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September 24, 2001

**BY HAND DELIVERY**

Ms. Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Determination of Regulated Earnings of Tampa Electric Company Pursuant to Stipulations for Calendar Years 1995 through 1996; Docket No. 950379-EI

Dear Ms. Bayo:

Enclosed for filing in the above referenced are the original and fifteen (15) copies of Tampa Electric Company's Post-Hearing Statement and Brief.

Also enclosed is a diskette containing the above document generated in Word and saved in Rich Text format for use with WordPerfect.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

Lee L. Willis

LLW/bjd
Enclosures

cc: All Parties of Record (w/encl.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Determination of Regulated Earnings of Tampa Electric Company Pursuant to Stipulations for Calendar Years 1995 through 1999. | ) | DOCKET NO. 950379-EI<br><br>Filed: September 24, 2001 |

**POST-HEARING STATEMENT AND BRIEF**
**OF TAMPA ELECTRIC COMPANY**

Tampa Electric Company ("Tampa Electric" or "the company") files its Post-hearing Statement and Brief filed pursuant to Uniform Rule of Procedure 28-106.215 and Order No. PSC-01-1724-PHO-EI.

**Introduction**

In rendering its decision in Order No. 0113[1] this Commission properly considered the context of the whole Stipulation, the purposes sought to be effectuated by it and its prior decisions in this docket. Upon that review, the Commission found 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 is the agreement of the parties as expressed in the plain language of the Stipulation. 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 for which they bargained.

[1] Order No. PSC-01-0113-PAA-EI issued January 17, 2001.

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 appropriately included in the calculation of 1999 earnings. The cost-benefit study was 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.

Office of Public Counsel's ("OPC") argument regarding retroactive ratemaking is without merit. The consideration of a study is not retroactive ratemaking. Moreover, there is nothing inherent about recognizing 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 would be considered a prudent expense under the Stipulation.

OPC's argument in paragraph 10 prevents the inclusion of interest on tax deficiencies is also without merit. 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 addressed 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 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 protest challenges this Commission's well-reasoned 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 prudence of the company's decisions. The Commission correctly concluded in Order No. 0113:

> As 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.) (Emphasis supplied)

OPC has presented no evidence challenging the company's recording of interest on tax deficiencies in 1999. The recording of such interest was clearly necessary under Financial Accounting Standard 5 ("FAS 5") and Generally Accepted Accounting Procedures ("GAAP")

(Issue 3). In fact, OPC's Witness Hugh Larkin testified that he has not formed an opinion as to whether the tax positions were "right, wrong or indifferent." (Tr. 230) In his opinion, the expense should be disallowed based on his interpretation of four sentences in the Stipulations (Tr. 234). OPC first contends that the Stipulation does not allow the inclusion of prudently incurred interest on tax deficiency expense because: (1) paragraph 10 of the Stipulation specifically directs that interest on tax deficiencies related to Polk Power Station shall be considered a prudent expense; and (2) paragraph 11 of the Stipulation allows only adjustments which were made in the last rate proceeding. (See Issues 1 and 2)

OPC further argues that if this Commission allows prudent expenses to be considered in the calculation (as clearly required by paragraph 11) then the Commission must only consider the cost-benefit analysis relied on in Order No. 0113, and that certain adjustments should be made to that study removing rate case benefits, deferred revenue benefits, and interest on deferred revenues (Issues 5, 6, 8 and 9). OPC's proposed adjustment to remove rate case benefits (Issue 5) is founded on a contention that if a lower balance of deferred taxes had been considered in the 1994 test year, the Commission would not have provided additional revenues to cover that cost because of the financial integrity targets used for that test year. These financial integrity targets were used to adjust the amount of CWIP included in rate base to meet a specified interest coverage ratio.

OPC then asserts that benefits of the company's tax positions cannot be considered for the years covered by the Stipulation because the amounts ordered to be deferred or refunded could not be too high or too low since it was covered by the operation of the Stipulation (Issue 6). OPC also contends that the analysis is somehow flawed because it "taps into" interest accrued on deferred revenues (Issue 8). OPC finally contends that the use of a cost-benefit

analysis as an analytical tool violates the doctrine prohibiting retroactive ratemaking (Issue 10) and the Commission must only consider the one cost-benefit analysis used in making the initial decision in considering the prudence of incurring interest on tax deficiencies in 1999.

All of these arguments are built on a house of cards which falls on its own weight. Most of these arguments have been thoughtfully considered and rejected by this Commission in Order No. 0113, and must be rejected again based on the evidence presented at the hearing on August 27, 2001. Furthermore, an appropriate application of Florida law to this evidence, including the doctrine of equitable estoppel, forecloses OPC's ability to assert inconsistent positions in this proceeding (Issue 11).

OPC's position depends on: (1) ignoring the intent of the parties by rewording the Stipulations, and interpreting the language in a manner inconsistent with prior positions taken by OPC and inconsistent with this Commission's prior decisions in this docket for earnings in 1996, 1997, 1998 and 1999; (2) confining the Commission's analysis of prudence to one particular cost-benefit analysis; (3) making inappropriate adjustments to the rate case benefits included in the cost-benefit study (which when done correctly still shows $6.8 million of net benefits if all rate case benefits are removed (Tr. 43, Ex. 8) and $8.5 million net benefits if only the 1994 test year is adjusted (Tr. 280, 289)); (4) adjusting the cost-benefit study to exclude interest on deferred revenues (based on a theory previously rejected by this Commission in this docket in 1999); and (5) attempting to apply the doctrine prohibiting retroactive ratemaking to a stipulated agreement which, in the first place, makes that doctrine totally inapplicable and, in the second place, does not preclude the use of a "what-if" cost-benefit tool of analysis.

All of the arguments advanced by OPC are completely without merit and must be rejected once again based on "consistency, fairness and the most reasonable interpretation of the

Stipulations . . ." (Order No. 0113, pp. 18-19) Accordingly, the appropriate net operating income for 1999 is $178,865,105 and the amount to be refunded is $6,102,126 through December 31, 2000 plus interest accrued until the refund is made to customers.

**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?**

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 benefited customers.

* * * * *

Discussion:

**The Agreement**

The key to the Commission decision in this proceeding is the proper interpretation of the Stipulation. 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 Commission has appropriately concluded that ". . . the guiding principal of the Stipulations is whether the expense or investment at issue is reasonable and prudent." (Order No. 0113, pg. 16. See also OPC's representation on May 12, 1998 urging the Commission to focus on . . . "just a test of reasonableness" (Ex. 10).)

**OPC Attempts to Rewrite the Agreement**

OPC contends:

> . . . normally an agreement will not be rewritten under the guise of interpretation to give one party more rights or benefits than it bargained for. The Commission, however, 'interpreted' a new entitlement for Tampa Electric . . . .

This is an amazing statement in the context of this proceeding because it is OPC's interpretation of the Stipulation that attempts to rewrite and add words to the Stipulation.

The second sentence of paragraph 11 of the Stipulation provides that all reasonable and prudent expenses and investment will be allowed in the computation of the actual ROE and no annualization or pro forma adjustments shall be made. There are no other provisions of the Stipulation that limit the clear language of the second sentence of paragraph 11. The first sentence of paragraph 11 states that adjustments consistent with the last rate case must be made. It does not say such adjustments are the only adjustments that were made in the last rate case can be made. The second sentence of paragraph 10 states that Polk Power Station related tax deficiency interest expense should be allowed in the calculation of the actual ROE. It does not state that only tax interest expense related to the Polk Power Station may be allowed in the calculation.

The cost-benefit analysis has proven that tax deficiency interest was a prudently incurred expense in 1999, and FAS 5 required the recording of this expense in 1999. As the Commission correctly concluded in Order No. 0113:

> The inclusion of the adjustment for tax deficiency interest expense in the calculation of 1999 earnings is consistent with other adjustments made by the Commission in determining earnings during the deferred revenue period.

The Commission did not rewrite the agreement. Instead it interpreted the agreement in a fair and reasonable manner that gave each party the rights and benefits for which it bargained. This interpretation of the Stipulation by the Commission was merely a reaffirmation of its prior interpretations of the Stipulation.

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

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.

* * * * *

Discussion:

The Commission's interpretation in Order No. 0113 is consistent with the balance of the Stipulation, which in some instances references one particular expense or investment within a class of expenses or investments. It is obvious that the distinct guidelines in the Stipulation for a specific expense or investment are simply instructions with respect to specific items of investment or expense and were never intended to be a complete list of all of the elements to be used in the ratemaking formula with respect to any investment, taxes or any other expense. The Commission determined the intent of the parties by giving a complete review of the agreement embodied in the Stipulation and by giving effect to the entire agreement.

OPC urges the Commission to find that, because Polk Power Station tax deficiencies are specifically cited in paragraph 10, then all other tax deficiencies are disallowed. OPC's focus on specific references in paragraph 10 in the First Stipulation[2] explicitly ignores other distinct directions in the Stipulation with respect to specific expenses and investments which are to be included or excluded in the calculation. For example, paragraph 5 of the Second Stipulation provides that the Polk Power Station is to be included in rate base and that the Port Manatee site

[2] The "First Stipulation" was approved by Order No. PSC-96-0670-S-EI on May 20, 1996 and the "Second Stipulation" was approved by Order No. PSC-96-1300-S-EI on October 24, 1996.

is to be excluded from rate base. The inclusion of these specific instructions with respect to these individual items of generating plant and property held for future use obviously was not intended to address in any way the inclusion in rate base of any other generating plant or other property included in property held for future use. The specific mention of these specific assets was obviously not intended to exclude other assets of the same type. The specific direction that Polk Power Station be included in rate base did not mean that Big Bend, Gannon and Hookers Point Stations were to be excluded. It is clear from reading the entire agreements that in every instance where a specific instruction for a precisely described investment or expense is not included, that item is to be reviewed on the basis of whether the particular investment or expense was reasonable and prudent.[3] The Commission appropriately considered the entire agreement and harmonized each provision of the agreement.

OPC argues that the intent of paragraph 10 was to somehow limit the inclusion of tax deficiency interest expense. However, Witness Larkin agreed at the hearing that the purpose of paragraph 10 was to require OPC's support of tax deficiency interest expense related to Polk Power Station tax life (Tr. 242-243). The purpose of paragraph 10 does not extend any further than this.

**OPC's Interpretation is Inconsistent with Prior Orders in this Docket**

For the Commission to accept OPC's logic and reverse its decision on interest on tax deficiencies, it would have to acknowledge that the adjustments it made to 1999 earnings such as equity ratio and investment in the OUC line were contrary to the intent of the Stipulation. The

[3] Paragraph 11 of the First Stipulation and paragraph 7 of the Second Stipulation contain identical language: "All reasonable and prudent expenses and investment will be allowed in the computation . . ."

Commission decisions to specifically identify deferred revenue in the capital structure and use a 13-month average balance for short-term debt rather than the average daily balance in the calculation of the short-term debt rate would also be contrary to the intent of the Stipulation. To accept OPC's argument would be to acknowledge that these same types of adjustments were erroneously made in prior orders in this docket. The overall effect of the Commission's interpretations has been to sharply increase the amount of refunds due.

The rule of ejusdem generis cited by OPC cannot override the plain language of the Stipulation and is totally inapplicable in this situation. Mr. Larkin testified that the Stipulations are not ambiguous (Tr. 252-253). Mr. Larkin essentially testified that he was in a better position than this Commission to read four unambiguous sentences in the agreement and state what his understanding is from that reading. As such, his testimony is inappropriate because he attempted to provide a legal interpretation of an unambiguous contract. OPC contends that the inclusion of a specific provision in an agreement requires the exclusion of all others. Again, this rule of thumb is applicable, if at all, to ambiguous provisions and does not apply where the intent of the parties can be gleaned from the plain language of the agreement. Moreover, the conclusions of OPC are inconsistent with its course of conduct in this docket and this Commission's interpretation of the agreements in calculating the company's earnings for 1996, 1997, 1998 and 1999. These actions evidence and reinforce the intent of the parties consistent with this Commission's ruling in Order No. 0113.

The rule of ejusdem generis advanced by OPC is simply inappropriate here. While it can be used in some instances as an aid in construction of a statute or agreement, it does not allow the Commission to interpret a provision in the Stipulation . . ."in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose. . . ." (See Miller et

al v. Amusement Enterprises, Inc., 394 F.2d 342 (5th Cir. 1968)) Ejusdem generis does not prevail when the result of its use would be contrary to the obvious purpose of the agreement in question and is inapplicable where the language interpreted is unambiguous.

The Commission carefully explained in its Order No. 0113 how all of the relevant paragraphs discussed by OPC can be read in harmony. This interpretation has cut both for and against Tampa Electric over the duration of the Stipulation. Upon that review, the Commission found in Order No. 0113 that prudently incurred interest on tax deficiency must be considered in the calculation of 1999 earnings. The rule of ejusdem generis should not be applied where to do so would disregard intent. See Utley et al v. City of St. Petersburg, 106 Fla. 692 (Fla. 1932).

OPC also argues that the rule of ejusdem generis requires that where both general and specific language is used in an agreement, the specific language will govern where there is a conflict. In the first place, there is no conflict between the three provisions of the Stipulation cited by OPC.[4] The Commission's interpretation gave full effect to all three provisions. "Where both the general and special provisions may be given reasonable effect in the context of the contract both provisions must be retained and given whatever meaning the words employ." See Pottsburg Utilities, Inc. v. Dougharty, 309 So.2d 199 (1st DCA, 1975)

During the period the Stipulation has been in place, issues have arisen and have consistently been resolved on the basic principle of whether a particular investment or expense was reasonable and prudent. That is what the Commission should continue to do here by reaffirming its finding in Order No. 0113, pg. 18:

> 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 any challenge to the

[4] See paragraphs 10 and 11 of the First Stipulation and paragraph 7 of the Second Stipulation. The language of 11 and 7, supra, are identical.

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 those categories either included in the last full revenue requirements proceeding or specifically enumerated in the Stipulation.** (Emphasis supplied)

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

TECO: Yes. FAS 5 requires the company to book an expense when, based on available information, it is probable that a liability has been incurred and the amount of the expense can be reasonably estimated. Tampa Electric properly recognized the interest because the IRS took definitive action, and the liability could be estimated.

* * * * *

Discussion:

After a series of IRS audits, examinations, rulings and appeals, the IRS in 1999 determined the final tax for 1986-1988, and Revenue Agent Reports (RARs) were received for 1989-1991 and 1992-1994 audit cycles. It was also then evident in 1999 that the same issues for these tax years carry over into tax years 1995-1998 (Tr. 179-180). Tampa Electric, faced with this information in 1999, was required by FAS 5 to recognize this expense (Tr. 182-183). It is uncontroverted that interest on tax deficiencies was an expense which was incurred in 1999. OPC's Witness Larkin candidly admitted that he had not formed a professional opinion that 1999 was an inappropriate year to record the tax deficiency expense that the company recorded in 1999 (Tr. 233) and that he did not even review the information necessary to form such an opinion saying "I didn't and it would be inappropriate to do so."

Mr. Larkin revealed OPC's position in the following exchange:

> Q. Isn't it true that it's your position that even though the tax expense was prudently incurred and properly recorded in 1999 that it should be disallowed for refund purposes?
>
> A. Yes. I don't even think you get past the Stipulation, and you can't get past the deficiencies in the cost-benefit analysis (Tr. 234).

Tampa Electric presented the testimony of James W. Sharpe, a tax partner PricewaterhouseCoopers LLP ("PwC") stating unequivocally that based on FAS 5 criteria, Tampa Electric properly booked its tax adjustment and related interest in 1999 saying:

> It is PwC's opinion that the IRS positions and determinations of the issues made it clear that tax and interest expense must be adjusted in 1999. PwC agreed with Tampa Electric that the 1999 IRS activity resulted in the interest and tax expense accrual under the standard articulated in FAS 5 and therefore the year for charging operations with the interest and tax adjustment was 1999 (Tr. 183).

Mr. Sharpe further stated that in no way should the tax adjustment and related interest taken by Tampa Electric be considered a prior period adjustment. Mr. Sharp testified:

> It was not until 1999, that it became probable that Tampa Electric would owe additional tax and interest on the adjustments to taxable income. In 1999, it became clear that Tampa Electric was not going to be able to sustain the tax return positions that it had taken on various returns. Under GAAP, the adjustment of tax expense and related interest were current year expenses in 1999, the year the adjustment became probable (Tr. 183-184).

It is uncontroverted that interest on tax deficiency at issue here was a 1999 expense and was properly recorded as an expense in 1999. There is no evidence to support any other conclusion.

**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 ratemaking purposes in this proceeding under paragraph 10 of the Stipulation?**

TECO: OPC agreed in paragraph 10 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." A significant portion of the $13.2 million tax deficiency interest is related to the Polk Power Station.

* * * * *

Discussion:

Paragraph 10 of the March 25, 1996 Stipulation provides:

> The parties agree 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 purposes and **will support this position in any proceeding before the FPSC**. (Emphasis supplied)

The IRS, after extensive discussions with the company, assessed Tampa Electric for research and experimental expenses and the capitalization of interest with respect to the Polk Power Station and listed amounts relating to Polk Power Station in the RAR on Form 4549-B received by the company on November 17, 1999. (Hearing Ex. 2; Bacon Deposition Ex. 12, Bate Stamp pg. 24, Tr. 143-144.)

Consequently, there is no doubt that a portion of the tax deficiency interest at issue here is clearly related to the Polk Power Station. Under such circumstances OPC under paragraph 10 of the Stipulation is obligated to affirmatively advocate that such expenses "will be considered as a prudent expense for ratemaking purposes." Paragraph 10 requires that OPC ". . . will support this position in any proceeding before the FPSC." The company on August 9, 2001 sent OPC a letter identifying the portion of the interest on tax deficiency which relates to the Polk Power Station. Tampa Electric asked OPC to withdraw its protest with respect to items related to the Polk Power Station (Tr. 146, 149, 154).

OPC seeks to avoid its responsibility under the agreement by ignoring the plain unambiguous language of the second sentence of paragraph 10 by attempting to modify words or by adding words to that sentence that are not there. OPC contends that the recitation of fact in the first sentence of paragraph 10 modifies the second sentence. That sentence reads:

> 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.

This sentence recites a fact regarding the company's intentions. The following sentence sets out the agreement between the parties.

> The parties agree 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 purposes.

For OPC's position to prevail, that sentence must be modified to read:

> The parties agree that only ~~any~~ interest expense that might be incurred as the result of a Polk Power Station tax life ~~related~~ tax deficiency assessment will be considered a prudent expense.

The tax deficiency interest assessed by the IRS in 1999 is related to the Polk Power Station, and is related to the Polk Power Station tax life (Tr. 293-294).

In any event, the main point is that OPC has agreed that interest on tax deficiencies related to Polk can be included as a prudent expense for ratemaking purposes. Consequently, OPC agrees that there is nothing inherent about that expense that requires that expense to be excluded for ratemaking purposes in a stipulated agreement. The very nature and the normal procedures for filing a tax return based on a historical period and subsequent audits involves an assessment of interest for prior years. Consequently, we turn once again to the agreement of the parties to include all prudently incurred interest on tax deficiencies in the calculation. OPC had the affirmative obligation to support any tax deficiency interest related to the Polk Power Station.

This should have had the effect of preventing OPC from raising issues of prudence or reasonableness regarding a portion of the interest, but did not in any way limit the inclusion of any other prudently incurred interest on tax deficiency.

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

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 contested tax positions that created deferred taxes in the rate case.

* * * * *

Discussion:

The revenue requirements included in the rate case test years included deferred taxes that lowered the cost of capital and therefore the permanent rates that have been paid by customers since that time. Even if OPC's position regarding the interest coverage used by the Commission in the rate case were taken into account, the 1993 test year and the deferred revenue benefits must still be considered. Excluding the 1994 test year along with its permanent rates, but including the 1993 test year and deferred revenue years has provided customers with an $8.5 million nominal benefit due to the company's tax positions (Tr. 96, 261). Moreover, even if all rate case benefits are removed from the cost-benefit study, there would still be $6.8 million in net benefits (Tr. 261, Ex. 8).

In addition, OPC incorrectly calculated the effect of removing rate case benefits from the cost-benefit analysis. Tampa Electric categorically rejects OPC's attempted one-sided calculation of rate case benefits (Tr. 95-97). Tampa Electric's witness DeLaine M. Bacon

explained there are two aspects of such an adjustment. The first is assuming, for purpose of analysis, higher rates and the second is the impact that those higher rates (if they had been in effect) would have had on the deferred revenue amounts (Tr. 95-96). Ms. Bacon concluded:

> . . . . to pull out one without pulling out the other makes no sense at all. If you're really going to exclude the rate case impacts for 1994, it will affect both the avoided higher permanent rates line, but it also – a portion of the avoided lower/higher deferred revenue refund also would be affected. And that's the reason why we're getting a benefit of 8.5 million, and then you remove that line, you're getting a negative million or negative whatever the number is.

OPC, however only adjusts the immediate effect of higher rates and ignored the effect of these higher rates on deferred revenues.

**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?**

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 did not and was not an attempt to change the amounts ordered to be deferred or refunded.

* * * * *

Discussion:

The refund to customers from 1998 was based upon the actual regulated return on equity approved by the Commission for the deferred revenue periods beginning in 1995. The eventual refund from 1999, as well, will be based upon the earned return on equity approved by the Commission. Without any doubt, if the company had taken different tax positions leading up to and during these periods, the cost of capital of the company and, therefore, the earned return on equity for each year would have been different. If the returns on equity were different, then the

deferrals and eventual sharing with customers would have changed. It is therefore clearly proper to include the deferred revenue period in a quantitative analysis of whether the tax positions taken by the company that led to the tax deficiency interest expense in 1999 were appropriate.

The Commission is attempting to determine the prudence of a particular cost incurred in 1999. It is absolutely appropriate in a prudence review for the Commission to consider all relevant information available. If a quantitative analysis can be performed that examines the reasonableness of a cost based on what would have happened if the company had taken different action, the Commission has an obligation to consider it. For OPC to argue that the Stipulation precludes any such "what-if" scenarios in a review of the reasonableness and prudence of an expense is absurd.

The cost-benefit analysis, in no way, is an attempt to change what has been ordered to be deferred or refunded. It simply outlines the benefits to customers that have been included in the deferrals and refunds ordered and compares that result to the cost of tax deficiency interest expense. These benefits are not "hidden" and cannot be considered "unknown." Even without the mechanical calculations within the cost-benefit analysis, it is clear that taking tax positions that defer taxes benefits customers through a lower cost of capital. Therefore, it is very appropriate to include the deferred revenue benefits in the cost-benefit analysis used to determine the prudence of costs incurred in 1999.

**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 Issue 9 subsumes this issue.

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

TECO: Yes. Deferred revenue interest was treated consistently 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.

* * * * *

Discussion:

Stripped to its core, OPC's position here is an attempt to reargua theory previously rejected by this Commission. OPC and Florida Industrial Power Users Group ("FIPUG") protested Order No. 98-0802-FOF-EI establishing Tampa Electric's earnings under the Stipulation for 1996 challenging whether or not a cost of capital rate for deferred revenues should be included in the capital structure. The issue arose out of a disputed interpretation of the Stipulation. FIPUG and OPC contended that deferred revenue interest should be treated as a below-the-line expense arguing that this interest represents revenue in excess of the company's cost of service. This Commission in Order No. PSC-99-0683-FOF-EI ("Order No. 0683") issued April 7, 1999 in this docket described Mr. Larkin's December 7, 1998 testimony. "OPC's Witness Larkin stated that the Stipulations require the company to pay interest and that interest should be at the stockholder expense. Witness Larkin added that the Stipulation would not have been entered into by the ratepayers if they themselves had to pay their own interest." (See Order No. 0683, pg. 4) This Commission in Order No. 0683 firmly rejected this argument saying:

> . . . we infer from the plain language of the Stipulations that deferred revenues and accrued interest should be included in the capital structure at the 30-day commercial paper rate. This is especially true in light of previous Commission decisions.

Consequently, it is the law of this case that interest on deferred revenues is merged with deferred revenues into a common "pot of dollars" and OPC cannot collaterally attack that ruling by attempting to reargue that issue here in a subsequent hearing in the very same docket involving the interpretation of the same Stipulation. The Commission has unequivocally ruled that the accrued interest on deferred revenues is indistinguishable within the total deferred revenue balance. Doctrines of res judicata and collateral estoppel preclude the Commission from reaching a different decision in the same docket involving the same parties and an identical issue. That ruling makes it clear it is appropriate to include interest accrued on deferred revenues as a component of the cost-benefit analysis.

**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?**

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.

* * * * *

Discussion:

While logic and reasoning are also important aspects in the Commission's decision making, the cost-benefit analysis used in this proceeding provides a Commission-recognized quantitative measure for determining prudence. The cost-benefit analysis correctly identified the benefits of deferred taxes in the last rate case and deferred revenues versus the eventual cost of the tax deficiency interest.

The logic underlying the cost-benefit analysis is sound regardless of the situation to which it is applied. OPC contends the Commission should not consider a cost-benefit analysis designed similar to one approved by the Commission In re: Investigation into 1996 Earnings of Peoples Gas Systems.[5] Both the Peoples Gas System case and this proceeding involved a calculation of the amount of revenue above a specified ROE for a prior period to determine the amount of excess earnings under a stipulation. Peoples Gas System used a cost-benefit analysis to determine the prudence of including tax deficiency interest expense in the calculations of a potential refund related to overearnings above a specified ROE for a prior period under a stipulation approved by the Commission. Similarly, this cost-benefit analysis is being used by Tampa Electric to determine the prudence of including tax deficiency interest expense in the calculations of a potential refund related to a sharing of earnings above a specified ROE.

Tampa Electric has shown in a series of cost-benefit studies that there are very significant net benefits of its tax positions that led to the assessment by the IRS of tax deficiency interest. The cost-benefit analysis is merely a tool of analysis which considered what would have happened if the company had not taken the specific tax positions. It is not an attempt to and does not change any rate, deferred revenue calculation or refund of the company. It is simply one method of looking at the benefits of a particular approach as compared with what it might have been if the company had taken a different approach to its tax positions.

This is one method of looking at prudence but is not the only evidence of prudence presented in this proceeding. Mr. Sharpe testified that under FAS 5, the company was required to recognize the expense. Further, he testified that the Commission should allow the tax

[5] Docket No. 971310-GU, Order No. PSC-98-0329-FOF-GU.

adjustment and related interest to be included as a 1999 operating expense in furtherance of a policy to encourage utilities to minimize their payments to taxing authorities (Tr. 184-185).

Since May 2000, the company has presented a series of cost-benefit studies, all of which show substantial benefits. These studies have been refined over time to: (1) include adjustments requested by Staff (Ex. 6); (2) correct an inadvertent omission of a number (Ex. 7); and (3) conform the study to the adjustments made by this Commission in Order No. 0113 (Ex.1). Additional sensitivities were provided to show that even if all rate case benefits were removed from the study as suggested by OPC, $6.8 million net benefits remain (Tr. 43, Ex. 8). If only the 1994 test year rate case benefits were removed, $8.5 million of net benefits remain (Tr.280-289). All of these studies support the company's finding that the interest on tax deficiencies was prudently recorded in 1999 because the underlying tax positions were in the best interest of ratepayers.

**ISSUE 10: Does the cost-benefit analysis, which finds $10.7 million of net benefits to customers violate the proscription against retroactive ratemaking?**

TECO: No. The Commission did not engage in retroactive ratemaking by employing a cost-benefit study as a tool of analysis in determining the prudence of an expense under the terms of the Stipulation. The Stipulation requires that all reasonable and prudent expenses be allowed in the calculation of Tampa Electric earnings.

* * * * *

Discussion:

The Commission in Order No. 0113 correctly rejected OPC's assertions that consideration of interest on tax deficiency was retroactive ratemaking. Florida Cities Water Company ("FCWC"), Order No. PSC-98-1583-FOF-WS cited by OPC is totally inapplicable

because it included a limited scope proceeding requesting a rate increase. This proceeding is not a rate case. The filed base rates of the company remain unchanged. It involves the calculation of earnings for a prior period in accordance with guidelines specified in agreements signed by OPC and approved by the Commission. The issue of whether or not customers receive a refund is based in part on the calculation of an earned rate of return in accordance with the directions in the agreement, which provides that "all reasonable and investment will be allowed in the computation . . . ." These directions require the consideration of prudently incurred expenses during the period under review. The Commission specifically found that interest on tax deficiency expense was reasonably and prudently incurred in 1999 and consequently was appropriately considered in the calculation. There is no question but that tax deficiency interest can be considered under the terms of the Stipulation. OPC challenges the use of a cost-benefit study in determining whether the tax deficiency interest Tampa Electric incurred in 1999 was a prudently incurred cost. However, a cost-benefit study is simply a tool of analysis and is not an action which constitutes retroactive ratemaking.

The process of an earnings review under a Stipulation by prior agreement of the parties necessarily involves an after-the-period review of earnings based on the provisions of the agreement. Absent that agreement and the Commission's prior orders approving the agreements, a post period review could only result in a prospective change in rates and no refunds of any description would be allowed. The refunds that are allowed are determined by the provisions in the agreement.

There is no question that tax deficiency interest as an expense under a stipulation does not violate the prescription against retroactive ratemaking. OPC, in fact, specifically agreed in paragraph 10 of the Stipulation that any tax deficiency interest related to Polk Power Station

"will be considered as a prudent expense for ratemaking purposes and will support this position in any proceeding before the FPSC." How then can a mere study used to analyze the prudence of tax deficiency interest related to other issues possibly be violative of the prescription against retroactive ratemaking? The clear conclusion is that it could not.

The prohibition against retroactive ratemaking was explained by the Florida Supreme Court in City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968). In that case, the Attorney General contended that after the conclusion of a rate case in which the Commission found that the company's earnings were excessive and ordered a prospective rate reduction, that the Commission should have made the rate reduction orders retroactive and ordered refunds. The Court interpreted the specific language of §§ 366.06 and 366.07 as only allowing the Commission to determine rates "to be thereafter charged." The Court simply found "the statute in terms thus gives the Commission power to prescribe such rates prospectively only." Consequently, the Court concluded there is no basis in the statute for concluding that the Commission's orders can be retroactive to the date when the Commission inquiry began. If indeed this principle is at all applicable to the Stipulation at issue here, the Commission would not be allowed to order a refund at all. Again, OPC seeks to selectively apply a principle which, if applied to the entire agreement, would totally eliminate any obligation for refunds.

OPC's argument with respect to retroactive ratemaking is answered in its observation ". . the parties to the Stipulation could have, if they had so chosen, agreed that Tampa Electric could include interest expense on all tax deficiencies in calculating its 1999 earnings." In other words, OPC concedes that the doctrine against retroactive ratemaking is not applicable to a Stipulation specifying how earnings are to be calculated in a prior period for purposes of determining whether a refund is due. So once again we come back to a matter of interpretation of the

provisions of the agreement. The Commission found that interest on tax deficiencies was a reasonable and prudent expense which under the terms of the Stipulation is required to be considered in the calculation of 1999 earnings.

All of OPC's discussion about the nature of interest on tax deficiencies and retroactive ratemaking is totally irrelevant and inapplicable. The matter simply comes down to what was agreed to in the Stipulation. OPC's description of the characteristics of interest on tax deficiencies applies equally to interest that might be incurred as a result of a Polk Power Station related tax deficiency. OPC in paragraph 10 of the First Stipulation specifically agreed that interest on tax deficiencies related to that asset "will be considered a prudent expense for ratemaking purposes" and further agreed it ". . . will support this position in any proceeding before the FPSC." How then could interest on tax deficiencies related to other matters result in retroactive ratemaking if the agreement provides for the consideration of this type of expense?

The Commission in Order No. 0113 correctly determined that it should consider an expense appropriately recognized in the year under review when calculating the company's earned return for the year. The sole question is whether the expense was reasonably and prudently incurred. The cost-benefit analysis was merely a tool of analysis to determine the prudence of expenses incurred in 1999. The Commission appropriately found that the company prudently took positions with respect to income taxes paid and that the actions were prudent and beneficial to ratepayers despite incurring the interest on tax deficiency expense in the year under review.

Mr. Larkin conceded that it would be appropriate to consider tax deficiency interest as an appropriate expense in 1999 if you stipulate to the inclusion of that expense (Tr. 268-269). As explained by Mr. Larkin, the question turns on the intent of the parties (Tr. 268-269):

> Q. Is it your testimony that if we had a . . . Polk tax life issue in this case, that it would still be retroactive ratemaking?
>
> A. No, because it would have been stipulated . . . that's what Public Counsel agreed to allow you to have.

What OPC agreed to be allowed to be considered in the calculation is all reasonable and prudent expenses. As stated in Order No. 0113:

> We agree with TECO that the guiding principle of the Stipulation is whether the item of expense or investment at issue is reasonable and prudent. (Order No. 0113, pg. 16)

The Commission further stated in Order No. 0113, pg. 18:

> With respect to the potential interest on tax deficiencies associated with Polk Power Station addressed in paragraph 10, the Stipulation forecloses the possibility of any 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 those categories either included in the last full revenue requirements proceeding or specifically enumerated in the Stipulations.

Therefore, given the Commission's clear interpretation of the intent of the agreement, OPC's Witness Larkin has admitted the doctrine against retroactive ratemaking is totally inapplicable here. The question turns solely on whether the expense at issue was reasonably and prudently incurred. There is no evidence whatsoever that the company's actions were imprudent. OPC is left with its misplaced attacks on the cost-benefit study which was only one aspect of the company's affirmative proof that the tax positions taken that led to an assessment of interest on tax deficiencies was reasonable and prudent.

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

TECO: Yes. Having accepted the Commission's consistent interpretation of the Stipulation in prior years and with respect to 1999 on other issues, 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.

* * * * *

Discussion:

The course of conduct of a party to an agreement is a powerful indication of the agreement of the parties. Having accepted the Commission's consistent interpretation in prior years (and, indeed, with respect to 1999 on other issues), OPC by its course of conduct under the Stipulation is estopped from urging a different position on an issue that cuts the other way. Estoppel is often based upon the acceptance or retention of benefits from a transaction, contract, instrument, regulation or statute by one having knowledge or notice of the facts, which such person might have rejected or contested. Fla. Jur. 2d, Estoppel § 55. The doctrine of estoppel is a branch of the rule against assuming inconsistent positions. Id.

In Head v. Lane, 495 So.2d 821, (Fla. 4th DCA 1986), the Court observed:

> One such application of the doctrine of estoppel, often called equitable estoppel, is present where a person attempts to change his position after representing a contrary position to another who reasonably relied upon the representation and who would suffer substantial injury if the inconsistent position were permitted to be successfully asserted. The representation may be made by words or conduct and, where there is a duty to speak, failure to do so can be a representation relied upon by a party claiming estoppel. (Citations omitted)

As shown in Exhibit 10, Mr. Howe representing OPC in this docket in May 12, 1998 urged the Commission to make an adjustment to Tampa Electric's equity ratio which was not made in the company's last rate case. Mr. Howe then argued the interpretation of paragraph 11

was ". . . Just a test of reasonableness. And that is contemplated by the Stipulation where it says all reasonable and prudent expenses and investment will be allowed." The position taken by OPC on May 12, 1998 is exactly the opposite of the position taken by OPC in this proceeding on August 27, 2001 in the same docket. Further, OPC has both advocated a similar position or stood silent while similar adjustments were made consistent with its statement on May 12, 1998.

In fact, in this very matter with respect to OPC's calculation of the refund amount under Issue 12, OPC's position includes adjustments fundamentally inconsistent with the position taken in the same proceeding with respect to interest on tax deficiencies. OPC's calculation includes an adjustment to the capital structure and other adjustments not included in the company's last rate case (Tr. 245-247).

OPC has further accepted the benefits of the company's calculation of deferred revenues or refunds based on the company's actual deferred taxes which depended on the company's tax position that gave rise to the assessment of interest on tax deficiencies in 1999. Having accepted the benefits of this interpretation with respect to some issues, OPC is estopped from asserting a contrary position with respect to interest on income tax deficiency. OPC cannot just stand by and fail to raise issues that increase the amount of refund which are fundamentally inconsistent with the assertions made by OPC with respect to interest on tax deficiencies.

**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?**

TECO: Section 120.66, F.S., is applicable to proceedings held under Sections 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.

* * * * *

Discussion:

OPC argues that the Staff, which reviewed and developed the December 7, 2000 recommendation, is precluded by Section 120.66, F.S., from making any further recommendation on whether the Stipulation allowed for the inclusion of interest expense on income tax deficiencies. This position is based on a claim that Staff became an advocate by reviewing and testing the cost-benefit analysis and by ultimately recommending the inclusion of interest on tax deficiency in the calculation of Tampa Electric earnings. OPC argues as a consequence, Staff cannot engage in ex parte communications with the Commissioners. In the first instance, Section 120.66, F. S. relied on by OPC was not even applicable until the protest was filed. These activities are preliminary to any Section 120.569 or 120.57 proceedings. Proceedings under Sections 120.569 or 120.57, F. S. commence once an affected party challenges the proposed action. Secondly, in an abundance of caution, it appears that the Commission has made a complete substitution of technical staff to make recommendations on OPC's protest. Moreover, OPC incorrectly characterizes the Staff as an advocate simply because, after investigation review and testing of the cost-benefit analysis, the Staff recommended the Commission issue a proposed agency action allowing the inclusion of the expense. If that were the test, Staff would never be in an advisory role. The fact is that Staff's probing of the cost-benefit study required changes which led to a lowering of the benefits shown in the analysis (See Ex. 6).

Section 120.66, F.S., is applicable to proceedings held under Sections 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 Section 120.569 or 120.57 proceedings. Proceedings under Sections 120.569 or 120.57, F.S. 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's assertions on this issue are a red herring designed by innuendo to undermine the focus of the real issues in this case.

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

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.

* * * * *

Discussion:

OPC's calculation of net operating income includes adjustments not made in Tampa Electric's last rate case which is fundamentally inconsistent with the position OPC takes here with respect to interest on tax deficiencies.

**ISSUE 14: What is the amount to be refunded?**

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's calculation of the amount to be refunded includes adjustments not made in the company's last rate case which is fundamentally inconsistent with the position OPC takes here with respect to interest on tax deficiencies.

**Conclusion**

For the reasons stated herein and in the Commission's Order No. 0113, the Commission should find the appropriate net operating income for 1999 is $178,865,105 and the amount to be refunded is $6,102,126 through December 31, 2000 plus interest accrued until the refund is made to customers.

Respectfully submitted,

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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Post-Hearing Statement and Brief, filed on behalf of Tampa Electric Company, has been furnished by hand delivery (*) on this 24th day of September 2001 to the following:

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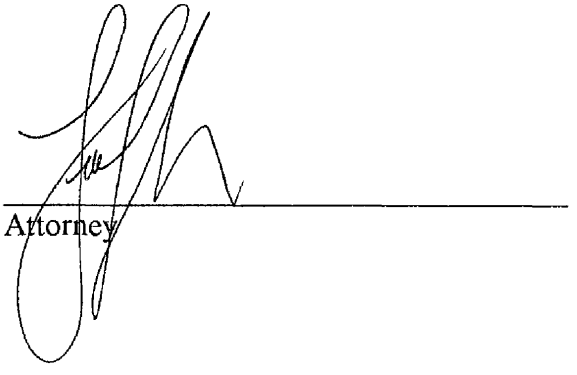

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