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January 26, 1999

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

RE: Docket No. 980693-EI

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of a Motion for Reconsideration for filing in the above-referenced docket.

Also Enclosed is a 3.5 inch diskette containing the Motion for Reconsideration in WordPerfect for Windows 6.1 format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

John Roger Howe
Deputy Public Counsel

JRH/dsb
Enclosures

ORIGINAL

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 & 2 Flue Gas Desulfurization System.

DOCKET NO. 980693-EI

FILED: January 26, 1999

MOTION FOR RECONSIDERATION

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Rule 25-22.060, Florida Administrative Code, move the Florida Public Service Commission to reconsider its Order No. PSC-99-0075-FOF-EI, issued January 11, 1999, for the following reasons:

1. Reconsideration should be granted if the Commission made a mistake either of fact or law in its order which, if corrected, would necessarily lead to a different result. In its Order No. 99-0075, the Commission made one of each. The Commission was mistaken, as a matter of law, in its belief that it did not have to comply with the specific provisions of Section 366.825, Florida Statutes (1997), but could instead rely on the far more general provisions of Section 366.8255 to decide that Tampa Electric should receive prior approval for its Big Bend 1 and 2 scrubber project to comply with Phase II of the Clear Air Act Amendments of 1990. The case law is uniform that where two statutes address the same subject area, one in specific terms and one in more general terms, the more specific statute is controlling and must be followed.

2. The Commission was also factually mistaken that it had adequate record evidence to determine that Tampa Electric had proven fuel savings from burning high-sulfur coal and petroleum coke could reasonably be expected to offset the costs of the scrubber and generate net savings for customers. The Commission can only base its factual findings on evidence in the record and on matters officially noticed. The fuel price comparisons on a delivered-price basis necessary to make

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such a determination are simply not in the record. Correction of either or both of these mistakes would require the Commission to deny Tampa Electric's petition.

THE MORE SPECIFIC SECTION 366.825 CONTROLS OVER THE MORE GENERAL SECTION 366.8255

3. On July 29, 1998, the Office of Public Counsel filed its "Suggestion that the Public Service Commission, on its own Motion, Dismiss Tampa Electric's Petition without Prejudice." In that pleading, Public Counsel noted the differences in specificity between Sections 366.825 and 366.8255 in terms of both information to be submitted and procedures to be followed and the reasons why, in Public Counsel's estimation, Tampa Electric was required to follow the former statute and could not proceed under the latter. The Staff, in its August 20, 1998, recommendation urged rejection of Public Counsel's suggestion (as well as pending motions to dismiss filed by FIPUG and LEAF). The Staff's legal rationale was captured in its explanation, at page 9, that the two provisions were, after all, "separate statutes":

> The Motions also argue that Section 366.825, Florida Statutes, require TECO to seek preconstruction prudence review before seeking cost recovery under Section 366.8255, Florida Statutes. This is false. The two Sections, 366.825 and 366.8255, Florida Statutes, are not "allied." They are separate statutes. A filing under one has no bearing on the other. TECO has appropriately filed for prudence review under Section 366.8255, Florida Statutes, and has reserved to a later docket the cost recovery aspect of a filing under that section.

The staff obviously did not feel the difference in specificity between the statutes was worthy of consideration. Moreover, the last sentence in the passage quoted above completely ignores the fact that it is only Section 366.825 which specifically provides for prior approval of a Clean Air Act project with a prudence review of actual expenditures to be held later.

4. Staff's recommendation was taken up at the September 1, 1998, agenda conference. To address the matter of specificity which was lacking in the recommendation, the undersigned attorney for the Office of Public Counsel distributed a copy of Christo v. State, Dept. of Banking & Finance, 649 So. 2d 318, 321 (Fla. 1st DCA 1995), at the agenda conference for the proposition that "a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. See Dep't of Health and Rehabilitative Serv. v. America Healthcorp. of Vero Beach, Inc., 471 So.2d 1312 (Fla. 1st DCA 1985), opinion adopted by 488 So.2d 824 (Fla. 1986)."

5. The Commission's acceptance of its Staff's recommendation (to deny the motions and suggestion) was reported in Order No. PSC- 98-1260-PCO-EI, issued September 22, 1998. The order did not address whether both statutes offered a procedure for prior approval of environmental projects designed to satisfy the Clean Air Act Amendments of 1990 or whether one statute outlined a regulatory scheme with more specificity than the other and was, therefore, controlling. Instead, the Commission simply stated, at page 6, that "[t]he substantive law governing this docket is found in Section 366.8255, Florida Statutes," and otherwise repeated text from the recommendation that a reconciliation of the disparate provisions of Sections 366.825 and 366.8255 is unnecessary because "[t]hey are different statutes."

6. The mere existence of two different statutes, however, cannot resolve the matter. This is precisely the issue in dispute. Where there are two statutes, each addressing the same subject matter, the Commission cannot ignore one at the expense of the other without reconciling the two. There is one statute, Section 366.825, which by its explicit terms applies to projects undertaken to satisfy the Clean Air Act Amendments of 1990. It is this statute, and this statute alone, which

identifies the precise information which must accompany a petition and adopts a procedure for prior approval followed by later consideration of the prudence of costs incurred. This is exactly what Tampa Electric was asking for. There is a second statute, Section 366.8255, which the Commission has interpreted to permit consideration of the same issues using the same procedure. Assuming, for the sake of argument, the Commission's interpretation of Section 366.8255 is correct, it is still faced with two statutes addressing the same subject matter, and it must apply principles of statutory construction to decide whether one trumps the other.

7. Concededly, the Commission is recognized to have a great deal of expertise in interpreting statutes it administers. And its interpretation will not be disturbed by a higher tribunal unless clearly erroneous. This motion, however, is not challenging the interpretation of Section 366.8255. This motion is directed to the Commission's failure to reconcile its interpretation of that section with the facial applicability and specificity of another statute.

8. Rudimentary rules of statutory construction have been implicated in this proceeding, whether the Commission has chosen to address them or not. Resort to such rules would, of course, be unnecessary if the relevant sections could be read in pari materia and effect given to each word of both. That is not possible in this case, however, because the Commission must find some basis to support its implicit conclusion in Order No. 99-0075 that the applicability of Section 366.8255 makes compliance with Section 366.825 unnecessary. The Commission's earlier decision in Order No. 98-1260 did not address the issue of statutory construction raised here. Order No. 99-0075 is incorrect as a matter of law in that it grants prior approval for Tampa Electric's compliance plan pursuant to a statute which, although sanctioned in Order No. 98-1260, is not controlling under prevailing principles of statutory construction.

9. There can be no question but that Section 366.825 could be applicable to a Commission evaluation of an electric utility's petition for prior approval of a Clean Air Act compliance plan. And there can be no question that Section 366.825 addresses that specific matter in more detail than Section 366.8255. The case law is uniform in holding that, in such a situation, the more specific statute must be followed. The Christo case was previously cited and copies given to Commissioners and Staff. The most recent pronouncement on the matter is probably Zorc v. City of Vero Beach, 23 Fla. L. Weekly D2622, D2625 (Fla. 4th DCA Dec. 2, 1998)("[I]t is a basis [sic] tenet of statutory construction that a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994).") Going back to 1997 is the case of Legal Environmental Assistance Foundation v. Dep't of Environmental Protection, 702 So. 2d 1352, 1353 (Fla. 1st DCA 1997)(Immediately after quoting from McKendry, the court said: "In Florida law, a more specific statute is considered an exception to, or qualification of, the general terms of the comprehensive statute. See Floyd v. Bentley, 496 So.2d 862, 864 (Fla. 2d DCA 1986).") For a 1996 case, See, C.S. v. S.H., 671 So. 2d 260, 268 (Fla. 4th DCA 1996), review denied, 680 So. 2d 424 (Fla. 1996).

THE FUEL PRICE FORECASTS NECESSARY
TO EVALUATE THE REASONABLENESS OF
THE SCRUBBER ARE NOT IN THE RECORD

10. The pivotal factual issue in this proceeding was whether Tampa Electric's fuel price forecast demonstrated the reasonableness of its decision to build a scrubber to meet Phase II requirements of the Clean Air Act Amendments of 1990. The viability of the scrubber option was wholly dependent upon fuel savings on a delivered-price basis from burning high-sulfur coal and

petroleum coke with the scrubber as opposed to the costlier low-sulfur coal and emission allowance purchases required if the scrubber was not built.

11. Section 120.57(1)(h), Florida Statutes (1997), requires Commission's findings of fact to be based exclusively on the evidence of record and on matters officially recognized. The Office of Public Counsel, in its initial brief, took the position that the fuel price forecasts necessary to support a finding of fact as to their reasonableness did not make their way into the record. The company apparently agreed. In Tampa Electric's reply brief, it did not even try to identify where the relevant forecasts were located in the record. Instead, it said Staff had them, and they were readily available to Public Counsel to review at any time. In other words, Tampa Electric essentially conceded the point.[1]

12. Staff, however, did not. Staff could find the record source for relevant fuel price data even if Tampa Electric could not, and even if Staff had to infer its existence in the record. In language from the recommendation which was incorporated in the final order, Staff said the relevant

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[1]Tampa Electric, in its initial brief at page 10, had said its fuel price forecast "was based on various external forecasts, actual prices reported in various periodicals, actual buying experience, and information obtained through energy supply representatives." The specific sources for this information, as well as the manner in which it was incorporated into Tampa Electric's own forecast, was for the most part, undisclosed on the record of this docket. In its reply brief, Tampa Electric again did not identify record sources for its fuel forecast. To the contrary, it identified the non-record sources. Beginning at page 10 of its reply brief, Tampa Electric said its forecasts had been provided to Staff during discovery, that Staff asked questions about the 30-year forecast during depositions, and that Intervenors did not express any interest in this data. Then, turning the concept of burden-of-proof (along with procedures for confidentiality) on its head, Tampa Electric (at page 11) said other parties could have invoked procedures to protect the confidentiality of its fuel data and prevented public disclosure if they were interested in having the forecasts in the record. Tampa Electric obviously failed to develop record evidence on the subject.

fuel price data was either explicitly or "implicitly" in the record. That's not good enough under the Administrative Procedure Act. Either it is in the record, or it is not.

13. Issue 2 in this proceeding was very straightforward: "Is the fuel price forecast used by TECO in its selection of a CAAA Phase II Compliance plan reasonable?" Tampa Electric had to prove the fuel price forecast it actually "used" was reasonable. To make such a determination, the Commission had to, at least, see the forecast. Since the scrubber was portrayed to be the least-cost option on a system-wide basis (it would, for example, purportedly allow high-sulfur coal to be burned at Gannon), the Commission had to evaluate projections of delivered prices of coal, oil, petroleum coke and natural gas at each of the various generating stations in sufficient detail and with adequate explanation to gauge their reasonableness.

14. The Commission tries to explain the source of fuel data available to it beginning at page 13 of Order No. 99-0075. For example, in the second full paragraph on that page, the Commission states that, although only mine-mouth prices are portrayed in the simplistic line graphs of Exhibits 2 and 12, it is nevertheless reasonable to assume that Eastern Kentucky and Western Kentucky coals would have similar transportation costs. This concession that delivered prices are not even represented does nothing, of course, to establish the reasonableness of the actual delivered fuel price forecast the Commission has never seen.

15. In the last paragraph on page 13, the Commission states that the fuel price forecasts Public Counsel alleged in his brief were missing are, in fact, to be found in several late-filed deposition exhibits entered into the record as part of Late-Filed Exhibit 14. Late-Filed Deposition Exhibit 1, for example, is alleged to have "explicitly provided 27-year coal and natural gas price forecasts." But that deposition exhibit only shows the projected coal costs for Big Bend Units 1 and

2. and only on a $/MMBtus basis. Moreover, those numbers were driven by Staff's insistence that, for reporting purposes in this specific exhibit, the average generation each and every year be exactly 5,600,000 megawatt-hours at an average heat rate of 10,000 Btu/kWh. The exhibit bears no relation at all to the fuel forecast "used" by Tampa Electric to select the scrubber option.

16. Next, the Commission states that Late-Filed Deposition Exhibit 6 "implicitly provided 27-year coal price forecasts." That document, however, only shows differential revenue requirement scenarios on assumed 10-, 20- and 30-year book life bases. The entries under "Fuel" in the "Big Bend 1&2 FGD" scenario, for example, are only given in total dollar amounts. They are not represented to be just for coal. And there is no way to evaluate them for reasonableness.

17. Next, the Commission states that Late-Filed Deposition Exhibit 8 "implicitly provided 27-year price forecasts for several fuels to calculate annual system fuel costs." No, it doesn't. It provides, at most, a single entry for each year's total system fuel cost. There is no way to know how Tampa Electric projected its fuel prices or to gauge the reasonableness of the results.

18. There is no evidence in the record of this proceeding from which the Commission can determine that Tampa Electric's projections of coal, oil, petroleum coke and natural gas on a delivered basis for its current and future generating units over the life of the scrubber option are reasonable. As a result, the Commission has no basis upon which to determine whether the aggregate cost of fuel, plus the cost of emission allowances, plus the capital and O&M costs of the scrubber, on a cumulative-present-worth-revenue-requirements basis, is reasonably expected to be less than the aggregate cost of fuel and allowances if the scrubber is not built. The Commission is obviously mistaken in its assertions that it has adequate evidence in the record to determine the reasonableness of the fuel price forecast actually used by Tampa Electric in its evaluation and selection of the

scrubber as the least-cost way of complying with Phase II of the Clean Air Act Amendments of 1990.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, move the Florida Public Service Commission to reconsider its Order No. PSC-99-0075-FOF-EI and deny Tampa Electric Company's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 980693-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR RECONSIDERATION has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 26th day of January, 1999:

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