IN THE SUPREME COURT OF FLORIDA

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CITIZENS OF THE STATE OF FLORIDA)
Appellants,)
v.) CASE NO. 75,074
MICHAEL MCK. WILSON, ETC., ET AL.)
Appellees.)

ON APPEAL OF ORDER NO. 22093 IN
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 881499-EI
PETITION OF TAMPA ELECTRIC COMPANY

ANSWER BRIEF OF APPELLEE, TAMPA ELECTRIC COMPANY

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SYMBOLS AND DESIGNATION OF PARTIES

The Florida Public Service Commission is referred to in this Brief as "the Commission."

Tampa Electric Company will be referred to as "Tampa Electric" or "the company."

Appellants, Citizens of the State of Florida, shall be referred to herein as "Public Counsel."

References to the Appendix to this Brief are designated "(A-___)."

STATEMENT OF THE CASE AND OF THE FACTS

Tampa Electric Company generally accepts the Statement of the Case and of the Facts set forth in Public Counsel's initial Brief except for the following:

Public Counsel's Statement of the Case and of the Facts fails to appropriately recognize the fact that Tampa Electric's proposal, as approved by the Commission, was designed to generate additional fuel savings to be shared by all of the company's customers. In addition, the base rate revenues to be generated by the Supplemental Service Rider would benefit all customers either as additional refunds or by deferring Tampa Electric Company's need for additional rate increases. This is demonstrated in the Appendix to Public Counsel's Brief at pages A-50 through A-52, which is a copy of the Commission's recent Order No. 22467 in Docket No. 891303-EI. This order approved an extension of the Supplemental

Service Rider for interruptible customers for an additional one-year period. That Order states, at page two, (Public Counsel's A-51):

> . . .While the bulk of the credit earned by increased KWH sales goes to the interruptible customers on the rider, the general body of ratepayers realized a net benefit of over $2 million due to increased base revenues during the first nine months of 1989. KWH sales increased by 238,693,928, generating $3,294,877 in base rate revenues while TECO paid out $1,216,224 in fuel credits.

SUMMARY OF ARGUMENT

Public Counsel's appeal should be dismissed because the order to which the appeal is directed does not constitute final agency action reviewable by the Court. Public Counsel should be required to pursue his claims before the Comm ssion in the hearing provided for in Order No. 22093.

The Tampa Electric customers which Public Counsel purports to represent have benefitted from the Supplemental Service Rider. Public Counsel should not be heard to challenge the Supplemental Service Rider credits which brought about these benefits and at the same time retain for his clients the benefits thus produced.

With respect to Public Counsel's procedural arguments, the Commission approved Tampa Electric's Supplemental Service Rider proposal subject to a single modification which the Commission required as a condition to approval. The action taken below was consistent with the Florida Administrative Procedure Act, as explained in this Court's decision in Florida Interconnect Telephone Company v. Florida Public Service Commission, infra. Public Counsel's approach fails to take into account the various alternatives open to the Commission in response to a tariff proposal submitted by a public utility under Section 366.06(3), Fla. Stat.

Public Counsel was offered, but apparently has rejected, an opportunity for a hearing in Order No. 22093. In addition, Public Counsel is pursuing a second opportunity to raise the matters addressed in this appeal in the Commission s semi-annual fuel adjustment hearing scheduled for February 21, 1990. Public Counsel has abundant opportunities to present his concerns. H s contentions that Tampa Electric's Supplemental Service Rider tariff does not comport with Order No. 20581 is without merit as is Public Counsel's suggestion that the Commission cannot instruct its Staff to ministerially approve a tariff which comports with specific requirements described by the Commission.

POINT I

PUBLIC COUNSEL'S APPEAL OF ORDER NO. 22093 SHOULD BE DISMISSED.

This is another of a recent series of appeals filed by the Office of the Public Counsel challenging orders by the Commission approving specific utility tariff proposals as a matter of final agency action. Tampa Electric submits that Public Counsel's appeal should be dismissed for two reasons. First of all, the order to which the appeal is directed, Order No. 22093 in FPSC Docket No. 881499-EI, is an interim order granting a hearing in response to Public Counsel's Protest and Request for Hearing. The interlocutory nature of this order makes it nonappealable. The order does not constitute final agency action reviewable by this Court. Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976).

Against the foregoing, Public Counsel contends that the opportunity for prospective relief in a complaint proceeding is inadequate. Tampa Electric disagrees and submits that the opportunity to seek prospective relief provides an equitable balance of the rights of customers whom Public Counsel purports to represent with the right of Tampa Electric to expect prompt challenges to any tariffs submitted to and approved by the Florida Public Service Commission. Had Public Counsel acted more promptly rather than waiting several months after this tariff was approved, Tampa Electric would have known of this challenge and would have been able to act to protect itself from the potential of having to make retroactive refunds. Public Counsel could have mitigated any threat to his clients by asking the Commission to assert jurisdiction over the challenged fuel adjustment charges pending the outcome of a hearing. It simply would be inequitable

to permit Public Counsel to challenge retroactively a tariff proposal approved by the Commission and relied upon by Tampa Electric for a number of months prior to the filing of the challenge.

Secondly, Tampa Electric submits that the Tampa Electric customers Public Counsel purports to represent are not adversely affected by the Supplemental Service Rider which Public Counsel has challenged. The Commission recently extended for one additional year the Supplemental Service Rider in its Order No. 22467 issued January 24, 1990 in FPSC Docket No. 891303-EI (In re: Petition of Tampa Electric Company for a One-Year Extension of its Supplemental Service Rider for Interruptible Service). That Order appears in the Appendix to Public Counsel's Brief at pages A-50 through A-52. On page two of the Order, the Commission recognized that Tampa Electric's general body of ratepayers realized a net benefit of over $2 million due to increased base rate revenues during the first nine months of 1989. The Order states that kilowatt hour sales increased by 238,693,928 KWH, generating approximately $3.3 million in additional base rate revenues, while Tampa Electric only paid approximately $1.2 million in fuel credits to the participating interruptible customers. Notwithstanding Public Counsel's contrary arguments, this $2 million over nine months (or $2.7 million annualized) will inure to the benefit of all ratepayers, either as additional refunds or by deferring the need for rate relief.

The Supplemental Service Rider was proposed and approved with a specific goal of increasing fuel savings for the benefit of all customers, not just interruptible customers. Public Counsel should not be heard to challenge the credits which brought about these increased sales and at the same time retain for his clients the benefits thus produced.

POINT II

PUBLIC COUNSEL'S PROCEDURAL ARGUMENTS ARE WITHOUT MERIT.

<u>As to Point I of Public Counsel's Initial Brief</u>

In Point I of his argument Public Counsel wrongly characterizes the action taken below by the Commission. Public Counsel begins by claiming that this is not a case of Commission inaction which allowed a tariff to go into effect automatically upon expiration of the 60-day suspension period provided for in Section 366.06(3), Fla. Stat. In actuality, the Commission acted prior to the expiration of the 60-day period at its December 20, 1988 Agenda Conference and accepted as appropriate Tampa Electric's proposal, subject to a single modification which Tampa Electric agreed to and which was approved ministerially by the Commission's Staff. The discussion by the Commissioners and their Staff at the Agenda Conference on December 20, 1988 makes it very clear that the Commission approved Tampa Electric's proposal with one modification:

> "CHAIRMAN NICHOLS: All right. Commissioners.
>
> "COMMISSIONER GUNTER: Madam Chairman, I would move to deny Staff with the modification and the assertion on the part of counsel for TECO that there be an 80-20 split and that we move forward with that tariff with that modification.
>
> "COMMISSIONER WILSON: I would second that, and so what I would assume would happen would be that if the company within the next few days files a tariff that reflects the 80-20 split it would then be approved.
>
> "MS. BROWNLESS: [Staff counsel] Yes, sir.
>
> "MS. KUMMER: [Staff Electric and Gas representative] We could approve that administratively.
>
> "COMMISSIONER WILSON: All right, I will second that motion.

"CHAIRMAN NICHOLS: All right, Mr. Willis, do you need to say something?

"MR. WILLIS: [Tampa Electric's counsel] I would say that the company will accept that condition, and that we will file it and will make the tariff effective January 1st.

"CHAIRMAN NICHOLS: All right. Any objection?

"COMMISSIONER GUNTER: No.

"CHAIRMAN NICHOLS: Item 7 is approved as amended."

(A copy of the court reporter's notes of this portion of the Commission's December 20, 1988 Agenda Conference appears in the Appendix to this brief.)

Tampa Electric subsequently complied with the above commitment by filing a tariff that contained the 80%/20% split of incremental savings. Accordingly, the tariff as modified was stamped "approved" by the Staff as a ministerial function in accordance with the Commission's vote.

The "denial" that Public Counsel speaks of was actually the Commission's approval, subject to the condition that the company modify its proposal to provide shared savings between the company's interruptible customers and the general body of ratepayers.

Public Counsel fails to recognize that the Commission can either ake no action within the 60-day suspension period or take action to approve implementation if it finds no reason to withhold its consent to the operation of a tariff. In Maule Industries v. Mayo, 342 So.2d 63 (Fla. 1976), the Court observed that the Commission is obligated not to suspend rates unless there is some reasonable basis to believe that the rates are unreasonable or discriminatory.

Public Counsel's approach fails to take into account the various alternatives open to the Commission in response to a tariff proposal submitted by a public utility under Section 366.06(3), Fla. Stat. The Commission may:

(1) Take no action, in which event the rates take effect at the end of the 60-day period;

(2) Notify the utility that the Commission is withholding consent for good cause, in which case the utility may not implement the tariff until the Commission gives its consent or until eight months have elapsed; or

(3) Withhold its consent but nevertheless authorize the utility to implement the tariff under bond and subject to refund. Citizens v. Mayo, 333 So.2d 1 (Fla. 1976)

In Florida Interconnect Telephone Company v. Florida Public Service Commission, supra, this Court rejected the contention that the Florida Administrative Procedure Act ("APA") requires a hearing before the expiration of the notice period contained in the telephone statutes, Chapter 364, Fla. Stat. The particular section involved, §364.05(4), Fla. Stat., is virtually identical to the file and suspend law for public utilities, §366.06(4), Fla. Stat. In that case Florida Interconnect, a competitor of Southern Bell, attempted to overturn a Commission order approving a reduction in Southern Bell's rates.

The Southern Bell tariff filing was processed under the pre-1980 version of the File and Suspend Law, which required the Commission to act within 30 days to suspend the tariff, if it found good cause to do so. Otherwise the tariff would automatically go into effect. Florida

Interconnect filed a complaint and a request for hearing, much the same as Public Counsel did in the instant case. The Commission approved the proposed tariff at its Agenda Conference and notified Florida Interconnect that its complaint would be set for hearing. Florida Interconnect, like Public Counsel in the instant case, ignored the complaint proceeding and took an appeal claiming that Section 120.57(1)(b), Fla. Stat. affords an opportunity for a hearing before implementation of the proposed tariff changes.

The Court rejected Florida Interconnect's appeal for several reasons. First, the Court observed that the order approving the tariff was not "final agency action" under Section 120.52(9), Fla. Stat., because a complaint proceeding was still pending. A complaint is pending before the Commission in the proceeding below, although Public Counsel apparently has rejected the opportunity to participate and has appealed the order offering a hearing in that proceeding. Because the complaint proceeding is still pending, the Court should conclude that Order No. 22093 is not final and, therefore, not reviewable.

Public Counsel has opposed the Commission's interpretation of this Court's decision in Florida Interconnect. Public Counsel's primary contention is that only interim rates, effective pending a final order after a proceeding is conducted according to the APA, are exempt under §120.72(3), Fla. Stat. However, in Florida Interconnect, as in the instant case, the tariff filing was made outside of a full rate proceeding and did not involve a request for an interim rate increase. In the Florida Interconnect case, the Commission failed to find good cause to suspend Southern Bell's proposed tariff. In the instant case, after Tampa

Electric agreed to modify its proposal to meet the Commission's concerns, the Commission was satisfied **it** lacked good cause to suspend the proposed tariff.

In the Florida Interconnect case the complaining party was given an opportunity, by way of a complaint proceeding, to challenge the reasonableness of Southern Bell's tariff changes. The same opportunity was offered to Public Counsel in Order No. 22093. Public Counsel rejected that opportunity and, instead, filed this appeal.

Public Counsel pursued a second opportunity to raise the matters he complains of in this appeal at the Commission's semi-annual fuel adjustment hearing which commenced on February 21, 1990. In that proceeding, Public Counsel raised the issue of whether Tampa Electric should be permitted to adjust its fuel revenues downward reflecting the discounts earned by Supplemental Service Rider customers. Public Counsel went on to claim that refunds should be ordered to the extent that fuel revenues for past periods have been reduced by the amount of the Supplemental Service Rider credits. The semi-annual hearings in the fuel adjustment docket (Docket No. 900001-EI) are when increases and decreases in the fuel adjustment charge are actually approved. In the February 1989 hearing in this docket Public Counsel did not raise an issue regarding Tampa Electric's treatment of the Supplemental Service Rider credits.

Thus, Public Counsel has refused one opportunity for a hearing for prospective relief and used the just concluded fuel adjustment hearings as another opportunity to address the same concerns raised in this appeal. Surely, Public Counsel should not be heard to contend that he has had no opportunity to air his concerns regarding the Supplemental Service Rider.

As to Point II of Public Counsel's Initial Brief

Public Counsel contends that he never received notice of the action taken by the Commission (Public Counsel's initial Brief at pages 15-16). In fact, Public Counsel did receive the order which defined the single specific change which needed to be made in order for Tampa Electric to have its Supplemental Service Rider approved ministerially by the Commission's Staff. If, by comparison, the Commission had entered an order stating that all future increases in utility operating and maintenance expense must be absorbed by the utility's shareholders, Public Counsel would probably contend that the time for the utility to challenge that ruling is keyed to the date that order is entered, and not at some later date when the utility is required to implement such order. Tampa Electric submits that Public Counsel has an obligation to act and act promptly in response to orders of the Commission. A belated protest and request for hearing filed months after approval of the Supplemental Service Rider should not be permitted to stand.

In Section C of Point II of his Brief, beginning on page 17, Public Counsel rejects the notion that an opportunity to file a complaint against Tampa Electric's Supplemental Service Rider is adequate. Public Counsel claims that it is his desire to avoid the burden of proof to establish that the service rider should not be permitted to remain in force any longer. However, that is the burden Public Counsel has voluntarily taken in the fuel adjustment docket (Docket No. 900001-EI). Public Counsel's opportunity for a hearing with full due process rights is not removed by the fact that Public Counsel would have to assume the burden of demonstrating the issues he raises. The only particular issues Public

Counsel mentions are at the bottom of page 18, where he claims that Tampa Electric should be required to prove that the Supplemental Service Rider is not discriminatory and it does not violate the Florida Energy Efficiency and Conservation Act ("FEECA"). In essence, Public Counsel is contending that a utility should have to prove the nonapplicability of any number of defenses to the utility's proposal which an interested party might raise. These defenses are more properly raised by any objecting party who wishes to raise them. Obviously, there are many arguable objections to any particular proposal before the Commission. It would be inequitable to require a utility to speculate as to which types of defenses might be raised by any affected person against a particular tariff proposal and demonstrate that each of them does not apply.

As to Point III of Public Counsel's Initial Brief

Point III is basically a restatement of Public Counsel's arguments in Point I to the effect that Section 120.72(3), Fla. Stat., only exempts interim rates. This is contrary to the Court's earlier interpretation in the Florida Interconnect decision.

As to Point IV of Public Counsel's Initial Brief

In Point IV Public Counsel contends that the approved tariff does not comport with Order No. 20581 because of an observation in the order that there might be a more equitable approach than that which was approved in the tariff. Apparently Public Counsel wants to be assured that interruptible customers will be charged more when marginal fuel cost exceeds average fuel cost.

The December 20, 1988 Agenda Conference discussion does not disclose any such requirement nor does Order No. 20581 impose such a requirement. The fact that any particular proposal might be improved upon does not signify that the proposal is not itself equitable and worthy of approval. Public Counsel has not alleged any harm to his clients resulting from this aspect of Order No. 20581. Marginal fuel costs did not exceed average fuel costs during the first year of the Supplemental Service Rider, so Public Counsel's argument is a moot point. In addition, the Commission did impose the requirement Public Counsel seeks when the Rider was approved for one additional year.

As to Point V of Public Counsel's Initial Brief

In this final point Public Counsel erroneously contends that the Commission made an unlawful delegation of authority to its Staff to approve Tampa Electric's tariff proposal if modified to meet the condition agreed to at the December 20, 1988 Agenda Conference. This is erroneous. If the Commission cannot instruct its Staff what it can or cannot administratively approve, in accordance with guidelines established by the Commission, then the wheels of public utility regulation are sure to grind to a halt. In virtually every major rate case, and in tariff approval cases like this one, the Commission determines what it is willing to accept, then instructs the Staff to approve tariffs later submitted to conform with the Commission's ruling. The same was done in the instant case. The Commission clearly indicated that it would approve Tampa Electric Company's proposal if modified to incorporate an 80%/20% split of fuel savings. This change was made pursuant to the commitment made by Tampa Electric at the

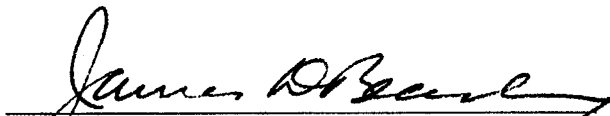
December 20, 1988 Agenda Conference. There was nothing left to do other than to verify the inclusion of the 80%/20% split in the tariff sheets and mark them "approved" as is routinely done by the Commission's Staff in every instance that tariffs are approved.

CONCLUSION

For the foregoing reasons, Tampa Electric submits that Public Counsel's appeal of Order No. 22093 should be dismissed or, in the alternative, that such Order should be affirmed in all respects.

DATED this 26th day of February, 1990.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail on this 26th day of February, 1990 to the following individuals:

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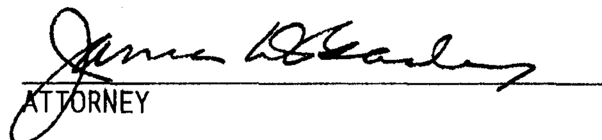

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