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August 6, 2001

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 950379-EI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the Prehearing Statement of the Office of Public Counsel. A diskette in WordPerfect 6.1 format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

John Roger Howe
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Determination of regulated)
earnings of Tampa Electric Company)
pursuant to stipulations for calendar)
years 1995 through 1999.)
_____)

Docket No. 950379-EI
Filed: August 6, 2001

PREHEARING STATEMENT OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to Order No. PSC-01-0629-PCO-EI, issued March 14, 2001, submit this Prehearing Statement.

APPEARANCES

JOHN ROGER HOWE, Esquire
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
On behalf of the Citizens of the State of Florida

A. WITNESSES:

Hugh Larkin, Jr.

B. EXHIBITS:

1. Transcript and exhibits from DeLaine Bacon's August 2, 2001, deposition.
2. Transcript from the December 16-17, 1992, special agenda conference in Docket No. 920324-EI, Application for a Rate Increase by Tampa Electric Company, pages 1-4A, 21, 162, 194-205, 214-36.
3. Other exhibits, unknown at this time, may be introduced during the course of cross-examination.

C. STATEMENT OF BASIC POSITION

Paragraph 10 of the first stipulation provides that "any interest expense that might be incurred as the result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking purposes." This language allowed for inclusion of a

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narrowly defined category of expense in calculating Tampa Electric's earnings for 1999 which the parties to the stipulation necessarily considered not to be covered by other provisions. For the Commission to find that the stipulation allows for the recovery of interest expense on tax deficiencies generally would violate the following principles of contract interpretation: (1) the inclusion of one thing presupposes the exclusion of other similar matters not enumerated; (2) specific provisions in an agreement control over the more general; (3) one provision of an agreement should not be read so as to make another provision meaningless; and (4) an agreement should not be construed in such a way as to give one party more rights or benefits than it bargained for.

Of sitting Commissioners, only Commissioner Deason (and perhaps Commissioner Palecki who was an attorney on the staff at the time) would recall that, towards the end of deliberations on Tampa Electric's last rate case in late 1992, the Commission adopted a financial integrity measure of 3.75 times interest coverage. The rate award for 1993 was unaffected by application of this standard because Tampa Electric would exceed the coverage multiple for that year. For 1994, however, the Commission concluded a revenue award calculated in the same traditional manner used for 1993 would be inadequate. The revenue award for 1994 was therefore set to meet the 3.75 interest coverage standard. As a result, the financial integrity standard alone determined the final revenue requirement for 1994. The level of deferred taxes in the capital structure purportedly attributable to aggressive tax positions taken by Tampa Electric in earlier years -- which lies at the heart of the cost-benefit analysis relied upon by the Commission -- was irrelevant to the ultimate revenue award or to final rates from 1994 through 1999. Removing the purported "rate case benefits" for 1994-99 from the cost-benefit analysis relied upon in the PAA causes the \$10.7 million of net benefits to disappear, to be replaced by a net cost to customers of \$1,811,000.

Even if there had been "benefits" from the last case accruing to the customers' account, such benefits only materialized in hindsight, after the IRS purportedly disallowed certain tax deductions in 1999. For the Commission to take the position that customer refunds for 1999 should be less because rates might have been set too low in 1994 (based upon what the company may have found out five years later) clearly violates the proscription against retroactive ratemaking.

The cost-benefit analysis accepted by the Commission as the basis of its PAA had been refined over several iterations in discussions between Tampa Electric and the Staff. Staff's first recommendation to the Commission on 1999 refunds was based upon the result of this joint undertaking. A second recommendation urged the Commission to reject Public Counsel's arguments that Paragraph 10 of the first stipulation precluded Commission acceptance of the proffered cost-benefit analysis. Staff is on record as taking a position against Public Counsel's position and in favor of its own. Section 120.66, Florida Statutes (2000), precludes Commissioners from engaging in ex parte communications with staff members who engaged in "advocacy in connection with the matter under consideration or a factually related matter." In

Public Counsel's opinion this would apply to all staff members who signed off on either of the recommendations addressing 1999 earnings considered thus far.

D. STATEMENT OF FACTUAL ISSUES AND POSITIONS:

ISSUE 1.: Was it appropriate for Tampa Electric to record interest expense on income tax deficiencies in 1999?

OPC: No. Nothing happened to make 1999 the ideal time to record the second (maybe third?) revenue agent's report (RAR) for audit years 1989-91, the first RAR for 1992-94, estimates for 1995-98, and a Memorandum of Understanding for 1986-88. Moreover, entries for a revised RAR for 1992-94 were made in March 2000, and a "final IRS appeals settlement for '86-'88" was not recorded until March 2001. It appears Tampa Electric just wanted a placeholder that could reduce refunds for 1999 until the time was right to make final entries.

ISSUE 2.: Were "[r]ate case benefits" properly included in the cost-benefit analysis the Commission relied upon to find that customers still received net benefits of \$10.7 million if interest expense on income tax deficiencies was included in the calculation of Tampa Electric's earnings for 1999.

OPC: No. There couldn't be any "[r]ate case benefits" attributable to the amount of deferred taxes in the capital structure for the years 1994-99 because the revenue requirement for 1994 was established solely to meet a target interest coverage multiple of 3.75 times. The Commission rejected the 1994 revenue requirement calculated in the traditional manner because it would not satisfy this interest coverage multiple. The amount of deferred taxes in the capital structure has had absolutely no effect on rates customers have paid since that time. Correcting this error removes \$12,552,000 of reputed "benefits" and results in a \$1,811,000 net detriment to Tampa Electric's customers.

ISSUE 3.: Were "[d]eferred revenue benefits/(costs)" properly included in the cost-benefit analysis the Commission relied upon to find that customers still received net benefits of \$10.7 million if interest expense on income tax deficiencies was included in the calculation of Tampa Electric's earnings for 1999.

OPC: No. The amounts ordered deferred or refunded under the stipulations could not, by definition, have been either too high or too low. It's pure sophistry to suggest that customers should be required to forego refunds for 1999 because undisclosed customer "benefits," hidden within the stipulations and unknown to the individuals who negotiated their terms, must now be considered because Tampa Electric chose to record interest expense on tax deficiencies in 1999. Correcting

this error removes another \$4,025,000 of reputed “benefits” and increases the net detriment to customers by a like amount, for a total net detriment of \$5,836,000.

ISSUE 4.: What amount should Tampa Electric be ordered to refund for 1999 pursuant to the stipulations?

OPC: \$14.4 million plus additional accrued interest.

E. STATEMENT OF LEGAL ISSUES AND POSITIONS:

ISSUE 5.: What legal effect, if any, do stipulations between Tampa Electric and the Office of Public Counsel have on Tampa Electric’s ability to include interest expense on tax deficiencies in the calculation of 1999 earnings?

OPC: Tampa Electric is precluded by Paragraph 10 of the first stipulation from including interest expense on tax deficiencies unrelated to the Polk Power Station in its calculation of 1999 earnings. Moreover, in the absence of Paragraph 10, the first sentence of Paragraph 11, which only permits adjustments from the last rate case, would preclude all interest expense on income tax deficiencies.

ISSUE 6.: Is a cost-benefit analysis relevant to this proceeding?

OPC: No. If interest expense on tax deficiencies generally is not allowable pursuant to the terms of the stipulations, that should be the end of the matter. It doesn’t make any difference that customers might have gotten “benefits” from purportedly aggressive tax positions in the past as well as refunds for 1999 that don’t take this fact into consideration. Results cannot be unfair to the company if they are consistent with the stipulation it signed. For whatever reason, Tampa Electric chose to protect itself only with regard to interest expense incurred as the result of a Polk Power Station related tax deficiency assessment.

ISSUE 7.: Is a cost-benefit analysis based upon the one used to evaluate Peoples Gas System’s overearnings for 1996 relevant to this proceeding?

OPC: No. The cost-benefit analysis relied upon by the Commission for the PAA issued in this docket was based on one Staff used to support its recommendation in a Peoples Gas System docket. In that case, however, there were no stipulations requiring refunds, there were no deferred revenue “benefits,” and rates had not been set previously to meet a financial integrity standard. The methodology from the Peoples Gas cost-benefit analysis has absolutely no applicability to Tampa Electric’s situation for 1999.

ISSUE 8.: Do the stipulations authorize Tampa Electric to retain any of the interest accrued on deferred revenues?

OPC: No. Interest expense on deferred revenues has already been used to reduce the amounts deferred and refunded. Nothing in the stipulations suggests Tampa Electric can tap the interest accrued and paid for by customers to shore up its earnings and reduce either deferrals or refunds.

ISSUE 9.: Did the Commission's reliance on the cost-benefit analysis to find \$10.7 million of net benefits to customers violate the proscription against retroactive ratemaking?

OPC: Yes. Charging the customers more in the future to make up for purportedly inadequate rates in the past is the essence of retroactive ratemaking. Refunds for 1999 cannot be reduced based upon rate levels established by final orders for 1993-99 without violating the prohibition. An exception to this general principle might be found in the interim-rate-setting process, but that is not applicable here.

ISSUE 10.: What effect, if any, does Section 120.66, Florida Statutes (2000), have on the Commissioners ability to engage in ex parte communications with staff members?

OPC: Substitution of "presiding officer" for "hearing officer" in the 1996 amendments to Section 120.66(1) effected a fundamental change in the applicability of that section to Commission proceedings. Public employees engaged in prosecution or advocacy -- which should include staff members who advocated inclusion of interest expense on tax deficiencies to derive Tampa Electric's 1999 earnings -- should be precluded from engaging in ex parte communications with Commissioners in this docket.

ISSUE 11.: What effect, if any, does Section 120.80(13)(b), Florida Statutes (2000), have on the issues to be heard in this proceeding?

OPC: Commission precedent holds that, pursuant to Section 120.80(13)(b), only matters in dispute can be addressed in this proceeding and that "matters in dispute" are limited to those specific matters found in a protest to a PAA. Therefore, this proceeding must be limited to those matters raised in Public Counsel's protest.

F. STATEMENT OF POLICY ISSUES AND POSITIONS:

None.

G. STIPULATED ISSUES:

None.

H. PENDING MOTIONS:

None. However, Public Counsel will probably move at hearing to strike those portions of Ms. Bacon's prefiled direct and rebuttal testimony and Mr. Sharpe's prefiled direct testimony which do not address matters specifically raised in Public Counsel's protest.

I. PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY:

None.

J. STATEMENT OF COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE:

There are no provisions of the order establishing procedure with which the Office of Public Counsel cannot comply.

Respectfully submitted,

JACK SHREVE
Public Counsel



John Roger Howe
Deputy Public Counsel

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Attorneys for the Citizens
of the State of Florida

**CERTIFICATE OF SERVICE
DOCKET NO. 950379-EI**


I HEREBY certify that a copy of the foregoing PREHEARING STATEMENT OF THE OFFICE OF PUBLIC COUNSEL has been served by *hand delivery or U.S. Mail to the following parties of record on this 6th day of August, 2001.

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