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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause and generating performance incentive factor.
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Docket No. 000001-EI

Filed: May 18, 2000

Motion for Mid-Course Protection
By The Florida Industrial Power Users Group

The Florida Industrial Power Users Group (FIPUG), pursuant to rule 25-22.036, Florida Administrative Code, and rule 28-106.201, Florida Administrative Code, files this Motion seeking emergency relief from Tampa Electric Company (TECo) in regard to continuing and on-going power supply interruptions and excessive costs for electric power.

I. General Statement of Position

TECo has entered into wholesale power supply agreements and continues to manage its daily power supply in a manner that is detrimental to its retail customers in general and economically devastating to its nonfirm industrial customers.

On a daily basis, TECo diverts the electricity produced by installed generating capacity away from retail customers and sells it in the wholesale market. On most days, the electric power is replaced by more expensive power that it purchases in the wholesale market. When TECo is unable to find replacement power, nonfirm customers are interrupted. These interruptions and high cost replacement power substitutions affect nonfirm customers by increasing their costs of production and impairing their ability to compete in their markets. They also cause work curtailments and stoppages to the detriment of FIPUG's employees.

The adverse economic impact of TECo's actions have heretofore been brought to the

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attention of the Commission in workshop sessions held by the Commission in February and March of this year.

FIPUG requests specific emergency relief. It further requests an expedited order based on the filing made by TECo in this docket using the same quantum of proof that the Commission used in granting TECo's request for a mid-course correction of its fuel surcharges at the May 16 Agenda Conference.

II. Jurisdiction

1. The Commission has jurisdiction over this Motion pursuant to § 350.011, *Florida Statutes*, and §§ 366.04, 366.041, 366.05, 366.055, 366.06, 366.075, *Florida Statutes*.

III. Parties

2. The name and address of Movant is:

The Florida Industrial Power Users Group
c/o John W. McWhirter, Jr.
McWhirter Reeves McGlothlin Davidson Decker Kaufman Arnold & Steen , PA
400 North Tampa Street, Suite 2450
Tampa, Florida 33601-33350

3. All notices, orders and other correspondence should be directed to:

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4. FIPUG is composed of a group of large and relatively small industrial customers, many of whom are customers of TECo. FIPUG members take service from TECo under TECo's GSLD, IST-1, IST-3 and other miscellaneous tariffs. These customers purchase bundled interruptible electric generation, transmission, general and ancillary services from TECo. The bundled service generally does not include the cost of owning and maintaining transmission substations, distribution substations, distribution lines, transformers or distribution lines or distribution services. These customers consume approximately 11% of TECo's total output and pay retail charges of over $70,000,000 a year. Some FIPUG members generate electricity for their own use and to supplement TECo's generating capacity when they have surplus power. This power is sold to TECo at prices less than TECo pays for other available purchased power. Most FIPUG members purchase power under TECo's interruptible tariffs. TECo's interruptible industrial service is priced comparable to firm electric rates in other states where these companies compete. The TECo interruptible tariffs obligate the customers to buy electricity only from TECo or self generate, but TECo has no corresponding obligation to serve the interruptible customers. About $35,000,000 of the payments made to TECo by FIPUG members are attributable to the carrying costs of TECo's generation plants and transmission lines even though TECo does not build generating plant to serve these customers. These customers have a substantial interest in the manner in which service is priced and delivered. Their substantial interests are adversely affected by TECo 's current operating practices.

5. TECo is an electric utility subject to regulation by this Commission pursuant to Chapter 366, *Florida Statutes*. TECo is a subsidiary of an investor-owned utility holding company which also owns and operates coal mines, coal transportation companies, independent power producing companies, energy services companies and other affiliated companies which sell electricity, fuel, fuel

transportation services and other services to TECo and others.

6. TECo's address is:

Tampa Electric Company
c/o Angela Llewellyn
Administrator, Regulatory Coordination
PO Box 1111
Tampa, Fl 33601

7. TECo owns and operates power plants which have a potential summer capacity of 3447 megawatts (MW). When the power plants were constructed, TECo alleged that they were needed to provide service to its retail customers. The Commission certified the need as to all plants falling within the purview of the Power Plant Siting Act, § 403.519, *Florida Statutes*. The Commission approved the inclusion of this capacity in the retail rate base as needed for the electrical requirements of TECo's retail customers. The Commission authorized TECo to charge retail customers for the carrying costs of this capacity. Carrying costs are composed of fixed operating expense, depreciation expense attributable to the power plants and a return on the utility's investment in the plants. The plants have an equivalent availability factor of 76%.

8. TECo has entered into firm wholesale contracts with other utilities to sell them 300 MW more or less of its most efficient power plant capacity. Some of the contracts promise 100% availability. This is the same capacity TECo previously said it needed to meet the demand of retail customers. Present retail rates cover the carrying costs of the power plants committed exclusively to the wholesale market. The revenue from these wholesale sales is less than the fuel costs and other carrying costs attributable to the plants.

IV. Material Issues of Disputed Fact

9. Over the past twelve months, TECo's interruptible customers have been subject to

numerous, excessive and unnecessary interruptions. According to information compiled by the Commission Staff, in 1999, TECo interruptible customers were subject to adverse power conditions on 155 days. TECo interrupted them 16 times and purchased emergency power for them on the peak period spot market another 139 days at prices up to $3400/ per megawatt hour (MWH). Under TECo's tariffs, interruptible customers are entitled to receive service from TECo unless TECo requires the capacity being used by nonfirm customers to serve the needs of its firm native customers. The only exception is when other utilities' firm customers face a shortfall. "Economic" interruptions or interruptions for any other reasons are not permitted. On information and belief, TECo has interrupted its native nonfirm retail customers and exposed them to high buy-through costs to pursue opportunistic wholesale transactions, thereby subordinating the service needs of retail customers, for which TECo holds a monopoly, for opportunities in other, competitive markets. Such transactions do not constitute grounds for interruption under the terms of the governing tariffs, and such behavior on TECO's part is a betrayal of its fundamental responsibilities to its native retail customers.

10. Customers who are obligated to buy from a utility are obligated to rely exclusively upon that utility to act as their agent for purchasing off-system power. They have a reasonable expectancy that the utility will act in their best interest. Customers are led to believe that the *quid pro quo* for the utility's monopoly power is a fiduciary duty not to harm customers.

11. On April 3, 2000, TECo filed the actual true-up of its 1999 fuel costs with the Commission in this docket. This document discloses that for the period from January 1999 through December 1999, TECo sold 775,927 MWH hours of electricity to wholesale customers from its own generating capacity at an average price of $24.90. It sold another 944,856 MWH of purchased electricity on the wholesale market, but does not state the cost or revenue from these transactions or

whether the sales came from purchased power included in TECo's reserve margin calculations.

12. As a result of the wholesale sales from the power plants in the retail rate base and the unanticipated failure of other power plants it owns, according to the April 3 filing, TECo purchased 1,511,694 MWH to replace this power for all customers at an average price of $37.69/MWH. This is $12.79/MWH more than was received for the power sold.

13. To evaluate the financial impact on a retail residential customer, a MWH is the same as 1000 kWh. A Department of Energy analysis of typical home appliances discloses that it is the amount of electricity consumed in the typical monthly use of a TV, a 16 cubic foot refrigerator, and an electric water heater plus burning ten 100watt light bulbs continuously. The additional use of energy for heating, cooling, or cooking would require more than one MWH.

14. In 1999, interruptible customers fared much worse than firm customers. The power they buy in periods when TECo has insufficient capacity is called buy-through power. In 1999, it cost an average of $83.21/MWH. This charge includes capacity charges, fuel costs and profits charged by other utilities. This charge is imposed on each MWH consumed. It is added to the carrying costs the interruptible customers pay to use the generating plant in TECo's retail rate base when it is available. These charges are added to the cost of buy-through power even when TECo's plants are unavailable. Interruptible customers paid for 186,240 MWHs of buy-through power in 1999.

15. The situation worsens. In Docket 990001-EI, Exhibit 27, Schedules E-6 and E-7, TECo estimated that for the current calendar year, it will sell 1,734,266 MWH of electricity from capacity included in its retail rate base to wholesale customers at an average price of $26.60/MWH. This is below the cost to produce the power. When this power is delivered, TECo estimates that it will have insufficient power to meet the needs of its retail customers. It plans to enter the wholesale market and

buy 1,122,999 MWH of replacement power at an average cost of $36.74/MWH. 105,321 MWH will be emergency power for FIPUG members at an estimated average price of $120.79/ MWH.

16. On May 4, 2000, TECo filed a pleading with the Commission stating that its earlier fuel cost estimates were understated based on actual experience during the first four months of the year. In the new estimate attached to the petition for mid-course correction, the fuel cost for power TECo generates and sells is projected to go *down* by $875,461, but the replacement power it buys to serve retail customers is projected to go *up* by $26,716,465. The additional cost to interruptible customers is unstated.

17. TECo's pleading was accompanied by an exhibit providing estimated purchased power costs. There was no testimony or other offer of proof and no public hearing. At the Agenda Conference held on May 16th, the Commission accepted the estimated price increase and increased customers rates based on the revised estimates. There will be an opportunity to challenge the increase in the November 2000 fuel hearing but this will occur *after* the money is spent. The relief sought by FIPUG may reduce the additional fuel and purchased power costs to customers.

18. Under the provisions of § 366.05, *Florida Statutes*, and the other sections enumerated above, the Commission has authority to act on this Motion presently to: 1) enforce the tariff that provides that TECo can interrupt only if it experiences a capacity shortage created by the needs of its native firm customers; 2) order a utility to avoid the additional expense by curtailing an imprudent wholesale transaction; and 3) offset the additional fuel cost increases by separating the portion of the rate base dedicated to any firm wholesale sales and contemporaneously reducing base rates attributed to that portion of the rate base.

19. The Commission has authority under the same statute to refrain from allocating an

imprudent purchased power expense to the fuel clause and to the cost of buy-through power for nonfirm customers who are obligated to buy only from TECo.

20. The extraordinary cost of purchased power has increased disproportionately because current wholesale rate schedules allow utilities to take advantage of capacity shortages. Selling utilities can charge market prices in a constricted market during peak period price spikes. The bundled price includes fuel costs, capital costs and market-based profit. When the price for purchased power can be passed through to retail customers, there is no incentive for the purchasing utility to avoid the risk of selling its capacity to the wholesale market. TECo could avoid many price spikes by entering into longer term purchase contracts. This approach would save customers money. Customers would continue to pay the carrying costs on any TECo capacity that was idle during the off-peak period, but TECo's affiliate companies which sell fuel and fuel transportation services to TECo might lose revenue. There is a patent conflict of interest when the decision is made whether or not to enter into a less costly long term purchase contract.

21. TECo's subordination of its retail customers to wholesale customers is markedly different than the approach approved by the Court in *Northern States Power Co. v. Federal Energy Regulatory Commission*, 176 F.3d 1090 (8th Cir. 1999). In that case, in the wake of Order 888, the FERC attempted to impose a requirement that there be no discrimination in curtailment of power between wholesale and retail customers when there are power constraints. Northern States and the Minnesota Department of Public Service challenged this requirement noting that it would cause a disruption to Northern States' retail customers. Northern States and the Minnesota Commission argued that good utility practice required that wholesale transactions be curtailed before a utility is forced to shed native load. The Court agreed. It further noted that "when there is a power outage due to power restraints,

the wholesale customer may use alternative supplies from other utilities or generate power themselves, and can avoid power outages through such practice. The native/retail consumer, however, is unable to turn to alternative sources of supply." This is the exact situation in which FIPUG members find themselves.

22. TECo's retail customers are being severely damaged by TECo's wholesale market activities. The customers' obligation to buy exclusively from TECo arises because of Commission-approved noncompetitive agreements entered into with other Florida utilities, but the Commission does not have jurisdiction over the price TECo pays for spot market wholesale power. The anti-competitive agreements are exempt from the application of the Sherman Antitrust act because the Commission has a continuing responsibility to supervise them. If another utility seeks to serve a retail customer, TECo can initiate a territorial dispute to restrain the other utility from providing retail service. There is logic in preventing another utility from duplicating transmission and distribution lines, but there is no logic in prohibiting a customer from acquiring less costly replacement power and requiring the native utility to deliver it when the native utility has abused its regulatory bargain with the retail customer.

23. TECo's behavior in this regard is in stark contrast to its explicit recognition that "a Florida utility's primary obligation is to serve Florida's <u>retail</u> customers."[1] It appears that TECo's aggressiveness in the wholesale arena, combined with its insufficient reserves, has led TECo to dramatically increase interruptions to enable it to serve its wholesale customers.

V. Request for Expedited Relief

24. FIPUG industries and other nonfirm customers presented extensive testimony at the

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[1] Prefiled rebuttal testimony of W. Lynn Brown in Docket No. 991779-EI at p. 6, emphasis added. In Docket No. 991779-EI, TECo advocates an increased incentive to "encourage" wholesale economy sales.

Commission workshops held in February and March. This testimony quantified the impact of TECo's wholesale transactions and its inability to provide adequate service to meet customers' needs. Witnesses predicted that the situation would worsen for the summer months. TECo's petition for mid-course correction validates the concerns expressed by customers at those hearings. FIPUG expects the number of interruptions and the necessity to buy through at excessive prices to continue and to worsen in the summer months if this Commission does not take immediate action. Every day that the situation described in this Complaint continues is a day that FIPUG members' ability to compete is hampered and that revenues and other benefits to the state of Florida are lost. Therefore, FIPUG requests that its for mid-course protection to be given the same expedited treatment that the Commission gave to TECo's petition for mid-course correction. The relief sought will obviate expense that TECo anticipates that it will incur for replacement power for the benefit of all retail customers.

VI. Relief Sought

WHEREFORE, FIPUG hereby requests that the Commission provide the following relief in response to this Motion:

(1) Require TECo to curtail any wholesale sale if such sale would occur during the same hour in which TECo plans to interrupt interruptible customers;

(2) Enable TECo to avoid peak period emergency power purchases and other costly short-term purchases by adding a rider to the tariffs which contain buy-through provisions authorizing TECO's industrial customers receiving service under such tariffs to be relieved of the obligation to use TECo as their exclusive agent for buying power. Allow them to enter into contracts with other Florida utilities and suppliers to purchase electric power to be wheeled to the customer and delivered by TECo. The purchased power contracts could be for periods up to January 1, 2004 when TECo promises to have a reserve margin of 20%. Industrial customers entering into such short-term contracts would continue to pay TECo for transmission service, general service and other ancillary services provided by TECo and can return to TECo interruptible generation service when the reserve margin is more favorable;

(3) Authorize customers which produce power from self-generation plants in Florida, outside of TECo's service area, to wheel the power to their own sites within TECo's service area;

(4) Direct TECo to reduce the buy-through power rate by the amount included in base rates for generating capacity;

(5) Because this Motion is based upon official filings by TECo with the Commission as to the condition of the TECo system and the wholesale transactions planned by TECo, process this Motion in the same manner and elapsed time that the Commission used to process TECo's petition for mid-course correction;

(6) Take administrative notice of the testimony offered during the February and March nonfirm workshop hearings;

(7) Order such other relief as it deems appropriate

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Attorneys for the Florida Industrial Power Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Mid-Course Protection by the Florida Industrial Power Users Group has been provided by (*) hand delivery or U.S. Mail to the following parties of record this day of 18th May 2000:

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Blanca S. Bayo, Director
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Re: Docket No. 000001-EI

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and 15 copies of:

- Motion for Mid-Course Protection by The Florida Industrial Power Users Group; 06167-00
- Notice of Service of FIPUG's First Set of Requests for Admission (Nos. 1-27). 06168-00

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

Yours truly,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

AFA Vandiver
APP
CAF
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