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
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 891303-EI
PETITION OF TAMPA ELECTRIC COMPANY

INITIAL BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

On November 16, 1989, Tampa Electric Company (TECO) petitioned the Florida Public Service Commission (PSC) to approve a one-year extension of a supplemental service rider tariff for interruptible customers. [A-1][1] The original service rider had been approved for calendar year 1989. TECO wanted to offer a similar tariff during 1990. The PSC considered the petition at the January 2, 1990, agenda conference, voting to approve it as filed, with one modification. [A-18] The decision was reported in Order No. 22467, dated January 24, 1990. [A-19]

The validity of the PSC's approval of the 1989 service rider is now before the Court in Citizens of the State of Florida v. Michael McK. Wilson, etc., et al., Case No. 75,074. Briefs have been filed, and oral argument is scheduled for June 8, 1990. The decision in that case may be dispositive of this appeal.

TECO had requested approval for the 1989 service rider in a petition filed November 17, 1988. [A-23] The service rider gave a credit on electric bills to large industrial customers taking service pursuant to interruptible rate schedules. The discount was equal to the difference between marginal and average fuel costs for electricity usage above a threshold derived from historic consumption. The PSC voted on December 20, 1988, to deny TECO's

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[1]Portions of the record included in the appendix to this brief are referred to by the appendix page number. Other portions of the record are referenced by the letter "R" with a page designation.

petition but announced that a similar tariff providing for a sharing of fuel savings would be approved. [A-31]

The PSC authorized its staff to "administratively approve" a tariff giving the interruptible customer 80% of any fuel savings, with the other 20% going to the general body of ratepayers. Sometime shortly after the agenda conference, TECO filed a tariff which the PSC's staff approved without review by the Commissioners. [A-32]

TECO used the service rider credits to reduce the fuel revenues reported in the fuel cost recovery docket. The tariff did not provide for this explicitly, but TECO had stated in its petition that the credits would be used "to downwardly adjust fuel revenues reported in the fuel adjustment filing." [A-25] This had the effect of increasing fuel cost recovery charges to all customers to reimburse TECO for credits given to interruptible customers.

The denial of TECO's petition was recorded in Order No. 20581, dated January 10, 1989. [A-34] The order did not mention the PSC staff's authorization to approve a tariff or TECO's implementation of a revised service rider pursuant to staff's action.

The Public Counsel provides legal representation for the people of the State in proceedings before the PSC pursuant to Section 350.0611, Florida Statutes (1989). The Public Counsel is authorized to appear, in the name of the State or its Citizens, in any proceeding or action before the PSC and urge therein any position he deems to be in the public interest, whether consistent

or inconsistent with positions previously adopted by the Commission. § 350.0611(1), Fla. Stat. (1989). Generally, the Public Counsel appears on behalf of a utility's residential consumers.

On May 5, 1989, the Citizens of the State of Florida, through the Office of Public Counsel, filed a "Protest and Request for Hearing on Tampa Electric Company's Supplemental Service Rider Tariff for Interruptible Customers" in which they alleged, among other things, that TECO's tariff did not conform to Order No. 20581, and it had not been approved as final agency action pursuant to the Administrative Procedure Act, Chapter 120, Florida Statutes (1987). [A-38] The Protest and Request for Hearing stated explicitly that it was not a complaint against a valid tariff. [A-46]

The PSC, on October 25, 1989, issued Order No. 22093 treating the Protest and Request for Hearing as a complaint challenging only the prospective application of the tariff. [A-49] On November 22, 1989, the Citizens of the State of Florida, through the Office of Public Counsel, filed their Notice of Administrative Appeal. One of the issues in that appeal is whether the PSC failed to provide a clear point of entry to challenge the 1989 service rider. Another issue is whether TECO's tariff actually complied with Order No. 20581.

TECO's petition for a one-year extension through 1990 modified some terms of the 1989 tariff. Instead of applying a zero credit when marginal fuel costs exceeded the average, the tariff proposed

for 1990 required the interruptible customer to pay 100% of the difference. [A-10] On the subject of recovery in the fuel docket, TECO said "[t]he discounts earned by participating Customers will continue to be used to downwardly adjust fuel revenues reported in the fuel adjustment filing." [A-3]

The PSC considered the 1990 service rider at the January 2, 1990, agenda conference. The agenda conference was not noticed or held as a hearing under the APA, although interested persons were permitted to address the Commission. Attorneys representing the Office of Public Counsel, TECO and the Florida Industrial Power Users Group (an ad hoc association of large industrial customers) participated in the agenda conference discussion, along with three PSC staff members. Mr. Howe, for the Office of Public Counsel, acknowledged that the 1990 tariff corrected one of that office's concerns with the 1989 version by having the credit apply when marginal cost exceeded average cost. [A-56] He asserted, however, that TECO's ratepayers were still harmed because they would continue to pay the same base rates but would now pay increased fuel adjustment charges to reimburse TECO for credits given to interruptible customers. [A-57, 70]

The pending Supreme Court appeal was also discussed. Since the appeal was addressed principally to PSC procedures, it was acknowledged that another appeal would be necessary to attack the application of similar procedures to PSC consideration of the 1990 tariff. [A-68-70]

TECO had addressed the pending appeal in a December 19, 1989, pleading entitled "Supplement to Petition of Tampa Electric Company for a One-Year Extension of its Supplemental Service Rider for Interruptible Service." [A-16] TECO agreed to have its petition treated through the proposed-agency-action process, which would afford affected persons an opportunity for hearing, and to refund, with interest, any amounts the PSC ultimately decided were unjustified. [A-17]

The PSC did not accept TECO's offer and, as it had done with the 1989 service rider, the PSC approved the one-year extension without offering a point of entry into the tariff-approval process. TECO's petition was approved as final agency action, with the modification that the interruptible customer only be charged with 80% of increased costs when marginal fuel costs exceeded average fuel costs. [A-18] The decision was recorded in Order No. 22467, dated January 24, 1990. [A-19] The Citizens of the State of Florida, through the Office of Public Counsel, filed their Notice of Administrative Appeal on February 23, 1990. [R-83]

SUMMARY OF ARGUMENT

Once again, the PSC has refused to provide the Public Counsel or other adversely affected persons with the clear point of entry mandated by the Administrative Procedure Act, Chapter 120, Florida Statutes (1989). The PSC has also failed to comply with the notice and hearing requirements of Section 366.06(2), Florida Statutes (1989). The PSC's approval of Tampa Electric Company's petition

to extend its supplemental service rider through the year 1990 is invalid and ineffective until the PSC provides appropriate notice and opportunity for hearing and renders an order based on a record compiled pursuant to Section 120.57, Florida Statutes (1989).

ARGUMENT

I.

THE PSC'S APPROVAL OF TECO'S SUPPLEMENTAL SERVICE RIDER TARIFF WAS SUBJECT TO THE ADMINISTRATIVE PROCEDURE ACT, CHAPTER 120, FLORIDA STATUTES (1989).

A. TECO'S FIRM CUSTOMERS WERE HARMED BY PSC APPROVAL OF TECO'S PETITION FOR A ONE-YEAR EXTENSION OF THE SUPPLEMENTAL SERVICE RIDER TARIFF.

Order No. 22467 did two things: 1) it authorized TECO to reduce charges to its large industrial customers; and 2) it allowed TECO to increase fuel cost recovery charges to recoup credits given pursuant to the service rider. Approval of the service rider reduced rates for interruptibles and increased rates for firm customers.

TECO's authority to increase fuel cost recovery charges is not explicit in Order No. 22467. The order merely notes that "[t]he company proposes continuing to adjust fuel revenues downward reflecting the discounts earned by customers served under the SSI [supplemental service-interruptible] rider." Order No. 22467, at 2. [A-20] TECO and the PSC, however, view approval of the tariff as authority to also recover the credits.

Electric utility fuel cost recovery factors are established every six months. The PSC sets the factors based on the utilities'

projections of fuel expenses for generation. The projections are compared with actual experience in subsequent proceedings. Any over- or underrecoveries are incorporated in succeeding projection periods to be returned or recouped with associated carrying costs (i.e., interest). Reducing reported revenues because of the service rider credits creates a revenue shortfall and increases the fuel cost recovery charge accordingly. TECO's firm customers are, therefore, paying higher rates for electric service because of Order No. 22467.

Order No. 22467 tries to portray the service rider as a benefit to TECO's customers, stating, at 2 [A-20]:

> While the bulk of the credit earned by increased KWH [kilowatt-hour] 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 rate 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.

It would appear TECO's customers received almost $2 million, computed as the difference between increased base revenues and credits paid to interruptible customers. In fact, TECO received all of the base revenue increase and its customers reimbursed the utility for the credits. In other words, TECO benefited to the tune of $3.3 million. Its customers, however, paid the same base rates as always and an additional $1.2 million to offset the service rider credits. Order No. 22467 harmed TECO's customers, and it is invalid under the APA.

The APA requires notice and an opportunity for hearing. The APA requires an evidentiary basis for findings of fact. The APA requires an agency to defend and explicate its interpretation of governing statutes and the applicability of nonrule policy. The Court must remand for appropriate proceedings because Order No. 22467 was entered in derogation of the due process safeguards incorporated into the APA. § 120.68(8)-(13), Fla. Stat. (1989).

B. THE PSC'S PROCEDURES FOR APPROVING ELECTRIC UTILITY TARIFFS ON A PERMANENT BASIS ARE NOT EXEMPT FROM THE APA.

Order No. 22467 is invalid unless consideration of TECO's petition was exempt from the APA. Any exemptions must be explicit within the APA or found elsewhere in statutes. § 120.72, Fla. Stat. (1989);[2] Roberson v. Florida Parole & Probation Commission, 444 So.2d 917, 919 (Fla. 1983) ("The APA was intended to apply to all agencies unless specifically exempted under the Act. Graham Contracting, Inc. v. Department of General Services, 363 So.2d 810 (Fla. 1st DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1979)."). There is no general exception for utility tariffs. A limited

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[2]Section 120.72(1)(a) reads: "The intent of the Legislature in enacting this complete revision of chapter 120 is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state. To that end, it 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, licensing procedure, 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." See City of Plant City v. Mayo, 337 So.2d 966, 969 (Fla. 1976).

exemption applies to temporary, interim rates, collected before the APA process is concluded, but none exists for permanent rate changes.

Electric utility tariffs are filed pursuant to Section 366.06, Florida Statutes (1989). File-and-suspend procedures appear in Subsection 366.06(4). That subsection was enacted as Chapter 74-195, Laws of Florida. A limited exemption from the APA for Chapter 74-195 is found in Section 120.72(3), which reads:

> 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.

Since there are no other statutory exemptions, any conclusion that the tariff-approval process is outside the APA must be grounded on this provision. Note, however, that it only entitles public utilities to proceed under the interim rate provisions of Chapter 364, Florida Statutes, (which governs PSC regulation of telephone companies) or Chapter 74-195, Laws of Florida.

Interim rates are those rates authorized to be collected pending the outcome of a full rate case subject to hearings under the APA. Order No. 22467 did not establish interim rates for TECO; it is a final order setting permanent rates for 1990.[3] There is no

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[3]Although TECO's service rider will only be in effect for one year pursuant to Order No. 22467, the rates will be temporary and not "interim." Interim rates have been uniformly recognized to be those a utility is allowed to charge until the hearing process is concluded. See § 366.071(1), Fla. Stat. (1989)("The commission may, during any proceeding for a change of rates, upon its own motion, or upon petition from any party, or by a tariff filing of

(continued...)

statutory provision exempting the PSC from the APA for permanent rate changes under file-and-suspend or any other statute.

C. THE PSC FAILED TO PROVIDE A CLEAR POINT OF ENTRY FOR SUBSTANTIALLY AFFECTED PERSONS TO PARTICIPATE IN ITS CONSIDERATION OF TECO'S SUPPLEMENTAL SERVICE RIDER TARIFF.

The PSC voted to take final agency action at the January 2, 1990, agenda conference. The agenda conference was not noticed or held as a hearing, though, and the PSC was not voting based on a record compiled at an earlier hearing. In Florida Interconnect Telephone Co. v. Florida Public Service Commission, 342 So.2d 811, 814 (Fla. 1976), this Court observed, in dicta, that the agenda conference was no substitute for a hearing under the APA:

> [T]he agenda conference could not have been the occasion for taking 'final agency action' because it was preceded by inadequate notice. . . . Adequacy of notice is not a factor in reaching our decision in this case because the action taken at the hearing [sic: agenda conference] (i.e., intermediate consideration of the new rates) would have occurred had the hearing not been held. Nevertheless, we do not find the [Florida Administrative Weekly notice] to constitute adequate notice within the contemplation of Section 120.57(1)(b)2.b., Florida Statutes (1975).

The notice for the PSC's January 2, 1990, consideration of TECO's petition was virtually identical to the notice discussed in Florida Interconnect. The purpose of the agenda conference was "to consider those matters ready for decision." 15 Fla. Admin. Weekly 5891-92 (Dec. 15, 1989) [A-87]. TECO's petition, however, was not ready for a final decision. The PSC has not offered any further

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[3](...continued) a public utility, authorize the collection of interim rates until the effective date of the final order. . . .").

proceedings to challenge approval of TECO's service rider for 1990, even though the January 2, 1990, agenda conference could not have been the occasion for final agency action. See General Development Utilities, Inc. v. Hawkins, 357 So.2d 408, 409 (Fla. 1978) ("The arbitrary selection of this [equity/debt] ratio as a 'fact' comes from outside the record of the proceeding and plainly violates the notions of agency due process which are embodied in the administrative procedure act.").

The Commission's rules recognize the applicability of the APA. Rule 25-22.036, Florida Administrative Code, applies to all Section 120.57 hearings. [A-84] Rule 25-22.036(4)(a) states that a petition is the appropriate pleading for an electric utility seeking authority to change its rates or service. [A-84] Accordingly, TECO sought permission to offer a supplemental service rider in 1990 by filing a petition to that effect. Rule 25-22.036(9)(a) provides that the Commission will dispose of a petition in one of four ways, each consistent with the APA [A-85]:

1. The Commission will deny the petition if it does not adequately state a substantial interest in the Commission determination or if it is untimely;
2. The Commission will issue a notice of proposed agency action where a rule or statute does not mandate a hearing as a matter of course, and after the time for responsive pleadings has passed;
3. The Commission will set the matter for hearing before the Commission, or member thereof, or request that a hearing

officer from the Division of Administrative Hearings be assigned to conduct the hearing. The assignment of a matter for hearing shall be pursuant to Rule 25-22.0355; or

4. The Commission will dispose of the matter as provided in section 120.57(2).

Therefore, pursuant to Section 120.57 and its own rules, the PSC cannot allow a tariff affecting the substantial interests of TECO's firm customers to go into effect on a permanent basis without providing a clear point of entry into the decisionmaking process. See International Minerals & Chemical Corp. v. Mayo, 336 So.2d 548, 552-53 (Fla. 1976) ("Both by statute [Section 120.57(1)(b)8, Florida Statutes (1975)] and its own rules [Rule 25-2.116(5), Florida Administrative Code (1975)] the PSC is required to make findings of fact in rate proceedings. [Citations omitted.]"); Central Truck Lines, Inc. v. King, 146 So.2d 370, 372-73 (Fla. 1962).[4] Section 120.68(12)(b), Florida Statutes (1989), states that the Court must remand to the agency if it finds an exercise of discretion to be inconsistent with an agency rule.

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[4]The Court's opinion reads, in pertinent part: "The Commission not only neglected to follow the mandate of Section 323.03 F.S.A. and Chapter 120, Administrative Procedure Act, Section 120.25(8) F.S.A., but also ignored its own Rule 2.620 Formal Orders [requiring findings of fact to support final decisions]. . . . [T]he Commission has heretofore almost uniformly met the requirements of statutory law and its own rule in making and entering its orders. We cannot understand why the Commission failed in this case to meet said requirements. The fact remains, however, that the Commission neglected to comply with them. . . . It is assuredly obvious that we have no alternative. This Court must reverse the Commission's Order No. 5320 . . . ."

The Commission had been engaged in a free-form proceeding until it voted to approve TECO's petition. At that time, it decided on a course of conduct that had obvious, adverse consequences for firm customers. It had to invite participation from them. See § 120.59(4), Fla. Stat. (1989)[5]; U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698, 699 (Fla. 1988) ("Section 120.57(1), Florida Statutes (1985), requires an agency to provide a party whose 'substantial interests' are affected by the agency's actions with an opportunity to request a hearing."); City of St. Cloud v. Department of Environmental Regulation, 490 So.2d 1356, 1358 (Fla. 5th DCA 1986) ("Notice of agency action which does not inform the affected party of his right to request a hearing, and the time limits for doing so, is inadequate to provide a clear point of entry to the administrative process."); FFEC-SIX, Inc. v. Florida Public Service Commission, 425 So.2d 152, 153 (Fla. 1st DCA 1983) ("The Commission order did not . . . articulate appellant's right to request a § 120.57, Florida Statutes, hearing, or the applicable time limit for such a request, or the applicable procedural rules. The Commission has thereby failed to provide appellant with a clear point of entry into the administrative process, thus rendering the Commission action

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

invalid." [Emphasis by the court]); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981) ("The petition for a formal 120.57(1) hearing, as in this case, commences a de novo proceeding."); Capeletti Brothers, Inc. v. Department of Transportation, 362 So.2d 346, 348 (Fla. 1st DCA 1978) ("[A]n adverse determination of a party's substantial interests is ineffective until an order has properly been entered pursuant to Section 120.59, after proceedings under Section 120.57.")

D. THE PSC ADOPTED INCIPIENT NONRULE POLICY WITHOUT RECORD SUPPORT CONTRARY TO THE DICTATES OF THE APA.

TECO's petition asked for a change in industry-wide policy, not codified in rules, that required all electric utility customers to pay equal fuel cost recovery charges. The Commission has, pursuant to its Order No. 22467, instituted a policy change without a hearing and without any explication of the statutory interpretation or incipient policy that would support its action.

The pivotal case on the issue of nonrule policy is McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977), which this Court has cited with approval in deciding appeals of PSC decisions. See e.g., Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission, 443 So.2d 92, 96-97 (Fla. 1983); Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla. 1980) ("[W]hen an agency elects to adopt incipient policy in a non-rule

proceeding, there must be an adequate support for its decision in the record of the proceeding. McDonald at 583-84.").

McDonald and its progeny have recognized that, as an incentive for agency rulemaking, agencies must explicate and defend their nonrule policy each time it is placed at issue. The APA requires an agency to "fully and skillfully expound its non-rule policies by conventional proof methods and, in appropriate cases, subjects policymakers to the sobering realization their policies lack convincing wisdom." McDonald, 346 So.2d at 569. This process has been held to be applicable to the PSC for each company to which it intends to apply its policy. In Florida Public Service Commission v. Indiantown Telephone System, Inc., 435 So.2d 892, 896 (Fla. 1st DCA 1983), the First District Court of Appeal held as follows:

> We hold that the PSC may proceed to develop the policy involved in the instant case through adjudication on a case-by-case basis. If the PSC continues to proceed only through adjudication, it will have to "'explicate and defend policy repeatedly in Section 120.57 proceedings.'" Anheuser-Busch [,Inc. v. Department of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA 1981)] at 1182, for each company to which it intends to attempt to apply that policy.

The PSC's decision on TECO's petition, however, would allow the PSC, alone among agencies subject to the APA, to sidestep this line of cases and effectuate changes in industry-wide policy without being subjected to the sobering realization that its ideas lack convincing wisdom.

Hearings under the APA are intended to formulate agency action based on a record. The process is structured to allow parties an opportunity to present evidence and argument on all

issues involved, to conduct cross-examination and submit rebuttal evidence and to be represented by counsel. § 120.57(1)(b)4, Fla. Stat. (1989). There is an assigned burden of proof that must be met by the party seeking affirmative relief. Florida Power Corp. v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982) ("'Burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates.' WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION, 638 (Revised Edition 1968)."). The PSC is required to evaluate evidence and render its decisions within this framework.

TECO is the party seeking affirmative relief. It wants to revise rates for its large industrial customers and become the only electric utility that requires its general body of ratepayers to reimburse it for discounts given to a specific customer class. Only after TECO has proven on the record of a proceeding conducted pursuant to the APA that its proposal complies with statutes and policy and is not discriminatory, and the PSC issues an order to that effect, will it become the "established" rate recovery mechanism. Only then will others seeking to revise TECO's rates have to prove they should be changed.

The change in TECO's method of accounting for fuel revenues was adverse to firm customers, and it is "ineffective until an order has properly been entered pursuant to Section 120.59, after proceedings under Section 120.57." See Capeletti, supra, 362 So.2d at 348. Moreover, the PSC cannot use subsequent proceedings to review the efficacy of allowing TECO to collect fuel adjustment

charges under the service rider. The purpose of Section 120.57 proceedings is to formulate agency action, not to review earlier, tentative decisions. McDonald, supra, 346 So.2d at 584.

E. THE APA SPECIFIES WHEN A HEARING MUST BE HELD AS WELL AS THE MANNER IN WHICH A HEARING MUST BE CONDUCTED.

The PSC (and other Appellees) will, in all likelihood, argue that there are other provisions of statute that permit the PSC to set electric utility rates without hearing and without reference to the APA. The implication will be that the PSC need not offer a proceeding under the APA unless it chooses to do so. The Florida APA, however, specifies when a hearing must be held as well as the manner in which it must be conducted. See L. Levinson, The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments, 29 U. Miami L. Rev. 617, 658 (1975) ("[T]he new Florida Act creates the right to a hearing in situations defined in the Act itself."); P. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U.L. Rev. 965, 1076-78 (1986) ("The Florida statute does not require reference to other law. A person is entitled to an adjudicatory proceeding, either formal or informal,'in all proceedings in which the substantial interests of a party are determined by an agency.' [Footnote omitted.] . . . As a result, even if there is no other law requiring a hearing, one must be granted if the access criteria are satisfied."); Reporters Comments on Proposed Administrative Procedure Act for the State of Florida (March 9, 1974), reprinted in, 3 A. England & L. Levinson, Florida Administrative Practice

Manual, app. C at 18 (1979) ("The requirements of a trial-type hearing are established in terms of what is involved, by reference to disputed facts, legal issues or policy, whether or not another statute establishes a hearing requirement."). Thus, the APA would require the PSC to offer a clear point of entry into its consideration of TECO's petition independently of any other statute.

II.

IF THE APA WERE NOT CONTROLLING, THE PSC WOULD STILL BE REQUIRED TO HOLD A HEARING PURSUANT TO SECTION 366.06, FLORIDA STATUTES.

Even if the APA could be ignored, the PSC would be forced to provide notice and a hearing pursuant to Section 366.06, Florida Statutes (1989). The first sentence of Subsection 366.06(1) precludes a utility from changing any rate schedule or charging a rate not on file with the PSC. The second sentence requires that all applications for a change in rates be made to the PSC in writing. Subsection 366.06(2) provides that the PSC "shall order and hold a public hearing" whenever 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."[6] The file-and-suspend law

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[6]The mandatory hearing language of Section 366.06(2) would apparently preclude the PSC from proceeding on a tentative basis subject to protest and request for hearing because Rule 25-22.036(9)(a)2, Florida Administrative Code, only permits a proposed agency action to issue "where a rule or statute does not mandate a hearing as a matter of course." [A-84] See discussion, supra, pages 11-12.

in Subsection 366.06(4) gives the PSC certain latitude to craft expedited rate relief, but only "[p]ending a final order" after the hearing required by Subsection 366.06(2). These provisions demonstrate that, even apart from the APA, the PSC must hold a hearing before changing electric rates.

Case law holds that, even when rates are initially set under file-and-suspend without a hearing, a full hearing conforming to Section 366.06 and the APA must follow. <u>See</u> <u>Citizens v. Mayo</u>, 316 So.2d 262, 264 (Fla.1975) ("An interim rate increase is a part of the main proceeding and is authorized <u>only</u> 'pending a final order by the commission.' The statute must be read as a whole." [Emphasis by the court; footnote omitted]). Enactment of file-and-suspend did not decrease the level of due process to be afforded affected persons. <u>Florida Gas Co. v. Hawkins</u>; 372 So.2d 1118, 1121 (Fla. 1979) ("[T]he public policy of this state favor[s] traditional due process rights in utility hearings."); <u>Florida Power Corp. v. Hawkins</u>, 367 So.2d 1011, 1013 (Fla. 1979) ("It is clear the [file-and-suspend] statute was designed to provide accelerated rate relief without sacrificing the protection inherent in the overall regulatory scheme."). Even when the Commission fails to suspend proposed rates, they are in effect only pending the outcome of proceedings culminating in a final order. <u>Florida Interconnect</u>, <u>supra</u>, 342 So.2d at 814 ("This procedure [file-and-suspend] survives the adoption of the new Administrative Procedure Act. See Section 120.72(3), Florida Statutes (1975). . . . Thus, the commission was without authority to suspend [Southern Bell's]

new rate tariffs had it chosen to do so, and consequently Interconnect is in no position to complain about the new schedule's having gone into effect on at least an interim basis." [Emphasis added]).

III.

FUNDAMENTAL CONCEPTS OF DUE PROCESS WOULD REQUIRE AN EVIDENTIARY RECORD FOR PSC ACTION EVEN IF THE APA AND SECTION 366.06 DID NOT REQUIRE NOTICE AND HEARING.

The file-and-suspend statute must be read, as must all provisions of Chapter 366, Florida Statutes (1989), in the light of Section 366.01. That declaration of legislative intent defines utility regulation to be in the public interest as an exercise of the police power for the protection of the public welfare.[7] All provisions of Chapter 366 "shall be liberally construed for the accomplishment of that purpose." Approving rate changes without affording due process cannot be read consistently with that declaration. As the Court said in Florida Gas, supra, 372 So.2d at 1120 (quoting with approval from Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So.2d 601, 607 (Fla. 1959):

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[7] Cf. Otter Tail Power Co. v. Federal Power Com'n, 429 F.2d 232, 87 P.U.R. 3d 113 (8th Cir. 1970) (stating that, since the public has a stake in the outcome in utility rate proceedings, due process requires a balancing of the public interest with the company's interest), cert. denied, 401 U.S. 947 (1971); Boyd v. Southeastern Telephone Co., 105 So.2d 889, 893 (Fla. 1st DCA 1958) (stating that utility consumers have an interest in a telephone company's request to increase its rates that is protected by the notice and hearing requirements of due process), appeal dismissed per curiam, 114 So.2d 1 (Fla. 1959).

> '[W]e have held that where a rate, rule or regulation is made without statutory authority or without giving the carrier affected by it, reasonable opportunity to be heard, or without obtaining or considering any substantial evidence, where investigation, inquiry and evidence are necessary as a basis for the action taken, the proceeding is not had in due course of law and this court will not enforce it. State ex rel. Railroad Com'rs v. Florida East Coast R. Co., 1912, 64 Fla. 112, 59 So. 385, 393.'

Even without the mandatory hearing language of the APA or of Section 366.06(2), Florida Statutes (1989), the necessity for investigation and evidence would mean the PSC's approval of TECO's supplemental service rider was not had in due course of law.

Nearly a century ago, the United States Supreme Court applied essential constitutional principles to legislative regulation of utilities operated in the public interest. Smyth v. Ames, 169 U.S. 466 (1897). A private enterprise regulated by the Legislature in the public interest is entitled to just compensation for its services. The rates charged must also be reasonable to the public. The legislature's "duty is to take into consideration the interests both of the public and of the owner of the property." Id. at 546.

Fifty years later, the Court stated that "the rudimentary requirements of fair play . . .[a] 'fair and open hearing' [were] essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness" of administrative regulation. Morgan v. United States, 304 U.S. 1, 15, 58 S.Ct. 773, 82 L.Ed. 1129 (1938). The fundamental requirement of fairness inherent in due process mandates a full hearing in quasi-judicial administrative

proceedings. Id. at 19. The Court stated that a fair and open hearing

> embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party [in this case the Bureau of Animal Industry] and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. Id. at 18-19.

"These principles are still very much alive." Hill v. Federal Power Commission, 335 F.2d 355, 363, 55 PUR3d 136, 144 (5th Cir. 1964) (quoting Morgan, supra, and finding that the FPC must give notice of the standards it will apply to rate increase requests and afford a utility a full and fair opportunity to meet them before making its decision). The Court enumerated the minimum requirements of due process as notice, an opportunity to be heard and present evidence, the right to cross-examine adverse witnesses, the right to an impartial decisionmaker, and a record stating the reasons supporting the decision. Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (finding that due process protections apply to parole revocation proceedings).

Even if this Court were to set aside the statutory due process safeguards mandated by the APA under the guise of statutory exemption, the Court would still be faced with the same due process requirements because these are based on fundamental constitutional principles.

The PSC is required to balance the competing interests of the public in reasonable rates and the utility in earning a fair return on its investment. It must do so in accordance with the principles of fair play, which require a full and open hearing, an evidentiary record, an impartial decisionmaker and a record.

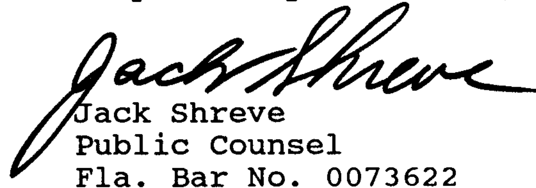
In 1974, the Florida Legislature, in the same enactment that created file-and-suspend procedures, Chapter 74-195, Laws of Florida, assigned the Office of Public Counsel the statutory duty to represent the public interest. §§ 350.0611-.0614, Fla. Stat. (1989). The PSC cannot impartially balance the utility's property rights against the interest of the public without permitting the public advocate to inform the Commission of the consumers' position. On behalf of a party in interest, TECO's firm customers, the Public Counsel respectfully suggests that the Commission cannot avoid the dictates of constitutional due process by foreclosing the public from full participation in rate proceedings before a final order is entered.

CONCLUSION

TECO's firm customers were adversely affected by the supplemental service rider approved in Order No. 22467 to be in effect during 1990. The tariff was the vehicle for increased fuel cost recovery charges to all TECO customers. Interruptible customers taking service pursuant to the service rider, however, receive credits that more than offset the increase in the fuel cost recovery factor. The PSC's failure to afford notice and an

opportunity for hearing contravened the Administrative Procedure Act, Chapter 120, Florida Statutes (1989); Section 366.06(2), Florida Statutes (1989); and fundamental precepts of due process. The Court should reverse and remand for appropriate proceedings pursuant to the provisions of Section 120.68(8) and (9), Florida Statutes (1989). The Court should include specific directions that service rider credits have never been authorized by a valid PSC order. TECO must, therefore, stop recouping credits through the fuel cost recovery docket and must refund, with interest, all amounts recovered so far pursuant to Order No. 22467.

Respectfully submitted,



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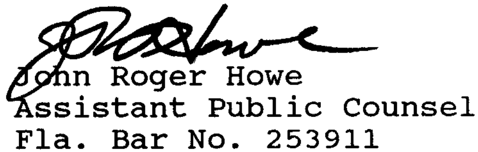

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CERTIFICATE OF SERVICE
Case No. 75,597

I HEREBY CERTIFY that a correct copy of the foregoing Initial Brief of Appellants, Citizens of the State of Florida, and Appendix have been furnished by U.S. Mail to the following parties on this 4th day of May, 1990.

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