

**ORIGINAL**  
**AUSLEY & McMULLEN**

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET  
P.O. BOX 391 (ZIP 32302)  
TALLAHASSEE, FLORIDA 32301  
(850) 224-9115 FAX (850) 222-7560

April 17, 2007

HAND DELIVERED

Ms. Ann Cole  
Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: Environmental Cost Recovery Clause  
FPSC Docket No. 070007-EI

RECEIVED FPSC  
07 APR 17 PM 3:51  
COMMISSION  
CLERK


Dear Ms. Cole:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Tampa Electric Company's Notice of Suspension of Phase II Rules Adopted Pursuant to Clean Water Act Section 316(b).

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

Thank you for your assistance in connection with this matter.

Sincerely,

  
James D. Beasley

JDB/pp  
Enclosure

cc: All Parties of Record (w/enc.)  
Mr. Jim Breman (w/enc.)

  
RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

03278 APR 17 07

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Environmental Cost )  
Recovery Clause. )  
\_\_\_\_\_ )

DOCKET NO. 070007-EI  
FILED: April 17, 2007

**TAMPA ELECTRIC COMPANY'S  
NOTICE OF SUSPENSION OF PHASE II RULES  
ADOPTED PURSUANT TO CLEAN WATER ACT SECTION 316(B)**

Tampa Electric Company ("Tampa Electric" or "the company") hereby notifies the Commission and all parties of record that on March 20, 2007, the United States Environmental Protection Agency ("EPA") announced that the rule it adopted pursuant to Section 316(b) of the Clean Water Act to establish requirements for reducing the mortality of aquatic organisms by cooling water intake structures at certain existing large power plants (the "Phase II Rule")<sup>1</sup> should be considered suspended. A copy of EPA's March 20, 2007 letter is attached hereto as Exhibit 1. As explained in the letter, EPA intends to suspend the Phase II Rule based on the recent decision in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2<sup>nd</sup> Cir. 2007), which remanded several provisions of the Phase II Rule to EPA for further rulemaking. The letter states that EPA intends to issue a Federal Register notice formally suspending the Phase II Rule in the near future, but no such notice has been issued yet.

Tampa Electric recovers through the Environmental Cost Recovery Clause ("ECRC") costs associated with conducting the Comprehensive Demonstration Study ("CDS") that is required by the Phase II Rule. When the Commission approved Tampa Electric's "CWA 316(b) Phase II Rule" project, it observed that there was a possibility that Phase II Rule would be stayed and directed Tampa Electric to notify the Commission promptly of the stay. Order No. PSC-05-0164-PAA-EI,

<sup>1</sup> The Phase II Rules are codified in 40 CFR Parts 9, 122, 123, 124 and 125, and became effective on September 7, 2004.

DOCUMENT NUMBER-DATE

03278 APR 17 05

FPSC-COMMISSION CLERK

Docket No. 041300-EI, dated February 10, 2005. The Phase II Rule was never stayed, but because the effect of EPA's announced intention to suspend the phase II Rule will be similar to the effect of a stay, Tampa Electric has elected to notify the Commission of EPA's intent.

Attached hereto as Exhibit 2 is the affidavit of Laura R. Crouch, Tampa Electric's Manager – Land and Water Programs in the Environmental Health and Safety Department. The affidavit explains that Tampa Electric is presently collecting biological data needed for the CDS. While Tampa Electric does not yet know the specific terms of EPA's suspension, it likely will render the current deadline for submitting a CDS ineffective. Therefore, strictly from a deadline perspective, Tampa Electric may have the option of suspending its data collection, as well as the data analysis and technology evaluation work that Tampa Electric plans to conduct in support of filing the CDS. However, for the reasons explained in the affidavit, Tampa Electric does not intend to suspend that work because it would not be cost-effective or appropriate to do so. Tampa Electric believes that the costs of the work remain ECRC recoverable, because the work will continue to be useful for purposes related to the Phase II Rule, irrespective of the ultimate outcome of EPA's further rulemaking.

DATED this 17<sup>th</sup> day of April 2007.

Respectfully submitted,



LEE L. WILLIS  
JAMES D. BEASLEY  
Ausley & McMullen  
Post Office Box 391  
Tallahassee, FL 32302  
(850) 224-9115

ATTORNEYS FOR TAMPA ELECTRIC COMPANY

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Suspension of Phase II Rules Adopted Pursuant to Clean Water Act Section 316(b), filing on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (\*) on this 17<sup>th</sup> day of April 2007 to the following:

Ms. Martha Carter Brown\*  
Office of General Counsel  
Florida Public Service Commission  
Room 370N – Gerald L. Gunter Building  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Mr. Gary V. Perko  
Ms. Carolyn S. Raeppele  
Ms. Virginia C. Dailey  
Hopping Green & Sams, P.A.  
Post Office Box 6526  
Tallahassee, FL 32314

Mr. Charles Beck  
Ms. Patricia Christensen  
Office of Public Counsel  
111 West Madison Street – Suite 812  
Tallahassee, FL 32399-1400

Mr. R. Alexander Glenn  
Deputy General Counsel - Florida  
Mr. John T. Burnett  
Associate General Counsel - Florida  
Progress Energy Service Co., LLC  
Post Office Box 14042  
St. Petersburg, FL 33733

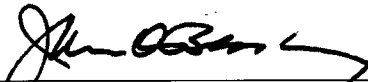
Mr. John W. McWhirter, Jr.  
McWhirter, Reeves & Davidson, P.A.  
400 North Tampa Street, Suite 2450  
Tampa, FL 33601-5126

Ms. Susan Ritenour  
Gulf Power Company  
One Energy Place  
Pensacola, FL 32520

Mr. John T. Butler  
Senior Attorney  
Florida Power & Light Company  
700 Universe Boulevard  
June Beach, FL 33408-0420

Mr. Jeffrey A. Stone  
Mr. Russell A. Badders  
Mr. Steven R. Griffin  
Beggs and Lane  
Post Office Box 12950  
Pensacola, FL 32591-2950

Mr. R. Wade Litchfield  
Ms. Natalie F. Smith  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, FL 33408-0420

  
\_\_\_\_\_  
ATTORNEY



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 20 2007

MEMORANDUM

OFFICE OF  
WATER

SUBJECT: Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation

FROM: Benjamin Grumbles, Assistant Administrator

A handwritten signature in black ink, appearing to read "Ben Grumbles".

TO: Regional Administrators

The purpose of this memorandum is to provide guidance on the status of the Cooling Water Intake Structures Phase II regulation under section 316(b) of the Clean Water Act ("Phase II rule" or "Rule"). The Phase II rule set national standards for cooling water withdrawals by large, existing power producing facilities ("Phase II facilities"). See 40 C.F.R. Part 125 Subpart J; 69 Fed. Reg. 41576 (July 6, 2004). The Second U.S. Circuit Court of Appeals recently issued its decision in the litigation over the Phase II regulation. See *Riverkeeper, Inc., v. EPA*, No. 04-6692, (2d Cir. Jan. 25, 2007).

The court's decision remanded several provisions of the Rule on various grounds. The provisions remanded include:

- EPA's determination of the Best Technology Available under section 316(b);
- The Rule's performance standard ranges;
- The cost-cost and cost-benefit compliance alternatives;
- The Technology Installation and Operation Plan provision;
- The restoration provisions; and
- The "independent supplier" provision.

With so many provisions of the Phase II rule affected by the decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the Rule in the near future.<sup>1</sup> In the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis. See 40 C.F.R. § 401.14.

If you have questions regarding the application of section 316(b) at Phase II facilities, please contact either Janet Goodwin with the Office of Science and Technology at 202-566-1060 ([goodwin.janet@epa.gov](mailto:goodwin.janet@epa.gov)) or Deborah Nagle with the Office of Wastewater Management at 202-564-1185 ([nagle.deborah@epa.gov](mailto:nagle.deborah@epa.gov)).

<sup>1</sup> In the event that the court's decision is overturned prior to publication of the Federal Register notice, then I will not proceed to effect the suspension; if the court's decision is overturned after publication of the notice, the Agency will take appropriate action in response.

## AFFIDAVIT

STATE OF FLORIDA  
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared Laura R. Crouch, who being first duly sworn deposes and says:

1. My name is Laura R. Crouch, and I serve as the Manager - Land and Water Programs in the Environmental, Health and Safety Department of Tampa Electric Company ("Tampa Electric"), 702 North Franklin Street, Tampa, Florida 33602. In this position I have knowledge of and familiarity with the matters addressed in this Affidavit.
2. I received a Bachelors Degree in Chemical Engineering from the University of South Florida. I began my career at Tampa Electric in 1995 as an engineer in Environmental Planning with responsibility for air and chemical management related activities. In 1997, I joined Regulatory Affairs with responsibility for rate analyses, preparing for regulatory proceedings and assisting in rate design for retail special contracts. In 1999, I worked in the Resource Planning department with responsibility for providing engineering support towards the company's integrated resource planning process and business planning activities. In 2001, I was promoted to Manager - Air Programs in the Environmental, Health and Safety Department. In that position, I was responsible for all air permitting and compliance programs. In 2005, I became Manager, Land and Water Programs and my present responsibilities include the management of land and water permitting and compliance.
3. I am responsible for directing the overall corporate environmental planning, programs, licensing and permitting activities to ensure Tampa Electric's achievement of the basic objective of obtaining and maintaining the federal, state, regional and local government approvals necessary to site, construct and operate Tampa Electric's power plants, transmission lines and fuel facilities and maintaining compliance with environmental laws.
4. On November 10, 2004, Tampa Electric petitioned for cost recovery through the Environmental Cost Recovery Clause ("ECRC") the costs associated with performing a Comprehensive Demonstration Study ("CDS") to determine the effect of its cooling water intake structures on aquatic life. Tampa Electric's petition stated that the CDS was necessary to address rules adopted by the U. S. Environmental Protection Agency ("EPA") pursuant to Section 316(b) of the Clean Water Act ("the Phase II Rule"). The Phase II Rule establishes performance standards that are designed to reduce impingement and entrainment of aquatic organisms related to the withdrawal of waters of the United States for cooling purposes through cooling water intake structures. The Phase II Rule was codified in 40 CFR Parts 9, 122, 123, 124 and 125, effective September 7, 2004, but it was subsequently challenged by several environmental groups and six northeastern states.

5. On February 10, 2005, the Florida Public Service Commission (the "Commission") issued Order No. PSC-05-0164-PAA-EI in Docket No. 041300-EI proposing agency action authorizing Tampa Electric to recover prudently incurred CDS costs through the ECRC. The Order noted that it was possible that the Phase II Rule would be stayed. The Order noted that the rule is in effect, but it is impossible to know whether it will be stayed or changed in a way that affects Tampa Electric's CDS activity. Accordingly, the Order further provided that if the EPA rule is stayed or new content is proposed, Tampa Electric shall notify the Commission within two weeks of such change. That proposed agency action decision became final with the issuance of Commission Order No. PSC-05-0254-CO-EI on March 7, 2005.
6. The Phase II Rule was never stayed, and Tampa Electric has continued to gather data and perform analyses necessary for the CDS, which was essential in view of the CDS deadline established by the rule.
7. On January 25, 2007, the Second Circuit Court of Appeals issued its decision on the rule challenges in *Riverkeeper, Inc. v. EPA*, which resulted in a remand of the Phase II Rule to EPA on several grounds.
8. On March 20, 2007, Benjamin Grumbles, the Assistant Administrator of the EPA, issued a memorandum entitled "Implementation of the Decision in *Riverkeeper, Inc. v. EPA*, Remanding the Cooling Water Intake Structures Phase II Regulation" (the "EPA Memorandum"). The EPA Memorandum states that, "With so many provisions of the Phase II rule affected by decision, the rule should be considered suspended. I anticipate issuing a Federal Register notice formally suspending the rule in the near future. In the meantime, all permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment (BPJ) basis. See 40 C.F.R. Section 401.14." To date, no Federal Register notice has been issued on this subject. A copy of the EPA Memorandum is attached herein as Exhibit 1.
9. Because the effect of EPA's intended suspension of the Phase II Rule will be similar to the effect of a stay, Tampa Electric has elected to notify the Commission of EPA's intent.
10. While Tampa Electric does not yet know the specific terms of EPA's suspension, it is likely to render the current deadline for submitting a CDS ineffective. Therefore, strictly from a deadline perspective, Tampa Electric may have the option of suspending the data collection and analysis activities that it has been performing in support of filing a CDS. However, Tampa Electric does not believe that it would be cost-effective or appropriate to suspend that work. Tampa Electric completed biological sampling at the Bayside Power Station in March 2007. All other costs for Bayside will be incurred due to report preparation and biological data evaluation, projected to be completed in September 2007. As a result of the imminent suspension of Phase II Rule, the biological data collection at the Big Bend Power Station has been revised to focus on key aspects of the study. The Big Bend Power Station biological sampling, based on a revised biological sampling plan, will be completed by October 2007. All other costs will be incurred due to report

preparation and data evaluation, projected to be complete in January 2008 Tampa Electric believes that the following activities should continue and that Tampa Electric should continue to recover the costs for those activities via the ECRC:

- Complete sampling events for all facilities and complete data report preparation.

11. These foregoing activities should continue to completion for the following reasons:

- To be meaningful, biological sampling must occur in a minimum of one-year intervals so all seasons are represented. To discontinue sampling with only partial-year data would invalidate, or certainly make much less valuable, all of the data previously collected. Moreover, to restart a sampling program would result in a minimum of \$50,000 in incremental mobilization fees for each facility.
- It would be much more efficient to have the data that is currently being collected analyzed and summarized now, rather than putting the data "on the shelf" and then analyzing it later. Important details about the data collection could be lost in the interim, and the analytical personnel would not be as familiar with the data if significant time passes between data collection and analysis.


12. Tampa Electric expects that the foregoing biological data collection and analysis will continue to be highly useful to Tampa Electric, no matter the eventual outcome of rulemaking on the Phase II Rule.

- The EPA Memorandum indicates that EPA will require BPJ determinations pursuant to the National Pollutant Discharge Elimination System ("NPDES") permit process while the Phase II Rule is suspended. This means Tampa Electric will have to address its plans to reduce the mortality of aquatic organisms in cooling water intake structures as part of its NPDES permit renewal applications via the BPJ process during the suspension period. Tampa Electric will be required to demonstrate to the Florida Department of Environmental Protection ("FDEP") permit writers that the operation of each permitted facility has no "adverse environmental impact." The current data collection and analysis will assist the FDEP permit writers in determining the impact of the permitted facility's cooling water intake structures, and the technology evaluation will assist them in determining the proper course of action for the facility to take.
- Completion of on-going biological data collection and analysis will support compliance with future rulemaking proceedings on the Phase II Rule. Rulemaking that was conducted for the existing Phase II Rule was based on biological data that were generally 30 years old. Technology evaluations that were made to determine the overall cost of the rule, as well as potential costs to an individual facility were based on minimal data submitted to EPA in a 1998 questionnaire. Having more detailed technology/cost data will assist Tampa Electric in presenting its views on the true cost of the revised rule and enable



Tampa Electric to better justify the inclusion of realistic, cost-effective compliance alternatives in the revised rule.

- Given the nature of the issues on which the Phase II Rule was remanded by the 2<sup>nd</sup> Circuit, it is highly likely that a CDS or something comparable will be required under the revised Phase II Rule. Tampa Electric's biological data and analysis would be useful to support Tampa Electric's compliance with such requirements in the revised rules.
  - Some or all of the grounds for remand in *Riverkeeper, Inc. v. EPA* could be reversed in subsequent appellate review by the Second Circuit *en banc* or by the Supreme Court if certiorari is sought and granted.
13. Regardless of the status of the Phase II Rule, Tampa Electric continues to be subject to a "governmentally imposed environmental regulation enacted after the utility's last test year upon which rates are based" - - as contemplated by section 366.8255 of the Florida Statutes and Order No. PSC-94-0044-FOF-EI - - to address the entrainment and impingement of marine organisms at its power plants. That requirement arises either under the Phase II Rule or, in the absence of currently effective rules, as part of the NPDES permitting process pursuant to section 316(b) of the Clean Water Act. As noted above, Tampa Electric expects that if the Phase II Rule is not effective at the time of the next round of NPDES permitting, Tampa Electric will be required to make a similar showing about entrainment and impingement of marine organisms at its power plants to what the Phase II Rule would have required. That showing would become the basis for the FDEP's BPJ determination, which is an integral part of the NPDES permit renewal process.
14. Tampa Electric projects that completing the current biological data collection, analysis and report preparation for the Bayside and Big Bend Power Stations will cost approximately \$400,000. Tampa Electric expects that these expenses all will be incurred in 2007 and early 2008.
15. Affiant says nothing further.

  
\_\_\_\_\_  
Laura R. Crouch

SWORN TO AND SUBSCRIBED to me this 17<sup>th</sup> day of April 2007, by Laura R. Crouch, who is personally known to me or who has produced personally known (type of identification) as identification and who did take an oath.

  
\_\_\_\_\_  
Notary Public, State of Florida

My Commission Expires:

