IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. MICHAEL MCK. WILSON, ETC., ET AL., Appellees.	)	CASE NO. 75,597

ANSWER BRIEF OF
APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

The Public Service Commission is referred to in this brief as the "Commission." Appellee, Tampa Electric Company, is referred to as "TECO." Appellants, the Citizens of the State of Florida, are referred to as Public Counsel, their representative in this case. References to the record on appeal are designated (R-___). References to the initial brief of Appellants are designated "Appellants' brief at _____." References to Appellee's Appendix to the brief are designated by the Appendix designation and page number, e.g., (A-___).

STATEMENT OF THE CASE AND FACTS

The Commission believes that there are certain facts in addition to those presented by Public Counsel which will aid the Court's understanding in this case. The Commission, therefore, presents its own statement of the case and facts.

TECO's first Supplemental Service Rider for Interruptible Service (SSI) was approved on December 20, 1988. That SSI tariff was effective January 1, 1989, with an expiration date of December 31, 1989. Over five months later, on May 5, 1989, Public Counsel filed a "Protest and Request for Hearing on Tampa Electric Company's Supplemental Service Rider Tariff for Interruptible Customers." The Commission accepted Public Counsel's protest and set the matter for hearing by its Order No. 22093, issued October 25, 1989. Public Counsel did not pursue the proferred hearing but instead appealed the Commission's procedural order. That appeal is currently pending before this Court as Case No. 75,074, Citizens of the State of Florida v. Michael McK. Wilson, etc., et al. Oral argument in that case is set for June 8, 1990. The Commission had originally scheduled a hearing date of May 14, 1990, on Public Counsel's protest to TECO's original SSI. (R-18)

On November 16, 1989, TECO filed a petition for a one-year extension of its original SSI tariff. (R-19) The Commission considered TECO's petition at its January 2, 1990, agenda conference. Interested parties, including Public Counsel, were given notice that the SSI tariff would be considered by memorandum from the Commission's Director of the Division of Records and

Reporting, dated December 22, 1989. The memorandum had attached to it a short excerpt showing that the Commission staff was recommending approval of TECO's petition for a one-year extension of its SSI tariff. The excerpt showed that the docket was opened on November 16, 1989, and showed that the 60-day period for Commission action under the file and suspend law expired on January 15, 1990. (R-35-A) The Commission's memorandum referred to the excerpt and stated: "This excerpt summarizes the issues to be decided in the docket in which you have expressed an interest. As a party of record or interested person in this docket, you may wish to attend the conference and address the Commission regarding this matter." (R-35)

At the January 2, 1990, agenda conference, the Commission had before it a 16-page staff recommendation consisting of the staff's analysis of TECO's petition as well as the petition itself with attached tariff and supporting financial analysis of the tariff's effect. (R-24-33). When the item was called up for discussion, two Commission attorneys, the staff analyst from the Commission's Electric and Gas Division, TECO's attorney, an attorney for the Florida Industrial Power Users Group (FIPUG), and Public Counsel's attorney, Roger Howe, participated. (R-37) Public Counsel opposed approval of the tariff, focusing his objection on TECO's proposal to adjust its fuel revenues downward by the amount of the credits granted interruptible customers and recover the amount of those credits from the general body of ratepayers. (R-39-42) Mr. Howe summarized his position ". . . we don't have any serious

concern, except for the fact that it is inappropriate to allow for recovery through the fuel adjustment clause, that directly impacts the general body of ratepayers and all they see is a rate increase and no benefit." (R-42) Staff took the position that increased base rate revenues from the additional kilowatt hours consumed by industrial customers might help postpone a general rate increase and would tend to bring down the average cost of fuel charged to the general body of ratepayers. (R-53-54; 44)

After some debate, the Commissioners reached the conclusion that the 80/20 split of the difference between marginal and average fuel costs should also be applied in situations where marginal costs exceed average costs. (R-61) However, the Commissioners recognized that they did not have the legal authority to unilaterally modify the terms of TECO's tariff but could only deny it, if it did not meet their approval. (R-62) In the face of the Commission's potential denial of the tariff and the necessity of refiling, TECO's attorney agreed to make an amendment to its tariff at the agenda conference, and with that amendment the tariff was approved. (R-63-64)

On January 24, 1990, the Commission issued Order No. 22467 approving the extension of TECO's SSI tariff. (R-79) Subsequent to the issuance of Order No. 22467, Public Counsel participated in the Commission's semi-annual fuel adjustment proceedings in Docket No. 900001-EI. In those proceedings, Public Counsel raised the issue of TECO's recovery from its general body of ratepayers of the credits granted interruptible customers under the SSI tariff.

The issue and the positions of the parties were stated in Prehearing Order No. 22581 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)

STAFF: Yes. Order No. 20581, page 2, issued 1/10/89, which was the basis of staff administratively approving TECO's Supplemental Service (SSI) Rider tariff states that TECO's proposed fuel credit under SSI would be passed directly through the fuel adjustment clause, and Order No. 22467, page 2, issued 1/24/90, which approved extension of the SSI rider, states that TECO proposed to continue adjusting fuel revenues downward reflecting the discounts earned by SSI customers. Moreover, Staff believes this issue should be addressed as part of the Commission's scheduled hearing in Docket No. 881499-EI, which was granted in Order No. 22093, issued 10/25/89.

TECO: Yes. From the very outset Tampa Electric made it clear that the company proposed that the fuel credits earned by participating customers under the SSI would result in a downward adjustment to the fuel revenues reported in the fuel adjustment filing. See Petition dated November 17, 1988. It was clear to all parties that this was the basis upon which the SSI provision was ultimately approved. Public Counsel obviously construed the SSI rider to have this result because he objected to the SSI proposal on the ground that it would adversely affect firm customers. Further, Tampa Electric adopts the position on this issue stated by the Staff.

FIPUG: FIPUG has no position at this time, but reserves the right to take a position on this issue by the date of the prehearing conference.

OPC: TECO has been reducing its reported fuel revenues by credits given interruptibles pursuant to the service. 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. (A-6-7)

Public Counsel participated in the hearings held February 21-22, 1990, and argued that recovery of the fuel credits had not been authorized by the Commission. As indicated in its statement of position, the Commission staff recommended that Public Counsel's issue concerning recovery of the fuel credits could be addressed at the May 14, 1990, hearing scheduled on the original SSI tariff and its extension. (B-1)[1]

On February 23, 1990, Public Counsel filed its appeal of Order No. 22467 approving the extension of TECO's SSI tariff.

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[1]The Commission has not yet issued its order memorializing its decision in Docket 900001-EI. A copy of the pages of the official transcript of hearing recording the vote on issue 7i is attached as Appendix B-1-2.

SUMMARY OF ARGUMENT

Public Counsel's claim that he has been deprived of due process by the Commission's approval of TECO's SSI tariff is purely academic. Public Counsel has been given two opportunities for hearing in which he could have raised the issue of the recovery of fuel credits from TECO's general body of ratepayers. Those were the complaint hearing set by Order No. 22093, which Public Counsel appealed, and the February, 1990, fuel adjustment proceedings in Docket No. 900001-EI. Public Counsel has not taken the opportunity to address the substance of his complaint but continues to pursue the issue in the abstract through appeals based on procedural points.

Public Counsel's procedural arguments under the APA, the electric file and suspend law, and constitutional concept of due process are likewise without merit.

The Commission approved TECO's supplemental service rider under the procedures of the file and suspend law, section 366.06(4), Florida Statutes. Under this Court's interpretation of the file and suspend law, a complaint proceeding provides an adequate opportunity to contest the implementation of a tariff.

Since this Court decided Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976) under the first file and suspend law, it has been recognized that, in dealing with tariff filings proposing changes in a utility's rates, charges, and regulations, the Commission has a range of options which includes the alternatives of suspending the rates, actively approving their implementation

or taking no action, thereby allowing the rates to go into effect. Under none of these alternatives is the Commission required by the APA to hold an evidentiary hearing prior to its action, even if it means that increased rates may go into effect without hearing. This procedure survived the 1974 amendments to the APA and applies to tariff filings as well as regular rate increases. Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976).

Constitutional concepts of due process are not violated by file and suspend statutes. It is generally held that while a utility has a property right to protect in the ratemaking process, ratepayers have no vested rights to any given level of rates. Therefore, implementation of rates under file and suspend procedures without hearing do not deny ratepayers due process. Georgia Power Project v. Georgia Power Company, 409 F.Supp. 332 (N.D. Ga. 1975).

The Commission's order approving the extension of TECO's SSI tariff did not change industry wide policy. The Commission's decision is specific to one company and is of limited duration.

I.

NEITHER THE ADMINISTRATIVE PROCEDURE ACT, NOR CHAPTER 366, FLORIDA STATUTES, NOR TRADITIONAL CONCEPTS OF DUE PROCESS REQUIRED THE COMMISSION TO HOLD A HEARING PRIOR TO ITS APPROVAL OF AN EXTENSION OF TECO'S SSI TARIFF.

A. THE COMMISSION PROVIDED PUBLIC COUNSEL AN OPPORTUNITY FOR HEARING IN WHICH HE COULD RAISE ANY ISSUES AFFECTING HIS SUBSTANTIAL INTERESTS.

Public Counsel's claimed deprivation of due process in the Commission's approval of TECO's SSI tariff is purely academic. The Commission has afforded Public Counsel two opportunities to contest implementation of the tariff and recovery of the fuel credits from the general body of ratepayers. The first opportunity was provided when Public Counsel filed his protest to the Commission's administrative approval of TECO's original SSI tariff. Notwithstanding that the protest was filed five months after the tariff was approved, the Commission set the issue for hearing. In that proceeding, Public Counsel could have raised any issue concerning the SSI tariff, including the recovery of the fuel credits from the general body of ratepayers. Moreover, as the Case Assignment and Scheduling Record (CASR) for Docket No. 891303-EI indicates, the staff of the Commission contemplated that these issues as well as any issues arising out of the extension of the SSI tariff could be considered in that hearing. (R-18) (See staff's position on Issue 7i, page 4, supra.) The hearing was originally scheduled for May 14, 1990, and would have been held, had Public Counsel not chosen to appeal the Commission's procedural order. The second opportunity for hearing was provided

to Public Counsel during the February, 1990, fuel adjustment proceedings. As the prehearing order in that docket indicates, Public Counsel raised an issue concerning the validity of TECO's adjustment of its fuel revenues by the amount of the credits given interruptible customers. He could have developed the issue by presenting his own witness and challenging the witnesses of the company. Instead, he chose only to take a legal position on the procedure followed by the Commission, consistent with his prior appeals.

In either the SSI tariff hearing scheduled by the Commission or the fuel adjustment proceedings, Public Counsel could have pursued the issue of whether the fuel credits should have been passed along to TECO's general body of ratepayers at all. The determination of fuel adjustment factors is an ongoing proceeding in which collection of the fuel charges from prior periods can be challenged. This Court has specifically recognized the validity of that proposition in the case of Gulf Power Company v. Florida Public Service Commission, 487 So.2d 1036, 1037 (Fla. 1986), where it stated:

> The fuel adjustment proceeding is a continuous proceeding and operates to a utility's benefit by eliminating regulatory lag. This authorization to collect fuel costs close to the time they are incurred should not be used to divest the commission of the jurisdiction and power to review the prudence of these costs.

Public Counsel has foregone two opportunities to contest the alleged harm that he has suffered from TECO's SSI tariff; that is, the recovery of fuel credits from TECO's general body of

ratepayers from the date of the approval of the tariff. It is through no fault of the Commission that he has not chosen to do so.

B. THE ELECTRIC FILE AND SUSPEND LAW, SECTION 366.06(4), FLORIDA STATUTES, DID NOT REQUIRE THE COMMISSION TO HOLD A HEARING PRIOR TO APPROVING THE EXTENSION OF TECO'S SSI TARIFF AND ALLOWING IT TO GO INTO EFFECT.

Given the opportunities for hearing the Commission has made available to Public Counsel, his claimed deprivation of due process is, as a factual matter, without merit. His claims are likewise without merit as a matter of law. This Court long ago recognized that the Commission has a range of alternatives for proceeding under the file and suspend law, including allowing the proposed rate change to go into effect without a hearing. In Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976) this Court found that no hearing was required before implementation of interim rates in a full rate proceeding. The Court rejected Public Counsel's argument that due process required a full evidentiary hearing and agreed with the utility that a prior hearing was not consistent with the newly enacted file and suspend law. The Court stated:

> . . . We agree with Gulf Power that an inflexible hearing requirement was not intended inasmuch as the Commission can obviate any hearing requirement simply by failing to act for 30 days. We must conclude, therefore, that the Legislature intended to provide elected public service commissioners with a range of alternatives suitable to the factual variations which might arise from case to case.

Id. at 6.

The Court found no inconsistency between the "procedure for due process" contained in the then current version of the APA,

section 120.26, Florida Statutes (1973), and the implementation of interim rates without hearing under the file and suspend law. Id. at 7.

This Court has recognized that file and suspend laws also apply to routine tariff filings. In Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976), the issue concerned a tariff filing by Southern Bell Telephone and Telegraph Company which was processed by the Commission under the telephone file and suspend law (section 364.05(4), Florida Statutes (1975)). This Court found that the file and suspend law did allow Southern Bell's tariff to go into effect without a prior hearing. Southern Bell's competitor in the private branch exchange (PBX) business, Florida Interconnect Telephone Company, had asserted that it was entitled under the APA to a hearing before the tariff could become effective. This Court found that the order of the Commission, issued more than 30 days after the tariff was filed, was in "a very real sense surplusage." Id. at 813. This Court explained that conclusion as follows:

> This is so because of the provisions of the 'file-and-suspend' law, enacted as Chapter 74-195, Laws of Florida. If the Commission does not object to the proposed tariff changes within 30 days, the proposed rates automatically go into effect . . . .

Id.

This Court went on to find that the automatic implementation provision of the file and suspend law survived the adoption of the APA specifically referring to section 120.72(3), Florida Statutes

(1975), which grants an exception to the APA for file and suspend procedures.

The Commission's approval of TECO's original SSI filing in 1989 and its approval of the extension in 1990 without a prior hearing are entirely consistent with this Court's interpretation of the file and suspend law. The Commission found no "good cause" to withhold its consent to the operation of TECO's tariffs and therefore approved their implementation as it is required to do. See Maule Industries v. Mayo, 342 So.2d 63, 67 n. 7 (Fla. 1976) (the Commission would appear to have a statutory obligation to withhold suspension and allow rates to become effective where it has no reasonable basis to believe that rates are unreasonable or discriminatory) The question of due process did not arise because TECO made its filing of the SSI tariff under the file and suspend law, and the Commission found no reason in Public Counsel's, or any other party's, arguments to suspend the tariff. Any substantial interest of the parties affected by the utility's tariff must initially yield to the rights of the utility to put its rates into effect under the file and suspend law, if the Commission has no reason to withhold its consent.

C. THE COMPLAINT HEARING GRANTED PUBLIC COUNSEL WAS THE PROPER VEHICLE TO CHALLENGE TECO'S SSI TARIFFS IMPLEMENTED UNDER THE FILE AND SUSPEND LAW.

As this Court recognized in the Florida Interconnect case, a complaint hearing is the proper vehicle to challenge a utility's rates put into effect under the file and suspend law. The issue is a simple one. Under the file and suspend law, the Commission

cannot arbitrarily withhold consent to a utility's new rate schedules nor thwart their implementation by requiring the utility to face a hearing before the rates go into effect. A challenge is available to affected ratepayers, if the Commission has found no basis to object to the proposed tariff, but it must be brought through the complaint process.

The use of a complaint proceeding to challenge a tariff that has been approved by the Commission or that has become effective by operation of law is consistent with those parts of section 366.06 which define hearing requirements in rate proceedings. Section 366.06(2) states that

> (w)henever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law, . . . the commission shall order and hold a public hearing. (emphasis supplied)

Obviously, if the Commission has first consented to a tariff filing, it must have some basis to later pursue a challenge to it. That challenge can be initiated by the Commission on its own motion or by affected ratepayers. The vehicle available to the ratepayers is the complaint proceeding. That is clearly set out in section 366.07 which states that whenever the Commission finds "after public hearing either upon its own motion or upon complaint" that rates are unjust or unreasonable, it can adjust rates.

This interpretation is not contradicted by the language of the file and suspend law, 366.06 (4), which has to do only with those instances where the Commission has found good cause to withhold its consent to the new rates. The phrase "(p)ending a final order . . . the Commission may withhold consent . . . ." is directed toward providing the utility the opportunity for hearing where its proposed rates and the property interest embodied in them have been challenged by the Commission. It does not mean that there must be a hearing in any proceeding initiated under the file and suspend law.

Public Counsel has been given effectively two opportunities to pursue his complaint against both TECO's original SSI and the extension of that tariff: first, in the complaint hearing scheduled by the Commission in response to his petition directed to the original SSI tariff, and second, in the February, 1990, fuel adjustment proceedings. He has chosen to pursue neither and, in the instance of the Commission's approval of the extension of the SSI tariff, he has, in fact, not even asked for a hearing. Nevertheless, the law is clear that if Public Counsel wants to challenge a validly approved tariff, he must file a complaint stating the basis on which he contests the reasonableness of the rates. That alternative is available to him at any time. See, American District Telegraph Company v. Yarborough, 273 So.2d 65 (Fla. 1973). (court upheld Commission's finding that a formal complaint was proper vehicle to resolve burglar alarm company's challenge to Southern Bell's rate differentials between old and

new customers and general body of ratepayers) and Alabama Metallurgical Corporation v. Alabama Public Service Commission, 441 So.2d 565 (Ala. 1983) (complaint hearing was always available to ratepayers or commission to initiate review of rates, including those put into effect automatically without notice and hearing)

D. THE EXEMPTION TO THE ADMINISTRATIVE PROCEDURE ACT FOUND IN SECTION 120.72(3), FLORIDA STATUTES APPLIES TO ALL PROCEEDINGS UNDER THE FILE AND SUSPEND LAW.

This Court recognized in the Florida Interconnect case, supra, that the file and suspend laws survived the enactment of the new APA in 1974 by virtue of the exemption contained in section 120.72(3). 342 So.2d 814. The exemption applies to all filings under the file and suspend laws, not just those instances where the Commission has set an interim rate to grant the utility relief pending a final decision. This interpretation of the effect of 120.72(3) is consistent with the plain meaning of the statute. It states:

> 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 75-195, Laws of Florida, or as otherwise provided by law.

Section 120.72(3) recognizes that, notwithstanding the enactment of Chapter 120, utilities and companies retain the right to pursue certain courses of action which affect the substantial interests of parties without the requirement for a prior hearing. Section 120.72(3) defines two instances in which this may occur: 1) utilities or companies may "proceed under the interim rate

provisions of chapter 364 or (under) the procedures for interim rates contained in chapter 74-195, Laws of Florida;" or 2) utilities or companies may "proceed . . . as otherwise provided by law." The prepositional phrase "under the interim rate provisions . . ." and the clause "as otherwise provided by law" serve the function of adverbs which define "how" companies or utilities may "proceed". Each retains its grammatical and logical independence and each provides a distinct exception to the APA. A utility or company may seek an interim rate increase without the necessity of a hearing prior to putting the rates into effect. It may proceed in a like manner under the file and suspend law where the Commission takes no action within sixty days, or where the Commission approves the proposed tariff.

Section 366.06(4) in its broadest application is a provision of law which otherwise creates an exception to the APA. The plain meaning of the statute is clear and it should be given effect. Citizens of Florida v. Florida Public Service Commission, 435 So.2d 784 (Fla. 1983).

The exemption contained in 120.72(3) has the effect of guaranteeing the right of a utility to put unopposed tariff filings into effect. It recognizes that the file and suspend law effectively holds due process claims arising from changes in utility rates in abeyance until such time as either the Commission challenges the rates on its own initiative, or an affected party complains that the rates are unjust. Due process rights under the APA, such as adequacy of notice and the necessity of an

evidentiary hearing, simply do not arise. See Florida Interconnect, supra, (adequacy of notice not a factor where rates would have gone into effect without hearing), 342 So.2d 814, and Mayo, supra, (commission can obviate hearing requirement by failing to suspend proposed rates, and questions of due process do not arise), 333 So.2d 5, n.9; 6.

E. THE COMMISSION'S ORDER APPROVING THE EXTENSION OF TECO'S SSI TARIFF IS CONSISTENT WITH TRADITIONAL CONCEPTS OF DUE PROCESS UNDER FILE AND SUSPEND STATUTES.

At common law, a public utility had the right to set its own rates and to adopt and put into effect such rate schedules or tariffs as it believed to be just and reasonable. Mountain States Telephone and Telegraph Company v. New Mexico State Corporation Commission, 377 P.2d 43 (N.M. 1959); Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438, 445 (Fla. 1943). The remedy at common law for the utility's customers was to attack the utility's rates as arbitrary or discriminatory in the courts. Cooper v. Tampa Electric Company, 17 So.2d 785, 786 (Fla. 1944).

The common law process for the promulgation of utility rates was abridged in Florida in 1951 when the Legislature exercised its prerogative to delegate the review and rate-setting authority to the Commission. That delegation did not, however, modify the fundamental proposition that a utility has the right to propose rates that are capable of producing a fair return on its investment so long as those rates are just and reasonable. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944). A utility's ratepayers are entitled to just and

reasonable rates but, unlike utilities, they have no vested property interests in any particular rates. Georgia Power Project v. Georgia Power Company, 409 F.Supp. 332 (N.D. Ga. 1975) relying on Holt v. Yonce, 370 F.Supp. 374 (D.S.C. 1973) affirmed 415 U.S. 969 (1974).

It is out of the tension between the common law concept of a utility's right to prescribe its rates, so long as they are just and reasonable, and the delegation of that ratemaking authority to a commission that review under the so-called "file and suspend" laws is born. United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958). While a utility no longer has the prerogative of changing its rates solely at its discretion but must submit them to review by the regulatory commission, the regulators cannot arbitrarily or indefinitely withhold consent to their operation.

The operation of Florida's file and suspend law is similar to other state and federal statutes. Some examples illustrate the point. In Mississippi Power Company v. Goudy, 459 So.2d 257, 261 (Miss. 1984), the constitutionality of Mississippi's file and suspend law (Mississippi Code Annotated § 77-3-1, et. seq. (1972)) was challenged because it did not allow for notice and hearing before rates were put into effect by the utility. Under the statute, the utility could give the commission notice and was authorized to make the rate change unless a complaint was filed or the commission set a hearing on its own motion. Id. at 274. The Mississippi court concluded that the file and suspend statute did

not violate the customer's constitutional rights. It based that conclusion on the finding that customers had no specific vested property right in a fair and reasonable utility rate; that there was no unlawful delegation of legislative power to the commission; and that the rate implementation proceeding under the file and suspend law did not violate due process of law. Id. at 263.

In State ex rel. Utilities Commission v. Edmisten, 230 S.E.2d 651 (N.C. 1976), the North Carolina Supreme Court upheld a challenge to the operation of North Carolina's file and suspend law (N.C. General Statute 62-134 and 62-135). The Attorney General of North Carolina attacked the commission's authority to place increased rates in effect ex parte upon the utility's application.

The court concluded that the North Carolina Commission could allow rates to go into effect in three ways under its file and suspend law. First, it could refuse to exercise it power to suspend the proposed rate change, thereby allowing it to go into effect automatically upon expiration of 30 days. Second, even if the rates were suspended, the utility could place the rates in effect subject to refund after a six-month period, if the commission had not acted. Finally, the court noted that North Carolina statutes authorized the commission to "allow" the rates to go into effect by the issuance of an affirmative order prior to the end of the 30-day suspension period. Id. at 665-666. In neither case was there a requirement for a prior hearing before implementation of the new rates.

In the case where the commission issued an affirmative order allowing the rates to go into effect, the court recognized that the rates could go into effect conditionally or unconditionally. Id. The court did note, however, that whenever rates were allowed to go into effect by any of these procedures, it should not generally be the end of the ratemaking process. The commission itself, as well as interested parties, had the right to challenge the rates and request a hearing if they were unreasonable in their effect. Id.

The operation of Florida's file and suspend law is by no means unique. Moreover, the Commission has interpreted section 366.06(4), consistently since its inception to allow the type of tariff approval granted TECO's SSI tariff. That interpretation has been recognized by this Court and it is entitled to great weight. Pan American World Airways, Inc. v. FLorida Public Service Commission, 427 So.2d 716 (Fla. 1983). The Legislature reinacted the file and suspend laws in 1980 and 1989 without changing their substance. If it had found the Commission's or this Court's interpretation inconsistent with those laws, it had the opportunity to remedy the situation, and it has not. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983).

File and suspend statutes have been almost universally upheld by the courts. Mississippi Power Company v. Goudy, supra, and cases cited therein.

F. THE COMMISSION'S APPROVAL OF THE EXTENSION OF TECO'S SSI TARIFF DID NOT EFFECT A CHANGE IN INDUSTRY-WIDE POLICY.

Order No. 22467 applied only to TECO, and it approved fuel credits only for the interruptible class of customers. The extension was limited to one year. It did not result in a change which affects the electric industry generally, but applied only to the limited factual circumstances involved in TECO'S request. A change in policy relating to one utility for a specific period of time cannot be held violative of APA procedures. Even policies of wide application are not necessarily violative of APA requirements where their application is specific and of limited duration. Cf., State Department of Commerce, Division of Labor v. Matthews Corporation, 358 So.2d 256 (Fla. 1st DCA 1978). (wage rate guidelines issued by the Division of Labor and required to be included in competitive bids for constructions projects were not rules because they were applicable only to the construction of particular projects and had no prospective application to any other project)

The Commission has not made a change in policy affecting the electric industry in Florida.

CONCLUSION

The Commission's approval of the extension of TECO's SSI tariff violated no due process rights of Public Counsel or any other party. Order No. 22647 is consistent with the essential requirements of law and should be affirmed.

Respectfully submitted,

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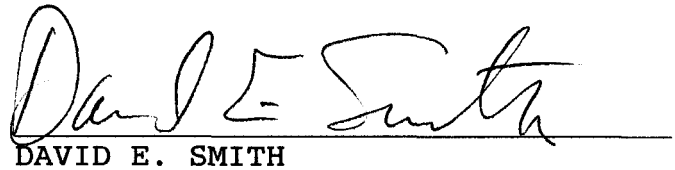

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission and Appendix have been furnished by U.S. Mail to the following parties on this 29th day of May, 1990.

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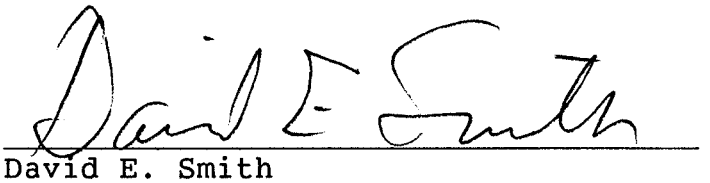

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