

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power
cost recovery clause and
generating performance incentive
factor.

DOCKET NO. 010001-EI
ORDER NO. PSC-01-2185-PCO-EI
ISSUED: November 6, 2001

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL

I. BACKGROUND

On June 13, 2001, Tampa Electric Company ("TECO") served its First Set of Interrogatories (Nos. 1-14) and First Request for Production of Documents (Nos. 1-6) to the Florida Industrial Power Users Group ("FIPUG") in this docket. In response, FIPUG served three sets of answers: one on behalf of itself and IMC Phosphates, one on behalf of LaFarge Corporation ("LaFarge"), and one on behalf of International Paper Company ("IPC"). On June 25, 2001, FIPUG filed written objections to Interrogatory Nos. 4, 7, and 14, and Document Request Nos. 1-6. On August 1, 2001, Tampa Electric Company ("TECO") filed a Motion to Compel FIPUG to respond to Interrogatory Nos. 1, 2, 3, 4, 6, 8, 10, 11, and 13, and Document Request Nos. 1-6. On August 8, 2001, FIPUG filed a response to TECO's Motion to Compel.

Pursuant to Rule 28-106.206, Florida Administrative Code, this dispute is governed by Rules 1.280 through 1.400, Florida Rules of Civil Procedure.

II. POSITIONS OF THE PARTIES

Interrogatory Nos. 1 and 2

TECO's Interrogatory No. 1 reads:

Identify each member of FIPUG who is a Tampa Electric customer and who specifically authorized FIPUG to represent the member's interests in this proceeding prior to FIPUG's filing of its Notice of Reaffirming Party Status on January 3, 2001.

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TECO's Interrogatory No. 2 reads:

Identify each FIPUG member who is a Tampa Electric customer and who specifically authorized FIPUG to represent the member's interests in this proceeding subsequent to FIPUG's filing of its Notice of Reaffirming Party Status on January 3, 2001.

In its answers to both interrogatories, FIPUG provided a list of members that it says share the cost of its participation in this proceeding.

In its Motion to Compel, TECO submits that Interrogatory Nos. 1 and 2 ask FIPUG to identify each member who has authorized FIPUG to represent the member's interest in this proceeding, not just those members who share in the cost of this proceeding. FIPUG does not address this concern in its response.

Upon consideration, TECO's Motion to Compel is granted as it relates to Interrogatory Nos. 1 and 2. FIPUG's responses to these interrogatories only identify those FIPUG members who share the cost of FIPUG's participation in this proceeding. The interrogatories ask a broader question: which FIPUG members have authorized FIPUG to represent them in this proceeding? It may be that the answers will be the same, but it is not clear from FIPUG's response. Within three business days of the issuance of this Order, FIPUG shall answer Interrogatory Nos. 1 and 2 as they were posed.

Interrogatory No. 3

TECO's Interrogatory No. 3 reads:

Identify each FIPUG member who generates and sells or who has the ability to generate and sell electricity in the wholesale market. From this list, identify each FIPUG member who has market-based pricing authority.

Only IMC Phosphates' answer provides an answer to this interrogatory by identifying itself. The answers provided by LaFarge and IPC indicate that the interrogatory is not applicable to those entities.

In its Motion to Compel, TECO states that "[i]f IMC Phosphates is the only FIPUG member who generates or sells or who has the ability to generate and sell electricity in the wholesale market, FIPUG needs to so state." TECO also states that it is aware of at least one additional FIPUG member who sells electric power at wholesale. TECO emphasizes that this interrogatory is not limited to FIPUG members who are customers of TECO.

In its response, FIPUG asserts that "[t]o the extent Interrogatory #3 pertains to customers of other utilities, the information sought is objectionable because it is irrelevant, is not designed to lead to relevant information concerning the price paid by TECO for purchased power, and seeks to discover information concerning sales to other utilities which those utilities may have received authority to keep confidential." FIPUG also asserts that the information sought is objectionable as an attempt to discover proprietary trade secrets from utility customers of other utilities.

Upon consideration, TECO's Motion to Compel is granted as it relates to Interrogatory No. 3. FIPUG should clearly indicate which of its members match the criteria set forth in the interrogatory. The information sought is clearly relevant to this proceeding; prior orders concerning discovery disputes between these very parties in this proceeding have required non-disclosure agreements that prohibit disclosure of competitively sensitive information to FIPUG members who generate and sell electricity in the wholesale market. It is certainly relevant for TECO to know who those members are. FIPUG offers no explanation for its claims that the interrogatory is an objectionable attempt to discover confidential information concerning sales to other utilities or proprietary trade secrets from utility customers of other utilities. Within three business days of the issuance of this Order, FIPUG shall fully respond to Interrogatory No. 3.

Interrogatory No. 4

TECO's Interrogatory No. 4 reads:

Identify each FIPUG member who has generated and sold electricity to Tampa Electric at any time since January 1, 1998. For each hour of the period January 1, 1998 to 2001 year-to-date that each FIPUG member sold electricity

to Tampa Electric, please provide the following (for each member):

- a. Number of megawatt-hours sold
- b. Product type (capacity, energy, call option, must take, etc.)
- c. Selling price
- d. Seller's cost
- e. Seller's net revenue

FIPUG answered each subpart by stating: (a) the information is in TECO's possession; (b) the product type is as available power; (c) the price is specified in TECO's COG tariff and other TECO tariff offers; (d) electricity is produced by waste heat and internal cost allocations are not relevant to these proceedings; and (e) there is no net revenue, only a net reduction in electricity costs paid to TECO.

In its Motion to Compel, TECO asserts that FIPUG has overlooked the fact that TECO does not know who all of FIPUG's members are. TECO states that it knows who it has purchased power from but does not know whether the sellers are members of FIPUG. TECO asserts that FIPUG has stated no legal ground for refusing to answer this interrogatory.

In its response, FIPUG states that "on information and belief, PCS Phosphates, Inc. and an affiliated company of Air Products and Chemicals Inc. in addition to the companies previously named generate electricity in Florida and have contributed to FIPUG operating costs" and that "TECO can determine its purchases from these companies, if any." FIPUG further states that "[a]s to these companies, the question is objectionable because it is irrelevant and not designed to lead to relevant evidence."

Upon consideration, TECO's Motion to Compel is denied as it relates to Interrogatory No. 4. With the information to be provided in response to Interrogatory No. 1 along with TECO's knowledge of its own power purchases, TECO will be able to determine the information sought in all but parts d. and e. of this interrogatory. In addition, parts d. and e. of this interrogatory do not appear reasonably calculated to lead to the discovery of information relevant to any issue or other matter in this docket.

Interrogatory No. 6

TECO's Interrogatory No. 6 reads:

For each hour identified in interrogatories 4 and 5 above, identify each instance where a FIPUG member concurrently received interruptible service and sold power into the wholesale market (at common or separate interconnect points). Provide the following for each hour:

- a. Purchase price of interruptible service power
- b. Price of power sold into the wholesale market

FIPUG answered by stating that for FIPUG companies participating in the TECO fuel case, there were no wholesale sales, except for sales to TECO at TECO's approved rate and except for IMC Phosphate's sales during a production shutdown. In response to subparts a. and b., FIPUG states that the information sought is in TECO's possession, except for the price of the power sold by IMC Phosphates during the recent shutdown, which FIPUG asserts cannot be voluntarily disclosed.

In its Motion to Compel, TECO asserts that FIPUG restricted its response to FIPUG members participating in the "TECO fuel case" when no such restriction was included in the interrogatory. TECO also asserts that it is entitled to know which of FIPUG's members compete with TECO in the wholesale power market to ensure that those members are not permitted to see TECO's confidential, proprietary wholesale power market information. TECO states that if there are no other FIPUG members competing, FIPUG should so state without reference to the limitation it has imposed.

In its response, FIPUG states that it did not understand the full breadth of this interrogatory until it was explained in TECO's Motion to Compel. FIPUG asserts that most FIPUG companies are national and multinational concerns. FIPUG states that "[i]f the question wants to know if a FIPUG company served by another utility is generating electricity in one country or even multiple locations in the same country or the state of Florida and concurrently buying electricity at the same location or other locations throughout the world, it is so patently irrelevant and burdensome that FIPUG

couldn't conceive that this was the information sought." FIPUG objects on these grounds.

Upon consideration, TECO's Motion to Compel is granted in part and denied in part as it relates to Interrogatory No. 6. TECO is correct that FIPUG's response to the interrogatory added a limitation not present in the interrogatory, i.e., that it referred only to FIPUG members participating in the "TECO fuel case." However, the extreme example provided by FIPUG demonstrates that a broad reading of this interrogatory could be burdensome while producing little relevant information for this proceeding. A more reasonable approach, for purposes of finding information relevant to this proceeding, is to limit the scope of the interrogatory to instances where FIPUG members concurrently received interruptible service from TECO and sold power within the FRCC region. Within five business days of the issuance of this Order, FIPUG shall respond to this interrogatory as modified in the previous sentence. TECO's concern that it know which of FIPUG's members are competitors of TECO in the wholesale power market should be adequately addressed in the response to Interrogatory No. 3, as discussed above.

Interrogatory No. 8

TECO's Interrogatory No. 8 reads:

Identify each FIPUG member who is a Tampa Electric interruptible service customer and who has not received a minimum of 99.5 Electric Service Availability (ESA) during each of the calendar years 1999 and 2000 and year to date 2001. (ESA is defined as Number of Hours in a Calendar Year that Electric Service was Available divided by Total Number of Hours in the Calendar year times 100%).

In its Motion to Compel, TECO asserts that FIPUG attempts to evade the question by restricting its response to electric service "from Tampa Electric generated capacity." TECO states that this limitation was not contained in the interrogatory. TECO further states that FIPUG's response includes a mischaracterization of the buy through provision of TECO's tariff as creating some agency relationship for retail wheeling which does not exist. TECO

asserts that the answer provided by IMC Phosphates is not entirely clear.

In its response, FIPUG states only that it disagrees with TECO's characterization of FIPUG's answers and stands by its answers as written.

Upon consideration, TECO's Motion to Compel is granted as it relates to Interrogatory No. 8. Rather than directly answer the question as written, FIPUG has responded to its own reworked version of the question, by adding the condition that the service must have been received from TECO's generating units. Within five business days of the issuance of this Order, FIPUG shall respond to the interrogatory as it is written. If FIPUG wishes to argue that the information sought in this interrogatory should be considered or interpreted in any particular way, it may do so at the appropriate time in this proceeding.

Interrogatory No. 10

TECO's Interrogatory No. 10 reads:

Identify each FIPUG member who is a Tampa Electric interruptible service customer and who has developed procedures for determining whether to buy through or be interrupted.

FIPUG answered by stating "See response to 1 & 2."

In its Motion to Compel, TECO states that this is a meaningless response because Interrogatory Nos. 1 and 2 do not seek the same information sought in Interrogatory No. 10. TECO states that if the FIPUG members listed in response to Interrogatory Nos. 1 and 2 are the only FIPUG members that fall within the description in Interrogatory No. 10, FIPUG should so state.

In its response, FIPUG states that "all FIPUG interruptible customers named in Interrogatories #1 and 2 have developed procedures for determining whether to let TECO buy power for them rather than being interrupted."

Upon consideration, TECO's Motion to Compel is granted as it relates to Interrogatory No. 10. Interrogatory Nos. 1 and 2 are

not limited to FIPUG members who are interruptible customers, but Interrogatory No. 10 is. Within three business days of the issuance of this Order, FIPUG shall clearly list its members who meet the criteria in Interrogatory No. 10 or clearly state that its members who meet those criteria are the same members listed in the response to Interrogatory Nos. 1 and 2 that is required by this Order.

Interrogatory No. 11

TECO's Interrogatory No. 11 reads:

State FIPUG's understanding as to why the Florida Public Service Commission voted to close Tampa Electric's IS-1, IS-3, SBI-1 and SBI-3 rates for interruptible service.

FIPUG answered by stating "Tampa Electric Requested it to do so."

In its Motion to Compel, TECO asserts that "[t]his cute response is an insult to the integrity of the Commission and demonstrates FIPUG does not take the discovery process seriously." TECO asks that FIPUG be required "to state its understanding of the real reason why the Commission concluded that the interruptible rate schedules listed should be closed."

In its response, FIPUG states that it is "not 'cute' nor does it try to be." FIPUG asserts that it presumes Commission orders speak for themselves and that tariff modifications are generally made upon the request of utilities seeking a modification. FIPUG states that it will not speculate on the Commission's unstated rationale for its action.

Upon consideration, TECO's Motion to Compel is denied as it relates to Interrogatory No. 11. FIPUG correctly asserts that Commission orders speak for themselves. FIPUG should not be required to restate the rationale set forth in the Commission's order to close the rate schedules in question.

Interrogatory No. 13

TECO's Interrogatory No. 13 reads:

For each FIPUG member who is a Tampa Electric interruptible service customer with an affiliate power marketing entity:

- a. Please identify the name, location, and net non-fuel revenue realized by such affiliated power marketing entity since January 1, 1998.
- b. If such affiliated power marketing entity is authorized to sell power into the wholesale power market that was produced from the customer's Florida generating facilities, please identify the gross non-fuel revenue and net non-fuel revenue realized by the affiliated power marketing entity from such sales since January 1, 1998.

FIPUG answers "None that are participating in this case."

In its Motion to Compel, TECO asserts that FIPUG has placed a restriction on the interrogatory by only referring to FIPUG members participating in this case. TECO claims that it is entitled to an answer that includes each FIPUG member with an affiliated power marketing entity regardless of whether the member is participating in this case. TECO further asserts that it is entitled to this information to protect itself and its retail customers from any harm that could occur if confidential proprietary TECO wholesale marketing information were shared with TECO competitors in the wholesale power market.

In its response, FIPUG states that it stands on its answer. FIPUG argues that "[b]y electing to participate in a matter that adversely affects its interests, a consumer should not be subjected to burdensome discovery in every docket that other companies see fit to pursue." FIPUG goes on to state that "[t]his interrogatory is a classic example of an attempt to embroil customers of other utilities into burdensome invasions of privacy and trade secrets because they had the temerity to become fellow travelers in other causes that affected them." FIPUG further states that "[a]s to the tangential contention that TECO's own information is secret while it seeks to compel its customers to conduct extensive explorations of their worldwide activities, TECO is standing on thin ice."

Upon consideration, TECO's Motion to Compel is granted in part and denied in part as it relates to Interrogatory No. 13. The

identities and locations of FIPUG member affiliates who are power marketing entities is clearly relevant to this proceeding; prior orders concerning discovery disputes between these very parties in this proceeding have required non-disclosure agreements that prohibit disclosure of competitively sensitive information to FIPUG members who generate and sell electricity in the wholesale market and FIPUG members with affiliates who generate and sell electricity in the wholesale market. It is certainly relevant for TECO to know who those members are and where they are located. However, knowledge of the gross and net non-fuel revenues of these entities does not appear necessary for TECO to adequately protect disclosure of sensitive TECO power marketing information. Further, such information does not appear relevant to any issue or other matter in this proceeding. Within five business days of the issuance of this Order, FIPUG shall provide TECO the identities and locations of the power marketing affiliates of its members who are TECO interruptible service customers.

Document Requests No. 1-6

TECO's Document Request No. 1 reads:

Provide all documents relied upon or reviewed in responding to Tampa Electric's First Set of Interrogatories (Nos. 1-14).

FIPUG objected to this request on the ground that the documents relied upon, which are not trade secrets, are TECO tariffs or information supplied to FIPUG by TECO.

TECO's Document Request No. 2 reads:

Provide all documents created since January 1, 1998 related to any marketing or strategic analyses, conducted by one or more FIPUG members who are Tampa Electric interruptible service customers, regarding wholesale power markets and transmission access and services. State the intended purpose of such analyses and any action taken by those customers as a result of such analyses.

FIPUG objected to this request on the grounds that it seeks information that is a confidential company trade secret or requests

information that is neither relevant nor calculated to lead to relevant evidence.

TECO's Document Request No. 3 reads:

Provide all documents prepared by or on behalf of any FIPUG member who is a Tampa Electric interruptible service customer which documents contain goals, targets, methodologies, or strategies to determine the prices, costs, and quantities of the commodities and services the FIPUG member receives from Tampa Electric.

FIPUG objected to this request on the grounds that it seeks information that is a confidential company trade secret or requests information that is neither relevant nor calculated to lead to relevant evidence.

TECO's Document Request No. 4 read:

Provide all documents prepared by or on behalf of any FIPUG member who is a Tampa Electric interruptible service customer which documents contain goals, targets, methodologies, or strategies to determine the prices, costs, and quantities of the commodities and services the FIPUG member sells in the wholesale market.

FIPUG objected to this request on the grounds that: (1) TECO develops and maintains the prices it will charge for as-available cogeneration power; and (2) to the extent the request seeks internal policies customers use to determine whether they will make power available to Tampa Electric, the information is a confidential company trade secret or requests information that is neither relevant nor calculated to lead to relevant evidence.

TECO's Document Request No. 5 reads:

Provide all meeting minutes from each board of director's meeting since January 1, 1998 of each FIPUG member who is a Tampa Electric interruptible service customer which minutes discuss the following issues:

- a. Wholesale power market competition affecting such customer
- b. Electric utilities in Florida

- c. Retention and acquisition of wholesale power sales
- d. Wholesale power market planning
- e. Strategic utilization of the electric transmission system in Florida

FIPUG objected to this request on the grounds that: (1) industries intervening in this docket under FIPUG are retail customers obligated to buy only from TECO or self-generate; (2) to the extent that board minutes discuss these issues, the information is privileged attorney client work product or concerns company confidential long-range planning; and (3) the information is neither relevant to the price TECO pays for the purchase of fuel and wholesale power nor calculated to lead to relevant evidence.

TECO's Document Request No. 6 reads:

Provide all documents containing procedures for determining whether to buy through or be interrupted for each FIPUG member who is a Tampa Electric interruptible service customer (Interrogatory No. 10).

FIPUG objected on the grounds that this request may solicit attorney client work product or, to the extent the request deals with determining the cost of permissible self-generation, the information requested comprises internal company data that is a trade secret and is not relevant to this proceeding nor calculated to lead to relevant evidence.

In its Motion to Compel, TECO asserts that FIPUG has provided only conclusory claims that the documents requested either are trade secret or not relevant or not calculated to lead to relevant evidence with no detailed support. TECO asserts that these conclusory claims are inadequate and that FIPUG should be compelled to produce these documents. FIPUG does not address these Document Requests in its response to the motion.

Upon consideration, TECO's Motion to Compel is granted in part and denied in part as it relates to Document Request No. 1. Consistent with the resolution of an identical request propounded by FIPUG to TECO (see Order No. PSC-01-1444-PCO-EI, issued July 5, 2001), FIPUG shall provide, within five business days, all documents upon which it relied in responding to TECO's First Set of Interrogatories. If any such documents contain confidential

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information, an appropriate non-disclosure agreement shall be executed by the parties. FIPUG shall not, however, be required to provide such supporting documents for interrogatory responses it is not required to provide pursuant to this Order.

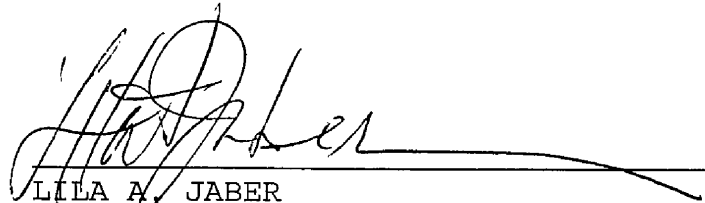
With respect to the remaining Document Requests, TECO's Motion to Compel is denied. Despite the lack of detail in FIPUG's objections, these requests, on their face, appear to clearly seek strategic business information that FIPUG members or any business would consider proprietary confidential business information. In its Motion to Compel, TECO does not indicate that this information is necessary for use at hearing. Further, the relevance of these requests to any issue or other matter in this proceeding is questionable.

In light of the continuing discovery disputes between these same parties and the magnitude of the issues that must be addressed in this docket, these parties should take caution to avoid the appearance of unnecessary motion practice which requires the devotion of an inordinate amount of the parties' and the Commission's resources.

Based on the foregoing, it is

ORDERED that Tampa Electric Company's Motion to Compel is granted in part and denied in part, as set forth in the body of this order.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 6th day of November, 2001.



LILA A. JABER
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.