

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's  
2004-2008 waterborne transportation contract  
with TECO Transport and associated  
benchmark.

DOCKET NO. 031033-EI  
ORDER NO. PSC-04-0546-PCO-EI  
ISSUED: May 26, 2004

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

Pursuant to a Notice of Deposition Duces Tecum filed with the Commission on May 12, 2004, Tampa Electric Company (Tampa Electric) indicated its intent to take the deposition of Mr. Walter Dartland, Executive Director of the Consumer Federation of the Southeast (CFSE), on Monday, May 17, 2004. The accompanying subpoena required Mr. Dartland to bring with him several types of documents including materials reflecting (1) financial contributions to CFSE by specified corporations; (2) payments to or from certain named individuals and corporations; (3) communications between CFSE or Mr. Dartland and various persons and companies as well as their attorneys; (4) communications with a potential expert witness once consulted about aspects of the case but ultimately not called as an expert witness in this docket; (5) contracts and engagement letters between CFSE and Michael Twomey, attorney for a group of nine residential customers (Residential Customers) in this case; and (6) documents provided to and reviewed by an expert witness in the case.

On May 13, 2004, Tampa Electric filed with the Commission two Notices of Intent to Serve Subpoena on Nonparty Pursuant to Rule 1.351, Florida Rules of Civil Procedure, one directed to Walter Dartland in his capacity as Executive Director of Consumer Federation of the Southeast and the other directed to CorpDirect Agents, Inc., as the registered agent of Consumer Federation of the Southeast. Although Rule 1.351, Florida Rules of Civil Procedure, establishes a procedure for obtaining documents from non-parties via subpoena without a deposition, each Notice of Intent to Serve Subpoena was accompanied by a subpoena duces tecum for deposition, with the depositions now scheduled for Thursday, May 20, 2004. Each subpoena requested the same documents as those requested in the subpoena attached to Tampa Electric's May 12, 2004, Notice of Deposition, with only a slight variation. Pursuant to Rule 1.351, Florida Rules of Civil Procedure, the Residential Customers filed an objection to Tampa Electric's two Notices of Intent to Serve Subpoena, primarily claiming procedural defects. Tampa Electric responded that it corrected any claimed procedural defects by providing the new deposition notices discussed below.

According to an uncontroverted affidavit provided by Mr. Dartland, Mr. Dartland returned from a trip to Europe on the late evening hours of May 19, 2004, and discovered that a subpoena directed to him in his role as Executive Director of CFSE had been delivered to his wife at his residence on May 13, 2004. In his affidavit, Mr. Dartland states that because he had just returned from a lengthy overseas trip and had no opportunity to review these papers, consult with an attorney, gather the requested documents, or recover from jet lag, he contacted Tampa

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Electric's attorneys on the morning of Thursday, May 20, 2004, and advised them that he would not appear for the deposition.

On May 20, 2004, Tampa Electric filed with the Commission two Notices of Deposition Duces Tecum for depositions to be held Monday, May 24, 2004, one directed to Walter Dartland in his capacity as Executive Director of Consumer Federation of the Southeast and the other directed to CorpDirect Agents, Inc., as the registered agent of Consumer Federation of the Southeast. Both notices were accompanied by a subpoena duces tecum for deposition which requested the same documents as those requested in the subpoenas attached to each of Tampa Electric's May 13, 2004, Notice of Intent to Serve Subpoena.

On May 21, 2004, CFSE and Walter Dartland, in his capacity as Executive Director of CFSE and in his individual capacity, filed a Motion for Protective Order directing that Tampa Electric's depositions not be conducted and quashing the subpoenas to CFSE and Dartland. In the motion, CFSE and Dartland assert that the depositions sought by Tampa Electric do not allow adequate time for preparation for the deposition, including obtaining available counsel, filing objections, and gathering and reviewing documents sought by the subpoena. CFSE and Dartland contend that Tampa Electric has been aware of Mr. Dartland's involvement in the activities sought to be discovered for many months and could have sought this discovery at a time sufficiently in advance of the hearing so as to allow for reasonable notice. CFSE and Dartland also assert procedural flaws in Tampa Electric's notices and subpoenas, including failure to provide witness fees. Finally, CFSE and Dartland object on the grounds that Tampa Electric's subpoenas seek confidential and financial records of non-parties, that CFSE documents are irrelevant to the issues in this case, and that the subpoenas invade work-product privilege. Tampa Electric informed counsel for the Commission and parties that it would cancel the May 24, 2004, deposition pending the resolution of CFSE and Dartland's motion.

Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "it is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence."

Rule 1.280(c), Florida Rules of Civil Procedure, provides that "upon motion by a party or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires . . ."

Upon consideration, I find that Tampa Electric's proposed depositions of Mr. Dartland and CFSE impose an undue burden upon those entities given the very limited time in which those entities have been afforded the opportunity to obtain counsel, gather the requested

documents, and prepare themselves for deposition. Tampa Electric's most recent set of notices and subpoenas was filed with the Commission only seven days prior to the scheduled start date of the hearing in this docket and only three days prior to the proposed deposition date. Tampa Electric has been aware of CFSE's involvement in providing funding assistance to the Residential Customers for purposes of litigation in this docket at least since it received the Residential Customers' response to Tampa Electric's Interrogatory 8 which stated as much. Mr. Dartland and CFSE should not be required to shoulder the burden of obtaining counsel, gathering numerous documents requested in the subpoenas accompanying the deposition notices, and preparing themselves for deposition in the limited time frame created by Tampa Electric prior to the start of this hearing. There is no indication in this case that these depositions are being pursued at this late date to follow up on information that was only recently revealed or information that could not have been obtained through timely discovery.

It should be noted that the Commission has typically established a cut-off date for discovery of approximately one week prior to hearing, in part to protect parties who are preparing for hearing from having to spend time responding to discovery in the days just before the hearing. The discovery cut-off date also avoids disputes arising from last minute discovery efforts that require the Commission to provide last minute rulings. When hearing dates for this docket were originally scheduled for April 13-14, 2004, a discovery cut-off date of April 6, 2004, was established. When the hearing was rescheduled to the current dates, the discovery cut-off date was inadvertently not moved accordingly. Still, as evidenced by the original cut-off date and the Commission's practice of establishing such cut-off dates prior to hearing, the parties in this proceeding, who have long practiced before the Commission, should be aware of the Commission's desire to avoid the type of last minute discovery requests that are being pursued in this instance and the disputes that can arise from them.

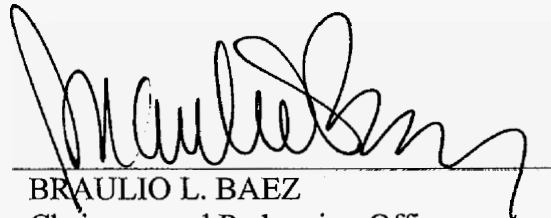
Based on the foregoing, I find that that Mr. Dartland and CFSE's Motion for Protective Order should be granted on the grounds that requiring compliance with Tampa Electric's subpoenas duces tecum for deposition would impose an undue burden upon those entities. Having found these grounds sufficient to grant the motion, I find no need to address the remaining arguments in Mr. Dartland and CFSE's motion.

Based on the foregoing, it is

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that CFSE and Walter Dartland's Motion for Protective Order is granted.

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By ORDER of Chairman Braulio L. Baez, as Prehearing Officer, this 26<sup>th</sup> day of  
May, 2004.



BRAULIO L. BAEZ  
Chairman and Prehearing Officer

(SEAL)

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate

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remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.