IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellants,

vs.

MICHAEL MCK. WILSON, ETC., ET AL.,

Appellees.

CASE NO. 74,471

ON APPEAL OF ORDERS NOS. 20825 AND 21448
IN FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 881416-EG
PETITION OF TAMPA ELECTRIC COMPANY

ANSWER BRIEF OF APPELLEE, TAMPA ELECTRIC COMPANY

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SYMBOLS AND DESIGNATION OF PARTIES

The Florida Public Service Commission is referred to in this brief as "the Commission." Tampa Electric Company will be referred to as "Tampa Electric" or "the company." Appellants, Citizens of the State of Florida, shall be referred to herein as "Public Counsel."

References to the Record on Appeal are designated "(R. ___)." References to the Appendix to this brief are designated ("A-___)."

STATEMENT OF THE CASE AND OF THE FACTS

Tampa Electric generally accepts the Statement of the Case and of the Facts set forth in Public Counsel's Initial Brief subject to the following exceptions:

Public Counsel correctly states that Tampa Electric sought Commission approval to stop charging conservation cost recovery charges to the company's interruptible Customers. However, Public Counsel omits the basis upon which Tampa Electric sought, and the Commission approved, such modification. Tampa Electric's interruptible and standby interruptible Customers are served under rate schedules which authorize their immediate and total interruption of service whenever any portion of the energy provided to them is needed by Tampa Electric for the requirements of firm Customers who are served pursuant to noninterruptible rate schedules. Therefore, they take electric service subject to generating facilities being available after other Customers have been provided firm load capacity. Accordingly, interruptible Customers do not contribute to the need for new generating capacity; therefore, they cannot receive benefits

from avoidance of generating capacity by other Customers. Thus, the company had urged the Commission to recognize the inequity of requiring interruptible and standby interruptible Customers to absorb a portion of the cost of conservation programs since those Customers do not contribute to the cost which those programs are designed to avoid. (R. 3)

As an additional basis for the reallocation, Tampa Electric stated that the goal of lowering the difference between marginal fuel costs and average fuel costs does not apply in the case of Tampa Electric. This is because Tampa Electric's marginal fuel costs are ower than average system fuel costs charged out to Customers. Since Tampa Electric is able to purchase less expensive coal on the spot market, it is not beneficial to reduce overall energy usage. Any such reduction would reduce the percentage of spot coal generation and thereby increase the unit cost of fuel borne by Tampa Electric's Customers. (R. 2)

A key fact completely overlooked in Public Counsel's Statement of the Case and Facts is that nothing in the orders on appeal increased the conservation cost recovery charge paid by Tampa Electric's firm Customers. Order No. 20825 approved Tampa Electric's proposal to exclude interruptible and standby interruptible Customers from the energy conservation cost recovery factor. Order No. 21448 denied Public Counsel's motion for reconsideration. However, neither of these orders effected an increase in the conservation factor applicable to firm Customers. Instead, the increase Public Counsel complains of was brought about in a separate Commission proceeding, Docket No. 890002-EG, with the issuance of Order No. 21317.

The increase in the charge paid by Tampa Electric's firm Customers took place in a separate docket (Docket No. 890002-EG). Docket No. 890002-EG is known as the conservation cost recovery docket. Hearings are conducted at least twice annually in this docket, typically in February and August of each year. No change in any conservation cost recovery factor of any participating public utility is allowed to occur until after it is fully addressed at one of these hearings or stipulated to by all parties.

The increase in the conservation cost recovery factor applicable to Tampa Electric's firm Customers was stipulated to by all parties, including Public Counsel, who participated in the February 1989 conservation cost recovery hearing in Docket No. 890002-EG. The stipulated increase was not approved until after a full hearing in which Public Counsel actively participated.

On page 7 of his Initial Brief, Public Counsel states that Order No. 20825, on appeal here, stated that the exclusion of interruptible Customers from having to pay for conservation programs would require firm Customers to pay an additional 20¢ per 1,000 KWH, or $2,129,198 per year. This is the very same 20¢ per 1,000 KWH increase to which Public Counsel stipulated without comment or objection in the conservation cost recovery hearing conducted prior to the issuance of Order No. 20825.

Tampa Electric did not profit from the conservation cost recovery factor modification which Public Counsel agreed to during the hearing conducted in Docket No. 890002-EG. In that docket the Commission allows participating utilities to recover reasonably and prudently incurred conservation costs. However, the participating utilities are not allowed to retain any of these revenues regardless of how they are collected from

the utilities' Customers. The revenues simply reimburse prudently incurred costs approved by the Commission subject to a hearing.

On February 10, 1989 a Prehearing Conference was conducted in Docket No. 890002-EG. During that conference Tampa Electric's counsel indicated that Tampa Electric would recalculate its proposed conservation cost recovery factor for the six month period beginning April 1, 1989 to reflect the Commission's vote in Docket No. 881416-EG to cease applying the conservation cost recovery factor to interruptible Customers. No objection was raised by any party and the modification of the conservation cost recovery factor was later embodied in the Prehearing Order in the conservation cost recovery docket. (Order No. 20785 issued February 21, 1989 in Docket No. 890002-EG.) (A-2).

On June 2, 1989 the Commission entered its Order No. 21317 in Docket No. 890002-EG approving the increase Tampa Electric conservation cost recovery factor of 0.1114 per KWH to which Public Counsel had stipulated during the hearing conducted in February. (A-4). Public Counsel did not seek reconsideration or appellate review of this order. Order No. 21317 was not issued until after Public Counsel had had an opportunity to receive and analyze Order No. 20825 which was issued on March 1, 1989.

Public Counsel's Statement of the Case and Facts quotes at length various documents, orders and other materials, including Public Counsel's own arguments previously submitted. These documents speak for themselves and Public Counsel's attempt to paraphrase portions of them is more in the nature of argument as opposed to a concise statement of the relevant facts. Rather than attempting to follow suit, Tampa Electric will confine its argument to the argument section of this brief.

SUMMARY OF ARGUMENT

The orders on appeal involve a determination by the Commission that it would be unfair for Tampa Electric to fully charge its interruptible and standby interruptible Customers for conservation programs which were not calculated to receive benefits during the affected periods. Such determination, although initially made in the orders on appeal, did not cause any increase in the conservation cost recovery factor applicable to the class of Customers Public Counsel purports to represent. Instead, that change was made in the Commission's conservation cost recovery docket (Docket No. 890002-EG).

The conservation cost recovery factor increase for firm Customers was based in part not only upon Public Counsel's failure to object at the Commission Agenda Conference conducted in this docket, but also on Public Counsel's affirmative stipulation to such increase in Docket No. 890002-EG. Public Counsel actively participated in that docket and his actions invited the result which he now seeks to challenge.

Even after the issuance of a final order in Docket No. 890002-EG, Public Counsel steadfastly remained silent when he could have challenged the increase through reconsideration or by way of appeal. In short, Public Counsel has waived his right to challenge the approved change or is estopped by equitable considerations from later challenging the action of the Commission.

Public Counsel's procedural argument that public utility rates cannot change without a Commission hearing is erroneous and contrary to the holding in Citizens v. Mayo, 333 So.2d 1 (Fla. 1976) and subsequent cases. Moreover, the Commission did not modify any industry-wide policy;

it simply addressed the particular issues raised by Tampa Electric concerning its interruptible and standby interruptible Customers.

Public Counsel further errs in his interpretation of the Commission's reference in Order No. 21448 to Public Counsel's opportunity to file a complaint regarding the modification to Tampa Electric's conservation cost recovery charges.

Public Counsel's only substantive arguments concerning the modification of Tampa Electric's conservation cost recovery factor pertain to the Florida Energy Efficiency and Conservation Act. Public Counsel's arguments in this regard misinterpret the legislative intent of FEECA. Public Counsel's arguments place energy conservation ahead of the basic right of utility Customers not to pay for costs they do not cause. Public Counsel completely misinterprets the provisions in FEECA concerning discrimination against any class of Customers because of their use of four different conservation measures, none of which are involved in this proceeding.

Finally, Tampa Electric would urge the Court to recognize the equitable considerations which support a determination that Tampa Electric should not be made to suffer any loss or make any refunds even if the Court were to accept the arguments put forth by Public Counsel, Tampa Electric followed established procedures in the proceeding below and properly relied on Public Counsel's stipulation in Docket No, 890002-EG that the conservation cost reallocation was appropriate.

POINT I

THE PUBLIC COUNSEL WAIVED ANY OBJECTION TO ORDER NO. 20825 BY STIPULATING TO THE APPROVAL AND IMPLEMENTATION OF TAMPA ELECTRIC'S REVISED CONSERVATION COST RECOVERY FACTOR IN DOCKET NO. 890002-EG.

During the conservation cost recovery hearing conducted in Docket No. 890002-EG commencing on February 22, 1989, Public Counsel affirmatively acquiesced in the upward modification of Tampa Electric's conservation cost recovery factor. The reason for that upward modification was discussed during the earlier prehearing conference in that docket and was again addressed at the final hearing. Public Counsel participated actively in the conservation cost recovery prehearing conference and final hearing, yet raised no issue and preserved no objection to the implementation of the upward modification. Tampa Electric explained during the prehearing conference in Docket No. 890002-EG that it had modified its conservation cost recovery proposal in order to implement the Commission's approval of Tampa Electric's proposal to exempt interruptible Customers from participation in the conservation cost recovery process.

In reliance upon Public Counsel's stipulation, the Commission approved Tampa Electric's modification of its proposed conservation cost recovery factor in Docket No. 890002-EG. Tampa Electric implemented the revised factor effective April 1, 1989. Public Counsel actively participated in the conservation cost recovery hearing which led to this modification and never raised one issue or provided any input to suggest to any party that Public Counsel did not agree that the new cost recovery factor required any further analysis by way of a public hearing before it could be appropriately applied by Tampa Electric. Thus, Public Counsel did more

than simply waive the right to object to the increased charge to firm Customers through inaction -- he affirmatively invited that increase by way of stipulation. Tampa Electric would urge that the Court determine that Public Counsel is estopped from challenging the implementation of that to which he has stipulated.

Apparently recognizing this, Public Counsel contends in Point I of his brief that he believed his stipulation in the conservation docket was subject to an opportunity to request a hearing in Docket No. 881416-EG. Such position is entirely inconsistent with Public Counsel's traditional assertion that ***any*** increase in a conservation cost recovery factor (or for that matter, any other type of cost recovery factor) must be shown to be appropriate in advance of Commission approval and implementation of such increase by the utility.

The conservation cost recovery docket (Docket No. 890002-EG) corresponds with the Commission's fuel adjustment docket (Docket No. 890001-EI) and both dockets are considered at consolidated hearings conducted in February and August of each year. In the fuel adjustment docket the Public Counsel recently argued that the Commission cannot approve a fuel adjustment charge increase without a reasoned basis, not even a "mid-course correction" which is subject to verification at a later true-up hearing. In the instant case, the reasoned basis the Commission relied upon was the unqualified stipulation by all of the parties as to the appropriateness of Tampa Electric's upward modification in its conservation cost recovery factor proposed for use beginning on April 1, 1989.

Tampa Electric relied to its potential detriment on Public Counsel's stipulation. Had Public Counsel expressed any problem with or objection

to the increase, Tampa Electric easily could have rejustified the ncrease during the course of the February conservation cost recovery hearing

In that hearing the Commission, by approving the stipulated ncrease in Tampa Electric's conservation factor, actually incorporated by reference into that proceeding the substantive decision the Commission had previously made in Docket No. 881416-EG. Any subsequent adjustment to the costs approved or revenue collected pursuant to the conservation cost recovery docket would have to be made in that docket and not in the docket which produced the orders here on appeal. Yet, Public Counsel voiced no objection in the conservation hearing to the increased cost recovery factor but, instead, furnished an unqualified stipulation that that increase was appropriate.

Apparently recognizing this, Public Counsel contends, on page 6 of his Initial Brief, that Mr. Howe, the Assistant Public Counsel, only stipu ated to the "accuracy" of Tampa Electric's revised billing factor. Nothing said during the hearing remotely suggested that the stipulation was restr cted to any type of sterile "calculation," or that Public Counsel opposed the increase in the cost recovery factor applicable to firm accounts. The only reasonable impression the Commission and Tampa Electric could have obtained from Public Counsel's stipulation was that the upward revision of the factor was substantively appropriate. After all, this was a conservation factor which would actually be charged to firm Customers of Tampa Electric for a six month period beginning April 1, 1989 -- not some hypothetical calculation having no real effect on what those Customers pay.

The increase in Tampa Electric's conservation cost recovery factor was addressed in Order No. 21317 issued in Docket No. 890002-EG on June 2,

1989. That order states, at page 4, that the parties "stipulated to the appropriate conservation cost recovery factors" for the period Apri1 1989 through September 1989, and specifically identifies Tampa Electric's approved factor to be 0.111¢ per KWH. **(A-7).** This order was issued over three months after the issuance of the primary order Public Counsel here seeks to have reviewed. The later final order in the conservation cost recovery docket, Order No. 21317, incorporates by reference and implements the policy decision here challenged by Public Counsel. Yet Public Counsel did not seek reconsideration or appellate review of Order No. 21317. That order, which reaffirms the policy approved in the orders on appeal, has become final. Thus, the modification of Tampa Electric Company's conservation cost recovery factor is appropriate without regard to the arguments which Public Counsel now directs toward Order No. 20825.

On page 25 of his Initial Brief, Public Counsel claims that the content of Order No. 20825 made Public Counsel's stipulation to the accuracy of the revised factor a "nullity." Public Counsel's effort to withdraw from the stipulation he entered into at the conservation cost recovery hearing and which was confirmed in Order No. 21317 issued on June 2, 1989 is inappropriate. Any concerns which Public Counsel may have had with respect to the stipulation should have been brought to the Commission's attention on a motion to reconsider Order No. 21317 or through a timely appeal of that order. Again, **it** was Order No. 21317, and not the orders here appealed, which brought about the conservation cost recovery factor increase to which Public Counsel now objects. All of the concerns expressed in Public Counsel's initial brief could have been expressed during the period of time for requesting reconsideration or

taking an appeal of Order No. 21317 which confirmed the appropriateness of the stipulation.

The balance of Point I of Public Counsel's Initial Brief involves a discussion of various cases regarding waiver, some of which were cited in Order No. 20825. None of those cases involve factual circumstances which compel a finding of waiver or estoppel like the instant case does.

POINT II

PUBLIC COUNSEL'S PROCEDURAL ARGUMENTS ARE DEFECTIVE.

A. THE EXEMPTION IN SECTION 120.73(3), FLA. STAT., AUTHORIZES THE PROCEDURE UTILIZED BY THE COMMISSION IN RENDERING THE ORDERS HERE ON APPEAL.

In its Order No. 21448, denying Public Counsel's Motion for Reconsideration, the Commission expressed the belief that its procedures utilized below is consistent not only with the Administrative Procedure Act, but also the holding of this Court in Citizens v. Mayo, supra. In that decision this Court observed that an inflexible hearing requirement does not apply to Commission proceedings inasmuch as the Commission can obviate any hearing requirement simply by failing to act. In that decision the Court said that in disposing of rate proceedings the Commission has a number of alternatives including taking no action at all, in which event the proposed rates would go into effect automatically without further action by the Commission. The Court said:

> (3) The Legislature did not intend a full rate hearing before all new rate schedules become effective. Had it intended that result, there would have been no need to enact subsection 366.06(4) at all.

Public Counsel attempts to dismiss the Court's holding in Citizens v. Mayo, supra, with the statement that that case was decided under the pre-1974 Administrative Procedure Act ("APA"). However, the holding in Citizens v. Mayo, supra, and the alternatives open to the Commission in disposing of cases before it have been reaffirmed in subsequent cases under the 1974 APA. See, Citizens v. Mayo, 335 So.2d 809 (Fla. 1976); Florida Gas Company v. Hawkins, 372 So.2d 1118 (Fla. 1979). Moreover, the pre-1974 APA contained the following provision which the Court in Citizens v. Mayo, supra, did not construe to require a hearing each time a matter was decided by the Commission:

> Section 120.22 Hearing Guaranteed -- Any party's legal rights, duties, privileges or immunities shall be determined only upon public hearing by an agency unless the right to public hearing is waived by the affected party, or unless otherwise provided by law. [§120.22, Fla. Stat. (1973)]

In addition, as pointed out in Point I of this brief, the orders here on appeal do not bring about a rate increase for the class of firm Customers Public Counsel purports to represent. Instead, they have the effect of relieving interruptible Customers from paying for Commission approved conservation programs during a specific period. The rationale for this treatment was separately addressed and approved in Docket No. 890002-EG. Public Counsel stipulated to the resolution of that docket and did not seek reconsideration of or appeal the outcome of that case. As a consequence, the orders on appeal did not have any impact on the rates of Tampa Electric's firm Customers. Therefore, Public Counsel cannot be heard to argue that he was inappropriately denied a hearing. Public Counsel was

afforded a hearing in Docket No. 890002-EG and affirmatively elected not to oppose the conservation factor modification he now seeks to overturn.

B. PUBLIC COUNSEL WAS AFFORDED A CLEAR POINT OF ENTRY INTO THE COMMISSION'S DECISION-MAKING PROCESS.

In Part II B. *of* his brief, Public Counsel restates his argument that the Commission failed to prov de a c ear point of entry into its decision-making process. On the contrary the Commission afforded Public Counsel ample opportunity to address the concept of not charging interruptible Customers a conservation cost recovery factor in the proceeding which gave rise to the orders on appeal. More importantly, in the proceeding which actually had the effect of implement ng this concept and which resulted in an increase in the conservation fact r applicable to firm electrical Customers, Public Counsel not only was afforded a clear point *of* entry, but actively participated and stipulated to the effect which Public Counsel now challenges.

In addition, at the time the Commission entered its Order No. 21317 in the conservation cost recovery docket (Docket No. 890002-EG), Public Counsel was well aware that the Commission had exempted interruptible Customers through final agency action in Order No. 20825. Although Public Counsel now contends that his prior stipulation to the modification of Tampa Electric's conservation factor was rendered null and void, Public Counsel made no effort to make that assertion either through reconsideration of Order No. 21317 or through an appeal of that order. The increase in the conservation factor applied to firm Customers thus became

fina and Public Counsel should not now be heard to challenge the effect of that in which he acquiesced.

Finally, in this section of his brief Public Counsel again fails to reco nize the options available to the Commission as clearly articulated in the series of cases beginning with Citizens v. Mayo, supra, including the observation that no inflexible hearing requirement governs changes in utility rates.

C. THE COMMISSION DID NOT MODIFY AN INDUSTRY-WIDE POLICY; INSTEAD THE COMMISSION IN ORDER NO. 20825 MADE A LIMITED DETERMINATION BASED ON THE PARTICULAR FACTS AND CIRCUMSTANCES AFFECTING TAMPA ELECTRIC AND ITS INTERRUPTIBLE CUSTOMERS.

In Part II C. of his argument Public Counsel contends that Order No. 20825 adopted incipient policy. This simply is erroneous.

In the proceeding below the Commission responded directly to the particular concerns expressed by Tampa Electric regarding the inappropriateness of charging a conservation cost recovery factor to Tampa Electric's interruptible and standby interruptible Customers. The company explained the basis for its request in its petition and the Commission and its Staff carefully considered that basis. Order No. 20825 fully explains the basis for the action taken by the Commission.

Public Counsel's contention that the Commission change an industry-wide policy in the proceeding below is negated by Public Counsel's own reference to what took place at the prehearing conference in the conservation cost recovery docket. In footnote 1 on page 18 of his Initial Brief, Public Counsel observes that the attorney for Occidental Chemical

Corporation attempted to obtain a similar result for her client but was advised by the Prehearing Officer that Occidental would have to file a separate request. Quite clearly, the action taken below was not one in which the Commission adopted incipient policy in a nonrule proceeding. Even if it were, Public Counsel waived any right to object when he subsequently stipulated to the implementation of that change in the conservation cost recovery docket, then permitted that stipulated change to become final without further comment.

D. PUBLIC COUNSEL ERRONEOUSLY INTERPRETS THE COMMISSION'S REFERENCE IN **ORDER** NO. 21448 TO PUBLIC COUNSEL'S OPPORTUNITY TO FILE A COMPLAINT REGARDING THE MODIFICATION TO TAMPA ELECTRIC'S CONSERVATION COST RECOVERY CHARGES.

In this section of Public Counsel's Initial Brief, beginning on page 41, the suggestion is made that the opportunity to file a complaint against a particular rate or methodology cannot be substituted for the Commission's "failure to comply with the APA in the first place." This erroneously assumes that the action taken below contravened the APA -- an assumption which we have demonstrated is false.

Tampa Electric views the reference in Order No. 21448 to Public Counsel's opportunity to file a complaint as being supplementary to the other rights of participation which Public Counsel could have taken advantage of but elected not to.

Public Counsel criticizes the complaint proceeding alternative because he would have the burden of proof if he pursued such an action. This is obviously as it should be. Anyone who stipulates to a proposed

modification, then later reverses course and challenges the modification should have the burden of proof as to why the modification is no longer appropriate.

At the the bottom of page 42 of his Initial Brief, Public Counsel states that the change in conservation cost recovery is not effective until an order is entered pursuant to Section 120.59, Fla. Stat., after proceed ngs under Section 120.57, Fla. Stat. While this is contrary to the holding in Citizens v. Mayo, supra, the prerequisites demanded by Public Counsel nevertheless have been provided. The change in the conservation cost recovery factor, to the extent that it affected firm Customers, was the subject of the hearing conducted in Docket No. 890002-EG. This, again, is the docket in which Public Counsel stipulated to the actual change in the conservation cost recovery factor. A hearing was conducted and an order was entered pursuant to Section 120.59, Fla. Stat., after that hearing took place. Public Counsel did not challenge that order even though he could have done *so* through a request for reconsideration or by way of an appeal. For whatever reason, Public Counsel elected not to pursue either alternative. The orders on appeal should not be disturbed on account of inaction by Public Counsel.

POINT III

TAMPA ELECTRIC'S CONSERVATION COST RECOVERY REALLOCATION DID NOT VIOLATE THE FLORIDA ENERGY EFFICIENCY AND CONSERVA ION ACT.

Public Counsel's only substantive cr ticisms of Tampa Electric's conservation cost recovery reallocation do not appear until page 43 of Pub ic Counsel's Initial Brief. Those criticisms are two-fold. First,

Public Counsel contends that the reallocation violates the provisions of the Florida Energy Efficiency and Conservation Act ("FEECA") on the ground that it "encouraged increased electric energy usage." Public Counsel's position on this point is erroneous for several reasons.

First, the primary reason for the conservation cost recovery reallocation, as explained in Tampa Electric's petition, was that interruptible and standby interruptible Customers should not have to pay for conservation programs which do not benefit them. If it is inequitable to charge a particular class of Customers for a particular item of expense, that class of Customers should be exempt from paying for that expense regardless of the impact the exemption has on their energy consumption. For example, when the cost of fuel goes down and, as a result, the fuel adjustment factor is lowered, Tampa Electric's Customers experience reduced electric bills which may, in fact, stimulate higher electric consumption. Surely, Public Counsel would not contend that the fuel factor should not be reduced because of the potential impact that could have on energy consumption.

Public Counsel on a number of occasions has petitioned the Commission to reduce the rates and charges of Commission regulated utilities. The potential impact of those reductions, i.e., increased energy consumption due to lower rates, did not deter Public Counsel from pursuing those reductions.

Obviously FEECA does not stand for the proposition that no action can be taken if it is likely to cause an increase in energy consumption by Commission regulated utilities. In fact, FEECA does not speak in terms of increases in energy consumption but, instead, speaks to the growth rates

of electric consumption. Implicit in FEECA is the legislative recognition that electric energy consumption is bound to increase over time, despite the Act's provisions. In any case, the Act does not prohibit the Commission from taking appropriate action even though it may result in some increase in energy consumption.

Since the total dollars being collected by Tampa Electric are the same whether spread among all Customers or only to firm Customers, it is reasonable to assume that no perceptible effect on electric energy consumption will occur because of the reallocation.

Public Counsel's second argument regarding FEECA is the allegation that the decision below resulted in discriminatory rates. Again, the Commission's acceptance of the basis for the reallocation did not change any rates; that was done later in Docket No. 890002-EG. Even if the rates had been changed in the orders on appeal, no discrimination resulted within the meaning of FEECA.

The portion of FEECA quoted by Public Counsel on page 45 of his Initial Brief in support of the discrimination argument reads in pertinent part:

> . . .Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, and load-control systems be encouraged. Accordingly, in exercising its jurisdiction, the commission shall not approve any rate or rate structure which discriminates against any class of customers on account of the use of such systems or devices. . . .

The plain meaning of the above language is to prevent discrimination against any class of Customers based on their use of solar energy, renewable energy sources, highly efficient systems and load-control

systems. Obviously, the purpose for prohibiting such discrimination is to encourage use of these types of systems. However, this has nothing to do with the concept approved in the orders below to the effect that a class of Customers should not be required to pay for conservation programs which do not benefit the members of that class.

All in all, Public Counsel's FEECA arguments are labored to the point of appearing contrived for the purpose of having some basis to challenge the conservation cost reallocation. Tampa Electric would urge that the Court recognize that Public Counsel has waived any opportunity to present these types of arguments or, in the alternative, to reject these arguments as being facially invalid.

POINT IV

EQUITABLE CONSIDERATIONS WOULD MAKE ANY REFUNDS INAPPROPRIATE EVEN IF PUBLIC COUNSEL PREVAILS ON ANY OF HIS ARGUMENTS.

Tampa Electric firmly believes that the procedures utilized by the Commission, both in the docket below and in the conservation cost recovery docket, adequately protected the rights and interests of the firm Customers Public Counsel purports to represent. For many years the Commission has utilized a tariff approval process which has not involved an inflexible requirement that a public hearing be conducted in every instance. The actions taken below were consistent not only with that long-term practice but also the Court's observations in Citizens v. Mayo, supra, to the effect that no inflexible hearing requirement applies in Commission actions.

Notwithstanding this, Tampa Electric is understandably concerned that Public Counsel has asked the Court to use a single Commission decision involving Tampa Electric as a vehicle for retroactively imposing an

inflexible hearing requirement. Accordingly, Tampa Electric would urge the Court, in resolving this appeal, to be mindful of the following equitable considerations which support a determination that Tampa Electric should not be made to suffer any loss or make any refunds even if the Court accepts the arguments put forth by Public Counsel:

(a) In the proceeding below Tampa Electric simply followed accepted Commission procedures in seeking the conservation cost recovery modifications involved in this appeal.

(b) In approving and implementing the proposed modification, both the Commission and Tampa Electric relied upon Public Counsel's inaction in the proceeding below, Public Counsel's affirmative stipulation in the conservation cost recovery docket (Docket No. 890002-EG) to the effect that the modification was appropriate, and Public Counsel's failure to raise any of these issues in the conservation cost recovery docket, even after the issuance of the final order in that docket.

(c) Tampa Electric's function in administering its conservation cost recovery programs is to collect, dollar for dollar, the reasonable and prudent costs of those programs -- not to make any profit or absorb any unreimbursed costs.

(d) If there was any unintended error in the procedures below, Tampa Electric was not responsible for it. This Court observed in Citizens of Florida v. Mayo, supra, (at 333 So.2d 7):

> Neither Gulf Power nor Public Counsel were responsible for the impropriety of the Commission's procedures. Since the defect is not of constitutional significance, and despite the fact that Public Counsel was mislead, we believe it would be unduly harsh

> to punish Gulf Power by directing a refund of charges collected between December 30, 1974 and March 2, 1975. . .

In view of the foregoing considerations, Tampa Electric submits that it should not be made to absorb any of the costs of its conservation cost recovery programs regardless of the outcome of this appeal.

CONCLUSION

For the foregoing reasons Tampa Electric urges that Orders Nos. 20825 and 21448 issued by the Florida Public Service Commission in Docket No. 881416-EG be affirmed in all respects.

DATED this 30th day of October, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail this 30th day of October, 1989, to the following:

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