IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. MICHAEL MCK. WILSON, ETC., ET AL., Appellees.	)	CASE NO. 75,074

ON APPEAL OF ORDER NO. 22093 IN
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 881499-EI:
PETITION OF TAMPA ELECTRIC COMPANY

INITIAL BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

On November 17, 1988, Tampa Electric Company (TECO) petitioned the Florida Public Service Commission (PSC) for approval of a "supplemental service rider" tariff. [A-10][1] The service rider entitled large industrial customers taking service pursuant to interruptible rate schedules to receive reduced charges for electric usage above historic levels. The PSC voted to deny the petition at its December 20, 1988, agenda conference, but announced that a similar tariff providing for a sharing of fuel savings attributable to increased sales would be approved. [A-18]

At the agenda conference, the PSC gave its technical staff authority to approve any tariff TECO might file later that conformed with its decision, i.e., staff was authorized to "administratively approve" a tariff incorporating a provision that 80% of any fuel savings go to the interruptible customer receiving service under the rider with the other 20% going to the general body of ratepayers. The Office of Public Counsel did not make an appearance at the agenda conference, which was not noticed or held as a hearing pursuant to Section 120.57, Florida Statutes (1987).

When TECO filed a new tariff, the PSC staff approved it without review by the Commissioners. [A-19] The date on which TECO submitted the tariff is unknown, but it must have been shortly after the December 20, 1988, agenda conference because it was

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[1]Portions of the record in the appendix to this brief are cited with reference to the appendix page numbers, e.g. [A-__]. Other parts of the record are cited as [R-__].

approved for implementation on January 1, 1989, for one year.

TECO implemented its tariff pursuant to the staff's approval. Credits given interruptible customers were treated as a reduction to TECO's fuel revenues in the fuel cost recovery docket. The tariff did not provide for this, but TECO had stated in its petition that the credits would be used "to downwardly adjust fuel revenues reported in the fuel adjustment filing." [A-121 This increased fuel cost recovery charges to all customers to reimburse the utility for credits granted under the service rider.

The PSC's decision to deny TECO's petition was recorded in Order No. 20581, which issued January 10, 1989, after TECO had implemented the new tariff pursuant to staff's approval. [A-1] The order does not mention that the PSC staff had been given authority to approve a subsequent tariff or that one had already been submitted and approved.

The Public Counsel provides legal representation for the people of the State in proceedings before the PSC pursuant to Section 350.0611, Florida Statutes (1987). The Public Counsel is authorized to appear, in the name of the State or its Citizens, in any proceeding or action before the PSC and urge therein any position he deems to be in the public interest. § 350.0611(1), Fla. Stat. (1987). Generally, the Public Counsel appears on behalf of a utility's residential customers.

On May 5, 1989, the Citizens of the State of Florida, through the Office of Public Counsel, filed a PROTEST AND REQUEST FOR HEARING ON TAMPA ELECTRIC COMPANY'S SUPPLEMENTAL SERVICE RIDER

TARIFF FOR INTERRUPTIBLE CUSTOMERS in which they alleged, among other things, that the tariff did not conform to Order No. 20581 and had not been approved as final agency action pursuant to the Administrative Procedure Act, Chapter 120, Florida Statutes (1987). [A-21] The Protest and Request for Hearing stated explicitly that it was not a complaint against a valid tariff. [A-29]

The PSC, on October 25, 1989, issued its Order No. 22093. [A-5] The Protest and Request for Hearing would be treated as a complaint challenging only the prospective application of the tariff. On November 22, 1989, the Citizens of the State of Florida, through the Office of Public Counsel, filed their Notice of Administrative Appeal of Order No. 22093. [R-39]

On November 16, 1989, TECO petitioned for a one-year extension of its service rider tariff. [A-32] On December 19, 1989, TECO filed a supplement to its petition. [A-47] The PSC considered the extension at its January 2, 1990, agenda conference. It was not approved as filed. TECO, upon the representation of its attorney, agreed to file a tariff satisfying the Commission's concerns. The PSC then voted to approve a tariff so modified. [A-49] An attorney from the Office of Public Counsel appeared at the agenda conference and reiterated the concerns which form the basis of this appeal. These were rejected. The PSC's decision is recorded in Order No. 22467, which issued on January 24, 1990. [A-50]

SUMMARY OF ARGUMENT

The tariff-approval procedures utilized in this case cannot be reconciled with statutes the PSC administers or with the Administrative Procedure Act, Chapter 120, Florida Statutes (1987). The APA applies to agency decisions determining the substantial interests of a party. § 120.57, Fla. Stat. (1987). An agency must provide a clear point of entry for substantially affected persons to participate in the decision-making process. The exemption from the APA afforded the PSC is applicable only to interim rates instituted pursuant to Section 366.06(3), Florida Statutes (1987). § 120.72(3), Fla. Stat. (1987).

Approval of TECO's service rider tariff was a decision determining the substantial interests of an electric utility subject to the jurisdiction of the PSC. TECO's firm customers, who were required to pay higher fuel cost recovery charges to reimburse TECO for credits given interruptible customers, were adversely affected by agency action. The PSC did not provide a clear point of entry for them to participate in the tariff-approval process.

Order No. 20581, which denied TECO's first service rider, issued as a final order. It did not provide an opportunity to contest the denial of TECO's first service rider or the approval of the tariff now in effect. The PSC staff's approval of the second tariff amounted to an agency decision adversely affecting TECO's customers without notice or an opportunity to be heard.

TECO's service rider was not approved on an interim basis, nor

did the tariff go into effect automatically under the file-and-suspend provisions of Section 366.06(3), Florida Statutes (1987). As such, the Section 120.72(3) exemption from the APA is not applicable to the facts of this case.

Section 366.06, Florida Statutes (1987), outlines the procedures for fixing and changing electric utility rates. Subsection 366.06(1) provides that the PSC, not the utility, shall "determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service." Subsection 366.06(2) provides that "the commission shall order and hold a public hearing" before setting rates "to be thereafter charged."

Therefore, pursuant to the APA and Chapter 366, the PSC can not approve or acquiesce in a change of electric utility rates without offering notice and an opportunity for hearing. PSC approval of TECO's service rider tariff is ineffective until the PSC conducts appropriate proceedings pursuant to the law.

The PSC cannot delegate its statutory obligation to consider and approve electric utility tariffs to its staff under the circumstances of this case. The service rider tariff approved by staff was not consistent with the PSC's decision at its December 20, 1988, agenda conference or with Order No. 20581.

ARGUMENT

I.

PUBLIC COUNSEL'S MAY 5, 1989, PROTEST AND REQUEST FOR HEARING COULD NOT HAVE BEEN TOO LATE IN TERMS OF THE FILE-AND-SUSPEND LAW, SECTION 366.06(3), FLORIDA STATUTES (1987), BECAUSE TECO'S RATES WERE NOT IMPLEMENTED PURSUANT TO THAT LAW.

This is not a case of PSC inaction which allowed a tariff to go into effect automatically upon expiration of the 60-day suspension period. § 366.06(3), Fla. Stat. (1987). To the contrary, the PSC first acted to deny TECO's initial service rider tariff and then acted through its staff to approve a tariff purportedly modified to meet PSC standards. As the PSC states in its Order No. 22093, at 2: "The tariff was administratively approved by Staff." [A-6] In spite of this, the basis for treating the Protest and Request for Hearing as a complaint challenging only the prospective application of the tariff is that it is too late to challenge a tariff that went into effect automatically because of Commission inaction.

Order No. 22093, at 2, characterizes Public Counsel's APA argument as "the same argument rejected by the Supreme Court of Florida in Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977)." [A-6] Florida Interconnect, however, has nothing to do with the circumstances of this case, even under the PSC's interpretation of that opinion.

Florida Interconnect was an appeal of a PSC decision approving a tariff filed by Southern Bell Telephone & Telegraph Company on May 24, 1975. Thirty-two days later, on June 25, 1975,

Interconnect filed a complaint and request for hearing. On July 7, 1975, the PSC voted at agenda conference, without notice to Interconnect, to approve the tariff effective July 10, 1975. Interconnect then filed a petition for writ of certiorari and motion to stay the order reflecting the PSC's action in this Court.

The Court denied the petition on the "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 [Administrative Procedure] Act." 342 So.2d at 813. Actions of the Director of the PSC's rate department and its Chief Hearing Examiner indicated a hearing was to be held on Interconnect's complaint. The Commission's order was, therefore, an interim rate decision not subject to review pursuant to Citizens of Florida v. Mayo, 316 So.2d 262 (Fla. 1975). 342 So.2d at 813. Denial of the petition for writ of certiorari was made "without prejudice to petitioner's right to seek relief in this Court of a duly-entered final order." 342 So.2d at 815.

The Court said "[a]nother reason" for denial was because the PSC's order "was in a very real sense surplusage" since the tariff was automatically effective upon expiration of the statutory 30-day (now 60-day) suspension period. 342 So.2d at 813. Interconnect's complaint was submitted and the Commission's vote taken more than 30 days after the tariff was filed, so neither

event affected the tariff's implementation on an interim basis.[2]

The PSC's interpretation of Florida Interconnect is tied to the Court's statements that a utility's ability to implement new rates, if the Commission failed to act within the suspension period, survived adoption of the APA in **1974:**

> According to the Supreme Court, if we do not suspend the proposed tariff changes within thirty days [now **60** days] the rates automatically go into effect. The Court further stated that the file-and-suspend procedure 'survives the adoption of the new Administrative Procedure Act.' **342** So.2d at **814.** Order No. **22093** at **3.** [A-7]

While the statement is accurate, the interpretation of it is not. The file-and-suspend procedure survived adoption of the APA pursuant to Section **120.72(3),** Florida Statutes **(1987).** But file-and-suspend is not a vehicle for implementing permanent rates without a hearing. Only interim rates, effective pending a final order after proceedings conducted according to the APA, are exempt.[3]

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[2]The PSC obviously interprets this case as standing for the proposition that it need not hold any hearing at all if it fails to act and the utility implements rates at the end of the suspension period. Public Counsel disagrees with such an interpretation. But even if that view were accepted, it would still be inapplicable to this appeal because TECO did not institute rates pursuant to the file-and-suspend provisions of Section **366.06(3).**

[3]Section **120.72(3)** reads as follows: "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 [codified as Section **366.06(4),** Florida Statutes (Supp. **1974),** and now found as Section **366.06(3),** Florida Statutes **(1987)],** or as otherwise provided by law." [Emphasis added]. See discussion, infra, pages **19-25.**

In any event, TECO's service rider did not go into effect automatically after 60 days. The tariff was filed sometime shortly after the December 20, 1988, agenda conference and approved by the PSC's staff in time to be effective on January 1, 1989. This case, therefore, has nothing whatever to do with the file-and-suspend law and the limited exemption from the APA afforded interim rate procedures by Section 120.72(3).

The PSC's interpretations of cases cited as being consistent with Florida Interconnect have no more bearing on this case than that opinion does. The fact that Citizens v. Mayo, 333 So.2d 1, 6 (Fla. 1976), says "the Commission can obviate any hearing requirement simply by failing to act for 30 days" is irrelevant. Order No. 22093, at 3. [A-7] That case cannot be read to hold that the Commission can obviate a hearing requirement by taking final action before the suspension period runs.[4] By the same token, Florida Gas Company v. Hawkins, 372 So.2d 1118, 1119 (Fla. 1979), cited by the PSC for the proposition that Commission inaction "'permit[s] the new rates to become effective after expiration of the statutory 30-day period,'" is meaningless. Order No. 22093, at 3. [A-7] This case is only concerned with Commission action.[5]

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[4]The PSC's citation is taken out of context. In Citizens v. Mayo, 333 So.2d at 4, the Court said rates that were not suspended went into effect, but only as "interim charges" pending the outcome of "the full rate proceeding." The citation in Order No. 22093 is irrelevant regardless of the interpretation, though, because TECO's service rider was not allowed to go into effect automatically.

[5]The citation to Florida Gas is also out of context. See note 4, supra. The passage quoted in Order No. 22093, at 3, [A-7] follows the Court's quotation from Citizens v. Mayo, 333 So.2d at 4, that rates not suspended are "interim charges" pending "the full

Similarly, Maule Industries v. Mayo, 342 So.2d 63 (Fla. 1977), is inapplicable because this is not a case of the Commission withholding suspension because it believes the rates as filed were reasonable.[6] Order No. 22093, at 3. [A-7] To the contrary, the PSC believed the rates were unreasonable and issued an order to that effect. The second service rider was approved by the PSC's staff because it purportedly agreed with the Commission's directives in that order.

The citation to Florida Power Corporation v. Hawkins, 367 So.2d 1011 (Fla. 1979), is confusing because it is not evident how the PSC interprets that case. The quoted passage from that opinion states:

> 'The statute expressly empowers the Commission to withhold consent to rate schedules within thirty days of filing, or consent to rate relief any time after filing.' 367 So.2d at 1013. Order No. 22093, at 3. [A-7]

The PSC did not withhold consent to TECO's tariff pending the

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rate proceeding." Florida Gas states throughout that due process rights attend all PSC determinations of electric utility rate changes: "[I]n Citizens of the State of Florida v. Mayo, supra, [333 So.2d 13 the Court reaffirmed the public policy of this state favoring traditional due process rights in utility rate hearings. . . . There can be no compromise on the footing of convenience or expedience, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored. [Citation omitted]." 372 So.2d at 1121.

[6]Order No. 22093, at 3, quotes language from Maule Industries, 342 So.2d at 67 n.7, that the PSC should withhold suspension and allow rates to go into effect if it has no reason to suspend them. Nothing in that opinion, however, suggests that the PSC need not hold hearings to resolve whether rates should remain in effect on a permanent basis. See footnotes 4 and 5, supra. Moreover, the facts of the case did not involve a failure to suspend rates. The PSC was reversed for failure to base its interim rates, granted after the filed rates were suspended, on adequate evidence.

outcome of hearings pursuant to Section 366.06(3); it denied the original tariff outright without offering any opportunity for hearing. Certainly, the PSC may consent to rate relief any time after filing, but consent requires a decision determining a utility's substantial interests. That triggers the notice and hearing requirements of Section 120.57.[7]

The Commission concludes its citation of cases that purportedly support the Court's holding in Florida Interconnect with a statement that Public Counsel's protest was even later than the one in that appeal:

> In the instant docket, Public Counsel's protest and request for hearing comes not one day late, as in Interconnect, but months after the tariff went into effect. Nonetheless, consistent with our action in Interconnect, it remains our policy to afford hearings on complaints which protest the prospective application of tariffs in cases such as this. Therefore, we will treat Public Counsel's Protest and Request for Hearing as a complaint attacking the prospective application of the tariff and will afford a hearing on it.

There is, however, no relation between the timing of the protests and requests for hearing in the two cases.

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[7]The issue in Florida Power v. Hawkins was whether the PSC could revoke an interim rate increase without notice or hearing. 367 So.2d at 1013. The Court said it could not: "The general statutory scheme for making and adjusting rates embraces the traditional requirements of procedural due process, i.e., notice and a hearing. Sections 366.06(3); 366.07, Florida Statutes (1975). Within this framework is the so-called 'File and Suspend Law,' Section 366.06(4), Florida Statutes (1975) [now Section 366.06(3), Florida Statutes (1987)]. . . . It is clear the statute was designed to provide accelerated rate relief without sacrificing the protection inherent in the overall regulatory scheme." 367 So.2d at 1013.

Interconnect was **"late"** only in the sense that it did not file its protest before Southern Bell's tariff went into effect when the PSC failed to act within the file-and-suspend period. Hearings were still held to see if the rate change should remain in effect on a permanent basis. The Court's opinion noted that the tariff was only "'approved' pending disposition of the complaint" and otherwise characterized the approval resulting from the PSC's inaction as being "tentative," "intermediate," and "interim." 342 So.2d at 813-14.[8] Interconnect may have been too late to stop the tariff from going into effect automatically pending a final decision by the PSC, but it was not too late to challenge the tariff itself. Nor was Interconnect limited to the prospective application of the tariff.

Public Counsel's Protest and Request for Hearing on the service rider could not have been too late in terms of the 60-day suspension period because TECO never implemented rates pursuant to the file-and-suspend statute. TECO filed its second tariff sometime shortly after the December 20, 1988 agenda conference and staff approved it in time to be effective on January 1, 1989.

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[8] "The letter [from the Director of the PSC's Rate Department] noted that Southern Bell's tariff had been 'approved' pending disposition of the complaint. . . . Rather than cooperate with this effort to expedite its complaint, petitioner chose to seek review of the Commission's tentative approval in court." 342 So.2d at 813. "[T]he 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. . . . [T]he action taken at the hearing [sic: agenda conference] (i.e. intermediate consideration of the new rates) would have occurred had the hearing not been held." 342 So.2d at 814. [Emphasis added.]

The PSC dismissed the various APA arguments raised in Public Counsel's Protest and Request for Hearing based on a misinterpretation **of** Florida Interconnect. Arguments based on specific provisions of Section 366.06, Florida Statutes (1987), were ignored altogether. [A-24-28] The PSC also ignored the assertion that encouragement of increased energy usage was contrary to the Florida Energy Efficiency and Conservation Act (FEECA), Section 366.80, **et** seq., Florida Statutes (1987). [A-281

In the PSC's view, hearings are not required by either the APA or Section 366.06(2) as part of the process of approving electric utility rate changes. This has never been the state of the law in Florida. The PSC's error is manifest. Reversal and remand for appropriate proceedings are required by Section 120.68(9), Florida Statutes (1987), which provides:

> (9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
> (a) Set aside or modify the agency action, or
> (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

The Commission (and other Appellees) will, no doubt, retreat from the rationale of Order No. 22093 in their answer briefs. New reasons will be given why the PSC need not offer hearings before electric utility rates are changed on a permanent basis. Therefore, although Order No. 22093 has been shown to be grounded on an error of law, it would not be appropriate to close this brief at this point. Arguments that follow show that the PSC must always comply with the APA when setting permanent rates.

These arguments were, for the most part, included in the Protest and Request for Hearing filed May 5, 1989. The PSC's failure to address them in its Order No. 22093 means the Court cannot address the Commission's interpretations but must, instead, consider these arguments in the first instance.

II.

THE PSC'S APPROVAL OF TECO'S SERVICE RIDER TARIFF IS INVALID AND INEFFECTIVE UNTIL IT OFFERS *AN* APPROPRIATE PROCEEDING UNDER SECTION 120.57, FLORIDA STATUTES.

A. THE DECISION TO DENY TECO'S FIRST SERVICE RIDER TARIFF WAS REACHED WITHOUT OFFERING A CLEAR POINT OF ENTRY INTO THE AGENCY DECISION-MAKING PROCESS.

The decision to deny the November 17, 1988, petition was clearly a determination of TECO's substantial interests. § 120.57, Fla. Stat. (1987). The PSC was obligated to offer affected persons a clear point of entry into the process pursuant to the statute and its own rules. See Fla. Admin. Code Rule 25-22.036(4)(a) and (9)(a). The PSC, however, voted for denial as final action.

Order No. 20581 did not offer a hearing opportunity. TECO's general body of ratepayers was not adversely affected by denial of the petition, and Public Counsel would not have protested it, but the Commission's failure to offer a point of entry highlights the fact that, from start to finish, the procedures were defective under the APA.[9]

'Appellants read Order No. 20581 as a denial of TECO's November 17, 1988, petition and accompanying tariff. It is, after all, entitled "ORDER DENYING TARIFF." That action, alone, did not harm TECO's firm customers. It was the subsequent action of the staff in approving a different tariff that TECO used as a vehicle

B. THE PSC'S DECISION TO APPROVE TECO'S SECOND SERVICE RIDER TARIFF WAS REACHED WITHOUT OFFERING A CLEAR POINT OF ENTRY INTO THE AGENCY DECISION-MAKING PROCESS.

When the PSC announced at the December **20, 1988,** agenda conference that it would approve a tariff providing for a sharing of fuel savings, a member of the PSC staff requested authorization to "administratively approve" any subsequent tariff filing. Although not recorded on the vote sheet, the request was granted, thereby delegating tariff approval to the PSC's technical staff.

The only published action, though, was the order denying the initial tariff. That order issued after the staff had "administratively approved" the subsequent filing. However, Order No. **20581** did not inform that staff had been authorized to approve a tariff or that it had already acted before the order issued on January **10, 1989.** In fact, Order No. **20581,** at 3, indicated a second tariff had not been submitted; it announced terms that would be acceptable to the PSC if TECO submitted one. [A-3]

Commission action to approve a tariff increasing fuel recovery charges to TECO's customers determined the utility's substantial interests and adversely affected its firm customers. Public Counsel would have protested and requested a hearing if the PSC had given notice of its action (as implemented through its staff). There was, however, no notice given nor any point of entry offered.

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to increase their fuel adjustment charges. Order No. **20581** did not direct TECO to modify its first service rider tariff nor approve the tariff that was filed later. Even if it did, Order No. **20581** did not provide a point of entry for any form of agency action. See discussion in footnote **12,** infra.

See § 120.59(4), Fla. Stat. (1987)[10]; U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698, 699 (Fla. 1988) ("Section 120.57(1), Florida Statutes (1985), requires an agency to 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."); FFEC-SIX, Inc. v. Florida Public Service Commission, 425 So.2d 152, 153 (Fla. 1st DCA 1983) ("The Commission order did not . . . articulate appellant's right to request a § 120.57, Florida Statutes, hearing, or the applicable time limit for such a request, or the applicable procedural rules. The Commission has thereby failed to provide appellant with a clear point of entry into the administrative process, thus rendering the Commission action invalid." [Emphasis by the court]); Florida Department of Transportation 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

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[10]Section 120.59(4) provides: "Parties shall be notified either personally or by mail of any order; and, unless waived, a copy of the final order shall be delivered or mailed to each party or to his attorney of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under s. 120.57 or s. 120.68, shall indicate the procedure which must be followed to obtain the hearing or judicial review, and shall state the time limits which apply."

So.2d 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.")

After learning that TECO had implemented a service rider tariff pursuant to the PSC staff's approval and was using that approval as authority to increase fuel cost recovery charges, Public Counsel filed a Protest and Request for Hearing on May 5, 1989. The Protest and Request for Hearing could not have been too late in terms of the time allotted by the PSC for filing a protest because the PSC never gave the notice required by Section 120.59(4). See 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.")

C. THE OPPORTUNITY TO FILE A COMPLAINT AGAINST TECO'S SERVICE RIDER TARIFF 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. § 120.57(1)(b)4, Fla. Stat. (1987). 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).")[11] The PSC is required to evaluate evidence and render its decision within this framework.

The PSC, however, seeks to circumvent this process by treating the Protest and Request for Hearing as a complaint challenging only the prospective application of TECO's service rider tariff. Presumably, TECO's firm customers would accept the burden of proof to establish that the service rider should not be permitted to remain in force any longer.

This places the cart before the horse. TECO is the party seeking affirmative relief in Docket No. 881499-EI. TECO wants to give credits to interruptible customers and recover those credits from all customers through the fuel cost recovery charge. 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,

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[11] "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 "'established rates' means rates formally adopted by the PSC."

will it become the **"established"** rate and method for recovery of the interruptible credits. Only then will others seeking to overcome it have to prove that it should be changed.

Approval of TECO's service rider tariff was a decision adverse to the interests of TECO's 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 proceeding as a basis to review the efficacy of allowing TECO to collect charges under the service rider. The purpose of Section 120.57 proceedings is to formulate agency action, not to review earlier, tentative decisions. McDonald v. Department of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977).

III.

SECTION 366.06, FLORIDA STATUTES (1987), DOES NOT PERMIT ELECTRIC UTILITIES TO CHANGE RATES WITHOUT EXPLICIT PUBLIC SERVICE COMMISSION APPROVAL NOR DOES THE APA PERMIT THE PUBLIC SERVICE COMMISSION TO APPROVE PERMANENT RATE CHANGES WITHOUT HEARING.

The manner in which the PSC considers and passes on electric utility tariffs is defined by Section 366.06, Florida Statutes (1987). That statute is written in terms of full rate cases in which base rates (as opposed to cost recovery charges) are set for all customer classes. The case is initiated by the filing of proposed tariffs and a petition seeking their approval. Subsection 366.06(2) requires that a hearing be held.

The tariff filing also triggers the 60-day file-and-suspend

period of Subsection 366.06(3). That subsection permits proposed rates to go into effect automatically after 60 days "pending a final order by the commission in any rate proceeding under this section." Alternatively, the PSC may suspend the proposed rates pending hearing by acting within 60 days. Another option is to suspend the rates but permit the collection of interim rates subject to refund pending the outcome of hearings and a final order. Section 120.72(3) recognizes that hearings are not required for PSC decisions on whether to suspend rates pending the outcome of hearings or for decisions to approve rates on an interim basis.

The purpose of file-and-suspend procedures is to reduce regulatory lag. Florida Power v. Hawkins, supra, 367 So.2d at 1013; Citizens v. Mayo, supra, 333 So.2d at 4. It enables rate changes to take effect before completion of the protracted regulatory process, which can take as much as eight months to complete. Once the Commission issues a final order after hearing, the utility is directed to file tariffs conforming to the final decision. Tariffs filed at that time do not initiate another rate case or a new file-and-suspend period. They simply satisfy the requirement that a utility can only charge for service pursuant to tariffs on file with the PSC.[12] U.S. Sprint, supra, 534 So.2d 698.

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[12]This appeal is not concerned with the administrative approval of tariffs filed after hearings. In such cases, the PSC orders the utility to file specific tariffs conforming to findings of fact and conclusions on law and policy. In this case, the PSC did not conduct a hearing beforehand and did not direct that a tariff be filed. It merely stated that it would approve a tariff containing certain conditions if TECO chose to file one. Thus, Order No. 20581 cannot be construed as an order approving the tariff TECO filed after the December 20, 1988 agenda conference. In its

The PSC's actions on TECO's tariffs do not mesh with the statutory scheme for electric utility ratemaking in Florida. In some other states and at the federal level, utilities may institute rate changes by filing new tariffs. **See 1974** Op. Att'y Gen. Fla. **074-309** (Oct. **9, 1974).**[13] There is generally no mandatory hearing requirement. The APA's in such jurisdictions do not specify when a hearing must be held. They only specify the procedures that must be followed if a hearing is held pursuant to another substantive statute. Rates go into effect automatically unless the regulatory agency exercises its discretion to suspend rates and conduct a hearing. Otherwise, the authority to institute rate changes rests with the utility. Thus, the suspension power limits the rights of the utilities. Without the suspension authority, a utility commission could not limit a utility's ability to change rates, except through after-the-fact complaint procedures.

In Florida, however, before adoption of file-and-suspend, electric utilities were not permitted to institute rate changes

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response to Public Counsel's Protest and Request for Hearing, however, TECO characterized staff approval as merely a ministerial function based on the PSC's prior approval of a modified tariff. [R-25] The same APA infirmities would exist if that were true because Order No. **20581** failed to provide a clear point of entry for either denial or acceptance of a service rider tariff.

[13]**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 for Electric Companies, Order No. **6357** (November **26, 1974).**

without explicit PSC approval. Section 366.06(2), Florida Statutes (1973) [now Section 366.06(1), Florida Statutes (1987)], provided that "no change shall be made in any schedule." Applications for rate changes had to be made to the PSC in writing. The PSC, not the utility, had "the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged or collected by any public utility for its service." Section 366.06(3), Florida Statutes (1973) [now Section 366.06(2), Florida Statutes (1987)], provided that, whenever the PSC found that rates should be changed, it was required to conduct hearings:

> Whenever the commission shall find, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility company for public utility service, or that the rules, regulations, or practices of any public utility company affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law, or that such rates are insufficient to yield reasonable compensation for the services rendered, or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the utility company, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used . . .. (Emphasis added.)

See Louisville & Nashville R. Co. v. Speed-Parker, Inc., 103 Fla. 439, 137 So. 724, 730 (Fla. 1931), for a discussion how the statutory scheme in Florida differed from that applicable to the Interstate Commerce Commission and required the Florida Railroad Commission (the PSC's predecessor) to set rates and promulgate rules and regulations the railroads must follow, which created "Commission" rates as opposed to "railroad" rates.

Therefore, in Florida, before enactment of file-and-suspend procedures, the PSC was required to hold hearings for any change of rates. Decisions reached without first holding hearings were held to be invalid. See Florida Gas, supra, 372 So.2d at 1120, (Citing with approval to Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So.2d 601, 607 (Fla. 1959): "[W]e have held that where a rate, rule or regulation is made . . . without obtaining or considering any substantial evidence, where investigation, inquiry and evidence are necessary as a basis for the action taken, the proceeding is not had in due course of law and this court will not enforce it. State ex rel. Railroad Com'rs v. Florida East Coast R. Co., 1912, 64 Fla. 112, 59 So. 385, 393.")

The enactment of file-and-suspend procedures in Section 366.06(4), Florida Statutes (Supp. 1974) [now Section 366.06(3)], did not limit the utility's rights as it did in other jurisdictions. To the contrary, it granted a new right to institute rates, if the PSC failed to suspend, pending the outcome of the full rate case. This right was not created directly, but by implication from the fact that the PSC could withhold consent to the new rates by acting within the suspension period. Presumably, if the PSC failed to act, the utility could apply the new rates.[14] This was recognized in Citizens v. Mayo, supra, 333

[14]Section 366.06(3) reads, in pertinent part: "Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written

So.2d at 4, where the Court observed that rates not suspended could go into effect as "interim charges" pending "the full rate proceeding."

The same year file-and-suspend was enacted, the Legislature made substantial revisions to the APA. Unlike the APA's in most other jurisdictions, the Florida APA 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."); P. Dore, Access to Florida Administrative Proceedinss, 13 Fla. State U.L. Rev. 965, 1076-78 (1986) ("The Florida statute does not require reference to other law. A person is entitled to an adjudicatory proceeding, either formal or informal, 'in all proceedings in which the substantial interests of a party are determined by an agency.' [Footnote omitted]. . . . As a result, even if there is no other law requiring a hearing, one must be granted if the access criteria

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statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. . . ."

are satisfied."); 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.")[15]

Section 120.72(3) permitted electric utilities to implement "interim rates" pursuant to file-and-suspend outside of the APA. There is, however, no exemption for the PSC's procedures for setting permanent rates. Accordingly, electric utilities in Florida can only implement rates on their own initiative on an interim basis pending the outcome of hearings required by Section 366.06(2) and Section 120.57. Moreover, Section 120.57 would require a hearing for permanent rate changes even if Section 366.06(2) did not. TECO's service rider, however, was not implemented pursuant to file-and-suspend procedures. It was approved on a permanent basis by action of the PSC staff.

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[15]Contrast, for example, with the Federal APA. See K. Davis, Administrative Law Treatise, § 12:10, 447 (2ed.1978)("The [Federal] Administrative Procedure Act never requires a trial-type hearing. Applicability of [5 USCS] §§ 554, 556, and 557 is always dependent on § 554(a): 'This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .' Unless another statute requires a determination on the record, §§ 554, 556, and 557 do not apply. [Emphasis in original]").

IV.

THE TARIFF APPROVED BY THE PSC'S STAFF WAS NOT CONSISTENT WITH THE DECISION REACHED AT THE DECEMBER 20, 1988, AGENDA CONFERENCE AS REFLECTED IN ORDER NO. 20581

TECO's tariff was inconsistent with the Commission's decision. In Order No. 20581, the PSC stated that it would approve a tariff providing for fuel savings to be shared both when marginal cost was less than average and when marginal cost exceeded the average:

> Given all of these considerations, we deny TECO's current petition for approval of a supplemental service rider for interruptible service under rate schedules IS-1, IST-1, IS-3 and its standby service schedules. We do wish to indicate, however, that we would approve a tariff which required that 20% of any fuel savings resulting from incremental load be returned to the general body of ratepayers. This would mitigate the one-sided benefits of the existing proposal. It would also adjust for fuel savings due to increases in consumption which would have occurred in the absence of any incentive. Further, we are of the opinion that the credit would be more equitable if marginal fuel cost is applied both when it is less than and when it exceeds average fuel costs. (Emphasis added.) Order No. 20581, at 2-3. [A-2-31

The tariff approved by the PSC staff, however, provided for a sharing only when marginal cost exceeded average.

Public Counsel brought this inconsistency to the Commission's attention in the Protest and Request for Hearing filed May 5, 1989:

> It is noteworthy that the Commission believed any credit would be more equitable if marginal fuel cost applied whether it was greater or less than average fuel cost. Presumably, if marginal cost was greater, the "credit" would increase charges to interruptibles accepting the service rider. The tariff filed by TECO, however, only applies "where monthly average fuel cost exceeds the monthly marginal fuel cost." Original Sheet 6.510. [A-23]

Thus, even if it is assumed that Order No. 20581 was valid under the APA, the tariff TECO filed was not consistent with the order.

The PSC has taken the position before this Court that it will order a utility to file a conforming tariff whenever it learns that a nonconforming tariff was submitted in response to one of its orders. U.S. Sprint, supra, 534 So.2d 698. The PSC does not even address this point in its Order No. 22093. That order offers Public Counsel the opportunity to contest the prospective application of the tariff now on file, but the PSC is apparently unconcerned whether the tariff complies with its directive.

V.

THE AUTHORITY TO REVIEW AND APPROVE ELECTRIC UTILITY TARIFFS RESIDES WITH THE PSC AND CANNOT BE DELEGATED TO THE TECHNICAL STAFF ON THE FACTS OF THIS CASE

Section 366.01 declares the legislative intent of Chapter 366 that the regulation of electric utilities be an exercise of the police power of the state for the protection of the public welfare. Electric utility rates must be approved by the Public Service Commission pursuant to Section 366.06, Florida Statutes (1987). Consideration of TECO's second service rider tariff required an exercise of delegated legislative authority that could not be delegated to the PSC's staff.

This issue need not be addressed, however, if the Court agrees that the PSC erred by not providing a clear point of entry into the process by which TECO's tariff was approved. Any hearings will be held by either the Commission itself or by a Hearing Officer of the Division of Administrative Hearings with review by the PSC. In either event the result will be a final order of the PSC

determining TECO's substantial interests and not an action of the PSC staff.

CONCLUSION

TECO's customers were adversely affected by the service rider approved by the PSC's staff. That tariff was the vehicle for increased fuel cost recovery charges to all TECO customers. Customers taking service under the rider, however, received credits that more than offset the increase in the fuel cost recovery factor. The Commission's failure to offer a hearing opportunity has freed TECO of the responsibility of proving its revised tariff will not harm its firm customers; that its factual representations were accurate; that its tariff would not violate statutes, rules, or policy; that it was consistent with the Commission's intent; that it does not create unjust discrimination among customer classes; and that it does not violate the legislative intent of FEECA. In other words, the PSC has circumvented the very purpose the APA is intended to serve. The Court should reverse and remand for appropriate proceedings pursuant to the provisions of Section 120.68(8) and (9), Florida Statutes (1987).

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CERTIFICATE OF SERVICE
Case No. 75,074

I HEREBY CERTIFY that a correct copy of the foregoing Initial Brief of Appellants, Citizens of the State of Florida, and Appendix have been furnished by U.S. Mail to the following parties on this 31st day of January, 1990.

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