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December 22, 2003

BY HAND DELIVERY

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

Re: Review of Tampa Electric Company's Waterborne transportation contract with TECO Transport and associated benchmark; Docket No. 031033-EI

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and ten copies of Tampa Electric's Response and Opposition to CSX Transportation's Petition to Intervene.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,

Lee L. Willis

LLW/bjd
Enclosures

cc: All Parties of Record (w/encl.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's Waterborne transportation contract with TECO Transport and associated benchmark.	))))	DOCKET NO. 031033-EI FILED: December 22, 2003

TAMPA ELECTRIC'S RESPONSE AND OPPOSITION TO CSX TRANSPORTATION'S PETITION TO INTERVENE

Tampa Electric Company ("Tampa Electric" or "the Company") pursuant to Rule 25-22.037(2), Fla. Admin. Code, moves the Commission to deny, or in the alternative, to dismiss CSX Transportation's ("CSX") Petition to Intervene filed in this proceeding on December 16, 2003 and says:

1. The Petition fails to comply with the requirements pertaining to standards set forth in Fla. Admin. Code 25-22.039. That rule requires a petition for leave to intervene:

> Include allegations sufficient to demonstrate that the intervenor is entitled to participate in a proceeding as a matter of constitutional or statutory right pursuant to Commission Rule, or that the substantial interest of the intervenor are subject to determination or will be affected through the proceeding.

2. CSX simply does not have standing for the reasons described below.

3. As the court stated in Agrico Chem. v. Dept. of Envl. Reg., 406 So.2d 478, 482 (Fla. 2nd DCA 1981):

> Before one can be considered to have a substantial interest in the outcome of a proceeding you must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a §120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Both requirements must be met to demonstrate a substantial interest. CSX fails to meet either requirement of the test.

4. Injury in fact. Remote, speculative, abstract or indirect injuries are not sufficient to meet the "injury in fact" standing requirement. See International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3rd DCA 1990); Village Mobile Home Park Ass'n v. Dept. of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Dept. of Envl. Reg., supra; Dept. of Offender Rehabilitation v. Jerry, 353 So.2d 123 (Fla. 1st DCA 1978). There must be allegations that either (1) the petitioner has sustained actual injuries at the time of the filing of the petition, or (2) that petitioner is greatly in danger of sustaining some direct injury as a result of the Commission's decision in the proceeding. See Village Park, 506 So.2d at 433.

It should be obvious even to the most casual observer that the real reason for CSX's intervention in this proceeding is an attempt to enhance its competitive interests. CSX's immediate purpose in intervention is clearly shown in its Motion to Intervene which identifies the issues CSX will attempt to raise and the ultimate facts CSX alleges entities it to relief. The entire thrust of CSX's participation is to (1) attempt to have this Commission require Tampa Electric to use CSX to transport coal, or (2) exact some sort of retribution on Tampa Electric for not procuring its coal transportation services from CSX. CSX's competitive economic interests are not within the "zone of interest" of this proceeding.

The policy of this Commission with respect to what is relevant in assessing the appropriate market based pricing for Tampa Electric's transactions with its coal and coal transportation affiliates is set out in a settlement agreement through this Commission in Order No. 20298 in Docket No. 870001-EI-A issued on November 10, 1988. That order approved a settlement agreement that provided in pertinent part:

> In accordance with the Commission's direction, Staff, Office of Public Counsel ("OPC") and Tampa Electric have met to discuss

> the methods by which market pricing can be adopted for affiliated coal and coal transportation transactions between Tampa Electric and its affiliates. As a result of these discussions, Staff, OPC and Tampa Electric agree as follows:
>
> Public Counsel and Staff agree that the specific contract format, including the pricing indices which Tampa Electric may include in its contracts with its affiliates, are not subject to this proceeding and Tampa Electric may negotiate its contracts with its affiliates in any manner it deems reasonable. . . . (Emphasis added.)

Since the currently approved Commission policy in this area specifically excludes consideration of how Tampa Electric negotiates or enters into transactions with its affiliated supplier, CSX by definition cannot have been impacted by the manner in which Tampa Electric entered into its current coal transportation contract with TECO Transport. CSX simply does not meet the first prong of the Agrico test. Failure to satisfy one prong of the Agrico test is sufficient to find that CSX does not have standing to participate in this proceeding; but as further explained below CSX also fails to satisfy the second prong of the Agrico test.

5. Zone of interest. The Agrico standing test also requires that the injury must be of the type or nature that the proceeding is designed to protect. In determining where the petitioner has met the zone of interest test, the agency must examine the nature of the injury alleged and determine if the statute or rule governing the proceeding is intended to protect that interest. See Grove Isle, Ltd. v. Bayshore Homeowner's Ass'n 418 So.2d 446 (Fla. 1st DCA 1982); Suwannee River Area Council Boy Scouts of America v. Dept. of Community Affairs, 384 So.2d 1369 (Fla. 1st DCA 1980); Boca Raton Mausoleum v. Dept. of Banking and Finance, 512 So.2d 1060 (Fla. 1st DCA 1997); Friends of the Everglades v. Board of Trustees, 595 So.2d 186 (Fla. 1st DCA 1992). CSX argues that their economic interest falls within the zone of interest of this fuel proceeding because: "CSX is a significant customer of TECO, having several different accounts . . ." CSX contends that the rates Tampa Electric proposes to charge

are unreasonable because they include costs billed to TECO's affiliate, TECO Transport for the transportation of coal because this cost should have been paid to CSX. The transparency of this argument is obvious. The real interest of CSX is not as a customer but as a competitor. CSX's competitive economic interest is beyond the scope of this proceeding. This proceeding was not designed to promote and protect the economic interest of CSX and it has failed to meet the zone of interest requirement, the Agrico standing test.

6. The Florida Supreme Court in Ameri-Steel Corp. v. Clark, 691 So.2d 473 (Fla. 1997) affirmed this Commission's denial of Ameri-Steel's standing to intervene in a territorial agreement proceeding where it alleged that it was an electric customer whose rates would be affected by which utility provided electric service. The court affirmed the Commission's ruling that Ameri-Steel could not meet either prong of the Agrico test. The Commission rejected Ameri-Steel's claim that higher rates it pays FPL for electricity are one factor threatening the continuing viability of its Jacksonville plant. The Commission held and the court affirmed that such an allegation is not an allegation of injury in fact of sufficient immediacy to bind Ameri-Steel to a 120.57 hearing. The court in Ameri-Steel also found the second prong of the Agrico test had not been met by holding a proceeding to approve a territorial agreement is not the proper form for intervention by a resident electricity customer like Ameri-Steel to compel service from a municipal utility based on speculative economic interest. See also the Commission's Order No. PSC-96-0158-PCO-EU issued February 5, 1996.

7. CSX should not be permitted to intervene in this proceeding in an attempt to enhance its prospects for economic gain or to secure an advantage in its efforts to compete against Tampa Electric's coal transportation affiliate or any other transportation supplier.

8. CSX's real interest in this proceeding is as a competitive transportation provider not as a customer of Tampa Electric. CSX's access to confidential information in this proceeding would be particularly problematic. Such access would not only be harmful to TECO's customers but would also be harmful to all ratepayers in Florida, since CSX and TECO Transport & Trade ("TECO Transport") are direct competitors in all facets of TECO Transport's existing waterborne shipping routes. Consequently, the disclosure of confidential information to CSX would damage the competitive interests of other companies, the other RFP bidders and all companies which provide U. S. inland and ocean waterborne transportation or terminal services.

WHEREFORE, Tampa Electric Company urges the Commission to deny, or to dismiss CSX's Petition for Leave to Intervene. If the Commission does allow CSX to intervene over Tampa Electric's objection, its intervention should be strictly limited to its interests as a customer and not as a competitor, and that its access to confidential proprietary information be denied.

DATED this 22nd day of December 2003.

Respectfully submitted,

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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response and Opposition to CSX's Petition to Intervene, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 22nd day of December 2003 to the following:

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