IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. MICHAEL MCK. WILSON, ETC., ET AL., Appellees.	)	CASE NO. **76,000**

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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The Public Service Commission is referred to in this brief as the "Commission." Appellee, Tampa Electric Company is referred to as **"TECO;"** Appellee, the Florida Industrial Power Users Group is referred to as **"FIPUG."** Appellant, the Citizens of the State of Florida, represented by the Office of Public Counsel, are referred to as "Public Counsel." References to the record on appeal are designated (R _____). References to the hearing transcript are designated (T _____), with the term "prehearing" inserted to distinguish the prehearing from the hearing transcripts.

For convenience sake, the Commission has cited to orders already contained in Public Counsel's Appendix to his Initial Brief with the designation (A _____).

STATEMENT OF THE CASE AND FACTS

Public Counsel has used the Statement of the Facts and Case to restate arguments from his previous appeal, Case No. **74,471,** Citizens of the State of Florida v. Michael McK. Wilson, etc., et al., and has included many irrelevant and selectively cited facts which appear to be designed not to support legal argument but mere insinuations against the Commission and its staff. For that reason, the Commission submits its own statement of the facts and the case for the Court's consideration.

On December **21, 1989,** Tampa Electric Company (TECO) filed a petition with the Commission seeking a one-year extension of its modification to its interruptible service tariff excluding interruptible customers from payment of conservation cost recovery charges. The original tariff modification was approved by the Commission in Order No. **20825** issued March **1, 1989.** That order explicitly stated that the approved interruptible service tariff modification was for one year only, and that it would be reviewed as to its further applicability by its expiration date in March, **1990.** (A-12). Public Counsel appealed Order No. **20825** as well as the Commission's Order Denying Reconsideration, Order No. **21448,** which appeal remains pending before this Court in Case No. **74,471.** Oral argument was held on February **9, 1990,** in that case.

TECO's petition for extension asked that the Commission allow it to continue to exclude interruptible service customers from conservation cost recovery for the period April 1, **1990** through

March 31, 1991. (R 24). Attached to the petition was the testimony of Mr. Gerard J. Kordecki and an exhibit offered in support of the proposed one year extension. The petition was filed in the Commission's ongoing conservation cost recovery docket which, at the time, was designated Docket No. 890002-EG. A copy of the petition and Mr. Kordecki's testimony and exhibit in support of it was served on all parties to that docket, including Public Counsel. (R 26).

On January 5, 1990, TECO submitted its "Statement of Issues and Positions" for the upcoming conservation cost recovery hearings in February 1990. The filing was made in Docket No. 900002-EG, the administratively redesignated extension of the 1989 conservation docket, 890002-EG. A copy of the statement of issues and positions was served on Public Counsel. (R 39). In addition to listing TECO's conservation true-up amounts and cost recovery factor, the statement also listed as an issue TECO's proposed extension of its exclusion of interruptible customers from conservation cost recovery:

> ISSUE NO. 4: Should Tampa Electric's currently effective conservation cost recovery reallocation, under which conservation costs are collected from firm Customers but not interruptible Customers, be extended for one year (April 1, 1990 - March 31, 1991)?
>
> TAMPA ELECTRIC'S POSITION: Yes. The Conditions which warranted the Commission's initial approval of this reallocation in Order No. 20825 hold true today and are expected to continue through the proposed one year extension period. (Witness: Kordecki). (R 38).

TECO's statement of issues and positions was served on Public Counsel. (R 39).

On January 9, 1990, TECO made its regular conservation cost recovery filing which included the utility's request for approval of its conservation costrecoverytrue-up amounts and cost recovery factors. It was supported by the direct testimony and exhibits of Mr. Kordecki. This filing did not specifically address TECO's request for extension of its interruptible service's tariff.

On January 10, 1990, TECO filed the prepared supplemental testimony of Mr. Kordecki with supporting exhibits. (T 135-138). Mr. Kordecki's supplemental testimony and exhibits provided an analysis of fuel cost effects caused by conservation. The testimony was filed in support of TECO's request to extend its exclusion of interruptible customers from conservation cost recovery.

On January 16, 1990, Public Counsel filed his "Motion to Dismiss Tampa Electric Company's Petition for One-Year Extension of Modification to Conservation Cost Recovery Methodology." (R 78). Public Counsel's filing was made in Docket 881416-EG, which was the docket number in which TECO's original 1988 petition for approval of its modified interruptible service tariff excluding conservation cost recovery was filed and in which the Commission's Orders 20825 and 21448 were issued.

The docket numbers in this case were a source of some confusion, since, when TECO filed its petition to extend on December 21, 1989, the Commission's Office of Records and Reporting put it in the file for Docket No. 881416-EG, even though TECO had designated it with the conservation cost recovery Docket No.

890002-EG. The assignment of TECO's petition to Docket No. 881416-EG was a purely administrative decision by the Commission's Records and Reporting staff. (T Prehearing 37).

TECO's petition for extension and related filings, as well as Public Counsel's motions and the Florida Industrial Power Users Group's (FIPUG) petition to intervene was administratively transferred back to the conservation cost recovery file in Docket No. 900002-EG at the request of the staff of the Commission's Division of Electric and Gas. (Memorandum dated January 23, 1990 R 130).

Whatever confusion there may have been about docket numbers was clarified at the prehearing conference held in Docket No. 900002-EG on February 15, 1990. There, Commissioner Herndon, acting as prehearing officer, ruled that Public Counsel's motion to dismiss would be heard in Docket No. 900002-EG. (T Prehearing 38). Public Counsel maintained, however, that his motion should be heard not by a three-member panel but the full Commission. Resolution of that question was deferred by the prehearing officer to be considered by the full panel. (T Prehearing 42).

At the prehearing held on February 12, 1990, Public Counsel maintained, consistent with his motion to dismiss, that TECO's request to extend the modification of its conservation cost recovery methodology should be considered by the full Commission, not the conservation panel. The specific issue on continuation of TECO's exclusion of interruptible customers from conservation cost recovery and the positions of the parties on the issue were

formulated as follows:

> **ISSUE:** Should TECO be allowed to continue to exclude the application of the Energy Conservation Cost Recovery (ECCR) factor for customers receiving interruptible service for the period April 1, 1990 through March 31, 1991? (Staff)
>
> This issue was restated by TECO as follows: Should Tampa Electric's currently effective conservation cost recovery reallocation, under which conservation costs are collected from firm customers but not interruptible customers, be extended for one year (April 1, 1990 - March 31, 1991)?
>
> Staff: No position at this time.
>
> TECO: Yes. The conditions which warranted the Commission's initial approval of this reallocation in Order No. 20825 in Docket No. 881416-EI hold true today and are expected to continue through the proposed one-year extension period. (Kordecki)
>
> FIPUG: Yes. FIPUG adopts the position of TECO.
>
> OPC: Although TECO filed its request to extend the modification to its conservation cost recovery methodology in this docket, it was assigned by the Clerk's office to Docket No. 881416-EG. Public Counsel believes this is appropriate because the original decision in Order No. 9974, issued April 24, 1981, to impose a cost recovery factor on all customers was reached by the full Commission. TECO's initial petition was also docketed for consideration by the full Commission. Any extension should follow the same process because of the policy nature of the decision involved. (Public Counsel has filed a motion to dismiss in Docket No. 881416-EG).

(Prehearing Order No. 22582 R 174-175).

At no time during the prehearing conference or before did Public Counsel propose to submit testimony on the issue of whether TECO's petition to extend should be granted. Nor did he ask for

the opportunity to present testimony during the course of the hearing.

During the hearing on February 1, 1990, TECO's witness Kordecki presented his direct and supplemental testimony. He was cross-examined extensively by Mr. Howe of the Public Counsel's office (T 141-168) and briefly by Ms. Rule of the Commission staff. (T 168-170). Public Counsel's Motion to Dismiss was then heard by the Commissioners and after extensive argument was denied. (T 235-252).

After the motion to dismiss was denied, a discussion took place among the Commissioners, staff and the parties on how the Commissioners should proceed with a final decision on the merits of TECO's petition. (T 253-259). The options considered included ruling from the bench, as the Commission typically does in such matters, (T 253-254; 255-256; 258), postponing a decision to a later agenda, (T 254-255) and continuing the hearing. (T 255).

Mr. Howe asserted that he wanted the Commission to follow a procedure which would allow him to submit proposed findings of fact and which would "get this Commission to rule explicitly on what I think are the relevant facts, as Mr. Kordecki has testified." (T 256).

Commissioner Herndon suggested that the hearing just be continued to accommodate Mr. Howe's expressed desire to submit findings. He stated: "Mr. Howe can do that at his pleasure. I mean, I have no problem with that." (T 257).

After further discussion, however, the Commissioners and

parties agreed to go forward with immediate oral argument and a bench decision. (T 257-259).

In response to staff's suggestion that this compromise procedure be followed, Mr. Howe stated: "I would be willing to do that." (T 257). Later, he reiterated agreement: "Commissioners, I am prepared to do that right now, and then you can vote on TECO's relief if they (sic) want to." (T 259).

After hearing argument from the opposing parties, Public Counsel, TECO and FIPUG, (T 259-271), the Commissioners turned to staff for a recommendation as to the disposition of the merits of TECO's petition. Ms. Rule and Mr. Dean proceeded to make their recommendation. (T-272). When Mr. Dean mentioned Mr. Howe's arguments, Mr. Howe objected stating that ". . . I feel like Mr. Dean is going far afield of anything Mr. Kordecki said in his testimony." (T 273). After a brief discussion of the objection, Mr. Dean was allowed to continue. The Commissioners then proceeded to a vote on the conservation cost recovery issues identified in the prehearing and approved TECO's requested one-year extension.

SUMMARY OF THE ARGUMENT

The Commission's Order No. 22812 granting TECO's petition for an extension of its conservation cost recovery methodology is supported by competent, substantial evidence. TECO's witness, Mr. Kordecki, established that interruptible customers would not receive any fuel cost reduction benefits from conservation programs through March, 1991. He further established that interruptible customers do not receive any conservation benefits from capacity deferral, since TECO does not build new plant to serve the anticipated load of interruptible customers. He further established that any indirect benefits interruptible customers might receive, such as the likelihood of not experiencing an interruption in service, were speculative and that, in any case, none were likely to accrue in the next year. Responses elicited by Public Counsel through cross-examination of Mr. Kordecki did not undermine the fundamental premises of TECO's theory supporting the exclusion of interruptibles from conservation cost recovery. The Commission could reasonably conclude on the evidence that TECO's request should be granted.

The Commission's Order No. 22812 was procedurally correct and meets the standard articulated by this Court in Occidental Chemical Company v. Mayo, 351 So.2d 336 (Fla. 1977). The order contained a "succinct and sufficient statement of the ultimate facts upon which the Commission relied" as required by that case and adequately presented the record basis of the Commission's. The Commission was not required to discuss every nonessential issue or argument that

was made during the course of the hearing. The order properly reflects the basis of the Commission's decision in the context of its overall conservation cost recovery policies. The Commission's decision took into account the unique circumstances affecting interruptible customers and the particular conditions which prevail in the fuel market at this time. The Commission's proceedings met the due process requirements for any policy development or explication which may have occurred. Florida Public Service Commission v. Indiantown Telephone Company, 435 So.2d 892 (Fla. 1983).

The Commission's decision was a proper exercise of its broad authority under the Florida Energy Efficiency and Conservation Act and does not conflict with that Act.

Public Counsel did not raise the issue of whether staff's recommendation at hearing was an ex parte communication. It cannot be heard for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978).

Even if the issue was promptly raised, the Commission staff's oral recommendation to the Commissioners at hearing was not an ex parte communication in violation of section 120.66, Florida Statutes. That statute, by its own terms, does not apply to proceedings where there is no recommended order submitted by a hearing officer. Even if the statute does apply, the Commission staff members who participated in the hearing are exempted as advisory staff members who did not testify. Moreover, the concerned staff members, Ms. Rule and Mr. Dean, took no position

for or against approval of TECO's petition going into the hearing and did not advocate in favor of it during the course of the hearing. This Court has recognized the validity of the staff's role to "make inquiry of utility witnesses and assist in evaluating the evidence". South Florida Natural Gas Company v. Florida Public Service Commission, 534 So.2d 695, 697 (Fla. 1988). Finally, even if the staff's recommendation to the Commissioners was an ex parte communication, Public Counsel was present when it was made and, in fact, was allowed to respond by way of his objection. Nothing more is required by section 120.66.

Point I of Public Counsel's brief contains irrelevant and subjective arguments which no not support a legal challenge to the Commission's order.

ARGUMENT

I. THE COMMISSION'S DECISION TO ALLOW TECO TO CONTINUE TO EXCLUDE ITS INTERRUPTIBLE CUSTOMERS FROM CONSERVATION COST RECOVERY IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

The only issues before this Court in its review of Order No. 22812 are whether the Commission acted within its range of statutory discretion and whether its decision is supported by competent substantial evidence. Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983). The Commission has properly exercised its authority in this instance and its decision is supported by the evidence derived at a fair and impartial hearing.

A. THE COMMISSION'S DECISION IS SUPPORTED BY THE RECORD

In the conservation cost recovery hearings, the Commission was asked to decide whether, under current circumstances, TECO was justified in continuing to exclude its interruptible customers from conservation cost recovery. Based on its weighing of the evidence, the Commission correctly concluded that TECO had met its burden.

The only testimony at the hearing was presented by TECO's witness, Mr. Kordecki.

Mr. Kordecki testified that there are two fundamental benefits from conservation programs: 1) capacity deferral, which is a benefit derived from the utility's not having to build new plant and, 2) reductions in fuel costs. (T 139-140). Mr. Kordecki premised TECO's request in this case on the utility's belief that "at this time our conservation and load management programs do not accrue either capacity benefits nor fuel savings to interruptible

Customers." (T 128).

Mr. Kordecki explained that TECO does not build capacity in anticipation of the needs of its interruptible customers. The nature of service to these customers is that they may be interrupted during peak conditions, thereby eliminating the need to consider their specific capacity needs in planning to meet peak load. (T 128; 139; 146). Interruptibles, thus, do not receive the benefit of not having to pay for plant which, but for conservation, would have been built to serve them. Mr. Kordecki testified that the production costs for interruptible customers are done on a "energy basis" and are covered in embedded rates. (T 139).

As for fuel benefits to interruptible customers, Mr. Kordecki conceded that it was possible in theory for interruptibles to receive conservation benefits from reduced fuel costs. (T 146; 157). He further stated that if interruptible customers received calculable benefits from fuel savings, they should pay conservation costs. (T 157). However, for the period in question, 1990, Mr. Kordecki stated that the utility's model (Exhibit 27) showed that interruptible customers' fuel costs had actually gone up as a result of conservation efforts. (T 129; 140). Reduced energy production brought about by conservation has caused the average cost of fuel to go up. Had not conservation reduced the need for it, more lower priced, spot-market fuel would have been bought and burned, thereby lowering the average cost of fuel. (T 155).

Mr. Kordecki further testified that this result would obtain

notwithstanding fuel savings which might be associated with the deferral of a 75 megawatt combustion turbine (CT) plant scheduled for 1993. The Commission had earlier, in its Order No. 20825, indicated its belief that this deferral would begin to produce fuel cost savings for interruptible customers in 1990. Mr. Kordecki explained that there were potential fuel savings associated with the avoidance of construction of the CT. (T 155). However, his calculations showed that for 1990 there would be none on a net basis. (T 156). Mr. Kordecki stated his belief that this would was a reasonable analysis because:

> There are a lot of hours that the conservation program or that load management program may, in fact, be taking coal off the margin, not just the CT. You've got to deal with them simultaneously. It's not a singular item; it's not an incremental CT, and all the fuel and the fuel costs are associated only with the CT. That's not to say that there are no savings. I wouldn't say that there are no savings. The CT disappearance has savings. Unfortunately, in the year we're talking about, there are a lot of kilowatt hours that could be generated from spot coal which is substantially lower than the average price of fuel. At that point, the lack of those kilowatt hours, in essence, raises the per unit cost, not lowers it. (T 155).

TECO's petition for extension asked that it be allowed to continue to exclude interruptibles from conservation cost recovery through March 1991. On cross-examination, Mr. Kordecki acknowledged that, according to his model (Exhibit No. 29), interruptible customers would receive a slight fuel savings benefit in 1991. However, he stated that it was not projected to occur until the latter part of the year, in July or August, after the

requested extension had expired. (T 169).

Based on Mr. Kordecki's direct testimony and exhibits and the responses elicited during cross-examination, the Commission could reasonably conclude that the evidence supported approval of TECO's request.

Even though he had every opportunity to do so, Public Counsel presented no evidence of his own to refute TECO's basic theory in support of its exclusion of interruptibles from conservation cost recovery. Nor did the responses to Public Counsel's cross-examination undermine the fundamental premises of TECO's theory. As the Commission acknowledged in its order, Public Counsel may have been correct that conservation generally helps interruptible customers, since, all other things being equal (T 150), it makes the likelihood of being interrupted less. (R 185). However, there was no evidence to support the proposition that any such benefit existed for the period in question, or that if it did exist, it could be quantified and used to allocate conservation costs to interruptibles. (T 149-150).

The validity of TECO's conservation programs was not at issue in these proceedings. What was at issue was whether it was reasonable, in view of conditions prevailing through March, 1991, to exempt interruptible customers from paying conservation costs when they received no benefits. Clearly, the Commission had a reasoned basis in the evidence to conclude that it was.

Notwithstanding his protestations to the contrary, Public Counsel has asked this Court to reweigh the evidence and substitute

its judgment for that of the Commission. That is something which this Court has consistently declined to do. Citizens, 435 So.2d 784, supra; Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982); Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799 (Fla. 1984).

B. THE COMMISSION'S ORDER APPROVING THE EXTENSION OF TECO'S PETITION WAS PROCEDURALLY AND SUBSTANTIVELY CORRECT

This Court has recognized that the Commission's orders are procedurally sufficient if they contain a "succinct and sufficient statement of the ultimate facts upon which the Commission relied . . . . " Occidental Chemical Co. v. Mayo, 351 So.2d 336, 341 (Fla. 1977). It is not necessary that the Commission include a "summary of the testimony it heard or a recitation of every evidentiary fact on which it ruled." Id.

The Commission's Order No. 22812 succinctly outlined the proceedings leading up to its decision, summarized relevant testimony by TECO and countervailing arguments by Public Counsel. In sum, Order No. 22812 provided the essential basis of the Commission's decision in terms that this Court has found adequate.

Public Counsel's litany of alleged deficiencies in the order are largely irrelevant to the Commission's decision. They appear to be designed to a lead this Court into a procedural morass away from essential considerations of what the evidence at hearing showed.

1. THE COMMISSION'S DECISION WAS NOT INCONSISTENT WITH FEECA AND THE COMMISSION'S AUTHORITY UNDER THAT ACT

The Commission did not specifically address the Florida Energy

Efficiency and Conservation Act (FEECA) in its order because the issue before it did not turn on an interpretation of that act. TECO's requested extension required the Commission to consider whether conservation costs should be allocated to interruptible customers when they received no benefits from fuel cost reductions and capacity deferral. There is nothing in FEECA which mandates that the Commission require the utility to impose conservation costs on a customer group which receives no benefits from the program. On the contrary, FEECA, as well as the Commission's general ratemaking statute, section 366.06, Florida Statutes, require the Commission to protect utility customers against rates which are demonstrated to be unjust or unduly discriminatory. TECO demonstrated to the Commission's satisfaction that, in these limited circumstances tied to a particular customer group and a unique situation in the fuel market, it would not be fair for interruptible customers to pay conservation costs.

The validity of TECO's conservation programs was not at issue in this case, only who pays for the benefits. For that reason the issues raised by Public Counsel as to whether FEECA requires conservation programs to be cost effective or whether FEECA would ever countenance a program which increased fuel consumption were not at issue. The Commission found in its prior Order No. 20825 that such considerations were irrelevant to its approval of the temporary conservation cost reallocation TECO requested. (A-11).

Even if such considerations were relevant, Public Counsel has not pointed to anything in FEECA or the record in this case that

demonstrates that increased fuel consumption caused by a conservation program would be a **per se** violation of FEECA or inconsistent with the Commission's interpretation of it. In fact, he has not pointed to any definitive policy statement that supports his arguments.

As for the requirement that programs be "cost effective", FEECA itself, section 366.81, Florida Statutes, the Commission's Rule 25-17.001(2), Florida Administrative Code, and the Commission's Order No. 22176 (A 43) cited by Public Counsel all refer to a cost-effectiveness test to be applied in evaluating conservation programs. What the limits of that evaluation might be is a matter of Commission policy which was not at issue in these proceedings.

The Commission clearly has the authority and discretion to make a determination of conservation cost allocation under FEECA. Section 366.81, Florida Statutes, expresses the Legislature's finding that:

> the Florida Public Service Commission is the appropriate agency to adopt goals and approve plans related to the conservation of electric energy and natural gas usage. The Legislature directs the commission to develop and adopt overall goals and authorizes the commission to require each utility to develop plans and implement programs for increasing energy efficiency and conservation within its service area, subject to the approval of the commission.

The Commission has the authority and the duty to approve and oversee the implementation and administration of conservation plans. Under that authority and duty it can weigh the interests of

the state, the utility and its customers in the execution of conservation plans.

Public Counsel has pointed to nothing in the record of this proceeding that demonstrates that the Commission abused its discretion by granting TECO's petition.

C. ORDER NO. **22812** ADEQUATELY EXPLAINED THE POLICY BASIS OF THE COMMISSION'S DECISION

Public Counsel makes much of the Commission's alleged deviation from its non-rule policy on conservation cost recovery as expressed in Order No. **9974.** In the first place, if the Commission's decision can be considered a deviation, it is only a temporary one which does not affect the underlying policy. The Commission has not departed from the fundamental premise of Order No. **9974** that customers who receive the benefits of conservation should pay the costs. The requirement in Order No. **9974** that all customers pay for conservation was based on the Commission's finding that all customers would enjoy the benefits of avoiding "expensive new plant", or capacity deferral. (A **27).** The order did not specifically address allocation of the conservation costs associated with benefits from fuel cost reductions. In the instant case, the Commission has explicitly found that TECO's interruptible customers will not receive any direct benefits of avoiding the cost of new plant. Further, if there were some indirect benefits from the decreased likelihood of an interruption in service, those benefits would not be quantifiable for purposes of allocating conservation costs. The Commission found fuel benefits for interruptible customers non-existent under current conditions.

The Commission's order has explicitly stated the policy basis of its decision in a manner recognized as adequate by this Court in Occidental, supra. Nothing more is required under the APA or case law.

Ultimately, the requirement that an agency explain and defend its policy developed through adjudication is directed toward protecting the due process rights of affected parties. See Florida Public Service Commission v. Indiantown Telephone System, Inc., 435 So.2d 892, 896 (Fla. 1983) citing City of Plant City v. Mayo, 337 So.2d 966, 974-75 (Fla. 1976) ("no statutory or constitutional impediment to implementations of change (through individual rate case rather than broadbased rulemaking proceedings) so long as interested and affected parties have a forum in which to challenge any change and the basis on which the action is taken is supported by the record."). Public Counsel participated fully in the proceedings in this case and had every opportunity to challenge the Commission's actions. The cases and statutes cited by Public Counsel in his brief do not prescribe any standards which have not been met.

D. PUBLIC COUNSEL'S ARGUMENTS IN POINT I OF HIS BRIEF ARE SUBJECTIVE AND DEMONSTRATE NO LEGAL BASIS TO CHALLENGE THE VALIDITY OF ORDER NO. 22812

The arguments advanced by Public Counsel in Point I of his brief state no cognizable legal basis to challenge the Commission's order.

The first two pages of his analysis are simply a rehash of what Public Counsel argued in his briefs in Case No. 74,471. He

details yet again **his** view of what occurred in Docket No. 881416-EG, which led to the issuance of Order No. 20825 approving TECO's first tariff modifying its cost recovery methodology. He then proceeds to set up a series of straw men to knock over with subjective arguments. According to Public Counsel, the Commission's denial of reconsideration of Order No. 20825 placed TECO in a "quandary." What that quandary was or of what relevance it is to the case before this Court is a matter of speculation. Public Counsel does not tell us.

Public Counsel next assails the Commission for "refusing" to answer questions about the inconsistencies he finds in the Commission's orders and its position on appeal. It is not clear what legal principle would have required the Commission to engage in such a debate with Public Counsel about his perception of the Commission's orders and its position on appeal. The Commission believes that this Court will be able to evaluate the Commission's arguments in their own right and judge the merits of its positions in this case and Case No. 74,471.

The remainder of Public Counsel's Point I is a highly subjective recitation of what he perceives to be the mental impressions of the Commission. We are thus told that it is "fairly obvious . . . that the PSC does not really believe the file-and-suspend law excused its failure to conduct hearings on TECO's original petition"; that it is "also obvious that, if the PSC and TECO could not justify the one-year extension at hearing, PSC approval of the first petition without any evidence at all

would be shown to be even more fallacious"; and finally, that the PSC "was obviously reluctant to find that TECO had not proven its case."

What is truly obvious is that Public Counsel's statements are his own subjective impressions unsupported by fact or law. As such, they should be rejected out of hand by this Court as the baseless insinuations they are.

There is nothing in Public Counsel's Point I which is germane to this appeal. Case No. 74,471, which Public Counsel wants to reargue, involved a procedural question regarding the necessity of a hearing under the file-and-suspend law. It has been briefed and argued before this Court, and the positions of the parties are clearly stated. This case involved an evidentiary proceeding and turns on substantive issues of law. This Court can judge on the record whether the Commission's order is correct. The tangle of subjective argument and insinuation presented in Public Counsel's Point I should be dismissed as meritless and irrelevant.

11. THE STAFF'S ORAL RECOMMENDATION TO THE COMMISSIONERS PRIOR TO THEIR FINAL DECISION WAS NOT A VIOLATION OF SECTION 120.66, FLORIDA STATUTES.

Public Counsel has attacked the Commission's long established and accepted procedure whereby Commission staff assigned to the case makes a final recommendation for the Commission's decision. This issue was not raised by Public Counsel and may not be reviewed by this Court on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). Public Counsel said nothing to indicate his belief that the final recommendation procedure involved an impermissible ex parte communication by staff. Nor did he ask for an opportunity to file a rebuttal or ask for any kind of ruling from the Commission. (T 272-273).

Presumably, Public Counsel will argue that the mere fact of his "objection" and citing of an APA provision somehow encompassed the broad challenge to Commission policy argued in Point III of his brief. There was no way that the Commission could possibly have discerned such an intention from Mr. Howe's statement that he "felt like" staff was going beyond the record testimony. (T 272).

It would be grossly unfair to subject the Commission to this kind of procedural ambush. If Public Counsel wants the Commission to address his concerns he should be required to articulate those issues and support his position in the same manner he demands of the Commission and other parties.

Even if this Court should find that the issue has been properly raised, the actions of the Commission staff in making recommendations for the final disposition of TECO's petition in no

way violate any provision of section 120.66, Florida Statutes.

Section 120.66 does not apply to Commission staff who have not testified in a proceeding. It states:

> (1) in any proceeding under section 120.57, no ~~ex~~ ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the hearing officer by:
>
> (a) an agency head or member of the agency or other public employee or official engaged in prosecution or advocacy in connection in the matter under consideration or a factually related matter.
>
> (b) A party to the proceeding or any person who directly or indirectly would have a substantial interest in the proposed agency action or his authorized representative or counsel.
>
> Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under section 120.54.

It is clear on the face of this statute that it was designed to apply to proceedings where a hearing officer has submitted a recommended order to the agency head. There was no such preliminary ruling by a hearing officer in this case. The three-Commissioner fuel adjustment panel, acting as agency head, received the advice of their counsel and staff to make a decision in the first instance. There was no recommended order which could be undercut by ex parte communications from anyone.

Even if section 120.66 applies to the Commission's proceedings, the staff members who addressed the Commissioners at

hearing are exempted. Ms. Brownless, Ms. Rule, and Mr. Dean were acting in their advisory capacity to the Commissioners, and they did not testify.

There is no specific definition of "advisory" staff in section 120.66. However, common sense dictates that it be understood to mean staff members who provide advice to the agency head on the disposition of cases.

The Commission does have a group of six attorneys in the Division of Appeals and General Counsel's office who are sometimes referred as to the Commission's legal advisors. These attorneys, however, are not involved in making recommendations on the disposition of the substantive matters in a proceeding. That is the role of the technical staff and the attorneys in the Commission's Division of Legal Services.

Notwithstanding the sophistic distinctions urged by Public Counsel in his brief, the three staff members whose actions he questions were advisory staff to the Commission. As such, their communications with the Commissioners, in this case in an open administrative proceeding, were exempt under the exception for advisory staff in section 120.66.

Even if the three staff members who advised the Commissioners at hearing were not advisory staff, their participation in the hearing would still not meet the definition of an ex parte communication. The Commission's rules recognize that the staff may participate as a "party" in a proceeding, put on witnesses, and otherwise advocate a specific viewpoint. Rule 25-22.026(3),

Florida Administrative Code. That did not occur in this case; staff was not involved in "advocacy" as that term is used in 120.66. Staff presented no witnesses to advocate a particular position. Nor did Ms. Rule's limited cross examination of witness Kordecki nor her advice to the Commissioners rise to the level of advocacy. As prehearing Order No. 22582 indicates, the Commission staff, in fact, took no position on the issue of approval of TECO's petition going into the hearing. Staff maintained that position of neutrality throughout the proceedings.

Staff, in this proceeding, was performing that essential function which this Court recognized in South Florida Natural Gas Company v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988). There, this Court specifically rejected the utility's claim that it had been deprived of due process because the staff had participated in the proceeding and provided advice to the Commissioners on the issues to be resolved. The Court said: "We reject the utility's contention that it was deprived of due process of law because the Commission allowed its staff to make inquiry of utility witnesses and assist in evaluating the evidence." Id. at 697. The Court went on to further state: "We find that the Commission is clearly authorized to utilize its staff to test the validity, creditability, and competence of the evidence presented in support of [a rate] increase. Without its staff, it would be impossible for the Commission to "investigate and determine the actual legitimate costs of the property of each utility, actually used and useful in the public service." [366.06(1), Florida

Statutes (1985)]. Id.

The role of the staff recognized by this Court in South Florida Natural Gas is the adopted policy of the Commission. Rule 25-22.026(3) states:

> The Commission staff may participate as a party in any proceeding. Their primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration.

As a final point, this Court should not overlook the fact that the alleged ex parte communications by staff took place in the presence of the parties in an open administrative proceeding. Public Counsel responded to staff with his objection, and if he had a specific basis he could have articulated it. He could have said why specifically Mr. Dean was going beyond the record. But he did not. All that section 120.66 requires is an opportunity for parties to respond to the alleged ex parte communication, and Public Counsel had that.

CONCLUSION

The burden was on Public Counsel to overcome the presumption of correctness attached to the Commission's order No. 22812. Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). He has failed to meet that burden. The Commission's order should be affirmed.

Respectfully submitted,

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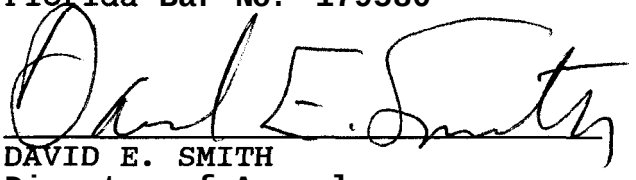

DAVID E. SMITH
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Dated: August 14, 1990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail this 14th day of August, 1990, to:

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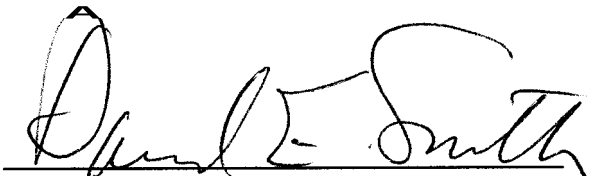

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