

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellant,

v.

CASE NO. 74,471

PSC DOCKET NO. 881416-EG

MICHAEL McK. WILSON, ETC., ET AL.,

Appellees.

_____ /

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

AMICUS CURIAE BRIEF
OF
THE FLORIDA INDUSTRIAL POWER USERS GROUP

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Preliminary Statement

The following abbreviations are used in this brief. Appellee, Florida Public Service Commission, is referred to as the Commission. Appellee, Tampa Electric Company, is referred to as TECO. Appellant, Office of the Public Counsel, is referred to as OPC. Amicus Curiae, Florida Industrial Power Users Group, is referred to as FIPUG.^{1/} Citations to the Appendix of OPC are referred to by appendix page number (A. ____).

^{1/} On October 16, 1989, the parties, pursuant to Rule 9.370, Florida Rules of Appellate Procedure, filed notice of their written consent to allow FIPUG to file an amicus curiae brief.

Statement of the Case

This case involves OPC's appeal of the Commission's final order which approved TECO's Petition for Modification of its Conservation Cost Recovery Methodology ("Petition"). The modified methodology excludes interruptible customers from payment of a conservation charge during the period April 1, 1989 through March 31, 1990 because they receive no benefit from the programs paid for through the charge. Order No. 20825. (A. 1-5). OPC also appeals the Commission's denial of reconsideration of Order No. 20825. (A. 6-10).

Statement of Facts

Agrico Chemical Company, Farmland Industries, IMC Fertilizer, Inc., LaFarge Corporation, CF Industries, Florida Steel Corporation and Mobil Mining & Minerals are industrial users of electricity on TECO's interruptible rate schedules.²¹ The companies refer to themselves in this proceeding as FIPUG.

TECO currently has eleven conservation programs which have the objective of reducing the growth rates of peak demand and energy usage in TECO's service territory. (A. 1). TECO's estimated conservation program expenditure for calendar year 1989 is \$14,653,807. (A. 1).

Direct Benefits of Conservation Surcharge

The \$14 million is spent on programs which provide direct incentives and credits to firm customers to encourage them to reduce electrical demand and consumption. There is only one conservation program which offers any direct benefits to interruptible customers--the industrial energy audit program. Conservation surcharge collections are not used to finance this program for interruptible customers. Any interruptible

²¹ Rule 25-6.0438(3)(b), Florida Administrative Code, defines "interruptible electric service" as electric service that can be limited or interrupted, either automatically or manually, solely at the option of the utility. Customers receiving service under interruptible tariffs may have their service interrupted whenever the energy supplied to them by the utility is needed for customers which contract for firm electrical service.

industrial customer seeking the benefits of this program must pay for it directly. (A. 3). Interruptible customers receive no direct benefits from monies collected to fund conservation programs.

Indirect Conservation Benefits

A. Curbing Demand Growth

The purpose of curbing the growth rate of electrical peak demand is to postpone the need to construct new electric generating plants. Because of their interruptible nature, TECO excludes the capacity demands of interruptible customers when determining the timing and amount of new capacity for its system. (A. 2). As a consequence, interruptible customers receive no indirect benefit from the postponement of new plant construction. In fact they are disadvantaged when new construction is postponed because it increases the likelihood that their service will be interrupted to meet the increasing demand of firm customers.

B. Curbing Electrical Consumption

In periods in which the marginal cost of TECO's fuel is greater than the average cost of fuel, interruptible customers receive a modest indirect benefit through the reduction in average TECO system fuel cost. Presently, the marginal cost of fuel is less than the average cost of fuel. (A. 3). Interruptible customers presently receive no indirect benefit from reduced electrical consumption.

In summary, TECO's interruptible customers receive no direct benefit from any conservation program offered by TECO except the one for which they directly pay (the energy audit program); they are prejudiced by the postponement and the construction of new generating facilities; and they receive no indirect benefit from reduction in energy consumption. Historically, interruptible customers have contributed to conservation programs benefiting firm customers in an amount of about \$2 million a year because the Commission determined in 1981, at the request of TECO, to pay for TECO's conservation programs by imposing a surcharge on each kilowatt hour of electricity consumed on the theory that all customers receive some benefit from such programs.

In 1989, it was anticipated that the surcharge imposed on interruptible customers would be \$2,129,198. This is 14.5% of the total cost of all conservation programs. Interruptible customers would receive absolutely no benefit from the charge. In recognition of this gross inequity, on October 28, 1988, TECO filed a petition requesting modification of its conservation cost recovery methodology. (A. 11-18). As a result of the relief granted to interruptible customers, firm customers are charged an additional \$.0002 (two one hundredths of one cent) per kilowatt hour. This is a de minimis amount. The average residential customer consumes 12,000 kilowatt hours a year.^{3/} This means

^{3/} The court is requested to take judicial notice of this fact under the provisions of section 90.202 (11), (12), Florida Statutes.

that because of Commission Order No. 20825, TECO's average residential customer's bill will be \$2.40 higher annually than it might have been if interruptible customers were forced to pay for benefits they did not receive.

None of the material facts set out above are disputed by any party. OPC's Petition for Reconsideration dealt with procedural issues and questions relating to the Commission's interpretation of the Florida Energy Efficiency and Conservation Act.

Summary of Argument

In the briefs filed by OPC, TECO, and the Commission, this Court will no doubt read extensive argument about whether OPC met the legal prerequisites for waiver of its right to object to Order No. 20825 and when a point of entry must be given to customers to protest a tariff filing. FIPUG is confident that others will fully develop these issues for this Court's review.

The point of FIPUG's Amicus Curiae brief is a simple one. The specific relief requested by OPC is inappropriate under the circumstances. FIPUG requests the Court to affirm the administrative action taken by the Commission. There are no material facts in dispute which would require a hearing and, as a matter of law, the Commission has appropriately interpreted the Florida Energy Efficiency and Conservation Act ("FEECA").

If the Court grants OPC's request that TECO's Petition simply be dismissed, FIPUG will be permanently and unfairly deprived of the application of TECO's modified tariff for the time period at issue. Ironically, if OPC's request is granted, the FIPUG consumer group will be denied the hearing opportunity OPC is seeking to preserve for all consumers. If the Court determines that the OPC appeal is well taken, justice to all consumers requires the Court to preserve the opportunity for FIPUG and TECO to demonstrate that the tariff modification was warranted.

ARGUMENT

THE RELIEF REQUESTED BY OPC IS INAP-
PROPRIATE AND WOULD SUBSTANTIALLY
PREJUDICE FIPUG.

In the Conclusion section of its brief, OPC sets out the relief it seeks from the Court--"this case should be remanded with directions to dismiss TECO's petition." OPC Initial Brief, p. 49. If the Court grants such relief, it will be to the substantial detriment of FIPUG and fly in the face of OPC's argument that under section 120.57, Florida Statutes, consumers are entitled to a hearing.

TECO's modified conservation cost recovery factor, as approved by the Commission, eliminated the conservation cost recovery charge for interruptible customers. Pursuant to Order No. 20825, this change is effective for an explicit one-year period, April 1, 1989 to March 31, 1990. (A. 4). The modification of this charge is a limited change in the application of TECO's tariff. The Commission will reevaluate TECO's revised charge prior to March 1990. (A. 4).

The Commission framed the issue raised by TECO's Petition as follows:

The fundamental issue in this petition is the quantification and allocation of benefits and costs arising from conservation programs. In theory, conservation programs could impact utilities load profiles in both peak and off-peak periods. Due to customer rebound effects such as increased purchases of comfort (heating and cooling) and due to the fact that most programs tend to have low capacity factors, the primary benefits of

conservation are demand savings generally during peak periods. These demand savings generally result in the avoidance of the construction of peaking or intermediate capacity and the burning of higher priced fuels to run these units. The petition at hand alleges that neither capacity deferral benefits nor fuel savings accrue to interruptible customers from conservation.

(A. 1).

The change in TECO's conservation cost recovery factor was based upon the Commission's explicit finding that:

[interruptible] customers receive no benefit from avoided demand or capacity-related production plant and no avoided CT fuel benefit until 1990. (A. 3).

This material fact and all others raised are undisputed. Section 120.57, Florida Statutes, requires a formal hearing only when "the proceeding involves a disputed issue of material fact." Further, as a matter of law, the Commission appropriately interpreted FEECA. Agencies are afforded wide discretion in the interpretation of the statutes they administer. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983).

Because the tariff change is for a specific one-year period, this Court cannot grant the relief requested by OPC (dismissal of TECO's Petition) without denying the substantive relief which the Commission specifically found to be appropriate. If the Court grants OPC's request to remand with directions to dismiss, the time span affected by the application of TECO's revised tariff to interruptible customers will be over. The opportunity to apply the tariff during this time frame will be lost forever to

interruptible customers, much to their detriment and contrary to the Commission's specific finding quoted above. If the OPC is correct that substantially affected parties are entitled to a hearing in this proceeding, the relief he seeks will deny that opportunity not only to FIPUG, but also to the utility and all other interested parties.

OPC had two clear entry point opportunities to raise its objection to TECO's revised conservation cost recovery factor which would have put all parties on notice of its contentions and which would have provided for a timely resolution of the issue prior to the targeted one-year period. OPC could have objected at the January 31 Agenda Conference on tariff modification or at the February prehearing conference in the conservation cost recovery docket; it is undisputed that it did neither.

In addition, there was a third opportunity. OPC had full knowledge of all relevant particulars before rate relief was granted to interruptible customers. The OPC Petition for Reconsideration was filed March 16, 1989 (A. 43), fourteen days before the rates went into effect on April 1. If OPC had filed a complaint instead of a Petition for Reconsideration and had raised a material issue of fact, a hearing would have been granted as a matter of right. (A. 67).

OPC's failure to act appropriately and its attempt to now void the revised charge over halfway through the one-year period to which the tariff applies is extremely prejudicial to FIPUG. Had OPC objected either at the Agenda Conference or at the

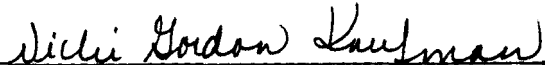
prehearing conference in the conservation cost recovery docket, or filed a timely complaint, the issue of the elimination of the conservation cost recovery charge for interruptible customers would have been joined. TECO and FIPUG would have litigated the issue in opposition to OPC's contentions, and the Commission would have ruled on those contentions prior to the April 1 effective date of the revision or reserved the rights of parties pending conclusion of the proceedings. The effect of OPC's objection now and the particular relief it seeks would be to foreclose forever the application of the tariff to interruptible customers during the one-year period--despite the fact that the Commission found interruptible customers entitled to application of the tariff during this time because interruptible customers receive no benefit from payment of the charge. OPC's backdoor approach to challenging the revised factor should not be permitted because to do so would severely prejudice FIPUG members and deprive them of relief from payment of a charge which the Commission found unwarranted; further, it would deny to others the right OPC seeks to preserve for itself.

CONCLUSION

In this case there is no material dispute of fact. The Commission found, and OPC did not dispute the fact, that unless relief were granted from the conservation surcharge, interruptible customers would be charged over \$2 million for benefits flowing only to firm customers. In essence, the

Commission determined that during this year the application of the surcharge discriminated against the interruptible class in contravention of section 366.81, Florida Statutes, which prohibits such discrimination. OPC complained in its Petition for Reconsideration that it was a change in policy for this \$2 million charge to be redistributed to the firm class, the class which received the benefits. This fact is not disputed. OPC had the opportunity in its Petition for Reconsideration to test the Commission's interpretation of the Florida Energy Efficiency and Conservation Act.^{4/} The Commission considered the arguments offered on the undisputed facts and found them wanting. The Commission's orders should be affirmed.

Respectfully submitted,


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^{4/} Section 366.80, Florida Statutes, et seq.

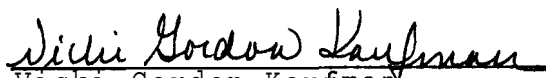
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amicus Curiae Brief of the Florida Industrial Power Users Group has been hand delivered to the following parties of record, this 30th day of October, 1989.

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