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March 2, 2004

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 031033-EI

Dear Ms. Bayó:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Reply to Tampa Electric's Response to Office of Public Counsel's Motion to Revision to Orders Establishing Procedure or Continuance Filed February 19, 2004.

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

Sincerely,

Robert Vandiver
Associate Public Counsel

RV/pwd
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO transport and trade

Docket No. 031033-EI

Filed: March 2, 2004

REPLY TO TAMPA ELECTRIC'S RESPONSE TO OFFICE OF PUBLIC COUNSEL'S MOTION FOR REVISION TO ORDER ESTABLISHING PROCEDURE OR CONTINUANCE FILED FEBRUARY 19, 2004

Tampa Electric has gone so far beyond the scope of a "Response" to Citizens Motion that the Citizens are compelled to file this reply.[1] In support thereof Citizens state:

1. On February 12, 2004, Citizens filed a four page Motion for Revision to Order Establishing Procedure or Continuance. In the motion, the Citizens explained that cost information from TECO Transport was critical to its case, citing Order PSC-04-0118-PCO, issued 30 2004, where the Prehearing Officer held TECO Transport's costs discoverable and relevant to Citizens pursuing a cost based theory of the case (hereinafter "TECO Order"). Tampa Electric did not appeal that order[2]. In its eleven page response, Tampa Electric never even mentions this critical order or the Prehearing Officer directly on point cited in the motion.

2. Tampa Electric makes much of what Citizens may have stated or not stated in 1991, but very little about what Citizens may state in the recent past about the stipulation. Attachment I hereto is Public Counsel's Brief submitted June 30, 1992 concerning this very stipulation. There, as now, Citizens stated changed circumstances can be the basis for modification of a stipulation; see Attachment I set 13-16. The Commission has

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[1] Paragraphs 1-8 arguably respond to Citizens original motion; while paragraphs 9-20 provide Tampa Electric's theory of the irrelevance of costs to this proceeding; paragraphs 21-22 represent a whole new proposal for dealing with the issues in this case, and are not responsive to anything. It is therefore appropriate to file this reply.

[2] Citizens have been informed orally that Tampa Electric has now appealed the Prehearing Officer's ruling to the First District Court to Appeal

for modification of a stipulation; see Attachment I set 13-16. The Commission has recognized that stipulations are not set in stone and can be changed in the public interest: "But where that public interest requires we modify an order or any part of an order that adopted a stipulation, we would have the obligation to do so" Order PSC-92-0048-FOF-EI at page 12, issued September 23, 1992.

3. More importantly, OPC, in the recent fuel docket, stated that the benchmark was outdated and needed to be reexamined by the Commission. See Prehearing Statement of Office of Public Counsel, Issue 17G, October 15, 2003.

4. At paragraph 4, Tampa Electric states that OPC's efforts to obtain cost information from a non-regulated affiliate is somehow inconsistent with *GTE v. Deason,* 642 So.2d, 545 (Florida 1994). The Deason case does not address the ability of the Citizens to discover evidence. At present there is only Tampa Electric's evidence in the record – the factual predicate for any of the GTE findings are not present here. The evidence which Citizens seek may render the GTE holding inapplicable to these facts.

5. The fact that a cost-based approach was abandoned some sixteen years ago by a previous Commission does not mean that such an approach is necessarily without merit today. Intervenors certainly have a right to present testimony and build a record to that effect. It is also important to note that cost plus pricing "had provided a effective means of ensuring that only reasonable and prudently incurred fuel costs were passed on to its customers." Order 20604, issued January 13, 1989; 89 FPSC 145 at 157.

6. The problem with Tampa Electric's discussion of market based pricing as the preferred methodology is that Citizens would concede it is the method preferred by the 1988 Commission, and is the method presently in use. After all the evidence is heard, the Commission could determine that market based pricing will continue as the preferred methodology. Such evidence could also find the existing system "inherently unfair" under the GTE case. The point is the Commission should not prejudge evidence it has not seen.

7. At paragraph 16, Tampa Electric graces us with the following double negative: "No party has presented any evidence that there is not a market for the transportation of coal for the mid-United States to Tampa." Only Tampa Electric has presently submitted evidence! Intervenors are scheduled to file testimony on March 29, 2004. Citizens may or may not submit evidence on this point once discovery is completed.

8. Tampa Electric suggests that costs are irrelevant and "cannot be legally adopted by this Commission on the facts of this case." Paragraph 18. The Citizens would point to the TECO Order in response. Ratemaking is prospective and always subject to change. The Commission has spoken to this particular stipulation:

> We cannot modify our prior rate orders capriciously, without sufficient demonstration that the public interest requires the modification; but where the demonstration has been adequately made, we not only have the authority to make the appropriate modifications, we have the obligation to make them. Tampa Electric has not adequately demonstrated in this case that a modification to Order No. 20298's market pricing index is necessary; but if Tampa electric had adequately shown the need for a change, we would certainly have the authority to make it, in spite of the fact that the original rate setting order was based upon a stipulation between the parties. Order PSC-92-1048-FOF-EI. (Emphasis added in first instance; second emphasis in original.)

9. Tampa Electric's suggestions for bifurcation should be rejected out of hand. The Commission can best understand this proceeding with all the facts before it. No purpose can be served by balkanization of the issues. Tampa Electric's proposal is changing the rules in the middle of the game. The bifurcation of proceedings can only add confusion to the issues, impose unnecessary costs upon the parties and take additional unnecessary hearing time of a busy Commission. The issues are ready for decision and have been for some time. Citizens believe the "bifurcation" idea is directly tied to Tampa Electric's unwillingness to allow access to the TECO Transport information that the Prehearing Officer has already ruled is relevant and discoverable.

10. The Commission should order the immediate enforcement of Citizen's long-delayed subpoena duces tecum upon TECO Transport and allow the deposition of TECO

Transport witnesses to proceed. The Citizens believe that an understanding of the actual costs of TECO Transport are essential for this Commission to reach an informed and fair decision. Time is of the essence.

Respectfully Submitted

Robert Vandiver
Associate Public Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing has been furnished by U.S. Mail or *hand-delivery this 2nd day of March, 2004:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Clarification)
and Guidance on Appropriate Market)
Based Pricing Methodology for Coal) Docket No. 920041-EI
Purchased from Gatliff Coal Company) Filed: June 30, 1992
by TAMPA ELECTRIC COMPANY.)
)

PUBLIC COUNSEL'S BRIEF

I. SUMMARY OF PUBLIC COUNSEL'S POSITION.

The Public Service Commission announced its "Fuel Procurement Policy" in Order No. 12645, on November 3, 1983. Fuel supplied by an affiliate company should be at a cost to the utility consistent with or below costs from an independent supplier in the open market obtained through competitive bidding. Order No. 12645, at 14. Five years later, in Order No. 20298, dated November 10, 1988, the Commission concluded its investigation of Tampa Electric's fuel supply relationship with its affiliates:

> We have determined as a matter of policy that utilities seeking the recovery of the cost of coal purchased from an affiliate through their fuel and purchased power cost recovery clauses shall have their recovery limited by a 'market price' standard, rather than under the 'cost-plus' standard now in effect.
>
> Order No. 20298, at 1-2.

At the Commission's direction, the Office of Public Counsel and Tampa Electric Company entered into a stipulation setting out a procedure to measure coal market movement. That stipulation was accepted, without modification, in Order No. 20298.

Mr. Metzroth, testifying for Tampa Electric in this docket, said declining prices in the coal market in recent years could be explained in terms of capacity expansions and overproduction. [T-133-35]. When supply exceeds demand, prices fall. The benchmark calculated pursuant to the stipulation has shown that the coal market has been in consistent decline since 1987. [Exhibits 4, 8 (HTS-3 Revised]. Obviously, the benchmark resulting from the express terms of the stipulation has tracked the market, just as it was designed to do.

Tampa Electric's two alternative proposals would have the benchmark go in the opposite direction, increasing year-by-year as the market falls. Justification for this departure from settled policy designed to protect electric utility ratepayers is completely absent from the record. In fact, Tampa Electric's proposals have nothing to do with measuring changes in the market price of coal. The utility's sole purpose in this docket was to get the benchmark above their affiliate's contract price. [T-386]. Tampa Electric's petition should be denied.

II. BACKGROUND LEADING TO THE STIPULATION, THE STIPULATION ITSELF, AND USE OF THE STIPULATION IN FUEL COST RECOVERY HEARINGS.

At hearings held in May, 1988, in Docket No. 870001-EI-A, the Commission heard the testimony of Staff's witness, Mr. John Pyrdol. [T-63, 67]. Mr. Pyrdol, an employee of the Federal Energy Regulatory Commission, recommended that the Commission adopt a market "cap" for Tampa Electric Company's purchases of coal from its affiliate, Gatliff Coal Company. [T-78; Order No. 20298, at 9]. Mr. Pyrdol suggested the use of FERC Form 423 data, compiled on an annual basis, for all coal transactions reported for Bureau of Mines, District 8, to establish a market proxy. [T-68, 80, 86-88, 499].

Mr. William Cantrell, testifying for Tampa Electric, offered rebuttal to Mr. Pyrdol. [T-67, 80]. Mr. Cantrell used monthly Form 423 data (instead of an annual compilation) and removed those transactions designated as "spot" on the Forms 423 and screened the remaining contract "shipments" to remove those not meeting specific quality criteria. [T-69, 88-89, 96, 499-500, 514, 544]. Mr. Pyrdol agreed with Mr. Cantrell's refinements. [T-69, 80].

Ultimately, Mr. Cantrell's method for using Form 423 data was incorporated into a stipulation between Tampa Electric and the Office of Public Counsel.[1] [T-80, 540]. The base price of $39.44 per ton for Gatliff coal was derived by applying Mr. Cantrell's method to the $40 per ton price identified by Emory Ayers & Associates in a 1981 study. [T-62, 87-88, 348-49, 513-14, 540]. The

[1]The data reported on FERC Form 423 has not changed substantially since the Commission began using it in 1988. [T-307].

1981 starting price included a $3 premium for low-ash-fusion-temperature coal. [T-109-10, 349, 520, 526-27, 530, 536, 549].

This base price was then to be escalated (or de-escalated) in future years using Mr. Cantrell's Form 423 method.[2] This approach assumed that the base price, once set to recognize the specific characteristics of Gatliff coal, should thereafter move in step with a broad market of similar coals.[3] [T-515]. A 5% zone of reasonableness was then added to the escalated price to arrive at a benchmark price. The zone of reasonableness added an additional premium for quality and/or market conditions. [T-350]. Inclusion of the 5% meant that, even if the market price of coal did not change, Gatliff coal could escalate to $41.41 per ton ($39.44 plus 5%) and still not exceed the benchmark. [T-100].

Both parties to the stipulation realized that the use of Forms 423 would preclude consideration of contract vintage, contract term (apart from differentiating between "S" and "C" on the Forms 423), contract expiration dates, ash-fusion-temperature, and other quality parameters not specifically identified.[4] [T-551]. The parties also understood they were agreeing to use a delivered price index to escalate an F.O.B. mine price. [T-549].

Form 423 data is public information available to all parties for review. The information is submitted by numerous utilities and is compiled by the Department of Energy, an independent agency with no interest in Commission proceedings. [T-353, 542].

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[2]Ms. Payne testified that there is no inherent problem in using monthly data to calculate an annual percentage change. [T-542]. Mr. Wood noted that the benchmark procedure, in effect, allowed for continued escalation of the 1981 Emory Ayers study price in subsequent years. [T-95].

[3]Mr. Twomey testified that "coal is coal; and as long as you recognize the proper starting point, coal would follow the average, that is, the rise of any one coal would follow the average of many." [T-531].

[4]The majority of contracts used to calculate the benchmark far exceed the quality characteristics required at the Gannon Station. [T-374]. Mr. Wood noted that the parties chose these specific quality parameters because "these are the only ones that do appear in the 423 data." [T-101].

Under the stipulation, contractual terms between Tampa Electric and Gatliff should have no bearing on the benchmark. Order No. 20298, at 17. Neither party would unilaterally recommend or support modification of the stipulation nor seek reconsideration or appeal any Commission order approving it. The stipulation would be void if the Commission modified it. Order No. 20298, at 20.

The stipulation was signed by Tampa Electric's vice-president, Mr. Cantrell, and its attorney, Mr. Lee L. Willis. The undersigned attorney for Public Counsel and Ms. Avis H. Payne signed for the Office of Public Counsel. The stipulation contained the full agreement between the parties. [T-475, 477, 482, 525].

The stipulation did not affect the actual price of Gatliff coal or the amount Tampa Electric would pay Gatliff under any contract the affiliates might enter into. It only affected the amount of money the utility would have to justify as prudent before the Commission would authorize recovery from Tampa Electric's ratepayers.

The stipulation was approved in Order No. 20298, dated November 10, 1988. [T-64]. Mr. Harry T. Shea, testifying for the Staff, succinctly summarized what the Order did and did not do:

> The order specifically states to calculate an average of data as reported on the Form 423, a monthly form. The order does not state calculate annual figures for each contract. It does not state take only those contracts which deliver over 100,000 tons per year. It does not state take only those contracts which have deliveries in two consecutive years. And it does not state take only those contracts with a term of over five years. The order states take all monthly figures reported as contract from Bureau of Mines District 8, which meet certain quality characteristics, and then average them for each year.
>
> [T-363-64].

Tampa Electric calculated the benchmark consistently in fuel cost recovery proceedings in August, 1989, August, 1990, and August, 1991. [T-361, 479, 488, 516-17, 545]. No one questioned the accuracy of the Form 423 data. [T-418-19]. In 1989 and 1990, the price of Gatliff coal was below the benchmark and, therefore, considered reasonable for fuel cost recovery purposes. [T-108, 425].

In 1991, Mr. Cantrell calculated the price of Gatliff coal to be above the benchmark. [T-425]. The specific mechanism causing the Gatliff price to increase was the escalators in the contract.[5] [T-105-7, 425]. Mr. Cantrell testified at that time that the benchmark calculated according to the stipulation was unsuitable to measure fluctuations in the price of Gatliff coal. Mr. Cantrell said the benchmark was deficient because it did not capture the low-ash-fusion-temperature characteristic required for coal at Gannon Station. He also said the benchmark was biased because the Form 423 data was based on the delivered price of coal (as opposed to the F.O.B. mine price) which introduced a transportation component which skewed results.[6][T-489-96].

The Commission did not accept Mr. Cantrell's criticisms of the benchmark in 1991, but it did find the excess price of Gatliff coal above the benchmark had been justified. The benchmark approach has been applied in three hearings since the stipulation was entered into, and, in each case, the Commission found the price of Gatliff coal to be reasonable.

III. GATLIFF COAL COMPANY ASKS RDI TO DEVELOP A NEW BENCHMARK.

Resource Data International (RDI) has been in business since 1982, and under contract to Gatliff Coal Company since 1985. [T-117, 299]. RDI has been receiving FERC Forms 423 directly from the FERC offices since 1984. [T-188]. RDI does not have a contractual relationship with Tampa Electric. [T-285]. Sometime in October, 1991, Gatliff asked RDI's Mr. Lawrence Metzroth if he could develop a benchmark methodology consistent with the language in the stipulation. [T-286].

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[5]Mr. Cantrell testified at hearing that "its important for everyone to understand that a long-term contract like this does not follow the market." [T-501]. Tampa Electric negotiated its 1988 contract with its affiliate without conducting a competitive bid solicitation. It signed the contract after the stipulation had been signed. The utility was fully aware of inconsistencies between its contract and the terms of the stipulation. [T-361].

[6]Mr. Cantrell's criticisms would remain even if the Commission adopted Mr. Metzroth's proposals to modify the stipulation. [T-489-96].

Mr. Metzroth was unaware of the facts and circumstances of Docket No. 870001-EI-A, or of subsequent fuel cost recovery proceedings. He has never reviewed Mr. Cantrell's calculation of the benchmark. [T-298]. He was told, incorrectly, that the price of Gatliff coal shipped to Tampa Electric's Gannon Station (as opposed to the amount Tampa Electric could recover from its customers) was subject to a market-based index.[7] [T-298]. Mr. Metzroth's assignment from Gatliff was to determine how he would interpret the language of the stipulation and derive a benchmark. [T-298].

Each of Mr. Metzroth's approaches gave a benchmark calculation that exceeded those Mr. Cantrell had used at fuel cost recovery hearings. Neither of Mr. Metzroth's proposals measured price movement in the coal market. Mr. Metzroth reported his analyses to Gatliff officials in late October, 1988.

IV. TAMPA ELECTRIC'S DECISION TO ADVOCATE METZROTH'S INTERPRETATION OF THE STIPULATION AND ORDER NO. 20298.

In early November, 1991, Mr. Metzroth met with Tampa Electric officials. [T-286]. He was asked to testify in support of a petition alleging his interpretation of the stipulation, reached without the benefit of participation in Docket No. 870001-EI-A, was what the parties meant and what the Commission intended when it approved the stipulation in Order No. 20298. [T-285-86].

In its petition, filed January 10, 1992, Tampa Electric alleged it needed "clarification and guidance" to understand the stipulation it had signed in 1988. The utility maintained that Mr. Metzroth's methods "reflect[] the appropriate way to implement the Order and do[] not constitute in any way a modification of the benchmark or its method of calculation approved in the Order." Petition, at 6. Tampa Electric said Mr. Metzroth's data "shows that certain transactions reflected in

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[7]Mr. Metzroth testified: "They [Gatliff Coal Company] indicated that the price of the coal for shipment to Gannon Station was governed by a market-based index and described it verbally to me and asked if I could calculate such an index using COALDAT." [T-298].

the FERC Form 423 data base have been erroneously included in earlier implementations of the benchmark procedure." Petition, at 4-5.

In its order denying Public Counsel's motion to dismiss the petition (Order No. PSC-92-0304-FOF-EI), the Commission said it must accept the allegation of errors as true. Review of the evidence, however, shows that Tampa Electric was unable to identify any errors in prior benchmark calculations or to establish that Mr. Metzroth's two proposals either conformed to the stipulation or offered a basis for modifying it.

V. TAMPA ELECTRIC FAILED TO ESTABLISH CHANGED CIRCUMSTANCES, THE EXISTENCE OF ERRORS IN PRIOR BENCHMARK CALCULATIONS, OR ALTERNATIVES THAT WERE CONSISTENT WITH THE STIPULATION.

A. MR. WOOD'S TESTIMONY.

As the party seeking affirmative relief, Tampa Electric had to prove its case by a preponderance of evidence. Tampa Electric first called Mr. G. Pierce Wood as a witness. Mr. Wood said, with reference to Docket No. 870001-EI-A, that "[i]t was the task of the parties and the Commission to develop a method for determining a proxy market which would reflect, in some reasonable manner, the market price changes in coal bearing some semblance to the Gatliff Blue Gem coal." [T-66]. On cross-examination, he agreed that Tampa Electric entered into the stipulation with full knowledge that the specified Form 423 data would not address contract duration, contract vintage, contract expiration dates, ash-fusion temperatures, or certain quality attributes such as moisture and grindability.[8] [T-97, 101-2]. Mr. Wood's testimony did nothing to establish changed circumstances, errors in prior benchmark calculations, or viable alternatives to current procedures.

B. MR. METZROTH'S TESTIMONY.

[8]Mr. Cantrell testified that "[q]uality as it relates to ash fusion temperature in not available on any of the documents, nor have if [sic] we said that that is absolutely required in any of these methodologies." [T-510].

Tampa Electric then called Mr. Metzroth to the stand. Mr. Metzroth was not familiar with Mr. Cantrell's calculations in Docket No. 870001-EI-A or in subsequent fuel hearings.[9] [T-203-4, 242, 283, 298]. He did not know what the parties contemplated when they signed the stipulation. [T-248, 257]. He "speculated" that, since RDI had found errors in Form 423 data RDI receives on computer diskette from its outside contractor, "there could be an error in the calculation of the benchmark."[10] [T-193]. He could not, however, identify any specific errors.[11] [T-422, 466].

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[9]Apparently, Mr. Metzroth's first opportunity to review the specifics of the benchmark calculations came when the Staff's witness, Mr. Shea, submitted testimony. "I do not know how Mr. Cantrell made his calculations. The only calculations I've seen are Mr. Shea's." [T-283]. Mr. Metzroth assumed that Tampa Electric's calculations were done the same way. [T-203-4, 242].This just highlights the fact that Tampa Electric was totally unprepared in its direct case to prove up the allegations in its petition.

[10]When asked whether Tampa Electric received and used a FERC diskette in calculating the benchmark for fuel adjustment purposes, Mr. Metzroth answered "I'm not familiar with their approach." [T-464].

[11]Q (By Mr. Howe) Where have you identified errors in the data [Tampa Electric] used?
A (By Mr. Metzroth) I'm assuming by extrapolation that the sorting methodology that was explained to me resulted in errors...
Q Would it be correct to state, though, that you have not actually analyzed the specific data Tampa Electric Company relied on in past fuel adjustment proceedings to see if, in fact, that was the case?
A That is correct. [T-194-95].

1. MR. METZROTH'S METHOD OF COMBINING CONTRACTS BEFORE SCREENING FOR QUALITY DID NOT IDENTIFY ERRORS OR OFFER A REASONABLE ALTERNATIVE TO CURRENT PROCEDURE. Mr. Cantrell first screened the Forms 423 for contract coal shipments which met the quality specifications. He then aggregated them on an annual basis. Mr. Cantrell excluded those contract coal "shipments" that did not meet quality specifications on any single monthly Form 423.

Acting as he was in isolation from the Commission proceedings, Mr. Metzroth gave his own meaning to the language in the stipulation and Order No. 20298. Mr. Metzroth construed the order as requiring that shipments first be aggregated on an annual basis and combined to reflect RDI's definition of "controlling company" and contract expiration date.[12] [T-178, 190, 443-48]. To do this, he employed the RDI database, COALDAT, which contained information from FERC Forms 423, PURPA Forms 580, MSHA Forms 7000-2, and information gleaned from RDI's telephone conversations with utility employees. [T-191-3, 201-2, 210-11, 217, 224-28, 303, 440].

Mr. Metzroth said there were twenty-two errors in his compilation of 591 aggregated contracts. [T-208]. He conceded that four of his listed contracts should be ignored altogether. [T-207-8, 245-46]. But he never disclosed what effect these RDI errors would have on his analyses.

His unique interpretation led him to allege errors existed in Mr. Shea's data, not because Mr. Shea had made mistakes, but because Mr. Shea had not used the technique Mr. Metzroth had concocted in Boulder, Colorado. For example, he said Mr. Shea should have excluded the Kopper Glo coal shipment to the Cape Fear plant reported on the Form 423 from Carolina Power & Light Company in 1987.

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[12]Mr. Metzroth said the analysis he provided to Gatliff at the conclusion of his assignment was "essentially my exhibits" appended to his prefiled direct testimony. [T-286].

But Mr. Shea did not err under the parties' interpretation of the stipulation they signed.[13] [T-543, 545, 550]. Mr. Metzroth conceded on cross-examination that the Carolina Power & Light, Cape Fear, Kopper Glo transaction was, in fact, a contract shipment reported on Form 423 that meets the quality criteria. [T-229-31].[14] It precisely met the terms of the stipulation.[15] In a joint interrogatory response answered by Mr. Metzroth and Mr. Cantrell, they conceded that Mr. Metzroth's aggregated annual contracts could not be used to identify contracts that Mr. Metzroth would exclude but Mr. Cantrell had not excluded in prior fuel adjustment hearings. [Exhibit 11].

Mr. Metzroth's aggregation of contracts at the annual level seemed to appeal to some Commissioners who viewed it as being consistent with Order No. 20298. [T-366-82]. Actually, this approach is not consistent with the language of the stipulation or with past practice. It requires the use of sources other than Forms 423 and is inconsistent with the intent of the stipulation. [T-356]. As discussed more fully below, the Commission could not adopt such a change under the standards of Peoples Gas System v. Mason, 187 So.2d 335 (Fla. 1966). The parties to the stipulation could have specified an annual aggregation before screening, but they did not do so. A decision now to

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[13]Mr. Shea participated in negotiations leading to the stipulation. He testified that he would not have supported a proposal to aggregate contracts on an annual basis instead of using the shipment data as reported on the Forms 423. [T-356].

[14]Mr. Metzroth limited his allegations of error to those instances in which the method of first screening then aggregating differed from his approach of first aggregating and then screening: "No, sir. I didn't say there was an error in the FERC data. I said . . . that inappropriate data was used for calculating the benchmark. " [T-460]. If there were, in fact, errors in Mr. Shea's (or Mr. Cantrell's) screening for spot-versus-contract or quality specifications on the Forms 423, Mr. Metzroth surely would have pointed them out.

[15]Mr. Woods, in his testimony at the beginning of Tampa Electric's evidentiary presentation, also characterized the stipulation as requiring the base price to be adjusted based on changes in coal "shipments": "The base price, for cost recovery purposes, is to be adjusted by the weighted average annual percentage increase or decrease for certain coal shipments from Bureau of Mines Region 8." [T-65].

aggregate first on an annual basis would be based on matters the parties could have addressed in Docket No. 870001-EI-A.[16] 187 So.2d at 339.

2. MR. METZROTH'S FIVE-YEAR TERM PROPOSAL IS NOT CONSISTENT WITH THE STIPULATION NOR JUSTIFIED AS A MODIFICATION OF THE STIPULATION.

Mr. Metzroth developed two different (and inconsistent) methods to screen his aggregated annual contract/controlling-company data for spot transactions and quality. Both methods concluded that the benchmark should be increasing since 1987, even though the coal market has been declining since that time. [T-364, 423]. Under his five-year-term method, Mr. Metzroth eliminated, for the entire period 1987-1990, those aggregated contracts that did not, in any one year (1987, 1988, 1989, or 1990), meet the specified quality criteria. [T-158, 247]. The remaining aggregated contracts were then screened to remove any that were not in effect during the entire period from November 1, 1988, through December 31, 1993. [T-159-60].

Mr. Metzroth chose this time period to coincide with the contract Tampa Electric signed with Gatliff in 1988: His reading of Order No. 20298 indicated that the Commission intended to consider contract vintage. [T-248, 254-56, 260]. When asked which contract he believed was referenced in the Order, he replied: "I have no idea what contract it spoke to. " [T-256]. He was apparently unaware of the parties' conscious decision to ignore contract vintage or the stipulation provision excluding consideration of contracts between Tampa Electric and Gatliff. [T-359].

He was left with nineteen aggregated annual contracts which had deliveries in each year 1987-1990 and were "in effect" for November 1, 1988 - December 31, 1993.[17] Some of the contracts

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[16]The only changed circumstance since the stipulation was approved has been the increase in Gatliff's coal prices while the market price has been falling. [T-386]. Such a "change" would not satisfy the Peoples Gas standard.

[17]It is unclear from the record how deliveries in 1987 were made under a contract entered into after November 1, 1988. [T-258-60]. It is also unclear how Mr. Metzroth determined that his nineteen contracts were "in effect" until the end of 1993.

aggregated in this fashion had shipments in 1987 of less than 100,000 tons. [T-257, 308-9]. These nineteen contracts escalated in price between 1987 and 1990 because of the escalation provisions contained in them. [T-261-62, 267]. They were totally unaffected by changes in the open market. [T-264-65]. Yet, Mr. Metzroth interpreted the stipulation to say: "[M]easure the movement of the market and raise or lower the index on the basis of movement in the market." [T-278].

Every year, more and more contracts would be deleted under his proposal. [T-253-54, 359]. Mr. Metzroth's method was completely inconsistent with the stipulation. Mr. Shea testified that he would not have supported this procedure if it had been raised in stipulation negotiations. [T-360].

3. MR. METZROTH'S YEAR-TO-YEAR PROPOSAL IS NOT CONSISTENT WITH THE STIPULATION NOR JUSTIFIED AS A MODIFICATION OF THE STIPULATION.

In his year-to-year approach, Mr. Metzroth removed all aggregated contracts of 100,000 tons or less per year because he "know[s]" these to also be "spot" transactions. [T-162, 232, 449-51]. The remaining contracts were then screened to identify those that were in effect in any two-year period, 1987-1988, 1988-1989, and 1989-1990. [T-160-63].

Contracts were included if they involved more than 100,000 tons in each of the two calendar years in question. In spite of the alleged importance of annual data, it did not matter that the total duration of the shipments might be less than one year (e.g., 100,000+ tons shipped in the last two months of 1988 and 100,000+ tons shipped in the first two months of 1989 would qualify). [T-468-72]. Some aggregated contracts that were excluded under the five-year-term method were included in the year-to-year approach. [T-257-58].

Mr. Metzroth started with 190.21 cents/MMBtu for 1987 and ended with 188.29 cents/MMBtu for 1990. Under his approach, this indicated that the market price of coal was increasing, and, accordingly, escalated the 1987 base price from $39.44 to $42.97.[18] [T-366]. Even

[18]The ending price for 1987-1988 under Mr. Metzroth's proposal was 192.10 cents/MMBtu. If the price in 1988-1989, hypothetically, ranged between 100 and 150 cents/MMBtu, Mr. Metzroth would use this fact to escalate the 1988 ending dollar-per-ton price by 50%, (continued...)

though he maintained that the weighted-average cents/MMBtu calculated for 1987-1988 was unrelated to the calculation for 1988-1989, Mr. Metzroth believed the change in the latter data could be used to escalate the former. [T-274].

Each of the paired years used in the year-to-year proposal stood in isolation, unaffected by new contracts entering or old contracts leaving the market between years. Cents/MMBtu varied within paired years only because of changed Btu content or escalation provisions within the contracts themselves. Mr. Metzroth's year-to-year approach ignored changes in the market altogether.

Mr. Shea noted the obvious errors in Mr. Metzroth's proposal:

> It is not appropriate to eliminate contracts based on calendar year tonnage because all transactions, regardless of tonnage reflect the market price determined by the competitive market. A supplier will charge as high a price as the market will bear. In addition, it is not appropriate to eliminate contracts if they did not supply coal in two consecutive years. Each contract transaction helps to define the market. Finally, this screening process limit the number of transactions used to create the index.
>
> [T-357-58].

Mr. Metzroth's year-to-year proposal was shown to be inconsistent with the stipulation and the Commission order adopting the stipulation. Tampa Electric could not offer any plausible reason to modify the stipulation to conform to the year-to-year proposal.

VI. THE COMMISSION'S LEGAL AUTHORITY TO REVISIT AND CHANGE A PRIOR ORDER IS LIMITED TO THOSE INSTANCES IN WHICH CHANGED CIRCUMSTANCES MAKE A MODIFICATION NECESSARY TO PROTECT THE PUBLIC INTEREST.

Because the stipulation between Tampa Electric and the Office of Public Counsel required Commission approval, Order No. 20298 effectively converted the stipulation to an ordered course of conduct required by the agency. This consequence was explained in the context of a territorial agreement between gas companies in City Gas Company v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965), as follows:

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[18] (...continued)
without regard to the overall decline in the coal market. [T-272].

> [W]e are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission. . . . [T]he practical effect of such approval is to make the approved contract an order of the commission, binding as such upon the parties. (Emphasis added.)

The Commission's ability to revisit the stipulation is, therefore, defined by its ability to terminate or modify its prior orders.

In Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), the Court considered the Commission's power to modify an order after it had become final by the passage of time:

> [T]he commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified. (Emphasis added.)
>
> 187 So.2d at 339.

The Court reaffirmed its decision in Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979), where it recognized that "administrative finality" had attached in both Peoples Gas System and Austin Tupler where orders were amended four years and two years respectively after their inception.

In Richter v. Florida Power Corporation, 366 So.2d 798 (Fla. 2d DCA 1979), the court recognized the power of the Public Service Commission to alter final orders but only under extraordinary circumstances. Tampa Electric does not assert any extraordinary circumstances or any substantial change in circumstances since Order No. 20298 was issued.

Many parallels can be drawn between Tampa Electric's attempts to modify the stipulation and the City of Homestead's attempts to escape a territorial agreement in the recent case of City of Homestead v. Beard, 17 F.L.W. S273 (Fla. May 7, 1992). Homestead and Florida Power & Light Company (FPL) signed a territorial agreement in 1967. Commission approval was needed because of the Commission's regulatory oversight of FPL. The agreement, which did not provide for a termination date, was approved in Order No. 4285, dated December 1, 1967.

Homestead filed a petition with the Commission on September 4, 1990, to "Acknowledge Termination or in the Alternative, Resolve Territorial Dispute." The Commission granted FPL's motion to dismiss the petition in Order No. 23955, dated January 3, 1991, because the city had not demonstrated changed circumstances:

> When a territorial agreement is approved by the Commission, it becomes embodied in the approving order which may only be modified or terminated in accordance with the Commission's express statutory purpose. See [Public Service Commission v.] Fuller[, 551 So.2d 1210 (Fla. 1989)] at 1212. Therefore, in order to withdraw or modify Order No. 4285, Homestead must make a showing that, "such modification or withdrawal of approval is necessary in the public interest because of changed conditions or circumstances not present in the proceedings which led to the order being modified." Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966). Homestead has failed to allege facts sufficient to support a modification of Commission Order No. 4285 consistent with Peoples Gas and Fuller.

The City maintained on appeal of Order No. 23955 that, since it was not subject to Commission jurisdiction, the territorial agreement should be governed by the law applicable to contracts. The Court responded:

> We disagree. In the absence of an express provision to the contrary in the approved agreement, the statutory and decisional law surrounding the modification or termination of PSC orders governs the territorial settlement in the instant case.
>
> * * *
>
> The City was able to enter in the instant agreement only by obtaining PSC approval. . . . Therefore, the law governing the modification or termination of PSC orders was applicable to the instant agreement to the extent it did not contradict the express terms of the agreement.5/
>
> 5/ The law at the time of the agreement set forth that PSC orders could be withdrawn or modified at the initiation of the PSC, a party to the agreement, or an interested member of the public "after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceeding which led to the order being modified. " Peoples Gas System v. Mason, 187 So.2d 335, 339 (Fla. 1966).
>
> 17 F.L.W. at S274.

The Court characterized the importance of leaving settlements undisturbed, with the following language:

> Parties usually enter into settlement agreements with the intention of permanently resolving their conflicts with respect to the subject matter of the agreement. Further,

> PSC orders are generally considered final absent the commission's inherent authority to modify or terminate them in a proper proceeding. Peoples Gas System v. Mason, 187 So.2d 335 (Fla. 1966). . . . The purpose behind settlement agreements is to end the dispute, not to delay the dispute until one of the parties decides its advantageous to begin competing again.
>
> 17 F.L.W. at S275.

The Court upheld the Commission's order, agreeing that the agreement between the parties could only be modified or terminated by the Commission in a proper proceeding complying with the standards of Peoples Gas.

To change Order No. 20298 in any fashion, the Commission would have to first make a "specific finding based on adequate proof" that Order No. 20298 must be changed to protect the public interest. However, on the facts of this docket, the Commission must conclude that the public interest is protected by the Order and stipulation as written. A change would only protect Tampa Electric's interest in paying its affiliate as much as possible to benefit their common owner.

VII. SINCE THERE ARE NO CHANGED CIRCUMSTANCES UNDER THE PEOPLES GAS STANDARD, DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND ADMINISTRATIVE FINALITY PRECLUDE THE COMMISSION FROM REVISITING ITS PRIOR ORDER NO. 20298.

A stipulation is a form of settlement which takes the place of an evidentiary hearing. Section 120.57, Florida Statutes (1991), specifies procedures an agency must follow when making decisions affecting the substantial interests of a party. Subsection 120.57(1), formal proceedings, applies whenever there are disputed issues of material fact. Subsection 120.57(2), informal proceedings, applies when there are no disputed issues of fact. Subsection 120.57(3) allows for informal disposition of any proceeding by stipulation, agreed settlement or consent order.

Accordingly, a stipulation, after being accepted by the agency, satisfies the formal hearing requirements. Parties are in the same posture as if the agency, after hearing all relevant evidence that could have been offered, rendered a final decision consistent with the terms of the stipulation.

Tampa Electric is therefore precluded from relitigating this issue by the doctrine of res judicata which applies to administrative proceedings. Hollingsworth v. Department of Environmental Regulation, 466 So.2d 383 (Fla. 1st DCA 1985); see also, Metropolitan Dade County Board of County Commissioners v. Rockmatt Corp., 231 So.2d 41 (Fla. 3d DCA 1970). The district court in Hollingsworth recognized, however, that, to the extent appellant's position was predicated upon an assertion of changed circumstances or new conditions, the doctrine of res judicata was inapplicable. 466 So.2d at 386. There is no proof of changed circumstances in this case.

The stipulation freely entered into by Tampa Electric Company put the utility in the same position as if the Commission had issued a final order after formal evidentiary hearings and the time for reconsideration and appeal had expired. Tampa Electric is in the same position as if it had offered the testimony of Messrs. Wood and Metzroth at a hearing preceding issuance of Order No. 20298 and that testimony was considered and rejected by the Commission. Tampa Electric voluntarily surrendered its right to argue the position it now espouses by agreeing to the stipulation.

In Spitzer v. Bartlett Brothers Roofing, 437 So.2d 758 (Fla. 1st DCA 1983), the court relied on Steele v. A.D.H. Building Contractors, Inc., 174 So.2d 16 (Fla. 1965), for the proposition that "it

is the policy of the law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes. . ." In Steele, the court stated that

> One entering a stipulation relative to present facts should be sure of his ground before he executes the agreement and subsequently reaps benefits from it . . .. Such an agreement should neither be ignored nor set aside in the absence of fraud, overreaching, misrepresentation or withholding facts by the adversary or some such element as would render the agreement void.
>
> 174 So.2d at 19.

Tampa Electric cannot choose to abide by the order approving the stipulation only when it benefits from its terms, then disavow the stipulation when market conditions change. The very purpose of the stipulation was to recognize changes in the market price of coal.

The public policy favoring the settlement of disputes applies to stipulations freely entered into in administrative proceedings. Palm Springs Gen. Hosp., Inc. v. Health Care Cost Containment Bd., 560 So.2d 1348, 1349 (Fla. 3d DCA 1990)(holding that the Board could not renege on its written agreement with the parties); Spitzer, supra, 437 So.2d 758, 760 (Fla. 1st DCA 1983); see Health Care & Retirement Corp. v. Department of Health & Rehab. Servs., 516 So.2d 292 (Fla. 1st DCA 1987)(finding that HRS was bound by its assurance that it would consider provider's updated application and evidence); cf. Citizens of the State of Fla. v. Florida Pub. Serv. Comm'n, 415 So.2d 1268 (Fla. 1982) (finding that the Commission's approval of Southern Bell's depreciation represcription was not in conflict with prior stipulation as to overearnings).

Once entered into, an agency should not ignore or set aside a stipulation without record evidence of fraud, overreaching, misrepresentation or withholding facts by the adversary or some other reason rendering it void. Spitzer, 437 So.2d at 760-61 (holding that deputy improperly rejected the parties' stipulation as to award of catastrophic loss benefits on his own motion on the grounds that it was based on the parties' misconception of law). After expiration of the time for appeal, a final order adopting a stipulation becomes binding on the parties. Zoning Bd. of Monroe County v. Hood, 484 So.2d 1331, 1333 (Fla. 3d DCA 1986) (holding that board of commissioners was bound by its

stipulation for judgment to approve rezoning land for development if the zoning board granted approval).

The Commission, as well as the parties, is bound by the stipulation adopted in Order No. 20298. The time for appeal has long since past. The Commission cannot now "pick and chose [sic] which stipulations of the parties it desires to honor in an after-the-fact fashion." Manatee County v. Florida Pub. Empl. Rel. Comm'n, 387 So.2d 446, 453 (Fla. 1st DCA 1980)(holding that the administrative proceeding was fatally defective because PERC rejected the parties' stipulation excluding CETA employees from the proposed bargaining unit without providing the parties an additional opportunity to present evidence on that nonissue). To do so violates public policy favoring the disposing of all or part of issues by stipulation, as reflected in section 120.57(3), Florida Statutes. 387 So.2d at 449.

In the instant case, the data Tampa Electric wants to use for its new benchmark procedure was available at the time Tampa Electric and Public Counsel reached the stipulation. Therefore, Tampa Electric should be precluded from establishing a new benchmark merely because it is not presently achieving the results it desires from the market pricing methodology adopted by Order No. 20298. Once the final order issued, the Commission lost jurisdiction to reject the stipulation or to conduct formal hearings. Because of the stipulation, there are no disputed issues of material fact to be determined by the agency.

WHEREFORE, the Citizens of the State of Florida, through the Office of Public Counsel, urge the Florida Public Service Commission to deny the relief requested by Tampa Electric Company in this docket. The facts will not support the petition, and the law will not support the Commission modifying Order No. 20298.

Respectfully submitted,

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing PUBLIC COUNSEL'S BRIEF has been furnished by *Hand-delivery or by U.S. Mail to the following parties on this 30th day of June, 1992.

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