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BEFORE THE FLORIDA SUPREME COURT

FLORIDIANS FOR RESPONSIBLE UTILITY GROWTH,

Appellant,

v.

THOMAS M. BEARD, ET.AL. as the
FLORIDA PUBLIC SERVICE COMMISSION and
TAMPA ELECTRIC COMPANY,

Appellees.

CASE NO. 80,225

APPEAL FROM A FINAL ORDER OF THE
FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT FLORIDIANS FOR RESPONSIBLE UTILITY GROWTH

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STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal taken from a Final Order of the Florida Public Service Commission (PSC), pursuant to Sections 403.519 and 120.68, Florida Statutes (1991). The Final Order is styled "Order Determining the Need for a Proposed Electrical Power Plant". [R. 457-489]. The Final Order authorizes a determination of need for Tampa Electric Company's (TECO) proposed 220 megawatt (MW) integrated coal gasification combined cycle (IGCC) unit and associated facilities including transmission lines, a gas line, and an oil pipeline to be located in Polk County, Florida. [R.457-489].

2. Course of the Proceedings.

TECO initiated an administrative proceeding before the PSC by filing a Petition for Determination of Need on September 5, 1991. [R. 2-137].

Destec Energy, Ark Energy, Florida Industrial Cogeneration Association, and Floridians for Responsible Utility Growth timely intervened in the proceeding. [R. 141-143; 150-152; 166-168; 189-190].

Floridians for Responsible Utility Growth is an informal ad hoc coalition of individual utility customers and organizations doing business in Florida. Members include the Legal Environmental Assistance Foundation, Inc., Florida Public Interest Research Group, Florida Solar Energy Industries Association, Inc., Florida Consumer Action Network, Manasota-88, Mr. John A. Ryan, Mr. John O.

Blackburn, and Mr. Timothy Steorts. [R. 189-190].

Destec and Ark withdrew from the proceeding prior to the Prehearing Conference. [R. 177-178; 231-232].

A Prehearing Conference was held on November 20, 1991, pursuant to the Commission's procedural rules, and a Prehearing Order was issued on December 9, 1991. [T. 1-89; R. 325-346].

On December 10-11, 1991, Commissioners Susan F. Clark and Betty Easley conducted a formal hearing. [T. Vol.1-5].

Floridians for Responsible Utility Growth timely filed Proposed Findings of Fact and Post-hearing Brief on January 3, 1992. [R. 351-389]. Tampa Electric Company did not file proposed findings of fact but did file a Post-hearing Brief on January 3, 1992. [R. 390-453].

On March 2, 1992, the Florida Public Service Commission entered a Final Order. [R.457-489].

On March 17, 1992, Floridians for Responsible Utility Growth timely moved for reconsideration of the Final Order. [R. 490-495].

On June 11, 1992, the Commission entered an Order which denied the Motion for Reconsideration, and the Order Determining the Need for a Proposed Electrical Power Plant, thereby became final agency action. [R. 505-508].

On July 23, 1992, Floridians for Responsible Utility Growth initiated an appeal of the Order. [R. 509-510].

3. Disposition in the lower tribunal.

TECO's petition was conditionally granted by the PSC. [R. 466; 469; 473]. The determination of need approves Polk Unit One, a 220

MW IGCC unit, with 150 MW on-line in 1995 and 70 MW on-line in 1996. [R-473]. The PSC instructed TECO to resubmit its conservation plan no later than one year prior to filing its next need determination petition and to detail why market penetration cannot be increased for each of TECO's conservation programs. The PSC also encouraged TECO to conduct market achievability studies and to experiment with control and test groups and to consider expanding its conservation plan to include programs that would defer the need for baseload and intermediate load units. [R. 469].

STATEMENT OF THE FACTS

TECO, an investor-owned electric utility, provides service to approximately 460,000 retail customers located in Hillsborough and portions of Polk, Pinellas and Pasco counties. [R. 3].

As required by the 1980 Florida Energy Efficiency and Conservation Act, TECO established conservation (demand side management) programs during the 1980's. [R. 62]. TECO's most recent PSC conservation plan filing prior to the need Petition at issue in this case was submitted on February 2, 1990. [R. 28; 475 Finding No. 5]. TECO did not undertake to revise its February, 1990, conservation plan to determine the availability of additional conservation savings which would be available to defer capacity in 1995-1996 in preparation of its September 5, 1991, petition. [R-475, Finding 5].

In developing its 1990 conservation plan, TECO evaluated 22 prospective programs. [R. 475-476 Finding No. 5]. TECO eliminated five of the prospective programs for various reasons, and then

eliminated nine of the remaining 17 programs through its application of the lost revenue portion of the Rate Impact Measure (RIM) test. [R. 476 Findings 6 and 7].

The RIM test is one of the PSC's three cost-effectiveness analyses required by the PSC for evaluating proposed conservation programs - the results of all three tests must be submitted to the PSC when programs are filed for review and approval. [R. 475, See Findings 3 and 4 (rejected); Fla. Admin. Code Rule 25-17.008 (3) and Manual].

Conservation and other DSM measures that failed the RIM test were excluded from further consideration by TECO, even if they passed the Total Resource Cost (TRC) test, one of the other PSC-required cost-effectiveness tests. [R. 481 Finding 30; Fla. Admin. Code Rule 25-17.008 (3) and Manual]. DSM programs that fail the RIM are excluded by TECO without regard to the number of likely participants or the reasons for non-participation. [R. 483-484 Finding 43].

TECO does not eliminate supply options from further review solely on the basis that they would increase rates to some degree or raise revenue requirements. [R. 481 Finding 34].

In evaluating supply options TECO attempts to determine which option is "least cost" -- has the lowest present worth revenue requirements. [R. 481-482 Finding 35].

Although TECO expressed concern about meeting clean air standards, it made no environmental impact comparisons between rejected DSM programs and the final group of supply options

evaluated. [R. 483-484 Finding 47].

TECO's conservation programs are primarily peak load reduction programs, and the company did not seek

to reduce the need for baseload power plants, or evaluate potential conservation programs against baseload units for cost-effectiveness. [R. 469; 477 Finding 15].

TECO's 1990 conservation planning did not investigate direct installation of DSM measures in residences, appliance labeling programs, motor efficiency measures, or retail rebate programs. [R. 477 Findings No. 13 and 14].

TECO does not offer efficiency measures for many end-uses in the residential and commercial/industrial sectors, for example for important household appliances and lighting in the residential sector and for heating/air conditioning and refrigeration in the commercial/industrial sector. [R. 477, Finding 19].

In prior PSC planning proceedings, TECO's "avoided unit" was a 220 MW phased combined cycle unit, but in 1991, TECO switched its proposed generating expansion plan and entered into an agreement with United States Department of Energy whereby the Department would grant the company $120 Million towards a "clean coal" demonstration project. [R. 4, 16-18; 457-458; see, Fla. Admin. Code Rule 25-18.0833].

(Polk Unit 1 would be a 220 MW IGCC unit to be phased into service in 1995 and 1996. [R. 13; R-457]. The power plant would include several "associated facilities", including transmission lines and fuel lines. [R. 457].

SUMMARY OF ARGUMENT

Because the Final Order in this case is a quasi-judicial order rather than a quasi-legislative ratemaking or rulemaking order, it should be reviewed under Section 120.68, Florida Statutes (1991). The narrow standard of judicial review usually applied to the Commission's quasi-legislative ratemaking and rulemaking functions would be inappropriate for this agency action.

In the PSC agency action appealed there were material errors in procedure, including the failure to separately state findings of fact and conclusions of law, the failure to provide Appellant with a proposed order to which it could file exceptions, and the failure to state a reason for denial of some proposed findings of fact. These errors require remand since they affected the correctness of the PSC's agency action.

Further, the Final Order contains at least two apparent findings of fact that are not based upon competent, substantial evidence: that TECO had adequately performed the requisite conservation measures to mitigate the need for Polk Unit One; and that Polk Unit One is the most cost-effective alternative. These "findings" necessitate remand.

In addition, the PSC improperly interpreted Section 403.519, Florida Statutes (1991), which is governed by the stated legislative intent of the Florida Energy Efficiency and Conservation Act and not the Florida Power Plant Siting Act. First, the PSC interpreted "mitigate" to mean "eliminate" in application of Section 403.519, Florida Statutes, with respect to conservation

alternatives to Polk Unit One. The plain meaning of "mitigate", clear expression of legislative intent, and proper statutory interpretation all compel a different interpretation of the statute.

Second, the PSC interpreted "most cost effective" in a manner contrary to Section 403.519, Florida Statutes (1991), in that supply-side and demand-side alternatives were not properly evaluated. The Polk Unit One was not compared with cost-effective conservation and demand-side management alternatives.

The clear substantive and procedural errors in the Final Order compel that it be remanded to the Commission pursuant to Sections 120.68 (8), (9) and (10), Florida Statutes (1991).

ARGUMENT

1. THE COMMISSION'S FINAL ORDER SHOULD BE REVIEWED UNDER A TRADITIONAL ADMINISTRATIVE STANDARD OF JUDICIAL REVIEW OF QUASI-JUDICIAL AGENCY ACTION.

A. THE NEED DETERMINATION ORDER IS FINAL AGENCY ACTION.

Florida Public Service Commission need determinations under the Florida Energy Efficiency and Conservation Act (FEECA) are governed by the Administrative Procedure Act ("APA"). Chapter 120, Fla. Stat. (1991). FEECA was amended in 1990 to specifically provide that a PSC power plant need determination order is "final agency action". Ch. 90-331, Laws of Fla.; s. 403.519, Fla. Stat. (1991). See also, Florida Power Corp. v. State of Florida, Siting Board, 513 So. 2d 1341 (Fla. 1st DCA 1987). The Florida Public Service Commission is an "agency" for purposes of review of its need determination order. 120.52 (1)(c), Fla. Stat. (1991); Florida Power Corp, supra.; General Telephone Co. of Fla. v. Florida Public Service Commission, 446 So.2d 1063, 1065 (Fla. 1984).

The Final Order appealed is a quasi-judicial administrative order. [R. 474]. The standard of judicial review in this case should be identical to the standard employed in the review of any other quasi-judicial administrative order under Section 120.68, Florida Statutes (1991).

B. THE FINAL ORDER DOES NOT INVOLVE THE LEGISLATIVE RATE-MAKING FUNCTION AND IS SUBJECT TO REVIEW OF QUASI-JUDICIAL ACTION UNDER SECTION 120.68, FLORIDA STATUTES (1991).

The case at bar does not involve the exercise of the PSC's quasi-legislative ratemaking function. It is a case of first

impression: judicial review of the PSC's determination of need for a new power plant under the Florida Energy Efficiency and Conservation Act. s. 403.519, Fla. Stat. (1991).

The Commission's need determination is a condition precedent to, and necessary finding of, a subsequent final order of the Governor and Cabinet acting as the Siting Board under the Florida Power Plant Siting Act. Florida Power Corp. v. State of Florida Siting Board, 513 So.2d 1341, 1344 (Fla. 1st DCA 1987).

Since this will be the Court's first review of a final order granting a need determination petition, the Court should specifically distinguish the different standards of judicial review applicable to the PSC's quasi-judicial functions that do not involve the quasi-legislative ratemaking and rulemaking actions.

Recently, this Court affirmed that the PSC is "an entity of the legislative branch" rather than an executive branch agency. Chiles v. Public Service Commission Nominating Council, 573 So.2d 829, 832 (Fla. 1991). The decision properly noted that the PSC does perform quasi-judicial functions, and said: "However, its primary function is setting rates, which is legislative in nature." Id. at 832. The Court also has stated that rulemaking involving utility rates is quasi-legislative in nature. General Telephone Co. of Fla. v. Florida Public Service Comm., 446 So.2d 1063, 1066-1067 (Fla. 1984).

Floridians for Responsible Utility Growth submits that the PSC's consideration of power plant need determinations is a quasi-judicial function. Unlike the general and permissive criteria

applicable to rate cases, the Legislature requires the PSC to evaluate four specific criteria in a need determination:

> In making its determination, the commission shall take into account 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. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

s. 403.519, Fla. Stat. (1991).

The Legislature has granted the PSC broad discretion to set rates that are "fair, just and reasonable". s. 366.06, Fla. Stat. (1991); see also, s. 366.07, Fla. Stat. (1991). The PSC may also consider other factors in setting rates, but utilities are entitled to a reasonable rate of return. s. 366.041 (1), Fla. Stat. (1991). The PSC must evaluate utility conservation performance under FEECA when setting rates and the Legislature has granted the PSC additional discretion to set "experimental or transitional" rates to encourage energy conservation or energy efficiency. ss. 366.075 and 366.82 (4), Fla. Stat. (1991).

In cases involving PSC orders of a quasi-legislative ratemaking and rulemaking nature, this Court has conducted a more limited review than occurs under traditional review of quasi-judicial administrative action:

> As a quasi-legislative proceeding, our review of the rulemaking is more limited than would be review of a quasi-judicial proceeding.... a qualitative, quantitative standard such as competent and substantial evidence is

> conceptually inapplicable to a proceeding where the record was not compiled in an adjudicatory setting and no factual issues were determined.

Id. at 1067.

In many instances, this Court has reviewed PSC orders which involve utility rate issues to determine if competent, substantial evidence supports the order, and if the order meets the essential requirements of law. Duval Utility Co. v. Florida Public Service Comm., 380 So.2d 1029, 1030-1031 (Fla. 1980) (connection charges); Pan American World Airways v. Florida Public Service Comm., 427 So.2d 716, 717 (Fla. 1983) (deposit); Citizens of the State of Florida v. Public Service Comm., 464 So.2d 1194 (Fla. 1985) (treatment of profits); Florida Power Corp. v. Public Service Comm., 487 So.2d 1061, 1063 (Fla. 1986) (refund order); Monsanto Co. v. Wilson, 555 So.2d 855, 857 (Fla. 1990) (rate increase). Cf. Manatee County v. Marks, 504 So.2d 763, 764-765 (Fla. 1987) (boundary dispute where competent, substantial evidence was combined with "arbitrary" standard).

In PSC rule challenge proceedings which typically involve factual adjudication, this Court has stated that the standard of judicial review 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. Florida Public Service Comm., 460 So.2d 370, 373 (Fla. 1984).

The standard of review in these cases derives from this

Court's past certiorari jurisdiction to review PSC orders. Surf Coast Tours, Inc. v. Florida Public Service Comm., 385 So.2d 1353, 1354 (Fla. 1980), citing Florida Telephone Corp v. Mayo, 350 So.2d 775 (Fla. 1977). Section 366.10, Florida Statutes was rewritten in 1980 to delete reference to certiorari review by this Court. Ch. 80-35, s. 11, Laws of Fla.

Subsequent to the enactment of the APA, this Court has cited Section 120.68, Florida Statutes, in its review of PSC orders entered after evidentiary administrative proceedings. All of the cases involved review of final agency action in quasi-legislative ratemaking proceedings. Gulf Power Co. v. Florida Public Service Comm., 453 So.2d 799, 805 (Fla. 1984)(utility appeal of rate increase less than requested); Citizens of the State of Florida v. Public Service Comm., 435 So.2d 784, 787 (Fla. 1983)(Public Counsel appeal of rate increase); Duval Utility Co. v. Florida Public Service Comm., 380 So.2d 1028 (Fla. 1980)(utility appeal of order on connection charges); and Citizens of the State of Florida v. Hawkins, 356 So.2d 254, 259-260 (Fla. 1978)(Public Counsel appeal of rate increase).

Floridians for Responsible Utility Growth urge this Court to distinguish the usual standard of review of PSC orders in the case at bar because it involves a quasi-judicial agency action that did not involve the PSC's quasi-legislative ratemaking or rulemaking functions. See, England and Levinson, Florida Administrative Practice Manual s. 15.14 (a) (1979). This case should be reviewed under Section 120.68, Florida Statutes (1991).

2. THE FINAL ORDER MUST BE REMANDED TO CORRECT MATERIAL ERRORS IN PROCEDURE WHICH AFFECTED THE CORRECTNESS OF THE AGENCY ACTION AND THE FAIRNESS OF THE PROCEEDING.

A. THE FINAL ORDER FAILS TO PROVIDE SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY PSC RULE AND STATUTE.

Agency Rules on Final Orders

The PSC has adopted rules of practice and procedure to guide the performance of agency functions pursuant to Section 120.53, Florida Statutes. Fla. Admin. Code Rule Chapter 25-22. The PSC has adopted a specific rule on practice and procedure for final orders. Fla. Admin. Code Rule 25-22.059.

The Commission's rule on final orders provides in relevant part:

> The final order shall include...statement of the issues, findings of fact, conclusions of law, and statement of final Commission action.

Fla. Admin. Code Rule 25-22.059 (1).

Section 120.59 (1), Florida Statutes (1991)

In addition to obligations imposed by its own rules, the Commission's agency action is subject to the requirements of Sections 120.59 (1) and 120.58 (1)(e), Florida Statutes (1991).

Section 120.59 (1), Florida Statutes (1991), provides in relevant part (emphasis supplied):

> The final order in a proceeding which affects substantial interests shall be in writing or stated in the record and include findings of fact and conclusions of law separately stated, and it shall be rendered within 90 days....

Section 120.58 (1)(e), Florida Statutes (1991) provides in relevant part (emphasis supplied):

> In agency proceedings for a rule or order: if a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given the opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision. The proposed order shall contain the necessary findings of fact and conclusions of law and a reference to the source of each....

Notwithstanding the clear requirements of law and PSC rules, and over the objection of Floridians for Responsible Utility Growth, the Final Order contains no distinct findings of fact and conclusions of law. [R.457-474].

In the Commission's Order Denying Motion for Reconsideration, the agency stated that "FRG's contentions are simply form over substance arguments." [R. 506]. The PSC also stated that the APA does not require that findings of fact and conclusions of law be labeled as such. [R. 506]. Floridians for Responsible Utility Growth believe the PSC's approach to its APA obligations as to the form of its orders not only frustrates the due process rights of the parties, but it also makes meaningful review by this Court much more difficult. (The record in this case consists of 511 pages of pleadings and orders, 685 pages of transcript, and 37 exhibits).

The Court has admonished the Commission to prepare its orders with due regard for the appellate process. In a pre-APA decision, the Court stated that PSC orders should contain specific findings of fact upon which the ultimate conclusion is founded and that "this is no mere technical or perfunctory requirement". Greyhound

Lines Inc. v. Mayo, 207 So.2d 1, 5 (Fla. 1968).

Post-APA, this Court again addressed the issue of findings of fact in International Minerals and Chemical Co. v. Mayo, 336 So.2d 548, 552-553 (Fla. 1976), and said:

> The requirement of explicit fact findings makes for more careful consideration by the Commission, helps assure that this Court does not usurp the PSC's fact finding prerogatives, and otherwise facilitates review of Commission orders by this Court....Although we are constrained to agree with petitioners' characterization of some of the findings in the present case as "mere conclusions and generalizations", we reject petitioners' contention that the fact findings as a whole fail in their intended function.

Id. at 553.

In a 1977 interim rate case, this Court informed the Commission that "Greater factual clarity in these types of orders, however, will be expected in future cases." Maule Industries, Inc. v. Mayo, 342 So.2d 63, 68 (Fla. 1977).

Later, in Occidental Chemical Co. v. Mayo, 351 So.2d 336, 341 (Fla. 1977), this Court again observed that PSC orders should contain specific fact findings to support its conclusions, but the order was not remanded for more specificity.

This issue has been addressed by other courts and in other contexts. Pan American World Airways v. Florida Public Service Comm., 427 So.2d 716, 718-719 (Fla. 1983) (involved stipulated facts and waiver of an evidentiary hearing). Schomer v. Dept. of Professional Regulation, 417 So. 2d 1089, 1090 (Fla. 3d DCA 1982), (agency adoption of a recommended order met the APA requirement); and General Development Corp. v. Division of State Planning, 353

So.2d 1199, 1210 (Fla. 1st DCA 1978), (applied to the informal proceeding associated with a binding letter of interpretation of development of regional impact status).

The PSC's status as a legislative branch agency does not excuse it from compliance with APA requirements. The Florida Commission on Ethics, also a legislative branch agency, enters its orders in the required form. Comm. on Ethics v. Sullivan, 489 So.2d 10 (Fla. 1986); In re: Stakich, 13 F.A.L.R. 3277 (Fla. Comm. on Ethics 1989).

Since the PSC has repeatedly failed to render its final orders with regard for the level of factual and legal detail contemplated by the Maule Industries decision and the APA, and since the decisions typically involve hundreds of millions of dollars and "critical" matters of public interest [R-459], the Court should remand this matter to the Commission with instructions that the Final Order set out findings of fact and conclusions of law, separately stated.

Fundamentally, it is unfair to an appellant to "divine" which of the Commission's statements are findings of fact and which are conclusions of law. Different standards of review are specified. 120.68 (7)-(12), Fla. Stat. (1991).

This is not "harmless error" or "form over substance". On its face, the Commission's order is characterized by "appearances", "beliefs" and "opinions", rather than specific "findings of fact" and "conclusions of law". [R.457-474].

The difficulty presented by the Commission's failure to

separately state facts and legal conclusions is illustrated by the following paragraph:

> 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%. There is little evidence in the record to conclusively demonstrate either the feasibility or the difficulty of increasing participation rates in those programs. Furthermore, TECO's conservation programs appear to be deferring peaking units only, not baseload or intermediate load units. [R.468-469].

The first sentence comments on the evidence, but does not indicate why it is relevant that "quantitative evidence regarding the possibility of expanding participation" is relevant. The second sentence implies that some evidence exists that actually bears on the subject but does not state as fact what the evidence is, and the sentence implies a legal conclusion that evidence related to increasing participation rates must be "conclusively demonstrated". The third sentence, in essence, states that TECO's conservation programs do not defer baseload units like the 220 MW IGCC unit under review, which appears to be a factual determination, but also implies that the factual issue is irrelevant to the Commission's decision.

Although it is dicta, the Court's recent observation is correct that:

> Section 403.519 requires the PSC to make specific findings for each electric generating facility proposed in Florida....

Nassau Power Corp. v. Beard, 17 F.L.W. 314 (Fla. May 28,

1992)(emphasis supplied).

B. THE FINAL ORDER IMPROPERLY REJECTED PROPOSED FINDINGS OF FACT.

The Commission failed to specify a reason for its denial of proposed findings of fact numbers 59, 60, and 61. [R.487-488]. 120.59 (2), Fla. Stat. (1991). The PSC did not state that the proposed findings of fact were subordinate, cumulative, immaterial or unnecessary.

The three proposed findings of fact are ultimate facts which the Commission should not have rejected without some justification. Island Harbor Beach Club, Inc. v. Department of Natural Resources, 476 So.2d 1350, 1352-1353 (Fla. 1st DCA 1985). The failure to adequately consider and respond to the proposed findings of fact was a material error in procedure which may have impaired the fairness and correctness of the PSC's action. Ehrenzeller v. Department of Health and Rehabilitative Services, 390 So.2d 181, 182 (Fla. 2nd DCA 1980).

C. THE FINAL ORDER IS BASED UPON FINDINGS OF FACT WHICH ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Without a waiver of the previous argument which addresses the Commission's failure to separately state findings of fact and conclusions of law, Floridians for Responsible Utility Growth submit that the Final Order appears to be based upon two findings of fact which are not supported by competent, substantial evidence: (1) that TECO has adequately performed the conservation measures that are reasonably available to avoid the need for the proposed IGCC power plant [R-469], and (2) that the IGCC unit is the most cost-effective alternative to meet TECO's capacity needs [R-462,

465].

This Court has defined "competent substantial evidence" as:

> such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or]...such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.

Duval Utility Co, v. Florida Public Service Comm., 380 So.2d 1028, 1031 (Fla. 1980), citing DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957).

1. TECO CONSERVATION EFFORTS WERE NOT ADEQUATELY ALLEGED OR PROVEN.

The "finding" that TECO's conservation performance was adequate is without support in the record, and is contrary to the Commission's acceptance of several of FRG's proposed findings of fact. [R-475-488]. For example, TECO uses the Rate Impact Measure (RIM or no-losers) test as a cost-effectiveness screen for DSM. [R-475]. TECO did not consider direct installation of DSM measures in residences or facilities. [R-477]. TECO did not consider residential appliance labeling, motor efficiency or retail rebate programs. [R-477]. TECO does not offer efficiency measures for many end-uses in the residential and commercial/industrial sectors. [R-478].

TECO did not consider the development of conservation programs that would reduce the need for baseload capacity or evaluate DSM measures against baseload units. [R-477]. TECO's conservation programs defer peaking units, rather than baseload and intermediate load units. [R-469].

Further, the "finding" conflicts with the Commission's rules

and other parts of the Final Order. The Final Order and PSC rules require that need determination petitions contain a discussion of the conservation potential supplemental to the savings associated with a utility's existing FEECA programs. Fla. Admin. Code Rule 25-22.081 (5); [R-471].

However, TECO alleged the need for the IGCC power plant based solely upon TECO's existing Commission-approved conservation programs. [R-2-8; 27-28; 59; 71-74; 105-106]. Not only did TECO fail to allege and present evidence on supplemental savings, TECO's last "complete" DSM program evaluation was done before TECO's February 12, 1990 conservation plan filing, and not in preparation for the September 5, 1991, need petition. [R. 475; T-497]. Nevertheless, the Commission accepted TECO's old conservation plan as the basis for its "finding" of adequacy.

This situation is somewhat analogous to the PSC's old practice of presuming need based upon its cogeneration regulations, a practice discussed in Nassau Power Corp. v. Beard, 17 F.L.W. 314 (Fla. May 28, 1992). As the Court correctly found, all four criteria in Section 403.519, Florida Statutes (1991), are "utility and unit specific". Id. at footnote 9. FEECA encourages solar energy, renewable energy sources, highly efficient systems, cogeneration and load control systems. s. 366.81, Fla. Stat. (1991).

Although the PSC has not presumed TECO's need based upon rules, it is uncontroverted in the record that TECO did not evaluate conservation measures that would specifically mitigate the

need for the Polk Unit One. The PSC has presumed TECO's 1995-1996 need for Polk Unit One based upon TECO's one and one-half year old conservation plan, when the PSC rules make it clear that such a presumption is legally insufficient. Fla. Admin. Code Rules 25-22.081 (5) and 25-17.001 (4).

Therefore, the Commission's "belief" that TECO had adequately considered the conservation measures that would be reasonably available to avoid the need for the power plant is not based upon evidence that supports a reasonable inference, or that a reasonable mind would accept as adequate to support the PSC's "finding" and the Final Order should be remanded to the agency.

2. COST EFFECTIVENESS WAS NOT DEMONSTRATED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The Final Order contains a "finding" that the IGCC power plant is TECO's most cost-effective alternative. [R-461; 462; 465-468; 473]. The Final Order accepted many of Floridians for Responsible Utility Growth's proposed findings of fact relative to cost-effectiveness, which show that the PSC was in no position to determine that the IGCC was the most cost-effective alternative. [R-480-488].

In essence, supply-side options and demand-side options were evaluated using different standards of cost-effectiveness, and there is no factual predicate for the Commission to determine that the new supply represented by the IGCC power plant is more cost-effective than additional conservation.

TECO eliminated numerous potential conservation measures by using one of the three PSC-approved cost-effectiveness tests - the

Rate Impact Measure Test (RIM or no-losers test) - as an economic screen before the measures were compared with supply options. [R-481]. The RIM test rejects conservation measures that have rate impacts without regard to their effects on utility revenue requirements or total system costs. [R-481]. Supply-side measures, however, were not rejected merely because they have rate impacts or increased revenue requirements. [R-481]. Thus, as the record clearly shows, no comparisons were made between the proposed IGCC unit and conservation measures that were screened out with a different test of cost-effectiveness.[1]

The PSC's acquiescence to TECO's different treatment of the cost-effectiveness of supply-side and demand-side alternatives - that is, permitting use of the RIM to eliminate potential conservation measures - is fundamental flaw in the process of determining what is the cost-effective. Further, it is contrary to good public policy because it penalizes consumers of electricity:

> Though it appears neutral on its face, the no-losers test is inherently discriminatory. Conservation typically raises rate more than new generating capacity of equal or even much higher cost, because the utility sells less electricity under the conservation scenario and there are fewer kilowatt-hours over which to spread the system's fixed costs. Compared to more expensive alternatives, conservation reduces <u>bills</u> but may raise <u>rates</u>; utilities applying the no-losers test are in effect

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[1] In its Request for Judicial Notice, Appellant requested that the Court notice the PSC rule and manual excerpt on cost-effectiveness of conservation. Fla. Admin. Code Rule 25-17.008 (3). On page three of the Manual, in the last paragraph, "avoided generating unit" is defined to refer to "a utility's proposed generating unit that is avoided in whole or in part by the demand side management program."

contending that bills matter less than rates. Cavanaugh, Least-Cost Planning Imperatives for Electric Utilities and Their Regulators, 10 Harvard Environmental Law Review 299, 325 (1986).

D. NO PROPOSED FINAL ORDER WAS PREPARED TO WHICH EXCEPTIONS WERE ALLOWED PRIOR TO THE COMMISSION'S DECISION.

Two Commissioners acted as hearing officers in this matter. [R.457]. Nevertheless, the Final Order constitutes an order of the full Commission. No proposed order was prepared.

Section 120.58 (1)(e), Florida Statutes (1991) (emphasis supplied), provides:

> If a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision. The proposed order shall contain necessary findings of fact and conclusions of law and a reference to the source of each....

APA definitions indicate that the requirement for proposed orders is intended to apply when the agency head is a collegial body. s. 120.52 (14), Fla. Stat. (1991) ("proposed order"); s. 120.52 (3), Fla. Stat. (1991) ("agency head"). Since the PSC is comprised of five commissioners, and only two commissioners heard the evidence, a proposed order with specific findings of fact and conclusions of law should have been circulated to Floridians for Responsible Utility Growth for the opportunity to file exceptions.

The APA does not define "render", but "rendition" is defined in the Florida Rules of Appellate Procedure. Fla. R. App. P. 9.020

(g). When read in pari materia with the corresponding definitions of "administrative action", "order" and "lower tribunal", "rendition" suggests that the Final Order was rendered by the PSC, and not by the two Commissioners who served as hearing officers. Fla. R. App. P. 9.020 (a), (d) and (e).

In another context, "rendition" of a "development order" of a collegial zoning board was the "issuance and transmittal" of the order to the Department of Community Affairs, rather than the date that the order was adopted. Fox v. South Florida Regional Planning Council, 327 So.2d 56, 58 (Fla. 1st DCA 1976). The case supports the notion that rendition is the official act of the full Commission, rather than the decision of two Commissioners.

The Final Order appealed, was "rendered" by the Commission, rather than the two hearing officers. [R. 457-489]; s. 350.01 (1), Fla. Stat. (1991). See also, Fla. Admin. Code Rule 25-22.060 (1)(c) (rendered used in context of full PSC).

Section 350.01 (5), Florida Statutes (1991), might suggest, but does not require, a different interpretation:

> only those commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the commission as to that proceeding; provided, 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.

Presumably, the two Commissioners would not know whether a tie vote would occur until after the time for filing exceptions. See also, Fla. Admin. Code Rule 25-22.057 (PSC rule which provides

for exceptions only where one Commissioner serves as hearing officer).

3. THE FINAL ORDER ADOPTED AN ERRONEOUS INTERPRETATION OF SECTION 403.519, FLORIDA STATUTES (1991), WHICH ADVERSELY AFFECTS THE CORRECTNESS OF THE COMMISSION'S ACTION.

A. EXPRESS LEGISLATIVE INTENT OF FEECA IS CONTROLLING.

On review of the Commission's order, this Court:

> must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence.

Public Employees Relations Comm. v. Dade County Police Benevolent Assoc., 467 So.2d 987, 989 (Fla. 1985).

Floridians for Responsible Utility Growth submit that the Commission's interpretation of Section 403.519, Florida Statutes (1991), is inconsistent with legislative intent and is not supported by substantial, competent evidence.

Legislative intent: FEECA or Siting Act?

Recently, this Court considered the Commission's obligations under Section 403.519, Florida Statutes (1991), a case that did not arise from the Commission's entry of a final order granting a need determination for a power plant. Nassau Power Corp. v. Beard, 17 F.L.W. 314 (Fla. May 28, 1992). In that case, this Court noted in a footnote that:

> Section 403.519 was originally enacted as part of the Energy Efficiency and Conservation Act, chapter 80-65, section 5, Laws of Florida, but is codified as part of the Siting Act.

Id. at 315, footnote 5.

Because Section 403.519, Florida Statutes, was enacted as part of the Florida Energy Efficiency and Conservation Act but was codified adjacent to the Florida Electrical Power Plant Siting Act ("Siting Act"), legislative intent could easily be misconstrued. s. 403.519, Fla. Stat. (Supp. 1980).

There are several reasons why Section 403.519, Florida Statutes, must be interpreted according to the stated intent of FEECA, rather than the Siting Act.

First, the Legislature adopted the need determination statute as part of FEECA and denoted it "s. 366.86". Ch. 80-65 s. 5, Laws of Fla. The Division of Statutory Revision assigned it a different number. s. 403.519, Fla. Stat. (Supp. 1980).

Second, when the Legislature amended the Siting Act in 1990 the short title section was changed, but Section 403.519, Florida Statutes, continued to be part of FEECA and not the Siting Act. Ch. 90-331 s. 1, Laws of Fla.; s. 366.80, Fla. Stat. (1991).

Third, legislative intent must be derived from established principles of statutory construction, and the arrangement and classification of the laws for purposes of codification in the Florida Statutes is not determinative of legislative intent. State v. Bussey, 463 So.2d 1141, 1143 (Fla. 1985).

To determine legislative intent, the court must look at:

> the act as a whole - the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject.

State v. Webb, 398 So.2d 820, 824 (Fla. 1981), citing Foley v.

State, 50 So.2d 179, 184 (Fla. 1951)(emphasis in original).

Under the Webb criteria, Section 403.519, Florida Statutes, is properly interpreted as part of FEECA. The 1973 Siting Act sought to cure the evil of the "pressing need for increased power generation facilities" with "abundant low-cost electrical energy". Ch. 73-33, s.1, Laws of Fla. In contrast, confronted with the perceived energy crisis, the 1980 Legislature saw a "critical" need to use the most efficient and cost-effective energy conservation and aspired only to have adequate electricity at reasonable cost. Ch. 80-65, s. 5, Laws of Fla. See also, Ch. 90-331, s. 2, Laws of Fla. (Siting Act intent - deleted reference to "abundant, low cost" energy).

The short title of the Florida Energy Efficiency and Conservation Act expressly provides that Section 403.519, Florida Statutes, is part of FEECA. s. 366.80, Fla. Stat. (1991). The short title of the Siting Act, clearly excludes Section 403.519, Florida Statutes, from its operation. s. 403.501, Fla. Stat. (1991). This Court may look to the short title as an aid to statutory interpretation. 49 Fla. Jur. 2d Statutes s. 156.

The stated findings and expressions of legislative intent of the Siting Act and FEECA are different. 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. s. 403.502, Fla. Stat. (1991). See also, s. 403.507 (2)(a)2, Fla. Stat. (1991). FEECA, on the other hand, addresses the critical importance of conservation and energy

efficiency.

Therefore, although Section 403.519, Florida Statutes, appears in the statutes adjacent to the Siting Act, it is properly interpreted according to the express intent in Section 366.81, Florida Statutes (1991). Floridians for Responsible Utility Growth urge this Court to clarify that Section 403.519, Florida Statutes, is to be construed in a manner that is consistent with the legislative findings and intent expressed in Section 366.81, Florida Statutes (1991). In C.F. Industries, Inc. v. Nichols, 536 So.2d 234, 236, 239 (Fla. 1988), Section 366.81, Florida Statutes, was read in pari materia with other provisions of Chapter 366, Florida Statutes.

B. THE PSC'S INTERPRETATION OF "MITIGATE" CONTRAVENES LEGISLATIVE INTENT.

Intent of FEECA - "Mitigate"

In FEECA, the Legislature found 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....ss. 366.80-366.85 and 403.519 are to be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption and reducing the growth rates of weather-sensitive peak demand; increasing the overall efficiency and cost-effectiveness of electricity and natural gas production and use....

366.81, Fla. Stat. (1991).

As noted in Nassau Power Corp., Section 403.519, Florida

Statutes:

> requires the PSC 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 Power Corp., at 314. (emphasis supplied).

In the case at bar, the PSC ignored the plain meaning of the word "mitigate", and interpreted it to mean "eliminate". [R.471; 489]. The Final Order provides:

> While the record in this proceeding shows that TECO can improve its conservation efforts, the record in this proceeding does not show that additional conservation can be implemented quickly enough to avoid construction of this particular power plan, and thus additional conservation can not "mitigate the need" for the IGCC plant. [R. 471].

In the absence of a statutory or common law definition of "mitigate", the PSC should have used the plain meaning of the word. City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 579 (Fla. 1984); Tropical Coach Line, Inc. v. Carter, 121 So.2d 779, 782 (Fla. 1960).

The plain meaning of "mitigate" is:

> (1) to cause (as a person) to become more gentle or less hostile: MOLLIFY (2) to make less severe, violent, cruel, intense, painful: SOFTEN, ALLEVIATE...TEMPER...LESSEN....

Webster's Third International Dictionary, (1976).

Although it does not define "mitigate", Black's Law Dictionary

defines "mitigation" as:

> to make less severe. Alleviation, reduction, abatement or diminution of a penalty or punishment imposed by law.

Black's Law Dictionary 1002 (Rev. 6th Ed. 1990).

The Commission's rules which implement Section 403.519, Florida Statutes (1991), support the view that "mitigate" should not be construed to mean "eliminate". Fla. Admin. Code Rule 25-22.081. A power plant need determination petition must include a discussion of "viable nongenerating alternatives" including an evaluation of the reductions "historically and prospectively" on the "timing and size of the proposed plant". Fla. Admin. Code Rule 25-22.081 (5) (emphasis supplied).

Other FEECA rules establish criteria whenever the PSC requires a determination of cost-effectiveness for conservation. Fla. Admin. Code Rule 25-17.008. The manual adopted and incorporated by reference in the rule clearly provides that the term "avoided generation unit" refers to a unit avoided "in whole or in part" by a DSM program.

Further, the Legislature intended that FEECA be "liberally construed" to reduce and control growth in energy consumption and peak demand and to increase the efficiency and cost-effectiveness of electricity production and use. The Commission's construction of "mitigate", however, is antithetical to improvement of TECO's conservation efforts.

In the event that this Court is not convinced that the Commission's interpretation is erroneous based upon the plain

meaning of "mitigate", the language of implementing rules, and the express legislative intent of FEECA, any remaining ambiguity can be resolved by examination of the legislative history of FEECA. See, Rhodes and Seereiter, The Search of Intent: Aids to Statutory Construction in Florida-An update. 13 Florida State University Law Review 485-514 (1985); City of Tampa v. Thatcher Glass Corp, 445 So.2d 578, 580 (Fla. 1984).

In the process of adoption of FEECA, the Legislature considered, but declined to adopt, the following language:

> In making its determination of need, the commission shall consider only alternatives reasonably proven to be available within the time projected to remain before the capacity of the proposed addition is needed, and the commission shall keep the reliability and integrity of the state grid foremost....

CS/CS/HB 786 (1980 Legislature).

As the measure worked its way through the Legislature, the operative language was changed (but ultimately rejected):

> In making its determination, the Commission shall take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity, and whether the proposed plant is the most economical and appropriate alternative available within the time projected to remain before the capacity of the proposed addition is needed. The Commission shall also expressly consider the conservation measures....

CS/CS/HB 786 as amended by Senate Committee on Ways and Means on May 27, 1980 (emphasis supplied).

CS/CS/HB 786, cited above, died in the Legislature. Instead, the alternative FEECA language which is repugnant to the PSC's

construction of the statute in the case at bar, was amended onto CS/HB 1052 on the House floor on May 30, 1980. (HJ 873-875). The amended bill became Chapter 80-65, Laws of Florida (1980)(FEECA).

Thus, the Commission's interpretation of Section 403.519, Florida Statutes, requiring that conservation be demonstrated to be available to displace the total capacity represented by a proposed power plant in a need determination, was specifically rejected by the Legislature.

> There is no authority for a department of the government charged with the execution of a law, to restore a provision which the Legislature strikes from the Act when in progress of its passage.

State ex rel. Finlayson v. Amos, 76 Fla. 26, 35, 79 So. 433 (1918).

Section 120.68, Florida Statutes, (1991), compels remand of the Final Order because it is premised upon an erroneous interpretation of Section 403.519, Florida Statutes (1991).

C. PSC'S APPLICATION OF "MOST COST-EFFECTIVE" CONTRAVENES LEGISLATIVE INTENT.

1. "COST-EFFECTIVENESS" WAS A STANDARD OF DECISION.

The PSC "found" that Polk Unit One was the most cost-effective alternative to meet TECO's capacity needs and "That fact drives our decision to grant TECO's petition." [R-462]. However, no clear standard of "cost-effective" was applied, and supply-side and demand-side alternatives were considered differently.

FEECA does not define "cost-effective". Nevertheless, FEECA requirements and the Final Order make a definition of "cost-effective" essential; or, at a minimum they necessitate the use of an objective standard for the Commission's decision.

The PSC rejected Floridians for Responsible Utility Growth's argument that "most cost-effective" means "least cost". [R-488; 469-470]. The PSC observed that the Legislature did not use the phrase "least cost" in Section 403.519, Florida Statutes (1991). [Id.]. However, "least cost" was the standard actually applied on the supply side, and the Commission did not state an alternative standard.

In addition, the PSC failed to recognize that "cost-effective" is defined in another statute on the same subject. s. 377.709 (2)(b), Fla. Stat. (1991). In this statute, the Legislature determined that combustion of refuse to supplement the electricity supply is an "effective conservation effort", and defined "cost-effective" in terms of least cost - requiring a "no greater than" cost test for "conservation" as compared with the "cost to the utility of producing an equivalent amount of capacity and energy". ss. 377.709 (1) and (2), Fla. Stat. (1991); In re: Petition by Broward County for a Determination of Need for a Solid-Waste Fired Electrical Power Plant, 86 F.P.S.C. 2:287 (1986).

In determining legislative intent of Section 403.519, Florida Statutes, this Court may consider the definition of "cost-effective" in Section 377.709 (2), Florida Statues (1991). Wakulla County v. Davis, 395 So.2d 540, 542 (Fla. 1981); Sanders v. State ex rel. Shamrock Properties, Inc., 46 So.2d 491, 495 (Fla. 1950). When statutes employ exactly the same words or phrases, the Legislature is assumed to intend the same meaning and statutes on the same subject should typically receive compatible

interpretations. Schorb v. Schorb, 547 So.2d 985, 987 (Fla. 2nd DCA 1989).

2. COST-EFFECTIVENESS OF SUPPLY SIDE OPTIONS WAS EVALUATED WITH A "LEAST COST" STANDARD.

The PSC applied a "least cost" standard of cost-effectiveness as between the various supply side alternatives. The Final Order's treatment of "Alternative Generating Technologies" concludes that Polk Unit One is the most cost-effective alternative [R-468] (emphasis supplied):

> In other words, the IGCC unit had the lowest present worth revenue requirements (PWRR) of the other generating alternatives available.

The economic analysis used by TECO and approved by the PSC in the Final Order sought to minimize present worth of revenue requirements for supply side options only. [R-93-97]. TECO's Petition omits any analysis of the relative present worth of revenue requirements of demand-side alternatives. [R-2-137].

3. THE RELATIVE COST-EFFECTIVENESS OF DEMAND SIDE ALTERNATIVES WAS NOT EVALUATED.

The Final Order does not specify how cost-effectiveness of conservation or demand side alternatives should be evaluated, but the order establishes that TECO used one cost-effectiveness test (the RIM or no-losers test) to eliminate potential conservation programs prior to submission to the PSC. [R-475, Finding 2]. The RIM test was used to exclude potential conservation programs that would increase rates, even if they passed the total resource cost test (TRC), another PSC-required test for programs submitted for approval. [R-481, Finding 30]. However, the Final Order also found

that TECO does not eliminate potential supply options because they would raise rates or increase revenue requirements. [R-481, Finding 34].

It follows, therefore, that there is no factual predicate for finding that the conservation programs that TECO rejected because they failed the RIM test would be less cost-effective than the IGCC unit. More importantly, there is no showing that Polk Unit One is more cost-effective than the options that were eliminated by the RIM test.

The Commission's approach to determining "most cost-effective", which permits demand side alternatives to be evaluated by a different standard than supply side alternatives, leads to what is at best a subjective comparison that is inconsistent with the intent of FEECA. FEECA does not support an interpretation that allows the PSC, or TECO, to eliminate economic conservation alternatives due to projected rate impacts, without any comparable consideration of the rate impacts of supply side alternatives, and without any comparative consideration of the present worth of revenue requirements of the different options.

Nothing the FEECA (or the Siting Act) suggests that the Legislature intended that different measures of cost-effectiveness be applied to supply-side and demand-side alternatives. The only fair reading of the statute is that "cost-effectiveness" must be evaluated uniformly by utilities and the PSC. The phrase "cost-effective" is used to describe both electric production and use, as well as conservation. ss. 366.81, and 366.83, Fla. Stat. (1991). A

presumption is made that the same words used in different parts of an act have the same meaning. Doctors Hospital, Inc. of Plantation v. Bowen, 811 F.2d 1448, 1452 (11th Cir. 1987).

FEECA suggests that supply-side and demand-side alternatives should at least be evaluated equally upon remand of the Final Order. s. 366.82 (6)(b), Fla. Stat. (1991).

CONCLUSION

Pursuant to Section 120.68, Florida Statutes (1991), and for the reasons stated in this Brief, this Court should remand the Final Order to the Commission: to correct the form of the order and the procedures for its adoption; to correct, and properly determine, its findings of fact; and to enter findings of fact, conclusions of law and an order in a manner that is consistent with Section 403.519, Florida Statutes (1991).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Lee L. Willis, Esquire & James D. Beasley, Esquire, Ausley, McMullen, McGehee, Carothers and Proctor, Post Office Box 391, Tallahassee, Florida 32302; Martha C. Brown, Esquire, Cynthia Miller, Esquire, Robert D. VanDiver, Esquire & Prentice Pruitt, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399 by United States Mail this 1st day of October, 1992.

Ross Stafford Burnaman