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 ORDER NO. PSC-97-1273-FOF-EU ISSUED: October 15, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER DETERMINING APPROPRIATE COST ALLOCATION

BY THE COMMISSION:

In August and October of 1996, Tampa Electric Company (TECO or Company) entered into two long term, wholesale electricity sales agreements with the City of Lakeland (Lakeland) and the Florida Municipal Power Agency (FMPA), respectively.

Service for the FMPA contract began on December 16, 1996, and is scheduled to continue through March 15, 2001. The original contracted base capacity was 35 megawatts (MW) in 1997 and was scheduled to increase to 80 MW on December 16, 1999. FMPA has since requested additional amounts of capacity and is now scheduled to receive 50 MW in 1997 increasing to 150 MW in December, 1999. Capacity is available to FMPA any time generating resources from either Big Bend 2 or 3, or Gannon 5 or 6 are available. Upon mutual consent of FMPA and TECO, supplemental capacity may be provided and will be served at an equivalent priority as the original contracted capacity.

TECO began providing service to Lakeland on November 4, 1996, for 10 MW of firm peaking capacity. Service is scheduled through September, 2006. Capacity will be delivered from TECO's system at

the same priority as TECO's firm, native load customers. In addition, at TECO's discretion, it will supply up to 10 MW of supplemental service to Lakeland.

An issue was raised at the February, 1997, fuel hearing regarding the manner in which the costs and revenues associated with TECO's wholesale sales to FMPA and Lakeland should be treated for cost recovery purposes. In order to establish the retail regulatory treatment of the costs and revenues associated with these sales, the Commission established Docket No. 970171-EU and held an evidentiary hearing on June 11, 1997. A Recommendation was filed on July 24, 1997, for consideration at the August 5, 1997, Agenda Conference. The matter was deferred until the September 23, 1997 Agenda Conference in order to allow the parties to present oral argument. Having considered the all the evidence and the arguments of the parties, we now render our decision.

Commission Jurisdiction

The Office of Public Counsel raised the issue of whether we would exceed our jurisdiction if we were to allow Tampa Electric Company to earn a return through retail rates for the wholesale sales to the Florida Municipal Power Agency and the City of Lakeland. We have jurisdiction to regulate the returns earned by public utilities through retail rates and thus have not exceeded our jurisdiction in this proceeding.

In its Brief, TECO argued that the cases cited by OPC as authority for preemption do not apply to the instant proceedings. In its Brief, FIPUG argued that the we have jurisdiction over the manner in which TECO's wholesale sales impact retail customers. OPC's extensive argument considered three primary points: (1) based on established federal case law, we have required jurisdictional separation because to do otherwise would permit the retail jurisdiction to subsidize the wholesale jurisdiction;(2) we are preempted from allowing wholesale sales in the retail jurisdiction by federal law; and (3) permitting the wholesale sales in the retail jurisdiction would violate the 'filed rate' doctrine. We agree with TECO and FIPUG for the reasons set forth in their briefs as well as for the following reasons. First, our jurisdiction to regulate the returns earned by public utilities is well established by statute and supported by the case law. Second, contrary to the assertions set forth in OPC's Brief regarding our policy to separate wholesale sales, there are several types of wholesale sales which are currently retained in the retail jurisdiction.

Finally, the issues in these proceedings involve the treatment of revenues from wholesale sales, not the rates charged for those sales. As such, we are not preempted by federal law, nor is there a violation of the filed rate doctrine.

Our jurisdiction to regulate the returns earned by public utilities is established by statute. Section 366.01, Florida Statutes, enunciates our general jurisdiction: "The regulation of public utilities as defined herein...shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose." Section 366.041(1)establishes our specific jurisdiction over returns earned by public utilities.

> In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered, the cost of providing such service and the value of such service to the public...provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings.

Our plenary jurisdiction over the returns earned by public utilities is well supported by the case law. In Gulf Power Company v. Wilson, 597 So. 2d 270 (Fla. 1992), our authority and broad discretion over returns earned by utilities is clearly enunciated:

> It is well established that all a regulated public utility is entitled to is "an opportunity to earn a fair or reasonable rate of return on its invested capital". What constitutes a fair rate of return for a utility depends upon the facts and circumstances of each utility, and this Court has expressly recognized that the Commission must be allowed broad discretion in setting a utility's appropriate rate of return. (citations omitted)

579 So. 2d 270, 273.

The Gulf Power decision is indicative of the deference the Supreme Court of Florida grants with respect to our authority to fix fair,

just and reasonable rates and a reasonable return on investment. "This Court has consistently recognized the broad legislative grant of authority which these statutes confer and the considerable license the Commission enjoys as a result of this delegation." Citizens of the State v. Public Service Commission, 425 So. 2d 534, 540 (Fla. 1982).

The specific question of a public utility's earning a return through retail rates from wholesale sales has not been addressed by Florida's courts. However, the Supreme Court has approved our treatment of the profits (returns) of economy energy sales in the retail jurisdiction. Citizens of the State v. Public Service Commission, 464 So. 2d 1194 (Fla. 1985). Economy energy sales are wholesale sales of electricity. The treatment proposed was that the selling utilities be allowed to retain 20% of the economy sales profits for their shareholders and that the remaining 80% be credited to ratepayers through the fuel and purchased power cost recovery clauses. In affirming our order, the Court stated:

> As we have repeatedly stated, we will not reweigh or reevaluate the evidence presented to the commission, but will examine the record only to determine whether the order complained of meets the essential requirements of law and whether the agency had available to it competent substantial evidence to support its findings. We find that the commission clearly had substantial competent evidence to support its order. (citations omitted)
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> Id.

Public Counsel was the appellant in the economy sale profits litigation. A review of the Public Counsel's extensive brief filed with the Supreme Court in that case reveals that the issue of the our jurisdiction to allow a return from wholesale sales was not raised at that time.

Public Counsel's arguments in the instant case may be summarized as follows: (1) we have long required jurisdictional separation; (2) we are preempted from allowing the wholesale sales to be included in retail jurisdiction by the Federal Power Act; and (3) permitting the wholesale sales in the retail jurisdiction would indirectly infringe on the FMPA and Lakeland rates established by the Federal Energy Regulatory Commission. Each of the arguments is addressed in turn.

Public Counsel's first contention that we have required jurisdictional separations since 1967, does not fully represent our decisions or policy on the subject. The 1967 decision upon which the assertion is based does not affirmatively require jurisdictional separations. In a case of first impression, we struggled with the interpretation of the then-current federal case law on the subject. Many of the cases cited in that order are recounted in Public Counsel's brief in this docket. The decision, which ultimately required separation was permissive, not mandatory.

> From the various cases we have discussed herein, we must conclude that where two services are conducted by the same public utility--one regulated and the other unregulated--it is proper, *although it may not be essential*, for the ratemaking body to make a segregation or separation of the investments, revenues and expenses assignable to the different services. This, we believe, is the preferable practice in order that the regulatory agency may be sure that the rates over which it has jurisdiction are fair and reasonable, and that the customers of the regulated service are not subsidizing the customers of the unregulated service.

In Re: General Investigation Of The Rates, Charges, And Earnings Of Florida Power Corporation, As Well As A Review And Re-evaluation Of The Rate-making Practices, Policies, And Philosophies Under Which Said Public Utility Operates And Prices Its Service, For The Purpose Of Making Whatever Adjustments, If Any, May Be Appropriate And In The Public Interest. Docket No. 7767-EU, Order No. 4139, March 19, 1967, pg. 61. Our subsequent practice permits a variety of wholesale sales in the retail jurisdiction. As stated above, wholesale economy energy sales are jurisdictional sales. Likewise, Schedule A and B, short term, emergency wholesale sales are in the retail jurisdiction. In addition, Schedule J negotiated non-firm wholesale sales are also in the retail jurisdiction.

Public Counsel's argument that we are preempted from allowing the wholesale sales to be included in retail jurisdiction by the Federal Power Act is not supported by the evidence presented in this docket or the federal legislation pertaining thereto. The Federal Power Act, 16 U.S.C. 791a et seq. specifically reserves retail jurisdiction for the states:

> **(a) Federal regulation of transmission and sale of electric energy.** It is hereby declared that the business

> of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation...and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824(a).

What is expressly preempted by the Federal Power Act is wholesale ratemaking by the states. The FMPA and Lakeland wholesale transactions were approved by the Federal Energy Regulatory Commission (FERC). The reasonableness of the wholesale rates TECO is charging its wholesale customers is not an issue in this docket. In addition, there is no evidence in the record of these proceedings to indicate that the rates approved by FERC and charged by TECO for the wholesale electricity will be affected by the decision of the Commission. The sole issue before us is the retail treatment of the *costs and revenues* generated by the sales. No aspect of the instant proceedings encroached upon the express Federal rate jurisdiction.

As stated, our decision regarding the treatment of wholesale revenues in this docket is not expressly preempted by the Federal Power Act. Likewise, there is no evidence to support a finding of implied preemption. Preemption may be implied where a scheme of federal regulation is so pervasive that enforcement of state laws on the same subject is precluded. In addition, preemption may be implied where federal law conflicts with state law so as to render compliance with both impossible. United Distribution Companies v. Federal Energy Regulatory Commission, 88 F. 3d 1105, 1109 (D.C. Cir. 1996) *quoting* Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 109, 203-04 (1983). Neither type of implied preemption appear to be at work in the instant proceedings. Our decision regarding the treatment of the revenues of the FMPA and Lakeland sales will be enforceable under state law. In addition, TECO will be able to comply with FERC's wholesale rate decision concomitantly with its compliance with our revenue decision.

Public Counsel's third argument, the "filed rate" doctrine, is not applicable. The filed rate doctrine requires that interstate power rates established through Federal Energy Regulatory Commission be given full and binding effect by state utilities commissions in setting intrastate rates. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986). The rates set by FERC for the FMPA and Lakeland sales are not an issue in this proceeding. Additionally, there is no evidence in the record suggesting any impact on the FMPA and Lakeland rates resulting from the Commission's treatment of the revenues generated by the sales.

In sum, we have jurisdiction to allow Tampa Electric Company to earn a return through retail rates for its wholesale sales to the Florida Municipal Power Agency and the City of Lakeland. Our jurisdiction arises from Florida Statutes Chapter 366 and is not preempted by the Federal Power Act.

Applicability of Stipulation

In post-hearing briefs, both the Office of Public Counsel (OPC) and the Florida Industrial Power Users Group (FIPUG) raised issues concerning the applicability of the Stipulation approved pursuant to Order No. PSC-96-1300-S-EI, issued October 24, 1996, in Docket 960409-EI. Because the Stipulation was not directly addressed during the hearing, we requested that the parties present oral argument on the limited issue of the applicability of the Stipulation. Consideration of the item was postponed to the September 23, 1997, Agenda Conference to allow all parties to present oral argument on this issue. Specifically, Section 5F of the Stipulation states:

> 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.

At the September 23, 1997, Agenda Conference, TECO argued that the FMPA and Lakeland sales were unique because they contained the provision for supplemental sales. The ability to purchase supplemental capacity does not change the fact that the firm portion of the contract is for a period exceeding one year and requires a commitment of capacity. This is a difference without a distinction. Order No. PSC-93-0165-FOF-EI, Docket No. 920324-EI, required that TECO's long term wholesale sales be separated at

average embedded cost based on the separation studies filed in those proceedings. We find that the FMPA and Lakeland sales fall within the category of sales contemplated by the Stipulation, and the capital and O&M costs associated with these sales shall be separated from the retail jurisdiction at average embedded cost. This treatment is consistent with the procedure approved in Docket No. 920324-EI. We note that the Stipulation is silent as to the treatment of fuel costs for these types of sales.

Fuel Costs

In Order No. PSC-97-0262-FOF-EI, issued March 11, 1997, in Docket No. 970001-EI, we agreed to deviate from our traditional accounting treatment of fuel costs for these types of sales in situations where it could be demonstrated that the sales provided overall benefits to the utility's retail ratepayers. Because the capital and O&M costs associated with the FMPA and Lakeland sales are to be separated from the retail jurisdiction, the retail customers' cost burden will decrease. Consequently, the potential for refunds will increase in accordance with the Stipulation. Therefore, we believe that the sales will provide overall benefits to TECO's retail ratepayers as described in Order No. PSC-97-0262-FOF-EI. As such, we find that TECO shall credit its Fuel Clause with an amount equal to the system incremental fuel cost resulting from the FMPA and Lakeland sales. This will ensure that TECO's Fuel Cost Recovery Clause will be made whole. TECO shall document how the incremental fuel costs are calculated in its fuel adjustment filings.

SO_2 Allowances

By increasing production to accommodate the additional loading requirements of the FMPA wholesale sales, TECO's generating units will emit additional tonnages of sulfur dioxide. This additional cost would normally be reflected in TECO's Environmental Cost Recovery Clause (ECRC). To prevent any negative effect of the sales on existing retail customers, TECO shall credit its ECRC with all incremental SO_2 allowance costs incurred as a result of making the FMPA sale based on current market conditions.

With respect to the proper accounting treatment, TECO must document and identify the incremental SO_2 allowance costs and the quantity of SO_2 allowances retired during each period as a separate line item within TECO's ECRC filings. In addition, TECO must also

provide documentation supporting its SO_2 allowance replacement cost calculations, which will be subject to audit during ECRC proceedings.

Revenue and Cost Reconciliation

We have found that the Stipulation requires separation of the capital and O&M costs associated with the sales to FMPA and Lakeland. Accordingly, all non-fuel revenues will be retained by TECO and serve to support the additional wholesale cost responsibility resulting from the separation. In addition, we believe that the sales will provide overall benefits to TECO's retail ratepayers. As such, we find that TECO shall credit its Fuel Clause and Environmental Cost Recovery Clause with amounts equal to the system incremental costs resulting from the FMPA and Lakeland sales. It is anticipated that the revenues received in excess of the non-fuel revenues will be less than the incremental costs resulting from the FMPA and Lakeland sales. If this occurs, TECO may reduce retail operating revenues, for monthly surveillance purposes, by an amount equal to the shortfall. This will ensure that TECO's cost recovery clauses will be made whole, as well as being consistent with our requirement to separate these sales. We acknowledge that using retail operating revenues to make up this difference will reduce the potential for a refund under the Stipulation. However, the benefit TECO's retail ratepayers will derive from the separation of capital and O&M costs is greater than the reduction in retail operating revenues due to anticipated shortfalls. TECO shall document this shortfall, if any, with its fuel adjustment filings.

Consistent with Order No. PSC-97-0180-PHO-EI, Docket No. 970001, issued February 18, 1997, the accounting treatment discussed within the body of this order shall be applied back to the time when Tampa Electric Company began receiving revenues under the FMPA and Lakeland wholesale contracts.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that TECO shall separate capital and O&M costs associated with the wholesale sales made to FMPA and Lakeland at average embedded cost in accordance with the terms of the Stipulation approved by Order No. PSC-96-1300-S-EI. It is further

ORDERED that TECO shall credit its Fuel Clause with the system incremental fuel cost associated with the FMPA and Lakeland sales. In addition, TECO shall document how the incremental fuel costs are calculated in its fuel adjustment filings. It is further

ORDERED that TECO shall credit its Environmental Cost Recovery Clause with all incremental SO_2 allowance costs incurred as a result of the FMPA and Lakeland sales based on current market conditions. TECO shall follow the accounting treatment discussed within the body of this order. It is further

ORDERED that in the event revenues received in excess of the non-fuel revenues are less than the incremental costs resulting from the FMPA and Lakeland sales, TECO may reduce retail operating revenues by the amount of the shortfall. TECO shall document this shortfall, if any, with its fuel adjustment filings. It is further

ORDERED that consistent with Order No. PSC-97-0180-PHO-EI, Docket No. 970001-EI, issued February 18, 1997, the accounting treatment approved within the body of this order shall be applied back to the time when Tampa Electric began receiving revenues under the FMPA and Lakeland wholesale contracts. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 15th day of October, 1997.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.