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STATE OF FLORIDA

OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400
904-488-9330

JACK SHREVE
PUBLIC COUNSEL

July 7, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 970171-EU

Dear Ms. Bayó:

Enclosed are an original and fifteen copies each of the Citizens' Post-Hearing Statement of Issues and Positions and Brief of the Citizens of the State of Florida for filing in the above referenced docket.

Also Enclosed is a 3.5 inch diskette containing the Citizens' Post-Hearing Statement of Issues and Positions and Brief of the Citizens of the State of Florida in WordPerfect for Windows 6.1 format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

John Roger Howe
Deputy Public Counsel

JRH/dsb
Enclosures

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Brief
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06832 JUL-7 97

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DOCUMENT NUMBER-DATE
06831 JUL-7 97

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Determination of appropriate cost allocation and regulatory treatment of total revenues associated with wholesale sales to Florida Municipal Power Agency and City of Lakeland by Tampa Electric Company.	)	DOCKET NO. 970171-EU FILED: July 7, 1997

BRIEF OF THE CITIZENS OF THE STATE OF FLORIDA

ISSUE 1: Does the off-system sale agreement to the Florida Municipal Power Agency provide net benefits to Tampa Electric Company's general body of rate payers?

ISSUE 4: Does the off-system sale agreement to the City of Lakeland provide net benefits to Tampa Electric Company's general body of rate payers?

POSITION: *No. Tampa Electric did not prove benefits would exceed: (1) the $3.5 million of lost gains on economy sales; (2) the lower fuel costs from reporting the FMPA and Lakeland sales at average cost pursuant to Order No. PSC-97-0262-FOF-EI; or (3) refunds required to be made under the stipulations. *

DISCUSSION

TAMPA ELECTRIC HAS NOT PROVEN OVERALL BENEFITS TO RETAIL CUSTOMERS WILL RESULT FROM COMMISSION ACCEPTANCE OF ITS PROPOSAL.

A. THE AMOUNTS TO BE FLOWED BACK TO CUSTOMERS THROUGH THE FUEL CLAUSE ARE LESS THAN THE 80% GAIN ON ECONOMY SALES CUSTOMERS WOULD HAVE RECEIVED IF THERE WERE NO FMPA OR LAKELAND CONTRACTS.

Tampa Electric witnesses testified that the company is confident of the accuracy of its projections and of the ability of the FMPA and Lakeland contracts to provide the anticipated margins. [T.81] The company's projections show that these contracts will reduce the flow-back of gains on economy sales to retail customers by more than $3.5 million over the lives of the contracts. [T. 171, 178, 325, 378-81, 391] Mr. Ramil said, under the company's proposal, "the customers are foregoing their 80% share of that [economy sale] margin." [T.155] In other words, if the fuel charges are otherwise held constant, the FMPA and Lakeland contracts will cause retail rates to rise by $3.5 million. In return, Tampa Electric projects a flow-back of nonfuel revenues in the amount of $2.4 million, while guaranteeing only $2 million.

Mr. Ramil and Ms. Branick testified that foregone gains on economy sales were taken into consideration in the cost benefit analyses. [T.185-87, 378-81] If this is true, the effect of such consideration must be in the amounts above $2.4 million which the company proposes to book as operating revenues, i.e., the increased stockholder return portion of the "net benefits." Actual flow back to customers through the fuel clause would be reduced by over $1 million.

Mr. Ramil testified that the company obtains lower margins on broker sales than it expects to earn from FMPA and Lakeland. [T.108, 153-55] Through its proposal, however, Tampa Electric would have the sales with higher margins result in lower benefits for its customers. The immediate return of in excess of $3.5 million to customers would be converted to higher stockholder returns. Mr. Pollock correctly characterized the company's proposal as "pay the shareholders first." [T.212]

B. TAMPA ELECTRIC HAS NOT PROVEN CUSTOMER RATES WILL BE LOWER UNDER ITS PROPOSAL THAN THEY OTHERWISE WOULD HAVE BEEN.

Even if the effect on economy sales is ignored, Tampa Electric did not provide evidence demonstrating customer rates would be lower with its proposal than without it. If Tampa Electric had not offered its proposal, Order No. 97-0262-FOF-EI would require that average fuel costs be reported for the FMPA and Lakeland sales for purposes of calculating retail fuel charges. The Company's proposal would increase retail fuel charges by subtracting lower, system incremental fuel costs for the FMPA and Lakeland sales. [T.333-34, 346, 364-68, 381-86, 480] (The 'A' schedules clearly show that "Payments to Qualifying Facilities" (Schedule A1, line 11), which Tampa Electric proposes to use as a measure of system incremental fuel cost, are well below the average fuel cost for the system. [Exhibit No. 9, p. 11; Exhibit No. 11])

The amount by which retail fuel charges would increase under the company's proposal should be readily quantifiable. But Tampa Electric offered no evidence at all to demonstrate that the $2.4 million projected fuel clause credit or the $2 million guarantee was greater than the fuel cost increase attributable to the use of system incremental fuel cost in lieu of average fuel cost. Without such evidence, Tampa Electric cannot prove its customers are better off.

A question may arise about the proper interpretation of the requirement in Order No. 97-0262, at 4, that Tampa Electric demonstrate "overall benefits" to its retail ratepayers. The company has taken the position that it need only demonstrate the existence of "net benefits" <u>within</u> the terms of its proposal. Under the company's approach, it is assumed that Order No. 97-0262 does not [illegible] define retail fuel costs. With this as a starting point, Tampa Electric can claim net benefits if fuel charges do not increase over what they otherwise would have been without the order, and some nonfuel revenues are channeled back to customers. This leads to the absurd result in which a $1 "net benefit" could be used to justify a $2 increase in fuel charges. The only reasonable interpretation of Order No. 97-0262 is that Tampa Electric must prove that customer rates, in absolute terms, are lower under its proposal than if no proposal had been offered in the first place. Tampa Electric, however, offered no evidence to support such a finding.

C. TAMPA ELECTRIC HAS NOT PROVEN ITS "NET BENEFITS" EXCEED THE BENEFITS WHICH WOULD FLOW FROM THE STIPULATION.

As noted above, Tampa Electric has only calculated net benefits which exist <u>within</u> its proposal. The stipulations approved in Orders Nos. PSC-96-0670-S-EI and PSC-96-1300-S-EI, however, are directly affected by the company's proposal. Under the stipulations, all earnings for 1997 and 1998 above 11.75%, up to a net return on equity of 12.75%, are split 60% for the customers and 40% for the company. In addition, the customers are entitled to 100% of earnings above the 12.75% net ROE. The customers' share of revenues for 1997 is deferred and included in revenues for 1998. To the extent the customers' share of revenues for 1998 exceeds the $25 million to be refunded over the 15 months from October 1, 1997, through December 31, 1998, Tampa Electric must make additional refunds of 1998 overearnings in 1999. Furthermore, 60% of 1999's earnings above 12%, up to a net ROE of 12.75, and 100% of revenues above a net 12.75% ROE (after adjusting for company revenue deferrals from 1998 to 1999) must be refunded to customers in 2000. (The terms of the stipulations are addressed in greater detail in the discussion of Issue 2, below.)

The levels of Tampa Electric's earnings and the amount of future refunds are, therefore, directly affected by the manner in which current and future wholesale sales are separated. These sales (except for sales based on the incremental cost of fuel out of Polk Unit 1) must be separated in the same manner used in the company's last rate case. The separation of the assets and expenses associated with the FMPA and Lakeland sales will necessarily increase Tampa Electric's earnings in the retail jurisdiction and increase the likelihood of refunds under the stipulation in both 1999 and 2000. This was understood by all parties to the stipulations and recognized as a necessary and desirable consequence of their terms.

For Tampa Electric to demonstrate overall benefits for its customers in this docket, it must prove its customers would be better off with its proposal than with the terms of the stipulation (setting aside for the moment that Tampa Electric has no business doing anything but separating these sales under the explicit terms of the Second Stipulation). Tampa Electric, however, has offered no evidence at all to show benefits from its proposal must necessarily exceed benefits reasonably expected to flow from the stipulations and the orders approving them.

Mr. Ramil testified that crediting 50% of nonfuel revenues to retail operating revenues "will indeed enhance the potential for refunds during the term of Tampa Electric's current rate Stipulation." [T.42] True enough, but would the potential for refunds be enhanced even more by separating the FMPA and Lakeland sales? Will the company's proposal <u>reduce</u> the likelihood of refunds by increasing earnings less than would result from a jurisdictional separation? This is a crucial point necessary to evaluate whether there really are overall benefits from the company's proposal. Yet, company witnesses and exhibits were essentially silent on the subject.

The closest any Tampa Electric witness got to this issue was Mr. Ramil's statement that "[t]he impact of separating the rate base portion of these sales at system average embedded cost over the term of the sales, would lower retail non-fuel revenue requirements by $71.1 million, present value." [T.43] This doesn't tell us exactly how much additional refunds would be expected to result in 1998 and 1999 from a jurisdictional separation pursuant to the Stipulations. But it does imply that the annual retail revenue requirement reductions, which the company chose to express only in cumulative present value terms, must be substantial. Although he equivocated somewhat, Mr. Ramil essentially answered affirmatively when Mr. McWhirter asked: "So when the Commission is weighing the benefits[,] what it needs to weigh here is are the customers better off to get a $9.9 million benefit or a $71.7 million benefit, is that it?" [T.94]

D. TAMPA ELECTRIC'S ABILITY TO SHOW PURPORTED "NET BENEFITS" IS MERELY AN ACCIDENT OF THE REPORTING FORMAT.

If Tampa Electric's monthly surveillance reports were based only on the rate base, capital structure, and income statement for the retail jurisdiction, wholesale contracts could not have any effect on retail earnings. It is only because the books are kept on a total company basis that Tampa Electric can even offer its proposal.

Every month, Tampa Electric adjusts its separation factors to account for the current level of capacity and energy separated for off-system sales. (See Mr. Ramil's testimony from the 1996 fuel docket quoted below in the discussion on Issue 2.) What

Tampa Electric is really asking for then is authority to use hypothetical separation factors in the future so FMPA and Lakeland will appear to be retail sales.

The intent of the surveillance program has always been to isolate the earnings from retail operations, given the fact that the starting point was total company numbers. This should closely approximate retail earnings which would be reported if separate books were kept. The Commission's jurisdiction, after all, is limited to oversight of operations affecting the ultimate consumer, not sales for resale. Tampa Electric's objective, however, is to misstate the results of retail operations because the reporting format offers the opportunity. This is totally inconsistent with the Commission's established policy to have surveillance reports accurately report retail operations.[1]

This is also true for the fuel docket reporting format. Wholesale "costs" are deducted from total system numbers to derive retail fuel cost responsibility. The result, however, given the Commission's policy to allow for recovery of fuel costs of generation on a weighted-average inventory basis (plus costs of purchased power), should not differ significantly from the product of multiplying retail KWH's times average cost per KWH. And it wouldn't, but for the fact that Tampa Electric has seen a way to have retail customers pay above average fuel costs simply as a result of a reporting format which allows for creative substractions to distort retail costs.

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[1]This is not to say that allowing retail numbers to be overstated for nonseparated wholesale sales while flowing back 100% of nonfuel revenues through the fuel clause is not another way to achieve a full separation. In Tampa Electric's case, the Commission does some of both. The intent is to have retail customer rates only support retail operations.

ISSUE 2: How should the non-fuel revenues and costs associated with Tampa Electric Company's wholesale schedule D sales to the Florida Municipal Power Agency be treated for retail regulatory purposes?

ISSUE 5: How should the non-fuel revenues and costs associated with Tampa Electric Company's wholesale schedule D sales to the City of Lakeland be treated for retail regulatory purposes?

POSITION: *The stipulations require that the FMPA and Lakeland sales be separated in the same manner as was used in the company's last rate case. The firm portion of these long-term schedule D sales must be fully separated, and 100% of non-fuel revenues for the supplemental portion must be flowed back.*

ISSUE 8: Will the Commission's treatment of the City of Lakeland and Florida Municipal Power Agency wholesale sales have an impact on Tampa Electric Company's refund obligation under the stipulation in Docket No. 950379-EI, Order No. PSC 96-0670-S-EI, approved by the Commission?

POSITION: *No. Tampa Electric is bound by the stipulations and the orders approving them. The Commission cannot impair the refunds which would result from treating the FMPA and Lakeland sales in a manner consistent with the stipulations.*

DISCUSSION

THE COMMISSION ORDER APPROVING THE STIPULATION AND AMENDED STIPULATION IN DOCKET NO. 960409-EI PRECLUDES THE REGULATORY TREATMENT REQUESTED BY TAMPA ELECTRIC COMPANY IN THIS CASE.

A. THE ORDERS APPROVING THE STIPULATIONS REQUIRE FULL SEPARATIONS

The Office of Public Counsel and the Florida Industrial Power Users Group (FIPUG), after good faith negotiations with Tampa Electric Company in Docket No. 960409-EI, the prudence review for the Polk IGCC unit, entered into a stipulation (the

"Second Stipulation") on September 25, 1996, with the understanding all parties would be bound by its terms.[2] Paragraph 5F of the Second Stipulation provided as follows:

> F. The separation procedure to be used to separate capital and O&M which was approved in the Company's last rate case, Docket No. 920324-EI, shall continue to be used to separate any current and future wholesale sales from the retail jurisdiction.

The parties to the Second Stipulation reasonably expected that future wholesale sales would lead to higher reported retail earnings and an increased likelihood of further refunds under the sharing arrangement embodied in both the First and Second Stipulations. Paragraph 15 of the Second Stipulation reported the parties' agreement "not . . . to seek modification of this settlement and Stipulation subsequent to final Commission approval, except by mutual consent." (The First Stipulation had this same provision in Paragraph 19.) An amendment to the Second Stipulation, dated September 27, 1997, applied only to future wholesale sales which might be made at Polk Unit 1's incremental fuel cost.

The Letter of Commitment for the FMPA contract is dated October 2, 1996, seven days after the Second Stipulation was signed. [Exhibit No. 10, page 2] A reasonable assumption would be that the FMPA contract was negotiated before and/or during negotiations which led to the September 25, 1996, Second Stipulation. The Lakeland Letter of Commitment is dated April 23, 1997. [Exhibit No. 10, page 32]

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[2] The September 25, 1996, stipulation is referred to as the Second Stipulation because it followed and modified an earlier stipulation (the "First Stipulation") signed on March 25, 1996, and approved by Order No. 96-0670-S-EI, issued May 20, 1996, in Docket No. 950379-EI

Tampa Electric entered into the FMPA and the Lakeland contracts with full knowledge of the terms of both the First and Second Stipulations.

Mr. Ramil repeatedly claimed that forcing the company to separate these sales would act as a disincentive and might preclude such sales in the future. [T. 43, 49, 50, 51, 97, 155, 170] But he can't be serious that Tampa Electric wouldn't have entered into the FMPA and Lakeland contracts if it thought these sales would have to be separated. It was Mr. Ramil, after all, who signed both letters of commitment for Tampa Electric after the company committed in the Second Stipulation to use the separation methodology from its last case. [Exhibit No. 10, pp. 23 and 57] And it was Mr. Ramil who said "the issue of whether Tampa Electric is saddled with these contracts or not shouldn't have a bearing on what the fair treatment is." [T.162] Although it's hard to believe anyone at Tampa Electric could possibly have been confused about the terms of the Second Stipulation, the company should have filed a petition for declaratory statement if was in substantial doubt how Order No. 96-1300 would affect the retail treatment of the FMPA and Lakeland contracts.

The First Stipulation did not include an explicit provision requiring separations consistent with the last rate case. Yet, Mr. Ramil's testimony in the August, 1996, fuel adjustment hearings shows he understood that, even without explicit terms, the First Stipulation would still require the separation of both current and future wholesale contracts:

> Q. How do Tampa Electrics [sic] retail customers receive the benefits of the contribution to fixed costs from separated off-system sales? [Emphasis in original.]

A. The separated off-system sales benefit retail customers through the calculation of return on equity ("ROE") reported in the monthly surveillance report. Every month, in a procedure that we believe is unique to Tampa Electric, the separation factors are adjusted to account for the current level of capacity and energy being sold as separated off-system sales. Since the additional off-system sales remove rate base and expenses from the retail jurisdiction, the retail ROE increases. All other things being equal, the effect over time of this increase is to lower retail rates. In fact, for Tampa Electric, the benefits to retail customers are even more direct than is usually the case.

Q. Please elaborate on your last statement.

A. I refer to the deferred revenue plans that OPC and Tampa Electric, along with the Florida Industrial Power Users Group, have agreed upon, first for 1995 and then for 1996 through 1998. As a result of the regulatory structure reflected in those plans, retail customers benefits are more immediate than would be the case in the normal situation.

Q. Please describe the regulatory structure applicable to Tampa Electric.

A. . . . <u>For 1996 through 1998, the demand and energy from existing separated off-system sales and any increase from future sales will contribute to deferred revenues and any amount available for refunds to customers in 1999.</u> [Emphasis Added]

Transcript of Hearing, Docket No. 960001-EI, August 29, 1996, pp. 213-15

The Commission approved the Second Stipulation, as amended, without modification on October 24, 1996, in Order No. 96-1300. In a summary of its provisions, the Commission noted at page 4 that the Second Stipulation "continues to use the separation procedure adopted in the company's last rate case to separate any current and future wholesale sales from the retail jurisdiction." In the last rate case, all long-term firm sales were separated. All other wholesale sales were subject to a flow back in the fuel docket of 100% of non-fuel revenues.

Under relevant case law, an agreement approved by the Commission becomes an ordered course of conduct mandated by the Commission. City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965) ("[T]he practical effect of such approval is to make the approved contract an order of the Commission, binding as such upon the parties.") Effectively, Tampa Electric has been ordered to treat all wholesale sales -- other than those based on the incremental fuel cost out of the Polk unit -- in the same manner used in its last rate case. And the company has been ordered not to seek modification of the stipulation without the consent of all parties.

Neither the Office of Public Counsel nor FIPUG has ever agreed to any modification of the First or Second Stipulation (except as reflected in the September 27, 1996, amendment to the Second Stipulation). Tampa Electric is bound by the Stipulations and the orders accepting their terms. Tampa Electric must separate both the FMPA and the Lakeland sales in the same manner employed in the company's last rate case. As Mr. Pollock noted, the company's proposal "would artificially depress earnings from retail operations and reduce the potential for future refunds under the earnings cap approved in Docket No. 960409-EI." [T.209] A full separation must be made for the base portion of both sales and all non-fuel revenues from supplemental sales must be flowed through the fuel and capacity cost recovery clauses to Tampa Electric's retail customers.

B. THE FMPA AND LAKELAND SALES ARE NOT SALES BASED ON THE INCREMENTAL FUEL COST OF THE POLK UNIT.

The Commission's staff was concerned that the September 25, 1996, stipulation in the Polk IGCC docket did not cover all eventualities with regards to jurisdictional separations. In particular, staff was concerned that Tampa Electric might enter into new wholesale contracts based on the low incremental fuel price of the IGCC unit but otherwise separated at the average embedded cost of the system. Such an arrangement would require retail customers to support a disproportionate share of the high-cost IGCC in base rates. In response to this concern, the parties entered into an amendment to the stipulation on September 27, 1996. The amendment applies only if Tampa Electric enters into wholesale contracts based on the incremental fuel cost out of the Polk IGCC:

> 1. Paragraph 5F of the Second Stipulation is hereby amended to add the following sentence: The Parties agree that if Tampa Electric makes an off-system sale priced based on the unit incremental fuel cost of the Polk IGCC Unit, the Commission shall not be precluded from determining the appropriate separation treatment of the Polk IGCC Unit for that specific sale.
>
> 2. The Second Stipulation is hereby ratified except as specifically modified herein.
>
> Order No. 96-1300, at page 26.

In an effort to circumvent the stipulation, Mr. Ramil testified that "[l]ike a potential sale from the Polk Power Station, the FMPA and Lakeland sales are different sales and therefore require review for appropriate regulatory treatment." [T.45] Neither the FMPA nor the Lakeland sale, however, is priced at the incremental fuel cost of the Polk IGCC. The amendment to the Second Stipulation has no applicability whatsoever

C. THE MARCH 11, 1997, ORDER IN THE FUEL DOCKET DID NOT AUTHORIZE JURISDICTIONAL SEPARATIONS IN DEROGATION OF THE STIPULATIONS.

The Commission's March 11, 1997, order in Docket No. 970001-EI announced, as a matter of policy, that an electric utility cannot burden its retail customers in the fuel docket by attributing less-than-average fuel costs to wholesale customers when calculating retail fuel cost responsibility -- unless the utility could demonstrate overall benefits for retail customers:

> [A] utility shall credit average system fuel revenues through the fuel adjustment clause unless it demonstrates, on a case-by-case basis, that each new sale does in fact provide overall benefits to the retail ratepayers.
>
> Order No. 97-0262, at page 4.

Mr. Ramil suggested that, even though Order No. 97-0262 was limited by its terms to how fuel costs would be treated, it might still be invoked as authority for the proposal offered by the company in lieu of the jurisdictional separation required by the stipulations and by Order No. 96-1300:

> The Commission recognized the potential for a difference in regulatory treatment in sales of [the FMPA and Lakeland] type in Order No. PSC-97-0262-FOF-EI issued March 11, 1997. As per that order, if a utility can demonstrate that there are net benefits to retail ratepayers associated with sales like FMPA and Lakeland, then costs other than system average embedded costs could be credited to the retail clauses. [T.45]

Tampa Electric, of course, cannot show a retail fuel cost benefit. The company's proposal is to offer something else to make up for the subsidy from retail it wants in the fuel docket. But the only "something else" Tampa Electric has to offer is an alternative to the jurisdictional separation stipulated to by the company and ordered by the Commission.

The company could have insisted on a provision in the stipulation allowing future wholesale contracts to be treated differently in the future, but it did not do so. Tampa Electric negotiated away any alternative it might have had to a jurisdictional separation.

D. TAMPA ELECTRIC CANNOT BE HARMED BY A JURISDICTIONAL SEPARATION OF THE FMPA AND LAKELAND WHOLESALE CONTRACTS.

Tampa Electric's witnesses maintained that a traditional separation would be unfair to the company. A jurisdictional separation, however, would not affect retail base rates, and the company would keep every dollar it collected from its new wholesale customers. Mr. Ramil stated it this way:

> If wholesale sales are separated at average embedded cost, the revenues will not be available to the retail jurisdiction for flow through to retail customers because they will have been allocated to the wholesale jurisdiction. [T.486]

Total revenues for the company -- and total profits, given Tampa Electric's position that incremental revenues exceed incremental costs -- would have to increase if the sales were separated.

ISSUE 3: How should the fuel revenues and costs associated with Tampa Electric Company's wholesale schedule D sales to the Florida Municipal Power Agency be treated for retail regulatory purposes?

POSITION: *Fuel costs for FMPA and Lakeland are included in the weighted-average inventory cost of fuel on Line 1 of Schedule A1. They should be deducted on a weighted-average inventory basis on Line 16 pursuant to Order No. PSC-97-0262-FOF-EI.*

ISSUE 6: How should the fuel revenues and costs associated with Tampa Electric Company's wholesale schedule D sales to the City of Lakeland be treated for retail regulatory purposes?

POSITION: *Fuel costs for FMPA and Lakeland are included in the weighted-average inventory cost of fuel on Line 1 of Schedule A1. They should be deducted on a weighted-average inventory basis on Line 16 pursuant to Order No PSC-97-0262-FOF-EI.*

ISSUE 7: How should the transmission revenues and costs associated with Tampa Electric Company's wholesale sales to the Florida Municipal Power Agency and the City of Lakeland be treated for retail regulatory purposes?

POSITION: *Since all transmission costs are included in base rates, the only way to effect a jurisdictional separation consistent with the last case is to flow all transmission revenues back to the retail customers through the fuel clause.*

ISSUE 9: Would the Commission exceed its jurisdiction if it were to allow Tampa Electric Company to earn a return through retail rates for its wholesale sales to the Florida Municipal Power Agency and to the City of Lakeland?

POSITION: *Yes. The Commission has no authority to allow revenues and costs from sales for resale under FERC's jurisdiction to affect reported earnings from retail operations or the refunds due under the stipulations, which are based on reported retail earnings levels. *

DISCUSSION

THE COMMISSION HAS NO AUTHORITY TO USE THE RETAIL JURISDICTION TO MAKE UP FOR LESS-THAN-COMPENSATORY PRICING IN THE WHOLESALE JURISDICTION.

The issue is whether the Commission can make an adjustment which achieves less than a full separation without exceeding its jurisdiction. The fact that the Commission may believe (erroneously in Public Counsel's estimation) that allowing wholesale sales to have an effect on retail rates will act as an incentive to benefit the retail customer does nothing to confer jurisdiction on the Commission. Similarly, the fact that none of the parties ever raised the jurisdictional issue before cannot bestow jurisdiction in an area outside retail boundaries.

Tampa Electric's not-so-veiled threat is that, if the Commission requires a jurisdictional separation, then Tampa Electric will not enter into wholesale contracts in the future to the ultimate detriment of the retail customers. Stated differently, Tampa Electric's position is that it will not enter into any more wholesale sales unless the Commission makes those sales more attractive than what the company can obtain in the increasingly competitive wholesale market.

The Commission, however, has no authority to use retail rates to make wholesale sales more appealing to Tampa Electric. This is based on a long-standing interpretation of the Commission's jurisdiction and the necessity for separations to assure that jurisdictional boundaries are not crossed.

The Commission has apparently followed a consistent practice of requiring jurisdictional separations in electric utility cases since the 1964 investigation of Florida Power Corporation's earnings culminated in the issuance of Order No. 4139 in Docket No. 7767-EU on March 10, 1967. In an extensive review of relevant case law, the Commission quoted with approval from those seminal decisions requiring separations.

> The Smyth [v. Ames, 169 U.S. 466 (1898)] case is famous, too, as the apparent beginning of the separation principle which is now well recognized by most authorities as a necessary step in the fixing of rates for one of two or more services when only the one service is subject to the

jurisdiction of the rate-making body. In the Minnesota Rate case, Simpson v. Shepard, 230 U.S. 352, the Court said that :

> . . . [T]he state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.

In the same year, 1912, the Supreme Court of Florida recognized the same principle in the case of Railroad Com'rs. v. Louisville & N.R. Col, 62 Fla. 315, 57 So. 175. There, the Court made the statement:

> Where the same property, labor and management are used at the same time by a common carrier in interstate and intrastate commerce, the value of the property and labor and management used should be apportioned in determining the reasonableness of the compensation for service rendered by the carrier in the intrastate business.

* * *

The Court considered the matter, in the case of General Teleph. Co. of Florida v. Carter, (1959) 115 So. 2d 554, 31 PUR 3d 497, and after reviewing the Minnesota rate case, and Smith v. Illinois Bell Teleph. Co., supra, and several Florida Cases, held that:

> Separation is not a theoretical problem of methods but is a necessary recognition of the fact that the commission's sphere of authority is basically intrastate in nature. . . .

* * *

In its discussion of this issue the Supreme Court, in its opinion reported in Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U.S. 635, 58 PUR(NS) 100, (1945) said:

> We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. Otherwise the profits or losses, as the case

> may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the act. The Commission recognizes this necessity. . . .
>
> * * *
>
> In the present proceeding, it has been declared by Pinellas County that the wholesale business of respondent is beyond the jurisdiction of this Commission and falls within the jurisdiction of the Federal Power Commission. There is no question but what such business is specifically exempt by statute from the jurisdiction of the Florida Commission. . . . If the Federal Power Commission does, in fact, have jurisdiction over the utility's wholesale rates, then there should be a separation between the intrastate service which is under the jurisdiction of the Florida Commission, and the wholesale service which is under the jurisdiction of the Federal Power Commission.

Order No. 4139, at 54-61.

Although Tampa Electric maintains there is no subsidy from the retail jurisdiction, this is refuted by the company's own allegations that it cannot make recent wholesale contracts stand on their own; it must have retail support because of current conditions in the wholesale market:

> The ratepayer would enjoy the artificially high benefits from these [wholesale] transactions through separation at higher than the actual revenues from the sales while the shareholders would be left with no way to meet the revenue requirement deficit associated with meeting the market price. [Ramil, T.44]

The point lost on Mr. Ramil is that the effect on retail customers' rates and the retail rate of return is the same after separation regardless of the price Tampa Electric gets in the wholesale jurisdiction. Since it is the inadequacy of the wholesale price to cover costs that motivates Tampa Electric, the company could not be asking for anything but a subsidy. If the company's stockholders will lose money under a separation [T 50-51], but the company's proposal offers the opportunity for increased shareholder returns [T.36], some of the wholesale return has to be coming from the retail jurisdiction.

In rebuttal, Mr. Ramil tried to disprove a subsidy by observing that if these sales "suddenly went away, the rate paid by retail customers would not suddenly drop, by any supposed 'subsidization' amount." [T.484] In a very real sense, however, they would because the real rate being paid per unit of assets devoted to their service would actually decrease. For the same amount of money retail customers would start supporting more assets actually available to serve them. Additionally, the proposal would require the retail jurisdiction to pay fuel costs that are higher than the weighted-average inventory cost to make up for the discounts given to FMPA and Lakeland.

To see whether Tampa Electric is asking the Commission to invade FERC's jurisdiction, the Commission need only review the results which would flow from acceptance of the company's proposal. The Commission would have to find that it is the current, competitive state of the wholesale market, not anything in the retail jurisdiction, that requires that a jurisdictional separation not be done. The Commission would have to find that these same market forces, which Tampa Electric cannot control and the Commission has absolutely no power to regulate, mandate that the company be able to report its retail earnings on a hypothetical basis, as if assets which are concededly devoted to FMPA and Lakeland are available to serve retail load. The Commission would have to find it reasonable that Tampa Electric be allowed to report lower earnings from retail operations for the specific purpose of reducing the likelihood of refunds under the stipulations because, to do otherwise, would force Tampa Electric to bear full responsibility for the bargains it struck in the wholesale jurisdiction after it entered into the stipulations.

A. CROSSING THE "BRIGHT LINE" DRAWN ACROSS "THE ATTLEBORO GAP."

The Commission may believe, as a factual matter, that electric companies will endeavor to make additional wholesale sales if they receive some return from the retail jurisdiction above that specified in interchange agreements filed with, and approved by, the FERC. The Commission, however, cannot invade FERC's jurisdiction even if it believes doing so will provide an incentive for electric utilities to provide retail service at the lowest reasonable cost. The Commission cannot cross the "bright line" drawn by Congress between state and federal jurisdiction. Federal Power Commission v. Southern California Edison Co., 376 U.S. 205, 215-216 (1964) ("... Congress [in the Federal Power Act] meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis.")

The Federal Power Act, 16 USC §§ 824, et seq., was enacted in 1935 to provide the federal regulation of electric utilities found to be outside the domain of state regulators in the case of Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83, 71 L.Ed.549, 47 S.Ct. 294 (1927). In Attleboro, the Supreme Court held that the sale of electricity between two electric utilities, one located in Rhode Island and the other in Massachusetts with power being delivered at the state line, was inherently interstate in nature and outside the reach of state regulation. Rhode Island could not alter an existing contract and regulate the terms of sale between the two utilities even if, as Rhode Island claimed, it could not effectively regulate sales to local consumers and protect them from unfair rates without doing so.[3] This was true even though Congress had never acted to provide for regulation at the federal level. The Federal Power Act was created to fill "the Attleboro gap." Southern California Edison, supra, 376 U.S. at 213; Appalachian Power Co. v. PSC of West Virginia, 812 F.2d 898, 904-5 (4th Cir. 1987).

The Act gave the Federal Power Commission, now FERC, exclusive jurisdiction over all sales of electricity crossing state boundaries and also over all sales for resale, i.e. wholesale transactions in interstate commerce. Federal jurisdiction attaches to almost all wholesale transactions because all interconnected electric utilities (outside of Texas) are considered to be interstate providers, even when all their facilities are located within a single state and they have no direct connections with utilities in other states. Federal Power Commission v. Florida Power & Light Company, 404 U.S. 453, 30 L.Ed. 2d 600, 92 S.Ct. 637, 92 PUR 3d 149 (1972); See Re Public Service Company of Indiana, Inc., 62 PUR 3d 65, 68 (Federal Power Comm'n, 1965) ("Even if PSCI's interstate transactions are confined to economy and emergency interchanges, its sales at wholesale of such energy are subject to our jurisdiction.")

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[3] Narragansett Electric Lighting Company, the utility in Rhode Island, entered into a contract in 1917 to provide energy and capacity to Attleboro Steam & Electric Company in Massachusetts. Attleboro dismantled its generating plant sometime after signing the contract. In 1924, after Narragansett was unsuccessful in convincing Attleboro to renegotiate the contract, Narragansett filed schedules with the Rhode Island Public Utilities Commission that had the effect of canceling the contract and imposing increased charges on Attleboro.

B. FERC'S JURISDICTION LEAVES NO ROOM FOR STATES.

There are many cases construing jurisdictional boundaries between FERC and state regulatory commissions, but none deal with the precise factual situation we have here. Many of the cases arose in situations where state commissions sought to reduce the amount of wholesale charges reflected in retail rates for a utility that purchased power at wholesale and sought to include those charges in its retail cost of service. This issue, on the other hand, addresses the Commission's jurisdiction to increase retail rates (by raising the rate base and increasing expenses thereby reducing the potential for refunds) based on revenues received by a wholesale seller of electricity. In spite of the factual differences, the legal rationale underlying the decisions, that states cannot intrude in matters preempted by FERC, is equally applicable. Thus, the legal basis for these decisions would prevent the Commission from allowing any form of profit or loss on wholesale sales from affecting the retail jurisdiction.

The Southern California Edison case, cited above, dealt with the Federal Power Commission's (FPC's) assertion of jurisdiction over sales made by Edison to the city of Colton, California, which purchased all its requirements from the utility. The California Public Utilities Commission (PUC) had regulated the terms of these sales for some years, but, when the PUC approved a second increase in the contract price, Colton asked the FPC to investigate whether it had jurisdiction over the sales. In 1958, the FPC asserted jurisdiction under §201(b) of the Federal Power Act, which governs all sales of electric energy at wholesale in interstate commerce. The Supreme Court upheld the FPC's position, even though the utility had no customers outside the state.

Edison received some power from Nevada and Arizona, particularly from the Hoover dam, but the Court's decision would apparently have been the same even if this were not the case. The comprehensive nature of the federal statute vested exclusive jurisdiction over wholesale rates in the FPC.

There is no reason to believe the decision would have been different if the California PUC had sought to increase wholesale rates or to give an incentive return through retail rates to foster wholesale sales. The FPC, now FERC, occupies the entire field of wholesale rate regulation. No one else can establish, or influence, the rates or the profits to be earned from those transactions.

C. THE FILED RATE DOCTRINE.

The "filed rate doctrine," as it has come to be known, means that a state commission cannot indirectly interfere in federal matters by questioning the reasonableness of wholesale rates affecting retail cost of service. Federal preemption is premised upon the Supremacy Clause, Article VI, U.S. Constitution.

In Narragansett Electric Company v. Burke, 381 A. 2d 1358, 1361 (R.I. 1977), cert. denied 435 U.S. 972 (1978), the Rhode Island Supreme Court, citing to Southern California Edison, said:

> [T]he [U.S. Supreme] Court has determined that Congress, in enacting the Federal Power Act, intended to vest exclusive jurisdiction in the FPC to regulate wholesale utility rates. [Citation and quote omitted.] The result is a blend of state-federal regulation, each with exclusive authority in its respective field. We conclude, therefore, that jurisdiction to determine the reasonableness of the wholesale rate charged by [New England Power Company (NEPCO)] to Narragansett rests exclusively with the FPC.

The court's decision in Narragansett overturned an order of the Rhode Island Public Utilities Commission. The PUC had evaluated the wholesale charges of $9.3 million from NEPCO to Narragansett (both companies are wholly-owned subsidiaries of the New England Electric System) pursuant to Narragansett's filing with the PUC for a price adjustment under the PUC's purchased power cost adjustment procedures. The PUC only allowed Narragansett to recover $5.3 million of the NEPCO charges in its retail rates. The PUC's action, of course, did not modify FERC's decisions setting NEPCO's wholesale rates; the amounts actually billed by NEPCO and paid by Narragansett pursuant to the FERC-approved wholesale charges were not affected by the PUC's action. The PUC only decided the amount of wholesale charges Narragansett could impose upon its retail customers. The court, however, agreed with Narragansett that the Federal Power Act preempted any authority in state commissions to even question interstate prices set by the FPC. 381 A. 2d at 1361. The court found that retail rates to ultimate consumers that did not give full effect to the precise charges authorized by FERC violated the supremacy clause. 381 A. 2d at 1361. The case was remanded to the PUC with directions to treat the NEPCO charges as prudent operating costs for purposes of establishing retail rates. 381 A. 2d at 1363.

The Florida Commission is, essentially, faced with an issue the opposite of what the Rhode Island PUC tried to do. Instead of reducing retail rates because it believed wholesale charges to be excessive, the Florida Commission is being asked to increase retail rates (by reducing the potential for refunds) to give Tampa Electric a higher profit than FERC intended them to receive from the FMPA and Lakeland contracts.

The deference to federal authority which prevents a state from second-guessing wholesale charges precludes the Commission from offering an additional profit on wholesale sales above that contemplated by FERC. A state commission cannot directly, nor indirectly, use retail rates to increase or diminish the profit set by FERC within its exclusive area of expertise. See State of Minnesota by Att'y Gen'l v. F.E.R.C., 734 F.2d 1286 (8th Cir. 1984) (Minnesota Public Utilities Commission could not challenge 15% rate of return included in intercompany agreement approved by FERC, even though return permitted by FERC might affect PUC's ability to set reasonable retail rates.) This is a clear violation of the Supremacy Clause. The Commission lacks any authority to make wholesale sales either more or less rewarding to Florida's electric utilities than results directly from contracts FERC approved.

Respectfully submitted,

JACK SHREVE
Public Counsel

John Roger Howe
Deputy Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400

(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 970171-EU

I HEREBY CERTIFY that a true and correct copy of Citizens' Post-Hearing Statement of Issues and Positions, has been furnished by *Hand-delivery or U.S. Mail this 7th of July, 1997 to the following:

Gary Lawrence, Esquire
501 East Lemon Street
Lakeland, Florida 33801-5079

*Leslie Paugh, Esquire
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Robert Williams, Esquire
7201 Lake Ellionor Drive
Orlando, Florida 32809

Angela Llewellyn, Esquire
Regulatory and Business Strategy
Post Office Box 111
Tampa, Florida 33601-0111

John W. McWhirter, Jr., Esquire
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas
Post Office Box 3350
Tampa, Florida 33601

Vicki Gordon Kaufman, Esquire
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301

Lee L. Willis, Esquire
James D. Beasley, Esquire
Kenneth R. Hart, Esquire
Ausley & McMullen
227 South Calhoun Street
Post Office Box 391
Tallahassee, Florida 32302

Harry W. Long, Jr., Esquire
TECO Energy, Inc.
Post Office Box 111
Tampa, Florida 33601-0111

John Roger Howe
Deputy Public Counsel