, 561 (Fla. 1957). That something more, that support, is absent in the instant case.

The appellees have miscontrued the cases that they cite to this Court. In all of those cases, there was some evidence, other than the witness's own statement, to support the witness's opinion testimony. The PSC (Brief at 5) quotes from that part of United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977), in which the evidence surrounding a telephone company's rate of return was being discussed. As the opinion indicates, Id. at 654, and as anyone who has dealt with rate of return in a rate case knows, rate of

return witnesses offer exhibits and analyses to support their opinions. Unlike the case at bar, there is some bases for the witnesses' conclusions. Although it is true that the PSC has the prerogative to evaluate the witnesses' testimony, Id., the statement in United Telephone was given in the context of there being some support for the witnesses' conclusions.

The PSC has misread Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982). By merely reading the opinion, one sees that this Court never affirmed the PSC's decision "based solely on the testimony of an expert opinion." (Brief at 6). This Court stated that the PSC had heard "considerable evidence" on the issue in question (construction work in progress - "CWIP"), Citizens, supra at 538, and that the decision was "supported by substantial competent evidence," Id. at 539. As previously explained, by definition, a witness's statement, with nothing more, fails to serve as proof of the witness's conclusion. The opinion referred to solid evidentiary support for the witness's conclusion, Id. at 538-39, which is something that is missing from the instant record. In addition, when determining the specific dollar amount of CWIP to include in rate base (akin to determining the specific percentage of the economy energy incentive), the PSC referred to a factual number found in one of the utility's standard reporting accounts. See 18 C.F.R. part 101, account 107 (construction work in progress - electric) (1983). The PSC did not, as it did in the instant case, pull the number out of thin air.

The PSC's hornbook law quote (Brief at 6) from Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980), is accurate. If, however, one looks to see how it was applied in that case, one discovers that this Court quashed the PSC's Order because "[t]he conclusory statements relied upon by the commission do not provide sufficient support for the

findings necessary to underpin the commission's action...." Id. at 1031. Just as in the case sub judice, the PSC had based its decision on the bare testimony of two witnesses. Id. at 1030-31. Just as it should do in the instant case, this Court explained that these witnesses' statements "do not constitute competent substantial evidence for the commission's determination." Id. at 1031.

The additional hornbook law quotes that the PSC recites (Brief at 8) from Utilities, Inc. of Florida v. Florida Public Service Commission, 420 So.2d 331 (Fla. 1st DCA 1982), are again accurate, but in that instance the PSC had been presented with detailed methods for calculating rate of return. Id. at 331. Obviously the PSC can choose between competing opinions that are both developed in and supported by the record. When, however, as in the case below, there is nothing to support the witnesses' statements, the PSC has no support for its decision.

The burden of proving the validity of the assumptions that allegedly support the 20% figure and the responsibility for showing the desirability of that amount is on the parties that advocate its adoption. See Balino v. Dept. of Health and Rehabilitative Services, 348 So.2d 349, 350 (Fla. 1st DCA 1977). Parties (such as the Citizens) who oppose that proffered percentage have no obligation to disprove the appropriateness of the amount. If the proponents fail to meet their burden of proof, then the proffered percentage must be rejected.

Gulf's effort at producing hornbook law is equally accurate (Gulf's Brief at 9), but in the case that Gulf cites, Gulf Power Co. v. Florida Public Service Commission, ___ So.2d ___, 9 F.L.W. 286 (Fla. 1984), the PSC was presented with conflicting detailed evidence in the nature of

studies and analyses. Id. at 288. In contrast to the instant appeal, the record showed much more than mere unsupported conjecture. The same holds true for Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308 (Fla. 1976), to which both Gulf and Tampa refer. In that case, the PSC was evaluating a Traffic Usage Study, Id. at 311, and various cost of service studies, Id. at 312, which were slightly more detailed than the unsupported testimony received in the instant case.

Turning to the second of the four reasons, none of the appellees have challenged the accuracy of the example given in the Initial Brief (pages 25-26) that shows that a utility can receive more profit through this alleged incentive to increase sales even if the level of profit is the same or less than it was before this sales incentive was started. It appears that the PSC's Brief never addressed this point. Gulf (Brief at 18-19) and Tampa (Brief at 18) make simple, single paragraph responses, both of which miss the mark. The only response that these utilities can dredge up is to defend the basic idea of an incentive. To make it clear, in Point II, the Citizens are concerned with the specific incentive that the PSC adopted, not with incentives in general. (As already pointed out, the Citizens support properly constructed incentives.) As explained in the Initial Brief (pages 24-27), this incentive rewards the mere act of selling, rather than rewarding the act of selling more. There is no standard or base level that triggers a sharing of the profit. The ratepayers can be worse off at the same time that the utility is better off. A rational incentive would make some attempt to ensure that a utility improves its performance before it participates in the profit sharing.

As to the third and fourth reasons, the PSC again has nothing to say in response, and Gulf (Brief at 19) and Tampa (Brief at 19) refer to their

arguments in Point I. The structure of the specific incentive that was adopted is arbitrary or capricous because it is irrational, illogical, and contrary to the record to (1) create an incentive when no one has identifed any problem that needs to be addressed [third reason, Citizens' Brief at 27-28], and (2) reward a selling utility's blind luck in making sales [fourth reason, Citizens' Brief at 28]. The PSC (Brief at 15-16), Gulf (Brief at 20), and Tampa (Brief at 21) claim that it is impossible to set a standard for economy profits. This is really an admission that the level of profit is beyond the selling utility's control.

III. THE UNEXPLAINED DEVIATION IN POLICY

As explained in the Initial Brief (pages 29-35), 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 has failed to explain why it deviated from this clear, established policy. The appellees' examples provide the point.

The conservation incentive that Tampa mentions (Brief at 7-8) is being implemented through rewards and penalties. [Vol. II, T. 68-69]. The Generating Performance Incentive Factor ("GPIF") (PSC's Brief at 14) contains both rewards and penalties.

> At the end of the six month fuel adjustment period, actual equivalent availability and average heat rate are compared to the pre-established target. Based on this comparison, a monetary reward is awarded for improvements from the performance targets; a monetary penalty is deducted for degradation from the performance targets.

Order No. 9558 at 1-2 (emphasis added) [Appendix B to the PSC's Brief].

The PSC's (Brief at 14) and Tampa's (Brief at 20) discussion about the Oil-Backout Cost Recovery Factor ("Oil-Backout Factor" or "the Factor"), Rule 25-17.16, Florida Administrative Code ("the Rule"), is deficient in two respects. First, the PSC has referred this Court to an old version of the Rule. The new version was adopted in Order No. 11188 [Appendix to this Brief at A-42] and was the subject of Citizens v. Public Service Commission, 448 So.2d 1024 (Fla. 1984). Second, unlike the economy energy incentive, the Oil-Backout Factor contains (1) qualification criteria that must be met before a utility can take advantage of the Factor (Id. at 1026; Section (3)(a) of the Rule), and (2) continuous performance evaluation to determine whether a utility can continue to take advantage of the Factor (Id. at 1027; Section (4)(a) of the Rule). Under the Oil-Backout Rule, a utility must meet certain standards before it can use the Factor. If the ratepayers will not receive a benefit, neither will the utility. Not so with the 20% incentive. No base level of performance must be met. The utility can be better off at the same time that the ratepayers are worse off.

The PSC has deviated from the basic policy established in the conservation incentive, the GPIF, the Oil-Backout Rule, and the St. Lucie Unit No. 2 proceeding (Citizens' Brief at 30).

CONCLUSION

The record is devoid of any support for the general need for an economy energy incentive. None of the bald, unsubstantiated assertions that the appellees cite to support the 20% incentive constitute evidence. No appellee challenges the example that shows that the specific incentive that was adopted allows the utilities to participate in the incentive even if its performance is worse than it was before the incentive started. Finally, the PSC has deviated from its long-standing policy on incentive. Order Nos. 12923 and 13092 should be set aside for being departures from the essential requirements of law and for being arbitrary or capricious or violations of due process.

Respectfully submitted,

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

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

I HEREBY CERTIFY that a true copy of the Citizens' Reply Brief has been furnished by U.S. Mail or by hand-delivery to the following parties on this 20th day of September, 1984.

Matthew M. Childs, Esquire
Charles A. Guyton, 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
Ralph A. Peterson, Esquire
Beggs and Lane
Post Office Box 12950
Pensacola, FL 32576

Richard W. Neiser, Esquire
James A. McGee, Esquire
Albert H. Stephens, 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

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

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

Stephen Fogel

Stephen Fogel