State of Florida

Public Service Commission

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DATE: JUNE 14, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF SAFETY AND ELECTRIC RELIABILITY (BOHRMANN)
DIVISION OF ECONOMIC REGULATION (WHEELER)
DIVISION OF LEGAL SERVICES (C. KEATING)

RE: DOCKET NO. 000001-EI - FUEL AND PURCHASED POWER COST RECOVERY CLAUSE AND GENERATING PERFORMANCE INCENTIVE FACTOR.

AGENDA: JUNE 20, 2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE - PROPOSED AGENCY ACTION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\SER\WP\000001A.RCM

CASE BACKGROUND

On May 18, 2000, the Florida Industrial Power Users Group ("FIPUG") filed a Motion for Mid-Course Protection ("motion") seeking emergency relief from Tampa Electric Company ("TECO") with respect to "continuing and on-going power supply interruptions and excessive costs for replacement power." (Although FIPUG's pleading was styled as a "motion", it has been handled as a petition for practical purposes.) TECO filed a response to FIPUG's motion on May 25, 2000. At staff's request, a meeting was held among the parties and staff on May 26, 2000, to discuss FIPUG's motion and TECO's subsequent response. In response to questions that staff raised during this meeting, FIPUG filed supplemental information regarding its motion on May 30, 2000, and June 5, 2000. Coronet Industries, Inc. ("Coronet") filed a petition to intervene and comments in support of FIPUG's motion on June 5, 2000. Coronet is an existing TECO customer under Rate Schedule IS-3. At the time of

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filing this recommendation, no response to Coronet's petition had been filed and no ruling on the petition had been made.

In its motion, FIPUG requests the following substantive relief:

> (1) Require TECO to curtail any wholesale sale if such sale would occur during the same hour in which TECO plans to interrupt [non-firm retail] customers;
>
> (2) Enable TECO to avoid peak period emergency power purchases and other costly short-term purchases by adding a rider to the tariffs which contain buy-through provisions authorizing TECO's industrial customers receiving service under such tariffs to be relieved of the obligation to use TECO as their exclusive agent for buying power. Allow [these customers] to enter into contracts with other Florida utilities and suppliers to purchase electric power to be wheeled to the customer and delivered by TECO. The purchased power contracts could be for periods up to January 1, 2004 when TECO promises to have a reserve margin of 20 [percent]. Industrial customers entering into such short-term contracts would continue to pay TECO for transmission service, general service, and other ancillary services provided by TECO and can return to TECO's interruptible generation service when the reserve margin is more favorable;
>
> (3) Authorize customers which produce power from self-generation plants in Florida, [within and] outside of TECO's service area, to wheel power to their own sites within TECO's service area; and
>
> (4) Direct TECO to reduce the buy-through power rate by the amount included in base rates for generating capacity.

Staff addresses each of FIPUG's specific, substantive requests for relief in Issues 1 through 4. Based on its recommendations in Issues 1 through 4, staff addresses the disposition of FIPUG's motion as a whole in Issue 5. Staff recommends in Issue 6 that this docket remain open.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission require TECO to curtail any wholesale energy sale if such sale would occur during the same hour in which TECO plans to interrupt its non-firm retail customers or buy replacement power on behalf of its non-firm retail customers?

RECOMMENDATION: No. *FIPUG has provided no factual support for a* finding that TECO has made wholesale energy sales in violation of its interruptible service tariffs or applicable law. Furthermore, curtailment of a lawful, firm wholesale transaction may not be the appropriate remedy for any proven violation of a tariff or applicable law. (BOHRMANN, C. KEATING)

STAFF ANALYSIS: In its motion, FIPUG asserts that TECO has entered into wholesale power supply agreements and continues to manage its daily power supply in a manner that is detrimental to its retail customers in general and economically devastating to its non-firm industrial customers. FIPUG further asserts that TECO diverts the electricity produced by installed generating capacity away from retail customers and sells it in the wholesale market on a daily basis. According to FIPUG, on most days, the electric power is replaced by more expensive power that TECO purchases in the wholesale market. When TECO is unable to find replacement power, its non-firm retail customers are interrupted. FIPUG contends that these interruptions and high cost replacement power substitutions affect TECO's non-firm retail customers by increasing their production costs and impairing their ability to compete in their markets.

FIPUG asserts that TECO's non-firm retail customers have experienced numerous, excessive, and unnecessary interruptions during the past twelve months. In 1999, TECO interrupted these customers on 16 occasions and purchased emergency power on their behalf on the peak period spot market on another 139 occasions at prices up to $3,400 per megawatt-hour (MWH). TECO's tariffs allow TECO to interrupt these non-firm retail customers when the reliability of TECO's firm retail customers is threatened. However, TECO's tariffs do not specifically allow for interruptions for "economic" reasons. FIPUG alleges that TECO has interrupted its non-firm retail customers or bought high-priced emergency power on these customers' behalf to pursue more profitable opportunities in the wholesale energy market (FIPUG Motion at 5).

FIPUG believes that the Commission has an obligation to ensure the reliability and adequacy of the state's power supply for native retail customers under Chapter 366, Florida Statutes, (i.e., Grid Bill). When native retail customers receive an inferior quality of service to allow TECO to serve wholesale load, FIPUG argues that the Commission has the authority to instruct TECO to cease such behavior. FIPUG cites Northern States Power Co. v. Federal Energy Regulatory Commission, 176 F.3d 1090 (8th Cir. 1999), for the proposition that states retain authority in periods of curtailment to give preferential treatment to the retail customers over wholesale sales. FIPUG posits that the Commission has broad statutory authority to provide customer relief on rate issues and experimental rate designs to address the situation at issue (FIPUG's June 5, 2000 Response at 2). Coronet supports FIPUG's comments on this issue (Coronet Comments at 1).

TECO disagrees with FIPUG's presentation of the relevant facts. First, TECO states that its non-firm retail customers have volunteered to be interrupted in return for deeply discounted rates (54 percent of the average retail rates). The capacity needs of these non-firm retail customers are part of the reserves available to continue to provide service to firm customers when the utility's generating capacity is less than its firm and non-firm load. However, TECO has included in its tariffs an optional provision for buy-through power purchases to avoid an actual interruption for these non-firm retail customers. This provision is exercised at the customer's discretion, not TECO's. All 33 of TECO's customers which receive service under either the IS-1 or IS-3 rate schedule have exercised this option (TECO's Response at 3).

Second, TECO notes that the Commission closed TECO's IS-1 rate in 1985 and TECO's IS-3 rate in 2000 to new customers because these rates are no longer cost-effective. Subsequently, the Commission approved TECO's request for a GSLM rate schedule which is cost-effective for customers who receive a rate discount in return for allowing themselves to be curtailed to meet the reliability needs of TECO's firm customers (TECO Response at 3-4).

Third, TECO disputes FIPUG's accusation that TECO has interrupted its non-firm retail customers or exposed them to high priced buy-through emergency power to pursue opportunities in the wholesale energy market. TECO asserts that, according to company policy, TECO does not sell non-separated, non-firm wholesale energy sales while simultaneously making buy-through purchases to serve its non-firm retail customers. However, as buy-through purchases first occur, a brief period of time may be needed to conclude any pre-existing non-separated, non-firm wholesale energy sale, but that is done promptly with minimal and unintentional effect on non-firm retail customers. Moreover, TECO asserts that FIPUG does not state any specific action that would warrant any change to how TECO participates in the wholesale energy market. According to TECO, the situation that FIPUG describes is more attributable to the current, tight wholesale energy market, the corresponding higher cost of energy under tight market conditions, and the occasional non-availability of buy-through power (TECO Response at 5-6).

TECO disagrees with FIPUG's interpretation of the Commission's authority to provide the relief requested. TECO believes that FIPUG's reference to the Northern States Power case is misplaced. According to TECO, that decision did not turn on the considerations quoted in FIPUG's motion. TECO asserts that the court made no decision on the curtailment policy issue, but reversed and remanded on the grounds that FERC had transgressed its Congressional authority which limits its authority to interstate transactions. TECO further asserts that the portion of that decision quoted by FIPUG is simply the court's recitation of arguments by Northern States Power, not the Court's reliance upon those arguments as the basis for the Court's decision. TECO notes that Northern States Power argued that a pro rata curtailment requirement for both native retail customers and wholesale customers would force the utility to provide interruptible service to its native retail customers. TECO points out that in the instant case FIPUG's members have voluntarily elected (emphases in original) to take interruptible service (TECO Response at 8-9).

At the outset, staff believes it is necessary to clarify that the Northern States Power case provides little aid in the analysis of FIPUG's request. The issue on appeal in that case was whether FERC could require a public utility to curtail electrical transmission to its wholesale customers on a comparable basis with its "native/retail" customers when it experiences transmission constraints. The more fundamental issue involved, according to the Court, was whether FERC had jurisdiction to affect the curtailment practices of a public utility with respect to its native/retail customers. Noting the arguments of Northern States Power ("NSP") that FERC's requirement for *pro rata* curtailment of power to wholesale and retail customers was inconsistent with NSP's obligations under state law and its state-approved tariffs to serve its native/retail customers, the Court found that FERC's curtailment requirements were unlawful because they exceeded FERC's specific grant of authority and encroached upon the authority of the states. The Court made no decision as to the appropriate curtailment policy, but instead reversed and remanded the case to

FERC to amend its curtailment requirements so as not to encroach upon the states' regulatory authority.

The Court's decision suggests that our analysis should rest on TECO's obligations under the laws of Florida and its Commission-approved tariffs. In this case, TECO's non-firm retail service tariffs establish the terms under which TECO provides service to its non-firm retail customers. In its motion, FIPUG alleges, on information and belief, that TECO has interrupted its native, non-firm retail customers and exposed them to high buy-through costs to pursue opportunistic wholesale transactions. FIPUG argues that these "economic interruptions" are not permitted under TECO's interruptible tariffs.

For its analysis, staff has classified TECO's wholesale energy sales into three different groups: separated; non-separated; and TECO's wholesale sale to the Florida Municipal Power Agency ("FMPA"). A separated wholesale energy sales is a long-term (i.e., one year or longer), firm wholesale energy sale in which TECO has dedicated a proportion of its system resources to make that sale. The retail ratepayers do not bear any cost responsibility nor receive any revenue associated with a separated sale. This separation achieves in part what FIPUG requests in its motion. A non-separated wholesale energy sale is either short-term (i.e., shorter than one year), non-firm, or both, in which TECO does not dedicate a proportion of its system resources to make that sale. Retail ratepayers are responsible for the fixed costs associated with making that sale, but receive most, if not all, of the revenues received from the purchasing utility. The Commission re-affirmed its policy regarding separated and non-separated wholesale energy sales in Order No. PSC-97-0262-FOF-EI, in Docket No. 970001-EI, issued March 11, 1997.

FIPUG's largest concern, staff believes, is the impact on its members when TECO sells wholesale energy to FMPA under a contract scheduled to expire March 15, 2001 ("FMPA sale"). The Commission has twice considered the appropriate cost recovery mechanism for the FMPA sale, most recently in Order No. PSC-99-2512-FOF-EI, issued December 22, 1999, in Docket No. 990001-EI. In that order, the Commission approved TECO's proposal to classify the FMPA sale as a non-separated sale because TECO could show net ratepayer benefits. For retail ratepayers, the Commission's decision means that the plant used to serve the FMPA sale is not available to retail ratepayers in periods of high energy demand. For TECO, the FMPA sale pushed its reserve margin down to near its 15 percent standard. Staff believes that FIPUG is attempting to re-argue its position expressed in the hearing held in November 1999, but the

Commission has already re-affirmed its decision by denying FIPUG's motion for reconsideration on the regulatory treatment of the FMPA sale in Order No. PSC-00-0911-FOF-EI, issued May 8, 2000, in Docket No. 000001-EI.

FIPUG has not provided any factual evidence of TECO violating its tariffs or applicable law. Thus, staff cannot determine, based on FIPUG's motion alone, whether TECO has violated the provisions of its interruptible tariff which prohibit "economic interruptions." Further, staff would be reluctant to recommend curtailment of a lawful, firm wholesale transaction as the appropriate remedy for a proven violation of the prohibition on "economic interruptions."

ISSUE 2: Should the Commission provide TECO's non-firm retail customers the option of obtaining energy from an energy provider other than TECO?

RECOMMENDATION: No. (BOHRMANN, C. KEATING)

STAFF ANALYSIS: FIPUG contends that TECO's non-firm retail customers are severely damaged by TECO's wholesale energy market activities. FIPUG states that these customers are obligated to buy exclusively from TECO because the Commission has approved noncompetitive territorial agreements that TECO has entered into with other Florida utilities. However, the Commission, FIPUG asserts, has no jurisdiction over the price TECO pays for wholesale energy on the spot market. According to FIPUG, these anti-competitive territorial agreements have a Sherman Antitrust Act exemption, because the Commission actively supervises these agreements. If another utility sought to serve one of TECO's customers, TECO could initiate a territorial dispute to prevent the other utility from providing retail service. Although it may be logical in preventing another utility from duplicating transmission and distribution lines, FIPUG asserts that it sees no logic in prohibiting a customer from acquiring less costly replacement power and requiring the native utility to deliver the replacement power when the native utility has abused its regulatory bargain with the retail customer (FIPUG Motion at 9). Coronet supports FIPUG's comments on this issue (Coronet Comments at 1).

Accordingly, FIPUG requests that the Commission should relieve non-firm retail customers which receive service under TECO's Rate Schedules IS-1 and IS-3 of the obligation to use TECO as their exclusive agent for buying power. Under FIPUG's proposal, these non-firm retail customers could enter into contracts with other Florida utilities and other energy providers to purchase electric power to be wheeled to the customer and delivered by TECO. These purchased power contracts could be for periods up to January 1, 2004 when TECO has stipulated to have a reserve margin of 20 percent. The Commission approved this stipulation by Order No. PSC-99-2507-S-EU, in Docket No. 981890-EU, issued December 22, 1999. Non-firm retail customers who enter into such contracts would continue to pay TECO for transmission service, general service, and other ancillary services provided by TECO. These customers could also return to TECO's non-firm retail service when the reserve margin is more favorable (FIPUG Motion at 11).

If the Commission grants the relief requested, TECO believes that the Commission's action would establish retail wheeling, contrary to the current statutory framework for regulation in this state. TECO contends that the Commission should not grant the relief requested by FIPUG in the absence of any authorizing legislation (TECO Response at 9).

Staff believes that the relief requested by FIPUG is not permitted under current state law. As TECO contends, granting the relief requested by FIPUG would establish retail wheeling for TECO's non-firm retail customers. In PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988), the Florida Supreme Court held that the sale of electricity to even just a single customer makes the provider of that electricity a "public utility" pursuant to Section 366.02(1), Florida Statutes, and thus subject to the Commission's jurisdiction. In reaching its decision, the Court noted that its interpretation of the term, "public utility", was consistent with the legislative intent of Chapter 366, Florida Statutes, because the regulation of the production and sale of electricity necessarily contemplates the granting of monopolies in the public interest. The Court also noted that allowing unregulated companies to enter into contracts with high-use industrial customers for the sale and purchase of electricity on an one-on-one basis would drastically change Florida's regulatory framework by increasing the burden on remaining customers to provide the regulated utility enough revenue to recover its fixed costs.

Accordingly, staff recommends that the Commission deny FIPUG's proposal for retail wheeling for its members. Staff suggests, however, that an arrangement under which non-firm retail customers would "shop" for power and TECO would take title to that power before selling and delivering the power to the customer may overcome the obstacles that currently exist in the law. Such an arrangement would require further analysis and input from the parties to identify the economic, legal, regulatory, operational, and financial factors that would come into play to determine the arrangement's feasibility. Of course, neither such an arrangement nor its feasibility is before the Commission at this time.

ISSUE 3: Should the Commission allow non-firm retail customers which own and operate self-generation facilities, whether such facilities are located within or outside TECO's service area, to wheel surplus energy to another location within TECO's retail service area (i.e., self-service wheeling)?

RECOMMENDATION: Yes, if a non-firm retail customer can show that its self-service wheeling proposal meets the conditions set forth in Rule 25-17.0883, Florida Administrative Code. (BOHRMANN, C. KEATING)

STAFF ANALYSIS: In lieu of interruption or buy-through, FIPUG requests that the Commission grant TECO's non-firm retail customers the following authority: authorize a non-firm retail customer who can self-generate power at one location (Point A) to wheel surplus energy generated at Point A to another location (Point B) owned by the same customer. Point A may be located within or outside TECO's service area. Point B would be located within TECO's service area (FIPUG May 30, 2000 Response). Coronet supports FIPUG's comments on this issue (Coronet Comments at 1).

TECO believes that the relief requested may be covered under Rule 25-17.0883, Florida Administrative Code, which states conditions under which utilities can provide transmission service for self-service wheeling. However, FIPUG does not identify any non-firm retail customer who would qualify for self-service wheeling under this rule in its motion (TECO Response at 9).

Pursuant to Rule 25-17.0883, Florida Administrative Code, a retail customer is eligible for self-service wheeling under the following conditions:

> Public utilities are required to provide transmission and distribution services to enable a retail customer to transmit electrical power generated at one location to the customer's facilities at another location when the provision of such service and its associated charges, terms, and other conditions are not reasonably projected to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers. The determination of whether transmission service for self service is likely to result in higher cost electric service may be made by using cost effectiveness methodology employed by the Commission in evaluating conservation programs of the

> utility, adjusted as appropriate to reflect the qualifying facility's contribution to the utility for standby service and wheeling charges, other utility program costs, the fact that qualifying facility self-service performance can be precisely metered and monitored, and taking into consideration the unique load characteristics of the qualifying facility compared to other conservation programs.

If a non-firm retail customer meets the conditions set forth in Rule 25-17.0883, Florida Administrative Code, then the customer may request transmission and distribution services from TECO in order to transmit electrical power generated at one location to the customer's facilities at another location. If TECO does not provide transmission and distribution services to the customer pursuant to such request, the customer may petition the Commission for relief.

ISSUE 4: Should the Commission direct TECO to reduce the buy-through power rate by the amount included in base rates for generating capacity?

RECOMMENDATION: No. (WHEELER, BOHRMANN)

STAFF ANALYSIS: This issue addresses the operation of the "Optional Provision" (sometimes referred to as a "Buy-Through" provision) contained in TECO's non-firm retail rate schedules. The Optional Provision allows non-firm retail customers to maintain service during periods when they would otherwise be interrupted pursuant to the tariff. During these periods, TECO attempts to make off-system purchases that will allow them to continue serving non-firm retail customers.

FIPUG believes that the amount paid by non-firm retail customers for buy-through power should be reduced by an amount equal to the base rate charges paid by non-firm retail customers that support TECO's generating plants (FIPUG Motion at 3, 11). *Coronet supports FIPUG's comments on this issue* (Coronet Comments at 1).

TECO believes that the relief requested has no foundation in fact or law. TECO asserts that if the Commission granted the relief requested, the Commission would give non-firm retail customers more benefits than what these customers have bargained for and bestow an undue advantage on these customers at the expense of TECO's shareholders and other customers (TECO Response at 10).

Staff does not believe it is appropriate to reduce the charges paid by non-firm retail customers during buy-through periods. Customers who have opted to be served under the optional provision have agreed to pay the actual cost of these purchases, plus an additional fee of $.002 per kWh. Non-firm retail customers pay these charges in lieu of the otherwise applicable per kWh charges associated with non-firm retail service. Thus during those hours TECO is providing them buy-through power, non-firm retail customers do not pay the tariffed base rate non-fuel energy charge, nor do they pay any adjustment clause charges (i.e., the fuel, capacity, environmental, and energy conservation charges). During buy-through periods, customers therefore are not paying twice for the same power.

Staff does not believe that it is appropriate to further excuse non-firm retail customers from their obligation to pay the base rate charges related to generation costs. In TECO's last rate case (Docket No. 920324-EI), the Commission accepted a Cost of Service and Rate Design Stipulation signed by the parties (including FIPUG) that stated the method to be used to allocate costs to TECO's rate classes, and to design rates to recover those costs by Order Nos. PSC-93-0664-FOF-EI and PSC-93-0758-FOF-EI, issued April 28, 1993, and May 19, 1993, respectively. Non-firm retail customers were allocated only those generation costs that were deemed to be related to energy (kWh) consumption. They were not allocated any demand-related production costs, because the demands of the non-firm retail classes are not considered when TECO plans its generation needs. FIPUG has provided no compelling reason for relieving non-firm retail customers of their obligation to pay the rates contained in TECO's tariff.

ISSUE 5: Based on the resolution of the foregoing issues, should the Commission grant FIPUG's Motion for Mid-Course Protection?

RECOMMENDATION: The Commission should grant in part and deny in part FIPUG's motion. FIPUG's motion should be denied as to its requests for relief addressed in Issues 1, 2, and 4. The motion should be granted as to its request for relief addressed in Issue 3, to the extent such relief is already provided by Commission rule. (BOHRMANN, WHEELER, C. KEATING)

STAFF ANALYSIS: Based on staff's analysis of FIPUG's specific, substantive requests for relief in Issues 1 through 4, the Commission should grant in part and deny in part FIPUG's motion. FIPUG's motion should be denied as to its requests for relief addressed in Issues 1, 2, and 4. The motion should be granted as to its request for relief addressed in Issue 3, to the extent such relief is already provided by Commission rule.

Staff notes that FIPUG, in its motion, requests "an expedited order based on the filing made by TECO in this docket using the same quantum of proof that the Commission used in granting TECO's request for a mid-course correction of its fuel surcharges." Staff has handled FIPUG's motion on an expedited basis to prepare this recommendation. Staff believes, however, that FIPUG's motion is not due the same "quantum of proof" that was applied to TECO's request for mid-course correction. FIPUG's motion requests substantially different relief than TECO's recent request for a mid-course correction. TECO's request for a mid-course correction sought interim relief subject to a later prudence review by the Commission. FIPUG's motion requests more permanent relief. Given the distinct substance of FIPUG's motion, it is not due the same "quantum of proof".

ISSUE 6: Should this docket be closed?

RECOMMENDATION: No. (C. KEATING)

STAFF ANALYSIS: The Fuel and Purchased Power Cost Recovery clause is an on-going docket and should remain open.