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October 1, 2001

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 010001-EI

Dear Ms. Bayo:

On behalf of Florida Industrial Power Users Group (FIPUG), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ FIPUG's Third Motion to Compel Tampa Electric to Respond to Discovery.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery
Clause with Generating Performance Incentive
Factor.

Docket No. 010001-EI

Filed: October 1, 2001

**FIPUG'S THIRD MOTION TO COMPEL TAMPA ELECTRIC TO RESPOND TO
DISCOVERY**

The Florida Industrial Power Users Group (FIPUG), pursuant to rule 28-106.206, Florida Administrative Code, files this motion to compel Tampa Electric Company (TECo) to fully respond to FIPUG'S Third Set of Interrogatories (Nos. 34-74). As grounds therefor, FIPUG states:

**I.
Introduction**

1. TECo's recalcitrance to respond to discovery requests has prejudiced FIPUG's ability to prepare for the November fuel hearing. A review of TECo's behavior in this docket is provided below as background for this motion after a brief review of the governing law on the subject.

2. It is black letter law that the purpose of discovery is "to simplify the issues of the case, to eliminate the element of surprise, . . . to avoid costly litigation, and to achieve a balanced search for the truth and achieve a fair trial." See *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996). In *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980), the Florida Supreme Court stated that: "A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal." The Court also stated that a main purpose of discovery is "to provide each party with all available sources of proof as early as possible to facilitate trial preparation." *Id.* at 706. These cases

are consistent with the broad rules of discovery.¹

3. TECo asserts that much of the data requested by FIPUG is composed of confidential “trade secrets” exempted from disclosure under the provisions of the evidence code, § 90.506, *Florida Statutes*² and the confidentiality exemption of § 366.093, *Florida Statutes*.³ Ironically, the statutes upon which TECo bases its claim for protection are not only required to be narrowly construed, they expressly state that they cannot be used to frustrate the type of inquiry FIPUG has made. The data FIPUG seeks will disclose whether TECo’s retail customers are subsidizing unregulated wholesale operations and whether TECo is using the privilege to hide unjust treatment of retail consumers. TECo obviously does not want to see this information exposed, but the law forbids its concealment.⁴

¹“In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 1.280(b)(1), *Florida Rules of Civil Procedure*.

²“Privilege with respect to trade secrets. A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person ***if the allowance of the privilege will not conceal fraud or otherwise work injustice.***” (*Emphasis supplied*).

³“Public utility records; confidentiality.-- 1) The commission shall continue to have reasonable access to all public utility records and records of the utility's affiliated companies, including its parent company, regarding transactions or cost allocations among the utility and such affiliated companies, ***and such records necessary to ensure that a utility's ratepayers do not subsidize nonutility activities.*** Upon request of the public utility or other person, any records received by the commission which are shown and found by the commission to be proprietary confidential business information shall be kept confidential and shall be exempt from s.119.07(1). . . .” (*Emphasis supplied*).

⁴The fact that TECo continues to abuse the shield of confidentiality to withhold information is also illustrated by its behavior in Docket No. 010283-EI. In that docket, the Office of Public Counsel sent all four investor-owned utilities the same interrogatory questions. The question asked for information regarding the investor-owned utilities’ non-separated sales, but only TECO sought to keep such information confidential. FIPUG has objected to that

4. Exhibits filed by TECo in this docket show that on a kwh basis TECo sold large quantities of power in 2001 on the wholesale market. The same circumstances will recur in 2002. On average, retail customers will be charged 123% more next year for wholesale power than TECo will charge its wholesale customers. There is a similar disparity for the current year. TECo is seeking to recover the price it paid in 2001 and to set a new factor based on 2002 cost estimates. Contemporaneous sales and purchases of wholesale power — which compel retail customers to pay more for purchased power than they would pay if they received the same electricity from TECo's generation — may be the result of abusive transactions that should be disallowed. If this has happened, customers are entitled to an explanation to justify the reason that sales and purchases have occurred. If it didn't happen, there is no issue. TECo asks that the Commission protect it from even disclosing simultaneous transactions. When the information is partially supplied, it is redacted so that price differentials remain secret. This has been a continuing course of conduct. A good deal of the information TECo shields from disclosure is more than 18 months old and no longer entitled to protection under the statute without a special showing.⁵ TECo's shallow justification for secrecy — that some FIPUG members may potentially be viable competitors because they produce electricity with waste heat to meet their own requirements and sell incidental power when it is not needed internally — would require sophisticated reviewers to stretch their imagination beyond its tensile strength. TECo is seeking to thwart FIPUG's legitimate discovery efforts. It not only prejudices FIPUG's efforts to prepare for trial, it also makes a mockery of this Commission's proceedings and

request.

⁵See § 366.093(4): "Any finding by the commission that records contain proprietary confidential business information is effective for a period set by the commission **not to exceed 18 months**, unless the commission finds, for good cause, that the protection from disclosure shall be for a specified longer period." (*Emphasis supplied*).

the statutes upon which TECo's secrecy claim is based.

5. Cases construing 119.01(1), *Florida Statutes* (2000), provide persuasive insight as to the appropriate boundaries of confidentiality. The Public Records Act is construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purpose. See *City of St. Petersburg v. Romine*, 719 So. 2d 19, 21 (Fla. 2nd DCA 1998); *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994). "When in doubt, the court should find in favor of disclosure rather than secrecy." See *Romine*, at 21 (citing *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 n.1 at 780 (Fla. 4th DCA 1985)). It is the clear policy of our State to encourage open proceedings and access to documents by the public. The cases listed above, as well as *Southern Bell v. Beard*, 597 So. 2d 873, 876 (Fla. 1st DCA 1992), recognize that documents shall be open to the public for inspection under the Public Records Act, and exceptions to the act are to be narrowly construed.

II. **Background**

6. The following is a chronology of FIPUG's continuing efforts to obtain discovery from TECo in this docket.

A. **FIPUG's First Set of Discovery**

7. Nearly seven months ago, on March 7, 2001, FIPUG served its First Set of Interrogatories (Nos. 1-23) and First Set of Requests for Production (Nos. 1-6) on TECo. On March

16, 2001, TECo objected to many of the requests.⁶

8. TECo partially responded to FIPUG's first Set of Discovery on April 6, 2001. In its response, TECo refused to provide answers for Interrogatories Nos. 1, 4, 11, 18 and Production Request Nos. 1, 2, and 4. Due to TECo's partial responses, FIPUG was forced to file its First Motion to Compel and Request for Expedited Treatment. In its Motion to Compel, FIPUG moved to compel TECO to respond, or respond completely, to Interrogatory Nos. 1, 2, 3, 4, 5, 7, 11(a), 11(c), 15, 17, and 18, and Request for Production Nos. 1, 2, and 3.⁷

9. On April 18, 2001, TECo responded to FIPUG's Motion to Compel and specifically opposed an expedited hearing on the matter. Over TECo's objection, FIPUG's request to expedite was granted by Prehearing Officer Jaber who said: "The parties case preparation, including conduct and analysis of discovery, should not be delayed."⁸

10. A hearing on FIPUG's first Motion to Compel was held before Prehearing Officer Jaber on May 31, 2001. On July 5, 2001, the Commission issued Order No. PSC-01-1444-PCO-EI. In the Order, the Commission granted most of FIPUG's requests, ordering TECo to respond to Production Request No. 3 and Interrogatory Nos. 1, 2, and 11(e).⁹ TECo was ordered to respond to Interrogatories Nos. 2, 11(e), and Production Request No. 3 within 14 days. The Order left the door open for TECo to provide other justification for its confidentiality claim.

⁶ Specifically, TECo objected to Interrogatory Nos. 1, 4, 11, and 18 and Production Request Nos. 1, 2, and 4.

⁷ TECo provided incomplete responses to Interrogatory Nos. 2, 3, 5, 7, 15, and 17 and Production Request No. 3.

⁸ Order No. PSC-01-1057-PCO-EI at 3.

⁹ TECo had revised or supplemented answers to many of the discovery requests that were the subject of FIPUG's Motion. Thus, the items remaining outstanding were Interrogatory Nos. 1, 2, 11(e), 18, and Production No. 3.

11. On July 12, 2001, TECo filed a Motion For Protective Order in which it again claimed certain information FIPUG sought was confidential.¹⁰ TECo refused to provide such information unless FIPUG entered into a non-disclosure agreement with TECO. In its motion, TECo requested that any non-disclosure agreement limit the information to be provided to FIPUG's counsel and consultants only, to the exclusion of FIPUG's members.

12. FIPUG responded to TECo's Motion for Protective Order on July 19, 2001, asserting that the information should not be classified as confidential and further objecting to TECo's highly unusual request to exclude the actual party, FIPUG, from viewing the information. FIPUG asserted that counsel and consultants' preparation of FIPUG's case would be hampered if such information could not be discussed with FIPUG's members. Moreover, in FIPUG's view, TECo failed to explain how information from 1998 and 1999 could possibly be used within the wholesale market to TECo's disadvantage. Given the volatile nature of the market and the fact that the law does not permit even confidential information to remain secret for more than 18 months without a special showing, it is FIPUG's position that this information could no longer be of any use to TECo's competitors.¹¹ The motion remains pending and with its testimony due within a week, FIPUG still does not have answers to Request for Production No. 3.

13. Even as to those items which TECo agreed to provide, its responses have been slow and it has required prompting from FIPUG every step of the way. As part of its response to

¹⁰It made this claim as to Interrogatory No.11(e) and Production Request No. 3. Interrogatory No. 11(e) requested incremental costs of power purchases made on certain days. Production Request No. 3 asked for documentation of how the incremental fuel costs for FMPA and Lakeland sales are calculated in TECo's fuel adjustment filings.

¹¹In compromise, at the May motion hearing FIPUG had agreed to keep information from 2000 and 2001 confidential. TECo rejected that compromise.

Production Request No. 2, after negotiation, TECo agreed to produce system status reports in Tampa, but failed to produce reports older than October 1999. Counsel for FIPUG reviewed such reports on August 23, 2001, and identified specific documents to be copied. As of September 4, 2001, FIPUG had yet to receive the copies requested. On September 6, 2001, counsel for FIPUG sent an e-mail to TECo counsel again requesting the documents, which were finally provided, but only in part. Some information was produced and TECo said other information would only be produced if FIPUG paid \$1,560.00 for copies. TECo refused to produce the rest of the information unless FIPUG filed further formal pleadings.

B.
FIPUG's Second Set of Discovery

14. On June 18, 2001, FIPUG served its Second Set of Interrogatories (Nos. 24-33) and Second Request for Production (No. 7) on TECo. On July 20, TECo served its partial response to FIPUG's Second Set of Interrogatories. However, TECo refused to answer Interrogatories Nos. 24(c) and 28 and filed a Motion for Protective Order.¹² TECo claimed that answers to these interrogatories would contain confidential competitive or trade secret information and again TECo required a non-disclosure agreement before responding. TECo asserted that the non-disclosure agreement should contain the same limitation clause discussed above, excluding FIPUG's members from reviewing the information. FIPUG Responded to TECo's Motion for Protective Order on July 23, 2001.

15. As noted above, TECo refused to answer many discovery responses unless FIPUG

¹² Interrogatory No. 24(c) requests information regarding firm contracts for the purchase of power, to which TECo or an affiliate were parties, with an effective date on or before December 31, 2001. Interrogatory No. 28 requests information regarding the purchase of power on the wholesale market to provide to interruptible customers in lieu of interruption.

executed a non-disclosure agreement. FIPUG executed such an agreement under protest on August 20, 2001, (Attachment A) to gain access to documents its expert witness required to prepare his testimony.

16. FIPUG did not acquiesce to TECo's position that the documents requested were confidential. The right to challenge the confidentiality claims was reserved.¹³ TECo's motion for protective order remains pending.

C.
FIPUG's Third Set of Discovery

17. FIPUG served its Third Set of Interrogatories Nos. 34-74, and Third Set of Requests for Production of Documents Nos. 8-9, on TECo on August 21, 2001. On August 31, 2001, TECo again objected to FIPUG's discovery requests, claiming that the information was confidential. Specifically, TECo claimed that Interrogatories Nos. 58(d) , 58(f), and 59 request information that is confidential business information. Upon receiving the objection, counsel for FIPUG requested that the information be provided pursuant to the non-disclosure agreement. However, despite the execution of an agreement between the parties, TECo refused to provide the discovery responses at all! In a letter to FIPUG counsel, dated September 7, 2001, TECo stated that the agreement contemplated only the disclosure of information requested prior to the agreement, but not information sought subsequently. (Attachment B).

18. TECo's contention that the non-disclosure agreement was meant to cover only past discovery is, at best, absurd and is yet again an attempt to withhold legitimate discovery from

¹³ The Agreement provides: "Nothing in this Agreement is intended to preclude FIPUG from challenging the merits of whether a particular document is proprietary confidential business information within the meaning of Section 366.093, Florida Statutes." (Attachment A, page 4, ¶ 3).

FIPUG. TECo's attempt to limit the non-disclosure agreement to discovery outstanding at the time of execution flies in the face of the agreement's plain language. The agreement does not pertain to specific discovery responses but was kept general in scope to cover all alleged confidential discovery responses, both pending and in the future.¹⁴ The agreement was intended to cover everything that TECo claimed was confidential until the Commission could issue a decision.¹⁵ TECo states that it is impossible for FIPUG's counsel to have knowledge of TECo's confidential business information and not rely on that knowledge when advising FIPUG on legal or business matters. Such a proposition is not only insulting, it is ridiculous. If this were the case, non-disclosure agreements would be worthless and their use nonexistent. The discovery process employed by the Commission would be irreparably frustrated whenever a proceeding required the disclosure of any alleged confidential business information. TECo has sought to renege on its agreement with FIPUG (which it insisted upon) in order to prevent FIPUG from having any access to discoverable information to which FIPUG is entitled.

19. On September 27, 2001, TECo filed a motion for protective order¹⁶ relating to Interrogatory Nos. 43, 44 and 45.¹⁷ TECo again asserted that FIPUG should be required to enter into

¹⁴"The terms of this Agreement shall cover all confidential discovery answers and documents . . . to which Tampa Electric believes a colorable claim of confidentiality attaches, produced in response to FIPUG's discovery requests." (Attachment A, Page 2, ¶ 1).

¹⁵In fact, counsel for FIPUG even told TECo counsel that she intended to send out a Third Set of Discovery which, should there be objections based on confidentiality, would be covered by the agreement.

¹⁶TECo filed no motion for protective order as to Interrogatory No. 51, but nonetheless redacted the information.

¹⁷Interrogatory No. 43 requests information regarding the amount in MWH and cost of purchased power allocated to wholesale sales during times of interrupted service for the period 1998-2001. Interrogatory No. 44 requests information relating to the allocation of purchased power to wholesale sales during forced outages for the period of 1998-2001. Interrogatory No.

a non-disclosure agreement prior to TECo's disclosure of the information. TECo stated that Interrogatory Nos. 43, 44 and 45, require confidential treatment for the same reasons it earlier sought a protective order for Interrogatory No. 28.¹⁸ TECo requested another non-disclosure agreement though FIPUG had already executed one. (Attachment C). In a letter dated September 28, 2001, FIPUG reminded TECo's counsel of the non-disclosure agreement already in effect and sought immediate production of the requested information pursuant to that agreement. (Attachment D). Clearly, any further non-disclosure agreement was unnecessary. TECo should have complied with the non-disclosure agreement in place and produced the sought after discovery. However, TECo refused to provide the information unless an amendment to the current agreement between the parties was executed. TECO's requirement of an amendment to a valid non-disclosure agreement is yet again an attempt to withhold legitimate discovery from FIPUG. Again, to gain access to the information FIPUG executed the amendment TECo demanded. (Attachment E).

1.

Interrogatory Nos. 43, 44 and 45

20. Interrogatory Nos. 43, 44 and 45, all request information regarding TECo's allocation of purchased power to wholesale transactions.¹⁹ TECo characterizes this information as "highly

45 requests information regarding the allocation of purchased power to wholesale sales in the period of 1998-2001. This portion of the motion should be considered a response to TECo's most recent motion for protective order.

¹⁸TECo filed a motion for protective order in connection with Interrogatory No. 28 on July 20, 2001. FIPUG later received the information pursuant to the non-disclosure agreement entered into on August 20, 2001.

¹⁹Interrogatory No. 43 requests information regarding the amount in MWH and cost of purchased power allocated to wholesale sales during times of interrupted service to interruptible customers during the period of 1998-2001. Interrogatory No. 44 requests information relating to the allocation of purchased power to wholesale sales during forced outages for the period of 1998-2001. Interrogatory No. 45 requests information regarding the allocation of purchased power to wholesale sales during the period of 1998-2001.

sensitive trade secret information disclosure of which would be harmful to the competitive interests of Tampa Electric and to the interest of its retail customers.” When examining whether the trade secret privilege applies, courts examine Rule 1.280 in concert with § 688.002(4)²⁰ and § 90.506.²¹ *See Sheridan Healthcorp, Inc. v. Total Healthchoice, Inc.*, 770 So. 2d 221, 222 (Fla. 3d DCA 2000); *Rare Coin-it, Inc v. I.J.E., Inc.*, 625 So. 2d 1277, 1278 (Fla. 3d DCA 1993). When the trade secret privilege is asserted, the court must first determine if the information is in fact a trade secret; if so, the court must require the party seeking production to show reasonable necessity for the requested materials. *See Rare Coin-it* at 1278. Broad discretion is granted in balancing the competing interests of the parties and a wide variety of factors can be considered. *See Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of South Florida*, 423 So. 2d 545, 547 (Fla. 4th DCA 1982).

21. TECo has failed to make a showing of good cause as to how the information could be used by FIPUG to its economic advantage. Even if the information could be used by FIPUG to its economic advantage, the Commission should order the material to be disclosed in order to prevent the working of an injustice. TECo seeks to conceal the requested information to prevent FIPUG and other ratepayers from discovering business transactions which are decidedly not in the best interest of the ratepayer. The Commission should order the disclosure of the discovery sought by FIPUG

²⁰A "trade secret" is defined in section 688.002(4), *Florida Statutes*, as:

information, including a formula, pattern, compilation, program, device, method, technique or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

²¹*See* footnote 2.

to prevent such an injustice.

22. TECo asserts that the discovery sought by FIPUG is confidential business information protected from disclosure under the Public Records Act by § 366.093, *Florida Statutes*. However, the Act is construed liberally in favor of openness, and all exemptions from disclosure are to be narrowly construed and limited to their designated purpose. *See Romine* at 21; *Christy* at 1366; *Barfield* at 1136; *Beard* at 876; paragraph 5, *supra*. The Commission should construe § 366.093 narrowly and deny TECo's request for a protective order.

2.

Interrogatories No. 58, Subparts(d) & (f)

23. In Interrogatory No. 58, FIPUG asks TECo to provide a summary of all coal contracts in place or entered into between 1998-2001. Specifically, subpart (d) of Interrogatory No. 58 requests that TECo provide “[a]ny indices to which the contract is tied.” Subpart (f) of Interrogatory No. 58 requests the monthly costs in \$/ton of coal delivered to TECo under the aforementioned coal contracts. TECo objects to these subparts claiming that the information would be severely detrimental to the interests of TECo and the customers it serves. FIPUG believes that it is in the best interest of the customers to have TECo expose the prices paid for coal to the sunshine — especially when the coal price embedded in the price of electricity is higher than that of all other Florida utilities filing testimony in this docket to date. The ratepayer, who guarantees full recovery of TECo's prudent coal costs, has a right to have TECo prove that its purchases are competitively priced or explain why it is prudent for it to pay more on average for coal shipped by TECo's affiliate transportation fleet and processed through its affiliates' transfer terminals. Customers can only conduct such an analysis with access to the information FIPUG has requested.

24. In addition, TECo objects that the information requested is confidential business information, and the disclosure of such information would be harmful to the competitive interests of TECo's coal transportation affiliate. TECo wants its customers, who foot the coal bill, to take it on faith that the prices TECo pays its affiliates are the best prices it could get in the marketplace. This may be true, but if so why is it a secret? Why does TECo seek to shield information which is years old and can be of no possible competitive value?

2.

Interrogatory No. 59

25. Interrogatory No. 59 requests information regarding the cost of coal purchased on the spot market. TECo objects that this is confidential business information and should not be disclosed. FIPUG strongly asserts that it is in the best interest of the ratepayer to have TECo reveal the prices paid for the supply of coal. The ratepayer, who pays for the cost of the coal, has a right to know whether these purchases are in their best interests and can only do so by analyzing the requested information. In addition, TECo objects to the discovery of old information which is no longer valuable to its competitors and thus should not remain secret.

26. As to FIPUG's Third Motion to Compel, the Commission should reject TECo's August 31, 2001, Objections and Motion for Protective Order.²² TECo should be required to fully respond to FIPUG's interrogatories.

D.

Other Discovery Violations

27. TECo's failure to comply with the rules governing discovery extends beyond just

²²Though TECo labels its pleading a "motion for protective order," its two sentence motion does not meet the standards for a protective order which requires a showing of good cause. See, Rule 1.280(c), Florida Rules of Civil Procedure.

information FIPUG has requested as detailed above. On August 1, 2001, Staff served its Second Set of Interrogatories, (Nos. 9-130) on TECo; on September 5, 2001, TECo served its answers but did not serve FIPUG with a copy. Under the rules of civil procedure, a party must serve answers to interrogatories on every other party. See Rule 1.340(a) and (e), Florida Rules of Civil Procedure. FIPUG's counsel was required to call and specifically request a copy of the interrogatory answers, which were finally provided on September 10, 2001, five days later.²³

28. In addition, FIPUG requested that TECo provide a copy of its response to Staff's Production Requests to TECO, Nos. 1-33. It is common for a party to provide a courtesy copy when another party makes such a request. TECo stated it would provide copies but only after payment of \$200. (Attachment G). Thus, FIPUG was required to serve a Fourth Request for Production, No. 10, seeking the same materials Staff had already asked for and received. Again, TECo's actions only delay FIPUG's receipt of these materials.

III. **Summary**

29. In this case, TECo has filed seven Motions for Protective Orders and required non-disclosure agreements before it would answer many of FIPUG's discovery requests, some from as early as March of this year.²⁴ Further, despite having executed a non-disclosure agreement, FIPUG

²³This is not the first time this has happened. FIPUG's counsel was required to send TECo's counsel a letter reminding him of his ongoing obligation. (Attachment F).

²⁴TECo has filed the following seven Motions for Protective Order: (1) March 16, 2001, objecting to Interrogatory Nos. 1, 4, 11, and 18; (2) March 16, 2001, objecting to Production Request Nos. 1, 2, and 4; (3) July 2, 2001, objecting to Interrogatory No. 31; (4) July 12, 2001, objecting to Interrogatory No. 11(e) and Production Request No. 3; (5) July 20, 2001, objecting to Interrogatory Nos. 24(c) and 28; (6) August 31, 2001, objecting to Interrogatory Nos. 58(d), 58(f), and (59); (7) September 28, 2001, objecting to Interrogatory Nos. 43, 44, and 45.

still has not received crucial materials necessary to prepare its case.²⁵ Intervenor's testimony in this case is due on October 10, 2001 for a November 20, 2001 hearing. FIPUG continues to be prejudiced in its ability to prepare for hearing.

30. As of the date of this motion, the following FIPUG discovery requests remain unanswered by TECo. In addition, FIPUG has had to file and respond to the numerous motions and requests detailed above to receive critical information.

- First Request for Production, No. 3
- Third Set of Interrogatories, No. 58(d)
- Third Set of Interrogatories, No. 58(f)
- Third Set of Interrogatories, No. 59.

31. FIPUG has had to battle TECo at every turn to receive responses to legitimate discovery requests. This is wholly unacceptable and contrary to the principles of discovery. The continuing discovery disputes arising from TECo's recalcitrance have severely prejudiced FIPUG.

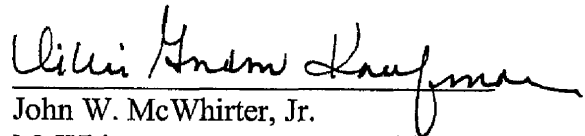
32. TECo's abuse of the discovery process denies FIPUG and customers in general access to critical documents. It permits TECo to operate a "public" utility, financed by ratepayer dollars, in secret. FIPUG urges the Commission to quickly and sternly deal with TECo's bogus confidentiality claims as well as TECo's outrageous failure to honor the terms of a non-disclosure agreement which it drafted and foisted on FIPUG. TECo cannot be permitted to continue to obstruct discovery in this case and shield critical information from counsel, other intervenors and the general

²⁵Much of the discovery sought by FIPUG, and objected to by TECo, is related to business transactions entered into by TECo. The discovery sought by FIPUG is necessary to determine whether TECo has endeavored to enter into transactions which are fair, prudent, and in the best interest of its ratepayers – like FIPUG.

public.

WHEREFORE, FIPUG requests that the Commission:

- a. Grant its motion to compel and order TECo to immediately respond to all of FIPUG's outstanding discovery;
- b. Deny TECo's motions for protective order seeking confidentiality;
- c. Grant FIPUG the right to provide supplemental testimony within a reasonable time after its discovery requests are answered;
- d. Deny any adjustment to TECo's fuel factor or request for true up until the discovery issues are resolved;
- e. Impose sanctions upon TECo; and
- f. Grant such other relief as necessary.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FIPUG's Motion to Compel Tampa Electric Company to Respond to Discovery and Request for Expedited Motion Hearing has been furnished by *hand delivery, or U.S. Mail this 1st day of October, 2001, to the following:

(*)Wm. Cochran Keating IV
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Suite 601
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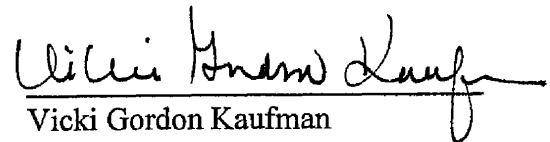
(*)James D. Beasley
Ausley & McMullen
227 S. Calhoun Street
Tallahassee, Florida 32302

Jeffrey A. Stone
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576

James A. McGee
Post Office Box 14042
St. Petersburg, Florida 33733

Norman H. Horton
Messer, Caparello & Self
215 South Monroe Street
Suite 701
Tallahassee, Florida 32302

John T. English
Florida Public Utilities Company
Post Office Box 3395
West Palm Beach, Florida 33402


Vicki Gordon Kaufman

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery)
Clause with Generating Performance Incentive) DOCKET NO. 010001-EI
Factor.)
_____)

NON-DISCLOSURE AGREEMENT

THIS AGREEMENT is entered into by and between Tampa Electric Company ("Tampa Electric" or "the company") and Florida Industrial Power User's Group ("FIPUG"), by and through their respective counsel.

Recitals

FIPUG has propounded a number of discovery requests to Tampa Electric during the course of this proceeding. It is expected that certain of Tampa Electric's answers to interrogatories and documents produced in response to requests for production of documents by FIPUG will contain proprietary confidential business information.

The Florida Public Service Commission ("the Commission") has adopted a detailed rule, Rule 25-22.006, Florida Administrative Code ("Rule"), for dealing with proprietary confidential business information. Under this Rule, the party claiming that information is proprietary confidential business information must file a Request for Confidential Classification before such information is submitted to the Commission. The procedure for filing a Request for Confidential Classification is time consuming and burdensome because it requires a line-by-line, page-by-page analysis of the documents to which a claim of confidentiality attaches.

Under paragraph 7(b) of the Rule, all parties to proceedings are urged to seek mutual agreement regarding access to Confidential Documents and information prior to bringing a

controversy over such access to the Commission for decision. Under the rule, such agreements do not constitute a waiver of any claim of or objection to confidentiality a party may have.

Agreement

Accordingly, in accordance with paragraph 7(b) of the Rule, and to facilitate the timely review of the information that FIPUG has requested of Tampa Electric, Tampa Electric and FIPUG hereby promise and agree as follows:

1. Applicability. The terms of this Agreement shall cover all confidential discovery answers and documents (hereinafter, "Confidential Documents") to which Tampa Electric believes a colorable claim of confidentiality attaches, produced in response to FIPUG's discovery requests.

2. Procedures for Production and Review of Confidential Documents.

a. FIPUG's counsel and consultants may review the Confidential Documents only in strict accordance with this Agreement. FIPUG's counsel and consultants shall not disclose the contents of any of the Confidential Documents to anyone other than FIPUG's counsel and consultants without the prior written consent of Tampa Electric. The Confidential Documents shall only be reviewed and/or disclosed to FIPUG counsel and consultants who have a need to review the information in connection with the subject matter of this Docket No. 010001-EI, and have signed this Agreement or the acknowledgment attached to this Agreement. Under no circumstance shall any of the content of the Confidential Documents be disclosed to any officer, director, employee, or agent of any FIPUG member.

b. In addition, FIPUG's counsel and consultants for Docket No. 010001-EI may designate some or all of the Confidential Documents for copying. Tampa Electric may provide a copy of the Confidential Documents directly to FIPUG's counsel or consultant in

which event the Confidential Documents will be stamped "Confidential" and numbered consecutively beginning with the number "1", and delivered in boxes or envelopes clearly marked "Confidential." There may be situations where Confidential Documents of a particular type are so voluminous as to render it too costly, burdensome and time consuming to stamp the documents confidential and consecutively number them prior to allowing counsel for FIPUG to make a preliminary review of the Confidential Documents. In those instances Tampa Electric may simply inform FIPUG's counsel that the documents are confidential at the time they are presented for review and later stamp confidential and consecutively number only those of the Confidential Documents FIPUG's counsel requests to have copied. FIPUG's counsel may not reproduce the Confidential Documents in any manner without the express written permission of Tampa Electric, which consent will not unreasonably be withheld. Tampa Electric will maintain a separate file copy of each Confidential Document supplied to FIPUG's counsel or its consultant along with file copies of transmittal letters describing the Confidential Documents provided to FIPUG's counsel or consultants.

c. While the Confidential Documents are in the possession of FIPUG's counsel and consultants, they shall individually and collectively implement procedures that are adequate to ensure that the Confidential Documents are not disclosed to anyone other than those persons covered by this Agreement.

d. Before any FIPUG consultant reviews Confidential Documents, such person shall sign a written acknowledgment in the form of the NON-DISCLOSURE AGREEMENT attached hereto as Exhibit "A", that he or she has read this Agreement and agrees to abide by its terms. The total number of persons who may review the Confidential Documents pursuant to this Agreement shall not exceed eight (8) without the express written permission of

Tampa Electric. Each person shall sign the acknowledgment attached to this Agreement as Exhibit "A".

e. The Confidential Documents and copies thereof produced pursuant to this Agreement shall remain the property of Tampa Electric. Such Confidential Documents and copies shall not be used for any purpose unrelated to the proceeding in FPSC Docket No. 010001-EL.

3. Pre-Hearing Procedure. At least seven working days before the final hearing in the above-styled docket, FIPUG's counsel shall provide Tampa Electric with a list of Confidential Documents, if any, that FIPUG intends to use at the final hearing. All Confidential Documents not listed by FIPUG shall be returned to Tampa Electric. Upon receipt of the list from FIPUG's counsel, Tampa Electric shall within a reasonable time file a Request for Confidential Classification covering the Confidential Documents on the list. Nothing in this Agreement is intended to preclude FIPUG from challenging the merits of whether a particular document is proprietary confidential business information within the meaning of Section 366.093, Florida Statutes. If the Commission should rule that any confidential document or information contained therein is not entitled to confidential protection, Tampa Electric would be afforded the opportunity to pursue a timely motion for reconsideration and appeal of such ruling and the confidential treatment afforded by this Agreement would remain in full force and effect through the final outcome of any reconsideration and appeal proceedings (or beyond if the reconsideration or appeal is successful).

4. Term. This Agreement shall be effective from the date it is executed by the parties until the conclusion of the above-styled docket. At the end of the term of this Agreement,

or before, FIPUG's counsel and consultants shall return all Confidential Documents of Tampa Electric remaining in its possession to the undersigned counsel for Tampa Electric.

5. Remedies. In the event any of FIPUG's counsel or consultants discloses, disseminates or releases any information contained in any Confidential Document without proper authorization, Tampa Electric may refuse to provide any further proprietary information and may demand prompt return to Tampa Electric all Confidential Documents previously provided pursuant to this Agreement. The parties agree: divulgence or unauthorized use of the Confidential Documents could damage Tampa Electric; the amount of resulting damages could be difficult to ascertain; Tampa Electric may not reasonably or adequately be compensated for public disclosure of such information in damages alone; and Tampa Electric shall be entitled to injunctive or other equitable relief to prevent or remedy a breach of this agreement or any part of it. Nothing herein is intended to restrict any remedies available to the parties for disclosure, dissemination or release of proprietary information by another party involved in this agreement.

6. Authority. The undersigned acknowledge and represent that they have actual authority to enter into this Agreement on behalf of their respective clients.

7. Modifications. This Agreement can be modified by further written agreement of the parties. If the parties are unable to agree on a mutually acceptable modification, either party may petition the FPSC to determine the basis on which such documents will be made available for review by FIPUG's expert witnesses.

DATED this 20th day of August, 2001.

Vicki Gordon Kaufman

VICKI GORDON KAUFMAN
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

and

JOHN W. MCWHIRTER, JR.
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
400 North Tampa Street – Suite 2450
Tampa, FL 33601-3350

ATTORNEYS FOR FIPUG

LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, FL 32302

ATTORNEYS FOR TAMPA ELECTRIC
COMPANY

Exhibit "A"

NON-DISCLOSURE AGREEMENT

The undersigned hereby certifies that prior to the disclosure to them of certain information and documents belonging to or in the possession of, or made available by Tampa Electric, which are considered by Tampa Electric or the owner of such information or documents, to be of a trade secret, privileged or confidential nature, they have read the Non-Disclosure Agreement between Tampa Electric and FIPUG for purposes of FPSC Docket No. 010001-EI, and agree to be bound by its terms.

_____	_____
_____	_____
_____	_____
_____	_____

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AUSLEY & McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

September 7, 2001

HAND DELIVERED

Ms. Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance
Incentive Factor; FPSC Docket No. 010001-EI

Dear Vicki:

I have spoken with Tampa Electric regarding your September 5 e-mail request that Tampa Electric answer FIPUG's Interrogatories Nos. 58(d) and (f) and part of No. 59. As we pointed out in our Objections, Motion for Protective Order and Written Response filed on August 31, 2001, these interrogatory subparts seek information that has consistently been treated as confidential proprietary business information concerning the pricing of coal purchased by Tampa Electric. The Commission has consistently held that disclosure of this type of information would do serious harm to Tampa Electric and the customers it serves.

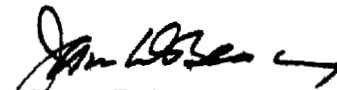
Tampa Electric cannot in good conscious disclose the particular information you request in Interrogatories 58(d) and (f) and part of 59 to you under the Non-Disclosure Agreement of August 20, 2001 which, by its own terms, addresses procedures for the review of discovery requests FIPUG had requested of Tampa Electric as of the date of the agreement and not information of a different sensitivity sought subsequently. Your firm advises certain of Tampa Electric's competitors in the wholesale electric market. Over the years your firm has provided not only legal counsel to your industrial clients, but also has also served in an advisory role regarding business planning and business strategies. Once a lawyer and business advisor gains knowledge of matters that are highly confidential from a competitive standpoint, he or she must know and rely upon that information when advising a client who directly competes with the provider of the information, even if the lawyer does not disclose any of the confidential information directly to the client. The FIPUG members disclosed thus far in response to Tampa Electric's discovery requests include industrial firms who compete directly with Tampa Electric in the wholesale market.

Ms. Vicki Gordon Kaufman
September 7, 2001
Page Two

We have also reviewed the representative sample of clients represented by Mr. Pollock's firm, Brubaker and Associates, Inc., that appears on that firm's website. That list includes IMC Agrico Company and a number of other firms which do or may compete with Tampa Electric in the wholesale power market.

Our Non-Disclosure Agreement by its own terms does not constitute a waiver of any claim of confidentiality. Based on the relationship your firm and that of Mr. Pollock's have with entities that directly compete with Tampa Electric in the wholesale electric power market, Tampa Electric must adhere to the objections set forth in the company's August 31, 2001 filing.

Sincerely,



James D. Beasley

JDB/pp

cc: Wm. Cochran Keating (via: facsimile)

AUSLEY & McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-0115 FAX (850) 222-7560

September 27, 2001

HAND DELIVERED

Ms. Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 S. Gadsden Street
Tallahassee, FL 32301

Re: Fuel and Purchased Power Cost Recovery Clause with Generating
Performance Incentive Factor; FPSC Docket No. 010001-EI

Dear Ms. Kaufman:

Enclosed are Tampa Electric Company's Answers to FIPUG's Third Set of Interrogatories (Nos. 34-74) and Third Set of Request for Production of Documents (Nos. 8-9). We have redacted portions of our answers to Interrogatories Nos. 43, 44 and 45 which are the subject of a Motion for Protective Order, a copy of which is enclosed.

In our Motion we have requested that FIPUG's counsel and consultants be required to sign a non-disclosure agreement in advance of reviewing certain pricing information contained in Tampa Electric's answers to Interrogatories Nos. 43, 44 and 45, for the same reasons we moved for a protective order in connection with FIPUG's Interrogatory Nos. 28. If you want to expedite matters, I will be glad to prepare and send you a Non-Disclosure Agreement relating to the information addressed in our Motion.

Sincerely,


James D. Beasley

JDB/pp
Enclosures

MCWHIRTER REEVES

ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602-5126
P.O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 Fax

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 Fax

September 28, 2001

VIA FACSIMILE

James D. Beasley
Ausley & McMullen
227 South Calhoun Street
Tallahassee, Florida 32301

Re: Docket Number: 010001-TP

Dear Jim:

In response to your letter of September 27, 2001, in which you ask that FIPUG execute a non-disclosure agreement in order to receive the information we requested in Interrogatory Numbers 43, 44 and 45, I remind you that we executed such an agreement on August 20, 2001, and would ask that you immediately provide the requested information.

Sincerely,



Vicki Gordon Kaufman

VGK/bae

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN, ARNOLD & STEEN, P.A.

AUSLEY & MCMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

September 28, 2001

HAND DELIVERED

Ms. Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 S. Gadsden Street
Tallahassee, FL 32301

Re: Fuel and Purchased Power Cost Recovery Clause with Generating
Performance Incentive Factor; FPSC Docket No. 010001-EI

Dear Vicki:

By this letter, Tampa Electric offers to amend the August 22, 2001 Non-Disclosure Agreement by and between Tampa Electric and the Florida Industrial Power Users Group to make that Agreement apply to the confidential portions of Tampa Electric's answers to FIPUG's Interrogatories Nos. 43, 44, 45 and 51, providing you agree to advise FIPUG's consultants that they are bound by such amendment. If you agree with this amendment, please so indicate by signing in the space provided below and we will hand deliver to you the unredacted (highlighted) answers to the three interrogatories in question.

Sincerely,



James D. Beasley

JDB/pp

Agreed to this 28th day of September 2001



VICKI GORDON KAUFMAN

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602-5126
P.O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 Fax

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 Fax

September 6, 2001

James D. Beasley
Ausley & McMullen
227 South Calhoun Street
Post Office Box 391 (32302)
Tallahassee, Florida 32301

Re: Discovery

Dear Jim:

Please consider this my request that whenever TECo responds to discovery in a case in which FIPUG is a party (such as the fuel case, the RTO case...) that you serve FIPUG with copies of your discovery responses. That way I do not have to contact you each time and request the information and I will not experience additional delay in receiving the discovery. Since this has occurred several times in the recent past, I thought it might be useful to put my request in writing.

Thank you for your consideration.

Sincerely,



Vicki Gordon Kaufman

MCWHIRTER, REEVES, MCGLOTELIN, DAVIDSON, DECKER, KAUFMAN, ARNOLD & STEEN, P.A.

AUSLEY & McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

227 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

September 10, 2001

HAND DELIVERED

Ms. Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Dear Vicki:

This is in response to your letter of September 6, 2001 regarding discovery. We will serve you with a copy of any interrogatory answers we file in dockets to which FIPUG is a party unless there is some basis to object to FIPUG having access to the information, in which event we will seek relief via an objection or a motion for a protective order.

With respect to requests for production of documents, you no doubt are aware that document production can run into thousands of pages. A party is not obligated to provide copies of documents produced in response to a party's request to all other parties to a case. That could wipe out whole forests. We will respond to any proper request for production FIPUG wishes to make, subject to the usual caveats regarding privileged and confidential information. We will provide copies at a reasonable cost.

In addition, if FIPUG wishes to obtain copies of documents produced at the request of other parties, we will let you know on a request-by-request basis what the copying charge will be and provide you copies upon receipt of your firm's check to cover the cost of copying.

You had requested a copy of the documents produced in response to Staff's production requests Nos. 1-33. I am advised that that production run includes approximately 4,950 sheets of paper. We will set about to have those copies made upon receipt of your firm check in the amount of \$200 to cover copying costs.

Sincerely,



James D. Beasley

JDB/pp