

State of Florida



Public Service Commission

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DATE: 2/21/02

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (MERCHANT, WILLIS)
OFFICE OF THE GENERAL COUNSEL (VINING) *HRVE TEV* *JDT*

RE: DOCKET NO. 950379-EI - DETERMINATION OF REGULATED
EARNINGS OF TAMPA ELECTRIC COMPANY PURSUANT TO
STIPULATIONS FOR CALENDAR YEARS 1995 THROUGH 1999.

AGENDA: 3/5/02 - REGULAR AGENDA - POST HEARING DECISION -
PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\E950379.RCM

CASE BACKGROUND

Tampa Electric Company (TECO), the Office of Public Counsel (OPC), and the Florida Industrial Users Group (FIPUG) are signatories to a series of stipulations governing the calculation of TECO's regulated earnings and providing for certain refunds for the years 1995-1999. FIPUG subsequently withdrew its intervention in this docket. By Order No. PSC-01-0113-PAA-EI, issued January 17, 2001, in this docket, the Commission determined TECO's 1999 earnings. On February 7, 2001, OPC timely filed a protest of Order No. PSC-01-0113-PAA-EI, challenging the inclusion of interest on tax deficiencies in TECO's net operating income for 1999. The administrative hearing for this matter was held on August 27, 2001, to consider OPC's protest. By Order No. PSC-01-2515-FOF-EI (Final Order), issued December 24, 2001, the Commission found that the interest on tax deficiencies was a prudently incurred cost for 1999. TECO was allowed to include the interest expense on tax deficiencies, in the amount of \$12,687,672, in the calculation of

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its 1999 earnings. Accordingly, TECO was ordered to refund \$6,307,427, which included interest calculated through September 30, 2001. Interest from that date was required to be accrued in the same manner until the refund was made.

On January 8, 2002, OPC filed a Motion for Reconsideration of the Final Order. TECO filed its response to OPC's motion on January 22, 2002. This recommendation addresses OPC's Motion for Reconsideration. The Commission has jurisdiction over this subject matter pursuant to Sections 366.04, 366.05, and 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant OPC's Motion for Reconsideration of Order No. PSC-01-2515-FOF-EI?

RECOMMENDATION: No, OPC has not demonstrated that the Commission overlooked or failed to consider a material and relevant point of fact or law; accordingly, OPC's Motion for Reconsideration should be denied. (Merchant, Vining)

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

OPC's Motion

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

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

Further, OPC asserts that Exhibit 8 is mathematically inaccurate because it included deferred revenue benefits for 1999. Since the deferred revenue pot was empty after 1998 and earnings for 1999 were to be calculated in the traditional manner, the cost/benefit analysis should be unaffected by nonexistent deferred revenues. OPC argues that the only benefit customers received in 1999 was a refund reduction.

Based on the above, OPC concludes that the Commission erred in relying on Exhibit 8 to demonstrate that net benefits accrued to the customers. As such, OPC argues that the Commission should

reconsider its decision to include the interest expense on tax deficiencies in the calculation of TECO's earnings for 1999, disallow the interest expense, and order increased refunds plus interest.

TECO's Response

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

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

The company reiterates the Commission's Order No. PSC-01-2515-FOF-EI, on page 34, where the Commission stated: "we find the expenses reasonable and prudent because the proactive approach taken by TECO on tax issues benefits the overall body of ratepayers." As a result, TECO states that the Commission looked at this issue as an opportunity to encourage utilities to be aggressive on tax issues by incurring some interest expense while at the same time avoiding tax penalties.

TECO also disputes OPC's argument that Exhibit 8 is flawed or in error. TECO contends that OPC's assertion that this exhibit was based on an "implausible assumption that rate increases which were

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

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

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

Staff Analysis

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

As described in the final order, Exhibit 1 reflects the company's primary cost/benefit analysis. It takes into account the rate case benefits and the deferred revenue benefits for the years

1993 to 1999. It also includes the non-protested final adjustments to the 1999 year which were also approved in this docket. Exhibit 8 reflects the company's cost benefit analysis excluding the impacts of the 1993 and 1994 rate case benefits, but otherwise is the same as Exhibit 1. Exhibit 8 reflects net benefits of \$6.8 million. In the final order, the Commission adopted the cost/benefit analysis contained in Exhibit 8, not the analysis from Exhibit 1.

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

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

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

Staff also agrees with the company's response to OPC's motion regarding the inclusion of deferred revenue benefits for 1999 in

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its cost/benefit analysis. The Commission's order clearly states that the refunds would have been less in 1999 had the company not taken the tax positions that it did. OPC's motion is simply a reargument of its positions and does not demonstrate any errors that the Commission made in fact or law.

Based on the above, staff recommends that OPC's motion for reconsideration be denied because OPC has not shown that the Commission erred in fact or law in reaching its final decision in this case.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: The docket should be closed after the time for filing an appeal has run. (Vining)

STAFF ANALYSIS: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.