IN THE SUPREME COURT OF FLORIDA

Florida Industrial Power
Users Group,

Appellant

v.

Case No. SC02-187
PSC Docket No. 010001-EI

Lila A. Jaber, et al,

Appellees
_____/

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT
FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief. Appellant, Florida Industrial Power Users Group, is referred to as FIPUG. Appellee, Florida Public Service Commission, is referred to as the Commission or the FPSC. The Federal Energy Regulatory Commission is called FERC. Appellee, Tampa Electric Company, is called TECo. TECo's affiliated companies, TECo Power Services and Hardee Power Partners, are referred to as TPS and Hardee or HPP, respectively.

Citations to the Record on Appeal are designated (R.), citations to the hearing transcript are designated (Tr.), hearing exhibits are referred to as (Exh.), and the Appendix is referred to as (Appdx).

GLOSSARY and GENERAL CHRONOLOGY[1]

IOU — Investor-owned utility regulated by the Commission. The Commission sets its rates.

Rate Base — The value to be determined by the Commission for ratemaking purposes. Section 366.06(1), *Florida Statutes,* provides:

> . . . The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes. . . .

Base Rates — The rates set by the Commission in a general rate case for an IOU.

Cost Recovery Proceedings — Before 1972, all utility expenses were recovered through base rates. Fuel costs were removed from base rates in 1972. The Commission guarantees 100% recovery of these costs. Over the years, the Commission has authorized other expenses to be removed from base rates and recovered through adjustment clauses.

1972 — Fuel costs were removed from base rates.

1981 — Conservation costs were removed from base rates.

1992 — Purchased power costs were removed from base rates.

1993 — Environmental costs to comply with the Clean Air Act are collected separately until rolled into base rates.

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[1]The Glossary and General Chronology are included for ease of reference.

2001 — New security costs are collected through cost recovery clause.

Florida Retail Customer — Retail customers' rates are set by the Commission.

Florida Wholesale Customer — A customer who buys electricity for resale. Prices are set by the FERC. Where there is a competitive wholesale market, the FERC allows competition to set the price. As to sales between affiliated companies, the FERC sets price based on cost.

Municipal Utility — Potential generator and wholesale trader. Retail rates for city customers are set by the city authority.

Seminole Electric Cooperative (Seminole) — A cooperative that generates electricity and engages in wholesale trading. It is the purchasing agent for ten Florida Rural Electric Cooperatives. Seminole also generates electricity. The Rural Cooperatives set retail rates for their customers.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This case concerns transactions between a regulated electric utility and its unregulated affiliate merchant plant. FIPUG contends that the Commission erred when it authorized TECo to increase its retail rates, without conducting a meaningful investigation of past and prospective transactions between TECo and its unregulated, merchant affiliate. The disputed transactions span a four-year period during which TECo sold and will sell power to its unregulated affiliate for a price below its average fuel cost. TECo contemporaneously purchased and will purchase power from its unregulated affiliate at a price above its average fuel cost. Such transactions harm retail customers because they result in improper cross-subsidization of TECo affiliate activities.

FIPUG is an association of consumers, each of which purchases electricity from TECo. TECo is a public utility within the meaning of §366.02, *Florida Statutes* (2001). FIPUG appeals a portion of Commission Order No. PSC-01-2516-FOF-EI at 12 (Final Order) in Docket 010001-EI, as it relates to TECo's affiliate transactions. (R. 428).

In this case, TECo requested authority to raise rates to collect $495 million to cover its estimated 2002 fuel costs plus an $88.67 million "under recovery" from prior collection periods. Much of the $88.67 million "under-recovery" is related to the "losses" TECo incurred on its affiliate transactions, which it then

passed through to retail customers. TECo witness Jordan admitted that none of this true-up amount is charged to TECo's wholesale customers. (Tr. 76). TECo Energy profits on both sides of the merchant plant sales and retail customers pick up the losses.

TECo supported its rate increase request with an exhibit that set out the aggregate sum of the alleged under recovery and the estimated total expenditures for fuel and purchase power for 2002. (Exh. 3, JDJ-3, Schedule E1, Appdx at A-31). TECo did not offer any evidence disclosing the details of its dealings with its merchant affiliate or other wholesale transactions. It claims the details are trade secrets protected by §366.093, *Florida Statutes* (2001).

The Prehearing Order, Order No. PSC-01-2273-PHO-EI (Nov. 2001) (Prehearing Order)(R. 351-414), set out the disputed issues in the case. Issue 1 related to the appropriate final true-up amounts for 2000. Prehearing Order at 10-11 (R. 360-61). Issue 2 related to the estimated/actual true-up amounts for 2001. Prehearing Order at 11-13 (R. 361-63). Issue 3 dealt with amounts to be collected in 2002. Prehearing Order at 13-14 (R. 363-64). Issue 4 in the Prehearing Order set the projected fuel adjustment factor for the coming year. Prehearing Order at 14-15 (R. 364-65). As to each of these issues, FIPUG demanded that the Commission defer granting TECo's requested rate increase until the Commission investigated the prudency of the wholesale transactions buried in the total cost figures TECo provided. Prehearing Order at 10-15

(R. 360-365).

Issue 21C focused directly on TECo's dealings with its merchant affiliate:

> For the period January 1998 to December 2000, were Tampa Electric Company's decisions regarding its wholesale energy purchases from and its wholesale energy sales to Hardee Power Partners reasonable?

Prehearing Order at 27 (R. 377). FIPUG's position on the issue was:

> No. The Commission should open a separate docket to conduct a thorough investigation of Tampa Electric Company's affiliate transactions and its procurement of power for its wholesale customers to determine whether Tampa Electric Company's actions regarding affiliate transactions are prudent and beneficial to retail ratepayers.

Prehearing Order at 27 (R. 377). TECo contended that Commission and the FERC had resolved the issue 12 years before and it could not be reopened.

The Commission heard the TECo issues (contemporaneously with the fuel and purchase power costs, conservation costs, and environmental surcharge issues related to all Florida IOUs) on November 20-21, 2001. The only evidence TECo offered about its wholesale sales was the total fuel cost for each type of sale and the total capacity payment for each type of sale.

At the conclusion of the hearing, Commission Staff made an oral recommendation to the Commissioners. The Commission restricted its view of the merchant affiliate contract to a

Staff member's analysis developed from evidence outside the record. Staff's recommendation provided no analysis of the November 1990 FERC order on which the Staff relied. *TECO Power Services Corporation and Tampa Electric Company*, 53 FERC P61,202 (Nov. 19, 1990) (*FERC Nov. 1990 Order*). For example, there was no mention that the FERC study dealt with only 40% of the fixed costs of the sale to the merchant affiliate. Nor did the Staff mention that the capital costs for "unit" purchase power are not fixed as assumed by FERC but change every year. Finally, the Commission approved expenditures for the past four years on the premise that the contract will end next year. Although information regarding the affiliate transactions was confidential, the Commission placed the burden on FIPUG to prove imprudence.

The Commissioners voted on the issues from the bench. (Tr. 659-695). They approved TECo's total rate increase and refused to conduct any investigation into TECo's affiliate activities. (Tr. 686-688). In its Final Order, rendered a month later, the Commission found that TECo's decisions regarding its transactions with HPP were reasonable and that the wholesale contract between HPP and TECo was "FERC-approved and cost-based." Final Order at 12 (R. 428)(Appdx at A-12).

On January 25, 2002, FIPUG filed its Notice of Appeal of the Final Order. (R. 447-80). The Court has jurisdiction of this appeal pursuant to Article III, §3(b)(2), Florida

Constitution.

Statement of the Facts

TECo Energy Inc., is a public utility holding company. It is exempt from the requirements of the Public Utility Holding Company Act of 1935 (intrastate exemption), (*TECo Power Services Corporation and Tampa Electric Company*, 52 FERC P61,191, 61,693, at n.2 (Aug. 1990) (*FERC Aug. 1990 Order*) (Appdx at A-36)). It is exempt because it operates its regulated utility in a single state and is subject to state regulation. Much of the amounts[2] at issue below were the result of the regulated utility's sales to and purchases from its unregulated, affiliate merchant generating company.

TECo witness J. Denise Jordan, presented the only evidence in support of TECo's requested rate increase. Exhibit 3 shows TECo's fuel cost projections for January 2002-December 2002. This schedule shows that, based on the power TECo will generate and purchase, its system average fuel cost will be ***$33.01***/MWH. (Exh. 3, JDJ-3, Schedule E1, line 41)(Appdx at A-31).

As to sales to HPP, for the period January 2002 through December 2002, Ms. Jordan said that TECo plans to sell 486,051 MWH to HPP for $17.5 million. The projected sales price for fuel is $25.62/MWH. The fuel payment from the HPP sale is

[2]*See* Exhibit 3 JDJ-3, Schedules E6 and E7(Appdx at A-32-35).

used to reduce retail customers' fuel costs. (Exh. 3, JDJ-3, Schedule E6, p. 2 of 2; Appdx at A-33).

The $25.62/MWH that TECo charges HPP for fuel is $7.39/MWH[3] less than TECo charges its retail customers for fuel. The disparity between the wholesale and retail fuel cost is because the wholesale cost is based only on the cost of fuel burned in the more efficient Big Bend 4 (BB-4) generator, while retail customers pay the average cost of fuel burned in all TECo generators. FERC approved the HPP sale in 1990 based on the promise that BB-4 would be available for retail use 60% of the time and 100% of the time during peak periods. *FERC Nov. 1990 Order* at 61,812 (Appdx at A-53). No evidence was presented below to show that the FERC criteria will be met this year or that it was met during the "true up" period.

As to purchases, in 2002, TECo estimates it will purchase 1,050,349 MWH from its unregulated, merchant affiliate, HPP. It will pay $48.5 million for fuel, plus a payment for capacity. The fuel cost alone is $46.19/MWH or $20.57/MWH[4] more than TECo charges HPP for fuel. (Exh. 3, JDJ-3, Schedule E7, p. 2 of 2)(Appdx at A-35). The Final Order provides no

[3]$7.39/MWH is the difference between $33.01/MWH (system average fuel cost) and $25.62/MWH (what TECo charges HPP for fuel).

[4]$20.57/MWH is the difference between the $46.19/MWH (what TECo pays HPP for fuel when it buys from HPP) and the $25.62/MWH (what TECo charges HPP for fuel when it sells to HPP.)

explanation to justify the large differential in cost in these sale and purchase transactions.

If the Commission had ordered TECo to charge retail customers the "cost" price TECo sells to its merchant affiliate ($25.62/MWH) rather than the "cost" price it pays its affiliate ($46.19/MWH), retail customers would pay $21.6 million[5] less in 2002 and the $88.67 million under recovery "true up" would be substantially reduced.

It is uncontroverted (and in fact, is established in Ms. Jordan's own testimony and exhibits) that TECo's ongoing practice is to pay higher rates to its unregulated affiliate, HPP, than it charges HPP. Retail customers pick up the loss. As FIPUG's witness testified, "TECo has no incentive to minimize the cost of purchased energy. This is because all purchased energy costs are directly flowed through to customers." (Tr. 214).

At the hearing, TECo witnesses testified that the HPP transaction related to BB-4 was a separated sale,[6] meaning

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[5] $21.6 million is the difference between $46.19/MWH (what TECo pays HPP for fuel) and $25.62/MWH (what TECo charges HPP for fuel) X the projected MWH hours to be purchased in 2002 (1,050,349 MWH).

[6] When TECo makes a sale to HPP, it makes it out of 145 MW of its BB-4 unit (one of its most efficient coal units). (Tr. 250). That portion of the unit serving HPP is supposed to be removed from the retail rate base, (Tr. 247), but the separation is only made in general rate cases, so if HPP takes more than 40% of 145 MW, retail consumers are adversely affected. HPP gets the cheapest fuel cost without having to pay for the related fixed

that the assets to serve the sale are removed from the retail rate base. There is no evidence confirming that HPP receives no more than the 40% of the 145 MW of BB-4 it paid for, or that no BB-4 sales occurred during peak hours.

Further, there was no evidence to support HPP's current fuel costs. TECO witnesses provided no evidence to support the alleged separation at current investment cost as required by §366.06, *Florida Statutes* (2001). In fact, TECo witnesses admitted that *no* study or analysis had been conducted in either 2000 or 2001 to determine if the sale was beneficial to retail customers. (Tr. 85, 108). TECo witness, Mr. Brown, testified that the last time the "benefits" of the transaction were reviewed was in 1989,[7] over 12 years ago! (Tr. 266-267). TECo has no plans to do any such study in the future. (Tr. 294).

Ms. Jordan candidly admitted that customers would be better off if they could retain that portion of the BB-4 plant that had been sold to the affiliated company rather than selling BB-4 power and repurchasing power from HPP's units. (Tr. 84). Ms. Jordan's view is confirmed by the fact that,

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costs. The last time fixed costs were separated was in Order No. PSC-93-0664-FOF-EI, Docket No. 920324-EI (Apr. 1993).

[7] *See In re: Petition of Seminole Electric Cooperative, Inc., TECo Power Services Corporation and Tampa Electric Company for determination of need for proposed electric power plant, Order No. 22335*, Docket No. 880309-EC (Dec. 1989); see discussion *infra* at III.C.2.

because a portion of BB-4 is unavailable to retail customers, power to meet their needs must be purchased on the wholesale market. At times, such power has been purchased for as much as $105/MWH. (Tr. 291). This is a staggering amount when compared to TECo's $33.01/MWH system average.

In the face of the uncontroverted evidence described above, regarding the disparity in costs allocated to the retail and wholesale jurisdictions, FIPUG made a modest request of the Commission:

> The Commission should conduct a more thorough investigation of TECo's affiliate transactions and its procurement of power for wholesale customers.
>
> . . .
>
> [T]he Commission [should] convene an investigation and require TECo to quantify the impact of its wholesale costing and pricing practices on retail customers. The goal of this investigation would be to quantify the subsidies provided by retail customers to help underwrite TECO's low-cost wholesale sales and to assure that TECO's wholesale purchases from affiliate companies were prudent.

(Tr. 209, 219). However, the Commission declined to investigate TECo's activities.

SUMMARY OF ARGUMENT

The Commission failed in its statutory duty to set just, fair and reasonable rates and to prevent cross-subsidization of affiliate companies. The Commission denied FIPUG's request for an investigation based on numerous mistakes of law.

The Commission erred when it determined that it was legally required to make retail customers pay fuel charges contained in a wholesale contract between TECo and its affiliate because the contracts were FERC-approved. The Commission failed to recognize that FERC uses a different standard to review wholesale contracts than the Commission must use. FERC only determined the cost of each sale to the seller and authorized a "sell low/buy high" deal based on cost.

In contrast, the Commission is required to evaluate the fairness of the buy/sell transaction to retail customers. It cannot approve an unfair or unjust transaction.

In any buy/sell scheme with an affiliate, Florida law prohibits the Commission from determining the transaction is prudent if retail customers are harmed. The utility holding company, rather than retail customers, must bear any risk of loss to discourage abusive self-dealing. The current Commission is not prohibited from examining self-serving projections of future customer benefits that fail to materialize even if earlier Commissions believed and gave

credence to the projections.

The Commission also erred in deferring its judgment to that of FERC. Having done so, it then failed to examine TECO's operations to see if they conformed to the conditions FERC set.

The Commission erred in basing its decision on the fact that the affiliate contracts will soon expire. This fact is irrelevant to the harm to consumers which is the subject of this appeal.

The Commission improperly shifted the burden of proof to FIPUG. The burden of proof rests squarely with TECo who sought to increase customers' rates.

When the indicia of power "laundering" appeared in TECo's testimony admitting that TECo charges retail customers $20.57/MWH more for the fuel cost in the power it buys from its affiliate than customers receive from the fuel cost in the power TECo sells to its affiliate, the Commission had a duty to examine the prudency of the current application of the contracts. It erred when it failed do so.

The Court should remand this case to the Commission and instruct it to conduct a thorough investigation to determine whether TECo's transactions with its affiliate are in the best interests of Florida's retail customers.

ARGUMENT

I. SECTION 120.68(7)(d) CONTAINS THE APPLICABLE STANDARD OF REVIEW.

In this case, the Commission erroneously interpreted its responsibilities under Chapter 366, *Florida Statutes*. It incorrectly found that no investigation was necessary regarding the transactions between TECo and its sister company, HPP, based on the erroneous legal conclusion that because the FERC had approved the transactions and concluded they were cost-based, the Commission need look no further. It failed to even determine that the parameters of the FERC order it relied upon were met. In addition, the Commission inappropriately shifted the burden of proof to FIPUG to prove that TECo's actions, when dealing with its affiliate, were "unreasonable." However, the burden *always* rests with the utility to prove its request to collect costs from customers. Finally, the Commission based its decision on irrelevant facts that had nothing to do with the legal determination it was required to make in the case.

The Commission's erroneous conclusions constitute mistakes of law. Therefore, in reviewing the Commission's decision, §120.68(7)(d), *Florida Statutes*, sets out the applicable standard of review:

> The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:. . .

> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action.

This standard of judicial review requires the Court to reverse or remand an agency order which incorrectly interprets a provision of law. *See, e.g., Equity Corp. Holdings, Inc. v. Department of Banking and Finance*, 772 So.2d 588 (Fla. 1st DCA 2000) (order of Department of Banking and Finance finding that appellants were mortgage lenders who required licenses reversed because statutory language did not encompass their activities); *Florida Municipal Power Agency v. Department of Revenue*, 764 So.2d 914(Fla. 1st DCA 2000), *affmd*, 789 So.2d 320 (Fla. 2001) (order of Department of Revenue requiring appellants to pay sales tax on certain purchases reversed because statute incorrectly interpreted); *City of Safety Harbor, Florida v. Communications Workers of America*, 715 So.2d 265 (Fla. 1st DCA 1998)(order of Florida Public Employees Relation Commission reversed due to improper statutory construction).

In this case, the Commission has erroneously relied upon the findings of another agency as a substitute for its own investigation into matters directly within its own jurisdiction. The Commission is the agency responsible for ensuring just and reasonable rates for Florida's retail consumers. The FERC review only examined the cost to the seller in each transaction.

II. SECTION 366.06, REQUIRES THE COMMISSION TO SET "FAIR, JUST AND REASONABLE RATES." THE COMMISSION MUST ENSURE THAT RETAIL CUSTOMERS DO NOT SUBSIDIZE TECO'S UNREGULATED WHOLESALE BUSINESS. THE COMMISSION FAILED TO CARRY OUT ITS RESPONSIBILITY WHEN IT DECLINED TO INVESTIGATE THE TECO/HPP TRANSACTIONS. ITS DECISION WAS BASED ON ERRORS OF LAW.

A. The Commission has the statutory responsibility to ensure that retail rates are fair and just and that there is no cross-subsidization of TECo's unregulated wholesale enterprises.

The Florida Legislature has declared the regulation of public utilities to be in the public interest and to be an exercise of the police power of the state for the protection of the public welfare.[8] It has provided that all the provisions of Chapter 366, *Florida Statutes*, are to be liberally construed to accomplish that purpose. Section 366.01, *Florida Statutes*. The Florida Commission is the state agency charged with protecting the interests of retail customers.[9]

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[8]The United States Supreme Court has recognized that: "... the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

[9] In general, the Florida Commission is charged with setting rates and reviewing transactions related to retail ratepayers, while the FERC is responsible for overseeing wholesale transactions among utilities. The Commission recognized this dichotomy between the jurisdictions: "In the instance of ratemaking, the Commission does not maintain ratemaking jurisdiction over any wholesale power sales in this state. The Commission's ratemaking authority is limited to retail rates.

Section 366.04(1), *Florida Statutes*, provides that the Commission shall have jurisdiction to "regulate and supervise each public utility with respect to its rates...." Section 366.05(1), *Florida Statutes*, provides that, in the exercise of its jurisdiction, the Commission will prescribe fair and reasonable rates and charges for each public utility. Section 366.041(1), *Florida Statutes*, also requires the Commission to set just and reasonable rates as does §366.06(1), *Florida Statutes*.

Further, §366.093(1), *Florida Statutes*, explicitly gives the Commission access to public utility records and records of the utility's affiliated companies to "ensure that a utility's ratepayers do not subsidize nonutility activities." The inclusion of an explicit statutory prohibition against cross-subsidization requires the Commission to carefully oversee this area of potential abuse. As the Commission has recognized: "a basic premise of regulation is that utility operations should not subsidize other operations. . . ." *In re: Petition for a rate increase by Florida Power Corporation*, Order No. PSC-92-1197-FOF-EI at 130, Docket No. 910890-EI (Oct. 1992). *See also*, *In re: Investigation into the earnings*

Wholesale ratemaking is entirely within the jurisdiction of the FERC." *In re: Petition for determination of need for an electrical power plant in Okeechobee County by Okeechobee Generating Company, L.L.C.* Order No. PSC-99-2438-PAA-EU at 47, Docket No. 991462-EU (Dec. 1999).

and authorized return on equity of Gulf Power Company. In re: Petition by Gulf Power Company for approval of proposed plan for an incentive revenue-sharing mechanism that addresses certain regulatory issues including a reduction to the company's authorized return on equity, Order No. PSC-99-1047-PAA-EI at 6-7, Docket Nos. 990250-EI, 990244-EI (May 1999); *In re: application for a Determination of Need for an Intrastate Natural Gas Pipeline by Sunshine Pipeline Partners*, Order No. PSC-93-0987-FOF-GP at 24, Docket No. 920807-GP (Jul. 1993).

In regard to the importance of its responsibility to ensure appropriate fuel adjustment charges, the Commission has said:

> Because of the relative importance and impact of fuel costs upon the ratepayers, it is incumbent that electric utilities exercise all reasonable means to purchase the lowest costing fuel possible. Any deviation from this policy results in excessive monthly fuel adjustment charges, the majority of which are passed on to the ratepayers through the application of the fuel cost recovery clause. Where excessive charges for fuel are paid by a utility, *we find it to be our responsibility to correct such overcharges and take whatever measures are necessary in order to rectify that situation.*

In re: General investigation and show cause order as to alleged overcharges paid by Florida Power Corporation for spot purchases of fuel oil, Order No. 8205 at 1-2, Docket No. 770671-CI (March 1978)(emphasis supplied). FIPUG simply requested that the Commission carry out its responsibility and thoroughly investigate the TECo/HPP affiliate transactions.

B. Only reasonable and prudent expenses

> related to retail service can be recovered from retail customers.

The well-established standard, which governs whether a utility may recover expenses from retail customers, is whether the expenses are reasonable, prudent and necessary to provide service to those customers. The principle that only prudent costs necessary to provide service may be recovered flows from the principle that a utility may not impose unnecessary costs on its customers. *Cities Service Gas Co. v. Federal Power Commission*, 424 F.2d 411,417 (10th Cir. 1969), *cert. denied*, 400 U.S. 801 (1970).

The Commission has often applied this well-known standard. For example, in *In re: Fuel and Purchased Power Cost Recovery Clause and Generating Performance Incentive Factor*, Order No. 23366, Docket No. 900001-EI (Aug. 1990), the Commission reviewed Gulf Power Company's decision to lease aluminum railcars to transport coal to a generating plant. It found the number of cars leased to be excessive, that is not necessary to provide service, and disallowed recovery for a portion of the railcars. In *In re: Investigation of fuel cost recovery clause of electric utilities*, Order No. 9950 at 5, Docket No. 810001-EU (Apr. 1981), *affm'd*, *Florida Power Corporation v. Cresse*, 413 So.2d 1187 (Fla. 1982), the Commission disallowed $3.5 million of fuel expenses Florida Power Corporation claimed because they were excessive.

Similarly, in *In re: Petition of Florida Power and Light Company for an increase in its rates and charges*, Order No. 13537, Docket No. 830465-EI (July 1984), the Commission disallowed $84 million of Florida Power and Light Company's projected O&M expenses because the Company did not demonstrate that the projected expenses were reasonably and prudently incurred and necessary to the provision of electric service to its customers.

Thus, only expenses that are reasonable and prudent and related to the provision of retail service may be recovered from retail customers. Those excessive costs which have been allocated to retail customers due to TECo's transactions with HPP fail to meet that test.

C. The Commission's failure to thoroughly investigate and appropriately allocate costs between the wholesale and retail jurisdictions was based on several mistakes of law.

1. The Commission's reliance on FERC approval of the TECo/HPP contract as a bar to proper cost allocation was error.

The Commission erroneously concluded that because the FERC had approved the contract between TECo and HPP, it was foreclosed from evaluating wholesale charges passed through to retail customers. However, FERC approval does not prohibit state review. FERC relied upon the Commission to protect retail customers.

The FERC approval of contracts between affiliates is

based on the cost to the seller. It is not based on the criteria contained in §366.06. That statute requires the Commission to set aside any costs which are unjust, unreasonable or unjustly discriminatory.

The Commission's erroneous legal conclusion appears to rest on the faulty assumption that TECo ***must*** recover all its costs from either the wholesale or retail jurisdiction. The silent corollary of this argument is that shareholders bear no responsibility for these transactions. The Commission accepted TECo's argument that: "[a]ll affiliate wholesale power transactions are cost-based, as required by the FERC. Tampa Electric and its affiliates have requested and received approval from FERC for its . . . wholesale energy transactions. . . ." (Tr. 282, 285), and erroneously concluded that retail customers must bear the loss. Commission Staff used almost the identical phrasing when making its oral recommendation to the Commission: "TECO's contract with Hardee Power Partners is FERC-approved and cost-based." (Tr. 685).[10]

FIPUG does not dispute that FERC approved the HPP/TECo contracts; however, that fact is **irrelevant** to this appeal.

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[10] Staff also relied on the fact that the transaction is scheduled to end on December 31, 2002. (Tr. 686). Again, FIPUG does not dispute this, but that fact does nothing to address harm caused to ratepayers while the contract was in existence. See section III. C. 4., *infra*.

TECo struck a bargain with its affiliate, HPP; it is bound by that bargain. But, TECo cannot require retail customers to "make up the difference" for amounts which TECo may lose on the wholesale transactions in which it has chosen to participate nor should retail customers overpay for such transactions.[11]

Case law supports the Commission's authority to properly allocate costs between the retail and wholesale jurisdictions. In *New Orleans Public Service Commission, Inc. v. Council of the City of New Orleans*, 911 F.2d 993 (5th Cir. 1990), the court found that the public utility authority could review the allocation of costs between the retail and wholesale jurisdiction and determine that shareholders may have to bear some costs which cannot be passed on to the wholesale jurisdiction.

NOPSI provided utility service to the City of New Orleans and was also a member of a "power pool" which built the nuclear Grand Gulf power plant. The New Orleans City Council (the Council), which regulates NOPSI, disallowed recovery of part of the costs related to Grand Gulf which FERC had allocated to NOPSI. *Id.* at 997. The Council's decision was not based on a reanalysis of FERC's decision to allow

[11] FIPUG witness, Mr. Collins, testified that it is not FIPUG's position that TECo should abrogate any of its wholesale contracts. Rather, the issue before the Commission was "the allocation of costs incurred by Tampa Electric in order to meet its combined retail and wholesale demands." (Tr. 191-192).

recovery, but on NOPSI's failure to diversify its supply portfolio when it experienced large cost overruns in building the plant.[12]

The Council's decision was appealed to both the state and federal courts. The federal courts initially abstained. However, the United States Supreme Court overruled the lower courts and the Fifth Circuit reviewed the Council's decision. In its decision, the United States Supreme Court characterized the Council's ruling:

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risk of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences. *Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.*

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[12] *Nantahala Power & Light Co, v. Thornburgh*, 476 U.S. 953 (1986), and *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), affirm the doctrine that if FERC has jurisdiction over a subject then states cannot have jurisdiction over the same subject. However, as *NOPSI* and subsequent cases discuss, these two cases do *not* stand for the proposition that state commissions cannot look at portfolio management or at the allocation of subsequently incurred costs between the wholesale and retail jurisdictions. As the *Gulf States* case, *infra*, finds: "FERC's inquiry focuses on the rate at which sellers market their power. FERC does not review the market conditions or other factors that govern the prudence of the purchaser's decision to buy power in the wholesale transaction." *Gulf States*, 841 S.W.2d at 465.

Id. at 998. (*citing New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 367 (1998)(emphasis added).

When the *NOPSI* case was remanded to the Fifth Circuit for review, the Fifth Circuit found that the Council could decide whether NOPSI had acted unreasonably because it had failed to diversify its portfolio. The court concluded that the Council could review and deny the pass through of costs a utility incurs.

NOPSI is directly applicable to the issues at bar. Like the Council in *NOPSI,* FIPUG does not ask the Commission to reevaluate or alter FERC-approved contracts. Rather, FIPUG seeks to have the Commission exercise its statutory grant of power to regulate retail rates and to determine whether TECo's recovery of costs related to the wholesale transactions are reasonable in light of TECo's actions over the life of those contracts. Such a review is particularly warranted due to Ms. Jordan's admissions that customers would be better off without the contracts and that the utility has done no study regarding the benefits of the contracts in some 12 years.

Other courts have applied the Fifth Circuit's *NOPSI* decision to investigate improper cost allocation. In *Gulf States Utility Company v. Public Utility Commission of Texas*, 841 S.W.2d 459 (Tex. App. Austin 1992), the court reviewed a decision of the Public Utility Commission of Texas (Texas

Commission) which denied Gulf States Utility's (Gulf States) request to recover the costs of a Southern Company power purchase contract. As in *NOPSI* and the instant case, FERC had reviewed and approved the contracts. *Id.* at 462.

On appeal, the court held that "[t]he NOPSI decisions validate state review of costs that a purchaser voluntarily but imprudently incurs in a wholesale transaction involving FERC set rates. The decisions support a state or local regulatory agency's refusal to pass through to consumers certain imprudently incurred operating expenses." *Id.* at 470.

The critical point in the appeal before the Court in this case is stated succinctly in *Gulf States*:

> A state's refusal to pass through to consumers unreasonable capacity costs voluntarily incurred by a utility is not impermissible trapping; it is the exercise of a discretion necessary and proper to meaningful retail rate-making. *To hold otherwise would effectively end state regulation of retail sales that involve any wholesale purchases of power at FERC-set rates*.

Id. at 470 (emphasis added).[13] As the *Gulf States* court further noted, FERC has acknowledged that whether a utility has "purchased wisely or has made the best deal available . . . are legitimate concerns of the state commissions. . . ." *Id.* at 471 (quoting *Pennsylvania Power & Light*, 23 FERC

[13]"[T]rapping occurs when FERC mandates a particular rate or quantity of power and the state commission refuses to allow the utility to recoup that mandated expense in its retail rates." *Gulf States*, 841 S.W.2d at 469 (citations omitted). "Trapping" is not an issue in this case.

P61,325 at 61,716 (1983)).[14]

NOPSI and *Gulf States* support Commission review of the costs to be allocated between the wholesale and retail jurisdictions. Moreover, this case law supports the Commission's ability to decide whether to allow the recovery of costs related to wholesale power contracts, even when there has been FERC approval of the contracts. Further, case law supports the Commission's ability to conduct the review FIPUG requested regarding the reasonableness of TECo's actions as to its affiliate transactions.

The Florida Commission itself has recognized that it has authority to address the manner in which TECo's wholesale sales impact retail customers. *See, e.g., In re: Determination of appropriate cost allocation and regulatory treatment of total revenues associated with wholesale sales to the Florida Municipal Power Agency and City of Lakeland by Tampa Electric Company*, Order No. PSC-97-1273-FOF-EU at 2-4, Docket No. 970171-EU (Oct. 1997). In that case, the Commission stated that it had authority to deal with the "retail treatment of the *costs and revenues* generated by the [wholesale] sales." *Id.* at 10-11 (emphasis in original).

Finally, even the FERC's own orders approving the

[14]*See also, Office of Consumers Council v. Public Utilities Commission of Ohio*, 592 N.E. 2d 1370 (Ohio 1992) (state utility Commission could review utility's decision to continue doing business with certain wholesale providers).

TECo/HPP contract support the Commission's authority to conduct the requested review. As discussed below, when the wholesale contracts at issue were presented to FERC for approval, they were initially rejected. The FERC found the rates unreasonable and expressed concern about the potential for affiliate abuse. *FERC Aug. 1990 Order* (Appdx at A-44). The FERC stated that: "All three agreements provide the opportunity for preferential and/or discriminatory pricing because of the affiliate relationships." *Id.* at 61,697 (Appdx at A-44).

In the *FERC Nov. 1990 Order* (Appdx at A-53), FERC again reviewed the wholesale power contracts "to ensure that *wholesale* rates are just, reasonable, and not unduly discriminatory or preferential." *Id.* at 61,811 (emphasis added)(Appdx at A-61). In its order, FERC hesitantly approved the wholesale contracts, again expressing concern about preferential affiliate pricing.

Later, TPS applied for approval to transfer the contracts to its affiliate, HPP. *TECO Power Services*, Order Authorizing Transfer, 54 FERC P62,172 (Mar. 1991) *(FERC Mar. 1991 Order*)(Appdx at A-69). FERC granted TPS' request, **but expressly stated that the authorization was "without prejudice to the authority of [FERC] or any other regulatory body with respect to rates, service, . . . determinations of cost, or any other matter whatsoever now pending or which may come**

before [FERC] or any other regulatory body in the future. . . ." *Id.* (emphasis supplied) (Appdx at A-71). Thus, FERC recognized that it would be appropriate for the Commission to deal with future issues which might arise under the contracts.

And, the Florida Commission exercised its jurisdiction when it conducted an after-the-fact review of the outcome of the FERC proceedings. *In re: Notification of changes to power sales contracts by Tampa Electric Company, Seminole Electric Cooperative, Inc. and Hardee Power I, Inc. formerly known as TECO Power Services Corporation*, Order No. 24692, Docket No. 910633-EU (Jun. 1991). In that docket, the Commission approved FERC's changes in the allocation of revenues for sales to other utilities. The Commission also approved changes to the contracts. *Id.* Additionally, the Commission approved the assignment of the power sales contracts from TECo to HPP. If it had no ability to review the contracts as to their effect on retail customers, such a docket would have been meaningless.

FIPUG requested that the Commission determine whether TECo's actions as to transactions with its affiliate justify passing through additional costs to the retail customers. Federal and state law, as well as the Commission's own orders, not only support this inquiry but require it.

2. The Commission's failure to investigate whether TECo is maintaining the FERC-approved allocation

> of BB-4 power between the retail and wholesale markets was error.

The FERC orders upon which the Commission purported to rely were based on the premise that retail customers would have use of BB-4 60% of the time. However, no proof was presented below that this is the case today and the Commission rebuffed a request to investigate the current circumstances surrounding these affiliate transactions. The facts surrounding the BB-4 allocation are discussed below.

In *In re: Application for certification of Tampa Electric Company's proposed 417 megawatt net coal-fired Big Bend Unit No. 4,* Order No. 9749, Docket No. 800595-EU (Jan. 1981), the Commission determined that TECo needed to construct the 427 MW BB-4 generating plant *to meet the need of its retail customers*. When the plant was placed in service in December 1985, TECo acknowledged that the capacity of BB-4 was greater than was needed to meet the current demands of its retail customers. It nevertheless sought to put the entire power plant in its rate base immediately, thus requiring customers to pay for unneeded capacity.

In *In re: Petition of Tampa Electric Company for authority to increase its rates and charges; In re: Petition of Tampa Electric Company for closure of its existing interruptible rate schedules to new businesses and for approval of new interruptible rate schedules, IS-3 and IST-3,*

Order No. 15451, Dockets No. 850050-EI, 850246-EI (Dec. 1985), the Commission approved including the total plant in the retail rate base but adopted a plan to phase in the corresponding rate increase. The plan established a mechanism to encourage TECo to temporarily sell excess capacity to other utilities in wholesale transactions. The retail increase was to phase in as wholesale sales phased out. The Commission said:

> [W]e believe that we have supplied TECO with adequate incentives for marketing **temporarily** unnecessary BB4 capacity through the methodology we adopted for treating BB4's revenues and expenses.

Id. at 59, emphasis supplied.

The Commission observed that coal fueled BB-4. *Id.* at 16. Coal is less expensive than the fuels other types of generators burned. This fact enabled TECo to readily sell any excess capacity to other utilities, until about 1990 when the plant was needed for retail demand.

Having whetted its appetite for wholesale marketing using the low cost fuel of TECo's rate-based generation, TECo's parent corporation decided to build an unregulated merchant plant. The opportunity arose when Seminole solicited bids for a new power supply. The details are described in *In re: Petition of Seminole Electric Cooperative,Inc., TECO Power Services Corporation and Tampa Electric Company for a determination of need for proposed electric power plant*, Order No. 22335, Docket No. 880309-EC (Appdx

at A-72). Seminole alleged a need for 450 MW of electric generating capacity to meet the demands of the rural electric cooperatives it served. The Commission found there was a need for the capacity.

Next Seminole sought the least expensive power supply. It first determined how much it would cost to build a power plant. This price was used as a benchmark. Seminole then requested bids from wholesale power suppliers to see if they could beat the price. TPS won the bid with "an entity which all parties admit is in a jurisdictional limbo with apparently no direct regulatory oversight by anyone." *Id.* at 9 (Appdx at A-75).

TECo Energy's unregulated subsidiary, TPS, was to build a power plant with an aggregate capacity of 295 MW. TPS would buy 145 MW from its sister company, TECo, and sell the bundled 440 MW package to Seminole. The bundled price was cheaper than Seminole's price to build because, even though Seminole could build 295 MW for $23 million less than the TPS price, the low price offered by TPS partner, TECo, drove the bundled price below Seminole's target price. *Id.* at 8-9 (Appdx at A-74-75).

Because TPS was taking power TECo needed for its retail customers, the agreements projected that TECO would have use of the BB-4 capacity 60% of the time. Seminole only needed it for off-peak use when its own units were down for maintenance. The last part of the deal called for TPS to replace BB-4 power with profitable sales from TPS to TECo. Because the contracts between

TECo, the regulated utility, and TPS, the unregulated affiliate, were for ten years, the Commission recognized that:

> What may be a great deal for SEC [Seminole] may be a terrible deal for TECO . . . (*i.e., its retail customers who bear the risk of loss*) when the decision to go forward with the next phase needs to be made.

Id. at 10 (observation supplied)(Appdx at A-75).

Fortunately, FERC left the door open for further review by the FPSC. Its order expressly refrained from prohibiting any other regulatory body from reviewing the rates specified in the contracts. *TECo Power Services, supra*.

When Seminole sought a certificate of need for a power plant under the Power Plant Siting Action (§403.519, *Florida Statutes*), the Commission focused not on TECo's responsibility to its retail customers, but on the fact that Seminole needed the capacity and the TECo/TPS below cost bid was the lowest price. The Commission then cautioned that FERC had jurisdiction of wholesale contracts and that if FERC modified the tripartite contracts between TECo and TPS and between TPS and Seminole, it might present difficulties:

> Having given our approval of the contracts on the front end, it may be difficult for us to take any meaningful steps to subsequently disallow the payments made by TECO for energy and capacity purchased from the Phase II unit if such payments are made according to the original terms and conditions of the present agreements. Whatever action FERC takes may "trump" any subsequent state action on prudency.

Id. at 10 (Appdx at A-75).

When the three-way TPS conduit deal was presented to FERC, it

rejected the transactions out of hand. *FERC Aug. 1990 Order* at 61,697 (Appdx at A-44). FERC's principal justification for disapproving the contracts was because they called for TPS and TECo to pay and charge market prices for the power in transactions between affiliated companies. *Id.* The FERC order went into great detail regarding how self-dealing between affiliated companies could unfairly inflate prices to consumers for the benefit of the holding company's shareholders. FERC said:

> Preferential Pricing: Abuse of Self Dealing
>
> All three agreements provide the opportunity for preferential and/or discriminatory pricing because of the affiliate relationships. Under the BB4 agreement, Tampa Electric will sell capacity and energy to its affiliate, Power Services. In the Tampa Electric agreement, Power Services will sell power and capacity from the planned CC/CT 1 and 2 units to its affiliate, Tampa Electric. In the Seminole agreement, Power Services will bundle its affiliate's BB4 power and capacity with CC/CT 1 and 2 power and capacity for sale to Seminole; the bundling of the two sources provides the opportunity for TECO to adjust the combined price of BB4 and the CC/CT 1 and 2 power to the advantage of TECO/Tampa Electric/Power Services shareholders rather than either the Tampa Electric or Seminole ratepayers.

Id. (Appdx at A-44).

FERC then scrutinized the agreements and rejected them. It gave the following example as one of its reasons for rejecting the agreements:

> Although the Applicants provide a conceptual basis for establishing the value for the BB4 sale at something below a 100-percent contribution to fixed costs, this proposition alone does not provide a sufficient basis to conclude that the arrangement is not unduly preferential. Because of the potential and incentives for preferential manipulation of the rates within the bundled BB4 and

> CC/CT 1 and 2 transaction, we cannot conclude on this record that there was no undue preference because there is no indication that Tampa Electric offered BB4 power to anyone other than to its affiliate.
>
> Although the Florida Commission granted a Certificate of Public Need for this proposal, it also concluded that had Seminole constructed 295 MW of CC/CT capacity itself, using the costs in its self-construction option, and bought BB4 power as provided in the Tampa Electric and Seminole agreements, it would have saved $23 million more than in the Applicants' proposal. n46 The $23 million additional savings adduced by the Florida Commission illustrate the opportunity for Tampa Electric and Power Services to price the BB4 power sale low and to price the CC/CT 1 and 2 components high so as to reduce the revenue credit for BB4 sales and increase the return to shareholders from the sales to Seminole from Power Services units.
>
> n46 Exhibit A, Final Order at 5. The Florida Commission did not review this hypothetical alternative for purposes of the certification, primarily because neither Seminole nor Tampa Electric offered to enter into such an arrangement. Accordingly, the Florida Commission based its final decision on its evaluation only of the Applicants' proposed transactions in comparison with Seminole's self-construction alternative.

Id. at 61,698-99 (Appdx at A-46).

TPS and TECo immediately filed a request for reconsideration; Seminole intervened out of time; the Chairman of the Florida Commission wrote a letter stating that FERC was interfering with Florida's jurisdiction to approve low-cost capacity additions. TECO and TPS, the affiliated companies, modified their agreements. FERC reconsidered its earlier decision and approved the three contracts. *FERC Nov. 1990 Order* at 61,809 (Appdx at A-57).

On reconsideration, FERC observed:

> The applicants claim that the Florida Commission

> undertook an extensive review of the proposal and found it to be the most cost effective means to provide much needed capacity, and *maintain that the matter is largely one of local concern, as only Floridians will be affected by the proposed transaction*.

FERC Nov. 1990 Order at 61,807 (emphasis supplied) (Appdx at A-55).

In response to the new evidence from Florida, FERC washed its hands of the transaction once the contracts between the affiliates were based on cost. However, the transactions are only cost based if TECo's retail customers have use of the facilities 60% of the time, including the summer and winter peak periods. FERC made the following cost analysis:

> B. Sale of 145 MW of BB4 to Power Services for Resale to Seminole
>
> Tampa Electric proposes a demand charge of $8.74/kW/month on the sale of BB4 power to Power Services. According to the Commission's analysis, the levelized fixed costs and average transmission investment associated with BB4 come to $17.80/kW/month. This reflects a 100-percent contribution to BB4 fixed costs. The BB4 agreement, however, includes annual energy limitations that restrict Power Services/Seminole to an average load factor of about 40 percent. A 60-percent reduction in the production component of the demand charge would reflect this restriction and support a rate of $7.81/kW/month.
>
> The arrangement also provides Power Services/Seminole with additional benefits. Seminole has first call on its 145 MW entitlement even when the unit is derated. Under a typical unit contract, a purchaser's entitlement is reduced pro rata as the unit's available capability is reduced. Seminole, however, will enjoy its full entitlement except in those circumstances when less than one third (145 MW) of the unit is available. Even then, Seminole has a full claim on the entire usable output of the unit. This provision substantially firms up what is otherwise an interruptible unit commitment. The Commission's analysis indicates that a reasonable

premium for this provision is $1.17/kW/month.

FERC Nov. 19 Order at 61,812-13 (footnotes omitted).

In 1992, TECo filed a rate increase request. In *In Re: Application for a rate increase by Tampa Electric Company,* Order No. PSC-93-0165-FOF-EI, Docket No. 920324-EI (Feb. 1993), the Commission found that TECo had 106,000 new customers and needed more capacity. The Commission authorized TECo to charge its retail customers $13.2 million a year to compensate HPP for the TECo 40% share of the HPP 295 MW unit. *Id.* at 141 (Appdx at A-87). The 1993 Commission order allows TECo to adjust this price every year (no FERC jurisdiction is mentioned). Ms. Jordan's purchase capacity exhibit contains a current unit power purchase capacity charge of $35.3 million, with no justification. (Exh. 3, JDJ-3, Schedule 1, page 2 of 3). If the $35.3 million charge is for the TPS agreement, it is nearly three times higher than FERC approved years ago.

In bemoaning the wholesale preemption rights TECo gave to its cheapest fuel cost capacity, the Commission said:

> . . . Tampa Electric has commitments to sell firm capacity and energy to the Utilities Commission of the City of New Smyrna Beach, the Reedy Creek Improvement District, the City of Wauchula and the Florida Municipal Power Association in 1993. In 1994, Tampa Electric will sell firm capacity and energy to the City of Saint Cloud also.
>
> These four systems have a firm commitment from Tampa Electric for capacity from the Big Bend Station through 1996. (Exhibit 37, Letters of Commitment) The terms and conditions of the commitment are such that

> these four entities have first call for their contract amount over the retail customers for Big Bend Station plants as long as the capacity from Big Bend Station is available. (Tr. 484) Seminole, through Tampa Power Services, has first call over both the firm Schedule D customers and the retail customers for up to 145 MW of the Big Bend 4 plant.
>
> We do not believe it is fair or appropriate for nonretail customers to be buying firm capacity, particularly when the nonretail customers have first call for the capacity, at a rate which is not compensatory or cost-based, which means the retail customers are responsible for part of the revenue requirement for the plant serving the nonretail customers.

Id. at 9-10 (Appdx at A-82).

The FERC approval of the TPS/Seminole/TECo deal was contingent upon the fact that the transactions would be cost based. The transaction is only cost based if TECO makes BB-4 available for retail customers 60% of the time. The Commission reaffirmed this concept in Order No. PSC-93-0165-FOF-EI.

In the Final Order on appeal, the Commission found:

> The record indicates that TECO's contract with Hardee Power Partners is FERC-approved and cost-based. The original contract was appropriately compared to other available capacity and energy options. TECO's latest amendment to the contract compares favorably to the forwards energy market price, even if the capacity costs of the Hardee contract are included.

Final Order at 12 (R. at 428)(Appdx at A-12). The Commission made no reference to the required FERC allocation in its Final Order.

The FERC comparison alluded to in the Final Order took place twelve years ago. The transaction in that comparison was found to be cost based only when TECo's retail customers were given use of

the less expensive power from BB-4 60% of the time. However, the Commission did not satisfy its duty to ensure that retail customers received the proper allocation of BB-4 power. Further, the evidence TECo presented made no effort to demonstrate this fact. The Commission refused to look further into the matter even though FIPUG testimony cast grave doubt on TECo's allocation of power to the wholesale jurisdiction and demonstrated that retail customers were charged millions of dollars more for fuel than they would have been charged if they had received the promised output from BB-4.

3. The Commission erroneously shifted the burden of proof to Intervenors to demonstrate that TECo's charges were not just and reasonable.

TECo and the Commission took the position that the burden of proof in this case rested upon FIPUG to "disprove" TECo's request for a rate increase. TECo witness Jordan articulated this incorrect standard:

> FIPUG has not revealed anything new....*FIPUG has not proven* anything that should cause this Commission to withhold or delay Tampa Electric's recovery of prudently incurred costs. . . . .

(Tr. 284-285)(emphasis supplied).

Commission Staff, in making its oral recommendation to the Commissioners at the conclusion of the hearing, reiterated the same erroneous position on the burden of proof:

> No evidence has been presented that suggests that TECO's actions regarding its wholesale energy purchases from and its wholesale energy sales to Hardee Power Partners were *inappropriate* during this time period.

(Tr. 685)(emphasis supplied).

Pertinent case law and the Commission's own orders demonstrate that the Commission placed the burden of proof on the wrong party. In its earliest fuel adjustment orders, the Commission held that:

> [T]he *companies* would be required to explain the reasonableness of their fuel purchases at the hearing during which projected amounts would be compared to actual results.

In re: General investigation of fuel cost recovery clause. Consideration of staff's proposed projected fuel and purchased power cost recovery clause with an incentive factor, Order No. 9273 at 6, Docket No. 74680-CI (Mar. 1980)(emphasis supplied).

In *Florida Power Corporation v. Cresse,* 413 So.2d 1187, 1190 (Fla. 1982), the Court expressly rejected the argument that "legitimately incurred operating expenses such as fuel costs are presumed to be reasonable, and evidence that such operating costs were incurred satisfies the utility's initial burden of production." The Court stated that:

> the requirement that utilities demonstrate the reasonableness of their fuel costs is not improper or unusual. 'Burden of proof in a commission proceeding is *always on a utility seeking a rate change*, and upon other parties seeking to change established rates.'

Id.(citation omitted)(emphasis added);[15] *see also, Florida Public Service Commission v. Florida Waterworks Association*, 731 So.2d 836, 841 (Fla. 1st DCA 1999)(citations omitted)(the burden of proof in a ratemaking case is on the utility seeking an increase in

[15]In this case, TECo sought a rate change; FIPUG sought the status quo pending an investigation.

rates); *South Florida Natural Gas Co. v. Florida Public Service Commission*, 534 So.2d 695, 697 (Fla. 1988)(citations omitted)(the burden of proof was on a gas utility which sought a rate change); *Sunshine Utilities v. Florida Public Service Commission*, 577 So.2d 663, 664-665 (Fla. 1st DCA 1991)(the burden of proof was on the utility to prove an investment it sought to include in rate base). *Cresse* (and the other cases cited above) confirms that the burden to justify recovery of the requested fuel costs rested squarely with TECo. It was not FIPUG's role to "disprove" TECo's recovery request. It was just such a "presumption of reasonableness" which *Cresse* explicitly rejected.

Further, while the Commission's Final Order states that TECo's actions were reasonable, TECo's witnesses and the Commission Staff failed to cite *any* evidence to justify TECo's actions. Final Order at 12 (R. 428)(Appdx at A-12). Moreover, the Final Order fails to cite to any evidence presented which contradicts FIPUG's claim. Therefore, the Final Order was doubly fatal in that it failed to support the reasonableness of TECo's actions, and it improperly shifted the burden to FIPUG to prove that TECo's actions were unreasonable.[16]

[16] TECo referred to audits which had been done of these transactions. (Tr.280-281, 284). However, such "audits" were not introduced as evidence and are not part of the record in the proceeding. Therefore, they cannot be relied upon to support the Commission's decision.

4. The Commission erroneously relied upon the contract termination date in approving TECo's requested rate increase.

In support of its decision at issue in this appeal, the Commission stated:

> This [Hardee/TECO] contract was signed in 1989 and expires on December 31, 2002. The record indicates that TECO has no plans to renegotiate this sale upon expiration of the contract. At the expiration of this contract, the capacity from TECO's Big Bend Unit 4 reserved for this contract will be available to serve TECO's retail ratepayers.

Final Order at 12 (R. 428)(Appdx at A-12). Reliance on the expiration date of the contract was error.

FIPUG does not dispute that the HPP/TECo contract will expire this year. Nor does it dispute that, at least as of the date of the testimony in this case, TECO did not plan to renew the contract. However, such information is irrelevant to the issue that was before the Commission for consideration — whether the TECo/HPP purchases and sales were appropriate and should be included for cost recovery from retail customers. Issues 1-4 and 21C, described *supra*, relate to dollars TECo has recovered and will recover from retail customers. The fact that the contract may expire *in the future* has no bearing on the amounts which have already been collected or the amounts which TECo will collect in 2002.

CONCLUSION

The Commission's statutory obligation is to prevent cross-subsidization, but the Commission ignored prevailing law and refused to make TECo prove its case. The Commission failed to conduct an investigation to answer the following questions of critical importance to Florida customers:

- Why was it not unjust for TECo to sell power at below average cost to its unregulated company and buy power from the same affiliate at more than average cost?
- Did TECo's parent company take a profit on each end of the transaction and pass the risk of loss on to customers?
- Were these transactions for the benefit of retail customers or holding company shareholders?
- Were the wholesale contracts the Commission said it had no authority to examine fair and just to retail customers?
- Should the affiliate deals be examined in the sunshine?

The Court should remand this case to the Commission and instruct it to thoroughly investigate TECo's affiliate fuel transactions for the protection of retail customers.

Respectfully submitted,

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I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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