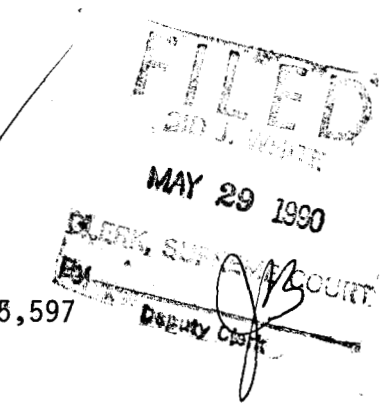
IN THE SUPREME COURT OF FLORIDA



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

ON APPEAL OF ORDER NO. 22467 IN
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 891303-EI
PETITION OF TAMPA ELECTRIC COMPANY

ANSWER BRIEF OF APPELLEE, TAMPA ELECTRIC COMPANY

LEE L. WILLIS
Florida Bar No. 0135074

JAMES D. BEASLEY
Florida Bar No. 0178751

Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

Attorneys for Tampa Electric Company

TABLE OF CONTENTS

TABLE OF CITATIONS

SYMBOLS AND DESIGNATION OF PARTIES

The Florida Public Service Commission is referred to in this Brief as "the Commission."

Tampa Electric Company will be referred to as "Tampa Electric" or "the company."

Appellants, Citizens of the State of Florida, shall be referred to herein as "Public Counsel."

References to the Appendix to this Brief are designated "(A-___)."

STATEMENT OF THE CASE AND OF THE FACTS

Tampa Electric Company generally accepts the Statement of the Case and of the Facts set forth in Public Counsel's initial Brief except for the following:

Public Counsel's Statement of the Case and of the Facts fails to appropriately recognize the fact that Tampa Electric's Supplemental Service Rider proposal, both as initially approved and later extended for one year by the Commission, was designed to generate additional fuel savings to be shared by all of the company's Customers. In addition, the base rate revenues generated by the Supplemental Service Rider benefit all Customers, either as additional refunds or by deferring Tampa Electric Company's need for additional rate increases. This is demonstrated in the Appendix to Public Counsel's Brief at pages A-19 through A-22, which is a copy of the Commission's Order No. 22467 in Docket No. 891303-EI, here on appeal. That Order states, at page two, (Public Counsel's A-20):

> . . .While the bulk of the credit earned by increased KWH sales goes to the interruptible Customers on the rider, the general body of ratepayers realized a net benefit of over $2 million due to increased base revenues during the first nine months of 1989. KWH sales increased by 238,693,928, generating $3,294,877 in base rate revenues while TECO paid out $1,216,224 in fuel credits.

Public Counsel's Statement of the Case and of the Facts restates a number of the arguments Public Counsel presented to the FPSC in the proceeding below, thereby converting this section of Public Counsel's initial brief into what amounts to a supplement to the argument portion of Public Counsel's initial brief. The essential facts are that the FPSC approved a one-year extension of Tampa Electric's Supplemental Service Rider for interruptible service, incorporating therein one change previously urged by Public Counsel, and did so in the same manner previously challenged by the Public Counsel in Citizens of the State of Florida v. Michael McK. Wilson, etc., et al., Case No. 75,074.

Even more importantly Public Counsel's Statement of the Case and of the Facts fails to acknowledge that Public Counsel has participated in a public hearing conducted by the Florida Public Service Commission for the specific purpose of addressing the propriety of Tampa Electric's reducing its reported fuel cost recovery revenues to recognize credits given to interruptible Customers pursuant to the company's Supplemental Service Rider Tariff. That issue was raised by Public Counsel in advance of the semi-annual public hearing conducted by the FPSC on February 21-22, 1990 in Docket No. 900001-EI (In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor). The specific issue raised by Public Counsel appeared on pages 27 and 28 of the February 21, 1990

Prehearing Order in Docket No. 900001-EI (A-4-5). Public Counsel contended that the challenged practice was unauthorized and further urged that the Commission require refunds and prospective relief. (A-5)

Public Counsel's challenge to the Supplemental Service Rider was fully aired at the February 21-22, 1990 fuel adjustment hearing (A-10-14), and thereafter unanimously rejected by the Commission. During this hearing Public Counsel refrained from presenting any witnesses.

SUMMARY OF ARGUMENT

This is the fourth in a series of appeals wherein Public Counsel has recently challenged procedures which has been utilized by the Commission and which for many years have been relied upon by those entities regulated or affected by Commission action. In this appeal, as in Public Counsel's challenge to the initial approval of Tampa Electric's Supplemental Service Rider (Case No. 75,074), Public Counsel erroneously fails to recognize that the Tampa Electric Customers Public Counsel purports to represent have benefitted from the operation of the rider. Public Counsel should not be heard to challenge the Supplemental Service Rider credits which have brought about these benefits, and at the same time retain for his clients the benefits thus produced.

The Commission's one-year extension of Tampa Electric's Supplemental Service Rider was consistent with the Florida Administrative Procedure Act, as explained in the Court's decision in Florida Interconnect Telephone Company v. Florida Public Service Commission, infra. Public Counsel's approach fails to take into account the various alternatives open to the

Commission in response to a tariff proposal submitted by a public utility under Section 366.063, Fla. Stat.

Public Counsel has, in fact, been afforded an opportunity for a hearing in advance of any change in the fuel adjustment charges applicable to the Customers he purports to represent. Three semi-annual evidentiary hearings have been conducted in Docket No. 900001-EI since the Supplemental Service Rider was initially approved. Any Supplemental Service Rider based monetary impact on Public Counsel's clients had to be approved in these semi-annual hearings before becoming effective. Public Counsel actually participated in the February 1990 hearing and specifically challenged the Supplemental Service Rider. Public Counsel presented no evidence in that hearing and his arguments were rejected by the Commission. Thus, Public Counsel cannot be heard to claim any denial of an opportunity for input.

Contrary to Public Counsel's contention, the provisions of Section 366.06, Fla. Stat., do not require a hearing to be conducted each time a tariff modification occurs. Moreover, Public Counsel's due process arguments, presented for the first time in his Initial Brief, do not compel public hearings for each limited tariff filing submitted to the Commission.

Public Counsel's arguments in this proceeding, like those presented in Case No. 75,074 regarding the Commission's initial approval of the Supplemental Service Rider, are without merit and should be rejected.

POINT I

FIRM CUSTOMERS OF TAMPA ELECTRIC HAVE NOT BEEN HARMED AS A RESULT OF TAMPA ELECTRIC'S SUPPLEMENTAL SERVICE RIDER AND PUBLIC COUNSEL HAS FAILED TO DEMONSTRATE ANY PROCEDURAL ERROR IN CONNECTION WITH THE FPSC'S APPROVAL OF A ONE-YEAR EXTENSION OF THAT RIDER.

Public Counsel begins Point I of his Brief with the assertion that Tampa Electric's firm Customers were harmed by the entry of the order on appeal (Point IA. of Public Counsel's Initial Brief), then proceeds with four additional subarguments identifying what Public Counsel perceives to have been procedural errors below. Tampa Electric firmly believes that its Customers have benefitted from the operation of the Supplemental Service Rider and that the procedures followed by the FPSC in approving the one-year extension of that rider were appropriate.

First, as to the benefits to Tampa Electric's Customers, as the Commission observed in Order No. 22467, Tampa Electric's general body of ratepayers realized a net benefit of over $2 million due to increased base rate revenues produced by the Supplemental Service Rider during the first nine months of 1989. That is to say that the revenues attracted by the operation of the Rider were over $2 milion greater than the revenue reduction credits given in return. Public Counsel refuses to recognize this and is apparently unwilling to accept the fact that an increase in a utility's revenues will benefit all ratepayers, either as additional refunds or by deferring the utility's need for rate relief.

Tampa Electric's Supplemental Service Rider was proposed and approved with a specific goal of increasing fuel savings for the benefit of all Customers, not just interruptible Customers. Public Counsel should not be

heard to challenge the credits which brought about these increased sales and at the same time retain for his clients the resulting benefits.

In Point IB. Public Counsel challenges Order No. 22467 on the basis that the APA was not complied with. Public Counsel's primary contention is that only interim rates, effective pending a final order after a proceeding is conducted according to the APA, are exempt under Section 120.72(3), Fla. Stat. However, in Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976), as in the instant case, the tariff filing was made outside of a full rate proceeding and did not involve a request for an interim rate increase. In the Florida Interconnect case, the Commission failed to find good cause to suspend Southern Bell's proposed tariff. In the instant case, after Tampa Electric agreed to modify its proposal to meet the Commission's concerns, the Commission was satisfied it lacked good cause to suspend the proposed tariff.

Point IC. of Public Counsel's argument is simply a continuation of his APA based claim that Public Counsel was denied a clear point of entry to the administrative process. On the contrary, Public Counsel has had abundant opportunities to challenge the Supplemental Service Rider. In fact, Public Counsel actively participated in the hearing which preceded and gave rise to the result not challenged by Public Counsel.

In Docket No. 900001-EI (In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor), Public Counsel actively challenged the Supplemental Service Rider and thereafter his arguments were rejected by the Commission. In the February 1990 fuel adjustment hearings, Public Counsel was afforded a full opportunity to air

his concerns over the Supplemental Service Rider. That hearing, like the semi-annual hearings conducted in February and August of 1989, was the proceeding which actually brought about any change in the fuel adjustment factor of Tampa Electric which resulted from the operation of the Supplemental Service Rider. Public Counsel elected to present no witnesses in that hearing.

Public Counsel had been afforded an earlier opportunity to challenge the Supplemental Service Rider in Order No. 22093 issued in Docket No. 881499-EI on October 25, 1989. This was the order which responded to Public Counsel's protest and request for a hearing directed at the Commission's initial approval of Tampa Electric's Supplemental Service Rider. A similar opportunity was afforded in the Florida Interconnect case where the complaining party was given an opportunity, by way of a complaint proceeding, to challenge the reasonableness of Southern Bell's tariff changes. In the instant case Public Counsel rejected the opportunity for the hearing provided for in Order No. 22093 and, instead, filed an appeal of such order. That appeal is now pending before this Court in Case No. 75,074.

Thus, Public Counsel has refused one opportunity for a hearing for prospective relief and has actually participated in fuel adjustment hearings before the FPSC to challenge Tampa Electric's Supplemental Service Rider and the one-year extension of that rider. Surely Public Counsel should not be heard to complain that he had no opportunity to present his concern regarding the Supplemental Service Rider.

In Point ID. of his argument Public Counsel contends that the FPSC adopted incipient nonrule policy without record support. This simply is

erroneous. In the proceeding below the Commission extended for a one-year period Tampa Electric's previously approved Supplemental Service Rider. Tampa Electric explained the basis for its request in its petition and the Commission and its Staff carefully considered that basis. Order No. 22467 did not institute a policy change. Instead, the order preserved the status quo with respect to the Supplemental Service Rider for one year.

The Supplemental Service Rider is a company-specific proposal which pertains only to Tampa Electric and to no other electric utility regulated by the Commission. It was treated as such all along by Public Counsel and it was categorized as a "company specific fuel adjustment issue" by Public Counsel in his Prehearing Statement in Docket No. 900001-EI. Quite clearly, the action taken below was not one in which the Commission adopted incipient policy in a nonrule proceeding.

Point IE. of Public Counsel's Initial Brief is a restatement of Public Counsel's earlier argument concerning APA hearing requirements as they relate to Commission proceedings. Certainly Tampa Electric would agree that there are occasions when the Commission is required to conduct full trial type proceedings under Section 120.57, Fla. Stat. However, the tariff approval involved in the instant case is not in the category of activities requiring such a hearing. Nonetheless, Public Counsel was afforded a full and complete trial type hearing opportunity in Docket No. 900001-EI. He participated in that proceeding and should not be heard to complain that he has been denied procedural rights.

POINT II

THE PROVISIONS OF SECTION 366,06, FLA. STAT., DO NOT REQUIRE A HEARING TO BE CONDUCTED EACH TIME A TARIFF MODIFICATION IS APPROVED.

Point II of Public Counsel's Brief attempts to construe Section 366.06, Fla. Stat., to require public hearings each time a rate schedule is modified -- a conclusion which is inconsistent with this Court's holding in the Florida Interconnect case and the plain meaning of Section 366.06, Fla. Stat. The Commission traditionally has construed its authority under Chapter 366, Fla. Stat., not to require a hearing each time a utility tariff is modified.

Public Counsel refers to the first sentence of subsection 366.06(1), Fla. Stat., which states that a utility shall not charge or receive any rate not on file with the Commission. Tampa Electric did not begin accruing any credits under the Supplemental Service Rider until after the tariff was approved and on file with the Commission. Moreover, none of the Customers whom Public Counsel purports to represent was affected at all until after the company's "Additional Billing Charges" tariff was approved and on file with the Commission pursuant to the Commission's approval at its February 1989 semi-annual fuel adjustment hearing. This is the tariff sheet which changes the applicable fuel adjustment charge each six months, pursuant to the Commission's vote at the conclusion of the semi-annual fuel adjustment hearings. Public Counsel here complains of firm Customers having to pay higher fuel adjustment charges than would otherwise be the case in the absence of the Supplemental Service Rider. To the extent any such higher charges have been paid, such was the direct result of the fuel adjustment hearings of which Public Counsel is a regular and active

participant. Public Counsel actively participated in the February 1989 proceeding as well as the subsequent semi-annual hearings conducted in August of 1989 and in February of 1990.

Public Counsel next refers to the provision of Section 366.06(2), Fla. Stat., providing that the Commission shall order and hold a public hearing when it finds existing rates to be unjust, unreasonable, unjustly discriminatory or in violation of law; or that such rates are insufficient to yield reasonable compensation for the services rendered. This language has been construed by the Commission to refer to full revenue requirements cases, because the Commission has never interpreted this language to require a public hearing each time a tariff change is submitted for approval, certainly not a separate hearing for that limited topic alone. Even if such a hearing were required, Public Counsel had a full opportunity to participate and did participate in each of the semi-annual fuel adjustment hearings which resulted in the fuel adjustment charge modifications Public Counsel complains of in this appeal.

Public Counsel refers to Citizens v. Mayo, 316 So.2d 262 (Fla. 1975) as having required a full hearing. However, that case did involve a full revenue requirements case as opposed to an individual tariff modification like that involved in the instant case.

Point II of Public Counsel's Brief fails to demonstrate any requirements under Section 366.06, Fla. Stat., that a hearing be conducted as a prerequisite to the Commission's approval or renewal of a tariff provision such as the Supplemental Service Rider. Even if such a requirement existed, Public Counsel was afforded opportunities and has participated in the three semi-annual fuel adjustment hearings conducted in

Docket No. 900001-EI which preceded changes in Tampa Electric's "additional billing charges" tariff sheet. This tariff sheet effected the fuel adjustment modification about which Public Counsel complains in this appeal. Public Counsel was afforded a clear point of entry in those fuel adjustment proceedings and, in fact, entered those proceedings as an active participant. Public Counsel should not now be heard to contend that any other hearing was required. Due process did not require a hearing to be conducted in advance of Commission renewal of Tampa Electric's Supplemental Service Rider for an additional one-year period.

POINT III

FUNDAMENTAL DUE PROCESS DOES NOT REQUIRE HEARINGS FOR LIMITED TARIFF FILINGS.

In Point III of his Brief, Public Counsel raises an argument not presented in his first appeal of the initial approval of Tampa Electric's Supplemental Service Rider. This is despite the fact that the Commission used the same procedure for tariff approval in both instances.

In Point III Public Counsel recites broad tenets of procedural due process which, in the general sense, no one can deny. However, he goes on to claim that the Commission was constitutionally obligated to conduct a hearing prior to approving the renewal of Tampa Electric's Supplemental Service Rider for one year. This is erroneous.

Public Counsel has received abundant notice and opportunities to participate in connection with the approval, implementation and extension of Tampa Electric's Supplemental Service Rider. When the rider came up for renewal, Public Counsel was already before this Court challenging the initial approval of that rider. Moreover, as we have pointed out, Public

Counsel fully participated in the fuel adjustment hearings which preceded any change in the fuel adjustment charges relating to the Supplemental Service Rider. Public Counsel did, in fact, raise as an issue the appropriateness of the rider. He presented no evidence in Docket No. 900001-EI, although nothing would have precluded Public Counsel from so doing.

Finally, Public Counsel at any time could have attacked the Supplemental Service Rider by means of a complaint (as was done in the case of Florida Interconnect). Instead, Public Counsel refused one opportunity for a complaint hearing offered by the Commission in its Order No. 22093 issued October 25, 1989. It is becoming increasingly apparent that Public Counsel does not really want a hearing on the merits of the Supplemental Service Rider. Instead, Public Counsel's goal appears to be to avoid hearing opportunities in order to claim that they had been improperly withheld.

Public Counsel's recently developed due process argument is without merit and should be denied.

CONCLUSION

The Commission's approval of a one-year extension to Tampa Electric's Supplemental Service Rider tariff was appropriate, was in the best interests of Tampa Electric's Customers and should be affirmed by this Court. Public Counsel has had numerous opportunities to provide input and has actively participated in hearings conducted in Docket No. 900001-EI with such hearings preceding all changes in fuel adjustment charges to those Customers Public Counsel purports to represent.

Tampa Electric urges that the Court affirm Order No. 22467 in all respects.

DATED this 29th day of May, 1990.

Respectfully submitted,

LEE L. WILLIS
JAMES D. BEASLEY
Ausley, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, Florida 32302
(904) 224-9115

Attorneys for Tampa Electric Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail on this 29th day of May, 1990 to the following:

Ms. Susan F. Clark*
Ms. Martha Carter Brown
Division of Legal Services
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

Mr. Jack Shreve
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Ms. Vicki Gordon Kaufman
Lawson, McWhirter, Grandoff
and Reeves
522 East Park Avenue, Suite 200
Tallahassee, FL 32301

Mr. John W. McWhirter, Jr.
Lawson, McWhirter, Grandoff
and Reeves
201 East Kennedy Blvd., Suite 800
Tampa, FL 33601

ATTORNEY

*By hand delivery