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October 8, 2001

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 950379-EI

Dear Ms. Bayó:

Enclosed is an original and fifteen copies each of the Public Counsel's Reply Brief for filing in the above referenced file.

Also enclosed is a 3.5 inch diskette containing the Public Counsel's Reply Brief in WordPerfect for Windows 6.1. 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

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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: October 8, 2001

PUBLIC COUNSEL'S REPLY BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Order No. PSC-01-1724-PHO-EI, issued August 23, 2001, submit this post-hearing reply brief.

I. ORDER NO. 01-0113 CANNOT DICTATE TREATMENT OF INTEREST EXPENSE BECAUSE PUBLIC COUNSEL'S PROTEST INITIATED A DE NOVO PROCEEDING ON THAT ISSUE

A dozen orders have been issued in this docket governing deferrals and refunds from 1995 through 1999 and expressing the Commission's interpretation of the stipulations. Tampa Electric in its brief, however, refers to only one, Order No. PSC-01-0113-PAA-EI. With repeated reference to that one order, the company urges the Commission to cling to the clarity of reasoning only the company could find there. That order, however, is of no force or effect on the issue of including interest expense on income tax deficiencies in the calculation of earnings for 1999. Public Counsel's protest forced a de novo proceeding on that issue. The Commission is going to have to make its findings based exclusively on the record of this proceeding. It cannot adhere to a tentative, preliminary decision based upon a self-serving cost-benefit methodology which, once exposed to the light of day, has been shown to be illegal, irrelevant and incorrect.

The Commission, in Order No. 01-0113, said the only reason it was allowing Tampa Electric to include $12.7 million (jurisdictional) of interest expense on income tax deficiencies in

the calculation of 1999's earnings was because of the net benefits demonstrated in the cost-benefit study provided by the company:

> [T]he above-the-line treatment of the interest on tax deficiencies for TECO is approved solely upon the merits of the company's cost/benefit results. [Emphasis added.]
>
> Order No. 01-0113, at page 10.

The $10.7 million cost-benefit study before the Commission at that time was identical in all material respects to the $12.4 million study the company offered at hearing through its witness, Ms. Bacon. [T-72; Ex. 1] That study has been discredited on the record to such an extent that the company can only muster weak platitudes of support in its brief.[1] Even if the Commission follows the same logic used in Order No. 01-0113 as Tampa Electric suggests, but makes its decision based upon record evidence as it must, it would have no option but to conclude it must deny the company's treatment of interest on tax deficiencies solely upon the inherent weaknesses, inaccuracies and errors in the cost-benefit study.

II. STIPULATIONS, BY THEIR VERY NATURE, DO NOT BESTOW OPEN-ENDED OPPORTUNITIES ON ONE PARTY

Tampa Electric's problem is that it needs to have its 1999 earnings subject to some form of review so that it can gain some financial advantage from the interest expense it booked in 1999. Just moving interest expense above the line in recognition that taking "aggressive" tax positions was the right thing to do would ordinarily be a hollow gesture, since it would just lead to lower reported earnings for regulatory purposes. What good would that do? Well, it might do a

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[1]Tampa Electric's brief (at pages 4, 5) mistakenly characterizes Public Counsel as insisting that the only cost-benefit study at issue is the one the Commission relied upon in its Order No. 01-0113. References to that $10.7 million cost-benefit study were deleted from issues and positions in the prehearing order.

lot of good if Tampa Electric's earnings were subject to an unrestricted review without mandatory refunds as was the case in the Peoples Gas System docket. Then, permission to move the expense above the line might actually save the company some money.

This would not be true, however, if instead of a generalized earnings review, stipulations were in place which, by their terms, dictated whether and how much had to be refunded. And it certainly would not be true if the stipulations allowed only a narrow category of interest expense to be included in the NOI calculation, but none of the interest expense the company incurred fit that description. In such a case, there are no questions of fairness in the abstract. There is only a question whether the expense is explicitly allowed within the bargain the parties struck. This is where Tampa Electric finds itself.

Stipulations are almost always entered into to carve out a middle ground between the extremes of parties in opposition, to bind the parties, and to avoid surprises. Yet Tampa Electric argues (at pages 2, 7, 8, 11 and 26) that stipulations it signed in 1996 are without boundaries, that the other parties gave the company carte blanche to interpret the second sentence of Paragraph 11 in any manner it chose and, pursuant to that single sentence, to seek recovery of any expense the company wanted. Could the company claim an expense not ordinarily included in the calculation of NOI? Could it claim a non-utility expense? A wholesale expense? Can it be seriously argued that advocates stipulating with Tampa Electric would have ever agreed, without very explicit language, that the company could keep their clients' money to make up for unspecified historic "benefits" subject only to the company's own definition?

A Commission decision to allow a new category of expense would be a decision affecting substantial interests. There would have to be an opportunity for hearing. Instead of streamlining

the process, a unilateral grant of authority to Tampa Electric would open the door to even more hearings. No party representing the customers' side would, for example, concede that the company was free to violate the prohibition against retroactive ratemaking, or any other fundamental principle of ratemaking, without explicit language to that effect.

What methods might the company use to convince the Commission an expense or investment was prudent? Certainly, opposing parties would not leave it to the company's discretion to invoke a novel type of justification which would not come into being until years after the stipulations were signed.

The fact that the stipulations could not be modified to explicitly support the company's positions without changing the intent of the parties strongly suggests the stipulations, in their present state, cannot be interpreted in the manner advocated by Tampa Electric. On the other hand, Public Counsel's interpretation gives meaning and effect to each of the provisions. Paragraph 10 allows Tampa Electric to include interest expense related to Polk's tax life above-the-line in the calculation of 1999 earnings and requires Public Counsel to support the deduction in any proceeding at the Commission, even though tax deficiency interest expense was not an adjustment in the last rate case. (The same interpretation the Commission used in the order approving the First Stipulation.) If there is no interest expense qualifying for special treatment under Paragraph 10, then earnings for 1999 will be calculated on an FPSC adjusted basis using the adjustments permitted in the company's last rate case. All reasonable and prudent expenses and investment traditionally allowed in the calculation of Tampa Electric's earnings for

surveillance purposes will be permitted without further justification, except that Polk Unit 1 will be included in rate base while the Port Manatee site will be excluded.[2]

III. IT IS DOUBTFUL TAMPA ELECTRIC REALLY BELIEVES PARAGRAPH 10 APPLIES TO ALL POLK-RELATED INTEREST EXPENSE

Tampa Electric's position (at pages 6-10) is that Paragraph 10 from the First Stipulation, while referencing interest expense explicitly and very narrowly, was not meant to limit the company's ability to use interest expense generally. Then why is Paragraph 10 there at all? The company does not really try to answer this question. On the one hand, at page 8, it implies that Paragraph 10 is just there to require Public Counsel's support for any interest expense which is Polk related (under the company's new interpretation addressed later in this brief). On the other hand, (at page 9) the company says Paragraph 10 is just there to assure Public Counsel's support for interest expense specifically related to Polk's tax life.[3] Tampa Electric is now obviously

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[2]Tampa Electric's claims (at page 9) that Polk Unit No. 1 is just another generating unit like any other are simply wrong. The Second Stipulation was entered in Docket No. 960409-EI. That docket was opened to consider, among other things, whether the Polk unit should be placed in rate base and, if so, in what dollar amount. Tampa Electric had to refund a second $25 million for the privilege of having Public Counsel agree to let the company rate base the unit.

[3]At page 9, Tampa Electric states: "OPC argues that the intent of paragraph 10 was to somehow limit the inclusion of tax deficiency interest expense. However, Witness Larkin agreed at the hearing that the purpose of paragraph 10 was to require OPC's support of tax deficiency interest expense related to [the] Polk Power Station tax life (Tr. 242-243). The purpose of paragraph 10 does not extend any further than this." [Emphasis added.] Tampa Electric makes no attempt to explain how Paragraph 10 could be limited to Polk's tax life but still require Public Counsel to support interest expense related to Polk non-tax-life issues. Some of the company's difficulty might be traced to its confusion about the doctrine of expressio unius est exclusio alterius, which Public Counsel raised in its protest and brief, and the doctrine of ejusdem generis, which Tampa Electric (at pages 10-11) apparently thinks is the same thing. While we're on the subject, Tampa Electric is also incorrect (at page 11, note 4) that the language of Paragraph 11 of the First Stipulation is the same as Paragraph 7 of the Second Stipulation. See Public Counsel's brief, page 11, note 8. Tampa Electric is also incorrect in its assertion (at page 19) that Public

(continued...)

unsure of its ability to establish interest expense as reasonable and prudent under its own narrow, restricted reading of the second sentence of Paragraph 11, and it cannot seem to find a cohesive argument to salvage what it can by invoking Paragraph 10.

It would appear that Tampa Electric has decided to adopt a half-a-loaf-is-better-than-none strategy, arguing without apparent conviction on the one hand that its cost-benefit studies are still viable while, on the other, saying it is entitled to Polk-related expenses without having to prove anything. (Brief, at 14) Under this approach, interest expense can allegedly be broken down into two separate categories under stipulations which only refer to the subject once, in Paragraph 10 of the First Stipulation. Tampa Electric's conduct, however, indicates the company cannot reasonably believe any of the interest expense is covered by Paragraph 10.

Soon after recording interest expense on its books in the last few months of 1999, Tampa Electric started putting together a cost-benefit study to justify the expense. [T-72-73] This action, in itself, is very telling. Obviously, the company did not believe the interest expense was explicitly permitted under the stipulations. If it had, there would have been no need to create an artificial justification out of whole cloth. At the same time, Tampa Electric must have considered Paragraph 10 of the First Stipulation inapplicable to the category of expense it felt such a strong need to justify. Certainly, if the company thought it could demand Public Counsel's support because some or all of the interest expense met the parameters of Paragraph 10, it would have done so at the first opportunity. After all, this is not something that could be revisited at a later

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[3](...continued)
Counsel took the position that deferred revenue interest should be treated as a below-the-line expense. To the contrary, it was Public Counsel's position that deferred revenues and accrued interest on deferred revenues should be included in the capital structure, but at a zero cost.

date; the Commission had already announced its interpretation of Paragraph 10 in its Order No. 96-0670 (at pages 5-6).

It is quite clear that Tampa Electric did not believe the interest expense it recorded was in any way related to Polk's tax life, to Paragraph 10 in general, or that Public Counsel's support could be insisted upon. The company was on its own without any explicit support in the stipulations, and its only hope was to convince the Staff and the Commission that an after-the-fact cost-benefit study which had helped its subsidiary, Peoples Gas System, avoid refunds some two years after the stipulations were signed might work the same magic for the electric utility.[4]

Tampa Electric had provided three different cost-benefit studies before the Staff filed its first recommendation on 1999 earnings for the October 17, 2000, agenda conference. [T-72-81; Ex. 6, 7] Paragraph 10 had not been mentioned by the company as having any impact on the calculation of earnings for 1999. We know this because Staff did not refer to that provision in its recommendation. The undersigned attorney for Public Counsel appeared at the agenda conference to argue against Staff's recommendation because Paragraph 10 only allowed for interest expense on the Polk Power Station. The company's attorney disagreed that Paragraph 10 was controlling, and he certainly did not contend that any of the interest expense was allowable pursuant to that paragraph.

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[4]Consider these circumstances for a moment. Tampa Electric, a party to a stipulation, is all alone, left to its own devices to find a way to prove the prudence and eligibility of an expense for above-the-line treatment. And the best it can do is to invoke a cost-benefit methodology from a Peoples Gas System case which the Commission adopted in 1998, well after Tampa Electric and Public Counsel, in 1996, negotiated the stipulations at issue in this docket. See Order No. PSC-98-0329-FOF-GU. It's fairly obvious that Tampa Electric seized upon something that worked for its gas subsidiary two years later and set about to construe the stipulations in any manner necessary to achieve the same result for the electric utility.

At Staff's request, the matter was deferred from the agenda. After a meeting among Staff, Tampa Electric and Public Counsel on November 9, 2000, this office and the company filed written statements with the Staff on November 15, 2000. Public Counsel maintained that since none of the interest expense was Polk-related, none was recoverable under Paragraph 10. Moreover, in the absence of Paragraph 10, Paragraph 11 would preclude recovery of an adjustment not made in the last rate case. Tampa Electric titled its filing: "Company Positions on the Treatment of Tax Deficiency Interest Incurred in 1999." Paragraph 10 was not mentioned in the 10-page document.

Staff filed another recommendation for the December 19, 2000, agenda conference, which did not refer to any interest expense qualifying under Paragraph 10. The undersigned attorney for Public Counsel appeared at the agenda conference as did attorneys for Tampa Electric. Public Counsel's position on Paragraph 10 was repeated.[5] Tampa Electric's attorney did not say any of the interest expense booked in 1999 qualified for recovery under Paragraph 10.

The Commission adopted its Staff's recommendation and issued Order No. 01-0113 on January 17, 2001. Public Counsel protested the order on February 7, 2001, specifically citing to Paragraph 10, among other things. The company filed its direct testimony on April 30, 2001. Neither witness, Ms. Bacon or Mr. Sharpe, alleged that any of the interest expense recorded in

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[5]Tampa Electric will probably try to make something of the fact that the undersigned attorney for Public Counsel usually referred to the second sentence of Paragraph 10 in his various presentations. The company will, no doubt, portray these statements as indications that Public Counsel did not construe Paragraph 10 as applying solely to interest expense on Polk tax-life issues. However, until August of this year, Tampa Electric itself had not referred to <u>any</u> interest expense as relating to Polk at all. Under these circumstances, there was no need for Public Counsel to address the subject more narrowly. When it came time to file testimony, though, the full text of Paragraph 10 was included in Mr. Larkin's testimony. The same cannot be said of the company's witnesses.

1999 qualified for recovery under Paragraph 10. Public Counsel filed the direct testimony of its witness, Mr. Larkin, on May 14, 2001. His testimony quoted Paragraph 10 in full, stated that it was the controlling provision in this case, and said the company witnesses had not identified any of the 1999 expense as qualifying under Paragraph 10. Tampa Electric's witness, Ms. Bacon, did not identify any of the 1999 interest expense as qualifying under Paragraph 10 in her June 8, 2001, rebuttal testimony.

Almost two years had passed since the company first recorded interest expense on its books in the fall of 1999. If Tampa Electric truly believed it had incurred an expense covered by Paragraph 10, how many opportunities did it have to bring this fact to the Staff's and/or the Commission's attention? If we just count the three early cost-benefit studies; the October 17, 2000, agenda conference; the November 9, 2000, meeting; the November 15, 2000, written submittal; the December 19, 2000, agenda conference; and the two testimony filing dates, the total is nine. And this does not include any discussions between Tampa Electric employees and staff members. Tampa Electric also had at least as many (actually many more) opportunities to insist on Public Counsel's support pursuant to Paragraph 10 -- if the company thought its expense fell within the scope of that paragraph. The only reasonable inference to be drawn from the company's consistent statements and pattern of behavior over these years is that Tampa Electric never really believed any of the interest expense it recorded in 1999 was covered by Paragraph 10 because none of it related to Polk's tax life. And, for the same reason, it never expected it could demand Public Counsel's support.

But what about the company's change of tune since early August of this year? Since then the company has said all Polk interest expense, whether related to the unit's tax life or not, is

recoverable pursuant to Paragraph 10 and that Public Counsel must support the company. Certainly, the company's brief takes this view. The answer: Tampa Electric's current positions are inconsistent with the Commission's interpretation of Paragraph 10 in Order No. 96-0670 and are simply a last ditch effort to salvage a lost cause.

To decide whether Tampa Electric really had a eureka moment or is just backing and filling, the Commission should weigh the totality of the circumstances, paying particular attention to: (1) Tampa Electric's pattern of statements and behavior before August, 2001, clearly indicated none of the interest expense was covered by Paragraph 10; (2) The company's change of heart did not occur until after its witness, Ms. Bacon, was deposed on August 2, 2001; (2) The company's new positions are inconsistent with its own witness's prefiled and rebuttal testimony entered in the record of this proceeding; (3) The company never established an amount of Polk-related interest expense on the record of this proceeding; and (4) Tampa Electric's turnabout was most likely motivated by a realization that its cost-benefit studies cannot hold up to close scrutiny. Furthermore, the company's former interpretation of Paragraph 10 agreed with the Commission order approving the First Stipulation, which said: "The parties have agreed to support any interest expense incurred as a result of any tax deficiency assessment related to the tax life of the Polk Power Station." Order No. 96-0670, at pages 5-6 [Emphasis added]. On the other hand, Tampa Electric's newly adopted positions are in flagrant opposition to that order. The company's new positions should be rejected for what they are: self-serving attempts to salvage whatever it can and avoid a refund obligation under fairly negotiated stipulations.

Let's not lose sight of the obvious. This docket is all about (and only about) evaluating whether Tampa Electric should be able to get out of refunding a substantial portion of its

overearnings for 1999. Tampa Electric's epiphany on the scope of Paragraph 10 has been shown to be, at best, misguided confusion. All that's left is to consider the relevance and legality of the cost-benefit studies.

IV. INVOKING HISTORIC "BENEFITS" TO JUSTIFY CURRENT COSTS IMPLICATES RETROACTIVE RATEMAKING

The company's whole case hangs on first convincing the Commission that it can safely blow by Paragraph 10 and the first sentence of Paragraph 11 to focus solely on the second sentence of Paragraph 11 which refers to reasonable and prudent expenses and investment. Once there, the company then faces the apparently impossible task of demonstrating that the company should be entitled to higher rates in the future (in the form of lower refunds) to make up for lower rates received in the past.

Retreating as always to Order No. 01-0113, the company (at page 7) resurrects language from the order which says an adjustment for tax deficiency interest expense is consistent with other adjustments the Commission has made in determining earnings during the deferred revenue period. The year at issue in this proceeding, 1999, of course, is not in the deferred revenue period which ended with 1998. Moreover, Tampa Electric has made no attempt to explain how references either to "adjustments" or to "reasonable and prudent expenses and investment" could encompass a below-the-line item which typically does not enter into the NOI calculation at all. Simply establishing such an expense as prudent does not, in and of itself, justify moving it above the line.

What makes interest expense on tax deficiencies a prudent expense? It cannot be the simple fact that such an expense was recorded on Tampa Electric's books in 1999. Even the

company does not suggest that. The company knows it has to come up with a justification that will convince the Commission to allow it to move the expense above the line, reduce earnings, and withhold refunds from customers. However, the focus cannot, from the company's perspective, be on 1999 in isolation. Since the effect on customers in 1999 has to be a loss of in excess of $7.62 million; the company cannot possibly demonstrate a net benefit for customers in that year.

Perhaps addressing the matter in steps will show how Tampa Electric is incorrect in its contention that the specific cost-benefit studies it employed did not violate the proscription against retroactive ratemaking. Assume a hypothetical utility which was allowed a 12% return on equity two years ago but has only been able to earn a 10% ROE since that time. There can be no doubt that if this utility asked for increased rates for just the next year to earn a 14% ROE because of past underearnings, the Commission would have to deny the request as asking for retroactive ratemaking. It would not make any difference that, from the utility's perspective, it could clearly demonstrate increased revenues for the one year in the future would be less than its lost revenues over the previous two years. Similarly, it would make no difference that a cost-benefit study done from the customers' perspective showed "net benefits" in that the increased cost to customers was less than the cumulative effect of the "benefits" they received in the form of lower rates over the last two years.

Now assume the company rethinks its approach (under the doctrine of "there's still a chance to get money from our customers") and asks if it can impose a surcharge over the next year instead of changing the base rates. The cost-benefit study would, of course, show the same "net benefit" to customers. But there is really no difference between the surcharge and increasing

rates, both approaches violate retroactive ratemaking. This was the Commission's conclusion in the Florida Cities Water case cited in Public Counsel's protest of the PAA and again in Public Counsel's brief.

Still undaunted, assume the hypothetical utility comes back with ("Okay, how about this?") no change to base rates, and no surcharge, but the utility withholds some of the refunds it would otherwise have to make over the next year under a stipulation it signed with the customers' statutory representative after its last rate case was decided. What could be the harm? The cost-benefit study shows the same net benefits. And we're not really talking about rates anyway. No one's suggesting that previous rates should be changed. After all, the cost-benefit study is really just "a method of analysis" (Brief, at 2); "a 'what-if' cost-benefit tool of analysis" (Brief, at 5); a "'what if' scenario[]" (Brief, at 18); "in no way, is [it] an attempt to change what was ordered [in the past]" (Brief, at 18); it is "merely a tool of analysis" (Brief, at 21); it is "not an attempt to and does not change any rate, deferred revenue calculation or refund" (Brief, at 21); "[t]he filed base rates of the company remain unchanged" (Brief, at 23); "a cost-benefit study is simply a tool of analysis and is not an action which constitutes retroactive ratemaking" (Brief, at 23).

And such phrases are just a tool of salesmanship. In each case, the cost-benefit study is only offered to divert attention away from the governing legal principle which makes such a study irrelevant. There is no substantive difference between higher base rates, a customer surcharge or withheld refunds when the underlying purpose for the financial harm to customers is

intended to make up, either in whole or in part, for purported "benefits" the company bestowed upon its customers in the past.[6]

V. THE COST-BENEFIT STUDIES ARE FACTUALLY INCORRECT

The factual aspects of Tampa Electric's cost-benefit studies rest on two different philosophical foundations, although the concepts were merged in the $12.4 million study. The comparison of withheld refunds against rate case benefits rests on the premise that it is unfair for Tampa Electric's stockholders to have to absorb interest expense on tax deficiencies when customers received lower rates in the past from higher deferred taxes arising from the same tax strategy which eventually caused the IRS to impose the interest expense. This rationale fails for two, independent reasons. First, questions of fairness are not implicated within the prohibition against retroactive ratemaking. It is solely a matter of statutory jurisdiction. Neither the company nor its customers can remedy past injustices with future rates. Secondly, as the company itself must reluctantly concede, deferred taxes had no effect on Tampa Electric's base rates from 1994 until today.

The allegations of deferred revenue benefits (at pages 17-18) are something else altogether. At least the rate-case-benefit argument had some plausible, if not actual, appeal. It was at least possible that rates were lower in the past than they otherwise would have been, whether this was relevant or not. But the only concrete deferred revenue benefit customers could ever receive under the stipulations was the return of whatever was left in the deferred revenue pot

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[6]Tampa Electric suggests (at pages 2, 5, and 25) it is inconsistent for Public Counsel to invoke retroactive ratemaking while agreeing the company could move interest expense related to Polk's tax life above-the-line. Retroactive ratemaking, however, is not implicated by agreeing a traditional below-the-line expense can be deducted in the calculation of earnings. This is just a way of defining, by agreement, which 1999 expenses can be used to derive 1999 earnings.

at the end of 1998. That was only $734,332. There wasn't any more. If we assume through some stretch of the imagination that customers should not have gotten that money back, the maximum "benefit" is capped at that level. Thus, maximum benefits could not be even 10% of the $7.62 million cost the company wants to impose. A cost-benefit study based upon deferred revenues, in addition to violating retroactive ratemaking, has to show an enormous net detriment to customers.[7]

Of course, Tampa Electric says (at pages 19-20) it could also tap the accrued interest. Think about that for a moment. Deferred revenues plus accrued interest were included in the capital structure at the 30-day commercial paper rate for all earnings calculations 1995-99. Accordingly, customers have already been charged for the reduction in deferred revenues and the reduction in refunds coming out of 1998. Customers have been charged the time value of their own money. They got less principal and less interest. That's bad enough, but it is a battle Public Counsel has already fought and lost. So be it. But it is quite another matter for the company to now say that, to the extent the money was not taken away from customers a second time, it should be considered a "benefit" emanating from the goodness of the company's heart which justifies the company withholding some refunds from a year in which deferred revenues played no part. Now we're into a realm of pure nonsense.

Tampa Electric's assertion (at page 19) that Public Counsel is trying to re-litigate this matter is just a smoke screen. To the contrary, it is Public Counsel's position that, because the Commission agreed with the company that customers should pay the carrying costs for deferred

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[7]A comparison of deferred revenue costs and benefits could never result in a logical outcome because it seeks to answer an illogical question: "Should customers get less than they are entitled to for 1999 under the stipulations because they already got too much?"

revenues plus accrued interest, there is no way it could be considered a "benefit" provided by the company. If the Commission had agreed with Public Counsel in 1997 and made the company's stockholders liable for the interest, Tampa Electric's current argument might at least have some theoretical merit.

The underlying rationale for the cost-benefit study Tampa Electric offers as an alternative to Ms. Bacon's $12.4 million cost-benefit study is extremely murky, at best. Mostly, they are just statements that other studies show $6.8 million or $8.5 million of benefits. (The latter study is not even in the record of this proceeding.) Tampa Electric states (at page 17) that the $12.4 million study took into consideration both the higher base rates from the last rate case and the higher amount of deferred revenues presumably caused by those higher rates. The company then implies that Public Counsel cannot take away the higher rates without also changing the deferred revenue calculations. Public Counsel, however, never suggested the rates in effect since 1994 should be taken away. They have been there from 1994 to this day. It is simply Public Counsel's position (and one indirectly conceded by the company) that rates since 1994 were unaffected by deferred taxes in the company's capital structure. But the rates themselves are higher today than they would have been as a result of the Commission using a financial integrity standard to set them. Is the company saying that, if its approach to deferred taxes did not lessen the rate increase, then we should pretend for purposes of the deferred revenue analysis that there was no rate increase at all, even though we know rates were even higher? If that is the company's position, it's absolute nonsense. The amount of deferred revenues from 1995-98 had to be affected by revenues derived from rates in effect since 1994.

VI. TAMPA ELECTRIC'S ESTOPPEL ARGUMENTS ARE AN ATTEMPT TO DIVERT ATTENTION FROM ITS OWN EVIDENTIARY FAILURES

Let's review. Tampa Electric, the party seeking affirmative relief, has been unable to demonstrate it incurred any interest expense covered by Paragraph 10. It has been unable to establish the amount of interest expense which was Polk-related. It has been unable to demonstrate that tax deficiency interest expense is an adjustment made in the last case. It has been unable to demonstrate that a traditional below-the-line interest expense could be considered a prudent expense for NOI purposes pursuant to the stipulations. It has been unable to establish that its method of justifying interest expense as reasonable and prudent does not violate the prohibition against retroactive ratemaking. And it has been unable to demonstrate a net benefit for customers in its cost-benefit studies.

All these failures explain why Tampa Electric raised an issue on estoppel in the hopes of taking refunds away from customers without having to prove anything. The Orlando Utilities Commission's transmission line is probably a special case. Since this was separated out as a wholesale asset, the Commission essentially concluded it was a matter outside its jurisdiction. Stipulations approved by the retail regulatory body could not reasonably be construed to allow for wholesale investment in the calculation of retail earnings.

Tampa Electric says (at page 27) that Public Counsel is estopped from "urging" a different position on issues that cut the other way.[8] What inconsistent position is Public Counsel urging? Certainly, Public Counsel has accepted all the Commission decisions on issues not

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[8]Tampa Electric also states (at page 28) that Public Counsel "cannot just stand by and fail to raise issues that increase the amount of refund." This allegation is a complete mystery. It's Public Counsel's job to raise appropriate issues which might increase refunds, and the undersigned is unaware of any such issues which were overlooked.

protested, just as Tampa Electric has done, but joint acquiescence can hardly be construed as advocacy against the company. The company also says (at page 28) that Public Counsel's calculation of overearnings includes improper adjustments. But Public Counsel's calculations have the same starting point as the company's calculations. The only difference is in the treatment of interest expense on tax deficiencies in the income statement, which is the only matter protested and subject to dispute between the parties. If Tampa Electric is suggesting Public Counsel cannot agree with the Commission and the company on some issues unless it agrees on all, then it's estoppel argument is clearly outside both statutory and case law.

The equity ratio adjustment is something both Public Counsel and Tampa Electric have acquiesced in since 1995. Tampa Electric protested its use for 1997 and 1998 but then had a change of heart and stipulated to the adjustment. By stipulating, the company put itself in the same position as if it had fully litigated the issue and lost. Section 120.57(4), Florida Statutes. In its brief (at page 10), the company says that "[t]o accept OPC's argument would be to acknowledge that these same types of adjustments were erroneously made in prior orders in this docket." The statement is incorrect because Tampa Electric, by agreement, made the adjustments valid.

But even if the statement were correct, so what? It would just mean the Commission issued orders which are now final and beyond challenge that, in Tampa Electric's estimation, contain errors. Earnings for 1999 still have to be based upon a traditional earnings review. Even if errors from the past were repeated in Order No. 01-0113, the company had the same opportunity to correct them as Public Counsel did with respect to the Commission allowing interest expense above-the-line. Tampa Electric could protect its interests by filing a protest. The

fact that the company chose not to strongly suggests it did not believe the adjustments carried forward to 1999 were in error for any of the prior years or in 1999. Moreover, Tampa Electric was well aware that the Commission's interpretation of Section 120.80(13)(b), Florida Statutes (2000), would preclude consideration of any matter not protested. Such estoppel by statutory interpretation is outside Public Counsel's control.

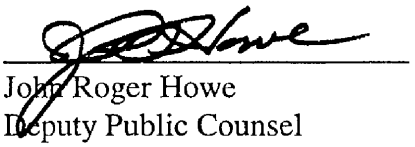
But let's stop kidding ourselves. Tampa Electric only raised this issue so it might withhold refunds from its customers. To accept the legal theory, the Commission would have to believe that even if its PAA order was completely in error, and regardless of the magnitude of the error or the harm it caused, the Commission could not allow itself to be informed of that fact, correct the error, and issue an order that balanced the interests of both the company and its customers. Such has never been the status of Florida's regulatory or administrative hearing process.

VII. CONCLUSION

Tampa Electric could not make its case at the hearing and it has been unable to make its case in its brief. Interest expense on tax deficiencies should be removed from the calculation of earnings for 1999 and appropriate refunds should be made to Tampa Electric's customers.

Respectfully submitted,

JACK SHREVE
Public Counsel



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I HEREBY certify that a copy of the foregoing PUBLIC COUNSEL'S REPLY BRIEF has been served by *hand delivery or U.S. Mail to the following parties of record on this 8th day of October, 2001:

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