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STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

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October 2, 1998

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. 980693-EI

Dear Ms. Bayó:

Enclosed is an original and fifteen copies each of the Brief of the Office of Public Counsel and Post-Hearing Statement of the Office of Public Counsel for filing in the above-referenced docket.

Also Enclosed is a 3.5 inch diskette containing both the Brief of the Office of Public Counsel and the Post-Hearing Statement of the Office of Public Counsel in WordPerfect for Windows 6.1 format. 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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PH Statement

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Tampa Electric Company for approval of cost recovery for a new environmental program, the Big Bend Units 1 & 2 Flue Gas Desulfurization System.

DOCKET NO. 980693-EI

FILED: October 2, 1998

BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel, pursuant to the Order Establishing Procedure in this docket, Order No. PSC-98-0864-PCO-EI, issued June 30, 1998, submit this Brief.

ISSUE 1: Has Tampa Electric Company (TECO) adequately explored alternatives to the construction of a Flue Gas Desulfurization (FGD) system on the Big Bend Units 1 and 2?

OPC: *No. Alternatives have been explored, but Tampa Electric's conclusion is largely unexplained on the record. No other coal-fired utility has chosen the scrubber option. Fuel savings are not adequately quantified. Information the Commission must consider under Section 366.825, Florida Statutes (1997), has not been provided.*

Tampa Electric's conclusion that a stand-alone scrubber for Big Bend Units 1 and 2 is the best alternative for meeting SO_2 emission limits does not appear unreasonable based on the limited amount of evidence the company has presented. The company, however, has not adequately explained why, if its analyses were done correctly, other coal-fired electric utilities have not come to a similar conclusion and opted to build scrubbers. Nor has Tampa Electric explained exactly how the purported fuel savings which caused the company to choose the scrubber alternative were calculated.

Mr. Black testified that his company is the only one that's chosen to go with scrubber technology, at least in the short-term. [T. 88-89] Operators of hundreds of other coal-fired units have

chosen to fuel switch (or blend) and purchase emission allowances. [T. 89] When asked about this, Mr. Black said other utilities, particularly those in the Midwest, were able to burn low-sulfur Western coal, an option not available to Tampa Electric, and thereby freed up allowances during Phase I for use in Phase II.[1] [T.89-90] But Tampa Electric integrated Big Bend 3 with Big Bend 4's scrubber in 1995 [T. 84] and designated Big Bend 4 as a substitution unit under Phase I. [T. 34, 70] Both actions freed up additional allowances in Phase I for Tampa Electric to use in Phase II. [T. 34, 70] Expanding on a production of document request, Tampa Electric said "[t]he accumulated inventory of SO_2 allowances allow Tampa Electric to defer additional SO_2 [allowance] purchases until 2001 thus lowering costs in the year 2000." [Exhibit No. 14, Hernandez/Black Late-Filed Deposition Exhibit No. 7, p. 3 of 7] And the earlier scrubber integration meant Big Bend 3 met both Phase I and Phase II SO_2 standards. [T. 82] It seems Tampa Electric's position is not significantly different from these other utilities.

If the scrubber is really the least cost alternative when compared with fuel blending with allowance purchases, Tampa Electric would have scheduled the scrubber for completion by January 1, 2000, when Phase II begins. Mr. Black said nothing prevented the company from scheduling the Big Bend 1 and 2 scrubber to come on line at the beginning of 2000. [T. 92] With the planned in-service date of mid-year 2000 for the scrubber [T. 90], Tampa Electric is going to have to fuel blend and purchase allowances for the first half of the year [T. 91], which if the company's analyses are correct, will increase customer costs. Mr. Hernandez testified that a one-year deferral of the scrubber

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[1]Although Mr. Black said Powder River Basin coal was not an option for Tampa Electric, three of the company's Phase II SO_2 compliance options show Gannon Units 1-3 using a combination of "PRB and WKy [i.e., Western Kentucky]" coal. [Exhibit 8, Bates stamp 04766]

would decrease savings to the ratepayer. [T. 172] Presumably, a six-month delay would also decrease customer savings. In sum, while Tampa Electric's decision appears justified based on the process described by its witnesses, the company's own actions and those of others in a similar situation make it appear illogical.

Furthermore, since the Commission has not seen much of the information required by Section 366.825, it cannot evaluate all the issues the Legislature deemed relevant for a prior-approval determination. In particular, Tampa Electric's choice of the scrubber alternative is based on the company's conclusion that fuel savings will make up for both the capital and O&M costs of the scrubber. [T. 176, 184] The Commission, however, has not been provided with the specific, estimated dollar costs and amounts of high- and low-sulfur coals (or petroleum coke) to be burned at each of the generating units needed to verify this conclusion. The questions left unanswered should preclude prior approval at this time.

ISSUE 2: Is the fuel price forecast used by TECO in its selection of a CAAA Phase II Compliance Plan reasonable?

OPC: *No. Cost-effectiveness of the scrubber depends on fuel savings from burning high-sulfur coal and petroleum coke. Fuel savings, in turn, depend on the reasonableness of the fuel price forecast. There is, however, no detailed fuel price forecast suitable to evaluate the company's SO_2 compliance plan in the record.*

Tampa Electric's overall justification for choosing the scrubber alternative is that fuel savings resulting from burning higher sulfur coal (at Gannon as well as at Big Bend) more than offset the capital and O&M costs of the scrubber on a cumulative present worth revenue requirements basis. [T. 43, 176] Yet Tampa Electric has not introduced into the record of this proceeding fuel price forecasts which would support that conclusion. Present and potential future sources of fuel which

the Legislature requires the Commission to consider under Subparagraph 366.825(2)(d)5 have also not been provided.

Mr. Hernandez, in his prefiled testimony, said Mr. Black would be the one to quantify the fuel savings which justified building a scrubber:

> The specific fuel price forecast utilized in the cost-effectiveness studies are described in detail by Mr. Black. . . . The fuel price forecast and availability and quality of the fuels is a key element of the cost effectiveness studies . . .. The FGD system is the most cost-effective compliance alternative due to the significant fuel savings which more than offset the capital costs of constructing and operating the FGD system for both Big Bend Units 1 and 2. [T. 175-76] [Emphasis added.]

From the foregoing, the "specific" fuel price forecast actually "utilized" in the cost-effectiveness studies to justify the scrubber should be found in the testimony and/or exhibits sponsored by Mr. Black.[2] After all, the reason the scrubber is the most cost-effective is "due to the significant fuel savings." Mr. Black's testimony and exhibits, however, do not contain a detailed description of Tampa Electric's fuel price forecast.

Mr. Black's prefiled testimony does contain a generalized response to a question asking how Tampa Electric forecasts fuel and SO_2 allowance prices. [T. 38] He states (among other things) that "[t]he forecast used in this analysis is the same forecast utilized in the Tampa Electric 1998 Ten Year Site Plan." [T. 38] The 10-year site plan, an exhibit to Mr. Hernandez's prefiled testimony [Exhibit 12, Bates stamp 146], however, does not contain a fuel price forecast. Exhibit 11, which was introduced during Mr. Black's cross-examination, contains some delivered coal price projections

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[2]In his deposition, Mr. Hernandez, when asked about coal prices FOB the mine, had said: "The fuel price and fuel department is under Mr. Black." [Exhibit 14, p. 147] In the prehearing order, at page 11, Mr. Black is identified as the company witness supporting the reasonableness of the fuel price forecast used by Tampa Electric in selecting the scrubber option to meet Phase II Clean Air Act compliance standards.

from the 10-year site plan for the years 1998 through 2007. This information could not be used, however, to determine whether Tampa Electric's conclusion that fuel savings would exceed capital and O&M costs of the scrubber was reasonable over the life of the scrubber.

The line graphs shown in Mr. Black's Document 2 (of Exhibit 2) provide almost no useful information at all, except to show a very simplistic and generalized relationship of Tampa Electric's projections of generic East Kentucky and West Kentucky coal prices to the estimates of outside consultants. The prices shown on the graphs, moreover, are mine prices, not the delivered prices Tampa Electric must have used in its analyses. The Commission does not know what those prices are and has no basis whatsoever to evaluate them for reasonableness.

Mr. Black testified that Tampa Electric was burning petroleum coke at Big Bend, the permits at Big Bend 3 and 4 having been amended to permit use of this non-coal fuel. [T. 95] Exhibit 8 (Bates stamp 04766) shows petroleum coke continuing to be burned at Big Bend 3 and 4 after the scrubber is added to Big Bend 1 and 2. Mr. Black acknowledged, however, that if the Commission was looking for a detailed price forecast for petroleum coke, it would not find it in his testimony. [T. 95-96]

Mr. Hernandez said the Big Bend 1 and 2 scrubber option yielded present worth savings of $18 million over the first 10 years, $80 million over the first 20 years, and $95 million over the first 25 years of scrubber operation. [T. 183] Since the savings are purportedly attributable to the cost differential between high- and low-sulfur coal, Tampa Electric was obligated to prove: (1) its fuel price projections over those time periods (i.e., well beyond the data in a 10-year site plan) were reasonable; and (2) the price differentials supported the company's selection of the scrubber option. Tampa Electric has not offered such evidence in this proceeding. Without it, the Commission lacks

record evidence to support a finding that the scrubber is reasonably expected to be the least cost alternative.

Big Bend 3 and 4 are already scrubbed. It is, therefore, reasonable to infer that petroleum coke is high in sulfur and low in price and will have some effect on Tampa Electric's system-wide emissions of SO_2. The manner in which these facts were incorporated into Mr. Hernandez's screenings or the final cost-effectiveness analysis, or indeed whether they were incorporated, is unknown on the record of this proceeding.

ISSUE 3: Are the economic and financial assumptions used by TECO in its selection of a CAAA Phase II Compliance Plan reasonable?

OPC: *The assumptions, other than AFUDC, used in making the SO_2 compliance comparisons do not appear to be unreasonable. Tampa Electric, however, has apparently not adopted a comprehensive compliance plan at this time. The AFUDC assumption is unreasonable. See OPC's position on Issue 6.*

ISSUE 4: Did TECO reasonably consider the environmental compliance costs for all regulated air, water and land pollutants in its selection of the proposed FGD system on Big Bend Units 1 and 2 for sulfur dioxide (SO_2) compliance purposes?

OPC: *No.*

ISSUE 5: Has TECO demonstrated that its proposed FGD system on Big Bend Units 1 and 2 for SO_2 compliance purposes is the most cost-effective alternative available?

OPC: *No. Tampa Electric has not explained why its result differs from other coal-fired utilities which have apparently opted for fuel switching with allowance purchases. Fuel savings are not adequately quantified. Section 366.825, Florida Statutes (1997), precludes piecemeal consideration of Clean Air Act compliance plans for purposes of prior approval.*

ISSUE 6: Should the Commission approve TECO's request to accrue allowance for funds used during construction (AFUDC) for the proposed FGD system on Big Bend Units 1 and 2?

OPC: *Tampa Electric has not made a formal request to accrue AFUDC. Tampa Electric should accrue AFUDC only to the extent that its CWIP balance for this project on a thirteen-month average basis exceeds the amount of CWIP allowed in rate base in the company's last rate case.*

The following, lengthy discussion on this issue is necessary because Tampa Electric has not been at all clear about what it is asking for or where it finds the legal authority for what it is implying. The company's petition does not even contain a formal request to accrue AFUDC. The absence of clarity and the lack of a formal request would justify denying the accrual of AFUDC on the scrubber project altogether. Additionally, Tampa Electric's approach to the AFUDC issue implies that it has been less-than-direct in seeking prior approval for the scrubber project itself.

An order from Tampa Electric's last rate case Order No. PSC-93-0664-FOF-EI, bears directly on the issue of whether, and in what amount, the company may accrue AFUDC. Tampa Electric, however, did not cite to the order in its petition or prefiled testimony. Yet, as will be seen below, Tampa Electric is apparently looking for a decision in this docket which it can construe as modifying that earlier order.

Rule 25-6.0141, entitled "Allowance for Funds Used During Construction," also bears directly on the issue. Yet Tampa Electric did not cite the rule in its petition, the pleading requirements of Rule 25-22.036(7)(a)4 notwithstanding. One utility witness claimed the company's position to be "consistent" with the rule, but as will be seen below, it is not evident that Tampa Electric has even implemented the rule. If the rule has been implemented, the full text of the rule

would preclude the relief the company is after. If the rule is applicable and Tampa Electric wants to deviate from its terms, the company should have petitioned for a waiver or variance.

If Tampa Electric believes Section 366.8255, the only legal authority cited in its petition, permits it to accrue AFUDC without regard to the rule or the order, it should have said so before now. Such a position, however, would be illogical given that a company witness claimed accrual of AFUDC was consistent with Rule 25-6.0141.

Years of experience suggest it prudent to pay close attention to any matter Tampa Electric addresses obliquely. In its petition, at page 5, Tampa Electric announced that "[p]roject costs will be tracked and accumulated in AFUDC until the FGD system goes into service." Taken at face value, this statement appeared to be no more than bookkeeping information provided for the Commission's edification. No explicit request for authority to accrue AFUDC was made, nor was reference made to any order or rule bearing directly on the subject. Nor did Tampa Electric acknowledge that AFUDC was not included in its earlier cost estimates. [Exhibit 5, Black's Late-Filed Deposition Exhibit No. 2, p. 2 of 2]

Mr. Hernandez was somewhat less indirect in his prefiled testimony when he said the company's treatment of AFUDC would be "consistent" with Rule 25-6.0141:

> Tampa Electric will track its costs associated with the construction of the FGD system and accumulate them in AFUDC until the FGD system goes into service. This is consistent with the Commission's Rule 25-6.0141 identifying projects eligible for AFUDC accrual. The proposed FGD system will involve gross additions to plant in excess of 0.5% of the sum of the total balance in Account 101-Electric Plant in Service, and Account 106-Completed Construction not Classified, at the time the project commences. In addition, the project is expected to be completed in excess of one year after the commencement of construction. [T. 178]

This testimony created the impression that AFUDC accrual on the scrubber project was permissible under the terms of the rule. Such was not the case.

On cross-examination, Mr. Hernandez acknowledged he had not even read the full text of the rule. [T. 231, 241] His prefiled testimony had just been referring to those subparts of the rule which identified factual circumstances similar to those of the scrubber project, i.e., gross plant additions which would cost in excess of 0.5 percent of the balances in major plant accounts and which would be under construction for more than one year. He had ignored the introductory language in Rule 25-6.0141(1) indicating construction projects were only eligible for AFUDC to the extent they exceeded the amount of CWIP allowed in rate base in the company's last rate case.[3] The factual parameters from Rule 25-6.0141(1)(a) upon which Mr. Hernandez relied are, in fact, additional limitations on projects that must first exceed the amount of CWIP in rate base.

By claiming consistency with the rule, Mr. Hernandez's prefiled testimony also left the impression that Tampa Electric was already following Rule 25-6.0141. Section (9) of the rule, however, provides that the rule need not be implemented by all electric utilities until January 1, 1999.[4] Mr. Hernandez admitted on cross-examination that he did not know whether Tampa Electric

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[3] The first sentence of Rule 25-6.0141 reads, in pertinent part: "(1) Construction work in progress (CWIP) . . . that is not included in rate base may accrue allowance for funds used during construction (AFUDC), under the following conditions: . . ." [Emphasis added.]

[4] The former rule provided that AFUDC could be charged on projects otherwise eligible which cost more than $25,000. The January 7, 1997, amendments increased the threshold cost and required certain information to be filed with forecasted surveillance reports. Although, the new rule was made effective on January 1, 1996, electric utilities do not have to implement it until January 1, 1999, or the next rate case, whichever occurs first. It would, therefore, appear that there is no Commission rule on AFUDC applicable to an electric utility which has not yet implemented this rule. This rule would not apply, and the old rule is gone.

had implemented the rule yet. [T. 242, 248] Evidence that the rule has not been implemented is found in Exhibit 13, which contains Tampa Electric's forecasted surveillance reports for 1997 and 1998. Those surveillance reports would contain a schedule of construction projects estimated to exceed a gross cost of $10,000,000 pursuant to Section (8) of the rule if Tampa Electric were following the rule for all purposes. There are no such schedules in those reports, nor are there statements that there are no such projects for the forecast periods.[5]

Tampa Electric's petition did not specifically request permission to accrue AFUDC on the Big Bend 1 and 2 scrubber project and did not cite to any statutes, rules or orders directly applicable to the subject. Mr. Hernandez's prefiled testimony continued the theme of obfuscation, invoking part of a rule which Tampa Electric may not have implemented as authority for relief inconsistent with the rule's complete text.

At the hearing, while summarizing his prefiled testimony, Mr. Hernandez said Tampa Electric wanted to accrue the "full amount of AFUDC." [T. 185] To the reasonably educated listener this would imply the company's intent to accrue as much AFUDC as possible, but certainly not beyond bounds established by rules or orders. In the company's vernacular, however, the "full amount of AFUDC" meant charging AFUDC on every dollar, without regard to any limitations imposed elsewhere.

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[5]Each of the transmittal letters for the forecasted surveillance reports in Exhibit 13 states that "computations have been made for the purposes of complying with Order No. PSC-94-1600-FOF-PU and were made according to the methodology prescribed in Order No. PSC-93-0165-FOF-EI dated February 2, 1993." No indication is given that these reports are consistent with Rule 25-6.0141, which was adopted on January 7, 1997, before either report was filed.

At the end of Tampa Electric's last rate case, the Commission issued Order No. 93-0664. That order set the amount of CWIP needed in Tampa Electric's rate base to meet the 3.75 times interest coverage ratio found necessary to preserve the company's financial integrity. It also limited the ability of the company to accrue AFUDC:

> In establishing the amount of CWIP to include in TECO's 1994 rate base, we target the achievement of a 3.75 times interest earned ratio. To maintain this interest coverage, we increase the 1994 CWIP amount by $6,947,000 based on the two above-mentioned adjustments [to account for increased amounts of coal in inventory and for a lesser amount of interest on oil-backout debt]. The total amount of allowed CWIP in 1994 therefore increases from $48,017,000 to $54,964,000. This balance represents $18,793,000 of short-term CWIP and $36,171,000 of CWIP subject to Allowance for Funds Used During Construction. From January 1, 1994 until ordered to modify or cease, the $36,171,000 which is earning a return from this proceeding, shall offset CWIP balances that accrue AFUDC. [Emphasis added.]
>
> Order No.93-0664, at page 2.

The underlined sentence merely states the reality of CWIP in rate base, i.e., that since customers cover the carrying costs of construction investment included in rate base, allowing the accrual of AFUDC would constitute a double recovery. The order is directly on point, relevant, and adverse to Tampa Electric's position in this docket. It should have been cited by the company.

From the foregoing discussion of Tampa Electric's petition and prefiled testimony, it's clear that nothing was pled or said to implicate Order No. 93-0664. Nothing the company filed alerted Commissioners that a decision in this docket consistent with the company's representations would be construed by Tampa Electric as a reversal of Order No. 93-0664. Yet that is precisely the message hidden in Mr. Hernandez's use of the words "full amount of AFUDC":

> Q. [by Mr. Howe] Without saying so directly, is it Tampa Electric's position that if the Commission issued an order in this case consistent with your testimony that Tampa Electric would in the future consider that order as modifying this earlier one [i.e., Order No. 93-0664]?

A. [by Mr. Hernandez] I would say yes. [T. 236-37]

* * * *

Q. And by the ["]full amount["] do you mean charging AFUDC on the first dollar, the last dollar and every dollar in between?

A. That's how the cost-effectiveness study was developed and the basis for the $7.2 million, that's correct.

Q. Do you necessarily mean without regard to any limitation imposed by Order No. 93-0664, or Rule 25-6.0141 for the amount of CWIP currently allowed in Tampa Electric's rate base?

A. Well, relative to the rule I believe -- and again, from the Order, it says until ordered to modify or cease by the Commission. So the Commission always has the opportunity and the flexibility to make that determination with our treatment. [T. 250]

* * * *

Mr. Howe: I think the question I asked was clearly susceptible to a yes or no answer. And the question was simply is Tampa Electric asking for permission to accrue AFUDC without regard to any CWIP in rate base limitation contained in the cited order or rule. I think it's perfect for a yes or no answer.

Mr. Beasley: Does your question assume that that's the only appropriate way that it can be justified?

Mr. Howe: No. It cites to that Order and that rule. You can take care of anything else on redirect.

Mr. Hernandez: I would say our intent is to get cost recovery for the full amount of AFUDC.

Mr. Howe: Chairman Johnson, could I have the witness directed to give a yes or no answer and then he is free to --

Mr. Hernandez: The answer is yes. [T. 251-52]

Only at this point, 252 pages into a 330-page transcript and 3 ½ months after Tampa Electric filed its petition, did the company's ultimate objective surface. Only at this point did Commissioners, staff

and adverse parties learn conclusively that Tampa Electric intended all along to have this docket result in an action inconsistent with both a Commission order and a Commission rule without the company having ever expressed its objective directly.[6] Perhaps most troubling is that Tampa Electric tried to accomplish this result by offering a chemical engineer to provide evasive testimony on a regulatory accounting issue.

There is no shortage of Tampa Electric employees competent to address AFUDC and other regulatory accounting subjects. The only logical explanation for offering the Commission a chemical engineer who disavowed an understanding of accounting is that the company did not want the subject fully explored. Section 120.569(2)(e), Florida Statutes (1997), however, requires the Commission to consider evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Reasonably prudent persons would not rely upon this chemical engineer to explain matters requiring expertise in accounting. Reasonably prudent persons would, however, likely assume the lack of candor on the AFUDC issue infected the reliability of the company's case on the scrubber issue, itself.

Mr. Black, whose Document 4 (in Exhibit 2) contained the first company reference to the amount of AFUDC requested, is a chemical engineer who acknowledged he lacked the expertise to express an opinion on the reasonableness of the company's AFUDC calculation. [T. 31, 111] Mr. Hernandez, also a chemical engineer, acknowledged he was not an accountant and asserted that,

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[6]Tampa Electric certainly did not disclose its objective even in its statement of basic position in the prehearing order. Echoing the words from its petition, it said: "The Commission should also approve Tampa Electric's tracking and accumulation of project costs in AFUDC until the FGD system goes into service." None of the other parties knew that an order simply recognizing the company's plans to track costs would be construed by Tampa Electric to allow for the accrual of AFUDC without regard to the amount of CWIP in rate base.

although he is now the vice-president for regulatory affairs for Tampa Electric, the regulatory accounting area of the company is not under his direction or supervision. [T. 167, 192, 193, 196] Neither witness knew whether the AFUDC rate had been derived from Rule 25-6.0141 or anything else about the reasonableness of the AFUDC rate. [T. 107-11, 196, 199, 241, 287] The company, therefore, offered no competent evidence to support recovery of the "full amount of AFUDC" as Mr. Hernandez used those terms. Nor did the company offer evidence which would justify any positive amount of AFUDC.

AFUDC on construction balances below the $36,171,000 CWIP-in-rate-base threshold would violate sound regulatory policy. It would require customers to pay twice for carrying charges on the company's construction projects. This is apparently the intent of Mr. Hernandez's testimony, to have Tampa Electric's customers pay over $7.2 million in AFUDC through future cost recovery charges on top of the carrying costs for construction the company is already receiving in base rates.[7] Mr. Hernandez's testimony, however, stands in stark contrast to Tampa Electric's first witness, Mr.

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[7]In retrospect, and in light of Mr. Hernandez's testimony at the hearing, Tampa Electric's word smithing on its statement of position on Issue 6 carries new meaning: "Yes. Accrual of AFUDC until such time as the FGD system is placed into operation is [a] reasonable accounting alternative which does not affect any customers' rates while the project is being constructed. The accrual of AFUDC is consistent with Rule 25-6.0141, F.A.C.[,] which identifies projects eligible for AFUDC." [Emphasis added.] It is, of course, only after the project is completed and cost recovery is occurring that customers will pay twice, once for the CWIP in base rates and a second time for over $7.2 million of AFUDC through an environmental cost recovery factor. But it is the accrual "while the project is being constructed" that makes the double recovery possible, indeed inevitable. Note also that the rule does more than "identif[y]" projects eligible for AFUDC in terms of cost and construction duration, it limits eligible projects by first requiring that they exceed the CWIP-in-rate-base from the last rate case. The company is really saying AFUDC on the scrubber project would be consistent with a small part of the rule, i.e., subsection (1)(a) -- if that part is taken out of context. However, Tampa Electric clearly lacked a reasoned basis to believe the accrual of AFUDC on the scrubber project is "consistent" with Rule 25-6.0141.

Black, who said "[i]t's not the company's intent to double dip in either case between the AFUDC and the base rates." [T. 105]

If Tampa Electric has implemented Rule 25-6.0141, the rule controls and AFUDC can only be accrued on the balance which exceeds the $36,171,000 included as CWIP in the company's last rate case. Even if the rule has not yet been implemented, it will apply to Tampa Electric by its express terms on January 1, 1999. Moreover, having invoked the rule as support for its position on the AFUDC issue, Tampa Electric should be estopped from raising any argument that the full text of the rule -- including the CWIP-in-rate-base limitation -- is not currently applicable to it. If, however, the rule is deemed not applicable to Tampa Electric until January 1, 1999, Order No. 93-0664 controls and limits projects eligible for AFUDC in the same manner as the rule.

Commissioners should recall that, at the September 1, 1998, agenda conference, oral argument was held on FIPUG's and LEAF's motions to dismiss and on Public Counsel's suggestion that the Commission dismiss on its own motion. In that argument, Tampa Electric maintained that the Commission could entertain a petition for prior approval of a Clean Air Act compliance project under Section 366.8255. The other parties, conversely, argued that the more specific Section 366.825 with its enumeration of matters the Commission must consider was controlling.

AFUDC was not a topic of the arguments. However, given the company's approach to this issue, it is not unlikely that Tampa Electric in its brief will argue that Section 366.8255 allows for the recovery of any and all costs associated with environmental compliance activities, including AFUDC, and without regard to Order No. 93-0664 or Rule 25-6.0141. (And in spite of the fact that the rule is the only legal authority cited in the company's statement of position on this issue in the prehearing order.) If so, it will indicate that the company's reliance on Section 366.8255 was not

really tied to a well-founded belief that the statute was a viable alternative to Section 366.825 for receipt of prior approval of Clean Air Act compliance projects. Instead, it was tied to the more general language in Section 366.8255(2) which Tampa Electric believes gives it an opportunity to include AFUDC among "prudently incurred environmental compliance costs" without regard to the CWIP-in-rate-base limitations of the rule and order and without informing the Commission beforehand of this interpretation.

Section 366.8255, however, cannot affect the viability of Rule 25-6.0141 or Order No. 93-0664. The statute became law on April 13, 1993. The rule was effective on January 1, 1996, and would apply to the accrual of AFUDC on any project which otherwise qualified for AFUDC. Even if the company has not yet done so, Tampa Electric will have to implement the rule by January 1, 1999. Order No. 93-0664 is dated April 28, 1993, and by its explicit terms applies to all major construction projects after January 1, 1994. Tampa Electric has not formally requested that Order No. 93-0664 be modified nor has it alleged that changed circumstances justify a departure from its terms.

Tampa Electric may attempt to argue that environmental cost recovery issues under Section 366.8255 are separate and apart from base rate proceedings, and as such, matters applicable to base rates (e.g., the effect of CWIP-in-rate-base on the accrual of AFUDC) are inapplicable here. Subsection 366.8255(5), however, specifically provides for environmental compliance activities to be included in base rates and precludes the recovery through a cost recovery factor of costs already in base rates. The legislative intent, therefore, is to calculate environmental costs for cost recovery purposes in the same manner as costs for base rate purposes. Accordingly, the amount of CWIP

allowed in rate base in Tampa Electric's last rate case pursuant to Rule 25-6.0141 and/or Order No. 93-0664 is applicable to both.

The Commission included $36,171,000 of CWIP in Tampa Electric's rate base on a thirteen-month average basis in Order No. 93-0664. Therefore (if the Commission does not preclude the accrual of AFUDC altogether), Tampa Electric should only accrue AFUDC on the Big Bend 1 and 2 scrubber project in those years in which the thirteen-month average of CWIP for that project exceeds the CWIP already included in rate base. In making the calculation of CWIP eligible for AFUDC, Tampa Electric should be required to exclude all costs which, in the absence of this or any other construction project, would be included in calculating the company's earnings for surveillance purposes. Those amounts are, by definition, already in base rates.[8]

ISSUE 7: Should TECO's petition for cost recovery for a FGD system on Big Bend Units 1 and 2 through the Environmental Cost Recovery Clause (ECRC) be granted?

OPC: *No. It's too late for prior approval and too early for final approval. The Commission cannot evaluate, grant prior approval and authorize future cost recovery for an incomplete plan to achieve partial compliance with Phase II of the CAAA when the requirements of Section 366.825 have not first been satisfied. *

Tampa Electric has planned on building a scrubber for Big Bend 1 and 2 since late 1996 or early 1997. When asked for his earliest memory of the scrubber being given "serious" consideration, Mr. Black said it was "reviewed in the screening analysis that dates back to the '96 time frame." The

[8]Tampa Electric compiled all its projected costs in Mr. Black's Document No. 4 [Exhibit 2], apparently without considering first whether some of the costs would be reflected in surveillance reports as expenses in the absence of this or any other construction project. [T. 104-6] AFUDC would be inappropriate for CWIP in rate base or for expenses included in base rates.

screening analysis is reflected in the exhibits to Mr. Hernandez's prefiled direct testimony in Exhibit 12. Table 2-4 (Bates stamp 120) compares the various alternatives in 1996 dollars because, as Mr. Hernandez testified in deposition, "[t]he screening analysis was really done in 1996." [Exhibit 14, pp. 37, 76-78, 158] The summary of SO_2 compliance alternatives in Table 2-6 (Bates stamp 125) which shows the Big Bend 1 and 2 scrubber as having the highest negative cumulative present worth revenue requirement differential (and, therefore, the lowest cost to customers [Exhibit 14, pp. 19, 96, 109]) is expressed in 1996 dollars because that is the year it was done. Mr. Hernandez's response to deposition questions also indicated Tampa Electric was reasonably certain the Big Bend 1 and 2 scrubber was the most cost effective alternative in late 1996 or early 1997:

> Q. (by Mr. McWhirter) At what point in time did you effectively reach the conclusion that scrubbing 1 and 2 is the answer?
>
> A. (by Mr. Hernandez) Conclusively?
>
> Q. Well, you know, 80% certain, or pretty darn certain.
>
> A. The results of the screening analysis or studies that were conducted in late '96, early '97, generally led to the conclusion that the FGD option was the most cost effective. However, there was a desire to kind of firm up some of the expected costs, and so there was some time that went by to try to firm those numbers up. But effectively, using the 80% number, the general conclusion from the screening analysis supported the scrubbing option.
>
> Q. In '97?
>
> A. In '97, early '97, late '96. [Exhibit 14, p. 223]

If Tampa Electric was really interested in prior approval, it would have filed its petition in 1997.

Tampa Electric is well on its way to actually building the scrubber. Wheelabrator has already been awarded the $25+ million contract for the scrubber module. [T. 98-99] Contracts have also been awarded for site development, piling, and the fan. [T. 100] Piling is now being placed for the

chimney foundation. [T. 99] Whether the Commission grants prior approval or not in this docket, Tampa Electric is going to build its scrubber. It's too late to do anything else, except continue fuel blending with allowance purchases. [T. 101-2, 142] This is what everyone else is doing anyway. Most significantly, Tampa Electric has neither alleged nor proven any adverse consequences expected to result if the Commission refuses to grant prior approval.

Meeting NO_x compliance standards will cost an additional $8 to $30 million. [T. 67] Classifier modifications necessitated by the Clean Air Act Amendments of 1990 are going to be part of the company's environmental cost recovery filing in October, 1998, to establish a recovery factor for calendar year 1999:

> Tampa Electric is not requesting approval for cost recovery of these classifier activities in this proceeding, however, the classifier projects will be included in the Company's October 1998 ECRC Projection Filing for the period January 1999 through December 1999.
>
> [Exhibit 14, Hernandez/Black Late-Filed Deposition Exhibit No. 7, p. 3 of 7]

Costs are now being recovered for classifiers which were included and approved for cost recovery in the current April through December, 1998, projection period. [Exhibit 14, pp. 26-27]

The Commission is unable, on the record of this proceeding, to put all these parts together to determine whether the scrubber is really the least cost alternative within an overall compliance plan. What's missing is the total picture which is what's required by Section 366.825, Florida Statutes (1997).

ISSUE 8: Should this docket be closed?

OPC: *Yes.*

Respectfully submitted.

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CERTIFICATE OF SERVICE
DOCKET NO. 980693-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF THE OFFICE OF PUBLIC COUNSEL has been furnished by U.S. Mail or *Hand-delivery to the following parties on this 2nd day of October,1998.

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