IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellants,

vs.

MICHAEL MCK. WILSON, ETC., ET AL.,

Appellees.

CASE NO. 76,000

ON APPEAL OF ORDER NO. 22812
IN FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 900002-EG
PETITION OF TAMPA ELECTRIC COMPANY

ANSWER BRIEF OF APPELLEE, TAMPA ELECTRIC COMPANY

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SYMBOLS AND DESIGNATION OF PARTIES

The Florida Public Service Commission is referred to in this Brief as "the Commission." Tampa Electric Company will be referred to as "Tampa Electric" or "the company." Appellants, Citizens of the State of Florida, shall be referred to herein as "Public Counsel."

References herein to Volume I of the record are designated by an R followed by a page number, e.g. (R-23). References to the transcript of the hearing conducted on February 21, 1990 are designated (Tr. _____).

STATEMENT OF THE CASE AND OF THE FACTS

Tampa Electric generally accepts the Statement of the Case and of the Facts set forth in Public Counsel's initial Brief. However, Tampa Electric believes that the details on which Public Counsel focuses and the sheer length of his Statement of the Case and of the Facts obscure the simple effect of what the Commission decided in the proceeding below. After carefully considering the evidence in the record, the Commission concluded that Tampa Electric's interruptible customers would continue to derive no discernable benefits from Tampa Electric's conservation programs, at least during the 12-month period ending March 31, 1991. Accordingly, the Commission approved Tampa Electric's request for a one-year extension of the Commission's earlier decision relieving the company's interruptible customers from having to contribute toward the cost of Tampa Electric's conservation programs.

Tampa Electric concurs with Public Counsel's observation that Commission orders approving the same conservation cost recovery procedures

for the 12 months ended March 31, 1990 is before the Court in Citizens of the State of Florida v. Michael McK. Wilson, etc., et al., Case No. 74,471. In that appeal Public Counsel primarily addresses procedural arguments whereas in the instant case his attack is more aligned toward the merits of the decision below. In this proceeding Public Counsel was afforded full procedural opportunities at a duly noticed public hearing.

SUMMARY OF ARGUMENT

Pub ic Counsel has failed to demonstrate any reversible error on the part of the Commission in entering Order No. 22812. If Tampa Electric's proposed one-year extension of its conservation cost recovery reallocation occurred automatically after the passage of the 60-day file and suspend period, Public Counsel is not harmed by the entry of Order No. 22812 which simply reconfirmed that the conservation reallocation would operate during the twelve months ending March 31, 1991. If, however, the initial reallocation was only approved for a one-year period, the subsequent entry of Order No. 22812 granting a one-year extension of the company's conservation reallocation provided the basis for Tampa Electric to continue that reallocation.

Public Counsel has failed to demonstrate that the Commission, in entering Order No. 22812, departed from the essential requirements of law or that the order lacks the support of competent substantial evidence. On the contrary, the Commission's decision to extend the conservation reallocation by one year is fully supported in the record. The order carefully explains the Commission's basis for extending for one year the cost reallocation it had initially approved a year earlier. The record

compelled a conclusion that these interruptible customers do not benefit from capacity deferral and, therefore, should not pay for that deferral through funding conservation programs.

The remainder of Public Counsel's argument consists largely of erroneous statements about the evidence in the record and misinterpretations as to the intent of the Florida Energy and Efficiency Conservation Act. Although Public Counsel disclaims the goal of having the Commission reweigh the evidence considered by the Commission, it is apparent that such is relief sought in Public Counsel's Initial Brief.

Finally, the procedure below did not violate Section 120.66, Fla. Stat. No ex parte communication took place. Public Counsel urges an interpretation of §120.66, Fla. Stat., which would deprive the Commission of meaningful input from its staff.

ARGUMENT

POINT I

POINT I OF PUBLIC COUNSEL'S BRIEF FAILS TO DEMONSTRATE ANY ERROR ON THE PART OF THE COMMISSION THROUGH THE ENTRY OF ORDER NO. 22812.

Public Counsel's arguments in Point I of his Brief do not appear to be directed toward the validity of Order No. 22812, which is the order on appeal in this proceeding. Instead, Public Counsel uses Point I of his Brief as a platform for rearguing the validity of the Commission's earlier Orders Nos. 20825 and 21448 issued in Docket No. 881416-EG. Those orders approved the initial one-year conservation cost reallocation which Tampa Electric had sought and denied Public Counsel's Motion for Rehearing of such approval. Those Orders are on appeal before this Court in Citizens v. Wilson, Case No. 74,471. Public Counsel's attempt in Point I to relitigate the validity of the earlier orders offers no basis for a conclusion that the Commission erred in entering Order No. 22812, which is the order here on appeal. Moreover, Public Counsel's speculation, at pages 16 and 17 of his Initial Brief, as to the motives of the Commission in approving a one-year extension of Tampa Electric's conservation cost reallocation affords no basis for a determination that the one-year extension approved in Order No. 22812 was in error.

In Point I of his Brief, Public Counsel attempts to characterize the Commission's one-year extension of Tampa Electric's cost recovery reallocation in Order No. 22812 to be inconsistent with the Commission's earlier conclusion that such cost recovery reallocation was placed into effect automatically and on a permanent basis 60 days after the

reallocation was initially proposed by Tampa Electric. According to Public Counsel, Tampa Electric proposed an unlimited permanent conservation cost recovery reallocation. Public Counsel further argues that if, as the Commission has concluded, the "permanent" reallocation went into effect automatically pursuant to the File and Suspend Law, then there would be no reason for the Commission to extend the reallocation for one year, as was done in Order No. 22812.

Even if Public Counsel were correct in this regard and if Order No. 22812 was unnecessary, then Order No. 22812 is at worst a superfluous order which could have no adverse effect on Tampa Electric's customers. The standard for review of Commission orders is whether the Commission's action comports with the essential requirements of law and is supported by substantial competent evidence. The burden is on the appealing party to overcome the presumption of correctness attached to Commission orders. Florida Telephone Corp. v. Mayo, 350 So.2d 775 (Fla. 1977); Pan American World Airway v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

Stated differently, if the initial proposal of Tampa Electric went into effect automatically on a permanent basis, then there is "no harm" in the Commission entering a subsequent order approving the reallocation to be in effect during a further one-year period already covered by the "permanent" applicability of the reallocation as Public Counsel describes it. Under these circumstances, the Order here on appeal would only be a reconfirmation of that which already exists.

Tampa Electric's request in Docket No. 900002-EG for a one-year extension of its conservation cost recovery reallocation was submitted in

an abundance of caution in advance of the expiration of the first one-year term on March 31, 1990. If the initial tariff filing continued in effect through operation of the File and Suspend Law, then an order reconfirming the applicability of the reallocation during the additional one-year period ending March 31, 1991 would simply be additional insurance for Tampa Electric. If, however, the initial reallocation was only approved for a one-year period ending March 31, 1990, then the entry of a further order granting the one-year extension would provide the basis for Tampa Electric to continue the reallocation. If the former situation exists, i.e., the initial tariff modification went into effect automatically and permanently pursuant to the File and Suspend Law, then the Order here on appeal could not have adversely affected the interests of Public Counsel's clients, because Order No. 22812 would only be confirming that which already exists. However, if the latter situation exists, then Public Counsel must show that Order No. 22812 is deficient under the standard of review cited above. Tampa Electric submits that Public Counsel has failed to demonstrate that Order No. 22812 fails to comport with the essential requirements of law or lacks support of competent and substantial evidence in the record of the February 21, 1990 hearing in Docket No. 900002-EG.

It is unfortunate that Public Counsel concludes Point I of his Brief, at pages 16 and 17, with speculation as to the motives of the Commission in the various orders it entered in initially approving the cost reallocation and subsequently extending that. reallocation of a one-year period. The fact of the matter is that Tampa Electric submitted a record basis for the Commission's decision in Order No. 22812 and Public Counsel was afforded a full opportunity to test Tampa Electric's assertions at the February 21,

1990 hearing in Docket No. 900002-EG, As we will later describe, the Commission's decision in Order No. 22812 is fully supported by the evidence presented at that hearing.

POINT II

THE COMMISSION'S DECISION TO EXTEND THE CONSERVATION REALLOCATION BY ONE YEAR IN ORDER NO. 22812 IS FULLY SUPPORTED IN THE RECORD.

Public Counsel begins Point II of his Brief by reiterating the argument made in Case No. 74,471 to the effect that the Commission, in rendering its decision, modified an industry-wide policy. This simply is not the case. In the Order here on appeal, Order No 22812, the Commission, after a full evidentiary hearing, voted to continue for a one-year period the conservation cost recovery methodology approved approximately a year earlier in Docket No. 881416-EG. The Commission did not "adopt incipient policy." Instead, the Commission responded directly to the particular concerns expressed by Tampa Electric regarding the inappropriateness of charging a conservation cost recovery factor to Tampa Electric's interruptible and standby interruptible customers. As was the case a year earlier, Tampa Electric explained the basis for its request in its petition and the Commission and its Staff carefully considered that basis. Order No. 22812 fully explains the basis for the action taken by the Commission with references to the transcript of the hearing where these considerations were presented.

As the Commission recognizes in Order No. 22812, interruptible customers can be interrupted during peak conditions and the utility does not build capacity to serve these customers. Consequently, the

interruptible customers receive no capacity deferral benefits. Furthermore, Commission Order No. 22812 explains that Tampa Electric's interruptible customers do not presently receive a reduction in fuel costs, which is the other benefit generated by conservation programs. This, the Order explains, is attributable to the fact that Tampa Electric burns spot market coal on the margin which costs considerably less than the average cost of fuel. The Order carefully explains that, according to Tampa Electric's witness, interruptible customers will not experience any fuel savings until well after the expiration of the proposed one-year extension of the conservation reallocation. (Order 22812 at page 5.)

Given the above findings, it was incumbent upon the Commission to approve a one-year extension of the cost recovery reallocation. Slipping back into his reargument of Case No. 74,471, Public Counsel cites a string of decisions in a vacuum at pages 19-20 of his Initial Brief to imply that Order No. 22812 somehow fails to "explain and defend the adoption of incipient policy." In actuality, the Commission fully explained and defended its basis for extending for one year the cost reallocation it had initially approved a year earlier. Public Counsel simply has ignored pages 4 and 5 of Order No. 22812.

In describing the general duties of a public utility, 6366.03, Fla. Stat., states in part:

> ". . .No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect." (Emphasis supplied.)

Under the above-quoted provision, it was incumbent upon Tampa Electric to propose, and the Commission to approve, relieving Tampa Electric's

interruptible customers from the obligation to fund programs from which they derive no benefit.

A. The Decision Reached in Commission Order No. 22812 is Fully Supported by Evidence in the Record.

The tone of Public Counsel's Initial Brief plunges again, beginning at page 20, with the suggestion that the Commission, in entering Order No. 22812, was predisposed to grant Tampa Electric's request for a one-year extension and simply sifted through the evidence to find something supportive of that outcome. We will not dignify Public Counsel's comments in this regard with a response other than to say that they have no place in an appellate brief. Public Counsel begins the argument by challenging the length of the various segments of testimony submitted by Tampa Electric's witness. Tampa Electric is not aware of any cases holding that brevity is reversible error, even when competent substantial evidence otherwise supports the decision rendered.

The first substantive argument in this section of Public Counsel's Initial Brief appears on page 22, where Public Counsel suggests that there might be some type of benefit to interruptible customers flowing from conservation programs. However, Mr. Kordecki clearly testified in the proceeding below that interruptible customers receive absolutely no capacity deferral benefits and that this absence of benefits was the primary reason Tampa Electric proposed to exempt interruptible customers from payments for conservation programs, at least on a temporary basis. (Tr. 139)

Public Counsel next contends that Tampa Electric's witness did not

> ". . .establish a rational relationship between the lack of capacity deferral benefits (as he defines the term), and forgiveness from conservation cost recovery."

The above-quoted statement totally ignores the principle of allocating costs based upon cost causation. If there are no benefits accruing to interruptible customers from conservation programs which are designed to defer capacity, these customers should not have to bear the burden of funding such a program. Public Counsel had a full opportunity to present evidence of any capacity-related benefit accruing to interruptible customers, but failed to do so. The record compelled a conclusion that these interruptible customers do not benefit from capacity deferral and, therefore, should not pay for that deferral.

On pages 24 and 25, Public Counsel discusses the earlier closure of certain interruptible rates by the Commission in 1985. From this, Public Counse jumps to the unsupported and erroneous conclusion that Tampa Electr c has excess capacity and that

> ". . .the purpose of TECO's request was simply to reduce rates to encourage increased usage by interruptibles."

This is absolute pure speculation on the part of Public Counsel and is totally contrary to the situation in which Tampa Electric found itself during the winter freeze of *1989* and in subsequent capacity shortages throughout Peninsular Florida.

On pages 25-26 of his Initial Brief, Public Counsel contends that interruptible customers may have achieved some type of fuel savings through the deferral of a combustion turbine unit that would have come on line in 1990 without the effects of conservation programs. On the top of page 26,

Public Counsel acknowledges that Tampa Electric's witness testified that he had netted these benefits out in his calculations so that interruptible customers would receive no such benefits if the one-year extension of the reallocation were granted. During cross-examination, Mr. Howe asked:

> "Have you asked for any recovery factor to be imposed on interruptible customers to recover that incremental savings?'' (Tr. 156)

To this Mr. Kordecki responded:

> "A. No, because on a net basis there is none.'' (Id.)

Mr. Kordecki reiterated again on page 157 of the transcript that the combustion turbine related fuel savings were netted out in his calculations.

Public Counsel goes on to contend that Tampa Electric did not explain any basis for departing from the previous methodology of charging a conservation cost recovery factor to all customers, including interruptible customers. This is simply erroneous. Tampa Electric's basis for temporarily exempting its interruptible customers from paying for conservation programs had its genesis in the unique situation, described both in Docket No. 881416-EG and in the hearing below, that Tampa Electric's marginal cost of fuel currently is lower than the average cost of fuel -- a significant change from the relationship which existed in 1981. Because marginal fuel costs are currently less than average costs, the benefits that any of our customers might receive from cheaper spot purchases are either being diminished or eliminated due to conservation programs. That current and temporary relationship constitutes the "changed circumstances" which Public Counsel refuses to recognize.

At the bottom of page 26, Public Counsel again speculates that Tampa Electric's position is to encourage increased electric usage by

interruptibles. This is pure speculation and is not supported by the transcript page references cited by Public Counsel in support of such statement.

On the bottom of page 26 through the middle of page 28, Public Counsel contends that Tampa Electric has misinterpreted the Florida Energy and Efficiency Conservation Act ("FEECA") by construing that Act to require utilities to reduce the growth rate and energy consumption when it is cost-effective to do so. The condition regarding cost-effectiveness is made clear in §366.81 which states:

> "The Legislature finds and declares that it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. . . ."

This was mirrored in Fla. Admin. Code Rule 25-17.001 where the Commission has stated:

> "(2) The Florida Energy Efficiency and Conservation Act requires increasing the efficiency of the electric and natural gas systems of Florida and the end use of these sources of energy by reducing weather sensitive peak demand, oil consumption and kilowatt hour consumption to the extent cost-effective." (Emphasis supplied.)

Quite clearly it would be contrary to the interests of the state and all customer classes to pursue conservation under circumstances where it is not cost-effective to utility ratepayers. As Tampa Electric has indicated in this proceeding, the current situation is a temporary one in which the marginal cost of fuel is lower than average cost. This accounts for the fact that the Order on appeal only excluded interruptible customers from having to pay for these programs for a one-year period.

Public Counsel's erroneous interpretation of FEECA ignores basic fairness. As we pointed out in response to a similar argument, in Case No. 74,471, the primary reason for Tampa Electric's conservation cost recovery reallocation, as was explained in Tampa Electric's initial petition, was that interruptible and standby customers should not have to pay for conservation programs which do not benefit them. If it is inequitable to charge a particular class of customers for a particular item of expense, that class of customers should be exempt from paying for that expense regardless of the impact the exemption has on their energy consumption. For example, when the cost of fuel goes down and, as a result, the fuel adjustment factor is lowered, Tampa Electric's customers experience reduced electric bills which may, in fact, stimulate higher electric consumption. Surely Public Counsel would not contend that the fuel factor should not be reduced because of the potential impact that could have on energy consumption.

Quite clearly, FEECA does not stand for the proposition that no action can be taken if it is likely to cause an increase in energy consumption by the customers of Commission regulated utilities.

Moreover, since the total dollars being collected by Tampa Electric are the same whether spread among all customers or only to firm customers, it is reasonable to assume that no perceptible effect on system-wide electric energy consumption will occur because of the one-year extension of the reallocation.

B. Order No. 22812 Adequately Explains the Commission's Basis for Approval of a One-Year Extension of Tampa Electric Company's Conservation Cost Reallocation.

Point IIB. of Public Counsel's Brief essentially is a restatement of Point IIA. of Public Counsel's Brief to the effect that the Commission, in entering Order No. 22812, failed to adequately explain its basis for the one-year extension of Tampa Electric's conservation cost reallocation. Again, Public Counsel overlooks the fact that Order No. 22812 extends for a one-year period the reallocation approved in Docket No. 881416-EG, which is the subject of Public Counsel's appeal in Case No. 74,471. Moreover, Public Counsel's argument overlooks the content of Order No. 22812 where the Commission explains the basis for its approval as well as the record of the hearing conducted on February 21, 1990 that gave rise to that order.

Based on the comments appearing on pages 28-29 of his Initial Brief, Public Counsel apparently believes that the Commission must address each and every argument and case cited by Public Counsel in order to properly approve the one-year extension sought by Tampa Electric. Again, the standard is whether the ultimate decision of the Commission is supported by competent substantial evidence in the record. The Commission is not required to include a summary of testimony it hears or to recite every fact on which it rules in reaching a decision. Occidental Chemical Company v. Mayo, 352 So.2d 336 (Fla. 1977).

Public Counsel refers to the "method *of* recovery" portion of Order No. 9974 issued on April 24, 1981 in Docket No. 810050-PU. That discussion of a method of recovery appears in the Appendix to Public Counsel's Initial Brief at page A-27. In that decision the Commission, in a much briefer

fashion than that criticized by Public Counsel in Order No. 22812, concluded:

> "However, Mr. Brubaker acknowledged that, to the extent conservation efforts succeed in obviating the need for expensive new plant, all customers will benefit. Because all customers will enjoy the benefits *of* such cost avoidance we direct that the authorized costs be recovered from all customers on a per kilowatt hour or per therm basis. . ."

In the instant proceeding, Tampa Electric presented evidence squarely distinguishing the basis upon which the Commission had earlier decided that all customers should share in the costs associated with conservation programs. As Public Counsel concedes, Tampa Electric's witness testified that interruptible customers receive no capacity deferral benefits. (Public Counsel's Initial Brief at page 29). Public Counsel goes on to erroneously state that the Tampa Electric witness, Mr. Kordecki, conceded on cross-examination that interruptibles do, in fact, receive capacity deferral benefits. Id. at 29. This is erroneous and is no where supported in the record. Mr. Kordecki went on to explain that, at least for the one-year period addressed in Tampa Electric's Petition, a fuel cost penalty results from conservation. (Tr. 129; 139-140)

Tampa Electric's record basis for relieving its interruptible customers from conservation program funding, again for a temporary one-year period, is carefully explained by the Commission in Order No. 22812 at pages 4-5. Thus, to the extent there has been any deviation from a prior Commission policy, that deviation is adequately supported by the record below and explained by the Commission in the Order on appeal.

Public Counsel refers again to his contention that Tampa Electric failed to recognize the deferral of a 1990 combustion turbine and,

therefore, understated fuel cost savings to interruptible customers. Again, however, as Mr. Kordecki testified, these savings were netted out of Mr. Kordecki's cost benefit analysis. (Tr. ____; R-36)

Next on page 30, Public Counsel faults the Commission for not explaining why it is appropriate to exclude interruptibles but not firm customers in light of the fact that lost fuel savings from conservation apply to all classes of customers. Public Counsel fails to recognize that the analysis of fuel savings was performed in order to demonstrate that interruptible customers obtain no savings (either capacity deferral related or fuel related) from conservation and, therefore, should not contribute toward the utility's conservation programs. The observation, however, did not establish that firm customers do not benefit from capacity deferral benefits associated with conservation programs.

All in all, Point IIB. of Public Counsel's Initial Brief fails to recognize that the very things demanded by Public Counsel to support the action taken below either are contained in the record of the February 21, 1990 hearing and addressed in Order No. 22812 or they are unnecessary because the demand therefor is predicated on Public Counsel's erroneous interpretations of the record.

Public Counsel has failed to demonstrate that the decision below lacks the support of competent substantial evidence of record or that the Commission, in rendering such decision, departed from the essential requirements of law.

POINT III

THE PROCEDURE BELOW DID NOT VIOLATE §120.66, FLA. STAT.

In Point II of his argument Public Counsel raises a new issue involving an interpretation of §120.66(1)(a), Fla. Stat. This issue was not raised before the Commission. Even if it had been, it would have been properly rejected by the Commission.

The Public Counsel's approach here seems to be to find some way of preventing any Staff member who disagrees with his position from having any input to the Commission on how an issue should be resolved. The only problem is the Staff communications about which Public Counsel complains were not ex parte but, in fact, were communications on the record during the course of a public hearing in which Public Counsel participated perhaps more than any other party. Section 120.66(2), Fla. Stat., states the remedies for disclosure and an opportunity for rebuttal of an ex parte communication. It is clear from a reading of this subsection that an ex parte communication is one which is, in fact, ex parte, i.e., presented outside of the record and without the knowledge of an aggrieved party. Here Public Counsel had full knowledge of, and actually debated with, the positions urged by the Staff. Section 120.66(2), Fla. Stat., states:

> "Any party desiring to rebut the ex parte communication shall be allowed to do *so,* if such party requests the opportunity for rebuttal within ten days after notice of such communication. . ."

If Public Counsel considered the Staff comments during the course of the hearing below to be ex parte communications (which they weren't) and if Public Counsel felt that he had not had an adequate opportunity to rebut the Staff's comments during the hearing (when, in fact, he did), then

Public Counsel should have requested an opportunity to submit rebuttal comments within ten days of the date of the hearing. He did not do so and should not now be heard to claim that Staff input to the Commissioners during the course of the hearing below constituted ex parte communications under §120.66, Fla. Stat.

Public Counsel's approach would hamper the Commission in carrying out its regulatory duty to investigate fully all matters within its jurisdiction. If the Commission cannot inquire of its Staff during the course of a duly noticed public hearing concerning matters at issue in that hearing, then the Commission loses one of the main sources of information it traditionally has relied upon.

Finally, Public Counsel should not be heard to rely upon Fla. Admin. Code Rule 25-22.057(5), which is the Commission rule pertaining to Agenda Conference participation. As the Commission is aware, Agenda Conferences often take place some weeks and even months after a formal hearing is conducted. The Order states, in the case of Agenda Conferences:

> ". . .The Commissioners may, at any time, request a recommendation and/or suggested order from Staff members who did not participate at the hearing. . ."

The rule further states that Staff members who prepare the recommendation or suggested order may participate at the Agenda Conference. This rule pertains only to Agenda Conferences and not to the conduct during the course *of* a hearing when the Commission rules on the issues at the conclusion of the hearing. Obviously, the two situations are distinguishable, particularly in a situation like in the hearing below where Public Counsel was afforded and actively took advantage of the opportunity to participate throughout the hearing.

CONCLUSION

Tampa Electric submits that Public Counsel has failed to demonstrate any error on the part of the Commission in entering Order No. 22812. Public Counsel has failed to demonstrate that such Order is not based on competent substantial evidence or that the Commission departed from the essential requirements of law in rendering its decision. Accordingly, Tampa Electric urges that the Court affirm Order No. 22812 in all respects.

DATED this 14th of August, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, filed on behalf of Tampa Electric Company, has been furnished by U.S. Mail this 14th day of August, 1990 to the following individuals:

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