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June 29, 2007

HAND DELIVERED

Ms. Ann Cole, Director
Division of Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company
FPSC Docket No. 050958-EI

Dear Ms. Cole:

Enclosed for filing in the above docket is the original and fifteen (15) copies of each of the following:

1. Tampa Electric Company's Response in Opposition to Office of Public Counsel's Motion for Reconsideration of Order No. PSC-07-0499-FOF-EI.

2. Tampa Electric Company's Request to Dispense with Oral Argument.

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

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Enclosure

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company.	)))))	DOCKET NO. 050958-EI FILED: June 29, 2007

TAMPA ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO OFFICE OF PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-07-0499-FOF-EI

Tampa Electric Company ("Tampa Electric" or "the company") pursuant to Rule 25-22.060, Florida Administrative Code, responds as follows in opposition to the Motion for Reconsideration of Order No. PSC-07-0499-FOF-EI filed on behalf of the Office of Public Counsel ("OPC") in this proceeding on June 25, 2007:

Background

1. OPC's Motion for Reconsideration addresses four of thirteen projects making up Tampa Electric's Big Bend Flue Gas Desulfurization System Reliability Program ("FGD System Reliability Program"). Each of the four programs along with the remaining uncontested components of the FGD System Reliability Program has previously been unanimously approved by this Commission on two separate occasions.

2. The Commission first approved the FGD System Reliability Program for cost recovery through the Environmental Cost Recovery Clause ("ECRC") by Order No. PSC-06-0602-PAA-EI, issued July 10, 2006. The Commission found that the proposed program and each of its components met the eligibility criteria for ECRC recovery prescribed by Section 366.8255, Florida Statutes. In that order the Commission said:

> We find that the cost associated with TECO's proposed program to improve the reliability of the scrubbers at Big Bend are eligible for recovery through the ECRC as environmental compliance costs, 'incurred in compliance with the Clean Air Act, and any amendments thereto or any change in the application or enforcement thereof.. . . .'

3. On July 21, 2006, the last day for so doing, OPC requested an evidentiary hearing. That hearing was conducted on March 5, 2007 during which the Commission heard and considered direct and rebuttal testimony of three Tampa Electric witnesses, one OPC employee and two outside consultants testifying for OPC.

4. On June 11, 2007, after considering the record of the hearing and post hearing briefs of OPC and Tampa Electric the Commission entered its order approving 12 of the 13 component projects of the FGD System Reliability Program for cost recovery through the ECRC and one project through base rates. In so doing the Commission concluded that the four projects contested by OPC are part of an integrated program intended to improve scrubber reliability as a compliance option for the requirements imposed by paragraph 40 of Tampa Electric's Consent Decree with the United States Environmental Protection Agency. The Commission affirmatively stated:

> . . .The record is clear that absent the reliability program, an alternative compliance option that does not include these four essential component projects will likely result in significant impact to customers in additional replacement power costs, as well as the potential impact to the power grid reliability that was not factored into TECO's cost-benefit analysis. We believe that approval of these projects as eligible for cost recovery through the ECRC is consistent with the statute and in the public interest. We approve them, as we do the stipulated position of the parties regarding the remaining projects in the FGD Reliability Program, . . .

5. Notwithstanding two lengthy orders in which the Commission described in detail its basis for unanimously approving the contested programs for ECRC cost recovery and the voluminous supporting record of the evidentiary hearing OPC requested, OPC, once again, has brought this matter before the Commission in the form of a 16-page Motion for Reconsideration.

brought this matter before the Commission in the form of a 16-page Motion for Reconsideration. For the reasons set forth below, OPC's motion registers nothing more than OPC's disagreement with the Commission's ultimate decision of the issues in this proceeding. OPC's motion merely reargues matters fully aired and carefully considered by the Commission in reaching its conclusion that the four contested projects are appropriate for ECRC cost recovery. As such, and for the reasons detailed below, OPC's Motion for Reconsideration should be denied in all respects.

Governing Standard for Motions for Reconsideration

6. OPC's motion correctly observes that motions for reconsideration are not appropriate for re-argument of matters that have already been considered. In Diamond Cab Company of Miami v. King, 146 So.2d 889 (Fla. 1962), the Court observed that a motion for reconsideration is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order. Instead, the Court observed that the purpose of a petition for rehearing is merely to bring to the attention of the trial court or administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance.

7. The inappropriateness of attempting to use a motion for reconsideration as a vehicle for rearguing matters that have been tried, heard and decided was addressed in United Gas Pipe Line Co. v. Bevis, 336 So.2d 560 (Fla. 1976) (reh. den. April 7, 1976). Justice England, concurring in the denial of reconsideration in that case, stated:

> I would deny rehearing in this case in the face of the multi-page, argumentative rehearing petitions which have been filed, for the reasons set forth in *Texas Co. v. Davidson*, 76 Fla. 475, 478, 80 So. 558,559 (1918). See also Florida Appellate Rule 3.14(b), which states that a petition for rehearing shall be 'without argument'.
>
> Counsel for Monsanto (7 page petition), Air Products (14 page petition), and the Public Service Commission (4 page petition) have essentially reargued the entire case, prompting counsel for United Gas Pipe Line and Florida Gas Transmission to file brief-like replies

> of 15 and 18 pages, respectively. This expenditure of counsel's time, and the clients' money, is completely unjustified. This case had been argued, briefed and fully considered by the Court when the decision was initially rendered. It is not the office of rehearing to invite a complete re-analysis of all that has gone before. See *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817, 818-19 (1st DCA Fla. 1958).

8. Here, similar to the situation addressed in the United Gas Pipeline Co. case, OPC has filed a 16-page Motion for Reconsideration that is nothing more than a reargument of the points raised by Public Counsel in the full evidentiary proceeding that gave rise to the Commission's final order. In a word, this is inappropriate. As discussed below, rather than concisely calling the Commission's attention to anything it overlooked or failed to consider, OPC's motion simply re-agues points already raised by OPC in the proceeding and registers OPC's disagreement with the outcome of this case. For this reason alone, OPC's motion should be denied.

Argument. As discussed below, OPC has failed to identify any point of fact or law which was overlooked of which the Commission failed to consider in rendering its final order.

A. The Commission's Final Order Does Not Create Any Environmental Requirement

9. The first point in OPC's argument – that the Commission's final order in this proceeding creates an environmental requirement where none exists, is nothing more than a re-packaged presentation of OPC's prior contention that the four contested projects are not needed to comply with the Consent Decree. The sum and substance of OPC's Post-Hearing Brief was that the four contested projects are not necessary or required to comply with Paragraph 40 of the Consent Decree. As the Commission recognized in its final order, this simply is not the case.

10. On page 3 of its Motion, OPC erroneously claims that the final order creates an "improved scrubber reliability" requirement from the actual requirement of Paragraph 40 of the Consent Decree. This is purely an exercise in semantics. As the Commission recognized in its final order, the Consent Decree created significantly tighter restrictions on the operation of Big Bend

Units 1 through 3 once the 2010 and 2013 deadlines occur, after which those units may not be operated unscrubbed. Those tighter restrictions, in turn, necessitated action by Tampa Electric to implement the best means of complying with the deadlines and, at the same time, discharging the company's statutory obligation to continue providing safe, adequate, reliable and reasonably priced electric service to its customers. Shutting those units down when the scrubbers are not operational, in face of Tampa Electric's statutory obligation to serve, simply is not an option. Carried to its logical extreme, OPC's contrary position would defeat each and every ECRC cost recovery proposal. Rather than complying with any new environmental restriction, OPC would have the utilities simply shut down any affected generating unit or units at any time the new restriction might otherwise be violated, regardless of the impact that shutdown would have on utility customers. The Commission clearly saw the fallacy of this type of reasoning and properly rejected it. Instead, the Commission properly characterized the four projects at issue as being part of an integrated program intended to improve scrubber reliability as a compliance option to meet the deadlines imposed by Paragraph 40 of the Consent Decree. OPC's attempt to recast this compliance option as some sort of newly created environmental requirement is purely semantics and wholly without merit.

11. Similarly, on pages 5 through 7 of its Motion, OPC attempts to reargue its earlier contention that Tampa Electric did not include the four contested programs in its Phase I and Phase II plans for optimizing the Big Bend FGD System and, therefore, did not consider them to be necessary to comply with the Consent Decree requirements. This exact same argument was presented by OPC's witness, Mr. Hewson, and rebutted in detail by Tampa Electric witness Crouch, at Tr. 201-203. The Commission did not overlook or fail to consider anything by properly recognizing Tampa Electric's differentiation between short-term Phase I and Phase II compliance projects and longer term capital projects to achieve long-term solutions beyond the activities

this point is just as wrong now as it was when first presented and the Commission should reaffirm its rejection of such effort.

12. OPC concludes Point A of its Argument with a failed effort to distinguish the Commission's reliance on the Commission's earlier decision in Order No. PSC-02-1421-PAA-EI, issued October 17, 2002 in Docket No. 020648-EI, In re: Petition for Approval of Environmental Cost Recovery of St. Lucie Turtle Net Project for a Period of 4/15/02 through 12/31/02 by Florida Power & Light Company, referred to in the Commission's final order as the "Turtle Order." In the Turtle Order, the Commission allowed recovery of activities related to the installation of a turtle net that were not specifically mentioned in the environmental regulation requiring the net, but were designed to allow the net to operate effectively. The Commission was eminently correct in its conclusion in the final order in this case that the principle stated in the Turtle Order applies here. As the Commission observed at page 9 of its final order:

> . . .Where the environmental requirement does not detail the specific means to comply with the requirement, the utility is 'impliedly required' to implement compliance by the most reasonable and cost effective means. (Turtle Order, page 5) Under this standard we find that the FGD Reliability Program and the four projects in dispute are necessary to comply with the Consent Decree.

13. OPC claims, ". . .there is no environmental requirement being implemented." (Motion, at page 8). As the Commission observed, there certainly is an environmental requirement being complied with – that being the deadlines for not operating Big Bend Units 1-3 unscrubbed, which will occur in 2010 and 2013. The deadlines clearly are required in the Consent Decree and the Commission properly recognized that the company's actions are impliedly required if Tampa Electric is to comply with those deadlines. Contrary to OPC's apparent belief, the Consent Decree, like the Nuclear Regulatory Commission ("NRC") license involved in the Turtle Order, does not have to dictate specific compliance actions in order for those actions to be impliedly required.

like the Nuclear Regulatory Commission ("NRC") license involved in the Turtle Order, does not have to dictate specific compliance actions in order for those actions to be impliedly required.

14. The Turtle Order is clearly analogous to the present situation. As Tampa Electric pointed out in its Post-Hearing Statement, the Consent Decree, like FPL's NRC license, does not presume to prescribe a list of compliance projects to accomplish the mandate. Instead, the Consent Decree and the NRC license both leave it up to the utility to determine and implement the best means of complying with the applicable requirement and, at the same time, discharging the utility's statutory obligation to continue providing safe, adequate, reliable and reasonably priced electric service to its customers. OPC's demand that compliance measures be specifically named in the Consent Decree is as wrong now as it was when first presented to the Commission and appropriately rejected. Compliance with environmental mandates is not a game of Simon Says. Instead, it involves the task of selecting appropriate measures to effect compliance even though the specific measures selected may not be dictated in the order mandating compliance. OPC's re-argument of this point should, once again, be rejected.

B. The Commission's Final Order does not Misconstrue Representations Made by Tampa Electric to the EPA

15. This portion of OPC's Motion, at pages 8 through the top of page 11, is simply a restatement of OPC's earlier argument that the inclusion of the four contested FGD System Reliability projects and Tampa Electric's quarterly compliance reports renders them "not required" by the Consent Decree. This argument was soundly rebutted at Tr. 207, line 20 through Tr. 210, line 5. This argument was appropriately addressed and rejected by the Commission in its final order at page 9. Once again, OPC simply disagrees with the result and attempts to reargue everything it presented at hearing on this subject. This is simply wrong and an abuse of the process of seeking reconsideration. As Ms. Crouch testified and, as the Commission agreed, the wording of the

quarterly reports does not change the nature of the projects in question, which would not have been undertaken but for the requirements of Paragraph 40 of the Consent Decree.

C. The Commission's Final Order does not Misinterpret the Partial Stipulation

16. In this argument, on page 11 of its Motion, OPC contends that the Commission "misinterprets" OPC's stipulation to allow some of the 13 projects comprising the FGD System Reliability Program to be recovered to ECRC. Rather than misinterpreting the Stipulation, the Commission simply observes that the Consent Decree in its entirety, including Paragraph 40, is a "new" environmental requirement because the costs associated with its implementation occurred after 1993 and it was enacted, effective, or whose effect was triggered after the company's last test year upon which rates are based. (Final Order, at page 7). As the Commission went on to observe, the evidence is uncontested that the Consent Decree was executed in 2000 and that no costs to implement the settlement were incurred before April 13, 1993. It is also clear that the company's last rate case was filed before the litigation that led to the Consent Decree. The Commission has overlooked or failed to consider nothing in connection with these aspects of its final order.

D. The Commission's Final Order Properly Addresses the Electric Isolation Project

17. OPC concludes its Motion for Reconsideration with a four page reargument of OPC's previously stated position adverse to the Electric Isolation Project component of the company's FGD System Reliability Program. Again, the issues regarding this component of the overall program were fully vetted. The deficiencies in OPC witness Stamberg's testimony on this subject were described in detail in the rebuttal testimony of Tampa Electric Smolenski, at Tr. 221-230. That testimony fully supports the Commission's conclusion that the new Induced Draft Fans 3A and 3B and the new Transformer 3B are appropriate for ECRC cost recovery and should not be

considered base rate items. OPC's four page reargument of this same point should be rejected, consistent with the Commission's earlier disposition of this argument it its final order.

18. On pages 13 and 14 of its motion OPC misstates the findings and conclusions of Sargent & Lundy in its Evaluation of Fan Alternatives Study. As it did in its post-hearing brief OPC uses carefully edited quotes and clear misstatements as to the conclusions reached by the consulting firm of Sargent & Lundy in the Evaluation of Fan Alternatives Study that firm performed for Tampa Electric. First of all, the Sargent & Lundy Study made recommendations from among the alternative forced draft ("FD") fans from a group of FD fan alternatives. The Study also evaluated and made recommendations from alternative types of induced draft ("ID") fan alternatives. At no time does Sargent & Lundy recommend that FD fans be used in lieu of ID fans. Sargent & Lundy clearly states on page 5, section 1.2 of its study, "[T]his report has been written based on balanced draft operation." In the power plant engineering world, it is universally understood that balanced draft operation is both practically and theoretically impossible without the use of ID fans. It would, therefore, be impossible for Sargent & Lundy to have made the recommendation asserted in OPC's post-hearing brief and now in its motion for reconsideration.

19. Sargent & Lundy evaluated nine different FD fan alternatives. Referring to the first and second of the FD fan alternatives, OPC's brief quotes Sargent & Lundy as saying "both of these FD fan alternatives were clear winners over the other options by a large margin, but there is an insignificant margin between the two of them." Alternatives 1 and 2 were identified as "clear winners" over alternatives 3 through 9 for the selection of FD fans, <u>not</u> as an alternative to the use of ID fans as suggested in OPC's post-hearing brief and now in its motion for reconsideration.

20. Sargent & Lundy evaluated four different ID fan alternatives:

1. Centrifugal fan and motor with variable inlet vanes
2. Centrifugal fan and motor with hydraulic coupling
3. Centrifugal fan and motor with variable frequency drive ("VFD")
4. Axial flow fan and motor

Sargent & Lundy's actual recommendation as quoted from the executive summary is, "[T]he following alternatives are recommended based on the lowest cost option over a 20-year operating period:

ID Fans:	New centrifugal fan with VFD
FD Fans:	Retrofit existing fan with new rotating element or add VFD to existing fan."

Sargent & Lundy's recommendation clearly states that the use of ID fans with VFD is part of the lowest cost alternative available to Tampa Electric despite OPC's attempts to characterize it as just the opposite. OPC was wrong on this point in its post-hearing brief and is wrong again rearguing the same point in its motion for reconsideration.

Conclusion

21. Consistent with the reasoning explained by Justice England in United Gas Pipe Line Co. v Bevis, supra, the Commission should deny reconsideration in this proceeding in the face of the multi-page, argumentative motion for reconsideration filed by OPC. As in the case of United Gas Pipe Line, OPC's 16-page motion for reconsideration essentially reargues OPC's entire case, necessitating this multi-page response. With this case having been decided twice by the Commission, OPC's causation of this further expenditure of the time and resources of the parties and the Commission is completely unjustified. It is not the office of rehearing to invite a complete reanalysis of all that has gone before.

22. The Commission's final order is well reasoned, fully supported by the record developed in this proceeding and should be affirmed in all aspects. OPC has failed to demonstrate

DATED this 29th day of June 2007.

Respectfully submitted,

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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to OPC's Motion for Reconsideration, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 29th day of June 2007 to the following:

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