BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Tampa Electric Co. for Approval of a Supplemental Service Rider for Interruptible Service.	DOCKET NO. 881499-EI ORDER NO. 22093 ISSUED: 10-25-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, CHAIRMAN
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER GRANTING HEARING

BY THE COMMISSION:

On September 9, 1988, Tampa Electric Company ("TECO") filed a petition to modify its interruptible and standby interruptible rate schedules. Essentially, the petition sought to waive the demand charges associated with interruptible services for off-peak KW demand and to implement separate on-peak and off-peak energy charges. Commission Staff recommended that these tariff changes be denied. The item was discussed but not voted upon at the Commission's October 18, 1988 Agenda Conference.

Staff's primary concern with the on-peak/off-peak proposal was the effect of the proposed rate changes on the general body of ratepayers. All customers could be harmed by the changes if an anticipated increase in usage did not materialize. The utility made an insufficient showing that such an increase would take place. At the October 18 Agenda Conference, we instructed Staff to confer with the utility and attempt to obtain further information. On October 28, 1988, TECO filed a Notice of Withdrawal of this petition, which was approved at the November 29, 1988 Agenda Conference.

TECO filed a new petition to modify its interruptible tariffs on November 17, 1988. Staff recommended that it be denied. The provisions of the proposed rider would have allowed all the fuel savings realized from increased usage by

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interruptible customers to be returned to them as long as marginal fuel cost was below average cost. When marginal cost went above the average, the adjustment would be zero. Therefore, the general body of ratepayers would have assumed all the risk of fuel price changes for the incremental load while allowing interruptible customers to receive all the benefits.

At the Agenda Conference on December 20, 1988, we voted to deny TECO's proposed tariff but indicated that we would approve a revised tariff providing for an 80/20% split of any incremental fuel savings between interruptible and general ratepayers. See Order No. 20581, pages 2 and 3. TECO submitted its supplemental service rider tariff for interruptible customers in accordance with the above order. The tariff was administratively approved by Staff.

On May 5, 1989, several months after the approval of the tariff, the Office of Public Counsel ("Public Counsel") through their attorneys filed a protest and request for hearing, which is currently at issue in the instant docket. Public Counsel's position is that the Commission's action constituted a rate change which will increase the amount paid by firm customers, and that our procedure in approving the tariff was fatally defective. Public Counsel contends that we must conduct a hearing, or use our Proposed Agency Action procedure before taking final action which results in a rate increase. Therefore, Public Counsel has requested that we rescind approval of the tariff, and place the parties in the same status they occupied prior to the tariff's effective date.

The argument now being embraced by Public Counsel is the same argument rejected by the Supreme Court of Florida in Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977). In that case, which was decided under the 30 day file-and-suspend statute (since amended to 60 days), Interconnect filed its complaint protesting application of a tariff 31 days after the tariff was filed by the utility. Interconnect argued that our approval of the tariff was improper because there was no opportunity for a hearing after reasonable notice, pursuant to the Administrative Procedures Act which requires a hearing before the entry of a final order affecting the substantial interest of a party.

The Supreme Court rejected Interconnect's argument because

by the time Interconnect filed its complaint with the Commission, more than thirty days had elapsed from the utility's filing of the tariff. According to the Supreme Court, if we do not suspend the proposed tariff changes within thirty days the rates automatically go into effect. The Court further stated that the file-and-suspend procedure "survives the adoption of the new Administrative Procedure Act." 342 So.2d at 814.

The Court's holding in Interconnect is consistent with the body of the Florida case law. See Citizens v. Mayo, 333 So.2d 1 (Fla. 1976) ("an inflexible hearing requirement was not intended inasmuch as the Commission can obviate any hearing requirement simply by failing to act for 30 days." 333 So.2d at 6); Florida Gas Company v. Hawkins, 372 So.2d 1118 (Fla. 1979) ("the statute permits the Commission to . . . take no action thereby permitting the new rate to become effective after expiration of the statutory thirty day period." 372 So.2d at 1119); Maule Industries v. Mayo, 342 So.2d 63 (Fla. 1977) ("If the Commission does not have a reasoned basis to believe that the rates as filed are unreasonable or discriminatory it would appear to have a statutory obligation to withhold suspension and allow them to become effective." 342 So.2d at 67, note 7); Florida Power Corporation v. Hawkins, 367 So.2d 1011 (Fla. 1979). ("The statute expressly empowers the Commission to withhold consent to rate schedules within thirty days of filing, or consent to rate relief any time after filing." 367 So.2d at 1013).

In the instant docket, Public Counsel's protest and request for hearing comes not one day late, as in Interconnect, but months after the tariff went into effect. Nonetheless, consistent with our action in Interconnect, it remains our policy to afford hearings on complaints which protest the prospective application of tariffs in cases such as this. Therefore, we will treat Public Counsel's Protest and Request for Hearing as a complaint attacking the prospective application of the tariff and will afford a hearing on it. TECO is thus directed to respond to Public Counsel's complaint within twenty days from the date of this Order.

Therefore, it is

ORDERED by the Florida Public Service Commission that Public Counsel's May 5, 1989, Protest and Request for Hearing

will be treated as a complaint attacking the prospective application of Tampa Electric Company's Supplemental Service Rider Tariff for Interruptible Customers, and Public Counsel will be afforded a hearing on said complaint. It is further

ORDERED that Tampa Electric Company shall respond to Public Counsel's complaint within twenty days from the date of this Order.

By ORDER of the Florida Public Service Commission this 25th day of OCTOBER, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MAP

by: Kay Flynn
Chief, Bureau of Records

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.