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July 23, 1998

VIA HAND DELIVERY

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records and Reporting
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 980693-EI

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of the Florida Industrial Power Users Group's Motion to Dismiss in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return them to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

VGK/pw
Encls.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Tampa Electric Company for Approval of Cost Recovery for a New Environmental Program, the Big Bend Units 1 and 2 Flue Gas Desulfurization System.	)	Docket No. 980693-EI
	)	Filed: July 23, 1998

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S
MOTION TO DISMISS

Pursuant to rule 25-22.037, Florida Administrative Code, the Florida Industrial Power Users Group (FIPUG) files this motion to dismiss the petition of Tampa Electric Company (TECO) for approval of cost recovery for new environmental program. As grounds therefor, FIPUG states:

Background

1. The United States Congress enacted 42 USC §§ 7401 *et seq* in February 1990. The act, popularly called the Clean Air Act Amendments (CAAA), called for electric utilities to meet certain emission constraints by January 1, 1995, Phase I, and additional emission constraints by January 1, 2000, Phase II.

2. TECO completed its Phase I compliance requirements in 1995 and submitted a petition for cost recovery under the provisions of §366.8255 in May 1996 after the plant was in service. In Order No. PSC-96-1048-FOF-EI in Docket No. 960688-EI, the Commission approved the recovery of $2.1 million a year for Big Bend Unit 3 Flue Gas Desulfurization Integration (FGD) and $635,000 a year to meet the compliance requirements for Big Bend Units 1 & 2 Flue Gas conditioning. Other alternative compliance plans were rejected at that time by TECO for Big Bend Units 1 & 2.

3. On May 15, 1998, TECO filed the current petition seeking approval for authority to impose a rate surcharge on its customers under the provisions of § 364.8255, *Florida Statutes*.

two years before the planned investment will be in useful service and two and one half years before the surcharge will commence. The CAAA Phase II compliance plan is to construct and maintain a (FGD) process at Big Bend Units 1 and 2. Although it is seeking approval of a cost recovery surcharge mechanism, TECO failed to seek the required pre-construction prudency approval permitted by §366.825, *Florida Statutes*, and failed to supply any information on the rate impact of its petition or whether base rates will be sufficient in the year 2000 to cover the cost of the proposed improvements.

4. FIPUG was granted intervenor status in this docket in Order No. PSC-98-0806-PCO-EI.

Grounds for Motion

This motion to dismiss is based upon the following grounds:

5. **The petition for cost recovery is premature:**

a. The assets for which TECO seeks cost recovery are not presently in used and useful service as required by §366.06(1), *Florida Statutes*.

b. TECO failed to seek pre-construction prudency approval as required by § 366.825, before seeking cost recovery under §366.8255(2).

c. Sections 366.825 and 366.8255, *Florida Statutes*, contemplate a finding that base rates are insufficient to cover environmental costs before the extraordinary provisions of a cost recovery surcharge can be employed. It is too early for regulators to determine what TECO's financial standing in January 2001 will be, and no evidence on the issue has been submitted in the petition or prefiled testimony.

6. **It is too late to convert the TECO cost recovery petition into a pre-construction prudency approval case:**

a. The petition in this case asks for cost recovery, not prudency approval, and fails to supply the information expressly required by §366.825, *Florida Statutes*, relating to rate impact and other essential elements needed for approval. Although it is inconsistent with the petition, TECO's prefiled testimony says its purpose is "to demonstrate the reasonableness and prudence of Tampa Electric's selection of ... FGD." The testimony likewise fails to supply the rate impact and financial information required to enable the Commission to make the determinations required by § 366.825 (3).

b. TECO has been aware of the CAAA requirements for more than 8 years. The Phase II compliance deadline is less than a year after the scheduled final action in this case, without any consideration of the prospect of judicial review. According to the prefiled testimony, it is already too late to complete permitting and construction in time to meet the January 1, 2000 deadline for compliance. Pre-construction prudence review is discretionary, not mandatory. By waiting until the 11th hour to file its petition, even if the petition is reformed into a proper application for pre-construction prudence approval sought by the testimony, the deliberative process will cause TECO to fail meet its compliance deadline. The net effect of permitting the process to go forward is to allow the utility to shift responsibility for failure to comply with the federal law in a timely fashion from the utility to the state rate regulatory commission.

Argument

7. It is significant that TECO has filed its petition pursuant to § 366.8255, *Florida*

Statutes, not § 366.825, *Florida Statutes*.[1] In doing so, TECO has attempted to ignore the requirements of § 366.825 and gain cost recovery for the FGD project without first complying with § 366.825. However, § 366.825 is the statutory section that deals specifically with Clean Air Act compliance. TECO must proceed under that section before seeking recovery of Clean Air Act compliance costs.

8. The FPSC is a rate regulatory agency not an environmental approval agency. Section 366.825 permits utilities to ask the Commission to determine that their plan to bring generating units into compliance with the Clean Air Act is financially prudent before they begin environmental permitting or construction. Utilities are not required to follow this comfort procedure, but if a utility opts to use it, the utility must file detailed financial and rate impact information with the Commission so that the Commission can determine whether the plan is in the public interest and evaluate, among other things,:

> . . . the costs necessarily incurred in implementing such plans, and any effect on rates resulting from such implementation are in the public interest.

§ 366.825(3), *Florida Statutes*.

9. Rather than providing the Commission with its Compliance Plan well ahead of the necessary implementation date in compliance with § 366.825 so that appropriate analysis and study could be done, TECO has essentially come in at the "11th hour" seeking cost recovery of

[1]Mr. Hernandez states in his direct testimony that TECO is proceeding under § 366.8255 and wants the Commission to conclude that the costs qualify for cost recovery. Hernandez direct testimony at 3.

a compliance plan that has not been reviewed, much less approved, pursuant to § 366.825 and for which no rate impact information has been provided. Having failed to timely file under § 366.825, TECO may not seek recovery for Clean Air Act compliance costs under § 366.8255.

10. The plain language of § 366.8255 clearly requires that a filing will be made under § 366.825 as a prerequisite to cost recovery under § 366.8255. Section 366.8255(2) states:

> An electric utility may submit to the commission a petition describing the utility's proposed environmental compliance activities and projected environmental costs in addition to any Clean Air Act compliance activities and costs shown in a utility's filing under s. 366.825.

Emphasis supplied. As the plain language of the statute indicates, § 366.8255 is not a stand alone section.[3] As the Commission said when it approved Gulf Power's Clean Air Act Compliance Plan under § 366.825:

> Cost recovery for compliance of the Clean Air Act Amendments of 1990 will be conducted in a subsequent proceeding.

Order No. PSC-93-1376-FOF-EI at 20. Thus, recovery under § 366.8255[4] first requires a petition and plan approval under § 366.825. TECO has not filed such a petition and it is too late to file now in order to come into compliance with the Clean Air Act by the January 2000 deadline. Since TECO has not timely filed under § 366.825, it cannot avail itself of cost recovery under § 366.8255. The Commission (and the parties) should not be put in the untenable

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[3] See, i.e., Order No. PSC-93-1376-FOF-EI where Gulf Power sought approval of its Clean Air Act Compliance Plan pursuant to § 366.825 and Order No. PSC-96-0044-FOF-EI where Gulf Power sought recovery of those costs pursuant to § 366.8255.

[4] Even if TECO had complied with § 366.825, the FGD project would still not quality for cost recovery at this time because it is not an in service capital investment. § 386.8255(1)(d)1.

position of "rubber stamping" cost recovery for a Clean Air Act compliance project because TECO did not comply with the Clean Air Act statute's filing and approval requirements.

11. TECO has filed its petition seeking cost recovery over two years before the project will come on line. It has provided no evidence as to the rate impact of the FGD project (if approved) on ratepayers as § 366.825 requires. Neither the Commission or the parties can make decisions about this project in a vacuum. Seeking cost recovery for the project without providing evidence of those costs, which presumably TECO cannot provide because the project has not yet gone forward, underscores the fallacy of TECO's request.

12. To the extent that TECO is asking the Commission to approve cost recovery before the cost of the project is known, TECO has put the proverbial cart before the horse. How can the Commission or the parties possibly determine if the proposed TECO project is prudent, when the amount TECO will spend for the project is unknown? The Commission cannot approve cost recovery of an unknown amount. The Commission should not be used as the scapegoat for delays in environmental compliance.

13. Dismissal of TECO's petition will enable TECO to promptly proceed without delay with the FGD project its management has determined to be the best course of action and without prejudice to a regular proceeding when the actual costs are known. When the plant is in used and useful service, TECO can seek cost recovery after the fact as it did in 1996 or more appropriately seek a determination of the prudence of the expenditures in conjunction with its next rate case, when the cost of the project is known and the impact on rates can be ascertained. No rate case may be required if base rates are sufficient in 2001 to cover the cost of the

environmental plan.

WHEREFORE, TECO's petition for approval of cost recovery for new environmental program should be dismissed.

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Attorneys for Florida Industrial
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Florida Industrial Power Users Group's Motion to Dismiss** has been furnished by *hand delivery or U.S. Mail to the following this **23rd** day of **July, 1998**:

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