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.)
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Docket No. 950379-EI
Filed: September 24, 2001

PUBLIC COUNSEL'S BRIEF

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 post-hearing brief.

I. SUMMARY OF PUBLIC COUNSEL'S POSITION

Tampa Electric's earnings for 1999 are subject to review because of two stipulations entered into between Tampa Electric and the Office of Public Counsel in 1996.[1] The First Stipulation provided for: (1) the deferral of revenues from 1995 and 1996; (2) the reversal of deferred revenues in 1997 and 1998; and (3) the refund of deferred revenues plus accrued interest at the end of 1998. The Second Stipulation modified certain provisions of the First Stipulation, continued others, and required the company to refund excess earnings for 1999 based upon a traditional earnings review, i.e., one in which deferred revenues played no part.

In the last few months of 1999, the company recorded $12.7 million (jurisdictional) of interest expense on income tax deficiencies (hereinafter referred to as "interest expense") on the income statement portion of its December 1999 surveillance report. The adjustment reduced

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[1]One stipulation was entered into on March 25, 1996, and approved by Order No. PSC-96-0670-S-EI, issued May 20, 1996, in this docket (the "First Stipulation"). The other was entered into on September 25, 1996, and approved by Order No. PSC-96-1300-S-EI, issued October 24, 1996, in Docket No. 960409-EI (the "Second Stipulation"). This latter stipulation provided that Docket No. 960409-EI would be closed and that both stipulations would be administered in this docket. The Florida Industrial Power Users Group (FIPUG) was also a party to the stipulations but has withdrawn from further participation in the docket.

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customer refunds by approximately $7.62 million (before interest). The propriety of such an adjustment does not depend on general notions of accounting standards or prudence; it depends on the terms of the stipulations.

Do the stipulations allow for adjustments to the income statement? Yes. Paragraph 11 of the First Stipulation (or Paragraph 7 of the Second) provides that "[t]he calculations of the actual ROE for each calendar year will be on an 'FPSC Adjusted Basis' using the appropriate adjustments approved in Tampa Electric's full revenue requirements proceeding."[2] Can interest expense be an "adjustment"? No, interest expense is a below-the-line item which does not typically affect NOI, as an adjustment or otherwise. If it can be construed as an adjustment, was such an adjustment allowed in the last rate case? No. So interest expense is not allowed pursuant to Paragraph 11.

Does another provision allow for interest expense in spite of Paragraph 11's terms? Yes. Paragraph 10 in the First Stipulation permits interest expense related to the tax life of the Polk Power Station.[3] Does any of the expense claimed by the company arise out of a dispute between

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[2]The full text of Paragraph 11 of the First Stipulation reads as follows: "The calculations of the actual ROE for each calendar year will be on an 'FPSC Adjusted Basis' using the appropriate adjustments approved in Tampa Electric's full revenue requirements proceeding. All reasonable and prudent expenses and investment will be allowed in the computation and no annualization or proforma adjustments shall be made."

[3]The full text of Paragraph 10 reads as follows: "The Company plans to take a position regarding the tax life of its Polk Power Station intended to minimize its revenue requirements and to provide maximum benefits to its customers. The Parties agree 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 and will support this position in any proceeding before the FPSC."

Tampa Electric and the IRS over the tax life of Polk? No. And that should be the end of the matter.

If the parties to the stipulations had wanted Tampa Electric to be able to reduce refunds, based upon a cost-benefit study or otherwise, they would have said so. The interest expense Tampa Electric is trying to recover is not allowable under the stipulations. The $12.7 million adjustment should be reversed, revenues should be increased by a like amount, and customers should receive 60%, or approximately $7.62 million (before interest) in additional refunds. Total refunds should be $14,422,776, plus additional interest through the date refunds are made.

II. THE STIPULATIONS

A. The First Stipulation

At its most basic, the First Stipulation, in combination with a 1995 agreement between Tampa Electric and Staff, allowed the company to put excess revenues for 1995 and 1996 in a deferred revenue "pot." The company could then tap the pot in 1997 and 1998 to shore up earnings after Polk Unit No. 1 entered service in late 1996. Sixty percent of excess revenues at the end of 1998, plus interest, was to be refunded to customers.

The First Stipulation was patterned on the agreement memorialized in Order No. PSC-95-0580-FOF-EI, issued May 10, 1995. That agreement, in turn, was predicated on Staff's belief that, in spite of significant overearnings projected for 1995, Polk Unit No. 1 entering service in late September, 1996, (and increasing the rate base by one-third) might make a rate reduction very short-lived. Deferring revenues from 1995 to 1997 would mitigate a rate increase expected for 1997. For 1995, Tampa Electric had to defer 50% of earnings above an 11.75% ROE, up to a net 12.75% ROE, and 100% of revenues above a net 12.75% ROE.

The First Stipulation modified and extended the 1995 agreement. Base rates were frozen through 1998. Additionally, Tampa Electric had to refund $25 million, plus interest, over the 12-months starting October 1, 1996. The refund was made up of $10 million deferred from 1995 and $15 million from 1996 revenues. Instead of a rate increase when Polk came on line, customers saw a rate decrease (in the form of a credit on the bills). Paragraphs 10 and 11 specified matters which could be considered in the calculation of earnings. After accounting for the $15 million refund, 1996 revenues contributing to earnings between an 11.75% and 12.75% ROE were to be shared on a 60%/40% basis, with the customers' 60% share adding to the deferred revenue pot. Interest would accrue on deferred revenues at the 30-day commercial paper rate. The company could then tap the pot in 1997 and 1998. Deferred revenues remaining at the end of 1998 (subject to the sharing arrangement), plus accrued interest, were to be refunded in 1999.

In its order accepting the First Stipulation, Order No. 96-0670, the Commission noted, at page 4, that the stipulation was "basically self-explanatory, but the following items are being addressed for the sake of clarity." The Commission then spoke to specific items of concern, including Paragraph 10, which was discussed at pages 5-6 of the order:

> Tax Deficiency Assessment (Section 10.) - 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. 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. [Emphasis added.]

The parties were bound by the bargain they'd struck to support interest expense -- if it was related to the tax life of Polk.[4] The Commission did not reserve the right to include or exclude "any interest expense" or " any Polk-related interest expense;" it reserved the right to include or exclude any "such" interest expense, which could only mean an expense related to Polk's tax life. A fair reading of the order suggests that, although parties were obligated to support interest expense related to Polk's tax life, the Commission might not allow even that.

B. Paragraphs 10 and 11 of the First Stipulation

Paragraph 10 allowed Tampa Electric to include interest expense related to the tax life of its Polk Power Station. Paragraph 11 allowed the company to use adjustments from its last rate case.[5] In the absence of Paragraph 10, Paragraph 11 would have precluded <u>all</u> interest expense as an impermissible adjustment. Paragraph 10 was needed for Tampa Electric to recover any interest expense at all. For whatever reason, the company chose to protect itself only with regard to a dispute with the IRS over Polk's tax life.

As noted above, the Commission, in Order No. 96-0670, said Paragraph 10 required Tampa Electric and Public Counsel to support interest expense "related to the tax life of the Polk Power Station." What could be clearer? Given the explicit language of the stipulation and the Commission's own interpretation of Paragraph 10, it is nothing short of amazing that Tampa

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[4]The order was almost verbatim (except for deletion of the phrase "it is Staff's belief") from Staff's recommendation. If Staff's interpretation of Paragraph 10 had been wrong, Tampa Electric would have spoken against it at the April 30, 1996, agenda conference. It did not. The interpretation of Paragraph 10 now offered by Tampa Electric is of very recent vintage.

[5]At the conclusion of its last rate case, Tampa Electric was ordered to file "all entries or adjustments to its . . . rate of return reports . . . as a result of the Commission's findings in this rate case." Order No. PSC-93-0165-FOF-EI, at page 91.

Electric claimed it was entitled to recover interest expense unrelated to Polk's tax life and was able to get this docket bogged down by meaningless cost-benefit studies. Tampa Electric did not incur any interest expense related to Polk's tax life. There is no reason to go any further in evaluating the prudence of interest expense for 1999. However, so as to leave no stone unturned, legal standards for applying Paragraph 10 as it was written are being provided.

Relevant concepts of contract interpretation require that the inclusion of interest expense be governed exclusively by Paragraph 10 because: (1) Under the doctrine of expressio unius est exclusio alterius, inclusion of a specific provision addressing interest expense related to the tax life of Polk implies the exclusion of interest expense on Polk not related to its tax life or to interest expense generally; (2) Specific provisions in an agreement control over the more general; so a general reference to "reasonable" expenses elsewhere in the stipulation cannot be elevated above the Polk limitation; (3) All provisions in an agreement must be given effect; one provision should not be read so as to make others meaningless; and (4) An agreement cannot be rewritten under the guise of interpretation to give one party more rights or benefits than it bargained for.

In Docket No. 970022-EU, In re: Petition of Florida Power & Light Company for Enforcement of Order 4285, the Commission had to interpret a territorial agreement (i.e., a stipulation) between FPL and the City of Homestead. The disputed provision allowed Homestead to serve "city-owned facilities," even those within FPL's service area. The city construed this language as allowing it to serve businesses built on the city's land, essentially equating "city-owned facilities" with "city-owned property." The Commission disagreed, concluding that specific reference to the Homestead Housing Authority Labor Camp as an example of a city-owned facility limited the category to facilities which performed a governmental function, stating

that "[i]t is a fundamental principle of construction that the mention of one thing implies the exclusion of another. Thayer v. State, 335 So.2d 815 (Fla. 1976); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944). . . .[S]pecific terms imply [the] exclusion of others." Order No. PSC-97-1132-FOF-EU, at page 8.

The Commission also felt that an agreement should be construed in a manner which gives meaning to each of its terms; one provision should not be read so as to render another meaningless:

> Finally, the rule of construction that requires harmonizing the different provisions of the Agreement in order to give effect to all portions thereof, supports the interpretation that the location and the use of the service exception site are limited. Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 34 (Fla. 1944).
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> Order No. 97-1132, at page 9.

See Pressman v. Wolf, 732 So.2d 356, 360 (Fla. 3d DCA 1999) ("Individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another, with specific language controlling the general."); See Aromin v. State Farm Fire & Casualty Company, 908 F.2d 812, 814 (11th Cir. (Fla.) 1990)("[I]t is a cardinal principle of construction that, if reasonably possible, no part of a contract should be taken as eliminated or stricken by some other part."); and Belen School, Inc. v. Higgins, 462 So.2d 1151, 1153 (Fla. 4th DCA 1985)("In interpreting a contract, the meaning of which is in doubt, 'an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.' Restatement (Second) of Contracts § 203(a) (1979).")

Paragraph 10 identified a narrow category of expense which the parties necessarily considered not to be covered elsewhere in the stipulation. Keep in mind that we are dealing with "interest expense" which, by definition, goes below-the-line and normally has no effect on the calculation of NOI.[6] [T-266-67] Permission must be obtained from the Commission before any interest expense can be moved above-the-line (as was done in the 1991 Florida Power Corporation rate case, Docket No. 910890-EI). As such, it is illogical to assume the parties contemplated interest expense could be treated as a run-of-the-mill "adjustment" or "reasonable and prudent" expense.

Reading the two sentences of Paragraph 10 together and in harmony with other provisions of the stipulations (the only way they can be read without rendering one sentence or the other meaningless) leads inescapably to the conclusion that Tampa Electric can only use interest expense related to the tax life of the Polk Power Station to reduce its reported 1999 earnings. Principles of construction such as the Commission applied in the City of Homestead docket could lead to no other result.

The Commission's decision in that docket was upheld on appeal in City of Homestead v. Johnson, 760 So.2d 80 (Fla. 2000), where the Florida Supreme Court said:

> The [Homestead Housing Authority] Labor Camp serves as an example of the type of "city-owned facility" contemplated by the agreement. Under the doctrine of expressio unius est exclusio alterius, [FN6] paragraph 8 has a limited application to exclude from FPL's service area "city-owned facilities" similar to the Labor Camp, i.e., facilities that serve a municipal/governmental function. Had the City also intended to exclude from FPL's service area city-owned land not

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[6]In response to a FIPUG interrogatory from an earlier part of this docket, the company said: "To place the tax deficiency interest back above the line in 1999, the company imputed this prudent expense as a separate adjustment on the surveillance report." [Ex. 2 (Deposition Ex. 7)]

> associated with the provision of municipal-type services from the agreement, it could have easily so stated by using the term city-owned property.
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> > [FN6] Meaning the expression of one term implies the exclusion of other terms not mentioned.
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> Finally, we rely upon the rule of construction requiring courts to read provisions of a contract harmoniously in order to give effect to all portions thereof. See Sugar Cane Growers Cooperative of Florida, Inc. v. Pinnock, 735 So.2d 530, 535 (Fla. 4th DCA 1999)(holding contracts should be interpreted to give effect to all provisions); Paddock v. Bay Concrete Indus., Inc., 154 So.2d 313, 315 (Fla. 2d DCA 1963)(stating "All the various provisions of a contract must be so construed, if it can reasonably be done, as to give effect to each.").
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> 760 So.2d at 84.

If the parties to the First Stipulation had intended any and all interest expense would be allowable, they would not have referred to the Polk Power Station in Paragraph 10. If the parties wished to address interest expense separately but have it apply generally, they would have said so. Instead, the subject was addressed very narrowly, limiting it to Polk's tax life. See Barakat v. Broward County Housing Authority, 771 So.2d 1193, 1195 (Fla. 4th DCA 2000)("It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain."); United States of America v. First National Bank of Crestview, 513 So.2d 179, 181 (Fla. 1st DCA 1987)("The maxim 'expressio unius est exclusio alterius' applies to contracts as well as statutes, 17 Am.Jur.2d Contracts § 255; hence, the enumeration of certain classes of activities which the contract permits is ordinarily construed as excluding from its operation all of those not expressly mentioned."); and Espinosa v. State, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997)("The deficiency in this agreement is plainly encapsulated within the maxim expressio unius est exclusio alterius. 'If one subject is specifically named [in a contract], or if several subjects of a large class are specifically

enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded.' 3 Corbin on Contracts § 552 (1960).")

Paragraphs 10 and 11 are each comprised of two sentences. For each, Tampa Electric would like to throw the first sentence away and rely solely on the second sentence, as if it alone established independent rights for the utility. But the first sentence of Paragraph 10, which refers to the tax life of Polk, cannot be ignored because it defines a parameter limiting the second sentence. Any other interpretation would render the first sentence meaningless, contrary to established case law cited above.[7] Similarly, the first sentence of Paragraph 11, with its requirement that adjustments must be those allowed in the last rate case, cannot be rendered meaningless by allowing it to be completely superseded by the second sentence's reference to "reasonable and prudent expenses and investment." Moreover, it is unreasonable to construe below-the-line interest expense as a reasonable or prudent expense for NOI purposes.

C. The Second Stipulation

One matter not resolved by the First Stipulation was the appropriate rate base treatment of Polk Unit No. 1. After the hearing concluded and briefs had been filed in the Polk Unit No. 1 docket, Docket No. 960409-EI, the parties to the First Stipulation negotiated the Second Stipulation. The Second Stipulation froze base rates for another year, through 1999. Polk Unit No. 1 was placed in rate base at a specified dollar amount, and Tampa Electric's investment in its

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[7]Imagine entering into a contract, consisting of two sentences, to have the roof on your house replaced: "The Acme Roofing Company will replace the roof at 123 Elm Street for $5,000. For the next five years, Acme will be responsible for all repairs." Six months later, your washing machine breaks down. Tampa Electric would say that, pursuant to the second sentence of the contract, Acme must pay to fix the washing machine.

Port Manatee Site was removed from rate base. Another $25 million of refunds had to be made over the 15-month period October, 1997, through December, 1998. Essentially, customers received a guaranteed minimum refund for 1998 and received it earlier than was contemplated by the First Stipulation. Tampa Electric was given the discretion to defer any portion of its 1998 revenues not subject to refund into 1999. However, such deferred revenues were to have no effect on the calculation of earnings for 1999. Tampa Electric's revenues contributing to earnings above a 12% ROE for 1999 were to be shared on a 60%/40% basis, with the 60% share being refunded to customers. Additionally, all revenues contributing to earnings above the net 12.75% ROE had to be refunded. Interest was to be added at the 30-day commercial paper rate.

Paragraph 7 of the Second Stipulation provided that "the actual ROE for 1999 will be on an 'FPSC Adjusted Basis' using the appropriate adjustments approved in Tampa Electric's last full revenue requirements proceeding."[8] Paragraph 14 provided that "the First Stipulation is hereby ratified and continued except as specifically modified herein." Thus, the First Stipulation's Paragraph 10 was carried forward and might be made applicable to the calculation of earnings for 1999 pursuant to the Second Stipulation -- if interest expense related to Polk's tax life. (If Paragraph 10 of the First Stipulation was not applicable for 1999, Paragraph 7 of the Second Stipulation (or Paragraph 11 of the First) would preclude consideration of interest expense for 1999 altogether.)

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[8]The first two sentences of Paragraph 7 of the Second Stipulation are, with minor exception, the same as Paragraph 11 of the First Stipulation.

D. Commission Orders on Deferrals and Refunds

The precise amounts of revenues to be deferred and refunded for each year were left for later review. In Order No. PSC-0436-FOF-EI, issued April 17, 1997, (almost two years after the 1995 agreement between Tampa Electric and the Staff) the Commission determined that $50,517,063 was the appropriate deferral amount for 1995.

Two Commission orders addressed 1996's deferral amount. The first, a PAA, Order No. PSC-98-0802-FOF-EI, concluded that $37,094,593 (before accounting for the $15 million from 1996 already refunded as part of the first $25 million refund) was the appropriate deferral amount for 1996. Public Counsel and FIPUG filed protests to the PAA. It was Public Counsel's position that the Commission erred in allowing Tampa Electric to include deferred revenues in the capital structure at anything other than a zero cost rate because, to do so, reduced the amount of deferrals and effectively required the customers to pay their own interest. After a hearing and the submittal of briefs, the Commission issued its Order No. PSC-99-0683-FOF-EI on April 7, 1999, rejecting Public Counsel's arguments and setting the 1996 deferral amount at $37,081,064 (again, before accounting for the $15 million already refunded).

The appropriate 1997 revenue reversal (this was the first year the company tapped the deferred revenue pot) was established in Order No. PSC-99-1940-PAA-EI, issued October 1, 1999, in the amount of $27,056,807. Two weeks later, on October 14, 1999, in Order No. PSC-99-2007-PAA-EI, the Commission set the 1998 reversal amount at $34,069,010. The remaining $734,332 of deferred revenues left at the end of 1998, plus $10,492,266 of accrued interest, for a

total of $11,226,598, was ordered to be refunded to customers.[9] It cannot be overemphasized that the company retained most of the revenues deferred in 1995 and 1996 to protect its own earnings.

Tampa Electric and FIPUG protested the PAA orders for both 1997 and 1998. However, another stipulation among Tampa Electric, FIPUG and Public Counsel ultimately resolved the matter. Under this stipulation, the 1997 and the 1998 PAA orders were made final except that, instead of refunding $11.2 million for 1998, Tampa Electric agreed to refund $13 million, plus interest. The stipulation was approved in Order No. PSC-00-1441-AS-EI, issued August 8, 2000. All that remained under the First and Second Stipulations signed in 1996 was to determine the proper amount of refunds for 1999 pursuant to the Second Stipulation.

III. THE COST-BENEFIT STUDIES

The cost-benefit studies offered by Tampa Electric are completely irrelevant. Since the parties to the stipulations agreed that only interest expense related to the tax life of Polk was allowable, there was no reason to evaluate whether other categories of interest expense might have been considered prudent if the stipulations never existed. Additionally, the Second Stipulation called for a traditional overearnings evaluation for 1999. [T-117] Yet, the underlying purpose of the cost-benefit studies is to take the Commission out of a simple evaluation of 1999 earnings by forcing consideration of hypothetical amounts from prior years. [T-123]

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[9]It is important to keep in mind exactly what money was accumulated as deferred revenue and what the company kept to prop up its earning. The 1995 deferral was $50,517,063 (Order No. 97-0436). The 1996 deferral was $37,081,064 (Order No. 99-0683), for a total in the deferral pot of $87,598,127. From this the company made $25,737,978 of refunds from October 1996 through September 1997 (apparently the factor applied to bills caused more than $25 million to be refunded). For 1997, the company reversed $27,056,807 (Order No. 99-1940), and for 1998 it reversed $34,069,010 (Order No. 99-2007). This left only $734,332 of principal, plus $10,492,266 of interest, which together made up the $11,226,598 originally ordered refunded for 1998. See page 14 of Order No. 99-2007 and Mr. Larkin's testimony. [T-220]

A. Is It Even a Cost-Benefit Study?

One might evaluate future costs versus future benefits to decide whether a contemplated action looks prudent. One might even look back at historic costs and benefits to see how things worked out in the past.[10] But no one compares current costs against past "benefits" to guide their economic decisions. No one rationally decides to pay more in the future because a previous deal turned out to be exactly the bargain which was anticipated. Yet, this is exactly the format of Tampa Electric's cost-benefit studies.

Imagine if, after being told Paragraphs 10 and 11 precluded an adjustment for interest expense on tax deficiencies, Tampa Electric said it thought it might be able to show that costs to customers were more than offset by benefits. With respect to a study matching costs for 1999 with benefits for that same year, the company would have been told the concept was absurd; the harm to customers was readily identifiable as a $7.62 million loss of refunds (before interest). Assume the company then asked if it could impose higher rates on its customers (in the form of reduced refunds) during the refund period after 1999 if it could show that, in years going back to 1993, rates were theoretically lower than they might have been. In response, Tampa Electric

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[10]Public Counsel's witness Mr. Larkin observed that a "[c]ost/benefit analysis [is] done either to examine the current cost in relationship to a current benefit or a past cost in relationship to a past benefit. But you don't examine a past cost in relationship to reducing the current refund." [T-232] Tampa Electric's witness, Ms. Bacon, was not far off the mark when she said: "A cost/benefit analysis is generally used to either decide the best approach for making a decision on a prospective basis or to confirm whether a previous decision was appropriate." [T-38] Similarly, in her "used truck" example, she compared historic costs against historic benefits. [T-103] In contrast, the cost-benefit study she sponsored is akin to comparing the cost of a new truck against savings made possible by the old one. Mr. Hart (perhaps unintentionally) framed the issue appropriately in his question to Mr. Larkin: "Well, if you want to measure the prudency of a historical action, you have to look at cost and benefits that occurred historically in order to tell?" [T-263] It's okay to look back, and it's okay to look forward; it's just not okay to mix the two.

should have been told not to waste its time. Even if the costs and benefits came out as the company hoped, the Commission could not allow rates to be higher in a future period to make up for purportedly inadequate rates in the past. Comparing future costs against historic "benefits" in such a manner directly implicates the prohibition against retroactive ratemaking."[11]

However, because Tampa Electric did not ask for permission to move interest expense above-the-line but, instead, came forward on its own with a cost-benefit study patterned after one Staff used in a Peoples Gas System case, the cart was placed before the horse and, instead of asking how such a study could possibly be legal or relevant, the concern of the company and Staff shifted to find a way to justify the study in spite of the stipulations. Thus, the-irrelevant-hitched-with-the-illegal became the two-horse team pushing this docket, giving rise to the need to provide the following explanation why, both factually and legally, the cost-benefit studies are all wrong.

B. Retroactive Ratemaking

Let's give Tampa Electric every benefit of the doubt and see where that leads us. Assume the company really had to record interest expense on its books in late 1999. Assume further that it seemed unfair to the company that this below-the-line expense reduced its earnings while (in the company's eyes) the tax positions which gave rise to the interest expense had also led to greater deferred taxes and lower rates for customers (forgetting for the moment that deferred taxes actually had no effect on rates from 1994 until today). Thus, Tampa Electric would

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[11]In other words, it is not the simple act of recording interest expense in 1999 that raises concerns of retroactivity. It is, instead, the allowance of the expense for the specific purpose of reducing refunds in the future (effectively, the imposition of higher rates during the refund period) because the purported historic "benefits" are greater than the current or future "costs." See Mr. Larkin's testimony at transcript pages 261-63 and 269.

think it unfair to receive lower rates during the 1999 refund period after it already received lower rates out of its last rate case. Distilled to its essence, the company has to be asking for higher rates in the future (in the form of a lower refund obligation) to make up for lower rates in the past. That's retroactive ratemaking. Couching the request in a form more palatable to the Commission and Staff, i.e. as a cost-benefit study purportedly from the customers' perspective, cannot change this underlying truth.[12]

The concept of retroactive ratemaking has been addressed in several different forms and with differing phraseology in the reported cases. The relevant Florida cases are discussed at length in a 1998 full-Commission decision involving Florida Cities Water Company's attempt to impose a future surcharge to make up for litigation expenses incurred in the past: In re: Petition of Florida Cities Water Company for [a] limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County, Docket No. 971663-WS, Order No. PSC-98-1583-FOF-WS (hereinafter referred to as Order No. 98-1583), issued November 25, 1998.

Florida Cities wanted to recover litigation expenses, which had not been previously claimed in a rate case or elsewhere, through a surcharge on customer bills. Tampa Electric wants to recover purportedly foregone revenues related to deferred taxes, which had not been requested previously, in the form of reduced refunds for the future (the equivalent of netting a surcharge against refunds). After discussing the relevant case law, the Commission dismissed Florida Cities' claim with words appropriate to the Tampa Electric situation:

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[12]It is likely that Staff now realizes that the cost-benefit study that formed the basis for the Commission's PAA was, in fact, inaccurate. However, while this point is significant, a dispositive legal concept should not be dismissed as inapplicable simply to address the factual errors.

> The utility argues that the Commission has allowed recovery of other out of test year litigation expenses on the basis that these expenses are extraordinary and non-recurring. . . . However, we note that the expenses approved in those dockets were requested in rate cases, and not for costs incurred prior to the date the application was filed, as is the case here. As courts have made clear, there is no reasonable claim for costs incurred prior to the date the application was filed or for cost categories discovered after the rate case is approved. <u>We find that the prohibition against retroactive ratemaking protects the public by ensuring that present consumers will not be required to pay for past deficits of the company in their future payments</u>.
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> <u>Allowance of these litigation expenses would violate the principle against retroactive ratemaking because it denies customers their right to be free from surprise surcharges after the service has been provided</u>. [Emphasis added.]

Order No. 98-1583, at 17-18.

Tampa Electric's 1992 rate case was decided eight years ago, in February 1993. In that case, Tampa Electric did not ask for recovery of interest expense (but Florida Power Corporation, whose case was being processed around the same time, did). That docket became final and closed to future review or revision. The Commission cannot allow Tampa Electric to reach back over those many years, re-evaluate what might have been, and use the hypothetical reduction in deferred taxes to lessen refunds in 2001 based upon a newly announced if-only-we-had-known regulatory principle.[13] This would be a classic case of retroactive ratemaking, made all the more egregious by the distortions necessary to conform the result to stipulations which, by their terms, preclude this outcome.

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[13]Tampa Electric will no doubt argue that it is not trying to recover all the past "benefits" it has identified. However, the prohibition against retroactive ratemaking does not turn on the mathematical equivalence of future rate increases and past rate deficiencies.

C. The Effect of Interest Expense on the Cost-Benefit Studies

One of the enduring mysteries of this docket has been Tampa Electric's reluctance to identify specific amounts of interest expense relating to Polk. [T-125] It would appear that Tampa Electric probably could not make its cost-benefit study work for all the interest expense it had booked without incorporating the deferred tax effects of using research-and-experimental and interest-capitalization tax issues associated with the Polk unit. (None, of course, was related to Polk's tax life.) However, if the company claimed those expenses separately under its interpretation of Paragraph 10, Staff might have removed them from the cost-benefit study to avoid a double counting. If the Staff had rejected the cost-benefit study on the merits, then the company probably would have "remembered" it might still be entitled (under the company's new interpretation of Paragraph 10) to some of the expense booked as an NOI adjustment for 1999.

As it happened, though, the Staff accepted the cost-benefit study. Under these circumstances, there was no reason for Tampa Electric to settle for half a loaf. So, when Tampa Electric filed the direct testimony of Ms. Bacon on April 23, 2001, no mention was made of any Polk-related tax deficiencies.[14] But Ms. Bacon did confirm that Paragraph 10 was intended by the parties to apply to tax life issues:

> No. One of the controlling events surrounding the Stipulation was the construction of the Polk Power Station. The reference to tax deficiency interest for the Polk Power Station was included to address the tax position that the company was taking on its seven-year tax life. Through the language proposed by the Company in the Stipulation, Tampa Electric sought assurance from the parties to

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[14]Footnotes to the $11.1 million cost-benefit study provided to Staff in early August, 1999, [Ex. 6] referred to "R&E expenses" and "interest capitalization,"so did the footnotes to a subsequent $10.4 million study. [Ex. 7] These may be Polk-related matters. Ms. Bacon's Document 1 [Ex. 1] is essentially identical to the $10.4 million study, but the footnotes do not refer to R&E or to interest capitalization.

> the Stipulation that the Polk tax life decision would be supported if the IRS disagreed with this specific tax position. The provision in the Stipulation was never intended to exclude or limit other similar expenses. [T-46-47]

Ms. Bacon's testimony is consistent with Public Counsel's witness, Mr. Larkin's, definition of "tax life" as "the depreciation period over which an asset would be recovered for tax purposes." [T-240-41] There was still no way, however, to tell whether a Polk tax-life issue might have been incorporated in the cost-benefit study Ms. Bacon was sponsoring. Therefore, Mr. Larkin, in his prefiled testimony, repeated the full text of Paragraph 10 (i.e., including reference to "tax life") [T-210] and then offered the following question and answer:

> Q. Has Ms. Bacon or Mr. sharpe identified any interest expense on tax deficiencies which relate specifically to the polk power station?
>
> A. To my knowledge, they have not. Although the stipulation clearly sets out the basis for recognizing interest on tax deficiencies, neither witness for Tampa Electric has identified any of the actual or proposed interest expense on tax deficiencies assessed by the IRS as specifically relating to the Polk Power Station. In fact, it appears that they have completely ignored this section of the stipulation in recommending that any and all interest on tax deficiencies be used as a reduction of operating income for refund purposes. [T-211]

Ms. Bacon still did not identify any interest expense related to Polk in her June 8, 2001, rebuttal testimony. She did, however, cement her agreement with Public Counsel's interpretation of Paragraph 10 by stating that "[t]he purpose of paragraph 10 is to document an agreement among the parties to support recovery should the Polk Power Station tax life position be questioned by the IRS at a future date." [T-276]

The full cycle of testimony filing was complete, almost a year and a half had passed since the end of the year at issue, and still no claim was made by the company that it incurred interest

expense related to Polk.[15] Then, in August 2001, the company asserted in its prehearing statement that Public Counsel had to support any and all interest expense related to Polk pursuant to the company's new interpretation of Paragraph 10. The allegation of consistency with the stipulation was absurd on its face since there was still no claim that any of the expense related to the Polk tax-life issue.

It can only be surmised that the company finally (after its rebuttal testimony had been filed) realized its cost-benefit study was fatally flawed. Therefore, it tried to adopt a new interpretation of Paragraph 10 which would allow for Polk-related interest expense having no relation to the tax-life issue -- even though such an interpretation was inconsistent with Ms. Bacon's prefiled direct and rebuttal testimony. However, by now showing its hand, the company has demonstrated its weakness on both fronts. Tampa Electric cannot claim interest expense under Paragraph 10 because none is related to a dispute with the IRS over the unit's tax life. And removal of Polk expenses (whatever they are, they have not been established on the record of this proceeding) from the cost-benefit studies would necessarily make the studies all the more unsupportable.[16]

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[15]The Commission deferred the agenda item (at staff's suggestion) on October 17, 2000, to allow Staff to review Public Counsel's invocation of Paragraph 10 as a barrier to acceptance of the cost-benefit study. Staff called a meeting on November 9, 2000, at which it asked for written submittals from Tampa Electric and Public Counsel, which were provided on November 15, 2000. Public Counsel argued, among other things, that since no Polk-related expenses had been identified, Paragraph 10 precluded any interest expense. Significantly, Tampa Electric's submittal did not even refer to Paragraph 10. The company, instead, argued that adjustments should not be limited to those from the last rate case. The company was still apparently unwilling or unable to go on the record as having incurred any Polk-related interest expense at all.

[16]Perhaps a line from a brief this office filed in another Tampa Electric case, Docket No. 980693-EI, bears repeating: "Years of experience suggest it prudent to pay close attention to any
(continued...)

D. Problems with the $12.4 Million Cost-Benefit Study

This is the study appended to Ms. Bacon's prefiled direct testimony. [Ex. 1] It is based on the Peoples Gas System template [T-72] and, therefore, improperly mixes current or future costs against historic "benefits." (The retroactive-ratemaking implications of such an approach are addressed above.) Moreover, the Peoples Gas case did not involve stipulations; it did not involve deferred revenues; and it did not involve rates that had previously been set to meet a financial integrity standard. In other words, the guiding template was totally inconsistent with the type of earnings review required for 1999 by the stipulations.

The underlying theme of this cost-benefit study is that undisclosed decisions Tampa Electric made behind the scenes (i.e., purportedly "aggressive" tax positions taken with the IRS) increased deferred taxes in the company's capital structure, resulting in lower rates which somehow accrued to the customers' "benefit." Since customers allegedly got lower rates from 1993-1999, Tampa Electric believes they should be obliged to forego the full refunds the Second Stipulation calls for from 1999's overearnings.

Tampa Electric postulates that, if the amount of purportedly "excess" deferred taxes are removed from the capital structure, the hypothetical increase in rates (from replacing zero-cost capital with equity, debt, etc.) can be claimed as a "benefit" resulting from the company's largesse. The suitability of removing the effect of aggressive tax positions from the capital structure, however, can only be meaningful if the company first demonstrated that its tax

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[16](...continued)
matter Tampa Electric addresses obliquely." In that case, Tampa Electric did not disclose until the hearing that it intended to accrue AFUDC on its scrubbers at Big Bend even though both the Commission rule on the subject and the allowance of CWIP in rate base in the company's last rate case would preclude such an action.

positions affected the capital structure in the first place. Otherwise, Tampa Electric is just taking something away from nothing. There's certainly no evidence in this docket that the amounts Tampa Electric removed from zero-cost capital were ever there in the first place.

1. Tax Audit Periods After 1990 are Irrelevant

What we do know is that the tax audit periods identified by the company are, for the most part, nonsensical. Tampa Electric claims it can identify rate case and deferred revenue benefits from the 1986-88, 1989-91, and 1992-94 audit cycles and deferred revenue benefits alone from the 1995-98 audit cycle. But Tampa Electric filed its last rate case in May of 1992, before its 1991 tax return was filed on September 15, 1992. [T-62] The company's tax witness in that case, Mr. McKnight, said only the tax returns through 1990 had been available for his review. [Ex. 4; T-62] In the last rate case, the Commission set rates for 1993 with a step increase for 1994. The base rates in effect today are the same ones the Commission approved for implementation in 1994. [T-60, 101] Tax positions taken after 1990 could not have had any effect whatsoever on rates from 1993-99. Three of the four tax audit periods used in the cost-benefit study are meaningless.

2. Deferred Taxes Had No Effect on Rates from 1994-1999

The most glaring error is Tampa Electric's treating base rates for 1993 and 1994 as if rates for each of those years had been set in the same manner. [T-89] In fact, although rates for 1993 had been set in the traditional manner with reference to a rate base, income statement and capital structure, rates for 1994 were set on a totally different basis. After first identifying a preliminary revenue requirement for 1994 in the traditional way, the Commission tested it against a 3.75 times interest coverage ratio which had been adopted as the financial integrity standard.

[T-89, 215] Finding the initial revenue requirement inadequate under this standard, the Commission increased revenues to meet the interest coverage multiple, which became the sole determinant of rates from 1994 to this day. [T-64-70, 89-91] The amount of deferred taxes in the capital structure had absolutely no effect on rates from 1994 through 1999.[17] [T-216, 228-29] Accordingly, there could not have been any "rate case benefits" during those years. Removing the $12,552,000 of nonexistent "rate case benefits" causes the $12,406,000 of net benefits to go negative (i.e., a net detriment to customers), by $146,000.

3. Deferred Revenues Were of No Benefit to Customers

The amounts deferred under the two stipulations could not, by definition, have been either too high or too low. To the contrary, they must be exactly what the agreement and stipulations required. Neither customers nor the company could have been either benefited or harmed from accurate implementation of the stipulations negotiated between the parties and approved by the Commission.

Perhaps it would help to focus on one claimed deferred revenue benefit. For the 1995-98 tax audit period, Tampa Electric claims customers received a $281,000 benefit in 1995. [Ex. 1, page 1 of 31 (the first entry under the heading "1995")] What form did this "benefit" take in 1995? It could not have been in the form of cash in the customer's pocket. Nor would it magically appear as future refunds. Remember, the company essentially wiped out the deferred revenue pot by the end of 1998; the 1998 refund just gave customers back their own money.

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[17]Mr. Larkin testified that "[t]he underlying factor which determined the level of rate increase was the interest coverage ratio and not any specific component of the Commission's Order. It certainly was not the amount of deferred taxes in the capital structure." [T-216] His testimony is unrefuted on the record of this proceeding.

Customers only got back $734,332 of the deferred revenues left at the end of 1998. To the extent deferred revenues were retained to prop up the company's earnings in 1997 and 1998, it was completely lost to the customers. Even if some had been left over, only 60% would have ever been refunded -- and that would have happened in 1998.[18]

Is the company saying the right amount was deferred for 1995, but since it could have (would have? should have?) been different, customers should be deprived of the full benefit of their bargain for 1999?[19] The cost-benefit study shows four entries (one for each tax audit period) for "Avoided lower/(higher) revenue refund" under the "1999" column. But, the deferred revenue pot, along with all its accrued interest, was empty after 1998. [T-116-17] The Second Stipulation (Paragraph 4) precluded deferred revenues from having any effect on refunds for 1999. When all is said and done, Tampa Electric is actually (and with a straight face) claiming that, although customers only got back $734,332 of their deferred revenue, they really received a deferred revenue "benefit" of $5,690,000 [T-95] which justifies them being required to forego $7.62 million of refunds (before interest) required by the explicit terms of stipulations negotiated on their behalf. Removing the incorrect deferred revenue benefits and costs causes the $12.4 million cost-benefit analysis to go negative by another $5,690,000, for a total net detriment to customers of $5,836,000.

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[18]Ms. Bacon testified that a "portion" of the $281,000 was included in the refund of 1998 overearnings. [T-106] She also said "only 60 percent probably of the 1995 number might have survived into 1997 because that's the way the stipulation actually worked." [T-114] The balance would have taken another 60% hit in the calculation of 1998 refunds.

[19]Ms. Bacon testified that the $50,517,063 deferred from 1995 was a correct amount. [T-102]. She also said $3,496,000 of "benefits" "are buried within that." [T-104-106] But neither benefits nor detriments can be hidden within a correctly calculated deferral.

4. Interest on Deferred Revenues Belongs to the Customers

Tampa Electric can only make its cost-benefit study "work" by laying claim to the interest accrued on the deferred revenue balances. For example, at page 6 of 31 of Ms. Bacon's Document No. 1 [Exhibit 1], even though there was $10,492,000 of accrued interest remaining at the end of 1998, the company claims it should only have been required to refund $6,448,000. The $4,044,000 difference, plus the $734,000 remaining balance of deferred revenues at the end of 1998, explains why the company's refund number is $4,778,000 less than the $11,227,000 the Commission originally ordered refunded for 1998 in Order No. 99-2007. But the stipulations do not authorize the company to keep the interest accrued on deferred revenues. Tampa Electric is allowed to reverse and add to its revenues in 1997 and 1998 the "deferred revenues" from 1995 and 1996. See, e.g., Paragraph 5 of the First Stipulation. If the parties intended to authorize Tampa Electric to reverse deferred revenues and interest accrued on deferred revenues, they would have said so.

As noted above in the section on Commission orders setting deferral amounts, the Commission, in its Order No. 99-0683, rejected Public Counsel's arguments that deferred revenues should be included in the capital structure at zero cost for purposes of calculating deferral amounts. The Commission, instead, allowed Tampa Electric to carry the deferred revenues as a cost item in its capital structure. Thus, the interest in the capital structure was used to reduce both deferrals and refunds for each year 1995-99.

Mr. Larkin correctly described the burden already placed on customers by charging them for their own interest:

> The Florida Public Service Commission included the deferred revenue in the capital structure at a cost rate of the 30-day commercial paper rate. This, in effect, charges the ratepayer for the carrying cost of the deferred revenues because earnings are reduced by the weighted cost of the deferred revenue included in the capital structure. So the refund to ratepayers is really the carrying cost of the deferred revenues which in essence has already been paid for by ratepayers. [T-220]

Customers already paid for the accrued interest; it is money that was taken away from them in prior periods. [T-259] It is ludicrous for the company to assert that customers received "benefits" from having the interest they paid for returned to them.

E. Problems with the $6.8 Million Cost-Benefit Study

This cost-benefit study shows an amazing change of events. [Ex. 8] Whereas the first study showed deferred revenue benefits totaling $5,690,000, this second one shows deferred revenue benefits of $14,300,000: The company somehow found an additional $8,610,000. Customers who only had $734,332 of their deferred revenues returned to them after 1998, purportedly received over $14 million of benefits from the way Tampa Electric "handled" their deferred revenues.

How did the elimination of rate case benefits cause deferred revenue benefits to grow by $8,610,000 ($14,300,000 - $5,690,000 = $8,610,000) from one cost-benefit study to the other? Before jumping into the details, it bears repeating that Public Counsel has not taken the position that rates were set improperly in the last rate case. It is just that, for the years 1994-1999, the rates were unaffected by any tax positions the company may have taken because the Commission set rates for 1994 based upon a 3.75 times interest coverage multiple. Deferred taxes in the capital structure, therefore, had no effect on the revenue requirement for 1994 or upon rates since that time. However, (and this is the important point) it must be remembered that rates for 1994

were set higher than they normally would have been so as to meet the financial integrity standard.[20]

What the company has apparently done in this second cost-benefit study is to mistakenly assume that, if rate case benefits were improperly reflected in the $12.4 million study, it must be because the rates used in the first study (i.e., the rate increase from the last rate case) had never been implemented. [T-97, 137] If this were true, then rates paid by customers would, in fact, have been lower during the deferred revenue years; less revenues would have been deferred under the stipulations; and the difference between what was actually deferred and what should of been has accrued as a benefit to customers. But, of course, the premise for the study is all wrong. It's a house of cards just waiting to fall. Rates from the last rate case were neither too high nor too low. They were just unaffected (at least since 1994) by any tax positions the company may have taken.

F. Staff's Role in the Formulation of the Cost-Benefit Studies

The pre-1996 version of subsection 120.66(1) provided that ex parte communications relative to the merits of a proceeding could not be made to the agency head after receipt of a recommended order or to a DOAH hearing officer by public employees engaged in prosecution or advocacy. The Commission construed Section 120.66 as being applicable only in those cases which were referred to hearing officers, not those in which the Commission sat as the trier of fact. Citizens v. Wilson, 569 So.2d 1268, 1270 (Fla. 1990)("This statute [Section 120.66] is

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[20]The 3.75 multiple is a one-way street. For example, the Commission evaluated the revenue requirement for 1993 calculated in the traditional way and found that it provided over 4 times interest coverage. So rates for that year were more than adequate. Revenues for 1993, however, were not then reduced to satisfy the 3.75 standard. But for 1994, because the traditional method gave a result below 3.75 times, revenues and rates were raised to meet the standard.

wholly inapplicable because it is directed toward ex parte communications to a hearing officer or to an agency head after receipt of a recommended order. There was no hearing officer involved in these proceedings.")

Subsection 120.66(1) was amended in 1996 and now precludes ex parte communications with an agency head, after receipt of a recommended order, or with a "presiding officer." Substitution of "presiding officer" for "hearing officer" effected a fundamental change in the applicability of Section 120.66 to Commission proceedings. Subsection 120.66(2) defines presiding officer as "including an agency head or designee." Rule 28-106.102, Florida Administrative Code, provides:

> "Presiding officer" means an agency head, or member thereof, who conducts a hearing or proceeding on behalf of the agency, an administrative law judge assigned by the Division of Administrative Hearings, or any other person authorized by law to conduct administrative hearings or proceedings who is qualified to resolve the legal issues and procedural questions which may arise.

Therefore, public employees engaged in prosecution or advocacy -- which should include staff members who advocated inclusion of interest expense to derive Tampa Electric's 1999 earnings -- should be precluded from engaging in ex parte communications in this docket.

This case has a unique procedural history involving interactions between the company and the staff leading eventually to the cost-benefit analyses now before the Commission. The company's witness, Ms. Bacon, had previously worked on a docket concerning the 1996 earnings of Tampa Electric's subsidiary, Peoples Gas System. [T-72] In that docket, the Commission accepted a cost-benefit analysis as justification for allowing the gas utility to include interest expense in the calculation of its 1996 earnings. Aware of this precedent, Ms. Bacon, with the assistance of another company employee, Mr. Ron Neil, prepared a similar cost-benefit study

which they hoped would justify the inclusion of a similar expense Tampa Electric had recorded in the last several months of 1999. [T-75] Commission acceptance of the $12.7 million expense as an adjustment to Tampa Electric's December 1999 surveillance report would reduce refunds to Tampa Electric's customers by approximately $7.62 million (before interest).

In May, 2000, at a meeting attended by the company, Staff, and OPC, Tampa Electric presented its cost-benefit analysis which purported to show that customers had received net benefits totaling $18.3 million resulting from aggressive tax positions Tampa Electric had taken before the IRS. [T-73] Another cost-benefit analysis was appended to a letter from Mr. Neil to a staff member in early August 2000. [Ex. 6] (OPC received a copy of the correspondence around the same time.) This second analysis incorporated certain changes resulting from discussions with the staff and purported to demonstrate a net benefit to customers of $11.1 million. [T-76-77] Further discussions between the company and staff led to a third analysis which purported to show net benefits of $10.7 million. [T-78-79] This third analysis formed the basis of the staff recommendation for the October 17, 2000, agenda conference. [Ex. 7; T-80-83]

At this point, it might be useful to more fully describe some of the players. Tampa Electric's Mr. Neil used to work for the Commission. [T-71] As a staff member, he was the one who advised the Commission in late 1992 on how to set Tampa Electric's revenue requirement for 1994 to meet a 3.75 times interest coverage financial integrity standard. [Ex. 2 (Bacon's Deposition, pp. 12, 17, 20, 21; Ex. 1, 3); Ex. 3; T-75] Mr. Neil, perhaps more than anyone else, knew that rates for 1994 had not been set on the same basis as was used for 1993 and that deferred revenues in Tampa Electric's capital structure had no effect on rates during the period 1994-99.

Ms. Bacon had been actively involved in Tampa Electric's efforts in its 1992 rate case. She was a backup witness, and attended all hearings as well as the December 16-17, 1992, special agenda conference at which the Commission set revenue requirements for 1994 based on the interest coverage multiple. She also knew revenue requirements for 1993 and 1994 had not been established on the same basis, but she had forgotten this fact in preparing the cost-benefit analyses. [T-89-91]

Certain staff members who worked on Tampa Electric's last rate case were also assigned to this docket. It is not necessary to identify the individuals, but suffice it to say that all of them must have also forgotten that rates for 1994 were set to meet a financial integrity standard. Particularly troubling is the fact that Mr. Neil, who did not work on deferred tax issues in the last case, worked with and provided cost-benefit analyses (which incorrectly portrayed the effect of deferred taxes) to a staff member who had been responsible for that very issue. Mr. Neil's representations were accepted even though this staff person, of all people, knows that Tampa Electric did not identify any amounts of deferred taxes related to purportedly aggressive tax positions for inclusion in the company's capital structure during the last rate case. How could the effects of removing these positions on deferred taxes be accepted without first determining whether they had ever been included in the first place?

The $10.7 million cost-benefit analysis which formed the basis for the staff recommendation presented to Commissioners for the October 17, 2000, agenda conference resulted from interactions between the company and Staff. The item was deferred until a later agenda after Staff heard Public Counsel's objections based primarily on the language in Paragraph 10 of the First Stipulation. Staff was apparently unaware until then that the issue of

interest expense was covered in the stipulation. How do we know? Because the staff is very thorough. They would never have left reference to the stipulation out of their recommendation if Tampa Electric had disclosed it or even if they had discussed the subject among themselves.

But having already accepted the result of their joint endeavors, Staff evaluated Public Counsel's objections to the cost-benefit analysis not in neutral terms but in terms of whether Public Counsel offered convincing enough arguments to retreat from the initial recommendation. This is evident from the language used in the staff's recommendation for the December 19, 2000, agenda conference. Staff who participated up to this point were clearly engaged in advocacy about a matter closely related to the subject matter considered at the August 27, 2001, hearing in this docket. Communications between Commissioners and those staff members would, in Public Counsel's estimation, clearly violate the ex parte provisions of Section 120.66, Florida Statutes.

IV. TAMPA ELECTRIC CANNOT DICTATE ISSUES ELIGIBLE FOR PROTEST

The Commission issued a PAA order which took away $7.62 million of refunds from Tampa Electric's customers in derogation of stipulations previously approved by the Commission, based upon its mistaken acceptance of an illegal, irrelevant and inaccurate cost-benefit study served up by the utility. Nothing can prevent a substantially affected party, particularly a signatory to the stipulations, from bringing this mistake to the Commission's attention pursuant to the Administrative Procedure Act, Chapter 120, Florida Statutes. The company's decisions not to pursue its own protests and its willingness to be bound by Commission decisions it initially disagreed with are completely irrelevant to Public Counsel's ability (indeed, duty) to protest other, unrelated matters when they arise for the first time.

In the order establishing the amount of 1995 revenues to be deferred, Order No. 97-0436, the Commission adjusted out Tampa Electric's investment in its share of the Orlando Utilities Commission's Lake Agnes-to-Cane Island 230 kV transmission line, finding that the investment was strictly devoted to wholesale sales outside the Commission's retail jurisdiction. The Commission also adjusted downward the cost rate the company was using for deferred revenues in the capital structure.[21] No adjustment was made for changes in the equity ratio since the last case; the 1995 actual equity ratio of 58.7% was permitted even though it had increased to its highest level ever.

In the first order on 1996 earnings, Order No. 98-0802, the Commission made the same adjustments it had made for 1995 as well as others. The equity ratio was maintained at the 1995 actual level of 58.7% even though it had climbed higher in 1996 (to 59.5%). This decision was contrary to the Staff's recommendation, which had proposed the equity ratio be lowered to 57.5%. The Staff noted in its recommendation, at page 11, that the Commission, when it approved use of the actual ratio for 1995, had said it was not foreclosing further consideration of this "adjustment" for future determinations of earnings under the stipulation. The undersigned attorney from the Office of Public Counsel spoke in favor of Staff's position. That position, however, was rejected; the Commission used the 58.7% equity ratio approved for measuring 1995 earnings to measure 1996 earnings. In other words, the Commission rejected one hypothetical equity ratio in favor of a different hypothetical ratio.

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[21]Tampa Electric wanted to include deferred revenues in the capital structure at its overall rate of return even though interest would only accrue at the 30-day commercial paper rate.

Public Counsel and FIPUG filed protests. Public Counsel did not, however, protest the equity ratio decision. Tampa Electric was apparently content with the Commission's decision. It is apparently Tampa Electric's position that Public Counsel's willingness to accept Staff's hypothetical equity ratio at an earlier stage in the proceeding is somehow different from the company's and Public Counsel's willingness to accept the Commission's own hypothetical ratio as reflected in the PAA order. The protests were resolved by Order No. 99-0683, which denied Public Counsel's contention that deferred revenues should be a zero-cost item in the capital structure.

Tampa Electric and FIPUG protested the 1997 order (Order No. 99-1940) as well as the 1998 order (Order No. 99-2007). Although Tampa Electric originally protested use of the 1995 equity ratio for 1997 and 1998, it relented during the course of the proceeding, stating in its June 26, 2000, Prehearing Statement, at page 4:

> [W]hile Tampa Electric believes its actual capital structure as presented in its surveillance reports for 1997 and 1998 is the most appropriate capital structure for those years, <u>the Company is willing to accept the Commission's decision to use a 58.7% equity ratio which was Tampa Electric's actual equity ratio in 1995</u> and the equity ratio approved by the Commission for Tampa Electric for 1996. [Emphasis added.]

Ultimately, earnings for 1997 and 1998 were resolved with Tampa Electric stipulating to refund <u>more</u> than the Commission had originally ordered for 1998. Order No. 00-1441.

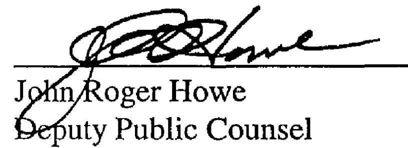
V. CONCLUSION

Tampa Electric's customers are entitled to the benefit of the bargains negotiated on their behalf five years ago. The company's $12.7 million adjustment to its 1999 income statement should be reversed, earnings should be increased accordingly, and an additional $7.62 million

dollars plus accrued interest should be added to the $6.1 million refund amount determined in Order No. 01-0113. The total refund should be $14,422,776, to which appropriate interest from December 31, 2000, until the date refunds are completed must be added.

Respectfully submitted,

JACK SHREVE
Public Counsel



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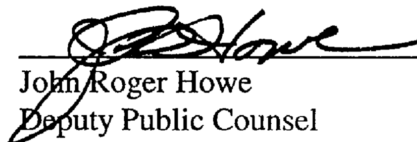

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