State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER ● 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

RECEIVED-FPSC
01 NOV 19 AM 11:49
COMMISSION CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: 11/19/01

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (MERCHANT, WILLIS, BRINKLEY)
DIVISION OF LEGAL SERVICES (VINING, ELIAS)

RE: DOCKET NO. 950379-EI - DETERMINATION OF REGULATED EARNINGS OF TAMPA ELECTRIC COMPANY PURSUANT TO STIPULATIONS FOR CALENDAR YEARS 1995 THROUGH 1999.

AGENDA: 12/4/01 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\950379EI.RCM

CASE BACKGROUND

Tampa Electric Company (TECO), the Office of Public Counsel (OPC), and the Florida Industrial Users Group (FIPUG) are signatories to a series of stipulations governing the calculation of TECO's regulated earnings and providing for certain refunds for the years 1995-1999. FIPUG subsequently withdrew its intervention in this docket. By Order No. PSC-01-113-PAA-EI, issued January 17, 2001, in this docket, the Commission determined TECO's 1999 earnings. On February 7, 2001, OPC timely filed a protest of Order No. PSC-01-113-PAA-EI. The administrative hearing for this matter was held on August 27, 2001, to consider OPC's protest. Having considered the evidence and the arguments of the parties, staff submits its post-hearing recommendation. The Commission has jurisdiction over this subject matter pursuant to Sections 366.04, 366.05 and 366.06, Florida Statutes.

DOCUMENT NUMBER-DATE
14676 NOV 19 01
FPSC-COMMISSION CLERK

TABLE OF CONTENTS

ISSUE/ NO.	DESCRIPTION	PAGE NO.
-	Case Background	1
1	Compliance with Settlement Provisions (Vining)	3
2	Settlement Preclusion of Other Than Polk Power Station Interest on Tax Deficiencies (Vining)	6
3	Appropriate Expense Treatment in 1999 for Interest on Tax Deficiencies (Merchant)	15
4	Amount of Interest Expense Related to Polk Power Station (Merchant)	19
5	Inclusion of Rate Case Benefits in Cost/Benefit Analysis (Merchant)	22
6	Inclusion of Deferred Revenue Benefits in Cost/Benefit Analysis (Merchant)	28
7	Subsumed by Issue 9	
8	Inclusion of Interest Accrued on Deferred Revenues in Cost/Benefit Analysis (Merchant)	34
9	Cost/Benefit Analysis and Prudence of Interest On Tax Deficiencies (Merchant)	36
10	Violation of Proscription Against Retroactive Ratemaking (Vining)	43
11	Equitable Estoppel (Vining)	48
12	Ex Parte Communication (Vining)	50
13	Net Operating Income for 1999 (Brinkley)	53
14	Amount to be Refunded (Brinkley)	54
15	Close the Docket (Brinkley)	55

Attachment No.		
A	Review of 1999 Earnings (Brinkley)	56
B	Staff Adjusted Surveillance Report (Brinkley)	57
C	Interest Reconciliation (Brinkley)	58
D	Refund Calculation (Brinkley)	59

DISCUSSION OF ISSUES

ISSUE 1: Does the inclusion of interest expense on tax deficiencies in the calculation of TECO's regulated earnings comply with the provisions of the settlement?

RECOMMENDATION: Yes. The inclusion of interest expense on tax deficiencies in the calculation of TECO's regulated earnings does comply with the provisions of the settlement. More specifically, paragraphs 10 and 11 of the settlement do not preclude the Commission from determining the prudence and reasonableness of interest expense on tax deficiencies in calculating TECO's regulated earnings. (Vining)

POSITION OF THE PARTIES

TECO: Most definitely yes. All prudently incurred expenses are properly allowed and included in the calculation of TECO's 1999 earnings under the terms of the Stipulation. Tax deficiency interest expense was a prudently incurred expense in 1999 associated with tax positions that have benefitted customers.

OPC: No. None of the claimed expense relates to the tax life of Polk, which is the only category allowable pursuant to Paragraph 10. If Paragraph 10 wasn't there, Paragraph 11 would preclude all such interest expense because it was not an adjustment made in the last rate case.

STAFF ANALYSIS:

TECO

TECO argues that the Commission gave appropriate meaning to each of the relevant provisions of the Stipulation and placed each of those provisions in harmony to give the parties the rights and benefits bargained for in the Stipulation. TECO asserts that the Commission correctly concluded in Order No. 0113, at page 6, that, "...the guiding principle of the Stipulations is whether the expense or investment at issue is reasonable and prudent." (TECO BR p. 6); (TECO RB p. 5-6)

The utility maintains that paragraph 11 of the Stipulation provides that all reasonable and prudent expenses and investment will be allowed in the computation of the actual ROE. Also, TECO

argues that there are no other provisions in the Stipulation that limit the language of paragraph 11. Paragraph 11 states that adjustments consistent with the last rate case must be made; but, it does not say such adjustments are the only adjustments that can be made. Similarly, paragraph 10 does not say that the only tax interest expense allowed in the calculation must be related to Polk Power Station. (TECO BR p. 7)

The utility asserts that 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 include all interest expense allowed under paragraph 11 of the settlement. TECO underscores that interest expense "by definition" does not go below the line as asserted by OPC. Prudently incurred interest expense is always included in the calculation of the achieved ROE. (TECO RB p. 6)

TECO argues that the Commission did not rewrite the agreement; instead, it interpreted the agreement in a manner which gave each party the rights and benefits for which it bargained. (TECO BR p. 7)

OPC

OPC argues that paragraph 11 of the settlement does not allow interest expense on tax deficiencies because interest expense is a below-the-line item which does not typically affect NOI, as an adjustment or otherwise. Even if the interest expense can be construed as an adjustment, OPC argues that this type of adjustment was not allowed in TECO's last rate case, so it is not allowed under the settlement. (OPC BR p. 2 and 8)

OPC asserts that paragraph 10 of the settlement does allow for interest expense related to the tax life of the Polk Power Station. However, OPC maintains that none of the expense claimed by TECO arises out of a dispute between TECO and the IRS over the tax life of the Polk Power Station. (OPC BR p. 2-3)

Analysis

Initially, staff notes that OPC's protest rendered Order No. PSC-01-0113-PAA-EI a nullity. Thus, the order is of no

precedential value. Staff agrees with TECO that the inclusion of interest expense on tax deficiencies in the calculation of TECO's regulated earnings complies with the provisions of the settlement. As stated by TECO, the guiding principle for the settlement is whether the expense is reasonable and prudent.

Staff notes that paragraph 11 of the settlement allows "all reasonable and prudent expenses" in the calculation of TECO's regulated earnings. Accordingly, staff argues that the Commission can include any interest expense that it deems reasonable and prudent, and still be in compliance with the provisions of the settlement.

Additionally, staff agrees with TECO's interpretation of paragraph 10 of the settlement. Paragraph 10 is there to specifically delineate what interest expense related to the tax life of Polk Power Station will be considered prudent for ratemaking purposes; however, that does not mean that all other interest expenses will be considered imprudent. Rather, paragraph 10 serves to settle the issue of the inclusion of interest expense related to the tax life of the Polk Power Station, not the larger issue of the inclusion of interest expense altogether.

In summary, staff recommends that the inclusion of interest expense on tax deficiencies in the calculation of TECO's regulated earnings does comply with the provisions of the settlement. Paragraphs 10 and 11 of the settlement do not preclude the Commission from determining the prudence and reasonableness of the inclusion of interest expense for tax deficiencies in TECO's regulated earnings.

ISSUE 2: Does the settlement preclude interest on tax deficiencies for any items other than those related to the Polk Power Station?

RECOMMENDATION: No. The settlement does not preclude any reasonably and prudently incurred interest on tax deficiencies. The plain meaning and purpose of the settlement allows any interest on tax deficiencies that the Commission deems to be prudent and reasonable. The settlement does preclude OPC from challenging the prudence of interest on tax deficiencies related to the tax life of the Polk Power Station. Because the language of the settlement is unambiguous, additional standards of contract interpretation need not be applied in this proceeding. (Vining)

POSITION OF THE PARTIES

TECO: No. The Stipulation forecloses any OPC challenge to the prudence of any interest on tax deficiency cost related to the Polk Power Station. It was never meant to, has not been interpreted to and should not be interpreted to limit possible prudent categories to those specifically enumerated in the Stipulation.

OPC: Yes. Paragraph 10 would not exist if the parties thought interest expense was recoverable under other provisions of the stipulations. And Paragraph 10 cannot be expanded beyond Polk's tax life by the doctrine of expressio unius est exclusio alterius, as well as other standards of contract interpretation.

STAFF ANALYSIS:

TECO

TECO argues that it is obvious that the guidelines in the settlement for a specific expense or investment are simply instructions with respect to those items, and were never intended to be a complete list of all the elements to be used in the ratemaking formula. The specific direction that Polk Power Station be included in the rate base did not mean that Big Bend, Gannon and Hookers Point Stations were to be excluded. TECO emphasizes that it is clear from reading the entire settlement that in every instance where a specific instruction for a precisely described investment or expense is not included, that item is to be reviewed by the Commission as to its prudence and reasonableness. Any other interpretation would lead to an absurd result. See In re: Finevest Foods, Inc., 159 B.R. 972 (Bkrtcy. M.D. Fla. 1993)(if an

interpretation of conflicting terms leads to an absurd conclusion, a more reasonable conclusion must be found). (TECO BR p. 8-9); (TECO RB p. 7); (TECO RB p. 11)

TECO maintains that the intent of paragraph 10 was not to limit the inclusion of tax deficiency interest expense. In support of that position, TECO notes that Witness Larkin agreed at the hearing that the purpose of paragraph 10 was to require OPC's support of tax deficiency interest expense related to Polk Power Station tax life. The purpose of paragraph 10 does not extend any farther than that. (TR 242-243); (TECO BR p. 9)

TECO asserts that the rule of *ejusdem generis*[1] cited by OPC cannot override the plain language of the settlement, so it is inapplicable in this situation. TECO states that OPC contends that the inclusion of a specific provision in an agreement requires the exclusion of all others. In response, TECO avers that this rule is applicable only to ambiguous provisions, and does not apply where the intent of the parties can be gleaned from the plain language of the agreement. (TECO BR p. 9)

Also, TECO maintains that paragraph 11 is the operative paragraph that provides for recovery of reasonable and prudent expenses. Nothing in paragraph 10 provides for the recovery of any expense because that was not the purpose of paragraph 10. The purpose of paragraph 10 was to prevent OPC from challenging the prudence of particular expenses. TECO argues that the second sentence of paragraph 10 outlines the parties' agreement that any interest expense incurred as a result of a Polk Power Station related tax deficiency was covered by the agreement. Paragraph 10 does not limit recovery to interest expense related to the tax life of Polk Power Station; it only demonstrates that TECO intended to take positions regarding the tax life of the Polk Power Station that were to the benefit of ratepayers. TECO asserts that the words in paragraph 10 are unambiguous and the plain meaning must be given effect. (TECO RB p. 3)

The utility argues that the rule of *ejusdem generis* advanced by OPC is inappropriate here, because it urges the Commission to

[1] The expression in a contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed.

interpret a provision in the agreement..." in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose..." Miller et al. v. Amusement Enterprises, Inc., 394 F.2d 342 (5th Cir. 1968). *Ejusdem generis* does not prevail when the result of its use would be contrary to the obvious purpose of the agreement in question and is inapplicable where the language interpreted is unambiguous. (TECO BR p. 11)

In addition, TECO argues that the holding of Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199, 201 (Fla. 1st DCA 1975) does not apply to this proceeding. (*ejusdem generis* requires where both specific and general language is used in an agreement, the specific language will govern where there is a conflict). Here, there is no conflict between the provisions of the settlement, so the general language of the settlement should prevail. As such, the Commission should continue to determine the inclusion of interest expense on tax deficiencies in TECO's earnings based upon the reasonableness and prudency of the expense. (TECO BR p. 11)

TECO cites to numerous cases in support of its argument that the general language of the settlement is clear, unambiguous, and should not be interpreted to limit prudently expended interest on tax deficiencies to only those related to the Polk Power Station. TECO asserts the agreement at issue must contain unclear or ambiguous language. Green v. Life & Health of America, 704 So. 2d 1386, 1391 (Fla. 1998); Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So. 2d 738 (Fla. 3d DCA 1989). The agreement must be construed according to its clear and unambiguous terms. Volusia County v. Aberdeen, 760 So. 2d 126 (Fla. 2000); Avis v. Monroe County, 660 So. 2d 413 (Fla. 3d DCA 1995); See 11 Fla. Jur. 2d Contracts §155 (2000). In the absence of ambiguity it is assumed that the intent of the parties is expressed, and the language of the agreement controls. Bruce v. Barcom, 675 So. 2d 219, 222 (Fla. 2d DCA 1996); J.C. Penney Co. v. Koff, 345 So. 2d 732 (Fla. 4th DCA 1977). The agreement is only open to construction if there is impure, imperfect or ambiguous language. See Hertz Corp. v. David Klein Mfg., 636 So. 2d 189 (Fla. 3d DCA 1994); 11 Fla. Jur. 2d Contracts §153 (2000). Accord Cleanco v. Manor Investment Co., 568 So. 2d 1309 (Fla. 4th DCA 1990). (TECO RB p. 8)

The utility argues that the principle of *expressio unius est exclusio alterius*[2] should not take precedence over the canon requiring the interpretation of the agreement as a whole. Also, TECO argues that Ideal Farms Drainage District v. Certain Lands, 19 So. 2d 234 (Fla. 1944)(specific terms imply the exclusion of others), which was cited by OPC in its brief, was overruled by Mason v. Avdoyan, 299 So. 2d 603, 605 (Fla. 2d DCA 1974), which held that courts should try to harmonize inconsistent statutory provisions. In the absence of "positive inconsistency or repugnancy" each provision of a statute shall be given its own effect. Id. (TECO RB p. 10)

Moreover, TECO argues that 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. Instead, the utility asserts that the Commission should construe the settlement as a whole. Florida Polk County v. Prison Health Services, 170 F. 3d 1081 (11th Cir. 1999)(provisions of a contract construed as a whole to give every provision meaning); See 11 Fla. Jur. 2d Contracts §165. (TECO RB p. 10-11)

Lastly, TECO rebuts OPC's assertion and argues that the utility has not asked the Commission to rewrite the settlement. TECO has merely asked the Commission to read the plain language of the stipulations and apply them the way they are written. The meaning of the settlement is clear and the agreement should not be altered. There is no ambiguity in the agreement; paragraph 10 prohibits OPC from challenging the prudence of tax interest expense related to the Polk Power Station. Paragraph 11 includes all reasonable and prudent expenses in the calculation of the return on equity, meaning the settlement does not preclude interest on tax deficiencies for any items in addition to those related to the Polk Power Station. (TECO RB p. 11-12)

OPC

OPC argues that paragraph 10 of the settlement allowed TECO to only include interest expense related to the tax life of its Polk Power Station. Paragraph 11 allowed the utility to use adjustments from its last rate case. In the absence of paragraph 10, paragraph

[2] The mention of one thing implies the exclusion of another.

11 would have precluded all interest expense as an impermissible adjustment. (OPC BR p. 5-6)

OPC asserts that principles of contract interpretation require that the inclusion of interest expense be governed by paragraph 10. OPC argues that it is a fundamental principle of construction that the mention of one thing implies the exclusion of another. In re: Petition of Florida Power & Light Company For Enforcement of Order 4285, Docket No. 970022-EU, Order No. PSC-97-1132-FOF-EU, at page 8, citing Thayer v. State, 335 So. 2d 815 (Fla. 1976) and Ideal Farms Drainage Dist. v. Certain Lands, 19 So. 2d 234 (Fla. 1944). Additionally, Order No. 97-1132, at page 9, states that the "rule of construction ...requires harmonizing the different provisions of the Agreement in order to give effect to all portions thereof..." See Oldham v. Rooks, 361 So. 2d 140 (Fla. 1978); Ideal Farms Drainage Dist. v. Certain Lands. See also 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"); 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."); 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)."). (OPC BR p. 6-7)

Next, OPC contends the Commission should apply the doctrine of *expressio unius est exclusio alterius* (the expression of one term implies the exclusion of other terms not mentioned). Follow City of Homestead v. Johnson, 760 So. 2d 80 (Fla. 2000). OPC argues that if the parties to the first stipulation had intended any and all interest expense to be allowed, they would not have referred specifically to the Polk Power Station in paragraph 10. Further, if the parties intended to address interest expense separately, but have it apply generally, they would have stated this explicitly. 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 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"); 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, 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).") Accordingly, OPC contends that paragraph 10 cannot be ignored because it defines a parameter limiting what interest expense is allowable. Any other interpretation would be contrary to the case law cited above. Similarly, paragraph 11 cannot be rendered meaningless by allowing it to be superceded by the second sentence's reference to "reasonable and prudent expenses and investment." Therefore, OPC argues that any interest on tax deficiencies except that related to the Polk Power Station is foreclosed by the doctrine of *expressio unius est exclusio alterius*. (OPR BR p. 8-10)

Analysis

Staff agrees with TECO that the settlement does not preclude interest on tax deficiencies for items other than those related to the Polk Power Station. For the reasons enumerated below, staff believes that the plain meaning of the settlement allows TECO to recover all reasonable and prudent expenses. Because the language of the agreement is clear on its face, staff recommends that the Commission does not need to apply any other principles of contract interpretation to clarify the terms of the settlement. Any expense related to interest on tax deficiencies, which is prudently and reasonably incurred, is not precluded by the agreement.

Staff agrees with TECO's assertion that rules of contract interpretation cannot override the general purpose of the agreement. Also, canons of contract interpretation cannot be utilized when the language of the agreement is unambiguous. U.S. v. Alpers, 338 U.S. 680, 682 (1950)("The rule of *ejusdem generis*... is only an instrumentality for ascertaining the correct meaning of words when there is an uncertainty...may not be used to defeat the obvious purpose..."). See also Securities and Exchange Commission

v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943)("However well these rules [of construction] may serve at times to aid in deciphering intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose..."). The general intent of paragraph 10 was not to limit the inclusion of tax deficiency interest expense. The purpose of paragraph 10 was to require OPC's support of tax deficiency interest expense related to the tax life of Polk Power Station. The language of paragraph 10 does not extend any further than that. With paragraph 10 limited to this specific purpose, the general language of paragraph 11 allows any reasonable and prudent expense to be included in the computation of TECO's earnings. As such, the general purpose of the agreement is unambiguous, and staff believes that rules of contract interpretation should not be applied and the general purpose of the agreement should control.

Staff disagrees with OPC that the Commission should apply the doctrine of *expressio unius est exclusio alterius* (the expression of one term implies the exclusion of other terms not mentioned). While staff acknowledges that the Commission has recognized this doctrine in City of Homestead v. Johnson, 760 So. 2d 80 (Fla. 2000)(citing Ideal Farms), staff believes that this rule of construction should not be applied to this proceeding. Absent any ambiguities, the actual language used in the agreement is the best evidence of the intent of the parties, and the plain meaning of the language controls. Acceleration National Service Corp. v. Brickell Financial Services Motor Club, Inc., 541 So. 2d 738, 739 (Fla. 3d DCA 1989). In interpreting the agreement, the Commission should first look to the plain language of the stipulation. Thayer v. State, 335 So. 2d 815, 816 (Fla. 1976)("To determine the...intent we look to the plain language..."). If the plain language of the agreement is ambiguous, then the Commission can clarify the settlement utilizing principles of contract interpretation. Pottsburg Utilities, Inc. v. Daugharty, 309 So. 2d 199 (Fla. 1st DCA 1975). See also Barakat v. Broward County Housing Authority, 771 So. 2d 1193, 1195 ("where the terms of a contract are unambiguous, the parties' intent must be determined from within the four corners of the document."). Here, staff recommends there are no ambiguities in the plain language of the settlement, so the intent of the parties must be determined from the four corners of the settlement. Therefore, staff believes the Commission need not employ any principles of contract interpretation to clarify the

agreement; the plain language of the settlement is unambiguous from the four corners of the document.

OPC also argued that if the parties had intended interest expense to apply generally, they would have stated this explicitly instead of narrowly tailoring the issue to address Polk's tax life. Staff disagrees and cites to Espinosa v. State, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997), which states:

> "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)." (emphasis supplied)

In fact, staff believes, the settlement included general words to show that other types of interest expense would be allowed in the computation of TECO's earnings. Paragraph 11 states that "All reasonable and prudent expenses and investment will be allowed in the computation...." Generally, interest on tax deficiencies is a type of expense which can be considered by the Commission for inclusion in TECO's earnings based upon a review for prudence and reasonableness. Because paragraph 11 included general words to show that other subjects of that class are included, staff recommends that it cannot be inferred that interest on tax deficiencies not related to the Polk Power Station is excluded from the settlement.

OPC's contention that all provisions in an agreement must be given effect conflicts with its argument that specific provisions in an agreement control the more general. OPC argues that the individual terms of a contract are not be to considered in isolation, but as a whole and in relation to one another, with specific language controlling the general. Pressman v. Wolf, 732 So. 2d 356, 360 (Fla. 3d DCA 1999). See also Belen School, Inc. v. Higgins, 462 So. 2d 1151, 1153 ("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)."). At the same time, OPC argues that "it 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." Aromin v. State Farm Fire & Casualty Company, 908 F. 2d 812, 814 (11th Cir. (Fla.) 1990). Instead, staff believes that the Commission should utilize the rationale in Florida Polk County v. Prison Health Services, 170 F. 3d 1081 (11th Cir. (Fla.) 1999), wherein the court determined that the provisions of a contract should be construed as a whole in order to give every provision meaning. See also 11 Fla. Jur. 2d Contracts §165. Staff contends that paragraphs 10 and 11 can be interpreted as a whole to give both clauses meaning. Paragraph 11 allows all reasonable and prudent expenses and investment in the computation of TECO's earnings; at the same time, paragraph 10 requires that the parties agree that any interest expense incurred as the result of a Polk Power Station tax deficiency must be considered a prudent expense for ratemaking purposes. Therefore, staff believes that if paragraphs 10 and 11 are construed as parts of a whole, the settlement does not preclude interest on tax deficiencies, if these expenses are found reasonable and prudent.

In summary, staff believes the settlement does not preclude any reasonably and prudently incurred interest on tax deficiencies. The plain meaning and purpose of the settlement does not disallow any interest on tax deficiencies that the Commission deems to be prudent and reasonable. The settlement does preclude OPC from challenging the prudence of interest on tax deficiencies related to the tax life of the Polk Power Station. Because the terms of the settlement are unambiguous, the Commission need not utilize additional canons of contract interpretation to clarify the agreement. Therefore, the Commission should give effect to paragraphs 10 and 11 of the settlement, and allow any reasonably and prudently incurred interest on tax deficiencies to be included in a determination of TECO's earnings.

ISSUE 3: Was it appropriate for TECO to record interest expense on income tax deficiencies in 1999?

RECOMMENDATION: Yes. It was correct to record the interest on tax deficiencies in 1999 because the liability was incurred and could be reasonably estimated. Further, under APB 20, it would have been improper for the company to record the expense as a prior period adjustment. (Merchant)

POSITION OF THE PARTIES

TECO: Yes. FAS 5 requires the company to book an expense when, based on available information, it is probable that a liability has been incurred and the amount of the expense can be reasonably estimated. TECO properly recognized the interest because the IRS took definitive action, and the liability could be estimated.

OPC: No. Interest expense cannot be recorded above-the-line without prior authorization. Whether appropriately recorded or not, interest expense is not allowed to affect refunds for 1999 unless it arose out of a dispute with the IRS over Polk's tax life. None of the claimed expense fits this category.

STAFF ANALYSIS: Utility witness Sharpe testified that in 1999, TECO had several open tax audit cycles where the tax liability had not yet been finalized by the Internal Revenue Service (IRS). Those tax audit cycles were for 1986-1988, 1989-1991 and 1992-1994.

Mr. Sharpe described the process in which TECO participates in its dealings with the IRS. He stated that it is common for the IRS and taxpayers to disagree about the tax treatment of a particular item and that there are several steps taken in determining a taxpayer's final tax liability. The first step is the annual tax accrual that is booked for the current year based upon estimated taxable income. Many items are estimates and adjustments are necessary to income tax expense after the books are closed and additional work has been done. After its annual audit of TECO's tax return, the IRS will propose certain adjustments to which some are agreed upon by TECO. For issues during the audit process on which the IRS and TECO do not agree, the IRS will issue its Revenue Agent's Report (RAR). The RAR reflects the IRS adjustments to taxable income and a redetermination of the tax due and any resulting interest expense. TECO then has the option of agreeing to the tax as determined by the IRS or formally protesting the

adjustments. Some adjustments may be settled during the appeals process, while others may proceed to litigation. (TR 179-180)

Witness Sharpe testified that the whole examination and appeal process can take several years depending on the complexity of the various issues. It was not until 1999 that the IRS determined the final tax for 1986-1988 and RARs were received for the 1989-1991 and 1992-1994 audit cycles. Further, some of the issues, referred to as carryover items, that have been resolved for earlier years may affect subsequent audit cycles and years not yet under audit. Once the outcome of an issue is determined for the initial year for which the issue was raised, tax and interest expense should be recorded for carryover items included in subsequent returns. (TR 180-181)

According to witness Sharpe, the events that resulted in TECO's tax liability being adjusted included: 1) In May 1999, TECO received the RAR for the 1989-1991 audit cycle; 2) In July 1999, the tax liability was finally determined for the 1986-1988 audit cycle; and 3) In November 1999, TECO received the RAR for the 1992-1994 audit cycle. Witness Sharpe testified that the determination of taxes for the 1986-1988 audit cycle and the IRS's definitive positions taken on the disputed issues were the necessary events that triggered the recording of tax and interest expense. The adjustment to tax and the related interest expense included the income statement impact of carryover items in tax years 1995 through 1998. (TR 182-183)

Witness Sharpe stated that his firm, PricewaterhouseCoopers LLP (PwC), agreed with TECO that the IRS's positions and determinations of the issues made it clear that the company would not be able to sustain the tax positions that it had taken on its various returns. Thus, accrual accounting required that the tax and interest expense be recorded in 1999. More specifically, the 1999 IRS activity met the requirements for the interest and tax expense accrual under the standard articulated in Statement of Financial Accounting Standards No. 5 (FAS 5). Paragraph 8 of FAS 5 generally requires an expense to be charged to income when information becomes available that indicates that it is probable that a liability has been incurred and the amount of the expense can be reasonably estimated. (TR 181-182) As such, 1999 was the year to charge operations with the interest and tax expense adjustment. (TR 182-183)

Mr. Sharpe also testified that the tax adjustment and related interest taken by TECO should not be considered a prior period adjustment. Mr. Sharp opined that, in 1999, it became clear that TECO was not going to be able to sustain the tax return positions that it had taken on various returns, thus the liability became probable in that year. Further, Accounting Principles Board (APB) Opinion 20, regarding Accounting Changes (paragraph 31), states, in part, that "changes in accounting estimates should not be reported in financial statements of prior periods or by reporting pro forma statements for prior periods." Since the income tax expense previously reported in prior years was an estimate, it is inappropriate to reflect either the adjustment to tax expense or the related interest as prior period adjustments. Thus, under Generally Accepted Accounting Principles (GAAP), 1999 was the proper year to record both the tax and the interest on tax deficiencies. (TR 183-184)

Witness Sharpe concluded that given the framework of the procedures required to vigorously contest various issues before the IRS, the company should not be penalized by having the tax deficiency interest disallowed as an operating expense. He contended that the expenses only arose because the company's tax positions were meant to minimize costs. (TR 188)

OPC witness Larkin admitted on cross examination by the utility that he had not formed an opinion as to whether the interest on tax deficiencies recorded in 1999 was improperly recorded under GAAP or that 1999 was the appropriate year to record the expense. Mr. Larkin stated that he did not review the information necessary to form such an opinion because he did not believe it would be appropriate to do so. Even if the tax expense was prudently incurred and properly recorded in 1999, Mr. Larkin stated that it should be disallowed for refund purposes because you cannot get past the Stipulation and the deficiencies in the cost-benefit analysis. (TR 233-234)

In its brief, TECO states that it is uncontroverted that the interest on tax deficiency at issue here was a 1999 expense and was properly recorded as an expense in 1999. TECO asserts that there is no evidence to support any other conclusion.

OPC's position on this issue in its post-hearing statement of issues and positions states that interest expense cannot be recorded above-the-line without prior authorization. Staff

believes that this position is not addressed by this or any other issue in this case. Further, the record is void of any evidence that supports OPC's argument, thus staff has not addressed on the merits of this argument. OPC also argues that it is not relevant whether the company appropriately recorded the interest because the interest expense cannot affect refunds for 1999 unless the interest arose out of a dispute with the IRS over Polk's tax life. OPC concludes that none of the claimed interest expense fits this category.

Based on staff's analysis of the record, we believe that witness Sharpe's testimony is clear and undisputed that the company properly recorded the interest on tax deficiencies in 1999. The expense accrual requirements of FAS 5 were met because, in that year, it became clear to TECO that it would not sustain its tax positions on the earlier tax years. This position was clearly supported by the company's tax and accounting consultant. Staff believes that the record reflects that in 1999 the liability for the interest expense was incurred and was reasonably estimated. Further, the record is clear that under APB 20, it would have been improper for the company to record the expense as a prior period adjustment.

ISSUE 4: What amount of tax deficiency interest included in the calculation of the company's earnings in 1999 is related to the Polk Power Station that OPC is obligated to support as a prudent expense for rate making purposes in this proceeding under paragraph 10 of the stipulation?

RECOMMENDATION: While the record indicates that some of the tax deficiencies relate to the Polk Power Station, it is silent as to what amount of interest on tax deficiencies relates to Polk. (Merchant)

POSITION OF THE PARTIES

TECO: OPC agreed in paragraph 10 that "any interest expense that might be incurred as a result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking." A significant portion of the $13.2 million tax deficiency interest is related to the Polk Power Station.

OPC: None. TECO has not demonstrated any interest expense on tax deficiencies were recorded in 1999 as a result of the IRS questioning the tax life of the Polk Power Station.

STAFF ANALYSIS: Staff believes that this recommendation should be broken into two parts. The first part addresses what amount of the total tax deficiency interest included in the calculation of the company's earnings in 1999 is related to the Polk Power Station. The second part addresses whether the Settlement requires OPC to support any interest on tax deficiencies related the Polk Power Station as a prudent expense for rate making purposes in this proceeding, or whether OPC's support is limited to only that interest related to the tax life of the Polk Power Station.

Amount of Polk Power Station Tax Deficiency Interest

Paragraph 10 of the March 25, 1996, Stipulation provides:

> 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 a result of a Polk Power Station related tax deficiency assessment will be considered a prudent expense for ratemaking purposes and

will support this position in any proceeding before the FPSC.

TECO did not present any evidence in its direct or rebuttal testimony that reflected whether any interest on tax deficiencies reported in 1999 related to the Polk Power Station. The evidence in the record that purports to identify Polk Power Station interest is from Ms. Bacon, on re-direct examination, reviewing an exhibit from her deposition. (EXH 2, Bacon Deposition Exhibit 12) She points out that several items listed on that exhibit, on Bate stamp page 24, relate to the Polk Power Station. Specifically, all of Lines F and P, reflected on the exhibit as research and development expenses, and a portion of Line Q, reflected as interest capitalization, are Polk Power Station amounts. (TR 144) Further, during OPC's cross examination, Ms. Bacon states that any position taken on research and development expenses related to the Polk Power Station is a form of a tax life issue.

In reviewing that exhibit, staff cannot determine what, if any, amount of interest is related to the Polk Power Station. First of all, this exhibit reflects the IRS adjustments to income for the total company: TECO Energy, Inc. and Affiliated Corporations. No breakdown is shown on this schedule as to what portion relates to Tampa Electric alone. Secondly, the adjustments reflected on this page relate to income amounts, not the interest on tax deficiencies. Staff also notes that the total adjustments to income shown on Bate stamp page 24 do not agree with the amounts reflected on Bate stamp page 23. Further, Ms. Bacon's statements are not supported by any additional corroborating evidence. Thus, staff believes that the record does not support conclusively that any of the interest on tax deficiencies reported in 1999 relates to the Polk Power Station.

OPC's Obligation to Support Polk Power Station Interest

Regardless, OPC witness Larkin testified that he believed that it was clear that the parties intended that only interest assessed on tax deficiencies directly related to the Polk Power Station would be included as reductions of operating income for refund purposes.(TR 210-211) On cross examination, Mr. Larkin adds that any interest related to the Polk Power Station should be limited to only that related to tax life issues. Further, any discussion by the company that research and development expenses could be interpolated to be a tax life issue is distorted. The issue of tax

life is not addressed by the decision to expense or capitalize an expenditure. Once you capitalize an asset, the tax life issue is what period do you depreciate the asset. (TR 240-241)

In its brief, the company states that "there is no doubt that a portion of the tax deficiency interest at issue here is clearly related to the Polk Power Station." (emphasis added) The utility believes that under these circumstances, OPC is obligated to affirmatively advocate the inclusion of the Polk Power Station interest in expenses for ratemaking purposes. TECO makes the claim that, based on witness Bacon's testimony on pages 293-294, "the tax deficiency interest assessed by the IRS in 1999 is related to the Polk Power Station, and is related to the Polk Power Station tax life." This statement, as it is formed, however, could be perceived as a declaration that all of the tax deficiency interest in 1999 is related to the Polk Power Station. The evidence in the record, however, does not reflect this.

Staff believes that what is very clear is that two parties have interpreted paragraph 10 of the Stipulation in two completely different ways. What both parties fail to mention is that in its order approving the stipulation, the Commission states that the agreement on the treatment of interest on tax deficiencies is only binding on the parties of the stipulation. Based on evidence presented during a proceeding, the Commission may make a determination to either include or exclude any such interest expense for ratemaking purposes. See Order No. PSC-96-0670-S-EI, issued May 20, 1996. Staff believes that ultimately the inclusion of this expense should be based on whether the record in this case reflects that it was prudent to incur this expense and in what amount. Issue 9 addresses staff's recommendation of the prudence of the interest on tax deficiencies.

ISSUE 5: Should rate case benefits be included in the cost/benefit analysis used to determine the prudence of costs incurred in 1999?

RECOMMENDATION: No. The evidence does not reflect that a rate change would have resulted if the deferred tax balance in the 1994 test year for the last rate case was lower. Thus, the rate case benefits should be removed from the company's cost/benefit analysis. (Merchant)

POSITION OF THE PARTIES

TECO: Yes. The revenue requirements calculation used in TECO's last rate case included deferred taxes that lowered the cost of capital and permanent rates that have been paid by customers since that time. Consequently, customers have benefitted from contested tax positions that created deferred taxes in the rate case.

OPC: No. Lower rates in past years cannot justify higher rates in the future without violating the prohibition against retroactive ratemaking. Moreover, rates charged from 1994-99 were not affected by the company's tax positions because the Commission set rates for 1994 to meet a financial integrity standard.

STAFF ANALYSIS: In utility witness Bacon's direct testimony, she explains that the company prepared a cost/benefit analysis to demonstrate the net benefits that customers received from TECO taking certain tax positions that were later disputed by the IRS. Ms. Bacon stated that a cost/benefit analysis is generally used to either determine the best approach for making a decision on a prospective basis or to confirm whether a previous decision was appropriate. (TR 37-38)

The cost/benefit analysis that Ms. Bacon relied upon examined TECO's past tax positions to determine the appropriateness of including tax deficiency interest expense in the calculation of 1999 earnings. She stated that these tax positions created deferred taxes that were included in the company's last rate case and in the calculations of deferred revenues that benefitted customers. Ms. Bacon believed that the deferred tax benefits resulting from TECO's tax positions outweighed the eventual cost of associated tax deficiency interest expense. (TR 38; EXH 1, Document 1)

Witness Bacon testified that the company took what it called a conservative approach in its cost/benefit analysis by only including deferred taxes that were related to the issues contested by the IRS that lead to tax deficiency interest. Any deferred taxes related to issues resolved in the company's favor were not included. She stated that this approach was more conservative than that used by the Commission for Florida Power Corporation (FPC) in Docket No. 910890-E1, Order No. PSC-92-1197-FOF-EI. In that case, FPC included all deferred taxes as net benefits, regardless of whether the issues were later resolved for lesser amounts. Ms. Bacon stated that TECO's benefits would have been greater if analyzed consistent with FPC's approach.

In addition to the FPC rate case, witness Bacon stated that the Commission required a cost/benefit analysis from Peoples Gas System (PGS) in Docket No. 971310-GU. The purpose of that analysis was to determine whether tax deficiency interest expense should be allowed for determining the amount of overearnings subject to refund for 1996. The Commission examined the benefits provided to customers from including deferred taxes in PGS' last rate case compared to the cost of the tax deficiency interest. (TR 39-40)

Ms. Bacon testified that, in its cost/benefit analysis, TECO considered two separate rate impacts to customers. The analysis first evaluated whether the tax positions taken by the company up to its last rate case would have resulted in lower permanent rates. For the second impact, the tax positions were analyzed for the impact on the deferred revenue refunds provided to customers under the Stipulation. Ms. Bacon concluded that the analysis proved that the company's actions leading up to its rate case, and for each year of the Stipulation period, lowered TECO's cost of capital by increasing its deferred taxes. Deferred taxes are a cost-free source of funds. Had the company not taken these tax positions, it would have had to fund investments with other higher cost sources of capital, such as debt and equity. Thus, Ms. Bacon contends that the revenue requirements for the rate case and for refund calculations under the Stipulations would have been lower. (TR 41-42)

Ms. Bacon refers to rate case benefits as those amounts that result from the impacts of a higher cost of capital that might have been generated in the last rate case if the company had not taken the tax positions that it did. In her opinion, the cost/benefit analysis proved that customers enjoyed a $12.4 million nominal net

benefit as a direct result of TECO's tax positions on the specific issues included in the tax deficiency interest. Even if the rate case items were removed from the cost/benefit analysis, a $6.8 million dollar net benefit would have been realized for the customers. (TR 261, EX 8) Ms. Bacon states that the reason for identifying the rate case benefits is to prove that customers received net benefits from the company's tax positions even after inclusion of the tax deficiency interest expense. Ms. Bacon believes that the above-the-line treatment of the tax deficiency interest expense for 1999 is fair and reasonable because the $12.4 million net benefit has been proven. (TR 42-45)

OPC witness Larkin testifies that the theory that ratepayers have benefitted by reduced rates as a result of the tax positions taken by the company is fallacious. Mr. Larkin purports that in the company's last rate case, Docket No. 920324-EI, the Commission did not set rates in the traditional manner. The Commission, after employing the standard revenue requirement calculation, adjusted rates to a level which would provide the company a before-tax operating income using a targeted interest coverage ratio of 3.75 times interest expense. The Commission did this by increasing the amount of construction work in progress (CWIP) in rate base until the 3.75 interest coverage ratio was determined. See Order No. PSC-93-0165-FOF-EI, page 32.

Mr. Larkin contends that the underlying factor which determined the level of rate increase was the interest coverage ratio and not any other specific component of the Commission's Order. It certainly was not the amount of deferred taxes in the capital structure. For Ms. Bacon to now say that one component of the capital structure had the effect of decreasing ratepayers' rates in the last rate case, when the Commission clearly adjusted rates to achieve an interest coverage ratio, is inaccurate.

Mr. Larkin doesn't believe the argument that had the company taken different tax positions, rates would have been higher than they currently are. He contends that since the company deferred revenues and/or made refunds to ratepayers from 1995 to 1998, clearly, the rates approved in Docket No. 920324-EI were excessive. It is disingenuous to argue that ratepayers received some kind of benefit because they were not over-charged even more in the periods subsequent to the company's last rate case, because of tax positions taken by the company.

Utility witness Bacon, on rebuttal, testifies that Mr. Larkin misconstrued the Commission's 1992 rate proceeding decision by stating that rates were established at an excess level. Ms. Bacon states that rates were established based upon costs incurred at the time of the 1992 proceeding. Subsequent to the rate proceeding, TECO reduced its operating costs significantly which resulted in a 1995 projected return on equity in excess of 12.75 percent. These cost control efforts provided customers with $63 million of refunds thus far, along with other benefits. According to Ms. Bacon, Mr. Larkin is wrong to state that permanent rates were established at an excess level.

Ms. Bacon also states that witness Larkin's assertion that the rate case benefits cannot be included in the cost-benefit analysis because of the 3.75 times interest coverage target is incorrect. She states that Mr. Larkin misunderstood the 1993 test year because the Commission did not approve any CWIP in the 1993 rate base that was eligible for Allowance for Funds Used During Construction[3] (AFUDC). She states that the $18.8 million of CWIP included in rate base for 1993 was short-term CWIP that was not the type of CWIP that the Commission was granting to retain the 3.75 times interest coverage ratio. In fact, the interest coverage resulting from the Commission's approval of rates for 1993 was 4.16 times interest coverage. (TR 60) Ms. Bacon states on cross examination that the Commission did not need to make any adjustment to 1993 because the interest coverage ratio exceeded 3.75. (TR 65, 279-280)

Regardless of whether CWIP would have been adjusted in the 1994 test year, Ms. Bacon asserts that real benefits from deferred taxes for the disputed tax positions were included in the revenue requirement from the last rate case. She argues that just because CWIP may have been re-adjusted does not take away from this fact and ignoring or not recognizing the efforts of the company could lead to flawed decision making. Ms. Bacon contends that the $36.2 million of CWIP in the 1994 test year rate base is an AFUDC threshold the company has to exceed before it can earn AFUDC on its current capital projects. She states that this benefits

---

[3] AFUDC is an accounting entry which increases the amount of plant in service and is designed to permit the utility recovery of the cost associated with financing on-going, long-term construction activities.

customers' rates because less AFUDC is being charged on significant capital projects. (TR 280)

Ms. Bacon concludes that even if the 1994 test year were ignored and only the 1993 test year and the 1995 to 1999 deferred revenue benefits were examined in the cost/benefit analysis, customers have been provided a $8.5 million nominal benefit due to the company's tax positions. (TR 280-281) Staff notes that there is no exhibit in the record that supports this position.

On cross examination by OPC, Ms. Bacon admits that while preparing the cost/benefit analysis, she did not think about the impact of the interest coverage ratio calculation that was made in the last rate case. She alleges that it is arguable whether or not the impact of the interest coverage ratio calculation should even be in the analysis. Ms. Bacon again states that there are still $8.5 million in benefits even if you remove the rate case benefits from the cost/benefit analysis. In addition, if you lower the amount of CWIP and include it in the analysis, you then have to book higher AFUDC, which in turn raises rates even more. She concludes that it would still result in a net benefit, although she has no support for that theory. (TR 91-92)

OPC, in its brief, argues that the amount of deferred taxes in the capital structure had absolutely no effect on rates from 1994 through 1999. (TR 216, 228-29) Accordingly, there could not have been any "rate case benefits" during those years. Removing the $12,552,000 of what OPC refers to as nonexistent "rate case benefits" causes the $12,406,000 of net benefits become negative, thus a net detriment of $146,000.

In its brief, the company states that OPC incorrectly calculated the effect of removing rate case benefits from the cost/benefit analysis. Ms. Bacon states that if you simply remove the amounts shown as rate case benefits that would be inappropriate. When the rate case benefits are removed, the deferred revenue impact of those benefits also has to be removed. (TR 95-97)

Staff believes that Mr. Larkin's point that rates would not have changed since the last rate case is valid. The record is clear in this case that the revenue requirement in the last rate case was adjusted to allow a 3.75 interest coverage ratio. Ms. Bacon, while disagreeing with Mr. Larkin's argument, admitted that

she did not consider that impact of the interest coverage ratio in the cost/benefit analysis. Further, staff believes that the impact that AFUDC has is that plant and depreciation expense are increased over the life of an asset and thus over a long period of time. This does not necessarily correlate to an increase in rates in a year immediately following the addition of more AFUDC in rate base. Even if the impact of higher AFUDC would cause an increase in rates to customers, as Ms. Bacon contends, the materiality of this impact has not been reflected in the record. As such, staff believes that it is inappropriate to consider the rate case benefits in the cost/benefit analysis.

ISSUE 6: Should deferred revenue benefits/(costs) be included in the cost/benefit analysis used to determine the prudence of costs incurred in 1999?

RECOMMENDATION: Yes. To the extent the cost/benefit analysis is relied upon by the Commission, it is appropriate to include the deferred revenue benefits. Had the company not taken the tax positions it did, the overall refund that the customers received for the years 1995-1998 would have been much less, assuming that the stipulated refunds were decreased proportionately. (Merchant)

POSITION OF THE PARTIES

TECO: Yes. The calculations within the cost/benefit analysis accurately depict what would have happened during the deferred revenue years if the company had not taken the tax positions that it did. The cost/benefit analysis did not and was not an attempt to change the amounts ordered to be deferred or refunded.

OPC: No. Amounts deferred and refunded in 1995-98 pursuant to the stipulations could not, by definition, have contained any hidden benefits or costs. Since the deferred revenue pot was empty after 1998, there couldn't have been any deferred revenue effect on the calculation of refunds for 1999.

STAFF ANALYSIS: OPC witness Larkin believes that the company's cost/benefit analysis is also flawed because it assumes that all the benefits flowed to the ratepayers from the deferral of revenues pursuant to the Stipulations. Mr. Larkin states that the deferral of revenue was designed to maintain the company's earnings at up to a 12.75% return on equity in 1997. He believes that this obviously cannot be counted as a benefit received by ratepayers as the benefit actually flowed to the stockholders. Any 1997 excess earnings over 11.75% was split 60/40 with the 40% allocated to stockholders being counted as earnings in 1997. The remaining 60% was deferred into 1998. (TR 219)

Mr. Larkin testifies that the company was able to reverse and record as income deferred revenues of $61,125,817 in 1997 and 1998. The amount of 1995 and 1996 deferred revenues per Commission orders totaled $87,598,127. (TR 219-220) According to these amounts the utility's shareholders were able to retain 70 percent of the amounts originally deferred. Thus, Mr. Larkin contends that the excess revenue paid by ratepayers primarily went to the benefit of

the company's stockholders. Staff notes that these amounts, however, do not include the total amounts that were refunded to the customers for the years 1995 to 1998.

Mr. Larkin also believes that the utility's analysis assumes that ratepayers benefitted because rates set in the prior rate case could have been more excessive then they were and then the ratepayers could have been overcharged even more than they were. Mr. Larkin contends that this is obviously a convoluted conclusion since deferring revenues that essentially went to stockholders and not overcharging ratepayers more cannot be considered as benefits to ratepayers. (TR 221)

Ms. Bacon testifies that the cost/benefit analysis proves that customers have already received more refunds than they otherwise might have because of the company's tax positions. (TR 44) She further states that Mr. Larkin underestimates the customer benefits provided by the deferred revenue plan by ignoring all of the refunds made and the $50 million savings over 4 years from collapsing the Oil Backout Clause. Also, delaying tax payments provides additional cash flows that reduce the company's cost of capital and benefit the customers at all times. (TR 283-284) Although Ms. Bacon does not dispute that the shareholders benefitted, staff believes that she does show that customers did receive benefits from higher refunds than they otherwise would have received.

In its brief, the company argues that the refund to customers from 1998 was based upon the actual regulated return on equity approved by the Commission for the deferred revenue periods. This is true also for the eventual refund for 1999. If the company had taken the different tax positions, the cost of capital and the earned return on equity of the company for each year would have been different. As such, the company contends that the deferrals and eventual sharing with customers would have changed. This reason, the company believes, makes it is proper to include the deferred revenue from those periods in an analysis to determine whether the tax positions taken by the company were appropriate that led to the tax deficiency interest expense in 1999.

In addition, TECO believes that the Commission, in determining the prudence of a particular cost incurred, should consider all relevant information available. The company contends that the Commission is obligated to consider a "what-if" quantitative

analysis if one can be performed. It simply outlines the benefits to customers that have been included in the deferrals and refunds ordered and compares that result to the cost of tax deficiency interest expense. Even without the mechanical calculations within the cost/benefit analysis, the company believes that taking tax positions that defer taxes benefits customers through a lower cost of capital. Therefore, TECO argues that it is appropriate to include the deferred revenue benefits in the cost/benefit analysis used to determine the prudence of costs incurred in 1999.

Staff has analyzed this issue in great detail. We compared the four different cost benefit analyses admitted into the record to make sure that we understand what those exhibits purport to prove. Exhibit 1, (Document 1) reflects the company's primary cost/benefit analysis. It takes into account the rate case benefits and the deferred revenue benefits for the years 1993 to 1999. It also includes the non-protested final adjustments to the 1999 year that were otherwise approved by the Commission in this docket. As addressed in Issue 5, staff has recommended that the rate case benefits are not appropriate to include in the cost/benefit analysis. Accordingly, staff has not utilized Exhibit 1 to make our recommendation.

The cost/benefit analyses in Exhibits 6 and 7 are very similar in theory and are different to the extent that Exhibit 6 contains a minor mathematical error which was corrected in Exhibit 7. (TR 83) Exhibit 7 is the cost/benefit analysis that was used by the Commission to reach its PAA decision for the 1999 refund. The Exhibit 7 analysis is also very similar to the one performed and included in Exhibit 1. The only exception is that the adjustments to 1999 in Exhibit 7 reflect the company's proposed earnings, whereas Exhibit 1 includes the Commission's final 1999 adjustments with the exception of the protested interest on tax deficiencies issue.

Exhibit 8 reflects the company's cost benefit analysis which is the same as Exhibit 1, but excludes the impacts of the 1993 and 1994 rate case benefits. This is the exhibit that the company contends reflects net benefits of $6.8 million. There is no exhibit in the record that supports the company's purported $8.5 million in net benefits with only the 1994 rate case benefits removed. Consistent with our recommendation is Issue 5, the rate case benefits are not appropriate to include in the cost/benefit analysis. Thus, staff believes that the only exhibit that is left

in the record to support the company's argument regarding the cost/benefit analysis is Exhibit 8, which removes the impact of the 1993 and 1994 rate case benefits.

Exhibit 8 reflects an analysis by each tax audit cycle: 1995-1998; 1992-1994; 1989-1991 and 1986-1988. For each audit cycle, the company calculates the incremental change in earnings that the company contends would have occurred had the company not taken the tax positions that it did. The exhibit reflects the 1995-1998 tax audit cycle first and presents a schedule for each year starting in 1995 and going until 1998. On the page after 1998, the company reflects a deferred revenue summary of the net impact for that tax audit cycle. After this summary page is shown for each audit cycle, the company reflects what it believes is the 1999 impact if it had not taken the tax positions it did. The analysis then allocates the interest expense between the different tax audit cycles.

OPC argues in its brief that the cost-benefit study from Exhibit 8 shows a change of events from Exhibit 1. The study in Exhibit 1 shows deferred revenue benefits totaling $5.7 million, whereas Exhibit 8 shows deferred revenue benefits of $14.3 million. OPC wonders how the company somehow found an additional $8.6 million in deferred revenue benefits. 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 TECO "handled" their deferred revenues. (TECO BR p. 24-26)

Staff has several areas of concern regarding the company's cost/benefit analysis. First, this is an extremely complex and somewhat confusing analysis and it is difficult to analyze the relationships between the years included in the tax audit cycles. Each year in each cycle starts with an incremental analysis and you cannot easily see the total impact that the change in deferred taxes has on the company for each year as a whole. While many of the calculations are supported throughout the analysis, the supporting calculations for the achieved rate of return or most of the deferred tax changes for each year are not reflected. There is one exhibit that reflects some deferred tax adjustments made but it is not clear how the amounts flow through the utility's analysis by year. (EXH 7, last page) In addition, staff agrees with OPC that this analysis does not reflect what deferred tax issues were projected in the rate case to make sure that no double counting of benefits has occurred. Further, staff also shares OPC's concern

that if you accept the argument that rates would not have changed since the last rate case and the rate case benefits are removed, how is such a large difference of an additional $8.6 million in deferred revenue benefits generated. Staff believes that this question is left unanswered in the record.

However, if you accept that the utility's logic and methodology in calculating the costs and benefits is correct, then this cost/benefit analysis shows that net benefits accrue to the customers, but it does not show what the refund would have been at the end of 1998. In order to test the utility's argument that a smaller refund would have occurred, staff has prepared a schedule which reflects the adjusted deferrals for 1995-1996 and reversals for 1997-1998. We kept the amount of refunds constant for the 1995-1996 period and we also prorated the refund interest down based on the decrease in the amount of deferrals for 1995-1996. Based on this analysis, staff reflects that there would not have been any refunds as of 1998.

	1995-1998 Deferral Per Order No. PSC-99-2007-PAA-EI	1995-1998 Deferral Per Settlement After Protest	What-If on Cost/Benefit Analysis
1995 Revenue Deferral	$50,517	$50,517	$47,428
1996 Revenue Deferral	37,081	37,081	$34,224
1995-1996 Refunds	(25,737)	(25,737)	(25,738)
1997 Revenue Reversal	(27,056)	(27,056)	($30,459)
1998 Revenue Reversal	(34,069)	(34,069)	($37,347)
Refund Interest	10,492	12,265	9,780
Total	$11,226	$13,000	($2,112)

By strictly agreeing with the logic that the customers would have received fewer refunds had the company not taken these tax positions, the cost/benefit analysis from Exhibit 8 shows a net benefit. To the extent the cost/benefit analysis is relied upon by the Commission, then staff agrees that the deferred revenue benefits should be included. Had the company not taken the tax positions it did, the overall refund that the customers received for the years 1995-1998 would have, theoretically been much less.

Staff does, however, agree with OPC that we cannot step into the shoes of the parties involved in a settlement to see if the different facts would have driven another settlement result. One might logically conclude that if the original revenue requirement calculations for a given year happened to be lower based on a lower cost of capital that the settlements on refunds would in turn be less.

In conclusion, to the extent the cost/benefit analysis is relied upon by the Commission, staff believes that it is appropriate to include the deferred revenue benefits. Had the company not taken the tax positions it did, the overall refund that the customers received for the years 1995-1998 would have been much less, assuming that the stipulated refunds were decreased proportionately.

ISSUE 7: The Prehearing Officer ruled that this issue is subsumed by Issue 9.

ISSUE 8: Is it appropriate to include the interest accrued on deferred revenues as a component of the cost/benefit analysis?

RECOMMENDATION: Yes. To remain consistent with the Commission's prior treatment of interest on deferred revenues, staff agrees that, to the extent the cost/benefit analysis is relied upon by the Commission, the deferred revenue interest component should not be removed. (Merchant)

POSITION OF THE PARTIES

TECO: Yes. Deferred revenue interest was treated consistently in the cost-benefit analysis with the treatment of deferred revenue interest approved by the Commission for each of the deferred revenue years. The accrued interest is indistinguishable within the total deferred revenue balance.

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

STAFF ANALYSIS: OPC witness Larkin testifies that since the Commission included the deferred revenue in the capital structure at a cost rate of the 30-day commercial paper rate, the ratepayers are charged 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, the refund to ratepayers is essentially the carrying cost of the deferred revenues which in essence has already been paid for by ratepayers. (TR 220) OPC, in its brief, argues that customers already paid for the accrued interest; it is money that was taken away from them in prior periods. It is ludicrous for the company to assert that customers received "benefits" from having the interest they paid for returned to them.

TECO, in its brief, argues that OPC's position is an attempt to reargue theory previously rejected by this Commission regarding the treatment of deferred revenues in the cost of capital at the commercial paper rate in the capital structure. The Commission, in

Order No. PSC-99-0683-FOF-EI, issued April 7, 1999, inferred from the plain language of the Stipulations that deferred revenues and accrued interest should be included in the capital structure at the 30-day commercial paper rate.

The company argues that Order No. PSC-99-0683-FOF-EI established that deferred revenues would be merged with deferred revenue interest into a common "pot of dollars". OPC's attempt to reargue that issue is inappropriate as it has previously been addressed by the Commission in this docket. TECO also argues that the Commission has ruled, in that order, that accrued interest on deferred revenues is indistinguishable within the total deferred revenue balance, although staff does not believe that the order in fact states or implies that meaning. Further, TECO argues that doctrines of res judicata and collateral estoppel preclude the Commission from reaching a different decision in the same docket involving the same parties and an identical issue. That ruling makes it clear it is appropriate to include interest accrued on deferred revenues as a component of the cost/benefit analysis.

Staff agrees with the company that the Commission has ruled in numerous orders in this docket that deferred revenues and the associated interest shall be included in the capital structure at the 30-day commercial paper rate. Staff does not believe that OPC is rearguing this point. Staff's interpretation of OPC's argument is that the interest on deferred revenues should not be included as a benefit to customers supporting the company's cost/benefit analysis. In reviewing the orders in this case where prior years earnings have been addressed, the Commission has included the interest component from deferred revenues in calculating the amount to defer or refund. Staff's review does not reflect that a distinction has been made to separate out the interest component in the prior refunds made during the revenue deferral as well as the reversal years. To remain consistent with the Commission's prior treatment of interest on deferred revenues, staff agrees that, to the extent the cost/benefit analysis is relied upon by the Commission, the deferred revenue interest component should not be removed.

ISSUE 9: Does the cost/benefit analysis prepared by the company support its claim that the interest on tax deficiencies is prudent and in the best interests of the customers?

RECOMMENDATION: No. However, allowing recovery of half of the requested interest expense on tax deficiencies is the most reasonable alternative available to determine fair and reasonable costs to allow for 1999. Interest on tax deficiencies of $6,343,836 should be allowed as an above-the-line expense in determining the net operating income for 1999. (Merchant)

POSITION OF THE PARTIES

TECO: Yes. The cost-benefit analysis was an accurate representation of the impact on customers if the company had never taken the tax positions that led to the tax deficiency interest expense in 1999 and shows that the tax deficiency interest was a prudently incurred cost.

OPC: No. The analysis is wrong in its philosophical approach; it is based upon an erroneous methodology; and it is replete with factual mistakes.

STAFF ANALYSIS: In its brief, the company contends that while logic and reasoning are important, its cost/benefit analysis provides a Commission-recognized quantitative measure for determining prudence. Further, the cost/benefit analysis correctly identifies the benefits of deferred taxes in the last rate case and deferred revenues versus the eventual cost of the tax deficiency interest.

TECO believes that the cost/benefit analysis is sound regardless of the situation to which it is applied. Both the PGS case and this proceeding involved a calculation of the amount of revenue above a specified ROE for a prior period to determine the amount of excess earnings under a stipulation. In addition, TECO believes that all of its cost/benefit studies show significant net benefits of its tax positions that led to the assessment by the IRS of tax deficiency interest.

The cost/benefit analysis, according to the company, is one method of analysis which considered what would have happened if the company had not taken the specific tax positions. It is not an attempt to and does not change any rate, deferred revenue

calculation or refund of the company. Mr. Sharpe testified that the Commission should allow the tax adjustment and related interest to be included as a 1999 operating expense and the Commission should have a policy to encourage utilities to minimize their payments to taxing authorities. (TR 184-185)

In its brief, OPC argues that the cost/benefit studies offered by TECO 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. As Ms. Bacon testified, the Second Stipulation called for a traditional overearnings evaluation for 1999 since the deferred earnings pot was empty as of the end of 1998. (TR 117) Yet, OPC argues, the company's 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.

As discussed previously, Ms. Bacon testifies that TECO based its cost/benefit analysis on that performed for PGS. (TR 40) By Order No. PSC-98-0329-FOF-GU, issued February 24, 1998, (pages 9-12) the Commission approved the inclusion of interest on tax deficiencies for PGS. Staff has addressed several components of the Commission's PAA decision on that issue. In that order, the Commission stated that the company provided staff with copies of the check and supporting documentation for the tax and interest; several cost/benefit analyses demonstrating benefits for the ratepayers were more than the $264,000 of interest paid out; and the Internal Revenue Code and Treasury Regulation Sections that the company relied on when it took its position on the issue that eventually led to the majority of the interest on the deficiencies. The order also described the method of how the interest was computed on the tax deficiency.

In its final paragraph regarding the treatment of interest on tax deficiencies in the PGS order, the Commission stated:

> We note that above-the-line treatment for Peoples Gas is based solely upon the merits of our cost/benefit results; above-the-line treatment of interest on subsequent tax deficiencies will not be assumed to be appropriate. The appropriate accounting and recovery should be decided on a case by case basis, <u>following a careful examination of</u>

> the unique circumstances of each underlying position taken by the company that gave rise to the interest. (emphasis added)

Staff believes that it is important to distinguish the facts in the record in the current TECO case with those found in the PGS case. First, staff notes that the current record does not contain any information showing the calculation of interest: when it began, to what issue or even tax audit cycle it relates, or when interest stopped accruing on specific issues or tax cycles. Second, while Exhibit 6 contains a brief explanation of the major tax issues disputed, the record is silent as to the unique circumstances of each underlying position taken by the company that gave rise to the interest and whether each of these positions are prudent, in and of themselves. The company's testimony contains only general statements that taking aggressive tax positions benefits the ratepayers and the Commission should encourage utilities to minimize their tax payments to taxing authorities. (TR 184) Thus, it appears as if the company is arguing that the importance of the individual issues is not relevant. The company's position is that as long as the utility's tax positions result in no penalties being assessed, all interest on tax deficiencies should be considered prudent.

Staff is troubled with the lack of evidence in the record supporting the individual prudence of issues that gave rise to the tax deficiency interest. Even in approving the settlement language related to the inclusion of interest on the Polk Power Station, the Commission stated in Order No. PSC-96-0670-S-EI, that regardless of whether the parties agreed to the inclusion of the Polk related interest, the Commission reserved the authority to review the prudence of any such inclusion. Since the company relied upon the cost/benefit analysis performed for the PGS decision, one would think that the company would carefully review the language of the order to make sure that it complied with the Commission's statement of future treatment of interest on tax deficiencies. This should have been especially obvious since PGS is a division of TECO as well as the fact that Ms. Bacon worked on the cost/benefit analysis in the PGS docket. (TR 72)

As testified by witness Bacon, this is the first time that TECO has had a material amount of interest on tax deficiencies. To Ms. Bacon's knowledge, TECO had a dispute with the IRS over a small item during the 1980's. (EXH 2, page 48) Staff believes that the

tax deficiency issue in this case sets up many "red flags" for both the company and the Commission. First, TECO has never incurred this type of expense at this level. Second, the utility has never requested above-the-line treatment of this expense in any prior proceeding. Further, a $13.2 million interest expense that covers issues spanning a period of ten years is unusual. In the two cases cited by the company where the interest on tax deficiencies was previously addressed, the Commission considered expense levels of $2.1 and $1.2 million for Florida Power and $264,000 for PGS. A one-time $13.2 million expense is very material for the Commission to consider without reviewing the very detail that gave rise to such an expense amount.

It is the utility's burden to prove that its requested costs are prudent. Florida Power Corp. v. Cresse, 413 So. 2d 1187, 1191 (Fla. 1982). The record does not contain evidence stating specifically why it was reasonable for the company to fight any of the tax issues, such as early capacity payments, interest capitalization, the ADR[4] repair allowances, the inclusion of CIAC as revenue, or research and experimental costs, just to name a few. The record also does not show the calculation of the amount of interest expense associated with any of these issues if the Commission found any of these amounts to be unreasonable or imprudent.

Staff believes that the Commission should be able to review each circumstance to determine the prudence of incurring those amounts on all of the varied issues involved. As discussed above, the record is inadequate in this regard. Thus, staff does not believe that the utility has met its burden to prove that all of its requested interest expense on tax deficiencies is prudent.

Staff agrees that it is prudent for the utility to attempt to lower its tax expense and that the interest expense associated with tax deficiencies, when deemed prudent, should be included in the above-the-line earnings equation. Thus, to the extent that a company is able to be aggressive on tax issues, without incurring penalties, the Commission should have a policy that allows above-the-line recovery of prudent interest expense on tax deficiencies. If the Commission were to completely disallow this expense, this

---

[4] Although not provided in the record, ADR is an acronym for Asset Depreciation Range.

could discourage utilities from attempting to lower its tax burdens. This could have the unintended result of raising overall costs to the ratepayers.

Alternatively, staff does not believe that the Commission should have a blanket policy of including any and all tax deficiency interest expense in operating income as long as the company can show that amounts in the past justify inclusion of an expense in the future. In TECO's case, if the Commission had the information to review each specific item and found that some of the tax issues were not reasonable for the ratepayers to bear, then the utility's cost/benefit analysis might have a different result.

In addition, while staff believes that the company's cost/benefit analysis from Exhibit 8 reflects a net benefit to the ratepayers, we are not convinced that this analysis alone should be relied upon to determine the prudence of this expense as an above-the-line amount. Staff is concerned that this type of cost/benefit analysis looks at what would have happened in the past to determine what costs should be allowed in the future. We believe that a historical perspective is informative but it should not be the sole factor used to determine prudence on a going-forward basis.

While staff believes that the evidence in the record supports denying the whole cost, the record also allows an interpretation that TECO should get full recovery of this expense. Further, OPC witness Larkin believes that the cost should be denied and TECO witness Bacon contends the cost should be fully allowed. Thus, we have competing testimony and exhibits in the record.

The Commission has addressed this same concern in several prior cases. The most notable case was the Gulf Power decision regarding the inclusion of coal inventory in the working capital calculation. Gulf Power Co. v. FPSC, 453 So. 2d 799 (Fla. 1984). In that case, the Commission was faced with two different policy positions supported by utility and staff witnesses. Neither of these positions were supported by empirical evidence, such as why particular factors were selected, why a particular weight was attached to the factors and how those factors were included in the cost benefit analysis of alternatives. The Commission, disagreeing with both policies, was faced with a record that did not permit the Commission to determine the appropriate policy. Thus, the

Commission reduced the coal inventory to that level it believed to be within a zone of reasonableness.

The Court agreed with the Commission stating that "[I]t is the Commission's prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary. *See United Telephone Co. v. Mayo, 345 So. 2d 648, 654 (Fla. 1977).*" Gulf Power Co. at 805. The Court found that the Commission had sufficient evidence to chose from three alternatives: to allow the company's position without competent substantial evidence, to allow zero, or to make some other reasonable determination. Thus, the Court found that the Commission's choice properly recognized its responsibility to set fair and reasonable rates, among its other statutorily required responsibilities. Further, the Court found that the Commission was precluded by statute and common sense from totally disallowing the fuel inventory in working capital.

Staff believes that the Commission in this case has the same three alternatives available to use. The Commission could rely on TECO's testimony and include the full expense in 1999, although staff believes that the utility has failed to meet its burden and the record does not support full inclusion. Alternatively, the Commission could disallow all of the expense. Staff believes that full disallowance, however, would be detrimental to a desired policy of encouraging a companies to lower their tax burden, and thus, costs to the ratepayer. Allowing zero also would be contrary to common sense and would not provide recovery of fair and reasonable costs. The best alternative, staff believes is to do what the Commission did in the Gulf Power case and allow half of the expense in above-the-line expenses.

In further support of allowing only half of the interest expense in 1999, staff believes that another analogy could be reviewed in determining the reasonableness of this amount. If TECO had recognized that it had a reasonable probability that it might lose some of its tax positions in years prior to 1999, it could have accrued the interest expense ratably over the years 1995 to 1999. If the company had done this, staff believes that it would be conceivable that a much lower expense would have been incurred in 1999. What staff is suggesting is that by accruing the interest expense in earlier years, the company could have normalized the level of the expense and not had such a large amount flow through income in 1999. As discussed in Order No. PSC-92-1197-FOF, issued

October 22, 1992, Florida Power had monthly accruals and amortization of interest on tax deficiencies since 1987. Staff believes that TECO could have very easily employed this same type accounting treatment and should consider this for future tax deficiency interest.

However, to test the reasonableness of the remaining 1999 accrual under this theory, staff would need the breakdown of the amount of interest calculated by year as well as by tax audit cycle. As we discussed earlier, this breakdown is not provided in the record. Exhibit 6, on unnumbered page 11, reflects that one adjustment that the IRS disallowed was $20 million in research expenses in 1994. This IRS adjustment was one of the largest items that the record reflects any possible disallowance. Certainly, if TECO had accrued the possible incurrence of interest for the tax audit cycles for years 1986 to 1998 prior to 1999, the expense in 1999 would be greatly reduced. Staff notes that the Revenue Agent Report (RAR) on which that item is reflected is dated March 8, 2000, but we do not know if that was the first time that the IRS disallowance was communicated to TECO.

In conclusion, staff believes that allowing recovery of half of the requested interest expense on tax deficiencies is the most reasonable alternative available to determining fair and reasonable costs to allow for 1999. TECO's requested interest expense is $13.2 million, or $12,687,672 on a jurisdictional basis. Based on staff's recommendation, 50% of that amount, or $6,343,836, should be allowed as an above the line expense in determining the net operating income for 1999.

ISSUE 10: Does the use of a cost/benefit analysis as a method to determine the prudence of a cost incurred in 1999 violate the proscription against retroactive ratemaking?

RECOMMENDATION: No. The cost-benefit analysis does not violate the proscription against retroactive ratemaking as it is not applying new rates to past consumption. Rather, it is applying a past rationale to determine the prudence of a cost incurred in 1999. (Vining)

POSITION OF THE PARTIES

TECO: No. The Commission did not engage in retroactive ratemaking by employing a cost-benefit study as a tool of analysis in determining the prudence of an expense under the terms of the Stipulation. The Stipulation requires that all reasonable and prudent expenses be allowed in the calculation of TECO earnings.

OPC: It does when the purported inadequacy of past rates is used as a justification for higher rates in the future. Finding that customers should pay higher rates (in the form of lower refunds) in the future to make up for lower rates in the past is the essence of retroactive ratemaking.

STAFF ANALYSIS:

TECO

TECO argues that the consideration of interest on tax deficiencies is not retroactive ratemaking because this proceeding is not a rate case. OPC's reliance on the Florida Cities Water *Company*, Order No. PSC-98-1583-FOF-WS, is misplaced because it was a limited scope proceeding requesting a rate increase. TECO maintains that this proceeding does not involve a request for a change in rates. The filed base rates of TECO remain unchanged. The issue here is what expenses were reasonably and prudently incurred, and can be included in the calculation of TECO's earned rate of return. TECO asserts that there is no question the tax deficiency interest can be considered under the terms of the Stipulation. The cost-benefit analysis is simply a tool of analysis to determine prudence, not an act of retroactive ratemaking. (TECO BR p. 22-23)

The utility relies on City of Miami v. Florida Public Service Commission, 208 So. 2d 249 at 260, (Fla. 1968), which states that the Commission has "the power to prescribe . . . rates prospectively only." TECO contends that if this principle is at all applicable to the stipulation, then the Commission would not be allowed to order a refund at all. Further, TECO argues that OPC seeks to selectively apply a principle which, if applied to the entire agreement, would negate any obligation for refunds. (TECO BR p. 24)

TECO asserts that the matter simply comes down to what was agreed to in the Stipulation. The agreement provides that interest on tax deficiencies related to Polk Power Station will be considered a prudent expense for ratemaking purposes. Accordingly, TECO argues that interest on tax deficiencies related to other matters cannot result in retroactive ratemaking as that category of expense was considered in the Stipulation. (TECO BR p. 25)

TECO maintains that the Commission appropriately found that the utility took income tax positions which were prudent and beneficial to ratepayers despite incurring the interest on tax deficiency expense in 1999. The inclusion of the interest expense turns solely on whether the expense was reasonably and prudently incurred. TECO contends that OPC's attack on the cost-benefit analysis is misplaced, as it is only a tool of analysis, not a form of retroactive ratemaking. (TECO BR p. 26) The point is that the benefits provided to ratepayers based on TECO's tax position outweighed the cost, so the actions were prudent. (TECO RB p. 15) TECO further maintains that events relating to interest on tax deficiencies span over other years, which is the plain nature of how deferred taxes are recorded and IRS audits are developed. (TR 173-174); (TECO RB p. 15)

OPC

OPC argues that TECO is asking for higher rates in the future, in the form of a lower refund obligation, to make up for lower rates in the past, which is the essence of retroactive ratemaking. OPC avers that TECO is couching this request in the form of a cost-benefit study purportedly from the customers' perspective, in order to inveigle the Commission to approve what is retroactive ratemaking. (OPC BR p. 16)

OPC relies on the Commission's decision from 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. In Florida Cities, the utility wanted to recover litigation expenses, not previously claimed in a rate case or elsewhere, via a customer surcharge. The Commission found that the imposition of these costs on customers would constitute retroactive ratemaking as customers would be required to pay for past deficits of the company in future payments. OPC contends that TECO 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, which is the equivalent of netting a surcharge against refunds. OPC argues that TECO should be barred from requiring its customers to pay for the past deficits of the utility in reduced refunds. Further, TECO cannot be allowed to reach back over many years, reevaluate what might have been, and use the hypothetical reduction in deferred taxes to lessen refunds based upon a if-only-we-had-known rationale. (OPC BR p. 16-17)

Finally, OPC avows that there is no substantive difference between higher base rates, a customer surcharge or withheld refunds when the underlying rationale for the financial cost to customers is intended to make up for purported benefits the utility bestowed upon its customers in the past. (OPC RB p. 13-14)

Staff Analysis

Staff agrees with TECO that the use of a cost-benefit analysis to determine the prudence of a cost incurred in 1999 does not violate the proscription against retroactive ratemaking. Our review of the facts of this case and the cases cited by both parties leads to the conclusion that the cost-benefit analysis is only a tool the Commission may use to determine the prudence of expenses. Utilization of the cost-benefit analysis does not constitute retroactive ratemaking as it is not being used to determine new rates applied to past consumption.

The Commission addressed the issue of retroactive ratemaking In re: Petition for Limited Proceeding Regarding Other Postretirement Employee Benefits and Petition for Variance from or Waiver of Rule 25-14.012, F.A.C., by United Water Florida, Inc.,

Docket No. 971596-WS, Order No. PSC-98-1243-FOF-WS when it remarked, at page 13, that:

> This Commission has consistently recognized that ratemaking is prospective and that retroactive ratemaking is prohibited. See City of Miami; Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982); Meadowbrook Utility Systems, Inc. v. Florida Public Service Commission, 518 So. 2d 326 (Fla. 1987); Citizens of the State of Florida v. Florida Public Service Commission, 448 So. 2d 1024 (Fla. 1982); and GTE Florida Inc. v. Clark. See also Ortega Utility Company 95 Florida Public Service Commission 11:247 (1995). The general principle of retroactive ratemaking is that new rates are not to be applied to past consumption. The Courts have interpreted retroactive ratemaking to occur when an attempt is made to recover either past losses (underearnings) or overearnings in prospective rates.... In City of Miami, the petitioner argued that rates should have been reduced for prior period overearnings and that the excess earnings should be refunded...[but the court] deemed to be retroactive ratemaking and [was] prohibited.

Staff disagrees with OPC that Florida Cities should control in this proceeding. In that proceeding, Florida Cities sought to recover legal expenses related to environmental litigation. The utility argued these were extraordinary and non-recurring costs which it should be able to recover by increasing rates based upon the rationale in GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). The Commission disagreed and instead found that recovery of litigation costs would be prohibited as it would constitute retroactive ratemaking. The Commission stated, at page 15, that "FCWC did not request recovery or deferral of the litigation costs in question prior to incurring the costs." The utility would only be permitted to recover costs which would have been allowed anyway in a timely filed case. The expenses in this proceeding have already been the subject of a timely filed case and allowed in Order No. 01-0113 by the Commission. Florida Cities does not apply based upon the facts of this proceeding.

Staff disagrees with TECO's interpretation of the decision in City of Miami v. Florida Public Service Commission, 208 So. 2d 249 (Fla. 1968). In City of Miami, the Court states, at page 259, that "the Commission would have no authority to make retroactive

ratemaking orders." See also Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943). TECO argues that this case, if applied, would not allow the Commission to order any refunds at all. Staff believes that TECO's interpretation is overreaching.

Staff disagrees with OPC's assertion that allowing the expense of interest on tax deficiencies is tantamount to enacting new rates on past benefits. The use of the cost-benefit analysis in this case does not constitute retroactive ratemaking, as it is not the application of new rates to past consumption. Citizens of the State of Florida v. Public Service Commission, 448 So. 2d 1024, 1027 (Fla. 1984). Rather, the cost-benefit analysis examines the effect of what would have happened, but did not, to determine the prudence of the 1999 interest expense on tax deficiencies. This is not retroactive ratemaking. If the Commission were to go back and adjust the prior earnings or the refunds, staff believes that such action would constitute retroactive ratemaking. That is not the case in this proceeding.

Therefore, staff recommends that the use of a cost-benefit analysis as a method to determine the prudence of a cost incurred in 1999 does not violate the proscription against retroactive ratemaking. The cost-benefit analysis is just an analytical tool used to review the appropriateness of a current expense. Staff does not believe that the use of this analysis violates the proscription against retroactive ratemaking.

ISSUE 11: Is OPC equitably estopped from asserting inconsistent positions in this proceeding regarding adjustments not made in the last TECO rate case?

RECOMMENDATION: No. TECO did not rely to its detriment on positions asserted by OPC in this proceeding. Accordingly, OPC cannot be equitably estopped from asserting inconsistent positions in this proceeding regarding adjustments not made in the last TECO rate case. (Vining)

POSITIONS OF PARTIES

TECO: Yes. Having accepted the Commission's consistent interpretation of the Stipulation in prior years and with respect to 1999 on other issues, OPC by its course of conduct under the Stipulation is estopped from urging a different inconsistent position on tax deficiency interest that cuts the other way.

OPC: No.

STAFF ANALYSIS: TECO argues that OPC is estopped from asserting inconsistent positions in this proceeding based upon its acceptance of the terms of the Stipulation in prior years. Also, TECO contends that OPC has accepted the benefits of TECO's calculation of deferred revenues or refunds. These calculations were based on tax positions that gave rise to the assessment of interest on tax deficiencies in 1999. Having accepted these benefits, OPC is estopped from asserting a contrary position with respect to the interest on income tax deficiencies. (TECO BR p. 27-28)

In support of its position, TECO contends that equitable estoppel is present where a person attempts to change his position after representing a contrary position to another who relied upon that representation and who would suffer substantial injury if the inconsistent position was asserted. Head v. Lane, 495 So. 2d 821, (Fla. 4th DCA 1986). Additionally, TECO states that estoppel is based upon the acceptance of benefits from a transaction, contract, instrument, regulation or statute by one having knowledge of the facts, which such person might have rejected or contested. Fla. Jur. 2d. Estoppel §55. (TECO BR p. 27)

OPC argues that TECO raised the issue of estoppel in the hopes of taking refunds away from customers without having to prove anything. OPC disputes that it is urging any inconsistent

positions. Joint acquiescence, vis a vis stipulations with TECO, can hardly be construed as advocacy against TECO. Further, OPC contends it is the job of OPC to raise appropriate issues which might increase refunds. (OPC RB p. 17-18)

Staff believes that the doctrine of equitable estoppel does not bar OPC from asserting inconsistent positions in this proceeding regarding adjustments not made in the last TECO rate case.

In order to demonstrate equitable estoppel, the following elements must be shown: 1) a representation as to a material fact that is contrary to a position asserted later; 2) reliance on that representation; and 3) a detrimental change in position to the party claiming estoppel caused by reliance on the representation. State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). See also United Contractors Inc. v. United Construction Corp., 187 So. 2d 695 (Fla. 2d DCA 1966). Estoppel operates to prevent the benefitting party from repudiating the accompanying or resulting obligation. Doyle v. Tutan, 110 So. 2d 42, 47 (Fla. 3d DCA 1959).

Staff contends that TECO has failed to demonstrate that equitable estoppel should be applied in this proceeding. Without reaching the question of whether or not OPC asserted inconsistent positions in this proceeding, TECO did not rely on OPC's representations in this proceeding to its detriment. TECO did not suffer a detrimental change in position caused by reliance on the representations of OPC. Further, OPC did not attempt to repudiate its obligations under the Stipulations agreed to by both parties. As such, TECO cannot reasonably argue that OPC should be estopped from asserting inconsistent positions in this proceeding.

ISSUE 12: What effect, if any, does Section 120.66, Florida Statutes (2000), have on the Commissioners' ability to engage in ex parte communications with staff members?

RECOMMENDATION: None. The staff has not engaged in any "prosecution or advocacy" in this proceeding which would result in the application of Section 120.66, Florida Statutes, to staff in these proceedings. (Vining)

POSITION OF THE PARTIES

TECO: Section 120.66, F.S., is applicable to proceedings held under Sections 120.569 and 120.57, F.S. Staff has not engaged in any "prosecution or advocacy" in the context of such a proceeding or at any time in this docket. Rather, the staff has advised the Commission, through a written recommendation, based on investigation and review.

OPC: The cost benefit analysis accepted by the Commission in its PAA order resulted from a collaboration between the company and staff. Communications with certain staff members would therefore constitute prohibited ex parte communications under the statute.

STAFF ANALYSIS: TECO argues that Section 120.66, Florida Statutes, was not even applicable to the proceedings until the protest was filed by OPC. Before OPC's protest, the activities were preliminary to any Section 120.569 or 120.57 proceedings. Proceedings under Sections 120.569 or 120.57, F.S., commence once an affected party challenges the proposed agency action. After OPC filed its protest, Section 120.66, Florida Statutes, did govern the proceedings; however, staff has not engaged in any "prosecution or advocacy" in the context of such a proceeding or at any time in this docket. Rather the staff has advised the Commission, via a written recommendation, on the appropriate proposed agency action. As such, Section 120.66, Florida Statutes, does not apply in this proceeding. (TECO BR p. 29-30)

The utility also argues that OPC incorrectly characterized the staff as an advocate simply because the staff recommended the Commission issue a proposed agency action allowing the inclusion of the expense. If that were the test for advocacy, then the staff would never be in an advisory role. The effect of OPC's assertion is that the staff is an advocate if the staff member disagrees with

OPC's position. OPC's assertions are designed to undermine the focus of the real issues in this case. (TECO BR p. 30)

OPC argues that staff members acted contrary to Section 120.66, Florida Statutes, by advocating the inclusion of interest expense to derive TECO's 1999 earnings, and should be precluded from engaging in ex parte communications in this docket. (OPC BR p. 28) The $10.7 million cost-benefit analysis, which formed the basis for the staff recommendations, resulted from interactions between TECO and staff. OPC avers that these interactions clearly show that staff engaged in advocacy about a matter closely related to the issues considered at the August 27, 2001, hearing. (OPC BR p. 30-31)

Staff believes that Section 120.66, Florida Statutes, does not apply to the actions of staff in this proceeding because no "prosecution or advocacy" by the staff occurred. Staff acted in an advisory fashion, providing the Commissioners with recommendations based on investigation and review of information provided by both parties.

Section 120.66(1)(a), Florida Statutes, states:

> "In any proceeding under ss. 120.569 and 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the...presiding officer by:
> (a) ...any...public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter...
> Nothing in this subsection shall apply to ***advisory staff members who do not testify on behalf of the agency in the proceeding***...(emphasis added).

Staff did not "advocate" inclusion of the cost-benefit analysis provided by TECO. Staff chose to utilize this analysis because they deemed it reasonable based upon the information available. Staff interactions with TECO were designed to correct errors in the cost-benefit analysis, not to provide an avenue for advocacy of a more beneficial position for TECO. Staff utilized this information to formulate recommendations to the Commissioners in an advisory capacity.

Section 120.66, Florida Statutes, has been interpreted by this agency to prohibit any staff member who testifies in a proceeding from participating in the further preparation of the staff recommendation or advising the Commissioners. No members of the Commission staff testified at the hearing for this matter. Also, this proceeding is de novo, requiring staff to prepare recommendations on the protested issues based only on the record developed as part of the hearing. Therefore, pursuant to Section 120.66, F.S., no staff members of the Commission should be prohibited from participating in the preparation of the staff recommendation or advising the Commissioners on this matter.

In summary, staff believes that Section 120.66, Florida Statutes, does not apply to staff's actions in this proceeding. The staff acted in an advisory fashion, not as advocates. As such, Section 120.66, F.S., does not have any effect on the ability of Commissioners to engage in ex parte communications with staff in this proceeding.

ISSUE 13: What is the appropriate net operating income for 1999?

RECOMMENDATION: The appropriate net operating income for 1999 is $182,762,385. (Brinkley)

POSITION OF THE PARTIES

TECO: The appropriate net operating income is $178,865,105 for 1999. The same amount as already approved by the Commission in Order No. 0113.

OPC: $186,659,086.

STAFF ANALYSIS: Order No. PSC-01-0113-PAA-EI, issued January 17, 2001, established net operating income at $178,865,684. The staff recommendation to remove 50% of interest on tax deficiencies expense of $6,343,836 ($3,896,701 net-of-tax) increases net operating income to $182,762,385 as illustrated in Attachment A.

ISSUE 14: What is the amount to be refunded?

RECOMMENDATION: The amount to be refunded is $10,512,378 through September 30, 2001, plus interest accrued from October 1, 2001, until the refund is made to customers. (Brinkley)

POSITION OF THE PARTIES

TECO: The amount to be refunded is $6,102,126 through December 31, 2000 plus interest accrued until the refund is made to customers. Such refund shall not be commenced until a final non-appealable order (by the Commission or a court, as the case may be) has been issued with respect to the calculation of the refund.

OPC: $14,422,766 plus additional accrued interest.

STAFF ANALYSIS: Order No. PSC-01-0113-PAA-EI, issued January 17, 2001, established the refund at $6,102,126 according to terms of the stipulation approved in Order No. PSC-96-1300-S-EI, issued October 24, 1996. The terms of the stipulation included a mechanism for refunding 60% of any revenues which contributed to an ROE in excess of 12.00% up to a net ROE of 12.75%. The staff recommendation to remove 50% of interest on tax deficiencies does not cause net ROE to exceed 12.75%. Attachment D summarizes the amount to be refunded.

The staff recommendation to reduce $6,343,836 of interest expense ($3,896,701, net-of-tax) causes an additional $6,232,758 of Revenues to be subject to refund at 60%. This increases the pre-interest refund to customers to $9,304,757.

Interest on the refund was calculated using the average monthly commercial paper rate compounded monthly and was calculated to be $1,207,621 through September 30, 2001. The total amount to be refunded including interest through September 30, 2001, is $10,512,378. Additional interest from October 1, 2001, should be accrued similarly until the refund is made to the utility's customers.

ISSUE 15: Should this docket be closed?

RECOMMENDATION: The docket should be closed after the time for filing an appeal has run. (Elias, Brinkley)

STAFF ANALYSIS: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.

TAMPA ELECTRIC COMPANY
REVIEW OF 1999 EARNINGS

ATTACHMENT A
DOCKET NO. 950379-EI

	As Filed FPSC Adjusted Basis	Asset Transfer	Change in Depreciation Rates	ECRC Liability	Deferred Revenue Accrual	Industry Assn. Dues	Adv'sing	ECRC Depr.	OUC Transm'sion Line	Gross Receipts Tax	Interest Reconc.	Interest on Tax Defic.	Total Adjustments	Total Adjusted Rate Base
RATE BASE														
Plant in Service	$3,461,523,114												$0	$3,461,523,114
Accum. Depreciation	(1,453,094,672)	(61,003)	952,705										891,702	(1,452,202,971)
Net Plant in Service	2,008,428,442	(61,003)	952,705	0	0	0	0	0	0	0	0	0	891,702	2,009,320,144
Property Held for Fut. Use	31,218,432												0	31,218,432
Construction WIP	48,904,076	0	0	0	0	0	0	0	0	0	0	0	0	48,904,076
Net Utility Plant	2,088,550,950	(61,003)	952,705	0	0	0	0	0	0	0	0	0	891,702	2,089,442,652
Working Capital	27,272,486	0	0	116,591	0	0	0	0	0	0	0	0	116,591	27,389,077
Total Rate Base	$2,115,823,436	($61,003)	$952,705	$116,591	$0	$0	$0	$0	$0	$0	$0	$0	$1,008,293	$2,116,831,729
INCOME STATEMENT														
Operating Revenues	$673,131,789	$0	$0	$0	$4,000,000	$0	$0	$0	$0	$0	$0	$0	$4,000,000	$677,131,789
Operating Expenses.														
O & M - Fuel	10,980,860												0	10,980,860
O & M - Other	234,627,583					(20,250)	(29,136)					(6,343,836)	(6,393,222)	228,234,362
Depr. & Amort.	137,203,881		(1,905,409)					(507,000)					(2,412,409)	134,791,472
Taxes Other Than Inc.	47,435,458								(43,128)	(158,608)			(201,736)	47,233,722
Income Taxes - Current	86,416,568		735,012		1,543,000	7,811	11,239	195,575	16,637	61,183	(556,034)	2,447,135	4,461,558	90,878,126
Deferred Inc. Taxes (Net)	(13,465,313)												0	(13,465,313)
Investment Tax Cr. (Net)	(4,263,365)												0	(4,263,365)
(Gain)/Loss on Disp.	(20,459)		0	0	0	0	0	0	0	0	0	0	0	(20,459)
Total Operating Exp.	498,915,213	0	(1,170,397)	0	1,543,000	(12,439)	(17,897)	(311,425)	(26,491)	(97,425)	(556,034)	(3,896,701)	(4,545,809)	494,369,404
Net Operating Income	$174,216,576	$0	$1,170,397	$0	$2,457,000	$12,439	$17,897	$311,425	$26,491	$97,425	$556,034	$3,896,701	$8,545,809	$182,762,385
Overall Rate of Return	8.23%												0.40%	8.63%
Return on Equity	11.95%												1.00%	12.95%

TAMPA ELECTRIC COMPANY
STAFF ADJUSTED EARNINGS SURVEILLANCE REPORT
AVERAGE TEST YEAR ENDING DECEMBER 31, 1999

ATTACHMENT B
DOCKET NO. 950379-EI

	Retail Per Books	Company Specific	Company Pro Rata	Company Adjusted	Staff Specific	Staff Pro Rata	Staff Adjusted	Weight	Cost Rate	Weighted Cost
LONG TERM DEBT	$686,573,509	($5,548,455)	($73,309,204)	$607,715,850	$23,416,300	$360,699	$631,492,849	29.83%	6.54%	1.95%
SHORT TERM DEBT	87,022,511	(212)	(9,367,549)	77,654,750		44,381	$77,699,131	3.67%	5.00%	0.18%
PREFERRED STOCK	0	0	0	0		0	$0	0.00%	0.00%	0.00%
CUSTOMER DEPOSITS	53,866,130	0	(5,798,440)	48,067,690		27,471	$48,095,161	2.27%	6.12%	0.14%
COMMON EQUITY	1,154,445,058	723,930	(124,348,611)	1,030,820,377	(23,416,300)	575,742	$1,007,979,819	47.62%	12.00%	5.71%
DEFERRED REVENUE	7,705,739		0	7,705,739			$7,705,739	0.36%	5.06%	0.02%
DEFERRED TAXES	341,426,601	1,530,664	(36,917,767)	306,039,498			$306,039,498	14.46%	0.00%	0.00%
FAS 109 DEFERRED TAXES	0	0	0	0			$0	0.00%	0.00%	0.00%
TAX CREDITS - ZERO COST	0	0	0	0			$0	0.00%	0.00%	0.00%
TAX CREDITS - WEIGHTED COST	42,392,160	(10,430)	(4,562,198)	37,819,532	0	0	$37,819,532	1.79%	9.90%	0.18%
TOTAL CAPITAL	$2,373,431,708	($3,304,503)	($254,303,769)	$2,115,823,436	$0	$1,008,293	$2,116,831,729	100%		8.18%
			EQUITY RATIO	60.06%		EQUITY RATIO	58.70%			

TAMPA ELECTRIC COMPANY
REVIEW OF 1999 EARNINGS

ATTACHMENT C
DOCKET NO. 950379-EI

INTEREST RECONCILIATION	Amount	Cost Rate	Interest Exp.	Tax Rate	Effect on Income Tax
Long Term Debt	$631,492,849	6.54%	$41,299,632		
Short Term Debt	77,699,131	5.00%	3,884,957		
Customer Deposits	48,095,161	6.12%	2,943,424		
Deferred Revenue	7,705,739	5.06%	389,910		
Tax Credits - Weighted Cost	37,819,532	2.52%	952,704		
Interest Expense			49,470,627		
Adj. Company Interest Expense			48,029,192		
Adjustment			($1,441,435)	38.575%	($556,034)

TAMPA ELECTRIC COMPANY
1999 REFUND CALCULATION

ATTACHMENT D
DOCKET NO. 950379-EI

Adjusted Rate Base			$2,116,831,729
Adjusted Achieved Rate of Return	8.63%		
Allowed Maximum Rate of Return at 12.00% ROE	8.18%		
Excess Rate of Return		x	0.45%
Excess Net Operating Income			9,525,743
Revenue Expansion Factor		x	1.628002
Revenues in Between 12.00% and 12.75% ROE			15,507,928
Less: 40% Sharing			(6,203,171)
Amount to be Refunded			9,304,757
Plus: Interest from Jan. 1, 1999 to Sept. 30, 2001			1,207,621
Total Amount to be Refunded			**$10,512,378**