

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: May 2, 2019

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Engineering (Knoblauch, Graves, Salvador)
Division of Economics (Wu)
Office of the General Counsel (Weisenfeld, Murphy)

Handwritten notes in blue ink: EK, RH, LS, JH, CH, TM, JW, ayw, <u>, TH

RE: Docket No. 20180231-EI – Petition for approval of the big bend south gypsum storage area closure project for cost recovery through the environmental cost recovery clause, by Tampa Electric Company.

AGENDA: 05/14/19 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On December 26, 2018, Tampa Electric Company (TECO or Company) petitioned the Florida Public Service Commission (Commission) to approve the Big Bend South Gypsum Storage Area (SGSA) Closure Project for cost recovery through the Environmental Cost Recovery Clause (ECRC), as governed by Section 366.8255, Florida Statutes (F.S.). TECO asserts that the SGSA must be closed in order to comply with the provisions of the United States Environmental Protection Agency's (EPA) Coal Combustion Residual (CCR) Rule.¹

¹40 CFR Part 257

On April 17, 2015, the EPA published the CCR Rule, which provides the requirements for the safe disposal of CCR in landfills and surface impoundments. CCR is a byproduct of coal combustion at electric utilities and independent power producers. The effective date of the CCR Rule was October 19, 2015, and the Rule is self-implementing.

On October 15, 2015, TECO requested approval from the Commission of its first phase of the CCR Compliance Program, which the Company developed to comply with the CCR Rule. The Commission approved this first phase on February 9, 2016.² On December 22, 2017, the Commission approved a second phase of the Company's CCR Program, which involved the closure of its Big Bend Economizer Ash & Pyrites Ponds.³

In the instant docket, TECO is requesting cost recovery for the closure of the SGSA through the ECRC. The SGSA was utilized to house gypsum generated from the Company's flue gas desulfurization (FGD) systems. TECO's FGD systems were implemented to meet both the requirements of the Clean Air Act Amendments of 1990 and a Consent Decree entered into in 2000, and were approved by the Commission through the ECRC.⁴ On September 26, 2012, the Commission approved the construction of a new Big Bend Station Gypsum Storage Facility, also referred to as the East Gypsum Storage Area (EGSA).⁵ At the time, the EGSA was constructed because the existing SGSA was no longer able to accommodate all of the gypsum that was produced due to a decline in the demand for gypsum.

The ECRC is a statutory mechanism which allows investor-owned electric utilities to periodically seek recovery outside of base rates for their proposed environmental compliance costs. The Commission has interpreted the ECRC to permit recovery for prudently incurred costs legally required for a utility to comply with a governmentally imposed mandate.⁶ The Commission has also denied recovery for costs a utility has incurred as a voluntary undertaking not needed for compliance with any governmental mandate.⁷

²Order No. PSC-16-0068-PAA-EI, issued February 9, 2016, in Docket No. 20150223-EI, *In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause, by Tampa Electric Company.*

³Order No. PSC-2017-0483-PAA-EI, issued December 22, 2017, in Docket No. 20170168-EI, *In re: Petition for approval of the second phase of CCR program for cost recovery through the environmental cost recovery clause, by Tampa Electric Company.*

⁴Order No. PSC-96-1048-FOF-EI, issued August 14, 1996, in Docket No. 19960688-EI, *In re: Petition for approval of certain environmental compliance activities for purposes of cost recovery by Tampa Electric Company.*

⁵Order No. PSC-12-0493-PAA-EI, issued September 26, 2012, in Docket No. 20110262-EI, *In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause, by Tampa Electric Company.*

⁶Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 19930613-EI, *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.0285, Florida Statutes by Gulf Power Company.*

⁷Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 19930613-EI, *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.0285, Florida Statutes by Gulf Power Company, and Order No. PSC-11-0080-PAA-EI, issued January 31, 2011, in Docket No. 20100404-EI, In re: Petition by Florida Power & Light Company to recover Scherer Unit 4 Turbine Upgrade costs through environmental cost recovery clause of fuel recovery clause.*

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When interpreting the meaning of a statute, the Commission must employ a “plain meaning” analysis, looking at the ordinary meaning of the words as written.⁸ Statutes implemented by the Commission must be narrowly construed; recovery of costs under a clause is only permissible for costs arising from activities enumerated in the clause.⁹ The Commission has jurisdiction over the instant matter pursuant to Section 366.8255, F.S.

⁸See *Citizens of State v. Graham*, 191 So. 3d 897, 901 (Fla. 2016).

⁹*Id.*

Discussion of Issues

Issue 1: Should the Commission approve Tampa Electric Company's petition for approval of the Big Bend South Gypsum Storage Area Closure Project for cost recovery through the Environmental Cost Recovery Clause?

Recommendation: No. Staff does not recommend approval for cost recovery of the Big Bend South Gypsum Storage Area Closure Project through the Environmental Cost Recovery Clause. The Commission has not made a prudency determination on the Big Bend Modernization Project. Furthermore, the necessity of the Closure Project was triggered by Tampa Electric Company's business decision to change its operation, and not by a change in environmental regulation. Tampa Electric Company may request cost recovery for the Closure Project utilizing traditional methods of cost recovery in the future. (Knoblauch, Salvador, Wu)

Staff Analysis: The EPA's CCR Rule sets forth the minimum criteria for the safe disposal of CCR in landfills and surface impoundments.¹⁰ CCR is generated at sites where electric utilities use the combustion of coal as an energy source for fueling steam generating units. TECO's Big Bend Units 1-4 are four pulverized coal-fired steam units that can also be fired with natural gas. The CCR Rule applies to new and existing active landfills and surface impoundments for the purpose of solid waste management of CCR.

In its petition, TECO stated that it plans to cease the combustion of coal in Big Bend Units 1 and 2, resulting in a reduction of gypsum being produced for beneficial reuse. The Company further asserted that the EGSA has sufficient capacity to store the amount of gypsum now being generated; therefore, the SGSA will no longer be needed. In response to staff's first data request, TECO explained that "the SGSA was formerly a beneficial reuse storage area that was exempt from the CCR Rule. As a result of the storage area no longer being used for beneficial reuse, it now is defined as a CCR Landfill under the rule." The CCR Rule provides that CCR Landfills are subject to several requirements, one of which is groundwater monitoring and corrective action.¹¹

Historic groundwater monitoring results showed elevated levels of contaminants in the vicinity of the SGSA. Section 257.96 of the CCR Rule states that following a violation of a groundwater protection standard, there must be "an assessment of corrective measures to prevent further releases, to remediate any releases and to restore affected area to original conditions." Given the historic groundwater monitoring results and the proximity of the bottom of the SGSA to the water table, TECO asserts that it is prudent to close the SGSA.

After considering the alternatives, TECO opted to remove all gypsum from the SGSA and to close the storage area, rather than employing a "cap and close method" which would not address groundwater concerns. The selected alternative includes excavation and preparation of CCR material for reprocessing, sale, or disposal, additional reprocessing equipment and materials, truck fees, transportation and disposal in permitted landfill, site restoration, and post-closure groundwater monitoring.

¹⁰40 CFR Part 257

¹¹40 CFR Part 257.95 and Part 257.96

As shown in Attachment A, the estimated cost for the SGSA Closure Project is approximately \$15.7 million. As of the date of its petition, the Company has incurred approximately \$5 million in closure expenses associated with the project. TECO explained that the estimated costs are based on an engineering analysis performed by consultants.

ECRC Eligibility

Pursuant to Section 366.8255(2), F.S., electric utilities may petition the Commission to recover “projected environmental compliance costs” that are required by environmental laws or regulations. Environmental laws or regulations include “all federal, state or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment.”¹² If the Commission approves a utility’s petition for cost recovery through the ECRC, only prudently incurred costs may be recovered.¹³

The Commission has interpreted Section 366.8255, F.S., to prescribe three criteria for recovery of environmental compliance costs through the clause. Pursuant to Order No. PSC-94-0044-FOF-EI, these criteria are:

1. All expenditures will be prudently incurred after April 13, 1993.
2. The activities are legally required to comply with a governmentally imposed environmental regulation that was created, became effective, or whose effect was triggered after the company’s last test year upon which rates are based.
3. None of the expenditures are being recovered through some other cost recovery mechanism or through base rates.¹⁴

While staff agrees that the closure of the SGSA necessitates compliance with the CCR Rule, there are two concerns regarding the eligibility of the SGSA Closure Project for recovery through the ECRC. Staff’s first concern is that determining the prudence of the project is premature at this time. As stated in TECO’s petition, the Company plans to cease combustion of coal in Units 1 and 2 as part of its Big Bend Modernization Project. TECO’s Ten Year Site Plan states that the Big Bend Modernization Project will be completed in 2023. The Company states in its petition that “given the reduction in the amount of coal to be burned at the station in the future, the SGSA is no longer needed and will not be used to store gypsum for beneficial reuse.” It is this decision to close the SGSA, tied to the Modernization Project, which resulted in a change of status under the CCR Rule. In view of the SGSA’s connection to the Big Bend Modernization Project, staff recommends that it would be more appropriate to determine prudence of the SGSA closure expenditures at the same time that the Commission reviews the costs and benefits associated with the Big Bend Modernization Project.

Similarly, staff’s second concern stems from the fact that TECO’s operational changes are voluntary business decisions. TECO asserts in its petition that in 2014, the Company installed a

¹²Section 366.8255(1)(c), F.S.

¹³Section 366.8255(2), F.S.

¹⁴See Order No. PSC-94-0044-FOF-EI, issued January 12, 1994, in Docket No. 19930613-EI, *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.0825, Florida Statutes by Gulf Power Company*.

natural gas pipeline to Big Bend Station, which resulted in a decrease in the amount of coal burned. In 2018, TECO stated that it planned to cease coal combustion in Big Bend Units 1 and 2. In response to staff's second data request, TECO stated that these recent "operational changes did result in a reduction in flue gas desulfurization ("FGD") gypsum production at the facility, thus eliminating any need to continue operating the SGSA as a beneficial use storage area." Given the Company's operational changes at the Big Bend Power Station, less gypsum is being produced and the SGSA is no longer needed. Since the SGSA will no longer be needed as a beneficial reuse storage area, the area is subject to the CCR Rule. Therefore, regardless of the merits of the decision to close the SGSA, the necessity of the SGSA Closure Project was triggered by TECO's own voluntary business decision to change its operation, and not due to a change in environmental regulation.

Staff recommends that the purpose of the ECRC is to provide a mechanism for cost recovery for environmental compliance costs incurred outside of a utility's planning or control. Order No. PSC-94-1207-FOF-EI provides an overview of the purpose of the ECRC and states in part:

Section 366.8255, Florida Statutes, provides a mechanism for reasonably expeditious recovery of the costs utilities prudently expend to comply with environmental laws and regulations. Those laws and regulations may change with some frequency, and a utility may not be able to anticipate the changes, or the costs it would incur to comply with them, in every instance. We can also envision a situation where an environmental emergency would require a utility to incur costs that it did not anticipate before it could ask for our approval.

We will have to review such extraordinary circumstances as they arise. Some changes to environmental laws and regulations can be anticipated well in advance of the change. Some emergencies can be avoided by prudent management and maintenance of facilities. The same is true of the operation of environmental projects. The key will be whether the utility could reasonably have anticipated the changes and the costs, or not. The utility will have the burden to show that it could not.¹⁵

The closure of the SGSA is not being done in response to an emergency condition, or in response to an environmental requirement that TECO did not anticipate. In fact, the closure of the SGSA is completely up to TECO to decide. Based on the above, staff recommends that the SGSA Closure Project does not meet the second criterion of eligibility as outlined in Order No. PSC-94-0044-FOF-EI.

While staff recommends that the costs associated with the SGSA Closure Project are not eligible for recovery through the ECRC because the necessity of the SGSA Closure Project was triggered by TECO's own voluntary business decision to change its operation, TECO is not foreclosed from seeking recovery of these costs in the future. Typically, a utility accrues carrying costs on long-term construction projects by applying a Commission-approved allowance for funds used during construction (AFUDC) rate. The AFUDC allows the utility to accrue and later capitalize

¹⁵Order No. PSC-94-1207-FOF-EI, issued October 3, 1994, in Docket No. 19940094-EI, *In re: Environmental Cost Recovery Clause*.

as plant, the carrying costs of construction projects in progress. When the plant is placed into service, the utility seeks recovery of said investment through a return on the capitalized plant investment and through depreciation expense in its next base rate proceeding. This traditional method of recovery for the costs associated with the SGSA Closure Project is available to TECO.

Conclusion

The prudence of the Big Bend Modernization Project has not yet been reviewed by the Commission. Additionally, the closure of the SGSA was not triggered by a new environmental regulation, but was due to operational changes made by TECO. For these reasons, staff recommends that the Commission should not approve TECO's petition for cost recovery through the ECRC at this time.

Issue 2: If the Commission does not approve staff's recommendation in Issue 1, should the Commission limit its approval of eligible cost recovery to those projected costs at the time TECO filed its petition for cost recovery on December 26, 2018?

Recommendation: If the Commission approves the staff recommendation in Issue 1, then this issue is moot. If the Commission does not approve staff's recommendation in Issue 1, then yes, staff recommends that only the costs incurred after the Commission's vote in this docket should be eligible for cost recovery through the Environmental Cost Recovery Clause. At a minimum, the costs that had already been incurred by the Company at the time of its filing should be excluded for cost recovery through the ECRC. (Knoblauch, Salvador, Wu)

Staff Analysis: Section 366.8255(2), F.S., states that an electric utility may petition the Commission for cost recovery through the ECRC for proposed environmental compliance activities and projected environmental costs. In Order No. PSC-94-1207-FOF-EI the Commission determined that:

Environmental compliance cost recovery, like cost recovery through other cost recovery clauses, should be prospective. Section 366.8255(2), Florida Statutes, is clear: a utility's petition for cost recovery must describe proposed activities and projected costs, not costs that have already been incurred. Utilities may recover the costs of environmental compliance projects after the Commission has had the opportunity to review and approve cost recovery for the projects. Utilities may not recover costs incurred in past periods for activities not yet approved. This is the general rule for environmental compliance cost recovery that we wish to make clear here.¹⁶

The Commission did opine that there may be exceptions to these requirements in the event of "certain extraordinary circumstances" as determined by the facts of the specific case.

In response to staff's data request, TECO stated that a closure plan for the SGSA was submitted to the Florida Department of Environmental Protection on February 14, 2018, which was approved on March 1, 2018. TECO asserted that it "concluded a thorough evaluation of the SGSA's regulatory status in late November 2018," at which time it determined that the SGSA was subject to the CCR Rule.¹⁷ The Company filed its petition for the SGSA Closure Project on December 26, 2018, which included approximately \$5 million in costs that had already been incurred. It does not appear there are any extraordinary circumstances for including these previously incurred costs.

Attachment A provides the costs identified by TECO for the SGSA Closure Project. If the Commission does not approve staff's recommendation in Issue 1, staff recommends that at a minimum, the costs that had already been incurred by the Company at the time of its filing should be excluded for cost recovery through the ECRC. As previously noted, TECO is not foreclosed from seeking recovery of these previously incurred costs through the more traditional

¹⁶Order No. PSC-94-1207-FOF-EI, issued October 3, 1994, in Docket No. 19940094-EI, *In re: Environmental Cost Recovery Clause* (emphasis original).

¹⁷Document No. 03064-2019

method of recovery. Table 2-1 shows the estimated residential customer bill impact associated with the projected SGSA closure activities, excluding the amount already expended of \$5,024,683.

Table 2-1
Monthly Bill Impact

	\$ / 1,000 kWh	\$ / 1,200 kWh
2020	0.54	0.65
2021	< 0.01	< 0.01
2022	< 0.01	< 0.01
2023	< 0.01	< 0.01

Source: Document No. 03064-2019

Conclusion

If the Commission does not approve staff's recommendation in Issue 1, staff recommends that only the costs incurred after the Commission's vote in this docket should be eligible for cost recovery through the ECRC.

Issue 3: Should this docket be closed?

Recommendation: Yes. This docket should be closed upon the issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. (Weisenfeld, Murphy)

Staff Analysis: If no timely protest to the proposed agency action is filed within 21 days, this docket should be closed upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order.

**Estimated and Actual Costs for
 Tampa Electric Company's South Gypsum Storage Area Closure Project**

Activity	Total Project		Costs To Date		Remaining Project Costs	
	O&M (\$)	Capital (\$)	O&M (\$)	Capital (\$)	O&M (\$)	Capital (\$)
Excavation and Preparation of CCR Material for Reprocessing, Sale, or Disposal	4,817,932	-	2,066,386	-	2,751,546	-
Additional Reprocessing Equipment & Maintenance	1,093,100	-	845,081	-	248,019	-
Truck Fees	1,898,496	-	617,525	-	1,280,971	-
Transportation and Disposal in Permitted Landfill	3,645,489	-	1,495,691	-	2,149,798	-
Site Restoration	4,105,875	-	-	-	4,105,875	-
Post-Closure Groundwater Monitoring	100,000	-	-	-	100,000	-
Total	15,660,892	-	5,024,683	-	10,636,209	-

Source: Document No. 07671-2018