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October 28, 2003

HAND DELIVERED

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: Fuel and Purchased Power Cost Recovery Clause with Generating Performance  
Incentive Factor; FPSC Docket No. 030001-EI

Dear Ms. Bayo:

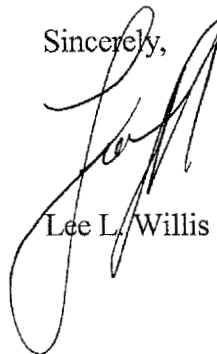
Enclosed for filing in the above docket are the original and ten (10) copies of each of the following:

1. Tampa Electric's Response and Opposition to CSX Transportation's Petition to Intervene.
2. Tampa Electric's Response to CSX Transportation's Notice of Joinder, Etc.

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  
Enclosures

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

Notice

DOCUMENT NUMBER-DATE

10564 OCT 28 8

FPSC-COMMISSION CLERK

Petition

DOCUMENT NUMBER-DATE

10663 OCT 28 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery )  
Clause with Generating Performance Incentive ) DOCKET NO. 030001-EI  
Factor. ) FILED: October 28, 2003  
\_\_\_\_\_ )

**TAMPA ELECTRIC'S RESPONSE AND OPPOSITION  
TO CSX TRANSPORTATION'S PETITION TO INTERVENE**

Tampa Electric Company ("Tampa Electric" or "the Company") pursuant to Rule 25-22.037(2), Fla. Admin. Code, moves the Commission to deny, or in the alternative, to dismiss CSX Transportation's ("CSX") Petition to Intervene filed in this proceeding on October 23, 2003 and says:

1. The Petition fails to comply with the requirements pertaining to standards set forth in Fla. Admin. Code 25-22.039. That rule requires a petition for leave to intervene:

Include allegations sufficient to demonstrate that the intervenor is entitled to participate in a proceeding as a matter of constitutional or statutory right pursuant to Commission Rule, or that the substantial interest of the intervenor are subject to determination or will be affected through the proceeding.

2. CSX simply does not have standing for the reasons described below.

3. As the court stated in Agrico Chem. v. Dept. of Envl. Reg., 406 So.2d 478, 482

(Fla. 2nd DCA 1981):

Before one can be considered to have a substantial interest in the outcome of a proceeding you must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a §120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Both requirements must be met to demonstrate a substantial interest. CSX fails to meet either requirement of the test.

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FPSC-COMMISSION CLERK

4. Injury in fact. Remote, speculative, abstract or indirect injuries are not sufficient to meet the “injury in fact” standing requirement. See International Jai-Alai Players Association v. Florida Pari-Mutual Commission, 561 So.2d 1224 (Fla. 3rd DCA 1990); Village Mobile Home Park Ass’n v. Dept. of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987); Agrico Chem. Co. v. Dept. of Envl. Reg., *supra*; Dept. of Offender Rehabilitation v. Jerry, 353 So.2d 123 (Fla. 1st DCA 1978). There must be allegations that either (1) the petitioner has sustained actual injuries at the time of the filing of the petition, or (2) that petitioner is greatly in danger of sustaining some direct injury as a result of the Commission’s decision in the proceeding. See Village Park, 506 So.2d at 433.

It should be obvious even to the most casual observer that the real reason for CSX’s intervention in this proceeding is an attempt to enhance its competitive interest. CSX’s immediate purpose in intervention is clearly shown in its separately filed Notice of Joinder, etc. which has the sole purpose of attempting to delay this proceeding and to exact some sort of retribution on Tampa Electric for not procuring its coal transportation services from CSX. CSX’s competitive economic interests are not within the “zone of interest” of this proceeding.

The policy of this Commission with respect to Tampa Electric is set out in a settlement agreement through this Commission in Order No. 20298 in Docket No. 870001-EI-A issued on November 10, 1988. That settlement agreement recites that:

In accordance with the Commission’s direction, Staff, Office of Public Counsel (OPC) and Tampa Electric have met to discuss methods by which market pricing can be adopted for affiliate coal and coal transportation transactions between Tampa Electric and its affiliates. As a result of these discussions, Staff, OPC and Tampa Electric agree as follows:

Public Counsel and Staff agree that the specific contract format, including the pricing indices which Tampa Electric may include in its contracts with its affiliates, were not subject to this proceeding

and Tampa Electric may negotiate its contracts with its affiliates in any manner it deems reasonable. (Emphasis added.)

CSX does not meet the first prong of the Agrico test. Failure to satisfy one prong of the Agrico test is sufficient to find that CSX does not have standing to participate in this proceeding; but as explained further below CSX also fails to satisfy the second prong of the Agrico test.

5. Zone of interest. The Agrico standing test also requires that the injury must be of the type or nature that the proceeding is designed to protect. In determining where the petitioner has met the zone of interest test, the agency must examine the nature of the injury alleged and determine if the statute or rule governing the proceeding is intended to protect that interest. See Grove Isle, Ltd. v. Bayshore Homeowner's Ass'n 418 So.2d 446 (Fla. 1st DCA 1982); Suwannee River Area Council Boy Scouts of America v. Dept. of Community Affairs, 384 So.2d 1369 (Fla. 1st DCA 1980); Boca Raton Mausoleum v. Dept. of Banking and Finance, 512 So.2d 1060 (Fla. 1st DCA 1997); Friends of the Everglades v. Board of Trustees, 595 So.2d 186 (Fla. 1st DCA 1992). CSX argues that their economic interest falls within the zone of interest of this fuel proceeding because: "CSX is a significant customer of TECO, having several different accounts . . ." CSX contends that the rates Tampa Electric proposes to charge are unreasonable because they include costs billed to TECO's affiliate, TECO Transport for the transportation of coal because this cost should have been paid to CSX. The transparency of this argument is obvious. The real interest of CSX is not as a customer but as a competitor. CSX's competitive economic interest is beyond the scope of this proceeding. This proceeding was not designed to promote and protect the economic interest of CSX and it has failed to meet the zone of interest requirement, the Agrico standing test.

6. The Florida Supreme Court in Ameri-Steel Corp. v. Clark, 691 So.2d 473 (Fla. 1997) affirmed this Commission's denial of Ameri-Steel's standing to intervene in a territorial agreement proceeding where it alleged that it was an electric customer whose rates would be affected by which utility provided electric service. The court affirmed the Commission's ruling that Ameri-Steel could not meet either prong of the Agrico test. The Commission rejected Ameri-Steel's claim that higher rates it pays FPL for electricity are one factor threatening the continuing viability of its Jacksonville plant. The Commission held and the court affirmed that such an allegation is not an allegation of injury in fact of sufficient immediacy to bind Ameri-Steel to a 120.57 hearing. The court in Ameri-Steel also found the second prong of the Agrico test had not been met by holding a proceeding to approve a territorial agreement is not the proper form for intervention by a resident electricity customer like Ameri-Steel to compel service from a municipal utility based on speculative economic interest. See also the Commission's Order No. PSC-96-0158-PCO-EU issued February 5, 1996.

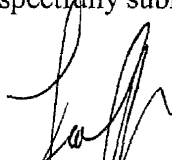
7. CSX should not be permitted to intervene in this proceeding in an attempt to enhance its prospects for economic gain.

8. CSX's real interest in this proceeding is as a competitive transportation provider not as a customer of Tampa Electric.

WHEREFORE, Tampa Electric Company urges the Commission to deny, or in the alternative, to dismiss CSX's Petition for Leave to Intervene.

DATED this 28<sup>th</sup> day of October 2003.

Respectfully submitted,



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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 and Opposition to CSX's Petition to Intervene, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (\*) on this 28<sup>th</sup> day of October 2003 to the following:

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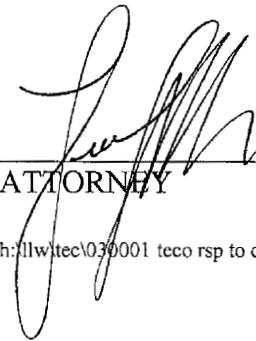
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ATTORNEY

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