

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellant,

v.

CASE NO. 75,597  
PSC DOCKET NO. 891303-EI

MICHAEL McK. WILSON, ETC., ET AL.,

Appellees.

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ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

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**AMICUS CURIAE BRIEF OF  
THE FLORIDA INDUSTRIAL POWER USERS GROUP**

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## PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellee, Florida Public Service Commission, is referred to as the Commission. Appellee, Tampa Electric Company, is referred to as TECO. Appellant, Office of the Public Counsel, is referred to as OPC. Amicus Curiae, Florida Industrial Power Users Group, is referred to as FIPUG.<sup>1/</sup> References to the Appendix of this brief are designated (A. ). Citations to the Appendix of OPC's Initial Brief are designated (OPC A. ).

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<sup>1/</sup> On May 16, 1990, the parties, pursuant to Rule 9.370, Florida Rules of Appellate Procedure, filed notice of their written consent to allow FIPUG to file an amicus curiae brief.

## STATEMENT OF THE CASE

This case involves OPC's appeal of the Commission's final Order No. 22467 which approved TECO's petition for a one-year extension of its Supplemental Service Rider for Interruptible Service ("SSI"). (OPC A. 19-22). FIPUG generally accepts OPC's Statement of the Case and Facts insofar as it sets out the procedure followed by the Commission. As OPC correctly points out, OPC's appeal of the original SSI tariff is currently before this Court in Citizens of the State of Florida v. Michael McK. Wilson, etc., et al., Case No. 75,074. In that appeal, OPC makes essentially the same arguments he raises in this case.

## STATEMENT OF THE FACTS

IMC Fertilizer, Inc. ("IMC") is a large industrial customer of TECO. IMC and others in FIPUG entered into a written contract with TECO in January 1989 to receive part of their service under TECO's new SSI tariff. Order No. 20581 (OPC A. 34-37); Order No. 22093. (OPC A. 49-53).

The SSI rate schedule offered customers who would take more electricity from TECO the benefit of 80% of TECO's fuel cost savings. In simple terms, the fuel adjustment clause works by dividing TECO's total fuel cost by the number of kilowatt hours sold. If the total fuel cost for a six month period is \$150 million and the utility sells six billion kilowatt hours of electricity, under the formula, each customer will pay 2.5 cents in fuel cost for each kilowatt hour of electricity purchased. There is no dispute that for 1990 TECO can reduce its total fuel cost per kilowatt hour by purchasing spot coal if it sells more electricity. Therefore every customer will see a reduced fuel bill due to the implementation of the SSI tariff. Each customer's cost per kilowatt hour will be reduced because the SSI tariff encourages increased consumption by customers. The fuel cost savings discussed above are projected to be available to TECO for one to two years because the current market price for spot coal is cheaper than the price TECO pays for the coal it buys under contract.

The original SSI tariff was due to expire at the end of 1989. (OPC A. 1). The benefits to all customers which

supported TECO's original SSI tariff request and the Commission's approval thereof were projected to continue through 1990. Therefore, TECO petitioned the Commission to extend the SSI tariff for 1990. (OPC A. 1-15). TECO's petition for extension was approved by the Commission (OPC A. 19-22), and IMC and others entered into contracts in 1990 to continue to take service under the SSI tariff.

To qualify to take service under the SSI tariff (both in 1989 and in 1990), IMC and others had to agree to pay a higher customer charge, had to agree that they would get no fuel cost reduction unless they used more electricity than had been purchased in the previous year, and had to agree to continue to pay the non-fuel related base charges charged to all interruptible customers. Most importantly, the SSI rate was only available to customers who would agree to have their electric service interrupted if TECO needed to divert its energy to meet the demands of its firm customers.<sup>2/</sup>

Further, the 1990 SSI tariff, as approved by the Commission in Order No. 22467 (OPC A. 19-22), contained a new provision beneficial to firm customers, in addition to the benefits they received through a reduction in their fuel costs. (OPC A. 62, 72). The 1989 SSI tariff provided a credit

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<sup>2/</sup> Rule 25-6.0438(3)(b), Florida Administrative Code, defines "interruptible electric service" as electric service that can be limited or interrupted, either automatically or manually solely at the option of the utility. Customers receiving service under interruptible tariffs may have their service interrupted whenever the energy supplied to them by the utility is needed for customers which contract for firm electric service.

to interruptible customers on the tariff when the marginal cost of fuel was less than average. However, no adjustment was made when the marginal cost was above average. The 1990 SSI tariff approved by the Commission provided that when marginal fuel costs exceed average fuel costs, SSI customers would pay an amount equal to the KWHs above the billing threshold times 80% of the difference between TECO's marginal and average fuel cost. (OPC A. 21). This ensures that if costs increase, there is sharing of the cost among all customers. (OPC A. 77).

A rudimentary understanding of electric rates is important to an evaluation of the legal arguments pertinent to this case. Electric companies have two kinds of costs - fixed costs which arise because they stand ready to serve and variable costs.

Examples of fixed costs are ad valorem taxes, interest costs on the debt incurred to build the electric system, and the cost to recover the utility's investment in electric plant over its useful life. These costs are present even if the utility sells no electricity. These costs are recovered through base rates.

Variable costs are those costs which change in proportion to the amount of electricity sold. Fuel is the utility's primary variable cost. In TECO's case, it burns coal to make steam which turns electric generating turbines that produce electric energy.

Fixed and variable costs are charged to the customers



separately as base charges designed primarily to recover fixed costs and energy charges designed primarily to recover variable costs. Because variable costs change with consumption, the more electricity a customer consumes, the more energy charges he pays. The largest variable cost, fuel, is recovered from customers through a fuel adjustment charge.

The Commission approves all of TECO's charges. As OPC recognizes, there is a difference between base rate charges, approved in a rate case, and fuel costs which are examined and reset by the Commission at least every six months because of their highly volatile nature. Order No. 9273; OPC Initial Brief at 6-7.

The original SSI tariff went into effect on January 1, 1989 and was then extended through 1990. IMC and others agreed to change their operations to use more TECO-generated energy. Between January 1, 1989 and September 30, 1989, TECO collected \$3,294,877 more in base charges from IMC and others under the new tariff than it had collected from sales to these customers in the previous year. (OPC A. 20). TECO requested an extension of the SSI rider for 1990 in order to maintain the increased levels of energy sales which occurred under the SSI tariff in 1989, in order to increase energy sales to other interruptible customers in 1990, and in order to continue to provide an incentive to interruptible customers taking service under the rate so that fuel cost benefits would continue to accrue to all customers. (OPC A. 2, 4, 19). Because incremental fuel costs are expected to remain below average

fuel costs for 1990, the 1990 SSI will engender significant additional savings in addition to those received in 1989. (OPC A. 4).

In 1989, TECO collected all of its fuel costs and over \$3 million<sup>3/</sup> more to cover its fixed costs than it would have collected without the SSI rate. Similar benefits will flow from the rate in 1990. As Commission Staff member Ms. Kummer noted, the SSI rate encourages customers on the rate to increase their usage substantially and this greatly increases base rate revenues. To the extent TECO does not cover its authorized rate of return, it postpones the filing of a rate increase. (OPC A. 71). Contrary to OPC's contention, all customers benefit from the additional base revenue flowing to TECO for new sales due to the SSI tariff in 1990.

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<sup>3/</sup> The amount collected in base charges based on the customer's additional electric demand is not included in this sum but would increase it substantially.

## SUMMARY OF ARGUMENT

OPC argues that he has not been provided with a hearing opportunity to address the Commission's approval of TECO's petition for an extension of the SSI tariff. The substantive harm which OPC wants to address in such a hearing, procedural arguments aside, is the monetary increase in fuel cost recovery charges to firm customers. This is the substantial interest which OPC seeks a hearing to address.

However, OPC has already been provided with at least two such hearing opportunities. OPC's failure to substantively prevail in the hearing he participated in and his failure to affirmatively take advantage of other available hearing opportunities does not change the fact that such hearing opportunities were, and continue to be, available. OPC's procedural arguments are an attempt to obscure and confuse the undisputed fact that the hearing opportunities OPC wants have been provided.

## ARGUMENT

OPC HAS BEEN PROVIDED WITH HEARING OPPORTUNITIES TO ADDRESS THE COMMISSION'S APPROVAL OF TECO'S PETITION FOR A ONE-YEAR EXTENSION OF ITS SUPPLEMENTAL SERVICE RIDER.

Once again OPC argues that he has been given no clear point of entry to protest a Commission decision - this time he makes this argument in regard to the Commission's approval of TECO's petition to extend the SSI tariff in 1990. Regardless of whether OPC's argument is couched in terms of Chapter 120, Chapter 366, or federal due process, what OPC is complaining about in this appeal is the lack of a hearing opportunity. However, in reality, OPC has been given several points of entry and hearing opportunities and has either chosen not to pursue those opportunities or has not prevailed in his substantive position before the Commission. The burden in this appeal is on OPC to demonstrate that the Commission order he appeals is invalid. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982); he can make no such showing.

In order to relate OPC's hearing opportunities to the claims made in his brief, it is necessary to focus on the harm which OPC alleges has been caused due to the Commission's alleged failure to provide him with a hearing opportunity. The harm which OPC alleges has occurred is that the SSI tariff extension has resulted in increased fuel cost recovery charges to firm customers. OPC Initial Brief at 2, 4, 6, 7, 16, 23.

That is, all of OPC's procedural machinations are related to his complaint that firm customers have suffered some monetary harm due to an increase in the semi-annual fuel adjustment charge.<sup>4/</sup> It is this harm for which OPC seeks a remedy and for which he claims he has been denied a hearing opportunity.

OPC incorrectly states in his brief that the Commission has not provided him with any proceedings to challenge the 1990 SSI extension. OPC Initial Brief at 10-11. Not only have opportunities for hearing been provided, but OPC has actually participated in at least one such hearing.

OPC recognizes and accurately describes in his initial brief the process by which the Commission sets the fuel cost recovery factors about which he complains. OPC Initial Brief at 6-7. In summary, public hearings are held in August to determine the fuel charges that will be imposed on customers during the following October to March period. In February, public hearings are held to determine the costs that will be charged during the succeeding April to September period. If TECO has charged its customers too much or too little during any six-month period, the difference, plus interest, is included in the charges which are imposed during the next six months. This is the undisputed mechanism by which fuel cost recovery factors are set and OPC clearly acknowledges this process in his brief. OPC Initial Brief at 7. It is the

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<sup>4/</sup> OPC's argument in this regard fails to recognize the benefit which all customers receive from the increase in base revenues and the decrease in total fuel costs. See pp. 3, 6, supra.

semi-annual fuel cost recovery docket which results in any adjustment (up or down) to the fuel cost recovery factors not the Commission's approval of the SSI extension which OPC has attempted to appeal here.<sup>5/</sup>

OPC routinely participates in the Commission's semi-annual fuel adjustment docket. In this docket, the parties may raise any issues relating to the fuel cost recovery factors. In the fuel adjustment hearing in Docket No. 900001-EI held in February 1990, the Commission issued a Prehearing Order, Order No. 22581 (A. 1-14, excerpts), which set out the scope of issues to be considered at the February hearing. The Order provides, in part:

As part of the continuing fuel and energy conservation cost recovery proceedings, a hearing is set for February 21-23, 1990, in this docket . . . . The following subjects were noticed for hearing in such dockets:

1. Determination of the Proposed Levelized Fuel Adjustment Factors for all investor-owned utilities for the period April, 1990 through September, 1990;

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<sup>5/</sup> In an analogous situation, involving the conservation cost recovery charge (through which utilities recover the cost of their conservation programs on a semi-annual basis pursuant to hearing), OPC has appealed the Commission's decision to exclude interruptible customers from payment of the conservation charge. In recognition that this charge is imposed in the conservation cost recovery docket, OPC has appealed the Commission's final order in the docket which implements the conservation cost recovery charge. Citizens of the State of Florida v. Michael Mck. Wilson, etc., et al., Case No. 76,000, Notice of Appeal filed May 11, 1990.

2. Determination of the Estimated Fuel Adjustment True-Up Amounts for all investor-owned electric utilities for the period October, 1989 through March, 1990, which are to be based on actual data for the period October, 1989 through November, 1989, and revised estimates for the period December, 1989 through March, 1990;

Order No. 22581 at 3, emphasis supplied. (A. 3). Thus, the issue of the appropriate level of TECO's fuel cost recovery charges for most of 1990 was clearly noticed as an issue which the Commission would consider at the February 1990 public hearing. John Roger Howe, Assistant Public Counsel, and the same attorney involved in this appeal, appeared at the February 1990 hearing on behalf of OPC. (A. 2).

Not only was the issue of the determination of the fuel cost recovery factors noticed for hearing by the Commission, and not only was a hearing held, but OPC specifically raised the issue of the Commission's treatment of the SSI tariff credit for fuel adjustment purposes in that docket, making the very same arguments he now urges upon this Court.

OPC raised the SSI tariff issue and stated his position on it as follows:

7i. ISSUE: Has TECO been authorized to reduce its reported fuel cost recovery revenues to recognize credits given interruptible customers pursuant to its supplemental service rider tariff? (OPC).<sup>6/</sup>

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<sup>6/</sup> The designation (OPC) means that this issue was raised by the Office of Public Counsel in this docket.

OPC: TECO has been reducing its reported fuel revenues by credits given interruptibles pursuant to the [supplemental] service [rider]. 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. 10-11).<sup>7/</sup>

At the February 1990 hearing, OPC chose to present no evidence on the SSI issue he raised, but he did argue his position to the Commission. While OPC chose not to utilize them, all the due process rights he claims, OPC Initial Brief at 22, were available to him in this proceeding. The Commission clearly and specifically rejected OPC's position and voted from the bench on February 22, 1990 that TECO was authorized to reduce its reported fuel revenues to recognize the supplemental service rider credits. However, the Commission's vote is not what is at issue here. What is critical is that OPC was clearly and unequivocally provided with a hearing opportunity and he utilized this opportunity.<sup>8/</sup> If he had prevailed, the harm which he has

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<sup>7/</sup> OPC also took the opportunity to address the SSI issue in his position on Issues 2, 3, 4 in the Prehearing Order. (A. 5-9). See also the actual calculation of the factors. (A. 13-14).

<sup>8/</sup> It is interesting to note that though OPC could have presented testimony on the SSI issue at the hearing which he has so vociferously requested, he presented no evidence but merely orally argued his position on the SSI credit to the Commission.



alleged occurred would have been alleviated<sup>9/</sup> - OPC has had his point of entry. OPC availed himself of a clear point of entry in regard to the issue now on appeal before this Court and lost - he should not be permitted to turn this substantive defeat into a procedural morass which obscures the real issue. The real issue is did OPC have the opportunity for a hearing. The answer is clearly yes.

Further, OPC continues to have available, but refuses to take advantage of, another opportunity for hearing. Section 366.07, Florida Statutes (1989), provides for a public hearing upon complaint that the charges of a utility are "unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in anywise in violation of law. . . ." OPC could have used this statutory provision at any time in the past, and may use it at any time in the future, to invoke his right to a hearing on TECO's SSI tariff for any legitimate reason outlined in the statute.<sup>10/</sup>

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<sup>9/</sup> The Commission has explicit and continuing jurisdiction to review past and future fuel adjustment charges and order a refund of past charges if appropriate. Gulf Power Company v. Florida Public Service Commission, 487 So.2d 1036, 1037 (Fla. 1986). Thus, if the Commission had agreed with OPC, it had jurisdiction to adjust past fuel adjustment charges as well as to determine the amount of future charges. All the harm of which OPC complains could have been remedied but for the fact that the Commission rejected OPC's substantive position on the issue which underlies OPC's convoluted procedural argument here.

<sup>10/</sup> In fact, in regard to OPC's challenge to the 1989 SSI tariff, the Commission treated OPC's protest as a complaint and granted OPC a hearing. Order No. 22093. (OPC A. 49-53). To date, OPC has refused to avail himself of this opportunity, but has chosen instead to appeal to this Court.

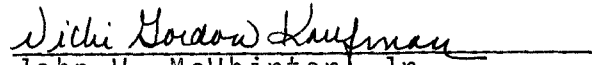
One final point OPC argues bears comment here. OPC argues that the Commission's adoption of the SSI tariff extension is a change in industry-wide policy. OPC Initial Brief at 14. However, the Commission's action is not an industry-wide policy change. Rather the Commission's approval of the SSI extension is utility-specific (it applies only to TECO) and is applicable only for a one-year period. Thus, the Commission's action does not represent an industry-wide policy change, but is a limited change in TECO's tariff in a response to a unique and non-permanent market situation.

Finally, IMC and other customers relied in good faith on the SSI tariff which the Commission approved and which was therefore presumptively valid. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982). IMC and others fulfilled their obligations under the terms of the SSI tariff and received credits for doing so. If the Court should find that the Commission committed a procedural impropriety, the customers who relied on the Commission's presumptively valid order should not be prejudiced. If this Court does find procedural error, it should protect these customers from harm by applying any decision prospectively only.

## CONCLUSION

OPC has been provided with not one but several hearing opportunities in regard to the extension of TECO's SSI tariff. OPC took advantage of one hearing opportunity in the February 1990 fuel adjustment docket where he presented his position on the SSI tariff to the Commission; he did not prevail. OPC has refused to utilize the complaint process available to him before the Commission. The procedural infirmity about which OPC complains does not exist. Therefore, FIPUG requests that Order No. 22467 be affirmed.

Respectfully submitted,

  
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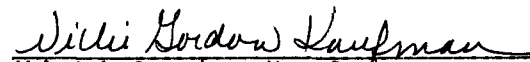
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amicus Curiae Brief of the Florida Industrial Power Users Group and Appendix have been furnished by U.S. mail to the following parties of record, this 29th day of May, 1990.

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