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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

REPLY BRIEF OF APPELLANT FLORIDIANS FOR RESPONSIBLE UTILITY GROWTH

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ARGUMENT

1. NEED DETERMINATIONS ARE QUASI-JUDICIAL ADMINISTRATIVE PROCEEDINGS SUBJECT TO REVIEW UNDER SECTION 120.68, FLA. STAT.

The PSC acknowledges that the proceedings below were quasi-judicial and governed by the Administrative Procedure Act. [PSC's Brief, page 24]. A determination of need for a proposed power plant does not invoke the PSC's quasi-legislative powers.

Not only is this the first need determination case reviewed by the Court, it is also an atypical review of quasi-judicial PSC action. The Court has noted that the standards of review are different and depend upon the character of the agency action at issue. General Telephone Co. of Fla. v. Florida Public Service Comm., 466 So. 2d 1063, 1067 (Fla. 1984), did not directly address the standard to be applied in a need determination, but clearly the review of solely quasi-judicial agency action is broader than that traditionally applied.

TECO would apply the standard in Polk County v. Public Service Comm., 460 So. 2d 370, 373 (Fla. 1984). [TECO's Brief, page 5]. But that case is based on General Telephone Co. of Fla. v. Carter, 115 So. 2d 554, 557 (Fla. 1959), where the Court highlighted that its review was by certiorari.

FRG does not have the burden to show that the Final Order is "arbitrary or unsupported by evidence", as implied by TECO's citation to Citizens v. Public Service Commission, 435 So. 2d 784, 787 (Fla. 1983) and Manatee County v. Marks, 504 So. 2d 763, 764-765 (Fla. 1987). [TECO's Brief, pages 8-9].

Another case cited by TECO, Kimball v. Hawkins, 364 So. 2d

463, 465 (Fla. 1978), notes that the competent, substantial evidence test is to be applied, but also notes the PSC's "broad discretion". Unlike the motor carrier certificate statute at issue in Kimball, the need determination statute does not exempt the Commission from record-based review of fact findings. In this appeal, the PSC's discretion is more limited than usual and is similar to that exercised by other agencies in solely quasi-judicial proceedings.

FRG's argument on this point is simple. FRG need only demonstrate to the Court that remand is required under Section 120.68, Florida Statutes. FRG contends that remand of the Final Order is required because the order depends upon a finding of fact that is not supported by competent, substantial evidence in the record. Remand is also required since the PSC acted outside of its delegated legislative authority in violation of its own rule. Further, the PSC erroneously interpreted a provision of law and the correct interpretation commands a particular action contrary to the Final Order. Lastly, material errors in procedure affected the correctness of the action and the fairness of the proceeding.

2. THE FINAL ORDER IS BASED UPON ERRONEOUS INTERPRETATION OF SECTION 403.519, FLA. STAT.

A. "MITIGATE" DOES NOT MEAN "ELIMINATE".

Appellees concede that Section 403.519, Florida Statutes, must be construed consistent with FEECA's intent.[1] [PSC Brief, page 26;

[1] Point IV of the PSC's Answer Brief and Point VI of TECO's Answer Brief address Point 3 of FRG's Initial Brief concerning the interpretation of Section 403.519, Florida Statutes.

TECO Brief, page 26]. The Siting Act's intent does not control.

The PSC circuitously argues that FRG's contention regarding the proper construction of the term "mitigate" is irrelevant since "the Commission found that expanded conservation could not defer or mitigate the need for the proposed plant in the time required". [PSC Brief, page 27, citing R. 471, 473]. "Defer" means the postponement of Polk Unit One, rather than a reduction in proposed capacity. The meaning of "mitigate" is not defined in the Order, but the PSC does not deny that the term was applied to the entire capacity represented by Polk Unit One. [PSC's Brief, page 27].

The PSC's interpretation of "mitigate" is inconsistent with its rules and must be reversed[2]. DeCarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st DCA 1989). DeCarion v. Martinez involved an exercise of discretion by the State's highest elected officials concerning private use of public lands. Surely, when acting in a quasi-judicial police power capacity, the appointed PSC must decide need determinations in a manner consistent with its adopted rules.

TECO argues that its conservation plan is adequate and that, in any event, the PSC did not adopt the construction of the statute

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[2] As noted in FRG's Initial Brief and supported by FRG's Request for Judicial Notice, two PSC rules show that "mitigate" does not mean "eliminate". A need determination petition must include a discussion of viable non-generation alternatives including an evaluation of the reductions "historically and prospectively" on the "timing and size of the proposed plant". Fla. Admin. Code R. 25-22.081 (5). Further, by rule the PSC has adopted by reference the "Cost Effectiveness Manual for Demand Side Management Programs and Self-Service Wheeling Proposals", attached in relevant part to the Request for Judicial Notice. Fla. Admin. Code R. 25-17.008 (3). "Avoided generating unit" used in the Manual is defined: "a utility's proposed generating unit that is avoided in whole or in part by the demand-side management program." (p. 3).

suggested by FRG. According to TECO, the PSC simply balanced its "evaluation of achievable conservation" with the other three statutory criteria. [TECO's Brief, pages 26-27].

On its face, the Final Order sets forth the standard for reconciling all four statutory criteria in Section 403.519, Florida Statutes. [R. 471, paragraph one]. In addition, the Final Order harmonized Section 403.519, Florida Statutes, with two other FEECA sections -- Sections 366.81 and 366.82 (2) & (3), Florida Statutes, (emphasis in original):

> We are of the opinion that a consistent construction of the two statutes is achieved by requiring a utility in a need determination to show that it has reasonably implemented measures in its conservation plans, as directed by section 366.82 (3) and as approved by Commission order, and that it has reasonably considered conservation measures that might mitigate the need for this proposed plant. [R. 471, paragraph two].

The PSC's Final Order articulated, but failed to apply, that standard in its determination of TECO's compliance with FEECA's conservation requirements. FRG is not challenging the rejection of Mr. Chernick's testimony regarding implementation of TECO's approved conservation programs. Instead, FRG contends that TECO failed to reasonably consider additional conservation measures that might specifically lessen the need for Polk Unit Two capacity.

The Final Order's determination that TECO considered conservation measures to "mitigate" the need for Polk Unit One is based upon a finding of fact that is not supported by competent, substantial evidence.

In its Initial Brief, FRG argues that "TECO Conservation

Efforts Were Not Adequately Alleged or Proven" [FRG's Brief, Point 2.C.1 (pages 19-21)][3]. Appellees responded with a description of conflicting testimony regarding TECO's conservation potential.

Appellees discuss evidence but ignore FRG's citation to the numerous Findings of Fact adopted in the Final Order, which prove that TECO did not consider any conservation measures that might defer of avoid Polk Unit One. [FRG's Brief, pages 3-5, 19-20].

Appellees' lengthy synopsis of testimony given at the hearing, as opposed to Findings of Fact, does not establish a substantial basis from which the fact at issue can reasonably be inferred, or such relevant evidence that a reasonable mind would accept as adequate to support a conclusion. [TECO's Brief, pages 18-23; PSC's Brief, pages 7-14].

For example, TECO admits its reliance on the Polk Unit One Need Determination Study. [TECO's Brief, page 19]. TECO claims that it has an approved "updated" conservation plan and has met the PSC-approved goals. [Id. at 22]. TECO then concludes that FRG seeks to have the Court reweigh the evidence "in apparent hopes of obtaining some sort of moratorium on power plant construction". [Id. at pages 22-23].

As noted in FRG's Initial Brief, TECO justified the need for Polk Unit One solely upon the conservation plan which was submitted

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[3] TECO responded in Point III of its Brief and the PSC responded in Point I A of its Brief.

to the PSC in February, 1990[4]. [FRG's Brief, pages 3, 20]. TECO did not try to determine if additional conservation programs could defer or reduce its need for Polk Unit One, although one and one-half years elapsed between TECO's filing of its conservation plan and the filing of its need determination petition. [FRG's Brief, page 20, citing [R. 2-8; 27-28; 59; 71-74; 105-106 and 475][5].

The facts do not support the inference that TECO's consideration of additional conservation options available to supplement the savings generated by its February, 1990, programs approved by the PSC was "reasonable". TECO's Need Petition did not contain a discussion of viable nongenerating alternatives other than the utility's eighteen month-old plan. Yet, the PSC's rules plainly require a utility seeking approval of a new power plant to do more than rely upon conservation programs previously approved by the PSC. Fla. Admin. Code R. 25-22.081 (5)[6]. Agency action which

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[4] Rather than reweigh the "evidence" FRG refers the Court to the Commission's accepted Finding of Fact number 5: The last "complete" DSM program examination by TECO was done prior to February 12, 1990 -- not as a part of the company's preparation for this need determination proceeding -- and only 22 potential new DSM programs were identified for further investigation and analysis. (Kordecki, TR 497). [R. 475].

[5] In its Polk Unit One Need Determination Study, TECO admits that the prospect of the DOE grant funding caused the company to revise its supply side plan [R. 16] TECO did not, however, revise its conservation (demand side) plan, notwithstanding the claim in the Study that the company "annually performs an analysis of DSM programs" [R. 59].

[6] The rule requires the petition to contain a "discussion of viable non-generating alternatives including an evaluation of the nature and extent of reductions...resulting from the goals and programs adopted pursuant to the Florida Energy Efficiency and Conservation Act both historically and prospectively and the effects on the timing and size of the proposed plant". FRG

is inconsistent with agency rules must be remanded. DeCarion v. Martinez, supra.

Appellees did not address FRG's citation of PSC rules which establish that TECO had the burden to demonstrate that additional conservation could not reduce the size of, or delay the timing of, Polk Unit One. [FRG's Brief, page 30, citing Fla. Admin. Code R. 25-22.081 and 25-17.008 (and the Manual)].

FRG contends that the PSC erred in its quasi-judicial determination that "it does not appear that additional, timely and cost-effective conservation measures can reliably defer the need in 1995." [R. 469]. Indeed, the Final Order notes that TECO's prior conservation efforts are questionable:

> participation rates for some of TECO's commercial and industrial programs...appear to be low....TECO's conservation programs appear to be deferring peaking units only, not baseload or intermediate load units....we will not accept conjecture about market penetration feasibility....TECO should consider expanding its conservation plan to include programs that would defer the need for baseload and intermediate load units. [R-468-469].

The Final Order purports to defer addressing the deficiency of TECO's conservation efforts until a subsequent need determination. In its Answer Brief, the PSC argues inconsistent positions about whether the PSC's remedial action is mandatory or directory. [PSC's Brief, pages 1 and 13]. Since this a quasi-judicial adjudication of TECO's petition for Polk Unit One, it does not appear that the PSC has the authority to impose conditions upon subsequent

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interprets this rule, as did the Final Order, such that "including" means "including, but not limited to".

administrative proceedings. No cross appeal was filed, however.

Since the PSC had a statutory duty to consider the conservation criterion, if that consideration violates Section 120.68, Florida Statutes, the Final Order must be remanded.

B. THE PSC'S CONSTRUCTION OF "COST-EFFECTIVE" IS ERRONEOUS.

Ironically, TECO and the PSC place great emphasis on the reliability and integrity criteria in Section 403.519, Florida Statutes, but do not fully address FRG's arguments about the cost-effectiveness criterion. The cost-effectiveness criterion was "the determinative issue", in the Final Order. [R. 461-462].

TECO argues that FRG wants the Court to "reject the use of the RIM test" (rate impact measure test), but claims that the issue is irrelevant since the PSC "found" that conservation could not mitigate the need for Polk Unit One. [TECO's Brief, pages 27-28]. FRG has not asked the Court to invalidate one of the PSC's three cost-effectiveness tests, rather, FRG asserts that FEECA requires that supply and demand side alternatives be fairly evaluated.

The PSC responded to FRG's argument in two ways. First, it argues that competent, substantial evidence supports the "finding" that Polk Unit One is the most cost-effective alternative. [PSC's Brief, pages 14-15]. But, the PSC's citation to the record evidence addresses only TECO's evaluation of supply-side alternatives. [PSC's Brief, pages 14-15]. FRG does not dispute TECO's evaluation of the various supply-side options. Instead, FRG cites to findings of fact in the Final Order which prove that supply-side and demand-side alternatives were not fairly compared.

[FRG's Initial Brief, pages 4 and 34].

Next, the PSC argues that Section 403.519, Florida Statutes, does not require supply-side and demand-side options to be "evaluated in exactly the same manner". [PSC's Brief, pages 27-28]. The PSC, however, agrees with FRG that the issue before the Court is one that requires statutory interpretation, and simply asks the Court to afford the agency's interpretation "great weight". The PSC did not respond to the merits of FRG's discussion of legislative intent and argues that FRG's reference to a companion statute, Section 377.709 (2)(b), Florida Statutes, is "unconvincing". [PSC's Brief, pages 27-28]. The PSC's unsubstantiated statutory interpretation should be rejected as inconsistent with FEECA.

3. STATUTORY INTERPRETATION MUST BE CONSISTENT WITH LEGISLATIVE INTENT AND SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Neither TECO nor the PSC distinguished or disputed FRG's citation to Public Employees Relations Comm. v. Dade County Police Benevolent Assoc., 467 So. 2d 987, 989 (Fla. 1985)(PERC) [FRG's Initial Brief, pages 25]. Instead, the PSC urges the formulation expressed in later case, P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988)(P.W. Ventures), which was cited in a footnote in Nassau Power Corp. v. Beard, 17 Fla. L. Weekly S314, 315 (Fla. May 28, 1992).

PERC and P.W. Ventures represent two different formulations of the proper standard of judicial deference to agency construction of statutes. Both cases are ultimately derived from another case cited in the PSC's Brief -- Gay v. Canada Dry Bottling Co. of Fla., 59 So. 2d 788, 790 (Fla. 1952)(Gay).[PSC's Brief, page 28]. See, State

ex. re. Biscayne Kennel Club v. Board of Business Regulation, 276 So. 2d 823 (Fla. 1973); United States Gypsum Co. v. Green, 110 So. 2d 409 (Fla. 1959); and Warnock v. Fla. Hotel and Restaurant Comm., 178 So. 2d 917 (Fla. 3d DCA 1965).

Gay involved the issue of whether a bottler's purchase of new returnable bottles for subsequent distribution of soft drinks was a "retail sale". The Comptroller sought to tax the bottler's purchase of the bottles under his interpretation of the Florida Revenue Act of 1949. The Court reversed the trial court's injunction against the Comptroller, who had interpreted the tax exemption to apply only to disposable beverage bottles. In its reversal the Court said:

> Although not necessarily controlling, as where made without authority of or repugnant to the provisions of statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

Id. at 790, quoting Coca-Cola Co. v. State Board of Equalization, 25 Cal. 2d 918, 156 P.2d 1, 2. In Gay, the Court went on to consider the legislative history of the Revenue Act. On rehearing, the Court rejected plain meaning arguments based upon the agency interpretation and the Court's determination of legislative intent.

It is clear from Gay that the PERC standard of judicial deference to agency interpretation of statute is more complete than that expressed in P.W. Ventures.

FRG urges the Court to consider its undisputed arguments

regarding the proper interpretation of Section 403.519, Florida Statutes. FRG has supplied the Court with ample authority to show that the PSC applied the statute in error. The Court should consult the plain meaning of words used, the PSC's rules, FEECA's express legislative intent and history of enactment. FEECA requires a fair cost-effectiveness comparison of supply-side and demand-side alternatives. [FRG's Initial Brief, pages 32-36].

4. THE FINAL ORDER IS IN IMPROPER FORM.

Both the PSC and TECO assert that the Final Order contains, but just did not label, Findings of Fact and Conclusions of Law. [PSC's Brief, page 17; TECO's Brief, pages 12-13].

FRG statement of the facts recites Findings of Fact in the Final Order, which must have been relevant, material and supported by the record before the Commission. [R. 475-488].

In contrast, TECO and the PSC's Answer Briefs provided "facts" grounded in citations to the hearing transcript. [TECO's Brief, pages 2-4; PSC's Brief, pages 1-4]. TECO waived its right to have the PSC rule on proposed findings of fact. On appeal, TECO now essentially asks the Court to find the facts.

If the Final Order clearly provides findings of fact and conclusions of law, TECO and the PSC should have no need to cite the transcript of the hearing, or TECO's Petition to supply the Court with the facts necessary to affirm the order[7]. The PSC's

[7] TECO's Statement of the Facts is supplementary to FRG's and consists of fourteen citations to testimony, mostly that of its own witnesses.

Answer Brief cites extensively to the testimony and to TECO's Petition to refute FRG's argument that no competent, substantial evidence supports the "finding" that TECO's conservation performance was reasonable. [PSC's Brief, pages 7-15].

By way of example, FRG will address the debate regarding TECO's conservation achievements in order to show that the Final Order is not in proper form and that the fairness of the proceeding may have been impaired. s. 120.59 (1), Fla. Stat.; Fla. Admin. Code R. 25-22.059.

The PSC claims that it determined that TECO 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, citing R 469. [PSC's Brief, page 11, paragraph one]. The Final Order qualified those determinations, however: "we do not believe" and "it appears that". The first "finding" is set forth in a manner that is no more than a tracking of the statutory language: the PSC was obligated to provide a concise and explicit statement of the underlying facts of record which support it. Fla. Stat. 120.59 (2) (Supp. 1992).

The second and third sentences of the paragraph do not constitute concise, explicit underlying facts to support the finding. TECO had the burden to allege and prove that it had considered "viable non-generating alternatives...and the effects on

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[8] The PSC's Statement of the Facts is in lieu of FRG's "biased and lopsided" statement (derived from the Final Order). The statement contains eleven citations to the Final Order (many to the background section), three citations to TECO's Petition, and fourteen citations to pages of the transcript.

the timing and size of the proposed plant". Fla. Admin. Code R. 25-22.081 (5).

It is established fact that TECO did not evaluate additional conservation as against the construction of Polk Unit One, but instead TECO relied upon programs which had been approved by the PSC eighteen months prior to filing the need Petition[9]. [R. 475, Finding of Fact 5]. The testimony cited in the PSC's Answer Brief corroborates Finding of Fact five and does not indicate that TECO evaluated any measures not already approved against the need for Polk Unit One. [Tr. 227-273; 497; 499; 500]. TECO did not even finalize a petition for approval of a program which passed the screening -- the duct efficiency program -- at hearing, TECO's witness said that the company "is now in the process of filing" the program. [Tr. 500; see R. 479, Findings of Fact 22, 23 and 24].

Separate findings of fact make for more careful PSC decision-making, help the Court to keep from serving as a finder of fact, and facilitate judicial review. International Minerals and Chemical Co. v. Mayo, 336 So. 2d 548, 552-553 (Fla. 1976). FRG submits that

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[9] The "Results" of the "Demand Side Analysis" contained in the "Polk Unit One Need Determination Study" list the programs which TECO had in place during 1990 [R. 72-74] and under "Additional Conservation/Load Management" refer only to TECO's then-approved Conservation Value Program [R. 74]. TECO's allegation in the Petition, cited as fact in the PSC's Brief, that "Tampa Electric met all of the FEECA goals...including those for winter peak demand, summer peak demand, and net energy for load" [R. 74; PSC's Brief, page 11] is an impossibility. In November, 1989, almost a year prior to the Petition, the PSC repealed the numerical FEECA goals and adopted "the goals expressed in existing Rule 25-17.001". In re: Implementation of Section 366.80 - .85, Florida Statutes, Conservation Activities of Electric and Natural Gas Utilities, 89 F.P.S.C. 11: 253-261, 254 (1989); In re: Review of Conservation Goals, Rule 25-17.002, F.A.C., 89 F.P.S.C. 11:244-245 (1989).

these policies would be well served by a remand of the Final Order. It would be unfair if the Court were to affirm the Final Order because of obfuscation of the facts underlying the PSC's decision. The PSC's outright rejection of FRG's Statement of the Facts (from the few distinct findings in the order), combined with extensive Brief citations to testimony and pleadings, hardly promotes judicial economy or commends the form of the Final Order appealed.

CONCLUSION

Based upon arguments and authority presented to the Court, FRG respectfully requests that the Final Order be remanded, as required by Section 120.68, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Lee L. Willis, Esq. & James D. Beasley, Esq., Ausley, McGehee et al, P.O. Box 391, Tallahassee, Fla. 32302; Martha C. Brown, Esq., Prentice Pruitt, Esq., Robert D. VanDiver, Esq.& Cynthia B. Miller, Esq. Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Fla. 32399-0862 by United States Mail this 17th day of December, 1992.

Ross Stafford Burnaman