

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-04-0158-PCO-EI
ISSUED: February 16, 2004

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL

On January 20, 2004, the Florida Industrial Power Users Group (FIPUG) filed a Motion to Compel Tampa Electric Company (Tampa Electric) to fully respond to Interrogatory Nos. 25 and 29-32 from FIPUG's First Set of Interrogatories and Document Request Nos. 10, 11, and 13 from FIPUG's First Request for Production of Documents. On January 27, 2004, Tampa Electric filed a Response in Opposition to FIPUG'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.

FIPUG states that on December 5, 2003, it served its First Set of Interrogatories (Nos. 1-34) and First Request for Production of Documents (Nos. 1-23) on Tampa Electric, and on January 5, 2004, Tampa Electric served its responses on FIPUG. FIPUG states that Tampa Electric refused to respond to relevant questions concerning TECO Transport and refused to produce the transportation contracts at issue in this docket, insisting instead that they be reviewed in Tampa Electric's presence. FIPUG asserts that the requested information is critical to enable it to prepare its testimony and prepare for hearing. According to FIPUG, the information it seeks is relevant and likely to lead to the admission of relevant evidence because it relates directly to the issues in this docket, thus falling within the broad scope of discovery addressed in Rule 1.280(b), Florida Rules of Civil Procedure.

FIPUG states that Interrogatory Nos. 29 and 30 seek information related to TECO Transport's earnings under its prior

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contract with Tampa Electric for waterborne transportation and its projected earnings under the contract signed in October 2003 with Tampa Electric. FIPUG further states that Interrogatory Nos. 31 and 32 seek information related to which companies TECO Transport does most of its business with and which commodities it most frequently transports. FIPUG states that Tampa Electric did not object to these Interrogatories, but refused to answer them claiming lack of access to the information. FIPUG asserts that since Tampa Electric and TECO Transport are affiliated companies, their revenues go to the same place - the parent company, TECO Energy. According to FIPUG, Tampa Electric should be required to obtain the requested information from either its affiliate or its parent company. FIPUG argues that the requested information is necessary to judge the reasonableness of the amount Tampa Electric agreed to pay its sister company, TECO Transport.

FIPUG states that its Document Request Nos. 10, 11, and 13 request drafts of the contract executed in October 2003 between Tampa Electric and TECO Transport, the contract itself, and the prior contract between the parties. FIPUG further states that Interrogatory No. 25 asks Tampa Electric to identify the differences between the contract signed in October 2003 and the previous contract with TECO Transport. FIPUG states that Tampa Electric did not object to FIPUG's discovery requests or provide the information to FIPUG, but instead offered to make the information available for review by FIPUG. According to FIPUG, it should be provided with copies of the requested documents for analysis since the contracts and contract comparison are integral to this case and since FIPUG has signed a non-disclosure agreement with Tampa Electric.

Tampa Electric responds that it opposes FIPUG's Motion to Compel. First, Tampa Electric states that it did not refuse to answer Interrogatory No. 25. Tampa Electric states that Interrogatory No. 25 asks it to identify any and all differences between the existing contract between Tampa Electric and TECO Transport which expires at the end of 2003 and the new contract executed on October 6, 2003. Tampa Electric asserts that the old and new transportation contracts speak for themselves. According to Tampa Electric, rather than attempting to characterize the contents of the two contracts and any differences that might exist between them, it offered FIPUG access to a comparison of the two

documents that shows each change in legislative format as well as to the two contracts themselves so that FIPUG could make its own comparison and reach its own conclusions as to the nature of any differences that might exist between the two contracts.

Tampa Electric further states that it did not refuse to answer Interrogatory Nos. 29 through 32, rather, it stated that it does not know TECO Transport's earned rate of return for the waterborne transportation contract that expired December 31, 2003, the percentage of TECO Transport revenues contributed by Tampa Electric, information regarding other TECO Transport customers or information about non-coal commodities transported by TECO Transport. Tampa Electric asserts that it provided truthful statements that fully answer the interrogatories. 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 further asserts that the requested information is irrelevant to this proceeding since the information does not indicate what Tampa Electric pays TECO Transport for waterborne transportation services provided to Tampa Electric. According to Tampa Electric, the books and records of TECO Transport are kept entirely separate from the books and records of Tampa Electric. Tampa Electric states that it provided FIPUG with access to all information relating to the amounts paid or to be paid to TECO Transport for transportation services it provides to Tampa Electric.

Tampa Electric states that the Commission-approved methodology for assessing the reasonableness of amounts paid by Tampa Electric to TECO Transport for transportation services was approved by way of stipulation in Order No. 20298, issued November 10, 1988, in Docket No. 870001-EI and reaffirmed in Order No. PSC-93-0443-FOF-EI, issued March 23, 1993, in Docket No. 930001-EI. According to Tampa Electric, when the current procedure was approved, OPC and staff agreed that details concerning the coal supply and coal transportation contracts between Tampa Electric and its affiliates were not subject to the proceeding that gave rise to the stipulation and that Tampa Electric was free to negotiate a contract without the involvement of the parties or the Commission so long as the pricing resulting from the contract remained at or below the pricing benchmarks. Tampa Electric asserts that while

FIPUG may allege deficiencies in the currently approved benchmark pricing methodology, there has been no determination by the Commission that the benchmark is no longer valid. Tampa Electric states that Interrogatory Nos. 25 and 29-32 seek information that is irrelevant to the appropriateness of payments made by Tampa Electric for coal transportation services and will not lead to the discovery of admissible evidence.

With regard to Document Request Nos. 10, 11, and 13, Tampa Electric states that it has offered FIPUG access to the requested contracts in the offices of Tampa Electric's counsel, subject to the non-disclosure agreement between FIPUG and Tampa Electric. Tampa Electric asserts that FIPUG has, in the recent past, openly disclosed confidential information covered by non-disclosure agreements in a public meeting and has provided confidential information to individuals who are not signatories to a confidentiality agreement with Tampa Electric. According to Tampa Electric, these disclosures have made it clear that neither FIPUG nor counsel for FIPUG should be permitted to have physical possession or control of copies of the confidential documents requested.

Upon review of the pleadings and consideration of the arguments, FIPUG's Motion to Compel is granted in part and denied in part, as set forth below. 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.

Interrogatory Nos. 29-32

I find that FIPUG's Interrogatory Nos. 29-32 seek 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 FIPUG relates to these issues, and, thus, may lead to the discovery of admissible evidence on these issues.

As noted in 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, 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 S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del 1986). 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.

The Order, citing Afros, 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. 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 Interrogatory Nos. 29-32 by the close of business on February 23, 2004.

Document Request Nos. 10, 11, and 13

Rule 1.350(a), Florida Rules of Civil Procedure, states, in part, that "[a]ny party may request any other party to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents . . . that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed." (Emphasis

added.) FIPUG states, and Tampa Electric does not refute, that the parties have signed a non-disclosure agreement that would cover the documents requested in Document Request Nos. 10, 11, and 13. Still, Tampa Electric states a concern that this information may be released by FIPUG. Tampa Electric did not object to the discovery on any other grounds.

In essence, Tampa Electric has requested a protective order through its Response in Opposition to FIPUG's Motion to Compel. To provide FIPUG the ability to effectively prepare for hearing by having unfettered access to these documents and to address Tampa Electric's concern about potential disclosure of the documents, Tampa Electric shall, by the close of business on February 23, 2004, provide FIPUG copies of each document requested pursuant to the following terms: (1) FIPUG shall not disclose the documents or the information contained therein to any other person; (2) the documents shall be returned to Tampa Electric no later than 15 days after a final order in this docket has been issued and is no longer subject to appeal or further proceedings; and (3) the otherwise applicable terms of the non-disclosure agreement between FIPUG and Tampa Electric shall govern the handling of the documents.

Interrogatory No. 25


Interrogatory No. 25 requests Tampa Electric to identify the differences between the existing contract between Tampa Electric and TECO Transport which expires at the end of 2003 and the new contract executed on October 6, 2003. As set forth above, FIPUG will have access to both contracts and can conduct its own analysis of the differences between the contracts. Accordingly, FIPUG's Motion to Compel Tampa Electric to respond to Interrogatory No. 25 is denied.

It is therefore,

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that FIPUG's Motion to Compel is granted in part and denied in part as set forth in the body of this Order.

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By ORDER of Chairman Braulio L. Baez, as Prehearing Officer,
this 16th day of February 2004.

 for Chairman Braulio Baez

BRAULIO L. BAEZ
Chairman 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.

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

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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.