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

REPLY BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

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I.

A COMPLAINT PROCEEDING IN 1990 IS A USELESS VEHICLE TO CHALLENGE A TARIFF THAT WAS ONLY IN EFFECT DURING 1989.

TECO's service rider was approved by the PSC's staff to be in effect during calendar year 1989. [A-1] Public Counsel protested and requested a hearing on May 5, 1989, after learning that TECO had increased its fuel cost recovery charges to recover credits given under the tariff. On October 25, 1989, in Order No. 22093, the PSC treated the Protest and Request for Hearing as a complaint challenging only the prospective application of the service rider.

A schedule for the various docket activities was approved by the Chairman on December 4, 1989. [A-3] Hearings were scheduled for May 21, 1990, one year after the Protest was filed. At that time, Public Counsel could contest the "future" applicability of a tariff that expired almost six months earlier. Contrary to Appellees' arguments, the complaint proceeding that was offered foreclosed Public Counsel from contesting the service rider at all. [PSC, at 4-5, 13-15; TECO, at 4, 9-10; FIPUG, at 12-13]

TECO sought approval for its service rider by filing a petition because Rule 25-22.036(4)(a), Florida Administrative Code, requires such a pleading from an electric utility "seek[ing] authority to change its rates or service." [A-4] Rule 25-22.036(9)(a) provides for disposition pursuant to the APA. [A-5] Appellees arguments are, therefore, in direct opposition to PSC rules. Complaints are only appropriate to challenge utility action "which is in violation of a statute enforced by the Commission, or

of any Commission rule or order." Fla. Admin. Code Rule 25-22.036(4)(b) and (7)(c). [A-4,5] Public Counsel was offered too little, too late. L.R. v. Dept. of State. Div. of Archives, 488 So.2d 122, 123 (Fla. 1st DCA 1986) ("The clear point of entry requirement enables affected parties to have a meaningful opportunity to request and obtain review." [Emphasis by the court.])

II.

ORDER NO. 22093 IS A FINAL DECISION PREVENTING PUBLIC COUNSEL FROM CHALLENGING INCREASED CHARGES IMPOSED ON TECO'S CUSTOMERS SINCE JANUARY 1, 1989

In Order No. 22093, the PSC concluded Public Counsel's protest was too late to challenge implementation of the tariff, but a complaint against its future application would be permitted. Thus, Order No. 22093 was a final determination that, even though no point of entry had been offered, TECO's customers were properly charged for past periods and must continue to reimburse the utility for service rider credits until the tariff expired at the end of 1989. Appellees contentions that Order No. 22093 is nonfinal are clearly erroneous.' [PSC, at 4-5; TECO, at 4; FIPUG, at 17].

'The offered hearing was limited to the tariff's future applicability: "[I]t 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." [Emphasis added.] Order No. 22093 at 3. [R.-32] The PSC is incorrect when it states that "Order No. 22093 did not preclude Public Counsel from litigating any issue, procedural or substantive, with respect to TECO's supplemental service rider." [PSC, at 4] Moreover, this position is contradicted by the PSC's (continued..)

Even if Order No. 22093 were nonfinal, the Court would have jurisdiction to review it. Article V, Section 3(b)(2), Florida Constitution, provides that the Court shall, when provided by general law, review any "action" of the PSC relating to electric utility rates or service. Jurisdiction is not limited to final orders. Section 366.10, Florida Statutes (1987), also provides for review of PSC "action" on electric utility rates and service. Rule 9.030(a)(1)(B)(ii), Florida Rules of Appellate Procedure, includes PSC "action" within the Court's mandatory appeal jurisdiction. Section 120.68, Florida Statutes (1987), provides for immediate review of nonfinal agency action if review of the final decision would not provide an adequate remedy. The PSC's assertion that the Court "no longer has jurisdiction to entertain appeals of non-final orders of any kind" [PSC, at 5] is based on a misunderstanding of the law.[2]

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[1](...continued)
later statement that "[d]ue process under the file and suspend law does not require that the complaint challenge be retroactive in application. A prospective challenge is adequate." [PSC, at 14]

[2]The PSC has apparently misread both the 1968 Florida Constitution and the 1980 amendments. Before 1980, Section 3(b)(3) said: "The supreme court: . . . May review . . . any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction." Additionally, Section 3(b)(7) said "The supreme court: . . .Shall have the power of direct review of administrative action prescribed by general law." The 1980 amendments only removed the Supreme Court review of interlocutory orders of trial courts. See A. England, E. Hunter, C. Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L.R. 147, 191 (1980) [the same authority and page cited by the PSC, at 5.] "[T]he 1980 amendment allows the legislature to prescribe review of the 'action' of statewide
(continued...)

III.

TECO'S FIRM CUSTOMERS WERE HARMED BY THE DECISION REACHED IN ORDER NO. 22093 BECAUSE THEY HAVE PAID INCREASED FUEL COST RECOVERY CHARGES TO OFFSET SERVICE RIDER CREDITS

The service rider allocates purported fuel "savings" between interruptible customers taking service pursuant to the rider and TECO's other customers. Assuming, for the sake of argument, that savings would be generated, TECO's firm customers are harmed by the tariff and adversely affected by the PSC's approval of it.

Savings are supposed to emanate from additional purchases of spot coal which is priced below TECO's cost for long-term contract coal. The tariff calls for an 80%/20% split, 80% of savings going directly to the interruptible customer and 20% to the general body of ratepayers. If we assume $1 million of fuel savings, interruptible customers would receive a fuel cost reduction of $800,000 and all customers would get $200,000. The latter customers would, however, have to reimburse TECO for the $800,000 credit, thereby suffering a net additional charge of $600,000. Interruptible customers experience a net benefit, the firm customers a net loss. TECO's and FIPUG's claims of no adverse

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[2](...continued)
agencies relating to the three subject classes of utilities. The obvious intent of the framers was to parallel former section 3(b)(7) and the terminology of the Administrative Procedure Act, which describes virtually all things which an agency can do, either by order or rule, as 'agency action.'" [Footnote omitted] Id., at 176.

effect from the PSC's actions are groundless.[3] [TECO, at 5; FIPUG, at 9, 17]

Furthermore, TECO did not file a tariff conforming to the PSC's directions. [TECO, at 6-7]. The Commission directed an 80%/20% split without regard to the respective costs of marginal and average fuel. The tariff TECO implemented deletes the sharing scheme when marginal cost exceeds average because interruptibles would then experience a net loss and firm customers a net benefit.

IV.

THE PSC REFUSED TO CONSIDER THE ISSUES BEFORE THE COURT IN THE FUEL COST RECOVERY DOCKET BECAUSE THE STAFF'S APPROVAL OF THE SERVICE RIDER WAS CONTROLLING PENDING THE "HEARING" TO BE HELD PURSUANT TO ORDER NO. 22093.

TECO has been reducing reported fuel revenues to recoup the service rider credits and firm customers have been paying increased fuel cost recovery charges because of it. It was apparent that TECO viewed the PSC staff's approval of its tariff as authority for its actions.

Public Counsel challenged the fuel revenue adjustment in his Protest and Request for Hearing filed May 5, 1989, which was, for

[3]The PSC and TECO interpret the PSC staff's approval of the service rider as authority to also recover the credit. The magnitude of the credits is greater than the example given because TECO claims credits of $1,216,224 for the first nine months of 1989 alone. [TECO, at 2] FIPUG is correct that "[a]ny alleged harm occurs in the way TECO recovers the credits from ratepayers." [FIPUG, at 13] However, the tariff cannot be separated from the credit recovery mechanism under the PSC's interpretation. Were this simply a case of reduced interruptible rates, firm customers probably would not have been harmed, and FIPUG and customers represented by Public Counsel would not be at odds.

all practical purposes, denied in Order No. **22093**. Additionally, Public Counsel contested the credits in the fuel docket:

> TECO has been reducing its reported fuel revenues by credits given interruptibles pursuant to the service rider tariff. The tariff was approved by Staff and does not contain any provisions allowing for recovery of the credits from all customers through the fuel cost recovery docket. There are no orders in the fuel docket or elsewhere that permit such treatment. TECO should be ordered to refund credits claimed thus far as reductions to fuel revenues for past periods and ordered to cease the practice for future periods. Order No. **22581,** at **27-28. [A-6-71**

The PSC, however, decided at the fuel adjustment hearing on February **22, 1990,** that TECO was authorized by Order No. **20581** and staff approval of its service rider to increase fuel charges to recoup the credits. Public Counsel could challenge the credits at the **"hearing"** granted in Order No. **22093.** [A-151 TECO's and FIPUG's contentions that the issue before the Court could have been addressed in the fuel cost recovery docket are clearly erroneous. [TECO, at 10; FIPUG, at 14-17]

V.

ACCEPTANCE OF APPELLEES' ARGUMENTS WOULD REQUIRE THE COURT TO CONCLUDE THAT THE PSC HAS A BLANKET EXEMPTION FROM THE ADMINISTRATIVE PROCEDURE ACT

The real issue before the Court in this appeal is the scope of the APA's applicability to the PSC. The legislative intent of the APA is to supersede all other statutory provisions relating to agency adjudication or rulemaking, except as specifically exempted:

> [I]t is the express intent of the Legislature that chapter **120** shall supersede all other provisions in the Florida Statutes, **1977,** relating to rulemaking, agency orders, administrative adjudication, licensingprocedure, or judicial review or enforcement of administrative

> action for agencies as defined herein to the extent such provisions conflict with chapter **120**, unless expressly provided otherwise by law subsequent to January 1, **1975**, except for marketing orders adopted pursuant to chapters **573** and **601**. **§ 120.72(1)** (a), Fla. Stat. **(1987)**.

The PSC is, therefore, constrained by the APA, except to the extent it is specifically exempted from it. See Daniels v. Florida Parole and Probation Commission, **401 So.2d 1351, 1353** (Fla. 1st DCA 1981) ("We have repeatedly held that the **1974** Administrative Procedure Act enforces its discipline on all agencies, unless they are specifically exempted, whose actions affect the substantial interests of a party." [Citations omitted])

The Legislature could have provided that setting electric utility rates was outside the APA altogether. Instead, only one narrow exemption exists. Section **120.72(3)** excludes only interim rates instituted pursuantto the file-and-suspend law fromthe APA:

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

Chapter **74-195** is codified in Chapter **366** as Section 366.06(3), Florida Statutes **(1987)**. To escape from the reference to "interim rates" in Section **120.72(3)**, however, the PSC says that electric utilities may also "proceed . . . as otherwise provided by law" and that "Section **366.06(4)** [sic: **366.06(3)**] is a provision of law which otherwise creates an exception to the APA." [PSC, at **22-23]**

Section 366.06(3) cannot be both a specific exemption and another provision of law. Even if Chapter 74-195 (i.e., Section 366.06(3)) is ignored, the PSC is left with Section 366.06(2), which states that "the commission shall order and hold a public hearing" whenever it changes electric utility rates. The PSC simply cannot escape the notice and hearing requirement either within or without the APA.

The Court should ask itself why the PSC is making these strained arguments. It is, after all, the agency charged by statute to regulate electric utilities as an incident of the police power for the protection of the public welfare. § 366.01, Fla. Stat. (1987). The PSC has apparently abrogated its ratesetting responsibilities to the very utilities it is supposed to regulate. This appeal, therefore, "presents the recurring question which has plagued public regulation of industry: Whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." Moss v. Civil Aeronautics Board, 430 F.2d 891, 86 PUR3d 48, 49 (D.C. Cir. 1970).

The Citizens' Initial Brief cited to Section 120. 9(4) [at 16], PSC Rules 25-22.036(4)(a) and (9)(a) [at 14], two law review articles [at 24], Reporters Comments [at 25], and seven cases construing the APA [at 16-19], all of which supported the PSC's duty to provide a clear point of entry into the tariff-approval process. Citations were also made to Section 366.06(2) [at 16, 22] and an Attorney General opinion [at 21] which would require a

hearing independent of the APA. It is noteworthy that Appellees' answer briefs do not refer to even one of these authorities.

Appellees have no answer under the APA. The best they can do is ask the Court to construe rate cases in which interim rates were authorized pending a hearing as authority for permanent rate changes without any hearing at all.

The purpose of file-and-suspend, as Appellees note, is to reduce "regulatory lag." [PSC, at 18; FIPUG, at 10] Regulatory lag refers to the lapse of time between a utility's filing for rate relief and ultimate resolution after hearings under the APA. The lag exists because a hearing is required. File-and-suspend reduces the lag by offering expedited rate relief outside the APA pending final resolution within the APA. It is only available, however, to a utility whose financial integrity would suffer when the PSC is unable to act expeditiously.

In Citizens v. Mayo, 333 So.2d 1, 4 (Fla. 1976), the first case to construe the file-and-suspend law, the Court observed:

> Section 366.06, Florida Statutes (1975), provides general standards for the award of rate increases to public utilities in the State of Florida. The general procedure has been and remains that rate increases are awarded only after a public hearing in which testimony is presented by all interested parties and cross-examination is permitted. In the framework of this general approach to rate regulation, the 1974 Legislature enacted a special provision expressly designed to reduce so-called 'regulatory lag' inherent in full rate proceedings. Subsection 366.06(4) [now 366.06(3)] was created to provide a series of alternatives for the Commission whenever, in conjunction with a general rate increase request for which a full rate proceeding is required, a utility company seeks immediate financial relief. [Emphasis added, footnote omitted].

Accord, Florida Power Corp. v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979) ("This provision was enacted to protect utilities from the 'regulatory lag' associated with full-blown rate proceedings."); Citizens v. Public Service Commission, 425 So.2d 534, 540-41 (Fla. 1982) ("The statutory standard imposed upon the Commission is to fix 'fair, just and reasonable rates.' §§ 366.06(2), 366.05(1), Florida Statutes (1979). . . . The purpose of section 366.06(4), which gives the Commission authority to award interim relief, is to protect utilities from the 'regulatory lag' associated with full-blown rate proceedings. . . . The whole purpose of interim awards is to reduce regulatory lag; the sooner new rates can be implemented on an interim basis, the better the purpose of section 366.06(4) is served.")

In 1980, much of the file-and-suspend case law was codified in Section 366.071. See Citizens v. Public Service Commission, 435 So.2d 784, 785-86 (Fla. 1983). Section 366.071(1) provides that "[t]he commission *may* . . . by a tariff filing of a public utility, authorize the collection of interim rates until the effective date of the final order." [Emphasis added.] Entitlement to interim rates under Section 366.071(1) is based on a financial needs test, i.e. the utility must be earning outside the rate-of-return range previously established to be reasonable.

There simply is no statutory authority for the PSC to permit an electric utility to increase rates as the utility sees fit. The PSC acknowledges that it must approve electric utility rates. [PSC, at 6-8, 17] The PSC's consent to new rates is a decision

determining the substantial interests of the utility, which initiates the notice and hearing requirements of Section 120.57. In the past, the PSC approved TECO's tariffs pursuant to Section 120.57.[4]

The PSC's position is that it need not offer a hearing because of its interpretation of Section 120.72(3) and Section 366.06(3). [PSC, at 9-12, 14, 17-23] This interpretation of statutes, however, is itself subject to a hearing under the APA. See Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla. 1980); Ganson v. State, Department of Administration, 554 So.2d 516, 520 (Fla. 1st DCA 1989) ("When, as here, an agency does not choose to document its policy by rule, there must be adequate support for its decision in the record of the proceeding. Florida Cities Water Co. V. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980)."); 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

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[4]See In re: Emergency 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 re: Petition of Tampa Electric Company for Modification of GSDT On-Peak Demand Charses, 84 F.P.S.C. 2:100 (1984); In re: Petition of Florida Power & Lisht 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). But see, 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 without offering a hearing.)

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 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)."); Rice v. Department of Health and Rehabilitative Services, 386 So.2d 844, 847 (Fla. 1st DCA 1980) ("The principal objective of many APA processes is to expose policy errors which have become habitual in an agency's free-form routine and to subject agency heads 'to the sobering realization [that] their policies lack convincing wisdom . . . .' McDonald v. Dept. of Banking & Finance, 346 So.2d 569, 583 (Fla. 1st DCA 1977).")

The PSC gave no notice at all that, through its staff, it had authorized TECO to increase fuel charges to its customers. Public Counsel, in his Protest and Request for Hearing, challenged the procedural deficiencies and, further, alleged discriminatory rates and a violation of the Florida Energy Efficiency and Conservation Act (FEECA), Section 366.80, et seq., Florida Statutes (1987). [R-13-23] The APA requires these issues to be addressed expeditiously. The PSC, however, argues that a rate alteration

essentially negotiated between TECO and its staff need not even be evaluated by the Commissioners.[5] If the Court agrees with the PSC, it would create a judicial exemption to the APA. Even then, approval of TECO's tariff would require an exercise of discretion that could not be delegated to the PSC staff.

VI.

APPROVAL OF TECO'S SERVICE RIDER TARIFF REQUIRED *AN* EXERCISE OF DISCRETION THAT COULD NOT BE DELEGATED TO THE PSC'S STAFF

The Commissioners could have denied TECO's service rider because the tariff did not allow for a sharing when marginal fuel costs exceeded the average as required by Order No. 20581. Therefore, approval of TECO's service rider could not have been a ministerial act. The PSC's delegation to its staff was unlawful.

Ministerial duties lawfully delegatedto the staff are defined in the PSC's rules. **See** Fla. Admin. Code Rules 25-21.020-.032. Pursuant to Rule 25-21.028, the Division of Electric and Gas provides "technical information, advice and assistance in the areas of electric safety, electric rates, system planning/conservation, accounting, fuel, and natural gas." Nowhere has the PSC empowered its staff to approve tariffs. In fact, PSC rules clearly state that no modification to a tariff "**shall** be effective until filed with and approved by the Commission as provided by law." Fla.

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[5]At the December 20, 1988, agenda conference, TECO's attorney disclosed that, after a previous attempt to modify its interruptible rates had been denied, its service rider tariff was fashioned through negotiations with the PSC staff. [A-18]

Admin. Code Rules 25-6.033(4) and 9.001(3). Rule 25-6.0438(4)(a) permits TECO to offer interruptible rates, such as those at issue in this appeal, only "pursuant to tariffs or contracts approved by the Commission." Rule 25-14.001 provides that "[t]he Commission is responsible for the setting of reasonable rates and charges of numerous utility companies."

Statutorily, the PSC only has express authority to delegate to its staff the determination of the commencement date for final agency action under file-and-suspend procedures:

> [T]he 'commencement date for final agency action' means the date upon which it has been determined by the commission or its designee that the utility has filed with the clerk the minimum filing requirements as established by rule of the commission. § 366.06(3), Fla. Stat. (1987).

Rule 25-6.043(3) provides that "[t]he Director of the Electric and Gas Department shall be the designee of the Commission for the purpose of determining whether the utility has met the minimum filing requirement imposed by this rule."

Case law has determined that approval of a utility tariff is a discretionary act that only Commissioners may exercise. Tamiami Trail Tours v. Carter, 80 So.2d 322, 327 (Fla. 1954) (Railroad Commission "may not delegate the exercise of sovereign power to any of its employees.") (rev'd on other grounds on rehearing); but see Ace Delivery Service, Inc. v. Boyd, 111 So.2d 448, 452 (Fla. 1959) (receding from rule on rehearing in Tamiami Trail Tours and reaffirming original opinion.); see Nicholas v. Wainwright, 152 So.2d 458 (Fla. 1963) (holding that the Legislature vested final

So.2d **458** (Fla. **1963)** (holding that the Legislature vested final responsibility for forfeiting a prisoner's gain time solely in the Board of Commissioners of State Institutions and that the Board could not delegate its final authority to the Director of the Division of Corrections, who recommended gain time to the Board): State ex rel. Wolyn V. Apalachicola Northern R. Co., 81 Fla. **394,** 88 So. **310, 311 (1921)** ("An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board.")

Therefore, PSC staff approval of TECO's modified tariff, submitted after PSC denial of its first service rider tariff, cannot be considered a ministerial act. Rather, it was an unlawful delegation of statutory authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

CASE NO. 75,074

I HEREBY CERTIFY that a correct copy of the foregoing Reply Brief of Appellants, Citizens of the State of Florida, and Appendix have been furnished by U.S. Mail to the following parties on this 23rd day of March, 1990.

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