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ORIGINAL

February 19, 2004

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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 are the original and fifteen (15) copies of Tampa
Electric Company's Response to Office of Pubic Counsel's Motion for Revision to Order
Establishing Procedure or Continuance.

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,

RECEIVED & FILED

Jh
FPSC-BUREAU OF RECORDS

James D. Beasley
James D. Beasley

JDB/pp
Enclosure

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

- AUS _____
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- OPC _____
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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: February 19, 2004
_____)	

**TAMPA ELECTRIC COMPANY'S RESPONSE TO
OFFICE OF PUBLIC COUNSEL'S MOTION FOR REVISION
TO ORDER ESTABLISHING PROCEDURE OR CONTINUANCE**

Tampa Electric Company ("Tampa Electric" or "the Company") files this its Response to Office of Public Counsel's ("OPC" or "Citizens") Motion for Revision to Order Establishing Procedure or Continuance and in support thereof says:

1. OPC's Motion centers its need for additional time on outstanding discovery requests OPC has concerning the books and records of TECO Transport, an unregulated affiliate of Tampa Electric. "The information sought by the subpoena goes to the costs of TECO Transport to provide coal transportation service to Tampa Electric." (See OPC Motion, paragraph 3.)

2. OPC more specifically seeks information concerning the compensation of TECO Transport's backhaul of bulk commodities transported from Tampa Bay to Louisiana contending . . . "(t)hese revenues must be credited or allocated back to ratepayers in the Citizen's view." (OPC Motion, paragraph 6.) OPC further stated ". . . backhaul is only one aspect of the total cost equation. Citizens need access to all facets of costs."

The Existing Stipulation

3. OPC contends it needs information from TECO Transport's books and records to prepare its case advocating a return to cost pricing. This effort is inconsistent with the existing Commission approved Stipulation between Staff, Office of Public Counsel and Tampa Electric

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FPSC-COMMISSION CLERK

prescribing a benchmark methodology for assessing the reasonableness of Tampa Electric's payments to TECO Transport. That methodology was approved by the Commission in 1988 in Order No. 20298 issued November 11, 1988; was reaffirmed in 1992 in Order No. PSC-92-1048-FOF-EI; and remains in effect until changed by order of the Commission. This Stipulation is now merged into and is an integral part of the Commission's order approving it. As such, it is the ongoing policy of the Commission until changed by the Commission. Tampa Electric now has in place a contract with TECO Transport that is in conformance with the Stipulation, and that provides for payments that are below the Commission approved benchmark.

4. OPC's efforts to obtain cost information from a non-regulated affiliate is inconsistent with current law as described by the Florida Supreme Court in GTE v. Deason, 642 So.2d 545 (Fla. 1994) and is inconsistent with the Commission's current policy set out in Order Nos. 20298 and PSC-92-1048, *supra*.

5. In the past OPC has characterized the Stipulation among the parties which gave rise to the current benchmark methodology as an agreement which affirms Tampa Electric's unimpeded freedom to negotiate its contracts with its affiliates. OPC has, likewise, observed that the public policy favoring the settlement of disputes applies to stipulations freely entered into in administrative proceedings.

6. In a motion for reconsideration of a 1991 fuel adjustment order approving the prices paid by Tampa Electric for coal supplied by its affiliate, OPC contended that once entered into, an agency should not ignore or set aside a stipulation without record evidence of fraud, over-reaching, misrepresentation or withholding facts by the adversary or some other reason rendering it void (citing Spitzer v. Bartlett Brothers Roofing, 437 So.2d 758, 760 (Fla. 1st DCA 1983)).

7. OPC has also urged, with respect to the currently approved Stipulation methodology, that the Commission, as well as the parties, are bound by the Stipulation adopted and issued as a final order. All of OPC's claimed need for access to cost information of TECO Transport is predicated on a return to cost base pricing.

8. OPC has further stated that Order No. 20298 established a market pricing methodology as the sole means of regulating Tampa Electric's purchases from its affiliate coal and coal transportation suppliers. OPC has stated that Tampa Electric has been on notice since 1988 that it can no longer attempt to justify its payments to affiliates by using by a cost-plus "reasonable and prudent" standard. Yet, that is what OPC here attempts to re-inject, prior to establishing the necessary predicate set out in GTE v. Deason, supra, that no market exists.

The Basis for the Existing Benchmark

9. OPC, Staff and Tampa Electric agreed in 1988 that a market existed for the transportation of coal from the mid-western United States to Tampa. The 1988 stipulation recites at the outset that it was the product of numerous meetings between Staff and OPC. The essence of the stipulation with respect to coal transportation by TECO Transport to Tampa Electric is that rail rates for transportation of coal into Florida provide a reasonable market proxy to use as a cap in review of prices charged by TECO Transport to Tampa Electric. The order recited that contracts between affiliates were not normally subject to bid and specifically approved the language in the stipulation that:

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, are not subject to this proceeding and Tampa Electric may negotiate its contracts with its affiliates in any manner it deems to be fair and reasonable.

The objective of the benchmark was to reduce or eliminate the raging controversies which existed under the cost of service methodology for affiliate transaction pricing. More specifically Order No. 20298 describes the extreme difficulty with cost plus pricing as follows:

Irrespective of whether any imprudence or unreasonable expenses are found and disallowances made, we agree with the parties to this case that a change from cost-plus pricing is warranted. While we believe that the current system has been generally successful in allowing only reasonable and prudent costs to be passed through the utilities' fuel adjustment clauses, we concur with TECO's position that it has been administratively costly, caused unnecessary regulatory tension, and left the lingering suspicion that it has resulted in higher costs to a utility's customers.

Inherent Difficulties of Cost-Based Pricing

10. The cost-based pricing methodology urged by OPC was previously rejected by the Commission in Orders Nos. 20298 and 20604 as wasteful and less effective than market based pricing. In this regard Order No. 20298 states:

Implicit in cost-plus pricing is the requirement that one is capable of conducting a cost-of-service analysis of a business to determine that its expenses are both necessary and reasonable. This is a methodology that is demanded for monopoly utility services, and which usually proves to be complex, expensive and time consuming. It is a methodology which requires a high degree of familiarity with the capital requirements and expenses necessitated by the operation of the business being reviewed. Cost-of-service analysis of affiliate operations places additional demands upon the regulatory agency in terms of time, expense and acquiring additional expertise. All come at some additional cost that must eventually be borne by the ratepayer, either in his role as a customer or as a taxpayer. Furthermore, there seems to be no end to the types of affiliated businesses that we are expected to become sufficiently familiar with so that we might judge the reasonableness of their costs on a cost-of-service basis.

11. OPC's efforts in this regard are inconsistent with the observations made by the Commission in Order No. 20604 requiring Florida Power Corporation to use a market based benchmark for coal transportation. In so doing the Commission held:

. . .that this methodology [cost-plus pricing] was administratively costly and caused unnecessary regulatory tension, . . .even in the face of outstanding results. (Emphasis supplied)

* * *

. . .we believe and find that a change from cost-plus pricing is warranted.

* * *

. . .we believe that it has been administratively costly, caused unnecessary regulatory tension, and left the lingering suspicion that it has resulted in higher costs to a utility's customers.

* * *

Implicit in cost-plus pricing is the requirement that one is capable of conducting a cost-of-service analysis of a business to determine that its expenses are both necessary and reasonable.

* * *

Considering the many advantages offered by a market pricing system, we, as a policy matter, shall require its adoption for all affiliated fuel transactions for which comparable market prices may be found or constructed

* * *

Cost-of-service regulation of some type is essential when there is no competitive market for the product or service being purchased; it is superfluous when such a competitive market exists.

12. Order No. 20298 approved market pricing for Tampa Electric and made findings that: (1) the Staff did not have the necessary expertise to audit unregulated entities; (2) that cost-

plus pricing is not as effective as market based pricing and; (3) that cost-based pricing for affiliated transactions was unnecessarily costly for the taxpayer and the ratepayer.

Market Based Pricing – The Preferred Methodology

13. The Florida Supreme Court, in GTE v. Deason, supra, made it clear that not only was cost-plus pricing not the preferred method for affiliate pricing, it could not be used in instances where a market exists. Under the Deason decision, it is reversible error for the Commission to consider costs in affiliate pricing where a market exists. The Court set forth the standard for recovery of costs by a regulated utility for services rendered by an unregulated affiliate. In GTE, the Court stated that “the mere fact that a utility is doing business with an affiliate does not mean that unfair or excess profits are being generated, without more.” The Court set forth the standard by stating, “We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair.”

14. The relative difference between the price charged by TECO Transport and the benchmark against which it has been compared has not changed substantially since the benchmark was put in place in 1988 down through 2002 (the last period for which the benchmark data is now available).

15. The Commission Staff submitted testimony in the 2003 fuel adjustment proceeding in Docket No. 030001-EI that a waterborne coal transportation market exists, the market can be measured by proposed rail prices submitted in response to Tampa Electric June 27, 2003 Requests for Proposals and advocated a market based methodology for reviewing the reasonableness of TECO Transport prices charged to Tampa Electric.

16. No party has presented any evidence that there is not a market for the transportation of coal for the mid-United States to Tampa. The Commission has calculated a

market based benchmark for Tampa Electric for each year since 1988 and by Tampa Electric to the prices paid to TECO Transport are below the market. Staff has recently filed testimony providing a market based methodology for review of the TECO Transport contract. On information and belief, the entire purpose of CSX's participation in this docket is to show there is a market and that CSX is a viable participant in that market. CSX simply seeks to displace TECO Transport by contending CSX is a better market alternative. On information and belief other participants in this proceeding may be sponsored in whole or in part by entities that want to participate in a market for coal transportation and perhaps for the sale of coal.

Current Irrelevance of Cost-Based Data

17. If OPC wishes to suggest improvements upon or modifications to the current market based pricing benchmark methodology, there is a universe of information equally available to OPC and its consultants as the same is available to Tampa Electric. Access to that information does not equate to access to the books and records of Tampa Electric's unregulated affiliate.

18. It is simply unreasonable to cascade into all of the endless issues which arise under a methodology which cannot be legally adopted by this Commission under the facts of this case.

19. If OPC wishes to advocate a return to cost pricing, notwithstanding its stipulation that market based pricing is appropriate and should be used, OPC doesn't need to have access to actual cost data to make that assertion. OPC can simply advocate whatever cost procedure it believes appropriate given the Court's and this Commission's prior decision and orders. The implementation of that methodology would come after the Commission's determination that the adoption of a cost methodology is in the public interest.

20. However, unless and until there is a finding by the Commission that the currently approved market based pricing model should be replaced by a cost-based model, the cost information sought by OPC is irrelevant. The Commission should not consider such a leap without recalling the Commission's own prior experience with the difficult and contentious nature of cost-based pricing of affiliated services.

Alternative Means of Proceeding

21. Recognizing that this proceeding needs to move forward, a reasonable way to proceed in this docket to accommodate the interests of all concerned would be to bifurcate this proceeding. A bifurcated hearing schedule would allow Docket No. 031033-EI to proceed in an orderly manner and could avoid extensive arguments and potential costly and time-consuming litigation regarding access to books and records of TECO Transport. As set forth in detail below, the case schedule for Docket No. 031033 could be bifurcated in a manner that would allow the Commission to decide whether a market exists for transportation services, and whether Tampa Electric's contract with TECO Transport results in costs that are at or below the relevant market. The Commission could address these issues without having to get into complex issues regarding access to highly sensitive proprietary confidential business information in the possession of the unregulated affiliate. If the Commission finds that a suitable market or market proxy exists for waterborne coal transportation services, and that Tampa Electric's contract with TECO Transport results in costs that are reasonable and prudent, it would not be necessary to proceed to the second phase of the proceeding. Phase II would only be necessary in the event of a finding during Phase I that there is no market by which to measure the contract costs. In the event that Phase II becomes necessary, the Commission would address alternative regulatory schemes for judging the prudence of Tampa Electric's coal transportation costs. During Phase II, it may, for

example, be appropriate for the Commission to develop an appropriate cost-based recovery methodology. Furthermore, Tampa Electric asserts that the three issues deferred from the fuel proceeding regarding this matter fall squarely within the Phase I concept. Details of the two phases of the bifurcated proceeding could include:

PHASE I: Addresses current market-based benchmark methodology. Examines the legal standard for recovery of costs paid to TECO Transport for transportation services, taking into consideration the Supreme Court's standard for recovery of costs for services rendered by affiliated entities. If the Commission is persuaded that a market exists, then the Commission may determine that the existing market benchmark is appropriate, or it may prescribe a new market benchmark based on evidence presented in the case. The Commission may also determine that Tampa Electric's new contract with TECO Transport is reasonable and that Tampa Electric should be allowed to recover the costs incurred thereunder. If the Commission finds that there is no relevant market, the Commission would proceed to Phase II of the proceeding to prescribe a different regulatory methodology for determining the prudence of costs paid to TECO Transport (e.g., cost-plus arrangement).

PHASE II: Addresses issues related to the establishment of a new cost recovery methodology if the Commission decides in Phase I that there is no relevant market. If Phase I results in a finding that there is no relevant market upon which to judge the reasonableness of costs paid to TECO Transport, the Commission would explore whether a return to cost-based regulatory regime, or some other regulatory regime, is appropriate for assuring that costs are reasonable and prudent.

If the Commission orders in Phase I a return to cost-based pricing, the proceeding could be one where accounting, cost allocation and cost of capital and perhaps other experts would be

called upon to devise an appropriate cost allocation methodology. During this phase of the proceeding, it would not appear that specific cost information from TECO Transport would be necessary to develop the methodology. Rather, information regarding TECO Transport's operations and the types of costs incurred would be relevant. Specific cost information would become part of normal cost recovery proceedings, at which time the new methodology would be applied to derive the reasonable and prudent costs to be recovered by Tampa Electric.

Phase II would likely be a lengthy process involving significant subjectivity in the recommended methodologies proposed by the various experts. Cost allocations, particularly, are subject to various opinions. Also, there is not liable to be a consensus on the appropriate methodology for arriving at a fair cost of capital for the unregulated affiliate.

Recommendation

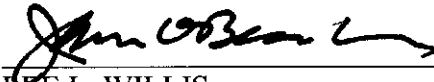
22. The prehearing officer should order the parties to meet with the Commission's General Counsel and Staff to discuss the procedural schedule and the merits of this proceeding in an effort to secure a timely, efficient and cost-effective resolution of the issues. It is incumbent on all parties to engage in an effort to reduce, if not eliminate, all of the various controversies in this proceeding. The parties should be able to balance the perceived need for additional information with an orderly procedure. Discovery is expensive and time consuming and can be used as a tool for delay. Every effort should be made to avoid controversies and to proceed in an orderly manner.

WHEREFORE, Tampa Electric urges the prehearing officer to enter an order either denying OPC's Motion for Revision to Order Establishing Procedure or Continuance, or in the alternative, bifurcating this proceeding as described above and ordering the parties to meet with the Commission's General Counsel in an effort to amicably resolve all of the issues in this

proceeding. If the proceeding is bifurcated, the prehearing officer should further order all parties and Staff to meet with the Commission's General Counsel in an effort to settle all procedural and substantive issues in this case.

DATED this 19th day of February 2004.

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 to Office of Public Counsel's Motion for Revision to Order Establishing Procedure or Continuance, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 19th day of February 2004 to the following:

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