

BEFORE THE FLORIDA SUPREME COURT

LEGAL ENVIRONMENTAL
ASSISTANCE FOUNDATION, INC.,

Appellant,

v.

SUSAN F. CLARK, J. TERRY DEASON,
JOE GARCIA, JULIA L. JOHNSON,
and DIANE K. KIESLING, as the
FLORIDA PUBLIC SERVICE COMMISSION,

Appellees.

FILED

SID J. WHITE

APR 21 1995

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

CASE NO. 85-204

APPEAL FROM FINAL ORDERS OF THE
FLORIDA PUBLIC SERVICE COMMISSION IN
DOCKETS 930548-EG, 930549-EG,
930550-EG and 930551-EG

**INITIAL BRIEF OF APPELLANT
LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.**

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STATEMENT OF THE CASE AND OF THE FACTS

1. NATURE OF THE CASE.

This is an appeal taken from Final Orders of the Florida Public Service Commission (Commission), pursuant to Sections 366.82 and 120.68, Florida Statutes. The Final Orders are styled "Order Setting Conservation Goals" (Order PSC-94-1313-FOF-EG) (hereinafter "Goals Order") and "Order Granting in Part and Denying in Part Reconsideration" (Order PSC-95-0075-FOF-EG) (hereinafter "Reconsideration Order"). [R 5223-5277; 5398-5412]. The orders set numeric electric utility conservation goals for four utilities: Florida Power & Light Company, Florida Power Corporation, Tampa Electric Company and Gulf Power Company. [R 5223-5277; 5398-5412].

2. COURSE OF THE PROCEEDINGS.

The Commission initiated proceedings to implement rules which require the Commission to set numeric demand side management goals for utilities subject to the Florida Energy Efficiency and Conservation Act (FEECA) and to consider two federal conservation standards. §§366.80 - 366.85 and 403.519, Fla. Stat.; Fla. Admin. Code R. 25-17.001 - .005. [R 5231 "Case Background"].

LEAF's Petition to Intervene in these proceedings was granted by the Commission. [R 19-22; 27-28]. Many other parties petitioned for, and were granted, intervenor status in one or more of the dockets¹. The Department of Community Affairs

¹ The four dockets were consolidated.

noticed its intervention in all four dockets, on behalf of the Governor, which was recognized. [R 23-26; 29-56; 163-173; 308-312; 352-355; 374-379; 559-560; 605-609; 808-811; 1251-2; 1301-1302; 1311-1317; 1386-9; 5566-5587; 5645-5657; 5659; 5692-5700; 5714-5715; 7023-7040; 7098-7105; 7124-7128; 9665-9671; 9676-9681; 9686-9694; 9772-9786; 9790-9794; 9813-9815; 9821-9824].

The four utilities filed petitions to set conservation goals on March 18, 1994. [R 951-969; 6865-6870; 9563-9568; 10502-10506].

The Commission entered numerous procedural orders. [R 1-18; 313-314; 337-338; 475-494; 555-556; 601-604; 635-636; 782-789; 1289-1292; 1372-1374; 1399-1411; 1429-1431; 1479-1481; 2172-2175; 2471-2475; 2493-2495; 2524-2527; 2542-2676 (Prehearing Order); 2682-2688; 3025-3032; 3041-3048; 6862-6864; 7158-77159; 7171-7173; 9649-9651; 9838-9839].

The Prehearing Order was issued on May 26, 1994 (Order PSC-94-0652-PHO-EG). [R 2542-2676].

The formal hearing was held before a panel of four Commissioners on: June 1-4, 6-10, 17-18, 20-21, 27, 29-30, and July 12, 1994. [R 5231; "Case Background"].

Briefs and Post-hearing Statements were filed on August 22, 1994, by parties other than the Commission's staff. [R 4372-5014; 6953-7017; 9580-9628; 10557-10603]. The Commission's staff filed an unsolicited memorandum making recommendations to the Commission on September 23, 1994. [R 5015-5222].

The Commission held a special agenda conference on October

3, 1994, to decide the issues. [TrSA 1-256]. The Commission conducted the special agenda conference by considering the staff memorandum and oral argument from staff, including the attorney who had represented the staff at trial. [TrSA 1-256]. Parties other than staff were not allowed to participate in the special agenda conference. [TrSA 1-256].

The Goals Order, issued on October 25, 1994, conformed substantially to the staff memorandum. [R 5015-5277; 5015-5222].

On November 9, 1994, LEAF moved for reconsideration of the Goals Order. [R 5278-5324]. The Department of Community Affairs adopted LEAF's motion in toto. [R 5327-5331]. Florida Power & Light Company, Tampa Electric Company and Gulf Power Company responded to the Motions for Reconsideration, and Florida Power & Light Company filed an amended response. [R 5336-5349; 5365-5379; 9629-9633; 10604-10609]. LEAF and others requested oral argument. [R 5325-5326; 5332-5335; 10610-10613].

On November 30, 1994, the Commission staff asked Florida Power & Light Company to clarify its response to LEAF's motion. [R 5437]. On December 6, 1994, Florida Power & Light Company provided an informal response admitting errors in evidence which the Commission staff had used for purposes of preparing the staff recommendation and containing "reconciliation schedules" that showed that the CEGRR residential TRC values, certain exhibits, and in the Goals Order were incorrect. [R 5438-5444]. On December 8, 1994, LEAF replied to Florida Power & Light Company's comments. [R 5445]. On December 9, 1994, Florida Power & Light

Company filed an Amended Response to LEAF's Motion for Reconsideration. [R 5365-5379].

On December 13, 1994, the Commission staff filed its memorandum (dated December 8, 1994) making recommendations to the Commission as to the disposition of LEAF's Motion. [R 5380-5394]. On December 19, 1994, LEAF requested the Commission staff to file an amended staff recommendation to correct alleged errors. [R 5449-5460]. Staff declined to amend the memorandum.

Reconsideration was considered during the December 20, 1994, agenda conference (Item 4), during which the panel relied on the staff memorandum and oral argument of staff, chiefly the Division of Legal Service's attorney, Mr. Palecki, who represented staff in the proceedings. [TrA 1-13]. Other parties were not allowed to participate since the panel initially voted to deny oral argument to LEAF and others, based upon Mr. Palecki's advice. [TrA 1-13; R 5399-5400; 5461].

On January 12, 1995, the Commission rendered its Reconsideration Order. [R 5398-5412; 5461-5462]. The Order made certain corrections to the residential TRC potential for Florida Power & Light Company, and to the percentage of system calculations for Florida Power & Light Company and Gulf Power Company. [R 5401-5402; 5408]. The Order conformed substantially to the staff memorandum. Id. [R 5380-5394].

On January 25, 1995, LEAF filed its Exceptions to Order, or in the Alternative, Motion to Alter or Amend Order. [R 5413-5495].

On February 13, 1995, LEAF initiated this appeal of the

Goals Order and Reconsideration Order. [R 5503-5548].

On March 3, 1995, the Commission staff filed a memorandum recommending that the Commission strike LEAF's motion. [R 5561-5564].

On March 21, 1995, the Commission panel voted to approve the staff's recommendation to strike LEAF's Exceptions/Motion to Alter or Amend Order. [Tr (March 21, 1995); R 5565-A].

On April 10, 1995, the Commission rendered Order PSC-95-0463-FOF-EG striking LEAF's Exceptions and Motion to Alter or Amend Order (sic). [R 5565-B - 5565-G].

The court should take judicial notice of LEAF's April 12, 1995, Motion for Order Directing Appellees to Consider and Respond to Intervenor/Appellant's Alternative Motion to Alter or Amend Order, filed in this appeal, and accompanying Motion to Toll Time.

3. DISPOSITION IN THE LOWER TRIBUNAL.

The Goals Order established numeric conservation goals for each utility for the residential and the commercial/industrial sectors. [R 5254-5266; 5274-5275]. The Order also rejected adoption of the federal standards. [R 5245-5246].

Generally, goals were set for winter demand (megawatts), summer demand (megawatts) and for energy (gigawatt hours), for each year of the ten-year period 1994-2003. Id. However, Tampa Electric Company's goals were set for the period 1995-2004, and the Commission declined to set commercial/industrial energy goals for the years 1995-1999 for Gulf Power Company, placing a "dash"

in lieu of numeric goals and declined to set 1994 goals for Gulf Power Company. [R 5265-5266; 5260].

The Commission ordered that "any utility that does not achieve its annual conservation goals shall be subject to penalty." [R 5275].

The Commission required the utilities to: consider the development of alternative funding sources to promote renewable energy and to submit such proposals during the program approval dockets; conduct certain types of natural gas research and demonstration projects and to submit project plans for approval; study and report on the level of benefits available to low-income customers during the program approval dockets; and conduct themselves in accordance with other requirements set forth in the body of the Order. The Commission established a task force to evaluate the cost-effectiveness of the building code. [R 5275-5276].

On reconsideration, the Commission panel voted to correct various numeric errors in the Goals Order, but denied LEAF's request to set TRC-based goals. [R 5398-5412].

4. STATEMENT OF THE FACTS.

History of Goals-Setting²

In the 1980 FEECA, the Legislature required the Commission to adopt energy conservation goals for most electric utilities and to oversee utility conservation plans and programs designed

² LEAF's Post-hearing Brief contains a more detailed history of FEECA implementation. [R 4593-4603].

to meet the goals. The Commission subsequently adopted conservation goals in Order 9552. 80 F.P.S.C 9:230-239 (1980).

Affected utilities submitted plans and programs, which the Commission reviewed and approved. 80 F.P.S.C. 11:216-368 (1980). For investor-owned utilities, a cost-effectiveness determination was made with a simple utility cost test exclusive of rate impact considerations. Order 9672 (officially recognized at Tr 4422.13-21); 80 F.P.S.C 11:280-281, 285-289 (1980). After the Commission approved the plans, the utilities implemented conservation programs.

In 1982, the Commission, by rule, prescribed uniform filing requirements for conservation cost-effectiveness analyses. [Order 11303 (officially recognized at Tr 140.16-22); 82 F.P.S.C. 11:33-58 (1982); Fla. Admin. Code R. 15-17.08 (1982)]. Three analyses were required for program filings: All Customer Cost Benefit Analysis, Florida Societal Benefit, Embedded Cost Benefit Analysis to Participating Customers³. 82 F.P.S.C. 11:51-58 (1982). Rate impacts were not counted because energy sales grew. [*Id.* at 11: 33, 36, 53; EX 24, p. 1; EX 39, p. 43; EX 12, pp. 50-63; EX 147; EX 46, p. 38; EX 56; EX 179; EX 59, p.II-15; EX 61].

In 1989, the Commission repealed the goals, adopted part of the preamble to the then-existing goals rule as the new goals and ordered new program filings. [Order 22176, 89 F.P.S.C. 11:253-261 (1989); Order 22180, 89 F.P.S.C. 11:266-270 (1989)].

³ The rule also defined "cost-effective" in a manner inconsistent with the RIM. 82 F.P.S.C. 11:37 (1982).

In 1991, the Commission revised the cost-effectiveness filing requirements, adopting the "Manual on Cost-Effectiveness of Demand-Side Management Programs and Self-Service Wheeling." [Order 24745 (officially recognized at Tr 139.8-15); 91 F.P.S.C. 7:153-154 (1991) (partially reported)]. As with the 1982 rules, the Commission required three tests for all program filings: the Participant's Test, the Total Resource Cost Test (TRC), and the Rate Impact Measure (RIM) test. [*Id.*]. Subsequently-approved utility plans included RIM-failing programs. [EX 129; 24, p. 1].

In 1993, the Commission amended the goals rules. [Order PSC-93-0641-FOF-EG (officially recognized at Tr 590.13-18); 93 F.P.S.C. 4:665-690 (1993)].

Goals-Setting Process that Resulted in the Orders Appealed

During 1992-1993, the Commission staff, Department of Community Affairs, some utilities, and other interested parties (including LEAF) participated in an assessment of Florida's conservation potential. [EX 89]. The Department retained Synergic Resources Corporation to prepare a report guided by the collaborative. "Electricity Conservation and Energy Efficiency in Florida: Technical, Economic and Achievable Results, Final Report" (No. 7777-R8, May, 1993) (hereinafter "the SRC Report"). [EX 89; Tr 2642.1-25].

Shortly after amending the goals rule, the Commission began setting numeric conservation goals for Florida Power & Light Company, Florida Power Corporation, Tampa Electric Company and Gulf Power Company and required the utilities to analyze numerous

demand-side measures described in the SRC Report and to evaluate other measures employing natural gas, renewable resources and original measures. [R 1-18]. Initially, measure "applicability" was to be assessed and "technically achievable energy and demand savings" provided for measures deemed applicable. [R 3-4].

After reviewing the "technical potential" filings, the Commission specified the measures each utility was to evaluate for cost-effectiveness using the Commission's cost-effectiveness rules governing program filings. [R 475-494]. Results were required to be reported separately for the residential and commercial/industrial classes and for two "portfolios of measures" -- TRC and RIM. For each portfolio and for each measure, the Commission required each utility to report the winter and summer demand savings, the energy savings, and the annual and cumulative rate impacts. [R 5; 475-494].

The utilities filed the cost-effectiveness analyses, termed "Cost-Effectiveness Goal Results Reports" (hereinafter "CEGRR"). [EX 1; EX 3; EX 4; EX 37; EX 52; EX 53; EX 62; EX 64; R 9840-10426]. LEAF informed the Commission that Florida Power & Light Company's CEGRR was legally deficient. [R 778-781]. Various revisions to the initial CEGRR filings were made by the utilities, including Florida Power & Light Company. [R 970-1072; 2348-2408; 7200-9424]. The CEGRR data (as revised) was accepted into evidence. [EX 1; EX 3; EX 4; EX 37; EX 52; EX 53; EX 62; EX 64].

The Goals Order explicitly relied upon the utilities' CEGRR

data in setting goals, except as to the data and analyses for gas substitution. [R 5240-5241]. The Reconsideration Order, however, revealed that the CEGRR data was manipulated "to place the data in the correct context." [R 5401-5402]. For Florida Power & Light Company, the staff said it relied on witness Hugues' testimonial data instead of CEGRR data. [R 5401-5402; 5437; EX 16, Document 3]. In an informal post-hearing exchange, Florida Power & Light Company provided "reconciliation schedules which corrected exhibit 16, using exhibit 3, Table 3." [R 5438-5444; EX 16, Document 3; EX 3].

The Commission Staff's Participation

The Commission's staff, including Division of Legal Services' attorneys, made numerous formal appearances as a party in the proceedings. [Tr 5; Tr 11.22-25; TrSA 4, TrA]. Staff, through counsel, filed a Prehearing Statement that stated a basic position. [R 1559-1576]. The Prehearing Order contained the Commission staff's basic position, along with position on the issue of cost-effectiveness and the legality of specialty goals. [R 2558-2559; 2585; 2601].

Division of Legal Services' attorneys propounded discovery. See, for example, Exhibit 56.

The Commission's staff presented no witnesses. [Tr Volumes 1-36; R 2547-2552]. Division of Legal Services lawyers, including Mr. Palecki, cross-examined witnesses for other parties. Eg. [Tr 437.5 - 454.14; 2297.21-2302.9; 5550.2-5556.11]. The Division of Legal Services' attorneys moved items into evidence on behalf of

staff, most of which were accepted into the record by the Commission. [EX 12; 25; 27; 37; 41; 52; 53; 56; 61; 134; 147; 148].

Division of Legal Services' attorney Michael Palecki and others advised the Commission regarding the merits of other parties' motions and objections during the hearing and during the agenda conferences. Eg. [Tr 15.17-23; Tr 101.10-16; TrA 3.2-4.7; 4.21-8.9; 8.11-9.4; 10.11-12.10]. For example, at trial, LEAF's Motion to Strike the testimony of some of Florida Power & Light Company's witnesses was denied upon Mr. Palecki's recommendation. [Tr 2206.22-2218.23]. At the agenda conference, Mr. Palecki advised the panel on the merits of LEAF's objections to Florida Power & Light Company's late-filed exhibits number 55, 56, 141 and 164. [TrSA 9.10-17.12].

The Commission staff, including the Division of Legal Services lawyers did not file a Post-hearing Statement of Issues and Position, but instead filed an unsolicited memorandum which recommended action on the issues. [R 5015-5222].

Only the Commission's staff, including Division of Legal Services' attorney Michael Palecki, advised the Commission during the agenda conferences. [TrSA, TrA].

The Commission's Office of General Counsel, Division of Appeals, attorneys appeared on behalf of the Commission panel during the hearing, and provided advice at the hearing and the special agenda conference, but not during the agenda conference on reconsideration. [Tr 12.1-2; TrSA 2; TrA; R 2544; 5225].

The Goals

Goals were set separately for the residential and commercial/industrial classes. [R 5254-5266; 5274-5275]. Separate goals were quantified for summer demand savings, winter demand savings, and energy savings. Id. The Commission set goals at the levels partially represented by the RIM cost-effectiveness test achievable potential stated in the utility CEGRRs. Id. In proposing goals, the utilities variously discounted their CEGRR RIM potential. Id.

Florida Power & Light Company's 1994-2003 goals were set as proposed by the utility for the years 1994-2000. [R 5254-5257]. For the years 2001-2003, staff extrapolated the year 2000 incremental utility-proposed goals. Id. Goals were not based on the company's CEGRR RIM portfolio.[EX 3, pp. 36-41; R 5254-5257].

Florida Power Corporation's 1994-2003 goals are the sum of savings from all RIM-passing measures in the CEGRR. [R 5258-5260; EX 37; EX 184].

Tampa Electric Company's 1995-2004 goals are identical to gross RIM CEGRR portfolio. [R 5264; EX 64].

Gulf Power Company's 1994-2003 goals are 100% of the CEGRR savings, except the commercial/industrial class energy goals for the years 1994-1999 are reported as "dash" goals and for the year 2000 as 2 GWH. Gulf Power Company's CEGRR reported negative values for those years. [R 5261-5263; TrSA 140.16-22, 141.18-25; 145.2-3; 146.16-25; 147.1-11; EX 52].

The Commission's assessment of cost-effectiveness was based

upon staff's representations regarding the projected energy and demand savings for the utilities RIM and TRC portfolios contained in the staff's memorandum. [R 5244; 5272-5273; The memorandum contained charts which depicted the "comparison of goals for the year 2003" for the two classes. [R 5016-5018]. The Goals Order and Reconsideration Order contain versions of the year 2003 comparison of goals charts. [R 5272-5273; 5411-5412].

The comparison charts in the orders contain each utilities' proposed goals, the 100% RIM goals approved by the Commission, utility calculated goals based on TRC portfolios, and SRC "Best Practices" Goals. Id. The only evidence of energy conservation as a percent of system is contained in the Synergic Resources Corporation study. [EX 89, pp. V-38-39]. It shows from 1981 to 1991, the four utilities achieved energy savings between 1.2% and 4.8% of system total sales. Id. The Reconsideration Order charts show that the differences between the utilities' RIM and TRC-based energy savings range between 1.1% and 3.5% of total system sales. Further, the findings of percent of system used divergent forecast data and incorrect assumptions regarding utility-assumed conservation levels in the forecasts. [R 5417-5425; EX 13, pp. 37-39, 43-44; EX 39, pp. 11-12, 15-16; EX 46, pp. 7-8, 15-16; EX 59, pp. II-22-27].

SUMMARY OF ARGUMENT

The Commission's action must be remanded under several provisions of Section 120.68, Florida Statutes.

The Commission's post-hearing procedures deprived LEAF of procedural due process because of unfair access to the decision-makers given to one party -- the Commission staff -- and the denial of a meaningful opportunity for other parties to respond to staff's advocacy.

The Commission's new policy to require the imposition of a penalty for a utility which does not meet numeric conservation goals was unlawfully applied to set goals based upon the RIM cost-effectiveness test. That policy is inconsistent with legislative intent of FEECA, and the Commission's rules.

The Commission's decision to set RIM-based goals was premised upon a finding of fact that there were negligible differences between utility estimates of cost-effective conservation under two tests -- RIM and TRC. There is no competent, substantial evidence in the record to support that finding, which was based upon other findings comparing the results of the utilities' cost-effectiveness estimates which also lack competent, substantial evidence.

ARGUMENT

I. THE COMMISSION'S POST-HEARING PROCEDURES VIOLATED LEAF'S RIGHT TO PROCEDURAL DUE PROCESS.

The Florida Constitution guarantees due process in proceedings before courts and administrative agencies, although agencies do not necessarily have to follow judicial procedures. Art. I, s. 9, Fla. Const.; Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322, 323-24 (Fla. 1990); Hadley v. Department of Administration, 411 So. 2d 184, 187 (Fla. 1982). The United States Constitution also guarantees due process. Morgan v. United States, 298 U.S. 468, 56 S.Ct. 908, 80 L.Ed. 1288 (1936); Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938).

In the recently-decided Cherry Communications, Inc. v. Deason, No. 83,274 (Fla. April 20, 1995), this court held that the due process rights of a party to a quasi-judicial Commission proceeding were violated because the same attorney who prosecuted the case before the Commission also served as advisor to the Commission at agenda conference deliberations. The court noted that the Commission adopted in substantial form the staff attorney's memoranda in its final order. Id. at 6.

In Cherry, this court distinguished South Florida Natural Gas v. Florida Public Service Comm. 534 So. 2d 695 (Fla. 1988), because of the nature of the proceedings. Further, the court implicitly rejected the Commission's claim that its procedures passed the "balancing test" set out in Hadley v. Dept. of

Administration, 411 So.2d 184, 187 (Fla. 1991).

The facts and circumstances in the instant appeal are equally compelling to those in Cherry and warrant a reversal under the tests discussed in Hadley v. Dept. of Administration, 411 So.2d 184, 187 (Fla. 1991).

LEAF's interests pass the "balancing of interest" test under the facts and circumstances presented. LEAF intervened in goal setting to protect its members use and enjoyment of natural resources whose quality is placed at risk by construction and operation of power plants that may result from regulatory incentives to increase supply-side rather than demand-side investments, and to protect the interest of members who were customers of the four utilities since customer bills are impacted by utility conservation and efficiency efforts. [R 19-22; 5566-5569; 7023-7026; 9665-9668]. Those substantial interests are affected by goal-setting. §120.57, Fla. Stat. and FEECA.

The Commission granted LEAF "party status" in accordance with applicable statutes and rules. §§120.52 (11), 120.57 (1), Fla. Stat.; Fla. Admin. Code R. 25-22.029 (4), 25-22.036 (4). LEAF fully appeared as a party during the proceedings below, exercising its fundamental right to petition the government for redress. U.S. Const. amend. I; Art. I, s. 5, Fla. Const.; §120.57, Fla. Stat.

The Commission's interests in adopting RIM-based goals⁴, or

⁴ While the Legislature has specifically authorized utility programs which include a "residential energy conservation subsidy," the Commission applied a test of "cost-effectiveness" that

in ease of decision-making, cannot be said to outweigh LEAF's interests to advocate its interests as an affected party.

Having granted LEAF the right to participate fully as a party, the Commission was not entitled to conduct the proceedings unfairly, or to render a decision that justifiably creates the suspicion of prejudice and unfairness. Here, the staff's position was advocated by Division of Legal Service during the hearing and staff's primary litigator served as a de facto law clerk during the Commission's final deliberations.

LEAF acknowledges that this court has granted considerable latitude to the Commission in utilization of its staff for a wide variety of functions in rate cases. South Florida Natural Gas Co. v. Florida Public Service Comm., 534 So. 2d 695 (Fla. 1988).

While its ratemaking activity is quasi-legislative, the Commission also performs quasi-judicial functions. Chiles v. Public Service Commission Nominating Council, 573 So. 2d 829, 832 (Fla. 1991). The license revocation proceeding in Cherry Communications, Inc. v. Deason was a quasi-judicial proceeding.

The proceedings in the case at bar were quasi-judicial. [R 2544]. The Commission determined disputed issues of material fact in an adjudicatory proceeding held to set numeric conservation goals pursuant to rules which had been previously adopted in an exercise of the Commission's quasi-legislative

automatically rejects any conservation technique which involves a subsidy to participants from non-participants -- the RIM test. In doing so, the Commission rejected any consideration of societal costs, or even, the total cost to the utility and its customers.

authority. See, General Telephone Co. of Fla. v. Florida Public Service Comm., 446 So. 2d 1063, 1067 (Fla. 1984); §§120.57 (1), 366.82, Fla. Stat.

To balance the equities, this court should review staff's role as contemplated in the Commission's procedural rules, adopted pursuant to Chapter 120, Florida Statutes, as in Hadley v. Dept. of Administration. The Commission's rules addressing staff's participation authorize full "party" status and other types of participation. Fla. Admin. Code R. 25-22.025; 25-22.026 (1); 25-22.026 (3). In that respect, the rules comport with the Administrative Procedure Act's definition of "party" to include:

any other person who, as a matter of ... agency regulation, is entitled to participate in whole or in part in the proceeding ... and who makes an appearance as a party.

§§120.52 (12), 120.53 (1)(c), Fla. Stat.

In the case at bar, the Commission's rules allowed staff (including Division of Legal Service's lawyers), to participate as a full party if it entered an appearance.

**A. THE SAME ATTORNEY WHO PROSECUTED THE CASE
ON BEHALF OF A PARTY -- THE COMMISSION STAFF --
ALSO SERVED AS THE COMMISSION'S LEGAL ADVISOR.**

In the proceedings below, the Commission's staff appeared and participated as a full party represented by staff counsel. [TrPHC 3; Tr 11.22-25; R 2544]. Notably, the Prehearing Officer exercised his discretion to order staff to file a Prehearing Statement, as was required of other parties. [R 7-8]. Fla. Admin.

Code R. 25-22.038 (5)⁵.

Staff's Prehearing Statement stated a basic position, significantly that "Goals should be based primarily on RIM potential." [R 1559-1576]. The Prehearing Order reported the Commission staff's basic position and specific positions on cost-effectiveness and goals for specific end-uses and markets. [R 2558-2559; 2585; 2601].

The Division of Legal Service's attorney Mr. Palecki and others formally appeared "on behalf of the Commission staff." E.g. [TrPHC 3; Tr 11.22-25; R 2544]. However, lawyers from the Division of Appeals appeared as "Counsel to the Commissioners." [TrPHC 3; Tr 12.1-2; R 2544; TrSA 2; TrA 2]. That dichotomy is addressed by rule. Fla. Admin. Code R. 25-21.021 (1) & (2).

The distinct appearances of counsel representing staff and counsel to the Commissioners is an important due process consideration as in Cherry Communications, Inc. v Deason, where the staff's attorney performed dual roles of litigator and advisor notwithstanding the appearance of separate counsel to the Commissioners. Cherry, No. 83,274 at 6.

For example, at the special agenda conference to set goals, attorney Palecki provided advice as to the merits of LEAF's objections to four late-filed exhibits, and two Department of Community Affairs' motions; the Commissioners' attorney advised

⁵ The Prehearing Officer explained his understanding of staff's role, but his sentiments were not transmitted into the Prehearing Order, although staff did state a position on the cost-effectiveness issue. [TrPHC 97.12-98.19; TrPHC 64.12-65.16].

Commissioners solely about how to break a tie vote on a four-person panel. [TrSA 55.10 - 55.17]. At the agenda conference on reconsideration, Mr. Palecki provided the only legal advice; the Division of Appeals' lawyers were silent. [TrA 1-13].

In sum, staff was a full party and its principal attorney Mr. Palecki, also advised the Commissioners during agenda conferences.

B. PARTIES OTHER THAN STAFF WERE DENIED THE OPPORTUNITY TO FAIRLY PARTICIPATE IN POST-HEARING PROCEDURES OR TO RESPOND TO THE STAFF'S MEMORANDA AND ORAL RECOMMENDATIONS.

Most parties filed the requisite post-hearing statement of positions on the issues and some parties filed optional briefs. [R 4372-5014; 6953-7017; 9580-9628; 10557-10603]. However, the Commission staff waived those opportunities, even though it was not formally excused from doing so.⁶ [R 5015-5222; 2544]; Fla. Admin. Code R. 25-21.021 (2); 25-21.042; 25-26.026 (1)(a) & (3).

Instead, the primary legal advocate for staff filed an unsolicited staff memorandum, in conjunction with his colleagues, which commented upon the evidence and made recommendations based upon a biased analysis of the record which favored RIM-based goals. [R 5015-5222]. The staff and its lawyer enjoyed exclusive rights to advise the Commission panel on the merits. Other parties were unfairly deprived of any opportunity to respond to

⁶ Staff's basic position indicated in part that "Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions." [R 2559]. There was no notice in the order that staff would state its "final positions" in the form of an advisory memorandum.

staff's advocacy.

As in Cherry Communications, Inc., the Commission's Goals Order adopted in substantial form the staff's advisory memorandum, with minor variations⁷.

Despite LEAF's plea for fundamental fairness to respond to staff's advocacy, the same unconstitutional procedures were followed during the reconsideration phase of the proceeding. [R 5325-5326]. Notably, it is only because of LEAF's Motion that the Commission made corrections to the Order.

Throughout the Commission's post-hearing procedures, one party -- the Commission staff -- was afforded a special advantage in influencing the decision. Under the circumstances here, as in Cherry Communications, Inc., procedural due process has been denied under any reasonable balancing of the equities.

This matter must be remanded. Having allowed its staff to participate fully as a party, the Commission must be directed to provide a new hearing that affords due process by recognizing the proper separation of the advocacy and advisory roles of staff and agency lawyers.

⁷ For example, the Commission set "dash" energy goals for GULF's commercial/industrial sector for some years, instead of negative goals recommended by staff. [R 5263; TrSA 140.16-22; 141.18-25; 145.2-3; 146.16-25; 147.1-11].

II. THE ORDER ERRONEOUSLY ADOPTED A PASS-FAIL GOALS POLICY WHICH IS INCONSISTENT WITH THE LAW IMPLEMENTED AND THE COMMISSION'S RULES.

Remand is required where an agency's exercise of discretion is inconsistent with an agency rule or a statute, or outside a lawful delegation of power. §120.68 (12), Fla. Stat.

In this case, the Commission decided to set RIM-based goals in conjunction with an unadopted "pass-fail" policy that is contrary to the intent of the law implemented and inconsistent with adopted rules.

Whatever the merits of the Commission's new policy, it must be adopted by rule before used in formal proceedings involving multiple parties⁸. §120.535, Fla. Stat. See, Christo v. Fla. Dept. of Banking and Finance, 20 Fla. L. Weekly D262 (Fla. 1st DCA, Jan. 26, 1995).

Since the new policy is outside of the range of Legislature's delegation to the Commission under FEECA to set goals and is inconsistent with adopted rules, the orders must be remanded.

A. THE COMMISSION CLEARLY ANNOUNCED A NEW PASS-FAIL POLICY.

In the discussion of cost-effectiveness, the body of the Goals Order provides:

Each utility's RIM based conservation goal shall be considered to be a minimum, pass/fail goal. We are not

⁸ Before Section 120.535, Florida Statutes took effect, incipient policy had to be justified and based upon a foundation in the record below. Florida Cities Water Co. v. Florida Public Service Comm., 384 So. 2d 120 (Fla. 1980).

setting aspirational goals in this docket. Each utility shall be expected to achieve its goal. Any utility that does not achieve its goal shall be either penalized or have programs prescribed to it in a manner to be determined by this Commission on a case-by-case basis.

[R 5244]. Consequently, the Commission:

ORDERED that Florida Power and Light Company, Florida Power Corporation, Tampa Electric Company and Gulf Power Corporation shall achieve or surpass the annual conservation goals set forth in this order. Any utility that does not achieve its annual conservation goals shall be subject to a penalty.

[R 5275].

The Goals Order clearly established a new "pass-fail" policy and mandated penalties for non-compliance.

B. THE NEW POLICY IS INCONSISTENT WITH THE FLORIDA ENERGY EFFICIENCY AND CONSERVATION ACT.

The Commission's duty to set goals is provided by FEECA:

The Commission shall adopt appropriate goals for increasing the efficiency of energy consumption and increasing the development of cogeneration The commission may change the goals for reasonable cause. The time period to review the goals, however, shall not exceed 5 years. After the programs and plan to meet those goals are completed, the commission shall determine what further goals, programs or plans are warranted and, if so, shall adopt them...the Commission shall require each utility to develop plans and programs to meet the overall goals.

§366.82, Fla. Stat.

The plain and ordinary meaning of the statute must prevail unless the words are defined by statute or by clear intent of the Legislature. Green v. State, 604 So. 2d 471 (Fla. 1992).

Chapter 366, Florida Statutes, does not define "goals."⁹

The only Florida statute which defines "goal" comports with the plain meaning¹⁰: "the end toward which effort or ambition is directed: AIM, PURPOSE: a condition or state to be brought about through a course of action." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 972 (1961).

The Legislature contemplated for utilities to "develop plans and programs to meet the overall goals." §366.82 (3), Fla. Stat. Narrative goals have existed since the initial adoption of the Commission's goal rules, whereas numeric goals have not been continuously provided. Fla. Admin. Code R. 25-17.001 (5); 82 F.P.S.C. 10:103 (1980)¹¹. Clearly the plain meaning of "overall" goals includes both narrative and numeric goals.

Penal statutes and highly regulatory laws are subject to strict construction. 49 Fla. Jur. 2d Statutes §195.

The sanctions provided in FEECA clearly show that the new "pass-fail" policy is unlawful. In lieu of mandatory penalties

⁹ Another statute defines "goal" as a "the long-term end toward which programs and activities are ultimately directed." §23.0112 (6), Fla. Stat.; Ch. 84-257, §3, Laws of Fla.

¹⁰ Synonyms include: "aim, ambition, aspiration, design, destination, determination, end, fixed purpose, hope, intent, intention, mark, mission, object, objective, plan, predeliberation, predetermination, premeditation, purpose, resolution, resolve, scheme, set purpose and target." William C. Burton, Legal Thesaurus, 241 (1980).

¹¹ In the 1993 amendment of the rules, the Commission made minor changes to the narrative goals, including the addition of a priority to increase the "end-use consumption of electricity to the extent cost-effective." Fla. Admin. Code R. 25-17.001; 93 F.P.S.C. 4:665-670 (1993).

for utility failure to meet conservation goals, the Legislature required the Commission to consider FEECA "performance" in rate cases.^{12, 13} §366.82 (4), Fla. Stat.; Ch. 80-65 §5, Laws of Fla. While the Commission can clearly consider a utility's overall conservation performance during ratemaking, there is no basis for assuming that the Legislature intended for a utility's failure to meet the numeric goals per se to be the sole criterion for imposition of a penalty.

Instead, FEECA requires the Commission to review utility performance under all of the Act's requirements, notably: (1) the development of a plan and programs to meet the overall goals; (2) submission and approval of the plan; (3) the utility's "substantial compliance" with an approved plan; (4) reporting of results; (5) residential energy audit offerings; and perhaps most importantly, (6) the avoidance of unnecessary, more-expensive, less efficient, supply-side resources that deplete resources and cause pollution. §§366.82 (3), (4) and (5); 403.519, Fla. Stat.

The Legislature provided the Commission with additional police powers to enforce conservation program implementation by

¹² In a more specific statute ("Rate fixing; adequacy of facilities as criterion"), conservation is a discretionary, rather than mandatory, ratemaking criterion, however. §366.041 (1), Fla. Stat.; Ch. 80-35 §4, Laws of Fla.

¹³ For example, in its 1991 review of Florida Power & Light Company's rates and charges, the Commission disallowed certain expenses that promoted the use of electricity in a manner that "appeared inconsistent" with the FEECA rules. [Order 24460, p. 3, officially recognized at Tr. 2581.25 - 2582.6; 91 F.P.S.C. 5:26-28 (1991)].

requiring annual reports on "progress toward meeting these goals." §366.82 (5), Fla. Stat. Commission findings that a utility has failed implement its plan and programs and to substantially comply with its plan (not its goals) invoke the Commission's non-ratemaking regulatory powers. §366.82 (3), Fla. Stat.

The Commission's exercise of discretion in adopting RIM-based pass-fail goals exceeded the scope of delegated authority and must be reversed. §120.68 (12)(a), Fla. Stat.

C. THE NEW POLICY IS INCONSISTENT WITH THE COMMISSION'S RECENTLY-AMENDED CONSERVATION RULES.

As "general information," the Commission's goals rules provide in part:

[T]hese goals represent a starting point for establishing demand side management programs for all electric utilities. While there is no absolute assurance that these goals will be fully achieved within the expected time frames, the best efforts by the electric utilities to achieve them shall be required. In any proceeding for determining whether new capacity is needed, the length and nature of experience under the goals will be considered. The goals will not be used exclusively because the Commission recognizes that they might not be achieved and that the estimates upon which they are based may prove to be incorrect....

Fla. Admin. Code R. 25-17.001 (6) (emphasis supplied)¹⁴.

The rules clearly envision aspirational goals, and explicitly preclude one sanction for failure to achieve numeric

¹⁴ The basic language was adopted in Order 9634, effective Dec. 2, 1980. 80 F.P.S.C 11:99 (1980). The rules were amended on Dec. 30, 1982 and May 10, 1993. 82 F.P.S.C. 10:103 (1982); 93 F.P.S.C 4:665 (1993).

goals: the denial of a utility petition for a power plant need determination.

Further, the new monitoring and evaluation rules contemplate that goals may not be achieved:

Each utility shall submit an annual report no later than March 1 The report shall contain ... comparison of the achieved KW and KWH reductions with the established Residential and Commercial/Industrial goals, and the following information for each program... (K) a justification for variances larger than 15% for the annual goals established by the Commission.

Fla. Admin. Code R. 25-17.0021 (5) (emphasis supplied)¹⁵.

Presumably, for pass-fail goals, the Commission would require an explanation of any variance from adopted goals!

There is no reasonable interpretation of the Commission's rules that sanctions the new pass-fail policy and it cannot stand. Legal Environmental Assistance Foundation, Inc. v. Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994); §120.68 (12)(b), Fla. Stat. Agency action that is inconsistent with its rules must be reversed. DeCarion v. Martinez, 537 So. 2d 1083 (Fla. 1st DCA, 1989).

¹⁵ In conjunction, the Commission repealed the rule section on "Evaluation of Utility Conservation Efforts" which defined "goals" as:

the target levels of winter end use KW demand, summer end use KW demand and end use KWH consumption calculated and adjusted as specified in Rule 25-17.002 and the number of energy audits calculated to be the utility's allocation....

Fla. Admin. Code R.25-17.005 (3)(1) (1992); 93 F.P.S.C. 4:679 (1993).

**III. THE COMMISSION ERRONEOUSLY FOUND THAT THERE WERE
NEGLIGIBLE ENERGY AND DEMAND SAVINGS DIFFERENCES
BETWEEN DEMAND-SIDE MANAGEMENT PORTFOLIOS BASED ON
DIFFERENT COST-EFFECTIVENESS TESTS.**

If the court finds that the Commission's goals decision depends upon any finding of fact that is not supported by competent, substantial evidence in the record, it must remand the case. §120.68 (10), Fla. Stat. The court does not reweigh the evidence, but it examines the record to determine whether there is any competent, substantial evidence to support the disputed finding. Polk County v. Fla. Public Service Comm., 460 So. 2d 370, 373 (Fla. 1984).

In this case, the levels at which the Commission set numeric conservation goals were based upon the finding that differences between energy and demand savings between the two cost-effectiveness portfolios (RIM and TRC) filed by each utility were "negligible" . That finding is not supported by any competent, substantial evidence of record. Hence, the Commission's action should be remanded.

**A. THE COMMISSION CLEARLY SET THE GOALS BASED UPON A FINDING
THAT THE DIFFERENCES IN LEVELS OF CONSERVATION SAVINGS
ESTIMATED BY THE UTILITIES FOR TWO COST-EFFECTIVENESS TESTS
WERE NEGLIGIBLE.**

In the Goals Order and the Reconsideration Order, the Commission stated why it decided to set conservation goals upon the results of the utilities' RIM cost-effectiveness analyses,

rather than their TRC analyses¹⁶.

The Goals Order states:

We will set overall conservation goals for each utility based on measures that pass both the participant and RIM tests. The record in this docket reflects that the difference in demand and energy saving between RIM and TRC portfolios are negligible. We find that goals based on measures that pass TRC but not RIM would result in increased rates and would cause customers who do not participate in a utility DSM measure to subsidize customers who do participate. Since the record reflects that the benefits of adopting a TRC goal are minimal, we do not believe that increasing rates, even slightly, is justified.

(emphasis supplied). [R 5244].

In essence, the Commission elected to avoid potential rate impacts and subsidies from customers who did not participate in conservation programs to customers who participated based on a factual finding that the different levels of conservation estimated under the two cost effectiveness tests were about the same -- that the differences were "negligible."

LEAF's Motion for Reconsideration complained that the Commission finding appeared to be in error and addressed the various means by which the Commission could have made that incorrect finding. The motion also questioned the facts found in two charts which purported to depict the Year 2003 energy and demand savings estimated by various parties under the two cost-effectiveness tests. [R 5278-5324].

¹⁶ The Commission rejected use of the SRC report as a benchmark in goals-setting given the decision to set "pass-fail" goals. [R 5240-5241; 5403-5406].

The Reconsideration Order elaborated the manner in which the Commission initially compared the conservation benefits of the RIM and TRC cost-effectiveness tests and further justified its finding that energy and demand savings differences were "negligible."¹⁷ [R 5400-5403].

The Reconsideration Order provides, in relevant part:

THE COMMISSION'S USE OF THE WORD "NEGLIGIBLE" TO DESCRIBE THE DIFFERENCE BETWEEN RIM AND TRC BASED GOALS WAS NOT ERROR

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*

[T]he "substantial" versus "negligible" savings question cannot be answered solely through a comparison of TRC to RIM MW and MWH (megawatt hour) savings. Differences in MW and MWH savings may be substantial in isolation, but negligible when viewed from a rates, generation expansion, and revenue requirements perspective. In this docket, when we compared the MW and MWH savings in each RIM and TRC portfolio and the differences between the two, to each utility's system peak demand and energy sales, the savings are negligible.

(emphasis supplied). [R 5403].

The savings represented by the two cost-effectiveness portfolios, and the substantial differences in demand (MW) and energy (MWH) are obvious from the CEGRRs and the tables in the Goals Order. [EX 3, pp. 36-41; 37, pp. 183, 185; 52, pp. 9, 29; 62, Appendix D, pp. 1-4; 64]. In fact, staff's reconsideration memorandum admitted that the "differences in MW and MWH are substantial in isolation...." [R 5386].

¹⁷ There is a key difference between the language which the Commissioners voted to approve without modification at the agenda conference and the text of the subsequently-filed Reconsideration Order. (Discussed in Point III. C., infra).

When viewed in the context of the total projected sales and peak demand, however, the order claimed that the savings differences between RIM and TRC portfolios were negligible. The graphic depiction of the savings in terms of each utility's total system in 2003 is provided in the "Comparison of Goals for the Year 2003" charts. [R 5272-5273; 5411-5412]. If a year-by-year percentage of system comparison exists, it is not part of the record. The charts show the "Commission Approved 100% RIM Goals" and the "Utility Calculated Goals Based on TRC." Id. The comparisons of the savings for each portfolio, which show the differences between the two portfolios, involve those reported values. Those values for demand and energy savings then must be compared to each utility's system peak demand and energy sales, respectively. The comparisons are represented by the "% of SYS" (percent of system) columns for each utility. Id.

The Commission set RIM-based goals because of findings regarding energy and demand savings in each of the two customer classes estimated by each utility under the two cost-effectiveness tests (RIM and TRC), the differences between those savings in the absolute and as a percentage of the utility's total system.

B. THERE IS NO COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE COMMISSION'S FINDING OF NEGLIGIBLE DIFFERENCES IN SAVINGS.

The Commission set RIM-based goals based upon an evaluation of the savings under the TRC and RIM tests for all four

utilities. For three utilities the Commission compared the savings for all measures passing the TRC test with the savings of all measures passing the RIM test as reported in the CEGRRs, accepted into evidence. However, for Florida Power & Light Company, the Commission compared the savings represented by CEGRR TRC-passing measures as "adjusted" by data contained in other exhibits and explained to staff informally after the hearing. That evidence, the Ten Year Site Plans, and the one exhibit that contains a percent of system calculation show that the finding of "negligible" differences is not supported by any competent, substantial evidence.

The results of the staff's unexplained and untested percentage of system analysis were accepted without question by the Commission:

A. CALCULATION OF PERCENT OF SYSTEM - Staff used projected demand and energy data from Exhibits 13, 39, 46, and 59 in the calculation. These values were then added to utility proposed goal values to get the value of the system absent any DSM. In other words, the Summer DSM goal (Residential and Commercial combined) was added to the utility projected summer peak demand. This is because the demand reported in the Ten Year Site Plan is net of the utility's DSM efforts. The proposed goal was then divided by this adjusted number to arrive at the percent of system number. LEAF has shown no error in the methodology used to calculate percent of system.

(emphasis supplied). [R 5401].

To get the total system size, staff took values in the utilities' Ten Year Site Plans and added the respective utility proposed goals. [EX 13,39,46,59]. Ten Year Site Plans are planning documents required to be filed with the Department of

Community Affairs and the Commission. §186.801, Fla. Stat.¹⁸

1. THE TEN YEAR SITE PLAN DATA USED BY THE COMMISSION DO NOT SUPPORT THE PERCENTAGE OF SYSTEM CALCULATIONS USED TO COMPARE ENERGY AND DEMAND SAVINGS.

A key aspect of the Commission's comparison of RIM and TRC potential involved evaluation of the savings projected for the year 2003 as a percentage of the energy sales and peak demand forecast for that year in the Ten Year Site Plans.

LEAF's Exceptions/Motion to Alter or Amend details which energy¹⁹ and demand²⁰ data the Commission and its staff used the year 2003 energy sales and peak demand forecasts, and each utility's forecast was adjusted. [R 5417-5425]. Since each percent of system figure is a finding, it must be supported by competent, substantial evidence. The evidence shows that the

¹⁸ Enacted in the Florida Electrical Power Plant Siting Act in 1973, and amended and moved to Section 186.801, Florida Statutes in 1976. Ch. 73-33, §2, Laws of Fla.; Ch. 76-76, §2, Laws of Fla., respectively.

¹⁹ **NET ENERGY FOR LOAD** [FPL EX 13, page 39, column 19, Cf. pages 37-38, columns 4 + 7 + 10; FPC EX 39, page 15, column 9, Cf. pages 11 and 12, columns 4 + 7 + 11; GULF EX 46, page 15, Cf. pages 7 and 8, columns 4 + 7 + 11; TECO EX 59, page II-24, Cf. pages II-22 and II-23, "Rural & Residential GWH + Commercial GWH + Industrial GWH"].

²⁰ **PEAK DEMAND.** FPL EX 13, pages 43-44, column 7 "Firm Demand (Summer/Winter Peak Forecast w/adj. for Load Management Programs if Load Mgt is exercised during the peak hour)"; FPC EX 39, page 15, column 4 - "Summer Firm Total Peak Demand" [Total Peak Demand - (interruptible load + load management + QF load served by QF generation + conservation)] and page 16, column 15 "Winter Total Firm Peak Demand"; GULF EX 46, pages 15-16 "Summer Firm Total Peak Demand" and "Winter Firm Total Peak Demand" (includes "contracted capacity allocated to certain resale customers by Southeastern Power Administration"; TECO EX 59, pages II-26 and II-27, "Firm Retail Summer Peak Demand" and "Firm Retail Winter Peak Demand".

findings are based upon inconsistent data, and that the data was improperly adjusted to estimate system size.

Inconsistent "net energy for load" data were used -- for some utilities it included "sales for resale" and "utility use" -- sales that would not be directly affected by conservation. [R 5418-5419]. Inconsistent "peak demand" data were also used -- Tampa Electric Company's retail firm demand was used, whereas wholesale firm demand was used for the other utilities; and Florida Power Corporation's peak demand was net of interruptible load, load management, heatworks, voltage reduction, self-generation by cogenerators and conservation, whereas Florida Power & Light Company's peak demand data was net of only load management. [R 5419-5420].

In addition to using inconsistent types of system data, there are two fundamental flaws with the percentage of system calculation.

First, it incorrectly assumes that the year 2003 sales and peak demand forecasts in the Ten Year Site Plans are "net of DSM" equal to RIM-based utility-proposed goals. [R 5401]. In fact, none of the utilities' year 2003 forecasts assumed levels of conservation equal to the proposed RIM goals²¹ [R 5420-5425;

²¹ The PSC staff adjustments are shown on the calculation sheets and repeated, other references are to each utility's Ten Year Site Plan:

FPL

PSC STAFF ADJUSTMENTS

Summer MW 16,048 + 1,051 = 17,099

Winter MW 16,800 + 721 = 17,521

GWH 97,533 + 1,246 = 98,779

EXHIBIT 13, pages 52, 43-44.

5494-5495].

Secondly, the percentage of system for each customer class was figured by adding the savings for both classes (residential and commercial/industrial) to get adjusted forecasts, and then comparing savings for each class to the total system. [R 5401; 5420-5425; 5494-5495; EX 13,39,46,59]].

Thus, the findings as to the percentage of system are not supported by competent, substantial evidence and do not support the Commission's finding that the savings differences were "negligible" as a percentage of total system size. The Commission's findings are not based upon evidence that establishes a substantial basis of fact from which the fact at issue can reasonably be inferred. Duval Utility Co., v. Florida Public Service Comm., 380 So. 2d 1028, 1031 (Fla. 1980).

As noted previously, staff was a party supporting the RIM, and the same person cannot be expected to provide an unbiased

FPC

PSC STAFF ADJUSTMENTS

Summer MW 7,729 + 242 = 7,971
Winter MW 8,792 + 498 = 9,290
GWH 42,800 + 375 = 43,175
EXHIBIT 39, pages 24, 41, 55.

TECO

PSC STAFF ADJUSTMENTS

Summer MW 3,074 + 94 = 3,168
Winter MW 3,273 + 273 = 3,546
GWH 18,157 + 207 = 18,364
EXHIBIT 59, pages II-1, II-15-II-16, II-26 and II-27.

GULF

PSC STAFF ADJUSTMENTS

Summer MW 2,160 + 103 = 2,263
Winter MW 1,987 + 104 = 2,091
GWH 10,538 + 44 = 10,582
EXHIBIT 46, pages 37-38.

recommendation to the Commission. Upon that party's advice, the Commission elected not to consider the merits of LEAF's showing of errors and inconsistencies in the percent of system values and adjustment of CEGRR data. Absent review of the evidence used to support the Commission's percent of system findings, the proper evidentiary basis for one party's position remains untested by other parties.

This court should remand the orders because they lack competent, substantial evidence to support the findings supporting the Commission's comparisons. [R 5413-5495; 5561-5564; 5565-A].

2. THE DIFFERENCES BETWEEN THE RIM AND TRC GOALS WERE, BY ANY REASONABLE STANDARD, SUBSTANTIAL RATHER THAN "NEGLIGIBLE."

"Negligible" means:

(a) that is so tiny or unimportant or otherwise of so little consequence as to require or deserve no attention: TRIFLING; (b) that is of so little substance or extent or worth as to be practically nonexistent and so requiring or deserving little or no attention or respect.

WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1514 (1961).

Even if this court finds that reported savings and percent of system figures are supported by competent, substantial evidence, the court should determine that the finding of negligible differences between the reported percentages is not supported by competent, substantial evidence.

The only evidence containing a "percentage of system" comparison in the record is undisputed. [EX 89, pp. V-38-39;

5403]. It is found in a chart ("Review of Utility DSM Activities") in the Synergic Resources Corporation study which shows the "energy conserved (1991) in GWH" as a percentage of total sales and the "peak reduction as a percentage of capacity," ("conservation," "load management" and "Interruptible/TOU)." [EX 89, pp. V-38-39]. This evidence conclusively establishes that after over a decade of FEECA conservation, the four utilities achieved energy savings between 1.2% and 4.8% of system total sales (percent of system). Id.

Using the Commission's numbers, the differences between the utilities' RIM and TRC-based energy savings range between 1.1% and 3.5% of total system sales. Thus, the differences in projected energy savings between the utilities' RIM and TRC portfolios can only be said to be "negligible" if the Commission concluded that the 1981-1991 savings were "negligible."

The table below presents the Commission's findings regarding the RIM and TRC portfolios as percentage of total system sales and the differences (delta or Δ) between the two for each utility.

1991 Energy Savings % vs. 2003 TRC/RIM % of System Differences

<u>Utility</u>	<u>1991 savings</u>	<u>TRC 2003</u>	<u>RIM 2003</u>	<u>Δ</u>
FPL	3.6%	3.0	1.9	1.1
FPC	1.6%	4.7	1.2	3.5
TECO	1.2%	5.1	2.4	2.7
GULF	4.8%	2.0	0.6	1.4

[EX 89, pp. V-38-39; R 5411-5412]. Comparing the difference

between RIM and TRC projections as a percentage of the 1991 percent of system savings shows that for Florida Power Corporation and Tampa Electric Company the differences are 219% and 225%, respectively. For Florida Power & Light Company and Gulf Power Company, whose data LEAF asserted were less reliable, the differences are still significant, 31% and 29% respectively.

As for demand savings, it is impossible to reconcile the Commission's chart with the SRC chart because SRC evaluated the utilities' 1991 peak reductions as a percentage of installed capacity rather than as a percentage of projected peak demand. Id. However, the differences between the RIM and TRC demand savings are even larger, so the Commission's finding of negligible demand savings differences is likewise not supported by competent, substantial evidence.

In view of the Legislature's finding and declaration that it is "critical to utilize the most efficient and cost-effective energy conservation systems," and the historical evidence of savings which were achieved during 1981-1991, this court should invalidate the Commission's finding of "negligible differences" as wholly unsupported by the record and not in accord with the essential requirements of law. §366.81, Fla. Stat.

C. ADDITIONAL FINDINGS APPROVED BY THE COMMISSION, BUT NOT RENDERED IN THE RECONSIDERATION ORDER, ARE NOT SUPPORTED BY ANY COMPETENT, SUBSTANTIAL EVIDENCE.

A key sentence in the Reconsideration Order is different than the Commission voted to approve in the staff memorandum, and

this appears to have the effect of changing basic findings of fact to mere hypothetical statements. The staff memorandum which the Commission voted to approve without modification included the use of the word "are" instead of "may." [R 5387; 5462]. Thus, the findings were apparently translated into an observation not tied to the record. Since the Commission makes its decisions in public, and since the record indicates no official decision to change the findings of fact, it was error for the Commission Clerk to render an order which was materially different than that approved by the Commission.²² Fla. Admin. Code R. 25-21.042. [TrA; R 5462; 5387]. The person(s) who decided to change the language of the order is not of record, but it should concern this court.

The Commission initially voted to adopt RIM-based goals based upon verbal and written advice from staff that the differences between the RIM and TRC portfolios were negligible as

²² The staff memorandum filed December 13, 1994, states in relevant part: Differences in MW and MWH savings are substantial in isolation, but negligible when viewed from a rates, generation expansion, and revenue requirements perspective. When comparing the MW and MWH savings in each RIM and TRC portfolio and the differences between the two, to each utility's system peak demand and energy sales, the savings are negligible. [R 5387].

The Reconsideration Order provides in relevant part: Differences in MW and MWH savings may be substantial in isolation, but negligible when viewed from a rates, generation expansion, and revenue requirements perspective. In this docket, when we compared the MW and MWH savings in each RIM and TRC portfolio and the differences between the two, to each utility's system peak demand and energy sales, the savings are negligible. (emphasis supplied) [R 5403].

concerned rates, generation expansion, and revenue requirements.^{23, 24} [R 5015-5222; TrSA 61.11-86.4]. LEAF's Motion

²³ At the special agenda conference the Commission was advised:

MR. BALLINGER: The basic recommendation is that, at this juncture and based on the recommendation in this case, the Commission should use the RIM test when setting DSM goals basically because we did not see large savings with other programs. Even though rate impacts were minimal, I don't think the Commission should set a policy of saying a little harm is okay as far as rates go. Some ideas of why this may be is because the utilities' avoided costs today are very low, they're building primarily combustion turbine and combined cycle units not for another five, six, seven years. Even though there were significant megawatt differences between RIM and TRC portfolios, the shift in the generation expansion plans seem minimal. For example, FPL'S plan only shifted a combined cycle unit one year. The combined cycle units, by their nature, will shift a lot. Even when it gets close, they may only build the CT portion of that unit and defer the heat recovery portion another year or so. So a year or two deferral in that type of plant is not going to amount to a lot of savings. We may see different results if we get closer to building coal plants and that becomes the units in the generation expansion plans. Then a year or two deferral of that type of plant could be significant in terms of savings....

COMMISSIONER JOHNSON: Could you explain in a little more detail or define for me what the minimum savings are? Often in this particular analysis we talk in broad terms; and I guess, as one Commissioner, if I could better understand what is minimal, what do you mean by minimal?

MR. BALLINGER: I think what I said earlier is basically the shifting of a power plant a year or two. It is minimal for two reasons: The type of power plant that is deferred have fairly low capital costs to begin with; and, two, they are fairly far out in the future, six or seven years into the future. When you look at those on a present value basis, the impacts become minimal.

TrSA. 61.11-64.6 (emphasis supplied).

for Reconsideration of Final Order refuted each of those alleged bases for the findings. Arguably, the language of the Reconsideration Order, insofar as it does not contain such

²⁴ The staff's initial written memorandum provided:

ISSUE 15: What cost-effectiveness test, cost-effectiveness criteria, or other criteria should the Commission use to set DSM goals?

RECOMMENDATION: The Commission should adopt the RIM test at the present time because the savings difference between RIM and TRC in addition to the rate impacts are negligible. However, the Commission should indicate that TRC will be the policy when it is found that the savings are large and the rate impacts are small. Programs that have large savings and small rate impacts may qualify for optional lost revenue recovery and incentives.

[BALLINGER]

STAFF ANALYSIS: The problem with TRC is that customers who do not participate in a utility DSM measure subsidize the customers who do participate. Most parties agree that the benefits of DSM should be the deferral or avoidance of power plants, which comes primarily from savings of peak demand, or the conservation of natural resources and/or reduced emissions, which comes primarily from reductions in energy consumption. (Tr. 797, 798, 1084, 1327, 1329).

From a demand savings perspective, an increase in DSM measures to include both RIM and TRC measures resulted in little or no change to FPL's generation expansion plans. (Ex. 3) In FPL's case, the change in the generation expansion plan from RIM to TRC results in the deferral of a combined cycle unit one to two years. (Ex. 3) This is not significant since combined cycle units are designed for construction flexibility in order to minimize capital expenditures.

* * *
The Participant, RIM, TRC tests all provide useful data. The Commission recognized this when it adopted Rule 25-17.0021(4)(j), F.A.C. Since the benefits of adopting a TRC goal seem minor, i.e. few additional power plants deferrals and insignificant changes in emissions, staff does not believe that increasing rates, even slightly, is justified. Therefore, goals for the IOUs should be based on measures that pass both the participant and RIM tests at this time.

* * *
(emphasis supplied) [R 5061-5064].

findings, reflects a different basis for the ultimate decision to adopt RIM-based goals -- one premised largely upon the percentage of system calculations.

However, if this court determines that the Commission's ultimate finding of negligible differences between RIM and TRC goals was premised upon the facts which the Commission voted to approve in the staff memorandum, then the court should determine that there is no competent, substantial evidence in the record to support those facts.

Regarding rates, the utilities projected minor rate impacts differences, which is consistent with authoritative literature on the subject. [EX 4, Appendix H, I; EX 37, pp. 183-185; EX 52, pp. 9 & 29; EX 64 Documents 1 & 2; EX 169, p. 16; Tr 217; Tr 1212]. In fact, staff's goals memorandum admitted "The cumulative rate impacts between TRC and RIM appear small." [R 5073].

As to generation expansion impacts, apparently the key factor for staff, the differences are significant. The pertinent evidence is two charts showing Florida Power & Light Company's comparisons under its "resource plans" and the Company's Ten Year Site Plan. [EX 3, Table 1, p. 8; EX 3, Figure 7, p. 73; EX 13, p. 51]. In the 1994-2003 goals period, 1594 MW (three power plants) would be added under RIM, whereas no generation expansion is indicated for TRC. Id. For the period from 1994-2010, TRC would eliminate/defer the need for a large coal plant. [EX 3, Figure 7, p. 73].

Lastly, significant differences in revenue requirements are


evident, and TRC-based goals for Florida Power & Light Company would save over \$550 Million than RIM on a net present value basis. [EX 3, figure 8, p. 80].

No competent, substantial evidence regarding impacts on rates, generation expansion, and revenue requirements supports the Commission's finding of negligible differences between the TRC and RIM portfolios and the orders should be vacated.

CONCLUSION

Pursuant to Section 120.68, Florida Statutes, and for the reasons stated in this Brief, this Court should vacate the Commission's orders under review and should remand this matter to the Commission for a fair hearing. In view of the Legislature's finding that it is "critical to use the most efficient sources", the great number of parties, and the complexity of the proceedings below, the court should also give directions to the Commission to obtain advice from neutral advisors, to rely upon evidence of record to correct factual errors, and to set lawful goals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to David E. Smith, Esquire, and Robert VanDiver, Esq., Florida Public Service Commission, Room 226, 101 East Gaines Street, Tallahassee, Florida 32399; Charles A. Guyton, Esq., Steel Hector & Davis, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301; Frederick M. Bryant, Esq., Moore, Williams et al, Post Office Box 1169, Tallahassee, Florida 32302; James D. Beasley, Esq., and Lee L. Willis, Esq., MacFarlane, Ausley, et al., P.O. Box 391, Tallahassee, Florida 32302; Gerald A. Williams, Esq., Florida Power Corporation, P.O. Box 14042, Saint Petersburg, Florida 33733-4042; David L. Jordan, Esq. and Andrea D. England, Esq., Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida 32399-2100; Jeffrey Stone, Esq., Beggs & Lane, P.O. Box 12950, Pensacola, Florida 32576; Robert S. Wright, Esq., Landers & Parsons, 310 West College Ave. Third Floor, P.O. Box 271, Tallahassee, Florida 32301; & Suzanne Brownless, P.A., 2546 BlairStone Pines Drive, Tallahassee, Florida 32301 by United States Mail this 21st day of April, 1995.



Ross Stafford Burnaman