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October 1, 2001

BY HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Review of Tampa Electric Company and impact of its participation
in GridFlorida, a Florida transmission company, on TECO's retail
ratepayers; Docket No. 010577-EI

Dear Ms. Bayo:

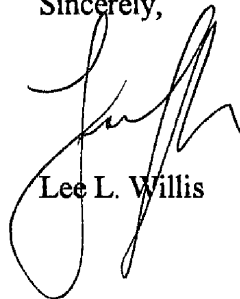
Enclosed for filing in the above referenced are the original and fifteen (15) copies of Tampa Electric Company's Response to Florida Public Service Commission Staff's Motion to Compel Responses to Interrogatories.

The attached Affidavit will be executed by Mr. Long and faxed to the Prehearing Officer after Mr. Long arrives in Tallahassee this afternoon.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,



Lee L. Willis

LLW/bjd
Enclosures

cc: All Parties of Record (w/encl.)

DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company and)
impact of its participation in GridFlorida, a)
Florida transmission company, on TECO's)
retail ratepayers)
_____)

Docket No. 010577-EI
Filed: October 1, 2001

**RESPONSE BY TAMPA ELECTRIC COMPANY TO
FLORIDA PUBLIC SERVICE COMMISSION STAFF'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES**

Pursuant to Rule 28-106.204, Florida Administrative Code, Tampa Electric Company ("Tampa Electric" or the "company") hereby responds to the Florida Public Service Commission Staff ("Staff") Motion to Compel Responses to Interrogatories (the "Motion") by Tampa Electric Company that was filed with the Commission in this proceeding on September 27, 2001. Tampa Electric respectfully submits that the information that Staff seeks in response to Staff's Third Set of Interrogatories (No. 78) is subject to the attorney-client and attorney work product privileges and is, therefore, not subject to forced disclosure under Florida Law. Staff has demonstrated no "exceptional circumstances" within the meaning of the Florida Rules of Civil Procedure that might be grounds for requiring the disclosure of such otherwise privileged information. As grounds therefore, the Company says:

1. On September 10, 2001, the Staff served the Company with its Third Set of Interrogatories in this proceeding. In responding to the over 175 interrogatories in this

most recent set, the Company raised objection to only one – Interrogatory No. 78, in which Staff requested the following information:¹

Refer to page 27, lines 11-12 of witness Hoecker's testimony. Has TECO, or any entity known to TECO, calculated the approximate dollar benefit to Florida from an RTO? If TECO has made such a dollar calculation, please provide the results of the calculation, stating all assumptions. If another entity known to TECO has made the calculation, please identify that entity and, if known, the results of its calculations.

2. On September 18, 2001, in an abundance of precaution, the Company filed its objection to providing an answer to interrogatory No. 78 on the grounds that any such information is protected from disclosure on the grounds of the attorney-client and attorney work product privileges. The facts underlying the Company's assertion of privilege are set forth in the affidavit attached hereto as Exhibit A. What is at issue is the forced disclosure of any information produced by a consulting expert retained in anticipation of litigation, who will not testify in this proceeding. This clearly constitutes attorney work product.

3. Tampa Electric respectfully submits that Staff's reliance on Rule 1.280 (b) (3), Florida Rules of Civil Procedure, as the statutory basis for compelling the disclosure of the information at issue is misplaced. As explained in Exhibit A, any information that is related to Interrogatory No. 78 was developed by an outside consultant who will not be expected to be called as a witness at the hearings in this proceeding. Therefore, the

¹ It should be noted that Tampa Electric provided early responses to over 175 interrogatories propounded by Staff in its Third Set of Interrogatories. These responses provided a massive amount of information requested by Staff on September 10, 2001 and was filed by the company on September 28, 2001 as an accommodation to Staff. These responses were not due to be filed until 5:00 p.m. on October 1, 2001. Staff's Motion to Compel was filed on Thursday September 27 and served by mail on Tampa Electric. Staff's Third Set of Interrogatories were filed 25 days after the company filed its testimony on August 16, 2001.

question of whether or not disclosure of any such information can be compelled is governed by the provisions of Florida Rule of Civil Procedure 1.280 (b) (4) (b), which provides in relevant part:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 360(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the facts or opinions on the same subject by other means. (emphasis added)

4. Rule 1.280(b)(4)(b), Florida Rules of Civil Procedure, protects not only the facts known or opinions held by such experts, but also protects a party from disclosing the identity of such an expert, absent a showing of exceptional circumstances. Ruiz ex rel. Ruiz v. Brea, 489 So. 2d 1136, 1137-38 (Fla. 3d DCA 1986).

5. The “exceptional circumstances” standard set forth in Rule 1.280(b)(4)(b), F.R.C.P. has been clearly articulated by the Florida courts who have addressed this issue in a number of cases. In Dodson v. Persell, 390 So.2d 704 (1980), the Florida Supreme Court concluded the test to be applied is whether there are circumstances that render protected information unique and otherwise unavailable. In the Court’s view, such exceptional circumstances would be presented where a photograph related to a material issue in the case depicted a scene that had been changed or could not be reproduced, making it impossible for the party seeking discovery to develop such evidence through its own investigation. In the case of Wackenhut Corp. V. Crant-Heisz Enterprises, Inc., 451 So.2d 900 (1984), the Court of Appeal of Florida, Second District, ruled that photographs taken by Plaintiff’s investigator in anticipation of litigation showing the interior of a warehouse destroyed by fire were subject to discovery due to the existence of exceptional

circumstances. Although the photographs in question would otherwise have been protected under the work product privilege, the court concluded that the photographs were subject to disclosure nonetheless, since the warehouse in question had been torn down and replaced, making it impossible for the defendant to obtain the same kind of evidence through its own investigative efforts.

6. The Staff has not articulated and cannot demonstrate exceptional circumstances, within the meaning of Rule 1.280(b)(4)(b), which make it impossible for the Staff to independently develop facts or opinions on the subject of quantifiable benefits associated with the GridFlorida proposal. The Staff obviously has the expertise to formulate and render its own opinion with regard to the magnitude of GridFlorida benefits. The test is not whether the Staff can reproduce the same information that might be contained in Tampa Electric's work product. Instead, the test under Rule 1.280(b)(4)(b) is whether it is possible for the Staff to develop its own facts and opinions on the subject of quantifiable GridFlorida benefits without access to the information requested in Interrogatory No. 78 (see Centex Rooney Construction Co., Inc. v. SE/Broward Joint Venture, 697 So2d 987 (4th DCA 1997)). It has access to the same universe of outside consultants and relevant information that is available to any other party to this proceeding. Staff's assertion that no other party has offered testimony on the subject of quantifiable benefits in this proceeding and that Staff has undertaken no comparable analysis of its own does not render Tampa Electric's work product unique. The fact is that Staff could have and should have undertaken its own analysis and rendered its own opinions on the topic of quantifiable benefits if it felt that such information could be developed in a reliable manner. The fact that they have chosen not to do so cannot be allowed to pass for "exceptional circumstances".

7. Irrespective of the issue of whether Staff has demonstrated an “exceptional circumstance” necessitating a response to Interrogatory No. 78, Tampa Electric respectfully submits that Staff’s request for an in camera inspection of documents is without justification. Tampa Electric has not prepared an answer to the interrogatory in dispute so there is no information to be subjected to on in camera review. There are no other documents in dispute to be examined. The issue in dispute is whether Tampa Electric will answer Interrogatory No. 78, not whether Tampa Electric will produce any documents. No documents have been requested by Staff. Therefore, any request by Staff for an in camera inspection of documents would be without merit.

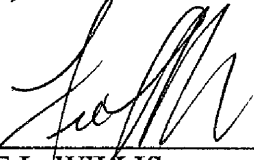
WHEREFORE, Tampa Electric respectfully requests Staff’s Motion be denied on the information sought is protected from disclosure under the attorney client and work product privileges.

DATED this 1st day of October, 2001.

Respectfully Submitted

HARRY W. LONG, JR.
Assistant General Counsel
Tampa Electric Company
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(813) 228-1702

and



LEE L. WILLIS
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ATTORNEYS FOR Tampa Electric Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response by Tampa Electric Company to Florida Public Service Commission Staff's Motion to Compel Responses to Interrogatories has been served by hand delivery (*), overnight delivery (**) or U. S. Mail this 1st day of October, 2001 to the following:

Mr. Wm. Cochran Keating*
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Mr. Jon C. Moyle, Jr.*
Ms. Cathy M. Sellers
Moyle, Flanigan, Katz, Raymond
& Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301

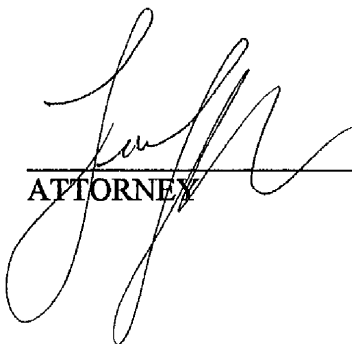
Mr. John W. McWhirter, Jr.**
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Ms. Leslie J. Paugh
Landers & Parsons P.A.
310 West College Avenue
Tallahassee, FL 32301



ATTORNEY

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF LEON)

BEFORE ME the undersigned appeared Harry W. Long, Jr. who deposed and said:

As Co-Counsel for Tampa Electric Company in Phase I of the proceedings before the Florida Public Service Commission in Docket No. 010577-EI, I worked with external experts in defining and structuring testimony and exhibits that would address the issues identified in the above-mentioned proceeding. On the question of quantifiable benefits associated with the GridFlorida RTO, I requested that a particular outside consultant be engaged to provide advice on the subject. The consultant in question was specifically advised that he was being engaged to assist counsel for Tampa Electric in preparation for hearing in the above-mentioned proceeding and that all work products were to be provided only to me for my use in the proceeding.

Based on review of the information received from the consultant, we concluded that the effort to quantify RTO benefits was a subjective process with many complicated variables which require very subjective input. In the end, if carried to a conclusion, the result would be no different than a qualitative analysis and would be speculative in nature. The effort to address the development of a methodology to quantify benefits would take weeks, if not months, of intensive effort, with no clear prospect of obtaining meaningful results. Based on this assessment, Tampa Electric concluded that no useful purpose would be served in continuing with the analysis.

Any information requested by Interrogatory No. 78 was solely for the purpose of assisting Counsel for Tampa Electric in preparation for the hearing scheduled in this proceeding and forced disclosure of the information requested in Interrogatory No. 78 would violate both the attorney-client and work product privileges.

Harry W. Long, Jr.

I HEREBY CERTIFY that on this 1st day of October, 2001, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Harry W. Long, Jr., who is personally known to me, and he acknowledged before me that he provided the response to Staff's Motion to Compel in Docket No. 010577-EI, and that the response is true and correct based on his personal knowledge.

In Witness Whereof, I have hereunto set my hand and seal in the State and County aforesaid as of this 1st day of October, 2001.

Notary Public

My Commission Expires:

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