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JAMES E. "JIM" KING, JR.  
President

JOHNNIE BYRD  
Speaker



STATE OF FLORIDA  
OFFICE OF PUBLIC COUNSEL

c/o THE FLORIDA LEGISLATURE  
111 WEST MADISON ST.  
ROOM 812  
TALLAHASSEE, FLORIDA 32399-1400  
850-488-9330



Harold McLean  
Public Counsel

EMAIL: OPC\_WEBSITE@LEG.STATE.FL.US  
WWW.FLORIDAOPC.GOV

Patricia A. Christensen  
Associate Public Counsel

November 4, 2004

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk  
and Administrative Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0870

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04 NOV -4 PM 3:22  
COMMISSION  
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RE: Docket No. 031033-EI

Dear Ms. Bayó:

Enclosed please find an original and fifteen copies of Citizens' Response to Tampa Electric Company's Motion for Reconsideration and/or Clarification and Request for Official Recognition and Motion to Reopen Record for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing Citizens' Response to Tampa Electric Company's Motion for Reconsideration and/or Clarification and Request for Official Recognition and Motion to Reopen Record in Microsoft Word format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Patricia A. Christensen  
Associate Public Counsel

- CMP \_\_\_\_\_
- COM 5
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC \_\_\_\_\_
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**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: November 4, 2004

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**Citizens' Response to Tampa Electric Company's Motion for  
Reconsideration and/or Clarification and Request for Official Recognition  
and Motion to Reopen Record**

The Citizens of the State of Florida, by and through undersigned counsel, pursuant to Rule 25-22.060, Florida Administrative Code, hereby files its response in opposition to Tampa Electric Company's (Tampa Electric) Motion for Reconsideration and/or Clarification and Request for Official Recognition and Motion to Reopen the Record. In support of its Response, Citizens state that:

1. On October 27, 2004, Tampa Electric filed its Motion for Reconsideration and/or Clarification and its Request for Official Recognition and Motion to Reopen the Record. In its Motion for Reconsideration and/or Clarification, Tampa Electric failed to identify any point of fact or law that the Commission overlooked or failed to consider in rendering its decision in Order No. PSC-04-0999-FOF-EI (Final Order). See Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1<sup>st</sup> DCA 1981). Further, Tampa Electric failed to point to any error in the Commission's decision which would justify the Commission's reopening the record in this proceeding.

2. Tampa Electric is wrong in its claim that the Commission relied on confidential information which was not made part of the record. Tampa states that only

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the redacted Commission Staff audit of Progress Energy was admitted into the evidence, but contends that Commission staff relied on the confidential portions of that audit which were not part of record in this docket in the formulation of its recommendation. However, a simple review of the recommendation reveals that Commission staff needed only to rely on the redacted audit response to make its recommendation. In Appendix 7, under the subheading Progress Energy Florida, staff cites to Exhibits 60, 65, 66, 97 and Late Filed 12 as the sources on which they relied to form their recommendation. Specifically, Commission staff refers to Exhibits 60 and 66 in its discussion of Progress Energy's 2003 waterborne transportation costs.<sup>1</sup> Exhibit 66 contains the Public Version to Progress Energy's Response to Staff's Waterborne Transportation Audit Report Disclosure #1 and #2 and the public version of the chart of Progress Fuels Weighted Average Contractual Cost per Ton for Coal Shipped by Water from Mine to Crystal River. Tampa Electric incorrectly assumes that Commission staff must have used the confidential Commission staff audit of Progress to obtain the numbers in its recommendation. However, the information contained in Exhibit 66 public version can easily be used to obtain the numbers in Commission staff's recommendation. In addition, Tampa Electric's argument is an improper attempt to re-litigate its objection made at hearing to the use of Exhibit 66 which was overruled. Further, since this information was contained in the record, in no way was Tampa Electric's due process rights denied. Tampa Electric's failure to fully utilize or comprehend the evidence in the record does not constitute a failure on the Commission's part.

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<sup>1</sup> Exhibit 60 is Witness Anatoly Hochstein, AH-9-Florida Utilities Coal Shipments for 2003 and Exhibit 66 is Progress Terminal Rate. Contrary to Tampa Electric's assertion at page 5 of its Motion that Exhibit 65 is Progress Terminal Rate, Exhibit 65 is Dibner Terminal Rate.

3. Tampa Electric tries to argue that the Commission should not have considered historical analysis and should have used what Tampa Electric claims is the best data available in rendering its decision. For Tampa Electric's argument to have merit, the Commission would have to ignore the enormous body of data that is part of the record in this case and on which it relied on in making its decision. The mere fact that Tampa Electric would like the Commission to weigh the evidence differently does not cause its argument to rise to the level of a mistake of fact or law which the Commission overlooked.

4. Tampa Electric also argues that the Final Order should be reconsidered or the record should be reopened to address the Stipulation and Settlement for Progress Energy waterborne coal transport. Tampa Electric would like the Commission to now determine that a 2004 Stipulation and Settlement in the Progress Energy docket is relevant merely because the Commission, at its discretion, chose to consider Progress Energy's 2003 waterborne transportation audit. Tampa Electric is wrong.

First, it would be inappropriate for the Commission to reopen the record to consider the rates contain in a stipulation which by its very nature has no precedential value. In fact, the Stipulation and Settlement was approved by the Commission in its entirety by Order No. PSC-04-0713-AS-EI. The Stipulation and Settlement states in Paragraph 11 that "[t]his Stipulation and Settlement is based on the unique factual circumstances of this case and shall have no precedential value in proceedings other utilities. . ."

Second, Progress' affiliate company submitted to an audit of its transportation affiliate, and ultimately a Stipulation and Settlement was reached. However, Tampa

Electric refused to participate in an audit of its transportation affiliate. Thus, the Commission used the best publicly available information of eight expert witnesses and a voluminous record to reach its decision. Moreover, if Tampa Electric wanted the benefit of a settlement, it could have worked with the parties to reach an acceptable settlement. Nothing in Tampa Electric's argument demonstrates that the Commission overlooked the facts or that the Commission is somehow at fault for Tampa Electric's failure to reach a settlement.

5. Finally, Tampa Electric requests that the Commission reword its order to essentially pre-approve its RFP process. The job of issuing and pursuing a competitive bid is an inherent function of the commercial process and does not require Commission clarification of an order to engage in such commercial process. Moreover, Tampa Electric really does not want clarification; it seeks to be relieved of any risk if it chooses to rebid. So, the Commission does not need to clarify its position that Tampa Electric may, at its discretion, choose to rebid the current contract to attempt to mitigate the impact of the cost recovery disallowance. If Tampa Electric believes that no reasonable person would seek to rebid under the conditions the Commission set out in the order, it does not have to seek to rebid the current contract. Tampa Electric's clarification request is inappropriate since it does not seek clarification but the addition of an unreasonable condition solely to mitigate a perceived risk regarding a rebid it can choose not to conduct. Tampa Electric's duty in this regard is to bring forth contracts for the Commission's review and approval that are prudent, fair and reasonable. That obligation cannot be arbitrarily dismissed, nor can the Commission simply disregard its statutory obligation as suggested by the company.

Wherefore, the Citizens requests that the Commission deny Motion for Reconsideration and/or Clarification and Request for Official Recognition and Motion to Reopen the Record.

Dated this 4<sup>th</sup> day of October, 2004.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Patricia A. Christensen', written over a horizontal line.

Patricia A. Christensen  
Florida Bar No. 0989789  
Associate Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
(850) 488-9330

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and exact copy of the above and foregoing has been furnished by U.S. Mail or \*hand-delivery this 4<sup>th</sup> day of November, 2004:

James Beasley \*  
Lee Willis  
Ausley Law Firm  
Post Office Box 391  
Tallahassee, FL 32302

Gil Feltel  
CSX Transportation  
500 Water Street, J150  
Jacksonville, FL 32302

Robert Scheffel Wright  
John LaVia, III  
Landers Law Firm  
Post Office Box 271  
Tallahassee, FL 32302

Angela Llewellyn  
Tampa Electric Company  
Post Office Box 111  
Tampa, Florida 33601-0111

Cochran Keating\*  
Florida Public Service Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

John McWhirter, Jr  
McWhirter Reeves Law Firm  
400 North Tampa Street, Suite 2450  
Tampa, FL 33602

Vicki Gordon Kaufman  
McWhirter, Reeves, McGlothlin  
117 South Calhoun Street  
Tallahassee, Florida 32301

John Rogers  
227 S. Adams Street  
Florida Retail Federation  
Tallahassee, FL 32301

Benjamin H. Hill, III  
Landes V. Curry, III  
Hill, Ward & Henderson, P.A.  
101 E. Kennedy Blvd. Suite 3700  
Post Office Box 2231  
Tampa, FL 33601

Mike Twomey  
P.O. Box 5256  
Tallahassee, FL 32314-5256



Patricia A. Christensen  
Associate Public Counsel