IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. MICHAEL MCK. WILSON, ETC., ET AL., Appellees.	)	CASE NO. 74,471

ANSWER BRIEF OF APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

The Public Service Commission is referred to in this brief as the "Commission." Appellee, Tampa Electric Company, is referred to as "TECO." Appellants, the Citizens of the State of Florida, are referred to as Public Counsel, their representative in this case. References to the record on appeal are designated (R.-___). References the initial brief of Appellants are designated "Appellants' brief at _____." References to Appellee's Appendix to the brief are designated (A.-___.)

STATEMENT OF THE CASE AND FACTS

The Commission generally accepts Public Counsel's statement of the case and the facts insofar as it objectively depicts the events and circumstances leading to the issuance and appeal of Orders Nos. 20825 and 21448. The Commission does object, however, to Public Counsel's argumentative discussion of Orders Nos. 21448 and 20825 beginning at page 10 of the brief. The orders speak for themselves, and this Court is certainly capable of understanding their content without the help of Public Counsel's selective quoting of passages with which he disagrees.

Such additional facts as the Commission may have relied on in support of its arguments are very limited in nature and are incorporated into the body of its brief.

SUMMARY OF ARGUMENT

Since this Court decided Citizens of Florida v. Mayo 333 So.2d 1 (Fla. 1976) under the first file and suspend law, it has been recognized that, in dealing with tariff filings proposing changes in a utility's rates, charges, and regulations, the Commission has a range of options which includes the alternatives of suspending the rates, actively approving their implementation or taking no action, thereby allowing the rates to go into effect. Under none of these alternatives is the Commission required by the APA to hold an evidentiary hearing prior to its action, even if it means that increased rates may go into effect without hearing. This procedure survived the 1974 amendments to the APA and applies to tariff filings as well as regular rate increases. Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976).

The Commission's action in approving Tampa Electric Company's tariff modifying its conservation cost recovery methodology is consistent with this Court's holding in these cases and others which have followed. To require the Commission to issue a proposed agency action (PAA) order when the file and suspend law allows the utility's proposed tariffs to go into effect within 60 days would defeat the right guaranteed by that law. The APA does not require the issuance of a PAA order nor does it guarantee any right of entry before the tariff changes go into effect. Sections 366.06 and 366.07, Florida Statutes, contemplate a complaint as the basis for a challenge to the prospective applications of rates

put into effect under the file and suspend law. That opportunity to challenge TECO's proposed tariff modifications was and is available to Public Counsel, as the Commission's Order No. **21448** makes clear.

The Commission's Orders Nos. **20825** and **21448** approve a change in conservation cost recovery methodology for Tampa Electric Company only. These orders did not violate the APA by effecting an industry-wide policy change for electric utilities in Florida. The order is of a limited temporal duration, subject to review by the Commission before March **1990.**

The Commission's orders are not in violation of the Florida Energy Efficiency and Conservation Act, sections **366.80 - 366.85,** Florida Statutes. The Commission's orders do not result in discrimination against the utility's firm ratepayers but only require them to bear costs which are ascribable to the benefits they receive. There is nothing in the Commission's orders which approves a program designed to increase fuel consumption, and any discussion of the requirements of FEECA in this regard by the utility have no bearing on the Commission's decision in this case.

Public Counsel had actual notice of the filing of Tampa Electric's petition and the Commission's pending action at the January **31, 1989,** agenda. Public Counsel failed to appear and attempt to influence the Commission's action at that time thereby foregoing a reasonable opportunity to participate in the proceedings and make his concerns known. In full knowledge of the effect of the utility's proposed tariff changes on conservation

cost recovery, Public Counsel stipulated to the implementation of the increased recovery factor approved in Docket No. 890002-EG. Having entered into that stipulation accepting the increased conservation cost recovery factor for Tampa Electric Company, Public Counsel has waived any opportunity to indirectly dispute it through the procedural argument he has raised on this appeal.

I.

NEITHER TRADITIONAL CONCEPTS OF DUE PROCESS NOR THE PROCEDURES UNDER CHAPTER 120, FLORIDA STATUTES, REQUIRE THE COMMISSION TO HOLD A HEARING PRIOR TO APPROVING A TARIFF FILING BY AN ELECTRIC UTILITY.

At common law a public utility had the right to set its own rates and to adopt and put into effect such rate schedules or tariffs as it believed to be just and reasonable. Mountain States Telephone and Telegraph Company v. New Mexico State Corporation Commission, 337 P2d 43 (N. M. 1959); Miami Bridge Co. Miami Beach Ry. Co., 12 So.2d 438, 445 (Fla. 1943). The remedy at common law for the utility's customers was to attack the utility's rates as arbitrary or discriminatory in the courts. Cooper v. Tampa Electric Company, 17 So.2d 785, 786 (Fla. 1944).

The common law process for the promulgation of utility rates was abridged in Florida in 1951 when the Legislature exercised its prerogative to delegate the review and rate-setting authority to the Commission. That delegation did not, however, modify the fundamental proposition that a utility has the right to propose rates that are capable of producing a fair return on its investment so long as those rates are just and reasonable when measured by **correctstandards that bear a proper relation to the factors involved in the production." Id. For electric utilities, that process is currently described in section 366.06, Florida Statutes (1987) -- Rates: Procedure for Fixing and Changing -- which states in relevant part.

> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any utility for its service. The commission shall investigate and determine the actual legitimate cost of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, ...

It is out of that tension between the common law concept of a utility's right to prescribe its rates, *so* long as they are just and reasonable, and the delegation of that ratemaking authority to a commission that review under the so-called "file and suspend" laws is born. While a utility no longer has the prerogative of changing its rates solely at its discretion but must submit them to review by the regulatory commission, the regulators cannot arbitrarily or indefinitely withhold consent to their operation. That principle is embodied in section 366.06(4), Florida Statutes (1987), which states:

> Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than eight months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, ...

Clearly, the Florida file and suspend law represents a compromise between the utility's right to immediate rate relief and the duty of the Commission to protect the interests of the public by a review to establish that the rates are just and reasonable. In other terms, this Court has recognized that the purpose of the file and suspend law was "expressly designed to reduce so-called "regulatory lag'' inherent in full rate proceedings. Citizens of Florida v. Mayo, 333 So.2d 1, 4 (Fla. 1976).

A. PUBLIC COUNSEL'S INTERPRETATION OF THE FILE AND SUSPEND PROCEDURE AS IT APPLIES TO TECO'S TARIFF IS CONTRARY TO THE HOLDINGS OF THIS COURT AND WOULD RENDER THE OPERATION OF THE FILE AND SUSPEND LAW MEANINGLESS.

In his brief, Public Counsel concedes that due process does not require a hearing before implementation of interim rates under the file and suspend law, but argues that the same should not apply to the implementation of TECO's change in its conservation cost recovery mechanism, notwithstanding the Commission's express consent to the operation of the tariff change. Presumably, this is the result of the enactment of the 1974 amendments to the APA (Chapter 74-310 Laws of Florida), specifically the operation of section 120.72(3), Florida Statutes. Yet, the considerations of due process under the file and suspend law and the procedural rights guaranteed by the pre-1975 APA are essentially the same as those contained in the current versions of these statutes. The Mayo case, which was the first case decided under the newly-enacted file and suspend law in 1974, illustrates this

proposition. In that case, Public Counsel had argued that due process required the right to a full evidentiary hearing before implementation of an interim rate increase. This Court ultimately rejected that proposition:

> We agree with Public Counsel that the Legislature's placement of subsection 366.06(4) suggests no reason to alter the public policy of this state in favor of traditional due process rights in rate "hearings," permanent or interim. On the other hand, we agree with Gulf Power that an inflexible hearing requirement was not intended inasmuch as the commission can obviate any hearing requirement simply by failing to act for 30 days. We must conclude, therefore, that the Legislature intended to provide elected public service commissioners with a range of alternatives suitable to the factual variations which might arise from case to case.

Id. at 6.

The Court found no inconsistency between "procedure for due process" contained in 120.26, Florida Statutes (1973), and the implementation of interim rates without hearing under the file and suspend law. That statute provided:

> "The agency shall afford each party authorized by law to participate in an agency proceeding the right to: (1) present his case or defense by oral and documentary evidence; (2) submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Id. at 7, n. 16.

Admittedly, the Mayo case did not require the court to specifically address the question of a due process hearing before implementation of final rates under the file and suspend law, since it was only concerned with a interim request. However, the opinion makes clear that the same consideration of due process for the interim increase were applicable to permanent rates under the

file and suspend law. This is clearly stated among the conclusions reached by the court on the file and suspend law's operation. Among other things, the court concluded that

> **(3)** [t]he Legislature did not intend a full rate hearing before all new rate schedules become effective. Had it intended that the result, there would have been no need to enact subsection 366.06(4) at all.
>
> **(4)** [t]he Legislature obviously intended to allow public utilities the benefit of proposed rate increases from the date they could satisfy the commission on the basis of an uncontested preliminary showing that the needs of the company were such as to necessitate immediate financial aid. Where the commission is *so* satisfied after a preliminary analysis extending over a period not longer than 30 days, the rates become effective without further action by the commission.
>
> . . .

Id. at 5. (Footnote omitted)

It was in contemplation of the rights of the utility vis-a-vis the power of the regulators to protect the public interest that the court could conclude that the commission could "obviate any hearing requirement simply by failing to act for 30 days." Id. at 6. The court further emphasized that conclusion in footnote 9 of the Mayo opinion where it stated: "Obviously the question of due process does not arise if the commission does not suspend the new rates within 30 days. In those cases the Legislature has directed that proposed rates become effective on the 31st day." Id. at 5, n. **9**.

The court's conclusion that no hearing at all would be required if the proposed rates went into effect by operation of

law on the 31st day is emphasized in the opinion at footnote 10 which states that this alternative (of not holding a hearing) will

> "generally be impolitic for elected public service commissioners. The commissioners would have to justify their analysis of the company's needs, generally based on staff recommendations, without the benefit of a publicly-developed record and without any publicly-expressed reasons to support the new increase."

Id. at 5.

It may be no less "impolitic" for the current, appointed commissioners to allow a rate increase to go into effect without hearing, but the court clearly concluded that that was an option under the file and suspend law. That option has been repeatedly recognized by this Court in a series of opinions following enactment of the revised APA in 1975, and it remains a viable option which must be recognized today.

In two cases decided on December 22, 1976, the Court further emphasized the file and suspend law's force as a vehicle requiring the immediate implementation of rates upon expiration of the suspension period. The first case, Maule Industries v. Mayo, 342 So.2d 63 (Fla. 1976) was an appeal of the Commission's order lifting the suspension of Florida Power and Light Company's proposed rate. The effect of the order was to allow an interim rate increase to go into effect. The order was challenged by Public Counsel, who claimed that the Commission had not made the requisite findings to warrant lifting the suspension. The Commission sought to justify its action upon the grounds, among others, that the suspension for "good cause" requirement of the file and suspend law only necessitated a finding that the rates

"may" be unjust and unreasonable. On this theory, the Commission claimed it did not need to develop the "additional or corroborative data" required by the court's decision in the Mayo case, supra. This Court rejected the Commission's argument as a light-handed treatment of its obligation under the suspension provisions of the law. The court noted:

> If the Commission does not have a reasonable basis to believe that the rates as filed are unreasonable or discriminatory, it would appear to have a statutory obligation to withhold suspension and allow them to become effective.

342 So.2d 67, n. 7.

This Court thus concluded that the file and suspend law requires the Commission to allow the proposed rates to go into effect unless the Commission can demonstrate some substantial basis to contest their reasonableness.

In the second case decided in December 1976, Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 11 (Fla. 1976), the court issued an opinion on the operation of the file and suspend law which is most germane to the instant appeal. Florida Interconnect Telephone Company (Florida Interconnect), a competitor of Southern Bell Telephone and Telegraph Company (Southern Bell) in the private branch exchange (PBX) business, contested a tariff filing by which Southern Bell lowered its rates for PBX equipment and services.

The tariff filing was processed under the telephone file and suspend law (section 364.05(4), Florida Statutes (1975)), which is the same in all relevant respects as the electric file and suspend

law. As with the electric file and suspend law of the same vintage, the telephone statute required the Commission to act within thirty days to suspend the tariff, if it found good cause to do so.

Before the Commission acted on the proposed tariff, but more than 30 days after the tariff was filed, Florida Interconnect filed a complaint and request for hearing on the proposed rate changes alleging that its substantial interests would be effected by approval of the tariff. Thereafter, the Commission proceeded to approve the tariff at its agenda conference, but notified Florida Interconnect that its complaint would be set for hearing. Florida Interconnect did not pursue the immediate opportunity for a hearing on its complaint, much as Public Counsel has rejected the Commission's suggestion in its order that a complaint proceeding would allow the opportunity for hearing in this case. (See Order No. 21448 at 3, R.-138). Instead, Florida Interconnect took an appeal claiming that the APA, specifically section 120.57(1)(b), Florida Statutes, required that it be given an opportunity for hearing prior to the implementation of the proposed tariff changes.

This Court found that Florida Interconnect's appeal was not well-founded for three basic reasons. First, the Court concluded that the Commission's order approving the tariff did not constitute final agency action within the contemplation of the APA, specifically section 120.52(9), Florida Statutes (1975), which defines order as a "final agency decision." Because the

complaint proceeding was still pending, the Court concluded that the decision was not "final" and, therefore, not reviewable.

This Court went on to find, however, that the order of the Commission, issued more than **30** days after the tariff was filed, was in "a very real sense surplusage." Id. This Court explained its conclusion as follows:

> This is *so* because of the provisions of the "file-and-suspend" law, enacted as Chapter **74-195**, Laws of Florida. If the Commission does not object to the proposed tariff changes within **30** days, the proposed rates automatically go into effect . . . Id.

The court further concluded that the automatic implementation provision of the file and suspend law survived the adoption of the APA, specifically referencing section **120.72(3),** Florida Statutes **(1975),** which grants an exception to the APA for file and suspend procedures. Id. at **814.**

Finally, the court concluded that "the Commission was without authority to suspend intervenor's new rate tariffs had it chosen to do **so**, and consequently Interconnect is in no position to complain about the new schedule's having gone into effect on at least an interim basis. Id.

In the Florida Interconnect case this Court reconciled the competing interests of the utility and affected persons, which are at issue in this appeal. In this case, as in Florida Interconnect, the Commission found no good cause to suspend TECO's tariff filing. In the absence of that finding, the Commission approved the tariff, even though, as in the Florida Interconnect case, the Commission's order approving the tariff may have been in

a "very real sense surplusage." As in the Florida Interconnect case, TECO's tariff filing was made outside of a full rate proceeding and did not involve a request for interim rates. As in the Florida Interconnect case, a belated challenge to the tariff under the due process and hearing requirements of section 120.57, Florida Statutes, was rejected as an inappropriate challenge to the approved tariff. As in Florida Interconnect, the opportunity to challenge the reasonableness of the changes made effective by the file and suspend law was held out in the form of a complaint proceeding. Finally, in this case, as in Florida Interconnect, adequacy of notice is not a decisive issue; under the file and suspend procedure the tariff could have gone into effect whether or not the Commission voted to approve it at agenda. Id.

The Florida Interconnect case and the predecessor cases decided by this Court on the file and suspend law compel affirmance of the Commission's order in this case. This Court has repeatedly held that under the operation of the file and suspend law, there is no right under the APA for a hearing prior to the implementation of the rates, either where the Commission fails to act or approves the tariff filing in the absence of good cause to suspend.

The cases decided by this court after the Florida Interconnect decision likewise support the utility's right to propose and implement rates consented to by the Commission. In Florida Power Corporation v. Hawkins, 367 So.2d 1011 (Fla. 1979), this Court found that the Commission was without authority to unilaterally,

without notice and hearing, revoke Florida Power Corporation's interim rate award put in effect pursuant to the file and suspend law. As it did in the Mayo and Florida Interconnect cases, this Court found that the power to unilaterally undo rates put into effect by consent or operation of law would render the utility's right to put rates into effect after 30 days meaningless. Id. at 1014. In this context, the Court further expressly rejected Public Counsel's argument that the utility had no constitutional right of due process flowing from the file and suspend statute.

B. A COMPLAINT PROCEEDING IS AN ADEQUATE VEHICLE TO CHALLENGE TARIFF CHANGES PUT IN EFFECT UNDER FILE AND SUSPEND.

A complaint proceeding is the historical vehicle to challenge the reasonableness of rates which are legitimately in effect. That opportunity for initiating a complaint proceeding exists at any time during the effectiveness of any rate schedule. No procedural error can be ascribed to the Commission for Public Counsel's failure to take the opportunity to file a complaint to challenge the reasonableness of TECO's tariff.

Lest there be any doubt that a complaint is the proper vehicle for initiating a challenge to existing rates, one need only refer to section 366.07, Florida Statutes, relating to adjustments in utility's rates. That section states:

> Whenever the Commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged, or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or

> unjustly discriminatory, or preferential, or anywise in violation of law, or any service is inadequate or cannot be obtained, the Commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts, or service, to be imposed, observed, furnished, or followed in the future. (Emphasis supplied).

This section of the statute contemplates that virtually any challenge to the tariffed rates, rules, and regulations of an electric utility can be brought in the form of a complaint. Public Counsel's lament that a complaint proceeding would be inadequate to protect its interests is not well founded. The complaint balances the due process rights of the utility to put rates into effect under file and suspend with those of the ratepayers to challenge the rates' prospective application. Moreover, Public Counsel's contention that the complaint proceeding would place him at an unfair disadvantage, so far as burden of proof is concerned, does not comport with the Commission's practice in proceedings where rates and other terms and conditions of the utility's services are at issue. As this Court recognized in Gulf Power Co, v. Public Service Commission, 453 So.2d 799 (Fla. 1984) and South Florida Natural Gas Company v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988) the Commission is required to investigate and test rates which it, or a challenging party, believes may be unreasonable. Accordingly, the utility bears the ultimate burden of persuasion in such proceedings. 534 So.2d 697.

C. ORDER NO. 20825 DOES NOT EFFECT A CHANGE IN INDUSTRY-WIDE POLICY

Finally, it should be noted that the Commission's Order No. 20825 is interim in nature. The order states that the tariff modifications will be effective only for the period April 1, 1989 to March 31, 1990. The Commission further expressed its intention to revisit the issue of conservation benefits to the interruptible rate classes prior to March 1990. It does not effect an industry-wide policy change, as Public Counsel urges, but applies only to TECO's conservation programs. It is of limited temporal duration and is not founded in any far-reaching policy decisions. Instead it recognizes only that current factual circumstances do not warrant the imposition of conservation charges on the interruptible class customers, who currently receive no benefits from conservation. Such changes in policy of limited scope and duration should not be held violative of APA procedures. Cf., State Department of Commerce, Division of Labor v. Matthews Corporation, 358 So.2d 256 (Fla. 1st DCA 1978). (Wage rate guidelines issued by Division of Labor and required to be included in competitive bids for construction projects were not rules because they were applicable only to the construction of particular projects and had no prospective application to any other project.)

II.

THE COMMISSION'S ORDERS APPROVING TECO'S TARIFF DOES NOT VIOLATE FEECA.

Public Counsel's assertion in its brief that TECO's petition violated FEECA because it encourages fuel consumption and discriminates against customers participating in conservation programs is totally without merit. As the Commission recognized in its Order No. **20825,** TECO's requested tariff modification only addressed the questions of whether interruptible customers receive quantifiable benefits from conservation programs such that they should be charged for their implementation. The order stated:

> 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.

Order No. **20825** at 1; R.-49.

Ultimately, the Commission concluded that because no demand-related production plant costs are allocated to the interruptible customers they do not receive any benefit from conservation programs based on demand-related production plant avoidance or deferral. The Commission did recognize, however, that some fuel cost savings might accrue to TECO's benefit beginning in 1990.

The Commission explained:

> The other benefit of conservation is potential fuel savings due to not burning oil or gas in the peaking capacity. TECO's current generation expansion plan shows the addition of a 1993 75 MW combustion turbine (CT) as the next generation addition. Without conservation and load management programs, TECO's next generation addition would have been a 1990 75 MW CT. Therefore, TECO's conservation programs have deferred this 1990 unit and avoided the associated higher fuel costs of dispatching the CT unit. From a planning prospective, since higher priced gas and oil would be burned in this unit the avoidance of this unit does benefit the interruptible customer by keeping the average fuel charge below what it would have been if the 1990 CT is built. The value of this benefit needs to be identified and credited as a conservation benefit which accrues to the interruptible customer.

Order No. 20825 at 2; R.-49.

Although not expressly stated in its order, the Commission's findings as to the effect of conservation programs on TECO's interruptible customers is based in part on knowledge of the utility's operations gained in its last rate case in Docket No. 850050-EI and in the course of the Commission's Annual Planning Hearing which consider the generation expansion plans of all utilities in Florida. In addition, as the order notes, TECO submitted data in support of its petition based on its production costing model PROMOD. Order No. 20825 at 2; R.-50.

Ultimately, the Commission accepted staff's recommendation that TECO's interruptible customers did not currently receive any avoided fuel benefits and should, therefore, be relieved of contributing to conservation cost recovery. However, the Commission also accepted the staff's proposal that this relief from conservation cost recovery be implemented on an interim basis

for the one-year period April 1, 1989 to March 31, 1990. This was because the staff's analysis indicated that starting in 1990 interruptible customers would begin to benefit from avoided fuel costs associated with the deferred CT unit.

In no way can it be said that the Commission's finding that interruptible customers should not pay for conservation benefits they do not receive is discriminatory under FEECA. The relevant portion of that act states:

> 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 system or devices.

Section 366.81, Florida Statutes.

The Commission's order shifting conservation cost to those who receive the benefits of such programs hardly discriminates against them for their use of the energy-saving devices that the conservation programs subsidize. On the contrary, it would be a much more credible challenge for the interruptible customers to argue that they were the victims of a form of reverse discrimination under FEECA, because they are being asked to bear the costs which do not in anyway accrue their benefit.

The validity of TECO's conservation programs was in no way at issue before the Commission. TECO's argument in its petition that the FEECA goal of reducing the growth rate of electric consumption contemplated reducing the difference between marginal fuel costs

and average fuel costs had virtually nothing to do with the relief it requested. TECO was simply stating its belief that buring more lower cost fuel purchased on the spot market helped drive down overall fuel costs. The Commission found this interpretation of FEECA to be incorrect and irrelevant to the petition at hand. The Commission's Order stated:

> We believe a strict reading of this goal requires TECO to reduce the nominal quantities of fuels burned, not the price differential. However, whatever the interpretation of FEECA, this issue has no relevance to the relief requested here.

Order No. 20825 at 3; R.-51.

TECO did not violate FEECA by expressing its opinion on the meaning of the statute's goal relating to reducing the growth rate of electric consumption. Nor is there any discrimination in allowing the beneficiaries of conservation programs to pay for them. The Commission has in no wise, "deferred to this Court to evaluate the legality of Order No. 20825 under FEECA in the first instance. (Appellants' brief at page 47). It is the primary responsibility of the Commission to interpret the statutes it administers, and its findings should not be overturned unless clearly erroneous. Pan Am World Airways v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983). The Commission committed no such error in approving TECO's petition.

III.

PUBLIC COUNSEL WAIVED THE RIGHT TO CONTEST THE EFFECTS OF ORDER NO. 20825 BY STIPULATING TO THE THE IMMEDIATE IMPLEMENTATION OF TECO'S REVISED CONSERVATION COST RECOVERY FACTOR IN DOCKET NO. 890002-EG.

Public Counsel's appeal of the Commission's Order No. 20825, issued in Docket No. 881416-EG, is an attempt to bootstrap a foregone challenge to TECO's increased conservation cost recovery factor approved in Docket No. 890002-EG. It is ultimately the result of this later docket, which may have added twenty cents per customer per month to the firm customers' conservation charges, against which Public Counsel mounts this belated challenge. Cf., Appellants' Brief at 8. Public Counsel was fully informed as to the substance of the Commission's proceedings in Docket No. 881416-EG, in which Order No. 20825 was issued, and their relation to Docket No. 890002-EG, the Conservation Cost Recovery Docket. Yet, Public Counsel failed to come forward with his complaint before the Commission approved TECO'S tariff filing in Docket No. 881416-EG and clearly waived any objection to the implementation of TECO's conservation cost recovery factor by stipulating to it in the proceeding held in Docket No. 890002-EG.

Section 350.0613, Florida Statutes, requires the Commission to provide copies of pleadings and other documents filed with the Commission to Public Counsel. In relevant part that statute states:

> The commission shall furnish the Public Counsel with copies of the initial pleadings in all proceedings before the commission, and if the Public Counsel intervenes as a

party in any proceeding he shall be served with copies of all subsequent pleadings, exhibits, and prepared testimony, if used.

Consistent with prescribed statutory policy, Public Counsel was provided a copy of TECO'S petition and the Commission staff's recommendation to approve it. That recommendation was prepared and issued on January 11, 1989, well in advance of the January 31, 1989, agenda at which it was considered. R.-16. As is reflected in Order No. 20825, the recommendation clearly stated that staff advocated the approval of TECO's petition requesting the elimination of the conservation cost recovery factor for interruptible customers. The recommendation also described the proposed implementation of the change. Order No. 20825 at 3-4; R.-51-52; 18-27.

Public Counsel does not dispute that TECO's petition and the staff recommendation for the January 31, 1989, agenda conference had been provided to his office. Appellants' brief at 16. Public Counsel was advised by the recommendation itself and the Commission's notice of the agenda conference that the matter would be considered on that date and that interested parties would have an opportunity to address the recommendation. R.-31-32. Nevertheless, Public Counsel, being fully aware of the nature of the staff's recommendation and its potential consequences, did not come forward to address the Commission. Notwithstanding the clear opportunity to use the agenda conference to influence the Commission's decision, Public Counsel chose to do nothing. Public Counsel's reason for not coming forward at that time, be it

purportedly overwhelming work load, or whatever reason, are purely his own.

The issue decided by the Commission at the January 31, 1989, agenda conference was limited to relieving interruptible customers from conservation cost recovery for a one-year period extending from April 1, 1989 to March 31, 1990. It did not set the rate for conservation cost recovery. That was the subject of the proceedings in Docket No. 890002-EG styled In re: Conservation Cost Recovery Clause. In the conservation cost recovery proceedings, normally held in February and August of each year, the Commission sets the mechanism by which utilities recover the cost of their conservation programs in a cents-per-kilowatt hour charge.

In the proceedings held in February of 1989, TECO proposed to increase its conservation cost factor from .096 cents per kwh to .111 cents per kwh. This was a direct result of the Commission's action at the January 31, 1989, agenda which approved TECO's proposal to charge conservation cost recovery only to the firm customers; the costs to the firm customers went up because the customer base from which they are collected is smaller.

TECO's proposed increase in its conservation cost recovery factor and its relationship to the Commission's Order No. 20825 approving the change in methodology was made clear to Public Counsel at the prehearing conference in Docket No. 890002-EG, held on February 10, 1989. Public Counsel's attorney, Mr. Howe, who later filed a petition for reconsideration of Order No. 20825,

attended those proceedings on February 10, 1989. During the discussion of issues at the prehearing conference, TECO's attorney, Mr. Beasley explained how the Commission's vote on January 31st in Docket No. 881416-EG would effect TECO's conservation cost recovery factor:

> MR. BEASLEY: Commissioner, with respect to Tampa Electric's proposed factor of .096 cents per kwh as was eluded to earlier, the Commission on January 31st voted to approve Tampa Electric's request to have an adjustment to its conservation cost recovery methodology, and I would suggest that we stipulate that the .096 cents per therm (sic) or per kilowatt hour charged is correct prior to the adjustment that needs to be made, and that Mr. Kordecki is in the process of putting together the slight adjustment that would be affected by the Commission's vote on January 31st, and that he appear at the hearing to explain that adjustment, and that that be the only issue to be addressed at the hearing for Tampa Electric Company, but that we would file the adjustment prior to the hearing so everybody can look at it.

R-71-72.

When the official prehearing order in Docket No 890002-EG was issued on February 21, 1989, the issue relating to the conservation cost recovery factor was Issue No. 3. Order No. 20785 stated the issue as follows:

> 3. ISSUE: (Stipulated As to All Utilities Except FPL):
>
> What is the appropriate Conservation Cost Recovery Factor for the period April, 1989 through September, 1989?
>
> . . .
>
> TECO: .111¢/kwh (recalculated per ruling in Docket No. 881416-EG excluding interruptible customers from ECCR clause.).

Order No. 20785 at 13; A.-13.

The prehearing order, in a section entitled "stipulated issues" repeated that all parties, including Public Counsel, had stipulated to the conservation cost recovery factor in Issue 3 as to all utilities except FPL:

> The following stipulations have been approved by the prehearing officer:
>
> . . .
>
> The parties have stipulated issues 1, 2, and 3 as to all utilities except FPL.

Order No. 20785 at 19; A-19.

The final hearing in the conservation docket was held in conjunction with the related proceedings in Dockets Nos. 890001-EI (Fuel Adjustment) and 890003-GU (Purchased Gas Adjustment), beginning on February 22, 1989. Public Counsel was silent during those proceedings as to any objection to the increase in TECO's conservation cost recovery factor to .111¢. Yet, it could not have been made more clear that the increase related to the Commission's approval of a change in methodology in Docket No. 881416-EG.

Public Counsel's stipulation is reflected in the final order in the conservation docket, Order No. 21317, issued June 2, 1989 at page 4:

> The parties further stipulated to the appropriate conservation cost recovery factors for the period April, 1989 through September, 1989:
>
> . . .
>
> TECO: .111¢/KWH.

A.-28.

Public Counsel's and the other party's stipulation to TECO's conservation cost recovery factor was more than a stipulation to the "accuracy" of the calculation or to the "numbers only" as Public Counsel would have this Court believe. Appellants' brief at 16, et seq. As the prehearing order and the final order in the conservation docket indicate, the stipulation was to both the level of the conservation cost recovery charge and its implementation for a specific period. If Public Counsel had any reservation about agreeing to those numbers, the time to voice it was at the prehearing and the hearing. The whole purpose of the conservation proceeding is to test the reasonableness of the costs included in conservation cost recovery and establish the appropriate factor based on those costs. That was the case in this proceeding, as it is in every conservation cost recovery proceeding. Public Counsel was well aware of the dockets purpose and the procedure involved. It strains credibility to believe that Public Counsel would enter into an unqualified stipulation on TECO's conservation factor, if he in fact had even the slightest reservation about its propriety.

With Public Counsel's complete agreement, the Commission approved and allowed TECO's conservation cost recovery factor to be put into effect. Moreover, even after the Commission issued its order approving TECO's tariff filing in Docket No. 881416-EG, Public Counsel did not react to the obvious effect of his stipulation. Order No. 21317 approving the conservation cost recovery factors for April 1989 through September 1989 was issued

on June 2, 1989, three months after the Commission had issued its Order No. 20825 approving TECO's tariff modification. Public Counsel must have been aware during that time of the effect of his stipulation in the conservation docket. If he were not, it was certainly brought home to him at the June 6, 1989, agenda conference where the Commission, after listening to his extensive comments, denied reconsideration of the tariff approval Order No. 20825. Even then, however, Public Counsel did not ask for reconsideration or pursue an appeal of the final order in the conservation docket, Order No. 21317. He certainly could have told the Commission that he made a mistake in stipulating to TECO's conservation cost recovery factor, if he believed he had done so, and conceivably could have kept the issue alive for later proceedings.

Having sat mute through the entire course of the conservation cost recovery proceedings in Docket No. 890002-EG, Public Counsel cannot use this appeal of Order No. 20825 to drag the amount of TECO's conservation cost recovery factor back into contention. Public Counsel cannot be allowed to stipulate to the final factor in the conservation docket then proceed to raise the same substantive issue through an appeal in the tariff-approval docket. Florida Medical Center v. Department of Health and Rehabilitative Services, 484 So.2d 1292 (Fla. 1st DCA 1986).

Notwithstanding the blustering hyperbole with which Public Counsel condemns the Commission's actions in denying his reconsideration of Order No. 20825, that order was properly issued

under the file and suspend law. The Commission was not required to issue a proposed agency action order in this instance. In this case, as in the Florida Interconnect case, supra, Public Counsel, as an intervening party had no expectation of a prior hearing, and adequacy of notice on that basis cannot be an issue. **342** So.2d 814. Whatever confusion the Commission's scheduling documents may have occassioned for Public Counsel, any error in this regard is harmless and cannot be used as the basis to attack the stipulation he entered into in the conservation docket.

CONCLUSION

The Commission's proceedings in Docket No. 881416-EG are consistent with the legislative mandate of the file and suspend law and this Court's rulings interpreting its operation. No due process rights of the Citizens of Florida or any other party have been violated. Orders Nos. 20825 and 21448 comport with the essential requirements of law and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE
Case No. 74,471

I HEREBY CERTIFY that a correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission and Appendix have been furnished by U.S. Mail to the following parties on this 30th day of October, 1989.

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INDEX TO APPENDIX