IN THE SUPREME COURT OF FLORIDA

SOUTH FLORIDA NATURAL GAS COMPANY

Petitioner,

vs.

PUBLIC SERVICE COMMISSION,

Respondent.

Case No. 71,035

Appeal from Final Agency Action of the Public Service Commission

Amended Petitioner's Reply Brief

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Statement of Facts

In its initial brief, the Company set forth a detailed recitation of procedural and substantive facts regarding this case. By way of response, the Commission states that the Company's Statement of the Facts "is factually accurate".[1]

The Commission's acknowledgment of the factual accuracy of the Company's Statement of Facts vastly simplifies the court's burden in deciding this case. In light of the concession, the court can accept as true the following factual predicates for this appeal.

1. The Company prepared, and presented through final hearing, a rate case based on a test year and two attrition years, using the Commission's format for MFRs. Yet the Commission rejected the concept of attrition years after the close of evidence, despite the Company's acknowledged proof that operating expenses had increased, and were continuing to increase, at a faster rate than operating revenues. (The Commission defines net operating income attrition to mean an

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1 Answer brief at page 1. The Commission does challenge what it perceives as an inference that the Company is charging the Commission with responsibilty for delay in processing the rate increase request. The Company inferred no such thing, and it regrets the Commission's concern in that regard. It is not the speed with which the Commission processed the rate request that is the cause of the Company's complaint; it is the manner in which the rate request was processed.

increase in operating expenses at a rate faster than operating revenues.) (R. 338).[2]

2. The staff's wasteful challenge to an acquisition adjustment on the Company's books caused significant, documented rate case expense which the Company would not have incurred had the challenge not been made. Additional, unanticipated rate case expenses were incurred by the staff's 90 interrogatories, two depositions, and demand for 26 exhibits. Although the Commission itself precipitated rate case expenses far in excess of the original amount projected, the Commission denied the Company's request to recover these expenses in favor of a lesser amount arbitrarily selected from a wholly different rate case.

3. The record for the rate proceeding was closed in January 1987. Yet the staff of the Commission was allowed to raise 56 "issues" in March of that year, and to force the Company into a full-blown evidentiary hearing which involved only those issues.

4. The staff of the Commission was not made a party to the proceeding, yet it was given party rights to act as an adversary to the Company. In its adversarial role, the staff sent a secret memorandum to the Commission with its recommendations on June 18, 1987, then turned around and acted as

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2 On page 21 of its brief, the Commission states that it awarded the Company a rate increase to compensate, among other things, for long-term debt. This is factually incorrect. The Commission reduced the Company's rate award to take in account long-term debt. See initial brief at p. 9, n. 2.

legal advisor to the Commission when a decision on the rate case was under consideration.

Argument

In order to simplify the Court's review, the Company will initially reply to the Commission's brief by addressing separately each of the points made in the Commission's brief. General observations are provided following discussion of the individual points.

1. Distinction between sections 120.57(1) and 120.57(2), Florida Statutes.

The Commission begins its brief by declaring that the proceeding below was a formal one under section 120.57(1), rather than an informal proceeding under section 120.57(2). This revelation produces no conflict between the parties, as the Company had already argued that the proceeding it endured had to be a proceeding under section 120.57(1). The point notably not addressed by the Commission is that proceedings under 120.57(1) require the full range of procedural and administrative due process. Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976).[3]

The Commission next discusses what it conceives to be the Company's burden in rate cases. The Company suggests that the Commission is simply mistaken in suggesting that the Company had the burden of establishing by "clear" evidence that rates

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3 The Commission's only challenge to the Company's due process argument is its attempt to distinguishing Deel Motors Inc. v. Department of Commerce, 252 So.2d 389 (Fla. 1st DCA 1971), which the Company had suggested was comparable to this case.

currently on file with the Commission are unreasonable or arbitrary.[4] That high burden applies only when rate structure -- how charges are dispersed among classes of customers -- is the sole issue before the court, as was the situation in the cited case of Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). It does not apply in a general, multi-issue rate proceeding, and could not.

A full rate case is not, as the Commission suggests, "analogous" to a determination of rate structure as an isolated issue. If the Commission's asserted position on burden were correct, a utility would be obliged to introduce facts on every facet of its existing rates to show that those rates were not unreasonable. Numerous unnecessary issues would be tried. The Company's burden in a full rate proceeding is, and has always been, to provide a preponderance of competent and substantial evidence to support its proposed new rates. Florida Power Corp. v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982).

In this portion of its brief, the Commission also discusses the nature of a 120.57(1) proceeding and when material facts are in dispute. The Company finds no fault with the Commission's formulation that MFRs must be proven by a preponderance of the evidence. (Answer brief at p. 8). The record below, which is overlooked by the Commission, amply

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4 Answer brief at pp. 6, 8. Even the statute cited as authority on page 6 of the Commission's does not say what the Commission says it says.

reveals that the Company accepted that burden, and met it overwhelmingly with testimony and other evidence. The key to this case is not what the Company failed to do, but what the Commission failed to do with the record that was developed in the 120.57(1) proceeding which the Commission convened.

2. Absence of an adversary does not deny due process.

The Commission either does not understand or chooses to ignore the Company's due process argument. At no point has the Company said that an adversary is needed for due process. The Company has said that at least a party other than the applicant is required to raise disputed issues of material fact, that due process minima apply in an adversarial proceeding under 120.57(1), that none was present in this case, that without authorization the Commission conferred party privileges on its staff without requiring attendant obligations, and that in doing so the Commission ran roughshod over the Company's due process rights. The Company will rely on its original statement of the due process deprivations for an explanation of its position, rather than repeat the argument here. The Commission's discussion on pages 9-11 of its brief is basically non-responsive to the Company's contentions.[5]

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5 Contrary to the Commission's assertion in its brief (p. 9), the Company has never said that the Commission has an obligation to present a case contrary to the Company's. If the Commission elects to have staff members present a case as a party, however, as happened here, the staff then carries all of the responsibilities of a party. That is all that the Company has asserted in this case, and that is not what was done here.

Two points should be emphasized in passing. First, in discussing its contention that due process was absent from the Commission's proceeding, the Company noted that the staff acted first as prosecutorial adversary to the Company and later as advisor to the Commission in its decisional role. The Company also noted that the applicable statutes and rules of the Commission require formal participation by the staff members as a "party" if staff elects to adopt an adversarial position in the rate case.

The Commission does not challenge either the duality of roles played by staff in this case or the requirements for lawful participation. Rather, it seems to take the extraordinary position that its staff's advocacy in the 120.57(1) proceeding was merely a part of the Commission's "investigatory" responsibility. This veiled assertion makes no sense.

The Commission's non-judicial responsibility to investigate utility charges would run afoul of section 120.52(11)(c), and the Commission's own rules as to party participation, if the concept of investigation is elevated to encompass the traditional, adversarial advocacy activities such as the formulation of issues, the presentation of evidence, and the cross-examination of witnesses. Certainly the statutory authority cited for the position that "investigation" encompasses both formal, adversarial advocacy and advising the Commission in its decisional role does not support that view. That statute identified in the Commission's brief is not the statute

applicable to a rate proceeding; it addresses only record-keeping requirements for rate base.

Second, in its discussion of the role of the staff the Commission agrees with the Company that staff members who adopt the status of a party and testify may not advise the Commission during its deliberation. (Answer brief at p. 10). That was not the problem in this proceeding, of course. The problem came when the Commission allowed its staff to act as if they are parties, without formal participation in the proceeding, and then later to advise the Commission in private following the close of public testimony. The Commission neglects to discuss that situation or its use of the staff's non-evidentiary data to formulate its final order, both of which were among the more egregious due process deprivations of which the Company complains. By ignoring what in fact occurred here, the Commission never comes to grips with the Company's grievances.

3. Obstruction of investigation.

The Commission says that the Company "obstructed" the Commission's investigation by raising a number of evidentiary objections in the course of the 120.57(1) hearing. (Answer brief at pp. 11-13). The Company suggests this assertion is sheer nonsense.

The Company put on a full rate case, from pre-filing MFRs and testimony to appearing and testifying at the Commission's scheduled hearing. The Company acknowledges that, in the course of the proceeding, it sought to prevent the

Commission from turning the rate hearing into a due process nightmare by attempting to clarify staff's dual roles, by inquiring what the Commission meant by its repeated demands for more "justification" when it had uncontroverted, explanatory evidence before it, and by objecting to irrelevant and improper inquiries of staff counsel.[6] Legitimate objections in an evidentiary proceeding have never been considered "obstructionist" in a court or administrative tribunal, and the very fact the Commission would consider them to be reveals its rather grandiose view of its decisional responsibilities. By contending that its investigatory function was obstructed by the Company's exercise of its due process rights in the evidentiary hearing, the Commission provides clear confirmation that it either lacked the will or the understanding to give the Company a fair hearing on its rate case.

It should not escape notice that the Commission demonstrates its assertion of obstructionism only by referencing objections made during staff's cross-examination of Company witness Robert Morgan. Not one of the issues mentioned in the Commission's brief as being raised during the testimony of that witness -- gas emergency rules, continuing property records, abandoned plant, allocation of physical plant -- is a rate issue

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6 That the Commission frequently ruled with its staff, rather than with the Company, does not suggest that the Company's objections obstructed the Commission's investigation. The Company abided by every ruling of the Commission despite its belief that the rulings were legally wrong.

in controversy in this appeal. Only one of those issues, abandoned plant, is even relevant to the Commission's denial of rate relief, and the effect of that issue in the rate case is negligible. The Commission's use of these relevancy objections illustrates further the absence of any merit in the Commission's complaint of obstructionism.

4. Burden of proof.

Regarding the Commission's burden of proof discussions (answer brief at pp. 13-17), the Company vigorously contests the suggestion that the Company refused to do more than merely file MFRs. Witnesses testified in elaborate detail on direct and cross examination as to the justification, rationale, and need for the expenditures made. No amount of testimony was enough for the Commission, however. The Company's complaint was and is that the Commission has defined "prudency" and "justification" out of reach, making it as unattainable as Shangri-la.

The Commission's assertion that the Company failed to establish the prudence of its expenses and investments is a conclusory generality. The Commission seems to don a mantle of imperial invulnerability, in order to avoid dealing with the specifics of the record that was developed. The specifics of what the Company allegedly failed to prove are glaringly absent from the Commission's brief. Platitudes, the Company suggests, cannot substitute for facts.

The factual underpinning of prudence and need is uncontroverted on this record, and easily demonstrated. The

Commission does not deny that the only evidence in the record of this proceeding was produced by the Company (other than the non-controversial testimony of staff employee Cichetti), and the Commission does not address any specific record deficiency in the Company's proof. A quick review of the record will identify the competent and the substantial evidence on each point.

(a) salary expense.

The Company was at pains to identify the record evidence of salary expense,[7] which the Commission's final order denied as being "non-recurring". In its answer brief, the Commission does not attempt to defend its "non-recurring" justification for denial. In fact, the word "non-recurring" does not appear even once in its answer brief!

Unable or unwilling to state why or to what extent prudency was not proved, what additional proof would have been needed to convince the Commission, or why "non-recurring" was the only stated basis for denial in the Commission's final order, the Commission ducks the specifics about salary expense and simply relies on its sweeping generality about an absence of proof. The Company suggests that the record more than adequately demonstrates that the Commission's denial of salary expense was initially pretextual, and was then and is now purely arbitrary.

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7 Initial brief at pp. 10, 37-39.

(b) rate case expense.

The same insubstantial response is given to the Company's detailed explanation of rate case expense.[8] The Commission's response to this point goes beyond inadequacy; it borders on the bizarre. The Commission cites one of its own decisions in another case, decided long after this proceeding had concluded, as authority for rejecting an "automatic" award of rate case expenses. There are two obvious irrelevancies in the Commission's assertion. The first is that the Company has at no time asserted that rate case expense is awardable automatically. (The Commission, of course, does not and cannot assert that proven rate case expenses are not recoverable.) In point of fact, the Company took exactly the opposite view, and accepted the burden of proving the amount and nature of the expenses incurred. It demonstrated, on the record, that virtually all amounts in excess of the original estimate were the direct consequence of untenable positions or extraordinary adversarial discovery forced on the Company by the Commission's staff.

A second problem with the Commission's "authority" on this point is its reliance on a December decision of the Commission when the case was concluded in July. It is hard to understand how a self-serving post-trial decision of the agency, (which may itself be before the Court on appeal) can be authority for the denial of rate case expense in this proceeding. With

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8 Initial brief at pp. 9-10, 31-36.

this as a basis for its reliance, the Commission has attained the pinnacle of bootstrap technology.

(c) billing determinants and benchmark variances.

Once again, the identical form of non-responsiveness was adopted by the Commission both with regard to billing determinants (addressed in detail in the Company's brief at pp. 11, 45-47) and with regard to benchmark variances (addressed at pp. 10-11, 39-45). As to the former, not a word is said by the Commission. Yet the Company's proof of billing determinants encompassed detailed and expositive evidence of the pattern of diminished gas consumption which warranted the Company's position on that issue.

As to the latter, the Commission's only comment on the record of benchmark variances is the non-specific and inaccurate assertion that the Company objected to carrying its burden of establishing prudency. This reversion to the Commission's sanctuary as a decision-maker, without explaining what specific factual deficiencies exist, is merely another arbitrary rejection of all record evidence and testimony in order to implement the Commission's pre-conceived decision to deny the Company rate relief.

In sum, the Commission's position on the burden of proof gives credulity to the Company's due process contention that the Commission imposed an ever-escalating, evanescent and unattainable burden of persuasion and proof. Nowhere is this more evident than in the Commission's non-specific and vague

explanation to this Court regarding the various arbitrary actions taken below.

5. Inappropriate remedy.

The Commission argues that the Company has improperly asked the Court to substitute its judgment for that of the Commission by setting the rates which the Commission denied. The Commission misperceives the Company's position. The Company asks only that the Court grant the relief which is appropriate in any appeal when the evidence of record is competent, substantial and uncontroverted. In those situations, an appellate court will always direct the entry of an order doing that which the record supports and which should have been done by the lower tribunal, in lieu of remanding for unnecessary additional proceedings before the original fact-finder.[9]

The legal underpinning of the parties' positions on the form of available relief is markedly different. The Commission states that the Company cites no authority for a grant of the relief requested, yet the Company specifically and expressly addressed the Court's authority to grant the relief requested, with statutory citations, on pages 48-49 of its brief. On its part, the Commission cites to a statutory provision which admittedly has no bearing on the case (answer brief at p. 23).

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9 As indicated in the Company's initial brief, a clear directive by the Court that the Commission perform its lawful duty is particularly appropriate in a regulated utility proceeding where customers must bear any new expense.

The Company suggests that the Commission's position on the relief requested is no more persuasive than its retreat behind generalized principles of jurisprudence on the merits' issues. There is no usurpation of the functions of the trier of fact when an appellate court requires a lower tribunal to enter findings supported by the only record evidence in the proceeding.

General Observations

Although the Commission repeatedly asserts that the Company was unwilling to meet its burden of proof, at no point does it say that there is a lack of competent and substantial evidence in this record on the issues that were tried. This candid omission by the Commission tells the whole story. The Company met, and overcame its burden. It produced not a preponderance, but a plethora of evidence. The Commission simply defaulted procedurally and substantively in its statutory responsibilities.

The Commission has also sidestepped any discussion of the fairness of its proceeding in this case. Yet the absence of fair play toward the Company leaps from the pages of the record. The law demands that this Court examine the fairness of a proceeding provided by an administrative agency. Section 120.68(8), Fla. Stat. (1985). The Commission does not, and cannot defend the manner in which this rate request was processed.

The role of the Court in reviewing rate orders of the Commission is best stated in the Court's own words:

> We must merely determine whether competent, substantial evidence supports a Commission order. We cannot affirm a decision of the Commission if it is arbitrary or unsupported by the evidence.

Citizens of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983). On the record before the Court in this case; it cannot affirm the Commission's decision.

Conclusion

The Company stands four-square on its initial brief. The Commission's generalized defense of its final order is legally and factually inadequate. The relief requested by the Company in its initial brief should be awarded.

Respectfully submitted,

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Certificate of Service

I certify that true and correct copies of this brief were mailed on January 19, 1988 to David E. Smith, Esq. and to Prentice P. Pruitt, Esq., Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0861.

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