BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Tampa Electric Company for modification of its conservation cost recovery methodology.	) DOCKET NO. 881416-EG) ORDER NO. 21448) ISSUED: 6-26-89	

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
JOHN T. HERNDON

ORDER DENYING PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Tampa Electric Company (TECO) on October 28, 1988, petitioned the Public Service Commission to release its interruptible and standby interruptible customers from their obligation to pay for conservation cost recovery. As is our customary procedure, we immediately provided Public Counsel with a copy of the petition.

The matter was placed on the agenda scheduled for January 31, 1989. We provided Public Counsel with a copy of the agenda which included a summary of the issue to be decided. A notice announcing the specific time, date, and place of the agenda conference was published in the Florida Administrative Weekly ten (10) days in advance.

On January 11, 1989, Staff issued its recommendation summary, which recommended that interruptible customers be excluded from the application of the energy conservation cost recovery cause because these customers received no benefits from the conservation programs, the objectives of which are to reduce the growth rates of peak energy usage. We provided Public Counsel with a copy of the Staff's recommendation.

On January 31, 1989, at our regularly scheduled agenda conference, we voted to approve TECO's proposed modification of its conservation cost recovery methodology. Public Counsel elected not to provide input at the agenda conference although TECO and the Commission Staff participated in the discussion, which preceded the vote.

Order No. 20825, issued March 1, 1989, as a final order granted TECO's petition and stated:

> After a thorough review of the record, we agree with our Staff and approve the removal of TECO's interruptible customers from the conservation cost recovery clause for the period April 1, 1989 to March 31, 1990.

Our vote on this docket was a factor in several other dockets. On February 10, 1989, Commissioner Herndon, as Prehearing Officer, conducted a prehearing conference in consolidated Dockets Nos. 890001-EI, 890002-EG and 890003-GU.

During the course of the prehearing conference, TECO, through counsel, advised the participants that TECO would be resubmitting its conservation factor in light of the Commission's vote in the instant docket (881416-EG). Public Counsel actively participated in this prehearing conference.

The hearing concerning conservation cost recovery was conducted on February 22, 1989. During that hearing, Staff indicated that it was satisfied with TECO's resubmission of its conservation cost recovery factor to reflect the Commission's vote in the instant docket (No. 881416-EG). This item was stipulated to without objection by any party, including Public Counsel. In fact, the same Assistant Public Counsel who has filed the Motion for Reconsideration in the instant docket, concedes that he participated in the conservation cost recovery proceeding and entered into the stipulation, although he characterizes the stipulation as being as to "numbers only".

On March 16, 1989, Public Counsel filed its Motion for Reconsideration of Order No. 20850. On June 6, 1989, oral argument on the motion was had at the agenda conference and all parties were afforded the opportunity to be heard.

Public Counsel's position is that this is a rate case which will burden firm customers with an additional $2,000,000 dollars in conservation cost, and that our procedure in granting the relief requested by TECO was fatally defective. Public Counsel contends that we would have to conduct a hearing before final action, or use our Proposed Agency Action procedure.

Public Counsel bases its argument upon language in the Administrative Procedures Act requiring a hearing before the entry of a final order affecting the substantial interest of a party. See Sections 120.52 and 120.57, Florida Statutes. Public Counsel, however, misinterprets the act and its applicability. Section 120.57 is not controlling on the issue presented and does not entitle Public Counsel to a hearing.

To the contrary, we precisely followed the applicable law. Section 120.72(3), Florida Statutes, clearly provides:

> Notwithstanding any provision of this Chapter, all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provisions of Chapter 364 or the procedures for interim rates contained in Chapter 74-195, Laws of Florida, or as otherwise provided by law.

Public Counsel's argument is not well taken because the "order" of which Public Counsel complains is in a very real sense surplusage. The "file-and-suspend" law, Section 366.06, Florida Statutes, enacted as Chapter 74.195, Laws of Florida, provides that if the Commission does not object to the proposed tariff changes within sixty (60) days, the proposed rates automatically go into effect:

> (3) Pending a final order by the Commission in any rate proceeding under this Section, the Commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period of longer than 8 months from the date of filing the new schedules. (Emphasis added). Section 366.06(3), Florida Statutes (1987).

Here, as in Florida Interconnect v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977), adequacy of notice is not a factor because the action taken by the Commission would have occurred had no hearing whatsoever been held, since the Commission's inaction is equivalent to its consent. Citizens v. Mayo, 333 So.2d 1 (Fla. 1976). There the court stated "we agree with Gulf Power than an inflexible hearing requirement was not intended inasmuch as the Commission can obviate any hearing requirement simply by failing to act for 30 days." Furthermore, in Footnote 9 the court stated:

> Obviously, the question of due process does not arise if the Commission does not suspend the new rates within 30 days. In these cases, the Legislature has directed that proposed rates become effective on the thirty-first day.
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> 333 So.2d at 5.

Although the thirty (30) day provision of Section 366.06 has been changed to sixty (60) days, the operation of the statute remains the same. As the court pointed out in Citizens v. Mayo, supra, the legislative purpose behind the file and suspend statute was to reduce "regulatory lag" inherent in full rate proceedings. The legislature did not intend a full rate hearing before all new rate schedules would become effective. Had it intended that result, there could have been no need for the legislature to enact the file and suspend statute at all.

This is not to say that Public Counsel is left without recourse by the file and suspend statute. Public Counsel has every opportunity to file its own complaint attacking application of the tariff. Florida Interconnect Telephone Company v. Florida Public Service Commission, supra. Public Counsel, however, is in no position to complain about the tariff having gone into effect on an interim basis, as there is no mechanism by which customers can ever recover interim charges where proposed rates go into effect under the sixty (60) day provision of the file and suspend law. Public Counsel may file a complaint attacking the prospective application of the tariff, and if it does so, we will be required to tender Public Counsel the opportunity for a hearing conducted in a fashion fully compatible with the requirements of the law. Florida Interconnect Telephone Company v. Florida Public Service Commission, supra.

Although the procedures followed in this docket were in compliance with the applicable law, it would nonetheless appear that Public Counsel has waived any objection it may have had to any procedural deficiency. During the agenda conference, Public Counsel had ample opportunity to voice any objections to any procedural deficiencies and failed to do so. See: Citizens v. Public Service Commission, 435 So.2d, 784 (Fla. 1983) where the Florida Supreme Court held that Public Counsel's failure to identify his issues, either prior to or at the prehearing conference, constituted a waiver. Likewise, in the instant case, the agenda conference was held to provide counsel an opportunity to raise issues of concern. Compare: Citizens v. Public Service Commission, 383 So.2d 901 (Fla. 1980), where no parties were allowed to participate at the agenda conference at which the Commission's decision was made.

Public Counsel, in the instant case, received copies of the initial petition, copies of the Staff recommendation, a copy of the Commission conference agenda as well as notice announcing the specific time, date and place of the agenda conference published in the Florida Administrative Weekly. Public Counsel was given full opportunity to participate in the agenda conference, and failed to object to any of the alleged procedural deficiencies now set forth in its motion. Where one has actual notice of proceedings, but makes no appearance or provides no input, it waives its rights and thus is estopped from challenging any irregularity in the proceeding. South Florida Regional Planning Counsel v. State, 372 So.2d, 159 (Fla. 3 DCA 1979); Burger King Corporation v. Metropolitan Dade County, 349 So.2d 210 (Fla. 3 DCA 1977).

The issue of waiver may have been a closer one but for later developments involving participation of Public Counsel. Here, where our vote in the instant docket was relied upon in other dockets, and where our order formed the basis for a stipulated change in TECO's conservation cost recovery factor, which was agreed to by Public Counsel, the waiver becomes clear. An irregularity in proceedings before the court may be waived by subsequent proceedings of parties, who, knowing the irregularity, act without making objection or exception. Scarso v. Scarso, 488 So.2d, 549 (Fla. 4 DCA 1986); Hart v. Smith, 17 Fla. 767 (Fla. 1880); and See South Florida Regional Planning Counsel v. State, Supra, wherein the court held that failure to intervene in a suit affecting the validity of a government action acts as a waiver and precludes further review of the act of the government. In the instant case, the Assistant Public Counsel, who filed this motion was the same attorney who acquiesced in TECO's stipulation, which reflected our vote in this docket. The waiver is clear.

Therefore, it is

ORDERED by the Florida Public Service Commission that Public Counsel's March 16, 1989 Motion for Reconsideration of Order No. 20825, is hereby denied.

By ORDER of the Florida Public Service Commission, this 26th day of JUNE, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAP

NOTICE OF FURTHER PROCEEDINGS OR 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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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.