IN THE SUPREME COURT OF FLORIDA

FLORIDIANS FOR RESPONSIBLE UTILITY GROWTH, Appellants, v. THOMAS M. BEARD, etc., et al. Appellees.	)	CASE NO. 80,225

ON APPEAL OF ORDER NO. PSC-92-0002-FOF-EI
IN FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 910883-EI

ANSWER BRIEF OF APPELLEE, TAMPA ELECTRIC COMPANY

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SYMBOLS AND DESIGNATIONS OF PARTIES

Appellant, Floridians for Responsible Utility Growth, will be referred to as "Appellant."

Appellees, Thomas M. Beard, et al., as the Florida Public Service Commission, will be referred to as "the Commission."

Appellee, Tampa Electric Company, will be referred to as "Tampa Electric" or "the company."

References herein to the record on appeal will be designated "(R. ___)."

References to the separately paginated transcript of the hearing below will be designated "(Tr. ___)."

References to the appendix to this answer brief will be designated "(A. ___)."

The order on appeal, Commission Order No. PSC-92-0002-FOF-EI, rendered on June 23, 1992 by the Commission's Order Denying Motion for Reconsideration (Order No. PSC-92-0552-FOF-EI) will be referred to herein as "the order on appeal" or "the order."

All references herein to the Florida Statutes pertain to the 1991 edition.

STATEMENT OF THE CASE

Tampa Electric accepts Appellant's Statement of the Case with two additional observations. First, the Florida Industrial Cogeneration Association, identified as an intervenor on page 1 of Appellant's Brief, withdrew as an intervenor prior to the hearing below. Secondly, on page 3 of its Brief, Appellant refers to certain provisions of the order on appeal having to do with

conservation which, the order indicates, should be applied on a prospective basis. The order goes on to conclude that additional conservation programs cannot be implemented quickly enough to avoid the need for Polk Unit One and, thus, additional conservation cannot mitigate the need for Polk Unit One. (R. 471)

STATEMENT OF THE FACTS

In its Statement of the Facts Appellant omits reference to a number of facts which Tampa Electric considers significant. First, in constructing Polk Unit One, Tampa Electric has the unique opportunity to secure $120 million in funding from the United States Department of Energy. (Tr. 16-17). Tampa Electric could lose this economic benefit for its customers if it were to postpone or defer the Polk plant. (Tr. 462). Polk Unit One will be a state-of-the-art clean coal project, a conservation initiative itself, which accounts for the DOE's willingness to provide this significant funding. (Tr. 52-A, 53)

In view of the DOE funding, anticipated fuel cost savings and the efficiency of the proposed plant, the overall savings to Tampa Electric's customers are estimated to equal or exceed $195 million. (Tr. 69). This amount does not include an additional $50 million to $100 million in Clean Air Act related savings described by Mr. G. F. Anderson, President of Tampa Electric, in his testimony at the hearing. (Tr. 35, 66)

With respect to conservation, Tampa Electric was the first Florida utility to have its conservation programs approved by the

Commission under the Florida Energy Efficiency and Conservation Act ("FEECA"). (Tr. 231). Tampa Electric was successful in accomplishing the goals initially set out in FEECA. (Id.)

The Rate Impact Measure (RIM) test, referred to in Appellant's Statement of the Facts, is a beneficial test to apply for all Tampa Electric customers in order to achieve the lowest cost per kilowatt hour. (Tr. 234)

Tampa Electric has resubmitted most of its programs under FEECA (some with modifications) and has instituted three new programs primarily devoted to non-residential market sectors. (Tr. 236)

On page 5 of its Statement of the Facts, Appellant states that Tampa Electric did not seek to reduce the need for base load power plants, or evaluate potential conservation programs against base load units for cost-effectiveness. That is misleading. Tampa Electric did not direct attention to the development of conservation programs that reduce the need for base load capacity because the company has no base load units in its immediate expansion plan. (Tr. 244). Nevertheless, the company's programs may have the effect of shifting or deferring base load capacity. (Tr. 245). Tampa Electric evaluated its conservation programs against the units which appeared in its generation expansion plan. (Tr. 245). The opportunity presented through the DOE funding of this project is less costly than the generating unit it displaces in the company's expansion plan. (Tr. 550-551). Finally, Tampa Electric expects that 30 percent of its future growth will be met

by demand side management programs. (Tr. 247)

SUMMARY OF ARGUMENT

Appellant's initial brief begins with an attempt to fashion a new but unidentified standard for review of the Commission orders in power plant need determination cases. The appropriate standard for review has been and remains whether the Commission, in rendering its decision, complied with the essential requirements of law and whether its decision has the support of competent substantial evidence in the record. Equally deficient are Appellant's contentions that the order on appeal does not conform to the procedural requirements of section 120.59(1) and section 120.58(1)(e), Florida Statutes.

The order on appeal is a very carefully drafted decision which goes to great lengths in addressing the matters required to be considered in these types of proceedings, making appropriate findings and conclusions relative to those issues, and addressing and disposing of the proposed findings and conclusions which Appellant submitted below.

Appellant has also failed to demonstrate that the substance of the Commission's decision lacked the support of competent substantial evidence in the record. The order on appeal devotes great detail to weighing and analyzing the evidence presented on all of the criteria affecting the need for Polk Unit One, including the conservation issues on which Appellant singularly focuses.

Contrary to Appellant's argument, no proposed order was required to be circulated below under section 120.58(1)(e), Florida Statutes, nor did the Commission adopt any erroneous interpretation of section 403.519, Florida Statutes.

While Appellant may have demonstrated its disagreement with the substance of the decision below, it has failed to demonstrate any reversible error. The order on appeal should be affirmed in all respects.

ARGUMENT

POINT I

APPELLANT'S POINT I REPRESENTS AN ERRONEOUS ATTEMPT TO FASHION A NEW, ALTHOUGH UNIDENTIFIED, STANDARD FOR REVIEW APPLICABLE TO NEED DETERMINATION ORDERS.

Point I of Appellant's brief seems to say: need determination orders of the Commission are quasi-judicial as opposed to quasi-legislative; they are somehow different from other Commission orders and, therefore, the judicial standard for review should be different. However, Appellant offers no hint as to what this mysterious standard for review should be.

Appellant has properly stated the applicable standard for review on page 11 of its initial brief, and that is:

> Whether the order complained of complies with the essential requirements of law and whether the agency had available competent substantial evidence to support its findings.
>
> Polk County v. Public Service Commission, 460 So.2d 370,373 (Fla. 1984.)

Appellant has offered not a single authority for departing from the above standard in this case. There is no reason to depart from this long established standard of review.

Appellant suggests that the standard of review applied by this Court when reviewing other Commission orders is somehow less stringent than the standard set forth in section 120.68, Florida Statutes. Section 120.68, Florida Statutes, is the portion of Florida's Administrative Procedures Act ("APA") which addresses judicial review of final agency action. Subsection (9), (10) and (12) of section 120.68, Florida Statutes, address the standard for review as follows:

> (9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
> (a) Set aside or modify the agency action, or
> (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.
> (10) If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.
>
> * * *
>
> (12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:
> (a) Outside the range of discretion delegated to the agency by law;
> (b) Inconsistent with an agency rule;
> (c) Inconsistent with any officially stated

> agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or
>
> (d) Otherwise in violation of a constitutional or statutory provision;
>
> but the court shall not substitute its judgment for that of the agency on an issue of discretion. (emphasis added)

Thus, under Section 120.68, Florida Statutes, if a court finds that an agency has interpreted a provision of law erroneously and a correct interpretation compels a different action, it must set aside or modify the agency action or remand the case for further action. Bacon v. Unemployment Appeals Comm'n., 498 So.2d 689 (Fla. 5th DCA 1986). If any agency order is dependent on a finding of fact not supported by competent substantial evidence in the record, the court must set aside the agency action or remand the case to the agency. Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 495 So.2d 790 (Fla 1st DCA 1986), rev. denied 504 So.2d 767. A court shall not substitute its judgment for that of an agency on matters within the agency's discretion. Fla. Stat., §120.08(12).

For many years this Court has applied a standard of review for decisions of the Commission which is consistent with the principles outlined in section 120.68, Florida Statutes. Numerous decisions involving appeals of the Commission's rate orders as well as the Commission orders dealing with other matters have all been decided using the same basic standard of review. Like the principles set forth in Section 120.68, Fla. Stat., the standard of review in appeals of Commission orders is whether the Commission complied

with the essential requirements of the law and whether the Commission's decision is supported by competent substantial evidence. Consistent with Section 120.68, Fla. Stat., the Court has declined to substitute its judgment for that of the Commission on matters within the Commission's discretion.

For example, in reviewing Commission orders, the Court has stated:

> We have spoken time and time again of the task for this Court on judicial review of Commission orders. Our task is not to reweigh the evidence. We must merely determine whether competent, substantial evidence supports a Commission order. We cannot affirm a decision of the Commission if it is arbitrary or unsupported by the evidence.

Citizens v. Public Service Commission, 439 So.2d 784, 787 (Fla. 1983) (citations omitted). The court further noted:

> Under Section 120.68(12), the Court may not now substitute its judgment for the Commission's own action taken within the statutory range of discretion.

Id.

Other decisions reviewing the Commission's exercise of its ratemaking powers use the same basic standard. See Monsanto Co. v. Wilson, 555 So.2d 855 (Fla. 1990); Florida Power Corp. v. Public Service Comm'n, 487 So.2d 1061 (Fla. 1986); Gulf Power Co. v. Public Service Comm'n, 480 So.2d 97 (Fla. 1985); Citizens v. Public Service Comm'n, 464 So.2d 1194 (Fla. 1989); Gulf Power Co. v. Florida Public Service Comm'n, 453 So.2d 799 (Fla. 1984); Citizens v. Hawkins, 356 So.2d 254 (Fla. 1978). The same standard has also been used to review Commission orders dealing with rate design.

See Polk County v. Florida Public Service Comm'n, 460 So.2d 370 (Fla. 1984); City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1982).

The Court has used this same standard to review orders of the Commission determining the rights of electric and telephone companies to provide service in particular areas. For example, in Manatee County v. Marks, 504 So.2d 763 (Fla. 1987), the court considered an order of the Commission denying Manatee County's request to be served by General Telephone through an exchange located in Manatee County rather than an exchange located in Sarasota County and stated:

> On review of action of the Public Service Commission, this Court does not re-evaluate or reweigh the evidence, but only determines whether the commission's decision is supported by competent, substantial evidence. Conflicts in the evidence and varying interpretations thereof are for the commission to resolve. The burden is on the party seeking review here to demonstrate that the commission's determination is arbitrary or unsupported by evidence. Id. at 311.

504 So.2d at 764-765 (citations omitted). See also, Lee County Electric Coop. v. Marks, 501 So.2d 585 (Fla. 1987) (electric territorial dispute); Gulf Power Co. v. Public Service Comm'n, 480 So.2d 97 (Fla. 1985) (electric territorial dispute); Surf Coast Tours v. Florida Public Serv. Comm'n, 385 So.2d 1393 (Fla. 1980) (telephone certificate of need case).

In decisions both before and after the APA was enacted, the Court used the same basic standard of review in appeals of the Commission orders granting or denying permits for motor carriers.

For example, in Greyhound Lines v. Yarborough, 275 So.2d 1 (Fla. 1973), the court considered whether the Commission erred by granting a for-hire permit to an applicant. In that case, the Court considered whether the Commission had the discretion to issue the permit and whether the Commission's order met the essential requirements of the law and was supported by substantial competent evidence. 275 So.2d at 102. Similar inquiries were undertaken in Smith Terminal Warehouse Company v. Bevis, 312 So.2d 721, 722 (Fla. 1975); Gulf Oil Company v. Bevis, 322 So.2d 30 (Fla. 1979); Kimball v. Hawkins, 364 So.2d 463, 466 (Fla. 1978), Gulf Coast Motor Line, Inc. v. Hawkins, 326 So.2d 391 (Fla. 1979) and others. These motor carrier cases are somewhat analogous to determination of need proceedings under section 403.519, Florida Statutes, in that they involved the granting or denial of authority to engage in a particular activity, based on evidence presented as to the need for that activity.

Both section 120.68, Florida Statutes, and previous decisions involving the Commission orders require that the Commission's decision comply with the law and be supported by competent, substantial evidence. Both section 120.68, Florida Statutes, and numerous decisions involving the Commission require that the Court abstain from substituting its judgment for the agency's in matters within the Commission's discretion. Precisely how section 120.68, Florida Statutes, compels a more stringent standard of review in need determination cases, and what that standard might be, are issues totally unexplained in Appellant's initial brief. The Court

should continue to apply the standard it has traditionally used when reviewing Commission orders.

POINT II

APPELLANT HAS FAILED TO DEMONSTRATE ANY PROCEDURAL ERROR IN THE ORDER ON APPEAL AFFECTING THE CORRECTNESS OF THE AGENCY ACTION OR THE FAIRNESS OF THE PROCEEDING BELOW.

A. The Order on Appeal Contains Sufficient Findings of Fact and Conclusions of Law.

Appellant's Point 2 is equally without merit. In it, Appellant challenges the form of the order on appeal and in so doing attempts to elevate form over substance.

Appellant first contends that the order on appeal fails to conform with sections 120.59(1) and 120.58(1)(e), Florida Statutes. The latter referenced statute has nothing to do with this proceeding but, instead, addresses the preparation of a proposed final order in situations where a majority of those who are to render the final order have not heard the case or read the record.

With respect to the claim that the final order does not conform with section 120.59(1), Florida Statutes, Appellant simply is incorrect. Extensive findings in the order on appeal precede the Commission's ultimate conclusion that Tampa Electric has demonstrated the need for Polk Unit One. Appellant's interpretation of what section 120.59(1), Florida Statutes, requires is a strained reading of the statute. The Commission's findings and conclusion in the order on appeal are presented in a manner fully consistent with the way in which the Commission has

written, and the courts have affirmed, hundreds of Commission orders over the years.

Appellant also contends that the order fails to comply with Fla. Admin. Code Rule 25-22.059(1), which is the Commission rule stating what final orders must include. The order on appeal contained each of the elements described in the Commission's rule. Appellant's contrary assertion underscores Appellant's inability to find any meritorious ground for appealing the decision below.

For convenience of reference, the order on appeal is contained in the Appendix to this brief. The order is 33 pages in length and fully considers and rules upon each of the criteria set forth in section 403.519, Florida Statutes. The order goes on to consider in detail and reject the irrelevant arguments made by Appellant in its effort to broaden this need determination proceeding into a rulemaking proceeding to mandate the use of Appellant's favored method of performing a cost-effectiveness test. (A. 13-14)

Appellant attempted a similar argument in its motion for reconsideration below, to which the Commission aptly responded in its order denying the motion for reconsideration:

> As to the technical objections themselves, FRG's contentions are simply form over substance arguments. Sections 120.58(1)(e) and 120.59(1), Florida Statutes require that final agency orders <u>contain</u> findings of fact and conclusions of law sufficient to inform the parties and the reviewing court of the bases on which the decision was made. They do not require <u>labeling</u>. Order PSC-92-0002-FOF-EI does contain extensive factual findings and legal reasoning to support the decision the Commission made, and to inform the parties and the courts of the grounds for that decision.

> As TECO points out in its response to the motion, a reviewing court is well able to distinguish factual findings from legal conclusions, and will not overturn any agency order because they are just not labelled as such.

Order No. PSC-92-0552-FOF-EI, Docket No. 910883-EI, at p. 2.

In its motion for reconsideration to the Commission, Appellant cited a case which is notably absent in its initial brief to this Court, Kinney v. Department of State Division of Licensing, 501 So.2d 129 (Fla. 5th DCA 1987). There, the court concluded that the mere labeling of a statement as a finding of fact as opposed to a conclusion does not make it so. Appellant's right to judicial review is totally unaffected by the manner in which the order in question was drawn up. This Court well knows the standard of review to apply and also recognizes the difference between a finding of fact and a conclusion of law. Stated differently, administrative agencies cannot dictate which standard of review courts may apply simply by designating a particular statement as a finding of fact or a conclusion of law.

At pages 14 through 16 of its initial brief, Appellant cites a string of cases to support the unquestioned requirement that the Commission orders must contain adequate findings and conclusions. However, the cited cases do not lend any support for Appellant's contention that the order on appeal in this case is deficient in any way.

On pages 16 and 17 of its initial brief, Appellant proclaims its inability to understand the nature and basis for the Commission's decision by reference to a single paragraph contained

in the order on appeal. Again, borrowing from the Commission's analysis in its order denying Appellant's motion for reconsideration below:

> . . .FRG [here Appellant] requests that we modify the responses to some of the proposed findings, and specifically distinguish findings of fact from conclusions of law in the body of the order. FRG does not contend that we failed to consider any substantive matters in our decision, and FRG requests no changes in the substantive findings or decisions of the order.

The Commission went on to observe:

> FRG's objections to the final order do not contain a single material point of fact or law that we overlooked or failed to consider in this case, let alone one that would in any way alter the substantive decisions we made. All of FRG's objections are insubstantial criticisms either of the technical form of the order or of the responses to FRG's proposed findings of fact. Even if we agreed to make the technical changes FRG demands, it would change nothing.

Order No. PSC-92-0552-FOF-EI.

B. <u>The Order on Appeal Properly Rejected Proposed Findings of Fact Nos. 59, 60 and 61</u>.

In this section of its second point, Appellant states that the Commission did not provide reasons for its denial of Appellant's proposed findings of fact no. 59, 60 and 61. Again, there is no requirement that a statement of the grounds for denying proposed findings or conclusions be included in an agency order. Although not required, the order <u>does</u> in fact articulate a basis for the rejection of Appellant's proposed findings.

With respect to proposed finding of fact number 59, Appellant alleges that Tampa Electric did not adequately examine or implement any of the various conservation measures which FRG contends are available to mitigate the need for Polk Unit One. This was specifically rejected by the Commission on page 31 of the appendix to the order. (A. 31) Moreover, on pages 12 through 15 in the body of the order, the Commission specifically addressed Appellant's arguments.

The order includes a specific finding on page 15 (A. 15) that the record in the proceeding did not show that additional cost-effective conservation can be implemented quickly enough to avoid construction of the particular power plant and, thus, additional conservation could not "mitigate the need" for the plant. This key finding renders irrelevant Appellant's proposed findings concerning the adequacy or appropriateness of Tampa Electric's conservation efforts, including proposed finding number 59. In other words, if existing and additional conservation efforts cannot forestall the need for Polk Unit One, any further discussion of conservation programs or their adequacy, or methods for selecting one conservation program over another, would have been academic, at best, in the need determination proceeding.

The Commission also specifically rejected Appellant's proposed finding number 60, having to do with the propriety of Tampa Electric's approach to evaluating demand and supply side resource options. Moreover, in the body of the order, at pages 13 and 14 (A. 13-14), the Commission specifically addressed and rejected

Appellant's arguments concerning the manner in which Tampa Electric has considered resource options. Again, the Commission found at page 15 of the Order (A. 15) that the record shows that additional conservation programs cannot be implemented soon enough to avoid construction of the particular power plant and, thus, additional conservation could not "mitigate the need" for the plant. The Commission also concluded that Appellant's proposal is irrelevant:

> . . .FRG's proposal to expand our review and analysis of TECO's conservation efforts may have merit in another forum, but they exceed the scope of our review of those efforts here.

The Commission's statement that FRG's proposals exceed the scope of this proceeding rendered it unnecessary for the Commission to elaborate on the rejected findings as the Commission's explicit ruling rendered them subordinate, immaterial, or unnecessary. Health Care Management, Inc. v. Department of Health and Rehabilitative Services, 479 So.2d 193 (Fla. 1st DCA 1985). There the Court held that section 120.59(2), Florida Statutes, only necessitates a specific ruling as to such proposed findings as are pertinent and which are not subordinate, immaterial, or unnecessary. The Court further stated that the failure to explicitly address a proposed finding would require reversal of the agency action only when such failure has the effect of impairing the fairness of the proceeding or the correctness of the action.

The Commission also specifically rejected Appellant's proposed finding number 61, having to do with whether the proposed new plant is the most cost-effective alternative available. This aspect of Appellant's proposed findings was discussed at length in the body

of the Order at pages 13-15 (A. 13-15), where the Commission specifically rejected Appellant's interpretation of the term "most cost-effective alternative."

The basis for the requirement in section 120.59(2), Florida Statutes, that proposed findings of fact be ruled upon was discussed in Schomer v. Department of Professional Regulation, Board of Optometry, 417 So.2d 1089, 1090:

> The basis for the requirement in section 120.59(2) that an administrative party's proposed findings of fact be ruled upon is that without a fairly distinct treatment of the proposed findings the reviewing court must go through the entire record to determine whether the order corresponds to the evidence. This provision thus requires the agency to, on the record, discuss, treat and dispose of the major factual issues in the case.
>
> As with all such rules, however, the courts will not elevate form over substance, and accordingly, the agency need not independently quote verbatim each proposed finding and independently dispose of that proposed finding; rather, it is sufficient that the agency provide in its decision a written foundation upon which the reviewing court may assure that all proposed findings of fact have been considered and ruled upon and not overlooked or concealed. (emphasis supplied)

Any reasonable person examining the order on appeal cannot help but conclude that no proposed finding of fact was disregarded or overlooked by the Commission. Instead, as was the case in Schomer v. Department of Professional Regulation, Board of Optometry, supra, the Commission adopted the Appellant's proposed findings in many instances and entered findings of fact which were contrary to Appellant's proposed findings in others.

In responding to this same contention on reconsideration below, the Commission observed:

> Our responses to FRG's proposed findings of fact more than adequately satisfy the standards of the Administrative Procedures Act. It is not that the responses are inadequate, it is just that FRG is unhappy with the substantive nature of the responses. . . .

In essence, Appellant's erroneous position is that if the Commission can't decide in favor of Appellant, then there must be reversible error in what it did decide.

POINT III

THE DECISION EMBODIED IN THE ORDER ON APPEAL IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD.[1]

In this portion of its brief Appellant contends that conservation efforts "were not adequately alleged or proven." This is incorrect. Conservation is discussed at length on pages 12 through 15 of the order on appeal. (Tr. 468-471) In that discussion the Commission concludes that it does not appear that additional, timely and cost-effective conservation measures can reliably defer the need for capacity in 1995. Accordingly, the Commission concludes, on page 15 of its order, that additional conservation cannot be implemented quickly enough to avoid construction of Polk Unit One and, thus, additional conservation cannot "mitigate the need" for this plant.

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[1]This point addresses subsection 2C of Appellant's Brief, which Appellant included under the category of "errors in procedure," but which actually alleges substantive deficiencies in the order.

A number of witnesses testified on this issue and there is abundant evidence in the record to support the Commission's action. Tampa Electric's President, Mr. Girard F. Anderson, testified that based on the projected population and electricity demand growth within the company's service area, Tampa Electric has determined that it needs the proposed power plant, coupled with the company's demand side management programs, in order to discharge its statutory and corporate obligation to provide reliable electric service. (Tr. 20)

The need for Polk Unit One, including the consideration of the results of conservation programs in determining that need, was detailed at great length in the Polk Unit One Need Determination Study, a 128 page document identified as Exhibit 1 and contained in Volume VII of the record on appeal in this proceeding. As that need determination study indicates, Polk Unit One will be needed within the time frame approved in the order on appeal even after the company's present and projected conservation program savings are factored into the company's demand and energy forecasts. (Polk Unit One Need Determination Study, p. 18.)

Tampa Electric's Director, Power Resource Planning, Mr. John B. Ramil, testified that there is absolutely no slack in the schedule to certify, permit and construct Polk Unit One. (Tr. 484) The schedule provides for one year of environmental data collection and permit application preparation, 19 months for the complete state and federal permitting process, and 16 months for on-site construction. This 37 month schedule can be accomplished, but with

no time to spare. (Tr. 484)

Mr. Gerard J. Kordecki, Assistant Director in Power Resource Planning, in charge of demand side planning, presented testimony concerning Tampa Electric's various conservation, load management and non-firm rate programs, the success of these programs in reducing peak demand and energy usage and in increasing fixed plant utilization. He also described the basis used for evaluating conservation and load management programs. (Tr. 229)

Mr. Kordecki testified that Tampa Electric was the first utility in Florida to have its conservation programs approved by the Commission under FEECA. (Tr. 231). He further testified that Tampa Electric has been able to accomplish the conservation goals set out in FEECA. Id.

Mr. Kordecki testified that the company has resubmitted most of its programs under FEECA (some with modifications) and has instituted three new programs primarily devoted to non-residential market sectors. (Tr. 236)

Mr. Kordecki testified that by the year 2000 Tampa Electric expects to have reduced winter and summer peak demand by 796 MW and 405 MW, respectively, with energy use expected to drop by 257 gigawatt hours.[2] (Tr. 236-237)

Witness Kordecki testified that during the 1990's Tampa Electric predicts that approximately 30 percent of its growth is expected to be met through conservation programs -- a significant

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[2]A gigawatt hour means 1,000,000 kilowatt hours. Thus, 257 gigawatt hours equals the annual usage of over 21,000 average residential customers using 1,000 kwh per month.

contribution. (Tr. 248). Mr. Kordecki further testified that Tampa Electric believes it is starting to "tap out" some of the resources available through demand side planning. (Tr. 250)

Mr. Thomas F. Bechtel, of the U. S. Department of Energy, testified that if the Tampa Electric project experienced significant delays, it could very well leave the Department with no alternative but to explore other avenues on which to demonstrate the commercial viability of the proposed technology. (Tr. 462)

Appellant presented the testimony of Mr. Paul L. Chernick which was rebutted through testimony and exhibits of Professor Alfred E. Kahn on behalf of Tampa Electric. Tampa Electric also submitted rebuttal testimony of Dr. Lewis J. Perl, Senior Vice President of National Economic Research Associates, Inc., and of Mr. Ramil and Mr. Kordecki from within the company.

In his rebuttal testimony Mr. Kordecki described Tampa Electric's comprehensive demand side management efforts which effectively address the important peak causation end users on the company's system. (Tr. 500). Mr. Kordecki expressed his disagreement with Appellant's witness Chernick's assertion that an effective comprehensive demand side management effort requires a program for every energy using appliance or application. (Id.)

Mr. Kordecki further stated that in screening its conservation programs Tampa Electric is interested in maintaining the lowest overall utility rates. He further stated that Mr. Chernick's interests appear to be to raise customer rates in order to accomplish some unmeasured global goal. (Tr. 503)

Mr. Kordecki went on to describe Mr. Chernick's apparent lack of knowledge of the various conservation programs Tampa Electric has in place or the market sectors they address. (Tr. 505). Given these and other criticisms of Appellant's only witness's testimony, Mr. Kordecki concluded that Tampa Electric would face significant risks in delaying Polk Unit One in hopes of relying upon conservation programs that (1) don't exist today, and (2) may not exist or function tomorrow. (Tr. 582-583)

Other salient points established by Tampa Electric and the deficiencies in Mr. Chernick's presentation were addressed at length by Tampa Electric in its Posthearing Statement and Brief filed with the Commission. Rather than unduly lengthening this brief, Tampa Electric includes in the appendix to this answer brief, and incorporates herein by reference, its posthearing comments on Issue 16, having to do with the question of whether conservation measures taken by or reasonably available to Tampa Electric might mitigate the need for Polk Unit One. (A. 34-46)

The Public Service Commission is the agency charged with the duty of implementing FEECA. The Commission has accomplished this. It has approved a conservation plan for Tampa Electric, and Tampa Electric has met the Commission approved goals. Tampa Electric has updated its plan, as demonstrated in the record on appeal. Clearly, the Commission has taken into account the role played by conservation programs in Tampa Electric's need for Polk Unit One. Appellant is simply asking the Court to reweigh the evidence in apparent hopes of obtaining some sort of moratorium on power plant

construction in Florida.

POINT IV

THE COST-EFFECTIVENESS OF POLK UNIT ONE WAS DEMONSTRATED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD.[3]

Appellant's chief effort here, as it was before the Commission below, is to substitute Appellant's favored cost-effectiveness test in place of the RIM test utilized by Tampa Electric, the results of which (in the form of conservation programs) have been approved by the Commission. The Commission does not require the use of any particular cost-effectiveness test, nor does any statute or rule of the Commission. In essence, Appellant erroneously attempted to use the proceeding below as a rulemaking forum in which to champion one method of analyzing cost-effectiveness over another. The Commission acted reasonably in rejecting that effort.

As to Mr. Chernick's criticism of the RIM test, Mr. Kordecki testified that in almost every example a program passing the RIM test will also pass the Total Resource Cost (TRC) test favored by Mr. Chernick. However, Mr. Kordecki stated that the converse may not be true. The adoption of the TRC test may lead to massive ratepayer expenditures with dubious results. (Tr. 502) Other deficiencies in Mr. Chernick's cost-effectiveness approach were described in Tampa Electric's Posthearing Statement and Brief. (A. 36-46)

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[3]This substantive issue was included by Appellant under the "errors in procedure" Point 2C2 beginning on page 21 of Appellant's initial brief.

At the bottom of page 20, carrying over to the top of page 21 of its brief, Appellant argues that Tampa Electric did not compare the relative cost-effectiveness of Polk Unit One and potential conservation measures which failed the RIM test. As Tampa Electric's witness, Mr. Kordecki, explained during the hearing, the company's analysis used a combustion turbine (CT), because the company's reliability studies prior to the DOE funded project becoming available showed a need for combustion turbine generating capacity. The company pursued the DOE funded Polk Unit One project because the economics associated with that unit are better than the previous plan which had called for combustion turbine capacity. Thus, the CT stood as a higher cost surrogate for the DOE funded Polk Unit One. Therefore, programs which were rejected would have increased rates. (Tr. 550-551)

As a bottom line, the Commission concluded that Tampa Electric will need Polk Unit One in the 1995-1996 time frame, even taking into account cost-effective conservation savings which can be achieved between now and then. Given DOE's financial participation in the project, together with the fuel cost and efficiency savings it promises, Polk Unit One was clearly established as the most cost-effective alternative available to Tampa Electric. Appellant's approach would deny Tampa Electric's customers the demonstrated benefits and at the same time threaten Tampa Electric's system reliability.

POINT V

NO PROPOSED FINAL ORDER WAS REQUIRED TO BE PREPARED AS A CONDITION PRECEDENT TO THE COMMISSION'S DECISION.[4]

Appellant's allegation that section 120.58(1)(e), Florida Statutes, required the publication of a proposed order is in error. The fact of the matter is that the proceeding below was heard by a two member panel of commissioners acting as the Commission -- not as duplicate hearing officers. This is consistent with section 350.01(5), Florida Statutes, which authorizes the Commission's chairman to assign various proceedings pending before the Commission requiring hearings to two or more commissioners. It follows that no proposed order was required inasmuch as a majority of those who were to render the final order heard the case or read the record. Appellant's feeble attempt to distinguish section 350.01(5), Florida Statutes, on pages 24-25 of its initial brief underscores the frivolous nature of this appeal. If a tie vote had occurred, as Appellant hypothecates, section 350.01(5), Florida Statutes, expressly provides:

> ...If only two commissioners are assigned to a proceeding requiring hearings and cannot agree on a final decision, the chairman shall cast the deciding vote for final disposition of the proceeding... .

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[4]This point responds to Appellant's Point 2D, beginning on page 23 of Appellant's initial brief.

POINT VI

THE COMMISSION DID NOT ADOPT AN ERRONEOUS INTERPRETATION OF SECTION 403.519, FLORIDA STATUTES (1991).[5]

Point III of Appellant's brief is much ado about nothing. It presents a convoluted argument concerning whether section 403.519, Florida Statutes, should be construed with reference to FEECA or the Florida Electrical Power Plant Siting Act. The Commission is charged with the duty of implementing FEECA and also section 403.519, Florida Statutes. It is obvious that the two statutes should be construed together. The distinction raised by Appellant is a distinction without a difference.

At page 29 of its brief, Appellant next claims that the Commission ignored the meaning of the word "mitigate" in concluding that additional conservation programs cannot mitigate the need for Polk Unit One. Again, Tampa Electric has a Commission approved conservation plan and it has resubmitted and updated the various programs contained in that plan. Appellant's witness in the proceeding below, Mr. Paul Chernick, conceded that he has not performed an integrated resource plan for Tampa Electric based on his estimates of additional available demand side savings. (Tr. 289) Thus, there is no evidence of any deficiency in Tampa Electric's conservation programs or the results they are projected to achieve.

On page 32 Appellant apparently misconstrues the action taken by the Commission in the order on appeal. The Commission did not

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[5]This point addresses Point 3 of Appellant's initial brief.

interpret section 403.519, Florida Statutes, to require that conservation be demonstrated to be available to displace the total capacity represented by a proposed power plant in a need determination proceeding. What the Commission did was to balance its evaluation of achievable conservation, the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. Appellant's one-sided emphasis on conservation would have denied Tampa Electric's customers $120 million in DOE funding and many millions of additional dollars in savings stemming from the efficiency of the state-of-the-art plant and the clean, relatively low cost fuel it will use.

POINT VII

THE COMMISSION PROPERLY ANALYZED THE COST-EFFECTIVENESS OF POLK UNIT ONE.[6]

Appellant Fails to Demonstrate any Error in the Cost-effectiveness Analysis Used by the PSC.

Point 3C of Appellant's brief, beginning on page 32, is but another effort by Appellant to have the Court mandate the use of Appellant's favored method of evaluating the pros and cons of various supply and demand side alternatives. As it did before the Commission, Appellant here seeks to have the Court reject the use of the RIM test which Tampa Electric used in screening which

[6]This point is in response to Point 3C of Appellant's brief, beginning on page 32 thereof.

conservation programs it would propose for PSC approval.

Tampa Electric has in place a PSC approved conservation plan. No statute or rule of the Commission prescribes the use of a particular cost-effectiveness test for selecting which conservation programs an electric utility should pursue. The PSC rules require the submission of three different cost-effectiveness calculations for each program submitted. Tampa Electric performed and submitted all three of these calculations for each program it proposed.

The debate over which is the most appropriate cost-effectiveness test to apply really was academic insofar as the proceeding below was concerned, given the Commission's conclusion that the record in this proceeding does not show that additional conservation can be implemented in time to avoid the need to construct Polk Unit One and, thus, that additional conservation cannot "mitigate the need" for this plant. (R-471)

CONCLUSION

Based on the foregoing, Tampa Electric submits that Appellant has failed to demonstrate any error on the part of the Commission in entering its Order No. PSC-92-0002-FOF-EI. Appellant has failed to demonstrate that the order on appeal is not based on competent substantial evidence or that the Commission departed from the essential requirements of law in rendering such order. Accordingly, Tampa Electric urges that the Court affirm in all respects the order on appeal.

DATED this 26th day of October, 1992.

Respectively submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief, filed on behalf of Tampa Electric Company, and a true copy of the Appendix to such Brief, have been furnished by U. S. Mail on this 26th day of October, 1992 to the following:

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