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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 000685-EI - Petition of Tampa Electric Company for approval of a new environmental program for cost recovery through the Environmental Cost Recovery Clause.

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 33**PAA

DATE: Tuesday, September 5, 2000

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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PARTICIPANTS:

JAMES BEASLEY, Ausley & McMullen, on behalf of Tampa Electric Company.
JIM BREMAN, Commission Staff.
NOREEN DAVIS, on behalf of the Commission Staff.
BOB ELIAS, on behalf of the Commission Staff.
VICKI GORDON KAUFMAN, McWhirter Reeves, on behalf of FIPUG.
MAUREEN STERN, on behalf of the Commission Staff.

STAFF RECOMMENDATION

Issue 1: Is Tampa Electric Company's Big Bend 1, 2, and 3 Flue Gas Desulfurization System Optimization and Utilization Program eligible for cost recovery through the Environmental Cost Recovery Clause?
Recommendation: Yes.

Issue 2: Should costs incurred prior to June 2, 2000, the date TECO filed its petition, be recovered through the ECRC, pursuant to Order No. PSC-94-1207-FOF-EI?

Recommendation: No. Section 366.8255(2), Florida Statutes, only allows for recovery of prospective costs. In addition, TECO was not subjected to extraordinary circumstances as defined in Order No. PSC-94-1207-FOF-EI. However, TECO may include the costs incurred prior to June 2, 2000, in its surveillance reports.

Issue 3: Should this docket be closed?

Recommendation: Yes. This docket should be closed upon issuance of a consummating order unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the proposed agency action order.

1 CHAIRMAN DEASON: Item 33.

2 COMMISSIONER JABER: I have one question,
3 Mr. Chairman, on Item 33. It's really just a
4 clarification for my education. Did the TECO
5 settlement with DEP -- was any part of the
6 settlement agreement contingent on cost recovery
7 here?

8 MR. BREMAN: Paragraph 0 of the DEP
9 settlement was contingent on that.

10 COMMISSIONER JABER: Is that how -- forgive
11 my ignorance on this issue. Is that normally
12 how the consent final judgments work? That
13 settlement agreement was executed between DEP
14 and TECO without consultation from the PSC;
15 right?

16 MS. STERN: As far as I know, there was no
17 consultation with the Public Service Commission.

18 I don't think that we've seen too many
19 requests to recover under --- you know, pursuant
20 to a settlement agreement. The agreement that
21 TECO had with EPA didn't have any kind of
22 recovery contingent on passing through the ECRC,
23 so I don't -- based on -- I don't really know if
24 it's standard or not. I don't think we've seen
25 enough to say there is a standard.

1 COMMISSIONER JABER: Just hypothetically
2 speaking, in situations like this, whether they
3 have occurred in the past or will occur in the
4 future, let's say the PSC finds that no cost
5 recovery -- that the utility isn't entitled to
6 any cost recovery because of their own
7 inactions. And this is hypothetical, because I
8 don't necessarily have a problem with this
9 recommendation. But what does that do to the
10 settlement agreement when there's a clause
11 contingent on cost recovery? Does it go back to
12 DEP?

13 MS. STERN: I think under this settlement
14 agreement with DEP, it sounds like it would go
15 back to DEP, that if TECO could not recover
16 through the ECRC, then part of that settlement
17 agreement was not reached. You know, it sounds
18 like it would mean TECO wouldn't have to do some
19 of the stuff in that settlement agreement. But
20 I can't -- on the other hand, I find that
21 situation sort of unrealistic. I think, you
22 know, DEP would find something to --

23 CHAIRMAN DEASON: well, I guess if that
24 were to happen, then it would be between TECO
25 and DEP to sort that out, it seems to me.

1 MS. STERN: Right, right.

2 CHAIRMAN DEASON: Either TECO would go
3 ahead with their obligation regardless of cost
4 recovery, or if they felt like that it was an
5 inordinate burden on them to go forward without
6 cost recovery, that would have to be worked out
7 between TECO and DEP.

8 MS. STERN: Yes, I think that's correct.

9 COMMISSIONER JACOBS: The question that
10 comes to me is similar, but not directly the
11 same. It's my understanding that the company
12 was engaging in an acceptable program of
13 emissions control, and we acknowledged and
14 approved of its recognized program. What I
15 understood the contention to be with regard to
16 the EPA was whether or not that was enough and
17 whether or not they should have undertaken more
18 dramatic emission control programming,
19 specifically whether or not they should have
20 gone to either newer plant technology or
21 dispensed with the old plant altogether.

22 It would occur to me that the question is
23 to what extent they were required by this
24 consent to incur some expense beyond what they
25 would have normally incurred in their normal

1 ongoing emissions control program. Do you
2 understand?

3 MR. BREMAN: Yes, sir. The settlement with
4 the DEP is nonspecific. It would be very
5 difficult to tell the full extent of what costs
6 that agreement might have occurred. In --

7 COMMISSIONER JACOBS: Can we tell the
8 difference --

9 MR. BREMAN: In this case, the program that
10 is specifically identified -- I think it's
11 paragraph 31 of the consent decree with EPA --
12 is very specific. It has time lines, dates. It
13 has specific activities at specific plants. So
14 I don't think there's very much ambiguity as to
15 what exactly TECO has to achieve.

16 COMMISSIONER JACOBS: I understand, but can
17 we tell whether or not the provisions of that
18 agreement are exceeding what we would have
19 expected TECO to have done? And I think it's
20 important to note that under the prior program,
21 what they were achieving in terms of emissions
22 control was within legal bounds. Is that
23 correct?

24 MR. BREMAN: I think the answer is yes.
25 This is more than what they were.

1 COMMISSIONER JACOBS: So they were on a
2 course to achieving emissions control within
3 legal bounds, and then the consent decree comes
4 and ratchets up the cost considerably, and to
5 meet new -- arguably, these revised legal
6 bounds, but we won't get into that. But to
7 achieve a new place of compliance. And so the
8 issue here is to what extent that difference was
9 legally required. Is that a fair statement?

10 MR. BREMAN: Yes.

11 COMMISSIONER JACOBS: And can we tell what
12 the difference is, is my question. Do we know
13 what the difference there is in what TECO would
14 have been doing under this former program?

15 MR. BREMAN: It would be very difficult to
16 answer the question a year from now as to what
17 the costs would be for the path not chosen,
18 because as time goes by, there's going to be
19 certain economic options that were built into
20 the long-term plans of the Company that are no
21 longer available, particularly SO2 allowance
22 market participation. The economic benefits of
23 that program were one of the heart and key
24 programs of the Environmental Cost Recovery
25 clause through phase 1, through the end of

1 1999. But on a going-forward basis, Tampa
2 Electric Company will not be able to use
3 allowances or bank them. They just simply have
4 to use whatever they use in that year and then
5 retire them. So there's no value beyond -- I
6 think it's 2004 for SO2 allowances.

7 COMMISSIONER JACOBS: I'm sorry. Whereas
8 previously they would have had value.

9 MR. BREMAN: Previously they would have had
10 value. So in the long term, I don't know that
11 we will ever be able to evaluate the cost of the
12 path not chosen, because it's simply not an
13 option anymore.

14 CHAIRMAN DEASON: Mr. Beasley?

15 MR. BEASLEY: Thank you, Commissioners.
16 James D. Beasley with the Ausley & McMullen law
17 firm in Tallahassee for Tampa Electric Company.
18 Also with me is Ms. Karen Zwolak, manager of
19 energy issues with the Regulatory Affairs
20 Department of Tampa Electric, and seated behind
21 me is Ms. Dee Brown, the director of electric
22 regulatory affairs for Tampa Electric.

23 Commissioners, we agree with your
24 Commission staff on Issue 1 that Tampa Electric
25 Company's Big Bend 1, 2, and 3 FGD optimization

1 and utilization program complies with your
2 standards for environmental cost recovery and
3 should be approved. The staff recommendation
4 recites your standards in that regard and
5 explains how this program meets them.

6 We respectfully disagree, however,
7 Commissioners, with the staff on Issue 2. That
8 issue is whether Tampa Electric should be
9 allowed to recover the costs which it occurred
10 in connection with this program in implementing
11 it prior to the date when we filed our petition
12 for environmental cost recovery. While we agree
13 with staff that under normal circumstances,
14 environmental costs should be approved
15 prospectively -- that is, absent extraordinary
16 circumstances, a utility should petition for
17 cost recovery in advance of including it or
18 incurring the cost to be recovered. Tampa
19 Electric has always attempted to follow this
20 course of action with respect to all of its
21 environmental projects.

22 However, as the staff points out in its
23 recommendations, and as you have observed, you
24 have the discretion to make exceptions to this
25 requirement on a case-by-case basis where a

1 utility demonstrates that extraordinary
2 circumstances required that costs be occurred
3 prior to the petition being filed.

4 We think that when you look at the
5 situation that Tampa Electric faced when it made
6 the decision and had to make the call to expend
7 funds in pursuit of this program, you should
8 agree that extraordinary circumstances indeed
9 compelled the Company to incur those costs
10 before a meaningful petition could be prepared
11 and submitted to the Commission.

12 As a bit of background, in 1999 and then
13 carrying over into the year 2000, Tampa Electric
14 was involved in litigation with the U.S.
15 Environmental Protection Agency and the Florida
16 Department of Environmental Protection. The DEP
17 case was settled through the entry of a consent
18 final judgment as of December 16, 1999. The EPA
19 lawsuit continued into this year, and the
20 parties were involved in continuing confidential
21 negotiations up until the very end of that
22 session. Finally, on February 29, 2000, Tampa
23 Electric and EPA signed a settlement agreement
24 in the form of a consent decree that was lodged
25 on the same day.

1 That consent decree required Tampa Electric
2 to maximize the availability of its FGD or
3 scrubber systems for Big Bend Units 1, 2, and 3
4 within the tight time frame, time schedule that
5 was set forth in that consent decree. Tampa
6 Electric was required to meet new increased
7 removal standards by the entry date of the
8 consent decree.

9 The work that needed to be performed in
10 order to comply with that decree involved the
11 installation of essential upgrades for the FGD
12 systems. Tampa Electric also knew it would need
13 to perform a more detailed evaluation to
14 determine what else might be required in order
15 to fully comply with the consent decree's
16 emission limitations once the system was down
17 and those evaluations could be performed.

18 Under the federal procedural schedule, a
19 60-day period for input followed the entry or
20 the lodging of the consent decree, and Tampa
21 Electric reasonably expected that the consent
22 decree would be entered at the expiration of
23 that time frame, which would mean that Tampa
24 Electric would have to meet the increased
25 standards by the end of April or the first part

1 of May of this year.

2 Extraordinary circumstances did exist in
3 this situation. After the consent decree was
4 finalized, Tampa Electric faced a last-minute
5 decision of whether to try to accomplish this
6 work required to upgrade the Big Bend Unit 3 FGD
7 system during a major planned maintenance outage
8 of the unit which would begin some ten days
9 later on March 11 and which would end as early
10 as April 21 of this year, or the Company's
11 option was to study its options and decide later
12 what course of action to pursue. In other
13 words, the Company faced the option of seizing
14 an opportunity to commence the required upgrades
15 and evaluations during the impending scheduled
16 outage or to schedule another planned outage at
17 a later time and at obvious additional cost to
18 its ratepayers.

19 Two facts were clearly evident at that
20 time. First, there was no time to prepare and
21 file a meaningful petition for ECRC cost
22 recovery prior to commencement of the March 11
23 scheduled outage, because there was incomplete
24 information at that time on the scope of the
25 work or the cost of the work for the required

1 upgrades and further evaluations. A petition
2 for some sort of blank check authority from this
3 Commission clearly to us did not seem likely to
4 succeed. Secondly, there was every reason to
5 believe that if the Company didn't act promptly,
6 it would find itself soon in violation of the
7 consent decree, which was expected to be two
8 months away at that time.

9 Clearly, Tampa Electric was operating in an
10 emergency mode. It was in a rock and hard place
11 type of situation that justified the Company's
12 decision to take immediate action for the
13 benefit of its ratepayers and to request cost
14 recovery at a later time.

15 Now, significant benefits inured to Tampa
16 Electric's customers as a result of the
17 Company's prompt action. By using the impending
18 planned outage of Big Bend Unit 3 to perform
19 these essential upgrades and further
20 evaluations, Tampa Electric avoided the
21 prospects of finding itself unable to run the
22 Big Bend units during the beginning of this
23 year's peak summer season. This could have left
24 Tampa Electric short of capacity and could put
25 the state's reliability at issue as well. with

1 an outage of just one of the FGD systems at Big
2 Bend Station, the Company could have lost over
3 900 megawatts of generating capacity.

4 If the Company had waited until a
5 meaningful petition could have been completed
6 and filed with the Commission, a later planned
7 outage would have been needed and could have
8 impacted the reliability of Tampa Electric's
9 system, as well as Peninsular Florida, not to
10 mention the cost of the additional planned
11 outage to Tampa Electric's customers.

12 As your staff has agreed, Tampa Electric
13 acted prudently and swiftly, taking advantage of
14 the planned March 11 outage to take steps to
15 comply with the consent decree rather than
16 waiting and exposing its customers to higher
17 costs and the potential threat to reliability
18 that we saw.

19 We respectfully urge that you recognize
20 that Tampa Electric indeed was operating in an
21 emergency mode and acted prudently under the
22 circumstances for the benefit of its customers.
23 This Commission has a policy of encouraging the
24 utilities it regulates to take advantage of cost
25 saving opportunities where and when they arise

1 and to put substance over form when it comes to
2 -- the interests of the utility customers are at
3 stake. That is what Tampa Electric did under
4 these circumstances.

5 We urge you not to penalize Tampa Electric
6 for having seized an opportunity. This would
7 send the wrong message to the companies that you
8 regulate. This isn't a situation where Tampa
9 Electric sat back and just through neglect
10 failed to prepare and submit a petition that it
11 had information with which to do that. This is
12 not a situation where the Company could or
13 should have known what the costs and the scope
14 of the work was prior to taking action to
15 commence that work on March 11 when the planned
16 outage started.

17 Under these particular circumstances,
18 Commissioners, we sincerely believe that you
19 should exercise your discretion to allow Tampa
20 Electric to recover all of the costs it
21 prudently incurred in implementing this
22 important program commencing with the March 11,
23 2000 planned outage of Big Bend Unit 3.

24 And we're available to answer questions if
25 you have them.

1 CHAIRMAN DEASON: Ms. Kaufman?

2 MS. KAUFMAN: Thank you, Chairman Deason.
3 Vicki Gordon Kaufman of the McWhirter Reeves law
4 firm. I'm here on behalf of the Florida
5 Industrial Power Users Group. And I'm here only
6 to address Issue Number 2, and I'm here to
7 support the staff's recommendation to you on
8 that.

9 I think that the staff has done the
10 correct analysis. And if you read their
11 recommendation, you'll see that the very first
12 thing they quote to you is the statute, which is
13 where the authority for the ECRC program comes
14 from to begin with. The statute is very plain.
15 It's very clear. It talks about proposed
16 compliance activities and projected
17 environmental costs.

18 Now, staff also pointed out to you that in
19 one of your orders interpreting this statutory
20 section, you have said that you might make an
21 exception if there were extraordinary
22 circumstances. I question whether that's the
23 case or not, whether you have the authority to
24 make an exception. But nonetheless, even
25 assuming that you do have that authority, I

1 don't think that there are extraordinary
2 circumstances before you. I don't think that
3 the fact that Tampa Electric was in negotiations
4 for a settlement with another agency is an
5 extraordinary circumstance that either requires
6 you to or either should encourage you to make an
7 exception. The statute says that a company may
8 come to you and submit a program for
9 environmental cost recovery of certain types of
10 programs and that recovery is on a projected
11 basis. And I don't think there's any dispute
12 that that has not happened here.

13 Mr. Beasley gave you a lengthy history of
14 the negotiations of Tampa Electric with some of
15 the other agencies involved in environmental
16 compliance. And what TECO chooses to do or what
17 settlements it chooses to enter into with other
18 agencies is perhaps its own business, but those
19 costs should not be visited on the ratepayers in
20 contravention of the statute. I would suggest
21 to you that a statute like this is one that you
22 should give strict construction to. And Tampa
23 Electric has not complied with the statute, and
24 therefore, they are not entitled to incur costs
25 before -- I believe the date is before June 2nd.

1 So we would urge you to adopt your staff's
2 recommendation on Issue Number 2. Thank you.

3 CHAIRMAN DEASON: Questions, Commissioners?

4 COMMISSIONER JABER: I can actually move
5 staff. The only reason I raised the question
6 about the contingency related to cost recovery
7 is, you know, the overall concern I've had with
8 many items we have with respect to DEP. I would
9 want them to always take into account that their
10 actions result in costs to the retail
11 ratepayers. You know, we've offered to go over
12 and talk to DEP about things like that and
13 making us part of their process. But I can move
14 staff.

15 CHAIRMAN DEASON: well, let me -- I have
16 just a few questions, and then we'll get to the
17 motion.

18 I'm looking at page 3 of the
19 recommendation, and I want to just -- first of
20 all, I'm trying to understand just as a matter
21 of information. Staff, do you have any idea why
22 it was a requirement imposed by the
23 environmental agencies that TECO would not --
24 could not bank SO2 allowances and market those?
25 I thought that was the whole idea of that law,

1 was to let the market determine what is the most
2 cost-effective compliance, and it appears that
3 that's going contrary to that policy.

4 MR. BREMAN: Well, I would agree with you,
5 Commissioner. And like Tampa Electric Company
6 said earlier in its own comments, it had
7 confidential negotiations with EPA, and in order
8 to settle, they agreed to those terms. Why they
9 agreed to them, Commissioner, I don't know.

10 CHAIRMAN DEASON: Okay. There's not a cost
11 that you can just point to and identify as a
12 cost associated with that, because you just
13 can't really tell what the market would have
14 been or what would have happened. We just know
15 that it's a restriction on what TECO otherwise
16 would have been able to have legally done;
17 correct?

18 MR. BREMAN: Well, we can look at papers,
19 and there are publications that track and
20 project SO2 allowance costs. And the green
21 pricing program, for example, is deriving some
22 of those costs from that location. So there is
23 a way to allocate a cost. But on a
24 going-forward basis, the zero-based allowances
25 will have zero cost.

1 CHAIRMAN DEASON: The other question I have
2 has -- also I'm referring to page 3. There's a
3 requirement to pay \$2 million into the Tampa Bay
4 Estuary Program, and then in one of the other
5 settlements there's a 3.5 million one-time civil
6 penalty. Now, none of those costs are being
7 reflected in the -- I'm trying to ascertain, are
8 any of those costs included in what is being
9 proposed for recovery through the environmental
10 clause?

11 MR. BREMAN: None of those costs are being
12 proposed for recovery at this stage.

13 CHAIRMAN DEASON: Okay. I guess the other
14 question I have has to do with Issue 2. And I'm
15 trying to understand -- I know Ms. Kaufman
16 raised a legal question as to whether we have
17 the authority to say that there are
18 extraordinary circumstances, but just ignoring
19 that for right now, assuming we have that
20 authority, why is it that staff believes that
21 this is not an extraordinary circumstance, given
22 the timing of the outage, the planned outage
23 during the springtime and the advantages of
24 trying to utilize that outage for as much of the
25 compliance as possible so as to avoid a future

1 planned outage?

2 MS. STERN: Well, in the order where the
3 Commission established the extraordinary
4 circumstances exception, they defined --
5 extraordinary circumstances was defined as
6 whether the utility could reasonably have
7 anticipated the changes in environmental
8 regulations and the costs. And in the
9 recommendation we explained that we thought TECO
10 could have anticipated the changes, because they
11 went through this whole negotiation process that
12 was sort of a long-term process. So I think
13 they -- and they had input into it. It wasn't
14 something just strictly imposed on them by the
15 regulatory agencies. So I think it's something
16 they could have anticipated.

17 CHAIRMAN DEASON: Well, let's back up for
18 just a second. You're saying that while they
19 were negotiating, they should have been able to
20 figure out what the end result of the
21 negotiation was going to be and come before this
22 agency and say, "Even though we're still
23 negotiating, Commission, we think this is going
24 to be the outcome of the negotiation, so we're
25 filing our compliance plan with you now so we

1 can go ahead and get cost recovery"?

2 MR. BREMAN: Excuse me. I think the time
3 line is a little messed up. The agreement was
4 struck, and then it went through due process.
5 The company is talented and very -- I assume
6 very aware of what due process through the EPA
7 and public notice is. So there's a time line of
8 due process where the public comments are going
9 to be received. The Company wasn't surprised by
10 the decision. It knew what the decision was.

11 And we're not disputing that doing what
12 they did was smart. It was smart. But there's
13 nothing to show that there would absolutely
14 beyond a reasonable doubt have been additional
15 cost incurred. There could have been --

16 CHAIRMAN DEASON: Well, I --

17 MR. BREMAN: There's another outage
18 probably going to occur in the spring of next
19 year.

20 So there is flexibility and reasonableness
21 at EPA, according to some people, and according
22 to others, you know, there's another opinion.

23 MS. STERN: I also want to add that I
24 think they could have submitted a petition to
25 cover their costs from April -- March through

1 June. They wouldn't have had to submit a
2 petition to cover the whole year. They wouldn't
3 have had to do all that analysis. We're talking
4 about a petition to cover two months. The
5 petition I believe could have been held in
6 abeyance until all the noticing requirements
7 were met.

8 Furthermore, they never even sent us a
9 letter saying we're having this emergency.
10 There was no indication to us that TECO was
11 thinking in terms of following the cost recovery
12 statute, because they never contacted the staff
13 to say, you know, we're having this emergency
14 situation, you know, can we submit a petition
15 that's maybe not 100% up to par and get it
16 covered.

17 And I also want to note that other
18 utilities have been in situations where they've
19 incurred environmental costs before they filed
20 their petition for the year, and they have just
21 not asked for those costs that have been
22 incurred. That's part of the reason why the
23 issue hasn't come up yet. Sometimes -- it's my
24 understanding that staff in the past has made
25 the utilities aware of the prospective

1 requirement, and they just voluntarily say,
2 "we're just not going to include it then." So
3 this is --

4 COMMISSIONER JABER: In the order that
5 acknowledges there might be situations where
6 we would find extraordinary circumstances, what
7 authority is cited in that order for -- is there
8 any authority cited for the notion that we might
9 be able to find extraordinary circumstances to
10 the prospective recovery?

11 MS. STERN: There's no authority for --
12 there's no authority cited in the order.

13 COMMISSIONER JABER: And staff is not
14 saying that the costs are not prudently
15 incurred. You're just saying that the clause
16 might not be the appropriate mechanism for
17 recovering those costs.

18 MR. BREMAN: That's correct.

19 CHAIRMAN DEASON: I'm trying to ascertain
20 then, what would staff had -- what would you
21 have required TECO to have done, and at what
22 time period, so that there would have been 100%
23 recovery of these costs? What would have been
24 required?

25 MS. STERN: They would have had to submit a

1 petition before they incurred the costs, and in
2 the petition they would have --

3 CHAIRMAN DEASON: Let's back up just a
4 second. Okay. Before they incurred any costs.
5 when were the first costs incurred?

6 MS. STERN: I believe they were incurred in
7 April.

8 CHAIRMAN DEASON: In April.

9 MR. BREMAN: March.

10 MS. STERN: March. Okay.

11 CHAIRMAN DEASON: They were incurred in
12 March. Okay. So they should have filed a
13 petition requesting recovery, and the petition
14 should have been filed March or earlier. Did
15 TECO know what the costs were in March?

16 MR. BREMAN: I don't know what they knew in
17 March. They did know that they were going to do
18 something on Big Bend Unit 3. They decided what
19 to do, and they did it. A utility has a
20 requirement to be careful about how it spends
21 its money, so it already did some level of
22 internal review before it incurred the costs to
23 do the Big Bend 3 activities.

24 CHAIRMAN DEASON: Okay. So there should
25 have been a petition filed, and there should

1 have been -- to the extent they could have
2 identified any costs, they should have
3 identified those.

4 MR. BREMAN: Correct.

5 CHAIRMAN DEASON: Okay. Mr. Beasley, why
6 didn't you do that?

7 MR. BEASLEY: Commissioner, the settlement
8 resulted just prior to this planned outage. It
9 was a confidentially negotiated settlement. We
10 didn't know at that point in time what the costs
11 were. That would have to be turned over to the
12 engineers and the cost estimators and other
13 folks involved in actually doing the work. They
14 set about to do that as quickly as they could
15 and pulled it together as quickly as they could.

16 But we were in a dual mode. We were trying
17 to take advantage of the March 10 -- excuse me,
18 March 11 outage, and to get that in operation so
19 we wouldn't miss that opportunity. And we
20 didn't have the information about what further
21 examinations of the unit once it was down would
22 produce as far as additional costs. We had to
23 do those further evaluations after the unit was
24 brought down.

25 But our first goal was to take advantage of

1 that outage before it got away, and then we
2 followed along pretty promptly with our petition
3 after that.

4 CHAIRMAN DEASON: Okay.

5 MR. BEASLEY: And these are costs, again,
6 of a program which the staff has said that we
7 were prudent to do, that we are to be
8 congratulated for taking advantage of that
9 planned outage. So we feel that they're costs
10 that should be recovered with that program.

11 CHAIRMAN DEASON: I have a concern, and I
12 guess I'll address this to staff. My concern is
13 this. I understand the way the law reads, but
14 at the same time, it seems to me a negotiated
15 settlement of this type may rise to the level of
16 what at least I personally consider to be
17 extraordinary.

18 And the reason I say that is because it
19 seems to me that to be engaged in meaningful
20 negotiation such that each party is able to cut
21 the best deal, so to speak, there has to be some
22 flexibility involved. And to the extent that a
23 utility has one hand tied behind their back, in
24 the sense that they have to have everything
25 finalized to be able to file for cost recovery,

1 if that's the message we're going to send to
2 them, it's like don't bother to negotiate, just
3 let DEP mandate to you what they're going to
4 require you to do, and then you can come to the
5 Commission, and regardless of what the cost is,
6 by law, we have to pass it through. So we're
7 perhaps taking away an incentive for the
8 utilities to be perhaps forward-looking and
9 negotiate hard and try to cut the best deal and
10 try to take advantage of planned outages so as
11 to minimize impacts on the system, both from a
12 reliability and a cost perspective.

13 That's my concern. Is that the message
14 we're sending to companies who are involved in
15 these type negotiations? And it's possible
16 there's going to be more and more of these type
17 negotiations with the environmental agencies.
18 That's the concern.

19 MR. BREMAN: Commissioner, staff debated
20 this issue amongst itself for a long time, and
21 in fact, it's at the heart of why we deferred
22 this recommendation once. It boils down to a
23 legal argument, Commissioner, not a question of
24 prudence.

25 CHAIRMAN DEASON: Okay.

1 MS. STERN: Could I just add something? If
2 I understood your question properly, you're
3 wondering -- you're thinking that it's
4 ultimately harmful to everyone involved if we
5 don't consider this situation extraordinary,
6 that it doesn't create the right incentives to
7 get the best deal.

8 CHAIRMAN DEASON: I'm concerned that it
9 sends the wrong signal to utilities, don't try
10 to be innovative or look at time lines. The
11 only thing you should be concerned about is just
12 making sure that whatever the costs are, just
13 make sure that we don't incur any costs until we
14 have something filed. And if that's going to be
15 the requirement, then that may hinder them from
16 being able to negotiate what is in the best
17 interests of their customers.

18 MS. STERN: Well, the statute is pretty
19 clear that the costs have to be prospective, so
20 that's -- part of the problem stems from the
21 statute. The only thing -- and I can understand
22 the problem that you're explaining. The order,
23 the Commission's order identifies an exception,
24 extraordinary circumstances.

25 The Commission, as I'm sure you know, has

1 some discretion when it implements statutes, you
2 know, some liberties that it can take. And to
3 keep taking more and more liberties, you raise
4 the question of are you exceeding your
5 discretion, because the statute is pretty
6 straightforward and clear, and you also just
7 start down that sort of slippery slope of, well,
8 this thing we thought -- you know, in this case,
9 it was a settlement agreement, and we think that
10 might be extraordinary. Well, nothing like a
11 settlement agreement was identified as
12 extraordinary in the --

13 COMMISSIONER JABER: Do we have rules
14 implementing this statute?

15 MS. STERN: No. That's just a word of
16 caution.

17 MR. ELIAS: And again, Commissioner Jaber,
18 this is a cost recovery clause pursuant to
19 Chapter 366, which is specifically exempted from
20 the rulemaking requirements.

21 COMMISSIONER JABER: So I go back to the
22 question then. When you issued the order that
23 said that there might be an exception for
24 extraordinary circumstances, what statutory
25 authority did you cite?

1 MS. STERN: There wasn't any cited. But
2 agencies do have some discretion in interpreting
3 their statutes. We didn't look at the question
4 of, in that order, did the --

5 COMMISSIONER JABER: But an agency can't
6 read more into a statute than is there;
7 correct?

8 MS. STERN: Yes.

9 COMMISSIONER JABER: Issue by issue?

10 CHAIRMAN DEASON: Okay. We can go issue
11 by issue. Issue 1.

12 COMMISSIONER JABER: I can move Issue 1.

13 CHAIRMAN DEASON: It's been moved. Is
14 there a second?

15 COMMISSIONER JACOBS: Second.

16 CHAIRMAN DEASON: Moved and seconded. All
17 in favor say "aye."

18 COMMISSIONER JACOBS: Aye.

19 COMMISSIONER JABER: Aye.

20 COMMISSIONER JACOBS: I want to --

21 MS. DAVIS: Chairman Deason, if I may
22 interrupt, I think I might have an answer to
23 Commissioner Jaber's question.

24 COMMISSIONER JACOBS: Before we do that,
25 can I -- as to Issue 1 -- you're going as to

1 Issue 2; right?

2 MS. DAVIS: Yes, sir.

3 COMMISSIONER JACOBS: It somewhat ties in,
4 but I think it's really important that we be
5 clear here. This is a troubling case because of
6 how the legal requirement came to be. And it
7 sets bad precedent, in my mind, when the legal
8 requirement that we now have to consider did not
9 anticipate economic ramifications. In fact, on
10 the front end of this, the prediction was of
11 significant and dramatic economic impact from
12 this.

13 while there's no discussion or debate that
14 the environmental issues are pertinent and
15 relevant and important, I think it's important
16 for us to acknowledge that a balancing has to
17 occur, and the best time for that balancing to
18 occur is on the front end. We're now faced with
19 the unenviable task of trying to do that
20 balancing on the back end, and that makes this a
21 really onerous decision in my mind. So with
22 that caveat, I think we basically can only do it
23 with hindsight.

24 CHAIRMAN DEASON: Okay. I think we did --
25 we voted on Issue 1.

1 COMMISSIONER JACOBS: We did.

2 CHAIRMAN DEASON: Okay. Issue 2.

3 MS. DAVIS: Commissioners, I don't recall
4 the discussion in 1994 that the Commission held
5 that resulted in the language in the order that
6 Ms. Stern quoted that said, you know, there may
7 be an exception for extraordinary circumstances,
8 but I just wanted to bring to your attention
9 that in Chapter 366, subsection .01, there is
10 language that says, "All the provisions hereof,"
11 referring to Chapter 366, "shall be liberally
12 construed for the accomplishment of that
13 purpose."

14 I don't know if that was part of the
15 discussion back then, but that's the only thing
16 that came to mind that perhaps could have
17 supported that kind of a statement.

18 CHAIRMAN DEASON: Well, let me say this.
19 You know, it seems to me that the reason that
20 the Legislature adopted this provision was to
21 have a mechanism for legitimate costs to be
22 recovered, which has the effect on the utilities
23 of complying with environmental law. Not that
24 they wouldn't otherwise, but I guess if there an
25 is a recovery mechanism for these requirements,

1 I think it expedites the process in which
2 compliance is achieved. And I think that's a
3 good policy to have, a good policy goal to have.

4 And I think it was envisioned that it would
5 be a situation that there would be perhaps some
6 new environmental program or compliance or
7 requirement, and that there may be some type of
8 a rulemaking process or whatever at the
9 environmental agency, and there would be a
10 decision made, and it would be of a prospective
11 nature, and the utility would say, well, we've
12 got to meet X standard for a certain pollutant,
13 or a certain emissions standard, or whatever it
14 is, and they could come forward and say, what's
15 the most cost-effective way to comply? Well, we
16 think it's program A, and we're going to submit
17 to the Commission that here's the requirement,
18 here's the best way to comply, and here are the
19 costs, and it's going to be implemented -- we
20 have to start implementing it June 1st of next
21 year. It's all done on a very forward-looking
22 basis, planned out. Everybody knows where they
23 are and what the requirements are, and an
24 engineer is going to look at it and say this is
25 the least cost way to meet the requirements. And

1 this is the way that the statute was written,
2 envisioning that type of a situation, which I
3 think would be the more normal situation.

4 what we have in front of us now is not what
5 we would consider the normal situation,
6 particularly when you've got the utility and the
7 regulator negotiating as to what the compliance
8 is going to be. And then to require that the
9 utility have to come forward in the middle of
10 negotiations or shortly thereafter, come forward
11 with a detailed compliance, saying that this is
12 the least cost option and, Commission, we want
13 you to approve this on a going-forward basis, I
14 just don't think the two mesh too well.

15 And if there's an overriding policy as to
16 -- what signals do we send our utilities when
17 they're engaged in these type negotiations? It
18 would be -- the extreme interpretation could be,
19 utilities, don't negotiate, and just let DEP
20 require you to do something, and just make them
21 require you to do it sometime in the future so
22 that you can put together your plan. And it
23 might cost twice as much as if you had
24 negotiated, but at least they get 100% recovery.
25 I don't think that serves our ratepayers, and

1 that's what my concern is.

2 So I'm willing to take a motion on Issue 2.

3 COMMISSIONER JABER: Staff, did OPC
4 participate in the negotiations, or any
5 customers?

6 MR. BREMAN: To the best of our knowledge,
7 the only participants were TECO and EPA.

8 CHAIRMAN DEASON: Commissioners, I realize
9 there is not a clear-cut answer to the question,
10 and that there are --

11 COMMISSIONER JABER: No, there's not.

12 CHAIRMAN DEASON: The legal basis upon
13 which we try to establish extraordinary
14 circumstances is certainly not clear.

15 COMMISSIONER JABER: The difficulty I'm
16 having is there's only one regulator at the
17 negotiation table, and the people that are most
18 affected by DEP's or EPA's actions are not at
19 the negotiation table. But you're absolutely
20 right. And consistent with everything I've said
21 and my philosophical beliefs, Chairman Deason, I
22 do not want to discourage companies from
23 entering into negotiations, but I think with
24 good negotiations, you have everyone at the
25 table that's going to be affected. That's the

1 difficulty I'm having. I can't make a motion on
2 this.

3 COMMISSIONER JACOBS: Well, we can punt it
4 to Braulio.

5 COMMISSIONER JABER: I'm punting.

6 COMMISSIONER JACOBS: I begin with the
7 legal statement from my prior order. And you
8 could argue with how that decision came to the
9 conclusion that there would be exceptions to
10 this, but it's clear that we recognized that
11 there could be an exception. And so I come to
12 the point of trying to square this circumstance
13 with what we recognize to be an exception.

14 Staff suggests that the first question that
15 you have to ask is whether the Company could
16 have reasonably anticipated the changes and the
17 costs that it incurred. It's a tough call.

18 On the one hand, the Company had been in
19 negotiations prior to this action, is my
20 understanding. Prior to the EPA action, there
21 had been ongoing discussions with the regulator
22 as to this issue. On the other hand, those
23 discussions involved an honest, legitimate
24 dispute over the interpretation of the
25 prevailing law.

1 And so if we take one approach here, i.e.,
2 that the Company should have been aware, we
3 essentially say that the Company should have
4 anticipated that it would lose in its arguments
5 as to the prevailing interpretation of the law.
6 On the other hand, if we say that it could not
7 have anticipated these costs, we say that the
8 Company should have anticipated that its
9 interpretation of the law would have prevailed,
10 in view of the fact that the regulator who has
11 responsibility for that law sees differently.

12 I don't end it there. I look beyond just
13 the dispute and what was going on. I look at
14 the idea that -- what was happening with regard
15 to the overall environmental endeavors of the
16 company.

17 I look at the fact that while this dispute
18 had a history, it was a clear escalation of this
19 difference of opinion that occurred at this
20 point in time, i.e., while there had been this
21 difference of interpretation, this was a clear
22 escalation from the regulator as to their
23 aggressiveness in pursuing the avenues of the
24 law. I don't know or can't recall, but I do not
25 think the Company could have anticipated that

1 the agency was -- that the EPA was going to
2 escalate its effort to enforce its views of the
3 law.

4 I look at the idea that when this came
5 about, there were two agencies that became
6 immediately involved, the federal agency and the
7 state agency. There was negotiation with the
8 state agency that occurred and negotiation with
9 the federal agency that occurred, which they
10 wound up not being that different, but there
11 were differences.

12 I look at the fact that this company in
13 fact had undergone some other efforts. And I
14 come to the conclusion that this gets very close
15 to being extraordinary circumstances. Again,
16 it's a very tough call.

17 I would have expected the Company to take
18 some action here at the time -- immediately when
19 it saw that the EPA was going to take this more
20 aggressive stance. And I'll be honest with you,
21 you can't -- this is hindsight, and I have to
22 say that up front. But when I see where the
23 Company was, i.e., caught in the cross-hairs
24 between two governmental agencies in a very
25 serious turf battle, I would have expected the

1 Company to take some kind of action to give
2 itself some flexibility. That is what I don't
3 see that troubles me the most here.

4 Now, I remember that there was some effort
5 by the Company to do something here, and that,
6 quite frankly, gives me some comfort that there
7 was an effort to do something that was
8 withdrawn. But I would have expected some
9 action to be taken here.

10 However, I go back to my original
11 statement. When I put all that together, it
12 begins to reach what I would view to be
13 extraordinary circumstances that the Company
14 faced.

15 I would add, however, that -- we've said
16 that we didn't have very much to provide
17 guidance as to what we meant in our first order.
18 And when we announced this exception of
19 extraordinary circumstances, I would put this to
20 be about the outer limit. This, in my mind,
21 would be about as much as I would be willing to
22 accept in terms of defining what extraordinary
23 circumstances are.

24 Again, I would have expected some more
25 affirmative action at the point in time when the

1 Company recognized that the EPA was escalating
2 their stance on this issue. And I believe at
3 that point we should have had some discussion
4 here, somehow, some way, so that we could have
5 come here and balanced the economic impacts
6 versus what the regulatory hurdles were, the new
7 regulatory hurdles that the Company perceived
8 itself to be faced with.

9 But having gone all that route and come to
10 that conclusion, then I guess I would come to
11 the point of saying that this seems -- these
12 circumstances seem, about as much as I can
13 imagine, to be extraordinary circumstances that
14 would meet the exception that we announced to
15 the requirement that a petition be filed in
16 advance of any costs being incurred. And I
17 still -- it's tough for me to get there, but I
18 have to be honest in looking at what the
19 circumstances were.

20 So, Mr. Chairman, with that, I'll move to
21 deny staff on Issue 2.

22 CHAIRMAN DEASON: There's a motion to deny
23 staff on Issue 2. Is there a second?

24 COMMISSIONER BAEZ: Second.

25 CHAIRMAN DEASON: Moved and seconded. All

1 in favor say "aye."

2 COMMISSIONER JACOBS: Aye.

3 COMMISSIONER BAEZ: Aye.

4 CHAIRMAN DEASON: Aye. All opposed, "nay"

5 COMMISSIONER JABER: Nay.

6 CHAIRMAN DEASON: The motion carries on a
7 three-to-one vote. And that addresses Issues 1
8 and 2.

9 Issue 3.

10 COMMISSIONER JACOBS: Move it.

11 CHAIRMAN DEASON: Without objection, show
12 staff's recommendation on Issue 3 is approved.

13 Thank you all. That concludes Item 33.

14 (Conclusion of consideration of Item 33.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 42 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 12th day of September, 2000.



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