BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Tampa Electric Company for approval of a new environmental program for cost recovery through the environmental cost recovery clause.	DOCKET NO. 000685-EI ORDER NO. PSC-00-1906-PAA-EI ISSUED: October 18, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ

PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR COST RECOVERY THROUGH THE ENVIRONMENTAL COST RECOVERY CLAUSE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose substantial interests are substantially affected files a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code.

I. Background

The United States Department of Justice, on behalf of the United States Environmental Protection Agency (EPA), filed a law suit against Tampa Electric Company (TECO), on November 3, 1999, alleging TECO violated the Prevention of Significant Deterioration (PSD) requirements at Part C of the Clean Air Act, 42 U.S.C. §§ 7470-7492. The EPA alleged that TECO was required to obtain a PSD permit and apply best available control technology (BACT) before proceeding with various power plant modifications which TECO completed between 1991 and 1996. The power plant modifications in question were replacements of boiler equipment such as steam drum internals, high temperature reheater, water wall, cyclone, and furnace floor.

The Florida Department of Environmental Protection (DEP) filed a lawsuit against TECO on December 7, 1999, which mirrored the EPA lawsuit. Shortly after DEP filed its lawsuit, TECO and DEP settled the suit by entering a Consent Final Judgment (CFJ). The CFJ became effective on December 16, 1999. The CFJ requires TECO to:

- Optimize the scrubber on Big Bend Station Units 1&2 to achieve 95% sulfur removal efficiency beginning year 2000.
- Maximize the availability of both scrubbers at Big Bend Station beginning in year 2000.
- Repower Gannon Station with natural gas by December 31, 2004.
- Install Selective Catalytic Reduction technology on the repowered Gannon units to achieve a emission rate for nitrogen oxides (NO_x) of 3.5 parts per million by December 31, 2004.
- Install retrofit NO_x controls, repower or shut down Big Bend Units 1&2 by the year 2007.
- Install retrofit NO_x controls, repower or shut down Big Bend Units 3&4 by the year 2010.
- Spend up to $8 million to control NO_x emissions with non-ammonia control technology or other combustion controls by December 31, 2004.
- Perform Best Available Control Technology analysis and optimization of the Big Bend Station electro-static precipitators by the year 2003.
- Install continuous emission measuring equipment for particulate matter on one Big Bend stack by May 1, 2003.
- Pay $2 million into the Tampa Bay Estuary (BRACE) program by year end 2002.
- Prohibit sale of NO_x emission allowances if such allowances are established by state or federal law.

On December 23, 1999, TECO filed a petition for Commission approval of its plan to comply with the compliance plan outlined in the CFJ. This petition was assigned Docket No. 992014-EI.

The EPA lawsuit remained unresolved even though TECO and DEP had reached settlement. TECO continued independent negotiations with the EPA to resolve the EPA's concerns. On February 29, 2000, TECO and the EPA signed a settlement agreement (Consent Decree). The Consent Decree was filed with the U.S. District Court in Tampa on February 29, 2000. The notice of lodging of the Consent Decree was published in the Federal Register on March 20, 2000, Volume 65, No.54.

The Consent Decree, includes the requirements of the CFJ, but modifies some of the CFJ compliance dates, provides more explicit instructions than the CFJ and goes beyond the CFJ in three areas. The three additional requirements of the Consent Decree are: a) TECO is prohibited from banking or selling SO_2 emission allowances; b) TECO is required to pay a one-time civil penalty of $3.5 million; and, c) TECO is required to spend up to $9 million on innovative or other combustion controls to reduce NO_x emissions at the Big Bend Station.

After entering the Consent Decree with the EPA, TECO filed with the Commission a Voluntary Dismissal and Withdrawal of the petition in Docket No. 992014-EI on March 1, 2000. The Commission closed Docket 992014-EI by Order PSC-00-0817-PAA-EI, issued April 25, 2000, without addressing TECO's proposed plan to implement the CFJ.

On June 2, 2000, TECO petitioned for cost recovery of the Big Bend Units 1, 2, and 3 Flue Gas Desulfurization System Optimization and Utilization Program (FGD Plan) through the ECRC. Developing this plan is required by the CFJ and the Consent Decree. TECO also seeks to include the actual year 2000 expenditures in their 2000 true-up amounts in the ECRC. TECO states that the FGD Plan costs will be allocated to rate classes on an energy basis because the program is a Clean Air Act compliance activity. We have jurisdiction over the subject mater of this petition pursuant to Section 366.8255, Florida Statues.

Part II of this Order addresses whether the FGD plan meets the eligibility criteria for cost recovery established in Order No. PSC-94-0044-FOF-EI, issued on January 12, 1994 in Docket No. 930631-EI. A portion of the costs for which TECO seeks recovery were incurred before TECO filed the petition. Part III of this Order addresses recovery of the costs TECO incurred before filing its petition.

II. Eligibility of the FGD Plan for Cost Recovery Through the ECRC

Order No. PSC-94-0044-FOF-EI, issued January 12, 1994 in Docket No. 930613-EI, sets forth the criteria used to administer Section 366.8255, Florida Statutes. According to our interpretation of the statute as expressed in Order No. PSC-94-0044-FOF-EI, we must first determine whether the project is eligible for recovery through the Environmental Cost Recovery

Clause before cost recovery occurs. The criteria used to assess eligibility for cost recovery through the ECRC are:

1. The costs were prudently incurred after April 13, 1993;
2. The activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the company's last test year upon which rates are based; and,
3. Such costs are not recovered through some other cost recovery mechanism or though base rates.

TECO's compliance with these criteria is discussed below.

A. Costs Prudently Incurred After April 13, 1993

This ECRC criterion limits cost recovery to prudently incurred costs which have occurred after the enactment of the ECRC. This ECRC criterion is satisfied because none of TECO's FGD Plan expenses were incurred prior to calendar year 2000.

For purposes of the ongoing ECRC proceedings, this criterion limits cost recovery to those which are prudently incurred. As indicated in a following section, TECO must implement the FGD Plan as approved by the EPA. The EPA's final decision on TECO's proposed FGD Plan is not expected until some time in 2001. Consequently, the specific activities and costs listed in the FGD Plan may change. Program implementation issues, such as these, are typically addressed in the ongoing ECRC proceedings and not necessary to resolve at this time.

B. Legal Requirement for the Activities

Costs incurred in order to comply with the environmental requirements of orders are recoverable through the ECRC. See Sections 366.8255(c) and (d), Florida Statutes; Order No. PSC-94-0044-FOF-EI, issued on January 12, 1994 in Docket No. 930631-EI. Activities which are elective, discretionary, or generally image enhancement activities are excluded from recovery through the ECRC. See Order No. PSC-94-0044-FOF-EI, issued on January 12, 1994 in Docket No. 930631-EI.

The FGD Plan is required by orders of FDEP and the EPA to improve air quality. The Consent Decree, at Paragraph 31 requires

TECO to develop a plan addressing all operational and maintenance changes needed to maximize the availability of the existing scrubbers at Big Bend Units 1,2, and 3. The plan may be in one or two phases, and TECO elected a two phased plan. The first phase requires TECO to ensure that its staff is available to work overtime and that a supply of spare parts is available on-site. The EPA approved Phase I. TECO anticipates filing phase II of the FGD Plan with the EPA in the spring of 2001. EPA will have 60 days to issue its decision. TECO must receive prior written approval from the EPA before implementing any changes to the FGD Plan.

TECO's settlement with the FDEP does not require a detailed FGD Plan. Section V.(D) of the CFJ simply states that TECO "...shall maximize scrubber utilization on all four boilers." Because the FGD Plan is a direct requirement of the Consent Decree at Paragraph 31, it is reasonable to conclude that the FGD Plan also satisfies the more general requirements of the CFJ.

Based on the forgoing analysis, TECO's petition satisfies the ECRC criterion that the proposed activity is legally required.

C. Costs are not Recovered by Other Means

The purpose of this ECRC criterion is to ensure that the environmental compliance costs are incremental to those used in setting current base rates.

TECO's current base rates were set in Docket No. 920324-EI. The 1992 rate case addressed the cost of scrubbing only Big Bend Unit 4. At that time, TECO was not projected to incur costs associated with scrubber facilities at Big Bend Units 1, 2 or 3 because scrubber facilities were not planned for those generating units at that time. As previously stated, the Consent Decree and the CFJ require TECO to implement the FGD Plan. The implementation of the FGD Plan began in calendar year 2000. Therefore, the FGD Plan costs were not considered when TECO's base rates were set.

Based on the above analysis, the environmental compliance costs are incremental to those used in setting current base rates.

D. Cost Recovery Schedules and Rate Impact

FGD Plan costs will be included in the cost recovery true-up filings for calendar year 2000 and in the projections for calendar year 2001. TECO's most recent estimates of the FGD Plan costs are

listed in the tables below. TECO'S updated FGD Plan estimate of $1,615,000 for Operations & Maintenance activities is $20,000 less than the estimate included with the petition. The level of capital investment to implement the FGD Plan is still projected to be $5,130,000. Approximately $261,000 in capital expenditures and approximately $936,000 for O&M activities were incurred prior to June 2, 2000 when TECO filed this petition. Recovery of these incurred costs is addressed in Part III of this Order.

Table 1

Big Bend Unit 1&2 FGD Activities			
Description	Projected Completion Date	Cost ($000)	
		Capital	O&M
Preventive Maintenance	12/1/00		250
Oxidation Air Control Improvements	12/1/00		10
Tower Water,Air,Reagent & Startup Piping Upgrade	12/1/00	100	25
Sub Total		100	285

Table 2

Big Bend Unit 3 FGD Activities			
Description	Projected Completion Date	Cost ($000)	
		Capital	O&M
Duct Work Improvements	10/1/00	50	100
Quencher System Improvements	10/1/00		165
Electrical System Reliability Improvements	12/1/00	310	80
Tower Control Improvements	12/1/00	10	10
DBA System Improvements	6/1/01	25	150
Booster Fan Reliability Improvements	6/1/01	930	40
Tower Piping, Nozzle, and internal improvements	6/1/01	230	110
Absorber System Improvements	6/1/01	420	415
Tower Demister (packing) Improvements	6/1/01	530	
Sub Total		2,505	1,070

Table 3

Common Support System Projects			
Description	Projected Completion Date	Cost ($000)	
		Capital	O&M
Limestone Supply Reliability Improvements	6/1/01	1,120	100
Gypsum De-Watering Improvements	6/1/01	100	10
Stack Reliability Improvements	6/1/01	275	50
Waste Water Treatment Reliability Improvements	12/1/01	1,030	120
Sub Total		2,525	280

Paragraph 16 of TECO's Petition states that TECO is not requesting a mid-course change in the ECRC factors for year 2000. Based on the available information, it appears there will not be a significant rate impact. The actual program expenditures will be addressed in the November 2000 ECRC hearing and will be subject to audit.

Paragraph 17 of TECO's Petition states that TECO will be allocating the cost of the FGD Plan to rate classes on an energy basis because the program is a Clean Air Act compliance activity. The Commission determined in 1994, that costs for Clean Act Compliance Activities should be allocated to rate classes on an energy basis. This has been Commission practice since the guidelines were established in Order No. PSC-94-0393-FOF-EI, issued April 6, 1994. Program implementation issues, such as this one, are typically addressed in the ongoing ECRC proceedings and are not necessary to resolve at this time.

F. Conclusions

Based on the forgoing review of TECO's FGD Plan and application of the Commission's ECRC criteria to TECO's FGD Plan, we find that the FGD Plan meets the requirements of Order No. PSC-94-0044-FOF-EI.

III. Costs Incurred Before the Petition was Filed

Section 366.8255(2), Florida Statutes, provides:

> An electric utility may submit to the Commission a petition describing the utilities proposed environmental compliance activities and projected environmental costs....

In Order No. PSC-94-1207-FOF-EI, issued October 3, 1994, in Docket No. 940042-EI, we stated, "environmental compliance cost recovery, like recovery through other cost recovery clauses, should be prospective." However, in that Order we recognized that there might be exceptions to the prospective costs requirement in "extraordinary circumstances." We further stated that whether extraordinary circumstances existed would be determined case-by-case, based on the facts of each case. The key to determining extraordinary circumstances is "whether the utility could reasonably have anticipated the changes [in environmental regulations] and the costs." Examples of extraordinary circumstances provided in the Order were rapidly changing laws, imposition of unanticipated costs, and environmental emergencies.

Through interrogatories, our staff brought the question of incurred costs to TECO's attention. TECO explained that it had to implement parts of the Consent Decree immediately, due to time schedules in the Consent Decree and the previously scheduled outage

of Big Bend Unit 3. The unit had to be altered to meet the requirements of the Consent Decree and the most efficient time to do it was during a planned outage. The Consent Decree was signed in February and the outage had been scheduled to begin in March 2000. If TECO had not acted immediately, it would have had to schedule another outage.

TECO also explained that it wanted to avoid recovering costs associated with FGD optimization and utilization in a piecemeal fashion and so it chose to request recovery of the FGD activities "under one program." TECO further explained that the outage not only provided an opportunity to perform the required work, but also afforded the best means to compile an estimate of the initial scope and costs for compliance with the FGD Plan.

Upon consideration, we find that extraordinary circumstances led to TECO's incurring costs before a petition could be filed. TECO's settlement negotiations were not finalized until February 2000 and TECO had to start incurring costs in March 2000 in order to take advantage of a planned shut-down. Given that TECO was involved in negotiations nearly until the time it had to act, we find that TECO could not have reasonably anticipated the environmental requirements it had to meet. Therefore, TECO was subjected to extraordinary circumstances and can recover the costs it incurred before it was able to file the petition.

From a policy perspective, we believe that to deny recovery of the incurred costs creates a disincentive for utilities to be vigorous negotiators. If we were to deny recovery of the costs incurred under TECO's circumstances, we would be sending a message to utilities to acquiesce in negotiations just so the issues can be resolved in time to file a petition before incurring costs. Under such a scenario, utilities might incur greater costs than necessary, to the ultimate detriment of the ratepayers.

We temper our decision by noting that TECO did have some indication of the outcome of the negotiations. It signed the CFJ with FDEP in December 1999 and the EPA Consent Decree largely mirrors FDEP's CFJ. We recognize, however, that TECO could not have known the outcome of the negotiations with the EPA with certainty. Under these particular circumstances, the determination of whether TECO could have anticipated the incurred cost is a difficult one. For this reason we note that this case represents the outer limit of extraordinary circumstances.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's Petition for Cost Recovery through the Environmental Cost Recovery Clause is granted. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 18th day of October, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

MKS

DISSENT

Commissioner Jaber dissents only from the decision to allow recovery through the clause for those expenses incurred prior to the filing of the utility's petition.

Section 366.8255(2), Florida Statutes, provides in part: "An electric utility may submit to the Commission a petition describing

the utility's proposed environmental compliance activities and **projected** environmental costs..." (emphasis added). In Order No. PSC-94-1207-FOF-EI, issued October 3, 1994, in Docket No. 940042-EI, the Commission stated, "environmental compliance cost recovery, like recovery through other cost recovery clauses, should be prospective." However, in that Order the Commission recognized that there might be exceptions to the prospective costs requirement in "extraordinary circumstances." I do not believe the statute permits the inference of an "extraordinary circumstances" exception to the prospective requirement. For this reason, I dissent from the majority's decision. This does not mean that I believe that the utility's decision to begin the project was not prudent or that the costs of the project are not reasonable utility expenditures. Recovery of the costs incurred prior to the filing of the petition through the utility's base rate earnings, rather than the environmental cost recovery clause, is appropriate.

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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 8, 2000.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.