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ORIGINAL

February 20, 2004

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COMMISSION
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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 each of the
following:

1. Tampa Electric Company's Motion for Reconsideration of Order Granting in Part
and Denying in Part Motion to Compel.
2. Tampa Electric Company's Request for Oral Argument.

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

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R. V. W.

FPSC BUREAU OF RECORDS

JDB/pp

Enclosures

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

(1)

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(2)

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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 20, 2004
_____)

**TAMPA ELECTRIC COMPANY'S
MOTION FOR RECONSIDERATION OF ORDER GRANTING
IN PART AND DENYING IN PART MOTION TO COMPEL**

Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to Rule 25-22.0376, Florida Administrative Code, moves the Commission for reconsideration of Order No. PSC-04-0158-PCO-EI ("the Order") issued in this proceeding on February 16, 2004 wherein the Chairman, as Prehearing Officer, granted in part and denied in part a Motion to Compel filed by the Florida Industrial Power Users Group ("FIPUG"). In support thereof, the company says:

1. The nature of the Order sought to be reconsidered is a non-final order.
2. The Order grants in part and denies in part FIPUG's Motion to Compel Tampa Electric to respond to Interrogatory Nos. 25 and 29-32 from FIPUG's First Set of Interrogatories and Document Request No. 10, 11 and 13 from FIPUG's First Request for Production of Documents. Tampa Electric respectfully requests that the full Commission reconsider those portions of the Order compelling Tampa Electric to respond to FIPUG's Interrogatories Nos. 29-32. In those interrogatories, FIPUG has asked that Tampa Electric produce information concerning TECO Transport's earned rate of return for the waterborne transportation contract that expired December 31, 2003, the percentage of TECO Transport revenues contributed by Tampa Electric, information regarding other TECO Transport customers or information about non-coal commodities transported by TECO Transport.

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3. Tampa Electric asserts that to the extent the Order requires Tampa Electric to produce information of its non-regulated affiliate, TECO Transport, the Order fails to recognize or give effect to Tampa Electric's lack of possession or control over the information in question. Tampa Electric does not have possession or control of the books and records of its affiliate and should not be ordered to produce that which it does not possess or control.

4. The Order in question cites Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 130 (D. Del. 1986), as authority for requiring Tampa Electric to produce information from its non-regulated affiliate's books and records. It is important to note that Afros involved a discovery request concerning a parent-subsidary relationship whereas the discovery issue here pertains to two entirely separate subsidiaries. The Court in Afros went on to observe that the fact that two corporations are sister companies does not automatically permit an inference of control. The Order overlooks or fails to consider this important distinction.

5. Afros cites Penwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 263 (D. Del. 1979), where the Court refused to order production of the non-party sister corporation's documents, absent a showing of identical boards of directors or a deeply intertwined corporate structure. FIPUG demonstrated neither of these characteristics as between Tampa Electric and its non-regulated affiliate, TECO Transport, nor did the Order find that such characteristics exist.

6. Tampa Electric is a direct subsidiary of TECO Energy, whereas TECO Transport is a subsidiary of TECO Diversified, which is a direct subsidiary of TECO Energy. TECO Transport has no common directors with either Tampa Electric or TECO Energy. Tampa Electric and TECO Transport only have one common officer (treasurer). The corporate structures of Tampa Electric and TECO Transport are not intertwined at all. Instead, they are completely stand-alone entities.

7. In the Penwalt case the Court observed:

Since Schering is a separate legal entity from Plough, possibly having different legal and commercial interests at stake, its rights should not be determined in absentia. (Emphasis supplied)

Clearly the same can be said with respect to the rights of TECO Transport and the different legal and commercial interests of Tampa Electric and its affiliate, particularly given the non-regulated nature of the affiliate and a highly competitive nature of its business.

8. The Court, in Penwalt, went on to hold that Schering need not produce the sales and promotional cost information of its affiliate and that a non-party subpoena would provide a much more appropriate method for seeking access to the documents in question and offer an opportunity for the affiliate's views on the matter to be considered. Indeed, at least Office of Public Counsel in this proceeding has recognized the appropriate protocol of affording TECO Transport an opportunity to respond in its own behalf to demands for access to TECO Transport's books and records, as evidenced by the fact that OPC has subpoenaed documents directly from TECO Transport. Objections to that discovery have been filed by TECO Transport and it is the appropriate corporate entity to defend those objections.

9. It is also important that the discovery issue involved here, like that in Penwalt, does not relate to a parent corporation's allocation of costs as between two of its subsidiaries. Instead, the issue is whether to require a corporate subsidiary to produce information completely unique to a wholly separate sister company. Tampa Electric and TECO Transport are not even coequal sister companies, as TECO Transport is a subsidiary of TECO Diversified which, itself, is a corporation wholly separate from Tampa Electric. The Commission should refrain from

pursuing courses of action that would disrespect the corporate boundaries of separate corporate affiliates.

10. The Order compelling Tampa Electric to produce information concerning TECO Transport's earnings and costs also fails to consider that it would be much more efficient and cost effective to make that determination if, and only if, it is first determined that a market based pricing methodology is no longer appropriate. To Tampa Electric's knowledge, no party to date has made such an assertion. With an existing Commission approved market based benchmark methodology in place, it would appear more efficient to first address whether a relevant market or market proxy exists prior to launching into an examination of highly proprietary cost information of an unregulated non-party affiliate. In this regard, Tampa Electric is proposing an alternative procedure whereby the disposition of the issues in this proceeding would be bifurcated. That bifurcation is detailed in Tampa Electric's February 19, 2004 Response to Office of Public Counsel's Motion for Revision to Order Establishing Procedure of Continuance, which response is incorporated hereby by reference. Under the proposed bifurcated procedure the Commission would first determine whether a market based or market proxy based pricing mechanism should continue. If that determination were made in the positive, there would be no need to devote considerable time, expense and dispute resolution efforts concerning the discovery of cost related data of entities who are not parties to this proceeding.

WHEREFORE, Tampa Electric moves the Commission to reconsider its Order Granting in Part and Denying in Part FIPUG's Motion to Compel to the extent that Order requires Tampa Electric to respond to FIPUG's Interrogatories Nos. 29-32 or, in the alternative, to stay the effectiveness of that Order and a ruling on this Motion pending a determination of whether the second phase of the bifurcated proceeding proposed by Tampa Electric is necessary.

DATED this 20th 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 Motion for Reconsideration, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 20th day of February 2004 to the following:

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