

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 950379-EI

In the Matter of

DETERMINATION OF REGULATED
EARNINGS OF TAMPA ELECTRIC COMPANY
PURSUANT TO STIPULATIONS FOR
CALENDAR YEARS 1995 THROUGH 1999.

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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER BRAULIO L. BAEZ
Prehearing Officer

DATE: Friday, August 17, 2001

TIME: Commenced at 9:30 a.m.
Concluded 10:30 a.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Chief, Office of Hearing Reporter
FPSC Division of Commission Clerk
Administrative Services
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3 Ausley & McMullen, Post Office Box 391, Tallahassee, Florida
4 32302, appearing on behalf of Tampa Electric Company.

5 JOHN ROGER HOWE, Deputy Public Counsel, Office of
6 Public Counsel, 111 West Madison Street, Room 812, Tallahassee,
7 Florida 32399-1400, Appearing on behalf of the Citizens of the
8 State of Florida.

9 ROBERT ELIAS, Florida Public Service Commission,
10 Division of Legal Services, 2540 Shumard Oak Boulevard,
11 Tallahassee, Florida 32399-0870, appearing on behalf of the
12 Commission Staff.

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P R O C E E D I N G S

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2 COMMISSIONER BAEZ: All right. Call the prehearing
3 to order.

4 Mr. Elias, please tell everyone why we are here.

5 MR. ELIAS: Notice issued by the Clerk of the Florida
6 Public Service Commission on June 27th, 2001 advises that a
7 prehearing conference will be held in Docket Number 950379-EI
8 at this time and place.

9 COMMISSIONER BAEZ: Take appearances.

10 Mr. Willis.

11 MR. WILLIS: I am Lee L. Willis, appearing with James
12 D. Beasley and Kenneth R. Hart with the firm of Ausley &
13 McMullen, Post Office Box 391, Tallahassee, Florida 32302,
14 appearing on behalf of Tampa Electric Company.

15 COMMISSIONER BAEZ: Mr. Howe.

16 MR. HOWE: I'm Roger Howe with the Public Counsel's
17 Office, appearing on behalf of the Intervenors, the Citizens of
18 the State of Florida.

19 COMMISSIONER BAEZ: Okay.

20 MR. ELIAS: I'm Robert V. Elias, representing the
21 Commission Staff.

22 COMMISSIONER BAEZ: Mr. Elias, do we have any
23 preliminary matters?

24 MR. ELIAS: Not that I am aware of, Commissioner. I
25 would suggest that we can go section-by-section through the

1 draft prehearing order.

2 MR. HOWE: I might ask, Bob, are we going to address
3 our motion to strike Ms. Bacon's testimony at this proceeding?

4 COMMISSIONER BAEZ: Mr. Howe, I think -- I have read
5 the motion and the response, although the response was kind of
6 late getting to me, so I'm all right entertaining some
7 discussion of it.

8 More than likely, I think we are going to reserve
9 ruling for the presiding officer. But if you all want to hash
10 some things out, get some things on the record, that's fine
11 with me.

12 MR. HOWE: I was just addressing it, because Bob had
13 said no preliminary matters, and I just wanted to be sure this
14 was not a preliminary matter.

15 COMMISSIONER BAEZ: We will take that up at the end,
16 I think, after we get through these things.

17 MR. HOWE: All right. Fine.

18 COMMISSIONER BAEZ: Through the prehearing order.
19 Okay. Some minor notes on Section II -- first of all, is there
20 anything on Section I? I am assuming not. On Section II, if
21 you see we've ordered -- I'm sorry. Mr. Willis?

22 MR. WILLIS: Commissioner, we want to conform the
23 appearances to the appearances that we made today. I will give
24 Mr. Elias that markup as well as some minor wording changes to
25 our positions. Rather than take up time here, we will just

1 give him a markup.

2 COMMISSIONER BAEZ: Very well. Mr. Elias, you've got
3 something coming.

4 As I was mentioning, on Section II we have added a
5 provision for opening statements, ten minutes per side. Please
6 don't abuse it. Any changes to Sections III, IV?

7 MR. WILLIS: With respect to Section IV, post-hearing
8 procedures, Commissioner, we believe that it would be
9 appropriate to allow rebuttal briefs to be filed. I think that
10 they have proved useful in this proceeding before. And we
11 would urge you to allow us to file a rebuttal brief at a set
12 time after the filing of the initial briefs.

13 COMMISSIONER BAEZ: Staff, have we -- and forgive me
14 for not having memory of this, but certainly on this docket
15 have we been following that procedure?

16 MR. ELIAS: I can't specifically remember what we
17 have done in the past in this docket, but I know that we have
18 in the past allowed for rebuttal briefs.

19 COMMISSIONER BAEZ: Mr. Howe, I mean -- do you want
20 to raise --

21 MR. HOWE: I have no objection.

22 COMMISSIONER BAEZ: No objection? Okay. And what
23 would be your recommended page limit on the rebuttal briefs?
24 If you have a suggestion, Mr. Willis, or if Mr. Elias has any.

25 MR. WILLIS: Well, no more than 40 pages, which is

1 the requirement. But it could be less than that.

2 COMMISSIONER BAEZ: Forty pages is a hefty sum,
3 Mr. Willis.

4 MR. WILLIS: It is. In fact, I doubt either one of
5 us will use that amount of space on the brief in chief, but I
6 would just suggest that is certainly a limit.

7 COMMISSIONER BAEZ: Any objections to 40 pages as a
8 limit?

9 MR. HOWE: No, sir.

10 COMMISSIONER BAEZ: With the understanding that you
11 are going to try like heck not to get there.

12 MR. WILLIS: Of course.

13 COMMISSIONER BAEZ: All right. We will make it 40.

14 MR. ELIAS: I guess one other issue that we should
15 probably address would be the timing of the filing of the
16 rebuttal briefs.

17 COMMISSIONER BAEZ: Good point.

18 MR. WILLIS: I'm sorry, what was your last point?

19 MR. ELIAS: The timing of the filing. In other
20 words --

21 MR. WILLIS: I would say 20 days from the filing of
22 the initial briefs.

23 COMMISSIONER BAEZ: Does that impinge on any timing?
24 Does that create any timing issues that you know of? I think
25 20 days is reasonable. My concern is that --

1 MR. ELIAS: The only statutory consideration that we
2 have is that there is a requirement in Chapter 120 that the
3 agency render its decision within 90 days of the conduct of a
4 hearing. And depending on the timing of the post-hearing
5 briefs, and the rebuttal briefs; and the recommendation, and
6 the Commission's consideration of the order, you can fill up 90
7 days pretty quickly here.

8 Now, in the past we have interpreted that provision
9 of the statute to include the ability for the parties to waive
10 that time period, if necessary, or if appropriate.

11 MR. WILLIS: Well, as I recall, the CASR provides a
12 fairly lengthy time from the end of the hearing until the first
13 briefs are due, and all of that time may not be required. I
14 think the briefs are due on September 24th. It, you know, is
15 really keyed off of when the transcript is finished. But, in
16 any event, if those are on the 24th, we still, I think, can fit
17 it in.

18 MR. ELIAS: That would have the rebuttal briefs filed
19 on the 14th, and we would be looking at the 90-day period
20 expiring sometime around the 26th of November, I believe, based
21 on the -- or the 25th of November based on the current
22 schedule.

23 MR. WILLIS: You would still have a couple of weeks
24 before your Staff recommendation is due on the 25th of October.

25 MR. ELIAS: My suggestion would be that rather than

1 20 days for the rebuttal briefs, we do it in 14 days. That
2 would give us a comfort zone that we don't have to rush the
3 staff recommendation. And I would think that the arguments in
4 the rebuttal briefs would be somewhat narrower than would be in
5 the case in chief.

6 COMMISSIONER BAEZ: I tend to agree, Mr. Willis. I
7 think probably 14 days for some narrowly focused rebuttal is
8 more than adequate.

9 MR. WILLIS: That's agreeable.

10 COMMISSIONER BAEZ: Okay. Forty pages, 14 days.

11 Mr. Howe, I'm sorry, I didn't ask you. Is that all
12 right?

13 MR. HOWE: That's fine with me.

14 COMMISSIONER BAEZ: Thank you.

15 Any other discussion on Section IV? Hearing none,
16 Section V.

17 MR. ELIAS: Commissioner, this might be an
18 appropriate time to bring up a subject that we had discussed,
19 and I haven't shared this with the parties yet.

20 COMMISSIONER BAEZ: And this is just a minor nit that
21 we are trying to address for the Commissioners' benefit. If we
22 can take time and submit errata sheets, whatever modifications
23 or changes to prefiled testimony at the time of hearing can be
24 made in writing, I think it would make all of our lives a
25 little easier and probably cut down on some time at the

1 hearing, as well.

2 MR. WILLIS: Rather than provide additions and
3 corrections on the stand, live, that we would provide --

4 COMMISSIONER BAEZ: Precisely. I'm not foreclosing,
5 if need be, to make certain changes, but certainly whatever the
6 witnesses are walking in with, if they could please provide it
7 in writing, if there is no objection.

8 MR. HOWE: No objection.

9 COMMISSIONER BAEZ: We will have the order reflect
10 that?

11 MR. ELIAS: Yes.

12 COMMISSIONER BAEZ: Any other changes to Section V?
13 Moving on to Section VI, order of witnesses.

14 MR. HOWE: Commissioner Baez --

15 COMMISSIONER BAEZ: Yes.

16 MR. ELIAS: -- on Section VI, I can designate the
17 issues that Mr. Larkin is testifying to. I can do that now or
18 I can provide it to Mr. Elias, however you would like.

19 COMMISSIONER BAEZ: If you want to do it, we can take
20 it up. Now is a good time.

21 MR. WILLIS: What I will do is just put it together
22 with these other minor comments that I have just for
23 expediency.

24 MR. HOWE: Okay. I will have Mr. Larkin testifying
25 on Issues 1, 2, 3, 5, 6, 8, 9, 10, 13, and 14.

1 COMMISSIONER BAEZ: Just to make sure, Mr. Howe, I
2 have 1, 2, 3, 5, 6, 8, 9, 10, 13, and 14?

3 MR. HOWE: Yes, sir.

4 COMMISSIONER BAEZ: Okay. Noted. And I guess we
5 will be taking Ms. Bacon's rebuttal and direct together, is
6 that --

7 MR. WILLIS: We would like the option to do it
8 direct.

9 COMMISSIONER BAEZ: Then we will reserve that, and
10 have the presiding officer -- you can take it up at hearing.

11 MR. WILLIS: Okay.

12 COMMISSIONER BAEZ: Next. Section VII.

13 MR. HOWE: Commissioner Baez, I would like the
14 opportunity to -- there are just a couple of sentences I would
15 like to tweak a little bit on our basic position. We have not
16 changed it since the issues have been solidified, and I can
17 provide that to Mr. Elias.

18 COMMISSIONER BAEZ: Very well. Mr Willis?

19 MR. WILLIS: The same.

20 COMMISSIONER BAEZ: Okay. And Section VIII, I know
21 there is a fair amount of questions on this. How do we want to
22 proceed?

23 MR. HOWE: Commissioner Baez, for my part I can tell
24 you there is just one position on one issue that I believe I
25 would like to make a very minor change in the wording, and I

1 can provide that to Mr. Elias.

2 COMMISSIONER BAEZ: Okay. What issue is that,
3 Mr. Howe, just so I know?

4 MR. HOWE: On Issue 9, I would like to make a minor
5 change to my statement of position. And let me take a quick
6 look here and see if I've got marks anywhere else. And, in
7 fact, if you like, I can make the change right here. It is
8 very minor.

9 COMMISSIONER BAEZ: Lead us through it, then.

10 MR. HOWE: At the very end of the position on
11 Issue 9, the very next to the last line, after the words "Polk
12 Power Station" --

13 COMMISSIONER BAEZ: Yes.

14 MR. HOWE: -- insert the words "tax life," and then
15 delete the words "tax deficiency."

16 COMMISSIONER BAEZ: That is your only change?

17 MR. HOWE: On the positions, yes, sir.

18 COMMISSIONER BAEZ: On the positions.

19 Mr. Willis?

20 MR. WILLIS: Have you finished with your comments on
21 this section on issues?

22 COMMISSIONER BAEZ: Yes, sir.

23 MR. WILLIS: We had a discussion at the preliminary
24 issue identification conference with respect to what is now
25 Issues 5 through 9. Issue 9 is an issue that covers and

1 subsumes, we believe, all of the matters in the previous Issues
2 5 through 8. We also thought that we had agreed that Issue 7
3 was subsumed by Issue 9, and that any argument that could be
4 made with respect to the method used for the cost/benefit
5 analysis could be argued under that issue. And I thought we
6 had agreed to that when we were there, I guess last Friday.

7 But our point is with respect to these issues, is
8 that it really rolls out the position of Public Counsel in
9 phases and provides, in effect, argument and positions that can
10 be argued under the Issue Number 9. We also believe that they
11 are stated in a way that is repetitive and could be improved,
12 even if they stay in.

13 But our first position and the position that we urge
14 you is to eliminate Issues 5 through 8 and provide that any
15 argument or positions that can be taken under those issues can
16 be taken under Issue 9. And, obviously, it doesn't preclude
17 Public Counsel from making the arguments that he sets out here;
18 they would just be made under that particular issue.

19 MR. HOWE: Commissioner Baez, may I respond?

20 COMMISSIONER BAEZ: Yes, please.

21 MR. HOWE: In the proposed agency action order that
22 we protested, the Commission stated that the sole basis for
23 allowing the company to include interest expense on tax
24 deficiencies as an expense since 1999, in its 1999 income
25 statement, was the Commission's acceptance of this cost/benefit

1 analysis offered by the company. The analysis itself is fairly
2 complex. It addresses many different topics. There would be
3 almost no way for us to take a position on all of those topics
4 in one summary.

5 For example, Issue 5, we state: Were rate case
6 benefits properly included in the cost/benefit analysis? You
7 will note we have the words rate case benefits in quotes. The
8 reason that is so is there are three major elements of the
9 cost/benefit analysis, and this is the topic that the company
10 chose to include in that cost/benefit analysis which the
11 Commission accepted.

12 Another major category, again, you will notice on
13 Issue 6 I have it in quotes because that's the topic that the
14 company is addressing, a different topic in its cost/benefit
15 analysis, and that is, quote, deferred revenue benefits/costs.
16 And the question is, are they properly included?

17 Issue 7 is the basis of the cost/benefit analysis.
18 It was represented by the staff recommendation, and I believe
19 it is reflected in the Commission's order also that the
20 cost/benefit analysis is analogous to the one previously
21 accepted by the Commission in a Peoples Gas System case. So it
22 again goes to the essence of the cost/benefit analysis which
23 formed the sole basis for the Commission's decision.

24 Issue 8 comes about from the supporting documents the
25 company provided to the cost/benefit analysis in which they

1 show a particular treatment of the interest accrued on deferred
2 revenues as a component.

3 So in each case I don't believe we are taking an
4 argumentative position. In each case, for example, Issue 5,
5 were rate case benefits properly included? I don't think there
6 is any question but there is a specific category in the
7 cost/benefit analysis called rate case benefits.

8 On Issue 6, were deferred benefit/costs properly
9 included? I think that is a fairly neutral question. Again,
10 it's a topic that the company included. It is self-evident
11 upon the face of the cost/benefit analysis. Whether it is
12 based on a similar one used in the Peoples Gas System, that is
13 what the Commission said in its order. So we believe the
14 question is neutral. Is a cost/benefit analysis based on what
15 was done in the Peoples Gas case appropriate in this
16 proceeding? I think that is a pretty neutral question.

17 Issue 8, is it appropriate to include interest
18 accrued on deferred revenues as a component? Again, I think
19 that is fairly neutral. We are just saying, is it appropriate?
20 I guess we could have used different words, should it be
21 included? But I don't think the statement of the issue
22 predicts an outcome.

23 Issue 9 is the fallout issue. Does the cost/benefit
24 analysis support the company's claim? That is not the
25 appropriate place to address the components of the analysis

1 itself. And it was on that basis that I thought it was
2 appropriate to carve these things out as separate issues. I
3 don't think you can address them otherwise.

4 COMMISSIONER BAEZ: How relevant is it to -- I guess
5 the one that gives me the most concern -- Mr. Willis, I will
6 tell you where I am at with this. The Commission used a
7 certain process, used a certain cost/benefit analysis, and that
8 is made up of -- that is, I agree, made up of certain
9 components.

10 So I think if nothing else than for the benefit of
11 having a road map for the Commission to reconsider or to
12 consider again the component parts of that cost/benefit
13 analysis to arrive at a conclusion I think is beneficial to us
14 as we sit up here. So I am inclined not to subsume and to
15 throw this into some aggregate issue to get argued one way or
16 the other. I think there is a lot of nuts and bolts to this,
17 and I think we could all benefit of having those issues laid
18 out.

19 The one that I do have a problem with, and I guess,
20 Mr. Howe, you can probably address this as well or, perhaps,
21 you are the best person to address this, is Issue 7. I am
22 having trouble seeing of what, I guess, considering what
23 analogous proposal, analogous cost/benefit analysis we used,
24 the Commission used in evaluating this particular one, how that
25 really is relevant. The analysis we use is the analysis we

1 use. I'm not sure if coming to some decision as to whether we
2 should use one analogy versus another is even appropriate.
3 That question is going to get answered.

4 MR. WILLIS: Well, in any event, it is a position to
5 argue under Issue 9.

6 COMMISSIONER BAEZ: Well, I guess --

7 MR. WILLIS: If at all.

8 COMMISSIONER BAEZ: -- I'm more seeing your point on
9 this specific one. I'm not sure that --

10 MR. HOWE: Commissioner Baez, I think I can answer
11 that question. In this particular case, as I said, the
12 Commission in its order, in its Order Number
13 PSC-01-0113-PAA-EI, at Page 11 the Commission states that the
14 Commission allowed Peoples Gas System above-the-line treatment
15 in 1996 of the interest Peoples paid in 1996 for tax
16 deficiencies resulting from the audit of tax years 1998 through
17 1990. And the point is, they are talking about how you have
18 done this before.

19 I think the record in this proceeding is going to
20 establish that the company offered a cost/benefit analysis
21 first to the staff, which in turn offered to it the Commission,
22 in which the Peoples Gas' cost/benefit analysis was used as a
23 template, and they included the same categories. And the
24 reason I think it is substantial, and it is also addressed
25 somewhat in your PAA, is -- and as you will see from our

1 position, in the Peoples Gas case there was no stipulation
2 involved. Rates were not set on a financial integrity
3 standard. There were no deferred revenues under consideration.

4 So it goes to the essence of the cost/benefit
5 analysis, in the first place. The Commission started by saying
6 we will accept one similar to or based upon the Peoples Gas
7 template and that is what drove the whole cost/benefit
8 analysis.

9 COMMISSIONER BAEZ: I hear what you are saying, but
10 here is the trouble that I am having. If this is -- you have
11 protested the cost/benefit analysis, at least the cost/benefit
12 analysis, and that throws us into some de novo proceeding. So
13 whatever our basis is going to be for deciding, you know,
14 whatever cost/benefit analysis becomes acceptable to us as a
15 basis for deciding the issue is going to be -- it is a new
16 decision. And to me, this suggests elimination of alternatives
17 and it suggests reviewing a decision that doesn't exist
18 anymore. And I'm having a little bit of difficulty with --

19 MR. HOWE: I understand. Perhaps I can clear it up.
20 My concern is what will we likely be faced with at the back end
21 of this case? Could the Commission say we think it is a good
22 cost/benefit analysis because it is consistent with the one we
23 accepted in the Peoples Gas case, and that is my concern.

24 In other words, that you will treat that as
25 precedent, and I will have lost the opportunity to show you not

1 only is it not precedent, but on a factual basis it has no
2 relationship to the circumstances Tampa Electric was in with
3 regard to its earnings for 1999.

4 COMMISSIONER BAEZ: Well, I think I would disagree
5 that we are keeping you from making that as part of a general
6 argument to say, you know, these alternatives are more
7 appropriate and these are not. I'm just -- I'm not ready -- I
8 don't know that I can accept focusing on the Peoples Gas
9 cost/benefit analysis. It may turn out that it is a valid
10 analysis, and if you want to -- I also don't think that you are
11 precluded on the back end from saying this -- you know, you are
12 going to propose a theory and a certain cost/benefit analysis
13 that you think is appropriate, and I think that is going to be
14 to the exclusion of others. And I think it is going to be -- I
15 think you are going to have ample opportunity to make that
16 argument.

17 MR. HOWE: Commissioner Baez, then as long as it is
18 understood that we are not foreclosed from in our briefing, in
19 our cross examination, and so forth, from addressing that
20 issue, I have no problem if you choose to delete the issue.

21 COMMISSIONER BAEZ: To the extent that the Peoples
22 Gas model, if you will, is offered up as an appropriate
23 cost/benefit analysis, I think you are going to have ample --
24 you are going to have a target to shoot at.

25 MR. HOWE: All right.

1 COMMISSIONER BAEZ: With that understanding, I think
2 we are going to eliminate Issue 7, counsel, with the
3 understanding that based on TECO's position it is subsumed
4 under Issue 9.

5 Mr. Willis, you were going to say something.

6 MR. WILLIS: Yes. And we accept your determination
7 with that. With respect to the statement of the issues that
8 remain --

9 COMMISSIONER BAEZ: Yes.

10 MR. WILLIS: -- with respect to the cost/benefit
11 analysis, we think that it would be a fairer, more neutral
12 statement if you reworded Issue 5, for example, which says:
13 "Were rate case benefits properly included in the cost/benefit
14 analysis," and this is what I would substitute, "used to
15 determine the prudence of costs incurred in 1999?" I think
16 that is a more direct and accurate statement of what was done,
17 and it also avoids a lot of repetition in the statement of the
18 issue.

19 COMMISSIONER BAEZ: I'm sorry, Mr. Willis, can you be
20 more specific as to what changes you would mean? And I guess I
21 will pipe up here and tell you that I think the way this issue
22 is worded reverts back to a previous decision. And I think
23 that if we are all in agreement that we are reviewing, again, a
24 cost/benefit analysis anew, then this should be -- this should
25 have some, a different tense, I think, if you will. It should

1 -- our rate case or should rate case benefits be included or --

2 MR. WILLIS: Right. And I think in that vein, the
3 phrase that I used, "used to determine the prudence of costs
4 incurred in 1999," is the issue. That is what the cost/benefit
5 analysis purports to do. That is the issue that we believe
6 that we are trying before you, is whether or not the incurrence
7 of these costs in 1999 are prudently incurred; and, therefore,
8 properly included in the calculation of the company's earnings
9 in 1999.

10 COMMISSIONER BAEZ: Mr. Elias, a question, and just
11 so that I can get it clear in my mind what the object of this
12 is. I think the reference to 10.7 million, I mean that number
13 based on this after hearing and whatever testimony and evidence
14 is adduced, that number could change. I mean, that could just
15 as well be another number, is that correct?

16 MR. ELIAS: Yes.

17 COMMISSIONER BAEZ: And the purpose of the issue is
18 not necessarily to test the 10.7, because that number went away
19 with the PAA, is that correct?

20 MR. ELIAS: I believe the purpose of the issue is to
21 test that portion of the cost/benefit analysis that led to
22 the --

23 COMMISSIONER BAEZ: Irrespective of numbers?

24 MR. ELIAS: Yes. -- that led to the finding that
25 this expense was prudent.

1 COMMISSIONER BAEZ: Mr. Howe, I mean, is this --

2 MR. HOWE: I would disagree. I think the dollar
3 amount is inextricably linked to the Commission's decision.
4 What the Commission found was, in its order, there were \$10.7
5 million of net benefits. And the reason that they found that
6 was because of the cost/benefit analysis they relied upon.

7 COMMISSIONER BAEZ: But we don't have that anymore.

8 MR. HOWE: I'm not sure you don't. What I mean is,
9 what we challenged was the cost/benefit analysis the Commission
10 relied upon. That is a separate issue. That is the subject of
11 our motion to strike the company's testimony, whether under the
12 Commission's own interpretations of a particular statute under
13 the APA, whether you can consider other things.

14 But having said that, I would suggest that if you
15 want to clarify this issue and avoid dissension, just stop it
16 after the word Commission, "Were rate case benefits properly
17 included in the cost/benefit analysis," just leave it right
18 there, period.

19 COMMISSIONER BAEZ: Mr. Willis, any comment?

20 MR. WILLIS: Commissioner, we believe that the phrase
21 that I presented to you, "used to determine the prudence of
22 costs incurred in 1999," is appropriate to include.

23 COMMISSIONER BAEZ: I agree, just for clarity's sake.

24 MR. HOWE: My problem with that, Commissioner Baez,
25 is the prudence of costs in 1999, the cost/benefit analysis,

1 nothing in it was used to determine the amount that was
2 recorded in 1999. It is an analysis to show other costs from
3 other time periods to make the cost that was recorded in the
4 1999 prudent in the eyes of the company. So I don't think you
5 can have an issue of whether the rate case benefits included in
6 the cost/benefit analysis are directly tied to the amount the
7 company recorded in 1999.

8 MR. WILLIS: The cost/benefit analysis is merely a
9 tool of analysis. It is a method of review that the Commission
10 used to determine whether or not a cost that was included in
11 the company's calculation is a prudent cost or not. That is
12 what the cost/benefit study or analysis is.

13 COMMISSIONER BAEZ: And the purpose of -- and the
14 purpose of your suggested language identifying costs in 1999
15 has what?

16 MR. WILLIS: Well, it says what it was used for,
17 which was what it was and is used for, to determine the
18 prudence of the costs incurred in 1999.

19 COMMISSIONER BAEZ: I'm sorry, Mr. Howe, you were
20 going to say something.

21 MR. HOWE: I'm trying to avoid getting into any
22 conflicts. To me, if we want to be clear on the issue and
23 avoid qualifiers and how we view how it might be used or what
24 it applies to, I think if you put a period after the word
25 "analysis," you have got it. "Were the rate case benefits

1 proper included in the cost/benefit analysis," and you're done.
2 And when I say "a period," I guess the better term would be a
3 question mark, since it is a question.

4 COMMISSIONER BAEZ: I'm sorry, folks, I need to see
5 this. Mr. Willis, your proposed language would read, "Were
6 rate case benefits properly included in the cost/benefit
7 analysis," continue from there.

8 MR. WILLIS: "Used to determine the prudence of costs
9 incurred in 1999?" Really, it should be are.

10 COMMISSIONER BAEZ: I'm sorry?

11 MR. WILLIS: "Are rate case benefits properly
12 included in the cost/benefit analysis?"

13 COMMISSIONER BAEZ: Mr. Elias, do you have any
14 thoughts on this? I'm sure you do.

15 MR. ELIAS: I think we understand the issue the way
16 it is worded here in the draft. If we are going to start
17 changing the language, rather than "are," I think the question
18 should probably be: "Should rate case benefits be included?"

19 MR. WILLIS: That's fine.

20 COMMISSIONER BAEZ: I agree.

21 MR. ELIAS: And the inclusion of the phrase, "used to
22 determine the prudence of costs incurred in 1999," I think that
23 is implicit in the shorter stated issue, but it does no harm,
24 as we see it, to the meaning and the intent of the issues as I
25 understand from Public Counsel's protest and getting to the

1 particular piece-parts of the analysis.

2 COMMISSIONER BAEZ: Very well. Issue 5 will read:
3 Should rate case benefits be properly included in the
4 cost/benefit analysis used to determine prudence of costs
5 incurred in 1999?"

6 MR. ELIAS: And I would suggest you can strike the
7 word "properly." I think it's implicit.

8 COMMISSIONER BAEZ: Strike "properly," yes, I agree.
9 All right. I think we have got something workable. "Should
10 rate case" -- I'm sorry.

11 MR. WILLIS: Excuse me.

12 COMMISSIONER BAEZ: Mr. Willis, yes.

13 MR. WILLIS: Go ahead. I didn't mean to interrupt
14 you.

15 COMMISSIONER BAEZ: I'm sorry?

16 MR. WILLIS: I didn't mean to interrupt you. I'm
17 sorry.

18 COMMISSIONER BAEZ: No, no, not at all. Please.

19 MR. WILLIS: The same wording would apply to Issue 6.

20 COMMISSIONER BAEZ: I agree that Issue 6 should be
21 modified accordingly. That would be: "Should deferred revenue
22 benefits/costs be included in the cost/benefit analysis?"

23 MR. WILLIS: Issue 8 should be reworded similarly, as
24 well.

25 COMMISSIONER BAEZ: "Used to determine prudence of

1 costs incurred in 1999."

2 I'm sorry, Mr. Willis, you said something?

3 MR. WILLIS: I said Issue 8, as another component,
4 should be worded similarly.

5 COMMISSIONER BAEZ: I'm not sure that Issue 8 needs
6 to be changed. I mean, to the extent that if Mr. Elias is
7 correct, the tail end of the modification really doesn't add
8 anything. I mean, the form is fine, "Is it appropriate to
9 include accrued interest as part of the cost/benefit analysis?"

10 MR. WILLIS: Shouldn't it say, though, "Should the
11 interest accrued on deferred revenues be included as a
12 component?"

13 COMMISSIONER BAEZ: Well, it seems to me we are
14 asking the same thing. But, I mean, I don't have any heartburn
15 in changing it to be consistent. I'm not sure that we are
16 changing the --

17 MR. WILLIS: I understand.

18 COMMISSIONER BAEZ: I mean -- Mr. Elias?

19 MR. ELIAS: We believe the issue is appropriate the
20 way it is worded.

21 COMMISSIONER BAEZ: I don't think we need to change
22 it.

23 MR. WILLIS: Okay.

24 COMMISSIONER BAEZ: We are going to leave Issue 8.
25 Issue 9 stays.

1 And we are all right with Issue 10, 11, and 12?

2 MR. WILLIS: We had some considerable discussion on
3 the appropriate wording of Issue Number 10 at the issue
4 identification conference. We had initially proposed the
5 wording: "If the Commission finds that the recognition of
6 interest expense on tax deficiencies is consistent with the
7 settlement, is such recognition prohibited as retroactive
8 ratemaking?" We feel like that is a better focus of the issue.
9 But if you use the basic language that you have here with Issue
10 10 --

11 COMMISSIONER BAEZ: Well, that goes -- this issue
12 goes back to my initial concern of tying 10.7 as a number. I
13 don't believe that we are -- I don't believe that we are
14 judging a 10.7. We are going through a cost/benefit analysis
15 all over again. So if there is a way to strike that reference
16 and keep the issue making sense --

17 MR. WILLIS: I guess it would be: "Does the use of
18 the cost/benefit analysis as a method to determine the prudence
19 of a cost incurred violate the proscription against retroactive
20 ratemaking?"

21 MR. HOWE: Commissioner Baez, I don't think I have
22 any problem with what Mr. Willis just suggested. I would want
23 to make it clear that the essence of what we are trying to get
24 at here is not that any cost/benefit analysis necessarily
25 violates the proscription against retroactive ratemaking. The

1 way we intend to address it is a cost/benefit analysis that
2 reaches back to past years. So I just want to be clear on
3 that, and we will be addressing it from that standpoint.

4 COMMISSIONER BAEZ: Okay.

5 MR. WILLIS: I understand that is a part of the
6 argument.

7 COMMISSIONER BAEZ: Can you provide that language
8 again? I mean, I'm sorry, I don't -- Bob, I don't have that
9 consolidated list in front of me. I thought I had packed it
10 with my materials, so I'm not -- I don't have what --

11 MR. ELIAS: The language that Mr. Willis read isn't
12 that language. Could you read it one more time?

13 MR. WILLIS: "Does the use of the cost/benefit
14 analysis as a method to determine the prudence of a cost
15 incurred violate the proscription against retroactive
16 ratemaking?"

17 MR. HOWE: And just for clarity, if I could, say a
18 cost incurred in 1999.

19 MR. WILLIS: It should be, "a cost/benefit analysis,"
20 as well, "use of a cost/benefit analysis."

21 COMMISSIONER BAEZ: I'm sorry, Mr. Willis, "as a
22 method to" --

23 MR. WILLIS: "Does the use of a cost/benefit analysis
24 as a method to determine the prudence of a cost incurred"--

25 COMMISSIONER BAEZ: And we are going to add 1999 to

1 keep it focused.

2 MR. WILLIS: Okay.

3 COMMISSIONER BAEZ: "As a method to determine" -- I'm
4 sorry, "a cost incurred"--

5 MR. WILLIS: "In 1999 violate the proscription
6 against retroactive ratemaking?"

7 COMMISSIONER BAEZ: Mr. Howe, are you all right with
8 that language?

9 MR. HOWE: Yes, sir.

10 COMMISSIONER BAEZ: Very well. Staff?

11 MR. ELIAS: That is acceptable to us.

12 COMMISSIONER BAEZ: Okay. I'll make note of the
13 changes.

14 MR. HOWE: Commissioner Baez, are you going to
15 address Issue 11 now?

16 COMMISSIONER BAEZ: I think that is the next one on
17 the list.

18 MR. HOWE: We have some concerns with Issue 11. And
19 I guess I should state that it is summarized in the third
20 sentence of our position. I'm not sure exactly what Tampa
21 Electric is getting at. We have filed a protest, and we have
22 addressed the issues in the protest we raised. There seems to
23 be an allegation that we are estopped from asserting
24 inconsistent positions. I don't know if that is -- the
25 inconsistency is portrayed as being within the positions we are

1 taking on the matters we have protested, or if Tampa Electric
2 is suggesting there is an inconsistency between the matters we
3 have protested and matters Tampa Electric itself chose not to
4 protest.

5 MR. WILLIS: You have engaged in a course of conduct
6 in support of, or remaining silent when issues were discussed
7 which made adjustments to the company, to the company's
8 detriment, which were not made in the company's last rate case.
9 And then after taking those positions and remaining silent,
10 when we believe that you would have had a duty to come forward
11 and speak, you now take a position that if an adjustment was
12 not made in the last rate case, that that adjustment cannot be
13 made and seek to hide behind the narrow focus of the protest.

14 So it is within the context of this proceeding, it is
15 within the context of the Commission's consideration of issues
16 in 1999, as well as the Commission's considerations of similar
17 issues in previous years under the stipulation. And it is a
18 course of conduct that a party may engage in that is indicative
19 of its inconsistent positions.

20 MR. HOWE: Commissioner Baez, I believe I am being
21 accused of being an advocate. I think I'm hearing that the
22 inconsistency arises because I protested those things that I
23 felt went against us and did not protest those things that I
24 felt were in my favor. I think that is my job and that is what
25 the public expects of me.

1 But if I could go one step further. If you will
2 notice in the company's position, one of the specific things it
3 alleges is such as the adjustment to the company's equity
4 ratio. Commissioner Baez, such an argument is untenable.
5 Tampa Electric protested the PAA setting the amount to be
6 refunded for 1998, and I believe explicitly protested the
7 equity ratio issue. We went through the prehearing process.
8 We were ready to go to hearing. And in the end the company
9 backed off and stipulated to a refund even larger than the one
10 the Commission had first proposed.

11 The company itself raised the equity ratio issue to
12 protect its own interest, withdrew that protest effectively or,
13 better yet, conceded the issue. Because under the
14 Administrative Procedure Act, a stipulation stands in the stead
15 of the hearing. So that issue has essentially been completely
16 litigated.

17 The Commission in the 1999 earnings just did exactly
18 what it had done in 1998 which the company had protested. The
19 company is now suggesting because it protested and essentially
20 lost on that issue that I should take that into consideration
21 in determining which issues I should protest that it included
22 in its 1999 earnings.

23 Commissioner Baez, the question of interest expense
24 on tax deficiencies was recorded by Tampa Electric only in 1999
25 within the multi-year term of the stipulation. The first time

1 it came up I protested it because I felt it was detrimental to
2 the customers. I believe the company's position is completely
3 untenable to suggest that I am somehow constrained in what I
4 must do to represent the customers of Tampa Electric because I
5 have to give recognition to the fact that the Commission may
6 have made other decisions adverse to Tampa Electric, either
7 ones that they chose not to protest, or ones that they
8 protested and retreated from. I believe this issue is totally
9 inappropriate.

10 MR. WILLIS: Our point is that whatever was done with
11 respect to the Commission's decision or the company's positions
12 were taken in the face of advocacy by the Office of Public
13 Counsel, that those adjustments could be made and could be made
14 within the intent of the stipulation.

15 It is certainly relevant to bring to this
16 Commission's attention and for you to determine that Public
17 Counsel now can't play fast and loose on its position with
18 respect to the interpretation of the stipulation by taking one
19 position with respect to an issue that benefits him, and taking
20 another position with respect to a position that reduces the
21 refund and is included as a properly incurred expense.

22 It is inconsistent, this Commission recognized that
23 was inconsistent, and that is the issue that we are -- have
24 presented to you for a decision. I mean, we are arguing on the
25 merits that we will argue in our final briefs here. But it is

1 certainly relevant to determine the intent of the stipulation
2 to see what the course of conduct of the parties have been with
3 respect to the consideration of similar provisions. And in
4 this instance you find that it takes a diametrically different
5 and opposed position with respect to whether or not an
6 adjustment can be made if it had not been made in the last rate
7 case.

8 In the prior time when it hurt the company, certainly
9 it could be made. Now, in this issue, he doesn't want to
10 consider this past history. But you can't ignore what has been
11 done in the past, and there is certainly evidence of how the
12 Commission should rule on this matter.

13 MR. HOWE: Commissioner Baez, could I ask -- I am
14 being accused of taking inconsistent positions. Could
15 Mr. Willis please identify one issue that fits the definition
16 of what he considers to be an improper action on my part?

17 COMMISSIONER BAEZ: Let's calm down. And I think
18 Mr. Elias is poised to say something, and then I have a
19 question after you are done.

20 MR. ELIAS: I think the issue of estoppel, an
21 equitable estoppel, is a legal issue and it is an affirmative
22 defense. It is something that Tampa Electric has raised in
23 response to the protest that OPC filed. And I think what you
24 have heard here for the last ten minutes is argument on the
25 applicability of the doctrine or the theory to the specifics of

1 this case. I think the utility is entitled to raise it. They
2 are going to have the burden on this issue of carrying the day
3 in terms of the greater weight of the evidence to the extent
4 that there is evidence, and the appropriateness of the
5 application of the doctrine to this particular factual
6 circumstance. I think that the issue --

7 COMMISSIONER BAEZ: Might have been more artfully
8 drawn as a legal issue?

9 MR. ELIAS: Possibly. Well, it is primarily legal,
10 but there are some factual elements of it because it is based
11 on past conduct. Now, that conduct is probably reflected in --
12 or is going to be argued based on previous decisions of this
13 Commission. So to the extent that they are reflected in
14 Commission orders, I don't know how much factual evidence will
15 be necessary.

16 I am somewhat comforted by the fact that we have
17 allowed for reply briefs, that the ability of the parties to
18 fully argue this issue on the merits and assure that the
19 Commission has good information to make a decision on the issue
20 will be available to the Commission when the time comes.

21 COMMISSIONER BAEZ: Well, we can file that under
22 stolen thunder, then. I don't have any other question then.

23 Mr. Howe, we are going to leave the issue. I think
24 it is an issue that is legal in nature. And as to the
25 applicability of estoppel and you -- you know, we can take care

1 of it through briefs, and I expect to hear a lot of the same
2 argument in writing.

3 MR. HOWE: Commissioner Baez, could I then just ask
4 for a point of clarification?

5 COMMISSIONER BAEZ: Yes, sir.

6 MR. HOWE: One of the things I did not understand
7 about Mr. Elias's comments, is it the staff's position that an
8 estoppel argument can be raised with respect to issues that the
9 company has previously protested?

10 COMMISSIONER BAEZ: I don't think that is what
11 Mr. Elias said.

12 MR. ELIAS: No, we are not even that far. I mean --

13 MR. HOWE: I just wanted to be sure. Because the way
14 the company took its position it refers to some specifics, and
15 I just wanted to be sure.

16 COMMISSIONER BAEZ: Moving on. Issue 12 is okay.
17 And Issue 13 and 14, no changes.

18 Section IX, the exhibit list, are there any changes?

19 No proposed stipulations. And the pending motions,
20 we can take up argument on the motion to strike for now. I can
21 pretty much tell you I'm going to reserve ruling. I think we
22 are going to pass that along, so it's at your option whether
23 you want to argue here or argue at the time when the hammer is
24 going to come down.

25 MR. HOWE: Is it your thinking that we are just going

1 to have to address the same argument to the full Commission, or
2 to the full panel later?

3 COMMISSIONER BAEZ: I believe that is my preference.
4 That's what I intend to do.

5 MR. HOWE: So if I do not argue it now, am I
6 foreclosed from doing so later?

7 COMMISSIONER BAEZ: I don't think you are. I can --
8 the hours -- we have been at this a little while, and I think
9 if you want to take some time and take their reply brief back
10 and bone up for the full Commission, I would suggest that. We
11 are not going have a decision today. And as a matter of fact,
12 no matter what I hear today, I think it is more appropriate for
13 the entire Commission.

14 MR. HOWE: When you say the "entire Commission," you
15 mean the panel, is that correct?

16 COMMISSIONER BAEZ: Right, exactly. I'm sorry, I
17 misspoke.

18 MR. HOWE: And when you say the "reply brief," this
19 is something that, I assume, that we would have the opportunity
20 to address at the time Ms. Bacon takes the stand.

21 COMMISSIONER BAEZ: Exactly. I'm sorry, I said
22 "reply brief," I mean the company's reply.

23 MR. HOWE: Yes. And I believe that -- then this
24 issue, the way the -- Section XI, perhaps, needs to be
25 clarified. I had written this just to put everybody on alert

1 of how I was viewing the testimony.

2 COMMISSIONER BAEZ: Yes, we should properly make the
3 modification to Section XI.

4 MR. ELIAS: I would include the motion there. And
5 then in the ruling section, I will include --

6 COMMISSIONER BAEZ: A reservation.

7 MR. ELIAS: -- a statement that reflects the fact
8 that argument on the motion to strike was deferred to be taken
9 up at the hearing.

10 COMMISSIONER BAEZ: At the hearing.

11 And the rulings, the extension of time has been
12 granted in Section XIII.

13 Is there anything else? I'm sorry.

14 MR. HOWE: Commissioner Baez, I would just ask for
15 some guidance.

16 Bob, I had told you -- he's not listening. Let me
17 get his attention.

18 Bob, I had said I would get you some minor changes to
19 our statement of basic position. Should we have a deadline for
20 that?

21 MR. ELIAS: My suggestion would be the close of
22 business Monday --

23 MR. HOWE: Close of business Monday.

24 MR. ELIAS: -- for all changes. And if you can just
25 e-mail them to me and copy the other party, it would be my

1 intent to have a draft or a prehearing order --

2 COMMISSIONER BAEZ: A final prehearing order.

3 MR. ELIAS: -- forwarded to the prehearing officer
4 for signature by the close of business Tuesday so that we could
5 issue it on Wednesday.

6 COMMISSIONER BAEZ: Mr. Willis, is that all right?

7 MR. WILLIS: That's fine.

8 COMMISSIONER BAEZ: Okay. If there is nothing
9 further, we stand adjourned.

10 Thank you.

11 (The prehearing conference concluded at 10:30 a.m.)

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1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)
4

5 I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter
6 Services, FPSC Division of Commission Clerk and Administrative
7 Services, do hereby certify that the foregoing proceeding was
8 heard at the time and place herein stated.

9 IT IS FURTHER CERTIFIED that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript constitutes a true transcription of my notes of said
13 proceedings.

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a relative
16 or employee of any of the parties' attorney or counsel
17 connected with the action, nor am I financially interested in
18 the action.

19 DATED THIS 21st day of August, 2001.

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