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

October 12, 2001

HAND DELIVERED

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

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

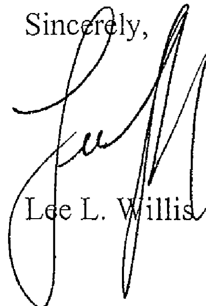
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Motion of Tampa Electric Company for Reconsideration of Order No. PSC-01-1965-PCO-EI.

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

Thank you for your assistance in connection with this matter.

Sincerely,



Lee L. Willis

LLW/pp
Enclosure

DOCUMENT NUMBER-DATE
12999 OCT 12 ō
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 12, 2001

MOTION OF TAMPA ELECTRIC COMPANY FOR RECONSIDERATION OF ORDER NO. PSC-01-1965-PCO-EI

Pursuant to Rule 25-22.060, Florida Administrative Code, Tampa Electric Company ("Tampa Electric" or the "Company") hereby requests that the Prehearing Officer withdraw or this Commission reconsider and reverse Order No. PSC-01-1965-PCO-EI Granting Motion To Compel (the "Order") issued by the Prehearing Officer in this proceeding on October 2, 2001. Tampa Electric respectfully submits that the Order is based on significant errors of fact and law in that it misapprehends and, therefore, misapplies the controlling "exceptional circumstances" standard for the disclosure of otherwise privileged information set forth in Florida Rule of Civil Procedure 1.280 (b) (4) (b). 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 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:

> *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. September 18, 2001, the Company filed its objection to providing the information sought in Interrogatory No. 78 on the grounds that the information sought was 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.

3. On September 27, 2001, Staff filed and served by mail a Motion to Compel Response to Interrogatory No. 78. As set forth in its Motion, the basis for the relief requested by Staff was as follows:

> *Staff needs the materials to fully assess the benefits of an RTO. Staff has no quantitative measure of the RTO's benefits and is aware of no other source from which to obtain the information. None of the parties to this or the other RTO dockets has such information. TECO is the only party that has access to the needed information.*

4. After being informed of Staff's Motion on September 28, 2001 by the office of the Prehearing Officer of Staff's filing, Tampa Electric was required to file a response on October 1, 2001. In its October 1, 2001 response to the Motion To Compel, Tampa Electric argued 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 was misplaced given the fact, as set forth in Exhibit A, that the information at issue was developed at the request of counsel in anticipation of litigation by an outside consultant who was not expected to be called as a witness at the hearings in this proceeding. Therefore, Tampa Electric took the position that the question of whether or not disclosure

of the information at issue could be compelled should be 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 partying 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)*

5. In the Order granting the Motion to Compel (faxed to the Company at 3:00 p.m. on October 2), the Prehearing Officer agreed with Tampa Electric, based on the Company's response and affidavit, that Rule 1.280(b)(4)(b) articulated the proper standard for determining whether the information sought in Interrogatory No. 78 was discoverable. However, citing the Staff's need for the information at issue as set forth in Section 3 above, the Prehearing Officer ruled as follows:

> *I find that in the unusual circumstances of this case, it [Staff] has made the necessary showing that "exceptional circumstances" exist which make it "impracticable" to obtain the requested materials by other means. This case has been expedited at TECO's request, shortening the time for discovery and preparation for hearing for Commission Staff and other parties. I am unpersuaded by TECO's assertion that Commission Staff has " access to the same universe of outside consultants and relevant information that is available to any other party to this proceeding". Nor do I find that the issue of compelling discovery under Rule 1.280(b)(4)(b) turns on " 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". The test under the rule is one of "impracticability" not impossibility. See, Gilmore Trading Corp. v. Lind Electric, Inc., 555 So. 2d 1258 (Fla. 3rd DCA 1989); Delcastor, Inc. v. Vail Associates, Inc., 108 F.R.D. 405 (D. Colo. 1985). In short, I find that exceptional circumstances exist in this*

case which make it impracticable for the Commission Staff to obtain the information on quantifiable benefits requested in Interrogatory No. 78.

6. As directed by the Prehearing Officer, Tampa Electric delivered to the Staff by 8:00 a.m. on the morning of October 3, 2001, a full and direct response to Interrogatory No. 78 with the understanding that, in so doing, Tampa Electric was not waiving the privilege associated with the underlying information and was reserving its right to request reconsideration of the Order. Tampa Electric fully answered in order to avoid unnecessary advocacy at the hearings which began that same day at 9:30 a.m. The Company, however, made it clear that the principles set out in the order required it to seek reconsideration and an appeal of the order at the appropriate time.

7. Tampa Electric respectfully submits that the conclusion reached in the Order that the Staff has made the necessary showing of "exceptional circumstances" is based on a fundamental error with regard to the interpretation and proper application of Rule 1.280(b)(4)(b). Tampa Electric respectfully submits that the distinction between "impracticability" and "impossibility" articulated in the Order does not exist. Therefore, the proper test to apply to the facts presented is whether it was 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. Under this standard, it is clear that the Staff has fallen far short of demonstrating exceptional circumstances that would justify forced disclosure of information that otherwise would be privileged.

8. A primary rule of statutory construction is that words should be given their plain and obvious meaning. *See Florida Dept. Of Business and Professional Regulation, Division of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374*

(1999). In the American Heritage dictionary, Fourth Edition, the word "impracticable" is defined as "impossible to do or carry out". Similarly, Webster's II New College Dictionary defines the word "impracticable" as " not capable of being done or carried out". In fact, impracticability and impossibility are synonyms[1]. The judicial interpretation and application of Rule 1.280(b)(4)(b) has been consistently based on the plain meaning of the term "impracticability.

9. In Dodson v. Persell, 390 So.2d 704 (1980), the Florida Supreme Court concluded that the content of movies or photographs that were prepared in anticipation of litigation but would not be used in evidence at trial were discoverable only upon a showing of exceptional circumstances. The Court concluded that the test to be applied is whether there are circumstances that render such 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

[1] See *The Synonym Finder* by J.I. Rodale, Warner Books (1978)

own investigative efforts. It should also be noted that the Court ruled that the reports, memoranda and other documents relative to the fire in question prepared by the same investigator constituted work product exempt from discovery. In so holding, the Court noted that the party seeking discovery had presented no evidence of exceptional circumstances that would prevent independent development of facts or opinions on the same subject.

10. Even the cases cited in the Order purporting to support forced disclosure, in fact, require precisely the opposite result. In the Gilmore Trading case, supra, the Court denied discovery of the opinions of an expert engaged by counsel in anticipation of litigation but who was not expected to be called as a witness at trial. The Court concluded that, unlike a case where the not-to-be-called expert was the only meaningful source of relevant information, the party seeking discovery in the immediate case had access to relevant facts through independent investigation. Similarly, in the Delcastor case, supra, the court concluded that if requested discovery were to be granted pursuant to Rule 26(b)(4)(b), Federal Rules of Civil Procedure, which is the equivalent of Florida Rule 1.280(b)(4)(b), exceptional circumstances would exist where the information sought consisted of expert observations of terrain that had been substantially altered making it impossible for other experts to make similar, independent observations of the same terrain[2].

11. The Staff did not articulate and cannot demonstrate exceptional circumstances, within the meaning of Rule 1.280(b)(4)(b), which make it impossible for

[2] The case can be distinguished from the matter at issue in this proceeding since the expert in question was going to testify at trial but only with regard to facts rather than opinions. Therefore a different standard was applied in deciding whether discovery would be granted. Nonetheless, the Court would have applied the

it to independently develop facts or opinions on the subject of quantifiable benefits associated with the GridFlorida proposal. There was nothing in the pleadings before the Prehearing Officer that demonstrated or even suggested that it would be impossible for the Staff 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 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)). Staff could have attempted its own analysis to quantify GridFlorida benefits months ago. Tampa Electric is not aware of any case in which a Court has mandated discovery of protected information under Rule 1.280(b)(4)(b) simply because the opposing side didn't have the requested information and didn't have time to develop its own comparable information. 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". Tampa Electric respectfully submits that the conclusions in the Order to the contrary constitute fundamental legal error.

"exceptional circumstances" standard in a manner consistent with the other cases cited by Tampa Electric in support of its decision.

12. Tampa Electric believes that the most expedient and practical manner to address this matter is for the Prehearing Officer to simply withdraw that order and to thereby avoid any further advocacy on this matter.

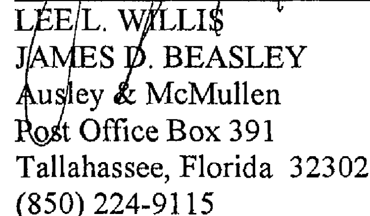
WHEREFORE, Tampa Electric respectfully requests that the Prehearing Officer withdraw the Order in light of the fact that the Company has provided the limited information requested by the Staff in Interrogatory No. 78. Under these circumstances, the Order serves no useful purpose and should not be mistaken for valid precedent. In the alternative, Tampa Electric respectfully requests that the Commission reconsider and reverse the Order on the grounds set forth above.

DATED this 12th day of October, 2001.

Respectfully submitted,

HARRY W. LONG, JR.
Assistant General Counsel
Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601
(813) 228-1702

and



LEE L. WILLIS
JAMES D. BEASLEY
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(850) 224-9115

ATTORNEYS FOR Tampa Electric Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Reconsideration of Order No. PSC-01-1965-PCO-EI, filed on behalf of Tampa Electric Company, has been served by hand delivery (*), overnight delivery (**) or U. S. Mail this 12th 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. John W. McWhirter, Jr.**
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen P.A.
400 North Tampa Street, Suite 2450
Tampa, FL 33602

Mr. Joseph A. McGlothlin*
Ms. Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen P.A.
117 South Gadsden Street
Tallahassee, FL 32302

Mr. Matthew M. Childs*
Steel Hector & Davis
215 South Monroe, Suite 601
Tallahassee, FL 32301-1804

Mr. James A. McGee**
Senior Counsel
Florida Power Corporation
Post Office Box 14042
St. Petersburg, FL 33733

Mr. Thomas A. Cloud**
Gray, Harris & Robinson, P.A.
Post Office Box 3068
Orlando, FL 32802-3068

Ms. Diane K. Kiesling*
Ms. Leslie J. Paugh
Landers & Parsons P.A.
310 West College Avenue
Tallahassee, FL 32301

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

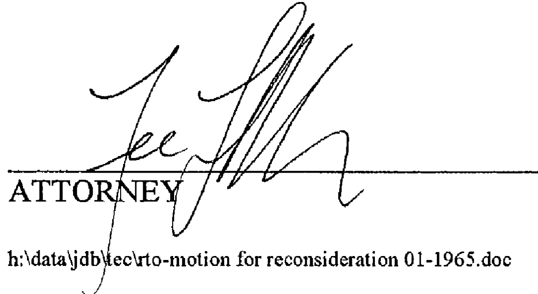
Mr. N. Wes Strickland*
Foley & Lardner
106 East College Ave., Suite 900
Tallahassee, FL 32301-1514

Mr. William L. Bryant, Jr.*
Ms. Natalie B. Futch
Haigler, Alderman, Bryant & Yon P.A.
106 East College Avenue – 12th Floor
Tallahassee, FL 32301

Mr. John Roger Howe*
Deputy Public Counsel
Office of Public Counsel
111 West Madison Street – Suite 812
Tallahassee, FL 32399-1400

Mr. James P. Fama**
LeBoeuf, Lamb, Greene & MacRae
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5728

Mr. Michael B. Twomey
Post Office Box 5256
Tallahassee, FL 32314-5256



ATTORNEY

h:\data\jdb\tec\rto-motion for reconsideration 01-1965.doc

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF LEON)

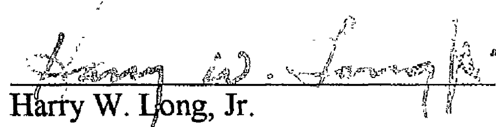
BEFORE ME the undersigned appeared Harry W. Long, Jr. who deposed and said:

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.

EXHIBIT "A"

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.

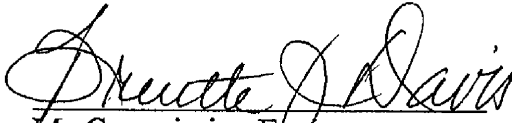


Harry W. Long, Jr.

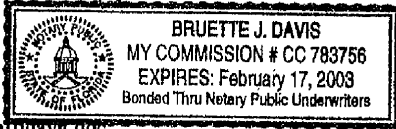
I HEREBY CERTIFY that on this 1st day of October, 2001, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Harry W. Long, Jr., who is personally known to me, and he acknowledged before me that he provided the response to Staff's Motion 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:



h:\data\jml\teco\affidavit.doc