BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause and generating performance incentive factor.	DOCKET NO. 000001-EI ORDER NO. PSC-00-0911-FOF-EI ISSUED: May 8, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE COMMISSION:

I. BACKGROUND

As part of this Commission's continuing fuel and purchased power cost recovery and generating performance incentive factor proceedings, a hearing was held on November 22-23, 1999, in Docket No. 990001-EI. The hearing addressed issues set forth in the Prehearing Order for that docket, Order No. PSC-99-2271-PHO-EI, issued November 18, 1999.

Among the issues addressed was the following: "Should the Commission approve Tampa Electric Company's proposed regulatory treatment of its wholesale power agreement with Florida Municipal Power Agency for January 1, 2000 through March 15, 2001?" This issue was identified in the Prehearing Order as Issue 19J. Through the prefiled testimony of Mr. Thomas L. Hernandez, Tampa Electric Company ("TECO") proposed to credit all revenues received from its wholesale power supply agreement with Florida Municipal Power Agency ("FMPA") to its retail customers through the Environmental Cost Recovery Clause ("ECRC") and the Fuel and Purchased Power Cost Recovery Clause ("fuel Clause"). After reimbursing its retail ratepayers through the ECRC for the SO_2 emission allowances used to make the sale to FMPA, TECO would credit all remaining revenues to the fuel clause.

At the close of evidence at the November 22-23 hearing, our staff ("staff") made oral recommendations on all issues addressed at the hearing, including Issue 19J. For Issue 19J, staff recommended a modification to TECO's proposed treatment. Staff recommended that TECO, after crediting its ECRC to cover SO_2 emission allowances, credit capacity and transmission revenues from its sale to FMPA to its capacity cost recovery clause ("capacity clause") and then credit any remaining revenues to its fuel clause.

By Order No. PSC-99-2512-FOF-EI, issued December 22, 1999, in Docket No. 990001-EI, we issued a final order approving projected expenditures and true-up amounts for fuel adjustment factors, GPIF targets, ranges and rewards, and projected expenditures and true-up amounts for capacity cost recovery factors. In that order, we approved the treatment recommended by staff for TECO's wholesale power supply agreement with FMPA.

By Order No. PSC-00-0001-PCO-EI, issued January 3, 2000, we established that Docket No. 990001-EI would be identified as Docket No. 000001-EI on a going forward basis.

On January 6, 2000, Florida Industrial Power Users Group ("FIPUG") filed a Petition for Reconsideration of Order No. PSC-99-2512-FOF-EI. FIPUG specifically seeks reconsideration of our ruling on Issue 19J, concerning the regulatory treatment of TECO's wholesale power supply agreement with FMPA. No party filed a response to FIPUG's motion. For the reasons set forth below, we deny FIPUG's Petition for Reconsideration.

II. STANDARD OF REVIEW

The applicable standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law that was overlooked or not considered by the decision- maker in rendering 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 valid basis for reconsideration. Id. Further, reweighing of the evidence is not a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958).

III. ANALYSIS AND FINDINGS

FIPUG states as grounds for its Petition for Reconsideration the following:

(1) The ruling is not based upon competent substantial evidence;

(2) The ruling ignores the Commission policy of giving deference to stipulations between parties;

(3) The post-hearing position taken by Commission Staff on Issue 19 J and adopted by the Commission was not declared before or at the Prehearing Conference. The parties with opposing views were blind-sided. Neither FIPUG nor TECO was given the opportunity to present evidence on the relative merits of the position taken by staff *vis a vis* the stipulation entered into between FIPUG and TECo. Like FIPUG, the [Office of Public Counsel] objected to the TECo proposal before hearing, but presented no evidence on the subject at hearing. The only evidence in the record is the information supplied by TECo. No evidence was presented in support of Staff's post-hearing recommendation; and

(4) The evidence supplied by TECo demonstrates that the treatment of FMPA revenues proposed by TECo is the most equitable solution to a difficult dilemma.

Notably, none of FIPUG's stated grounds for reconsideration addresses the applicable standard of review for a motion for reconsideration, i.e., whether this Commission overlooked or failed to consider any point of fact or law. Nonetheless, each of FIPUG's arguments is discussed in detail below.

Competent, Substantial Evidence to Support Commission's Ruling

FIPUG asserts that our ruling on Issue 19J is not based on competent, substantial evidence. We note that this argument does not go toward the standard of review for a motion for reconsideration but addresses a standard for appellate review. Regardless, FIPUG's argument is without merit.

The definition of competent, substantial evidence in Florida can be gleaned from the definition of its components. Substantial evidence is defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." Becker v. Merrell, 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 evidence relied upon by this 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." International Minerals and Chemical Corporation v. Mayo; Mobil Chemical Company v. Mayo, 336 So.2d 548 (Fla. 1976). 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).

FIPUG asserts that the only record evidence addressing Issue 19J is the testimony supplied by TECO. FIPUG further asserts that no evidence was presented in support of our staff's post-hearing recommendation on Issue 19J, which we approved. We find that adequate support for our decision can be found in this Commission's order establishing the capacity clause and in an exhibit to the testimony of FIPUG's own witness in Docket No. 990001-EI.

On May 7, 1991, FIPUG petitioned this Commission to change the method by which Florida Power & Light Company allocated the capacity-related portion of purchased power costs to rate classes. At that time, investor-owned electric utilities (IOUs) allocated all recoverable purchased power costs on an energy (kWh) basis. FIPUG requested that this Commission require the IOUs to allocate on a demand (kW) basis and recover through a capacity clause those capacity costs that the utilities were recovering through the fuel clause and oil backout clause. By Order No. 25773, issued February 24, 1992, this Commission established the capacity cost recovery clause as the mechanism by which a utility could recover demand-related capacity costs not being recovered through its base rates.

In Order No. 25773, this Commission stated, in pertinent part:

> We agreed in Docket No. 910580-EQ that an inequity exists in the recovery of capacity-related costs between purchased capacity and constructed capacity. ... The

> parties agreed that the demand portion of capacity costs should be treated the same, no matter how those costs were incurred. The cost of capacity constructed by the utility would be allocated to each customer class based on the class's contribution to peak demand or KW, and purchased power capacity costs should be similarly allocated. To allocate purchased power capacity costs on energy (KWH) penalizes high load factor customers to the benefit of lower load factor customers who may be just as responsible for the peak KW demand. The cost is incurred to provide capacity based on maximum KW required and should be recovered accordingly on a demand basis.
>
> In order to match costs and revenues, we also find revenues related to demand capacity sales to be netted against demand related capacity costs to determine the amount recoverable through a capacity recovery factor. If similar costs and revenues are not considered together, the factor will be too high. As with costs, only those revenues considered in fuel or oil backout calculations should be included. Revenues currently accounted for in base rates will be treated the same as costs in base rates. [Emphasis added].

As indicated in the record of our November 22-23, 1999, hearing in Docket No. 990001-EI, FMPA will pay separately identified capacity and transmission charges to TECO under the terms of the wholesale power supply agreement at issue. Thus, the treatment of revenues from TECO's wholesale sale to FMPA that we approved in Order No. PSC-99-2512-FOF-EI is entirely consistent with the purpose of the capacity cost recovery clause, as that purpose is stated in Order No. 25773.

More importantly, an exhibit attached to the prefiled testimony of FIPUG's own witness in Docket No. 990001-EI, Mr. Kent D. Taylor, provides direct support for the treatment we approved in Order No. PSC-99-2512-FOF-EI. Witness Taylor attached to his prefiled testimony a copy of the testimony of David P. Wheeler from Docket No. 970171-EI. Mr. Wheeler's testimony was identified as an exhibit and entered into the record at our November 22-23, 1999, hearing. In his testimony, Witness Taylor agreed with the regulatory treatment recommended in Docket No. 970171-EI by Mr. Wheeler for the revenues from TECO's wholesale power supply agreement with FMPA. Mr. Wheeler's testimony states, in pertinent part:

> If the sales remain in the retail jurisdiction, the retail ratepayers are fully supporting the costs associated with these sales through their rates. As a consequence, they should receive the full benefit of all the revenues which result from them. All energy charge revenues, including fuel, should be credited to ratepayers through the Fuel Clause. All capacity charge revenues should be credited through the Capacity Cost Recovery Clause. [Emphasis added].

Based on the foregoing, we find that there is competent, substantial evidence in the record to support the treatment we approved in Order No. PSC-99-2512-FOF-EI for the revenues from TECO's wholesale power supply agreement with FMPA.

Deference to Stipulations between Parties

FIPUG asserts that our ruling on Issue 19J ignores this Commission's policy of giving deference to stipulations between parties. We are not completely certain of which "stipulation" FIPUG believes we have not given deference to. The only stipulation referred to in the hearing record on Issue 19J and in FIPUG's motion is the TECO earnings stipulation approved by this Commission in Order No. PSC-96-1300-S-EI, issued October 24, 1996, in Docket No. 960409-EI. The only other "stipulation" to which FIPUG may be referring is its mid-hearing change in position to agree with TECO on this issue. In either event, FIPUG's argument does not satisfy the standard of review for a motion for reconsideration and is otherwise without merit.

By Order No. PSC-97-1273-FOF-EI, this Commission established the regulatory treatment that was applied to revenues from TECO's wholesale sale to FMPA prior to the Commission's decision in this proceeding. As the record indicates, the regulatory treatment approved in Order No. PSC-97-1273-FOF-EI was tied to the duration of the TECO earnings stipulation, which terminated on December 31, 1999. In this proceeding, TECO proposed a different regulatory treatment for its FMPA sale revenues to take effect on January 1, 2000, through the remaining term of its agreement with FMPA. Clearly, the termination of TECO's earnings stipulation on December 31, 1999, opened the door for us to consider other options for the treatment of revenues from TECO's sale to FMPA.

On page 1 of its motion, FIPUG asserts that "[l]ike FIPUG, the [Office of Public Counsel] objected to the TECo proposal before the

hearing, but presented no evidence on the subject at hearing." On page 2 of its motion, FIPUG goes on to state that "[a]t the hearing after the evidence was in, FIPUG changed its position to agree with the TECo proposal." These two statements may account for what FIPUG has referred to as the "stipulation" that we have failed to give deference to. However, the record of this proceeding is clear that the parties did not stipulate to this issue.

In its Prehearing Statement in Docket No. 990001-EI, the Office of Public Counsel ("OPC") took the position that we should not approve TECO's proposed treatment for its FMPA sale revenues. OPC's position was reflected in the Prehearing Order. While OPC did not present testimony concerning TECO's proposal, at no point in the hearing did OPC indicate that it wished to change its position on this issue. Thus, regardless of whether FIPUG changed its position to agree with TECO's proposal, there was no stipulation among all of the parties to the docket. Further, although the record indicates that FIPUG expressed agreement with TECO's proposal during cross-examination of witness Hernandez, it did not withdraw the testimony of its witness Taylor on that issue.

Appropriateness of Staff's Post-Hearing Recommendation

FIPUG asserts that it and the parties were blind-sided by our staff's post-hearing position on Issue 19J because it was not declared before or at the Prehearing Conference. FIPUG further asserts that neither it nor TECO "was given the opportunity to present evidence on the relative merits of the position taken by the Staff *vis a vis* the stipulation entered into between FIPUG and TECo." FIPUG again contends that there was no record evidence presented in support of staff's post-hearing recommendation.

FIPUG's assertion that it was improperly "blind-sided" by our staff's post-hearing recommendation is not relevant to the standard for a motion for reconsideration and is otherwise without merit. Staff is not precluded from taking "no position" on an issue prior to hearing. In fact, the Order Establishing Procedure issued in Docket No. 990001-EI allows parties, under certain circumstances, to maintain "no position at this time" prior to hearing. Because staff is not a party whose substantial interests are affected by the outcome of this Commission's decision and acts primarily as an advisor to this Commission, staff often takes no position on issues, pending evidence adduced at hearing. In the Prehearing Order for Docket No. 990001-EI, with respect to Issue 19J, staff declared no position pending further discovery and evidence adduced

at the hearing. All parties had the opportunity to present evidence on the merits of Issue 19J at hearing. Based upon the testimony and evidence, staff made its post-hearing recommendation on Issue 19J, on the record, at the conclusion of the hearing. Subsequently, we made a bench decision based upon staff's recommendation.

As discussed above, we find that there was no stipulation on Issue 19J among all the parties to the docket, and that competent, substantial evidence of record supports our ruling on Issue 19J.

Support for TECO's Proposal

Finally, FIPUG argues that the evidence supplied by TECO presents "the most equitable solution to a difficult dilemma." In its motion, FIPUG seeks to show how the evidence supports its position concerning allocation of the revenues from TECO's wholesale sale to FMPA. Paragraph 15 of FIPUG's motion succinctly summarizes FIPUG's argument:

> ... it is far more logical to allocate all of the revenues received from the FMPA sale in the manner TECo proposed rather than segregating the revenues by applying the capacity payments to the capacity clause in which the interruptible customers, who bear the greatest loss burden through kwh charges for replacement power, will receive the least loss mitigation benefit.

FIPUG's argument begs this Commission to reweigh the evidence it already considered in ruling on Issue 19J, and thus is an improper ground for requesting reconsideration. FIPUG's own witness adopted testimony that supported the allocation that we ultimately approved. That testimony was inserted into the record by FIPUG. FIPUG shall not be permitted to seek reargument on that point.

IV. CONCLUSION

In conclusion, FIPUG's motion for reconsideration fails to identify some point of fact or law that we overlooked or did not consider in rendering our decision in that portion of Order No. PSC-99-2512-FOF-EI concerning the appropriate regulatory treatment for TECO's wholesale power supply agreement with FMPA. Therefore, FIPUG's motion is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Industrial Power Users Group's Petition for Reconsideration of Order No. PSC-99-2512-FOF-EI is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 8th day of May, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF 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 or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.