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March 3, 2004

VIA HAND DELIVERY

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

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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 Motion for Reconsideration of Order No. PSC-04-0158-PCO-EI and Request for Oral Argument..

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

AUS	_____
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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 3, 2004

**THE FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE IN
OPPOSITION TO TAMPA ELECTRIC COMPANY'S
MOTION FOR RECONSIDERATION OF ORDER NO. PSC-04-0158-PCO-EI
AND REQUEST FOR ORAL ARGUMENT**

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) Motion for Reconsideration of Order No. PSC-04-0158-PCO-EI (the Order) granting in part and denying in part FIPUG's Motion to Compel and its request for Oral Argument. TECo's motion should be denied. As grounds therefore, FIPUG states:

Background

1. On January 20, 2004, FIPUG filed a motion to compel TECo to respond to questions contained in its First Set of Discovery. The Order granted FIPUG's motion in part, and required TECo to answer Interrogatory Nos. 29-32 and Request for Production of Documents Nos. 10, 11 and 13. On February 20, 2004, TECo filed a motion for reconsideration of the Order, seeking reconsideration of that part of the Order requiring it to respond to Interrogatory Nos. 29-32, regarding TECo Transport's earnings under its contract with TECo and the commodities that it transports.

Standard of Review

2. The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. *See, Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315

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(Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959), citing *State ex.rel. Jaytex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse* at 317.

TECo's Motion Fails to Meet the Reconsideration Standard

3. In the Order for which reconsideration is sought, the Prehearing Officer carefully considered and rejected all of the arguments TECo raises in its motion. The Order finds *Afros S.P.A v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del. 1986), on point and dispositive of the discovery dispute:

. . . Afros, set forth three factors to be considered when deciding whether a subsidiary may be compelled to obtain documents from a parent or affiliate for discovery: (1) the corporate structure; (2) the non-party's connection to the transaction at issue; and (3) the degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. **In light of the factors set forth in Afros**, in particular TECO Transport's direct connection as a party to the contract at issue, Tampa Electric shall respond to Interrogatory Nos. 29-32 by the close of business on February 23, 2004.¹

4. For example, TECo argues that the Prehearing Officer overlooked or failed to consider that *Afros* involved a discovery request concerning a parent-subsidary relationship and is thus inapplicable because the instant case concerns two affiliated companies. However, the Prehearing Officer did not overlook the *Afros* case; it is discussed and cited in the Order. Further, the test set forth in *Afros* notes that it is equally applicable to both parent-subsidary and

¹ Emphasis added.

affiliate relationships: “It is obvious that the particular *form* of the of the corporate relationship does not govern whether a party controls documents.” *Id.* at 131 (emphasis in original).

4. And in fact, *Afros* cites *Alimenta (U.S.A.) v. Anheuser Busch Co.*, 99 F.R.D. 309 (N.D. Ga. 1983), which addresses an affiliate transaction similar to the instant case. In *Alimenta*, Anheuser Busch sought, and was granted, discovery of documents in the possession of Alimenta USA’s non-party sister corporation, Alimenta BV, located in the Netherlands. *Alimenta* is similar to the instant case because TECo procures transportation services from its affiliate and charge its ratepayers the same price it pays TECo Transport. Just as Alimenta USA was required to provide access to its sister company’s documents, the Prehearing Officer correctly found that the TECo is required to provide the information requested in Interrogatory Nos. 29-32.

5. TECo also cites *Pennwalt Corp. v. Plough, Inc.* 85 F.R.D. 257, 263 (D. Del. 1979), for the proposition that to discover a non-party sister corporation’s documents, a party must show that the companies have either identical boards of directors or a deeply intertwined corporate structure. TECo states that FIPUG failed to demonstrate either of these characteristics and that the Order did not find such characteristics. However, TECo's reliance on *Pennwalt* is misplaced because it is factually and legally distinguishable from the instant case. In *Pennwalt*, the non-party had *no* connection to the transaction at issue and did not stand to benefit from an outcome favorable to the party to the litigation. This case is just the opposite. This is a transaction between two related companies, for which ratepayers are responsible. TECo Transport is a *signatory to the contract* and the *beneficiary of the revenues* which ratepayers will pay under the contract. Further, *Afros* does not require that one must show that the companies have either identical boards of directors or a deeply intertwined corporate structure.

6. In addition, as *Afros* makes clear, the relationship of the party and non-party corporations' corporate structures is one of three equally important factors to consider in the analysis, along with the non-party's connection to the transaction at issue and the degree that the non-party will receive the benefit of any award in the case. *Afros*, 113 F.R.D. at 130. *Afros* does not require that the party seeking discovery show that the companies have either identical boards of directors or a deeply intertwined corporate structure. Nonetheless, a closely intertwined corporate structure is present here.

7. FIPUG's Motion to Compel incorporates OPC's Motion to Compel filed January 9, 2004. Attachment I to OPC's motion contains printouts from the Florida Secretary of State, Division of Corporations web pages showing the common officers and directors for both TECo and TECo Transport. It is evident from these reports that these TECo entities share the same registered agent and many of the same officers and directors. Clearly there is substantial overlap of directors and officers as *Afros* contemplates.

8. Finally, TECo alleges that the Prehearing Officer failed to consider whether it is appropriate to grant FIPUG's motion in light of TECo's request for bifurcation, and requests that the Prehearing Officer stay the effect of the Order until a decision can be made on the issue of bifurcation. FIPUG hereby incorporates by reference the arguments made in its Response in Opposition to "Alternative" Procedure filed March 2, 2004. For the reasons stated therein, the Prehearing Officer should reject TECo's request to bifurcate this case.

9. TECo also requests that the Commission conduct oral argument on its motion. FIPUG asserts that such argument is unnecessary. The Prehearing Officer's Order is clear and well-reasoned and TECo has failed to demonstrate any error. Therefore, oral argument is not needed.

WHEREFORE, the Commission should enter an order denying TECo's motion.



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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 Motion for Reconsideration of Order No. PSC-04-0158-PCO-EI and Request for Oral Argument has been furnished by (*) hand delivery, or U.S. Mail this 3rd day of March 2004, to the following:


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