BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: 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. | DOCKET NO. 980693-EI<br>ORDER NO. PSC-99-0744-FOF-EI<br>ISSUED: April 19, 1999 |

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER NO. PSC-99-0075-FOF-EI

BY THE COMMISSION:

By motion for reconsideration filed January 26, 1999, the Office of Public Counsel (OPC) urges 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. The Florida Industrial Power Users Group (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.

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, we believe that neither OPC nor FIPUG have shown that Order No. PSC-99-0075-FOF-EI, issued January 11, 1999, was based upon mistake of either law or fact or upon inadvertence.

II. OPC AND FIPUG'S ARGUMENTS

First, OPC and FIPUG argue that we made a mistake of law in our Order which requires reconsideration. OPC and FIPUG assert that we must render Section 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 we 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. OPC and FIPUG assert, therefore, that TECO has not shown that fuel savings will offset the cost of the flue gas desulfurization system (FGD) and result in net savings to TECO customers.

IV. CONTROLLING STATUTE

OPC and FIPUG argue in the motion 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 at the Agenda Conference held on September 1, 1998, when we denied OPC and FIPUG's motions to dismiss.

OPC and FIPUG assert that both Section 366.825 and 366.8255, Florida Statutes, address the same subject matter. We agree, but only to the extent that both statutes address our jurisdiction for the determination of prudent environmental costs for mandated compliance. In furtherance of this argument, OPC and FIPUG urge us 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 we must "apply principles of statutory construction" to decide that Section 366.825, Florida Statutes, is the controlling statute. OPC and FIPUG's legal argument relies on "rudimentary rules of statutory construction." We point out that for every statutory construction precept, there are others suggesting the opposite outcome.

We first refer 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 we look at "rudimentary rules of statutory construction," as urged by OPC, we find that the statute enacted last in time controls, 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).

We further note 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, we believe 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). In the instant case, this construction leads us to conclude that Section 366.825, Florida Statutes, covers comprehensive Clean Air Act compliance plans and that Section 366.8255, Florida Statutes, covers cost recovery for singular environmental compliance activities.

We also believe that we have already stated what we believe to be the operative area of Section 366.8255, Florida Statues, in Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI. In that Order, we 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 us with an environmental compliance activity for prudence review under Section 366.8255, Florida Statutes, before bringing the activity before us in a cost recovery proceeding.

By crafting our interpretation of Section 366.8255, Florida Statutes, in this manner, we believe that we have 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, negate the prior legislative pronouncement found in Section 366.825, Florida Statutes. By doing so, we also have avoided repealing Section 366.8255, Florida Statues, by implication, as would have been the case if we had 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, we would have to decide which statute was operative and which was a nullity. (OPC Motion at 4). We have enunciated a means of giving both statutes an area of operation without rendering one or the other ineffective. We believe 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.

We believe that our interpretation of Section 366.8255, Florida Statutes, as explained in Order No. PSC-98-1260-PCO-EI, issued September 22, 1998, was correct. Therefore, we find that OPC and FIPUG have not demonstrated a mistake of law on the part of this Commission.

## V. FUEL FORECAST DATA

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

### A. Expert Witnesses and Competent, Substantial Evidence

We are entitled to rely upon the opinions of expert witnesses in deciding the cases before us. Int'l Minerals at 552. The evidence we relied upon in making our 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).

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

TECO's Witness Hernandez stated on the record 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.

The record also shows that Witness Hernandez 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.

Additionally, the record shows that TECO 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 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.

Witness Black's statement refers to a series of line graphs shown in the record. 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 stated, 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, the record shows that 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.

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. The record shows that the validity or reliability of TECO's sources were not questioned. Moreover, TECO used these sources for its prior Ten Year Site Plan filings with the Commission which we have consistently been determined to be reasonable for planning purposes. We believe the record shows that TECO has taken reasonable steps to monitor current trends and future expectations of fuel prices.

We believe that the record contains sufficient evidence about TECO's fuel price forecast to support our 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 Commission staff sought additional information to ascertain whether a natural gas-fired combined cycle unit was more cost-effective than TECO's proposed FGD system. The record shows that a hypothetical natural gas-fired combined cycle unit was 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 the record.

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 record shows TECO's price forecasts of natural gas, distillate oil, low-sulfur coal, medium-sulfur coal, and high-sulfur coal are those filed during the Commission's review of TECO's Ten Year Site Plan. TECO used these fuel price forecasts to support on the record its long-term planning decisions. The record also shows that 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. The record further shows that 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.

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

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for Reconsideration as joined by the Florida Industrial Power Users Group is denied. It is further

ORDERED that this docket shall be closed when the time for filing an appeal has run.

By ORDER of the Florida Public Service Commission this 19th day of April, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 and/or wastewater 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.