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

INITIAL BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

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SYMBOLS AND DESIGNATIONS OF PARTIES

The Florida Public Service Commission is referred to in this brief as the PSC or as the Commission. Tampa Electric Company is referred to as TECO, the utility or the company.

Portions of the record on appeal that are included in the appendix to this brief are referred to by the appendix page number, e.g. [A-12]. References to the record not included in the appendix to this brief are designated by the letter R followed by the page number, e.g. [R-12].

STATEMENT OF THE CASE AND FACTS

Tampa Electric Company (TECO) petitioned the Florida Public Service Commission (PSC) for permission to change the manner in which it recovered the expenses of its conservation programs. TECO wanted to stop charging its industrial customers taking service pursuant to interruptible rate schedules and collect the resulting shortfall from its remaining **"firm"** customers who were projected to pay an additional $2 million per year. The PSC approved TECO's petition in Order No. 20825, issued March 1, 1989, in Docket No. 881416-EG. [A-1]. The altered recovery procedure is in effect for the period April 1, 1989, through March 31, 1990.

The Citizens of the State of Florida, through the Office of Public Counsel, intervened and filed a motion for reconsideration of Order No. 20825 on March 16, 1989. That motion was denied in Order No. 21448 on June 26, 1989. [A-61. This appeal was filed on July 26, 1989.

Pursuant to the enactment of the Florida Energy Efficiency and Conservation Act (FEECA), Section 366.80, et. seq., Florida Statutes, in 1980, the PSC evaluated conservation programs of electric utilities designed to reduce peak electric usage and overall electric consumption. The costs of approved programs were allowed to be recovered through a conservation cost recovery factor. The factor was derived by dividing the expenses of approved conservation programs by the kilowatt-hours (KWH) of sales projected for a six-month period. Over- and underrecoveries were

used to adjust succeeding projection periods. The projection periods for conservation cost recovery coincide with the projection periods for fuel cost recovery so that, every six months, the PSC approves billing factors for the investor-owned electric utilities under its jurisdiction. Since its inception in 1980, the conservation cost recovery factor has been imposed on all customer classes.

Tampa Electric Company's Petition for Modification of its Conservation Cost Recovery Methodology was filed with the PSC on October 28, 1988. [A-11]. In its petition, TECO noted that it applied an energy conservation cost recovery factor on bills rendered to all its customers but asked that those taking interruptible service under rate schedules IS-1, IST-1, IS-3, and IST-3 and standby interruptible customers under schedules SBI-1 and SBI-3 be excluded from further cost recovery factors. The PSC was asked to approve the petition "for immediate implementation." [A-14] TECO would discontinue charges for interruptible customers and "[t]he shortfall would be collected as a true-up component of the conservation cost recovery factor applied in the next six-month cost recovery period." TECO appended a revised tariff sheet to its petition as Exhibit A and another one in legislative format as Exhibit B. The effect of TECO's proposal would be to "apply the energy conservation cost recovery clause only to each kilowatt hour delivered to Customers taking firm service." [A-14].

TECO asserted in its petition that exempting interruptible

customers "would comport with the goals of the Florida Energy Efficiency and Conservation Act." [A-12]. TECO characterized the second FEECA goal and its applicability to the utility as follows:

> The second FEECA goal, reducing the growth rate of electric consumption, is directed at lowering the difference between marginal fuel costs and average fuel costs. This does not apply on an energy basis for Tampa Electric because the company's marginal fuel costs are lower than average system fuel costs charged out. Since Tampa Electric is able to Purchase less expensive coal on the spot market, it is not beneficial to reduce overall energy usage. Reducing overall energy usage would reduce the percentage of spot coal generation and thereby increase the unit cost of fuel borne by the company's Customers. The company expects marginal fuel costs to be lower than average fuel costs for the next five to six years. (Emphasis added). [A-12].

TECO closed its analysis of its proposal by stating:

> Based on the foregoing, the company's proposed modification of its conservation cost recovery methodology is entirely consistent with existing FEECA conservation goals. (Emphasis added). [A-13].

TECO's petition was assigned Docket No. 881416-EG. The PSC clerk sent a memorandum dated November 17, 1988 to "All Interested Persons" transmitting a case-assignment-and-scheduling-record (CASR) "approved by the Chairman." [A-19]. The docket had been assigned to "all" commissioners for disposition. [A-20]. A revised schedule dated December 14, 1988, specified that PSC staff members would file their recommendation on January 19, 1989; the Commission would consider it as a proposed agency action (PAA) item at its January 31, 1989 agenda conference; the "PAA order" would issue on February 20, 1989; and the final order would issue on March 13, 1989, after expiration of the 21 days in which affected persons were allowed to file a protest to the Commission's proposed

action. [A-21,221. The docket would close on April 14, 1989, upon expiration of the 30-day period in which to file a notice of appeal.

The PSC staff members assigned to the case filed their joint recommendation, designated "PROPOSED AGENCY ACTION," to approve TECO's petition on January 11, 1989. [A-23]. A memorandum dated January 20, 1989, transmitted an excerpt of the January 31, 1989, agenda and advised anyone who "may wish to attend the conference and address the Commission regarding this matter" that "[a]ny comments you wish to make should be limited to approximately five minutes." [A-24]. The agenda excerpt showed the item number to be "8**PAA." [A-25]. The notice on the first page of the agenda itself informed of the meaning of the symbols and letters that followed the number 8:

> * N O T I C E *
>
> Persons who may be affected by Commission action on certain items on this agenda for which a hearing has not been held (other than actions on interim rates and declaratory statements) will be allowed to address the Commission concerning those items when taken up for discussion at this conference. These items are designated by double asterisks next to the agenda item number.
>
> Certain matters brought before the Commission for "Proposed Agency Action" are included in the above category, and affected persons may similarly address the Commission regarding them: such items are identified by the added symbol "PAA." [R-31].

The Florida Administrative Weekly notice for the agenda conference stated its purpose to be "To consider those matters ready for decision." The notice also stated that a copy of the agenda could be obtained from the PSC and that "[p]ersons who may be affected

by Commission action on certain items...will be allowed to address the Commission concerning those items when taken up for discussion at this conference." [A-26].

Three people participated in the agenda conference discussion with four of the five Commissioners (Commissioner Gunter was absent), in addition to four PSC staff members. [A-28]. They were Mr. Kordecki, a TECO employee; Mr. Willis, TECO's attorney; and Mr. McWhirter, an attorney representing the Florida Industrial Power Users Group (FIPUG) which is comprised of some of TECO's large industrial customers who would benefit from TECO's petition being granted. The Office of Public Counsel did not participate in the agenda conference discussion.

Mr. Kordecki summarized TECO's petition and characterized the effect of fuel costs on conservation as follows:

> We have found ourselves at this time to be in a position where our marginal fuel costs are less than our average fuel costs, so at this point we do not build peaking capacity for interruptible customers. In fact we do not build capacity at all for interruptible customers. Actually with our marginal fuel cost being less than our average fuel cost, the effect of conservation programs that reduce consumption actually raise the fuel adjustment. [A-28].

Later, he said that fuel costs would have been lower throughout the 1980-1988 time period if there had been no conservation programs. [A-35-36].

The Commission voted to approve the staff recommendation without modification. [A-42]. The order was scheduledto be filed on February 20, 1989. [A-22].

In the meantime, a prehearing conference was held on February

10, 1989 before Commissioner Herndon in the conservation cost recovery docket, Docket No. 890002-EG, in which the Commission approves specific recovery factors for six-month projection periods. At the prehearing conference, which was attended by Mr. Howe from the Public Counsel's office, TECO's attorney, Mr. Beasley, announced that "the Commission on January 31st voted to approve Tampa Electric's request to have an adjustment to its conservation cost recovery methodology." (A-55-56). He suggested that all parties stipulate to the factor previously proposed by TECO and that Mr. Kordecki

> appear at the hearing to explain that adjustment [resulting from the Commission's January 31st vote], 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."

A PSC staff member, Mr. Dean, responded:

> That's fine. We'll make sure the numbers are right and don't have to deal with it. (A-56).

Hearings were held in the conservation cost recovery docket on February 22, 1989 before the three-member panel. Mr. Howe appeared for the Office of Public Counsel. The order on TECO's petition, which was scheduled to issue two days earlier, on February 20, 1989, had not been filed. At the conservation cost recovery hearing, Mr. Howe stipulated to the accuracy of TECO's revised billing factor.

On March 1, 1989, Order No. 20825 issued as a final order entitled: Order Approving Modification of Conservation Cost Recovery Methodology. Order No. 20825 did not offer affected

persons an opportunity to request a hearing.

The Commission observed in its order that TECO has eleven approved conservation programs with estimated annual program expenditures for 1989 of $14,653,807. The exclusion of interruptible sales from recovery of these expenses would require the remaining firm customers to pay "an additional $0.20 per 1000 KWH or $2,129,198 per year." [A-1].

TECO's assertion that its petition satisfied the three FEECA goals was evaluated and the utility's position with respect to the second FEECA goal was explicitly rejected, although then dismissed as irrelevant:

> TECO argues that the second FEECA goal, reducing the growth rate of electric consumption, is directed at lowering the difference between marginal fuel costs and average fuel cost. This does not currently apply to TECO's system because their marginal fuel costs are lower than the system average fuel cost, due to the purchases and use of less expensive spot coal. Reducing overall energy usage decreases the average cost of fuel borne by TECO's customers. TECO projects marginal fuel costs to be lower than average for the next five to six years. We do not agree with TECO's interpretation of the second FEECA goal. 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. (Emphasis added). [A-3].

Instead of granting TECO's request that the recovery method be changed immediately, the Commission ordered it to begin April 1, 1989 and stay in force for only one year:

> After a thorough review of the record, we agree with our Staff and approve the removal of TECO's interruptible customers from the conservation cost recovery clause for the period April 1, 1989 to March 31, 1990.
>
> Therefore, it is.

> ORDERED by the Florida Public Service Commission that the October 28, 1988 petition of Tampa Electric Company for approval of Modifications to Rate Schedules IS-1, IST-1, IS-3, IST-3, SB-1 and SB-3 excluding the application of the energy conservation cost recovery factor from those schedules be and is hereby granted. It is further
>
> ORDERED that these tariff modifications will be effective for the period April 1, 1989 to March 31, 1990. [A-4].

Public Counsel filed a Notice of Intervention [R-54] and a motion for reconsideration of Order No. 20825 on March 16, 1989. [A-43]. In the motion, Public Counsel argued that everything in the docket indicated a proposed agency action order would issue, not a final order. Because TECO's request would saddle firm customers with an additional $2 million of conservation costs, a clear point of entry into the agency process had to be provided pursuant to the Administrative Procedure Act (APA), Chapter 120, Florida Statutes.

Public Counsel also asserted that, although the opportunity for reconsideration was inadequate to protect the firm customers' interests, even under that standard Order No. 20825 had to be rescinded. [A-46-47]. It was Public Counsel's position that the Commission's order contravened FEECA on two separate grounds: (1) it resulted in discriminatory rates prohibited by FEECA, and (2) it violated the FEECA goal "to reduce the growth rates of electric consumption." [A-47-50].

TECO responded in opposition to the motion, noting that it and the Commission staff participated in the January 31, 1989 agenda conference discussion which preceded the vote but that

"Public Counsel elected not to provide input." [A-51]. TECO also stated that Public Counsel actively participated in the February 10, 1989 prehearing conference in the conservation docket where TECO, through counsel, "advised participants that in light of the Commission's vote in Docket No. 881416-EG, Tampa Electric would be resubmitting its conservation factor to reflect that vote. . . .The Staff indicated they would verify the recalculation by Tampa Electric." [A-51].

TECO said that staff indicated at the February 22, 1989 hearing that "it was satisfied with Tampa Electric's resubmission" which "was stipulated without objection by any party, including Public Counsel." TECO further asserted:

> Order No. 20825 was issued in Docket No. 881416-EG on March 1, 1989 or approximately nine days after the hearing in the conservation cost recovery factor. Public Counsel fully participated in the conservation cost recovery proceeding and should not now be heard to object to the cost reallocation which was voted on on January 31, 1989 and which was later stipulated to in the conservation cost recovery docket. Tampa Electric is entitled to rely upon Public Counsel's participation in the stipulated reallocation in Docket No. 890002-EG in going forward with the reallocation cost recovery factor during the April-September 1989 period. [A-52].

TECO did not address the APA arguments raised by Public Counsel's motion. On the FEECA issues, TECO said "it appears Public Counsel misconstrues Section 366.81, Fla. Stat." because "[t]he Commission's reallocation of Tampa Electric's conservation cost recovery does not discriminate against any Customer...." [A-52-53]. TECO did not discuss whether its proposal violated the FEECA goal to reduce KWH consumption except to say:

The remainder of Public Counsel's Motion is somewhat

> confusing but appears to suggest that the Commission's action in this docket somehow conflicts with the FEECA goals. Public Counsel's arguments at pages 6-8 of its Motion do not set forth any basis for reconsideration of the reallocation approved by the Commission but instead represent perceptions by Public Counsel which have no bearing on the propriety of the action which the Commission approved. [A-53].

FIPUG filed an "Amicus Curiae Response" to Public Counsel's motion [R-73] in which it stated that

> FIPUG, like Public Counsel, is not a party to this docket. Consumers have no standing at this late date to file a petition for reconsideration nor a response to such a petition under the provisions of rule 25-22.060, Florida Administrative Code. . . .

FIPUG also asked that the Commission not stay its decision pending resolution of the Public Counsel's motion.

Staff members filed a recommendation on May 25, 1989, that Public Counsel's motion for reconsideration be denied. [R-78]. Interested persons were allowed to participate in the June 6, 1989 agenda conference discussion. Commissioner Gunter abstained because he had not participated in the vote on January 31, 1989. At the conclusion of the agenda discussion, the Commission voted to deny Public Counsel's motion for reconsideration of Order No. 20825. [R-92].

Order No. 21448 issued June 26, 1989 entitled: Order Denying Public Counsel's Motion for Reconsideration. [A-6]. At page 1 of that order, the Commission said Public Counsel had received a copy of TECO's petition; a copy of the agenda for January 31, 1989 with a summary of the issue to be decided; notice of the agenda conference in the Florida Administrative Weekly; and a copy of the

January 11, 1989 staff recommendations but "Public Counsel elected not to provide input at the agenda conference although TECO and the Commission Staff participated in the discussion, which preceded the vote."

At page 2 of Order No. 21448, the Commission noted that TECO's attorney advised participants in the conservation docket prehearing conference that it would be resubmitting its recovery factor based on the January 31st vote in this docket. Staff had indicated it was satisfied with the resubmission which was stipulated to by all parties:

> . . . In fact, the same Assistant Public Counsel who has filed the Motion Reconsideration in the instant docket, concedes that he participated in the conservation cost recovery proceedings and entered into the stipulation, although he characterizes the stipulation as being as to "numbers only." [A-7].

The Commission stated that Public Counsel misinterpreted the Administrative Procedure Act and its applicability:

> Section 120.57 is not controlling on the issue and does not entitle Public Counsel to a hearing. [A-7].

The Commission next stated that "we precisely followed the applicable law" and quoted from the Section 120.72(3) exemption to the APA for interim rate procedures under the file-and-suspend statute, Section 366.06(3), Florida Statutes. [A-7].

Order No. 20825 is characterized in Order No. 21447, at page 2, as "in a very real sense surplusage" because, under file-and-suspend, if the Commission fails to object to tariff changes within sixty days, the proposed rates automatically go into effect. [A-7]. The Commission, at page 3, said adequacy of notice is not a

factor because "the action of the Commission would have occurred had no hearing whatsoever been held, since the Commission's inaction is equivalent to its consent," citing to Florida Interconnect Telephone Co. v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977). [A-8].

The case of Citizens V. Mayo, 333 So.2d 1 (Fla. 1976), was cited for the proposition that due process concerns do not arise when the commission fails to act to suspend a tariff within the 60-day period. [A-8]. The purpose of file-and-suspend was stated to be to reduce the regulatory lag inherent in a full rate case. Florida Interconnect was again cited for the proposition that Public Counsel was not left without recourse by the file-and-suspend statute because he could file a complaint attacking the tariff.

The Commission next stated, at page 4 of Order No. 21448, that, although its procedures complied with applicable law, Public Counsel waived any objections to procedural deficiencies because he failed to participate in the agenda conference that preceded the January 31, 1989 vote. [A-9]. The order does not disclose whether all information available before the vote and the vote itself was for a proposed agency action decision.

Two cases, South Florida Regional Planning Council v. State, 372 So.2d 159 (Fla. 3rd DCA 1979), and Buraer Kina Corporation v. Metropolitan Dade County, 349 So.2d 210 (Fla. 3rd DCA 1977), are cited for the proposition that:

> Where one has actual notice of proceedings, but makes no appearance or provides no input, it waives its rights and

thus is estopped from challenging any irregularity in the proceeding. [A-91.

The Commission went on to state that "where our order formed the basis for a stipulated change in TECO's conservation cost recovery factor, which was agreed to be Public Counsel, the waiver becomes clear." The cases of Scarso v. Scarso, 448 So.2d 549 (Fla. 4th DCA 1986), and Hart v. Smith, 17 Fla. 767 (Fla. 1880), were cited for the proposition that irregularities in proceeding may be waived "by subsequent proceedings of parties, who, knowing the irregularities, act without making objection or exception." [A-91.

Public Counsel's motion for reconsideration of Order No. 20825 was denied in Order No. 21448 without mentioning the Florida Energy Efficiency and Conservation Act and without determining whether Order No. 20825 violated that statute.

Public Counsel filed a notice of appeal of Orders Nos. 20825 and 21448 on July 26, 1989. [R-141].

On July 28, 1989, TECO filed a motion to vacate stay with the PSC pursuant to Rule 25-22.061(3), Florida Administrative Code. The Citizens, through the Public Counsel, responded in opposition on August 4, 1989. After argument on August 30, 1989, Chairman Wilson ruled that the stay was vacated.

SUMMARY OF ARGUMENT

The Public Service Commission simply blundered initially. At the end of free-form agency proceedings it issued an order

approving Tampa Electric Company's petition as final agency action when it meant to issue a notice of proposed agency action. Adversely affected persons were supposed to have an opportunity to protest the tentative action taken at the January 31, 1989 agenda conference and request a hearing. The hearing would be a de novo proceeding to formulate final action based on a record compiled pursuant to Section 120.57, Florida Statutes. When, however, Public Counsel moved for reconsideration of Order No. 20825 and pointed out that the Commission had voted for a proposed agency action and, moreover, the order violated FEECA, the Commission responded with an order that denied any error in procedure had taken place and ignored FEECA altogether.

Order No. 21448 is a compilation of inconsistencies: Public Counsel purportedly waived his right to protest and have a hearing because he did not participate in the discussion at the agenda conference held on Janaury 31, 1989. However, the agenda conference itself was unnecessary and could not have been the basis for agency action because, pursuant to the file-and-suspend law, Section 366.06(3), Florida Statutes, more than 60 days had passed since TECO filed its petition and tariff, so the tariff had gone into effect automatically. The order resulting from that agenda conference was therefore, "in a very real sense surplusage."

The Commission states that Public Counsel was incorrect in his assertion that, under the APA, it must hold hearings before final action or act on a tentative, proposed agency action basis subject to protest and a hearing to follow. Rates can be approved outside

the APA because the purpose of file-and-suspend is to reduce regulatory lag pending full proceedings under the APA. No proceedings, however, are scheduled because, as far as the PSC is concerned, the decision on TECO's petition was final; so the case is over. If Public Counsel wants a hearing, he can file a complaint.

The Commission's "order formed the basis for a stipulated change in TECO's conservation cost recovery factor, which Public Counsel agreed to, [so] the waiver becomes clear." But the order did not issue until seven days after the conservation hearing and the order was purportedly "surplusage" anyway.

The obvious inconsistencies in Order No. **21448** exist because the PSC dug in its heels and refused to admit its procedural error or that it had acted contrary to FEECA. Statutory and case law, however, as well as the PSC's own policies and rules, require that substantially affected parties be offered a clear point of entry into the agency process, particularly when a change in industry-wide policy is being implemented.

The PSC cannot affirmatively approve or acquiesce in changing an electric utility's rates or service without first conducting an appropriate proceeding under Section **120.57,** Florida Statutes. The opportunity to file a complaint against the change is inadequate where the APA has not been complied with in the first instance. The exemption expressed at Section **120.72(3),** Florida Statutes, is limited to interim rate changes pending the outcome of proceedings that must comply with the APA.

I

THE PUBLIC COUNSEL DID NOT WAIVE ANY OBJECTION TO ORDER NO. 20825 BY STIPULATING TO THE ACCURACY OF TAMPA ELECTRIC COMPANY'S REVISED CONSERVATION COST RECOVERY FACTOR IN DOCKET NO. 890002-EG

This case did not develop for the Public Counsel's office in the sequence depicted in this brief's statement of the case and facts. Undoubtedly, TECO's petition and the staff recommendation for the January 31, 1989 agenda had been forwarded to this office. But the Public Counsel, with its staff of twenty-six for PSC and Hospital Cost Containment Board matters, cannot participate in all the dockets handled by the PSC's 350-plus personnel. Besides, TECO's petition had been placed on a proposed agency action track that did not call for early intervention. If and when the PSC issued an order adverse to the customers' interests, a decision could be made whether to protest and request a hearing. If the PSC denied TECO's petition, no intervention would be necessary unless TECO protested, opening the possibility of a hearing and reversal of the initial, tentative decision. See e.g. Rudloe V. Department of Environmental Regulation, 517 So.2d 731, 733 (Fla.1st DCA 1987).

Accordingly, this office became "aware" of possible adverse consequences of the PSC's vote on TECO's petition when, at the February 10, 1989 prehearing conference in Docket No. 890002-EG, TECO's attorney announced that the company would be submitting a revised calculation of its conservation cost recovery factor for the February 22, 1989 hearing. The announcement did not require

a position to be taken because no issue had been identified, and the effect on the general body of customers was not evident from the statement that revised figures would be forthcoming. It did, however, trigger an inquiry into just what action had been taken on TECO's petition.

A review of the PSC's file showed that TECO's petition had been approved as a proposed agency action. Thus, the statement by TECO's attorney at the prehearing conference that "the Commission on January 31st voted to approve Tampa Electric's request to have an adjustment to its conservation cost recovery methodology" meant TECO wanted to revise its recovery factor based on this proposed action, subject to any later, final decision. [A-65].

The schedule indicated the order on TECO's petition would precede the hearing in the conservation docket. That would provide an opportunity to evaluate the rationale for the PSC's action. When the order did not issue on schedule, Public Counsel decided not to oppose the revised factor because it is not unusual to have cost recovery factors approved subject to decisions in other dockets. Retroactive adjustments could be made based on subsequent decisions. See Gulf Power Company V. Florida Public Service Commission, 487 So.2d 1036, 1037 (Fla.1986).

TECO responded to the Public Counsel's motion for reconsideration of Order No. 20825 by stating, among other things, that it had a right to rely on Public Counsel's stipulation to the recovery factor in the conservation docket. But TECO must have been as surprised as the Public Counsel was when Order No. 20825

issued as a final decision. TECO's employee participated in the agenda conference discussion and TECO's attorney was also present when the PSC voted to approve the petition as a proposed agency action. TECO, at the time of the prehearing conference and hearing in the conservation docket, could not have thought the PSC had reached a binding, final decision on its petition.[1]

When Public Counsel moved for reconsideration of Order No. 20825 because it failed to provide a clear point of entry and violated FEECA, TECO had to support the finality of the order. Arguing that Public Counsel missed his chance by stipulating to the resubmitted factor was the only way TECO could avoid confronting the fact that both the APA and FEECA had been violated.

The PSC concluded, at page 4 of Order No. 21448, that Public Counsel waived any objection to procedural deficiencies because he failed to appear at the January 31st agenda conference to raise them. The error however, occurred <u>after</u> the agenda conference when the Commission issued an order inconsistent with its vote.

'The attorney for Occidental Chemical Corporation proposed at the prehearing conference in the conservation docket that industrial customers such as her client on Florida Power Corporation's system should also be excused from conservation cost recovery. She characterized the Commission's actions on TECO's petition as follows: "[T]his is in reaction to a Commission decision at the agenda conference last week on January 31st to issue a <u>notice of proposed agency action proposing to arant the specific request of Tampa Electric Corporation [sic]</u> to exclude all interruptible customers from the application of the energy conservation cost recovery clause" (Emphasis added). Her request was denied by the prehearing officer who said it should be filed as a separate petition and opening the door for Public Counsel's participation: "Public Counsel, if they want to get in, feel free." [A-58, 61].

Moreover, the agenda was not noticed as a hearing. In fact, the notice provided in the Florida Administrative Weekly was virtually identical to the one the Court, in Florida Interconnect, supra, 342 So.2d at 814, characterized as totally inadequate for final agency action. (See discussion at pages 34-35 of this brief.)

The agenda conference was noticed only as an opportunity for interested persons to comment on the staff recommendation. Order No. 21448 is grossly misleading where, at page 4, it refers to Public Counsel's receipt of copies of TECO's petition, the staff recommendation, the agenda conference and FAW notices without disclosing that the FAW notice said virtually nothing at all and everything else designated the agenda item as proposed agency action. Cf. Gulf Coast Home Health Services of Florida, Inc., v. Department of H.R.S., 515 So.2d 1009, 1011 (Fla.1st DCA 1987).

This is just another example of the PSC's refusal to address its error in issuing Order No. 20825 as final action. Public Counsel's petition for reconsideration brought the inadequacy of notice to the Commission's attention:

> The CASR, the staff recommendation and the agenda conference designation for this docket all identified it as a proposed agency action. It was apparent that, because TECO's request would adversely affect its firm customers by burdening them with an additional $2 million of conservation costs, the Commission would have to conduct a hearing before final action or proceed through the PAA process. [A-43].

The failure to respond lies solely with the PSC. The Commission's contention that Public Counsel should have objected to a procedure that was, up to that point, consistent with the APA is nonsensical.

The Commission then goes on to state that, since its vote on January 31st was relied on in the conservation docket and its "order formed the basis for a stipulated change in TECO's conservation cost recovery factor which was agreed to by Public Counsel, the waiver becomes **clear."** [A-9]. The vote relied on by Public Counsel, however, was the vote approving staff's recommendation to issue a proposed agency action order. The order itself, which the PSC states formed the basis for the stipulation, did not issue until nine days after the conservation hearing.

The cases cited in Order No. 21448, at page 4, are totally inapplicable. The portrayal of the agenda conference as being "held to provide counsel an opportunity to raise issues of concern" is completely inaccurate. A case such as Citizens v. Public Service Commission, 435 So.2d 784 (Fla.1983), in which the Commission contends that the Court **"held"** that failure to raise an issue at or before the prehearing conference **"constituted** a waiver" does not apply where no hearing was held or offered. Moreover, that opinion does not express a holding on the concept of waiver. The Court simply found that the Commission acted within its discretion to bar consideration of rate case expense on reconsideration when it had not been raised before or during the hearing and Public Counsel did not show good cause for raising the issue after hearing. 435 So.2d at 787.

The citation to Citizens v. Public Service Commission, 383 So.2d 901 (Fla.1980), is totally illogical. The majority opinion consisted of one sentence denying certiorari. The dissent did not

analyze agenda conference participation at all, except to state in its description of the facts:

> Later, at an agenda conference at which no participants were allowed to appear, the Commission voted to terminate the proceeding in accordance with a staff recommendation. 383 So.2d at 903.

Neither case supports the Commission's position that the January 31, 1989 agenda conference was noticed or held to provide an opportunity to either frame issues or be heard on them.

South Florida Regional Planning Council v. State, 372 So.2d 159 (Fla.3rd DCA 1979), is cited twice at page 4 of Order No. 21488. The first citation purportedly supports the PSC's contention that, since Public Counsel did not appear at the agenda conference, "it waives its rights and thus is estopped from challenging any irregularity in the proceeding." As noted previously, however, the procedural irregularities followed the agenda conference. Was Public Counsel supposed to know in advance that the PSC's order would not agree with its vote?

In South Florida Regional Planning Council, the court concluded that SFRPC "is not a 'party' under Chapter 120." 372 So.2d at 167. In dictum that followed, the court said, even if SFRPC was a party, it failed to seek judicial review and is therefore bound by res iudicata. The court then said, if SFRPC was not a party but could have been and made no appearance after actual notice, it waived its rights. It is this third alternative the PSC cites at page 4 of Order No. 21448. But the PSC never gave notice of any proceeding. The notice, by statute, was to be

incorporated in the proposed agency action order it never issued. Section 120.59(4), Florida Statutes (1987); Henry v. Department of Administration, 431 So.2d 677, 680 (Fla.1st DCA 1983) ("An agency seeking to establish waiver based on the passage of time following action claimed as final must show the party affected by such action has received notice sufficient to commence the running of the time period within which review must be sought. The requirements for such notice are objective rather than subjective in nature and apply regardless of actual or presumed notice of agency action. . . ."); NME Hospitals, Inc., v. Department of H.R.S., 492 So.2d 379, 385 (Fla.1st DCA 1986) (Opinion on motion for rehearing).

The case of Buraer Kina Corporation v. Metropolitan Dade County, 349 So.2d 210 (Fla.3rd DCA 1977), is apparently cited by the PSC because it is cited by the Southern Florida Regional Plannina Council court after its list of alternatives. Its applicability to either case is not clear. In Buraer King, the court held that sufficient changed circumstances to overcome the doctrine of administrative or judicial res judicata had not been shown in a second appeal of a county commission's refusal to grant a zoning variance to permit the first story of a building to house a restaurant.

In Scarso v. Scarso, 488 So.2d 549 (Fla.4th DCA 1986), the court said the paternal grandmother in a child custody action could not raise an objection to the receipt of seventeen days' notice instead of the twenty days required by statute because "no

objection was filed on this basis for well over a year nor was any attack made on the order entered as a result of that hearing." 488 So.2d at 550. Scarso is cited at page 4 of Order No. 21448. Its status as authority for the PSC's action is less than clear.

Even less clear is the PSC's reference to Hart v. Smith, 17 Fla. 767 (Fla.1880), although the sentence in Order No. 21448 precedingthe Scarso cite is apparently extracted fromthe somewhat inaccurate headnote of that 1880 appeal. In Hart, the court concluded that a Mr. McCall had not objected to further circuit court proceedings which, by statute, required ten days' notice. The court agreed, however, that Mr. McCall did not become the executor of Mr. Hart's estate "by reason of having been appointed the executor of the estate of [Mr. Hart's wife] Penelope" who had also since died.

The Commission's position on the subject of waiver is apparently that Public Counsel twice failed to inform: He failed to object to the procedures followed before Order No. 20825 issued, and he failed to object when TECO, at the conservation hearing, submitted a revised recovery factor based on the Commission's vote on the utility's petition. Ostensibly, the Commission and TECO had a right to rely on Public Counsel's representations or lack thereof. Any failures to inform, however, emanated from the PSC and acted to the detriment of TECO's firm customers.

Public Counsel had a right to rely on TECO's representation at the prehearing conference in the conservation docket that it wanted to revise its recovery factor consistent with the

Commission's vote on its petition at the January 31, 1989 agenda conference. After TECO's representation to that effect, Public Counsel reviewed the Commission's action and learned that the petition had been approved only on a proposed agency action basis. Additionally, the docket schedule indicated that the written order would be out before the conservation hearing. The order did not issue on time, but the Public Counsel still had adequate assurances that any adjustment would be subject to the opportunity for hearing and ultimate decision in the petition docket. Every document in the Commission's file indicated the PSC had **not** taken final action.

Thus, the only failure to inform lies with the PSC itself. Neither Public Counsel nor TECO knew the Commission was going to render a final decision that would foreclose the opportunity for a clear point of entry into the decision-making process. The Commissioners on the conservation docket panel, who accepted TECO's representation that its revision was consistent with an earlier vote, did not disclose any change. In fact, it is very unlikely those Commissioners knew or thought that Order No. **20825** would not be consistent with their votes. No other publicly noticed meetings were held at which the Commission could have changed its original decision.

Issuance of Order No. **20825** as a final order was, no doubt, just an administrative mistake, one that was easily remedied. The Commission's response to Public Counsel's motion for reconsideration which informed of the error and provided the opportunity to correct it, however, is inexcusable. The PSC's

refusal to rationally address whether its original action was consistent with the APA or to consider whether its decision was permissible under FEECA foreclosed customer input. This is an irresponsible act by an agency charged by statute to protect the public interest. This made TECO's representations at the conservation prehearing conference inaccurate and Public Counsel's stipulation to the accuracy of the revised factor a nullity. The PSC's statements in its Order No. **21448** that Public Counsel waived his opportunity to represent the customers' interests by not appearing at the January 31, **1989** agenda conference and by stipulating to a revised factor at the conservation hearing are expressions of its own duplicity, nothing more.

II

THE ADMINISTRATIVE PROCEDURE ACT, CHAPTER **120**, FLORIDA STATUTES, APPLIES TO THE PUBLIC SERVICE COMMISSION'S APPROVAL OF ELECTRIC UTILITY TARIFFS.

A. THE EXEMPTION IN SECTION **120.72(3),** FLORIDA STATUTES, APPLIES ONLY TO RATES COLLECTED DURING THE PENDENCY OF PROCEEDINGS CONDUCTED PURSUANT TO SECTION **120.57,** FLORIDA STATUTES.

The Administrative Procedure Act applies to all agency actions determining a party's substantial interests. Section **120.57,** Florida Statutes **(1987).** Any exemptions must be explicit within the APA itself or found elsewhere in statutes. Section **120.72,** Florida Statutes **(1987).** There is no general exception for utility tariffs filed with the Public Service Commission. A limited exemption applies to temporary, interim rates, collected before the

APA process is concluded, but none exists for permanent rate changes. Therefore, the Commission cannot allow a tariff affecting the substantial interests of TECO's firm customers to go into effect on a permanent basis without providing a clear point of entry into the decision-making process.

Electric utility tariffs are filed pursuant to Section 366.06, Florida Statutes (1987) and, more specifically, subsection 366.06(3), the file-and-suspend law. That statute (formerly subsection 366.06(4)) was enacted as Chapter 74-195, Laws of Florida. A limited exemption from the APA for Chapter 74-195 is found at Section 120.72(3), which reads:

> (3) Notwithstanding any provision of this chapter, all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provisions of chapter 364 or the procedures for interim rates contained in chapter 74-195, Laws of Florida, or as otherwise provided by law. (Emphasis added).

Since there are no other statutory exemptions, any conclusion that the Commission's tariff-approval process is outside the APA must be grounded on this provision. Note however that it is limited to "procedures for interim rates." There is no statutory exemption from the APA for permanent rate changes under file-and-suspend or any other statute.

The rationale for the interim exemption is evident. Were it otherwise, setting interim rates would itself be a decision affecting substantial interests subject to notice and hearing requirements. The temporary nature of interim rates mitigates harm. Moreover, the overall process contemplates compliance with

the APA's procedural requirements. Subsection 366.06(3) applies only "[p]ending a final order." Refund and recordkeeping provisions attach at the end of eight months if a final order has not yet issued. And the Commission is still required "upon completion of hearing and final decision" to order refunds of "such portion of the increased rate or charge as by its decision shall be found not justified."

The file-and-suspend statute must be read with the other provisions of Section 366.06. [A-721. Read together, it is evident that the Commission cannot approve a tariff without affording due process to adversely affected persons. The first sentence of subsection 366.06(1) precludes a utility from changing any rate schedule or charging a rate not on file with the Commission. The second sentence requires that all applications for a change in rates be made to the Commission in writing. Subsection 366.06(2) provides that the Commission "shall order and hold a public hearing" whenever it finds existing rates to be "unjust, unreasonable, unjustly discriminatory, or in violation of law; or that such rates are insufficient to yield reasonable compensation for the services rendered." The file-and-suspend law in Subsection 366.06(3) gives the Commission certain latitude to craft expedited rate relief, but only "pending a final order" after the hearing required by Subsection 366.06(2). These provisions demonstrate that, even apart from the APA, the Commission must hold a hearing before changing any electric rates.

Case law holds that, even when rates are initially set under

file-and-suspend without a hearing, a full hearing conforming to Section 366.06 and the APA must follow. See Citizens v. Mayo (Florida Power Corp.), 316 So.2d 262, 264 (Fla.1975) ("An interim rate increase is a part of the main proceeding and is authorized only 'pending a final order by the commission.' The statute must be read as a whole." [Emphasis by the court; footnote omitted]) Enactment of file-and-suspend did not decrease the level of due process to be afforded affected persons. Florida Power Corp. v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979) ("It is clear the [file-and-suspend] statute was designed to provide accelerated rate relief without sacrificing the protection inherent in the overall regulatory scheme."); Florida Gas Co. v. Hawkins; 372 So.2d 1118, 1121 (Fla. 1979) ("[T]he public policy of this state favor[s] traditional due process rights in utility hearings.") Even when the Commission fails to suspend proposed rates, they are in effect only pending the outcome of proceedings culminating in a final order. Florida Interconnect, supra, 342 So.2d at 814 (Fla. 1976) ("This procedure [file-and-suspend] survives the adoption of the new Administrative Procedure Act. See Section 120.72(3), Florida Statutes (1975). . . . Thus, the commission was without authority to suspend [Southern Bell'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." [Emphasis added]).

The file-and-suspend statute must be read, as must all provisions of Chapter 366, in the light of Section 366.01. [A-71].

That declaration of legislative intent defines utility regulation to be in the public interests as an exercise of the police power for the protection of the public welfare. All provisions of Chapter 366 "shall be liberally construed for the accomplishment of that purpose." Approving rate changes without affording due process cannot be read consistently with that declaration.

The PSC is simply erroneous in its interpretation of Section 120.72 (3). Case law has recognized that due process protections inherent in the overall regulatory scheme provide adequate opportunities for notice and hearing on both interim and permanent rate awards. Order No. 21448 recognizes this, at page 3, where the Commission states:

> As the court pointed out in Citizens v. Mavo, [333 So.2d 1 (Fla. 1976)], the legislative purpose behind the file and suspend statute was to reduce 'regulatory lag' inherent in full rate proceedings.

Regulatory lag arises from the delay in processing a rate case under the APA. The file-and-suspend statute has never been recognized as a basis not to have hearings at all.

In fact, the cases cited by the PSC in Order No. 21448 hold that due process attaches to both interim and permanent rate awards. At page 3 of Order No. 21448, the PSC selectively quotes from Citizens v. Mavo, supra, for the proposition 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 [now 60 days]." [A-81. The PSC then quotes from footnote 9 of that opinion which states that questions of due

process do not arise if the Commission fails to suspend because the Legislature directed that rates become effective on the thirty-first day in the absence of Commission action. This would seem to indicate a statutory grant of authority to electric utilities to increase their own rates subject only to the Commission's objection, expressed through an order to suspend proposed rates.

The Commission's citations to Citizens v. Mayo, however, are taken out of context. In the first place, that case was decided under the pre-1974 APA. 333 So.2d at 7, n. 16. Furthermore, the Court did not recognize an exception to traditional due process in utility rate setting procedures created by enactment of the file-and-suspend statute. To the contrary, the court found due process continued to apply in all respects:

> Section 366.06, Florida Statutes (1975), provides general standards for the award of rate increases to public utilities in the State of Florida. The general procedure has been and remains that rate increases are awarded only after a public hearing in which testimony is presented by all interested parties and cross-examination is permitted. In the framework of this general approach to rate regulation, the 1974 Legislature enacted a special provision expressly designed to reduce so-called "regulatory lag" inherent in full rate proceedings. Section 366.06(4) was created to provide a series of alternative for the Commission whenever, in conjunction with a general rate increase request for which a full rate proceeding is required, a utility company seeks immediate financial relief. (Emphasis added, footnote omitted) 333 So.2d at 4.

The court then listed the alternatives available to the Commission. The first one, failure to suspend, allowed rates to go into effect automatically, but only pending the full rate case hearing:

> Since the Commission's inaction is equivalent to its consent to the new rate schedule, no bond is required of the utility and there is no mechanism by which customers of the utility system can ever recover interim charges which, after the full rate proceeding, the Commission may find to have been wholly or partly unwarranted. (Emphasis added) **333** So.2d at **4.**

The Court in Citizens v. Mavo was not concerned with whether a hearing had to be held, but only whether one had to precede both the interim and final awards.

Throughout the opinion the Court found that due process applied to the overall procedure and that both permanent and interim awards had to be supported by competent, substantial evidence in the record:

> 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. **. . .333** So.2d at **6.**

> By placing the file and suspend law in Section **366.06,** however, the Commission was given direct responsibility in this type of proceeding to insure that all charges collected by a public utility are lawful. See Section **366.06(1),** Florida Statutes **(1975). 333** So.2d at **5.**

> The requisite showing, naturally will vary from case to case, and judicial review of an interim award will be premised on the traditional test of whether the award is supported by competent and substantial evidence. Section **120.68(10),** Florida Statutes **(1975). 333** So.2d at **7.**

It must also be understood that the specific issue before the Court was to define standards applicable to a second request for interim rates after the first had been rejected. **333** So.2d at **5.** The Court remanded the case because of a material error in the PSC's procedure. **333** So.2d at **8-9.** Citizens v. Mavo will not support the Commission's position that, when it fails to suspend a tariff,

it need not conduct a hearing or have evidentiary support for its decision.

The PSC also misconstrues the case of Florida Interconnect Telephone Co. v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977). Florida Interconnect sold telephone equipment known as automatic private brand exchanges (PBXs). It was not a regulated telephone company, although it competed with companies that were. Southern Bell Telephone and Telegraph Company filed a tariff on May 24, 1975, a portion of which "constituted a rate reduction, accompanying the introduction of a new line (trademarked Dimension) of Private Branch Exchange Service." Florida Interconnect filed a complaint with the PSC on June 27, 1975, alleging that approval of the tariff would affect its substantial interests. On July 7, 1975, the PSC approved the tariff at an agenda conference "without individual notice to, or knowledge of, petitioner." 342 So.2d at 814.

The director of the PSC's rate department notified Southern Bell and Florida Interconnect by letter dated July 10, 1975 that the complaint would be set for hearing. "The letter noted that Southern Bell's tariff had been 'approved' pending disposition of the complaint." 342 So.2d at 813. On July 14, 1975, the PSC's chief hearing examiner also wrote to both parties "requesting certain information in order to expedite the hearing." Instead of participating in the hearing, Florida Interconnect appealed the Commission's interim decision which the company maintained failed to comport with the APA's requirements for notice and hearing.

The court conceded that Florida Interconnect's argument appeared "plausible at first blush" but concluded that the order being appealed did not constitute final agency action under the APA:

> We therefore deny the petition for writ of certiorari. Central to this determination is our specific finding that the Commission's Order No. T-75-74, which we review today, does not constitute final agency action within the contemplation of the Act.

Correspondence sent by the PSC's rate department director and chief hearing examiner to Florida Interconnect indicated the interim nature of the Commission's decision:

> Rather than cooperate with this effort to expedite its complaint, petitioner chose to seek review of the Commission's tentative approval in court. But the actions of Messrs. Swafford and Smithers indicate that the agency decision was not **"final"** and hence not reviewable by this Court. Cf. Citizens of Florida v. Mavo (Southern Bell Tel. &Tel. Co.), 322 So.2d 911 (Fla.1975); Citizens of Florida v. Mavo (Florida Power corp), 316 So.2d 262 (Fla.1975); Citizens of Florida v. Mavo (Florida Power & Light Co.), 314 So.2d 781 (Fla.1975). (Emphasis added)

The cases cited in the quote above all involved appeals of PSC orders granting interim rates. They were all decided based on the decision in Citizens v. Mavo (Florida Power Corp.), 316 So.2d 262 (Fla.1975). In that case, the Court said, even if the interim award is granted in a separate docket, it is nonfinal as an integral part of the full rate case:

> An interim rate increase is a part of the main proceeding and is authorized onlv 'pending a final order by the commission.' The statute must be read as a whole. When read in this manner an interim order is clearly not a separate proceeding whatever its docket number.

(Emphasis by the court, footnote omitted.) 316 So.2d at 264.[2]

The Court's primary reason for denying Florida Interconnect's petition was therefore because the Commission order was not final agency action. The petition for writ of certiorari was dismissed without prejudice to Florida Interconnect's right "to seek relief in this Court from a duly-entered final order." 342 So.2d at 815.

The Court in Florida Interconnect also found that "[a]nother reason" for denying the appeal was because the order from the July 7, 1975 agenda conference was "in a very real sense surplusage." Under the file-and-suspend statute, the tariff went into effect automatically thirty days after the filing on May 24, 1985:

> By the time Interconnect filed its complaint with the Commission on June 27, 1975, more than thirty days had elapsed from Southern Bell's May 24, 1975 filing of its proposed tariff rates. Thus, 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. (Emphasis added.) 342 So.2d at 814.

The court then noted that "[i]n any event," the notice in the Florida Administrative Weekly, was inadequate for the agenda

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[2] In Citizens v. Mavo, the Court held that adequate due process protections were encompassed within the file-and-suspend law because the Commission had to act "in the main proceeding" within eight months and had to account for "increased funds in order to provide refunds." 316 So.2d at 264. In a later appeal that referred to both Florida Interconnect and Citizens v. Mavo, the Court said: "Indeed, the File and Suspend Law itself restricts the Commission's action and imposes time and bond requirements to protect the public. Citizens of Florida v. Mavo, 316 So.2d 262, 264 (Fla.1975)." Florida Power Corp. V. Hawkins, supra, 367 So.2d at 1014.

conference to have been the occasion to take final agency action. After quoting from the FAW notice, the Court said:

> Adequacy of notice is not a factor in reaching our decision in this case because the action taken at the hearing (i.e., intermediate consideration of the new rates) would have occurred had the hearing not been held. Nevertheless, we do not find the foregoing quoted material to constitute adequate notice within the contemplation of Section 120.57(1)(b)2.b., Florida Statutes (1975). 342 So.2d at 814.

The notice the Court in Florida Interconnect found to be so inadequate is virtually identical to the FAW notices for the PSC agenda conferences in this case. [A-26]. But beyond that, the Commission, at page 3 of Order No. 21448, quotes the first sentence of this criticism as authority for its action on TECO's petition, but without acknowledging the "intermediate consideration of the new rates" to which it was addressed. [A-8].

This is the underlying flaw in the Commission's reasoning. It portrays its failure to suspend a tariff as the end of the matter. It then tries to interpret Florida Interconnect as support for the proposition that allowing a complaint proceeding against the tariff will satisfy its obligations under the APA. It is true that a compliant had been filed against Southern Bell's tariff in Florida Interconnect, but that case does not stand for the proposition that, in the absence of a complaint, the initial approval of TECO's tariff would have been final instead of "'approved' pending disposition of the complaint", "tentative," "intermediate," or "interim." Since Florida Interconnect had filed a complaint and a hearing was to be held to decide whether Southern

Bell's tariff should stay in force, the Court was not faced with the question whether, in the absence of a complaint, the Commission would have had to conduct a hearing anyway. (See discussion at page 41 of this brief).

B. THE PUBLIC SERVICE COMMISSION FAILED TO PROVIDE A CLEAR POINT OF ENTRY INTO ITS DECISION MAKING PROCESS

The Commission's rules, surprisingly, are completely consistent with the APA. Rule 25-22.036, Florida Administrative Code, applies to all Section 120.57 hearings, "including a hearing requested by a substantially affected person subsequent to proposed agency action." [A-68]. Rule 25-22.036(4)(a) states that a petition is the appropriate pleading for an electric utility seeking authority to change its rates or service. Accordingly, TECO sought permission to change its conservation cost recovery methodology, on October 28, 1988, by filing a petition to that effect.

Rule 25-22.036(9)(a) provides that the Commission will dispose of a petition in one of four ways:

1. The Commission will deny the petition if it does not adequately state a substantial interest in the Commission determination or if it is untimely;

2. The Commission will issue a notice of proposed agency action where a rule or statute does not mandate a hearing as a matter of course, and after the time for responsive pleadings has passed:

3. The Commission will set the matter for hearing before the Commission, or member thereof, or request that a hearing officer from the Division of Adminsistrative Hearings be assigned to conduct the hearing. The assignment of a matter for hearing shall be pursuant to Rule 25-22.0355; or

4. The Commission will dispose of the matter as provided in section 120.57(2). [A-69].

The PSC chose the second alternative for TECO's petition and issued a schedule to that effect. The first schedule, dated November 14, 1988, targeted a December 20, 1988 agenda conference. In its order on reconsideration, the Commission maintains that the tariff attached to TECO's petition went into effect by operation of law when the Commission failed to act within 60 days, or by December 27, 1988. Why then did the Commission revise its schedule on December 14, 1988 to take the petition up at the January 31, 1989 agenda conference? [A-21]. Why did TECO, at the February 10, 1989 prehearing conference in the conservation docket, say it wanted to revise its recovery factor based on the January 31st vote? Didn't TECO know its tariff had already been in effect for over a month? More to the point, where is the rate in TECO's tariff? The tariff only says that a conservation cost recovery factor will be applied to each kilowatt-hour delivered to "customers other than those served on interruptible schedules." The factor, i.e. the rate itself, will be the one approved by the Commission in the conservation docket. [A-16]. If the Commission was powerless to change the recovery methodology at the

conservation hearing, how could Public Counsel have waived anything by stipulating to TECO's factor?

In fact, the Commission properly followed its rules and its case schedule up to and including its vote approving its staff's recommendation to issue a proposed agency action order. Noncompliance with the APA and its own rules followed the vote. Rule 25-22.029 provides, in pertinent part:

> (1) At any time subsequent to the initiation of a proceeding before the Commisssion, the Commissionn may give notice of proposed agency action. Proposed agency action shall be made upon a vote of the Commission, and may be reflected in the form of an order or a notice of intended action.
>
> (2) After agenda conference, the Commission clerk shall issue written notice of the proposed agency action, advising all parties of record that they have fourteen (14) days from service of notice in which to request a section 120.57 hearing. The Commission may also serve copies of its notice on interested persons and may require a utility to serve written notice on its customers.[3] [A-67].

This step never took place. A mistake was made and the Commission issued the wrong order. Its unwillingness to correct that mistake necessitated this appeal.

The Commission had been engaged in a free-form proceeding until it voted to approve TECO's petition. At that time, it decided on a course of conduct that had obvious adverse consequences for firm customers; it had to invite participation from them. Section 120.59(4), Florida Statutes (1987); FFEC-SIX, Inc. v. Florida Public Service Commission, 425 So.2d 152, 153 (Fla.

[3]The PSC routinely allows for a 21-day protest period to its proposed agency action orders instead of the 14 days specified in the rule. [A-20].

1st DCA 1983); U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698, 699 (Fla. 1988) ("Section 120.57(1), Florida Statutes (1985), requires an agencyto provide a party whose 'substantial interests' are affected by the agency's actions with an opportunity to request a hearing."); City of St. Cloud V. Department of Environmental Regulation, 490 So.2d 1356, 1358 (Fla.5th DCA 1986) ("Notice of agency action which does not inform the affected party of his right to request a hearing, and the time limits for doing so, is inadequate to provide a clear point of entry to the administrative process."); Florida Department of Transportaion V. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla.1st DCA 1981) ("The petition for a formal 120.57(1) hearing, as in this case, commences a de novo proceeding."); Capeletti Brothers, Inc., V. Department of Transportation, 362 So2d. 346, 348 (Fla.1st DCA 1978) ("[A]n adverse determination of a party's substantial interests is ineffective until an order has properly been entered pursuant to Section 120.59, after proceedings under Section 120.57.").

C. APPROVAL OF TAMPA ELECTRIC COMPANY'S PETITION WAS A CHANGE IN INDUSTRY-WIDE POLICY WITHOUT EVIDENTIARY SUPPORT CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT, CHAPTER 120, FLORIDA STATUTES.

The Court must also consider the effects of the Commission's interpretation of its actions (or lack thereof) on previous judicial pronouncements on nonrule policy. TECO's petition asked for a change in industry-wide policy, not codifed in rules, that required all electric utility customers to pay equally for the

costs of conservation programs. The Commission has either, pursuant to its Order No. 20825, instituted a policy change without a hearing, or, worse yet, recognized TECO's ability to effect such a change without Commission intervention.

The pivotal case on the issue of nonrule policy is McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), which this court has cited with approval in deciding appeals of PSC decisions. See e.g. Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla.1980) ("[W]hen an agency elects to adopt incipient policy in a non-rule proceeding, there must be an adequate support for its decision in the record of the proceeding. McDonald at 583-84.")

McDonald and its progeny have recognized that, as an incentive for agency rulemaking, agencies must explicate and defend their nonrule policy each time it is placed at issue. The agency must @@fully and skillfully expound its non-rule policies by conventional proof methods and, in appropriate cases, subjects policymakers to the sobering realization their policies lack convincing wisdom." McDonald, 346 So.2d at 569. This process has been held to be applicable to the PSC for each company to which it intends to apply its policy. In Florida Public Service Commission v. Indiantown Telephone System, Inc., 435 So.2d 892, 896 (Fla. 1st DCA 1983), the First District Court of Appeal held as follows:

> We hold that the PSC may proceed to develop the policy involved in the instant case through adjudication on a case-

by-case basis. If the PSC continues to proceed only through adjudication, it will have to "'explicate and defend policy repeatedly in Section 120.57 proceedings.'" Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA 1981)) at 1182, for each company to which it intends to attempt to apply that policy.

The PSC's decision on TECO's petition, however, would allow the PSC, alone among agencies subject to the APA, to completely sidestep this line of cases. The Commission, through decisions outside the APA or electric utilities through purported tariff filings under Section 366.06(3) (the file-and-suspend statute), could effectuate changes in industry-wide policy without either the utility or the PSC being subjected to the sobering realization that their ideas lack convincing wisdom.

D. THE OPPORTUNITY TO FILE A COMPLAINT AGAINST TECO'S RECOVERY METHODOLOGY CANNOT BE SUBSTITUTED FOR THE PSC'S FAILURE TO COMPLY WITH THE APA IN THE FIRST PLACE.

Hearings under the APA are intended to formulate agency action based on a record. The process is structured to allow parties an opportunity to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence and to be represented by counsel. Section 120.57(1)(b)4, Florida Statutes. There is an assigned burden of proof that must be met by the party seeking affirmative relief. Florida Power Corporation v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982) ("'Burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates.' WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION, 638

(Revised Edition 1968)."). The PSC is required to evaluate evidence and render its decisions within this framework.

The PSC, however, seeks to circumvent this process at page 3 of Order No. 21448 by holding out the opportunity for Public Counsel to file a complaint challenging the manner in which TECO's conservation costs are recovered from its customers:

> Public counsel may file a complaint attacking the prospective application of the tariff, and if it does so, we will be required to tender Public Counsel the opportunity for a hearing conducted in a fashion fully compatible with the requirements of law. Florida Interconnect Telephone Company v. Florida Public Service Commission, supra.

Presumably, the firm customers would accept the burden of proof to establish that the procedure TECO requested should be changed.

But this is all placing the cart before the horse. The party seeking affirmative relief in Docket No. 881416-EG is TECO. It wants to change its cost recovery procedure and become the only electric utility that recovers all its conservation expenses from firm customers. Only after TECO has proven on the record of a proceeding conducted pursuant to the APA that its proposal is not discriminatory and does not violate FEECA, and the PSC issues an order to that effect, will it become the **"established"** rate recovery mechanism. Only then will others seeking to overcome it have to prove that it should be changed.

The change in TECO's recovery was adverse to the firm customers, and it is "ineffective until an order has properly been entered pursuant to Section 120.59, after proceedings under Section 120.57." See Capeletti, supra, 362 So.2d at 348. Moreover, the

PSC cannot use any subsequent proceedings as a basis to review the efficacy of allowing TECO to collect charges under the revised procedure. The purpose of Section 120.57 proceedings is to formulate agency action, not to review earlier, tentative decisions. McDonald, 346 So.2d at 584.

III

TECO'S PETITION VIOLATED FEECA BECAUSE IT ENCOURAGED INCREASED ELECTRIC ENERGY CONSUMPTION AND BECAUSE IT DISCRIMINATED AMONG CUSTOMER CLASSES BECAUSE OF THEIR PARTICIPATION IN CONSERVATION MEASURES

TECO's petition violated FEECA, but it is not entirely clear whether the relief the utility sought really had anything to do with FEECA directly. TECO's rate structure in its last rate case was developed using an equivalent-peaker methodology. That rate design caused TECO's interruptible rates to be higher than those of other electric utilities, particularly Florida Power Corporation, whose service area surrounds TECO's. TECO's last case also gave it a 14.5% return on its common equity, which is well above prevailing market conditions.

Sorting out its rate design problem in a rate case would also place the equity return at issue. Since TECO's interruptible customers should be neutral to whether they receive a rate reduction in their base rates or as forgiveness from conservation cost recovery factors, TECO's petition offered the opportunity to reduce the interruptibles' rates without jeopardizing the utility's allowed return on equity. This is admittedly speculation, but it

is one of the issues that the Commission's action foreclosed from consideration. Therefore, it is necessary in this brief to confront the legality of the PSC's order under FEECA.

TECO said in its October 28, 1988 petition that the cost of its marginal fuel is less than its system average fuel cost. In other words, the more electricity TECO generates, the more coal it will buy on the spot market where prices are lower than its long-term contract prices. Inclusion of the lower priced coal in its total fuel expense will reduce the unit cost of fuel, i.e. the cost per kilowatt-hour, for everyone. Therefore, "it is not beneficial to reduce overall energy usage." [A-12]. The total fuel cost would, of course, increase.

TECO correctly identified the second FEECA goal to reduce the growth rate of electric consumption. It then said it doesn't apply to TECO because its marginal fuel cost is less than average. [A-12]. It then concluded that:

> Based on the foregoing, the company's proposed modification of its conservation cost recovery methodology is entirely consistent with existing FEECA conservation goals. [A-13].

The inherent inconsistency is obvious; TECO's petition should have been rejected out-of-hand.

The legislative intent of Section 366.81, Florida Statutes, is unambiguous:

> 366.81 **Legislative findings and intent.**--The Legislature finds and declares that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Reduction in the growth rates of electric consumption and of weather-sensitive peak demand are of particular

importance. The Legislature further finds that the Florida Public Service Commission is the appropriate agency to adopt goals and approve plans related to the conservation of electric energy and natural gas usage. The Legislature directs the commission to develop and adopt overall goals and authorizes the commission to require each utility to develop a plan for increasing energy efficiency and conservation within its area, subject to the approval of the commission. 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. This expression of legislative intent shall not be construed to preclude experimental rates, rate structures, or programs. The Legislature further finds and declares that ss. 366.80-366.85 and 403.519 are to be liberally construed in order to meet the complex problems of reducing the growth rates of electric consumption and weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use; and conserving expensive resources, particularly petroleum fuels. (Emphasis added).

TECO's petition violated this legislative intent in two respects: it encouraged increased electric energy usage and it resulted in discriminatory rates.

Public Counsel raised both these issues in the motion for reconsideration filed March 16, 1989: [A-47-50]

> TECO's request was premised on the assumption that, because interruptible and standby interruptible customers do not contribute to costs which the conservation programs are designed to avoid, they should not have to pay for conservation cost recovery. This view would impose additional charges on firm customers for participating in conservation programs. Such a view, adopted by the Commission in its order, contravenes Section 366.81, Florida Statutes, which prohibits disparate treatment for any class because of its participation in conservation programs: [Quote from Section 366.81 omitted].
>
> TECO's petition and the Commission's order both fail to explain how excusing interruptible and standby

interruptible customers from conservation cost recovery would not result in unjust discrimination among rate classes or a violation of Section 366.81. Order No. 20825 also fails to address the factual or legal reasoning for departure from the conservation cost recovery policy of the last nine years.

Order No. 20825 is also inconsistent with any logical consideration of relevant facts. One goal of FEECA is 'to reduce the growth rates of electric consumption.' In other words, increases in KWH usage should be curbed. TECO, however, at page 2 of its petition, suggests that energy usage should not be limited because its marginal fuel cost is less than average fuel cost: [Quote from petition omitted].

In other words, interruptible and standby interruptible customers should be encouraged to use as much energy as possible. Presumably, the lower marginal fuel cost will encourage energy usage. Order No. 20825 recognizes the conflict with FEECA goals, at page 3, but dismisses it as irrelevant:

> 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.

The first sentence in the quote above is accurate. The dismissal in the second sentence is incongruous because two paragraphs later reference is made to Staff's recommendation, which was adopted, that interruptibles and standby interruptibles should be freed from their conservation cost obligation because they would receive no fuel savings benefits until 1990. If fuel price is irrelevant, it is irrelevant, period.

The fallacy in the Commission's perspective is its acceptance of the 'fact' that conservation will cause higher fuel costs for interruptible customers: [Quote from order omitted]. Fuel costs are higher only on a per-unit basis. In absolute terms, they are not. It is only by increasing electric consumption so that spot coal is burned that unit costs decrease, but in absolute terms, for all customers, fuel costs have to increase, albeit at a reduced rate.

As the Commission correctly states, the goal of FEECA is to reduce the absolute quantity of fuel burned, not the price differential. But if lower fuel prices will increase usage by interruptibles, so will any preferential price decrease, even one attributable to the absence of conservation costs. The interruptibles should be expected to increase usage because they are freed from conservation costs just as they would because marginal

fuel costs are lower than average. But increased consumption, for whatever reason, is contrary to FEECA.

TECO did not seriously confront these arguments in its response to the motion for reconsideration, and the PSC, in its order on reconsideration, Order No. 21448, did not confront them at all. The PSC has therefore deferred to this Court to evaluate the legality of Order No. 20825 under FEECA in the first instance.

Since TECO's petition indicated on its face that its proposal would violate the FEECA proscription against engaging in activities intended to increase electric energy consumption and since the resultant rate design discriminates against TECO's firm customers, TECO's petition should have been denied. The PSC would have reached this same conclusion if it had acted consistent with its existing policy and prior orders. For example, when the industrial customers of Florida Power & Light Company asked that they be excused from payment of FPL's oil-backout cost recovery factor (another conservation measure under FEECA, one to reduce oil usage) the Commission responded that such treatment would be inconsistent with existing policy:

> The purpose of the Oil Backout Cost Recovery Rule is to encourage implementation of supply-side oil conservation projects. We have determined that the primary purpose of the transmission project is the displacement of oil fired generation. We have previously determined that conservation measures benefit all customers, and therefore should be collected in like manner from all customers. We find, likewise, that the Oil Backout Cost Recovery revenue be allocated among the customer classes on the basis of KWH sales and should be collected on a cents per KWH basis. In re: Investigation of fuel cost recovery clauses of electric utilities, 82 F.P.S.C. 9:210, 218 (1982).

TECO also has an approved oil backout project. All its customers, even its interruptible customers, have a recovery factor for this conservation project reflected on their bills as a KWH charge. One was approved by the PSC after the February 1989 hearings and another, six months later, after the August 1989 hearings. In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor, 89 F.P.S.C. 3:413, 416 (1989). TECO's petition clearly violated policy and statute.

CONCLUSION

The Public Service Commission committed material errors in procedure when it approved Tampa Electric Company's petition to modify its conservation cost recoverey methodology. Firm customers were not afforded a clear point of entry into the decision-making process even though there was a change in industry-wide policy that required them to absorb all the costs of TECO's conservation programs. The opportunity to initiate a proceeding challenging the PSC's action is inadequate to protect the firm customers' interests where the PSC has not afforded the opportunity for hearing required in the first instance.

The Court should order that the PSC cannot affirmatively approve or otherwise permit electric utilities to change rates or services on a permanent basis without first complying with the notice and hearing requirements of Section 120.57, Florida Statutes (1987). Since, in this case, the PSC's Order No. 20825 was based

on an improper interpretation of the Florida Energy Efficiency and Conservation Act, Section 366.80, et seq., Florida Statutes (1987), and TECO's petition was inconsistent with a proper interpretation, this case should be remanded with directions to dismiss TECO's petition. Section 120.68(9)(a), Florida Statutes (1987).

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CERTIFICATE OF SERVICE
Case No. 74,471

I HEREBY CERTIFY that a correct copy of the foregoing Initial Brief of Appellants, Citizens of the State of Florida and Appendix has been furnished by U.S. Mail or by hand-delivery* to the following parties on this 4th day of October, 1989.

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