

AUSLEY & MCMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

August 15, 2001

HAND DELIVERED

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

Re: Determination of regulated earnings of Tampa Electric Company pursuant to stipulations for calendar years 1995 through 1999; FPSC Docket No. 950379-EI


Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa Electric Company's Response in Opposition to Public Counsel's Motion to Strike Prefiled Testimony.

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

Thank you for your assistance in connection with this matter.

Sincerely,


James D. Beasley

JDB/pp
Enclosures

cc: All Parties of Record (w/enc.)
Prehearing Officer Braulio L. Baez (w/enc.)

DOCUMENT NUMBER-DATE
10011 AUG 15 2001
FPSC-COMMISSION CLERK

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

FILED: August 15, 2001

**TAMPA ELECTRIC COMPANY'S RESPONSE IN OPPOSITION
TO PUBLIC COUNSEL'S MOTION TO STRIKE PREFILED TESTIMONY**

Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to Rule 28-106.204, Florida Administrative Code, responds as follows in opposition to the Motion to Strike Prefiled Testimony filed in this proceeding on August 10, 2001 on behalf of the Office of Public Counsel ("OPC"):

1. Public Counsel's Motion to Strike is predicated on the erroneous conclusion that the prefiled testimony of Tampa Electric's witness DeLaine M. Bacon goes beyond the scope of the matters in dispute as protested by Public Counsel. In fact, Public Counsel's protest disputed "all the factual data assumptions and methodology used in, and conclusions drawn from, the cost/benefit analysis used to justify the interest expense on income tax deficiencies claimed for 1999." Public Counsel has placed in question Tampa Electric's cost benefit analysis thereby rendering that portion of the proposed agency action ("PAA") order a nullity. Having raised the issue of cost effectiveness, Public Counsel cannot now claim that Tampa Electric is precluded from addressing a cost benefit analysis in support of the action proposed by the Commission. OPC has cited no precedent for disputing the cost effectiveness of a proposed action and at the same time precluding the proponent of that action from having the opportunity to submit testimony directly pertaining to the cost effectiveness of the proposed action.

2. Public Counsel further erroneously contends that Tampa Electric is urging the Commission to rely upon a “totally different study” from that relied upon by the Commission in its PAA order. In fact, the testimony and exhibit of witness Bacon utilizes the exact same cost benefit analysis relied upon by the Commission in support of its PAA order. The only difference is the fact that in the earlier cost benefit analysis Tampa Electric utilized the then best available input data from its 1999 surveillance reports since final data for 1999 was not yet available. More accurate final data for 1999 was available when Ms. Bacon’s current testimony and exhibit were prepared. Public Counsel has cited no precedent or authority precluding the use of the most current and accurate factual data available when preparing testimony and exhibits responsive to a PAA protest.

3. Public Counsel attempts to convert Tampa Electric’s burden of proof in this proceeding to an appellate review standard as to whether the Commission relied upon competent substantial evidence in relying upon the cost benefit analysis addressed in the PAA order. However, Public Counsel’s protest of that portion of the PAA order rendered it a nullity. Nothing associated with the Commission’s reliance upon that cost benefit analysis remains to be defended. A nullity is a nullity. Tampa Electric’s burden is not to defend in an appellate sense the action taken by the Commission in its PAA order. Instead, the company’s burden is to demonstrate anew, by means of competent substantial evidence, an appropriate basis for the Commission to reach the same result that it proposed in the PAA order. That is exactly what the company has done in the testimony and exhibit of witness Bacon, using the exact same cost benefit analysis previously submitted and relying upon the most current data available at the time the testimony and exhibit were prepared.

4. Public Counsel has not cited a single authority requiring Tampa Electric to rely anew on stale data from historical 1999 surveillance reports when actual data for 1999 has become available subsequent to the issuance of the PAA order. If that current data showed a reduction in benefits to customers, surely Public Counsel would want to rely upon it as being the best evidence available at the time the testimony and exhibit were prepared. A witness preparing prefiled testimony knows what he or she knows at the time the testimony is prepared, and then again when it is adopted at the hearing. Witness Bacon was aware of the actual accounting results for 1999 when she prepared her testimony for this proceeding and properly included that information in the cost benefit analysis she performed. Relying upon the old surveillance report data would have been wrong. If the old data had been included in the prefiled testimony, witness Bacon, when asked at hearing if her answers to the prefiled testimony questions would be the same as set forth in the prefiled testimony, would have to say no.

5. There simply is no factual support for Public Counsel's erroneous allegation that Tampa Electric used a totally different type of cost benefit analysis in the testimony and exhibit of witness Bacon. On the contrary Ms. Bacon's testimony and exhibit utilize the exact same cost benefit analysis the Commission relied upon in issuing its PAA order. Public Counsel has not cited any law, rule or precedent which would preclude the company from using the best evidence available at the time it prepared testimony and exhibits responsive to a PAA protest.

6. In paragraph 3 of the Motion to Strike Public Counsel erroneously contends that Ms. Bacon's testimony is submitted in support of a protest of various adjustments to Tampa Electric's equity ratio, its short-term debt rate and to its capital structure and to seek reversals of those adjustments. This is clearly not the case and Ms. Bacon's testimony specifically states that

she does not believe reversals are necessary. Her reference to the adjustments made by the Commission is included only for the purpose of demonstrating the error in Public Counsel's logic. Public Counsel should not be heard to exclude legitimate argument simply because it refers by way of example to adjustments that were not protested.

7. In the Motion to Strike at paragraph 4, Public Counsel faults Tampa Electric for making the correct observation that the Commission can use logic and reasoning in addition to a quantitative analysis to determine what is fair. Surely the Commission relied upon Tampa Electric's cost benefit analysis as an evidentiary basis for determining that the tax deficiency interest should be allowed. However, that does not suggest that in so doing the Commission disengaged the logic, reasoning and judgment it routinely relies upon in determining what is fair. Public Counsel's contrary suggestion would have the Commission serve in the role of a pocket calculator as opposed to a responsible regulatory agency.

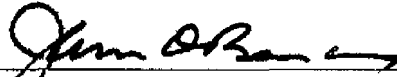
8. Public Counsel's demand in paragraph 5 of the motion to strike portions of Ms. Bacon's testimony is similarly flawed. In that paragraph 5 Public Counsel criticizes Ms. Bacon's prefiled rebuttal testimony for having referred to certain customer benefits that accrued during the existence of Tampa Electric's deferred revenue plan. Public Counsel says only 1999 earnings are relevant. Public Counsel's own witness, Mr. Larkin, is the one who raised the issue of who benefited from revenues paid by ratepayers going back to 1995 (see question and answer at page 14 of Mr. Larkin's testimony, beginning at line 13, and continuing through page 15, line 9). The portions of Ms. Bacon's testimony Public Counsel challenges are directly relevant to the subject matter addressed by witness Larkin and appropriately rebut witness Larkin's erroneous conclusions regarding who benefited and to what extent. If Public Counsel believes that refunds

for 1999 are dependent solely upon calculated earnings for that year, outside the context of other events affecting the issue of benefits, Public Counsel should have instructed its own witness to focus solely on 1999.

WHEREFORE, Tampa Electric urges the Commission to deny Public Counsel's Motion to Strike Portions of the prefiled direct and rebuttal testimony of Tampa Electric's witness DeLaine M. Bacon.

DATED this 15th day of August 2001.

Respectfully submitted,



LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(850) 224-9115

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Public Counsel's Motion to Strike Prefiled Testimony, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 15th day of August, 2001 to the following:

Mr. Robert V. Elias*
Staff Counsel
Division of Legal Services
Florida Public Service Commission
3540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Mr. John Roger Howe*
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street - #812
Tallahassee, FL 32399-1400



ATTORNEY