

JAMES E. "JIM" KING, JR.
President



Harold McLean
Public Counsel

STATE OF FLORIDA
OFFICE OF PUBLIC COUNSEL

c/o THE FLORIDA LEGISLATURE
111 WEST MADISON ST.
ROOM 812
TALLAHASSEE, FLORIDA 32399-1400
850-488-9330

JOHNNIE BYRD
Speaker



January 9, 2004

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 031033-EI

Dear Ms. Bayó:

Enclosed for filing in the above-referenced docket are the original and fifteen (15) copies of Office of Public Counsel's First Motion to Compel Production of Documents to Tampa Electric Company.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Vandiver".

Robert Vandiver
Associate Public Counsel

RV/pwd
Enclosures

DOCUMENT NUMBER-DATE

00410 JAN-9 3

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's
2004-2008 waterbound transportation
contract with TECO transport and trade

Docket No. 031033-EI

Filed: January 9, 2003

CITIZENS' FIRST MOTION TO COMPEL PRODUCTION OF DOCUMENTS

The Citizens of the State of Florida (Citizens) through the Office of Public Counsel, pursuant to Rule 28-106.204, Florida Administrative Code, and Rules 1.280, 1.350 and 1.380 Florida Rules of Civil Procedure, request the Prehearing Officer issue an order compelling Tampa Electric Company (TECO) to produce the documents identified in the paragraphs below. In support thereof the Citizens allege:

1. On December 3, 2003, the Citizens served 14 interrogatories on TECO and 10 requests for production of documents.
2. On January 4, 2004 TECO served both interrogatory responses and production of documents on the Office of Public Counsel.
3. Document Request Number 9 reads as follows: "Produce the balance sheet and income statement for TECO Transport for December 31, 1992 and the past five years." In response TECO stated:
 - A. Tampa Electric does not possess or have access to the balance sheet and income statement for TECO Transport. The consolidated balance sheets and income statements for TECO Energy, the parent company of TECO Transport, for December 31, 1992 and the past five years are attached.
4. Discovery of the information is a critical element of preparation in this case. The reasonableness of waterborne transportation costs under the Tampa Electric/TECO Transport

contract for cost recovery purposes is one of the principal issues in this docket. The reasonable rate to Tampa Electric could be discerned by reference to market studies as Tampa Electric presented in its testimony. Another method surely is by reference to cost. This is highly relevant information that could be used to present a competing theory of the case.

5. Florida Statute 366.093 (2003), is entitled Public Utility Records; Confidentiality. Subsection (1) provides that the Commission shall continue to have access to “all public utility records and the records of the utility’s affiliated companies.” Subsection (2) provides that discovery shall be in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure and that information which affects rates is relevant.

6. In Order No. PSC-01-1725-EI, Order Granting in Part Motion to Compel and Denying Request for Oral Argument and Requiring In Camera Review (Order), issued August 23, 2001, Commissioner Baez, as Prehearing Officer outlined the standards for dealing for motions to compel.¹ There the Office of Public Counsel sought to obtain documents of Southern Power, which was a wholly-owned subsidiary of Southern Company. Southern Company was also the parent company of Gulf Power Company, a commission regulated utility which proposed to sell the Smith Plant to Southern Power and obtain capacity and energy from the facility under a purchased power agreement. As relevant here, Gulf Power objected to production on the basis that it did not have possession of the Southern Power records. Order at p. 3. Citing the case of Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del 1986), Commissioner Baez set forth three factors to be

¹ Docket No. 010827-EI, Petition by Gulf Power Company for approval of purchased power arrangement regarding Smith Unit 3 for cost recovery through recovery clauses dealing with purchased capacity and energy. Accord: Order No. PSC-01-2475-PCO-EI, issued December 19, 2001; In re: Review of Florida Power Corporation’s earnings, including effects with proposed acquisition with Florida Power Corporation by Carolina Power & Light, 01 FPSC 12:242 at 250-251.

considered in whether a subsidiary may be compelled to obtain documents from a parent or affiliate for discovery. Those three factors were: 1) the corporate structure; 2) the non-party's connection to the transaction at issue; and 3) the degree to which the non-party will benefit from an outcome favorable to the corporate party to the litigation. Order at p. 4, See Afros at 131-32.

With regard to the first factor, TECO Transport and Tampa Electric have the same registered agent for service of process and have 2 common officer/directors according to the Florida Secretary of State website. One individual, S.W. Callahan also serves on the TECO Energy, Inc. panel. These records appear as Attachment I.

With respect to the second factor, the non-party's relationship to the transaction at issue, TECO Transport is a signatory to the contract at issue in this proceeding. It is hard to imagine a more fundamental interest in the litigation. TECO Transport's balance sheet and income statement are highly relevant to the central issue of this case.

Regarding the third factor, benefit of award, here again TECO Transport has signed a five year contract to haul millions of tons of coal. "If a non-party will directly receive the benefit of an award, then it is unjust that it can frustrate the discovery process and complete resolution of the issues by refusing to furnish documents in its possession." Afros at 127.

Clearly, the test for compelling discovery from a subsidiary under Order No. PSC-01-1725-PCO-EI and Afros have been met. Time is of the essence and the Prehearing Officer should order immediate production of Citizens Request for Production of Documents Number 9.

7. Production should also be compelled in the public interest pursuant to the Commission's general access to affiliate records pursuant to subsection 366.093(1), *Supra*.

Ratepayers should not underwrite a contract of this magnitude without an examination of the books of the underlying carrier.

8. Citizens experts are in the process of reading the responses to Citizens Request for Production Number 1 and Number 2 to determine whether Tampa Electric has been responsive to those requests regarding Mr. Dibner's cost model. In this regard, TECO counsel has recently informed the parties of plans for a proposal for Mr. Dibner to explain his model to parties representatives.² Citizens look forward to resolution of this matter through agreement rather than litigation. Citizens reserve the right to bring discovery issues relating to the model should the need arise in the future.

9. Citizens request an expedited ruling on this motion due to the tight time schedule of this docket.

WHEREFORE, the Citizens of the State of Florida respectfully request that the Prehearing Officer immediately order productions of the requested documents.

Respectfully submitted,

Robert D. Vandiver
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

² A copy of Mr. Beasley's memorandum appears as attachment II.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing has been furnished by U.S. Mail or *hand-delivery this 9/14 day of January, 2004:

James Beasley*
Lee Willis
Ausley Law Firm
Post Office Box 391
Tallahassee, FL 32302

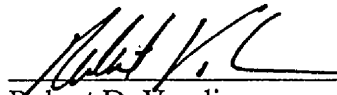
Gil Feltel
CSX Transportation
500 Water Street, J150
Jacksonville, FL 32302

Robert Scheffel Wright
John LaVia, III
Landers Law Firm
Post Office Box 271
Tallahassee, FL 32302

Angela Llewellyn
Tampa Electric Company
Post Office Box 111
Tampa, Florida 33601-0111

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

Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin
117 South Calhoun Street
Tallahassee, Florida 32301



Robert D. Vandiver
Associate Public Counsel

Florida Department of State, Division of Corporations

Corporations Online

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Public Inquiry

Florida Profit

TAMPA ELECTRIC COMPANY

PRINCIPAL ADDRESS

C/O D. E. SCHWARTZ
 702 N. FRANKLIN ST.
 TAMPA FL 33602-4418 US
 Changed 05/19/1999

MAILING ADDRESS

% D.E. SCHWARTZ
 P.O. BOX 111
 TAMPA FL 33601-0111
 Changed 05/10/2002

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Registered Agent

Name & Address

MCDEVITT, S.M.
 702 NORTH FRANKLIN STREET
 TAMPA FL 33602

Name Changed: 05/29/1992

Address Changed: 05/29/1992

Officer/Director Detail

Name & Address	Title
RAMIL, J. B. 702 N. FRANKLIN STREET	P

TAMPA FL 33602 US
 BARRINGER, P.L.
 702 N. FRANKLIN STREET

V

TAMPA FL 33602
 CALLAHAN, S. W.
 702 N. FRANKLIN STREET

T

TAMPA FL 33602
 SCHWARTZ, D E
 702 N. FRANKLIN STREET

S

TAMPA FL 33602
 FAGAN, R.D.
 702 N. FRANKLIN STREET

CD

TAMPA FL 33602
 GILLETTE, G. L.
 702 N. FRANKLIN STREET

V

TAMPA FL 33602-4418

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TECO TRANSPORT CORPORATION

PRINCIPAL ADDRESS

C/O D.E. SCHWARTZ
702 N FRANKLIN STREET
TAMPA FL 33602-4429 US
Changed 05/04/2000

MAILING ADDRESS

C/O D.E. SCWARTZ
PO BOX 111
TAMPA FL 33601-0111 US
Changed 05/10/2002

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Registered Agent

Name & Address

MCDEVITT, S.M.
702 N FRANKLIN STREET
TAMPA FL 33602

Name Changed: 05/04/2000

Address Changed: 05/04/2000

Officer/Director Detail

Name & Address

Title

BRESNAHAN, T.M.
702 N FRANKLIN ST

TAMPA FL 33602-4429

SCHWARTZ, D.E.
702 N. FRANKLIN ST.

V

TAMPA FL 33606-4429

GILLETTE, G. L.
702 N. FRANKLIN ST.

S

TAMPA FL 33629-4429

RANKIN, D.J.
702 N FRANKLIN ST

DT

TAMPA FL 33629-4429

EUSTACE, R K
702 N. FRANKLIN ST.

PD

TAMPA FL 33602-4429

D

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Florida Profit

TECO ENERGY, INC.

PRINCIPAL ADDRESS
C/O D. E. SCHWARTZ
702 N. FRANKLIN ST.
TAMPA FL 33602-4418 US
Changed 05/19/1999

MAILING ADDRESS
C/O D. E. SCHWARTZ
P O BOX 111
TAMPA FL 33601-0111 US
Changed 05/19/1999

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Registered Agent

Name & Address

MCDEVITT, S.M.
702 NORTH FRANKLIN STREET
TAMPA FL 33602

Name Changed: 05/29/1992

Address Changed: 05/29/1992

Officer/Director Detail

Name & Address

Title

WELCH, J.O.
702 N. FRANKLIN ST.

D

TAMPA FL 33602
 FAGAN, R.D.
 702 N FRANKLIN ST CPD

TAMPA FL 33602
 LEHFELDT, R.
 702 N FRANKLIN ST V

TAMPA FL 33602
 R. K. EUSTACE
 702 N FRANKLIN ST V

TAMPA FL 33602
 SCHWARTZ, D.E.
 702 N. FRANKLIN STREET VS

TAMPA FL 33602
 CALLAHAN, S.W.
 702 N. FRANKLIN STREET VT

TAMPA FL 33602

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MEMORANDUM

TO: Wm. Cochran Keating IV
Robert Vandiver
Vicki Gordon Kaufman

FROM: James D. Beasley

RE: Review of Tampa Electric Company's waterborne transportation contract with
TECO Transport and associated benchmark; FPSC Docket No. 031033-EI

DATE: January 7, 2004

This is to update you on Tampa Electric's actions to make available Mr. Brent Dibner's computer models for analysis by the parties of record in this proceeding. Tampa Electric is in the final stages of that effort and plans to have a proposal for consideration by Friday of this week. Our goal is to proceed as promptly as possible, and to have Mr. Dibner available at the outset of the process to explain his procedures on an interactive basis with representatives of the parties. Hopefully, this will expedite the parties' understanding of Mr. Dibner's work.

JDB/pp

cc: Dee A. Brown
Jorge Chamizo