



Public Service Commission

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RECORDS AND REPORTING

DATE: MARCH 18, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JAYE) *RUE*
DIVISION OF ELECTRIC AND GAS (BOHRMANN) *SK RLT Tb*

RE: DOCKET NO. 980693-EI - PETITION BY TAMPA ELECTRIC COMPANY FOR APPROVAL OF COST RECOVERY FOR A NEW ENVIRONMENTAL PROGRAM, THE BIG BEND UNITS 1 & 2 FLUE GAS DESULFURIZATION SYSTEM.

AGENDA: 3/30/99 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980693R.RCM

CASE BACKGROUND

By motions for reconsideration filed January 26, 1999, the Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) urge the Commission to reconsider Order No. PSC-99-0075-FOF-EI (Order No. 99-0075), issued January 11, 1999. In its Motion for Reconsideration, OPC asserted that the Order reflects mistakes of law and fact. FIPUG joined in OPC's Motion for Reconsideration. On February 8, 1999, Tampa Electric Company (TECO) filed a Response to Office of Public Counsel's Motion for Reconsideration and the Joinder Therein by the Florida Industrial Power Users Group, urging the Commission to uphold its original Order.

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FPSC-RECORDS/REPORTING

DOCKET NO. 980693-EI
DATE: March 18, 1999

DISCUSSION OF ISSUES

ISSUE 1: Should FIPUG and OPC's motions for reconsideration be granted?

RECOMMENDATION: No. FIPUG and OPC's motions for reconsideration should not be granted. These motions raise two issues already disposed of in this proceeding, the choice of statute and the sufficiency of the evidence. OPC and FIPUG's argument that TECO must proceed under Section 366.825, Florida Statutes, rather than Section 366.8255, Florida Statutes, has been considered and rejected by the Commission. OPC and FIPUG raised this argument in their motions to dismiss, which were denied by Order No. PSC-98-1260-PCO-EI, issued September 22, 1998. The Commission's decision concerning fuel savings is supported by competent substantial evidence. Therefore, the motions for reconsideration should be denied. [Jaye, Bohrmann]

STAFF ANALYSIS: Staff notes that FIPUG's Motion for Reconsideration merely joins in OPC's without further comment, therefore, staff will address the arguments contained in OPC's Motion for Reconsideration because it speaks for both parties.

I. STANDARD FOR MOTIONS FOR RECONSIDERATION

It is well settled that an agency may reconsider its final Order if the Order is found to have been based on mistake or inadvertence. People's Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966). The purpose of a motion for reconsideration is to bring to the attention of the agency some matter that it overlooked or failed to consider when it rendered its Order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the Order is not a basis for rearguing the case. Id. Nor is reweighing the evidence a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958). In this instance, staff believes that neither OPC nor FIPUG have shown that Order No. PSC-99-0075-FOF-EI, issued January 11, 1999, was based upon mistake of law or fact or upon inadvertence.

II. OPC AND FIPUG'S ARGUMENTS

First, OPC and FIPUG argue that the Commission made a mistake of fact and law in its Order which should lead to reconsideration. OPC and FIPUG assert that the Commission has to render Section

DOCKET NO. 980693-EI
DATE: March 18, 1999

366.8255, Florida Statutes, subordinate to Section 366.825, Florida Statutes, because the two statutes, in OPC and FIPUG's opinion, address the same subject matter. OPC and FIPUG argue that Section 366.8255, Florida Statutes, is more general than Section 366.825, Florida Statutes, and, therefore, must be controlled by Section 366.825, Florida Statutes. Christo v. State Dept. of Banking & Finance, 649 So.2d 318, 321 (Fla. 1st DCA 1995).

Second, OPC and FIPUG argue that the Commission made a mistake of fact in relying upon fuel savings information provided by TECO. OPC and FIPUG assert that information is not in the record concerning whether TECO has proven that it will realize fuel savings from burning lower cost high sulfur coal and petroleum coke which will offset the cost of the flue gas desulfurization system (FGD) and result in net savings to TECO customers.

III. TECO'S RESPONSE TO OPC AND FIPUG'S ARGUMENTS

TECO responded to OPC and FIPUG's first argument by noting that OPC and FIPUG's argument that TECO must proceed under Section 366.825, Florida Statutes, rather than under Section 366.8255, Florida Statutes, was already made before the Commission in the motions to dismiss. TECO asserts that Section 366.8255, Florida Statutes, authorizes utilities to come before the Commission for prior approval of singular environmental compliance activities. Comprehensive environmental compliance plans are dealt with under Section 366.825, Florida Statutes. TECO points out that such interpretation of these statutes has been used by the Commission before in In Re: Petition for Recovery of Environmental Compliance Costs by Florida Power & Light Company, Order No. PSC-93-1580-FOF-EI, issued October 29, 1993, in Docket No. 930661-EI, and in In Re: Tampa Electric Company, Order No. PSC-96-1048-FOF-EI, issued August 14, 1996, in Docket No. 960688-EI.

TECO responded to OPC's second argument by asserting that the Commission was entitled to rely upon the testimony of expert witnesses as to fuel savings. Int'l Minerals and Chemical Corp. v. Mayo, 336 So.2d 548, 552 (Fla. 1976). TECO pointed out that OPC agreed in its prehearing statement that TECO had demonstrated that its proposed FGD system was the most cost-effective compliance option available. (OPC prehearing statement at page 3, Issue 5). TECO affirms that it made certain confidential information pertaining to fuel forecasts available in Witness Hernandez's Exhibit 14. TECO asserts that OPC and FIPUG chose not to consider

DOCKET NO. 980693-EI
DATE: March 18, 1999

this data or to execute non-disclosure agreements, and, therefore, the information went unchallenged and unrebutted. TECO asserts that OPC and FIPUG are attempting to reargue the case merely because they do not agree with its outcome in derogation of the standard set forth in Diamond Cab, supra.

TECO asserts that the Commission's decision in Order No. PSC-99-0075-FOF-EI, issued January 11, 1999, should not be reconsidered. TECO maintains that the motions for reconsideration should be denied.

IV. CONTROLLING STATUTE

OPC and FIPUG argue in their motions for reconsideration, as they did in their motions to dismiss, that Section 366.825, Florida Statutes, and not Section 366.8255, Florida Statutes, governs this docket. This argument was made before the Commission at the Agenda Conference held on September 1, 1998, on staff's recommendation to deny the motions to dismiss in this docket. The Commission denied the motions to dismiss. Staff believes that OPC and FIPUG argue the same grounds in their motions for reconsideration.

OPC and FIPUG assert that both Section 366.825 and 366.8255, Florida Statutes, address the same subject matter. (OPC Motion at 3). Staff agrees, but only to the extent that both statutes address the Commission's jurisdiction for the determination of prudent environmental costs for mandated compliance. In furtherance of this argument, OPC and FIPUG urge the Commission to adopt their principle of statutory construction, that the more specific statute, that is, Section 366.825, Florida Statutes, controls the more general statute, Section 366.8255, Florida Statutes. OPC and FIPUG state that the Commission must "apply principles of statutory construction" to decide that Section 366.825, Florida Statutes, is the controlling statute. (OPC Motion at 4). OPC and FIPUG's legal argument relies on "rudimentary rules of statutory construction." Staff points out that for every statutory construction precept, there are others suggesting the opposite outcome.

Staff directs attention to the legislative history of Section 366.825, Florida Statutes. This statute was first enacted in 1992. Section 355.8255, Florida Statutes, was enacted in 1993. When staff looks at "rudimentary rules of statutory construction," as urged by OPC, staff finds that the statute enacted last in time controls,

DOCKET NO. 980695-EI
DATE: March 18, 1999

if the two statutes cannot be read in pari materia, as they cannot be in this case. State v. Dunmann, 427 So.2d 166 (Fla. 1983), Askew v. Schuster, 331 So.2d 297 (Fla. 1976), Arvida Corp. v. City of Sarasota, 213 So.2d 756 (Fla. 2d DCA 1968).

Staff further notes that not only is the last expression of legislative will enacted controlling over previous expressions of legislative will in the same or different statute dealing with the same subject matter (See: State v. Dunmann supra), the last statute in order of arrangement is controlling in the case of conflicting statutes or statutory provisions on the same subject matter. State v. City of Boca Raton, 172 So.2d 230 (Fla. 1965), Kiesel v. Graham, 388 So.2d 594 (Fla. 1st DCA 1980), Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982).

However, staff believes that the two principles of statutory construction described above should be incorporated with a third, namely, the principle that conflicting statutes should be construed to give both statutes an area of operation. City of Punta Gorda v. McSmith, Inc., 294 So.2d 27 (Fla. 2d DCA 1974). As to the instant case, this construction leads staff to conclude that Section 366.825, Florida Statutes, covers comprehensive Clean Air Act compliance plans and Section 366.8255, Florida Statutes, covers cost recovery for singular environmental compliance activities.

Staff also believes that the Commission has stated what it believes to be the operative area of Section 366.8255, Florida Statutes, in Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI. In that Order, the Commission stated that Section 366.8255, Florida Statutes, "authorizes the recovery of prudently incurred environmental compliance costs through the environmental cost recovery factor." However the statute does not preclude a utility facing the need to comply with any anticipated, mandated environmental legislation from coming before the Commission with an environmental compliance activity for prudence review under Section 366.8255, Florida Statutes, before bringing the activity before the Commission in a cost recovery proceeding.

In crafting its interpretation of Section 366.8255, Florida Statutes, thus, the Commission followed the most important principle of statutory construction by not requiring that the statute last in time or order of arrangement, Section 366.8255, Florida Statutes, "trump" the prior legislative pronouncement found in Section 366.825, Florida Statutes. The Commission also avoided

DOCKET NO. 980693-EI
DATE: March 18, 1999

repealing Section 366.8255, Florida Statutes, by implication, as would have been the case if the Commission adopted OPC's interpretation that the more specific statute must control the more general. OPC itself stated that if its method of statutory construction were followed, the Commission would have to decide which statute was operative and which was a nullity. (OPC Motion at 4). The Commission has enunciated a means of giving both statutes an area of operation without rendering one or the other ineffective. Staff believes that this is the guiding principle of statutory construction based upon the belief that the legislature, in passing laws, intends for each law to have an area of operation.

Staff believes that the Commission's interpretation of Section 366.8255, Florida Statutes, as explained in Order No. PSC-98-1260-PCO-EI, issued September 22, 1998, was correct. Therefore, staff recommends that OPC and FIPUG have not demonstrated a mistake of law on the part of the Commission.

V. FUEL FORECAST DATA

OPC and FIPUG allege that there is insufficient evidence in the record concerning fuel savings. Staff believes the evidence in the record regarding TECO's fuel price forecast supports the Commission's decision in Order No. PSC-99-0075-FOF-EI, for the reasons discussed below.

A. Expert Witnesses and Competent, Substantial Evidence

The Commission is entitled to rely upon the opinions of expert witnesses in deciding the cases before it. Int'l Minerals at 552. The evidence relied upon by the Commission in making its decisions need not be "such as to compel the result reached by the PSC so long as it is not so insubstantial that it does not support the result." Int'l Minerals at 553. The Florida Supreme Court has also held that:

When orders of the Public Service Commission are challenged in this Court as being unsupported by the facts, this Court will uphold the Orders even though it differs with the Commission's view as to the effect of the evidence as a whole, so long as there is competent substantial evidence to support the orders. Chicken 'N' Things v. Murray, 329 So.2d 302 (Fla. 1976).

DOCKET NO. 980693-EI
DATE: March 18, 1999

The definition of competent, substantial evidence in Florida has two parts, substantial evidence and competent, substantial evidence. Substantial evidence is defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." Becker v. Merrill, 20 So.2d 912, 155 Fla. 379 (Fla. 1944). Competent, as a modifier of substantial, means "that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). The following evidence in the record fulfills the requirements of "competent, substantial evidence" as defined in the cases cited above.

B. The Evidence Presented by TECO

Witness Hernandez stated that:

the FGD option provides significantly greater CPWRR [cumulative present worth revenue requirements] savings when compared to our base case scenario and nearly twice the expected savings of the next most economical option. The FGD option for Big Bend Units 1 and 2 offers the greatest fuel savings and will provide the greatest benefits to retail customers compared to the other alternatives analyzed (TR 172-173).

He also stated that:

the FGD option is the most cost-effective compliance alternative due to the significant fuel savings which more than offset the capital costs of constructing and operating the FGD system for both Big Bend Units 1 and 2 (TR 176).

Additionally, Witness Black stated:

The base case achieves compliance by switching from high sulfur and medium sulfur coals to low sulfur coals in conjunction with allowance purchases. As we reviewed the forecasts from consultants for high sulfur and low sulfur coal, we determined that our forecast for low sulfur coal was less expensive than the consultant's estimates, and that our

DOCKET NO. 980693-EI
DATE: March 18, 1999

forecast for high sulfur coal was more expensive than the consultant's Consequently, the consultant's forecasts would favor the FGD option more than the forecasts we used in our cost recovery studies (TR 39,172, 176, 183-184, 271, EXH 12, EXH 14).

Witness Black's statement refers to a series of line graphs shown in Hearing Exhibits 2 and 12. The forecasted price differential between low-sulfur and high-sulfur coal partly determines the relative cost-effectiveness of the FGD system. As the differential becomes larger, the more cost-effective the FGD system generally becomes. As Witness Black states, the difference between TECO's forecast of low-sulfur and high-sulfur coal prices at the minemouth was smaller than similar forecasts by Resource Data International (RDI) and Energy Ventures Analysis (EVA). Also, TECO's coal price forecasts escalated at a slower rate than the two independent forecasts. Based upon these two characteristics, TECO considered its forecasts to be a conservative projection of future coal prices (TR 39; EXH 12, pages 137-139).

The record shows that TECO compared historical fuel prices with future fuel prices as projected by several consultants and government agencies such as U.S. Energy Information Administration, American Gas Association, Cambridge Energy Research Associates, Resource Data International, and Energy Ventures Analysis. Furthermore, TECO also reviewed several industry publications to monitor historical price trends. (TR 38-39, 48) Staff agrees that no party questioned the validity or reliability of TECO's sources (TR 48-69, 73-111, 186-252). Moreover, TECO used these sources for its prior Ten Year Site Plan filings with the Commission which have consistently been determined to be reasonable for planning purposes. Staff believes TECO has taken reasonable steps to monitor current trends and future expectations of fuel prices.

Staff believes that the record provides sufficient evidence about TECO's fuel price forecast to support the Commission's decision. During the discovery phase, parties and staff explored the possibility that other compliance alternatives might have been more cost effective than TECO's proposed FGD system. For example, both the Legal Environmental Assistance Fund (LEAF) and staff sought additional information to ascertain whether a natural gas-fired combined cycle unit was more cost-effective than TECO's proposed FGD system. TECO provided Late-Filed Deposition Exhibit

DOCKET NO. 980693-EI
DATE: March 18, 1999

1 which shows a hypothetical natural gas-fired combined cycle unit over \$230 million more expensive than the proposed FGD system. TECO's forecasts of coal and natural gas prices (\$/MMBtu) over a 27-year period are prominently displayed in Late-Filed Deposition Exhibit 1 (EXH 14).

OPC also sought additional information to determine whether burning low-sulfur coal and purchasing emission allowances was more cost-effective than TECO's proposed FGD system. However, the Commission admitted Hearing Exhibit 11 into the record which shows TECO's price forecasts of natural gas, distillate oil, low-sulfur coal, medium-sulfur coal, and high-sulfur coal filed during the Commission's review of TECO's Ten Year Site Plan (EXH 11). TECO used these fuel price forecasts to support its long-term planning decisions (TR 38-39, 48, 172, 176, 183-184, 271). In Late-Filed Deposition Exhibit 6, TECO used these forecasts to calculate the fuel component of the difference in revenue requirements between the base case alternative (burning low-sulfur coal and purchasing emission allowances) and four different compliance alternatives (EXH 14). In Late-Filed Deposition Exhibit 8, TECO used these forecasts to calculate net recoverable fuel and purchased power costs on a native load basis for the base case and the FGD case scenarios for 2000 through 2026 (EXH 14).

In summary, sufficient evidence exists within the record about TECO's fuel price forecast to support the Commission's decision in Order No. PSC-99-0075-FOF-EI, issued January 11, 1999.

REPORT NO. 980693-EI
DATE: March 18, 1999

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed after the time for filing an appeal has run.

STAFF ANALYSIS: The docket should be closed 30 days after issuance of the order, to allow the time for filing an appeal to run.