

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company and impact of its participation in GridFlorida, a Florida Transmission Company, on TECO's retail ratepayers.

DOCKET NO. 010577-EI
ORDER NO. PSC-01-1965-PCO-EI
ISSUED: October 2, 2001

ORDER GRANTING MOTION TO COMPEL

On September 27, 2001, Staff of the Florida Public Service Commission (Commission Staff) moved to compel Tampa Electric Company (TECO) to answer Interrogatory No. 78 of Staff's Third Set of Interrogatories propounded in this docket. For the reasons set forth below, I grant the Motion to Compel.

Interrogatory No. 78 seeks information concerning quantifiable monetary benefits accruing to Florida as a result of TECO's participation in a Regional Transmission Organization (RTO). Specifically, Interrogatory No. 78, served September 10, 2001, asks the following:

Refer to page 27, lines 11-12 of Witness Hoecker's testimony. Has TECO, or any entity known to TECO, calculated the approximate dollar benefit to Florida from an RTO? If TECO has made such a calculation, please provide the results of the calculation, stating all assumptions. If another entity known to TECO has made the calculation, please identify that entity and, if known, the results of its calculations.

TECO initially objected to the interrogatory "to the extent that such request calls for information which is exempt from discovery by virtue of the attorney/client privilege, work product privilege, or other applicable privilege". Tampa Electric Company's Objections to Staff's Third Set of Interrogatories, Filed September 18, 2001.

In its Response to the Motion to Compel (Response), TECO argues that Commission Staff incorrectly relied on Rule 1.280(b)(3), Florida Rules of Civil Procedure, as the basis of its Motion to Compel. Response at 2. That Rule allows discovery of certain trial preparation materials upon a showing that "the party

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seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 1.280(b)(3), Fla. R. Civ. P. The applicable rule in this case, TECO asserts, is Rule 1.280(b)(4)(B), which specifically applies to facts and opinions of experts not expected to be called as witnesses at trial. See, Toward v. Cooper, 634 So. 2d 760 (Fla. 4th DCA 1994); Ranpura v. Dept. of Professional Regulation, 507 So. 2d 146 (Fla. 1st DCA 1987). The test under this rule requires that a party demonstrate "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means". 1.280(b)(4)(B), Fla. R. Civ. P.

In support of its position, TECO states that Staff's Interrogatory No. 78 seeks to compel disclosure of "any information produced by a consulting expert retained in anticipation of litigation, who will not testify in this proceeding". Response at 2. It further asserts in the Affidavit of Harry W. Long, Jr., its attorney, that "a particular outside consultant" was engaged to assist counsel in his hearing preparation on the question of quantifiable benefits for the Florida RTO. Affidavit at 1.

Initially, I agree with TECO, based on its Response and Affidavit, that the applicable rule in this case is Rule 1.280(b)(4)(B). That rule deals directly with discovery of materials developed by not-to-be-called expert witnesses. See, Toward, Ranpura, *supra*. I do not agree, however, that the Commission Staff has failed to make the necessary showing under 1.280(b)(4)(B) to compel discovery in this case. Staff has asserted that it needs the materials to "fully assess the benefits on the RTO", and that it is "aware of no other source from which to obtain the information" than TECO, the "only party with access to the information". Motion to Compel at 3. Staff further asserts that it needs the materials to "make an informed recommendation to the Commission." Motion to Compel at 2. Even if the Commission Staff has couched its arguments in terms of the standard of Rule 1.280(b)(3), I find that in the unusual circumstances of this case, it has made the necessary showing that "exceptional circumstances" exist which make it "impracticable" to obtain the requested materials by other means. This case has been expedited at TECO's request, shortening the time for discovery and preparation for

hearing for Commission Staff and other parties. I am unpersuaded by TECO's assertion that Commission Staff has "access to the same universe of outside consultants and relevant information that is available to any other party to this proceeding." Response at 4. Nor do I find that the issue of compelling discovery under Rule 1.280(b)(4)(B) turns on "whether it is possible for the Staff to develop its own facts and opinions on the subject of quantifiable GridFlorida benefits without access to the information requested in Interrogatory No. 78". Response at 4. The test under the rule is one of "impracticability" not impossibility. See, Gilmor Trading Corp. v. Lind Electric, Inc., 555 So. 2d 1258 (Fla. 3rd DCA 1989); Delcastor, Inc. v. Vail Associates, Inc., 108 F. R. D. 405 (D. Colo. 1985). In short, I find that exceptional circumstances exist in this case which make it impracticable for the Commission Staff to obtain the information on quantifiable benefits requested in Interrogatory No. 78.

The hearing in this case is scheduled for Wednesday, October 3 and Thursday, October 4, 2001. In view of the short time available, I recognize that compliance with this order may be challenging. Nevertheless, the object of Commission Staff's Interrogatory No. 78 is to aid in its preparations for hearing, and TECO must provide an answer which facilitates that use. Accordingly, I find that TECO must submit its response by 8:00 a. m., Wednesday, October 3, 2001, earlier if possible.

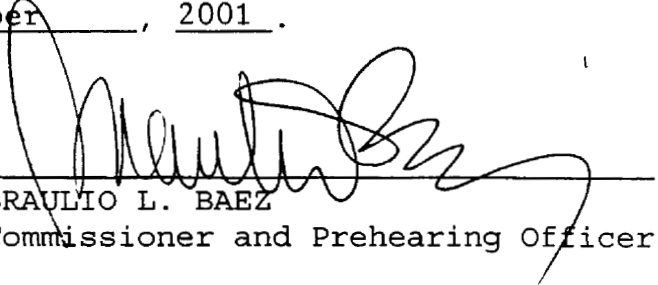
In consideration of the above, it is

ORDERED by Commissioner Braulio L. Baez as Prehearing Office that the Motion to Compel filed September 27, 2001, by the Staff of the Florida Public Service Commission is granted as set forth above. It is further

ORDERED that Tampa Electric Company shall provide its answer to Interrogatory No. 78 of Staff's Third Set of Interrogatories to Tampa Electric Company no later than 8:00 a. m., Wednesday, October 3, 2001.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 2nd day of October, 2001.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

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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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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

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