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IN REPLY REFER TO

October 14, 2002

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VIA FEDERAL EXPRESS

Blanca S. Bayo, Director
Division of Commission Clerk & Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 020384-GU -- Application for a rate increase by Tampa Electric Company d/b/a PEOPLES GAS SYSTEM

Dear Ms. Bayo:

Enclosed for filing in the above docket on behalf of Peoples Gas System, please find the original and 20 copies of Peoples' Reply to Citizens' Motion to Strike Testimony, or in the Alternative, Expedited Motion to Compel Production and Responsive Answers to Discovery Requests and To Extend Filing Date for Testimony.

Please acknowledge your receipt and the date of filing of the enclosures on the duplicate copy of this letter, and return the same to me in the enclosed preaddressed envelope.

Thank you for your assistance.

Sincerely,



ANSLEY WATSON, JR.

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Blanca S. Bayo, Director
October 14, 2002
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cc: Parties of Record
Ms. Angela Llewellyn
Matthew R. Costa, Esquire

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate increase by :
Tampa Electric Company d/b/a Peoples :
Gas System. :

Docket No. 020384-GU

Submitted for Filing:
10-15-02

**PEOPLES' REPLY TO CITIZENS' MOTION TO STRIKE TESTIMONY,
OR IN THE ALTERNATIVE, EXPEDITED MOTION TO COMPEL
PRODUCTION AND RESPONSIVE ANSWERS TO DISCOVERY
REQUESTS AND TO EXTEND FILING DATE FOR TESTIMONY**

Peoples Gas System ("Peoples" or the "Company"), by its undersigned attorneys, files this Reply to the Citizens' Motion to Strike Testimony, or in the Alternative, Expedited Motion to Compel Production and Responsive Answers to Discovery Requests and To Extend Filing Date for Testimony ("Citizens' Motion"), and says:

Citizens' Motion

1. Citizens' Motion seeks, in essence:

(a) an order striking, "as unsupported by evidence withheld from the Commission,"¹ any testimony (presumably testimony of Peoples' witnesses) regarding the costs, charges and/or expenses associated with Citizens' production of documents requests ("POD") numbers 2, 4, 12, 15 and 17, and with Citizens' interrogatories numbers 50, 51, 52 and 53;

(b) alternatively, an order of the Prehearing Officer that Peoples provide, on an expedited basis, all responsive documents in the possession, custody or control of TECO Energy, Inc., Tampa Electric Company and TECO Partners, Inc., associated with PODs numbers 2, 4, 12, 15 and 17, and that responsive answers

¹ As will be made manifestly clear herein, *Peoples* has withheld nothing in the way of evidence from the Commission.

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be provided by Peoples to Citizens' interrogatories numbers 50-53; and

(c) regardless of the Prehearing Officer's decisions contemplated by subparagraphs (a) and (b) above, that the scheduled date for the filing of Citizens' direct testimony in this docket be extended to October 25, 2002.

Developments Since Filing of Citizens' Motion

2. Since the filing of Citizens' Motion, Peoples has served what it deems to be more responsive supplemental answers to Citizens' interrogatories numbers 50-53, inclusive. In discussions between counsel for Citizens and counsel for Peoples subsequent to the service of the supplemental answers to Citizens' interrogatories numbers 50-53, counsel for Citizens has not asserted that any of such supplemental answers is non-responsive. Thus, Peoples submits that it has rendered moot those portions of Citizens' Motion directed to allegedly non-responsive answers to Citizens' interrogatories numbers 50-53.

3. Since the filing of Citizens' Motion, Peoples has provided to Citizens' counsel (marked "confidential") copies of the two internal audit reports covered by Citizens' POD number 15, and identified in paragraph 15 of Citizens' Motion. Thus, Peoples submits that it has rendered moot that portion of Citizens' Motion directed to a failure to produce the two internal audit reports identified in Citizens' Motion and sought by Citizens' POD number 15.

4. Since the filing of Citizens' Motion, Peoples has provided to Citizens' counsel copies of the actual operating plans for Tampa Electric Company for the years 2000, 2001 and 2002, covered by Citizens' POD number 17. Counsel for Peoples hereby states that

TECO Energy, Inc. has no operating plan. Thus, Peoples submits that it has rendered moot that portion of Citizens' Motion directed to a failure to produce, pursuant to Citizens' POD 17, the operating plans of Tampa Electric Company and TECO Energy, Inc.

Citizens' Motion to Compel Production – PODs Numbers 2, 4 and 12

5. Paragraphs 2, 4 and 12 of Peoples' Response to Citizens' First Set of Requests for Production of Documents (Nos. 1-71) stated that Peoples did not have within its possession, custody or control, documents responsive to Citizens' PODs numbers 2, 4 and 12, respectively. *The documents sought by these PODs are not Peoples' documents.* Notwithstanding this fact, Peoples obtained from its affiliate, TECO Partners, Inc., and provided to Citizens', documents responsive to Citizens' PODs numbers 2, 4, 12 and 17. Thus, Peoples submits that it has rendered moot that portion of Citizens' Motion directed to a failure to produce documents responsive to the referenced PODs for TECO Partners, Inc.

6. Since the filing of Citizens' Motion, counsel for Peoples has engaged in numerous discussions with Citizens' counsel regarding the documents Peoples might be able to obtain from Tampa Electric Company ("TEC") that might be acceptable to Citizens for the purpose of satisfying PODs numbers 2, 4 and 12. As of the time of the service of this reply to Citizens' Motion, nothing (short of the broad scope of documents requested) has been deemed acceptable to Citizens for that purpose.

7. The TEC financial, budget and budget variance documents sought by PODs

2, 4 and 12 belong to TEC, which is not a party to this proceeding.² This is not a case in which, as alleged by Citizens' Motion, Citizens are in any way adversely affected in the preparation of their testimony, or in the presentation of their case generally, by not having access to documents requested in PODs numbers 2, 4 and 12, which are the documents of a company not a party to this proceeding. Although Peoples is an operating division of the TEC *corporate entity*, its books and records, *natural gas operations* and employees are entirely separate from the books and records, *electric operations*, and employees of TEC.

8. In determining in this proceeding whether the rates and charges for which Peoples seeks the Commission's approval are fair, just and reasonable, the Commission will consider whether the costs incurred by Peoples in providing service to its customers are reasonable. Citizens are clearly entitled to documents in the possession of Peoples (and possibly its affiliates) that are relevant to the issue of the reasonableness of Peoples' costs of providing service. That is not, however, what Citizens seek by PODs 2, 4 and 12. Those PODs seek financial and budgetary information *with respect to the electric operations of TEC*.

9. TEC does charge Peoples directly and via allocations for certain services provided by TEC for Peoples. The documents requested by Citizens with respect to these charges and allocations *have been provided to Citizens*. Peoples has produced for inspection and copying by Citizens (a) all of Peoples' general ledgers for the years

² Rule 1.350, *Florida Rules of Civil Procedure*, provides that a party need only respond to POD requests with documents that are in its possession, custody or control.

requested, (b) the invoices to Peoples for every charge or allocation of expense by TEC (and by TECO Energy, Inc., Peoples' ultimate parent company), (c) Peoples' trial balances for the years requested, and (d) every document requested by Citizens relating to TECO Partners, Inc., which provides sales and marketing services for Peoples. Citizens were also provided the TECO Energy Shared Resources reports for 2000, 2001 (the historic base year in this case) and 2002, which details the budgeted charges from TEC to Peoples.

10. With respect to the allocation of general and administrative expense to Peoples from TECO Energy, Inc., Peoples provided to Citizens (a) every invoice to Peoples from TECO Energy for the years requested, together with line item detail for each allocation, (b) an identification of the percent each amount allocated represented in relation to the total amount being allocated to all TECO Energy companies, (c) for a representative month, detail for the calculation of the percent being allocated to Peoples, and (d) a description (provided by TECO Energy) of how the allocations are determined.

11. With respect to affiliate charges, Peoples served its answer, consisting of 12 pages of schedules, in response to Citizens' interrogatory number 13, which (as amended) reads:

Affiliate Charges. Please identify those affiliated charges monthly made both to and from Peoples Gas that are equal to or in excess of \$10,000 for the historic base year and 2002 year-to-date and annually for the last three 3 calendar years. List the type of goods or services provided in comparative form for these periods (e.g., supplies, data service, management services, etc.), and the method used in billing (e.g., direct or allocated) and basis for allocating common charges.

12. Citizens' Motion (paragraph 6) alleges that Peoples is asking in this case that the Commission permit Peoples to recover through its rates more than \$24.7 million that is either directly charged or allocated to Peoples by affiliates (including TEC) or TECO Energy. That is indeed true. However, the TEC documents sought by Citizens' PODs 2, 4 and 12 will provide neither Citizens nor the Commission any information bearing on the issue of the reasonableness of costs incurred by Peoples, including costs charged or allocated to Peoples by TEC (whose financial and budgetary documents Citizens seek by PODs 2, 4 and 12). The TEC documents sought relate to TEC's costs, not to Peoples' costs.

Citizens' Motion must therefore be considered in terms of the information (already provided to Citizens) regarding costs incurred by Peoples, not in terms of the costs incurred by TEC, which are not at issue in this case.

As described in paragraphs 9 through 11 above, Citizens have already been provided by Peoples every document sought *with respect to the amount and nature of every cost directly charged or allocated by TEC to Peoples*. The documents sought by Citizens' PODs 2, 4 and 12 provide information regarding *costs incurred or budgeted to be incurred by TEC, not costs incurred or budgeted to be incurred by Peoples. Those documents will show not what Peoples pays, or is budgeted to pay (the reasonableness of which is an issue in this proceeding), for the services provided by TEC, but what TEC pays to provide such services for PGS, itself and others*. Thus, while Citizens' Motion states that it "is difficult to imagine a more compelling case requiring Peoples to provide responsive documents" from TEC, the very nature of the

documents sought by Citizens' PODs 2, 4 and 12 leads to the opposite conclusion. Peoples submits that the proper conclusion to be drawn from Citizens' insistence on the production by Peoples of these TEC documents (which are not within Peoples' possession, custody or control), is that Citizens are on a fishing expedition for information regarding the financial details associated with the electric operations conducted by TEC – a company regulated by the Commission, but not a party to this proceeding.

13. Citizens' Motion cites to, and quotes from, the Commission's Order No. PSC-01-1725-PCO-EI, for the factors to be considered in determining whether a subsidiary may be compelled to obtain documents from a parent company or affiliate for discovery. With respect to those factors, Peoples submits:

(a) Corporate Structure. While Peoples and TEC are part of the same corporate entity, they have completely separate officers and employees, operate different systems (natural gas vs. electric) in different geographic areas of the State of Florida, and maintain completely separate books and records.

(b) The Non-Party's Connection to the "Transaction" at Issue. Peoples and TEC have operated, since Peoples' merger into TEC in 1997, as completely separate utilities, one providing natural gas service, the other electric service. See paragraph (a) above. Peoples has applied to the Commission for an increase in rates; TEC has not. Peoples is a party to this proceeding; TEC is not. While there are transactions between Peoples and TEC, detailed information (see paragraphs 9 through 11 above) regarding those transactions, and the directly billed or allocated costs associated therewith, has been provided by Peoples to both

Citizens and the Commission Staff. Moreover, as indicated above, it is difficult to imagine how the TEC documents sought by Citizens' PODs 2, 4 and 12 could have any relevance whatsoever to the issues in this proceeding. Those documents related to the charges and allocations from TEC to Peoples have been provided to Citizens as requested.

(c) Degree to Which TEC Will Benefit from a Peoples Rate Increase. As indicated above, TEC (not a party to this proceeding) will derive no benefit whatsoever from whatever amount of rate relief the Commission may grant Peoples as a result of this proceeding.

In this case, the facts do not support a finding that the TEC documents requested by Citizens' PODs 2, 4 or 12 are within Peoples' possession, custody and control.

The facts involved in the situation before the Prehearing Officer which resulted in Order No. PSC-01-1725-PCO-EI, as well as the facts in the case cited therein,³ are readily distinguishable from the facts in the instant case.

Order No. PSC-01-1725-PCO-EI was issued in a proceeding on Gulf Power Company's ("Gulf's") petition for approval of recovery, through cost recovery clauses, of the purchased power arrangement for Smith Unit 3. As part of their theory that Gulf's transfer of Smith Unit 3 to its affiliate was part of a business strategy not discussed in any of Gulf's testimony, Citizens sought from Gulf Southern Power's (Gulf's affiliate's) "notes, minutes or any records of meetings at which the decision to seek approval of the power purchase agreement [between Gulf and its affiliate] and/or sell Smith Unit 3 to Southern

³ *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127 (D. Del. 1986).

Power were discussed.” Gulf had responded to a similar Citizens’ request by stating that it had no such documents. The Prehearing Officer, in Order No. PSC-01-1725-PCO-EI, compelled production by Gulf of its affiliate’s documents responsive to the request. The documents sought by Citizens were clearly relevant to Citizens’ theory of that case, and based on other facts pertinent to the three-part test discussed in *Afros, supra*, the Prehearing Officer found the requested documents to be within Gulf’s possession, custody and control.

In the instant proceeding, however, the only reason stated in Citizens’ Motion regarding a need for the TEC documents sought from Peoples is that (Citizens’ Motion, paragraph 17):

[t]he information contained in the records relating to numbers 2, 4, 12, . . . is needed to review the reasonableness of those charges by affiliates and to help determine whether or not the amount included in the 2003 projected test year is reasonable and appropriate.

This is simply not the case. As set forth in paragraphs 9 through 11 above, Peoples has already provided *all* Peoples documents related to *Peoples’ costs* sought by Citizens. Citizens’ Motion contains no explanation whatsoever with respect to how the TEC documents sought by PODs 2, 4 or 12 are relevant to the issue of the reasonableness of Peoples’ costs, or to any other issue in this case.

Afros, supra (see Footnote 3), was an action by Afros for infringement of its patent on mixing heads. The defendant, Krauss-Maffei Corporation (“KMC”), denied infringement and counterclaimed for Afros’ infringement of patents held by KMC on the same or similar mixing heads (the rights to which KMC had obtained, for the consideration of \$1.00, by

assignment from its parent company after Afros filed its suit for infringement). As set forth in the Court's opinion (113 F.R.D. at 131-132), virtually all decisions related to transfer of the patent were made by officers/directors of KMC's parent, which had developed the patented article. With respect to the issue of the parent's control of the party to the action (KMC), KMC and its parent shared common officers, directors and employees.

Because of the common officers, directors and employees, the parent's control of key decisions in the litigation, and the parent's "undeniable" connection to KMC's counterclaim for infringement of the patents developed by its parent, the court found that KMC had the requisite control of the documents sought by Afros. *As was the power purchase agreement in the Gulf case, the patents were the very subject of the litigation.*

In the instant proceeding, Peoples and TEC conduct their entirely different operations separately, and TEC has no stake in the outcome of Peoples' rate case. Moreover, the documents sought by Citizens are far from crucial for the preparation of testimony considering the details provided by Peoples with respect to its costs attributable to charges or allocations from TEC. (Citizens have stated that the documents are needed, but no rational explanation for that conclusion is set forth in Citizens' Motion.)

14. Based upon the foregoing, Citizens' Motion, to the extent it seeks an order compelling Peoples' production of TEC documents responsive to Citizens' PODs 2, 4 and 12, must be denied. When considered in relation to the information provided to Citizens in discovery with respect to *Peoples' costs*, the TEC documents sought by Citizens will

provide nothing Citizens have not already obtained.⁴

Citizens' Motion to Strike Testimony

15. Whether or not Peoples is ordered to provide all or any of the documents sought by Citizens' PODs 2, 4 and 12, Citizens' motion to strike testimony should be denied. If Peoples is not ordered to produce the involved TEC documents, Citizens' motion to strike testimony will be moot. Even if Peoples is required to produce all or some of the TEC documents, it is inconceivable that Citizens have been prejudiced in their

⁴ In an effort to resolve the issues raised by Citizens' Motion for an order compelling the production of documents responsive to PODs 2, 4 and 12, Peoples had offered to provide to Citizens, in lieu of the broad range of financial and budgetary information sought, (a) a list of all departments at TEC used for budget purposes, (b) for 2000, 2001 and 2002 to date, the departmental budget for each department at TEC that makes (or made) direct charges or allocations to Peoples, and (c) for the same years, the actual expenses incurred by each department for which the departmental budget information was furnished (thereby enabling Citizens to calculate for themselves the variance between the budgeted expenses and actual expenses). (As indicated in this Reply to Citizens' Motion, Peoples has already provided to Citizens detailed documentation with respect to these charges and allocations to Peoples.)

The information offered as described above, however, must be obtained from TEC's mainframe computer, and there are innumerable different ways in which the information can be displayed, depending on the query made of the database. A broad query for only one TEC department that makes direct charges to Peoples yielded a report approximately 1.25 inches in thickness. The report (a "PAR Report") contained the most minute details, none of which had any remote relevance to any issue in this case. The report covered the period of a month, and Citizens have sought the TEC budgetary and actual expense information for each month, quarter and year for the years 2000, 2001 and 2002 to date. For this most detailed inquiry of the TEC system, these reports would need to be run for 56 departments that charged Peoples during that period. The stack of reports would be approximately seven feet in height. (Counsel for Peoples learned on Monday, October 14, 2002, that there are even more departments for which PAR Reports would need to be produced in order to ensure that those reports for **every** TEC department that actually charged Peoples during 2000, 2001 and 2002 was included. There could be as many as 96 reports for 2000, 84 for 2001, and 73 in 2002 (through September), for a possible total of 253 reports.)

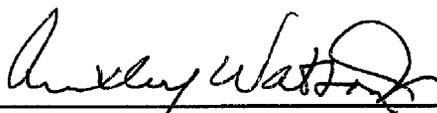
A more focused query of the system yielded a single page report (again, a "PAR Report") showing, by month and type of expense (or resource), the budgeted expenses for the TEC mail room/bill insertion department that makes charges to Peoples. The TEC system is apparently capable of producing a similar one-page report showing the actual expenses of that department for the same period. Peoples had offered to Citizens this "short" version of the departmental budget information for the TEC departments that charge or allocate costs to Peoples because it would (a) be less costly and time-consuming to produce, (b) be easier for Citizens to read and understand, and (c) be easier for Citizens (or anyone else) to quickly conclude that the information contained in the reports was of no relevance to any issue in this case.

preparation of testimony in this proceeding. The documents sought relate to TEC's costs, not those of Peoples, which are the only costs at issue in this proceeding.

Citizens' Motion to Extend Date for Filing Testimony

16. Citizens' Motion should be denied to the extent it seeks an extension to October 25, 2002 for the filing of Citizens' testimony.⁵ Peoples hereby agrees, however, to an extension to and including October 21, 2002, of the date by which Citizens must file their testimony and exhibits in this proceeding.

Respectfully submitted,



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and

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Attorneys for Peoples Gas System

⁵ Citizens' request for an extension of time is based on their assertion of "unjustified delay" in receiving the TEC documents sought from Peoples. This is a specious assertion. First, the TEC documents sought are not Peoples' documents. They were sought by Citizens from the wrong person. Second, it should be noted that Peoples filed its petition, direct testimony and the Minimum Filing Requirements on June 27, 2002. Commission Staff's first request for documents was served on July 5, 2002, and the CASR was issued on July 18, 2002. Citizens, however, waited until August 21, 2002 – almost two months after the filing of Peoples' petition – to commence their discovery in this case.

CERTIFICATE OF SERVICE

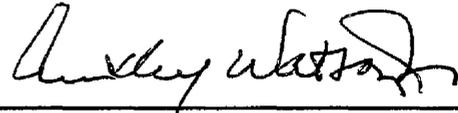
I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished via Federal Express to H. F. Rick Mann, Esquire, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, Florida 32399-1400, and that a copy of said Motion has been furnished by hand delivery* or Federal Express** to the following, this 14th day of October, 2002:

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