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

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

INITIAL BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

Jack Shreve
Public Counsel
Fla. Bar No. 0073522

John Roger Howe
Assistant Public Counsel
Fla. Bar No. 253911

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

904/488-9330

Attorneys for the Citizens
of the State of Florida

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STATEMENT OF THE CASE AND FACTS

This is an appeal of Public Service Commission (PSC) Order No. 22812 authorizing Tampa Electric Company (TECO) to modify the way the utility imposes conservation cost recovery factors on the electric bills of its customers. [R-181][1] TECO was allowed to exclude industrial customers who take service pursuant to interruptible rate schedules and collect all the costs of its conservation programs from its firm customers during the period April 1, 1990, through March 31, 1991. Orders approving the same recovery procedures for April 1, 1989, through March 31, 1990, are before the Court in Citizens of the State of Florida v. Michael McK. Wilson, etc., et al., Case No. 74,471. Oral argument was heard on February 8, 1990.

In 1980, the Legislature enacted the Florida Energy Efficiency and Conservation Act (FEECA), Sections 366.80, et seq., Florida Statutes (1989). Pursuant to FEECA, the PSC approved programs for electric utilities designed to reduce weather-sensitive peak demand and the growth rate in electricity usage. Program costs are recovered through a conservation cost recovery factor projected for six-month periods. Over- and underrecoveries are used to adjust succeeding projection periods. In February the Commission conducts

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[1]References to volume I of the record are designated by an R followed by a page number, e.g. [R-23] Transcripts of the prehearing conference and hearing are in volume 11. References to the transcript of the prehearing conference are designated by the letter T with a parenthetical reference to the prehearing conference and a page number, e.g. [T(prehearing)-12]. References to the hearing are designated by the letter T, alone, with a page number, e.g. [T-172].

hearings to set factors for the April through September period and in August holds hearings for the October through March period.

In one of its first orders in the conservation docket, the PSC decided costs should be recovered equally from all customers on a per-kilowatt-hour basis. Order No. 9974, dated April 24, 1981, reported as In re: Conservation Cost Recovery Clause, 81 F.P.S.C. 4:154 (1981). This policy was followed consistently until the PSC issued Order No. 20825 on March 1, 1989. In re: Petition of Tampa Electric Company for Modification of its Conservation Cost Recovery Methodolosv, 89 F.P.S.C. 3:15 (1989). That order approved TECO's October 28, 1988, petition to modify its conservation cost recovery methodology, but limited its duration to one year. TECO filed a tariff effective April 3, 1989, pursuant to Order No. 20825.

Public Counsel moved for reconsideration of Order No. 20825 alleging: (1) that the PSC mistakenly issued a final order after it had voted at agenda conference to issue a notice of proposed agency action; (2) that the order was invalid under the Administrative Procedure Act, Chapter 120, Florida Statutes, since a clear point of entry had not been offered; and (3) that the order violated FEECA. The motion for reconsideration was denied in Order NO. 21448 on June 26, 1989. In re: Petition of Tampa Electric Company for Modification of its Conservation Cost Recovery Methodolosv, 89 F.P.S.C. 6:476 (1989).

The PSC concluded, among other things, that Order No. 20825 was "in a very real sense surplusage." 89 F.P.S.C. 6:477. The PSC had not voted on TECO's petition until January 31, 1989.

Therefore, the tariff appended to TECO's petition had gone into effect automatically upon expiration of the 60-day suspension period of Section 366.06(3), Florida Statutes (1987), the file-and-suspend law for electric utilities. Orders Nos. 20825 and 21448 were appealed on July 26, 1989. Citizens v. Wilson, supra.

On December 21, 1989, TECO petitioned to extend the provisions of Order No. 20825 through March 31, 1991. [R-23] The prepared direct testimony of Mr. Gerard J. Kordecki was filed in support of the petition. [R-28]

On January 16, 1990, Public Counsel filed a motion to dismiss, alleging that TECO's petition was premised upon the fact that its current tariff was only in effect until March 31, 1990. [R-78] Public Counsel maintained that the PSC, however, had concluded in Order No. 21448 that the tariff accompanying TECO's original petition, which was not limited in duration, had gone into effect automatically. The order pursuant to which TECO filed another tariff had been characterized by the PSC in its later order as "surplusage." Since a tariff of indefinite duration had gone into effect automatically, it was Public Counsel's contention that there was nothing to extend.

The motion to dismiss also asserted that the petition was inconsistent with the PSC's position before the Court that modification of TECO's recovery methodology could not violate nonrule policy because it only applied to one utility and was only in effect for one year. Additionally, Public Counsel contended that TECO's petition failed to address fuel benefits of the avoided

combustion turbine (CT) unit that Order No. 20825 said would have to be considered in 1990. Further, Public Counsel asserted TECO had failed to explain how its petition could be granted without violating FEECA.

On January 22, 1990, the Florida Industrial Power Users Group (FIPUG), an ad hoc group of large industrial customers, petitioned to intervene. [R-120] On January 24, 1990, TECO filed a motion to strike and response to Public Counsel's motion to dismiss. [R-131] FIPUG filed a response to the motion to dismiss on January 29, 1990. [R-145] Public Counsel responded to TECO's motion on February 2, 1990. [R-154] FIPUG's intervention was granted by Order No. 22518, on February 12, 1990. [R-156]

A prehearing conference was held in the conservation docket on February 12, 1990, before Commissioner Herndon. [T(prehearing)-13 One aspect of the motion to dismiss was Public Counsel's argument that the full Commission should consider TECO's petition because of the basic policy issue involved and because it was the full Commission that approved TECO's first petition. Commissioner Herndon decided the motion to dismiss should be heard by the three-member conservation cost recovery panel at the hearings beginning February 21, 1990. [T(prehearing)-38] TECO's attorney withdrew his motion to strike the motion to dismiss. [T(prehearing)-38] On January 10, 1990, TECO filed the prepared supplemental testimony of Mr. Kordecki with an exhibit addressing the recovery methodology. [T-135]

Hearings were held in the conservation docket on February 21, 1990. The three Commissioners assigned to the docket first heard argument on Public Counsel's motion to dismiss. [T-9] Commissioners heard from Public Counsel, TECO and FIPUG. Commissioner Herndon, the Chairman of the panel, indicated he would like to take the matter under advisement and vote at a future time. [T-22] Mr. James Dean, Bureau Chief for Conservation and System Planning in the PSC's Electric and Gas Division, advised him that the Commission usuallymade a bench decision after the conservation hearings and quick action was needed because TECO's authority expired on March 31, 1990. [T-23]

Commissioner Beard asked if staff was prepared to advise him "so that I will remain consistent with my previous positions to include the one that we are currently taking, or have taken to the Supreme Court." [T-25-26] The Commission's attorney, Ms. Marsha Rule, stated that staff thought the position taken by TECO and FIPUG was correct but would like the opportunity to confer with someone from the General Counsel's office. [T-26] Commissioner Herndon decided "to set this aside for the moment" and matters concerning other utilities were addressed. [T-26]

After the witness for Gulf Power Company was excused, TECO's attorney called Mr. Kordecki to the stand. [T-119] The attorney from the Office of Public Counsel, Mr. Howe, noted the effect on his case of the procedures the PSC was following:

> Commissioner Herndon, before Mr. Kordecki begins testifying, I would like to make some comments about our ability to put on our case.

> In your rules it provides for motions to dismiss, which we have filed. It also provides in Rule 25-22.037 that in the event such a motion is denied, an answer or other responsive pleading may be filed within ten days after issuance of an order denying the motion.
>
> As I stated earlier today, and at the prehearing conference, we understood that this docket was going to be handled by the full Commission in a separate proceeding, and it had been assigned that by the Clerk. Our first notification that, in fact, that would not be the case was at the February 12th prehearing conference. The time to file testimony had already past [sic: passed]: in fact, the parties' testimony was due on January 29th of 1990. We haven't had the opportunity to develop testimony on the subject.
>
> Now, I am prepared to cross examine Mr. Kordecki on his testimony, and that doesn't cause me any concern. But as far as an opportunity for us to put on our own direct case, we just haven't had that. And with that understanding I am prepared to proceed with the cross examination of Mr. Kordecki. [T-119-20]

Mr. Kordecki was then called as a witness. He adopted the prepared written testimony filed earlier which was "inserted into the record as though read." [T-127] He was cross-examined by Mr. Howe and by Ms. Rule for the PSC staff. [T-141-170] The Commission then returned to the motion to dismiss. [T-234][2]

Another PSC attorney made a recommendation for disposition of the motion. Ms. Suzanne Brownless was the Bureau Chief for electric and gas matters in the PSC's Legal Division and Ms. Rule's direct superior; she was not a member of the separate advisory staff of the General Counsel's office. Ms. Brownless recommended that the motion to dismiss be denied. [T-235-38]

[2]Pages 173 through 233 of the hearing transcript contain the prefiled testimony of witnesses for other utilities which were inserted into the record upon agreement of the parties. These pages are omitted from the appellate record and have no bearing on this appeal. Discussion of TECO's request is not interrupted even though it appears to stop on page 172 and continue on page 234.

Ms. Brownless stated that the tariff TECO had filed in response to Order No. 20825 had gone into effect automatically when the PSC failed to act within 60 days. [T-236] Mr. Howe pointed out that that was not the tariff attached to TECO's original petition. [T-238-39] Ms. Brownless then said that the tariff that was appended would have been the one to take effect automatically:

> [W]hat was filed with the initial petition would have gone into effect had the 60 days run and no action been taken by this Commission. [T-241]

But she concluded that she was "pretty sure that this [the April 3, 1989, tariff] is the tariff that was filed in conjunction with [TECO's] petition." [T-242]

Mr. Howe then distributed copies of TECO's October 28, 1988, petition with the attached tariff pages. [T-242] With reference to those tariff pages, Ms. Brownless said:

> We specifically got a waiver from Tampa Electric Company not to act on these tariffs within 60 days. That's why they came up at the agenda on January 31st of 1989. That takes care of the first problem. So these tariffs that Mr. Howe believes went into effect never went into effect, and to my knowledge we never argued on appeal that we [sic] did. [T-247-48]

Ms. Brownless's statements were simply incorrect. TECO was never asked to waive the 60-day period and did not do so. There is no indication in the record that anyone considered that the 60-day file-and-suspend period might apply before the issue was raised at the June 6, 1989, agenda conference as a basis for denying Public Counsel's motion for reconsideration. Public Counsel's motion to dismiss was denied. [T-252] The question then arose as to how the

Commission should evaluate Mr. Kordecki's testimony. Commissioner Herndon said:

> . . . I would like to have some thought given to what Mr. Kordecki has said. I mean, unfortunately some of his testimony came in later than others and, while I have read it, I haven't had an opportunity to digest it. . . . I thought what we were going to do is get some analysis from staff with respect to the testimony and the petition on its merits. [T-253-54]
>
> MS. RULE: You mean just take it to a recommendation at [an] agenda [conference]? [T-254]
>
> COMMISSIONER HERNDON: Yes.

Ms. Rule and Mr. Dean advised the Commissioner that a decision had to be reached before April 1. [T-254-55] Mr. Howe informed the Commission that, under the APA, Public Counsel had an absolute right to submit proposed findings of fact and conclusions of law. [T-256] Ms. Rule suggested that, in lieu of written submittals, Mr. Howe be given the opportunity to argue orally "right now." [T-257] Mr. Howe said he would be willing to do that. [T-257] Commissioner Herndon then asked if he could ask Mr. Dean for a recommendation based on Mr. Kordecki's testimony as well as other information:

> COMMISSIONER HERNDON: Do I have the capability to ask Mr. Dean for his recommendation right now?
>
> MS. RULE: Absolutely.
>
> MS. BROWNLESS: Absolutely.
>
> COMMISSIONER HERNDON: Based on what he has heard from Mr. Kordecki and any other information?
>
> MS. BROWNLESS: Sure. [T-259]

Mr. Howe was then allowed to present his argument. [T-259-69] Argument from the attorneys for TECO and FIPUG followed. [T-269-71]

Ms. Rule for the PSC staff made the following recommendation:

> As to the legal issue, I agree with TECO and FIPUG. There is competent substantial evidence in the record. I think you have enough to go on here to make your decision. As to the factual decision, I'd like Mr. Dean to address that. [T-271]

Mr. Dean said:

> The bottom line [is] that staff would support the Company's petition to exclude interruptible customers for a one-year period. I would elaborate on our reasons if you would like for me to.
>
> COMMISSIONER HERNDON: Please. [T-271]

Mr. Dean, continued, addressing the legislative intent of FEECA and matters inside and outside the record of the proceeding. [T-271-75]

Mr. Howe had interposed an objection during Mr. Dean's presentation because he felt it had gone outside the record on which the Commissioners had to base their decision:

> MR. HOWE: Objection, Commissioners. I think Staff should be limited in this situation to a recommendation based on the evidence in the record. That's what your decision must be based on, and I feel like Mr. Dean is going far afield of anything Mr. Kordecki said in his testimony.
>
> MS. RULE: I think Staff has the same leeway in an oral recommendation that they would [have] in a written one. And if they want to bring matters of a common knowledge around the Commission to your attention, they are entitled to do so. Mr. Dean is not testifying here.
>
> MR. HOWE: Commissioner, I'd cite you to Section 120.57, I think its (1)(b)8. It says, 'Agency decisions shall be based exclusively on evidence in the record.'

> Nothing Mr. Dean has to contribute is evidence in the record.
>
> And I think, since you must constrain your decision to evidence in the record, he should be constrained [in] his recommendation to what you have heard here today, which is the basis of TECO's position [sic: petition].
>
> MS. RULE: I think he is pointing to evidence in the record. He is also pointing out some of the other reasons why the Commission may want to make the decision supported by the evidence in the record.
>
> COMMISSIONER HERNDON: Go ahead, Mr. Dean. [T-272-73]

The three Commissioners voted to approve the extension sought by TECO so that all the costs of the utility's conservation programs would be borne by its firm customers until, at least, March 31, 1991. [T-287-89] The PSC approved a conservation cost recovery factor for TECO which was only applicable to firm customers. Approximately $2 million per year in costs were shifted from TECO's interruptible customers and assigned to firm customers for recovery. The decision is reported in Order No. 22812, dated April 12, 1990.[3] [R-181] A notice of appeal was filed on May 11, 1990. [R-189]

[3]Order No. 22812 also set the conservation cost recovery factors for other electric and gas utilities. Only that part of the order allowing TECO to exclude its interruptible customers from conservation cost recovery charges is being challenged.

SUMMARY OF ARGUMENT

TECO's petition presumed that the tariffs filed pursuant to Order No. **20825** were about to expire on March **31, 1990.** If TECO was to continue excluding its interruptible customers from imposition of a conservation cost recovery factor for an additional year, it would need PSC authorization to do so.

The PSC, however, in an order denying Public Counsel's motion to reconsider Order No. **20825,** had concluded that the tariff appended to TECO's original petition had gone into effect automatically when the PSC failed to act within 60 days of the October **28, 1988,** filing. That tariff was not limited in duration. There was nothing to extend unless the PSC was incorrect in its Order No. **21448** and in its position before the Court that Order **No. 20825** was mere surplusage. PSC consideration of TECO,s petition to extend its conservation cost recovery methodology must be considered a concession that TECO never implemented its original tariff automatically under the file-and-suspend law, Section **366.06 (4),** Florida Statutes **(1989),** and that Public Counsel was denied a clear point of entry into the agency process that granted TECO's first petition to exclude interruptibles from conservation cost recovery.

TECO sought to prove its case at hearing through the testimony of its employee, Mr. Kordecki. On direct examination, Mr. Kordecki testified that TECO's interruptible customers should not have to pay for conservation because they receive none of the benefits intended to flow from conservation. He said they do not benefit

from deferring the construction of additional generating capacity, and they do not benefit from reduced fuel consumption. On cross-examination, however, Mr. Kordecki conceded that TECO's interruptibles received some capacity deferral benefits and that all customers were equally affected by decreased fuel usage. Considering the evidence in its totality, TECO failed to prove its case.

The PSC has required all electric utilities under its jurisdiction to collect for approved conservation programs equally from all customers since the first conservation cost recovery factors were approved in **1981**. There is inadequate evidence in the record of this proceeding to support a departure from that nonrule policy. TECO's petition was inconsistent with FEECA and the PSC's prior interpretations of FEECA that the legislative intent was to reduce the nominal quantities of fuel burned for electric generation.

The PSC relied on extraneous factors outside the record of the hearing held on TECO's petition, contrary to Section **120.57** (1)(b)**8,** Florida Statutes **(1989).** Additionally, the PSC violated Section **120.66,** Florida Statutes **(1989),** by permitting staff members who advocated in favor of TECO's position to make the final recommendation on which the PSC acted to approve TECO's petition.

ARGUMENT

I.

THE PSC WAS RELUCTANT TO CONCLUDE TECO HAD NOT JUSTIFIED THE RELIEF IT SOUGHT BECAUSE TO DO SO WOULD DEMONSTRATE THAT THE PSC'S DECISION ON TECO'S EARLIER PETITION HAD BEEN IN ERROR.

Order No. 22812, the subject of this appeal, must be evaluated in light of the procedures employed by the PSC on TECO's first petition. TECO had asked for a permanent change in the manner in which the costs of conservation programs were recovered from its customers. The PSC voted on January 31, 1989, to approve TECO's petition -- but only for one year. The change was approved as a proposed agency action. Under this procedure, substantially affected persons would be given an opportunity to protest the agency's tentative action and request a hearing.

In spite of the vote, Order No. 20825 was issued on March 1, 1989, as a final order. 89 F.P.S.C. 3:15. Public Counsel moved for reconsideration on March 16, 1989. The PSC denied the motion in Order No. 21448. 89 F.P.S.C. 6:476. The PSC said it did not have to provide a point of entry for three reasons: (1) Public Counsel had foregone an opportunity to participate at the agenda conference; (2) Public Counsel waived any deficiency in procedures by stipulating to a cost recovery factor in the conservation docket where the vote was implemented; and (3) the order complained of was of no force and effect because the vote was taken more than 60 days after the petition was filed, so the tariff appended to the petition had gone into effect automatically pursuant to the

provisions of Section 366.06(3), Florida Statutes (1987), the file-and-suspend law for electric utilities.

The PSC said Order No. 20825 was unnecessary, characterizing it as "surplusage:"

> Public Counsel's argument is not well taken because the 'order' of which Public Counsel complains is in a very real sense surplusage. The 'file-and-suspend' law, Section 366.06[(3)], Florida Statutes, enacted as Chapter 74.195 [sic: 74-195], Laws of Florida, provides that if the Commission does not object to the proposed tariff changes within sixty (60) days, the proposed rates automatically go into effect: [Quotation from Section 366.06(3), Florida Statutes (1987), omitted.] Order No. 21448, at 2, 89 F.P.S.C. 6:477.

Neither Public Counsel nor TECO were forewarned that the PSC considered Order No. 20825 a nullity. TECO had never implemented the tariff appended to its original petition. It was not really a tariff anyway; it was not dated and only the first of two pages had been submitted in support of the petition.

Accordingly, the only tariff TECO had on file had been submitted in response to Order No. 20825. The tariff showed an effective date of April 3, 1989, and was to be in effect until September 30, 1989. After the PSC set another recovery factor at hearings in August 1989, TECO submitted a tariff to be effective October 1, 1989, for the six-month period ending March 31, 1990.[4]

Order No. 21448 placed TECO in a quandary. The order said the "tariff" appended to the petition had gone into effect, and that

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[4]Order No. 20825 gave TECO permission to collect all its conservation costs from its firm customers for one year. Since the tariff had to specify the factor applicable during each projection period, however, TECO filed two tariffs, one after the other, for each of the two six-month projection periods encompassed in the one-year period.

was why Order No. 20825 was surplusage and Public Counsel's motion for reconsideration was "not well taken." However, the only tariffs on file were those submitted pursuant to Order No. 20825. So, for the year April 1989 through March 1990, TECO and the PSC assumed Order No. 20825 was in effect. During this same time period, TECO and the PSC took the position before the Court in Public Counsel's appeal of Orders Nos. 20825 and 21448 that Order No. 20825 was surplusage and Public Counsel was not entitled to a hearing because the original "tariff" was implemented automatically outside the APA.

When TECO petitioned to extend the authority granted in Order No. 20825 for an additional year, Public Counsel moved to dismiss. [R-78] One of the grounds alleged for dismissal was that, inasmuch as the PSC's position before the Court was that the original "tariff" was in effect, there was nothing to extend. [R-78-80] At oral argument on the motion to dismiss, Mr. Howe said:

> My position in this is, simply, that in this case TECO is asking for the Commission to exten[d] what it granted at [the January 31, 19891 agenda conference, and pursuant to the order [, Order No. 20825,] out of that agenda conference. However, in a subsequent order, [Order No. 21448,] and as I construe the Commission's position before the Supreme Court on appeal, it's that [Order No. 208251 is a nullity. The language the Commission used was that it was surplusage. If that order is surplusage, and TECO's tariff really went into effect automatically on the passage of 60 days, that tariff did not contain any limitation in its duration. If that tariff was in effect automatically there is nothing to extend. If it is the Commission's position now that it really did approve [a] tariff at its January 31st, 1989 agenda conference, and its order out of that agenda conference is the vehicle for TECO's change, I think fairness requires that this Commission inform the Court that it is no longer this Commission's position

> that that tariff went into effect automatically without any limitation. [T-11-12]

The Commissioners did not state their grounds for denying the motion to dismiss with any precision at the hearings and Order No. 22812 essentially ignores the motion altogether.[5] The PSC has refused to answer whether entertaining TECO's petition for an extension was inconsistent with Order No. 21448 or with the PSC's position before the Court in the appeal of Orders Nos. 20825 and 21448.

It is fairly obvious, however, that the PSC does not really believe the file-and-suspend law excused its failure to conduct hearings on TECO's original petition. Order No. 20825 is no longer surplusage in the order approving the extension, Order No. 22812, which is the subject of this appeal:

> On March 1, 1989 this Commission issued Order No. 20825 in Docket No. 881416-EG which approved a one year exclusion of TECO's Energy Conservation Cost Recovery (ECCR) factor for its interruptible customers. Order No. 22812, at 4. [R-184]

It is also obvious that, if the PSC found 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. The PSC's appraisal of TECO's evidentiary presentation

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[5]The motion to dismiss TECO's petition raised several issues and grounds for dismissal. It was subject to responses by TECO and FIPUG. TECO moved to strike the motion, to which Public Counsel responded. TECO ultimately withdrew its motion to strike. Argument and discussion on the motion to dismiss take up approximately 35 pages of transcript of the February 21, 1990, hearing. Order No. 22812, however, limits discussion on the motion to dismiss TECO's petition to one sentence, at 4: "Public Counsel filed a Motion to Dismiss TECO's petition, which motion was denied a hearing." [R-184]

at the February **1990** hearings must, therefore, be evaluated in the light of this administrative inertia.

The PSC was obviously reluctant to find that TECO had not proven its case. The Court should, therefore, be circumspect in any deference it would ordinarily afford the PSC's findings and the weight given by the agency to testimony. In this case, Mr. Kordecki, TECO's employee, was the only witness. Consideration of all of his testimony, both direct and cross-examination, confirms that the PSC did not weigh the evidence and did not have adequate record support for its departure from established nonrule policy in Order No. **22812.**

II.

THE PSC DID NOT HAVE A FACTUAL OR LEGAL BASIS FOR DEPARTING FROM THE POLICY THAT HAD BEEN FOLLOWED UNIFORMLY FROM **1981** UNTIL TECO'S FIRST PETITION WAS APPROVED IN **1989** WITHOUT A HEARING.

Electric utilities subject to the jurisdiction of the PSC had been imposing equal per-kilowatt-hour charges on billings to their firm and industrial customers since **1981** on the authority of the PSC's decision in Order No. 9974, 81 F.P.S.C. 4:154. In that order, the PSC addressed the legislative intent of FEECA as follows:

> In **1980,** the Florida Legislature enacted the Florida Energy Efficiency and Conservation Act (FEECA), now codified in Sections **366.80-366.85** and **403.519,** Florida Statutes. The act established the objective of utilizing the most efficient and cost-effective energy conservation programs to protect the health, prosperity, and general welfare of the state. This Commission was directed by the Legislature to establish conservation goals, and to require utilities to develop plans with which to meet

> those goals. As required by Section 366.82(2) and (3), we have established conservation goals and have reviewed and approved many plans submitted by individual utilities. Order No. 9974, at 2, 81 F.P.S.C. 4:155.

In a portion of the order entitled Method of Recovery, the PSC concluded that all customers should pay equally for conservation on a per-kilowatt-hour basis:

> . . . 'Because all customers will enjoy the benefits of such cost avoidancy we direct that the authorized costs be recovered from all customers on a per kilowatt hour or per therm basis. Order No. 9974, at 9, 81 F.P.S.C. 4:162.

TECO's petition asked that it be treated differently than the other electric utilities and be allowed to recover all costs from firm customers.

Faced with such a direct challenge to established policy, the PSC had to require certain evidentiary presentations. TECO had to argue and prove changed circumstances. See Occidental Chemical Co. v. Mayo, 351 So.2d 336, 341 (Fla. 1977) ("It is difficult for us to overturn a decision of the Commission to continue a rate structure previously found to be fair and reasonable, absent a clear showing in the record that the earlier structure was arbitrary or that changed circumstances have made it unreasonable.") The utility, of course, had to provide justification for treating it differently than others similarly situated. TECO had to demonstrate that its petition was not inconsistent with FEECA. TECO had to convince the agency that reliance on its evidence would provide adequate record support for departing from decade-old policy under relevant statutes and case law. See Duval Utility Company v. Florida Public Service

Commission, 380 So.2d 1028, 1030-31 (Fla. 1980) (testimony at hearing inadequate to support change in industry-wide policy.) TECO provided none of this; yet the PSC granted TECO the relief it sought.

If TECO had proven its case, the PSC's final order still had to explicate and defend the adoption of incipient policy. See Florida Public Service Commission v. Indiantown Telephone System, Inc., 435 So.2d 892, 896 (Fla. 1st DCA 1983) (If PSC proceeds through adjudication instead of rulemaking, it will have to explicate and defend policy repeatedly in each proceeding in which it intends to attempt to apply that policy.) The PSC had to explain its rationale for abandoning existing policy. See Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980); Ganson v. State, Department of Administration, 554 So.2d 516, 520 (Fla. 1st DCA 1989); McDonald v. Department of Banking and Finance, 346 So.2d 569, 582 (Fla. 1st DCA 1977) ("The agency's final order in 120.57 proceedings must describe its 'policy within the agency's exercise of delegated discretion' sufficiently for judicial review.") Compliance with FEECA or specific reasons why that statute was inapplicable had to be explained in detail. See Department of Education v. Atwater, 417 So.2d 749, 751 (Fla. 1st DCA 1982); Rice v. Department of Health and Rehabilitative Services, 386 So.2d 844, 850-51 (Fla. 1st DCA 1980). Statutes, cases and prior agency orders cited by opposing parties as a basis for denying TECO's petition had to be addressed. Countervailing positions, argument and interpretation of facts and

law had to be untangled and resolved. See Doctors' Osteopathic Medical Center, Inc. v. Department of Health and Rehabilitative Services, 498 So.2d 478, 480-81 (Fla. 1st DCA 1986); McDonald, supra, 346 So.2d at 582 (citing to Tamiami Trail Tours, Inc. v. Bevis, 316 So.2d 257, 260 (Fla. 1975)). TECO's petition could ultimately be granted only because, all things considered, it was fully justified. Order No. 22812 is completely deficient in these aspects.

A. THE EVIDENCE PRESENTED BY TECO WAS INADEQUATE TO SUPPORT THE DECISION REACHED BY THE PSC IN ORDER NO. 22812 TO DEPART FROM THE POLICY DECISION REACHED IN 1981 IN ORDER NO. 9974.

Appellants do not ask that the Court reweigh the evidence heard by the PSC. They do ask the Court to evaluate whether, given the scope of Mr. Kordecki's responses to direct and cross-examination questions, the PSC weighed the evidence at all or just selected statements that would support what the PSC intended to do all along.

Mr. Kordecki's prepared direct testimony filed December 21, 1989, is only three pages long. [T-128-30] The prepared supplemental testimony filed January 10, 1990, adds less than three and one-half pages. [T-135-38][6] Mr. Kordecki gave two reasons why

[6]TECO prefiled Mr. Kordecki's testimony in three installments. Mr. Kordecki's original testimony on the proposed extension was filed on December 21, 1989. It appears in the hearing transcript at pages 128-130. Supplemental testimony was filed on January 10, 1990, and appears at transcript pages 135-138. In between is four pages of testimony filed January 9, 1990, addressing conservation costs generally which are not at issue in this appeal.

interruptible customers do not benefit from conservation. They are repeated here in their three-short-paragraph entirety:

> Tampa Electric Company does not build capacity for its interruptible Customers. These customers can be interrupted during peak conditions, therefore obviating capacity need.
>
> To determine fuel savings effects, we have modeled a 'what if there had been no conservation programs.' The model indicates that the avoided GWH's have actually increased average fuel costs due to the fact that more lower priced marginal coal would have been burned if the gigawatt-hours had not been saved.
>
> The attached analysis (GJK-2) portrays costs and benefits. It shows that we do not expect marginal fuel cost to surpass average fuel cost until 1991 based on this type of analysis. [T-129]

FEECA states, at Section 366.81, Florida Statutes (1989), that "[r]eduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance." Mr. Kordecki's comments on the purported absence of capacity-deferral benefits was addressed to the peak demand issue. Electricity cannot be stored efficiently, so electric utilities are sized to have sufficient capacity available to meet demand when it is at a maximum. This usually occurs when the air temperature is at its highest or lowest, hence the reference to weather-sensitive peak demand. Demand on an electric system is measured as a rate of electricity usage in gigawatts, or billions of watts.[7]

Interruptible customers receive electricity at reduced rates; in return, they agree to have service interrupted if the utility

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[7] Units of electricity are unusual in that the rate of usage does not include a time element such as in gallons-per-minute or miles-per-hour. This is so because the unit of consumption is the watt-hour. The rate of consumption is watt-hours-per-hour, which simplifies to watts.

needs the capacity to serve other customers. Because they can be interrupted, utilities do not consider interruptible load when calculating the amount of capacity that must be available. Mr. Kordecki was apparently trying to make the point that interruptible customers do not benefit from conservation programs designed to reduce peak demand because TECO does not consider them in deciding how much capacity to build. Mr. Kordecki did not address whether interruptible customers receive other benefits from reductions in peak demand. Nor did Mr. Kordecki establish a rational relationship between the lack of capacity-deferral benefits (as he defines the term), and forgiveness from conservation cost recovery.

Mr. Kordecki's second point addressed fuel costs on TECO's system. Fuel burned to generate electricity is priced out on a weighted-average inventory basis. TECO's generating units are, for the most part, coal-fired, and most of TECO's coal is purchased under long-term contracts. Once TECO satisfies its contractual commitments, it is free to purchase additional coal on the spot market where prices are below contract prices. The more electricity TECO generates, the more coal it will purchase on the spot market. The result will be reduced fuel costs on a per-kilowatt-hour basis, but higher costs overall.

Mr. Kordecki said conservation on TECO's system had reduced the amount of electricity generated (hardly a surprising result given the legislative intent of FEECA), which reduced purchases of spot coal and increased the per-unit cost of coal burned for generation. The total cost of fuel had, of course, been reduced

by conservation. In Mr. Kordecki's view, even though firm and interruptible customers paid the same fuel cost recovery factor, only interruptible customers were harmed by paying a higher fuel cost recovery factor because of conservation. Mr. Kordecki did not attempt to explain how **TECO** decided increased usage that would foster additional spot coal purchases could be attributed to interruptibles as opposed to other customers.

Mr. Kordecki acknowledged that he participated in the **1981** proceedings that culminated in Order No. **9974. [T-143-44] 81 F.P.S.C. 4:159. TECO's** position had been that an equal per-kilowatt-hour charge should be used for all customers:

> I think we filed 12 different methods of collection. If I remember, I believe we felt administratively that per kilowatt hour was probably best, not necessarily the fairest, because I'm not sure you could ever get at 'the fairest.' **[T-144-45]**

TECO imposed a conservation cost recovery factor on all its customers from May **1981** until April **1989** on the authority of Order NO. **9974. [T-143-44]**

Mr. Kordecki agreed on cross-examination that, although **TECO** does not consider the demand of interruptible customers in its decision whether to add additional capacity, it does consider the interruptible load in its decision on what type of unit to construct. **[T-146-47]** In other words, once **TECO** decides to add capacity without regard to the interruptible load, it will consider the amount of electricity interruptibles will use in deciding whether to build a base load unit, an intermediate unit or a peaking unit.

Mr. Kordecki conceded that **TECO's** interruptible customers are not always interrupted when **TECO** runs out of capacity for other customers; **TECO** will purchase power from other utilities so that the customer is not interrupted. **[T-148]** He also agreed that conservation by other customers which reduces the peak demand on the existing system frees up capacity and reduces the likelihood that interruptibles will be interrupted:

> Q. [by Mr. Howe] Would you agree that interruptibles may benefit from conservation if it increases the likelihood that they will not be interrupted?
>
> A. Yes, but probably not over the next year.
>
> Q. As other noninterruptible customers reduce their peak demand, does that increase the amount of capacity available to interruptibles within existing system capacity?
>
> A. I'm sorry, do that again. Are you saying if firm customers reduce their usage, then there is more capacity on the system?
>
> Q. To serve interruptibles.
>
> A. It depends on when they do it, but, you know, all things being equal, yes. **[T-150]**

Mr. Kordecki acknowledged that, in **1985, TECO** had petitioned for permission to close its interruptible rate schedules to new customers because it had excess capacity on its system. **[T-168]** An increase in the number of interruptible customers would exacerbate the excess capacity situation in which **TECO** found itself. Moreover, because **TECO** had so much excess capacity, its interruptible customers were receiving what amounted to firm service at interruptible rates:

> TECO alleged that it and its ratepayers did not now need additional generation capacity that would be made available by transfers of existing firm customers to interruptible rate schedules and that, in fact, no such new generating capacity or the purchase of such capacity was contemplated before **1992**. TECO stated that its interruptible customers were now receiving what amounted to firm service and alleged that the availability of virtually firm service at discounted interruptible rates was creating considerable interest by existing firm customers in taking service under existing interruptible rate schedules. TECO concluded that if current firm customers were allowed to switch to the existing interruptible rates, they would not provide sufficient revenue to cover the generating capacity installed to serve them when they were firm customers, which would work to the detriment of both the utility and the other ratepayers. Order No. 14550, at 1, reported as In re: Emergency Petition of Tampa Electric Company for Closure of its Existing Interruptible Rate Schedules to New Businesses and for Approval of New Interruptible Rate Schedules, IS-3 and IST-3, **85** F.P.S.C. **7:91 (1985).**

It appears that TECO continues to have excess capacity and the purpose of TECO's request was simply to reduce rates to encourage increased usage by interruptibles. TECO's request has nothing to do with the absence of quantifiable benefits from conservation programs.

In Order No. **20825,** at 2, the PSC recognized that conservation on TECO's system deferred the need for a combustion turbine (CT) unit that would otherwise have come on line in **1990**. **89** F.P.S.C. 3:16. That unit would have operated on an expensive fuel that would increase the fuel costs for firm and interruptible customers alike:

> . . . TECO's conservation programs have deferred this **1990** unit and avoided the associated higher fuel costs of dispatching this unit. From a planning perspective, since higher priced gas and oil would be burned in this unit, the avoidance of this unit does benefit the interruptible customer by keeping the average fuel charge below what it would have been if the **1990** CT is built.

> The value of this benefit needs to be identified and credited as a conservation benefit which accrues to the interruptible customer. Order No. 20825, at 2, 89 F.P.S.C. 3:16.

Mr. Kordecki said he had netted this benefit in his calculations, but removing interruptibles from cost recovery could hardly assign any benefit to them. [T-155-57]

None of Mr. Kordecki's statements about the absence of capacity-deferral benefits for TECO's interruptible customers were addressed to changed circumstances since 1981. TECO was asking the PSC to view old information in a new light and the Commission was more than willing to comply. This does not offer a sufficient basis to change the established policy of the previous decade.

Mr. Kordecki's analysis, which purported to show conservation was inconsistent with fuel savings, was based on the absence of changed circumstances. Conservation throughout the period 1980 through 1988 caused TECO to purchase less coal on the spot market, which, in turn, caused the fuel adjustment factor to be higher. [T-142-43, 157-58] It was higher for firm customers as well as for interruptible customers, which, in TECO's view meant that only interruptibles should be free of paying for conservation programs. [T-159-60]

The purpose of TECO's petition was to encourage increased electric usage by interruptibles. [T-155, 160, 164] Excusing them from conservation charges merely reduced rates for that purpose. In its October 1988 petition, TECO asserted that it should encourage electric usage by interruptibles in spite of FEECA:

> The second FEECA goal, reducing the growth rate of electric consumption, is directed at lowering the difference between marginal fuel costs and average fuel costs. This does not apply on an energy basis for Tampa Electric because the company's marginal fuel costs are lower than average system fuel costs charged out. Since Tampa Electric is able to purchase less expensive coal on the spot market, it is not beneficial to reduce overall energy usage. Reducing overall energy usage would reduce the percentage of spot coal generation and thereby increase the unit cost of fuel borne by the company's customers. Tampa Electric Company's Petition for Modification of its Conservation Cost Recovery Methodology, filed October 28, 1988, at 2.

In Order No. 20825, the PSC had disagreed with TECO's characterization of FEECA as trying to reduce the difference between marginal and average fuel costs:

> We do not agree with TECO's interpretation of the second FEECA goal. We believe a strict reading of this goal requires TECO to reduce the nominal quantities of fuels burned, not the price differential. However, whatever the interpretation of FEECA, this issue has no relevance to the relief requested here. Order No. 20825, at 3, 89 F.P.S.C. 3:17.

Mr. Kordecki had testified that FEECA only required utilities to reduce the growth rate in energy consumption when it was cost effective to do so. [T-129-30, 164-65] This interpretation is inconsistent with the plain language of the statute and the PSC's previous interpretations of it. See discussion supra at 17-18.

Mr. Kordecki was asked some questions about TECO's actions pursuant to Order No. 22176, issued November 14, 1989, entitled Order On Conservation. [T-165] In re: Implementation of Section 366.80-.85, Florida Statutes, Conservation Activities of Electric and Natural Gas Utilities, 89 F.P.S.C. 11:253 (1989). In that order the PSC noted the strides that had been made in the

residential sector and announced the agency's intent to expand conservation further into the commercial and industrial sectors:

> The conservation efforts of Florida's electric and natural gas utilities over the past decade have produced significant savings of both dollars and natural resources for the citizens of our state. We believe that further savings can be realized if the state's electric utilities devise plans and programs which enhance the gains made in the residential sector: substantially increase conservation and efficiency efforts in the commercial and industrial sectors: aggressively seek out cogeneration and small power production facilities; and pursue research, development, and demonstration projects designed to promote energy efficiency and conservation. We therefore require that the Florida Utilities subject to the provisions of the FEECA statute submit new and revised plans and programs to meet these goals. Order No. 22176, at 2, 89 F.P.S.C. 11:254.

Mr. Kordecki acknowledged that it was TECO's industrial customers who took service pursuant to interruptible rate schedules, [T-167] but TECO was not proposing any conservation for interruptibles because, from TECO's perspective, it was not cost effective to do so. [T-166-67] There is nothing in FEECA, however, that indicates the legislative policy of conservation is to be encouraged only if it is cost effective to a particular class of customer.

B. ORDER NO. 22812 DOES NOT MEET STATUTORY OR CASE LAW STANDARDS REQUIRING THE AGENCY TO EXPLICATE AND DEFEND INCIPIENT POLICY.

Order No. 22812 does not mention FEECA, even though Mr. Kordecki addressed it directly in his prefiled testimony and was cross-examined on his interpretation. Mr. Kordecki was also cross-examined with reference to PSC Orders Nos. 9974, 14550, and 22176. At Mr. Howe's request, the Commission took official notice of those orders. [T-234] They are not mentioned in Order No. 22812. During

oral argument, Mr. Howe cited to Florida Cities Water Co. v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980); Florida Public Service Commission v. Indiantown Telephone System, Inc., 435 So.2d 892 (Fla. 1st DCA 1983); and St. Francis Hospital v. Department of Health and Rehabilitative Services, 553 So.2d 1351 (Fla. 1st DCA 1989), for the proposition that TECO had not provided adequate grounds for the PSC to depart from its nonrule policy. [T-262-67] These cases are not mentioned in Order No. 22812.

Mr. Howe had argued that, although Mr. Kordecki had stated at first that interruptible customers received no capacity deferral benefits, he conceded on cross-examination that they did. [T-259-60] The PSC relies only on the answers to direct examination, citing to Mr. Kordecki's prefiled testimony and his summary before cross-examination:

> The record reflects that because service to interruptible customers can be interrupted during peak conditions, the utility does not build capacity for these customers. Interruptible customers thus receive no capacity deferral benefits. [T.129, 139] Order No. 22812, at 4-5. [R-184-85]

The PSC concedes Public Counsel is correct that conservation freed up capacity and reduced the likelihood of interruption, but concludes that it is not quantifiable and, therefore, not a basis for charging interruptibles. Order No. 22812, at 5. [R-185] Even if that were true, the admission completely defuses Mr. Kordecki's argument and the Commission's own conclusion that interruptibles receive no benefits at all from conservation. The PSC makes no attempt to resolve the discrepancy with TECO's position that it is

the complete absence of benefits that justifies excusing interruptibles.

Mr. Howe had argued that TECO failed to recognize the deferral Of a 1990 combustion turbine (CT) unit with its associated higher fuel costs, which the PSC had identified in Order No. 20825. [T-260] Order No. 22812 doesn't mention the issue or resolve it.

Mr. Howe had argued that the loss of fuel savings that Mr. Kordecki identified applied equally to firm customers. [T-260-61] The PSC doesn't attempt to explain why it is appropriate to exclude interruptibles but not firm customers when conservation has (if TECO's argument is accepted at all) increased fuel costs for both.

TECO's petition and its encouragement of energy usage, as well as the discrimination against firm customers for participating in conservation programs, is directly contrary to FEECA.[8] Section

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[8]Section 366.81, Florida Statutes (1989), provides, in pertinent part: "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. Reduction in, and control of, the growth rates of electric consumption and of weather-sensitive peak demand are of particular importance. The Legislature further finds 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. Since solutions to our energy problems are complex, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged. Accordingly, in exercising its jurisdiction, the commission shall not approve any rate or rate structure which discriminates against any class of customers on account of the use of such facilities, systems, or devices. . . ."

120.68(9), Florida Statutes (1989), states that a reviewing court should modify agency action or remand the case if a correct interpretation of statute mandates a result different from that reached by the agency.

Section 120.68(12)(c) states that the reviewing court shall remand the case to the agency if it finds the agency's exercise of discretion to be inconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency. Case law has held that an agency's failure to explain disparate results based on similar facts violates the APA as well as the equal protection guarantees of both the Florida and United States Constitutions. See St. Johns North Utility Corporation v. Florida Public Service Commission, 549 So.2d 1066, 1069 (Fla. 1st DCA 1989); Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43, 47 (Fla. 1st DCA 1983); North Miami General Hospital, Inc. v. Department of Health and Rehabilitative Services, 355 So.2d 1272, 1278 (Fla. 1st DCA 1978). Order No. 22812 is glaring in its inadequacies in this regard. Remand is mandatory.

III.

THE PSC'S PRACTICE OF ALLOWING STAFF MEMBERS WHO ADVOCATED AT HEARING TO FORMULATE THE FINAL RECOMMENDATION ON WHICH THE PSC VOTES VIOLATES SECTION 120.66, FLORIDA STATUTES.

The PSC allows staff members engaged in prosecution or advocacy in a case to make a final recommendation on its disposition. This is true of members of the technical staff and

attorneys. Only employees who actually testify in a particular proceeding are excluded, and then only for that case.

Technical staff members identify issues before hearing and take positions on other parties' issues. They assist in drafting interrogatories, and help draft questions for use at depositions and hearings. Staff attorneys conduct discovery, sponsor witnesses and cross-examine witnesses for other parties.

After hearings conclude, the other parties file briefs or proposed findings of fact and conclusions of law. Technical staff members and attorneys active in the case then file a joint recommendation which the PSC votes on at an agenda conference.

This procedure violates Section **120.66,** Florida Statutes **(1989).** Section **120.66** (1)(a) prohibits agency employees engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter from communicating with the agency head after hearings end.'

In the cost recovery proceedings, the PSC makes a bench decision, and briefs are usually not submitted. Staff makes an oral recommendation at the end of the hearing. As a matter of

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'Section **120.66** is written in terms applicable most directly to proceedings heard first by a hearing officer and then submitted to the agency head for review. Thus, prosecutorial staff may not engage in ex parte communications with the agency head after he has received the recommended order. Since the PSC usually sits as the trier of fact, Section **120.66** would apply at the point at which the PSC is preparing to make its final decision on the record.

practice, other parties do not participate in the discussion between Commissioners and staff.[10]

At the conservation hearings, Commissioners turnedto Mr. Dean and Ms. Rule for recommendations. [T-271-75] Neither were advisory staff as that term is used in Section 120.66. Ms. Rule cross-examined Mr. Kordecki, attempting to solicit responses to support staff's view of TECO's position before the PSC. [T-168-70] Mr. Dean may have assisted Ms. Rule in drafting questions for Mr. Kordecki. Mr. Dean had initialed the staff recommendation to approve TECO's first petition. Mr. Dean had previously opposed Public Counsel's motion for reconsideration of Order No. 20825 in a joint recommendation to the Commission. Neither Ms. Rule nor Mr. Dean were in a position to make an impartial recommendation based strictly on the evidence and argument presented at hearing. Mr. Dean, in fact, went well outside the record in his recommendation.

Earlier in the proceedings, Commissioners had turned to another attorney, Ms. Brownless, for a recommendation whether to grant Public Counsel's motion to dismiss TECO's petition. Ms. Brownless had previously opposed Public Counsel's motion for reconsideration of Order No. 20825. She had not prosecuted or advocated in a hearing, but her position that Public Counsel was not entitled to a clear point of entry was open opposition to Public Counsel's position that carried through to the motion to dismiss.

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[10]In this regard, Mr. Howe's objection to Mr. Dean's presentation may be considered an unusual occurrence. [T-272-73]

The apparent intent of Section 120.66 is for an agency to bifurcate its staff between advocacy and advisory functions. Staff members actively engaged in development of a record are in no position to recommend how the agency head should evaluate that record.

In this case, it is difficult to understand why Commissioners asked staff for a recommendation at all. The Commissioners were voting right after hearing testimony from the only witness. Section 120.57(1)(b)8 required that the decision be based exclusively on the evidence of record. This was not a case in which Commissioners needed technical assistance to understand a voluminous record compiled at an earlier time. From the record of the proceedings, it cannot be discerned whether the PSC voted as it did because it believed TECO had proven its case on the record or because it did not disagree with its staff recommendation which both went outside the record and failed to address everything within it.

CONCLUSION

The PSC approved TECO's first petition to modify the manner in which it recovered the costs of its conservation programs without a hearing. The PSC took the position in its Order No. 21448 and in brief and argument before the Court that evidentiary support for its action was not required. The PSC allowed TECO to extend its recovery methodology for an additional year based on the impetus of that earlier decision and not on the quality of TECO's

evidence. Order No. **22812** lacks the factual and legal underpinnings necessary to permit the PSC to depart from the policy decision first reached in **1981** and followed consistently until **1989**. The Court should remand Order No. **22812** to the PSC with directions that it deny TECO's request to extend the modification of its conservation cost recovery methodology for an additional year. The PSC should be directed to order TECO to refund, with interest, all monies collected from firm customers above what TECO would have been allowed to charge if an equal per-kilowatt-hour cost recovery factor had been set for both firm and interruptible customers.

Respectfully submitted,

Jack Shreve
Public Counsel
Fla. Bar No. **0073622**

John Roger Howe
Assistant Public Counsel
Fla. Bar No. **253911**

Office of Public Counsel
c/o The Florida Legislature
Room **812**
Tallahassee, FL **32399-1400**

904/488-9330

Attorneys for the Appellants,
Citizens of the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing Initial Brief of Appellants, Citizens of the State of Florida, has been furnished by U.S. Mail to the following parties on this 20th day of July, 1990.

Susan F. Clark, General Counsel
David E. Smith, Director
Division of Appeals
Public Service Commission
101 E. Gaines Street
Tallahassee, FL 32399-0863

Lee Willis, Esq.
James D. Beasley, Esq.
Ausely, McMullen, McGehee,
Carothers and Proctor
Post Office Box 391
Tallahassee, FL 32302

Vicki Gordon Kaufman, Esq.
Lawson, McWhirter, Grandoff
and Reeves
522 E. Park Ave., Suite 200
Tallahassee, FL 32301

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

John Roger Howe