BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Petition of Tampa Electric Company for approval of construction deferral agreement with IMC Fertilizer, Inc. | DOCKET NO. 890200-EQ<br>ORDER NO. 24151<br>ISSUED: 2/25/91 |

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
BETTY EASLEY
FRANK S. MESSERSMITH

ORDER APPROVING CONSTRUCTION DEFERRAL AGREEMENT

BY THE COMMISSION:

On February 8, 1989, Tampa Electric submitted its initial petition for approval of a construction deferral agreement with IMC. Tampa Electric asserted that its willingness to enter into the agreement was prompted by a determination by IMC to construct its own 2.8 mile transmission line from IMC's cogeneration facility at its New Wales chemical plant to IMC's Kingford No. 2 mine. This transmission line construction would traverse land owned or controlled by IMC and would have enabled IMC to deliver its excess cogenerated electricity (estimated at 5.4 megawatts of capacity and 37,843,200 kilowatt hours of electricity per year) from IMC's New Wales plant to its Kingsford No. 2 mine. Tampa Electric Company asserted that the loss of revenues associated with this plan would have been harmful to Tampa Electric's Customers. (Tr. 52)

Under this agreement IMC agreed to cease its actions to construct the 2.8 mile transmission line for a period of one year. IMC was well on its way toward constructing the line, having ordered the materials needed to do so. In exchange for the deferral, IMC would receive a credit on its monthly electric bill based on the total KWH of electricity sold by IMC New Wales to Tampa Electric each month. For each KWH thus sold Tampa Electric agreed to provide IMC a credit for continued full service to the Kingsford No. 2 mine, with such credit being based on the difference between marginal fuel cost and average fuel cost. This

arrangement would be based on the level of generation sold on an as-available basis to Tampa Electric by IMC at its New Wales facility. The duration of the agreement was to be one year. The agreement expired on July 10, 1990. (Tr. 52-53)

Tampa Electric asserted that the agreement would enable the company to avoid or minimize revenue losses and that this, in turn, would provide benefits to Tampa Electric's other Customers.

On June 27, 1989 Staff recommended approval of the agreement and further that Tampa Electric be authorized to treat the IMC credits as additional fuel costs to be recovered from Tampa Electric's Customers through the fuel and purchased power cost recovery clause. We considered Tampa Electric's petition and the Staff's recommendation at our July 11, 1989 Agenda Conference and voted to approve the agreement and the fuel cost recovery treatment of the IMC credits. The Office of Public Counsel later appealed that decision to the Supreme Court of Florida.

On December 8, 1989 we filed with the Supreme Court a Motion to relinquish Jurisdiction stating that we were prepared to provide Public Counsel the opportunity for a full hearing before issuing a final order. That motion was granted by the court on February 22, 1990.

Thereafter we reissued Order No. 21600 as a proposed agency action. (Tr.54-55)

On May 24, 1990 Public Counsel filed a petition requesting a full hearing on the matters addressed in the proposed agency action order approving the line deferral agreement. Such a hearing was conducted on September 24, 1990. Testimony and exhibits were presented on behalf of Tampa Electric, IMC, and Public Counsel.

TECO reasonably believed that IMC would build the line.

We find that the facts and circumstances known to TECO at the time it negotiated the IMC Line Deferral Agreement provided a reasonable basis for TECO to conclude that, absent the agreement, IMC would construct the transmission line.

At the time the agreement was negotiated, TECO's and IMC's engineering personnel had been discussing the details of constructing the line, line clearance, and specific installation of

equipment by TECO's and IMC's personnel over a nine-month period, beginning with a meeting in March of 1988. (T. 190, 334) In May of 1988 IMC completed an engineering proposal which demonstrated sufficient savings to justify construction of the line. (T. 190) On August 19, 1988, IMC's president approved the plant's request for approval of construction of the transmission line. (T. 190)

IMC hired an engineering firm to prepare construction plans and ordered the transformers, which are long-delivery items on September 8, 1988. (T. 190, Exhibit 7) This equipment was ordered before TECO first approached IMC with a proposed agreement in late September of 1988. (T. 166-167, 191) There was a 100 percent cancellation penalty on this equipment after a certain date. The estimated total cost of the line was $684,268. (Exhibit 1, Document 1) IMC had already spent at least 44 percent of the estimated total cost of the transmission line by the time the agreement was signed.

IMC had also discussed with TECO planned improvements to their cogeneration facility which would have increased the output of those facilities over and above the levels of as-available sales in 1987 and 1988. IMC had earlier provided to TECO (for another purpose) an analysis which identified between 13 to 50 million excess KWH that would be available at New Wales to be wheeled to the Kingsford Mine per year under various expansion scenarios. (T. 318)

At the March 1988 meeting with IMC, TECO was informed that the IMC New Wales plant would have a peak generation of 60.5 MW and a peak plant load of 55 MW. TECO thus assumed excess capacity of 5.4 MW and, based on an 80% capacity factor, 37.8 million KWH of excess electricity. (T. 118-120; Exhibit 4)

A cost-effectiveness analysis based on the as-available sales for 1988, the twelve months immediately preceding the signing of the agreement, showed construction of the line would yield a rate of return of 19.34 percent. (Exhibit 3, page 3; T. 117) Mr. Wright, witness for the Office of Public Counsel acknowledged that if IMC could borrow the money at the prime rate, a return of about only ten percent would be required. (T. 286-287) Furthermore, TECO's analysis is based on a five-year depreciation while Mr. Hirsch testified that IMC normally calculates the return assuming a ten-year life. (Tr. 115-116, 157) Mr. Wright testified in cross examination that assumption of a longer depreciation life would

decrease depreciation expense and annual costs and increase the profit. (T. 288) Also, the calculated return of 19.34 percent on construction of the transmission line does not include the demand savings from elimination of transformer rental and consolidation of demand. Dr. Hirsch testified that about one-third of the savings would come from these demand savings. (T. 190) Mr. Wright acknowledged that these savings could be $120,000 a year. (T. 294)

There is abundant evidence in the record that IMC intended to build the transmission line in 1988:

1. IMC and TECO engineering staff held meetings over the course of nine months, beginning with a meeting in March of 1988, on the logistics and details, engineering and technical data on the construction of the line. (T. 190, 266, 334)

2. An engineering proposal was completed by IMC in May 1988 which demonstrated sufficient savings to justify construction of the line. (T. 190)

3. On August 19, 1988, IMC's president approved the plant's request to build the line. (T. 190)

4. IMC hired an engineering firm to prepare construction plans. (T. 190) The cost of this engineering design was greater than $77,622. (Tr. 148, Exhibit 13)

5. On September 8, 1988 IMC ordered transformation equipment, which had a long delivery period, and a 100 percent penalty after a certain date. If TECO had not purchased the equipment pursuant to its informal agreement with IMC it would have had to pay the 100 percent penalty. (T. 122-123) The cost of this equipment was $287,000 plus $17,221 of sales tax. The total cost of the line was $684,268. (Exhibit 1, Document 1) Thus IMC had already spent at least 44 percent of the estimated total cost of the transmission line by the time the agreement was signed.

6. Dr. Hirsch testified that IMC would not have accepted the agreement except that late 1988 was a time of limited capital availability. Dr. Hirsch testified that "the only reason that this agreement looked good at the time is because of a tight capital bank." (T. 158) In discussing why the company determined not to go forward with the project, Dr. Hirsch testified that "[w]hen IMC's three capital opportunities were weighed for their relative merits

and TECO proferred its construction deferral contract, it tilted the scales in favor of spending our capital funds on the two other projects and deferring the transmission line." (T. 191-192)

7. A cost-effectiveness analysis prepared by TECO based on the 1988 level of as-available sales for the twelve months preceeding the signing of the agreement indicates that construction of the line would yield a rate of return of 19.34 percent. (Exhibit 3, page 3; T. 117)

8. The calculated return of 19.34 percent on construction of the transmission line does not include the demand savings from elimination of transformer rental and consolidation of demand. Dr. Hirsch testified that about one-third of the savings would come from these demand savings. (T. 190) Mr. Wright acknowledged that these savings could be $120,000 a year. (T. 294)

The Office of Public Counsel argues that the reduction in as-available sales indicates that IMC would not have built the line in July. However, Mr. Hirsch testified that if IMC had built the transmission line, the driving force for internal dispatching, one of the reasons for the reduction in IMC's as-available sales, would have disappeared so that some of the reduction in as-available sales would not have occurred. (T. 195, 152) He further testified that the 58.5 turbo generator had been losing capacity of perhaps as much as 9 or 10 MW in 1989 and 1990. (T. 189, 152) A chemical wash on September 10, 1990 restored at least five or six megawatts of the lost capacity. (T. 152) An overhaul in the fall of 1990 along with the chemical wash for the silica build-up will increase its capacity by 10 megawatts, resulting in substantial additional electricity for export. (T. 147, 182-183, 193) Therefore, it is reasonable to conclude that the electricity for export over the proposed transmission line would have been greater than the actual as-available sales as of July 1989.

We find that the aforementioned facts and circumstances constitute a reasonable basis for TECO to conclude that absent the agreement, IMC would have constructed the transmission line.

TECO reasonably believed that the construction deferral agreement would benefit its general body of ratepayers.

We have answered in the affirmative the question of whether the information available to TECO forms the basis for a reasonable determination that IMC was going to build the transmission line absent the agreement. We must next address the question of whether it would be in the financial interest of the general body of ratepayers to approve the agreement. TECO knew that, if the transmission line were constructed, the ratepayers would be responsible for at least the oil backout charges and the difference between marginal and average fuel, (which is the amount of the credit), for as-available sales which would have been exported over the line instead of sold to TECO. In addition, lost base rate revenues would have more than offset increased standby revenues. (T. 57, 63, 259, 229-230, 320-321)

At the hearing, TECO presented an analysis of whether the line would be cost beneficial to the general body of ratepayers based on the as-available sales of 37.8 MWH and 5.4 MW of capacity. The analysis considered the revenues net of marginal fuel that TECO would receive under three scenarios: (1) the existing system, (2) if IMC built the line, and (3) if the agreement was approved. The estimated total TECO revenues for 1989 if the agreement was approved are $647,406 while the estimated benefits if IMC had built the line are $52,104. Because the benefits or estimated retained revenues under the Agreement exceed the benefits if the line were constructed by $595,302, the agreement would be cost beneficial by $595,302 if there were 37.8 million KWH for export.

Both Mr. Mestas and Mr. Wright, Public Counsel's witness, testified that for the year the agreement was in effect $121,246 of net benefits flowed to the ratepayers due to the agreement. (T. 59, 230) The stockholders retained $57,086 of net benefits because TECO was not subject to the Commission's tax savings refund rule after 1989 (T. 230). The net benefits started accruing to the ratepayers as of the date the transmission line would have become operational. (T. 338) The net benefits for the period April 1 through July 10, 1989, were $61,304; $42,066 in retained base revenues (Exhibit 8) and $19,238 in retained fuel and oil backout revenues (Exhibit 9).

Therefore, the net benefits to the ratepayers before and during the period of the agreement were $182,550.

We believe that, if the line had been constructed, the general body of ratepayers would have lost some base rate revenues in 1989 and would have been responsible for additional fuel and oil backout costs. Entering into the agreement was cost beneficial for TECO's ratepayers.

The increase in TECO's fuel adjustment charge was prudent.

We will not reconsider our decision to allow recovery of the credits through the fuel clause. Our initial approval of the agreement and the recovery of the credits through the fuel clause was appropriate and is supported by the record. As previously discussed, we found that IMC intended to build the transmission line in 1988, and that it is in the ratepayers' best interest for the agreement to be approved. We further find that the credits granted to IMC and recovery of the credits through the fuel docket were lawful and appropriate, and the credits should not be refunded.

If the transmission line had been built, the reduction of sales to IMC at the mine would cause a loss of oil backout, fuel and base rate revenues. (T. 63, 127, 129-130, 259 and 338) The reduction in fuel revenues was equal to the credit paid to IMC. The general body of ratepayers would pay the same level of fuel charges during the effective period of the one-year agreement if the line were built or as a result of the agreement. (T. 127) Therefore, we find that recovery through the fuel clause recovery mechanism was and is appropriate.

The principle of retroactive ratemaking does not apply to this case.

The Florida Supreme Court recently decided three cases which are dispositive of this issue. Each of the three cases is entitled Citizens vs. Wilson, issued by the Court as Case Nos. 74,471, 74,915 and 75,074 (Fla. 1990).

These Supreme Court Decisions interpreted the file and suspend portion of Section 366.06, Florida Statutes. The Court held that when rates are filed and go into effect because the Commission does not withhold consent in 60 days, the rates are interim rates.

These rates become final only after a final order of the FPSC. The Commission however, must provide an opportunity for a hearing before it enters its final order.

Thus, at the time of the hearing in this docket, the rates in question were interim rates, subject to refund should they be deemed excessive or improper by the Commission. The principle of retroactive ratemaking does not apply to this case. The rates were interim in nature and subject to refund. Citizens vs. Wilson, Case Nos. 74,471, 74,915 and 75,074 (Fla. 1990).

Approval of the agreement does not give undue preference to IMC.

While special rates for any single customer could be discriminatory, Section 366.03, Florida Statutes, does not prohibit rates such as those resulting from the construction deferral agreement in this docket. Section 366.03, Florida Statutes (1989) provides:

> No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

This statute prohibits only those rates which are unduly discriminatory. In this case, the evidence shows that the IMC revenues TECO kept and its customers received far outweigh the additional revenues they gave up when TECO provided IMC the credit for electric service at the Kingsford Mine. We therefore find that the rates resulting from the construction deferral agreement are not unduly discrimatory.

Proposed Findings of Fact.

The Office of Public Counsel proposed 46 findings of fact. We will accept the following findings of fact: numbers 1, part of 2, 3, 5, 8, 9, part of 10, 11, part of 12, 13, part of 14, 15, 16, 18-22, 25-27, 30, part of 31, 32-42, part of 43 and 44-46. All others are rejected for the reasons discussed below.

1. Increases in electricity for export during the years 1986-87 and 1987-88 and the anticipation that similar increases would continue in the future led IMC to decide to construct a transmission line linking its New Wales chemical plant and its Kingsford No. 2 phosphate mine. [T. 151-52]

We accept this proposed finding with the provision that about one-third of the anticipated savings justifying construction of the transmission line was to come from consolidation of demand and elimination of transformer rental from TECO (T. 190, 292-294) and the other two-thirds from purchased energy savings (T. 190). The purchased energy savings depend on the level of electricity for export and the price differential between what TECO was paying for the energy it purchased from New Wales and what it was charging IMC for electricity purchased for the Kingsford Mine. At the time IMC made the decision to build the line the price differential was so great that IMC concluded that the cost of the line could be quickly amortized. (T. 143-144)

2. IMC performed a cost-effectiveness analysis that considered, among other things, the number of kilowatt-hours that could be carried over the transmission line, but that analysis has not been disclosed to TECO or to the Commission. [T. 154, 166]

We accept a portion of the proposed finding as follows: "IMC performed a cost-effectiveness analysis that considered among other things, the number of kilowatt-hours that would be carried over the transmission line." However, the final clause is incomplete and we will substitute the following in lieu of the clause proposed by the Office of Public Counsel: "While IMC did not provide the calculations contained in its analysis, IMC's witness testified to its conclusion that, based on the analysis, the transmission line was cost-effective."

3. IMC had taken preliminary steps toward building the transmission line by March 1988 [T. 167]; the engineering proposal was completed in May 1988 [T. 190]; and the president of IMC approved the construction of the line on either August 19 or August 22, 1988. [T. 181, 190, 192]

We accept this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding.

4. IMC first discussed construction of the transmission line with TECO at a meeting on March 8 or 9, 1988. [T.118, 127, 167, 190] At the March 1988 meeting, IMC informed TECO of the maximum ever generated at New Wales (60.4 megawatts) and the maximum load the plant has had (55 megawatts). IMC did not provide TECO with specific figures about the amount of excess kilowatt-hours IMC could sell to TECO on an as-available basis [T. 167-68; Exhibits 4,5 ] In fact, IMC has never made any representations to TECO about what as-available sales would be during the term of the agreement. [T. 155]

We accept this proposed finding with the provision that IMC would not give TECO the number of as-available sales but IMC's witness did tell TECO that the conclusion of TECO's cost-effectiveness calculation using the level of sales in the agreement was correct. (T. 155)

5. In the Fall of 1988, TECO offered IMC incentive payments if IMC would defer construction of the line. [T. 151, 167, 191] TECO did not propose any terms at that time that differed from those in the agreement ultimately signed in January 1989. [T. 169]

We accept the proposed finding with the modification that TECO first offered the proposed agreement to defer construction of the line in late September, 1988. (T. 166-167)

6. IMC considered TECO's offer relatively small because it did not equal IMC's economic justification for constructing the transmission line. [T. 151]

We reject this finding. There is no evidence in the record on <u>why</u> IMC considered TECO's offer relatively small. IMC's witness, Dr. Donald Hirsch, stated during the hearing that "The offer was relatively small <u>and</u> didn't equal the economic justification for constructing a tie-line." (T. 151) Furthermore, Dr. Hirsch testified that this was a time of limited capital availability and that the offer of the construction deferral agreement "tilted the scales in favor of spending our capital funds on the other two projects and deferring the transmission line." (T. 191-192, 151)

7. IMC proceeded to complete the design of the line and to order long delivery equipment and materials after TECO first proposed the agreement. [T. 144]

We reject this finding because there is conflicting evidence in the record. There is a statement in Dr. Hirsch's prefiled direct testimony that "Two or three months after IMC informed TECO of its decision to construct the line, TECO approached [him] with a proposed agreement to postpone construction of the tie-line. Negotiations proceeded for the next several months, during which time design of the line was completed and long delivery equipment and materials were ordered." (T. 144)

However, in cross examination, Dr. Hirsch testified that TECO first approached IMC with a proposed agreement in late September of 1988 (T. 166-167, 191) and that IMC ordered the long delivery transformation equipment in early September. (T. 181) Exhibit 7 shows that the long term delivery transformation equipment was ordered on September 8, 1988. The potential and current transformers, which had a somewhat shorter delivery time, were ordered on October 26, 1988.

8. Transformers and other long-delivery items were ordered in September 1988. [T. 181]

We accept this proposed finding with the modification that the long-delivery equipment was ordered on September 8, 1988. (T. 181, Exhibit 7)

9. IMC originally planned to put the transmission line in service in January 1989, but delivery dates for ordered equipment caused delays that pushed the expected in-service date back to mid-April, 1989. [T. 128, 184]

We accept most of the proposed finding with the modification "but when the equipment was ordered delivery was longer than expected, which changed the expected in-service date to April." (T. 184, 128) The witness did not indicate the equipment delivery caused delays, rather, that the expected in-service date was revised due to longer than expected delivery time.

10. Contrary to IMC's original expectations of increases in electricity for export, the amount of electricity for export decreased from 19.7 million KWH in 1987-88 (twelve months ending June 30, 1988), to 12.2 million KWH in 1988-89, to 10.7 million KWH in 1989-1990. [T. 80, 152, 283; Exhibit 14]

While the proposed finding is not incorrect, it presents only a portion of the relevant facts, which can be misleading. We accept the following modified version of the Office of Public Counsel's proposal. "IMC's electricity available for export increased from 13.8 million KWH in 1986-87 to 19.7 million KWH in 1987-88 (twelve months ending June 30, 1988). IMC expected similar export power increases, but contrary to IMC's expectation, the amount of electricity for export decreased to 12.2 million KWH in 1988-89 to 10.7 million KWH in 1989-90. (T. 80, 152, 283; Exhibit 14)

11. In 1987, IMC sold TECO 16.3 million KWH of electricity. [T. 74] In 1988, IMC sold TECO 19.1 million KWH [T. 74, 216] For the last half of 1988, IMC sold TECO 6.9 million KWH. [T. 216] For the first six months of 1989, IMC sold TECO 5.3 million KWH. [T. 74]

We accept this proposed finding, as it is supported by a preponderance of the evidence in the record of this proceeding.

12. The reasons for the decreased electricity for export were: (1) New Wales' consumption of electricity increased in 1988-89 and 1989-90 because of a debottlenecking program; (2) electricity at New Wales has been dispatched more efficiently; and (3) the turbine generator no. 2 has been losing capacity over this period of time. [T. 152, 172, 189-90, 194] There is also a fourth factor which IMC considers to be a trade secret. [T. 172, 190]

We accept this proposed finding except for the first reason for decreased electricity for export. The time period in the first reason should be modified to 1989 and the first half of 1990. Dr. Hirsch testified that the decision to debottleneck was made in early December of 1988. (T. 159-160)

13. IMC decided to debottleneck the chemical plant at New Wales in early December 1988 in anticipation of greater demand for its product. [T. 160, 189] Debottlenecking caused electrical demand to increase faster than steam production, which reduced electricity for export. [T. 152, 160-162]

We accept this proposed finding, as it is supported by a preponderance of the evidence in the record of this proceeding.

14. IMC's decision to debottleneck was completely independent of the agreement offered by TECO, and IMC would have debottlenecked the chemical plant even if TECO had not offered a construction deferral agreement. [T. 171]

We accept the second independent clause of this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding. We reject the first independent clause because it is conclusory.

15. TECO was not aware of IMC's plans to debottleneck the chemical plant. [T. 330]

We accept this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding.

16. IMC notified TECO of its willingness to postpone construction of the transmission line in early December 1988. [T. 151] The agreement was signed on January 17, 1989.

We accept this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding.

17. The construction deferral agreement was executed without first obtaining Commission approval for the agreement.

We reject this finding because the use of the word "executed" is ambiguous in this context. It is unclear whether the Office of Public Counsel is using the word to mean "signed" or "completed." Certainly the agreement was signed by the parties prior to Commission approval. We note that the parties engaged in the common practice of signing or executing a contract subject to or contingent upon Commission approval. However, the contract was not

executed in the sense that performance was completed without first obtaining Commission approval. TECO did not pay IMC the credits for which TECO received fuel cost recovery until sometime after July 11, 1989 when the Commission approved the agreement. (T. 339-340) TECO made IMC a payment issued on August 22 for credits for the time between February 21 and July 11, when the Commission approved the agreement during its agenda conference, on a below-the-line expense basis to TECO's stockholders. (T. 170,340)

It is true that IMC ceased proceeding with construction of the line. (T. 339) However, practically IMC must stop construction of the line or the line would have been built before the Commission considered the agreement. (T. 184)

18. TECO did not ask IMC to confirm whether the 13 to 50 million kilowatt-hours of excess electricity IMC had predicted years earlier was still anticipated at the time the agreement was entered into. [T. 332]

The record indicates that, at the time TECO decided to enter into the agreement, Mr. Mestas did not ask IMC to confirm whether the 13 to 50 million kilowatt hours of excess electricity IMC had predicted years earlier was still anticipated at the time the agreement was entered into. (T. 332) With the addition of this information, we will approve the finding. We note that we do not necessarily draw the same conclusions from this statement that the Office of Public Counsel may draw. IMC's witness testified that he told TECO that TECO's numbers did not agree with IMC's numbers, but because IMC considered its numbers proprietary, he could not give them to TECO. (T. 155)

19. At the time the Commission first considered the agreement on July 11, 1989, both TECO and IMC knew the level of IMC's electricity for export had been declining. [T. 75, 170]

We accept this proposed finding, as it is supported by a preponderance of the evidence in the record of this proceeding.

20. The construction deferral agreement was to be in force for a one-year period following approval by the Commission. For the one-year period following the Commission's vote on July 11, 1989, IMC does not know: (1) whether the amount of electricity for export would

have been sufficient to justify construction of the transmission line; or (2) whether construction of the transmission line would have been cost effective to IMC. [T. 170, 171]

We accept this proposed finding, with the modification that Dr. Hirsch, not IMC, did not know (1) whether the amount of electricity for export would have been sufficient to justify construction of the transmission line; or (2) whether construction of the transmission line would have been cost effective to IMC. (T. 170) We note that the cost-effectiveness over a one-year period would not be determinative in deciding whether to build a transmission line with a ten-year life. (T. 157)

21. IMC does not know whether it would have proceeded to construct the line if the Commission had refused to approve the agreement on July 11, 1989. [T. 170, 177]

We accept this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding.

22. Considering the levels of excess electric generation IMC has had since July, 1989, IMC does not know whether it would have been harmed if the Commission had voted on July 11, 1989, to deny the agreement. [T. 171]

We accept this proposed finding with the clarification that IMC's witness, not IMC, did not know whether IMC would have been harmed if the Commission had voted on July 11, 1989, to deny the agreement; he had not made that calculation. (T. 171)

23. There is no evidence in the record that, when IMC informed TECO of its willingness to enter the construction deferral agreement, (1) IMC believed at that time it would have sufficient excess electricity to make construction of the line worthwhile; (2) IMC would construct the line if it would not be cost effective; (3) IMC was still planning to construct the line to be in service by mid-April 1989; or (4) if the agreement had not been entered into, IMC would have gone forward with construction.

We reject this finding. There is evidence that, when IMC informed TECO of its willingness to enter the construction deferral agreement in December 1988, IMC believed it would have sufficient excess electricity to justify construction of the line. First on page 156 Dr. Hirsch stated "IMC is determined that it would be in its financial interest to construct the 2.8 mile transmission line. (T. 155-156) In his summary of his direct prefiled testimony Mr. Hirsch stated that

> [TECO's] offer was relatively small and didn't equal the economic justification for constructing a tie-line. However, at that particular time, IMC had a number of demands on its limited capital bank. The Tampa Electric offer tipped the scale in favor of postponing the tie-line thus freeing the capital for other projects." (T. 151)

Second, a cost-effectiveness analysis by TECO based on the actual as-available sales for 1988 of 19 million KWH, shows construction of the tie-line was cost-effective and would yield a 19.34% return. (Exhibit 3, page 3; T. 92, 117) The Office of Public Counsel's witness, Mr. Wright, agreed that, if IMC could borrow the money at the prime rate to build the line, a 10% return would be required. (T. 286-287) TECO's analysis is based on a 5-year depreciation while Mr. Hirsch testified that IMC normally calculates the return assuming a ten-year life. (Tr. 115-116, 157) Mr. Wright in cross examination testified that to the extent that one assumed a longer depreciation life that would bring down the depreciation expense and there would be lower annual costs and higher annual profits. (T. 288) Furthermore, Mr. Hirsch had testified that one-third of the expected savings was to come from consolidation of demand and elimination of transformer rental from TECO. (T. 190) Mr. Wright also agreed that the demand savings from building the line could be ten to twenty thousand a month, which would be $120,000 a year. (T. 294) The TECO cost-effectiveness calculation did not include the demand savings. (T. 294)

There is evidence that, at the time IMC informed TECO of its willingness to enter into the agreement, IMC was still planning to construct the line to be in service by mid-April 1989 and that if the agreement had not been entered into, IMC would have gone forward with construction. IMC had ordered the long-delivery transformation equipment on September 8, 1988. (Exhibit 7) There

was a 100 percent cancellation penalty after a certain date. TECO would have had to spend $287,000 plus $17,221 in tax to cover all the equipment purchased by IMC for the line because of the 100 percent penalty. (T. 122-123) The estimated total cost of the line was $684,268. (Exhibit 1) Thus, IMC had already spent 44 percent of the estimated total cost of the installed cost. Furthermore, the Office of the Public Counsel established through cross examination of IMC's witness that IMC did not provide for a buy-back option for the transformation equipment if the Commission did not approve the contract and that selling of the transformers outright exposed IMC to inflation. In response to the question of whether it is true that indicates that perhaps IMC was getting out of the construction business definitely for some short time period, whether the Commission approved the construction deferral agreement or not, Mr. Hirsch responded, "No, that's not true." (T. 177-178)

24. Although TECO believed IMC would go forward with plans to construct the line if the agreement was not entered into, neither TECO nor IMC introduced evidence that, at the time IMC informed TECO that it would accept the agreement or at the time the agreement was signed, the agreement was necessary to induce IMC not to construct the line.

We reject this finding for the same reasons stated in number 23, above.

25. The record is not clear when TECO committed to purchase the transformers ordered by IMC, but the issue was discussed prior to execution of the agreement on January 17, 1989. [T. 110, 125, 182]

We accept this proposed finding with the clarification that IMC did not discuss the possibility of TECO buying the equipment prior to IMC's placement of the order in early September. (T. 125, 181-182) IMC's witness also testified that he didn't recall when TECO first discussed the possibility of buying the equipment but that it was probably about December. (T. 182)

26. TECO's purchase of the transformers was not contingent on Commission approval of the construction deferral agreement. [T. 158]

We accept the proposed finding with the clarification that TECO committed to IMC that it would either purchase the transformers or pay the cancellation charges on the equipment if IMC and TECO entered into the agreement. (Tr. 110)

27. TECO entered into the construction deferral agreement believing construction of the transmission line would be cost effective to IMC, but without insisting upon or receiving any cost effectiveness analysis from IMC that would clearly demonstrate cost effectiveness of the line to IMC. [T. 334]

We accept the proposed finding with the clarification that because, in the discussion of TECO's presentation of its cost-effectiveness analysis, IMC made it clear that they would not share their analysis with TECO because it was proprietary, TECO did not pursue that matter any further. IMC did, however, verify the conclusions of TECO's cost-effectiveness analysis. (T. 70-71, 155)

28. The agreement was not renewed after July 1990 because the energy available for export did not justify construction of the line nor did it justify TECO in proposing an agreement to dissuade IMC from constructing the line. [T. 193]

We reject this finding. In his prefiled direct testimony, IMC's witness stated that the agreement was not reviewed in July 1990 when it expired because

> based on our 1989-1990 operating experience, the energy available for export neither justified construction of a transmission line to the Kingsford Mine nor did it justify TECO in proposing an agreement to dissuade IMC from constructing the line.

His next statement was that these

> Circumstances will change when we complete the overhaul of the New Wales turbine in the fall of the year. The funds have been approved for that project. It will result in additional electricity for export either to TECO or to the Kingsford Mine. (T. 192-193)

29. The agreement stated that IMC would cease construction activities when the Commission granted final approval, but IMC, in fact, sold its transformers to TECO and ceased construction activities before the Commission considered the agreement for the first time in July 1989.

We reject this finding. The agreement states "IMC agrees to cease its actions to construct the above described ...line on the date on which the provisions of this agreement are finally approved by the FPSC. IMC would refrain from constructing any such transmission line for a period of one year from that date." It is a future prohibition and does not address any action IMC might have determined prudent prior to the approval date.

As a practical matter, it would appear prudent for IMC to cease active construction at the time negotiations for the contract began. If they had not, the line would have been built even if the agreement was approved.

30. The agreement stated that IMC had determined it was in its financial best interests to build the line, but neither IMC nor TECO has produced at the hearing cost effectiveness calculations demonstrating how IMC reached this conclusion.

We accept this proposed finding with the clarification that according to Dr. Hirsch IMC completed an engineering report which demonstrated savings sufficient to justify construction of the line. Two-thirds of the savings came from purchased energy savings and the rest from consolidation of demand and elimination of transformer rental fees. (T. 190) IMC considered the analysis proprietary. (T. 191) TECO did produce a cost-effective analysis based on the New Wales 1988 as-available sales which showed that the return on the transmission line would have been 19.34% without including the aforementioned demand savings. (T. 92, 117; Exhibit 3, page 3)

31. The agreement states that "IMC would deliver its excess cogenerated electricity which is approximately 5.3 megawatts of capacity and 37,843,000 kilowatt hours of electricity over this transmission line to the Kingsford

No. 2 mine." In fact, IMC has never had this amount of capacity or electricity for export and does not foresee having that amount in the foreseeable future.

We accept this proposed finding with respect to the amount of electricity for export and rejection of the proposed finding with respect to the amount of capacity available for export. There is no evidence in the record on the actual amount of the capacity associated with the historical as-available sales.

32. The agreement provides that TECO will start paying IMC credits for one year from the date of final Commission approval of the construction deferral agreement, but TECO has, in fact, given IMC credits for service from February 21, 1989 to July 10, 1990, a period of approximately 17 months. [T. 339; Late-filed Exhibit 13]

We accept this proposed finding with the clarification that the credits for service from February 21, 1989 to July 10, 1989 were paid on a below-the-line basis by TECO's shareholders, not the general body of ratepayers. (T. 339-340)

33. The agreement provides that its operation and effect is contingent upon TECO's obtaining a final determination that the credit is reasonable and prudent and in the best interest of TECO's customers, but both IMC and TECO acted pursuant to the agreement's terms for time periods preceding the Commission's consideration of the agreement or final Commission approval.

We accept this proposed finding with two modifications. First, TECO did not pay the credits for the time period preceding the Commission's consideration of the agreement until August 22, 1989, and payment was on a below-the-line basis by TECO's shareholders. (T. 339-340) Second, IMC must cease construction activities on the line for the time period prior to Commission consideration of the agreement or the line would have been completed by the time the Commission considered the agreement. The transmission line was scheduled to be completed by April, 1989, and we did not vote on the agreement until July 11, 1989. (T. 184, 170) Therefore, IMC must cease construction on its line or not enter into the agreement with TECO.

34. If IMC had built its transmission line, TECO would have suffered a loss of nonfuel revenues.

We accept this proposed finding.

35. Neither TECO's petition nor the construction deferral agreement mention the subject of fuel cost recovery of credits given IMC pursuant to the agreement.

We accept this proposed finding with the modification that we approved fuel cost recovery of the credits in Order No. 21600.

36. TECO did not formally request fuel cost recovery of the IMC credits until its attorney announced it sought such relief at the September 24, 1990, hearing in this docket.

We accept the proposed finding but such a finding is irrelevant in that we may grant such relief as we decide appropriate considering the particular facts and circumstances of each case. We ordered such recovery in Order No. 21600 which was an interim order. Furthermore, the fuel cost recovery was an issue in the June 27, 1989, memorandum dealing with Tampa Electric's petition for approval of the agreement and is discussed in the testimony of TECO's witness Donald Mestas. (T. 54-61)

37. TECO has never raised an issue or formally requested recovery of the credits to IMC in the fuel cost recovery hearings held in February 1989, August 1989, February 1990, or August 1990.

We accept the proposed finding that TECO did not raise the issue. However, as stated in Findings 35 and 36, the intention to do so was a matter of public record as of June 27, 1989 and the credits were included in TECO's fuel cost recovery filings. Utilities are not required to raise all possible issues for costs included in their fuel filings.

38. The IMC credits were not separately identified in TECO's fuel cost recovery filings, but were included on supplemental schedule A2 as a revenue reduction with the supplemental service rider credits.

We accept this proposed finding, as it is supported by a preponderance of the evidence in the record of this proceeding.

39. Credits given to IMC for the period February 21, 1989, through July 10, 1989, were charged below-the-line to TECO's stockholders and were not recovered through the fuel docket. [T. 339-40]

We accept this proposed finding, as it is supported by a preponderance of the evidence in the record of this proceeding.

40. At the time of the July 11, 1989, agenda conference, when the Commission was considering the agreement which portrayed IMC's excess electricity as being approximately 38 million kilowatt-hours, TECO knew, or should have known, that IMC's as-available sales for 1987 and 1988 were approximately 16.3 and 19.1 million kilowatt-hours respectively. [T. 74]

We accept this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding.

41. At the time of the July 11, 1989, agenda conference, TECO knew or should have known that IMC's as-available sales for the last half of 1988 were approximately 6.9 million kilowatt-hours. [T. 216]

We accept this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding.

42. At the time of the July 11, 1989, agenda conference, TECO knew that IMC's as-available sales for the first six months of 1989 were approximately 5.3 million kilowatt-hours. [T. 70, 71]

We accept this proposed finding with the provision that at the time TECO entered into the agreement, it did not have any 1989 data. (T. 75)

43. Mr. Mestas had reviewed the staff recommendation for the July 11, 1989, agenda conference and was aware that staff had relied on analyses provided by TECO to conclude that the transmission line was in IMC's best financial

> interest. But at that time, Mr. Mestas really didn't know whether it was, in fact, in IMC's financial interest to build the line. [T. 85-86]

We accept the first sentence of this proposed finding as it is supported by a preponderance of the evidence in the record of this proceeding. We reject the second sentence. Counsel for the Office of Public Counsel asked Mr. Mestas, TECO's witness, the following question about the cost-effectiveness analysis TECO provided to staff:

> And at that time you really didn't know that it was in IMC's financial interest, did you, based on hard numbers? It was just your approximation, wasn't it? (T. 85)

Mr. Mestas replied, "That's correct", and then gave the following expansion of that statement.

> Our financial analysis indicated that it was in IMC's financial interest to build the line. Again, based on our belief that that line was going to be built absent the Construction Deferral Agreement, it was obvious to us that if they were going to build the line, it was obviously in their best financial interest to do so. T. 86

Tampa Electric was convinced IMC was going to build the line based on a number of factors other than the cost-effectiveness calculation, such as IMC's discussion with TECO and a letter to TECO indicating they were going to build the line, and ordering of the equipment, etc. The analysis supported their conclusion. (T. 93-94)

Both Mr. Mestas and Dr. Hirsch testified that IMC had told TECO that the conclusion of TECO's analysis that the line was cost-effective or in IMC's financial interest was correct. (T. 70, 155) Further, Mr. Mestas testified that the line would have been cost-effective at a much lower level of sales and was cost-effective based on the 1988 level of as-available sales KWH. (T. 90, 117)

44. Mr. Mestas was aware that the staff recommendation accepted his analysis which assumed 37,843,000 kilowatt-hours of excess electricity would be available but did not disclose that IMC had not provided him with the amount of electricity available for export or that IMC would not confirm his assumptions. [T. 86]

We accept this proposed finding with the modification that IMC had confirmed the conclusion of his analysis that construction of the transmission line was cost-effective. (T. 70, 155)

45. Mr. Mestas was in contact with IMC about its level of as-available sales before the July 11, 1989, agenda conference but did not disclose the fact to the Commission. [T. 96]

We accept this proposed finding, as it is supported by a preponderance of the evidence in the record of this proceeding.

46. At the time of the April 17, 1990, agenda conference, TECO possessed data on IMC's as-available sales through February or March 1990 but did not disclose the level of actual as-available sales to the Commission at that time. [T. 98]

We accept this finding that TECO possessed but did not disclose updated information on April 7, 1990, but such a finding is irrelevant. TECO entered into the agreement based on the information available at the time the agreement was signed.

Conclusions of Law

The Office of Public Counsel proposed 21 conclusions of law which are discussed individually below. We accept proposed conclusions 1, 2, 3, 4, 5, 6, 7, 9, 13 and 15, and reject proposed conclusions 8, 10, 11, 12, 14, 16, 18, 19, 20 and 21.

1. The party seeking affirmative relief in this docket is Tampa Electric Company, which must prove its case by preponderance of the evidence.

We accept this proposed conclusion of law. It appears to accurately reflect the law as applied to the facts of this case.

2. A special retention rate for a single customer is only justified if it is necessary to retain that customer's load on the electric utility's system.

We accept this proposed conclusion of law as it appears to accurately state Florida law.

3. A retention rate should be approved only if the utility's general body of ratepayers will be better off because the retention rate is approved.

This proposed conclusion also accurately reflects the law and we accept it.

4. A customer should not be allowed to receive special retention rates if such rates are not actually necessary to retain the customer's load on the electric utility's system.

We accept this conclusion of law, as far as it goes. Of course the decision of whether such rates are necessary to retain the customers load must be based on available facts.

5. The hearing held September 24, 1990, was a de novo proceeding to give TECO an opportunity to prove its petition should be granted. Its purpose was not to review whether either Order No. 21600 or Order No. 22884 was correct and should be affirmed.

We accept this conclusion of law as far as it goes. We note that we do not make our decisions in a vacuum. It must be recognized that the parties have been living with the construction deferral agreement on an interim basis for two years because of our procedural error.

6. Order No. 21600 was not a valid final order dispositive of the issues in this case.

We accept this proposed conclusion of law. The Commission has already acknowledged this in its Motion to Relinquish Jurisdiction filed in the Florida Supreme Court.

7. Pursuant to Rule 25-9.001(3), Florida Administrative Code, a retention rate for IMC is not valid until it has been approved by the Commission as provided by law.

We accept this proposed conclusion as far as it goes. In this case, the rate was interim in nature until finally approved by the Commission.

8. TECO's signing of the construction deferral agreement before receiving Commission approval violated Rule 25-9.034, Florida Administrative Code, which provides that a contract, such as the agreement at issue here, must be approved by the Commission prior to its execution.

We reject this proposed conclusion of law. The implementation of the construction deferral agreement was based upon the apparent approval of the Commission which was reasonably relied upon by the parties.

9. Pursuant to Section 366.06(1), Florida Statutes (1989), TECO cannot directly or indirectly charge a rate that has not first been approved by the Commission.

We accept this proposed conclusion as an accurate statement of the law.

10. Since the Commission, pursuant to Section 366.06(2), Florida Statutes (1989), can only set rates to be "thereafter charged" after first providing notice and hearing, the final order in this case can only have prospective effect.

We reject this proposed conclusion of law. The Commission is permitted to recognize that a procedural error was committed in this case which was reasonably relied upon by the parties. OPC's proposed conclusion ignores the fact that extraordinary circumstances sometimes require "special treatment" by the Commission so that injustice is not done. In addition, OPC's proposed conclusion ignores the fact that the rates are interim in nature until finally approved by the Commission.

11. If the Commission were to approve TECO's petition and a retention rate for IMC for one year beginning July 11, 1989, it would violate Section 366.06(2), Florida

Statutes (1989), and the proscription against retroactive ratemaking.

We reject this proposed conclusion of law as it fails to recognize that the rates in question are interim in nature until such time as they receive final Commission approval.

12. If a special retention rate for IMC was not necessary to retain IMC's load on TECO's system for the benefit of TECO's general body of ratepayers, credits to IMC based on the difference between TECO' marginal and average fuel cost would violate Section 366.03, Florida Statutes (1989), which prohibits an electric utility from giving any undue preference or advantage to any customer.

We reject this proposed conclusion of law as it is based upon an incorrect factual premise. The facts in this case do not demonstrate any preference or advantage to IMC.

13. TECO and/or IMC could have petitioned the Commission to vacate any stay occasioned by Public Counsel's appeal of Order No. 21600 pursuant to Rule 25-22.061, Florida Administrative Code, but failed to do so.

We accept this proposed conclusion of law as it appears to be accurate.

14. Since the facts of record do not demonstrate that IMC was still planning to construct the transmission line in the near term [i.e., mid-April 1989] if the agreement was not entered into, and TECO would have suffered a reduction in revenues only if IMC would, in fact, have built the line in the absence of the agreement, the record will not support a conclusion that the agreement was necessary to forestall IMC from reducing its purchases from TECO or that TECO's customers benefitted from the agreement.

We reject this proposed conclusion of law because it incorrectly interprets the record of this proceeding, as discussed above.

15. The fact that TECO believed IMC was going to build a transmission line to be in-service in mid-April 1989 is

not probative of whether IMC was, in fact, proceeding on such a schedule.

We accept this proposed conclusion of law.

16. If the Commission denies TECO's petition and refuses to approve the construction deferral agreement, IMC will not suffer harm because there is not evidence that IMC still planned, after early December 1988, to construct the transmission line for an April 1989 in-service date.

We reject this proposed conclusion of law because it incorrectly states the evidence presented at the hearing. As discussed previously, the testimony presented by IMC was that absent the construction deferral agreement, their plans were to build the line.

17. TECO's petition was not filed under Section 366.06(3), Florida Statutes (1987) [now found at Section 366.05(4), Florida Statutes (1989)], and the file-and-suspend law is not applicable to this proceeding.

We reject this proposed conclusion of law as it is not accurate. The file-and-suspend law is applicable to this proceeding.

18. If TECO wanted fuel cost recovery for credits given IMC pursuant to the construction deferral agreement, it should have petitioned for that specific relief pursuant to Rule 25-22.036, Florida Administrative Code.

We reject this proposed conclusion of law as there is no showing that TECO acted improperly.

19. TECO's unilateral decision to give IMC credits for the period February 21, 1989, through July 10, 1989, was a willful violation of Section 366.06(1), Florida Statutes (1989), and Rule 25-9.001, Florida Administrative Code.

Pursuant to Section 366.095, Florida Statutes (1989), the Commission should impose a fine of $5,000 per day and order TECO to backbill IMC for credits for that time period.

We reject this proposed conclusion of law as it does not accurately reflect the facts in the record. The record reflects that after the Commission's issuance of Order No. 21600 on July 24, 1989, TECO gave IMC credits for the period February 21, 1989 through July 10, 1989, but that the credits were paid from funds which were "below the line" in TECO's budget and therefore not passed through to the ratepayers. (T. 339)

20. TECO should be ordered to backbill IMC for credits given for the period July 11, 1989, through July 10, 1990.

We reject this proposed conclusion of law as it is not supported by the record in this proceeding.

21. TECO should be ordered to refund, with interest, all IMC credits collected through the fuel cost recovery docket.

We reject this proposed conclusion of law as it is not supported by the record.

Conclusion

We are convinced that at the time TECO and IMC negotiated and entered into the agreement, IMC was going to build the transmission line. Assuming that IMC would build the line absent the agreement, approval of the agreement is in the general body of ratepayers' financial interest. Therefore, the line deferral agreement should be approved.

The Office of Public Counsel's position is that the agreement should not be approved because IMC did not have adequate excess generation to make construction of the line a prudent decision. However, if IMC had determined it was in its best interest to construct the line and was constructing the line, whether IMC's decision was prudent is irrelevant. Furthermore, Dr. Hirsch testified that IMC completed a study which demonstrated savings sufficient to justify construction of the line and that construction of the line was cost-effective for IMC. (T. 156, 190) Also, Mr. Mestas' cost-effectiveness analysis based on the 1988 level of IMC's actual as-available sales to TECO indicated that the line would yield a return of 19.34%.

Furthermore, this analysis did not include the savings IMC would experience from the consolidation of demand and elimination of transformer rental and was based on a shorter depreciation life (five years) than the ten-year life IMC would have used

It is therefore

ORDERED by the Florida Public Service Commission that the February 8, 1989 Petition of Tampa Electric Company for approval of its construction deferral agreement with IMC Fertilizer, Inc. is hereby granted. It is further

ORDERED that it is fair and reasonable for Tampa Electric Company to recover, through its fuel adjustment mechanism, the amounts of credits made on IMC's electric bills pursuant to the Agreement.

By ORDER of the Florida Public Service Commission, this 25th day of FEBRUARY, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

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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.