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October 2, 1998

VIA HAND DELIVERY

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records and Reporting
Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 980693-EI

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of the Florida Industrial Power Users Group's Post-Hearing Brief in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/pw
Encls.

10861 OCT-2 98

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Tampa Electric Company for Approval of Cost Recovery for a New Environmental Program, the Big Bend Units 1 and 2 Flue Gas Desulfurization System.	)))))	Docket No. 980693-EI Filed: October 2, 1998

THE FLORIDA INDUSTRIAL POWER USERS GROUP'S

POST-HEARING BRIEF

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PRELIMINARY STATEMENT

Pursuant to rule 25-22.056(1), Florida Administrative Code, the Florida Industrial Power Users Group files its Post-Hearing Brief. As required by rule 25-22.056(3)(a), Florida Administrative Code, FIPUG has also filed its Post-Hearing Statement of Issues and Positions, which contains a summary statement of the positions developed and supported in this brief.

The following abbreviations are used in this brief. The Florida Industrial Power Users Group is referred to as FIPUG. Tampa Electric Company is referred to as TECo. The Florida Public Service Commission is referred to as the Commission. The Public Counsel is referred to as OPC or Public Counsel. The Legal Environmental Assistance Foundation is referred to as LEAF. Flue Gas Desulfurization is referred to as FGD, The Clean Air Act Amendments are referred to as CAAA. References to the transcript are designated (Tr._).

FIPUG has provided a position statement on all of the issues in its Post-Hearing Statement of Issues and Positions, but does not address all issues in this brief.

SUMMARY OF ARGUMENT

> COMMISSIONER CLARK: . . . let's suppose there are overearnings in 2000. Is it your company's position we should address those overearnings as part of an overearnings investigation and that we should allow this recovery through the cost recovery clause, or could we deny cost recovery because you're overearning?
>
> WITNESS HERNANDEZ: To tell you the truth I'm not sure which one comes first, absent of knowing what our position, in fact, is going to be. And my assumption is that that review would occur, in fact, after the year, in terms of how that year settled out; that the appropriate thing to do would be perhaps to go ahead and recover the full amount of the costs associated with the project, and then subsequent to the -- an audit review, perhaps, a review of the earnings for year 2000, that the Commission can take whatever action they deem appropriate.
>
> Q (By Mr. McWhirter) Your quoted language used the phrase "fair return." As a regulatory representative of your company, what does that mean to you?
>
> A We have a -- an amount, if you will, allowed in terms of the allowed rate of return, which I understand is at 12.75% return on equity, which is the top point of the range, and that we should be allowed to earn all the way up to that range. That would constitute in that sense, given that cap, a fair rate of return.
>
> Q If you were earning 14%, would that be considered a fair return, in your opinion?
>
> A I would say that's even a fairer, more fairer return.

(Tr. 214-215).

This corporate philosophy, as articulated above, misapprehends the law and common sense.

ARGUMENT

Issues 1, 4, & 5

Relating to the Adequacy and Content of the Plan

In most ways, the TECo petition and evidence filed in this docket is like the Bay of Pigs Invasion, it is too little, too late and unsupported. In other ways, it is like Dewey's claim of victory in the 1948 presidential campaign, a little early and not factually sound.

The enigma arises because TECo misinterprets the laws it promotes. Two sections of the Florida statutes are involved in this case, §366.825, *Florida Statutes*, and its related section § 366.8255. The former section is a planning provision, the latter is a collection mechanism. In its petition, TECo attempts to benefit from a combination of the two, but satisfies the requirements of neither.

TECo failed to supply the minimum information requirements set out in § 366.825, *Florida Statutes*, the planning section. This section directs a company seeking plan approval to provide at a minimum its plan for both SO2 <u>and</u> NOx removal; the "**[a]chievable emissions reductions and methods for monitoring emissions;**" and "**[t]he estimated cost of implementation of the public utility's compliance plan to the utility's customers**". When the Commission has this information, its responsibility is "**to determine whether such plans, the costs necessarily incurred in implementing such plans, and any effect on rates resulting from such implementation are in the public interest.**" The eleventh hour plan presented by TECo doesn't give the Commission the minimum information it must have before it can evaluate the plan.

1. Why is the plan too little and too late?

The Clean Air Act was enacted by Congress in 1955 to deal with the perceived problem of acid rain. Although the 1990 Amendments significantly alter and add to the regulatory requirements of the Clean Air Act, the basic framework and procedural aspects of today's Act were established by 1970 and 1977 Amendments.[1] It was designed to be an effort by federal, state, regional and local government to identify new sources of pollution and to prevent significant deterioration of existing sources.

The principal pollutants being emitted by electric utilities are sulphur dioxide, (SO2) and nitrous oxide (NOx). The Federal law specifically identified Big Bend Units 1,2 & 3 as "affected units" that had to be dealt with. The law expressly set the 1995 and 2000 allowance limitations on November 15, 1990 [2] TECo was required to file its initial permit application not later than March of 1993. That permit had to be accompanied by a compliance plan for all units demonstrating that the CAAA requirements would be met in a timely fashion.[3] The national goal expressed in the

---

[1] *42 USCS 7401 et seq.* Act, July 14, 1955, ch 360, 69 Stat. 322, as generally amended by Act Dec. 17, 1963, P.L. 88-206, 77 Stat. 392, which formerly appeared as *42 USCS §§ 1857* et seq. prior to its general amendment by Act Aug. 7, 1977, P.L. 95-95, 91 Stat. 685, and now appears as *42 USCS §§ 7401* et seq. Explanatory notes:

§ 401 of Title IV of Act, July 14, 1955, ch 360, as added Dec. 31, 1970, P.L. 91-604, § 14, 84 Stat. 1709, appears as *42 USCS § 7641*. Note effective date of section:

This section is effective on enactment, except as provided by § 711(b) of Title VII of Act Nov. 15, 1990, P.L. 101-549, 104 Stat. 2684, which appears as *42 USCS § 7401* note.

[2] *42 USCS 7651c*, Table A & *42 USCS 7651d*.

[3] *42 USCS 7651g*.

law is to reduce SO_2 emissions 10 million tons below 1980 levels and NO_x by 2 million tons below 1980 levels.[4]

An allowance, as defined in the law, is an emissions permit or a marketable emissions reduction credit. Each allowance permits affected plants to emit one ton of sulfur dioxide. A utility cannot emit more sulfur dioxide or nitrous oxide than allowances permit. A utility can comply with the law in several ways:

1. By reducing emissions to the level of allowances it holds;
2. By obtaining additional allowances to cover its emissions;
3. By substituting alternative plans in Phase I;
4. By pooling emissions reduction requirements across two or more affected units; or;
5. By drafting compliance strategies using limited time extension provisions.

The sulphur emission allowances set in 1990 were 2.50 pounds of SO_2 per mmbtu by 1995 for "affected units" reducing to 1.20 pounds per mmbtu for all units over 75 MW by January 1, 2000. For NO_x, the emission limitation ranges from .86 pound per mmbtu to .45 pound per mmbtu for Big Bend Units 1-4 and Gannon Units 3-6 by January 1, 2000. (Tr. 66). It is a crime to exceed these limitations.[5]

TECo, on average, consumes 1 mmbtu of energy for every 100 kwh of electricity it sells. In the first quarter of 2000, for each 100 kwh it sells, it will be allowed to release approximately 2 pounds of these pollutants into the atmosphere. This would appear to be a lot of pollution, but it is approximately half the amount being emitted in the last quarter of 1998.

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[4] *42 USCS 7651(b).*

[5] *42 USCS 7651 et seq.*

Time is short to achieve this major undertaking. Unnecessary regulatory preapprovals on financial recovery should not be allowed to slow the essential prcblem of environmental compliance. Preapproval is optional. The standard post-construction review can get the job done at no loss to TECo and at a better time, when all of the pertinent information is in hand.

Fuel burned to make economy and other wholesale sales emits SO2 at the same rate as fuel burned to make retail sales, but under the current environmental cost recovery mechanism, retail ratepayers pay the total cost of environmental compliance, unless there has been a separation of environmental capital improvements in the rate base. This is a circumstance that needs to be addressed under the Commission's responsibility to protect the public interest. The Commission should ensure that the rates being paid in Tampa are proportional to the consumption in Tampa and that all the beneficiaries of the promised lower fuel cost will share in the environmental cost burdens that bring about the fuel cost savings.

TECo's four generating units at the Big Bend Station and six units at the Gannon Station were identified early on as major pollution sources. Each unit is assigned an emission allowance. The CAAA emission allowances are based on the average consumption during the period 1985 to 1987.[6] It was necessary to begin

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[6]*42 USCS § 7651a(4)*: The term "baseline" means the annual quantity of fossil fuel consumed by an affected unit, measured in millions of British Thermal Units ("mmbtu's"), calculated as follows:

(A) For each utility unit that was in commercial operation prior to January 1, 1985, the baseline shall be the annual average quantity of mmbtu's consumed in fuel during calendar years 1985, 1986, and 1987, as recorded by the Department of Energy pursuant to Form 767.

the curative plan many years ago to meet the well-publicized emission allowance requirements.

It is a big and serious problem. Its magnitude has been precisely known for nearly 8 years. In 1997, TECo emitted 172,100 tons of sulphur dioxide into the air, 30,000 tons or more came from coal burned to make wholesale sales. Total sales are growing. (Tr. 51). By 2000, TECo must reduce these emissions to 83,882 tons (Tr. 51), a reduction of at least 88,000 tons. In addition, it must reduce its undisclosed NOx emission tonnage by 30%.

Florida law gives every utility the option to have its anticipated environmental expenditures preapproved as prudent if it submits a CAAA compliance plan for approval to the Commission disclosing a certain minimum amount of pertinent data. It would be incredible to believe that TECo hasn't known what it planned to do to comply with the law for many years. The CAAA required an initial plan to be filed with the environmental agencies in 1993. The plan must be completed and in commercial operation by midnight December 31, 1999. It takes over two years to build. Construction contracts have been awarded. One must wonder why TECo waited until the plant was under construction before seeking preapproval. The utility has waited so long to present its plan that meaningful alternatives can't be adequately considered. It would be unwise for the Commission to grant plan approval in the dark when no harm is done by waiting until the complete full compliance program has been fully disclosed. Approval is not needed to supply comfort to lenders and potential investors, the construction money is in hand. It has already been supplied by customers.

The next heading will deal with some of the key deficiencies in the plan submitted.

Why is the plan too little and unsupported?

Some of the missing ingredients required for plan preapproval were quoted above. These and other missing items are not insignificant. Three of the fatal omissions will be quickly dealt with here. The Commission Staff and the other parties, recognizing the importance of TECo's failure to comply with the minimum requirements of the preapproval law, tried to compel production of the information but only got the tip of the iceberg. The concealed portion is enough to sink the TECotanic plan.

A. The law requires the plan to tell what the utility plans to do about NOx emissions. Mr. Black was asked about this at the hearing and said the cost would be relatively modest. He explained what the company wanted to do and said, at worst, it would cost between \$10 and \$30 million dollars. Commission Staff cast serious doubt on this estimate when it produced an estimate provided to TECo by a firm of independent experts TECo hired to assess the issue. Exhibit No. 10. The experts concluded that the cost would be about \$103 million, over 3 times the maximum cost Mr. Black estimated. That is a significant difference. The combined cost of the SO2 and NOx environmental cures might justify an entirely different approach to CAAA compliance, even though the two cures are separate endeavors. What does the total cost do to the comparative prospect of fuel switching, wholesale sales curtailments or gas burning? No one knows and Mr. Black didn't explain why his estimate was correct and that of the independent engineers his company hired was wrong.

B. The FGD solution won the compliance cure comparison contest because of the estimated fuel cost savings that would be achieved after the FGD is installed. (Tr. 186). TECo only gave estimated total savings numbers and left out the "present and proposed sources of fuel," even though this information is required by § 366.825 and is a essential detail needed by anyone who wishes to test the fuel savings assumption.

C. Section 366.825(2)(d)4 of the planning statute requires the utility to spell out the cost of the plan to its customers, not just the cost to TECo. This bit of information is essential to the Commission's decision because its obligation in the process is to determine "if the effect on rates is in the public interest." The Commission is not charged with environmental approval; it has the duty to insure that rates are fair and reasonable. It would seem that this information more than any other would be needed by the Commission in its decision-making process.

The answer to Issue 1 in this case must be that TECo has failed to supply competent substantial evidence that it has adequately explored alternatives. The evidence that it did supply came after construction contracts were obligated and construction was underway. This is too late for the Commission to play any meaningful part in the selection of a cost-effective compliance plan.

The answer to Issue 4 is that TECo did not prove that it reasonably considered all environmental compliance costs. The great disparity between the TECo witness testimony on the NOx compliance cost and the estimate given to the company by the independent engineering firm went undiscussed.

The answer to Issue 5 is that without a credible explanation of how fuel cost savings will offset the very large capital costs required for TECo's SO2 removal plan, there is no way to tell if the plan is the most cost-effective solution.

Issue 6

> **Should the Commission approve TECo's request to accrue an allowance for funds used during construction (AFUDC) for the FGD system?**

The Commission has a rule on AFUDC. Rule 25-6.0141, Florida Administrative Code. Section (1)(b) of the rule precludes accrual of AFUDC on a project which does not exceed the level of CWIP allowed in the last general rate case. No proof has been presented that the FGD project exceeds the current authorized CWIP level.

Section 25-6.0141(1)(c) precludes AFUDC accrual prior to Commission consent because FGD is being added to a generating plant that is providing service during construction. This consent should not be a rubber stamp permission. The Commission should examine the source of funds being used for construction.

Some of the reasons that make this case special are discussed in Docket No. 950379-EI,[7] Commission Order No. PSC-98-0802-FOF-EI. This order deals with

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[7]In re: Investigation into earnings for 1995 and 1996 of Tampa Electric Company.

TECO's earnings in excess of the top of the range of its authorized return and makes significant findings that have a bearing on this case:

1. That order pointed out that at the end of 1996, TECO was holding $77 million in excess earnings collected from customers. Because this money is subject to refund, the Commission ruled that customers should pay a 5.46% interest charge on their own money. If the money isn't refunded, TECo keeps the overearnings and the interest. These funds are available for FGD construction until they are refunded; thus obviating the need for any additional charge to customers.

2. The Commission observed in the order cited above that equity capital could be used to manipulate the earnings cap mandated in 1995. Corporate profits and noncash depreciation expense that are not paid out in dividends or plowed back into the other aspects of the enterprise are cash available for FGD construction. If these funds are used for FGD construction, they are already earning the company's authorized return. There is no need to supplement the return already in place. The Commission should not allow surplus cash in the equity component of capital structure just to bloat TECo's earnings.

3. There is no prohibition that keeps holding company management from using the utility's cash surplus in the operations of affiliated companies while the cash surplus is supporting the equity component of the utility as a working capital book entry.

4. If the cash surplus is retained by the utility, it is already earning the utility's authorized return. Allowing AFUDC on top of the return already in place would result in double recovery.

5. Do we know that the utility or its holding company have not borrowed money at low cost commercial paper rates to fund the construction? If it has done so, it can make a nice arbitrage profit at customer expense on a higher AFUDC rate, plus an allowance for income tax payments on the equity component of the return even though no taxes will have to be paid on borrowed funds.

There is no evidence in the record that any of these circumstances have occurred, but common regulatory due diligence should examine the actual source of funds being used for construction before granting an accrual rate. That clearly is what § 25-6.0141(1)(c) is all about.

TECo supplies the Commission with much of the information needed to make the requisite study in its monthly surveillance reports which are part of the Commission's public records and are filed by TECo under an oath that they are truthful. FIPUG attempted to shed some light on the subject by offering this public information into the record of this case for study. The proffer was rejected when submitted as an item which the Commission could administratively notice; it was rejected as a business record of the Commission maintained in the normal course of business and finally rejected when submitted as an admission of TECo. Can it be that sworn surveillance reports submitted under the pains and penalties of perjury by TECo can't be trusted in the eyes of the Commisson? A conjecture on that possibility will not be attempted, but without some evidence of the source of funds to be used for FGD construction the decision on AFUDC should be postponed until the source is known.

Issue 7

Should TECo's petition for cost recovery of a FGD system be granted?

TECo seeks the benefits of § 366.8255, *Florida Statutes*, the collection statute, for authority to impose a surcharge on its customers for a plant that hasn't been built. When it used this section of the law, TECo ignored the funds it will already be collecting from customers through base rates in the year 2000.

Even though the law says, "**[a]n adjustment for the level of costs currently being recovered through base rates or other rate-adjustment clauses must be included in the filing,**" TECo failed to make the requisite adjustment. If its petition is granted, TECo will use the approval it seeks today to impose an additional $20 million surcharge on its customers in the first full year the FGD is in operation. This is a greater increase than was allowed in TECo's last general rate case.[8] In that case, after months of intense scrutiny, the Commission allowed $18.5 million total over a two-year period. This surcharge will be imposed to cover the anticipated annual carrying costs of the plant now under construction. The collection statute disallows double recovery. It says, "**any costs recovered in base rates may not also be**

[8]In re: Application for Rate Increase by Tampa Electric Company, Docket No. 920324-EI.

recovered in the environmental cost-recovery clause." Why should TECo think the Legislature doesn't mean what it says?

TECo presented no evidence on the status of its base rates and opposed FIPUG Exhibit No. 1 for identification which was proffered to put information relating to base rates in the record. TECo relies on policy established in Order No. PSC-94-0044-FOF-EI, "In re: Petition to establish an environmental cost recovery clause pursuant to section 366.0825, Florida Statutes by Gulf Power"[9] (referred to hereafter as the Gulf case). TECo says the precedent of that case binds the Commission in this one, even though there is no Commission rule of general application in place adopted under the provisions of Chapter 120.54, *Florida Statutes*.

Further, neither the Commission nor the courts have ever had concern about modifying *stare decisis* when the need arises.

> In the Gulf case the Public Counsel argued that if a utility is earning within its allowed return on equity range, it is already being compensated for all environmental expenses, and it should not be allowed to recover any costs through the environmental cost recovery clause. Public Counsel maintains that it does not matter whether the environmental activity was included in the test year of the utility's last rate case. The utility should only be allowed to recover costs through the clause if the utility is under-earning and if the environmental expenses are the cause of the under-earning. OPC argued that to allow any recovery through the clause if the utility is not under-earning would amount to double recovery.

(Gulf *supra* at 4).

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[9]Docket No. 930613-EI.

> Although regulatory philosophy indicates that OPC is theoretically correct, we must consider the legislation establishing the environmental cost recovery clause.

(*Id.*).

The Commission then proceeded to construe the statute and appeared to conclude that it was prohibited by the statute from applying the correct theory. FIPUG believes the Commission should have the courage to apply the theoretically correct philosophy when it is in the public interest to do so. It has taken that position on numerous occasions before to deal with statutes that were not in the public interest and brought about changes in bad law. *United Telephone v. Mayo*, 215 So.2d 609 (Fla. 1968) (allowing the consideration of adequacy of service in rate cases); *Utilities Operating Co., Inc. v. King*, 143 So.2d 854 (Fla. 1952) (Commission promoted actual cost rate base rather than engineer's appraisal called for by statute). Let the court deal with statutory construction of the statute which appears to want to protect the public from utility double dipping, but fails to achieve its end. The Commission quoted the two portions of the statute which expressly prohibit the recovery of costs currently being recovered through base rates and concluded:

> Thus, we find that the legislature clearly intended the recovery of investment carrying costs and O&M expenses through the environmental cost recovery clause. For this reason, Public Counsel's argument must be rejected.

(Gulf *supra* at 5).

While the conclusion is not as clear to the drafter of this brief as it was to the three Commissioners that heard that case, there are two important differences between that case and this one:

1. In the Gulf case, the Commission examined current earnings to ensure that the utility was earning a "fair rate" of return as set in the last general rate case. It said:

> This Commission establishes a range of ROEs, not a single number, to allow the utility an opportunity to earn a fair rate of return on its investment. If it is earning in the allowed range, the utility is receiving the Commission approved amount of revenue to compensate it for all carrying costs and O&M expenses incurred. If the utility earns above or below the set range, this would indicate the utility is over- or under-earning. In Gulf's case, the allowed range is 11% to 13%, with a mid-point of 12%. **On a monthly basis, we receive a surveillance report which considers all revenues and expenses incurred by the utility and calculates an overall rate of return earned by the utility.**

(Emphasis supplied). The Commission thus defined "fair rate of return" and provided guidance on how to utilize it in connection with cost recovery through the environmental clause.

> Accordingly, we find that **if the utility is currently earning a fair rate of return** that it should be able to recover, upon petition, prudently incurred environmental compliance costs through the ECRC. . .

(Gulf *supra* at 5, emphasis supplied). The Commission analysis in Gulf is different than that of Mr. Hernandez who relies on the Gulf case for support. He concludes that earnings above the authorized range are "even a fairer, more fairer return." (Tr. 215).

2. In the present case, TECo presented no evidence to show that it will be earning a fair rate of return as required by the statute and the Gulf decision. It objected to the use of the surveillance report which the Commission relied on heavily

in the Gulf case. In the Gulf case, the Commission had information that it extracted from Gulf's sworn surveillance reports and relied on this information to conclude that Gulf was earning a fair return at the time on its other assets; therefore, it would do no harm to allow the same fair return on a new set of assets already in service, but constructed after the rate case. This is a far cry from the TECo proposal to authorize the concept of environmental cost recovery before the plant is built and to ignore the return on base rates. Mr. Hernandez's idea is to let TECo get the cost recovery money and deal with base rate revenues later. If an audit finds them to be excessive, the Commission can take whatever action it deems appropriate. Do you suppose he knows that the law would then prohibit the Commission from retroactively reducing[10] base rates that are excessive, thus enabling TECo to keep the excess profits?

---

[10]Rates may only be set on a prospective basis. *Gulf Power Co. v. Cresse*, 410 So.2d 495 (Fla. 1982); *Gulf Power Co. v. Bevis*, 289 So.2d 401 (Fla. 1974); .

CONCLUSION

TECo came to the Commission too late with its preapproval request and supplied less than the minimum required information. It has come too early with its request for extraordinary environmental cost recovery and supplied less than the minimum required information. Under the circustances, it is in the public interest to deny the petition without prejudice and allow TECo to come back after the plant is in service, as Gulf did and as § 366.8255 provides. At that time, the Commission will know whether base rates are affording a fair return within the prescribed limits and can properly determine the best course of action to take in the public interest. In the meantime, TECo will suffer no financial loss and can concentrate all of its considerable talents on the urgent task at hand -- meeting the fast approaching environmental compliance deadline without furtner delay from the financial regulators.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **FIPUG's** foregoing **Post-Hearing Brief** was furnished by hand delivery (*) or U.S. Mail to the following this **2nd** day of **October, 1998**:

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