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April 6, 2004

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 Citizens of the State of Florida (Public Counsel) and the Florida Industrial Power Users Group (FIPUG), enclosed for filing and distribution is the original and 15 copies of the following:

- ▶ Joint Response in Opposition to TECo's Motion for Temporary Protective Order.

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 _____
CAF _____
CMP _____ Enclosure
COM _____
CTR _____
ECR _____
GCL I _____
OPC _____
MMS _____
SEC I _____
OTH _____

RECEIVED & FILED

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EPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A. 04321 APR-6 3

FPSC-COMMISSION CLERK

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: April 6, 2004

**JOINT RESPONSE IN OPPOSITION TO TECO'S
MOTION FOR TEMPORARY PROTECTIVE ORDER**

The Citizens of the State of Florida (Public Counsel) and the Florida Industrial Power Users Group (FIPUG), pursuant to rules 28-106.204 and 25-22.006, Florida Administrative Code, respond in opposition to Tampa Electric Company's (TECo) Motion for Temporary Protective Order filed March 30, 2004. Public Counsel and FIPUG request that the Commission enter an order denying TECo's requests to shield the information described below from public review. As grounds therefore, Public Counsel and FIPUG state:

Introduction

1. The policy of the State of Florida is that all public records be open to review:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Section 119.01(1), Florida Statutes. The Commission has recognized that:

Florida law presumes that documents submitted to governmental agencies shall be public records. The only exceptions to this presumption are the specific statutory exemptions provided in the law and exemptions granted by governmental agencies pursuant to the specific terms of a statutory provision. This presumption is based on the concept that government should operate in the "sunshine." Rule 25-22.006(4)(c), Florida Administrative Code, provides that it is the Company's burden to demonstrate that the documents fall into a statutory exemption or that the information is proprietary confidential business information, the disclosure of which will cause the Company or its ratepayers harm.

Order No. PSC-01-2252-CFO-EI at 2, Docket No. 000061-EI (November 16, 2001).

DOCUMENT NUMBER-DATE

2. This case concerns the amount TECo demands ratepayers pay to it for services it has secured from an affiliate company. However, TECo wants to shield from public review the amounts it seeks to recover as well as the amounts that Public Counsel and FIPUG's expert witness testifies is more appropriate. The Commission should deny TECo's request for the reasons set out below.

TECo Has Failed to Comply With The Commission's Confidentiality Rule

3. TECo has failed to comply with the Commission's confidentiality procedures. Because keeping public documents secret is the exception rather than the norm, the Commission has a detailed rule on the process that must be followed to request confidentiality – Rule 25-22.006, Florida Administrative Code. The burden of proof is always on the utility to show that the material in question contains bona fide proprietary confidential business information because the presumption is otherwise. Rule 25-22.006(4)(e), Florida Administrative Code.

4. The Commission's confidentiality rule requires the party requesting confidentiality to comply with the following requirements:

- The utility must file one highlighted copy of the information and two redacted copies. Rule 25-22.006(4)(a)
- The utility must identify the page and line at which the alleged confidential material is found and correlate the page and line identified with specific justification for keeping the information a secret. *Id.*
- The utility must provide a line-by-line justification for confidential classification which clearly demonstrates how the information asserted to be confidential qualifies as one of the statutory examples listed in section 366.093(3). Rule 25-22.006(4)(c).
- A request for confidential classification must identify the material for which confidential classification is sought in sufficient detail to permit a reasoned analysis or provide the required justification for confidential classification. A request that fails to do so may be denied as insufficient on

its face. Rule 25-22.006(4)(e), Florida Administrative Code.

5. TECo has failed to comply with the requirements of rule 25-22.006. It provided no line-by-line justification for its confidentiality request, thus hampering the Commission's and the parties' ability to analyze any justification TECo might have for its request. This by itself is sufficient to deny TECo's motion.

6. Rather than complying with the rule, TECo states:

Tampa Electric has submitted in this proceeding numerous justifications for the confidential treatment of information previously submitted as confidential proprietary business information and incorporates herein by reference those justifications.

Reference to "numerous justifications" is wholly insufficient to satisfy TECo's burden to show that the materials in Public Counsel's and FIPUG's testimony contains confidential proprietary business information. The reason for the line-by-line analysis is to permit the Commission, and parties, to identify the material for which confidential classification is sought in sufficient detail to permit a reasoned analysis of whether confidential classification is justified. Further, TECo has never provided, nor can it provide, any justification for keeping the analysis of Public Counsel/FIPUG witness Majoros secret.

7. TECo also attempts to rely on its Non-Disclosure Agreements with FIPUG as justification for its request. It says: "All of the information in question is protected by virtue of a Non-Disclosure Agreement entered into by and between Tampa Electric . . . and FIPUG." TECo's Motion at 2. However, the presence of a Non-Disclosure Agreement between TECo and FIPUG is not justification to award materials confidential status. Such agreements are often executed so that a party may obtain access to information. TECo's agreement with FIPUG specifically belies any claim that FIPUG has assented to confidential classification of the

material at issue. The agreement clearly reserves FIPUG's right to challenge any alleged claim of confidentiality:

Nothing in this Agreement is intended to preclude [FIPUG] from challenging the merits of whether a particular document is proprietary confidential business information within the meaning of Section 366.093, Florida Statutes.

Non-disclosure Agreement between TECo and FIPUG, paragraph 3.

8. TECo's motion fails to identify the material for which confidential classification is sought in sufficient detail to permit a reasoned analysis and fails to provide the required justification for classification; therefore, it should be denied on that basis alone.

TECo's Motion Fails to Provide Adequate Justification for its Request

9. Putting aside TECo's failure to comply with the Commission's confidentiality rule, there is no basis to grant confidentiality for the following information in Mr. Majoros' testimony and exhibits, filed on March 29, 2004, which TECo has required to be redacted:¹

<u>Page(s)</u>	<u>Line(s)</u>
2	7 and 12
26	12 (the second highlighted figure)
28	1

<u>Exhibit</u>	<u>Row</u>	<u>Columns</u>
Exhibit No. ____ (MJM-5) Page 1 of 8	3	6 and 8

10. TECo may attempt to rely on § 366.093(3), Florida Statutes, which provides that, upon a proper showing, confidential proprietary business information may be kept secret. However, this exception requires a clear showing that "disclosure of the information would cause

¹ Public Counsel and FIPUG provided TECo with a copy of Mr. Majoros' testimony prior to filing to allow TECo to identify that material which it believes to be confidential.

harm to the ratepayers or the person's or company's business operations....” No such showing has been made here.

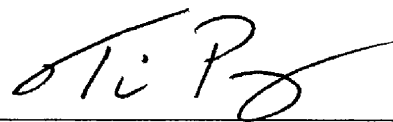
11. The information identified above represents the results of Mr. Majoros’ analysis. These figures comprise Mr. Majoros’ judgment as to the percentage amount of TECo’s payments to TECo Transport that the Commission should disallow for recovery, Mr. Majoros’ estimate of the overcharge to ratepayers as a result of the new affiliate waterborne transportation contract, and Mr. Majoros’ adjustment to Mr. Dibner’s ocean rate. This information is Mr. Majoros’ work product and does not contain any proprietary information of TECo, TECo Transport or Dibner Maritime Associates. The information is of no competitive value and cannot be used to harm TECo’s ratepayers. The information does not meet any of the statutory exemptions for public records; therefore, it should not be shielded from disclosure.

WHEREFORE, Public Counsel and FIPUG request that the Commission enter an order denying TECo’s Motion for Temporary Protective Order as discussed above.

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Attorneys for the Florida Industrial
Power Users Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Response in Opposition to TECo's Motion for Temporary Protective Order has been furnished by (*) hand delivery, or U.S. Mail this 6th day of April 2004, to the following:

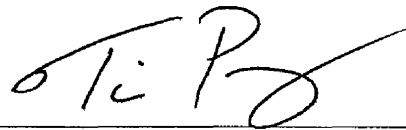
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