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October 8, 2001

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Determination of Regulated Earnings of Tampa Electric Company
Pursuant to Stipulations for Calendar Years 1995 through 1999;
Docket No. 950379-EI

Dear Ms. Bayo:

Enclosed for filing in the above referenced are the original and fifteen (15) copies of Tampa Electric Company's Reply Brief.

Also enclosed is a diskette containing the above document generated in Word and saved in Rich Text format for use with WordPerfect.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

Lee L. Willis

LLW/bjd
Enclosures

cc: All Parties of Record (w/encl.)

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: October 8, 2001

REPLY BRIEF
OF TAMPA ELECTRIC COMPANY

Tampa Electric Company ("Tampa Electric" or "the company") files this Reply Brief pursuant to Order No. PSC-01-1724-PHO-EI and says:

The Office of Public Counsel's ("OPC") arguments in its Brief are superficial, illogical and contrary to its previous positions in this docket. In fact, many of the statements in OPC's Brief are inappropriate and offensive. Moreover, OPC cites cases and presents arguments, which, if correctly applied to this case, clearly defeat OPC's protest. Furthermore, OPC's hyper-technical legal arguments attempt to lead the Commission down a path that conflicts with the plain language of the agreements[1] signed by OPC.

OPC does not challenge the prudence of the tax positions taken by the company or the application of generally accepted accounting principles that required the related interest expense be recorded in 1999. OPC's position depends entirely on distorted interpretations of the Stipulations and innuendo designed to distract the Commission's attention from the merits of this case.

[1] The First Stipulation was approved by Order No. PSC-96-0670-S-EI issued on May 20, 1996 ("Order 0670") and the Second Stipulation was approved by Order No. PSC-96-1300-S-EI on October 24, 1996 ("Order 1300").

OPC Distorts The Plain Language Of Paragraph 10

OPC is simply incapable of quoting, explaining or referring to what paragraph 10 of the First Stipulation means in any sort of logical way. Paragraph 10 states 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 maximize benefits to its customers. The parties agree that any interest expense that might be incurred as a result of a Polk Power Station relating to tax deficiency assessment will be considered a prudent expense for ratemaking purposes and will support this position in any proceeding before the FPSC.

Throughout this case and its brief, OPC has intentionally misstated and distorted the meaning of paragraph 10. For example, the OPC states "paragraph 10 is needed for Tampa Electric to recover any interest expense at all." (OPC Brief, page 5) This is absolutely incorrect.

In fact, paragraph 10 does not provide for the recovery of any expense. It merely states the company's plans to take certain tax positions and the agreement between the parties. Clearly, the first sentence sets out Tampa Electric's intentions and the second sentence sets out the agreement between the parties. Specifically, the second sentence of paragraph 10 states that the parties agree that certain tax deficiency interest expense is a prudent expense for ratemaking purposes and that OPC will support this position before this Commission. As repeatedly recognized by this Commission in prior orders in this docket, **paragraph 11 is the operative paragraph** that provides for the recovery of reasonable and prudent expenses. Simply stated, there is nothing in paragraph 10 that provides for the recovery of any expense because that was not the purpose of paragraph 10. The purpose of paragraph 10 was an attempt to prevent OPC from challenging the prudency of particular expenses, an attempt that obviously failed.

The parties have a serious disagreement over what interest expense OPC agreed to support as prudent before the Commission. Although the company is disappointed that OPC has

not complied with their contractual obligations, their failure is of no significance as to whether or not tax deficiency interest expense is a prudent or recoverable expense.

The first sentence of paragraph 10 states that the company plans to take a position regarding the tax life of its Polk Power Station. However, in an abundance of caution, the company wanted, and OPC agreed to, a Stipulation that any interest expense incurred as a result of a tax deficiency assessment related to the Polk Power Station would be considered a prudent expense by OPC. The language is clear. There is no need to resort to the rules of construction that OPC uses in an attempt to lead this Commission to an unintended and absurd result.

OPC seeks to limit the operation of the plain language of the second sentence of paragraph 10. However, the agreement in paragraph 10 is broader than just the tax life of Polk. The fact that different words were used in the two sentences of paragraph 10 makes it clear to any reasonable person that the parties intended to say something different in the two sentences. The first sentence demonstrates that the company intended to take positions regarding the tax life of the Polk Power Station that were to the benefit of ratepayers. However, the fact that the parties use different language in the second sentence is not because they were bored with using the term "the tax life of the Polk Power Station," but because the parties in fact obviously agreed to something different in the next sentence. They agreed that any interest expense as a result of a Polk Power Station related tax deficiency was covered by the agreement. The words in paragraph 10 are unambiguous and their plain meaning must be given effect. To reach OPC's interpretation of that paragraph would require the Stipulation be rewritten. This would be a clear violation of the rules of construction OPC cites in its Brief. These rules of construction are discussed more fully below.

The importance of a broad application of the second sentence of paragraph 10 is illustrated by the facts of this case. Clearly, under even OPC's distorted view of paragraph 10, a portion of the disputed interest expenses relates to the tax life of Polk. The issue as to whether research and experimental expenditures should be expensed or capitalized illustrates this. Although the company believes that this is a Polk tax life issue, *i.e.* expensed in the current year or capitalized over a longer period, it is unquestionable that once the item is capitalized, the Internal Revenue Service ("IRS") disputes the tax life for which it should be depreciated. The tax deficiency asserted by the IRS expresses not only the difference in capitalization versus expense, but once capitalized, the difference between the company's and the IRS' positions regarding the tax life of the Polk Power Station. Therefore, a portion of the expense is clearly, by any rational thought process, an issue related to the tax life of the Polk Power Station. However, this does not deter OPC from their unwillingness to comply with their contractual obligations. The contractual obligations that OPC has in paragraph 10 are self-executing. It is not incumbent upon the company to prove anything to OPC. OPC has known the interest was an expense related to the Polk Power Station, known that it was related to tax life and knew they had an affirmative obligation to comply with the Stipulation. Attempting to hide behind lack of proof is simply a tactic to avoid carrying out their obligations.

OPC misstates Mr. Larkin's prefiled testimony, which does not contain one word about the tax life of the Polk Power Station except when quoting from the entire paragraph 10. Mr. Larkin's original testimony states:

> It is clear that the parties intended only interest assessed on tax deficiencies related to the Polk Power Station would be included as reductions of operating income for refund purposes. (Tr. 210)

Mr. Larkin testified that the agreement included "interest related to the Polk Power Station" because that is what the plain language of paragraph 10 says. It is clear from this testimony that Mr. Larkin knew the Stipulation allowed for the inclusion of all tax deficiency interest expense related to the Polk Power Station. He just did not know there was any such interest at issue. This apparently was because he failed to review the documents from August 2000 identifying the Polk issues before filing his testimony. When he found that such interest expense did exist, he switched his argument to a tax life issue.

It is clear that this Commission's comments in Order 0670 approving and adopting the First Stipulation relating to the tax life of Polk quoted on page 4 of OPC's Brief are correct. That is . . . "[t]he Stipulation is basically self-explanatory, but the following items are being addressed for the sake of clarity." Order 0670 then referred to paragraph 10 of the Stipulation. Since the company had already provided information in August 2000 identifying the Polk Power Station issues, the Commission in Order 0670 merely acknowledged that it was going to make a determination of whether or not to include or exclude such expenses for determining the 1999 refund. The Commission made it clear in Order 0670 that for issues related to tax deficiency interest expense, reasonableness and prudence would determine whether to include these expenses in the regulatory calculations. The reasonable and prudent requirements in paragraph 11 are the very reason that a cost-benefit analysis was performed showing the appropriateness of the company's tax positions that led to interest on tax deficiencies.

OPC Distorts The Plain Language Of Paragraph 11, Its Previous Positions And This Commission's Prior Orders Interpreting Paragraph 11

OPC asserts that in the absence of paragraph 10, paragraph 11 would have precluded all interest expense as an impermissible adjustment. Such an assertion is nonsense. OPC's position is contrary to every interpretation this Commission has made of paragraph 11. As discussed

more fully below, it is also contrary to this Commission's long-standing practice of including interest in the regulatory formula as a recoverable expense. The Commission's common sense approach to paragraph 11 has been to include adjustments made in the last rate case and then to review the facts and circumstances underlying any additional investment or expense that has been raised as an issue. The Commission, from the outset of its reviews of earnings for 1996 and continuing in its review of 1997, 1998 and 1999 earnings, has consistently held that "the guiding principle of the Stipulations is whether the item of expense or investment at issue is reasonable and prudent." (See Order 0113, page 16)

OPC's Claim That Interest Expense Is Not Includable In The Regulatory Formula Is Misleading And Absurd

OPC states on page 2 of its Brief that interest expense is a "below-the-line" item inferring that it is either unrelated to the utility operations or that it is a disallowed expense. Prudently incurred interest expense has always been allowed in the regulatory formula. Interest expense is included within the cost of capital calculations that are integral to determining the actual return on equity of the company. The "calculations of the actual ROE" for 1999 undisputedly include all interest expense that is allowed under paragraph 11 of the Stipulation. The reason that interest on tax deficiencies is typically separated from interest in the capital structure is because it is not directly associated with the sources of capital that are included in the capital structure. Tampa Electric included the tax deficiency interest expense in its surveillance report as an adjustment to operating and maintenance ("O&M") expense in the exact same manner as other utilities in their filings. OPC's argument on this topic makes no sense, defies logic and is contrary to Commission precedent. Interest expense, does not "by definition" go below the line as asserted by OPC on page 8 of its Brief. Prudently incurred interest expense is **always** included in the calculation of the achieved ROE.

OPC Misstates And Misapplies Relevant
Principles Of Contract Interpretation

The legal arguments included in OPC's Brief on pages 6-8 are a misapplication of the doctrines of contract interpretation. The Stipulation provides in paragraph 10 that "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 . . ." The Stipulation made no statement at all regarding other items of interest expense. OPC contends that directions in the Stipulation pertaining to treatment of any one line item in a category of expense requires exclusion of all other items in that category of expense.[2] If you took all the specific items mentioned in the Stipulations[3] and excluded all other similar items under the rather shallow application of OPC's legal theories, there would not be enough specific items left to calculate the company's earnings. For example, under OPC's rationale, the agreement in paragraph 5B. of the Second Stipulation to include Polk Power Station in rate base would mean that all other power stations would be eliminated from the ratemaking formula. That result would be obviously absurd but that is exactly where the application of this so-called rule of construction would lead.

It is absolutely clear that the Stipulation did not provide a complete list of items to include or exclude from the formula. **The guiding principle of the Stipulation is in paragraph**

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[2] The initial, obvious problem in the application of OPC's position is determining what class of items are excluded. For example, interest expense includes interest on tax deficiencies. Application of the principle would exclude all interest expense. Further, interest is in a larger category of operating expenses. Does the mention of one operating expense intend the exclusion of all others?

[3] Polk Power Station operating expenses to be included in net operating income (paragraph 5C. of the Second Stipulation); Polk Power Station treatment in capital structure on pro rata basis, paragraph 5D. of Second Stipulation; Port Manatee site excluded from rate base (paragraph 5E. of Second Stipulation); separation procedure for capital and O&M used in the last rate case shall continue to be used (paragraph 5F. of Second Stipulation); "using the appropriate adjustments approved in Tampa Electric's last full revenue requirements proceeding" (paragraph 10 of First Stipulation, paragraph 7 of Second Stipulation).

11 which provides that all reasonable and prudent expenses and investment shall be included in the calculations of earnings. Specific directions were provided for just a few of the thousands of individual items that are included in the regulatory formula. Again OPC's attempted application of so-called rules of construction is absurd.

Before the Commission can turn to so-called principles of construction, the agreement at issue must contain unclear or ambiguous language. Green v. Life & Health of America, 704 S.2d 1386, 1391 (Fla. 1998); Acceleration Nat'l Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So.2d 738 (Fla. 3d DCA 1989). An agreement must be construed according to its clear and unambiguous terms. Volusia County v. Aberdeen, 760 S.2d 126 (Fla. 2000); Avis v. Monroe County, 660 S.2d 413 (Fla. 3d DCA 1995); See generally 11 Fla. Jur.2d Contracts § 155 (2000). In the absence of ambiguity it is assumed that the intent of the parties is positively expressed, and the language of the agreement controls. Bruce v. Barcom, 675 S.2d 219, 222 (Fla. 2nd DCA 1996); J.C. Penny Co. v. Koff, 345 S.2d 732 (Fla. 4th DCA 1977). Contrarily, an agreement is only open to construction if there is impure, imperfect or ambiguous language. See generally Hertz Corp. v. David Klein Mfg., 636 S.2d 189 (Fla. 3d DCA 1994); 11 Fla. Jur.2d Contracts § 153 (2000). Before turning to construction, the ambiguities must arise from words within the agreement. Cleanco v. Manor Inv. Co., 568 S.2d 1309 (Fla. 4th DCA 1990).

There is no ambiguity or inconsistency here as was clearly pointed out in Order 0113 at page 18. The Commission has harmonized the provisions of paragraphs 7, 10 and 11 in a fair and reasonable manner. Further, the Commission has consistently applied these paragraphs in review of Tampa Electric's earnings in 1996, 1997, 1998 and 1999. This course of conduct is

much stronger evidence of the meaning of these agreements than the mechanical application of conflicting principles of construction cited by OPC.

It is not appropriate here for the Commission to now utilize so-called "principles of construction" when such devices are only used as a last resort to determine the meaning of ambiguous words in an agreement. The contested portion of the agreement is unambiguous. In fact, Mr. Larkin stipulated to this in his testimony. However, he did claim that he was in a better position than this Commission to read the four unambiguous sentences in the agreement. Witness Larkin's statement that the Stipulations are not ambiguous (Tr. 252-253) is evidence that OPC's intent was expressed in the plain words of the agreement. There is no ambiguity in the terms of the contract that warrants a retreat to reliance on "principles of construction."

The Rules Of Construction If Applied Correctly Defeat OPC's Protest

Assuming for purposes of argument that the Commission finds that the contract is ambiguous - it should not be persuaded that the rules of construction cited by OPC lead to the conclusion urged by OPC. Quite the opposite result is obtained. OPC contends that four concepts of contract construction should be applied to the contested paragraphs. First, they argue that the principle of expressio unius est exclusio alterius implies the exclusion of any interest expense not related to Polk's tax life in the calculation. (OPC's Brief, page 6.) Second, they argue that specific provisions in an agreement control over the more general. Id. Third, they argue that all provisions in an agreement must be given affect. Id. Finally, they argue that neither the Commission, nor any other party, can rewrite the agreement as a means of interpretation. Id.

The Agreement Must Be Interpreted As A Whole

The overarching principle of construction must be to interpret the agreement as a whole, reading each provision "harmoniously in order to give effect to all portions thereof."[4]

The principle of expressio unius est exclusio alterius should not take precedence over the principle requiring the interpretation of the agreement as a whole.[5] In its Brief, OPC cites Ideal Farms Drainage Dist. v. Certain Lands, 19 S.2d 234 (Fla. 1944) (holding that specific terms imply the exclusion of others). Ideal was overruled by Mason v. Avdoyan, 299 S.2d 603, 605 (Fla. 2d DCA 1974), which held that courts should try to harmonize inconsistent statutory provisions. This is exactly what this Commission did on page 18 of Order 0113. In the absence of "positive inconsistency or repugnancy," each provision of a statute shall be given its own effect. Id. Finally, although it pertains to constitutions, Taylor v. Dorsey, 19 S.2d 876 (Fla. 1944), is also persuasive. Taylor holds that the expressio unius should be used sparingly and applied with caution. See also Bush v. Holmes, 767 S.2d 668, 674 (Fla. 1st DCA 2000).

Furthermore, OPC's contention that all provisions in an agreement must be given effect, conflicts with their argument that specific provisions in an agreement control over the more general. While specific provisions may control over general provisions in some instances,[6] the Commission must construe the contract as a whole. Florida Polk County v. Prison Health Services, 170 F.3d 1081 (11th Cir. 1999) (holding that provisions of a contract should be

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[4] See City of Homestead v. Johnson, 760 S.2d 80, 84 (Fla. 2000), cited by OPC on page 9 of its Brief.

[5] For an exception to "ejusdem generis" rule, see Florida Police v. Dept. of Agriculture, 574 S.2d 120 (Fla. 1991) (holding that where a statute's list of members in a group is exhaustive, the general terminology following that list shall not be limited solely to members of the same class.)

[6] OPC does not support their argument that specific provisions control over general provisions with case law.

construed as a whole so as to give every provision meaning). See generally 11 Fla. Jur.2d Contracts § 165.

The Application Of So-Called Rules Of Construction
May Not Be Allowed To Lead To Absurd Results

If an interpretation of conflicting terms leads to an absurd conclusion, a more reasonable conclusion must be found. In re: Finevest Foods, Inc., 159 B.R. 972 (Bkrtcy.M.D. Fla. 1993).

OPC Seeks To Rewrite The Agreement Through A Tortured
Technical And Selected Application Of The Rules Of Construction

Finally, OPC asserts that an agreement cannot be rewritten as a means of interpretation, yet that is exactly what OPC proceeds to do in its arguments.[7] OPC necessarily depends on revisions to the language in paragraph 10 and 11 because the plain language of the agreement is clear.[8] When the meaning of an agreement is clear, the agreement cannot be modified by interpretation. See supra Acceleration, 541 So.2d 738. The meaning of the agreement is clear and the agreement should not be altered.

Contrary to OPC's assertion, the company has not asked the Commission to rewrite the agreements. The company has merely asked the Commission to read the plain language of the contracts and apply them the way they are written. There is, in fact, no ambiguity in the

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[7] OPC's Hypothetical Example

In attempted support of its alteration of the language of the Stipulation, OPC presents a rather fatuous hypothetical (see footnote 7, page 10 of OPC's Brief). In any event if, in fact, a contractor agreed to be responsible for all repairs to the house as a condition of providing a roof and entered into a contract with a provision that clearly said so, the contractor would in fact be required to replace the washing machine in OPC's hypothetical.

[8] For OPC's position on paragraph 10 to prevail the second sentence of that paragraph must be rewritten to read:

> The parties agree that only ~~any~~ interest expense that might be incurred as the result of a Polk Power Station tax life ~~related~~ tax deficiency assessment will be considered a prudent expense.

contracts. Plainly and clearly, under paragraph 10, OPC is prohibited from challenging the prudence of tax interest expense related to the Polk Power Station. In paragraph 11, all reasonable and prudent expenses are to be included in the calculation of the return on equity.

Over the period of the Stipulation from 1996, 1997, 1998 and 1999, the adjustments made in the company's last case have been included in the calculation, as well as numerous adjustments that were not part of the last case or specifically mentioned in the Stipulation. The course of conduct of the parties and this Commission's contemporaneous orders construing the Stipulation for earnings in 1996, 1997, 1998 and 1999 shows the proper interpretation of the agreement.

The Cost-Benefit Studies Are A Relevant Tool Of Analysis For Review Of Prudency

On page 13 of their Brief, OPC asserts that the cost-benefit analysis studies are irrelevant since only interest expense related to the tax life of Polk was allowable. This is an obvious misstatement of the Stipulation. The Stipulation does not use the word "allowable." This is another manufactured term and a tortuous interpretation of paragraph 10. The parties simply stipulated in paragraph 10 that OPC would not object to the prudence of certain expenses. The Commission's orders approving the Stipulations state that the Commission is not bound by the parties' Stipulation of prudence. Therefore, a cost-benefit analysis was very much relevant and very much called for under the Stipulation.

Likewise, OPC seeks to rewrite the first sentence of paragraph 11 to state that only adjustments made in the last case can be made in calculating Tampa Electric's actual ROE.

The Cost-Benefit Studies Are Proper And Prove
Significant Net Benefits Under A Variety Of Assumptions

Contrary to OPC's assertion, the studies presented by witness Bacon are appropriately calculated cost-benefit analyses (see Exs. 1, 6, 7 and 8). These studies are relevant to the issue of whether the tax positions taken by the company were reasonable. This can be measured by looking at the benefits and costs that occurred as a result of making those tax decisions. As a result of the tax positions taken by the company, there were additional deferred taxes created and included at a zero cost in the company's capital structure. Customers benefited by this action. In 1999, as a result of these very same tax positions that provided customer benefits, an interest expense was incurred. The OPC's assertions that the company is now using the studies in an attempt to recover amounts because rates were lower in the past is just a complete misstatement of the record and the issues. It is hard to tell whether OPC doesn't understand the cost-benefit analysis or just intentionally misstates what the analysis does. The cost-benefit analysis examines costs and benefits over a period of time ending in 1999 that resulted from taking certain tax positions. It is simply an analysis to see if the expenses incurred outweighed the benefits that customers received. The company seeks to recover a 1999 expense incurred in 1999. This expense, however, was the result of prior tax decisions.

Footnote 10 on page 14 of OPC's Brief incorrectly suggests that the cost and the benefits analyzed were not related to the same issues or actions. OPC states that the cost-benefit study sponsored by Tampa Electric ". . . is akin to comparing the cost of a new truck against the savings made possible by the old one." This is not at all analogous to the method used in the cost-benefit studies to consider the costs and benefits of the company's tax positions. The cost-benefit analysis compares the costs and benefits associated with the exact same tax positions. This is exactly what OPC believes is appropriate, i.e., it looks "back at historic costs and benefits

to see how things worked out in the past." The Commission analyzed the result of Tampa Electric's tax positions over a period from 1986 through 1999 to determine if customers received a net cost or benefit from those positions with the IRS over that period of time. The undeniable result is that customers have benefited (see Exs. 1, 6, 7 and 8).

The Use Of A Cost-Benefit Analysis As An Analytical Tool In A Review Under A Stipulation Does Not Result In Prohibited Retroactive Ratemaking

OPC argues that the company is asking for higher rates in the future in the form of a reduced refund obligation to make up for lower rates in the past (see OPC's Brief, page 16). That assertion is totally incorrect. This Commission is applying and following the terms of the Stipulation where the parties agreed that following the end of an accounting period, the Commission **by prior agreement** would retroactively calculate the achieved return on equity of the company using the basic principle of determining the reasonable and prudent expenses to be included in the actual NOI.

Tampa Electric's permanent rates were not inadequate in the past as OPC asserts and there is no attempt directly or indirectly to change any permanent rates for any period of time by using a cost-benefit study. The only activity involved is the implementation of an agreement. Without this agreement the Commission could not engage in the retroactive process of determining the appropriate level of earnings in 1999 and then order a refund. The cost-benefit analysis simply identifies the benefits within those rates that customers have enjoyed due to the company's tax positions with the IRS. If, as OPC asserts, the point of the cost-benefit analysis was to extract some additional money from ratepayers, then not only should the tax deficiency interest expense be included in 1999, but another $6.8 million to $12.4 million of benefits identified in the study would now, under OPC's theory, be provided to the company. That is not

what the company requests and that was not the point of the analysis. The point is that the benefits provided to ratepayers due to the company's tax position outweighed the cost. Consequently, the company actions were prudent.

Again, the absurdity of OPC's argument is apparent. How can a current period cost ever be considered prudent without considering whether it either has provided a benefit or will provide a benefit? Applying the principle against retroactive ratemaking in the manner proposed by OPC would frustrate the Commission's ability to determine prudence based on benefits that accrued before an expense is incurred in the period under review. This would foreclose the opportunity to recover prudently incurred costs that have benefited customers and lead to short sighted results. Such is not the policy of this Commission in the consideration of interest on tax deficiencies. The facts, which led to the incurrence of a cost, have to be considered to determine prudence. Almost 100% of the time, events relating to interest on tax deficiencies span over other years. As explained by witness Sharp, that is the plain nature of how deferred taxes are recorded and how the audit process of the IRS develops. This process takes years to complete. The filing of a tax return alone involves assertions of taxable income for a prior period (see Tr. 173-174).

The Commission in Order 0113 correctly rejected OPC's assertions with respect to retroactive ratemaking. Florida Cities Water Company ("FCWC"), Order No. PSC-98-1583-FOF-WS cited by OPC is totally inapplicable because it involved a limited scope proceeding requesting a rate increase. This proceeding is not a rate proceeding. It involves the calculation of earnings for a prior period in accordance with guidelines specified in agreements signed by OPC and approved by the Commission. The filed rates of the company remain unchanged. The issue of whether or not customers receive a refund is based in part on the calculation of an earned

rate of return in accordance with the directions in the agreements. These directions require the consideration of prudently incurred expenses during the period under review. The Commission specifically found that interest on tax deficiency expense was reasonably and prudently incurred in 1999 and consequently was appropriately considered in the calculation.

OPC's argument with respect to retroactive ratemaking is answered in its observation ". . . the parties to the stipulations could have, if they had so chosen, agreed that Tampa Electric could include interest expense on all tax deficiencies in calculating its 1999 earnings." In other words, OPC concedes that the doctrine against retroactive ratemaking is not applicable to a stipulation specifying how earnings are to be calculated in a prior period for purposes of determining whether a refund is due. So once again we come back to a matter of interpretation of the provisions of the agreement. The Commission found that interest on tax deficiencies was a reasonable and prudent expense, which under the terms of the Stipulation is required to be considered in the calculation of 1999 earnings.

All of OPC's discussion about the nature of interest on tax deficiencies and retroactive ratemaking is totally irrelevant and inapplicable. The matter simply comes down to what the agreement provides. OPC's description of the characteristics of interest on tax deficiencies applies equally to interest that might be incurred as a result of a Polk Power Station related tax deficiency. OPC, in paragraph 10 of the First Stipulation, specifically agreed that interest on tax deficiencies related to Polk "will be considered a prudent expense for ratemaking purposes" and further agreed it ". . . will support this position in any proceeding before the FPSC." How then could interest on tax deficiencies related to other assets result in retroactive ratemaking if: (1) the agreement provides for the consideration of reasonable and prudent expenses; and (2) the

Commission finds that interest on tax deficiencies was reasonably and prudently incurred? The answer is obvious.

OPC's arguments with respect to retroactive ratemaking are meant to confuse and entangle the Commission in another web of misapplied and inapplicable principles of law. The issue is whether tax deficiency interest expense is prudent. The cost-benefit analyses clearly shows that the company's actions with respect to its tax position were prudent. The Commission in Order 0113 appropriately found that the company's actions with respect to its positions on income tax issues were prudent and beneficial to ratepayers despite incurring the interest on tax deficiency expense in the year under review.

Timing Of Identification Of Polk Related Interest

Tampa Electric has not been reluctant to identify specific amounts of interest expense relating to the Polk Power Station as OPC asserts on page 18 of its Brief. In fact, the company did so through answers to discovery as far back as August 2000. OPC never attempted to resolve the question of whether the Polk-related expenses were tax life related before filing its protest. Once the protest was filed, the company had an obligation to defend and support the full amount of tax deficiency interest.

OPC failed to seek any information in the discovery process related to the Polk Power Station tax deficiencies. As a final attempt to ensure complete understanding, Tampa Electric provided OPC a plethora of details quantifying the Polk related interest. It was ignored, never disclosed to the FPSC, never questioned and never discussed with the company. The company, at witness Bacon's deposition, made it clear to OPC that its deposition questions involved accounting entries related to Polk Power Station tax deficiencies.

Tax Periods After 1990

OPC is completely mistaken on page 22 of its Brief that the tax years after 1990 are irrelevant for the cost-benefit analysis. It makes absolutely no difference when the IRS audited the taxes. As witness Bacon testified, what matters is what tax positions were included in the rate case test years and in the deferred revenue periods that were at issue with the IRS.

In the cost-benefit analysis, Tampa Electric very carefully identified which contested tax positions were included in the rate case test years. This is why, even though $9.6 million of deferred taxes from the 1992-1994 tax period were related to the tax deficiencies recorded in 1999, only $1.4 million of the $9.6 million of deferred taxes were included in the 1993 test year and $3.1 million was included in the analysis for the 1994 test year. It is easy to identify within the cost-benefit analysis that smaller deferred tax adjustments were applied to the 1992-1994 tax period for the rate case test years. The tax audit periods are irrelevant and OPC fails to understand that the tax positions were not only identified, but also properly taken into account.

The Treatment Of Interest On Deferred Revenues Has Been Decided By This Commission In This Case Contrary To OPC's Position

OPC asserts that interest on deferred revenues belongs to customers (OPC Brief, page 25). This issue was decided in Order No. PSC-99-0683-FOF-EI ("Order 0683") issued April 17, 1999 in this docket. This is the well-established law of this case. In addition, if the parties intended to authorize Tampa Electric to absorb the cost of interest on deferred revenues, the stipulation would have said so. Without any doubt, if Tampa Electric were to be disallowed the accrued interest expense on deferred revenue, it would have been clearly identified within the stipulation.

Error In OPC's Calculation Of Net Benefits/Detriment

OPC asserts on page 20 of its Brief that removing the expenses and associated deferred taxes related to the Polk tax issues from the cost-benefit analysis could cause the analysis to turn negative. This simply is not the case. This amounts to an attempt to assign different values for interest assessed for different issues. The interest assessed by the IRS doesn't change by issue. The deferred taxes are included in the analysis at a zero cost for each contested issue. There is no differential treatment by issue in the analysis that could support OPC's baseless statement.

Secondly, the numbers presented by OPC on page 24 of its Brief and its method of calculation was laid bare by witness Bacon as incomplete, inaccurate and misleading. Yet, OPC, without any foundation or evidence of any kind, attempts to manufacture numbers showing a net detriment.

As clearly and repeatedly explained at the hearing and during the discovery process, the cost-benefit studies show that if the company took less aggressive tax positions on specifically identified issues and thereby deferred less taxes, there would have been less zero-cost deferred taxes included in the company's capital structure in the rate case test years and the permanent rates set by the Commission at that time would have been higher. The analysis then considers that the additional revenues created from these hypothetically higher rates would have been in effect throughout the deferred revenue period and would have obviously created additional deferred revenues during the years under review by the Commission in the Stipulation. That is to say, the assumption of hypothetically higher rates has two effects. It creates higher base rates for customers to pay but those higher rates would have created an offset in the cost-benefit analysis in the form of additional deferred revenues that flow through the return on equity calculations to provide additional refunds. If the rate case benefits are removed, then the

associated higher revenues from 1994 through 1999 assumed in the study to be caused by these higher rates must also be removed in the analysis. The resulting analysis would then include only the original rates set in the last rate case, which would be in effect throughout the study period. That is exactly what was presented in the cost-benefit study that removed all rate case benefits and still showed a net benefit to customers of $6.8 million (see Ex. 8). The company also showed that if only the rate case benefits relating to the 1994 test period are removed, there remains $8.5 million in net benefits accruing as a result of the company's tax positions.

Again, it is important to recognize that this hypothetical study did not, in fact, change in any way the permanent rates charged by the company. Excluding the rate case benefits only changed the hypothetical study. The impact of removing the rate case benefits from the study is really not a difficult concept to understand. OPC's argument attempts to make an unfair, one-sided and unbalanced adjustment and is driven by a desire to obtain a negative result. Such a result cannot be obtained from the evidence presented in this proceeding.

Deferred Revenue Benefits Are Undeniable

The Commission should completely disregard OPC's inaccurate calculations and interpretations on pages 12 and 13 of their Brief of how much benefit customers have received under the Stipulations. The $11,226,598 quoted by OPC that remained at the end of 1998 was not made up of $734,332 of deferred revenues and $10,492,266 of interest. The interest was not and should not be distinguished from the total amount of deferred revenue. OPC cannot reference any language in the Stipulations or Commission orders that contemplate the deferred revenue balance in that manner. Just because the final balance of accrued interest is identified in Attachment E of Order PSC-99-2007 does not mean that it was excluded from the revenue reversals. During the deferred revenue period, interest was continually added to the total "pot"

of dollars in the deferred revenue account each month, and interest would then be recalculated on the new balance.

OPC also wants to cast off the $25 million temporary base rate reduction from its calculations of customer benefits as if this amount was meaningless. On page 12 of its Brief, OPC identifies that $50,517,063 was deferred from 1995 and $37,081,064 was deferred from 1996. What OPC fails to mention on page 12 is that $25,737,978 of those deferred revenues was flowed back to customers through the temporary base rate reduction. OPC's minimized ratepayer benefit calculation of $734,332 should at least add the $25,737,978 to its balance. In actuality, it cannot be overemphasized that customers have received over $120 million in lower rates due to the deferred revenue stipulations, including up-front refunds, the oil-backout clause savings and the $6.1 million refund for 1999.

OPC is correct on page 23 of its Brief that the deferred revenue balances were accurate and neither too high or too low. The $25 million temporary base rate reduction to customers that was removed from those deferred revenue balances was also accurate. The resulting $11.2 million refund from those deferred revenues, later agreed to be $13 million, was accurate. The $6.1 million refund from 1999 is also accurate.

The deferred revenue balances, which OPC agrees were accurately stated, include the benefits of Tampa Electric's tax positions, which eventually led to the interest on tax deficiencies in 1999. If Tampa Electric had not taken these tax positions, the refunds provided to customers under the Stipulation would have been much less. OPC insinuates on page 26 of its Brief that customers could not have received the benefits resulting from the cost-benefit analysis since they actually received so little during the deferred revenue period. However, the $13 million of refunds from 1998 together with another $6.1 million from 1999 more than covers the deferred

revenue benefits of $14.3 million identified in the company's cost-benefit analysis. This does not even take into account the $25 million temporary base rate reduction that came from these same deferred revenue balances.

Staff's Role In Review Of The Cost-Benefit Study

OPC's unwarranted personal attacks on the integrity of Tampa Electric and the Staff are designed to confuse the Commission and draw attention away from the fact that OPC has nothing logical to say about the merits of the case.

OPC's statements with respect to what any Staff member or Tampa Electric employee "knew" are manufactured, false, and offensive both in their tone and in their implication. The Staff, in its due diligence, made numerous requests in public meetings for adjustments designed to test the company's analysis. Refinements to the study were presented for review. OPC likewise requested information on refinements to the study (see Ex. 8, answer to OPC Interrogatory 14). These refinements illustrate that if all rate case benefits are removed, the cost-benefit analysis still shows that it was a prudent expense because $6.8 million in benefits accrued to ratepayers (see Ex. 8).

The truth is that OPC's conduct in this case has been outrageous. OPC refuses to comply with the provisions of paragraph 10. OPC has taken previous inconsistent positions on issues now raised in this case. OPC has used adjustments not made in the last rate case in their own calculations of the revenue requirements for this year, such as the equity ratio, and simultaneously contended the interest on tax deficiency adjustment cannot be made because it was not made in the last rate case. OPC accepted one interpretation when they benefited from that interpretation and reverses its position when it produces a result OPC does not like. OPC attempt to justify its behavior as that of one acting as an advocate. Justice and fair play cannot

tolerate such inconsistent behavior. These inconsistencies undermine all of the positions taken by OPC in this case. OPC has taken blatantly inconsistent positions in this proceeding.

Staff Conduct

OPC incorrectly asserts that the third analysis showing benefits of $10.7 million was the result of "further discussions between the company and staff." This statement is false. The third Staff analysis, which reduced the net benefits from $11.1 million to $10.7 million, was submitted when the company discovered an error in its own review shortly after the second study was submitted. The error was minor and obvious. The revenue expansion factor on page 7 of the study (see Ex. 6) incorrectly included an expansion factor of zero. This produced a mathematical and mechanical error in the result of $.4 million. Yet OPC goes on to imply that the company and Staff secretly agreed to present the cost-benefit analysis even though there was a problem with the rate case benefits causing the cost-benefit analysis to be wrong. These assertions are patently offensive and totally unsupported by the record in this case.

Furthermore, as demonstrated in Tampa Electric's initial brief, there is no legal basis for OPC's position regarding ex parte communications because the sections of Florida Statutes cited by OPC do not apply prior to a protest being filed. There is simply no legal basis for OPC's position. The only conclusion that can be drawn is that OPC is merely seeking an excuse to impugn the integrity of various employees of the Commission and of Tampa Electric.

Conclusion

After treading down the path of OPC's tortured logic it is absolutely clear that this Commission's original decision in Order 0113 was totally correct in every respect. OPC has only accomplished confusion and delay by advancing this protest.

Order 0113 provides a fair and even-handed interpretation of paragraph 7, 10 and 11 of the Stipulation by concluding "the fact that no adjustment was made in the last full revenue requirements proceeding does not preclude an adjustment in any year covered by the Stipulation. The only question is one of prudence." (See Order 0113, page 18) The company's tax decisions reduced revenue requirements and were clearly prudent as shown by the convincing evidence presented in this proceeding. The cost-benefit analysis was prepared consistently with those used by the Commission in other proceedings and showed benefits to ratepayers as a result of the company's tax positions that led to the incurrence of interest on tax deficiencies. Benefits to ratepayers have accrued because of the deferral of taxes that are due to the IRS. Deferring the taxes avoided a higher cost of capital that would have existed if the tax had been paid sooner. The central issues here are the proper interpretation of the Stipulation and the prudence of the company's decision. The Commission correctly concluded in Order 0113:

> As discussed in this order, we believe this interest is a prudent expense. **Consistency, fairness, and the most reasonable interpretation of the stipulations** leads us to find that it is appropriate to include the interest expense associated with the tax deficiencies in the calculation of Tampa Electric's 1999 actual ROE. (Order No. 0113, at pages 18-19) (Emphasis supplied)

OPC has presented no evidence challenging the company's recording of interest on tax deficiencies in 1999. The cost-benefit studies, together with other evidence presented in this proceeding, clearly and convincingly show that the incurring interest on tax deficiency expense in 1999 stemmed from prudent tax decisions made by the company.

DATED this 8th day of October, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief, filed on behalf of Tampa Electric Company, has been furnished by hand delivery (*) on this 8th day of October 2001 to the following:

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