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: November 8, 2004

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THE FLORIDA INDUSTRIAL POWER USERS GROUP'S RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION, REQUEST FOR OFFICIAL RECOGNITION AND TO REOPEN RECORD, AND REQUEST FOR ORAL ARGUMENT

The Florida Industrial Power Users Group (FIPUG), pursuant to rules 25-22.060 and 28-106.204, Florida Administrative Code, files its response in opposition to Tampa Electric Company's (TECo) Motion for Reconsideration and/or Clarification, Request for Official Recognition and to Reopen Record, and Request for Oral Argument. These motions and requests should be denied in their entirety. As grounds therefore, FIPUG states:

INTRODUCTION

1. TECo has bombarded this Commission and the parties with a plethora of motions and requests, all with the aim of overturning the Commission's well-reasoned findings embodied in Order No. PSC-04-0999-FOF-EI (Final Order). In its Final Order, the Commission found that the five-year contract that TECo entered into with its sister company, TECO Transport, to provide coal transportation services for the benefit of ratepayers was the result of a biased Request for Proposals (RFP) and contained above market prices which should not be passed on to ratepayers. TECo's numerous post-decision pleadings raise no issue that calls this Commission's Final Order into question. The Commission should affirm its decision in its entirety.

2. TECo's contract for transportation services with its affiliate, TECO Transport, expired at the end of 2003. After the issuance of a severely flawed RFP, TECo signed a new

five-year contract with its affiliate for 2004-2008. TECo sought to have the contract approved in the 2003 fuel adjustment docket, but due to the lack of time to investigate the issues surrounding the affiliate transaction, the Commission removed the issues to a separate docket.[1]

3. After a three-day evidentiary hearing, which included the testimony of 10 witnesses, 112 exhibits, and ran 1455 transcript pages, the Commission issued its Final Order.[2] Based on competent substantial evidence, the Commission found:

- TECo's RFP was insufficient to determine the market price for coal transportation;
- The amount TECo sought to recover from ratepayers was unreasonable and should be adjusted on an annual basis by approximately $15 million;[3]
- The benchmark is obsolete and should be eliminated.

TECo has made no showing, in any of its post-decision pleadings, that any of these findings should be overturned.

TECO'S MOTION FOR RECONSIDERATION SHOULD BE DENIED

Standard for Reconsideration

4. The Commission has often reiterated the well-known standard for a motion for reconsideration. To prevail on a motion for reconsideration, the moving party must identify 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 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So.2d 162

[1] The issue regarding the propriety of TECo's dealings with its affiliated transportation company, TECO Transport, first arose in the 2002 fuel adjustment proceeding. The issue was deferred to the 2003 fuel adjustment proceeding.

[2] As Commissioner Davidson said: "We've had a full, indeed a lengthy hearing, the Commission has taken evidence, the Commission has heard from the witnesses, we have a staff recommendation on the table, and we're posthearing…." Agenda Transcript at 4.

[3] Intervenors presented the Commission with a range of proposed adjustments, each based on competent, substantial evidence. For example, OPC's and FIPUG's expert witness testified that an adjustment in excess of $22.3 million per year was appropriate. Residential Customers' expert witness recommended an adjustment of $38.6 million per year. See Appendix 1 to Staff Recommendation. Thus, based on competent, substantial evidence, the Commission could have ordered an adjustment as high as $38.6 million per year. It took a more conservative approach.

(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, Inc.* at 317.

TECo's Motion for Reconsideration Fails to Identify Any Point of Fact or Law Which the Commission Overlooked or Failed to Consider

The Rates in the Final Order are Reasonable and Based on Competent, Substantial Evidence

5. TECo argues that the rates the Commission has permitted TECo to recover for coal transportation services are "far below any of the rates the Commission has found reasonable for Tampa Electric to recover over the last 15 years."[4]

6. This argument conveniently ignores the fact that during the period of time TECo cites, the Commission used a benchmark based on rail prices to gauge the prices TECo paid to its affiliate for waterborne transportation. In the very order TECo challenges, the Commission did away with the rail benchmark, holding[5]:

> …[A] wide disparity exists between actual costs recovered by Tampa Electric and the benchmark price. The rail benchmark has clearly not served as a market price indicator as originally hoped. From 1992 through 2000, the benchmark has exceeded the actual charges by amounts ranging from $5.15 to $9.44 per ton. In percentage terms, the benchmark has exceeded actual charges by amounts ranging from 24.9% to 51.9%.[6]

TECo does not seek reconsideration of that portion of the Final Order eliminating the benchmark. The fact that TECo utilized a flawed tool to over recover from ratepayers in the past

[4] TECo motion at 1.
[5] Final Order at 4.
[6] Final Order at 4-5.

provides no basis to overturn the Commission's Final Order and allow TECo to continue to do so in the future.

TECo's Arguments Regarding the Progress Settlement Must Be Rejected

7. TECo argues that it "suspects" that the rates the Commission has allowed TECo to recover for waterborne transportation are "far below" what Progress Energy Florida (Progress) will recover for waterborne coal transportation rates in 2004.[7] TECo argues that this "wide disparity" (albeit "suspected") denies TECo its constitutional rights.[8]

8. As an initial matter, TECo's claim that this proceeding somehow has denied it due process and equal protection because the rates it has been ordered to charge *may* be below that of another utility falls well short of the standard for reconsideration. The Progress matter is irrelevant to the Commission's decision here. The Progress docket was an entirely different proceeding that was resolved without hearing through a negotiated settlement between adverse parties for a one-year period. The Commission should not use the Progress rates, which resulted from a negotiated settlement, as the basis for reconsidering the rates in the Final Order in this case, which were rendered after the conclusion of an evidentiary proceeding.[9]

9. In addition, the Progress settlement was submitted to the Commission and approved in Order No. PSC-04-0713-AS-EI. When the Commission approves a settlement, it is

[7] TECo motion at 1.
[8] TECo motion at 1.
[9] It is ironic that TECo *now* wants the Commission to consider matters related to Progress. At the time the waterborne transportation issues were spun out of the fuel adjustment case, TECo was adamant that the matters not be considered together. Hearing Transcript in Docket No. 030001-EI at 1109. In arguing against consolidation, TECo's attorney stated:

> . . . I do take issue with [the] suggestion that if [the Progress] issues aren't decided here tomorrow, that they be consolidated with a separate proceeding that you set up for Tampa Electric. While the issues are waterborne coal transportation, the parties, their circumstances are completely different and the issues are different, and we think it would be -- on top of that, it would be an administrative nightmare for you to handle confidential information pertaining to competing interests in the same docket. So we would urge that you find that be ill-advised and not do that.

merged into the Commission's order.[10] Paragraph 11 of Stipulation and Settlement, merged into Order No. PSC-04-0713-AS-EI, states:

> This Stipulation and Settlement is based on the unique factual circumstances of this case and shall have *no precedential value in proceedings involving other utilities* or in other proceedings involving PEF before this Commission.[11]

Thus, as the Commission found, the Progress settlement is of no precedential value here. The Commission's order incorporating this provision of the settlement, as well as the rest of the settlement, was not appealed and is now a Commission final order.

10. Further, Paragraph 10 of the Stipulation and Settlement states: "This Stipulation and Settlement is conditioned upon approval by the Commission in its entirety." The parties to Stipulation and Settlement relied on the fact that the Commission approved *all* provisions of the agreement and that the entire agreement is in full force and effect. Had the settlement not been approved in its *entirety*, any party to the agreement had the right to disavow the entire settlement and proceed to hearing. Were the Commission to take the action TECo suggests—utilizing a settlement from another case which explicitly states that it will have no precedential value in any other proceeding and which has been approved in its entirety—it will chill the incentive of parties to enter into settlement agreements. Parties will be entirely uncertain as to when the Commission may abrogate provisions of a settlement that the parties have bargained for in good faith and which the Commission approved.

11. Finally, TECo wants the Commission to enter the unredacted Stipulation and Settlement in the record. TECo ignores Order No. PSC-04-0705-CFO-EI where the Commission

[10] *Florida Public Service Commission v. Fuller,* 551 So.2d 1210 (Fla. 1989); Order No. PSC-92-1048-FOF-EI, Docket 920041-EI, *In Re: Petition for Clarification a Guidance on Appropriate Market Based Pricing Methodology for Coal Purchased from Gatliff Coal Company by Tampa Electric Company* (1992) ("When a stipulation on a matter within our jurisdiction is entered into by the parties and approved by the Commission, the stipulation is subsumed by our order approving it."); Order No. 24676, Docket 910474-EU, *In Re: Petition of Clay Electric Cooperative, Inc., Central Florida Electric Cooperative, Inc., and the City of Williston, for a Declaratory Statement Regarding their Obligations to Serve a Proposed School Site in the City Limits of Williston* (1991).

[11] Emphasis added.

held: ". . . the specified rates on lines 3 and 6 of paragraph 4, page 1 of the Stipulation and Settlement constitute proprietary confidential business information as defined in Section 366.093, Florida Statutes."[12] This order is also final.

The Information on Which the Commission Relied Is Part of the Record

12. TECo claims that the Commission relied on **"**confidential information which was not made part of the record…."[13] Not only is this assertion wrong, *but TECo knows it is wrong*. A review of the Commission's decision, and the Appendix TECo cites, makes it obvious that the Commission did not use or rely in any way on the information about which TECo complains.[14] And, TECo *knows* its claim is wrong because TECo, like all the parties, had access to Appendix 7 to the Staff Recommendation. Even the most cursory review of the Commission's decision and the Appendix to the Staff Recommendation reveals that the Progress rate played *no role in the Commission's decision*. Exhibit No. 65, the subject of TECo's claim, is *irrelevant* to the Commission's decision.[15]

13. Even assuming, *arguendo*, that confidential information was withheld from TECo (which it was not), there can be no due process violation because the information did not form the basis of the Commission's decision in this case. Even if TECo's specious claim were true (which it is not), it would be nothing more than harmless error[16] that has no effect on the validity of the Commission's decision.

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[12] *Id.* at 2. The order finds that this information "falls within the category of '[i]nformation concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.'"

[13] TECo motion at 1.

[14] Nonetheless, such information is in the record because it can be calculated from record information.

[15] Even if Exhibit No. 65 were stricken from the record, it would have no effect on the Commission's Final Order.

[16] *Peoples Bank of Indian River County v. Department of Banking and Finance*, 395 So.2d 521 (Fla. 1981) (Harmless error rule applied to agency's improper consideration of data outside the record in deciding whether statutory criteria necessary for banking license had been met. There was substantial competent evidence apart from the data to support the Department's finding.); *Greyhound Corp. v. Carter*, 124 So.2d 9 (Fla. 1960) (error, if any, in considering evidence was harmless in view of the more than ample evidence in the record.).

TECo Has Shown No Basis for Overturning the Commission's Factual Findings

14. The remainder of TECo's complaints relate to its disagreement with some of the Commission's factual findings. TECo says that the Commission did not understand the nature of the JEA coal movements.[17] TECo complains that the Commission erred in finding the TECO Transport barges more efficient than the Progress barges.[18] TECo contends the Commission did not consider the "compelling" testimony of TECo witnesses Dibner and Wehle (while apparently considering the testimony of other witnesses).[19] TECo argues that the Commission erred because it did not use the higher 2004 TECO Transport rate for JEA.[20] Each of these arguments simply asks the Commission to reweigh the evidence. TECo's disagreements with the Commission's factual findings, after sitting as the trier of fact and hearing and evaluating all the sworn testimony, point out no error warranting reconsideration.

CONCLUSION

15. TECo had the burden to justify the charges it sought to impose upon ratepayers,[21] and it failed to do so. After a full evidentiary hearing and all the protections afforded to it under Chapter 120, Florida Statutes, and the Commission's rules, TECo simply failed to carry its

[17] TECo motion at 1. The JEA movement was discussed in the direct testimony, and during the cross-examination, of several witnesses (Tr. at 307-10, 452-53, 520-24; 610-612, 633-34, 712, 761-62, and 813), and was also the subject of several hearing exhibits. (Exhibit No. 7, Document No. 5 and Exhibit No. 17).
[18] TECo motion at 7.
[19] TECo motion at 9.
[20] TECo motion at 9.
[21] Order No. 12645, Docket No. 830002-EU, *In re: Investigation of Fuel Adjustment Clauses of Electric Utilities,* (1983) ("The burden of proof rests *solely* with the utility to document the reasonableness of its procurement practices and the resultant expenses from such practices."); Order 9775 at 4, Docket No. 780732-EU, *In re: Investigation of forced shutdown of Crystal River No. 3,* (1981) ("The burden is upon the company to demonstrate that the fuel expenses which it proposes to recover from ratepayers were reasonably and prudently incurred."); Order No. 15486 at 21, Docket No. 840001-EI-A, *In re: Investigation into extended outage at Florida Power and Light Company's St. Lucie Unit No. 1,* (1985) ("[U]tilities bear the burden of demonstrating that their fuel costs are reasonable and prudent.").

burden of proof. The Commission's decision is supported by competent substantial evidence[22] and TECo does not claim otherwise. TECo has been accorded full due process and equal protection in this matter. TECo's motion falls far short of meeting the standard on reconsideration and should be denied.

TECO'S MOTION FOR "CLARIFICATION" SHOULD BE DENIED

18. Because the RFP TECo proffered in this docket was woefully deficient, in its Final Order, the Commission delineated the minimum procedures TECo must follow in any subsequent RFP. TECo attempts to take the Commission's direction and box the Commission into preapproval of any *future* bid process. TECo asks the Commission to "*unequivocally* state that it will *accept without reservation* the results of a new RFP…"[23]

19. Not only is TECo's request not "clarification" (the Commission never intimated that it would preapprove the results of a future bid)[24], it is ridiculous on its face. The Commission has no basis to approve the results of process that has yet to happen. If and when a new RFP occurs, TECo can bring the results to the Commission. The Commission, Staff and interested parties will then have an opportunity to review and analyze TECo's RFP process and the results. Only after such analysis and hearing, if necessary, will the Commission be in the

[22] Competent, substantial evidence, is defined as "'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957)); *Gulf Power Company v. Florida Public Service Commission,* 487 So. 2d 1036 (Fla. 1986) (holding that the Commission's order requiring Gulf Power to refund $2.2 million was supported by competent, substantial evidence, and affirming the order.); *Gulf Power Company v. Florida Public Service Commission,* 453 So.2d 799 (Fla. 1984) (holding that the Commission's order requing two downward adjustments to Gulf Power's rates was supported by competent, substantial evidence, and affirming the order.); *Florida Power Corporation v. Cresse*, 413 So.2d 1187 (Fla. 1982) (holding that the Commission's order disallowing recovery of $3.5 million in costs via the fuel adjustment clause was supported by competent, substantial evidence, and affirming the order.)

[23] TECo motion at 10-11.

[24] The Final Order states at 20: "We note that Tampa Electric, *at its own discretion*, may choose to rebid all or any portion of its existing coal transportation requirements to attempt to mitigate the impact of the cost recovery disallowance discussed above." (emphasis added). See also, Agenda Transcript at 26-30.

position to approve or deny the results of any such process. TECo's "clarification" request should be denied.

TECO'S MOTION TO REOPEN THE RECORD SHOULD BE DENIED

20. In the guise of a Request for Official Recognition, TECo asks the Commission to reopen the record in this case, after an evidentiary hearing has been held, a decision has been made, and a Final Order issued. Through this motion, TECo tries a different vehicle to inject the irrelevant Progress settlement into this case. For the reasons set out in paragraphs 7-13 above, the Progress settlement is irrelevant to the issues in this case. It would be entirely inappropriate and fundamentally unfair to the parties to the Progress settlement for the Commission to insert into the record of this proceeding the unredacted settlement in a different docket between different parties. As noted above, the Commission itself has found that the Progress settlement has "no precedential value in proceedings involving other utilities…" Thus, it can be of no relevance to this docket.

24. A motion to reopen the record after hearing and decision is an extraordinary action that should only occur in the most rare circumstance.[25] Not only is this *not* one of those rare occasions, but the Commission's prior orders regarding the Progress settlement forbid it.

[25] *See, Lawnwood Medical Center, Inc. v. Agency for Health Care Administration*, 678 So.2d 421, 425 (Fla. 1st DCA 1996) (holding that an agency is not authorized by section 120.57(1)(b)10 to reopen the record, receive additional evidence and make additional findings; *Collier Medical Ctr., Inc. v. Department of HRS*, 462 So. 2d 83, 86 (Fla. 1st DCA 1985) "[T]o allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by [Chapter 120]."); Order No. PSC-00-0288-FOF-TP, Docket No. 980119-TP, *In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. for violation of the Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency relief* (2000) (denying a request to reopen the record in a proceeding because to do so "would be contrary to the doctrine of administrative finality.").

TECO'S REQUEST FOR ORAL ARGUMENT SHOULD BE DENIED

25. TECo requests oral argument on its various motions. However, TECo has raised no arguments that merit additional argument in this case. The Commission had a three-day hearing, received briefs from the parties, and reviewed a thorough Staff recommendation. The Commission then thoroughly discussed the matters at issue before making a final decision. There is simply no need for oral argument.

WHEREFORE, TECo's Motion for Reconsideration and/or Clarification, Request for Official Recognition and To Reopen Record, and Request for Oral Argument should be denied in their entirety.

s/ Timothy J. Perry
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 the 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 to TECo's Motion for Reconsideration and/or Clarification, Request for Official Recognition and To Reopen Record, and Request for Oral Argument has been furnished by electronic mail and U.S. Mail this 8th day of November 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

Patricia A. Christensen
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

s/ Timothy J. Perry .
Timothy J. Perry