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January 16, 1997

Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850


Re: Docket No. 960258-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the Posthearing Comments of the Citizens of the State of Florida. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

  
John Roger Howe  
Deputy Public Counsel

JRH:bsr

Enclosures

APP-1  
AFA-1  
RRR-1  
WAW  
LIN-5  
SEC-1

DOCUMENT NUMBER-DATE  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition to Adopt Rules )  
on Margin Reserve and Imputa- )  
tion of Contributions-In-Aid-Of )  
Construction on Margin Reserve )  
Calculation, by Florida Water- )  
works Association )  
\_\_\_\_\_ )

Docket No. 960258-WS  
Filed: January 16, 1997

POSTHEARING COMMENTS OF THE CITIZENS OF THE STATE OF FLORIDA

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Order No. P.C.-96-1153-PCO-WS, file their posthearing comments on the Commission's proposed Rule 25-30.431, which should be adopted, as proposed, for the following reasons:

1. The purpose of rulemaking is to narrow the gap between what the agency knows about its policies and what the public knows. Rules inform the public of an agency's policies of general applicability. Research on the Commission's nonrule policy on margin reserve would inform an interested person that, in those cases in which it is included in rate base, margin reserve is allowed based on an assumed 18 months of growth and CIAC is always imputed on this allowance. Research would also disclose that the refinement over time and consistent application of this policy means it has matured into a statement of general applicability which would be expected to govern future cases. In other words, the policy has become a "rule" as that term is defined in the Administrative Procedure Act. The public has a right to

expect that, consistent with the APA, the Commission will adopt such a mature policy as a rule in an expeditious manner.

2. Public Counsel's opposition to margin reserve is well known. This office does not believe that margin reserve is "used and useful" in serving current customers as those terms are used in Section 367.081(2)(a), Florida Statutes (1995). If, however, the Commission is going to allow the inclusion of margin reserve in rate base, then Public Counsel has argued that, in fairness, the CIAC which will be provided by future customers should be imputed to mitigate the effects of margin reserve. The Commission has consistently accepted this argument and imputed CIAC in all recent cases in which it has allowed a margin reserve.

3. There can be little doubt that the Commission's policy on margin reserve and the imputation of CIAC is (and has been for some time) a "rule" as defined in Section 120.52(15), Florida Statutes (Supp. 1996), because it is a "statement of general applicability that implements, interprets, or prescribes law or policy." Section 120.54(1)(a) requires that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." Therefore, the rule ultimately adopted in this proceeding should codify existing policy which has become a rule, i.e., a statement of general applicability, through repeated application under various factual circumstances.

4. Since the Commission has not granted margin reserve in all cases, the existing policy constrains the Commission's

discretion only in those cases in which factual circumstances justify margin reserve. The outcome of this proceeding should, therefore, be a rule consistent with this established policy. Alternatives offered by the industry which would make the allowance of margin reserve virtually automatic based upon a five-year period or any other terms inconsistent with current policy should be rejected as outside the scope of this proceeding.

5. Section 120.56(4) incorporates a new procedure for "challenging agency statements defined as rules." This new statutory scheme suggests that the Commission could be compelled to adopt its existing policy as a rule if it had not already proposed to do so. Paragraph (a) allows any substantially affected person to seek an administrative determination that the Commission's statement on margin reserve violates Section 120.54(1)(a). It should not be difficult to demonstrate that the current margin reserve policy is a statement of general applicability or that the Commission "has not adopted the statement by the rulemaking procedure provided by s. 120.54."

6. Paragraph (d) provides that, upon a finding by an administrative law judge that the statement violates Section 120.54(1)(a) (i.e., that it met the definition of a rule but had never been codified through rulemaking procedures), "the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." Paragraph (e), however, provides that "if an agency

publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e) [which provides for de novo review by an ALJ when agency action is based on an unadopted rule and delineates the evidence in support of the existing policy which the agency must demonstrate].” Alternatives proposed by the industry do not match the existing “statement” and cannot reasonably be construed as “a substantially similar statement.”

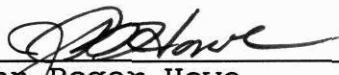
7. If the Commission does not believe it is prepared to codify the policy it has refined over many years, it is certainly not ready to codify the new policy statements promulgated by the industry. The distinction, of course, is that the APA requires the adoption of established policies through rulemaking. Industry proposals, if adopted, would amount to an abrupt discontinuance of established policy, the antithesis of the orderly progression from vague standards to definite standards to broad principles to rules contemplated by the APA. McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977). See City of Tallahassee v. Florida Public Service Commission, 433 So. 2d 505, 507 (Fla. 1983) (“To the extent the P.C. solidifies its position on policy in a particular area, we believe such established policy should be codified by rule.”) Through years of case-by-case adjudication, the Commission has informed itself of the

manner in which it wishes to consistently constrain its exercise of discretion on the issue of margin reserve and the imputation of CIAC. It is now time to inform the public.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to adopt its proposed Rule 25-30.431 without change.

Respectfully submitted,

JACK SHREVE  
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**CERTIFICATE OF SERVICE  
DOCKET NO. 960258-WS**

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or \*hand-delivery to the following party representatives on this 16th day of January, 1997.

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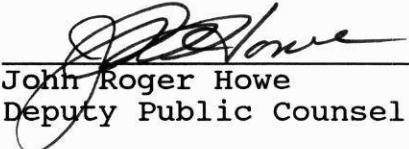
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