BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Tampa Electric Company for determination of need for proposed electrical power plant and related facilities.	)	DOCKET NO. 910883-EI ORDER NO. 25567 ISSUED: 1/6/92

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
BETTY EASLEY

ORDER DENYING RECONSIDERATION

BY THE COMMISSION:

On August 26, 1991, Tampa Electric Company (TECO) filed a notice of intent to file a petition for determination of need.

On September 6, 1991, TECO filed a petition to certify the need for a planned IGCC unit, along with a need study and the testimony of six witnesses. On October 8, 1991, FICA filed a Motion for Extension of Time and Motion Regarding Discovery asserting that the period to file prepared testimony in response to TECO's petition, and testimony was too short. On October 16 and 23, 1991, Commissioner Wilson as prehearing officer issued Order Nos. 25224 and 25224-A granting a partial extension of time to file testimony and denying the motion regarding discovery. The orders granted FICA an additional twenty days, from October 11, 1991 until October 31, 1991, in which to file its testimony. On October 28, 1991, FICA filed its Motion for Reconsideration of Order Nos. 25224 and 25224-A by Full Panel.

An initial issue which arises whenever a panel is asked to review an order of the prehearing officer is what standard of review should be applied. While it has been argued that a "de novo" standard should be applied to commission review of the prehearing officer's order, we believe that the "de novo" standard is inappropriate because it impinges on the prehearing officer's authority to resolve discovery disputes and handle procedural matters. The appropriate standard to be applied is the legal standard for a motion for reconsideration. The Company must establish that the prehearing officer made an error in fact or law in his decision that requires that the full commission reconsider

his decision. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintence, 394 So.2d 161 (Fla. 1st DCA 1981).

In this docket FICA's motion fails under either the "de novo" or reconsideration standards. In its Motion for Extension of Time, FICA requested an extension of time until November 8, 1991, in which to file its testimony. Commissioner Wilson granted FICA most of the time it requested, allowing FICA until October 31, 1991 to file its testimony. In so doing the prehearing officer had to move the time for filing rebuttal testimony to November 20, 1991, which is the date of the prehearing conference in this case. Commissioner Wilson left the date for completion of discovery at November 22, 1991, two days after the prehearing conference.

Thus, the prehearing officer allowed FICA an additional 20 days over the original 35 days scheduled for intervenor testimony, for a total of 55 days. FICA was granted 20 of the 28 days it requested.

In its Motion for Reconsideration FICA raises the same fairness and due process arguments previously made, but with constitutional and statutory due process provisions specifically cited. It is not different from the argument previously raised in FICA's Motion for Extension of Time.

With regard to the merits of FICA's "due process" arguments we would point out that in most courts, parties are routinely required to respond to direct testimony moments after it is given. The luxury of "prefiled" testimony is virtually unheard of in a courtroom scenarios. FICA is unable to cite a single case where 55 days to file responsive testimony is deemed to be a due process violation under any constitutional or statutory provision. As stated in Order No. 25224:

> The Motions for Extension of Time to File Testimony are granted to the extent that the extension does not require changes to the schedule of major events in this case. The Motion Regarding Discovery is denied in toto. FICA and Ark have not shown any credible extraordinary circumstances that would entitle them under any statute, rule, or constitutional principle to an extension of time that would delay the scheduled hearing and prehearing in this case. Nor has FICA demonstrated that it is entitled to an expansion of the established discovery process

in this case, while at the same time it is entitled to a decrease in the time allowed to respond to that expanded discovery. (Order No. 25224 at p. 1)

There is no due process violation here.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Motion of the Florida Industrial Cogeneration Association for Reconsideration of Order Nos. 25224 and 25224-A by a Full Panel, filed in this docket on October 28, 1991, is hereby denied.

By ORDER of the Florida Public Service Commission, this 6th day of JANUARY, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of

Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.