

IN THE SUPREME COURT OF FLORIDA

Florida Industrial Power
Users Group,

Appellant

v.

Lila A. Jaber, et al,

Appellees

Case No. SC02-187
PSC Docket No. 010001-EI

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT
FLORIDA INDUSTRIAL POWER USERS GROUP

John W. McWhirter, Jr.
Florida Bar No. 53905
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
400 North Tampa Street, Suite
2450
Tampa, Florida 33602
(813) 224-0866

Vicki Gordon Kaufman
Florida Bar No. 286672
Timothy J. Perry
Florida Bar No. 0496391
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
117 South Gadsden
Tallahassee, Florida 32301
(850) 222-2525

Attorneys for the Florida
Industrial Power Users Group

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Introduction

This reply brief narrows the focus of the issues before the Court because Appellees have agreed with FIPUG's understanding of the legal principles that control this case.¹ FIPUG relies on its Initial Brief for the points not specifically addressed herein.

ARGUMENT

I. THE FPSC FAILED TO CARRY OUT ITS RESPONSIBILITY WHEN IT DECLINED TO INVESTIGATE THE TECO/HPP TRANSACTIONS.

The potential for abuse in dealings between a regulated utility and its unregulated affiliates has long been a concern of legislative and regulatory bodies. It is specifically addressed in the preamble to the Public Utility Holding Company Act. 15 USC §79a(b). The dangers of such dealings were articulately dissected and evaluated when FERC initially analyzed the arrangement between TECo and its affiliated unregulated merchant company. *TECo Power Services Corporation and Tampa Electric Company* 52 FERC P61, 191 (Aug. 1990). (FIPUG Appdx to Initial Brief at A-36). The evidence TECo offered below presented a red badge of impropriety, but the FPSC elected not to investigate. FIPUG believed this was because the FPSC had made a mistake of law and concluded that its hands were tied because the affiliate deal had been approved by an agency with greater authority. In its Answer Brief, however, the FPSC admits that it has full authority to act for the protection of consumers. But, it found no wrongdoing and washed its hands of the

¹FIPUG will continue to use the same abbreviations contained in its Initial Brief. In addition, references to FIPUG's Initial Brief are designated (FIPUG Initial Brief __). References to the FPSC's Answer brief are designated (FPSC Brief __). References to TECo's Answer Brief are designated (TECo Brief __).

affair. The problem is that there is no evidence to support its finding. The only evidence leads in the opposite direction, and the FPSC failed to investigate a patent indicia of abuse that cost consumers millions in excess charges.

The FPSC acknowledges that it has the statutory responsibility to set fair, just and reasonable rates and to ensure that a utility's ratepayers do not subsidize non-utility activities. (FPSC Brief at 5; TECo Brief at 23). Appellees also agree that only reasonable and prudent expenses may be recovered from ratepayers. (FPSC Brief at 5; TECo Brief at 23). Most importantly, Appellees admit that the FPSC is not barred from taking action to protect retail customers after FERC has approved a contract. (FPSC Brief at 6, 9; TECo Brief at 25). The FPSC says it can:

investigate TECO's affiliate transactions under the contract and ensure that costs are properly allocated between TECO's wholesale and retail jurisdictions.

(FPSC Brief at 9).

What it didn't say is that even if costs are properly allocated between wholesale and retail jurisdictions, it can further determine that the utility company rather than its customers be required to assume the risk of loss on bad deals with affiliates where the utility has contracted to sell low and buy high. If a regulated utility wants to contract to sell low and buy high, it should be required to live with the bargain, not pass the spoiled fruit on to captive customers.

While the FPSC recognized that it has the authority to, and should, protect consumers from overpriced wholesale transactions,

it failed to fulfill its duty in this instance by refusing to investigate the TECo/HPP transactions. Having conceded the controlling law that governs the case, the case should be remanded for further consideration.

The only evidence TECo presented regarding its dealings with HPP was:

- For the year 2002, TECo estimates that its average fuel cost will be \$33.01/Mwh this year. It then proposes that when it sells power to its affiliate, HPP, it will charge \$25.62/Mwh for fuel. When it buys power from HPP, it will pay \$46.19/Mwh for fuel. (FIPUG Appdx to Initial Brief at A-31-35);
- The "true up" to recover costs for 1998-2001 is \$88,672,735 in 2002 because previous fuel and purchased power estimates were incorrect. There is no explanation for these errors. (FIPUG Appdx to Initial Brief at A-31, line 33);
- TECo was given the opportunity to justify its admitted discriminatory fuel pricing technique in affiliate dealings. When asked whether any current studies have been conducted to determine if retail customers benefit from the affiliate transactions in question, TECo witnesses, Brown and Jordan, said "no." (Tr. 84-85, 266-67, 294).
- When asked to explain why the fuel cost differential was beneficial to retail customers, TECo witnesses said it was because the sales are "separated" and cost-based,

without further explanation. TECo failed to explain the nature of this "benefit." (Tr. 85)

The FPSC addressed the issue of fuel costs for separated sales in its Order and said:

First, capital and O&M costs for the generating plant necessary to make separated sales are allocated to wholesale customers. This reduces capital costs for retail customers when putting new plant in service for which total capacity is not immediately needed to serve retail load. A complete review of the effect of separated sales on retail customers must include the reduction in capital costs associated with serving separated wholesale customers.

Second, we agree with FIPUG's witnesses Collins and Pollock that fuel costs should be allocated to separated sales based on average system fuel cost. We also agree with FIPUG that average system fuel costs should include both generation and purchased power costs. Order No. PSC-97-0262-FOF-EI, issued March 11, 1997, in Docket No. 970001-EI, required that on a prospective basis, separated sales should be allocated average system fuel costs. The evidence indicates that TECO appears to be adhering to this policy. Only one of TECO's separated sales has fuel costs based on a specified unit. All other sales are based on average system fuel costs. TECO's only unit based sale was entered into in 1989, prior to issuance of Order No. PSC-97-0262-FOF-EI.

(FIPUG Appdx to Initial Brief at A-10).

The only separated sale that receives special treatment is the TECo/HPP transaction. The FPSC admits that it has the power to re-examine the consumer benefits from 13-year old contracts that it said might prove to be a problem in the future. (FIPUG Appdx to Initial Brief at A-72). Why didn't it do it?

The totality of the FPSC's comments on the TECo/HPP transaction is found in the following three paragraphs:

We find that the evidence in the record shows that TECO's decisions concerning its wholesale energy purchases from and sales to Hardee Power Partners were reasonable during the period January 1998 through December 2000. No evidence was presented that indicated

TECO is abusing the Hardee Power Partners contract or allocating the costs of this contract inappropriately. We do not believe that further study of this issue is warranted at this time.

The record indicates that TECO's contract with Hardee Power Partners is FERC-approved and cost-based. The original contract was appropriately compared to other available capacity and energy options. TECO's latest amendment to the contract compares favorably to the forwards energy market price, even if the capacity costs of the Hardee contract are included.

Further, TECO's separated sale of 145 megawatts to TECO Power Services from Hardee is TECO's only unit-based sale. This contract was signed in 1989 and expires on December 31, 2002. The record indicates that TECO has no plans to renegotiate this sale upon expiration of the contract. At the expiration of this contract, the capacity from TECO's Big Bend Unit 4 reserved for this contract will be available to serve TECO's retail ratepayers.

(FIPUG Appdx to Initial Brief at A-12).

Based on the face of the Order on appeal quoted above, FIPUG concluded that: the FPSC had shifted the burden of proof to FIPUG; that the FPSC believed it was bound by the 1990 FERC order; and that the FPSC thought it was appropriate for TECO to give its affiliate a special break on fuel costs for the four-year period under review, 1998-2002, because the commitment to sell to HPP will expire at the end of 2002.

However, the FPSC says in its Answer Brief that FIPUG misunderstood its Order and that the second two paragraphs quoted above were just dicta. (FPSC Brief at 6, 16). Based on these representations in the FPSC brief, the relevant portion of the Order is restated, with the dicta removed:

We find that the evidence in the record shows that TECO's decisions concerning its wholesale energy purchases from and sales to Hardee Power Partners were reasonable during the period January 1998 through December 2000. No evidence was presented that indicated

TECO is abusing the Hardee Power Partners contract or allocating the costs of this contract inappropriately. We do not believe that further study of this issue is warranted at this time.

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The single paragraph quoted above, which is the basis for the FPSC's decision, is not supported by competent substantial evidence. Further, the Order makes **no** mention of the evidence FIPUG presented, or the fact that the TECo witnesses on cross-examination admitted that they had made no effort to discover if there were any customer benefits to off set the discriminatory fuel pricing. The Order erroneously bases its ruling on the statement that no evidence was presented that TECo was abusing its contract with HPP. This is the wrong standard. The factual premise of the statement is wrong as well. TECo's evidence shows that it exchanges low-priced fuel with its affiliate in return for high-priced fuel with a detriment to the retail consumers. (FIPUG Initial Brief at 8-10).

The Court has ruled that it can only look to the evidence that the FPSC specifically referred to in its Order; it may not infer

what other evidence the FPSC did or did not consider when it made its decision. See, *Greyhound Lines, Inc. v. Mayo*, 207 So.2d 1, 5 (Fla. 1968). The Final Order fails to cite any specific facts in support of its decision. (FIPUG Initial Brief at 38-42). Therefore, the bases given in the Final Order are insufficient to sustain it.

According to controlling law, including that cited in the FPSC's brief, the Order must contain a "succinct and sufficient statement of the ultimate facts upon which the Commission relied. . . ." *Occidental Chemical Co. v. Mayo*, 351 So.2d 336, 341 (Fla. 1977).² The Order³ contains no such supporting facts.

That the Order does not meet the standards set out in *Occidental* or *Greyhound* is made clear by the fact that in its brief, the FPSC attempts to resort to "evidence in the record", which is not even mentioned in the Order on appeal as the bases for the FPSC's decision. (FPSC Brief at 13-14). Even those citations have little to do with the issue before the Court. For example, the FPSC places particular emphasis on Exhibits 4 and 5, as "support" for its decision. (FPSC Brief at 1, 13-14). However, these

² In affirming the FPSC's order in *Occidental*, the Court noted that the FPSC had "specifically dealt with all significant rate design changes." *Occidental*, 351 So.2d at 10. In the Order at issue here, the Commission did not deal with the significant issues that were before it.

³ The Commission has often stated, "Commission orders speak for themselves." See, *In re: Fuel and purchased power cost recovery clause and generating performance incentive factor*, Docket No. 010001-EI, Order No. PSC-01-2185-PCO-EI at 13 (Nov. 6, 2001); *In re: Petition for interim and permanent rate increase in Franklin County by St. George Island Utility Company, Ltd.*, Docket No. 940109-WU, Order No. PSC-95-1316-FOF-WU at 5 (Oct. 27, 1995); *In re: Proceedings to implement cogeneration rules*, Docket No. 830377-EU, Order No. 13846 at 4 (Nov. 13, 1984).

exhibits deal with "buy through" power. "Buy through" power is purchased pursuant to an agreement between the utility and a specific, individual customer. If anything these exhibits indicate that TECo has a need for power to serve its retail customers and would benefit from having BB-4 available to serve retail consumers 100% of the time. The Order fails to comply with the Court's mandate in *Occidental*.⁴

II. THE FPSC ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO FIPUG.

Both the FPSC and TECo deny that the burden of proof in this case was transferred to FIPUG. (FPSC Brief at 12; TECo Brief at 30). Nevertheless, the Order quoted above says nothing about TECo proving that its affiliate transactions are fair, just and reasonable. Rather, the Order says there was no proof that there was any abuse in these sweetheart transactions -- thus, requiring FIPUG to prove abuse. In its brief, the FPSC illustrates how the burden of proof was inappropriately shifted by stating that "[t]here is nothing in the record showing that *FIPUG* questioned TECO's compliance with the contract provision. . . ." (FPSC Brief at 12, emphasis added). In a similar vein, TECo emphasizes what FIPUG witnesses did or did not say (*see, i.e.*, TECo Brief at 30), rather than discussing its own proof.

There was no need for consumers to prove abuse; TECo's own exhibits did just that. (FIPUG Appdx to Initial Brief at A-31-35).

⁴*See also, Greyhound* 207 So.2d at 5 (Fla. 1968), in which the Court said: "In order that we might be informed regarding the factual basis on which the Commission relies it is essential that the order enlighten us with at least a succinct summarization of the [FPSC's] views on the factual issues."

These TECO exhibits show discriminatory pricing in sales and purchases between TECo and HPP. The burden is on TECo to explain why this discriminatory pricing scheme is fair in the period under review, 1998-2002.⁵ Surely it is not the responsibility of the customers the FPSC is supposed to protect to ferret out the evidence from TECo's alleged confidential trade secrets and prove that discriminatory pricing is abusive. An in-depth investigation is needed to reveal exactly what is going on in these related transactions.

TECo and the FPSC note in their briefs that the affiliate contracts at issue in this appeal held the promise of projected potential savings to retail ratepayers based on TECo's deferral of the need to build new power plants. (TECo Brief at 9; FPSC Brief at 8). If TECo had the need to build new power plants, why was it beneficial to retail customers for TECo to sell power from its most economical plant, BB-4, to its merchant affiliate for resale in the wholesale market and buy power from its merchant plant affiliate at a higher price to serve retail customers? That important fact was overlooked in the briefs and omitted from evidence in the case below.

The FERC order approving the wholesale contract (FIPUG Appdx to Initial Brief at A-53) found the affiliate contracts to be appropriate for FERC approval **only** if retail consumers had use of the plant 40% of the time, including during the summer and during

⁵TECo suggests that FIPUG wants wholesale customers to "subsidize" retail customers. (TECo Brief at 7). TECo is wrong. If TECo's transactions with its related company are not just, fair and reasonable, TECo shareholders must bear the excessive cost.

peak periods. *TECo Power Services Corp. and Tampa Electric Company*, 53 F.E.R.C. P. 61,202, 61, 811 (Nov. 19, 1990). (FIPUG Appdx to Initial Brief at A-61-63). TECo made no showing below that the ratepayers received the proper allocation of BB-4 during the 1998-2001 period when it paid \$88 million more than its estimate for high priced fuel and purchased power.

The FPSC and TECo complain that FIPUG did not raise retail ratepayers' entitlement to a portion of BB-4 below; therefore, the Court should not consider it on appeal. However, the availability of BB-4 for retail use is part and parcel of TECo's burden in this case, but TECo presented **no** evidence on this point.⁶ Despite TECo's protestations to the contrary, the burden does not rest with FIPUG to demonstrate the availability of this plant -- it rests squarely with TECo who seeks to change its rates based on these affiliate contracts. *See, Florida Power Corporation v. Cresse*, 413 So.2d 1187, 1190-91 (Fla. 1982).

III. APPELLEES' ATTEMPT TO ANALOGIZE FIPUG'S REQUEST FOR A THOROUGH INVESTIGATION OF AFFILIATE TRANSACTIONS TO A CONTINUANCE IS MISPLACED.

The FPSC and TECo argue that FIPUG's request that the FPSC investigate TECo's affiliate dealings is really a motion for continuance in disguise and is thus a subterfuge for delay. (FPSC

⁶ The FPSC states that the only evidence in the record is that "TECO is in compliance with [the BB-4 contract]." (FPSC Brief at 12). The FPSC relies on page 268 of the transcript to support this notion. However, TECo witness Brown's statement is not supported by any evidence that he investigated TECo's compliance with the terms of the agreement. Further, it is contrary to statements by TECo witnesses indicating that no study has been performed to confirm the benefits of the contracts. (Tr. 85, 108, 266-67). The benefits of the agreements cannot be established without first establishing that the proper allocations are maintained.

Brief at 4; TECO Brief at 15-16, 22). This contention is without merit and TECO's reliance on *Sandegren v. State ex rel. Sarasota County Public Hospital Board*, 397 So.2d 675 (Fla. 1981) is misplaced.

A continuance is a request to reschedule a hearing to a later date. FIPUG did not request that the hearing be continued (R. 377), but rather, given the seriousness of the overcharge issues and the fact that the transactions were not arms' length but between related companies, requested that the Commission open a separate docket to fully and thoroughly investigate TECO's affiliate transactions -- the Commission often opens "spin off" dockets to consider matters which cannot be adequately dealt with in the truncated fuel adjustment proceedings.⁷

Although this docket was opened in January, TECO did not file its evidence in the case until September 20, 2001.⁸ (Tr. 51, 90). It was not until that time that FIPUG was able to review the evidence of the party with the burden of proof to discern if the affiliate transactions at issue in this appeal were justified.⁹

⁷At the annual fuel hearing, a myriad of issues are considered for many utilities. Due the time constraints, including no briefing and a bench vote, the Commission cannot conduct an in-depth review of utility activities.

⁸Thus, TECO's comment that FIPUG "had nearly a full year in which to prepare its case", (TECO Brief at 23), is incorrect. TECO filed its direct testimony on September 20, 2001, and FIPUG was required to file its Intervenor testimony on October 12, 2001, giving FIPUG a very truncated time in which to "prepare its case" and further illustrating the way in which the burden of proof was inappropriately shifted. Further, FIPUG never "changed its position" as to TECO's conduct. (TECO Brief at 23).

⁹ This process is not unlike the complaint and answer in civil practice. The allegations of a complaint are deemed admitted unless they are denied. If they are denied, the plaintiff must prove them. See Rule 1.110, Florida Rules of Civil Procedure. TECO's contention that its dealings with its sister company were

The further investigation requested by FIPUG would merely cause the FPSC to fulfill its duty and require TECO to prove its contention that its transactions with its affiliate are fair, just and reasonable.

FIPUG's purpose in this case has never wavered -- it has insisted that the Commission perform its statutory duty to closely review TECO's arrangements with its affiliate. Because of their obvious potential for abuse, transactions between regulated utilities and their affiliates must bear the burden of Caesar's wife. They must be beyond reproach after careful scrutiny. They are not entitled to escape current examination because they may have looked good for the Seminole Cooperative when it needed more power in 1989.

FIPUG sought a detailed investigation into TECO's affiliate transactions, after TECO's own filing demonstrated that TECO was engaged in a "sell low/buy high" scheme with a related company to the detriment of consumers. The purpose of the requested investigation was to ensure the protection of consumers from excessive costs by delving fully into whether TECO's transactions with HPP are in consumers' best interests.

Contrary to Appellees' contention, FIPUG's request was not a last minute ploy or an "eleventh hour" motion for continuance. It was a timely and appropriate request that the Commission conduct a thorough investigation of the reasonableness of TECO's wholesale transactions that are harming retail customers.

reasonable were clearly at issue in the case, requiring TECO to prove up its position.

Finally, the FPSC argues that FIPUG's "remedy" was to seek reconsideration of the Final Order from the Commission. (FPSC Brief at 3, 17). Whether or not FIPUG chose to seek reconsideration has no relevance to the issue before the Court in this appeal. Reconsideration of an agency final order is not a prerequisite to appeal. See, Rules 9.110 and 9.190, Florida Rules of Appellate Procedure.

CONCLUSION

All parties agree that FIPUG correctly identified the controlling law in its Initial Brief. It is TECo, not the customers, that must justify the discriminatory pricing in its sweetheart contract with its merchant affiliate. TECo presented no evidence to justify the discriminatory pricing. The Order on appeal recited no finding of fact that the FPSC could rely upon to justify approving the discriminatory pricing. The case should be remanded for a full investigation.

Respectfully submitted,

John W. McWhirter
Florida Bar No. 53905
McWhirter, Reeves, McGlothlin,
Davidson Decker, Kaufman
Arnold & Steen, P.A.
400 North Tampa Street,
Suite 2450
Tampa, Florida 33602
(813) 224-0866 Telephone
(813) 221-1854 Telefax

Vicki Gordon Kaufman
Florida Bar No. 286672
Timothy J. Perry
Florida Bar No. 0496391
McWhirter, Reeves, McGlothlin,
Davidson Decker, Kaufman
Arnold & Steen, P.A.
117 South Gadsden
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

Attorneys for the Florida
Industrial Power Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant Florida Industrial Power Users Group has been furnished by (*)U.S. Mail this 4th day of June, 2002, to the following:

Christiana Moore
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Fl 32399-0850

Rob Vandiver
Office of the Public
Counsel
111 West Madison Street
Room 812
Tallahassee, Fl 32399

Charles Guyton
Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, Fl 32301

Lee L. Willis
James D. Beasley
Ausley & McMullen
227 S. Calhoun Street
Tallahassee, Fl 32302

Jeffrey A. Stone
Beggs & Lane
Post Office Box 12950
Pensacola, Fl 32576

James A. McGee
Post Office Box 14042
St. Petersburg, Fl 33733

Norman H. Horton
Messer, Caparello & Self
215 South Monroe Street
Suite 701
Tallahassee, Fl 32302

John T. English
Florida Public Utilities
Company
Post Office Box 3395
West Palm Beach, Fl 33402

Thomas A. Cloud
Gray, Harris & Robinson
301 East Pine Street
Suite 1400
Post Office Box 3068
Orlando, Fl 32802-3068

Vicki Gordon Kaufman

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Vicki Gordon Kaufman