

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-02-0385-FOF-EI  
ISSUED: March 21, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman  
BRAULIO L. BAEZ

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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-01-0113-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-01-0113-PAA-EI, challenging the inclusion of interest on tax deficiencies in TECO's net operating income for 1999. The administrative hearing for this matter was held on August 27, 2001, to consider OPC's protest. By Order No. PSC-01-2515-FOF-EI (Final Order), issued December 24, 2001, we found that the interest on tax deficiencies was a prudently incurred cost for 1999. We allowed TECO to include the interest expense on tax deficiencies, in the amount of \$12,687,672, in the calculation of its 1999 earnings. We also ordered TECO to refund \$6,307,427, which included interest calculated through September 30, 2001. Interest from that date was required to be accrued in the same manner until the refund was made.

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On January 8, 2002, OPC filed a Motion for Reconsideration of the Final Order. TECO filed its response to OPC's motion on January 22, 2002.

OPC's Motion

In its motion, OPC argues that we improperly relied upon Exhibit 8 to determine whether TECO had demonstrated the reasonableness of including interest expense on income tax deficiencies in the calculation of earnings for 1999. OPC contends that the cost/benefit study in Exhibit 8 was premised on an unrealistic hypothetical and inclusion of deferred revenue benefits for 1999. If the cost/benefit analysis were corrected, no net benefits would have resulted. Thus, we would have to conclude that TECO could not justify including interest expense on tax deficiencies in the 1999 earnings calculation.

OPC argues that it now knows why the net benefits of \$14.3 million from Exhibit 8 increased from the \$5.7 million shown in Exhibit 1. OPC explains that this difference can be found in the utility's response to OPC Interrogatory 13, included on page 2 of Exhibit 8. Exhibit 8, the company's response to Interrogatory 13, contains a written explanation and supporting calculations of one of the company's cost/benefit analyses. OPC contends that in Exhibit 8, TECO wants the Commission to believe that the rate increases in 1993 and 1994 never happened. OPC's theory is that in Exhibit 8, the company assumes that if there had been no rate increases, earnings would have been lower each year for 1995-99. Lower earnings would have meant fewer deferred revenues. Consequently, what we ordered to be deferred might have been larger. This is why, OPC argues, that for each of the tax periods the deferred revenue benefits are larger in Exhibit 8 than those identified in Exhibit 1; thus, the exhibit is based on an implausible assumption. Based on the above, OPC contends that we mistakenly accepted Exhibit 8 as portraying what could have actually happened.

Further, OPC asserts that Exhibit 8 is mathematically inaccurate because it included deferred revenue benefits for 1999. Since the deferred revenue pot was empty after 1998 and earnings for 1999 were to be calculated in the traditional manner, the

cost/benefit analysis should be unaffected by nonexistent deferred revenues. OPC argues that the only benefit customers received in 1999 was a refund reduction.

Based on the above, OPC concludes that we erred in relying on Exhibit 8 to demonstrate that net benefits accrued to the customers. As such, OPC argues that we should reconsider our decision to include the interest expense on tax deficiencies in the calculation of TECO's earnings for 1999, disallow the interest expense, and order increased refunds plus interest.

#### TECO's Response

In response, TECO asserts that OPC's motion should be denied because it fails to allege a legal basis for reconsideration or to attempt to meet the standard required for such a motion. The company contends that OPC's motion reargues the merits of the cost/benefit analysis from Exhibit 8. According to TECO, we found that Exhibit 8 demonstrated that the benefits of the deferred taxes associated with the tax positions taken by the company outweighed the tax deficiency interest expense incurred by the company in 1999. The company argues that OPC's motion is both legally improper and factually flawed. The issues presented have already been argued by OPC, considered by us, and rejected in the final order in this proceeding.

TECO argues that we did not make any mistake of fact in reaching our decision. TECO maintains that our decision on the prudence of the interest on tax deficiencies was not based solely on the cost/benefit analysis, but on both qualitative and quantitative evidence in the record. While we found, based on the conclusions from Exhibit 8, that net benefits resulted, we could have determined that the expense was reasonable solely by relying on the testimony of the utility's expert witnesses. Therefore, TECO avows that it was not necessary to rely on the cost/benefit analysis to determine that the expenses were prudent and should have been allowed.

The company reiterates our Order No. PSC-01-2515-FOF-EI, on page 34, where "we [found] the expenses reasonable and prudent because the proactive approach taken by TECO on tax issues benefits the overall body of ratepayers." As a result, TECO states that we

looked at this issue as an opportunity to encourage utilities to be aggressive on tax issues by incurring some interest expense while at the same time avoiding tax penalties.

TECO also disputes OPC's argument that Exhibit 8 is flawed or in error. TECO contends that OPC's assertion that this exhibit was based on an "implausible assumption that rate increases which were actually granted for 1993 and 1994 never happened" is incorrect. The company believes that OPC misconstrues and distorts the company's response to OPC Interrogatory 13. The revenue that was referred to in that response was the additional revenue over and above the rate increase approved in the prior rate case. The company's response did not state that the actual, approved permanent rate increases in 1993 and 1994 were excluded in Exhibit 8. TECO contends that the actual base rate increase from the rate case was included in Exhibit 8. The company eliminated the impact of the additional hypothetical rate increase ("rate case benefits") included in Exhibit 1 that the company argued would have been approved by us if less deferred taxes had been included in the test years of the prior rate case. TECO argues that obviously the difference in deferred revenue benefits between Exhibits 1 and 8 would have been much higher had the company excluded the permanent base rate increase approved by us for the 1994 test year.

The company also disputes OPC's argument that it was wrong to identify deferred revenue benefits for 1999 since the 1998 refunds eliminated the "pot" of deferred revenues that existed up to that point. The company asserts that regardless of what labels were used, the customers benefitted in 1999 due to the company's aggressive tax positions and Exhibit 8 was correct to identify those amounts.

In conclusion, TECO asserts that OPC is simply expressing disagreement with our final decision and rearguing positions already considered and rejected by us. Thus, the company argues that OPC's motion for reconsideration should be denied.

#### Analysis

The appropriate standard of review for a motion for reconsideration is whether the motion identifies a material and relevant point of fact or law which was overlooked, or which we

failed to consider when rendering the Order in the first instance. Diamond Cab v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1<sup>st</sup> DCA 1981). The mere fact that a party disagrees with the Order is not a basis for rearguing the case. Diamond Cab. Additionally, reweighing the evidence is not a sufficient rationale for granting reconsideration. State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

In its motion, OPC argues that we made an error of fact, not an error of law, in our final order. OPC has not shown that we erred. OPC just does not agree with our decision. The error OPC alleges is simply a re-argument of the issues previously addressed by us.

As described in the Final Order, Exhibit 1 reflects the company's primary cost/benefit analysis. It takes into account the rate case benefits and the deferred revenue benefits for the years 1993 to 1999. It also includes the non-protested final adjustments to the 1999 year which were also approved in this docket. Exhibit 8 reflects the company's cost benefit analysis excluding the impacts of the 1993 and 1994 rate case benefits, but otherwise is the same as Exhibit 1. Exhibit 8 reflects net benefits of \$6.8 million. In our Final Order, we adopted the cost/benefit analysis contained in Exhibit 8, not the analysis from Exhibit 1.

We were clear in our deliberations that we wanted to encourage companies to take aggressive tax positions as long as those positions did not result in tax penalties. We found that had the company not taken the tax positions it did, the overall refund that the customers received for the years 1995-1998 would have been much less. Disallowing this expense could discourage utilities from attempting to lower their tax burdens, with a possible result of raising overall costs to the ratepayers. We did consider the net benefits shown by Exhibit 8 in deciding whether to allow the interest on tax deficiencies; however, the net benefits were not the sole basis for our decision.

Further, OPC's contention is erroneous that the deferred revenue benefits in Exhibit 8 were based on calculations that excluded the actual 1993 and 1994 rate increases from the last rate case. We fully analyzed Exhibit 8 in reaching our final decision. TECO is correct that the revenue that was addressed in Exhibit 8 related to the additional revenue above the amounts included in base rates, which the company labeled "rate case benefits." Had the company removed the permanent base rate increases from its cost/benefit analysis in Exhibit 8, the differences in the deferred revenue benefits between Exhibits 1 and 8 would have been much greater.

As addressed in the Final Order on pages 19-24, the reference to "rate case benefits" was the increase in base rates that TECO contended would have happened if the company had not taken the tax positions it did. This interpretation of "rate case benefits" is consistent with the company's response to Interrogatory 13. This is not a reference to a reduction of rates below that of the base rate increase approved in the rate case.

The company's response to OPC's motion regarding the inclusion of deferred revenue benefits for 1999 in its cost/benefit analysis is correct. Our Order clearly states that the refunds would have been less in 1999 had the company not taken the tax positions that it did. OPC's motion is simply a reargument of its positions and does not demonstrate any errors that we made in fact or law. OPC has not demonstrated that we overlooked or failed to consider a material and relevant point of fact or law in reaching its final decision in this case. Accordingly, OPC's Motion for Reconsideration is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion for Reconsideration of Order No. PSC-01-2515-FOF-EI is hereby denied. It is further

ORDERED that this docket shall be closed after the time for filing an appeal has expired.

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By ORDER of the Florida Public Service Commission this 21st  
day of March, 2002.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing  
Services

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NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the

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First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.