SUPREME COURT OF FLORIDA

FLORIDIANS FOR RESPONSIBLE UTILITY GROWTH, Appellant, v. THOMAS M. BEARD, et al. Appellee.	)	CASE NO. 80,225

AMENDED ANSWER BRIEF OF APPELLEE,
THE FLORIDA PUBLIC SERVICE COMMISSION

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PRELIMINARY STATEMENT

The subject of this appeal is an order of the Florida Public Service Commission, which shall hereinafter be referred to as "the Commission" or "the FPSC". The Floridians for Responsible Utility Growth shall hereinafter be referred to as "FRG" or "Appellant".

Citations to the record shall be in the following form (R.___). However, transcript citations of the hearing before the Florida Public Service Commission are in the form (TR. ____).

STATEMENT OF THE CASE AND FACTS

Statement of the Case

The Commission accepts Appellant's Statement of the Case except for the section "Disposition in the lower tribunal." Appellant implies that the conditional granting of TECO's petition was based on the resubmission of a conservation plan. That is not the case. The petition was granted contingent only upon the Department of Energy's (DOE) $120 million funding of the project and the DOE guaranty that the ratepayers would not be liable for repayment of the funding if the project failed. (R. 459, 466) The Commission did instruct Tampa Electric Company (TECO) to resubmit a conservation plan with certain information one year in advance of any future need determination petition. (R. 469) The Commission's instruction was not a condition of the determination of need.

Statement of the Facts

The Commission maintains that Appellant's statement of the facts is biased and lopsided. The Commission offers the following facts instead.

TECO seeks authority to construct a state-of-the-art integrated coal gasification combined cycle ("IGCC") unit, Polk Unit One, together with associated facilities. Polk Unit One is scheduled to be in full service in June 1996. The phased construction will include a 150 MW advanced combustion turbine, to be placed in service in mid-1995, and a 70 MW heat recovery steam generator and coal gasifier to be placed in service in mid 1996. (R. 457)

The project, with $120 million in funding from the Department of Energy (DOE), will demonstrate hot gas clean up technology in an integrated coal gasification combined cycle (IGCC) system. (R. 4, 464) The coal gasifier will employ a new technology that efficiently cleans coal gas at high temperatures. This technology will be a demonstration project for the U.S. Department of Energy (DOE). DOE has signed a cooperative agreement with TECO to provide a $120 million grant to offset some of the costs associated with the construction of the plant and the demonstration of the new technology. (R. 457, 458)

Upon learning of the availability of the $120 million grant from DOE to build the coal gasification plant, TECO estimated the cost of the IGCC unit and compared the project's impact on TECO's expansion plan with eight other expansion plans. When TECO ascertained that the IGCC unit, with the benefit of $120 million of DOE funding, was more cost-effective than the "avoided unit" proposed in another docket, TECO initiated this proceeding to determine the need for the IGCC unit. (R. 458)

As the Commission noted in Order No. PSC-92-0002-FOF-EI, at 2, Section 403.519, Florida Statutes, delineates five major topics for FPSC consideration in making a determination of need:

1. The need for electric system reliability and integrity;

2. The need for adequate electricity at a reasonable cost;

3. Whether the proposed plant is the most cost-effective alternative available;

4. Conservation measures taken by or reasonably available to the applicant which might mitigate the need for the proposed power plant; and

5. Other matters within the Commission's jurisdiction which it deems relevant.

Conservation is but one of several factors the Commission must review and balance.

TECO described the methodology and assumptions for determining the required level of system reliability. (R. 62) The goal is to provide an adequate level of service reliability to the customer by planning for appropriate generation capacity at a reasonable expense. Brown-outs are to be avoided and so are unnecessarily high rates. (R. 64-70) The Commission found it clear from the record that if additional capacity is not placed into service by 1996, TECO's winter reserve margin is expected to fall below 20% and its assisted Loss of Load Probability (LOLP) is projected to rise above the 0.1 days per year maintained for system reliability. (R. 460) The Commission determined that TECO's reliability criteria will not be met unless the proposed IGCC unit is completed in the time frame requested. (R. 460)

TECO testified on the laborious and complex process of sifting through alternatives to identify the most cost effective option. Mr. Ramil testified that the IGCC plant will have the lowest rate

impact of any alternative available. (TR. 20)

The Commission heard lengthy testimony on the utility's conservation programs, the development and modification of these programs, and the programs' achievements. (TR. 227-273) The Commission also heard testimony on the conservation efforts of some utilities in the northeast and in other states. (TR. 317-341) The record is also replete with testimony in favor of the use of the Ratepayer Impact (RIM) Test and in opposition to the use of such test. (TR. 300, 346, 409, 429-439, 502, 522-554, 621, 628) Upon review of all of the evidence in the record, and taking into consideration all of the criteria propounded in Section 403.519, Florida Statutes, the Commission decided that TECO had a need for capacity in 1995 and 1996, that the IGCC unit was the most cost-effective way to meet that need; and, that additional conservation measures could not reliably mitigate the need for the IGCC unit to provide that capacity by 1996. (R. 459, 460, 473, 505)

SUMMARY OF ARGUMENT

There is competent and substantial evidence in the record to support the Commission's decision that the proposed IGCC plant is the most cost-effective alternative available to meet TECO's need for capacity in 1996. The record further demonstrates the Commission considered the conservation measures taken by or reasonably available to the company to mitigate the need. Testimony showed that TECO may be able to improve its conservation programs. Testimony did not show that those improvements can be implemented swiftly and reliably enough to mitigate the need for the power plant. (TR. 469)

The Commission complied with the requirements of Administrative Procedure Act in its final order. The Commission is not required to issue a proposed final order when the Commissioners who heard the case were the ones who rendered the decision. Separately labelled determinations on the proposed findings of fact are not necessary when the Commission addresses the matters in the Order, where the "facts" are actually conclusions of law, where no unfairness results, and where such "facts" are subsumed, immaterial or unnecessary.

The standard of review remains a narrow one in which the Court should not re-weigh the evidence. The standard is whether the Commission complied with the essential requirements of law and whether its order is supported by competent and substantial

evidence.

The Commission addressed and evaluated all of the statutory factors required by Section 403.519, Florida Statutes. FRG single-mindedly overlooked the Commission's concern for the provision of adequate electricity at a reasonable cost, reliability and integrity of the electric utility systems. The concern for system reliability and avoiding brown-outs is also critical in the Commission's review.

ARGUMENT

POINT I

THE COMMISSION'S DECISION IS BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE

A. There is competent and substantial evidence to support the Commission's finding that conservation measures taken or reasonably available would not mitigate the need for the plant.

TECO demonstrated that it could not take expanded conservation measures that would be sufficient to mitigate the need for the proposed unit. Any additional timely and cost-effective measures could not reliably defer the need for the unit. (R 421, 469, 471; TR. 185)

Mr. Gerard J. Kordecki, Assistant Director of Power Resource Planning in charge of demand side planning for TECO, testified regarding the company's conservation achievements. (TR. 231-238) By the year 2000 TECO expects to have reduced winter and summer demand by 796 MW and 405 MW, respectively with energy use expected to drop by 257 gigawatt hours. (TR. 236-237) TECO's conservation measures were discussed in detail. (R. 37-40, 72-74; TR 227-273)

Mr. Paul Chernick testified on behalf of FRG regarding the potential for TECO applying some conservation measures developed in some other states. (R. 287-289) He advocated that TECO could expand its conservation measures which would mitigate the need for the plant.

Mr. Alfred Kahn warned that TECO should not hastily undertake an expanded demand side management (DSM) program of the character recommended by Mr. Chernick, because such a DSM program could be injurious to the welfare of TECO's customers. (TR. 404) His testimony strongly supports the use of the Ratepayer Impact Test (RIM) as a way to protect the ratepayer. (TR. 429-439)

-- **Difficulty of Projecting System Savings from Conservation**

Mr. Lewis J. Perl, Senior Vice President of National Economic Research Associates, Inc., also refuted the testimony of Mr. Chernick. He criticized the use of projected conservation achievement in the northeast and elsewhere as a basis for supporting the proposition that Florida utilities generally, and TECO in particular, should be able to perform within the same range of estimates. Dr. Perl testified that programs implemented in the northeast do not provide the basis to conclude that expansive DSM programs are cost-effective or can achieve substantial reductions in energy growth in the TECO geographic area. (TR. 591-592) Also, the studies do not show actual achievements, but desired achievements. (TR. 594, 624) He testified that actual savings achieved are well below those originally projected for DSM programs generally. (TR. 595-597)

The reasons for such overestimates of DSM savings are varied, testified Mr. Perl. There are at least five factors that have been hypothesized to explain the difference between measured or actual

savings and the engineering estimates of savings. First, there may be systematic biases in engineering estimates of savings. Typically, such estimates are derived from laboratory circumstances or from theoretical models which simply may not accurately model reality. (TR. 598)

Second, engineering estimates of savings often rely on survey data or guesses to determine the utilization for particular appliances. (TR. 598)

Third, there is the "snap back" effect. One consequence of installing energy saving or efficiency improving devices is to lower the consumer's effective cost of electricity. The consumer who, with an inefficient unit, set his thermostat at 76 may lower the setting to 70 (for cooling) after he buys the more efficient unit.

Fourth, for most utility-sponsored DSM programs, there are likely to be "free rider" effects. Some of the people participating would have made the investment even if the program did not exist. (TR. 600)

Fifth, is the "taste factor" in which people find the device unattractive and remove it. For example, a study showed that 20% of energy-efficient fluorescent bulbs had been removed by dissatisfied users. (TR. 595, 601)

In addition, testified Mr. Perl, there are reasons that the selection of northeast utilities conservation plans is

inappropriate. The primary differences are that the northeast baseline utilities are summer peaking with heavy commercial and industrial electric usage. In addition, Mr. Chernick's referenced utilities are new to demand side management (DSM) efforts, while Florida utilities have been performing cost-effective conservation since 1981. (TR. 509-510, 513-514, 518) TECO's peaks are driven by residential customers and the company is a winter peaking utility. (R. 468, TR. 569-571, 578-579)

Mr. Kordecki also testified that it appears Mr. Chernick has little knowledge of the various conservation programs TECO has in place or the market sectors they address. (TR. 505-506, 508)

There is little evidence in the record to conclusively demonstrate either the feasibility or the difficulty of increasing participation rates in conservation programs with low participation. In addition, TECO's conservation programs appear to be deferring peaking units, not baseload or intermediate load units like Polk Unit One. (R 468-469) There was risk in delaying the project. (TR. 582) There was 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, then, 16 months for on-site construction. Testimony indicated that this 37 month schedule can be accomplished but with no time to spare. (TR. 484)

-- **TECO's Achievements in Conservation are Demonstrated in the Record**

The Commission determined that TECO had adequately considered the conservation measures that would be reasonably available to mitigate the need for the proposed plant, and that such measures could not defer the need. (R 469) The record illustrated TECO's conservation programs and the company's evaluation of potential measures. (R. 37-40, 72-74; TR. 227-273, 497, 499, 500)

The TECO petition describes the conservation programs. The objectives are:

1. To defer capital expansion, particularly production plant;

2. To reduce marginal fuel cost by reducing energy usage during higher fuel cost periods;

3. To give the customers some ability to control their energy usage and reduce their energy costs. (R 71-72)

TECO described the programs put in place during 1990: incentives for high energy efficiency heating and cooling program; a residential and commercial industrial program to reduce weather sensitive heating, cooling, water heating and pool pump loads through a radio signal control mechanism; energy audits for customers; ceiling insulation programs; etc. (R 72-74) TECO has met all of the goals established by the Commission pursuant to the Florida Energy and Efficiency Act (FEECA), including those for winter peak demand, summer peak demand and net energy for load.

(R 74) TECO demonstrated it had reasonably implemented conservation measures included in its conservation plan pursuant to Section 366.82(3), Florida Statutes, and approved by Commission Order. (R. 471, 473, 505)

-- **The Ratepayer Impact Test is an Appropriate Measure**

TECO's reliance on the Rate Impact (RIM) test as a review for its DSM program is appropriate and permitted by Commission Rule 25-17.008, Florida Administrative Code, and the manual incorporated therein. (TR. 409, 435) As Mr. Perl testified, concentration on load management that does not violate the RIM test is sensible. (TR. 621) For a typical utility, where the average price of electricity is 5 cents per kilowatt-hour, the cost of delivering peak energy (during the 100 hours of highest demand) might well be 40 to 50 cents for KWH. The off-peak costs might be as little as 2-3 cents per KWH. (TR. 621) Mr. Perl said that any sensible utility DSM program would concentrate heavily on load management, because that is where the principal market imperfection lies. Electricity is priced at similar rates throughout the year and at various times of the day, when, in fact, the cost of producing electricity on the peak is perhaps 10 times the price of electricity generally charged. It makes sense to try to design programs to overcome those imbalances where people over-consume on the peak periods. (TR. 628)

Mr. Kordecki also testified in opposition to Mr. Chernick's criticism of the Ratepayer Impact (RIM) test. He stated that in about every example a program passing the RIM test will also pass the Total Resource test favored by Mr. Chernick. However, he stated the converse may not be true. The adoption of the Total Resource test may lead to massive ratepayer expenditures with dubious results. (TR. 502)

How much is enough to satisfy FRG? While the Commission has ordered TECO to resubmit its conservation plan no later than one year prior to its next need determination petition, there was nothing in the record to indicate that expanded conservation efforts would magically mitigate the need for the proposed plant. (R. 463, 473)

Mr. Kordecki said that reliance on an unknown and unproven DSM potential would be risky in the face of the need for power described in Mr. Ramil's testimony. (TR. 505-506, 508, 509, 510, 518-519) The Commission was convinced that the amount of conservation necessary to mitigate the need could not occur within the necessary timeframe. (R. 471)

The weight of the evidence supported the conclusion that conservation measures taken or reasonably available to TECO would not mitigate the need for the plant. The Commission would not accept conjecture about market penetration feasibility. (R. 469) There is competent substantial evidence for the Commission's

finding and the Court should not re-weigh that evidence.

B. **There is competent and substantial evidence to support the finding that IGCC power plant is the most cost-effective alternative.**

The Commission was convinced that the proposed plant was the most cost-effective alternative to fill TECO's capacity needs. According to TECO's most recent financial estimates, the proposed IGCC unit is estimated to save TECO's ratepayers $195 million over the life of the unit compared to the next best option. These savings are primarily attributable to fuel savings (resulting from the use of coal) and the $120 million DOE contributions. (R. 465)

Witness Bechtel of the Department of Energy testified that the $120 million grant money is not refundable by TECO under any conditions. (R. 466). Thus, the Commission believed that TECO's ratepayers were adequately protected if the technology fails. The Commission conditioned the approval on TECO's receipt of the $120 million grant with no requirement that TECO repay any part of the $120 million grant.

TECO was asked by the Commission Staff to conduct an economic comparison of the proposed IGCC unit (using coal) and the phased combined cycle unit, using five different gas forecasts for the phased combined cycle plant. (R. 466) In addition, TECO performed a "break even capacity factor" analysis and a "revenue requirement" analysis using the above mentioned fuel forecasts. (R 467)

TECO demonstrated in the proceeding that it adequately explored the construction of alternative generating technologies. TECO initially evaluated 46 different generating technologies to meet its future capacity needs.

Each of these technologies was screened on the basis of geographic availability, construction lead time required, public acceptance, environmental compliance, cost, safety, and power demonstration and commercialization. TECO then selected seven technologies for an economic optimization analysis. TECO then found that the expansion plan which included the IGCC unit -- with the $120 million grant from the DOE -- was the most cost-effective plan. The IGCC unit had the lowest present worth revenue requirements of the other generating alternatives available. (R. 468) There was, thus, competent and substantial evidence to support the finding that the power plant was the most cost-effective alternative.

POINT II

THE COMMISSION'S PROCESS AND ORDER COMPORT WITH THE REQUIREMENTS OF CHAPTER 120

A. No Separate Rulings on Findings of Fact are Required

A specific ruling on rejected findings of fact is not necessary where the proposed findings are immaterial or unnecessary. Health Care Management, Inc., v. Department of Health and Rehabilitative Services, 479 So.2d 193 (Fla. 1st DCA 1985). The failure to explicitly address a proposed finding only requires reversal of agency action when the failure impairs the fairness of the proceeding or correctness of the action. In Health Care, the Court stated that the agency's explicit ruling rendered Appellant's further proposed findings subordinate, immaterial and unnecessary.

In Occidental Chemical Co. v. Mayo, 351 So.2d 336, 341 (Fla. 1977), the Court enunciated the point that while the FPSC order must include specific findings of fact upon which its ultimate conclusion is founded, the Commission was not required to include a recitation of every evidentiary fact upon which it rules.

Similar results obtained in Florida Sugar Cane League v. State, 580 So.2d 846, 851 (Fla. 1st DCA 1991), where the Court rejected the Appellant's argument on findings. The Court stated that the Siting Board's final order adequately stated the basis for the agency's disposition of the issues raised by the Appellant's proposed findings of fact.

Section 120.59, Florida Statutes, requires that final agency orders contain findings of fact and conclusions of law sufficient to inform the parties and the reviewing court of the basis on which the decision was made. They do not require labelling. The Order, in this case, does contain extensive factual findings and legal reasoning to support the decision the Commission made and to inform the parties and the Court of the grounds for that decision. Appellant does not have to "divine" anything. A reviewing court should not overturn an agency order because findings of fact and conclusions of law are just not labelled as such.

Appellant objects to the Commission's treatment of FRG's proposed findings of "fact" numbers 59, 60, and 61. Those proposed findings of fact at issue actually do cross the line into conclusions of law. (R. 487-488) "Fact #59" submitted by FRG states:

> On the basis of these facts and those listed in Parts A & B above, the Commission finds that TECO has neither adequately examined (investigated, analyzed and compared) nor reasonably implemented (i.e., undertaken well designed programs that are comprehensive in their coverage of customer market segments and electric end user) many cost-effective energy conservation measures that are available to mitigate the need for the proposed new power plant.

This proposed finding is not a fact. Inherently, it addresses the statutory requirement of Section 403.519 and is thus a conclusion of law. The Commission's decision rejected this

conclusion of law and instead made the determination that the company had examined all alternatives reasonably available to mitigate the need.

Similarly, the Commission found that the proposed finding of fact #61 is actually a conclusion of law. The proposed finding states that TECO has not demonstrated the proposed plant is the most cost-effective option. On the contrary, the Commission held that TECO had demonstrated that the proposed IGCC unit is the most cost-effective alternative to provide the additional needed capacity. (R. 473)

These proposed findings of "fact", in accordance with Health Care, are unnecessary when the Commission's explicit order renders them so. The final 33-page order clearly reveals the Commission's rationale and provides an adequate foundation for appellate review. (R. 506)

Appellant also criticizes language in the order regarding no "quantitative evidence" on expanding participation in conservation programs. (Appellant's Brief at 17) FRG did not offer convincing evidence in the record to demonstrate that additional participation was possible and achievable for this utility in its service area for approved conservation programs. This was the point the Commission made when it stated that "None of the parties in this proceeding presented quantitative evidence regarding the possibility of expanding participation in TECO's approved programs

that are projected to have a participation rate of less than 10%." (R. 468)

FRG's claimed errors do not establish harm. In Schomer v. Department of Professional Regulation, 417 So.2d 1089 (Fla. 3rd DCA 1982), Appellant had proposed 33 findings of fact. The hearing officer set out findings of fact which did not correspond numerically to those proposed by Appellant. The Court, however, could ascertain that no proposed finding of fact was completely disregarded or overlooked by the agency. The Court upheld the agency's action and stated that the departure did not materially impair the fairness or correctness of the proceeding. See also Psychiatric Institutes of America, Inc. v. Department of Health and Rehabilitative Services, 491 So.2d 1199, 1201 (Fla. 1st DCA 1986), in which the Court held the hearing officer's order was sufficient even though it could have addressed the disputed factual issue more explicitly. Similarly in this case, no material harm was done to the fairness or correctnessof the decision. Appellant's proposed findings of "fact" Nos. 59 and 61 are actually conclusions of law that were expressly addressed by the FPSC Order. Proposed Finding of "Fact" No. 60 is subsumed in the Commission's determination that the IGCC proposed plant is the most cost-effective alternative for TECO.

FRG's use of the Court's statement in Nassau Power Corp. v. Beard, 17 FLW 314 (Fla. May 28, 1992) to support the concept of

separate findings of fact is misleading. (Appellant's Brief at 17-18) The Court's statement is that "Section 403.519 requires the FPSC to make specific findings for each electric generating facility proposed in Florida, as to (1) electric system reliability and integrity; (2) the need to provide adequate electricity at a reasonable cost; (3) whether the proposed facility is the most cost-effective alternative available for supplying electricity; and (4) conservation measures reasonably available to mitigate the need for the plant." Nassau at 314. The Court's point is that the Commission must rule on the four statutory factors; not that the Commission is to set out separately labelled rulings on 60 proposed findings of fact.

B. **No Proposed Order is Required**

Section 120.58(1)(e), Florida Statutes, requiring a proposed order, addresses an entirely different procedure than the one utilized in this case. Section 120,58(1)(e) applies when a "majority" of those who are to render the final order have not heard the case or read the record. Here, the two Commissioners who heard the case also rendered the final order. Section 350.01(5), Florida Statutes, expressly provides for the FPSC Chairman to assign proceedings to two or more Commissioners. Section 350.01(5) further states that "Only those Commissioners assigned to a proceeding are entitled to participate in the final decision of the Commission as to that proceeding."

FRG's reliance on Island Harbor Beach Club v. Department of Natural Resources, 476 So.2d 1350 (Fla. 1st DCA) is misplaced. The Court in Island Harbor only ruled that a sweeping response to all proposed findings is inappropriate. "We do hold that simply ruling on all proposed findings in a single broadly phrased paragraph . . . is insufficient to comply with Section 120.59(2)." Appellant can not argue here that the Commission's 33 page order rules on all proposed findings in a single broadly phrased paragraph. The detail in the order is undeniable and provides an ample basis for a Court's review.

In Ehrenzeller v. Department of Health and Rehabilitative Services, 390 So.2d 181 (Fla. 2nd DCA 1980) the Court noted that the agency's failure to make findings requested by Mr. Ehrenzeller was potentially prejudicial to him in that case. Here, as discussed above, the agency's lack of labelling of findings as the proposed findings of "fact" is not prejudicial because the order does address all of the points raised by FRG in their proposed findings.

POINT III

THE STANDARD OF REVIEW REMAINS A NARROW ONE IN WHICH THE COURT SHOULD NOT REWEIGH THE EVIDENCE

The appropriate standard of review is, and has been, whether the Commission's decision is supported by competent and substantial evidence, and whether the decision complies with the essential requirements of law. Section 120.68(10), Florida Statutes, applies the competent, substantial evidence standard.

Appellant's argument about the triggering of some new standard is puzzling. A long line of the cases reviewing FPSC decisions has applied the competent, substantial evidence standard. See Citizens of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982); Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 718 (Fla. 1983); City of Tallahassee, v. Mann, 411 So.2d 162 (Fla. 1981); International Mineral and Chemical Corp. v. Mayo, 336 So.2d 548 (Fla. 1976); Polk County v. Public Service Commission, 460 So.2d 370, 373 (Fla. 1984).

The Commission's orders are presumed valid and the presumption can only be overcome where error appears plainly on the face of the order or is shown by clear and satisfactory evidence. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d

716 (Fla. 1983).

This Court has stated time and time again that it will not re-evaluate the evidence when it reviews a decision of the Florida Public Service Commission. Citizens of Florida v. Public Service Commission, 435 So.2d 784 (Fla. 1983). The Court defers to the Commission as the fact-finder in cases within the Commission's jurisdiction. Florida Power Corp. v. Cresse, 413 So.2d 1187, 1190 (Fla. 1982). The burden is on the challenging party to overcome the presumption of validity of Commission orders. City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981).

The Commission does not dispute that this is a quasi-judicial matter. Nor does the Commission dispute that it must comply with the Administrative Procedure Act.

Even assuming for argument sake that the standard of review of Commission orders would apply in which the Commission order has no presumption of validity and in which the Court does not defer to the Commission in its role as fact-finder, the Commission has clearly met the competent, substantial evidence test and there is no material error of procedure.

POINT IV

THE COMMISSION APPROPRIATELY FOLLOWED SECTION 403.519, FLORIDA STATUTES

Section 403.519, Florida Statutes, requires the Commission to determine the need for an electrical power plant. In making the determination, the Commission must take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed power plant is the most cost-effective alternative available. The Commission must also consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for its proposed plant and any other matters within its jurisdiction.

FRG's single-minded focus on the Commission's consideration of conservation measures is noteworthy. The need for system reliability and integrity and the need for adequate electricity at a reasonable cost play at least an equal role in the statutory framework. Yet FRG chooses to overlook these matters altogether.

The record is replete with evidence on the proposed plant's contribution to reliability and integrity and its role in satisfying the need for adequate electricity. The proposed project not only provides a reliable and economical way to serve the TECO load, it will be the most efficient unit on the TECO system. The unit will be the first unit dispatched on the TECO system, backing

out other energy sources more economically, more efficiently and in a more environmentally benign manner. The plant will enable TECO to burn coal more cleanly and efficiently than any other existing coal-fired technologies. (R. 13, 17) While providing new capacity for load growth, Polk Unit One provides help to the "aging of the fleet" being faced by TECO and most other utilities. By 1995, all of the units of Hookers Point Station will be over 40 years old. That represents 6% of the company's generating capacity. Also, by that time, Gannon Units 1, 2 and 3, another 12% of the generating system will be over 35 years old. (TR. 484, 485)

The Commission notes that it did not have the benefit during the proceeding of FRG's legal argument that FEECA controls in that the Chapter 403 revision was made contemporaneously with the FEECA legislation. The Commission has objected to Appellant's Request for Judicial Notice of a bill and of a legislative committee vote sheet. Even so, this argument is not compelling.

Appellant's strained argument regarding the interplay of Section 403.519, Florida Statutes, and the Florida Energy and Efficiency Conservation Act (FEECA) is unpersuasive and difficult to follow. The Commission agrees that Section 403.519, Florida Statutes, should be construed in a manner that is consistent with and gives effect to the terms of FEECA, yet is unpersuaded on Appellant's specific argument. (R. 471) As Appellant acknowledges (Appellant's Brief at 27), the Siting Act is premised upon a

balancing of the need for additional power generation, with the resultant environmental, health and natural resource impacts of increased power production. FEECA addresses the critical importance of conservation and energy efficiency, but neither FEECA nor the Siting Act can reasonably be interpreted to intend that the Commission should consider conservation and energy efficiency above all other statutory criteria in a determination of need proceeding. Apparently, the purpose of Appellant's argument relates to the definition of "mitigate" and "cost-effective". This argument is beside the point in that the Commission found that expanded conservation could not defer or mitigate the need for the proposed plant in the time required. (R. 471, 473)

Appellant also opposes the use of the RIM test to rule out conservation alternatives that carry negative rate impacts. Yet, the Commission Rule 25-17.008, Florida Adminsitrative Code, allow the use of the RIM test; and the record is replete with illustrations and evidence supporting the use of that test.

Appellant attempts to make an argument that there was a presumption of need applied in this process. Yet the complex, lengthy and laborious hearings, the filings, and the analysis demonstrate otherwise.

Finally, Appellant argues that supply side and demand side measures must be evaluated in exactly the same manner (Appellant's Brief at 36). There is nothing in Section 403.519, Florida

Statutes, which mandates such treatment. FEECA, likewise, does not superimpose such a requirement upon the need determination process either.

FRG's arguments relating to the application of the Section 377.709(2)(b), Florida Statutes, to Section 403.519 for the purposes of defining "cost effective" was unconvincing to the Commission. (R. 488) That statute, instead, addresses solid waste facilities which are cogenerators, and the electric utilities' purchase of power from those cogenerators. That relates to implementation of federal law under the Public Utility Regulatory Policies Act. Appellant has attempted to persuade the Court to accept a different interpretation of the Section 403.519. That attempt should be rejected.

In Nassau Power Corp. v. Beard, 17 FLW 314 (Fla. May 28, 1992), the Court addressed the Commission's implementation of Section 403.519, Florida Statutes. The Court noted that under that statute, the FPSC is designated the "sole forum" for determination of need under the Siting Act. The Court said, "It is well settled that the construction placed on a statute by the agency charged with the duty of executing and interpreting it is entitled to great weight." Nassau at 315, citing to P.W. Ventures Inc., v. Nichols, 533 So.2d 281, 283 (Fla. 1988). Courts will not depart from such a construction unless it is clearly unauthorized or erroneous. Gay v. Canada Dry Bottling Co., 59 So.2d 788 (Fla. 1952).

Here, too, the Commission's interpretation of the statute is entitled to great weight. The Commission was not persuaded by FRG's argument on the meaning of the terms, the superimposing of FEECA, or the singling out of the conservation factor over and above the reliability and system integrity factors. (R. 470, 488) The Commission, as in Nassau, has reasonably implemented Section 403.519, Florida Statutes and its Order should be upheld.

CONCLUSION

Based upon the foregoing presentation of argument and authorities, the Florida Public Service Commission respectfully submits that the decision of the Commission was correct, and must be upheld. Therefore, the Commission further requests that this Honorable Court enter its order affirming the decision of the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Amended Answer Brief of Appellee, Florida Public Service Commission has been furnished by U.S. Mail to Lee L. Willis, Esquire, Ausley, McMullen, McGehee, Carothers and Proctor, Post Office Box 391, Tallahassee, Florida 32302 and Mr. Ross Burnaman and Ms. Debra Swim, Legal Environmental Assistance Foundation, 1115 North Gadsden Street, Tallahassee, Florida 32303-6327, this 14th day of December, 1992.

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