

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

BEFORE: CHAIRMAN E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 36

DATE: Tuesday, December 4, 2001

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(850)878-2221

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15537 DEC 13 2001

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PARTICIPANTS:

BOB ELIAS and TRICIA MERCHANT, FPSC Staff.

STAFF RECOMMENDATION

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.

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.

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.

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

ratemaking 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.

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.

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.

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.

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.

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.

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.

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.

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

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

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.

ISSUE 15: Should this docket be closed?

RECOMMENDATION: The docket should be closed after the time for filing an appeal has run.

1 CHAIRMAN JACOBS: Item 36.

2 MS. MERCHANT: Commissioners, Item No. 36
3 is staff's recommendation regarding the
4 determination of regulated earnings of Tampa
5 Electric Company pursuant to stipulations for
6 the calendar year 1999. This recommendation
7 addresses various issues surrounding the issue,
8 the inclusion of interest expense on tax
9 deficiencies and whether that should include
10 above-the-line income for 1999 surveillance
11 purposes.

12 Staff is prepared to address any questions
13 you may have regarding this recommendation.

14 CHAIRMAN JACOBS: Commissioners, shall we
15 go issue by issue?

16 Sounds like resounding approval on that.

17 COMMISSIONER BAEZ: I only really had
18 questions on one issue.

19 COMMISSIONER JABER: Yes, exactly.

20 CHAIRMAN JACOBS: Issue -- let me guess.

21 Okay. So with the exception of Issue 6, we
22 can go -- was that it, Issue 6?

23 COMMISSIONER BAEZ: That's fine.

24 CHAIRMAN JACOBS: Let's go ahead and take
25 that up, and then the other issues, sounds like

1 we can come back and take them up in summary
2 fashion. Sounds like a reasonable thing?

3 COMMISSIONER JABER: Commissioner Baez, for
4 whatever it's worth to you, my questions really
5 are generic policy questions before I even get
6 to the issues. I don't know that I can --

7 CHAIRMAN JACOBS: Ladies first. Executive
8 call.

9 COMMISSIONER JABER: Ladies don't always
10 want to go first.

11 COMMISSIONER BAEZ: But sometimes they have
12 to go first.

13 COMMISSIONER JABER: All right. Here's my
14 generic policy question. It seems to me that
15 staff's recommendation is again an attempt to
16 compromise as it relates to the sharing of the
17 expense issue. But, Tricia, what I got out of
18 your recommendation was, there's flexibility
19 based on the record, and it hinges on the policy
20 approach the Commissioners want to take. If we
21 want to send a very strong signal that companies
22 should aggressively fight issues in front of a
23 governmental body, whether it be the IRS in this
24 case or a state agency, then perhaps we want to
25 make sure that they have every incentive to do

1 that. Or to not allow the expenses to flow
2 through at all, which is still within our
3 discretion, might have the opposite effect. We
4 would be sending a signal to the utility that
5 they should never be aggressive in fighting
6 issues in front of governmental bodies.

7 You sort of took a middle approach and you
8 said it's important to send the incentive. The
9 record exists for sending the incentive. You
10 didn't believe the record existed for
11 determining how much of the sharing.

12 MS. MERCHANT: That's correct, or exactly
13 how much of the interest expense in 1999 was
14 prudently incurred, what were the items, what
15 were the breakdowns for the types of
16 deficiencies that they had.

17 COMMISSIONER JABER: Okay. My policy
18 question is this. The record does support 100%
19 of the recovery, basically no sharing, but
20 allowing the company to sort of have full
21 incentive.

22 MS. MERCHANT: If the Commission believes
23 that just relying on the cost/benefit analysis,
24 including only the deferred revenue benefits, if
25 you believe that, then, yes, I believe that you

1 could allow 100% of the cost.

2 CHAIRMAN JACOBS: Just based on a deferred
3 revenue analysis, not the other.

4 MS. MERCHANT: Just based on the
5 cost/benefit analysis, that there are benefits
6 that occurred because this company took the tax
7 positions that it did.

8 COMMISSIONER JABER: Right. And it doesn't
9 affect that there is a refund. What's affected
10 is the amount of the refund, depending on the
11 policy approach that we take.

12 MS. MERCHANT: That's correct.

13 COMMISSIONER JABER: There is no question
14 in your mind that the company acted prudently in
15 fighting the IRS issue aggressively, the income
16 tax on -- the interest expense on the amount
17 owed?

18 MS. MERCHANT: On a generic basis, yes, I
19 think the company acted prudently. On a
20 specific item-by-item basis, I don't think we
21 can tell.

22 CHAIRMAN JACOBS: I guess my questions are
23 more of a generic -- pretty much of a generic
24 nature as well. And in conducting an analysis
25 ex post facto of the company's actions, we've

1 attempted to go in and assess basically the
2 facts as they existed at that time and how the
3 company responded to those facts; correct?

4 MS. MERCHANT: To the extent that the
5 information was in the record. There was not a
6 whole lot of detail in the record that showed
7 specifically -- there was some information that
8 showed these were the types of issues that they
9 were taking before the IRS.

10 CHAIRMAN JACOBS: Right. Did the IRS in
11 their ruling give any analysis that says, okay,
12 we -- kind of like this is a good domain of
13 debate between us and taxpayers, and their
14 ruling -- and I had intended to get a copy of
15 that to read it, but I did not. So is the IRS
16 acknowledging that we accept that this is a
17 valid subject, these are valid subjects for
18 companies to step out on and basically assert a
19 position?

20 MS. MERCHANT: I'm not sure that the record
21 goes to that extent. The IRS did not penalize
22 the company, and that's in the record. So the
23 individual basis behind each of these issues,
24 the IRS -- I don't believe that the record shows
25 specifically what the IRS believed on a given

1 issue, but in general these were the issues --
2 the IRS did not penalize them on these issues.

3 COMMISSIONER BAEZ: Ms. Merchant, should
4 the fact that they weren't penalized have any --
5 I mean, is that any indication that --

6 MS. MERCHANT: Yes. The fact that they
7 were not penalized shows that they were not
8 overly aggressive in -- if they had been
9 penalized, then --

10 COMMISSIONER BAEZ: There's an imprudence
11 there.

12 MS. MERCHANT: Then we would consider some
13 of that amount to possibly be imprudent, if they
14 went to the extent that they were going to be
15 penalized. But they were not penalized.

16 COMMISSIONER BAEZ: In any case, in any of
17 these instances.

18 MS. MERCHANT: For these examples.

19 COMMISSIONER BAEZ: Right.

20 MS. MERCHANT: Or for these tax issues, I
21 should say.

22 COMMISSIONER JABER: Commissioners, you
23 know, generically speaking, on this proceeding,
24 I've never been troubled by the fact that the
25 company aggressively challenged the IRS on the

1 deficiencies. That has never been a question in
2 my mind with respect to their being prudent in
3 their actions.

4 I approached this docket in this fashion.
5 I looked at the settlement first and then the
6 plain reading of the settlement. I just kept
7 going back to the words. Whether the parties
8 had a meeting of the minds, I don't know,
9 because, you know, obviously, we weren't a party
10 to the settlement. But I looked at the plain
11 meaning of the words and realized that for
12 whatever reason, this situation, in my opinion,
13 and especially after the hearing, didn't fall
14 into that part of the settlement related -- as a
15 matter of fact, it did the opposite. I think
16 the exact words were all reasonable and prudent
17 expenses shall be recovered. And I think this
18 was a reasonable and prudent expense, so that
19 took care of the settlement issue for me.

20 And then it was, well, obviously, they were
21 prudent, and we want to encourage that
22 challenge, but we don't want to send the very
23 extreme signal where -- go off and challenge
24 every little thing, because you'll be protected
25 in the ratemaking process. I don't want to do

1 that. And I'm comforted again by the approach
2 staff took, because they will analyze these
3 situations on a case-by-case basis.

4 50-50, although legally we're allowed to do
5 it because there's a range and there's a case
6 that says we can look at our, you know,
7 expertise in the area and determine a number
8 based on the range, I know that that can be
9 done. But I think this is one of those cases
10 that justify not sharing, because the benefits
11 that the customers received were benefits
12 associated to keeping the tax expense down.

13 And I offer these comments because I can
14 make a motion, but I don't want to take away
15 from the discussion. That's where I am. This
16 is -- if we deny staff's recommendation on the
17 main issue and say that 50-50 isn't appropriate
18 in this limited case, I don't want to preclude
19 that some sharing at some point may be necessary
20 or that companies shouldn't rely on this
21 decision and think that they will always have a
22 buffer in the ratemaking process. I think the
23 amount of the benefit that was gained by the
24 consumers in this case warrants our being
25 proactive in sending an after-the-fact signal

1 that they acted appropriately in this case.

2 COMMISSIONER BAEZ: Well, Commissioner, I
3 guess as it turns out, whatever questions I may
4 have had were generic as well. Here's the way
5 that I approached it.

6 First of all, this docket was opened
7 originally protesting a PAA action in which
8 prudence was determined. Now, I know that that
9 should have nothing to do with the instant
10 case. However, it became a contract, an issue
11 of contract interpretation. And in my mind,
12 once the contract interpretation issue was
13 answered, we interpreted the term whether it
14 included all anticipated additional expenses or
15 just the ones that were explicitly enumerated.
16 Once that issue would have been developed or
17 determined, then all the other issues would have
18 fallen out.

19 I don't believe that there should have been
20 -- maybe in retrospect, it's my fault for
21 allowing it to kind of develop that way, but I
22 don't believe that we were ever considering an
23 issue of how much money was going to be allowed.
24 In my mind -- and I could be wrong processwise,
25 but in my mind, the prudence and the entirety of

1 the number that should have been in question or
2 would have been in question had been somehow
3 determined beforehand, at least in my mind, the
4 way that I was thinking about it.

5 And it never -- I never had a doubt but
6 that if it was a contract interpretation
7 situation, then an interpretation one way or the
8 other would have decided what the ultimate
9 number was. To me, any play in between -- I
10 understand that we have all that discretion, but
11 any play in between as to whether it was zero or
12 all of it wouldn't have been the place for it as
13 a result of the challenge that OPC offered.

14 So I guess to my way of thinking, there was
15 never any concern as to whether there should be
16 sharing or not. I think we can -- I'll accept
17 your suggestion that there should be a signal or
18 some notation made in an order that says this is
19 a case-by-case basis, it continues to be a
20 case-by-case basis, and it shouldn't be taken as
21 precedent that 100% recovery will be appropriate
22 every time in every case.

23 However, that's not what I felt -- that's
24 not what I took this docket to be about. This
25 docket was about how a settlement agreement was

1 going to be interpreted. And once that was
2 determined, there wasn't going to be a question
3 on an issue that I think we had spoken to
4 before.

5 I'm also not comfortable with the fairness
6 of saying you go out and take aggressive
7 positions, and even though it's not inconsistent
8 with other situations, with other similar
9 situations in which all the recovery had been
10 allowed, because of some order of magnitude on
11 what the numbers are or how long these
12 deficiencies have been carried, that we're going
13 to take a look at the number. I think that's
14 kind of sandbagging. At least that's the way it
15 felt to me.

16 COMMISSIONER JABER: Yes. And actually, it
17 might be that the bigger the number, the more
18 aggressive they need to be. There are
19 situations like that.

20 COMMISSIONER BAEZ: Yes. And I realize
21 that this is -- also, I just wanted to say, I
22 think what made this magnitude an issue or the
23 materiality or the number being so big is the
24 number of years that this was being carried on.
25 If I'm not mistaken, there were some tax issues

1 that were being carried over since the late
2 '80s. So, you know, that's just a function of
3 -- it was more a function of the timing of it
4 than anything else. I wasn't concerned so much
5 by the size of the number. And I think -- long
6 story short, I think I'm more comfortable
7 standing by what I believe was the original
8 decision and let it stand at that.

9 CHAIRMAN JACOBS: well, my approach to this
10 is actually a combination of the two concerns.
11 One is, we do have a stipulation that the
12 parties entered into. And if we're going to
13 give credence and credibility to the
14 negotiations that happened in the context of
15 those stipulations, then we have to be very
16 concerned about how we give them effect here
17 now.

18 Alternatively, we have a strategy that was
19 undertaken that clearly had some benefits to
20 ratepayers which you cannot simply toss aside.
21 You cannot ignore those benefits.

22 what I found myself getting back to is the
23 policy issue here. We will -- our action will
24 give direction and incent some conduct. I am
25 concerned that we be very clear about what

1 conduct we want to incent.

2 If at the time these tax positions were
3 taken the cost/benefit analysis was undertaken
4 and done, and the risk to the company assessed
5 and risk to the ratepayers assessed, and then it
6 turns out that -- however that decision
7 ultimately wound up being resolved, I have a lot
8 of confidence in that strategy, because that's
9 where the balancing needs to occur. That's
10 where the give and take needs to occur, at the
11 time the risk to both the company and the
12 ratepayers is fully assessed before you engage
13 in and take that position, and then our process
14 I believe should then be simply a confirmation
15 that that balancing of interests occurred.

16 I think it's great, and it should be that
17 on average, the guesses were good, the guesses
18 were on point, that the analysis that was done
19 is a good analysis, and on average, we should
20 see that ratepayers see benefits that accrue to
21 them from this conduct.

22 If I would see then -- ultimately see
23 results where, even though the aggressive
24 positions were taken, but ultimately I don't see
25 the results coming forward, that should speak to

1 the prudence of those actions as well.

2 The challenge here is I believe that --
3 first of all, I don't know that we had given
4 enough direction initially on that, I think, we
5 as the regulator had given. So then absent
6 that, I have to look at then -- and we're
7 fortunate enough here to have the expertise, if
8 you will, although somewhat in a removed state,
9 and perhaps even in an indirect state. I have
10 to look at what the expert agency would say as
11 to this. And so it carries great weight for me
12 that the IRS took a look at this and basically
13 determined that, well, it's within the range of
14 reasonableness to dispute this, or not so much
15 to dispute this, but to take these positions,
16 and even if they lose, we won't penalize them.

17 I still believe, however, that if we're
18 going to say that we think we want to see this
19 conduct, I want to see a better record. And I
20 think we absolutely have to do this on a
21 case-by-case basis. I want to understand that
22 at the time these positions were taken that
23 these cost/benefit analyses were done. And I
24 quite frankly am not saying that they weren't in
25 this case. In fact, I think the company's proof

1 is -- I think they've done a significant job of
2 that.

3 I'm suggesting that from a public policy
4 standpoint that if we're saying that we think
5 it's a reasonable strategy to take aggressive
6 tax positions, that it is done in a very
7 informed, a very deliberate, and a very
8 professional manner at the time the positions
9 are taken so that we can -- with the
10 disadvantage of looking after the fact, can come
11 and impress some level of objectivity to our
12 decision-making. That's much more important
13 here than the result that we achieve in this
14 particular decision, that we have in some way,
15 form, or fashion achieved objectivity in how we
16 reviewed this conduct after the fact.

17 And that is a concern for me under these
18 facts. I think staff has done an analysis that
19 I think is extensive. However, I think where I
20 come down is again, when I look at the totality
21 of the circumstances, I see that apparently this
22 was a -- there was a range of reasonableness
23 here that the IRS accepted, at least as to the
24 ability to take these positions initially. And
25 so I think that carries considerable weight for

1 me.

2 But I want to emphasize again that on a
3 going-forward basis, when this issue comes up, I
4 would make sure that we as an agency dig into
5 the issues, what were the nature of the
6 calculations, what was the nature of the
7 cost/benefit analysis done at the time the
8 positions were taken, so that we know the risk
9 that is on the company going forward and the
10 risk that is on the ratepayer going forward.

11 And again, I don't think we need to say in
12 every instance that there was a 100% success
13 rate for the position that was taken. But on
14 average, that's how we balance it out. On
15 average, the ratepayers should see the benefit
16 of these tax positions taken. And then, in my
17 mind, we have some manner of objectivity in the
18 future to take a look at these transactions and
19 determine, okay, this was within reason, this
20 was prudent.

21 And having said that, did I hear --

22 COMMISSIONER JABER: I can move Issues 1
23 through 8 if you all don't have questions on 1
24 through 8.

25 COMMISSIONER BAEZ: Well, Commissioner, if

1 I'm reading the tea leaves correctly here, I
2 just have a question for staff. A denial of
3 staff on Issue 9, how does that impact the
4 previous issues? I mean, is there anything that
5 would fall out differently?

6 MS. MERCHANT: No.

7 COMMISSIONER BAEZ: There wouldn't. So --

8 COMMISSIONER JABER: Go ahead, Bob, because
9 I'm reading 1 through 8 to be those foundation
10 questions, the settlement, the cost/benefit
11 analysis.

12 MR. ELIAS: Just a point of clarification.
13 Issue 7 was subsumed in Issue 9, so it would be
14 1 through 6 and 8.

15 COMMISSIONER JABER: But, you know, to play
16 it safe, why don't we just go issue by issue,
17 because we don't want to find out later we have
18 to come back.

19 So Issue 1 dealt with the settlement,
20 whether the inclusion of the expense was
21 consistent with the settlement. I can move
22 staff on Issue 1.

23 COMMISSIONER BAEZ: Second.

24 CHAIRMAN JACOBS: Moved and seconded. All
25 in favor?

1 COMMISSIONER BAEZ: Aye.

2 COMMISSIONER JABER: Aye.

3 CHAIRMAN JACOBS: Aye. Opposed? Show
4 Issue 1 is approved. Issue 2.

5 COMMISSIONER JABER: Issue 2, I can move
6 staff on Issue 2.

7 COMMISSIONER BAEZ: Second.

8 CHAIRMAN JACOBS: Just a moment, please.

9 COMMISSIONER JABER: Issue 3 --

10 CHAIRMAN JACOBS: Just a second.

11 COMMISSIONER JABER: Oh, I'm sorry.

12 CHAIRMAN JACOBS: My only problem here is
13 that -- I don't know. I guess I'm okay on that.
14 Okay. Motion and a second. All in favor?

15 COMMISSIONER JABER: Aye.

16 CHAIRMAN JACOBS: Aye. Opposed? Show
17 Issue 2 is approved. Issue 3.

18 COMMISSIONER JABER: Move staff on Issue 3.

19 COMMISSIONER BAEZ: Second.

20 CHAIRMAN JACOBS: Moved and second. All in
21 favor?

22 COMMISSIONER JABER: Aye.

23 COMMISSIONER BAEZ: Aye.

24 CHAIRMAN JACOBS: Aye. Opposed? Show
25 Issue 3 is approved. Issue 4.

1 COMMISSIONER JABER: Issue 4, I would move
2 staff.

3 COMMISSIONER BAEZ: Second.

4 CHAIRMAN JACOBS: Moved and seconded. All
5 in favor?

6 COMMISSIONER JABER: Aye.

7 COMMISSIONER BAEZ: Aye.

8 CHAIRMAN JACOBS: Aye.

9 COMMISSIONER JABER: Issues 5 cleans up the
10 cost/benefit analysis a little bit, so I would
11 move staff on Issue 5.

12 COMMISSIONER BAEZ: Second.

13 CHAIRMAN JACOBS: Moved and seconded. All
14 in favor?

15 COMMISSIONER JABER: Aye.

16 COMMISSIONER BAEZ: Aye.

17 CHAIRMAN JACOBS: Aye. Show Issue 5 is
18 approved. Issue 6.

19 COMMISSIONER JABER: Issue 6, I would move
20 staff.

21 COMMISSIONER BAEZ: Second.

22 CHAIRMAN JACOBS: Subject to my prior
23 comments, I'm going to vote in favor of this,
24 but I may in all these cost/benefit analysis
25 issues write something that encompasses my

1 comments.

2 Motion and a second. All in favor?

3 COMMISSIONER JABER: Aye.

4 COMMISSIONER BAEZ: Aye.

5 CHAIRMAN JACOBS: Aye. Show Issue 6 is
6 approved. Issue 7.

7 COMMISSIONER JABER: Issue 7 we don't need
8 to vote on. Issue 8, I would move staff.

9 COMMISSIONER BAEZ: Second.

10 CHAIRMAN JACOBS: Moved and seconded. All
11 in favor?

12 COMMISSIONER JABER: Aye.

13 COMMISSIONER BAEZ: Aye.

14 CHAIRMAN JACOBS: Aye. Show Issue 8 is
15 approved. Issue 9.

16 COMMISSIONER JABER: Issue 9, generically
17 I would want to allow recovery of all of the
18 requested interest expense on tax deficiencies
19 because the approach taken by the company is
20 prudent. Is that enough, Bob Elias? I mean,
21 how --

22 MR. ELIAS: I believe, consistent with the
23 prior discussion, that we have a good basis for
24 understanding the rationale behind that
25 decision.

1 COMMISSIONER JABER: Okay.

2 MR. ELIAS: That's sufficient.

3 COMMISSIONER JABER: Because it's not
4 exactly how you worded the issue, but that's
5 okay.

6 MR. ELIAS: I understand, I think, with
7 sufficient clarity to craft an order that
8 reflects the decision.

9 COMMISSIONER JABER: Commissioner Baez, my
10 point is, staff takes the --

11 COMMISSIONER BAEZ: It's a different
12 grounds.

13 COMMISSIONER JABER: Yes.

14 COMMISSIONER BAEZ: That's what it is.
15 You're not actually denying, but --

16 COMMISSIONER JABER: It would be to find
17 the expenses reasonable and prudent because the
18 proactive approach taken by the company in
19 challenging those issues was prudent and
20 benefits the overall body of general ratepayers
21 in that it limited the tax expense.

22 COMMISSIONER BAEZ: Well, I guess -- as
23 part of your statement, you said it benefited
24 the ratepayers, so I guess -- aren't you
25 implying somehow that the cost/benefit analysis

1 was adequate?

2 COMMISSIONER JABER: Right, yes.

3 COMMISSIONER BAEZ: Isn't that fact that
4 you're just denying staff --

5 CHAIRMAN JACOBS: That may lose me if you
6 go that far.

7 COMMISSIONER JABER: Well, that's why I'm
8 asking these questions, because staff says the
9 cost/benefit analysis is not adequate. I think
10 it is.

11 COMMISSIONER BAEZ: And I don't have any
12 problem with that. I just want to be clear on
13 what we're saying, because that becomes the
14 grounds for whatever.

15 CHAIRMAN JACOBS: Here's my point. The
16 implication is that the mere taking of the
17 position in and of itself and some measure of
18 benefit afterwards equals prudence. And my
19 whole point is that there is a deeper, more
20 robust analysis of how the position was taken,
21 what IRS provisions were in play, what were the
22 prior rulings of IRS on those positions. A
23 deeper, more robust discussion is necessary more
24 than just the fact an aggressive position was
25 taken. And what I want to say here is that I'm

1 prepared to accept the positions here because I
2 see that an indirect opinion by the prevailing
3 agency seems to give some credence to that. But
4 in the future, I would hope that we would engage
5 in such a more robust discussion about the
6 decision, the strategies, and the factors in
7 play at the time the decision was made.

8 COMMISSIONER BAEZ: Well, Mr. Chairman, I
9 guess I don't disagree that more is better in
10 situations on issues like this. But I guess --
11 are you saying then that the cost/benefit
12 analysis as presented here meets with your
13 satisfaction or not?

14 CHAIRMAN JACOBS: Because it includes the
15 idea that -- yes, a qualified --

16 COMMISSIONER BAEZ: Based on the totality
17 of --

18 CHAIRMAN JACOBS: Based on the totality, a
19 qualified yes. And again, I'll probably write
20 something to concur. But a qualified yes.

21 COMMISSIONER JABER: Okay. Aren't we
22 saying -- the three of us, aren't we saying
23 what's on the bottom of the page 39, that last
24 paragraph on the bottom of page 39?

25 COMMISSIONER BAEZ: I agree with that.

1 COMMISSIONER JABER: Mr. Elias, does that
2 get us where we need to be?

3 MR. ELIAS: Yes, I think so. And then --

4 COMMISSIONER JABER: Based on the record,
5 it recognizes I think that the cost/benefit
6 analysis may not have been comprehensive. But
7 at some point you have to rely on good old
8 common sense.

9 MR. ELIAS: And I've always thought of
10 prudence as kind of a two-step analysis. You
11 know, you look at planning, and you look at
12 results. And if the utility appropriately
13 planned on the front end and they were
14 reasonable in their actions --

15 COMMISSIONER BAEZ: An adverse result can
16 be outweighed, or overcome.

17 MR. ELIAS: That's correct, or, you know,
18 that they shouldn't be penalized for acting
19 appropriately on the front end, for doing what a
20 reasonable person would do.

21 CHAIRMAN JACOBS: That's exactly the
22 point. What if we were here looking at adverse
23 results?

24 MR. ELIAS: And here, if I can kind of
25 summarize what you're saying, the result was

1 favorable. Therefore, it's not necessarily
2 appropriate to go into the same level of depth
3 on the front end with respect to the
4 reasonableness of the steps they took.

5 COMMISSIONER BAEZ: Can I change that a
6 little bit? I don't think that I'm saying that
7 it's not appropriate to go into a deeper level.
8 I'm saying that given the results, that it may
9 not have been -- it has been overcome. I mean,
10 you're calling it a two-prong or two-sided test,
11 and I think that to the extent that one -- I
12 mean, I like the concept. To the extent that
13 one can overcome the other, then one can
14 overcome the other, and it doesn't necessarily
15 have to be whether the proper planning on the
16 front end -- it can possibly be the other way
17 around.

18 MR. ELIAS: I think we're saying the same
19 thing.

20 CHAIRMAN JACOBS: Let's not beat a dead
21 horse. My whole point here is that nobody at
22 the time they took these positions were
23 guaranteed results. I have very serious concern
24 with incenting a company to take these positions
25 based on the fact that they think they know what

1 the results are going to be.

2 COMMISSIONER JABER: If it's the right
3 thing to do, it's the right thing to do.

4 CHAIRMAN JACOBS: If it's the right thing
5 to do, it is.

6 COMMISSIONER JABER: Put that in the
7 order. As long as Bob, who is crafting the
8 order, understands what we're trying to
9 accomplish, I'm comfortable moving forward. And
10 certainly we can read the order, Bob.

11 MR. ELIAS: Yes.

12 CHAIRMAN JACOBS: Very well. I think we're
13 on --

14 COMMISSIONER BAEZ: Did we get the motion
15 straight?

16 COMMISSIONER BAEZ: The motion on Issue 9
17 would be to allow recovery of the entire
18 requested interest expense on tax deficiencies.

19 CHAIRMAN JACOBS: Yes. That sounds --

20 COMMISSIONER BAEZ: Second.

21 CHAIRMAN JACOBS: Motion and a second. All
22 in favor?

23 COMMISSIONER JABER: Aye.

24 COMMISSIONER BAEZ: Aye.

25 CHAIRMAN JACOBS: Aye. Opposed? Show

1 Issue 9 is approved.

2 COMMISSIONER JABER: Okay. And Issue 10, I
3 would move staff, because I do not believe it
4 constitutes -- what we just did constitutes
5 retroactive ratemaking.

6 COMMISSIONER BAEZ: Second.

7 CHAIRMAN JACOBS: I had some trouble with
8 this, but I think you convinced me.

9 COMMISSIONER JABER: Okay.

10 CHAIRMAN JACOBS: Motion and second. All
11 in favor?

12 COMMISSIONER JABER: Aye.

13 COMMISSIONER BAEZ: Aye.

14 CHAIRMAN JACOBS: Show it approved. Issue
15 11.

16 COMMISSIONER JABER: Now, Issue 11, I have
17 to tell you, I found annoying, and I want to
18 send a very strong signal to companies. The
19 office of Public Counsel, in my humble opinion,
20 is in a very unique situation because of
21 provisions found in 350 that allow them on
22 behalf of customers to raise any issue, perhaps
23 at any time they want, within limits, obviously.
24 But this -- to say that OPC is equitably
25 estopped from raising an issue is like saying a

1 customer can't raise an issue. And I just -- my
2 motion to be to move staff, and I hope I never
3 see that issue again.

4 COMMISSIONER BAEZ: Second.

5 CHAIRMAN JACOBS: Moved and seconded. All
6 in favor?

7 COMMISSIONER JABER: Aye.

8 COMMISSIONER BAEZ: Aye.

9 CHAIRMAN JACOBS: Aye. Opposed? Show
10 Issue 11 is approved.

11 COMMISSIONER JABER: Issue 2, I would move
12 staff.

13 CHAIRMAN JACOBS: Twelve, you mean.

14 COMMISSIONER JABER: I'm sorry. What did I
15 say?

16 CHAIRMAN JACOBS: Two.

17 COMMISSIONER JABER: Issue 12, I would move
18 staff. And, Legal, if you would also think
19 about whether a reference to 350 is appropriate
20 for the order as well. There is a provision in
21 350 that specifically exempts staff from
22 ex parte communications. So I would move staff
23 on Issue 12.

24 COMMISSIONER BAEZ: Second.

25 CHAIRMAN JACOBS: Moved and seconded. All

1 in favor?

2 COMMISSIONER JABER: Aye.

3 COMMISSIONER BAEZ: Aye.

4 CHAIRMAN JACOBS: Aye. Opposed? Show that
5 Issue 12 is approved. Issue 13.

6 COMMISSIONER BAEZ: Thirteen has to
7 change.

8 COMMISSIONER JABER: Fall out, yes.

9 CHAIRMAN JACOBS: It has to fall out.

10 COMMISSIONER BAEZ: Right.

11 COMMISSIONER JABER: Can we just give broad
12 discretion to staff to make the necessary
13 fall-out adjustments? So with that modification
14 to Issues 13 and 14, can we make a motion on
15 those two?

16 MS. MERCHANT: It will be the same amounts
17 from the PAA order.

18 COMMISSIONER BAEZ: Okay.

19 CHAIRMAN JACOBS: Okay. So the motion on
20 Issue 13 is to make those positions consistent
21 with our decision in the prior issues, but it
22 would likely be very close to the prior PAA
23 order; correct?

24 MS. MERCHANT: That's correct.

25 CHAIRMAN JACOBS: Okay. We have a motion

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and a second.

COMMISSIONER BAEZ: Second.

CHAIRMAN JACOBS: All in favor?

COMMISSIONER JABER: Aye.

COMMISSIONER BAEZ: Aye.

CHAIRMAN JACOBS: Aye. Opposed? Show
Issue --

COMMISSIONER JABER: Move 15.

COMMISSIONER BAEZ: Second.

CHAIRMAN JACOBS: Moved and seconded. All
in favor?

COMMISSIONER JABER: Aye.


CHAIRMAN JACOBS: Aye. Opposed? Show it
approved.

Thank you. And we will take a recess and
be back on Issue 39 at 1:30.

(Conclusion of consideration of Item 36.)

1
2 CERTIFICATE OF REPORTER
3

4 STATE OF FLORIDA)

5 COUNTY OF LEON)
67 I, MARY ALLEN NEEL, do hereby certify that the
8 foregoing proceedings were taken before me at the time
9 and place therein designated; that my shorthand notes
10 were thereafter transcribed under my supervision; and
11 that the foregoing pages numbered 1 through 34 are a
12 true and correct transcription of my stenographic
13 notes.14 I FURTHER CERTIFY that I am not a relative,
15 employee, attorney or counsel of any of the parties,
16 or relative or employee of such attorney or counsel,
17 or financially interested in the action.18 DATED THIS 11th day of December, 2001.
19
2021 
22 _____
23 MARY ALLEN NEEL, RPR
24 100 Salem Court
25 Tallahassee, Florida 32301
(850) 878-2221