BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Determination of regulated earnings of Tampa Electric Company pursuant to stipulations for calendar years 1995 through 1999.	DOCKET NO. 950379-EI ORDER NO. PSC-01-1724-PHO-EI ISSUED: August 23, 2001

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on August 17, 2001, in Tallahassee, Florida, before Commissioner Braulio L. Baez, as Prehearing Officer.

APPEARANCES:

LEE L. WILLIS, ESQUIRE, JAMES D. BEASLEY, ESQUIRE, and KENNETH R. HART, ESQUIRE, Ausley & McMullen Law Firm, P. O. Box 391, Tallahassee, Florida 32302
On behalf of Tampa Electric Company (TECO).

JOHN ROGER HOWE, ESQUIRE, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400
On behalf of the Citizens of the State of Florida (OPC).

ROBERT V. ELIAS, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff (Staff).

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

Tampa Electric Company (TECO), the Office of Public Counsel (OPC), and the Florida Industrial Users Group (FIPUG) are signatories to a series of stipulations governing the calculation of TECO's regulated earnings and providing for certain refunds for the years 1995-1999. FIPUG subsequently withdrew its intervention in this docket. By Order No. PSC-01-113-PAA-EI, issued January 17, 2001, in this docket, the Commission determined TECO's 1999 earnings. On February 7, 2001, OPC timely filed a protest of Order No. PSC-01-113-PAA-EI. This matter is set for an administrative hearing on August 27, 2001, to consider OPC's protest. Opening statements, if any, shall not exceed ten minutes per party.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 366.093, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to

present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Commission Clerk and Administrative Service's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding. Each party may file a reply brief of no more than 40 pages. Reply briefs shall be due 14 days after the filing date for post-hearing briefs.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. Each wittness shall prepare an errata sheet incorporating all changes and or corrections to his/her prefiled testimony, if necessary. Each errata sheet will be marked as an exhibit, to be offered at the same time as the prefiled testimony and exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes

the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Witness	Proffered By	Issues #
Direct		
Delaine M. Bacon	TECO	1, 2, 3, 4, 5, 6, 8, 9, 13, 14
James W. Sharpe		3
Hugh Larkin, Jr.	OPC	1, 2, 3, 5, 6, 8, 9, 10, 13, 14
Rebuttal		
Delaine M. Bacon	TECO	1, 2, 4, 5, 6, 8, 9, 10, 11

TECO may ask that Ms. Bacon's direct and rebuttal testimony be taken at the same time.

VII. BASIC POSITIONS

TECO: The Commission should affirm its decision in Order No. PSC-01-0113-PAA-EI ("Order No. 0113") which held that interest on tax deficiency expense was prudently incurred in 1999 and should be included in the calculation of the company's earnings for 1999 under the Stipulation. The central issues here are the proper interpretation of the Stipulation and the prudency of the company's decisions. The Commission correctly concluded in Order No. 0113:

> As we discussed in this order, we believe this interest is a prudent expense. Consistency, fairness, and the most reasonable interpretation of the stipulations leads us to find that it is appropriate to include the interest expense associated with the tax deficiencies in the calculation of Tampa Electric's 1999 actual ROE. (Order No. 0113, at pages 18-19).

This Commission properly considered the context of the whole agreement, the purposes sought to be effectuated and its prior decisions in this docket. Upon that review, the Commission found in Order 0113 that prudently incurred interest on tax deficiency expense must be considered in the calculation of 1999 earnings. The Commission interpreted the agreement in a fair and even-handed manner by giving full effect to all the provisions of the agreement.

The key to the Commission's decision here is the intent of the parties. The Commission gave appropriate meaning to each of the relevant provisions of the Stipulation and placed each of those provisions in harmony to give the parties the rights or benefits they bargained for.

The Stipulation in paragraph 11 provides that all reasonable and prudent expenses will be allowed in the computation of the actual ROE. A cost-benefit study was used by the Commission in determining whether interest on tax deficiency incurred in 1999 was a prudent expense and therefore includable in the calculation of 1999 earnings.

The cost-benefit study is merely a method of analysis used to demonstrate how customers benefited from the company's actions that gave rise to the interest on tax deficiency in 1999. The consideration of a study is not retroactive ratemaking. Moreover, there is nothing inherent about recognition of interest on tax deficiencies that results in retroactive ratemaking. Indeed OPC clearly agreed in paragraph 10 of the Stipulation that such interest related to the Polk Power Station must be considered a prudent expense under the Stipulation.

The Commission in Order No. 0113 correctly interpreted paragraph 10 of the Stipulation by concluding:

> With respect to the potential interest on tax deficiencies associated with the Polk Power Station addressed in paragraph 10, the Stipulation forecloses the possibility of a challenge to the prudence of those costs. It was not meant to, has not been interpreted to, and should not be interpreted to limit the possible prudent expenses to the categories either included in the last full revenue requirements proceeding or specifically enumerated in the stipulation. (Emphasis supplied.)

The Stipulation was never intended to include a complete laundry list of all the adjustments that could be made. For example, the fact that the Stipulation specifically provides that the Polk Power Station is included in rate base did not mean all other power plants are excluded. Likewise, the specific exclusion of the Port Manatee site from rate base did not mean all other sites are either excluded or included. The Commission has consistently held that it is appropriate to revert back to a determination under paragraph 11 to determine whether the cost or investment was prudently incurred for any items not specifically mentioned in the Stipulation.

Order No. 0113 provides a fair and even-handed interpretation of paragraphs 7, 10 and 11 of the

Stipulation by concluding "the fact that no adjustment was made in the last full revenue requirements proceeding does not preclude an adjustment in any year covered by the Stipulation. The relevant question is one of prudence." (Order No. 0113, pg. 18.) The company's tax decisions reduced revenue requirements and were clearly prudent. The company's cost-benefit analysis was prepared consistently with those used by the Commission in other proceedings and showed benefits to ratepayers as a result of the company's tax positions that led to the incurrence of interest on tax deficiencies. Benefits to ratepayers accrued because of the deferral of taxes that are due to the IRS. Deferring the taxes avoided the higher cost of capital that would have existed if the tax had been paid sooner.

OPC's challenge to the Commission's ruling on the grounds it made an adjustment not made in the last rate case is inconsistent with prior positions taken by OPC supporting adjustments detrimental to the company that were not made in the last rate case. Consequently, OPC is equitably estopped from taking an inconsistent position with respect to interest on tax deficiency expense in this proceeding. Moreover, under paragraph 10 of the March 25, 1996 Stipulation, OPC is required to support a determination that any interest expense incurred as the result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking purposes. Included in the amount of tax deficiency interest at issue in this proceeding is $6.6 million of interest expense incurred in 1999 as the result of Polk Power Station related tax deficiency assessments. The appropriate way for OPC to comply with its obligation under the Stipulation is to withdraw its protest with respect to the Polk Power Station related amounts of income tax deficiency interest.

OPC: Paragraph 10 of the first stipulation only allows Tampa Electric to include interest expense on tax deficiencies related to the tax life of its Polk Power Station in the calculation of earnings for 1999:

> 10. The company plans to take a position regarding the tax life of its Polk Power Station intended to minimize its revenue requirements and to provide maximum benefits to its customers. The Parties agree that any interest expense that might be incurred as the result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking purposes and will support this position in any proceeding before the FPSC.

This paragraph cannot reasonably be interpreted as allowing for the recovery of interest expense on Polk tax deficiencies generally (i.e., including those not related to the tax-life issue) because to do so would render the first sentence of the paragraph meaningless. See, e.g., Pressman v. Wolf, 732 So.2d 356, 360 (Fla. 3d DCA 1999) ("Individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general.") Tampa Electric has not alleged that any interest expense on tax deficiencies recorded in 1999 relate to the tax life of the Polk Power Station. Indeed, the company's prefiled direct and rebuttal testimonies do not allege any of the interest expense recorded in 1999 was related to Polk at all.

The cost-benefit analysis relied upon by the Commission in its PAA order, as well as the new analysis offered by the company, assume revenue requirements for 1993 and for 1994 were determined in the same way. This is incorrect because, towards the end of deliberations on Tampa Electric's last rate case in late 1992, the Commission adopted a financial integrity measure of 3.75 times interest coverage. The rate award for 1993 was unaffected by application of this standard because Tampa Electric would exceed the coverage multiple for that year. For 1994, however, the Commission concluded a revenue award calculated in the traditional manner would be inadequate. The revenue award for 1994 was therefore increased to meet the 3.75 interest coverage standard. As a result,

the financial integrity standard alone determined the final revenue requirement for 1994. The level of deferred taxes in the capital structure purportedly attributable to aggressive tax positions taken by Tampa Electric in earlier years was irrelevant to the ultimate revenue award or to final rates from 1994 through 1999. Removing the purported "rate case benefits" for 1994-99 from the cost-benefit analysis relied upon in the PAA causes the $10.7 million of net benefits to disappear, to be replaced by a net cost to customers of $1,811,000. Removing these same purported benefits from the new cost-benefit analysis offered by Tampa Electric's witness Ms. Bacon also causes her $12.4 million of net benefits to disappear, to be replaced by $146,000 of net cost to customers.

The cost-benefit analyses are also deficient in other respects. For example, the level of deferred taxes in the capital structure for 1993-99 could not have been affected by tax positions taken after 1990 because tax returns for 1991 and subsequent years were not submitted to the IRS until after the last rate case was filed in 1992. Moreover, the Peoples Gas System case upon which the cost-benefit study is based did not involve: (1) stipulations; (2) rates established on the basis of a financial integrity measure; or (3) deferred revenues and refunds. Furthermore, there can be no "benefits" from deferred revenues required by negotiated agreements among the parties; the parties, by definition, could not have gained or lost more than they bargained for.

Even if there had been "benefits" from the last case accruing to the customers' account, such benefits only materialized in hindsight, after the IRS purportedly disallowed certain tax deductions in 1999. For the Commission to take the position that customer refunds for 1999 should be less because rates might have been set too low in 1992 (based upon what the company may have found out seven years later) clearly violates the proscription against retroactive ratemaking.

The cost-benefit analysis accepted by the Commission as the basis of its PAA had been refined over several iterations in discussions between Tampa Electric and the Staff. Staff's first recommendation to the Commission on 1999 refunds was based upon the result of this joint undertaking. A second recommendation urged the Commission to reject Public Counsel's arguments that Paragraph 10 of the first stipulation precluded Commission acceptance of the proffered cost-benefit analysis. Section 120.66, Florida Statutes (2000), precludes Commissioners from engaging in ex parte communications with staff members who engaged in "advocacy in connection with the matter under consideration or a factually related matter." In Public Counsel's opinion this would apply to staff members who signed off on either of the recommendations addressing 1999 earnings considered thus far.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: Does the inclusion of interest expense on tax deficiencies in the calculation of TECO's regulated earnings comply with the provisions of the settlement?

POSITIONS

TECO: Most definitely yes. All prudently incurred expenses are properly allowed and included in the calculation of Tampa Electric's 1999 earnings under the terms of the Stipulation. Tax deficiency interest expense was a prudently incurred expense in 1999 associated with tax positions that have benefitted customers.

OPC: No. Tampa Electric is precluded by Paragraph 10 of the first stipulation from including interest expense on tax deficiencies unrelated to the tax life of the Polk Power Station in its calculation of 1999 earnings. Moreover, in the absence of Paragraph 10, the first sentence of Paragraph 11, which only permits adjustments from the last rate case, would preclude all interest expense on income tax deficiencies.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 2: Does the settlement preclude interest on tax deficiencies for any items other than those related to the Polk Power Station?

POSITIONS

TECO: No. The Stipulation forecloses any OPC challenge to the prudence of any interest on tax deficiency cost related to the Polk Power Station. It was never meant to, has not been interpreted to and should not be interpreted to limit possible prudent categories to those specifically enumerated in the Stipulation.

OPC: Yes. For the Commission to find that the stipulation allows for the recovery of interest expense on tax deficiencies generally would violate the following principles of contract interpretation: (1) the inclusion of one thing presupposes the exclusion of other similar matters not enumerated; (2) specific provisions in an agreement control over the more general; (3) one provision of an agreement should not be read so as to make another provision meaningless; and (4) an agreement should not be construed in such a way as to give one party more rights or benefits than it bargained for. Furthermore, even the interest expense that might be incurred as a result of a Polk Power Station deficiency assessment is limited by the terms of Paragraph 10 of the first stipulation to assessments arising out of disputes on the tax life.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 3: Was it appropriate for Tampa Electric to record interest expense on income tax deficiencies in 1999?

POSITIONS

TECO: Yes. FAS 5 requires the company to book an expense when information that is available indicates that it is probable that a liability has been incurred and the amount of the expense can be reasonably estimated. Tampa Electric properly recognized that interest had to be recorded when the IRS took definitive action that demonstrated it was probable and estimatable that it would incur the tax expense and related interest. Tampa Electric appropriately booked $13.2 million of tax deficiency interest in 1999.

OPC: No. Nothing happened to make 1999 the ideal time to record the second (maybe third?) revenue agent's report (RAR) for audit years 1989-91, the first RAR for 1992-94, estimates for 1995-98, and a Memorandum of Understanding for 1986-88. Moreover, entries for a revised RAR for 1992-94 were made in March 2000, and a "final IRS appeals settlement for '86-'88" was not recorded until March 2001. It appears Tampa Electric just wanted a placeholder that could reduce refunds for 1999 until the time was right to make final entries.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 4: **What amounts of tax deficiency interest included in the calculation of the company's earnings in 1999 is related to the Polk Power Station that OPC is obligated to support as a prudent expense for rate making purposes in this proceeding under paragraph 10 of the stipulation?**

POSITIONS

TECO: $6.6 million of the $13.2 million tax deficiency interest included as an expense in 1999 is related to Polk Power Station. Under paragraph 10 of the Stipulation, OPC agreed that "any interest expense that might be incurred as a result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking." OPC has an affirmative obligation to support this position in any proceeding before the FPSC.

OPC: None. Paragraph 10 applies to interest expense on tax deficiency assessments arising from Tampa Electric taking an aggressive position on the tax life of the Polk Power Station: "The purpose of paragraph 10 is to document an agreement among the parties to support recovery should the Polk Power Station tax life position be questioned by the IRS at a future date." [Prefiled rebuttal testimony of Tampa Electric's witness, DeLaine M. Bacon, page 6, lines 9-12.] Tampa Electric is now trying to justify interest expense on tax deficiencies for Polk arising out of research and development expenditures and interest capitalization, but it has not demonstrated any interest expense on tax deficiencies for Polk were recorded in 1999 as a result of the IRS questioning the tax life of the unit.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 5: **Should "[r]ate case benefits" be included in the cost-benefit analysis used to determine the prudence of costs incurred in 1999?**

POSITIONS

TECO: Yes. The revenue requirements calculation used in Tampa Electric's last rate case included deferred taxes that lowered the cost of capital and permanent rates that have been paid by customers since that time. Consequently, customers have benefited from the fact that taxes the IRS found to be due and upon which interest was assessed were considered as deferred taxes in the rate case.

OPC: No. There couldn't be any "[r]ate case benefits" attributable to the amount of deferred taxes in the capital structure for the years 1994-99 because the revenue requirement for 1994 was established solely to meet a target interest coverage multiple of 3.75 times. The Commission rejected the 1994 revenue requirement calculated in the traditional manner because it would not satisfy this interest coverage multiple. The amount of deferred taxes in the capital structure has had absolutely no effect on rates customers have paid since that time. Correcting this error removes $12,552,000 of reputed "benefits" and results in a $1,811,000 net detriment to Tampa Electric's customers.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 6: Should "[d]eferred revenue benefits/(costs)" be included in the cost-benefit analysis used to determine the prudence of costs incurred in 1999?

POSITIONS

TECO: Yes. The calculations within the cost-benefit analysis accurately depict what would have happened during the deferred revenue years if the company had not taken the tax positions that it did. The cost-benefit analysis obviously did not and was not an attempt to change the amounts ordered to be deferred or refunded under the Stipulation, but rather, represents a Commission accepted "what-if" tool of analysis to assist the Commission in

determining the prudency of recording tax deficiency interest expense in 1999.

OPC: No. The amounts ordered deferred or refunded under the stipulations could not, by definition, have been either too high or too low. It's pure sophistry to suggest that customers should be required to forego refunds for 1999 because undisclosed customer "benefits," hidden within the stipulations and unknown to the individuals who negotiated their terms, must now be considered because Tampa Electric chose to record interest expense on tax deficiencies in 1999. Correcting this error removes another $4,025,000 of reputed "benefits" and increases the net detriment to customers by a like amount, for a total net detriment of $5,836,000.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 7: Is a cost-benefit analysis based upon the one used to evaluate Peoples Gas System's overearnings for 1996 appropriate in this proceeding?

The Prehearing Officer ruled that this issue is subsumed by Issue 9.

ISSUE 8: Is it appropriate to include the interest accrued on deferred revenues as a component of the cost-benefit analysis?

POSITIONS

TECO: Yes. Deferred revenue interest was treated consistent in the cost-benefit analysis with the treatment of deferred revenue interest approved by the Commission for each of the deferred revenue years. The accrued interest is indistinguishable within the total deferred revenue balance. To give credence to OPC's new revelation that interest on deferred revenues was unavailable for use by

the company means there was a requirement that the interest must be refunded to customers.

OPC: No. Interest expense on deferred revenues has already been used to reduce the amounts deferred and refunded. Nothing in the stipulations suggests Tampa Electric can tap the interest accrued and paid for by customers to shore up its earnings and reduce either deferrals or refunds.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 9: Does the cost/benefit analysis prepared by the company support its claim that the interest on tax deficiencies is prudent and in the best interests of the customers?

POSITIONS

TECO: Yes. The cost-benefit analysis was an accurate representation of the impact on customers if the company had never taken the tax positions that led to the tax deficiency interest expense in 1999 and shows that the tax deficiency interest was a prudently incurred cost. While logic and reasoning are also important aspects in the Commission's decision making, the cost-benefit analysis provided a Commission-recognized quantitative measure for determining prudency. The cost-benefit analysis correctly identified the benefits of deferred taxes in the rate case and deferred revenue calculations compared to the eventual cost of the tax deficiency interest.

OPC: No. If interest expense on tax deficiencies generally is not allowable pursuant to the terms of the stipulations, that should be the end of the matter. It doesn't make any difference that customers might have gotten "benefits" from purportedly aggressive tax positions in the past as well as refunds for 1999 that don't take this fact into consideration. Results cannot be unfair to the company if they are consistent with the stipulation it signed. For

whatever reason, Tampa Electric chose to protect itself only with regard to interest expense incurred as the result of a Polk Power Station tax life-related assessment.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 10: Does the use of a cost-benefit analysis as a method to determine the prudence of a cost incurred in 1999 violate the proscription against retroactive ratemaking?

POSITIONS

TECO: Absolutely not. It is not retroactive ratemaking to employ a cost-benefit study as a tool of analysis to determine the prudency of a current period cost. Retroactive ratemaking occurs when rates that have been ordered from a prior period are readjusted. Tampa Electric is not asking that the $10.7 million of benefits to customers proven in the cost-benefit analysis that is over and above the tax deficiency interest be returned to the company or that rates be reset in any way. The action taken by the Commission in this proceeding is covered by a Stipulation Agreement. Therefore, no retroactive ratemaking has occurred.

OPC: Yes. Charging the customers more in the future to make up for purportedly inadequate rates in the past is the essence of retroactive ratemaking. Refunds for 1999 cannot be reduced based upon rate levels established by final orders for 1993-99 without violating the prohibition. An exception to this general principle might be found in the interim-rate-setting process, but that is not applicable here.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 11: Is OPC equitably estopped from asserting inconsistent positions in this proceeding regarding adjustments not made in the last Tampa Electric rate case?

POSITIONS

TECO: Yes. Having accepted the Commission's consistent interpretation of the Stipulation in prior years and with respect to 1999 on other issues (such as the adjustment to equity ratio which was not made in the company's last rate case), OPC by its course of conduct under the Stipulation is estopped from urging a different inconsistent position on tax deficiency interest that cuts the other way. OPC is attempting to change its position after representing a contrary position through verbal representation and a duty to speak which estop the assertion of a contrary position.

OPC: No. And OPC has not taken inconsistent positions. OPC has taken positions on those issues identified in its protest. If Tampa Electric is suggesting that OPC is constrained in the issues it can identify because the company chose not to file a protest of its own, this issue is completely irrelevant.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 12: What effect, if any, does Section 120.66, Florida Statutes (2000), have on the Commissioners ability to engage in ex parte communications with staff members?

POSITIONS

TECO: § 120.66, F.S., is applicable to proceedings held under §§ 120.569 and 120.57, F.S. Staff has not engaged in any "prosecution or advocacy" in the context of such a proceeding or at any time in this docket. Rather the Staff has advised the Commission, through a written recommendation based on investigation and review, on an appropriate proposed agency action. These activities are

preliminary to any 120.569 or 120.57 proceedings. Proceedings under Sections 120.569 or 120.57, Fla. Stat. commence once an affected party challenges the proposed action.

OPC's assertion that Staff was in the role of an advocate in this proceeding is simply unfair and incorrect. OPC in effect asserts that if a Staff member disagrees with OPC then that Staff member is an advocate. The fairest description of Staff's role was to provide an impartial review of each issue. Staff was in the role of an advisor to the Commission, not an advocate.

OPC: Substitution of "presiding officer" for "hearing officer" in the 1996 amendments to Section 120.66(1) effected a fundamental change in the applicability of that section to Commission proceedings. Public employees engaged in prosecution or advocacy -- which should include staff members who advocated inclusion of interest expense on tax deficiencies to derive Tampa Electric's 1999 earnings -- should be precluded from engaging in ex parte communications with Commissioners in this docket.

STAFF: § 120.66, Florida Statutes, is applicable to proceedings (ie, hearings) held under §§ 120.569 and 120.57, Florida Statutes. Section 120.66, Florida Statutes, has been interpreted by this agency to prohibit any staff member who testifies in a proceeding from participating in the further preparation of the staff recommendation or advising the Commissioners. No hearing has yet been held in this matter, and no staff person has offered, or will offer testimony. Accordingly, Section 120.66, Florida Statutes is not applicable in this matter.

ISSUE 13: What is the appropriate net operating income for 1999?

POSITIONS

TECO: The appropriate net operating income is $178,865,105 for 1999. The same amount as already approved by the Commission in Order No. 0113.

OPC: $186,659,086.

STAFF: No position at this time pending the evidence adduced at the hearing.

ISSUE 14: What is the amount to be refunded?

POSITIONS

TECO: The amount to be refunded is $6,102,126 through December 31, 2000 plus interest accrued until the refund is made to customers. Such refund shall not be commenced until a final non-appealable order (by the Commission or a court, as the case may be) has been issued with respect to the calculation of the refund.

OPC: $14.4 million plus additional accrued interest.

STAFF: No position at this time pending the evidence adduced at the hearing.

IX. EXHIBIT LIST

Witness	Proffered By	I.D. No.	Description
Direct			
Delaine M. Bacon	TECO	(DMB-1)	Exhibit of Delaine M. Bacon
Delaine M. Bacon	TECO	(DMB-2)	Transcript and exhibits from Delaine M. Bacon's August 2, 2001, deposition.

Witness	Proffered By	I.D. No.	Description
Delaine M. Bacon	TECO	(DMB-3)	Transcript from the December 16-17, 1992, Special Agenda Conference in Docket No. 920324-EI, Application for a Rate Increase by Tampa Electric Company, pages 1-4A, 21, 162, 194-205, 214-36.

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

Public Counsel's Motion to Strike Prefiled Testimony.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. RULINGS

TECO's August 14, 2001, Motion for an Extension of Time to Conduct Discovery is granted.

Public Counsel's Motion to Strike Prefiled Testimony will be considered at the hearing.

Each party may file a reply brief of no more than 40 pages. Reply briefs shall be due 14 days after the filing date for post-hearing briefs.

Each wittness shall prepare an errata sheet incorporating all changes and or corrections to his/her prefiled testimony, if necessary. Each errata sheet will be marked as an exhibit, to be offered at the same time as the prefiled testimony and exhibits.

It is therefore,

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 23rd day of August, 2001.

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

RVE

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing 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.

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

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.