IN THE SUPREME COURT QF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellant,

v.

CASE NO. 76,000
PSC DOCKET NO. 900002-EG

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

Appellees.

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF
APPELLEE, THE FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellee, Florida Public Service Commission, is referred to as the Commission. Appellee, Tampa Electric Company, is referred to as TECO. Appellee, Florida Industrial Power Users Group, is referred to as FIPUG. Appellant, Office of the Public Counsel, is referred to as OPC. Citations to the Appendix are referred to by appendix page number (A-). Citations to the Appendix of OPC's Initial Brief are referred to by appendix page number (OPC A-). Citations to documents in the Record on Appeal are designated (R-). References to exhibits are designated "Ex." and references to the hearing transcript are designated by page number (T-).

STATEMENT OF THE CASE

This is yet another OPC appeal in a long line of OPC appeals challenging Commission procedure. This case involves OPC's appeal of the Commission's final order, Order No. 22812, which approved TECO's request to exclude interruptible customers from the payment of the energy conservation cost recovery charge for the period April 1, 1990 through March 31, 1991.[1/] After considering the evidence presented at an evidentiary hearing held on February 21-23, 1990, the Commission concluded that the extension should be granted because interruptible customers receive no capacity deferral benefits or fuel cost savings due to TECO's conservation programs. Order No. 22812 at 5; (OPC A-5).

TECO's Petition for One-Year Extension of Modification to Conservation Cost Recovery Methodology was filed on December 21, 1989 in Docket No. 890002-EG. (R-23).[2/] The issue of the exclusion was raised in the conservation cost recovery docket[3/] first through TECO's petition as well as through TECO's Statement of Issues and Positions filed on January 5,

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1/ OPC has also appealed the Commission's order which approved the exclusion for the period April 1, 1989 through March 31, 1990. Case No. 74,471.

2/ The "0002" docket designation denotes the Commission's on-going conservation cost recovery docket. The first two numbers are changed annually to indicate the year. Thus, this docket number was subsequently changed to 900002-EG.

3/ The on-going conservation cost recovery docket is the docket in which the Commission assesses the conservation cost recovery charge. The charge is trued-up and adjusted every six months.

1990. (R-37). The issue of the exclusion was also raised in TECO's Prehearing Statement, (R-111), FIPUG's Prehearing Statement, (R-123), Staff's Prehearing Statement, (R-128), and the Prehearing Statement of OPC itself.[4/] TECO presented testimony on the exclusion issue at hearing and TECO's witness on this issue was cross-examined by OPC. OPC had the same opportunity as all parties to present testimony on the facts supporting TECO's requested extension. Order No. 22423; (R-84). In noting that TECO's request for the extension was properly raised in the conservation docket, the Commission held:

> The utility timely raised the extension issue in compliance with the Order on Prehearing Procedure issued in this docket, and has otherwise complied with applicable Commission rules. We find that the issue is properly and timely raised in this docket independently of the petition, such that Public Counsel was placed on notice of the issue and had the opportunity to respond to it.

Order No. 22812 at 4; (OPC A-4). OPC, as in many other cases, chose not to use that opportunity.

4/ OPC's Prehearing Statement is not listed in the Index to the Record on Appeal which according to the Stipulation of Record on Appeal is to include all documents related to TECO's conservation factor. (R-192). OPC's Prehearing Statement is included in FIPUG's Appendix. (A 1-7).

STATEMENT OF THE FACTS

Agrico Chemical Company, Farmland Industries, IMC Fertilizer, Inc., LaFarge Corporation, CF Industries, Florida Steel Corporation and Mobil Mining & Minerals are industrial users of electricity on TECO's interruptible rate schedules.[5/] The companies refer to themselves in this proceeding as the Florida Industrial Power Users Group ("FIPUG").

The Commission is vested by the legislature with the responsibility of approving energy conservation programs.[6/] The Commission also determines the methodology for funding those programs. Between 1981 and 1988, TECO's conservation programs were funded by a uniform energy charge imposed on all customers. In 1989 the Commission suspended that charge for a one-year period as it applied to TECO's interruptible electric customers because they received no benefits from the programs during that time.

In this case, the Commission approved an extension of the 1989 action for one additional year. The Commission's approval of the extension was based on the record testimony *of*

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

6/ Section 366.81, Florida Statutes (1989).

Mr. Gerard J. Kordecki in a duly noticed public hearing addressing the relevant issues.

Conservation programs typically generate two benefits to ratepayers: capacity deferral benefits and fuel savings. Mr. Kordecki's testimony demonstrated that TECO's conservation and load management programs provide no capacity benefits or any fuel savings to interruptible customers during the period of the extension. Therefore, such customers should not be forced to fund TECO's conservation programs.

Mr. Kordecki testified that TECO does not build capacity to meet the needs of its interruptible customers. These customers' service can be interrupted during peak periods when the energy is required to meet the demands of firm customers. Because no capacity is built to serve these customers, they receive no capacity deferral benefit from conservation programs. (T-129, 139). Interruptible customers are actually disadvantaged when new construction is postponed because the postponement increases the likelihood that their service will be interrupted to meet the increasing demand of firm customers.

As *to* fuel savings, in periods when the marginal cost of TECO's fuel is <u>greater</u> than the average cost of fuel, interruptible customers receive a small benefit when conservation programs cause customers to consume less electricity because less of the more expensive fuel is used. Mr. Kordecki testified that for 1990, TECO's marginal fuel cost will be <u>less</u> than TECO's average fuel cost. Additional

consumption will cause fuel costs to go down. Conservation programs causing lower consumption of fuel will use less fuel but keep its price higher. Therefore, interruptible customers receive no fuel savings benefits from conservation programs. (T-129, 139-40; Ex. 27).

Historically, interruptible customers have contributed to conservation programs benefiting firm customers in an amount of about $2 million a year because the Commission determined in 1981, at the request of TECO, to pay for TECO's conservation programs by imposing a surcharge on each kilowatt hour of electricity consumed on the theory that all customers receive some benefit from such programs. The Commission concluded after hearing the evidence in the public hearing in this case that TECO's interruptible customers receive no direct benefit from any conservation program offered by TECO during 1990 and the early part of 1991; and that they receive no benefit from reduction in energy consumption. Order No. 22812 at 5; (OPC A-5).

In recognition of the fact that interruptible customers receive no benefit from TECO conservation programs, Order No. 20825 (OPC A-9) relieved them from payment of this onerous charge for the period April 1, 1989 to March 31, 1990. The order appealed here extends that exclusion for one additional year based on competent substantial evidence demonstrating that interruptible customers will receive no benefits from TECO's conservation programs for the period April 1, 1990 through March 31, 1991.

SUMMARY OF ARGUMENT

In this case, OPC appeals another Commission order on various procedural grounds which have been before this Court before. OPC argues that the Commission committed error in extending TECO's exclusion of interruptible customers from payment of the energy conservation cost recovery charge for an additional year for a variety of reasons. None of the reasons have merit.

The order before the Court for review is based on competent substantial evidence of record. An evidentiary hearing was held in this docket, OPC was provided with the full gamut of due process rights, the Commission weighed the evidence and rendered a decision based on that evidence. There is no legal, factual or logical basis to overrule the Commission's decision.

OPC bases much of his argument on a different Commission order which is currently before this Court in a separate appeal. FIPUG suggests that such argument is inappropriate. The order before the Court now must rise or fall on the basis of the evidence that led to its rendition.

To the extent that the Court views the order which first approved the exclusion of interruptible customers from payment of the conservation cost recovery charge as relevant to this appeal, FIPUG suggests that OPC's procedural arguments can be appropriately resolved by reading section 120.57, Florida Statutes (1989), and section 366.06(4), Florida Statutes (1989), the file and suspend law, in pari materia. By

requiring notice to OPC of tariff filings and then requiring OPC to file a protest to such filings within a reasonable time frame, the Court can accomodate both the interests of ensuring that substantially affected persons receive a hearing and of avoiding any delay in implementation of legitimate tariffs due to regulatory lag. Thus, the interests promoted by both statutes can be accomodated.

Additionally, FIPUG contends that the prohibition in section 120.66, Florida Statutes (1989), against ex parte communciations has not been violated. All the communications about which OPC complains were made on the record with OPC present and able to respond.

Finally, it is FIPUG's position that Order No. 22812 should be affirmed. However, in the event that the Court finds error below, any decision should be applied prospectively only so as not to prejudice parties who relied on a presumptively valid Commission order.

ARGUMENT

I.

THE COMMISSION'S ORDER IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

This Court's review of Commission Order No. 22812 is governed by section 120.68(10), Florida Statutes (1989), which provides:

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

Order No. 22812 comes to this Court clothed with the presumption of validity, Citizens of Florida v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982), and this Court must sustain the Commission's action if it is supported by competent substantial evidence of record.

This Court defined competent substantial evidence in DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). Substantial and competent evidence is:

> [S]uch evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred . . . . [S]uch relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Citations omitted.

Further, the Court may not substitute its judgment for that of the Commission's as to the weight to be given to the evidence. See, i.e., Citizens of Florida v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983) ("Our task is not to reweigh the evidence . . . . We must merely determine whether competent, substantial evidence supports a Commission order.")

OPC recognizes and accepts the above standard of review and tells the Court that he "do[es] not ask that the Court reweigh the evidence heard by the PSC."[7] Having said this, on the same page of his brief, OPC asks this Court "to evaluate whether, given the scope of Mr. Kordecki's responses to direct and cross-examination questions, the Commission weighed the evidence at all or just selected statements that would support what the PSC intended to do all along." OPC is correct. He does not ask the Court to reweigh the evidence. He asks the Court to ignore the evidence and reverse the Commission based on what QPC perceives to be the Commission's underlying intent, a totally new concept of judicial review.

At the evidentiary hearing, TECQ presented the testimony of Mr. Gerard J. Kordecki. (T-125-141). Mr. Kordecki discussed the factual basis underlying TECO's tariff proposal complete with supporting exhibit. (Ex. 27). Mr. Kordecki was cross-examined at length by OPC. (T-141-168). OPC had the opportunity to present his own witnesses and documentary

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[7] OPC Initial Brief at 20.

evidence but declined to do so.

Within his testimony, Mr. Kordecki set out the facts supporting the Commission's decision that interruptible customers receive no benefits from TECO's conservation programs and therefore should not have to pay for them. Mr. Kordecki presented an exhibit documenting these facts. The Commission based its decision on the facts of record.

Now OPC is unhappy with the final order resulting from the Commission's evidentiary proceeding. He attempts to attack it on the basis of innuendo. The burden is on OPC to demonstrate that the Commission's order is invalid. Citizens of Florida v. Public Service Commission, 425 So.2d 534, 539 (Fla. 1982). OPC has failed to carry that burden. OPC's unfounded allegations regarding the Commission's reason for reaching its decision find no record support and are not grounds for reversal. The Commission evaluated the evidence and made its decision. The Commission's decision is supported by competent substantial evidence and should be affirmed.

II.

THE COMMISSION PROVIDED OPC WITH A FULL AND FAIR OPPORTUNITY TO PARTICIPATE IN THE DECISION-MAKIN6 PROCESS LEADING TO ORDER NO. 22812, CONSIDERED HIS POSITIONS, AND MADE AN APPROPRIATE DECISION.

A. The Appropriate Procedure Was Followed In This Docket.

The Commission allowed OPC to participate fully in every stage of the proceedings leading to its decision to grant TECO's request for the additional one-year exclusion. OPC had the opportunity to present direct testimony and evidence and rebuttal testimony and evidence. He did neither. OPC was given great latitude to make all his procedural and legal arguments before the Commission during the course of the proceeding. (T-9-23, 119-125, 238-268, 272-273). OPC had the ability to avail himself of every right afforded by the Administrative Procedure Act. The Commission considered OPC's arguments during its deliberations and entered its order. Having failed on numerous occasions to convince the Commission of his arguments, OPE has likewise failed to show adequate grounds for this Court to overrule the Commission's order.

In Section II of his Initial Brief, OPC makes a plethora of arguments attacking not only Order No. 22812, the subject of this appeal, but previous Commission orders. Although OPC's case citations are superficially impressive, his premise for each argument is faulty and therefore his arguments must fail.

OPC argues that Order No. 22812 is deficient because it

does not reference the Florida Energy Efficiency and Conservation Act ("FEECA"), certain orders and cases, and other items raised by OPC. (OPC Initial Brief at 28-30). OPC fails to identify any authority upon which to base his argument that in entering its written order, the Commission must refer to and refute each position and argument raised by the parties to the proceeding. Such a requirement would be tantamount to incorporating the hearing transcript in Commission orders. The Commission found it unnecessary to recite every one of OPC's positions and respond to every one of OPC's arguments, many of which the Commission had heard and rejected numerous times before,

Also based on faulty premises is OPC's argument that Order No. 22812 does not meet certain standards which he states require the Commission "to explicate and defend incipient policy." (OPC Initial Brief at 28). OPC fails to demonstrate that the current method used by utilities to pay for conservation programs rises to the level of Commission "non-rule policy." In addition, there are at least two other faulty premises underlying OPC's argument.

First, the linchpin of OPC's argument is that the decision in Order No. 22812 represents a major departure from Commission policy which previously imposed the conservation charge on a per kilowatt hour basis. However, the order which OPC challenges excludes only <u>TECO's interruptible customers</u> from payment of the conservation cost recovery charge <u>for one year</u>. The Commission's action is not an industry-wide policy

change. It does not change the manner in which other utilities collect the charge. Nor does it change the way TECO collects the charge on a permanent basis. Rather, the Commission's approval of the exclusion is utility-specific (it applies only to TECO) and is of limited duration (April 1, 1990 to March 31, 1991). Further, TECO's tariff is experimental. Tariffs of this type are expressly sanctioned by section 366.81, Florida Statutes (1989).

Second, OPC argues throughout his Initial Brief that Order No. 22812, extending TECO's conservation cost recovery methodology for one year, is based on some impetus created by the Commission's decision in Order No. 20825. This portion of OPC's argument explains why much of OPC's Initial Brief is a reiteration of his briefs in Case No. 74,471. Apparently, OPC believes that if he can establish some procedural error in the Commission's handling of the petition leading to Order No. 20825, such error would require this Court to overturn the instant order. This argument ignores the standard of review discussed in Section I of this brief.

This is an appeal of Order No. 22812. In that order, the Commission approved TECO's request to exclude interruptible customers from payment of the conservation cost recovery charge from April 1, 1990 to March 31, 1991 based on record evidence in this docket. This is not an appeal of Order No. 20825 in which the Commission granted a similar TECO request for the period from April 1, 1989 to March 31, 1990. While the subject of those two orders required the Commission to

review similar facts and come to similar conclusions, the orders are not dependent on each other. There is no evidence that the Commission ignored or failed to fulfill its statutorily imposed obligation to base its decision on the evidence in the record. OPC's "impetus" argument is simply an attempt to misdirect this Court away from the appropriate standard of review as well as an attempt to reargue his earlier appeal of Order No. 20825.

B. OPC's Procedural Dilemma Can Be Resolved.

Assuming arguendo that there is a basis for OPC's argument that Order No. 22812 was based merely on the impetus of the Commission's earlier decision, OPC's attack on the earlier order can be appropriately resolved. OPC's procedural concerns (raised again and again in his many appeals) [8/] have a certain facial merit and revolve around the question of the interplay between section 366.06(4), Florida Statutes (1989), the file and suspend law which allows a rate to take effect if not suspended by the Commission, and section 120.57, Florida Statutes (1989), which entitles persons to a hearing when their substantial interests are affected.

As to Order No. 20825 and Order No. 22812, no procedural defect occurred. OPC was provided with several hearing opportunities as to Order No. 20825. OPC was provided with a

[8/] OPC has raised the same or similar procedural arguments before this Court in, at least, the following cases: Case No. 74,471, Case No. 75,074, and Case No. 75,597.

hearing opportunity and participated in a hearing leading to the decision in Order No. 22812. Thus, the requirements of section 120.57, Florida Statutes (1989), have been satisfied in those cases.

However, the broader issues raised by OPC's appeals can readily be resolved by reference to previous decisions of this Court. The Court has addressed aspects of the statutory interplay between section 120.57, Florida Statutes (1989), and section 366.06(4), Florida Statutes (1989), on several occasions and has provided a foundation for resolving OPC's procedural concerns so that the two statutes can be read consistently with each other.[9/]

The Commission is an agency subject to the provisions of Chapter 120. Van Gorp Van Service, Inc. v. Mayo, 207 So.2d 425, 427 (Fla. 1968). As such, it is bound by section 120.57, Florida Statutes (1989), and must provide the minimal due process of notice and a hearing when requested by a party whose substantial interests are affected by its action.

Section 366.06, Florida Statutes (1989), provides the general standards for the changing of utility rates. Subsection 4,[10/] the file and suspend law, provides the Commission with alternative procedures to follow to avoid the

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9/ A court is required to read two statutes consistently with each other whenever possible. In Interest of J.N., 279 So.2d 50 (Fla. 4th DCA 1973).

10/ Chapter 74-195, §4, Laws of Florida, now appears as section 366.06(4), Florida Statutes (1989).

"regulatory lag" inherent in full rate proceedings. Citizens of Florida v. Mayo, 333 So.2d 1, 4 (Fla. 1976). In that case, this Court first discussed whether the file and suspend law is in conflict with the due process provisions of Chapter 120. It described the Commission's alternative procedures as follows:

> (1) If the Commission does not affirmatively act within 30 [now 60] days to suspend the proposed new rate schedule filed as a part of the request for higher rates, the new rates go into effect automatically on the 31st day following the utility company's filing. Since the Commision's inaction is equivalent to its consent to the new rate schedule, no bond is required of the utility and there is no mechanism by which customers of the utility system can ever recover interim charges which, after the full rate proceeding, the Commission may find to have been wholly or partly unwarranted.
>
> (2) If the Commission acts within thirty [now 60] days to suspend all or part of the tariffs, the utility may not charge its customers the proposed new rates. The Commission's action is effective on a day to day basis until either (a) it grants full or partial consent to the new rates, or (b) eight months elapse from the date the new schedules were filed. If consent is given before the time expiration, as it was here, the utility may then begin to charge the new rates. Where consent is continuously withheld, the utility may still begin to charge its customers on the new basis after eight months have passed, under bond and record-keeping requirements required by statute.

Id. at 4. The Court then reached several conclusions concerning the Commission's powers and responsibilities when proceeding under the file and suspend law:

> (1) The Legislature did not intend all public utility filings to go into effect

> without some review by the Public Service Commission. Had that been the intent, the Legislature would not have created a "suspend" power in the Commission.
>
> (2) By placing the file and suspend law in Section 366.06, however, the Commission was given direct responsibiity in this type of proceeding to insure that all charges collected by a public utility are lawful. See Section 366.06(1), Florida Statutes (1975).
>
> (3) The Legislature did not intend a full rate hearing before all new rate schedules become effective. Had it intended that result, there would have been no need to enact subsection 366.06(4) at all.
>
> (4) The Legislature obviously intended to allow public utilities the benefit of proposed rate increases from the date they could satisfy the Commission on the basis of an <u>uncontested</u> preliminary showing that the needs of the company were such as to necessitate immediate financial aid. Where the Commission is so satisfied after a preliminary analysis extending over a period not longer than thirty days, the rates become effective without further action by the Commission.

Id. at 5, footnote omitted, emphasis supplied.

The Court went on to conclude that subsection 366.06(4), Florida Statutes, provides no reason to alter the public policy of the state in favor of traditional due process rights, but that an inflexible hearing requirement was not intended either, inasmuch as the Commission can obviate any hearing requirement simply by failing to act. Finally, the Court said that the legislature intended to provide the Commission with a "range of alternatives suitable to the factual variations which might arise from case to case." Id. at 6.

Since Mayo, the Court has added to this framework. In Florida Power Corp. v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979), the Court stated that "[i]t is clear the [file and suspend] statute was designed to provide accelerated rate relief without sacrificing the protections inherent in the overall regulatory scheme." Regarding procedural circumstances similar to the instant case, the Court stated that where the Commission held a hearing "in which all intervenors and the public were permitted to participate fully," there was no procedural defect. Citizens of Florida v. Mayo, 335 So.2d 809, 810 (Fla. 1976).

This Court's analysis, in Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976) and later cases, of the statutory scheme created by section 366.06(4), Florida Statutes (1989), allows the Commission a range of alternatives in determining what procedure to provide to persons whose substantial rights are affected by a Commission decision. The alternatives must be suitable to the factual variations of the case. They must provide for some review by the Commission, but if no direct challenge is filed by persons who are substantially affected, the procedure need not include a hearing. This range of alternatives provides the vehicle for the consistent interpretation of section 366.06(4), Florida Statutes (1989), and section 120.57, Florida Statutes (1989).

The Commission has interpreted the file and suspend law as an exception to Chapter 120's requirement that substantially

affected persons be provided with a hearing upon request.[11]
This approach can sometimes lead to situations in which a person's substantial rights are jeopardized if a hearing is not ultimately provided on tariff filings which affect him. However, the Commission receives many, many tariff filings. The majority of these tariffs do not affect anyone's substantial interests and notice of these tariffs and the holding of a hearing on each of them would be an immense waste of time and taxpayer money.

Some tariffs clearly do affect substantial rights. These include tariffs which, for example, increase rates or limit service availability.[12] If a tariff which affects substantial rights is identified by an affected person, the Commission should be required to hold a hearing if the petition makes a prima facie showing of such interests. The utility may be permitted to put the disputed rate into effect if it posts a bond.[13]

Neither OPC nor the Commission dispute that at some point, a substantially affected person is entitled to a hearing. It is the timing and impact of the hearing which is in controversy and which requires a complementary reading of the

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11/ See Commission briefs in cases cited in footnote 8.

12/ FIPUG does not suggest that these are the only tariffs which affect substantial interests. Such a claim must be evaluated in light of the complaining party's petition.

13/ This would be analogous to the requirement for posting a bond pursuant to section 366.06(4), Florida Statutes (1989).

statutory sections at issue.

OPC suggests that any tariff complaint should set aside the proposed rate *ab initio* no matter when his complaint is filed; the Commission argues that relief, if granted, on a non-suspended tariff is prospective only and will take effect only after a final Commission order irrespective of when the hearing is held. The solution lies somewhere between these two poles.

FIPUG suggests that the Commission be directed to establish time frames for tariff hearing requests which affect substantial interests. Just as the Court can prescribe procedural rules, the Commission has the authority to require that any substantially affected person who believes that a utility tariff should not take effect file a section 120.57 petition within fifteen days of the proposed tariff filing. Such a petition, assuming it meets the prerequisites of section 120.57, should have the effect of precluding the disputed tariff from taking effect until the hearing's conclusion. This would be very similar to the procedure which the Commission currently uses to deal with decisions affecting substantial interests, other than tariff filings. The Commission gives notice of its intent to take action through a notice of proposed agency action. Persons are then given fourteen days to protest such action. If no protest is filed, the Commission's action becomes effective upon expiration of the time within which to request a hearing. Rule 25-22.029, Florida Administrative Code.

Failure to file a petition within fifteen days (or some other reasonable period) would allow the tariff to take effect (assuming the Commission did not suspend it). Affected persons would be entitled to comfortably rely upon the tariff if no complaint has been filed.

The procedure outlined above would, of course, not preclude anyone at anytime from challenging a rate pursuant to section 366.07, Florida Statutes (1989); after the fifteen days has passed, such a challenge would be prospective only. The above mechanism would strike a balance between the rights of persons affected by a tariff to challenge it pursuant to section 120.57, Florida Statutes (1989), and the rights of other persons affected by a tariff to rely upon it.

It would also obviate the very practical problem which has arisen in other OPC appeals where affected persons have relied on a presumptively valid Commission tariff only to have OPC challenge the tariff many, many months later. For example, in Case No. 74,471, OPC challenged the tariff over halfway through the tariff's one-year period of applicability.

The final issue is how notice of tariff filings is to be given. Adequate notice to OPC and others could be provided by publication of all tariff filings in the Florida Administrative Weekly. The large volume of tariffs may, however, make that solution unworkable. Practically, the Commission or the utility could give notice directly to OPC of each tariff filing. It is well within OPC's statutory duties, section 350.0611, Florida Statutes (1989), to monitor

such tariff filings and protest those which affect the substantial interests of the citizens of the state.

The mechanism described above will allow this Court to read section 366.06(4), Florida Statutes (1989), and section 120.57, Florida Statutes (1989), in pari materia. It will achieve the legislative purpose of balancing the interests of the citizens with those of the state in effectively and efficiently regulating utilities for the public benefit. It provides affected persons with the rights guaranteed by section 120.57, Florida Statutes (1989), but requires OPC to take an active part in identifying those few tariffs which do, in fact, affect the substantial interests of the citizens. It also honors the legislative intent of the file and suspend law to avoid the regulatory lag inherent in the ratemaking process.

III.

THE COMMISSION'S PROCEDURE DOES NOT VIOLATE THE EX PARTE PROHIBITION OF SECTION 120.66, FLORIDA STATUTES.

Section 120.66, Florida Statutes (1989), prohibits ex parte communications with an agency head after the agency head has received a recommended order. The legislature has specifically prohibited certain ex parte communications in the administrative hearing process and has provided a remedy if such communications occur.[14/] In this case the agency heads (the Commissioners) sat as the hearing officers. Therefore, the statute prohibits ex parte communications to the Commissioners from non-advisory staff members or from advisory staff members who testify on behalf of the agency after the Commissioners hear the evidence of record and before they make their final decision.

No such communications were made in these proceedings. In his Initial Brief, OPC raises three communications by Commission staff members as violative of the ex parte prohibition. None of the described communications was made ex parte. Each communication was made on the record in the hearing with OPC present and participating. In fact, as OPC notes in his Initial Brief at 9-10, OPC raised an objection on

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[14/] The Florida Administrative Procedure Act does not define "ex parte communications." However, the Federal Administrative Procedure Act defines an "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. . . ." 5 USCA § 551(14).

the record to the communication made by Mr. Dean. The communications identified by OPC simply are not ex parte communications and are not the type of communications prohibited by section 120.66, Florida Statutes (1989).

Further evidence of the inapplicability of section 120.66, Florida Statutes (1989), to these communications is found in subsections 120.66(2),(3), Florida Statutes (1989). These subsections provide remedies in the event an ex parte communication occurs. The remedies include: place the communication on the record; notify all parties that the communication has been placed on the record; allow any party desiring to rebut the communication the opportunity to do so; allow the hearing officer who received the ex parte communication to withdraw and appoint a successor; and impose a fine or other disciplinary action on the person making the communication or on the hearing officer receiving the communication.[15/] These remedies are not relevant to the communications identified by OPC. The communications are already on the record and OPC had many opportunities to rebut them.

[15/] See also, 1 Fla. Jur. 2d Administrative Law § 131 (1977).

IV.

IF THE COURT FINDS ERROR BELOW, ANY DECISION SHOULD BE APPLIED PROSPECTIVELY ONLY.

Order No. 22812 is supported by substantial competent evidence of record, is not tainted by error, and should be affirmed. However, if this Court finds otherwise and overturns the order, it should protect FIPUG from undue prejudice and apply any decision prospectively only.

This Court has given its decisions prospective application where a refund of the charges or assessments would be inappropriate. In Citizens of Florida v. Mayo, 333 So.2d 1, 7-8 (Fla. 1976), the Court held that since neither Gulf Power nor Public Counsel were responsible for the Commission's procedural defect, it would be unduly harsh to punish the utility by directing a refund of the charges collected. Here TECO acted in good faith on the presumptively valid order of the Commission, as did FIPUG and other TECO interruptible customers. If this Court finds the Commission's order to be defective, it should protect these customers from harm by applying its decision prospectively only.

CONCLUSION

For the reasons outlined above, FIPUG requests that Order No. 22812 issued by the Commission in Docket No. 900002-EG be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief of Appellee, the Florida Industrial Power Users Group, has been furnished by U.S. Mail to the following parties of record this 14th day of August, 1990:

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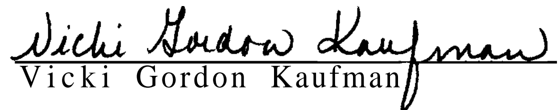

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