

FLORIDA PUBLIC SERVICE COMMISSION

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Tallahassee, Florida 32399-0850

M E M O R A N D U M

APRIL 6, 1995

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PALECKI) *mp JS*  
DIVISION OF AUDITING AND FINANCE (SLEMKEWICZ, P. LEE, *ALM*  
MAILHOT, MAURY, *198*  
DIVISION OF ELECTRIC AND GAS (BASS, TRAPP) *RLT DM JDJ*

RE: DOCKET NO. 950379-EI - INVESTIGATION INTO EARNINGS FOR  
1995 AND 1996 OF TAMPA ELECTRIC COMPANY.

AGENDA: 04/18/95 - REGULAR AGENDA  
DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY  
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950379.RCM

CASE BACKGROUND

On March 1, 1995, Tampa Electric Company (TECO) submitted its 1995 Forecasted Earnings Surveillance Report in compliance with Rule 25-6.1353, Florida Administrative Code. Per the report, TECO forecasted an achieved return on equity (ROE) of 14.28% for 1995. This exceeds the top of TECO's currently authorized ROE range (10.35% to 12.35%, with an 11.35% midpoint). The 1.93% in excess of the top of the range represents approximately \$25.8 million of excess revenues for 1995. Subsequently, additional data was requested and received for 1996 that indicated an achieved ROE of 13.81%, which represents additional excess revenues of approximately \$21.9 million. For 1994, TECO reported an actual achieved ROE of 11.26%, which included a one-time restructuring charge of \$21.3 million. If the restructuring charge is excluded, TECO's 1994 achieved ROE would be 12.87%.

Due to concerns over the high level of TECO's forecasted earnings, a meeting was scheduled on March 22, 1995, to explore alternatives regarding the possible disposition of the excess

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earnings. TECO, the Office of the Public Counsel, FIPUG and the Staff participated in the discussions at the meeting. At this and subsequent meetings, various proposals have been proffered concerning the disposition of the excess revenues. To date, no mutually agreeable proposal has been presented.

In order to protect the ratepayers' interests while the discussions continue, the following recommendation is being presented.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission order Tampa Electric Company to hold 1995 earnings in excess of the maximum of the range of its authorized rate of return on equity (12.35%) under bond or corporate undertaking subject to refund?

**RECOMMENDATION:** Yes. Where the company itself has projected substantial overearnings for 1995, the Commission should order TECO to hold earnings in excess of the maximum of the range of its authorized rate of return on equity (ROE), under bond or corporate undertaking subject to refund.

**STAFF ANALYSIS:** Tampa Electric Company (TECO) has informed staff that it has projected substantial overearnings for 1995. This docket addresses the core issue of whether the Commission has the inherent authority to attach jurisdiction over utility overearnings on a going forward basis.

The action staff recommends is preliminary in nature. If staff's recommendation is adopted, the Commission still has a duty to conduct a fair hearing, after actual 1995 results are known, to determine the amount and appropriate disposition of TECO's overearnings. United Telephone Co. of Florida v Beard, 611 So 2d 1240 (Fla 1993). Staff's recommendation at this time is only that TECO, based on its own data, be required to hold earnings in excess of the maximum of its ROE range under bond or corporate undertaking subject to refund. The questions of whether a refund will be ordered, and the amount of the refund, should be addressed later, after a hearing.

The Florida Legislature has declared the Commission's regulation of public utilities to be in the public interest, and has deemed Chapter 366, Florida Statutes, to be an exercise of the police power of the state for the protection of the public welfare with all provisions of Chapter 366 to be liberally construed for the accomplishment of that purpose. See Section 366.01, Florida Statutes. In addition, Section 366.07, Florida Statutes, provides that whenever the Commission finds the rates proposed, demanded or

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collected by any public utility unjust, unreasonable, or excessive, the Commission shall determine and fix fair and reasonable rates to be imposed in the future.

The Commission's inherent authority to prevent detriment to ratepayers resulting from unjust or unreasonable earnings has been well recognized by the courts. In United Telephone Co. of Florida v Beard, supra, the Supreme Court of Florida stated:

We agree with the Commission that the unusual factual circumstances of this case, namely the length of time since the company's last full rate proceeding and the drop in interest rates, would have resulted in "unjust, unreasonable, [and] unjustly discriminatory" earnings for United, to the detriment of its ratepayers. §364.14(1), Fla. Stat. (1989). Accordingly, we find that the Commission had the inherent authority to conduct a limited proceeding in this case, even before specific legislation conferred the express authority to do so. Cf. Southern Bell Tel. & Tel. Co. v Bevis, 279 So 2d 285 (Fla. 1973) (Court approved Commission's inherent authority to make interim rate increase). 611 So 2d at 1243

Section 364.14, Florida Statutes, relied on by the Court in United Telephone Co. of Florida v Beard, is the telecommunications equivalent to Section 366.07, Florida Statutes. Section 366.07 confers to the Commission the same broad grant of authority over electric and gas utility rates that Section 364.14 confers over telecommunications rates. Both statutes contain language allowing the Commission to protect ratepayers from unjust and unreasonable rates.

The case of Southern Bell v Bevis, supra, referred to in the passage quoted above, predates both the file and suspend statute (enacted in 1974) and the interim statute (enacted in 1980). In that case, the Court rejected the Commission's argument that it could not set rates without a comprehensive review, stating that nothing precluded the Commission from subjecting the increase to a refund provision. The Court found that a range of alternatives suitable to the particular circumstances of the case was available to the Commission, including the imposition of a reasonable refund provision to protect both the company and its customers.

In United Telephone v Mann, 403 So 2d 962 (Fla. 1981), the Court upheld the Commission's order subjecting earnings to refund down to the authorized rate of return, pursuant to Section 364.14, Florida Statutes (the telecommunications equivalent to Section 366.07, Florida Statutes). The Court stated that the Commission

could order moneys held subject to refund, " upon finding that a company is earning revenues in excess of its maximum allowable rate of return." 407 So 2d at 966. The Court relied on the Commission's inherent authority, outside of the file and suspend and interim statutes, to capture revenues subject to refund. The court found a broad range of alternatives (including capturing money subject to refund), that did not necessarily flow from the file and suspend and interim statutes, to be inherent in the Commission's general rate setting authority set forth in Section 364.14, Florida Statutes.

In Citizens v Public Service Commission, 425 So 2d 534 (Fla., 1982), the Court indicated that it did not intend a narrow reading of United Telephone v. Mann, supra. The court stated that it has consistently recognized the broad legislative grant of authority conferred upon the Commission and the considerable license the Commission enjoys as a result of that delegation. Citizens v Public Service Commission, reaffirmed the sentiment expressed in the 1973 Southern Bell v Bevis case: the Commission has a broad range of discretion, which remains unimpaired with the passage of the interim and file and suspend statutes, to protect against unreasonable rates, even to the point of conditioning revenues on the outcome of future hearings. Where a utility itself has projected substantial overearnings, the Commission definitely has the inherent authority to protect ratepayers by requiring the utility to hold earnings in excess of the maximum of its ROE range, under bond or corporate undertaking subject to refund.

Attaching jurisdiction over a portion of current rates believed to be excessive will not harm the utility. A hearing will provide ample opportunity to challenge both the factual and legal basis for any revenues held subject to refund. No one is harmed if the Commission should later determine that it must remove the refund condition without ordering any refunds. The utility is not harmed if it has a full opportunity to present its case and is put on notice that its revenues are not unconditional.

Staff therefore recommends that the Commission order Tampa Electric Company to hold 1995 earnings in excess of the maximum of the range of its authorized rate of return on equity (12.35%) under bond or corporate undertaking subject to refund. If staff's recommendation is adopted by the Commission, a hearing should be conducted, after 1995 results are known, to determine the amount and appropriate disposition of TECO's overearnings.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open until staff has reviewed Tampa Electric Company's historic earnings data for 1995, and the Commission has determined the amount and appropriate disposition of overearnings.

**STAFF**

**ANALYSIS:** Pursuant to United Telephone Co. of Florida v Beard, 611 So 2d 1240 (Fla 1993), the Commission should conduct a hearing, after 1995 results are known, to determine the amount and appropriate disposition of TECO's overearnings.