

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
ORDER NO. PSC-04-0118-PCO-EI
ISSUED: January 30, 2004

ORDER GRANTING MOTION TO COMPEL PRODUCTION OF DOCUMENTS

On January 9, 2004, the Citizens of the State of Florida through the Office of Public Counsel (OPC), filed a Motion to Compel Production of Documents. On January 16, 2004, Tampa Electric Company (Tampa Electric) filed a response opposing OPC's Motion to Compel.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based upon this authority, and having considered the Motion and Response, the rulings are set forth below.

OPC states that on December 3, 2003, it served 10 requests for production of documents on Tampa Electric and on January 4, 2004, Tampa Electric served its responses on OPC. OPC states that Document Request No. 9 reads as follows:

Produce the balance sheet and income statement for TECO Transport for December 31, 1992 and the past five years.

Tampa Electric's response stated:

Tampa Electric does not possess or have access to the balance sheet and income statement for TECO Transport. The consolidated balance sheets and income statements for TECO Energy, the parent company of TECO Transport, for December 31, 1992 and the past five years are attached.

OPC argues that discovery of the requested information is a critical element of preparation for the hearing and that the reasonableness of waterborne transportation costs under the Tampa

DOCUMENT NUMBER-DATE

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Electric/TECO Transport contract for cost recovery purposes is one of the principal issues in this docket. In support of its position, OPC cites Section 366.093, Florida Statutes, which states, in pertinent part:

(1) The commission shall continue to have reasonable access to all public utility records and records of the utility's affiliated companies...

. . .

(2) Discovery in any docket or proceeding before the commission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure. Information which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service are at issue.

According to OPC, production should be compelled in the public interest pursuant to the Commission's general access to affiliate records pursuant to the above-cited statute.

In further support of its position, OPC cites Order No. PSC-01-1725-PCO-EI, issued August 23, 2001, in Docket No. 010827-EI, In Re: Petition by Gulf Power Company for approval of purchased power arrangement regarding Smith Unit 3 for cost recovery through recovery clauses dealing with purchased capacity and energy. Order No. PSC-01-1725-PCO-EI outlined the standards for dealing with motions to compel. Citing Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del 1986), the Order 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. OPC argues that with regard to the first factor, TECO Transport and Tampa Electric have the same registered agent for service of process and have two common officers/directors according to the Florida Secretary of State website. OPC also states that one individual also serves as a TECO Energy, Inc. officer/director. OPC argues that with regard to the second factor, TECO Transport is

a signatory to the contract at issue in this docket and its balance sheet and income statement are highly relevant to the central issue of this docket. OPC states that with regard to the third factor, TECO Transport has signed a five year coal transportation contract and thus benefits from an outcome favorable to Tampa Electric.

Tampa Electric responds that it opposes OPC's Motion to Compel. Tampa Electric states that the requested documents are documents of a company not a party to this proceeding and that it does not possess or have access to the balance sheet and income statement for TECO Transport. In support of its position, Tampa Electric cites Rule 1.350, Florida Rules of Civil Procedure, which does not require a party to respond to discovery requests that are not within its possession, custody or control. Tampa Electric states that its affidavit of Joanne T. Wehle, Tampa Electric's Director of Wholesale Marketing and Fuels, details the separateness of Tampa Electric and TECO Transport and the lack of access Tampa Electric has over the books and records of TECO Transport. According to Tampa Electric, the requested documents do not show what Tampa Electric pays TECO Transport for services provided to Tampa Electric and the requested documents do not relate to Tampa Electric's costs. Tampa Electric argues that OPC is not adversely affected in the preparation of its testimony by not having access to the documents requested. Tampa Electric states that financial and budgetary information relating to TECO Transport operations is not relevant to the determination of the reasonableness of Tampa Electric's cost of providing service. Tampa Electric further states that it has provided OPC access to all information relating to the amounts paid or to be paid by Tampa Electric to TECO Transport for transportation services.

Tampa Electric argues that OPC's reliance on Section 366.093, Florida Statutes, is misplaced. According to Tampa Electric, the books and records of TECO Transport do not govern or affect what Tampa Electric pays TECO Transport for its services. Tampa Electric asserts that its transactions with TECO Transport are governed by the current transportation agreement between the two companies and OPC has access to that agreement. Tampa Electric states that the Rules of Civil Procedure and Section 366.093, Florida Statutes, do not contemplate unwarranted access to the books and records of a non-party "just for the sake of having access for a fishing expedition."

Tampa Electric asserts that OPC's reliance on the Afros decision and Order No. PSC-01-1725-PCO-EI is misplaced, as each of the three prongs in the Afros test is inapplicable to the facts of this case. With respect to the first prong, Tampa Electric states that while Tampa Electric and TECO Transport are both owned by the same corporate entity, they have separate officers and employees, operate different systems in different geographic areas and maintain completely separate books and records. Tampa Electric states that TECO Transport and Tampa Electric operate as completely separate entities. With respect to the second prong of the Afros test, Tampa Electric states that while TECO Transport is the party providing transportation services to Tampa Electric, that provision of service has nothing to do with the reasonableness of the amounts paid by Tampa Electric for the services. With respect to the third prong of the Afros test, Tampa Electric asserts that TECO Transport will not receive any benefit from the outcome of this litigation since the transportation contract is already in place and will remain in place regardless of the outcome of this litigation.

Tampa Electric states that OPC's reliance on the fact that TECO Transport and Tampa Electric have the same registered agent for service of process is of no consequence as the registered agent simply performs a ministerial function and does not direct or control the activities of the two corporations. Tampa Electric states that the same reasoning applies to the fact that the two companies have common officers/directors with one individual serving as a TECO Energy, Inc. officer/director. In support of its position, Tampa Electric relies on Penwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 263 (D. Del 1979), cited in the Afros case, with regard to sister companies:

The fact that two corporations are sisters does not, however, automatically permit an inference of control.

Tampa Electric states that in the Penwalt decision, the Court refused to find that one corporation had control over a sister corporation in the absence of evidence that the two corporations have identical board of directors, or that their respective business operations are so intertwined as to render meaningless their separate corporate identities. Tampa Electric asserts that no such allegations can be made in the instant case.

In support of its position, Tampa Electric cites Order No. PSC-02-1613-PCO-SU, issued November 21, 2002, Docket No. 020384-GU, In Re: Petition for Rate Increase by Peoples Gas System. In that Order, the Commission denied OPC's motion to compel Peoples Gas to produce various financial documents provided to management of Tampa Electric, TECO Energy and affiliates of Peoples Gas since the requested information did not appear to be reasonably calculated to lead to the discovery of admissible evidence. According to Tampa Electric, the instant case is similar to Peoples Gas in that the utility and the non-party have separate officers and employees, operate different systems in different geographic areas, maintain separate books and records, are operated as completely separate entities, and involve the utility being a party to the proceeding while the affiliate is not.

Upon review of the pleadings and consideration of the arguments, OPC's Motion to Compel Production of Documents is granted. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence." Section 366.093(2), Florida Statutes, provides that in any proceeding where the utility's rates or cost of service are at issue, information which affects those rates or cost of service shall be considered relevant for discovery purposes. I find that OPC's Document Request No. 9 seeks information reasonably calculated to lead to the discovery of admissible evidence and relevant to this docket. Among the issues deferred to this docket from Docket No. 030001-EI are: (1) the continued appropriateness of the current benchmark mechanism for determining reasonableness of costs incurred by Tampa Electric when it purchases coal transportation services from TECO Transport; and (2) the reasonableness of Tampa Electric's projected coal transportation costs from 2004-2008 under its new contract with TECO Transport. The information sought by OPC relates to TECO Transport's costs to provide coal transportation service, and, thus, may lead to the discovery of admissible evidence on the issues in this proceeding noted above. Precluding discovery on this matter could effectively preclude parties from pursuing, if they choose, a cost-based alternative to the current benchmark

mechanism or looking at cost as a basis for determining the reasonableness of the new contract rate.

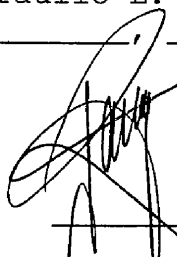
As noted in Order PSC-01-1725-PCO-EI, mentioned above, the Commission may compel a subsidiary to obtain documents from a parent or affiliate for discovery based on consideration of the three factors set forth in Afros. See also Order No. PSC-02-0254-PCO-EI, issued February 27, 2003, Docket No. 001148-EI, In Re: Review of the retail rates of Florida Power & Light Company, and Order No. PSC-96-0822-PCO-WS, issued June 25, 1996, Docket No. 951056-WS, In Re: Application for rate increase in Flagler County by Palm Coast Utility Corporation. 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 Document Request No. 9 by the close of business on February 6, 2004.

It is therefore,

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that OPC's Motion to Compel Production of Documents from Tampa Electric is granted. It is further

ORDERED that Tampa Electric shall fully respond to the document request discussed in this Order by the close of business on February 6, 2004.

By ORDER of Chairman Braulio L. Baez, as Prehearing Officer,
this 30th day of January, 2004.


for Chairman Braulio L. Baez

BRAULIO L. BAEZ
Chairman and Prehearing Officer

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, Florida Administrative Code; or (2) 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.