

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Tampa Electric)	DOCKET NO. 890200-EQ
Company for Approval of)	ORDER NO. 23513
Construction Deferral Agreement)	ISSUED: 9-18-90
with IMC Fertilizer.)	
_____)	

Pursuant to Notice a Prehearing Conference was held on September 7, 1990 before Commissioner Betty Easley, Prehearing Officer.

APPEARANCES:

LEE L. WILLIS and JAMES D. BEASLEY, Ausley, McMullen, McGehee, Carothers and Proctor, Post Office Box 391, Tallahassee, Florida 32302
On behalf of Tampa Electric Company

JOHN W. McWHIRTER, JR., Lawson, McWhirter, Grandoff and Reeves, 201 East Kennedy Boulevard, Suite 800, Post Office Box 3350, Tampa, Florida 33601 and VICKI GORDON KAUFMAN, Lawson, McWhirter, Grandoff and Reeves, 522 East Park Avenue, Suite 200, Tallahassee, Florida 32301
On behalf of IMC Fertilizer, Inc.

JOHN ROGER HOWE, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400
On behalf of the Citizens of the State of Florida

MICHAEL A. PALECKI, Esquire and ROBERT V. ELIAS, Esquire, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff

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Counsel to the Commissioners

DOCUMENT NUMBER-DATE

08314 SEP 18 1990

FPSC-RECORDS/REPORTING

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PREHEARING ORDER

Background

On February 8, 1989, Tampa Electric Company (TECO) filed a petition requesting Commission approval of a construction deferral Agreement (Agreement) with IMC Fertilizer, Inc. (IMC). In its petition TECO stated that its willingness to enter into the Agreement was prompted by the determination of IMC to go forward with the construction of a 2.8 mile transmission line from IMC's cogeneration facility at its New Wales chemical plant to IMC's Kingsford No. 2 mine.

TECO asserted that by building the transmission line IMC would be able to deliver excess cogenerated electricity of approximately 5.4 megawatts of capacity and 37,843,000 kilowatt hours of energy over the line to the Kingsford No. 2 mine, thereby reducing the amount of electricity IMC would be purchasing from TECO for the operation of its mine.

Without the proposed transmission line all excess generation at the New Wales plant is sold to TECO on an as-available basis and the Kingsford No. 2 mine is an all-Requirements customer of TECO. TECO has indicated that the construction of the line would reduce TECO's nonfuel revenues. TECO has estimated that base revenues of approximately \$547,620 would have been lost if the line had been operable for all 1989. The estimated construction cost for IMC to build the line is \$684,268.

Under the terms of the Agreement entered into by TECO and IMC, IMC agreed not to construct the 2.8 mile transmission line for one year from the date of final approval of the Agreement by the Commission. In exchange for this, TECO would apply monthly credits equal to the difference between average fuel cost and marginal fuel cost to IMC's bill for service at the Kingsford No. 2 mine. The credits would be based on the total number of KWH electricity which the New Wales chemical plant sells to TECO on an as-available basis during a particular month. Thus, for each KWH sold by IMC/New Wales during the term of the agreement, TECO would credit the same number of KWH at the IMC Kingsford No. 2 mine with the difference between marginal fuel cost and average fuel cost.

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On July 24, 1989, the Florida Public Service Commission (FPSC) issued Order No. 21600 in this docket approving the Construction Deferral Agreement between IMC Fertilizer, Inc. (IMC) and Tampa Electric Company (TECO). That order was issued as final agency action and was appealed by the Office of Public Counsel. On December 8, 1989 the Commission filed a Motion for Relinquishment of Jurisdiction with the Florida Supreme Court. The purpose of the Motion was to regain jurisdiction over Order No. 21600 so that the Commission might reconsider its order and hold out the opportunity for hearing to any affected parties. The Supreme Court granted the Motion on February 22, 1990. Accordingly, the Commission on its own Motion reconsidered Order No. 21600 and reissued it as Proposed Agency Action Order No. 22884.

On May 24, 1990, the Citizens of the State of Florida, through the Office of Public Counsel, filed a petition protesting the proposed agency action, which resulted in this proceeding.

Use of Prefiled Testimony

All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and exhibits, unless there is a sustainable objection. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his testimony at the time he or she takes the stand.

Use of Depositions and Interrogatories

If any party seeks to introduce an interrogatory or a deposition, or a portion thereof, the request will be subject to proper objections and the appropriate evidentiary rules will govern. The parties will be free to utilize any exhibits requested at the time of the depositions, subject to the same conditions.

Order of Witnesses

The witness schedule is set forth below in order of appearance by the witness' name, subject matter, and the issues which will be covered by his or her testimony.

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Witness
(Direct)

Subject Matter

Issues

D.M. Mestas, Jr.
 (Tampa Electric)

Grounds for approval of
 Line Deferral Agreement
 Fuel Adjustment Recovery
 of Line Deferral Credits

Donald E. Hirsch, Ph.D.
 P.E. (I.M.C. Fertilizer,
 Inc.)

In support of the
 Commission's approval of
 the construction deferral
 agreement, will demonstrate
 that IMC relied on the
 Commission's approval of the
 agreement, and will show that
 reversal of approval of the
 agreement would substan-
 tially prejudice IMC.

Robert Scheffel Wright
 (Office of Public
 Counsel)

Factual and Policy Issues

(Rebuttal)

D.M. Mestas, Jr.
 (Tampa Electric)

Rebuttal of Testimony
 of Robert Scheffel
 Wright

Donald E. Hirsch, Ph.D.
 P.E. (I.M.C. Fertilizer,
 Inc.)

Rebuttal of Testimony
 of Robert Scheffel
 Wright

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EXHIBIT LIST

<u>EXHIBIT</u>	<u>WITNESS</u>	<u>DESCRIPTION</u>
<u>(DMM-1)</u>	Mestas	Scenario Analyses and Cost-Effectiveness Analysis
<u>(DEH-1)</u>	Hirsch	Ranking of IMCF Electric Production with Generating Electric Utilities in Florida, 1987
<u>(DEH-2)</u>	Hirsch	Map showing location of New Wales Cogeneration facility and IMC mines
<u>(RSW-1)</u>	Wright	Table 1-Actual As-Available Energy Sales from IMC-New Wales to Tampa Electric Company, 1987-1989.
	Wright	Table 2-Cost Effectiveness Analysis of IMC-Transmission Line Adapted to Reflect Actual 1988 As-Available Energy Sales Level.
	Wright	Table 3-Cost Effectiveness Analysis of IMC Transmission Line Adapted to Reflect Actual July-December 1988 As-Available Energy Sales Level.

PARTIES STATEMENTS OF BASIC POSITIONS

Tampa Electric Company (TECO): When viewed in the context of the facts and circumstances known to exist when Tampa Electric entered into its line deferral agreement with IMC, it is very clear that

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such agreement was in the best interests of Tampa Electric's general body of Customers. Moreover, the actual results of the operation of this agreement confirmed that it was beneficial to all of Tampa Electric's Customers. The Commission should enter its order confirming its approval of the Tampa Electric/IMC line deferral agreement as well as the fuel adjustment recovery of the credits made to IMC under the agreement.

IMC Fertilizer, Inc. (IMC): The construction deferral agreement between IMC and Tampa Electric Company (TECO) became effective by operation of law on April 9, 1989. Imc relied on the agreement in foregoing construction of a transmission line which would have enabled it to use excess electricity produced at its New Wales plant at its Kingsford mine in exchange for credits under the agreement. To reverse the agreement now would substantially prejudice IMC.

Office of Public Counsel (OPC): It is doubtful that IMC would, in fact, build a transmission line to transfer 5.4 megawatts of capacity and 37,843,200 kilowatt-hours of electricity from its New Wales chemical plant to its Kingsford No. 2 phosphate mine. A special retention rate for IMC is therefore inappropriate, and TECO's petition should be denied.

Even if it could be assumed that IMC would transfer that amount of electricity, TECO's petition should still be denied for the following reasons:

1. If IMC could transmit 37,843,200 kWh, the rate reductions offered by TECO would be inadequate to dissuade IMC from building the transmission line;
2. A special rate for IMC would constitute unjustly discriminatory rates and an undue preference contrary to statutes; and
3. After-the-fact approval of the Agreement would violate the statutory prohibition against retroactive ratemaking.

TECO should be ordered to backbill IMC for credits granted pursuant to Order No. 21600, which the Commission recognizes to be invalid. TECO should be ordered to refund, with interest, all IMC credits be found to be unduly discriminatory and contrary to statute. Staff's proposal to allow TECO to recover IMC credits through the fuel cost recovery docket should be rejected.

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STAFF: No position at this time.

STATEMENT OF ISSUES AND POSITIONS

ISSUES OF FACT

ISSUE 1: Did the facts and circumstances known to Tampa Electric at the time it negotiated the IMC Line Deferral Agreement provide a reasonable basis for Tampa Electric to conclude that, absent the agreement, IMC would construct a transmission line from its New Wales facility to its Kingsford No. 2 mine thereby reduce its purchases from Tampa Electric?

TECO: Yes. (Mestas)

IMC: Yes.

OPC: The issue as stated is not relevant because it does not consider whether IMC would have sufficient kilowatt-hours for export to make the transmission line economically viable to IMC. A special retention rate is not appropriate to keep a customer from acting against its own best interests just because the result would be reduced electric utility sales.

STAFF: No position at this time.

ISSUE 2: Did the information available to Tampa Electric at the time the IMC Line Deferral Agreement was negotiated form the basis for a reasonable determination that such agreement would be cost beneficial from the standpoint of Tampa Electric's general body of ratepayers?

TECO: Yes. (Mestas)

IMC: Yes.

OPC: No. The agreement itself only gives IMC reduced rates. As such it cannot be construed as beneficial to TECO's general body of ratepayers.

STAFF: No position at this time.

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ISSUE 3: Based on actual information relative to the operation of the Line Deferral Agreement, have Tampa Electric Customers obtained a positive net benefit under the Agreement?

TECO: Yes. (Mestas)

IMC: Agree with Mr. Mestas' testimony.

OPC: No. TECO's other customers would neither be benefitted nor harmed by the special rate to IMC because neither the Agreement nor TECO's petition seeking its approval sought to increase charges to them. IMC would simply be the recipient of reduced rates which would reduce TECO's base revenues and hence its earnings.

STAFF: No position at this time.

ISSUE 4: Would TECO's general body of ratepayers have incurred increased fuel adjustment charges if the Agreement were not approved?

TECO: Yes.

IMC: Agree with TECO.

OPC: No. Even if IMC is presumed to be the marginal customer on TECO's system, TECO's purchases of spot coal would be unaffected by denial of the Agreement and fuel adjustment charges would not increase. This is true because IMC could not transfer sufficient electricity to make construction of the transmission line worthwhile.

STAFF: No position at this time.

ISSUE 5: Should the Commission reconsider its decision to allow TECO to increase its fuel adjustment charge by the amount it paid for the load retention contract?

TECO: No.

IMC: No, the customers received a net benefit, and even if they did not, de minimus non curat lex. The impact on TECO's

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average customer was less than 2 cents per month.

OPC: This issue is not relevant as stated. The hearing is on TECO's petition, not on a proposed agency action order that was rendered a nullity by Public Counsel's protest. TECO has not included a request for fuel cost recovery in its petition and the issue is not before the Commission. TECO has never been authorized by a valid final order to impose additional fuel adjustment charges to recoup IMC credits. Any amounts collected must be refunded with interest.

STAFF: No position at this time.

ISSUE 6: Did IMC intend to build a transmission line from the New Wales chemical plant to its Kingsford mine in 1988?

TECO: Agree with IMC.

IMC: Yes. (Hirsch)

OPC: Probably not. Moreover, the simple question of whether IMC was going to build the line is not in any way dispositive of this case. The relevant issue is whether IMC was going to build a line that would carry sufficient kilowatt-hours to make construction of the line a prudent economic decision. A special retention rate is inappropriate to forestall a large industrial customer from acting contrary to its own best interest just because the result would be lowered electric utility revenues.

STAFF: No position at this time.

ISSUE 7: Based on information available to TECO at the time it entered into the Agreement with IMC and at the time the Commission voted to approve the Agreement, did TECO reasonably expect that IMC would actually build a transmission line during the relevant time period?

TECO: Yes.

IMC: Yes.

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OPC: No. TECO should have known from past experience that IMC would not transfer 37,843,200 kWh of electricity over its proposed transmission line, and, as such, a special retention rate was unnecessary to keep IMC as a customer. As-available energy sales to TECO from IMC-New Wales were only 16.3 million KWH in 1987, 19.1 million KWH in 1988 and 12.5 million KWH in 1989.

STAFF: No position at this time.

ISSUE 8: Did IMC rely to its detriment on the construction deferral agreement?

TECO: Agree with IMC.

IMC: Yes. IMC negotiated the agreement in good faith and relied upon it. (Hirsch)

OPC: No. The terms of the Agreement were explicit that it would not become operative until the Commission granted final approval. A hearing is now scheduled because final approval was never granted. TECO and IMC were aware that Public Counsel opposed the special rate at the July 11, 1989, agenda conference and initiated an appeal on August 23, 1989. TECO and IMC have acted as though final approval was granted in the face of clear evidence that it was not. As such, they have acted at their own peril.

STAFF: No position at this time.

ISSUE 9: Did TECO and IMC construe Order No. 21600 as initiating the one-year period during which IMC would refrain from constructing its transmission line?

TECO: Tampa Electric believed that the one-year period of the agreement commenced when the Commission voted to approve such agreement at its Agenda Conference conducted on July 11, 1989.

IMC: No. IMC believes the contract became effective April 10, 1989.

OPC: Yes. Mr. Mestas states in his prefiled testimony that the one-year term of the Agreement has already expired.

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Apparently, TECO and IMC construed the Agreement to be approved during the period July 11, 1989 through July 10, 1990.

STAFF: No position at this time.

LEGAL ISSUES

ISSUE 10: Can the Commission lawfully require IMC to refund the credits it received?

TECO: Yes. However, Tampa Electric beeves that it would be inequitable and inappropriate for the Commission to require Tampa Electric to make any retroactive adjustments to the amounts credited to IMC under the line deferral agreement. (Mestas)

IMC: No. IMC gave valuable consideration for a binding contract that was approved by the Commission. The Office of Public Counsel (OPC) did not challenge the construction deferral agreement. It became effective without objection from OPC although OPC had full knowledge of the agreement.

OPC: Yes. A utility has an obligation to backbill whenever it learns that a customer has not paid the full charges imposed by valid tariffs and there has been no valid final Commission action permitting special rates. Corporation De Gestion Ste-Foy v. Florida Power & Light Company, 385 So.2d 124, 126 (Fla. 3rd DCA 1980) ("[I]t is universally held that a public utility or common carrier established rates, whether they result from its own negligence or even from a specific contractual undertaking to charge a lower amount.")

STAFF: Yes.

ISSUE 11: Should TECO be ordered to refund, with interest, all IMC credits passed through the fuel clause?

TECO: No.

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IMC: No. The credits to IMC became effective by operation of law and were implemented in 1989. The evidence will show that other customers benefitted from credits by an amount greater than the costs they paid through increased fuel charges. As to the timing of the cost flow-through, even if the Commission concluded that it erred in not holding a public hearing until a year after the fact, the flow-through period should match the period when the IMC credits were recognized rather than mandating a concurrent refund and offsetting cost flow-through.

OPC: Yes.

STAFF: No position at this time.

ISSUE 12: Should TECO be ordered to backbill IMC for credits granted pursuant to Order No. 21600?

TECO: No.

IMC: No, for the reasons stated in response to Issue 10 above and because of OPC's knowledgeable inaction in failing to timely challenge the IMC credits in this docket or the cost recovery mechanism in the fuel cost-recovery dockets Nos. 8900001-EI and 900002-EI. TECO flowed the IMC credit costs along to other customers in the fuel cost recovery dockets. OPC waived the opportunity to challenge the cost pass through in August 1989 and February 1989 although there were public hearing opportunities to do so in both of the dockets.

There is no legal mechanism to mandate a refund from a customer which paid rates which were on file and approved by operation of law under the provisions of Section 366.06(4), Florida Statutes.

Conceding arguendo that the Commission failed to follow the correct procedure in this case, a refund is not in order under the principles enunciated in the case of Gulf Power vs. Mayo, 333 So.2d 1 (Fla. 1976).

OPC: Yes.

STAFF: No position at this time.

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ISSUE 13: Does the principle of retroactive ratemaking apply in this case?

TECO: The way this issue is framed it does not say how the principle of retroactive ratemaking might apply in this case. Tampa Electric believes it would not be retroactive ratemaking for the Commission to approve the line deferral agreement and to leave the parties in their current status quo regarding the credits made on IMC's bills pursuant to the agreement. Even if the agreement were disapproved in this docket, Tampa Electric does not believe that it would be equitable for the Commission to require Tampa Electric to back bill IMC or refund any amounts to its general body of customers. (Mestas)

IMC: Retroactive ratemaking is applicable only if the construction deferral agreement is declared void ab initio.

OPC: Yes. The existence of a contract between TECO and IMC does not alter this fact. The contract was specifically subject to the approval of the Commission before it could be considered final or operative. Moreover, a contract with a public utility, once approved by a regulatory authority, becomes an ordered course of conduct of the agency and not a contractual arrangement between the parties. As such, the prohibition against retroactive ratemaking applies because special rates for IMC have never been authorized by a valid, final Commission order.

STAFF: No.

ISSUE 14: Would approval of TECO's petition result in undue discrimination in IMC's favor by treating that customer preferentially in relation to other, similarly situated customers?

TECO: No.

IMC: No.

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OPC: Yes. Since IMC's current rates are not discriminatory, and a special retention rate is not justified, there is no reason to discriminate in IMC's favor.

STAFF: No position at this time.

ISSUE 15: Would approval of TECO's petition violate Section 366.03, Florida Statutes (1989), which provides, in pertinent part:

. . . . "No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect?"

TECO: No.

IMC: No.

OPC: Yes. Since there is no reason on the facts of this case to approve a retention rate, IMC would receive an undue or unreasonable preference or advantage from TECO.

STAFF: No position at this time.

ISSUE 16: Were credits granted to IMC and recovery of the credits through the fuel clause lawful?

TECO: Yes.

IMC: Yes.

OPC: No. Pursuant to Section 366.06(2), Florida Statutes (1989), the Commission can only set rates to be "thereafter charged" after first providing notice and hearing. Since the Commission has reconsidered Order No. 21600 and issued Order No. 22884 as a proposed agency action, there are no valid final orders approving a special retention rate for IMC. As such, after-the-fact approval of the Agreement would constitute retroactive ratemaking.

STAFF: No position at this time.

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ISSUES OF POLICY

ISSUE 17: Is it appropriate to allow recovery of the IMC credits through the fuel docket?

TECO: Yes.

IMC: No position.

OPC: No. TECO has alleged in its petition that the reduction of sales to IMC at the Kingsford No. 2 mine would cause a loss of nonfuel revenues. TECO has not requested recovery of the IMC credits in the fuel cost recovery docket. The Commission should only consider whether TECO should recover the IMC credits upon a showing, not made in this case, that TECO was earning less than a fair return on equity by virtue of the special rate to IMC.

STAFF: No position at this time.

ISSUE 18: Should the Commission approve the line deferral agreement?

TECO: Yes.

IMC: Agree with TECO.

OPC: No. The line deferral agreement should not be approved because IMC did not have adequate excess generation to make construction of the line a prudent decision on IMC's part.

STAFF: No position at this time.

STIPULATED ISSUES

None.

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MOTIONS

Public Counsel's motion to strike TECO's testimony and responses thereto. It was agreed that rulings on these motions would be deferred to the panel at the Final Hearing.

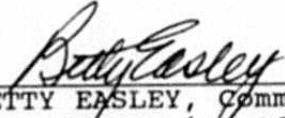
OTHER MATTERS

None.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that these proceedings shall be governed by this order unless modified by the Commission.

By ORDER of Commissioner Easley, as Prehearing Officer, this 18th of SEPTEMBER, 1990.



BETTY EASLEY, Commissioner
and Prehearing Officer

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