

IN THE SUPREME COURT OF FLORIDA

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CITIZENS OF THE STATE OF FLORIDA,)
)
 Appellants,)
)
 v.)
)
 MICHAEL MCK. WILSON, ETC., ET AL.,)
)
 Appellees.)

CASE NO. 76,000

ON APPEAL OF ORDER NO. 22812 IN
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 900002-EG
PETITION OF TAMPA ELECTRIC COMPANY

REPLY BRIEF OF APPELLANTS,
CITIZENS OF THE STATE OF FLORIDA

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I.

THE PSC PRESUMED THE VALIDITY OF ORDER NO. 20825 BUT GRANTED RELIEF INCONSISTENT WITH THAT ORDER.

To find merit in Appellees' arguments, the Court must first accept the viability of Order No. 20825, an order the PSC itself has characterized as "**surplusage.**" Secondly, the Court must agree that the differential between TECO's marginal and average fuel costs is relevant even though the PSC, in Order No. 20825, found to the contrary. Lastly, the Court must agree that the record supports TECO's claims of changed circumstances even though nothing has changed.

A. TECO'S PETITION WAS BASED ON AN INVALID ORDER.

The PSC breathes life into Order No. 20825, stating **that** "[t]he original tariff modification was approved by the Commission in Order No. 20825." [PSC, at 13 TECO alleges it was unsure whether Order No. 20825 was in effect and petitioned for an extension "**in an abundance of caution,**"¹ [TECO, at 5-6] However, neither the PSC nor TECO disputes the statement in the Citizens' initial brief, at 14, that TECO's filing which preceded Order No. 20825 "was not really a tariff anyway; it was not dated and only the first of two pages had been **submitted.**"

¹In its petition, TECO did not allude to any confusion, citing to Order No. 20825 as authority for its modified recovery procedures. [R-24] TECO's witness, Mr. Kordecki, cited to Order No. 20825 as authority for excluding interruptibles from conservation cost recovery. [T.129, 136] TECO's attorney said the tariff submitted pursuant to Order No. 20825 was the one "that's on file and approved." [T.242]

There is no dispute that Order No. 20825 determined TECO's substantial interests and was issued without a hearing. TECO's one-year extension cannot be valid if it is grounded on an invalid order. Moreover, if the validity of the order is presumed, the extension should have been denied because the grounds offered by TECO were inconsistent with the order.

B. THE ONLY FUEL SAVINGS RECOGNIZED AS A BENEFIT OF CONSERVATION IN ORDER NO. 20825 ARE FROM REDUCED PEAKING UNIT GENERATION.

In Order No. 20825, the PSC recognized only one type of fuel savings from conservation -- the reduction in total fuel cost from diminished peaking unit generation. Peakers are small units that can be brought on-line quickly to meet maximum demands on the system. They are relatively inexpensive but operate on expensive fuels. Conservation reduces the need to fire up the peaking units and reduces overall fuel costs accordingly. This was recognized in Order No. 20825 as follows:

The other benefit of conservation is potential fuel savings due to not burning oil or gas in the peaking capacity. . . . Without conservation and load management programs, TECO's next generation addition would have been a 1990 75 [megawatt] CT [combustion turbine]. Therefore, TECO's conservation programs have deferred this 1990 unit and avoided the associated higher fuel costs of dispatching the CT unit. From a planning perspective, since higher priced gas and oil would be burned in this unit, the avoidance of this unit does benefit the interruptible customer by keeping the average charge below what it would have been if the 1990 CT is built. The value of this benefit needs to be identified and credited as a conservation benefit which accrues to the interruptible customer.

Order No. 20825, at 2. [Citizens, at A-10].

In this regard, Order No. 20825 tracks Rule 25-17.001(3), Florida Administrative Code, which reads, in pertinent part:

Reducing weather sensitive peak demand benefits not only the individual customer who reduces his demand, but also all other customers on the system, both of whom realize the immediate benefits of reducing the fuel costs of the most expensive form of generation and the longer term benefits of deferring additional higher cost capacity.

Since all electric utilities burn more expensive fuel in their peaking units, fuel savings from reduced peaker usage was recognized as an industry-wide benefit. The PSC rejected TECO's utility-specific arguments with the following language:

TECO argues that the second FEECA goal, reducing the growth rate of electric consumption, is directed at lowering the difference between marginal fuel costs and average fuel cost. . . .TECO projects marginal fuel costs to be lower than average for the next five to six years. We do not agree with TECO's interpretation of the second FEECA goal. We believe a strict reading of this goal requires TECO to reduce the nominal quantities of fuels burned, not the price differential. However, whatever the interpretation of FEECA, this issue has no relevance to the relief requested here.

Order No. 20825, at 3. [Citizens, at A-11].

If the validity of Order No. 20825 is accepted as a starting point, TECO's petition was contrary to the order and the applicable rule. Furthermore, TECO failed to establish any changed circumstances that would justify a departure from Order No. 20825 on the record of the February 21, 1990, hearing.

C. THERE WERE NO CHANGED CIRCUMSTANCES TO JUSTIFY A DEPARTURE FROM PSC POLICY WHICH HAD BEEN APPLIED CONSISTENTLY SINCE 1981.

Mr. Kordecki's testimony failed to establish changed circumstances because the same facts have predominated since conservation programs were first approved for cost recovery from all

customers, firm and interruptible alike, beginning in 1980. At most, the record demonstrates that TECO is still not considering interruptible load in evaluating whether to build new power plants, and TECO is still incurring higher fuel costs because conservation continues to reduce purchases of spot coal as it did throughout the period 1980-1990.

There was really no way for TECO to argue changed-circumstances as it applied to generation planning decisions, so TECO focused on the fuel cost issue. In its answer brief, TECO repeatedly states that Mr. Kordecki testified to unique conditions expected in the fuel market.² The PSC also cites to purportedly atypical conditions expected during the one-year period at issue.³

²TECO's answer brief contains repeated references to the purportedly unique circumstances affecting the relationship between long-term contract prices and the spot coal market: "Tampa Electric's marginal cost of fuel currently is lower than the average cost of fuel -- a significant change from the relationship which existed in 1981. . . . That current and temporary relationship constitutes the 'changed circumstances' which Public Counsel refuses to recognize." [At page 11] "[T]he current situation is a temporary one in which the marginal cost of fuel is lower than average cost." [At page 12] "[A]t least for the one-year period addressed in Tampa Electric's Petition, a fuel cost penalty results from conservation." [At page 15]

³For instances in which the PSC refers to the purportedly unique nature of TECO's fuel prices, refer to the PSC's answer brief, at 8: "[I]nterruptible customers would not receive any fuel cost reduction benefits from conservation programs through March, 1991."; at 9: "The Commission's decision took into account the unique circumstances affecting interruptible customers and the particular conditions which prevail in the fuel market at this time."; at 12: "[F]or the period in question, 1990, Mr. Kordecki stated that the utility's model (Exhibit 27) showed that interruptible customers' fuel costs had actually gone up as a result of conservation efforts."; at 16: "TECO demonstrated to the Commission's satisfaction that, in these limited circumstances tied to a particular customer and a unique situation in the fuel market, (continued..)

The changed-circumstances argument was introduced in Mr. Kordecki's prefiled testimony. Mr. Kordecki said TECO had run a "what if" program which showed that, without conservation, fuel costs would be lower during the next year. [T.129] In his summary, Mr. Kordecki referred to "the particular situation at this time" which caused spot coal to be priced below long-term contract prices. [T.139]

Mr. Kordecki had also spoken at the January 31, 1989, agenda conference at which the PSC considered TECO's first petition to exempt interruptibles from conservation cost recovery. At that time, Mr. Kordecki said conservation had increased fuel costs ever since the PSC first instituted conservation pursuant to FEECA:

The calculation is -- had there not been any conservation programs for the period '80 through '88 with the assigned energy savings that, in fact, the fuel adjustment would have been lower had there been no conservation programs than had there been conservation programs.

[T.142].

Mr. Kordecki was questioned about that statement at the February 21, 1990, hearing. At first, he said he didn't remember making the statement. [T.142] He then said he was only talking about the period 1988-1989 when he made it. [T.142] He was then shown a transcript of the agenda conference. [T.142] Mr. Kordecki was not under oath at the agenda conference, but when asked under oath whether the statement was accurate at the time it was made,

³(...continued)
it would not be fair for interruptible customers to pay conservation **costs.**"; and at 18: "The Commission found fuel benefits for interruptible customers non-existent under current **conditions.**"

he answered: "Yes." [T.142] When asked whether the statement was still true at the time of the hearing, he answered: "Yes. That's what this petition is based on." [T.143]

The Court will not see any reference to these answers in Order No. 22812 or in the PSC's, TECO's or FIPUG's answer briefs. Nothing new has occurred on TECO's system to justify a departure from the Commission's long-standing policy. TECO should be treated in the same manner as other electric utilities. Approval of TECO's petition bestowed an unreasonable preference or advantage on interruptible customers, contrary to Section 366.03, Florida Statutes (1989), and TECO's argument based on that **statute.**⁴ [TECO, at 8]

II.

ORDER NO. 22812 FAILS TO ADDRESS COUNTERVAILING ARGUMENTS RAISED AGAINST TECO'S PETITION.

Contrary to Appellees' contentions, Order No. 22812 does not even mention Public Counsel's legal arguments against TECO's petition. [PSC, at 15, 18-19; TECO, at 7-9; FIPUG, at 12] Public Counsel's only briefing opportunity was the oral argument allowed at the hearing. Oral argument was held so that the PSC could make a bench decision without the delays attendant to written

⁴It is not unusual for a coal-fired electric utility to find the spot market price of coal below contract prices. For example, when Gulf Power Company, the State's other predominantly coal-fired utility, petitioned the PSC to approve a special rate for a large industrial customer, the PSC noted the fuel price differential in its order. In re: Request for Approval of Special Rate Agreement Between Gulf Power Company and Air Products and Chemicals, Inc., 88 F.P.S.C. 7:23 (1988). TECO is the only utility to be allowed to stop charging its industrial customers for conservation, however.

submittals. Since briefs were not filed, however, the PSC's attorney was completely unaware of cases and other authorities Public Counsel's attorney might cite. As a result, the staff attorney had to make a legal recommendation without the opportunity to even read cited cases. Consequently, at the conclusion of oral argument, the staff attorney made a three-sentence recommendation to find in TECO's favor without reference to any legal authorities at all:

[Ms. Rule] As to the legal issue, I agree with TECO and FIPUG. There is competent, substantial evidence in the record. I think you have enough to go on here to make your decision.

[T. 271].

Commissioners accepted the staff recommendation without giving consideration to cases, orders and statutes cited by Public Counsel.⁵ The result is an order that also ignores authorities cited by Public Counsel. The result is an order completely deficient under the Administrative Procedure Act, Chapter 120, Florida Statutes (1989). See Couch Construction Co. v. Department of Transportation, 361 So.2d 172, 175 (Fla. 1st DCA 1978) ("**The Administrative Proced-**

⁵When Public Counsel had first insisted on the right to file proposed findings of fact and conclusions of law, the staff attorney suggested that the parties instead be given an opportunity to argue orally "right now." [T.257] The offer was accepted. Since written arguments had not been submitted, the staff attorney had no idea what cases or orders Public Counsel might cite in support of his position. As a result, the applicability of those authorities to the issue at hand was ignored in the legal recommendation. A further consequence, of course, was that the Commissioners, none of whom are attorneys, did not receive an evaluation of Public Counsel's legal arguments before reaching their decision to accept their staff's recommendation.

ure Act requires that the [agency's] decision be by a final order that takes account of countervailing evidence and argument.")

III.

PSC APPROVAL OF TECO'S PETITION ALTERED EXISTING NONRULE POLICY.

Changes in nonrule policy occur when one utility is treated in a manner inconsistent with existing policy. The PSC, however, says any deviation was only temporary and did not affect the underlying policy. [PSC, at 18] TECO and FIPUG argue there was no change in nonrule policy because the PSC's decision only affected TECO. [TECO, at 7; FIPUG, at 13]] These positions conflict with McDonald v. Department of Banking & Finance, 346 So.2d 569 (Fla. 1st DCA 1977), and PSC appeals that preceded and came after McDonald. See City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620, 623 (Fla. 1983); City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505, 507 (Fla. 1983); Florida Cities Water Company v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla. 1980); Duval Utility Company v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980); State v. Hawkins, 364 So.2d 723, 727 (Fla. 1978); City of Plant City v. Mayo, 337 So.2d 966, 972-75 (Fla. 1976); and Florida Public Service Commission v. Indiantown Telephone System, Inc., 435 So.2d 892, 896 (Fla. 1st DCA 1983). The policy before Order No. 20825 was to have all electric utility customers support the costs of conservation programs through equal per-kilowatt-hour charges. There is no evidentiary basis for the departure in TECO's case.

IV.

FEECA IS RELEVANT BECAUSE TECO'S CONSERVATION PROGRAMS WERE APPROVED PURSUANT TO THAT STATUTE.

The Florida Energy Efficiency and Conservation Act, Sections 366.80, et seq., Florida Statutes (1989), according to TECO's position at hearing, actually harmed its interruptible customers by raising the fuel adjustment charge. The interpretation of FEECA cannot, under these circumstances, be irrelevant, as the PSC seems to maintain in its answer brief. [PSC, at 16]⁶

FEECA outlines a comprehensive program to reduce the growth rates in weather-sensitive peak demand and in kilowatt-hour electricity usage. Section 366.81(1), Florida Statutes (1989), states that "it is critical to utilize the most efficient and cost-effective energy conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens."

TECO acknowledges that conservation on its system has had the intended result; TECO has burned less fuel. TECO also acknowledges that, because its spot coal prices are less than average costs, all its customers have incurred a higher fuel adjustment charge because of conservation. Yet TECO asserted at hearing that its interruptible customers alone were actually harmed by satisfaction of FEECA goals.

In reality, none of TECO's customer classes can be heard to complain about the satisfaction of a legislative policy designed

⁶At page 9 of its answer brief, the PSC identified FEECA as the source of its decision: "The Commission's decision was a proper exercise of its broad authority under the Florida Energy Efficiency and Conservation Act and does not conflict with that Act."

to protect the general welfare of the state and its citizens. FEECA's policy objectives, Rule 25-17.001(3) and the PSC's earlier orders recognized that everyone benefits from conservation. There is no indication in FEECA that conservation should alternately be encouraged then discouraged as the marginal fuel costs of a single utility fluctuate around its average fuel costs. TECO and the PSC must have presumed the variation would have no effect on conservation cost recovery because TECO itself espoused equal cost recovery between 1981 and 1989. FEECA is relevant and it argues against the PSC's action in Order No. 22812.

TECO suggests that imposing conservation costs on interruptibles is inconsistent with traditional ratemaking theory which strives to allocate costs based on causation. [TECO, at 10] To begin with, there is no such thing as pure cost-of-service rates. Secondly, FEECA is antithetical to cost-of-service ratemaking.

Cost-of-service rates presume that costs should be recovered from the person imposing additional charges on the utility. Thus, residential ratepayers should support their fair share of a utility's transmission, secondary transmission and distribution systems because all these facilities are necessary to serve them. Large industrial customers who receive service at transmission voltage, however, should not have to pay for residential distribution lines.

Conservation programs are different. The costs of advertisements to encourage conservation and the rebate given to a single residential customer for installing more attic insulation cannot be imposed on that customer. Obviously, conservation requires

subsidies. Everyone should pay for the advertisements and the rebate because everyone is benefited by the one customer's acceptance of the offered incentive. Everyone should pay because of the legislative intent of FEECA and because of the PSC's consistent policy interpretations before Order No. 20825 issued without evidence or a hearing.

The PSC and TECO are correct that Section 366.81, Florida Statutes (1989), and Rule 25-17.001(2), Florida Administrative Code, require that conservation programs be cost-effective. [PSC, at 17; TECO, at 12] They fail to disclose, however, that cost-effectiveness has always been interpreted in terms of what is cost-effective to the utility's general body of ratepayers. The PSC has never excused a customer class from conservation cost recovery based on costs and benefits to that class.⁷

⁷In one of the early orders approving conservation programs under FEECA, Order No. 9670, dated November 26, 1980, the Commission stated, at page 3: "A cost/benefit analysis of conservation plans should be limited to the costs and benefits experienced by the utility **alone.**" In re: Approval of Plan of Certain Utilities to Meet the Energy Efficiency Goals Set by the Commission Under the Florida Energy Efficiency and Conservation Act, 80 F.P.S.C. 11:260, 262 (1980). Rule 25-17.008(6), Florida Administrative Code, states that "'cost effective' means that the cumulative present value of the benefits to a utility's ratepayers is greater than the cumulative present value of the cumulative costs of the program to a utility's ratepayers through the horizon year; or the cumulative present value of the benefits to all electric ratepayers in Florida is greater than the present value of the cumulative costs of the program to all electric ratepayers in Florida through the horizon year."

V.

THE PSC IS NO LONGER ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Section 350.12 (2)(m), Florida Statutes (1975), gave the PSC a statutory presumption of correctness in **all its actions**.⁸ State courts had to presume the validity of Commission actions, and the PSC came to rely upon this deference in making its decisions. [PSC, at 27, and TECO, at 5 (citing Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983)); FIPUG, at 9, 11 (citing Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982))].

Chapter 76-168, Section 3(2)(j), Laws of Florida, the Regulatory Reform Act of 1976, as amended by Chapter 77-457, Section 1, Laws of Florida, identified Section 350.12 as one of the regulatory statutes to be repealed on July 1, 1980, pursuant to "sunset" review, unless it was subsequently re-enacted. Instead, it was repealed by Chapter 81-170, Section 6, Laws of Florida.

The repeal of Section 350.12 (2) (m) removed a "shadow" unique to the PSC and applied the "clarified and comprehensive scheme for

⁸Section 350.12 (2) (m), Florida Statutes (1975), provided, in pertinent part: "All rules and regulations made and prescribed by the commissioners shall be made prima facie evidence. . . . Every rule regulation, schedule or order heretofore or hereafter made by the commissioners shall be deemed and held to be within their jurisdiction and their powers, and to be reasonable and just and such as ought to have been made in the premises and to have been properly made and arrived at in due form of procedure and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumptions shall be in favor of every action of the commissioners and all doubts as to their jurisdiction and powers shall be resolved in their favor"

judicial review" noted in Roberson v. Florida Parole & Probation Commission, 444 So.2d 917, 919 (Fla. 1983). Judicial statements of deference since 1980 relied on earlier cases without considering: (1) the repeal of Section 350.12 (2)(m); (2) standards of judicial review enunciated in Section 120.68, Florida Statutes (1989); or (3) the fact that, since 1980, the Court reviews PSC orders under its mandatory appellate jurisdiction pursuant to Article V, Section 3(b)(2), of the Florida Constitution, instead of by petition for writ of certiorari.⁹

VI.

"ADVISORY STAFF" UNDER SECTION 120.66 DOES NOT INCLUDE PSC STAFF MEMBERS "ENGAGED IN PROSECUTION OR ADVOCACY"

Paragraph 120.66 (1)(a), Florida Statutes (1989), prohibits ex parte communications by any "public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related **matter.**" Subsection 120.66(1) closes, however, with the statement that

Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceeding under s. 120.54.

⁹For example, Pan American World Airways, supra, 427 So.2d at 717-718, cites Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353, 1354 (Fla. 1980), to support a presumption of correctness. Surf Coast Tours cites Florida East Coast Ry. v. King, 158 So.2d 523, 525 (Fla. 1963), which in turn cites Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So.2d 601, 605 (Fla. 1959), which traces the presumption of correctness directly to Section 350.12(2)(m).

Apparently, there is some distinction between "advisory staff" and staff "engaged in prosecution or advocacy." If there were not, an absurd result obtains because then any staff member who did not testify in a case could engage in ex parte discussions with hearing officers or agency heads. Advisory staff must mean staff that is unbiased and available to recommend to the agency head how to rule because it neither testified nor actively advocated or prosecuted during the formation of the record.

There was no opportunity to raise this issue at the hearing because the PSC made a bench decision after oral argument. [PSC, at 22] Neither the legal staff nor the Commissioners responded in any way to Public Counsel's legal arguments on the merits of TECO's petition. It is unlikely that Commissioners would have responded to the impropriety of staff even making a recommendation. Public Counsel's objection to the scope of Mr. Dean's recommendation was met with the statement: "Go ahead, Mr. Dean." [T.273]

The staff was not performing an "essential function which this Court has recognized in South Florida Natural Gas Company v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988)." [PSC, at 25] The issue in that case was whether staff could conduct cross-examination to develop the record: it was not whether the staff which conducted cross-examination could make the recommendation for final disposition of the case:


We find that the commission is clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented [by a utility] in support of a [rate] increase.

534 So. 2d at 698.

The PSC apparently accepts the applicability of Section 120.66 to proceedings held by Commissioners, arguing that staff members who do not testify are excluded pursuant to the terms of the statute itself. [PSC, at 23] If the statute were not applicable, even staff members who testified could prepare the final recommendation. The statute is meaningless, however, unless there is some relevant distinction between prosecutorial and advisory staff. The PSC's view that prosecutorial staff becomes advisory staff as soon as the hearing concludes has no support in the statute or in fundamental concepts of fairness.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing REPLY BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA, has been furnished by U.S. Mail or by *hand-delivery to the following parties on this 10th day of September, 1990.

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