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July 16, 1997

Ms. Blanca S. Bayó, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0870

RE: Docket No. 970171-EU

Dear Ms. Bayó:

Enclosed are an original and fifteen copies each of a Joint Motion in Opposition to Tampa Electric Company's Motion for Leave to File Supplemental Brief for filing in the above referenced docket.

Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

John Roger Howe  
Deputy Public Counsel

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JRH/dsb  
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Determination of appropriate cost )  
allocation and regulatory treatment of )  
total revenues associated with wholesale )  
sales to Florida Municipal Power Agency )  
and City of Lakeland by Tampa Electric )  
Company. )

DOCKET NO. 970171-EU  
FILED: July 16, 1997

**JOINT RESPONSE IN OPPOSITION TO  
TAMPA ELECTRIC COMPANY'S MOTION  
FOR LEAVE TO FILE SUPPLEMENTAL BRIEF**

The Citizens of the State of Florida, through the Office of Public Counsel, and the Florida Industrial Power Users Group (FIPUG), pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, respond in opposition to the Motion for Leave to File Supplemental Brief filed by Tampa Electric Company on July 16, 1997, which should be denied for the following reasons:

1. Tampa Electric's motion does not cite to any authority for the filing. The motion is, in fact, not authorized by the Commission's procedural rules nor is it permitted by the Order Establishing Procedure in this docket.

2. Issue 9 from the Prehearing Order was first raised in the Citizens' Preliminary List of Issues and Positions filed on April 7, 1997. To put everyone on notice of the issue and the Citizens' position, some of the cases upon which the Citizens' intended to rely were cited in the position statement, even though this is not required by Commission rules or practice.

**ISSUE:** Would the Commission exceed its jurisdiction if it were to allow Tampa Electric to earn a return through retail rates for its wholesale sales to the Florida Municipal Power Agency (FMPA) and to the City of Lakeland?

**OPC:** Yes. The Federal Power Act, 16 USC §§ 824, et seq., was enacted in 1935 to provide the federal regulation of electric utilities found to be outside the domain of state regulators in the case of Public Utilities Commission of Rhode

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Island v. Attleboro Steam & Electric Co., 273 U.S. 83, 71 L. Ed. 549, 47 S. Ct. 294 (1927). The Commission cannot invade FERC's jurisdiction even if it believes doing so will provide an incentive for electric utilities to provide retail service at the lowest reasonable cost. The Commission cannot cross the "bright line" drawn by Congress between state and federal jurisdiction. Federal Power Commission v. Southern California Edison Co., 376 U.S. 205, 215-216 (1964) ("... Congress [in the Federal Power Act] meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary [] case-by-case analysis.")

The Office of Public Counsel was under no obligation to inform Tampa Electric of any of the cases upon which it might rely; the position could have been just "YES "

3. This same issue and position were repeated in the Citizens' prehearing statement filed on May 19, 1997. The Statement of Basic Position in the Citizens' prehearing statement was based on this legal issue:

The wholesale contracts at issue in this proceeding were submitted to, and approved by, the Federal Energy Regulatory Commission (FERC), the only agency authorized to decide whether the revenues Tampa Electric Company receives from the wholesale jurisdiction are adequate. Since Tampa Electric has decided unilaterally, and for its own purposes, that assets previously available to serve residential customers should now be committed to the wholesale jurisdiction, the Public Service Commission's job is to assure, to the extent possible, that none of the wholesale costs are borne by, and no return on wholesale assets is earned from, the retail jurisdiction.

All parties understood that, since Issue 9 was a legal issue, the only opportunity to address it would be in the briefs filed on July 7, 1997.

4. Four attorneys represented Tampa Electric in this case. Each of them knows how to confront a legal issue when procedures allow for only one filing. Normal practice is to offer argument and cases supporting your position and to anticipate and distinguish argument and cases opposing counsel may rely upon. Most legal research is done after the hearing. In its brief, at page 3 note 4, Tampa Electric said "OPC's assertion that This [sic] Commission lacks authority to adopt Tampa

Electric's proposed regulatory treatment of the FMPA and Lakeland sales on the grounds of federal preemption has no basis in law." Tampa Electric could have written volumes after this statement (at least up to the Commission's page limitation), but it obviously thought a footnote would suffice to get its point across. This was a tactical decision made by the company and binding upon it


5. Granting Tampa Electric's motion would create a dangerous precedent. It would imply that any time a party raises a new case or makes an argument not explicitly provided to the adverse party beforehand, a reply brief would be permissible and appropriate

6. Tampa Electric has neither alleged nor demonstrated prejudice from the procedures used in this case. The Citizens and FIPUG, however, are severely prejudiced by the company's actions.

**WHEREFORE**, the Citizens of the State of Florida, through the Office of Public Counsel, and the Florida Industrial Power Users Group urge the Florida Public Service Commission to deny Tampa Electric Company's Motion for Leave to File Supplemental Brief

Respectfully submitted,

JACK SHREVE  
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John Roger Howe  
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**CERTIFICATE OF SERVICE  
DOCKET NO. 970171-EU**

I HEREBY certify that a copy of the foregoing Joint Response in Opposition to Tampa Electric Company's Motion for Leave to File Supplemental Brief has been served by \*hand delivery or U.S. Mail to the following parties of record on this 16th day of July, 1997

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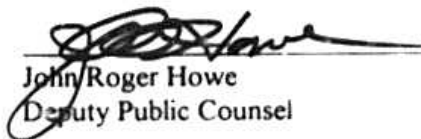
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