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

REPLY BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

1. CASES PAGE

CASES CONT. PAGE

2. FLORIDA STATUTES

3. LAWS OF FLORIDA PAGE

4. FEDERAL STATUTES

5. PUBLIC SERVICE COMMISSION RULES

6. PUBLIC SERVICE COMMISSION ORDERS IN DOCKET NO. 881416-EG

7. OTHER PUBLIC SERVICE COMMISSION ORDERS (REPORTED)

OTHER PUBLIC SERVICE COMMISSION ORDERS (REPORTED) CONT. PAGE

PUBLIC SERVICE COMMISSION ORDERS (REPORTED) CONT. PAGE

8. OTHER PUBLIC SRVICE COMMISSION ORDERS (NOT REPORTED)

9. OTHER AUTHORITIES

I.

REPLY TO PUBLIC SERVICE COMMISSION'S ANSWER BRIEF

A. THE PSC COULD NOT IDENTIFY ANY STATUTORY OR CASE LAW THAT ALLOWS PERMANENT RATE INCREASES WITHOUT HEARING

The PSC misstates the Citizens' position on whether hearings are required before rates can be changed. [PSC, at 2, 5-14].[1] No assertion was made that all rate changes must be preceded either by a hearing or by issuance of a proposed agency action order. Under the file-and-suspend law, Section 366.06(3), Florida Statutes (1987), rates may change without a hearing as a result of interim rates approved by the PSC or because the PSC failed to suspend proposed rates within the statutory 60-day period. It is the Citizens' position that such rates are only in effect on an interim basis pending the outcome of proceedings which must conform to the Administrative Procedure Act. [Citizens, at 15, 25-39]. As the Citizens stated in their initial brief, "the Commission cannot allow a tariff affecting the substantial interests of TECO's firm customers to go into effect on a <u>permanent</u> basis without providing a clear point of entry into the decision-making process." [Citizens, at 26] [Emphasis added].

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[1]References to the answer briefs of appellees, the Public Service Commission, Tampa Electric Company, and the Florida Industrial Power Users Group, will be made as [PSC, at 3, [TECO, at], and [FIPUG, at]. The Citizens' initial brief will be referred to as [Citizens, at 3.

The suggestion that TECO's revised cost recovery resulted from automatic tariff implementation was raised, for the first time, seven months after TECO's petition was filed. It arose at the June 6, 1989 agenda conference at which Public Counsel's motion for reconsideration of Order No. 20825 was under consideration. TECO did not raise the issue at any stage of the proceedings. The PSC adopted the theory in Order No. 21448 to justify its failure to offer a hearing opportunity consistent with its January 31, 1989 agenda conference vote.

TECO's tariff was not a rate specifically; it simply specified a recovery methodology. The Commission's interpretation of the file-and-suspend law in its answer brief would require the Court to accept that a fundamental change in PSC-prescribed policy can be effected by an electric utility's unilateral decision to append a document labeled "tariff" to its petition.[2] Section 366.06(3), however, by its terms is applicable only to changes in rates.

Section 366.06(3) is also by its terms only applicable to general rate cases in which all rates are at issue. The Citizens do not assert in this appeal that the PSC cannot approve a single tariff under file-and-suspend. But the PSC's construction of automatic implementation upon a failure to suspend would permit even general rate increases without hearing.

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[2] In its Order No. 9974, issued April 24, 1981, the PSC set the first conservation cost recovery factors. In a section of the order entitled "Method of Recovery," the full Commission rejected the position espoused by industrial intervenors and concluded that the cost recovery factor should be imposed on all customers. In re: Conservation Cost Recovery Clause, 81 F.P.S.C. 4:154, 162 (1981).

The PSC alleges the common law right of utilities to implement rate changes endures if proposed rates are not suspended. [PSC, at 5-71. No cases are cited, however, that directly support this proposition. Citizens v. Mayo, 333 So.2d 1 (Fla. 1976), and Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976), are addressed in the Citizens' initial brief. Maule Industries, Inc., v. Mayo, 342 So.2d 63 (Fla. 1976), does nothing to refute the Citizens' position. The immediate implementation of rates upon expiration of the suspension period is conceded. [PSC, at 10-11]. But Maule will not stand for the proposition that the PSC need not hold a hearing to resolve whether such rates should remain in effect on a permanent basis.

The statutory scheme in Florida is not consistent with the PSC's arguments based on the common law rights of utilities. Except for rates which, since 1974, may be implemented automatically pending the outcome of hearings, utilities in Florida have not been authorized to change rates without PSC approval. The distinction was noted in Louisville & Nashville R. Co. v. Speed-Parker, Inc., 103 Fla. 439, 137 So. 724, 730 (Fla. 1931), in a comparison between railroad rates set on an interstate basis with the Interstate Commerce Commission (ICC) and intrastate rates set by the PSC's predecessor Florida Railroad Commission:

> The rules of construction applied by the Interstate Commerce Commission to interstate tariffs . . . lose much of their force, and are largely inapplicable, in a case of this kind, where we are dealing with tariffs applying solely to Florida intrastate traffic issued under the authority of the Florida Railroad Commission. There is

> a fundamental difference between the two. While the supervision of interstate rates was fully conferred upon the Interstate Commerce Commission . . . yet (contrary to the State system) power to initiate rates was left to the carriers, subject to the power of the Interstate Commerce Commission to suspend, or after hearing, to set them aside when shown to be unreasonable. . . .
>
> But here we are dealing with a different situation. Under the laws of this state, the railroad commissioners are vested with greater powers . . . . .. Thus in this state the power of the carriers to initiate rates on intrastate traffic is not recognized. The lawful rates, and the rules and regulations governing the same, are the rates and rules of the Florida Railroad Commission, and not of the carriers. [Emphasis added].

The Court found the statutory language that required the Railroad Commission to set rates and promulgate rules and regulations the railroads must follow created "Commission" rates as opposed to "railroad" rates.

Similarly, Section 366.04 (1) provides "the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service." Section 366.05 provides "the commission shall have power to prescribe fair and reasonable rates and charges." Sections 366.06(1) and (2) require the PSC to "determine and fix fair, just, and reasonable rates" and "promulgate rules and regulations affecting equipment, facilities and service." The file-and-suspend law, at most, created a limited right for electric utilities to set their own rates pending the outcome of the PSC proceedings required by Section 366.06(2).[3]

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[3]The Court, in Citizens v. Mayo, supra 333 So.2d at 6, recognized the "statutory nexus between the file and suspend procedures and the role prescribed for public counsel in rate regulation," both of which were enacted by Chapter 74-195, Laws of Florida. The PSC's interpretation of file-and-suspend would enable electric utilities and the PSC to circumvent Public

The PSC does not cite to any previous decisions or consistent practice of allowing electric utilities to change rates through tariff filings. But see, Re Southeastern Telephone Company, 23 PUR3d 477 (Fla. PSC 1958) (hearing required before allowing temporary increase in telephone rates subject to refund); Re Tampa Electric Company, 26 PUR3d 158 (Fla. PSC 1958), (order on reconsideration vacated rates set by PSC and permitted TECO to submit rates after hearing for PSC's approval); Re Houston Corporation, 33 PUR3d 98 (Fla. PSC 1960), reh'g denied, 33 PUR3d 100 (Fla. PSC 1960) (manufactured gas rates not approved by PSC unlawful). A review of orders authorizing TECO to revise rates indicates the practice had been to afford an opportunity for hearing, not automatic implementation upon a failure to suspend. See, e.g., In re: Petitions of Florida Power and Light Company, Florida Power Corporation, and Tampa Electric Company to Revise Their Tariffs Relating to Underground Distribution Facilities, 83 F.P.S.C. 4:223 (1983); In re: Petition of Tampa Electric Company for Modification of GSDT On-Peak Demand Charges, 84 F.P.S.C. 2:100 (1984); In re: Petition of Tampa Electric Company for Approval of GSD and GSDT Tariffs, 84 F.P.S.C. 4:129 (1984); In re: Emersency Petition of Tampa Electric Company for Closure of its Existing Interruptible Rate Schedules to New Business and for Approval of New Interruptible Rate Schedules, IS-3 and IST-3, 85 F.P.S.C. 7:91 (1985). In 1987, the PSC started approving some electric utility

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Counsel's participation in the rate-setting process by the simple expedient of tariff filings and PSC inaction.

rate changes as final orders instead of proposed agency actions. See, e.g., In re: Petition of Florida Power & Light Company, Florida Power Corporation and Tampa Electric Company for Authority to Revise Their Tariffs Relating to Undersround Distribution Facilities, 87 F.P.S.C. 5:52 (1987)(Affirmative action to approve tariffs without suspension.)

Assuming TECO's submittal was a tariff, the PSC's justification for its implementation on a permanent basis without a hearing fails to consider the interplay of the Florida APA, the Office of Public Counsel, and the file-and-suspend procedure, which were all enacted by the 1974 Legislature. The Legislature could have easily provided that rate changes resulting from the PSC's failure to exercise its suspension authority were exempt from the APA altogether. Instead, Section 120.72(3), Florida Statutes (1987), provided only that "interim rates" pursuant to Section 366.06(3) were exempt. Interim rates are those collected during the pendency of formal proceedings which must conform to the APA.[4]

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[4]See Southern Bell v. Bevis, 279 So.2d 288 (Fla. 1973). In that case, decided under the pre-1974 APA, the Court held that the emergency interim rate provisions of Section 364.05 were exempt from Section 120.22 which required a public hearing whenever legal rights were determined "unless otherwise provided by law." Section 120.22 was deleted in the 1974 rewrite of the APA. In its place, Section 120.57 was created guaranteeing a hearing "in all proceedings in which the substantial interests of a party are determined by an agency." See 2 A. England & L. Levinson, Florida Administrative Practice Manual, § 11.02(a) (1979). The limited exemption for interim rates in Section 120.72(3) carried the Southern Bell holding into the 1974 APA for telephone and electric utilities by referring to interim procedures under both Chapter 364, Florida Statutes, and Chapter 74-195, Laws of Florida. That case reveals that, contrary to the PSC's assertions in its answer brief, before adoption of the file-and-suspend statute, the practice was to not allow interim rate increases of any kind except

(The Court, in Citizens v. Mayo, supra, 333 So.2d at 4, referred to rates in effect upon a failure to suspend as "interim charges" preceding the "full rate proceeding.")

In other states, and at the federal level, regulatory agencies are usually not required to hold hearings on utility tariffs submitted pursuant to file-and-suspend statutes. In Mountain States Telephone and Telesraph Co. v. New Mexico State Corporation Commission, 337 P.2d 943, 28 PUR3d 348, 351 (N.M. 1959), [PSC, at 5] the suspension statute under consideration provided that "the commission *may,* either upon complaint or upon its own initiative, upon ten days' notice, enter upon a hearing concerning the reasonableness or lawfulness of such proposed rate or rates." [Emphasis added].[5] In Florida, Section 366.06(2), Florida Statutes (1987), provides that "the commission shall order and hold a public hearing." See 1974 Op. Att'y Gen. Fla. 074-309 (October 9, 1974).[6] [A-2]. The Florida file-and-suspend statute, Section 366.06(3),

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upon a demonstration of emergency financial need. 279 So.2d at 286.

[5]See 15 USCS § 717c(e) (1984) (Federal Energy Regulatory Commission - natural gas companies); 16 USCS § 824d(c) (1984 & Supp. 1989) (Federal Energy Regulatory Commission - electric utilities); and 47 USCS § 204(a)(1) (1984 & Supp. 1989) (Federal Communications Commission), all of which permit but do not require hearings.

[6]After surveying other state statutes, Florida was found to be one of only four states in which a hearing was required by law. 1974 Fla. Att'y Gen. Ann. Rep. at 501. The Attorney General's conclusion that rate changes could not be implemented by tariff filings led the PSC to adopt a hearing procedure for changes in fuel adjustment charges. In re: General Investigation of Fuel Adjustment Clauses of Electric Companies, Order No. 6357 (November 26, 1974).

follows this mandatory hearing requirement and offers certain options "[p]ending a final order" after that hearing.

The APA's in most other jurisdictions only prescribe the manner in which a hearing must be conducted if a hearing is required by some other statute. The Florida APA, however, specifies when a hearing must be held as well as the manner in which it must be conducted. See L. Levinson, The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments, 29 U. Miami L. Rev. 617, 658 (1975) ("[T]he new Florida Act creates the right to a hearing in situations defined in the Act itself."); Reporters Comments on Proposed Administrative Procedure Act for the State of Florida (March 9, 1974), reprinted in, 3 A. England & L. Levinson, Florida Administrative Practice Manual, App. C at 18 (1979) ("The requirements of a trial-type hearing are established in terms of what is involved, by reference to disputed facts, legal issues or policy, whether or not another statute establishes a hearing requirement.") Accordingly, the APA, which superseded the hearing requirements of other statutes, would require a hearing before permanent rate changes were implemented even if a hearing were not required by Section 366.06(2). Sections 120.72 and 120.722, Florida Statutes (1987).[7] The limited exemption of

[7]Section 120.722 explains the legislative intent of Chapter 78-95, Laws of Florida. Language expressing a hearing requirement was deleted by that act from many regulatory statutes as being unnecessary in light of the controlling language of the APA. Section 366.06(2) retained the hearing requirement, indicating the Legislature did not want any confusion to cloud the necessity for hearings before permanent utility rate changes.

Section 120.72(3) cannot be extended to encompass permanent rate changes.

The PSC had to offer an appropriate proceeding under the APA. The PSC's Rule 25-9.001(3), Florida Administrative Code, provides that all rules, regulations and schedules of rates be "approved by the Commission as provided by law." The PSC's action would be a decision determining the substantial interests of a party triggering the hearing requirements of Section 120.57. The PSC cannot identify any provision of law allowing permanent rate changes without a hearing or point to any cases in which the courts have approved anything other than interim rates subject to the outcome of proceedings conforming to that statute. The file-and-suspend statute is not a mechanism for permanent rate changes outside the APA.

B. A CLEAR POINT OF ENTRY INTO THE DECISION-MAKING PROCESS HAD TO BE OFFERED

The PSC's argument that a complaint would be an adequate vehicle to challenge tariff changes is made without reference to the APA. Instead, reliance is placed on Section 366.07, Florida Statutes (1987). [PSC, at 15-16] Such reliance is misplaced for two reasons. In the first place, Section 366.07 is only applicable to changes in existing rates that were previously established as reasonable, hence its title: "Rates; adjustment." Chapter 366 tracks the formula of most utility regulatory statutes. Rates that were in effect at the time jurisdiction was first conferred on the

PSC remain in effect and cannot be changed by the utility without approval. Section 366.06(1). Provision is also made to review rates that were "grandfathered" and those approved at a later date upon the PSC's own motion or upon complaint of a customer. Section 366.07. A prerequisite for invocation of Section 366.07 is therefore that the rates challenged were previously held to be lawful. This is inapplicable to rate changes, such as TECO's increased charges to its firm customers, implemented without regard to the hearing requirements of either Section 366.06(2) or the APA. Secondly, as noted above, the APA itself defines the necessity for a hearing before interim rates become permanent without regard to other statutes. Section 120.72.[8]

In spite of the fact that the "tariff" issue was first raised at the June 6, 1989 agenda conference, the PSC states that the January 31, 1989 agenda conference was the occasion for explicit approval of TECO's tariff. [PSC, at 13, 22] Assuming this to be true, the APA mandated that a clear point of entry be offered to substantially affected persons. The PSC answer brief does not dispute the requirement or its failure to comply with it. The best

[8]The PSC's suggestion, at page 16 of the answer brief, that the burden of persuasion would rest with the utility is inconsistent with the APA and relevant case law. The burden rested with the utility in Gulf Power Co. v. Public Service Commission, 453 So.2d 799 (Fla. 1984), and South Florida Natural Gas Co. v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988), because these were traditional rate cases in which the utilities sought to change established rates TECO was allowed to change rates without a hearing. The PSC cannot circumvent the APA by failing to offer an opportunity for hearing in the first place by making a utility prove its case only when and if a customer raises a challenge to rates that went into effect outside the APA.

it can do is argue that Public Counsel failed to appear at the conference. In spite of the inferences, though, the PSC cannot identify any rule, order, statute, or form of practice that required attendance.

If the PSC had voted on January 31 to deny TECO's petition, whether Public Counsel participated or not, the decision would not have been adverse to the firm customers and no hearing would have been requested. See Doheny v. Grove Isle, Ltd., 442 So.2d 966, 976 (Fla. 1st DCA 1983) (Dissent adopted on rehearing). If the Public Counsel had appeared at the agenda conference and the PSC had voted as it did to approve TECO's petition, the PSC still would have had to offer a clear point of entry. McDonald v. Department of Banking and Finance, 346 So.2d 569, 575 (Fla. 1st DCA 1977) (Participation in "Comptroller's conference" preceding formal Section 120.57(1) proceedings.)

The proposed agency action procedure offers significant advantages to the PSC. It can review information provided by a utility informally and make a tentative decision that, if not protested, becomes final and obviates the need for a hearing. In other words, the PSC may choose to risk plowing the same ground twice in return for the possibility it might avoid a hearing altogether. See McDonald, supra, 346 So.2d at 578 n.5. But it cannot be seriously suggested that the agenda conference is an occasion to contest findings based on TECO's last rate case, the annual planning hearings and the computerized production costing

models referenced as underpinnings for Order No. **20825.** [PSC, at 19]

C. THE CONSERVATION HEARING WAS NOT AN OCCASION TO ADDRESS THE POLICY ISSUE POSED BY TECO'S PETITION

Consistent PSC practice since **1980** has had the full Commission pass on policy issues to be implemented by the three-member panel in the conservation docket. The conservation panel then decided the reasonableness of costs incurred and set a recovery factor. Modifications to TECO's programs and approval of new programs were first considered by the full Commission on a proposed agency action basis with factors being set by the panel based on the reasonableness of costs for those programs.[9] The conservation docket hearings were not an occasion to challenge the programs themselves. Once costs were ascertained, the factors resulted from

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[9] Order No. **20825** is apparently the only order the PSC has issued establishing a method of cost recovery or approving or modifying TECO's conservation programs as a final order without hearing. Previous orders were either issued after hearings concluded or as proposed agency actions (which is what the PSC voted out at its January **31, 1989** agenda conference) offering the opportunity for protest and hearing. See e.g., In re: Conservation Plan of Tampa Electric Company, **81** F.P.S.C. **3:206 (1981);** In re: Conservation Plan of Tampa Electric Company, **82** F.P.S.C. **7:140 (1982);** In re: Conservation Plan of Tampa Electric Company, **83** F.P.S.C. **4:58 (1983);** In re: Petition of Tampa Electric Company for Modification of its Heating and Cooling Program, **84** F.P.S.C. **2:105 (1984);** In re: Petition of Tampa Electric Company for Approval to Expand Residential Load Management Monitoring, **85** F.P.S.C. **9:296 (1985);** In re: Energy Conservation Loan Test Program, **86** F.P.S.C. **11:166 (1986);** In re: Petition of the Tampa Electric Company to Modify its Heating and Cooling Program, **87** F.P.S.C. **2:260 (1987);** In re: Petition of Tampa Electric Company to Modify its Heating and Coolins Program, **88** F.P.S.C. **10:461 (1988);** In re: Petition of Tampa Electric Company to Modify the Efficiency Ratings Used in its Heating and Cooling Program, **89** F.P.S.C. **2:115 (1989).**

simple division by the number of kilowatt-hours. This appeal is concerned with the denominator used in the calculation, i.e. whether costs should be divided by all kilowatt-hours or just those of firm customers. That is the policy determination the full Commission reserved for resolution.

The PSC mischaracterizes the issue, arguing that the attorney from the Public Counsel's office who participated in the conservation hearings knew their purpose was to evaluate the reasonableness of program costs. [PSC, at 27] This is an attempt to obscure the fact that no challenge has been raised to the costs themselves. The only issue was whether those costs, accepted as reasonable, should be recovered only from TECO's firm customers. The PSC does not allege in its answer brief that the conservation panel could have decided the policy issue. Nor does the PSC contest the statements in the Citizens' initial brief that "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." [Citizens, at 17]. The conservation hearing was only an occasion to challenge the reasonableness of costs, not to contest the policy of imposing all costs on firm customers.[10]

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[10]The PSC's answer brief gives the impression that a recovery factor, once set, is immutable. This has never been the case. Because the factors are set without detailed analysis, there is always the opportunityto make corrections as issues are identified later and adjustments made. See, e.g., Gulf Power Co. v. Florida Public Service Commission, 487 So.2d 1037 (Fla. 1986); Florida Power Corporation v. Cresse, 413 So.2d 1187 (Fla. 1982). The PSC recognized this in its order vacating the stay occasioned by Public Counsel's appeal. As a public officer, this appeal effected an

D. THE PSC'S INTERPRETATION OF FEECA HAS NO RECORD SUPPORT

The PSC contends its purported **"findings"** that TECO's pet tion would not violate FEECA should not be overturned unless clearly erroneous. [PSC, at 21] There are, however, no findings in the evidentiary sense. The hearing that would have provided a basis for findings of fact and conclusions of law and policy has never been held or offered. The very arguments the PSC now seeks to diffuse on appeal are the same ones it chose to ignore in its order denying reconsideration. The order itself is invalid because no clear point of entry was offered for TECO's firm customers to posit why the PSC's own interpretation of FEECA lacks convincing wisdom. McDonald, supra, 346 So.2d at 583.

The PSC's contention that "shifting conservation costs 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" has never been expressed before. This statutory interpretation merits serious concern on the Court's part and must be evaluated in light of the circumstances in which it is offered. The Commission is now striving to uphold an order that has none of the procedural

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automatic stay pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure. Upon motion of TECO, the PSC Chairman, pursuant to Rule 25-22.061(3), Florida Administrative Code, vacated the stay because "the relief sought by Public Counsel herein can be rendered in the conservation cost recovery proceeding should the Public Counsel prevail on appeal. Thus it would appear that there is no need for a stay in this docket." Order No. 21979. [A-1].

underpinnings mandated by the APA. The Legislature knew conservation would be costly. If only those persons who receive direct benefits from conservation programs must support their costs, participation will likely decrease and the societal benefits intended by the Legislature will be lost. Statutory interpretation by an agency is generally accorded great weight, but the Commission has not engaged in the type of thoughtful evaluation that is presumed to precede statutory construction in this case. Under the circumstances, deference is inappropriate.

II.

REPLY TO TAMPA ELECTRIC COMPANY'S ANSWER BRIEF

A. FACTORS APPROVED BY THE PANEL IN THE CONSERVATION DOCKET WERE SUBJECT TO REVISION BY THE FULL COMMISSION IN THE PETITION DOCKET

TECO states that it modified its conservation cost recovery factor to "implement the Commission's approval of Tampa Electric's proposal to exempt interruptible customers from participation in the conservation cost recovery process." [TECO, at 7]. The only decision the PSC reached, however, was its tentative, conditional decision to grant TECO's petition as a proposed agency action. This is the dilemma in which TECO finds itself. It needs the action from the January 31 agenda conference to validate the revision of its recovery factor. Implicitly, TECO concedes that onlythe full Commission could make the policy determination. TECO also needs that decision to be binding so the recovery factor cannot be challenged at a later date.

TECO **"solves"** the problem by characterizing Public Counsel's stipulation to the revised factor as a waiver of any objection to the validity of the initial decision. In other words, even if Public Counsel stipulated based on a well-founded belief that the policy decision was not final, the stipulation itself makes the character of the decision irrelevant. TECO's **"logic"** fails of its own weight. TECO's argument on the subject is made without reference to any legal authority whatever. [TECO, at **7-11]**.

TECO alleges that it could have justified the reallocation of its conservation costs at the February conservation hearings if Public Counsel had expressed an objection to the proposed revision. [TECO, at **8-91**. This statement, however, is made without any reference to the conservation panel's authority to pass on the underlying policy. Consistent PSC practice has had the full Commission make policy decisions with the three-member conservation panel evaluating only the reasonableness of costs incurred.

TECO gives an inaccurate impression of how cost recovery factors are set at the PSC. [TECO, at **9-10]**. Issues concerning the reasonableness of costs are identified in the prehearing order and heard by the panel. Policy issues are heard by the full Commission in separate proceedings.

Particularly illustrative of the PSC's cost recovery procedure is its investigation of electric utility coal purchases from affiliated companies. In February **1986,** the Commission **"spun-off"** into a separate docket consideration of whether affiliate purchases should meet a market standard. Since that time, Florida Power

Corporation's fuel cost recovery factor has generally been the subject of stipulations. However, it has been understood by all concerned that refunds might be ordered. On September 7, 1989, the full Commission ordered that Florida Power must refund $5,370,000 plus interest for the period 1984-1988. In re: Investigation into Affiliated Cost-Plus Fuel Supply Relationships of Florida Power Corporation, 89 F.P.S.C. 9:159 (1989). (Motions and cross-motions for reconsideration have been denied but orders have not yet issued.)

In Gulf Power Company v. Florida Public Service Commission, 487 So.2d 1036 (Fla. 1986), this Court concurred in the PSC's ability to revisit fuel cost recovery factors and order refunds based on subsequent review:

> The fuel adjustment proceeding is a continuous proceeding and operates to a utility's benefit by eliminating regulatory lag. This authorization to collect fuel costs close to the time they are incurred should not be used to divest the commission of the jurisdiction and power to review the prudence of these costs. The order was predicated on adjustments for 1980, 1981 and 1982. We find them permissible. 487 So.2d at 1037.

Rule 25-17.015(4), Florida Administrative Code, provides that the PSC shall dispose of petitions for recovery of conservation costs "in the same manner as fuel cost recovery clause proceedings." See PSC Legal Opinion, DGA Proj. No. 0-86-027 (1986) (Concluding that Gulf Power, supra, was applicable to conservation cost recovery: "Because the recovery of conservation expenditures is a continuing proceeding, the Commission may find earlier expenditures improper and make appropriate adjustment.") [A-9].

Stipulations in the conservation docket lack the attributes of finality TECO would ascribe for purpose of this appeal.

TECO contends Public Counsel should have challenged the order out of the conservation docket. [TECO, at 13]. Appeal in the conservation docket, however, was no more necessary than it was to appeal the orders approving fuel factors precedingthe refund order in the Gulf Power case. TECO's contention that Order No. 21317 (approving TECO's conservation cost recovery factor in the conservation docket) reaffirmed the orders on appeal and became final is inconsistent with this Court's holding in Gulf Power and the PSC's interpretation of it. [TECO, at 10, 12].

TECO's position is also inconsistent with its own practice. On January 19, 1989, the PSC denied TECO's petition for approval of a supplemental service rider tariff for its interruptible customers. In re: Petition of Tampa Electric Company for Approval of a Supplemental Service Rider for Interruptible Service, 89 F.P.S.C. 1:97 (1989). Before the order issued, however, TECO filed a tariff that purportedly conformed with the PSC's decision at the December 10, 1988, agenda conference. The PSC's staff approved the tariff administratively. One provision of the tariff allowed TECO to increase fuel costs to offset credits given pursuant to the service rider. TECO included these credits in its February fuel filings. TECO never identified recovery of these credits as an issue to be resolved by the cost recovery panel and never received explicit approval for their inclusion. TECO believed that, if the

tariff was blessed by the full Commission, acquiescence of the cost recovery panel was unnecessary.[11]

Similarly, when TECO was authorized by the full Commission in July 1989 to increase fuel charges to recover credits given to IMC Fertilizer, Inc., it did not seek approval from the fuel panel to include them in its cost recovery factor. In re: Petition of Tampa Electric Company for Approval of Construction Deferral Agreement with IMC Fertilizer, 89 F.P.S.C. 7:484 (1989). It was not identified as an issue and TECO did not deign to address it in its prefiled testimony. Having been approved by the full Commission, TECO believed confirmation from the panel was unnecessary.[12] TECO

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[11]Public Counsel protested and requested a hearing on May 5, 1989, when he learned that increased fuel charges were being collected pursuant to a tariff filed without notice after the PSC's order denying the first tariff. Public Counsel contended the tariff was inconsistent with the Commission's order and that it could not be implemented on a permanent basis without a hearing opportunity. The PSC, in Order No. 22093, said the tariff had gone into effect upon its failure to suspend. The protest would be treated as a complaint attacking the prospective application of the tariff and giving TECO twenty days to answer the "complaint." In re: Petition of Tampa Electric Co. for Approval of a Supplemental Service Rider for Interruptible Service, Order No. 22093 (Oct. 25, 1989). This, of course, contrasts with the PSC's position in this appeal that TECO would have the burden of proof in a complaint proceeding. [PSC, at 16; but contrast with TECO, at 15-16]. A notice of appeal was filed on November 22, 1989.

[12]Public Counsel appealed the IMC order in Citizens v. Wilson, Case No. 74,637 on August 23, 1989. The initial brief was filed on November 1, 1989. The PSC allowed TECO to increase its fuel costs to recover credits given IMC even though TECO did not request such treatment. No hearing was held in spite of Public Counsel's appearance at agenda conference and argument that a hearing was necessary. There are now three cases pending before the Court in which TECO was authorized to increase charges to its firm customers to offset rate reductions given its interruptible customers. In one case the PSC issued an order denying TECO's tariff, but its fuel charges still increased without a hearing (the supplemental service rider referenced above in footnote 11.) In

would not have informed the panel or parties that it was implementing the full Commission's action on its conservation cost recovery revision if it had not earlier submitted a factor that had to be amended. It's only for purposes of this appeal that TECO portrays action by the panel as imperative and decisive.

B. STATUTORY AND CASE LAW REQUIRE A HEARING FOR PERMANENT RATE CHANGES

TECO misconstrues the Court's construction of the pre-1974 APA applicable to Citizens v. Mayo 333 So.2d 1 (Fla. 1976). [TECO, at 12]. After quoting from the APA's hearing requirements, the Court concluded any inconsistencies between the APA and the file-and-suspend law would have to be resolved in favor of the APA. Conflict did not arise, however, because the APA still governed the final order whereas file-and-suspend was only concerned with interim decisions:

> Although nothing in the file and suspend law expresses a later legislative directive for the non-applicability of Section 120.26, there is no inconsistency between the due process procedures required before **"final"** agency action (Section 120.21(3), Fla.Stat. (1973)), and interim agency action under the file and suspend law. 333 So.2d at 7 n.16.

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this appeal, the PSC issued a final order instead of the proposed agency action it voted out at agenda conference. TECO was able to increase charges without a hearing. In the IMC case, TECO didn't even ask to increase firm customer charges and was allowed to do so without a hearing. The PSC does not believe it needs to hear from customers under any of these differing circumstances in which it has increased their rates for TECO's benefit.

Although the Court concluded that Southern Bell v. Bevis, 279 So.2d 288 (Fla. 1973), was supplanted by the file-and-suspend law (333 So.2d at 6 n.12), it reached the same conclusion that, under the pre-1974 APA, hearings were not required for interim rate decisions. The 1974 APA carried the exemption forward as Section 120.72(3). Rates may change on an interim basis without hearing, but a final decision setting permanent rates had to be reached after a Section 120.57 hearing. See footnote 4, supra.

TECO claims support for the PSC's position in the following quote from Citizens v. Mayo:

> (3) The Legislature did not intend a full rate hearing before all new rate schedules become effective. Had it intended that result, there would have been no need to enact subsection 366.06(4) at all. 333 So.2d at 5. [TECO, at 11; also PSC, at 9].

Note the use of the word "effective." The Citizens concede that rates may become effective without a hearing. But such rates are only in effect on an interim basis while the administrative process required by Section 120.57 runs its course. By quoting this passage out of context, TECO confuses rates allowed to go into effect on an interim basis with the PSC's statutory obligation to ultimately decide whether they are lawful.[13] Alternatives under Section 366.06(3) are only available "[p]ending a final order."

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[13] In Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716, 719 n.1 (Fla. 1983), the Court, speaking to an electric utility's right to collect undercharges from established rates said "'[e]stablished rates' means rates formally adopted by the PSC."

C. THE PSC'S ACTION ON TECO'S PETITION ALTERED NONRULE POLICY

Changes in nonrule policy occur when one utility is treated in a manner inconsistent with existing policy. Incredibly, TECO argues there was no change in nonrule policy because the PSC "made a limited determination based on the particular facts and circumstances affecting Tampa Electric." [TECO, at 14]. This position conflicts with McDonald, supra, and PSC appeals that preceded and came after McDonald. See City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620, 623 (Fla. 1983); 435 So.2d 892, 896 (Fla. 1st DCA 1983); City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505, 507 (Fla. 1983); Florida Cities Water Company v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla. 1980); Duval Utility Company v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); Citizens v. Hawkins, 364 So.2d 723, 727 (Fla. 1978); City of Plant City v. Mayo, 337 So.2d 966, 972-75 (Fla. 1976); Florida Public Service Commission v. Indiantown Telephone System. Inc., 435 So.2d 892, 896 (Fla. 1st DCA 1983). The policy before Order No. 20825 was to have all customers support the costs of conservation programs. In re: Conservation Cost Recovery Clause, supra, 81 F.P.S.C. 4:154. There is no evidentiary basis for the departure in TECO's case.

III.

REPLY TO FLORIDA INDUSTRIAL POWER USERS GROUP'S ANSWER BRIEF

FIPUG concedes that imposing all conservation costs on TECO's firm customers would be a significant departure from existing policy. [FIPUG, at 5]. The argument FIPUG offers to the Court is the same one rejected by the PSC eight years ago. The rejection in that case, however, came after hearings in which all parties were afforded an opportunity to present evidence on facts and argument on law and policy. In **1981**, FIPUG sponsored testimony by an expert witness who said interruptible customers should not have to pay for conservation because they received no benefit. The PSC, however, concluded that all customers benefit from conservation:

> One of the issues addressed during this proceeding was whether the unreimbursed costs should be recovered on a per kilowatt hour (or therm) basis from all customers, or whether an attempt [should] be made to impose the costs upon certain classes of customers. Mr. Brubaker, who testified on behalf of the Florida Industrial Power Users Group, advocated the latter proposition, on the theory that those individual customers who availed themselves of conservation measures would receive the benefits of lower bills resulting from reduced consumption. However, Mr. Brubaker acknowledged that, to the extent conservation efforts succeed in obviating the need for expensive new plant, all customers will benefit. Because all customers will enjoy the benefits of such cost avoidancy we direct that the authorized costs be recovered from all customers on a per kilowatt hour or per therm basis. [Emphasis added]. In re: Conservation Cost Recovery Clause, **81** F.P.S.C. **4:154, 162,** (1981).[14]

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[14]FIPUG, in its statement of facts, states that interruptibles are disadvantaged when new construction is postponed because it increases the likelihood their service will be interrupted. [FIPUG, at 4]. The source of this "fact" is not disclosed, but it obviously contradicts the conclusion reached by the PSC in **1981.** Similarly, other factual representations by FIPUG, including those extracted from Order No. **20825,** are not facts in the evidentiary

In this case, the PSC has reversed itself on established policy, as it applies to TECO, without affording anyone a hearing. FIPUG alleges it would be disadvantaged if the relief sought in this appeal were granted because "the FIPUG consumer group will be denied the hearing opportunity OPC is seeking to preserve for all cosumers." [FIPUG, at 7]. When Public Counsel sought reconsideration of Order No. 20825 because a hearing had not been offered, however, FIPUG filed an amicus response in opposition. [R. 73].

Public Counsel does seek to preserve a hearing opportunity for all consumers, and for all utilities. The inconsistent positions taken by FIPUG highlight the particular importance of PSC compliance with the APA. The PSC, as an agency, is unaffected by its decisions. But those decisions have a significant impact on utilities and their customers; monies are going to flow from one party to the other, or, as in this case, between customer classes. When the PSC fails to follow appropriate procedures, the disadvantaged party can challenge its action. The favored party, however, will argue that no error in procedure occurred, even if it knows otherwise. TECO and FIPUG know full well that the PSC erred when it issued Order No. 20825 as final agency action instead of the proposed agency action voted out at the January 31, 1989,

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sense since no hearings were held. The source of factual representations in Order No. 20825 apart from information in TECO's petition is unknown. The PSC, in its answer brief, states that Order No. 20825 was based on knowledge gained in TECO's 1985 rate case and from annual planning hearings and data submitted by TECO with its petition based on a computerized production costing model. [PSC, at 19]. This information was not in the PSC clerk's docket file. In any event, it is not evidence.

agenda conference. But, as beneficiaries of an improper procedure, they can't own up to it.

FIPUG takes the position that TECO's cost recovery modification is of limited duration. [FIPUG, at 8, 9]. The PSC also emphasized that its Order No. 20825 only approved TECO's petition for the period April 1, 1989 through March 31, 1990. [PSC, at 3]. The limitation, however, is unenforceable. The PSC maintains the tariff, which had no such limitation, went into effect automatically and that its Order No. 20825, as a consequence, was surplusage. Additionally, if the tariff is ignored, the limitation in Order No. 20825, being adverse to the relief TECO requested in its petition, is ineffective until the PSC conducts proceedings pursuant to Section 120.57. Capeletti Brothers, Inc. v. Department of Transportation, 362 So.2d 346 (Fla. 1st DCA 1978).

The limited duration of Order No. 20825 that FIPUG portrays as support for the PSC's decision is really evidence to the contrary. FEECA cannot be interpreted to allow TECO to be treated differently than all other electric utilities while a temporary condition in the coal markets makes spot purchases cheaper than long-term contracts. The Legislature did not tie conservation to fluctuatations in the price of fuels. Yet FIPUG argues the purportedly well-founded policy determination that interruptibles should not have to pay for conservation is only in place until March 1990, when, pursuant to Order No. 20825, at page 3, interrup-

tibles will begin experiencing fuel savings from deferral of a combustion turbine generating unit.[15]

FIPUG cites to Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983), for the proposition that an agency's interpretation of a statute it administers is entitled to great weight. [FIPUG, at 9]. This is generally true. In Pan American, deference was accorded for the PSC's interpretation of its rules. In either case, the PSC afforded the parties every opportunity to argue their positions on the appropriate interpretation before rendering a final decision. Section 120.53 (1)(c) requires no less:

> (1) In addition to other requirements imposed by law, each agency shall:
> (c) Adopt rules of procedure appropriate for the presentation of arguments concerning issues of law or policy, and for the presentation of evidence on any pertinent fact that may be in dispute.

TECO's petition, however, was granted without affording Public Counsel an opportunity to argue whether it conformed to existing policy or to FEECA. The first and only opportunity was in the Public Counsel's motion for reconsideration of Order No. 20825. The motion was denied in Order No. 21448 without reference to those

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[15]Note that FIPUG alleges harm from the deferral of new generating units [FIPUG, at 5], but the PSC found in its order that interruptibles will begin saving on fuel expense in 1990 because conservation will defer construction of a combustion turbine (CT) unit: "Interruptible customers will, however, experience positive fuel savings in 1990 and beyond due to the avoidance of the CT and its higher fuel costs." Order No. 20825, at 3.

arguments.[16] The source of the PSC's policy decision and its interpretation of FEECA is undisclosed. Certainly, there is no record supporting either decision. See E.M. Watkins & Company Inc. v. Board of Regents, 414 So.2d 583, 587-88 (Fla. 1st DCA 1982) ("To the extent an agency may intend in its final order to rely upon or refer to policy not recorded in rules for [sic:or] discoverable precedents, that policy must be established by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action. Florida Cities Water Co. v. Public Service Commission, 384 So.2d 1280 (Fla. 1980); Anheuser-Busch, Inc. v. Dept. of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA 1981); McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977)."); Department of Education v. Atwater, 417 So.2d 749, 751 (Fla. 1st DCA 1982) ("It is, at the least, . . . a non-rule interpretation of the statute manifesting policy that is now emerging. [Footnote omitted]. As such, it requires record foundation and explication of the agency's non-rule policy. Florida Cities Water Company v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980); [other citations omitted]. There is in this case neither record foundation nor explication of the basis

[16] FIPUG is simply incorrect in the conclusion to its answer brief where it states that the Commission "considered [Public Counsel's] arguments offered on the undisputed facts and found them wanting." [FIPUG, at 12]. Besides, the opportunity offered in Order No. 20825 to seek reconsideration, which requires the moving party to demonstrate a mistake of fact or law, cannot be equated to the opportunity to offer argument before the agency decides in the first place.

for the Commission's non-rule policy. For this reason alone the order must be reversed. [Footnote omitted]."); Cenac v. Florida State Board of Accountancy, 399 So.2d 1013, 1018 (Fla. 1st DCA 1981) ("[W]e caution that the agency has a 'duty to explicate its nonrule interpretation of the governing statute by conventional proof methods as far as reasonably possible.' ABC Liquors, Inc. v. Dept. of Business Regulation, 397 So.2d 696 (Fla. 1st DCA 1981).").

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CERTIFICATE OF SERVICE
Case No. 74,471

I HEREBY CERTIFY that a correct copy of the foregoing Reply to Public Service Commission's Answer Brief, Reply to Tampa Electric Company's Answer Brief and Reply to Florida Industrial Power Users Group's Answer Brief, has been furnished by U.S. Mail or by hand-delivery* to the following parties on this 27th day of November, 1989.

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