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October 9, 1998

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 Reply Brief of the Office of Public Counsel for filing in the above-referenced docket.

Also Enclosed is a 3.5 inch diskette containing the Reply Brief of the Office of Public Counsel 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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Tampa Electric Company for approval of cost recovery for a new environmental program, the Big Bend Units 1 & 2 Flue Gas Desulfurization System

DOCKET NO 980693-EI

FILED October 9, 1998

REPLY BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Commission's directive at the September 2, 1998, hearing in this docket submit their reply brief

Allowance for Funds Used During Construction (AFUDC) - Issue No. 6

Tampa Electric's brief on the AFUDC issue bears no resemblance to the company's statement of basic position in the prehearing order in this docket It is also unrelated to the position the company took on the AFUDC issue And it is unrelated to any evidence in the record Incredibly, Tampa Electric's discussion of AFUDC in its brief does not contain a single reference to testimony or exhibits introduced into the record of this proceeding

Instead of offering its interpretation of what the company has proven on the record, Tampa Electric's brief offers a new case constructed entirely of whole cloth Tampa Electric has formulated a new theory, a new position, and new facts to support them Having decided the Commission was not entitled to hear from a company accountant on this regulatory accounting issue, Tampa Electric has now submitted a brief which shows signs of having been written by one

Tampa Electric's totally new position on the AFUDC issue can be repeated here without running much risk of bolstering the company's cause

> Yes. The Commission should authorize Tampa Electric to accrue AFUDC, for eventual recovery through the ECRC for the entire FGD Project because this decision will further the environmental policies of this state, best match customer savings with cost and prevent under recovery of expenditures required by law for a project clearly demonstrated to be the least cost option. [Emphasis added.]

Commissioners, of course, will not recall a company witness explaining how allowing Tampa Electric to accrue AFUDC on its scrubber project will further the state's environmental policies. Nor will they recall an issue having been identified which such testimony might have addressed. Commissioners will also not recall hearing testimony explaining how allowing AFUDC on the scrubber project will match customer savings with costs. (You'd expect such a "matching" argument to be presented by an accountant.) Indeed, they will not recall anyone explaining how AFUDC on the scrubber could be a "cost" or its disallowance could be an "under recovery of expenditures required by law" to the extent CWIP was included in rate base in Tampa Electric's last rate case. (Another job for an accountant.) And, of course, Commissioners will not recall opposing parties having an opportunity to rebut such positions through either expert testimony or cross-examination of company witnesses.

Tampa Electric makes various assertions of fact which are not in the record. For example, at page 15, the company says "[a]ccrual of AFUDC versus current recovery of carrying costs is a timing issue." This may be true in the abstract, but this office would have liked to address this contention as it applies to Tampa Electric. If the company means it has a choice of AFUDC or ECRC as incurred, we would have pointed out that the timing issue is between CWIP-in-rate-base and AFUDC. Timing of alternatives is a moot issue for Tampa Electric, however, because the company is already recovering its carrying costs through CWIP in base rates. The ECRC,

therefore, does not enter into consideration because there is no timing issue involving CWIP-in-rate-base and AFUDC or ECRC.

Tampa Electric goes on to state, as a fact, that precluding the accrual of AFUDC would introduce a bias against construction of capital projects to solve environmental problems which could lead companies to adopt less cost-effective solutions. Brief, at 16. Commissioners, however, heard no testimony from the company that Tampa Electric specifically would not have built the scrubber if AFUDC were not permitted. After all, in its earlier projections of project cost, the company did not even include a line-item for AFUDC. [Exhibit 5, Black's Late-Filed Deposition Exhibit No. 2, p. 2 of 2] Company witnesses could not state with any degree of certainty what Tampa Electric would do if the Commission either failed to act on its petition or denied it outright. The impression left by the equivocal responses of Messrs. Black and Hernandez, however, was that Tampa Electric was past the point-of-no-return and would build the scrubber regardless of Commission action in this docket. [T. 100-03, 216-17] Intervenors have had no opportunity to address whether this assertion of bias against capital projects is true or how it might apply to Tampa Electric in its particular circumstances. Evidence in the record, though, suggests any bias against scrubbers is being imposed by the marketplace because everyone else has chosen to fuel switch and purchase allowances, at least in the near-term. [T. 88-89]

Tampa Electric's factual assertion that, after the Polk Unit came on line, the company "reduced the CWIP in its surveillance reports to $0" is especially egregious. Brief, at 19. Mr. McWhirter and Ms. Kaufman tried to introduce the surveillance reports into the record through

official recognition, as admissions against interest, and as business records. [T. 6-13, FIPUG Brief, at 12] The surveillance reports offered by FIPUG are not in the record because of Tampa Electric's enthusiastic opposition. Excluded reports can play no part in an agency decision which must be based on evidence in the record. With or without surveillance reports, though, Tampa Electric cannot offer a plausible reason for believing it had to reduce CWIP to zero. The company's representation, at page at 21, that it made this adjustment because it was what the company thought FIPUG would want it to do is not worthy of serious consideration.

The company's representation is also inconsistent with its witness's testimony at hearing. Mr. Hernandez testified under oath that Tampa Electric would consider an order in this docket accepting the company's position as modifying Order No. 93-0664 and removing the CWIP-in-rate-base limitation. [T. 236-37] Tampa Electric's assertion that Order No. 93-0664 was modified by Order No. 96-1300 is an eleventh-hour attempt to impeach its own witness.

When Mr. Hernandez was asked by the attorney from the Office of Public Counsel "Is there any order issued by the Commission subsequent to [Order No.] 93-0664 in which the Commission has modified the amount of CWIP allowed in Tampa Electric's rate base," he answered "Not that I'm aware of." [T. 241] That question was asked specifically to learn whether Tampa Electric construed another order issued after Order No. 93-0664 as allowing for AFUDC accrual on the entire scrubber project. At an earlier point in the hearing, Tampa Electric's attorney said the statute cited in the company's petition, Section 366.8255, Florida Statutes (1997), was the basis for all relief requested. No mention was made of Order No. 96-1300. [T. 229-30]

Exhibit 13, the forecasted surveillance reports for 1997 and 1998, is in the record. Those surveillance reports show CWIP included in Tampa Electric's rate base on an "FPSC adjusted" basis of over $10 million and $21 million respectively. Both transmittal letters claim the reports "were made according to the methodology prescribed in Order No. PSC-93-0165-FOF-EI," i.e., the final order from the company's last rate case (before the corrections were made in Order No. 93-0664). There would, of course, be no "FPSC adjusted" basis for including CWIP in Tampa Electric's rate base in any amount (or for any reason) if Order No. 93-0664 were no longer viable on this issue. The transmittal letters make no mention of Order No. 96-1300, which Tampa Electric now argues is dispositive of the amount of CWIP in rate base. If Order No. 96-1300 were controlling in the guise urged by Tampa Electric, CWIP would have been eliminated from rate base and the company would not have any authority to report any CWIP in its forecasted surveillance reports.

Tampa Electric, at page 19, quotes from the order approving the Polk stipulation where it says "the Actual final capital cost of the Polk Power Station project shall be included in Tampa Electric's rate base for regulatory purposes up to an amount equal to one percent above the capital cost estimate of $506,165,000 . . . ." If Tampa Electric's portrayal of FIPUG's position in the Polk case were correct, FIPUG would not have signed off on the stipulation unless it provided that only the Polk investment above CWIP in rate base could be added to rate base. FIPUG, of course, signed the stipulation in its final form, just as Public Counsel and Tampa Electric did, in a spirit of compromise and on a basis vastly different from the positions taken in our respective briefs.

For the sake of argument, assume Tampa Electric is right, that the order approving the Polk stipulation removed CWIP from its rate base. Assume also that Tampa Electric's petition in this docket included a specific request to allow for the accrual of AFUDC and cited to the Polk stipulation order as authority for the request. An inconsistency surfaces immediately. If there were no CWIP in rate base, Tampa Electric would not have asked for authority to accrue AFUDC. Rule 25-6.0141 already allows for AFUDC above the CWIP in rate base (which would be $0 under this hypothetical) on construction projects which cost in excess of 0.5% of major plant account balances and which take longer than one year to build. The cost and duration of construction of the scrubber would not be subject to much dispute. If Tampa Electric has not yet implemented the rule but wants the benefits of its provisions, the company can just start following the rule. It's going to have to by January 1, 1999, anyway.

The less-than-forthright manner in which Tampa Electric has addressed the AFUDC issue suggests it to be, ironically, of critical importance to the company. Almost eight pages of the company's 22-page brief is devoted to this issue, yet AFUDC accrual did not merit a formal request in the originating petition. Since the company has not seen fit to explain its intentions, perhaps an exploration of possible motives will illuminate whether the company's new argument could have any validity.

Tampa Electric, in the normal course of business, may have projected its earnings for 1998 and 1999 and found them insufficient for its corporate goals or for Wall Street's expectations. Revenues cannot be increased because of the stipulations scheduled to expire at the end of 1999. Booking AFUDC, however, in 1998, and especially in 1999, on its largest construction project

would allow the company to report higher earnings and collect over $7.2 million in additional environmental cost recovery charges.

The company's outside auditors, however, would not sanction accrual of AFUDC on construction costs below the level of CWIP allowed in the last rate case because of the explicit language in Order No. 93-0664. And Tampa Electric could not point them to a rule or a subsequent order permitting the accrual. Certainly, Order No. 96-1300, by its own terms, does not remove CWIP from rate base. Auditors, however, would probably accept an order which even indirectly "affirmed" or "confirmed" Tampa Electric's tracking of construction costs and accrual of AFUDC on the entire project.

So Tampa Electric filed a petition treating AFUDC virtually as an afterthought, without an explicit request to permit the accrual. The petition was followed by testimony asking the Commission to "confirm" the AFUDC accrual because the project was, after all, of appropriate size and duration to satisfy specific parts of Rule 25-6.0141. Unwilling to tell the Commission exactly what it was after, the company's witness at hearing hid behind buzzwords that the company wanted to accrue "the full amount" of AFUDC. When forced to concede it wanted to accrue without regard to the CWIP-in-rate-base limitations found in an order and a rule, Tampa Electric retreated to the argument found in its brief, that the order accepting the Polk stipulation eliminated the CWIP in rate base, albeit without saying so explicitly.

Whether the foregoing precisely describes what actually happened is beside the point. The exercise, itself, helps to underscore the implausibility of the company's newly discovered argument. No reasonable person with even a rudimentary understanding of AFUDC and CWIP, be it an outside auditor or anyone else, could be expected to read the Polk stipulation order,

Order No. 96-1300, as even inferring that this Commission has removed CWIP from Tampa Electric's rate base. The Commission, with its far more stringent standard of justification, has no basis to conclude otherwise. The record of this proceeding offers no justifiable basis for the Commission to modify a stipulation negotiated between the parties in good faith and approved in a Commission order.

Tampa Electric obviously believes the stipulation between the company, FIPUG and the Office of Public Counsel, as well as the order approving it, can mean anything the utility wants it to. In this case, the Commission has been urged to find words in the stipulation and order which simply are not there so that Tampa Electric can tell itself, its auditors, and everyone else they were there all the time. Contrast this to another recent docket where Tampa Electric chose to completely ignore explicit terms in the same stipulation.

The Polk stipulation was signed by the parties on September 25, 1996. Paragraph 5F of the stipulation required that future wholesale contracts be separated from the retail jurisdiction using the same methodology employed in the company's last rate case.

> F. The separation procedure to be used to separate capital and O&M which was approved in the Company's last rate case, Docket No. 920324-EI, shall continue to be used to separate any current and future wholesale sales from the retail jurisdiction.

Seven days after the stipulation was signed, Tampa Electric entered into a Letter of Commitment with the Florida Municipal Power Agency (FMPA) for wholesale capacity and energy. Another letter of commitment, with the City of Lakeland, was dated April 23, 1997.

The Commission opened Docket No. 970171-EU to address the appropriate regulatory treatment of the FMPA and Lakeland contracts (an issue which had first surfaced in the fuel

adjustment docket). Tampa Electric completely ignored the explicit language of Paragraph 5F and maintained throughout the proceedings that these new wholesale contracts should not be separated from the retail jurisdiction. Ultimately, the Commission ordered the company to separate the sales to conform with the stipulation and the order which had approved it.

Tampa Electric states (at page 15) that "[p]ursuant to Rule 25-6.0141, Florida Administrative Code, the project is eligible to either accrue AFUDC or recover financing costs on a current basis through the ECRC." The second alternative is, of course, nonsense. The rule does not even mention the environmental cost-recovery clause.[1]

The first alternative is equally meaningless. The rule is not currently applicable to Tampa Electric unless it has chosen to implement its terms before January 1, 1999. This matter was fully explored at the hearing with Mr. Hernandez who said he did not know if the company had implemented the rule. [T. 242] The company's failure to affirmatively assert that it follows the rule (given that it is not at all reluctant to introduce other new facts for the first time in its brief) virtually assures all concerned that the rule has not been implemented. If, by some chance, Tampa Electric has implemented the rule, the company must deduct the CWIP allowed in rate base

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[1]The quoted reference to Rule 25-6.0141 was followed by a footnote 5 in which Tampa Electric cited to Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 930613-EI, Gulf Power Company's petition for environmental cost recovery. That order was concerned with approving amounts for cost recovery; it was not concerned with prior approval for a compliance plan. The "three criteria" so often cited by Tampa Electric were developed in that order to determine whether cost recovery, as opposed to prior approval, was justified. The section of the order dealing with CWIP cites to Tampa Electric's last rate case order, Order No. PSC-0165-FOF-EI, for the proposition that CWIP is included in rate base to maintain financial integrity. This is followed by a quote from Florida Public Utilities-Marianna Division's Order No. 93-1640-FOF-EI in which the Commission said: "No AFUDC is taken on that portion of CWIP which is included in rate base." Gulf Power was allowed to recover the carrying costs of CWIP, but only for CWIP which was "non-interest bearing," i.e., not eligible for AFUDC. Tampa Electric's scrubber project is not in this category.

pursuant to Order No. 93-0664 before accruing AFUDC on the scrubber project. Nowhere is Tampa Electric given a choice between AFUDC and ECRC without regard to the CWIP already in its rate base.

Tampa Electric then says (still on page 15) that, although the Office of Public Counsel is opposed to the accrual of AFUDC on the entire project, it did not allege that the project is ineligible to accrue AFUDC as a general matter. The company is splitting hairs, but it should be noted that this office, in its statement of basic position in the prehearing order, said "[m]ost of the $83 million scrubber project, therefore, will not qualify for AFUDC under the cited [Order No. 93-0664] or [Rule 25-6.0141]." The position taken in Public Counsel's brief is that AFUDC should not be allowed because no formal request has been made to permit the accrual. If AFUDC is permitted, however, it should only be accrued to the extent that the 13-month average for this project exceeds the $36,171,000 of CWIP included in rate base in the last rate case. This will likely preclude any AFUDC accrual at all.

Reasonableness of the Fuel Price Forecast - Issue No. 2

The Commission is being asked in this docket to find that Tampa Electric, through the presentation of evidence in the record, has proven that fuel savings more than make up for the scrubber capital costs and O&M expenses customers will have to absorb through the cost recovery mechanism. The type of evidence necessary to prove this point is fairly straightforward. The company has to show that the aggregate cost of fuel (i.e., coal, oil, natural gas and petroleum coke on a delivered basis for all of its current and future generating units under the scrubber alternative over the 10-, 20-, and 25-year periods used in its evaluations), plus the cost of allowances, plus the capital and O&M costs of the scrubber, on a cumulative-present-worth-

revenue-requirements basis, is less than the aggregate cost of fuel and allowances if the scrubber is not built.

Tampa Electric states in its brief, at page 10, that the company's "fuel price forecast used in the analysis was based on various external forecasts, actual prices reported in various periodicals, actual buying experience, and information obtained through energy supply representatives. The same forecast used by Tampa Electric in evaluating its 1997 and 1998 Ten Year Site Plan[s], filed April, 1997, and April, 1998, respectively, was used in evaluating the FGD compliance options (tr. 38)." This process description is inadequate to prove to the Commission that the company's fuel price forecasts, as those forecasts were actually incorporated into evaluations of the various compliance alternatives, were reasonable and necessarily led to the company's conclusion that the stand-alone scrubber for Big Bend Units 1 and 2 was the least-cost alternative reasonably expected to have the smallest adverse impact on the utility's customers. And there are no exhibits in the record which adequately fill in the missing information. Tampa Electric has not demonstrated the reasonableness of its fuel price forecasts either in the record or in its brief.

Conclusion

The Commission should not grant prior approval for the stand-alone scrubber at Big Bend Units 1 and 2 as the appropriate method for Tampa Electric to meet the Phase II SO_2 standards of the Clean Air Act Amendments of 1990. None of the costs, including accrued AFUDC, have been proven reasonable. If Tampa Electric is permitted to accrue AFUDC, it should do so only to the

extent the 13-month average of CWIP for the scrubber project exceeds the $36,171,000 of CWIP allowed in rate base pursuant to Order No. 93-0664 and/or Rule 25-6.0141

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 REPLY BRIEF OF THE OFFICE OF PUBLIC COUNSEL has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 9th day of October, 1998

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