

BEFORE THE FLORIDA 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-04-0157-PCO-EI  
ISSUED: February 16, 2004

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ORDER GRANTING IN PART AND DENYING IN PART  
MOTION FOR PROTECTIVE ORDER

On January 2, 2004, Tampa Electric Company (Tampa Electric) filed an Objection and Motion for Protective Order (Motion) with respect to discovery served on it by CSX Transportation (CSX) on December 24, 2003. CSX filed its Response, along with a Request for Oral Argument, on January 14, 2004.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . ." Based upon this authority, I find that oral argument is not necessary to resolve this matter and enter this Order in consideration of the pleadings as set forth herein.

CSX, through its First Request for Production of Documents (Nos. 1 and 2) to Tampa Electric Company, has requested all documents that Tampa Electric will produce in response to previous discovery requests by the Office of Public Counsel (OPC) and Florida Industrial Power Users Group (FIPUG). In its Motion, Tampa Electric asserts that many of these documents contain highly proprietary confidential business information concerning competitive coal transportation services, bids, and other related contractual information. Tampa Electric states that CSX competes directly with Tampa Electric's coal transportation affiliate, TECO Transport, in the bulk commodities transportation industry. Further, Tampa Electric indicates that CSX competes with those entities who provided bids in response to Tampa Electric's 2003 request for proposals (RFP) for coal transportation service. Tampa Electric asserts that disclosure of information to CSX relating to bids and other contractual data associated with the transportation of coal for Tampa Electric would afford CSX a competitive advantage

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and cause TECO Transport and other transportation suppliers a competitive disadvantage. Tampa Electric contends that this would have a detrimental effect of Tampa Electric and its general body of customers. In support of these arguments, Tampa Electric provided the affidavit of Joann T. Wehle, its Director of Wholesale Marketing and Fuels, as an attachment to its Motion.

In its Response, CSX asserts that Tampa Electric's motion seeks an unnecessarily extreme remedy of preventing CSX from conducting any discovery of confidential information. CSX contends that Tampa Electric's concerns can be addressed more appropriately through a protective order or confidentiality agreement between CSX and Tampa Electric that allows the information to be reviewed and analyzed by CSX's experts on a "need to know" basis, while implementing safeguards to prevent the information from being disclosed to CSX personnel who are in a position to use the information for competitive advantage. CSX asserts that such an appropriately crafted order or agreement will satisfy its need for the information to protect its interests in this proceeding while also satisfying Tampa Electric's interests in protecting its proprietary confidential business information from disclosure to persons in a position to use that information to Tampa Electric's competitive disadvantage.

Rule 1.280(c) (7), Florida Rules of Civil Procedure, allows issuance of protective orders to protect trade secrets or other confidential commercial information. When ruling on a motion for protective order involving such information, a two part test is used to decide if the information is discoverable. First, the movant, TECO, must demonstrate that the information sought is confidential by virtue of being a trade secret or some other type of confidential commercial information. See Order No. PSC-01-2122-PCO-EI, issued October 29, 2001, in Docket No. 010001-EI, at p.5; Kavanaugh v. Stump, 592 So.2d 1231, 1232-3 (Fla. 5th DCA 1992); Inrecon v. The Village Homes at Country Walk, 644 So.2d 103, 105 (Fla. 3rd DCA 1994); Rare Coin-it v. I.J.E., Inc., 625 So.2d 1277 (Fla. 3rd DCA 1993). If the movant makes a showing that the information is confidential, the burden shifts to the opposing party, CSX, to establish that its need for the information outweighs the countervailing interest in withholding production. See Order No. PSC-01-2122-PCO-EI, at p.5; Inrecon at 105; Rare Coin-it at 1277; Higgs v. Kampgrounds of America, 526 So.2d 980,

981 (Fla. 3rd DCA 1988); Eastern Cement Corp. V. Dep't of Environmental Protection, 512 So.2d 264, 265-6 (Fla. 1st DCA 1987). Broad discretion is granted in balancing the competing interests of the parties and a wide variety of factors can be considered. See Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of South Florida, 423 So.2d 545, 547 (Fla. 4th DCA 1982); Inrecon at 105.

Based upon the Motion and supporting affidavit filed by Tampa Electric, it appears that the information sought by CSX is confidential commercial information that, if disclosed to CSX, may harm the competitive interests of TECO Transport and other competitive suppliers who bid in response to Tampa Electric's 2003 RFP. CSX does not challenge the notion that this information is competitively sensitive. Thus, I find that Tampa Electric has satisfied its initial burden to demonstrate the confidential nature of the information sought.

I further find that CSX, who was granted intervenor status in this proceeding to protect its interests as a retail ratepayer of Tampa Electric, has satisfied its burden to establish the need for this information to effectively represent those interests. The issues deferred from Docket No. 030001-EI for consideration in this proceeding involve, among other things, questions concerning the reasonableness of the rate paid by Tampa Electric to TECO Transport under a contract between those parties that is considered confidential. Further, the bids that Tampa Electric considered prior to entering that contract are held by Tampa Electric as confidential, as well as the market analysis supporting the rate in the contract. Thus, this proceeding requires, at least in part, review and analysis of confidential information. Accordingly, CSX has demonstrated a need for this information to represent its interests in this proceeding.

To balance the parties' competing interests, Tampa Electric should provide CSX access to the information pursuant to a non-disclosure agreement that limits access to the confidential information in question to CSX's outside counsel and outside experts retained for the purposes of this proceeding, provided that such persons do not serve CSX in a capacity where the information could be used to the competitive advantage of CSX over TECO Transport or other competitive suppliers of commodity


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transportation. The parties, rather than this Prehearing Officer, are best equipped to draft a mutually acceptable non-disclosure agreement that includes these terms and are directed to do so in an expeditious manner.

It is therefore,

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that Tampa Electric's Motion for Protective Order is granted in part and denied in part, as set forth in the body of this Order.

By ORDER of Chairman Braulio L. Baez, as Prehearing Officer, this 16th day of February, 2004.

 for Chairman Braulio L. Baez

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