

State of Florida



Public Service Commission
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DATE: February 5, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Economic Regulation (Bohrmann, Floyd, Matlock, Maurey, McNulty, Windham) ^{TB} ^{sum}
Office of the General Counsel (C. Keating, Rodan) ^{JAR} ^{Nat} ^{BW}

ALM
WBM
RLT

RE: Docket No. 031033-EI – Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark.

AGENDA: 02/17/04 – Regular Agenda – Decision on Motion for Reconsideration of Non-Final Order – Oral Argument Requested

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\031033.RCM.DOC

Case Background

By Order No. PSC-03-1359-PCO-EI, issued December 1, 2003, in Docket No. 030001-EI, In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor (“fuel docket”), the Commission deferred consideration of issues related to the prudence of Tampa Electric Company’s (“Tampa Electric”) procurement of waterborne coal transportation services from the fuel docket to a separate proceeding. That order memorialized a Commission vote taken at the November 3, 2003, Agenda Conference. This docket was opened to conduct the separate proceeding.

By Order No. PSC-03-1398-PCO-EI (“Order Establishing Procedure”), issued December 11, 2003, in this docket, procedural guidelines and a hearing schedule were established for this proceeding. By that order, the hearing for this proceeding is scheduled for April 13-14, 2004.

DOCUMENT NUMBER-DATE

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On December 22, 2003, the Office of Public Counsel (“OPC”) and Florida Industrial Power Users Group (“FIPUG”) filed a joint motion to reschedule the hearing to May 26-27, 2004. Also on December 22, 2003, Catherine L. Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E. Strohm, Mary Jane Williamson, Betty J. Wise, Carlos Lissabet, and Lesly A. Diaz (“residential customers”), filed their notice of joinder in OPC and FIPUG’s joint motion, adopting the arguments raised therein. On December 29, 2003, Tampa Electric filed its response to OPC and FIPUG’s joint motion.

By Order No. PSC-04-0048-PCO-EI (“Order 04-0048”), issued January 16, 2004, OPC and FIPUG’s joint motion was denied. (Order 04-0048 is attached hereto as Attachment A.) On January 26, 2004, the residential customers filed a motion for reconsideration of this order and a request for oral argument. On January 28, 2004, Tampa Electric filed a response in opposition to the motion for reconsideration and a response in opposition to the request for oral argument.

The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes, including Sections 366.04, 366.05, and 366.06, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant the residential customers' request for oral argument on their motion for reconsideration of Order No. PSC-04-0048-PCO-EI?

Recommendation: No. Oral argument on the motion for reconsideration will not aid the Commission in its understanding and disposition of the motion. Therefore, the Commission should deny the request for oral argument. (C. KEATING, RODAN)

Staff Analysis: In their request for oral argument, the residential customers assert that oral argument from the parties on the motion for reconsideration will aid the Commission in reaching its final determination of the issues. In its response in opposition, Tampa Electric states that oral argument is not necessary or appropriate in order for the Commission to fully consider and dispose of the residential customers' motion for reconsideration. Tampa Electric asks that the request be denied, but reserves its right to participate in oral argument if the request is granted.

Rule 25-22.0376, Florida Administrative Code, provides that the Commission, at its discretion, may grant a request for oral argument on a motion for reconsideration of a non-final order, such as Order 04-0048. The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying motion. Staff believes that the arguments put forth by the residential customers in their motion for reconsideration, together with the arguments put forth by Tampa Electric in its response, present an issue that is simple to comprehend and resolve, therefore oral argument would not assist the Commission. Thus, staff recommends that the Commission deny the residential customers' request for oral argument.

Issue 2: Should the Commission grant the residential customers' motion for reconsideration of Order No. PSC -04-0048-PCO-EI?

Recommendation: No. The motion for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider. Therefore, the Commission should deny the motion for reconsideration. (C. KEATING, RODAN)

Staff Analysis: The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Steward Bonded Warehouse, Inc. v. Bevis.

In their motion for reconsideration, the residential customers contend that the Prehearing Officer, in rendering Order 04-0048, made a mistake of fact by finding that the moving parties, i.e., OPC, FIPUG, and the residential customers, were not prejudiced by the scheduling of the hearing in this docket on April 13-14, 2004. The residential customers assert that while in retrospect it may have been better practice for the moving parties to have filed affidavits describing the extent to which they would be prejudiced, those parties made sufficient assertions in their pleadings to support the allegations that their ability to prepare for hearing was prejudiced due to the scheduled hearing dates.

In its response, Tampa Electric contends that the residential customers have not identified any point of fact or law overlooked by the Prehearing Officer in rendering Order 04-0048. Rather, Tampa Electric argues, the residential customers are simply rearguing the matters asserted in OPC and FIPUG's original joint motion and the residential customers' notice of joinder in that motion.

Staff recommends that the residential customers' motion for reconsideration be denied as it fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order 04-0048. Clearly, as set forth in the following excerpt from the order, the Prehearing Officer considered and rejected the arguments of OPC, FIPUG, and the residential customers concerning any prejudice to their ability to prepare for hearing pursuant to the scheduled hearing dates:

Other than noting that a hearing scheduled for May 26-27 will allow additional time to prepare for hearing, none of the parties seeking new hearing dates has alleged with any specificity how the current hearing dates will prejudice their ability to effectively prepare for hearing. Recognizing that Tampa Electric's direct case

on these issues was first presented in testimony filed September 25, 2003, in the fuel docket, parties will have had ample time - almost six and a half months - to retain experts, conduct discovery, prepare testimony, and take other steps necessary to prepare for hearing under the current schedule. The Order Establishing Procedure allows parties to conduct several rounds of discovery prior to the current hearing dates by requiring that discovery responses be provided within 15 days of service of the request, half the time required by the Florida Rules of Civil Procedure. Further, while the current hearing dates are six weeks earlier than the tentative hearing dates identified prior to issuance of the Order Establishing Procedure, intervenor testimony is due only three and a half weeks earlier than it would have been under the tentative schedule shown in the December 1, 2003, CASR. No party has explained why an additional six weeks is necessary.

In the motion for reconsideration, the residential customers' simply state their disagreement with the Prehearing Officer's findings. As noted above, it is not appropriate in a motion for reconsideration to reargue matters that have already been considered.

Based on the foregoing, the residential customers' motion for reconsideration of Order 04-0048 should be denied.

Docket No. 031033-EI
Date: February 5, 2004

Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open to allow the Commission to continue processing this case.

Staff Analysis: An evidentiary hearing in this docket is scheduled for April 13-14, 2004. This docket should remain open to allow the Commission to continue processing this case.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated benchmark.

DOCKET NO. 031033-EI
ORDER NO. PSC-04-0048-PCO-EI
ISSUED: January 16, 2004

ORDER DENYING MOTION TO ALTER HEARING SCHEDULE

By Order No. PSC-03-1359-PCO-EI, issued December 1, 2003, in Docket No. 030001-EI, In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor (fuel docket), the Commission deferred consideration of issues related to the prudence of Tampa Electric Company's (Tampa Electric) procurement of waterborne coal transportation services from the fuel docket to a separate proceeding. That order memorialized a Commission vote taken at the November 3, 2003, Agenda Conference. This docket was opened to conduct the separate proceeding.

By Order No. PSC-03-1398-PCO-EI (Order Establishing Procedure) issued December 11, 2003, in this docket, procedural guidelines and a hearing schedule were established for this proceeding. By that order, the hearing for this proceeding is scheduled for April 13-14, 2004.

On December 22, 2003, the Office of Public Counsel (OPC) and Florida Industrial Power Users Group (FIPUG) filed a joint motion to reschedule the hearing to May 26-27, 2004. In their motion, OPC and FIPUG noted that a Case Assignment and Scheduling Record (CASR) for this docket was filed on December 1, 2003, which indicated that a hearing was scheduled for May 26-27, 2004. OPC and FIPUG asserted that they have been deprived of six weeks of preparation time and, thus, that their ability to prepare for hearing has been prejudiced by the fact that the Order Establishing Procedure in this docket provided for a hearing on April 13-14, 2004, rather than on the hearing dates listed on the CASR. Specifically, OPC and FIPUG stated a concern that Tampa Electric had not yet provided proprietary computer models relied upon by its consultant to establish rates for waterborne coal transportation service to Tampa Electric.

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In their motion, OPC and FIPUG contended that the current hearing schedule, as opposed to a hearing scheduled six weeks later, does not provide them an effective point of entry into the administrative process or the ability to conduct a thorough review of the issues in this docket. OPC and FIPUG further contended that the current hearing schedule is inconsistent with the Commission's intentions as expressed in the order deferring these issues from the 2003 fuel docket. OPC and FIPUG asserted that Tampa Electric would not be prejudiced if the hearing were scheduled for May 26-27.

On December 22, 2003, Catherine L. Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E. Strohm, Mary Jane Williamson, Betty J. Wise, Carlos Lissabet, and Lesly A. Diaz (residential customers), filed their notice of joinder in OPC and FIPUG's joint motion, adopting the arguments raised therein. In their notice of joinder, the residential customers noted that on November 14, 2003, at the close of the 2003 fuel docket hearings, then-Chairman Jaber stated with regard to the hearing date for this docket: "I don't know if it changes or not, but the hearing date is currently May 26th and May 27th." The residential customers assert that they were put on notice at that time that they would have this amount of time to obtain witnesses, conduct discovery, and prepare their testimony.

On December 29, 2003, Tampa Electric filed its response to OPC and FIPUG's joint motion. In its response, Tampa Electric noted that the hearing schedule set forth in the Order Establishing Procedure provides a delay of 162 days from the date of the Commission's vote to defer the waterborne coal transportation issues to a separate proceeding. Tampa Electric asserted that this delay provides sufficient time for intervenors to prepare for hearing, particularly because intervenors have known Tampa Electric's direct case since the filing of its testimony in the 2003 fuel docket and were able to conduct discovery on the deferred issues through the fuel docket.

In its response, Tampa Electric contended that the hearing schedule set forth in the Order Establishing Procedure is consistent with the Commission's intentions as expressed during its deliberations to defer these issues. Further, Tampa Electric disagreed with OPC and FIPUG's assertion that they are denied an

effective point of entry, noting that the Florida Statutes provide shorter periods of time for other types of hearings, such as power plant and transmission line need determination hearings. Tampa Electric asserted that it will be prejudiced by any additional delay in this proceeding because it has been the victim of false statements to the media, through anonymous letters to the Governor's office and legislative leaders, and similar attacks and should not remain a target for such attacks any longer than necessary to have the deferred issues resolved. Tampa Electric also asserted that the longer these issues are left unresolved, the greater the impact will be on its financial integrity.

Upon consideration, the joint motion to alter the hearing schedule set forth in the Order Establishing Procedure is denied. The current hearing schedule is consistent with the expressed intentions of the full Commission and does not prejudice any party. Further, the parties' reliance on the tentative hearing dates identified prior to issuance of the Order Establishing Procedure is misplaced.

At the November 3, 2003, Agenda Conference, where the Commission voted to defer the Tampa Electric coal transportation issues to a separate proceeding, the Commission expressed its desire to allow parties the opportunity to conduct a more thorough review of the issues but also expressed a clear intention to conduct the separate proceeding within the time frame of six months. The motion to approve deferral of these issues, which was unanimously accepted by the Commission, indicated that the issues should be deferred "to a separate proceeding to be had as soon as possible" Further, the second to that motion clearly indicated "that a six-month delay is in the range of reasonableness, something within that time period" Accordingly, the current hearing dates, set approximately five and a half months from the date of the Commission's vote, are consistent with the expressed intentions of the Commission.

Other than noting that a hearing scheduled for May 26-27 will allow additional time to prepare for hearing, none of the parties seeking new hearing dates has alleged with any specificity how the current hearing dates will prejudice their ability to effectively prepare for hearing. Recognizing that Tampa Electric's direct case on these issues was first presented in testimony filed September

25, 2003, in the fuel docket, parties will have had ample time - almost six and a half months - to retain experts, conduct discovery, prepare testimony, and take other steps necessary to prepare for hearing under the current schedule. The Order Establishing Procedure allows parties to conduct several rounds of discovery prior to the current hearing dates by requiring that discovery responses be provided within 15 days of service of the request, half the time required by the Florida Rules of Civil Procedure. Further, while the current hearing dates are six weeks earlier than the tentative hearing dates identified prior to issuance of the Order Establishing Procedure, intervenor testimony is due only three and a half weeks earlier than it would have been under the tentative schedule shown in the December 1, 2003, CASR. No party has explained why an additional six weeks is necessary.

OPC and FIPUG have raised concerns about Tampa Electric not providing proprietary computer models relied upon by its consultant to establish rates for waterborne coal transportation service to Tampa Electric. Since the time of OPC and FIPUG's motion, Tampa Electric has made the models available for review and use under terms that are currently being discussed by the parties. I encourage the parties to continue working toward mutually acceptable terms for use of the models.

Finally, the parties' reliance on the tentative hearing dates identified prior to issuance of the Order Establishing Procedure is misplaced. OPC and FIPUG asserted that they were deprived of six weeks of preparation time because the hearing dates set forth in the Order Establishing Procedure were set approximately six weeks earlier than the hearing dates shown on a CASR filed December 1, 2003. The Commission's CASRs, however, are nothing more than internal planning documents. Every CASR available on the Commission's website states: "**WARNING: THIS TIME SCHEDULE IS TENTATIVE AND SUBJECT TO REVISION.**" (Emphasis provided in CASR.) CASR's accessed through the Commission's internal Case Management System state: "**WARNING: THIS SCHEDULE IS AN INTERNAL PLANNING DOCUMENT. IT IS TENTATIVE AND SUBJECT TO REVISION.**" (Emphasis provided in CASR.) Any dates identified in a CASR are tentative as indicated by the bold print disclaimer supplied with each CASR. That is especially the case where the dates have not yet been established by order or notice of the Commission.


The residential customers asserted that, in making preparations for hearing, they relied upon a statement made at the close of the hearing in the fuel docket identifying May 26-27 as hearing dates for this docket. With respect to those hearing dates, the statement quoted by the residential customers includes the disclaimer "I don't know if it changes or not . . ." Clearly, the announcement was made to inform the parties of tentative hearings dates subject to change.

For the reasons set forth above, the joint motion to alter the hearing schedule set forth in the Order Establishing Procedure is denied.

Based on the foregoing, it is

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that the joint motion of the Office of Public Counsel and Florida Industrial Power Users Group to alter the current hearing schedule for this docket is denied.

By ORDER of Chairman Braulio L. Baez, as Prehearing Officer,
this 16th day of January, 2004

 for Chairman Braulio L. Baez

BRAULIO L. BAEZ
Chairman and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.