BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 ORDER NO. PSC-98-0038-FOF-EU ISSUED: January 6, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTIONS FOR RECONSIDERATION

BY THE COMMISSION:

On June 11, 1997, an evidentiary hearing was held to determine the retail regulatory treatment of the costs and revenues of two wholesale electricity sales made by Tampa Electric Company (TECO) to the Florida Municipal Power Agency (FMPA) and the City of Lakeland (Lakeland). The issues addressed at the hearing focused on whether retail ratepayers received net benefits from the sales, the manner in which the fuel and non-fuel revenues and costs from the sales should be treated, and Commission jurisdiction to determine the retail regulatory treatment.

On October 15, 1997, we issued Order No. PSC-97-1273-FOF-EU (Order), in which we found that TECO must separate capital and O&M costs associated with the FMPA and Lakeland wholesale sales from the retail jurisdiction. In addition, the Order provided that TECO may credit the Fuel Cost Recovery Clause and Environmental Cost Recovery Clause with incremental fuel and SO_2 allowance costs and that TECO may reduce retail operating revenues by the amount of the shortfall, if any, between fuel revenues and incremental fuel costs.

On October 30, 1997, Office of Public Counsel (OPC) and Florida Industrial Power Users Group (FIPUG) filed a Joint Motion for Reconsideration and a Request For Oral Argument. Also on

October 30, 1997, TECO filed a Motion for Expedited Clarification or Reconsideration of Order No. PSC-97-1273-FOF-EU. OPC filed a Response in Opposition to TECO's Motion for Expedited Clarification or Reconsideration on November 6, 1997. On November 12, 1997, TECO filed a Response to Motion for Reconsideration Filed on behalf of Office of Public Counsel and the Florida Industrial Power Users Group and a Conditional Request for Oral Argument. This recommendation addresses the six pending pleadings.

Request for Oral Argument

OPC and FIPUG filed a Request for Oral Argument in conjunction with their Joint Motion for Reconsideration on October 30, 1997. The Request stated that the "complicated interactions between the base rate stipulations and the fuel cost recovery proceeding could best be clarified through oral presentations." TECO filed a Conditional Request for Oral Argument in conjunction with its Response to OPC and FIPUG's Joint Motion on November 12, 1997. TECO's Conditional Request stated that OPC and FIPUG are attempting to reargue matters fully considered and decided by the Commission. As such, TECO believes oral argument is unnecessary. However, if OPC and FIPUG were granted oral argument, TECO requested the opportunity to participate also.

Pursuant to Rule 25-22.060(1)(f), Florida Administrative Code, whether to grant oral arguments is solely within the discretion of the Commission. A request for oral argument must "state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." Rule 25-22.058(1), Florida Administrative Code.

We find that OPC and FIPUG have failed to state with particularity why oral argument would aid the Commission in evaluating the issues before it. Instead, the request appears to be an attempt to reargue matters already fully considered and decided by the Commission. A hearing lasting a full day, on this docket, was held in June of 1997. In September of 1997, several hours of oral argument were heard by the Commission on the issue of the stipulation. Therefore, we find that additional oral argument on the stipulations and fuel cost recovery would add nothing to the Commission's exhaustive analysis in this docket and would be duplicative.

Joint Motion For Reconsideration

OPC and FIPUG's Joint Motion for Reconsideration appears to be based on two primary points of contention: (1) an alleged unlawful modification of a stipulation, and (2) an alleged mistake of fact. Both arguments challenge that portion of the Order which allows a reduction in retail operating revenues by the amount of the shortfall between fuel revenues and incremental fuel costs. As discussed below, we find that the Joint Motion fails to establish a legally or factually cognizable basis for reconsideration and is more in the nature of a disagreement with the Order in this Docket.

It is well established that an agency may reconsider its final order if the order is found to have been based on mistake, inadvertence or a specific finding based on adequate proof of changed conditions or other circumstances not present in the proceedings which led to the order being modified. People's Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) The purpose of a reconsideration proceeding is to bring to the attention of the agency some matter which it overlooked or failed to consider when it rendered its order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962) The mere fact that a party disagrees with the order is not a basis for rearguing the case. Id. Nor is reweighing the evidence a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958)

Unlawful Modification of Stipulation

The first basis for OPC and FIPUG's Joint Motion is an alleged unlawful modification of a stipulation in Docket No. 950379-EI, Order No. PSC-96-0670-S-EI, issued May 20, 1996 (TECO Over earnings Docket) resulting from the Commission's adjustment to operating revenues in this Docket. In support of their Motion, OPC and FIPUG argued that the Order violated paragraph 11 of the stipulation approved in Docket No. 950370-EI by modifying it. (Joint Motion, para. 1) "The Commission has absolutely no authority . . . to modify orders approving negotiated stipulations without a finding that such modification is necessitated by changed circumstances." (Joint Motion, para. 3, *citing* City of Homestead v. Beard, 600 So.2d 450, 453 (Fla. 1992) and Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966) There can be no changed circumstances in this instance, they argue, because new wholesale contracts were contemplated by the parties at the time they entered

into the stipulation. OPC and FIPUG argue that the adjustment is unlawful because it is tantamount to a modification of a Commission order without the requisite finding of changed circumstances. The relief they request is that the Commission withdraw that portion of the Order which allows for the adjustment for fuel cost shortfalls. The stipulation language states:

> 11. The calculation of the actual ROE for each calender year will be on an "FPSC Adjusted Basis" using the appropriate adjustments approved in Tampa Electric's full revenue requirements proceeding. All reasonable and prudent expenses and investment will be allowed in the computation and no annualization or proforma adjustments shall be made.
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> Joint Motion, para.1, *quoting* Order No. PSC-96-0670-S-EI

TECO filed a Response to Motion for Reconsideration filed on behalf of Office of Public Counsel and the Florida Industrial Power Users Group on November 12, 1997. The substance of the Response was that the Joint Motion should be rejected because it provided an insufficient basis for reconsideration. TECO asserted that the Joint Motion was a reargument of matters previously litigated and decided. (TECO Response, para. 1) With respect to the alleged unlawful modification of the stipulation, TECO demonstrated that the language of the stipulation had no bearing on the Commission's legal authority in this matter. (TECO Response, para. 3) TECO pointed out that OPC and FIPUG did not specify what language in paragraph 11 had been contravened or how the language should have been interpreted. "Instead, they simply characterize[d] the Commission's order as permitting an 'artificial reduction' in calculated earnings . . ." (TECO Response, para. 4) TECO believed that OPC and FIPUG's position was erroneous because the fuel treatment ordered in this Docket was more favorable to ratepayers than the treatment in effect when the stipulation was approved. Thus, negating the possibility of the Commission having committed an unlawful modification. (TECO Response, para. 5) TECO also stated that the Commission Order did not constitute a proforma or annualized adjustment. (TECO Response, paras. 6 & 7). We agree with the position put forth by TECO in its Responses.

OPC and FIPUG's concern appears to be not whether traditional adjustments or normalizations are made that affect base rates as in a rate case, but rather, the use of base rate operating revenues to make up a shortage in wholesale fuel revenues. OPC and FIPUG's

concern may be that using retail base rate operating revenues to make the fuel cost recovery clause whole will reduce the refund amounts in the year 2000 pursuant to the stipulations. However, OPC and FIPUG did not expressly state that the above is their concern.

The Joint Motion did not clearly state which portion of, or the manner in which, paragraph 11 has been unlawfully modified. However, construction of the language of paragraph 11 is instructive in responding to the Joint Motion. On its face, paragraph 11 must be interpreted as a unit. This is so because the second sentence refers to and creates exceptions to the requirements of the first sentence. We find that the first sentence is a general statement that return on equity will be determined using adjustments approved in TECO's last rate case. We further find that the second sentence expands upon the first by stating that reasonable and prudent expenses and investment will be allowed in the computation of TECO's return on equity as long as they are not annualization or proforma adjustments.

That portion of the Order in this Docket which permits a shortfall of fuel revenues to be made up from operating revenues does not modify paragraph 11. On the contrary, the shortfall provision is permissible under the quoted stipulation language because it has been found to be a reasonable and prudent expense to be included in the computation of TECO's jurisdictional earnings.

The Commission's jurisdiction to make an adjustment which affects TECO's return on equity under the terms of paragraph 11 is supported by Commission precedent. In considering the TECO Polk Prudence Review, Docket No. 960409-EI, the Commission found that:

> The proposed stipulation provides that "All reasonable and prudent expenses and investment . . ." are to be included in the calculation of the actual ROE for 1999. Similar language was also included in "the First Stipulation." The Commission makes the final determination of "reasonable and prudent" in reviewing the basis of the ROE calculations.
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> Order No. PSC-96-1300-S-EI, pg. 5

The adjustment to operating revenues for possible fuel revenue shortfalls is neither an annualized nor a proforma adjustment. An annualization adjustment is made to extrapolate an

adjustment for an entire year that occurred for only a portion of that year. A proforma adjustment is one in which future expected changes are estimated and accounted for prior to their occurrence. The adjustment to operating revenues provided for in the instant Order will only be made if a shortfall exists. The shortfall will not be annualized into a yearly adjustment and it will not be estimated for future adjustments.

In sum, we find that with OPC and FIPUG that the FMPA and Lakeland wholesale sales do not constitute changed circumstances which would justify modification of prior Commission orders. On the contrary, the cost allocation and regulatory treatment of the sales are consistent with the provisions of the stipulation regarding reasonable and prudent adjustments when determining TECO's return on equity. Because the provisions of the stipulation have not been modified by Order No. 97-1273-FOF-EU, OPC and FIPUG have not demonstrated a basis for reconsideration.

Mistake of Fact

The second aspect of OPC and FIPUG's Joint Motion for Reconsideration is an alleged mistake of fact with respect to the Commission's finding that overall benefits from the wholesale sales will be experienced by TECO's retail ratepayers. The significance of a finding of overall benefits is based on Order No. PSC-97-0262-FOF-EI, issued March 11, 1997 in Docket No. 970001-EI which states that a utility shall credit the fuel costs of separable wholesale sales at system average unless there is an affirmative demonstration of "overall benefits" from the sales. In that event, fuel costs may be credited at an amount other than system average.

OPC and FIPUG argued that the wholesale contracts with FMPA and Lakeland required the commitment of generating capacity which was previously available to make economy sales, 80% of the gain on which was flowed back to retail customers through the fuel clause. They further argued that while separation of the FMPA and Lakeland sales may increase the likelihood of refunds under the stipulation, the actual amount of the refund was not known therefore ". . . the Commission cannot possibly make a factual determination that the purported benefits of separation will exceed foregone economy sales gains." (Joint Motion, para. 6) Since there was no specific evidence of the amount of prospective refunds the ratepayers can expect, OPC and FIPUG asserted that fuel costs from the wholesale sales must be credited at system average cost.

TECO addressed OPC and FIPUG's net benefit argument in its Response. TECO stated that the fuel treatment in this Docket was consistent with Order No. PSC-97-0262-FOF-EI. The Commission made a specific finding on net benefits:

> The Commission went on to observe that separation of capital and O&M costs associated with the FMPA and Lakeland sales will be beneficial to customers and increase the potential for refunds under the stipulation. During the Agenda Conference discussion of this matter, the Commission and Staff were in agreement that the benefits to retail customers from shifting all of the costs of the FMPA and Lakeland sales out of the retail jurisdiction were even greater than the benefits of the regulatory treatment Tampa Electric had proposed.
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> TECO Response, para. 9, *citing* Agenda Conference Tr. 80.

TECO's assessment was that OPC and FIPUG's Joint Motion was a "belated and misguided attack on the fuel adjustment treatment provided for in the Order" and a reargument of their position at hearing. (TECO Response, para. 10). We agree with TECO's characterization of OPC and FIPUG's net benefit argument.

OPC and FIPUG's net benefit argument was not supported by the evidence adduced at hearing or the law of the case. In fact, the argument that net benefits can only be ascertained by reference to the actual amount of refunds retail customers may receive under the stipulation was unique to the Joint Motion. The net benefits analysis in this docket went well beyond the sole issue of refunds and was the primary focus of this proceeding. Two of the nine issues, a substantial amount of discovery, and direct, rebuttal and cross examination testimony in the case directly addressed net benefits. At no point did OPC or FIPUG argue that the actual amount of the refund was the sole determinative factor of net benefits. Instead, a broad range of treatments and effects were proffered by the parties and considered by the Commission and it was ultimately decided that net benefits are derived from the sales.

In sum, we find that OPC and FIPUG's net benefits allegation did not demonstrate mistake of fact. Likewise, their argument did not establish a matter which the Commission overlooked when it rendered its decision. On the contrary, net benefits were

extensively litigated in this proceeding and the Order makes a specific finding thereon:

> We have found that the Stipulation requires separation of the capital and O&M costs associated with the sales to FMPA and Lakeland. Accordingly, all non-fuel revenues will be retained by TECO and serve to support the additional wholesale cost responsibility resulting from the separation. *In addition, we believe that the sales will provide overall benefits to TECO's retail ratepayers.*
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> Order No. PSC-97-1273-FOF-EU, pg.9 (emphasis added)

Accordingly, because the Joint Motion did not demonstrate a basis upon which reconsideration should be granted, the Joint Motion is hereby denied.

Expedited Clarification or Reconsideration

Tampa Electric Company's Motion requested a clarification or reconsideration of that portion of Order No. PSC-97-1273-FOF-EU that addressed the treatment of the supplemental energy sales made as part of the contracts for firm wholesale power to FMPA and Lakeland.

In its Motion, TECO suggested that the supplemental service portion of the FMPA and Lakeland contracts were distinct from the base portion of the contracts and thus should be treated differently. Stated another way, TECO was asserting that the supplemental sales should not have to be separated in the manner ordered for the base portion of the wholesale sales. "Since the supplemental sales to FMPA and Lakeland are sales of less than a year, the separation procedure adopted in the company's 1992 rate case and reaffirmed in the Second Stipulation requires that they be flowed back rather than separated." (TECO Motion, para. 7) In support of its Motion, TECO quoted from that portion of Order No. PSC 97-0262-FOF-EI, Docket No. 970001-EI which reiterated established Commission policy of treating non-firm wholesale sales of less than a year in duration as non-separated sales. (TECO Motion, para. 9)

OPC filed a Response in Opposition to Tampa Electric Company's Motion for Expedited Clarification or Reconsideration of Order No.

PSC-97-1273-FOF-EU on November 6, 1997. The Response was timely filed. In its Response, OPC took issue with TECO's implication that the Commission failed to consider the manner in which the supplemental sales should be treated. (OPC Response, para. 3) OPC asserted that the Commission fully addressed the effect of the supplemental sales before rendering its decision.

> [T]he Commission: (1) considered the provisions for supplemental sales; (2) dismissed the supplemental sale provisions as a basis for distinguishing the FMPA and Lakeland transactions; and (3) ultimately concluded that the FMPA and Lakeland sales, while providing for supplemental service, were more in the nature of firm wholesale contracts and should be separated as such.
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> OPC Response, para. 5

We agree with OPC's arguments. The character and ultimate regulatory treatment of the supplemental sales associated with the FMPA and Lakeland contracts were fundamental issues in this docket. This is so because as part of its justification for retaining the base wholesale sales in the retail jurisdiction, TECO argued that the option to purchase supplemental energy under both contracts somehow differentiated the FMPA and Lakeland contracts from other separable wholesale sales. (Witness Ramil, TR pg. 38)

After full and careful consideration, the Commission determined that the supplemental sales were only an optional provision of firm, long-term contracts and thus would be treated in the same manner as the base contracts. That is, the supplemental sales must be separated in the same manner as the base wholesale sales.

> At the September 23, 1997, Agenda Conference, TECO argued that the FMPA and Lakeland sales were unique because they contained the provision for supplemental sales. The ability to purchase supplemental capacity does not change the fact that the firm portion of the contract is for a period exceeding one year and requires a commitment of capacity. This is a difference without a distinction. Order No. PSC-93-0165-FOF-EI, Docket No. 920324-EI, required that TECO's long term wholesale sales be separated at average embedded cost based on the separation studies filed in those proceedings. We find that the FMPA and Lakeland sales fall within the category

> of sales contemplated by the Stipulation, and the capital and O&M costs associated with these sales shall be separated from the retail jurisdiction at average embedded cost.
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> Order No. PSC-97-1273-FOF-EU, pgs. 7-8

The Commission did not address the base portion and supplemental portion of the wholesale sales separately because it was not necessary. The sales were contracted for as a whole, analyzed by the Commission as a whole and the regulatory treatment applies to all the provisions of the contracts with equal force and effect. The issue raised in TECO's Motion for Clarification was a restatement of its position taken during in these proceedings and has been fully and completely addressed in the Order. The motion did not identify any legal basis for reconsideration; that is, mistake of fact or law, inadvertence, or any point which the Commission failed to consider in rendering its decision in the first instance. Therefore, we conclude that TECO's Motion for Expedited Reconsideration or Clarification shall be denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel and Florida Industrial Power Users Group's Request for Oral Argument is denied. If is further

ORDERED that Tampa Electric Company's request for Oral Argument is denied. It is further

ORDERED that the Office of Public Counsel and the Florida Industrial Power Users Group's Joint Motion for Reconsideration is hereby denied. It is further

ORDERED that Tampa Electric Company's Motion for Expedited Clarification or Reconsideration of Order No. PSC-97-1273-FOF-EU is denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of January, 1998.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.