

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Declaratory) DOCKET NO. 951347-PU
Statement Regarding Public) ORDER NO. PSC-95-1623-DS-PU
Utility Status of Affiliates) ISSUED: December 29, 1995
Involved in Gas Supply)
Arrangements, by Tampa Electric)
Company)

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On November 9, 1995, Tampa Electric Company (Tampa Electric or the Company) filed a petition for declaratory statement. The petition asked us to state that the gas supply arrangements for Tampa Electric's Polk Power Station will not subject the Company's proposed gas supply affiliate to our regulation as a public utility engaged in supplying gas to or for the public.

The proposed gas supply affiliate will be a coal gasification system located adjacent to the Polk Power Station, will sell gas solely to Tampa Electric for its use in Polk Power Station Unit No. 1 and will be owned in part by Tampa Electric, by means of an ownership interest not exceeding 50%, together with other investors. The affiliate, which will have no transmission or distribution facilities, will be organized for business reasons and tax considerations. Petition, p. 2-3.

Tampa Electric notes that customers will benefit from the reallocation of risks associated with the coal gasification system achieved through the formation of the affiliate and the reduction in the Company's revenue requirements resulting from the sale of 50% of the gasification system. Further reductions in revenue requirements will result from the Company's having at least 50% of the Section 29 tax credits and a potentially shorter tax life on

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the gasification assets. Petition, p. 4. The Company also asserts that our regulatory jurisdiction over Tampa Electric, including the Company's purchases of gas supplies from the affiliate, eliminates any need on our part to regulate the affiliate.

Petitioner has included, in Attachment 1, three alternative diagrams of the proposed entity, which differ only in that the first alternative includes a specific entity as a limited partner and part of the general partner whereas the second alternative includes that entity, as well as other investors, as limited partners and an unspecified investor as part of the general partner. In the third alternative, the general partner is a wholly-owned subsidiary of Tampa Electric.

The Company presents three theories as to why the gas supply affiliate should not be subject to our regulatory jurisdiction as a public utility:

1) Relying on an Attorney General opinion, the Company asserts that an entity selling gas exclusively to a public utility regulated by us is not itself supplying gas to or for the public and is not a public utility.

2) The affiliate and Tampa Electric have a "unity of interests" such that no sale of gas to the public is at issue. In support, the Company relies on Petition of Seminole Fertilizer, Docket No. 900699-EQ, Order No. 23729 (December 7, 1990).

3) Citing the statutory exemption in Section 366.02(1) of entities selling natural gas which do not own or operate transmission or distribution facilities from the definition of public utility, the Company reasons that its gasification system should also be exempt.

DISCUSSION

In Attorney General Opinion 051-440 (December 5, 1951), the question of whether a company selling gas exclusively to public utilities regulated by us was a "public utility" was responded to as follows:

Since this proposed corporation here being considered would not...be supplying manufactured gas, oil, or other petroleum products to or for the public, but would supply such products only to other corporations or companies which themselves would be subject to the jurisdiction of the

Commission, I do not believe that such proposed corporation would come within the intended scope of the law, nor within the definition of "public utility" as contained in the law. [e.s.]

We believe that this is adequate precedent for issuance of the declaratory statement sought here. We note, in this connection, that this precedent parallels the explicit exemption now provided for in Section 364.02(12), Florida Statutes, to the effect that entities providing telecommunication facilities exclusively to telecommunication companies certificated by us are not themselves telecommunication companies subject to our regulatory jurisdiction.

As stated at p. 3 of the petition in this case,

There is no policy reason to apply the regulatory protection of Chapter 366 to the project entity created by this transaction given the existing jurisdiction that this Commission has over Tampa Electric. The Commission will retain full regulatory oversight over the project entity's sale of gas to Tampa Electric through the regulation of the rates of Tampa Electric.

The validity of this reasoning, as reflected in such disparate sources as the above-cited 1951 Opinion of the Attorney General and the 1995 revision of Chapter 364, extends, in our view, to the facts of this case.

In arriving at this conclusion, we considered the other arguments offered by petitioner, but found them less persuasive. Though it is unnecessary, in view of the preceding recommendation, to discuss these other asserted grounds extensively, we would note the following:

First, it is not clear that the entity at issue here would have the "unity of interest" with Tampa Electric that Seminole Sub L.P. was found to have with Seminole. In the latter instance, a wholly-owned subsidiary of Seminole was the general partner of Seminole Sub L.P., whereas in this case, the general partner of the gas supply entity will be shared by Tampa Electric and another investor. Tampa Electric's third alternative configuration, Attachment I, does provide for a general partner wholly owned by that company, thus more closely tracking Seminole.

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Second, the fact that a seller of natural gas which had neither transmission nor distribution facilities would be exempt under Section 366.02(1), Florida Statutes, would not clearly encompass this case, where petitioner concedes that the product of the coal gasification at issue will not be natural gas. Petition, p. 11.

Because, pursuant to Attorney General Opinion 051-440, the gas supply affiliate will not be supplying gas to or for the public or be subject to regulation as a public utility under Section 366.02(1), Florida Statutes, we believe that it is unnecessary to reach any ultimate conclusion as to the asserted alternative bases for exemption.

In view of the above it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's Petition for Declaratory Statement is granted. It is further

ORDERED that this docket be closed.

BY ORDER of the Florida Public Service Commission this 29th day of December, 1995.

BLANCA S. BAYÓ
Director of Records & Reporting

by: Kay J. Lynn
Chief, Bureau of Records

(S E A L)

RCB

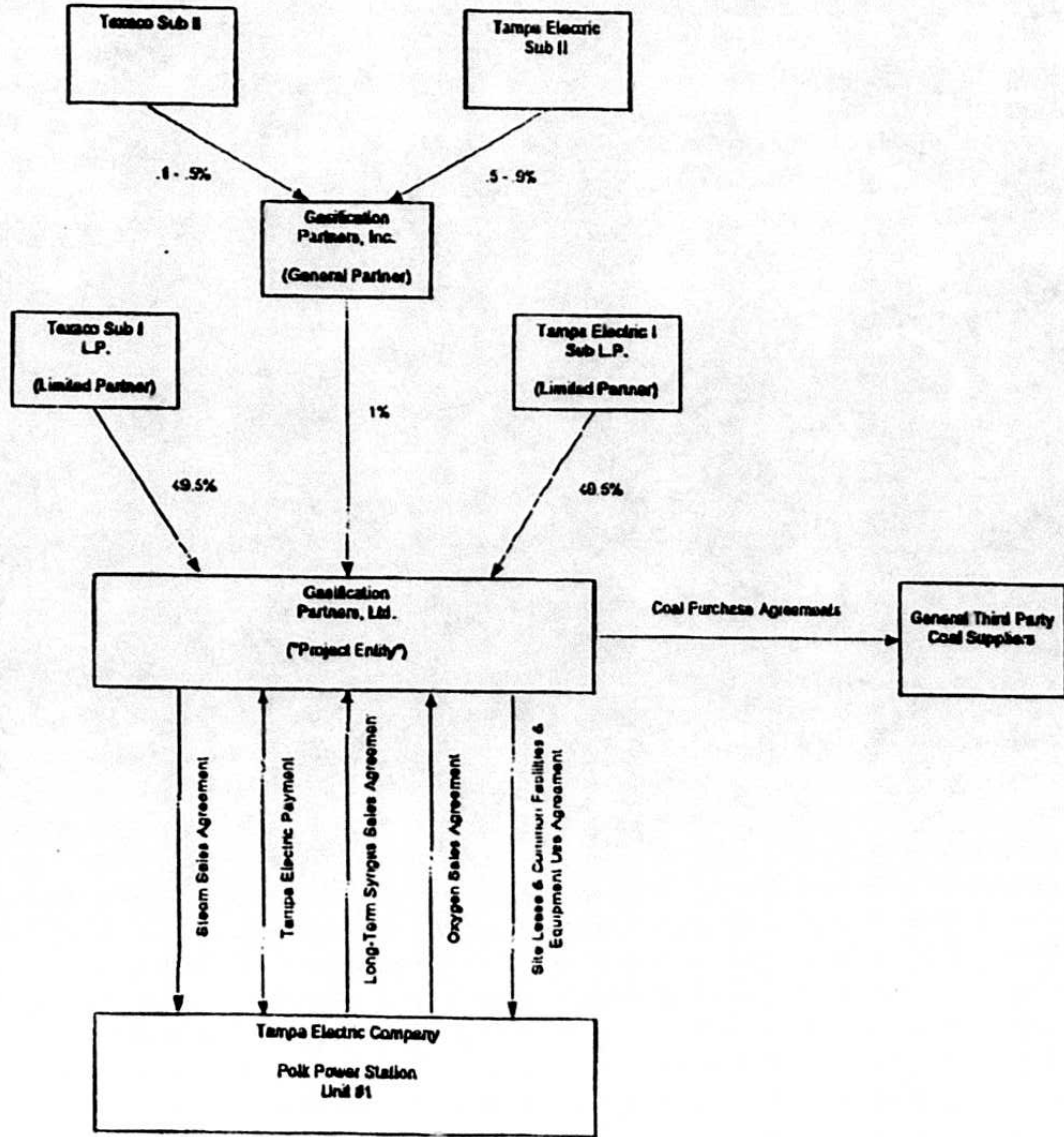
NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 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 or sewer 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

Proposed Ownership Structure
and Synthesis Gas Sale Arrangement

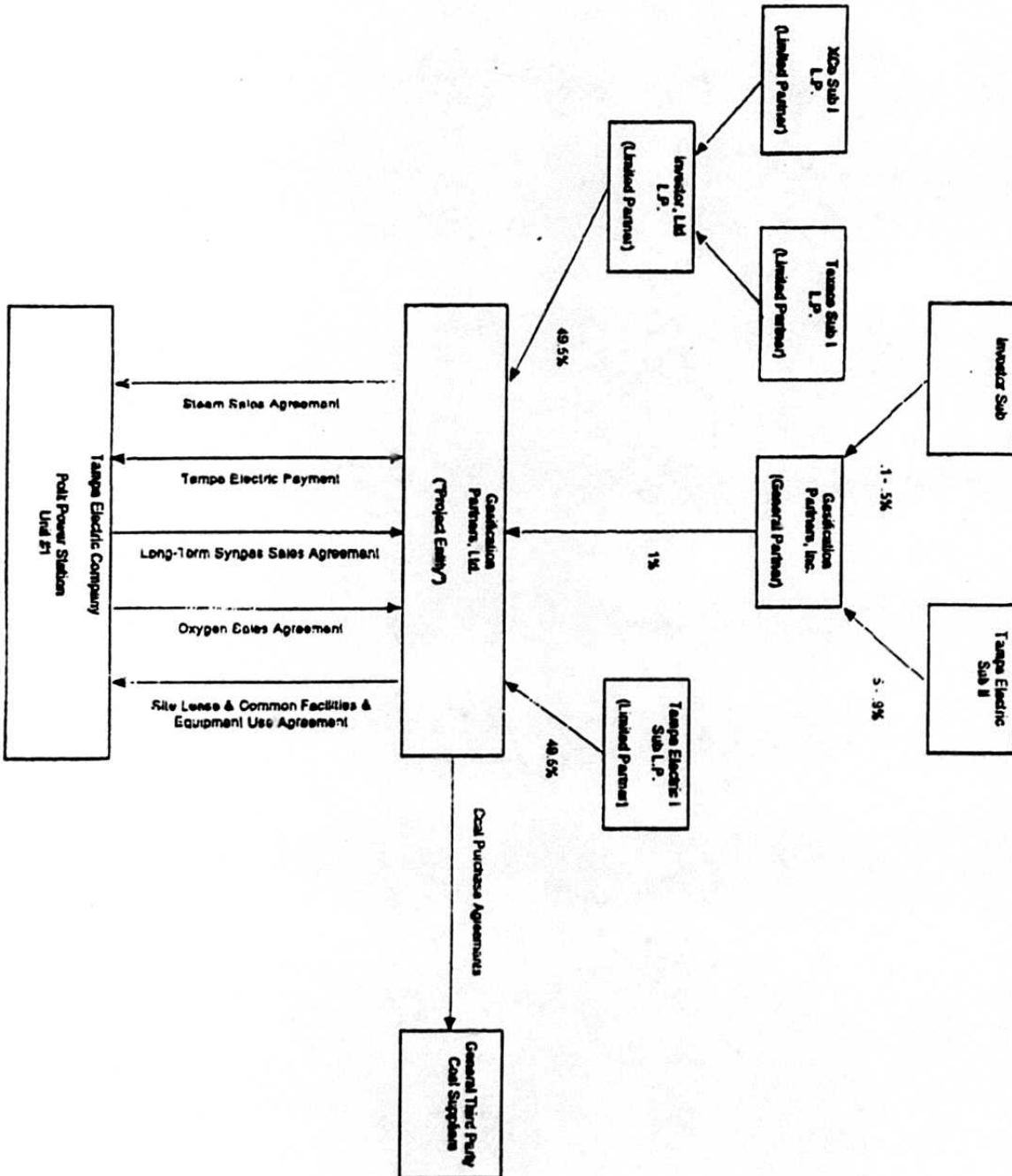
Alternative I



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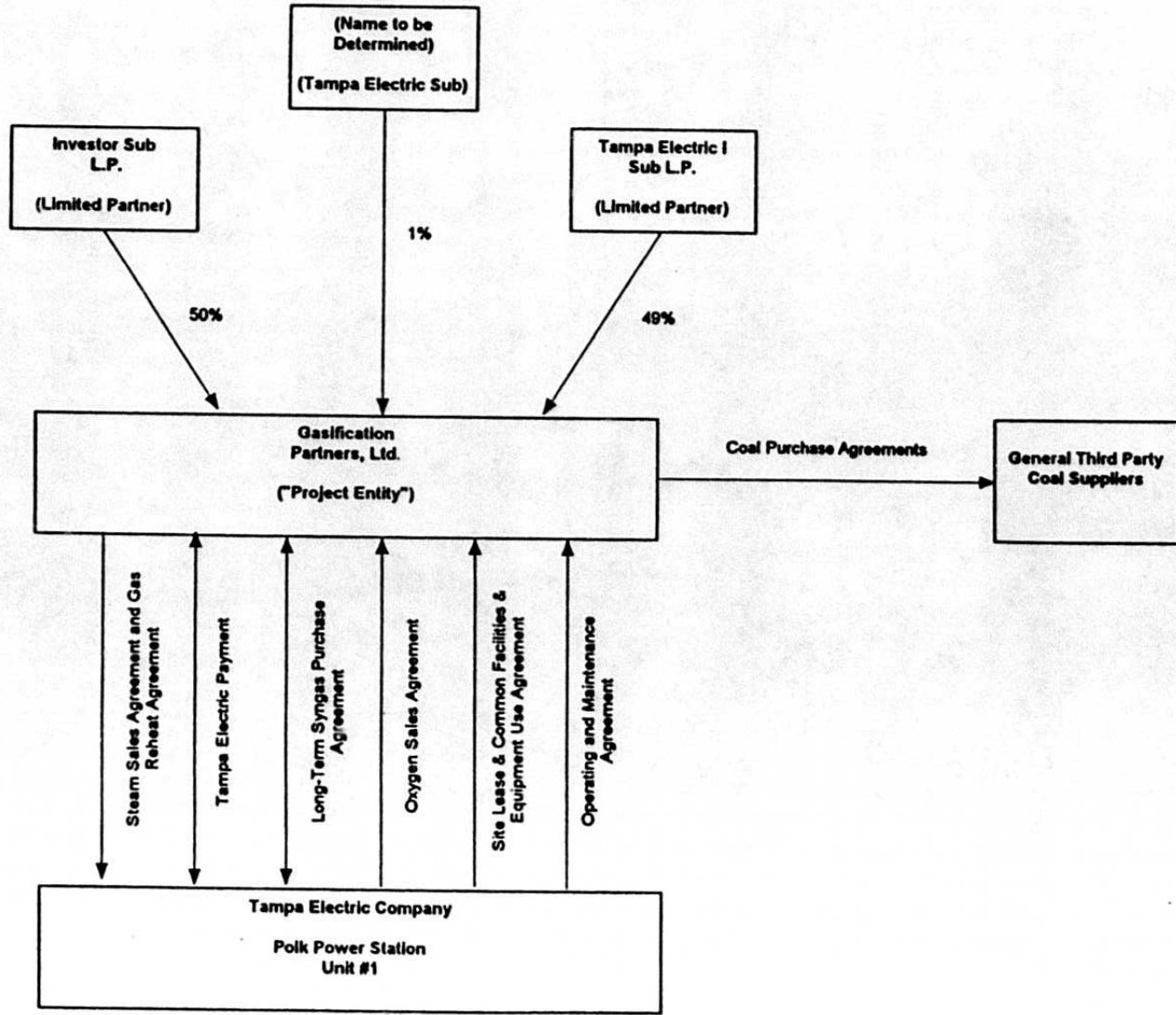
Proposed Ownership Structure
 and Synthetic Gas Sale Arrangement
 Alternative II



**Proposed Ownership Structure
and Synthesis Gas Sale Arrangement**

(November 30, 1995)

ATTACHMENT 1



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