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.
_____/

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

REPLY BRIEF OF APPELLANT LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.

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REFERENCES TO THE RECORD

References to the record are as noted in LEAF's Initial Brief, with the addition of references to the transcripts of the customer service hearings as follows: TRMia refers to the Miami public hearing and TRTpa refers to the Tampa public hearing.

SUMMARY OF ARGUMENT

There is no impediment to judicial review of LEAF's due process claim. The judiciary, not the Commission, properly decides the constitutionality of Commission procedures. LEAF's request for oral argument to the Commission on reconsideration, along with a prior challenge to the Commission's procedural rules, were sufficient to preserve the due process issue.

In quasi-judicial proceedings under the Administrative Procedure Act which determine and affect the substantial interests of parties, such as goal-setting, due process is violated when staff is a party-advocate represented by counsel who advises the Commission while other parties are deprived of any meaningful opportunity to respond. Under the circumstances presented, the Commission's interests do not outweigh LEAF's interests and a remand is appropriate to ensure a correct result.

Pass-fail goals are not appropriate given the plain meaning of "goals" in FEECA. The implementing rules anticipate "aspirational" goals and only require utilities to justify shortfalls of over 15%.

Neither Appellee has cited any competent, substantial evidence to support the Commission's findings used to justify RIM-based goals. Contrary to the Commission's findings, differences in energy and demand savings between RIM and TRC-based goals are substantial, as are the differences in revenue requirements and generation expansion plans. Rate impacts do not justify the findings of negligible differences.

ARGUMENT

I. THE COURT SHOULD REMAND THIS CASE BECAUSE OF THE VIOLATION OF LEAF'S DUE PROCESS RIGHTS.

A. DUE PROCESS IS PROPERLY AT ISSUE.

The Commission and Gulf Power Company complain that LEAF can not "raise a new issue" and so LEAF's due process claim should be rejected. The court has jurisdiction and should decide the issue. Hormel v. Hovering, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037, 1041 (1941); Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995); 4 C.J.S. Appeal and Error § 207; 73A C.J.S. Public Administrative Law and Procedure § 191, note 92-93. The court, and not the Commission, is competent to decide constitutional rights. As the First District Court of Appeal stated in Stuckey's of Eastman, Ga. v. Dept. of Transportation, 340 So. 2d 119, 120 (Fla. 1st DCA 1976):

> Enforcement of statutory procedural guaranties remains a judicial function under the review procedures of s. 120.68, and it would be inconsonant with the purposes of the Administrative Procedure Act to hold that an affected party must first debate procedural defects before a nonjudicial agency in order to complain to the appropriate reviewing court.

Further, the Commission was clearly on notice of LEAF's objections to the lack of opportunity for parties to respond to staff's post-hearing advocacy in proceedings determining or affecting parties' substantial interests. Legal Environmental Assistance Foundation, Inc. v. Florida Public Service Comm. 15 F.A.L.R. 3555 (Fla. Div. of Administrative Hearings 1993), aff'd 641 So. 2d 1349 (Fla. 1st DCA 1994).

As a practical matter, LEAF's first opportunity to object to the staff attorney's post-hearing advisory role was during reconsideration. However, such a claim is not colorable under the Commission's reconsideration standard. [R 5279-5281]. By January 1994, the Commission had rejected as improper for reconsideration similar complaints about its post-hearing procedures. In Re: Initiation of Show Cause Proceedings Against Cherry, 94 F.P.S.C. 1: 361, 388-390 (1994). Given that decision, a formal objection would have been futile and likely to antagonize the Commission. Instead, LEAF requested oral argument on reconsideration requesting fairness for all parties to influence the decision. [R 5325-5326]. LEAF's due process claim is premised on the denial of fundamental fairness to respond to staff's post-hearing advocacy.

The merits of the due process claim deserve consideration.

B. IN QUASI-JUDICIAL PROCEEDINGS TO SET GOALS, DUE PROCESS PROTECTS INTERVENORS' RIGHTS TO RESPOND TO STAFF COUNSEL WHEN IT REPRESENTS STAFF AS A PARTY.

Although Cherry Communications, Inc. v. Deason was a disciplinary proceeding, the right to due process governs all quasi-judicial Commission proceedings under Section 120.57 (1), Florida Statutes, not involving ratemaking or rulemaking. State ex rel. Dept. of General Services v. Willis, 344 So.2d 580, 587, Note 4 (Fla. 1st DCA 1977). The principle that the decisionmaker must not allow one side in the dispute to have a special advantage in influencing the decision applies equally in any adjudicatory proceeding which determines a party's substantial

interests. Cherry Communications, Inc. v. Deason, 652 So. 2d at 805.

The more specific issue identified in Cherry was:

> whether the same individual who prosecutes a case on behalf of the agency may also serve to advise the agency in its deliberations as an impartial adjudicator.

Id. Although the court used the term "prosecutes", due process requires that in quasi-judicial proceedings, the same attorney cannot be both a party-advocate before, and an advisor to, a factfinder which retains separate counsel to advise it.

The proceedings below were quasi-judicial proceedings that determined the utilities' substantial interests based upon the adjudication of disputed issues of material fact.[1],[2] §§ 120.57 (1), 366.82 (2), Fla. Stat.; State ex rel. Dept. of General Services v. Willis, 344 So.2d 580, 587, Note 4 (Fla. 1st DCA 1977). By granting LEAF intervention as a "full party", the Commission recognized that LEAF's substantial interests would also be determined or affected. § 120.57 (1), Fla. Stat.; Fla. Admin. Code R. 25-22.039; Commission's Brief, p. 17.

Adjudication of disputed material facts determining a party's substantial interests comprises quasi-judicial proceedings. Consideration of legal and policy issues during a hearing does not

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[1] For example, the Commission determined the cost-effectiveness of DSM measures on a case-by-case basis for each utility. [R 2544].

[2] After amending the goals rules, the Commission opened a docket to revise each utility's goals. The dockets were consolidated for hearing and goals for each utility were adjudicated. [R 2544]

render the proceedings quasi-legislative. McDonald v. Dept. of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), cert. denied, 368 So. 2d 1370 (Fla. 1979).

C. THE STAFF ATTORNEY WAS A PARTY-ADVOCATE AND WAS ALLOWED TO UNFAIRLY INFLUENCE THE COMMISSION'S DELIBERATIONS.

Appellees argue, in essence, that staff was a party during the hearing but that it did not advocate any positions, and that during the post-hearing phases, staff counsel did not appear on behalf of a party.

Represented by Mr. Palecki and others, staff appeared as a full party, although other limited forms of participation were available. Fla. Admin. Code R. 25-22.026 (3)[3].

The Commission claims that staff did not present witnesses nor advocate a position. Commission's Brief, p. 6, citing Fla. Admin. Code R. 25-22.026 (4)(b). However, it is undisputed that: the Commission required staff to file a Prehearing Statement [R 7]; Staff espoused a "preliminary" pro-RIM position, saying "Staff's final positions will be based upon all the evidence and may differ from the preliminary positions". [R 1559-1576; 2559]; Mr. Palecki cross-examined witnesses and offered evidence regarding the cost-effectiveness issue; and staff's post-hearing positions were only contained in the staff recommendations.

The filing of a Prehearing Statement by a party creates a

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[3] Arguments that, by rule, staff "represents the public interest" and that staff is "neither in favor of nor against any particular party" are lacking. Obviously the Department of Community Affairs, and LEAF, have a different view of the public interest, and LEAF has not alleged a personal bias.

post-hearing obligation to file a position on any issue advocated therein. Fla. Admin. Code R. 25-22.038 (3) and 25-22.056 (3). Staff did not file a post-hearing statement even though it did not withdraw as a party and was not formally excused from the filing requirement.[4] The Commission's rules and orders do not prohibit staff from filing a post-hearing statement of issues and positions. [R 10-11; 2546]; Fla. Admin. Code R. 25-21.042, 25-22.0021, 25-22.056. Even if staff could file a recommendation in lieu of a post-hearing statement of issues and positions, it does not follow that the Commission "requested" the Division of Legal Services' lawyers to provide a recommendation along with the Division of Electric and Gas.[5] While the Commission could seek staff's recommendations, it was error to allow Mr. Palecki to advise the Commission's deliberations since he represented a party espousing positions. The Division of Appeals' counsel was present throughout the proceedings to advise the Commission.

D. A BALANCING OF THE INTERESTS INDICATES THAT REMAND IS PROPER.

The balancing of interests test shows that remand is proper. Hadley v. Dept. of Administration, 411 So.2d 184, 187 (Fla. 1991). The Commission's asserted interests are in carrying out FEECA's mandate and in preserving discretion. Commission's

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[4] Chairman Deason's opinions on staff's post-hearing role generally (without specific mention of counsel), did not waive the requirements of the rules and procedural orders.

[5] Indeed, "staff" can refer to other Commission employees who are employed to advise the Commission on regulatory matters. Fla. Admin. Code R. 25-21.031 and 25-21.022.

Brief, p. 27.

The Commission improperly suggests that LEAF's substantial interests affected by goal-setting are "somewhat tenuous". Commission's Brief, p. 26. In Re: Determination of Need for Cypress Energy Partners, Ltd. and Florida Power & Light, 92 F.P.S.C. 11-363, 366 (1992).

LEAF's specific interests are to avoid unneeded new power plants and to obtain lower energy costs to customers. LEAF's general interests are in fairly exercising the right to petition the government through intervention in Commission proceedings. Goal-setting involves multi-million dollar investment decisions and the potential avoidance of large amounts of new power plant capacity and resulting impacts to Floridians. [EX 3].

Having granted LEAF's standing as a party, the Commission was obliged to afford LEAF due process. LEAF participated fully and invested substantial resources into presenting its case. LEAF's positions were often coincident with the Department of Community Affairs, other public interest intervenors, and the overwhelming majority of customers and citizens who testified at the three customer service hearings. [Tr. Vol. 4; TRMia; TrTpa].

The Commission asserts that LEAF has no right to "go on quarreling with the Commission's staff ad infinitum". Commission's Brief, p. 24. In Occidental Chemical Co. v. Mayo, 351 So. 2d 336, 341-342 (note 9)(Fla. 1977), this court rejected the company's attack on the final order vis a vis staff's recommendation, and presumed that such recommendations "can be offset or challenged ...

by appropriate motion or petition either during or after the proceedings." In the case at bar however, the Commission refused to hear the merits of LEAF's challenges to staff's pro-RIM advocacy. During reconsideration, oral argument was denied and the Commission (and staff) sidestepped LEAF's detailed showing that the evidence cited by staff did not support the Commission's cost-effectiveness findings. LEAF's exceptions to the Commission's reconsideration findings (including the percentage of system findings) were stricken as an unauthorized filing.

Lastly, the Commission argues that remand would be expensive, time-consuming, would delay implementation of conservation, and would entail a burdensome internal reorganization.

The time and expense of additional proceedings pale in comparison to the "critical" need to implement those efficiency programs that avoid multi-million dollar power plant costs and resulting impacts to Floridians. As noted in Cherry, the Commission's Office of General Counsel is already bifurcated; no reorganization is required. As a matter of fairness, the Commission is obliged to allow some form of "exceptions" to staff's post-hearing advocacy of positions. § 120.57 (1)(b)4, Fla. Stat.

LEAF submits that the remand could be limited to requiring the Commission to enter corrected findings and an order based upon the record developed below, so long as staff's post-hearing role is restricted to comport with fundamental fairness, and all parties are given a meaningful opportunity to inform the Commission's decision.

II. THE COMMISSION'S PASS-FAIL POLICY SHOULD BE REMANDED.

A. SECTION 120.68 (12), FLORIDA STATUTES REQUIRES THE COURT TO REVIEW THE NEW POLICY.

Section 120.68 (12), Florida Statutes, requires the court to remand the orders if the Commission's exercise of discretion is beyond that delegated by law or is inconsistent with rules.

The Commission mistakenly argues that Section 120.535, Florida Statutes, has, in effect, repealed Section 120.68 (12), Florida Statutes, and that standing and ripeness bar judicial review of the policy. Commission's Brief, pp. 29-31.

LEAF was adversely affected by the orders and thus has standing to seek judicial review of the new policy. The Commission articulated its "proposed enforcement policy" in conjunction with the cost-effectiveness findings and conclusions used to support the choice of RIM-based goals. [R 5244]. The issue is ripe for review since the new policy was used to justify the choice of RIM-based goals.

B. THE COMMISSION'S EXERCISE OF DISCRETION IS INCONSISTENT WITH FEECA AND IMPLEMENTING RULES.

The Appellees stress that the Commission should have broad discretion to decide what are appropriate goals.[6] However, the term

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[6] Gulf Power Company defends the Commission's decision not to set 1995-1999 energy goals for the commercial/industrial sector as appropriate, claiming that no reasonably achievable savings were reported in its CEGRR. Gulf's Brief, pp.13-14. In fact, the demand goals which the Commission set require increased energy consumption, notwithstanding the "dash" energy goals. [EX 52, p. 29]. The company's CEGRR reported energy and demand savings for each year under the TRC test. [Id]. It is difficult to understand how demand goals which require increased energy use are

"appropriate" modifies the term "goals". Mandatory pass-fail "goals" are inconsistent with the plain meaning of "goals" and are incompatible with Chapter 366, Florida Statutes.

Likewise, Appellees have not shown the new pass-fail policy to be consistent with rules which clearly acknowledge that goals (previously "targets") may not be met and which only require a utility to justify deficiencies greater than 15%. Fla. Admin. Code R. 25-17.001 (6) and 25-17.0021 (5).

Judicial deference to an agency's construction of its rules is not absolute. There is no reasonable interpretation of the rules that supports the new pass-fail policy. Legal Environmental Assistance Foundation, Inc. v. Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994).

III. THERE IS NO COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS SUPPORTING RIM-BASED GOALS.

In its brief, the Commission attempts to reconcile the findings in the Reconsideration Order with the Commission's affirmative vote to approve staff's recommended finding that:

> Differences in MW and MWH savings are substantial in isolation, but negligible when viewed from a rates, generation expansion, and revenue requirements perspective.

Commission's Brief, p. 38.

Even if the court decides to consider the factual basis for this post hoc rationalization of the decision to set RIM-based goals, it must conclude that there is no competent, substantial

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"appropriate". § 366.82 (2), Fla. Stat.

evidence to support the findings.

This court must determine whether there is any competent, substantial evidence in the record to support the Commission's factual findings. § 120.68 (10), Fla. Stat. The Commission failed to provide the court with a single citation to the record to support its findings. The Commission has consistently failed to provide record citations for the facts underlying its decision, because no competent, substantial evidence supports those findings.

Appellees do not dispute LEAF's specific arguments that the percentage of system comparisons were flawed by use of inconsistent data and incorrect adjustments, and that the differences for Florida Power Corporation and Tampa Electric Company are over 200% of the historical energy savings through 1991. Instead, they rely upon the Commission's murky claim of differences in "rates, generation expansion, and revenue requirements" to justify the finding of "negligible" differences between RIM and TRC-based goals.

The Commission argues that it made "the essential policy choice" for RIM goals because the "minimal" benefits of TRC goals did not justify any rate impacts to non-participants. Commission's Brief, p. 37. There is no record foundation for the Commission's undocumented claim of "minimal" benefits, in either of the orders or the Commission's brief.

Gulf Power Company purports to provide record support for the Commission's findings, but the citations do not constitute

competent, substantial evidence.[7]

A. RATE IMPACTS WERE FOUND TO BE MINOR.

Is it crucial for the court to realize that the Commission weighed what it termed "slight" rate impacts against the "benefits of adopting a TRC goal". [R 5244]. Clearly, minor rate impacts would result from implementation of TRC-based goals, because the utilities would recover fixed costs over a smaller number of KWH sales. The Commission explicitly balanced those slight rate impacts with other "benefits" of TRC-based goals.

Thus, when it said that differences in MW and MWH savings were "negligible" from a "rates perspective", the Commission was illogically attempting to weigh rate impact differences as a "benefit" against rate impacts.

B. GENERATION EXPANSION DIFFERENCES ARE SUBSTANTIAL.

The court need only review Exhibit 3, Table 1 and Figure 7 in order to evaluate the factual support for the Commission's finding of "negligible" differences between generation expansion under TRC and RIM, since it is the only exhibit cited by any party. It shows that under RIM, Florida Power & Light Company would need two 417 MW units and one 760 MW unit through 2003, whereas under TRC no new capacity would be needed. [EX 3, Table 1]. A less reliable, extended forecast (1994-2010) exhibited the same ten-year reductions and showed that by 2010 TRC would avoid the 760 MW power

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[7] Gulf Power Company's brief simply reiterates the record citations contained in staff's recommendation (Tr. 797, 798, 1084, 1327, 1329; EX 3). None of those citations supports the findings.

plant required under RIM. [EX 3, Figure 7].

TRC-based goals would defer substantial new capacity.

C. TRC GOALS WOULD SUBSTANTIALLY REDUCE REVENUE REQUIREMENTS COMPARED TO RIM GOALS.

Gulf Power Company argues that "revenue requirements impacts" alone "could have" supported the decision to set RIM-based goals since TRC goals would "greatly increase utilities revenue requirements". Gulf's Brief, p.18, citing Tr. 891, 3573, 5609, 1244. None of the record citations support the absurd claim that TRC goals would increase overall revenue requirements[8]. By definition, measures that pass the TRC are cost-effective to the utility and its customers compared to supply options on a net present value of revenue requirements basis.[9] [EX 160, pp. 25-30; EX 168, p. 4].

Neither the Commission, nor Gulf Power Company, cites any

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[8] Tr 891 is United States Department of Energy witness Dr. Fox-Penner supporting evaluation of intergenerational equities using both TRC and RIM tests but supporting "investments in the future" under TRC. Tr 3753 is gas witness McIntyre confirming that RIM measures rate impacts. Tr 5609 is Gulf Power Company witness Kilgore's prefiled rebuttal testimony that the Commission has considered RIM results in past program dockets and that TRC should be rejected because it presumes that customers do not behave as perfectly rational consumers. Tr. 1244 is Gulf Power Company witness Kilgore's explanation of Exhibit 47 and the $19 difference between projected year 2003 bills under TRC and RIM for the residential class -- a number he admittedly did not understand the significance of and was unsure was a "meaningful number". Tr 1243.9-15.

[9] RIM does not evaluate revenue requirements. As Florida Power Corporation's witness Dr. Chamberlin wrote: A fallacy of the RIM test strategy is that it "fails" conservation programs that cost less to implement than the power they replace and that provide benefits to ratepayers as a whole. [EX 168, p. 1].

evidence bearing on overall revenue requirements comparisons for any utility's full RIM and TRC portfolios. Gulf Power Company does not dispute the only evidence which shows total projected revenue requirements -- Florida Power and Light Company Exhibit 3 -- which shows that TRC goals would result in a $550 Million net present value savings over RIM goals. LEAF's Brief, p. 43, citing EX 3, figure 8, p. 80.

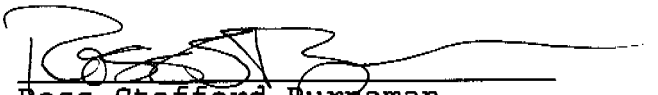
Although TRC goals would create minor rate impacts to non-participating customers, substantial benefits would result. For Florida Power & Light Company alone, TRC goals would avoid about 1600 MW of new capacity through 2003, and would save the utility and its customers over half a Billion dollars on a net present value of revenue requirements basis (1995-2022) over RIM goals.

Appellees have totally failed to direct the court to any competent, substantial evidence of record to support the findings or to show why LEAF's record citations are inappropriate. Although the record is immense, only a few exhibits and transcript citations have been cited to the court by Appellees, and LEAF asserts that they show that the record is devoid of any competent, substantial evidence to support the Commission's finding of negligible relative benefits between TRC and RIM portfolios.

CONCLUSION

Pursuant to Section 120.68, Florida Statutes, and for the reasons stated in this Brief and LEAF's Initial Brief, this Court should vacate the Commission's orders under review and should remand this matter to the Commission.

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., Lee L. Willis, Esq. and J. Jeffry Whalen, 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., Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida 32399-2100; Jeffrey Stone, Esq., Russell A. Badders, Esq. and Teresa E. Liles, 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, Deborah B. Evans, 12307 Old Country Road, Wellington, Florida 33414, Vicki Gordon Kaufman, Esq., McWhirter, Reeves, et al., 315 South Calhoun Street, Suite 716, Tallahassee, Florida 32301, and John McWhirter, Esq., Post Office Box 3350, Tampa, Florida 33601 by United States Mail this 16th day of June, 1995.

Ross Stafford Burnaman