BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 950379-EI - Determination of regulated earnings of Tampa Electric Company pursuant to stipulations for calendar years 1995 through 1999.

BEFORE:	CHAIRMAN J. TERRY DEASON COMMISSIONER E. LEON JACOBS, JR. COMMISSIONER LILA A. JABER COMMISSIONER BRAULIO L. BAEZ COMMISSIONER MICHAEL A. PALECKI
PROCEEDINGS:	AGENDA CONFERENCE
ITEM NUMBER:	28
DATE:	Tuesday, December 19, 2000
PLACE:	4075 Esplanade Way, Room 148 Tallahassee, Florida
REPORTED BY:	MARY ALLEN NEEL Registered Professional Reporter

ACCURATE STENOTYPE REPORTERS
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PARTICIPANTS:

ROBERT ELIAS, on behalf of the Commission Staff.
ROGER HOWE, on behalf of the Office of Public Counsel.
SAMANTHA MERTA, Commission Staff.
RON NEAL, Tampa Electric Company.
CHRISTINE ROMIG, Commission Staff.
LEE WILLIS, on behalf of Tampa Electric Company.

STAFF RECOMMENDATION

Issue 1: What is the appropriate rate base for 1999?
Recommendation: This appropriate rate base is $2,116,831,729.

Issue 2: What is the appropriate capital structure for purposes of measuring earnings for 1999?
Recommendation: For the purpose of measuring earnings under the stipulation, the appropriate capital structure for 1999 is shown on Attachment B of staff's December 7, 2000 memorandum.

Issue 3: What is the appropriate net operating income for 1999?
Recommendation: The appropriate net operating income is $178,865,684 for 1999.

Issue 4: What is the amount to be refunded?
Recommendation: The amount to be refunded is $6,102,126, including interest, as of December 31, 2000. Additional interest should be accrued from December 31, 2000, to the time the actual refund is completed.

Issue 5: Should this docket be closed?
Recommendation: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.

CHAIRMAN DEASON: We're going to go back to the normal order, except we are going to take up Item 28 out of order. We will take it up at this time, Item 28.

COMMISSIONER PALECKI: Chairman Deason?

CHAIRMAN DEASON: Yes.

COMMISSIONER PALECKI: On Item 28, I was a member of Commission staff in 1994 and '95 when this docket was initiated. I would like to point that out to the parties, that I have been previously involved in this docket. I believe that I can decide this docket fairly and impartially, but if any of the parties does object, I would certainly recuse myself, having been involved in this docket prior.

MR. WILLIS: No objection.

CHAIRMAN DEASON: No objection from Mr. Willis.

MR. HOWE: No objection.

CHAIRMAN DEASON: No objection from Mr. Howe. And I know staff has no objection.

We are now on Item 28. Staff, do you wish to introduce the item?

MS. MERTA: Commissioners, Item 28 is the determination of regulated earnings of Tampa

Electric Company pursuant to stipulations for calendar years 1995 through 1999. This item was deferred from the October 17th agenda conference in order to allow staff to address the arguments of TECO and the Office of Public Counsel regarding the treatment of interest on tax deficiencies. Earnings for 1995 through 1998 are addressed in prior Commission orders. This recommendation addresses 1999 earnings only.

CHAIRMAN DEASON: Okay. Thank you.

Mr. Willis?

MR. WILLIS: I am Lee Willis, representing Tampa Electric. I would like to make a few brief remarks and then reserve some time to respond to any points that Public Counsel may make.

We are here before you today to conclude the determination of the amount of refunds due with respect to Tampa Electric Company's earnings under its stipulation. This stipulation has provided tremendous benefits to Tampa Electric Company's customers by freezing its rates during the stipulation period and by providing refunds of some $63 million to date.

Throughout the stipulation period, Tampa

Electric has worked very hard to reduce its expenses, to maximize the amount of deferred revenue, and to increase the amount of refunds to its customers. The Company has been very successful to date in this effort.

We come now to the resolution of Tampa Electric's earnings for 1999, the last year of the agreement. We have reviewed staff's recommendation and realized that it carries forward in it some positions on issues with which the Company has disagreed in the past and which have been resolved by you. Based on your decisions in prior years' earnings, we accept the premise that you have advanced in review of the appropriateness of these various adjustments.

You have stated and have ruled that the guiding principle of the stipulation is that all reasonable and prudent expenses and investments will be considered in the calculation of the Company's earnings, and you have determined that the stipulation provides specific directions for specific expenses and investments that are to be included or excluded. But these specific guidelines are not intended to be a complete laundry list of all the issues to be considered by the Commission in the review of the Company's earnings.

Additional issues have arisen and have been resolved by you on the basis of the basic principle I have just provided, that is, whether or not the investment or expense was reasonable or prudent. There are numerous examples of these adjustments that have been made that have been outlined in your staff's recommendation to you.

In making those adjustments in prior years, the staff has asserted and the Commission has confirmed that the specific directions included in the stipulation with respect to certain investments and expenses are not intended to be a complete laundry list.

So in the interest of bringing this matter to a close, the Company will accept the results of the staff's recommendation if it's accepted by this Commission and no protests are filed. We strongly believe that at the end of the day, customers have fared very well under this agreement, and we urge to you approve staff's recommendation.

I would like to take just a minute to turn to the specific issue that has been raised by OPC, that is, the appropriate treatment of interest on tax deficiencies. We strongly support staff's recommendation and sharply disagree with Public Counsel's position on this issue.

Your staff has concluded that the positions taken by Tampa Electric with respect to the IRS on outstanding tax issues has provided overall benefits to customers. These benefits were derived not only by avoiding the cost of the tax, but also avoiding the cost of capital which would have been necessary to pay the tax during the period the tax issue was pending before the IRS. Those benefits accrued, and each year the tax was outstanding.

Now, you have a Commission policy on this issue. That policy is to recognize interest on deficiencies, on tax deficiencies where the cost/benefit analysis shows benefits to customers, as is the case here. That is the policy of the Commission. Your staff has outlined to you several cases that hold that policy.

Now, OPC has contended that to consider interest on tax deficiencies in 1999, it would be an adjustment inconsistent with the Company's last rate case, and that only adjustments approved in the Company's last rate case can be made. We agree with the position of the staff that the provision requiring that adjustments be made in the last rate case merely requires that those adjustments be made as a point of beginning. It is not intended to be a complete list of the adjustments that can be made.

The key here is to give full effect to the entire writing in paragraph 7, which is a key provision of stipulation. That paragraph reads that the calculation of the actual ROE for calendar year 1999 will be used -- will be an FPSC adjusted basis using appropriate adjustments approved in Tampa Electric's last full revenue requirements proceeding. But it goes on to the key part of that paragraph, which reads, "All reasonable and prudent expenses and investments will be allowed, and no annualization of pro forma adjustments will be made."

As recommended by your staff, interest on tax deficiency is certainly a prudent expense incurred in 1999, and the language, referring to the Company's last rate case, was never intended to define the full universe of prudent expenses that could be considered.

In summary, we believe that OPC's position on this issue tips the scales of reasonableness against the Company and penalizes it for actions that it has taken that have lowered costs for its customers. During the stipulation period, as we said, the Company did everything that it could to lower its expenses, and one of the things that it did was to take aggressive positions before the IRS with respect to various tax issues. The Company has shown that the benefits associated with the tax position taken outweigh the interest expense assessments by the IRS.

The bottom line to all of this is -- and it's expressed in your staff's recommendation as its bottom line. It states that consistency, fairness, and the reasonable interpretation of the stipulations lead staff to recommend to you that the appropriate -- that it is appropriate to include interest expense associated with tax deficiencies in the calculation of Tampa Electric's 1999 ROE. We urge you to approve staff's recommendation.

CHAIRMAN DEASON: Mr. Howe?

MR. HOWE: Commissioners, I'm Roger Howe with the Public Counsel's Office.

Staff in its recommendation did not address one area of our concerns, and that was with the cost/benefit analysis itself, and I would like to touch on that very quickly.

Three and a half years after we signed the first stipulation and three years after we signed the second, Tampa Electric in its surveillance reports started showing interest expense on tax deficiencies. The cumulative amount was approximately $12.7 million.

First of all, we disagree with the 12.7. Commissioners, you need to keep in mind, this isn't just the bill they got from the IRS. This includes the estimate of what they would also have to pay for those existing open years. The effect of inflating this amount is that it helps to reduce the amount of refunds under the stipulation. It reduces the earnings for 1999. If it turns out the Company has overaccrued, they just make adjustments in future years after there are no refunds at issue.

Secondly, the cost/benefit analysis itself, the approach that your staff has accepted which was offered by Tampa Electric is that because of the IRS's decisions in 1999 to impose interest income tax deficiencies, that that indicates that Tampa Electric was not allowed high enough rates in its last rate case, that in 1993, Tampa Electric should have been allowed to earn an additional $1.7 million in rates, and that in 1994, because there was a step increase -- and this increase for '94 was $2 million, which applied in '94, '95, '96, '97, '98, and '99. If you add those all together, that was approximately $2 million. So the Company was deprived of $14 million in revenues in its last rate case. It should have been allowed to receive more money, and that $14 million that they were not allowed to collect is what justifies the Company in 1999 booking $12.7 million of interest expense on tax deficiencies because they would still be in the negative.

It serves the purpose of reducing refunds under the stipulation going forward. And it also ignores all aspects of retroactive ratemaking, administrative finality, and the explicit terms of the stipulation. So the position that's being posed to you here is a cost/benefit analysis in which if the Company had been allowed to earn $14 million more in past years, they were -- I'm sorry. They were deprived of the opportunity to earn $14 million in past years, and that justifies them recording 12.7 million of interest expense in 1999.

So we have serious concerns with the cost/benefit analysis and the actual calculations that go into it.

More importantly, Commissioners, I believe it's really an issue of law and policy. As I stated the last time we met on this topic -- I believe it was October 17th, and I think at that time it was a panel assigned. Now it's the full Commission. I told the Commissioners we did not ignore the subject of interest expense on tax deficiency in our stipulation. In that stipulation, we explicitly said that any interest expense imposed upon the Company -- the term we used was "assessed upon the Company" -- related to the Polk Power Station would be recognized as a prudent expense for ratemaking purposes. The explicit language was in paragraph 10 of the first stipulation, and it reads, "The parties agree that any interest expense that might be incurred as a result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking purposes and will support this position in any proceeding before the PSC."

Now, Commissioners, this is an explicit provision in the stipulation. It is followed by the next paragraph, which says the calculation will be based on adjustments consistent with the last rate case, and it's followed by a sentence that says all reasonable and prudent expenses will be allowed.

Now, the staff has accepted the Company's position that this "all reasonable and prudent expenses" language allows for recovery of any interest expense on tax deficiencies.

But, Commissioners, if interest expense on tax deficiencies were recoverable pursuant to this language, we would have had no reason for the language limiting recovery to adjustments consistent with the last rate case. We would not have had a paragraph dealing with interest on tax deficiencies associated with the Polk Power Station, because that adjustment would be subsumed. Everything would be captured by the second sentence of paragraph 11.

The only rational --

COMMISSIONER JABER: Mr. Howe, let me ask you a question. You point to that language, which you acknowledge is explicit language --

MR. HOWE: Yes, ma'am.

COMMISSIONER JABER: -- related to the Polk Power Station, and you says that's an example of OPC's consideration of the interest tax expense. But the opposite is also true. Because it's explicitly related to the Polk Power Station -- it's like you're talking out of both sides of your mouth. It's either explicit or it's not. It's explicit as it relates to the Polk Power Station, but it's silent on how that issue is related to any other scenario.

MR. HOWE: That's correct.

COMMISSIONER JABER: And how do we reconcile your argument with their argument?

MR. HOWE: I would suggest that you apply a rule of consistency, that if any and all interest expense on tax deficiencies was covered by the second sentence of paragraph 11, there would be no reason for the first sentence of paragraph 11 to say an adjustment is consistent with the last rate case.

And secondly, if all interest expense on tax deficiencies was recoverable, there would be no reason for paragraph 10 identifying -- specifically allowing for the Polk Station. Allowing for an interest expense on a tax deficiency assigned to the Polk Station was a recognition by the parties that there was a narrow category of potential future expense that was not covered elsewhere in the stipulation. It would not fit within an adjustment consistent with the last rate case, and it would not fit as a reasonable expense. Therefore, it was necessary if we were going to address interest expense on tax deficiencies at all to recognize that it was outside those parameters, and we did so. But in doing so, we said, "But it only applies to the Polk Power Station."

COMMISSIONER JABER: Okay. Well, why isn't the consistency argument that -- you explicitly pointed out the Polk Power Station interest tax expense was an example of reasonable and prudent.

MR. HOWE: My point there is if it were an example, there would be no reason for paragraph 10. All interest expense on income tax deficiencies would be covered as reasonable expenses. There would be no reason to have the language for adjustments consistent with the last rate case. There would be no reason to have a specific allowance for Polk, because under the Company's and the staff's interpretation, all interest expense on all income tax deficiency is recoverable if it can be shown to the cost-beneficial, which is also not addressed in the stipulation, under the "all reasonable and prudent expense" language. There would be no reason for the parties to have entered into such language.

All right. So we think that constrains -- that should be the end of the matter. Did the parties address the subject of interest expense on income tax deficiencies in their stipulation? Clearly, yes. That should end it all, because the Company is not asking for an appropriate interest expense on tax deficiency as defined under the explicit terms of the stipulation.

Secondly, if paragraph 10 did not exist, the first sentence of paragraph 11 says adjustments consistent with the last rate case. The Company's position and the staff's is that that doesn't mean you can't have adjustments consistent -- inconsistent with the last rate case.

Commissioners, that just doesn't make any sense. There would be no reason for us to limit it to adjustments consistent with their last rate case.

What the Company did is, they started in September '99 listing income tax expense on tax deficiencies as an adjustment on their surveillance reports. It's clearly not an adjustment consistent with their last rate case.

Now, Commissioners, I would like to for a moment refer you to the Order you issued -- and I realize it was another panel of Commissioners, although, Commissioner Deason, you were on it. In 1996 the Commission in Order No. PSC-96-0670-S-EI approved the first stipulation. Just leafing through the order itself, I note that you have the stipulation was incorporated in the order as Attachment A.

Now, why is that important? Why am I pointing that out? One of the things you're faced with here today is, how do you interpret a stipulation in which the parties who drafted it are apparently in disagreement?

I would suggest that you do it on the plain language of the stipulation, the reasonable man standard. But beyond that, Commissioners, I would cite you to a case, City Gas Company vs. Peoples Gas System, 182 So.2d 429, from 1965. This case dealt with, interestingly, Peoples Gas, which is now a subsidiary of Tampa Electric Company. It was contesting City Gas's actions pursuant to a territorial agreement the two gas companies had entered into. It went to Circuit Court, and it went up through the appellate process. And one of the important issues is: What is the effect of the Commission reaching a decision and approving an agreement? And I would suggest that a territorial agreement is in the nature of a contract, a stipulation. At this particular point in time, I don't believe the Commission had authority explicitly under the statute to approve territorial agreements.

And the Court said -- and let me see if I can get to this page number, 436. The Court said, "We also conclude that the Commission has adequate implied authority under Chapter 366 to validate such agreements as the one before us. Indeed, we agree with the North Carolina court that the practical effect of such approval is to make the approved contract an order of the Commission, binding as such upon the parties."

And the reason I cite this, Commissioners, is, I think if it comes down to this matter cannot be resolved by the plain language of the stipulation, which I think it can, I think your next question should be: What could this Commission have possibly intended when they approved the stipulation? Was their intent to bind the parties that with reasonable assuredness you would know what was going to be at issue in determining the utility's return on equity, and once the numbers were crunched, you could determine the reasonableness and the amount of refunds?

Now, Commissioners, referring to the Order in which you approved the stipulation, at page 4, the Commission's Order says, "The stipulation is basically self-explanatory, but the following items are being addressed for the sake of clarity." And one of those specific items they address is on page 5 at the bottom of the page, tax deficiency assessment, Section 10, and I quote -- and this is on the bottom of page 5 and carries over to page 6. "The parties have agreed to support any interest expense incurred as a result of any tax deficiency assessment related to the tax life of the Polk Power Station as a prudent expense for ratemaking purposes." And here the Commission editorialized, "However, this provision is binding only on the parties to the stipulation. Based on the evidence presented during a proceeding, the Commission may make a determination to either include or exclude any such interest expense for ratemaking purposes."

In other words, Commissioners, we identified interest expense related to the Polk Power Station, and you said that might be binding on the parties, but you reserved the right not to even allow interest expense as it related to the Polk Power Station. I would suggest that a fair reading of the stipulation and the Commission's Order approving it leads to the inescapable conclusion that the only interest expense permitted is related to the Polk Power Station, and the Commission has reserved the discretion to not even allow that.

COMMISSIONER JABER: Is that because the Commission wanted to make a review as to whether it was reasonable and prudent?

MR. HOWE: Yes, I believe so, as it related to the Polk Power Station.

COMMISSIONER JABER: Why would they not hold that standard on every situation as it relates to income tax expense?

MR. HOWE: They were free to do so. They did not. In other words, in the order they said that provision, paragraph 10, referring to the Polk Station, is binding on the parties, but not on the Commission. "We reserve the right to either include or exclude any such interest expense for ratemaking purposes." And I would submit that under general grammatical construction, such interest expense could only be that related to Polk.

Continuing in the order, the Commission said, still on page 6, "This settlement provides an incentive for TECO to be more cost-efficient since it can retain a significant portion of any increased earnings. In recent years, the Commission has promoted various forms of incentive regulation."

Now, Commissioners, I don't know exactly where Tampa Electric has effected its cost reductions and its expense savings. But under the stipulation, it was recognized that they had an incentive to reduce their expenses. What the company has done is pick one category of expenses that has gone up, booked it in the very last quarter of the last term of the stipulation, and used it to reduce the refunds the customers are entitled to. Essentially, the Company's position is that they should be allowed to charge higher rates in the future in the form of reduced refunds because they didn't get enough in the last rate case.

Commissioners, the public, the citizens, the ratepayers of Tampa Electric are entitled to an additional $8.3 million of revenues related to the removal of this interest expense.

Commissioners, I also suggest to you that you have a real construction problem with the two stipulations. I don't think anybody would dispute that had only the first stipulation expired by its own terms at the end of 1998 -- the first stipulation, by the way, only covered through 1998. The second stipulation extended it under some different terms through 1999.

Commissioners, you would be in a position of saying that because you extended -- the actual extension of the stipulation for one year in 1999 created the right in Tampa Electric to do a cost/benefit analysis going back to 1993 and use that as a basis to increase customer rates in the form of lower stipulations (sic) in 1999. Commissioners, I don't think there's any way you can read your approval of that one-year extension as creating some substantive rights in Tampa Electric. It's just not there. It's nowhere in the words of the stipulation.

And with that, Commissioners, I will conclude. Thank you very much.

MR. WILLIS: Very briefly, I would like to refocus the Commission on staff's recommendation, which addresses the points that Mr. Howe has made.

The staff has said to you based on the

previous decisions interpreting these stipulations, the language of the stipulations, and the actions of the parties, staff believes that it's appropriate to include the interest expense on tax deficiencies in the calculation of TECO's 1999 actual ROE. Staff agrees with TECO that the guiding principle of the stipulation is whether the item of expense or investment is reasonable and prudent. Further, the reference to the adjustments in the last rate case does not serve as a limit to the type of reasonable and prudent expenses which may be incurred in the calculation of TECO's actual ROE.

Staff in its recommendation points to you a series of adjustments that have been made from year to year under the stipulation which were not made in the last rate case. Staff then sets out its most reasonable interpretation of the stipulation as follows:

"If an adjustment was made in the last full revenue requirements proceeding, the methodology employed in the full revenue requirements proceeding will control.

"2. The fact that no adjustment was made in the last full revenue requirements rate proceeding does not preclude any adjustment in any year covered by the stipulation. The relevant question is one of prudence.

"3. With respect to the potential interest on tax deficiencies associated with the Polk Power Station addressed in paragraph 10, the stipulation forecloses the possibility of any challenge to the prudence of those costs. It was not meant to, has not been interpreted to, and should not be interpreted to, limit the possible prudent expenses to those categories either included in the last full revenue requirements proceeding or specifically enumerated in the stipulations."

And the staff again concludes at the end of this recommendation that consistency, fairness, and the most reasonable interpretation of the stipulations led staff to recommend that it is appropriate to include interest expense associated with tax deficiencies in the calculation of Tampa Electric Company's 1999 actual ROE.

We urge you to approve staff's recommendation. It has been thoroughly considered. It has been thoroughly reviewed over about the last month or six weeks, and you should approve it.

COMMISSIONER JACOBS: Mr. Willis, how do you get around the retroactive ratemaking argument that Public Counsel raises?

MR. WILLIS: I think this is not retroactive ratemaking at all. There is a -- what you determine, Commissioner, the Company without question incurred this expense in 1999. You then determine whether it was prudent for the Company to take positions with the IRS over time where it took positions, it reduced the amount of earnings that it was -- or expenses that were considered in the calculations year by year, and didn't have to raise cost of capital to pay the tax.

And what staff has said is that that makes sense, that was prudent. You are -- it's a very different idea to say that you're changing rates retroactively. We're not doing that at all. We're determining what the amount of refund is. That's very different than just making a calculation to determine whether or not the Company's actions over time were prudent, which they were and which staff has confirmed to you they were.

COMMISSIONER JACOBS: So your argument is that so long as we don't affect rates, then any expense that we determine to be prudent would be acceptable?

MR. WILLIS: Yes, sir. I mean, you're not in any way through this cost-effectiveness analysis considering retroactive ratemaking. You're just determining what the amount of the appropriate refund is for 1999.

COMMISSIONER JACOBS: Now, the example that you cited where expenses were allowed which were not expressly cited in the prior -- or referenced in the prior case, is that the transmission line?

MR. WILLIS: The transmission line is one of them. There are several others, but another adjustment that has been made that has been very significant and which this Commission has discussed is the equity ratio adjustment. That's what I was telling you earlier. We came before you initially and said, "That adjustment is not in the stipulation," and you said, "No, the guiding principle of the stipulation is whether or not it was reasonable and prudent. We're going to look at that and determine whether or not to make an adjustment."

COMMISSIONER JACOBS: Now, was the equity adjustment tied to the transmission line? It wasn't?

MR. ELIAS: No, they were separate and distinct.

COMMISSIONER JACOBS: Mr. Howe, how do you get around that adjustment?

MR. HOWE: Two ways, if I might.

While this is being distributed -- while this is being passed out, Commissioner Jacobs, I would point out a couple of things. On the Orlando Utility Commission transmission line, as I understand the basis of the Commission's decision, it was because that sale was to be used strictly for wholesale sales. As such, it was a matter that the Commission determined had to be fully separated. It was outside your jurisdiction.

On the equity ratio, I think that Mr. Willis's argument supports my position. Where you're dealing with a matter not explicitly addressed in the stipulation, address it from a reasonable expense perspective. Interest expense on tax deficiencies was addressed and limited to the Polk Power Station, so those are two different characteristics.

What we just passed out was -- this is the Company's yearly benefit/impact to customers that supports the $10.7 million figure you see in your staff's recommendation, and you'll see that kind of in the middle of the page on the right-hand side.

Now, the text at the bottom of the page is mine. Those are my additions.

If you total up the three categories of costs and benefits, as the Company characterizes the term, you'll find that the total for deferred revenue benefits/costs is 4,025,000. The total tax deficiency interest expense at 60% is 7,542,000. The net effect of the adjustments under the stipulation under the Company's cost/benefit analysis is a negative 3,517,000.

The only way the Company is able to show a positive cost/benefit result is by including 14,257,000 of rate case benefits. And where that number comes from, if you go to 1993, at the bottom of the column for 1993, you'll see the figure $1,705. Tampa Electric was awarded approximately -- something less than $2 million as a rate increase in 1993. Your staff's position and the Company's is that the Company should have been given 1,705,000 more in 1993. There was a step increase in 1994, and that grew to 2,092,000.

If you multiply 2,092,000 by six for the years 1994 through 1999 and add the 1,705,000, you again get the 14,257,000. You can also get it by just extracting from the far right column.

And this is my point. These are amounts that the Company is maintaining they were deprived of, these are rates they didn't receive in '93 and '94 that they should have. And if you assume the 1,705,000 was in place in 1993 and that the 2 million was in place that they should have gotten in '94, '95, '96, '97, '98, and '99, you get a total of 14,257,000. And that's revenue the Company claims it wasn't entitled to, or wasn't granted under the rate case orders. It then turns it on its head and says, "Those are benefits the customers received, because they didn't have to pay us for what we didn't ask the Commission to give us, what the Commission didn't consider, and what the parties did not include in their stipulation, and that's $14 million."

You add that $14 million to the net detriment under the stipulation as the Company has calculated it of 3.5 million, and you get a net cost/benefit to the customers of 10.7. And, Commissioners, the total benefit, the only benefit is what they're claiming is forgone rates that you did not give them in 1993 and '94, that because they were not allowed to receive these increased revenues, they should be allowed to book additional expense in 1999 to make up for it.

And the effect of booking it in 1999, Commissioner Jacobs, is to increase customer rates in the future in the form of reduced refunds. Customers' bills will be higher during the refund period under the stipulations because -- if the Company is allowed to include this expense, than they otherwise would be, and it will be based upon their argument that they were disadvantaged and deprived of revenues in the period 1993 through 1999. I think that clearly implicates concerns of retroactive ratemaking.

I believe --

COMMISSIONER JABER: Mr. Howe, what's your definition of retroactive ratemaking?

MR. HOWE: In simple terms, it is an increase in rates in the future to make up for a past deficiency in rates, or a reduction of rates in the future to make up for an excess in rates in the past.

In this particular case, the Company is saying, "We should have lower refunds. The customers should receive lower rates (sic) because the Company did not receive rates as high as they should have been." So basically they're taking a rate deficiency --

COMMISSIONER JABER: Is it rates?

MR. HOWE: -- in the past --

COMMISSIONER JABER: Is it rates, or is it recovery of an expense? Is retroactive ratemaking recovery through rates for an expense incurred in a prior period? And if that's the case, then are you talking about the amount of the refund being less, or are you talking about the rates being higher?

MR. HOWE: They are both the same. The reason I say that, the customers pay rates and bills. What they will see is -- on their bills in the future, they will see rates and a credit for the refund. The rate is the net of those two. To the extent that that credit on the customer bill is smaller, the net rate necessarily is higher. And the reason is to allow -- under this scenario would be to allow the Company to make up for the fact that you didn't give them enough revenues, as they see it, back in '93.

Commissioners, '93 is done. '94 is done. You can't reach back there and say, "Well, we think, you know, the Company has got a point. Given that the IRS has assessed an interest expense on a tax deficiency in '99, that means we didn't give the Company enough money back in 1993, and we should now take into consideration the fact that those rates were too low in the past and use it to increase rates in the future."

And keep in mind that it's not just a philosophical discussion about retroactive ratemaking. It's the bottom line result of the cost/benefit analysis. They're saying, "Because we were deprived of revenues in the past, you should let us include an expense in the future that has the effect of reducing refunds, thereby increasing rates in the future." It has a very real, tangible result.

My point to you, Commissioners, is the Company's own numbers show that if you just look at what's happening under the stipulation -- and by the way, even these numbers we disagree with somewhat, because what the Company calls deferred revenue benefits, they assign 100% of them to the customers.

Well, the way the stipulations worked and the plan of the Commission that started in 1995 was that the Company would defer excess revenues from 1995, and the thought was that they would necessarily have a rate increase in 1997 after their Polk Power Station came on-line in late 1996, and the intent was to mitigate the magnitude of that increase. Well, under our stipulations, what we said was that money would also be deferred.

But, Commissioners, that money went 100% to the utility to the extent it was needed to bring the utility up to the trigger points, 11.75 for the years '97 and '98, and 12.0 for '99. What that means is, had -- for example, after recognizing the revenues deferred from prior years, had the Company then only earned either 11.72 in earlier years or 12.0 in '99, nothing would have gone to the customers, and if anything did, it would only be 60% above that level. The Company's methodology assigns 100% of those deferred revenues as benefiting the customers. It doesn't happen that way under the stipulation.

But even taking that as a starting point, if you take the total deferred revenue benefits they've shown on their supporting schedule and subtract the total tax deficiency interest, you get a negative number. The net effect under the stipulation is negative. The only way they're able to show any positive benefit is to reach back and say, "We were deprived of revenues in 1993 through 1999," you see. So even under their own -- a reasonable analysis, you don't have a reasonable cost/benefit analysis at all in this case. The customers are being assigned with a benefit which is in reality the amount of revenues the Company claims it was deprived of.

So we disagree with the methodology. We

disagree with the dollar amount that they've booked, to the extent it reflects estimates that have not yet been assessed by the IRS. We disagree with the cost/benefit. And we really believe the whole idea of any recovery of interest expense on tax deficiencies for other than the Polk Power Station is a clear violation of the explicit terms of the stipulation and of the order you adopted approving that stipulation.

MR. WILLIS: Commissioners, Mr. Howe's position really attacks the whole policy of the Commission with respect to interest on tax deficiency, because it invariably involves a period of time over which the Company would have taken -- any company would have taken a tax position before the IRS. Those things are not resolved year by year. They're resolved years later.

And what you're doing here -- there's no question that the expense was incurred within 1999. You're merely judging whether or not the Company was prudent in taking those aggressive tax positions because of what happened over history. And in a number of instances, you have to look at what happened over a series of years to determine whether or not the Company was prudent. That's just a non-issue with respect to retroactive ratemaking.

With respect to the difference between summarizing all these benefits or doing it on a year-by-year basis, you come out at exactly the same point. And we believe that even if you take away the benefits with respect to the rate case, which you shouldn't do, we still have a positive analysis here. And I would like to have Ron Neal, who is the financial analysis manager in the utility section in Tampa Electric, address those points.

MR. NEAL: Thank you, Commissioners. As Lee said, what we did is, we booked the cost in 1999 above the line. And what staff says is, "To allow that cost above the line, you're going to have to show us --

CHAIRMAN DEASON: Let me interrupt just a second. What period of time did that entry cover in 1999?

MR. NEAL: The booking was in October or November of '99. The deferred taxes and interest expense was related to periods back to

1986.

CHAIRMAN DEASON: 1986 through up to the time --

MR. NEAL: Through 1999. We booked it to current period. We trued-up to the current period.

CHAIRMAN DEASON: So it was through October or November of '99.

MR. NEAL: Yes, through 1999.

So anyway, the staff's position is, "To keep this above the line, you're going to have to show us that it was prudent and reasonable." So what they asked us to do basically is a benefit analysis. And what it is -- his interpretation of it being a deprivation of the revenues is not necessarily true. What it's meant to show is a "what if" analysis, because for this type of expense, it did create when the IRS contests you some interest cost. But it has also created when we took those tax positions -- that's what it's all related to, is tax positions. It created deferred taxes.

So what the benefit analysis does is, it says, "Show me the benefits created by these deferred taxes, because they're a zero cost source of capital that lowers your cost of capital. And if that outweighs the fact that you now later" -- you had to one day come back and you're going to not quite get where you want to get with the IRS and have to book a cost. So what the benefit analysis that we did -- since we went all the way back to 1986, we had deferred taxes on our books all the way up to the rate case. So we said, "Well, those deferred taxes were included in the rate case, and the revenue requirement calculation included those deferred taxes."

So what we did in our "what if" analysis is, let's say -- let's say we never took those tax positions. Let's remove the deferred taxes, shift them over to debt and equity in the capital structure, and let's see what that cost of capital would have been. And we did that for the rate case and got the rates for '93 you see, and '94. And, of course, after '94 those rates were permanent. So if not for the tax positions we would have taken, what we're saying is, rates would have been higher by a certain amount, and it would have affected ratepayers every year thereafter, because they're permanent and haven't been changed since then.

What we also did is, because we were under a deferred revenue plan -- well, let me add to that. Because we were under a deferred revenue plan, we're saying in our analysis we collected more revenues from our rates, if you can think of it that way. We didn't take these tax positions. We have now collected more revenues. In our analysis, we include those additional revenues as a benefit to ratepayers during the deferred revenue plan, because we're collecting more revenues under this "what if" scenario.

So anyway, we're under the deferred revenue plan --

CHAIRMAN DEASON: You need to back up for just a second.

MR. NEAL: Okay.

CHAIRMAN DEASON: Explain to me how you collected more revenues because --

MR. NEAL: This is a "what if" scenario, as if we had never taken these tax positions before. If we had done that, we would have had higher rates, permanent rates. If we had had higher permanent rates during the deferred revenues, we would have collected more revenue;

right? So we would have had more revenue to defer. So that's in this analysis, just to let you know that.

But we also -- beyond that, we did the same calculations during the deferred revenue plan. We did the impacts each year as to how much would have been deferred. You know, the way the calculations work under the deferred revenue plan is, you know, we get to keep a certain amount before we start deferring. And then when we start to refund, I mean, it's sort of to reverse deferred revenues, and we would keep a certain amount before we started reversing.

So that's the impact on the analysis, is, we've got those deferred taxes in there now, and what would have happened? How much less would we have deferred and kept for ourselves before deferring, and then in the reversal years, how much would we have kept before we reached that ROE limit before reversing revenues? And that's what the benefit analysis shows.

Am I going to fast for you? Am I speaking too fast?

And so what we did is, we compare those benefits to the final cost that we incurred in

1999 and see what the net benefit is, or it could have been a net cost. It's important to recognize that we would have had to incur this cost whether the benefit analysis worked or not. Our tax department came to us and said, "We have to book this cost, you know, according to FAS 5." And fortunately the benefit analysis worked in our favor, but no matter what, these costs would have had to have been incurred in 1999.

And so we did the analysis, and we presented it to the staff and to the other parties, and that's what you see in front of you now.

COMMISSIONER JABER: Mr. Neal, are the costs incurred in 1999, or were they incurred 1996 forward?

MR. NEAL: They were incurred in 1999. They address periods, tax periods all the way up through 1999, issues, tax issues.

COMMISSIONER JABER: But isn't that because you deferred it until 1999? I mean, the cost is actually incurred in the year you incur taxes; right? So in 19 --

MR. NEAL: I'm sorry. These are actually

-- you take positions when you do your tax returns.

COMMISSIONER JABER: Right.

MR. NEAL: And you try to be somewhat aggressive so you can defer taxes. And later on when the IRS comes back and looks at these tax positions, they may not agree with all of them. So you go through a lot of different scenarios with them, and then you get to a point where you're not going to win, and you can cut your losses or you can go all the way to the final end of the game. So in that period, you don't know yet which ones are going to be disputed, so that's why it moves forward that way.

CHAIRMAN DEASON: So you booked in 1999 the cumulative effect for all the tax positions you had taken since 1986?

MR. NEAL: Yes. We trued-up. We had three very important things happen in 1999 that showed us that we had been too optimistic in our tax positions. We -- I mean, you could have said that we could have booked these sooner, but we felt optimistic. So when the '86 to '88 period came through, we had to settle. We were going to lose if we went further. That settled a lot of issues all the way from that period -- you know, these are the same issues that go to the next tax period and the next tax period. It settled it all the way through there.

And then we had other positions that we lost, or IRS denied our refund for the '89 to '91 period, and in 1999 we got that. And also in 1999, we received an RAR report for our '92 to '94 periods of what was going to be disputed, and it became obvious to us and to our auditors that we had been too optimistic and we were going to have to book these costs and true it up to current times.

An important thing -- we couldn't have booked it sooner, but an important thing to recognize is that if we had booked it sooner, it would have affected deferred revenues as much or more. I mean, this is a 60% sharing year. If we booked it in an earlier year, it would have -- maybe it could have been a 100% sharing year.

MR. WILLIS: The bottom line, Commissioner, is that we have provided a cost/benefit analysis and the staff has looked at it very thoroughly. We've had a discussion just like this with staff at an extended session with them, and they have confirmed that there were positive cost/benefits to customers for the Company taking these positions. It would have unintended results if you didn't approve interest on tax deficiencies, because you would encourage the Company never to take those kinds of risks that you would expect a company to take on behalf of its customers.

And the bottom line is that your staff has recommended to you that it is appropriate and consistent with the stipulations to include it in 1999, and we urge that you approve that.

CHAIRMAN DEASON: Let me ask staff a question. If we were to ignore for a moment the fact that there was a revenue sharing plan, that there was a stipulation, just assume that it doesn't exist, and the facts concerning the tax deficiencies and the positions taken by TECO, that they all played out like they did, how would we require them to book that?

MS. ROMIG: Could you repeat that one more time?

CHAIRMAN DEASON: Surely.

MS. ROMIG: I'm sorry.

CHAIRMAN DEASON: Let's just assume for a moment there is no revenue sharing plan, there's no stipulation which addresses the Company's earnings.

MS. ROMIG: Right.

CHAIRMAN DEASON: The same facts play out concerning TECO's tax positions, and the same determination is made by the IRS, and there is a tax deficiency. How would we require TECO to book that?

MS. ROMIG: I don't know that we would require TECO to book it any way, but we would certainly anticipate that they would book it the same way they have done in 1999.

CHAIRMAN DEASON: So they would book the full impact in 1999?

MS. ROMIG: Yes.

CHAIRMAN DEASON: Okay. Now, let's make the next assumption. Let's assume that 1999 was the test year --

MS. ROMIG: Okay.

CHAIRMAN DEASON: -- to establish rates on a going-forward basis. How would we treat that entry on their books in '99 for ratemaking purposes?

MS. ROMIG: I believe that if you're looking in a rate case environment, you would be looking at setting rates on a going forward basis using a reasonable level. And in that case, I would say there would be more analysis that would go into it to determine what a reasonable level would be on a going-forward basis.

CHAIRMAN DEASON: Okay. Now, for purposes of the stipulation, which we know does exist, how did we treat it? How does staff recommend that we treat it? The full impact, the full entry, the full dollar amount, all to be recognized in one year, in 1999?

MS. ROMIG: Yes.

CHAIRMAN DEASON: Okay. Is that inconsistent with what the stipulation calls for?

MS. ROMIG: I might defer that --

CHAIRMAN DEASON: That we determine the prudent expenses? Because I look at it like even though we're under the stipulation, we would look at it as what would be the prudent amount of expenses we would allow if we were in a rate case.

MS. ROMIG: I guess I'm looking at -- I would view that a little bit like maybe an overearnings type of investigation, where you're not setting your expenses on a going-forward basis, but whatever occurred in that year and was reasonable and prudent would be allowed in that year, rather than a going-forward basis.

COMMISSIONER JABER: And isn't that why this is not retroactive ratemaking?

MR. ELIAS: In a word, yes.

CHAIRMAN DEASON: You need to repeat that for me again. I'm sorry.

MR. ELIAS: In a word, yes.

CHAIRMAN DEASON: No, no, no. I'm not -- I'm talking about -- I understand that. I'm talking about the exchange that took place prior to that which led you to say that.

COMMISSIONER JABER: Christine, my question was this, along the lines of what you said. The distinction I think you're making is that unlike a rate case, this would be more like an overearnings investigation where you're looking at the period of time for determining what a refund would be or what the rate reduction would be.

MS. ROMIG: Yes.

COMMISSIONER JABER: And in that regard,

retroactive ratemaking does not come into play. Is that a correct assumption on my part?

MS. ROMIG: I would say I would tend to agree with you, yes.

CHAIRMAN DEASON: Well, let me ask this. As I understand the stipulation, it is to look at the Company's earnings year by year, determine how much is to be shared or deferred, and so we need to capture what we think is a realistic view of the Company's earnings for that year.

Now, if we recognize all of this expense in 1999 for all these prior years, does that give a distorted view of the Company's earnings for the year 1999?

MS. ROMIG: I don't believe so. I believe that, you know, under FAS 5, as has been mentioned many times, that is a valid 1999 cost of doing business. I cannot say that that would be an appropriate level to set in a rate case on a going-forward basis, but I do believe that under this scenario that it is a valid 1999 cost. And it could not have been booked previously, and it is required to be booked in 1999.

And there is no future benefit to the ratepayers or anybody else. There's no future benefit to that expense. It would be -- you know, I think you're maybe thinking should we amortize it or should we just allow a portion of it. I don't think there's any future benefit to amortizing it going forward.

MR. HOWE: Commissioner Deason, if I might refer you to the staff's recommendation at page 11, the first full paragraph. The first sentence reads, "Although this interest was recorded in 1999, the interest is applicable to 1999 and prior years. As such, the interest expense has no future benefit." I don't think the Commission has ever allowed recovery of interest expense or anything else in a future period without an expectation that there's going to be a future benefit. I mean, that's the whole nature of it.

And to answer Commissioner Jaber's question about if it was an overearnings investigation, I think that's a very good point. But the only way you can do that in overearnings investigations is if you impose conditions at the beginning, and it's only to the extent you impose those conditions that you can capture them in the future.

In this particular case, conditions were imposed, very explicit conditions, but they were imposed pursuant to a stipulation that said you won't allow interest expense on tax deficiencies to be used to calculate earnings. So if you analogize to an overearnings investigation, it would be one in which you captured that money, but said we're not going to allow interest expense on tax deficiencies in calculating the amount you have to give back in the future.

COMMISSIONER JABER: That's a good point. Is it not retroactive ratemaking in overearnings because you do an interim calculation and set aside money, capture that money for security purposes? So in a sense, you stop the clock for the prior period, and then it's no longer retroactive ratemaking.

MR. HOWE: The court has recognized that that obviates the concerns of retroactive ratemaking. The doctrine of retroactive ratemaking does not prevent the Commission from conditioning the money today conditioned upon future events, and thereby can avoid the concerns of retroactive ratemaking.

MR. WILLIS: Commissioners, the precedent with regard to this is in a case that your staff cited to you in its recommendation. And the Peoples Gas case that was decided in 1998 involved a situation where the Company had voluntarily limited its earnings, and the Commission was determining what the appropriate amount of earnings was under that agreement for 1996. The issue of interest on tax deficiencies came up, and you allowed the full amount to be included in 1996 above the line. And that decision and the others that are mentioned are the policy of this Commission.

The entire amount has to be booked in 1999 because it was an appropriate expense incurred in there. We've shown through the cost/benefit analysis that it was reasonable for the Company to take that kind of position with the IRS. It's the kind of thing that you want to encourage the Company to do, the kind of action that you want to encourage it to do, and we urge that you approve the staff's recommendation on this point.

MR. HOWE: Commissioner Jaber, I'm sorry.

Could I just on that point you again to the staff's recommendation at page 11. The first, second, third full paragraph addresses that very topic. It says, "Both the FP&L and FPC decisions were reflected in final orders through litigation." The Peoples Gas decision was proposed agency action.

COMMISSIONER JABER: Right. Mr. Chairman, I --

MR. HOWE: None of them involved stipulations. That is a substantial determining difference in this case.

COMMISSIONER JABER: I don't know if anyone else has any questions, but --

CHAIRMAN DEASON: Any further questions?

COMMISSIONER JACOBS: I have one brief question.

Mr. Willis, what would be the -- what's the scenario -- what are the contingencies under which the first sentence in paragraph 11 was anticipated? Could you give us the Company's view of how that would have been interpreted?

MR. WILLIS: The first sentence with respect to the adjustments approved in the last rate case?

COMMISSIONER JACOBS: Right.

MR. WILLIS: Every one of those adjustments have to be made. There's no question that we have to make those adjustments as a point of beginning. But they don't say that those are the only adjustments that you make. You make those adjustments, and you take into account any specific directions that are given to the Commission with respect to particular expenses. And with regard to what is left, you determine what is reasonable and prudent.

And that's what we've asked you to do here. That's the guiding principle we would like you to follow here, is what the staff has recommended to you, that we were reasonable and prudent and that these expenses should be included.

COMMISSIONER JACOBS: And this is for staff. What do we do with the actual deficiencies themselves?

MS. ROMIG: I'm sorry?

COMMISSIONER JACOBS: The actual deficiencies themselves, what happens to those? Not the interest, but the deficiency itself.

MS. ROMIG: Well, when they paid their tax bill in 1999 --

CHAIRMAN DEASON: You need to press your button.

MR. ROMIG: Pardon me. When they settle up with the IRS and they make the payment in 1999, they book the accrual at least in 1999.

COMMISSIONER JACOBS: Okay.

MS. ROMIG: So then there are no longer any deficiencies.

COMMISSIONER JACOBS: So that was booked in -- the actual payment of the tax was booked in '99?

MS. ROMIG: Well, the recording of the tax liability would have been recorded in 1999. It would probably be a switch from the deferred tax account to the current tax account.

COMMISSIONER JACOBS: Okay. And that has been anticipated in what we're talking -- we're dealing with here?

MS. ROMIG: Yes.

COMMISSIONER JACOBS: Okay.

MR. NEAL: I believe that we have paid the cash at this time. We had in 1999 -- you could call it a contingent liability at that point. We had to book --

COMMISSIONER JACOBS: So there was -- my point is, that was within the -- that would be within the confines of what was anticipated under the stipulation.

MR. HOWE: Excuse me, Commissioner Jacobs.

MR. WILLIS: Yes.

MR. HOWE: Are you assuming that when they booked this actual tax -- you know, the expense, the liability -- I'm not sure of the accounting term -- that it actually affected 1999 earnings?

COMMISSIONER JACOBS: Uh-huh, yes.

MR. HOWE: I don't believe it affected 1999's earnings.

COMMISSIONER JACOBS: It went back to --

MS. ROMIG: No, it wouldn't have.

COMMISSIONER JACOBS: So why would you -- so it would have been still deferred. You remove the deferral from the prior years, is what you're saying. I'm not a good accountant, so straighten me out. I may be totally off base here.

MS. ROMIG: I'm not sure that I understand exactly what --

COMMISSIONER JACOBS: What I want to understand is how did that play into the stipulation. When the deficiency actually became known and it was taken care of by the Company, how did that affect the stipulation? That's really my question.

MS. ROMIG: The actual -- your tax expense, if that's what you are getting at --

COMMISSIONER JACOBS: Right.

MS. ROMIG: Your income tax expense would not change on your earnings surveillance report from what it was previously, because we are a flow-through state, and we book tax expense on booked tax expense.

COMMISSIONER JACOBS: Okay.

MS. ROMIG: So it only affects your current liability for taxes or your deferred income tax expense account, which is a balance sheet account.

COMMISSIONER JACOBS: Okay.

CHAIRMAN DEASON: But, now, how it affects earnings in 1999 is the interest associated with that; correct?

MS. ROMIG: Right.

COMMISSIONER JACOBS: Okay.

CHAIRMAN DEASON: And so that's the question that comes in. How do we recognize the impact on 1999 earnings of the interest associated with the tax deficiency?

MS. ROMIG: Yes.

CHAIRMAN DEASON: And it's your position that the Commission has previously addressed that question, and you cite a number of cases, and the Commission has allowed that recognition in the year of booking without any type of allocation between years or amortization or pro rata treatment.

MS. ROMIG: Correct.

MR. ELIAS: Mr. Chairman, there may be something in the stipulation that speaks to that question too, which is the next sentence in paragraphs 11 and 7, "All reasonable and prudent expenses and investment will be allowed in the computation, and no annualization or pro forma adjustments shall be made."

Now, we hadn't considered whether spreading the interest expense out over a number of years could be fairly characterized as either an annualization or a pro forma adjustment, but it certainly could.

CHAIRMAN DEASON: Let me ask the Company a question. Mr. Neal, maybe you can answer this one. What was the determining factor in TECO's decision to make the entry in the October, November 1999 period?

MR. NEAL: In early 1999 after this settlement, and then for the '86 to '88 period, and then with the determination that we were not going to get a refund for the '89 to '91 period, and then receiving the RAR report for the '92 to '94 period, our auditors --

CHAIRMAN DEASON: I'm sorry. Could you -- RAR report?

MR. NEAL: Yes, sir. It's a revenue --

MR. WILLIS: It's a revenue audit report.

MR. NEAL: It's their first report telling you what they're disputing for that period of time.

MR. WILLIS: What basically occurred, Commissioner, is that after a series of considerations by the IRS, they placed down a firm position that we were not going to prevail on those issues. And at that point, while we had been optimistic in pursuing that over some period of time, having gone through a series of these conferences and other confrontations with the IRS, we were out of options at that time and had to stop and recognize it. That's the simple thing. It was on a completely different track than the stipulation. It just happened that that was where we had no more options.

MR. NEAL: Our auditors had been keeping a close eye in that area, and at that point, they felt like we couldn't delay that cost anymore and they thought it was probable, thought it was calculated, so under FAS 5 it had to be booked.

CHAIRMAN DEASON: So it had to be -- it was the viewpoint of your auditors that it needed to be booked in 1999, that it could not go another year under the position that it was being contested.

MR. NEAL: Yes, if I understand your question.

MR. WILLIS: Yes.

CHAIRMAN DEASON: And did you get that opinion in writing from your auditors?

MR. NEAL: I'm not certain. The tax -- we are in the regulatory area. They came to us and said they were required to book the expense and told us, you know, they knew we were in a deferred revenue year. And so at that point we went to -- we worked more on getting the cost/benefit analysis and the prudency determined. I could check with that.

CHAIRMAN DEASON: Did staff review anything from the auditors, or that was not part of your decision-making?

MS. ROMIG: It was not part of my decision-making.

MR. HOWE: Chairman Deason, if I might, though, on that point, I would like to point out that the open years were -- there's two open years that have been finalized, or periods, '86 to '88 and '89 to '91.

CHAIRMAN DEASON: But I think what -- as I understand TECO's position, they're saying that the issues are essentially the same and that there would be no basis to continue the other item because it's the same basic argument or principle involved.

MR. HOWE: My point only is, we sat down and negotiated this stipulation and finalized one in March of '96 and the other in September of '96, and the subject of interest expense on tax deficiencies came up and was incorporated in the stipulation. The Company had every opportunity at that time to insist that it include other open years. I just want the Commission to bear in mind that the last open year was '91, and we signed the stipulation five years later.

CHAIRMAN DEASON: Is it your viewpoint that because there was a tax deficiency associated -- a specific potential tax deficiency that was identified within the stipulation that that prevents consideration of any other?

MR. HOWE: I think a formal reading of the stipulation -- and I would point out that one of the things that we seem to be --

CHAIRMAN DEASON: Let me ask -- I'll give you a chance.

MR. HOWE: Yes.

CHAIRMAN DEASON: Why wasn't there a sentence inserted right after that that says, "And there will be no consideration of any other tax deficiencies on any other litigated positions," or whatever?

MR. HOWE: There could have been. There could have been. But the obligation I think would have been on the party who wanted to include something. In other words, there's an infinite universe of what --

COMMISSIONER JABER: Or on the party that wanted to prevent the inclusion of something.

MR. HOWE: Well, the way to capture that is to say at the end of it, "Nothing we didn't say here is meant to apply." You know, it's a document. It's limited, I think, in its words. But I think, Commissioner, that's why I would ask you to come back -- what could you have possibly meant when you approved this stipulation?

Keep in mind, the underlying premise of a stipulation is its intent to bind the party and assume the risk of future conditions. For example, for the first couple of years we had a share in 11.75. Why did it go to 12.0 and the Company get to keep 100% between 11.75 and 12.0 for the year 1999? Because that's what we stipulated. We intended to bind ourselves. We recognized fully, as did Tampa Electric, that some expenses would go up and some expenses would go down.

Commissioners, in your own order you recognized that it provided the Company with every incentive to reduce expenditures, because under the sharing arrangement, they would get to keep part of their savings, and you viewed that as an incentive. Now we're cherry-picking. Here's one category of expense that went up. We don't know what expenses went down. But I think when you're dealing with a well-managed company, it's reasonable to assume that every expense they could have taken lower, they did so.

But again, the intent of the parties was to bind themselves and disable their ability to raise particular factual issues that might argue for or against their respective positions. You take the stipulation, you live with it, you do what it says to do, and you're done.

Commissioners, you know, one of the things you might keep in mind is, our office currently has stipulations with Florida Power & Light, with Florida Power Corporation, and Gulf Power Company. This one with Tampa Electric has expired. When have you ever seen us here discussing the terms of a stipulation with another utility? It doesn't happen.

We understand the terms that bind us. This is not the first time. This is the third or fourth time that Tampa Electric has said, "We've got an idea about how our stipulation can be interpreted. It doesn't agree with the party with whom we negotiated the stipulation, but we think it will put a few dollars in our pocket, and we think you should let us have it." Stipulations are not supposed to work this way.

MR. WILLIS: Commissioners, your staff has set out a three-paragraph, 1, 2, 3, appropriate interpretation of this stipulation that puts together all these different things that we have been talking about. I read it to you earlier. It's reasonable.

And coming back to the bottom line, that the consistency, fairness, and the most reasonable interpretation of the stipulations led staff to recommend that it is appropriate to include interest expense associated with tax deficiencies in the calculation of 1999. That is a reasonable interpretation. Again, I urge you to approve it.

COMMISSIONER JACOBS: Isn't it reasonable -- I mean isn't it true that we've somewhat clarified that interpretation today by your response to Commissioner Jaber about how you looked at this in terms of an overearnings investigation? If you were to take this language here in paragraph 11 and interpret it in ways that I think that it may be interpreted today, it would say that we would give no consideration to overearnings -- I'm sorry, to retroactive ratemaking in implementing this second sentence here in paragraph 11. And what I hear you saying is that that's not the case, that we would absolutely give consideration to retroactive ratemaking, and in this instance, it doesn't broach that because it was done so in the context of this overearnings investigation. Is that a correct summary of what you said?

MR. ELIAS: Retroactive ratemaking does not enter into it because you're not changing rates retroactively. You're not telling people that bought kilowatt-hours of electricity in August of this year that what you thought you were paying 7-1/2 cents for is actually going to cost you --

COMMISSIONER JACOBS: As you've interpreted this arrangement. But if you read the second sentence in paragraph 11 without any reference or clarification to that effect, could one come in with a sentence like that and argue for any prudent expense under a stipulation?

MR. ELIAS: I don't think that that is retroactive ratemaking any more than it would have been when we adjusted the equity ratio for 1995, '96, '97, and '98, and changed the earnings sharing amount from what was reported the first time, which was flowed through on a prospective basis to the customers. I see no distinction between this adjustment here and any of the half dozen or more that we've made in the previous decisions on the stipulation.

COMMISSIONER JACOBS: I accept your response, but your premise is that we're speaking only about this adjustment; correct? Where does it say in this paragraph that we're only looking at this one adjustment? It doesn't, does it?

MR. ELIAS: No, it does not.

COMMISSIONER JACOBS: And that's my concern. One could take this paragraph and extend it well beyond this adjustment. Is that a fair reading? If it's not, tell me. I want to know that. But my concern is, are we subject -- if we make this ruling today based on your interpretation of this paragraph, could someone come in here with any adjustment on a stipulation and argue that because it's prudent, it deserves consideration and needs to be considered in the execution of the stipulation?

MR. WILLIS: Commissioner Jacobs, you're interpreting this stipulation. But when you have another situation, you'll interpret whatever that stipulation was, or that circumstance.

COMMISSIONER JACOBS: I can agree with that, except in this very analysis, we were cited stipulations that didn't even -- I'm sorry. We were cited to orders that didn't even include stipulations in interpreting this.

COMMISSIONER JABER: Is your concern or question can TECO come in and say there are expenses that they want to recover and use the broad language of this stipulation?

COMMISSIONER JACOBS: Yes.

COMMISSIONER JABER: That's your question?

MR. WILLIS: We're finally deciding this stipulation today. This is the end of it.

COMMISSIONER JACOBS: I understand. My concern is, should there be specific caveats put on our interpretation of this language today such that it doesn't bind us in the future when we see similar language? And you've already cited us to another stipulation that has this exact language in it; is that correct?

MR. ELIAS: The other stipulation that has this exact language was in this docket.

COMMISSIONER JACOBS: Okay.

MR. ELIAS: There's two stipulations applicable to --

COMMISSIONER JABER: I guess, Commissioner, I don't share your concern, because we will look at the reasonableness and the prudence of any expense and determine whether they were appropriately incurred and then whether recovery is warranted for them. So I don't know that we need caveats.

COMMISSIONER JACOBS: In the instance where, as we are in this instance, we're looking at prior years' earnings and we're coming in and being asked to assess whether or not an adjustment should be made under the context of the stipulation that has to do with, yes, this -- and that's what persuades me here, is that this is a 1999 adjustment. I can agree with that. But there's nothing in this language that limits us to that.

MR. ELIAS: Well, I think there are other provisions of the stipulation that you might take some comfort in that provide that the calculation of the actual ROE for each of the years shall be on an FPSC adjusted basis, which employs the FERC Uniform System of Accounts and GAAP and requires us to book expenses and look at expenses according to certain, you know, predisposed methodologies. So if your concern is that all of a sudden they're going to load up an expense in one year, there's a framework in place to address those kinds of concerns.

COMMISSIONER JACOBS: Okay. I don't want to belabor the discussion today, because I don't think it's an issue that would sway my judgment. But I think I would like perhaps some discussion or see if it would be useful to put some clarifying language in the order.

MR. ELIAS: Okay.

COMMISSIONER JACOBS: Maybe it's an unreasonable concern, but if this is the real objection, I would like to at least see what the language would look like.

MR. ELIAS: All right.

CHAIRMAN DEASON: You're always free to

review an order. That's no problem.

I want -- another clarifying question. And I touched upon it earlier, and this is to staff. If we were using 1999 as a test year to set rates on a going-forward basis and this entry was made in 1999, you're saying it would have no effect on the rates that we set on a going-forward basis, because you said there's no future benefit from these past interests, and the deferral and the deferred rev -- the deferred tax account would have already been reversed, so it's just going forward, there's really no impact from the entry; correct?

MS. MERTA: If I understand you correctly, yes. If we were looking at it on a going-forward basis and we were in a rate case, we would allow a reasonable level in that year. I guess the determination might be, you know, are we going to defer part of it from a ratemaking standpoint and let them, you know, amortize it on a three- or four-year period going forward. I guess you could do that. But you're also going to be doubling up on what happens in some of these subsequent years that have not been decided --

CHAIRMAN DEASON: Let me explain what my concern is. My concern is, what would happen in normal ratemaking situation? If we were in a rate proceeding and the Company came in and said, "This was the prudent thing to do. We challenged these. We really reduced our cost of service for a period of time, but we came to the end of the rope, and there's nothing more we can do. We've got to pay the deficiencies. We've got to make the payment, and we've got to reverse our deferred taxes."

MR. WILLIS: Commissioner, what --

CHAIRMAN DEASON: Are they allowed -- just a second, Mr. Willis. Would they come in and argue that, "Look, this was the prudent thing to do, and we're having to pay all of this interest right now, and the ratepayers have got the benefit for the last seven or eight years. You need to allow us to take this interest expense on these deficiencies and allow us to amortize it over the next five years so that we get made whole because it was the prudent thing to do"? And if we would allow them to do that, why don't we just recognize in 1999 for purposes of the stipulation -- see, it bothers me that we're getting 100% of this impact in the last year of the stipulation. And if it were just three or four months later, it would have no impact on the stipulation.

And I'm not questioning the timing. I mean, I've had -- TECO has indicated that their auditors said it was the correct thing to do. But it's just -- it's difficult for me. You know, I can take it one way or the other. If staff is saying that in the future we're not going to allow companies to amortize it on a going-forward basis and have it included in rates, that's one thing.

I guess I'll ask TECO. What is your position? What is TECO's position? Has this ever come up before where something like this has happened and it's your position that we booked it in a prior year, or even a test year, and we need to be made whole, so let us amortize it over five years? Is that something that you've done?

MR. WILLIS: First of all, I think it depends entirely on the circumstance that you are faced with at the time of what are the ongoing interest deficiencies that would be expected to occur on an ongoing basis in the future. That would be a determination that you would make in the context of a rate case, which is different than what you're doing here, because you're determining here what is a reasonable and prudent expense to have occurred by the Company in a year that you were determining their earnings. It's not --

CHAIRMAN DEASON: But staff has just said that if this was a 1999 test year, you could book it, but they wouldn't allow it in rates.

MR. WILLIS: Well, we would have --

CHAIRMAN DEASON: What would be the benefit?

MR. WILLIS: We would have to show what the circumstance was in the future with respect to what we expect to perhaps occur within the time that the rates are expected to be in effect. So it's a factually unique situation that you would have to look at with respect to a rate case, which is different than this. And following your precedent which you have set before in the case that I cited to you, you would include all of it. That's what you should do.

CHAIRMAN DEASON: Yes, and that's another difficulty that I'm --

MR. HOWE: Commissioner Deason --

CHAIRMAN DEASON: -- having, is that I feel like -- just a second. I feel like if we -- it's very important when we interpret stipulations that we follow precedent. And if has been the precedent of this Commission to interpret it that way, I feel compelled to do that, but I'm not necessarily saying that it would be binding on the Commission in some future rate proceeding to make some different interpretation if the facts supported that. But I guess that would be an issue for another case at another time.

MR. WILLIS: Exactly.

CHAIRMAN DEASON: Does staff agree with that?

MS. MERTA: I agree with that, yes. I mean, every one has to be looked at on a case-by-case basis. It does not -- you know, it's not, you know, rubber stamping it for the future of what we think should be done in future years. Every case is different. Every interest is different, looking at the underlying reason for that tax deficiency.

MR. HOWE: Chairman Deason, on that point, I think you should be aware that back in 1992, 1993, we were having hearings on both Florida Power Corporation and Tampa Electric. A little over three months before the Tampa Electric order issued in 1993, in late October of '92, the Commission issued its order in the Florida Power Corporation case. I don't know if I'm going to help or hurt myself with this, but I'm going to inform you.

Florida Power Corporation asked for and we litigated the issue of whether they should be allowed to include interest expense on tax deficiencies, and we lost, and Florida Power Corporation won. And every year and every month since then, to my knowledge, on Florida Power Corporation's surveillance reports under the category "FPSC adjustments" is an entry -- I think it's phrased a little differently, but essentially it's interest expense on tax deficiencies that the Company asked for and was granted.

Tampa Electric did not ask for it, and we entered into a stipulation that said their earnings would be calculated consistent with their last rate case. This adjustment appeared on their surveillance report three and a half years after our first stipulation. If they wanted it, they could have asked for it. What they're trying to do here I really feel is to back and fill and reduce fairly negotiated refunds pursuant to a stipulation you've approved.

CHAIRMAN DEASON: Was there -- I'll ask TECO. Was there -- in your last rate proceeding, was there an interest amount associated with past tax deficiencies?

MR. WILLIS: No, sir. And I think that's a distinction with respect to the Florida Power case, is that they had some at that time, and so therefore it was litigated in their case, and we did not.

CHAIRMAN DEASON: So it was not an issue in your case.

MR. WILLIS: It was not an issue.

MR. NEAL: And Mr. Howe raised that same point when we had our discussions about this same issue, and I looked back at Power Corp.'s surveillance reports let's say for a year in 1999, and the amount they're putting on their surveillance report above the line doesn't match up with what was allowed in their rate case. It's varying up and down, so it's not just putting a flat amount of what was allowed in the last rate case.

CHAIRMAN DEASON: Okay. Further questions, Commissioners, a motion?

COMMISSIONER PALECKI: I have a comment I would like to make. And this is my first decision on a controversial docket, and I would like to do what's fair to the Company and also what is fair to the ratepayers. I think both parties have done an excellent job of arguing this matter, and I think the staff has done an excellent job in their recommendation.

But I'm having a difficulty with this item, and I would feel more comfortable if the Commission were to set this item down for a hearing and encourage the parties to see if they can reach perhaps a further stipulation, because if I recall correctly, in 1996 when this stipulation was entered into, the parties were very far away from each other as far as what the result should be, and yet they were able to get together and resolve the matter. And I would prefer that we set this for a hearing, perhaps in deference to the fact that this is my first decision on a controversial docket. I really am, I believe, seeing the merit of both arguments, and I'm having a hard time deciding. Perhaps there is no right or wrong on this one.

CHAIRMAN DEASON: Well, let me say -- I certainly can respect that, but let me make two observations.

First of all, this will be issued as PAA, so whatever we decide, there's opportunity for a hearing from whichever party wishes to take it to hearing.

And the second of all, if we go to hearing, at this point, I don't know how much more we're going to get at hearing that we've not already heard today. We've been on this item for an hour and a half, and a lot of it is just kind of legal policy. I don't know that it's so much fact-finding that you really spend a lot of time at hearings. We may just take it to hearing and hear exactly what we've already heard today. But if that's what you want to do, you know, I'm not opposed to that.

COMMISSIONER JABER: Let me --

CHAIRMAN DEASON: There's the motion, Commissioners.

COMMISSIONER JABER: Let me just comment on the motion, Commissioner Palecki, that I've gone back and forth about raising the issue of setting it automatically for hearing. And like Chairman Deason, I could go along with that if that's the pleasure of the Commission. But what you take away, I think, from the parties when you automatically set it for hearing versus issuing a PAA order is perhaps, you know, in the PAA order you give a little bit of guidance or rationale that the parties can work with, you know. That's not to say, you know, I won't go along with setting it for hearing.

I wanted to in making -- in preparing to make a motion, I wanted to tell Mr. Howe that he raised very, very good questions and very good concerns. And the difficulty I'm having is what you intended to stipulate to and what the words actually say. That's the difficulty I'm having. And what I have before me are the two orders on the stipulation and the stipulation itself, and the fact that the Commission has ruled in a similar fashion on similar issues.

And just to offer to all of you, what I was prepared to do was issue a PAA order that would have been consistent with what the Commission has done in the past, but recognize that it's a PAA order, and I think at the end of the day we might get to hearing, but if there was a slim chance that the parties could go along with a PAA order, that it was worth taking that risk.

CHAIRMAN DEASON: Well, let me say this. Commissioner Palecki, I agree with you that this is something that maybe there could be another stipulation, maybe a "split the baby" thing. I'm not really sure, because there are issues here, and I'm a little concerned about some things.

But even if we issue a PAA, and realizing that at least one party, one side or the other can protest, it may be that the parties get together and enter into another stipulation to address this specific issue so that there will not be a protest, or else maybe the protest then would be -- if there were one to follow, the protest would be settled by the stipulation. So I think we -- even by issuing the PAA, we still preserve the possibility that there could be a further stipulation on this particular issue.

But here again, if there is a desire to go ahead and set this for hearing, I'm not adverse to that. I'm just trying to look at what our options are and where we would find ourselves if we do that.

COMMISSIONER JACOBS: I'm inclined to agree that if we were to go to hearing, straight to hearing, we would have primarily legal arguments presented to us. It has much to do with the interpretations of the stipulation and/or interpretations of precedent attached to the language that's included in there. If there were significant factual issues, I'm troubled enough by this that -- I share in your views on that, that I'm troubled by this. There's no question in my mind.

But I think -- I don't see that that process would give us any comfort. They would probably wind up at the end of that with a recommendation that pits very much the same arguments amongst themselves. I think your desire to see the parties take another go at this is very appropriate, and I agree that perhaps the idea or the prospect of a protest to this order may be as much of an incentive as anything we might do to set it down for hearing. So in that vein, I guess I would concur with the other comments.

COMMISSIONER BAEZ: And I'm going to agree with the Chairman on this one, I think, and with what Commissioner Jacobs has said. I think that taking it out of the parties' hands -- although a hearing might be of some value, I also think that the potential of a protest as part of that negotiating process has value as well. And I agree with what Commissioner Jaber said as well. We may be able to issue a PAA order that has some kind of guidance that will help that process along as well.

COMMISSIONER JACOBS: And we don't want to detract from the idea that I've heard at least three significant reserve -- reservations of concerns expressed here today, which I'm sure would add to the exigency of any discussions that might occur.

CHAIRMAN DEASON: So is there a motion? I'm sorry. Commissioner Palecki, was that a motion or just --

COMMISSIONER PALECKI: Yes, that was a

motion.

CHAIRMAN DEASON: Is there a second to the motion?

The motion dies for lack of a second. Is there another motion?

COMMISSIONER JABER: Okay. I can move staff. And I want to commend staff, because I know a lot of what you put in the recommendation were responses to questions that we had at a previous agenda. I move staff.

I would also ask staff, Chairman Deason, with your approval, to expand the order to cover the arguments heard today about retroactive ratemaking. I think that that would be essential for a PAA order as well. And the dialogue between Chairman Deason and Ms. Romig with respect to the analysis made in a rate case on this issue I think is appropriate for a PAA order as well.

CHAIRMAN DEASON: Okay. There is a motion.

COMMISSIONER JACOBS: Second.

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

COMMISSIONER JABER: Aye.

COMMISSIONER JACOBS: Aye.

COMMISSIONER BAEZ: Aye.

CHAIRMAN DEASON: Aye. All opposed?

COMMISSIONER PALECKI: Nay, with an understanding that I would not vote against the staff recommendation. I would merely set it down for a hearing with instructions for the parties to try to resolve this matter through a further stipulation.

CHAIRMAN DEASON: Okay. Find then the motion carries on a four-to-one vote, and that concludes Item 28.

(Conclusion of consideration of Item 28.)

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 85 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 28th day of December, 2000.

Mary Allen Neel

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