

ORIGINAL

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

March 2, 2004

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VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 031033-EI


Dear Ms. Bayo:

On behalf of the Florida Industrial Power Users Group (FIPUG), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Florida Industrial Power Users Group's Response in Opposition to Tampa Electric Company's Request for "Alternative" Procedure.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,


Timothy J. Perry

Enclosure

AUS	_____
CAF	_____
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COM	<u>5</u>
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ECR	_____
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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
Filed: March 2, 2004

**THE FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE IN
OPPOSITION TO TAMPA ELECTRIC COMPANY'S
REQUEST FOR "ALTERNATIVE" PROCEDURE**

The Florida Industrial Power Users Group (FIPUG), pursuant to rule 28-106.204, Florida Administrative Code, responds in opposition to Tampa Electric Company's (TECo) request that the Commission revise its Orders on Procedure¹ in this docket and institute an "alternative" procedure. Such request should be denied. As grounds therefore, FIPUG states:

Background

On February 19, 2004, Tampa Electric Company filed its Response in Opposition to Office of Public Counsel's Motion for Revision to Order Establishing Procedure or Continuance. Beginning on page 8 of the "Response," in the section entitled "Alternative Means of Proceeding," TECo raises for the first time its request that the Commission bifurcate this proceeding into two phases.² While TECo's proposal is contained within its "Response" to OPC's motion, this portion of its "Response" is not a response at all but rather a new request for affirmative relief requesting bifurcation of the proceedings.³ Thus, pursuant to Rule 28-106.204, Florida Administrative Code, FIPUG files this response.

¹ Order Nos. PSC-04-0195-PCO-EI, PSC-04-0156-PCO-EI, and PSC-03-1398-PCO-EI.

² On page 10 of its "Response," in the "Wherefore" paragraph, TECo urges the Prehearing Officer to enter an order "bifurcating this proceeding."

³ In fact, late in the afternoon of February 18, 2004, TECo sent this proposal to FIPUG, asking for its reaction. The formal request was filed with the Commission the next day.

TECo's Proposal is an Attempt to Evade its Discovery Obligations

The Prehearing Officer has issued two orders in this docket requiring the discovery of information from TECo Transport, the TECo affiliate who will provide transportation services under the contract at issue. First, OPC filed a motion to compel TECo to respond to its Request to Produce No. 9, served December 3, 2003. Order No. PSC-04-0118-PCO-EI, at 4, grants OPC's motion to compel and requires TECo to provide OPC with certain TECo Transport balance sheet and income statement information. The order describes the relevance of the TECo Transport information to this case:

The information sought by OPC relates to TECO Transport's costs to provide coal transportation service, and, thus, may lead to the discovery of admissible evidence on the issues in this proceeding. . . . Precluding discovery on this matter could effectively preclude parties from . . . looking at cost as a basis for determining the reasonableness of the new contract rate.

On January 20, 2004, FIPUG moved to compel TECo to respond to questions contained in its First Set of Discovery. Order No. PSC-04-0158-PCO-EI, at 4, grants FIPUG's motion in part, and requires TECo to provide FIPUG with information regarding TECo Transport's earnings under its contract with TECo, as well as information regarding the commodities that it transports. The Prehearing Officer specifically noted the relevance of FIPUG's discovery to the issues in this docket:

(1) the continued appropriateness of the current benchmark mechanism for determining reasonableness of costs incurred by Tampa Electric when it purchases coal transportation services from TECO Transport; and (2) the reasonableness of Tampa Electric's projected coal transportation costs from 2004-2008 under its new contract with TECO Transport.

TECo's bifurcation proposal simply seeks to avoid providing the relevant and critical discovery responses described above — discovery that the Prehearing Officer has already ruled **twice** must be provided. Such information goes to the revenue, costs and return of TECo

Transport, the company providing the transportation service, and is critical to the Commission's assessment of whether the contract rate is reasonable, and thus appropriate for recovery from ratepayers.

TECo has a fiduciary duty to its customers not only to obtain the lowest and best cost for fuel transportation, but also to keep its regulatory costs to a minimum. It should be disinterested in whether its affiliate profits from fuel transportation. Further, the information TECo seeks to shield is necessary to a decision in this matter. In *GTE Florida, Inc. v. Deason*, 642 So.2d 545, 547-48 (Fla. 1994), the Florida Supreme Court held that the standard for review of transactions between a utility and an unregulated affiliate requires a review of whether "unfair or excess profits are being generated." The Commission must decide whether the transaction exceeds the going market rate or is otherwise inherently unfair. *Id* at 548. As the Prehearing Officer has already determined, the discovery sought is relevant to the reasonableness or unreasonableness of the new contract. Bifurcation would deny the parties access to relevant information necessary to perform the analysis *GTE* requires and would have the Commission consider isolated issues in a vacuum without an awareness of the totality of the circumstances surrounding the transaction for which TECo expects the ratepayers to be responsible.

TECo also says that bifurcation will allow the docket to proceed in "an orderly manner." This claim of "orderly process" appears to be nothing more than a veiled threat regarding litigation over materials to which it has already been determined that the parties are entitled.⁴ The fact that TECo may continue to obfuscate the process by failing to provide access to relevant materials does not make the procedure set out in the Procedural Orders "disorderly" and should

⁴ It is FIPUG's understanding that TECo is also strenuously resisting a Staff audit of TECo Transport — again, an attempt to shield relevant information from the Commission and parties' view. It should be noted that Staff audited Florida Progress' transportation affiliate with none of the histrionics that have characterized this case.

not dissuade the Commission from ensuring that it (and the parties) have all necessary materials before it upon which to make an informed judgment.

TECo's Proposal is Untimely, Expensive and Inefficient

TECo's proposal should also be rejected because it is untimely. The issue identification meeting was held in this docket on December 17, 2003, at which time the parties agreed on the issues TECo now claims are unclear. TECo waited over two months to file its request for bifurcation. It is no coincidence that TECo's request comes on the heels of the Commission's discovery orders, rather than when the parties met to discuss the issues in this proceeding.

Despite TECo's claim of proceeding in an "orderly manner", conducting two hearings is expensive and inefficient, both for the Commission and its Staff as well as for the parties to this matter. FIPUG has already expended considerable resources on discovery and testimony preparation, only to have TECo attempt to change the process mid-stream. FIPUG asks the Prehearing Officer to consider that it would incur considerable expenses, beyond that required for one hearing, if it were required to twice conduct discovery, prepare multiple sets of testimony, prepare for two separate hearings, and prepare two briefs in this case.

In addition, the Commission should be mindful of the effects of a delay in the resolution of the case, should the proceeding be bifurcated. On February 23, 2004, TECo filed its final true up of 2003 fuel costs in Docket No. 040001-El. In its filing, TECo acknowledged that this year it will overcharge customers \$30,622,243.00 because the fuel cost deficit it predicted in November 2003 was flawed. This over collection will be exacerbated if its estimate of the lowest and best price for fuel transportation also turns out to be excessive. Bifurcation will delay resolution in this case and push any refund owed to the ratepayers far into the future. Further, the delay benefits TECo because it will in effect obtain a low cost cash advance from customers

at an interest rate far below customers' opportunity cost, and probably even the commercial paper rate currently available to TECo.

This proceeding has already been delayed as the result of TECo's resistance of relevant discovery. It now appears that TECo contends that until the Commission affirmatively acts to reject the current benchmark price determination methodology, customers are obligated to continue to pay the amount charged for transportation even if it turns out to be excessive. If this contention is correct, it is an even more compelling reason to expedite the conclusion of this case and avoid further delays.

WHEREFORE, FIPUG requests that the Commission enter an order denying TECo's bifurcation request.



John W. McWhirter
McWhirter, Reeves, McGlothlin, Davidson,
Kaufman, & Arnold, P.A.
400 North Tampa Street, Suite 2450
Tampa, Florida 33602
Telephone: (813) 224-0866
Telecopier: (813) 221-1854
jmcwhirter@mac-law.com

Vicki Gordon Kaufman
Timothy J. Perry
McWhirter, Reeves, McGlothlin, Davidson,
Kaufman, & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 (telephone)
(850) 222-5606 (fax)
vkaufman@mac-law.com
tperry@mac-law.com

Attorneys for Florida Industrial Power Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Industrial Power Users Group's Response in Opposition to Tampa Electric Company's Request for "Alternative" Procedure has been furnished by (*) hand delivery, or U.S. Mail this 2nd day of March 2004, to the following:

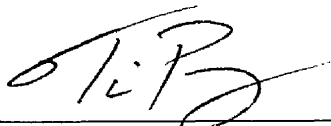
(*) Wm. Cochran Keating IV
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Lee L. Willis
James D. Beasley
Ausley & McMullen
227 S. Calhoun Street
Tallahassee, Florida 32302

Rob Vandiver
Office of the Public Counsel
111 West Madison Street
Room 812
Tallahassee, Florida 32399

R. Sheffel Wright
Landers & Parsons
301 West College Avenue
Tallahassee, Florida 32301

Mike Twomey
Post Office Box 5256
Tallahassee, Florida 32314-5256



Timothy J. Perry