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January 16, 2004

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's waterborne transportation contract with  
TECO Transport and associated benchmark; FPSC Docket No. 031033-EI

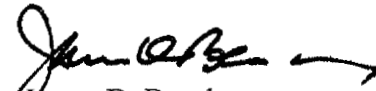
Dear Ms. Bayo:

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

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,

  
James D. Beasley

JDB/pp  
Enclosures

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

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's )  
Waterborne transportation contract with ) DOCKET NO. 031033-EI  
TECO Transport and associated benchmark. ) FILED: January 16, 2004  
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**TAMPA ELECTRIC COMPANY'S RESPONSE  
IN OPPOSITION TO OFFICE OF PUBLIC COUNSEL'S  
FIRST MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to Rule 28-106.204, Florida Administrative Code, and Rules 1.280, 1.350 and 1.380, Florida Rules of Civil Procedure, responds in opposition to the First Motion to Compel Production of Documents filed in this proceeding on January 9, 2004 on behalf of the Citizens of the State of Florida, by the Office of Public Counsel ("OPC") and, says:

1. OPC's Motion to Compel demands production of the balance sheet and income statement for TECO Transport for December 31, 1992 and the past five years. The documents in question are not Tampa Electric documents but are documents of a company not a party to this proceeding. As Tampa Electric stated in its answers to OPC's document requests, Tampa Electric does not possess or have access to the balance sheet and income statement for TECO Transport. Attached hereto as Exhibit A is an affidavit of Joann T. Wehle, Tampa Electric's Director of Wholesale Marketing and Fuels, detailing the separateness of Tampa Electric and TECO Transport and the lack of access Tampa Electric has over the books and records of TECO Transport. The company did have access to and duly produced 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.

2. The documents in question do not show what Tampa Electric pays TECO Transport for services provided to Tampa Electric nor do the documents relate to Tampa Electric's costs.

3. The TECO Transport documents sought by OPC belong to TECO Transport which is not a party to this proceeding. Rule 1.350, Florida Rules of Civil Procedure, does not require a party to respond to discovery requests that are not within its possession, custody or control.

4. OPC is not adversely affected in the preparation of its testimony, or in this case generally, by not having access to the documents requested which are the documents of a company not a party to this proceeding. The books and records of TECO Transport are kept entirely separate from the books and records of Tampa Electric. Financial and budgetary information relating to the TECO Transport operations are not relevant to the determination of the reasonableness of Tampa Electric's cost of providing service.

5. Tampa Electric has provided OPC access to all information relating to the amounts paid or to be paid by Tampa Electric to TECO Transport for transportation services it provides to Tampa Electric.

**Afros S.P.A. Inapplicable**

6. OPC's reliance on Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127 130 (D. Del 1986) and Order No. PSC-01-1725-EI is misplaced. The Afros decision imposes a three-prong test, each of which is inapplicable to the facts of this case.

7. The first prong of the Afros test looks to the corporate structure of the involved entities. While it is true that Tampa Electric and TECO Transport are both owned by the same corporate entity, they have separate officers and employees and operate different systems in

different geographic areas and maintain completely separate books and records. Tampa Electric and TECO Transport operate as completely separate entities, one providing electric service and the other transportation services. Tampa Electric is a party to this proceeding and TECO Transport is not. Detailed information regarding the transactions between Tampa Electric and TECO Transport has been provided to OPC.

8. With respect to the non-party's connection to the transaction at issue, while TECO Transport is the party providing transportation services to Tampa Electric, that provision of service has nothing to do with the reasonableness of the amounts paid by Tampa Electric for the services, any more than would be the case if some non-related entity provided the services in question.

9. With respect to the third prong of the Afros test, TECO Transport will not receive any benefit from the outcome of this litigation. The transportation contract pursuant to which TECO Transport provides transportation services to Tampa Electric is already in place and will remain in place regardless of the outcome of this litigation. Further, there has been no allegation to the effect that there exists any contingent benefits for TECO Transport depending upon the outcome of the litigation.

10. OPC's reliance on the fact that TECO Transport and Tampa Electric have the same registered agent for service of process is of no moment. The registered agent simply performs a ministerial function and does not direct or control the activities of the two corporations. The same applies with respect to the fact that the two companies only have two common officer/directors with one individual serving on the TECO Energy, Inc. panel. In the case of sister companies (like Tampa Electric and TECO Transport), the Afros decision, itself, states:

The fact that two corporations are sisters does not, however, automatically permit an inference of control.

See, Penwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 263 (D. Del 1979)

In the Penwalt decision, cited in the Afros case, the Court refused to find that one corporation had control over a sister corporation in the absence of evidence that the two corporations have identical boards of directors, or that their respective business operations are so intertwined as to render meaningless their separate corporate identities. No such allegations can be made in the instant case.

11. OPC's reliance on In re: Petition of Gulf Power<sup>1</sup> is, likewise, misplaced. That decision even had a representative of the affiliated company filing testimony in the docket. A more applicable precedent is In re: Petition for a Rate Increase by Peoples Gas System.<sup>2</sup> There the Commission denied OPC's motion to compel Peoples Gas to produce various financial documents of Tampa Electric Company. Virtually all of the arguments presented on behalf of Peoples Gas in opposition to OPC's motion to compel in that case apply with equal force in this case.

12. Here, as in Peoples Gas, the utility and the non-party have separate officers and employees and operate different systems in different geographic areas. Both maintain completely separate books and records and are operated as completely separate entities. The Peoples Gas decision even involved two utilities, whereas the instant case involves a completely non-regulated provider of transportation services to customers virtually on a worldwide basis.

13. Here, as in the Peoples Gas case, Tampa Electric is a party to this proceeding and the affiliate is not.

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<sup>1</sup> Order No. PSC-01-1725-PCO-EI issued August 23, 2001 in Docket No. 010827-EI

<sup>2</sup> Order No. PSC-02-1613-PCO-GU issued November 21, 2002 in Docket No. 020384-GU

14. In Peoples Gas the Prehearing Officer, Commissioner Baez, concluded that OPC's requests for production of various capital, expense and revenue budget reports provided to management of Tampa Electric, TECO Energy and affiliates of People Gas sought information that did not appear to be reasonably calculated to lead to the discovery of admissible evidence. Therefore, OPC's motion to compel these documents was denied.

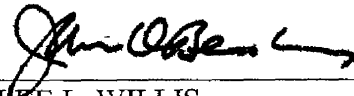
15. Here, like in Peoples Gas, the information sought by OPC does not appear to be reasonably calculated to lead to the discovery of admissible evidence. Accordingly, OPC's motion to compel in this proceeding should be denied on the same grounds that the motion to compel in Peoples Gas was denied.

16. OPC's reliance on Section 366.093, Florida Statutes, is misplaced. The books and records of TECO Transport do not govern or affect what Tampa Electric pays TECO Transport for the services it provides. Instead, Tampa Electric and TECO Transport's transactions and the amounts Tampa Electric pays TECO Transport for transportation services are governed by the current transportation agreement between the two companies and OPC has access to that agreement. Section 366.093, Florida Statutes, focuses on cost allocations between a utility and affiliated companies and the question of whether utility ratepayers subsidize non-utility activities. There is no issue in this proceeding concerning cross-subsidization and/or cost allocations. Instead, what we have is a written agreement that prescribes the amounts paid by Tampa Electric to TECO Transport. That contract speaks for itself. This is not a situation where the parent corporation is allocating costs as between utility and non-utility operation, nor has OPC allege any such issue. Neither the Rules of Civil Procedure nor Section 366.093, Florida Statutes, contemplate unwarranted access to the books and records of a non-party just for the sake of having access for a fishing expedition.

WHEREFORE, Tampa Electric submits the foregoing in opposition to OPC's First Motion to Compel Production of Documents to Tampa Electric Company.

DATED this 16<sup>th</sup> day of January 2004.

Respectfully submitted,



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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 copy of the foregoing Response in Opposition to OPC's First Motion to Compel Production of Documents, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (\*) on this 16<sup>th</sup> day of January 2004 to the following:

Mr. Wm. Cochran Keating, IV\*  
Senior Attorney  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0863

Ms. Vicki Gordon Kaufman  
Mr. Timothy J. Perry  
McWhirter, Reeves, McGlothlin,  
Davidson, Kaufman & Arnold, P.A.  
117 S. Gadsden Street  
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Mr. Robert Scheffel Wright  
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Post Office Box 271  
Tallahassee, FL 32302

  
\_\_\_\_\_  
ATTORNEY

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**AFFIDAVIT OF JOANN T. WEHLE**

I, Joann T. Wehle, am the Director of Wholesale Marketing and Fuels for Tampa Electric Company. My business address is 702 N. Franklin Street, Tampa, Florida 33602.

I have reviewed Citizens' First Motion to Compel Production of Documents filed in Florida Public Service Commission Docket No. 031033-EI on January 9, 2004 by the Office of Public Counsel ("OPC") and wish to address the separateness with which Tampa Electric Company and its affiliate, TECO Transport Corporation ("TECO Transport"), are operated.

During the course of negotiations which gave rise to the current coal transportation agreement between Tampa Electric and TECO Transport ("Current Agreement"), Tampa Electric did not have access to, control of, or any opportunity to review the books and records of TECO Transport. Tampa Electric and TECO Transport are operated as separate corporate entities whose books and records are not commingled. Neither company permits the other to have access to its books and records. This is of particular concern to TECO Transport given that company's competitive provision of bulk transportation services to customers worldwide.

Tampa Electric's books and records, electric operations and employees are entirely separate from the books and records, transportation operations and employees of TECO Transport. Financial and budgetary information with respect to the transportation operations of TECO Transport are not relevant to the determination of the reasonableness of Tampa Electric's cost of providing service. The Current Agreement is based on a model developed by Tampa Electric's maritime consultant. The consultant did not and does not have access to TECO Transport's books and records. The model and resulting market rates were developed based on public information and industry knowledge. Providing TECO Transport records as backup for the Current Agreement will provide no useful purpose.

The TECO Transport documents sought by OPC relate to TECO Transport's costs, not to Tampa Electric's costs. The documents in question would show the revenues, costs and other financial characteristics of TECO Transport – not Tampa Electric. All documents requested by OPC that relate to the charges and allocations to Tampa Electric have been provided.

Tampa Electric and TECO Transport operate as completely separate companies, one providing electric service and the other bulk commodity transportation services. Tampa Electric is a party to this proceeding and TECO Transport is not. Detailed information regarding the amounts paid by Tampa Electric to TECO Transport have already been provided to OPC.

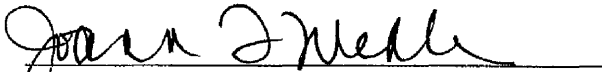
While Tampa Electric and TECO Transport are part of the same corporate entity, they have separate officers and employees, operate different systems in different geographic areas and maintain completely separate books and records.

TECO Transport will derive no benefit whatsoever from the manner in which the issues set forth in this proceeding are resolved. The amount of revenue TECO Transport will receive from Tampa Electric will be governed by the current transportation services agreement between the two entities – not by reference to how this proceeding is decided.

Tampa Electric stands ready, willing and able to share relevant cost information concerning its operation as may be needed for the resolution of issues in this proceeding, subject to appropriate safeguards to protect against the disclosure of confidential proprietary business information. However, the company does not have access to or control or possession of the books and records of TECO Transport and, therefore, should not be ordered to produce that which it does not control.

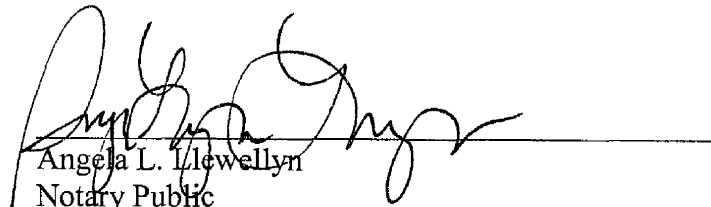
FURTHER AFFLIANT SAYETH NAUGHT.

DATED this 15<sup>th</sup> day of January 2004.



JOANN T. WEHLE, Director  
Wholesale Marketing and Fuels Department  
Tampa Electric Company  
702 N. Franklin Street  
Tampa, FL 33602

Sworn and subscribed to before me the undersigned authority this 15<sup>th</sup> day of January  
2004.



Angela L. Llewellyn  
Notary Public  
State of Florida at Large

